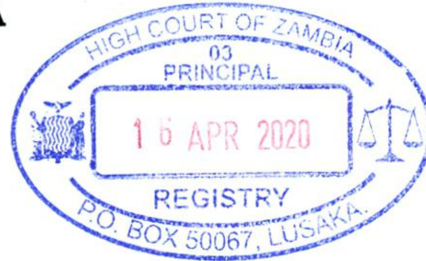
IN THE HIGH COURT FOR ZAMBIA **2018/HP/1905**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

LUNGA RESOURCES LIMITED	**1ST PLAINTIFF**
LUNGA FAMILY TRUST LIMITED	**2ND PLAINTIFF**
SHAWKI FAWAZ	**3RD PLAINTIFF**

AND

FIRST NATIONAL BANK ZAMBIA LIMITED **DEFENDANT**

BEFORE HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiffs: *Messrs S. Chikuba and R. Sambo of Messrs Paul Nora Advocates*

For the Defendant: *Ms. Mwape Bwalya with Mr. Bright Kaluba of Messrs Mwenye & Mwitwa Advocates watching in brief – Mr. Wikus De Wet of Messrs Van Greu n ene & Associates (RSA)*

JUDGMENT

Cases referred to:-

1. *Maureen Simpemba v. Abrahma Kalomba (2013) 2 ZR 279*

2. *Standard Chartered Bank Zambia Plc v. Bansa Kabwe (2013) 1 ZR 13*
3. *Khalid Mohamed v. The Attorney General (1982) ZR 49*
4. *Esquire Rose Farm Limited v. ZEGA Limited (2013) 1 ZR 74*
5. *Workers Registered Trustees and workers Compensation Fund Control Board v. Davey Musama SCZ Appeal No. 107/2002*

Learned Authors

1. *Zambia Civil Procedure, Commentary and Cases Vol. 2 page 140*

The genesis of this case is that on 1st November, 2018, the Plaintiffs launched proceedings in the General list of the High Court against the Defendant by mode of Writ of Summons and Statement of Claim claiming for the following reliefs:

(i) A declaration that the consent Judgment entered between the Plaintiffs and the Defendant and through their respective Advocates in *Cause No. 2017/HPC/0339* on or about the 11th September, 2017 for settlement of US$1, 494,676.30 allegedly owed by the Plaintiffs as at 5th July, 2017 was executed under fundamental mistake, misrepresentation and misapprehension.

(ii) A consequential declaration that the said consent Judgment is legally null and void and thus incapable of being enforced.

(iii) An order setting aside the consent Judgment and directing a full hearing of the principal action.

(iv) An order staying enforcement and/or execution of the consent Judgment.

(v) Any other and or further relief the court shall deem fit.

(vi) Costs.

The Defendant entered appearance and disputed the claims and put the Plaintiff to strict proof thereof.

The Plaintiffs marshaled one witness, **PW1**, **Mr. Shawki Fawaz**, the 3rd Plaintiff and Managing Director of Lunga Resources Limited, (the first Plaintiff herein). He described himself as a settler of Lunga Family Trust Limited, the 2nd Plaintiff.

The essence of his evidence was that the terms of the consent Judgment were discussed between and amongst himself, the lawyers for the Plaintiffs and those of the Defendant. Amongst the important specific terms were :

(1) that due to the nature of the business of the Plaintiffs business was adversely affected during the rainy season and no payments would be expected to service the plaintiff's debt to the Defendant during that rainy period 3 months due to non or minimal operations of the Plaintiffs.

A consent judgment was subsequently signed by the parties lawyers. He however only had sight of the signed consent Judgment after about one and a half months (1½) months later when it was shown to him by his Advocates.

To his alarm he noticed that the consent Judgment did not incorporate the moratorium clause to take into account the rainy season.

He prompted his Attorneys to rectify this serious omission and the Defendant was immediately engaged. Amongst those engaged was one of the Defendant's managers named Mr. Biggy Banda.

He referred the Court to document at page 3 of the Plaintiffs bundle of documents which is his letter to his Advocates complaining about the omission of the clause providing for suspension of monthly installments during the rainy season and urging them to address the matter as soon as possible.

