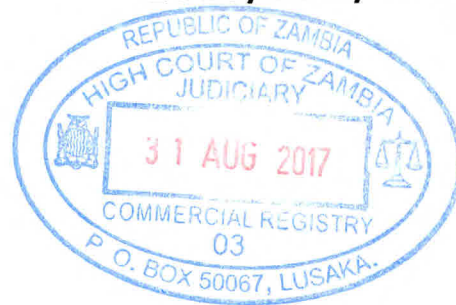


**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2016/HPC/0156



BETWEEN:

FRONTLINE FINANCIAL SERVICES LIMITED APPLICANT

AND

YANGTS JIANG ENTERPRISES LIMITED 1ST RESPONDENT

COLLUM COAL MINING INDUSTRIES 2ND RESPONDENT

LIMITED

Before the Hon. Lady Justice Irene Zeko Mbewe.

For the Applicant : Mr E Banda of Messrs BCM Legal Practitioners

*For the 2nd Respondent : Mr Simwanza of Messrs Lungu Simwanza and
Company*

RULING

Cases Referred To:

1. *Lusaka West Development Corporation Limited, BSK Chiti, Zambia State Insurance Limited v Turnkey Properties Limited SCJ No 1 of 1990*
2. *Zambia Seed Company Limited v Chartered International (Pty) Limited [1999] ZR 151*

3. *Wilding v Sanderson* [1897] 2 CH 534
4. *De Lasala v De Lasala* [1980] AC 546
5. *Purcell v T. C. Trigell Limited* (1970) 3 ALL.E.R 6

Legislation and Other Works Referred To:

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Mines and Minerals Development Act No. 11 of 2015*
2. *Seaton on Judgments and Orders 7th Edition, Volume 1*

This is a Ruling on the 2nd Respondent's application for an Order to set aside consent judgment, Order for appointment of receiver manager and writ of possession made pursuant to **Order 3 Rule 2 High Court Rules, Cap 27 of the Laws of Zambia.**

It is supported by an affidavit deposed to by Charles Dindiwe the Executive Director in the 2nd Respondent. It is deposed that the 2nd Respondent only became aware of the matter when it was advertised in the Zambia Daily Mail on 22nd September 2016 stating that a receiver manager was appointed to manage the affairs of the 2nd Respondent. The gist of the evidence is that the 2nd Respondent has never had dealings with the Applicant or 1st Defendant and that the only nexus is that one of the 2nd Respondent's director and

shareholder is also a director and shareholder in both Yangsts Jiang Enterprises Limited the 1st Respondent herein and Collum Coal Mining Industries Limited the 2nd Respondent. That the 2nd Respondent at no time authorised the 1st Respondent or any of its Directors to borrow money from the Plaintiff as no resolution was passed to allow its mining licence to be used as collateral. That the 2nd Respondent has an interest in the matter and that this Court has power to set aside a consent judgment which affects a third party who was not a party to the consent judgment. It is deposed that the Plaintiff wishes to sell the 2nd Respondent's mine on the basis of the consent judgment. According to the 2nd Respondent, the resolution produced by the Plaintiff is a forgery of signatures for genuine shareholders and directors of the 2nd Respondent (**Exhibit "CD1"**). That the letter head issued for the purported resolution is not the official letter head of the 2nd Respondent. (**Exhibit "CD 2"**). According to the 2nd Respondent, it never made a resolution authorising the Company to seek authority from Minister of Mines and Minerals Development in order to cause an encumbrance to be entered in respect of its mining licence by way of security for a loan. On this basis, it is argued that there are triable issues.

In its skeleton arguments, Counsel for the 2nd Respondent cites the case of **Lusaka West Development corporation Limited, BSK Chiti, Zambia State Insurance Limited v Turnkey Properties Limited**¹ in support of the proposition that a consent judgment can be withdrawn if there were proper grounds upon which the validity of any contract could be impugned such as fraud or mistake. Counsel argues that the 2nd Respondent has demonstrated that there is fraud and further that it goes against Section 66 (1) and (2) of the **Mines and Minerals Development Act No. 11 of 2015** that requires the prior approval of the Minister before an interest in a mining right is encumbered, transferred or assigned. Counsel contends that the failure to obtain the Minister's approval renders the postulation of the mining licence as security for a loan by the 1st Respondent null and void. Counsel submits that the 2nd Respondent has satisfied the requirements of the law on setting aside or withdrawal of the Consent Judgment.

The Applicant opposed the application by way of affidavit deposed to by George Mwansa a Director in the Applicant Company. According to the deponent, the 2nd Respondent has not met the

requirements for setting aside the consent judgment, Order for appointment of receiver manager and writ of possession and that the 2nd Respondent's application lacks merit as the procedure for setting aside is well known.

