

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 53 OF 2020

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

DANGOTE INDUSTRIES ZAMBIA LIMITED

APPELLANT

AND

ENFIN LIMITED

RESPONDENT

CORAM: Chashi, Lengalenga and Ngulube, JJA

On: **14th October 2020 and 29th January 2021**

Appellant: *A. D. A Theotis and J. Mutemi (Ms.), Mesdames Theotis Mataka and Sampa Legal Practitioners*

Respondent: *M. Chiteba, Messrs Mulenga Mundashi Legal Practitioners*

JUDGMENT

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. **Selly Yoot Asset Management Limited v Remotesite Solutions Zambia Limited (2010) 2, ZR, 35**

2. **Wickman Machine Tools Sales Limited v L. Schuler, AG (1974) AC 235**

3. **Sylvester Musonda Shipolo v Shadreck Maipambe - SCZ Appeal No. 1 of 2016**
4. **Mwape and 61 Others v ZCCM Investments Holdings Limited PLC - SCZ Appeal No. 57 of 2012**
5. **Fribrosa Spolka Akoyjina v Fairbairn Lawson Combe Barbour Limited (1943) AC, 32**
6. **National Drug Company Limited and Zambia Privatization Agency v Mary Katongo - SCZ Appeal No. 79 of 2001**
7. **Holmes Limited v Buildwell Construction Company Limited (1973) ZR, 97**
8. **Ford v Beech (1848) 11 QB, 852**
9. **Phinate Chona v Zesco Limited - CAZ Appeal No. 66 of 2019**
10. **Friday Mwamba v Sylvester Nthenge and Others - SCZ Judgment No. 5 of 2013**
11. **Premesh Bhai Megan Patel v Rephidim Institute Limited - SCZ Judgment No. 3 of 2011**
12. **Lauritzen AS v Wijsmuller BV (1990) 1 Lloyd's Rep, 1**

13. **Blue Financial Zambia Limited and Others v African Banking Corporation Zambia Limited (T/a Banc ABC) - SCZ Appeal No. 118 of 2015**
14. **Newston Zulu v Metal Fabricators of Zambia Limited - SCZ Appeal No. 10 of 2006**
15. **Printing and Numerical Registering Company v Simpson (1975) ZR, 106**
16. **Colgate Palmolive (Z) Inc. v Abel Shemu Chuka and 110 Others - SCZ Appeal No. 181 of 2005 (unreported)**
17. **Zambia Telecommunications Company Limited v Eva Banda - CAZ Appeal No. 2 of 2017**

Legislation referred to:

1. **The Zambia Development Agency Act No. 11 Of 2006**

Other works referred to:

1. **Anson's Law of Contract, 28th Edition, New York: Oxford University Press (2002)**
2. **Roland Burrows, Interpretation of Documents, London: Butterworth & Co (1943)**

1.0 INTRODUCTION

1.1 This is an appeal by the Appellant, against the Judgment of Hon. Mr. Justice E. L. Musona, delivered on 14th November, 2019, in favour of the Respondent.

2.0 BACKGROUND

2.1 The background to this matter is that, on 10th November, 2009, by a letter of mandate, the Defendant in the court below, now the Appellant engaged the Plaintiff, now the Respondent, for the provision of services, appearing at pages 42-47 of the record of appeal (the record). According to the letter of mandate, the Respondent was tasked with the responsibility of negotiating an Investment Promotion and Protection Agreement (IPPA) with the Government of the Republic of Zambia (GRZ) through its agent the Zambia Development Agency (ZDA).

2.2 It was a term of the said mandate, that as payment for the services proffered by the Respondent, the Appellant would remunerate the Respondent the fees as stipulated under clause 9 of the letter of mandate as follows:

i) A fixed fee of USD 55,000.00 excluding 16%

VAT payable as follows:

a) 50% on contract signing to cover mobilisation.

b) 50% on completion and submission of final draft IPPA to ZDA/GRZ.

ii) Plus a flat fee of USD 70,000 excluding 16% VAT on successful conclusion of IPPA.

2.3 In pursuance of the said clause, the Respondent issued invoice No. 1N10115 in the sum of US\$ 31,900.00 comprising of 50% of the mobilisation fee in the sum of US\$ 27,500.00 and the VAT component of US\$4,400.00 appearing at pages 48 – 49 of the record, which invoice was settled by the Appellant on 3rd December, 2009.

