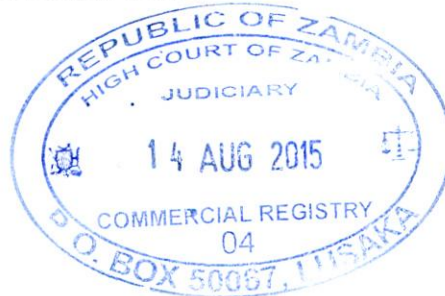


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IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2012/HPC/0159



BETWEEN:

POUWELS HOTELS AND RESORTS LIMITED

PLAINTIFF

AND

KITWE DEVELOPMENT LIMITED

DEFENDANT

**BEFORE THE HON. MR JUSTICE JUSTIN CHASHI IN OPEN
COURT ON THE 14th DAY OF AUGUST, 2015**

For the Plaintiff:

*J. Jalasi, Messrs Eric Silwamba,
Jalasi & Linyama Legal Practitioners*

For the Defendant:

*F. M. Zaloumis (Mrs.) Messrs Dove
Chambers.*

J U D G M E N T

Cases referred to:

- 1. Musa Ahmed Adam Yousuf v Mahtani Group of Companies and
Three (3) Others -2011/HP/0081*

Other works referred to:

2. Halsbury's Law of England, 4th edition by Lord Hailsham, volume 9, Butterworths London 1974

The Plaintiff **Pouwels Hotels and Resorts Limited**, commenced proceedings herein against the Defendant, **Kitwe Development Limited** on the 30th day of March 2012 by way of a Writ of Summons. The relief being claimed is specific performance of an agreement to lease land for construction of a hotel on a property namely property number 7732, Freedom Park, Kitwe.

According to the Statement of Claim accompanying the Writ of Summons, the Defendant which is a Limited Company owns property number 7732 Kitwe, and the majority shareholder in the Defendant is Platinum Gold Equity Limited who are the developers of the shopping mall being constructed on the property.

It is averred that on the 23rd day of June 2011, an oral agreement which had already been acted upon was reduced into writing.

Platinum Gold Equity Limited by way of a written letter unequivocally expressed the Plaintiff's right to enter into a 50 year lease with the Defendant on the property in exchange for works done by Pouwels Construction Zambia Limited, the Plaintiff's associate company. That it was agreed and understood that the Plaintiff was to build a hotel which was delineated on the site plan with clear and definite boundaries.

It is further averred that the following works have since been completed:

(a) Material excavated from the hotel area and transported to the required fill for the shopping mall to the value of US\$96,875.00

(b) Material excavated of the basement area transported to the shopping mall to the value of US\$139,500.00.

It is further averred that Pouwels Construction Zambia Limited, which was doing the works on behalf of the Plaintiff is no longer the contractor for the shopping mall. That since the works can no longer be done, that the value of works which should have been

done can be paid in monies, using the formula: the cost of excavating the material from the basement area, plus the cost of excavating material from the hotel area plus the cost of building 3000m² of the basement under the shopping mall (cost of building the basement is at US\$1,269,000 which the Plaintiff is willing to pay) in exchange for a 50 year lease for the specific land for the hotel.

According to the Plaintiff, they employed an Architect to design the hotel, a consultant to do business plans, models and feasibility studies to acquire financing.

It is averred that whilst the Plaintiff is keen to honour the agreement and build a hotel as agreed, the Defendant has not shown any indication to honour the agreement and in fact mortgaged the entire property to Barclays Bank Zambia Plc without the Plaintiff's consent.

The aforestated is as much as I can decipher from the Writ of Summons and Statement of Claim, which pleadings I should state were badly drafted.

The Defendant settled its Defence on the 6th day of June 2012 and averred that the only contractual relationship that existed in relation to the subject matter herein was between **Platinum Gold Equity Limited and Pouwels Construction Zambia Limited** and not the parties herein. That the construction contract has since been terminated.

It is averred that the dispute relating to the construction contract between Platinum Gold Equity Limited and Pouwels Construction Zambia Limited is already the subject of litigation under cause No. 2011/HPK/517 at Kitwe High Court.

