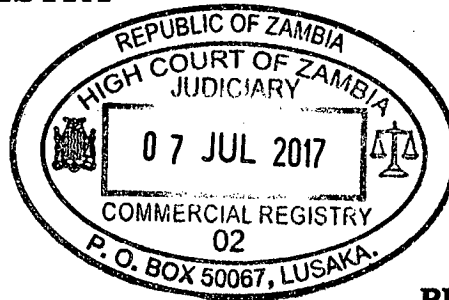


**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

2016/HPC/0536

(Civil Jurisdiction)



B E T W E E N:

RHOYDIE CHISANGA

PLAINTIFF

AND

LAWRENCE SAMVA SIKUTWA

1st DEFENDANT

LAWRENCE SIKUTWA AND ASSOCIATES

2nd DEFENDANT

MADISON FINANCIAL SERVICES LIMITED

3rd DEFENDANT

BEFORE THE HON. LADY JUSTICE IRENE ZEKO MBEWE

For the Plaintiff : *Mr. Sam. Chisulo SC of Messrs Chisulo and Co*
For the Defendants : *Mr. A. of Messrs Musa Dudhia and Company*

R U L I N G

Cases Referred to:

1. *Shawaza Fawaz and Another v The People* [1995] ZR 3
2. *Gentiruco AG v Firestone SA (Pty) Limited* [1972] 1 SA 589 (A)
3. *National Justice Compania Naviera SA v Prudential Assurance* [1987] 1 Lloyds Reports 379
4. *Cosgrove and Another v Pattison and Another* [2001] LTL

5. *Lusaka West Development Company Limited, BSK Chiti (Receiver), Zambia State Insurance Corporation v Turnkey Properties Limited [1990] SJ*
6. *Zambia Seed Company limited and Chartered International (PVT) Limited SCZ Judgment No 20 of 1999*
7. *Balkanbank v Taher and Others [1995] 2 ALL E R 904*
8. *Cornhill Insurance Plc v Barclays [1992] CA Transcript 948*

Legislation Referred to:

1. *Rules of the Supreme Court Practice, 1999 Edition.*
2. *Securities Act, Act No. 41 of 2016*

This is the Defendants' application for leave to adduce expert evidence at trial pursuant to **Order 38 Rule 36 (1) as read with Order 38 Rule 37 (1) Rules of the Supreme Court, 1999 Edition.**

It is made by way of summons and supporting affidavit, both filed on 15th February 2017. The application is supported by a list of authorities and skeleton arguments.

The affidavit in support is sworn by one Lawrence Samva Sikutwa, the 1st Defendant and deposed on behalf of all the Defendants. The evidence reveals that the Plaintiff commenced this action against the Defendants by way of writ of summons and statement of claim on 8th December 2016. According to the Defendants, upon perusal of the pleadings in this matter, it has become apparent that one of

the main issues in dispute is the valuation of the Plaintiff's interest in the 2nd Defendant including the indirect interest in the 3rd Defendant. The evidence reveals that the Plaintiff currently holds a total of 6,700,700 ordinary shares of the 3rd Defendant representing 13.4% of the shareholding in the 3rd Defendant. According to the Defendant, the Plaintiff is a registered member in the 2nd Defendant and holds shares in the issued share capital of the 2nd Defendant which is yet to be determined following the 2nd Defendant's disposal of his interest in the non financial services businesses of the 2nd Defendant and the Plaintiff's partial disposal of the interest he indirectly holds in the 3rd Defendant. That the Plaintiff's remaining beneficial interest in the 3rd Defendant which he holds indirectly by virtue of him being a member of the 2nd Defendant has to be determined.

According to the deponent, that the Plaintiff at the time of executing the Supplementary Mediated Confidential Settlement agreed to have his shareholding in the 2nd Defendant diluted after taking into account his share in the liabilities of the 2nd Defendant with

Barclays Bank Zambia Plc, and in a similar fashion the Plaintiff having been paid for his interest in the non financial services side of the business of the 2nd Defendant resulted in a dilution. According to the deponent, that the Plaintiff's interest in the 2nd Defendant has to be determined by calling expert evidence in order to assist the Court determine the true value of the Plaintiff's interest in the 2nd Defendant and indirectly in the 3rd Defendant. That the dispute centers around the parties' failure to agree on the value of the Plaintiff's interest in the 2nd and 3rd Defendant and therefore the best method to effect the Plaintiff's exit from the financial services side of the business. It is the Defendants' prayer that the Plaintiff will have an opportunity to call any expert of his choice, and that the Plaintiff will in no way be prejudiced.