2.4 Further, upon GRZ having approved the Appellant's IPPA, which was executed on 9th December, 2010, the Respondent issued a second invoice No. 101377 in the sum of US\$ 113,100.00 comprising of the remaining 50% of the mobilisation fee in the sum of US\$ 27,500.00, additional

flat fee in the sum of US\$ 70,000.00 and the VAT Component on the two amounts in the sum of US\$ 15,600.00, appearing at pages 55 -56 of the record.

- 2.5 Following the issuance of the second invoice, the Appellant declined to pay the sum of USD 70,000.00 alleging that the IPPA only contained standard incentives and did not encompass the additional fiscal incentives. And that, the Respondent was only entitled to the additional flat fee on successful conclusion of the IPPA, which entailed achieving the fiscal incentives set out under clause 3(b) of the IPPA.
- 2.6 The Respondent subsequently issued another invoice No. 101378 for the sum of USD 27,500.00 plus the VAT component of USD 4,400.00 representing the remainder of the 50% mobilisation fee. Upon receipt of the invoice, the Appellant paid the sum of USD 27,500.00 exclusive of the VAT component.
- 2.7 Dissatisfied with the Appellant's refusal to pay the additional flat fee, the VAT component on the flat fee and the VAT component on the remainder of the 50%

mobilisation fee, the Respondent instituted proceedings against the Appellant in the court below.

3.0 CASE BEFORE THE LOWER COURT

3.1 The claim by the Respondent was by way of Writ of Summons, seeking the following reliefs:

- i) The sum of USD 85,600 (United States Dollar Eighty-Five Thousand Six Hundred) being the money due and owing inclusive of VAT from the Defendant pursuant to an agreement to render professional services.
- ii) Interest on the sum claimed in (i)
- iii) Costs
- iv) Any other relief that the court may deem fit.

3.2 The Respondent's case was substantially that, it had fully performed its obligations as stipulated under the letter of mandate which resulted in the signing of the IPPA and as such, the Respondent was entitled to be paid the additional flat fee of USD70,000.00.

3.3 In addition, the Respondent contended that, through the correspondence between the Appellant and ZDA, the Appellant was advised that GRZ would facilitate access to the incentives granted under the IPPA. According to the Respondent, notwithstanding the confirmed grant of incentives by GRZ, the Appellant has failed or willfully neglected to settle the balance and as a result, breached the terms of the agreement.

3.4 The Appellant settled its defence and denied the Respondent's claims. The Appellant averred that sometime in 2009, the Appellant intended to undertake development projects in Zambia and that in order to achieve the said projects, it required fiscal incentives from GRZ. That the Respondent, therefore, advised the Appellant to enter into an IPPA with the government whose objective was the provision of the fiscal incentives.

3.5 The Appellant further averred that, following the Respondent's negotiations, a draft IPPA was prepared providing for standard incentives only and did not contain fiscal incentives. As a result, the Appellant requested that

the signing of the IPPA be suspended until such a time that there was clarity on the incentives to be granted.

3.6 According to the Appellant, the Respondent further advised that the fiscal incentives would have to be independently negotiated for and that it was in the Appellant's best interest to sign the IPPA. The Appellant relying on the Respondent's advice, executed the IPPA with the view that the Respondent would negotiate for the fiscal incentives.

3.7 It was the Appellant's further averment that, although the IPPA was concluded, it did not provide for the additional incentives and that, the Respondent was only entitled to the flat fee upon successful conclusion of the IPPA providing for the fiscal incentives. As such, the Respondent had not discharged its obligations as contained in the letter of mandate.

3.8 All in all, the Appellant claimed that the nonpayment of the balance was on account of the Respondent's failure to negotiate for the additional incentives.

3.9 At the trial, the Respondent called two witnesses who gave evidence in pursuit of its claims, whilst the Appellant called one witness.

4.0 JUDGMENT OF THE LOWER COURT

4.1 After considering the evidence and submissions, the learned Judge identified the issue which needed to be resolved as; *whether or not the Respondent performed its obligations under the letter of mandate in order to be entitled to the payment of the flat fee inclusive of the VAT component as claimed in the writ of summons.*

4.2 The learned Judge considered the letter of mandate and found that indeed the Appellant was interested in getting the fiscal incentives from GRZ and engaged the Respondent to negotiate on its behalf for the said incentives. The learned Judge further considered Part 8 of **The Zambia Development Agency Act¹**, particularly Section 58, and found that, based on the said provision of the law, it is the Minister of Finance who by Statutory Instrument specifies the additional incentives to be granted to an investor and that the Minister acts upon recommendations made by

ZDA. According to the learned Judge, this procedure was made known to the Appellant before the signing of the IPPA.

