IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 26/2013
SCZ/8/340/2012

BETWEEN:

ZAMBIA REVENUE AUTHORITY **APPELLANT**

AND

NASANDO ISIKANDO AND 3525 OTHERS **RESPONDENTS**

CORAM: **Chibomba, Muyovwe, JJS and Lengalenga, Ag JS.**
On 10th October, 2013 and 30th September, 2014.

For the Appellant : Mrs. D. B. Goramota and Mrs. F. Kambobe Mweetwa, In-house Legal Counsel, ZRA.
For the Respondents: Mr. N. Okware of Messrs Okware and Associates and Mr. M. Katolo of Messrs Milner Katolo and Associates.

J U D G M E N T

Chibomba, JS, delivered the Judgment of the Court.

Cases referred to:

1. *Blair Freight International Limited v Credit Africa Bank Appeal No. 8/1997.*
2. *Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa, The Electoral Commission of Zambia and the Attorney General (2005) ZR 138.*
3. *Palmer and Another v Dunford Ford (a firm) and Another [1992] 2 All ER 122.*
4. *Warson v Birch (1847) 15 Sim 523.*
5. *Hebblethwaite v Peever (1892) 1 QB 124.*
6. *July Danobo T/A Juldan Motors v Chimsoro Farms Limited (2009) ZR 147.*
7. *Siebe Gorman and Company Limited v Priepac Limited (1982) 1 All ER 377.*
8. *Balkanbank v Taher and Others [1995] 2 All ER 904.*

Legislation referred to:

1. ***Income Tax Act, Chapter 323 of the Laws of Zambia.***
2. ***Supreme Court Act, Chapter 25 of the Laws of Zambia.***

Works referred to:

1. ***Rules of the Supreme Court (RSC) Whitebook 1999 Edition, Order 45/ 6, Order 3/6 and Order 42/5A/4, 4608.***

This is an Appeal from the Judgment of a High Court Judge in Chambers, dated 21st September, 2012, dismissing the Appellant's (Defendant in the Court below) Appeal and referring the Respondents' (Plaintiffs in the Court below) tax refund claim back to the Deputy Registrar for individual assessment.

The facts of this case are that the Respondents were former employees of the Appellant. They were placed on voluntary separation under the Public Service Reform Programme, between March and September, 1999. The Respondents were paid special severance packages. They, however, claimed that these had been wrongfully subjected to tax deductions, as they were exempted from paying tax under **Part IV of the Second Schedule of the Income Tax Act**. On 5th September, 2002, the Respondents issued a Writ of Summons against the Appellant, seeking the following reliefs: -

"(i) The sum of K4, 231,308,212.00 being monies wrongly deducted from their terminal benefits;

(ii) Interest on the amount wrongly deducted from the date of the deduction until final payment;

(iii) Costs and;

(iv) Any other relief the Court may deem just and appropriate."

The Appellant did not file any defence. The Respondents obtained Judgment in Default of Appearance and Defence. On 8th January, 2003, the parties signed a Consent Order (the subject of these proceedings), in which it was mutually agreed, *inter alia*, that the Judgment in Default of Appearance and Defence be set aside and that the Respondents be paid according to their individual assessments.

Afterwards, the parties engaged in *ex curia* settlement for the refunds. Payments in the sum of K2, 604, 587, 756.68 were made to some of the Respondents through their Advocates. During that period, there was a change of Advocates and those Respondents that had received refunds complained of under payments due to further tax deductions. The Respondents demanded immediate refunds of these re-assessed amounts. The Appellant, in turn, declined to pay on ground that the claims by the Respondents had been re-assessed and refunded through their previous Advocates. And that the Appellant had been indemnified by the

Respondents from all further claims and that there having been no objection to the assessments, the Respondents' claims had become statute barred. The *ex-curia* settlement, subsequently, broke down.

