

IN THE HIGH COURT FOR ZAMBIA

2008/HPC/0396

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



**BETWEEN:**

**SEONG SANG LIMITED**

**PLAINTIFF**

**AND**

**ATTORNEY GENERAL**

**1<sup>ST</sup> DEFENDANT**

**NANCY MACTRIBUOYE**

(Administratrix of the Estate of the Late Duncan Marlie)

**2<sup>ND</sup> DEFENDANT**

Before the Honourable Mr Justice W.S Mweemba at Lusaka in  
Chambers.

For the Plaintiff: Mr J. A. Wright- Messrs Wright Chambers

For the 1<sup>st</sup> Defendant: Mr Martin M. Lukwasa- Deputy Chief State  
Advocate

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## **RULING**

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### **LEGISLATION REFERRED TO:**

1. Law Reform (Miscellaneous Provisions Act, Chapter 74 of the Laws of Zambia.

### **CASES AND WORKS REFERRED TO:**

1. Phillips Loots and Donald Charret (2009) Practical Guide to Engineering and Construction Contracts.
2. W.V.H. Rogers, Winfield & Jolowicz on Tort, Sixteenth Edition, London, Sweet & Maxwell 2002.

This is ruling on an application by the 1<sup>st</sup> Defendant for Apportionment of Liability for Contributory Negligence pursuant to Section 10 (1) of the Law Reform Miscellaneous Provisions Act Chapter 74 of the Laws of Zambia.

The application is supported by an Affidavit sworn by Martin Muyayi Lukwasa and Skeleton Arguments filed into Court on 23<sup>rd</sup> June, 2016.

It was deposed by Mr Lukwasa that the Plaintiff commenced proceedings in the High Court, initially against the 1<sup>st</sup> Defendant and the Drug Enforcement Commission for:

- (i) A declaration that the 1<sup>st</sup> Defendant and the Drug Enforcement Commission are liable to account to the Plaintiff 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 Drug Enforcement Commission is a constructive trustee of the Plaintiff property in the sum of US\$822, 100.00 as were in the possession and control of the Drug Enforcement Commission.
- (iii) Further or in the alternative a declaration that the Plaintiff is equitably entitled to trace the sum of US\$822,100.00 that the Drug Enforcement Commission held in trust for the Plaintiff.
- (iv) An order that the 1<sup>st</sup> Defendant and the Drug Enforcement Commission pay to the Plaintiff the sum of US\$822, 100.00.

It is further deposed that in a Judgment delivered on 8<sup>th</sup> February, 2010 the Plaintiff was awarded the prayers it sought from the Court to the extent that the sum involved was US\$648, 113.08 which was the subject of the actual seizure, the balance being withdrawn by it and assumed by the Deceased prior to intervention by the Drug Enforcement Commission.

Moreover, that the 1<sup>st</sup> Defendant being dissatisfied with the Judgment appealed to the Supreme Court under Appeal No. 182 of 2010 where the Court found that both the Appellant (Attorney General) and the Administratrix were constructive trustees and therefore held liable to account to the Plaintiff.

It was further deposed that the Supreme Court then referred the matter back to the High Court for purposes of Joinder of the Administratrix and the Attorney General made the application for Joinder and the Administratrix was joined to the proceedings as Intended 2<sup>nd</sup> Defendant.

Moreover that in its Ruling on Joinder delivered on 30<sup>th</sup> December, 2014 the Court did not apportion how each of the Defendants were going to pay towards the settlement of the claim by the Plaintiff.

He also stated that it was desirable that the Court apportions the amount payable by each of the Defendants to avoid escalation of interest on the amount due.

Further that he verily believed that the interests of justice would be served for both parties in the matter if the apportionment was done by this Court.



That neither the Plaintiff nor the Defendants would in any way be prejudiced if the Application was granted as this was a fit and proper case to be determined by this Court.

There was also an Affidavit in Opposition filed into Court on 17<sup>th</sup> August, 2016 sworn by Jonathan Andy Wright the Advocate of the Plaintiff.

He stated that as correctly stated by the 1<sup>st</sup> Defendant in its Skeleton Arguments and Affidavit in Support it was not in dispute that the Plaintiff herein suffered damage as a result of the 1<sup>st</sup> Defendant's actions as found by both the High Court and the Supreme Court.

Further that he believed that the question of apportionment of liability did not apply as no contributory negligence was found by both the High Court and the Supreme Court.

Moreover that he believed that the Supreme Court did not refer the matter back to the High Court for purposes of apportionment of liability but for purposes of Joinder of the Administratrix to these proceedings.

