

**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

2015/HP/0862



BETWEEN:

**PERFECT INVESTMENTS LIMITED**

**PLAINTIFF**

AND

**LINKSOFT COMMUNICATIONS SYSTEMS LIMITED**

**1<sup>st</sup> DEFENDANT**

**AIRTEL NETWORKS (Z) LIMITED**

**2<sup>nd</sup> DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 18<sup>th</sup> DAY OF  
AUGUST, 2017**

*For the Plaintiff : Mrs K.M. Chileshe, Mweemba Chashi and Partners*

*For the 1<sup>st</sup> Defendant : No appearance*

*For the 2<sup>nd</sup> Defendant : Mr P. Chungu, Ranchod and Chungu Advocates*

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## **J U D G M E N T**

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CASES REFERRED TO:

- 1. Cavmont Merchant Bank Limited V Amaka Agricultural Development Company Limited SCZ No 12 of 2001.**
- 2. York Farms Limited V Cee Cee Freight and Suppliers Limited and Quest Cargo Management Limited Appeal No 120 of 2010**

OTHER WORKS REFERRED TO:

- 1. Chitty on Contracts Volume II Specific Contracts, 13<sup>th</sup> edition, Sweet and Maxwell, 2008**
- 2. The Law of Agency, G.H.L Fridman 2<sup>nd</sup> edition, Butterworths and Company, London 1966**

### **3. Halsbury's Laws of England, 4<sup>th</sup> edition Volume 1(2)**

The Plaintiff commenced this action on 10<sup>th</sup> June, 2015 by writ of summons which was amended on 5<sup>th</sup> October, 2016, claiming;

- i. *K63, 752.00 being the balance due from the Defendants to the Plaintiff under contracts for the construction of two communication towers constructed by the Plaintiff at the instruction of the Defendants at Chikonkomene Railway Station and Chikonkomene Village in the Kabwe district of Central Province of Zambia under purchase orders number No LPO006/LCSZM/P1/2011 and No LPO005/LCSZM/P1/2011 dated 16<sup>th</sup> May, 2011, at the instance of the Defendants.*
- ii. *Damages for breach of contract*
- iii. *Interest thereon*
- iv. *Any other relief that the court may deem fit*
- v. *costs*

The amended statement of claim shows that the Plaintiff is a company incorporated under the Companies Act, Chapter 388 of the Laws of Zambia and is registered with the National Council for Construction (NCC), as a grade 4 category "C" contractor, with its registered office at Lusaka. That the 1<sup>st</sup> Defendant is also a company incorporated under the Companies Act, Chapter 388 of the Laws of Zambia, and has its registered office No 74 Mpile Park Independence avenue in Lusaka, and the 2<sup>nd</sup> Defendant is also a company incorporated under the Companies Act, and has its registered office in Lusaka.

Paragraph 4 of the statement of claim states that by a purchase order No LPO 006/LCSZM/P1/2011 the first Defendant as agent and acting on behalf of the 2<sup>nd</sup> Defendant contracted and instructed the Plaintiff to construct a communication tower at Chikonkomene Railway Station, Kabwe at a total cost of K200, 953.15.

It is stated in paragraph 5 of the statement of claim that it was a term of the contract that the Defendants would pay the Plaintiff thirty five (35) percent of the contract sum as down payment for mobilization upon moving onto the site, and fifty five (55) percent would be paid upon completion acceptance, and ten (10) percent would be paid upon final acceptance.

The statement of claim in paragraph 6 further states that on the same day 16<sup>th</sup> May, 2011 under LPO 005/LCSZM/P1/2011, the 1<sup>st</sup> Defendant as agent of the 2<sup>nd</sup> Defendant and acting on their behalf instructed and contracted the Plaintiff to also erect or construct a communication tower at Chikonkomene village Kabwe, at a total cost of K200, 953.15. That the terms of this agreement with regard to payment were the same as for the agreement under No LPO 006/LCSZM/P1/2011, and the total sum due under the contract was K401, 906.32.