The Respondents then issued a Notice of Assessment for the tax refunds on 17th August, 2011, before the learned Deputy Registrar, pursuant to the Consent Order and under Order 45 Rule 6 of the Rules of the Supreme Court (RSC) White book, 1999 Edition. The Appellant objected and filed a Notice to Raise Preliminary Issues, urging the Court below to set aside the Application for irregularity. It was the Appellant's contention that the assessment ought to have been done by the Appellant and not the Court. The learned Deputy Registrar dismissed the Preliminary Objection and ordered that the matter proceeds for assessment on account that the Appellant, as a party to the dispute, could not assess the extent of its own liability. The Appellant appealed to a High Court Judge in-Chambers, advancing five grounds of appeal. These were that the learned Deputy Registrar had neglected to address the issue of the application being statute barred and the fact that what the Respondents had been claiming was *ultra vires* the Consent Order and untenable at law. Further,

that the learned Deputy Registrar had not taken into account the fact that the Respondents had already been paid their refunds and hence, the Court was *functus officio*.

The Respondents, on the other hand, argued that the learned Deputy Registrar was on firm ground when he ordered the assessment to proceed. That Sections 87, 108 and 113 of the **Income Tax Act** were inapplicable to the case in *casu* as the provisions envisaged a situation where the Appellant initiated an assessment against a tax payer and that the affected tax payer raised an objection or appeals against that assessment. That this was different from the present case, where there had been a Court Order to assess what was due and payable to each individual. That the Court was not *functus officio* as the learned Deputy Registrar had not carried out any assessment and neither had there been any time limit within which to conduct such assessment.

Upon considering the submissions, the learned Judge dismissed all the five grounds of appeal. He found that that since the matter had been brought before Court it was well within its jurisdiction to conduct the assessment. The learned Judge also came to the same conclusion, as had

been argued by Counsel for the Respondent, that Sections 87, 108 and 113 of the **Income Tax Act** were irrelevant, as the provisions related to matters before they became subject of Court proceedings. The learned Judge conceded that the learned Deputy Registrar had not addressed the issue of statutory limitation but that on the basis of his findings, he was confident that the learned Deputy Registrar would have reached the same conclusion. That in any event, there had been no time limit stipulated for assessment in the Consent Order. The learned Judge also held that the Court was not *functus officio* as it had not conducted any assessment. He then concluded the Judgment in the following manner: -

> ***"The sum total of this Appeal is that all the five grounds of appeal are dismissed with costs to the Respondents, to be taxed in default of agreement by the parties. As laborious as the exercise might be, the matter is referred back to the learned Deputy Registrar for assessment."***

Dissatisfied with the Judgment, the Appellant appealed to this Court raising only one ground of appeal in the Memorandum of Appeal, namely: -

> **"That the learned trial Judge in the Court below misdirected himself in law and in fact when he held that the provisions of Sections 87, 108 and 113 of the Income Tax Act, Chapter 323 of the Laws of Zambia, are not applicable to assessments in tax matters relating to Court proceedings."**

When the parties appeared before us at the hearing of this Appeal, Counsel on both sides indicated that they would rely on their filed written *Heads* of Argument. The gist of Mrs. Goramota's argument, on behalf of the Appellant, was that the learned Judge erred when he held that the provisions of Sections 108 and 113 of the ***Income Tax Act*** were not applicable to tax assessments relating to Court proceedings. She contended that because the Respondents were challenging the Appellant's assessment, the matter ought to have been referred to the Commissioner General who was the only one empowered under Section 113 of the Act, to make assessments and adjustments that would give effect to the Consent Order. It was Counsel's submission that the action commenced by the Respondents fell within the ambit of Section 113 as it had been resolved by the Consent Order and had in effect been finally determined by the High Court.

Mrs. Goramota urged this Court to examine the meaning of Section 113 within the context of the entire Part XI of the Act which dealt with objections and appeals. She, particularly, urged us to interpret the meaning of the words "***...final determination of an objection or appeal against an***

assessment..." in Section 113. She, further, reiterated that the Respondents' claim was statute barred as their objections to the assessments were raised after a lapse of more than five years instead of within 30 days from the date of the initial objection pursuant to Section 108.

