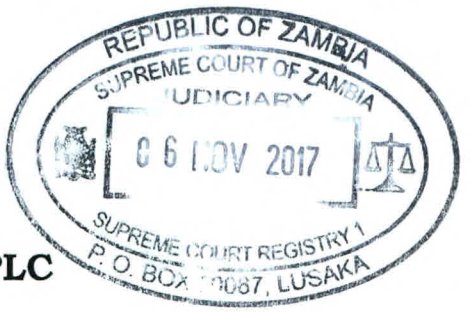
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 126/2011**
HOLDEN AT LUSAKA **SCZ/8/179/2011**
(Civil Jurisdiction)



BETWEEN:

MOPANI COPPER MINES PLC **APPELLANT**

AND

ANDREW MULENGA AGENCIES LIMITED **RESPONDENT**

CORAM: Phiri, Musonda and Hamaundu, JJS.
On 4th December, 2012 and 3rd November, 2017.

For the appellant : Legal counsel (In-house)

For the respondent : Mr C. M. Mukonka, Messrs Carlisto Mukonka Legal practitioners

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court.

Cases referred to:
Zulu v Avondale Housing Project Limited [1982] ZR 172

Works referred to:
Chitty on Contracts, 29th edition

When we heard this appeal, we sat with Mr Justice Phillip Musonda. Mr Justice Musonda has since resigned. Therefore, this judgment is by majority.

This appeal is against the Judgment of the High Court by which the respondent's claim for breach of contract was upheld and a sum of US$163,900 was awarded.

It is not in dispute that the respondent was one of the contractors that was invited by the appellant to participate in the mining and excavation of slag from slag dumps at its Mufulira Mine. According to the initial agreement each contractor was to excavate and sell slag to the appellant. The contractors were to excavate the slag for either 3 months or up to a maximum of 150 tonnes of sorted slag, whichever came earlier. The appellant was to buy the sorted slag as follows:

(i) for slag that would be assessed to have a copper content of 30% and above, the appellant would purchase it at US$90 per tonne

(ii) for slag that would be assessed to have a copper content of between 20% and 29%, the appellant would purchase it at US$50 per tonne.

The appellant stipulated that it would not pay for any slag that would be assessed to have a content of 20% or less, although it

reserved the right to treat it at its discretion. The contracts commenced on the 2nd May, 2002. Obviously, there must have been some variations along the way; otherwise this dispute would not have arisen, considering that it arose long after the initial period of contract had expired.

This dispute stems from a decision which the appellant announced at a meeting that it held with the contractors on the 10th July, 2003. At that meeting, the appellant informed the contractors that the smelter no longer required low grade slag having a copper content of 15% or less; but that it would continue to accept slag with a copper content of 15% and above. In a letter from the appellant to the contractors, dated 30th July, 2003, the appellant stated that the contract to extract high grade reverts had been extended to 31st August, 2003. The appellant also stated that the Smelter Department no longer required high grade reverts. In the circumstances the contractors were informed that, after 31st August, 2003, their continued operations to extract low grade reverts would depend on a trial that was underway at the concentrator. As it turned out, the contracts and activities on the slag dumps ended on the 31st August, 2003.

The respondent started engaging the appellant regarding reverts that were said to be at the Smelter and at the dump site. The engagement became protracted, spanning over three years. The parties failed to reach any agreement. The respondent then commenced this action.

The respondent's account of the events giving rise to the dispute was this:

Upon being awarded the contract of 2nd May, 2002, the respondent was assigned a portion of slag dump site No.1. It moved on site and started excavation, using manual labour. Due to the increased demand for slag material, or reverts, by the appellant, the price for the slag was revised. This time, the appellant was to buy slag whose copper content was 2% and above. This went on up to 31st May, 2003 when, by letter dated 28th May, 2003, the appellant informed the contractors that it had reverted to buying high grade copper slag only and that it should contain a copper content of 15% and above. In the meantime, the appellant encouraged the contractor to improve production and even suggested that they hire machinery. The respondent hired an excavator from the Zambia National service and a 20 ton truck from elsewhere. With that

equipment, the respondent excavated three thousand tonnes (3,000) of copper slag. Of that, 908.240 tonnes was weighed and taken to the smelter yard, leaving 2,092, tones on the dump site and an extra 300 tonnes at the pit. The 3,000 tonnes was graded at the dump site into high medium and low grade. In breach of the agreement, the appellant failed to pay for the 3000 tonnes.

