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**IN THE SUPREME COURT OF ZAMBIA** **APPEAL NO. 129/2009**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**BETWEEN:**

**NATIONAL HOUSING AUTHORITY** **APPELLANT**

**AND**

**SINETECH CONSTRUCTION LIMITED** **RESPONDENT**

**CORAM: Muyovwe JS, Lisimba and Kaoma, Ag JJS**

**On the 11th of July, 2013 and 24th July, 2014**

For Appellant: Ms. W. Ndhlovu-In House Counsel

For Respondent: Mr. S. Mambwe-Mambwe Siwila & Lisimba Advocates

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**JUDGMENT**

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**Kaoma, Ag JS, delivered the Judgment of the Court.**

**Cases referred to:**

1. **Zambia Building & Civil Engineering and Contractors Ltd v Janina Georgopoullos (1972) Z.R. 228**
2. **Dodd Properties (Kent) Ltd and another v Canterbury City Council and others (1980) 1 ALL ER 928**
3. **Hanak v Green (1958) 2 ALL ER 141**
4. **East Ham Corp v Benard Sunley & Sons Limited (1966) AC 456**

5. **Ellis v Hamlen (1810) 3 TANT 52**
6. **Hoeing v Isaacs (1952) ALL ER 176**
7. **Wilson Masauso Zulu v Avondale Housing Project Ltd (1982) Z.R. 172**
8. **William David Carlisle Wise v E.F. Hervey Ltd (1985) Z.R. 179**
9. **Anderson Mazoka & Others v Mwanawasa & Others (2005) Z.R. 138**
10. **Undi Phiri v Bank of Zambia (2007) Z.R. 186**

**Other Works referred to:**

1. **Halsbury's Laws of England 4th Edition, Volume 4,**
2. **Hudson Building & Engineering Contracts, para. 1-014, p. 9**

The appellant has appealed against the judgment of the Commercial Court delivered on 2nd May, 2008 granting the respondent its claim for the sum of K469,254,506.72 less the amount of K400,000,000.00 already paid by the appellant.

The history of the matter is that the appellant and the respondent entered into an agreement through the latter's agents Apex Design/Watkins Grey International Architects wherein the respondent undertook to do construction works for the appellant at Millennium Village in Lusaka. The works included setting out all the road works, setting out substructure (foundations) for 24 villas, and construction of up to completion stage of 4 villas. Prior to that, the parties had another agreement for construction of housing units at the Bennie Mwiinga Housing Complex (PHI) also in Lusaka.

At the Millennium Village, the respondent completed only one unit in full and did a substructure on another. The appellant considered the works incomplete and abortive. Meantime the appellant had paid the respondent a sum of K400,000,000.00 for the works at PHI, but the respondent diverted the money to the FTJ Institute, a private institution, without the knowledge or authority of the appellant. The appellant asked for refund of the money, but after it became apparent that the respondent had failed or neglected to refund the money, it was agreed between the parties that the money be treated as an advance payment to be deducted from certificates to be issued for works done at the Millennium Village.

Later, the respondent rendered its final account in the sum of K469,254,506.72 for the works done at the Millennium Village and the appellant issued certificates for the said works. However, the appellant failed to settle the amount. The respondent then commenced proceedings seeking payment of the said sum of K469,254,506.72; interest and other charges from the date of issue of the certificates up until payment standing at K3,314,794,759.52 as at April, 2006; damages for breach of contract; and costs.

In its defence, the appellant pleaded that the respondent was not entitled to any of its claims, and that upon reconciling the figures, it discovered that it owed the respondent a sum of K4,336,189.08 which was admitted. Consequently, judgment on admission was entered on 6th June, 2007 for the admitted sum.

As we have said the lower court found in favour of the respondent less the K400,000,000.00 which was misapplied. It seems that the respondent had abandoned its claim for compound interest. Therefore, the court awarded interest on the balance payable to the respondent at the normal ruling banking rate.

The appellant now appeals on the following five grounds:

1. **The lower court erred in law and fact when it held that the Court accepts that FTJ Institute is a private institution which should not be funded by public resources but did not order refund of the sum of K400,000,000.00**

2. **The lower court erred in law and fact when it found that the Plaintiff misapplied the K400,000,000.00 but then contradicts itself by taking the amount as part of the money due to be paid to the plaintiff for works carried out at both Millennium Village and the FTJ Institute when in fact the plaintiff completed only one villa while MKP supplemented the plaintiff's shoddy works**

3. **The lower court erred in law and fact when it failed to find for the defendant that the plaintiff did abortive works which clearly points to breach of contract on the plaintiff's part for which the court should have found that the defendant was entitled to damages for breach of contract for causing delay in completion**

