Hon Madam Beatrice Mandalima

SELECTED JUDGEMENT NO. 13 OF 2004

IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. 89/2003**
HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

THE RATING VALUATION CONSORTIUM	**1ST APPELLANT**
D W ZYAMBO & ASSOCIATES (Suing as a firm)	**2ND APPEALLENT**
AND	
THE LUSAKA CITY COUNCIL	**1ST RESPONDENT**
ZAMBIA NATIONAL TENDER BOARD	**2ND RESPONDENT**

Coram:

Sakala, CJ, Chibesakunda and Chitengi, JJS
on 29th April 2003 and 6th May 2004

For the Appellants: **Mr. R.M. Simeza of Simeza Sangwa and Associates**
For the 1st Respondent: **Messrs. Permanent Chambers (not in attendance)**
For the 2nd Respondent: **N/A**

JUDGMENT

Chibesakunda, JS, delivered the Judgment of the Court

Cases referred to:

1. **Jean Mwamba Mpashi Vs. Avodale Housing Project Limited [1998-99] ZR 140**
2. **Mobil Oil (Z) Limited Vs. Loto Petrol [1977] ZR 336**
3. **Branca Vs. Cabarro [1947] 2 AER P.101**
4. **DP Service Limited Vs. Municipal of Kabwe [1976] ZR 110**
5. **Rossiter Vs. Muller [1878] 3 AC P1124**
6. **Salmon Vs. Salmon Company [1897] AC 22**
7. **Bridget Mutwale Vs. Professional Limited [1984] ZR 72**
8. **Re Mahmound Vs. Ispahani [1921] 2 K B 716**
9. **Associated Chemicals Limited Vs. Hill and Delma and Others SCZ No. 2/1998**
10. **Stevenson Vs. Mc Clean [1880] 5 QBD P 346**
11. **Hyve Vs. Wrench [1840] 3 BEAR 334**
12. **Global Tankers Incorporation Vs. Amercoat Europa Ny 1975 Llyod Report P666**
13. **Spa Vs. Feed Products (1887 2 Llyods Reports)**
14. **Falle Vs. Classique Counches (**
15. **Craven Ellis v Canons Limited (1936) 2 K B 403**

Laws referred to:

16. **Section 3(1) of the Rating Act Cap 192 Volume 12**
17. **Section 2 of the Judgment (Amendment Act) Cap 81**
18. **Part viii Regulation 39 – 40 of the Zambia National Tender Board Cap 394**
19. **Rule 69 of the Supreme Court Rules Cap 25**
20. **Halsbury's law of England, 4th edition volume 9 paragraph 695**

Text referred to:

21. **Chitty on Contracts 25th Edition Para 1147 P620**
22. **Ewan Mc Kendrisk Contract Law 3rd Edition Pages 22, 36-37, 180, 286**
23. **Pollock on Contracts 13th Edition P521**
24. **Cheshire and Fifoot Edition P157**

In this appeal, Messrs. Permanent Chambers, on behalf of the Respondents, filed a notice of non-appearance before the court before the date of hearing under **Rule 69(1) of the Supreme Court Rule** (19). At the hearing the court therefore proceeded in their absence. They had however filed detailed heads of argument, which we have taken into account in this judgment.

This appeal arises from the High Court judgment in which that court dismissed the Appellant's claims.

The appellants, who were the Plaintiffs in that court, sued the Respondents claiming:-

1) Specific performance of an agreement made between the Appellants and the 1st Respondent evidenced by various memoranda made between 5th January and 26th February 2001 for the preparation of the Lusaka City Council Main Valuation Roll 2001;

2) Further or alternatively damages for breach of contract; and

3) Payment by the 1st Respondent of the sum of K75 million being five per cent of the contract sum of K1.5 billion which was due and payable for the months of February and March 2001 as per the memorandum dated 2nd February 2001.

The facts before the lower court on which there was common ground are that:-

On 29th June 1999, the 1st Respondent invited tenders through the national press from Valuation Surveying firms to undertake a compilation of the Lusaka City Council Main Valuation Roll.

Resulting from this invitation, on 30th January 2001 the 1st Respondent wrote to the 2nd Appellant appointing them as lead valuation surveyor of a consortium company to be incorporated of three surveying firms, comprising of the 2nd Appellant, Mukonde Chartered Surveyors and S.P. Mulenga Associates International.

The 1st Respondent's letter says:-

"LUSAKA CITY COUNCIL
OFFICE OF THE DIRECTOR OF FINANCE

P O BOX 30252
10101 LUSAKA, ZAMBIA
254496

TELEGRAMS 'CITY'
TEL/FAX 260 1

REF MZ/BMS

30th January, 2001

Mr. D.W. Zyambo
D W Zyambo and Associate
P O Box 32064
LUSAKA

Dear Sir,

RE: TENDER FOR THE PREPARATION OF THE LUSAKA CITY COUNCIL MAIN VALUATION ROLL

Further to our advertisement in the Zambia Daily Main of the 29th June, 1999 in which we invited firms of Valuation Surveyors to Tender for the preparation of the Lusaka City Council Main Valuation Roll, I am now pleased to advise that your firm has now been appointed as the land valuation surveyor.