The Plaintiff's response is by way of an affidavit in opposition and skeleton arguments, filed on 20th April, 2017 sworn by Rhydie Chisanga, the Plaintiff herein. The evidence reveals that the 1st and 2nd Defendant and KRC (presumably the Plaintiff) on 30th July 2010 reached an amicable settlement. This settlement was contained in a

Confidential Mediation Settlement Agreement dated 11th July 2011 which was made into a Consent Order on 14th June 2011. That the parties reached an ex curia settlement in the form of a Supplementary Agreement on 7th October 2013, which agreement was subsequently made into a Consent Order on 7th October 2013. That the said Supplementary Agreement provides for 24.20% as the Plaintiff's interest in the 3rd Defendant's issued share capital (**Exhibit "RC-1"**). The evidence reveals that on the 1st September 2014, the 3rd Defendant was listed for trading on the Lusaka Stock Exchange in fulfilment of the Initial Public Offering (IPO) agreement under the Supplementary Agreement. Due to the market conditions, not all the shares were disposed of and as such 6,700,000 shares representing 13.4% of the Plaintiff's interest in the 3rd Defendant remained indisposed during the IPO. The evidence reveals that the said 13.4% interest held in the 3rd Defendant ought to be transferred into the Plaintiff's name or that of his nominee by the 2nd Defendant in accordance with the provisions of clause 4.3.2 of the Supplementary Agreement.

According to the Plaintiff, the 2nd Defendant has wilfully delayed, neglected or refused to transfer the said equity into the Plaintiff's name as agreed by the parties. The evidence reveals that this action was specifically commenced for the purpose of enforcing the Defendant's obligations under the provisions of the Supplementary Agreement attached to the Consent Order of 7th October 2013. That the 6,700,000 shares representing the balance of the deponent's interest in the 3rd Defendant has already been publicly traded on the Lusaka Stock Exchange and the said shares therefore are not subject to any expert evaluation to determine their current price but that the value of the said shares is affected by the market price fluctuations on the Lusaka Stock Exchange.

According to the deponent, that during the trading of the 3rd Defendant's shares on the Lusaka Stock Exchange, the Plaintiff's shares in the 2nd Defendant were deemed to be cancelled pursuant to Clause 6.1.1 of the Supplementary Agreement by a reduction of the share capital of the 2nd Defendant and therefore the Plaintiff no longer has any interest in the 2nd Defendant. That the issue of

adducing expert evidence has been agreed and settled between the parties in Clause 4.1.1, 4.1.2 and 4.2 of the Supplementary Agreement which is the basis of the Consent Order of 7th October 2013. That this action does not require expert evidence as it is entirely based on the enforcement of the provisions of the Supplementary Agreement as directed by my Learned Brother Justice Mutuna in his Ruling delivered on 9th February 2016 directing that a fresh action be commenced to enforce the obligations of the parties in the said agreement.

The matter came up for hearing on 26th April, 2017. Along with making verbal submissions, Counsel for the parties indicated that they relied upon the skeleton arguments filed herein.

In arguing the application, Counsel for the Defendants', Mr. A. A. Dudhia, began by giving a background to the matter. Counsel, proceeded to justify the application by reference to **Order 38 Rule 36 (1) of the Rules of the Supreme Court, 1999 Edition**. In its skeleton arguments, the Defendants argue that the import of **Order**

38 Rule 36 of the Rules of the Supreme Court, 1999 Edition is mandatory for a party who seeks to adduce expert evidence at trial to seek the leave of the Court and such party is to apply for directions to do so and must have complied with such directions given. In this respect, Counsel argues that expert witness is relevant in assisting the Court in determining the issues in dispute and relied on the case of **Shawaza Fawaz and Another v The People**¹.

