**IN THE SUPREME COURT FOR ZAMBIA APPEAL NO. 74/2009**

**HOLDEN AT NDOLA/LUSAKA**

(*Civil Jurisdiction*)

**BETWEEN:**

**ZESCO LIMITED Appellant**

**AND**

**MICHAEL MASENGU AND CO. 1st Respondent**

**S M T DENTAL SURGERY 2nd Respondent**

**Coram: Chirwa Ag. DCJ, Chibesakunda and Mwanamwambwa JJS.**

**1st June 2010 and 5th June 2012**

For the Appellant : Mr. M. V. Chiwale, Principal Legal Officer

For the Respondents : Mr. M. G. Masengu of Messrs Michael Masengu

and Company

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**JUDGMENT**

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**Chibesakunda, JS., delivered the Judgment of the Court.**

**Laws referred to**

(1) Electricity Act Cap 433 Section 9

(2) Section 3(4) of the ZESCO Limited By-Laws 2000 of the Laws of Zambia

This is an appeal against the High Court judgment, Kitwe, in a claim by the Respondents against the Appellant for:-

(1) An interim order of injunction to restrain the defendants from

cutting off the supply of electricity from the premises in issue until the matter is determined

(2) Damages with interest and an order that the defendants properly provide two meters for the two plaintiffs for two accounts instead of using one meter to run two accounts

(3) An order that the accounts so far rendered by the defendants be declared null and void

(4) Costs

The High Court ruled in favour of the Respondents hence this appeal.

The evidence before the High Court on which there was no controversy was that the two Respondents were tenants in a building owned by Mr. Mpundu of Tropics Investments which was previously owned by Mr. Richard Mulenga of Nkana Milling. This building is known as Leanor House, Plot No 3634 Freedom Way, Kitwe. The 2nd Respondent had moved into this Leanor House on the 2nd of October, 1998. The 1st Respondent had moved into this Leanor House by April 1998. The 2nd Respondent started operating as a dental surgery in April 1999. The two Respondents never received any bills of electricity consumed individually from the Appellant until the 16th of December, 2002 when they both received a letter stating that electricity power was going to be disconnected if they did not settle the outstanding charges.

It is common ground also that from the time both Respondents went into occupation of this building, Leanor House, they found outstanding electricity charges on the account incurred by previous tenants. They did not pay these arrears neither did they pay their charges. Neither did they enter into any contract with the Appellant on their utilization of the electricity. Because they shared one meter box, their respective bills came as one bill. The Appellant disconnected electricity power to the two premises belonging to the 1st and 2nd Respondents. The 2nd Respondent paid part of the bill. After the 2nd Respondent paid some money, this power was restored. It is also common ground that these two Respondents were charged on unmetered commercial rate.

After power was disconnected, both Respondents applied for interlocutory injunction, which was granted to them on 17th April, 2003. The two Respondents continued not to pay electricity bill after the injunction was granted up to-date.

The Respondents called one witness PW1 (the Doctor operating the dental clinic), who testified that as they found outstanding arrears incurred by the previous tenants, they refused to pay electricity charges because according to them, they did not know exactly what each of them owed the Appellant as the bill was shared. He testified that the two Respondents did not pay any electricity charges from the time they went into occupation of the premises known as plot No. 3634 Leanor House from 1998 to 2002. PW1 told the court that the two Respondents had preferred to have each a meter box to know what each of them as customers was consuming. According to PW1, both Respondents’ case is anchored on the fact that they did not receive each its monthly bill of electricity consumed.

