SCZ Judgment No. 7 of 2013
(113)

IN THE SUPREME COURT FOR ZAMBIA **Appeal No. 98/2011**
HOLDEN AT KABWE
(Civil Jurisdiction)

BETWEEN:

PROMART INVESTMENT LIMITED
T/A CHAS EVERITT **APPELLANT**

AND

AFRICAN LIFE FINANCIAL SERVICES
ZAMBIA LIMITED **1ST RESPONDENT**

SATURNIA REGNA PENSION TRUST LIMITED **2ND RESPONDENT**

SINYUKA PROPERTY AND ASSETS MANAGEMENT
COMPANY LIMITED **3RD**

RESPONDENT

Coram: **CHIBESAKUNDA, MUYOVWE and MUSONDA, JJS**
On the 1ST November, 2011 and 27th June, 2013

For the Appellant: Mr. A. Wright of Messrs Wright Chambers

For the Respondent: Mr. S. Simuchoba, Messrs NKM and Associates

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U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

1. **The Rating Valuation Consortium, D.W. Zyambo & Associates (Suing as a firm) vs. Lusaka City Council, Zambia National Tender Board (2004) Z.R. 109 (11 4)**
2. **D.P. Services Limited vs. Municipality of Kabwe (1976) Z.R. 110**
3. **WJ Allan and Co. Ltd. Vs. EI Nasr Export and Import Co. (1972) 2 All E R 127**
4. **Wilson Masauso Zulu vs. Avondale Housing Project Limited (1982) Z.R. 172**
5. **Minister of Home Affairs and Others vs. Habasonda (2007) Z.R. 207**
6. **Mabuye vs. Council of Legal Education (1985) Z.R. R.10**
7. **Collett vs. Van Zyl Brothers Limited (1966) Z.R. 65**
8. **Kitwe City Council vs. William Ng'uni (2005) Z.R. 57**
9. **Base Chemicals Zambia Limited, Mazzonites Limited vs. Zambia Air Force and The Attorney General Appeal No. 10/2011**
10. **Hyundai International Trading Corporation (PTY) Ltd vs. Food Reserve Agency Appeal No. 187/2005**

Materials referred to:

1. **A Treatise on the Law of Contract by William W. Story**
2. **Contract Law by Ewan Mckendrick (8th Edition)**
3. **Chitty on Contracts (28th Edition)**
4. **Halsbury's Law of England Vol. (Third Edition)**
5. **Black's Law Dictionary (Eighth Edition)**
6. **Oxford Advanced Learner's Dictionary (New 7th Edition)**

When we heard this appeal Justice Dr. Musonda sat with us. He has since resigned and, therefore, this Judgment is by the majority.

This is an appeal by the appellant against the judgment of the Lusaka High Court which found in favour of the

respondents. The appellant had claimed for its commission in the sum of $114,938 (inclusive of VAT) or alternatively 75% of the

(115)

commission due plus VAT @ 16% in the sum of $86,203 and interest. According to the appellant the claim arose out of an oral agreement with the respondents entered into on or about April 2009 through the 3rd respondent who orally instructed them to find a tenant for the lease and or letting of the 2nd respondent's property situate at No. 4647 Beit Road, Lusaka also known as Lusaka Circle Office Park.

In his witness statement PW1 Chandalala Kondolo stated that on or about April 2009 he approached the 3rd respondent being the agent for the respondents with a view of finding or securing them a tenant for their property in issue. Subsequently, an oral agreement was entered into through the 3rd respondent who mandated the appellant to find a suitable tenant for the property. PW1 explained that in order for him to carry out the assignment, he was provided with technical drawings and standard specifications relating to the property. PW1 was also granted access to the property for purpose of

viewing the property with potential tenants. That the respondents did not intimate to him that they would not accept MTN as a tenant. The appellant visited the property with potential tenants including MTN

(116)

representatives who were the only ones who showed interest in the property. On 27th April 2009 MTN wrote to express their firm interest in leasing the said property and in a letter dated 28th April 2009 the appellant informed the respondents that he had found a tenant. Their response dated 4th May 2009 was that the plaintiff should indicate its commission but that they would not accept if the tenant was MTN. The appellant by letter dated 5th May 2009 informed the respondents about its commission in the sum of $114,938 which is the standard equivalent of one month's rent plus VAT based on the total lettable area of the property. That, however, the appellant would consider 75% of the equivalent of one month's rent plus VAT in the sum of $86,203.95. In a letter dated 6th May 2009 the appellant informed the respondents that the potential tenant was MTN. According to PW1, the respondents never mentioned MTN as a prospective tenant and that the issue of MTN only came after they received the letter of offer from the appellant. The

appellant insisted that MTN would not have made the offer through them if they already had an existing relationship with the respondents. That although the respondents had intimated that they would not accept MTN as an introduction from the plaintiff, the

(117)

counter-offer from the respondents was sent to the appellant for onward transmission to MTN by the appellant. The appellant conveyed the counter-offer to MTN on 6th May 2009 and MTN confirmed by 14th May 2009 that the offer had been approved by the Board and by letter dated 15th May 2009, the appellant informed the respondents of MTN's approval, but they stated that they would not accept MTN. The appellant maintained that the current lease signed by MTN and the respondents was based on the terms negotiated through the appellant. That the ex-curia settlement of this matter failed.

