KANSANSHI MINING PLC
v
FRANCIS NDILILA T/A NDILILA
ASSOCIATES ARCHITECTS

SUPREME COURT
SAKALA, C.J., CHIBESAKUNDA, AND MWANAMWAMBWA, (JJS).,
2nd MARCH, 2010 and 27th JULY, 2011.
(S.C.Z. Judgment No. 24 of 2011

[1] Architectural profession - Fees - Whether excessive and unjustified.

The appellant instructed the respondent to undertake consultancy work for the proposed development plan of Solwezi District. The respondent and his team travelled to Solwezi District and held various meetings with various stakeholders in order to collect necessary information and data for the project.

Later, the appellant requested the respondent to send a bill for services rendered. The respondent sent a bill of K185,274,000.00, inclusive of disbursements and professional charges. However, despite several follow ups and reminders, the appellant failed to settle the fees. The respondent then commenced an action against the appellant claiming the sum of K185,274,000.00, with interest, and costs of the proceedings.

The appellant in the defence admitted the facts. But asserted that the bill was excessive and unjustifiable. The respondent in turn, contended that the charges were within the limit agreed and the law.

The trial judge entered judgment for the respondent in the sum of K185,274,000.00, being payment for professional services, interest and costs. This was therefore an appeal against that judgment.

Held:

1. The trial judge cannot be faulted for finding that the fees charged by the respondent complied with both statutory instrument number 106 of 1999, relating to the agreement on fees and the established custom and usage in the Architectural profession.

2. The trial judge did not disregard the provisions of statutory instrument number 106 of 1999, and the provisions of the Zambia Institute of Architects Act, when arriving at the fees due to the respondent, as well as the recommendation of the Institute which are the recognized custom and usage of the Architectural profession.

3. There was evidence on record that there was agreement as to the fees to be charged by the respondent.

Cases referred to:

1. Cunlife Owen v L.A. Selimann and company [1967] 3 ALL E.R. 561.

Legislation referred to:

1. Zambia Institute of Architects Act, cap. 442 s.37
2. StatutoryInstrument Number 106 of 1999. Regulations 4 and 7.

Work referred to:

1. Halsbury Laws of England, 4th Edition, Volume 12.

V.K. Mwewa of Messrs V.K. Mwewa and Company with N.M. Mulenga (Ms.) of Messrs Abha Patel and Associates for the appellant.
W.M. Mutofwe of Messrs Douglas and Partners for the respondent.

SAKALA, C.J.: delivered judgment of the Court. This is an appeal against the judgment of the High Court granting the respondent's claim for the sum of K185,274,000.00, being payment for professional services rendered. The respondent was also awarded interest at the current bank lending rate from the date it became due and payable. The respondent was further awarded costs to be taxed if not agreed.

For convenience, the appellant will be referred to as the defendant, while the respondent will be referred to as the plaintiff, the designations which the parties were at trial.

The salient facts of the case leading to this appeal are that on or about 23rd January,, 2006, the defendant instructed the plaintiff to undertake consultancy work for the proposed Development Plan of Solwezi District. The plaintiff and his team travelled to Solwezi District and held various meetings with various stakeholders in order to collect necessary information and data for the project. The plaintiff also appraised the maps and other documentations with the Surveyor General's Office, Ministry of Local Government and Housing, Planning Authority, Committee of Permanent Secretaries on Planning of Solwezi and the Ministry of Lands.

The plaintiff also drew up the terms of reference to be used as a base for Solwezi District Council to originate an application for planning to the Ministry of Local Government and Housing.

On or about 17th August, 2006, the defendant requested the plaintiff to send a bill for the services rendered. The plaintiff sent a bill in the sum of K185,274,000.00, inclusive of all disbursements and professional charges. However, despite several follow ups and reminders, the defendant has not settled the fees.

The plaintiff then commenced an action against the defendant claiming for payment of the sum of K185,274,000.00, with interest and costs of the proceedings.