The Appellant called one witness, DW1 an Electrical Engineer. DW1 testified that he was in charge of the Appellant’s metering for the whole Copperbelt. He personally and physically inspected the premises where the two Respondents operated from. He confirmed that the two premises shared the same meter box and the same distribution box, and as such the two Respondents shared the same bill, and as such disconnecting one of the Respondents meant that the other Respondent had to be disconnected. On the question of providing separate meter boxes, he told the court that only the 2nd Respondent had applied for such a provision verbally. That the 2nd Respondent was advised that it was not the responsibility of the Appellant to provide a meter box and to hire somebody to do the internal wiring. He, therefore, testified that because both Respondents had not done their internal wiring, they were therefore, on fixed unmetered commercial tariffs. He also told the court that although the address on the bills for the two Respondents was wrong as the address used was plot No. 640 Kuomboka Drive Parklands, however since the Respondents were well known customers, for instance, the 1st Respondent (Messrs Masengu and Co.) was the only legal firm operating in Parklands, it was not possible to make any mistake in delivering bills to them. DW1 further told the court that the outstanding charges in April, 2002 for the two Respondents were 774 units. It rose to 800 units according to the un-metered commercial tariff. His further testimony was that the two Respondents had not paid for electricity consumed from the time they started using those premises up to the time of the hearing of this matter except for the amount of K375,710.00 paid by the 2nd Respondent after power was disconnected. This amount was paid just before electricity was reconnected. DW1 also told the court that customers have a duty to establish that the previous tenants have settled all arrears before moving into new premises. That the internal wiring of any building is the responsibility of customers. That the Appellant’s responsibility ended at the meter box. That the bills for the Respondents were shown from December 2002 to February 2003. In cross examination, DW2 told the court that the application for the two Respondents was for the connection of power in 2003. When the application for separation was received, he informed the court that it was not possible to separate these two meters of the two Respondents until after the cabling was separated. According to DW1, they now have a new billing system which started in 2004. He further told the court that the billing of the two Respondents was based on meter reading. He added that although the 2nd Respondent applied for separate meters, its application form did not indicate that it was applying for separate meter boxes.

After analyzing this evidence, the learned trial Judge ruled in favour of the Respondents. It is against this judgment that the Appellant is appealing. It has raised 3 grounds of appeal, namely:-

1. The learned trial Judge misdirected herself when she held that the Respondents could not be held to have failed to pay for electricity before the disconnection when the evidence on record is clear that they were in occupation of the premises for a period from 1998 to 2002 without paying for electricity
2. The learned trial court failed to take consideration that the electricity tariffs are regulated by law and the Appellant acted according to law
3. The learned trial court erred when she did not credit the defense witness testimony that the Plaintiff were advised verbally to revive their premises to facilitate the fixing of 2 meters as she went in the realm of speculation.

We will deal with all grounds of appeal together as they are interrelated.

On grounds 1 and 2, Counsel for the Appellant argued that the learned trial Judge misdirected herself when she held that the Respondents could not have failed to pay electricity consumed before the disconnection when there was evidence on record on which there was no dispute that the two Respondents were in occupation of these premises (a) for the 2nd Respondent from April 1998 to 2002 and even up to-date, (b) for the 2nd Respondent from October 1998 to 2002 and up to-date, without paying for any of the electricity consumed by them. Counsel pointed out that there was evidence before the court on which there was common ground that the two Respondents, without entering into a contract with the Appellant, right after occupying the premises in Leanor House, Kitwe, started to consume electricity and as such they were in breach of Section 3(4) of ZESCO Limited By-Laws, which says:-

“**No person shall receive supply at any premises until such time that all arrears, if any owing (by such person to the Company has been fully paid.**

**“No supply shall be given to an applicant until the contract of supply has been executed”. (our own emphasis)**

According to Counsel, this same evidence established in addition that the two Respondents were also in breach of Clause 5 of ZESCO Limited By-Law 2000 which says:-

**“No supply shall be given to an applicant until the contract of supply has been executed between the applicant and the Company and the execution or the contract of supply by each party shall be conclusive evidence of notice had and received of by each party of the terms and conditions of supply”.**

In spite of all this evidence, the learned trial Judge held that the Respondents could not be held to have failed to pay for electricity before disconnection. This was a misdirection. Thus Counsel argued further that the learned trial Judge failed to take into consideration the fact that electricity tariffs are regulated by Law and that the Appellant acted according to the Law. Referring to the lower court’s portion of the judgment at page 20 of the record where the court said:-