The evidence of the respondents was led by DW1 and DW2. In her statement DW1 stated that PW1 approached her as he had a prospective tenant for the property in issue. The prospective tenant was Railway Systems of Zambia and she availed him the drawings of the building to enable the client

determine the suitability of the building. That PW1 was authorized to take RSZ on site and she was not aware if he took other prospective clients and her understanding was that the prospective client was being taken there for inspection. That in fact PW1's approach was unsolicited and was never engaged by the respondents to find

(118)

them a tenant for the said property. She stated that the respondents did not work with the appellant to conclude the lease between MTN and the respondents. That the lease was drawn and negotiated by the respondents' South African associates known as Eris Properties without the involvement of the appellant. She stated that the respondents would never enter into a verbal contract of such magnitude without reducing the same into writing to ensure the terms and conditions were clearly spelt out.

According to DW2 the Chief Executive Officer of the 2nd respondent and Director in the 3rd respondent, the alleged agreement which the appellant alleged was entered into, could not have in the corporate governance of the respondents been entered into verbally. He stated that the respondents did not

authorize the appellant to find a tenant as doing so would disregard the sensitivities of their already existing relationships such as diplomats. That the respondents were already in a relationship with MTN since 25th August 2008 to develop its offices on a piece of land leased from the Agricultural and Commercial Show Society of Zambia. Further, that the parties

(119)

were in the process of finalizing the development transaction when the Lusaka Circle property became available as a result of Barclays Bank resiling on the earlier commitment to occupy the building. That since MTN had space pressure, he suggested to them to rent the Lusaka Circle offices while their offices were being developed. According to DW2, MTN opted for a ten year lease and abandoned their project in the Showgrounds. DW2 said he never involved the appellant in this matter and that this was the reason why he stated that MTN would not be an introduction as he was already in discussion with them. That the communication to the appellant on this issue was on more than one occasion and in writing and that PW1 remained mute over the issue. He stated that the appellant was not acting in good faith in ignoring the respondents' position and did not alert MTN that the respondents had refused to recognize him as

agent in the transaction. He stated that the appellant only revealed MTN as the prospective tenant when it knew that the MTN Board had resolved to take up the lease without the appellant tendering cogent evidence of his appointment as the respondents' agent.

(120)

That if what led to the approval of the lease is the appellant's intervention then this could be attributed to the relationship between the appellant and MTN and that, therefore, any demand for commission should not be thrown at the respondents in the face of express exclusion by the respondents of MTN as an introduction. That the appellant had no authority to act for the respondents and there is no justification for the appellant to demand commission from the respondents.

The learned trial Judge after analysing the evidence before him found that there was no contract between the parties to warrant the appellant earning a commission. That the appellant could not rely on the principle of waiver. Further, that even assuming there was a contract, the conduct of the respondents

did not suggest that they had waived their rights. That by its own plea of waiver, the appellant was admitting that it was aware of the relationship between the respondents and MTN. The learned trial Judge also rejected the argument relating to the ex-gratia payment.

The learned trial Judge took the view with regard to the issue of the relationship between MTN and respondents, that the

(121)

appellant should have called witnesses to show that in fact it was the one who facilitated MTN’s tenancy of the Lusaka Circle property. That the respondent was not privy to the correspondence between MTN and the appellant and could not be bound by it. He found that the appellant had failed to prove his case on a balance of probabilities and dismissed the claim with costs.

The appellant being dissatisfied with the judgment of the lower Court appealed to this Court advancing the following grounds of appeal:

1. **The learned trial Judge misdirected himself at Law when he found that, there was no**

agreement and/or contract between the parties.

2. **The learned trial Judge misdirected himself at Law by accepting the Respondent's exclusion of MTN, which exclusion was after the Appellant had already found MTN as a tenant and/or after the event.**

3. **The learned trial Judge misdirected himself at Law by failing to take into account the issue of "*Quantum Meruit*".**

4. **The learned trial Judge misdirected himself at Law by failing to draw the correct and proper inference**

(122)

relating to the issue of "*ex-gratia offer of payment.*"

5. **The learned trial Judge misdirected himself at Law, in finding that, the non-calling of MTN as a witness was fatal to the Appellant's claim.**

6. **The learned trial Judge misdirected himself at Law when he took into account the issue of "Insider dealing "in his Judgment, when in fact he had expunged the same issue from the record during the proceedings.**

Counsel argued grounds one and two together. First of all, he referred us to the case of **The Rating Valuation Consortium, D.W. Zyambo & Associates (Suing as a firm)**

vs. Lusaka City Council, Zambia National Tender Board[1]

where it was held that:

> **"The approach of analyzing the process of reaching business relationships in simplistic terms of offer and acceptance, gives rise to complications. What is required is for the Court to discern the clear intention of the parties to create a legally binding agreement between the parties as a whole".**

Counsel analysed what he termed as 'the undisputed evidence'. According to him the appellant through PW1 approached the respondents between March and April 2009 with a view to finding the respondents a tenant for their property

known as Lusaka Circle Office Park. Counsel submitted that meetings were held with DW1, the company accountant and DW2 the Chief Executive Officer and that it was revealed to PW1 that the said property was available for rent and that they were willing to pay commission to the appellant if PW1 brought a tenant. That the respondents handed over to PW1 the technical data, architectural drawings; fact sheet and specifications of the property and also granted the appellant unfettered access to property.