In response, Mr. Katolo augmented the Respondents' arguments with oral submissions on two points. Firstly, that the matter before us was anchored on the Consent Order and in particular, paragraph two which provided for assessment of the amounts due to each individual. He submitted that the question for resolution is who, between the Court and the Appellant, was entitled to conduct the assessment? It was his submission that it was the Court, and not a party. Secondly, that in response to the Appellant's argument that the Application for assessment was out of time, it was submitted that even if it was admitted that there was time lapse between the Consent Order and the Application for assessment, that the Application was within time for an on-going matter.

In their written Heads of Arguments, Counsel for the Respondents submitted that the assessment referred to in the Consent Order was not

that contemplated under Sections 87, 108 and 113 of the **Income Tax Act**. He, further, submitted that the learned Judge was on firm ground when he held that tax matters subject of Court proceedings could only be heard by the Commissioner General if they were referred to him by the Court. Counsel argued that the Appellant's claim that the Respondents' objections were statute barred was untenable at law. It was Counsel's submission that the statute of limitation the Appellant was relying on only applied to commencement of suits before the relevant Courts of law and not to enforcement of Judgments or Orders. Counsel contended that the fact that the Appellant paid into Court the sum of K2, 783,315.25 was not only an admission of liability, but also, in partial fulfillment of his clients' claim. The Respondents prayed that this Court would dismiss this Appeal as it was frivolous.

At this stage, we note that Counsel for the Appellant filed submissions for what purports to be a second ground of appeal. We found this to be rather strange but we shall give our reasons later. Suffice to say that this "ground of appeal" was to the effect that: -

> **"The learned trial Judge in the Court below erred in law and fact when he overlooked the provisions of Sections 14 and 15 of the Income Tax Act and neglected to consider the Appellant's contention that what the**

Respondents were claiming before the learned Deputy Registrar was ultra vires the Consent Order of 8th January, 2003 and untenable at law."

Counsel argued, in respect of this "ground of appeal" that contrary to the Respondents' claim that they were exempted from paying tax altogether on ground that there is no law in place that provides for taxation of payments made to employees who opt for voluntary separation, Section 14 of the **Income Tax Act** makes it mandatory for all income received from any source within Zambia to be subjected to tax. That only incomes set out in the Second Schedule of the Act were exempt and that incomes of persons that had opted for voluntary separation or early retirement, like the Respondents, were not among those covered in that Schedule.

In response, Counsel for the Respondents urged us not to entertain the second "ground of appeal" as leave had not been obtained to amend the Memorandum of Appeal to include other grounds of appeal pursuant to Section 25(1) of the **Supreme Court Act**. Counsel referred us to the case of ***Blair Freight International Limited v Credit Africa Bank***[1] to support the proposition that grounds of appeal, like pleadings, were meant to notify the other party or parties, and the Court of matters in issue over the Judgment of the lower Court. Counsel submitted that Heads of Argument

were means, by which evidence, fortifying those grounds, was presented, and not a platform to raise entirely new grounds of appeal. He urged us to expunge this particular "ground of appeal" from the record.

In the written submissions in reply, Counsel for the Appellant submitted that the Appellant had filed an Application for leave to add or substitute other grounds of appeal, which was granted, as demonstrated by the Summons and Order exhibited at pages 76 and 89 of the Record.

As regards, the provisions in Section 113 of the **Income Tax Act**, Counsel reiterated that the intention of Parliament was unambiguous and that in our interpretation of the statute, the words ought to be given their ordinary and natural meaning in line with the principles enunciated in ***Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa, the Electoral Commission of Zambia and the Attorney General***[2]. On the payment of money into Court, Counsel for the Appellant denied that it was an admission of liability.

Counsel, further, referred us to Order 3 rule 6 of the RSC 1999 Edition to buttress the Appellant's argument that the Application was

statute barred and to the following authorities: ***Palmer and another v Durnford Ford (a firm) and another***[3], ***Warson v Birch***[4], ***Hebblethwaite v Peever***[5], to demonstrate that the matter was determined with finality by way of Consent Order.