Paragraph 9 of the statement of claim states that on 1<sup>st</sup> June, 2011 the 1<sup>st</sup> Defendant verbally advised the Plaintiff to move on site and start working despite the thirty five percent down payment for mobilisation not having been made, and further advised that the said payment which came to K140, 667.211 would be made within five working days of the Plaintiff having moved on site and commencing the works, and the Plaintiff did so.

It is alleged in paragraph 11 of the statement of claim that the 1<sup>st</sup> Defendant did not honour its agreement to pay the entire thirty five percent for mobilisation within the five working days, and only made a part payment of K107, 108.57 on 15<sup>th</sup> July, 2011, leaving a balance of K33, 558.65. That on or around 11<sup>th</sup> August, 2011 the 1<sup>st</sup> Defendant had not paid the amount remaining on the thirty five percent advance payment despite the Plaintiff having completed 76.17% of the works on both sites, and having handed over the communication towers to the 2<sup>nd</sup> Defendant for commissioning. Further that the 2<sup>nd</sup> Defendant started using the said communication towers in August, 2011.

Paragraph 13 states that the Plaintiff had at a meeting in the second week of August, 2011, at Chita Lodge advised the 1<sup>st</sup> Defendant to pay the amount outstanding on the mobilisation payment so that it could complete all the works on time, but that this was not done. That the Plaintiff through funds mobilised from its own efforts managed to buy materials so that it could complete the remaining 23.83 percent of the works on both sites.

It is averred in paragraph 15 that on 7<sup>th</sup> September, 2011, the Plaintiff wrote to the 1<sup>st</sup> Defendant advising it to comply with the terms of payment of the purchase order and pay the balance remaining on the mobilisation funds, but the response given was that the Plaintiff should complete the remaining works within a week, failing which it would re-assign the work to another contractor, and recover the costs from the Plaintiff.

Paragraph 17 states that the 1<sup>st</sup> Defendant acting on behalf of the 2<sup>nd</sup> Defendant in September 2011 contracted a third party to complete the remaining 23 percent of the works which involved erection of a fence, installation of sunroofs for the equipment shelters and kerbstones and stone-chipping at the base of the towers. That in December 2011, through the help of law enforcement agencies, the Plaintiff traced the 1<sup>st</sup> Defendant's project manager and they were paid K137, 524.61, leaving a balance of K80, 910.89, and a further K17, 158.00 was paid, leaving a balance of K63, 752.00.

The Plaintiff in paragraph 20 states that the Defendants have failed to pay the remaining balance despite numerous reminders, and as a result the Plaintiff has failed to renew its construction licence with the NCC, and has suffered loss and damage. The Plaintiff therefore claims payment of K63, 752.00 being the balance due under the contract, damages for breach of contract, interest, any other relief that the court may deem fit, and costs.

The first defendant did not enter appearance and file its defence, and a default judgment was entered against it on 7<sup>th</sup> September, 2015.

In the defence filed by the 2<sup>nd</sup> Defendant on 26<sup>th</sup> July, 2016, it denies that the 1<sup>st</sup> Defendant acted as its agent for and on its behalf or at all, and that the 2<sup>nd</sup> Defendant was engaged for the purpose of constructing a communication tower at Chikonkomene Railway Station, Kabwe as an independent contractor, and not as an agent or employee of the 2<sup>nd</sup> Defendant.

The 2<sup>nd</sup> Defendant denies that it was a party to the purported contract and states that it was not aware of the terms and conditions of the said contract, let alone the terms of payment. The 2<sup>nd</sup> Defendant further denies the contents of paragraph 6 of the statement of claim, and denies that in contracting with the Plaintiff, the 1<sup>st</sup> Defendant acted as its agent for and on its behalf. With regard to the claim for the down payment in paragraph 7 of the statement of claim, the 2<sup>nd</sup> Defendant denies that it was privy to the said contract, and also denies the contents of paragraph 8 to 11 of the statement of claim.

In paragraph 10 of the defence, the 2<sup>nd</sup> Defendant denies that the 1<sup>st</sup> Defendant acted as its agent for purposes of erection of the fence, installation of sunroofs for the equipment towers and installation of kerbstones and stone chipping at the base of the towers.

