

**IN THE HIGH COURT OF ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(Commercial Jurisdiction)**

**2009/HPC/651**

**BETWEEN:**

**MTN ZAMBIA LIMITED**

**PLAINTIFF**

**AND**

**OLYMPIC MILLING COMPANY LIMITED**

**DEFENDANT**

**Before the Hon. Mr. Justice A.M. Wood in Chambers this 9<sup>th</sup> day of May 2011**

**For the Plaintiff: Mr. L. Mwanabo of Messrs. Lewis Nathan Advocates**

**For the Defendant: Mr. S. Malama SC of Messrs. Jacques & Partners**

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**JUDGMENT**

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**Works referred to:**

- 1. *Osborn's Concise Law Dictionary 8<sup>th</sup> Edition, Page 87\_***
- 2. *Chitty on Contracts, 27<sup>th</sup> Edition, Paragraph 6-019***
- 3. *Bullen & Leak 12<sup>th</sup> Edition, Page 449***
- 4. *Halsbury's Laws of England Volume 31, 4<sup>th</sup> Edition, Paragraphs 1001, 1005, 1091 and 1092***
- 5. *Chitty on Contracts General Principles 25<sup>th</sup> Edition, paragraph 394***
- 6. *Clerk & Lindsell on Torts 17<sup>th</sup> Edition, Paragraph 14.40***

**Legislation referred to:**

- 1. *The Misrepresentation Act Cap. 69 Section 3(1)***
- 2. *The Judgment Act, Cap. 81***
- 3. *The High Court Act Cap. 27 - Order 36 rule 8 of the High Court Rules***
- 4. *The Companies Act Cap. 388 Section 308***

By a writ of summons the Plaintiff is claiming the following from the Defendant:

1. Payment of the sum of K2,366,088,000.00 pursuant to the Defendant's representation and commitment to pay the said amount.
2. Payment of the sum of K1,834,288,295.50 being further loss sustained by the Plaintiff after being induced by the Defendant to provide further services to Carpe Diem Limited.
3. Interest, any other relief and costs.

On or about 14<sup>th</sup> April, 2004, the Plaintiff entered into a Teleshop Franchise Agreement with Carpe Diem Limited "Carpe Diem" whereby Carpe Diem was required to pay royalty fees and held a trading account with the Plaintiff by virtue of which various stocks were supplied to Carpe Diem.

By June 2007 Carpe Diem's indebtedness to the Plaintiff stood at K2,366,088,000.00 prompting the Plaintiff to issue a letter of demand with a view to taking legal action. In order to induce the Plaintiff not to take legal action against Carpe Diem, the Defendant made a representation to the Plaintiff by letter dated 14<sup>th</sup> July, 2007 with the following particulars:

1. That there were in the immediate past, at that time, significant changes in the ownership and management of Carpe Diem Limited which was to facilitate the future business of Carpe Diem Limited and enhance its relationship with suppliers.
2. That the Defendant had acquired 65% shareholding in Carpe Diem Limited making Carpe Diem an integral part of the Defendant and that the Defendant was committed to resolving Carpe Diem's account with the Plaintiff without resorting to court process.
3. That the Defendant was committed to resolution and payment of Carpe Diem's debt in accordance with the terms and conditions of the payment arrangement between Carpe Diem and the Plaintiff.

4. That the Defendant would procure that Carpe Diem strictly adhered to the agreed payment plan and that the Defendant would use its best endeavours to ensure that Carpe Diem's obligations were met outside any force majeure.
5. The Defendant requested the Plaintiff to give Carpe Diem up to 30<sup>th</sup> September, 2007 within which to raise an acceptable bank guarantee in favour of the Plaintiff.
6. The Defendant advised the Plaintiff that Carpe Diem and itself were in the process of executing a business turnaround strategy that was believed to be the best form of guarantee for both the Plaintiff and the Defendant.

The Plaintiff discovered that in fact most of the representations were not true because the Defendant was not actually committed to the resolution and payment of the debt in issue as no measures were put in place to meet the payment arrangement and even the acquisition of the shares was not even properly formalized at the Patents and Companies Registration Office. The Defendant never procured or ensured that Carpe Diem agreed to the payment plan and it never ensured that Carpe Diem obtained the necessary bank guarantee by 30<sup>th</sup> September, 2009. The Defendant never executed any business turnaround strategy to ensure that Carpe Diem's business was brought to a state where it could meet payments to the Plaintiff.

The Defendant knew that Carpe Diem could not at that time be entrusted with more goods and further extended payment terms and at the same time the Defendant too was not in a position to ensure that the debt was paid and did not put in place measures to ensure that the Plaintiff's debt was paid.

As a result of the representation and the Defendant's pledged commitment to payment of the debt, the Defendant induced the Plaintiff not to take immediate legal proceedings against Carpe Diem and even advanced more

goods and services to Carpe Diem thereby increasing Carpe Diem's indebtedness up to the sum of K4,200,376,275.50 thereby leaving the Plaintiff exposed to the loss in issue as it could not recover this sum even after obtaining judgment in a separate cause and levying execution.

