

IN THE COURT OF APPEAL OF ZAMBIA

Appeal No. 212 of 2023

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

TRILIGHT ACADEMY SCHOOL LIMITED

APPELLANT

AND

NCHANGA CHIMBOTELA LIMITED

RESPONDENT

CORAM: SIAVWAPA JP, CHISHIMBA & PATEL, JJA

On 17th & 24th February 2026

For the Appellant: No Appearance

For the Respondent: No Appearance

J U D G M E N T

Patel, JA, delivered the Judgment of the Court

Cases referred to:

1. International Trades Crystals Societe Anonyme v Northern Minerals Limited (1985) ZR 27
2. Wilson Masauso Zulu v Avondale Housing Project (1982) Z.R. 172
3. Re Aston Colour Print Limited [2005] 3 I.R. 609
4. Fresh Mint Limited and others v Kawambwa Tea Company Limited (2008) 2 Z.R. 32
5. Sigma Financial Solutions Limited & 3 Others v Chongo Kalela Sinyangwe - CAZ Appeal No. 004 of 2023
6. National Drug Company Limited & Zambia Privatisation Agency v Mary Katongo, SCZ Appeal No. 79 of 2001
7. Gemstar Holdings Limited v Afgri Corporations Limited – SCZ Appeal No. 183 of 2014
8. Stanbic Bank Zambia Limited v Bruce Mwewa CAZ Appeal No. 112 of 2020

Legislation & Rules referred to:

1. The Companies Act No.10 of 2017
2. The Rules of the Supreme Court of England 1965 (1999 Edition) (“The Whitebook”)
3. Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia
4. The Rent Act Chapter 206 of the Laws of Zambia

5. The High Court Amendment Rules, Statutory Instrument No. 58 of 2020

Other works referred to:

1. Cheshire and Fifoot's Law of Contract, 10th Edition

1.0 INTRODUCTION

- 1.1 This is an appeal against the Judgment of **Honourable E. Pengele J** dated 4th May 2023, over the sale of the Main Social Club, Plot No. 252, Nkula Street, Phiri Market Area, Nchanga North, Chingola, in which the Court found in favour of the Respondent.
- 1.2 The Parties shall be referred to as they appear in this Court.
- 1.3 The Record of Appeal (ROA) consists of a single volume and reference to page numbers shall refer to the ROA unless otherwise stated.
- 1.4 The issues in the appeal deal with *inter alia*, mode of commencement of actions, findings of fact made by a trial Court, as well as the exercise of case management.

2.0 BACKGROUND

- 2.1 The brief background to this matter is that the Respondent (Plaintiff below) was the legal owner of Main Social Club, Plot No. 252, Nkula Street, Phiri

Market Area, Nchanga North, Chingola (hereinafter referred to as “**the property**”).

2.2 In or about 2019, the Respondent entered into an agreement with the Appellant (Defendant below), for the sale of the property at the price of K1,600,000.00 and allowed the Appellant to take possession of the property under the belief that the Appellant would pay the purchase price within a short period of time.

2.3 The Respondent claimed that the Appellant did not pay the full purchase price and only paid the sum of K320,000.00 which was converted to rentals.

2.4 The Respondent contended that the Appellant had neglected to pay the purchase price and refused to vacate the property. Subsequently the Respondent commenced an action against the Appellant seeking the following reliefs:

- i. An order declaring the contract between the parties rescinded;*
- ii. An order evicting the Appellant from the property and restraining it from re-entering the property or interfering with the Respondent’s quiet enjoyment and possession of the property;*
- iii. Rentals for the period the Appellant has been in occupation as well as rentals from the people the Appellant has subletted part of the property to;*
- iv. Damages for breach of contract and for inconvenience caused and*
- v. Costs*

2.5 On 26th October 2021, the Appellant entered appearance and filed a defence and counter claim seeking the following reliefs:

