

IN THE COURT OF APPEAL FOR ZAMBIA

APPEAL NUMBER 134/2017

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

MBAIMBAI MUKOMAMBO BRIGHTON

APPELLANT

AND

ATTORNEY GENERAL

1ST RESPONDENT

KABWE MUNICIPAL COUNCIL

2ND RESPONDENT

LOCAL AUTHORITIES SUPERANNUATION

FUND

3RD RESPONDENT



CORAM: CHASHI, SIAVWAPA AND NGULUBE JJA

FOR THE APPELLANT: Mr W. Banda, Wilson and Cornhill Legal

Practitioners.

FOR THE 1ST RESPONDENT: Mrs M.N. Mundia, Senior State Advocate.

FOR THE 2ND RESPONDENT: Ms B. Bulaya, Director Legal Services, Mr J. Siwale.

FOR THE 3RD RESPONDENT: Ms B. Kasompe, Legal Officer

On 1st February, 2018 and 4th June, 2018

JUDGMENT

Ngulube JA delivered the Judgment of the Court

Cases referred to:

1. *Paul Mulenga vs. Chainama Hotels ,SCZ Judgment Number of 1999.*

2. ***Standard Shartered Bank Zambia Plc vs Chansa Kabwe (2013) ZR, Vol 1, 13***
3. ***Clement H. Mwenya vs. The Attorney General, International Police, Avis Rent A. Car (2012) Vol. 2 ZR 155***
4. ***Zambia Seed Company Limited vs. Charted International (Pty) Limited (1999) ZR 151***
5. ***Finsbury Investments Limited and Antonio Ventriglia, Ital Terrazzo Limited, SCZ Judgment No. 42 of 2016***
6. ***Hickman vs. Beren (1891-1712) – (1895) 2 Ch. 638***

Legislation referred to :

1. ***The High Court Act, Chapter 20 on the Laws of Zambia.***

This is an appeal against the Ruling of the High Court which dismissed the Appellant's claims against the Respondents.

The brief background of the case is that the Appellant, is a former Local Government practitioner who served in different positions in local authorities in the country over a period of 22 years, the last of which was the position of town clerk at Kabwe Municipal Council, the 2nd Respondent herein. The Appellant was employed in November, 1990 and was retired by the Local Government Service Commission on the 2nd September, 2013.

The Director of Finance at the 2nd Respondent then computed the Appellant's terminal benefits on 29th October, 2013, showing that the appellant was entitled to K1,467,136-30. However the same were not paid. The Appellant commenced an action in the High Court alleging that the 2nd and 3rd Respondents had neglected or

refused to pay him his terminal benefits despite requests and demands for the same.

The 3rd Respondent accepted liability to the extent of half of the claimed amount and by consent with the appellant on the admitted sums, a formal consent order was signed. However, for the disputed sums, it was agreed that the matter would proceed to trial as they alleged that there was a misrepresentation by the Appellant on his last gross salary. The Judge in the lower court then set aside the subsequent Consent Order alleging fraud hence the Appeal in this Court. The Appellant filed the following grounds of appeal.

1. The Learned High Court Judge in the court below erred both in fact and in law when, having found that there was a Consent Order agreed upon by the parties hereto, went ahead to set the same aside when there was no formal application by the Respondents to impeach the Consent Order.
2. The Learned Judge in the court below erred both in law and fact by relying on the contents of Catherine Nambule's affidavit in setting aside the Consent Order on grounds of fraud.

The Appellant's Advocates further submitted that Ms Kasombe, on behalf of the 3rd Respondent informed the court that the modalities on how the disputed amount would be settled needed to be discussed between the Appellant and the Respondents and that a period of two months would suffice for this purpose.

The matter was subsequently adjourned on 28th July, 2016, 1st September, 2016 and 28th November, 2016, respectively. On the said date, the 28th of November, 2016, the 1st and 2nd Respondents requested for time to respond to the Appellant's application to perfect the Consent Order. However, on 28th February, 2017, the 1st and 2nd Respondent's Advocates applied that the Consent Order be rescinded.

In the Ruling of the Learned High Court Judge, which the Appellants appeal against, the court referred to the case of **Sonny Paul Mulenga vs Chainama Hotels¹**, where the Court stated that a consent order is final. The lower court then stated in paragraph 4 on page 2 of the Ruling that –

*“The question before me however is , was this consent order reached at by fraud as argued by the Defendants herein, in which case as in the case of **Zambia Seed Company Limited vs.***

Chartered International (Pty) Limited shows , would be set aside.”