The Defendant in its amended defence filed on 23<sup>rd</sup> February, 2010, denied that it made any representations and demanded the particulars of the representation. If any representation was made (which was denied), it was made by an entity described in the letter of 14<sup>th</sup> July, 2007 as Olympic Milling Group or 'OMG'. As such, the Defendant denied that there was any debt owing to the Plaintiff.

In the alternative, if the Defendant was a proper party it denied that it was a major shareholder in Carpe Diem. It denied that it made any representation as alleged in paragraph 5 of the amended statement of claim. It denied that it induced the Plaintiff not to take any immediate legal action. The Plaintiff took no immediate legal action not because of the representation but because Carpe Diem and the Plaintiff were engaged in a resolution of disputes of a fundamental nature relating to the trading accounts between the Plaintiff and Carpe Diem. Further, the Plaintiff needed the business opportunities of Carpe diem and any such legal action would only have disrupted such business opportunities.

When the Plaintiff and Carpe Diem failed to resolve the fundamental disputes, the Plaintiff did not immediately take legal action which it had threatened to do but instead it cancelled the agreement. If there was any representation, then it was spent since the Plaintiff elected to give notice of cessation of the agreement. In the alternative and additionally, the representation as pleaded in paragraph 5 of the statement of claim was not such as would have induced the Plaintiff not to take immediate legal action against Carpe Diem and therefore that the Plaintiff merely slept on its rights.

If there was any actionable representation, the Defendant at the time when any alleged representation was made, honestly believed in what it stated and especially that it was at a time when negotiations to resolve the fundamental disputes were in progress and that both Carpe Diem and the Plaintiff honestly believed in finding a solution and move forward the business. If the Plaintiff suffered loss, it was due to the fact that Carpe Diem was unable to continue with its business and not because of the alleged representation. In its reply, the plaintiff stated that the Defendant referred to itself as the new majority shareholders of Carpe diem. The Defendant was indebted to the Plaintiff by virtue of its representations and pledged commitment to liquidate Carpe Diem's debt. Carpe Diem had already gone into liquidation when the Plaintiff commenced legal proceedings. The Plaintiff only agreed to engage in negotiations to resolve the dispute in question because of the Defendant's assured commitment to resolving the dispute and paying the Plaintiff's debt and that the Plaintiff was within its rights to cancel the agreement when the negotiations failed.

Kelvin Ndhlovu gave evidence on behalf of the Plaintiff. He stated in his witness statement that the Plaintiff is a telecommunications company which provided phone services in the territory of Zambia. It engages business partners to distribute products such as handsets, sim cards and recharge cards.

By virtue of a franchise agreement entered into between the Plaintiff and Carpe Diem and the various stocks supplied to Carpe Diem, the indebtedness of Carpe Diem to the Plaintiff by 25<sup>th</sup> June, 2007 had reached K2,366,088,000.00. In response to a letter of demand, Carpe Diem wrote a letter dated 27<sup>th</sup> June, 2007 to the Plaintiff showing that the Defendant had acquired 65% shares in Carpe Diem and that the Defendant was committed to the resolution of the matter concerning the debt in issue.

On 14<sup>th</sup> July, 2007 the Defendant wrote a letter confirming the contents of Carpe Diem's letter of 27<sup>th</sup> June, 2007. The Defendant's letter was received in good faith and the Plaintiff believed each and every word in the letter as accurate and to be a true reflection of the situation on the ground as what was written was a clear representation on which the Plaintiff relied to continue dealing with Carpe diem and not to take immediate court action. As a result of the representations, the Plaintiff was made to believe that with the involvement of the Defendant in the affairs of Carpe Diem everything was under control especially since the Defendant was seen as a big name in business circles hence the relaxation in taking immediate court action. That despite the wonderful representation by the Defendants, the Plaintiff was not paid the outstanding amount and its exposure was even increased after advancing Carpe Diem with more stock. By the time the Plaintiff took Carpe Diem to court and obtained judgment it transpired that Carpe Diem was just a shell and the Defendant did not put in place the measures it promised the Plaintiff as payments were not made and no proper business structures were found on the ground.

After commencement of the court action the shareholders of Carpe Diem quickly put the company under voluntary liquidation in total disregard of the court proceedings. As a result of the incorrect representations, the Plaintiff lost K4,200,376,295.50.

In addition to his witness statement, he filed an additional statement in which he stated that he requested the Plaintiff and advocates to conduct a search at the Patents and Companies Registration Office (PACRO) to establish whether the company known as Olympic Milling Group, which the Defendant claimed made the representations which are the subject of this action, is registered as such at the Companies Registry. A letter from the Patent and Companies Registration Office dated 23<sup>rd</sup> July, 2010 showed that there was no such company registered there.

