

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2012/HPC/0256

BETWEEN:

QUADRANT TRAVEL & TOURS LIMITED

AND

MAG PETROLEUM ZAMBIA LIMITED



PLAINTIFF

DEFENDANT

Before the Honourable Mr. Justice W. S. Mweemba at Lusaka in Chambers

For the Plaintiff : Mr. P. Songolo of Messrs. Philsong & Partners.

For the Defendants : Mr P. Chungu & Ms. O. Zyambo- Messrs Ranchod Chungu Advocates.

R U L I N G

LEGISLATION & WORKS REFERRED TO:

1. *THE HIGH COURT ACT, CHAPTER 27 OF THE LAWS OF ZAMBIA.*
2. *LANDLORD AND TENANT (BUSINESS PREMISES ACT) CAP 193 OF THE LAWS OF ZAMBIA.*

CASES REFERRED TO:

1. *ZCCM V REDDY DAKA AND DAVID KANTUMOYA (1998) S.J 9 (SC)*
2. *MWAMBA V NTENGE, KAING'A CHEKWE SCZ JUDGMENT NO.5 OF 2013.*

This is a ruling on an application by the Defendant for review after both parties were granted special leave to review the Courts decision as the applications to do so were made out of time.

The application is supported by an Affidavit sworn by Noah Nyirenda the Managing Director of the Defendant and Skeleton Arguments filed into Court on 15th March, 2016.

It was deposed by Mr Nyirenda that on 4th February, 2016 this Court passed judgment in this matter where it found that the agreement executed between the Plaintiff and the Defendant operated as a contractual licence with the amount payable being US\$4,500 from August, 2011 to March, 2012.

It was further deposed that this Court went on to make a finding that the total licence fees payable was US\$36,000.00 for the duration of the licence and that the Defendant had paid the Plaintiff the sum of US\$34,500 hence US\$1500 was due and payable to the Plaintiff by the Defendant.

It was also deposed that in arriving at the sum of US\$34,500 the Court did not take into account the fact that the Defendant paid the Plaintiff's the sum of US\$8,500.00 from August to September, 2011 and January to March, 2012.

Further, that in terms of this the Defendant paid a total of US\$56,000.00 to the Plaintiff broken down as follows:

- b. August, 2011 – US\$ 8,500.00
- c. September 2011 – US8,500.00
- d. October, 2011- US\$4,500.00
- e. November, 2011- 4,500.00
- f. December, 2011- US4,500.00
- g. January, 2012- US\$8,500.00

h. February, 2012- US\$8,500.00

i. March 2012- US\$8500.00

He also deposed that this is what had been paid to the Plaintiff and not US\$34,500.00 and that in fact the Plaintiff was the one that should pay the Defendant the US\$20,000.00 being sums paid over and above the contractual licence fees.

Thus it was in the interest of justice that execution of judgment be stayed and an order for special leave to review the Judgment passed on 4th February, 2016 be granted.

There was also an Affidavit in support of Cross Summons for review of Judgment dated 4th February, 2016 filed into Court on 8th April, 2016 sworn by Mahendra Srilal Rodrigo the Managing Director of the Plaintiff.

He stated that while he opposed the reasons given for the Defendant's application, he supported the application for review for the reasons stated in his Affidavit.

It was further deposed that in its Judgment dated 4th February, 2016 this Court held that at law the documents styled as Lease Agreement and Lease Variation Agreements respectively and made between the parties herein were not lease agreements and therefore incapable of being regulated by the Landlord and Tenant (Business Premises Act) Cap 193 of the Laws of Zambia but that the two documents were actually contractual licences whose terms and conditions were binding on the parties because they were supported by consideration.

That he had been advised that due to these findings this Court held that the parties must pay the licence fees as agreed between the parties and as

contained in the Lease and Lease Variation Agreements now called Contractual Licence Agreements.

Moreover that in computing the total licence fees payable and paid for the period the Defendant was in occupation of the Plaintiff's premises, this Court made a mistake and omitted to take into account the express terms of the contractual licence agreements as supported by the written evidence on record on licence fees payable and that if the Court had not omitted the express provisions of the Contractual Licence Agreements the schedule of payments should have appeared as follows:

- (a) September – US\$ 4,500.00
- (b) October – US\$ 4,500.00
- (c) November – US\$ 4,500.00
- (d) December – US\$ 8,500.00
- (e) January- US\$8,500.00
- (f) February- US\$ 8,500.00
- (g) March – US\$ 8,500.00

Total Licence Fee Paid US\$ 47,500

It was also deposed that although the Contractual Licence provided that the Lease would commence on 15th august, 2011 this did not happen because the Defendant failed to reach an agreement with Engen Petroleum on the running of the fuel station and thus went back to them with a request for a lease variation which they agreed to and reduced their rental down to US\$ 4,500.00 with the commencement date of 1st September, 2011 when they paid their first rental.

