

**IN THE COURT OF APPEAL OF ZAMBIA: APPEAL NO 188/2023
HOLDEN AT NDOLA**
(Civil Jurisdiction)

BETWEEN:

**MOSES MUTETEKA
NAOMI CHAMBESHI MUTETEKA**

**1ST APPELLANT
2ND APPELLANT**

AND

BLISS FINANCIAL SERVICES LIMITED **RESPONDENT**

CORAM: SIAVWAPA JP, CHISHIMBA AND PATEL JJA

On 19th and 22nd August 2024

FOR THE APPELLANTS: MR. M. KASHETA OF MESSRS
WILLA MUTOFWE & ASSOCIATES

FOR THE RESPONDENT: NOT IN ATTENDANCE

J U D G M E N T

SIAVWAPA JP delivered the Judgment of the Court

CASES REFERRED TO:

1. *Charlie Wise v Harvey* (1985) ZR 179 (SC)
2. *Daniel Peyala v Konkola Copper Mines Appeal No 81 of 2012* (SC)
3. *Attorney General v Marcus Achiume* (1983) ZR 1 (SC)
4. *Wilson Masautso Zulu v Avondale Housing Project Limited* (1982) ZR 172
5. *Examinations Council of Zambia v Reliance Technology Limited* SCZ Judgment No 46 of 2014
6. *Foss v Harbottle* (1843) 2 Hare 461
7. *Edwards v Halliwell* [1952] 2 All ER 1064

8. *Salomon v Salomon (1897) AC 22*

OTHER AUTHORITIES REFERRED TO:

1. Statute

High Court Rules

2. Works

Zambia Civil Procedure: Commentary and Cases

1.0 INTRODUCTION

1.1 This appeal is against the Judgment delivered by the Honourable Mrs. Justice Irene Z. Mbewe, on 28th March 2023, in the Commercial Division of the High Court. By the said Judgment, the learned Judge entered Judgment in favour of the Respondent for payment of the sum of K190,000.00 plus interest at the rate of 48% per annum from the date of the Money Lending Agreement to Judgment and thereafter, at short term deposit rate until full payment.

2.0 BACKGROUND

2.1 On 18th February, 2020, the Appellants entered into a Money Lending Agreement. In the parties' names portion of the Agreement, the Appellants are named as the borrowers while one Lydia L. Nabeza, is named as the lender.

2.2 However, in the signing part of the Agreement, the Respondent herein, is named as the lender while Lydia Nabeza's name is written against the word Name, just below the lender's name.

The loan was secured by an equitable mortgage over Subdivision C of Lot No 1666/M, Lusaka.

- 2.3 The Appellants defaulted and fell into arrears on the loan causing the Respondent to commence a mortgage action in the High Court. The action was premised on Order XXX rule 14 of the High Court Rules, under High Court Act, Chapter 27 of the Laws of Zambia.
- 2.4 In both the Originating Summons and the attendant affidavit, the Respondent sought the payment of the sum of K1, 102, 000.00, which is inclusive of interest, order of foreclosure on the mortgaged property and costs.
- 2.5 On 7th December 2022, the Appellants filed an affidavit in opposition to the Originating Summons deposed to by the 2nd Appellant in which they deny owing the Respondent any money.
- 2.6 The main arguments the Appellants advanced in denying liability are that they did not enter into any credit facility with the Respondent. They state that they instead entered into a Money Lending Agreement with Lydia, L. Nabeza which was secured by a contract of sale for property Sub-Division C of Lot No 16658/M. Lusaka.

2.7 The Appellants also argued that from the Money Lending Agreement they signed, it appeared that the Respondent's name was only placed on the document after it had been executed. This, they argue, is supported by the difference in the handwriting of the Respondent's name and the other handwritten parts of the document.

3.0 DECISION OF THE HIGH COURT

3.1 In her Judgment delivered on 28th March 2023, the learned Judge acknowledged that the name of the Respondent is inscribed in a different handwriting from that used on the other parts of the document. She however, held that there was no proof that it was illegally inserted in the document.

