IN THE HIGH COURT FOR ZAMBIA **2011/HPC/248**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

LEASING FINANCE COMPANY LIMITED **PLAINTIFF**

AND

FRESH DIRECT ZAMBIA LIMITED	**1ST DEFENDANT**
MARTIN TUWELILE SIMUMBA	**2ND DEFENDANT**
MALARO NYIRENDA	**3RD DEFENDANT**
PATRICK CHIMPULUMBA	**4TH DEFENDANT**

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

For the Plaintiff: Mr L. Matibini – Messrs M.L Matibini & Company.

For the Defendants: Mr M. D. Lisimba- Messrs Mambwe Siwila & Lisimba.

RULING

LEGISLATION & OTHER WORKS REFERRED TO:

1. The Banking and Financial Services Act (Classification and Provisioning of Loans) Regulations, 1996.
2. Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.
3. The Judgments Act, Chapter 81 of the Laws of Zambia.
4. Halsbury's Laws of England, Fourth Edition Reissue, Volume 32.
5. Chitty J and Beale HG (2008) Chitty on Contracts Volume II 30th Edition, London: Sweet and Maxwell.

CASES REFERRED TO:

1. Zambia Revenue Authority V Jayesh Shah (2001) ZR 60.
2. Industrial Credit Company Limited V Plavmark Zambia Limited 2003/HPC/0298.
3. Fimimost Mining and Transport Enterprises Limited V Leasing Finance Company Limited (2012 Vol. 12) ZR 44.
4. Parr's Banking Company Limited V Yates (1898) QBD 460.
5. Union Bank Zambia Limited V Southern Province Co-Operative Marketing Union Limited (1995-1997) ZR207.

This is an application by the Defendants for the Plaintiff to render account. The application is made pursuant to Order 3 Rule 2 of the High Court Rules and Order 30 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia.

The application is supported by an Affidavit sworn by Martin Simumba the 2nd Defendant herein and Skeleton Arguments filed into Court on the 28th of April, 2015.

It was deposed by Mr. Simumba that this Court entered judgment against him and three others in the sum of US$283,653.00 on 18th November, 2011 and despite the direction that each party was to bear its own costs, the Plaintiff forced him to pay US$50,000.00 to the Plaintiff's lawyers which should have been applied towards settling the Principal loan.

That on two occasions, bailiffs had been sent to execute writs of possession and he had paid the bailiff's fees in excess of K143, 000.00 and had to date paid the sum of US$249,666 to the Plaintiff towards the judgment debt.

That despite paying this amount the Plaintiff had not applied it well as it had been directing it all towards interest which has left the judgment debt constant.

That to date the Plaintiff despite several requests had refused to show the Defendants how they arrived at the contractual interest as it was not stipulated explicitly in either the Lease or Loan Agreements.

That the interest rate of 12.33% went against the Judgment which stipulated that interest to be charged after Judgment should be according to the Judgment Act, Cap 81 of the Laws of Zambia, considering that it was a United States Dollar loan.

That on 20th November, 2014 the Plaintiff sent a statement via *email* where it requested him to confirm that it was true and correct. That on 20th March, 2015, his advocates wrote to the Plaintiff's advocates requesting them to render an account and no response had been received to date but that the Plaintiff still intended to repossess his house.

It was further deposed that without obtaining a true statement of account from the Plaintiff he would suffer a great injustice by paying over and above what he was initially ordered to pay and in the process lose his house.

There is also an Affidavit in Opposition filed into Court on 11th June, 2015 and sworn by Arulandam Ramesh, the Managing Director of the Plaintiff.

He stated that on 18th November, 2011 this Court delivered its judgment in favour of the Plaintiff in the sum of US$286,653.00

together with contractual interest which was to run from the date of disbursement to the date of judgment and that thereafter interest was to be in accordance with the Judgments Act, Cap 81 of the laws of Zambia as it was a US Dollar loan. This sum of money was to be paid within 90 days.

It is further deposed that following this Judgment, the Plaintiff computed the pre judgment sum in strict compliance with the terms and arrived at the sum of US$505,253.00 as the amount owing on 18th November, 2011.

That the contractual interest on the Lease and the Loan which was allegedly unknown was clear from the relative documents. To arrive at this it had to be noted that the Finance Charge Interest Rate = (FC) US$44,400/ Period of 3 years/ Principle or amount financed US$148,000.00 = 10% p.a.

That with respect to the loan the Finance Charge interest rate = (FC) US$43,006/ Period 3 years/ Principle or amount financed US$143,354= 10% p.a.

Moreover that the 10% p.a contractual interest had prior to this application not been disputed. That regarding the post judgment period the Plaintiff addressed its mind to the provisions of the Judgments Act and sought confirmation of the applicable dollar rates from three banks. These were averaged to arrive at 12.33% p.a. and that this rate was consistently applied up until 30th April, 2015 to arrive at the sum of US$521,618.00.

He also deposed that from the date of Judgment the Respondents had paid the sum of US$195,666.00 in instalments and that

from exhibit "AR4" the payments had first been directed towards the liquidation of interest and that this common practice was lawful according to his Advocates.

That as regards the US$50,000.00 that the 2nd Respondent alleged to have paid by force towards legal fees, he did not disclose the fact that by a Contract dated 23rd October, 2013, the parties agreed that the Respondent was to pay US$200,000.00 in consideration of the release of a Scania Truck ABF 4264 which at the time was collateral for the loan facilities.

That the Plaintiff actually issued Writs of Possession on two occasions in line with the enabling terms of the Judgment of 18th November, 2011. On representations being made for suspension, the Respondent undertook in writing to reimburse the bailiff's fees. That following the execution of the contract mentioned above and the Respondent's lawful acquiescence to the reimbursement of the bailiffs fees the Plaintiff had reconciled a separate account and ZMW60,000.00 was the amount due and owing.

There is also an Affidavit in Reply filed into Court on the 8th of July, 2015 and deposed by Martin Simumba aforesaid.

It is deposed that clearly the 10% applied in "AR1" applied an interest rate of 10% which was not agreed in the Loan and lease Agreement and was thus erroneous and illegal as it was not an agreed term but had been arbitrarily applied by the Plaintiff.

Further that the Judgment of this Court ordered that the post judgment interest be in accordance with the Judgment Act which

the Plaintiff had completely ignored and that this was illegal and that the consistent application of 12.33 % interest did not legitimize its application as it was illegal.

