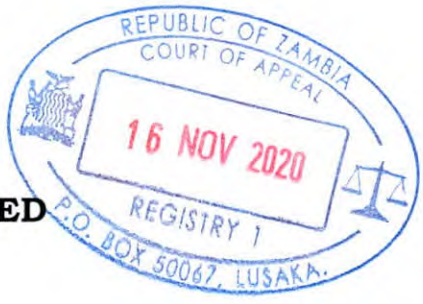
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 182/2019**

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

FSG LIMITED **1ST APPELLANT**
FSG (ZAMBIA) LIMITED **2ND APPELLANT**

AND

APEX LOAN SOLUTIONS (Z) LIMITED **RESPONDENT**

CORAM: ***MCHENGA, DJP, MAKUNGU AND NGULUBE, JJA.***
On 11th November, 2020 and 16th November, 2020.

For the Appellants *: Mr. C. Sianondo, Messrs Malambo and Company*

For the Respondent*: Mr. W. Muhanga, Messrs AKM Legal Practitioners*

J U D G M E N T

NGULUBE, JA delivered the judgment of the Court.

Cases referred to:

1. *Salomon vs A. Salomon and Company Limited (1897) A.C.22*
2. *William Masauso Zulu vs Avondale Housing Project (1982) Z.R. 172*
3. *Nkhata and four others vs The Attorney – General (1966) Z.R.124*
4. *The Albazero (1975) 3 W.L.R.491*
5. *Madison Investments Property and Advisory Company Limited vs Peter Kanyinji, Selected Judgment Number 48 of 2018*
6. *Suhayi Dudhia vs Samir Kara and Citibank Zambia Limited, S.C.Z Appeal Number 107 of 2015*
7. *Mike Hamusonde vs Kamfwa Kasongo and others (2006) Z.R.101*

8. *Kingfarm Products Limited, Mwanamuto Investments Limited vs Dipti Rain Sen (Executor and Administrator of the Estate of Afit Barab Sen) (2008) Z.R.72 Vol (2)*
9. *Adams vs Cape Industries Plc (1990) Ch 433*
10. *Ebbau Vale Urban District Council vs South Water Traffic Licensing Authority . . .*

Legislation referred to:

1. *High Court Rules, Chapter 27 of the Laws of Zambia*

INTRODUCTION

2. This is an appeal against a Ruling of the High Court, Commercial Division, delivered by Mbewe, B.C., J. on 14th June, 2019, in which the court ordered the joinder of the first appellant to the action between the second appellant and the respondent.

BACKGROUND FACTS

3. The respondent (plaintiff in the court below) sued the second appellant (defendant in the court below) claiming the following –

    1. ***The payment of the principal outstanding sum of ZMW164,046.42 being the amount not remitted towards the servicing of the defendant's employees' loan facilities as per the contract between the plaintiff and the defendant.***
    2. ***Interest accrued on the principal sum in accordance with clause 1.1.2 in the contract between the plaintiff and the defendant.***
    3. ***Damages for breach of contract and loss of money (re-)usage.***
    4. ***Costs of and incidental to those proceedings.***
    5. ***Any other relief that the court may deem fit to award in the circumstances.***

4. In its statement of claim, the respondent averred that on or about 21st October, 2015, the respondent and the second appellant entered into a payroll deduction agreement in which the plaintiff was to provide loan facilities to the defendant's employees which would be deducted by the second appellant from the salaries of the employees and then remitted to the respondent.

5. Pursuant to the agreement, the respondent lent money to the second appellant's employees and deductions that were effected on the employees' salaries were remitted to the respondent as agreed. However, in November, 2017, the second appellant stopped remitting the deductions to the respondent and owed the principal sum of K164,046.42. with interest at the ruling commercial bank lending rate. The respondent made efforts to recover the money owed without any success. As a result, it commenced the action to recover the debt.

6. In its defence, the second appellant averred that the agreement was signed on 28th October, 2015 prior to its incorporation and that as an unincorporated association, it was not a legal person and could not enter into a contract, thus making the contract a nullity.

