IN THE HIGH COURT FOR ZAMBIA **2012/HP/A0035**
AT THE PRICIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

LEONARD MSILI KAZILIMANI **PLAINTIFF**

AND

DEHAB TRANSPORT LIMITED **1ST RESPONDENT**

ELIAS MUNKODIA **2ND RESPONDENT**

Before the Hon. Mrs. Justice F. M. Chisanga, this.....day of..... 2014.

For the Appellant: *Ms. Chilambwe Natasha, Messrs Frazer Associates.*

For the 1st Respondent: *L. Zulu, Messrs Tembo Ngulube Ass.*

For the 2nd Respondent: *N/A*

JUDGEMENT

Cases referred to:

1. **Samson Mbavu & Others vs The People 1963-1964 ZR Reprint P. 195.**
2. **Kenmuir vs Hattingh (1974) Z.R. 162.**
3. **West vs Jones (1851) 1 Sim (N.S 205, 207).**
4. **Territorial and Auxiliary Forces Association of the County of London vs Nichols.**
5. **Low vs Bonverie (1891) 3 Ch 82 at 105.**
6. **Stock Bank Ltd vs Macmillan (1918) AC 777 at 818.**
7. **Moorgate Mercantile Co. Ltd vs Twitchings (1975) 3 ALL E.R. 314 at 323.**

Other Works Referred to:

1. **Osborns Concise Law Dictionary 8th Edition.**
2. **Chitty on Contracts General Principles 28th Edition page 338.**
3. **Cheshire & Fifoot in the Law of Contract, Sixth Edition London Butterworths 1964.**

This is an appeal against the judgment of the subordinate court as decides that the 2nd defendant was liable for the sum of K 9, 000, 000 claimed by the plaintiff. the grounds of appeal are reproduced below:

GROUND ONE:

"On ground one, it is our contention that the Learned Magistrate misdirected herself in law and fact when she did not find as a fact the nature of the representation, if any at all; whether or not such representation had any effect on the parties prior to the contract; whether or not the 1st respondent entered into the contract with the 2nd respondent on the strength of such representation."

GROUND TWO:

"The Learned Magistrate having rightly found as a fact that the appellant was not aware of the contract between the 2nd respondent and the 1st respondent, misdirected herself in law and fact when she held that the appellant was liable owing to representation that he made and against evidence to the effect that no such representation was made by the appellant."

GROUND THREE:

"The Learned Magistrate misdirected herself in both law and fact when she found that the appellant concluded the agreement between the 1st respondent and the 2nd respondent on the strength representations in the face evidence to the effect that the contract had already been concluded between the 1st respondent and the 2nd respondent prior to the 15th September, 2010."

GROUND FOUR:

"Learned Magistrate misdirected herself in both law and fact when she held that the Appellant incurred vicarious liability for the acts committed by the 2nd respondent when there was no Master Servant relationship between the 2nd respondent and appellant."

GROUND FIVE:

"The *Learned Magistrate misdirected herself in law and fact when she held that the Appellant, by having a position in the committee, he became liable to the claim by the 1st respondent when the appellant was not privy to the contract."*

Heads of argument have been filed in on behalf of the 2nd defendant. In arguing ground one, reliance is placed on the definition of 'representation' in **Osborns Concise Law Dictionary 8th Edition**, as well as **Chitty on Contracts General Principles 28th Edition page 338** where the learned author states that a representation must be a statement of fact, past or present, as distinct from a statement of opinion or of intention, of law. Further reliance is placed on the

statement by the learned authors of **Halsbury's Laws of England Volume 31, 4th Edition, paragraph 742,** that a representation is deemed to have been false and therefore a misrepresentation.

It is submitted that the nature of the representation, with an effect on the party prior to the contract, and which had induced that party to enter into the contract should have been established. That it was impossible to conclude that a party had been influenced by a misrepresentation without establishing the nature of the representation made. That the contract having been entered into on the 14th September, 2009, any representation if at all made, could not have had an effect on the parties as the contract had already been entered into, prior to the appellant being known to the 1st respondent.

