

**JUDGMENT NO. SCZ/16/2013**

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**IN THE SUPREME COURT FOR ZAMBIA**

**SCZ/8/177/2010**

**HOLDEN AT LUSAKA**

**182/2010**

**(Civil Jurisdiction)**

**Appeal No**

**BETWEEN:**

**ATTORNEY GENERAL**

**APPELLANT**

**AND**

**SEONG SAN COMPANY LIMITED**

**RESPONDENT**

**CORAM:** Chibesakunda, Ag CJ, Mwanamwambwa and Musonda, JJS

On 14<sup>th</sup> August, 2012, and 13<sup>th</sup> November, 2013

**FOR THE APPELLANT** : Ms. C. Mulenga, Assistant Senior State Advocate

**FOR THE RESPONDENT** : Mr. A. Wright of Messrs Wright Chambers

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**JUDGMENT**

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**Chibesakunda, Ag. C.J, delivered the Judgment of the Court.**

**Cases referred to:**

**1. *Hussey v Palmer* (1972) 3 All ER 744**

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**2. *Annie Bailes v Charles Anthony Stacey and Anierica Simoes* (1986) ZR 83 SC**

**3. *Selangor United Rubber Estates v Craddock (a bankrupt) and others (no 3)*(1968) 2 All ER 1072**

**4. *Carl Zeiss Stiftung v Herbert Smith and Company (a firm) (No 2)*(1968) 2 All ER 1233**

**5. *Nelson v Larholt* [1947] 2 ALL ER 751**

**6. *Attorney General v Aboubacar Tall and Zambia Airways* (1995-1997) ZR 54**

**7. *Soulous v Korkontzilas* (1997) SCR 217**

**8. *George Chishimba v Zambia Consolidated Copper Mines* (1999) ZR 198**

**9. *Collett v Van Zyl Brothers Ltd* (1966) ZR 65**

**10. *YB and F Transport Limited v Supersonic Motors Limited* (2000) ZR 22**

**Legislation referred to:**

**1. *Criminal Procedure Code Chapter 88 of the Laws of Zambia***

**2. *Prohibition and Prevention of Money Laundering Act No 14 of 2001***

**3. *Statute of Limitations Act of 1939***

**4. *Law Reform (Limitation of Actions etc) Act Chapter 72 of the Laws of Zambia***

**5. *High Court Act Chapter 27 of the Laws of Zambia***

**6. *Supreme Court Act Chapter 25 of the Laws of Zambia***

**Works referred to:**

- 1. Order 18/8 and 62/10/6 RSC White Book 1999 Edition**
- 2. Halsbury's Laws of England Volumes 28 4<sup>th</sup> Edition Reissue**
- 3. Cheshire and Fifoot's Law of Contract 10<sup>th</sup> Edition**
- 4. UnderHill on Trusts and Trustees 11<sup>th</sup> Edition**

When we heard this appeal, the Hon. Justice Musonda was a member of the panel. His Lordship Justice Musonda has since retired. This Judgment, therefore, is a majority Judgment. Also, the delay in delivering this Judgment is regretted but this was due to matters beyond our control.

This is an appeal against the Judgment of the High Court dated 8<sup>th</sup> February, 2010 declaring the Appellant (1<sup>st</sup> Defendant in the court below) liable to account to the Respondent (Plaintiff in the court below) the sum of \$648,113.08 for breach of fiduciary duty or trust. In this action the Respondent was claiming against the Appellant and the Drug Enforcement Commission (2<sup>nd</sup> Defendant in the court) the following reliefs:

- (i) “A declaration that the Defendants (The Appellant) are liable to account to the Plaintiff (The Respondent) for the sum of US\$822,100.00 or such other sum as the court thinks fit on the ground of breach of fiduciary duty/breach of trust.**
- (ii) A declaration that the Plaintiff is equitably entitled to trace the sum of US\$822,100.00 that the Defendants held in trust for the Plaintiff.**
- (iii) An order that the Defendants pay to the Claimant the sum of US\$822,100.00 or such other sum as the court thinks fit.**
- (iv) Interest and costs.”**

The evidence of PW1 Choi Seongho, the Respondent company’s representative, was that on 26<sup>th</sup> June, 2004 the Respondent, a South Korean company that manufactures electronic equipment, signed a Memorandum of Understanding with a Zambian company, Suleen Investments Limited, for the purchase of 1,000 metric tonnes of 99.99 percent Copper Cathodes, worth US\$822,100.00.