7. The second appellant further averred that the agreement was made between the first appellant and the respondent and not with the second appellant as it was not privy to the agreement. It further

averred that the General Manager, Winnie Nambeya and the Finance Manager Niya Musonda, who signed on behalf of the second appellant had no authority to commit the second appellant to any agreement. It denied owing the respondent any money for the aforestated reasons.

8. In its reply, the respondent averred that the second appellant's promoters entered into the agreement as a pre-incorporating contract, which was subsequently adopted by the second appellant after its incorporation. It was further averred that the second appellant is a subsidiary of the first appellant and cannot escape liability as it was the legal person that performed the contracts, as its employees benefited from the loan services.

9. On 31st May, 2019, the respondent issued summons for joinder of the first appellant to proceedings and leave to serve process outside jurisdiction, pursuant to order LIII Rule 10(1), Order XXX Rules 1 and 8, Order XIV, Rule 5 (1) and Order X Rule 16 of the High Court Rules, Chapter 27 of the Laws of Zambia. The summons were accompanied by an affidavit sworn by one Winnie Nambeya, a Director of the respondent who averred that the agreement in issue was executed by the respondent and the first appellant through employees of the second appellant, namely Niya Musonda and Winnie Nambeya.

10. The said Winnie Nambeya averred that the second appellant is a subsidiary of the first appellant and that the two companies were acting as one. She averred that the first appellant, as the parent company has sufficient interest and ought to be a party to the proceedings as it will be affected by the outcome of these proceedings and that as the party in whose name the agreement was executed, it ought to be joined to the proceedings so that it can be given an opportunity to be heard.

11. The first appellant's director, Nijayan Narayanan swore an affidavit in opposition to the summons for joinder as it was and averred that the agreement dated 21st October, 2015 was not signed by the first appellant and that Niya Musonda and Winnie Nambeya did not sign on behalf of the first appellant as they were not its employees. That the first appellant did not agree to its employees accessing loans and that the same was perpetrated by Winnie Nambeya, who was the General Manager of the second appellant from July 2013 to 31st December, 2017 when she was suspended and later resigned from employment.

12. It was further averred that the said Winnie Nambeya is a shareholder in the respondent. That the deductions and remittances to the respondent ended as Winnie Nambeya and Niza Musonda left the

second appellant company and no one else in the second appellant was aware of the alleged agreement.

13. It was averred that the first appellant and second appellant are two separate companies acting independently of each other, with the first appellant being registered in Botswana. That the first appellant has no interest in the matter and will not be affected by the outcome of the agreement.

CONSIDERATION OF THE ISSUES AND THE DECISION OF THE LOWER COURT

14. In its ruling, the lower court was of the view that a company and its shareholders are separate and distinct entities as set out in the case of ***Salomon and A. Salomon and Company Limited***[1]. The court went on to state that it did not agree with the respondent's averment that the intended second defendant (the first appellant herein) being the parent company, has sufficient interest to be a party to the action. The court opined that a parent or holding company is a separate and distinct entity from its subsidiary company.

15. That some acts were done on behalf of the parent company. The agreement was signed on behalf of the first appellant. It accordingly ordered the joinder of the first appellant to the action.

THE APPEAL

16. Dissatisfied with the decision of the lower court, the first appellant appealed to this court on four grounds:

1. ***That the court below erred both in law and fact in finding that FSG Limited, the first appellant herein was cited as a party to the agreement of 21st October, 2015 while on the other hand expressing doubt as to the contracting party.***
2. ***That the lower court erred both in law and fact when it found that the agreement of 21st October, 2015 was executed in the name of the first appellant in the absence of such evidence.***
3. ***The lower court erred in law and fact when it found that some acts were undertaken for and on behalf of the parent company in the absence of any evidence.***
4. ***The lower court erred in law and fact when it joined the first appellant to the proceedings after it rejected the respondent's averment that the first appellant as a parent company had sufficient interest and would be affected by the outcome of the case.***

THE ARGUMENTS

17. Both parties filed heads of argument for and against the appeal respectively. The appellant argued, grounds one and two together as they raise interrelated issues. According to Counsel, the parties in the agreement are the respondent and Funeral Services Group with the first and second appellants not appearing in the said agreement. This court was referred to the first appellant's certificate of incorporation as well as documentation which shows the name of the

first appellant and it was contended that the lower court's finding that FSG Limited was cited as a party to the agreement is not supported by any evidence.