In its skeleton arguments, Counsel for the Applicant relied on the case of **Zambia Seed Company Limited v Chartered International (Pty) Limited**², **Wilding v Sanderson**³, and **De Lasala v De Lasala**⁴ in support of the proposition that the Court has no power to set aside a consent judgment or Order previously made in that Court except on grounds of fraud or mistake.

I have carefully considered the 2nd Respondent's application, supporting affidavit, opposing affidavit as well as the parties' skeleton arguments supported by list of authorities in support of their respective rival arguments.

The issue for determination is whether to set aside the consent judgment dated 3rd May 2016, order for appointment of receiver manager dated 15th September 2016 and writ of possession dated 2nd August 2016.

The Court has on countless occasions pronounced itself on the effect of a consent judgment. It is trite that a consent judgment derives its legal effect from the agreement of the parties where consent to the agreement must or should have been free in the first place. If the agreement is vitiated by fraud or mistake then such a perfected consent judgment could be set aside and a fresh action commenced. This position was espoused in the case of **Zambia Seed Company Limited v Chartered International (Pty) Limited** cited by Counsel for the Plaintiff where the Supreme Court held that:

"By law the only way to challenge a judgment by consent would be to start an action specifically to challenge that consent judgment."

In the words of the learned authors **Seaton on Judgments and Orders 7th Edition, Volume 1 at page 124** it states as follows:

"Prima facie, any order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by

fraud or collusion or by an agreement contrary to the policy of the Court.... Or if consent was given without sufficient material facts, or in misapprehension or in ignorance for a reason which would enable the Court to set aside an agreement”.

The above position was followed in the case of **Purcell v T. C. Trigell Limited** (1970) 3 A.E.R 6H where Winn L.J at 676 stated that:

“It seems to me that, if a Consent Order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this Order looked at as a contract”.

Arising from the cited authorities, it is a well settled principle that a consent judgment or order has to be upheld unless it is vitiated by a reason that would enable a Court to set aside an agreement, such

as fraud, mistake, misapprehension or contravention of court policy.

The question then is do any of the reasons advanced by the 2nd Respondent provide sufficient grounds to set aside the consent judgment of 3rd May 2016 on the basis of fraud, mistake, misapprehension or ignorance of facts? I have perused the consent judgment and paragraph 2 states as follows:

"2. That the said sum shall be paid to the Respondent on or before the 30th July 2016 failure to which the Applicant shall be at liberty to foreclose on the mortgaged property without any further recourse to the Court."

The backdrop to the mortgaged property alluded to in the consent judgment emanates from a loan facility agreement between the Plaintiff and 1st Respondent wherein the security of the loan facility is the 2nd Respondent's original large scale mining and floating charges on all its mine assets. (Exhibit "**GM1**" in the affidavit in support of the originating summons).

The 2nd Respondent argues on three limbs, namely that the person who signed the loan facility had no authority to do so on behalf of

the 2nd Respondent. The second limb of argument is that no consent was obtained as required under Section 66 (1) and (2) of the **Mines and Minerals Development Act**. Thirdly that the 2nd Respondent was never a party to the consent judgment as it was not aware of the Applicant's actions until it read an advertisement for appointment of receiver manager in the Zambia Daily Mail and this is confirmed by the record. As a consequence of the consent judgment, a writ of possession and appointment of a receiver manager was effected. In response, the Plaintiff argues that the 2nd Respondent has not met the requirements for setting aside the consent judgment, order for appointment of receiver manager and writ of possession and that the application has no merit.

In my considered view, the 2nd Respondent has made serious allegations that border on fraud and an ignorance of material facts on the part of the Plaintiff and 1st Defendant. I therefore find that it is in the interest of justice that the 2nd Respondent be given an opportunity to be heard. For the above reason, this Court is convinced that the 2nd Respondent's application has merit and falls

within the legally known grounds for setting aside a consent judgment.

The upshot is that the consent judgment, Order for appointment of receiver manager and writ of possession is hereby set aside for reasons stated aforesaid. The matter will proceed to be determined.

Consequently, the 2nd Respondent is ordered to file into Court an affidavit in opposition to the originating summons within 21 days of this Order and a reply if any to be filed within 14 days of receipt of the opposing affidavit.

The originating summons shall be heard on 3rd November, 2017 at 9.00 hours.

Costs in the cause.

Leave to appeal granted.

Dated this 31st day of August 2017.



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HON. IRENE ZEKO MBEWE
HIGH COURT JUDGE