When he was cross examined, he said there was only one franchise agreement which was entered into in 2004 between Telecel and Carpe Diem. Telecel changed its name to MTN Zambia Limited. When asked whether there was a franchise agreement between the Plaintiff and the Defendant he said he could not give a yes or no answer because he needed to elaborate. He told the Court that Carpe Diem owed the Plaintiff K4,200,376,295.50. He also told the Court that Judgment was obtained against Carpe Diem but execution failed because Carpe Diem had ceased to exist. He disagreed with State Counsel that Carpe Diem was wound up because it failed to pay its debts. The winding up was a defence mechanism by the shareholders of the company who had made serious undertakings to the Plaintiff with regard to the debt.

He told the Court that with hindsight the writers of the letter dated 14<sup>th</sup> July, 2007 misrepresented themselves to the Plaintiff. Olympic Milling Group did not exist according to the Patents and Companies Registration Office. It was also not true that the banking facilities were going to be secured by the assets of Olympic Milling Group as Olympic Milling Group did not exist. The reason the Plaintiff commenced this action was because the letter of 14<sup>th</sup> July, 2007 was a letter of comfort issued by Olympic Milling Company Limited and not Olympic Milling Group. The undertaking was by Olympic Milling Company Limited. The reason this action was brought against the Defendant was because of the undertaking that the Defendant had made to the Plaintiff on the strength of which the Plaintiff considered further business with Carpe Diem.

The debt of K4.2 Billion was related to the franchise agreement. However, there was a debt that arose in addition to K2.3 billion as a result of the undertaking by the Defendant. Had it not been for the undertaking, the franchise agreement would have been terminated at the point the K2.3 billion had accrued.

The Plaintiff was aware of the letter of 14<sup>th</sup> July, 2007 when it commenced the earlier action in Cause Number 2008/HPC/0204 but did not sue the Defendant at that time because when the earlier action was commenced the Plaintiff believed Carpe Diem was in business and the Plaintiff was not at the time even aware of the changes that were going on at Carpe Diem with regard to the change of name from Carpe Diem to Mobile Connect and the liquidation.

In re-examination, he told the Court that the amount of K4.2 billion was contracted under the franchise agreement and also on the basis of the fact that the Defendant had undertaken to ensure that Carpe Diem turned around and met all its business obligations. The amount was made up of stock values, basically unpaid franchise fees from Carpe Diem and unpaid bills for a post paid account. He concluded his evidence by stating that the undertaking was not honoured in anyway by the Defendant.

Elisha Tsidikidzo testified on behalf of the Defendant. In his witness statement he stated that the Defendant was not a party to the franchise agreement. He further stated that all the matters relating to the franchise agreement were dealt with in Cause Number 2008/HPC/0204. Carpe Diem changed its name to Mobile Connect Limited on 13<sup>th</sup> February, 2009. It was therefore not correct that it had gone into liquidation before 30<sup>th</sup> May, 2008.

The Defendant never had a majority shareholding in Carpe Diem and could not be said to have made any representations as the letter of 14<sup>th</sup> July, 2007 referred to the Olympic Milling Group or "OMG". The Judgment entered in the earlier action could not be a debt owed by the Defendant.

The Defendant was not a party to the action. The reason why no immediate legal action was taken against the Defendant was because before and after the date of the letter, Carpe Diem and the Plaintiff were engaged in a mutually beneficial dialogue and negotiations to resolve disputes to the reconciliation of the account between Carpe Diem and the Plaintiff and each party honestly believed in finding a solution.



He denied that by the contents of the letter it was the intention or a scheme of the Defendant to induce the Plaintiff not to take legal action against Carpe Diem and repeated that the Plaintiff did not take any legal action because there were negotiations going on between Carpe Diem and the Plaintiff. It was the hope of the parties in a successful outcome of the negotiations that delayed any commencement of any action by the Plaintiff against the Defendant. The Plaintiff gave notice of cancellation of the franchise agreement on 1<sup>st</sup> April, 2008 and took legal action on 30<sup>th</sup> May, 2008. Due to the length of time it took for the negotiations to mature, any representations alleged by the Plaintiff were defeated by the long lapse of time and the alleged representations, therefore played no part in stopping the Plaintiff from taking legal action against Carpe Diem. If any representations were made, they were made honestly by the Defendant in that the Defendant honestly believed that negotiations would resolve the reconciliation dispute relating to the account between the Plaintiff and Carpe Diem and that henceforth, the parties would carry forward the business relationship between them on the basis of the then agreed plan of action. None of the alleged representations would have induced the Plaintiff not to take legal action against Carpe Diem as it took from 27<sup>th</sup> July, 2007 to 30<sup>th</sup> May, 2008 for the first action to be commenced and up to 29<sup>th</sup> September, 2009 for this action to be commenced. The only explanation for this was that of the negotiations that went on between the parties. The letter of 29<sup>th</sup> June, 2007 gave Carpe Diem a period of time up to 31<sup>st</sup> March, 2008. The letter of 14<sup>th</sup> July, 2007 was not meant to foster any inducement but was meant to facilitate negotiations to resolve any dispute between the parties. The contents of the letter of 25<sup>th</sup> June, 2007 were overtaken by the letter of 29<sup>th</sup> June, 2007.