Moreover that as proposed by the Defendant itself in its letter dated 29th August, 2011 it was an express term at clause 1.2 of the Lease Variation Agreement (now the Second Contractual Licence) dated 9th September, 2011 that as soon as Engen Petroleum Limited writes to Energy Regulation Board of Zambia informing them they had to relinquish this site from their portfolio of sites, the rentals would revert back to US\$8,500.00 and that this did happen as revealed and confirmed by letters appearing exhibited as "MSR3" and "MSR4".

It was also deposed that this Court merely made a mistake firstly by including August, 2011 in the computation because the 1st rental from the Defendant was only paid in September, 2011 after the Defendant renegotiated the rentak downwards from US\$8,500.00 to US\$4,500.00 following their failure to reach an agreement on the underground tanks with Engen Petroleum Limited.

Secondly this Court also made a mistake in computing the total rentals that were agreed and paid over the entire period because after making a finding of fact that all the rentals that were agreed upon by the parties were supported by consideration, the Court did not take the agreed US\$8,500.00 with effect from 1st December, 2011 into account when computing the final figures.

Based on these reasons this Court was urged to review the Judgment and hold that the rentals tabulated above in the sum of US\$ 47,500.00 were duly paid by the Defendant to the Plaintiff for good consideration as agreed in the Contractual Licence referred to and that the only money payable to the Plaintiff from the Defendant was ZMW1, 700.00 being the Lease Registration Fees.

Thus he also asked this Court to dismiss the reasons given for review by the Defendant firstly for being totally misleading and secondly, for being an attempt to benefit from an honest mistake of this Court.

Counsel for the Defendant filed in Skeleton Arguments to support the application on 15th March, 2016. He stated that Counsel submitted that Order 39 of the High Court Rules of the High Court Act, Cap 27 of the Laws of Zambia gave this Court the power to review its own decision and in the case of **ZCCM V REDDY DAKA AND DAVID KANTUMOYA (1)** it was held by the Supreme Court that Order 39 Rule 1 of the High Court Rules empowered a Judge to review his own decision, to either vary or confirm his earlier judgment.

It was contended that as deposed to in the Affidavit in Support of the application this Court did not take into account that the Defendant paid the Plaintiff's the sum of US\$8,500.00 from August to September, 2011 and January to March, 2012 in calculating the quantum payable by the Defendant to the Plaintiff in respect of the Contractual Licence.

Further that it was in the interests of justice that this Court should grant the application as prayed to review the said Judgment.

The Plaintiff also filed Skeleton Arguments in support of their cross application for review of the judgment. It was stated that it was now clear that both parties had conceded that the Lease Agreements executed by both parties were actually Contractual Licences with clear binding terms supported by consideration.

Further that the express terms agreed by the parties on rentals/licences fees are as disclosed at paragraph 8 of the Plaintiff's Affidavit in Support of the cross application for review, namely US\$4,500.00 from September 2011 to November, 2011 and US\$8,500.00 from December 2011 to March 2012.

According to Counsel it was clearly an honest mistake on the part of the Court to have held that the licence fees were US\$4,500 throughout the entire period. In addition that it is now trite law that where parties have voluntarily agreed to the terms and conditions of an agreement and they reduce the same in writing the said parties are bound by those terms.

Counsel referred this Court to the case of **NATIONAL DRUG COMPANY LTD AND ZAMBIA PRIVATISATION AGENCY V MARY KATONGO (1)** Appeal No 79 of 2011 where the Supreme Court advised to this effect.

This position was also set out in the case of **MWAMBA V NTENGE, KAING'A CHEKWE (2)** where the Supreme Court stated that:

“The law of contract is perceived as a set of power conferring rules which enable individuals to enter into agreement of their own choice on their own terms. Freedom of contract and sanctity of contract are the dominant ideologies. Parties should be as free as possible to make agreements on their own terms without the interference of the Courts or Parliament and their agreements should be respected, upheld and enforced by the Courts”.

Counsel then stated that as the Court held there was consideration for the licence fees that were paid, namely the US\$4,500.00 that applied from September 2011 to November, 2011 and the US8,500.00 that applied from December, 2011 to March, 2012 as expressly agreed by the parties themselves.

He also contended that the Court should therefore uphold the Plaintiff's cross appeal for review as it relates to the licence fees and hold that no licence fees are due to the Plaintiff at all as everything that was due namely the

US\$47,500.00 was fully paid by the Defendant and was duly received by the Plaintiff.