That the lawful and common practice was to apply the payments first towards liquidation of the principle and not interest and that the total sums of money paid in offsetting his indebtedness was US$245,000.00 and not US$195,000.00 as alleged. The US$50,000.00 allegedly applied as legal fees was neither sanctioned by him nor consented to by him as he did not sign "AR5" and in any event this could not be mistaken for legal fees as the judgment ordered that each party should bear its own costs.

There is also an Affidavit in Response to the Affidavit in Reply. It was filed into Court on 23rd July, 2015 and sworn by Isaac Mutale the Chief Operating Officer of the Plaintiff Company.

It is deposed that the insinuation that the contractual interest rate of 10% per annum for both the Lease and Loan Agreements was not agreed was misleading and it glossed over the undisputed facts in the executed agreements.

That exhibit "MS4" shows that the Defendants borrowed a sum of USD$143,354.00 but were expected to repay the sum of $186,360.00 by clause 7 of the relative agreement. Moreover, that the difference between the two figures amounting to USD$43,006.00 constituted interest which was calculated at 10% per annum for the relative period of the loan.

That similarly the said exhibit in particular reference to Equipment Leasing Agreement showed that the parties agreed to finance a sale and lease back of vehicles and plant and machinery whose cost/principal value was $185,000.00 and the Defendants were to repay the sum of $229,400.00. The finance charge of $USD44,400.00 constituted the interest which was calculated at 10% per annum.

That if as contended that the parties did not agree on the applicable interest then the method for calculation as advised by his Advocates should be $R = \frac{C}{T \times F}$.

Moreover that in view of the content in the immediate paragraph and to assist the Court in determining this issue a recalculation of the loan had been done in conformity with the statutory formula.

That the post judgment interest had been calculated in a mode and manner prescribed by the enabling Judgment of this Court and the Plaintiff believed it was the practice and was lawful to apply any payment to the interest first and thereafter to the principal.

It was also deposed that the Plaintiff was a law abiding entity cognisant of its corporate responsibility to its clients and the state. Further that the document marked "AR5" was signed by Martin Simumba who also affixed the seal on behalf of the 1st Defendant. Thus he was the incorrigible liar and the matter would be a subject of a criminal inquisition to put it to rest.

Counsel for the Defendants filed in Skeleton Arguments in support of the application on 9th July, 2015. It was contended that there was no dispute as to the Judgment Sum of $286,653 and that the only issues raised were with regard to the alleged contractual interest.

According to the Defendants there was no clause whatsoever in both the Loan and Lease Agreement which explicitly stated that the contractual interest rate was at 10%. The Plaintiff in this matter under paragraph (b) clearly stated that:

> ***"Under the column FINANCE charges are rates of interest which were determined on the assumption that the Respondents would adhere to the repayment terms in accordance with the lease. These figures are arrived at systematically using the formula stated in paragraph 7 of the Affidavit of Arulanandam Ramesh filed simultaneously with the arguments." Although the 10% p.a rate is not printed anywhere in the lease the tabulations of Finance Charges follows a systematic pattern to arrive at the rate. The notes in exhibit "AR2" annexed to the affidavit of Ramesh file simultaneously here with are instructive."***

It is also argued that this Affidavit was not part of the Lease Agreement and therefore the argument must be dismissed as the Plaintiff should have made the rate explicit in the Lease Agreement.

Counsel also stated that the Plaintiff had argued that:

"In a similar vein clause 7 (a) (11) of the Loan Agreement provided the repayment by 35 monthly instalments of US5,170.00. According to Counsel for the Defendant using this formula on paragraph 7 of Arulanandum Ramesh's Affidavit, again demonstrated that the applicable rate was 10% p.a and that for further clarity exhibit AR2 provided ample guidance."

Moreover that the Respondents were not asking the Plaintiff to show the formula of how they calculated interest as the only issue was that the Plaintiffs never stated the interest deliberately and this was against normal banking practice.

Counsel also argued that the Affidavit was not part of the Lease Agreement and that the Plaintiff ought to have made the rate explicit in the Lease Agreement. Moreover, that according to the Defendants what was agreed at the time was the London Inter-Bank Offer Rate LIBOR plus 1%. It was therefore Counsel's prayer that in the absence of proof this should be made the guiding rate for the contractual interest as 10% per annum was too high and the Respondents never signed for it.

As for the post judgment interest Counsel stated that in its Ruling the Court referred to the Judgments Act and although the Plaintiff argued that the Bank of Zambia had no subsidiary legislation, inclusive circulars that prescribed any applicable lending rates on dollar and other currency transactions on point, it was already clear that the Plaintiff was not lending money at this point for them to collect three quotations and arrive at an average rate as the guiding principle should be that if the

Plaintiff wanted to place the Judgment debt in a bank the interest they would get could not be more than 3% on average.

Counsel then cited S.I No. 142 of 1996 which deals with classification and provision for loans and section 9 (1) which deals with treatment of cash payments on non-accrual loans and states that:

> ***"Where a loan is placed in non-accrual status, any cash payments received shall first be applied to reduce the amount of the principle outstanding loan and due."***

It was then his position that contrary to this, the Plaintiff had been applying all their payments to the interest while the principle remained the same.

Moreover that the Plaintiff had used the interest rate of 10% to determine the contractual interest from 10th April, 2006 and Counsel wondered where the US$54,000.00 paid during the time the loan was running went and whether it was applied to the judgment sum on US$286,653 as their statement did not show this fact.

He also contended that assuming that the Judgment debt up to 18th November, 2011 was in fact US$505,000.00 according to their calculations and the judgment stated that the interest after 18th November should be calculated according to the Judgment's Act, Cap 81 of the Laws of Zambia Act No. 16 of 1997 in section 2 which states that:

"Section 2 of the Principal Act is amended by the deletion of at the rate of six per cent per annum and the substitution thereof as may be determined by the Court which rate shall not exceed the current lending rate as determined by the Bank of Zambia.

Based on this Counsel contended that the Bank of Zambia used the London Interbank Offer Rate of LIBOR and during the period under consideration which is 18th November, 2011 to this date this rate had never been more than 1% per annum.

In addition that it was common practice that the guiding principle for pricing of Dollar Loans for Zambian Financial Institutions Worldwide was LIBOR plus a margin which was based on the risk that a particular institution attached to a particular project which was rarely above 2% and that it would help the situation if this Court would determine the interest rate for both parties according to Cap 81.