The 2<sup>nd</sup> Defendant states in paragraph 11 of the defence that the Plaintiff's claims that it traced the 1<sup>st</sup> Defendant through law enforcement agencies and as a result the 1<sup>st</sup> Defendant paid K137, 524.61 and K17, 158.00, leaving a balance of K63, 752.00 are within its peculiar knowledge. As regards the claim that the 1<sup>st</sup> Defendant has neglected to pay the balance of K63, 752.00, the 2<sup>nd</sup> Defendant states that this is within the Plaintiff's knowledge, and that it was not privy to the contract and any agreements between the Plaintiff and the 1<sup>st</sup> Defendant.

That the failure by the Plaintiff to renew its construction licence at the NCC is also within its peculiar knowledge.

At the trial the Plaintiff called two witnesses while the 2<sup>nd</sup> Defendant called no witnesses. The first witness was Jonathan Nguleka, the managing director of the Plaintiff Company. He testified that the Plaintiff constructed two communication towers at Chikonkomene Railway Station and Chikonkomene village site after they were subcontracted to do the works, by the 1<sup>st</sup> Defendant, a foreign company based in Kenya. That the 1<sup>st</sup> Defendant was contracted by the 2<sup>nd</sup> Defendant.

He testified that the 1<sup>st</sup> Defendant gave them a local purchase order on 16<sup>th</sup> May, 2011, which he identified as the document on page 11 of the Plaintiff's bundle of documents. He also identified the documents on pages 12 to 14 of the Plaintiff's bundle of documents as the instructions and the site plans from both defendants which were attached to the local purchase order. That the document is signed by Cromwell Nchenje on the 1<sup>st</sup> Defendant's behalf. PW1 told the court that the document on page 13 is the site plan for the two towers and has the logos for both Defendants, and that the instructions are on page 12, and are signed by the 2<sup>nd</sup> Defendant's officer, Mr Mushabati.

He also testified that the document on page 14 is also part of the site plan, and is signed by the 2<sup>nd</sup> Defendant's head of engineering department, Mr Mushabati. PW1 also identified the document on page 17 of the Plaintiff's bundle of documents as another local purchase order also dated 16<sup>th</sup> May, 2011 for the construction of communication towers at Chikonkomene Railway Station. His evidence was that initially they were told to wait for payment before moving on site but later they changed, and asked them to move on site on 1<sup>st</sup> July, 2011, and were told that they would receive a down payment after five days.

Still in his evidence PW1 stated that they moved on site and started working while waiting to be paid the down payment as agreed. However this was not done and they were only paid part of the down payment after one month, leaving a balance of K33, 000.00. It was stated that the works were performed

up to completion of the towers, and they asked to be paid the balance of the down payment, so that they could complete the remaining works of fencing the towers, and that this was in August 2011.

PW1 further testified that they could not continue with the works as they needed to pay the workers and the suppliers of the materials that were used at the two sites. He stated that on 11<sup>th</sup> September, 2011 they wrote a demand letter for the payment, which he identified as the one at page 20 of the Plaintiff's bundle of documents. His evidence was that at that stage they had done 81.7 percent of the works, and that the 1<sup>st</sup> Defendant had responded asking them to complete the works, as the 2<sup>nd</sup> Defendant was pushing for the completion of the works, and that if not a third party would be assigned to complete the works, and thereafter deductions made from the contract price to pay the third party.

PW1 told the court that they could not go back to the site as the agreement entitled them to be paid the balance so that they could pay the supplier of the materials as they were pressurising payment, and they withdrew the credit facility. He referred to the letters on pages 23 and 25 of the Plaintiff's bundle of documents as the letter from the supplier of building payments asking for payment.

It was stated that PW1 went to see the 1<sup>st</sup> Defendant demanding payment and they threatened to report them to the police as they heard that they wanted to run back to their country. However the 1<sup>st</sup> Defendant sent them an e-mail assuring them that they would be paid as they needed to resolve issues with the 2<sup>nd</sup> Defendant. The document on page 24 of the Plaintiff's bundle of documents was identified as the said e-mail. PW1's evidence was that they waited for the payment, and then sued. He also testified that they could not renew their annual practising licence with the NCC as it is a requirement that each contractor is given a credit facility, and this was withdrawn.

He stated that they were awarded a contract by the Food Reserve Agency (FRA) but as the credit facility was withdrawn, they could not perform the works. He identified the document on page 9 of the Plaintiff's bundle of documents as the certificate that is issued to every contractor authorising the contractor to work. He also identified the document on page 34 of the Plaintiff's bundle of documents as written to them by the NCC after they had asked to renew their licence, but the request was denied as they needed to be re-assessed, as their licence had not been renewed for two years.

He added that they need to be re-assessed before they can renew their registration as the qualifications that they were given were withdrawn. PW1 stated that they would like to be paid the balance owed, as well as damages, and any other relief that the court may deem fit.

In cross examination PW1 stated that both Defendants owed them money. He testified that they had a contract with the 1<sup>st</sup> Defendant, and that the local purchase orders on pages 11 and 17 of the Plaintiff's bundle of documents were issued by the 1<sup>st</sup> Defendant. He further testified that the contract with the 2<sup>nd</sup> Defendant was on the attachments to the local purchase order, and that they contracted with the 2<sup>nd</sup> Defendant on 16<sup>th</sup> May, 2011.

PW1 stated that he did not sign on page 12 of the Plaintiff's bundle of documents, and that the Plaintiff's name does not appear on that document, while Airtel, Linksoft and Earthrow do. It was his testimony that the Plaintiff's name does not appear on page 12 as page 11 makes reference to attached documents, being the site plans. PW1 maintained that there was a contract that was signed with the 2<sup>nd</sup> Defendant. It was further his evidence that a local purchase order is a contract on its own, and that it describes the services provided.

He stated that the local purchase order issued by the 2<sup>nd</sup> Defendant was on page 11 of the Plaintiff's bundle of documents through the attached documents, but agreed that Airtel does not appear on the documents on pages



11 and 17 of the Plaintiff's bundle of documents. Further in cross examination PW1 testified that they had a sub contract with the 1<sup>st</sup> Defendant based on a contract that it had with Airtel, though he did not see the said contract. His evidence was that the 1<sup>st</sup> Defendant had informed him about the contract.

He agreed that the works were discussed between the Plaintiff and the 1<sup>st</sup> Defendant, but that to his knowledge the 1<sup>st</sup> Defendant was an agent of the 2<sup>nd</sup> Defendant, as the 1<sup>st</sup> Defendant is a foreign company, and the NCC rules state that foreign companies can only do works in Zambia in partnership with a Zambian company. He also stated that he would go to the 2<sup>nd</sup> Defendant for verification of any works done at the sites, and he would meet Mr Mushabati.

When asked whom he had dealt with over the payments, PW1 testified that it was the 1<sup>st</sup> Defendant, as could be seen from the e-mails. He testified that when the payments were not forthcoming they did not follow up with the 2<sup>nd</sup> Defendant, as the 1<sup>st</sup> Defendant was the project manager. That the 2<sup>nd</sup> Defendant only became aware of the money problems after they had sued, and that it was the 1<sup>st</sup> Defendant who paid them part of the monies due.

He stated that the NCC told them that they could not renew their licence as they could not be granted a certificate, due to non-renewal for two years, and they needed to be re-assessed. PW1 told the court that they had not gone for re-assessment as they still waited to be paid the K63, 752.00. When referred to the document on page 26 of the Plaintiff's bundle of documents, PW1 testified that the e-mail was not for the Plaintiff alone, but to all sub-contractors of the project.

He maintained that he was told that the 1<sup>st</sup> Defendant was an agent of the 2<sup>nd</sup> Defendant, and stated that the code of conduct requires that contracts are executed with only companies registered with the NCC. In conclusion he stated that he cannot find the 1<sup>st</sup> Defendant in Zambia today, and he is not in contact with them, as the matter is in court.

In re-examination PW1 testified that the arrangement was that the 1<sup>st</sup> Defendant would do the works on behalf of the 2<sup>nd</sup> Defendant. He also stated that the local purchase order was issued by the 2<sup>nd</sup> Defendant, as it knew that the 1<sup>st</sup> Defendant could only do works in Zambia in partnership with a Zambian company. PW1 told the court that they did not pursue the 2<sup>nd</sup> Defendant for payment, as it had authorised the 1<sup>st</sup> Defendant to do the works.

PW2 was Jackson Mulenga an engineer. His testimony was that he is employed as director technical for the Plaintiff, and that his responsibilities in relation to the contract with the 1<sup>st</sup> Defendant were to review the technical documents, that is the designs being the bills of quantity, and the contract to ensure viability and implementation. Further that his duties also included consideration of the logistics required for the job, obtaining the right skilled staff to undertake the works, and provide oversight of the technical aspects of the works.

PW2's continued evidence was that the contract was between the Plaintiff and the 1<sup>st</sup> Defendant for the construction of communication towers for the 2<sup>nd</sup> Defendant in Kabwe rural. That he was in charge of coordinating with the Airtel experts from India as the contract involved Airtel providing equipment for construction, and that they constructed the towers according to the plans provided by Airtel. He stated that the drawings were part of the local purchase orders signed by the 2<sup>nd</sup> Defendant's engineers, and he identified the documents on pages 12 to 14 of the Plaintiff's bundle of documents as the said drawings that the 1<sup>st</sup> Defendant had provided them.

PW2 continued stating that the documents were site drawings indicating the works to be done on the site, including the towers, and that upon signing the contract in May they received the drawings, and were given the coordinates to locate the points. He testified that it took them two days to find the said points and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants verified them. That upon verification they started mobilising, and sent people to the site to commence the works. However

payments delayed and as the site is in the bush they accrued costs, and looked for other sources of money to start the works.

It was also PW2's evidence that they received the first payment after about two months and after further delay to pay, they met the 1<sup>st</sup> Defendant to discuss the payment, who in turn told them that there had been delay to pay them. He told the court that they wrote a demand letter to the 1<sup>st</sup> Defendant for payment, which letter he identified as the one on page 20 of the Plaintiff's bundle of documents. However the 1<sup>st</sup> Defendant did not respond, and they stopped the works when 81percent of the works had been done. He asked to be paid the amount remaining unpaid, with interest and costs.

When cross examined PW2 stated that his role was on the technical side, and he did not have all the details of the administrative side of the contract. He also stated that the documents on pages 12 to 16 of the Plaintiff's bundle of documents are part of the contract. He further told the court that he is the only person who played a technical role in the contract, and he denied that the Plaintiff had a contract with the 2<sup>nd</sup> Defendant. That they were asking the 2<sup>nd</sup> Defendant to pay as it was their main client.

In re-examination PW2 told the court that they had a contract with the 2<sup>nd</sup> Defendant as on verification of the site, an engineer from the 2<sup>nd</sup> Defendant was sent.

The 2<sup>nd</sup> Defendant did not call any witnesses in this matter.

I have considered the evidence. It is not in dispute that the 1<sup>st</sup> Defendant contracted the Plaintiff to construct communication towers at Chikonkomene Railway Station and Chikonkomene village for the 2<sup>nd</sup> Defendant on 16<sup>th</sup> May, 2011, and issued them with the local purchase orders on pages 11 and 17 of the Plaintiff's bundle of documents to that effect. It is also not in dispute that the Plaintiff performed some of the works that it was contracted to do, and was paid some amounts of money under the contract by the 1<sup>st</sup> Defendant.

The dispute is on whether the 1<sup>st</sup> Defendant acted as the 2<sup>nd</sup> Defendant's agent, and the 2<sup>nd</sup> Defendant should therefore be liable for any amounts owing to the Plaintiff under the contract?

The Plaintiff in the submissions argues that 1<sup>st</sup> Defendant was an agent of the 2<sup>nd</sup> Defendant, and that on that basis the 2<sup>nd</sup> Defendant is liable for the debt owed to the Plaintiff. Reference is made to page 8 of *The Law of Agency G.H.L. Fridman 2<sup>nd</sup> edition, Butterworths and Company, London* which defines agency as ***“the relationship that exists between two persons when one called the agent is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship, by the making of contracts or the disposition of property”***.

Reference is also made paragraph 170 of *Halsbury's Laws of England 4<sup>th</sup> edition volume 1(2)* which states that ***“as a general rule any contract by an agent with the authority of his principal may be enforced by or against the principal where his name was disclosed to the other contracting party at the time the contract was made”***. That this position was confirmed in the case of ***CAVMONT MERCHANT BANK LIMITED V AMAKA AGRICULTURAL DEVELOPMENT COMPANY LIMITED SCZ NO 12 OF 2001***.

The submission by the Plaintiff is that at the time the 1<sup>st</sup> Defendant entered into the contract with the Plaintiff, it informed the Plaintiff that it was acting on the 2<sup>nd</sup> Defendant's behalf, and that it is not for the 2<sup>nd</sup> Defendant to deny this but the 1<sup>st</sup> Defendant. Thus as the identity of the 2<sup>nd</sup> Defendant was disclosed, the contract should be enforced against it.

The Plaintiff further refers to the case of ***YORK FARMS LIMITED V CEE CEE FREIGHT AND SUPPLIERS LIMITED AND QUEST CARGO MANAGEMENT LIMITED Appeal No 120 of 2010*** where reference was made to page 13 of *Chitty on Contracts Volume 2 para 31-006* which states that;

***“the consent of the principal, which is regarded as the basic justification for the agent’s power to effect his principal’s legal relations, may of course be implied from his conduct or from his position with regard to agent or vice versa”.***

That the court had in that matter noted that there was an agency relationship between the parties even though the appointment was not reduced into writing, or that the terms principal and agent were not expressly used. That neither of those are necessary to empower an agent to act. In so deciding, reference was made to paragraph 1 on page 4 of *Halsbury’s Laws of England 4<sup>th</sup> edition Volume 1(2)* where it is stated that ***“whether the relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent”.***

It is argued by the Plaintiff that the local purchase orders on pages 11 and 17 of its bundle of documents refer to the attached BOQ, which are accompanied by the site plans or drawings for the towers that the Plaintiff was expected to construct, and did in fact construct. That if the said site plans were not part of the local purchase orders, the Plaintiff would not have been able to construct the towers. Therefore the local purchase orders with the attachments being the Bill of Quantities (BOQ) and the site plans illustrate the connection between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in relation to the work that the Plaintiff was requested to carry out.

That PW1 had shown that the logo of the 2<sup>nd</sup> Defendant is on pages 13 and 14 of the Plaintiff’s bundle of documents together with the 1<sup>st</sup> Defendant’s, and that the document reads that all the works must be performed according to the Airtel site build standards, and there is provision for the 2<sup>nd</sup> Defendant to indicate its approval. It is submitted that Mr Mushabati of the 2<sup>nd</sup> Defendant as

head of engineering signed the said site plans, and that the towers on being constructed were handed over to the 2<sup>nd</sup> Defendant for its use.

Therefore even though the terms "*principal*" and "*agent*" were not used, and the agreement was not reduced into writing, on the basis of the case of **YORK FARMS LIMITED V CEE CEE FREIGHT AND SUPPLIERS LIMITED AND QUEST CARGO MANAGEMENT LIMITED Appeal No 120 of 2010**, the facts of this case disclose that the nature of the agreement, and the circumstances show that an agency relationship existed between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Thus as the Plaintiff suffered loss and damages as a result of the Defendant's refusal to pay its claims, the 2<sup>nd</sup> Defendant is liable to make good the same.

When PW1 testified he had referred to the local purchase orders issued to them by the 1<sup>st</sup> Defendant on pages 11 and 17 of the Plaintiff's bundle of documents as the contracts that were entered into for the construction of the communication towers. The document on page 11 is dated 16<sup>th</sup> May 2011 with the total contract sum of K200, 953.16 and the terms of payment being 35% as down payment, 55% as the completion acceptance payment, and 10% as the final acceptance payment. This document is the same as the one on page 17. The local purchase orders were issued to the Plaintiff by the 1<sup>st</sup> Defendant.