Counsel for the Defendants' argues that the opinion of an expert is his own opinion and that this is a proper case to call an expert witness to assist the Court reach its own conclusions on the issues in dispute. That it is necessary to call an expert witness in relation to the valuation of the Plaintiff's interest in the financial services side of the business of the 2nd Defendant which in essence is the 3rd Defendant. That the valuation would also determine to what extent the Plaintiff's shareholding has been diluted following his disposal of his shares of the non financial services side of the business and the extent the Plaintiff's share of the Barclays Bank Zambia Plc

liabilities affect the Plaintiff's interest in the financial services business. In conclusion, Counsel for the Defendants' argues that the application for leave to call an expert witness ought to be granted on the basis that the expert evidence will assist the Court to determine the issues in controversy, that is the valuation of the Plaintiff's interest in the 2nd and 3rd Defendant.

In response, Counsel for the Plaintiff relies on their skeleton arguments and argues that the Consent Order entered by the Court may by law only be challenged or allowed by commencing a fresh action. That the Defendants cannot in a sneaky manner seek to impugn the clear and unambiguous terms in clauses 4.1.1 and 4.2 of Annex A to the Consent Order dated 7th October 2013 without regard to procedure and providing proper grounds upon which the validity of the said clauses may be challenged or impugned. Counsel for the Plaintiff argues that it is trite law that where the parties have embodied the terms of their agreement in a written document, extrinsic evidence is generally not admissible to add, vary, subtract or contradict the terms of the written agreement.

The issue for my determination is whether or not to grant leave to the Defendant to adduce expert evidence.

The Defendants have anchored their application on the provisions of **Order 38 Rule 36 (1)** as read with **Order 38 Rule 37 (1) Rules of the Supreme Court, 1999 Edition**. Counsel for the Defendants contends that the Court has power to grant leave to adduce expert evidence at trial. The Plaintiff's Counsel argues that the application is unnecessary as the issue before Court is the enforcement of the Consent Order. **Order 38 Rule 36 (1) of the Rules of the Supreme Court, 1999 Edition** states as follows:

“(1) Except with the leave of the Court or where all parties agree, no expert evidence may be adduced at the trial or hearing of any cause or matter unless the party seeking to adduce the evidence -

- (a) has applied to the Court to determine whether a direction should be given under rule 37 or 41 (whichever is appropriate) and has complied with any direction given on the application; or**
- (b) has complied with automatic directions taking effect under Order 25 rule 8 (1) (b).**

(2) Nothing in paragraph (1) shall apply to evidence which is permitted to be given by affidavit or shall affect the enforcement under any other provision of these Rules (except Order 45 rule 5) of a direction given under this part of this Order.

Order 38 Rule 37 (1) Rules of the Supreme Court, 1999 Edition
states as follows:

"37. Direction that expert report be disclosed

(1) Subject to paragraph (2), where in any cause or matter an application is made under rule 36 (1) in respect of oral expert evidence, then, unless the Court considers that there are special reasons for not doing so, it shall direct that the substance of the evidence be disclosed in the form of a written report or reports to such other parties and within such period as the Court may specify.

The Defendant's application is predicated on the need to ascertain the value of the Plaintiff's shares in the 2nd and 3rd Defendant Company. I have perused the Consent Order dated 7th October 2013 which states as follows:

- "1. The Supplementary Agreement attached hereto as Annexe A be and is hereby made an Order of this Court.**
- 2. The 2nd Defendant be internally reorganised by the 2nd Defendant purchasing the Plaintiff's shares in itself pursuant to sub paragraph (c) of sub section (3) of section 239 of the Companies Act Chapter 388 of the Laws of Zambia, on the terms more particularly detailed in the Supplementary Agreement, and further that the 2nd Defendant's share capital shall be reduced accordingly.**
- 3. This order shall be effective immediately after the Exit Date as defined in the Supplementary Agreement; and**
- 4. Each party shall bear its or his own costs as the case may be.**

According to Counsel for the Defendants', the gist of their application is that there is a dispute that the value of the Plaintiff's shareholding is undetermined and what needs to be ascertained is to what extent the Plaintiff's shareholding has been diluted following the partial disposal of the shares in the IPO. Counsel for the Defendants' argues that the extent of liabilities of the 2nd

Defendant to Barclays Bank Plc affects the Plaintiff's share holding and this too requires to be determined.