On the issue of payments it was contended by Counsel that to date the Respondents had paid the sum of US$245,666 and that the statement should be adjusted to reflect this as the Judgment clearly stated that each party should bear its own costs.

On the mode of applying interest it was argued by Counsel that the Affidavit of Arulanandam Ramesh stated that the post judgment payments made by the Respondents were first applied towards the liquidation of the interest and thereafter the principal as this was a common practice and lawful.

In response to this it was argued that the parties to this agreement had actually agreed that the Loan and Lease would be secured by F/687/A/1/A/2/C and that the F/441a/74/A was extra security in case the promoters of the project failed to build the structure and that after the construction of the warehouse, the Plaintiffs refused to release the other property according to the agreement.

It was also argued that the initial argument presented by the Plaintiff was an accounting rule that applied when a loan was active and had not been classified in a financial institution however that this loan had been classified and was inactive as that was why the parties were even before Court.

According to Counsel the Law was clear on the Classification and Provisioning of Loans but that the Plaintiff rushed to Court due to the fact that it had classified this loan as a bad debt and if it had not, this matter would not even have been brought to Court.

He also argued that the provision did not address issues of whether the facility was adequately secured and only addressed the classification and how funds should be applied otherwise the Respondent would never pay off the debt and would continue paying it in perpetuity.

On the issue of legal fees Counsel for the Defendants argued that it was an undeniable fact that the Court clearly stated that each party should bear its own costs but the Plaintiff disobeyed this Order and took advantage of the Respondent's weak position and demanded that they forcibly pay legal fees and also threatened them with foreclosure.

Further that at no time did the Respondent agree to pay Legal Fees for the release of a Scania Truck and that was why the narration on the instruction to the bank was that *"Payment towards Legal Fees"* and that the Plaintiff should have provided the original document as the Defendant did not remember having used such a document. Moreover that in any case the Plaintiff had consistently emphasised that the Loan and Lease were secured by the Mortgage and that exhibit "AR5" was not a mere agreement but a Deed which the Defendants did not recall having signed as even Arulanandum Ramesh had only exhibited an Agreement with the Defendants and as such the Defendants prayed that this Court should throw out the deed as it was forged.

The Plaintiff also filed Skeleton Arguments in response on the 23rd of July, 2015. On the issue of Contractual Interest it was the Plaintiff's position that the Defendant argued that there was no express mention of the 10% per annum interest it used in the executed Equipment Leasing Agreement and Term Loan Agreement and that they were not requesting to be shown the formula and that any transaction involving money should be transparent, have the interest rate clearly spelt out in a lenders offer or terms sheets and then concluded that what was agreed at the time was that the London Inter-bank offer rate (LIBOR) plus 1% should be used.

The Plaintiff also brought to this Court's attention the fact that the parties herein entered into a Commercial Agreement for the provision of a Leasing Finance and a Cash Loan in consideration

of the repayment of the said facilities with interest and that this cardinal point was manifest in the "Extract of Minutes of the Board Meeting of **FRESH DIRECT ZAMBIA LIMITED** dated 10th February 2006, annexed to the Affidavit in support of Originating Summons of ARULANANDAM RAMESH filed on 3rd May 2011 as exhibit **"AR1".**

That it stated under item 1 of the resolution thus:

1. **The Company do enter into the following Loan/Lease Agreement with Leasing Finance Company Limited (hereinafter simply referred to as *"Financial Institution"*) and upon such terms and conditions as are stipulated in the said Agreements.**

   (a) Lease Agreement for $185,000.00

   (b) Loan Agreement for $143,354.00

According to Counsel for the Plaintiff, the Lease and Term Loan Agreements had specific conditions but of relevance to the issues at hand it had specific provisions relative to the repayment of the facilities. In the case of the Term Loan it provided under item 7 as follows:-

"7 REPAYMENT ARRANGEMENTS

(a) Repayments will be effected as follows:-

(i) US$5,200.00 to be paid on 10th May 2006

(ii) 35 monthly installments of US$5,176.00 each from 10th June 2006 to 10th April 2009.

(b) Any default will attract interest at 20% per annum on the defaulted amount and the interest will be compounded at the end of each month.

With reference to the equipment Leasing Agreement it provided under clause 3 that:-

"3 RENTAL AND OTHER PAYMENT

3.01 Upon the execution of this agreement the Lessee shall pay the Lessor the rental as shown in the second schedule and will pay the Lessor the installment amounts shown in the second schedule on the dates therein specified for payment in respect of such leasing."

Moreover that the second schedule appeared at page 13 in the Equipment Leasing Agreement and stated clearly and concisely the amount and date of each payment.

It was also contended that the Court would observe that the repayment amount in respect of the Term Loan for the period in contemplation i.e up to 10th April 2009 was **US$186,360.00** whilst the repayment amount in respect of the Equipment Leasing Agreement was **US$229,400.00**. That the difference between the respective principal sums and the repayment sums represented the consideration/interest that the parties agreed should be paid. In the case of the Term Loan the agreed interest over a period of 3 years was **$43,006.00**. In respect of the Equipment Leasing Finance interest for the 3 year period was

$44,400.00. Moreover, that these figures were placed on the bargaining table and willingly consented to by the parties as evidenced by formal execution for the Agreements.

Further that the point to note was that even if the parties did not expressly state the figure of 10% per annum in the respective agreements there was in essence a formula that was applied to arrive at the installment amount and upon this application being made has been disclosed. In both instances the computations have clearly shown that the rate of interest that is applicable is 10% per annum. The Defendants adverse argument would only have been plausible if it tended to show mathematical and or accounting errors in the Plaintiff's calculations. Further that as a business transaction, the component of interest was inevitable and quite clearly the 10% per annum had been demonstrated with clarity in exhibit **"AR1"** annexed to the affidavit of **ARULANANDAM RAMESH** filed on 11th June 2015.

That although it was contended by the Defendants that what was agreed by the parties was the LIBOR plus 1%, the Court will note that there has not been any calculation of how the LIBOR plus 1% will relate to the Lease/Loan amounts and the ascertained repayment amounts. Simply stated, the Defendants' argument was that the contractual interest ought to be 3% when and to demonstrate the inaccuracy of this argument Counsel invited the Court to consider the facts relating to the Term Loan. The Defendants were advanced the sum of **US$143,354.00** to be repaid in 36 equal installments within 3 years. A simple

calculation using the erroneous LIBOR rate of 3% will work out as follows:-

US$143,354×3/100×3 years

Interest for 3 years = **US$12,902.00**

Interest per month = **US$358.39**

From the above it is clear that LIBOR interest over a period of 3 years i.e. **US$12,901.86** is far below the agreed interest of **$43,006.00**. The same argument applies for interest relative to Equipment Leasing Agreement. It was therefore Counsel's submission that any perceived interest rate below 10% or indeed above will not be compatible with the applicable interest. Further that arguments which asserted that one could not determine the interest rate from the available data were archaic and unresponsive to basic mathematical concepts and that the Plaintiff's argument was on firm ground.