**“the question as to whether or not the Respondents were charged for outstanding bills incurred by previous tenants can not be answered from the evidence on record because “DW1” had said he was not aware of who was in occupation of the premises before the Respondents. He blamed the Respondents for not giving the Appellant information about the previous tenants.”**

and the fact that the learned trial Judge then went on to state that in her view, the Appellant as a service provider was supposed to keep the record in order, Counsel argued that the lower court blamed the Appellant for the lack of such information on who had been tenants of the premises in question before the Respondents. And yet according to DW1, the Respondents were informed of the fact that since they wanted separate meters, it was their responsibility to ensure that there were provisions enabling installation of separate meters. It was argued that the court below ignored the fact that although it was a statutory obligation for the Appellant to provide power up to the meter box, it was equally a statutory duty for the Respondents as consumers to ensure that there was separation of circuit breakers at the premises to bring about separation of meter boxes. Counsel further noted that DW1 had testified that the Respondents got electricity from the same circuit breaker, therefore as there was only one circuit breaker, it was only possible to provide one meter box for the two premises. Having only one meter box, Counsel argued, the Respondents were supposed to make their own internal arrangements regarding sharing of bills because if either of them did not pay ZESCO or that they did not share the bill, the Appellant had no option but to disconnect power. Counsel, therefore, argued that what the Appellant did is clearly supported by the provisions of Section 4 of the ZESCO Limited By-Laws 2000 which says:-

“**1. EXCEPT the intended or actual use of the premises otherwise requires, one point of supply only will be provided at each premises.**

**2. Where more than one point of supply is provided at**

**any premises a separate contract of supply shall be**

**entered into in respect of each point of supply.**

**3. Where after a point of supply has been provided a**

**customer required the alteration or resiting of such**

**point of supply he since pay to the Company any**

**costs incurred by the Company for such alteration.”**

He, therefore, argued that it was a misdirection by the learned trial Judge not to have taken into account all this evidence.

On ground 3, Counsel argued that the learned trial Judge erred when she did not take into account the evidence of DW1 that the Respondents were advised verbally to provide facilities for the Appellant to fix two meters for each of the Respondents’ electricity consumption. Counsel argued that the learned trial Judge merely speculated when she concluded that as the issue of advising the Respondents about applying to have two meters was done verbally, therefore, there was no such advice. Counsel argued that reading the judgment, one can conclude that the learned trial Judge did not properly evaluate the evidence before her, hence arriving at a decision which she did. Counsel, therefore prayed to this court to up hold the appeal.

In response, the Counsel for the Respondents on grounds 1 and 2 argued that although it was common ground that the Appellant, as by Law, was under statutory obligation to charge for electricity consumed as per Section 4 of the ZESCO Limited By-Laws, this was premised on the prerequisite that the Appellant had to send a bill to each of its customers. Counsel argued that it was common ground that the Appellant had not done so. In addition, the Appellant had sent bills of the Respondents to wrong addresses. It was further submitted that it was not scientifically possible to have one meter box producing two accounts with different readings. To illustrate this point, Counsel repeated the submissions which they had presented before the lower court namely that:-

**“when DW1 was asked why they put two numbers 201150584 and 201150376 on the bills, he said the numbers were fictitious”** see page 43 of the record.

So according to Counsel, this is why the learned trial Judge concluded that the bills sent to the Respondents on fictitious account numbers were null and void.

On ground 3, Counsel’s argument was that the advice on how to facilitate the introduction of two meters was a matter which was serious and therefore the learned trial Judge was correct to have held that the advice by the Appellant ought to have been in writing. Counsel referred to the fact that the learned trial Judge had immediately ordered the Appellant to install two separate meters in the building for each Respondent to receive consumption bills individually. This has been done which shows that this was possible all along.

On the additional claim, which point was not raised by the Appellant in the High Court, Counsel referred to the appeal on the award of damages to the 1st Respondent. Counsel argued that the judgment which is subject of appeal, was rendered, by the learned trial Judge, on the 3rd April, 2007. In that judgment, the 1st Respondent was not included in the award of damages. This prompted the 1st Respondent to apply to the learned trial Judge for her to review her judgment to include the 1st Respondent in the award. By consent of parties, the matter was resolved by inclusion of the 1st Respondent in the award of damages. Counsel therefore referring to the well established principle on consent judgments, argued that no appeal lies against a consent judgment. He, therefore, argued that the parties having consented to inclusion of the 1st Respondent in the award of damages, cannot now have an appeal against that judgment. Those were the arguments before the court.