- i. *An order for specific performance compelling the Respondent to show the Appellant its documents of title to the property in consideration of the part payment which the Appellant has made towards the purchase price*
- ii. *An order to compel the Respondent to render an account of the rentals which it has received from third parties after the sale of the property to the Appellant*
- iii. *Further and, in the alternative, an order declaring the notice to vacate and the commencement of these proceedings null and void for non-compliance with the Landlord and Tenant (Business Premises) Act; and*
- iv. *Interest on the money found due from the date of writ to the date of payment; and*
- v. *Costs*

2.6 Following the relevant exchange of pleadings, the matter was heard culminating in the now appealed Judgment of the lower Court.

3.0 DECISION OF THE LOWER COURT

3.1 The learned trial Judge considered the originating process, the defence and counterclaim, the testimonies of witnesses and the submissions of Counsel.

3.2 He noted that the Appellant's submissions did not respond to the substantive issues raised in the action and that instead, the Appellant appeared to raise preliminary issues on points of law relating to the propriety of the mode of commencement of proceedings which in any event, ought to have been raised sooner in the proceedings.

3.3 The learned trial Judge carefully considered the case of **International Trades Crystals Societe Anonyme v Northern Minerals Limited** ¹, cited by the Appellant. He noted that contrary to the submission by Counsel to the Appellant, the Court in the **International Trades Crystals** case did not decide that a company cannot commence legal action without a company resolution authorizing commencement of such action. He noted that the portion of the decision that was quoted by Counsel for the Appellant related to actual facts of that case. He further noted that the lower Court was of the considered view that the Supreme Court did not establish the position that **every** company must make a resolution before commencing legal action.

4.0 THE APPEAL

4.1 Dissatisfied with the Judgment of the Court below, the Appellant lodged its appeal in this Court by way of Notice and Memorandum of Appeal on 16th May 2023, advancing four (4) grounds of appeal, namely:

- i. *The learned Judge erred in law and fact when he held that the Respondent was entitled to commence Court proceedings without a company resolution passed for that purpose;*
- ii. *The learned Judge erred in law and fact when he made composite orders for damages for breach of contract; order for possession; and order for payment of rentals;*
- iii. *The learned Judge erred in law and fact when he held that the provisions of the Rent Act did not apply to this case;*

- iv. *The learned Judge erred in law and fact when he refused to hear the Appellant's Summons to re-open the case to call a witness.*

5.0 THE APPELLANT'S HEADS OF ARGUMENT IN SUPPORT OF THE APPEAL

- 5.1 We have considered and appreciated the Appellant's Heads of Argument filed on 12th July 2023.
- 5.2 The gist of the Appellant's argument is that at trial, the Appellant raised the issue that introducing the issue of tenancy and rentals into the contract of sale was improper and against the law. However, the Appellant submits that in the Judgment of the lower Court, the Respondent was allowed to recover on the contract of sale and rentals from the property in dispute.
- 5.3 Further in support of the appeal, the Appellant submits that the Respondent having failed to produce at trial, a board resolution authorizing commencement of these proceedings was wrongly granted the reliefs sought.
- 5.4 The Appellant in further arguing the recovery of rentals by the Respondent, submitted that the learned trial Judge erred when he ordered the Appellant to vacate the premises within 36 days from the date of the Judgment. On the same issue, the Appellant argues that the modes of commencement for relief under contract of sale and for the recovery of rentals also differ. The Appellant referred to Rule 3 of the **Landlord and Tenant Business Premises Rules** ¹ and submitted that the action should have been commenced by an Originating Notice of Motion. Therefore, the learned trial Judge erred both

in law and fact when he combined the reliefs of contract of sale and tenancy rentals on the same facts and in the same action.

5.5 In concluding its arguments, the Appellant has submitted that the learned trial Judge was required to hear its application to re-open the case and make a decision on the merits. The Appellant placed reliance on **Wilson Masauso Zulu v Avondale Housing Project** ² and submitted that the affidavit filed in support of the summons to re-open the Appellant's case exhibited the witness statement which highlighted matters which needed consideration in the Judgment.