The amount being claimed by the Plaintiff did not flow from the alleged representations as there was no connection or relationship between the amount and the representations. If the Plaintiff had suffered any loss, it was because of the judgment debtor. Carpe Diem had been unable to pay the

judgment debt it owed the Plaintiff. Any commitment made in the letter of 14<sup>th</sup> July, 2007 related to the conduct of the parties in future with regard to the guarantee and the matter of procurement of Carpe Diem to strictly adhere to the agreed payment plan and the payment of the debt, all related to future conduct.

When he was cross examined, he confirmed that he was the author of the letters dated 27<sup>th</sup> June, 2007 and 14<sup>th</sup> July, 2007. Hydracorn International Limited acquired the shares of Carpe Diem. It was part of the Olympic Milling Group. The letter was on the Defendant's headed paper because it was administratively convenient to do so. Hydracorn International Limited was not mentioned in the letter because the other companies were not mentioned. He agreed that Olympic Milling Group did not exist at law. The acquisition of the shares took place but he did not have any record to prove it.

The abrupt termination of the franchise agreement made it impossible to continue with the business. Carpe Diem's business model was based on one relationship which was the franchise agreement with the Plaintiff. The bank guarantee was not executed because the Plaintiff did not cooperate with the Defendant's staff in reconciling the account and, as a result, an acknowledgment of debt could not be signed.

During cross-examination, he admitted that he was the author of the letter dated 27<sup>th</sup> June, 2007 and 14<sup>th</sup> July, 2007. The letter of 14<sup>th</sup> July, 2007 confirmed certain things in the letter of 27<sup>th</sup> June, 2007. The shares of Carpe Diem were acquired by Hydracon International Limited which was part of the Olympic Milling Group. The letter was not written on the Hydracorn International Limited letterhead because the Defendant was talking about Olympic Milling Group and it was administratively convenient to use Olympic Milling Company Limited as had been done on other occasions. Hydracorn International Limited was not mentioned. The other companies were not

mentioned. He agreed that Olympic Milling Group did not exist at law. He said that the acquisition took place but there were no records to prove that it took place.

He said payments in the sum of K600 million were made by Carpe Diem but some amount still remained unpaid by Carpe Diem. The abrupt termination of the franchise made it impossible to continue the business. Carpe Diem's business model was based on one relationship which was the franchise agreement with the Plaintiff. He admitted that at the time of termination, the debt had increased.

He told the Court that a bank guarantee was not obtained because the Plaintiff did not cooperate with the Defendant's staff in reconciling the account and the inability to achieve that reconciliation meant that an acknowledgment of debt could not be signed between the parties.

When he was re-examined he told the Court that Carpe Diem would not have survived in the absence of the franchise agreement with MTN. He also explained that during the period 14<sup>th</sup> July, 2007 to 1<sup>st</sup> April, 2008 the commercial arrangement between the parties persisted. The letter of 14<sup>th</sup> July, 2007 was written because the Defendant wanted to achieve a resolution of the business problems which faced Carpe Diem and the Plaintiff. These problems related to the amounts which were owing to the Plaintiff by Carpe Diem and amounts which were owing to Carpe Diem by the Plaintiff. The Defendant believed that if those problems were properly resolved, it could lead to a viable relationship between the parties. The letter of 14<sup>th</sup> July, 2008 was not intended to mislead the Plaintiff from taking any legal action against Carpe Diem. The letter was consistent with the discussions between the Plaintiff and Carpe Diem. He also stated that in spite of the large amounts of dishonoured cheques, the Plaintiff did not take any action against Carpe Diem.

When he was referred to Cause 2008/HPC/0204, he told the Court that the parties were the Plaintiff and Carpe Diem and the Plaintiff had obtained judgment against Carpe Diem for the sum of K4,200,376,295.50 which was the same amount being claimed in the present action.

Counsel for the Plaintiff submitted that the brief facts were that the Defendant was a shareholder in Carpe Diem. As a result of Carpe Diem's indebtedness to the Plaintiff by virtue of various stocks supplied to Carpe Diem and royalty fees for a franchise agreement between Carpe Diem and the Plaintiff, the Defendant by a letter dated 14<sup>th</sup> July, 2007 made representations to the Plaintiff whereby the Defendant procured to see to it that Carpe Diem would liquidate its indebtedness to the Plaintiff. Relying on the Defendant's representations, the Plaintiff put on hold its intentions to commence legal proceedings against Carpe Diem. He submitted that this amounted to a representation as defined in **Osborn's Concise Law Dictionary 8<sup>th</sup> Edition at page 87 (1)**. Osborn's defines representation as:

***"A representation that is untrue, a statement or conduct which conveys a false or wrong impression...An innocent misrepresentation is one made with reasonable grounds for believing it to be true."***

He submitted that the Defendant's representations were a clear misrepresentation regardless of whether the same were made with reasonable grounds for believing the same as it was eventually discovered by the Plaintiff that the representations were false.

