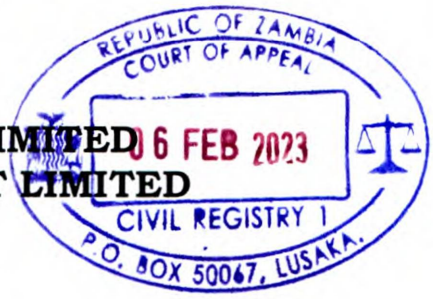
IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 241/2020**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

FIRST NATIONAL BANK ZAMBIA LIMITED **APPELLANT**

AND



LUNGA RESOURCES LIMITED **1ST RESPONDENT**
LUNGA FAMILY TRUST LIMITED **2ND RESPONDENT**
SHAWKI FAWAZ **3RD RESPONDENT**

Coram: Makungu, Ngulube and Sharpe-Phiri JJA.
On the 13th day of October, 2022 and the 6th day of February, 2023.

For the Appellant: Ms. M. Munji of Messrs Eric Silwamba, Jalasi & Linyama Legal Practitioners
For the Respondents: No appearance

JUDGMENT

MAKUNGU JA, delivered the Judgment of the Court.

Cases referred to:

1. *MTN Zambia Limited v. Investrust Bank PLC SCZ Appeal No. 155 of 2015*
2. *Clare Akombelwa Macwangi, Katongo Bwalya v. The Attorney General CAZ Appeal no. 108/2019*
3. *North Western Energy Co. v. Energy Regulation Board (2011) Vol. 2 ZR 513*
4. *John Mugala and Kenneth Kabenga v. The Attorney General (1988-1989) ZR 171 (SC)*
5. *National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo SCZ Judgment No. 79 of 2001*

6. *Felix Mutumwa (as administrator of the Estate of late Dr. Kabeleka Konoso) v. Yousuf Dasu and Union Bank Zambia (Z) Ltd (in Liquidation) SCZ Appeal No. 86 of 2003*
7. *Nkhata & 4 Others v. The Attorney General (1966) Z.R 124*
8. *Dangote Industries Zambia Limited v. Enfin Limited CAZ No. 53 of 2020*
9. *Zambia Revenue Authority v. Nasando Isikando & 3525 SCZ Appeal No. 26/ 2013*
10. *Balkanbank v. Tailer & Others (1995) 2 ALL ER 904*
11. *Afrope Zambia Limited v. Chate & Others SCZ Appeal No.160/2013*

Other Authorities Referred to:

1. *Atkins Court Forms, Volume 23/2011*
2. *Chitty on Contracts, General Principles, Volume 1, 29th Edition, London, Sweet & Maxwell.*

1.0 INTRODUCTION

1.1 This appeal is against the decision of Chitabo J, of the High Court dated 16th April, 2020 upholding the respondents' claim that a material term was omitted from the Consent Judgment signed under cause No. 2017/HPC/0339 due to mistake or misrepresentation. The Court then set aside clause three of the said judgment, which was the execution clause, and ordered that the matter returns to the original Court for computation of the principal amounts owing with interest.

2.0 BACKGROUND

2.1 The initial cause arose out of the respondents having defaulted on various facilities they obtained from the appellant. As a result of the alleged default, the appellant commenced an action in the Commercial Court under cause no. 2017/ HPC/ 0339 against all the respondents herein. The parties eventually settled the matter by way of Consent Judgment which was signed and sealed by the Court on 11th September, 2017.

2.2 On 1st November, 2018 the respondents commenced an action in the High Court (on the General List) against the appellant by way of writ of summons and statement of claim seeking the following reliefs:

(i) *A declaration that the consent judgment entered into between the plaintiffs and the defendant through their respective advocates in cause No. 2017/HPC/0339 on or about the 11th of September, 2017 for settlement of US$1, 494,676.30 allegedly owed by the plaintiffs as at 5th July, 2017 was executed under fundamental mistake, misrepresentation and misapprehension.*

(ii) *A consequential declaration that the said consent judgment is legally null and void and thus incapable of being enforced.*

(iii) *An order setting aside the consent judgment and directing a full hearing of the principal action.*

(iv) *An order staying enforcement and /or execution of the consent judgment.*

(v) *Any other relief the court may deem fit and costs.*

3.0 EVIDENCE ADDUCED BY THE PLAINTIFFS (NOW RESPONDENTS)

3.1 Under the consent judgment in issue, for the settlement of the sum of USS$ 1,494,676.30 allegedly owed by the respondent to the appellant as at 5th July, 2017, it was agreed inter-alia that the respondents would liquidate the judgment sum including interest thereon, by making payments of US$ 70,000.00 on or before the 15th day of each month, starting on 15th September, 2017 until the judgment sum is paid up.