Counsel contended that a binding agreement was reached between the parties in the form of an ‘executory contract’ rather than an ‘executed one.’ According to Counsel, the learned author **William W. Story** in his book **A Treatise on the Law of Contract** in paragraph 22 says:

> **“An ..executed contract.. is one which nothing remains to be done by either party and where the transaction is completed at the moment the agreement was made, as where an article is sold, and delivered, and payment therefore is made on the spot. An ..executory contract.. is a contract to do some future act. Where the contract is ..executory, if the agreement be that one party shall do a certain act or acts for the performance of which the another party shall pay a sum of money, the**
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> **(124)**
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> **performance of the act is a condition precedent to the payment of money”.**

It was submitted that at the time when the agreement was reached, the appellant had several tenants in its book looking for office space and MTN was among them. That after liaising with its prospective tenants, MTN expressed the greatest interest. That meetings were held with the Managing Director and Finance Director of MTN who are no longer working for MTN and are out of jurisdiction and they both visited the property

and were satisfied with it and they sent a note in a few days offering to rent the property through the appellant in their letter dated 27th April, 2009. Counsel contended that the offer by MTN was based on the 'Fact Sheet' supplied by the respondents to the appellant. That in accordance with the said 'Fact Sheet', the respondents were asking for US$20 per square metre. In a letter dated 28th April 2009, the appellant informed the respondents that it had received an offer from one of its clients and gave details of the offer. That on 4th May, 2009 the respondents counter-offered US$19 per square metre**.** The appellant by letter dated 6th May 2009 informed MTN about the respondents' counter offer and by letter dated 14th May addressed to the appellant MTN agreed to

(125)

the respondents' counter-proposal of US$19 per square metre. Further, that the appellant informed the respondents about MTN's acceptance of the proposal on 15th May 2009. Counsel referred us to the various correspondence between the parties over the expected letting commission and that an ex-gratia payment was offered by the respondents which was later withdrawn. That although Barclays had intended to rent the property, they withdrew and that MTN is in occupation of the

property. That the respondents never brought any documents to prove their direct relationship with MTN; that the respondents had no document to show that they negotiated the lease agreement and they admitted that at the completion of the building they had not secured a tenant for the building. Counsel submitted that although the learned trial Judge referred to the issue of the proposed building project at Lusaka Show grounds, this was not the issue in contention but rather whether there was a relationship between the respondents and MTN as regards the property in issue. That DW2 the Chief Executive Officer was at pains to produce documents between himself, the respondents and MTN. Further, he pointed out that in their letter to the respondents the appellant did not mention MTN and that PW1

(126)

said it was normal practice in their trade not to disclose the client in the first offer.

Counsel argued that looking at the facts, the only inference to be drawn was that there was/is a legally binding agreement between the parties which is capable of enforcement.

Counsel referred us to the case of **D.P. Services Limited vs. Municipality of Kabwe²** where it was held that:

> **"assuming that no express contract ever existed the only inference that can reasonably be drawn from the circumstances of this case is that, there must have been, at any rate an implied contract to pay for services to be rendered."**

Counsel submitted that in the court below, the respondents contended that (i) MTN was excluded, (ii) that the appellant's prospective tenant was Zambia Railways (iii) That Eris Property negotiated the lease; (iv) that the offer of ex-gratia payment was made for future relationships (v) the respondents' corporate-governance would not allow them to enter into such an agreement with the appellant.

Counsel sought to address the issue of exclusion of MTN and in this connection, he argued that consideration should be

(127)

given to the time when the agreement was made between the parties approximately about March/April 2009. That the letter purporting to exclude MTN was dated 4th May 2009 and by that time the parties had entered into a subsisting agreement (an executory contract). That although DW2 in cross-examination stated that they had engaged MTN since 2008 and that the

respondents were under no obligation to disclose MTN to the appellant, Counsel contended that the respondents belatedly created an 'exclusion' of MTN which they kept to themselves. He posed the question as to how the appellant could know about the exclusion? And that DW2 admitted in cross-examination that at the time of completion of the property, they had not secured a tenant. It was submitted that, therefore, the respondents could not have engaged MTN since 2008 as a prospective tenant of the property and notably they also did not produce documents proving their relationship with MTN. Counsel referred us to **Contract Law by Ewan Mckendrick** at Pages 152-153 where according to Counsel, the learned author stated:

> **"Contracting parties may agree to incorporate terms into their contract. Three hurdles must be overcome before such terms can be incorporated. The first is that, notice of the terms must be given at or before the time**
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> **(128)**
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> **of concluding the contract. In Olley and Marlborough Court (1949) 1K.B. 532, a notice in the bedroom of a hotel, which purported to exempt the hotel proprietors from any liability for articles lost or stolen from the hotel; was held not to have been incorporated into a contract with a guest: whose furs were stolen from her bedroom, because the notice was not seen by the guest until after the**

contract had been conclude at the hotel reception desk. Secondly, the terms must be contained or referred to in a document which was intended to have a contractual effect. It is a question of fact whether or not a document was intended to have contractual effect and the issue must be decided by reference to commercial or consumer practices. Thirdly, and finally, reasonable steps must be taken to bring the terms to the attention of the other party. In Parker v South Eastern Railway (1877) 2 CPD 416, it was established that the test is whether the defendant took reasonable steps to bring the notice to the attention of the claimant and not whether the claimant actually read the notice. What amounts to reasonable notice is a question which depends upon the facts and circumstances of the individual case…"