We have the examined the evidence on record, the submissions of both Counsel and the cited authorities. We propose to deal first with what purports to be the Appellant's second "ground of appeal". We must say from the outset, that we are taken aback by Counsel for the Appellant's attempt to sneak in a ground of appeal without leave of Court. Counsel for the Respondents referred us to Section 25 (1) of the **Supreme Court Act**. It is, however, our considered view that the appropriate provision for the present purposes, is Rule 58 of the **Supreme Court Rules**. Sub rules 2 and 3 of Rule 58 are very instructive and state as follows: -

> "(2) **The Memorandum of Appeal ...shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the Judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided...**
>
> (3) **The Appellant shall not, therefore without leave of the Court, put forward any grounds of objection other than those set out in the**

Memorandum of Appeal, but the Court in deciding the Appeal shall not be confined to the grounds put forward by the Appellant:

Provided that the Court shall not allow an Appeal on any ground not stated in the Memorandum of Appeal unless the Respondent including any person who in relation to such ground should have been made a Respondent, has had sufficient opportunity of contesting the Appeal on that ground."(Emphasis ours)

Evidently from the above stated rule, the purported second "ground of appeal" does not form part of the Appellant's Memorandum of Appeal at page 6 of the Record. Neither was leave sought in this Court to file additional or substituted grounds of appeal even when Counsel for the Appellant had the opportunity to do so well before hearing of this Appeal and thereby would have given an opportunity to the other side to respond. Although, Counsel for the Appellant submitted that leave was sought and obtained this was misleading because the Application Counsel was referring to (at pages 76 and 89), was made in relation to the Appeal before the learned High Court Judge in Chambers and not to this Appeal in this Court.

The provisions in the **Supreme Court Act**, specifying procedure for lodging the Record of Appeal as well as all other requisite documents, are

unequivocal and Counsel cannot be excused for failing to follow rules for preparing grounds of appeal. It is this sort of conduct that this Court frowns upon as it tends to ambush not just the Respondents, but also, the Court. As Counsel for the Respondents correctly observed, there is a purpose for preparing Memoranda of Appeal, and the grounds therein, in the manner prescribed. It is so that parties are not taken by surprise and may be notified what objections or issues in the Judgment they may have to meet. Failure to comply with these rules can have the grave consequence of an Appeal being dismissed (See ***July Danobo T/A Juldan Motors v Chimsoro Farms Limited***[6]). We hold that since leave was not sought, this Court will not allow the Appellant's second ground of appeal to stand and neither will we consider any of the arguments advanced under it. The purported second ground of appeal is accordingly expunged from the Record.

We shall now deal with the only ground of appeal. Most of the facts of this case are not in dispute. It is common cause that the Respondents left employment by voluntary separation but their terminal benefits were taxed by the Appellant. It is also common cause that by Consent Order, the Appellant agreed to pay, and even began, to refund the Respondents.

Further, it is common cause that a dispute arose over the assessment concerning the tax refunds. The issue, which this Court has to determine, as rightly submitted by Mr. Katolo, is whether the assessment of the Respondents' tax refund ought to be done by the Appellant or by the Court. This matter rests, to a very large extent, on how we construe the Consent Order in light of the provisions in Sections 87, 108 and 113 of the **Income Tax Act**.