The court further stated at page 3 of the Ruling that –

“taking these factors into consideration therefore, I find that though the parties agreed, it would be against public policy for me to unjustly enrich the Plaintiff by perfecting a consent order based on figures which are wrong under the guise of agreement, as the figures by the Plaintiff were fraudulently arrived at.”

The lower court then proceeded to set aside the Consent Order on grounds that it was fraudulently worked out. The Appellant’s Advocates referred to the case of **Standard Chartered Bank Zambia Plc vs. Chansa Kabwe²** where the High Court held inter alia as follows:-

(1) A consent order can be set aside on grounds of fraud or mistake.

(2) But special circumstances have to exist before a party can rely on mistake in order to escape liability under a consent order.

(3) Parties are expected to urgently apply to set aside consent orders, as time is a factor that needs to be considered.

They further referred to the case of **Base Chemicals vs. Zambia Airforce**,³ where the Supreme Court held inter alia that –

(1) If a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities.

(2) A party wishing to rely on the defence of fraud must ensure that it is clearly and distinctly alleged.

(3) When it comes to trial, the party must lead evidence so that the allegation is clearly and distinctly proved.

The Appellant's Advocates submitted that the defences filed by the 2nd and 3rd Respondent do not contain any allegation of fraud. They cited the case of **Clement H. Mwenya vs. The Attorney-General, International Police, Avis Rent A Car**⁴ where the court held inter alia that –

(1) There are some matters which the Defendant must specifically plead in his defence if he intends to rely on them.

(2) Order 18, Rule 8 specifically enforces one of the cardinal principles of the system of pleading, namely that every defence must plead specifically any matter which makes the claim not maintainable.

The Appellant's Advocates submitted that the finding of fact and law by the Learned Judge to set aside the Consent Order on grounds that it was tainted by fraud was not supported by law. They submitted that for a Consent Order to be set aside on ground of fraud, a fresh action must be commenced to challenge that Consent Order. The appellant's Advocates referred to the case of ***Zambia Seed Company Limited vs. Chartered International (Pty) Limited***⁴.

They further referred to the contents of the affidavit of Catherine Nambule and stated that the same are an after thought and only came after the 2nd Respondent had consented to the Judgment herein. They submitted that the Appellant's last place of work

was the 2nd Respondent and a payslip was filed to confirm the same.

The Appellant's Advocates further submitted that the Learned Judge having found that there was a valid Consent Order between the parties should have gone ahead to order the enforcement and it would have been up to the Respondents to commence a fresh cause of action to impeach the same. They prayed that the appeal be allowed and that the Consent Order be perfected and enforced with costs to the Appellants.

The 1st Respondent filed heads of argument in opposition to the appeal.

On Ground One and Three, the Learned Senior State Advocate Mrs Mundia submitted that the Learned Judge was on firm ground when he refused to perfect the Consent Order and proceeded to have the alleged Consent Order set aside. Counsel submitted that the Appellant unlawfully awarded himself a high basic pay contrary to the terms and conditions of service of the Local Government Service Commission. Counsel submitted that the lower court was on firm ground when it refused to perfect the Consent Order as Order III Rule 2 of the High Court Rules gives

the court authority to make orders that are necessary for doing justice.

On Grounds Two and Four, Counsel submitted that the Learned Judge was on firm ground when he made a finding that the Appellant knew or ought to have known that the salary he used in the alleged Consent Order was above what he was entitled to.

Counsel submitted that the Respondents produced documentary evidence in form of affidavits clearly showing the court below the reasons why the appellant's salary was contrary to the terms and conditions of service of the Local Government Service Commission. She submitted that the affidavit of Catherine Nambule shows that the Appellant, as Chief Executive Officer of the Council unlawfully awarded himself a basic pay above and beyond the approved notches.

On Ground Five, Counsel submitted that the Judge was on firm ground when he refused to perfect the Consent Order and proceeded to set it aside on grounds of fraud. She submitted that the appellant as Chief Executive Officer of the 2nd Respondent unlawfully awarded himself a higher pay contrary to

his terms and conditions. Counsel submitted that the appeal lacks merit and prayed that it be dismissed in its entirety.

The 2nd Respondent's Advocates filed heads of argument and referred to Order III Rule 2 of **the High Court Act**¹, submitting that the Learned Judge was on firm ground when he set aside the Consent Order. They submitted that the said Order of the High Court Rules gives authority or discretion to the court to decide such matters even in the absence of a formal application to promote justice. The 2nd Respondent's Advocates further submitted that the provisions of Order III Rule 2 of the High Court Rules gives the court inherent jurisdiction to grant any remedy whether there is properly an application before it or not.