PW1 testified (at pages 221-231 and 233-234 of the Record of Appeal) that pursuant to that Memorandum of Understanding, the Respondent Company paid the purchase price by way of a bank transfer, to Account no 8700220251400, belonging to one Archie

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Duncan Malie, a Director of Suleen Investments Limited, at Standard Chartered Bank. Thereafter the Respondent began to experience inordinate delays in the delivery of the copper cathodes prompting PW1 to travel, sometime in September 2004, to Durban South Africa, where Archie Duncan Malie had purportedly dispatched this consignment. Upon arrival in Durban, PW1 discovered that there had been no such delivery.

PW1's testimony was that he filed a complaint, though from the record it was not clear exactly when he did, with the South African Police Services which was relayed to Zambian authorities (letter dated 20<sup>th</sup> October, 2004 at page 69) and thereafter the bank account in question was seized. It was PW1's evidence that Archie Duncan Malie died and that the Drug Enforcement Commission in

breach of fiduciary duty and/or trust unblocked the account and colluded with the Administratrix of the estate of Archie Duncan Malie to enter into a Consent Order for the release of the US\$822,100.00 that was held in the account.

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But in his testimony, DW1, Kwaleyela Mukelabai, an Investigations Officer, said that the Drug Enforcement Commission - Anti Money Laundering Unit issued the notice of seizure (at page 72 of the record) on 23<sup>rd</sup> September 2004 freezing the said account and that Archie Duncan Malie was arrested and charged for being in possession of money suspected to have been unlawfully obtained (at page 243). He confirmed to the Court that Archie Duncan Malie died on 30<sup>th</sup> March, 2005 and that as a result the criminal proceedings against him in the Subordinate Court had abated. He testified that since the matter had abated, and according to him, since there had been no other claim, the Drug Enforcement Commission had no choice but to

release the money to the Administratrix of the estate of Archie Duncan Malie.

Curiously, what transpired after the seizure notice on the bank account was lifted was this. Sometime in April 2005, the Appellant entered into Consent Judgment with the Administratrix of the

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estate of Archie Duncan Malie in a civil action under Cause number 2005/HP/0072 in which the seizure was being challenged. On the strength of that Consent Judgment and upon instructions of the Administratrix, all the funds in the account were transferred to Okware and Associates, the lawyers representing the Administratrix and the account in question was closed.

In his Judgment, the learned trial Judge found in favour of the Respondent but struck off the Drug Enforcement Commission as a party to the proceedings on account, and rightly so, that it was not a body corporate. Further, the learned trial Judge found that at the time of the seizure there was only \$648,113.08 in the

account, and not US\$822,100.00. He then proceeded to make the following declaration:

“

- (i) That the 1<sup>st</sup> Defendant (the Appellant) is liable to account to the Plaintiff (the Respondent) for the sum of US\$648,113.08 on the ground of breach of fiduciary duty/breach of trust.**
- (ii) That the 1<sup>st</sup> Defendant is a constructive trustee of the Plaintiff's property in the sum of US\$648,113.08**

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- (iii) which was in the possession and control of the 1<sup>st</sup> Defendant.**
- (iv) That the Plaintiff is equitably entitled to trace the sum of US\$648,113.08 that the 1<sup>st</sup> Defendant held on trust for the Plaintiff.”**

The learned trial Judge also ordered the Appellant to pay interest pursuant to Order 36 rule 8 of the High Court Rules Chapter 27 of the Laws of Zambia with effect from 29<sup>th</sup> September, 2008 calculated on the US Dollar rate of interest until date of Judgment and thereafter pursuant to the Judgments Act Chapter 81 of the Laws of Zambia until full payment. The learned trial Judge however refused to award costs on account that the Respondent's claim had not fully succeeded.



