IN THE SUPREME COURT OF ZAMBIA **APEAL NO.164/2014**

HOLDEN AT LUSAKA

BETWEEN:

ZAMBIAN BREWERIES PLC **APPELLANT**

AND

STANLEY K. MUSA **RESPONDENT**

Corum : Hamaundu, Kaoma and Mutuna, JJS

On 7th June 2016 and 13th June 2016

For the Appellant : Mr. A. Tembo of Messrs Tembo Ngulube and Associates

For the Respondent : In Person

J U D G M E N T

Mutuna, JS delivered the Judgment of the court

Cases referred to:

1) Cowey vs Liberian Operations Ltd (1966) 2 Lloyd's Reps 45.

2) *Berry vs Berry (1929) 2.K.B. 316*

3) ZCCM Ltd and Ndola Lime Ltd vs Sikanyika and Others SCZ Judgment No. 24 of 2000

4) Esquire Roses Farm Ltd vs ZEGA Ltd SCZ Judgment No.3 of 2013

5) Kabwe vs BP (Zambia) Limited (1995-1997) Z.R. 218

6) Wilson Masauso Zulu vs Avondale Housing Project Limited (1982) Z.R. 172 (SC)

7) Stamp Duty Commissioners vs African Farming Equipment Company Limited (1969) Z.R. 32 (C.A)

Works referred to:

1) *Chitty on Contracts: General Principals, Volume 1, by H.G. Beale, QC, General Editor, Thomson Reuters, 2008 UK*
2) *Sewlyn's Law of Employment, 13th edition by N. M. Sewlyn (2004) Butterworths: London.*

In this judgment we have referred to the Appellant as the Defendant and the Respondent as Plaintiff, which is what they were in the court below.

The undisputed facts of this case are that by letter dated 18th August 2005, the Defendant appointed the Plaintiff as one of its Contract Driver Sales Manager. The effective date of appointment was 22nd August 2005, and the Plaintiff was to deliver the Defendant's products along a designated route. These products included soft drinks and beer.

The letter of appointment also made provision for the Defendant providing a truck for the Plaintiff's use which was to be fully maintained by the Defendant. It also provided for a remuneration in the sum of K160.00 to be paid to the Plaintiff per month for each case delivered. The letter of appointment indicated further that the Defendant

would avail the Plaintiff a contract to evidence the agreement of the parties.

Subsequently, a memorandum of agreement (MoA) was prepared which set out the terms and conditions upon which the parties' relationship would be governed. It set out the obligations of the Plaintiff as follows: to look after the cleanliness of the truck; purchase his own fuel from his commission; employ his own truck assistants who will wear protective uniforms; be responsible for the remuneration, discipline and conduct of the truck assistants; be responsible for the product load on his truck and be accountable for losses and breakages at a standard rate of 0.10%; be required to follow and complete laid down routes without fail; and leave the company premises no later than 8.00 hours. On the other hand, the obligations of the Defendant were designated as follows: to provide the truck for the transportation of the products and be responsible for its maintenance as long as the defects were not as a consequence of abuse; provide a profitable route to the Plaintiff which was to be audited by the Trade Marketing Representative every so often; pay the Plaintiff a commission of K850 per case, out of which K200.00 would

be retained by the Defendant and directed towards payment for the truck at the end of each calendar month (value of the truck being K72,000,000.00 un-rebased); and pay the Plaintiff commission from his previous month's earning by the 5th day of the following month. The MoA was signed by the Plaintiff but was not signed by the Defendant.

During the life of the contract, the Defendant paid the Plaintiff various monthly amounts as commission, depending on the number of cases transported, which averaged in the sum of K1,600.00. The said payments were witnessed by pay slips issued by the Defendant to the Plaintiff.