Regarding ground two, it is argued that the trial magistrate erroneously imposed liability on a party not privy to a contract by virtue of representation made after a contract had already been established.

Attention is drawn to **Chitty on Contracts General Principles 28th Edition page 961** where it is stated that:

"The common law doctrine of Privity of Contract may be stated as follows: a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it".

Reliance is also placed on the statement of the law expressed by Lord Haldane in **Dunlop Pneumatic Tyre Company Limited 1915 A 847**. When he said the following:

"In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it, but it cannot be conferred on a stranger as to a contract as a right."

It is then submitted the 1st respondent should have had no locus stand regarding the appellant as he was not known to the 1st respondent after the contract had already been entered into with the 2nd respondent. It is submitted that the appellant having been unaware of the contract between the 1st and 2nd respondents, he could not have made any representation to induce the parties to enter into a contract.

Regarding ground three, it is argued that the appellant cannot reasonably be said to have concluded an agreement which he was not aware of.

On ground 4, it is submitted that the trial magistrate erred when she held that the appellant incurred vicarious liability without having established the relationship subsisting between the appellant and the 1st respondent.

It is submitted, pertaining to ground 5 that the appellant should not have been held liable merely because he was coordinator of the committee.

Heads of argument have equally been filed in on behalf of the 1st respondent. Regarding ground one, it is submitted the lower court did find the representation made by the appellant and he was bound in equity as a result. Learned counsel for the 1st respondent has gone on to state that representation is not the same as misrepresentation. The attention of the court has been drawn to the definition of the word 'representation in Black's Law Dictionary. The definition of 'Estoppel' in the said dictionary has equally been relied upon.

It is advanced that the evidence on record justified the finding made by the court below that there was a representation by the appellant, which bound him to pay the cost of delivery of gravel which was effected after the said representation. It is counsel's view that the contract for delivery of the gravel was only concluded after the 1st load was approved by the appellant. He submits that the procedure for entering into the contract was irrelevant to the question. What mattered was when offer and acceptance was done. That the offer to deliver gravel was accepted by the appellant by his approval of the first load and instruction to deliver more. The Court's attention has been drawn to order 8 and 4 Subordinate Court Rules CAP 28, and it is urged that the appeal be dismissed.

Regarding ground two, it is argued that the appellant was privy to the contract by virtue of his representation. That the 2nd respondent conditionally accepted the offer subject to the approval of the appellant which approval was done.

Pertaining to ground three, it is maintained that the contract was not concluded with the 1st respondent. Had that been the case, there would have been no need to have the first load of gravel approved by the appellant.

It is conceded that vicarious liability does not arise, but learned counsel submits that the appellant is liable on the principle of estoppel as rightly found by the trial magistrate. In response to ground five, the submission on ground one is reiterated and the court is urged to dismiss the appeal.

I have considered the submissions advanced on behalf of the parties. I propose to deal with all the grounds together with the exception of ground four which is conceded by the 1st respondent's advocate. The power reposed in an appellate court to overturn a decision of a trial court on appeal is limited. Only in prescribed circumstances can an appellate court overturn the decision of a trial court that received the evidence from witnesses, observed their demeanor and assessed their credibility. In **Samson Mbavu & Others vs The People 1963-1964 ZR Reprint P. 195**, Blagden, J.A. as he then was, reading the judgment of the Court of Appeal, reviewed a number of decisions on the point and succinctly stated the circumstances in which an appellate court could overturn the decision of a trial court. These are that it must be shown positively that:

1. *By reason of some non-direction or misdirection or otherwise, the judge erred in accepting their evidence;*
2. *It unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot*

have taken proper advantage of his having seen and heard the witnesses; or

3. *In so far as the judge has relied on manner and demeanor, that there are other circumstances which indicate that their evidence in not credible, as, for instance, if they have on some collateral matter deliberately given an untrue answer.*

In **Kenmuir vs Hattingh (1974) Z.R. 162**, the Supreme Court held that an appeal from a decision of a judge sitting alone is by way of rehearing on the record and the appellate court can make the necessary findings of fact if the findings were conclusions based on facts which were common cause or on items of real evidence, when the appellate court is in as good a position as the trial court. Further that where questions of credibility are involved an appellate court which has not had the advantage of seeing and hearing the witnesses will not interfere with the findings of fact made by the trial judge unless it is clearly shown that he has fallen into error.