He then referred to document at pages 4 and 5 of the same bundle which is a letter dated 10th September, 2017 from the Plaintiffs Advocates to the Defendants legal counsel. The letter pointed out that "the clause indicating that the scheduled monthly installment payment would be suspended during the rainy season was not included in the aforementioned consent Judgment.

They implored the Defendant to have the said clause inserted by way of amendment and / or rectification or have the Bank settle an undertaking in writing to that effect. This was to ensure that there are no unnecessary disagreements regarding the enforcement and operation of the consent Judgment as these matters were principally agreed by the parties in any case.

It was the witness's testimony that Mr. Biggy Banda gave verbal assurance that the absence of that clause would not be a stumbling block as long as after the rains he commenced with payments.

That rightly as Mr. Banda had assured, the witness hardly made any payments during the months of December, 2017; January and February, 2018.

He commenced with the monthly installments only to receive a letter from the Bank on 14th August, 2018 that he had defaulted in the sum of US$270,000 and there was an immediate demand to pay the backlog or risk eviction and foreclosure of property and business. This is as appears at page 10 of the Plaintiffs bundle of documents.

He expressed his surprise on the turn of events as indicated to the letter he wrote to the Head of Credit of the Bank on 24th August, 2018 appearing at page 47 of the Defendants bundle of documents. In that letter he explained the factors the payment flow which included *inter alia* the rainy season challenges. He complained that the Bank had not reverted to him on his concerns.

It was his testimony that he heard from one of the local law firms that a South African law firm had been engaged by FNB and was negotiating how to dispose of the mortgaged property and that of the first Plaintiff.

He was further surprised to learn that the Bank was claiming 1.3 million US$ when the consent Judgment was for US$1, 494, 676.30

as at 5th July, 2017 as appears at page 1 of the Plaintiffs bundle of documents.

That he had made a payment of atleast US$600, 000. He believed there was a big discrepancy.

He made reference to paragraph 10 of the statement of claim in the Defendants bundle of pleadings. Reference was also made to page 6 paragraph 3 of the Plaintiff's bundle of documents to emphasize payment of US$600,000 as having been made. This is the letter from the Plaintiff's Advocates to the Bank.

It was his testimony that he at all material times with his lawyers engaged the Bank. He has been a committed customer. The notice of foreclosure had the effect of affecting the whole operations.

He concluded by restating the reliefs he sought in the pleadings.

Cross examined by Ms. Bwalya Mwape; the witness in so far as the evidence was not repetitive, **PW1** identified the consent Judgment of 11th September, 2017 at pages 1 and 2 of the Plaintiff's bundle of documents.

He had proposed the terms of settlement on behalf of himself and that of the 2nd Plaintiff and discussed them with his lawyers and the Defendant's legal counsel.

The consent Judgment arose following a court action in the Commercial Court where the Bank (The Plaintiff) in cause 2017/HPC/0339 presently Defendant in this cause 2018/HP/1905,

was pursuing recovery of money from the 3 Defendants in the Commercial suit.

The terms of the consent Judgment were familiar to him. The second Plaintiff pledged its property as third party mortgage. The agreement was to be paying monthly installments of US$70, 000.00 by the 15th day of every month and that consideration of the rainy season would be taken into account as business would be adversely be affected during that period.

Reference was made to document at page 38 and 39 in the Defendant's bundle of documents which is a letter from the Plaintiffs Advocates herein this action, dated 14th August, 2017 to Legal Counsel of the Defendant Bank.

Paragraph (v) of that letter at page 39 reads:-

> "in the event that a payment of more than US$70, 000.00is made, the same be carried over and credited to subsequent installments our client ought to make. Kindly note that as a mining company, our client's business slows down in the rainy season and this is intended to cover installments that may fall during that period"

The consent Judgment omitted a material clause about the adverse business rainy season. He instructed his lawyers by letter dated 15th September, 2017 bringing his concern to their attention as appears at page 8 of the Plaintiff's bundle of documents. He wrote:-

> "I acknowledge safe receipt of a copy of the consent Judgment dated 11th September, 2017. After review of the same, we have taken note that the vital clause which states that the monthly installments payments shall be suspended during our off "rainy" season from November through January was omitted. You will recall that this was discussed by ourselves and the Bank.
>
> Kindly see to it that this is addressed to avoid any possible confusion that may arise in the future owing to the same......"

