IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 77 OF 2019

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

LIEGE ZAMBIA LIMITED **APPELLANT**

AND

C & B ENTERPRISES LIMITED **RESPONDENT**

CORAM: Chashi, Mulongoti and Lengalenga, JJA

ON: 25th September and 28th November, 2019

For the Appellant: *I. Nambule (Ms.), Messrs. Sharpe & Howard Legal Practitioners*

For the Respondent: *E. Khosa, Messrs. Alberto Ngoyi Advocates.*

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. Shanklin Pier Limited v Detel Products Limited (1951) 2 KB, 854
2. Kalyoto Muhalyo Paluku v Granny's Bakery Limited, Ishaq Musa, Attorney General and Lusaka City Council (2006) ZR, 119
3. Macha Rainsford Hanziba and 21 Others v Lusaka Water and Sewerage Company, CAZ – Appeal No. 111 of 2017
4. Afrizone Global Merchant Limited v Bank of Zambia, CAZ – Appeal No. 165 of 2018

Rules referred to:

1. The Court of Appeal Rules, 2016
2. The Supreme Court Practice (White Book), 1999

Other works referred to:

1. Atkin's Encyclopedia of Court Forms in Civil Proceedings, 2nd Edition, Volume 23(1), 1998, London, Butterworths.

2. Black's Law Dictionary, Bryan A. Garner, 9th Edition, 2009

3. Concise Oxford English Dictionary, 11th Edition Revised, 2008, Oxford University Press

1.0 INTRODUCTION

1.1 This appeal emanates from the Judgment of the High Court, Commercial Division, delivered by the learned Lady Justice, Dr. W.S. Mwenda on 31st January, 2019.

1.2 In the said Judgment, the learned Judge ruled in favour of the Respondent in the main and in favour of the Appellant in its counter claim.

2.0 BACKGROUND TO THE CASE

2.1 The brief background to the matter is that, the Appellant was owed the sum of US$22,364.57 by the Respondent by way of an advance note. When the

Respondent failed to settle the amount, the Appellant commenced proceedings in the High Court under cause No. 2014/HPC/0520 which culminated into execution of a Consent Judgment appearing at page 112 of the record of appeal (the record).

To this effect, Judgment was entered in favour of the Appellant in the sum of US$22,364.57 as full and final settlement of the claim.

2.2 The said amount was to be liquated by the Respondent releasing its grader to the Appellant, for the Appellant's use, until the amount was recovered in full at the Respondent's standard rates. It was further ordered that, the Respondent will ensure that the grader was at all times maintained in good working condition and comprehensively insured. Lastly, it was ordered that upon the amount being liquidated in full,

neither party will have any further claims against the other whatsoever.

2.3 In pursuance of the said Consent Judgement, the Respondent released the grader to the Appellant by driving it to its premises, on 12th December 2014. The grader remained in the Appellants possession in excess of 228 days.

2.4 According to the Appellant, when the grader was released to them, it was in the rainy season and it could not be used as it is conditioned to perform better in the dry season. Further that, it was not handed over in the proper manner by explaining what condition it was in. It was later discovered that it had mechanical and electrical faults and as such it could not function properly and that it also required replacement of some tyres, which position was duly communicated to the Respondent.

2.5 According to the Appellant, it spent a total of US$ 13,746.25 on repairs, but the grader was still not able to function except for a few hours and as such they have not been able to recover the amount under the Consent Judgment.

3.0 THE CASE AND ARGUMENTS IN THE COURT BELOW

3.1 Later in 2015, when the Respondent demanded for the return of the grader and it was not returned, the Respondent commenced proceedings on 29th September 2015 by way of Writ of Summons claiming for the following reliefs:

(i) Immediate payment of the sum of US$228,000.00 being the cost of hire of the bell grader from 8th January, 2015 to 31st September, 2015.

(ii) Interest on the amount claimed and costs.

3.2 According to the Respondent, the Appellant was only supposed to have had possession of the grader for a

period of 23 days from 12th December, 2014 to 7th January, 2015, hence the claim for the excess days the grader had stayed in the Appellant's possession.

