

**IN THE HIGH COURT FOR ZAMBIA**

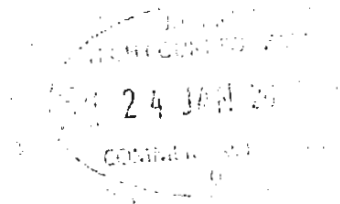
**2020/HKC/0015**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT KITWE**

**(CIVIL JURISDICTION)**

**BETWEEN:**



**CLIMATE CONTROL ZAMBIA LIMITED**

**PLAINTIFF**

**AND**

**MODULE METRIX ZAMBIA LIMITED**

**1<sup>ST</sup> DEFENDANT**

**FAMILY LEGACY MISSION INTERNATIONAL**

**2<sup>ND</sup> DEFENDANT**

**Before Hon. Lady Justice Abha Patel, S.C.**

**For the Plaintiff:**

**Mr. F.Chalenga with Ms. I. Ngobola  
Messrs Freddie & Company**

**For the 1<sup>st</sup> Defendant:**

**Mr. N. Simwanza and Mr. Y.S. Simukonda of  
Messrs Noel Simwanza L.P.**

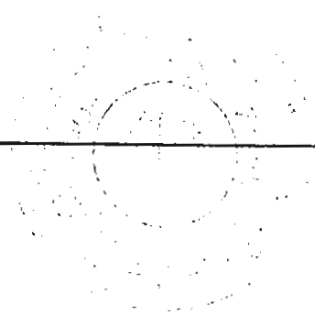
**For the 2<sup>nd</sup> Defendant:**

**Mr. M. Mwenye S.C with Mr E. B. Kaluba and  
Ms. M. Bwalya of Messrs Mwenye & Mwitwa Advocates**

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**JUDGMENT**

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## **List of Authorities**

1. Patrick Matibini, *Zambian Civil Procedure, Commentary and Cases* Lexis Nexis
2. Hughes W et al, *Construction Contracts; Law and Management* 5<sup>th</sup> Edition, New York, Routledge, 2015;
3. Chitty on Contract, *The Law of Contracts, Specific Contracts* 30<sup>th</sup> Edition Volume II London, Sweet & Maxwell, 2008
4. Chitty on Contract, *The Law of Contracts, General Principles*, 29<sup>th</sup> Edition Volume I, London, Sweet & Maxwell, 2004
5. Cheshire, Fifoot and Furmston's *Law of Contract* 11<sup>th</sup> edition.
6. Phipson on Evidence, 17<sup>th</sup> Edition Page 151

## **Cases Referred to:**

1. BJ Poultry Farms Limited vs Nutri Feeds Zambia Limited SCZ Judgment No. 3 of 2016
2. Khalid Mohamed vs Attorney General (1982) Z. R. 49
3. Zambia Railways vs Pauline S. Mundia and Another (2008) Z.R 287 Vol. 1
4. Sobek Lodges Limited v Zambia Wildlife Authority H.C. 2008/HP/668
5. Wilson Masauso Zulu v Avondale Housing Project (1982) Z.R 172 (SC)
6. Hampton v Glamorgan CC (1917) A.C 13 HL

## **1. Introduction**

1. The Plaintiff commenced this action on 3<sup>rd</sup> March 2020, and by its amended Writ of Summons and Statement of Claim filed on 7<sup>th</sup> October 2020, seeking the following reliefs:

- 1.1 An order for the Defendants to pay the Plaintiff the sum of United States Dollars Five hundred and thirtyfour thousand three hundred and eighty and fifty nine cents (USD 534,380.59) for works done and invoiced plus a sum of K18,816.00;
- 1.2 An Order for payment of interest at current bank commercial rate;
- 1.3 And an Order for costs incidental to these proceedings.
2. The 1<sup>st</sup> Defendant entered appearance and, in its defence, admitted all the Plaintiffs claims and further stated that it paid the Plaintiff certain payments received from the 2<sup>nd</sup> Defendant towards part of the dues of the Plaintiff.
  - 2.1 The 1<sup>st</sup> defendant also referred to a meeting, called in late December 2017, by the 2<sup>nd</sup> defendant and its professional advisers, for the purpose of reconciling amounts due to the various sub-contractors, of which the Plaintiff was one such sub-contractor and a payment plan of the amounts agreed was concluded.
  - 2.2 The 1<sup>st</sup> defendant further admits that the amount due to the Plaintiff after the meeting referred to above was in the sum of USD 534,380.59 and that the reconciled amount was payable by the 2<sup>nd</sup> defendant and not the 1<sup>st</sup> defendant.
  - 2.3 Save as pleaded above, the 1<sup>st</sup> defendant denied all the Plaintiff's claims.
3. The 2<sup>nd</sup> Defendant entered a defence to the Plaintiff's amended claim and admitted that there was a contract entered into between the 1<sup>st</sup> and 2<sup>nd</sup> defendant to carry out various works at the 2<sup>nd</sup> defendants Lodge, while denying all the allegations in the Plaintiff's amended statement of claim>

3.1 The 2<sup>nd</sup> defendant has also stated that it has paid in full, to the 1<sup>st</sup> defendant, all the monies for the works contracted and that the 2<sup>nd</sup> defendant is not indebted to the Plaintiff at all, there being no privity of contract between it and the Plaintiff.

