

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 19 OF 2020

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



AIRTEL NETWORKS ZAMBIA PLC

APPELLANT

AND

JAMES KUMWENDA

RESPONDENT

CORAM: CHASHI, SIAVWAPA AND BANDA - BOBO, JJA

ON: 18th May and 23rd July 2021

For the Appellant: M. Mando, Messrs. Mando, Pasi and Advocates

For the Respondent: F. B. Nanguzgambo, Messrs. F.B. Nanguzgambo and Associates

JUDGMENT

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. **Rukhsana Mohammed, Norman Mohammed, Ramsha Mohammed** (A minor suing by Rukhsana Mohammed, her Mother and next Friend) **v Ali Ghulam Siddique Mohammed** (Sued in his personal capacity and his capacity as Administrator of the Estate of Ghulam Siddique Mohammed (deceased))
Siddique Anis Ghulam (2012) ZR, Vol 2, 522
2. **Standerwick v Royal Ordnance Plc (1966) 8 C. L.**
3. **A. J. Trading Company Limited v Chilombo (1973) ZR, 55**
4. **Contract Discount Corporation Limited v Furlong and Others (1948) 1 All ER 276**
5. **Finance Bank Zambia Plc v Lamasat International Limited - CAZ Appeal No. 175/2017**
6. **Green v Rozen (1955) 2 All ER, 796**
7. **Finance Bank Zambia Limited v Noel Nkhoma – SCZ Appeal No. 77 of 2015**
8. **William David Carlisle Wise v E. F. Hervey Limited (1985) ZR,**

9. **Col Paul Chikuswe Chilanga (Rtd) v Lt. Gen S. A. Chisuzi (Rtd)**
Sued in his capacity as the Army Commander - SCZ Appeal
No. 53 of 2017
10. **Corpus Legal Practitioners v Mwanandani Holdings Limited -**
SCZ Appeal No. 134 of 2010
11. **Zega Limited v Zambezi Airlines Limited and Diamond**
Insurance Limited - SCZ Appeal No. 39 of 2014
12. **Foveros Mining Limited v Bell Equipment Zambia Limited -**
CAZ Appeal No. 115/2018
13. **Northwold Investments Ltd v Diamond General Insurance**
Limited - CAZ Appeal No. 135 of 2018
14. **Kalyoto Muhalyo Paluku v Granny's Bakery Limited, Ishaq**
Musa, Attorney General and Lusaka City Council (2006) ZR,
119

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia**

Rules referred to:

1. **Rules of the Supreme Court (White Book) 1999 Edition**
2. **The High Court Rules, Chapter 27 of the Laws of Zambia**

1.0 INTRODUCTION

1.1 This appeal emanates from the Ruling of Hon. Mrs. Justice Ruth Chibabbuka delivered on 12th July, 2019. In the said Ruling, the learned Judge refused the Appellant's application for entry of judgment on admission and to dismiss the counter claim for failure to disclose a reasonable cause of action and the claims being *res judicata*.

2.0 BACKGROUND

2.1 The brief facts leading up to the Ruling subject of this appeal are that, the Respondent under Cause Number **2017/HB/130** commenced proceedings by way of writ of summons against the now Appellant claiming rentals, damages and compensation arising from the Appellant's trespass who dug trenches and laid optic fibre cables on the Respondent's land.

2.2 On 7th May, 2018, the parties executed a Consent Order which was endorsed by a Judge. In the said Consent Order, the parties agreed *inter alia* as follows:

1) That upon signing and sealing of the Consent Order, the Respondent and the Appellant shall

have no further claims against each other in respect to the matter;

2) The Appellant shall pay the Respondent K95,000.00 as full and final settlement of the matter;

3) The Appellant to relocate the fibre cables located on the Respondent's property by 31st May, 2018; and

4) That the action against the Appellant dated 28th December, 2017 is withdrawn in its entirety.

2.3 In pursuance of clause 2 of the Consent Order, the Appellant paid the Respondent the sum of **ZMW295,000.00** instead of the agreed **ZMW95,000.00**. When the Appellant made a demand for a refund of the excess amount, the Respondent admitted to having received the amount of **ZMW295,000.00** but refused to pay and that is what led to the Appellant commencing an action under Cause No. **2019/HP/0336** for the refund of the said sum.

