# IN THE SUPREME COURT FOR ZAMBIASCZ/8/37/2010

# **HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

***B E T W E E N :***

 **LUSAKA ENGINEERING COMPANY APPELLANT**

 *(IN LIQUIDATION)*

*AND*

 **SAITON KAMANGA & 84 OTHERS RESPONDENT**

 **CORAM: Chirwa, Mwanamwambwa, Chibomba, J.J.S.,**

 ***On 22nd September 2010 and 17th July 2012***

*For The Appellant: Mr A. A. Dudhia of Messrs Musa Dudhia & Company.*

*For the Respondent: Mr. T. K. Ndhlovu of Messrs Batoka Chambers*

JUDGMENT

**Mwanamwambwa, J.S., delivered the Judgment of the Court.**

***Cases Referred to:***

1. **UNZA Council v Calder [1998] Z.R. 48.**

The delay in delivering this Judgment is deeply regretted. It is due to a heavy workload.

This is an application by motion by the Respondent, to reverse an order by a single Judge of this Court. The order in question was made in chambers on 26th February 2010. It granted the Appellant leave to appeal against a decision of the High Court of 1st February 2010. By that decision, the High Court refused the Appellant leave to appeal against its earlier decision to discharge a Consent Order. The facts of this matter are that the Respondents instituted Court proceedings, against the Appellant, their former employer, claiming for a total sum of K600,105,240.08. This was the balance due to the Respondents from the Appellant, upon termination of their employment, upon privatization of the Appellant. The action was tried without pleadings, on agreed facts and statement of issues. On 3rd March 2000, the High Court entered judgment in favour of the Respondents, with interest, less what was already paid to them. The Appellant appealed to this Court. On 12th September 2001, this Court dismissed the appeal and upheld the judgment of the High Court. On 11th November 2003, in a dramatic turn of events, the parties through their new Advocates, signed a Consent Order, before the trial Court. It reads as follows:-

**“BY CONSENT of the parties it is ordered as follows:**

1. **The Defendant company *(now in liquidation and acting by its liquidator Cosmas Mwananshiku of Ernst and Young)* shall use its best endeavours to procure a loan in order to pay to the Plaintiffs the settlement sum referred to below and it is a condition precedent to this consent order that such a loan is obtained.**
2. **It is understood and agreed by the parties that the settlement sum is being paid to the Plaintiffs on the basis that:**
3. ***The Plaintiffs have obtained a judgment from the Supreme Court in their favour prior to the liquidation of the Defendant company; and***
4. ***The Plaintiffs (as confirmed in the judgment)* *were all employed under the ZIMCO conditions of service and were not unionized employees; and***
5. ***The Court recognized that the terminal benefits payable to the Plaintiffs by the Defendants were to be discounted by 20% and 30%.***
6. ***It is acknowledged by the Plaintiffs that the exact amount owed to them is still unquantified.***
7. **The Defendant company shall pay to the Plaintiff’s advocates in full and final settlement of all and any claims whatsoever that the Plaintiffs (*or any person claim under them)* may have against the Defendant and its shareholders and directors the sum of K600,195,240.08.**
8. **The said settlement sum shall be paid to the Plaintiffs’ advocates within 14 days of the date of this consent order.**
9. **Upon payment of the settlement the Plaintiffs do and each of them will have released and discharged the Defendant Company, its liquidator, its shareholders and its directors from all claims demands actions and proceedings whatsoever herein.**
10. **The Plaintiffs shall jointly and severally indemnify and keep indemnified the Defendant company and the liquidator thereof the shareholders and the directors against any costs claims demans or actions whatsoever which are made against the Defendant company, the liquidator, its shareholders and directors as a result of this consent order.**
11. **Leave be and is hereby granted under S.281 of the Companies Act for this order to be granted.**
12. **Each party shall bear its own costs.**

**Dated 11th day of November 2003**

 **SIGNED ……………………………..**

 **JUDGE**

**We consent:…………………… We consent:………………………………**

 **Mainza & Company Musa Dudhia & Company**

 **4th Floor, South Wing 2nd Floor, COMESA Centre**

 **Chester House Zone C, North Wing**

 **Cairo Road Ben Bella Road**

 **LUSAKA LUSAKA**

 **Advocates for the Plaintiffs Advocates for the Defendants”**

On 10th June 2008, the learned trial Judge quashed and set aside the Consent Order, on the application of the Respondents. He did so in these words:

 **“RULING EXTEMPORE**

**Having seen this application, I am surprised that there could be a Consent Judgment on a finished Cause where there is a Supreme Court Judgment already delivered. The Consent Judgment must have been sneaked in before me by trick because under normal circumstances no Court or Judge can allow a Consent Judgment after final Judgment. The purported Consent Judgment is therefore quashed and shall be of no value or effect whatsoever on the final Judgment of this Court or the Supreme Court. Costs to follow this event.**

**DATED AT LUSAKA THIS 10TH DAY OF JUNE, 2008.**

**SIGNED**

**G.S. PHIRI**

**JUDGE"**

The Appellant applied to the learned trial Judge to review his decision to quash the Consent Order. On 19th October 2009, he refused to review his decision. Next, the Appellant applied for leave to appeal to this Court, against the Ruling of 19th October 2009. On 1st February 2010, the learned trial Judge declined to grant leave to appeal. Next, the Appellant applied for leave to appeal before a single Judge, of this Court, in Chambers. On 26th February 2010, the single Judge granted leave to the Appellant. The application was heard unopposed; Counsel for the Respondents did not attend Court. And there was no affidavit in opposition to the application. Then the Respondents applied before the single Judge, to re-hear the application of 26th February 2010. They did so under Rule 71 (2) of the Supreme Court Rules, CAP 25. The application was refused on procedural grounds; because Rule 71 (2) applied to appeals before the full Court and not to the decision of a single Judge in Chambers. The Respondents then applied to this full Court, by Motion.

After giving us the history of the matter, Mr. Ndhlovu, in sum, submits, on behalf of the Respondents, that the Appellant’s appeal is frivolous, vexatious and an abuse of the Court process. That to allow the Appellant to be heard would be asking this Court to review its judgment. He adds that there must be finality to litigation, to allow the successful litigants to enjoy the fruits of their litigation. He urges us to reverse the order for leave by the single Judge, because it was wrongly granted.

In response on behalf of the Appellant, Mr. Dudhia submits that the application is misconceived. That the order sought to be challenged has already been perfected, the record of appeal having been filed in April 2010. He submits that since the record of appeal has been filed, a Motion like this, under Rule 48, cannot be heard. In support of his submission, he refers us to **Unza Council v Calder (1)**. That case decided, inter alia, that when the order, direction or decision made by a single Judge has taken effect, nothing remains on the record that can be varied, discharged or reversed by the full Court.

We have examined the Motion and its supporting affidavit and have considered the submissions by Counsel. We agree with Mr. Dudhia that in line with our decision in **Unza Council v Calder (1)**, since the decision of the single Judge has taken effect; the record of appeal having been filed in April 2010, there is nothing that remains on this record that can be varied, discharged or reversed by this full Court. Further, we wish to state that the issues raised by the Respondents in this Motion are the very issues to be dealt with in the main appeal.

**For the foregoing reasons, this Motion is dismissed. We make no order as to costs**.

We appreciate the concerns of the Respondents that this matter has been before the Courts for too long. It was instituted in the Court below in 1997, i.e. 15 years ago. It is before us for the second time. We too, want it concluded and off our hands. But we must point out that it is the conduct of the Respondents in repeatedly changing Advocates, that partly contributed to the matter remaining in Courts up to now. In particular, the new Advocates they retained after this Court’s Judgment of 12th September 2001, signed a Consent Order on their behalf on 11th November 2003, before the High Court. And when they changed Advocates again, their new Advocates applied to the High Court to set aside that Consent Order, for trick or fraud. That Consent Order is the origin of several applications and the current pending appeal. **To address this issue, we direct that the pending appeal be cause listed for hearing soonest.**

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**D. K. CHIRWA**

**SUPREME COURT JUDGE**

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**M. S. MWANAMWAMBWA**

**SUPREME COURT JUDGE**

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**H. CHIBOMBA**

**SUPREME COURT JUDGE**