3.2 That the parties further agreed that owing to the nature of the respondents' business of small-scale mining, monthly installment payments would be suspended for the rainy season months of November, December, January and February as the business would be adversely affected by the weather. The

respondents then proceeded to make an initial payment of US$ 100,000.00.

3.3 It was averred that upon receipt of the sealed copy of the consent judgment a few days after it was endorsed by the Court, the respondents, through the 3rd respondent wrote to their advocates Messrs BCM Practitioners complaining that the clause indicating suspension of monthly payments during the rainy season was omitted from the Consent Judgment and that the same should be included. Accordingly, Messrs BCM Legal Practitioners wrote a letter dated 30th September, 2017 to the appellant to this effect.

3.4 After several correspondences and meetings, the appellant made an oral undertaking that during the rainy season, payment of monthly instalments would be suspended and hence did not request for payment during that period as shown in the respondents' bank statement.

3.5 The respondents paid monthly instalments after the 2017/18 rainy season. As at 30th July, 2018, a total sum of US$ 585,307.00 had been paid, leaving a balance of US$ 909,396.00.

3.6 That on or about 14th August, 2018 the appellant wrote to the respondents, stating that they were in breach of the Consent

Judgment and foreclosure proceedings for the sum of US$ 274,693.00 would be instituted.

3.7 The respondents denied owing the amount claimed and stated that the appellant's threat was prompted by a flawed and /or misrepresented Consent Judgment. That from 11th September, 2017 to September, 2018 instalment payments of US$ 70,000. 00 would ordinarily amount to US$ 840,000.00 and if the four agreed rainy season months were excluded, the total expected to be paid as at the date of the suit would have been US$ 560,000 and not the US$1,494,676.30 as claimed.

3.8 According to the respondents, they had already paid a total sum of USD 585,307.00. It was their position that they had made payments for 8 months and therefore complied with the agreed terms of paying US$ 70,000.00 per month, excluding the said three months of the rainy season that ought to have been excluded.

3.9 The respondents further stated that they had been taken aback by a statement of account from the appellant indicating an outstanding amount of US$1,289,642.26 instead of US$909, 396.00 which was an indication that the appellant had not taken

into account the total sum of US$ 585,307.00 that had already been paid.

3.10 That in the premises, the demands by the appellant were misconceived as the respondents did not breach the Consent Judgment, and the same should be varied and/or rectified to reflect what the parties had actually agreed on or it should be set aside altogether as the appellant will use unconscionable terms of the misrepresented Consent Judgment to the detriment of the respondents.

4.0 EVIDENCE ADDUCED BY THE DEFENDANT (NOW APPELLANT)

4.1 The appellant averred that at no point did it agree to deviate from the terms of the Consent Judgment to allow the respondents to suspend payment of the agreed monthly instalments during the rainy season; neither did it agree that the respondents would pay less than the agreed instalment payments in the rainy season. That at no time before the proceedings did the respondents raise the issue of the Consent Judgment not correctly reflecting the party's intentions.

4.2 That the respondents made the first payment of US$100,000.00 on 14th September, 2017, after which they struggled to meet the

agreed monthly payment of US$70,000.00. Because of these challenges, they requested the appellant to allow them to pay the instalments due in January, February and March, 2018 later, but they did not pay.

4.3 Upon receipt of the letter of 12th January, 2018 the appellant's management composed of witnesses (Euphrase M.L Kombe, Biggie Banda and Mandizya Daka) convened a meeting with the 3rd respondent on 1st February, 2018 to indulge the respondents. The rationale for the indulgence was that the respondents experienced low production during the rainy season. It was thus verbally agreed that the 3rd respondent would pay US$50,000.00 every 2 weeks. The indulgence or extension was supposed to be from March, 2018 to May, 2018. During these months, the respondents made some payments but not in accordance with the Consent Judgment. The appellant admitted having written to the respondents on 14th August, 2018 regarding their breach of the Consent Order by failing to settle the monthly instalments which had at that point accumulated to arrears of US$ 274,693.00. In the same letter notice to foreclose was given.