2.4 In response to the claim, the Respondents filed a defence and counter claim. The Appellant then took out an action that judgement on admission be entered against the Respondent on the basis that the Appellant admitted having

received the **ZMW200,000.00**. Further, that the counter claim be dismissed for failure to disclose a cause of action and that the issues raised therein were *res judicata*, having been dealt with in the Consent Order under Cause No. **2017/HB/130**.

- 2.5 In opposing the application, the Respondent admitted to having received the **ZMW 200,000.00** but alleged that the said money was not erroneously paid to him, as it corresponded with the initial amount, he sought under cause No. **2017/HB/130**. In addition, that the Respondent believed that the **ZMW95,000.00** that was agreed to be paid by the Appellant was only meant to cover monthly rentals up to 31st May, 2018. The Respondent maintained that he was entitled to the **ZMW200,000.00**.
- 2.6 It was further averred that because the Appellant failed to relocate their fibre cables by 31st May, 2018 in accordance with clause 3 of the Consent Order, the Respondent counter claimed for rentals and loss of income.

3.0 THE COURT BELOW

- 3.1 After considering the pleadings and the arguments, the learned Judge opined that the crux of the matter rested on the question as to how a consent order that has been breached can be enforced by either party to the said consent order.
- 3.2 In resolving this issue, the learned Judge took note of the fact that neither party had challenged the Consent Order executed under Cause No. **2017/HB/130** but that both parties acknowledged that there had been a breach in relation to the terms and conditions that were set out in the said Consent Order.
- 3.3 The lower court considered the terms of the Consent Order and found that upon signing of the same, the parties agreed not to have any further claims against each other in respect of the matter. The lower court then referred to the High Court case of **Rukhsana Mohammed, Norman Mohammed, Ramsha Mohammed** (Minor suing by Rukhsana Mohammed, her mother and next friend) **v Ali Ghulam Siddique Mohammed** (Sued in his personal capacity and his capacity as Administrator of the Estate of Ghulam

Siddique Mohammed (deceased)) **Siddique Anis Ghulam¹**

where it was held that agreements that purport to oust the jurisdiction of the court are contrary to public policy and void as a result.

- 3.4 The learned Judge found that, although the Respondent's claims under cause No. **2017/HB/130** were not adjudged on their merits, the nature of the wrongdoing allegedly committed by the Appellant was criminal trespass which fell in the realm of public interest. As a consequence, the Judge held that the portion of the Consent Order that sought to oust the jurisdiction of the court to determine a claim related to the action was void.
- 3.5 The Judge also found that, the failure by the Appellant to relocate the fibre cables by 31st May, 2018 was a clear departure from the provisions of the Consent Order and created a new set of facts which the Respondent was entitled to rely on in pursuit of a fresh action by way of a counter claim.
- 3.6 The Judge further found that, the Respondent could not enforce the provisions of the Consent Order under the same cause as it was a term of the Consent Order that the action

under the said cause had been withdrawn in its entirety. As a result, no further process could be filed apart from an application for costs.

3.7 The court opined that, as a new set of facts had been created by the Appellant's failure to remove the cables from the Respondent's premises by 31st May, 2018, the Respondent was entitled to claim as against the Appellant from 1st June, 2018.

That, therefore, it was premature to enter judgment on admission at that stage in view of the new facts. On that basis, the court refused to dismiss the counter claim as it disclosed a cause of action and she directed the Respondent to redo and refile the defence and Counter claim in accordance with Order 18/18(2) of **The Rules of the Supreme Court¹** so that there is clear distinction between the defence and counter claim.

4.0 GROUNDS OF APPEAL

4.1 Dissatisfied with the Ruling of the lower court, the Appellant launched an appeal before this Court, advancing six (6) grounds of appeal, couched as follows:

1. The Court below misdirected itself both in law and in fact when it held that it was premature to enter judgment on admission in view of the new set of facts that had been created by the Appellant's failure to remove the cable from the Respondent's premises.
2. The court below misdirected itself in law and fact when it held that there was no further process that could be filed after the entry of the Consent Order under cause No. 2017/HB/130 apart from an application for costs.
3. The court below misdirected itself in law and fact when it held that there was a new set of facts created by the non - removal of the cable by the Appellant.
4. The court below misdirected itself in law and fact when it held on its own motion, that the Appellant committed criminal trespass and proceeded to expunge portions of the Consent Order signed under Cause No. 2017/HB/130 on the basis of public policy which issues were neither before the court nor in issue.
5. The court below misdirected itself in law and fact when it held that the Respondent's counterclaim (in its original form) disclosed a reasonable cause of action).