Subsequently, on 28th August 2007, the Defendant terminated the contract by way of a month's payment in lieu of notice. As a consequence of the termination, the Plaintiff instituted proceedings in the court below claiming the following relief, that is to say: specific performance of contract dated 2nd September 2005; payment of the sum of K84,526,400.00 un-rebased; interest; and costs. The Plaintiff also made an alternative claim for: the purchase of the truck; payment of the sum of K12,526,400.00 (un-

rebased), being the excess deducted over and above the purchase price of the truck; interest; any other relief the court may deem fit; and costs. The basis of the Plaintiff's claim for K84,526,400.00 was that it was the total amount that the Defendant deducted from his commission which was to go towards the purchase of the truck.

During the trial in the court below the Plaintiff testified on his own behalf. His evidence revealed that he was employed by the Defendant on a contract basis from August 2005 to August 2007 as a driver salesman. That his duties involved delivery of soft drinks and beer to the Defendant's customers along designated routes. Subsequent to his appointment he signed a contract on 2nd September 2005. The conditions of the contract were, *inter alia,* as follows: that he would not work for a salary but a commission of K850.00 per case sold whenever he went out trading; of this amount he was paid K160.00 per case per month while the difference of K200.00 was withheld by the Defendant as a contribution towards the purchase of the truck, whose value was pegged at K72,000,000.00, un-rebased; that he would be purchasing the fuel to run the

truck from the K850.00 paid; and that he would be responsible to pay his helpers.

The evidence revealed further that despite what was agreed in the contract, the Defendant was refueling the truck and paid him a commission of K160.00 per case. On 28th August 2007, the Plaintiff received a letter from the Defendant, pursuant to which the contract was terminated. Upon termination of the contract, the Defendant refused to refund the moneys it had been deducting for the purchase of the truck during the tenure of the contract. This prompted the Plaintiff to write a letter of demand to the Defendant's Human Resources Department in October 2007. There was no response to the letter and thereafter, the Plaintiff was denied access into the Defendant's plant.

The Defendant's evidence in the court below was led by Clement Moyo, the warehouse manager and it confirmed the appointment of the Plaintiff as a contract driver by the Defendant. Further that he was appointed in the first category of SSD – Strategic Selling Depots – 1, which meant that he delivered the Defendant's pre-sold stock to selling depots spread across Lusaka.

The evidence went on to reveal that the Plaintiff's terms of engagement were governed by the MoA which set out the obligations the two parties had to fulfill. It revealed further that the two parties did not fulfill their obligations because the Plaintiff did not purchase fuel for the truck whilst the Defendant did not pay the commission of K850.00 as agreed or deduct the sum of K200.00 from the commission paid. Further that the MoA was not executed because there was a complaint from the other category of drivers. For this reason, the rate payable to the category of drivers the Plaintiff belonged to, was reduced to K160.00 per case because the stock they carried was already pre-sold. The other category of drivers had to source for customers and as such their rate was raised to K350.00 per case. As a consequence of this, the Plaintiff was paid the sum of K160.00 per case, throughout the tenure of the contract and that at no time was he paid the sum of K850.00 per case. Further that the Defendant did not deduct the K200.00 from the Plaintiff's commission and that there are no such deductions indicated on the pay slips that were given to the Plaintiff by the Defendant.

After considering the foregoing evidence, the Learned High Court Judge found as an undisputed fact that the parties entered into the MoA which was signed on 2nd September 2005. Further that the MoA set out the obligations that the two parties were to fulfill. She went on to consider the defence raised by the Defendant that the terms of the MoA were varied by the parties and held that in order for variation to be a valid defence, it must be by mutual agreement of the parties to the contract. Further, that the variation must conform to the tenets for formation of a contract, being, offer, acceptance and consideration. That a mere unilateral notification by one party to the other, in the absence of any agreement, cannot constitute a variation.

In arriving at the foregoing findings, the Learned High Court Judge considered various authorities namely, ***Chitty on Contracts: General Principles***, Volume 1; ***Cowey vs Liberian Operations Ltd***[1]; ***Berry vs Berry***[2]***; ZCCM Ltd and Ndola Lime Ltd vs Sikanyika and Others***[3]***;*** and ***Esquire Roses Farm Ltd vs ZEGA Ltd***[4].