4. **The lower court erred in law and in fact when it failed to hold that the expenditure on works at FTJ Institute was illegal and was outside the terms of the contract as such should have been excluded from the total expenditure incurred by the plaintiff as admitted in evidence**

5. **The lower court erred in law and in fact when it failed to find but merely glossed over that there was a breach of contract as admitted in the judgment at J4 in the second paragraph from the bottom and that MKP completed the other villa. It is travesty of justice to deny the defendant damages for breach of contract by the plaintiff**

In her written Heads of Argument, counsel for the appellant opted to abandon ground 2 and argued grounds 1 and 4 together and grounds 3 and 5 also together.

In relation to grounds 1 and 4, she submitted, in brief, that the K400,000,000.00 that was paid to the respondent should be refunded to the appellant as the respondent had been in utter disregard of the contractual relationship by misapplying funds meant for the project at the PHI to the FTJ Institute. She submitted that the court below should not have ended at accepting that public funds were misapplied by being directed to a private institution, but should have further ordered that the money be refunded instead of mixing the sum of K400,000,000.00 with the respondent's final account for the works carried out at the Millennium Village.

Counsel further submitted that the lower court ought to have considered the very important fact that the respondent had blatantly breached the contract to the extent that there was no legal linkage between the respondent's contract to construct housing units at PHI and that of constructing villas at the Millennium Village. She referred us to paragraph 452 of **Halsbury's Laws of England**, **Volume 4**. However, the actual text quoted by counsel appears at paragraph 1220 of the 4th edition and reads as follows:

> **"Where no price has been agreed and the work is carried out in the reasonable expectation of payment, the contractor is entitled to claim on a quantum meruit basis."**

We wish to state from the outset that all of the texts quoted by counsel for the appellant from Halsbury's Laws of England do not appear at the alleged paragraphs of either the 3rd edition or the 4th edition. Counsel did not find it necessary or important to give full and proper citations in her Heads of Argument. This conduct on the part of counsel is unacceptable and will not be condoned.

Counsel for the appellant also contended that from the statement of claim, the respondent's claim was for monies purportedly owed to them in respect of works done at the

Millennium Village; and that there was no legal foundation upon which the lower court held that the respondent would succeed save for the sum of K400,000,000.00 already paid to them.

Counsel further argued that the appellant's defence at page 51 of the Record of Appeal is very clear that the respondent was not owed any money as it had not performed the contract and was in breach and that for the actual work done, its claim had been settled in full by the judgment on admission on a reconciled amount; and that the court should have ordered a refund of the money paid to the respondent and not allowed it to benefit from funds meant for a public project and keep the money at the appellant's expense.

She contended also that the court below should have considered the fact that the works carried out at the Millennium Village were defective and ultimately abortive, so the appellant had no substantial benefit from those works; and that the appellant was in fact forced to engage another contractor to do the work which the respondent had been contracted to do.

She further argued that the fact that the respondent had been paid in full for the works does not mean that the appellant had

waived its right to collect damages and or compensation from the respondent for the incomplete and defective works. She cited paragraph 338 of Halsbury's Laws of England. The actual text appears at paragraph 1236 of the 4th edition and reads as follows:

> **"1236. Acceptance of defective or incomplete performance. Generally neither the employer nor his architect owes a duty to the contractor to condemn defective work promptly and acceptance will not be implied from the fact that the employer had knowledge of the defects at the time the work was done. The employer does not accept defective work merely by moving into occupation and making use of the building or other structure constructed under the contract. Further the fact that the employer has made interim payments or paid the contractor in full does not mean that he has accepted defective work. In all these circumstances, an employer has been able to maintain an action in respect of the defective work."**

Additionally, counsel argued that the court below should have considered the fact that the diversion of the K400,000,000.00 meant for the Millennium Village to works at the FTJ Institute was illegal and could not have been included in the respondent's final account as the money was not applied to construction works at Millennium Village. That the court erred in upholding the respondent's claim generally and saying the K400,000,000.00 would be deducted from the sum claimed without giving proper direction as to which part of the claims had succeeded.

It is also the argument of counsel that the appellant, in its defence, did not admit that the respondent was owed K66,860,000.61 as found by the court below. That the appellant admitted only the sum of K4,336,189.17 which appears in the reconciled accounts at pages 101 to 104 of the Record of Appeal; and that the delay to pay the admitted amount was due to the respondent's failure to render its final account.

Counsel further argued that since the court decided to set-off the sum of K400,000,000.00 it should also have set-off the sum of K62,334,407.05 to further reduce the respondent's claims to the amount entered on admission. She contended that the appellant was entitled to damages for breach of contract; therefore, it was erroneous for the court to condemn it in damages.