The misrepresentation induced the Plaintiff to continue supplying stocks to Carpe Diem but the Defendant on the other hand, did not put in place measures for payment as represented to the Plaintiff.

**Chitty on Contracts, 27<sup>th</sup> Edition (2)** at paragraph 6-019 notes as follows:

***“It is essential if the misrepresentation is to have legal effect that it should have operated on the mind of the representee. However, once it is proved that a false statement was made which was likely to induce the contract, it is a fair inference of fact (though not an inference of law) that he was influenced by the statement.”***

The Plaintiff received the Defendant’s representations in good faith and relied entirely on them in order to halt the intended court proceedings and continued to supply Carpe Diem with more stock based on the representations.

Furthermore, the **Misrepresentation Act Cap. 69 Section 3(1)** provides that:

***“Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto, and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts as represented were true.”***

He concluded by submitting that the letter of 14<sup>th</sup> July, 2007 clearly made representations that turned out to be false and or misrepresentations on which the Plaintiff relied resulting in loss of the amount being claimed. The Defendant neither executed nor fulfilled any of the representations stated in the said letter. Carpe Diem did not pay the debt and was eventually wound-up by its shareholders who included the Defendant. He therefore urged the Court to enter judgment in favour of the Plaintiff.

State Counsel Malama began by submitting that the Defendants had proceeded on the basis that the action was founded in actionable misrepresentation.

According to **Bullen & Leak 12<sup>th</sup> Edition at page 449 (3)**,

***“A claim to recover damages ... for misrepresentation inducing a contract or other conduct causing damage will lie in the following circumstances:***

- (a) where the misrepresentation is made dishonestly, i.e. fraudulently, in a common law action of deceit;***
- (b) where the misrepresentation is made innocently, i.e., not fraudulently, under Section 2 of the Misrepresentation Act. 1967;***
- (c) where the misrepresentation is made innocently in a common law action of negligent misstatement...***
- (d) Where the misrepresentation is made in breach of statutory duty.”***

He submitted that in an action of deceit such as this, the burden was on the representee of alleging and proving that the alleged representation consisted of something written which amounted in law to a representation and that the Defendant was the representor and the Plaintiff was the representee. Further, that the representation was false. He submitted that falsity turned a representation into a misrepresentation and therefore without falsity, a representation could not be a misrepresentation. The burden of alleging and proving falsity rested on the party who set it up. Whether a representation was false or not was a question of fact. There was no falsity in the letter of 14<sup>th</sup> July, 2007 because it did not state any untrue facts. In the absence of falsity, any alleged representations could not be actionable. He then gave examples of the introduction, company charges and guarantee as not being

false. He did not dwell on Olympic Milling Group not being in existence at the time the letter was written.

On the issue of inducement, he submitted that in order to establish effective inducement in law, the representee had to establish that the inducement was both the result and the object of the representation made by the Defendant and that the representation was made with the object and result of inducing the representee to alter his position. From the contents of the letter of 14<sup>th</sup> July, 2007, it could not be asserted that a representation was made by the Defendant with the object which would have resulted in the Plaintiff not to take legal action against Carpe Diem. Finally, he submitted that any damages should be assessed on the tort measure basis.

In order to appreciate the claim and defence in this matter, it is necessary to quote the letters dated 27<sup>th</sup> June, 2007 and 14<sup>th</sup> July, 2007 in full.

The letter dated 27<sup>th</sup> June, 2007 from Carpe Diem reads:

***“Our Ref ET 27062007***

***27 June 2007***

***The Finance Director  
MTN Zambia Limited  
P O Box 22427  
Lusaka  
ZAMBIA***

***Dear Sir***

***RE: OUTSTANDING ACCOUNT - K2,366,088,000.00***

***Introduction***

***We would like to make reference to your letter dated 25 June 2007, and our meeting of 26 June 2007 regarding the amount of K2,366,088,000.00 which you state as outstanding and due by Carpe Diem Limited. We are grateful for your time to see us and discuss this important issue which we are very committed to resolving as matter of urgency as well.***

### **Company Changes**

***In the immediate past months there have been significant changes in the ownership and management of Carpe Diem Limited which we believe will facilitate the relationship between our companies going forward.***

***Olympic Milling Group are now 65% majority owner of Carpe Diem Limited, and took management control of the Company with effect from 25 May, 2007. As the new majority shareholders and managers of the business, Olympic Milling Group are committed to the resolution of this account outside of the courts as we believe such an approach is in the best interests of both Carpe Diem Limited and MTN Zambia Limited.***

### **Reconciliation of the Account**

***Current Carpe Diem records show that the amount owed to MTN Zambia Limited is as follows;***

	<b>Amount - K</b>
<b>Balance owing as per MTN</b>	<b>2,366,088,000</b>
<b>Less amounts owing by MTN to Carpe Diem Limited</b>	<b>(335,017,480)</b>
<b>Net amount due to MTN as per Carpe Diem Limited</b>	<b>2,031,070,520.00</b>