According to Counsel for the Defendants' the Supplementary Agreement entered into by the parties lapsed, and this assertion is based on Clause 7.2 of the Supplementary Agreement which states as follows:

" 7.2 If the IPO of MFS PLC is not achieved by 30 June 2014 then this Supplementary Agreement shall lapse and the provisions of the CMSA shall apply to the Parties as if this Supplementary Agreement had not been entered into. In the event that the IPO of MFS PLC is achieved before 30th June 2014 then this Supplementary Agreement shall replace clause 3.3.5 and 6 of the CMSA and those clauses of the CMSA shall be deemed henceforth to have been amended by this Supplementary Agreement."

7.3 Save as stated herein all the clauses of the CMSA shall continue to operate in accordance with the terms and conditions contained therein.

At this stage of the proceedings, as much as I have avoided delving into the substantive issues yet to be determined, the evidence

shows that the 3rd Defendant was listed on the Lusaka Stock Exchange on the 1st September 2014 being three months later than the anticipated date of 30th June 2014 as contemplated in the Supplementary Agreement and as discerned from paragraph 8 of the Plaintiff's affidavit in opposition to this application. In my view, this raises a number of implications in relation to the enforcement of the Supplementary Agreement and the Confidential Mediation Settlement Agreement, including the obligations of both parties. I opine that all these issues are to be determined in the substantive matter.

In respect to the issue of the valuation of shares, the record shows that an independent valuation process was undertaken by IMARA whose Report is binding upon the parties pursuant to Clause 5.4 of the Confidential Mediation Settlement Agreement which provides as follows:

**"5.4 Upon the completion of the valuation, the
Independent Valuation Report shall form an**

Addendum to this Agreement (hereinafter referred to as "Annexure 1") and shall be the terms and conditions upon which LSS and/or LSA shall acquire the RC shares.

A perusal of Clause 5.4 of the Confidential Mediation Settlement Agreement provides that upon completion of the valuation, such valuation forms an Addendum to the said Agreement. This clause then guides the process on acquisition of shares between the parties, and I find that it is subject to interpretation as stipulated in the Consent Order of 7th October 2013 which is an issue for determination at trial.

According to the evidence on record, the Plaintiff's shares in the 3rd Defendant were partially traded on the Lusaka Stock Exchange on 1st September 2014. Counsel for the Plaintiff further contends that the outstanding balance is amenable to the securities market and is subject to the **Securities Act**. Conversely, Counsel for the Defendants' contends that the valuation of the Plaintiff's interest in

the 2nd Defendant and his indirect interest in the 3rd Defendant requires to be ascertained, and that the Plaintiff's remaining beneficial interest in the 3rd Defendant is not 13.4% as his disposal of his non financial services side of business interest in the 2nd Defendant was in effect a dilution. At this stage of the proceedings, these issues cannot be determined in the absence of hearing evidence from both sides in order to arrive at a decision, and therefore I shall make no pronouncement to that effect.

Counsel for the Defendants' argues that it is necessary that an expert witness be called to assist the Court in the determination of the issues between the parties once and for all as both parties have in the past used all manner of mechanisms to value the Plaintiff's interest in the financial services side of the business of the group. It is the duty of this Court to determine matters conclusively in respect to all matters as pleaded. Without delving into the substantive issues before this Court, a cursory glance at the pleadings and the arguments of the parties in respect to the application before Court, leads me to the inescapable conclusion

that there is a myriad of issues in contention between the parties in relation to enforcement of the Consent Order of 7th October 2013 in which an expert witness can shed light on. In my considered view, the Court can receive appreciable help from the opinion of an expert witness. The test of the admissibility of such evidence was crisply stated in a South African case of **Gentiruco AG v Firestone SA (Pty) Limited**² where the Court held that:

" The true and practical test of the admissibility of the opinion of a skilled witness is whether or not the Court can receive "appreciable help" from that witness on the particular issue."