As stated before, the parties signed a Consent Order which was couched in the following language: -

"By CONSENT of both parties through their Counsel, it is hereby ORDERED:

1. **That the Judgment in Default of Appearance entered on 25th September, 2002 is hereby set aside.**
2. **That the Plaintiffs will be paid as per individual assessment.**
3. **That the outstanding amount will attract interest as from the date of the Writ.**
4. **That costs to be agreed between the parties."**

From the facts on record, it is apparent that there was no dispute as to liability on the part of the Appellant. As the Court below properly found, the contention stemmed from paragraph two of the Consent Order, which

to some degree lacks clarity, firstly, as to who was to carry out the assessment and secondly, when the assessment was to be conducted and thirdly, the procedure to follow in the event that the parties disagreed over the assessments. Counsel for the Appellant argued with force, both before this Court and in the Court below that the assessment ought to have been done by the Appellant and that if there were any objections, these ought to have been referred to the Commissioner General, who was legally mandated under Sections 87, 108 and 113 of the **Income Tax Act**. The Respondents' case both here and in the Court below was that the provisions referred to were inapplicable because this matter was already a subject of Court proceedings.

Before we examine the contentious provisions, it must, first, be appreciated the nature and force of a Consent Order. There has been much persuasive debate. In the case of ***Siebe Gorman and Company Limited v Priepac Limited***[7], Lord Denning, MR, (as he was then) said at p379:

> ***"It should be clearly understood by the profession that when an Order is expressed to be made "by Consent" it is ambiguous. There are two meanings to the words "by Consent". That was observed by Lord Greene MR in***

Chandless-Chandless v Nicholson [1942] 2 All ER 315at 317. One meaning is this: the words "by Consent" may evidence a real contract between the parties. In such a case, the Court will only interfere with an Order on the grounds as it would with any other Contract. The other meaning is this: the words "by Consent" may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order can be altered or varied by the Court in the same circumstances any other Order that is made by the Court. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an Order made without obligation?"

In the Malaysian Court of Appeal, Ramly J, put it this way: -

"The Consent Order is founded on a Contract or agreement between the parties based on both parties' willingness to submit...to certain terms. Once the Appellant and the Respondent took (a) matter beyond the contract and recorded a Consent Order then they must accept all the implications of a Judgment or Order." (See Mayban Allied BHD v Kenneth Godfrey Gomez and Suhaimi bin Baharudin Rayuan Sivil No, W-02-1094 Tahun 2008)"

Lord Justice Staughton, summed it up more aptly in ***Balkanbank v Taher and others***[8] at p912 where he quotes Beldam LJ, in ***Cornhill Insurance Plc v Barclays [1992] CA Transcript 948:***

"When a Judge approves a Consent Order, it takes effect as if made by him after argument."

Essentially, although a Consent Order arises out of an agreement and terms arrived at by the parties themselves, and may even evidence a contract with or without obligation, it is a Judgment or Order made by or in the name of the Court and has all the consequences of a Court Judgment or Order (See Order 42/5A/4 RSC White book 1999 Edition). The parties must therefore accept all its implications.

Further, it is trite law that an action comes to an end when it is dismissed or where Judgment is given in favour of the Plaintiff, so far as deciding the rights of parties is concerned. The action is not at an end so far as regards the enforcement of the Judgment (See ***Electricity Supply Nominees Limited v Farrell and Others [1997] 2 All ER 498***). For this reason, we do not agree with Counsel for the Appellant that this matter was determined with finality and as such, the Court was *functus officio*. As a matter of fact, the authority Counsel cited: ***Palmer and Another v Durnford Ford (A firm) and Another***[3], held an action to be *res judicata* only if the "decision is one which leaves nothing to be judicially determined or ascertained in order to render it effective." That is not the case here. Therefore, based on the authorities we have cited, the Order for assessment to be done by the Deputy Registrar pursuant to the Consent

Order was perfectly within the province of the lower Court. The argument by the Appellant that the Consent Order had ousted the jurisdiction of the Court does not hold or arise at all. At any rate, if it was the intention of the parties to refer the assessment to the Commissioner General, they would have so specified in the Consent Order. In which case, it would still not have precluded the parties from having recourse to the Court in case of dispute over the assessment done by the Commissioner General. Thus, we cannot fault the finding of the learned Judge at page 20 of the Record of Appeal where he held as follows: -