6.0 THE RESPONDENT'S HEADS OF ARGUMENT IN RESPONSE

6.1 We have equally considered and appreciated the Respondent's Heads of Argument filed on 2nd August 2023.

6.2 In response to ground 1, the Respondent referred to the cases of **Re Aston Colour Print Limited** ³ and **International Trades Crystals Societe Anonyme v Northern (Zambia) Minerals Limited** and submitted that a company resolution is required authorizing the company representatives to commence legal proceedings. It was further submitted that in respect to this fact, the Respondent has already filed documents showing meetings were held with all the Directors present giving authorization to commence legal proceedings and appointing its advocates. It is the Respondent's argument that the lower Court correctly granted the reliefs sought by the Respondent. It was further argued that the Appellant's argument lacks legal standing and must be dismissed.

- 6.3 In response to ground 2, the Respondent has argued that the lower Court acted within its unlimited jurisdiction and that all reliefs granted were expressly pleaded and proved at trial. It was further argued that the requirement for six months' notice under section **5(1)** of the Landlord and Tenant (Business Premises) Act¹ was, in the circumstances of this case, sufficient as notice was given to the Appellant when the proceedings commenced in Court, and when the letter of demand was served on the Appellant before commencement of these proceedings.
- 6.4 It was the Respondent's submission that the Appellant's continued possession of the premises is unjustified at law, and which is to the detriment of the Respondent.
- 6.5 The Respondent has also argued that the Parties' conduct, viewed objectively and in accordance with established principles of contract law, demonstrated a clear breach on the part of the Appellant. The Appellant's non-performance of its obligations occasioned commercial inconvenience to the Respondent. Accordingly, it argued that the lower Court was on firm ground in granting the reliefs.
- 6.6 In response to ground 3, the Respondent submitted that the learned trial Judge was on firm ground when he held that the Rent Act did not apply to this case because the gist of the matter is the rescission of the contract of sale which has been necessitated by the Appellant's failure to pay the purchase price over a period of more than 4 years. As such, the Respondent strongly canvassed that the matter could not commence by a Notice of Motion.

6.7 In response to ground 4, the Respondent referred to **Order 20 rule 8 (4)** of the Rules of the Supreme Court 1965 ² which reads as follows:

“In all cases except where leave to amend is allowed... the party seeking or requiring amendment of any pleadings or document must apply for leave or order to amend.”

6.8 It is the Respondent’s submission that the record would show that the Appellant made no such application, nor was the witness statement produced before trial commenced. It is the Respondent’s submission that there is no substance in the appeal upon which this Court may overturn the Judgment of the lower Court and prayed that the appeal be dismissed with costs to the Respondent.

7.0 THE HEARING

7.1 At the hearing of the appeal, there was no appearance for the Parties. Being satisfied that due service had been affected, we have proceeded to deal with the Appeal on the Record before us.

8.0 ANALYSIS AND DECISION OF THE COURT

8.1 We have carefully considered the impugned Judgment together with the arguments and submissions advanced by both Parties. This appeal invites us to set aside the Judgment of the lower Court on the basis that it was perverse or unsupported by the evidence on record as enunciated in the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**. It therefore falls

upon us to examine whether, on evidence before this Court, the Appellant has sufficiently substantiated the arguments advanced in this appeal.