We have looked at both arguments by both sides. We have considered issues raised in the appeal. We entirely agree with the Counsel for the Appellant that as per provisions of Section 3(4) of ZESCO Limited By-Law 2000 as read with Section 18 of ZESCO Limited By-Laws 2000, the statutory duty of the Appellant in providing of electricity ends at the meter box. The Respondents on the other hand have a statutory duty to enter into a contract with the Appellant before starting to consume electricity. This obligation has to be under-taken right at the beginning of the contract before starting to consume power. There was evidence before the court on which there was common ground that the Respondents had moved into Leanor House and the 2nd Respondent even started operating a dental surgery without entering into a contract with the Appellant. There was evidence that the 1st Respondent entered into occupation of these premises in April 1988. The 2nd Respondent entered into occupation of the premises from October, 1998. Right from the entry into these premises, the Respondents started consuming power. These two occupants did not pay for power consumed up to 2002 when they obtained an injunction. Again it is common ground that they never paid for electricity consumed up to-date since they obtained an interlocutory injunction. We accept that the Appellant has a duty to consumers to charge them due charge of electricity they have consumed individually not collectively. We accept that this was not done in this particular case. However, we do not accept that the payment for the electricity consumed by each of the customers of the Appellant is premised on bills being individually metered. The ideal situation is that each consumer must be given their due charge. We nonetheless even after taking that into account hold that each consumer of energy has a statutory duty to pay for the electricity consumed on prorata basis. It has been argued by the Respondents that they individually and verbally expressed their wish to have separate meters and thus having separate bills. The Appellant’s evidence was that it was only one of the Respondents who applied verbally and that they were both advised to facilitate the establishment of individual meters by making internal arrangements for such establishment. Although we agree with the learned trial Judge that such an advice was a serious advice which ought to have been put in writing to the Respondents individually, nonetheless, we hold that omission to write that advice did not render the bills so rendered as null and void. We hold this taking into account the fact that the Respondents did not enter into contracts with the Appellant and as such, the Respondents were not in breach of Section 3 quoted at J9. We hold that the Respondents ignored the verbal advice given to them by the Appellant of facilitating the establishment of individual meters. We, therefore, agree with the Appellant that as an energy provider, it did adhere to legal provisions.

The next point we have to consider is the provisions of Section 5 of ZESCO Limited By-Laws 2000 which forbids any provider of energy to discontinue supplying power to a consumer. Counsel for the Respondents has argued that the Appellant was in breach of this provision. We do not accept that argument because there is a rider in this provision. In this case, there is evidence on which there was common ground that the Respondents did not pay for electricity consumed by them. This same provision states that such an operator of energy is legally entitled to disconnect supplying power if the consumer fails to pay for such supply of energy. Our view, therefore, is that the learned trial Judge failed to take into account this statutory provision. In fact, our conclusion on this point is supported by the fact that the Respondents have never denied that they never paid for electricity consumed. Their only defense, which is strange enough, is that they did not get separate bills because they had only one meter box. We, therefore, find that the evaluation of the evidence before the court was not properly done. The learned trial Judge misdirected herself.

Coming to the point which was raised by the Counsel for the Respondents regarding the award of damages to the 1st Respondent which was subsequently done in a judgment on review, we agree entirely that no appeal lies against a consent judgment. However, in this particular case, the appeal which is before us is the appeal against judgment which awarded damages to the 2nd Respondent. So the fate of that judgment on appeal would necessarily affect the consent judgment which was consequential. Therefore, since we have held that there was a misdirection by the learned trial Judge that misdirection would necessarily affect the consent judgment. The fate of the consent judgment in this particular case is totally dependant on the fate of the initial judgment which was delivered on 3rd April, 2007.

In total sum, we hold that the learned trial Judge misdirected herself. We find merit in the whole appeal. We up hold the appeal. We order that the matter go back before the learned District Registrar to assess how much the two Respondents had consumed up to date when separate meters were installed and which they owe to the Appellant. We order that they pay that amount plus interest. We order that the Respondents also pay the cost for this appeal. Costs to be agreed in default to be taxed.

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D. K. Chirwa

**ACTING DEPUTY CHIEF JUSTICE**

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L. P. Chibesakunda M. S. Mwanamwambwa

SUPREME COURT JUDGE SUPREME COURT JUDGE