5.0 DECISION OF THE COURT BELOW

5.1 Upon considering the evidence on record, the learned trial Judge made the following findings of fact:

i) That it is common cause that the parties entered into a Consent Judgment on 11th September, 2017.

ii) That accordingly, the respondents were to pay a sum of US$ 100,000.00 on or before the 19th September, 2017 and thereafter monthly instalments of US$ 70,000.00 commencing on the 15th of the following month until the full judgment sum is paid up.

iii) That in default of payment of any monthly instalments, the appellant would be at liberty to foreclose, take possession and sell the mortgaged property being stand number 465, Kitwe, without further court order.

iv) That in the event that the sale of the mortgaged property did not extinguish the debt, the 3rd respondent would be personally liable for the balance of the judgment sum as a personal guarantor of the debt.

v) That the respondents were at liberty to accelerate the liquidation of the judgment sum with a sum of

K3,000.00 as costs to the appellant in cause 2017/HPC/0339.

5.2 The trial Judge further found that there was a mistake for the following reasons:

i) The issue of non-payment of monthly instalments during the rainy season was discussed by the parties but not incorporated in the Consent Judgment.

ii) The admission by the appellant in document number 55 that the customer was compliant with the consent order was construed in favour of the respondents using the *contra proferentem* rule.

iii) The fact that the appellant did not foreclose or give notice of default when payments were not remitted, fortified the respondents' view that they had a legitimate expectation that the clause of nonpayment during the rainy season was indeed agreed on by the parties.

5.3 Having taken the view that the mistake could be rectified, the Judge went on to make the following orders:

i) The Consent Judgment in the sum of US$ 1,494,676. 30 as at 15th July, 2017 stands.

ii) The term granting the respondents not to remit payments during the rainy season was not incorporated, which subsequently led to the dispute culminating in the appellant to issue default notice. Therefore, clause 3 of the consent judgment, which was the default term was set aside.

iii) That the three months amnesty period as agreed by the parties stands as the respondents acted on it.

5.4 The Judge further ordered that in default of agreement, the parties should return to the original court, taking into account the payments made by the respondents in the sum of US$ 585, 307.30 and admitted as received by the appellant as at 30th July, 2018. It was held that the balance owing as at that date was US$ 909,369.30.

5.5 Each party was ordered to bear its own cost.

6.0 GROUNDS OF APPEAL

6.1 The appellant has advanced 7 grounds of appeal framed as follows:

1. The court below erred in law and fact when it found and concluded at page J27 of the judgment that the admission by the appellant in document number 55 of

the defendant's bundle of documents that the 1st and 2nd respondents were compliant with the Consent Judgment of 11th September, 2017 would be construed in favour of the respondents contrary to the facts and evidence on the record.

2. ***The court below erred in law and fact when it based its decision on the contra-proferentem rule when the consent judgment was drafted and settled by the parties thereto.***
3. ***The court below misdirected itself in law and fact when it held at page J28 of the judgment that the appellant not foreclosing or giving notice of default when the payments were not remitted fortified the respondents' view that, there was a legitimate expectation that the clause on non-payment during the rainy season was indeed agreed upon by the parties, when there was evidence on record to the effect that the appellant did issue a demand notice to the respondents contrary to the finding of the court.***
4. ***The court below misdirected itself when it held on page J29 of the judgment that the term granting the***

respondents permission not to remit payments during the rainy season was not incorporated in the consent judgment of 11th September, 2017 which subsequently led to the dispute between the parties culminating in the appellant issuing a default notice but then held that clause 3 of the consent judgment, which is the default clause, be set aside when this was neither a fact in issue to be determined by the court nor was the court entitled to interfere with the contents of the Consent Judgment.

5. ***The court below erred in law and fact when it set aside clause 3 of the Consent Judgment of 11th September, 2017 as doing so left the appellant with no remedy or avenue of enforcing the said consent judgment in the event of default, failure or neglect by the respondents to settle the judgment debt.***
6. ***The court below erred in law and fact when it held at J30 that the terms of the repayment of the balance due on the judgment debt and interest be determined by the original court in default of agreement by the parties when the parties had already settled a***

consent judgment in which the terms of payment were determined.