In support of grounds 3 and 5, counsel for the appellant reiterated that the respondent was engaged to build foundations for 24 villas and to complete 4 of them, but it finished only 1 and did shoddy works on another. She cited **Zambia Building & Civil Engineering and Contractors Limited v Janina Georgopoullos**[1] where the High Court held that it is an implied term of a building

contract that the contractor should maintain reasonable progress and that failure to proceed expeditiously after reasonable notice will evince an intention no longer to be bound and so to justify the employer in treating the contract as at an end.

She again referred us to the 4th Volume of Halsbury's Laws of England, paragraphs 318, 360 and 361. However, the actual texts quoted appear at paragraphs 1130, 1151 and 1152 of the 4th edition. The learned authors state in the said paragraphs as follows:

> "**1130. Need for tenders or estimates. Where the contractor agrees to carry out work without more but in expectation of payment, the employer must pay a reasonable sum in respect of the work done...**
>
> **1151. Duty to complete in general. Most contracts provide that the contractor shall carry out and complete the works described in the contract. Where the extent of the work is defined, a duty to complete the work is implied, the contractor having a correlative right to complete the work...**
>
> **1152. Extent of the obligation. Whether the contractor is responsible for the design of the building or engineering works depends on the terms of the contract. Where the contractor has undertaken that the works will be fit for a particular purpose, there is no completion if the work is useless and the employer is not bound to pay for a building which is not fit for its purpose but he may be liable on quantum meruit basis..."**

Counsel submitted further that the respondent was under an obligation to complete the works contracted to be done under the

contract, otherwise be liable at law to compensate the appellant by way of damages for breach of contract. She further referred to **Dodd Properties (Kent) Limited and another v Canterbury City Council and others**[2]. Counsel further cited **Hanak v Green**[3] and submitted that the appellant was at liberty to deduct both the K400,000,000.00 and the K62,344,407.64 from the amount claimed by the respondent because these sums fell due to the appellant by operation of law with respect to set-off. Counsel also cited **East Ham Corp v Benard Sunley & Sons Limited**[4].

She argued that the appellant rightly put its claim of set-off and counterclaim before the court below, but the court only considered one of the claims and left out the claims for set-off against the respondent's claim with respect to abortive works and the resultant claim for damages for breach of contract owing to the fact that the respondent did not complete construction and did shoddy works which had to be rectified by another contractor.

Counsel submitted that the court below should have considered the appellant's defence on the abortive works on the second villa and the roads which the next contractor had to

reconstruct including the other 22 foundations and the 4 villas which the appellant was forced to redo and awarded it damages. She also cited **Hudson Building & Engineering Contracts** where she argued that the learned authors state at paragraph 4-008:

> **"A builder might have apparently completed a project but if some omissions or defects were then discovered, the owner could then avoid payment of a perhaps substantial contract sum or balance otherwise overdue."**

Counsel further referred us to, inter alia, **Ellis v Hamlen**[5], and **Hoeing v Isaacs**[6] to buttress her argument that the respondent was not entitled to any payment due to shoddy work or that if so entitled, then it was to payment on a quantum meruit basis, but which does not include payment for work which is later discovered to be abortive. She further submitted that the appellant should be awarded damages for breach of contract for failure by the respondent to perform the contract. She urged us to uphold the appeal and to overturn the judgment of the lower court.

On the other hand, counsel for the respondent argued the four grounds of appeal individually. He submitted in his Heads of Argument, that the first ground of appeal is firstly, factually

incorrect as it does not reflect what the court below said in its judgment. Counsel further submitted that the court found as a fact that the respondent wrongly applied the PHI Vote to the FTJ Institute which was a private entity and ordered that the K400,000,000.00 be deducted from the respondent's claim.

He contended secondly, that the law which the appellant argued the court misapplied has not been stated. That the appellant is challenging a finding of fact without demonstrating what was wrong with the finding. He referred us to, inter alia, **Wilson Masauso Zulu v Avondale Housing Project Limited**[7] for the principle that we can only reverse findings of fact by a trial judge, where the findings were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or they were findings which on a proper view of the evidence, no trial court acting correctly could reasonably make.

Counsel further argued that all the findings of the court relating to the K400,000,000.00 had basis since the parties had agreed to treat the said amount as an advance payment to be deducted from certificates to be issued by the appellant, and that

the court was merely acting on the said agreement. He drew our attention to paragraphs 5 and 6 of the appellant's defence and the witness statement of Baldwin Mbuzi (DW1) and urged us to dismiss ground 1. Suffice to add that counsel has applied the same arguments to ground 5.