Please note that you are charged with the responsibility of carrying out and superintending over the preparations of the roll.

Please further note that you are required and with approval of Council to sub-contract this assignment to other Lusaka based Valuation Firms who together with you shall form a consortium to enter into contract with Council in this regard.

This appointment is effective from the 1st February, 2001, and the consortium is expected to commence the exercise on 15th February, 2001.

We have, in the meantime, instructed our Lawyers to draw up the requisite contract between Council and your consortium and you will no doubt hear from them in this regard.
(Our own emphasis)

Yours faithfully,

F.M. MUWOWO
ACTING TOWN CLERK"

In response to this letter, the 2nd Appellant accepted the nomination to superintend over the preparation of new valuation roll and nominated three firms, D M Zyambo and Associates, Mukonde Chartered Surveyors and SP Mulenga Associates International in the letter dated 31st January 2001. The 1st Respondent then responded, in their letter of 2nd February 2001, to the 2nd Appellant's letter approving the proposed surveyors. The 1st Respondent then advised Messrs. Mukonde Chartered Surveyors and SP Mulenga Associates International to liaise with the 2nd Appellant in forming a working consortium which was meant to enter into an agreement with the Council on terms and conditions to be agreed upon.

In the same letter of 2nd February 2001, the 1st Respondent further wrote also confirming the terms they offered to the 2nd Appellant in the consignment of superintending the main valuation roll and list on the flat rate including, inter alia, the following terms:-

a) the commencement date of 15th February, 2001;

b) the total contract price of K1.5 billion;

c) a monthly payment of K75 million over a period of six months.

The letter of 2nd February 2001 reads as follows:-

"OFFICE OF THE TOWN CLERK

Our reference FD/4/35/JMM/ems **DATE: 2nd February, 2001**

Mr. D.W. Zyambo
Principal Consultant
D.W. Zyambo & Associates
P.O. Box 32064
LUSKA

Mukonde Chartered Surveyors
P.O. Box 30454
LUSAKA

S.P. Mulenga Associates International
Chartered Surveyors
P.O. Box 50083
LUSAKA

Dear Sir,

Re: PREPARATION OF MAIN VALUATION ROLL 2001 AND LIST ON FLAT RATE

Further to my letter of even date, I now write to confirm the following terms relating to your appointment as valuers for the preparation of both the Main Valuation Roll as well as the list on the flat rate.

MAIN VALUATION ROLL

1. **The commencement date of this exercise is 15th February, 2001 and is for a period of eight (8) months.**

2. **That the total number of Units to be valued is about 75,000**

3. **That the fee payable to your consortium is the sum of K20,000 per unit**

4. **That a monthly sum of Seventy Five Million (K75 000 000 00)**

Payable monthly in arrear shall be paid to the consortium over a period of six (6) months subject to a minimum of Four Thousand (4,000) properties to be surveyed and submitted to council by each firm. That ten per cent (10%) of the balance

of the total contract fee be paid on signing the New Valuation Roll. That a further ten percent (10%) of the balance of the total contract fee shall be paid on the New Valuation Roll being approved by the Rating Valuation Tribunal. That the final balance of the contract fee shall be paid three (3) months after the notices for new rate bills have been sent to Leaseholders based on the Rateable Values from the new Valuation Roll.

FLAT RATE LIST

1. **That the commencement date is 15th February 2001 and is for a period of three (3) months**

2. **That the total number of Units to be valued is about 30,000**

3. **That the fee, payable to your consortium is K15,000.00 per unit. That the total fee shall be paid to the consortium Forty five (45) days after your consortium has submitted the Flat Rate List to council.**

Kindly note that the rest of the terms and conditions relating to this appointment shall be contained in the final agreement to be agreed upon by council and yourselves.
(Our own emphasis)

Yours faithfully,

Francis M. Muwowo
ACTING TOWN CLERK"

These correspondences from the 1st Respondent were all copied to the Mayor, Chairman of Finance and General Purposes, Acting Legal Counsel and Chief Valuation Surveyor Officer. On 9th February 2001, the 2nd Appellant then wrote to the 1st Respondent stating inter alia that:-

"Rating Valuation Consortium Ltd
3rd Floor Anchor House
P.O. box 32064
Cairo road
LUSAKA

Tel: 225216
Fax: 224176

9th February 2001

Mr Francis M Muwowo
Acting Town Clerk
Lusaka City Council
LUSAKA

- J7 -

RE: PREPARATION OF MAIN VALUATION ROLL 2001 AND COMPILATION OF FLAT RATE LIST

We refer to your letter of engagement dated 2nd February 2001 and confirm our acceptance of the terms/conditions as stipulated except for an omission on the payment of five per cent (5%) of the contract price, which will now be spread and paid between the months of end of February and end of March, 2001. The amounts will assist us in supplementing logistical and operational costs. (Our own emphasis)

The three firms have incorporated a company, the "Rating Valuation Consortium Ltd" under which we shall operate. We request that the contract of our engagement be drawn in the name of our incorporated company and all dealings will be with the said company. (Our own emphasis)

We will commence both the main valuation exercise and the compilation of data/calculations on the flat rate assignment by 15th February 2001. We sincerely hope that the contract for both exercises will be executed by both the Rating Valuation Consortium Ltd and by the Council before 15th February 2001.