According to the respondent, the 3000 tonnes of slag were graded as follows:

(i) 1000 tonnes comprised high grade slag of 55% copper content. At the price of US$120 per tonne, the value was US$120,000

(ii) 1,500 tonnes comprised medium grade slag of 16% copper content. At US$25 per tonne, the value was US$37,500

(iii) 500 tonnes comprised low grade slag of an undetermined percentage of copper content. At the price of US$3 per tonne, the value was US$1,500

(iv) 300 tonnes comprised low grade slag of an undetermined percentage of copper content. At the price of US$3 per

tonne, the value was US$900. The total sum claimed therefore, came to US$159,900.

The appellant denied the respondent's claim, stating that it had paid for all the slag or revert material that met the specifications.

The court below found the following facts not to be in dispute;

(i) that the respondent excavated 3000 tonnes of copper slag/reverts in 2003

(ii) that the slag was, however, not taken to the laboratory to ascertain its copper content

(iii) that the 3000 tonnes of slag was taken away from the dump site by the appellant in the absence of the respondent; and

(iv) that the appellant weighed the slag

The court noted that the respondent had gone to great lengths to hire workers and equipment to excavate the slag from the dump sites. Taking note of the appellant' s witness's evidence that, due to insufficiency of the processes at the smelter, high grade copper was sometimes dumped on the site, the court surmised that the 3000 tonnes of slag could not all have comprised low grade copper content of less than 2%. The court, therefore, accepted the

respondent's evidence and found as a fact that the copper slag comprised high grade, medium grade and low grade copper.

The court then found that the appellant did not act transparently when it took away the slag in the absence of the responded and had, consequently, breached the contract. For those reasons, the court held that the respondent had proved its claim on a balance of probabilities and awarded judgment for the sum of US$163,900 as claimed by the respondent.

The appellant filed four grounds of appeal. These are as follows:

1. The court below misdirected itself at law and in fact when it found that the appellant had breached the contract with the plaintiff and consequently awarded the respondent the sum of US$163,900
2. The court below misdirected itself in fact in finding that the appellant had taken away the 3000 tonnes of copper slag in the absence of the respondent and that the appellant had not followed procedure.
3. The court below misdirected itself at law in ignoring the fact that any copper slag excavated by the respondent which did

not meet assay requirements of the contract between the respondent and the appellant remained the property of the appellant.

4. The court below was not on firm ground when it found that the 3000 tonnes allegedly excavated by the respondent comprised high, medium and low grade reverts.

The appellant and its advocates opted not to attend the hearing, but to rely on the written heads of arguments filed on record. The first and third grounds of appeal were argued as one. It was argued that a reading of the contract and the procedure document which formed part of the contract showed that the slag dump which the respondent excavated was the property of the appellant. That the respondent was to present the excavated slag for analysis and determination of copper content. That the appellant was obliged to pay for slag which contained the minimum agreed percentage of copper content. That the minimum percentage content was revised from time to time. And that the slag whose percentage did not meet the fixed minimum percentage content remained the property of the appellant.

Referring to the 3000 tonnes of slag claimed, it was argued that the respondent did not present the slag for laboratory analysis before the contract came to an end. We were referred to two documents on record; the minutes of a meeting of the 10th July, 2003 and a letter by the respondent dated the 13th September, 2004. In both documents the respondent was quoted as referring to the 3000 tonnes of slag as low grade reverts. The appellant argued that this probably meant that the slag did not meet the minimum percentage threshold. It was argued that the appellant could not be held liable for none payment for the 3000 tonnes because the respondent did not meet the conditions precedent to the payment for the copper reverts, namely; that the 3000 tonnes did not meet the threshold of the assay requirements, and, that the respondent never took the slag to the laboratory for assessment.

