

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



B E T W E E N :

SULEMAN YOUNUS (MALE) T/A RELIABLE
WHOLESALE CENTRE

PLAINTIFF

AND

FOOD RESERVE AGENCY

DEFENDANT

Before Honourable Mrs. Justice M. Mapani-Kawimbe on 17th March, 2017

For the Plaintiff : Mr. O. Stimela, Messrs Fraiser & Associates
For the Defendant : Ms. B. Chibbonta, In-house Counsel

J U D G M E N T

Case Authorities Referred To:

1. *Zambia State Insurance v Serios Farms Limited (1987) Z.R. 93*
2. *Zambia Electricity Supply Corporation Limited v Meka (Z) Limited (1994) Z.R. 13*
3. *Collett v Vanzyl Bros Limited (1966) Z.R. 65*
4. *R.K. Musamba v M.M. Simpemba (T/A Electrical and Building Contractors) (1978) Z.R. 175*
5. *Khalid Mohammed v The Attorney General (1982) Z.R 49*

Legislation Referred To:

1. *High Court Act, Chapter 27*
2. *Judgments Act, Chapter 81*
3. *Law Reform Miscellaneous Provisions Act, Chapter 74*

The Plaintiff issued Writ of Summons on 5th August, 2015 seeking the following reliefs:

- (i) The sum of K310,250.89 being in respect of outstanding unpaid balance arising from transportation services rendered by the Plaintiff unto the Defendant transporting maize grain belonging to the Defendant from Chipata to Lusaka at the Defendant's instance and request between the period January 2011 to about December, 2014 particulars whereof exceed 1 folio in length and have already been delivered to the Defendant.*
- (ii) Interest on the said sum of K310,250.89 at 16% from date of accrual until complete payment.*
- (iii) Any further and or alternative relief that the Court shall deem fit and proper in the circumstances*
- (iv) Costs of suit.*

The Defendant entered an appearance and settled a Defence on 19th August, 2015. It disputed the Plaintiff's claim and stated that it was only indebted to the Plaintiff in the sum of K310,250.00. On 20th August, 2015 the Plaintiff applied to enter Judgment on Admission. On 1st September, 2015, the Defendant paid the sum of ZMW121,531.30 into Court leaving a balance of ZMW198,719.59 as disputed.

On 18th February, 2016, the matter was adjourned to allow the parties to attempt an ex-curia settlement. The ex-curia negotiations

culminated into a Consent Judgment which was filed into Court on 28th October, 2016. Judgment was entered against the Defendant in the sum of ZMW160,459.04 on the Plaintiff's claim of ZMW310,250.89.

In the Consent Judgment, the parties agreed to move the Court to determine the following issues by way of documentary evidence and written submissions, that is:

- 1) ***Whether or not a portion of the amount stated on the invoice No. 515 in the sum of ZMW15,278.85 and the whole of the amount stated on invoice No. 1332 in the sum of ZMW4,879.95 are due from the Defendant and payable to the Plaintiff;***
- 2) ***Whether in the circumstances the Defendant ought to pay interest, if so, what rate;***
- 3) ***Whether or not the Defendant should bear the cost of and incidental hereto.***

On 1st February, 2017, the parties appeared before Court and were given an opportunity to file written submissions. At the time of writing this Judgment, only Learned Counsel for the Plaintiff filed submissions. The Defendant filed a supplementary bundle on 27th February, 2017.

- 1) **Whether or not a portion of the amount stated on the invoice No. 515 in the sum of ZMW15,278.85 and the whole of the amount stated on invoice No. 1332 in the sum of ZMW4,879.95 are due from the Defendant and payable to the Plaintiff?**

On invoice 515, Learned Counsel for the Plaintiff submitted that the disputed amount of ZMW15,278.85 arose from a discrepancy in the calculation of distance by the Defendant on the transportation costs. Counsel stated that according to page 34 of the Plaintiff's Bundle, the Plaintiff's invoice No. 515 showed a sum ZMW261,290.61, out of which the Defendant paid ZMW246,011.76 leaving the disputed balance of ZMW15,278.87.

Counsel argued that the Defendant's contention that it had paid out the correct costs based on its calculation of the distance between Chipata and Kafue at 612 Kilometres (at pages 8-11 of the Defendant's bundles) was incorrect. Counsel contended that the distance from Chipata to Kafue is not 612 kilometres in view of the fact that the distance between Chipata and Lusaka alone is 604 kilometres.

Counsel averred that the distance between Lusaka and Kafue is 46Km and that being the case, it was improbable that the distance between Chipata and Kafue could be 612 kilometres. Counsel submitted that the balance of ZMW15,278.85 on invoice 515 was due to the Plaintiff from the Defendant and should have been settled without challenge.

On invoice No. 1332 Learned Counsel submitted that according to the account discrepancy analysis at page 34 of the Plaintiff's bundle, the rate applicable to the initial invoice No. 1313, under loading order No. 55945 dated 11th November, 2011, was adjusted upwards by the Defendant from K5,000.00 to K5,500.00. Thus, a balance of ZMW4,879.95 remained. Counsel further submitted that the upward adjustment was confirmed by the Defendant at page 13 of the Plaintiff's bundle. On that basis he contended that the amount due and payable to the Plaintiff is ZMW4,879.95.

2. Whether in the circumstances the Defendant ought to pay interest, if so, what rate?

It was Learned Counsel's submission that the debt in issue arose between the period 2011 to 2014, a period of over 3 years. Prior to litigation, the Plaintiff tried to settle the dispute with the Defendant but failed to succeed. Counsel further submitted that the Defendant only made a payment into Court after writ of summons was issued and served on it. Counsel called in aid the case of **Zambia State Insurance v Serios Farms Limited**¹ where the Supreme Court held, inter alia, that:

“...payment of interest is normally regarded as equivalent to an award of damages for the detention of a debt...”

