

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

APPEAL NO. 117/2018

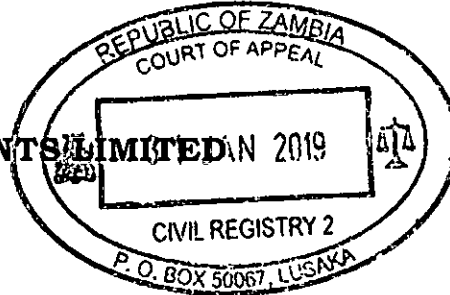
BETWEEN:

FINSBURY INVESTMENTS LIMITED IN 2019 APPELLANT

AND

ANTONIO VENTRIGLIA
MANUELA VENTRIGLIA

1ST RESPONDENT
2ND RESPONDENT



CORAM: LENGALENGA, SIAVWAPA AND MAJULA, JJA

On 30th October 2018 and 31st January, 2019

FOR THE APPELLANT: MR. J.P. SANGWA, SC WITH MR. J CHIMANKATA AND MR. MULENGA OF MESSRS SIMEZA SANGWA ASSOCIATES

MR. M. MUNDASHI, SC WITH MR CHAKOLEKA BOTH OF MULENGA MUNDASHI, KASONDE AND ASSOCIATES

FOR THE RESPONDENTS: MR. V. B. MALAMBO, SC WITH MR. C.M SIANONDO BOTH OF MESSRS MALAMBO & CO

MR. S. SIKOTA, SC WITH MR. K. KHANDA BOTH OF MESSRS CENTRAL CHAMBERS

MR. S. MAMBWE AND MR. A SIWILA BOTH OF MESSRS MAMBWE, SIWILA AND LISIMBA ADVOCATES.

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to

1. *National Westminster Bank PLC v IRC*¹ [1995] 1 AC 119, [1994] 3 ALL ER 1

Legal Works

1. *Farrar's Company Law 4th Edition, Butterworths 1998 at page 166 and 167*
2. *Gower's Principles of Modern Company Laws 6th Edition, Sweet and Maxwell London, 1997 page 305*

This is an appeal against the Judgment of the High Court delivered on 18th May 2018 which declared the Respondents in this appeal who were the Plaintiffs' in the court below as the only shareholders in Zambezi Portland Cement Limited (herein after referred to only as ZPC).

The Judgment further ordered the rectification to the membership Register of ZPC and the expunging from Companies Registry of documents reflecting the Appellant herein and Ital Terazzo, as shareholders in ZPC.

Aggrieved by the Judgment, the Appellant herein which was the Defendant in the court below raised seven grounds of appeal as per the memorandum of Appeal filed into Court on 21st May 2018.

The grounds are as follows;

1. *The learned Judge misdirected himself by failing to direct himself to the Respondents' case as set out in the pleadings.*
2. *The learned Judge was wrong in law by holding, despite the express provision of Section 50 of the Companies Act Chapter 388 of the Laws of Zambia that the Respondents' case was properly before Court.*
3. *The learned Judge misdirected himself by considering the Respondents' claims when neither Ital Terrazzo Limited nor Zambezi Portland Cement Limited were parties to the proceedings.*
4. *There was no evidence to support the 2nd Respondent's case as pleaded.*
5. *The finding of the learned Judge that the transfer of the Respondents' shareholding in Zambezi Portland Cement Limited was improperly done was against the weight of the evidence.*
6. *The finding of the learned Judge that the Respondents are the only shareholders of Zambezi Portland Cement Limited was against the weight of the evidence.*
7. *There was no evidence to support the order by the learned Judge that the filing of the Company Registry reflecting the Defendants and Ital Terrazzo Limited as shareholders be expunged from the Company Registry.*

In the court below the background of the case is that the Appellant commenced an action against the Respondents in September 2008.

By writ of summons and a statement of claim, the Appellant sought three remedies in the court below namely;

1. *An order that the Plaintiff is the registered and beneficial owner of K580, 000,000 issued shares in Zambezi Portland Cement Limited.*

2. *A declaration that the Defendants are not registered owners of any shares in Zambezi Portland Cement.*
3. *An injunction restraining the Defendants, whether by themselves individually and or severally or through their servants or agents from holding themselves out as shareholders of Zambezi Portland Cement Limited or taking any course of action of any nature whatsoever as shareholders of Zambezi Portland Cement Limited and or transferring their purported shares to a company known as Carmago Correa or any person whether corporate or otherwise until final determination of this matter in Court.*

The Defendants filed their defence and later an amended defence with a counter claim. After several amendments and re-amendments to their pleadings, the Plaintiff filed a Notice of Discontinuance on 19th May 2014 by which it wholly discontinued its action against the Defendants. The counter-claim was maintained and again the parties re-amended their counterclaim and defence to the counter-claim before trial commenced in 2017.