Arising from the cited case, the true criterion is whether the Court can receive appreciable help from expert evidence. In assessing what is reasonably required from expert evidence so as to resolve the proceedings fairly, there are a number of factors that ought to be considered. Instructive is the case of **Cosgrove and Another v Pattison and Another**³ where the following factors, though non-exhaustive were set out as follows:

"The nature of the dispute, the number of disputes on which the expert evidence was relevant the reasons for

needing an expert report; the amount of money at stake; the effect of allowing a further expert witness on the conduct of the trial; the delay that calling an expert witness would cause; any other special features and the overall justice to the parties in the context of the litigation."

Similarly, I am persuaded by the case of **National Justice Compania Naviera SA v Prudential Assurance**⁴ where Creswell J stated the duties of an expert as follows:

- "1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.**
- 2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an Advocate.**
- 3. An expert witness should state the facts or assumptions upon which his opinion is based. He**

should not omit to consider material facts which could detract from his concluded opinion.

- 4. An expert should make it clear when a particular question or issue falls outside his expertise.**
- 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one."**

What this entails is that an expert witness requires originality, objectivity with an unbiased assistance to the Court and should not be influenced by the wishes or desires of the particular litigant who may be paying for his or her services as an expert. This means that the expert evidence should be an independent product of the expert, uninfluenced as to form or content by the exigencies of litigation.

Counsel for the Plaintiff contends that by calling an expert witness, the Defendants' seek to vary or set aside the terms of the Consent Order. Reliance was placed on the case of **Lusaka West Development Company Limited, BSK Chiti (Receiver), Zambia State Insurance Corporation v Turnkey Properties Limited⁵,**

Zambia Seed Company limited and Chartered International (PVT) Limited ⁶. I agree with the principles expounded in these authorities. The foundation of a consent order or judgment was aptly stated in the Malaysian Court of Appeal where Ramly J put it in this way:

"A consent order is founded on a Contract or agreement between the parties based on both parties willingness to submit...to certain terms. Once the Appellant and Respondent took (a) matter beyond the contract and recorded a Consent Order then they must accept all the implications of a Judgment or order. (Mayban Allied BHD v Kenneth Godfrey Gomez and Suhalmi Bib Baharudin Rayuan Civil No W-02-1094 Tahum 2008."

In my considered view, the calling of expert evidence in no way constitutes a variation or setting aside of the Consent Order of 7th October 2013 as suggested by Counsel for the Plaintiff. In any case, as ably guided by the Supreme Court in the case of **Zambia Seed Company limited and Chartered International (PVT) Limited**, the Court is alive to the fact that a consent order or judgment can

only be challenged by way of instituting a fresh action and under certain circumstances such as where a party alleges fraud.

Counsel for the Defendants' argues that the Plaintiff will not be prejudiced should the application be granted by this Court as they too will have an opportunity to call its own expert witness should he so wish. Counsel for the Plaintiff submits that if the application is granted, it would manifest extreme prejudice to the Plaintiff's having regard to the benefits of the Consent Order of 7th October 2013. By all account, the benefits in the said Consent Order inures to the benefit of the parties subject to its terms.

The net result is that the Defendant's application for leave to adduce expert evidence at trial is granted. It is further Ordered as follows:

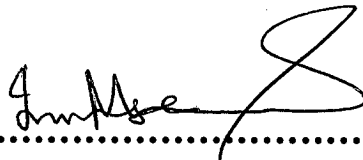
1. The expert witness shall file and serve their expert witness statement and Report in Court within 21 days from the date of the Order.
2. That the Plaintiff shall be at liberty to appoint an expert witness who shall file and serve their expert witness statement and report in Court within 21 days from the Order.

3. The Plaintiff's expert and the Defendant's expert shall have a meeting of experts pursuant to **Order 38 Rule 38 Rules of the Supreme Court, 1999 Edition** within 14 days of filing of the last witness statement and/or report in order to identify those parts of their evidence which are in issue and they shall prepare a joint statement indicating those parts of their evidence on which they are and on those which they are not, in agreement which statement shall be filed into Court within 21 days of the meeting.
4. The skeleton arguments and List of Authorities shall be filed not later than 7 days after filing of expert report.
5. A status conference shall be on 8th August, 2017 at 09.00 hours.

I make no order as to costs.

Leave to appeal granted.

Dated at Lusaka this 7th day of July, 2017



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IRENE ZEKO MBEWE
HIGH COURT JUDGE