4.3 Further, the learned Judge found that prior to the execution of the IPPA, vide a letter dated 17th November, 2010 addressed to the Appellant from ZDA, it was brought to the attention of the Appellant that the fiscal incentives sought by the Appellant could not be placed in the IPPA. Further that, after being informed of this fact, the Appellant proposed two amendments to the IPPA.

4.4 According to the learned Judge, when the Appellant proposed to suspend the signing of the IPPA, via a letter of comfort dated 7th December, 2010, ZDA assured the Appellant that it would be in a position to access additional incentives based on recommendations made by ZDA in accordance with section 58 of **The Zambia Development Agency Act¹**. Further that, the IPPA negotiating team had already provided their views on the incentives sought and it remained with ZDA to make appropriate recommendations as and when the additional incentives were required.

4.5 Based on the foregoing, the learned Judge opined that the Respondent had done its part in negotiating for the incentives sought by the Appellant and that the letter of comfort was clear that while the IPPA would not contain the fiscal incentives, recommendations were to be made by ZDA.

4.6 The learned Judge, therefore, dismissed the Appellant's argument that the payment of the flat fee was contingent on the Respondent successfully negotiating for the fiscal incentives and opined that his understanding of clause 9 of the letter of mandate was that the flat fee was payable upon conclusion of the IPPA, which was concluded on 9th December, 2010.

4.7 The learned Judge was of the view that there was no condition in the letter of mandate that the flat fee would only be paid upon the award of fiscal incentives to the Appellant. According to the Judge, after the conclusion of the IPPA, it was incumbent on ZDA to make the necessary recommendations to the Minister of Finance.

4.8 The learned Judge accordingly found that the Respondent was entitled to the amount of USD 85,600.00 claimed in the Writ of Summons and awarded interest on the Judgment sum at 4% per annum from the date of Writ of Summons until final payment.

5.0 GROUNDS OF APPEAL

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

1. The learned High Court Judge erred in law and fact when at page J15 of the Judgment relied on extrinsic evidence in the form of a letter dated 17th November, 2010 in determining the scope of work to be performed by the Respondent contrary to the law in the case of Holmes Limited v Buildwell Construction Limited (1973) ZR, 97, when as a matter of fact the parties herein had reduced their agreement on the scope of work to be performed by the Respondent into writing.

2. The learned High Court Judge misconstrued the letter of mandate when at page J17 of the Judgment, observed that there was no condition in the letter of mandate that provided, that the flat fee of USD 70,000.00 plus VAT could only be paid upon award of the fiscal incentives to the Appellant, when in fact, clause 3(b) of the letter of mandate provided conditional precedence for the successful negotiation of the IPPA.
3. The learned High Court Judge erred in law and fact when at page J16 of the Judgment, the Court held that the Respondent did its part in negotiating for incentives that were sought by the Appellant when in fact the only incentives negotiated by the Respondent were the standard incentives provided as of right by Statute contrary to the agreement between the parties and that the holding of the Honourable High Court Judge is contrary to the case of National Drug Company Limited and Zambia Privatization Agency v Mary Katongo Appeal No. 79 of 2001.

6.0 ARGUMENTS IN SUPPORT OF THE APPEAL

- 6.1 Counsel for the Appellant filed into court heads of argument in support of the appeal upon which she relied and augmented the same with oral submissions. We note that Counsel did not argue the said grounds of appeal in the order they appear in paragraph 5.1 above but started by arguing ground two, then ground three and lastly ground one.
- 6.2 The gist of the arguments put forward for ground two were that, clause 3(b) of the letter of mandate provided for the scope of work and that it was clear that the Respondent was tasked with the responsibility to successfully negotiate, draft and conclude an IPPA to achieve the outlined fiscal incentives.
- 6.3 It was further argued that, linked to clause 3 is clause 9 which provided that a flat fee of US\$70,000.00 excluding 16% VAT was payable on successful conclusion of the IPPA. According to Counsel, it follows therefore, that the condition precedent for payment of the flat fee was the successful completion of the IPPA.

6.4 In considering what was meant by the words “*successful completion of the IPPA*” under clause 9, Counsel relied on the case of **Selly Yoat Asset Management Limited v Remotesite Solutions Zambia Limited**¹ and submitted that, it entailed the achievement of the tasks set out under clause 3 of the letter of mandate. Counsel further contended that, the Respondent’s first witness conceded during cross examination that the Respondent had a duty to ensure that it negotiated for the special incentives as stipulated under clause 3(b) of the letter of mandate.

