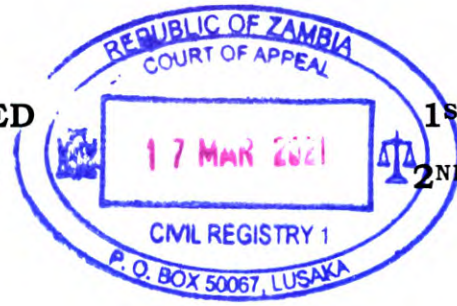
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL 94/2020**
HOLDEN AT NDOLA
(Civil Jurisdiction)
BETWEEN:



CAMLAND ESTATES LIMITED **1ST APPELLANT**
CAMLAND VILLAS LIMITED **2ND APPELLANT**

AND

MUCHINGA DEVELOPMENT COMPANY LTD **1ST RESPONDENT**
ARCHITRAVE DESIGN GROUP **2ND RESPONDENT**

CORAM: **Chisanga JP, Mulongoti and Siavwapa, JJA**
On 11th November, 2020 and 17th March, 2021

For the Appellants: *Mr. A. Wright of Messrs Wright Chambers*
For the Respondents: *Mr. S. Lungu SC, of Messrs Shamwana & Co*

J U D G M E N T

MULONGOTI, JA, *delivered the Judgment of the Court.*

Cases referred to:

1. ***Manal Investment Limited v Lamise Investments Limited-SCZ Judgment No. 1 of 2001***
2. ***Chief Bright Nalubamba and another v Mukumbuta (1987) ZR 75***
3. ***Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa (2005) ZR 138***
4. ***Shawaz Fawaz and others v The People (1995) ZR 3***

5. ***Machobane v The People (1972) ZR 101***
6. **Development Bank of Zambia v Mangolo Farms(1995-97) ZR 65**
7. **Indo Zambia Bank v Mushaukwa Muhanga (2009) ZR 266**
8. ***Nsansa School Intereducation Trust v Gladys Mtonga Musamba (2010) vol 1 ZR 457***
9. ***Power Lee v Bhramak Zambia Ltd***
10. ***Zambia State Insurance Ltd v Zambia Bottlers Limited Pension Scheme and 4 others SCZ Appeal No. 181 of 2009***
11. ***McCuteheon v David MacBrayne (1964) 1 WLR 125***
12. ***D.P Services Ltd v Municipality of Kabwe (1976) ZR 124***
13. ***The Rating Valuation Consortium and another v Lusaka City Council and another (2004) ZR 109***
14. ***Ellis and Company v Amdac Carmichael and another- SCZ***
15. ***Base Chemical Zambia Limited and another v Zambia Air Force and Another- SCZ No. 9 of 2011***
16. ***Ndilila Associates v Laico Zambia- SCZ Appeal No. 183 of 2016***
17. ***Promart Investment Ltd v African Life Financial Services-SCZ Appeal 98 of 2013***
18. ***Zambia Revenue Authority v Charles Walumweya Mahau Masiye-SCZ Appeal 56 of 2011***
19. ***Eddie Christopher Musonda v Lawrence Zimba- SCZ Appeal No. 4 of 2012***
20. ***Davis Chisopa v Sydney Chisanga- SCZ Appeal 179 of 2012***
21. ***Colgate Palmolive Inc. v Abel Shemu Chuka- SCZ Judgment No. 181 of 2005***
22. ***Jacobs v Batava General Plantations Trust***
23. ***Rodgers Chama Ponde & others v Zambia State Insurance Corporation Limited (2004) ZR 152***
24. ***Currie v Misa (1874) LR 10 Ex 153***
25. ***Afrope Zambia Limited v Anthony Chate and 5 others- SCZ Appeal 160 of 2013***
26. ***Finance Bank Zambia Limited v Lamasat -CAZ Appeal 175/2017***
27. ***Nkhata and 4 others v Attorney General (1966) ZR 124***
28. ***Khalid Mohamed v Attorney General (1982) ZR 49***
29. ***James Miller & Partners Limited v Whitworth Street Estates (Manchster) Limited***

30. ***Caledonian Railway Company v North British Railway Company (1881) 6 Appeal CAS 114***

31. ***Gibson v Manchester City Council [1978] 2 ALL ER 583***

Legislation referred to:

1. ***The Rules of the Supreme Court of England, 1999 edition (RSC)***
2. ***I.N Duncan Wallace, Hudson's Building and Engineering Contracts, Eleventh Edition Volume 2, London Sweet and Maxwell, 1955***
3. ***H. Beale, Chitty On Contracts, Sweet & Maxwell, 2004***

1.0 **Introduction**

1.1 This is an appeal against the decision of her Ladyship Mwenda-Zimba, J, dated 20th February, 2020 which found that the respondents, Muchinga Development Company Limited and Architrave Design group, who were the plaintiffs in the court below had proved their case on a balance of probability. The learned Judge found that the respondents were entitled to payment as agreed in their respective contracts entered into with Camland Estates Limited, the (1st appellant herein) as follows:

I. Payment of US$22,840.00 as Arranger's fees;
II. Payment of ZMW410,000.00 Transaction Advisor and Project Manager fees;
III. Payment of ZMW105,000.00 as damages for breach of contract and

IV. Payment of architectural fees (to 2nd respondent) to be assessed by the Registrar of the High Court on a quantum meruit basis

1.2 The respondents were also awarded interest on the judgment sums and costs, to be taxed failing agreement.

2.0 **Background**

2.1 The background giving to rise this appeal is that on 16th March, 2014, the 1st appellant, Camland Estates Limited and the 1st respondent, Muchinga Development Company Limited, executed an agreement. To that end, the 1st respondent's role was essentially to source and arrange for finance for the 1st appellant's housing estate project which was pegged at an estimated cost of US$22.9 Million. The agreement was drafted by the 1st respondent.

2.2 Concerning fees and expenses, in clause 6 of the agreement, the 1st respondent covenanted thus:

> ***"Our non-refundable fees for the services (the "fees") will be as follows:***
>
> ***(a) Arranger success fee – 1% flat amount raised for and payable by Camland Estates Limited to be paid upon successful raising of the financing as follows:***

- ***0.7% payable to MDC in form of land in Makeni. The value of the land is to be determined at market price.***
- ***0.3% payable in cash upon funds being disbursed.***

(b) Transaction Advisor and Project Manager Fees – K35,000.00 net of taxes per month for the duration of the project. Further, fees for securing and managing tenants and or purchasers to be agreed.

(c) Supervision fee to be agreed payable over the period of the project.

(d) All fees shall be payable in Zambia Kwacha or United States Dollars.

(e) ***MDC reserves the right to claim a full success fee in respect of any fundraising successfully carried out by the company or a third party, using any structure, instrument or documentation authored by MDC, within 12 months of expiry of this mandate."***

2.4 The agreement was terminable by either party giving 90 days notice.

2.5 The 1st respondent then brought on board the 2nd respondent, who made architectural designs for the project. During this period emails were exchanged between the 1st appellant's CEO and the 2nd respondent, discussing, *inter alia*, architectural fees, the designs etc.

2.6 In his bid to source for funds as agreed, the 1st respondent introduced a Mauritian company, Pan African Housing Fund (PAHF), to the 1st appellant as a funder. PAHF was represented by PHATISA Property Fund Managers. Further discussions occurred between PAHF and the 1st appellant which concluded with the creation of the 2nd appellant, Camland Villas Limited, as a Special Purpose Vehicle (SPV) through which the parties would carry out the Project.

