

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

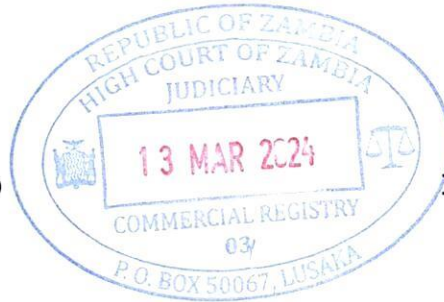
2023/HPC/0193

BETWEEN:

ROYAL KAFUE LIMITED

AND

**HUMPHREY KABINDA
BORNIFACE CHISOSHI**



PLAINTIFF

**FIRST DEFENDANT
SECOND DEFENDANT**

Before the Honourable Mr Justice K. Chenda on 13th March 2024

For the Plaintiff : Ms K. Mwila of Muleza, Mwiimbu & Co.
For the Defendants : Mr A.K. Kombe and Mr T. Msumuko of Andrew & Partners

JUDGMENT

Primary legislation referred to:

1. The Land (Perpetual Succession) Act, Cap. 186 of the Laws of Zambia
2. The High Court Act, Cap. 27 of the Laws of Zambia

Rules of Court:

1. The High Court Rules, created under Cap. 27 of the Laws of Zambia

Case law:

1. *Richwell Siamunene v Sialubalo Gift* - Vol. 3 (2017) ZR 335 at 354
2. *Tresford Chali v Bwalya E.K. Ngandu* - Appeal No.84/2014 at p.J32-33
3. *Jonathan Van Blerk v AG & Ors* - SCZ/8/3/2020 at p.J114

4. *Foss v Harbottle (1843) 2 Hare 461*
5. *Prudential Assurance Co. Ltd v Newman Industries Ltd. (No.2) (1982) Ch 204 at p.210*
6. *ZCCM IH Plc v First Quantum Mineral Ltd. & Ors. - Appeal No. 92 of 2020*
7. *Afropo Zambia Limited v Anthony Chate & Ors - Appeal No. 160/2013 at p.J16*

Authoritative texts:

1. John Hatchard with O'Brien Kaaba, (2022), *Principles of the Law of Evidence in Zambia*, Cape Town: Juta and Company (Pty) Ltd, p.106 at para. 1

1 INTRODUCTION AND BACKGROUND

- 1.1 The Plaintiff and Defendants had dealings as respectively, an investor in Chief Kaindu's area, Mumbwa District and representatives of a trust in the area.
- 1.2 The Plaintiff advanced monies to the Defendants in furtherance of the said dealings but differences arose with the Plaintiff alleging that the monies were misappropriated.
- 1.3 The Plaintiff accordingly sued by writ of summons and statement of claim recast on 16th May 2023 seeking:
 - (i) payment of the sum of USD 50,000 on account of money had and received by the Defendants for use of the beneficiaries of the trust;
 - (ii) damages for fraudulent misrepresentation;
 - (iii) any other reliefs the court may deem fit;

(iv) interest on sums payable at the current Bank of Zambia lending rate: and

(v) costs.

1.4 The Defendants reacted with a joint defence filed on 1st June 2023 refuting the allegations of misappropriation and any wrongdoing in their dealings with the Plaintiff.

1.5 The pleadings closed with the Plaintiff's reply of 12th June 2023 in which it reiterated its complaints.

2 COMMON GROUND AND ISSUES FROM PLEADINGS

2.1 It is common ground that the Plaintiff has had dealings with the trust and that the Defendants have interfaced with the Defendants in that regard. There is no contention that the dealings were also clothed by a lease agreement between the Plaintiff and the trust.

2.2 It is also common ground that the Plaintiff paid out monies to the Defendants for purposes of its dealings with the trust.

2.3 However, there appears to be no consensus on the exact name of the trust which the Plaintiff pleads as "Kaindu Natural Resources Trust" while the Defendants aver it is "Kaindu Natural Resources Trust Registered Trustees".