In the alternative Counsel stated that should the Court find the 10% per annum interest rate as not agreed by the parties, Statutory Instrument No. **179 of 1995** – The Banking and Financial Services Act (Cost of Borrowing) Regulations, 1995 was instructive on the point. Regulation 5 (1) states:-

"For loans repayable in equal installments, the cost of borrowing is determined by the following formula:-

$$\mathbf{R = \frac{C}{T \times P}}$$

Where

"C" is total cost of borrowing over the term of the loan, expressed as an amount and includes interest plus all other charges of borrowing

"P" is the average of the Principal of the Loan that is outstanding at the end of each interest calculation period before applying any payment due at that time.

"R" is the cost of borrowing over the term of the loan, expressed as a rate per annum; and

"T" is the term of the loan, expressed in years

(2) For the purpose of the calculation set out in sub-regulation (1)-

(a) the rate per annum of the cost of borrowing shall be rounded off to the nearest eighth of per cent; and

(b) a year shall be calculated as having 365".

It was also submitted that the Term Loan provided for repayment in 36 monthly installments of **US$5,176.00.** Equally the Equipment Leasing Agreement was repayable in monthly installments of **US$5,340.00.** In line with the statutory provision aforementioned the Plaintiff was on firm ground to resort to the formula embodied in the statute. This Court was urged to take note of the fact that the Plaintiff was an entity whose operations were regulated by the Banking and Financial Services Act. As such the formula $R = \frac{C}{T \times P}$ was applicable to the matter at hand.

Moreover that exhibit **"IM1"** annexed to the affidavit of Isaac Mutale provided an elaborate computation of the sums due and

payable as at 30th June 2015 and going by the said formula which is statute compliant, the Defendant was indebted to the Plaintiff in the sum of **US$965,382.00.** Suffice to mention all payments made by the Defendants except that made by virtue of an Agreement dated 23rd October 2013 marked as Exhibit **"AR5"** in **ARULANANDAM RAMESH**'s affidavit of 11th June 2015, had been taken into account in arriving at the sum due and owing.

On the issue of Post Judgment Interest, Counsel for the Plaintiff stated that it was argued by the Defendants that the Plaintiff was not lending money to be entitled to the average bank lending rate that had been applied in the Plaintiff's computations. Further that the interest should not exceed 3%.

In response Counsel for the Plaintiff reiterated that even though the enabling Judgment directed interest to accord with CAP 81 of the Laws of Zambia, Bank of Zambia (hereinafter referred to as "BoZ") did not determine interest rates until after 2012 and the determination had been restricted to Kwacha transactions. Further that the Judgment Act placed the burden of determination on the Court with a directive not to exceed the bank lending rate as determined by BoZ. In the light of the generalised directive embodied in the Judgment of the Court, the Plaintiff followed case law. Counsel also relied on the case of **ZAMBIA REVENUE AUTHORITY AND JAYESH SHAH (1)** where the court said that:-

> ***"It seems to us that an enquiry could easily have been held below to ascertain what could be considered to be fair average rate of interest on dollar deposits in an***

interest bearing account. From the figures tendered by the parties, ranging from a low saving rate of 2.5% to 3.1% obtained by the appellant to the rather higher rate of 12% to 18% in First Alliance Bank and even 21% suggested from Credit Africa Bank, an average rate of interest could have been selected. We also take into account the rates in Order 42 of the White Book. Rather than remit the case below for such an exercise to be conducted, as Mr. Banda suggested, we are in a position to do so on the material on record and in keeping with the requirement for finality to litigation whenever possible. It seems to us that a fair rate is to be found half way between the two extremes and this we consider to be 10%. Accordingly, we allow the appeal against a rate of interest of 18% and substitute one of 10%. The same should also apply as the post judgment rate."

According to Counsel for the Plaintiff, this case was decided in 2001 and the court was alive to the provisions of the Judgment Act and the Supreme Court arrived at the Post Judgment rate of **10%** after averaging figures of interest from respective banks. In a similar fashion the Plaintiff has averaged figures of interest from First Alliance Bank (Z) Ltd, Standard Chartered Bank (Z) Plc and Stanbic Bank (Z) Ltd so the 3% rate suggested by the Defendants has no lawful basis. Further the LIBOR rate was not mentioned in the Judgment Act and therefore inapplicable in this matter.

On the issue of Payments, Counsel for the Plaintiff contended that the Defendants herein categorically stated that they did not dispute the Judgment sum of **US$286,653.00.** Further that the Plaintiff's account demonstrated clearly and elaborately all payments made and received in arriving at the final amount in each of the two scenarios which the Court may opt to adopt. He also reiterated the contents of paragraph 10 of **ARULANANDAM RAMESH**'s affidavit of 10th June 2015 that a sum of **US$195,666.00** was paid after the delivery of the judgment and the Defendants' current arguments were devoid of proof.

On the mode of applying interest, Counsel in responding to this argument stated that the Defendants' argument was solely premised on Regulation 9(1) of the Banking and Financial Services Act (Classification and Provisioning of Loans) Regulations 1966 which states that :-

> ***"9(1) Where a loan is placed in non-accrual status any cash payments received shall first be applied to reduce the amount of the Principal outstanding and due."***

Moreover that the basis upon which a loan is placed in a Non-accrual status is founded on either of the four grounds outlined in **Regulation 7(1)(b)(c)** and **(d)**. Further that **"Non-accrual loan"** meant:-

> **(a) On which interest is no longer being taken into income unless paid by the borrower in cash;**
>
> **(b) which has been placed on cash basis for the purpose of financial reporting;**

(c) On which principal or interest is due and unpaid for ninety days or more; or

(d)On which interest payments equal to ninety days' interest or more have been capitalized, refinanced or rolled-over;

Moreover, that from the above and having regard to the facts of the facilities extended to the Defendants *viz-a-viz* the Mortgaged property held as collateral, it was clear that the loan and lease facilities were classified in the ***"Non-accrual status"*** for the purpose of **financial reporting only**. Further that there was no doubt in the mind of the Plaintiff about the collectability of the Principal and interest in the light of the existing mortgage on property known as sub division A of Sub division No. 441(a) Lusaka otherwise known as Plot No. 74A, Lusaka Road, Roma, Lusaka.