The Bank had agreed to that term though he had no document to that effect.

Asked as to who was at fault, the witness testified that it was up to the Court to determine who was at fault.

On 10th September, 2017 appearing at page 4 of the Plaintiffs bundle of documents, the Plaintiffs Advocates herein wrote to the Defendants Legal Counsel stating:-

> "Further to the consent Judgment that was settled by the parties and endorsed by the Honourable High Court Judge on or about the 11th of September, 2017, we write to advise that our client has since been in touch with our chambers and has noted that the clause indicating that scheduled monthly payments should be suspended during the rainy season has not been included in the aforementioned consent Judgment.

Our client wishes to have the said clause either inserted by way of an amendment and/or rectification or have your Bank settle an undertaking to this effect. This shall ensure that there are no unnecessary disagreements regarding the enforcement and operation of the consent Judgment as these matters were principally agreed by the parties in any case.

Do not hesitate to contact the assigned for any issue arising from the matter herein"

He did not know who actually drew up the consent Judgment. The witness then made reference to Plaintiff's Advocates letter dated 12th January, 2018 addressed to the Defendant's Legal Counsel appearing at page 42 of the Defendant's Bundles of Documents where the later were being informed about the reasons for the Plaintiffs failure

"to finish payment within the period was necessitated by the closure of their processing plant for close to 2 months relating to some compliance issues and that a court order had since been obtained for opening of the processing plant"

Paragraph 1 of the said letter stated that:-

"our client had found itself faced with unforeseen challenges occasioned mainly by the joint venture agreement with three mining firms on the Copperbelt Province namely Atlantis Mining Limited, the Mining Limited and Markov Investments Limited. Our client had supplied material to these three (3)

entities to the value of US$2, 000, 000.00 which supply was invoiced for payment and has not been obtained to date"

In that letter the Defendant's Advocates were informed that a payment of US$43, 000.00 had since been to the credit of the Bank. There were other explanations fostered in that letter.

The witness conceded that the issue of rainy season was not raised in that letter. He testified that as at that time had been making payments of US$70, 000.00 monthly installments. Payments were made for September to November, 2017.

That the issue of rainy season had been discussed with Bank. He could not recall if the US$43, 000 was for month of January, 2018. He recalled that payments were made in February and March 2018 though he could not recall the exact amounts made. They were less than US$70, 000.00 per month (at least in one month).

He had made payments after March, 2018 in the region of US$85,000.00 or US$65, 000.00 . He did not make any payment on 14th August, 2018 up to date of giving evidence.

The consent Judgment provided for foreclosure in the event of willful default. He would like consent order to be nullified on account of mistake. The mistake was the removal of a clause of amnesty during the rainy season.

The issue of rainy season was being discussed at all times with the Bank Manager and orally agreed and even confirmed in writing.

Reference was made to page 55 in the Defendants' Bundle of documents which is a status report by the Defendant dated 26th August, 2018. It states as follows:-

> "customer made repayments in line with the consent term until mid February, 2018. This was in the helm of the rain season as such mining activities are at a halt as such the business experienced reduced flows. Thus the customer made a request to clear the arrears for three months of February to April by the end of May, 2018"

Referred to payments at page 54 showing absence of payments during months of November, 2016 and December, 2016. The witness said that was before the consent Judgment was signed.

Shown the report at same page 54 that

> "customer failed to meet his obligations under the mutual repayment plan; he came down citing slow business during elections as the cause of his non repayment as his clients had fled in fear of election outcome. The new repayment plan was a follow up"

He conceded he did not make mention according to that report. He however reiterated paragraph 4 of page 55.