2.7 On 16th August, 2014, the 1st appellant and its CEO Mumeka Wright, PAHF under PHATISA, and Tie Li (1st appellant's business partner) entered into a Term Sheet agreement relating to the property development project, Camland Villas. The 1st appellant also signed a finance agreement with PAHF. PAHF was to advance the appellants US$22.9Million. However, of that amount only US$600,000.00 was disbursed for the Project. As a result, the appellants claimed that they faced challenges with carrying out the Project.

2.8 In or about May, 2015, the 1st appellant terminated the contract with the 1st respondent. The respondents

claimed that after terminating the agreement, the appellants did not pay for the services rendered by the respondents. In that regard, they made several demands for payment but to no avail.

2.9 This prompted the respondents, Muchinga Development Company Limited and Architrave Design Group, to sue the appellants, Camland Estates Limited and Camland Villas Limited, in the High Court Commercial list Registry seeking the following reliefs:

i. damages for breach of contract;
ii. 1% success fee for the project, this being US$229,000.00;
iii. the amount of K490,000.00 for the designs submitted to the defendant;
v interest;
v costs; and
vi any other relief the court may deem fit.

The appellants denied all of the respondents' claims.

3.0 **Evidence adduced at trial**

3.1 PW1 (Masauso Lungu) was the 1st respondent's Managing Director. He relied on his witness statement, plaintiff's bundle of documents and the supplementary bundle of documents. The appellant's counsel objected to the supplementary bundle on the premise that PW1

did not refer to it in his witness statement and secondly, that it was not pleaded in the statement of claim. The respondents' counsel contended that they filed a supplementary bundle in line with the Court's earlier ruling.

3.2 The court ruled, in a nutshell, that the email objected to, was the same email which was subject of her Ruling of 12th July, 2019 by which the objection was sustained only to the extent that the email presented for inspection was a forwarded one. And that, the original be presented.

3.3 When cross-examined, PW1 testified that, he was to be paid 1% of the amount raised and not 1% of the amount disbursed. Referring to page 14 of the plaintiff's bundle of documents, an agreement (Term Sheet) which showed that the total development cost was US$22,938,000.00 to which he testified development cost meant raising. He however, admitted that he only raised US$600,000.00. He also admitted that he consented to the agreement between the 1st appellant and the 1st respondent being terminated.

3.4 PW2 (Osbert Yunga) an Architect with the 2nd respondent relied on his witness statement which was admitted as his evidence in chief.

3.5 When cross-examined, he testified that, there was an agreement between the 1st and 2nd respondents but that the 1st appellant was supposed to pay the 2nd respondent's architectural fees for the drawings based on the emails between himself and the 1st appellant's CEO.

3.6 The appellant's witness (referred to as DW) was Ms. Mumeka Wright, the 1st appellant's CEO. DW relied on her witness statement and defendant's bundle of documents.

3.7 In cross-examination, DW admitted that the letter terminating the 1st respondent's contract did not provide for 90 days notice contrary to clause 8 of the agreement. It was her testimony that the Term Sheet for US$22.9Million signed between the 1st appellant and PAHAF was for purposes of raising finance. DW admitted that she exchanged emails with the 2nd respondent (PW2) regarding a competitive quote for

their work. It was her testimony that she found their quote uncompetitive and lost interest in their services.

4.0 **Consideration of the evidence and decision of the lower court**

4.1 After evaluating the evidence, the trial court made several findings of fact.

4.2 As regards the 1% arrangers' fee, the learned trial Judge found that the parties sourced financing for the project to the tune of US$2,284,000.00.

The Judge noted that the agreement stated: ***"Arranger success fees-1% flat of amount raised for and payable by Camland Estates Limited to be paid upon successful raising of the financing as follows: 0.7% payable to Muchinga Development Company in form of land in Makeni. The value of the land is to be determined at market price; 0.3% payable in cash upon funds being disbursed..."***

The Judge posed a question to herself as to what the word ***"raised"*** meant. Quoting **Black's Law Dictionary** that ***"raise" is to gather or collect (the charity raised funds)***". She opined that from that definition it appeared to mean money had been secured, not disbursed. The Judge reasoned that there was a contradiction in the

agreement as it referred to both funds ***'raised'*** and ***'disbursed'***. Accordingly that, by using the word ***'raised'*** it presupposes that the 1% would be prorated to the amount raised not necessarily the US$22.9Million. As aforestated she found that US$2,284,000.00 was raised as follows: ***"the 1st defendant was to provide land valued at US$1,300,000.00 and a cash injection of US$384,000.00 from the 1st defendant's Chinese partner and PAHF would match the investment by putting in US$600,000.00."***

The 1st respondent was, therefore, awarded US$22,840.00 as arranger fees being 1% of the US$2,284,000.00 raised. She observed that the parties appeared to have agreed to forego the land the 1st appellant was to give the 1st respondent.

4.3 With respect to the claim for K490,000.00 for advisory services, the learned Judge cited clause 7 which states that the mandate would be valid from the date of execution of the contract and found that the 1st respondent's mandate commenced on 1st April, 2014 when the agreement was signed. The Judge found that this role was not tied to any activity as the contract did

not contain any conditions precedent. Going by clause 6(b) the Judge found that the 1st respondent was entitled to K35,000.00 per month, net of taxes as Transaction Advisor and Project Manager fees; from 1st April, 2014 to 22nd May, 2015 (date of termination). This represented a total of 13 months x K35,000 totalling K455,000.00, less K45,000.00 which had already been paid to them. The appellants were ordered to pay the respondents the sum of ZMW410,000.00 as Transaction Advisor and Project Manager fees.

4.4 Concerning the claim of US$95,000.00 as architectural fees for the 2nd respondent's designs, the learned trial Judge found that there was no contract signed by the appellants and the 2nd respondent, and that clause 6 of the contract did not specify who was to pay for the architectural works. However, relying on a string of emails, (which she found to be credible) between the 1st appellant and the 2nd respondent, the Judge held that there was a relationship and a course of dealing between them. Moreover, that since the work was

done, and the drawings were presented to the appellants and helped them to meet the condition precedent for the funding from PAHF, the 2nd respondent was entitled to an award for payment for services rendered on a *quantum meruit* basis, with the amount due to be assessed by the Registrar.

4.5 The learned trial Judge allowed the claim for damages for breach of contract as the appellants breached the contract by failing to give 90 days notice. Damages of K35,000.00 per month for the 90 days totalling K105,000.00 were awarded for breach.

5.0 **The Appeal**

5.1 Aggrieved, the appellants appealed to this Court raising eight (8) grounds as follows:

1. The learned trial Judge in the court below misdirected herself at law when she entered judgment based on documents that were not specifically pleaded and not referred to in the witness statements of the respondents. And the finding by the Court below that the said documents were pleaded and / or not objected to is unsupported by evidence on Record.

2. That the learned trial Judge in the court below misdirected herself at law when she awarded the respondents the sum of US$22,840.00 (twenty-two thousand, eight hundred and forty) as 'Arranger's fees' this notwithstanding the fact that 'Arranger's fees' were not claimed by the Respondents.