On the face of it, it can therefore be said that the agreements embodied in the two local purchase orders were between the Plaintiff and the 1<sup>st</sup> Defendant. However the Plaintiff contends that the 1<sup>st</sup> Defendant acted as an agent of the 2<sup>nd</sup> Defendant when it contracted with the Plaintiff, and therefore the 2<sup>nd</sup> Defendant is liable under the agreement.

Paragraph 31-001 of *Chitty on Contracts Volume II Specific Contracts, 13<sup>th</sup> edition, Sweet and Maxwell, 2008* defines agency as "**a body of general rules under which a person, the agent, has the power to change the legal relations of another, the principal**". Paragraph 31-038 of the said *Chitty on Contracts* states that a contract made by an agent is in law the contract of the

principal, and the agent is considered merely as the medium by which the contract is effected, and his assent is merely the assent of the principal.

Thus the question is whether the evidence in this matter establishes that the 1<sup>st</sup> Defendant was acting as an agent of the 2<sup>nd</sup> Defendant when it contracted the Plaintiff to construct the communication towers for the 2<sup>nd</sup> Defendant? The only documents before court that evidence that the 1<sup>st</sup> Defendant contracted the Plaintiff to construct the said communication towers are the local purchase orders on pages 11 and 17 of the Plaintiff's bundle of documents.

These documents as seen stipulate the contract sum and manner of payment. On the two documents only the Plaintiff and the 1<sup>st</sup> Defendant are mentioned. The Plaintiff argues in the submissions that on pages 12, 13 and 14 of its bundle of documents are the site plans for the said communication towers that were constructed, and that the said documents bear the logos for Airtel and Linksoft, being the two Defendants in this matter, and therefore this is evidence of the relationship of principal and agent. Further that the 2<sup>nd</sup> Defendant's head of engineering signed the said site plans, and he approved the works that the Plaintiff did.

Both PW1 and PW2 when cross examined testified that they did not pursue the 2<sup>nd</sup> Defendant for payment when there was failure to honour the agreement that the Plaintiff had with the 1<sup>st</sup> Defendant, as the 1<sup>st</sup> Defendant signed the agreement with the 2<sup>nd</sup> Defendant, and was the project manager. Further both witnesses in cross examination agreed that they were sub contracted by the 1<sup>st</sup> Defendant after it had been contracted to do the works by the 2<sup>nd</sup> Defendant.

There is also evidence that shows that PW1 and PW2 testified that they were informed by the 1<sup>st</sup> Defendant that it could not pay the Plaintiff, as it had in turn not been paid by the 2<sup>nd</sup> Defendant.

While the authorities cited by the Plaintiff state that an agency agreement need not be expressed as such or be in writing, there is need for evidence to

establish such a relationship. The two local purchase orders on pages 11 and 17 of the Plaintiff's bundle of documents show that the 1<sup>st</sup> Defendant agreed with the Plaintiff for the construction of the communication towers, and it can be said that they were the two parties to the agreement. However the contract was for the benefit of the 2<sup>nd</sup> Defendant who in the defence filed in paragraph 3 denies that the 1<sup>st</sup> Defendant acted as its agent, stating that it was engaged as an independent contractor for construction of the said communication towers.

The burden rests on the Plaintiff to prove on a balance of probabilities that the 1<sup>st</sup> Defendant was an agent of the 2<sup>nd</sup> Defendant, and not an independent contractor for the construction of the communication towers. The Plaintiff argues that it is not for the 2<sup>nd</sup> Defendant to state that the 1<sup>st</sup> Defendant was not its agent, but for the 1<sup>st</sup> Defendant to so state. This argument cannot stand as the Plaintiff bears the burden of proving the relationship of the agency that it alleges.