The Plaintiff's reply to the Defence was belatedly settled on the 19th day of May 2014. The Plaintiff reiterated that, the contractual relationship that existed and has brought about this dispute was between the Plaintiff and the Defendant and that therefore the Defendants and its shareholders are stopped from denying the contractual relationship between the Plaintiff and the Defendant and that the Plaintiff will further rely on the doctrine of legitimate expectation.

It was further averred that even prior to the letter dated the 23rd day of June 2011 which confirmed the contractual relationship between the Plaintiff and the Defendant, there were negotiations and correspondence confirming the existence of a contractual relationship between the Plaintiff and the Defendant.

According to the Plaintiff, the matter under cause No. 2011/HK/517 involves different parties to the action and therefore has no bearing on this Cause.

At the hearing of the matter, the Plaintiff only called one witness, **Harold Martin Pouwels**, (PW1) whose evidence in examination in chief was as per his witness statement filed into Court on the 15th day of August 2014.

It was PW1's evidence that sometime in September 2010, he entered into an oral agreement with the Defendant on behalf of the Plaintiff in which both parties agreed that the Plaintiffs would enter into a 50 year lease with the Defendant on its property known as property No. 7732 Freedom Park in exchange for works done by the Plaintiffs associate company Pouwels Construction Zambia Limited.

That on the 23rd June 2011, the said oral agreement which had already been acted upon was reduced into writing whereby the Defendant's parent company, Platinum Gold Equity Limited by way of a written letter unequivocally expressed the Plaintiff's right to enter into a 50 year lease with the Defendant on the property in exchange for works done by the Plaintiff's associate construction company.

According to PW1 it was agreed and understood that the Plaintiff was to build a hotel which was delineated on the site plan with clear and definite boundaries. Reference in that respect was made to page 6 of the Plaintiff's Bundle of Documents, the letter dated the 23rd day of June 2011. That by virtue of the said letter described as an agreement in principal (sic) the contract commenced in 2010 without any objections or extra conditions created.

That material has been excavated and transported to the required fill from the hotel area and the shopping mall to the values of US\$96,875.00 and US\$139,500.00 respectively.

PW1, testified that Pouwels Construction Zambia Limited which was doing the works on behalf of the Plaintiff is no longer the contractor of the development of the shopping mall.

According to PW1, he had on behalf of the Plaintiff agreed with the Defendant that instead of monies as a medium of exchange for the land, the value of the works done would be considered as payment since the works can no longer be done and that the value of the works that should have been done can be paid in monies using the formula, the cost of excavating the material from the hotel area plus the cost of building 3000m² of the basement under the shopping mall (final works of building the basement have a monetary value of US\$1,269,000 which the Plaintiff is willing to pay) in exchange for a 50 year lease.

PW1 further testified that the Plaintiff engaged an Architect to design the hotel and a consultant to do business plans, models and feasibility studies to acquire financing. Reference was made to pages 12 to 25 of the Plaintiff's Bundle of Documents, containing the architectural works and designs.

It is PW1's further testimony that the Plaintiff is keen to honour the agreement whilst the Defendant has not shown any indication and

has without the Plaintiff's consent mortgaged the entire property to Barclays Bank Zambia Plc.

In cross examination, PW1 asserted that the basement was to become part of the shopping mall. When shown the letter dated 23rd June 2011 on page 6 of the Plaintiff's Bundle of Documents, PW1 asserted that there were many discussions regarding the works culminating in the said letter. That there was no contract signed in 2010 as there was no basement in the original plan, as such the basement was added later.

According to PW1, an addendum to the construction agreement was later signed to include additional works which were to be done by the Plaintiff some of which was to be paid for by the Plaintiff and included the building of the basement in exchange for a 50 year lease to put up a hotel on the hotel section of the property and to be funded by the Plaintiff.

PW1 asserted that they did all the bulk excavation works for both the basement and hotel area as well as drainage excavation and that there is a cost attached to excavation, which is a cost to the Plaintiff. PW1, conceded that the Defendant had nothing to do with the construction of the hotel.