3. That the learned trial Judge in the court below misdirected herself at law by failing to take into account that per the agreement entered into between the 1st appellant and the 1st respondent, the 1st respondent was only entitled to be paid

one per centum (1%) success fee of the amount the said 1st respondent raised.

4. That the learned trial Judge in the Court below misdirected herself at law when she ignored the evidence on record and / or failed to give proper and / or sufficient weight thereof that the only amount the 1st respondent had raised was only US$600,000.00 (six hundred thousand).

5. The learned trial judge in the court below misdirected herself at law when she ordered payment of the sum of K400,000.00 (four hundred thousand) to the 1st respondent for transaction advisor and project manager without taking into proper account and give sufficient weight to the evidence on record that the project did not commence and/ or that the 1st respondent was to be paid during the project per the agreement clause (6b).

6. That the learned trial Judge in the court below misdirected herself at law when she awarded damages for breach of contract without taking into account and / or giving proper and / or sufficient weight to the following wit:

   A. That the 1st respondent did not bring any evidence in proof; of the damages it had allegedly suffered as a result of the termination of the agreement and the agreement made no provision for payment in lieu of notice.

   B. That the 1st respondent was not earning any money based on the agreement before the termination of the said agreement. This notwithstanding, that the 1st respondent consented to the termination of the agreement.

   C. That upon the termination of the said agreement (albeit by consent) the 1st respondent did not issue any invoice per clause 8 of the agreement.

7. The learned trial judge misdirected herself at law when she ruled that there was a course of dealing between the appellants and the 2nd respondent.

8. That the learned trial Judge in the court below misdirected herself at law when she ordered payment of architectural fees to be assessed on a quantum meruit basis without taking into account the evidence on record that all the 2nd respondent's quotations were rejected by the 1st appellant.

6.0 **The Arguments**

6.1 To support the appeal, the appellant's counsel filed heads of argument on 9th June, 2020.

6.2 Concerning ground one, it was submitted that in the court below, the appellants objected to the production of certain emails. They made a formal application and the Court ruled that the emails were not original and expunged them from the record as they were forwarded and could thus have been tampered with. The Court granted the respondents leave to file an amended bundle of documents. Despite that order, the respondents proceeded to file a supplementary bundle of documents containing the same emails as the ones that had been previously expunged.

6.3 During trial, the appellants again objected to the use of the emails but the Court ruled that the issue had been dealt with in its earlier ruling. As regards whether the issue (email) was pleaded, the Court held that **Order 18 Rule 7 of the Rules of the Supreme Court of England, 1999 edition (RSC)** requires that fact, not evidence, be pleaded.

6.4 Counsel submitted that since there was no reference made to the documents in the respondent's supplementary bundle of documents or in the witness statement by the respondents' witness, the appellants are not precluded from raising an objection to evidence which was not pleaded, yet admitted at trial, just because the Court had earlier dealt with an application to expunge documents.

6.5 It was argued that it was rather paradoxical for the Court to hold that the email in issue, was not original and could have been tampered with, and then later rely on the same email when it was not even pleaded or referred to in the witness statement. Hence, the finding of the trial court regarding the emails was unsupported by evidence.

6.6 Still on the same issue, it was submitted that the alleged original email was sent to not less than three recipients including PW1 but none of them acknowledged or responded to it. Counsel wondered why the email was not listed on the initial list of documents and presented for inspection, if at all it was

in existence. He argued that it was not feasible that the email was forwarded by DW to PW1 and at the exact same time, PW1 claimed that the email appears forwarded because he sent it to his advocates for instructions. There was no evidence of it being forwarded to PW1's lawyer Mr. Stephen Lungu, SC and it was not possible that he could have been forwarding an email received on 6th October, 2015, on 8th October, 2015. PW1's evidence regarding this issue was therefore inconsistent and contradictory. Meanwhile, PW2 confirmed that the purported original email and the forwarded email are the same.

6.7 That despite all this controversy surrounding the emails, the court below made the following finding:

> ***"Therefore, in assessing this evidence in accordance with section 8(3) of the Electronic Transactions and Communications Act, I am of the view that the emails are reliable, and I find the evidence credible. I hold the view that the 1st defendant admitted the plaintiff's claim as contained in the aforesaid email. The admission is clear and unequivocal and there is nothing more to be added to it. The admission shows that the 1st defendant intended to be bound."***

6.8 Counsel argued further on that although the Judge correctly cited **section 8(1),(2),(3) and (4) of the Electronic Transactions Act No. 21 of 2009 ('the Act')**, she failed to consider subsection **3 paragraphs (a) to (d) of the Act** in assessing the evidence. **Section 8(3) (a) to (d)** provides that:

> **"8(3) In assessing the evidential weight of data message regard shall be had to -**
> **(a) The reliability of the manner in which the data message was generated, stored or communicated;**
> **(b) The reliability of the manner in which the integrity of the data message was maintained;**
> **(c) The manner in which the originator was identified; and**
> **(d) Any other relevant factor."**

6.9 Counsel concluded that the trial court failed to pay sufficient regard to the provisions of the Act by disregarding the manner in which the data message was generated, stored or communicated.

6.10 Additionally, that the court below failed to apply **section 8(4) of the Act** which, in counsel's view, required that the emails be certified before production or admission into evidence. It gave no reason for disregarding the requirement under **section 8(4)** above. Hence, the

appeal ought to succeed. The Supreme Court decision in the case of **Manal Investment Limited v Lamise Investments Limited**[1] was relied upon, wherein Sakala, DCJ, as he then was, elucidated that ***"The ruling of the court... gave no reasons. On this ground alone this appeal ought to have succeeded."***

6.11 In addition, learned counsel maintained that the Court failed to evaluate the evidence properly. Had it done so, it would have found that the emails were unreliable. For instance, during cross examination, DW said although the email address was hers, she did not author the email. But the trial court found that the appellants' evidence that the email was not authored by DW was not credible. That the emails when read properly and logically do not lead to an agreement on the 1%.

6.12 Concerning the relief for judgment on admission, it was submitted that the claimed amount of K490,000.00 was not endorsed on the writ as required by **Order 21 rule 5 of the High Court Rules Cap. 27 of the Laws of Zambia**. Also, the amount never materialised because instalments of K35,000.00 were supposed to

be paid per month for the duration of the project but the project never commenced. The 1st respondent did not provide any consideration for the sum of K490,000.00.

6.13 Relying on the cases of **Chief Bright Nalubamba and another v Mukumbuta**[2] and **Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa**[3], it was submitted that the alternative relief for judgment on admission was not pleaded and thus could not be entertained.

6.14 It was also submitted that the amount of the purported admission, the amount in the agreement and the amount the 1st respondent raised are all at variance. The respondent claimed 1% success fee for the project in the sum of US$229,000. In the disputed email (page 440 of the record of appeal), it is stated that the transaction fee was at 1% of US$1,684,000.00 which amounts to US$16,840.00. At the same time, in the disputed email the architect fee is pegged at US$35,000.00. Meanwhile, the 2nd respondent's claim was for US$95,000.00 architectural fees for the designs submitted to the appellants when there was no

agreement between the appellants and the 2nd respondent for the provision of architectural services. For these reasons and the fact that there were issues touching on the Electronic and Communications Transactions Act, the court below was not entitled to enter judgment on admission.

