IN THE SUPREME COURT OF ZAMBIA **SCZ/8/246/2016**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

DRILL AFRICA COMPANY LIMITED **APPELLANT**

AND

DANIEL MPUNDU KONKOLA **RESPONDENT**

Coram : Hamaundu, Musonda and Mutuna, JJS

On 6th February 2018 and 4th April 2018

For the Appellant : Mr. L.M. Matibini of Messrs L.M. Matibini and Co.

For the Respondent : Mr. A. Mbambara of Messrs A. Mbambara Legal Practitioners

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J U D G M E N T

Mutuna, JS. delivered the judgment of the court.

Case referred to:

1) **Holmes Limited v Buildwell Construction Company Limited (1973) ZR 77**

Legislation referred to:

1) **Supreme Court Rules, Cap 25**

2) High Court Rules, Cap 27
3) Supreme Court Practice, 1999, vol.1

When we heard this motion on 6th February 2018, we dismissed it and said we would give our reasons later. We now give the reasons for the dismissal.

On 12th April 2017, a Judge of this court sitting alone at chambers dismissed the Appellant's application to renew an application for leave to appeal out of time against a judgment of the High Court dated 3rd June, 2016; and leave to appeal against a ruling of the same court dated 6th July, 2016. The basis upon which the learned Judge dismissed the applications were that the Appellant did not disclose both before him and the court below compelling grounds to enable the court exercise its discretion to grant leave to appeal. He stated that one such compelling ground is to demonstrate that there is likelihood of the intended appeal succeeding. The learned Judge also found that the Appellant having settled the judgment debt in full by

consent of the parties, it cannot be heard to say that it was denied its day in court. For this reason, he went on to hold that the appeal would be rendered academic because there is nothing to appeal against as the judgment has been settled by consent. It is this decision that has riled the Appellant prompting it to raise this motion whose purpose is to set aside the ruling of the Learned Judge pursuant to Rule 48(4) of the ***Supreme Court Rules.***

The facts leading up to the motion are that the High Court held a trial in the absence of the Appellant which was the Defendant in that court after satisfying itself that the Appellant was aware of the trial date. The Court proceeded pursuant to Order 35 rule 3 of the ***High Court Rules*** which provision allows the said court to proceed with the hearing of a matter in the absence of a Defendant where there is proof of service of process relating to the hearing and no probable cause is shown for the absence of

the Defendant. After the trial, the Court rendered a judgment on 3rd June 2016 prompting the Appellant to apply to set aside the judgment and to stay execution pending the application to set aside judgment. Both applications were dismissed by way of a ruling dated 6th July 2016.

Following from this, the Appellant applied for leave to appeal against the judgment out of time and leave to appeal against the ruling of 6th July 2016. The High Court considered the affidavit evidence filed in support of the application and found that it merely expressed the Appellant's dissatisfaction at both the judgment and the ruling. That the application did not, therefore, set out any grounds upon which the leave sought could be granted. Meanwhile, to prevent execution from being levied against the Appellant, counsel for the Appellant caused the judgment sum and interest in the sum of K80,783.84 to be

paid into court. By consent, the said sum was later paid out of court to the Respondent. It is against this background that this motion is tabled before us.

In support of the motion the Appellant filed an affidavit, heads of argument which were in the record of appeal and further heads of argument. The Respondent equally filed heads of argument.

At the hearing counsel for the parties relied on their heads of argument which they augmented with *viva voce* arguments.

The bulk of the arguments by the Appellant in the heads of argument restate the background to this motion. To this extent they do not aid the Appellant's cause. The latter part of the arguments sets out the principles that govern the grant of leave to appeal in accordance with Orders 9 rule 14 Sub-rule 18 of the ***Supreme Court***

Practice (White Book), which is that leave will normally be granted unless the grounds of appeal have no realistic prospects of success. Counsel for the Appellant, Mr. L.M. Matibini, took the view that the Judge of this court should have found, and we should find, that there are realistic, rather than, remote prospects of success of the appeal. He went on to argue why he felt there were realistic prospects of success in the intended appeal. In closing, counsel explained the reason why the payment into court was made which was that there was a threat of execution. He also explained the effect of a consent order as being a contract between the parties and concluded by restating that the payment out of court was necessitated by the threat of execution.

In the further heads of argument, counsel argued that the learned Judge of this Court erred when he found that the Appellant had compromised its position by consenting

to the payment of the sum out of court. He argued that this amounted to admitting extrinsic evidence to vary the terms of an agreement by the parties. According to counsel, where parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add to, vary, subtract from, or contradict the terms of a written contract. In making the foregoing argument counsel referred to the case of ***Holmes Limited v Buildwell Construction Company Limited***[1] which he argued is a decision of this Court. We must here, hasten to remind counsel that the decision in that case is that of the High Court and not this Court.

In the *viva voce* arguments and following a query by the Court if his client had placed sufficient material before the Judge of this Court and the High Court to demonstrate that the appeal had realistic prospects of success, Mr. Matibini though not conceding that he had not, argued

that he was on firm ground in laying the said material before us because the motion is a renewal of the application which was before the Judge of this court. He also argued that his client has not had his day in court.

We were urged to allow the motion.

The Respondent's heads of argument also took the form of reciting the events in the court below and before our brother on the hearing of the application whose decision is the subject of this motion. Counsel for the Respondent, Mr. Mbambara, reproduced in detail the findings by the Judge of this Court and restated the need for litigation to come to an end. He argued that the consent order for payment of the judgment sum and interest out of court effectively put an end to the proceedings and any attempt at giving its effect the interpretation given by the Appellant, is an attempt at resurrecting the matter.

We were urged to dismiss the motion.

We have considered the record, motion, affidavit in support and the arguments by counsel. The motion primarily seeks to challenge the findings by the Judge of this Court that: no material was placed before the High Court to enable it determine whether the intended appeal had realistic prospects of success; and, that the consent order paying out the judgment sum and interest effectively extinguished the matter thereby rendering the appeal nugatory. Consequent to the foregoing, the issues that arise in this motion are; did the Judge of this Court err when he found that there was no material laid before the Court of first instance to justify the grant of leave to appeal; and, did the Judge of this Court err in his interpretation of the effect of consent order? The affidavit evidence and, indeed, arguments presented before the High Court Judge and Judge of this Court are bereft of any contentions or

arguments in the direction of the appeal having realistic prospects of success. We agree with our brother and indeed the High Court Judge that the Appellant focused only on its dissatisfaction with the judgment and ruling. Further, in terms of Order 59 rule 14 sub-rule 22 of the ***White Book***, when advancing arguments on realistic prospects of success, an applicant must refer to draft grounds of appeal for the consideration of the court. These draft grounds, as a practice, should be contained in the documents filed with the Court. The Order states as follows:

> **"The ground on which leave to appeal is sought must be specified. This can be done either by setting out the grounds of the proposed appeal in the notice of ex parte application, or by annexing to that notice a draft notice of appeal."**

This practice affords a court an opportunity to consider, *prima facie*, if the proposed grounds have realistic chances of success. The Appellant neglected to do this in its application both in the High Court and before our

brother and indeed before us. Therefore, although this motion is a renewal of the application which was dismissed before our brother, as argued by Mr. L. Matibini, it is misconceived for want of the draft grounds of appeal for the intended appeal. It is not enough for counsel to advance the grounds, as he did, in the skeleton arguments. We accordingly find that the Judge of this Court did not err when he found that the application in the High Court was bereft of acceptable grounds to enable the court grant the application.

Turning to the second issue. The provisions regarding payments into and out of court are regulated by Order 22 of the ***White Book***. The relevant provision, for our purposes, is Order 22 rule 3 sub-rule6 on *"Effect of acceptance on claim"* which states as follows:

> **"The acceptance of money paid into Court, if duly made, has effect in two ways, namely (1) whether the money paid in is accepted before or after the beginning of the trial or hearing of the action, the**

acceptance will operate as a stay of further proceedings; if the money was paid in and accepted before the beginning of the trial or hearing of the action, the Plaintiff is entitled as of right to receive payment of the money without, or in the cases mentioned in rr.4 and 10, subject to, an order of the Court and to tax his costs; but if the money paid in is accepted after the trial or hearing of the action has began, the money may not be paid out to the Plaintiff without an order of the Court, which order must deal with the costs of the action. The payment in and its amount are matters which the Court must take into account when exercising its discretion as to costs upon making such order. The stay of further proceedings resulting from the acceptance of money paid into Court takes effect immediately the notice of acceptance is given to each defendant, and it operates (1) in respect of all further proceedings in the action or in the particular cause or causes of action to which the acceptance relates, and (2) as against not only the defendant making the payment but all other defendants sued jointly or in the alternative with him; but such stay does not extend to the question of costs."

What we are able to discern from the foregoing Order is that the acceptance of funds paid into Court stays further proceedings in the matter. This is in relation to moneys paid in and accepted before the beginning of the trial or hearing of the matter. In addition the rationale for

the practice of paying moneys into court is that it has an effect on the order as to costs which a court will make at the end of the proceedings and, if made in settlement of an amount claimed, interest stops running from the date of the payment. The latter is relevant only if the court upholds the claim in relation to which the moneys were paid into court. The Order does not make provision for moneys paid in and accepted, as in this case, after the judgment is entered. Further, whilst the Order prescribes a method of applying for payment of such moneys out of court, it does not provide for a consent order as a means for payment and acceptance of moneys out of Court. Notwithstanding this *lucuna* in the rules, the circumstances of this case lead us to the conclusion that the payment out of court was done in full and final settlement of the claim because it was made after judgment and issuance of a writ of execution. At that point, there was nothing pending before this or the

High Court subject to which event the payment would have been made. In addition, the payment into court and payment out by way of the consent Order do not attach any conditions as revealed by the process filed into Court.

Our position is reinforced by the finding by the single Judge that there is evidence which reveals that the advocates for the parties agreed to settle the matter by the payment of the K80,784.84 by the Appellant. This evidence, as the Judge found, was not challenged. We cannot fault the finding by the single Judge and as such the application by the Appellant must fail on this issue as well.

We accordingly find no merit in the motion and dismiss it with costs to be taxed in default of agreement.

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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M.C. MUSONDA, SC
SUPREME COURT JUDGE

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N.K. MUTUNA
SUPREME COURT JUDGE