The appointed valuer as per the Lusaka City Council Resolution will be Mr D.W. Zyambo, the undersigned.

In compliance with our proposals the consortium will implement the following measures:-

a. We will incorporate the Lusaka City Council Valuation Department into our main working stream. We will be offered suitable office accommodation. All working files will be under the safe custody of the Chief Valuation Officer/Director for Valuation Department, Mr. Melvin Zulu.

b. To motivate your Council staff, we will pay monthly in arrears the following allowances:-

   i) The Director of Valuation/Estate Management Department – K1,500,000.00 per month

   ii) Graduate Valuation Surveyors – K400,000.00

   iii) Valuation Assistants – K300,000.00

   iv) Typists – K150,000.00

We look forward to receiving your contract of engagement for our exercise. (Our own emphasis)

Yours faithfully

D. W. ZYAMBO
APPOINTED VALUER FOR THE CONSORTIUM"

It is worthy noting that, this letter written on the 9th of February, was written before the consortium was incorporated. The consortium was incorporated on 16th February 2001. It is also worthy noting that the 1st Respondent wrote to the Minister of Local Government of Local Government and Housing seeking the approval of the Minister in accordance with **Section 3(1) of the Rating Act** (16). On 26th February 2001 the 1st Appellant wrote to the 1st Respondent giving them an up to date report on how the consortium was carrying out the assignment.

The report says:-

"CONSORTIUM

The consortium is now registered under the style "RATING VALUATION CONSORTIUM LTD". The company Registration Number is 46622 incorporated on 16th February 2001. (Our own emphasis)

MOBILISATION

As a Consortium we have been working with the Acting Director of Valuation as from 15th February 2001. (Our own emphasis)

We have since mobilized the following to enable us execute the job on the ground.

- **Cadastral survey maps**
- **Listing of Common Leasehold Scheme property schedule to December 1999, but still expecting an updated listing that goes up to December 2000**
- **Listing of approved plans from the Director of Planning**
- **Prepared general notices to Rate Payers which shall only be released after the fulfillment of the requirements of Section 9 of the rating Act**
- **Have obtained hard copies of the previous Valuation Roll**
- **The bulk of the inspection cards are almost ready**

WORKSHOP

A workshop for the officers to be engaged in the Re-Valuation Exercise for the Lusaka City Council was successfully conducted on Wednesday the 21st February 2001 at Civic Centre in the Valuation Hall of the Department of Valuation, at the instigation of the Rating Valuation Consortium Ltd.

This successful workshop was attended by 35 officers of the intended 40. The officers were drawn from the Consortium and the Valuation Department of Lusaka City Council.

The main purpose of this workshop was to orient, sensitize and introduce officers to what shall be expected of them during the re-valuation exercise. Written guidelines intended to assist the officers during inspections were given.

Otherwise the officers were during the workshop introduced to the following crucial areas of the exercise

- **Relevant Sections of the Rating Act pertaining to physical inspections.**
- **Common errors and pitfalls during physical inspection time were identified and highlighted.**
- **The standard approach to the format of the physical inspections, "the do's and don'ts".**
- **The international Code of Measuring practice was seriously emphasized.**
- **The working groups were formulated and individual Lusaka City Council officers were assigned.**
- **A general overview was given as to what is Rateable Property and also what is not Rateable Property.**
- **Substantial time was spent on Question and Answer session.**

FLAT RATE
The flat rate exercise has since commenced.

COMMERCIAL LISTING.

The Commercial listing (Asset Register) for Lusaka City Council also commenced.

INSPECTIONS

General inspections have started pending the Minister's approval of the exercise and confirmation of the Appointed Surveyor.

APPEAL.

The Consortium's earnest appeal is for your office to <u>quickly procure approval from the Minister of Local Government and Housing</u>." (Our own emphasis)

The record also show that on 9th March 2001, the Ministry of Local Government and Housing then responded to the 1st Respondent rejecting the application for approval for the following reasons:-

1. that the advertisement in the Zambia Daily Mail of 29th June was invalid as it had expired;

2. In relation to the same advertisement the tender was not advertised in the Government Gazette which is a statutory requirement;

3. The bidding document containing the evaluation criteria was not submitted for their review;

4. The 1st Respondent did not state the value and completion period of the contract; and
5. Also the record shows that it was after this that the 1st Respondent wrote to the 2nd Respondent.