It is against this Judgment that the Appellant has appealed and the Respondent has cross appealed to this Court. The Appellant raised the following five grounds of appeal:

**(i) That the learned trial Judge in the court below misdirected himself in law and fact when he held that the Appellant was a Constructive trustee of the Respondents.**

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**(ii) That the learned trial Judge in the court below misdirected himself when he held and ordered that the Appellant should account and pay the Respondents the sum of US\$648,113.08.**

**(iii) That the learned trial Judge erred in law when he found that delay does not prejudice a litigant's right to claim or commence an action.**

**(iv) That the learned trial Judge erred in law when he found that the Appellant should have taken steps to determine who the rightful owner of the money seized was.**

**(v) That the learned trial Judge misdirected himself in law and in fact when he found that privity of contract could not apply to the circumstances because the Respondent's claim was equitable.**

Both counsel filed written Heads of Arguments on which they relied. On ground one, Counsel for the Appellant submitted that while the learned trial Judge correctly found that section 355 of the Criminal Procedure Code was inapplicable in the present case,

he misdirected himself when he stated that decided authorities indicated that a high degree of care should be exercised when dealing with the disposal of exhibits. It was Counsel's submission that since the money in issue was not tendered as evidence in the

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criminal proceedings, the Drug Enforcement Commission was at liberty to lift the notice of seizure placed on the account in question.

Counsel for the Appellant further urged this Court to determine when constructive trusts arose, at what point one became a constructive trustee and who between the Appellant and the Administratrix of the Archie Duncan Malie's estate was the constructive trustee. Counsel drew us to the case of ***Hussey v Palmer***<sup>1</sup> to support the proposition that constructive trusts "***were imposed by law whenever justice and good conscience required it***". Counsel argued that to obtain constructive trust, the proponent ought to prove, amongst others,

the breach of special trust, fiduciary relationship or actual and unjust enrichment of the wrongdoer. Elements which, Counsel submitted, were missing in the court below and as such the learned trial Judge misdirected himself when he held that the Appellant was the constructive trustee. Counsel also referred us to a number of authorities to buttress the argument that constructive trusts were remedial in

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character and had a broad function of redressing wrong or unjust enrichment in keeping with the basic principles of equity and justice. Counsel for the Appellant argued that remedial constructive trusts did not merely recognize a pre-existing proprietary right but also would not gain automatic priority over the rights of third parties.

On ground two, Counsel for the Appellant submitted that using the maxim that “**equity treats as done that which ought to be done**” constructive trust could be imposed on the Administratrix and that the Respondent was entitled to the

equitable interest immediately, even though the copper cathodes were not delivered. Counsel submitted that the Administratrix had a duty to declare all assets and liabilities of the estate before distributing them and as such the Respondent ought to have claimed the money from the Administratrix or the estate of Archie Duncan Malie. Counsel submitted that in the present case the court below ought to have imposed or imputed a resulting trust for the Respondent by which

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the deceased held the money on terms which gave the Respondent an interest in the money proportionate to the US\$822,100.00 which was deposited for the purchase of the copper cathodes. Counsel submitted that there was a resulting trust or more accurately a constructive trust for the Respondent and the constructive trustee was the Administratrix. Counsel submitted that neither the Appellant nor the Drug Enforcement Commission had possession of the trust property for their own use or benefit.

As regards ground three, Counsel for the Appellant argued that in accordance with the maxims “**delay defeats equity**” and “**delay may be evidence of acquiescence so that the two cannot be separated**” the Respondent ought to have registered its interests in the seized funds in good time. Counsel submitted that had the Respondent done so, the Appellant would have dealt with the money differently. Counsel argued that a failure to bring an action tended to confirm that the innocent party had accepted or had

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agreed to breach of contract thus prevented him from enforcing his right to remedies for that breach.

On ground four, Counsel for the Appellant argued that there was no dispute as to the ownership of the money. She submitted that the Administratrix claimed the money which resulted in the Consent Judgment being entered into. She argued that the

learned trial Judge misdirected himself when he stated that the Commissioner (of the Drug Enforcement Commission) should have referred the matter to the High Court pursuant to section 18(4) of the Prohibition and Prevention of Money Laundering Act No 14 of 2001. Counsel submitted that the Commissioner acted based on the Consent Judgment in cause no 2005/HP/0072 and pursuant to Section 18(3) of the Prohibition and Prevention of Money Laundering Act No 14 of 2001.