3.3 On its part, the Appellant counter claimed the sum of US$13,746.25, spent on repair works, fuel, hire of a grader operator and various auto mechanics. Also, the sum of US$ 21,250.00 being the outstanding balance on the Consent Judgment sum plus interest.

4.0 FINDINGS OF THE LOWER COURT

4.1 After consideration of the pleadings, the evidence and arguments by the parties, the learned Judge in the court below formulated (5) issues for determination; namely:

a) Whether or not there was a grader hire agreement between the parties and if so, what the duration was and when the time started running.

b) Whether the amount of US$22,364.57 awarded through the Consent Judgment was liquidated in full by the Respondent.

c) Whether the Respondent was entitled to the sum of US$228,000.00 for the cost of hire of the grader from 8th January 2015 to 31st September 2015.

d) Whether or not the Defendant was entitled to a refund of US$13,746.25 for repairs to the grader.

e) Whether or not the Appellant was entitled to the sum of US$21,250.00 for the balance of the initial debt owed.

4.2 As regards the first issue, the learned Judge was of the view that the negotiations between the parties vide the emails exchanged is what culminated into the Consent Judgment of 2nd March 2015, which made no mention of any hire agreement or arrangement.

That further examination of the Consent Judgment and the facts on record leading to the Consent Judgment showed that the reason the grader was released was for the sole purpose of the Appellant recovering the monies owed to it by the Respondent. The agreement to release the grader did not exist in isolation from the unsettled debt and as such the agreement was more of a collateral agreement than a hire agreement.

4.3 In the circumstances, the learned Judge opined that given the parties' background, it cannot intelligibly be said that the object of the agreement to release the grader was to create a typical hire agreement. Rather it was of a collateral nature, created to serve the larger purpose of the Appellant recovering its money from the Respondent.

The learned Judge then concluded that in the absence of a hire agreement executed by the parties it is correct to state that there was no hire agreement regarding the grader.

4.4 On the duration and when time started running, the learned Judge found that, at the agreed rate of K5,000.00 per day, the duration was for 24 days, which was later increased to 30 days. The court observed that the grader having been released on 12th December 2014, by the time the Consent Judgment was signed on 2nd March 2015, the Respondent had already released the grader to the Appellant for three (3) months.

4.5 On the second issue, the learned Judge examined the terms of the Consent Judgment, on how the Judgment sum was to be liquidated. The learned Judge took the view that the Appellant was aware at the time of

entering into the agreement that December is the peak of the rain season in Zambia and should therefore, have raised the concern before executing the Consent Judgment. She opined that the Appellant was attempting to cry foul after the fact, which did not help its case.

4.6 However, the learned Judge found that the Appellant had produced evidence which showed that the grader was not working all the time. She found that the grader progress report indicated that, the first break down occurred on 15th April 2015, but it did not indicate the condition of the grader between 12th December 2014 and 14th April 2015.

After analyzing the grader progress report, the learned Judge was of the view that the Appellant had four months between 12th December 2014 and 14th April 2015 to recover the monies owed by the Respondent.

She was of the view that the excuse of rain which was not mentioned in the report, does not hold any water. The learned Judge found that the money was fully liquidated.

4.7 As regards the third issue, the court took the view that, despite the finding that there was no hire agreement, any unwarranted extended period that the grader was in the custody of the Appellant justified compensation as per the daily rate expressed in the collateral agreement.

Following the progress report, the Judge observed that although the grader was still in the Appellant's possession, it had never worked since 16th May 2015. In that regard, she took the view that, to award the Respondent the sum of US$ 228,000.00 for a grader that has not been working for the most time, would be to unjustly enrich the Respondent. The Judge

therefore, ordered payment for 103 days, being 90 days from 15th January 2015 to 14th April 2015, plus 13 days when the grader was with the Appellant from 23rd - 26th April, 28 – 29 April and 12th – 16th May 2015.

4.8 On the 4th issue, which arose from the counter claim, the learned Judge found that, it was clear from the terms of the Consent Judgment that the Respondent bore the responsibility of maintaining the grader in good working condition. In addition, she found that the Respondent had not adduced any evidence to prove that the Appellant was not permitted to carry out repairs or engage third parties to carry out repairs to the grader. She was of the view that the Respondent ought to refund the Appellant the sum of US$13,746.25 as costs of repairs of the grader.