That therefore this Honourable Court would be wanting in jurisdiction to apportion liability when the claim was not founded in negligence and/or contributory negligence but rather the Plaintiff's case against the 1<sup>st</sup> Defendant was founded in the equitable claim of constructive trust. That the 1<sup>st</sup> Defendant was indeed found liable as a constructive trustee, hence a tortfeasor.

Mr Wright also deposed that he believed that, in situations where a person had suffered loss caused by the actions of more than



one person, the traditional position had been that a Plaintiff could choose to take action against one or more of the wrongdoers and execute judgment for the entire amount of the damages against any one of the Defendants found to be jointly and severally liable.

Moreover that in the event of the Plaintiff choosing to execute judgment for the entire amount of the damages herein against the 1<sup>st</sup> Defendant, the law provided the 1<sup>st</sup> Defendant with the right to recover contribution by way of indemnity from the 2<sup>nd</sup> Defendant.

That in any case the 1<sup>st</sup> Defendant had indicated in its Skeleton Arguments herein that it was inclined to abide by the Judgment herein without prejudice to any other rights it might have in the settlement of the Judgment.

Further that in the premises, he craved the indulgence of this Court to dismiss this application with costs to the Plaintiff as doing so would not occasion any injustice or prejudice to the 1<sup>st</sup> Defendant.

Counsel for the 1<sup>st</sup> Defendant filed in Skeleton Arguments in support of the application. Counsel submitted that it was not in dispute that the Plaintiff suffered damage as a result of the 1<sup>st</sup> Defendant's actions as found by both the High Court and the Supreme Court and that the question that remained to be determined however was that of apportionment of liability.

Counsel also relied on Section 10 (1) of the Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia

which deals with apportionment of liability in case of contributory negligence and provides as follows:

**“10. (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:**

**Provided that-**

- (i) this subsection shall not operate to defeat any defence arising under a contract;**
- (ii) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.”**

Counsel also relied on Section 9 (1) (c) of the same Act and stated that this Section dealt with contribution between joint and several tortfeasors provided that:

**“(1) Where damage is suffered by any person as a result of a tort (whether a crime or not) (c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been,**

**liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.”**

Based on this section Counsel contended that the 1<sup>st</sup> Defendant was inclined to abide by the Judgment herein without prejudice to the other rights it may have in the settlement of the Judgment.

Counsel for the Plaintiff also filed Skeleton Arguments opposing the application. He submitted that Section 10 (1) of the Law Reform (Miscellaneous Provisions) Act, Cap 74 of the Laws of Zambia cited and relied upon by the 1<sup>st</sup> Defendant for its application did not apply to this case as it was not founded upon negligence, whether contributory and/or otherwise. Rather the Plaintiff's case against the Defendants was founded in the equitable claim of constructive trust and the 1<sup>st</sup> Defendant was indeed found liable as a constructive trustee, as joint tortfeasor. Therefore reliance upon section 10 (1) above was a serious misdirection.

He also contended that the position at law was that when a Plaintiff had a judgment against two or more Defendants, he was at liberty to execute on any of the parties.

He cited Philip Loots and Donald Charrett the learned Authors of Practical Guide to Engineering and Construction Contracts, 2009 at page 64 who stated that:



**“In situations where a person has suffered loss caused by the actions of more than one person, the traditional position has been that a Plaintiff can choose to take action against one or more of the wrongdoers and execute judgment for the entire amount of the damages against any one of the Defendants found to be jointly and severally liable.”**

Further it was Counsel’s submission that the Plaintiff had freedom to choose to execute the Judgment for the entire amount herein granted against any one of the two Defendants herein and the 1<sup>st</sup> Defendant had admitted that it was inclined to settle the Judgment.

He also cited Section 9 (1) (c) of the Law Reform (Miscellaneous Provisions) Act, Cap 74 of the Laws of Zambia which provides as follows:

**“(1) Where damage is suffered by any person as a result of a tort (whether a crime or not) (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.”**

Counsel then submitted that the 1<sup>st</sup> Defendant had admitted so in its Skeleton Arguments that the Plaintiff suffered damage as a

result of the 1<sup>st</sup> Defendant's actions as found by both this Court and the Supreme Court.

He also contended that the 1<sup>st</sup> Defendant had further admitted that it was willing to settle this debt without prejudice to any other rights it might have in the settlement of the Judgment. Therefore in an event of the Plaintiff choosing to execute judgment for the entire amount of the damages herein against the 1<sup>st</sup> Defendant, the provision of the law above provided the 1<sup>st</sup> Defendant with the right to recover contribution from the 2<sup>nd</sup> Defendant who was also liable to the Plaintiff as a joint tortfeasor.

He then submitted that from the foregoing, this case was not an appropriate one for this Court to grant the relief sought by the 1<sup>st</sup> Defendant in its application herein. Further that the 1<sup>st</sup> Defendant would not be prejudiced if it settled the entire amount of damages herein as the law made ample provision for it to recover from the other tortfeasor, the 2<sup>nd</sup> Defendant, by way of indemnity after an action.

It was Counsel's prayer that the Application be dismissed with costs.

During the hearing on 20<sup>th</sup> September, 2016 both Counsel for the Plaintiff and the 1<sup>st</sup> Defendant were before Court. Counsel for the 1<sup>st</sup> Defendant relied on the Affidavit in Support of Summons for Apportionment of Liability for Contributory Negligence and Skeleton Arguments filed into Court on 23<sup>rd</sup> June, 2016. Counsel for the Plaintiff also relied on the Affidavit in Opposition and Skeleton Arguments filed into Court on 17<sup>th</sup> August, 2016.



I have considered the Affidavit evidence, the Skeleton arguments and authorities cited by both learned Counsel for the Plaintiff and the 1<sup>st</sup> Defendant.

The gist of the 1<sup>st</sup> Defendants arguments was that it was not in dispute that the Plaintiff suffered damage as a result of the 1<sup>st</sup> Defendant's actions as found by both the High Court and the Supreme Court and that the question that remained to be determined however was that of apportionment of liability.

Counsel for the 1<sup>st</sup> Defendant relied on Section 10 (1) of the Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia which deals with apportionment of liability in case of contributory negligence and Section 9 (1) (c) of the same Act which dealt with contribution between joint and several tortfeasors.

Whilst a summary of the arguments of the Plaintiff in opposing the application are that the Supreme Court did not refer the matter back to the High Court for purposes of apportionment of liability but for purposes of Joinder of the Administratrix to these proceedings.

That this Honourable Court had no jurisdiction to apportion liability when the claim was not founded in negligence or contributory negligence but in the equitable claim of constructive trust therefore relying on Section 10 (1) of the Law Reform (Miscellaneous Provisions) Act, Cap 74 of the Laws of Zambia was a misdirection.



He also contended that the position at law was that when a Plaintiff had a judgment against two or more Defendants, he was at liberty to execute on any of them. Further that the 1<sup>st</sup> Defendant had admitted in its Skeleton Arguments that the Plaintiff suffered damage due to the 1<sup>st</sup> Defendant's actions as found by both this Court and the Supreme Court.

He also submitted that the 1<sup>st</sup> Defendant had further indicated that it was willing to settle this debt without prejudice to any other rights it might have in the settlement of the Judgment.

Lastly Counsel argued that the 1<sup>st</sup> Defendant would not be prejudiced if it settled the entire amount of the damages herein as the law made ample provision for it to recover from the other tortfeasor, the 2<sup>nd</sup> Defendant, by way of indemnity after an action.

I note from the record that it is not in dispute that the Plaintiff suffered damage due to the 1<sup>st</sup> Defendant's actions as found by both the High Court and the Supreme Court.

I also note that this matter was sent back to the High Court solely for purposes of Joinder of the Administratrix which was done by this Court in the ruling dated 30<sup>th</sup> December, 2014.

I accept the Plaintiff's submission that should the 1<sup>st</sup> Defendant pay the full amount of the Plaintiff's loss by executing the Judgment herein, the 1<sup>st</sup> Defendant may recover a contribution or indemnity from the 2<sup>nd</sup> Defendant. The authority is paragraph 21.1 of Winfield & Jolowicz on Tort, Sixteenth Edition where the learned author states that:

**“By statute, though not at common law, one defendant may recover a contribution or indemnity from any other defendant liable in respect of the same damage, but that is a matter between the defendants and does not affect the claimant, who remains entitled to recover his whole loss from whichever defendant he chooses.”**

Should the 1<sup>st</sup> Defendant settle the full amount of the damages herein it will be at liberty to recover a contribution or indemnity from the 2<sup>nd</sup> Defendant.

In my view this Court has no jurisdiction at this stage to apportion liability for contributory negligence. The Plaintiff who was the successful party is entitled to enjoy the fruits of the Judgment without wasting any more time.

I therefore find no merit in the application of the 1<sup>st</sup> Defendant for apportionment of liability for contributory negligence.

Based on the foregoing, I hereby dismiss the 1<sup>st</sup> Defendant’s application.

Costs in the cause.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 12<sup>th</sup> day of May, 2017.



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**WILLIAM S. MWEEMBA**  
**HIGH COURT JUDGE**