18. The court was referred to a portion of the Ruling where the court stated that –

> ***". . . the documents in this matter were prepared and signed in a manner that still leaves doubt as to who the contracting party was."***

19. Referring to the case of ***William Masauso Zulu vs Avondale Housing Project[2],*** where the Supreme Court stated that –

> ***"Before the court can reverse findings of fact made by a trial Judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which on a proper review of the evidence, no trial court acting correctly could reasonably make."***

Counsel urged the court to reverse the lower court's finding of fact that the first appellant was a party to the agreement as it was not a party to the agreement.

20. Ground three attacks the lower court's finding that some acts were undertaken for and on behalf of the parent company, which is the first appellant. Counsel submitted that though the first appellant is

the majority shareholder of the second appellant, no evidence was led to the effect that the agreement in issue was ever signed for and on behalf of the first appellant or the second appellant and that the lower court's finding was not supported by any evidence. Counsel referred to the case of ***Nkhata and four others vs The Attorney – General***[3], in which the court gave guidelines regarding when a finding of fact can be reversed.

21. Ground four, was that the lower court erred in law and fact by joining the first appellant to the proceedings after rejecting the respondent's averment that the first appellant as a parent company had sufficient interest in the matter and would be affected by its outcome. It was submitted that the first appellant does not appear as a party to the agreement nor does it show that it signed the said agreement. Counsel submitted that the payslips of the employees who had deductions effected on their salaries, do not have the particulars of the first appellant. The court was referred to the case of ***The "Albazero"***[4], where Roskill, L.J, stated that –

> ***". . . that each company in a group of companies (a concept) is a separate legal entity possessed by separate legal right and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would accrue benefits to the same person or corporate body."***

22. Counsel further referred to the case of ***Madison Investments Property and Advisory Company Limited vs Peter Kanyinji***[5], where the Supreme Court stated that –

> ***"The law takes the position that companies in a group are separate entities and are not agents of each other at a general level, therefore the effect of the rule in Salomon vs Salomon and Co. as it relates to individual subsidiaries within the conglomerate or group of companies is that they will be treated as separate entities and the parent company cannot be made liable for their legal obligations."***

23. Counsel for the first appellant argued that an alleged parent company cannot be saddled with the responsibility of the subsidiary as they are separate companies. It was contended that the first appellant cannot be joined to the proceedings as it is not affected in any way and further that the second appellant's employees were not its agents.

24. He went on to refer to the case of ***Suhayi Dudhia vs Samir Kara and Citibank Zambia Limited***[6], where the Supreme Court stated that–

> ***"It would not auger well for the administration of justice to haul an intended joinder through the court system at great costs within a scintilla of evidence what interest it has and how it may be affected by the result of the proceedings."***

25. That the first appellant does not appear in relation to the agreement in issue and that it would be against the proper administration of justice to add it to the proceedings as it has no interest in the matter. We were urged to allow the appeal and remove the first appellant from the proceedings.

26. In response, the respondent's Counsel submitted, on grounds one and two, that the lower court was correct to order the joinder of the first appellant as it was of the view that on the face of it, some acts were undertaken for and on behalf of the parent company. According to Counsel, the lower court did not make a finding of fact but was entitled to reason as it did from the documents that were before it. It was argued that the first appellant was joined to the matter and was given an opportunity to explain why it signed the agreement in contention. That the court would then determine all the matters in controversy between the parties that could be affected by the outcome or have an interest in the matter.

27. The respondent's Counsel further argued that although the first appellant's Certificate of Incorporation shows that it was registered as "FSG (Proprietary) Limited", it changed its name to "FSG Limited" and that it was correct to assume that the party appearing on the

agreement as "Funeral Services Group" was the same as FSG Limited, with one of its subsidiaries being the second appellant.

28. According to Counsel, the lower court acknowledged that the first appellant was the parent company of the second appellant and that the intended party to the agreement would be determined at trial as there was doubt on who the other contracting party was. He submitted that the lower court was on firm ground when it joined the first appellant, and he urged us to dismiss grounds one and two.