That the evidence of PW1 shows that it was never brought to the attention of the appellant when the first contact was made with MTN; that MTN was a prospective tenant of the respondents was not challenged by the respondents. That the evidence of PW1 that he was the first one to take MTN to view the property was not challenged. Counsel contended that even if we assume that this was a condition of the agreement, the respondents by their

(129)

conduct effectively waived the condition. This is because the respondents made the counter-offer to MTN through the

appellant. And that the respondent even requested to know the appellant's letting commission and by this time the purported exclusion of MTN was too late. Counsel also alluded to the offer of ex-gratia payment and the admission by the respondents that MTN is the current tenant. That the respondents led the appellant into believing that the respondents would not insist on their right (if any) that they would not accept MTN as a tenant from the appellant. Counsel referred us to the case of **WJ Allan and Co. Ltd. Vs. El Nasr Export and Import Co.**[3] where Lord Denning MR said:

"In Enrico Furst (1960) 2 Lloyd's Rep at 348 Diplock J said it was a 'classic case of waiver'. I agree with him. It is an instance of the general principle which was first enunciated by Lord Cairns LC in Hughes v Metropolitain Railway Co (1877) 2 App Cas 439 at 448, (1984-80) All ER rep 187 at 191) and rescued from oblivion by Central London Property Trust Ltd v High Trees House Ltd. The principle is much wider than waiver itself; but waiver is a good instance of its application. The principle of waiver is simply this: if one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so: There may be no consideration

(130)

moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may

be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by his conduct that he will thereafter insist on them: see Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd. But there are cases where no withdrawal is possible. It may be too late to withdraw; or it cannot be done without injustice to the other party. In that event he is bound by his waiver. He will not be allowed to revert to his strict legal right".

Counsel also alluded to the issue of Zambia Railway Systems stating that the respondents did not mention about this in any of their correspondence to the appellant. The gist of Counsel's argument is that if Zambia Railway Systems was one of the prospective clients, the respondents would have mentioned this from inception. That if the respondents had limited the agreement it had with the appellant to only Zambia Railway Systems, they would have mentioned this in one of their letters. It was submitted that the issue of Zambia Railway Systems was clearly an afterthought.

Regarding the issue of corporate governance, it was submitted that there was no evidence to show that the

(131)

respondents explained to the appellant about this matter. That during the formation of the agreement PW1 dealt with not only the CEO but also the group accountant for the 3rd respondent. Counsel pointed out again that the respondents did not show that Eris Property of South Africa negotiated the lease. It was emphasized, however, that the issue is not that of negotiation of a lease but rather the finding of a willing tenant to rent the property on the promise of the payment of commission. Counsel argued that at the time of the agreement, the precise commission payable could not be determined as the same is calculated based on the actual floor space per square metre occupied by the tenant and the price per square metre.

In support of ground three, it was submitted that the trial Judge misdirected himself by failing to consider the issue of quantum meruit. The gist of Counsel's argument is that in his submissions, in the Court below he raised the issue of quantum meruit in the alternative but that it was not considered. That he applied for review but same was refused yet in his judgment the trial Judge rejected the argument relating to ex-gratia payment which was not raised in the skeleton arguments. Citing the case

of **Wilson Masauso Zulu vs. Avondale Housing Project Limited**[1] and the case of **Minister of Home Affairs and Others vs. Habasonda**[2] where we said:

> **"Every judgment must reveal a review of the evidence, where possible a summary of the arguments and submission."**

He argued that the learned Judge's reliance on skeleton arguments to write the final judgment was both highly prejudicial and precipitous as these did not take into account evidence adduced at the trial. He contended that although the learned trial Judge found that there was no agreement between the parties, the evidence was to the effect that the respondents benefited from the appellant's sweat. He cited the case of **D.P. Services Limited vs. Municipality of Kabwe**[3] where the Supreme Court agreed that quantum meruit can be raised in a case where it has not been pleaded.

Turning to ground four, the gist of learned Counsel's submission is that the ex-gratia offer made by the respondents (whose stand was that it had no agreement with the appellant) was not only a tacit admission of a contractual relationship but

also an acknowledgement that the appellant did some work and at law the appellant is entitled to a commission. To buttress this argument, Counsel relied on **Chitty on Contracts 25th Edition** at **page 180** paragraph 1147 where according to Counsel the learned authors said:

"**The Courts have also been sensitive to the fact that non-enforcement may also result in unjust enrichment to the party who has not performed his part of the bargain but who has benefited from the performance of the other party.**"

Counsel invited us to draw a more proper and correct inference on the issue of ex-gratia.

In relation to ground five, Counsel contended that the learned Judge's stance regarding the non-calling of MTN was wrong. That it resulted in failure to attach due weight and cogency to the indisputable documentary evidence and the inference and conclusion, on a balance of probability, to be drawn from such correspondence. He submitted that there was evidence to show that the respondent did not challenge the offer letters from MTN. That there would have been no need for MTN to go through the appellant if the respondents were

already in direct negotiation with them over the leasing of the property.

