IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.122/2016**
HOLDEN AT LUSAKA **SCZ/8/124/2016**
(Civil Jurisdiction)

BETWEEN:

THE ATTORNEY GENERAL **APPELLANT**

AND

RODGER MASAUSO ALIVAS CHONGWE **RESPONDENT**

Coram: Hamaundu, Kaoma and Kajimanga, JJS
on 6th September, 2016 and the 23rd June, 2017

For the Appellant: Mr F. Imasiku, Acting Principal State Advocate

For the Respondent: Mr A. Hamir, SC, Messrs Ali M. Hamir

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Branca v Cobarro (1947) KB 854**
2. **Air Studios (Lyndhurst) Limited T/A Air Entertainment Group v Lombard North Central Park Plc (2012) EWAC 3162, (2013)1 Lloyds Rep.**
3. **Whitehead Mann Limited v Cheverny Consulting Limited (2006) EWAC CIV 1303**
4. **Samuel v Oustern (1941) 1 All ER 14**
5. **Victoria Laundry v Newman (1949) 2 143 528**
6. **Hardley v Boxendale (1854) 9 Ex. 341**
7. **Aruna Mills Dhanrajmal Gobindram (1968) 1QB 655**
8. **Chikuta v Chipata Rural Council [1974] ZR 241**

Legislation referred to:

1. **Judgments Act, Chapter 81 of the Laws of Zambia, S.2**
2. **State Proceedings Act, Chapter 71 of the Laws of Zambia, S.16**
3. **High Court Act, Chapter 27 of the Laws of Zambia, S.13**

Rules referred to:

1. **Rules of the Supreme Court** *(White Book)* **1999, edn, Order 18/8/14**

Works Referred to:

1. **Halsbury's Laws of England, (4th edition) Vol 9, para 740, P. 483 & Vol 37, para. 383**
2. **Black's Law Dictionary 9th edition, 2009**
3. **Website; Investopedia.com**
4. **McGregor on Damages, 15th edition, Para 3, P. 4**
5. **Chitty On Contract 30th edition, (London, Sweet & Maxwell), PP. 254 – 255, 276 & 282 – 284**
6. **Chitty On Contract 25th edition, Para 1147, P.220**

This is an appeal against a judgment of the High Court which upheld the respondent's declarations and entered judgment in the sum of US$6,743,918.38.

The facts in this case are these:

In 1997, the respondent was shot at and wounded by State security forces as he was coming from attending a rally in Kabwe. The respondent underwent an operation at Kabwe General Hospital where it was discovered that he had a wound on the cheek and skull and that some foreign metal object was embedded in the skull. The respondent immediately lodged a letter of demand with the Government of Zambia, seeking compensation for the injuries that he sustained as a result of the shooting. The Government denied

liability completely. The respondent then left the country and went to live in Australia.

The respondent came back to Zambia in 2003. In 2009, the respondent engaged the Government with regard to his demand for compensation. He did this through; the Republican President, the Republican Vice President and the Attorney General. This time, the Government agreed to compensate him.

A package was worked out. It included compensation, interest and costs. The figure which the parties agreed upon was US $6,743,918.38. The agreement and the terms thereof were embodied in, and evidenced by, a letter by the Attorney General to the appellant's advocates, Messrs Chilupe & Co, dated the 29th October, 2009. Arrangements to pay the respondent were initiated. Difficulties were encountered in that the Compensation and Awards Fund run by the Ministry of Justice had been exhausted for the year 2009; and also that the particular payment was not in the budget for the year 2010. It would appear that any effort to effect the payment ended at that point.

In April 2014, the respondent, by originating summons, sought the following declarations:

(i) that the agreement between him and the Government for the payment to him of the sum of US$6,743,918.38 in full and final settlement of his claims was a valid, subsisting and enforceable agreement;

(ii) that it was an express term of the agreement that the Government would pay interest at *LIBOR* rates on the sum of US $2,500,000; and

(iii) a declaration that the appellant had a legal obligation to discharge the agreement.