4.9 As regards the last issue, the court took the view that it had been resolved under the second issue.

5.0 DECISION OF THE COURT BELOW

5.1 The learned Judge, as a consequence of her findings, entered Judgment for the Respondent in the sum of US$103,000.00 being compensation for the use of the grader for 103 days plus interest.

She also entered Judgment for the Appellant in the sum of US$ 13,746.25 for repairs less the amount spent on fuel and hire of the grader operator plus interest and ordered each party to bear its own costs.

6.0 GROUNDS OF APPEAL

6.1 Dissatisfied with the Judgment of the lower court, the Appellant has appealed to this Court advancing three grounds of appeal couched as follows:

1. **The learned Judge erred in both law and fact when she made a finding at page J36 of the Judgment that the release of the grader by the Appellant to the Respondent was more of a "collateral agreement" than a "hire agreement".**

2. **The learned trial Judge erred in law and fact when she made a finding at page J44 of the Judgment that the Respondent had liquidated the sum of US$22,367.57 owed to the Appellant in the absence of evidence to support the determination.**

3. **The learned Judge erred in law and fact at page J51 of the Judgment when she awarded the Respondent the sum of US$103,000 plus interest as compensation equivalent to the cost of the use of the Bell grader between 15th**

January 2015 and 16th May 2015 by the Appellant for 103 days without justifying how the award was arrived at.

7.0 ARGUMENTS IN SUPPORT OF THE APPEAL

7.1 At the hearing of this appeal, Ms. Nambule, Counsel for the Appellant, relied on the Appellant's heads of argument. On the other hand, Mr. Khosa, Counsel for the Respondent, informed us that he did not file any heads of argument or list of authorities because he was satisfied with the decision of the lower court. Even though we reluctantly allowed Mr. Khosa to grace the record as Counsel for the Respondent, we wish to remind Counsel and litigants that it is mandatory for a Respondent in an appeal to file heads of argument after being served with the record and heads of argument in support of the appeal. **Order 10 Rule**

9(16) of **The Court of Appeal Rules (CAR)** provides as follows:

"The Respondent shall, within 30 days of being served with the record of appeal and heads of argument, deliver twenty-one hard copies and an electronic copy of the Respondent's heads of argument together with a list of authorities of each head to be cited and a supplementary record, if any, to the Master and one copy to a party to the appeal."

The above rule is couched in mandatory terms and as such, it is incumbent on the Respondent to file heads of argument even when they are satisfied with the Judgment of the lower court. The purpose of the arguments put forward by the Respondent is to convince the Court that the lower court's decision was correct and to address the issues raised by the Appellant.

7.2 The gist of the arguments put forward for ground one are that, after the learned trial Judge made a finding to the effect that there was no hire agreement or arrangement between the Appellant and the Respondent, she proceeded to make a finding that, what existed between the parties was a collateral agreement. According to Counsel, this was a misdirection on the part of the learned Judge.

It was argued that a collateral agreement exists alongside a valid contract or agreement and the lower court having found that there was no hire agreement between the parties could not, therefore find that a collateral agreement existed in the absence of a main contract or valid contract.

7.3 Counsel submitted that, the document which governed the parties' relationship at all times was the Consent Judgment and she wondered whether a Consent

Judgment could be considered as a contract upon which a collateral agreement could be formed. Ms. Nambule referred us to **Black's Law Dictionary**[2] definition of consent and judgment as follows:

"consent – Agreement, approval, or permission as to some act or purpose esp. given voluntarily by a competent person, legally effective assent..."

judgment – A Court's final determination of the rights and obligations of the parties in a case."

It was contended that, going by the above definition, a consent judgment is basically an agreement by the parties on how rights and obligations are determined and as such in the present case, the agreement by the parties was on how the Appellant was to recover the monies owed to it by the Respondent.

7.4 Counsel accordingly argued that, for a consent judgment to become binding, there is need for three

steps to be followed; execution of the consent judgment by the parties, filing of the executed consent judgment into court and validation of the consent judgment by a Judge. She added that, in the event that parties wished to vary the terms of the consent judgment, the three steps must be followed.