When referred to paragraphs 3(a) and (b) of his witness statement, PW1 stated that they were not paid for the excavation works. That the total excavation work was done and according to the agreement they were supposed to build a 3000m² basement, but only built part of it.

When shown the document on page 1 of the Defendant's Bundle of Documents, it was PW1's assertion that, that is the construction contract for a shopping mall, which did not include the basement.

As for page 5 of the same Bundle, that is the addendum and according to paragraph 6, Pouwels Construction Zambia Limited were supposed to build the basement, but did not finish as the

works were moved to phase 2 which came in on the 21st day of March 2011 at a meeting in Lusaka.

PW1 further asserted that due to lack of payment, on the 15th day of September 2011 he sent an e-mail to suspend the works. The e-mail appears on page 9 of the Defendant's Bundle of Documents. That everything in phase 1 was shut down and the contract was terminated by the shut down. At the time, the basement was already on hold as it had been pushed to phase 2.

When referred to paragraph 9 of his witness statement, PW1 stated that Pouwels Construction Zambia Limited were paid some money by Barclays Bank Zambia Plc. That the matter is now before arbitration as Pouwels Construction Zambia Limited is claiming payment for all works done as they were not paid.

In closing the cross examination, it was PW1's assertion that apart from the letter of 23rd June 2011 he did not have any specific agreement with the Defendant.

In re examination, PW1 was of the understanding that the letter of 23rd June 2011 was not an offer but a confirmation of the agreement with the Defendant who are wholly owned by Platinum Gold Equity Limited.

On the part of the Defendant, they called three witnesses.

Alfred Yona Kasito (DW1) a Quantity Surveyor and Principal at AMK Quantity Surveyors and Project Manager testified in examination in chief as per his witness statement filed on the 9th day of December 2014. According to DW1, they were contracted by Platinum Gold Equity Limited sometime in 2009 to provide Quantity Surveying Services on the Freedom Park Shopping Mall construction project. They carried out a valuation of the works that had been done on the site up to 15th September 2011 when the site was shut down by the contractor. The documents relating to the said works appears on pages 19-37 of the Defendant's Bundle of Documents.

That a final close account was compiled and the basement was not part of the account as it was not in existence at the time the account was made. That confirmation of the same is contained in the letter dated 14th August 2014 which appears on page 39 of the Defendant's Bundle of Documents.

In cross examination, DW1 asserted that by a final close account they were closing the account for Pouwels Construction Zambia Limited, whilst the project was still alive. That what prompted the valuation was that the parties had agreed that the works had reached a level where they could not proceed. Reference was made to the minutes of the meeting appearing on page 19 of the Defendant's Bundle of Documents which report was done after the meeting. That according to paragraph 3, the final account had been prepared to establish the works as executed at the site including all materials remaining unfixed in relation to the agreed works contract.

According to DW1, the purpose was also to establish the value of the works carried out.

DW1 asserted that their role was to deal with the contract and works related to the shopping mall and therefore did not include any work relating to the hotel.

In re examination, DW1 reconfirmed that there was no basement done within the premises of the shopping mall apart from some earth works when they were preparing for draining the water.

According to DW1, he did not have any dealing with the Plaintiff, but Pouwels Construction Zambia Limited and the final account was given to them in adhering to the process of the final account.

DW2, was **Tzannettis Aristides Serlemitsos**, a Property Developer and Executive Chairman for Platinum Gold Equity Limited and also Managing Director for the Defendant. DW2's evidence in

examination in chief was as per his witness statement filed into Court on the 9th day of December 2014.

According to DW2, the Defendant is a wholly owned subsidiary of Platinum Gold Equity Limited. That on the 16th day of July 2009, Platinum Gold Equity Limited entered into a construction contract with Pouwels Construction Zambia Limited. The title for the land to be developed was in the Defendant's name.

It was DW2's testimony that Platinum Gold Equity Limited as the parent company act on behalf of and in the interest of the Defendant. That the aforestated contract appears on pages 1-4 of the Defendant's Bundle of Documents.