- 2.4 There is also controversy on the positions which the Defendants held in the trust as the Plaintiff complains that the First Defendant purported to be the chairman with the mandate to receive and deal with payments from the Plaintiff. The Plaintiff has also alleged that the monies were not utilised for the intended purpose nor accounted for by the Defendants to the beneficiaries of the trust.
- 2.5 The Defendants have cross-alleged that they were duly authorized to deal with monies as representatives of the trust and that they appropriated the monies received from the Plaintiff in accordance with the trust deed.
- 2.6 The Plaintiff has complained that the Defendants have adversely affected the relationship between the Plaintiff and the trust. The Defendants for their part have denied the allegation and cross alleged that the Plaintiff has simply failed to cope with the termination of the lease.
- 2.7 After close of pleadings, I convened a scheduling conference on 7th June 2023 and engaged Counsel in a Bar-Bench consultation. It yielded fruit in the form of the following core issues distilled for interrogation at trial and determination as per order for directions:

- i) what is the correct name of the trust referred to in the statement of claim and defence (the “**Trust**”);
- ii) who were the Trustees and Chairman for the Trust between 21st May 2010 and 25th March 2017 and how were payments (if any) being remitted by the Plaintiff to the Trust in that period;
- iii) did the Defendants appropriate the monies received from the Plaintiff to the legitimate purposes of the Trust;
- iv) did the Defendants make any fraudulent misrepresentation to the Plaintiff over the Trust and their involvement in its affairs; and
- v) ultimately, is the Plaintiff entitled to any relief against the Defendants.

2.8 Following conclusion of all preparatory steps, the matter was set down for trial.

3 SUMMARY OF EVIDENCE

3.1 Trial was held on 14th - 15th November 2023, with the Plaintiff calling five witnesses while the Defendants called two witnesses.

3.2 **The Plaintiff's first witness was Andrew Baldry, whose evidence in chief** was embodied in a witness statement filed on 19th July 2023 supported by the Plaintiff's bundle of documents filed on 6th July 2023.

- 3.3 It was his evidence that he was a director in the Plaintiff company which entered into the lease with the trust on 21st May 2010. He stated that the lease appeared at p.17-47 of the Plaintiff's bundle.
- 3.4 Mr. Baldry testified that the lease in clause 4.1.4 required the Plaintiff to pay USD1,000 per month with an annual escalation of 5%.
- 3.5 He stated that the objectives of the trust were to provide for the people of Kaindu Chiefdom as beneficiaries.
- 3.6 It was his testimony that the two Defendants began to receive the payments from the Plaintiff as if on behalf of the trust.
- 3.7 He complained that the beneficiaries of the trust later complained that they were not receiving the payments remitted by the Plaintiff.
- 3.8 Mr. Baldry testified that the Plaintiff transmitted more than USD50,000 to the Defendants but only had records for USD50,000.
- 3.9 He stated that the Plaintiff sought a refund of the monies paid to the Defendants and unremitted to the beneficiaries of the trust.
- 3.10 **Mr. Andrew Baldry (PW1) was cross-examined** firstly by Mr. Msumuko during which he testified:

- i) the parties to the lease at p.17 of the Plaintiff's bundle were the Plaintiff and the trust;
- ii) the Plaintiff has sued the Defendants for USD50,000 as they were the signatories to the trust account and circumstances are such that the community has complained of not receiving their dues from the Plaintiff;
- iii) the Plaintiff's payments to the trust were for the benefit of the community;
- iv) the trust deed at p.2 of the Plaintiff's bundle has nothing to do with the Plaintiff;
- v) proof of payment of the USD50,000 by the Plaintiff to the Defendants appears at p.99-133 of the Plaintiff's bundle and it consists of letters, acceptance of money and two direct payments from the Plaintiff's clients; and
- vi) there is no document before the Court giving a detailed outline of the USD50,000 payments to the Defendants.

3.11 **Mr. Baldry was also cross-examined** by Mr. Kombe during which he testified:

- i) the Plaintiff derived a financial benefit from the lease;
- ii) the Plaintiff was expected to pay annual lease fees to the trust for use of the game ranch area;

- iii) the Plaintiff has no problem with the monies it paid to the trust between 2010-2017 and same was remitted mostly through cheques and in some instances cash;
- iv) after 2017 the Plaintiff made most of the payments into the trust account;
- v) he disagreed that the Plaintiff's reason for seeking an account of the period after 2017 is because the Defendants were instrumental in termination of the lease;
- vi) he denied that the lease was terminated by the trust in 2019;
- vii) he conceded that the Plaintiff is no longer operating the game ranch and no longer in occupation and he attributed it to a Court case over the legitimacy of the trust;
- viii) he was aware that Kashikoto Conservency currently has a lease with the trust and is operating the game ranch;
- ix) the Plaintiff seeks a refund of USD50,000 for the community but is not suing on behalf of the community; and
- x) he agreed that once lease fees are paid by the Plaintiff to the trust it ceases to be money for the Plaintiff.