In reply to ground 3, he submitted that the court below could not have found for the appellant in the absence of a counter-claim. That the appellant's defence and its arguments in the court below reveal no counter-claim for damages for breach of contract, therefore, the court had no basis on which to make such award. He cited our decisions in **William David Carlisle Wise v E.F. Hervey Limited**[8] and **Anderson Mazoka & others v Mwanawasa & others**[9] on the importance of pleadings. He argued that having failed to plead for damages by way of counter-claim, the appellant cannot, at this late hour, be allowed to sneak in that claim.

As to ground 4, counsel does not understand the gist of this ground. He argued that if the argument relates to the lower court's finding that the respondent had misapplied the K400,000,000.00 to the FTJ Institute, he repeats his arguments on ground 1. That in so

far as it relates to the terms of the contract, the issue of the FTJ Institute was only relevant in addressing the K400,000,000.00, and that if it relates to anything else it was not pleaded.

We have considered the evidence in the court below, the judgment appealed against, and the submissions of counsel. It is our view that the four grounds of appeal raise only two issues for consideration, namely whether the findings of the court in relation to the K400,000,000.00 misapplied by the respondent were not supported by the evidence, and whether the appellant is entitled to any damages from the respondent for breach of contract.

Concerning the lower court's finding on the K400,000,000.00 misapplied by the respondent to the FTJ Institute, we note, first, that the parties had agreed, long before the suit, to treat the amount as an advance payment to be deducted from amounts owing on the certificates to be issued to the respondent for the works at the Millennium Village. This is clear from the appellant's defence, the witness statement of Baldwin Mbuzi, employed by the appellant as director of projects, and from his letter to the

respondent's Managing Director and the full and final settlement of the claim at pages 51, 98, and 100 to 102 respectively of the record.

Second, the lower court's decision that the appellant denied the respondent's claim save for K66,860,596.72 which remained after deducting the K400,000,000.00, which was what the appellant was willing to pay is also a finding of fact supported by the evidence of Mr. Mbuzi who conceded that the respondent was owed more than K400,000,000.00; that the K400,000,000.00 misapplied by the respondent to the FTJ Institute was recovered by the appellant as agreed and instructed by the respondent; and that the outstanding amount owing to the respondent at the Millennium Village of K66,680,596.72 was going to be paid.

Third, whilst the appellant pleaded that after reconciliation only a sum of K4,336,189.08 was found owing to the respondent, Mr. Mbuzi acknowledged at trial that the respondent was entitled to the sum of K66,680,596.72; that the amounts the respondent had been claiming were accepted; and that the appellant's own Quantity Surveyor carried out a valuation of the works and its Architect issued the certificates of the amounts payable.

In **Hoeing v Isaacs**[6], one of the cases cited by the appellant, the issue was whether in a contract for work and labour for a lump sum payable on completion, the defendant could repudiate liability under the contract, on ground that the work though finished or done, was in some respect not in accordance with the contract. It was held that the defendant could not repudiate liability on that ground, and was liable for the balance sued for, less a deduction based on the cost of making good the defects or omissions proved.

In this case, the full and final settlement of the claim at p. 103 of the record, shows that the amount of K62,344,407.64, which the appellant argued accounted for liquidated and ascertained damages for abortive works, and ought to have been set-off or deducted by the court, and which the appellant deducted to arrive at the admitted sum of K4,336,189.17, was in fact owed to the appellant on the Twapia Projects.

It is clear to us that the attempt by Mr. Mbuzi to bring in the Twapia Project was shot down by his own counsel and was also objected to by counsel for the respondent on the ground that it was not pleaded. This is evident from pages 227 and 234 of the record.

On the basis of all the above mentioned, we do not agree with the appellant that the respondent can recover nothing on the contract because it stopped before the work was completed or abandoned the contract. In our view, the respondent was entitled to payment on a quantum meruit basis as stated in the various authorities cited by counsel for the appellant and we are convinced that the valuation of the works by the appellant was on quantum meruit basis. Hence, the court below was on firm ground when it held that the K400,000,000.00 should be deducted from the sum claimed by the respondent.

In point of fact, as submitted by the respondent, the court gave effect to the agreement of the parties by ordering that the K400,000,000.00 be deducted from what was due to the respondent as agreed by the parties. This is not a proper case for us to interfere with the holding of the lower court as the decision was based on clear evidence (See **Wilson Masauso Zulu v Avondale Housing Project Limited**[7]). However, in view of the fact that judgment on admission for the sum of K4,336,189.08 was entered before trial, the balance owing to the respondent should be less by that amount.