In the light of this fact Counsel also considered Regulation 9(2) of the Banking and Financial Services Act (Classification and provisioning of Loans) Regulations, 1996 which states that:-

> ***"9(2) Where the Principal outstanding of the Loan which is due has been fully recovered, any further excess payments may be taken into income, provided the amount of income recognized is limited to the amount which would have been due to the bank or the financial institution if the loan had been current at its contractual rate".***

The Court will observe that whereas Regulation 9(1) provides for application of funds towards Principal first, Regulation 9(2) on the other hand allows the bank or the financial institution to collect all funds due to it at its contractual rate. The intention of the statute is not to reward impropriety when the available facts dispel any notion of impecuniosity on the part of the borrower. The Court will observe that the Plaintiff was in the process of enforcing its rights under the enabling contracts as well as the relative Judgment. At such a time the amount due and payable should have been in conformity with Regulation **9(2)** i.e. as if the Loan was current at its contractual rate. Regulation 9(1) is therefore inapplicable in these circumstances and case.

On the aspect of the Plaintiff's legal fees, Counsel for the Plaintiff stated that the Defendants' position on this matter was that the relative Agreement was neither sanctioned nor consented to by the 2nd Defendant and as such a forgery. A perusal of the Defendants Skeleton Arguments states that the Plaintiff took advantage of the 2nd Defendant's weak position and demanded that he pays the legal fees after threatening him with foreclosure proceedings. He contends therefore that the sum of **ZMW200,000.00** should be considered as a payment and deducted from the loan amount.

According to Counsel for the Plaintiff the Skeleton Arguments suggested that they were settled by the 2nd Defendant and not his Advocates and page 3 lines 6 to 9 states that: ***"These guys have been applying all our payments to the interest....."*** Further that a member of the noble profession could not use such

unpalatable language in the documents intended for serious consideration by the Court and that the Skeleton Arguments relative to the Plaintiff's legal fees were clearly incoherent and at best indicative that the 2nd Defendant was suggesting that he signed the Agreement marked **"AR5"** under duress whilst dispelling the notion that the 2nd Defendant did not sign and affix the 1st Defendant's seal to the agreement.

Counsel went on to state that a further assertion of forgery should equally be discounted as there was no motive for such a course of action on the part of the Plaintiff. At best it was indicative of the 2nd Defendant's desperation to maintain his property at all costs as he had failed to liquidate the facilities.

Counsel also reiterated that the Agreement marked **"AR5"** annexed to **ARULANANDAM RAMESH**'s affidavit of 11th June 2015 was authentic and executed by the 2nd Defendant as his signatures on the said document and the Affidavit were clearly the same.

The issue of purported forgery borders on criminality and will be a subject of a criminal complaint. Notwithstanding Counsel urged the Court to scrutinize the said document and find that the **ZMK200,000.00** was paid in consideration of the release of a Scania Truck, ABF 4264 which fact had not been traversed in both the affidavit in reply and the submissions.

All in all it was submitted that the Plaintiff had an account consistent with the Judgment of the Court.

During the hearing on 18th September, 2015, both Counsel for the Plaintiff as well as Counsel for the Defendants relied on their respective Affidavits and Skeleton Arguments.

I have considered the Affidavit evidence and the arguments by learned Counsel for the parties.

I note from the onset that an application for rendering an account must be formally applied for by way of Summons as per Order 43 Rule 2 of the Rules of the Supreme Court of England, White Book 1999 Edition. The Defendants' application is made pursuant to Order 3 Rule 2 of the High Court Rules, Cap 27 of the Laws of Zambia. This provision in my view is sufficiently expansive to include the application before Court. The intention of the Sub Rule is clear and it gives the Court a lot of discretion, thus although usually an application for rendering an account should be made pursuant to Order 43 of the Rules of the Supreme Court of England, I will entertain the Defendants' application for the Plaintiff to render an account.

It is common cause that the Plaintiff Company and the 1st Defendant Company executed a Lease Finance Agreement of Equipment dated 10th April, 2006. The Equipment Leasing Agreement is exhibited as "MS4" to the 2nd Defendant's Affidavit in Support of Summons for an Order to Render Account.

It is also common cause that the Plaintiff Company and the 1st Defendant Company executed a Term Loan Agreement on 10th April, 2006 for US$143,354.00. The Term Loan Agreement is

also exhibited as "MS4" to the 2nd Defendant's Affidavit in Support aforesaid.

There is no dispute as to the Judgment sum of US$286,653.00. The Defendants have raised issues regarding the following:

1. Contractual interest payable on both the Lease Finance Facility of US$185,000.00 and the Term Loan Agreement of US$143,354.00;
2. Post Judgment interest payable on the Judgment sum of US$286,653.00;
3. Payments made towards the Judgment sum of US$286,653.99;
4. Mode of applying payments to principal and interest; and
5. The Plaintiff's legal fees.

On the issue of the contractual interest payable the learned authors of HALSBURY'S LAWS OF ENGLAND, Fourth Edition Reissue, Volume 32 at paragraph 106 page 53 regarding the right to interest state that:

> ***"interest is the return or compensation for the use of or retention by one person of a sum of money belonging to or owed to another. Interest accrues from day to day even if payable only at intervals, and is therefore, apportionable in respect of time between persons entitled in succession to the principal."***

As regards when interest is payable, the learned authors of HALSBURY'S LAWS OF ENGLAND (ibid) at paragraph 108 page 54 states that:

"At common law interest is payable

a) Where there is an express agreement to pay interest;

b) Where an agreement to pay interest can be implied from the course of dealing between the parties or from the nature of the transaction or a custom or usage of the trade or profession concerned;

c) In certain cases by way of damages for breach of contract. (other than a contract merely to pay money) where the contract, if performed, would to the knowledge of the parties have entitled the Plaintiff to receive interest."