(134)

Citing the case of **Mabuye vs. Council of Legal Education[6].** He submitted that there are numerous authorities which confirm that where no question of credibility arises and the issue is one of drawing an inference from primary facts or events, the appellate Court is in as good a position as the trial Court to draw its own inference and make its own conclusions. He also cited **Section 3 (1) of the Evidence Act, Cap 43 of the Laws of Zambia** which provides that:

> **"In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original documents, be admissible as evidence of that fact…"**

In support of ground six which relates to the issue of *insider dealing*, Counsel submitted during the trial the learned trial Judge expunged the issue of *insider dealing*. That in spite of this, the learned trial judge made reference to the issue in his judgment. And yet Counsel for the Respondents did not object to the expunging of the issue. He contended that the

trial judge was not at liberty to recount in his judgment the issue which had been expunged.

(135)

In support of ground seven, he conceded that the provisions of **Order 40 Rule 6 of the High Court Act** gives discretion to the trial Judge to award costs. However, it was submitted that this discretion must be exercised judiciously. He buttressed his argument by relying on the case of **Collett vs. Van Zyl Brothers Limited** where Blagden C.J. said at Page 72 that:

"the award of costs is thus discretionary in the trial judge but there are canons to which the trial judge must conform in exercising his discretion … wide though the discretion is, it is a judicial discretion and must be exercised on fixed principles, that is, according to rules of reason and justice and the exercise of discretion even by a judge sitting alone must be justifiable…"

That further at Page 73 the Court said:

"at first sight it would appear that, there was no appeal from a judge's order as to cost made in his discretion (omitting the irrelevant); no appeal shall lie without leave from an order of the High Court or a judge as to costs only which by law is left to the discretion of the court or judge making the order, Clearly the judge has the last word, s Lord Denning said, if leave to appeal is refused. Equally clearly, if leave to appeal is granted, or leave is not necessary because the appellant is not appealing as to cost only, the judge has not got

the last word, and his order as to costs can be reviewed by the court of appeal".

Counsel pointed out that leave to appeal was by Consent of the parties. He submitted emphasizing on **Rule 77** and **Van Zyl**

Brothers that this Court can review the discretion exercised by the Court below as to costs. Further, that in the **Van Zyl Brothers Case** Blagden C.J said:

"At one time it was that it would interfere only if he had gone wrong in principle; but since Evans v Bartlam, that, idea has been exploded. The true position was stated by Lord Wright in Charles Osenton & Co. v Johnston. This court can and will interfere if it is satisfied that the judge was a wrong. Thus it will interfere if it can see that the judge has given no weight (or no sufficient weight) to those circumstances which ought to have weight with him.. conversely it will interfere if it can see that, he has been influenced by other considerations which ought not to have weighted with him, or weighed so much with him".

That from the totality of the evidence, the learned trial Judge failed to give sufficient weight to certain matters which ought to have weight and the appeal should, therefore, be allowed.

In his oral submission, Mr. Wright submitted, inter alia, that a sequence of events as tabulated by the trial Judge was inaccurate in one material respect in that it is incomplete and selective and, therefore, the learned Judge arrived at a wrong conclusion. That the appellant dealt with the most senior persons at the respondent company. That the learned Judge

(137)

failed to mention the documents which were handed over to PW1 which contained all the relevant technical and vital information relating to the total GLA and also the price per square metre. Mr. Wright insisted that some service was rendered by the appellant for which it was entitled to payment. That they were granted access to the premises and the Judge did not reject that evidence. That PW1 visited the premises with potential clients including MTN. The Court did not mention that at the completion of the building, the respondents had no potential client. That if the trial Court had put all the events in sequence, he would have found that there was a contract. Counsel referred to the case of **Zyambo[1]** and questioned the intention of the respondent in supplying the fact sheet and technical details to the appellant if it was not to have an agreement. He argued that the exclusion came after the event

and that MTN whom they excluded are now the tenants. He pointed out that that respondents could not show any document of their relationship with MTN. That the question was whether there was an intention by the parties to be legally bound. He referred to **Chitty on Contract (28th Edition) at Page 55 para 2-146.** According to Counsel, the learned authors state that the onus of proof that,

(138)

there was no such intention is on the party who asserts that, no legal relation is intended and the onus is a heavy one. That in this case, the burden rested upon the respondents to show that there was no legal intention by their conduct.

In the alternative, he argued that even though the Court below found that there was no agreement, the trial Judge ought to have considered the issue of quantum meruit. He pointed out that this issue was raised in the submissions but that the Court did not taken into account the final submissions despite the fact that they were filed. He cited the case of **D.P. Services Limited vs. Municipality of Kabwe[2]** which he said was confirmed in the **Zyambo case[1].** He argued that the court should award the appellant on quantum meruit basis for the

services it rendered and from which the respondent benefited and the respondents will be unjustly enriched.

Mr. Simuchoba Counsel for the respondents relied on his Heads of Argument.

In response to ground one, we were also referred to the Skeleton Arguments filed in the Court below which are at Pages 193-197 of the Record of Appeal. Counsel for the respondents

(139)

submitted, inter alia, that the appellant made an unsolicited approach to the 3rd respondent that it had a prospective tenant for the Lusaka Circle Office Park. Although the appellant denied this, it named the prospective tenant as Railway Systems of Zambia (RSZ) and asked to unveil the building's specifications for the purpose of RSZ ascertaining suitability or adequacy of the building for its purposes. Counsel argued that the appellant did not mention MTN at this stage.