- 3.12 **Mr. Baldry was re-examined** by Ms. Mwila during which he clarified that the beneficiary of the income was the community divided into village action groups (VAGs) with separate bank accounts as the destination of money paid by the Plaintiff.
- 3.13 **Mr. Willie Muke** testified on behalf of the Plaintiff. **His evidence in chief** was embodied in a witness statement filed on 19th July 2023.
- 3.14 He stated that he served as chairperson of the Kaindu Community Resources Board (KCRB) from 2016-2019.
- 3.15 It was his evidence that KCRB has the responsibility of developments in the Chiefdom and that it would receive money from the trust and channel it to the 5 village action groups for welfare use for the villages.
- 3.16 He stated that in 2016 the KCRB received a total of K100,000 from the trust after payment by the Plaintiff.
- 3.17 Mr. Muke stated that no funds were received from the trust in 2017 and 2018 while in 2019 the amount received came to K12,000 when shared amongst the village action groups.
- 3.18 He also testified that whilst he sat on KCRB he saw no record of audited accounts for the trust.

3.19 **Mr. Willie Muke (PW2) was cross-examined** firstly by Mr. Msumuko during which he testified:

- i) there was no relationship between KCRB and the Plaintiff;
and
- ii) KCRB would receive money from the trust after the Plaintiff paid the trust.

3.20 **Mr. Muke was also cross-examined** by Mr. Kombe during which he testified:

- i) KCRB and the trust are two separate and independent institutions;
- ii) the trust deed does not mention VAGs;
- iii) KCRB is supposed to raise money from the game management area surrounding Kaindu Chiefdom and to negotiate and sign contracts with operators;
- iv) KCRB is dependent on funding from the trust and supervises the trust;
- v) he has no evidence before Court to prove that KCRB received K100,000 as alleged in paragraph 5 of his witness statement; and

vi) the K12,000 alluded to in paragraph 6 of his witness statement was paid into the accounts of each VAG but he conceded that he never saw their bank statements.

3.21 **When re-examined** by Ms Mwila, Mr. Muke clarified that KCRB stands for Kaindu Community Resources Board and VAGs stands for village action groups. He conceded that VAGs are not mentioned in the trust deed but that KCRB supervises the trust.

3.22 The Plaintiff also called **Mr. Chiwala Gehas Kayombo** to testify. **His testimony in chief** was embodied in a witness statement filed on 19th July 2023.

3.23 Mr. Kayombo testified that he was a trustee under the trust and elected as treasurer in 2020.

3.24 It was his evidence that the committee of the trust previously had the Second Defendant as chairperson and First Defendant as secretary and that at the point of his election, they did not hand over the trust's financial records.

3.25 He testified that he had no records of payments into the trust by the Plaintiff and remittances by the trust to the beneficiaries.

3.26 **Mr. Chiwala Kayombo (PW3) was cross-examined** by Mr. Msumuko during which he testified:

- i) he was elected as treasurer for the trust in 2020 and he is very familiar with the trust deed and lease;
- ii) in one breath he said he had access to the trust accounts as treasurer and in another breath, he said he did not as the previous committee did not handover;
- iii) the accounts are not personal but for the trust; and
- iv) he indicated that he had nothing to say when asked to show the Court any provision in the lease or trust deed that required outgoing trustees to write to the bank about changes in leadership.

3.27 **When cross-examined** by Mr. Kombe Mr. Kayombo testified:

- i) the outgoing committee that he spoke of in paragraph 2 of his witness statement included the Defendants;
- ii) he sued in a separate action challenging the election of the outgoing committee;
- iii) he does not have access to the trust accounts because the other group refused to handover;
- iv) he agreed that the other group also has a treasurer in office;
- v) he was not aware that there is a lease between trust and Kashikoto over the Kaindu game ranch nor that the latter is operating it and has been paying the trust since 2021; and

vi) he does not know about the trust's finances as there was no handover to him.