3.2 The learned Judge held that because Lydia L. Nabeza was the Director in the Respondent, the lender was the Respondent and not Lydia although she is stated as the lender in the document. On the above premise, the learned Judge sustained the Respondent's locus standi to have commenced the Originating Process.

3.3 The learned Judge also pronounced herself on the effect of the contract of sale between the parties in relation to the mortgaged property. There is no ground of appeal relating to the issue and as such, we shall not deal with it.

4.0 THE APPEAL

4.1 The Appellant filed the Notice and Memorandum of Appeal on 27th April 2023. The Memorandum of Appeal contains the following grounds of appeal

1. The learned trial Judge erred in both law and fact when she proceeded to hold that the applicant had a cause of action against the Respondent when in fact it ought to have been Lydia Nabeza
2. The learned trial Judge erred both in law and fact when she proceeded to ignore the fact that the Applicant was not incorporated at the time of the loan agreement.
3. The learned trial Judge erred both in law and fact when she ignored the fact that the Applicant conceded to having wrongly taken out process against the respondents at the hearing in her chamber but proceeded to find for the Applicant.

5.0 ARGUMENTS IN SUPPORT

5.1 The Appellants filed their heads of argument on 23rd June 2023, in which they argue grounds one and three together and ground two alone. In arguing grounds one and two, the Appellants reviewed the law on “cause of action” as defined in the case of Charlie Wise v Harvey,¹ Order 15/1/2 of the Rules of the Supreme Court and Dr Patrick Matibini’s Zambia Civil Procedure Commentary and Cases volume 1 pages 139 and 140.

5.2 In the cited authorities, a cause of action is defined as a factual situation which entitles a person to obtain a remedy from the Court against another person.

5.3 Based on the above definition of a cause of action, the Appellants have argued that they entered into a loan agreement with one Lydia L. Nabeza who appears as the lender on the Money Lending Agreement. They argue that the Agreement does not indicate that Lydia L. Nabeza entered into the Agreement in her capacity as the Respondent's Director.

5.4 The Appellants have further argued that not being a party to the Agreement, the Respondent lacked the requisite locus standi to commence the action against them. In support of the argument, the Appellants referred to the case of Daniel Peyala v Zambia Consolidated Copper Mines.² In that case, the Supreme Court of Zambia stated as follows;

"The principle of privity of contract provided that a contract could not confer rights or impose obligations arising therefrom on to other persons except the parties Only parties to a contract can sue, enforce rights or claim damages in a contractual situation."

5.5 In ground two, the Appellants have argued that the learned Judge ought to have considered the fact that the Respondent had not been incorporated at the time they entered into the loan agreement with Lydia L. Nabeza. They base this assertion on the response by Counsel for the Respondent in the Court

below to the effect that the Applicant had a Money Lending Certificate under which it operated. This response is at page 85 line five of the Record of Appeal.

- 5.6 Arising from the above assertion, the Appellants have alleged that the learned Judge engaged in an unbalanced evaluation of the evidence before him. The Appellants relied on the cases of Attorney General v Marcus Achiume,³ Wilson Masautso Zulu v Avondale Housing Project Limited⁴ and Examinations Council of Zambia v Reliance Technology Limited.⁵ The cases referred to all speak to the frown with which Appellate Courts view unbalanced treatment of evidence by trial courts.

6.0 ARGUMENTS IN OPPOSITION

- 6.1 There are no heads of argument in opposition on the Record. Further, we take it that the Respondent did not file heads of argument because it did not attend on the date of hearing.

7.0 OUR ANALYSIS AND DECISION

- 7.1 In our considered view, there is only one issue in contention in this appeal. The issue is whether or not the Respondent had the locus standi to commence a mortgage action against the Appellants as held by the Court below.