In their skeleton arguments in the Court below, the respondents addressed the issue of whether or not there was an agreement between the parties. The gist of the respondents' argument on this ground was that there was no agreement between the parties as regards MTN and that the

correspondence between the parties was evidence on this aspect. That the case of **Zyambo**[1] cannot be authority for ignoring the express statement of a party to exclude a specifically named entity from the intended contractual relationship. That there was nothing which implied a waiver of the exclusion of MTN. That the fact that MTN became the tenant cannot be viewed as establishing a waiver to the express exclusion of MTN in so far as the respondents are concerned. It was submitted that if the appellant who did not

(140)

expressly inform MTN of the respondents' non-recognition of the introduction has the belief that MTN entered the lease as a result of the appellant's introduction, then the appellant should ask for its commission from MTN and not the respondents. It was submitted that the appellant did not show that the lease agreement was facilitated by it and that the fact that MTN is the tenant does not in any circumstances of this case, establish the contractual obligation for commission in favour of the appellant.

In response to ground two, it was submitted that the learned trial Judge was on firm ground when he upheld the

exclusion of MTN as a prospective tenant. According to Counsel, the exclusion was contained in the first letter the appellant wrote to the respondents dated 28th April 2009 in which the appellant chose secrecy as to the identity of the prospective tenant. That the respondents' reply to the said letter dated 4th May 2009 was immediately and unequivocally excluded MTN. That in its letter dated 6th May 2009 the appellant argued its case and that of MTN. That the intention of the letter was to ignore the communicated exclusion of MTN by the respondents who steadfastly maintained their position of exclusion of MTN.

(141)

Counsel submitted that it was curious that while the appellant was secretive to the respondents about the prospective tenant being MTN, he was open to MTN about the respondents and their building at Lusaka Circle. It was submitted that although PW1 said it was normal practice in their trade not to disclose the client in the first offer until the offer and acceptance is firmed up, on 6th May, 2009 when the appellant disclosed MTN as the prospective tenant, a firmed up offer and acceptance was not in existence. Counsel submitted that it was irregular that the identity of a prospective tenant was withheld from the

landlord while the prospective landlord's identity was not withheld from the tenant even before a firm offer and acceptance. According to Counsel, this shows that the appellant was acting for MTN and not the respondents. To this end, the respondents by their letter dated 18th May 2009 informed MTN that the appellant was not acting for them in the said transaction.

In response to ground three and four, it was submitted, inter alia, that it is trite law that quantum meruit can be upheld even when not pleaded but that in this case quantum meruit was not established. We were referred to the Skeleton Arguments filed

(142)

in the Court below in opposition to an Application to Review Final Judgment at page 183 – 184 of the Record of Appeal. Reliance was placed on the case of **Kitwe City Council vs. William Ng'uni** where this Court held that:

"The Court is not bound to consider counsel's submissions because submissions are only meant to assist the Court in arriving at a judgment".

According to Counsel, the case of **Zyambo[1]** is not an authority for allowing quantum meruit when it is not supported

by evidence at trial. Further, that the law does not exclude ex-gratia payments to strangers and that it is not the same as quantum meruit.

In relation to ground five, it was submitted, inter alia, that the correspondence between the appellant and the respondents on one hand and that passing between the appellant and MTN does not bear uniform disclosure. Counsel pointed in particular to the letter dated 18th May, 2009 where he submitted that it was made known to MTN that the appellant was not acting for the respondents but he questioned how MTN could be said to have proceeded to lease the building from the respondents by industry of the appellant. Counsel contended that MTN would have stated

(143)

with whom they negotiated and had it been with the appellant they would have said so. Counsel submitted that the respondent stated that it had been in negotiation with MTN since 2008 and the appellant could only validly argue against this if MTN stated otherwise. That as was found by the learned trial Judge, had the appellant called MTN as a witness in the trial, they could have established the appellant's position in

relation to MTN. That the facts lead to the reasonable and only inference that it did not suit the appellant's purposes to call MTN to testify.

In relation to ground six, Counsel submitted that as advocate for the respondents they did not object to the material being expunged because they realised that the respondent's pleadings and testimony would still establish "*insider dealing*" on the part of the appellant.

With regard to ground seven, it was submitted that the learned trial Judge properly exercised its discretion in awarding costs to the successful party and that there were no circumstances to justify denial of costs to the successful party who are the Respondents in this matter. Counsel urged this

Court to uphold the judgment of the lower Court and dismiss the appeal.

We have considered the evidence on record; the judgment of the Court below and the submissions by both parties.

We will deal with ground one, two and five simultaneously as they are inter-related.

In his judgment, the learned Judge found that there was no contract between the parties. It is not in dispute that PW1 made an unsolicited approach to the respondents over the property in issue. That they subsequently handed to him the technical details and drawings relating to the said property. PW1 insisted that he was given the technical details and drawings so that he could find a potential tenant while the respondents stated that they believed it was for the purpose of the prospective tenant Railway Systems of Zambia having access to the property to determine suitability of the premises. According to the respondents, such a transaction could not have been dealt with without any written agreement. Looking at the correspondence,

(145)

the appellant wrote to the respondent on 28th April 2009 stating in paragraph two of their letter:

"We have received an offer from a top corporate company that is interested in leasing the Lusaka Circle Office Park. The offer is conditional as it will have to be

tabled at their upcoming Board meeting in May for approval"

On behalf of the respondents, DW2 responded to the above in a letter dated 4th May 2009 and we quote some portions of the letter below.