He confirmed that he was a surety, a personal guarantor to the Bank. There was collateral and personal guarantee of floating charge and 3rd party mortgage. The Bank will fall on those facilities in default.

Cross examined by Mr. Kaluba, the witness in so far as the evidence was not repetitive testified that to his knowledge he had not defaulted.

Referred to page 39 paragraph (v) of the plaintiffs bundle of documents being letter from Plaintiff's Advocates to the Defendants, the witness responded that they do not completely shut down. But business is slow due to a number of factors. Some companies go on holiday, safety concerns, huge in flow of water, frequent breakdown of machinery.

The exemption of installment payment during the rainy season was a good precondition in good faith. They could have made payments if they had.

Re-examined by Mr. Chikuba, shown letter at page 38 of the Defendant's bundle of documents; the witness testified that paragraph (v) underscored the renegotiating the consent Judgment to include a clause on the rainy season.

In respect of document at pages 42 and 43, he confirmed that that was a post consent Judgment letter. There was an ongoing relation between the parties and the Plaintiffs had a duty to be updating the Defendant on the status of their operations, whether good or bad.

There was a mutual understanding that the Plaintiffs would pay more during good months to cover for the rainy season. He pointed out that as long as the quantum of the expected amount in the consent Judgment balanced, there was no breach. That at an

amount of US$600,000.00 had been paid, excluding the 3 months of rainy season, the Plaintiffs were up to date with their payments. That is why the Defendant never issued a foreclosure notice during the rainy season. It was by mutual agreement.

Shown 43, he pointed out that the letter underscored the challenges of the rainy season among other things that include the copper project as a major source of income. He also attributed the low business due to some South African business partners closing from 15th December, 2017 to 15th January, 2018.

Referred to paragraph 4 at page 55 of the Defendants bundle of documents, the witness pointed out that that paragraph demonstrated that the parties were in active consultation. That was a Bank report from a Bank Manager who was dealing with the matter.

The Plaintiffs' rested their case.

The Defence marshaled one witness.

DW1 was **Euphrice Mukamuluti Luisy Kombe** a Banker and Senior Manager of the Defendant at the material time. It was her testimony that she knew the Plaintiffs by the facilities they had obtained from the Defendant Bank in form of overdraft, a vehicle and asset loan granted in October, 2015. The facility was obtained under Lunga Investments Limited (1st Plaintiff) under Directorship of Mr. **Shawki Fawaz** (3rd Plaintiff).

The second Plaintiff Lunga Family Trust Limited as guarantors of a security. A third party mortgage at page 1 of the Defendants bundle of documents of Stand 4665, Kafubu road, Industrial Area Kitwe.

It was signed by **Mr. Fawaz**. The terms of the security shift was to cover the facilities in case of a default. Then the surety will be liable to pay. There were no other facilities granted to the 1st Plaintiff after this.

Page 20 of the Defendants bundles shows the facility given by the Bank to Lunga Resources Limited as at 14th October, 2014. This is the overdraft of US$1, 080.00 and the Asset Finance of US$700,000. The purpose was to assist them to pay arrear installments on the Asset Finance and purchase fuel and overheads.

The overdraft was to be paid off on 16th February, 2016. The facility of Lunga Resources Limited was to be serviced by the fixed floating charge for US$1, 000,000 over the company assets and the 3rd party legal mortgage of K3, 297,000 over Stand 4665, Kitwe. The facility was to expire on 10th February, 2016. The terms of repayment were to be from the contract proceeds and this was a matter of additional security which was held on the facility.

The Bank held 3 assignments of recoverable from 3 companies

(i) Ocean mercury; (ii) Sino Metals; and (iii) Mopani Copper Mines. Repayments were to be done when contracts are done by Lunga

Resources and payments are availed to the company (Lunga) which will in turn service the facility from these payments. The terms of how the overdraft was to operate was outlined in the facility letter at page 25 of the Defendant's bundles. This overdraft was to reduce to a minimum of US$700,000 no later than 5th November, 2015 from proceeds of invoices submitted to the Bank.

