

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(CIVIL JURISDICTION)

APPEAL NO. 21/2016

BETWEEN:

ATTORNEY GENERAL

APPELLANT

AND

UWP CONSULTING ZAMBIA LIMITED

RESPONDENT

Coram: Hamaundu, Kaoma and Kajimanga, JJS

At Kabwe on 5th April, 2016 and at Lusaka on 22nd February, 2019

For the appellant : Mr F. Imasiku, Senior State Advocate and
Mr S.K. Nkandu, State advocate
For the respondent : Mr M. Chiteba, Messrs Mulenga
Mundashi & Kasonde Legal Practitioners

JUDGMENT

Hamaundu, JS delivered the Judgment of the court.

Cases referred:

1. **Dunlop Pneumatic Tyre Company Limited v Selfridge & Company Limited [1915] AC 847**
2. **Cavmont Merchant Bank Limited v Amaka Agricultural Development Company [2001] ZR 73**
3. **Mazoka & Others v Mwanawasa & Others (2005) ZR 138**
4. **Bridget Mutwale v Professional Services Limited (1984) ZR 72**

Legislation referred to:

- 1. Chitty On Contract, 26th edition**
- 2. The High Court Rules, Chapter 27 of the Laws of Zambia**

This is an appeal against an interlocutory ruling of the High Court in which the respondent's application to substitute the Civil Aviation Authority for the appellant as defendant in these proceedings was granted.

The facts leading up to this appeal are these:

On the 31st August, 2009, the Ministry of Communications and Transport on behalf of the Government of the Republic of Zambia entered into a contract with the respondent for consultancy services. The client was the Government of the Republic of Zambia. The authorized representatives for the parties were; the Director, Department of Civil Aviation, for the client and, A. Ngandu (Country Manager), for the consultants, that is, the respondent.

The work involved surveys for design purposes and of construction drawings with respect to the extension of Kasama and

Solwezi airports. The ceiling on the contract price was K2,267,000 (rebased).

In 2012, the **Civil Aviation Authority Act, No.7 of 2012**, was enacted. That piece of legislation established the Civil Aviation Authority; a body corporate with perpetual succession, a common seal and capable of suing and being sued in its corporate name.

On 16th May, 2014, the respondent commenced an action against the appellant for breach of contract, claiming a sum of K1,813,600 and interest of K2,515,033.94. The appellant admitted the claim of K1,813,600 but not the interest claimed. Judgment on admission was entered on the principal claim together with VAT in the sum of K290,176, bringing the judgment sum to K2,103,776.

The respondent then applied to substitute the Civil Aviation Authority for the appellant. The application was made on the strength of **clause 5** of the second schedule of the **Civil Aviation Authority Act** which provides for legal proceedings pending by or against the Government in respect of the former Civil Aviation Department to be continued by or against the Civil Aviation authority.

The court below ruled that, on the interpretation of that clause, the respondent was entitled to substitute the Civil Aviation Authority for the appellant.

The appellant's sole ground of appeal is that the court below erred in law and fact by holding that the Civil Aviation Authority becomes the defendant in place of the Attorney General.

The appeal was argued entirely by way of the heads of arguments which the parties filed.

The appellant's first argument was on the doctrine of privity of contract. On this subject, learned counsel for the appellant quoted the law as it is discussed by the learned authors of **Chitty On Contract** in their **26th edition**. Counsel also referred us to the case of **Dunlop Pneumatic Tyre Company Limited v Selfridge & Company Limited⁽¹⁾**, particularly the dictum of Lord Haldane affirming the principle that only a person who is a party to a contract can sue on it. It was then pointed out that the parties to the contract in issue in this case were the Ministry of Communications and Transport for the Government of the Republic of Zambia on one hand and the respondent on the other. Counsel emphasised that the Department of Civil Aviation was not privy to that contract. It was

argued that the respondent could, therefore, not purport to enforce its rights under that contract against the Department, a stranger to the contract. Counsel argued that it was not the intention of the **Civil Aviation Act** to alter parties and terms of contracts; and that the provisions of the **Act** must be construed according to the facts of each case.

The appellant's second argument was on the law of agency. We were referred to the case of **Cavmont Merchant Bank Limited v Amaka Agricultural Development Company**⁽²⁾, and in particular to our holding that where an agent, in making a contract, discloses both the interest and names of the principal on whose behalf he purports to make a contract, the agent, as a general rule, is not liable on the contract to the other contracting party.