There is also an equitable right to interest and HALSBURY'S LAWS OF ENGLAND at paragraph 109 page 55 states that:

> ***"In equity interest may be recovered in certain cases where a particular relationship exists between the creditor and the debtor, such as mortgagor and mortgagee, obligor and oblige on a bond, personal representative and beneficiary, principal and surety, vendor and purchaser, principal and agent, solicitor and client, trustee and beneficiary or where the debtor is in a fiduciary position to the creditor."***

To determine the contractual interest payable with respect to the Equipment Leasing Agreement it is necessary to define a finance lease. Equipment Leasing is also known as Finance Leasing.

A finance lease is defined by the learned authors of Chitty on Contracts, Volume II 30th Edition, Sweet and Maxwell, 2008 at paragraph 33-081 as:

> ***"Finance Leasing. In the light of various tax advantages, a form of long term financing has developed, which is known as finance leasing. In a Finance Leasing the lessee selects the equipment to be supplied by a manufacturer or dealer, but the lessor (a finance company) provides the funds, acquires title to the equipment and allows the lessee to use it for all (or most) of its expected useful life. During the period of the lease, the usual risks and rewards of ownership are substantially transferred to the lessee, who bears the risks of loss, destruction and depreciation of the leased equipment (fair wear and tear only excepted) and of its obsolesce or malfunctioning. The lessee also bears the costs of maintenance, repairs and insurance. The regular rental payments during the primary period of the lease are calculated to enable the lessor to amortise its capital outlay and to make a profit from its finance charges. At the end of the primary leasing period, there will frequently be a secondary leasing period during which the lessee may opt to continue the***

lease at a nominal rental, or equipment may be sold and a proportion of the sale proceeds retuned to the lessee as a rebate of rentals. The lessee thus acquires any residual value in the equipment, after the lessor had recouped its investment and charges. If the lease is terminated prematurely, the lessor is entitled to recoup its capital investment (less the realizable value of the equipment at the time) and its expected finance charges (less an allowance to reflect the accelerated return of capital). The bailment which underlies finance leasing is therefore only a device to provide the finance company with a security interest (its reversionary right); a finance lease is similar in function to outright purchase or hire purchase."

This passage from Chitty on Contracts at paragraph 33-081 was also considered by C. Kajimanga, J (as he then was) in **INDUSTRIAL CREDIT COMPANY LIMITED V PLAVMARK ZAMBIA LIMITED (2)** and by R. Kaoma J (as she then was) in **FIMIMOST MINING AND TRANSPORT ENTERPRISES LIMITED V LEASING FINANCE LIMITED (3).** They both held that when a finance lease is terminated before its expiry date, the lessor was entitled not to future rentals, but to recoup its capital investment and finance charges. I concur with their holdings. I have no doubt that when a finance lease is prematurely terminated the lessor is entitled not to future rentals, but to recoup its capital investment (less the realisable value of the equipment at the time) and its expected finance charges.

In this case, Schedule 1 to the Equipment Leasing Agreement dated 10th April, 2006 clearly shows that the Principal Repayment amount is US$185,000.00 while the finance charges are a total of US$44,400.00. As the 1st Respondent executed the said Equipment Leasing Agreement it is bound by the terms and conditions therein including the contractual finance charges of US$44,400.

The finance charges are in effect interest payable by the lessee to the lessor as a return or compensation for use or retention by the lessee of the lease finance provided by the lessor.

I am therefore of the considered view that the Respondents agreed to the payment of finance charges or interest of US$44,400.00 which works out to be 10% per annum over a period of 3 years.

Given that in Equipment Leasing or Finance Leasing the lessor is entitled to not only recoup its capital investments but also its finance charges, I find and hold that the agreement to pay interest or finance charges by the 1st Respondent to the Applicant (or Plaintiff) is implied from the course of dealings between the parties as well as the nature of the transaction between them namely Equipment Leasing or Finance Leasing.

As regards the Term Loan, the Facility Letter dated 10th April, 2006 executed by the parties shows that the 1st Respondent

borrowed a sum of US$143,354.00 but was expected to repay the sum of US$186,360.00. This is clear from Clause 3 and Clause 7 of the said Facility Letter or Term Loan Agreement dated 10th April, 2006 which is exhibited as "MS4" to the 2nd Respondent's Affidavit in Support of Summons for an Order to Render Account. I accept the Plaintiff's submission that the difference between the repayment sum of US$186,360.00 and the principal sum lent of US$143,354.00 represents the interest that the parties agreed should be paid. The contractual interest rate is US$43,006.99 which works out to be 10% per annum over a period of 3 years.

I am of the considered view that the Plaintiff herein is entitled to recover contractual interest of 10% per annum on the Term Loan.

I am also of the considered view that even in equity interest may be recovered by the Plaintiff on both the Equipment Leasing Agreement and the Term Loan Agreement both dated 10th April, 2006 because of the relationship that exists between the Plaintiff as creditor and the 1st Respondent as primary debtor and the 2nd, 3rd and 4th Respondents as secondary debtors. The specified relationship is that of mortgagor and mortgagee. The 2nd Respondent created equitable mortgages in favour of the Plaintiff over Subdivision A of Subdivision No. 74 of Farm No. 441a Lusaka and Subdivision C of Subdivision 1 of Subdivision No. 1 of Subdivision A of Farm No. 687 Lusaka.

The Respondents contended that what was agreed at the time was a contractual interest rate of London Inter-Bank Offer Rate

(LIBOR) plus 1%. No evidence was adduced in support of this contention which I accordingly reject as a red herring.

With respect to Post Judgment interest, I have been urged by the Plaintiff to take judicial Notice of the fact that whilst Bank of Zambia has been given authority to determine and regulate lending rates charged by commercial banks and financial institutions by the Bank of Zambia Act, Chapter 360 of the Laws of Zambia, the Bank's intervention only became manifest in 2012 and that only interest rates relative to Zambian Kwacha transactions are being determined and regulated by Bank of Zambia and not interest rates relating to other (foreign) currencies. It has been submitted that Bank of Zambia does not appear to have prescribed any applicable lending rates on US Dollar and other foreign currency transactions.

I accordingly take Judicial Notice of the fact that the Bank of Zambia does not prescribe and or regulate interest rates on US$ (Dollar) accounts or any other foreign currency accounts.

I am therefore of the considered view that when dealing with foreign currency accounts the Courts should follow the guidance given by the Supreme Court in the case of **ZAMBIA REVENUE AUTHORITY V JAYESH SHAH (1).** That is to say an inquiry should be made of say four or five commercial banks to ascertain what could be considered to be a fair average rate of interest on e.g. dollar deposits in an interest bearing account or indeed a fair average lending interest rate on a dollar loan account.