The ceiling on the overdraft reducing was put at US$900,000 from month of December, 2015 and US$850,000 in January, 2016. What triggered the default was if overdraft at time of expiry is not paid off or the funds in the months specified are not received. This is what led to call up for a full repayment in June, 2017 as shown at page 30. This is a debenture being a fixed charge created over the company's assets to secure the sum of US$1, 000,000 plus interest. This was entered into between Lunga Resources Limited and the Bank.

The fixed assets which constituted debenture are at page 36 and are 15 in total. To mention a few include a loader, excavator dump truck and others.

According to her, there was default in the servicing of the facility, in this case the overdraft facility. That is what ignited the proceedings in the Commercial Court.

The Plaintiff's Advocates then engaged the Defendant through letter dated 14th August, 2017 appearing at page 38 in the Plaintiffs'

bundle of documents. They proposed for the restructuring of the facilities. The terms were for Lunga Resources to pay US$70,000 beginning 15th September, 2017 on every 15th of each subsequent month until full settlement.

The consent Judgment was finally entered into and signed. There were no other terms. The letter alluded to specifically provided that Lunga Resources would pay more than US$70,000 in some months to cover for slow down in business during the rainy season. That notwithstanding the payments would continue to flow. The consent Judgment was signed on 11th September, 2017.

She disputed paragraph 5 of the statement of claim which alleged that it had been agreed that payments would be suspended during the rainy season. According to her, the letter dated 14th August, 2017 from the Plaintiff's Advocates at page 38 of the Defendants' bundle of documents proves this point. In any event, the said term did not find its way in the signed consent Judgment.

Performance of the Plaintiff

The witness testified that the Plaintiffs made a first payment on 15th September, 2017 of US$100,000.00 after which the plaintiffs struggled to meet the agreed monthly payments of US$70,000.00. They were however making partial monthly payments.

Reference was then made to Plaintiff's letter to the Defendant dated 12th January, 2018 appearing at page 42 of the Defendant's bundle

of documents which highlighted challenges Lunga Resources was going through namely:-

(i) Challenge with joint venture parties
(ii) Closure of sight
(iii) Production had slowed down
(iv) Incidence of rains and closure between 15th December, 2017 to 15th January, 2018

Because of these challenges, they asked for reschedulement of payments of January and February, 2018 to the end of March, 2018. This did not happen. Upon receipt of the letter of 12th January, 2018, the Defendants' management composed of the witness (Euphrase M.L Kombe, Biggie Banda, Mandizya Daka from Vehicle and Asset Finance convened a meeting with Mr. Fawaz on 1st February, 2018. The Plaintiffs' Advocates were not present.

The rationale for the indulgency was that law production was experienced during the rainy season. Further, there was intimation that Mr. FAwaz was to make US$50, 000 every 2 weeks and of which part of it was to go towards servicing of the vehicle and Asset Finance facility. This indulgency was not met by the Plaintiffs.

This indulgency or extension which was supposed to be done by March, 2018 was subsequently extended to May, 2018.

During these months Lunga Resources was making payments according to the consent but not making the full amounts. The

said agreement was not reduced to writing, it was just an indulgency.

Paragraph 9 of the statement of claim states as follows:-

> *"after several correspondence and meetings, the defendant gave an unwritten undertaking that the months during the rainy season would be suspended for purposes of monthly installment payments and accordingly did not request for the payment during that period as reflected in the customer Bank Account belonging to the Plaintiffs. She denied "a payment holiday" being granted to the Plaintiffs during the rainy season"*

It was her evidence that the indulgence was on the basis of the Plaintiffs capacity. Reference was made to page 80 of the Defendants bundle of documents being the statement of account belonging to Lunga Resources Overdraft Account 62429939830 for month of February, 2018; - 21:02:2018 (payment) 29, 970.00; outstanding balance:-US$1, 332,242.83.

This takes into account any other payments made by Lunga Resources and interest accruals. She testified that overdraft credit interest. The only applicable interest rate is as agreed in the facility at page 81.

