

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

2020/HP/0248

BETWEEN:

EDWARD CHANDA SOSALA



PLAINTIFF

AND

KINGSLAND CITY INVESTMENT LIMITED

1ST DEFENDANT

JOY MUNTHALI

2ND DEFENDANT

Before: Honourable Lady Justice C. Chinyanwa Zulu

For the Plaintiff: Mr N. Siwila & Mr. L.C. Lemba – Mulungushi Chambers

For the 1st Defendant: Mr. L. Kasali – NCO Advocates

For the 2nd Defendant: No Appearance

JUDGMENT

CASES REFERRED TO:

1. Grindlays Bank International Zambia Limited v Nahar Investment Limited SCZ Judgment No. 11 of 1991
2. National Airports Corporation v Reggie Ephraim Zimba and Another 2000 Z.R 154
3. Rudnap Zambia Limited v Spyron Enterprises Limited (1976) ZR 326;
4. Freeman and Lockyer v Buckhurst Part Properties (1967) 2 QB 480;
5. Llyod v Grace Smith & Company (1912) AC 17;
6. Industrial Gases Limited v Waraf Transport Limited and Massah Mageehaid (1995-1997) ZR 183;
7. Blackwater v Plint (2005) SCC 58;
8. Royal British Bank v Turquand (1856) 6E & B32;
9. Bata Shoe Company v Vin-Mas Limited (1993-1994) ZR 136;
10. Luk Win Yan v CMB Wing Lung Bank Limited (2021) HKCFI 279;
11. Mijoni v Zambia Publication Company Limited Appeal No. 10 of 1986 (unreported);
12. Mhango V Ngulube (1983) ZR 6;
13. Khalid Mohammed V Attorney General (1982) ZMSC 17;
14. Giorgio Frascini and Motor Parts Industries (Copperbelt) v

Attorney-General (1984) Z.R. 29 (S.C.);

15. Finance Bank Zambia Limited and Rajan Mahtani v Simataa Simataa Selected Judgment 21 of 2017;
16. Zambia National Building Society v Ernest Mukwamataba Nayunda SCZ Judgment 11 of 1993.

LEGISLATION AND OTHER WORK REFERRED TO:

1. Chitty on Contracts Volume 2, paragraph 31-001 at pages 1-5;
2. Bowstead and Reynolds on Agency
3. Halsbury's Law of England, 5th Edition, Volume 1;
4. Commercial Law in Zambia Cases and Materials; UNZA Press;

1.0 INTRODUCTION

1.1 The Plaintiff commenced this action on 21st February 2020 by way of Writ of Summons accompanied by a Statement of Claim. He seeks the following reliefs: -

- a) **An Order for the issuance of a receipt for the K230,000.00 paid towards the purchase of properties namely: -**
 - i. **G, 63#, D6-B of Stand Number Lusaka/LN_24982/3 situate in the Lusaka Province of the Republic of Zambia;**
 - ii. **C1, 37#-3 L2-B of Stand Number Lusaka/LN_24982/3 situate in the Lusaka Province of the Republic of Zambia;**
 - iii. **C1, 40#, L3-A of Stand Number Lusaka/LN 24982/3 situate in the Lusaka Province of the Republic of Zambia;**
- b) **Damages;**
- c) **An order for costs incidental to the proceedings; and**
- d) **Any other relief the Court shall deem fit and just.**

2.0 BACKGROUND

2.1 The brief background of this matter is that the Plaintiff and the 1st Defendant on 28th March 2018 and 7th May 2018 entered into a contract of sale for the aforementioned properties. Following that, the Plaintiff made payments towards the purchase price which included a cash payment of ZMW230,000.00 paid to the 1st Defendant's Sales Manager

the 2nd Defendant herein. The aforementioned payment was never receipted and all efforts by the Plaintiff to obtain a receipt from the 1st Defendant for the said payment proved futile. Consequently, on 21st February 2020 the Plaintiff commenced the herein proceedings against the 1st Defendant. The 2nd Defendant was subsequently joined to the proceedings.

3.0 STATEMENT OF CLAIM

3.1 According to the Statement of Claim, the Plaintiff and the 1st Defendant on 28th March 2018 and 7th May 2018 entered into contracts of sale for the sale of the above-stated properties. In relation to the above transaction, the Plaintiff paid the Defendant a total of USD130,000.00 by way of bank transfers made in the period 21st January 2018 to 14th December 2018 which were receipted by the Defendant on 29th July 2019.

3.2 The Plaintiff also made a cash part payment of K230,000.00 between May and July of 2018 towards the purchase price of the properties. The said sum was paid to the 1st Defendant's agent, the 2nd Defendant herein, who at the time was its Sales Manager. No receipt was issued by the 1st Defendant for this payment. All efforts by the Plaintiff to obtain a receipt for the said payment and to settle the matter ex-curia have proven futile.

4.0 DEFENCE

4.1 The 1st Defendant entered appearance and filed a Defence on 21st April 2021. The 1st Defendant did not dispute entering into contracts of sale with the Plaintiff on 28th March 2018 and 7th May 2018 for the purchase of the afore-stated properties. It also admits receipting the payment of USD130,000.00 towards the properties.

