IN THE HIGH COURT FOR ZAMBIA **2015/HPC/0377**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

TIMAN LOGISTICS **PLAINTIFF**

AND

A - PLUS MANAGEMENTS **DEFENDANT**

Before the Honourable Mr Justice W. S. Mweemba in Open Court at Lusaka.

For the Plaintiff: *Dr M. Mwanawasa – Messrs Levy Mwanawasa & Company.*

For the Defendant: *Mr A. Chileshe – Messrs Mambwe Siwila & Lisimba Advocates.*

J U D G M E N T

CASES REFERRED TO:

1. ***RTS Flexible Systems Ltd v Molkere Alois Muller GMBH 7 CO (2010).***
2. ***Dunlop v Selfridge (1915) UKHL 1.***
3. ***ZCCM v Goodward Enterprises Limited (2000) SCZ No. 7.***
4. ***Davis Contractors Ltd v Fareham Urban District Council (1956) AC 696.***
5. ***Holmes Ltd v Buildwell Construction Company Limited (1973) ZR 97.***
6. ***Indo Zambia Bank v Muhanga (2009) ZR 266.***
7. ***Eddie Musonda v Lawrence Zimba Appeal No. 41 of 2012.***
8. ***Fibrosa Spolka Akoyjina v Fairbairm Lawson Combe Barbour Ltd (1943) AC 32.***
9. ***Sam Amos Mumba v Zambia Fisheries and Fish Marketing Corporation Limited (1980) ZR 135.***

OTHER WORKS REFERRED TO:

1. ***Chiity J and HG Beale, Chitty on Contracts – General Principles (2004) London: Sweet and Maxwell.***
2. ***Geoff Monahan. Essential Contract Law. (2001). London: Cavendish Publishing.***

By Writ of Summons taken out on 28th August 2015, the Plaintiff is claiming the following:-

(i) The sum of **K300,000.00**

(ii) Interest

(iii) Costs

(iv) And any other relief that the Court may deem fit.

According to the Statement of Claim, on or about 28th January, 2015 the parties entered into a contract. The agreed terms were that the Plaintiff would provide consultancy services to the Defendant at a cost of **ZMW600,000.00** payable upon the Defendant collecting an advance guarantee from National Road Fund Agency.

It was further agreed that the first instalment of **ZMW300,000.00** would be paid upon the Defendant collecting the advance guarantee from the National Road Fund Agency.

Whilst the last payment would be paid after the Defendant had issued an Interim Payment Certificate (IPC) to National Road Fund Agency. The Plaintiff averred that the advance guarantee had since been paid to the Defendant who had failed to pay the first instalment to the Plaintiff.

It is averred that due to this failure by the Defendant to pay the money owed, the Plaintiff had suffered loss of business earnings and profits.

The Defendant filed its Defence on 8th September, 2015. It is averred that the last payment would be paid after the Defendant had issued an interim payment certificate to National Road Fund Agency but denied that funds had been paid to it.

According to the Defendant, no advance guarantee as alleged had been collected and no admission was made as to alleged or any loss of damages. Thus, the Plaintiff was not entitled to the relief claimed.

The Plaintiff filed its Reply into Court on 9th November, 2015. It is averred that the Defendant collected the advance guarantee and had refused or ignored to pay the first instalment to the Plaintiff.

Moreover, that the Plaintiff did not appreciate the extent and effect of entering into a Contract.

According to the Plaintiff this Court ought to dismiss the contents of paragraph 6 of the Defendant's defence as the Defendant merely wanted to take advantage and runaway from its contractual obligations.

During Trial on 3rd August, 2017, the Plaintiff had filed one Amended Witness Statement on record on 11th January, 2016 from **TIMOTHY MUNSHILINGWA (PW1)**, a Director of the Plaintiff.

He stated that the parties herein entered into a Contract that was exhibited on pages 1 to 4 of the Plaintiffs Bundle of Documents under the sub heading *"consultancy fees."*

That this contract was for the Plaintiff to provide consultancy services to the Defendant at a fee of **ZMW600,000.00** with a deposit of **ZMW300,000.00** payable to the Plaintiff upon the Defendant collecting advance payment.

The Defendant was paid advance payment of **ZMW813,575**.28 on 15th May, 2015 and this was not in dispute. The reason why the Defendant did not release the funds could not affect the Plaintiff because it had satisfied the conditions of the contract signed between the Plaintiff and the Defendant.

The Witness also added that the Plaintiff was in business and the money being held by the Defendant would have been ploughed back in the business and due to the delayed payment the Plaintiff had missed a business opportunity to reinvest the money.

That to date the Defendant has not paid the first instalment despite them having collected the advance payment and due to this the Plaintiff had suffered loss of business earnings and profits.

During Cross examination, Mr Munshilingwa stated that he provided consultancy services whereby he had to get the Defendant to work with another contractor to undertake road works in Luapula Province.