DW2 also testified that on the 17th day of September 2010 an addendum to the contract of 16th July 2009 was executed. The addendum amended the contract and provided for the construction of a basement under clause 6 of the addendum. The addendum appears on pages 5-6 of the Defendant's Bundle of Documents.

That on the 23rd day of July 2011, DW2 in his capacity as Managing Director of Platinum Gold Equity Limited wrote a letter to Pouwels Construction Zambia Limited, which letter appears on page 8 of the Defendant's Bundle of Documents.

That the terms of the letter were conditional upon certain things happening and Pouwels Construction Zambia Limited was mandated to build a basement in consideration of a fifty year lease on the hotel site.

According to DW2 the Plaintiff on the 15th day of September 2011 shut down the site before they even attempted to build a basement. That the only work done before the shutdown was the general excavation work for the shopping mall. No concrete work or any other work associated with the basement was ever performed before the shut down. That the document in that respect appears on page 9 of the Defendant's Bundle of Documents.

It was DW2's testimony that all works done on the shopping mall up to the shut down was paid for in full as evidenced by the Quantity Surveyors final account. That the said document appears on pages 19-37 of the Defendant's Bundle of Documents.

That on the 4th day of October 2011, Platinum Gold Equity Limited terminated the contract with Pouwels Construction Zambia Limited due to the unilateral shut down of the construction site, which was in violation of the contract terms. The document appears on page 10 of the Defendant's Bundle of Documents.

Further, according to DW2, Pouwels Construction Zambia Limited on the 6th day of October 2011 wrote to Barclays Bank Zambia Limited the financiers of the project, without authority or approval of Platinum Gold Equity Limited and erroneously claimed that they were owed over US\$3,000,000 for all works done, when in reality they had already been paid in full.

DW2 also testified that Pouwels Construction Zambia Limited challenged that termination of the contract and tried to take over the site which forced Platinum Gold Equity Limited to seek legal protection. That the matter was in the Kitwe High Court and was later by consent of the parties referred to arbitration.

In cross examination, DW2 asserted that Platinum Gold Equity Limited and the Defendant carry on almost as one entity.

When referred to paragraphs 6, 7 and 8 of his witness statement and the letter on page 8 of the Defendant's Bundle of Documents, DW2 confirmed that they did enter into an agreement and that prior to the said letter of 23rd June 2011 there was an addendum to the contract which was executed.

According to DW2 no work was done on the basement and the fifty year lease was never effected.

At the end of the trial both parties indicated that they would be filing written submissions.

The Plaintiff's Advocates filed their submissions on the 1st day of June 2015.

After recasting the facts of the case and the pleadings, as well as a review of the witnesses' evidence, Counsel for the Plaintiff *submitted that it cannot be disputed that an agreement was entered into* between the Plaintiff and the Defendant to the combined value of US\$236,325.

Counsel then went on to submit on the law of specific performance, the law on estoppel and legitimate expectation, breach of contract and quantum meruit. I have deliberately not reproduced the submissions by Counsel relating to these submissions for obvious reasons. It is only prudent before according any consideration to the said submissions, first to consider whether there was indeed in existence a contract between the Plaintiff and the Defendant and

consequent upon that whether the Plaintiff and the Defendant are the right parties to these proceedings. Only if that is answered in the affirmative will it be necessary for this Court to consider the issues relating to the law as regards specific performance, estoppel and legitimate expectation, breach of contract and the alternative plea for damages for breach of contract and quantum meruit.

In the view that I have taken, the same will equally apply to the consideration of the Defendant's submissions.

The Defendant's Advocates filed their submissions on the 16th day of June 2015. After stating the brief facts of the case, Counsel for the Defendant submitted that the Plaintiff commenced the action arising from a contract to which they were never a party and had no interest. That the contract which is the subject of this action was executed between Platinum Gold Equity Limited and Pouwels Construction Zambia Limited. In that respect Counsel drew the attention of the Court to the case of **Musa Ahmed Adam Yousuf v Mahtani Group of Companies and Three (3) others**¹.

Counsel then went on to submit on specific performance and duplicity of Court actions as an abuse of the Court Process.