"Thank you for the offer submitted to African Life Financial Services Ltd on 28th April, 2009 on behalf of an undisclosed party. Please note that we act for and on behalf of African Life Financial Services on this matter.

We would be willing to recommend acceptance of the offer submitted to our Pension Fund subject to the following counter offer:"……

….In order to avoid any misunderstanding, we point out that we have been engaged in discussions with MTN Zambia since July 2008, regarding the provision of offices to them. Lusaka Circle is one of the options available and we would not be in a position to acknowledge your introduction to Lusaka Circle if your client is disclosed as MTN…."

From the first letter above, we do not get the impression that there was an agreement between the parties. It is apparent and we believe this was the lower Court's impression as well, that on the 28th April 2009 PW1 communicated the fact that he had

(146)

found a tenant who was interested in their property and the respondents answered accordingly and also inquired about the

expected letting commission. Mr. Wright's argument that there was an executory contract between the parties cannot be discerned from the correspondence let alone the evidence before the lower Court. It is clear to us that the appellant on its own volition found a tenant and did not disclose that it was MTN for reasons best known to itself. We do not agree with the argument that the respondents belatedly created an 'exclusion' of MTN. It was not belated in our view, because the respondents reacted to the offer and indicated that MTN would not be accepted as they were already in discussion with MTN. Under this head, it was argued that the respondents did not produce documents to prove their relationship with MTN. It is trite that he who alleges must prove. And it is on this point that the learned Judge stated that the appellant should have called in witnesses from MTN to prove their allegation that there was no relationship between MTN and the respondents; that the appellant was involved in MTN occupying the property. We are fortified in our view by the contents of the following letter dated 6th May 2009 written by PW1 to the respondents:

(147)

May 6 2009

The Executive Director
Sinyuka Property & Assest Management Company
P.O. Box 31986
Lusaka

Attention: Mr. Muna Hantuba

Dear Sir,

LEASE OF LUSAKA CIRCLE

Reference to your letter dated 4th May, 2009

I wish to thank you for your prompt and positive response to our offer on behalf of our client regarding the lease of Lusaka Circle. However, we note your concern in the event that our client is MTN. Our client is indeed MTN. It is, therefore, imperative at this stage to clarify our knowledge that MTN and you had been engaged in discussions pertaining to the development of a property in the vicinity of Arcades Shopping Mall. It is also our understanding that MTN and yourselves did not come to conclusive agreement on the same.

On noticing that you were nearing completion of developing the Lusaka Circle property, we approached you offering our services to look for a client to lease the premises. During a meeting with African Life we were informed that the initial prospective lease, Barclays Bank had pulled out. You also revealed that interest in the property had been expressed by three other companies. Categorically, the three mentioned as having expressed interest did not include MTN.

(148)

With this knowledge we approached MTN and others with a view of interesting them to the property. MTN expressed interest and we contacted the Project Architect to arrange

for a site visit. Following the site visit by the Managing Director and Finance Director, MTN were generally content with the property and consequently requested Chas Everitt to put in an offer for the Lusaka Circle property. This we did in our letter to you dated 28th April, 2009.

At no time did MTN indicate that they were engaged in discussions with you over the Lusaka Circle property development. It is inconceivable that MTN would have opted to work through a third party if they were engaged in direct discussion with yourselves regarding Lusaka Circle. In fact, MTN had all along known that the Lusaka Circle property would be occupied by Barclays Bank and was not available. With this clarification we see no cause for any apprehension, let alone any misunderstanding, in our representing MTN in this matter.

We have since sent your counter proposal to MTN for their consideration and trust that we can proceed with the negotiations and reach an amicable agreement between MTN and yourselves.

Yours Sincerely,
Chas Everitt International Property Group-Zambia

Chandalala M. Kondolo

We are of the considered view that the above letter confirms that the respondent did not enter into any contract with the appellant and that the appellant went ahead and acted without any authority. Can the respondents be faulted if MTN chose not to disclose that they had been engaged with them to find them

(149)

property for rent? As the learned Judge found, the respondents were not privy to the correspondence between the appellant and MTN and cannot be drawn into such matters. It is indeed surprising that after the respondent informed them that they would not accept MTN as an introduction, the appellant still went ahead to advise the respondents that they had sent their counter-offer to MTN for consideration.

And without waiting for a response from the respondents and with the knowledge of the respondents' objection, the appellant wrote to MTN as follows on 6th May 2009.

Thank you for the offer which we subsequently submitted to African Life Financial Services Ltd on 28th April 2009. We have since been informed that Sinyuka Property and Asset Management Company will be acting for African Life Financial Services Ltd in this matter. (emphasis ours)

They will be willing to recommend acceptance of the offer we submitted to their Pension Fund subject to the following……"

Having regard to the correspondence above, the respondents cannot be said to have waived their right. The authorities cited on the issue of waiver cannot apply in this case and the spirited arguments advanced by learned Counsel Mr. Wright are far from being helpful to the appellant's case. Contrary to Mr. Wright's

submission, it was clear to the learned Judge and it is to us as well, that it was the appellant who made the offer to MTN and without any authority and so to say that the respondents made the counter-offer through the appellant is to twist the facts of this case. Indeed, dealing with senior members of a company cannot lead to a conclusion that parties have entered into a contract and in this case we do not find that there was any intention on the part of the respondents to enter into a contract with the appellant. Mr. Wright's argument that the learned Judge, in his analysis, did not follow the sequence of events and, therefore, arrived at a wrong conclusion cannot hold. Further, the learned Judge made findings of fact based on the evidence before him and he arrived at the conclusion that the evidence did not disclose an intention between the parties to enter into a binding agreement. In our view, the appellant having made an unsolicited approach should have ensured that a written agreement was entered into. At the level that the two parties are operating, we think that it can only be prudent and expected that such a business transaction cannot be entered into in a casual manner. We find no reason to reverse the findings of fact found by the

learned trial Judge. It follows that ground one, two and five must fail.