The 2nd Respondent responded to the 1st Respondent's request for approval on 19th February 2001, rejecting the application to invite the selective tender for the re-valuation for City of Lusaka in accordance with **Section 3(1) of the Rating Act**, (16) as according to them there were irregularities in the selective exercise of companies, which were short-listed. The 1st Respondent was directed by the 2nd Respondent to float an open tender through the Secretariat with the floating period of four weeks. They also brought to the attention of the 1st Respondent the fact that, in accordance with paragraph (a) of **Regulation 39 (2) of the Zambia National Tender Board Cap** (18), the authority they were relying on had only been valid for six months and that thereafter it was deemed to be invalid. On 10th May 2001 the 1st Respondent wrote to the 1st Appellant informing them that, the tender advertised on the appointment, had been rejected by the Ministry of Local Government and Housing.

There was also evidence which was not disputed that the 1st Respondent, after realizing that the procedure for inviting bidders was irregular, only informed the 1st Appellants that the Ministry of Local Government and Housing had refused to grant the approval/permission for the appointment and engagement of the 2nd Appellant in May 2001. At the hearing, the evidence on the other hand was that the Minister of Local Government and Housing had not refused to approve the appointment and engagement but had advised the 1st Respondent that there were anomalies in the application.

The Appellants' arguments before the lower court were that communication by the Respondents was very clear and unambiguous. The communication amounted to an offer. Their main argument was that the important terms and conditions were communicated to the Appellants.

These terms were:-

1) The commencement date – 15th February 2001;
2) The contract sum of K1.5 billion, to be paid monthly in the sum of K5 million for six months.

These terms and conditions were accepted by the 1st Appellants after it was registered on 16th February 2001. They also argued that it was an express term of the agreement that, the Consortium, after being incorporated, would use the 1st Respondent's Evaluation Department and its members of staff, subject to these members of staff, being paid monthly salaries in arrears, on condition scale as set out in the letters dated 2nd and 9th February 2001. They pointed out to the court that it was on this firm acceptance of these terms and with the full consent of the Respondents that the Appellants commenced the preparations of the main evaluation roll on 15th February 2001.

With the acknowledgement of the Respondents, they argued, the Appellants organized a workshop with the participation of the Evaluation Department in the Evaluation Hall and by 10th May 2001 they had evaluated over 12,000 properties. On 10th May 2001 when the 1st Respondent wrote a letter informing the Appellants that the Minister of Local Government and Housing had rejected their application to approve that exercise, the Appellants had already started to execute the exercise. This communication was late. It is, therefore, their argument that the 1st and 2nd Respondents are bound by the terms and conditions of the agreement.

The Respondent in response argued that the 2nd Appellant was at the material time, fully aware, as was acknowledged in their letter dated 26th February 2001 to the 1st Respondent, that the preparation of the main valuation roll, was under the **Rating Act** (16), as amended, and the **Zambia National Tender Board Act** (18) and that the appointment of the 1st Appellant was subject to the following conditions:-

i. The approval of such appointment by the 1st Respondent's full council or a lawfully constituted committee thereof;

ii. The grant of ministerial approval which had to be secured;

iii. That there had to be formal contract between the 1st Respondent and the 2nd Appellant and the other sub contractors;

Therefore the 2nd Appellant must have known that legally it was not possible to enter into a legally binding agreement between the 1st Appellant, 2nd Appellants and the 1st Respondent without complying with these statutory prerequisites.

It was further their contention, before the court, that at the material time the Appellants knew or ought to have known that the appointment of a surveyor, other than an officer of the Government, had to be subject to the regulations of the **Zambia National Tender Board Act** (18) and provisions relating to the **Rating Act** (16) as amended. They further contended that in the letter dated 21st March 2001 in which the 1st Respondent tried to seek approval of the National Tender Board, the 1st Respondent was advised to seek fresh tenders as the tenders bided in 1999 were irregular. The Respondents argued that all these were communicated to the Appellants.

The other limb of the Respondents' arguments was that there was correspondence exchanged between the parties as way back as 2nd, 9th and 26th February 2001, respectively, which indicated that the 2nd Appellant and the 1st Respondent were still in the process of negotiating the terms and conditions of the contract. So there was no agreement. The parties were not ad IDEM. Consequentially, the Appellants should not have commenced any works in furtherance or in preparation of execution of a contract which had not come into existence.

The learned trial Judge held that as there was no contract between the two parties, the Appellants suffered no damages. The learned trial Judge dismissed the claim with costs. The Appellants are aggrieved by this decision. They have come to this court challenging the High Court's decision.

Before us the Appellants in their memorandum of appeal, advanced two grounds of appeal:-

1. that the court misdirected itself both on a point of law and fact by holding that there was no contract between the parties and that the parties were still in negotiation; and
2. that the court below misdirected itself both in law and fact when in failed to consider the principle of "Quantum meruit" and held that the Appellants could only be entitled to claim damages if there was a valid contract subsisting between the parties.

In the written heads of argument and in the oral submission Mr. Simeza, learned counsel for the Appellants, elaborated on these two grounds of appeal.