The Judgment appealed against is therefore, on the trial of the counter claim by the herein Respondents who were the Plaintiffs in the counter claim in the court below.

In their counter claim, the Respondents sought the following remedies in the court below;

1. *A declaration that the Defendants are the only shareholders in Zambezi Portland Cement Limited.*

2. *A declaration that they have lawfully rescinded the agreements to transfer 58% of the shareholding in the company to the Plaintiff for reason of fraud. Alternatively an order for the rescission of the Agreement for fraud.*
3. *For an order that changes made to the membership Register be rectified and the filings at the Companies Registry reflecting the Plaintiff and Ital Terrazzo Limited as shareholders be expunged from the Companies Registry.*
4. *In the alternative payment of the sum of K500, 000,000 and USD 60,000,000 being the value of the share agreed to be transferred to the Plaintiff.*
5. *Damages for loss of earnings as shareholders*
6. *Damages for breach of contract*
7. *Interest on all sums that may be found due and owing*
8. *Further and other relief, as the court may deem fit*
9. *Costs.*

At trial the Respondents called five witnesses comprising of an official from PACRA, an expert forensic lawyer, a forensic document examiner, the 1st Respondent and a Director of Ital Terrazzo Limited.

From the record and the pleadings, it is clear that there are two main issues the Respondents advanced in the court below as the bases for seeking the remedies pleaded namely; that the share transfers and the resulting share certificates relating to ZPC in favour of the Appellant were made and obtained by fraud. Secondly that the Appellant did not pay for the shares it took from ZPC.

With regard to the allegations of fraud, the court below accepted the forensic report of the handwriting expert, who was PW3. The Court also accepted the 1st Respondent's evidence that the Appellant did not pay for the shares it accepted to take thereby conferring no shareholding status on the Appellant.

In his Judgment, the learned trial Judge found it as a fact that the share certificates were fraudulently obtained based on the handwriting expert's testimony and report on the signatures on the two share certificate transfer forms purporting to be for the Respondents.

The report concluded that although the signatures on the share transfer forms were those of the Respondents the same were not physically appended by the Respondents. The handwriting expert's opinion was that the same were either electronically or mechanically affixed to the documents because of their lack of what he calls natural writing variations. This conclusion was informed by a comparison between the signatures on the forms and the sample signatures collected from the Respondents which exhibited the natural writing variations.

As regards the alleged failure to pay for the shares, the learned trial Judge, accepted evidence to that effect and further rejected the Shareholders' Agreement of 26th February 2007 on account that it was not pleaded.

Before we delve into the appeal proper, we wish to trace back the genesis of this controversy over the shareholding in ZPC.

The record shows that ZPC Limited was incorporated under the Companies Act on 14th December 2004 with five (5) million allotted shares of which 4,999,999 were held by Ital Terrazzo Limited and 1 share held by the 1st Respondent out of the total authorized share capital of ten million.

On 18th April, 2005, Ital Terrazzo Limited transferred all its shares to the 1st Respondent making him the sole shareholder in ZPC Limited.

On 16th April 2005, ZPC Limited, by special resolution, altered its share capital from ten (10) million to one (1) billion with the 1st Respondent acquiring 825 million and the 2nd Respondent acquiring 170 million of the newly created shares. As a result, as of May 2006, records held at PACRA showed the Respondents as Directors of ZPC Limited as per page 211 of the Record of Appeal. The records also showed the two Respondents' shareholding as of May 2006 as 830 million and 170 million each respectively.

However, as of 12th December 2006, share certificate numbers 1 to 5 were cancelled. Certificate 1 was in the name of Ital Terrazzo and it was cancelled on 18th April 2015 when its shares were transferred

to the 1st Respondent. The rest of the Certificates which were in the names of the 1st and 2nd Respondent were cancelled on 12th December 2006.

Further cancellations were made to share certificate numbers 7 and 9 in the names of the Respondents on 15th January 2007. Then came the disputed form of transfer of fully paid shares in a Company Limited by shares dated 12th December 2006 and 15th January 2007 by which the 1st Respondent and the 2nd Respondent are purported to have transferred their shares to the Appellant and Ital Terrazzo Limited.

These purported transfers divested the Respondents of all their shareholding in ZPC Limited handing the full shareholding to the Appellant and Ital Terrazzo Limited.

As earlier indicated, the point of dispute is that the Respondents deny ever signing on the said forms although their true signatures appear on the forms as confirmed by the expert witness.

In its defence, the Appellant averred that there were a number of documents that when read together legitimize the share transfers from the Respondents to it.

The re-amended defence to the re-amended counter claim also avers that the one billion share capital remained unpaid for until