We will now deal with ground three and four together. Counsel's argument is that he raised the issue of quantum meruit in the alternative in his submissions but these were not taken into account by the Court below. As we held in the case of **Kitwe City Council vs. William Ng'uni**[8] submissions are only meant to assist the Court in arriving at its decision. And the learned authors of **Halsbury's Laws of England, Vol. 8 paragraph 390:**

> **"If services are rendered and accepted in pursuance of an agreement which is unenforceable, remuneration is payable on the basis of a quantum meruit."**

Further, in the case of **Base Chemicals Zambia Limited**, **Mazzonites Limited vs. Zambia Air Force and The Attorney General**[9] it was held that although there was no binding contract between the parties, the appellants were entitled to damages on a quantum meruit basis. This was because the respondents benefited from the works carried out by the appellants and the Court held that the works were

carried out at the request of the respondents. The case of **Hyundai International Trading**

(152)

Corporation (Pty) Ltd vs. Food Reserve Agency[1º] is also quite instructive on this issue though the case is also distinguishable from the case at hand. Without a doubt, the case at hand is distinguishable in that there is no evidence to show that the respondents requested the appellant to find them a tenant. In this case, the appellant proceeded to deal with MTN in spite of objection from the respondents. We take the view that the respondents cannot be said to have benefited from whatever the appellant did as they were themselves already in discussion with MTN who later occupied the premises.

The other argument advanced by Mr. Wright is that the respondents even requested to know the expected commission? The simple answer is that this was before they knew that the undisclosed tenant was MTN. We find no reasonable explanation why the appellant could disclose their alleged client to MTN and the property in issue; and yet after getting the offer from MTN dated 27th April 2009, the appellant

in writing to the respondents on 28th April 2009 failed to disclose the prospective tenant as MTN. And when they were informed of the objection from the respondents, they still went ahead as if there was no objection

(153)

from their so-called client (respondents). We take the view that if the appellant had been open in the way it dealt with MTN and the respondents, they would not have found themselves in limbo. In fact as the learned Judge observed, MTN would have responded to the letter dated 18th May 2009 copied to them but they remained mute.

With regard to the issue of the ex-gratia payment, in our view, Counsel should have been glad that the learned Judge who refused his application for review considered the matter in his judgment although he rejected it. Further, it was DW2's evidence that he offered the ex-gratia payment in order to preserve future relationships. The learned Judge's view was that the appellant did not deserve the payment having regard to the facts of this case. The learned Judge relied on the definition in **Black's Law Dictionary (Eighth Edition)** which defines ex-gratia as:

“a favour; not legally necessary.”

The **Oxford Advanced Learner’s Dictionary (New 7th Edition)** defines ex-gratia as:

“**given or done as a gift or favour, not because there is a legal duty to do it.”**

(154)

It cannot be simpler than above and we think it is clear that an ex-gratia offer cannot be an admission of the existence of a contract or even an acknowledgement that the appellant did some work for which he deserves a commission as suggested by Mr. Wright. Far from it. In our view, the lower Court’s position on these two aspects cannot be faulted. We, therefore, find no merit in ground three and four.

Turning to ground six, we note at Page J11 that the learned Judge recounted the following as part of DW2’s evidence:

“PW1 was well placed to know the goings-on in MTN because of his close association with a senior member of staff in the Human Resource Department at the material time. A principal shareholder of the plaintiff happened to be on the board of MTN as well, hence the willingness of MTN’s board to approve entering a lease without any proof of the plaintiff ever having been appointed to act on behalf of the defendants.”

The above paragraph is what is in contention as it is part of DW2's witness statement that was expunged from the record during trial. Mr. Simuchoba submitted that the Judge cannot be faulted as the issue of 'insider dealing' was established at trial. We do not agree with Mr. Simuchoba. Rather, we agree with Mr. Wright that the above narrative should not have found itself in

(155
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the judgment after being expunged. This was an error on the part of the learned Judge. However, we do not agree with Mr. Wright that by simply recounting the above narrative, the learned Judge 'took into account' the issue of 'insider dealing'. Ground six, therefore, fails.

With regard to ground seven which is on costs, there is a plethora of authorities on this which is to the effect that costs are awarded at the discretion of the Court. We have considered the spirited arguments advanced by Mr. Wright. Costs follow the event and we find that the learned Judge was on firm ground in awarding the same to the respondents. Ground seven also fails.

In conclusion, we find no merit in this appeal and we dismiss it with costs to the respondents to be taxed in default of agreement.

.....
L.P. CHIBESAKUNDA
ACTING CHIEF JUSTICE

.....
E.N.C. MUYOVWE
SUPREME COURT JUDGE

.....
P. MUSONDA
SUPREME COURT JUDGE