6. The court below misdirected itself in law and fact when it condemned the Appellant in costs despite the finding for the Appellant that the Defence and counter claim were defective.

5.0 ARGUMENTS IN SUPPORT

5.1 Mr. Mando, Counsel for the Appellant, relied entirely on the filed written heads of argument dated 14th February, 2020. Counsel argued grounds one and three together and referred us to page R12 of the lower court's Ruling where it stated as follows:

"As a new set of facts has been created by the Plaintiff not having removed its cable from the Defendant's premises by the 31st May 2018, the Defendant is entitled to claim as against the Plaintiff from 1st June 2018. It is therefore my considered view that it will be premature to enter Judgment on admission at this stage in view of the new set of facts that has been created by the Plaintiff's failure to remove the cable from the defendant's premises."

- 5.2 According to Counsel, this finding by the lower court was a misdirection as it failed to appreciate that firstly, where there is a clear admission, a party is at liberty to apply for judgment without waiting for the determination of any other question between the parties, thus an application for entry of judgment on admission cannot be considered premature. We were referred to Order 21 Rule 5 of **The High Court Rules**² and Order 27 Rule 3 of **The Rules of the Supreme Court**¹.
- 5.3 Counsel further called into aid the cases of **Standerwick v Royal Ordinance Plc**², **A. J. Trading Company Limited v Chilombo**³, **Contract Discount Corporation Limited v Furlong and Others**⁴ and **Finance Bank Zambia Plc v Lamasat International Limited**⁵.
- 5.4 Secondly, that the lower court in its Ruling, opined that a new set of facts had been created enabling the defendant to claim against the Appellant. According to Counsel, the said new facts were subject of a counter claim which is a separate action from the main action.
- 5.5 It was argued that, the lower court failed to appreciate the distinction between the counter claim and the main action

and that had she done so, she would have found that granting judgment on admission would not have affected the Respondent's right to counter claim on the new set of facts. We were referred to Order 15 Rule 2(4) of **The Rules of the Supreme Court**¹.

It was contended that, the Appellant's failure to remove the cable from the Respondent's premises had no legal effect on the Appellant's application for judgment on admission.

- 5.6 In support of ground two, we were referred to page R11 of the lower court's Ruling, where the court concluded that since it was a term of the Consent Order that the matter was withdrawn in its entirety, there was nothing else that could be filed in the case as it stood withdrawn. In arriving at this conclusion, the lower court relied on the **Mohammed**¹ case.
- 5.7 According to Counsel, the **Mohammed**¹ case was misapplied in that, in the present case, there were specific orders made by the court, which were the basis upon which the parties agreed to withdraw the matter and in the event of any breach, the innocent party was entitled to enforce the order in that cause.

5.8 It was argued that, a consent order is like any other order of the court only that it is made with the consent of the parties. Counsel relied on Order 42/5A/4 of **The Rules of the Supreme Court**¹ and submitted that a consent order is enforceable in the ordinary course of court business and that therefore, there was nothing that prohibited the Respondent from enforcing the judgment that ordered the removal of the cable by 31st May, 2018.

That the mere fact that the matter stood withdrawn, did not render the Consent Order invalid or unenforceable. Counsel referred to the case of **Green v Rozen**⁶.

5.9 In support of ground four, our attention was drawn to page R10 of the lower court's Ruling, where it held as follows:

"Nonetheless, though the claim was brought to court by way of civil suit it is apparent that the nature of the wrongdoing purportedly committed by the Defendant which is criminal trespass in that matter is one of public interest. Consequently, I hold that the portion of the Consent Order that seeks to oust the jurisdiction of the courts to determine a claim related to the action of the Defendant which action is still subsisting as evidenced

from the submissions by both parties in the present case is void."

5.10 Counsel argued that, the above holding is a misdirection and it is inconsistent with the definition of criminal trespass provided for in section 306 of **The Penal Code**.¹ According to Counsel, in the present case, the Appellant unintentionally laid its optic fibre cables on the Respondent's land and there was no intent to commit any offence or to enter onto the Respondent's land. That the Appellant was only made aware afterwards and the matter was settled by way of consent Order.

5.11 It was further submitted that, the Consent Order did not raise issues of public policy. It was an agreement which the court ought to have given effect to. And the fact that the parties agreed not to bring any other claims against each other did not mean that the court's jurisdiction had been ousted. We were referred to the case of **Finance Bank Zambia Limited v Noel Nkhoma**⁷.

5.12 It was argued that, a consent order being a valid order of the court, the learned Judge had no jurisdiction to reverse

an order of another High Court Judge in the absence of an application challenging it.

5.13 With regard to ground five, it was argued that, although the lower court agreed at page R13 of the Ruling that the counter claim was irregular in form, the court still found that it raised a reasonable cause of action. Counsel referred us to the counter claim appearing at pages 42 of the record and submitted that it did not disclose any reasonable cause of action. We were referred to Order 18 Rule 19 Rules of **The Rules of the Supreme Court**¹ and it was submitted that in determining whether the pleading discloses a cause of action, evidence is inadmissible, that therefore, the court ought not to look at the evidence on record but consider the pleadings at face value.

It was contended that in the instant case, the lower court went beyond the pleadings and considered new set of facts.

We were referred to **William David Carlisle Wise v E. F. Hervey Limited**⁸.

According to Counsel, a perusal of the contents of the counter claim reveal that there were no facts disclosed and no disclosure of any head of liability at law, as a result, it

was unknown whether the claim was in tort, contract or statutory duty. We were referred to the case of **Col. Paul Chikuswe Chilanga (Rtd) v Lt. Gen S. A. Chisuzi (Rtd) Sued in his capacity as the Army Commander⁹.**

5.14 In Support of ground six, it was argued that it is trite law that the award of costs is within the discretion of the court. Counsel called into aid the case of **Corpus Legal Practitioners v Mwanandani Holdings Limited¹⁰** and submitted that the court did not exercise its jurisdiction judicially. At page R13 of the Ruling, the court found in favour of the Appellant and ordered amendment of the pleadings entailing that the Appellant was a successful party. That the Application having been prompted by the defects in the Respondent's pleadings, the Respondents ought to bear the costs. We were urged to allow the appeal.

6.0 ARGUMENTS IN OPPOSITION

6.1 Counsel for the Respondent, Mr. Nanguzgambo, equally relied on the filed written heads of argument dated 20th March, 2020. In response to ground one and three, Counsel submitted that, the lower court was on firm ground when it

held that it was premature to enter judgment on admission as a new set of facts had been created by the Appellant's failure to remove the fibre cables by 31st May, 2018.

It was argued that to date, the said cables are still on the Respondent's land which is contrary to the terms of the Consent Order. Counsel referred us to the case of **Finance Bank Zambia Plc v Lamasat International Limited**⁵ and submitted that the Respondent's admission was not unequivocal to warrant the entry of judgment on admission. It fell short of the requirements that ought to be satisfied before such an order can be granted.

- 6.2 Counsel further referred us to the Consent Order and submitted that, based on the **Mohammed**¹ case, the learned Judge cannot be faulted when she held that no other proceedings could be taken in the withdrawn action, for it was extinguished by the withdrawal and that the only option left was to commence a fresh action on the new set of facts.
- 6.3 With regards to the disclosure of reasonable cause of action, it was argued that, the learned Judge correctly found that the Respondent's amended defence and counter claim appearing at pages 41 of the record disclosed a reasonable

cause of action. And that, the learned Judge, correctly observed that the format of the said defence and counterclaim were contrary to Order 18 Rule 18(2) of **The Rules of the Supreme Court**¹ and she accordingly directed that the Respondent redo his pleadings.

6.4 With regards to ground six, it was submitted that, the Appellant's application in the court below was twofold, firstly it was dealing with entry of judgment on admission and secondly, with the dismissal of the Respondent's counterclaim on grounds that it was res judicata and that it was contrary to the provisions of Order 18(18) of **The Rules of the Supreme Court**¹.

6.5 According to Counsel, the lower Court dismissed the first issue but upheld the Appellant's application on the second issue and ordered amendment of the counter claim within 14 days. The Appellant was therefore, partially successful and was not entitled to claim costs. We were urged to dismiss the appeal.

7.0 DECISION OF THIS COURT

7.1 We have considered the evidence on record, the impugned Ruling of the lower court and the submissions by both parties.

7.2 We note that, at page R7 of the Ruling, the learned Judge in arriving at her decision opined that, the crux of the matter rested on the question as to how a consent order which has been breached can be enforced by either party to the consent order.

In our view, the lower court formulated the wrong issue for determination. Upon perusal of the record, it is clear that the application before the Judge was for judgment on admission, therefore, all the Judge needed to do was to consider the facts before her and determine whether or not there was an admission of liability by the Respondent.

7.3 Order 21 Rule 6 of **The High Court Rules²** under which the Appellant sought entry of judgment on admission provides as follows:

"A party may apply, on motion or summons, for cancelled judgment on admissions where admissions of

facts or part of a case are made by a party to the cause or matter either by his pleadings or otherwise"

Similarly, Order 27 Rule 3 of **The Rules of the Supreme Court¹** provides that:

"Where admissions of fact or of part of a case are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties and the Court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by motion or summons."

7.4 It is clear from a reading of the said provisions that they are enabling provisions and are neither obligatory nor dictatorial. For that reason, the court has discretionary power to grant judgment on admission and such power ought to be exercised sparingly. In our recent decision of

Limited⁵, which has also been cited by both parties, we stated as follows:

"It is trite that the court has discretionary power to enter judgment on admission under Order 21 Rule 6 of the High Court Rules. This power is exercised in only plain cases where the admission is clear and unequivocal. There is a plethora of decisions on the admissions and entry of judgment. An admission has to be plain and obvious, on the face of it without requiring a magnifying glass to ascertain its meaning. Admissions may be by pleadings or otherwise..."

The requirements to be satisfied before the court can pronounce or enter a judgment on admission are that the admissions have been made in either the pleadings or otherwise, and must be clear and unequivocal."

7.5 Further in the case of **Zega Limited v Zambezi Airlines Limited and Diamond Insurance Limited¹¹**, the Supreme Court stated as follows:

"We wish to state from the outset that it is true that under both Order 21/6 of the HCR and Order 27/3 of the RSC the court is empowered to enter judgment in

favour of a party based on the admissions of fact made by the other party on its claims(s). However, we must also hasten to mention that the position of the law as spelt out under Order 27/3/2 of the RSC is that admissions of liability by the party against whom judgment on admission is sought to be entered may be express and or implied and that the admission must be clear. This position was echoed in the case of Himani Alloys Ltd vs Tata Steel Limited in which the Supreme Court of India made it clear, inter alia, that the admission must be a conscious and deliberate act of the party making it and showing an intention to be bound by it. And that unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim against him.”

7.6 In light of the authorities referred to above, it is clear that in exercising its discretionary power, the court must bear in mind that a judgment on admission is a judgment without trial which essentially denies the defendant of his right to contest the claim. In short, the discretion of the court

should only be exercised when there is a clear, categorical and unequivocal admission which can be acted upon.

7.7 On a further interpretation of the provisions referred to, the use of the word "otherwise" suggests that it is open to the Court to base the judgment on admissions dehors the pleadings, such as statements made by a party or correspondences exchanged between the parties.

7.8 That being said, we have perused the record and at pages 68 - 69 of the record is the Appellant's letter of demand dated 13th February 2019 sent to the Respondent, wherein the Appellant demanded for a refund of the **ZMW200,000.00**. In response to the letter of demand, the Respondent wrote a letter dated 19th February, 2019, appearing at pages 83 – 86 of the record, in which the Respondent acknowledged receipt of **ZMW200,000.00** but denied that the said amount was erroneously paid to him. The Respondent refused to refund the money and maintained that he was entitled to it. The Respondent subsequently wrote another letter dated 1st May 2019, appearing at page 65 of the record and it reads in part as follows:

"RE: K200,000.00 OVERPAYMENT IN CONSENT
JUDGMENT JAMES KUMWENDA VS AIRTEL
NETWORKS ZAMBIA PLC (2017/HB/130)

Admittedly, when I received the payment of K295,000.00 I was convinced that it was my legal money because it tallied with the total of my claims. Admittedly too, the length of time that passed before I was made aware was too long for me and my family not to have spent the money.

Having said this, we would like you to avail me and my family time to come to Lusaka and sit with you at a round table and discuss the way forward. We also would like to put forward our proposals as regards to settling the K200,000. We would like to also discuss other issues concerning both parties. We hope and trust that after this meeting all issues concerning both parties will be settled once and for all so that we can both continue living in harmony...

Yours Faithfully

Signed

James Kumwenda"

7.9 In our view, this letter dated 1st May, 2019 indicates an admission by the Respondent that he received the excess **ZMW 200,000.00**. In the said letter, the Respondent even went as far as requesting to meet with the Appellant in order to put forward proposals as regards settling the **ZMW200,000.00**. This in our view is a clear and unambiguous admission on the part of the Respondent. It is intentional and indicates a deliberate act on the part of the Respondent to act on its admission and to be bound by it.

7.10 Notwithstanding this clear admission of liability by the Respondent, we will proceed to also consider the Respondent's defence appearing at pages 41 - 42 of the record. We note that, the Respondent via its defence attempted to circumvent the terms of the Consent Order by alleging that the payment of **ZMW200,000.00** was not an overpayment but was the amount owed to him as it corresponded with his initial claims in the writ of summons. As we see it, the issues raised in the defence fly in the teeth of the principles governing consent orders.

- 7.11 It is evident that the claims raised in the writ of summons under cause No. **2017/HB/130** were resolved by way of a Consent Order. The consent order being contractual in nature, the parties of their own volition agreed to the terms contained therein, which were merely confirmed by the Judge. Therefore, the Respondent cannot now claim that he was still entitled to the **ZMW200,000.00** when he agreed to receive **ZMW95,000.00** as full and final payment. The consent order, having the effect of an order of the court, is legally binding on the parties to it and as a result, the parties are estopped from reneging on their agreement.
- 7.12 We therefore, hold the view that, had the lower court considered the pleadings and the correspondence between the parties, it would have found that there was a clear admission of liability on the part of the Respondent in the sum of **ZMW200,000.00**. The lower court, therefore, ought to have entered judgment accordingly.
- 7.13 We also note that the lower court declined to enter judgment on admission on account of the fact that a new set of facts had been created by the Appellant's failure to remove its fibre cables from the Respondent's land.

7.14 While we do agree with the trial Judge that the failure to remove the fibre cables in accordance with clause 3 of the Consent Order, created a new set of facts upon which the Respondent could make a fresh claim, our point of departure is that the said claim was indeed, subject of the Respondent's counter claim and as such, it ought to have been considered as a separate action from the main action.

7.15 In the case of **Foveros Mining Limited v Bell Equipment Zambia Limited**¹² we held that:

“The law that a counter-claim is a distinct action is well established. The mere fact that the Appellant is challenging the acknowledgment of debt in its counterclaim cannot be used as a basis for setting aside the judgment on admission granted to the Respondent.”

7.16 Further, in the case of **Northwold Investments Limited v Diamond General Insurance Limited**¹³, we held that:

“counterclaims are proceedings in their own right and the rules relating to costs apply in equal measure.”

7.17 In light of the cases referred to above, the counterclaim being an action in its own right, should not have operated as a bar to entering judgment on admission. An entry of

Judgment on admission would not have affected the Respondent's right to counterclaim on the new set of facts. The learned court, therefore, misdirected itself when it held that it was premature to enter judgment on admission in view of the new set of facts that had been created by the Appellant's failure to remove the cable from the Respondent's land.

7.18 In the view that we have taken, we accordingly set aside the Ruling of the lower court declining to enter judgment on admission and hereby enter judgment on admission in the admitted sum of **ZMW200,000.00** which shall attract interest at short-term commercial bank rate from the date of the writ until date of Judgment and thereafter at the current lending rate as determined by the Bank of Zambia from time to time until full payment. We, therefore, find merit in grounds one and three.