29. Turning to ground three, the respondent submitted that the lower court was of the view that the Funeral Services Group and the first appellant are connected, although the contract was performed by the second appellant as evidenced by the payslips. According to Counsel, the lower court was entitled to observe that it appeared as though the second appellant undertook some acts on behalf of the first appellant. For the aforestated reasons, we were urged to dismiss ground three of the appeal.

30. On ground four, the respondent argued that the more likelihood of the first appellant having an interest or the potential to be affected by the outcome in the matter warrants that the party be joined. The court was referred to the case of ***Mike Hamusonde vs Kamfwa Kasongo and others***[7] where it was held that –

> ***"A court can order a joinder if it appears to the court that all persons who may be entitled to or claim some share of interest in the subject matter of the suit or who may be likely to be affected by the result require to be joined."***

31. It was submitted that the first appellant, as a parent company to the second appellant and the two belonging to a group of companies, on the face of it, did not act independently of each other, and that the court was in order to treat them as one and the same for the purposes of that transaction. Counsel for respondent referred to the case of ***Kingfarm Products Limited, Mwanamuto Investments Limited vs Dipti Rain Sen (Executor and Administrator of the Estate of Afit Barab Sen)***[8] where the Supreme Court stated that –

> ***"The removal of the veil of incorporation in this case was caused by the appellant companies themselves through their conduct."***

32. It was submitted that the execution of the agreement points at the first appellant, while the performance points at the second appellant. Counsel contended that the lower court was on firm ground when it ordered the joinder of the first appellant so that each of the appellants may give an explanation at trial. We were urged to dismiss the appeal with costs.

33. The appellant's Counsel filed heads of argument in reply with leave of court on 11th November, 2020, wherein it was submitted on grounds one and two that there is no basis upon which the court joined the first appellant as it did not sign the agreements in issue. The two signatories were employees of the second appellant and the payslips on record are those of the second appellant. It is argued that the only connection is that the first appellant is a shareholder in the second appellant and that this was not a valid reason for joining the first appellant.

34. On ground four, Counsel submitted that the first appellant was not privy to the agreement as it is based in Botswana. We were urged to allow the appeal.

35. At the hearing of the appeal, the learned Counsel for the appellant sought leave to file heads of argument in reply out of time, which was granted. Mr. Sianondo then submitted that he would rely on the grounds of appeal and heads of arguments filed. He briefly augmented them by submitting that the issue is on the joinder of the first appellant to the matter when it is a company incorporated in Botswana. According to Counsel, the people who signed the agreement in controversy were employees of the second appellant. He contended that there was no basis upon which the first appellant was joined to the proceedings and that the evidence on record is that

the payslips on record show that deductions were effected on the salaries of the employees of the second appellant.

36. Counsel urged the court to sustain the appeal and remove the first appellant from the proceedings. The court was also referred to the case of ***Suhayl Dudhia vs Samir Karia and Citibank Zambia Limited (supra).***

37. In response, Mr Muhanga on behalf of the respondent submitted that he would rely on the heads of arguments filed. He submitted that the lower court exercised its jurisdiction correctly when it decided to join the first appellant to the proceedings as the court exercised the issue to joinder in accordance with the law. We were urged to dismiss the appeal for lack of merit.

DECISION OF THE COURT

38. We have considered the parties' respective arguments and the ruling being impugned. We shall deal with the four grounds separately. In ground one, the issue the appellants raised is whether the learned Judge in the court below in exercising his discretion in the application for joinder of the first appellant, applied the correct test. As earlier alluded to, the application for joinder was brought by the respondent pursuant to Order 53 Rules (10)1, Order 30 Rules 1 and

8, Order 14, Rule 5(1) and Order 10, Rule 16 of the High Court Rules, Chapter 27 of the Laws of Zambia.

39. It was deposed in the affidavit in support that the first appellant is the parent company of the second appellant and that the two entities were acting as one when they contracted with the respondent. It was further deposed that the first appellant being the second appellant's parent company has sufficient interest to be a party to the action as it will be affected by the outcome of the case being the party in whose name the agreement was executed.

40. A perusal of the record from the court below, particularly the agreement in issue, shows that the contracting parties were the respondent and "Funeral Services Group." The said Funeral Services Group was to administer monthly payroll loan deductions to repay the loans that its employees would obtain from the respondent and remit the same to the respondent as agreed.