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On ground five, Counsel for the Appellant submitted that it was trite law that a contract could not confer rights and impose obligations arising under it on any person except parties to it. Counsel argued that the Appellant never entered into any contract with the Respondent over the money in dispute. Counsel submitted that the rightful party to be sued ought to have been the Administratrix of the estate of Archie Duncan Malie.

In response to ground one, Counsel for the Respondent argued that there was no misdirection on fact and in law. He submitted that the State properly arrested and prosecuted the deceased, in this case Archie Duncan Malie, over the money in question. He stated that otherwise the Appellant would not have done so had it believed the money was lawfully acquired. He submitted that the Appellant was fully aware of the provisions of the law on the disposal of exhibits but failed in their duty imposed by law to deal with the exhibits. The Appellant also failed to invoke the jurisdiction

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of the Court to decide whether releasing the money to the Administratrix was just and equitable.

On ground two, Counsel for the Respondent argued that the Appellant had misapprehended the law applied by the learned trial Judge. Counsel submitted that the learned trial Judge correctly directed himself to the equitable law of constructive trusts and correctly applied it to the facts in the case.

As regards ground three, Counsel for the Respondent submitted that an order for payment was a logical and corollary to the finding of breach of constructive trust. Counsel argued that Appellant ought to have concentrated on addressing the constructive trust as that was the main issue in the present case as opposed to attacking the order for payment in separate grounds.

On Ground four, Counsel for the Respondent submitted that the Appellant did not plead statute of limitation and that even if the Appellant did so plead, it would have been inapplicable.

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Counsel submitted that not every alleged delay entitled a party to dismiss an opponent's case. Counsel submitted further that in any event there was no delay as the cause of action accrued between June 2004 and May 2005. The action commenced in 2008. Counsel argued that three years for a claim where the Respondent was resident out of jurisdiction could not amount to inordinate delay and thus prejudicial to the claim and the



Appellant. Further, Counsel submitted that the Respondent's claim rested upon equitable relief of constructive trust and tracing. He said Section 2 (7) of the Statute of Limitation Act of 1939 created an exemption for claims founded on among others, equitable relief.

In response to ground five, Counsel for the Respondent argued that the case before the court was a claim in equity for breach of constructive trust. He submitted that the issue of privity of contract was therefore irrelevant to the matter at hand.

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We have considered all the evidence on record and the submissions. We are grateful to both Counsel for the authorities cited and for their spirited arguments.

From the evidence, there is common ground that the Respondent deposited a sum of money into the personal bank

account of one Archie Duncan Malie, Director of Suleen Investments Limited. However, the evidence that the money was meant to procure copper cathodes remained unchallenged at trial as the Appellant never cross examined PW1 on it. It was undisputed that the money in question became a subject of a freezing order by the Drug Enforcement Commission which was investigating Archie Duncan Malie for failure to account under the Prohibition and Prevention of Money Laundering Act No 14 of 2001. It was common ground that Archie Duncan Malie died while the criminal proceedings were in motion. It was also common ground that the Drug Enforcement Commission lifted the seizure notice (at page 53

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of the record) and all the money in that account was surrendered to the Administratrix of the estate of Archie Duncan Malie (at pages 54-57).

We must state from the outset that this case before us comes by way of an equitable claim. On account of this, grounds

three and five of the Appeal must fail, and as such we shall deal with them first.

The Appellant argued ground three on the basis that the Respondent delayed in bringing its claim and thereby slept on its rights. We respectfully disagree. As Counsel for the Respondent correctly pointed out, the English Statute of Limitations Act of 1939 section 2 (7) as read together with the Law Reform (Limitation of Actions etc) Act Chapter 72 of the Laws of Zambia regarding equitable jurisdiction and remedies states that,

***“This section shall not apply to any claim for specific performance of a contract and for an injunction or for other equitable relief...”***

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It is trite law that time is no bar to an equitable claim. Even if this were not so, from the record, the Appellant did not specifically plead limitation of action either in its defence or at any stage of the proceedings in the lower court pursuant to Order 18/8 RSC. For this reason, ground three must fail.

