

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

CAZ Appeal No. 173/2019

B E T W E E N :

AFRICAN MILLING COMPANY LIMITED

APPELLANT

AND

CHAMBALA SIKAZWE
AMON MAVIYA
OSWARD SIMUYEMBA

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**



CORAM : Kondolo, Chishimba and Mulongoti, JJA
25th September, 2020 and 31st March, 2020

For the Appellant : Messrs Eric Silwamba, Jalasi Linyama
Legal Practitioners.

For the Respondents : Mr. M. Bataka of Messrs Muyatwa Legal
Practitioners.

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. Esquire Roses Farm v. Zega Limited SCZ Judgment No. 3 of 2013.
2. Nkhata and Others v. The Attorney General (1966) ZR 124
3. The Attorney General v. Marcus Kampumpa Achiume (1983) ZR 1
4. Chimbo and Others v. The People (1982) ZR 20
5. Philip Mhango v. Dorothy Ngulube and Others (1983) ZR 61
6. Eagle Charalambous Transport Limited v. Gideon Phiri SCZ Judgment No. 8 of 1994
7. Duff Kopakopa v. University Teaching Hospital Board of Management SCZ Judgment No. 8 of 2007
8. Justine Chansa v. Lusaka City Council SCZ Judgment No. 29 of 2007
9. Zambia Railways Limited v. Pauline S. Mundia, Brian Sialumba (2008) ZR 287 Vol. 1

10. Marjory Mambwe Masiye v. Cosmas Phiri (2008) ZR 56 Vol. 2
11. Ace Audit Expertise (Z) Limited v. Africa Feeds Limited SCZ Judgment No. 1 Of 2009
12. Communications Authority v. Vodacom Zambia Limited SCZ Judgment No. 21 of 2009
13. Ndongo v. Moses Mulyango, Roostico Banda SCZ Judgment No. 4 of 2011
14. The Attorney General v. John Tembo SCZ Judgment No. 1 of 2012
15. Midlands Breweries (PVT) Limited v. David Munyenyembe SCZ Judgment No. 3 of 2012
16. Khalid Mohamed v. The Attorney General (1982) ZR 49
17. Zulu v. Avondale Housing Project (1982) ZR 72
18. Constantine Line v. Imperial Smelting Corporation [1942] AC 154

LEGISLATION AND OTHER WORKS REFERRED TO:

1. William Bowstead; F M B Reynolds; Michele Graziadei. Bowstead and Reynolds on Agency, 17th Edition. London: Sweet & Maxwell, 2001.
2. The Halsbury's Laws of England, 4th Edition
3. The Rules of the Supreme Court of England (White Book) 1999 Edition
4. Bowsfead on Agency 13th Edition

INTRODUCTION

1. This is an appeal arising from a Judgment of the High Court delivered by Justice S. M. Wanjelani sitting at Lusaka.
2. The appeal addresses the issue of agency relationship and the extent of liability for actions carried out on behalf of a principal by an agent.

FACTUAL BACKGROUND

3. The respondents commenced an action by way of amended writ of summons and statement of claim against the appellant seeking the following reliefs namely;

(i) Payment of the sum of ZMW230, 879, 000.00 being the amount owing for the supply of 166, 100kg maize to the 1st Defendant;

(ii) Interest at the current bank lending rate;

(iii) Costs; and

(iv) Any other relief the Court may deem fit.

4. The facts preceding the appeal are as follows; the respondents, between the period 11th August, 2014 to 20th August, 2014 supplied a total of 166, 100kg bags of maize to the appellant (1st Defendant in court below). The 2nd Defendant Zinto Sakala was averred to be an agent for the appellant.

5. It was stated that the supply of maize to the appellant was carried out through the said Zinto Sakala. Further that the practice was that after supply of maize, the appellant would finance Zinto Sakala who would then make all the necessary payments for the various quantities of maize supplied to the suppliers.

6. The respondents demanded for payment of the sum of K230,879=00 in respect of the supplied maize. The appellant neglected and refused to pay the said sum to the respondent.