The Learned High Court Judge went on to dismiss the Defendant's contention that the non implementation or

execution of the terms of the MoA constituted variation of the MoA. The grounds upon which she dismissed the said contention was that the Defendant did not lead any evidence showing that it had at any time intended to vary the terms and conditions of the MoA. Further that the payment of the commission was a cardinal condition of the contract which could not be unilaterally abrogated by the Defendant. The Learned High Court Judge also found that the Plaintiff was not informed of the Defendant's intention to vary the terms of engagement nor was his consent sought.

As regards the Defendant's obligation to deduct the sum of K200.00 which was a contribution by the Plaintiff towards the purchase of the truck, the Learned High Court Judge found that clause c in the MoA in which it was contained is couched in mandatory terms. She found that the use of the word "shall" in the clause, compelled the Defendant to deduct the K200.00. She went on to find that it was correct for the Plaintiff to assume that, because he was only paid the sum of K160.00 per case and not K850.00, the K200.00 had been deducted and his fuel costs met from the balance of K490.00. Further that the

fact that the Defendant purchased fuel for the truck which the Plaintiff was obliged to purchase, did not constitute sufficient consideration to justify the Plaintiff foregoing the benefits of the contract. The basis of the finding was that there was no evidence led to show that the Plaintiff had been asked to purchase fuel and he declined.

The Learned High Court Judge concluded by dismissing the Defendant's contention that the Plaintiff consented to the variation of the contract by acquiescence. That is to say that, he did not protest at the variations. The Learned High Court Judge found that the Plaintiff was never informed of the adverse variation and neither was his opinion sought. To this extent, she found that the facts of this case were distinguished from the facts in the case of ***Kabwe vs BP (Zambia) Ltd***[5]. She concluded by finding that there was a unilateral variation of the MoA by the Defendant and as such the Plaintiff was entitled to a refund of the amount he contributed towards the purchase of the truck in the sum of K84,526.40 (re-based). She did not consider the claim for specific performance by way of an order for purchase of the truck because it had been made in the alternative. She also found that the claim for

K12,526.40, being the excess between the agreed value of the truck and the amount contributed, failed. The Learned High Court Judge also awarded interest on the adjudged amount and costs to the Plaintiff.

The Defendant being dissatisfied with the judgment launched this appeal on five grounds as follows:

1) *The Learned trial Judge erred in law and in fact when she held that the Appellant did not notify the Respondent that the terms and conditions of the Memorandum of Agreement had been adversely varied contrary to the unchallenged evidence of the Appellant's witness, DW1, which is available on record*
2) *The Learned trial Judge erred in law and fact, when she held that the variation of the Respondent's terms and conditions of the memorandum of agreement was not valid in the absence of a mutual agreement when in fact the Appellant did produce at trial, documentary evidence to show that the Respondent did accept or acquiesce to the new revised terms and conditions*
3) *The Learned trial Judge erred in law when she held that in order for a variation for contractual terms and conditions to constitute valid defence, it should be by*

mutual agreement of the parties, contrary to the established and settled law on the principle of variation of contracts

4) *The Learned trial Judge erred in law and in fact by finding that the Respondent was entitled to assume that the sum of K200.00 was being deducted by the Appellant towards his contributions for purchase of a motor vehicle and the remainder towards purchase of fuel without specifically proving his obligations of any such contributions contrary to the established and settled legal doctrine of the burden of proof*

5) *The Learned trial Judge erred in law and in fact by holding that since the terms and conditions of the memorandum of agreement had used the word "shall", the same could not be varied by the parties whether by consent or acquiescence.*

At the hearing of the appeal the Defendant abandoned grounds 3 and 4 and only argued grounds 1, 2 and 5.

Both parties filed heads of arguments which they relied on at the hearing of the appeal.