We now turn to the question of whether the appellant is entitled to any damages for breach of contract, which is the gist of its arguments on grounds 3, 4 and 5. To start with Order 28 (3) of the High Court Rules, Cap 25 provides as follows:

> **"A defendant in an action may set-off, or set up by way of counter-claim against the claim of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the Court or Judge may, if, in its or his opinion, such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereto".**

Undoubtedly, the aforesaid provision requires a defendant to set-off, or set up any right or claim by way of counter-claim against the claim of the plaintiff so as to enable the Court to pronounce a final judgment in the same action.

It is also trite law that matters that a party wishes to rely upon in proving or resisting a claim must be pleaded. But, where a party does not object to evidence on unpleaded matter, the court is not precluded from considering the evidence. The resolution of the matter will depend on the weight the court will attach to such

evidence. Each case must be considered on its own facts. In a proper case, the court will always exclude any matter not pleaded, more so where an objection has been raised.

It is further trite law that the function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties; and once the pleadings have been closed, the parties are bound by their pleadings and the court has to take them as such (See **William David Carlisl Wise v E.F. Hervey Limited[8], Mazoka and others v Mwanawasa and others[9]** and **Undi Phiri v Bank of Zambia[10]**).

In this case, we accept that the appellant averred in its defence, that the respondent only worked on 1 villa as a complete unit, and did a substructure on another villa, which was considered abortive works. We also admit that in his witness statement, Mr. Mbuzi stated that though the respondent was claiming to have set out the works for roads and foundations to 24 villas and constructed 2 villas, the foundations were discarded and fresh ones done by MKP and that the respondent completed only 1 villa, the

other villa was completed by MKP. The lower court was alive to this assertion as indicated at pages10 and 12 of the record.

However, as correctly argued by the respondent, the appellant's defence contained no counter-claim, either for damages for breach of contract arising out of shoddy and/or incomplete works or for set-off. It is also imperative to mention that the issue at trial centred not on the alleged damages for breach of contract, but on the K400,000,000.00 that was misapplied by the respondent to the FTJ Institute and on the question of interest.

Counsel for the appellant seeks to rely on authorities, which for us, are distinguishable. For instance **Dodd Properties (Kent) Limited and another v Canterbury City Council and others**[2] dealt with costs of repairs to a building and the issue as to how and, more particularly, on what date those costs were to be assessed. The text quoted by counsel for the appellant in her submissions does not appear anywhere in that judgment. Further, the quotation by counsel from **Hoeing v Isaacs**[6] is misleading as the gist of the decision was that a contractor is entitled to payment for work done less the cost of making good of the defects.

Furthermore, in **Hanak v Green**[3], there was no holding as cited by counsel for the appellant to the effect that '**there is a presumption that a binding contract does not disentitle a party to remedies that would arise by operation of law, including the right of abatement and set-off**'. The appeal in that case arose from the discontent of the defendant as to the orders as to costs. But in dealing with the issue the Court of Appeal considered the nature of the various claims and the issue of set-off before and after the Supreme Court of Judicature Act, 1873. In fact in that case the defendant put up a counter-claim which was allowed to be set-off against the plaintiff's claim, unlike the position in the present case.

Further still, in **East Ham Corp v Benard Sunley & Sons Limited**[4], Lord Cohen referred to three possible bases of assessing damages, namely a) the cost of reinstatement, b) the difference in cost to the builder of the actual work done or work specified or c) the diminution in value of the work due to breach of contract. Although that case related to defective work, it does not in any way assist the appellant as it did not counter-claim damages for breach of contract or set-off.

We are persuaded that failure to plead damages for breach of contract arising out of shoddy and/or incomplete works was fatal to the appellant's case. We are also convinced that on the evidence presented, the court below had no basis on which to award the appellant damages for breach of contract.

All in all, we find no merit in the four grounds of appeal. We dismiss the appeal with costs to the respondent, to be taxed in default of agreement.

As we end our judgment, we wish to comment strongly that this appeal was unnecessary. If counsel, both of Messrs. Paul Pandala Banda & Company, who filed the appeal, and indeed the appellant's, own In-house counsel, who filed the Heads of Argument and argued the appeal, properly addressed their minds to the evidence on record and to the law, the appeal could have been avoided. We would have condemned counsel, personally, to bear the respondent's costs, but for now a reprimand will suffice.

**E. C. MUYOVWE**
**SUPREME COURT JUDGE**

**M. LISIMBA**
**ACTING SUPREME COURT JUDGE**

**R. M. C. KAOMA**
**ACTING SUPREME COURT JUDGE**