7.5 According to Counsel, the lower court in arriving at its decision did not identify which agreement the purported collateral agreement was accompanying. She pointed out that, if the purported collateral agreement was supplementary to the Consent Judgment then such agreement ought to have been formed by following the three steps mentioned above. To buttress her argument, reliance was placed on **Atkin's Encyclopedia of Court Forms in Civil Proceedings'**[1] on consent judgment and orders found at page 212.

7.6 Ms. Nambule further pointed out that, the terms that were subject of the negotiations between the parties, leading up to the execution of the Consent Judgment, could not be considered as collateral because they were embodied in the Consent Judgment which was readily executed by both parties.

7.7 It was further argued that in order for a collateral agreement to be enforceable, it must be supported by consideration. Reliance was placed on **Shanklin Pier Limited v Detel Products Limited**[1]. It was argued that in the present case, there was no consideration from the Appellant to the Respondent.

Based on the foregoing, Counsel submitted that the release of the grader by the Respondent to the Appellant was due to the Consent Judgment.

7.8 With respect to ground two, it was argued that, one of the terms contained in the Consent Judgment was

that, the Appellant was to use the bell grader until recovery of the sum owed to the Appellant. However, the period within which the Appellant was to have and use the bell grader was not agreed upon and thus it was not a term of the Consent Judgment.

7.9 It is Counsel's argument that the bell grader was not functional due to weather and mechanical faults and to support this position, she referred us to correspondence exchanged between the parties vide emails found at pages 84 and 85 of the record and the evidence of the Appellant's witnesses found at pages 139 – 149 of the record confirming that the bell grader was not utilized often.

In addition, we were referred to documentary evidence in form of receipts and labour costs for repairs of the grader found at pages 113-126, the bell grader progress report found at pages 127 to 129 and to the

Respondent's witness' testimony at page 180 of the record confirming that the grader was not utilized on many days.

7.10 It was argued that in the face of such overwhelming evidence, the learned trial Judge fell into grave error when it made a finding that the amount owed to the Appellant was fully liquidated. According to the Appellant, the Respondent is still owing a sum of US$ 21, 250.00.

7.11 In support of ground three, Counsel argued that, the learned trial Judge, having found that the release of the bell grader by the Respondent to the Appellant was a collateral agreement and not a hire agreement, fell into grave error when she proceeded to award the sum of US$ 103,000.00, which award ought to have been predicated on some existing agreement.

Counsel reiterated her arguments in ground one that there was no collateral agreement in existence and that the Consent Judgment governed the relationship between the parties. She further argued that the Consent Judgment did not provide a timespan within which the Appellant was to have possession and use of the grader. And that, in the absence of an agreed term as to duration, the Appellant cannot be faulted for having possession of the grader for the sole purpose of recovering the debt.

7.12 Furthermore, Counsel criticized the learned trial Judge for awarding the sum of US$ 103,000.00 at a purported agreed rate of US$ 1,000.00. It was contended that, there was no evidence before the court below to the effect that the parties had agreed on a daily rate of US$ 1,000.00.

In conclusion, Counsel urged us to allow the appeal, set aside the decision of the lower court and grant the Appellant its claims as prayed for in its counterclaim.

8.0 DECISION OF THIS COURT

8.1 We have considered the record, the impugned Judgment and the arguments of the Appellant and the authorities cited therein.

8.2 The first ground of appeal attacks the learned Judge's finding that, there was no hire agreement or arrangement but a collateral agreement between the parties. According to the Appellant, considering the nature of a collateral agreement, the trial judge did not identify which agreement the collateral agreement was accompanying or supplementing.

8.3 We have carefully perused the lower court's Judgment and in particular pages J36 - J37 and note that, indeed after she rightly found that the negotiations

between the parties culminated in the execution of the Consent Judgment and that the said Consent Judgment did not make any reference to a hire agreement, the learned Judge found that what existed between the parties was a collateral agreement. The learned Judge then proceeded to define the collateral agreement according to **Black's Law Dictionary**[2] as follows:

"collateral – supplementary, accompanying, but secondary and subordinate to.

Collateral contract – a side agreement that relates to a contract, which if unintegrated can be supplemented by the evidence of the side agreement, an agreement made before or at the same time as, but separately from another contract."