Further, Counsel for the Appellant argued on ground five that the Appellant could not be held liable as it was not a party to the contract between the Respondent and Suleen Investments Limited. We agree with Counsel that the common law doctrine of privity of contract in general does not confer rights nor impose obligations on persons who are not parties to it. However equity tends to take a less rigid view of the boundaries of contract. It provides exceptions to the doctrine in equity where there may have been intentions to create a trust either expressly or impliedly or where there may not have been any intentions at all, giving rise to constructive trusts such as the one in the present case. (See Halsbury's Laws of England Volume p214-215 para 341 and note 13 and Cheshire and

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Fifoot's Law of Contract 10<sup>th</sup> Edition p404) In view of this, ground five too must fail.

We now turn to grounds one, two and four, which we shall deal with as one. As we see it, there are two main issues. We were asked to determine how a constructive trust was created and when one became a constructive trustee. But in our view, the main question is who the constructive trustee is, between the Appellant and the Administratrix, on whom liability to account for the breach of fiduciary or trust should rest. The second issue is whether procedure was followed in disposing of the money or the exhibit in the account.

We totally agree with Counsel for the Appellant that the constructive trust is a creature of equity and thus we uphold the principle we pronounced in the case of **Annie Bailes v Charles Anthony Stacey and Anierica Simoes<sup>2</sup>** where we stated at page 87,

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***“Constructive trust is a creature of equity and may be imposed in order to satisfy the demands of justice and good conscience.”***

We were fortified in our position by a plethora of English cases. One of the cases is ***Hussey v Palmer***<sup>1</sup> which was cited by the Appellant where Lord Denning made the following remark about constructive trusts,

***“By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it... It is an equitable remedy where the court can enable an aggrieved party to obtain restitution.”***

Essentially the constructive trust may arise in one of two ways. In ***Selangor United Rubber Estates v Craddock (a bankrupt) and others***<sup>3</sup> Ungood Thomas J, in answering the question as to how far a stranger could become liable as a constructive trustee in respect of a breach of trust, said there were two very different kinds of constructive trustees,

***“(i) Those who, though not appointed trustees, take on themselves to act as such and to possess and administer trust property for the beneficiaries, such as trustees de son tort. Distinguishing features for present purposes are (a) they do not claim to act in their own right but for the beneficiaries, and (b) their assumption to act is not of***

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***itself a ground of liability (save in the sense of course of liability to account and for any failure in the duty***

***so assumed), and so their status as trustees precedes the occurrence which may be the subject of claim against them. (ii) Those whom a court of equity will treat as trustees by reason of their action, of which complaint is made. Distinguishing features are (a) that such trustees claim to act in their own right and not for beneficiaries, and (b) no trusteeship arises before, but only by reason of, the action complained of.”***

Based on the authorities cited above, we find that the learned trial Judge rightly imposed a constructive trust on the Appellant. The Drug Enforcement Commission as an agent of the State seized funds credited to the bank account of Archie Duncan Malie to facilitate investigations and prosecution of money laundering activities. Up to that point, there was no trust and neither was there any intention to create a trust. But by reason of the Commission’s conduct or action, to sanction the release of the funds to the Administratrix of the estate of Archie Duncan Malie after the criminal matter abated and the seizure notice was lifted, there inevitably arose a constructive trust. From the evidence, it is very clear that there was still contention as to ownership of the funds

especially that these moneys emanated from a business arrangement between two corporate entities. The money did not belong to Archie Duncan Malie in his individual capacity and therefore, could not devolve upon his estate after his death. By releasing this money to the Administratrix, the Appellant clearly, fell within the second form of a constructive trustee.