6.15 Still on ground one, it was submitted that the trial Judge erred by questioning the credibility of DW without stating her reasons for recording that she was elusive. The cases of **Shawaz Fawaz and others v The People**[4] and **Machobane v The People**[5] were cited as authority to highlight that the court needed to do more than just record that the witness was evasive. Not to mention that DW was not cross-examined as to her credit. Meanwhile PW2 was caught referring to documents he was pulling out of his pocket during cross-examination as shown on page 749 of the Record of Appeal, but the trial court made no adjudication upon that transgression.

6.16 Counsel equally submitted that the observations made by the trial Judge regarding the appellants' lead

counsel's professional conduct during the proceedings was out of context because the court was merely referring to a portion of the appellant's final submissions in the court below. Simply put, that counsel denies having improperly conducted himself.

6.17 Grounds two, three and four were argued together. It was submitted that while there was an agreement between the 1st appellant and the 1st respondent, there was no agreement between the 2nd appellant and the 1st respondent. Counsel posited that, the question then, is, what is due to the 1st respondent under the agreement, is it 1% of the money raised by the 1st respondent or of the cost of the entire project? In answer, we were referred to clause 6 (a) of the contract. By that provision, counsel maintained that, the 1st respondent was only entitled to 1% of the amount raised, being 1% of US$600,000.00 and not 1% of US22.9Million being the total project cost, as claimed. The 1st respondent could not take credit for arranging the US$384,000.00 from the appellant's Chinese partner Li Tie. Moreover, they were not party to the

Term Sheet Agreement between PAHF, the 1st appellant, DW and Li Tie. It was, therefore, erroneous for the trial court to hold that the 1st respondent had arranged for the raising of US$1.3 million (being the value of the appellant's land), the US$600,000.00 and the US$384,000.00 aforementioned. Consequently, the 1st respondent was only entitled to payment of 1% of the US$600,000.00 which was paid into court.

6.18 In that regard, the trial court erred by making an award for US$22,840.00. This was contrary to its findings that the only financier found is PAHAF and it amounted to unjust enrichment which courts frown upon. To that end, the case of **Development Bank of Zambia v Mangolo Farms**[6] was cited as authority.

6.19 In addition, it was submitted that the agreement was clear that the 1st respondent would be paid from the money raised and actually **disbursed** not just from money raised. According to counsel the Court's interpretation that there was a contradiction between the words ***'raised'*** and ***'disbursed'***, ought to have been interpreted against the 1st respondent who drafted it.

Counsel called in aid the Supreme Court decision in **Indo Zambia Bank v Mushaukwa Muhanga**[7] that the *contra proferentum* rule ought to operate against the party who drafted the clause or document capable of more than one meaning.

6.20 Grounds five and six (a), (b) and (c) were argued concurrently on the premise that the contract was terminated by the agreement of both the 1st appellant and the 1st respondent. Prior to termination, the parties had a meeting where it was agreed that the contract be terminated. Hence, the 1st appellant did not breach the contract. Since the Court held a different view, it should have then adjudicated upon the effect of the consent to terminate (or waiver of clause 8) in order to determine all the issues to finality.

6.21 Additionally that, the trial Judge erred in awarding damages for breach of contract when it failed to appreciate the fact that the 1st respondent was not earning any money for transaction advisor and project manager. The amount awarded does not represent loss which is a direct consequence of the appellant's failure

to give the requisite notice. To support these assertions, the cases of **Nsansa School Intereducation Trust v Gladys Mtonga Musamba**[8] and **Power Lee v Bhramak Zambia Ltd**[9], were cited. According to counsel, if the 1st respondent should receive any damages, then they need only be nominal. Even then, the 1st respondent was not earning any money such that it is difficult to perceive any glimmer of damage suffered by the 1st respondent.

6.22 That the court below actually applied a wrong construction of the contract. Clause 7 as a non-circumvention clause entailed exclusivity between the parties. It could not be used as a determinant to trigger payment for transaction advisor and management fees. Clause 7 clearly stipulated that the agreement would be valid for the duration of the development which never commenced.

6.23 Thus, the holding that the 1st respondent's role as advisor was not tied to any particular activity commencing, because the project did not commence for there to be anything to supervise or manage was

wrong. If anything clause 7(c), required that supervision fees were to be agreed and payable over the period of the project.

6.24 The 1st respondent failed to prove the services it had rendered and that the weekly invoices had been issued as per the agreement. The 1st respondent was supposed to start getting paid K35,000.00 once the project commenced but since it did not, because the 1st respondent failed to secure full funding for the project, the finding that the commencement included the planning stage is wrong because the contract did not state so. Consequently, the award of K35,000.00 for 13 months was equally wrong.

6.25 With respect to grounds seven and eight which were argued together, it was counsel's argument that the court below erred by finding that even though there was no contract between the 1st appellant and the 2nd respondent, there was a course of dealing between them which entitled the latter to payment. We were referred to the case of **Zambia State Insurance Ltd v**

Zambia Bottlers Limited Pension Scheme and 4 others[10] in which the Supreme Court held as follows:

> *"As for the claim that there was evidence of dealing, the critical question is whether there was evidence to show a course of dealing which could have entitled the Court below to find that the cross-respondent was obliged to pay compound interest. As to what is meant by course of dealing we defined this in the case of Keembe Estates Ltd v Galaunia Farms Ltd SCZ/Appeal No. 182/2002 where we stated that, "course of dealing means that past business between the parties raises an implication as to the terms implied in a fresh contract where no provision is made on the point at issue... We also stated that to form a course of dealing there must be a series of events and not just one."*

6.26 Our attention was also drawn to the English case **McCuteheon v David MacBrayne**[11] where it was held that **"course of dealing must be both regular and consistent"**.

6.27 Adverting to the present case, it was counsel's submission that there was no evidence of previous dealing on terms between the 1st appellant and the 2nd respondent. There was equally no evidence of a business relationship between them that was conducted consistently and regularly. As a result the trial court's finding that there was no agreement

between them contradicts her finding that there was a course of dealing.

6.28 Counsel surmised that it was the 1st respondent who needed architectural designs in order to secure funding from PAHF not the appellants. Therefore, the 1st respondent and not the appellants, was the beneficiary of the 2nd respondent's architectural designs because it needed them to raise the US$600,000.00 from which it was entitled to be paid. In essence the 1st respondent was sub-contracting the 2nd respondent for works concerning architectural drawings. As such, there was no privity of contract between the 1st appellant and the 2nd respondent.

6.29 It was counsel's further submission that the finding by the trial court that the services of the 2nd respondent were solicited by the 1st appellant was unsupported by the evidence. As is the finding that the 1st appellant was willing to pay for the works. The 1st respondent had signed a Non-Disclosure Agreement (NDA) with PHATISA as testified by PW2. If there was any agreement for architectural fees, it was either between

the 1st respondent and the 2nd respondent with PHATISA, who the 1st respondent was negotiating with for funding. There is also no evidence that the drawings were submitted to the appellants.

