

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

2014/HPC/0183



BETWEEN:

RODGERS MASAUTSO ALIVAS CHONGWE
AND
THE ATTORNEY GENERAL

PLAINTIFF

DEFENDANT

**BEFORE HON. MADAM JUSTICE PRISCA MATIMBA NYAMBE, SC
AT LUSAKA IN CHAMBERS**

For the Plaintiff: Mr. Ali Hamir, SC
*Legal Practitioner, 138 Chandwe Musonda Road, Villa
Elizabetta/Namununga, P O Box 36475, Lusaka*

For the Defendant: Miss C Mulenga
*Principal State Advocate
Attorney General's Chambers*

JUDGMENT

List of authorities referred to:

1. Halsbury Laws of England, Vol. 9, 4th Edition at Page 194
2. Halsbury's Laws of England 4th Edition Vol. 37 paragraph 383 and Note 1
3. Palmer and Harvey Mclane Vs Gerrald and Another (2013) ALLERD 55 (Dec)
4. Halsbury's Laws of England, 4th Edition, Vol. 9 Paragraph 203
5. Halsbury Laws of England, 4th Edition Vol. 9 Paragraph 216
6. Halsbury Laws of England 4th Edition Paragraph 288/289
7. Chitty on Contracts, 25th Edition Paragraph 1147, Page 20

8. Branch V Caborro Case
9. Spa V Feed Products (1887)2 Lloyds Reports
10. Parts II to V of the Judicial (Code of Conduct) Act, 1999
11. Section 5(4) of the Judicial (Code of Conduct) Act 1999
12. Lawlor V Gray (1984) 34 ALL ER 345
13. McGregor on Damages, 15th Edition page 4, paragraph 3
14. Bas de Gaay Fortman, an Emeritus Chair in Political Economy at Erasmus University at Rotterdam and Professor of Political Economy of Human Rights at Utrech University Law School, the Netherlands, and has taught at the University of Zambia, in his book on: Political Economy of Human Rights

This is an action commenced by Originating Summons by Mr. **Rodger Masautso Alivas Chongwe, SC** seeking the following reliefs:-

1. A declaration that the agreement to compromise and settle the dispute between the Plaintiff and the Defendant made between them on 16th October 2009, settled on 23rd October 2009 and confirmed and incorporated in writing contained in letters dated 26th October 2009 from the Plaintiff to the Secretary to the Treasury, letter dated 29th October 2009 from the Defendant's Advocates Chilupe and Company, letter dated 2nd November 2009 from Chilupe and Company to the Defendant, E-mail communications of 16th November 2009 from the Plaintiff to the Defendant and from the Defendant to the Plaintiff and of 17th November 2009 from the Defendant to the Plaintiff, is a valid subsisting and an enforceable agreement in full and final settlement of the Plaintiff's claim against the Defendant whereby the Defendant agreed to pay the Plaintiff the total sum of US Dollars 6,743,918.38 in full and final settlement of all his claims against the Defendant arising from the Defendant's shooting the Plaintiff on 23rd August 1997 at Kabwe.
2. A declaration that it was an express term of the said agreement or an implied term thereof, that the Defendant shall pay the Plaintiff interest on US Dollars 2,500,000.00 from date of the agreement referred to in the

preceding paragraph to date of payment at the London Interbank Offered Rate (LIBOR) if the Defendant failed or neglected to make the payment of the agreed amount of settlement as agreed which the Defendant failed and or neglected to do.

3. A declaration that the Defendant has a legal obligation to discharge the agreement.
4. The costs of these proceedings to be taxed in default of agreement.
5. Further or other order.

The facts which were not challenged and are therefore not in dispute are that on 23rd August 1997 the Plaintiff was in Kabwe, in the Central Province of the Republic of Zambia, to attend a political rally organized by the Alliance of Opposition Political Parties of which he was the Chairman.

The Defendant cancelled the permit that had allowed the rally to take place without prior notification. The Plaintiff who was a passenger in a vehicle belonging to Dr. Kenneth Kaunda the first President of Zambia was shot at and wounded (as was the owner of the vehicle, Dr. Kaunda), in the cheek and the bullet came out from behind his head. He bled profusely and lost about 3 pints of blood. He underwent urgent medical treatment at the Kabwe General Hospital, and the Surgeon who performed the operation submitted a report whose findings were that the Plaintiff had suffered injuries as follows:-

- (A) A 4 Centimeter wound interior posterior to the right pinna.
- (B) A fractured outer table of the mastoid bone; and
- (C) A wound communicating with a puncture in the cheek.

On 23rd October 1997 a scan of the head of the Plaintiff was taken and so were X-rays of his Mandible and the skull. The results of the tests were that there was a small metallic foreign body to be seen in the soft tissue beneath the skull base close to the skin surface consistent with the history of a gunshot wound. The scan of the cranium disclosed that a small metallic fragment was noted in the soft tissue in the posterior aspect of the upper cervical region close to the skin surface. There was a small bone fragment in the soft tissues overlying the Mastoid process. He still retains metallic foreign bodies in the soft tissue beneath the skull surface and in the posterior aspect of the upper cervical region of the skin surface.

