

IN THE HIGH COURT FOR ZAMBIA  
AT THE NDOLA DISTRICT REGISTRY  
HOLDEN AT NDOLA  
INDUSTRIAL/LABOUR DIVISION

COMP/70/2010  
COMP/75/2010  
COMP/40/2011

**BETWEEN:**

VIOLET KASENGE BWALYA & OTHERS

COMPLAINANTS

AND

ZAMBIA TELECOMMUNICATION COMPANY  
LIMITED

RESPONDENT

THE ATTORNEY-GENERAL

INTERESTED PARTY

**CORAM: THE HONOURABLE MR. JUSTICE D. MULENGA ON THE  
3<sup>RD</sup> JUNE, 2016**

For the Applicant : Mr. C. Matibini of Messrs L.M. Matibini & Company

For the Respondent : Mr. Chiteba, Legal Counsel

For the Interested Party : Mr. L. Kalaluka (Attorney General) and Mr. F. Mwale

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**RULING**

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**CASES REFERRED TO:**

1. Christabel Ngimbu v Charles Kakoma and Electoral Commission of Zambia SCZ Judgment No. 29/2014.
2. Infinity TV Limited v Chamba Valley & Others HC Judgment 2006/HPC/0032.
3. Chandless - Chandless v Nocholuon [1942] 2 All ER 315 at page 317.
4. Norwich Union Fire Insurance Society Ltd v Price [1934] A.C. 455, 463.
5. Moorcock (1889), 14 P.D 64, page 68.
6. Shirlaw v Southern Foundries (1926). Ltd [1939] 2 K.B. 206, 227.
7. Way v Latilla (1937) 3 All E.R. 759.
8. Siebe Gorman & Co. Ltd v Pneupack Ltd (1982) 1 All ER 377 at page 380.

**OTHER WORKS REFERRED TO:**

1. Halsbury Laws of England 4<sup>th</sup> Edition Volume 26, page 279, paragraph 556.
2. Atikins Court Forms, Volume 23/2011 issued at page 45 paragraph 48
3. Suttons & Shannon

The Attorney General of the Republic of Zambia being an Interested Party jointly with the Respondent in the matter herein filed into Court Summons for this Court's determination of the Party Liable to settle the judgment debt herein under the terms of the Consent Order dated 16<sup>th</sup> March, 2015. The said application is supported by an affidavit dated 26<sup>th</sup> April, 2016. However, I have observed that the Applicant's affidavit aforesaid is not commissioned though it bears this Court's Seal.

I am mindful that the Attorney General does not pay filing fees, therefore the omission to commission the said affidavit falls on the Court's Registry Clerk who received the documents on the date in issue. Ordinarily un-commissioned affidavit is not only defective but invalid.

The Complainants filed into Court an affidavit in opposition to summons to determine the Party Liable to pay the judgment sum, dated 28<sup>th</sup> April, 2016. Further the Complainants filed skeleton Arguments on 29<sup>th</sup> April, 2016.

The Applicants' application stems from the judgment of the Supreme Court between the within parties dated 22<sup>nd</sup> October, 2013 and a Consent Order between the Interested Party (Attorney General), the Respondent of the one part and the Complainants of the other part.



Perusal of the judgment of the Supreme Court aforesaid, clearly shows that, it upheld the judgment of the Industrial Relations Court which decided in favour of the Complainants herein against the Respondent to the effect that, it awarded the Complainants a redundancy package of three months basic salary for each year served and pro-rata for any uncompleted years of service.

The Supreme Court also awarded the Complainants interest at bank lending rate as determined by the Bank of Zambia from the date of judgment till payment by the Respondent.

The Supreme Court in its judgment also as regards the alternative prayer by the Appellant (the Respondent herein) against the Interested Party, ordered that the Interested Party indemnifies the Appellant, in respect of the judgment pursuant to the indemnity undertaking of 9<sup>th</sup> July, 2010.