The Respondents contend that it is common practice that the guiding principle for pricing of US Dollar loans for Zambian financial institutions or worldwide is LIBOR plus a margin which is based on the risk that a particular institution attaches to a particular project which is rarely above 2%.

No evidence has been adduced by the Respondents for this contention. I accordingly reject it.

The Respondents urged the Court to determine the post Judgment interest as per Section 2 of the Judgment Act, Chapter 81 of the Laws of Zambia.

I note that in arriving at the post Judgment US$ interest rate, the Plaintiff followed the guidance given by the Supreme Court in the case of **ZAMBIA REVENUE AUTHORITY V JAYESH SHAH (1).** They obtained US$ lending rates from 3 commercial banks to arrive at a rate of 12.33% per annum which is the average lending rate. Of the rates obtained by the Plaintiff the higher rate of 14% per annum was in First Alliance Bank Zambia Limited. I note that in the Jayesh Shah case it was again First Alliance Bank which gave the highest US$ lending rate. It was 11% per annum at Standard Chartered Bank Zambia Plc and 12% per annum at Stanbic Bank Zambia Limited.

Because of the variance in rates, I decided to obtain 2 US$ lending rates from 2 other commercial banks for the period

January 2012 to April 2012 the same period as those obtained by the Plaintiff. The rates are 12% per annum at Barclays Bank Zambia Plc and 11% per annum at Zambia National Commercial Bank Plc. On the basis of these 2 additional US$ lending rates, I consider that the fair rate is the average of all 5 US$ lending rates. It is 12% per annum.

In view of this, I direct a recalculation of the post Judgment interest on the Judgment sum which is to be at the rate of 12% per annum. The recalculation should be done by the Plaintiff within 21 days of the Ruling and if the resultant figures are not agreed, there is liberty to either party to apply to the Registrar to settle the figures.

I turn now to the issue of payments made towards the Judgment sum of US$286,653.00. As there is no dispute as to the Judgment sum, the payments to be taken into account are those made by the Respondents after the date of Judgment i.e. 18th November,2011. The Affidavit of Arulanandam Ramesh on behalf of the Plaintiff filed on 11th June, 2015 at paragraph 10 shows that between 16th August, 2012 and 11th December, 2014 the payments made by the Respondents amount to US$195,666.00. However, the Respondents contend that they have to date paid a total of US$245,666.00 and that the Statement of Account should reflect this.

The variance of US$50,000.00 in the amount that the Plaintiff says has been paid and the amount that the Respondents say

they have paid relates to the sum which the 2nd Respondent paid on 26th July, 2013 to the Plaintiff's Advocates as legal fees, which the Respondents believe ought to have been applied towards settling the principal sum for the loan. The Plaintiff on the other hand contends that whilst they are cognisant of the Court's Judgment on the issue of costs, the payment of K200,000.00 legal fees due to Messrs L.M. Matibini and company was in order because the payment was made pursuant to an Agreement dated 23rd October 2013 and in consideration for releasing Scania Truck ABF 4264.

I note that the payment by the 2nd Respondent of K180,000.00 was made on or about 26th July, 2013 while the Agreement pursuant to which the said payment was made is dated 23rd October, 2013. I am therefore of the considered view that the payment of legal fees by the Respondents to the Plaintiff's Advocates for legal services rendered to the Plaintiff by its Advocates in this cause was contrary to the Courts decision that the parties were to bear their respective costs. The Agreement of 23rd October, 2013 between the Plaintiff and the 1st and 2nd Respondents cannot in my view oust the Court's discretion as to costs and is therefore of no legal effect.

I accordingly Order and Direct that the sum of US$50,000.00 paid by the 2nd Respondent to the Plaintiffs Advocates must be applied towards settling the principal sum outstanding as at 26th July, 2013.

With regard to the mode of applying payments made by the Respondents to principal and/or interest both parties cite the provisions of Regulation 9 of the Banking and Financial Services (Classification and Provisioning of Loans) Regulations 1996.

The Defendants contend that as the loan herein is in non-accrual status the cash payments made by the Respondents and received by the Plaintiff must first be applied to reduce the amount of the principal outstanding and due in accordance with Regulation 9(1) of the Banking and Financial Services (Classification and Provisioning of Loans) Regulations, 1996 ("the Regulations"). The Plaintiff on the other hand contends that Regulation 9 (1) is inapplicable because (a) the loan and lease facilities herein are classified in the *"non-accrual status"* for the purpose of financial reporting only and (b) there is no doubt about the collectability of the principal and interest outstanding and due in light of the existing mortgage on property known as Subdivision A of Subdivision No. 441 (a) Lusaka otherwise known as Plot No. 74, Lukanga Road, Roma, Lusaka.

That Regulation 9(2) which allows the Bank or Financial Institution to collect all funds due it at its contractual rate is applicable. It was the Plaintiff's submission that the intention of the statute is not to reward impropriety when the available fact dispels any nation of impecuniosity on the part of the borrower. That as the Plaintiff was in the process of enforcing its rights under the enabling contracts and the relative Judgment the

amount due and payable should be in conformity with Regulation 9(2) i.e. as if the loan was current at its contractual rate.

Learned Counsel for the Plaintiff Mr. L. Matibini submitted that the application of payments towards interest first is common practice. He relied on the website www.accountingcoach.com where it is stated that:

> ***"A payment towards the amount of Principal owed. Generally when a loan repayment consists of only a principal and interest payment, the amount owed for interest is processed first and the remaining amount of the payment is applied to the principal balance."***

Counsel also relied on the case of **PARR'S BANKING COMPANY LIMITED V YATES (4)** were Rigby LJ said that:

> ***"There is one point remaining with which I must deal. The Defendant's Counsel relied on the old rule that does, no doubt, apply to many cases, namely, that where both principal and interest are due, the sums paid on account must be applied first to interest. That rule, where it is applicable, is only common practice.***
>
> ***To apply the sum paid to principal where interest has accrued upon the debt, and is not paid, would be depriving the Creditor of the benefit to which he is entitled under his contract, and would be most unreasonable as against him."***

It was submitted that where a debtor as in this case has a contract for payment of interest it is just and fair that he is held by his bargain unless forbidden by law.