On 25th March, 2018, there was another payment for US$30,000.00. At page 82 a payment of US$10,000 is reflected as at 12th April, 2018. US$19,975 was made on 12th April, 2018. US$39,970 made on 7th September, 2018; US$19,977 made on 9th

September, 2018. Full payments were not made under the February, 2018 indulgency as at May, 2018.

On 14th August, 2018 the Bank communicated to Lunga Resources as at page 46 of the relevant bundle informing them about overdue amounts payable on the consent Judgment.

On 24th August, 2018, Plaintiffs Advocates' responded. They pointed out that their clients had made payments close to US$600,000. They are right because the actual amount paid came to US$ 525,000+.

It was explained that the dumpsite had been closed but about to reopen and operations would be normalized. There were no payments in July, 2018. Payments were made in October, 2018.

11:10:2018 - US$1, 6570.01

23:10:2018 - US$22, 187.30

The current outstanding as at 23rd September, 2018 was US$1.4 million inclusive of interest.

She denied having had site of letter dated 30th September, 2017; document number 4 in the Plaintiff's bundles addressed to the Legal Counsel of the Bank.

Reference was then made to Defendant's Supplementary bundle of documents from page 76. She testified that that was the statement for the overdraft account for month of September, 2017. It reflects a payment of US$39, 970 as at 30th October, 2017. This was after the consent Judgment.

There was a payment of US$29,970 as at 10th November, 2017. Reference was then made to page 24 paragraph 10 in the Plaintiff's statement of claim. She stated that whilst admitting that payment of US$585,307 was made as at 30th July, 2018; there was evidence that some payments were made during the rainy season.

That as at 30th July, 2018 the Plaintiffs should have paid US$800,000 as against the sum of US$585,307 they paid and were therefore behind in payments.

That the Plaintiffs assertion that the balance due as US$909,396 speaks to the Judgment amounts without interest.

Cross examined by Mr. Zambwe, she testified that prior to the proceedings, the Plaintiffs were in touch with the **DW1"s** office as senior manager. The subject of facility payments was discussed. In the normal course of duty, the Bank engages with customers on payments. There were no written documentation after discussions.

The Plaintiffs nature of business was made known to the Bank and that during the rainy season there would be low production. She made aware that the main contractors sometimes go for leave. They had challenges of the dumpsite where they get raw materials.

The Bank was aware of their challenges, but it was not agreed that they be allowed not to make payments during the rainy season. During the negotiations of the consent, that did not even arise as a factor.

Referred to the Plaintiffs Advocates dated 14th August, 2017 about enhanced payments during good times to cover for rainy days when production would be low, she stated that first installment of US$100,000 was in line with what was negotiated as to be the payment of 15th September, 2017 as per the payment structure and consent Judgment. The Bank did not agree to the proposals from the Plaintiffs Advocates.

She pointed out that the Plaintiffs had proposed monthly payments of US$70,000 but the Bank counter proposed US$100,000 as initial payment which formed part of the consent Judgment whilst the rest of installments were to be US$70, 000.

The counter proposal was in writing in emails though that evidence was not before Court, but there was the consent Judgment. She said it was not normal to arrive at an agreement to a proposal without putting it in writing.

Referred to clause 3 of the consent Judgment which provided for the Defendant to be at liberty to foreclose, take possession and sale mortgaged property without the order of the Court,; she stated that the Bank did not notice default from December, 2017 to March, 2018. This was because the parties were in constant touch and this is evidenced by payments the Plaintiff continued to make. She added that, "the Bank has a human face to these difficulties and has a listening ear".

In March, 2018 to August, 2018, the Plaintiffs resumed to make and did make some payments. That is in March, April, May and June.

The indulgency was a from February, 2018 to May 2018 for them to be paying US$50,000 every two weeks. The indulgency was outside the consent Judgment.

It was her testimony that the official demand notice was in August, 2018. The Bank has a human face to the defaulter. The engagements they had with Lunga Resources was on account that there was evidence of them making efforts to make payments and hence the indulgency of not effecting immediate demand.

Shown page 49 of the Defendants Bundle of Documents; the witness confirmed it was a status report prepared by Mr. biggie Banda but signed by herself. This was on 14th August, 2018 a few days after issuing the default notice.