The appellant relied on the following passage from **Chitty On Contracts, 29th edition** for the arguments above:

> **"The liability of one or both the contracting parties may become effective only if certain facts are ascertained to exist or upon the occurrence or non-occurrence of some further event. In such a case, the contract is said to be subject to a condition precedent"**

In the second ground of appeal, the appellant attacked the lower court's finding that the appellant took away the 3000 tonnes of slag in the absence of the respondent; and that the appellant did not follow the normal procedure. It was argued that the finding was against the weight of the evidence. We were referred to a letter by the respondent dated 13th September, 2004 where the respondent stated that the slag was still at the dump site. The appellant then argued that this was evidence that, even after the contract had ended on 31st August, 2003, the slag had not been removed by the appellant. It was argued that, in any event, any slag that remained upon the expiration of the contract on 31st August, 2003 was the property of the appellant, which it had every right to remove.

In the fourth ground of appeal, the appellant faulted the finding by the court below that the 300 tonnes of slag comprised high, medium and low grade reverts. It was argued on this ground that there was no basis upon which the court could reasonably come to that finding, given the following; the respondent's Managing Director's admission that the copper content could only be determined by laboratory analysis and the lower court's finding of fact that the slag was not taken. It was, therefore, argued that the

finding was against the weight of the evidence and the court's own finding. The appellant argued that, in the circumstances, there was no basis for awarding the respondent US$163,900, a figure which was even in excess of the sum of US$159,900 claimed in the amended statement of claim.

We were, therefore, urged to allow the appeal.

In response to the appellant's arguments in the first and third grounds, it was submitted on behalf of the respondent that it was not in dispute that the respondent excavated and sorted out 3000 tonnes of slag; and that there was no dispute that the ownership of the slag was with the appellant. It was argued that the agreement was not intended to pass ownership of the slag to the respondent; but that the agreement was for the hire of the respondent's labour in excavating and sorting out the reverts. In this regard, it was argued that the dispute was about the money spent and the labour applied by the respondent in sorting out reverts from the appellant's slag dumps.

We were referred to the procedural steps outlined in *clause 7* of the appellant's document on procedure. The respondent then referred to the evidence of its own witnesses to the effect that, when

approached about the 3000 tonnes of slag, the appellant informed the respondent that it had used it and offered to pay a very small amount of money for it. The respondent argued that this was evidence to support the lower court's finding that the appellant used the 3000 tonnes of slag without following the laid down procedure.

Responding to the appellant's argument that it only moved the slag after the contract had expired, the respondent submitted that the appellant's argument was immaterial because the respondent had excavated and sorted the reverts before the contract had expired.

In response to the arguments in the second ground of appeal, the respondent again referred us to the testimony of its witness which said that the appellant used the 3000 tonnes. It was argued that, infact, the appellant's own witness did not rebut that evidence.

In response to the arguments in the fourth ground of appeal, the respondent submitted that the failure to take the 3000 tonnes of slag for laboratory analysis was due to the arbitrary action by the appellant who took away the excavated slag in the absence of the respondent, thereby flouting the laid down procedure. It was

submitted that the evidence in the court below had shown that the respondent's deliveries from the same slag dump had produced reverts of high, medium and low grade copper. The appellant having flouted the laid down procedure, the court blow was on firm ground when it accepted the respondent's claim that the slag comprised high, medium and low grade copper.

With those arguments we were urged to dismiss the appeal.

We held in **Zulu v Avondale Housing Project Limited**[1], as we have done in several others, that an appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts.

We think that the lower court's findings in this matter were based upon a misapprehension of the facts in this case. We think that this was because the court below overlooked two events that were documented on record. We shall start with the latter of the two events. This was a meeting held on 10th July, 2003 at which the appellant addressed the contractors. The appellant explained that the smelter no longer required low grade reverts; that is, reverts of less than 15% copper content. The appellant went on to explain

that it would continue to accept reverts assayed above 15%. At this meeting, the respondent asked a question as to what would happen to the low grade reverts of between 2000 and 3000 tonnes in weight which was at its site. The appellant's answer to that question is not relevant to our decision in this appeal.