3.2 The 2<sup>nd</sup> defendant has denied owing the Plaintiff any monies at all and has stated that it did not enter any consent order admitting any payments to the Plaintiff or at all.

#### 4. Facts and Background

##### **The Plaintiff's case**

4.1 The Plaintiff led evidence through its Administration and Finance Manager and relied on the Witness Statement of **Mutale Sampa PW1**, and its bundle of documents filed into Court on 13 November 2020 and 26 January 2021 respectively.

4.2 The witness testified that its contract was with the 1<sup>st</sup> defendant and that they had had no dealings with the 2<sup>nd</sup> defendant till late in 2017 when the 2<sup>nd</sup> defendant engaged an International firm of Quantity Surveyors referred to as **RLB** who invited various contractors to a meeting, the purpose of which was to reconcile amounts owed to the various contractor for works carried out at the 2<sup>nd</sup> defendant's Lodge in Lusaka.

4.3 The witness testified that different contractors were invited into a room at different times. He said the purpose of the meeting was to reconcile amounts owed to the Plaintiff. He testified that the main contractor

certified the works done and issued certificates and stated that the Plaintiff presented the information for its claim and the meeting ended by the Quantity Surveyors gathering all the information. He also stated that the Plaintiff had never received a negative certificate from the 1<sup>st</sup> defendant, being the main contractor. He also explained that the Plaintiff would submit a claim, and once the same was signed by the 1<sup>st</sup> defendant, the Plaintiff would issue an Invoice which was paid by the 1<sup>st</sup> defendant.

4.4 The witness said that he knew of one Jim O' Flaherty, who he believed had been engaged by the 2<sup>nd</sup> defendant but that he had not gone to see him. He testified that early in the year 2018, Messrs Dimple Ranchhod, a Firm of Advocates, entered into correspondence and communication with the Plaintiff, on behalf of the 2<sup>nd</sup> defendant, and sent through a draft proposed payment plan and that the Plaintiff offered a discount on the amount owed to it. He stated that communication continued with the said Firm of Lawyers to agree and settle the terms of settlement and that their interaction with the 1<sup>st</sup> defendant was reduced.

4.5 The witness was shown a document marked "Draft Deed of Settlement" on pages 7 to 12 of the Plaintiffs bundle of Documents and the email correspondence on pages 3 to 6 in the said Bundle in support of his evidence before the Court.

4.6 Under cross examination by the 2<sup>nd</sup> defendant, the witness confirmed that the Plaintiff had executed several similar contracts and that the contract in *casu*, was in the form of a Purchase Order which was produced at page 1 of

its Bundle of documents. He confirmed that the said Purchase Order was not signed, nor did it give details of the number of Air conditioning units or cost per unit that it had to supply. He admitted that the Purchase Order was not a complete document and that details were in the drawings which were not before the Court.

4.7 He also admitted that although his witness statement at **paragraph 2i** stated that the Plaintiff had supplied and installed the Air conditioning units, there were no delivery notes produced before Court in support of that evidence. He further confirmed that the Plaintiff was only able to partially commission the air conditioning units as there was no permanent supply of power to the site. He also stated that he had received reports from his engineers on the status of the commissioning, which reports he confirmed, were not before Court. He also confirmed that the Plaintiff had not issued certificates after commissioning and further confirmed that as per the norms of the construction industry, the Plaintiff ought to pursue the 1<sup>st</sup> defendant for payment.

4.8 He was referred to the Draft deed at **page 7** of the Plaintiffs bundle and confirmed that a draft is unenforceable until execution. He confirmed that the full amount owed to the Plaintiff was the sum of USD 780,840 and that their claim was the sum of USD 534,380.59 pending certification. He confirmed that the contract was entered into with the 1<sup>st</sup> defendant and further confirmed that the Plaintiff had not produced any invoices to prove its claim. He also admitted that no minutes of site meetings were produced, nor did the Plaintiff have any communication with the 2<sup>nd</sup> defendant in

connection with the Contract and also confirmed that the Plaintiff's claim ought to be against the 1<sup>st</sup> defendant only. He further confirmed that the Plaintiff had not absolved the 1<sup>st</sup> defendant of its obligation to pay the Plaintiff.