- 7.2 It is not in dispute that the Appellants obtained a loan facility, upon which they defaulted and fell into arrears but the question is; who provided the loan facility to the Appellants?
- 7.3 The key document from which an answer to the question is found is the Money Lending Agreement found at page 25 of the Record of Appeal. In the recitals section of the Agreement, Lydia L. Nabeza is cited as the lender and the Appellants as the borrowers. The recitals also state the principle amount of the loan, the tenure period, the monthly instalment amount and the security property.
- 7.4 It is however, noted that in the boxed signature component of the Agreement, the Respondent is indicated as the lender and Lydia L. Nabeza's name appears against the word "name" below that of the Respondent and presumably signed the Agreement. What is remarkable is that the name of the Respondent is inscribed in a different style, handwriting and apparently with a different instrument. The learned Judge acknowledged the above facts in her Judgment at page 64 line 11 of the Record of Appeal.
- 7.5 On the same page, from line 7 to line 10 of the Judgment, the learned Judge also acknowledges that in the Money Lending Agreement, Lydia L. Nabeza is the lender while the boxed part shows the Respondent as the lender. However, the learned

Judge justifies her holding that the Respondent was the lender.

7.6 In her view even though the handwriting of the Respondent's name in the boxed part of the Agreement is different; there was no evidence that the name was illegally inserted in the Agreement. The learned Judge also drew comfort from the fact that in the Affidavit in support of the Originating Summons, Lydia L. Nabeza introduces herself as the Director in the Respondent.

7.7 To all the above findings by the learned Judge, the Appellants have firmly held that at the time of executing the Money Lending Agreement, the name of the Respondent was not in the Agreement. That it was only inserted after they had signed the Agreement, hence the difference in the handwriting.

8.0 THE LAW

8.1 In this part of the Judgment, we examine the law that governs corporate governance and legal personality to determine whether or not the Respondent in this case had locus standi to commence the Mortgage Action.

8.2 In corporate governance, policy matters are the preserve of the board of directors whereas the day to day management of the affairs of the company is left to the management team/ officers

appointed by the board. However, in a situation where active power and control are merged, the owners of the company are also involved in its management.

8.3 Because the board of directors is the face of the company, under the fictitious legal personality doctrine, decisions affecting the company are made in the name of the company. Such decisions include lawsuits by and against the company as generalized in the Foss v Harbottle case.⁶ In that case, as a general rule, only the company has the power to bring proceedings for wrongs done against it. This rule was expanded in the case of Edwards v Halliwell⁷ in which Jenkins LJ stated as follows;

“First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself.”

8.4 This general rule clearly draws from the principle of separate legal personality as set out in the case of Salomon v Salomon.⁸ The general rule however, has exceptions which provide for derivative actions brought by individual shareholders against the company, which are not the subject of this Judgment.

8.5 In the case at hand, it is common cause that the Respondent is stated to be a limited liability company. It follows therefore, that in line with the general rule in Foss v Harbottle; (supra)

only the Respondent has the right to bring an action for any wrong purportedly done against it.

- 8.6 For the company to bring any action against another person, it must be established that the alleged wrong was against it. This is what will confer the company with the requisite locus standi and in a contract based wrong or breach of contract, it must be established that the company was a party to the contract or agreement that gave rise to the cause of action.
- 8.7 The cause of action instituted in the Court below arose from a Money Lending Agreement which was collateralised by real property by way of an equitable mortgage registered in the names of the Appellants. There is no question that the Appellants were the borrowers and therefore, properly cited as Respondents to the originating Summons. However, there is a doubt as to whether the Respondent was a party to the Loan Agreement.
- 8.8 As earlier noted in this Judgment, two persons are presented as lenders in the Money Loan Agreement which is the subject of the Originating Summons. The contention is that the Respondent was only inserted as lender after the Agreement had been signed by the Appellants as borrowers and Lydia L. Nabeza as the lender.