3.28 **When re-examined** by Ms Mwila, Mr. Kayombo testified that upon change of office bearers, the outgoing and incoming trustees meet for a handover of records by the former to include financial records. He stated that it had been the trend since the trust was established.

3.29 **Mr. Joshua Cholobesa** testified on behalf of the Plaintiff on the basis of a witness statement filed on 19th July 2023 as evidence in chief.

3.30 He stated that he served as a trustee and secretary of the trust between 2004-2011.

3.31 It was his testimony that upon election of a new committee, the outgoing must hand over records including financial records to the secretary. Also, that there must be communication to the bank to inform them of the changes on who can access the account.

3.32 He testified that his outgoing committee handed over to that which came after under the chairmanship of the Second Defendant.

3.33 **Mr. Joshua Cholobesa (PW4) was cross-examined** by Mr. Msumuko during which he testified:

- i) he was a trustee from 2004-2011;
- ii) he was a signatory to the lease and familiar with both the lease and trust deed; and
- iii) the lease did not have any provisions for succession where a new trustee or committee is elected and he could not see any provisions in the trust Deed either.

3.34 **Mr. Cholobesa was also cross-examined** by Mr. Kombe during which he testified:

- i) he has not been involved in the operations of the trust since 2011 and would not know anything about the Plaintiff's claim for USD50,000 if it arose after 2011;
- ii) during his tenure the trust was not reporting to KCRB nor being supervised by it as the two have separate reporting structures; and
- iii) to some extent even the financial provisions of the two are independent.

- 3.35 **When re-examined by Ms. Mwila**, Mr. Cholobesa clarified that the trust was formed at Ministry of Lands under the **Land (Perpetual Succession) Act** while KCRB was created under ZAWA Act giving them different roles. He stated that KCRB is however a stakeholder in the resources of Kaindu Chiefdom because it represents the same community as the trust.
- 3.36 **Mr. Frazer Chilimboyi** testified on behalf of the Plaintiff. **His evidence in chief** was embodied in a witness statement filed on 19th July 2023.
- 3.37 He stated that he was a trustee of the trust and that he was elected as secretary on 25th March 2020. He echoed the complaint that the outgoing committee of the First and Second Defendants did not hand over financial records.
- 3.38 **Fraser Chilimboyi (PW5) was cross-examined** by Mr. Msumuko during which he testified:
- i) he was the current secretary of the trust after the election on 25th March 2020;
 - ii) he stated that the Defendants had been masquerading as trustees but admitted that he did not say so in paragraph 2 of his witness statement which instead recognized them as outgoing committee members;

- iii) the mandate of trustees is drawn from a list of members registered in the miscellaneous registry at the Ministry of Lands;
- iv) the bank accounts referred to in paragraph 4 of his witness statement was registered in the name of the trust but accessed by the committee led by the Defendants; and
- v) he has no evidence to prove the allegation in paragraph 5 of the witness statement.

3.39 **When re-examined** by Ms. Mwila, Mr. Chilimboyi clarified that the account is in the name of the trust but the people with access to it who also refused to hand over when he was elected are the committee led by the Second Defendant and First Defendant.

3.40 On that score the Plaintiff closed its case.

3.41 The Second Defendant, **Mr. Bornface Chisoshi**, testified as a witness on his own behalf. **His testimony in chief** was embodied in a witness statement dated 20th July 2023 together with the Defendants' primary bundle of documents and supplementary bundle.

3.42 He testified that he was appointed by Chief Kaindu on 25th March 2017 to sit on the trust as the Chief's representative. He also stated that he chaired the trust as a replacement of the First Defendant who was removed by the trustees on a no confidence vote.

3.43 Mr. Chisoshi also echoed the testimony of a lease between the Plaintiff and the trust.

3.44 He stated that the trust has a treasurer who handles accounting.

3.45 It was his testimony that the trust deed regulates the procedure for disbursement and withdrawal of funds.

3.46 He denied having misappropriated any funds and stated that the Plaintiff is not entitled to a refund of any payments under the terminated lease.