The defendant, in it's defence, admitted the facts, but denied that it refused to settle the bill, but that the bill was excessive and unjustifiable, and that the plaintiff was requested to justify the exorbitant bill, but that the plaintiff has not done so.

At the trial, both parties adduced evidence in support of their respective claims, by relying on their respective witness statements.

PW1, Dr. Francis Mwape Ndilila, confirmed the facts in cross-examination. He affirmed that he was an Architect and a member of the Zambia Institute of Architects, governed by the Zambia Institute of Architects Act, cap 442 of the laws of Zambia and statutory instrument No. 106 of 1999; and that as a member, he is bound by the Act, and the statutory instrument.

He explained that in June, 2006, the defendant requested him to undertake some work for them. He discussed the fees with the Manager, Mr. Jim Gorman. He was sure that the defendant was aware of the applicable fees as he noticed that they had done similar work as evidenced by the estates they had built. They also exchanged correspondence on the fees.

PW1 explained further in cross examination that he charged, inter alia, for information gathering, looking into the history and intention of Government, minute taking at meetings held, perusal of maps, research with all institutions involved to get the totality of all work done, or to be done with regard to the planning of Solwezi and on the Government policy on the development of Solwezi and held discussions with the Ministry of Local Government, who are supposed to originate all instructions for the planning of any city in Zambia.

PW1 also explained that after all the research and discussions had been done with the defendant and Solwezi District Council, terms of Reference were drawn up to be used by Solwezi District Council as Planning Authority to originate an application for planning to the Ministry of Local Government and Housing. PW1 further explained that in preparing the fee note, he made reference to other Planning; that looking at the planning guidelines, the amount charged was commensurate with time spent on Kansanshi. He further explained that the terms of reference, as an intellectual property, are not only based on time. They have value of their own.

PW1 further explained that the fee note was a summation of all charges, including secretarial services and consultation with engineers. He explained that the fees were agreed verbally.

He denied that the charges were excessive; but that they were within the limit agreed and the law; that the terms and fees were agreed with Mr. Gorman, who was the General Manager of the defendant Company, after initial meetings and consultations; that Mr. Gorman did not dispute the fees; but that the fees were disputed by people who took over from Mr. Gorman and that his fees were in

accordance with the common practice of the Profession, and that it was normal to set fees above the statutory instrument because it was passed some 10 years ago.

DW1, Mr. Bruce Lewis, confirmed that the defendant had requested the plaintiff to carry out consultancy works for the proposed development plan for Solwezi; that the issue of costs and pricing for services rendered by the plaintiff was not agreed between the plaintiff and the defendant; nor did the plaintiff inform the defendant of what their charges for work would be, which should have been done in accordance with the law.

DW1's evidence was that the defendant, Kansanshi Mining Plc, did not dispute that the services were carried out by the plaintiff; and that they were chargeable, but disputed the quantum of the charges claimed by the plaintiff as the same were well above any reasonable market related cost and also a contravention of the current law. He testified that fees were unjustifiable, and contravened the scale of costs permitted by law.

Under cross-examination, Mr. Lewis admitted that at the time when Mr. Gorman was General Manager, he was not aware that there was an agreement on fees between Mr. Gorman and the plaintiff. He further conceded that, as a junior to Mr. Gorman, he was not made aware of every detail discussed by Mr. Gorman.

The learned trial judge considered the oral and documentary evidence and found that it was not disputed that the defendant had engaged the plaintiff to undertake consultancy work relating to Kansanshi development in Solwezi; that what was in dispute was the cost of the services rendered by the plaintiff; that on costs, the defendant's contention was that the charges were excessive and in contravention of the law.

The Court noted that the plaintiff conceded in his evidence that the fees charged were above those set out in the statutory instrument because since 1999, the Minister had not approved the fees recommended by the Zambia Institute of Architects; that in order to function, the Zambia Institute of Architects had adopted the practice whereby the Architects adopt the recommendations of the Zambia Institute of Architects to the Minister and charge according to those recommendations, and that as a consequence, the use of the recommendations had become widely accepted in the profession, and was now common commercial practice, which has become the established and accepted customary practice and usage in the profession to charge for services rendered with reference to the recommendations by the Zambia Institute of Architects to the Minister.