6.5 Counsel further referred us to **Chitty on Contracts, General Principles, 27th Edition** where the authors stated as follows:

“The general rule is where one party failed to perform a promise which went to the whole of the consideration, the other was released from performance as the former had not performed that which was a condition precedent to the latter’s liability.”

6.6 According to Counsel, the letter from the Ministry of Commerce, Trade and Industry addressed to the

Respondent appearing at page 50 of the record shows that the IPPA contained standard incentives and not the additional fiscal incentives.

6.7 Counsel further referred us to a letter appearing at page 51 of the record addressed to the Appellant's president where he was advised as follows:

"In this regard, I wish to assure you that we will do everything possible once the scope and nature of the additional incentives have been understood, to put up a strong case with the Ministry of Finance and National Planning as well as the Zambia Revenue Authority (ZRA) towards the granting of such incentives. Please take note, that you will not in any way be disadvantaged in the process of obtaining additional consideration simply because they are not in the IPPA."

6.8 We were further referred to another letter appearing at page 57 of the record where the Appellant was again advised as follows:

"The Investment Promotion and Protection Agreement (IPPA) Negotiating Team has already provided their views on the incentives sought and it remains with ZDA to make the appropriate recommendations as and when the additional incentives are required."

6.9 Based on the foregoing, Counsel contended that, the Respondent failed to perform the condition precedent for the payment of the flat fee. In support thereof we were referred to the cases of **Wickman Machine Tools Sales Limited v L. Schuler AG**² and **Sylvester Musonda Shipolo v Shadreck Maipambe**³.

6.10 Counsel further referred us to the evidence of the Respondent's first witness and submitted that it was clear from his evidence, which the lower court disregarded, that the Respondent's role was to negotiate an IPPA on behalf of the Appellant and ensure that the Appellant executed an IPPA. And that it was also clear from clause 3 (b) of the letter of mandate that the IPPA was only to be considered as having been successfully negotiated and concluded upon achieving the fiscal incentives.

6.11 It was argued that, the Respondent in an attempt to avoid its obligations under the letter of mandate, alleged that the IPPA did not include incentives and that it was for ZDA to facilitate the grant of the fiscal incentives. According to Counsel, if the Respondent's position was correct, she wondered why the letter of mandate which was executed by both the Respondent and the Appellant provided that the Respondent would negotiate, draft and conclude an IPPA which provided for the fiscal incentives.

6.12 According to Counsel, the above facts ought to have persuaded the lower court to disregard the evidence of the Respondent's witness to the effect that while **The Zambia Development Agency Act¹** provided for the granting of incentives, details of those incentives were neither part of the negotiations nor explicitly included in the IPPA and that the IPPA would only include a provision to the effect that ZDA would facilitate an application for incentives.

6.13 Our attention was drawn to the evidence of the Respondent's second witness who testified that, it was for the potential investor to write to ZDA indicating the nature

and type of project incentives they were applying for outside of those set out in the Act and that on receipt of that communication, ZDA would facilitate approval of the grant of these incentives by the Minister of Finance.

6.14 It was submitted that, the aforesaid evidence by the Respondent's witnesses showed that it was impossible for the parties to perform the contents of clause 3(b) of the letter of mandate, on account that performance of the condition to negotiate and conclude an IPPA which provided for fiscal incentives was unachievable. This was owing to the alleged fact that ZDA and not the Respondent was to facilitate approval and grant of the incentives. Counsel referred us to the cases **Mwape and 61 Others v ZCCM Investments Holdings Limited Plc⁴** and **Fribrosa Spolka Akoyjina v Fairbairm Lawson Combe Barbour Limited⁵** and submitted that the fiscal incentives not having been successfully negotiated and granted to the Appellant, there was no basis upon which the Respondent could be paid the amount being claimed.

6.15 In support of ground three, Counsel referred us to page J16 of the Judgment and submitted that contrary to the findings of the lower court, the Respondent did not do its part in negotiating for the fiscal incentives because the Respondent failed to discharge its obligation under clause 3 (b) of the letter of mandate. According to Counsel, the fiscal incentives having been an express requirement under clause 3 (b) of the letter of mandate and the Respondent having failed to discharge its obligations, the Respondent was not entitled to the amount being claimed.

6.16 It was further argued that the evidence of the Respondent's first witness during cross examination was in tandem with that of the Appellant's sole witness and also in accordance with the provision of clause 9 of the letter of mandate to the effect that the parties agreed that the Respondent would be remunerated based on the services offered under clause 3(b) of the letter of mandate.

6.17 For the reasons stated above, Counsel submitted that the learned Judge at page J17 of the Judgment misconstrued the letter of mandate when he observed that there was no

condition in the letter of mandate that provided that the amount being claimed could only be paid upon award of the fiscal incentives to the Appellant. According to Counsel, clause 3 (b) of the letter of mandate defined what a successful negotiation of the IPPA covered and that included fiscal incentives.

6.18 Similarly, at page J15 of the Judgment, Counsel argued that, the court misdirected itself when it held that by the letter of 17th November, 2010, it was brought to the attention of the Appellant that the fiscal incentives could not be placed in the IPPA. According to Counsel, this position flies in the face of the fact that the letter referred to by the learned Judge was authored by ZDA about a year after the parties had reduced their agreement containing the scope of work into writing and as such, the said letter could not be relied upon to vary the express terms of the agreement. Secondly, the said letter did not absorb the Respondent of performing its obligations under clause 3(b) of the letter of mandate.

6.19 Lastly, in support of ground one, the Appellant argued that the lower court erred in law by relying on extrinsic evidence in the form of a letter dated 17th November, 2010, in determining the scope of work to be performed by the Respondent. According to Counsel, the said letter was written a year after the parties had reduced their agreement into writing and as such, relying on it would be contrary to the principles laid down in the case of **Holmes Limited v Buildwell Construction Limited**⁷.

7.0 ARGUMENTS OPPOSING THE APPEAL

7.1 Counsel for the Respondent relied on the amended Respondent's arguments filed on 13th July, 2020. The 1st and 2nd grounds of appeal were argued together. It was submitted that, it is trite law, that in construing a contract, the Court is entitled to consider the intention of the parties as gleaned from the whole agreement, including the surrounding circumstances. That the learned authors of **Anson's Law of Contract**¹, citing the case of **Ford v Beech**⁸ in respect to construction of the terms of the contract stated as follows:

"An agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of agreement, and greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent...however if the words of a particular clause are clear and unambiguous, they cannot be modified by reference to other clauses in the agreement."

7.2 Counsel also cited the case of **Phinate Chona v Zesco Limited**⁹ which reinforced the view from the **Investors Compensation Scheme Limited v West Bromwich Building Society case** that:

"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

It was Counsel's submission that, as such, the Court is permitted to look at the factual background and circumstances, to properly deduce the true meaning of terms in a contract.

- 7.3 It was further submitted that, the Supreme Court in the case of **Friday Mwamba v Sylvester Nthenge and Others**¹⁰ citing the learned author Kim Lewison held that:

"In construing any written agreement, the Court is entitled to look at the evidence of the objective factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction. However, this does not entitle the Court to look at the evidence of the parties' subjective intentions."

"That it is therefore clear that the factual background leading to the execution of these agreements is an important part when considering the meaning of the agreements as it has repeatedly been stated that an agreement is not made in a vacuum."

7.4 According to Counsel, paragraph (1) of the letter of mandate was clear as to the primary obligation of the Respondent. That in addition, clause 9 provided for the Respondent to be paid a flat rate of US\$ 70,000.00 on successful conclusion of the IPPA. Counsel contended that, it is not in dispute that the IPPA was concluded on 9th December, 2010. However, the Appellant contends that the IPPA did not contain all the incentives that it had sought when it engaged the Respondent.

7.5 Counsel submitted that, following the aforestated rules of interpretation, on a proper construction of the letter of mandate, the Respondent was entitled to receive the additional consideration of US\$ 70,000.00 on successful conclusion of the IPPA.

7.6 As regards the Appellant's argument in respect to the letter of 17th November, 2010, it is the Respondent's submission that the rule against the admission of extrinsic evidence is not an absolute one and that there are several exceptions to the rule. That the most applicable is where the contract is not intended to embody all the terms of the contract. Our

attention was drawn to the **Holmes Limited** case where it was held that:

"By way of exception to the above rule extrinsic evidence maybe admitted to show that the written instrument was not intended to express the whole agreement between the parties."

7.7 The case of **Premesh Bhai Megan Patel v Rephidim Institute Limited**¹¹ was relied on where the Supreme Court held that:

"Extrinsic evidence can be admitted to prove any terms which were expressly or impliedly agreed by the parties before or after execution of the contract, where it is shown that the agreement was not intended to incorporate all the terms and conditions of the contract."

It was Counsel's submission that, based on that exception in the context of contracts, the extrinsic evidence of correspondence and letters can be used appropriately to reflect the terms of the contract. That, as such, the trial

court did not err when it relied on the contents of the letter of 17th November, 2010.