On ground (1) – Mr. Simeza argued that the lower court misdirected itself in holding that there was no contract between the Appellants and the Respondents. He argued that it is lawful to enter into contract conditional upon complying with statutory requirements. Referring to two cases **Jean Mwemba Mpashi v Avondale Housing Project Limited** (1) and **Branca v Cabarro** (3), he argued that the courts have given effect to an agreement which provides for further terms to be agreed on, provided parties have reached substantial agreement. In the case of **Faile v Classisque Counches** (14) the court held that, at law it is feasible for businessmen to enter into binding agreement in principle without being able at the time to precisely settle all details. He questioned the holding by the lower court that the documents at pages 106 – 116 did not have all the fundamental terms and conditions which if accepted would not be incorporated in the final binding agreement.

He argued that all the terms and conditions were settled in the two documents and that the final agreement was to merely record the agreement. He furthermore queried the court's conclusion that the Appellants' letter of acceptance amounted to a counter offer, and as such did kill the original offer, thereby creating a new offer, which the Respondents were to either accept or reject. He argued that the letter of acceptance only contained an inquiry by the Appellants, not new terms.

On the argument that the documents exchanged should be construed that the parties did not intend to create an immediate binding contract, he referred to the passage in the case of **Jean Mwamba Mpashi v Avondale Housing Project Limited** (1), where this court said:-

> ***"It is in each case a question of construction whether or not the parties intended to undertake immediate obligations or whether they were suspending all liabilities until the conclusion of formalities. Have they, in other words made the operation of their contract conditional upon the execution of a further document in which case these obligations will be suspended or have they made an immediately binding agreement though one which is later to be merged into a more formal contract. The task of the court is to extract the intention of the parties both from the terms of their correspondence and form the circumstances surrounding and following it and the question of interpretation may thus be stated....."***

and a passage in **Mobil Oil (Zambia) Limited v Loto Petroleum Distributor Limited** (3) in which the High Court held that, ***"the court must investigate all the circumstances to see whether the documents evidence a perfect agreement"***, and argued that all the circumstances of a given case must be considered and analyzed to determine whether the parties created a bidding contract immediately or postponed the bidding effect of the agreement. He pointed out that had the court analyzed and examined the correspondence and the conduct of the parties, it would have reached the conclusion that there was a binding contract.

He went to categorise the facts, which the court should have considered. These are - that the parties agreed: on the commencement date of the contract which was 15th February 2001; on the contract period of 18 months; the total number of units to be valued as 75 000 at a fee of K20 000 00 to be paid per unit; and that the total contract sum was K1.5 billion with a monthly sum of K75 million payable monthly in arrears over a period of 6 months. In his view, the total sum of all these agreed facts, pointed to the fact that the parties had done all the negotiations and had reached a binding contract.

In the alternative to this argument, he argued that the Appellants commenced the execution of the contract with full belief that they had fully concluded negotiations and reached a binding contract. Also they commenced works stipulated in the agreement with full knowledge of the Respondents. One of these acts which they carried out in executing the agreement, was to organise a workshop at the Respondents' place. The Respondents were fully aware of this workshop being organized by the Appellant. One of their Departments even participated in the workshop. It was organized in their hall. The Appellants incurred certain expenses with full knowledge of the Respondents. They moreover sent an update report to the Respondents on the progress made in the preparation of the execution of this agreement. In his view, therefore, the lower court ought to have held that while there may have been other terms to be incorporated in the final agreement, that the parties did everything necessary to reach a binding agreement. In fact they reached a binding contract which was to be translated into a formal contract later. The court ought to have held that there was cogent evidence from the documents and the conduct of the parties that the parties reached a bidding contract.

He went to fortress his argument on that point by saying that there was nothing in the correspondence from the Respondents indicating that the Appellants were acting on a non-bidding contract between 15th February, 2001 and 10th May, 2001. Referring to **Halsbury's Laws of England** (20) Mr. Simeza argued that at law a declaration is not a counter offer. An offer must be capable of acceptance. He urged this court to adopt with approval the principle enunciated in the English case of **Stevenson v Mclean** (10), where it was held that where parties are making an inquiry or statement seeking an indulgence or through a statement a party does not proffer any new terms but that merely seeks either further elucidation of the terms in the offer or seeks indulgence from the offeree, such cannot amount to a counter offer.

Mr. Simeza elaborately argued that the documents and correspondence exchanged between the parties confirmed and established that a complete contract was finalized between the parties.

In response to these arguments the Respondents, in their written heads of argument, argued on first ground that on the basis of the abundant documents exchanged between the parties, this court should agree with the lower court that there was no final and complete contract finalized between the parties.

On the first limb of this argument, that there was an offer, they argued that the letter dated 2nd February addressed to the 2nd Appellant could not have been an offer to the 1st Appellant as the 1st Appellant was not in existence. They argued, that the letter of 9th February 2001, which is said to be an acceptance, was written by the 2nd Appellant.

It cannot be said to have been written by the 2nd Appellant on behalf of the 1st Appellant, as the 1st Appellant was non-existent at the time.

They went on to argue that the contents of the same letter at pages 111 – 112 of the record, in particular page 112, supports the view that despite what the parties may have agreed upon, there were still some pertinent terms and conditions, essential to the agreement, which remained unsettled. So their second argument is that even if there was an offer, which they deny, this court should accept the lower court's conclusion that there was no acceptance and that the parties were still in the process of negations.

Referring to **Ewan McKendrisk Contract Law** (22), they argued that an acceptance of an offer, to bring out binding conditions to both sides, must be unqualified expression of assent to all conditions and terms made by the offeror and presented to the offeree. They pointed out that looking at the letter which the Appellants were relying on as acceptance, that letter was not an unequivocal acceptance which mirrored a clear and unequivocal acceptance. They maintained that the purported letter of acceptance, at page 113 – 114 of the record contained issues which were subject to further negotiations and as such those new issues amounted to a counter offer, killing the original offer, thereby creating a new offer which the Respondents were at liberty to either accept or reject and which the Respondents rejected. They argued that the suggestion of five per cent (5%) of the contract price to be paid to the Appellants at the end of February and March 2001 to assist the Appellants in settling legal and operational costs, was not a mere inquiry. According to the Respondents, the Appellants were introducing new terms to the contract which amounted to a counter offer.

Mr. Zyambo also conceded in his testimony that there was a legal requirement that the appointment of the1st Appellant was going to be subject to the **Zambia National Tender Board Act** (18). It was therefore their argument that the Appellants were fully aware that the agreement in question was subject to the following conditions precedent:-

i. the approval of such appointment by the Respondent's full council or lawfully constituted committee thereof;

ii. the grant of ministerial approval by the Honourable Minister of Local Government and Housing under Section 3(1) of the Rating Act. F 1997 as amended as aforesaid;

iii. the signing of a final agreement/contract between the Respondent and the 2nd Appellant and the said subcontractors;

iv. compliance with the provisions of the National Tender Board act Chapter 394 of the Laws of Zambia and any statutory provisions thereunder.

It is trite law, they argued, that as a general rule the courts will not enforce a contract, which is illegal, nor will the courts permit the recovery of benefits conferred under such a contract. Again referring to the case of **Bridget Mutwale** (7) they argued that once a contract is illegal it is unenforceable. They further argued that, failure to obtain requisite ministry approval prior to their appointment meant that the Appellants acted at their own risk in carrying out some operations under the purported agreement. It was pointed out that the Appellants cannot now come to this court to enforce or seek benefits for carrying out certain

activities under the purported contract, being fully aware, that, when they carried out such activities, there was a possibility of the approval of the Minister not being forthcoming.

We have duly considered these arguments and the evidence before this court. We begin by stating that the approach of analyzing the process of reaching business relationships, in a free market atmosphere, in simplistic terms of offer and acceptance, gives rise to complications. There is a growing school of thought that analyzing the conduct of business entrepreneurships in terms of offer and acceptance, gives rise to considerable difficulties as the global free market provides various complicated arrangements. There is a growing school of thought, supported by a plethora of authorities, that the analysis of putting labels to the process of reaching agreement as offer and acceptance is to simplify the issues and thus being unrealistic. The proper approach, according to these developments in the law, is that the court has to, in a given case, take an objective approach.

In other words, what should guide the court in analyzing business relationships should be whether or not the parties' conduct and communication between them, amounted to an offer and acceptance. This was well stated in the case of **Spa v Feed Products** (13). What is regarded as important criterion is for the court to discern clear intention of the parties to create a legally binding agreement between themselves. This can be discerned by looking at the correspondence and the conduct of the parties as a whole.

The sole criterion is whether or not the offeror regarded the purported acceptance as introducing a new term in the bargain – **Global Tankers Incorporation v Amercoat European** (12). Also it is generally and legally accepted that parties can reach a provisional agreement and then agree to set it out in a formal document later. That agreement is legally binding. All in all, the court is duty bound to investigate the circumstances to see whether or not there is oral and documentary evidence evidencing a binding agreement. In the case of **Craven Ellis v Canons Limited** (15), an English case, the parties agreed in a telephone conversation to sell a house in Barbados. There was nothing further to negotiate or agree on. But later on the parties exchanged a deposit and a receipt.

The Appellant in that case argued that as there was no formal contract, the contract was not binding. The court held that there was a legally binding contract as there were clear terms of the deal and the purchase price. The court held that there was a legally binding contract even prior to the contract being drawn up because parties agreed to enter into a legally binding agreement which envisaged subsequent recording of that agreement. In the **Branch v. Caborro** (3) case, where a vendor agreed to sell a lease and goodwill of a mushroom farm, the parties agreed to a provisional agreement and to an agreement embodying all conditions to be signed between them later, the court held that, "by a word 'provisional', the parties intended to enter into a binding agreement from the out set which was to be subsequently replaced by a formal contract."