He further cited the case of **Zambia Electricity Supply Corporation Limited v Meka (Z) Limited**² where the Supreme Court stated thus:

“..the award of interest is within the Court’s discretion and in deciding whether or not to award interest, the Court ought to consider the experience relating to the conduct of the parties...”

On that basis, Counsel argued that since the Defendant only accepted its liability after a protracted discourse that culminated into litigation, its *laser fare* approach entitled the Plaintiff to an

award of interest. Counsel further relied on the case of **Zambia State Insurance**, Supra, where the Supreme Court stated that:

“It would be unrealistic to ignore the fluctuation in the rate of interest herein. The Respondent has been kept out of his money, and a fair average of interest should be applicable”

Counsel submitted that the Plaintiff's claim of interest at 16% from the date of accrual until complete payment should be re-considered in the light of fluctuations and the fact that interest rates had risen on the commercial market. He urged the Court to award the Plaintiff interest at the commercial lending rate on the paid amount of ZMW 160,459.04 from the date of writ to January 2017, being date of final settlement.

3) Whether or not the Defendant should bear the costs of and incidental hereto?

Counsel submitted that it is trite that costs are discretionally awarded by the Court. He cited the case of **Collett v Vanzyl Bros Limited**³, where the Court of Appeal held that:

“A trial Judge, in exercise of his discretion, should, as a matter of principle, view the litigation as a whole and see what was the substantial result. When he does not do so, the Court of Appeal is entitled to review the exercise of his discretion”

Counsel adverted to the case of **R.K. Musamba v M.M. Simpemba (T/A Electrical and Building Contractors)**⁴, where it was held, *inter alia* that:

“The ordinary rule is that, where a Plaintiff has been successful, he ought not to be deprived of his costs or at any rate, made to pay costs of the other side, unless he has been guilty of some sort of misconduct. In applying the rule it is necessary to decide whether the Plaintiff really has been successful. A Plaintiff who recovers nominal damages is not necessarily “successful”.

Counsel submitted that from the record, the Plaintiff recovered 50% of the debt from the Defendant and this only came about after issuance of Court process. He prayed to the Court to award the Plaintiff costs.

I have seriously considered the issues in contention, the documentary evidence and written submissions tendered by Learned Counsel for the Plaintiff. As I earlier stated the Defendant did not file submissions.

I am alive to the principle of law that the burden of proof lies on a Plaintiff even where a defence has failed, as elucidated in the case of **Khalid Mohamed v The Attorney General**⁵. Therefore, I

have to meritoriously determine whether the Plaintiff has proved his case.

There is no dispute that the Plaintiff and Defendant transacted by way of purchase and delivery orders on a special instance, order and or request arrangement between January, 2011 up to December, 2014.

Arising from the parties' relationship the Plaintiff transported maize from Chipata to Kafue on behalf of the Defendant. However, a dispute arose over underpayments on invoices that were presented by the Plaintiff to the Defendant. The Plaintiff made a demand for the monies as well as interest and costs from the Defendant.

From the evidence led by the Plaintiff and which has not been challenged by the Defendant, I find that the Plaintiff has proved that the monies on invoices No. 515 and 1332 are due to it. As regards invoice No.515, I take judicial notice that the distance

between Chipata and Kafue is in excess of 612 Kilometres. It therefore, naturally occurs that the Defendant's calculation of distance is incorrect and condemns it to an additional payment for the under-calculated mileage.

The Defendant's supplementary bundle at page 8 shows that it only acknowledged invoice No. 1313. It did not adduce evidence to show that it settled the claim. I am therefore, inclined to find that the Plaintiff's claim on invoice No. 1313 has not been settled and it is owed money by the Defendant.

The Plaintiff commenced this action on 6th August, 2015 and I accept the Plaintiff's contention that that this matter has taken an arduous course.

Order XXXVI, Sub rule 8 of the High Court Rules provides thus:

"Where a judgment or order is for a sum of money, interest shall be paid thereon at the average of the short term deposit-rate per annum prevailing from the date of the cause of action or writ as the court or judge may direct to the date of judgment".

Section 2 of the Judgment Act proffers that:

“Every judgment, order, or decree of the High Court or of a subordinate court whereby any sum of money, or any costs, charges or expenses, is or are to be payable to any person shall carry interest as may be determined by the court which rate shall not exceed the current lending rate as determined by the Bank of Zambia from the time of entering up such judgment, order, or decree until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment, order, or decree”.

In addition, Section 4 of the Law Reform (Miscellaneous Provision) Act holds that:-

“In any proceedings tried in any court of record for recovery of any debt or damages the Court may, if it thinks fit, order that there shall be included in the sum for which Judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of Judgment”.

In my view, the cited authorities permit the Court to award interest on a Judgment debt. Where interest is awarded, it is due from the date of writ of summons to the date of judgment at the average short term deposit rate and thereafter from the date of judgment till settlement at the current lending rate determined by the Bank of Zambia.

I therefore have no hesitation in awarding the Plaintiff interest on the paid amount of ZMW160,459.04 from the date of writ to January, 2017 on the basis of the cited authorities.

It is trite that costs abide the event. Accordingly, I award costs to the Plaintiff to be taxed in default of agreement.

All in all, I hold that the Plaintiff has proved its claims against the Defendant.

Leave to appeal is granted.

Dated this 17th day of March, 2017

M. Mapani
M. Mapani-Kawimbe
HIGH COURT JUDGE