7.8 Counsel further submitted that, contrary to the Appellant's submissions that the contract was frustrated, the law on frustration of contracts is trite, as a contract is deemed to be frustrated when it is incapable of being performed due to an unforeseen event. According to Counsel, the Appellant argues that it was impossible for the Respondent to have performed the contents of clause 3(b) of the letter of mandate and that its reliance on the **Jackson Mwape** case is misplaced as the case deals with contracts that are discharged on the basis of frustration. Counsel drew our attention to the case of **Lauritzen AS v Wijsmuller BV**¹² which was referred to by the learned authors of **Chitty on Contracts** when they stated that:

"Frustration operates to "kill the contract and discharge the parties from further liability under it" and that therefore "cannot lightly be invoked" but must be kept within very narrow limits and cannot be extended."

7.9 It was Counsel's contention that the test for frustration of contract has not been met in this case as the correspondence between the parties including ZDA and the text of the IPPA itself clearly demonstrates that there was no failure of the requirement to obtain additional fiscal incentives nor was the mandate incapable of being performed. According to the Respondent, this is clear from clause 8.1 which provided that the additional incentives would be granted on specific application through the ZDA as well as the letter of comfort from ZDA dated 7th December, 2010 which formed the basis for the Appellant to proceed to execute the IPPA.

7.10 It was the Respondent's contention that, the general rule is that a party to the contract cannot substitute the performance agreed upon in the contract. That, however, the exception to that rule is where there has been a variation by agreement either expressly or by conduct. The case of **Blue Financial Zambia Limited and Others v African Banking Corporation Zambia Limited (T/a Banc ABC)**¹³ was relied upon, in which the Supreme Court stated

that there may be a waiver or variation by agreement to the agreed performance. In that case, the parties to an agreement redefined their contractual relationship by varying the original terms of the agreement and as such were bound by the varied contract which they mutually agreed to.

7.11 It was further submitted that, the legal concept of variation of performance was applicable herein and the Appellant consented to the variation of the contract by their conduct. That it is clear from the conduct of the Appellant as evidenced by the correspondence exchanged with ZDA, by which the Appellant was advised that additional incentives would not form part of the IPPA and the fact that the Appellant proceeded to sign the IPPA on the basis of the assurance by the ZDA that additional incentives may be granted after the signing of the IPPA, that the Appellant effectively varied strict compliance with clause 3 (b) of the letter of mandate.

7.12 It was further submitted that, the aforestated position is further confirmed by the testimony of the Appellant's sole

witness in the court below who stated in cross examination that the reason the Appellant signed the IPPA was because of the comfort given by ZDA in the letter dated 7th December 2010. We were urged to note from the sequence of correspondence that the Appellant was well aware at the time it executed the IPPA, that not all incentives sought would be included therein.

7.13 The Respondent contended that by executing the IPPA without the express grant of the additional incentives, the Appellant consented to the variation of the mandate with respect to the requirement under clause 3(b) for the incentives to be included in the IPPA. It was Counsel's submission that the course of events indicate that the requirements for variation by conduct have been met as the Appellant was well aware of the change in the performance, but by their conduct decided not to reject the change and proceeded to sign the IPPA which was attained as a result of the varied performance.

7.14 It was further submitted that, when parties vary the manner of performance by their conduct, that amounts to

waiver of the performance fixed by the contract. According to the Respondent, the Appellant by their communication accepted that certain incentives could only be granted by the Minister and as such they effectively waived the right for the contract to be performed in the exact manner prescribed, as they had full knowledge and accepted the situation. That based on the principles of variation and waiver, the Respondent fully complied with the contract and the Appellant should not be discharged from counter performing.

7.15 In response to the third ground of appeal, Counsel submitted that, the court below was on firm ground in holding that the Respondent had fulfilled its mandate by negotiating for the incentives sought by the Appellant, as the IPPA clearly indicated under clause 8.1 that the Appellant was entitled to all applicable incentives under **The Zambia Development Agency Act¹** for the stability period and furthermore that any additional incentives under section 58 of **The Zambia Development Agency Act¹** may be applied for through ZDA.

7.16 It was submitted that; a contract is not merely comprised of express terms but implied terms as well. As it cannot always lay out each term and condition, the law provides that implied terms can be relied upon to fill in the gaps that inevitably arise from the contract. That the Supreme Court in the case of **Newston Zulu v Metal Fabricators of Zambia Limited**¹³ endorsed the view that the law implies a term in a contract although it is not expressly included by the parties. It was Counsel's submission that, therefore, getting approval from the Minister is an implied term from statute by virtue of Section 58 of **The Zambia Development Agency Act**¹ which provides that the Minister shall grant certain incentives.