***It appears from our records that the amount due to MTN is K2,031,070,520 and there is therefore the need to have a reconciliation and agreement of the net amount on the account.***

***We also submit with this letter the schedules in respect of the balance of K335,017,480 for your perusal and comment.***

### **Proposed Payment Plan - K2,031,070,520**

***We would like to propose a payment plan whose fundamentals are summarized as follows;***

- (i) the need to increase the MTN business volumes through the Carpe Diem channel to increase the capability by Carpe Diem to service the old debt,***
- (ii) the need to limit the risk exposure of MTN on Carpe Diem in all future transactions,***
- (iii) the need for Carpe Diem Limited to trade on a normal 14 day credit with MTN, and***



**(iv) the need to strictly meet the obligations under the proposed payment plan.**

**We would like to propose the following payment plan on the old debt;**

<b>Kmn</b>	<b>Sept07</b>	<b>Oct 07</b>	<b>Nov0 7</b>	<b>Dec07</b>	<b>Jan 08</b>	<b>Feb 08</b>	<b>Mar08</b>	<b>April0 8</b>	<b>May08</b>
<b>Payment</b>	<b>200</b>	<b>200</b>	<b>200</b>	<b>200</b>	<b>200</b>	<b>250</b>	<b>250</b>	<b>250</b>	<b>281</b>

**The following should be noted:**

- **Carpe Diem would need a grace period of 2 months to get to the level of business that would make it possible for the repayments to commence in September 2007.**
- **Carpe Diem would give a bank guarantee to MTN for future purchases to be done on 14 days credit.**
- **The actual risk exposure by MTN in respect of this debt is K1,051,000,000 after taking into account the franchise fee of K980 million.**
- **In the event that free cash flows are better than plan, Carpe Diem will review the above payment plan with a view to accelerating the payments.**

**We shall be grateful if you should positively consider our request.**

**Yours faithfully**

**E. Tsindikidzo  
Acting Managing Director"**

The letter of 14<sup>th</sup> July, 2007 from the Defendant states as follows:

**"14<sup>th</sup> July, 2007**

**The Finance Director  
MTN Zambia Limited  
P O Box 35464  
Lusaka  
ZAMBIA**

**Attn: Mr. S. Ntsele**

**Dear Sir**

**RE: AMOUNT OWED TO MTN ZAMBIA LIMITED BY CARPE DIEM LIMITED**

***Introduction***

***We would like to make reference to your letter addressed to Carpe Diem Limited (“the Company”) dated 25 June 2007, and the subsequent reply thereto dated 27 June, 2007 regarding the amount of K2,366,088,000.00 owing to MTN Zambia Limited (“MTN”) by the Company. We are pleased to note that subsequent meetings have since been held between MTN and the Company in an effort to resolve the issue of the outstanding amount and the trading relationship between the parties.***

***Company Changes***

***In the immediate past months there have been significant changes in the ownership and management of Carpe Diem Limited which we believe will facilitate the future business of the Company and enhance the relationship between the Company and its suppliers.***

***We are pleased to confirm that Olympic Milling Group (“OMG”) have now acquired a 65% majority interest in the equity of Carpe Diem Limited. This makes Carpe Diem an integral part of OMG whose interests cover milling, farming, mining and communications. As the new majority shareholders and managers of the business, Olympic Milling Group is committed to the resolution of this account outside of the courts as we believe such an approach is in the best interests of both Carpe Diem Limited and MTN Zambia Limited.***

***Commitment to Resolve Outstanding Account***

***We also would like to make specific reference to the proposed payment arrangement that has been agreed to between the Company and MTN in respect of the outstanding amount as detailed in your letter dated 29<sup>th</sup> June 2007.***

***We would like to state our commitment, (as the new majority shareholders of the Company), to the resolution and payment of the debt in accordance with the terms and conditions of the said payment arrangement. We shall procure that Carpe Diem will strictly adhere to the agreed payment plan, and that OMG***

**shall use its best endeavours to ensure that the Company's obligations under the same shall be met outside of any force majeure influences and developments.**

**Guarantee**

**We also understand from Carpe Diem management that MTN have requested for the outstanding balance to be covered by a bank guarantee. We understand the need for MTN to be secured in view of the age of the debt, and in principle we have no objection to the request.**

**As you may know, currently all the banking facilities of Carpe Diem Limited are secured on OMG assets, and while we have no objection to extending OMG exposure beyond the current levels, we would like MTN to take cognizance of the time that is required to organize and put in place such a guarantee.**

**We therefore would like to request MTN to give the Company up to 30 September 2007 to raise an acceptable bank guarantee in favour of MTN in respect of the outstanding debt.**

**However, we would like to advise that OMG and the Company are in the process of executing a business turnaround strategy that we believe is the best form of guarantee for both MTN and OMG in respect of the outstanding amount.**

**We would like to place on record our sincere appreciation for the continued business support the Company is getting from MTN.**

**Yours faithfully**

.....  
**Elisha Tsindikidzo**  
**Group Operations Director**

.....  
**Savvas Samaras**  
**Group Managing Director**

As can be seen from above, the letter of 14<sup>th</sup> July, 2007 forms the basis of the Plaintiff's claim. The Plaintiff contended that it was this letter that led it not to commence court proceedings immediately against Carpe Diem and also to extend further credit to it. Does the letter amount to a misrepresentation?