The 2nd Respondent's Advocates referred to the case of **Finsbury Investments Limited and Antonio Ventriglia, Manuel Ventriglia, Ital Terrazzo Limited**⁶ on the court's powers in disposing of matters expeditiously. They submitted that the evidence before the court was cogent and conclusive that the appellant was unjustly enriching himself and ignoring such evidence before the court was not going to serve justice. The Learned Advocates for the 2nd Respondent prayed that the appeal be dismissed with costs.

The 3rd Respondent's Advocates filed written submissions. They gave the background of the case, that the appellant, a member of the 3rd Respondent separated from his employment with the 2nd Respondent on 31st August, 2013. The 3rd Respondent then prepared a computation of the Appellant's retirement benefits on 28th October 2013, which amounted to K1,138,734-70. However, on 14th February, 2014, the 3rd Respondent received guidance from the Local Government Service Commission to the effect that the appellant's pensionable emoluments, did not fall within the approved salary structures for council employees. They then re-computed the retirement benefits which amounted to K782,982-40 and then communicated the same to the Appellant, who commenced this action claiming the sum of K1,138,734-70 which amount the 3rd Respondent computed before receiving guidance from the Local Government Service Commission.

The 3rd Respondent filed a Defence admitting the sum of K782,982-40 and disputed the balance because they were misled by the inflated amount that was used as the Appellant's basic salary, thus increasing the computation for the Appellant's retirement benefits. The 3rd Respondent entered into a Consent Order to liquidate the admitted amount and has since satisfied

the Consent Order that was entered into with the Appellant for the said amount.

The parties then entered into discussions with a view of settling the balance of the Appellant's claims by way of another Consent Order which was to be agreed upon by the Appellant and the 1st and 2nd Respondents. The 3rd Respondent stated that a formal Consent Order was never signed by the parties. However, the Appellant made an application for the perfection of a Consent Order which the lower court purportedly set aside on 14th May, 2017.

The 3rd Respondent's Advocates submitted that the Learned High Court Judge was on firm ground when he set aside the alleged Consent Order and denied its enforcement. They submitted that there was in fact no Consent Order entered among the parties for the settlement of the rest of the Appellant's claims apart from the one that was entered into by the Appellant and the 3rd Respondent for the admitted amount. The 3rd Respondent's Advocates prayed that the appeal be dismissed in its entirety for being misconceived at law and totally devoid of merit as there was no Consent Order to be perfected since none was duly signed and filed into court.

We have considered the heads of argument that were filed by the Appellant's Advocates as well as those of the 1st, 2nd and 3rd Respondents Advocates.

In the case of **Hickman vs. Berens**⁷ the court stated that –

“The court will force compromise upon a party who entered into it under a mistake as to its terms, it is clear that the parties were not ad idem as it is evident that he gave his consent under a misapprehension, the court will not hold his client to be bound by it.”

In Halsbury's Laws of England Volume 12 (2009) 5th edition it stated that –

“A Judgment given or an order made by consent may be set aside on any ground which would invalidate a compromise not contained in a judgment or order. Compromises have been set aside on the ground that the agreement was illegal as against public policy or was obtained by fraud or misrepresentation or non disclosure of a material fact which there was an obligation to disclose.....”

In the present case, it is not in dispute that the Appellant and the 3rd Respondent entered into a Consent Order for the undisputed sum which was duly settled. The Learned Judge found that there

was a Consent Order for the disputed amount which he set aside on the basis that there was fraud and the Appellant would be unjustly enriched if the said Consent Order was perfected.

The Record of Appeal shows that the parties held discussions regarding a possible ex-curia settlement on the claims by the Appellant. However, having critically examined the record, we did not find a Consent Order which was executed by the parties for the disputed sum. There was therefore no Consent Order that was entered into by the parties regarding the settlement of the rest of the Appellant's claims.

As such, there was no Consent Order that required perfection by the parties. Further, there was no consent order that was set aside by the Learned High Court Judge on grounds of fraud. All in all, this appeal was based on the parties not appreciating that in fact, no Consent Order was entered into by the parties for the Appellant's disputed claims.

The Learned Judge's order setting aside the Consent Order was wrongly made because there was no Consent Order. This appeal is accordingly dismissed for lack of merit and the matter is sent

back to the High Court for trial so that the issues in dispute can be determined on merit.

The 1st, 2nd and 3rd Respondents are awarded costs which shall be taxed in default of agreement.

Delivered this 4th day of June, 2018.



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J. CHASHI
APPEAL COURT JUDGE



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J.M. SIAVWAPA
APPEAL COURT JUDGE



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P.C.M. NGULUBE
APPEAL COURT JUDGE