In my view, each bank and financial institution is required under the Regulations to adopt a loans policy and to establish a loan review system which should identify risk, assure the adequacy of the allowance for loan losses account and to properly reflect the result of such loan reviews in the bank's or financial institution's financial statements. The purpose of the Regulations is evident from Regulation 8, which clearly is to ensure that the bank's or financial institution's income is not overstated in financial statement by uncollected and doubtful interest, so that these financial statements should reflect the fair and accurate income of the bank or financial institution to the central bank and to the shareholders.

Both parties are agreed that both the leasing facility and the loan advanced by the Plaintiff to the 1st Respondent were placed to non-accrual status through the mandatory loans review policy. It is clear that the "loan" was placed on non-accrual status at a point when principal or interest were due but unpaid for ninety days. Regulation 7(1)(d) makes it mandatory for a bank or financial institution to place a loan in non-accrual status if the principal or interest has been in default for a period of ninety days or more or if the account has been inactive for ninety days and deposits are insufficient to cover the interest capitalised during the period. From the Record it is clear that the loan was

placed or ought to have been placed to non-accrual status as early as 1st February, 2008 if not earlier.

Although the Regulations do not prohibit the collection of interest on non-accrual loans, Regulation 9(1) provides that where a loan has been placed on non-accrual status, any cash payments received shall first be applied to reduce the amount of the principal outstanding and due. The requirement that where a loan is in non-accrual status, any cash payments received shall first be applied to reduce the amount of the principal outstanding and due is mandatory. No cash payments received can be applied towards reducing the amount of the interest outstanding and due until the principal is fully paid.

Regulation 9(2) cited by the Plaintiff for the contention that cash payments received must first be applied to reduce interest cannot aid it, Regulation 9(2) provides that:

> ***"Where the principal outstanding of the loan which is due has been fully recovered, any further excess payments may be taken into income, provided the amount of income recognised is limited to the amount which would have been due to the bank or the financial institution if the loan had been current at its contractual rate."***

Under Regulation 9(2) it is clear that, after the principal outstanding has been recovered, then any further payments

received may be taken into income, meaning the further payments may be taken towards reducing the amount of the accrued interest with a limitation of the income or accrued interest to what was agreed upon by the bank or financial institution and the customer when the loan was current.

Indeed, when all the payments of the principal and interest become fully current on such non-accrual loan, then the non-accrual loan is restored to accrual status (Regulation 10(1), but until the loan has been restored to accrual status, any cash payment received should be treated in accordance with Regulation 9, namely, that the cash payments received are first to be applied to reducing the principal outstanding and due and the interest is only reduced after the principal is fully paid (Regulation 10(3).

The requirement that cash payments received are first to be applied to reducing the principal outstanding and due and the interest is only reduced after the principal is fully paid underscores the importance of the Regulation's concern for the bank or financial institution to collect the principal sum advanced which is a liability by the bank or financial institution to the depositors which must be collected.

The Plaintiff's contention that cash payments received by it should first be applied towards reducing accrued interest because (a) the loan herein was placed in non-accrual status for the purpose of financial reporting only and (b) in view of the

ultimate collectability of the principal and interest given the existing collateral which can easily be sold is a misconception.

Once a loan is placed in non-accrual status, any cash payments received shall first be applied to reduce the amount of the principal outstanding and due regardless of the reasons why the loan is placed in non-accrual status and whether or not the loan is well secured.

The authorities cited by Counsel for the Plaintiff of www.accountcoach.com and **PARR'S BANKING COMPANY LIMITED V YATES (4)** do not aid the Plaintiff's contention that it was proper to apply post Judgment Payments made by the Respondents first towards liquidation of the interest and thereafter the principal amount. The law i.e. Regulation 9(1) prohibits the use of cash payments received on non-accrual loans towards reduction or liquidation of accrued interest until the principal outstanding and due is fully paid.

I therefore find and hold that the Plaintiff wrongly applied cash payments received from the Respondents after the judgment date towards interest first. All cash payments received by the Plaintiff from the Respondents between 18th November, 2011 and 11th December, 2014 a total of US$245,666.00 ought to have been applied to the principal amount first in accordance with the Banking and Financial Services (Classification and Provisioning of Loans) Regulations, 1996.

To adopt the position taken in the case of **UNION BANK ZAMBIA LIMITED V SOUTHERN PROVINCE CO-OPERATIVE MARKETING UNION LIMITED (5)**, I direct a recalculation of the proper principal amount outstanding and due to the Plaintiff as at 11th December, 2014 by applying the total sum of US$245,666.00 received as cash payments after the Judgment herein towards the principal amounts due on the various dates the cash payments were received. The recalculation should be done by the Plaintiff within 21 days of the Ruling and if the resultant figures are not agreed, there is liberty to either party to apply to the Registrar to settle the figures.

As regards the issue of the Plaintiff's legal fees, I have already found and held that the Contract dated 23rd October, 2013 by which the parties agreed to the Respondents paying K200,000.00 in consideration of the release of a Scania Truck ABF 4264 had the effect of ousting the Court's decision on costs and is therefore null and void. The sum of K200, 000.00 (US$50,000.00) paid to the Plaintiff's Advocates must therefore be applied towards the principal amount due. This sum is part of the sum of US$ 245,666.00 referred to above. Exhibits "AR6" and "AR7" to the Affidavit in Opposition sworn by Arulanandam Ramesh shows that Bailiff's fees in the sum of K143,125.00 were paid by the Plaintiff and reimbursed by the 2nd Respondent. I am satisfied that the Bailiff's fees must be paid by the 1st Respondent. The expenses properly incurred by the Plaintiff in the enforcement of the Equipment Leasing Agreement and the Loan Agreement are for the Respondents' account.

In conclusion, on the entire matter, there is need to ascertain and assess the principal amount outstanding and due after post Judgment cash payments received by the Plaintiff from the Respondents are applied towards reducing the principal sum due. The Respondents are therefore entitled to object to the cash payments of US$245,666.00 being applied first towards the liquidation of interest.

The Respondents' application for an account of the manner in which the amounts paid by them after Judgment have been applied by the Plaintiff is therefore allowed.

The Ex-parte Order Staying Execution which I granted to the Respondents on 30th April, 2015 will remain in force until the amount outstanding and due to the Plaintiff is determined by either the agreement of the parties or the Registrar.

Costs normally follow the event, but taking into account the whole of the matter, there is no outright winner or loser. Therefore, I order each party to bear own costs.

Leave to appeal is granted.

Dated the 21st day of March, 2017.

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WILLIAM S. MWEEMBA
HIGH COURT JUDGE.