The court below was of the view that the respondent's claim was entirely based on the validity of a contract to compromise the respondent's claim against the appellant. Upon reviewing some authorities on the subject of compromise of an action, namely; **Halsbury's Laws of England, 4th Edition, Volumes 9** and **37**, among others, the court said that a compromise agreement is valid and enforceable unless it is deficient to meet the requisites for the creation of a legally enforceable contract. The court then went on to

consider the two requisites essential to the formation of a contract; that is, offer and acceptance. In considering these two requisites, the court reviewed the case of **Branca v Cobarro**[1] and the **25th edition at Chitty On Contracts, at para 1147, page 220.** The court looked at the Attorney General's letter of the 29th October, 2009 and held that the said letter was confirmation of the Government's decision to settle the matter. The court further said that, from this letter and the other correspondence, it had found that there was offer and acceptance. On that reasoning, the court found and held that the agreement between the parties was valid and enforceable. The court, then, granted the three declarations that the respondent sought. In addition, however, the court tacitly entered judgment for the respondent in the sum of US$6,743,918.38 and made a further order that the appellant shall pay interest on the claim in accordance with **Section 2** of the **Judgments Act**, **Chapter 81** of the **Laws of Zambia**, as amended by **Act No.16 of 1997** until final settlement.

On behalf of the Government, the Attorney General now appeals on two grounds.

The first ground is that the court below erred in law and fact when it held that there was a valid and enforceable compromise and settlement agreement between the appellant and the respondent for the payment of the sum of US $6,743,918.38, in full and final settlement of all the claims the respondent had against the Government arising from the shooting incident in Kabwe on the 23rd August, 1997.

The second ground is that the court below erred in law and fact when it awarded the respondent interest on the sum of US $2,500,000.00 from the date of the alleged agreement at the London Interbank Offered Rate (LIBOR).

In the first ground of appeal, Mr. Imasiku, learned Counsel for the appellant put forward one argument: That there was never a binding compromise and settlement agreement, but that there was merely an offer by the Government to settle the matter; and that, although the respondent accepted the offer to settle, the settlement itself failed due to budgetary and treasury constraints. In support of that argument, we were referred to three English cases, namely;

(i) **Air Studies (Lyndhurst) Limited T/A Air Entertainment Group v. Lombard North Central Park PLC**[2],

(ii) **Whitehead Mann Limited v Cheverny Consulting Limited**[3] , and

(iii) **Samuel v Oustern**[4]

In **Samuel v Oustern**[4], in particular, it was held that the test as to whether there was an ascertainable and determinate intention to contract is to be found in the words used. Relying on that holding, counsel for the appellant submitted that the Government had written that it had decided to settle the matter. It was argued that, by those words, the Government was merely putting forward an offer to settle the matter and did not intend that there be an agreement with contractual obligations. Hence, it was argued, no agreement was reduced in writing. We were, therefore, urged to find that the communication between the parties did not amount to a compromise and settlement agreement.

In the alternative, the learned counsel argued that the declarations that the respondent sought were nothing but a claim for specific performance of the alleged compromise agreement. It was submitted that, even if we were to confirm the lower court's

holding that there was a compromise agreement, we should nevertheless find that by virtue of **Section 16** of the **State Proceedings Act**, **Chapter 71** of the **Laws of Zambia**, a court cannot make an order against the State for specific performance. It was submitted that, in this case, an award of damages for breach of contract would have sufficed.

The learned counsel went on to cite authorities that lay down the principle governing the purpose for, and the scope of, the award of damages, namely;

(i) **Victoria Laundry v Newman**[5],

(ii) **Hardley v Baxendale**[6],

(iii) **Aruna Mills v Dhanrajmal Gobindram**[7]; and

(iv) **McGregor on damages, 2009, edition.**

We do not see how these cases apply to the issues in this matter.

With those arguments, the learned counsel urged us to uphold the first ground of appeal.

To Mr. Imasiku's argument that there was merely an offer by Government to settle the matter and that, although the offer was accepted, the settlement failed due to budgetary and treasury constraints, Mr. Hamir, State Counsel replied on behalf of the respondent that a debtor does not avoid a debt merely because he has no money to pay his debt; his legal responsibility always continues. The learned State Counsel argued that it was never a term of the compromise agreement that it would be subject to availability of funds.

Responding to the appellant's argument that there was no agreement on the ground that the compromise agreement was not reduced in writing and signed, the learned State Counsel argued that there is no law that states that an agreement must always be in writing. He submitted that the existence of an agreement is a matter of evidence and inference to be drawn therefrom; and that there may be legitimate reasons why an oral agreement is preferred; or a written one is not made and executed. State Counsel went on to explain that the parties herein were prominent lawyers, whose word was their bond.

With regard to the appellant's argument that this action being one for specific performance is caught up by the provisions of the **State Proceedings Act**; and that the only liability that should arise is for damages for breach of contract, the learned State Counsel submitted that the proposition by the appellant was bewildering. Sate Counsel argued that a claim for damages is subject to proof of loss; and the loss may be nominal. Hence, the appellant's proposition was absurd. To show the nature of the respondent's action, learned State Counsel referred us to a passage in **McGregor on Damages, 15th edition, page 4, Para 3** which states:

> **"Actions for money payable by the terms of the contract which the defendant has promised to pay... These are distinguished from actions for breach of contract."**

The learned State Counsel also cited **Order 18/8/14** of the **Rules** of the **Supreme Court** (White Book) **(1999 edition)** which states:

> **"A judgment for a claim in debt arising upon a contract does create an estoppel to preclude a claim for damages for breach of contract since such a claim raises a different cause of action (Lawler v Gray [1984](3) All E.R. 345)"**

On the strength of the above authorities, the learned State Counsel argued that a claimant has the right to claim for both the

money the defendant promised to pay him and the damages arising from the failure of the defendant to pay him. The doctrine of specific performance, it was argued, has nothing to do with monetary claims.

We were, therefore, urged to dismiss the first ground of appeal.

We have considered the arguments from both sides on this ground. The court below, quite rightly, held the view that, to be valid, the disputed agreement herein needed to contain all the elements that are found in a valid contract. As we have said, the court below discussed the law regarding the elements of offer and acceptance and found that both were present in the agreement. There is another requisite in a contract which affects its enforceability – consideration. **Chitty on Contracts, 30th edition** on this subject provides:

> "General. **In English law, a promise is not, as a general rule, binding as a contract unless it is either made in a deed or supported by some** *'consideration'*" (para 3 – 001).

The authority goes on to state:

"Benefit and detriment. **The traditional definition of consideration concentrates on the requirement that** *'something of value'* **must be given and accordingly states that consideration is either some detriment to the** *promisee* **(in that he may give value) or some benefit to the** *promisor* **(in that he may receive value)"**(para 3 – 004).

It is a general rule that consideration must move from the *promisee*. On this rule, **Chitty On Contracts** again provides:

"Promisee must provide consideration. **The rule that** *'consideration must move from the promisee'* **means that a person can enforce a promise only if he himself provided consideration for it."**(para 3 – 036)

Although the court below did not expressly discuss the principle, it did tacitly consider it by way of the passage it quoted from **Halsbury's Laws of England, 4th edition, Volume 9 at paragraph 740**. We cite it again:

> **"A compromise of a disputed claim which is honestly made, whether legal proceedings have been instituted or not, constitutes valuable consideration, even if the claim ultimately turns out to be unfounded. It is not necessary that the question in dispute should be really doubtful, it is**

> **sufficient if the parties in good faith believe it to be so, even if such belief is founded on a misapprehension of a clear rule of law. Presumably the position will be similar where the dispute is as to the facts, though a settlement based upon a mistake of fact might be void for mistake. Certainly, the giving up of a contingent right to the costs of proceedings which are in the discretion of the court is consideration in law".**

In this case, the respondent issued a letter of demand shortly after the shooting incident in 1997, threatening to take legal action. The respondent told the court below how, when he came back to Zambia in 2003, he continued engaging with the Government concerning his claim until the Government agreed in 2009 to settle the claim. We accept, therefore, that the respondent had a valid claim which he compromised in consideration of the promise made by the Government. In the circumstances, we agree with the court below that, all the ingredients necessary for a valid and enforceable agreement were present in this case.

We now turn to Mr Imasiku's alternative argument.

The argument is that this action is essentially one for specific performance and, therefore, under **Section 16** of the **State Proceedings Act, Chapter 71** of the **Laws of Zambia** the court

below should not have granted the claims. Instead, it was argued, the court below should have awarded damages for breach of contract.

Section 16(1) provides:

> **"In any civil proceedings by or against the State the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:**
>
> **Provided that---**
>
> **(i) where in any proceedings against the State any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties;"**

We have already stated the respondent's argument on this issue. A look at the relief set out on the originating summons shows that the respondent merely sought declarations of his rights and the obligations of the Government with regard to the agreement. As we have stated, the court below granted the declarations sought, but, however, went beyond what the respondent sought and entered

judgment in the sum of US$6,743,918.38, as well as an order that the appellant shall pay interest on the claim in accordance with **Section 2** of the **Judgments Act No.16 of 1997** until final settlement. We think that this is the source of Mr Imasiku's alternative argument. However, it is clear that the action was not in any way one for specific performance. The action was one for a declaratory judgment.

Indeed, while the High Court is empowered by **Section 13** of the **High Court Act, Chapter 27** of the **Laws of Zambia** to grant all such remedies or reliefs to which any of the parties may appear to be entitled, this power is exercised only in respect of a claim or defence properly brought forward. In this case, the respondent's action was for, essentially, only three declarations. The respondent, correctly, commenced the action by originating summons. If the respondent's action had been one for breach of the agreement or for judgment on the sum in the agreement, it would have had to be commenced by a different mode of commencement; that is, by writ of summons. We said in **Chikuta v Chipata Rural Council**[8] that the court has no jurisdiction to entertain and award judgment on

claims that have been wrongly commenced. In this case too, the court below had no jurisdiction to grant a relief that should have been brought forward by a different mode of commencement. It is, therefore, our view that the court below was in error when, in addition to granting the declarations, it entered judgment in the sum of US$6,743,918.38. We shall, towards the end of this judgment, set out the way the respondent's judgment ought to have read in the court below.

However, that error does not change the fate of the first ground of appeal. The respondent successfully obtained a declaration that the agreement between him and the appellant is valid and enforceable. The first ground of appeal seeks to impeach that declaration. We have already said that we agree with the court below that all the ingredients necessary for a valid and enforceable agreement were present. We, therefore, find no fault with the court below for granting the declaration that the agreement herein is valid and enforceable. On those grounds, we find no merit in the first ground of appeal.

In the second ground of appeal, the appellant's main argument was that no agreement to pay interest at LIBOR, whether express or implied, existed. Mr Imasiku urged us to examine all the correspondence written by the Attorney General in order for us to see that the appellant never made such an undertaking. In order to drive that argument home, learned counsel referred us to the definition of the London Interbank Offered Rate (LIBOR), as defined by Black's Law Dictionary, ninth edition, 2009.

The definition there states:

> **"daily compilation by the British Bankers Association of the rates that major international banks charge each other for large-volume, short-term loans of Eurodollars, with monthly maturity rates calculated out to one year. These daily rates are used as underlying interest rates for derivative contracts in currencies other than the Euro."**

The learned counsel also referred us to a website *investopedia.com* which explains that the primary function of LIBOR is to serve as a benchmark reference rate for debt instruments, including government and corporate bonds, mortgages, student loans, credit cards as well as derivatives such as currency and interest swaps, among many other financial instruments. It also serves as the

primary indicator for the average rate at which banks that contribute to the determination of LIBOR may obtain short term loans in the London Interbank Market.

It was argued that from the definition of LIBOR and its purpose, as explained above, the circumstances of this case do not permit interest to be paid at LIBOR.

In response, Mr Hamir, learned State Counsel, submitted that the trial court awarded interest because it found that the parties had agreed that the respondent would receive interest at LIBOR for the period that he was without the money that was due to him. The amount of interest, it was argued, was calculated to the date of the agreement and was quantified to the sum of US$743,918.00 which was added to the amount of the settlement. What the trial court did, it was argued, was merely to order that interest should continue accruing as agreed until the sum owed was paid.

Those were the respective arguments on that ground.

In arriving at its decision to grant the second declaration, the court below had found that the parties had agreed that interest at

LIBOR on the sum of US$2,5000,000 would be paid. According to the court below, its finding was based on the testimony of the respondent and his witness, which testimony was not challenged. We have examined the documents on the record of appeal. Indeed, there was an averment by the respondent in paragraph 17(b) of his affidavit in support of the originating summons in which he stated that it was an express or implied term of the agreement that the appellant would pay simple interest at LIBOR on the principal sum of US$2,500,000 up to the date of payment. This averment came in the wake of his earlier averment in paragraph 15 of the same affidavit wherein he stated that he had sat with the Attorney General and re-visited several aspects, or heads of his claim, including interest at LIBOR. The record shows that, at the trial, the respondent adopted the averments in that affidavit as his evidence. The record shows further that he was not cross-examined on that aspect of his averments. Therefore, we cannot fault the trial court for reasoning and finding that since those averments were not challenged, then the parties did indeed agree that the appellant would pay interest at LIBOR until date of payment. In the circumstances, we are of the view that the trial court was on firm

ground when it upheld the second declaration sought by the respondent. The second ground of appeal fails, as well.

All in all the appeal fails. At this point we now set out the respondent's judgment as it ought to appear.

The terms thereof are as follows:

1. **It is declared that the agreement to compromise and settle the dispute between the respondent and the appellant made between them on 16th October, 2009, settled on 23rd October, 2009 and confirmed and incorporated in writing, contained in letters dated 26th October, 2009 from the respondent to the Secretary to the Treasury, letter dated 29th October, 2009 from the appellant to the respondent's advocates Chilupe and Company, letter dated 2nd November, 2009 from Chilupe and Company to the appellant, E-mail communications of 16th November, 2009 from the appellant to the respondent, is a valid, subsisting and enforceable agreement in full and final settlement of the respondent's claim against the appellant whereby, the appellant agreed to pay the respondent the total sum of United States Dollars 6,743,918.38 in full and final settlement of all his claims against the appellant arising from the appellant's shooting of the respondent on 23rd August, 1997 at Kabwe.**
2. **It is declared that it was an express term of the said agreement or an implied term thereof, that the appellant shall pay the respondent interest on United States Dollars 2,500,000 from the date of the agreement to date of payment at the London Interbank Offered Rate (LIBOR) if the appellant failed or**

neglected to make payment of the sum agreed in the settlement; and the appellant has failed and/or neglected to do so.

3. **It is declared that the appellant has a legal obligation to discharge the agreement.**

To the extent that the trial court below purported to enter judgment in the sum of US$6,743,918.38, we set aside that aspect of its judgment because the purpose of this action was to declare the validity of the agreement; and the rights and obligations of the parties in respect thereof. Again, to the extent that the court below awarded further interest on the claim in accordance with **Section 2** of the **Judgments Act, No.16 of 1997**, we set aside that aspect of the judgment because interest under the **Judgments Act**, cannot be applied to a judgment that is merely declaratory of the parties' rights.

Otherwise, subject to the above correction or clarification, the appeal stands dismissed. We award costs to the respondent.

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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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C.Kajimanga
SUPREME COURT JUDGE