7.17 According to Counsel, the court below arrived at its conclusion based on its determination of the conduct of the parties and the correspondence exchanged with ZDA and Section 58 of **The Zambia Development Agency Act**¹.

7.18 Counsel further submitted that, it is clear under clause 9 of the letter of mandate that the Respondent was entitled to the additional flat fee of US\$ 70,000.00 on conclusion of

the IPPA, which it achieved, taking into account the clarifications sought by the Appellant. It was contended that, the Appellant does not allege breach of contract but merely seeks to be discharged despite the Respondent fulfilling its obligations. That if the Appellant is permitted to benefit from the IPPA despite the intervention of the Respondent in obtaining the incentives without adequate remuneration, that would amount to unjust enrichment.

8.0 CONSIDERATION AND DECISION OF THE COURT

8.1 We have considered the appeal together with the arguments in the respective heads of argument and the authorities cited. We have also considered the Judgment of the learned Judge in the court below.

8.2 We will deal with grounds 2 and 3 first. We have carefully perused the said grounds of appeal and are of the view that they raise one issue which is; *whether or not the Respondent had fully performed or carried out its mandate so as to be entitled to the full payment as per agreement.*

8.3 The Appellant has argued in the main that, the Respondent failed to fully carry out its mandate as the

Appellant was never awarded any fiscal incentives. That the Appellant was merely awarded the standard incentives contrary to the scope of the Respondent's mandate.

- 8.4 The Respondent on the other hand argued that, it was entitled to the entire amount due as clause 9 of the letter of mandate stipulated that all payments would be made upon successful conclusion of the IPPA. The Respondent, argued that, the IPPA having been concluded on 9th December, 2010, the Respondent was entitled to the entire amount due including the flat fee of US\$70, 000.00.
- 8.5 While we agree that, the payment of the flat fee was not conditional to any obligations on the part of the Respondent; what is clear is that, the Respondent was entitled to full payment of the amounts under clause 9 of the letter of mandate upon carrying out the full scope of the mandate.
- 8.6 We have noted that, the Respondent has vehemently argued that the payment under clause 9 was due upon

execution of the IPPA. It is not in dispute that the IPPA was executed albeit without the fiscal incentives.

8.7 Our view is that, the specific provisions of the letter of mandate are paramount in ascertaining the full scope of the Respondent's obligations. Where an agreement is before Court for interpretation, the role of the Court is to merely ensure that the manifest intention of the parties' triumphs. Our view is that, the task that we have is to interpret the letter of mandate executed by the parties. Especially because the parties are not agreed on the scope of the letter of mandate. According to the learned author of the book "**Interpretation of Documents**";

"The object of interpretation is to ascertain and declare the intention of the party or parties from the words used in the document or documents under consideration...it is not the function of the Court to ascertain that intention otherwise than from those words in the context in which they appear"

8.8 The learned author further cites the case of **Simpson v Foxon (1907)** where the Court held that:

"What a man intends and the expression of his intention are two different things. He is bound, and those who take after him are bound, by his expressed intention."

8.9 We have carefully perused clause 3 of the letter of mandate. It clearly sets out the fiscal incentives that the Respondent was engaged to secure. This intention is clear from Clause 2 which stipulates in part that:

"The Company seeks to enter into an IPPA with GRZ to outline fiscal incentives which will be granted to facilitate the investment."

8.10 In fact, it is not in dispute that the Respondent failed to secure the fiscal incentives. The Respondent's argument is that the agreement by the parties was varied by way of correspondence with ZDA which advised that the said incentives would not form part of the IPPA. That the Appellant eventually signed the IPPA on 9th December, 2010 with the variations made to exclude the fiscal incentives.

8.11 We are of the view that, it is imperative to examine the alleged variations. At page 50 of the record is a letter from Ministry of Commerce, Trade and Industry addressed to the Managing Consultant of the Respondent. It reads, in part, as follows:

"Regarding the additional incentives, you may wish to note that consultations were made on the same and enclosed herewith are our comments on the requested incentives. You may, therefore, request your clients to write to the Director General, Zambia Development Agency for additional incentives as they are outside the mandate of the Government Technical Negotiating Team."