- 4.2 The 1st Defendant however denies the Plaintiff's assertion that he made a cash payment of K230,000.00 towards the said properties between May and July of 2018. It further denies the allegation that the 2nd Defendant was an agent of the 1st Defendant Company and in a position to receive money on its behalf. Therefore, that the 1st Defendant cannot be liable for what it did not receive or ratify.
- 4.3 It is the 1st Defendant's position that contrary to the Plaintiff's assertion, it has always been willing to settle the matter amicably and ex-curia.

5.0 REPLY TO DEFENCE

- 5.1 On 6th May 2021 the Plaintiff responded to the 1st Defendant's Defence, restating, inter alia, that the 2nd Defendant was a bonafide employee and agent of the 1st Defendant. That in fact, it was only months after the 2nd Defendant had transacted with the Plaintiff, on behalf of the 1st Defendant, that it advertised in one of the newspapers that she had been laid off. The Plaintiff maintained the assertion that the 1st Defendant has been unwilling to settle this matter amicably.
- 5.2 By way of a Consent Order entered into by the parties on 10th August 2021, the 2nd Defendant was joined to the proceedings. However, she did not file any documents in relation to this matter nor attend court.

6.0 TRIAL

- 6.1 When the matter came up for trial on 6th October 2022, the 1st Defendant was not present in Court. However, having considered the fact that Counsel for the 1st Defendant was present in Court when the trial date was given and the fact that, as stated by Counsel for the Plaintiff, this matter has taken long to be concluded, this Court proceeded with the trial of the matter in the 1st Defendant's absence.

- 6.2 PW1 was **Edward Chanda Sosala**, the Plaintiff herein. It was his testimony that sometime in June 2018, he went to Zambia Air Force (ZAF). He met the Air Commander who advised him to buy property in Kingsland citing that ZAF had a joint venture with the Chinese. The Air Commander then introduced the Plaintiff to the 2nd Defendant, a Sales Lady at Kingsland, who later went to his office and offered him a property in Kingsland. The property was being sold for US\$450,000.00. Regarding payment towards the purchase price, the 2nd Defendant advised the Plaintiff to make a payment in cash. When the Plaintiff asked the 2nd Defendant why he was paying cash and not depositing the money in the 1st Defendant's bank account, she told him that "*the Chinese love cash*" for a contract to be signed. It was the Plaintiff's further testimony that he and the 2nd Defendant later went to the bank and he gave her K230,000.00.
- 6.3 Following this payment, the 2nd Defendant took to him a signed contract which the Plaintiff equally signed. The Plaintiff referred the Court to the said Contract which appears on pages P1-P22 of the Plaintiff's Bundle of Documents. The Plaintiff testified that he appended his signature on page 2 of the said Contract. Further, that the Contract had the company seal and was signed by the Chinese whilst the 2nd Defendant had signed as witness.
- 6.4 The Plaintiff stated that he further asked for the dollar account for the 1st Defendant where he could be depositing money in dollars as he had a dollar account. That he was given a dollar account where he has been depositing money. Reference was made to Page 24 of the Plaintiff's Bundle of Documents where there are three (3) deposit slips, each for Twenty Thousand United States Dollars (USD20,000.00). These deposits were made into the 1st Defendant's dollar account. The Plaintiff

testified that the 1st deposit slip was made on 21st January 2018, the second on 4th October 2018 and the third one was made on 14th December 2018. Further, that page 25 also shows deposit slips of Twenty Thousand United States Dollars (USD20,000.00) each. That the first was deposited on 18th November 2018 whilst the last one was deposited on 28th September 2018.

6.5 He testified that after depositing all the money in the bank account, he was not given any receipts as the 2nd Defendant stated that the accountant was out in China. That he waited until 25th January 2019 when he decided to write a letter to the 1st Defendant. To the said letter he attached the aforementioned deposit slips and requested that he be issued with receipts for all his payments including the K230,000.00 cash payment and a copy of the Contract. At the time, the total payments made were Two Hundred and Thirty Thousand Kwacha (ZMW230,000.00) and One Hundred and Ten Thousand United States Dollars (USD110,000.00) together totalling One Hundred and Thirty-Three Thousand United States Dollars (USD133,000.00). That following this letter, a meeting was held with the 1st Defendant on 1st April 2019 where it was agreed that the 1st Defendant would verify the Plaintiff's payments.

6.6 The Plaintiff went on to testify that he was further told that the 1st Defendant would ask the 2nd Defendant to account for the Two Hundred and Thirty Thousand Kwacha (ZMW230,000.00) payment. That the 1st Defendant's General Manager then called the 2nd Defendant and asked her whether she was aware of the said payment as they intended to issue a receipt for it. The 2nd Defendant told the General Manager that she was aware of the payment and that she had issued the Plaintiff a letter of comfort. It was his testimony that the said letter is on the 1st Defendant's

Letterhead. The Plaintiff went on to refer the Court to the letter, which is on page 26 of the Plaintiff's Bundle of Documents. The Plaintiff further stated that he waited for the 1st Defendant to carry out the verification both at the bank and with the 2nd Defendant. He stated that the Bank receipts were eventually given to him which receipts he said are at page 27 of the Plaintiff's Bundle of Documents. That the receipts are dated 29th July 2019 and were acknowledged by a Mr. John S, in his capacity as the 1st Defendant's Sales Manager.