At page 55, paragraph 4, it was reported that:-

> *"the customer made payments in lime with the consent order terms until mid February, 2018. This was at the helm of the rainy season as such the business experienced reduced inflows. This customer made a request to clear arrears for 3 months of February to April, 2018 by the end of May, 2018"*

The witness testified that because of the indulgency, the Bank on the basis of representations, the terms of the consent order were departed from. The payments made were irregular both on the

consent terms and the indulgency. She testified that prior to the default letter engagements were made by telephones and actual meetings.

She denied the proposition that the Bank approved certain written and unwritten representations outside the consent Judgment to enable settlement of the loan. She admitted that indeed there were several indulgencies given in trying to assist them meet their agreements.

Re-examined by Ms Bwalya Mwape, the witness confirmed that they were aware about the slowdown in business. That was however not a factor in agreeing the consent.

That the indulgency was outside the consent Judgment. But this did not waive the rights of the Bank to the consent order or Judgment but just to accommodate and not to replace the consent Judgment. The indulgencies came before the consent Judgment and some after the consent Judgment.

She concluded her evidence by stating that eventually a consent settlement was signed by both parties.

I am indebted on the submissions filed by the Learned Counsel for the Defendant. They were illuminating and helpful. I will however not replicate them but I assure the parties that those helpful submissions will be factored in as the Judgment will show.

The action herein is anchored on the setting aside of a sealed consent Judgment. The law relating to setting aside consent

Judgments is very clear. What's challenging are the morphorous situations which each peculiar case presents.

THE LAW

It is trite that a consent Judgment can only be set aside

(i) By consent of the parties, or
(ii) By commencement of a fresh action

The grounds are as follows:-

(i) That there exists fraud or mistake
(ii) That special circumstances exist before a party can rely on fraud or mistake to escape liability under a consent order
(iii) Any other reason that would warrant the court to set aside the consent Judgment.

Authorities abound suffice is to refer to the Learned Author and jurist Dr. Patrick Matibini, SCJ (as he then was) in his book Zambia Civil Procedure, Commentary and Cases[1] vol. II at page 140 and the cases of ***Maureen Simpemba v. Ibrahim Kabamba[1] and Standard Chartered Bank Zambia Plc v. Chansa Kabwe[2]*** referred to by Learned Counsel for the Defendant.

On the outset, I disclose my mind to settled principle of law that he who alleges must prove. The case of ***Khalid Mohamed v. The Attorney General[3]***.

I will now deal with the issues as raised by the parties.

(1) **Validity of Consent Judgment**

It is common cause that the parties entered into a consent Judgment which was sealed on 11th September, 2017 for payment by the Respondent of a sum of

(i) US$1, 494, 676.30 plus interest outstanding as at 15th July, 2017.

(ii) the Respondent was to pay a sum of US$100,000.00 on or before the 19th September, 2017 and thereafter payments of US$70,000 on or before the 15th of each succeeding month until full Judgment sum is liquidated in full.

(iii) Defaulting settling any one of the monthly repayments shall entitle the applicant to be at liberty to foreclose take possession of and sale the mortgaged property being Stand number 465, Kitwe without further court order.

(iv) In the event that the sale of the mortgaged property does not relinquish the debt, the 3rd Defendant to be personally liable for the balance of the Judgment sum as a personal guarantor of the debt.

(v) The defendants were at liberty to accelerate the liquidation of the Judgment sum with a sum of K3000.00 costs to the Applicant in cause 2017/HPC/0339.

(2) **Was there a variation of the terms of the consent Judgment**

It is trite law that persons of legal capacity can enter into any contract. When they do, the courts should assist in the enforcement of any such lawful binding contract.

The process of contracting is therefore party driven. The parties have the ownership of the contract. It therefore goes without saying that the parties can vary the terms of their contract.