In the same vein, we hold the view that by virtue of having received and dispensed with the money, which was clearly not part of the estate of the Archie Duncan Malie, the Administratrix was not immune from liability. We are fortified in this position by the decision of the Court of Appeal in ***Carl Zeiss Stiftung v Herbert Smith and Company (a firm)***<sup>4</sup> where it was stated,

***“A person who acquires or retains property subject to a trust, with notice of that trust, becomes a constructive trustee of that property for the beneficiaries.”***

Furthermore, the learned authors of the Halsbury’s Laws of England Volume 28 state at p402 note 2 that,

***“As a general principle it may be said the property subject to a constructive trust must have come into the***



***hands of the alleged trustee as a result of unconscionable dealing or in breach of a fiduciary obligation.”***

We are further persuaded by the writings of the learned authors of Underhill’s Law of Trust and Trustees 11th Edition at page 558 which states that,

***“All parties to a breach of trust were equally liable, and there was between them no primary liability. Such a breach was not confined to the express trustees but to all who were actually privy to the breach.”***

Consequently, in such circumstances the law of equity would allow an aggrieved party to recover his property from any person into whose hands it can be traced. This profound principle was made by Denning, J in ***Nelson v Larholt***<sup>5</sup> where he stated,

***“A man’s money is property which is protected by law. It many exist in various forms...but whatever its form, it is protected according to one uniform principle. If it is taken from the rightful owner or indeed from the beneficial owner without his authority, he can recover the amount from any person into whose hands it can be traced unless and until it reaches one who receives it in good faith and for value, and without notice of the want of authority. Even if the one who received it acted in good faith, nevertheless, if he had notice-that is, if he knew or***

**ought to have known of the want of authority-he must repay...This principle has been evolved by the courts of law and equity side by side. In equity it took the form of**

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***an action to follow moneys impressed with an express trust or with constructive trust owing to a fiduciary relationship. In law it took the form of action of money had and received or damages...*** (Emphasis ours)

We therefore find that both the Appellant and the Administratrix were constructive trustees and therefore must be held liable. We hold that the trial court ought to have joined the Administratrix to the proceedings even after the parties had closed their cases but before judgment by invoking Order 14 rule 5 of the High Court Rules based on our decision in ***Attorney General v Aboubacar Tall and Zambia Airways***<sup>6</sup>

Before we leave this subject, we wish to comment on Counsel for the Appellant's argument that for a constructive trust to exist there ought to have been or it ought to have been proved that there was a special trust, fiduciary relationship or actual and unjust enrichment of the wrongdoer. We disagree. While previously it was a requirement to prove unjust enrichment or

fiduciary relationship, the doctrine of constructive trusts has evolved rapidly. More recent case law has shown that Anglo-Canadian courts have tended to

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impose constructive trusts in the absence of enrichment and corresponding deprivation or without the defendant obtaining a benefit or even the plaintiff suffering loss. The case of ***Soulos v Korkontzilas***<sup>7</sup> is a perfect example. The brief facts of this case were that a real estate broker entered into negotiations to purchase a commercial building on behalf of his client. The vendor stated his price but instead of communicating to his client, the broker decided to purchase the property for himself. The client brought an action against the broker alleging breach of fiduciary duty giving rise to a constructive trust. The trial Judge found breach of loyalty but declined to impose a constructive trust on account that the broker had not been enriched because the value of the property had fallen from the time of the purchase. The Supreme Court of Canada held that the doctrine of constructive trusts would still be imposed,

***“to hold persons in different situations to high standards of trust and probity to prevent them from holding property which in good conscience they should not be permitted to retain”.***

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Now, the question left to determine is whether the Appellant disposed of the money or exhibit equitably. We have examined Section 355 (1) of the Criminal Procedure Code Chapter 88 of the Laws of Zambia on the disposal of exhibits and are satisfied with the learned trial Judge’s findings that the provision did not apply given that there was no evidence as to whether the money in question was tendered or produced as evidence in the criminal proceedings in the Subordinate Court or exactly at what stage the criminal proceedings were before abatement.