41. The agreement further shows that the persons who signed on behalf of "Funeral Services Group" were Niya Musonda, the Finance Manager and Winnie Nambeya the General Manager. We are of the view that the lower court erred when it joined the first appellant to the proceedings as the agreement was signed by employees of the second appellant and not those of the first appellant. There is no indication that those employees were acting agents of the first

appellant. We therefore find merit in ground one of the appeal and it succeeds.

42. Turning to ground two, we are of the view that the lower court erred in law and fact when it found that the agreement was executed in the name of the first appellant as the parties who signed the agreement were employees of the second appellant and the other party was Funeral Services Group and not FSG Limited. The liability of a corporation which is a parent one towards the acts of a subsidiary of the parent is regulated in accordance with the basic concepts of limited liability and separate entity in company law. The case in point is that of ***Adams vs Cape Industries Plc***[9]. We find merit in the second ground of appeal and it succeeds.

43. Ground three relates to whether the lower court erred when it found that some acts were undertaken by the second appellant on behalf of the parent company. A perusal of the record of appeal shows that the first appellant is a company registered in Botswana while the second appellant is a subsidiary of the first appellant which is registered in Zambia and conducts its business in Zambia.

44. The main decision in support of the principle of separate legal personality was in the case of ***Salomon vs A Salomon (supra).*** The facts of the case are that Mr Salomon sold his registered company in which he was a Managing Director and shareholder amongst seven

shareholders who were his family members subscribed to one share each of the six remaining shares. The company was later liquidated and subsequent to payment of secured creditors and Mr Salomon's debentures, nothing remained for unsecured creditors.

45. The liquidator alleged that the incorporation of the company was fraudulent and used to avoid liability by Mr Salomon, for debts of the company in particular claims by unsecured creditors. In the High Court, Judge Vaughan Williams ruled that Mr Salomon, was the principal and the company his agent, and therefore liable for the debt of unsecured creditors. The liquidator succeeded in the Court of Appeal where the Judge confirmed the High Court ruling on different grounds that Mr Salomon abused the privileges of incorporation and limited liability, for his own benefit enabling him to incur debts in the company name and avoid liability.

46. However, the House of Lords reversed the decision of the court and Lord Halsbury L. C. held that-

> ***"It seems to me impossible to dispute that once the company is legally incorporated, it must be treated like any other independent person its right and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."***

On the strength of the ***Salomon vs Salomon*** case, a subsidiary is not regarded as the agent of its holding company as they have separate personalities.

47. In the case of ***Ebbau Vale Urban District Council vs South Water Traffic Licensing Authority***[10] the Court of Appeal in England considered the relationship between the parent and a wholly owned subsidiary company, Cohen L.J. observed that -

> ***"Under the ordinary rules of law, a parent company and a subsidiary company, even a hundred percent subsidiary company, are distinct legal entities and in the absence of a contract of agency between the two companies one cannot be said to be the agent of the other."***

48. We are alive to the fact that the first appellant being the parent company and the second appellant as the subsidiary are two separate legal entities and there was no evidence that some acts were done by the 2nd appellant on behalf of the first appellant. As such without going into the merits of the main matter, we are of the view that the lower court erred in law and fact when it found that some acts were done on behalf of the first appellant when it is a separate legal entity from the second appellant. The case of ***Ebbau Vale Urban District Council vs South Water Traffic Licensing Authority (supra)***

applies. We therefore agree with the first appellant that there is merit in ground three and it succeeds.

49. Turning to the fourth ground of appeal, we are of the view that the lower court erred when it joined the first appellant to the proceedings as it does not have sufficient interest in the matter and is unlikely to be affected by the outcome of the case in the lower court.

CONCLUSION

50. Having found merit in the four grounds, the appeal succeeds as the lower court misdirected itself when it ordered that the first appellant be joined to the proceedings. The first appellant should therefore be dropped. The matter is sent back to the High Court before the same Judge. Costs are awarded to the first appellant, to be taxed in default of agreement.

C.R.F MCHENGA
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL

C.K MAKUNGU
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE