

**IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE**

2011/HK/164

(Civil Jurisdiction)

B E T W E E N:

CHARLES KABWITA & 18 OTHERS

PLAINTIFFS

AND

N.F.C. AFRICA MINING PLC

DEFENDANT

**Before Honourable Mrs. Justice Judy Z. Mulongoti in chambers on
the 13th day of July 2012**

For the Plaintiffs : Mr. Chabu of Ellis & company

For the Defendant : Mr. A. Imonda of Imonda & Company

R U L I N G

CASES REFERRED TO:

1. *AINSWORTH VS. WILDING [1896] 1 Ch 673*
2. *HUNDERSFIELD B. COMPANY VS. LISTER [1895] 2 Ch 273*
3. *RE S. AMERICAN COMPANY [1895] 1 Ch 44*
4. *THE STANDARD BANK (Z) LIMITED VS. THE ATTORNEY GENERAL AND SIAMFUMBA [1974] ZR 140 [HC]*
5. *ZAMBIA BREWERIES LIMITED VS. CENTRAL & PROVINCIAL AGENCIES [1983] ZR 152*
6. *THE ATTORNEY GENERAL VS. EB JONES MACHINISTS LIMITED JUDGMENT NO. 26 OF 2000*
7. *KING FARM PRODUCTS LIMITED & MWANAMUTU INVESTMENTS LIMITED VS. DIPTI SEN [2008] 2 ZR 72*
8. *JOSEPH NGULEKA VS. FURNITURE HOLDING LTD [2006] ZR 19*

LEGISLATION REFERRED TO:

1. *Order 2 Rule 2 of the Supreme Court Practice*
2. *Order 48 Rule 10 of the High Court Rules*

The Ruling relates to an application on behalf of the defendant, for summons to set aside the writ of fieri facias for irregularity pursuant to Order 2 Rule 2 of the Supreme Court Practice. The application was supported by an affidavit sworn by the learned counsel Mr. Akabondo Imonda, who is the defendant's advocate. Mr. Imonda has deposed that following delivery of judgment on 16th December, 2011, the plaintiffs' advocate, Mr. Chabu authored a letter of demand of payment on 10th January 2012 per exhibit "AI1". Mr. Imonda responded on that very day explaining the industrial unrest at the defendant's mine and requested for time to do proper calculations per exhibit "AI2". A day later, the plaintiffs' advocate wrote another letter demanding payment of the sum of K190,966,624.00 as the total claim inclusive of interest per exhibit "AK3". On 13th January, the plaintiffs wrote to the defendant threatening to issue a writ of fifa per exhibit "AI4".

This culminated in a consent order being signed by the parties. It was consented that the K190,966,624.00 was in full and final settlement of the principal sum inclusive of interest. The consent order was signed on 16th January and on 18th January 2012, the defendant effected payment as per consent order which is exhibit "AI5-6".

In paragraph 14, Mr. Imonda, deposed that if there is any underpayment on the principal sum inclusive of interest, the plaintiffs ought to seek full indemnity from their advocates for failing to exercise professional care and diligence.

The defendant also filed skeleton arguments in support of the application. It has been argued that when a final judgment made by consent has been passed and entered, the court can not set aside the consent order unless a fresh action is brought for that purpose. The cases of **AINSWORTH VS. WILDING [1]**, **HUNDERSFIELD B. COMPANY VS. LISTER [2]** and **RE S. AMERICAN COMPANY [3]** were cited as authorities.

Further that as the principal sum and interest indicated in the consent order has been settled in full by the defendant, it was irregular for the plaintiffs to issue a writ of fieri facias resulting into the seizure of the defendant's motor vehicles.

According to Mr. Imonda, Order 2 Rule 2 of the Supreme Court Practice Vol 1, provides for the procedure to set aside for irregularity any step taken in any proceedings.

Further that the plaintiffs should pay the Bailiff's fee as the issuance of the writ of fifa was irregular. The cases of **THE STANDARD BANK (Z) LIMITED VS. THE ATTORNEY GENERAL AND SIAMFUMBA [4]** and **ZAMBIA BREWERIES LIMITED VS. CENTRAL & PROVINCIAL AGENCIES [5]** and **THE ATTORNEY GENERAL VS. EB JONES MACHINISTS LIMITED [6]** were cited as authorities.

The court has been urged to set aside the writ of fifa and order the plaintiffs to pay the bailiff's fees. He reiterated that if the plaintiffs have suffered any loss as a result of the consent order, they have a cause of

action against their advocates for failing to exercise professional care and diligence.

The plaintiffs opposed the application through its affidavit sworn by one Mumbi Phiri one of the plaintiffs and also filed skeleton arguments. The affidavit in opposition shows that on or about the 24th of January, the defendant paid 19 of the plaintiffs six months salaries for unfair termination and March salaries plus interest per exhibit "MP1" which is a copy of the computation amounting to K190,966,624.00. That the defendant has neglected and refused to pay the allowances as ordered by the judgment per exhibit "MP2", "MP3" and "MP4". Further that one Changamuka Phiri has not been paid any thing ie six months salaries, March salary, allowances plus interest per exhibits "MP5", "MP6" and "MP7".

It was further deposed that the consent order filed herein did not discharge the defendant from paying the allowances, interest and Changamuka's entitlements. In paragraph 9, it is averred that the defendant's advocate had intention to defraud the plaintiffs' of the allowances and other entitlements because he knew that the same were omitted from the computation.

It has been submitted on behalf of the plaintiff that the application is irregular and should be dismissed. Further that the consent order did not affect the plaintiffs' entitlements namely allowances, interest and Gideon Changamuka's entitlements.

Mr. Chabu has argued that the consent order could not vary the plaintiffs accrued entitlements. The case of **KING FARM PRODUCTS LIMITED**

& MWANAMUTU INVESTMENTS LIMITED VS. DIPTI SEN [7] was cited as authority that the said consent order being sanctioned by the Deputy Registrar can not vary, amend or modify a final judgment made by a Judge in open court. Order 48 Rule 10 of the High Court Rules was also cited as authority.

In the alternative, it was argued on behalf of the plaintiffs that even if the consent order had varied, the final judgment and the plaintiffs accepted lesser amounts, the plaintiffs were still at liberty to claim the outstanding allowances on the ground that the defendant had not furnished any consideration to the plaintiffs to forgo the entitlements and that the defendants were not released from paying the allowances, interest and Changamuka's entitlements.

According to counsel, this was affirmed by the case of **ZAMBIA STATE INSURANCE CORPORATION LIMITED & HELMES TRANSPORT LIMITED VS. JOSEPH CHANDA (T/A LINK EXPRESS MOTORWAYS [7])**.

It has been further submitted, in the alternative, that the plaintiffs can not be estopped from relying on the final judgment as the consent order was not signed by this Court but the Deputy Registrar. The case of **ATTORNEY GENERAL & EB JONES & MACHINISTS LIMITED**, supra, was cited as authority that **"the doctrine of estoppel may not be invoked to render valid a transaction which the Legislature has on grounds of general public policy, enacted is to be invalid, or to give the court a jurisdiction which is denied to it by statute and the court's statutory jurisdiction under an enactment which precludes the parties from contracting out of its provisions"**.

Thus, likewise, no estoppel maybe invoked to render the plaintiff's unentitled who are entitled under the final judgment of the High court unless it is set aside by the Supreme Court.

The plaintiffs' advocate has also submitted that the defendant's counsel was aware that improper calculations had been done and there were some entitlements which were omitted from the computation. Nonetheless, the defendant's advocate drafted the consent for signing at night without indicating that some entitlements were missing. According to the plaintiff's counsel, the defendant's advocate had a duty of courtesy to him as provided under rule 38 of the Legal Practitioners Rules 2002.

He also owed a duty of fairness as he knew very well that the computations were not the actual reflection of the plaintiff's entitlements. Mr. Chabu further submitted that the plaintiffs' advocates are not liable for indemnity to the plaintiffs' for alleged failure to exercise professional care and diligence. It is argued that the advocate is immune from an action for negligence at common law.

At the hearing of the application, the defendant's advocates relied on the supporting affidavit and skeleton arguments. He urged the court to set aside the writ of fifa as there is no order on record certifying that the defendant owed the plaintiffs K156 million plus. Therefore, the fifa was irregularly issued. According to counsel, there is only a consent order dated 14th January made pursuant to the judgment of 16th December 2011, which required the defendant to pay K190 million plus in full and final settlement of the judgment debt.

He submitted that there were two ways in which the quantum of damages in a judgment are arrived at, firstly by assessment by court or secondly by agreement of parties. He contends that the parties herein opted not to have the damages assessed by court but settled the amount payable by consent order. According to Mr. Imonda, the existing rules of the court do not confer any power on the court to review or set aside a consent order.

It is the defendant's prayer that the fifa be set aside and the bailiffs' fees in the sum of K7,200,000 be settled by the plaintiff's advocates.

The plaintiffs' advocate opposed the application and relied on its affidavit in support and skeleton arguments. He submitted that the power to set aside the fifa was discretionary. He argued that the defendant has only paid K190 million plus in compliance with the consent order and not other allowances as ordered by the court in its judgment of 16th December, 2011. He quipped that the plaintiffs did not apply for review or setting aside of the consent order but had applied for enforcement of outstanding allowances and Changamuka's entitlements which the Deputy Registrar granted via the order of 28th March 2012. Further that the exparte order of leave to issue fifa dated 28th March 2012 was still valid and subsisting. It is the plaintiffs' prayer that the application be dismissed and the exparte order staying the fifa be discharged. The court should direct the defendants to pay allowances, interest and Changamuka's allowances.

I have studied the consent order executed by the parties herein. I have also perused the exhibits in both the affidavit in support of the application and those of the affidavit in opposition.

There are various crucial issues raised by the learned counsel for the plaintiffs pertaining to the question whether the defendant can get away without paying the plaintiffs' allowances as ordered by the court in light of the consent order. Mr. Chabu has put up spirited arguments as to why the defendant must pay as per judgment.

It is clear to me that the learned counsel for the plaintiffs did the calculations and came up with the figure of K190 Million plus as the total amount of the plaintiff's claim inclusive of interest per exhibit "AI3". The learned counsel also included the computation or breakdown of the K190 Million plus. The breakdown clearly shows that the K190 Million comprised six months basic salary plus interest for 19 plaintiffs per exhibit "MP1". The learned counsel for the defendant then drafted the consent order, which was couched in the following terms:

“The plaintiffs and the defendant having agreed on the total Amount of the principal sum and interest payable to the plaintiffs pursuant to the judgment herein dated 16th December, 2011, it is ordered that the defendant do pay the plaintiffs the sum of K190,966,624.00 in full and final settlement of the judgment debt as regards the principal sum plus interest.....”

The consent order was signed by the Deputy Director and both counsel on the 19th of January 2012. The defendant went ahead to pay the

K190,966,624.00 to the plaintiffs on the 18th of January 2012 as revealed by exhibit "A15".

On 23rd March 2012, the plaintiffs wrote demanding payment of allowances and Changamuka's entitlement. The defendant refused to pay and contended that the payment of K190 Million plus signified full and final settlement of the principal sum plus interest as per consent order. This promoted the plaintiffs to apply for leave to issue a writ of *fifa* for allowances plus Changamuka's entitlements totaling K156 Million plus which was granted by the Deputy Director. Hence the current application to set aside for irregularity.

Let me state from the onset that the judgment was very clear that the plaintiffs were to be paid six months salaries as damages for unfair and unlawful termination. I also deliberately stated in that judgment, that these salaries were to be paid inclusive of allowances that they were entitled to at the time of termination. I stated so because there has been numerous litigation on the question of whether the basic pay was inclusive of allowances. Indeed, the Supreme Court has pronounced in many cases such as **JOSEPH NGULEKA VS. FURNITURE HOLDING LIMITED [8]** that basic pay includes allowances that employees were entitled to at the time of termination.

This notwithstanding, the parties herein executed a consent order which calculated their basic pay minus allowances. It is the plaintiffs' advocate who did the calculations and in clear and unambiguous terms stated in a letter to the defendant that the amount of K190 Million plus was the final and full settlement per exhibit "A13". This then culminated in the consent order. The K190 Million plus was paid in January 2012. Then two to

three months later, a demand letter was sent to the defendant for allowances plus Changamuka's entitlements.

I opine and concur with Mr. Imonda's arguments that the parties are bound by the consent order. It is trite that consent orders are prepared by the parties setting out the terms and are only brought to court for approval or acknowledgment. I am therefore not persuaded by Mr. Chabu's argument that since the Deputy Director signed the consent, this was tantamount to him varying my judgment.

As submitted by Mr. Imonda, the only recourse available is for the plaintiffs to commence fresh action. Mr. Chabu must take responsibility for the fact that he did the calculations, K190 Million plus as the amount due in full and final settlement and desist from blaming his colleague.

Regarding Changamuka, I note that he was joined as a party and being similarly circumstanced as the other plaintiffs, he should be paid in accordance with the judgment. I hasten to add that it is trite that employees who were similarly circumstanced as the plaintiffs herein are entitled to be paid in like manner even though they were not party to the proceedings.

For the foregoing, the application is successful. The writ of *fifa* is set aside and the plaintiffs must pay the Bailiff's fees. In the circumstances of this case, I order that each party should bear own costs.

Dated this.....day of.....2012

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**Judy Z. Mulongoti
HIGH COURT JUDGE**