The Court then set out the definitions of custom and usage as per Halsbury's Laws of England, 4th Edition, Vol. 12, page 2 where custom is defined as follows:-

“A particular rule which has existed either actually or presumptively and obtained the force of law, in a particular locality although it May, be contrary to the general common law or law.”

and “usage” is defined as

"…….A particular course of dealing or line of conduct generally adopted by persons engaged in a particular Department of business life. It is more fully a particular course of dealing of line of conduct which has acquired such notoriety that where persons enter into contractual relationships in matters respecting the particular branch of business life, where the usage is alleged to exist, those persons must be taken to intend to follow that course of dealing, or line of conduct unless they have expressly or implicitly stipulated to the contrary."

The Court noted that the plaintiff did not deny that he charged fees outside the statutory instrument passed by the Minister, on recommendation by the Zambia Institute of Architects, almost 10 years ago, noting that it was out of tune with the reality in commercial practice today in Zambia to charge rates that have not been revised in commercial practice.

The Court observed that in accordance with the recommended fees, the plaintiff would be entitled to charge K380,000.00 per hour, while under the obsolete statutory instrument, he would be entitled to charge K149,940.00 per hour.

On the basis of the principle of custom and usage, the Court found that the plaintiff was entitled to charge the fees which he did; that even on the basis of the statutory instrument, there is a provision to charge fees higher than those payable under the statutory instrument. The Court found that the argument that there was no agreement as to the fees to be charged by the plaintiff to be improbable; that it was incredible that the defendant company could have entered into an agreement to undertake such project without first discussing and agreeing on the cost of the consultancy.

The Court concluded that from the evidence on record, the plaintiff was entitled to charge fees on the basis of the charges recommended by the Zambia Institute of Architects dated March, 2004, which by custom and common usage is used by Architects in Zambia; that the plaintiff had proved that the fees were discussed and agreed to with the then General Manager.

The Court entered judgment for the plaintiff in the sum of K185,274,000.00, being payment for professional services with interest and costs.

Dissatisfied with the judgment of the trial Court, the defendant appealed against the whole judgment and filed a memorandum of appeal containing two grounds; namely:-

1. That the learned trial judge misdirected herself when she disregarded the provisions of statutory instrument No. 106 of 1999, and the provisions of chapter 442 of the laws of Zambia when arriving at the fees due to the respondent, and opting to rely on the recommendation of the Zambia Institute of Architects, which have no force of Law; and

2. That the learned trial judge fell in gross error when she over looked most of the evidence which demonstrated that the respondent failed to comply with the law relating to the requirement of the parties agreeing to terms of engagement, and that in fact no such agreement was entered into.

On behalf of the parties, written heads of arguments were filed based on the two grounds. counsel for the defendant supplemented the written heads of arguments with oral submissions only on ground one. The plaintiff's counsel relied entirely on the written heads of arguments on both grounds.

The summary of the written heads of arguments on ground one, on behalf of the defendant, is that pursuant to statutory instrument No. 106 of 1999, all Architects, registered under the provisions of the Zambia Institute of Architects (Code of Professional Ethics and Conduct and Conditions of Engagement) Regulations, 1999, are bound by the same provisions; that in terms of section 37 of cap 442 of the laws of Zambia, a registered Architect is obliged to charge for professional services rendered at such rate as May, be prescribed by the Minister upon recommendation by the Council by a statutory instrument. It was submitted that this meant that a registered Architect can charge no other fees for professional services rendered apart from those contained in statutory instrument No. 106 of 1999.