8.4 With the above definition in mind, we are at pains to appreciate the reasoning behind the lower court's

conclusion, that what existed between the parties was a collateral agreement. It is clear from the record that the origin of the whole matter is the Consent Judgment found at page 112 of the record under cause No. 2014/HPC/0520.

8.5 According to **Black's Law Dictionary,**[2] a Consent Judgment is defined as an agreed Judgment. A settlement that becomes a court Judgment when the court sanctions it. It binds the parties as fully as other Judgments.

8.6 In addition**, Order 42/5A/4** of **The Rules of the Supreme Court (RSC)**[2] which deals with the practice regulating consent procedure, states that:

"*solicitors have an increased burden in ensuring that the consent Judgment is expressed fully, clearly and with precision, and carries into effect the intention of the parties, without ambiguity or possibility of a conflict of*

construction. Although the terms agreed are contractual in character, in form and effect they will have force and consequences of an order of the Court, and this must be borne in mind in the draft of the agreed terms."

8.7 The above position of the law was adopted by the Supreme Court in the case of **Kalyoto Muhalyo Paluku v Granny's Bakery Limited, Ishaq Musa Attorney General and Lusaka City Council** where the Supreme Court had an opportunity to discuss **Order 42/5A/4 RSC** and it held:

1. *"Whether all the parties to a cause or matter are agreed upon the terms in which judgment should be given or an order should be made, a judgment or order in such terms may be given effect as a judgment or order of the Court.*

2. *Before judgment or order is entered or sealed it must be drawn in the terms agreed and expressed*

as being "By Consent" and it must be endorsed by lawyers for each of the parties."

8.8 From a perusal of the correspondence exchanged between the parties and their lawyers, the terms discussed during the negotiations leading up to the execution of the Consent Judgment were embodied in the Consent Judgment drawn up by the lawyers and duly executed by the lawyers and sanctioned by the court.

Therefore, it is the Consent Judgment that governed the parties' relationship and carried into effect the intention of the parties. Upon a perusal of the Consent Judgment, it is quite clear that under clause (ii) of the Consent Judgment, the releasing of the grader to the Appellant for use until the sum due was recovered in full, cannot by any means, be said to be a hire agreement or a collateral agreement.

8.9 A collateral agreement, as has been aptly argued by Ms. Nambule, only exists as a side contract and is only active alongside a main contract. We are of the view that there was no other contract existing between the parties, upon which a collateral agreement could be formed. The learned trial Judge having found that there was no hire agreement between the parties, it was not necessary for her to go further and make a finding that there was a collateral agreement.

With that conclusion, it is our view that the learned Judge fell into serious error in finding as she did. We find merit in ground one of the appeal.

8.10 Ground two consists mainly of an attack of findings of fact. The Appellant attacks the learned trial Judge's finding that the amount of US$22,364.57 which was owed by the Respondent to the Appellant had been

liquidated as there was no evidence before the court on which such a finding could be anchored.

8.11 It is a well-established principle of law that an Appellate Court will not readily interfere with the findings of fact of a lower court. As per our recent decisions, **Macha Rainford Hanziba and 21 Others v Lusaka Water and Sewerage Company**[3] and **Afrizone Global Merchants Limited v Bank of Zambia,**[4] an Appellate Court will only interfere with the findings of fact of the lower court where it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts, or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make.

8.12 The grievances raised in ground two of the appeal arise from the findings of fact made by the learned trial

Judge in its judgment under the second issue at pages 140 to 144 of the record. The learned Judge considered the grader progress report found at pages 127 – 129 of the record and elucidated in detail at how she arrived at her decision. In summary, she noted that the first break down occurred on 15th April 2015, but the report did not indicate the condition of the grader between 12th December, 2014 and 14th April, 2015.

8.13 As a result, the learned Judge found that the Appellant had almost four months between 12th December, 2014 and 14th April 2015 in which to recover the sum owed to it. She dismissed the Appellant's excuse that the Appellant was fully aware when it agreed to accept the grader on 12th December 2014 that the period between December and April is the rain season and secondly, that it was not indicated

in the grader progress report for the period between 12th December 2014 and 14th April 2015.