The parties herein executed a Consent Order and the same was duly signed by the Deputy Registrar of this Court, dated 16<sup>th</sup> March, 2015. The said Consent Order shows that the parties agreed to the following:-

1. The principal sum of K78,508,382.94 due to the Complainants shall be paid by the Interested Party on or before 31<sup>st</sup> March, 2015.
2. The issue relating to Mrs. Eugenia Palula Mwanza (Pay No. 29966) as to whether she is entitled to the benefits of the judgment herein and the quantum as to the interest sum payable to the Complainants on the principal sum BE and HEREBY RESERVED for the determination of the Deputy Registrar.

3. Payment of the said principal sum shall act as a cap on the interest payable to the Complainants from the date of such payment until the interest is paid by the Interested Party.
4. The interest to be determined by the Court shall be paid by the Interested Party to the Complainants on or before 31<sup>st</sup> March, 2016.
5. The aforementioned amounts be paid as full and final payment of all claims and incidental to this matter.
6. Legal costs to be agreed and in default to be taxed.

The gist of the Applicants' application as to the Court understands it, arises from the Consent Order alluded to herein above. The understanding of – the applicants appear to be that since the Consent Order executed by the Parties specified that the Principal judgment sum of K78,508,382.94 and the interest to be determined by the Court was to be paid by the Interested Party, the Respondent (Zamtel) who is by the judgment of the Court, the Liable Party was insulated or removed from being a Liable Party.

On the hearing of the application the Learned Attorney General argued on behalf of the Interested Party that this Court was called upon to determine the Party liable to pay the judgment debt pursuant to Rule 55 of the Industrial Relations Court Rules, Chapter 269 of the Laws of Zambia and Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.

Learned Attorney General submitted that following the judgment of the Supreme Court, the parties herein negotiated and duly indorsed the Consent Order to the effect that the Interested Party shall pay the principal judgment sum and interest to the Complainants.



Whilst he conceded that an order of this Court or that of the Registrar of this Court cannot overrule the order of the Supreme Court, he submitted that the Supreme Court does not have enforcement jurisdiction of its orders or judgments, the parties therefore have to go to the lower courts to enforce Supreme Court judgments. He relied on the case of **Christabel Ngimbu v Charles Kakoma and Electoral Commission of Zambia**

**(1).** He therefore, argued that since the parties herein agreed by a Consent Order that the judgment debt and interest shall be paid by the Interested Party, the Complainants had no recourse to execute against the Respondent. He submitted that the Complainants should abide by the terms and conditions of the Consent Order which they freely negotiated and signed.

Learned Counsel for the Complainants in response relied on the affidavit in opposition to the application and skeleton heads of arguments filed into Court on 8<sup>th</sup> and 29<sup>th</sup> April, 2016 respectively.

Learned Counsel for the Complainant submitted that according to his understanding of the Applicants' application is that by the Consent of the parties dated 16<sup>th</sup> March, 2016 Liability shifted from the Respondent to the Interested Party. However, he argued that the Law is clear and instructive, **Halsbury Laws of England 4<sup>th</sup> Edition Volume 26, page 279, paragraph 556** provides:

*As a general rule except by way of appeal, no court judge or master has power to hear, review or alter any judgment or order after it has been entered, either in an application made in an original action or matter or in a fresh action brought to review the judgment order.*

At page 273 paragraph 550:

*Subject to an appeal and to being amended and set aside a judgment is conclusive as between the parties and their privies and its conclusive evidence of whole the world of its existence, date and legal consequences.*

Learned Counsel for the Complainants argued that in so far as the Supreme Court adjudged that the Respondent is the judgment debtor and further that the Interested Party should indemnify the Respondent, the said decision is final and binding between the parties and this Court. It is a final judgment which cannot be altered, reviewed or varied either by the parties themselves or any other Court than itself under slip rule.

