

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

Appeal No. 115/2023

BETWEEN:

CHRISTOPHER NGULUBE

APPELLANT

AND

GHAMBIR ENTERPRISES LIMITED

RESPONDENT

CORAM : Siavwapa JP, Chishimba, and Patel JJA

On 21st May, 2024 and 7th June, 2024

For the Appellant : Ms. I. Lishomwa of Messrs. Equitas Legal
Practitioners.

For the Respondent: Mr. Mweemba of Messrs. Mwamba & Co.

JUDGEMENT

CHISHIMBA JA, delivered the judgment of the Court.

CASES REFERRED TO:

- 1) Morris v C. W. Martin & Sons Limited (1965) 2 All ER 725
- 2) Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others (2005) ZR 138
- 3) Willaim David Carlisle Wise v E. F. Harvey Limited (1985) ZR 197
- 4) Zambia Railways Limited v Pauline S. Mundia & Another (2008) 1 Z.R. 287
- 5) Subramanium v The Director of Public Prosecutions (1956) 1 WLR 965
- 6) ZESCO Limited v Tembo SCZ Appeal No. 71 of 2016
- 7) Mususu Kalenga Building Limited v Richman's Money Lenders Enterprises (1999) ZR 27
- 8) Hygrotech Zambia Limited v Greenbelt Fertilizers Limited SCZ Appeal No. 138 of 2015
- 9) Wilhelm Roman Buchman v Attorney General (1993-1994) Z.R. 131

LEGISLATION CITED:

- 1) The Rules of the Supreme Court of England, 1999 Edition.
- 2) The High Court Act, Chapter 27 of the Laws of Zambia



OTHER WORKS CITED:

- 1) Odgers on Civil Court Action, 24th Edition
- 2) Halsbury's Laws of England, 4th edition (re-issue) Vol. 1(1).

1.0 INTRODUCTION

- 1.1 This appeal is against the judgment of Mr. Justice E. L. Musona dated 20th February, 2023, in which he held that the respondent had proved his case against the appellant for the claim of the sum of K627, 457.00, with interest at short term bank deposit rate from the date of writ to the date of judgment, and thereafter at the current Bank of Zambia lending rate. The court also awarded the respondent costs.
- 1.2 The appeal deals with the issue of whether the agreement between the parties is a credit sale or is an agency agreement.

2.0 BACKGROUND

- 2.1 The respondent commenced an action in the Commercial Division of the High Court claiming payment of the sum of K627, 457.00, being the purchase price of cement supplied to the appellant by the respondent; interest on the said sum and costs.
- 2.2 The respondent averred that between 1st November, 2018, and November, 2021, the appellant verbally ordered consignments of cement from the respondent on credit. That the cement was supplied to the appellant based on mutual

trust on account of previous business dealings. The appellant was expected to pay for the cement upon re-sale to his customers at the Kasumbalesa Border area.

- 2.3 The appellant denied ordering any cement from the respondent stating that he was merely a commission agent supplying Congolese businessmen on behalf of the respondent. He stated that the cement being claimed was in fact stolen from his warehouse and that the matter was reported to the police and the respondent.

3.0 DECISION OF THE COURT BELOW

- 3.1 The court below considered the evidence on record and found that it was not in dispute that the appellant received the cement from the respondent, and that the same was stolen from the appellant's custody. The court considered the case of **Morris v C. W. Martin & Sons Limited** ⁽¹⁾ and reasoned as follows: if the cement was stolen from the appellant in his capacity as a customer, then he would bear for the loss. But even if it was stolen while it was in his custody as an agent of the respondent, he would still be liable to bear the loss unless it can be shown that he was not negligent.

3.2 The court found that the respondent had proved its case and ordered the appellant to pay the Respondent sum of K627,457.00 with interest as earlier stated.