7.19 Coming to ground two of the appeal, the Appellant assails the lower court's holding at page R11 of the Ruling to the effect that the Respondent could not enforce the provisions of the Consent Order because it was a term of the Consent Order that the matter had been withdrawn and that as a

result, no further process could be filed apart from an application for costs.

- 7.20 As earlier stated, a consent order is a judge approved order and as such, it has the effect of a judgment of the court and can be enforced like any judgment of the court if one of the parties were to breach the order. In the case of **Kalyoto Muhalyo Paluku v Granny's Bakery Limited, Ishaq Musa, Attorney General and Lusaka City Council**¹⁴ the Supreme Court held as follows:

“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.”

- 7.21 Therefore, the learned Judge misdirected herself when she held that the consent order, which as seen above, has the effect of judgment of the court, could not be enforced. As correctly argued by Counsel for the Appellant, the Consent Order contained specific orders which had to be effected by a certain time and the Appellant having breached those terms, it was only logical that the Respondent enforce the Order of the court.

- 7.22 In our view, it was not the intention of the parties that by the inclusion of a clause stipulating that the action had been withdrawn, meant that the consent order itself could not be enforced. It being a judgment of the court, the Respondent had every right to enforce it as opposed to commencing a fresh action.
- 7.23 For the above reasons, we agree with Counsel for the Appellant that, the Appellant, having breached clause 3 of the Consent Order, the Respondent ought to have enforced the consent order like any other judgment of the court. Nonetheless, it is our view, that no prejudice was occasioned on the Appellant by the Respondent proceeding by way of a counter claim. To the extent that the lower court misdirected itself when it held that the Consent Order could not be enforced, we find merit in ground two of the appeal.
- 7.24 With regard to ground four, the Appellant attacks the lower court's finding that a portion of the Consent Order sought to oust the jurisdiction of the court. We have observed that in arriving at that conclusion, the learned Judge heavily

relied on the **Mohammed**¹ case and declared the said clause of the Consent Order void.

7.25 We have had the opportunity to read the **Mohammed**¹ case, and in our view, the said case was wrongly applied to the facts of this case. In that case, the court was dealing with an ouster clause contained in a consent agreement which sought to exclude the jurisdiction of the court, whereas, in the present case, the court was dealing with a consent order, which is for all intents and purposes an order of the court confirming the agreement between the parties.

7.26 We, therefore, agree with Counsel for the Appellant, that the learned Judge was wrong in interfering with the contents of the Consent Order given by another Judge of equal jurisdiction and on its own motion in the absence of an application or fresh action by either party. We find merit in ground four of the appeal.

7.27 Coming to ground five, the Appellant assails the Judge's finding at page R13 of the Ruling, that in its original form, the counterclaim disclosed a cause of action. We have perused the Respondent's defence and counter claim appearing at pages 41 - 42 of the record, and while

we do agree that the format of the defence and counter claim in its current state offends the provisions of Order 18 of **The Rules of the Supreme Court**², as stated under paragraph 7.14 above, we agree with the trial Judge that the Appellant's failure to remove the fibre cables, created new set of facts upon which the Respondent could claim. On that basis, the learned Judge cannot be faulted for finding that the counterclaim disclosed a reasonable cause of action. And she correctly ordered that the pleadings be amended. Ground five fails

- 7.28 With regard to ground six dealing with the award of costs, it has long been established that costs follow the event. We, therefore concur with Counsel for the Respondent that the Appellant in the court below was only partially successful in its claims and as a result, did not entitle them to costs. In any event, costs are in the discretion of the court and in our view, such discretion was exercised judiciously. We see no basis for setting aside the order of the court. Ground six fails.

8.0 CONCLUSION

8.1 The net effect of our decision is that, the Appeal having substantively succeeded, we order that the matter be sent back to the High Court for determination of the counterclaim before another Judge.

Costs to the Appellant, to be paid forthwith. Same to be taxed in default of agreement.



**J. CHASHI
COURT OF APPEAL JUDGE**



**M. J. SIAVWAPA
COURT OF APPEAL JUDGE**



**A. M. BANDA - BOBO
COURT OF APPEAL JUDGE**