7. ***Having misdirected itself on the issues raised in grounds 1, 2, 3, 4, 5 and 6 above, the court below erred in law and fact when it held that each party bears its own costs.***

7.0 APPELLANT'S HEADS OF ARGUMENT

7.1 The appellant relied on the heads of argument filed on 26th November, 2020. The arguments under the grounds of appeal are seemingly repetitive. However, the following is the summary of the same.

7.2 Grounds 1 and 2 were argued together as follows: that prior to the Consent Order under cause no. 2017/HPC/0339, the respondents, by letter dated 14th August, 2017, proposed the terms of settlement to the appellant. This letter did not contain any suggestion about an amnesty period during the rainy season. The settlement was agreed by the 3rd respondent and advocates for both the respondents and the appellant.

7.3 Counsel pointed out that during these discussions there was no mention that the respondent requested for amnesty of 3 months

during the rainy season in which they would not make payments towards liquidating the debt. That even if they had suggested it, the matter had to be accepted by the appellant.

7.4 That the respondents only mentioned the amnesty of the rainy season in the letter of 12th January, 2018. In February, 2018 the 3rd respondent met the appellant's officials and asked for permission to comply with their obligations under the Consent Judgment by May, 2018 which the appellant granted. That the indulgence was based on the fact that the respondents had low production during the rainy season. During that period, the respondents had proposed to be paying US$50,000.00 every two weeks and part of that money would go towards the vehicle and asset facility.

7.5 That at no time were the respondents allowed to stop making payments, and this is confirmed by the 3rd respondent, who testified that payments were made during the rainy season.

7.6 Counsel made reference to the bank statement at pages 327 to 330 of the record of appeal, showing the payments made by the respondents. He pointed out that the respondents continued to default in their payments as they made payments of less than US$ 50,000 fortnightly. That after May, 2018 the respondents

continued to default as can be seen by the payment US$ 59,570 which is less than the US$ 70,000.00 agreed upon in the Consent Judgment.

7.7 Counsel contended that after the meeting in February, 2018 there was no agreement to vary the Consent Judgment or veer from its terms, neither did the parties suspend payment during the rainy season. That the Court below erred when it adjudged that the admission by the appellant in document number 55 at page 202 of the record of appeal, that the 1st and 2nd respondent were compliant with the Consent Judgment of 11th September, 2017 would be construed in favour of the respondents as the finding was contrary to the evidence on record. The Court below was called upon to determine whether by reason of mistake or misrepresentation, the Consent Judgment ought to be set aside.

7.8 Therefore, the Court erred when it disregarded the evidence on record and decided to use the appellant's assertions at page 202 against the appellant.

7.9 Counsel went on to submit that a Consent Judgment is governed by ordinary principles of contract between the parties. Reference was made to **Atkins Court Forms, Volume 23/2011 at page 45 of paragraph 48** which states that: ***Consent order***

must be interpreted as a contract; any interpretation must be given a purposive construction.

7.10 Counsel contended that the lower court was only called upon to determine whether the parties had neglected to add a clause in the Consent Judgment and not to interpret any extrinsic evidence against the appellant.

7.11 Counsel further argued that, the Court fell into grave error when it applied the *contra proferentem rule* against the appellant. Reference was made to the authors of ***Chitty on Contracts*** on the *contra proferentem rule*, where it was stated that:

> ***"This rule of construction embraces two differing, but closely related principles. First since the party seeking to rely upon an exemption clause bears the burden of proving that the case falls within its provisions, any doubt or ambiguity will be resolved against him and in favour of the other party. Secondly, in the case of any other written document in situations of ambiguity the words of the document are to be construed strongly against the party who made the document and who now seeks to rely on them."***

7.12 As regards the first principle above, counsel submitted that the appellant was not seeking to rely on a clause to exclude it from liability because the party that was liable was the respondent.