7. In its defence, the appellant denied having dealt with the respondents. That it was not privy to any of the dealings or agreements made between the respondents and Zinto Sakala.
8. The respondents gave evidence in the court below. The evidence by the respondents regarding the transactions with the appellant was materially the same. The respondents testified that they were informed by the appellant's employees that the appellant did not deal directly with the customers. The customers were only allowed to sell their maize through two recognized 'agents' one of whom was Zinto Sakala. The respondents chose to deal and supplied maize through Zinto Sakala to the appellant.
9. According to the respondents, maize was supplied to the appellant. There was evidence before the lower court that when the respondents registered concern regarding the non-payment for the maize initially supplied, Mr. Ibrahim, Managing Director of the company at the time assured them that there was a slight glitch in the payment system and that the respondents should continue supplying the maize and would be paid at a later date.
10. The respondents stated that when they followed up with Zinto Sakala, he indicated that the appellant was yet to give him the

monies due to them. Further follow ups with the appellant led to a meeting with the District Commissioner regarding payment for maize supplied. Mr. Ibrahim was in attendance at the said meeting held with the District Commissioner. Once again the respondents were assured that they would be paid their dues.

11. The respondents further testified that Zinto Sakala and an accountant from the appellant company were at one point detained at the police station in connection with the non-payment of monies to the suppliers of maize to the appellant.
12. Julius Phiri a human resource personnel at the appellant company testified on the procedure involved regarding how all the appellant's customers were vetted before being engaged to supply maize to the appellant. The appellant stated that Zinto Sakala was one of the customers who supplied maize to the appellant. That their record shows that he was paid for the maize that he supplied to the appellant.
13. The appellant, in a nutshell, denied the fact that the respondents were its customers and insisted that it only dealt with a person called Zinto Sakala who was paid money for the maize that he supplied. The appellant denied having met the respondents or

made any assurances to them regarding payment through its officers.

DECISION OF THE LOWER COURT

14. The lower court found that the respondents were indeed in the business of supplying maize and that on diverse dates in August 2014 did deliver and supply maize to the appellant and were yet to receive payment. Further, the court found as a fact that the appellant had an intentional policy to only purchase maize from a few individuals who included Zinto Sakala.
15. The court also found that a payment was made to Zinto Sakala for maize supplied and that the goods received vouchers indicated that the appellant's customer was Zinto Sakala.
16. The trial court found that Zinto Sakala was the appellant's agent owing to the representations made by the company's employees and its own conduct. That the appellant knew that Zinto Sakala was not selling the maize in his own right but for and on behalf of others. That it was only because of the appellant's policy that the respondents sold their maize through Zinto Sakala. Consequently, the lower court found in favour of the respondents and ordered that they be paid their dues with interest by the appellant.

GROUND OF APPEAL

17. Being dissatisfied with the decision of the lower court the appellant has raised the following grounds of appeal namely that;

- a. The learned trial Judge erred in law and fact when she held that the 2nd Defendant in the lower court (Zinto Sakala) was an agent of the appellant by way of ostensible authority.*
- b. The learned trial Judge erred in law and fact when despite making clear findings of fact that the appellant had paid the 2nd Defendant Zinto Sakala and that the goods received voucher described the 2nd Defendant as customer, she still proceeded to hold that the 2nd Defendant was an agent of the appellant and not a customer.*
- c. The learned trial Judge erred in law and in fact when she failed to make any adjudication or finding of liability against the 2nd Defendant despite the fact that the 2nd Defendant was cited as co-Defendant in the matter.*

HEADS OF ARGUMENTS BY THE PARTIES

18. The appellants filed into court heads of arguments dated 20th September, 2019. In ground 1, the appellant argued that there was no agency relationship that existed between the appellant and Zinto Sakala as the appellant did not have any agents engaged, that received maize on its behalf.

19. The appellant maintained that the respondents did not exist in its books as customers. That only Zinto Sakala was recognized as a customer by the appellant. Further, that the respondents failed to point to which conduct on the part of the appellant led them to believe that Zinto Sakala was its agent.
20. The appellant argued that the meeting between its former Managing Director, Mr. Ibrahim and Zinto Sakala could not be proof that an agency agreement existed with the appellant as the Respondents were not certain as to what had been discussed by the two. Further, that the lower court only relied on the testimony of the respondents in arriving at the conclusion that an agency relationship existed between the appellant and Zinto Sakala. We were referred to an extract from the book **Bowstead and Reynolds on Agency, 17th Edition** in which the learned authors discuss agency relationship and how it arises.
21. The appellant contended that Zinto Sakala was not its agent neither did he have any actual or ostensible authority to act as such. That he was merely the appellant's customer. Further, that the fact that Zinto Sakala was a customer was admitted to by the respondents in cross examination.