- 6.7 The Plaintiff told the Court that he continued asking for receipts for the ZMW230,000.00 payment he made to the 2nd Defendant but the same was not given to him. That as a result, the Plaintiff reported the matter to the Police and the 2nd Defendant was arrested. He then went on to commence the herein legal proceedings against the 1st Defendant. The Plaintiff referred the Court to page 33 of the Plaintiff's Bundle of Documents showing a picture of the 2nd Defendant being advertised in a public notice that she was no longer an employee of the 1st Defendant with effect from 6th May 2019. He also referred the court to page 35 of the Plaintiff's Bundle of Documents whereat is a judgment delivered by Judge Newa in a different action involving the herein Defendants and whose facts are similar to the facts in the case at hand. In that matter, the case was resolved in favour of the Plaintiff therein. It was adjudged that the 2nd Defendant herein had the authority to bind the 1st Defendant herein in relation to sales as that was the nature of her employment.
- 6.8 Finally, the Plaintiff urged this Court to grant him an order for the 1st Defendant to give him a receipt acknowledging his kwacha payment of K230,000 made to it through the 2nd Defendant. The Plaintiff also stated that he has since paid USD\$390,000 towards the total purchase price of USD\$450,000.

6.9 At the end of PW1's testimony, the matter was adjourned for cross-examination of PW1 by the Defendants. When the matter came up for continued trial, the 2nd Defendant was not present in court despite having been served the originating process. Neither did the 2nd Defendant enter appearance nor file a defence. Counsel for the 1st Defendant informed this court that the 1st Defendant would not cross-examine PW1. That the 1st Defendant would further not call any witnesses but would only file written submissions.

7.0 PLAINTIFF'S SUBMISSIONS

7.1 The Plaintiff filed his submissions on 24th November 2022. He started by giving a brief background of the matter and went on to cite the authors of *Chitty on Contracts Volume 2, paragraph 31-001 at pages 1-5* where they state that:-

"At Common law, the word agency can be said to represent a body of general rules under which one person, the agent has power to change the legal relations of another, the principal. The full paradigm relationship of principal and agent arises where, one party, the principal consents that another, the agent, shall act on his behalf, and the agent consents to so act. The said consent is said to confer authority on the agent, and from this stems the authority..."

7.2 Further that paragraph 31-006 of the aforementioned book, at page 5 states that:-

"The consent of the principal, which is regarded as the basic justification for the agent's power to affect his principal's legal relations, may of course be implied from his conduct or from his position with regard to the agent or vice versa."

7.3 From the above provision it was contended that an employee is an agent of the employer, and that they have the capacity to alter the employer's legal relations with third parties. Thus, anything that an employee does in the name of the employer during the course of employment binds the employer. That the 2nd Defendant having been the 1st Defendant's Sales

Manager, had the authority with regard to third parties to give instructions on how third parties would transact with the 1st Defendant and these instructions were to be followed by the 1st Defendant's clients, which instructions bound the 1st Defendant, her employer.

7.4 Further that Friedman on Commercial Law states as follows:-

“The agent may be called any one of a number of terms- a representative, a broker, a factor- but whatever name he is in practice, he is in law an agent, if he is employed to effect the legal relations of his principal, usually by bringing a contract between his principal and a third party... in all these examples, the function of an agent is to act on behalf of his principal in bringing about a contract between his principal and third party.”

7.5 From the above it was submitted that the role of the 2nd Defendant as Sales Manager was to bring a contract between her employer, being the 1st Defendant, and the Plaintiff. Further, in the eyes of the Plaintiff, the 2nd Defendant as Sales Manager, was an agent of the 1st Defendant and she, therefore, had the authority to give instructions on how the sale was to be done.

7.6 It was further submitted that the definition of an agent as given above is indeed the position of the law and **Chitty on Contracts, Volume 2, Specific Contracts, 13th Edition, by Beale, Sweet and Maxwell, 2008 in paragraph 31-042 at page 28** was cited as an authority. There the author states that:-

“The general rule is that the principal is bound by and is entitled to the benefits of the contract of his agent, made on his behalf, within the scope of such agent's authority. This is so whether the agent at the time of the act named or identified his principal or merely indicated that he was acting for a principal, but did not identify him.”

7.7 It was submitted that the fact that the 2nd Defendant was employed by the 1st Defendant as Sales Manager was not in contention and so was

the fact that the 1st Defendant relieved her of her duties after the Plaintiff had already transacted with her. That by virtue of being Sales Manager, the 2nd Defendant had authority to bind the 1st Defendant in relation to sales, as that was the nature of her employment.

7.8 In relation to the 1st Defendant's failure to issue a receipt for K230,000.00 to the Plaintiff on the basis that the 2nd Defendant did not remit nor account for the said sum paid by the Plaintiff, this court was referred to the learned authors of **Bowstead and Reynolds on Agency** at paragraph 8-063 whereat they state: -

"An act of an agent within the scope of his apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interest."

7.9 Reference was also made to the case **Grindlays Bank International Zambia Limited v Nahar Investment Limited SCZ Judgment No. 11 of 1991** wherein the Supreme Court held that where the fraudulent conduct of the servant falls within the scope of the servant's authority, actual or ostensible, the employer will be liable.