The gist of the argument by counsel for the Defendant, Mr. Tembo, in respect of ground 1 was that the evidence on

record clearly shows that the Defendant did notify the Plaintiff when it reduced the commission payable from K850.00 to K160.00. It was therefore argued that the Learned High Court Judge erred in law when she held that the Defendant did not notify the Plaintiff that the terms and conditions of the MoA had been adversely varied. The said findings, counsel argued, are amenable to being reversed by this court because they are perverse in accordance with our decision in the case of ***Wilson Masauso Zulu vs Avondale Housing Project Limited***[6]**.**

As regards ground 2, counsel began by agreeing with the Learned High Court Judge's finding that in order for a variation of contract to be a valid defence the variation must be by consent of both parties. He, in this regard, referred us to our holding in the case of ***Kabwe vs BP (Zambia) Limited***[5]**.** It was counsel's argument that there was consent to the variation because the evidence by DW1 indicated that when the rates were adversely varied all drivers were informed. This evidence, it was argued, was not challenged or discredited in cross examination. The Plaintiff is therefore, deemed to have accepted the variation or acquiesced because he did not treat the contract as

repudiated. Further, that the variation was supported by consideration. In arguing the latter point, counsel contended that the evidence of DW1 indicated that there was a mutual abandonment of certain agreed terms of the MoA. He relied on ***Selwyn's Law of Employment*** and our decision in the case of ***Esquire Roses Farm Limited vs ZEGA Limited***[4].

As regards ground 5, counsel attacked the Learned High Court Judge's finding that since the word "shall" was used in the MoA, the same could not be varied by the parties by consent or acquiescence. It was counsel's argument that in accordance with the decision in the ***Esquire Roses Farm Limited*** case, any contract can be varied as long as it satisfies the laid down test. Further that ***Chitty on Contracts*** agrees with the proposition that parties to a contract may vary it by modifying or altering its terms by mutual agreement. Counsel argued further that the only time a contract may not be varied unilaterally is when it specifically says so. He argued, in this regard, that a perusal of the MoA indicates that there is no provision contained therein which prohibits variation. It was therefore, his submission that the parties were at liberty to

vary the terms relating to commission or any other provision, provided that there was consent or acquiescence. Counsel concluded arguments by submitting that the use of the word "shall" in the MoA was merely for purposes of describing the Appellant's obligations and not for the purpose ascribed to it by the Learned High Court Judge.

Counsel prayed that the appeal should be allowed.

In response to the arguments under ground 1, the Plaintiff challenged the Defendant to prove its contention that certain terms and conditions of the MoU were varied. He demanded evidence proving his consent to the alleged amendments.

As regards ground 2, he repeated the argument advanced in ground 1. He also confirmed that he never protested at the alleged variation to the MoA because there was nothing to protest about. It was his further argument that the pay slips do not prove that the commission paid to him was at the rate of K160.00 per case because they do not say so.

As regards grounds 5, it was the Plaintiff's argument that he assumed that the fuel cost was met by the sum of

K490.00, being the balance after the Defendant deducted the sums of K200.00 and K160.00 from the commission of K850.00 per case. It was also his argument that no explanation had been given to him as to how fuel payment would be made.

The Plaintiff prayed that the appeal should be dismissed.

We have considered the record of appeal, judgment of the court below and arguments by counsel for the Defendant and those by the Plaintiff.

We feel that the three grounds that the Defendant has advanced more or less raise the same issue and as such, we shall consider all three grounds together. Further, the issues that the grounds address can be condensed into two being: did the parties vary the MoA; and if so, what is the effect of the variation.

Before we consider the issues, we feel compelled to consider an issue that the two parties did not address us on which is, whether the MoA can be enforced against the Defendant in view of the fact that it did not sign it. This issue arises from a perusal of the MoA which is at pages 88

to 91 of the record of appeal, which perusal reveals that it was not signed by the Defendant. It was, however, signed by the Plaintiff.