3.47 **Mr. Chisoshi (DW1), was cross-examined** by Ms. Mwila during which he testified:

- i) between 2017-2020 he was a trustee and held the positions of chairperson, vice secretary, and chairperson again, he is still a trustee after the election on 21st July 2021;
- ii) he does not know of the Plaintiff paying the trust the monies under clause 4.1.4 of the lease in the period;

- iii) the chairperson is supposed to be a trustee;
- iv) he has no proof before Court that the First Defendant served as a trustee;
- v) he (Second Defendant) was chairperson in 2017 and 2021 while First Defendant was chairperson in 2019;
- vi) the money in clause 4.1.4 of the lease was for running the trust affairs and supporting community projects of the VAGs and part of it is used for fishermen;
- vii) the money paid according to the letter at p.102 of the Plaintiff's bundle is not part of that under clause 4.1.4 of the lease;
- viii) he deposed to the witness statement at p.88 of the Plaintiff's bundle and speaks of elections of 25th March 2017 at paragraph 4;
- ix) he and the First Defendant were elected on 25th March 2017 and after their tenure, they did not handover the accounts, books and financial records to the new committee;
- x) the document at p.99 of the Plaintiff's bundle has an account number which was used by the trust including during the period 2017-2020;

- xi) he (Second Defendant) had access to the account as chairperson and so did the committee through 4 chosen signatories inclusive of him;
- xii) the signatories for 2018 did not include the First Defendant, but he used to receive money for fishermen in 2019 in his capacity as chairman;
- xiii) he (Second Defendant) does not recall receiving money himself in the period 2017-2020;
- xiv) he confirmed that the Plaintiff paid the money referred to in the documents at p.113 to 125 of the Plaintiff's bundle and that it was going into the trust account;
- xv) he could not confirm that the trust received the money referred to in the document at p.130 of the Plaintiff's bundle; and
- xvi) the name of the trust was Kaindu Natural Resources Trust.

3.48 **When re-examined** by Mr. Msumuko, Mr. Chisoshi testified that the money which was said to have been given to the First Defendant came from the Plaintiff's manager but was not enough for all fishermen so they got some funds from the project.

3.49 **Mr. Watson Nyendwa** testified on behalf of the Defendants. **His testimony in chief** was contained in a witness statement filed on 20th July 2023.

3.50 It was his evidence that he chaired the trust from 30th June 2014 until the community called for premature elections that saw the First Defendant elected as chair on 25th March 2017 while he was re-elected as a trustee.

3.51 He stated that there was no hunting revenue received from the Plaintiff in 2017.

3.52 **Mr. Watson Nyendwa (DW2) was cross-examined** by Ms. Mwila and testified:

- i) he was elected chairman on 30th June 2014 but he was aware of transactions for the trust between 2017-2020;
- ii) the people who sought financial reports as alluded to in paragraph 4 of the witness statement were from the VAGs and they demanded for premature elections;
- iii) the election of 25th March 2017 was not held in accordance with the trust's constitution because the term of office never ended but the committee was still validly elected;

- iv) members are supposed to be given notice before an election but not all members were notified of the 25th March 2017 elections at which the First Defendant was elected as chairperson;
- v) outgoing committee members are supposed to handover financial reports and accounts to the new committee member;
- vi) the treasurer is responsible for handling monies of the trust and the rules do not allow the chairperson to do it;
- vii) the document at p.102 of the Plaintiff's bundle was issued by the First Defendant but he denied that it was not correct for the First Defendant to do so;
- viii) the Plaintiff did not pay the monies under clause 4.1.4 of the lease but instead 20% per season from hunting which monies benefitted the VAGs;
- ix) he could not show any clause in the lease for the 20% but recalls it being agreed with the developer; and
- x) when he was the chairperson he never handled the money for the trust but did the planning.

3.53 **Mr. Nyendwa was re-examined** by Mr. Msumuko during which he clarified that the constitution of the trust has distinct duties for the chairperson and treasurer. Further that when a treasurer withdraws money and allows the chairperson to direct it where it is supposed to go, they could agree as such and sign.

3.54 On that note the Defendants closed their case.

4 SUBMISSIONS FROM THE BAR

4.1 After conclusion of trial, the Plaintiff tendered final submissions on 23rd November 2023 while the Defendants did not tender any.

4.2 The Plaintiff's submissions were well researched and of immense use, for which I am grateful to Counsel. Owing to the peculiar circumstances of the case, I propose to dispense with a copious reproduction of their content.