8.14 The learned Judge in our view considered the evidence which was before her, took into consideration the number of days the grader was in the custody of the Appellant and thoroughly examined the grader progress report as regards the use of the grader before arriving at her decision.

8.15 In our view, there was ample evidence before the trial court to enable it arrive at the decision as it did. The learned Judge's decision cannot be said to have been made in the absence of any relevant evidence. The Appellant did not demonstrate that this is an appropriate case in which we can interfere with the findings of the lower court. We, therefore, find no merit in ground two.

8.16 The third ground of appeal attacks the learned trial Judge's finding that the grader was released to the Appellant at a daily rate of US$ 1000.00. Secondly, it attacks the award of the sum of US$103,000.00 to the Respondent as compensation in the absence of a hire agreement, as the award ought to have been premised on an underlying agreement.

8.17 With regard to the first issue, the learned trial Judge at page J38 to J39 found that upon a perusal of the correspondence exchanged between the parties and their lawyers, it was revealed that the parties had agreed on the daily rate of US$ 1000 per day for 30 days in full and final settlement of the Consent Judgment.

We have examined the correspondence relied upon by the trial Judge and the terms of the Consent Judgment. It is clear to us that through the

negotiations leading up to the execution of the Consent Judgment appearing at pages 77 to 87 of the record, an agreement had been reached by the parties that a daily rate of US$ 1,000.00 would apply. This rate was agreed to by the Appellant's Counsel through an email dated 12th September, 2014 found at pages 80 – 81 of the record and formed the basis of the Consent Judgment. Clause (ii) of the Consent Judgment states as follows:

"That the said sum in clause (i) above shall be liquidated in favour of the Plaintiff by the Defendant releasing its Grader bearing Engine No. DRTS2014E0C954172,Chassis No. DRTS14C0C954173 for the Plaintiff's use until the aforementioned sum is recovered in full at the Defendant's standard rates."

(Emphasis Ours)

It is without a doubt that reference to "*the Defendant's standard rates*" in the Consent Judgment signified the agreed daily rate as evidenced by the emails exchanged between the parties. We are of the view that it was the intention of the parties that the standard rate of US$ 1,000.00 would be applicable. The argument by the Appellant that an agreement as to the daily rate had not been concluded is without substance.

8.18 With regard to the second issue, which is the award of US$ 103,000.00 to the Respondent. The learned Judge, at page J45 of her Judgment was of the view that when the Respondent released the grader to the Appellant, it was not its intention that it be kept for longer than the agreed duration.

8.19 The learned Judge having found that the grader was released to the Appellant for its use for 30 days at the daily rate of US$ 1,000.00, she took the view that any

unwarranted extended period that the grader was in the custody of the Appellant justified compensation and the guiding factor being the daily rate.

8.20 The learned trial Judge then considered the number of days the grader was not operational using the grader progress report. She found that the unwarranted extended period was 103 days being 90 days from 15th January, 2015 to 14th April 2015, plus 13 days when the grader was with the Appellant from 23rd – 26th April, 28 – 29th April, 2015, 1st to 2nd May 2015 and 12th to 16th May, 2015.

8.21 Our understanding of the award is that it was not based on the hire agreement or collateral agreement as found by the trial Judge but on the Appellant disobeying the Consent Judgment to which there must be consequences. The Appellant had exceeded the 30 day period and in the process deprived the

Respondent's use of the grader. It is because of this that the Respondent is entitled to compensation. **Concise Oxford English Dictionary**[3] at page 291 to 292, defines compensate and compensation as follows:

"Compensate – to give (someone) something in recognition of loss, suffering or injury incurred.

Compensation - Something awarded to compensate for loss, suffering or injury."

8.22 In our view the Respondent incurred loss by being deprived of the use of its grader and as a result, the Appellant must be sanctioned for not acting in accordance with the Consent Judgment. The learned Judge cannot be faulted for the award. In the premise, we find no merit in ground three.

9.0 CONCLUSION

9.1 Ground two and three which are at the heart of this appeal, having failed, we hold that overall this appeal has no merit and we accordingly dismiss it.

Costs of this appeal are awarded to the Respondent.

Same to be taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE

J. Z. MULONGOTI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE