IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0164**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Jurisdiction)

B E T W E E N:

FLAME PROMOTION & PROCUREMENT LIMITED **PLAINTIFF**

and

JOE'S EARTHWORKS AND MINING LIMITED **DEFENDANT**

Before the Hon Lady Justice Irene Z. Mbewe in Chambers this 29th day of November 2016.

For the Plaintiff: *Mr. K. Kunda of Messrs Ellis & Co.*

For the Defendant: *Mr. K. Chenda of Messrs Simeza Sangwa & Associates*

R U L I N G

Cases Referred to:

1. *Home & Overseas Insurance Co Ltd v Mentor Insurance Co UK Ltd (1989) 3 All ER 7*
2. *Leopard Ridge Safaris Limited v Zambia Wildlife Authority 1(2008) ZR 97 Vol. 2.*
3. *Zambia Revenue Authority v Nasando SCZ/8/340/2010*

4. *Siebe Gorman and Company Limited v Priepac Limited [1982] AER 377*

5. *Balkanbank v Taher and Others [1995] 2 AER 904*

6. *Cornhill Insuance Plc v Barclays [1992] CA Transcript*

7. *Zambia Seed Company v Chartered International PVT Limited [1999] ZR 151*

8. *Aubrey Nyambe v Total Zambia SCZ Judgment No 1/2015*

Legislation Referred To:

1. *High Court Rules Cap 27 of the Laws of Zambia*
2. *Arbitration Act No. 19 of 2000*

Other Works

1. *Halsbury's Laws of England, 3rd Edition*
2. *Stroud's Judicial Dictionary of Words and Phrases Volume 3, 7th Edition London, Thomson; Sweet and Maxwell, 2006*

There has been a delay in this Ruling due to the Court's involvement in the hearing of the Parliamentary Elections of 2016.

This is a Ruling on the Defendant's application for referral of matter to arbitration and stay of proceedings made pursuant to **Order 45 Rule 1 of the High Court Rules, Cap 27 of the Laws of Zambia** and section 10 (1) of the **Arbitration Act, Act No. 19 of 2000** (hereinafter referred to as the **Arbitration Act**). It is made by way of summons supporting affidavit and skeleton arguments filed on 2nd August, 2016. The Plaintiff's response is by way of affidavit in

opposition and skeleton arguments filed on the 12th September, 2016.

The action was commenced by way of Writ of Summons dated 21st April 2016 with a Statement of Claim of even date. The claim as stated in the Writ of Summons is for -

(i) *A Preservation Order of Makoli Apartments to facilitate for its inspection and measurements by an Independent Quantity Surveyor of works undertaken before another contractor continues with the works thereon.*

(ii) *An Order of injunction restraining the Defendant from preventing or interfering with the Plaintiff's entry to Makoli Apartments and to demobilise by removal of its equipment and materials that have not been paid for by the Defendant as per Article 54.3 of the Addendum Contract of 18th September, 2015 between the Plaintiff and Defendant.*

(iii) *An order for the payment by the Defendant of the sums of US$344,000.00 and US$257,256.14 being outstanding payments on initial price contract (IPC) and Variation Orders (VO) respectively following fundamental breaches of the aforesaid contract by the Defendant.*

(iv) *Interest on the said sums at the current commercial bank rate;*

(v) *Further relief;*

(v) *Costs*

The parties subsequently entered into a Consent Order dated 27th May 2016. The record shows that both parties agreed inter alia that the pleadings filed on 8th June, 2016 be amended. On the 12th July, 2016 the writ of summons and statement of claim was amended as per Court Order granted on 8th July, 2016 and a status conference was scheduled for 15th August, 2016.

The supporting affidavit filed on 2nd August 2016 was deposed by Bulusu Vijay Kumar the Project Manager of the Defendant's Makoli Apartments Project. The evidence revealed that the Plaintiff and Defendant had entered into a construction contract in writing dated 18th November 2014 in respect to the Makoli Apartment Project wherein the Defendant was designated as employer whilst the Plaintiff was contractor. The evidence revealed that the construction contract was drawn up by the Plaintiff.

The evidence further revealed that as per industry practice, the construction contract had a dispute resolution mechanism in Clauses 23 and 24 of the conditions of the contract where it was provided that any grievance arising from a decision taken by the Project Manager was to be firstly submitted to an adjudicator appointed by the Zambia Association of Arbitrators with final recourse to arbitration if any party was still aggrieved. A copy of the Conditions of the Contract was exhibited as **"BVK 1".**

The evidence revealed that by an Addendum dated 18th September 2015, the conditions of the Construction Contract were varied to provide inter alia appointment of a Project Manager and to set a

new completion date in the schedule which set it at 20 weeks of signing of the Addendum Contract. This Addendum Contract expressly superseded the earlier contract dated 18th November, 2014. This was exhibited as **"BVK 2"** (hereinafter referred to as the "Addendum Contract")

The evidence revealed that the Project Manager was in charge of administering the Addendum Contract and the Makoli Apartment Project and was being assisted with the project management team comprising two Site Coordinators and a Quantity Surveyor all reporting to the Project Manager. According to the Project Manager and his Management team, the Plaintiff was under performing and this could be seen from the pace of work, quality of materials used, the workmanship, lack of proper supervision of personnel and laxity in observing safety precautions. According to the deponent, it came as no surprise when the Plaintiff failed to complete the project within the agreed timeline set in the Addendum Contract. The evidence revealed that as time was of the essence for the Defendant, drastic measures were instituted to compel the Plaintiff to honour its obligation.

According to the evidence the measures contemplated by the Defendant was the withholding of payment on interim payment certificates No. 12 and Variation Order Claim No. 10 which had been certified until the Plaintiff committed to a new timetable for completion of the project. According to the deponent the other measure was refusal to entertain or accept any new interim

payment certificates until the project completion. The evidence revealed that the deponent informed the Plaintiff by way of an email dated 6th April 2016 addressed to the Plaintiff's Technical Manager (Exhibit "**BVK 3"**).

The evidence revealed that the Plaintiff terminated the contract alleging a fundamental breach (Exhibit "**BVK 4**"). The evidence further revealed that the Plaintiff chose to seek redress in the Court rather than invoking the dispute resolution mechanisms provided for in the Addendum Contract. According to the Defendant that the parties should use alternative dispute resolution in terms of the Addendum Contract.

In the skeleton arguments filed on 2nd August 2016, Counsel for the Defendant applied for the action to be stayed and for the issues in dispute to be referred to arbitration and relied on **Order 45 Rule 1 of the High Court Laws** which provides that:

> *"If the parties to a suit are desirous that the matters in difference between them in any suit or any of such matters, should be referred to the final decision of one or more arbitrator or arbitrators, they may apply to the Court or a Judge, at any time before final judgment, for an Order of reference, and the Court or a Judge may, on such application, make an Order of reference accordingly."*

Counsel for the Defendant further relied on **Section 10 (1) of the Arbitration Act** which provides as follows:

> *"A Court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void in operative or incapable of being performed".*

In support of the application to stay proceedings and submit to arbitration, Counsel for the Defendant cited the case of **Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (1)** and the Supreme Court decision in **Leopard Ridge Safaris Limited v Zambia Wildlife Authority (2)** where Silomba JS summarised as follows:

> *"After considering the submission and the relevant law, the learned trial Judge, in his ruling of the 30th August 2006 found that the laws on the matter was settled and that the parties were bound by the arbitration Clause in the agreement; that since one party had requested for arbitration, there were grounds upon which the action could not be referred to arbitration. He accordingly stayed the proceedings and referred the dispute to arbitration hence the interlocutory appeal".*

The Court's attention was drawn to the dispute resolution mechanism under Article 23 and 24 of the Addendum Contract. Counsel emphasised that any grievance relating to a decision taken

by the Project Manager is to be redressed through alternative dispute resolution and not the Courts of Law. According to Counsel for the Defendant and quoting from paragraphs 7 and 8 of the Statement of Claim, the grievance complained of related to a measure taken and implemented by the Project Manager as follows:

> *"The Plaintiff will further aver that on 6th April 2016, the Defendant's Project Manager and agent informed the Plaintiff vide email of 6th April 2016 that the Defendant's Management had decided that the amounts for the Initial Price Contract (IPC) No. 12 Variation Order Claims and Progress Claim 13 would only be settled or entertained once the project has been completed."*
>
> *"The Plaintiff will aver that the decision by the Defendant to suspend payment until the project is completed is a unilateral amendment or alteration of several Clauses of the Addendum Contract on payment, and thus repudiation of the Contract and a fundamental breach thereof".*

Counsel for the Defendant argued that the Plaintiff as author and party to the Addendum Contract was required to submit the issue to an Adjudicator to be appointed by the Zambia Association of Arbitrators, and any unresolved grievance thereafter was to be submitted to arbitration.

It was Counsel's contention that the Court is duly bound to stay all proceedings in this matter including the Consent Order of 30th May

2016 and to refer the matter to alternative dispute resolution as agreed by the parties in the Addendum Contract and in view of the mandatory provisions of **Section 10 (1) of the Arbitration Act** and the Supreme Court's decision in **Leopard Ridge Safaris Limited v Zambia Wildlife Authority (2).** Counsel also prayed that the Plaintiff be condemned to the costs of this action as this was avoidable had the Plaintiff abided by the terms and the dispute resolution mechanism under the Addendum Contract.

In opposing the application, the Plaintiff filed in an affidavit on 12th September 2016 deposed by Kennedy Kaunda Counsel with conduct of the matter. It was deposed that a Consent Order dated 30th May, 2016 was entered into by the parties, which has not been set aside and that referring the matter to arbitration will in effect set aside the Consent Order without the consent of the Plaintiff and without the Defendant having instituted a fresh action. The evidence reveals that the Defendant by its conduct has waived the contractual right to refer the matter to arbitration. According to the Plaintiff, this assertion or proposition is based on the fact that executing a Consent Order whose negotiation by the parties was brought to the attention of the Court on several sittings. Further that there was a proposal for variation of the Consent Order by way of consent, but the Plaintiff through its Advocates declined to be engaged in such an endeavour. Counsel for the Plaintiff argued that the aforesaid actions confirmed the waiver by the Defendant.

The evidence revealed that Clauses 23 and 24 of the Construction Contract only referred a dispute to adjudication and later to arbitration in relation to the decision of the Project Manager. According to Counsel for the Plaintiff, the Project Manager in exhibit **"BVK 3"** was merely communicating Management's decision and not the Project Manager's decision per se.

The Plaintiff filed skeleton arguments into Court on 12th September, 2016 and the Plaintiff submitted that the Defendant's application is highly misconceived. It was submitted that it is trite that a Consent Order can only be stayed by way of a fresh Consent Order by the parties or by way of a fresh action, for the sole purpose of setting it aside. Counsel cited the Learned Authors of **Halsbury's Laws of England 3rd Edition** at page 1672 which states as follows:

> *"A judgment given or an order made by consent may, in a fresh action brought for the purpose, be set aside on any ground which would invalidate a compromise not contained in a judgment or order".*

Counsel for the Plaintiff argued that the cause of action being a Management decision to suspend payments, cannot be subjected to either adjudication or arbitration as provided in Clauses 23 and 24 of the contract. Counsel cited Clause 23.1 which he submitted shows that it is the Project Manager's decision that is subject to those forms of dispute resolution. Clause 23.1 reads as follows:

"If the contractor believes that a decision taken by the Project Manager was outside the authority given by the contract or that the decision was wrongly taken, the decision shall be referred to the Adjudication".

Counsel submitted that exhibit **"BVK 3"** confirms the decision to suspend payments was made by the Defendant's Management and not the Project Manager for Makoli Apartments.

It was further submitted that in light of the Consent Order, the Defendant's application is untenable as proceeding in that manner would ultimately set aside the Order without instituting a fresh action. The Plaintiff prayed that the Defendant' application to stay proceedings and submit to arbitration be dismissed with costs.

At the hearing on 14th September 2016, the parties relied on the skeleton arguments and list of authorities. Both Counsels also made viva voce submissions.

Counsel for the Plaintiff submitted that though the Addendum Contract provides for some form of dispute resolution, it only related to decisions made by the Project Manager which decisions could be referred to arbitration and thereafter adjudication as provided in clause 23 and 24. Counsel for the Plaintiff argued that the email communicated by the Project Manager was Management's decision and not the Project Manager.

Counsel for the Plaintiff further submitted that in respect to the Consent Order, it has not been varied or set aside and has to be

enforced through the Court. Counsel argued that the application to stay the Consent Order could not be sustained in the absence of a fresh action to set the Consent Order aside. Counsel argued that the application before Court is an attempt at setting aside a Consent Order. Counsel submitted that **Order 45 Rule 1 of the High Court Rules, Cap 27 of the Laws of Zambia** relied on by Counsel for the Defendant refers to a final judgment wherein a matter may be referred to arbitration. It was Counsel's contention that in this case, there is a final order and the matter cannot therefore be referred to arbitration.

In response, Counsel for the Defendant argued that the grievance did not relate to the decision of the Project Manager. Counsel argued that the Defendant's evidence as contained in the affidavit of 2nd August 2016 is pitted against the second hand evidence of Counsel for the Plaintiff which is based on instructions from the client. Counsel for the Defendant argued that in terms of cogency and weight, the first hand evidence of the Project Manager outweighs the second hand evidence of Counsel for the Plaintiff.

Counsel for the Defendant further argued that paragraphs 7-11 of the Project Manager's affidavit is sufficiently clear and shows that what is in issue is a decision taken by him and implemented by him and that the resultant grievance must be resolved in accordance with the grievance procedure which ousts the jurisdiction of the Court in preference to arbitration.

In response, Counsel for the Plaintiff argued that the Defendant's application is misconceived as an order staying proceedings will also stay the enforcement of the Consent Order. In respect of the argument relating to the Defendant attempting to set aside the said Consent Order, Counsel for the Plaintiff argued that the application before the Court had nothing to do with setting aside the Consent Order but the Defendant invoking a statutory right, with a corresponding obligation on the part of the Court to stay proceedings pursuant to **Section 10 (1) of the Arbitration**. Counsel for the Defendant argued that an application can be made at any stage even where there has been a Consent Order and the power to stay proceedings is not fettered, and that the Consent Order is part of the proceedings and within the province of the statutory powers to stay proceedings.

On the Plaintiff's contention that under **Order 45 Rule 1 High Court Rules, Cap 27 of the Laws of Zambia**, the Consent Order is like a final Order or judgment, Counsel for the Defendant's response was that the Consent Order was not at par with the Judgment of this Court, and that in any event, the statutory provisions of **Section 10 (1) Arbitration Act** overrides the provision of **Order 45 Rule 1 High Court Rules**. Counsel for the Defendant argued that **Order 45 Rule 1 of the High Court Rules** is contained in subsidiary legislation which is hierarchical subordinate to an Act of Parliament and therefore **Section 10 (1) of the Arbitration Act** should carry the day.

On the allegation of waiver advanced by Counsel for the Plaintiff, Counsel for the Defendant disputed this line of argument as it was tantamount to saying that the parties had by their conduct changed the contract in so far as the reference to arbitration was concerned. Counsel for the Defendant argued that Article 52.1 of the Addendum Contract was express and could only be amended by an agreement made in writing and not by mere conduct (Exhibit "**BVK 1**"). Counsel submitted that by arguing that there is a waiver, the Plaintiff is in essence saying that the Defendant is estopped from applying to have this matter referred to arbitration. Counsel reiterated that the right to submit to arbitration is enshrined in **Section 10 (1) of the Arbitration Act** and there can be no estoppel of the Defendant's right to apply to have the matter referred to arbitration as the section is couched in mandatory terms.

I have considered the affidavit evidence, skeleton arguments and viva voce evidence of Counsel for both parties and I am grateful for their spirited arguments.

The following facts are common cause: That the parties entered into a construction contract for the construction of Makoli Apartments in Ndola and executed an Addendum to the Contract on 18th September, 2015 which superseded the construction contract dated 4th December, 2014. The Addendum Contract embodied an arbitration clause under Clause 23 and 24, and a dispute has arisen out the said Addendum Contract.

The issues for my determination are as follows -

1. From the issues that have arisen is the dispute between the parties one of the disputes agreed to be referred to arbitration?

2. Whether the arbitration clause applies in respect of the matters in the Consent Order that are amenable to arbitration.

3. The effect of the Consent Order on the arbitration clause and application for referral to arbitration and whether it constitutes a waiver.

The Defendant's application is predicated on **Section 10** of the **Arbitration Act, No 19 of 2000** which states as follows:

"10. (1) A court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so request at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2)Where proceedings referred to in subsection (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

The High Court has unlimited jurisdiction to hear and determine disputes and such jurisdiction is not limitless and must be exercised in accordance with the law as confirmed in the case of **Zambia National Holdings Limited and another v The Attorney-General (3)** where parties agreed to settle any dispute between

them by arbitration. In such case, the Court's jurisdiction is ousted unless the agreement is null and void, inoperative or incapable of being performed. From the issues that have arisen, is the dispute between the parties amenable to be referred to arbitration? It is imperative that the wording used in the arbitration clause itself is closely scrutinised. Article 23 and 24 is couched as follows:

"23.1 *If the contractor believes that a decision taken by the Project Manager was outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator.*

24.1 *The Adjudicator shall give a decision in writing within 7 days of receipt of a notification of a dispute.*

24.2 *The Adjudicator shall be paid by the hour at the rate specified in the Schedule together with the reimburseable expenses of the types specified in the Schedule and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Adjudicator, Either party may refer a decision of the Adjudicator to an Arbitrator within 14 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 14 days, the Adjudicator's decision will be final and binding.*

24.3 *The arbitration shall be conducted in accordance with the arbitration procedure published by the Zambia Institute of Architects.*

The parties herein, within their contractual rights agreed to limit arbitration to any disputes arising from the decision of the Project Manager. Counsel for the Defendant has argued that under Section 10 of the **Arbitration Act**, the Court has a statutory duty to stay proceedings and refer a dispute to arbitration and that there are a number of decisions where the Supreme Court has given effect to section 10 of the **Arbitration Act**.

Counsel for the Plaintiff argued that the email dated 6th April 2016 being relied upon by the Defendant shows as follows:

> *"Refer to your progress claim 13 and VO claim 11, it is management's decision that any further IPC's or claims shall only be entertained once the project has been completed."*

According to Counsel for the Plaintiff, the said Project Manager only communicated Management's decision to the Plaintiff as stated in the aforesaid email. I concur with Counsel for the Defendant that this was the Project Manager's decision. A perusal of the Addendum Contract indicates the pivotal role that a Project Manager plays in the execution of the works of the Project, and generally in respect of administering the Addendum Contract. This is discerned from the various clauses in the Addendum Contract that expressly gives the Project Manager the powers to make decisions including payments

for variation certificates (Article 39.0), Monthly Payment Certificates (Article 41), payment upon termination (Article 54) which clauses all authorise the Project Manager to take decisions. I have perused the interpretation clause and find that Management is not defined in the Addendum Contract, and the powers of delegation are stipulated in Article 5 of the Addendum Contract. The Project Manager may delegate any of his duties and responsibilities to other people after notifying the Contractor in writing and cancellation of such delegation shall also be in writing. In my view, it is folly to argue that the decision which is the subject of arbitration was Management's decision and that the Project Manager was merely communicating Management's decision. I find that Management has no powers under the Addendum Contract to make such decisions in the absence of a clear delegation from the Project Manager.

A perusal of the writ of summons includes a claim for payment for works done, and in my view this falls within the purview of the Project Manager. Therefore, according to the wording of the arbitration clause, any decision taken by the Project Manager is subject to arbitration, and disagree with Counsel for the Plaintiff that it was a decision of Management. I therefore find that the communication was from the Project Manager who had the powers to oversee the entire Project pursuant to the Addendum Contract.

The other issue for my determination, is the effect of the Consent Order on the arbitration clause and application for referral to

arbitration. Counsel for the Plaintiff has argued that the Defendant's application is tantamount to setting aside the Consent Order. Counsel for the Defendant on the other hand contends that it has nothing to do with the Consent Order but the statutory provisions of Section 10 of the **Arbitration Act.** A starting point is to examine the Consent Order executed by the parties on 27th May, 2016, and its effect on the application to submit to arbitration, and whether by the parties executing a Consent Order that constitutes a waiver. The Consent Order is couched as follows-

The Consent Order executed by the parties states as follows:

BY CONSENT OF THE PARTIES

IT IS HEREBY ORDERED as follows:

(i) That Messrs City Worx Consult as appointed by the parties shall undertake measurements of works undertaken by the Plaintiff on Makoli Apartments in Ndola;

(ii) that the Defendant's Project Manager, Mr. Vijay Kumar, shall have no role to play during the measurements exercise as he is not registered with the Engineering Institute of Zambia;

(iii) that the parties shall be shared equally, the fees and incidental costs for Messrs City Worx Consult.

(iv) that the Plaintiff shall be at liberty to demobilise and remove verified materials from Makoli Apartments immediately after

the measurements of works is undertaken by Messrs City Worx Consult.

(v) that the Defendant shall permit a new contractor to work on Makoli Apartments after the measurements have been undertaken.

(vi) that after the measurements are taken, whichever party will be found owing the other shall promptly pay the money to the party found to be owed.

(vii) that each party shall bear its own legal costs.

The effect of a Consent Order has been restated in a number of authorities both Zambian and English. In determining the effect of a Consent Order, the Supreme Court case of **ZRA v Nasando Ikisando and 3525 Others (3)** has clarified the nature and force of a consent order and cited the case of **Siebe Gorman and Company Ltd v Priepac Limited (4),** where Lord Denning MR as he was then at page 379 said that:

> *"it should be clearly understood by the profession that when an order is expressed to be made by consent, it is ambiguous. There are two meanings to the words "by consent". That was observed by Lord Greene MR in the case of Chandless v Nicholas [1942] 2 All ER 315 at 317. One meaning is this: the words "by consent" may evidence a real contract between the parties. In such a case, the Court will only interfere with an Order on the grounds as it would with any other contract. The*

other meaning is this: the words "by consent' may mean the parties hereto are not objecting." In such a case there is no real contract between the parties. The order can be altered or varied by the Court in the same circumstances any other Order that is made by the Court. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an Order made without obligation?

The Malaysian Court of Appeal Ramly J put in this way:

"A consent order is founded on a Contract or agreement between the parties based on both parties willingness to submit to certain terms. Once the Appellant and Respondent took (a) matter beyond the contract and recorded a Consent Order then they must accept all the implications of a Judgment or order. (Mayban Allied BHD v Kenneth Godfrey Gomez and Suhalmi Bib Baharudin Rayuan Sivil No W-02-1094 Tahum 2008."

Lord Justice Sraughton summed it up more aptly in **Balkanbank v Taher and Others (5)** where Beldam LJ in **Cornhill Insurance Plc v Barclays (6)** [1992] CA Transcript at page 948 stated as follows:

"When a Judge approves a Consent Order, it takes effect as if made by him after argument"

Essentially a consent order arises out of agreement and terms arrived at by the parties themselves and may even evidence a

contract with or without obligation. It is a Judgment or Order made by or in the name of the Court and has all the consequences of a Court Judgment or Order **(See Order 42/5A/4 Rules of the Supreme Court, 1999 Edition)**, and sealed by the Court, and parties must therefore accept all its obligations. The Court endorses the consent order so as to cloth it with legality based on the mutual agreement of the parties without coercion, fraud or inducement. Parties are assumed to have fully comprehended the terms of a consent order hence the appending of signatures by their respective Counsels.

In my view, the Consent Order was arrived at after agreement between the parties. Counsel for the Plaintiff has argued that ignoring the Consent Order is tantamount to setting it aside indirectly. From the wording of the Consent Order, the content covers issues that are amenable to adjudication and arbitration. What this entails is that the subject matter amenable to arbitration is embodied in the Consent Order.

Counsel for the Plaintiff argued that by executing the Consent Order, the parties waived their right to arbitration. I agree with this proposition as the Defendant was served with the Writ of Summons and Statement of Claim and never objected to any court process, and subsequently entered into the Consent Order on 27th May, 2016. The parties proceeded to agree on the amendment of the pleadings to include a claim by the Plaintiff for damages. In my considered view, and from the steps taken by the parties, it is clear

and unequivocal that the conduct of the parties amount to a waiver of the right by any of the party to insist on adjudication or arbitration. By their action, the parties chose not to comply with the arbitration clause. I, therefore, find it inappropriate for the Respondent to file an application attempting to stay the proceedings after the Consent Order. In any case, having entered into a Consent Order, there are no proceedings to stay as issues have been determined by a Consent Order which covers the matters amenable to arbitration that have since been litigated.

The consequences of the parties action is that they cannot now rely on the arbitration clause to stay proceedings in Court as by their conduct agreed to accept the Court's jurisdiction. The only cause of action is to commence a fresh application as was held in the case of **Zambia Seed Company Limited v Chartered International PVT Limited.**

Counsel for the Plaintiff further argued that the matter has been determined and is now *res judicata.* In **Black's Dictionary 9th Edition** the Learned Authors define *res judicata* as follows:

> *"That a thing adjudicated, an issue that has been definitely settled by judicial decision, a situation where parties have been barred from litigating a second law suit on the same claim or any other claim arising from the same transaction or series of transactions and that could have been, but was not raised in the first suit."*

According to the Learned Authors of **Stroud's Judicial Dictionary of Words and Phrases Volume 3, 7th Edition** [London, Thomson; Sweet and Maxwell, 2006] at P. 2379.

> *"The phrase res judicata is used to include two separate state of things. One is where a judgment has been pronounced between parties and findings of fact are involved as a basis of that judgment. All the parties affected by the judgment are then precluded from disputing those facts, as facts in any subsequent litigation between them. The other aspect of the term arises when a party seeks to set up facts, which if they had been set up in the first suit, would or might have affected the decision. This is not strictly raising any issue which has already been adjudicated, but it is convenient to use the phrase res judicata as relating to that position (Robinson v Robinson (14) at 44 Per Henn Collins, J).*

Following from the definition of *res judicata* cited above, a judgment should have been pronounced between parties and findings of fact involved as a basis of that judgment. Thereafter, all the parties affected by the judgment are then precluded from disputing those facts as facts in any subsequent litigation between them. I agree with Counsel for the Plaintiff that the matter is *res judicata* as the dispute has already been determined by way of a Consent Order.

The only issue for further determination relates to damages and consequential loss occasioned by the delay in demobilisation from Makoli Apartments contrary to clause 54.2 of the Addendum Contract. The Defendant's application is predicated on Section 10 (1) of the Arbitration Act, which section makes it mandatory to stay proceedings where parties have agreed to submit to arbitration. I am mindful that there are exceptions carved out in Section 10 (1) of the **Arbitration Act**. A stay of proceedings will be granted except where the arbitration clause or agreement has become null and void, inoperative or incapable of being performed. Having found that the matter is *res judicata*, the arbitration clause contained in Clause 23 of the Addendum Contract becomes redundant and inoperative.

I am fortified in my finding by the case of **Aubrey Nyambe v Total Zambia Limited (8),** on the principle of inoperatibility where the Supreme Court held that, at the time the dispute arose between the parties and indeed at the time the matter was referred to arbitration, the arbitration clause had become inoperative and incapable of being performed and that the Learned Judge erred when she stayed the proceedings before her and referred the matter to arbitration. This is consonant with the exceptions in Section 10 (1) of the Arbitration Act

The sum total is that the Respondent's application to stay the proceedings and submit to arbitration pursuant to Section 10 (1) of the **Arbitration Act** is without merit and is accordingly dismissed.

Costs follow the event and in default of agreement to be taxed.

Leave to appeal is granted.

Dated at Lusaka the 12th day of December, 2016.

HON JUSTICE IRENE ZMBEWE
HIGH COURT JUDGE