It was contended that from the evidence on record, the Court made a finding of fact that the plaintiff did not render his fee note in accordance with the prescribed scale and, therefore, contravened the provisions of statutory instrument No. 106 of 1999; but that nevertheless the trial judge fell into serious error when she invoked the term usage and trade to justify the fee note rendered by the plaintiff. We were referred to a long passage in the case of Cunlife Owen v L. A. Selimann and Company (1) , Where usage and custom have been discussed as follows:-

"Usage May, be admitted to explain the language used in a written contract or to add an implied incident to it provided that if expressed in the written contract it would not make its terms or its tenor insensible or inconsistent … usage as a practice which a Court will recognize is a mixed question of fact and law. For a practice to amount to such a recognized usage, it must be notorious, in the sense that it is so well known in the market in which it is alleged to exist that those who conduct business in that market contract with the usage as an implied term, and it must be reasonable.

The burden lies on those alleging usage to establish it, in this case the defendants. The practice that has to be established consists of a continuity of acts and those acts have to be established by persons familiar with them, although, as is accepted before me, they May, be sufficiently established by such persons without a detailed recital of instances…."

It was submitted that the recommendations made by the Zambia Institute of Architects could not qualify to fall under custom and usage; that the recommendations made and relied upon by the plaintiff were dated March, 2004; and barely two years later, the plaintiff would want the Court to accept and believe that by 2006, when the plaintiff commenced this action, the same had become a well established usage in the industry.

It was contended that no evidence was led in the lower Court, that if the same recommendations were implemented, when implemented, to what extent, and how widely the same were accepted as a usage in the industry. It was submitted that the recommendations made therein fell far short of becoming a custom and usage.

The gist of the written heads of arguments in ground two, alleging gross error, when the trial Court overlooked the evidence which showed that the plaintiff failed to comply with law relating to a requirement of parties agreeing to terms of engagement, and that no such agreement was entered into, is that there is a provision under paragraph 7 of statutory instrument No 106 of 1999, for charging higher fees than those provided for; so long as there is an agreement between the Architect and the client; that contrary to the finding of the trial Court, there is no evidence on record showing that there was an agreement made between the defendant, and the plaintiff for payment of higher fees; that the evidence on record according to the plaintiff was that there was a discussion between him and the defendant's General manager, a Mr. Jim Gorman; but that there was no evidence that the verbal discussion led into an agreement; and that there was no evidence to show what was discussed and what was agreed upon in terms of the fees.

It was contended that it was inconceivable that an item such as fees could have been verbally discussed and agreed between the defendant and the plaintiff without being reduced in writing; and that the only logical conclusion was that, though the fees might have been discussed, there was no agreement reached by the parties. The Court was urged to allow the appeal on both grounds with costs.

The gist of the written response to ground one, on behalf of the plaintiff, is that the trial Court was on firm ground in ruling in favour of the plaintiff after considering both statutory instrument No. 106 of 1999 and the provisions of chapter 442 of the laws of Zambia, as well as the recommendations of the Zambia Institute of Architects, which are the recognized custom and usage of the Architects profession.

It was argued that the trial judge did not only consider the recommendations of the Zambia Institute of Architects as the basis of her finding in favour of the plaintiff; but that the trial judge went to great lengths to analyze the law as provided, after finding that the issue of the fees payable to the plaintiff had been discussed and agreed upon.

It was pointed out that in her judgment, the trial judge alluded to the statutory instrument, wherein there is a provision to charge higher fees and a higher charge as agreed between the parties; that the Court below referred to the email dated 31st July, 2006, written by a Mr. Matt Pascal, who invited the plaintiff to bill the defendant for the work done so far; that similarly the trial Court observed that in reply to the e-mail from Mr. Bruce Lewis, dated 17th August, 2006, the plaintiff, after trying to explain the basis of the charge, alluded to the fact that Mr. Lewis was present in the briefing meeting in Mr. Jim Gorman's office, when the same was discussed, confirming that the issue of costs for services was discussed in Mr. Gorman's office in the presence of Mr. Bruce Lewis; and that the trial Court observed that this evidence remained unchallenged under cross-examination.