4.0 GROUNDS OF APPEAL

4.1 Dissatisfied with the decision of the court below, the appellant appealed advancing five grounds as follows that:

- 1) *The court below erred in fact and in law by holding that the respondent proved its case against the appellant when it left open without being conclusive on the issue at page J6 of whether the transaction between the parties was a credit sale despite the pleading having alleged to have been a credit sale;*
- 2) *The trial Judge erred in fact and in law when he failed to take into account the fact that the respondent, as the mover of the court, failed to prove that the cement was supplied under a purported credit sale;*
- 3) *The trial Judge erred in fact and in law when, having effectively accepted that the appellant was at all material time acting as an agent on behalf of the respondent, found the appellant liable for loss when the respondent had neither specifically pleaded nor proved that the appellant was negligent;*
- 4) *The trial Judge erred in fact and in law, when having effectively accepted that the appellant was at all material times acting as an agent on behalf of the respondent, found him liable on negligence as bailee despite unchallenged and incontrovertible evidence that the loss was not on account of negligence but rather theft at Kasumbalesa Border and the matter was immediately reported to Chililabombwe Police, and the same was communicated to the respondent; and*

- 5) *The trial Judge erred in fact and in law when he failed to take into account the fact that the respondent failed to adduce evidence as to how the cement delivered to the appellant translates to the sum of K627, 457.00.*

5.0 APPELLANT'S HEADS OF ARGUMENT

- 5.1 The appellant filed heads of argument dated 21st April, 2023. In ground one, the appellant contends that the issue in dispute, between the parties, is whether the transaction that existed between the parties was a credit sale or an agency relationship, determination of which, would in turn ascertain the liability or otherwise of the appellant.
- 5.2 The court below completely neglected the pleadings which bound the parties and the court to the issues for determination by concluding that the appellant was either a customer or an agent. Reference was made to pleadings, that the respondent's claim was specifically that the appellant was a customer. It was not pleaded that there was any other basis for liability apart from moneys due on a credit sale. Neither was it pleaded that the appellant was an agent as a basis for attaching liability on him. Therefore, the case against the appellant was not proved. As authority the cases of **Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others** ⁽²⁾ and **Willaim David Carlisle Wise v E. F. Harvey**

Limited ⁽³⁾ on the functions and purpose of pleadings were relied on.

5.3 In ground two, the appellant cited the case of **Zambia Railways Limited v Pauline S. Mundia & Another** ⁽⁴⁾ in contending that the respondent, as mover of the court, must prove its case on a balance of probability. That in this case, contrary to the evidence adduced, the respondent did not prove that the cement was supplied under a credit sale on an oral agreement. The evidence by **Godwin Chanda (Pw1)** was referred to where he stated that the credit sale was negotiated and entered into by the appellant and the Operations Manager of the respondent. That he was not present during the negotiations as he was only briefed on what had transpired and was required to implement the agreement.

5.4 It was submitted that the evidence of Pw1 is hearsay and inadmissible. As authority, we were referred to the case of **Subramaniam v The Director of Public Prosecutions** ⁽⁵⁾. The appellant contends that the said evidence is only admissible to show that there was an agreement between the parties, and not the nature of discussions and terms that were agreed upon.

- 5.5 Grounds three and four, were argued together. The appellant submits that though the court below found him liable as an agent of the respondent, on the basis of negligence, the said claim was not specifically pleaded or proved. Further, though, the court found the appellant liable for negligence as a Bailee, there was evidence adduced that the cement was stolen. The main contention is that negligence was neither pleaded in the statement of claim nor proved as it was only mentioned in the judgment.
- 5.6 We were referred to the provisions of **Order 18 rule 12(29) of the Rules of the Supreme Court of England 1999 edition** and the learned authors of **Odgers on Civil Court Action, 24th Edition, paragraph 8.32** on the requirements that particulars of alleged negligence must be stated in the pleadings.
- 5.7 Counsel further submitted that while **section 13 of the High Court Act Chapter 27 of the Laws of Zambia** confers on a judge the jurisdiction to grant all such remedies or reliefs that a party to proceedings may be entitled to, the exercise of such jurisdiction should not create new reliefs or remedies for one party at the expense of the other. As authority the case of **ZESCO Limited v Tembo** ⁽⁶⁾ was cited.