Learned Counsel for the Complainants also submitted that it is common practice as it happened in this matter that the lower courts effectually moderates in the enforcement of judgments, by way of Consent Orders such as payment of judgment sums by way of instalments. He further alluded to the Doctrine of Party autonomy whose fundamental principle is the autonomous nature of Consent Orders which are contractual in character reflected in the parties' freedom to agree and structure the Consent Order according to their agreement or need. However, the autonomy enjoyed by the parties is not to be understood to be without Limit.



The Complainants have argued that there is no authority which provides that parties can alter a judgment by way of a Consent Order. They contend that there is no Consent to shift Liability from the Respondent to the Interested Party.

In reply Learned Attorney General submitted that the Law is very clear in relation to where a Party feels that a Consent Order may have been procured by mistake, fraud, and or misrepresentation.

The Interested Party questioned, what the intention of the parties were when they decided to change or alter the Party to pay the judgment debt. Learned Attorney General submitted that, the Consent Order in issue did not vary the material effect of the Supreme Court judgment which is that the Complainants need to be paid monies due to them. However, the Consent Order merely changed or revised the modalities of compliance of the Supreme Court judgment that the monies due to the Complainants shall be paid by the Interested Party. He argued that it is not correct that the Consent Order read that the Interested Party was to pay the Complainants for and on behalf of the Respondent but that the "Complainants shall be paid by the Interested Party. . ." Therefore the Consent Order revised the manner in which the money had to be paid.

Learned Attorney General, contended that it is not uncommon for parties to agree to pay judgment sums of money by instalments, or forego interest and costs which could have been awarded by the Court.

The Interested Party referred this Court to the case of **Infinity TV Limited v Chamba Valley & Others HC Judgment (2)**, stressing the point that a matter which was procedurally incorrect was waived by the Consent Order settled in the Supreme Court. Therefore, it is the argument of the Interested Party that if the varying of the Supreme Court Order is found to be incorrect, the Complainants have waived that procedural default and should be held accountable by the Doctrine of Party autonomy.

Learned Counsel for the Respondent in reply referred this Court to **Atkins Court Forms, Volume 23/2011 issued at page 45 paragraph 48** which states:-

*Consent Order must be interpreted as a contract any interpretation must be given a purposive construction.*

He, submitted that the Complainants through a letter marked "**MH2**" collectively shows that they threatened to levy execution against the Respondent in the event the Interested Party failed to make payment.

Learned Counsel for the Respondent agreed with the Complainant as sets out in the said exhibit "**NH2**" that contents of the Consent Order can only ably be settled by a fresh action if mistake or fraud is alleged. He argued that the said Consent Order did not provide for execution in case of a default and urged the Court to take judicial notice of the fact that Consent Orders that provides for payment of Liquidated Sums of money ordinarily also provides for a default provision setting out default consequences. In the case in casu, the consent Order did not provide for execution against



- the Respondent in case the Interested Party defaulted, therefore no execution should lie against the Respondent.

It is clear from the arguments of the parties herein that this Court is called upon to do the following:-

- (1) Make a determination arising from the Consent Order dated 16<sup>th</sup> March, 2015, as to which "Party" between the Respondent and the Interested Party is Liable to pay the Complainants the judgment sum as awarded by this Court and upheld by the Supreme Court of Zambia via its judgment dated 22<sup>nd</sup> October, 2013.
- (2) Whether the Complainants can execute against the Respondent in enforcement of the Judgment in the light of the Consent Order of the parties hereto dated 16<sup>th</sup> March, 2015.

As alluded to herein above, both the judgment of this Court and that of the Supreme Court found in favour of the Complainants against the Respondent. The Respondent therefore is a party who by the said judgment was Liable to pay the Complainant. The said position is not in dispute.

It is also not in dispute that the Interested Party, by the order of the Supreme Court judgment aforesaid, is Liable to indemnify the Respondent against its Liability to the Complainants.