- 4.9 He attempted to clarify his evidence by stating that a certificate of completion could only be issued after full power supply was made available and that is why they only attended to partial commissioning of the central system of air conditioning units that they had supplied and installed. He clarified that Invoices were only issued after the client has accepted the work and that as opposed to issuing delivery notes, the site Manager would accept and certify works done and payments were made using that process.

This marked the close of the case for the Plaintiff.

## 5. The 1<sup>st</sup> defendants evidence

- 5.1 The 1<sup>st</sup> defendant's evidence was led by **Christopher Seymour HowardDW1**, in his capacity as a director in the 1<sup>st</sup> defendant company. He relied on his witness statement and bundle of documents produced in Court and filed on 10 December 2020 and 24 November 2020 respectively.

Under cross examination by the Plaintiff, he confirmed that the Plaintiff had been subcontracted by way of the Purchase Order which he was shown on page 1 of the Plaintiff's Bundle. He confirmed that the Purchase Order was

signed by one *Ciprianno Felisarta*, a qualified civil engineer in the employ of the 1<sup>st</sup> defendant. He also confirmed that the said Purchase Order formed the basis of the Contract between it and the Plaintiff for the supply and installation of air conditioning units by the Plaintiff at the Legacy Lodge in Lusaka owned by the 2<sup>nd</sup> defendant. He testified that he was not involved in the project which was managed by one **Dale Carruth** on behalf of the 1<sup>st</sup> defendant, and who is since deceased. It was further his evidence that the 2<sup>nd</sup> defendant received daily reports through its architect on site.

5.2 He confirmed that the Plaintiff had supplied and installed the air conditioning units as per the Purchase Order and also confirmed that the units had not been commissioned due to the lack of power at the site. He explained that more than 600 employees were removed from site as the 2<sup>nd</sup> defendant did not release payments on time. He further narrated that the director of the 2<sup>nd</sup> defendant company went back to the United States to raise funds and did not return.

5.3 He was shown the documents on **pages 1 to 17** of the 2<sup>nd</sup> defendant's bundle of documents and confirmed it to be the contract between itself and the 2<sup>nd</sup> defendant, as Principal and Client respectively to perform the scope of works as set out in Annexure A, costs set out in Annexure B and time frame as set out in Annexure C. He explained the meaning of the term "*snag list*" and confirmed that they did not receive any complaints for the work done by the Plaintiff at the site. He explained that the 2<sup>nd</sup> defendant did not make payments at all which forced the 1<sup>st</sup> defendant to remove its



labour off site and the completion of the project was aborted. He was not aware of any meetings held in December 2017.

5.4 Under cross examination by the 2<sup>nd</sup> defendant, he confirmed that the contract was between the 1<sup>st</sup> and 2<sup>nd</sup> defendant and did not mention the Plaintiff at all. He was referred to the 2<sup>nd</sup> defendant's bundle of documents, filed (with leave) on 8<sup>th</sup> June 2021, from pages 1 to 6 showing a total of USD 10,002,136.45 as having been paid by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant for the works under the contract. The witness testified that it was possible that this amount of money may have been paid to the 1<sup>st</sup> defendant. The witness also confirmed that there were 42 contractors who had not been paid, but that the Plaintiff was owed the largest amount. He could not answer other questions put to him as he was not involved in the day to day running of the company with respect to the contract with the 2<sup>nd</sup> defendant.

5.5 He was questioned about a case currently pending this Court in Lusaka, in which the 1<sup>st</sup> defendant has brought a suit against the 2<sup>nd</sup> defendant for moneys not paid for the sub-contractors and confirmed that the nature of the case was similar and that the claim for non-payments extended to that of the Plaintiff also. He confirmed that the 2<sup>nd</sup> defendant had been making payments and stated that the problems arose after the death of Dale Carruth. He could not speak as to the value of the claims in the action at Lusaka as those instructions were issued by Dale Carruth and he was also asked if he knew that the 2<sup>nd</sup> defendant had in fact paid over USD9.4 million, a figure twice the amount in the contract under Annexure B. He was

referred to the scope of works in the contract on **pages 1 to 22** of the 2<sup>nd</sup> defendants Bundle and specifically at **pages 18 and 19** and asked to confirm if the air conditioning works fell within the scope of services that the 1<sup>st</sup> defendant was engaged to provide, to which he responded in the affirmative.