7.13 On the second principle, it was submitted that the Consent Judgment was not drafted by the appellant and it had no ambiguous words or phrases in it. Reliance was placed on the case of **MTN Zambia Limited v. Investrust Bank PLC**,[1] in support of the proposition that only when there is ambiguity in a contract, is the *contra preferentem rule* applied as a last resort. Counsel stated that the 1st and 2nd grounds of appeal therefore have merit.

7.14 On ground 3, counsel submitted that it is not true that the respondents legitimately expected not to pay monies during the rainy seasons as this position had never been agreed upon by the parties.

7.15 Citing the cases of **Clare Akombelwa Macwangi, Katongo Bwalya v. The attorney General**[2] and **Western Energy Co v. Energy Regulation Board,**[3] counsel submitted that for legitimate expectation to have existed between the parties, there should have been a clear or unambiguous representation by the Bank to grant payment breaks to the respondents during the

rainy season. The evidence shows that there was no such representation by the appellant.

7.16 It was further submitted that the only payment made in accordance with the Consent Judgment was the first payment of US$100,000.00 in September, 2017.

7.17 Grounds 4 and 5 were argued together as follows: that the Court was not called upon to interfere with the terms of the Consent Judgment but rather to determine whether the Consent Judgment could be set aside for mistake or misrepresentation. In support of this submission, counsel relied on the case of **John Mugala and Kenneth Kabenga v. The Attorney General.**[4]

7.18 It was further submitted that as the Court did not set aside the Consent Judgment, it ought to have maintained the sanctity of the terms therein and not interfere with clause 3 thereof. We were referred to the case of **National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo** [5] where the Supreme Court held as follows:

> ***"It is trite law that once the parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contract and that***

the role of the court is to give effect to the contract when one party has breached it by respecting, upholding and enforcing the contract."

7.19 On the strength of the above authority, it was submitted that the Court did not have jurisdiction to set aside clause 3 of the Consent Judgment, which was the execution clause, because without it, the appellant would not be able to levy execution against the respondents in case of default. Further that the respondents have continued to default in payment of the debt.

7.20 In support of ground 6, counsel submitted that the parties had already agreed on the terms of payment and there was no need for them to discuss the same again.

7.21 Counsel contended that it is not possible for the matter to revert to the original court in default of agreement of the terms because there is already a Consent Judgment which had not been set aside. Further, that High Court Judges have the same jurisdiction and, as such, one court cannot order another to take action on the same matter.

7.22 The gist of the arguments in support of ground 7 is that the Court erred when it ordered each party to bear its own costs

when it did not settle the issues which it was called upon to settle. That, this is a case in which this honourable Court can interfere with the exercise of the said discretion as the Court did not take into account the evidence before it.

8.0 RESPONDENTS' HEAD'S ARGUMENT

8.1 We note that the respondents did not file any heads of argument and did not attend Court on the hearing of the appeal.

9.0 DECISION OF THIS COURT

9.1 We have considered the submissions by counsel for the appellant as well as the evidence on record.

9.2 As regards ground 1, on the issue of interpretation of document number 55 in the defendant's bundle of documents, in which the appellant stated that the Consent Judgment was complied with by the respondents and which the lower court construed in favour of the respondents, we observe that the real dispute before Court was not whether the Consent Judgment was complied with, but whether the said judgment could be varied or set aside for the alleged omission of the clause on pausing instalment payments for 3 or 4 months during the rainy season. Since, a consent order or judgment is considered as a contract,

it must be interpreted as such (see **Atkins Court Forms, Volume 23/2011** at pages 45 of paragraph 48). In the case of **Felix Mutumwa (as administrator of the Estate of the late Dr. Kabeleka Konoso) v. Yousuf Dasu and Union Bank Zambia Limited[6] (in Liquidation)** the Supreme Court guided that a Consent Judgment can only possibly be set aside upon proper grounds on which the validity of any contract could be impugned such as fraud or mistake.

9.3 Therefore, the learned trial Judge ought to have directed his mind to the question whether the Consent Judgment was made in circumstances upon which its validity could be impugned.

9.4 We hold that the lower Court's finding that the Consent Judgment was complied with was contrary to the evidence adduced on behalf of the appellant, which clearly showed that the respondents had defaulted.