8.12 Another letter appears at page 51 of the Record. The said letter is by ZDA and addressed to the Chief Executive Officer of the Appellant. It reads, in part, that:

"By virtue of the Investment Licence issued by ZDA and the IPPA which Dangote Industries has negotiated with the Government of the Republic of Zambia, and has been approved by the Attorney

General, the Zambia Development Agency will facilitate for access to additional incentives as provided for under section 58 of the ZDA Act

It goes on to read that:

...I wish to assure you that we will do everything possible, once the scope and nature of the additional incentives have been understood, to put up a strong case with the Ministry of Finance and National Planning as well as the Zambia Revenue Authority (ZRA) towards the granting of such incentives.”

8.13 We have taken note of the correspondence on record from ZDA, the Ministry of Commerce, Trade and Industry as well as the email correspondence between the parties. Our view is that, it is clear from the above correspondence that in order to secure the additional fiscal incentives there was need for further negotiations with the Ministry of Finance and National Planning as well as the Zambia Revenue Authority. The question then is who was responsible to ensure that these negotiations were carried out and the fiscal incentives secured?

8.14 Our view is that, this was still within the scope of the letter of mandate by the parties. What is clear from the letter of mandate is that, the Respondent had in fact agreed to secure the additional incentives. The correspondence on record does not, in our view, indicate that the initial scope of the letter of mandate had been varied. The correspondence merely shows that the parties were guided as to how the additional incentives would be obtained and at what stage.

8.15 We are of the view that, the Respondent cannot argue that because additional incentives had to be renegotiated with other stakeholders they would be absorbed of responsibility under the letter of mandate. The letter of mandate, as agreed by the parties, still placed the responsibility of negotiating for those additional incentives on the Respondent. Clause 9 of the letter of Mandate was therefore tied to the Respondent fully carrying out its obligations under Clause 3.

8.16 We are of the view that, the mere fact that, the provision on the manner of payment is contained in a different part

of the letter of mandate does not mean that it is isolated from the rest of the document. A document such as this letter of mandate must be read as a whole. The learned author of the text **Interpretation of Documents** noted that the effect of the division of a document into parts in the following words:

"In matters of interpretation the general rule is that division into parts is a matter of convenience...The words of each clause should be so interpreted as to bring them into harmony with the general intention shown by the document read as a whole and with other clauses."

8.17 Our view is that, the reading of the entire letter of mandate shows that the payment under Clause 9 was tied to the completion of the scope of the mandate under Clause 3 which included the negotiation for additional incentives aside from the standard incentives.

8.18 We are of the view that, this was the clear intention from the letter of mandate executed by the parties. It is trite law that the courts will normally uphold the manifest

intention of parties who have properly executed an agreement. The holding in the case of **Printing and Numerical Registering Company v Simpson**¹⁵, quoted at page 8 in the case of **Colgate Palmolive (Z) Inc. v Abel Shemu Chuka and 110 Others**¹⁶ is as follows:

"If there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by Courts of justice."

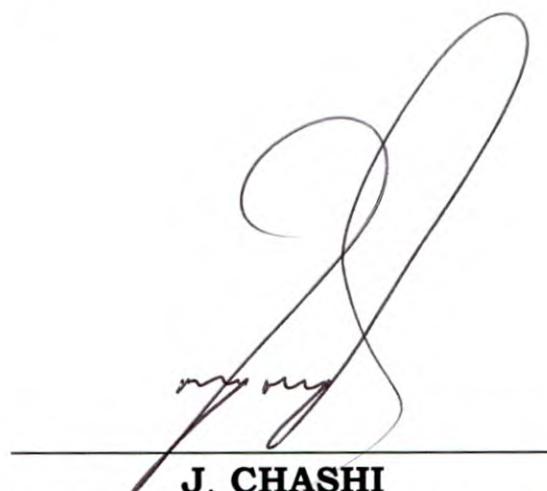
We reiterated this point in the case of **Zambia Telecommunications Company Limited v Eva Banda**¹⁷.

8.19 While we accept that the payment of the flat fee was not conditional on the Respondent securing the additional incentives, our view is that having failed to fully carry out the mandate under the letter of mandate, the Appellant was not mandated to pay the Respondent the full amount including the flat fee of US\$70, 000.00.

8.20 In light of the view we have taken in grounds 2 and 3, ground 1 has become otiose and we will not deal with it.

9.0 CONCLUSION

9.1 The net effect of our decision is that the appeal succeeds and is allowed. Costs are awarded to the Appellant to be paid forthwith. The same are to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



F. M. LENGALENGA
COURT OF APPEAL JUDGE



P. C. M. NGULUBE
COURT OF APPEAL JUDGE