It was submitted that ground one of appeal lacked merit as it attempts to ignore the fact that the trial judge based her judgment on the findings that the fees charged by the plaintiff complied with both statutory instrument No. 106 of 1999, relating to agreement on fees, and the established custom

and usage in the Architects profession; that the
entire ground one is premised on an attempt to mislead this Court into believing that the judgment of the trial Court was entirely, based on the recommendations of the Zambia Institute of Architects; when it was in fact premised on those recommendations, and on the provisions of paragraph 7 of statutory instrument No. 106 of 1999, relating to agreement on higher fees than those stipulated in the schedule thereto.

It was submitted that in view of the trial judge's express clear and elaborate discussion of the provisions of the Zambia Institute of Architects Act, cap 442 of the laws of Zambia and statutory instrument No. 106 of 1999, specifically paragraph 7 of the said statutory instrument, there is no basis for a complaint that the trial Court disregarded the provisions of statutory instrument No. 106 of 1999, and the provisions of cap 442 of the laws of Zambia.

It was further submitted that even assuming that the trial Court relied on the recommendations of the Zambia Institute of Architects only, the trial Court could not be faulted for doing so as it would have been in line with the provisions of the law relating to custom and usage as defined in Halsbury's Laws of England, 4th Edition, Vol. 12, at page 2.

It was argued that it has been the practice among Architects in Zambia to adopt recommendations of the Institute as the basis upon which clients are charged; that the custom and usage of applying the recommendations as revised from time to time has achieved notoriety. It was submitted that it was not the use of the recommendations of 2004, which had become custom and usage, but rather the use of recommendations altogether.

It was finally submitted in response to ground one that having shown that the trial judge did not disregard the provisions of the Zambia Institute of Architects Act, together with the statutory instrument, and having shown that the use of recommendations of the Zambia Institute of Architects Act, the fees charged are supported by the law on customs, and usage; and having shown that the use of recommendations generally is the practice, then ground one of appeal lacked merit. We were urged to dismiss ground one.

The short summary of the detailed written response to ground two is that the plaintiff did not fail to comply with any law; that the evidence on record showed that there was a briefing meeting where fees to be charged were discussed; that the meeting was attended by the defendant's only witness, Mr. Bruce Lewis; that in the meeting, the issue of fees was discussed and agreed, a position not challenged; and that there was no dispute that the issue of fees was discussed, except for the contention that it was not agreed.

We have very carefully considered the evidence on record, the judgment appealed against and the written heads of arguments on behalf of the parties. In our view, the two grounds of appeal are related.

The first ground of appeal raises the question of whether the trial judge disregarded the provisions of statutory instrument No. 106 of 1999 and the provisions of chapter 442 of the laws of Zambia, when arriving at the fees due to the plaintiff, and opting to rely on the recommendations of the Zambia Institute of Architects, which have no force of law.

We have anxiously addressed our minds to the arguments on ground one. The question, whether the trial Court disregarded the provisions of the law, when arriving at the fees due to the plaintiff, centres on the findings of fact.

The salient facts, as already alluded to in this judgment, were common cause. These are that the defendant instructed the plaintiff to undertake consultancy work. It was not in dispute that the plaintiff did the work, and subsequently, at the request of the defendant, the plaintiff rendered a bill in the sum of K185,274,000. This bill was not and has not been settled because, according to the defendant, it was excessive and unjustifiable.

It was common cause that the plaintiff did not render his fee in accordance with the prescribed scale as per provisions of statutory instrument No. 106 of 1999.

The contention of the defendant was that a registered Architect can charge no other fees for professional services rendered apart from those contained in statutory instrument No. 106 of 1999. It was submitted that the charges rendered by the plaintiff were excessive, and in contravention of the Law.

The trial Court identified the relevant law as being the Zambia Institute of Architects Act, cap 442 of the laws of Zambia and statutory instrument No. 106 of 1999. Section 37 of the Act provides as follows:-

"A registered Architect shall charge for professional services rendered at such rates as May, be prescribed by the Minister, upon recommendation by the Council, by statutory instrument.

Regulation 4 of statutory instrument No. 106 of 1999, provides that:-

"Every Architect registered under the Act shall be bound by the Conditions of Engagement of an Architect, as set out in the Second Schedule to these Regulations."