9.5 The lower court, in dealing with the issue whether the Consent Judgment was complied with, lost focus of the real issue before it which is mentioned above in paragraph 9.2. We therefore set aside the finding that the Consent Judgment was complied with. This is in accordance with the case of **Nkhata and Four Others v. The Attorney General**,[7] which allows us to interfere

with findings of fact by a trial Judge, upon being 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 view of the evidence, no trial court acting correctly could reasonably make."*

9.6 Ground one therefore succeeds.

9.7 In ground 2, the appellant alleges that the court used the *contra preferentem* rule to interpret the Consent Judgment but in actual fact this rule was only used to interpret document number 55 which is now at page 202 of the record of appeal. The document states *inter alia* that:

"(4) *Customer made repayments in line with the Consent Order terms until mid-February, 2018. This was at the helm of the rain season as such mining activities are at a halt and the business experienced reduced inflows. Thus, the customer made a request to clear the arrears for three months of February to April, 2018 by the end of May, 2018.*

(5) Payments were received accordingly but at the beginning of June, 2018 there was an accident that led to some lives being lost at the slug dump where the customer operates as such the Government had ordered immediate closure of the site until

adequate safety measures were put in place. The closure of the slug dump hampered the customers' cash inflows hence causing a default on the agreed relief structure.

(7) Customer has accrued arrears of about US$ 303, 600.00 as at 15th August, 2018 due to reduced business activity. The bank within the month of August proceeded to issue letter of default giving the customer seven (7) days to clear the arrears failure to which the repossession and sale of the asset under the FNB debt would be the next course of action for the Bank. The customer made a payment of USD 50,000.00 which was applied to the VAF facility in May, 2018, nevertheless, a final demand has since been issued pending repossession of the assets.

(8) The customer only acknowledged receipt of the letter of default on 24th August, 2018 as they were out of the country at the time the letter was issued."

9.8 Applying the case of **MTN Zambia Limited v. Investrust Bank PLC** *supra,* we hold that the *contra preferentem* rule is inapplicable as the said document is very clear. For the foregoing reasons, ground two has merit.

9.9 Turning to ground 3, on the finding by the lower Court that the appellant having not foreclosed or given notice of default earlier fortified the respondents' submission that they legitimately expected that the clause on non- payment during the rainy season was indeed agreed upon by the parties. In the case of **North Western Co. v. Energy Regulation Board**[3] it was held that:

> ***"Legitimate expectation arises where a decision maker has led someone to believe that they will receive or retain a benefit or advantage. The doctrine of legitimate expectation derives its justification from the principle of allowing the individual to rely on assurance given and to promote certainty and consistent administration."***

9.10 In *casu*, the evidence on record is to the effect that a demand notice was issued to the respondents for US$ 274,693.00 on 14th August, 2018. There was no basis for the holding that the appellant should have given notice of foreclosure earlier and there is no time limit as to when a lender can decide to give default notice or to foreclose. Therefore the lower Court

misdirected itself when it found that "there was legitimate expectation because the appellant should have foreclosed earlier." This finding is therefore set aside.

9.11 The complaint about the clause on not paying instalments during the rainy season being omitted from the Consent Judgment was made by the respondents through their advocates only after the respondents became aware of the sealed Consent Judgment.

9.12 Since there was no evidence of mutual consent about the addition of the clause complained of, our firm view is that most likely, the respondents were only given an indulgence during the rainy season as claimed by the appellant because the evidence shows that, the respondents were making payments during the rainy season albeit less than the amounts mentioned in the Consent Judgment. We apply the cases of **Clare Akombelwa Macwangi, Katongo Bwalya v. The Attorney General**[2] and **North Western Co. v. Energy Regulation Board**[3] to the facts of matter in hand and hold that the respondents had no legitimate expectation that they would retain the benefit of not paying instalments towards the debt during the rainy season because there was no clear representation made by the

appellant before or after the Consent Judgment to the respondents that a moratorium would be given to them every rainy season. It follows that the learned Judge erred when he found that there was legitimate expectation on the part of the respondents that they would not be paying the debt every rainy season. Ground three therefore has merit.