Although Counsel for the Appellant argued forcefully that there was no dispute as to the ownership of the money, as we have stated earlier, the evidence on the record shows otherwise. Firstly it was common ground that Archie Duncan Malie was being investigated over the source of the money in his account. Further,

DW1 admitted during cross examination that the Drug Enforcement Commission was aware of the Respondent and that he (the Respondent) had sent sum of \$822,100.00 to the personal bank account of Archie Duncan Malie (pages 238-239). Further, that up

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to Archie Duncan Malie's death, the funds had still not been accounted for. DW1 also stated that the Drug Enforcement Commission had made attempts to trace the Respondent through Interpol. We hold the firm view that, in the face of such serious doubt as to ownership, the Appellant ought to have applied to the Court for determination under Section 18(4) of the Prohibition and Prevention of Money Laundering Act No 2001. Section 18(4) states,

**"Where a claim is made against property seized under this Act and the Commissioner finds that -**  
**a) there is a dispute as to the ownership of the property;**  
**(b) there is insufficient evidence to determine the ownership of property;**  
**(c) the Commissioner is unable to ascertain whether the property is liable to forfeiture or not; the Commissioner shall refer the claim to High Court. (Emphasis ours)**

Our view is that the Consent Judgment (at page 58) only succeeded in short circuiting this inquisition by the Court. In light of what we have stated above grounds one, two and four partially succeed to the extent that the Administratrix has also been found liable.

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On the Cross Appeal, the Respondent raised the following ground of appeal:

- (i) The Court below misdirected himself at law by refusing to award costs to the Respondent: in spite of the Respondent succeeding the Court below.***

Counsel for the Respondent submitted that while the Court had complete discretion as to costs, such discretion ought to be exercised judiciously. Counsel further submitted that the Appellate Court had jurisdiction to vary or reverse an order for costs through Rule 77 (6) of the Supreme Court Act Chapter 25 of the Laws of Zambia. He also referred us to the cases of **George**

***Chishimba v Zambia Consolidated Copper Mines<sup>8</sup>*** and  
***Collett v Van Zyl Brothers Ltd<sup>9</sup>***.

Counsel submitted that the learned trial Judge appeared to have denied the Respondent costs on account that he had struck off the Drug Enforcement Commission as 2<sup>nd</sup> Defendants in the proceedings, had dismissed the suit against the Drug Enforcement Commission and that the Respondent's claim had not fully

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succeeded even when the Court below had no jurisdiction to dismiss the Respondent's claim for misjoinder of party.

Counsel submitted that the learned trial Judge's decision to deny costs because the sum claimed had been reduced was harsh. He argued that the award of US\$648,113.08 as opposed to \$822,100.00 was not nominal enough to deprive a litigant his costs especially that the Respondent pleaded in the alternative for such other sum as the Court would have deemed fit.

In response to the cross appeal, Counsel to the Appellant argued that costs did not come as a matter of right and cited ***YB and F Transport Limited v Supersonic Motors Limited***<sup>10</sup> to demonstrate that costs could be denied where the Defendant “substantially” won the counterclaim. Counsel submitted that the Court below was on firm ground when it ordered each party to bear their own costs because the Respondent’s claim against the Drug Enforcement Commission had failed. Furthermore, the Respondent’s claim for the US\$822,100.00 had failed because not

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the full claim was awarded. Counsel submitted that since the Respondent had succeeded in part and it was equitable and just for the Court to order that each party bears its own costs.

We have carefully considered the arguments and have examined what amounts to improper conduct. Although the inclusion of the Drug Enforcement Commission which was not a body corporate as a party was irregular, it did not necessarily amount to improper conduct within the meaning of our decision in



**George Chishimba v Zambia Consolidated Copper Mines<sup>8</sup>.** A

misjoinder ought not to defeat the case in accordance with Order 14 rule 5(3) of the High Court rules Chapter 27 of the Laws of Zambia. Neither would we say of a plaintiff who fails to prove all the allegations or recover the full claim to have conducted the prosecution of his case in an improper manner to warrant deprivation of costs. It was therefore a misdirection for the learned trial Judge to deny the Respondent his costs. This ground succeeds.

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For reasons stated above, this appeal partially succeeds. We order that the matter be taken back to the High Court for purposes of joinder of the Administratrix and costs to follow the event. We also allow the cross appeal.

L. P. Chibesakunda

**ACTING CHIEF JUSTICE**

M. S. Mwanamwambwa JJS  
**SUPREME COURT JUDGE**

P. Musonda, JJS  
**SUPREME COURT JUDGE**