5 ANALYSIS AND FINDINGS

5.1 I have closely studied the material on record, evidence and submissions and after a careful consideration, my decision is as set out below.

The contention of the correct name of the Trust referred to in the statement of claim and defence (the 'Trust')

- 5.2 The Plaintiff produced copy of a certificate of incorporation issued under the **Land (Perpetual Succession) Act⁽¹⁾** showing the name of the Trust as the 'Kaindu Natural Resources Trust Registered Trustees', see p.1 of the Plaintiff's bundle.
- 5.3 According to s. 2 of the said **Act**, upon the issuance of a certificate of incorporation, the trustees or trustee shall thereupon become a body corporate by the name described in the certificate.
- 5.4 Therefore, in the absence of any rebuttal evidence, I find that the name of the Trust referred to in the respective pleadings is the Kaindu Natural Resources Trust Registered Trustees.

The contention of who the trustees and chairman were from 21st May 2010 to 25th March 2017 and how payments (if any) were being remitted by the Plaintiff to the Trust in that period

- 5.5 The evidence is not conclusive on who constituted the full complement of office bearers for the Trust for the relevant period. However it shows:

5.16.1 the Second Defendant was chairman and the First Defendant secretary of the board of trustees of the Trust at some point in the relevant period (see evidence from Mr Kayombo, Mr Cholobesa and Mr Chilimboyi);

5.16.2 Mr Cholobesa was a trustee at some point in the period (see evidence of Mr Cholobesa); and

5.16.3 Mr Nyendwa chaired the board of trustees at some point in the period (see evidence of Mr Nyendwa).

5.6 It follows that whilst it is unsafe and unsound to make a finding on the exhaustive list of office bearers for the relevant period, I accept and find that the trustees in the period included the Defendants, Mr Cholobesa and Mr Nyendwa.

5.7 As for evidence of how payments were being remitted by the Plaintiff to the Trust in the period, PW1 conceded in cross examination (by Mr Kombe) that the Plaintiff had no problem with the payments for the period and lucidly testified that the payments were mostly by cheque into the Trust account and sometimes by cash.

5.8 In the absence of any evidence to the contrary, I accept that payments were being made by the Plaintiff to the Trust in the stated period. Further that the mode of payment was predominantly by cheque into the Trust account and sometimes in cash.

The contention of whether the Defendants appropriated the monies received from the Plaintiff to the legitimate purposes of the Trust

5.9 The learned authors of **Principles of the Law of Evidence in Zambia**⁽¹⁾, armed with jurisprudence from the Court of Appeal, give a useful discussion on the discourse of burden of proof:

*“In civil cases the general rule is that ‘they who assert must prove’. In most cases the legal burden of proof lies on the plaintiff although in some situations, both parties may assume the legal burden on an issue(s). This recognizes that civil cases do not involve a criminal conviction nor punishment. **In Hitech Logistics Limited v Ugondo Italian Style Limited, Chishimba JA referred to the placing of the burden of proof as follows:***

The legal burden of proof as to any fact in issue in a civil case lies upon the party who affirmatively asserts that fact in issue and to whose claim or defence proof of the fact in issue is essential.... If the plaintiff fails to prove any essential element of his claim, the defendant will be entitled to judgment. The position of the defendant is somewhat different. **Since the plaintiff affirmatively asserts his claim, the plaintiff bears the burden of proving the claim and the defendant assumes no legal burden of proof by merely denying the claim. However, if the defendant asserts a defence which goes beyond a mere denial (sometimes referred to as an affirmative defence) the defendant must assume the legal burden of proving such defence.** An affirmative defence is most easily recognised by the fact that it raises facts in issue which do not form part of the plaintiff’s claim.” (Emphasis added)

- 5.10 In the case before Court, the evidence shows that the Trust used to bank the money received from the Plaintiff. The Second Defendant did admit in cross examination that the Trust received the monies described in the cheque related documents produced at p.113-125 of the Plaintiff's bundle which monies he testified were banked.
- 5.11 The evidence also shows that the Defendants had access to the Trust's bank account.
- 5.12 The Plaintiff has shone a spotlight on the absence of accounting records and the omission by the Defendants to handover records to successor committees of the Trust.
- 5.13 However, there is no evidence that shows how any monies accessed by the Defendants from the Trust after payment by the Plaintiff were actually expended by the Defendants.
- 5.14 It is not the province of this Court to speculate and fill in the blanks through assumptions where the evidence is deficient. I am fortified in this regard by the decision of the Constitutional Court in ***Richwell Siamunene v Sialubalo Gift***⁽¹⁾.