In this regard, it was argued that the contract clearly revealed that the Director of the Department of Civil Aviation appeared on the contract document as a representative of the Ministry and not as a representative of the Department of Civil Aviation.

The appellant then presented its arguments on a several issues. There was an argument on the legal term "**funtus officio**". It was argued here that, since the substitution of the parties was being

sought after judgment on admission had been entered, the court had become *functus officio* and ought not to have entertained the application. It was further argued that, in the circumstances, there was no defence that the Civil Aviation Authority could enter and, therefore, that the substitution was nugatory.

An argument was also advanced based on the provisions of **Order 16** of the **High Court Rules, Chapter 27** of the **Laws of Zambia**. The argument here was that **Rule 1** of that order envisages that substitution of parties can only be done if the party to be replaced can no longer be capable of continuing with the proceedings. The appellant pointed out that, in this case, it was not at any point incapable of carrying on the suit; and neither was the suit defective in any way on account of the appellant.

An argument based on the **State Proceedings Act** was also advanced. The appellant submitted that according to the contract, the client was the Ministry of Transport and Communications whose controlling officer was the Permanent Secretary. It was submitted that according to **section 12** of the state **Proceedings Act, Chapter 71** of the **Laws of Zambia** civil proceedings by or against the State are to be instituted by or against the Attorney General. The appellant

argued then that in the circumstances of this case the correct party was, and still is, the Attorney General. And so, argued the appellant, it was wrong for the court below to invoke **Order 16 Rule 1** of the **High Court Rules** instead of **Order 14 Rule 5** thereof or **Order 15** of the **Rules of the Supreme Court** (*White Book*).

Finally, there was an argument on the powers and functions of the Civil Aviation Authority. Counsel for the appellant argued that the preamble in the **Civil Aviation Authority Act** defines the powers of the Authority as being of a regulatory nature only; and that, consequently, the responsibility to construct airports still remains vested in the Ministry of Transport and Communication. It was argued that, for the foregoing reason, the Government still remained the correct party to sue.

With those submissions, we were urged to uphold the appeal.

On behalf of the respondent, learned counsel submitted that the arguments by the appellant revolved around only two issues, namely:

- (i) that **Section 5(2)** of the second schedule to the **Civil Aviation Authority Act** did not apply in this case because the Department of Civil Aviation, the forerunner to the Civil Aviation Authority, had not been a party to the contract which was the subject matter of this suit,

and, (ii) that an alteration of parties can only occur if the party to be replaced is incapable of continuing with the suit

Submitting on the first issue of the appellant's argument, counsel for the respondent argued that **Section 5(2)** of the second schedule places emphasis on the continuation of proceedings pending by or against the government in respect of the Department. Learned counsel then went on to point out that there was a lot of evidence which went to show that the contract was entered for and on behalf of the Department of Civil Aviation. As examples of such evidence, counsel referred to a payment certificate that was duly approved by the Department of Civil Aviation; and several correspondence confirming previous payments and acknowledgment of the respondent's claim. Counsel argued that that evidence defeated the argument that the Department of Civil Aviation was a stranger to the contract.

Further, learned counsel submitted that it was common knowledge that the Department of Civil Aviation was a department of the Ministry of Communications and Transport and that all Government contracts are signed by Permanent Secretaries in the

Ministries. Counsel argued that, in this case, all contracts concerning the Director of Civil Aviation would necessarily have to be executed by the Permanent Secretary, as controlling officer in the Ministry.

Counsel then submitted that when the section is interpreted using a purposeful approach as laid down by this court in **Mazoka & Others v Mwanawasa & Others**⁽³⁾ it was clear that Parliament intended that the proceedings referred to in that section included those which were in respect of a contract that was entered into by the government in respect of the Department of Civil Aviation. In that regard, argued counsel, the appellant's arguments on the principles of privity of contract do not hold water because the statute in this case intended to alter the course of common law. In support of this argument counsel relied on the case of **Bridget Mutwale v Professional Services Limited**⁽⁴⁾ .