The apex court had occasion to pronounce itself on the subject matter in the case of ***Esquire Rose Farm Limited v. ZEGA Limited***[4] where Chibomba, JS (as she then was) guided as follows:-

> "Holding (1) *In order for variation of a contract to be a valid defence at law, it must be by mutual agreement of the parties to the contract. The variation must also be supported by consideration.*
>
> Holding (2) *A mere forbearance or concession granted by one party to the other later parties convenience does not constitute a variation"*

The essence of Mr. Fawaz's evidence, the Plaintiff's sole witness was that it was a material term of the agreement during the discussions that the Plaintiffs would be given an amnesty not to pay the monthly installment during the rainy season.

This was anchored on the fact that the Plaintiffs' businesses are adversely affected during that period. Amongst many factors are some co-operating partners going on holiday during Christmas recess, operations are bogged down due to weather factors so production is very low, failure by an invoiced debtor to meet its financial obligations.

He further pointed out that the rainy season amnesty was indeed recognized by the Defendant as it did not treat them as defaulters. He pointed to the Defendants bundle of documents which clearly stated that the customer was compliant with the consent order and nonpayment during the rainy season was captioned.

He complained that the non inclusion in the consent of the forbearance of payment of monthly repayments during the rainy season nullified the consent.

The Defendant's witness Euphraice Mukamuluti Luisy Kombe whilst admitting that the issue of business challenges during the rainy season was subject to discussion before and after the execution of the consent Judgment testified that that term did not find itself in the consent.

She conceded the Defendant did not foreclose as per the consent when payments were not forth coming during the rainy season because the Bank gave indulgence. It was a listening Bank with a face and they were in constant discussion with the customer.

I therefore make the following findings of fact:

i) That the issue of nonpayment of monthly repayments during the rainy season was discussed by the parties but was not incorporated in the consent Judgment.

ii) The admission by the Defendant in document number 55 mentioned above that the customer was compliant with the

consent order will be construed in favour of the Plaintiff. The rule of *contra-proferentum* lays it down that a document will be construed against the maker.

iii) By the Defendant not foreclosing or giving notice of default when payments were not remitted fortifies the Plaintiffs view that there were legitimate expectation that the clause of nonpayment during the rainy season was indeed agreed on by the parties.

It is trite law that a mistake can be rectified. The Supreme Court had occasion to pronounce itself on the subject matter in the case of ***Workers Registered Trustees and Workers Compensation Fund Control Board v. Darey Musan***[5].

On the evidence of both **PW1** and **DW1** that the issue of relief during the rainy season and on the post facto conduct of the Defendant not to issue default notice timeously and on the written evidence that the customer was not in breach during the material time, I do not accept **DW1's** evidence when she trivializes the rainy season term amnesty as a mere indulgence. The Defendant actually acted upon it.

In my view, it is obvious the Defendant wanted to keep the business relation with the Plaintiffs, that was the consideration. Further, the Defendant remained to benefit to earn its interest which is good consideration.

On the foregoing, I am satisfied that the Plaintiff has proved his case on the preponderance of probability that indeed

(i) Judgment was duly entered by the parties for the Defendant to recover the sum of US$1,494,676.30 as at 15th July, 2017. This cannot be impeached.

(ii) The term granting the Plaintiffs not to remit payments during the rainy season was not incorporated which subsequently led to the dispute herein culminating in the Defendant to issue a default notice. Clause 3 of the consent Judgment, that is the default term is therefore hereby set aside.

(iii) The three months amnesty period as agreed by the parties therefore stands as the Plaintiff's acted on it.

I therefore make the following orders:

(i) The consent Judgment in the sum of US$1, 494,676.30 as at 15th July, 2017 stands.

(ii) (a) The matter is retired to the original Court for determination of the interest on the agreed Judgment debt taking into account the payments made by Plaintiffs in the sum of US$585, 307.30 and admitted as received by the Defendant as at 30th July, 2018. The balance owing as at date is US$909, 369.30.

(b) The terms of repayment of the balance due on the Judgment debt and interest to be determined by the original Court in default of agreement by the parties.

(iii) The parties are to bear their own costs.

Leave to appeal to the superior Court of Appeal is granted.

Delivered under my hand and seal this 16th day of April, 2020

Mwila Chitabo, SC

Judge