The earlier event was the extension of the respondent's contract. This was by way of a letter written by the appellant and addressed to the respondent. This letter was dated 28th May, 2003 and read:

> **"We wish to advise you that your current contract which expires on 31st May, 2003 has been extended to 30th June 2003, should you accept the following condition: -**
>
> - **Mopani is no longer interested in low grade revert material (<15% CU) from the dump. From 1st June, 2003 only material assaying >15% CU will be paid for, at current rates. All other conditions remain unchanged."**

It is also important to note the contents of the letter that granted the respondent a final extension of the contract. The letter dated 30th July, 2003 was also addressed to the respondent and read in apart:

"Please be advised that the contract to extract high grade reverts has been extended up to 31st August, 2003. Also note that this is a final extension."

It is clear from these documents that the respondent was offered an extension of the contract as of 1st June, 2003 on the one condition that the appellant would only accept and pay for high grade reverts of 15% and above. The respondent obviously accepted that condition because the contract was indeed extended. The contents of the letter granting a final extension also confirmed that the extended contract had continued on the same condition, which the respondent had accepted in May, 2003.

It is therefore clear that it was pointless of the respondent to even ask at the meeting held on 10th July, 2003 as to what would happen to the low grade reverts that were at its site when it knew fully well that its extended contract was for the appellant to pay only for reverts assaying 15% and above in copper content.

As regards the grade of the 3000 tonnes of reverts claimed by the respondent, we note that it was not only at the meeting of 10th July, 2003 that the respondent stated that the reverts were of low grade. In a letter written to the appellant by the respondent, more

than a year later on 13th September, 2004, the respondent still referred to them as of low grade. Correspondence on the record shows that, as the dispute protracted, the respondent started changing its position until it finally came to the current one; namely, that the 3000 tonnes now comprised as follows;

(i) that 1000 tonnes of that material was of 55% copper content

(ii) that 1,5000 tonnes thereof was of 16% copper content; and

(iii) that only 500 tonnes was of low grade.

According to the respondent, it based this position upon comparing the percentages that had been found in the material that it had previously taken for assay. The court below accepted this position and made a finding of fact accordingly. This position or finding which is based on obtaining representative samples is not supported by the evidence on record. The respondent had, at the same meeting of 10th July, 2003, suggested that the assay be conducted by merely collecting representative samples from the slag dump. The chairperson of the meeting, who was also a metallurgist,

said that that was not possible because reverts were not homogeneous. Therefore, the lower court's finding that the grade of the 3000 tonnes was comprised as alleged by the respondent was wrong.

The evidence on record, on the other hand, is more in favour of the respondent's statement that the 3000 tonnes of material that was at its site was of low grade. We say this for the following reasons:

By 10th July, 2003, when the meeting was held, the respondent already had a stock pile of 3000 tonnes which it referred to as low grade. The extended contract which the respondent had accepted stipulated, in May 2003, that the appellant would only pay for reverts of copper content of 15% and above. If the respondent believed that the 3000 tonnes of slag had the copper content of high, medium and low; as it now claims, we think that the most prudent approach was for the respondent to hand-pick the material and arrange for its collection to be assayed. This was the requirement of *clauses 7.1 and 7.2* of the procedure document. Any slag which assayed 15% and above would have to be paid for. In this case, if the respondent's claim is correct then

about 2000 tonnes would have qualified under the terms of the extended contract. Instead the respondent did not take any of the 3000 tonnes for assay: at least no evidence was presented to show that between 1st June, 2003 and 31st August, 2003, when the contract ended, the respondent ever followed the procedure in clauses 7.1 and 7.2 and the appellant refused to accept the material for assay. Those lapses only go to support the view that the respondent somehow knew that the 3000 tonnes of material on its site was of low grade and did not, therefore, meet the requirement of the extended contract which the respondent had accepted in May, 2003.

In the circumstances, the holding by the court below that the appellant breached the contract by taking the material for assay in the absence of the respondent was wrong. Clearly, as we have shown above, the contract came to an end on 31st August, 2003; and all the contractors left their sites. The appellant only took the material after the contracts had ended. The appellant did not take the material while the contract subsisted. It cannot, therefore, be said that what the appellant did after the expiry of the contract was a breach thereof because there was no contract to breach.

We therefore find merit in this appeal and allow it. We set aside the judgment of the court below, together with the costs awarded to the respondent. We award costs, both here and in the court below, to the appellant.

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G. S. PHIRI

SUPREME COURT JUDGE

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E. M. Hamaundu

SUPREME COURT JUDGE