- 8.2 In addressing **ground 1** on the requirement to produce a Board Resolution, the Appellant placed reliance on the case of **Fresh Mint Limited and Others v Kawambwa Tea Company Limited** ⁴, submitting that the Supreme Court held that persons who act on behalf of a company must be authorized by a resolution of the company. We have also noted the Respondent's reliance on the case of **International Trades Crystals Société Anonyme v Northern (Zambia) Minerals Limited**, in which the Supreme Court found that a resolution of the company to commence legal action is only relevant if the memorandum of incorporation and articles of association provide for such.
- 8.3 We have carefully perused the record and take note of the clarity with which the learned trial Court addressed the **International Trades** case, as reflected at **page 20 to 22** of the ROA.
- 8.4 We have reflected on the said decision in which the Supreme court stated as follows:

" We now turn to the argument that the writ was issued without authority. The defendant applied to have the writ set aside on the ground that the resolution passed by three out of five directors of the plaintiff company, authorising the institution of proceedings was not validly passed. The submissions in this regard were that since one of the directors had not been notified of the meeting at which the resolution was passed, the proceedings at such meeting were invalid, and that, therefore, the resolution passed was of no effect and so, the proceedings were issued without authority. During

the course of the hearing, the issue was raised as to whether or not it is necessary for a company to pass a resolution before proceedings can be instituted. We observe that the record before this court does not exhibit the Company's Memorandum and Articles of Association, but since a resolution was passed (which is the subject of discussion), we assume that a resolution was required in this matter in terms of the Company's Articles and Association. If we understood both counsel correctly, it is not in dispute that all the directors of a company are entitled to receive notice of meetings save in the circumstances to which any appropriate articles may make exception."

8.5 In the circumstances, we are of the considered opinion that the issue of a board resolution is simply a red herring and has no merit. We do not find any reason to fault the reasoning of the lower Court on this issue. We dismiss ground 1 of the appeal.

8.6 With regard to **ground 2**, it is canvassed that the lower Court erred by making composite orders. We have reviewed the Record before us, the Judgment of the lower Court and ask ourselves as to the effect of the agreement between the Parties.

8.7 In our Judgment rendered in the case of **Sigma Financial Solutions Limited & 3 Others v Chongo Kalela Sinyangwe**⁵, which although centered on different facts, one key principle emerged, namely, that where parties have expressly consented to or agreed upon terms, the Court must give effect to the agreement as made. The principle of freedom to contract and the role of the Court to enforce such agreements has been the subject of many noted decisions in this jurisdiction. The Supreme Court, in the much-cited case of

National Drug Company Limited & Zambia Privatization Agency v Mary Katongo ⁶, guided as follows:

“It is trite law that once the parties have voluntarily and freely entered in to a legal contract, they become bound to abide by the terms of the contract and that the role of the Court is to give efficacy to the contract when one party has breached it by respecting, upholding and enforcing the contract.”

- 8.8 In *casu*, we have reviewed the record and taken note of **page 79** of the ROA, which reflects the agreement between the Appellant and the Respondent. It is evident from the agreement that 10% of the purchase price of K1,600,000.00 was to be paid, and that payment was to initiate the purchase process. The record further reveals that the Appellant complied with this requirement, followed by part payments, as reflected at **pages 81 to 84**. The record also shows that the Appellant took possession of the property following payment of the initial 10%.
- 8.9 In view of the above, the willful delay or reluctance to pay the balance constitutes, in our view, a breach of the agreement entered into by the Parties. We note that the agreement was executed on 9th February 2019, as reflected on **page 79** of the record, and that by 2021, when the Respondent commenced proceedings, the Appellant had failed to fulfil its obligations under the contract for what appears to be a period of over 2 years. While part payments were made by the Appellant during this period, there is no evidence to suggest any intention to complete the full transaction as agreed.
- 8.10 We have noted that the sale agreement did not stipulate a specific timeframe for the payment of the balance. However, the conduct of the

Appellant demonstrates a clear reluctance to fulfil its obligations, and there is nothing on the ground to suggest any genuine intention to honour the terms of the agreement. We refer to the learned authors, as cited by the trial Judge, in **Cheshire and Fifoot's Law of Contract, 10th Edition** ¹ which stated at page 499 as follows:

"...if in a case where one party has been guilty of undue delay, he is notified by the other that unless performance is completed within a reasonable time the contract will be regarded as at end..."

8.11 We therefore fully agree with the learned trial Judge, who held that by taking possession of and using the property for its business, there was an implied term that the outstanding balance of the purchase price was to be paid within a reasonable time. A review of the proceedings shows, at **page 64**, that the Appellant's witness admitted not only that the balance remained unpaid, but also that no rental payments had been made for occupation of the property.

8.12 We also refer to the case of **Gemstar Holdings Limited v Afgri Corporations Limited** ⁷ in which the Supreme Court held as follows:

"It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience he should keep."

8.13 We refer to of our decision rendered in the case of **Stanbic Bank Zambia Limited v Bruce Mwewa** ⁸. We stated as follows:

“**Paragraph 1174** of **Volume 9** of Halsbury’s Laws of England, 4th Edition states that –

“In cases of breach of contract, the contract breaker is responsible for resultant damage which he ought to have foreseen or contemplated when the contract was made as being unlikely.”

*The injured party under the contract should recover that which ought to have been due to him as a result of the breach. In the case of *Robinson v Harman*, it was held that –*

“...the rule of the common law is that where a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.”

8.14 Having considered the evidence on record, we are of the settled view that the lower Court was on firm ground in making findings of fact. The lower Court was of the considered view that the Respondent had proved its case on a balance of probabilities and was entitled to the reliefs it had claimed. We do not find any perversity in the findings and the subsequent reliefs that flow therefrom. **Ground 2** lacks merit and is dismissed.

8.15 We turn our attention to ground 3. Having fully considered the arguments, we are of the settled view that the **Rent Act**³ does not apply in this case. The transaction was for the purchase of the property and not for rent. The Appellant’s suggestion that the order to pay rentals falls under the **Rent Act** is therefore misconceived. The Appellant’s continued occupation of the property without payment amounted to unjust enrichment, and, if allowed,

would effectively allow the Appellant to remain on the property without compensation, causing loss to the Respondent. The Appellant's submission that the learned trial Judge erred in combining the reliefs for breach of contract of sale and payment of rentals on the same facts is entirely misconceived and cannot be entertained by this Court. **Ground 3** fails accordingly.

8.16 With respect to **ground 4** on the issue that the lower Court erred in not allowing the appellant's application. We also acknowledge the Respondent's arguments in opposition as it relates to **Order 20 Rule 8(4)** of the Rules of the Supreme Court². We have also noted the ex-tempore ruling of the learned trial Judge seen at **page 66** in which he stated as follows:

“EXTEMPORE RULING

I will not allow that application because those intended witnesses are not on the list of witnesses filed for Defendant. There are no witness statements from them, the Plaintiff has closed its case. The application is not supported by our Rules of Court. Therefore I take it that the Defendant has closed its case if there is no witness who is on the list and whose statement was filed into Court.” (emphasis ours)

8.17 Whilst we note the opposing arguments of the Respondent, who have submitted that leave of Court ought to have been obtained to amend the list of witnesses, we are of the considered view that under the new dispensation brought in by the **High Court Amendment Rules**⁴ a trial Court is empowered to exercise its discretion in case management. An application such as the one

in *casu*, on the date of trial, is bound to fail as Parties had shared their list of witnesses early on in the proceedings.

8.18 We have reviewed the Record and the *ex tempore* Ruling of the lower Court. We will not lightly interfere with the exercise of discretion on the part of the lower Court as it exercises its powers with respect to case management. The new Rules under which matters are prosecuted are crystal clear. We do not fault the decision made by the lower Court which exercised its discretion judiciously. **Ground 4** fails accordingly.

9.0 CONCLUSION

9.1 Having found no merit in any of the four (4) grounds before us, we accordingly dismiss the appeal in its entirety, with costs to the Respondent.

F. M. C.

COURT

M. J. SIAVWAPA

JUDGE PRESIDENT

F. M. CHISHIMBA

COURT OF APPEAL JUDGE

A. N. PATEL S.C.

COURT OF APPEAL JUDGE