The law relating to misrepresentation is not without difficulty. This can be seen from the authorities on the subject and also from the pleadings and arguments in this matter.

It is generally accepted that a representation:

***“...must be a statement of fact, past or present, as distinct from a statement of opinion or of intention, of law... Thus if it can be proved that the person who expressed the opinion did not hold it, or could not, as a reasonable man having his knowledge of the facts, honestly have held it, the statement may be regarded as a statement of fact.” (See Chitty on Contracts General Principles 25<sup>th</sup> Edition, paragraph 394).***

**Paragraph 1005 of Volume 31 Halsbury’s Laws of England 4<sup>th</sup> Edition**

**(4)** states that:

***“A representation is a statement made by a representor to a representee and relating by way of affirmation, denial, description or otherwise to a matter of fact. The statement may be oral or in writing or arise by implication from words or conduct. The representor and the representee must be distinct from one another in substance as well as in name,...”***

Paragraph 1091 of the same volume states that:

***“In an action of deceit the burden is on the representee of alleging and.... Proving all of the following matters (1) that the alleged representation consisted of something said, written or done which amounts in law to a representation; (2) that the Defendant was the representor; (3) that the Plaintiff was the representee; (4) that the representation was false; (5) inducement and materiality; (6) alteration of position; (7) fraud and (8) damage... The concurrence of fraud and damage is***

***essential, if damages are to be recovered, and neither is sufficient without the other.”***

In their introduction to actionable misrepresentation, the learned authors of ***Halsbury’s Laws of England Volume 31, 4<sup>th</sup> Edition (4)*** state as follows in paragraph 1001:

***“Where fraud can be shown by a representee who has in any way altered his position for the worse, whether by entering into a contract or binding transaction, or otherwise, as a consequence of it, such damage as he has suffered may, in accordance with the general principles governing the award of damages, be recovered from the representor in an action of deceit.”***

State Counsel Malama submitted that no falsity existed in this case and as a result, the alleged representation could not be actionable. In order to establish effective inducement in law, the representee had to establish that the inducement not to take legal action was both the result and the object of the representation. The representation had also been made with the object and result of inducing the representee to alter his position. From the letter of 14<sup>th</sup> July, 2007, it could not be asserted that a representation was made by the Defendant with the object and which would have resulted in the Plaintiff not taking legal action against Carpe Diem.

The letter of 14<sup>th</sup> July, 2007 is conveying the following message to the Plaintiff:

- (i) Some changes in the ownership and management of Carpe diem have been done.
- (ii) Olympic Milling Group has acquired 65% majority interest in the equity of Carpe diem.

- (iii) The Defendant shall procure that Carpe Diem, would strictly adhere to the agreed payment plan and that its obligations shall be met outside of any *force Majeure* influences and developments.
- (iv) Carpe Diem's banking facilities are secured on Olympic Milling Group assets. A guarantee was feasible but would take time. Carpe Diem should be given up to 30<sup>th</sup> September, 2007 to raise an acceptable bank guarantee.

From the evidence, there was no company registered as Olympic Milling Group at the time the letter of 14<sup>th</sup> July, 2007 was written. Olympic Milling Group could not therefore at law own the alleged 65% majority interest in Carpe Diem. The letter from the Registrar of Companies shows that even as late as 23<sup>rd</sup> July, 2010, the company was still not registered.

The evidence shows that Carpe Diem changed its name to Mobile Connect Limited and went into liquidation on 13<sup>th</sup> February 2009 due to its liabilities. On 5<sup>th</sup> September, 2008 the Plaintiff launched proceedings against Carpe Diem and obtained judgment on 22<sup>nd</sup> April, 2009. Further, the evidence shows that Carpe Diem's Acting Managing Director signed the letter dated 27<sup>th</sup> June, 2007 and also the Defendant's letter of 14<sup>th</sup> July, 2007.

The Plaintiff has, in my view, proved that (1) the representation was in writing (2) the Defendant was the representor, (3) it was the representee (4) that the representation was false (5) there was inducement and materiality (6) it altered its position by not immediately commencing legal proceedings against Carpe Diem and extended further credit to it and it has suffered damage as a result. There is no evidence to prove that the Defendant had reasonable grounds to believe and did believe that the facts as presented were true.