The Defendant's Defence is anchored on the plea as shown in paragraphs 4, 5, 6 and 7 of the Defence, that the parties in this Cause had no contractual relationship with each other as the only contract which existed was between Platinum Gold Equity Limited and Pouwels Construction Zambia Limited. This was supported by the evidence of DW2, who in his evidence drew the attention of the Court to the Contract Agreement dated 15th day of July 2009 and the Contract Agreement Addendum dated the 17th day of September 2010 which documents appear on pages 1 and 5 of the Plaintiff's Bundle of Documents respectively.

On their part, the Plaintiff are insistant that there was an oral agreement between the Plaintiff and the Defendant which was subsequently formalized by way of the letter dated the 23rd day of June 2011, appearing on page 6 of the Plaintiff's Bundle of

Documents. That this Cause has its footing on the said letter which they are referring to as the agreement.

In determining this issue, I have taken into consideration the parties pleadings, Bundle of Documents, the evidence as well as their respective submissions. A glean of the aforestated clearly shows that it is not in dispute that Platinum Gold Equity Limited and Pouwels Construction Zambia Limited entered into a contract for the construction of a Shopping Centre at plot 7732, Freedom Park, Parklands Kitwe on the 16th day of July 2009. The said contract as earlier alluded to appears on page 1 of the Defendant's Bundle of Documents.

It is also not in dispute that subsequently the same parties executed an addendum to the aforestated contract on the 17th day of September 2010.

It is evident from the record that as a precursor to the addendum, Platinum Gold Equity Limited and Pouwels Construction Zambia

Limited had entered into discussions and negotiations on how Pouwels Construction Zambia Limited could assist in the financing of the project as an investor. That can be deduced from the letter dated 11th day of May 2010 written by DW2 to Pouwels Construction Zambia Limited. The said letter appears on page 1 of the Plaintiff's Bundle of Documents. It is the said letter which confirms the agreement to enter into an agreement for the construction of a basement as a consideration in exchange for a fifty (50) year lease of land for building of the hotel. For ease of reference this is what the said letter says on page 2, line 4:

“Pouwels has agreed to build a basement measuring approximately 3,000m² at its own cost in exchange for the hotel next to the shopping mall via a 50 year lease on Freedom Park, commercial land”.

It is my finding of fact that it is the aforestated agreement which culminated into the addendum. Clause 6 of the addendum states as follows:

“Pouwels Construction Zambia Limited has agreed to build a basement measuring approximately 3,000 m² at its own cost in exchange for the rights to build the hotel next to the shopping mall via a 50 year lease on Freedom Park, commercial land”.

As far as I can focus, the only contract therefore which relates to the agreement to build a basement in exchange for the rights to build the hotel next to the shopping mall for a 50 year lease is the aforestated addendum. I cannot see any other agreement or contract. The said addendum has nothing to do with the Plaintiff and the Defendant in this Cause.

However, determination of the issue at hand cannot be put to rest without determining the effect of the letter of 23rd June 2011, which the Plaintiff seems to be placing reliance on as the contract giving rise to their claim. A careful perusal of the said letter shows that it was written by DW2 as Managing Director of Platinum Gold Equity Limited to Pouwels Construction Zambia Limited. For ease of reference, the first two paragraphs reads as follows:

*“As the Managing Director of Platinum Gold Equity Limited (PGE) I would like to confirm that PGE and Pouwels Hotels and Resorts Limited (PHRL) **have an agreement in principle**, whereby PHRL will enter into a long (50 year) lease with Kitwe Development Limited (KDL) a wholly owned subsidiary of PGE and the title holder of the commercial property at Freedom Park in Kitwe. This lease will allow PHRL to develop a hotel in its own right on a designated portion of the KDL land at Freedom Park. In exchange for the right to develop **Pouwels Construction Zambia Limited will provide an agreed upon consideration to PGE** development of the Freedom Park Shopping Mall’ (The bolding is mine for emphasis only.”*

What comes out clearly without any doubt from the said letter are the following points:

1. That this letter was a confirmation of an **agreement in principle** between Platinum Gold Equity Limited and the Plaintiff herein;

2. That the said agreement in principle was to the effect that the Plaintiff will enter into a long lease (50 years) with the Defendant herein;
3. That the said lease will allow the Plaintiff to develop a hotel in its own right on a designated portion of the Defendant's land.
4. That in exchange for the right to develop Pouwels Construction Zambia Limited will provide an agreed upon consideration to Platinum Gold Equity Limited.