In the present case, the trial magistrate held that the 2nd defendant became *"pro due to the representation that he made."* The meaning of that statement, I gather, is obviously that the 2nd defendant became liable for the sum claimed due to the representation he made. The trial magistrate found that a committee, whose coordinator was the 2nd defendant, was to pay for the loads of gravel. The 2nd defendant even witnessed delivery of the 1st load and recommended it and asked PW2 to deliver 9 more loads in the presence of the

1st defendant. This meant that the two had the necessary power of representation and he concluded the agreement on the strength of such representation, and it was up to the 2nd defendant to prove that the 1st defendant did not have any necessary power to enter into the agreement.

Cheshire & Fifoot in the Law of Contract, Sixth Edition London Butterworths 1964 define a representation as follows:

"*A representation is a statement made by one party to the other, before or at the time of contracting, with regard to some existing fact or to some past event, which is one of the causes that induces the contract..... A representation may also be inferred from conduct, as for instance where a man, without making any statements pretends to possess a status to which he is not entitled."*

The trial magistrate said the appellant was estopped from resiling from the representation he made to the 1st respondent. In **West vs Jones (1851) 1 Sim (N.S 205, 207)**, Lord Cranwell expressed himself on estoppel as follows:

"Where a party has by words or by conduct, made a representation to another, leading him to believe in the existence of a particular fact or state of facts and that other person has acted on the faith of such representation, then the party who has made the representation shall not afterwards be heard to say that the facts were not as he represented then to be."

See also **Territorial and Auxiliary Forces Association of the County of London vs Nichols** and **The Same vs Parker (1949) 1 KBD P. 35** (reported together) where Lord Cranwell's words were adverted to at page 49.

Estoppel by representation has been said to be a rule of evidence. Bowen LJ described it in the following terms:

'Estoppel is only a rule of evidence; you cannot found an action upon estoppel... (IT) ..... Is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the tenth of something which he has said.'

See **Low vs Boverie (1891) 3 Ch 82 at 105.**

This view was equally expressed in London joint **Stock Bank Ltd vs Macmillan (1918) AC 777 at 818** by Viscount Haldane when he said

"..... it is hardly a rule of what is called substantive law in the sense of declaring an immediate right of claim. It is rather a rule of evidence, capable not the less on that account of affecting gravely substantive rights."

In **Moorgate Mercantile Co. Ltd vs Twitchings (1975) 3 ALL E.R. 314 at 323**, however Lord Denning M.R. classified estoppel by representation in the following terms:

"Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and equity. It comes to this, when a man, by his words or conduct had led

another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so"

Lord Denning's classification of estoppel seems to run contrary to other dicta stating that estoppel by representation is a rule of evidence. Whether it be a rule of evidence or not, the principle established by estoppel is that when a representation is made to another by words or conduct, leading him to believe in a particular state of affairs, and the person to whom the representation is made acts on the faith of the representation, the maker of the representation is bound and cannot deny the truth of what he said.

In the case now under consideration, the trial magistrate rightly found that the appellant was not aware of the contract between the 1st defendant and the plaintiff. The evidence on record reveals that Elias Munkondia dealt with PW1 who gave him a quotation. He came back three days later and informed PW1 that he had accepted the quotation and said he needed 17 loads. 9 loads were delivered and Elias Munkondia called him to stop delivery.

According to PW2, Elias Munkondya told him about the community project. He was also told he was to deal with Mr. Kazilimani, the coordinator. He delivered one load, which was inspected by the said Mr. Kazilimani who recommended it to be the right gravel and told him the first consignment was for 9 loads for the following day.