I do not accept State Counsel Malama's submission that there was no falsity. The letter of 14<sup>th</sup> July, 2007 clearly states that Olympic Milling Group had acquired 65% shareholding in Carpe Diem. Even though it was submitted

that the paragraphs headed introduction, company charges and Guarantee contained no statement of untruth, the fact is that representations were made to the Plaintiff. The Plaintiff suffered loss as a result. Had there been no inducement not to take legal action, it would have done so earlier.

An argument was advanced that the misrepresentation was spent. This argument cannot be sustained because the letter of 14<sup>th</sup> July, 2007 itself was asking the Plaintiff to have patience in order to allow the guarantee to be put in place. Further, the termination letter of 20<sup>th</sup> March, 2008 and the notice of cessation as a franchise dated 1<sup>st</sup> April, 2008 do not assist the Defendant in any way as at that time it had become apparent that Carpe Diem or the Defendant were not settling what was due to the Plaintiff.

In an action for fraudulent misrepresentation the only damage which the law recognizes is:

***“Actual and temporal injury, that is, some loss of money or money’s worth, or some tangible detriment capable of being quantified and assessed...” (See paragraph 1092 of Halsbury’s Laws of England Volume 31).***

The purpose of damages in a tort of deceit is to put the Plaintiff into the position he would have been in had the representation not been made to him. ***(See paragraph 14.40 of Clerk & Lindsell on Torts 17<sup>th</sup> Edition (6) ).***

There must also be a connection between the damage and representation. It must have been a natural and direct result of the misrepresentation being believed and acted on or, where the representee is induced by fraudulent misrepresentation to believe a certain state of things exist. The representee should also show that it sustained the damage and that it was caused by the representee’s belief in the truth of the misrepresentation and whether the proved damage was the natural and direct consequence of the misrepresentation.

I have no hesitation in coming to the conclusion that the Plaintiff has indeed suffered some damage and that it has established the connection between the damage and the representation.

The Plaintiff's claim of K4,200,376,295.00 as damages is made up of two components. The first component of K2,366,088,000.00 was in existence before the letter of 14<sup>th</sup> July, 2007. The second component of K1,834,288,295.50 was incurred after 14<sup>th</sup> July, 2007. The correspondence shows that on 25<sup>th</sup> June, 2007, the Plaintiff gave Carpe Diem 7 days within which to settle K2,366,088,000.00. Shortly after this letter meetings were held which culminated in the letter of 14<sup>th</sup> July, 2007. As a result of this letter, the Plaintiff did not immediately enforce its claim against Carpe Diem. There is a connection between the sum of K2,366,088,000.00 and the representation. There is also a further connection between the sum of K1,834,288,295.50 and the inducement. The inducement was both the result and object of the representation.

Although in re-examination an attempt was made to show that the Plaintiff was claiming the same amount of K4,200,376,295.50 for which it obtained judgment in Cause Number 2008/HPC/02004, this was not pleaded. In any event, the cause of action is different from Cause Number 2004/HPC/0204. The current action is based on misrepresentation whereas the action against the principal debtor was based on breach of a franchise agreement. Further, claiming the same amount from different parties, cannot in my view be a bar to the current action in view of Order 14 rule 4 of the High Court Rules which states that:

***“Where a person has a joint and several demand against two or more persons, either as principals or sureties, it is not necessary for him to bring before the court as parties to a suit concerning that demand all the persons liable thereto, and he may proceed against any one or more of the persons severally***



***or jointly and severally liable. Where a defendant claims contribution, indemnity or other remedy or relief over against any other person, he may apply to have such person made a party to the suit.”***

Further, Order 15/4/14 of the Rules of the Supreme Court when making reference to the joinder of joint defendant states that:

***“...The result is that where the liability of two or more persons is several, or joint and several as well as joint, the Plaintiff may choose which of them he wishes to sue and he need not join, nor can be compelled to join, the other persons also liable to him even if their liability is under a joint contract only.”***

As I conclude this judgment I must comment on the various provisions of the Companies Act which would have had a bearing on the matter but were not raised.

The extract of a special resolution to wind up the company shows that Mobile Connect Limited (formerly Carpe Diem) went into voluntary liquidation. There is no indication that there was a declaration of solvency by the directors pursuant to Section 308 of the ***Companies Act Cap. 388*** which requires them to do so. If there was, this action and the earlier one would not have been commenced because Carpe Diem would have settled its debt.

The provisions of Section 383 of the Companies Act which deal with civil liability for fraudulent trading were not addressed nor were the provisions of Section 357 which deal with liability for contracting debt where there are no reasonable prospects of paying the debt.

For the foregoing reasons, I enter judgment in favour of the Plaintiff against the Defendant for K4,200,376,295.50 together with interest with effect from 29<sup>th</sup> September, 2009 pursuant to ***Order 36 rule 8 of the High Court Rules*** to date of Judgment and thereafter in accordance with the ***Judgments***

**Act** until full payment. Costs to the Plaintiff to be taxed in default of agreement.

**DELIVERED IN CHAMBERS AT LUSAKA THIS 9<sup>TH</sup> DAY OF MAY 2011**

**A.M. WOOD  
JUDGE**