In response to the appellant's argument that **Order 16** of the **High Court Rules** was not the appropriate provision under which the order of substitution should have been made, counsel for the respondent argued that the ground of incapacity on which the appellant has laid emphasis is not the only ground envisaged in the order. It was argued that, instead, what was important was that there

was a change, or transmission, of interest in the subject matter. Counsel further argued that, in any case, **rule 1** makes a *proviso* for any person served with an order of substitution to apply to the judge or court to discharge or vary that order. According to counsel, the appellant did not follow that procedure; which made this appeal incompetent.

On the arguments regarding the **State Proceedings Act**, counsel argued that it did not apply following the enactment of **Act No. 7 of 2012**.

We were, therefore, urged to dismiss the appeal.

We have considered the arguments by both parties. What is at the centre of this dispute is the provision of **Section 5(2)** of the second schedule of the **Civil Aviation Authority Act**. This provision states:

“5(2) Any legal proceedings or applications pending immediately before the appointed date by or against, the Government in respect of the Department may be continued by or against the Authority”

It is perhaps important to read the above provision together with a preceding provision, **Section 3** of the second schedule. It states:

“3(1) On or after the appointed date, there shall be transferred to, and vest in, or subsist against, the Authority by virtue of this Act and without further assurance:

(a) the affairs of the Department; and

(b) subject to this Act, all assets, rights and obligations which immediately before the appointed date were the assets, rights and obligations of the Department.

(2) subject to sub-paragraph (1), documents other than those referred to therein, which refer specifically or generally to the Department, shall be construed in accordance with paragraph 1, as far as applicable”

Listening to the arguments on both sides, it is clear that interpretation of the above provisions is not in issue. It appears to be agreed by either side that indeed on the appointed date, all affairs, assets, rights and obligations of the former Department of Civil Aviation were transferred to the Civil Aviation Authority.

Again, there appears to be no dispute by either side that **Section 5(2)** of the second schedule provides that any legal proceedings or applications that were pending immediately before the appointed date by, or against the Government, in respect of the Department could be continued by or against the authority. The real

dispute here is in the appellant's contention that the Director of Civil Aviation, the forerunner to the Civil Aviation Authority, was not privy to the contract in this case. The appellant argues that the parties to the contract were the Government, through the Ministry of Communications and transport, on one hand, and the respondent, on the other. We are amazed by this argument, especially coming, as it does, from the appellant who should have a thorough knowledge of the structure of the Government and its ministries. It cannot be disputed that the Department of Civil Aviation was a department in the Ministry of Transport and Communications. It cannot also be disputed that the Permanent Secretary in that Ministry is the controlling officer thereof; a position which gave him supervisory powers over all departments in the Ministry. Finally, it cannot be disputed that airports and aerodromes fell under the Department of Civil Aviation. Therefore, the contract, being concerned with airports, was a contract regarding the affairs of the Department of Civil Aviation. The liabilities that arose out of that contract were, in other words, liabilities which were incurred by the Government in respect of the Department; so that any proceedings commenced against the Government with respect to those liabilities could be continued

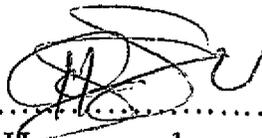
against the Civil Aviation Authority as provided by **Section 5(2)** of the second schedule. We find no merit in this argument.

There was an argument that the court below should not have entertained the application for substitution because, the said application coming after judgment on admission had been entered, the court had become *functus officio*. There was a further argument on the same issue that substituting the Civil Aviation Authority for the Attorney General after judgment had been entered had denied the Civil Aviation Authority the opportunity to mount a defence to the claim.

The appellant's argument overlooks the fact that the judgment on admission came about because of the admissions made by the Department of Civil Aviation which, as counsel for the respondent pointed out, were in the form of payment certificates and correspondence acknowledging the indebtedness. So, this was a liability that the Government incurred on behalf of the Department. It was, consequently, a liability that by **Section 3** of the second schedule was transferred to the Civil Aviation Authority. There is, therefore, no merit in this argument.

The foregoing reasons also dispose of the arguments regarding **Order 16** of the **High Court Rules**, the **State Proceedings Act** and the powers of the Civil Aviation Authority. For the above reasons, we are of the view that the court below was on firm ground when it ruled that the Civil Aviation Department could be substituted for the Attorney General in these proceedings.

We, find no merit in the appeal. We dismiss it, with costs to the respondent.



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E. M. Hamaundu
SUPREME COURT JUDGE



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R. M. C. Kaoma
SUPREME COURT JUDGE



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C. Kajimanga
SUPREME COURT JUDGE