The general principle regarding written contracts is that for such contracts to be enforceable against any party, that party must have signed the contract. Where, however, only one party signs the contract, it is enforceable on the party who has signed it notwithstanding the fact that the other party may not have signed it. By implication therefore, a contract is not enforceable against a party who has not signed it. This is in line with our holding in the case of ***Stamp Duty Commissioners vs African Farming Equipment Company Limited***[7] as follows:

> *"It is not necessary that an agreement should be signed by both or all the parties for it to be operative against a party who has signed it".*

In relation to this appeal, there is therefore, no doubt that the MoA is operative or enforceable against the Plaintiff. The same is not the case as it relates to the Defendant on account of want of execution on its part. The Defendant however, did not raise this defence and we are only considering it for purposes of completeness. That is to

say, as a court we cannot turn a blind eye to the fact that the contract that is at the heart of the dispute is not executed by the party against whom it is sought to be enforced. Having considered the circumstances of this case, that is to say, the fact that the Defendant has not used the absence of its signature on the MoA as a defence and that it derived a benefit from the MoA, the view we take is that it is enforceable against it on the ground of estoppel. ***Chitty on Contracts – General Principles*** at page 207 has this to say on this subject:

> *"Conversely, an agreement which originally lacked contractual force for want of execution of the formal document may acquire such force by reason of supervening events. This could, for example, be the position where it can be objectively ascertained that the continuing intention [SC. not to be bound until execution of the document] has changed or ... Subsequent events have occurred, whereby the non-executing party is estopped by relying on his non-execution".*

In this matter, the view we take is that subsequent to the parties agreeing the terms and the Plaintiff executing the contract, there were subsequent and supervening

events that altered the Defendant's position. These subsequent and supervening events are the fact that the Defendant started to enjoy the benefits of the MoA as a consequence of the Plaintiff performing his obligation to deliver the Defendant's products. This fact, in our considered view, bars the Defendant from relying on its not executing the MoA to assail it as being un-enforceable against it. We, therefore, hold that the MoA is binding and enforceable against both the Plaintiff and Defendant. This is subject to what we have said in the latter parts of this judgment in relation to the two issues we have identified for consideration.

We now turn to consider the issues.

The first issue we identified is, did the parties vary the MoA? The finding by the Learned High Court Judge on this issue was that the parties did not agree to vary the MoA. Further, that the Defendant varied the MoA unilaterally and to the detriment of the Plaintiff. In making the said finding she reasoned as follows: a variation of the contract must conform to the tenets of formation of a contract if it is to be valid, that is, there must be an offer, acceptance and consideration; that there was no consideration passing

from the Defendant to the Plaintiff; a unilateral variation by one of the parties cannot constitute a valid variation of the contract; and the wording of clause c in the MoA is couched in mandatory terms and, as such, the Defendant was obliged to pay the K850.00 and to deduct the K200.00 towards the purchase of the truck.

The arguments by counsel for the Defendant on this issue were that the evidence of DW1 indicates that the Plaintiff was informed, along with the other drivers in his category, that the rates had been reduced from K850.00 to K160.00. That the Plaintiff did not complain about the said variation, therefore, he acquiesced to the variation. It was also argued that the MoA is couched in such a way that it does not bar the parties from varying it.

There is general consensus that parties to a contract can vary it by mutual consent. ***Chitty on Contracts – General Principles*** states in this respect at page 1465 to 1467 as follows:

"The parties to a contract may effect a variation of the contract by modifying or altering its terms by mutual agreement ... The agreement which varies the terms of an existing contract must be supported by

consideration. In many cases, consideration can be found in the mutual abandonment of existing rights or the conferment of new benefits by each party on the other".

It is clear from the foregoing that the parties are at liberty to vary a contract. This fact was indeed acknowledged by the Learned High Court Judge. It is also evident from the passage from ***Chitty*** that we have quoted that there is need for consideration before a finding that a contract was varied can be upheld. This consideration, as ***Chitty*** demonstrates, can be found in the abandonment of existing rights.