7.10 Further in this regard, **Chitty on Contracts, paragraph 31-062 at page 39-40** was also cited. This paragraph states that: -

"The fact that the agent acted in his own interest and in fraud of his principal, will not relieve the principal of his liability in fact, the agent was in other respects within the scope of his apparent authority..."

A third party dealing in good faith with an agent acting within his ostensible authority is not prejudiced by the fact that as between the principal and the agent he is using his authority in an undisclosed way that the principal can rightly complain that the agent is using his authority for his own benefit, and not that of the principal."

7.11 That the above position was buttressed by the Supreme Court in the case **National Airports Corporation v Reggie Ephraim Zimba and Another** 2000 Z.R 154 wherein it stated: -

“An outsider dealing with a company cannot be concerned with any alleged want of authority when dealing with a representative of appropriate authority or standing for the class or type of transaction. Therefore, a director, or other officer could bind the company if he had ostensible or apparent authority, even though the board of directors had not endowed him with actual authority.”

7.12 In conclusion, it was submitted that the 2nd Defendant as the 1st Defendant’s Sales Manager had authority to alter the 1st Defendant’s relationship with third parties in terms of sales. It was prayed that the Plaintiff be granted the reliefs he seeks.

8.0 THE 1ST DEFENDANT’S SUBMISSIONS

8.1 The 1st Defendant filed its submissions on 1st December 2022 and posed questions for determination in this matter as follows:-

8.2 WHETHER THE 1ST DEFENDANT IS VICARIOUSLY LIABLE FOR THEIR ALLEGED EMPLOYEE’S CONDUCT

8.2.1 It was Counsel’s submission that agency is a fiduciary relationship that results from the manifestation of consent by one person to act on behalf of another person with that person’s consent. That the relationship of principal and agent is created by an express or implied agreement. Reliance was placed on **Halsbury’s Law of England, 5th Edition, Volume 1**, page 5 paragraph 1 which states as follows: -

“In law the word ‘agency’ is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties.”

8.2.2 Reliance was also placed on the learned authors of **Chitty on Contract, Volume 2, 30th Edition, Sweet and Maxwell** at pages 1-2, paragraph 31-001 whereat they state: -

“At common law the word agency can be said to represent a body of general rules under which one person, the agent has power to change the legal relations of another, the principal. The full paradigm relationship of principal and agent arises where one party, the principal consents that another, shall act on his behalf and the agent consents so to act. The consent is said to confer authority on the agent and from his authority stems his power.”

8.2.3 Counsel referred this Court to the following authorities on when a principal can be held liable for an agent's actions: -

The learned author of **Commercial Law in Zambia Cases and Materials; UNZA Press** at page 50 which states that: -

“The key features of any agency relationship, is the power of the agent to affect the principal's legal position vis a vis third parties.”

The case **Rudnap Zambia Limited v Spyron Enterprises Limited (1976) ZR 326** wherein the Supreme Court held as follows: -

“When a contract is made with an alleged agent of a company, the onus is on the claimant to prove that the agreement was made with an employee or agent of that company who held out to be authorized to enter into such an agreement.”

8.2.4 It was Counsel's submission that the Plaintiff's contention is that he allegedly dealt with the Sales Manager, the 2nd Defendant herein, of the 1st Defendant Company whom he thought was their authorised agent and that in this instance the agency relationship evolves from the employment relationship. Counsel proceeded to submit on ostensible authority. In this regard, that ostensible authority is the authority an agent is assumed to have been given by the principal in the eyes of a reasonable man. Reliance was placed on the case **Freeman and Lockyer v Buckhurst Part Properties (1967) 2 QB 480** wherein it was held that: -

“...An apparent or ostensible authority on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the ‘apparent’ authority, so as to render the principal liable to perform any obligations imposed on him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation. The representation, when acted on by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.”

8.2.5 It was Counsel’s submission that applying the cited principles to the present case, to establish whether the employee had apparent or ostensible authority, the correct test to apply is whether: -

- i. A principal, by words or conduct has represented to the third party that the agent has actual authority to enter into a transaction;*
- ii. The third party enters into a transaction in reliance on that representation;*
- iii. The reliance must be reasonable.*

8.2.6 It was submitted that should this Court find that the 2nd Defendant had ostensible authority to deal with the Plaintiff in the transaction, one of the key constituents is whether or not the Plaintiff acted reasonably by relying on her representations. The learned authors of **Bowstead & Reynolds on Agency** were called in aid particularly paragraph 8-024, which states as follows: -

“The reliance must have been reasonable. There are in turn two aspects to this. First, as already discussed, the grounds used to establish the representations of authority must be adequate to justify a belief that the agent had authority. Secondly, even where there are such grounds, there must be other evidence that undermines what would otherwise be an adequate representation of authority.”

8.2.7 Counsel referred this Court to case law on an employer’s liability. The English case **Llyod v Grace Smith & Company (1912) AC 17** was cited for persuasive value on the principle that an employer will be liable if the

fraudulent conduct of the employee falls within the scope of the employer's authority, be it actual or ostensible. This is in line with the case **Industrial Gases Limited v Waraf Transport Limited and Massah Magehaid (1995-1997) ZR 183** wherein the Supreme Court held:-

“As long as the wrong is committed by an employee in the course of his employment, the general rule is that the employer will be vicariously liable.”

8.2.8 Counsel referred to the Canadian case **Blackwater v Plint (2005) SCC 58** where the Court took into account several policy considerations in determining whether the employer was vicariously liable to the Plaintiff as follows: -

- i. Vicarious liability may be imposed where there is a significant connection between the conduct authorised by the employer or controlling agent and the wrong;*
- ii. Having created or enhanced the risk of the wrongful conduct, it is appropriate that the employer or operator of the enterprise be held responsible, even though the wrongful act may be contrary to his desires;*
- iii. The fact that the wrongful acts may occur is a cost of doing business;*
- iv. Faced with two faultless parties, a much stronger justification exists for facing the risk of loss on the party who introduces the risk and is much better able to control that risk.*

8.2.9 It was Counsel's submission that while the Defendant accepts the principle laid down in the case **Royal British Bank v Turquand (1856) 6E & B32** that a party transacting in good faith is entitled to assume that internal requirements and procedures have been complied with which principle was reaffirmed by the Supreme Court in the case **National Airports Corporation Limited v Zimba and Another SCZ Judgment No. 34 of 2000** wherein it held: -

“An outsider dealing with a company cannot be concerned with any alleged want of authority when dealing with a representative of appropriate authority of standing for the class or type of transaction.”

However, that the question should be whether there exists other evidence that undermines what would otherwise be an adequate representation of authority by the 2nd Defendant. That put differently, what could a reasonable person have inferred from the conduct of the 2nd Defendant?

8.2.10 It was Counsel's submission that looking at the circumstances of this case, the Plaintiff should have been put on notice when the 2nd Defendant requested him to deposit monies into her personal account on the premise that the 1st Defendant's account had a problem. That this is highly unusual considering as a business entity such as the 1st Defendant would not require a client to make any payment into an employee's personal account. That this should have been a red flag prompting him to enquire further.

8.2.11 Further, that the Plaintiff made payments into the 1st Defendant's account, not once, but on many occasions for several months as evidenced by the transaction receipts at pages 24-25 of the Plaintiff's Bundle of Documents. Therefore, that it was strange that despite knowing the 1st Defendant's account details and in fact remitting funds into the same on several occasions, on this one occasion, the Plaintiff decided to make a one-off deposit into the 2nd Defendant's personal account. Counsel implored this Court to find it highly inconceivable that the 2nd Defendant would have the authority to bank monies meant for the 1st Defendant into her personal account. Further, that the fact that the narrative accompanying the payments says *"Mr Sosala has paid K230,000 towards his houses (three) D6 A, L2B, L3A block to the Sales Manager Joy Munthali. Receipts not given."* does little to facilitate a conclusion that the 1st Defendant is vicariously liable for the 2nd Defendant's actions.

- 8.2.12 Counsel went on to submit that, the fact that the Plaintiff paid monies directly into a personal account and not the 1st Defendant's, raised a red flag. That the Plaintiff ought to have been put on notice and should have enquired into the dealings of the 2nd Defendant which went beyond her scope of duty or employment.
- 8.2.13 It was Counsel's submission that indeed the cases **Industrial Gases Limited v Waraf Transport Limited and Mussah Mogeheid (1995-1997) ZR 183** and **Bata Shoe Company v Vin-Mas Limited (1993-1994) ZR 136** are sound law on vicarious liability of an employer. However, that in this instance these cases are inapplicable and in no way aid the Plaintiff's claims. It was Counsel's submission that the 2nd Defendant's scheme was well calculated and her failure to issue the Plaintiff with receipts speaks to her intention to defraud both the Plaintiff and the 1st Defendant.
- 8.2.14 For the foregoing reasons, Counsel prayed that this Court makes a finding that the 1st Defendant is not vicariously liable for its employee's conduct on account of the Plaintiff's failure to act reasonably. That there was no credible or plausible explanation from the Plaintiff as to why he remitted money into a private person's account, more so, there being no official receipts from the 1st Defendant. Reliance was placed on the case of **Luk Win Yan v CMB Wing Lung Bank Limited (2021) HKCFI 279**, though of a persuasive nature, wherein it was submitted that the Hong Kong Court of first instance dealt with the issue of vicarious liability. The brief facts laid out being that the Plaintiff entered into a number of investments offered by a bank employee who was the securities manager. The Plaintiff transferred HK\$24m into the employee's personal account held with the Bank for purposes of making the investment. The plaintiff knew the internal investment was normally offered exclusively to the

Bank's staff but which the said employee was also making available to her. The employee forged receipts and agreements bearing the Bank's letterhead which led to the Plaintiff believing that the investment was genuine when not. The Court found the Defendant bank not liable for the actions of its employee who fraudulently offered investments which caused loss to the Plaintiff. The Court rejected the Plaintiff's claim that the Bank was vicariously liable as the Plaintiff knew the investments were internal to the Bank. That hence it followed that, the Plaintiff knew the Bank could not have intended to offer or have authorised its staff to offer on its behalf such internal investments.

8.2.15 That in the present case, the Plaintiff ought to have known that directly depositing money into the 2nd Defendant's personal account went outside the scope of her employment and the Plaintiff's reliance on the 2nd Defendant's instruction and representation was wholly unreasonable.