9.13 We shall deal with grounds 4 and 5 together as they both relate to the issue of the trial Judge interfering with clause 3 of the Consent Judgment. As regards interpretation of agreements, we re-affirm what we stated in the case of **Dangote Industries Zambia Limited v. Enfin Limited,**[8] that:

> ***"Where an agreement is before Court for interpretation, the role of the Court is to merely ensure that the manifest intention of the parties triumphs.... According to the learned author of the book "Interpretation of Documents,"***
>
> ***"The object of interpretation is to ascertain and declare the intention of the party or parties from the words used in the document or documents under consideration...it is not the function of the Court to ascertain that intention otherwise than***

from those words in the context in which they appear"

The learned author further cites the case of Simpson v. Foxon (1907) where the Court held that:

"What a man intends and the expression of his intention are two different things. He is bound, and those who take after him are bound, by his expressed intention."

9.14 In light of the above authority, the duty of the lower Court was to ensure the manifest intentions of the parties as per consent order triumph. If the lower Court was satisfied that the document did not reveal the intentions of the parties, it should have set aside the Consent Judgment upon any of the circumstances upon which a contract can be impugned, such as mistake or fraud. It is not possible that the respondents' advocates signed the Consent Judgment blindly. The advocates who signed the judgment did not even stand as witnesses. Also there was no cogent evidence that the issue of moratorium during the rainy season was discussed beforehand. In fact, the respondents defaulted even after the rainy season. Therefore, the respondents had failed to prove on the balance of

probabilities that there was an omission made in the Consent Judgment. Under the circumstances, the parties are bound by the terms and conditions of the Consent Judgment without any alterations as their intentions were clearly expressed therein.

9.15 Clause 3 of the Consent Judgment reads:

(iii) "D*efault in settling any one of the monthly repayments as ordered in clause 2 above shall entitle the applicant to be at liberty to foreclose, take possession of and sell the mortgaged property herein known as stand no. 4665, Kitwe, without further order of the court.*"

9.16 None of the parties had complained about the preceding clause and so we take it that there was nothing wrong with it. The lower Court therefore erred when it decided to delete the clause on its own motion. There was no need to set aside that clause. Consequently, grounds 4 and 5 succeed.

9.17 In ground 6, the appellant claims that the Court erred when it held that the terms of repayment of the balance due on the judgment debt and interest be determined by the original Court as the parties had already settled a Consent Judgment in which the terms of repayment were determined.

9.18 In the case of **Zambia Revenue Authority v. Nasando Isikando & 3525 Others**[9] the Supreme Court endorsed the case of **Balkan Bank v. Taher & Others**[10] where it was held that:

"When a Judge approves a consent order it takes effect as if made by him after argument."

9.19 In the same case, the Supreme Court went on to state that:

"Essentially, although a consent order arises out of an agreement and terms arrived at by the parties themselves, and may even evidence a contract with or without obligation, it is a judgment or order made by or in the name of the court and has all the consequences of a court judgment or order (see Order 42/5A/4 RSC White Book 1999 edition). The parties must therefore accept all its implications.

Further that it is trite law that an action comes to an end when it is dismissed or where a judgment is given in favour of the plaintiff, so far as deciding the rights of parties is concerned. The action is not at an end so far as regards the enforcement."

9.20 In light of the above authority, we take the view that, since the Consent Judgment was not totally set aside, the lower Court was on firm ground to refer issues of enforcement to the original Court that endorsed the Consent Judgment.

9.21 As regards the issue of costs in ground 7, it is trite that costs are awarded in the discretion of the court, such discretion is however to be exercised judiciously. Costs usually follow the event as per the case of **Afrope Zambia v. Chate.**[11]

9.22 The respondents had purportedly succeeded in their action before the lower Court and yet there was still an outstanding balance. We hold that the costs order was erroneous because the judgment should not have been made in favour of the respondents but the appellant as there was no basis for varying or setting aside the Consent Judgment. The appellant had proved that the respondents were defaulters who had already been given notice of default. For the foregoing reasons, the costs order cannot stand and we hereby quash it.

10.0 CONCLUSION

10.1 Finally, the appeal succeeds and so the Consent Judgment stands in its original form. This entails that the appellant is at

liberty to enforce the Consent Judgment. Any issues that may arise from execution will be resolved by the lower Court. We award costs of the appeal and costs in the court below to the appellant. The same may be taxed if not agreed upon between the parties.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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P.C.M. NGULUBE
COURT OF APPEAL JUDGE

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N.A. SHARPE-PHIRI
COURT OF APPEAL JUDGE