> ***"However one should not lose sight of the fact that there were and are still Court proceedings and the Consent Order was a product of the Court proceedings and therefore, the issue of assessment is the domain of the Court, unless the Court or Consent Order specifically stated otherwise. Although there is nothing wrong in the parties having taken the initiative with the Appellant leading the assessment, in order for any assessment to have the due efficacy, it would still need the endorsement of the Court. In that vein, the fact that the Appellant did not have the powers to unilaterally assess the damages, the Respondents, cannot be estopped from bringing the matter before the learned Deputy Registrar for final determination as regards the assessment, should the parties not agree on the assessment."***

However, it remains to be established whether the terms of this Consent Order can be subjected to procedures stipulated under Part XI of the **Income Tax Act**, as strongly canvassed by the Appellant. We have

examined Part IX and summarise the relevant provisions as follows: Section 87 gives the period and procedure for a person or partnership aggrieved by any excess tax paid or deduction to make a claim to the Commissioner General. Such a claim ought to be made within six years from the end of the charge year or after service of notice of assessment; Section 108 gives the assessed person 30 days in which to file a notice of objection to the Commissioner General; and Section 113 empowers the Commissioner General to make assessment or adjustment where there is final determination of an objection to or appeal against an assessment.

In this Appeal, we were asked to interpret the above-stated provisions, and in particular, Section 113, within the context of the whole of Part XI. The law relating to interpretation of statutes is well established. In ***Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa, the Electoral Commission of Zambia and the Attorney General***[2], and cited to us by Counsel for the Appellant, we stated as follows: -

> ***"It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention of the legislation cannot be ascertained from the words used by the legislature that recourse can be had to other principles of interpretation."***

Having examined the provisions, we agree with Counsel for the Appellant that the provisions in Sections 87, 108 and 113 are unambiguous. The words used are so clear and precise, that, in our view, they need not be stretched or strained. These provisions empower the Commissioner General, as head of a body charged with the collection of taxes, to carry out assessment where there is an objection or carry out re-assessment where there is a successful Appeal from the Revenue Appeals Tribunal (Section 110), High Court and Supreme Court (Section 111), by a tax payer in any charge year.

In the same way, when Section 113 makes the following reference "***on final determination of an objection or appeal against an assessment the Commissioner- General shall make all assessments and adjustments as are necessary to give effect to the determination…,***" it relates specifically to a process that commences in the manner prescribed, i.e., where a tax payer raises an objection against tax assessment or amount paid in excess or where the matter ends in an Appeal to the Revenue Tribunal, High Court or Supreme Court. The meaning of "***Final determination***" or final decision is as defined in the authorities we cited earlier.

However, these provisions do not envisage a situation, as here, where proceedings commenced in the Courts of law, which culminated into a Consent Order, and still remains unresolved. Such proceedings remain within the jurisdiction of the Court to bring to finality. Therefore, the learned Judge was entitled to conclude, as he did, that Sections 87, 108 and 113 did not have any application to this action. The lower Court was also on solid ground when it referred the matter to the Deputy Registrar for assessment as clearly, there is a dispute, to which the Appellant is a party, over the computation of the amounts owed which needs to be resolved.

It follows, therefore, that arguments that the action is statute barred do not arise because the provisions referred to do not apply. In addition, as Mr. Katolo, correctly submitted, this was an on-going matter. As we have stated earlier, this matter, like all other cases before the Court, only come to an end once there is nothing more to adjudicate. Furthermore, there were submissions relating to payment of money into Court. This Court has deliberately not given its opinion as we did not find any evidence on the Record in that respect. We, therefore, find no basis to disturb the findings of the learned Judge. This one ground of appeal, therefore, fails.

For reasons stated above, this Appeal is dismissed for lack of merit, and the matter is referred back to the Deputy Registrar for assessment. Costs in this Court and in the Court below are for the Respondents to be taxed in default of agreement.

.....

H. Chibomba
SUPREME COURT JUDGE

.....

E. C. Muyovwe
SUPREME COURT JUDGE

.....

F. M. Lengalenga
ACTING SUPREME COURT JUDGE