According to Counsel for the Plaintiff, that this Court should review the judgment and only hold that the only payment that is due to the Plaintiff from the Defendant was only K1,700.00 arising from Lease Registration Fees that were paid by the Plaintiff at the Ministry of Lands but which was expressly agreed in the contractual licences to be on the account of the Defendant.

Counsel lastly submitted that the Defendant's application for review on the other hand was not only misleading but was rather a sad attempt by the Defendant to benefit from an honest mistake of the Court and on this basis he urged this court to dismiss the Defendant's application for review with costs.

During the hearing on 6th September, 2016 both Counsel for the Plaintiff and the Defendant were before Court.

Counsel for the Defendant Mr Ngaba stated that he would rely on the Affidavit sworn by Noah Nyirenda and Skeleton Arguments filed into Court on 15th March, 2016.

Counsel for the Plaintiff Mr Songolo stated in response that he would rely on the Cross Summons, Affidavit in Support and Skeleton Arguments filed into Court on 8th April, 2016.

I have considered the Affidavit evidence, the Skeleton Arguments and the Authorities cited by both learned Counsel for the Plaintiff and the Defendant.

The main task for this Court is to review its judgment dated 4th February, 2016 following the applications before the Court to do so by both parties albeit for different reasons.

The Defendant who was the first to apply stated that I review my decision in order to make an order that since the contractual licence fee for the period in question was to be US\$4,500.00 then in consideration of the US\$56,000.00 already paid by the Defendant to the Plaintiff I should then order that the Plaintiff should give the Defendant the sum of US\$20,000.00.

The Plaintiff on the other hand asked me to review my decision and find that the only amount owing between the parties was the K1,700 which was payment for Lease Registration Fees.

Order 39 of the High Court Rules, Cap 27 of the Laws of Zambia gives me the jurisdiction to review my decisions.

It states that:

“1. Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision:

Provided that where the judge who was seized of the matter has since died or ceased to have jurisdiction for any reason, another judge may review the matter.

2. Any application for review of any judgment or decision must be made not later than fourteen days after such judgment or decision. After the expiration of fourteen days, an application for review shall not be admitted, except by special leave of the Judge on such terms as seem just.

3. The application shall not of itself operate as a stay of execution unless the Judge so orders, and such order may be made, upon such terms as to security for performance of the judgment or decision or otherwise as the Judge may consider necessary. Any money in court in the suit shall be retained to abide the result of the motion or the further order of the Judge”.

The Affidavit in support of the Plaintiff's application shows that the express terms of the Contractual Licence Agreements are set out in exhibits “MSR1” and “MSR2” the purported Lease Agreement and Lease Variation Agreement respectively.

A perusal of both shows that the agreement between the parties actually commenced on 1st September, 2011 and that the parties expressly agreed that rent/ consideration should be US\$4,500.00 monthly from then till 1st December, 2011 when Engen wrote to the Energy Regulation Board to relinquish the site as shown by exhibit “MSR4”. From 1st December, 2011 to 31st March, 2012 the agreed monthly rent was US\$8,500.00.

I have also been guided by the Supreme Court in their decision of **MWAMBA V NTENGE, KAING'A CHEKWE (2)** cited by Counsel for the Plaintiff where it was stated that:

“The law of contract is perceived as a set of power conferring rules which enable individuals to enter into agreement of their own choice on their terms. Freedom of contract and sanctity of contract are the dominant ideologies. Parties should be free as possible to make agreements on their own terms without interference of the courts or parliament and their agreements should be respected, upheld and enforced by the courts”.

On the basis of the foregoing I therefore make a finding of fact that the amount of consideration for the period when the Contractual Licence and its variation were in effect was determined by the two parties in their Agreements.

I accept the Plaintiff's submission that the Defendant's Application for review was not only misleading but also an attempt by the Defendant to benefit from a mistake made by the Court. The Defendant's Application for review is therefore dismissed with costs.

The Plaintiff's Application for review is granted.

I therefore vary my Judgment delivered on 4th February, 2016 only to this extent and I find and hold that no license fees are due to the Plaintiff from the Defendant as all the License Fees that were due namely US\$47,500.00 was fully paid by the Defendant and was duly received by the Plaintiff. I also find and hold that the only amount owing between the parties is the sum of K1,700.00 being the Lease Registration Fees that the Defendant should pay to the Plaintiff.

Costs for and incidental to this application are for the Plaintiff.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 5th day of December, 2016.



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WILLIAM S. MWEEMBA
HIGH COURT JUDGE