- 8.9 The learned Judge held the Respondent as the right party to the Money Loan Agreement on the basis that there was no evidence that the Respondent was illegally inserted after the Agreement was signed. The learned Judge also proceeded on the view that because Lydia L. Nabeza held out as the Director of the Respondent in the affidavit in support of the Originating Summons, she therefore, signed the Money Loan Agreement in that capacity.
- 8.10 The problem with the above stated reasoning by the learned Judge is that there is nowhere in the Money Lending Agreement where Lydia states that she is the Director of the Respondent and entering into that Agreement in that capacity on behalf of the company. In a typical action brought by a corporate entity, the name of the company should have occupied every space in the Agreement where the name Lydia L. Nabeza appears and the address should have been the business address of the Company.
- 8.11 We do not accept the view that by stating that she was the Director of the Respondent, in the affidavit in support of the Originating Summons, Lydia transferred the status of lender from herself to the Respondent.
- 8.12 Further to the above, the variance between the instrument and the handwriting for the Respondent in the signature boxes of

the Agreement raises serious doubt that the Respondent's name was on the Agreement on the date the Appellants signed it.

8.13 This is evident from the fact that it appears from the document itself that the parties signed the Agreement on the same day, the 18th February, 2020 and that they used the same pen. In fact looking at the handwriting on the document, it would not be far-fetched to assume that one individual filled in the relevant details and only allowed the parties and their witnesses to append their signatures. This of course is in exception to the insertion of the name of the Respondent in the signature boxes.

8.14 The next issue relates to the security of the loan which is said to be by an equitable mortgage relating to property subdivision C of Lot No 16658/M Lusaka. This property, which is the named security property in the Money Lending Agreement, is the subject of a Sale Agreement between the Appellants as the vendors and Lydia Lukiya Nabeza, as the purchaser, dated 17th February, 2020. The Sale Agreement occurs at page 48 of the Record of Appeal.

8.15 In its skeleton arguments in the Court below, the Respondent stated that the Money Lending Agreement was secured by an equitable mortgage settled by the Appellants having deposited

the Certificate of Title relating to the property with the Respondent. On the other hand, the Appellants stated in their affidavit in opposition to the Originating Summons that the Money Loan Agreement was secured by the Purchase Agreement appearing at page 48 of the Record of Appeal.

8.16 Whereas the Appellants obtained a loan in the sum of K190,000.00, the purchase price for the said property is K500,000.00. It is further noted that the Purchase Agreement was made on 17th February 2020, a day before the Money Lending Agreement was executed on 18th February 2020. In the Purchase Agreement, there is no reference to the Money Lending Agreement. Further, the Purchase Agreement clearly states that the same is a stand –alone agreement independent of any other transactions between the parties.

8.17 We are persuaded that the equitable mortgage was evidenced by the deposit of the Certificate of Title and not the Purchase Agreement because Lydia exhibited photocopies of the Certificate of Title to her affidavit in support of the Originating Summons, which confirms that the Certificate of Title was in her possession at the time of filing the pleadings. Further, the fact that the Purchase Agreement was executed prior to the execution of the Money Lending Agreement and that it has a stand-alone clause, renders it inapplicable as security for the Money Lending Agreement.

9.0 CONCLUSION

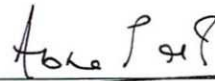
- 9.1 In view of the analysis of the facts of the appeal and the applicable law, we find that the Respondent lacked the requisite locus standi to commence the action in the Court below. The lack of locus standi stems from the finding that the Respondent was not the proper party to the Money Lending Agreement.
- 9.2 In the premise, the appeal ought to succeed. The Judgment of the Court below ought to be set aside for being a product of improperly commenced proceedings. We accordingly allow the appeal and set aside the Judgment of the Court below.
- 9.3 Costs should be for the Appellants to be taxed in default of agreement.



M.J. SIAVWAPA
JUDGE PRESIDENT



F.M. CHISHIMBA
COURT OF APPEAL JUDGE



A.N. PATEL SC
COURT OF APPEAL JUDGE