5.15 Based on the inconclusive position of the evidence, whereas I am not convinced that the Defendants appropriated the monies in their hands to the legitimate purposes of the Trust, it is also unsafe and unsound to make a finding that they misappropriated the monies.

The contention of whether the Defendants made any fraudulent misrepresentation to the Plaintiff over the Trust and their involvement in its affairs

5.16 In *Tresford Chali v Bwalya Emmanuel Kanyanta Ng'andu*⁽²⁾, Mambilima, CJ gave the following apt guidance on the discourse of fraud:

“The law regarding the pleading and proving of fraud is well settled. It is trite that fraud must be distinctly alleged and proved. This is evident from Order 18/8/16 of the RULES OF THE SUPREME COURT, 1999, which states that ‘Any charge of fraud or misrepresentation must be pleaded with the utmost particularity...’ Order 18/12/18 of the RULES OF THE SUPREME COURT, 1999, is also couched in similar terms. It provides that ‘Fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.’

*In addition, **the standard of proof for an allegation of fraud is higher than proof on a balance of probabilities, but lower than proof beyond reasonable doubt.** A case on point in this regard is our decision in the case of SITHOLE V. THE STATE LOTTERIES BOARD where we held that if a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities.” (Emphasis added)*

5.17 As far as conceptual definitions go the decision of the Supreme Court delivered by Wood JS in ***Jonathan Van Blerk v AG & Ors***⁽³⁾ is equally useful and I quote:

*“We are clear in our mind that **fraud is a deceptive act done intentionally by one party in order to influence or induce another party to believe or accept the existence of a certain state of affairs when the actual state of affairs is otherwise. A misrepresentation on the other hand is a representation of a miss-statement innocently or negligently which wrongfully persuades another party to accept the existence of a given state of affairs.** Both instances involve untruthfulness.” (Emphasis added)*

5.18 Quite clearly therefore a litigant such as the Defendant who alleges being induced by fraudulent misrepresentation must in order to succeed:

5.16.4 distinctly plead with particulars in the statement of claim the acts complained of; and

5.16.5 through evidence, prove beyond a balance of probabilities that a deceptive act intentionally done by the Plaintiff influenced, induced or persuaded the Defendant to accept the existence of a certain state of affairs which state of affairs was actually different from that accepted.

5.19 In the case before Court the Plaintiff's allegations of fraud against the Defendants are couched as follows in paragraphs 12, 13 and 14 of the statement of claim -

- “12. *The Plaintiff will aver at trial that on 25th March 2017, the First Defendant purported to have been elected as a chairperson of the Trust which position entitled him to have access to money that the Plaintiff was paying to the Trust under the agreement.*
13. *It was a representation of the Defendants that they had the authority to undertake all obligations of the Trust under the agreement which included handling the Trust account where the Plaintiff used to deposit money mentioned in paragraph 11 above.*
14. *In complete reliance on the Defendant's fraudulent misrepresentation which the Plaintiff believed to be true, the Plaintiff issued various payments on different dates to the Defendants in cash, bank transfers and cheques in satisfaction of their obligation mentioned in paragraph 11 above by advancing a sum of USD50,000 to the Defendants.*

Particulars of the Fraudulent Misrepresentation

- i) *the First Defendant holding himself out as a duly elected Chairperson of the Trust when in fact not;*

- ii) *the Second Defendant holding himself out as a person authorized to deal with monies received from the Plaintiff under clause 4.1.4 of the agreement;*
- iii) *the Defendants receiving monies paid by the Plaintiff under a lease agreement for Farm No. 10415, Mumbwa District, Central Province in cash, by cheque and bank transfer and not accounting for the same to the beneficiaries of the Trust; and*
- iv) *the Defendants receiving money from the Plaintiffs on behalf of the beneficiaries without authority from the Trust to do so.”*

5.20 I therefore find that the Plaintiff has met the first threshold of distinctly pleading and particularizing the alleged fraud.