The appellant, Leonard Kazilimani testified that Elias Munkondia who was a transporter called him to see the sample of the gravel he had delivered. Mr. Kazilimani said he never spoke to the driver of the truck, nor did he meet anyone from Dehab Transport. He only signed one delivery note. Both witnesses called on behalf of the 1st respondent confirmed that they had no discussions with the appellant prior to the 15th September 2009 when the first load was delivered. The evidence on record is that Elias Munkondya accepted the quotation given to him by Dehab Transport, and the latter began to deliver the gravel. By the time the first load was being delivered, a contract for the purchase of gravel from the 1st respondent by the 2nd respondent had already been concluded.

That being the case, it is surprising that the trial magistrate found a second contract overriding the contract already concluded between the respondents. As rightly submitted on behalf of the appellant, a representation made after conclusion of the contract could not 'induce' the 1st respondent to alter its position on the faith of the representation. On the particular facts of this case however, there is no evidence to support the finding that the appellant made a representation. In arriving at this finding, the trial magistrate failed to take advantage of the evidence led by the parties.

The minutes produced in evidence showed that Elias Munkondia offered to deliver stones and gravel as he was in that business. He was to start delivering the gravel on 14th September, 2009. The minutes equally showed that 10 loads

of gravel were required for the project. The price was K 900, 000 (old currency) per load, and the meeting was held on 12th September, 2009. According to PW2, Elias Munkondia approached him on 9th September, 2009 for a quotation for delivery of gravel, which he gave him at K 900, 000 per load.

PW1 testified that Elias Munkondia told him that he needed 17 loads. That indication clearly confirmed that it was Mr. Munkondya who was purchasing the gravel, as the minutes referred to 10 loads of gravel only. As both witnesses called on behalf of the respondent claimed to have seen the minutes, they ought to have read that Elias Munkondya offered to deliver the gravel as he was in that line of business. Therefore, although the community in question had agreed to purchase gravel, they had agreed to do so from Elias Munkondya and not anyone else. Laboring under the impression that Mr. Munkondya was delivering the gravel, the appellant, called to inspect the gravel delivered and approve it, gave his approval and signed for the one load. The purported representation that he made to DW2 is not apparent. It has equally not been shown that he knew that what he was saying was untrue and intended to induce DW2 to act on it. The trial magistrate's finding was made in the teeth of the evidence adduced before him and this court is entitled to interfere with said finding in line with the **Samson Mbavu case**.

It is undeniable that there was no privity of contract between the appellant and the 1st respondent. Liability could not be imposed on Mr. Kazilimani merely on account of examining the gravel and approving it. The enthusiasm expressed

by the 1st Respondent advocate for the trial magistrate's findings is misplaced. He argues that the offer to deliver the gravel was accepted by the appellant when he gave approval of the gravel. This argument ignores the fact that the 2nd respondent was availed a quotation on 9th September, 2009, which he accepted. At that moment, a contract for the purchase of gravel was concluded between the respondents. The appellant could not therefore be said to have been privy to the contract between the respondents, merely because he was coordinator of the committee that agreed to purchase gravel from the 2nd respondent. The submission that the 2nd respondent conditionally accepted the offer subject to the approval of the appellant is not reflective of the evidence led in the court below.

PW1 said,

"We only deliver after the quotation has been accepted."

Earlier in his evidence, PW1 had testified that the 2nd respondent came after 3 days and told him that he had accepted the quotation. And after he had delivered 10 loads, he was called by Elias who told him to stop the delivery of the gravel.

Clearly, the contract was concluded before delivery of the first load was effected, and I agree that the appellant could not have concluded an agreement he was unaware of. The trial magistrate erred in law and in fact in finding otherwise. The principle of estopppel was misapplied to the facts before the

trial court. A party who had made no representation could not be estopped as purportedly done by the court below.

On the foregoing, the appeal succeeds. The judgment of the court below against the appellant is set aside with costs to be agreed and in default to be taxed.

Dated the 24th **Day of** July **2014**

F. M. CHISANGA
HIGH COURT JUDGE