The evidence as seen shows that the 1<sup>st</sup> Defendant engaged the Plaintiff, and paid it some amounts of money due under the contract. The local purchase orders further show that the 1<sup>st</sup> Defendant was the contracting party in this matter, and on the strength of the case of **CAVMONT MERCHANT BANK LIMITED V AMAKA AGRICULTURAL DEVELOPMENT COMPANY LIMITED SCZ NO 12 OF 2001**, the 1<sup>st</sup> Defendant is liable to pay the Plaintiff any claims under the contract.

The fact that the site plans bear the logos of the 2<sup>nd</sup> Defendant and were signed by its head of engineering does not establish the agency relationship, and neither does the fact that the 2<sup>nd</sup> Defendant approved the works. The 2<sup>nd</sup> Defendant being the party that sourced the works obviously required that the same be done according to the standards that it wanted, and the logos of the two defendants show that both parties had agreed to this.

The Plaintiff also alleges that the 1<sup>st</sup> Defendant disclosed that it was an agent of the 2<sup>nd</sup> Defendant when they contracted. However the document exhibited as



'JN2' on the affidavit in opposition to the summons for misjoinder dated 28<sup>th</sup> July, 2015 being an e-mail from the 1<sup>st</sup> Defendant to the Plaintiff dated 15<sup>th</sup> February, 2013 is headed "*dear subcontractors*", and its substance relates to a technical challenge that the 1<sup>st</sup> Defendant was facing in resolving the 10 percent payment with the 2<sup>nd</sup> Defendant.

Even the documents at pages 1 and 3 of the Defendant's bundle of documents show that the 2<sup>nd</sup> Defendant paid the 1<sup>st</sup> Defendant on the contract that the Plaintiff executed. Further both PW1 and PW2 testified that the Plaintiff was sub contracted by the 1<sup>st</sup> Defendant to construct the communication towers.

The evidence clearly shows that the 1<sup>st</sup> Defendant is the party that contracted with the 2<sup>nd</sup> Defendant for construction of the communication towers, and it in turn sub contracted the Plaintiff to do the same. The basis for the sub contraction could be as argued by the Plaintiff that the 1<sup>st</sup> Defendant being a foreign company could only be awarded the contracts if it partnered with a local Zambian company as required by the NCC, although the pleadings filed by the Plaintiff show that the 1<sup>st</sup> Defendant is a company registered under the Companies Act, Chapter 388 of the Laws of Zambia. Therefore the sub contraction cannot amount to the 1<sup>st</sup> Defendant being an agent of the 2<sup>nd</sup> Defendant.

Consequently at law there was therefore no privity of contract between the Plaintiff and the 2<sup>nd</sup> Defendant, unless the agreement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant recognised that the 1<sup>st</sup> Defendant could sub contract the works, and the sub-contractor could claim directly from the 2<sup>nd</sup> Defendant. However there is no evidence to that effect on the record, and in fact the agreement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant has not been availed to that court, so it is not known what the two parties had agreed.

That being the position, and in light of the fact the evidence shows that the 1<sup>st</sup> Defendant sub contracted the Plaintiff to carry out the works that it had contracted to do on behalf of the 2<sup>nd</sup> Defendant, and that it is the party that

paid the Plaintiff some money for the works done, the 1<sup>st</sup> Defendant was not an agent of the 2<sup>nd</sup> Defendant, but an independent contractor who sub contracted the works.

Therefore the Plaintiff cannot claim payment from the 2<sup>nd</sup> Defendant on the basis that the 1<sup>st</sup> Defendant has failed to pay it in full, as there is no privity of contract between the Plaintiff and the 2<sup>nd</sup> Defendant. The claim for payment of the sum K63, 752.00 against the 2<sup>nd</sup> Plaintiff fails, as does the claim for damages for breach of contract, as these damages are consequential to the failure to pay the K63, 752.00, which the 2<sup>nd</sup> Defendant is not liable to pay the Plaintiff. The matter is therefore dismissed with costs to the 2<sup>nd</sup> Defendant to be taxed in default of agreement. Leave to appeal is granted.

**DATED THE 18<sup>th</sup> DAY OF AUGUST, 2017**

  
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**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**