5.8 It was further argued, on behalf of the appellant, that there is no principle of law which suggests that any theft an agent suffers entails that the agent is negligent. The evidence on record neither points nor alludes to the fact that the loss of the cement was due to the appellant's negligence. That the court below erred in placing the burden on the appellant to prove that he was not negligent.

5.9 Lastly, in ground five, the appellant submits that no evidence was adduced by the respondent to show that the value of the cement delivered to the appellant translates to the sum of K627, 457.00. That the delivery notes at pages 32 to 38 of the record of appeal merely indicate the number of bags delivered in a particular consignment, and not the value of each consignment. We were urged to set aside the judgment of the court below and allow the appeal.

6.0 ARGUMENTS BY THE RESPONDENT

6.1 The respondent filed heads of argument on 13th July, 2023 arguing grounds one and two together. The respondent submitted that a reading of the judgment of the court below shows that it does not matter whether or not the transaction was a credit sale. This is because if it was a credit sale, then

the appellant is still liable for the sum claimed having not disputed that he was supplied with cement of that value.

6.2 The appellant equally remains liable if it is found that it was not a credit sale, because as an agent, the appellant remains liable for the said cement value allegedly stolen in his custody. As authority the case of **Morris v C. W. Martin & Sons Limited** ⁽¹⁾. was cited. In this regard, it was unnecessary to make the specific finding of fact anticipated by the appellant because it would not change the outcome.

6.3 There being no dispute that the appellant was supplied the cement, and it having been stolen from him as an agent, he ought to have proved that the theft was not as a result of his negligence. The court below made a categorical finding that the appellant did not prove that he was not negligence. That the issue of negligence, or lack of it, having arisen from the appellant's defence, it was not for the respondent as plaintiff to plead or prove, but for the appellant as defendant to negative it in order for his defence to succeed.

6.4 In Grounds three and four, which were argued together, the respondent restated its position that it was not for it to plead or prove negligence. The appellant pleaded agency thereby raising the question of negligence or lack of it by operation of

law. That in trying to prove the lack of negligence, the appellant claimed that the cement was stolen from Kasumbalesa.

- 6.5 The respondent contends that the appellant was cross-examined at length on the alleged theft at pages 13 to 21 of the supplementary record of appeal, which pages were omitted by the appellant in his record of appeal. The appellant was very elusive on the issue of how the cement was allegedly stolen, how many bags were stolen and/or whether the theft was reported to the police; nor did he produce any police report to back his evidence.
- 6.6 In one breath, the appellant stated that the warehouse where the cement was kept, was occupied by the respondent's director, and in another, stated that he was the one in occupation. Further, the appellant testified that the matter was taken to court in Chililabombwe but was closed due to lack of witnesses. In addition, he contradicted himself by stating that the police are still investigating the report of theft.
- 6.7 That if this evidence in cross-examination proves that the appellant was an agent of the respondent, then he was negligent in his duties.

6.8 Lastly, in ground five, the respondent submits that a perusal of the statement of claim and defence at pages 18 to 19 and 23 to 25 of the record of appeal respectively, shows the claim for cement valued at K627, 457.00. The said amount and delivery of cement were not disputed by the appellant. The only contention by the appellant was that the cement was stolen while in his custody as agent of the respondent.

6.9 It was submitted that the issue of how the cement in question amounted to the sum being claimed, is being raised for the first time on appeal, not having being raised during trial. We were referred to the case of **Mususu Kalenga Building Limited v Richman's Money Lenders Enterprises** ⁽⁷⁾ where it was held that:

"... where an issue was not raised in the court below, it is not competent to raise it on appeal."

6.10 Counsel's position is that the issue is now being raised as an afterthought considering the admissions in the defence. In any event, paragraph 6 of the statement of claim at page 18 of the record of appeal, shows that the amount claimed in the sum of K627, 457.00 was a balance only of the total consignment of cement delivered to the appellant. The value of the cement was not traversed in paragraph 7 of the

defence. We were urged to dismiss the entire appeal with costs to the respondent.