I have carefully considered the hold in the case of **Infinity TV Limited v Chamba Valley & Others**. Firstly, it must be appreciated that whereas the said decision has no binding force on this Court, the same is persuasive. In that case Counsel had submitted that the Court sets aside

the Consent Settlement Order, alleging that it was procured by fraud. The Court held that it had no jurisdiction to set aside a decision of the Supreme Court which is a superior Court, secondly, the only way to challenge a Consent Order on the basis of fraud is to commence a fresh action.

This Court's understanding of the gist of the holding of the Court in that case is that it could not set aside a Consent Order which was entered by the parties in the Supreme Court, therefore the said Consent Order had become a decision of the Supreme Court. Further that the only way a Party can challenge a Consent Order on grounds that it was procured by fraud is to commence a fresh action. Accepting the said holding to be sound at Law means also that this Court has no jurisdiction either on application by any of the parties neither by way of consent of the parties to vary or review the decision of the Supreme Court.

The application and the opposition before this Court is not about the validity of the Consent Order dated 16<sup>th</sup> March, 2015, but for a determination by way of interpretation of the said Consent Order, therefore, there is no requirement for any of the parties to commence a fresh action.

Whereas this Court accepts the submission by the Learned Attorney General that it is not uncommon for parties to agree by way of Consent Order to pay judgment sums of money by instalments or forego interest and costs which could have been awarded by the Court, the issue herein is different as it relates to impliedly removing a Party found by the Supreme Court to be Liable to pay the Complainants.



Further in ascertaining which of the two between the 'Respondent' and the 'Interested Party' is liable to pay the Complainants, in the light of the Consent Order dated 16<sup>th</sup> March, 2015, the Court firstly should establish as to whether or not the said Consent Order is a real contract.

Lord Green MR, in the case of **Chandless – Chandless v Nocholuon (3)** observed that there are two meanings to the words 'by Consent'. One meaning is this 'by Consent' may evidence a real contract between the parties in such a case the Court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by Consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties.

I have closely perused the Consent Order in issue and I have no hesitation to agree with Learned Counsel for the Respondent that the said Consent must be interpreted as a real contract and be given a purposive construction in line with the holding in the case of **Chandless** alluded to herein above.

There are two terms in the Consent Order, which are crucial to the matter, the same are:

1. The Principal sum of K78,508,382.94 due to the Complainants shall be paid by Interested Party on or before 31<sup>st</sup> March, 2015; and
4. The interest to be determined by the Court shall be paid by the Interested Party to the Complainants on or before 31<sup>st</sup> March, 2016.

As I decipher from the submissions of Learned Attorney General on behalf of the Interested Party and Counsel for the Respondent, it is their belief and contention that by the said terms (1 and 4) of the Consent Order, the Respondent was removed from liability to pay the complainants, therefore, in default of payment by Interested Party the Complainants cannot execute against the Respondent.

The Learned authors of SUTTON AND SHANNON ON CONTRACTS 7<sup>th</sup> Edition Pub: Butterworths (London 1970 at page 31, in agreement with Lord Wright in the case **of Norwich Union Fire Insurance Society Ltd v Price (4)** states:-

*Although it is still true to say that the parties to a contract must be of the same mind, that there must be 'Consensus and idem' the law judges of this question in accordance solely with the outward expressions of the parties. The test of the intention here is objective, not subjective. Intention is to be ascertained from what the parties said and did.*

It is clear in my mind that applying an objective test and for that matter the purposive interpretation of the Consent Order in issue, I have to apply my mind to what the parties herein expressed. The parties expressly agreed that both the Principal amount of K78,508,382.92 and interest to be determined by the Court due to the Complainants was to be paid by the Interested Party, to emphasise, 'directly' to the Complainant on specified dates of 31<sup>st</sup> March, 2015 and 31<sup>st</sup> March, 2016 respectively.

Clearly, there is nothing expressly stated in the said Consent Order to remove the Respondent from being liable to the Complainants' dues under the judgment of the Court. However, whether the Consent Order in issue



implied that the Respondent was removed from Liability to pay the Complainants, depends as a rule, solely on the intention of parties as gathered from the words in the said Consent Order in the light of the surrounding circumstances.

In the case in casu, the surrounding circumstances are simply that by the judgment of this Court upheld by the Supreme Court of Zambia the Respondent is Liable to pay the Complainants and the Interested Party is liable to indemnify the Respondent. In this case therefore, this Court can come to only one interpretation of the intention of the parties.

The said Consent Order is interpreted by implication that the parties herein agreed that instead of the Interested Party indemnifying the Respondent, it shall pay the judgment sum and interest directly to the Complainants.

This Court has arrived at the above interpretation having considered the observation made by Bowen L. J. in the Leading case of **Moorocock (5)** thus:

*I believe that if one were to take all the cases, and they are many of implied warranties . . . ' it will be found that in all of them the law is rising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that all events it should have. The law desires to give such business efficacy to the transaction as must have intended at all events by both parties.*

And Mackinnon L.J. in the case of **Shirlaw v Southern Foundries (6)**, as regards 'Implied intention' stated:

*It is sometimes put that the term to be implied must be something to which, had it been suggested to the parties at the time of contracting by an 'officious bystander' they would have responded "oh, of course".*

It can be seen from the cited authorities that in the case in casu, the parties intended that the judgment sum owed to the Complainants by the Respondent is paid at a specified date. I have a very strong doubt if an officious bystander had to ask the parties herein, whether by the Consent Order dated 16<sup>th</sup> March, 2016, they intend to remove the Respondent from Liability, both parties would answer in unison 'oh, of course'. I therefore, do not see what could have been the difficulty of the parties if they intended to remove the Respondent from liability to the Complainants, to expressly state in the said Consent Order or by an application to the Court.

It is worthy noting, the observation made in the case of **Way v Latilla (7)** that it is the duty of the parties to contract to achieve certainty of terms, if they fail to do so, it is not possible for the Court to create a contract for them. This Court therefore cannot read into the Consent Order of 16<sup>th</sup> March, 2015 that the Respondent ceased to be Liable to pay the Complainants' dues nor that the judgment of this Court and the Supreme Court had been made ineffective against the Respondent.



Denning MR, puts it clearly in the case of **Siebe Gorman & Co. Ltd v Pneupack Ltd (8)** he stated:

*In any event, even if the Order (Consent Order) did evidence a contract between the parties, the agreement between the parties neither expressly nor impliedly accepted or contemplated that an order would be made which ousted the Court's jurisdiction under RSC Order 3, Rule 5 (1) to extend the period within which a person is required to do an act.*

In the matter herein like in the case of **Siebe Gorman**, this Court has not found in the Consent Order of the parties, expressly nor by implication accepting or contemplating that the said Consent Order was made to oust the judgment of this Court and that of the Supreme Court, by removing the Respondent from Liability to pay the Complainant's dues and not to enforce or execute against it.

It is concluded, therefore that the Consent Order dated 16<sup>th</sup> March, 2015 endorsed by both parties herein and signed by the Deputy Registrar of this Court cannot vary or review the substance of the judgment of the Supreme Court as it relates to the Respondent's Liability to pay the judgment sum and interest to the Complainants. Simply put, payment of the judgment debt by the Interested Party to the Complainants is as good as one made by the Respondent, the same is the case for any default. The Respondent is still a party to the proceedings herein and is still liable to pay the judgment debt whether by itself or through the Interested Party.

The joint application by the Respondent and the Interested Party herein is henceforth dismissed with costs to the Complainants.

Leave to appeal to the Supreme Court within thirty (30) days from the date hereof is granted.

Delivered at Ndola this **3<sup>rd</sup>** day of **June, 2016**.

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**D. Mulenga**  
**HON. JUDGE**

