

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

APPEAL NO 192/2023

BETWEEN:

CHARLES LAIMA

APPELLANT

AND

PULSE FINANCIAL SERVICES LIMITED
(T/A Entrepreneurs Financial Centre)

RESPONDENT

CORAM: SIAVWAPA JP, CHISHIMBA AND PATEL SC, JJA

On 19TH and 22nd August 2024

FOR THE APPELLANT: IN PERSON

FOR THE RESPONDENT: MR. J. SHAWA IN-HOUSE
COUNSEL

J U D G M E N T

SIAVWAPA JP delivered the Judgment of the Court

CASES REFERRED TO:

- 1. Hitech Logistics Limited v Ugondo Italian Style Limited Appeal No 80 of 2020 (CAZ)*
- 2. Fred M'membe & Another v Abel Mboози and Others ZMSC 4 2022*
- 3. Friday Mwamba v Sylvester Nthenge & 2 Others SCZ Judgment No 5 of 2013*

4. *Seed Company Limited v Chatterfield International (Pvt) Limited* (1999) ZR 151 (SC)
5. *Dary v Garret* [1987] Ch. 473
6. *Sablehand Zambia Limited v Zambia Revenue Authority* (2005) ZR 109
7. *Wilson Masautso Zulu v Avondale Housing Project Limited* (1982) ZR 172 (SC)
8. *L'Estrange v Groucob* [1934] 2 KB 394
9. *Wilton v Farnworth* (1948) 76 CLR
10. *Lusaka West Development Company Limited & Others v Turnkey Properties Limited* SCZ Judgment No 1 of 1990

OTHER AUTHORITIES REFERRED TO:

High Court Rules chapter 27 of the Laws of Zambia

1.0 INTRODUCTION

1.1 This Appeal is against the Judgment of the High Court, Commercial Division, dated 23rd March, 2023 by the Honourable Mr. Justice K. Chenda. By the afore-stated Judgment, the learned Judge dismissed the Appellant's action to set aside the amended Consent Judgment dated 12th April 2022.

2.0 BACKGROUND

2.1 By Contract dated 22nd February, 2018, between the Respondent and the Appellant, the Appellant obtained a loan in the sum of K35, 000.00, with interest at the rate of 6.5%

per month or 78% per annum. The Loan Agreement is at page 116 of the Record of Appeal.

- 2.2 On 23rd February 2019, the Appellant obtained another loan in the sum of K80, 000.00 evidenced by the Contract at page 162 of the Record of Appeal. The Loan would attract interest at the rate of 6% per month or 72% per annum.
- 2.3 The K35, 000.00 Loan was secured by a Mortgage while the K80, 000.00 Loan was secured by a Further Mortgage both relating to Stand No 345 of 8536.
- 2.4 On 13th October, 2020, the parties signed a “Restructuring Addendum Agreement to the original Loan Contract” which appears at page 232 of the Record of Appeal. By the said Agreement, the Respondent gave relief to the Appellant by reducing the monthly instalment payments to K5, 500.00 and the annual interest rate to 64%.
- 2.5 As at 17th March 2021, the Appellant was in arrears and the Respondents sent a written reminder to the Appellant to make payment. The letter of reminder is at page 237 of the Record of Appeal.
- 2.6 As at 21st April 2021, the Appellant was still in arrears in the sum of K81, 481.73. The Respondent sent a “Final Demand

Notice” to the Appellant which appears at page 238 of the Record of Appeal.

- 2.7 On 6th December, 2021, the Respondent commenced a Mortgage action against the Appellant pursuant to Order XXX rule 14 of the High Court Rules. The Respondent sought the following reliefs; the outstanding principal amount of K78, 265.53, accumulated interest in the sum of K24, 096.57 and costs. In the alternative, to exercise the rights of foreclosure, delivery, possession and conveyance of the mortgaged property.
- 2.8 On 21st January 2022, the parties filed a Consent Judgment setting out how the Appellant would liquidate the outstanding balance on the loan plus interest.
- 2.9 On 12th April 2022, the parties filed an Amended Consent Judgment which included the full citation of the mortgaged property number while the rest of the Consent Judgment remained the same as the first one in substance.
- 2.10 On 25th July 2022, the Sheriff executed the Writ of Possession on the mortgaged property as ordered by the Court below.

3.0 ACTION TO SET ASIDE CONSENT JUDGMENT

- 3.1 On 5th August, 2022, the Appellant commenced an action by writ of summons accompanied by a statement of claim by which he sought the following reliefs;
- (a) An order that the amended Consent Judgment dated 22nd April 2022 be set aside on account of fraud and or misrepresentation
 - (b) An injunction restraining the Defendant from selling the foreclosed property and that the same do revert to the Plaintiff
 - (c) Damages, costs, further and other relief
- 3.2 In support of the claimed reliefs, the Appellant averred, in paragraphs 6 of the statement of claim, that the parties agreed to amend the Consent Judgment by removing the forfeiture (sic foreclosure) clause and to reduce the monthly instalments to K5, 000.00.
- 3.3 In paragraph 7, the Appellant alleges that the Respondent, despite agreeing to the amendments stated in paragraph 3.2 above, fraudulently drafted an amended Consent Judgment backdated to the date of the initial Consent Judgment, leaving the Appellant in default. The Appellant contends that the amended Consent Judgment was procured by fraud and or misrepresentation.
- 3.4 In its Defence, dated 11th August 2022, the Respondent stated that the parties agreed to amend the Consent Judgment for

the purpose of rectifying the mortgaged property number. Further, that the Consent Judgment was not procured by fraud or misrepresentation as alleged by the Appellant.

4.0 DECISION OF THE COURT BELOW

4.1 After considering the evidence, the learned Judge proposed three issues for his determination as follows;

1. The reason the parties sought to amend the Consent Judgment

2. Whether the amended Consent Judgment aligned with the Agreement between the parties and,

3. Whether there was cause to set aside the amended Consent Judgment

4.2 In resolving the first issue, the learned Judge reviewed the law on burden of proof and drew heavily from our Judgment in the case of Hitech Logistics Limited v Ugondo Italian style Limited.¹ In that case, we re-iterated the position that the party that asserts a fact bears the burden to prove that fact. We however, also spoke to an affirmative defence which requires the defendant to prove the fact affirmed in the defence.

4.3 In that regard, the learned Judge found that both parties asserted facts which they needed to prove. The learned Judge found that the Respondent asserted that the amendment to

the Consent Judgment was intended to correct the number of the mortgaged property. That in fact, the Respondent proved that assertion as it is evident on the amended Consent Judgment which bears the correct number of the property as opposed to the first Consent Judgment which bears the wrong number.

- 4.4 The learned Judge however, found that the Appellant had failed to prove his assertions that the amendments were intended to reduce the monthly instalments to K5, 000.00 and to remove the forfeiture clause.
- 4.5 On the second issue, the learned Judge, again, adverted to our Judgment in the case of Hitech Logistics (supra) in so far as the parties made opposing assertions as to what they had agreed to amend in the first Consent Judgment.
- 4.6 The learned Judge found that whereas the Appellant stated in his witness statement that the Respondent had added some provisions not agreed to, he failed to lead evidence to that effect. On the other hand, the Respondent maintained that they only agreed to correct the property number and the change was effected.
- 4.7 With regard to the third issue, after citing the cases of Fred M'membe and Another v Abel Mboosi and Others², Friday Mwamba v Sylvester Nthenge and 2 Others³ and Atkin's Court Forms, the learned Judge found that the procedure for setting

aside a Consent Judgment had been complied with but that the Appellant had not established any basis in fact or law for setting aside the amended Consent Judgment.

5.0 THE APPEAL

5.1 Dissatisfied with the Judgment, the Appellant filed a Notice and Memorandum of Appeal on 21st April 2023. The Memorandum of Appeal contains the following grounds of appeal;

- 1. The learned Judge in the Court below erred in law and fact when he held that there was no fraud and or misrepresentation in the manner the Consent Judgment dated 21st January, 2022 was procured in the face of unchallenged evidence to the effect that the Appellant was made to sign on a separate page not attached to the main body of the Consent and clear the main body had its contents changed after signing*
- 2. The learned Judge in the Court below erred in law and fact when despite evidence on record to the effect that part of the conditions to be included in the amended consent is variation of monthly instalments, removal of the forfeiture clause and that the consent takes effect on signing as opposed to back dating to create a default for the Appellant proceeded to hold that there was no fraud and or misrepresentation*

3. *The learned Judge in the Court below erred in law and fact when he held that evidence of DW 1 was not shaken when clearly he admitted under cross-examination that the amended Consent Judgment was different to the initial consent had the main body and Appellant's signature on the same page while the amended Consent had the signature of the Appellant on totally a different page which is unprecedented given the fact that what was intended to be changed was only the property number.*

6.0 ARGUMENTS IN SUPPORT

- 6.1 In support of the grounds of appeal, the Appellant filed Heads of Argument on 26th June 2023, along with the Record of Appeal. The argument for ground one is a repeat of the ground, to the effect that the signature page for the amended Consent Judgment was a stand-alone page 3 whereas in the first Consent Judgment, the signatures were on page 2, along with clauses 3 to 5 of the Judgment.
- 6.2 He argues that had the intention of the parties been to just amend the property number, the signatures would have been on the same page as was the case with the first Consent Judgment. He has accordingly maintained his argument that the intention of the parties was to vary the monthly instalments and for the changes to take effect from the date of the amendment.

6.3 In ground two, he argues that the learned Judge evaluated the evidence in an unbalanced manner when he held that the Respondent's evidence was unshaken while holding that the Appellant conceded to the evidence by the Respondent that the objective of the amendment was to change the property number.

6.4 with regard to the third ground the Appellant repeated the arguments in respect of the first ground and it is therefore, unnecessary to repeat the arguments.

7.0 ARGUMENTS IN OPPOSITION

7.1 The Respondent filed its Heads of Argument in opposition on 23rd August 2023 and argues grounds one and three together. In arguing the two grounds, the Respondent has submitted that in order to set aside a Consent Judgment, the principles of contract apply for varying or rescinding a contract. This argument is based on the case of Seed Company Limited v Charterfield International (Pvt) Limited.⁴

7.2 In particular, the Respondent has argued that a Consent Judgment may be set aside on account of fraud, mistake or misrepresentation and that in the case of fraud and misrepresentation, the same ought to be specifically and particularly pleaded. The Respondent relied on the cases of Dary v Garret⁵ and Sablehand Zambia Limited v Zambia Revenue Authority.⁶

- 7.3 In view of the above cited authorities, the Respondent contends that the Appellant neither particularly pleaded fraud or misrepresentation nor adduced evidence in support of the two allegations at the hearing.
- 7.4 With regard to ground two, the Respondent has argued that the Appellant failed to prove his assertions that the parties had agreed to vary the monthly instalment sum, remove the forfeiture clause and to bring forward the effective date of the loan to the date of the amended Consent Judgment.
- 7.5 The Respondent has also aligned the argument with the principle of law that the party alleging a fact bears the burden of proof, and that the Appellant failed to discharge it.
- 7.6 The Respondent has further, called in aid the case of Wilson Masautso Zulu v Avondale Housing Project Limited⁷ in so far as it enjoins Appellate Courts against lightly interfering with trial Judges' findings of fact except on specific grounds.

8.0 OUR ANALYSIS AND DECISION

- 8.1 The issue in this appeal revolves around the question how a Consent Judgment may be set aside by the Court. The law is well settled by various Court decisions and the well-established practice in this jurisdiction and elsewhere.
- 8.2 The starting point is that once a Consent Judgment is drawn by the parties and signed by the Court, it acquires the force of a Court Judgment, obtained by voluntary volition of the

parties thereto and therefore, binding on them. A Consent Judgment therefore, comes within the principles of the law of contract as held in the case of Seed Company of Zambia v Charterfield International (supra).

8.3 As a general rule, a person cannot deny the contents of a document they have appended their signature to. This is because they are presumed to fully know its contents and effect. This principle is taken from the case of L'Estrange v Graucob.⁸ However, in the case of Wilton v Farnworth,⁹ it was held that where fraud or misrepresentation was employed to induce a person to sign a document, the document will be held voidable.

8.4 As relates to a Consent Judgment, the Supreme Court of Zambia had this to say in the case of Lusaka West development Company Limited and Others v Turnkey Properties Limited;¹⁰

“A consent agreement reached in circumstances such as this could possibly only have been allowed to be withdrawn if there were proper grounds upon which validity of any contract could be impugned such as fraud or mistake.”

8.5 The procedure for challenging a Consent Judgment has long been settled and we will not belabour it save to state that the learned Judge, in the Court below, settled the issue through a

Ruling on a preliminary application at the instance of the Respondent.

- 8.6 In his ruling on the preliminary issue, the learned Judge referred to the case of Zambia Seed Company Limited (supra) which categorically holds that the only legal way to challenge a Judgment by Consent is to start an action for that purpose only (paraphrased).
- 8.7 In this case, the Appellant challenges the Judgment of the Court below on account that the Respondent drafted and caused him to append his signature to an amended Consent Judgment which did not reflect the parties' agreed position.
- 8.8 According to the Appellant, the parties had agreed to reduce the monthly instalments towards the liquidation of the Loan to K5, 000.00. That they had agreed to remove the forfeiture clause and to have the tenure period of the Loan to run effective from the date of the amended Consent Judgment.
- 8.9 The Appellant has also reasoned that because the first Consent Judgment had only two pages with the signatures of the parties and the Judge appearing on the second page, while the amended Consent Judgment had three pages with the third page only containing the signatures, the Respondent fraudulently altered the content.
- 8.10 However, the only significant difference between the contents of the first and the amended Consent Judgment is the

property number. In the Consent Judgment dated 21st January 2022, appearing at pages 31 and 32 of the Record of Appeal, the property number appearing in paragraph 4 at page 32 is Stand No 8536.

8.11 In the amended Consent Judgment, dated 12th April 2022 appearing from page 33 to 35 of the Record of Appeal, the property number in paragraph 4 at page 34 is Stand No 345 of 8536. The property number appearing in the amended Consent Judgment corresponds with that appearing on the Certificate of Title, relating to the subject property as seen at page 154 of the Record of Appeal.

8.12 In his Witness Statement appearing from page 140 to 142 of the Record of Appeal, the Appellant avers that the Respondent made him sign only the last page of the amended Consent Judgment which was detached from the first two pages. In line 4, at page 141 of the Record of Appeal, the Appellant made the following statement; “-----by doing so the Defendant added some clauses that were not agreed to by the parties.”

8.13 However, in cross-examination, based on his Witness Statement, at page 297 of the Record of Appeal, the Appellant concedes that the decision to amend the Consent Judgment was necessitated by the realisation that the Property number was wrongly recorded in the Consent Judgment. Further, at page 298 of the Record of Appeal, when asked to identify in

the amended Consent Judgment the clauses that the parties had not agreed to, he said there was none.

8.14 It appears that the Appellant did not know what his grievance in relation to the amended Consent Judgment was. This is because of the contradictions both in his Witness Statement and in cross-examination.

8.15 In one breath he is saying that the Respondent left out the clauses on removing the forfeiture clause, reduction of monthly instalments and the bringing forward the starting time of the loan to the date of the amended Consent Judgment. In another, he is saying that the Respondent included in the amended Consent Judgment, clauses not agreed to. He however, could not produce evidence to support either assertion.

8.16 The learned Judge in the Court below interrogated this vacillation by the Appellant between the two positions as the basis upon which he was relying to have the amended Consent Judgment set aside.

8.17 The learned Judge reviewed the law relating to the legal burden and the setting aside of a Consent Judgment and concluded that the Appellant's evidence had not attained the veracity and threshold to warrant the setting aside of the amended Consent Judgment.

8.18 It is evident from the Appellant's evidence in the Court below and in his grounds of appeal and Heads of Argument here that he is frantically trying to wriggle his way out of the default status and save his property from being sold.

8.19 Unfortunately, there is no way out. The learned Judge below was on firm ground in dismissing the action and refusing to set aside the amended Consent Judgment.

8.20 We are not impressed by his argument that the Respondent presented to him a stand-alone signature page to sign. This is because, as a prudent literate adult with full capacity, he was not obliged to sign that page without seeing and satisfying himself that the document he was signing was part of the amended Consent Judgment with agreed upon content.

8.21 The principle that a party relying on fraud or misrepresentation ought to specifically plead it and at the hearing prove it to a standard slightly above a balance of probabilities holds firm. The Appellant fell short of the requirements in both cases and he cannot succeed.

9.0 CONCLUSION

9.1 In our considered view, the Appellant has failed to demonstrate that the learned Judge misdirected himself on any of the facts and the law that informed his decision to not set aside the amended Consent Judgment. The appeal therefore, lacks merit and liable to be dismissed.

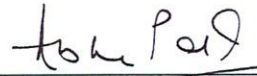
9.2 We therefore, dismiss it accordingly in its entirety for lack of merit with costs to the Respondent to be taxed in default of agreement.



M.J. SIAVWAPA
JUDGE PRESIDENT



F.M. CHISHIMBA
COURT OF APPEAL JUDGE



A.N. PATEL SC
COURT OF APPEAL JUDGE