6.30 As a result, the finding that the 2nd respondent was entitled to payment on *quantum meruit* was wrong and not supported by the evidence. Our attention was drawn to the cases of **D.P Services Ltd v Municipality of Kabwe**[12], **The Rating Valuation Consortium and another v Lusaka City Council and another**[13], **Ellis and Company v Amdac Carmichael and another**[14], **Base Chemical Zambia Limited and another v Zambia Air Force and another**[15] and **Ndilila Associates v Laico Zambia**[16]. It was then argued that for the court to make an award based on *quantum meruit*, there ought to be not only a contractual relationship in existence at the material time, but also an unenforceable or void contract. Additionally that, there is no evidence that the 1st appellant requested for the works such that the Supreme Court decision in the case of **Promart Investment Ltd v African Life Financial**[17], that damages may be awarded for *quantum meruit*

where services were requested, is inapplicable in *casu*. As such, the trial Judge erred by ordering the 1st appellant to pay the 2nd respondent's architectural fees on a *quantum meruit* basis.

The respondents' arguments:

6.31 In response to the appeal, the respondents filed Heads of Argument dated 7th October, 2020.

6.32 In respect of ground one, regarding the first issue of the emails, it was argued that if the appellants were dissatisfied with the Ruling of the court below regarding the admission of certain emails into evidence, which they wrongly contend were expunged, they should have appealed against that interlocutory Ruling to a Superior Court within 14 days as provided by **Order XLVII rule 2 of the High Court Rules Cap 27 of the Laws of Zambia**. Thus, the appellants' dissatisfaction with the emails is a disguised appeal which should not be entertained. The case of **Zambia Revenue Authority v Charles Walumweya Mahau Masiye**[18] was cited as authority where the Supreme Court had the following to say:

"First of all, we agree with Mr. Mubonda that this appeal is against the Judgment of the lower court dated 16th June, 2010 and the appellant is therefore, estopped from raising issue against the lower court's ruling dated 22nd December, 2008".

6.33 Counsel maintained that the emails were actually not expunged but rather the court ordered inspection, discovery and amendment of necessary documents which culminated in the respondents' filing the supplementary bundle.

6.34 On the admission of the respondents' supplementary bundle, it was submitted that following the Ruling of the court below, the respondents opted to file the supplementary bundle of documents as opposed to amending the initial bundle which was already filed into court. The appellants did not object to this as their objection was on the premise that the witness had not referred to the supplementary bundle in his witness statement.

6.35 Regarding DW's demeanor, the trial court's attention was drawn to portions of the transcript of proceedings at pages 799, 811 and 813 of the record of appeal, to demonstrate that the witness was indeed evasive. And,

it was on that basis that the Court below questioned DW's credibility. The cases of **Eddie Christopher Musonda v Lawrence Zimba**[19] and **Davis Chisopa v Sydney Chisanga**[20] were relied upon, where it was held that a trial judge has the advantage of observing the demeanor of witnesses to determine as to who is telling the truth in the trial. We were also referred to the case of **Machobane v The People**[5] to the effect that the demeanour of a witness is something that must be included in the Record. In this case the witness' demeanour is even evident from the proceedings.

6.36 Regarding the reprimand of the appellants' counsel, it was submitted that the Judge was well within her powers to reprimand counsel for utterances she perceived to be disrespectful to the court.

6.37 With respect to grounds two, three and four, it was submitted that there was no dispute as to the existence of the contract between the 1st appellant and the 1st respondent. By clause 4, the 1st respondent was appointed to act as arranger, transaction advisor and project manager. It was submitted that from the

evidence on record, it can easily be deduced that the 1st respondent was successful in its obligations as arranger and arranged a financier whom the appellants engaged in negotiations. As a result, it was agreed that the total building cost would be US$22.9Million which culminated into a Term Sheet Agreement between the financier and the 1st appellant. The 1st respondent then became entitled to 1% of the amount raised which was not tied to disbursement, to be paid in proportions of cash 0.3 % and land 0.7 %.

6.38 It was submitted that the 1st respondent raised a total of US$2,284,000.00 and not US$600,000.00 as alleged by the appellant. Although the financier provided US$600,000.00 cash, the financier also provided an investment worth US$1,684,000.00. Thus, the total of the finance raised amounted to US$2,284,000.00 Therefore, the court below was correct to hold that the 1st respondent was entitled to US$22,840.00 being 1% of the investment injected by the financier, PAHF.

6.39 Concerning grounds five and six, it was submitted that as per clause 6 of the contract, the 1st respondent

began to carry out its obligations as transaction advisor and project manager immediately after execution of the contract. It is immaterial that the project did not take off because the obligations under the contract were not limited to building commencing. For instance, the 1st respondent fulfilled its obligations to recommend and appoint a technical team which is how the 2nd respondent came into the picture. To that extent, the trial court was on firm ground in holding that the development of the project begun at commencement stage such that one cannot restrict development of a project to the commencement of a particular activity. The evidence was clear, as observed by the learned Judge, that there were numerous emails and meetings between the parties despite there being no supervision of 'a project'.

6.40 In that regard, counsel argued that it would seem that the appeal is an attempt by the appellants to avoid fulfilling their contractual obligations. The case of **Colgate Palmolive Inc. v Abel Shemu Chuka**[21] was cited, in which the Supreme Court elucidated that:

> ***"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 of contracts and that their contracts when entered into freely and voluntarily, shall be sacred and shall be enforced by the Courts of Justice."***

6.41 Relying on the cases of **Jacobs v Batava General Plantations Trust**[22] and **Rodgers Chama Ponde & others v Zambia State Insurance Corporation Limited**[23], counsel added that the appellant's attempt to read into the contract would amount to allowing extrinsic evidence or parol evidence which is inadmissible.

6.42 As regards the appellant's argument that the 1st respondent is not entitled to either the sum of K490,000.00 or K410,000.00 because it did not provide any consideration, it was submitted that consideration takes a variety of forms and includes work done on the basis of set promises. In the present case, the 1st respondent's consideration was the fulfilment of its obligations under the contract. To support this argument, counsel cited the case of **Currie v Misa**[24] where it was held that "**a valuable consideration, in the sense of the law, may consist either in some right,**

interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."

6.43 Concerning the mode and effect of termination of the contract, it was submitted that the agreement was improperly terminated as it was not terminated in accordance with the contract. It was submitted that the parties met and agreed to terminate the contract. After the agreement to terminate, a letter was immediately sent communicating the termination. Even though there was agreement, the termination was supposed to be made in accordance with the terms of the contract. It is untrue that the 1st respondent waived its right to be given 90 days.

The appellants were, therefore, in breach of the contract. Compensation for such breach lies in damages to put the injured party in the position they would have been had the contract been performed, per Chitty on Contracts at paragraph 1331.

6.44 The respondent's counsel objected to the appellants' argument that the respondents did not lead any evidence or include in their pleadings the issue of

damages. The case of **Afrope Zambia Limited v Anthony Chate and 5 others**[25] was cited, in which the court held *inter alia* that:

> "***In applying this test to the appeal before us, our answer would be that, had the respondents pleaded lost interest and repatriation in the first place, the appellant's preparation of the case and the conduct of the trial would have been the same. No additional evidence, other than the evidence before the Court would have been led to support new claims. It follows from what we have stated that the learned trial judge was entitled to consider the testimony regarding the respondent's entitlement to lost interest on the accrued terminal benefits as well as repatriation.***"

6.45 With regard to grounds seven and eight, the respondents' counsel argued that clause 4 of the contract, empowered the 1st respondent to bring the 2nd respondent on board. This created an implied agreement between the appellants and the respondents which could be deduced from the conduct of the parties. In that regard, we were referred to a passage from **Chitty on Contracts vol. 1 at paragraph 11** that:

> ***"Contracts may either be express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated,***

> ***as for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to pay the fare...Express and implied contracts are both contracts in the true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct.***

6.46 In *casu*, the consent of the parties was evident from the act of carrying out the works and making drawings by the 2nd respondent and, repeatedly requesting for quotations to ensure payment for the services by the 1st appellant. There is also a string of emails that the trial Judge relied upon which demonstrate that there was consent on the part of the 1st appellant to bring the 2nd respondent on board, thereby creating an implied contract between them. In addition, submission of the architectural drawings was a condition for the financier to come on board. The intention was thus clear that the 2nd respondent was contracted to provide the drawings.