The aforesaid agreement in principle as clearly stated was between Platinum Gold Equity Limited and the Plaintiff. The Defendant was not a party to the said agreement.

It was also futuristic as it was talking about some future event to take place at a later stage and with consideration to be agreed upon at a later stage. An oxymoron as an agreement in principle is no agreement at all. To bind the parties a contract must be concluded in all its fundamental terms with nothing left to negotiate. As aptly

stated by the learned authors of Halsbury's Laws of England at paragraph 203

"To constitute a valid agreement there must be two or more separate and definite parties to the contract. Those parties must be in agreement, that is there must be a consensus adidem. Those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises. The promises of each party must be supported by consideration, or by some other factor which the law considers sufficient. Generally speaking, the law does not enforce a bare promise (nudum pactum) but only a bargain."

It follows prima facie that there is no concluded contract where further agreement is expressly required as was the contents of the said letter.

Where the parties have reached an agreement in principle only, the proper inference is that they have not finished agreeing as was the case herein, the agreement was subject to a contract being entered

into at a later stage upon completing of certain issues such as consideration.

In my view that letter was merely an expression of intent and has no legal significance whatsoever.

In addition, there is no evidence on record that the parties commenced to implement the said agreement so as to enable this Court determine that a contract did indeed exist. I am sanguined in my view by the learned authors of Halsbury's Laws of England at paragraphs 261 where they had this to say:

"To constitute a binding contract there must be a concluded bargain and a concluded contract is one which settles everything that is necessary to be settled by agreement between the parties. This requirement may be expressed by way of a general rule that for the parties to be bound, they must have finished reaching an agreement so that it is possible to infer an intention on the part of both of them to be bound immediately. It follows that prima facie

there is no concluded contract where further agreement is expressly required”

Furthermore, no mention is made of the construction of the basement as consideration for the said agreement to have any bearing on the Plaintiff's claim.

Having dealt with the letter of 23rd day of June 2005, let me revert to the issue of parties in this matter. As earlier alluded to, the set of facts leading to the Plaintiff's claim can only be associated with the addendum aforestated and not any other document including the agreement in principle, which I have just disposed of.

The doctrine of privity of contract is well founded and cast in stone. Contractual rights and duties only affect the parties to a contract. The doctrine simply means that a person cannot acquire rights or be subjected to liabilities arising under a contract to which he is not a party. As a general rule, a contract cannot confer rights or impose

obligations on strangers to it, that is persons who are not parties to it.

In the view that I have taken, I am in agreement with the Defendant that the only contractual relationship which existed in relation to the set of facts giving rise to the claim before this Court was between Platinum Gold Equity Limited and Pouwels Construction Zambia Limited and not the Plaintiff and the Defendant herein.

The meaning of that, is that since the Parties herein were not privy to the construction contract and the addendum, the Plaintiff herein has no right to sue on the said contract to which it was not a party and equally the Defendant not having been a party cannot bear any liability, obligation or be sued.

It is my finding and conclusion that both parties are not right parties to this claim and on that basis, this matter is incompetently before this Court and is accordingly dismissed.

Having dismissed the matter, there is no need for this Court to endeavour to deal with the issues of specific performance, estoppel, legitimate expectation, breach of contract and quantum meruit or the issues relating to multiplicity of actions.

I will award the costs of the proceeding to the Defendant. Same to be taxed in default of agreement.

Leave to appeal is hereby granted.

Dated at Lusaka this 14th day of august 2015.

A handwritten signature in black ink, appearing to read 'Justin Chashi', is written over a horizontal dotted line. The signature is stylized with large loops and a long tail.

JUSTIN CHASHI
HIGH COURT JUDGE