7.0 ANALYSIS AND DECISION OF THE COURT

7.1 We have considered the appeal, the authorities cited and the arguments advanced by Learned Counsel. The fact that the respondent supplied cement to the appellant, which he took custody of, is not in dispute. The main issue in dispute is the nature of the transaction between the parties, whether it was a credit sale or the parties were in a relationship of principal and agent. The evidence before the trial court by the respondent was to the effect that the appellant made verbal orders of cement on credit which were delivered as evidenced by the delivery notes at pages 32 to 38 of the record of appeal. The verbal orders were based on mutual trust as, the appellant had previously dealt with the respondent. The appellant expected to be paid commission for the cement after selling to his customers at Kasumbalesa Border area.

7.2 According to the appellant, an opportunity arose to supply cement to a Congolese purchaser at Kasumbalesa Border which demand he could not meet. He then informed the respondent of the opportunity. The parties entered into a verbal agreement that the appellant would act as an agent for

the respondent to facilitate the supply of the cement to the Congolese purchaser on commission basis.

- 7.3 On the basis of this agency relationship, the appellant facilitated the sale of several consignments of cement on behalf of the respondent and remitted the proceeds to the respondent less the agreed commission. On or about 11th February, 2019, the consignment, part of which is the subject of the claim, was stolen at Kasumbalesa Border. The matter was reported to the police by the appellant and to the respondent. The cement has not been recovered.
- 7.4 In grounds one and two, the appellant contends that the trial court left it open in its judgment, whether the transaction between the parties was a credit sale, and that it was not proved that the transaction was a credit sale.
- 7.5 In cross-examination, Pw1 testified that the appellant was selling cement on behalf of the respondent but that he was not a distributor. That the respondent had put up a depot in Kasumbalesa that was run by the appellant, and that he used to receive consignments of cement for sale to Congolese and other persons.
- 7.6 In **Hygrotech Zambia Limited v Greenbelt Fertilizers Limited** ⁽⁸⁾, the Supreme Court considered whether there was

an agency relationship in the absence of an agreement. The court found that by selling and distributing the respondent's fertilizer, the appellant through its officer, was an agent of the respondent.

- 7.7 The learned authors of **Halsbury's Laws of England, 4th edition (re-issue) Vol. 1(1) paragraph 1** define the term 'agent' as follows:

"... in law, the word 'agency' is used to connote the relations which exist where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. The relation of agency arises whenever one person, called the 'agent' has authority to act on behalf of another, called the 'principal', and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the nature of the agreement or the circumstances of the relationship between the alleged principal and agent."

At paragraph 19, the authors state that:

"The relation of agency is created by the express or implied agreement of principal and agent, or by ratification by the principal of the agent's act done on his behalf. Express agency is created where the principal or some person authorized by him, expressly appoints the agent whether by deed, by writing or orally."

- 7.8 In this case, the respondent contends that he sold cement to the appellant on credit, whilst the appellant's position is that he sold cement on behalf of the respondent on commission

basis. On the evidence adduced we are of the view that the nature of the relationship between the parties was an agency relationship and not a credit sale agreement.

7.9 This is supported by the evidence on record that the appellant received consignments of cement which he, in turn, sold at a price dictated to him by the respondent. The proceeds of the sale would be remitted to the respondent less the commission due the appellant.

7.10 There being an agency relationship, we take the view that the respondent used to supply the appellant cement to be sold at a price dictated by the respondent in return for a commission. This view is supported by the Whatsapp text messages at pages 40 to 42 of the record where the appellant complains that the order price is too low for him to make a profit and that the sales are low.

7.11 In the circumstances of the facts of this case, we hold that the agreement was not a credit sale as the cement was supplied to be sold at a price dictated by the respondent on commission basis. This does not in any way take away the liability of the appellant which will be determined hereunder.

7.12 In grounds three and four, the appellant argues that negligence was not specifically pleaded by the respondent for

the court below to make a finding that the loss of the cement was due to the negligence of the appellant. The respondent on the other hand contended that the issue of negligence, or lack of it, having arisen from the appellant's defence, was not for the respondent as plaintiff to plead or prove, but for the appellant as defendant to negative it in order for his defence to succeed.