In the matter before us, it was argued by the Appellant that the lower court misdirected itself in both law and fact in holding that no binding contract was finalised between the parties and that the parties were still negotiating. We have been persuaded to hold that the letter dated 2nd February 2001from the Town Clerk to the Appellants, Messrs. Mukonde Chartered Surveyors and SP Mulenga International Associates, spelt out all material conditions which, in our view amounted to an offer capable of acceptance. However, we agree with Messrs Permanent Chambers in their written heads of argument that such an offer could only have been made to the 2nd Appellant and not the 1st Appellant, as the 1st Appellant was not legally in existence. This legal position is tied to the argument about acceptance. Looking at document 113 – 114 again it is possible to construe this letter as amounting to acceptance and especially connecting that letter to the subsequent conduct of the 1st Respondent. It has been argued by the Respondent that this document contained new terms. However, applying the principles already referred to in **Chitty on Contract** (21) we hold the view that the mention of five per cent (5%) contract price amounted to seeking indulgence from the Respondents. The Appellants were asking for an indulgence from the Respondents to consider paying them in advances the five per cent (5%). In our view, that request did not vitiate the offer in general.

We are fortified in taking this view, especially looking at the language in the letter dated 9th February 2001. In paragraph (1), we quote, "we refer to your letter of engagement dated 2nd February 2001 and confirm our acceptance of the terms/conditions as stipulated.....". In paragraph (2), the Appellants are saying, "We request that the contract of our engagement be drawn in the name of our incorporated company," and in paragraph (3), the Appellants are saying that, they are

prepared to be bound by the terms/conditions and that "we will commence the main valuation exercise and the compilation of data/calculation on the flat rate assignment by 15th February 2001." Even the last condition at page 2 of that letter, which talks about giving incentives to the Respondents' workers, is not putting an obligation on the Respondents, but rather explaining to the Respondents how the Appellants intended to carry out the works dutifully. In our view, these terms cannot be said to vary or vitiate the terms of offer by the Respondents and as such these did not amount to a counter offer. However, it is common ground that the letter of 9th February 2001 at page 113 was authored by the 2nd Appellant and it is common ground that the 1st Appellant was non-existent at that time and as such not capable of entering into any legally binding contract. The 2nd Appellant could not have acted as an agent for non-existent principal. We also note that a counter offer should be distinguished from an inquiry, request or suggestion, which does not itself, proffer new terms but merely seeks further elucidation of terms of the offer – **Stevenson Vs Mc Clean** (10). Therefore, the view we take is that the learned trial Judge was on firm ground on that point when he held that the two fundamental ingredients of a legally binding contract were not there in this arrangement and as such there was no legally binding agreement.

Coming to the last limb of the first argument which is overarching with the second ground of appeal, that is the claim by the Appellants on the quantum meruit basis, Mr. Simeza's argument is that the court ought to have considered the principle of quantum meruit as according to the case of **Craven Ellis v Canons Limited** (15), the English courts in Britain, he argued, have held that although the contract may be unenforceable because of the doctrine of illegality, nonetheless a party can claim damages on quantum meruit basis.

Mr. Simeza referred to the learned authors' views in **Halsbury's law of England** (20) and argued that where the contracts are not enforceable or where they are illegal or void, a litigant may recover, on quantum meruit, costs incurred. He cited **DP Services Limited Vs. Municipality of Kabwe** (4) where it was held by this court that the absence of a contract or specific resolution of the council did not absolve the Respondents from paying the Appellants on the basis of a quantum meruit, because "even assuming that no express contract ever existed, the only inference that can be drawn from all the circumstances of the case, is that there must be, at any rate, an implied contract to pay for services rendered." Citing the case of **Bridget Mutwale Vs. Professional Limited** (7) as authority to support this argument, the Respondents counter argued in their heads of argument that it is trite law, that as a general rule, the courts do not enforce a contract which is illegal nor permit the recovery of a benefit conferred under such contract – **Ewan McKendrick Contract Law** (22). They also relied on the case of **Re Mahmound and Ispahani** (8) to support their argument.

We, without hesitation, accept that where in constructing a statute, the contract is rendered illegal, and unenforceable or void by a provision in a statute, the court will not enforce such a contract – **Bridget Mutwale Vs. Professional Limited** (7). The illegality doctrine operates in all or nothing. That is, that there is no proportionality between the loss ensuing from non-enforceable and the breach of a statute. Devlin J, in the case of St. John Shipping Corporation v. Joseph Rank Limited aptly pointed out that, *"the doctrine cares not at all for the element on deliberation, or for the gravity of the infraction, and does not adjust the penalty to the profits unjustifiably earned"*.

In this case before us, **Section 3(1) of the Rating Act** (16) provides that:-

"APPOINTMENT AND POWERS OF VALUATION SURVEYORS

3. (1) The rating authority shall, subject to the approval of the Minister, appoint a Valuation Surveyor, who shall be responsible for the preparation of a roll or supplementary roll for the rating authority."

and **Part VIII of Regulation 39 – 40 of the Zambia National Tender Board** (18) also provides tender procedures which each government department and parastatal must adhere to is tender procedures and getting the approval of the authorities concerned before purchasing or obtaining services for the government department and/or parastatal.

On the true construction of these two provisions, it must be concluded in the appointment of a surveyor (other than government officer), it is a mandatory to seek the approval of the minister and/or to follow tender board procedures. So non-observance of these two provisions has to render any of the purported contracts, which results from such non-observance, to be illegal, null and void. However, the courts in Britain have resciled from this harsh application of the doctrine of illegality.

