

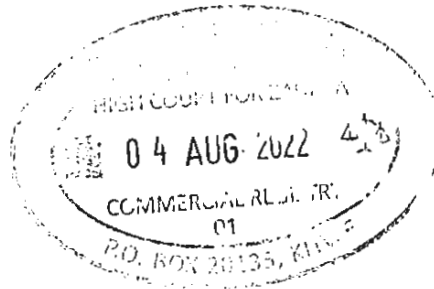
IN THE HIGH COURT FOR ZAMBIA

2021/HKC/017

AT THE COMMERCIAL REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)



BETWEEN:

ANTHONY GLAZEBROOK

1st PLAINTIFF

ANGELA CHANDA NKOMA GLAZEBROOK

2nd PLAINTIFF

AND

BELLINGTON TAYLOR KAMONA

DEFENDANT

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

On 22nd February 2022 and 4th August 2022

For the Plaintiffs:

**Mr. T. Chibeleka with Ms. S. Banda
Messrs ECB Legal Practitioners**

For the Defendant:

**Mr. K. N. Hang'andu
Messrs Kelvin Hang'andu & Co**



JUDGMENT

List of Authorities

1. Patrick Matibini, *Zambian Civil Procedure, Commentary and Cases* Lexis Nexis.
2. Hughes W et al, *Construction Contracts; Law and Management* 5th Edition, New York,

Routledge, 2015;

3. Chitty on Contract, The Law of Contracts, Specific Contracts 30th Edition Volume II London, Sweet & Maxwell, 2008.
4. Chitty on Contract, The Law of Contracts, General Principles, 29th Edition Volume I, London, Sweet & Maxwell, 2004.
5. Cheshire, Fifoot and Furmston's Law of Contract 11th edition.
6. Phipson on Evidence, 17th Edition Page 151.

Cases Referred to:

1. BJ Poultry Farms Limited vs Nutri Feeds Zambia Limited SCZ Judgment No. 3 of 2016.
2. Colgate Palmolive Zambia Limited vs Able Shemu Chuka SCZ 181 of 2005.
3. Dunlop Pneumatic tyre Co Ltd vs Selfridge & Co. (1919) A.C. 847 (H.L).
5. Leopard Ridge Safaris Ltd vs Zambia wildlife Authority (2008) Z.R. 97 (SC).
6. National Drug Company Limited and Zambia Privatisation Agency vs Mary Katongo Appeal No. 79/2001.
7. Konkola Copper Mines Plc vs NFC Africa Mining Appeal No. 118 of 2006 (SC).
9. Finance Bank Zambia Limited and Rajan Mahtani vs Simataa Simataa SJZ 21 of 2017.
10. Royal Bank of Scotland Plc vs Etridge (No.2) (2001) UKHL 44.
11. Tweedle vs Atkinson (1861) 1B & S 393.
12. Anderson Mazoka and others vs L.P. Mwanawasa and the ECZ 2005 (ZR) 138.
13. Friday Mwamba vs Sylvester Nthenge and others SCZ Judgment No. 5 of 2013.
14. Holmes Limited vs Buildwell Construction (1973) ZR 97 (HC).
15. Kasote Singogo vs Lafarge Zambia Plc SCZ/8/267/2011.
16. Zambia Railways vs Pauline Mundia.
17. Printing and Numerical Registered Company v Simpson (1975) LR 19 EQ4 62.

Statute:

1. The Constitution of Zambia Act No. 2 of 2016.
2. The High Court Act Chapter 27 of the Laws of Zambia.
3. The Arbitration Act No. 19 of 2000.

4. The Judgment Act Chapter 81 of the Laws of Zambia.

5. Legal Practitioners Practice Rules 2002, Statutory Instrument No. 51 of 2002.

1. Introduction

1. The 1st and 2nd Plaintiff commenced this action on 23rd April 2021, by Writ of Summons and Amended Statement of Claim, seeking the following reliefs:

1.1 Payment of the sum of ZMW 482,350.00 plus Kwacha depreciation at today's rate, totalling ZMW528,070 being the balance as a reimbursement relating to the Construction of Stand No. L1844M/SubE, 3rd Street, Ibex Hill, Lusaka pursuant to an agreement dated the 11th December 2020;

1.2 Damages for breach of contract;

1.3 Payment of all additional costs already incurred and remaining to be incurred to complete the house and correct the remaining defects and quality issues;

1.4 Interest on all sums found to be due;

1.5 Any other relief the Court may deem fit and

1.6 Costs of and incidental to these proceedings.

2. The Defendant entered appearance on 4th June 2021 and filed its Defence and Counterclaim on the same day. In its defence, he pleaded that he was at all material times, the Managing Director of African Infrastructure Services Limited, a company incorporated in the Republic of Zambia with its head office in Zambia. He also pleaded that the 2nd Plaintiff was a client of

the said Company who had been contracted to build a double-story residential dwelling at the property described in the Plaintiff's Statement of Claim.

- 2.1 It was his defence that the Company did in fact build and construct the house as per contract and rendered an Invoice for its services. He further stated that in his personal capacity, he can incur no liability, as he is neither an employee nor agent of the said company. He maintained that the building contract was executed between the Company and the 2nd Plaintiff and denied the Plaintiffs claims against him.
- 2.2 The defendant has also pleaded that his execution of the agreement to refund the sum of ZMW 512,350.00 was induced by duress for having been detained at Lusaka Central Police Station at the behest of the 1st Plaintiff, and as a consequence of which he did pay the sum of ZMW 30,000.00 the refund of which he has counterclaimed against the 1st Plaintiff. The defendant also claims interest and costs.

3. Facts and Background

The Plaintiff's case

- 3.1 The 1st Plaintiff led evidence on behalf of the Plaintiffs and relied on his Witness Statement of 29th September 2021 and his bundle and supplementary bundle of documents filed into Court on 16 September 2021 and 10 January 2022 respectively.

- 3.2 The Witness Statement is on record and forms the evidence in chief tendered by the Plaintiff. The 1st and 2nd Plaintiff are husband and wife, usually resident at House No. 7 Hawthorn Way Cambuslang, Glasgow in the United Kingdom. It was the Plaintiff's evidence that by an agreement called 'Contract of Building (New Construction)', and dated 7 August 2019, the Plaintiffs and Defendant agreed for works to be carried out at Stand No. L1844M/SubE, 3rd Street, Ibex Hill, Lusaka at a combined cost of K2 million of which K 1,520,000 and K 480,000 was apportioned as to materials and labour respectively.
- 3.3 It was the Plaintiff's further evidence that a total of K 2,326,621 was paid to the defendant who failed to complete the construction per the contract, leading to errors, quality issues and poor workmanship, among other complaints. It was further the Plaintiffs evidence that the defendant became elusive, and the Plaintiffs were forced to incur additional expenses to safeguard the house and secure it for the period that they were away from Zambia.
- 3.4 It was also the Plaintiff's evidence, that the Parties, after a series of meetings, executed a settlement agreement, in which it was agreed that the defendant would reimburse the Plaintiffs a total sum of ZMW 512,350.00 payable over a 6-month period, with effect from 1st January 2021. It was agreed that the last instalment would be adjusted to account for exchange fluctuations between Great British Pounds (GBP) and Zambian Kwacha (ZMK), for the period 10 December 2020 and 30 June 2021. The

defendant paid a sum of ZMW 30,000 as part payment of the 1st instalment.

3.5 The Contract of Building (New Construction), dated 7th August 2019 is produced at **page 1/2**. The Settlement Agreement dated 11 December 2020 is produced at **page 3**. Various Bank Transfers are collectively produced at **pages marked 21 to 30** in the Plaintiffs bundle of documents. Exchange of e-mail communication between the 1st Plaintiff and Defendant was produced in the Plaintiff's Supplementary Bundle of Documents at **pages 1 to 5** thereof.

3.6 The Plaintiff testified that the defendant failed to honour the agreement, failed to complete the works on the house and as a result the Plaintiffs have been unable to complete the house to make it secure and habitable. This marked the close of the case for the Plaintiff.

4. The Defendant's Evidence

4.1 The Defendant called 2 witnesses, apart from himself and relied on the contents of 3 Witness Statements. He called **Clair Kamona** and **Angela Kamona**, his wife and sister as **DW2** and **DW3** respectively. It is noted that all 3 Witness Statements being defective in form, were the subject of a contested application, to be expunged, as per the requirements of **Order 38** of the Rules of the Supreme Court (The White Book). In a Ruling of the Court, the same were ordered to be amended and re-filed, which has been done and these now bear the date of 23 February 2022.

4.2 The Defendant has maintained that he was not party to the building contract and that the settlement agreement was obtained because of duress and he seeks to repudiate the terms of the same and counterclaims the sum of K30,000.00 which was paid by him, to the first Plaintiff, as a result of duress and oppression. He placed reliance on his Witness Statement, the Defendant's bundle of documents, which for some reason, is entitled, Defendants Supplementary Bundle of Documents, filed into Court on 27 December 2021.

4.3 All the witnesses were duly cross-examined and details of their cross examination are on record and will not be re-cast here save for emphasis where appropriate.

5. The Issues for determination

5.1 Although the Parties having failed to file a list of agreed issues in dispute for the determination of the Court, the Plaintiff, did on **7 October 2021** file its list of issues for determination by the Court.

5.2 Whichever way one looks at this matter, the cardinal issue which requires determination by the Court is the following:

- i. Whether the Plaintiff is entitled to payment of ZMW 482,350.00 plus depreciation, in the sum of ZMW 45,720.00, totalling ZMW 528,070.00 being the balance due as reimbursement, pursuant to the terms of the Settlement Agreement dated 11 December 2020.

- ii. As a corollary, the Court will pronounce on whether the Plaintiff is entitled to other claims for damages, additional building costs, interest, if any, on these sums claimed and legal costs.
- iii. Was there duress, as pleaded by the Defendant in its counter-claim, in the execution of the settlement Agreement of 11 December 2020?

6. Findings of Facts

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

- 6.1 The 1st and 2nd Plaintiff are husband and wife and ordinarily resident in Glasgow in the United Kingdom.
- 6.2 The Defendant is a natural person resident in Lusaka, and the Managing Director of African infrastructure Services Limited. (*hereinafter referred to as the Company.*)
- 6.3 A Contract of Building (New Construction) was executed on 7th August 2019, between the 2nd Plaintiff and the Company. (*hereinafter referred to as the Building Contract.*)

- 6.4 The agreed value of the Building Contract was ZMW 2 million broken down as to ZMW 1,520,000 and ZMW 480,000 the cost of materials and labour respectively.
- 6.5 The property, on which a new double-storey dwelling house was to be constructed, the subject of the Building Contract, was on Stand No. L1844M/Sub E 3rd Street, Ibex Hill, Lusaka, in the Lusaka Province of the Republic of Zambia. (*hereinafter referred to as the property*).
- 6.6 A Settlement Agreement was executed on 11 December 2020 between the 1st Plaintiff and the Defendant. (*hereinafter referred to as the Settlement Agreement*.)
- 6.7 The value of the Settlement Agreement was the sum of K 512,350.00 payable over a period of six months from 1st January 2021, the last instalment of which was to include exchange differences, if any, in the GBP equivalent for the period between 10 December 2020 and 30 June 2021. (*hereinafter referred to as the Agreed Settlement Figure*).

7. The Submissions of the Parties

- 7.1 The Parties tendered written submissions, on dates as directed at the end of Trial, on 1st March and 21st March 2022 respectively. The same are on record, will not be restated, and have been considered by the Court in its analysis of the facts as applied to the case. I thank Counsels respectively,

for their diligence and industry, as they have assisted the Court in arriving at its Judgment.

8. Analysis of the Facts and The Law

8.1 In my considered opinion, the legal principles that are being canvassed by the Parties respectively, largely focus on the law of contract. I will begin by analysing the Defendant's defence and his contention that as he was not privy to the building contract, no liability can accrue on him. It is the thrust of the defendant's submission that the Plaintiffs' claims against him should fail on account of him not being party to the Building Contract, and further that the Settlement Agreement was attained by duress and undue police influence in the execution of the same on 11 December 2020.

8.2 It is the defendant's submission that: *"in its most essential terms the doctrine of privity of contract disallows any benefit of a contract to non-privies, exclusively reserving that sacrosanct right to the contracting parties. Accordingly, Anthony Glazebrook, the First Plaintiff, cannot enforce the building contract between the Second Plaintiff, (Angela Chanda Nkoma Glazebrook) and African Infrastructure Services Limited; nor can the obligations of that contract be enforced against the Defendant, Bellington Taylor Kamona. The attempt so to proceed is anathema under the general law of contract insofar as it violates the elementary common law doctrine of privity of contract."*

8.3 In quoting the above words from the submission of the defendant Counsel, I note that this forms the basis of his entire defence. I am also indebted for Counsel's research and citation of case law and elementary texts on the Law of Contract, in support of what he terms as the classic formulation of the doctrine of privity. **Tweedle vs Atkinson, Dunlop Pneumatic Tyre Co vs Selfridge & Co Ltd** are indeed examples of celebrated cases on the doctrine of privity of contract, and this Court endorses the principles of doctrine of privity established therein.

However, and for reasons which will become clear in the Judgment, the Court is of the considered view that the defendant has laboured under a mistaken apprehension of the application of the doctrine of privity, in *casu*.

8.4 The Plaintiff has submitted and the Court acknowledges the time old principle that "*he who alleges, must prove*" and in addition, the Plaintiff has referred this Court to the learned authors, **Phipson on Evidence** and the celebrated Zambian decisions in the case of **Anderson Mazoka and the Electoral Commission of Zambia and the Attorney General** on burden of proof, with the submission resting on the proposition that "*the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity.*"

8.5 The Plaintiff has canvassed, and as a starting point, has submitted that the first legal issue for consideration stems from the contractual agreement made between the 1st Plaintiff and the Defendant, and which culminated in the execution of the Settlement Agreement of 11 December 2020. The

Plaintiff has quoted from the oft-cited case of **National Drug Company Limited and Zambia Privatization Agency vs Mary Katongo** in support of its submission that the role of the Court is to give efficacy to the terms of a contract, when one party has breached it, by respecting, upholding and enforcing the contract. This is obviously with the caveat that the Parties to the said contract should have voluntarily and freely entered into that contract.

- 8.6 The above submission is further supported by the case of **Friday Mwamba vs Sylvester Nthenge, Monica Kap'inga, Derrick Chekwe**, in which case, the Supreme Court of Zambia, quoted with approval a passage from **Evan Mckendrick's Contract Law** as follows:

"The Law of contract is perceived as a set of power conferring rules which enable individuals to enter into agreement of their own choice on their own terms. Freedom of contract and sanctity of contract are the dominant ideologies. Parties should be as free as possible to make agreements on their own terms without the interference of the courts or parliament and their agreements should be respected, upheld and enforced by the Courts."

- 8.7 The Plaintiff has also submitted in support of the Courts role as regards the interpretation of contracts, that *"in construing any written agreement, the Court is entitled to look at evidence of the objective factual background known to the parties at or before the date of the contract, including evidence of the genesis and objectively the aim of the transaction. However,*

this does not entitle the Court to look at evidence of the parties subjective intentions."

8.8 My attention has also been drawn to the issue of extrinsic evidence, which generally, cannot be adduced for purposes of altering the contents of a written agreement. This principle was well settled in the case of **Holmes Limited vs Buildwell Construction**.

8.9 As a necessary consequence to the submissions above, I must examine the evidence and factual background known to the Parties before the date of the Settlement Agreement, in order to determine the overall aim, objective and intention of the Parties to the Settlement Agreement.

8.10 It is manifestly clear and has been stated as a finding of fact above, that though the 1st Plaintiff was not a direct party to the building contract, he did sign the building contract. A copy of this was seen on **page 2** of the Plaintiffs bundle of Documents where he signed the contract for and on behalf of his wife, the 2nd Plaintiff. It is also common ground that funds for the entire building contract, were remitted by the 1st Plaintiff. The 1st Plaintiff pointed to several bank transfers and copies of which are collectively produced from **pages 21 to 30** of the Plaintiffs Bundle of Documents. On the issue of the 1st Plaintiff having financed and negotiated the building contract, I have no doubt.

8.11 I have noted that the Defendant has attempted to plead in his defence that he is neither an employee nor an Agent of the company known as African

Infrastructure Services Limited. He has also in the same defence pleaded that he is the Managing Director of the Company.

The question that is cardinal here is: how can he be the Managing Director of the Company and at the same time not be an employee or agent of the same company?

From the evidence tendered under cross examination, the defendant admitted to not only being the Managing Director and Project Manager, but also a shareholder and the beneficial owner of the Company. He also confirmed being the person responsible for the building contract and confirmed receipt of all the monies that had been transferred by the 1st Plaintiff. He has also admitted that he signed the *building contract* in his capacity as Project Manager.

I arrive at the inescapable conclusion from the demeanour and conduct of the defendant, that attempting to hide under the guise of privity of contract, is simply a desperate attempt to avoid liability. This Court in the discharge of its functions, administers equity and justice between disputants. In the circumstances of this case, it is clear to my mind that purporting to advance the argument of privity and canvassing the principles applicable, does little or nought to protect the defendant from liability.

The defendant did not protest when the 1st Plaintiff signed the building contract, did not protest when monies were remitted and received by him,

from the account of the 1st Plaintiff, and only when claims are made, the issue of privity rears its head for the first time.

The kind of argument advanced by Counsel, if allowed, will lead to an industry of lawyers, promoting elastic interpretations of the law on behalf of their clients.

- 8.12 The Defendant has also pleaded that he was under duress to sign the Settlement agreement and by his counter claim, he claims the sum of Kwacha Thirty Thousand (K30,000.00) paid under the Settlement Agreement. It is noted that the Plaintiffs, not receiving any response from the Defendant, were left with no option but to report the Defendant to the Zambia Police. It is the defendant's contention that the Settlement Agreement was supervised and procured under the watchful eye of Zambia Police, and as such lacked his free will. Counsel has also submitted that Courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. He has referred the Court to the case of **Royal Bank of Scotland Plc v Etridge (No.2)** in support of the defendant's submission that if the complainant should prove "*overt acts of improper pressure of coercion such as unlawful threats*" rescission shall be granted. I am alive to the reasoning of Lord Nicholls of Birkenhead when he stated in that case that: "*whether a transaction was brought about by the exercise of undue influence is a question of fact...The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general*

rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, and all the circumstances of the case.”(emphasis by the Court).

8.13 In analysing the facts of this case, as guided above, I have examined the evidence before the Court, which narrates a completely different story. Under cross examination, the defendant admitted to having drafted the settlement agreement, and which draft in fact, from the evidence tendered in Court, was the further subject of amendments which were accepted in totality by the Defendant. He also confirmed that he was not under any pressure or duress to sign the Settlement Agreement.

I also refer specifically to exchange of email correspondence which appears at pages 1 to 5 of the Plaintiff's Supplementary Bundle of Documents. Page 5 clearly shows that the draft agreement sent under cover of e-mail, dated 10 December 2020, emanated from the defendant and the attached Agreement is referred to as '**BK and Tony Agreement**'. A further exchange of e-mails, of even date, on page 3, shows that the 1st Plaintiff proposed certain amendments, which were, almost immediately, accepted by the defendant and he further stated:

“Noted with thanks. Great Amendments. Will print three copies for signing tomorrow at 10:0 hours.”

I have also seen the exchange of WhatsApp communications, between the 1st Plaintiff and the Defendant, produced at pages 4 to 5 of the Plaintiffs Bundle of Documents, all of which were cordial, exchanged pleasantries

and suggested a personal relationship. This exchange and indeed the evidence of the defendant under cross examination, is in stark contrast to the entire contents of his Witness Statement.

- 8.14 Both the defendant's witnesses, **Clare Kamona DW2** and **Angela Kamona DW3**, his sister and wife, did little to support the Defendant's counterclaim. His sister confirmed that she was a witness to the execution of the Settlement Agreement and they both confirmed that he was in good health and spirits and unharmed when at the Police Station. It is also common cause that the e-mails (referred to above) and the Settlement Agreement, were drafted by the Defendant, and not in police custody.

Issues relating to the alleged duress, deposed in the defendant's Witness Statement, were successfully challenged under cross examination, and has led the Court to make a finding of fact that there was in fact no duress, and certainly not to the extent of leading to a rescission of the Settlement Agreement. The Court also noted from the demeanour of the defendant that he was being economical with the truth and did little to convince the Court on his claims of alleged duress.

- 8.15 The Plaintiff has also submitted on the meaning of the word *duress*. Suffice it to say, as I have stated above, from the evidence at trial and from the evidence of the defendant's own witnesses, I do not find any element of duress in the execution of the Settlement Agreement. From an examination of all the facts before me and from the evidence of the Parties, I arrive at the inescapable conclusion that at the time of signing the Settlement

Agreement, which not only was drafted by the Defendant, but that Parties being of full age and competent understanding, it is only left for the Court to enforce the terms of the Settlement agreement, representing the intention of the Parties. I accordingly dismiss the Defendant's counter claim having found that the Settlement Agreement was arrived at on terms which were agreed and accepted by all the parties.

8.16 The Defendant has also submitted that the building contract per **clause 7** provides an arbitration clause, which it submits, ought to have been invoked as opposed to litigation in Court. Counsel has relied on celebrated cases such as **Leopard Ridge Safaris Limited vs Zambia Wildlife Authority** and **Konkola Copper Mines Plc vs NFC Africa Mining Plc** among others. The Court takes no exception to the principles advanced by those cited cases, save to state that **section 10** of the Arbitration Act No. 19 of 2000, requires a Party to move the Court to stay those proceedings and refer the Parties to arbitration. This the Defendant did not do. He chose also not to add the Company as an interested party, to the action in Court.

This Court in the dispensation of justice, is mindful of the provisions of **Article 118** of the Constitution of Zambia, in its mandate to dispense justice without undue regard to technicalities. The Court is also mindful of limited judicial resources and use of judicial time.

8.17 The Court is alive to the fact that the issue of arbitration, though canvassed by Counsel Hanga'ndu in his written submissions, is not supported by any pleading to that effect. I am alive to the fact that this argument is possibly

only tendered as a *red-herring*, in a desperate attempt to lead the Court down a perilous slippery slope. Paragraphs 4.9 to 4.17 of the Defendant's submissions are totally misapplied, not borne out of the Pleadings and completely out of context for the reasons above.

9. It is trite and the law is clear with regards the burden of proof in civil matters. The law guides that where such burden is not discharged to the satisfaction of the Court, the Party claiming is not entitled to its claims, even in the face of a failed defence.

9.1 Counsel for the Plaintiff has quoted excerpts from **Phipson on Evidence** and further relied on the decisions in the case of **A. Mazoka and Others vs The Electoral Commission of Zambia and the Attorney General** in support of the principles required to discharge the burden of proof in civil matters. I am also alive to the holdings by the Supreme Court of Zambia, in the cases of **B.J. Poultry Farms Limited vs Nutri Feeds Zambia Limited** and **Zambia Railways vs Pauline S Mundia**, which cases have affirmed and re-affirmed, time and time again, the above principle on the burden to be discharged by the Plaintiff. I will accept this line of submission in its totality, as there really is no need for the Court to reinvent the wheel on this principle.

9.2 Having found that the Settlement Agreement was duly executed by the Parties, it is trite law that where the parties have agreed on the contractual terms, the Court has no option but to give effect to what the parties agreed on. I am suitably guided by the case of **Printing and Numerical Registered Company v Simpson**.

The preceding position was reaffirmed by the Supreme Court of Zambia in the case of **Colgate Palmolive (Z) Inc v Abel Shemu Chuka and 110 Others**.

Further and in the case of **Finance Bank Zambia Limited and Rajan Mahtani v Simataa Simataa**, the Supreme Court noted as follows:

"A settlement agreement, like any other agreement, is amenable to the core principle of English law applicable in this country, namely the need to preserve the value and sanctity of contracts. In the case of Colgate Palmolive Zambia Inc. v Abel Shemu Chuka and 10 Others, which Mr. Chanda referred us to, we reaffirmed the shibboleth of freedom of contract as summed up in the often quoted dictum of Sir George Jessel MR in Printing and Numerical Registering Co. v Simpson that: J23 if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Court of Justice."

Furthermore, in the case of **National Drug Company Limited and Zambia Privatization Agency v Mary Katongo** it was held that:

"It is trite law that once the parties have voluntarily and freely entered into a legal contract, they become bound to abide by the

terms of the contract and that the role of the court is to give efficacy to the contract when one party has breached it by respecting, upholding and enforcing the contract."

9.3 I am therefore of the considered view that the Plaintiff has proved its claim and is entitled to payment in the sum of ZMW 528,070.00 being the balance owed as a reimbursement relating to the Construction on Stand No. L1844M/SubE 3rd Street, Ibex Hill, Lusaka, *(the property)*, pursuant to the terms of the Settlement Agreement dated 11 December 2020. The Defendant's contention of duress and want of consideration are arguments which are dismissed in light of the evidence tendered by both Parties and as decided above. I have further paid close attention to the messages, which showed no duress and no protestation from the Defendant from the 17th day of December 2020, through to 25th February 2021, all promising to make good the payments as agreed by the Settlement Agreement, offering constant excuses and apologies for the delay in making those remittances through to 25th February 2021, until the 26th day of February 2021, when presumably, after engaging counsel, the defence of duress and consequent counter-claim, suddenly emerged on 26th February 2021.

9.4 I have already dismissed the counterclaim of the defendant. (Paragraph 8.15 above.)

9.5 I move now to analyse the Plaintiff's claim for damages for breach of contract and its entitlement to payment of all additional costs incurred and to be incurred to complete the house. The Plaintiff in its own submissions,

(para 37 thereof), has submitted that the 1st Plaintiff is not claiming a benefit from the building contract dated 7th August 2019, in advancing its argument for the Court to consider the circumstances that led to the Settlement agreement of 11 December 2020.

On this composite claim, I am of the considered view that there was little or no evidence placed before the Court in support of these claims. There was no expert evidence or anywhere in the pleadings a quantification of costs to be incurred to complete the house, or the manifest defects to the property, the subject of the dispute. I have also noted that although the Defendant has produced photographs marked from **pages 3 to 15** of its Bundle of Documents, (which were objected to by Plaintiff Counsel), I find as a fact that the same photographs do not conclusively show that these relate to the property in question, nor have any bearing to the defence or counter claim mounted by the defendant. Other than take note that these are photographs from a building site, I can arrive at no other conclusions, and none that will support either the Plaintiff or the Defendant.

- 9.6 I have anxiously considered **paragraphs 50 to 61** of the Plaintiff's submissions and note that the same attempts, at best to make estimates of what sums *may be* required to complete the construction of the said house. I also note that **paragraphs 40, 41, 42 and 43** of the 1st Plaintiff's Witness Statement, speaks to claims that have not been proved nor supported by any documentary evidence. Further **paragraph 44** makes a claim of the total loss in the sum of *K1,265,417 assuming legal costs of K30,000* in circumstances which are not clear and for which no evidence was led.

Despite the submissions of Counsel, these damages cannot be considered to have been proved or substantiated.

- 9.7 I take the view that there are only two real questions for determination, notwithstanding the unusually long submissions by both Parties. These two questions require the Court to determine whether there was in fact a settlement agreement which can be enforced and if the Plaintiff can make a claim for the sum of K1,265,417 for breach of the building contract.

As I have already determined on the issue of the settlement agreement, it remains for me to consider the issue of damages with respect to the claim in the sum of K1,265,417.00.

A violation of the settlement agreement, being a breach of contract, entitles the Plaintiffs to claim damages for the harm suffered from that breach. On this, I have no difficulty. I am also of the considered view that it is normally the function of the court to assess the money value of the loss suffered and award that sum as damages. In my considered opinion, no clear harm having been shown, an award of interest, as determined below, will suffice as damages for this claim.

- 9.8 I am not satisfied as to the claim for general and punitive damages, in the sum of K1,265,417.00 which not only embodies legal costs, before they have been awarded, but also claims for specific amounts, details of which have not been placed before the Court. I therefore dismiss this claim.

9.9 On the Plaintiff's claims to interest, Counsel has referred the Court to the principle espoused in the case of **Kasote Singogo vs Lafarge Zambia Plc** and **section 2 of the Judgment Act**. I have no hesitation in accepting these submissions.

9.10 I now turn to analyse the issue on costs. Although I am alive to the general principle that costs follow the event, I have looked at the circumstances prevailing in this dispute. It is clear in the Courts mind that from the onset of this action, this was a matter that was amenable to a mediated settlement.

This was reflected in the Order of the Court of 18th June 2021, by its referral of the matter to Mediation in accordance with **Statutory Instrument No. 72 of 2018**. At its status conference post-mediation, on 11th August 2022, Counsel for the Plaintiff informed the Court that the mediation had not taken place, citing several reasons, one of which being the unwillingness of the Plaintiff to attend Mediation. Not surprising, the defendant was not in attendance on this day and only represented by an Agent who had no instructions on the date of the referral Order. I note also from the report on Mediation that the matter was not mediated for non-appearance by both Parties.

9.11 It has long been a part of our legal system that Courts, may, in appropriate cases, refer matters to Mediation. It is trite that although settlement at a mediation is not compulsory, attendance, however is.

This brings me to reflect on two important public policy concerns. One that allows for settlement of certain disputes by an alternative method, in this case, mediation, and secondly, to de-congest the workload, whilst accepting the voluntary nature of the settlement and participation at the mediation. Wilful refusal to attend mediation, is considered costs thrown away, irrespective of the final outcome of the action in Court.

Order XXX1 rule 8 (3) of the High Court Rules as amended by S.I. No 72 of 2018 provides as follows:

"The Court shall, where a Party that has received notice of mediation in accordance with rule 7 fails to attend without reasonable cause, make an order as to costs from the date of the referral of the proceedings to mediation in favour of the party in attendance, despite the defaulting party being successful in the action."

9.12 The circumstances in *casu*, reflect that neither Party attended mediation as a consequence of which, Plaintiff Counsel was advised by the Court, at its Scheduling Conference post-mediation, referred to above, that costs had been deemed thrown away. I therefore make no award of costs.

10. For the avoidance of doubt, I enter Judgment in favour of the Plaintiffs as follows:

- a. The sum of K528,070.00 being the balance in respect of the Settlement Agreement, with interest at bank lending rates from the

date of the action to the date of Judgment and thereafter in accordance with the provisions of the Judgment Act till the date of payment.

11. Before I vacate this Judgment, and as a post-script, I regret the open hostility and aggression displayed by Counsels retained in this matter. Admittedly, ours is the adversarial system of law, but it is not necessary for counsels to descend into the arena, in the manner that this Record will reflect. From the start of the proceedings, the Court was obliged to listen to objection upon objection, and did deliver no less than 3 Rulings, all of which were heated and, in my considered opinion, were capable of being handled differently.

Counsels, albeit of senior standing, appear to have overlooked the provisions of the Legal Practitioners Practice Rules 2002, Statutory Instrument No. 51 of 2002, and more especially the provisions of Part VII. The Court regrets this display which may have the effect and be likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.

Delivered in Open Court, the 4th day of August, 2022.



Lady Justice Abha Patel, S.C.