7.13 A perusal of the statement of claim at pages 18 to 19 of the record of appeal, shows that the respondent averred that the appellant had "*to date failed, neglected and/or refused to pay ...*" for the consignment of cement. In paragraphs 7, 8 and 9 of its defence, the appellant averred that the loss of the cement was due to theft.

7.14 The defence of theft of the cement by the appellant inevitably invited the court below to consider whether there was negligence or breach of the duty of care, the appellant being an agent of the respondent under whose custody the cement was stolen.

7.15 The court below guided itself on the case of **Morris v C. W. Martin & Sons Limited** ⁽¹⁾ whose facts were as follows: The plaintiff sent her mink stole to a furrier for cleaning. He told her that he did not do cleaning, but would arrange for the fur

to be cleaned by the defendants. The furrier, contracting as principal not agent, arranged with the defendants for them to clean the plaintiff's fur on the current trade conditions, of which the furrier knew. The defendants knew that the fur belonged to a customer of the furrier, but did not know to whom it belonged. The current trade conditions provided that "goods belonging to customers" on the defendants' premises were held at customers' risk, and that the defendants should "not be responsible for loss or damage however caused". The conditions further provided that the defendants should compensate for loss or damage to the goods during processing by reason of the defendants' negligence "but not by reason of any other cause whatsoever."

7.16 M, an employee of the defendants, was given the task of cleaning the fur. He had entered the defendants' employment only recently. They had no reason to suspect his honesty. While the fur was in M's custody, he stole it. The plaintiff sued the defendants for damages. The English Court of Appeal held that the defendants were liable to the plaintiff for the fraudulent criminal act of M for the following reasons—

- (i) ***because, where a master had in his charge goods belonging to another person in such circumstances that he was under a duty to protect them from theft or depredation, then, if he entrusted that duty to a servant***

or agent, he was liable for the servant's breach of it, notwithstanding that the breach was a criminal act.

(ii) because the defendants, as sub-bailees for reward, were under such a duty of care because the plaintiff, as owner of the goods bailed, could sue the defendants, as sub-bailees for reward, for breach of duty as bailees.

7.17 Having had custody of the cement that was entrusted to him as an agent to sell on behalf of the respondent, the appellant was under a duty of care to protect the cement from theft. Did the appellant breach that duty of care? We hold the view that there was breach of duty of care. The appellant did not adduce evidence to show that the cement was safely secured whilst in his custody. There was contradictory evidence on the record by the appellant as to whether he reported the theft or not. He stated that the case was dismissed by the court. In another breath, he stated that the police were still investigating the theft, but no report was adduced. On the above basis, we hold that the appellant is liable for the loss of the cement. Ground three and four lack merit.

7.18 Lastly, in ground five, the appellant argues that no evidence was led to show how the cement delivered to the appellant translates to the sum of K627, 457.00.


7.19 In the case of **Wilheim Roman Buchman v Attorney General** ⁽⁹⁾ it was held that:

“A matter that is not raised in the court below cannot be raised before a higher court as a ground of appeal.”

7.20 We have no hesitation in dismissing this ground of appeal as the issue it seeks to have determined was not raised in the court below. In any event, the claimed sum of K627, 457.00 was not in dispute as the appellant admitted receiving the consignment of cement in issue, some of which was alleged to have been stolen.

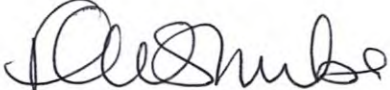
8.0 CONCLUSION

8.1 We reiterate that the transaction between the parties was not a credit sale and that the relationship between the parties was an agency relationship. Further, that the appellant breached his duty of care and is liable for the sum claimed. We uphold the judgment of the court below and accordingly dismiss the appeal. Costs to the respondent in default to be taxed.


.....

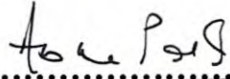
M. J. Siavwapa

JUDGE PRESIDENT


.....

F. M. Chishimba

COURT OF APPEAL JUDGE


.....

A. N. Patel SC

COURT OF APPEAL JUDGE