22. It was contended that there is no document in existence that shows Zinto Sakala in any other light save for the fact that he was the appellant's customer. The said Zinto Sakala was not an employee of the appellant for the respondent to expect that he would release monies to them. The agreement between the respondents and Zinto Sakala regarding the supply of maize was between them and did not affect the appellant.

23. The appellant, relying on an excerpt from **Bowstead and Reynolds on Agency**, argued that where the alleged agent is a buyer or seller no agency relationship would exist. The appellant argued that where there is an agency relationship, an agent would ordinarily be paid a commission or a form of remuneration. In support of this submission the court was referred to the case of **Esquire Roses Farm v. Zega Limited** ⁽¹⁾. The appellant contends that the documentation before the court only describes Zinto Sakala as a customer. He did not receive any commission or remuneration from the appellant. That in the circumstances the lower court should not have come to the conclusion that there was in existence an agency relationship.

24. The appellant argued that all monies paid to Zinto Sakala were all in relation to the monies paid for maize supplied. The trial court having found that no commission was paid to Zinto Sakala by the respondents should have equally found that there was no commission paid by the appellant to Zinto Sakala.

25. In a nutshell, the appellant argued under ground 1 that there was no relationship that existed between the appellant and the respondents. Therefore, there was no justification for the trial court to have found that such a relationship existed.

26. Under ground 2, the appellant argued that there was evidence before the lower court that the maize received by the appellant was paid for. The appellant submitted that an appellate court will only interfere with findings of fact if they are perverse. According to the appellant, the finding by the lower court that it was the appellant's policy to deal with a few people in its maize transactions was perverse.

27. The appellant maintained that the documentation before the lower court made reference to Zinto Sakala as the customer and not an agent. In holding that the said Zinto Sakala was an agent the lower court only relied on the evidence of the respondents and did not

take into account the documentary evidence that was before it. This resulted in perverse findings being made by the lower court. In addition, that the respondents relied on information that was received from employees of the appellant whom they could not identify. Therefore the finding by the lower court that Zinto Sakala was an agent is not supported by the evidence before the court. We were referred to the cases of *Nkhata and Others v. The Attorney General* ⁽²⁾, *The Attorney General v. Marcus Kampumba Achiume* ⁽³⁾, *Chimbo and Others v. The People* ⁽⁴⁾, *Philip Mhango v. Dorothy Ngulube and Others* ⁽⁵⁾, *Eagle Charalambous Transport Limited v. Gideon Phiri* ⁽⁶⁾, *Duff Kopa Kopa v. University Teaching Hospital Board of Management* ⁽⁷⁾, *Justine Chansa v. Lusaka City Council* ⁽⁸⁾, *Zambia Railways Limited v. Pauline S. Mundia, Brian Sialumba* ⁽⁹⁾, *Marjory Mambwe Masiye v. Cosmas Phiri* ⁽¹⁰⁾, *Ace Audit Expertise (Z) Limited v. Africa Feeds Limited* ⁽¹¹⁾, *Communications Authority v. Vodacom Zambia Limited* ⁽¹²⁾, *Ndongo v. Moses Mulyango, Roostico Banda* ⁽¹³⁾, *The Attorney General v. John Tembo* ⁽¹⁴⁾ and *Midlands Breweries (PVT) Limited v. David Munyenyembe* ⁽¹⁵⁾ where the court discussed instances when an appellate court may properly interfere with findings of fact made by a trial court. The court was referred to specific ‘perverse’ findings of fact made by the trial court

aforementioned earlier. The appellant contends that it has met the threshold to warrant interference of the findings of the trial court.

28. It was submitted that the respondents had failed to prove, on a balance of probabilities that an agency relationship existed between the appellant and Zinto Sakala. We were referred to the case of ***Khalid Mohamed v. The Attorney General*** ⁽¹⁶⁾ where the court discussed the burden of proof in civil matters. We were further referred to the cases of ***Masauso Zulu v. Avondale Housing Project*** ⁽¹⁷⁾ and ***Constantine Line v. Imperial Smelting Corporation*** ⁽¹⁸⁾ where the court stated that a party making allegations must prove the assertions. The appellant contended that the respondents had failed to prove their case to the required standard. We were urged to reverse the findings of fact made by the trial court as the same were not supported by evidence on the record.

29. Under ground 3, the appellant contended that the court below did not determine all the issues in controversy because it did not make any orders against Zinto Sakala. We were referred to portions of testimonies by the respondents where allegations against Zinto Sakala had been made. The lower court did not place any liability on Zinto Sakala despite his failure to defend the action and despite

- the fact that the respondents grievances stemmed from their dealings with him. It was argued that the court failed to find
30. Zinto Sakala liable having found that he was a customer and monies had been paid to him. Therefore, the lower court failed to adjudicate on all issues that were before it as guided by the court in the cases of *Wilson Masauso Zulu v. Avondale Housing Project* ⁽¹⁹⁾, *The Attorney General v. Aboubacar Tall and Zambia Airways Corporation Limited v. Sentor Motors Limited and 3 Others* ⁽²⁰⁾.
31. The appellant contends that it was an abdication of responsibility for the court below to fail to pronounce itself on the liability of Zinto Sakala despite there being evidence before her that he was paid by the appellants. That the failure to pronounce itself on the monies paid to Zinto Sakala exposed the appellant to double jeopardy. The lower court misdirected itself by placing all the blame on the appellant without advancing reasons. We were referred to an extract from **Halsbury's Laws of England** where the learned authors opined that where two defendants have been sued, a plaintiff will be awarded damages against each defendant.
32. It was contended that the lower court had failed to apportion damages between Zinto Sakala and the appellant and further

failed to determine the damage caused by each of the Defendants (Zinto Sakala and the appellant). In addition, that the lower court failed to take into account the provisions of **Order 13 Rule 1 of the Rules of the Supreme Court of England (White Book) 1999 Edition** which provides that where a number of defendants appear on a Writ and one or more fails to appear, the plaintiff may enter Judgment against such defendants that have not appeared.

33. In a nutshell, the appellant argued that the court below erred when she failed to find that Zinto Sakala was liable as a Co-Defendant. We were urged to uphold the appeal.

DECISION OF THE COURT

34. We have considered the appeal, the evidence in the lower court, the authorities cited and the heads of argument filed by the Learned Counsel. We will deal with grounds 1 and 2 together as they both relate to the issue of whether or not Zinto Sakala was in fact an agent of the appellant.

35. The appellant has argued, in a nutshell, that Zinto Sakala was its customer and that he had been paid for all the maize that he delivered to the appellant. That the appellant did not hold him out

to be its' agent. The appellant maintained that it was not privy to the agreement between Zinto Sakala and the respondents.

36. It is trite that an agency relationship is created either expressly or by implication. The learned authors of **Halsbury's Laws of England, 4th Edition**, state, at paragraph 19, that;

“The relation of agency is created by express or implied agreement of principal and agent...Implied agency arises from the conduct or situation of the parties.”

37. The respondents at trial stated that they had been informed by the appellant's employees at the weigh bridge that the appellant only dealt with specific customers one of whom was Zinto Sakala through whom maize was purchased. That it was on this basis that the respondents decided to sell their maize to the appellant through him.

38. Despite the appellant vehemently arguing that Zinto Sakala was merely its customer and not agent, the evidence on the record shows otherwise. The evidence shows that the appellant held out Zinto Sakala as its agent.

39. The appellant's witness at page 434 of the record of appeal confirmed, under cross examination, that the appellant dealt with “specific customers”. He added that the respondents must have

been told that Zinto Sakala was one of the 'customers' that the appellant dealt with.

40. We note that the respondents' evidence regarding the meetings and assurances of payment made by a Mr. Ibrahim was not disputed by the appellant. Our view is that there was evidence before the lower court that pointed to the fact that the appellant held out Zinto Sakala as its agent. This was through its employees at the weigh bridge and assurances by the then Managing Director, Mr. Ibrahim. We hold the view that given the conduct of the appellants, it matters little that the appellants 'internally' referred to Zinto Sakala as their customer when through their conduct they held him out to be an agent.

41. Our view is that a third party is not mandated to carry out investigations to find out the internal operations of a company in the face of that company's conduct in relation to third parties. We are of the view that the appellant is therefore estopped from denying the existence of an agency relationship with the said Zinto Sakala. The learned authors of **Halsbury's Laws of England** at paragraph 29 state that:

“Agency by estoppel arises where one person has so acted as to lead another to believe that he has authorized a third person to act on his behalf, and that other in such belief enters into transactions with the third person within the scope of such ostensible authority. In this case the first-mentioned person is estopped from denying the fact of the third person’s agency under the general law of estoppel, and it is immaterial whether the ostensible agent had no authority whatever in fact. The principal cannot set up a private limitation upon the agent’s actual authority so as to reduce the ostensible authority, for, so far as third persons are concerned, the ostensible authority is the sole test of his liability.”

42. The House of Lords in *Shearson Lehman Bros Inc and others v Maclaine Watson & Co Ltd and others (International Tin Council intervening) (No 2)[1988] 1 All ER 129* stated that:

“The issue of ostensible authority normally falls for decision where one party as agent has purported to undertake some obligation on behalf of another party as principal. In those circumstances the party seeking to enforce the obligation in reliance on the agent’s ostensible authority will need to show that the principal held the agent out as having the necessary authority so as to create an estoppel.”

43. We hold the view that there was evidence before the lower court pointing to the fact that the appellant carried themselves in a manner that showed that Zinto Sakala was its agent despite their insistence that he was a customer. In fact, DW in his examination in chief at page 427 of the record of appeal stated that Zinto Sakala was a Cashier at the appellant company.

44. We find it unreasonable to expect the respondents, third parties, to have enquired into whether or not Zinto Sakala was an agent of the appellant. To permit such an approach would place a heavy burden on innocent third parties. We therefore find no merits in grounds 1 and 2. The findings of facts by the lower court that Zinto Sakala was an agent of the appellant was supported by evidence and not perverse.

45. We now turn to the last ground of appeal. The appellant's argument is essentially that the lower court erred when she did not find Zinto Sakala liable having acknowledged the fact that money was paid to him following the supply of maize to the appellant. That the court did not hold him liable even when he did not make any effort to defend the matter.

46. We agree with the appellants to the "extent" that where there are two Defendants, a trial court ought to indicate the liability that accrues to both or either of them. The lower court did not give specific orders regarding liability of the Defendants in the lower court. We held in the case of **Manda Hill Centre Limited v. Freshview Cinemas Limited CAZ Appeal No. 154 of 2019** that;

“As a trial court, the lower court had a duty to distinctly outline its verdict in relation to the rights and obligations of the parties regarding the issues that were presented before it for determination.”

47. Dr. Matibini in his book **Zambian Civil Procedure: Commentary and Cases, Volume 2**, stated, at page 1117, that;

"A judgment is the final decision of the Court resolving the dispute and determining the rights and obligations of the parties. A judgment has two functional components. First, it is a command to the party or parties at which it is directed. Second, and perhaps more importantly, it regulates the legal relationship between parties and settles their mutual rights and obligations."

48. However, the case of agency is a unique one because an agent will ordinarily bind his principal provided he acted with authority; express or apparent. The key to determining whether a principal is liable for contracts made by his agent is authority. There are three types of authority, express, implied and apparent. In the circumstances of this case, we are concerned with apparent authority. In agency relationship, the agent's action in dealing with third party will affect the legal rights of the principal. What the third party knows about the agency agreement is irrelevant to the authority to act. The authority runs from principal to agent.

49. The issue is whether or not the agent had apparent authority or whether the respondents as third parties reasonably believed from

the principal's conduct that it had in fact consented to the agent's action. Apparent authority is a manifestation of authority communicated to the third parties. It runs from principal to third party and not to the agent. It is sometimes based on the principal of *estoppel* that a person will not be allowed to deny a promise or assertion previously made where there has been detrimental reliance on it. The appellant throughout held out the 2nd Defendant as its agent.

50. It is trite that an act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interest. See **Bowsfead on Agency 13th Edition**. Though the 2nd Defendant is contended by the appellant to have acted fraudulently by not paying the suppliers, his principal is bound and is held liable. Zinto Sakala in the circumstances bound the appellant. Therefore, the appellant is liable to the Respondents.

51. Having held that the lower court properly found that Zinto Sakala had ostensible authority to act on behalf of the appellant and therefore was held out as its agent, it is trite that any actions by

an agent will bind the principal. Therefore, the appellant is liable to the respondents.

52. The appellant may recover any loss incurred from the agent's conduct arising from his conduct not authorized by the principal. The learned authors of **Halsbury's Laws of England** state at paragraph 100 that;

“Upon an agent's breach of duty the principal's remedy is, as a rule, to bring an action for damages for breach of contract.”

53. Ground 3 equally fails. We find no merit in all the grounds of appeal and accordingly dismiss it. Costs to the respondents to be taxed in default of agreement.



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M. M. Kondolo, SC
COURT OF APPEAL JUDGE



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F.M. Chishimba
COURT OF APPEAL JUDGE



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J. Z. Mulongoti
COURT OF APPEAL JUDGE