And Regulation 7 of statutory instrument No. 106 of 1999, states as follows:-

"The fees and charges payable to an Architect under this part shall not exceed the fees and charges in the Scale of professional fees set out in Part II of this Schedule unless a higher charge is agreed between the Architect and the client when the Architect is commissioned."

The trial Court noted that in his evidence, the plaintiff conceded that the fees charged were above those set out in statutory instrument No. 106 of 1999. But nevertheless, the Court found that on the basis of the principle of custom and usage the plaintiff was entitled to charge fees, which he did.

More importantly, the Court stated as follows:-

"However, even on the basis of the statutory instrument, paragraph 7 of the statutory instrument quoted above provides that the fees and charges payable shall not exceed the fees and charge in the scale of professional fees set out in Part II of this schedule unless a high charge is agreed between the Architect, and the client when the Architect is commissioned".

The Court then went on to observe as follows:-

"The defendant's argument was that there was no agreement as to the fees to be charged by the plaintiff. I find this argument improbable and is not supported by evidence. I find it incredible that a mining company of the standing of Kansanshi could enter into an agreement to undertake such a project without first discussing and agreeing on the cost of the consultancy. In any event, the evidence on record points to the fact that such an agreement existed. In an e-mail dated 31st July, 2006, written by Mr. Matt Pascal, he invited the plaintiff to bill the defendant for work undertaken so far. Mr. Pascal could only make such intimation to the plaintiff if fees had been agreed upon, in respect of which the plaintiff could bill the defendant. If not, he should have requested the plaintiff to determine his charges for work done so far as opposed to asking him to bill the defendant for work done so far."

The Court went on to say:-

"Similarly, in reply to an e-mail from Mr. Bruce Lewis dated 17th August,, 2006, the plaintiff, after trying to explain the basis of his charges alludes to the fact that Mr. Lewis was present in the briefing meeting in Mr. Jim Gorman's Office when the same was discussed, confirming the fact that the issue of costs for his services were discussed in Mr. Gorman's Office in the presence of Mr. Bruce Lewis. This evidence remained unchallenged under cross-examination."

From the foregoing, we are satisfied that the learned trial judge cannot be faulted for finding that the fees charged by the plaintiff complied with both statutory instrument No. 106 of 1999, relating to agreement on fees and the established custom and usage in the Architect Profession.

We are, therefore, satisfied that the trial judge did not disregard the provisions of statutory instrument No. 106 of 1999 and the provisions of cap 442, of the laws of Zambia, when arriving at the fees due to the plaintiff as well as the recommendations of the Zambia Institute of Architects, which are the recognized custom and usage of the Architects profession.

Ground one of appeal lacks merit; and it is dismissed.

Ground two raises the issue of whether there was an agreement between the parties on the issue of the fees payable to the plaintiff. What we have observed and our findings in ground one apply to ground two. Suffice it to repeat that the issue of fees, according to the evidence, was not in dispute. It was discussed. The trial Court, in our view, was correct when it observed that:-

"The defendant's argument was that there was no agreement as to the fees to be charged by the plaintiff. I find this argument improbable and is not supported by evidence. I find it incredible that a

mining company of the standing of Kansanshi could enter into an agreement to undertake such a project without first discussing and agreeing on the cost of the consultancy. In any event, the evidence on record points to the fact that such an agreement existed. In an e-mail dated 31st July, 2006, written by Mr. Matt Pascal, he invited the plaintiff to bill the defendant for work undertaken so far. Mr. Pascal could only make such intimation to the plaintiff if fees had been agreed upon, in respect of which the plaintiff could bill the defendant. If not, he should have requested the plaintiff to determine his charges for work done so far as opposed to asking him to bill the defendant for work done so far."

We agree with the trial judge that the argument was improbable, and incredible. We are satisfied that on the evidence on record, there was an agreement as to the fees to be charged by the plaintiff.

We find no merit in ground two of appeal. It is also dismissed. The whole appeal, therefore, lacks merit and is dismissed with costs to be taxed in default of agreement.

Appeal dismissed.