Moreover, that according to paragraph A of the *"Consultancy, Confidentiality and Non – disclosure Agreement"* the Plaintiff was only going to be paid after the Defendant collected the money from National Road Fund Agency (NRFA).

He stated that he had no proof in documentary form to confirm that the Defendant had been paid the advance payment in the sum of **ZMW813,575.28** on 15th May, 2015.

It was also his evidence that he was aware that the Bank collected collateral from the Defendant in form of real property from the Defendants as a guarantee.

However, he was not aware that First Capital Bank (the Bank) revised its conditions and demanded collateral in form of cash from the Defendant which the Defendant did not have and therefore the Defendant could not have paid the Plaintiff.

The Witness maintained that he was certain the money was sent to the Defendants account from NRFA.

In Re – examination the Witness stated that the date of the Agreement was 15th January, 2015 and he only brought the matter to Court on 15th December, 2015.

According to the Witness the Defendant had been paid and he was unaware of any changes between the NRFA and the Defendant as they had remained the same and he was to be paid as agreed.

Further that he delivered the services for which he had been contracted to do and that his contractual obligations did not give him the possibility of having knowledge of any changes apart from the information he had when he signed the contract.

He lastly stated that the Confidentiality and Non- Disclosure Agreement was signed on 28th January, 2015.

The Defendant filed one Witness Statement on record on the 11th of December, 2015 from **PETER MAJULA (DW1)** the Managing Director of the Defendant.

In his Evidence in Chief he stated that Unik Construction Engineering Zambia Limited (Unik) was awarded a contract by Road Development Agency (the Main Contract) for the Rehabilitation and Upgrading of the Kawambwa – Mushota- Luwingu Road and the Chisembe- Chibote- Chief Chama Road, Tender No. ZPPA/CE/011/12 (the Project).

By a Sub Contract Agreement dated 18th September, 2013 (the Unik Sub contract) Unik engaged Luja Enterprises Limited (Luja) as Sub contractor under the Main Contract.

To enable Luja to perform its obligations under the Unik Sub – contract the said sub – contract provided for inter alia the settlement of an advance payment to Luja in the sum of **K813,575.28** being 10% of the total contract sum. The advance payment would be settled upon the issuance of an Advance Payment Guarantee in favour of Unik.

Following the execution of the Unik Sub – contract, Luja then sought the services of a further subcontractor to perform its obligations under the Unik Sub contract.

At this point the Plaintiff brokered a deal between Luja and the Defendant which culminated in the appointment of the Defendant by Luja as sub-contractor pursuant to a Memorandum of Understanding dated 6th February, 2015 (the Luja MoU).

Prior to the conclusion of the Luja MoU, the Plaintiff and the Defendant on 28th January, 2015 entered into what was in substance a brokerage agreement, although termed a *"Consultancy Confidentiality and Non – Disclosure Agreement"* (the Brokerage Agreement).

According to the Consultancy Fees section of the Brokerage Agreement it was their intention and their mutual understanding that:

(i) The total consultancy fees payable to the Plaintiff for its brokerage services would be **K600,000.00.**

(ii) **ZMW300,000.00** of the Consultancy Fees would be settled to the Plaintiff upon the Defendant receiving an advance payment of K813,575.28 from Luja, following the issuance of an Advance Payment Guarantee to Unik to secure Luja's performance of its obligations under the Unik Sub – contract;

(iii) The balance of the Consultancy fees being the sum of **K300,000.00** would be settled upon the issuance of an Interim Payment Certificate (IPC) to the Road Development Agency.

According to the Witness, First Capital Bank (the Bank) issued a Bank Guarantee No. FCBZ/2015/134 to Unik in the sum of **K813,575.28**; pursuant to which Luja made a request for the transfer of the advance payment to Unik on 11th February, 2015 and Unik in turn to the Road Development Agency.

This advance payment was made and to date stood to the credit of Luja's account with FCB. However, the funds had not been transferred to the Defendant as alleged by the Plaintiff, as the said funds had been withheld by the Bank.

According to **DW1**, upon the purported issuance of the Advance Payment Guarantee by collateral in the form of real property which had been offered to it by the Defendant. However, upon a collateral review, the Bank altered its position and demanded for cash cover in lieu of a real property as security.

On this basis, the Bank refused to release the advance payment to the Defendant until it received alternative collateral in the form of cash.

Further that on about 4th June, 2015 the Plaintiff through its Advocates wrote to the Defendant demanding the payment of **ZMW300,000.00** on the

basis that the Defendant had refused to settle the consultancy fees to the Plaintiff.

The Defendant and its Advocates, wrote to the Plaintiff to advise that the Defendant had not received the advance payment and that the same was still in Luja's account.

Notwithstanding this explanation, the Plaintiff still proceeded with this action. Additionally, the Defendant brokerage agreement had been frustrated on account of the fact that Unik never gave Luja or the Defendant site possession or a scope of works and opted to complete the whole scope of works under the Main Contract.

Thus, for all intents and purposes the Defendant did not receive the advance payment, as the contract had been executed. The funds for lack of a better description were sitting in a form of trust in favour of Unik.

Further that on account of the foregoing, it was **DW1's** understanding that the Defendant was not indebted to the Plaintiff as it had not received the advance payment of **K813,575.28** as alleged and the Luja MoU had been frustrated.

In Cross Examination **DW1** when shown page 3 of the Defendants Bundle of Documents under the sub heading consultancy fees stated that the money indicated in the Agreement as consultancy fees was due and had not yet been paid because as indicated in the Agreement it should have been paid upon the Defendant receiving monies which had not been paid to date.

Further that he had not been on site because they had not received the stated sums of money. When referred to the same documents at page 4 first paragraph under the sub heading consultancy obligations he stated that the Plaintiff was engaged as a Consultant.

The Witness maintained that he had not been paid and would be able to produce a Bank Statement of the Defendant if there was a court order. He

also agreed that the Consultancy fees were due to the Consultant but not payable.

In Re-examination **DW1** told the Court that when he signed the contract with the Plaintiff he agreed to respect it. On payments to the Plaintiff, the Contract provided that the Defendant should receive an advance payment of **K813, 575.28** from which the Plaintiff was to be paid the sum of **K300, 000.00** as brokerage fees for linking A- Plus Management to Luja Enterprises.

Moreover, that the balance of **K300, 000.00** would be paid progressively as the Plaintiff claimed from NRFA and to date, Luja had not paid them anything for them to pay the Plaintiff.

That the arrangement for him to receive the funds was to be done by way of Bank Transfer and to his knowledge, no funds had been transferred to the Defendant to date.

Further, that the funds had not been transferred to the Defendant's account because according to the contract between the parties herein, Luja was to provide a Bank Guarantee to Unik Construction, the Main Contractor.

It was also his testimony that the Bank Guarantee was to be secured by the Plaintiff's landed property which was given to Luja enterprises. However, after credit assessment by the Bank, it rejected the Plaintiff's property and opted for cash collateral.

That it was his understanding that Luja enterprises received the advance payment of **K813,000.00** from the NRFA and the Bank held this as cash collateral. Thus, Luja could not pay A- Plus in order to execute the works.

Thus, the payment made to Luja was being mistaken as the payment made to the Defendant. According to him, the Contract did not provide that they still had to pay the Plaintiff without receiving any payment.

He lastly stated that the Plaintiff did not require him to be physically on site and he had not been on site where these works were being done.

Counsel for the Plaintiff filed Written Submissions into Court on 19th October, 2017. She submitted that once a contract is entered into by the parties, it creates binding obligations between the contracting parties and whether there was a binding contract depended upon what they had objectively agreed.

Counsel then cited the case of **RTS FLEXIBLE SYSTEMS LTD V MOLKERE ALOIS MULLER (1)** in which it was held that there was a valid contract, since the essential terms were agreed and substantial works were then carried out.

According to Counsel, the gist of the agreement was that the Plaintiff should provide consultancy services to the Defendant who would pay for the service. By the parties agreeing to the terms of the contract, a binding contract was indeed created between the two parties.

It is also argued that the parties agreed that payment would be made to the Plaintiff with an initial deposit of **ZMW300,000.00**.

Therefore, the failure by the Defendant to receive payment from LUJA Investment did not have an effect on the payment that was due to the Plaintiff. The Plaintiff was not a party to the agreement by the Defendant to secure the bank guarantee. The fact that the Bank rejected the Defendants property and opted for cash could not by all means prevent the Plaintiffs from enjoying the fruits of its labour.

Moreover, that the fact still remained that they performed part of their bargain of the contract and that the signed contract between the Plaintiff and the Defendant did not in any way provide to the effect that the payment due to them was dependant on the Defendant securing the bank guarantee.

The failure to secure the Bank Guarantee arose out of what was agreed between the Defendants and LUJA Enterprises an agreement the Plaintiff was not privy to.

Further that the relationship between Luja and the Defendant put the Plaintiff in an awkward position. Counsel drew this Courts attention to the contents of the Consultancy Confidentiality and Non- disclosure Agreement signed between the Plaintiff and the Defendant at page 3 of the Plaintiff's Bundle of Documents (BOD) with the sub paragraph entitled **'CONSULTANCY FEES.'**

Counsel further submitted that the MOU between the Defendant and Luja Enterprises was signed and it was the back up of the payment which payment was the basis upon which the Defendant was relying upon for not paying the Plaintiff.

She stated that the said second part of this paragraph of the agreement was put there to safeguard the interests of the Plaintiff and that made the Defendant liable to pay the Plaintiff forthwith.

Counsel also drew my attention to page 4 of the Plaintiffs BOD under **'NON-CIRCUMVENTION'** sub 'b' and 1.1 respectively. She submitted that there was admission of responsibility by the Defendant to the Plaintiff to make good of the issues mentioned therein.

She further drew my attention to the subheading **'AGREEMENT FOR THE BENEFIT OF AFFILIATES'** at page 4 of the Plaintiffs Bundles of Documents particularly the last paragraph and submitted that they believed that the Plaintiff was an affiliate and therefore qualified to those remedies mentioned therein.

Counsel also pointed out that the key witness for the Defendant was Mr Peter Majula and upon inspection of the Plaintiffs Bundle of Documents at page 5 the same key witness appeared as the Finance Director for Luja Enterprises Limited under a Letter dated 11th February, 2015 addressed to

UNIK Construction Engineering Zambia Limited the main contractor for the same road under which this matter had been brought to Court.

In that letter Luja was asking for advance payment for the sum of **ZMW813,575.28** and as a follow up, on 19th March, 2015 at page 6 there is a letter from First Capital Bank to the main contractor confirming that the Bank had issued Bank Guarantee No. FCBZ/2015/134 for **K813,575.28** on 1st February 2015 on behalf of Luja Enterprises Limited. Further the main contractor Unik Construction Engineering Zambia Limited at page 7 of the Plaintiffs BOD gave a directive to the Road Development Agency to pay Luja.

Further that at page 9 of the Plaintiffs BOD there is a letter from the Defendants lawyers showing that the sum of **ZMW300,000.00** was confirmed to be sitting on Luja's account and that the amounts were waiting to be transferred to the Defendant's account and the same was to be paid to the Plaintiff.

She also stated that this sequence of events gave a conclusion that the Defendant and Luja were one and the same companies working in collusion under different names with one Mr Majula wearing two hats in the Defendant's company and under Luja.

Further that the letter at page 9 of the Plaintiffs BOD was written on 13th July, 2015 as an admission of the amount owed to the Plaintiff and the money should have been paid by now. The time taken was an unreasonable passage of time.

It is also submitted that this money must have been transferred by now to the Defendant's account as there was no condition attached to that transfer.

Moreover, that there was no full disclosure from the Defendant's company on the way they handled their partnership with UNIK and their failure to admit under sworn evidence that money had been paid to the Defendant was just to avoid their duty to pay the Plaintiff.

Counsel then reiterated the Plaintiffs contention that the can of worms should be opened in order to get to the root of the matter at hand. It was Counsel's contention that the Defendant's failure to receive the advance payment should not place any burden on the Plaintiff and it should not be borne by the Plaintiff. The Plaintiff had indeed performed their obligations as per contractual terms and thus, the initial deposit must be paid by the Defendant.

She went on to cite the case of **DUNLOP V SELFRIDGE (2)** where the Learned Judge having adopted the work of Sir Frederick Pollock stated that:-

> **"An act of forbearance of one party; or the promise thereof, is the price for which the promise of the other is bought and the promise thus given for value is enforceable."**

In the present case Counsel argued that the Plaintiff bought the promise of the Defendant and gave consultancy services to the Defendant.

Further, that a failure to perform the terms of a contract would constitute a breach of contract. Counsel also added that she had considered the bank statements sent through for that year in kwacha currency save for the dollar denominated accounts.

The difficulty was that the transactions being questioned were expected to be in kwacha currency denomination. It was her position that there was no full disclosure for that period in question.

All Bank Statements from First National Bank Zambia Limited were not stamped and also mostly had consolidated bank balances making it difficult for the Plaintiff to appreciate the individual entries date by date.

The bank statements were dollar denominated and as already alluded to the transactions under question must have been conducted in kwacha currency. Counsel drew this comparison of authenticity to the bank statements belonging to the Defendant from Barclays Bank from page 39 to 48 which were bearing the official stamp of the said bank.

The period of interest for the Barclays Bank account was from 14th February, 2017 but the Defendant had sent the bank statements from 17th February, 2017.

Moreover, that as for the Bank Statements from Finance Bank Zambia PLC their dates of interest were 20th December, 2016 but the Defendant had highlighted only 1st December, 2016 in the month of December, 2016 and skipped all other dates and only produced dates from 6th January, 2017 and this was highlighted on page 50 of the Defendant's filed bank statements document. She also pointed out that that these bank statements from Finance Bank Zambia Limited were not bearing the bank's official stamp.

The Bank Statements from First Capital Bank did not bear an official stamp of the Bank and the Plaintiff was expecting entries from the year 2013 yet the Defendant at page 53 only showed entries from 2016 without giving any evidence as to when all these accounts were opened.

Because of the nature of the other stakeholders involved the can worm was not allowed to be opened and this worked against the Plaintiff. Counsel therefore prayed that the benefit of doubt be given to the Plaintiff.

Counsel also cited the case of **ZCCM V GOODWARD ENTERPRISES LIMITED (3)** the Court held that: -

> **"Where the buyer wrongfully neglects or refuses to accept and pay for goods, the seller may maintain an action against him for damages."**

Counsel submitted that the Defendants failure to pay off the debt in time had breached a fundamental term of the contract. The burden of securing the bank guarantee should rest on the Defendants.

Counsel therefore urged this Court to consider the fact that the contract between the Plaintiff and Defendant could not be said to have been frustrated as what had been frustrated was not because the Plaintiff did not deliver but because the Defendant failed to meet the loan conditions.

What should be considered was that the refusal by First Capital Bank (Z) Limited to permit the transfer of the advance payment to the Defendant due to insufficient collateral could not deny the Plaintiff the payment due to them for the service that they provided to the Defendant.

She also stated that the failure by the Defendant to pay the Plaintiff clearly went against the spirit of business and corporate transactions, further the Defendants were not being fair to the Plaintiff who performed his part of the obligation under the agreement.

Counsel lastly urged this Court to find in its favour.

The Defendant's Counsel also filed written submissions into Court on the 7th of November, 2017. He submitted that the failure by the Defendant to pay the Plaintiff as agreed was not the fault of the Defendant but by a condition which was never envisaged by both parties at the time of making the contract.

The contract between the parties was thus frustrated. Counsel relied on the definition of such a contract from the learned author of ***Chitty on Contracts – General Principles (2004) at page 1311*** where the learned author sates as follows: -

> **"A contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into contract."**

Counsel went on to submit that payment to the Plaintiff depended on the Defendant receiving funds from LUJA as stated in the Contract under Consultancy Fees which stated as follows in part: -

> **"...first instalment being three hundred thousand kwacha (K300,000.00) which shall be paid upon collecting advance guarantee and the last instalment (300,000.00) paid on the first IPC issued to NRFA..."**

He went on to state that the advance payment was supposed to be collected from Luja but was never collected because the bank asked Luja to provide collateral in form of cash before releasing the money. Initially the bank had asked for real estate property which LUJA provided through the Defendant. The IPC was also never issued to NRFA because the Defendant never went to site to undertake the works for which they were sub contracted by Luja as the latter proceeded to do all the work by itself.

In regard to the IPC, the Contract between the Defendant and LUJA clause 5c required LUJA to facilitate payment claims relating to performed works and administration support in preparing the IPC and pushing for payments in collaboration with the Defendant. For reasons best known to themselves Luja did not give chance to the Defendant to perform its obligations hence there was no Interim Payment Certificate (IPC) issued concerning the work done and as such there was no payment made. This part of the term of the contract under CONSULTANCY FEES was equally frustrated.

He also pointed out that **MR TIMOTHY MUNSHILINGWA (PW1)** admitted in cross examination that he had no proof that the Defendant had received the funds from LUJA. In the circumstances to expect the Defendant to pay the Plaintiff when no funds were received from LUJA and no IPC was issued to NRFA by the Defendant would be tantamount to rendering a thing radically different from what was undertaken in the Contract.

It was Counsel's argument that this is the principle enunciated in the case of **DAVIS CONTRACTORS LTD V FAREHAM UDC (4)**. The Learned authors of Chitty on Contracts page 1351 state that:

> **"At common law, frustration does not rescind the contract abinitio; it brings to an end forthwith, without more, automatically in the sense that it releases both parties from any further performance of the contract. A court does not have power to allow the contract to continue and just adjust its terms to the new circumstances."**

Further that the submission by the Plaintiff that they were not affected by the failure by the Defendant to secure funds from an advance guarantee payment through LUJA, flew in the teeth of the provision of the clause on

Consultancy fees which unequivocally stated that payment to the Plaintiff would be made upon collecting the advance guarantee.

According to Counsel the word collect, meant that the Defendant had to collect the money from a third party, being Luja. Thus, the failure to collect money directly affected the Plaintiff's payment.

That this failure to collect money was not the Defendant's own making. The Plaintiff should instead respect the clause on Consultancy fees regarding payment and should not attempt to submit extrinsic evidence which was not part of the contract as doing so clearly offended the parole evidence rule.

Counsel then cited the case of **HOLMES LTD V BUILDWELL CONSTRUCTION COMPANY LIMITED (5)** where Bruce Lyle J stated that:

> **"Where the parties have embodied the terms of the contract in a written document the general rule is that extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written contract."**

Moreover, that the assertion by the Plaintiff on page 2 of their submission that the Clause on Consultancy Fees in the contract was only a back up to the payment to be made by the Defendant, is indeed extrinsic evidence and is unsupported.

Further that it was important that the Plaintiff sticks to the terms of the contract as asserted in **INDO ZAMBIA BANK V MUHANGA (6)** that:

> **"A party cannot easily depart from agreed terms at its own desire without sanctions."**

Counsel also pointed out that the Plaintiff's submission on page 2, second last paragraph refers to the clause on NON – CIRCUMVENTION sub 'b' and 1.1 of the contract, and indicates that there is admission of responsibility by the Defendant to the Plaintiff to make good of the issues mentioned in the said clause.

It was also Counsel's submission that the Defendant had not breached the said clause and there was nowhere in the evidence submitted before this Court which shows that the Defendant has admitted contravening the contract as stipulated in sub 'b' under NON CIRCUMVENTION in the contract.

Moreover, that the Plaintiffs understanding of the term affiliate was erroneous and contrary to the definition provided in clause 1.1 and clause 'a' and 'b' on page 3 of the Defendant's bundle of Documents.

According to Counsel for the Defendant, the Plaintiff was not an affiliate but the main party to the contract.

Moreover, that that there was another misconception by the Plaintiff that the Defendant and Luja were one and the same companies working in collusion under different names with Mr Peter Majula wearing different hats in the Defendant's company under Luja.

It was also stated that Luja and the Defendant had an adhoc arrangement which required Mr Majula to assist in getting funds from the main contractor UNIK.

Mr Majula signed that letter as Finance Director merely to facilitate payment of funds to Luja especially that Mr Majula was expecting the Defendant to be paid as well once Luja was paid.

This was in accordance with clause 5c of the Contract. Luja was expected to 'push for payments in collaboration with the Executors (Defendant)"

Counsel also pointed out that although the Plaintiff was at liberty to adduce evidence to prove that Luja and the Defendant were one or had the same Directors such evidence was not adduced contrary to the principle in civil matters that he who asserts must prove his assertion as was stated in the case of **EDDIE MUSONDA V LAWRENCE ZIMBA (7).**

Regarding the Bank Statements submitted by the Defendant, and the Plaintiffs assertion that there was no full disclosure for the year 2013, this had no basis and is irrelevant.

The Defendant Company was incorporated in May, 2013 and the contract between the Plaintiff and the Defendant was signed on 28th January, 2015. Anything before the contract date has no bearing on this case. Besides, all the bank statements submitted were printed from the date of opening of the Defendant's accounts.

According to Counsel, they submitted bank statements which had dollar accounts because they were merely complying with the Courts order in casu made on 21st September, 2017 to the effect inter alia that:-

> **"The Defendant Company is to produce and file into court all its bank statements at all various banks it may have banking relations with..."**

A dollar account therefore fell in the realm of all its bank statements at all various banks. Counsel also admitted that the bank statements from FNB and the First Capital Bank were not stamped with official stamps. The omission by the Defendant was not deliberate but was as a result of the rush in trying to beat the deadline and submit on time as per the court's order. However, he submitted that the unstamped bank statements were on the banks headed paper and were very genuine.

If the Plaintiff was insinuating that the statements were forged because they were not stamped, it was incumbent upon the accuser to prove forgery which the Plaintiff had not done.

The Bank statements from Barclays Bank started from 17th February, 2017 as that was when the account was opened. The statements from Finance Bank Zambia Limited were showing 1st December, 2016 and 6th January, 2017 because there were no entries between those two dates. Similarly, the statements were bearing consolidated balances because the accounts were mostly dormant.

According to Counsel, it is clear that the Plaintiff had failed to prove that Defendant received funds from Luja.

Counsel also added that the assertion of the Plaintiff relating to the Defednants relationship with UNIK was not only irrelevant but also an indication of shooting in the dark not knowing what they were looking for. Thus the Defendant had no relationship with UNIK save to state that the latter was the main contractor on the road project where the Defendant was engaged as an executor by Luja to undertake some of the works. It was therefore Luja who had a relationship with UNIK.

It was also Counsel's submission that the Plaintiff had not correctly understood clause 'a' under CONSULTANCY FEES in the contract and had subsequently failed in their submission to successfully challenge the Defendant's defence of frustration using the tenets of law as they related to exceptions of when a party could rely on frustration as a defence.

It was therefore Counsel's contention that the factor that frustrated the contract in this case was unforeseeable because it was not foreseen at the time of contracting by the Defendant or could be seen by any reasonable person of ordinary intelligence.

At the material time, the decision by the Bank to revise the collateral for the advance guarantee from real estate property to cash was not something that either party could have foreseen.

In essence, it was Luja not the Plaintiff that failed to meet the new advance guarantee condition demanded by the Bank and the Defendant was not in a position to assist Luja. It was not their fault. Counsel based his submission on the case of **FIBROSA SPOLKA AKOYJINA V FAIRBAIRM LAWSON COMBE BARBOUR LTD (8)** at page 70 where it is stated as follows:-

> **"In my opinion the contract is automatically terminated as to the future because at that date its further performance becomes impossible in fact in circumstances which involve no liability for damages for the failure on either party."**

In the light of the foregoing Counsel lastly submitted that the Contract was frustrated and the factor of this frustration was anchored on clause 'a' under CONSULTANCY FEES in the contract. The Plaintiff had failed to use or cite any exceptions to the defence of frustration. Counsel then prayed that this Court should find in its favour.

I am grateful to both Counsel for their written submissions which I have considered together with the pleadings and the evidence on record.

It is not in dispute that the parties herein entered into a contract where the Plaintiff was to provide consultancy services to the Defendant at a fee of **ZMW600,000.**00 with a first instalment payment of ZMW300,000.00.

It is also not in dispute that the parties executed a ***Consultancy, Confidentiality and Non – Disclosure Agreement*** which stipulated that the initial **K300,000.00** would be paid upon the Defendant collecting an advance guarantee and the balance on the first IPC issued to National Road Fund Agency.

What is in dispute is firstly whether the Plaintiff has been able to prove that the Defendant received the advance guarantee and thereafter failed to pay what was due to the Plaintiff under their agreed contract.

Secondly, whether or not the failure by the Defendant to provide collateral to the Bank in form of Cash frustrated the agreement by the parties to pay the Plaintiff the amount due to it.

I will resolve both issues at the same time.

Before getting into a brief summary of each party's position it is important to set out a brief background of this case and how the parties came to work together in a Contract which required the Plaintiff to provide consultancy services.

Unik Construction Engineering Zambia Limited (Unik) was awarded a contract by Road Development Agency (the Main Contract) for the Rehabilitation and Upgrading of the Kawambwa – Mushota- Luwingu Road

and the Chisembe- Chibote- Chief Chama Road, Tender No. ZPPA/CE/011/12 (the Project).

By a Sub Contract Agreement dated 18th September, 2013 (the Unik Sub contract) Unik engaged Luja Enterprises Limited (Luja) as Sub contractor under the Main Contract.

To enable Luja to perform its obligations under the Unik Sub – contract the said sub – contract provided for inter alia the settlement of an advance payment to Luja in the sum of **K813,575.28**. It was then agreed by the parties that the advance payment would be settled upon the issuance of an Advance Payment Guarantee in favour of Unik.

Following the execution of the Unik Sub – contract, Luja then sought the services of a further subcontractor to perform its obligations under the Unik Sub contract.

At this point the Plaintiff was invited to broker a deal between Luja and the Defendant which culminated in the appointment of the Defendant by Luja as sub-contractor pursuant to a Memorandum of Understanding dated 6th February, 2015 (the Luja MoU).

Prior to the conclusion of the Luja MoU, the Plaintiff and the Defendant on 28th January, 2015 entered into what was in substance a brokerage agreement, although termed a ***"Consultancy Confidentiality and Non – Disclosure Agreement"*** (the Brokerage Agreement).

Having set out the brief background I will now set out a summary of each party's case.

The essence of the Plaintiffs case was that the Defendant was paid an advance payment of **ZMW813,575.28** on 15th May, 2015. Further that the reason why the Defendant did not release the funds did not affect the Plaintiff because the Plaintiff had satisfied the conditions of the contract the parties signed.

The Plaintiff also argued that the Defendant to date has not paid the 1st instalment of **K300,000.00** despite having collected the advance payment. It is the argument of the Plaintiff that the Consultancy services provided were for them to get the Defendant to work with another contractor to undertake road works in Luapula.

It is the Defendants case on the other hand that the parties entered into a contract which required the Plaintiff to find an executor to broker an agreement between Luja and the executor.

So the Plaintiff found the Defendant and the parties agreed that the Defendant would pay a **K600,000.00** for providing this service. It is also stated that the failure by the Defendant to pay the Plaintiff was not the fault of the Defendant but due to a condition that was never envisaged by both parties at the time of making the contract. The contract was therefore frustrated. Moreover, that the payment to the Plaintiff was dependant on the Defendant receiving funds from Luja as stated in their contract.

The Defendant also argued that although the advance payment was supposed to be collected from Luja it was never collected because the bank asked Luja to provide collateral in form of cash before releasing the money. This was contrary to its initial request for real estate property as collateral, which Luja provided through the Defendant.

The Defendant also contended that the IPC was also never issued to the NRFA because the Defendant never went on site to undertake the works for which they were subcontracted by Luja as the latter proceeded to do all the work by itself.

It is trite law that in any civil case the Plaintiff bears the burden of proving a case on a balance of probabilities.

While it has been asserted by the Plaintiff in its pleadings and arguments that the Defendant received the advance payment under the guarantee from the Bank, no proof has been adduced that this payment was actually received in order for the consultancy fees to be paid.

In the Plaintiffs submissions Counsel made reference to the letter from the Defendants Lawyers dated 13th July, 2015 relating to the sum of **K300,000.00**, which was on Luja's Account awaiting transfer to the Defendant's Account. The said letter made it clear that the sum of **K600,000.00** was being held as cash collateral at the First Capital Bank on account of Luja Enterprises Ltd. That once the funds were transferred to the Defendants Account a sum of **K300,000.00** would be transferred to the Plaintiff's Account. No evidence was adduced to showthat the sum of **K600,000.00** was transferred from Luja's Account to the Defendants Account.

Apart from this, although it is not in dispute that a contract existed between the parties, this Contract could not be completed due to the fact that it was frustrated.

According to the learned author of ***Essential Contract Law, Geoff Monahan,*** the doctrine of frustration is based on the view that a frustrating event changes the nature of performance to such an extent that there is no longer any real contract between the parties.

However, for this doctrine to apply, three essential elements must be satisfied. The subsequent frustrating event must: (a) not have been contemplated by the parties at the time of the contract; (b) not be caused by either party; (c) cause a fundamental or radical change to the rights and obligations under the contract.

Although this doctrine has not received much judicial interpretation in Zambia I considered the case of **SAM AMOS MUMBA V ZAMBIA FISHERIES AND FISH MARKETING CORPORATION LIMITED (9)** where Sakala J (as he then was) held that:-

> **"A subsequent change in the law or in the legal position affecting a contract is a well-recognised head of frustration. At common law, the occurrence of a frustrating event terminates the contract forthwith.**

The Government directives to the defendant company were a frustrating event and put an end to the contract between the parties."

This case shows that despite the contract that was agreed by the parties, a subsequent change in the law which was not foreseeable frustrated the parties contract and it got terminated forthwith.

In the case in casu it is my considered view that it was not reasonably foreseeable for any of the parties to have expected that the Bank would change the form of collateral it had requested from real estate to cash form. I have also found that this was not the fault of either party and that it caused a fundamental change to the rights and obligations due to the parties under the contract.

I also considered the clause on Consultancy fees in the Confidentiality and Consultancy Agreement which states as follows:-

> **"(a) if the MOU signed between parties is a partnership/ Take over, ZMK600,000.00 shall be paid as consultancy fees, first instalment being K300,000.00 which shall be paid upon collecting advance guarantee and the last instalment (300,000.00) paid on the first IPC issued to NRFA. In an event that the said MoU between A – Plus Management Service Ltd is not signed and sealed for whatever reason, this agreement shall fall out henceforth be null and void."**

In my view this Clause was very categorical regarding the condition upon which the monies would be paid. It clearly states that the *first instalment being **K300,000.00** shall be paid upon collecting advance guarantee and the last instalment **(300,000.00)** paid on the first IPC issued to NRFA.*

I also note that the Plaintiff's only Witness Mr Munshilingwa in cross examination admitted having no documentary evidence to show that the Defendant did in fact receive an advance payment and thereafter declined to pay the Plaintiff. This was despite his claim in examination in chief that the Defendant was paid an advance payment of **ZMW813,575.28** on 15th May, 2015.

A perusal of the Defendants Bank statements filed into Court on 29th September, 2017 in particular the Kwacha Bank Statement of May 2015 on page 17 shows that no such monies had been received. The onus was therefore on the Plaintiff to have proved that these monies had been received by the Defendant and then withheld.

Moreover, there is also no proof adduced to show that the MoU between A-Plus Management Service Ltd and Luja Enterprises Limited was signed and sealed.

I accept the Defendant's argument that this contract was frustrated and therefore discharged both parties from performance due to unforeseeable circumstances. It is my considered view that the sum of **K600,000.00** being consultancy fees agreed to be paid by the Defendant to the Plaintiff under the Consultancy, Confidentiality and Non – Disclosure Agreement was agreed to be paid exclusively from the proceeds of an advance payment which was to be transferred to the Defendant from Luja Enterprises Limited pursuant to the MoU.

Since the Defendant did not receive this payment, the consultancy fees could not be settled.

I also note that in his Witness Statement **Mr Peter Majula** the Managing Director of the Defendant stated that the Defendant's Brokerage Agreement had been frustrated on account of the fact that Unik never gave Luja or the Defendant site possession or a scope of works and opted to complete the whole scope of works under the main contract. This evidence was not challenged by the Plaintiff and I therefore accept it.

On this basis I therefore find that the agreement between the two parties herein fell away and became null and void.

Apart from the doctrine of frustration there was a condition precedent in the contract between the Defendant and the Plaintiff. A condition precedent is an event or state of affairs which must occur, (unless its non-occurrence

is excused), before performance under a contract becomes due; i.e. it is a condition which must be satisfied before any contractual duty exists.

If the condition precedent is not fulfilled, then it is possible that the rest of the obligations in the contract fall away entirely and thus the contract comes to an end. An example is the obligation to provide a performance bond or performances guarantee (issued by a bank to guarantee satisfactory completion of a project by a contractor); since this depends on a bank that is not a party to the contract the provision is unenforceable. Thus, if the bank does not give the performance bond or performance guarantee and, therefore, the condition precedent is not satisfied, the contract does not come into existence. A condition precedent initiates a duty.

In casu, the condition precedent was that the first instalment of **K300,000.00** shall be paid upon collecting advance guarantee and the last instalment of **K300,000.00** shall be paid on the first IPC issued to NRFA. I find that the sum of **K600,000.00** which was being held as cash collateral at the First Capital Bank on account of Luja Enterprises Limited was not transferred to the Defendant by either the Bank or Luja enterprises Limited. It follows that the Defendants contractual duty to pay fell away and the contract came to an end.

In the circumstances, I find that the Plaintiff has failed to prove its case on a balance of probabilities. I dismiss the Plaintiffs' claims against the Defendant

Each party to bear its own costs.

DELIVERED AT LUSAKA THIS 18TH DAY OF AUGUST 2020

WILLIAM S. MWEEMBA
HIGH COURT JUDGE.