6.47 Accordingly, that it was imperative for the appellants to pay the 2nd respondent for the drawings to avoid being unjustly enriched as they have benefitted from the

drawings. On that basis, counsel urged us not to disturb the finding by the trial Judge that there was a course of dealing between the appellants and the 2nd respondent. And that, although no judgment on admission was entered in this matter owing to the highly contested email at pages 440 to 480 of the Record, it could be deduced that the intention of the 1st appellant was to pay the 2nd respondent's fees for its services.

6.48 Learned counsel supported the approach by the trial Judge to pay the 2nd respondent on a *quantum meruit* basis because the parties failed to agree on the fees payable to the 2nd respondent. Reliance was placed on the Supreme Court decision in **D.P Services v Municipality of Kabwe**[12] that even where the words *quantum meruit* have not been used in pleadings, this is in no way a bar from *quantum meruit* being entered on judgment.

6.49 We were urged to dismiss the appeal for lack of merit with costs, to the respondents.

7.0 **The Hearing**

7.1 At the hearing of the appeal, Mr. Wright, who appeared for the appellants relied on the appellants' heads of argument. In elaboration, he submitted that the 1st appellant and 1st respondent agreed that the 1st respondent was supposed to be paid 1% of the amount raised.

7.2 Mr. Lungu SC, who appeared for the respondents also relied on the respondents' heads of argument. In response to questions from the Court, he submitted that the 1% was in two parts (1) the amount successfully raised and (2) the amount disbursed. According to the Term Sheet at pages 234 to 243 of the record of appeal, the amount raised was US$22.9 Million. This was not the amount paid but raised and from which the 1% was due. He urged us to consider equity considerations as well. Mr. Lungu equally admitted that the 1st respondent did not claim for the land as agreed.

7.3 In reply, Mr. Wright, submitted that the issue of US$22.9 Million as the amount raised on the term

sheet amounts to extrinsic evidence. Additionally, that equity principles do not arise as they were not mentioned in the contract.

8.0 **Issues on Appeal**

8.1 We meticulously considered the evidence adduced in the court below, the arguments, submissions and the Judgment being assailed. The appeal raises the following issues:

8.1.1 *What, according to the agreement between the 1st appellant and 1st respondent, constituted the 1% payable to the 1st respondent? Was it 1% of the amount raised or 1% of the amount disbursed?*

8.1.2 *Did the 1st appellant breach the agreement when it terminated the 1st respondent's services?*

8.1.3 *Was there a course of dealing between the 1st appellant and the 2nd respondent such that the former should pay the latter's architectural fees?*

9.0 **Considerations and Decision of this Court**

9.1 We have noted the appellant's copious arguments in ground one dealing *inter alia* with the issue of the emails. We wish to state from the outset that having been dissatisfied with the interlocutory Rulings of the

trial Judge on the emails, the only recourse which was available to the appellant was to appeal to this Court against those Rulings. The rules are very clear. **Section 4(1) (a) of the Court of Appeal Act No. 7 of 2016** provides that the Court has jurisdiction to hear appeals from Judgments of the High Court. **Section 2 of the Court of Appeal Act** defines Judgment to include a decree, ruling, order, conviction, sentence and decision. This means that a party aggrieved with a ruling of the High Court has the right to appeal to this Court. This is what the appellants should have done if they were dissatisfied with the Ruling of the High Court dated 12th July, 2019 which dismissed their application to have some emails expunged from the record.

The appellant cannot use this appeal to challenge an interlocutory Ruling which it did not assail in the first place as canvassed by Mr. Lungu, SC. By not appealing, the appellant accepted the result and proceeded to trial with the implication that at the time of trial, the emails were part of the documents which the court was perfectly entitled to consider.

On entry of Judgment on admission based on the emails, we are of the considered view that it was unnecessary for the trial court to do so at Judgment stage, after trial and evaluation of the evidence. Judgment on admission is usually entered after the defence, before trial. We said in **Finance Bank Zambia Limited v Lamasat**[26] that for Judgment on admission to be entered there has to be a clear, unambiguous and unequivocal admission, at defence stage. The issue regarding emails on which the trial Judge entered admission at Judgment stage, was forcefully contested and has still arisen on appeal. It cannot be said that there was a clear, unambiguous and unequivocal admission. The amounts claimed, the amounts in the emails and the amounts awarded were all different as it shall become clear later. In this regard we find merit on this part of ground one. The trial Judge could not therefore enter judgment on admission at Judgment stage as she purported to do. This was a clear misdirection.

9.2 As regards the issue of credibility, the court below sitting as a trial Judge was entitled to record her observations of how the witnesses conducted themselves during trial. There was nothing unusual for the court to record that DW was elusive. The learned Judge was duty bound to record her observations because only she had ocular advantage as opposed to us as an appellate court. The email in question is at page 440 of the record of appeal. It was from DW to PW1. DW was cross-examined on it, in regard to the 2nd respondent's fees. DW wrote:

> ***"Dear Masauso***
> ***Good Evening and thank you for your email.***
> ***The following fees, with respect to the services Muchinga provided to Camland have been accepted as part of the entire project cost to be paid out when cash flows permit:***
> ***(1) Transaction Advisory Fee (April 1st 2014--May 31st, 2015): K490,000* (K35,000 x 14 months)***
> ***(2) Transaction fee @ 1% of $1,684,000 $16,840***
> ***(3) Architect Fees $35,000***
> ***(4) QS Fees (These have been discussed with Mr. Lungu)***
> ****Advance payments received will be deductible (K45,000)***
> ***Regards,***
> ***Mumeka M. Wright."***

The learned Judge observed that the appellants sought to dispute the email at trial, yet in her ruling of 12th July, 2019, she dealt with the issue of admitting the email into evidence. She observed that DW was elusive. According to the Judge, DW did not bring evidence to show that her email address was compromised at one point or another nor did she state or show surprise at the existence of the disputed emails. ***"All she said was that she did not author it."***

9.3 The contents of the email are clear. It was open to the learned Judge having read the email, with DW confirming the email address as hers but refusing being the author, the court seeing her demeanor; to record its observations as it did. Thus this aspect of ground one has no merit. We opine the arguments on the **Electronics Transactions Act** are also not of assistance to the appellants for the same reason that they did not appeal against the Rulings, which allowed the emails into evidence.

9.4 We do not agree that there was a possibility that the Judge made the observations on DW due to a

misapprehension of facts. This was the same hotly contested email which the appellant fought very hard to have expunged at every stage, even now on appeal. The trial Judge assessed all the oral evidence in light of the documents in making her findings. She cannot be faulted for doing so. See: **Nkhata and 4 others v Attorney General**[27].

In any event, the contention surrounding the credibility and weight to be attached to DW's testimony does not aid the appellants' case much. As it is well settled that the law places the burden of proof on the plaintiff to prove their case whatever may be said of the defendant's case. See: **Khalid Mohamed v Attorney General**[28].

The last leg of the arguments in ground one concerns the trial Judge's comments on the appellant's counsel's conduct during trial. These were made *obiter* and do not impact the outcome of the case. The Judge merely sounded a warning to counsel as a reminder of his professional duty to the court. This plainly falls into the category of statements made *obiter*. **Black's Law**

Dictionary, 8th Edition, at page 1102 defines obiter as ***"a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential..."***

Clearly, counsel's conduct is unnecessary to the decision of the court and is irrelevant on appeal. This is precisely why there is even no ground of appeal in this regard. Not to mention it was the trial Judge who observed counsel's conduct and not us. As aforestated on witness' demeanour, we can do nothing on appeal. The upshot to this is that ground one only partially succeeds as indicated.

9.5 We now turn to consider grounds two, three, and four. We are alive to the fact that the trial Judge based her findings on the arranger fee at 1% of US$22,840.00 based on the email DW wrote to PW1 (quoted at paragraph 9.2). We opine that this was erroneous as construction of a contract cannot be based on the conduct of a party post a written contract. In **James Miller & Partners Limited v Whitworth Street Estates (Manchster) Limited**[29], the House of Lords elucidated that evidence of a party's behaviour after a contract

had been made is inadmissible to assist in the construction of an entirely written contract. Furthermore, that while evidence of subsequent conduct is admissible to determine the existence of a contract, it is not admissible to determine the terms. What is crucial therefore, are the terms of the written contract, not what the parties did or said after it was made.

9.6 The agreement between the 1st appellant and the 1st respondent provided, regarding the 1st respondent's arranger success fee per clause 6(a):

> ***"Arranger success fee-1% flat amount raised for and payable by Camland Estates and to be paid upon successful raising of the financing as follows:***
> ***"Our non-refundable fees for the services (the "fees") will be as follows:***
> ***(f) Arranger success fee – 1% flat amount raised for and payable by Camland Estates Limited to be paid upon successful raising of the financing as follows:***
> - ***0.7% payable to MDC in form of land in Makeni. The value of the land is to be determined at market price.***
> - ***0.3% payable in cash upon funds being disbursed."***

9.7 To us, it is clear that the 1st respondent's arranger success fee is 1% of the amount raised for and payable, by Camland Estates. Therefore, the 1st

respondent (Muchinga) agreed to raise funds for Camland and Camland agreed to pay the 1st respondent from the funds, it raised, hence the use of the words amounts raised for and payable by.

Therefore, after 1st respondent raised funds for 1st appellant; 1st appellant was to pay the 1st respondent as follows:

> ***"0.7% in form of land in Makeni. The value of the land to be determined at market price and 0.3% payable in cash upon funds being disbursed."***

9.8 We are of the considered view that the terms of the contract were clear and unambiguous. It was not necessary for the trial Judge to engage in construction of the contract in the manner she did and only stop at interpreting the import of the use of the word *"raised"*. The law is settled that the ***"starting point in construing a contract is that words are to be given their ordinary and natural meaning. This is not necessarily the dictionary meaning of the word, but that in which it is generally understood. The courts assumed that the parties have used language in the way that ordinary persons ordinarily do."*** See: **Chitty on Contracts, General Principles, 32nd edition, vol. 1 at paragraph 13-052.**

In the *locus classicus* **Caledonian Railway Company v North British Railways Company**[30] Lord Blackburn stated thus:

> ***"...I have been long and deeply impressed with the wisdom of the rule, now I believe, universally adopted at least in the courts of law in Westminster Hall- that in construing wills, and indeed statutes and all written instruments 'the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of words maybe modified, so as to avoid the absurdity and inconsistency but no further."***

Guided by this, we are of the considered view that the court below should have given the words used in the agreement between the 1st appellant and 1st respondent their natural, ordinary meaning.

The ordinary language of the agreement is that 1% comprised 0.7% land and 0.3% of funds disbursed. The 1st respondent was to raise funds and the 1st appellant was to pay. The evidence is clear that the 1st respondent managed to bring PAHF on board, as funders. PAHF and 1st appellant signed the Term Sheet Agreement with 22.9Million as the development cost of

the project. PAHF then released US$600,000 towards the project.

The evidence on record is succinct that the land (where villas were to be built situate in Makeni) valued at US$1,300,000.00 was already secured and belonged to the 1st appellant, from which the 0.7% was to be given to the 1st respondent. As for the cash, the evidence is clear that the 1st respondent only successfully raised US$600,000.00. During cross examination of PW1 it became apparent that the 1st respondent did not raise the US$29.9Million which was the total development cost.

9.9 Going by clause 6 of the contract, the 1st respondent is therefore only entitled to 0.3% of the cash raised and disbursed which is US$600,000.00. The rest of the 0.7 % would have to be obtained from the value of the land whose market value should be determined after assessment. There was no evidence to support the Judge's finding, at page J57 on page 63 of the record, that the parties agreed that the 1% be in cash, when the contract was clear as to the payment terms. There

was no special reason to vary the terms using extrinsic evidence, if at all, since the parties had embodied their terms in the written agreement. See: **Chitty on Contracts, 33rd edition, paragraph 13-098 to 13-103**. The 1st respondent is only entitled to 0.3% of US$600,000.00 and 0.7% in form of land in Makeni. The value of the land to be determined at market price. The trial Judge erred when she found that the money raised was US$2,284,000.00 by including the value of the land for the project (US$1,300,000.00) and US$384,000.00 from the 1st appellant's Chinese partner. This did not form part of the money raised by the 1st respondent. We fail to see how the 1st appellant should raise money on its own and then agree to pay the 1st respondent what he did not raise. Yes, the email was written by DW indicating what was due according to her, but what is crucial is the agreement not the email. What the parties agreed is what they are bound by. See **Colgate Palmolive Inc. v Abel Shemu Chuka**, supra.

In light of the foregoing we find merit in grounds three and four. We find ground two to lack merit. Evidence on the arranger fee was let in without objection and if anything ground two is interlinked to grounds three and four. Counsel actually contradicts himself by arguing in ground two that the arranger fee was not claimed and then in ground three that the success fee was payable at 1% of the amount raised.

9.10 We now turn to ground six, on the award for damages for breach of contract of K105,000.00. The learned trial Judge found that the 1st appellant failed to give 90 days notice before termination. It was not disputed that the 1st appellant and 1st respondent met on 20th May, 2015 and agreed that the contract be terminated. There were no minutes of this meeting adduced at trial. However, on 22nd May, 2015 at 10:18 am, PW1 wrote the email at page 542 addressed to Jan, (Phatisa) himself, DW, PW2 and Clement Mugala. In the email, he informed Jan that on 20th May, 2015 there was a meeting and Camland requested that the agreement with Muchinga be terminated. And that, as Muchinga

they agreed in line with the termination clause. On the same day (22nd May, 2015) DW wrote a letter to PW1, giving reasons for termination such as the skills offered by Muchinga being inadequate to meet the requirements of the business, in line with clause 8.