8.3 WHETHER THERE WAS A VALID AND ENFORCEABLE CONTRACT OF SALE BETWEEN THE PARTIES.

8.3.1 It was Counsel's submission that should this Court make a finding that the 1st Defendant is not vicariously liable to the Plaintiff for the 2nd Defendant's actions, then it naturally follows that the 1st Defendant company has never entered into a valid enforceable contract of sale with the Plaintiff. This Court was referred to the case **RTS Flexible Systems Limited v Molkerei Alois Muller GmbH & KG (UK Production) (UG Production) (2010) UKSC 14** wherein the Supreme Court of the United Kingdom guided as follows: -

"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essentials for

the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend the agreement of such terms to be a precondition to a concluded and legally binding agreement.”

8.3.2 It was Counsel’s submission that to establish the validity of a contract for the sale of land, three key features ought to be present in a document purporting to be the same. These are, that the parties to the transaction are identified, the property is described and, the nature and amount of consideration disclosed. Counsel drew the attention of the Court to the case **Mijoni v Zambia Publication Company Limited Appeal No. 10 of 1986 (unreported)** where the Supreme Court observed that:-

“It seems to us that it is now settled that for a note of memorandum to satisfy section 4 of the Statute of Frauds, the agreement itself need not be in writing. A note or memorandum of it is sufficient provided that it contains all the material terms of the contract such as names or adequate identification of the parties, the description of the subject matter and the nature of the consideration...it has been said that letters may themselves constitute the contract and the written evidence of it. It follows that whether there is a binding contract or not it must be dependent on the construction of the letters.”

8.3.3 It was Counsel’s submission that while there was an offer and acceptance between the Plaintiff and the 1st Defendant, the matter does not end there. This is because the Plaintiff has never deposited into the 1st Defendant’s account a sum of ZMW230,000.00 towards the purchase of the properties the Plaintiff is alluding to. Therefore, that the consideration paid by the Plaintiff is partial and as such not sufficient for purposes of enforcing a valid enforceable contract of sale to the fullest extent. That the Plaintiff has failed to lead any evidence to prove the nature of the full consideration paid to the 1st Defendant as the same was paid to the 2nd Defendant’s personal account which was outside the scope of her employment and the Plaintiff’s reliance on her instruction and representation was wholly unreasonable.

8.3.4 Further, that the law will not always require commercially sound or sensible terms as long as it can be demonstrated that parties have agreed on the terms and that consideration exists upon which the parties can be held to their bargain. That in the case in casu, there isn't sufficient consideration upon which the parties can be held to their bargain to warrant the 1st Defendant being ordered to issue receipts for the ZMW230,000.00 paid by the Plaintiff to the 2nd Defendant towards the purchase of the properties.

8.4 CLAIM FOR DAMAGES

8.4.1 It was Counsel's submission on the claim for damages that the Plaintiff has not endeavoured to particularize the damages. Reference was made to the case **Mhango V Ngulube (1983) ZR 6** wherein it was held: -

"It is, of course, for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the Court to determine the value of that loss with a fair amount of certainty.

...

The result is that the evidence presented to the Court was unsatisfactory, and, in our opinion the learned trial Judge would have been entitled either to refuse to make any award or to award a much smaller sum, if not a token amount in order to remind litigants that it is not part of the Judge's duty to establish for them what their loss is."

8.4.2 Further reference was made to the case **Khalid Mohammed V Attorney General (1982) ZMSC 17** wherein it was stated that: -

"An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponents' defence does not entitle him to judgment."

8.4.3 Therefore, that the Plaintiff having not particularised any damage suffered meant that he has not proved any, and as such, it follows that he is not entitled to the said relief.

8.5 In summation, it is the 1st Defendant's prayer that this Court make a finding that the 1st Defendant is not vicariously liable for the 2nd Defendant's conduct in the subject transaction on account of the following- the Plaintiff's failure to act reasonably; the absence of a credible or plausible explanation from the Plaintiff as to why he remitted money into a private person's account more so in the absence of official receipts from the 1st Defendant; the Plaintiff's failure to prove damages suffered; and, the consideration paid by the Plaintiff being partial and as such not sufficient for purposes of enforcing a valid contract of sale to the fullest extent.

9.0 DECISION

9.1 I am of the considered view that the main issue for consideration is whether the 1st Defendant is liable for the 2nd Defendant's actions. It is common cause that the Plaintiff and the 1st Defendant entered into contracts of sale for portions of Stand Number Lusaka/LN_24982/3 namely **G, 63#, D6-B; C1, 37#-3, L2-B;** and, **C1, 40#, L3-A** all situate in the Lusaka Province of the Republic of Zambia. It is also common cause that the Plaintiff made bank transfers into the 1st Defendant's bank account on diverse dates totalling USD130,000.00 towards the purchase price of the properties. These were receipted by the 1st Defendant on 29th July 2019.

9.2 What is in contention in this matter is the cash instalment of K230,000.00 paid by the Plaintiff towards the properties between the period May and July 2018 which the 1st Defendant has refused to issue a

receipt for. The dispute arises from the fact that the Plaintiff made the cash payment to the 1st Defendant's Sales Manager, the 2nd Defendant herein, who did not remit the said funds to the 1st Defendant.

- 9.3 The Plaintiff's case is that the 2nd Defendant represented to him that the 1st Defendant preferred cash payments as opposed to bank transfers. Acting on this, the Plaintiff made a cash payment of K230,000.00 to the 2nd Defendant for which she acknowledged receipt by issuing a letter of comfort on the 1st Defendant's Letterhead. That the 2nd Defendant explained to him that a receipt could not be issued at the time because the 1st Defendant's accountant was out of jurisdiction and that a receipt could only be issued once he returned. Therefore, that the 1st Defendant is vicariously liable for its former employee's actions.
- 9.4 On the other hand, the 1st Defendant's contention is that the 2nd Defendant did not remit the cash payment to the 1st Defendant Company and that although she was its Sales Manager at the time, she was not an agent in a position to receive money on behalf of the 1st Defendant. Therefore, the 1st Defendant cannot be held liable for funds it did not receive nor for actions it did not ratify.
- 9.5 It is not in dispute that the 2nd Defendant was the 1st Defendant's Sales Manager at the material time, this being, when the Plaintiff made the cash payment of K230,000.00. The learned author of **Chitty on Contracts Volume 2 paragraph 31-001 at pages 1-5** who has been cited by both parties aptly explains the law of agency as follows: -

“At common law, the word agency can be said to represent a body of general rules under which one person, the agent has power to change the legal relations of another, the principal. The full paradigm relationship of principal and agent arises where, one party, the principal consents that another, the agent, shall act on his behalf, and the agent consents to so act.

The said consent is said to confer authority on the agent, and from this authority stems his authority...”

- 9.6 Both parties have equally ably referenced materials that guide on what constitutes an agent-principal relationship which have been reproduced in the foregoing paragraphs. The 2nd Defendant was at the material time employed by the 1st Defendant as a Sales Manager. Thus, she was an agent with authority to bind the 1st Defendant in transactions for the sale of property in Kingsland. I find no reason to belabour this point as her capacity to do so is not in contention but rather the act of receiving the cash payment of K230,000.00 which the 1st Defendant contends it did not authorise or ratify.
- 9.7 The question that follows is, is the 1st Defendant bound by the 2nd Defendant’s instructions to the Plaintiff to make a cash payment towards the properties even though she acted fraudulently and outside the scope of her authority. The Plaintiff gave evidence that when he queried the 2nd Defendant on her instruction that he make a cash payment and not deposit the money into the 1st Defendant’s bank account, her response was that “*the Chinese love cash*” for a contract to be signed. He made the cash payment and indeed the 2nd Defendant brought him a signed contract which he also signed. The three contracts of sale relating to the properties appear on pages 1- 22 of the Plaintiff’s Bundle of Documents. They are each signed by a representative of the 1st Defendant Company, the Plaintiff and are all witnessed by the 2nd Defendant. This evidence was not challenged by the 1st Defendant at trial.
- 9.8 The 1st Defendant makes the argument that even where adequate grounds exist to justify the belief that an agent has authority, this court has to consider, where it exists, evidence that undermines what would otherwise be an adequate representation of authority. In this regard, that

the question should be asked- What would a reasonable person have inferred from the conduct of the 2nd Defendant, particularly her instructions, notwithstanding her being the 1st Defendant's Sales Manager? According to the 1st Defendant, a reasonable person would have found it highly unusual for a business entity such as the 1st Defendant to require a client to make a cash payment to an employee. That this should have prompted the Plaintiff to make enquiries into the dealings of the 2nd Defendant. Thus, that it was odd that on this one occasion, the Plaintiff decided to make a one-off cash payment. The 1st Defendant implored this court to find it highly inconceivable that the 2nd Defendant had authority to bank monies meant for the 1st Defendant into her personal account.

- 9.9 Further, that it was clear from the evidence that the 1st Defendant's former employee by her conduct, sought to defraud both the Plaintiff and the 1st Defendant. Therefore, that the 1st Defendant is not vicariously liable for its employee's conduct pertaining to the subject transaction as the Plaintiff failed to act reasonably.
- 9.10 The Supreme Court has guided in the case **Giogio Frascini and Motor Parts Industries (Copperbelt) v Attorney-General (1984) Z.R. 29 (S.C.)** on when an employer can be held vicariously liable for the actions of an employee who acts outside the scope of his authority. The brief facts of the case are that a driver who was an employee of the Government of the Republic of Zambia was sent from Chipata to Lusaka on business. His instructions were that during his stay in Lusaka, he had to park the vehicle after 17:00 hours. Contrary to those instructions the driver drove the vehicle at midnight and was involved in an accident. There was no doubt that the accident was caused by his negligence, but the trial court held that an action against his employers

could not succeed on the ground that having driven outside the hours permitted by his employers, the driver could not be said to have been driving in the course of his employment. The plaintiffs appealed. The Supreme Court guided as follows: -

"...The general law relating to the onus of proof is set out in Halsbury's Laws of England (3rd Edition) Volume 28 p. 76 as follows:

"78. Proof of vicarious liability. If it is sought to make a master liable for the negligence of one who is proved to have been employed by him as a servant of a particular class, and the act complained of was one which would in the ordinary course be within the scope of the employment of servants of that class, this is sufficient to establish a prima facie case that the act complained of was committed by the servant in the course of his employment...."

...

Further, in the case of *Hilton v Thomas Burton (Rhodes)-Limited* (6) Diplock, J. said at p. 707:

"I think that the true test can be expressed in these words: was the servant doing something that he was employed to do? If so, however, improper the manner in which he was doing it, whether negligent... or fraudulent... or contrary to express orders... the master is liable."

9.11 I am guided.

9.12 Paragraph 5 of the Plaintiff's Statement of Claim states:-

"The Plaintiff wherewith paid the Defendant K230,000 in cash between May and July of 2018 as an instalment towards the said purchase whose receipt of payment was not issued by the Defendant."

The transaction receipts which appear on pages 24 and 25 of the Plaintiff's Bundle of Documents for the payments made to the 1st Defendant by bank transfer show that the Plaintiff made a bank transfer on 21st January 2018, a date prior to this period. Therefore, I do agree with the 1st Defendant's submission that the Plaintiff had the 1st Defendant's bank details prior to making the cash instalment and that he

had in fact made bank transfers prior to making the cash payment. However, as has been established, the 2nd Defendant in her capacity as Sales Manager was the 1st Defendant's agent with authority to bind it in transactions for the sale of property in Kingsland. Thus, the act of issuing instructions to both would-be buyers and existing buyers on modes of payment for the 1st Defendant's properties fell under the ambit of the duties she was employed to perform. Therefore, as guided by the Supreme Court, the fact that she was fraudulent in the execution of her duties does not relieve the 1st Defendant of liability. Based on the foregoing, the claim that the Plaintiff acted unreasonably when he made the cash payment of K230,000.00 to the 2nd Defendant cannot accordingly stand.

9.13 I also find that the Plaintiff did in fact take steps to ensure that the cash payment was acknowledged by those with authority to represent the 1st Defendant. This is evidenced by the Letter of Comfort issued to him on the 1st Defendant's Letterhead. I further find that the **Luk Wing Yan v CMB Wing Lung Bank Limited** case relied on by the 1st Defendant does not aid its case. I say so because the facts in that case are materially different to the present matter. In that case, the Defendant was not held vicariously liable for the actions of its employee who fraudulently offered investments because the Plaintiff was aware at the time of being offered the said investments that the same were only available to the Defendant Bank's employees. In the present case, the 1st Defendant has not established any such express notice on the part of the Plaintiff. In addition, there is no evidence to support the 1st Defendant's assertion that the Plaintiff banked the monies meant for the 1st Defendant into the 2nd Defendant's personal account. To the contrary, the Plaintiff's evidence at trial, which was not challenged by the 1st Defendant, was

that when the Plaintiff asked the 2nd Defendant why he was paying cash as opposed to depositing funds into the 1st Defendant's account, her guidance was that the Chinese love cash for a contract to be signed. It is based on this that he went to the bank with her and gave her cash in the sum of K230,000.00. I also note that this evidence was only raised in the 1st Defendant's final submissions.

9.14 Having established that the 1st Defendant is vicariously liable for its former employee's conduct, the question whether there was a valid and enforceable contract of sale between the parties raised by the 1st Defendant falls away.

9.15 As regards the 1st Defendant's argument that the Plaintiff has not particularised the damage suffered hence not proving his claim for damages- My brief response in this regard is that the cases cited by the 1st Defendant are wholly inapplicable as what Counsel has referenced is the law on special damages which is not what the Plaintiff is claiming. That said, the essence of the common law remedy of damages is to place an innocent party in the position in which they would have been had contractual obligations been performed. Put differently, it serves the purpose of compensating an innocent party for loss occasioned by the breach of a contract. See the Supreme Court's decision in the case **Finance Bank Zambia Limited and Rajan Mahtani v Simataa Simataa Selected Judgment 21 of 2017**. Damages are confined to this purpose and are not to be used as a means of punishing a Defendant. I am fortified by the Supreme Court's decision in the case **Zambia National Building Society v Ernest Mukwamataba Nayunda SCZ Judgment 11 of 1993** wherein it held as follows:-

"The essence of damages has always been that the injured party should be put as far as monetary compensation can go in about the same position he

would have been, had he not been injured. He should not be in a prejudiced position nor be unjustly enriched.”

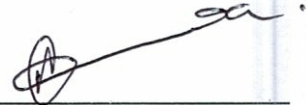
Based on the foregoing, I find no basis upon which to make an order for damages in the matter in casu.

9.16 In conclusion, I hereby make the following orders:-

- i. **The Respondent is hereby ordered to issue the Plaintiff a receipt for the cash payment of ZMW230,000.00 made to the 2nd Defendant towards the purchase of the following portions of Stand Number Lusaka/LN_24982/3 situate in the Lusaka Province of the Republic of Zambia:-**
 - a. G, 63#, D6-B;
 - b. C1, 37#-3 L2-B; and,
 - c. C1, 40#, L3-A
- ii. **I award costs to the Plaintiff to be taxed in default of agreement.**

9.17 Leave to appeal is granted.

Dated at Lusaka this 13th day of February 2024



**C. Chinyanwa Zulu
JUDGE**