5.6 The witness was referred to **paragraph 7** of his Witness Statement and could not point to any evidence to prove that some payments were made to the Plaintiff. He was questioned extensively on the contents of his Witness Statement and agreed that some of its content was not known to him personally but from what he was told by **Jim O'Flaherty**. He confirmed that the principal contract, the subject of the dispute was between the 1<sup>st</sup> and 2<sup>nd</sup> defendant. He could not refer to any evidence before the Court where the 2<sup>nd</sup> defendant is alleged to have agreed to pay the Plaintiff, as deposed in **paragraph 13** of his Witness Statement.

5.7 The Witness clarified that RLB Pentad International Consultants, acting on behalf of the 2<sup>nd</sup> defendant, had verified the amount due to the Plaintiff as appearing on **page 7** of their Bundle of Documents.

This marked the close of the case for the 1<sup>st</sup> defendant.

## **6. The 2<sup>nd</sup> Defendant's evidence**

6.1 The 2<sup>nd</sup> defendant led evidence through one **Mario Zandstra DW2**, who testified via live video link from Dallas, Texas in the United States of

America. He relied on his Witness Statement and Bundles of Documents filed into Court on 12 April 2021, and 29 January 2021 and 8<sup>th</sup> June 2021 respectively, all of which were admitted into evidence.

6.2 He confirmed and recognised the Plaintiff as a sub-contractor who had been contracted by the 1<sup>st</sup> defendant for the purpose of supply and installing air conditioning units at the Summit Lodge owned by the 2<sup>nd</sup> defendant. He was referred to the defence filed where in the 2<sup>nd</sup> defendant stated that full payment had been made to the 1<sup>st</sup> defendant for all works carried out at the site. He was referred to **page 40** of the 2<sup>nd</sup> Defendants Bundle of Documents being a report on the status of the air conditioning works done by the Plaintiff, but he was not able to refer to any document before the Court to indicate that the 2<sup>nd</sup> defendant had informed the 1<sup>st</sup> defendant of the incomplete or unsatisfactory works carried out by the Plaintiff. He confirmed that in accordance with **clause 8.2.1** of the contract on **page 11** of their Bundle, it was the 2<sup>nd</sup> defendant's obligation to compile list of defects within 7 days after the completion date, except that the works were never completed.

6.3 He was referred to **paragraph 7** of his Witness Statement relating to damage and costs suffered by the 2<sup>nd</sup> defendant at the hands of the Plaintiff and the 1<sup>st</sup> defendant and admitted that there were no documents before Court to prove that statement save to state that the building was incomplete, and the air conditioning not commissioned.

6.4 The Witness was further cross examined on the disparity between parts of the defence and that of his Witness Statement in as far as any settlement meetings were held. He confirmed that there had been engagements but that the same were not concluded. He further stated that he was not the Chief Executive Officer at the time this contract was executed and that he had institutional knowledge. He was referred to **page 23** of their Bundle of documents and confirmed that the sub heading of the e-mail referred to *Summit Sub contractor Payment plan- Climate Control*. He was also referred to **page 25 and 26** of the Bundle wherein the Plaintiff confirmed that the 2<sup>nd</sup> defendant could settle the amounts owed to it directly and the draft deed of settlement sent to the Plaintiff through Messrs Ranchhod Chungu. It was however his explanation that this was subject to execution, although **page 10** of the Plaintiffs Bundle of Documents reflects the amount outstanding to the Plaintiff in the sum of USD 510,950.44 and was contained in the draft deed of settlement sent by their Advocates to the Plaintiff for approval. He was also referred to the payment plan as per **clause 4 of page 10**. He confirmed that the person named in the e-mail correspondence, **Greer Kendall** was the former CEO of the 2<sup>nd</sup> defendant and was no longer in the employ of the 2<sup>nd</sup> defendant.

6.5 Under cross examination by the 1<sup>st</sup> defendant, he was able to show on **page 6** of their supplementary bundle of documents that payments of over USD 10 million had been paid but he was not able to point at back up Invoices to show if the Plaintiff has been paid for the works done. He explained that although the value of the contract was for approximately USD4 million, the 2<sup>nd</sup> defendant had paid over USD 10 million. He also explained that the

works at the site were not complete and that the 1<sup>st</sup> defendant was asked to leave the site. He was referred to several inconsistencies in his Witness Statement and the draft settlement agreement and questioned why if the 2<sup>nd</sup> defendant had paid more than USD 10 million, as alleged, that it would agree to pay the Plaintiff any monies at all. His testimony in Court centred around the fact of non-execution of the draft settlement deed and he further confirmed that the e-mails on pages 40 to 44 of their Bundle of Documents were e-mails from their consultants to the 2<sup>nd</sup> defendant, whose findings were not shared with the Plaintiff.

- 6.6 The witness clarified that the works at the Summit Lodge were not complete, and the 1<sup>st</sup> defendant was aware of the fact. He confirmed that the draft settlement deed and the release letter were not settled as required.

This marked the close of the case for the 2<sup>nd</sup> defendant.

## **7. The Issues for determination**

- 7.1 The Parties having failed to file a list of agreed issues in dispute for the determination of the Court, the Plaintiff, did on 26 January 2021, file what it believed to be the list of issues that required the Courts determination.
- 7.2 Whichever way one looks at this matter, the cardinal issue at hand is the following: Has the Plaintiff proved its case for payment in the outstanding sum of USD 534,380.59 plus the sum of K18,816.00 with interest and costs?

7.3 The Court will go further and discern the issue in contention, if the first issue is determined in the affirmative, namely, which of the two defendants is liable to settle the Plaintiff's claim.

7.4 The Court extends its gratitude to Counsels respectively for their industry, diligence and co-operation rendered to the Court and for its submissions, all of which have been painstakingly considered in the Judgment of the Court.

## 8. Findings of Facts

8.1 I am of the considered view that before I embark on analysing the facts, the evidence, the law as well as the supporting skeleton arguments and submissions filed by Counsels, I will proceed to make findings of facts, for clarity of Judgment and to prevent repetition.

8.2 The 1<sup>st</sup> and 2<sup>nd</sup> defendant entered a Contract on 12 July 2016 called a Memorandum of Agreement (hereinafter referred to as the **Contract**) wherein the Parties were described as **Principal and Client** respectively for a project involving works to be carried out at the 2<sup>nd</sup> defendant's Family Legacy Lodge in Lusaka (hereinafter referred to as the **Lodge**).

8.3 The authorised representative of the Principal, was **Dale Carruth or Chris Howard**, while the Client's authorised representative was **Greer Kendall**.

- 8.4 The 1<sup>st</sup> defendant and the Plaintiff entered a Manual Purchase Order dated 15 December 2016 (hereinafter referred to as the **Purchase Order**) for the supply and installation of Air conditioning as referenced in a quotation dated 14 December 2016 and for the supply and installation of fire protection pumps, fittings and fixtures as per quotation of 15 December 2016 at a total value of USD 958,301.52.
- 8.5 The quotation referred to in the Purchase Order was not produced.
- 8.6 On diverse dates, in August 2017, Messrs Ranchhod Chungu and Co, acting then as Advocates for the 2<sup>nd</sup> defendant, engaged in e-mail communication with the Plaintiff resulting in a draft settlement agreement (hereinafter referred to as the **Draft Deed of Settlement**) which was headed "**Draft Subject To Approval.**"
- 8.7 The Parties to the proposed **Draft Deed of Settlement** were the Plaintiff and the 2<sup>nd</sup> Defendant.
- 8.8 The witness for the 1<sup>st</sup> defendant, **Christopher Howard, DW1**, was not familiar with the case as he was not the Director responsible for or overseeing the performance of the project at the Lodge. **Dale Carruth** was the director involved and who is since deceased.
- 8.9 The representative of the 2<sup>nd</sup> defendant **Greer Kendall** was no longer in the employ of the 2<sup>nd</sup> defendant and the 2<sup>nd</sup> defendant's witness on record, one **Mario Zandstra, DW2**, relied on institutional information.

8.10 The issue of shoddy works as testified by **DW2** is peripheral to these proceedings and will not be analysed for reasons that will be clear in the Judgment of the Court.

## 9. The Submissions of the Parties

9.1 The Plaintiff has submitted that the 1<sup>st</sup> defendant paid it the sum of USD 423,920.93 from funds received from the 2<sup>nd</sup> defendant leaving a balance outstanding in the sum of USD 534,380.59, the Plaintiff's claim. The Plaintiff has submitted that the fact that the Plaintiff had fulfilled its obligation under the Purchase Order was not disputed and was admitted by the 1<sup>st</sup> defendant in its defence. The Plaintiff has also urged this Court to reject the evidence of the 2<sup>nd</sup> defendant wherein its witness stated that the works carried out by the Plaintiff were of poor quality and have caused resultant loss and damage to the 2<sup>nd</sup> defendant. The Plaintiff has submitted that this evidence along with the report produced by the 2<sup>nd</sup> defendant appearing at **pages 40-41** of the 2<sup>nd</sup> defendant's Bundle of Documents be disregarded in totality as lacking merit and being an afterthought. This is more so because the 2<sup>nd</sup> defendant attempted to enter a settlement proposal with the Plaintiff through its then Advocates, Messrs Ranchhod Chuungu.

9.2 The Plaintiff has also urged the Court to find that the Witness for the 2<sup>nd</sup> defendant, **DW2**, was not a witness of fact, as he appeared unsure of most answers and confirmed that he took over as CEO from his successor and that he had, at best, institutional knowledge. It was also submitted that the



former CEO of the 2<sup>nd</sup> defendant, Greer Kendall, was alive and based in Texas in the United States and could have testified on the same virtual platform as DW2, and his evidence may have been more relevant to the issues before the Court.

9.3 The 1<sup>st</sup> defendant submissions apart from narrating the background and facts relating to the dispute before the Court, rely heavily on the legal principles of novation. The 1<sup>st</sup> defendant has submitted and acknowledges that the Contract was between it and the 2<sup>nd</sup> defendant only, and that the Purchase Order was entered between the 1<sup>st</sup> defendant and the Plaintiff only. The 1<sup>st</sup> defendant accepts that both these agreements had their own terms and conditions and were made between the Parties that executed them.

9.4 The point of departure as far as the 1<sup>st</sup> defendant is concerned, is where the 2<sup>nd</sup> defendant stopped making payments to the 1<sup>st</sup> defendant, who in turn was not able to pay its subcontractors thereby forcing the 1<sup>st</sup> defendant to de-mobilise all its employees, the subcontractors equally removed their labour, and the project at the lodge was halted abruptly. It is their submission that the events leading to the 2<sup>nd</sup> defendant entering into proposed settlement proposals directly with the Plaintiff in the form of the draft deed of settlement and the exchange of correspondence between the Plaintiff and Messrs Ranchhod Chuungu, Advocates for the 2<sup>nd</sup> defendant, despite its eventual non-execution, changed the dynamics in the relationship between the Parties, such that the Plaintiff accepted and knew that the balance due to it would be settled by the 2<sup>nd</sup> and not 1<sup>st</sup> defendant.

They submitted that the Court should find on the principle of novation, that the debt had been taken over by the 2<sup>nd</sup> defendant. I will not restate the authorities cited as the same are on record, save to state that I have anxiously considered the same.

- 9.5 The 2<sup>nd</sup> defendant has belaboured the defence of privity of contract, has submitted extensively on the same, it has also submitted that the Plaintiff has not been able to prove its case to the required standard and has relied heavily on the fact that the draft deed of settlement remained a draft, was never executed and did not give rise to any relationship between the Plaintiff and itself, as conditions precedent to the draft deed were not met.

## 10. The Law

- 10.1 In my considered opinion, there is no serious dispute to the legal principles that are being canvassed by the Parties respectively. It is trite that the doctrine of privity of contract states that at common law, a contract cannot confer rights and cannot impose liabilities on anyone except a party to it. This Court has been referred to the learned authors of **Chitty on Contracts** and **Treitel, The Law of Contracts**.
- 10.2 My attention has been drawn to the issue of construction contracts, which is where the dispute in *casu*, sits. **Chitty on Contracts Vol 3** in discussing the relationship between the sub-contractor and the employer state as follows:

*"In the absence of any provisions in the main contract to the contrary, the rules in relation to privity of contract will mean that the contractual relationship between the employer and the main contractor and between the main contractor and the sub-contractor will be quite distinct and separate. It follows, that in the absence of a valid assignment from the contractor, the sub-contractor will not be able to sue the employer for goods supplied or work done under his sub-contract with the main contractor. Accordingly, in **Hampton v Glamorgan CC.** a builder contracted with a council to build a school in accordance with the specification and other documents contained in the contract, Part of the contract works comprised the provision of low-pressure heating apparatus, and a specialist sub-contractor was asked to provide a scheme for this part of the works. During the works, the builder paid the sub-contract on account, but was eventually unable to pay the balance so that sub-contractor sued the council. It was held that on a true construction of the building contract there was no privity between the sub-contractor and the council, so the sub-contractor's claim failed."*

- 10.3 The 1<sup>st</sup> defendant has urged this Court to find that the fact of settling the draft deed of settlement between the Plaintiff and the 2<sup>nd</sup> defendant, discharged the 1<sup>st</sup> defendant from its obligation to the Plaintiff and relied entirely on the principle of Novation.

Counsel has referred this Court to the case of **Credit Bureaus v Cox Brothers** and the definition of *Novation* by the learned author of **Cheshire, Fifoot and Furmston's Law of Contract** who has stated:

*"Novation is the only method by which the original obligor can be effectively replaced by another. A, B and C must make a new contract by which in consideration of A releasing B from his obligation, C agreed that he will assume responsibility for its performance."*

Counsel quoted further as follows:

*"An agreement by a creditor, A to accept the liability of C in substitution for that of his former debtor, B need not be express. Acceptance may be inferred from his conduct."*

- 10.4 Put in context, it is the 1<sup>st</sup> defendant's submission that an agreement between the Plaintiff (Party A) by accepting that the 2<sup>nd</sup> Defendant (Party C) will settle the indebtedness to it, shall discharge the 1<sup>st</sup> defendant (Party B), need not be express and that acceptance may be inferred from its conduct.

This submission leads me to interrogate whether there was a valid assignment of rights between the Parties as canvassed by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant has submitted that the events in the matter meant as a necessary consequence that the onus of payment to the Plaintiff, moved from, and was accepted that it would be discharged by the 2<sup>nd</sup> defendant.

- 10.5 The 1<sup>st</sup> defendant has implored the Court to find that the 1<sup>st</sup> defendant's liability to settle amounts due to the Plaintiff, for the Air Conditioning works was extinguished and assumed by the 2<sup>nd</sup> defendant, with the Plaintiff's full knowledge and acceptance. I have followed with keen interest this argument of the 1<sup>st</sup> defendant. If matters had indeed progressed in the

manner they were anticipated, and if the Draft Deed of settlement had been executed and honoured, this action would not have arisen. I am alive to the authorities cited by Counsel on the issue of Novation and take no exception with the authorities. However, I am also alive to the fact that the 2<sup>nd</sup> defendant has challenged the draft deed on the basis that it was a draft, it was not executed and that the condition precedent to its execution was not met. I am therefore left to analyse the submission on novation with a critical eye. Upon considering the evidence of the Parties and the communication exchanged, I am of the settled view and find that the 2<sup>nd</sup> defendant did not assume or accept the liability to settle the claims of the Plaintiff, despite indications that it may do so. I find and hold that the 1<sup>st</sup> defendant's submission on novation fails in the circumstances in *casu*.

- 10.6 In as much as the 1<sup>st</sup> defendant has challenged the evidence of DW2 in that the Witness could not point to any specific payment as having been for the Plaintiff, in the documents at **pages 1 to 6 entitled Schedule of payments made to Modulemetrix** of the 2<sup>nd</sup> defendant's supplementary bundles, I also note that the Plaintiff did not produce or lay before the Court copies of any delivery notes, Invoices or minutes of site meetings to prove that it had discharged its obligations under the terms of the Purchase Order.

The Court is alive to the fact that businessmen in the normal course of their dealings may accept informal procedures to conduct their business. However, when a matter is disputed to this extent, and brought before a Court, the Court will look to the Parties to discharge the onus incumbent upon them to do so.

10.7 From the evidence of DW1, he was unsure of the events the subject of this dispute. By his own admission, he was not the director who supervised or monitored the project at the Summit Legacy Lodge. The same was managed by his partner, **Hugh Carruth**, now deceased. The weight therefore placed on his testimony has been challenged and the Court notes that he struggled with answers especially those that related to the status of payments made by the 1<sup>st</sup> defendant to the Plaintiff and those payments made by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant. Those are the issues in contention in *casu*.

The witness however accepted that the payments as reflected in the Schedule may have been made and received, save that his company was still in the process of verifying records to establish or confirm the veracity of the Schedule. To the extent that neither party, save the 2<sup>nd</sup> defendant, was able to place any evidence before the Court, the Court does accept that payments reflected in the said Schedule appear to have been made by wire transfer in the sums stated and, on the dates, stated.

The rider to this finding is that these payments were not critically examined, nor forensically tested as that was not the scope of the dispute before this Court.

10.8 During the trial, it emerged that there is pending in Court at Lusaka before my learned senior sister, Hon Justice Ireene Mbewe, an action in which the 1<sup>st</sup> defendant as Plaintiff, has sued the 2<sup>nd</sup> defendant as Defendant, for non-payment under the Contract, and the Defendant appears to have made a

counter-claim for damages and losses due to unfinished or sub-standard work at the Legacy Summit Lodge in Lusaka, the subject of the Contract.

I will not make any findings on these issues as these were not canvassed in *casu*, the claim only relating to whether the Plaintiff has proved its claim for the balance of payment that it seeks for services rendered under the Purchase Order, and if so, against which of the two defendants.

10.9 I must express my reservation in the manner this case has proceeded, as the issues are the same, the principal Contract is the same and the Purchase Order entered with other sub-contractors may be essentially the same, and between the same Parties as are the defendants in the case in this Court.

I express my displeasure, in that it is cases such as these, and Judgments that may be handed down by different Courts, that may appear to undermine the process and integrity of the Judicial process and fall squarely within the definition of multiplicity of actions, something consistently frowned upon by the Courts. I am of the considered view that the action in *casu* ought to have been consolidated with the one in Lusaka, or at best stayed, until the main issues of liability for payment and quality of services rendered by the various sub-contractors, was fully interrogated, evidence presented and findings of facts made by the Court.

10.10 Suffice it to say, that this is the Plaintiff's action. I am not convinced that the Plaintiff has discharged the burden placed on it, notwithstanding that

both the 1<sup>st</sup> and 2<sup>nd</sup> defendant's witnesses were not conversant with the facts of the case and dispute at hand.

The Plaintiff did not place any evidence before the Court for the Court to make any findings of fact as to the performance and indeed the quality of services the Plaintiff claims to have discharged. There were no Invoices, no minutes of site meetings, no delivery notes and no record of installation and commissioning.

The Plaintiff's own witness, **Mutale Sampa, PW1**, testified that there had been partial commissioning of the air conditioning units due to there being no power supply to the site. What is also noted is that the Purchase Order, under **Description**, refers to *supply and install Air Conditioning and Ventilation as referenced in quotation dated 14 December 2016 with consideration of pending modifications/negotiations*. The number of **Units**, **Quantity** and **Unit price** all state *Provisional- Referenced on Quotation*. It is noted that the said quotation dated 14 December 2016 is not before the Court.

At the end of Trial, the Plaintiff did not even state the number of air conditioners it had supplied under the Purchase Order. This is not the norm for contracts performed under the construction industry. The Court has earlier referred to privity of contracts more so in the construction industry and has referred to the case of *Hampton v Glamorgan CC supra*, in support of its finding that the Plaintiff as sub-contractor and acting under the Purchase Order entered into between it and the 1<sup>st</sup> defendant, and the



defence of Novation having failed, cannot look to the 2<sup>nd</sup> defendant to settle its claim.

10.11 In **Zambia Railways vs Pauline S Mundia and Another** it was held that:

*"..the old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable...."*

10.12 The Plaintiff has equally submitted on similar principles espoused by the case of **Wilson Masauso Zulu v Avondale Housing Project** which echoes the general rule of thumb that a Plaintiff who has failed to prove his case cannot be entitled to Judgment, whatever may be said of the opponent's case.

The Plaintiff has quoted from **Phipson on Evidence**, as follows:

*"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons."*

10.13 The 1<sup>st</sup> defendant has urged the Court to look closely at the demeanour of **DW2** and to make a finding that not having placed any evidence before the Court to support its alleged report of sub-standard service by the Plaintiff, and by not calling any experts, that such evidence must be disregarded and the witness's evidence be treated as evasive, and for the Court to draw its own conclusions therefrom.

10.14 The Plaintiff has urged the Court to find that the Plaintiff having discharged the burden of proof, the Court must enter Judgment in its favour. The Court has also noted that the Plaintiff has maintained that it is the 2<sup>nd</sup> defendant who is in fact obliged to settle its claim.

I am not inclined to accept this as I have not accepted the 1<sup>st</sup> defendant's submission on novation. The Court has already noted that the correspondence exchanged between the Plaintiff and the erstwhile Advocates for the 2<sup>nd</sup> defendant was not executed, was marked Draft and the conditions precedent were not fulfilled. Whilst I have noted the efforts of the Plaintiff and the 1<sup>st</sup> defendant to discredit the evidence of DW2, I am of the considered view that a poor defence coupled with testimony from a person who claims institutional memory, as opposed to the person with actual knowledge of the events, does not necessarily lead to an automatic finding that the Plaintiff has discharged its burden of proof. In **Khalid Mohamed vs Attorney General**, the Court stated that:

*"an unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to Judgment. I would not accept the proposition that even if a Plaintiff's case has collapsed of its inanity or for some reason or other, judgement should nevertheless be given to him on the ground that the defence set up by the opponent has collapsed. Quite clearly a defendant in such circumstances would not even need a defence."*

10.15 Moving now to the issue of liability and where it ought to rest. For reasons known only to itself, the 1<sup>st</sup> defendant has accepted the Plaintiff's claim in totality and without reservation despite the observations by the Court, that the Plaintiff has not in the strict sense discharged the burden to prove its case. Nonetheless and be as it may, the admission of the 1<sup>st</sup> defendant sits in its Pleadings and the Court will enter Judgment for the Plaintiff against the 1<sup>st</sup> Defendant in the sum of United States Dollars Five hundred and thirty-four thousand three hundred and eighty and fifty nine cents (USD534,380.59) plus a sum of K18,816.00.

The Plaintiff is also awarded interest in accordance with **section 2** of the Judgment Act Chapter 81 of the Laws of Zambia being the current lending rate as determined by the Bank of Zambia from the date of this Judgment till the same is satisfied.

11.1 The circumstances of this case being as they are, and in my considered discretion, I will not make any order for costs.

11.2 Leave to Appeal is granted.

Delivered in open Court, the 24 day of January, 2022.



Abha Patel

**Lady Justice Abha Patel, S.C.**

24 JAN 2022