The facts of this case, as we have demonstrated in the earlier part of this judgment, show that the parties agreed on terms and conditions which spelt out their obligations. Some of the rights that the Plaintiff was entitled to were payment of a commission of K850.00 per case and the deduction there from of K200.00 to be applied to the purchase of the truck. As regards the Defendant, it was entitled to have its product delivered and the truck refueled by the Defendant. The conduct of the parties demonstrates otherwise. In respect of the Plaintiff, he received and

continued to accept commission at the rate of K160.00 per case. Further, he did not insist on the Defendant deducting the K200.00 for the purchase of the truck. This is revealed by the pay slips at pages 92 to 108 of the record of appeal which indicate that the K200.00 was not deducted. On the Defendant's part, the Plaintiff was not refueling the truck and it took up the responsibility of doing so, despite the terms of the MoA. Both parties did not complain about the other party's conduct in relation to their obligations.

The view we take from the foregoing conduct is that the parties varied the MoA by conduct and in doing so, the consideration that passed between them was the abandonment of their rights as explained in the preceding paragraph.

In arriving at the decision in the preceding paragraph, we have considered and dismissed the finding by the court below that the Plaintiff was in order to assume that the K200.00 was being deducted from the K850.00 and that a further amount of K490.00 was being channeled to meeting the fuel costs by the Defendant. We have dismissed the said finding because it is not supported by the evidence on record. The pay slips we have referred to in the earlier part

of this judgment show that the only deductions from the commission that were anticipated were photocopies, cell phones, canteen, breakages and tax. There is nothing in the pay slip to show that the K200.00 was being deducted or indeed that fuel costs were deducted.

We have also considered the evidence of the Plaintiff which supports our finding. This evidence is at page 165 of the record of appeal as follows:

> *"I agree that the contracts on the truck were not performed by parties wholly. There was alternative to the terms of the contract as some terms were not followed by both parties. One of the terms required that I buy my own fuel, correct.*
>
> *I never used to buy my own fuel but the company bought.*
>
> *I was paid K160 per crate per month, but that figure is not appearing in the memorandum of agreement*
>
> *I did not have any issue with the K160 payment per crate per month".*

This evidence, in our view, is a confirmation by the Plaintiff that both parties did not abide by the terms and

conditions of the MoA thereby abandoning their rights under the contract. It is also a confirmation that the Plaintiff was comfortable with the payment of the K160, thereby consenting to the variation of the consideration.

In the excerpt of the evidence that follows the portion we have quoted at page 165, the Plaintiff confirms that he received the pay slips and that none of them show that the sum of K200.00 was being deducted. This evidence re enforces our finding that the parties varied the terms of the MoA, especially that there is no evidence showing that the Plaintiff complained about the Defendant's omission to deduct the K200.00. This also lends credence to the evidence of DW1, under cross examination at page 172 as follows:

> *"When the rates were revised all contract drivers were advised. When you look at the pay slip, he should have objected to the payment of K160 per case as reflects on his pay slip".*

In view of the foregoing evidence which was not challenged, we take the view that the findings of the Learned High Court Judge were perverse as they were not supported by the evidence on record. These findings of fact

are therefore amenable to being reversed, and we so order, in accordance with our decision in the case of ***Wilson Masauso Zulu vs Avondale Housing Project Limited***[6].

We now turn to consider the second issue, which is the effect of the variation. The view we take is that the parties having abrogated some of their rights under the MoA as we have demonstrated, they cannot enforce them. It is therefore our finding that the Plaintiff cannot insist on enforcing his right for the sale of the truck to him or payment of the sum of K84,526.40 (rebased), on account of our earlier finding that, in any event, no deductions were made, in this regard, to the commission paid to him. We therefore find that it was a misdirection on the part of the Learned High Court Judge to award the sum of K84,526.40, plus interest. We accordingly strike it down.

The net result is that the appeal succeeds on all three grounds and we allow it. In doing so, we award the Defendant costs of this appeal and of the proceedings in the court below.

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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R.M.C. KAOMA
SUPREME COURT JUDGE

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N.K. MUTUNA
SUPREME COURT JUDGE