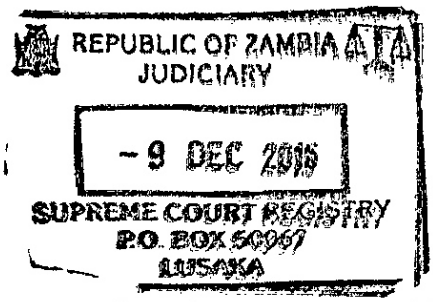
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 183/2016**

HOLDEN AT NDOLA



(Civil Jurisdiction)

BETWEEN:

NDILILA ASSOCIATES (Suing as a firm) **APPELLANT**

AND

LAICO ZAMBIA LIMITED **RESPONDENT**

Coram: Wood, Malila, Mutuna JJS.

On 6th December, 2016 and 9th December, 2016.

For the Appellant : *Mr. O. Sitimela - Messrs Fraser Associates*

For the Respondent : *No Appearance*

JUDGMENT

Wood, JS, delivered the judgment of the Court.

Cases referred to:

(1) *Dalrymple v Scott (1892) 19 OAR 477*

(2) *Base Chemicals Zambia Limited Mazzonites Limited v Zambia Air Force The Attorney General (SCZ Judgment No. 9 of 2011)*

(3) *DP Services Limited v Municipality of Kabwe (1976) Z.R. 110*

Legislation referred to:

(1) *The Zambia Institute of Architects (Code of Professional Ethics and Conditions of Engagement) Regulations S.I. No. 106 of 1999.*

(2) *Zambia Institute of Architects Act, Cap 442 of the Laws of Zambia.*

Other works referred to:

(1) *Paragraphs 631, 633 and 1155 of Volume 9(1) of Halsbury's Laws of England, Fourth Edition, Reissue.*

This is an appeal against a decision of the High Court which dismissed the appellant's claim for K1,428,762.72 architectural fees and instead entered judgment in favour of the appellant for K238,127.12 together with interest and costs. There is no cross appeal against the lesser sum.

The short history of this appeal is as follows. The appellant is a firm of architects while the respondent is a property developer incorporated in Zambia. The respondent was desirous of developing its property known as Plot No. 6953, Birdcage Walk, Longacres, Lusaka. Discussions were held with the respondent on 27th June, 2013 which culminated in the respondent writing a letter to the appellant dated 28th June, 2016 appointing the appellant as

architects and project managers. The second paragraph was a request to the appellant *"...to prepare a quotation for a feasibility study on the best maximum development for the ... plot."*

A month later on 29th July, 2013 and by letter of even date, the appellant accepted the appointment and felt honored to be of service to the respondent. The letter went into some considerable detail regarding the terms of engagement. It stated that the terms of engagement were going to be in accordance with the Zambia Institute of Architects Act of the Laws of Zambia. The appellant's fees for design, working drawings and supervision were going to be 6% of the appellant's estimate of the cost of construction. The letter also pointed out that the commission included undertaking a feasibility study of the site and advice on the possible maximum development for the plot. The appellant advised the respondent that it would be necessary to engage the services of a quantity surveyor, a civil and structural engineer and a mechanical and electrical engineer. Lastly the letter stated that the appellant had started doing some work on the commission and would report on progress in due course.

From the record it is quite clear that the appellant went to work almost immediately.

Shortly after the discussion and appointment, the appellant submitted a project proposal dated 21st August, 2013 indicating *inter alia* the design concept, development costs, professional services required and sketch plans. The respondent did not respond. The appellant sent a reminder to the respondent on 18th December, 2013. There was no response to the reminder either. On 17th July, 2014, the appellant sent a fee note in accordance with Part II 10 (b) of the Second Schedule to the Zambia Institute of Architects (Code of Professional Ethics and Conditions of Engagement) Regulations, S.I. No. 106 of 1999 for K1,231,692.00 which represented 1/6 of 6% of the estimated construction cost of K123,169,200.00. There was no response to this revised fee note. The appellant then sued for professional services rendered in the sum of K1, 231,692.00.

The respondent's defence in the court below was essentially that the appellant was only asked to prepare a quotation for a feasibility study and not to undertake any works. As such, the appellant was not entitled to judgment on the claim.

The learned trial judge found as a fact that the appellant had been appointed as architects and project managers for the development of the property and that the respondent's manager had authority to bind the respondent. From the evidence before him, he found as a fact that there was a legally binding agreement between the parties which was partly in writing and partly oral. The learned trial judge however found that the appellant's claim of K1,428,762.72 was excessive and unconscionable. He was of the view that since there was no supervision involved, the appellant was only entitled to one sixth of the sum of K1,428,762.72 which was K238, 127.12. He based this finding on S.I. No. 106 of 1999. This S.I. No. 106 of 1999 is the Zambia Institute of Architects (Code of Professional Ethics and Conditions of Engagement) Regulations and it stipulates how architectural fees should be calculated. Part II 10 (b) of the second schedule states that:

> *"10. In cases where an architect performs only partial services on behalf of a client, which expression shall be deemed to include the abandonment, deferment, substitution or omission of any project or works or part thereof, or if the services of an architect are terminated, the charges in respect of the services performed by the architect shall be as follows:*

(b) *for taking instructions from a client, preparing sketch designs sufficient to indicate the architect's interpretation of the client's instructions, and making an approximate estimate of cost, the charge shall be based on time in accordance with paragraph 17, but shall not exceed one-sixth of the percentage fee payable under the other provisions of this part calculated on the architect's estimated cost of such works."*

The grounds upon which the appellant has appealed to this Court are substantially that the learned trial judge erred in holding that the appellant was only entitled to one-sixth of K1,428,762.72 when the claimed amount of K1,428,762.72 was already one-sixth of the appellant's total estimated cost of the project and that alternatively the lower court should have referred the matter for assessment of damages on a *quantum meruit* basis as claimed by the appellant.

With regard to the first ground of appeal, counsel has argued that the finding by the learned trial judge that the appellant is only entitled to one-sixth of the claimed amount of K1,428,762.72 which is K238,127.12 is neither supported by the law nor the facts. The correct position is in accordance with the terms of the agreement between the parties and the Zambia Institute of Architects (Code of Professional Ethics and Conduct and Conditions of Engagement)

Regulations, 1999 contained under S.I. No. 106 of 1999, pursuant to the Zambia Institute of Architects Act, Cap 442 of the Laws of Zambia.

In so far as the terms of agreement were concerned, the court below found that the further request to the appellant to act was therefore, an acceptance of the terms outlined in the letter dated 29th July, 2013 on the part of the respondent. The appellant's estimate of the total building was US$19,866,000.00. 6% of this is US$1,191,960.00 which was the agreed fee for the entire project. However the project was abandoned and this was reduced to one-sixth of US$1,191,960.00 and converted to Kwacha to arrive at K1,231,692.00. To this must be added VAT to arrive at K1,428,762.72 which is the sum being claimed.

We agree with counsel for the appellant that that is the correct interpretation of S.I. No. 106 of 1999 in the event that the project was abandoned and not the interpretation adopted by the lower court which was in effect one-sixth of the one–sixth of the fee note. However, the issue as we see it goes beyond the interpretation of the Statutory Instrument. The issue is whether or not there was a consensus *ad idem* between the parties when the contract was

being entered into. It is an elementary requirement that among other requirements, to constitute a valid contract, the parties to the contract must be in agreement, that is, there must be a consensus *ad idem.* Paragraph 631 of Volume 9(1) of Halsbury's Laws of England Fourth Edition Reissue puts it as follows:

> *"631.* ***In general.*** *Agreement is usually reached by the process of offer and acceptance and, where this is so, the law requires that there be an offer on ascertainable terms which receives an unqualified acceptance from the person to whom it is made. In the nineteenth century, the popular theory was that there could be no contract without a meeting of the minds of the parties, a consensus ad idem. This is still the general rule, so that, where the intended acceptance is not in accordance with the terms of the offer, the court may find that there is no binding contract, even though both parties to the purported contract contend that there is a binding contract....*
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> *... Where a party has so conducted himself that a reasonable man would believe that he is unambiguously assenting to the terms as proposed by the other party, the former is precluded from setting up his real intention and is bound by the contract as if he had intended to agree to the other party's terms."*

From the evidence, the question that needs to be determined is whether or not there was a contract.

Paragraph 633 Halsbury's Laws of England Volume 9(1) Fourth Edition Reissue states that:

"In practice, the formation of a contract is frequently preceded by preliminary negotiations. Some of the exchanges in these negotiations contain no declaration at all, as where one party simply asks for information. Others may amount to invitations to the recipient to make an offer, these being invitations to treat."

The letter of 29th July, 2013 which stipulated the terms and conditions and conditions not discussed or agreed upon was in effect an offer. Paragraph 632 of the same volume of Halsbury's Laws of England defines 'offer' as *" ... an expression by one person or group of persons, or by agents on his behalf, made to another, of his willingness to be bound to a contract with that other on terms either certain or capable of being rendered certain.*

An offer may be made to an individual or to a group of persons or to the world at large. It may be made expressly by words, or implied from the conduct of the offeror, as where the seller of goods tenders the wrong quantity.

An offer must be distinguished from a mere invitation to treat."

In Dalrymple V Scott[1], CA P wired: 'Quote for May shipment...reply quick'. D replied by letter: 'We will ship you... fob here May shipment... If these figures met with your approval, we

would be pleased to open up business with you'. D's letter amounted to an offer.

The learned trial judge seems to have taken the view that since the parties paced around the area for the proposed project and engaged in some discussions this was sufficient to come within the ambit of entering into a contract by conduct. The evidence of the respondent's only witness by the name of Abdulaziz Goma was emphatic both in cross-examination and re-examination that all that the respondent wanted at that stage was a quotation for approval from the respondent's head office in Libya and he did not recall that the respondent's representative wanted designs and sketches for approval in Libya.

Mr. Sitimela attempted to advance the argument that it was paramount to undertake the exercise of preparing sketch designs and the feasibility study as this was necessary to enable the architect to determine the cost of the project. We take the view that it was critical for the appellant to comply with the request to prepare a quotation for a feasibility study as contained in the respondent's letter of appointment dated 28th June, 2013 before undertaking any additional work regardless of the appointment.

This is because the letter limited the scope of engagement to the preparation of a quotation for a feasibility study first, regardless of the general appointment of the appellant as architects and project managers. We do not accept the argument that an architect can only make a quotation for a feasibility study based on sketch designs and that sketch designs are a prelude to a feasibility report. It would be illogical to proceed in this manner if the respondent had no inkling of what expenses he was likely to face. We do not see the difficulty with coming up with an estimate as a guide of what to expect should the project proceed as earlier intimated prior to preparation of the sketch design and feasibility study. The respondent's letter of 28th August, 2013 appointing the appellant as architects and project managers and asking the appellant for a quotation, was an invitation to treat which cannot be accepted so as to form a binding contract. We further do not accept the argument that the evidence Mr. Sitimela pointed to suggests that the respondent by its representative's actions accepted the conditions outlined in the appellant's letter of 29th July, 2013. The evidence of Mr. Goma who was Mr. Boom's interpreter was that the respondent

needed quotations for approval in Libya. He could not recall that Mr. Boom wanted designs and sketches for approval in Libya.

The case of *Dalrymple v Scott*[1] is similar to what the parties did in this appeal. The respondent wanted a quotation and the appellant replied with terms and conditions which amounted to an offer. It was inappropriate for the appellant to simply forge full steam ahead on the assumption that there was a contract in place without at the very least indicating its fees as a preliminary matter in accordance with the respondent's request. The evidence on record shows that the respondent obtained quotations from other firms for the feasibility study. Although this was done after the appellant had submitted its fee note, it goes to show that a quotation could be submitted without a sketch design and feasibility study being prepared first. The record shows that Platinum Gold Equity and Homes and Gardens Limited submitted quotations in the sums K120,000.00 and K200, 000.00 respectively in order to prepare feasibility studies for the respondent. They did not encounter any difficulty in outlining the task that lay ahead or estimate how much it would cost. For these reasons, the first ground of appeal has no merit and we dismiss it accordingly.

The second ground is an alternative ground which seeks to refer this matter to the deputy registrar for assessment on a quantum meruit basis. We accept the argument that the learned trial judge adopted the wrong approach when he simply calculated the fees due as being one-sixth of the one-sixth claim when the fees if properly earned should have been as claimed by the appellant. In an appropriate case, he should have referred the matter to the deputy registrar for assessment on a quantum meruit basis.

According to Paragraph 1155 of Halsbury's Volume 9(1), the term 'quantum meruit' is used in three distinct senses at common law namely as denoting: "*(1) a claim by one party to a contract, for example on breach of the contract by the other party, for reasonable remuneration for what has been done; (2) a mode of redress on a new contract which has replaced a previous one; and (3) a reasonable price or remuneration which will be implied in a contract where no price or remuneration has been fixed for goods sold or work done*". The appellant has cited the case of *Base Chemicals Zambia Limited Mazzonites Limited v Zambia Air Force The Attorney General*[2] in support of the argument that it is entitled to payment on the basis of quantum meruit. While we agree with the appellant that

the learned trial judge adopted the wrong approach when he simply calculated the fees due as being one-sixth of the one-sixth claim when the fees if properly earned should have been as claimed by the appellant, we do not agree that the case of *Base Chemicals Zambia Limited* cited is applicable to this appeal because the works undertaken were not done at the request of the respondent. We have also perused the case of *DP Services Limited v Municipality of Kabwe*[3] which held that the employment of a person in a professional capacity raises a rebuttable presumption that he is to be paid for those services on quantum meruit basis. There is no doubt that some work was done by the appellant and as was held in *DP Services Limited v Municipality of Kabwe,* the appellant was engaged in a professional capacity to provide a quotation and it is in that capacity that the appellant is entitled to be remunerated on a quantum meruit basis for works actually carried out in execution of the assignment which it was engaged in. In this case, it was to provide a quotation similar to the two letters outlining the scope of works and estimated cost but not the actual works and design. While we agree that the learned trial judge should have referred this matter for assessment, we take the view that the assessment should

be limited to the inspection of the property that was undertaken, and the discussions had between the parties. There should be no fee charged for the feasibility study or the sketch plans as the respondent did not request the appellant to undertake these tasks. For the avoidance of doubt, the quotation should indicate how much it would cost to undertake a feasibility study on the best maximum development of the property.

The judgment of the court below is accordingly set aside. We order that this matter be referred to the deputy registrar for assessment within the parameters indicated above. As there is no proof that the respondent incurred any costs in connection with this appeal we order that its costs be limited to the proceedings in the High Court.

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A. M. WOOD
SUPREME COURT JUDGE

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M. MALILA, SC
SUPREME COURT JUDGE

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N. K. MUTUNA
SUPREME COURT JUDGE