Sometime after this incident, the Plaintiff fearing for his life took refuge in Australia where he spent about six (06) years as a refugee.

Zambia is and always has been his country. He grew up in Zambia and managed and operated a Law Firm in Lusaka. He was conferred and honoured by the first President Dr. Kenneth Kaunda with the Rank and Dignity of State Counsel. He has served in various positions in Government as Minister, including Minister of Legal Affairs now called Ministry of Justice.

While abroad the Plaintiff wrote and sent a letter to the Defendant demanding that the Defendant compensate him the sum of United States Dollars 2,500,000.00 for the injuries which he sustained in the attempted assassination and for the violation of his right to security of person and the Defendant's failure to act in accordance with its obligations under the Provisions of the International Covenant on Civil and Political Rights and the Optional Protocol to which the State of Zambia is a State Party. The Defendant responded on 25th November 2997 denying liability. The two letters appear as exhibits to his affidavit in support of Originating Summons and are collectively marked "RMAC1".

Having been denied redress by the Defendant and due to the gravity and nature of the Defendant's wrong doing he communicated the Defendant's violations of his right to security of person and Defendant's failure to act in accordance with its obligations under the International Covenant on Civil and Political Rights, and its Protocol, to the United Nations Human Rights Committee at Geneva.

The United Nations Human Rights Committee at Geneva gave due consideration to the written information submitted by the Plaintiff. It gave the Defendant the opportunity to respond and defend the communication as submitted by the Plaintiff. The Defendant elected not to defend it.

The United Nations Human Rights Committee was of the view that the Defendant had violated the Plaintiff's human rights. It prevailed upon the Defendant to effectively safeguard the Plaintiff's fundamental rights to life and personal security. It also urged the Defendant to grant him redress and compensate him for the violations of his fundamental rights and freedoms. The United Nation's Human Rights Committee communicated its views to the Defendant.

The Defendant through its Legal Advisor to the late President Levy Patrick Mwanawasa, SC, Mr. Darlington Mwape, later gave the Plaintiff assurances that he could return home, to Zambia, as it had become safe for him to do so. He returned to Zambia on 3rd March 2003.

The Defendant through then Attorney General, Bonaventure Mutale, SC, and his successor and various officers in the Attorney General's Chambers communicated with the Plaintiff on many occasions extending over several years with a view to settle the Plaintiff's claim as set out in the Originating Summons. The dispute as to the liability of the Defendant and its obligations to compensate the Plaintiff continued until ultimately the Defendant's then Vice President who was also Minister of Justice, Hon. George Kunda, SC and then Attorney General and now Supreme Court Judge Mr. Mumba Malila, SC (I shall refer to him as Attorney General for purposes of these proceedings), and the Plaintiff reached a comprehensive verbal agreement to compromise and settle the claim.

On 16th October 2009, the Plaintiff met with then Vice President and Minister of Legal Affairs, Hon. George Kunda, SC at his office on the Fourth Floor at the Cabinet Secretariat along Independence Avenue.

They discussed a compromise and settlement of the Plaintiff's claim in particular the compensation, loss of earnings, interest and costs. Hon. George Kunda, SC tentatively agreed to the figures in respect of each of the heads of the claim. He informed the Plaintiff that he would communicate with the Attorney General with whom he should discuss the matter further and conclude the settlement. Hon. George Kunda, SC also informed the Plaintiff that the Attorney General would write to the Secretary to the Treasury to find the money agreed to be payable in settlement of the **Plaintiff's claim**.

On 23rd October 2009 the Plaintiff met Attorney General Hon. Mumba Malila, SC now a Supreme Court Judge by prior arrangement in his chambers at the Ministry of Justice. Attorney General Mumba Malila, SC and the Plaintiff revisited each head of his claim. They addressed the question of compensation, costs, loss of earnings and interest, in the context of legal fees the Defendant paid its lawyers abroad, and the retainer it paid lawyers to prosecute offenders on behalf of the Task Force on Corruption and the **London Inter Bank Offered Rate (LIBOR)**, just as Hon. George Kunda had done at the meeting, on 16th October 2009. Attorney General Mumba Malila, SC and the Plaintiff agreed that they compromise the claim and that the defendant pays him a total

of US \$6,743,918.38 in full and final settlement of his claim broken down and quantified as follows:-

Claim as originally framed	-	US \$2,500,000.00
Interest on above	-	US \$ 743,918.00
Legal Costs	-	US \$2,000,000.00
Loss of earnings	-	<u>US \$1,500,000.00</u>
Total	-	<u>US \$6,743,918.38</u>

Attorney General Mumba Malila, SC informed the Plaintiff that he would write to his lawyers, Chilupe and Company informing them that they had reached a settlement. He also said he would write to the Secretary to the Treasury to direct him to pay the agreed sum to the Plaintiff.

The terms of the settlement were later confirmed and incorporated in writing contained in letters dated 29th October 2009, from the Attorney General to the Plaintiff's Advocates Chilupe and Company, a letter dated 2nd November from Chilupe and Company to the Attorney General, the Plaintiff's letter dated 26th October 2009 to the Secretary to the Treasury, and email communications of 16 November 2009, and 17th November 2009 exchanged between the Defendant and the Plaintiff. These letters are collectively marked "RMAC2" attached to the Plaintiff's affidavit filed in support of the Originating Summons.

Upon request and authorization from Attorney General Mumba Malila, SC, the Plaintiff wrote to the Secretary to the Treasury at the Ministry of Finance and Development Planning furnishing his bank details to which the Treasury was to transfer the Sums agreed as aforesaid; in a letter dated 26th October 2009. The Plaintiff contends that the above notwithstanding the Defendant has failed and/or neglected to pay or transfer the agreed sum of US \$6,743,918.38, or any sum to his bankers as agreed.

The facts as set out above were not challenged, *controverted*, opposed or disputed in any way by the Defendant.

Giving sworn evidence the Plaintiff also testified that on 16th November 2009, he notified the Attorney General Mumba Malila, SC by e-mail that the Defendant had failed to honour the settlement agreement with regard to discharging its liability to him. Attorney General Mumba Malila, SC responded by email and promised to look into the matter and revert to him. On 17th November 2009 Attorney General Mumba Malila, SC, responded in an e-mail to the Plaintiff explaining that payment had not been made for the following reasons:-

- (a) That the Defendant had experienced internal difficulties pertaining to budget issues;

- (b) That the fund administered by the Ministry of Justice, the Compensation and Award Fund, was inadequate to settle the Defendant's liability to him. The Fund was at the time more or less exhausted and no express provisions had been made to include the money payable to the Plaintiff in its budget for the year 2010;
- (c) That the Defendant needed to find the money to pay in compliance with the settlement agreement. The Defendant would examine options that were available to it at the time in order to settle its liability to him;

Copies of the emails referred to are attached to the Plaintiff's affidavit in support of the Originating Summons and collectively market "RMAC3".

It is the Plaintiff's proposition that in December 2009, in breach of the agreement as set out above, the Defendant unlawfully, irregularly with impunity and without just or proper cause repudiated the said agreement. He therefore requested the Court to grant him the reliefs as endorsed on the Originating Summons supported by an affidavit filed into Court, on 17th April 2014.

Under cross-examination, the Plaintiff affirmed that there was an agreement between the State and himself and the details are as contained in a letter

written by the Attorney General of Zambia Mr. Mumba Malila, SC, exhibited into Court. As far as he was aware, the State had never denied the contents of that letter. The letter appears at **Page 14** in the Plaintiff's bundle of documents, and is dated 29th October 2009. He affirmed that this letter is the basis of his claim. In addition he received an e-mail explaining the difficulties the State had at the time in making payment. The difficulties given by the State were that the budget for that year had been exhausted and that the Fund which was held by the Attorney General had insufficient money. At the time of the exchanging of emails the Attorney General was out of the country, in Ghana but promised that when he returned to Zambia he would look into other alternatives to pay the money. He therefore left it to the Attorney General to explore these options.

He testified further that the agreement reached between him and the State was abrogated, and that is why the matter is now before Court. The agreement has not been complied with by the State.

Under re-examination he clarified that the letter dated 29th October 2009 was addressed to **Messrs Chilupe & Co.** who were acting for him in Zambia at the time.

The Attorney General's letter dated 29th October 2009 stated *inter alia* that "*The Treasury has been requested to find the money to settle the claim*". He understood this to mean that the Treasury sincerely would find the money to pay his claim of US \$6,743,918.38.

He also communicated to the Treasury Secretary in a letter dated 26th October 2009 which appears at **page 17** of Plaintiff's bundle of documents. He gave his banking details for the Treasury Secretary to make direct payments. He was informed later that the State had difficulties to make the payments.

As the record will show the Plaintiff's evidence is contained in letters and e-mails exchanged between the parties. His *viva voce* evidence corroborates the documentary evidence as contained in the said letters and e-mail exchanges.

The Plaintiff's second witness was **Mr. Chilembo Zulu**, a banker with Finance Bank. He quantified the **London Inter Market Offered Rate (LIBOR)** on the principal sums agreed from the date of agreement to compromise and settle the claim to 28th February 2014 when the proceedings were commenced. He recalled that in or about August 2014 he gave a witness statement as part of his evidence, which was accepted as part of his evidence. He testified that he worked on the issue of interest first in October 2009 and updated it on 28th February 2011. He put the market rate to be around 16% as at the date of his testimony. His calculations of the updated quantification of interest forms part of the Plaintiff's list of documents.

The State did not cross-examine this witness. The Plaintiff closed his case.

The Defendant did not call any witnesses, stating that the former Attorney General Mumba Malila, SC was now a Supreme Court Judge.

Both parties filed written submissions, lists of authorities and skeleton arguments for which I am grateful. As stated herein, the facts of this case have not been challenged, controverted, opposed or disputed. The sum total of the Plaintiff's testimony is that the agreement for compromise of his claim was settled between him and the Defendant. Each item of the claim was negotiated and agreed to.

The Plaintiff's evidence was forthright and truthful. No evidence was adduced to show or to suggest that he was not candid.

The Defendant's Case is a mere denial that there was an agreement to compromise the Plaintiff's claim.

The Plaintiff's claim is based entirely on the validity of a contract to compromise Plaintiff's claim against the defendant. The Law relating to compromise of actions is settled. The learned authors of **Halsbury's Laws of England, Vol. 9, 4th Edition at Page 194** state that:-

"A compromise of action which is honestly made, whether legal proceedings have been instituted or not, constitute valuable consideration even if the claim turns out to be ill founded. It is unnecessary that the question in dispute should be really

doubtful, it is sufficient that the parties in good faith believe it to be so, even if such belief is founded on a misapplication of a clear rule of Law". (My emphasis)

Halsbury's Laws of England 4th Edition Vol. 37 paragraph 383 and Note 1 provides that: "*..... The power of the parties to settle or compromise an action may be exercised at any time after the issue of the original process and before trial or at or during trial.....and of course this power may be exercised when proceedings are intended or threatened and before they are actually began*".

In the case of **Palmer and Harvey Mclane Vs Gerrald and Another (2013) ALL ER (D) 55 (Dec)**, Claimants and Defendants made a settlement agreement to settle all claims between them. The Claimant sought to enforce the settlement agreement and sought a substantial payment with interest. The issue for consideration was whether the Defendant was bound by the settlement agreement. **Judge Sir William Blackburne** held that applying settled law to the facts, the settlement agreement was fully valid and enforceable. He dismissed the defendant's assertion that the settlement agreement was illegal and a sham on the grounds that the Defendant had come nowhere near adducing any evidence, let alone cogent evidence to establish that fact.

The ratio *decidendi* of these authorities is that a compromise agreement is valid and enforceable unless it is deficient to meet the requisites for the creation of a legally enforceable contract. The meaning of contract is a question of

construction and therefore of law; to be ascertained in light of the language used in the context of all surrounding circumstances.

The principles of formation of a contract in determining if parties have entered into a valid and enforceable contract are well established.

According to **Halsbury's Laws of England, 4th Edition, Vol. 9 Paragraph 203** a valid contract is constituted in the following circumstances:-

- a) *"There must be two or more separate and definite parties".*
- b) *"The parties must be in agreement that there is a meeting of the minds (Consensus ad idem)"*
- c) *"They must intend to create a legal relationship in the sense that the promises of each side are to be enforceable simply because they are contractual promises".*
- d) *The promise of each party must be supported by consideration or by some other factor which the Law considers sufficient*"

The critical characteristics of a contract is the offer and acceptance. An acceptance of the offer is an indication express or implied by the offeree. **(Halsbury Laws of England, 4th Edition Vol. 9 Paragraph 216)**. Any implication either as to existence or as to terms of a contract must be founded on the intention of parties as evidenced by their words or conduct. Once the offer has been accepted you have a valid subsisting contract capable of enforcement. The offeror cannot revoke the offer and the offeree cannot withdraw the acceptance **(Halsbury Laws of England, Vol.9 Paragraph 245)**.

Where there is a dispute between the parties as to the terms of the offer and a party has so conducted himself that a reasonable man would believe that he has assented to the terms proposed by the other party, the party who has conducted himself whatever the real intention may have been, is bound by the contract as if he had intended to agree to the other party's terms.

A party will not in general be permitted to deny his assent to a contract when he has been guilty of negligence and has thereby misled the other party and enticed him to believe that he has assented (**Halsbury Laws of England 4th Edition Paragraph 288/289**).

In the case of **The Rating Valuation Consortium D. W. Zyambo & Associates (suing as a firm) V Lusaka City Council and Zambia National Tender Board, (2004) ZR 109**, the Supreme Court considered the principles upon which a contract is formed.

It is stated therein that an offer can be accepted by a reply provided that such reply does not vary any of the terms in the offer, nor does that reply introduce any new terms, because if such a reply does that, then that reply amounts to a counter offer.

The Court citing **Chitty on Contracts, 25th Edition page 1147, P220** further stated that: *“.....an offer can be accepted by a reply provided that the reply does not vary any of the terms in the offer nor does that reply introduce entirely new terms, because if such a reply does that, then the reply amounts to a counter offer. In fact Courts have held replies which include new terms as not being a counter offer, if those terms do not vary the terms in the offer nor vitiate the terms in the offer.*

It is generally and legally accepted that parties can reach a provisional agreement and then agree to set it out in a formal document later. Such an agreement is legally binding. What is required is for the Court to discern the clear intention of the parties to create a legally binding agreement”.

In the **Branch V Caborro Case**, where a vendor agreed to sell a lease and good will of a mushroom farm, the parties agreed to a provisional agreement embodying all conditions to be signed between them later; the Court held that:- *“by a word provisionally”, the parties intended to enter into a binding agreement from the outset which was subsequently replaced by a formal contract”.*

The Court made the following observation regarding the development of Contract Law. *“The proper approach, in accordance with these developments in law, is that the Court has to, in a given case, take an objective approach. In other words, what should guide the Court in analyzing business relationship should be whether or not the parties’ conduct and communication between them amounted to an offer and acceptance: (Page 127, lines 17425)”.*

Citing the case of **Spa V Feed Products (1887)2 Lloyds Reports**, the Court explained that in order to discern the clear intention of the parties to create a legally binding agreement between them, it should examine the correspondence and the conduct of the parties as a whole. It further stated as follows:-

“Applying this approach, the Courts have held certain communications as offers and acceptance after looking at the conduct of the parties and the communications between them. For example, Courts have held certain communications as an offer after looking at the conduct of the offeror. If the conduct establishes that there was an intention to be bound, or if such conduct of the offeror was such as to make any reasonable person believe that the offeror is making an offer, which if accepted would bind him, the Courts have interpreted that as an offer and vice versa. The Courts have also held that certain conduct of an offeree as an acceptance if such conduct can be believed by a reasonable person to be unqualified expression of an assent to the terms proposed by the offeror”.

The gist of the Defendant’s defence, as it emerged from the brief cross examination of the Plaintiff and the Defendant’s submissions and skeleton arguments filed herein is to the effect that there was no agreement between the parties. This comes out more clearly in the defendant’s written submissions filed into Court on 17th August 2015 at **page 2**, where it is stated: *“the defendants submits that there was no binding agreement or contract as between the Plaintiff and the Defendant with respect to the payment of the US \$6,743,918.38 and the US \$2,500,000.00. Rather it was a mere offer to settle the matter. That settlement ultimately failed in consideration for budgetary and Treasury constraints”.*

Counsel for the Defendant in submitting that there was no agreement between the State and the Plaintiff refers to the letter dated 29th October 2009, authored by the Attorney General Mumba Malila, SC appearing at **page 14** of the Plaintiff's bundle of documents, which I take the liberty to reproduce hereinunder:-

REPUBLIC OF ZAMBIA
MINISTRY OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL
P O BOX..
RIDGWAY
LUSAKA

MLA/6/7/18/2

29th October 2009

Messrs Chilupe & Co.
1st Floor Superannuation House
Ben Bella Road
P O Box 33204
LUSAKA

Dear Sirs

RE: CLAIM FOR US \$2.5 MILLION: UNITED NATIONAS HUMAN RIGHTS COMMITTEE
COMMUNICATION NO. 821/1998

Please refer to the above matter and to numerous correspondences.

Your client called on the undersigned on 23rd October, 2009 and indicated that as he was scheduled to travel out of the country on Tuesday 27th October, 2009, he desired to have this issue concluded immediately. As you are aware, your client discussed this matter with His Excellency the President and His Honour the Vice President in the last one or two weeks.

I am pleased to advise that Government has decided to settle this matter by paying your client a total sum of US \$6,743.918.38 made up as follows:-

Claim as originally framed	-	US \$2,500,000.00
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Interest on above	-	US \$ 743,918.00
Legal Costs	-	US \$2,000,000.00
Loss of earnings	-	<u>US \$1,500,000.00</u>
Total	-	<u>US \$6,743,918.38</u>

The Treasury has been requested to find money to settle the above sum.

Yours faithfully,

Signed.
Mumba Malila, SC
ATTORNEY GENERAL

/emn

Firstly, Pursuant to **Article 54** of the Constitution of Zambia, the Attorney General is the Principal Legal Advisor to the Government. Exhibit "RMAC2" the said letter dated 29th October 2009, authored by Attorney General Mumba Malila, SC is unambiguous. The Attorney General states in this letter that, "..... As you are aware, your client discussed this matter with His Excellency the President and his Honour the Vice President in the last one or two weeks". He continues, "I am pleased to advise that the Government has decided to settle this matter by paying your client a total sum of US \$6,743,918.36 made up as follows:-

<i>Claim as originally framed</i>	-	US \$2,500,000.00
<i>Interest on above</i>	-	US \$ 743,918.00
<i>Legal Costs</i>	-	US \$2,000,000.00
<i>Loss of earnings</i>	-	<u>US \$1,500,000.00</u>
Total	-	<u>US \$6,743,918.38"</u>

He ends the letter by stating that the Treasury has been requested to find the money to settle the above sum.

The above letter is straight forward and speaks for itself.

This letter confirms the Government's decision to settle the matter by paying the Plaintiff a total sum of US \$6,743,918.38.

I cannot therefore accept **Miss Mutale's** submission that there was no binding agreement or contract as between the Plaintiff and the Defendant with respect to the payment of the US \$6,743,918.38. In the case in *casu* the evidence shows that the parties herein, in good faith and sincerely did agree to compromise the Plaintiff's claim. Looking at the communications between the Defendant and the Plaintiff and the conduct of the parties I can discern a clear intention of the parties to create a legally binding agreement, as clearly the parties conduct between them amounted to an offer and acceptance. I am satisfied that there was a clear intention on the part of the Defendant to be bound by the settlement agreement agreed upon. The conduct of the Defendant was such that any reasonable person would believe that the Defendant had made an offer to pay the Plaintiff the sum of US \$6,743,918.38 in final settlement of the Plaintiff's claim. The letter dated 29th October 2009 embodies the offer by the Defendant to settle the Plaintiff's claim in full, which the Plaintiff accepted. It is followed by email exchanges merely on the modalities of payment. As the record will show this offer was accepted by the Plaintiff leading him to provide his bank details for the subject sum to be

transferred. In analyzing the evidence herein, I am satisfied that the parties conduct and the sum total of communications between them amounted to an offer and acceptance. The conduct of the parties establishes that there was an intention to be bound; such as to make any reasonable person believe that the Defendant was making an offer to settle the claim which the Plaintiff accepted. I am satisfied that the compromise agreement as stated by the Plaintiff is fully valid and enforceable. The plethora of authorities cited herein abundantly support the conclusion that there was a valid and enforceable agreement for the Defendant to pay the Plaintiff the sum of US \$6,743,918.38.

Miss Mutale's submission that the settlement ultimately failed in consideration due to budgetary and Treasury constraints is not legally tenable, and is not a legitimate excuse to deny the Plaintiff the reliefs he seeks from the Court.

Moreover Counsel for the Defendant did not cite any authority for the proposition that a settlement agreement fails if a Defendant cannot pay. That is not the law. The inability of the Defendant to find the money cannot be put forward as a defence. In any event Attorney General Mumba Malila, SC in his e-mail exchanges does not state that the State is without money. He simply explains the constraints the Defendant had to pay the sum agreed. I reject this proposition, for being without any legal foundation or basis.

The Court is invited at **page 3** of Defendant's submission to consider circumstances surrounding this matter, including public policy and public

interest considerations with regard to the practicability of Government's inability to fund the sum claimed. I am not sure what public policy and public interest considerations Counsel was referring to since she has not specified what public policy or public interest considerations she was alluding to. Counsel herein is submitting upon matters on which the Court has no evidence. The Defendant has not asserted any defence nor shown any inclination to do so, save to make baseless comments totally devoid of any merit such as that the claim is too high or that the matter is very sensitive. The Attorney General had already requested the Treasury to find the money to settle the claim as far back as October 2009. It is incumbent upon Government to respect its own decisions.

The Defendant agreed to compromise the claim as far back as 2009. Had the Defendant made budgetary provisions for this claim in subsequent successive budgets no doubt the claim would have been satisfied by now. Alternatively the Defendant could have negotiated for sufficient time within which to pay the sum agreed to be payable.

The agreement to settle the claim was reached at the highest level, involving the Republican President, the Republican Vice President and Attorney General of the Republic of Zambia. It is astonishing how successive administrations reneged on the agreement agreed to at the highest level. The Office of the President, the Vice President and Attorney General are institutions and the obligations, duties, functions and decisions made by holders of such offices do not change with individuals who hold such office. The conduct of the Defendant and its failure to honour its obligations to the Plaintiff is manifestly

unjust and a blatant dereliction of its constitutional obligations as well as its international obligations under the International Covenant on Civil and Political Rights and its Protocol. **Bas de Gaay Fortman, an Emeritus Chair in Political Economy at Erasmus University at Rotterdam and Professor of Political Economy of Human Rights at Utrecht University Law School, the Netherlands, and has taught at the University of Zambia,** in his book on: **Political Economy of Human Rights**, addressed the Plaintiff's plight in the context of human rights and his failure to obtain relief and concludes that: ".....the Chongwe case exposes the impunity of state related perpetrators of serious violations which is part of what may be called, "the human rights deficit". He refers to such violations as *rights without remedies*. This should not be the case. The State ought to have a crucial role in the protection of the basic dignity of each and every human being on its territory.

Regarding the State's failure to call Attorney General, Mumba Malila, SC, as its witness, this suit was commenced on 17th April 2014. Attorney General Mumba Malila, SC was sworn in as Supreme Court Judge in September 2014. There was ample time for the State to engage Attorney General Mumba Malila, SC to repudiate or reject the compromise agreement. He had at least 3 months to do so before he was sworn in as Supreme Court Judge. He could have drawn, sworn and lodged an affidavit in opposition in Court. He did not do so. This act is a clear manifestation that he did not dispute any of the facts pertaining to the settlement agreement set out in the Originating Summons and affidavit in support. Moreover there was no evidence adduced to show that he disputed or renounced the compromise agreement either before he voluntarily vacated the office of Attorney General in 2009 or during his second tenure on

his re-appointment as Attorney General, or indeed upon his appointment as Supreme Court Judge. Attorney General Mumba Malila, SC after all is the only surviving member of the Defendant's team that has personal knowledge of the compromise agreement, and with late Vice President George Kunda, SC who was also Minister of Justice at the time were principal participants in the negotiation and in reaching the compromise settlement. He also wrote the letter to the Plaintiff's Advocates confirming that the Government had agreed to pay the Plaintiff the sum of US \$6,743,918.38 in settlement of the Plaintiff's claim herein, and directed the Secretary to the Treasury to proceed to make the payment. He similarly sent the e-mail to the Plaintiff, admitting the claim and explaining the Defendant's failure to timely meet its contractual obligations to the Plaintiff.

Attorney General Mumba Malila, SC though a Supreme Court Judge, is a competent and compellable witness. His adjudicative responsibilities, extra judicial activities, financial dealings and employment opportunities are governed by Parts II to V of the Judicial (Code of Conduct) Act 1999. The Constitution expects every citizen to perform his/her civic duties for the proper administration of justice, including giving evidence in Court. The only exception being the President of the Republic of Zambia who may not be compelled to appear before Court as a witness. Therefore a Judge is a competent and compellable witness in all matters except he/she may not be called as a character witness. Section 5(4) of the Judicial Code of Conduct, Act 1999 refers: "*A judicial officer (Judge) shall not testify as a character witness before a Court*".

Attorney General Mumba Malila, SC now Supreme Court Judge could have testified for the Defendant, if it so wished, and if his testimony would have been of assistance to the Defendant.

Admittedly the Defendant is immune from process of execution of Judgments pursuant to the provisions of the State Proceedings Act. While such immunity is appreciated, as there would be chaos if the State was subject to the process of execution of Judgment Debts and Court Judgments. However the immunity from process of execution of Judgments imposes a serious obligation on the Government to always settle its liabilities with or without a Judgment, and do so fairly, promptly, as the Constitution of Zambia expects it so to do. Government should not hide behind this immunity to avoid its legal obligations. Government should not invite law suits when it does not have a valid defence. It just incurs costs and expenses payable by the tax payer without good cause of reason.

If budgeted funds had run out as the communication from Attorney General Mumba Malila, SC to the Plaintiff suggested, the Defendant was expected to have negotiated for sufficient time to pay the amount agreed, or in any event should have made adequate provision in the following years' Budgets and paid it. Given the lapse of time that has passed since the agreement, the Defendant would most likely have paid the agreed sum or a substantial part of it by now. It is of grave concern to the rule of law and due process that in the case in *casu* the Defendant neglected or refused to honour its agreement to pay the agreed sum, but elected to contest the claim solely to delay or frustrate payment of money the Defendant had clearly agreed to pay. It is irrelevant how hostile or

unfavourable the State may consider the Plaintiff's political or other attributes. The conduct of the Defendant herein is with the utmost respect, blatantly frivolous, vexatious and an abuse of the Court process. Such type of conduct is not expected from the office of the Attorney General, as the institution heading the noble legal profession.

The Defendant has been recalcitrant and obstinate over the years regarding the Plaintiff's claim. Once the proceedings were commenced, it continued to show disdain to the Plaintiff's claim and conducted the case in the same manner it has conducted the negotiations for settlement of the Plaintiff's claim with arrogant impunity and without just cause. As the record will show on 27th May 2014, the Plaintiff and the Defendant agreed to a Consent order for Directions and the Court issued the orders for Directions according to the terms agreed upon by the parties. The said Order appears at page 26 and 27 of the Plaintiff's Combined Bundle of Pleadings and Documents filed into Court on 13th February 2015. Both parties agreed to every term of the Order and their respective Advocates appended their signatures signifying their consent to the terms and conditions therein and the Court then signed the Order. Thereafter it was expected of the parties to obey the Orders of the Court, lest the trial is unduly protracted. In disregard of the Orders for Direction, the Defendant did not file its affidavit in reply in compliance with the rules. The Defendant similarly showed its disdain of the Orders of the Court by failing to make Discovery of documents, furnishing its List of documents, attending to inspection of documents, or file its witness statements. The Court set 25th February 2015 as a date for trial and reminded the Defendant to comply with the Orders for Directions.

On 25th February 2015, the Defendant applied for an adjournment which was declined for good reasons and trial commenced, as scheduled. At the conclusion of the Plaintiff's testimony, the Defendant's request for an adjournment was repeated. Reluctantly the Court granted an adjournment to the afternoon.

In the afternoon the parties informed the Court that at the request of then Acting Attorney General the parties had agreed to a further adjournment of the trial to enable them discuss an *ex-curia* settlement of the claim. By agreement of the parties the adjournment was granted to 23rd June 2015. On 23rd June 2015, the Defendant again applied for an adjournment and the Court granted the same with a rider that it would be the very last time the matter would be adjourned. The lengthy adjournment proved an exercise in futility as the Defendant was not available to discuss the *ex-curia* settlement.

On 27th June 2015 the Defendant sought to adjourn the trial because it wanted to make an interlocutory application. This was declined because the Court had at the last adjournment, at the instance of the Defendant, adjourned the trial and made it abundantly clear that the Court would not entertain another application for an adjournment. In any event the continued trial had been deferred from 25th February 2015 to 23rd June 2015 and thereafter to 27th July 2015 without any tangible gain to either party. The Commercial Court Rules keep in check attempts to defer hearing dates and requires that a party that intends to vary a date of hearing shall make an application by notice, at least

ten days before the hearing date. **Rule 11(3) of the High Court (Amendment) Rules 2012.** Moreover the Rules further, keep in check a Judge's discretion to grant an adjournment and stipulates that: *"A judge shall not grant an application for an adjournment except in compelling and exceptional circumstances, (Rule 9(1))"*.

After a number of officers from the Attorney General's Chambers played trivial pursuits with the Plaintiff and the Court, the case was then palmed off to **Ms C. Mulenga**, a Principal State Advocate who appears to have been directed to continue the case, and was clearly out of depth.

I had intimated to then Acting Attorney General, that if, (as is my experience in the my Court), the Attorney General's Chambers lacks sufficiently qualified and competent staff, it is advisable that they consider outsourcing some cases to competent and qualified Legal Practitioners within the Law Association of Zambia to beef up its own lack of competencies in some cases. Alternatively in complex cases the Chambers should consider seeking a Legal Opinion(s) from Legal Practitioners with relevant specialization and competencies.

With regard to the Defendant's alternative submission to the effect that if the Court holds the compromise agreement valid and enforceable, the Court should award damages; this proposition is as baffling as the proposition that there was no binding agreement or contract as between the Defendant and Plaintiff because the settlement ultimately failed in consideration of budgetary and Treasury constraints. The Plaintiff has not instituted proceedings for breach of contract, but for determination of the validity of the contract as

agreed and for the Defendant to pay the Plaintiff what was agreed to be paid to him.

The case of **Lawlor V Gray (1984) 34 ALL ER 345** is a case in point. It states:-

“The Law is that the cause of action as formulated in the Originating Summons is distinct from an action for breach of contract. The Court may award damages for breach of Contract in a separate action specifically brought for breach of contract but may not do so in the case where the claim is expressly restricted to a claim for a declaration on agreed facts and for money payable under a contract (if found valid).”

Further, the authors of **McGregor On Damages** state in **McGregor on Damages, 15th Edition page 4, paragraph 3** that:-

“Actions for money payable by the terms of the contract are money which the Defendant has promised by the contract to pay..... These are distinguished from actions for damages for breach of contract”.

With the above authorities in view, the alternative defence has no legal basis, is without merit and is therefore dismissed.

The Plaintiff's claim includes a claim for interest based on the **London Inter Bank offered Rate (LIBOR)** because that is what the parties agreed. **Mr. Chilembo Zulu "PW2"**, called by the Plaintiff testified that he quantified the *LIBOR* on the US \$2,500,000.00 for the Plaintiff from 1997 to date of the compromise agreement, and thereafter to February/March 2014. The calculation was accepted by the Attorney General and confirmed in his letter dated 29th October, 2009. The rate has not been challenged and the witness was not cross-examined by Counsel for the Defendant. These figures were not arbitrary. The Plaintiff testified that on 23rd October 2009 he met Attorney General Mumba Malila, SC, and together they revisited each head of the claim. They addressed the question of compensation, costs, loss of earnings and interest, in the context of legal fees the Defendant paid its lawyers abroad, the retainer it paid lawyers to prosecute offenders on behalf of the Task Force on Corruption, the **London Inter Bank offered Rate (LIBOR)**, just as Hon. George Kunda, SC had done on 16th October 2009. Therefore the interest forms part and parcel of the compromise agreement.

Taking into consideration the evidence on record, the authorities cited herein, I find that the Plaintiff is entitled to Judgment in the sum of US \$6,743,918.38 as prayed with interest and costs.

I Order that:-

1. The Declaration that the agreement to compromise and settle the dispute between the Plaintiff and the Defendant made

between them on 16th October 2009, settled on 23rd October 2009 and confirmed and incorporated in writing, contained in letters dated 26th October 2009 from the Plaintiff to the Secretary to the Treasury, Letter dated 29th October 2009 from the Defendant to the Plaintiff's Advocates Chilupe and Company, Letter dated 2nd November 2009 from Chilupe and Company to the Defendant, e-mail communication of 16th November 2009 from Plaintiff to the Defendant and from Defendant to the Plaintiff, is a valid, substituting and enforceable agreement in full and final settlement of the Plaintiff's claim against the Defendant whereby the Defendant agreed to pay the Plaintiff the total sum of US Dollars 6,743,918.38 in full and final settlement of all his claims against the Defendant arising from the Defendant's shooting the Plaintiff on 23rd August 1997, at Kabwe.


2. It was an express term of the said agreement or an implied term thereof, that the Defendant shall pay the Plaintiff interest on Us Dollars 2, 500,000.00 from date of agreement referred to in the preceding paragraph to date of payment at the **London Intermarket offered Rate (LIBOR)** if the Defendant failed or neglected to make the payment of the agreed amount of settlement as agreed which the Defendant failed or neglected to do.

3. The Defendant has a legal obligation to discharge the said agreement.

4. Costs of these proceedings shall follow the event and are awarded to the Plaintiff, to be taxed in Default of Agreement.

Right to Appeal granted.

Dated this 29th day of January.....2016


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Prisca M. Nyambe, SC
JUDGE