The learned authors on **Chitty on Contracts at p.620** (21) in line with this thinking, in explaining this doctrine of illegality have made these remarks:-

"(3) The courts have also been sensitive to the fact that non-enforcement may also result in unjust enrichment to the party to the contract who has not performed his part of the bargain but who has benefited from the performance by the other party. As was stated by Devlin J., in the St. John Shipping case, non-enforcement of the contract may result in the forfeiting of a sum which "will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it."[59]

In the case of **Craven Ellis v Canons Limited** (15) it was held that even though a contract is illegal, a party to that contract, may be entitled to damages on quantum meriut bases. The learned authors on **Chitty on Contracts** (21) in the same paragraph at page 621 have put it this way:-

> ***"(5) Although the courts have recognized "the desirability of (their) ..... assisting to enforce a statute," the consequence of this in driving from the seat of judgment sometimes innocent supplicants has also to be weighed in the balance.***

In the case of **DP Services Limited Vs. Municipality of Kabwe** (4) a similar argument was raised as the one before us. The facts of that case briefly were that, the Appellants **DP Services Limited** brought an action in the High Court of Zambia against **Municipality of Kabwe** for the recovery of K7,161.65 being in respect of an amount outstanding for accountancy work rendered by the Appellants. It was common cause in that case that at all material times the Appellants were carrying on business in the line of accountancy work. It was also stated by the Appellants that they were appointed to carry out work of accountancy by the Respondents and that that was done pursuant to a resolution passed by the Respondents' Council. But the Appellants laid no evidence on this resolution. The learned trial Judge at the High Court found that there was no contract between the Appellants and the Respondents as there was no resolution appointing the Appellants. So it was argued before the Supreme Court, on behalf of the Appellant, that even if there no resolution passed and that even if there was no contract entered between the Appellants and the Respondents Municipality of Kabwe council, that did not absolve the Respondent from paying the Appellants on the basis of a quantum meriut. The court agreed with the Appellants and cited the case of **Craven Ellis v Canons Limited** (15) and held inter alia that even assuming that no express contract even existed, the only inference that could reasonably be drawn from all the circumstances of this case, was that there was, at any rate, an implied contract to pay for services to be rendered.

Gardner, ADCJ (as he was then) furthermore added that

"Although the words, "quantum meruit" have not been used in the pleadings this in no way debars a party from being entitled to judgment for such a claim."

These legal principles are restated in **Cheshire and Fifoot** (24). The learned authors' views are that, "in a case where one accepts the fruits of another's labour, in circumstances where payment would be expected, he must pay for it." Greer, LJ also restated the same principle In the case of **Craven Ellis v Canons Limited** (15):-

> ***"In my judgment, the obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact from the acceptance of services or goods."***

In the case before us, it is common ground that, the 2nd Appellant and the other two firms firstly were employed by the Respondents in their professional capacity which raised a rebuttable presumption that they had to be paid for the services rendered to the Respondents. This presumption has not been rebutted in this case. Secondly, looking at the evidence before us, we are satisfied that the Appellants must have excepted payment for the work done from the Respondents from 16th February 2001 up to 10th May 2001, because of these factors:-

1) that the Respondents knew that the 2nd Appellant and the other two firms commenced the tasks of compiling the main roll on 15th February 2001;
2) that the Respondents acquiesced to this commencement;
3) that the Respondents even participated in some of these activities giving a distinct impression that they endorsed the Appellants' commencement of the execution of the contract;

4) that some of the activities, for instance, workshop were held in the Respondent's premises; and

5) that the 1st Appellant on 26th February 2001 gave to the Respondent an up date report on work so far done.

In our view, therefore, the Respondents are estopped from taking shelter in the doctrine of illegality on the costs incurred by the Appellants in the period between the 16th February and 10th May 2001.

It was argued, before us, by the Respondents, that the Appellants cannot at this stage seek refuge in the doctrine of quantum meriut as this point was never canvassed at the High Court. We agree with that statement of the law. It is a well-settled principle of the law. However, we want to adopt Gardner, ADCJ's words (as he was then) in the case of **DP Services Limited Vs. Municipality of Kabwe** (4), where a similar argument was raised before this court:-

> ***"Although the words, "quantum meruit" have not been used in the pleadings this in no way debars a party from being entitled to judgment for such a claim."***

In addition, we hold that, although the words 'quantum meriut' were never use in the pleadings, claim number three in the Appellants' claim before the High Court reflected the plea of 'quantum meruit'. We therefore find merit in the second ground of appeal. The appeal is therefore partially successful. We order that the learned Deputy Registrar must assess the amount of damages to be paid to the Appellants on quantum meriut basis to carry interest as per **Section 2 of the Judgment Act** (17). As there is partial success on the appeal we make no order on costs.

E L Sakala
CHIEF JUSTICE

L P Chibesakunda
SUPREME COURT JUDGE

P Chilengi
SUPREME COURT JUDGE