5.21 Moving on to the evidence to prove the allegations, I find that it was less than cogent as:

5.16.6 Mr Chiwala Kayombo recognised in paragraph 2 of his witness statement that the First and Second Defendants were at some point office bearers of the Trust as secretary and chairperson respectively, albeit with a complaint being that they did not handover to his committee;

5.16.7 Mr Frazer Chilimboyi (in paragraph 2 of his witness statement) gave similar recognition to the Defendants and echoed the complaint of Mr Kayombo; and

5.16.8 Mr Joshua Cholobesa also recognised in paragraph 5 of his witness statement that the Second Defendant was at some point the chairman of the Trust.

- 5.22 The said evidence clearly establishes that the Defendants have at some point been trustees and office bearers, which flies in the teeth of the allegation of them fraudulently holding out.
- 5.23 Further, based on the cross examination of the Second Defendant by the Plaintiff's Counsel, it is clear that the Trust is embroiled in internal squabbles as to who the legitimate office bearers are, which has escalated to litigation between the factions.
- 5.24 The litigation is pending on the General List in cause 2021/HP/121 as depicted by a witness statement exhibited from page 87 of the Plaintiff's bundle of documents.
- 5.25 It is on this premise that I find that the Plaintiff has failed to prove to the requisite standard that the Defendants made any fraudulent misrepresentation to the Plaintiff over the Trust and their involvement in its affairs.

The contention of whether the Plaintiff is entitled to any relief against the Defendants

- 5.26 Mr Baldry testified that the monies sought to be recovered by the Plaintiff (USD50,000) had been paid to the Trust but that through the acts of the Defendants as signatories to the Trust accounts, the monies did not reach the beneficiaries of the Trust who were

the community members of Kaindu chiefdom. He also admitted that the Plaintiff seeks the refund of USD50,000 for the community.

- 5.27 Assuming that it had been proven that the Defendants had misappropriated the monies (which has not been proven) then, going by Mr Baldry's admission in cross examination, the Plaintiff had no further claim to the monies after payment.
- 5.28 Secondly, misappropriation of funds would be a breach of fiduciary duties by the Defendants as trustees, which would render them liable to a suit by the beneficiaries.
- 5.29 Thirdly, the **Land (Perpetual Succession) Act⁽¹⁾** in s.2 confers corporate legal capacity on a registered Trust inclusive of the power to sue and be sued in its own name.
- 5.30 Accordingly, going by the rule in **Foss v Harbottle⁽⁵⁾** (and offshoot jurisprudence including **Prudential Assurance Co. Ltd v Newman Industries Ltd.⁽⁶⁾** and closer to home, the Court of Appeal decision in **ZCCM IH Plc v First Quantum Minerals Ltd. & Ors.⁽⁷⁾**), the correct litigant to seek redress for wrongs committed against a body corporate is itself.

5.31 Thus assuming that it had been proven that the Defendants misappropriated the Trust funds as alleged by the Plaintiff (which has not been proven), it would have been the Trust entitled to relief not the Plaintiff.

6 CONCLUSION AND ORDERS

6.1 The Plaintiff has failed to prove its case against the Defendants and is not entitled to the reliefs claimed nor to any other form of relief in its favour under s.13 of the **High Court Act**⁽²⁾.

6.2 Turning to the issue of costs of litigation. They are a matter of discretion for the Court in terms of Order 40 Rule 6 of the **High Court Rules**⁽¹⁾.


6.3 As for the guidance in the exercise of that discretion, I heed the Supreme Court's judgment in **Afropo Zambia Limited v Anthony Chate & Ors**⁽⁸⁾, where Wood, JS aptly stated:

*"It is a settled principle of law that **a successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted costs.**" (Emphasis added)*

6.4 In the case at hand, it is evident that this litigation is a splinter of a wider feud over the Trust and its activities with business partners such as the Plaintiff.

6.5 Therefore, in order to avoid inadvertently widening the surface area for further acrimony, I order that each of the parties shall bear their own costs of this action. I hope that by doing so, it will leave room for genuine dialogue to resolve the root problems amicably.

Dated at Lusaka this *13th* day of *March* ----- 2024



K. CHENDA
Judge of the High Court