9.11 We note the appellants' arguments that the contract did not specify what would happen should notice not be given. The termination clause (8), in essence, states that, either party could terminate at anytime with specific reasons by giving 90 days prior written notice to the other. Furthermore that, if the 1st appellant terminates it was to pay the 1st respondent all earned unpaid fees and incurred but unpaid expenses.

On 20th May, 2015 the parties agreed to terminate, and followed up with the termination in writing. This entails the 90 days' notice was waived. What remained to be done was to pay the 1st respondent in accordance with clause 8, which apart from 90 days notice, provided for payment of all unpaid expenses incurred and earned and unpaid fees. These fees included arranger success fee (see paragraph 8.7 to 8.9 of the

Judgment), transaction fee etc. We find therefore, that the trial Judge erred when she awarded K105,000.00 as damages in lieu of 90 days notice. We, accordingly, set aside this award and allow ground six.

9.12 Regarding ground five, on the transaction and project management fees, we note that the contract did not have any conditions precedent to its commencement. A condition is precedent, if it provides that the contract is not to be binding until the specified event occurs. See: **Chitty on Contracts at paragraph 2-158**. The trial Judge was therefore, on firm ground in holding that the contract had no conditions precedent. The argument by the appellant's counsel that clause 7 should be read in isolation is unreasonable because the contract must be read as a whole. Commercial contracts which are intended to be predicated on a particular event have a standard clause for either conditions precedent or conditions subsequent. If the parties intended that to be the case, they would have agreed to it. Moreover, the parties began taking steps

in fulfilment of their obligations before it was terminated.

9.13 Clearly, the agreement was in phases and provided for payment of fees accordingly, as elucidated in relation to arranger fees. Concerning transaction and project manager fees, the agreement under clause 4 (top of page 226 of the record of appeal), is couched thus:

> ***"As transaction Advisor and Project Manager, MDC will:***
>
> - ***Supervise the development of the said property to be conducted by MDC Quantity Surveyor, Environmental Specialist and Architect;***
> - ***Ensure the development is performed in accordance to the agreed terms and conditions of the financing;***
> - ***Recommend and appoint the technical team to manage the development of your property."***

9.14 The agreement goes on to provide under clause 6(b) page 227 of the record of appeal that:

> ***"Transaction Advisor and Project Manager fees – K35,000 net of taxes per month for the duration of the project. Further fees for securing and managing the tenants and or purchasers to be agreed."***

9.15 Clause 4 on transaction and project manager fees is plainly clear that it speaks to supervising the

development of the property, which had not begun as testified by all the witnesses. The transaction and project manager fees were payable to the 1st respondent for *"supervising the development of the said property, ensure the development is performed in accordance with agreed terms and conditions of the financing and recommend and appoint the technical team to manage the development of the property"*. Clause 6 (b) speaks to payment of K35,000.00 for duration of the project and also securing and managing the tenants and purchasers etc. Obviously, parties did not reach this stage of the agreement at time of termination. The transaction and project manager fees were due after development of the property had begun. This was payable at K35,000.00 per month. The parties also agreed that after development of the property, the 1st respondent was to secure and manage tenants and purchasers, which stage they had not reached due to termination. All the 1st respondent did was to raise US$600,000.00 towards the project for which he was entitled to be paid 1% as agreed (0.3% cash and 0.7% land).

9.16 The trial Judge erred when she found that the 1st respondent was entitled to payment of transaction and project manager fees at K35,000.00 per month for 13 months. This was not in line with the agreement which plainly states when the transaction and project manager fees were due. Ground five equally succeeds. The ward of K410,000.0 is set aside. K45,000.00 advance payment to be deducted from what is due to the 1st respondent.

9.17 This brings us to grounds seven and eight.

The question is, was there a course of dealing between the appellants and the 2nd respondent to entitle the latter to payment for its services, as determined by the trial court?

9.18 Commercial law recognises that even where the parties may not have executed a contract in the traditional manner, a contract could still be construed from the conduct of the parties.

9.19 In **Gibson v Manchester City Council**[31] it was held that

"...if by their correspondence and their conduct you see an agreement on all material terms, which was intended thence

forward to be binding, then there is a binding contract in law even though all the formalities have not gone through."

9.20 The issue of whether there was a binding agreement between the appellants and the 2nd respondent turned upon an objective construction of the emails construed against the backdrop of what was known to all the parties. The conduct and the communications exchanged between the appellants and 2nd respondent discloses that the parties engaged in some negotiations but the negotiations appear inconclusive as DW found the quotations not to be competitive. The emails referred to by the trial court at pages 71, 72 and 73 of the Record of Appeal, show that what was being communicated were quotations for the 2nd respondent's work which cannot imply that works were being done on behalf of the appellants. It would have been different if the documents referred to were invoices which would imply that works were already done. The emails must be construed against the factual background that there is no contract between the appellants and the 2nd respondent. If a contract is to be construed, the intention ought to be clear that

the appellants engaged the 2nd respondent directly to carry out the works. What is clear and was undisputed, at trial by all the witnesses was that, the 1st respondent was the party that had contracted the 2nd respondent to provide architectural services in accordance with the agreement it had with the 1st appellant. The 1st respondent brought the 2nd respondent on board although there is no evidence as to the terms of their engagement. We opine that the nature of an SPV is such that it cannot be strange that the 1st appellant engaged in a series of communications with the 2nd respondent. Unless there were terms that could be deduced from their communication, to indicate that they intended to create legal relations, a contract could not simply be inferred. According to the authors of **Hudson's Building and Engineering Contracts**, at page 1314:

> ***"It cannot be over-emphasized that no privity of contract between an owner*** *(*Camland *in casu)* ***and another contractor*** *(*Architrave *in casu)* ***can arise out of a sub-contract concluded between the owner's main contractor and the other contractor."***

9.21 It is patent that the 1st appellant did not expressly execute a contract with the 2nd respondent and it is not privy to the agreement between the respondents.

9.22 Furthermore, their course of dealings is not such as to disclose a valid binding agreement as canvased by Mr. Wright based on the Supreme Court decision in **Zambia State Insurance Limited v Zambia Bottlers Limited Pension Scheme and 4 others**[10]. The trial judge therefore erred in her finding that there was a course of dealings between the appellants and 2nd respondent.

9.23 Consequently, the 2nd respondent is not entitled to be paid by the 1st appellant on *quantum meruit* basis as determined. The evidence is clear that the 1st respondent engaged the 2nd respondent. The 1st respondent, if anything, used the drawings to source for funds and, is strictly speaking, the beneficiary of the architectural designs at the stage the parties had reached.

9.24 Furthermore, the evidence is clear the construction of the villas has not begun and so the appellants did not benefit from the drawings as yet and even if they had;

the 1st respondent engaged the 2nd respondent and is bound to pay it. There was no agreement between the 1st appellant and 1st respondent that the former should pay the 2nd respondent.

Accordingly, we find merit in grounds seven and eight.

10.0 **Conclusion**

10.1 In the net result, the appeal substantially succeeds, with costs in this Court to the appellants to be taxed failing agreement.

10.2 The amounts due to the 1st respondent shall be paid with interest at short term deposit rate from date of writ to this Judgment and thereafter at Bank of Zambia current lending rate until payment in full.

F.M. CHISANGA
JUDGE PRESIDENT

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

M.J. SIAVWAPA
COURT OF APPEAL JUDGE