

**IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

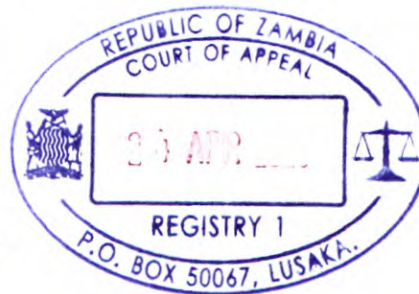
APP NO. 59/2021

BETWEEN:

ATTORNEY GENERAL

AND

PETER SINKAMBA



APPELLANT

RESPONDENT

Coram: Kondolo, Chishimba and Sichinga, JJA

On 22nd February, 2023 and 24th April, 2023

*For the Appellant: Mr. P. Ndovi, Principle State Advocate and Ms. N. Ntazi,
Senior State Advocate of The Attorney-General's
Chambers*

For the Respondent: Mr. C. Tafeni of Messrs Suba Tafeni and Associates

JUDGMENT

Sichinga JA delivered the judgment of the Court.

Cases referred to:

1. *Zambia Revenue Authority v Jayesh Shah (2001) ZR*
2. *Attorney-General, Development Bank of Zambia v Gershom Moses Burton Mumba (2006) ZR 77*
3. *Mumba v Lungu SCZ Judgment No. 55 of 2014*

Legislation referred to:

1. *The State Proceedings Act, Chapter 71 of the Laws of Zambia*
2. *The Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia*
3. *Mines and Minerals (Environmental Protection Fund) Regulations Statutory Instrument No. 102 of 1998*
4. *Public Finance Act No. 1 of 2018*

1.0 Introduction

1.1 This is an appeal by the Attorney General against the High Court's Judgment on Assessment delivered by the Acting Registrar, Honourable Yvonne Nalomba on 1st December, 2020 in which she awarded 13 percent interest rate on the dollar amount awarded to the Respondent in the High Court's judgment dated 27th November, 2017.

2.0 Background

2.1 On 27th November, 2017, the High Court (Lady Justice Makubalo) delivered judgment in favour of the respondent and awarded him the sum of \$325,560.00 in consideration of Environment Protection Fund audits carried out by the

respondent on Lafarge Cement PLC, on a consultancy executed for the Government in 2008. She held that the judgment debt must be paid with interest at the current bank lending rate from 16th February, 2009 to the date of judgment, and thereafter at six per cent until final settlement.

2.2 Following the lower court's decision the parties attempted to find an acceptable rate of interest. The appellant came up with his own computations through the Secretary to the Treasury and computed interest at 25.53% which was rejected by the respondent. The respondent then engaged three experts from the Copperbelt University School of Business. They computed the interest in kwacha with interest at 33% per annum. The parties failed to agree on the rate of interest to calculate what was owing to the respondent. The respondent then applied for assessment of the rate of interest to be paid on the judgment sum.

3.0 The decision of the lower court

3.1 In the decision subject of this appeal, the learned Acting Registrar found as a fact that the High Court ordered that

interest on the amount due to the respondent be at the current bank lending rate from 16th February, 2009 to the date of Judgment and thereafter at 6% till the debt is paid. She found that the amount awarded to the respondent was a sum in United States Dollars. She rejected the interest rates used by the Secretary to the Treasury and the Copperbelt University experts as the same were based on a kwacha debt and found to be too high. She applied the lowest lending interest rate on the market at 13% from 16th February, 2009 to 27th November, 2017.

4.0 The appeal

4.1 Dissatisfied the decision of the lower court, the Attorney-General launched his sole ground of appeal as follows:

- That the court below erred in fact and law by awarding the respondent high interest at 13 percent on a foreign currency (Dollar) denominated amount which is way in excess of the prevailing rates awarded by the courts in Zambia.

5.0 The appellant's submissions

- 5.1 In support of the sole ground of appeal, Mr. Ndovi, the learned Principal State Advocate, stated that the State was aggrieved by the rate of interest of 13% as it was higher than what the learned judge should have granted. He placed reliance on **section 20 of the State Proceedings Act¹** to the effect that interest on payments from the general revenue of the republic should not exceed 6%. He submitted that the learned Acting Registrar did not address this. He argued that in the case of **Zambia Revenue Authority v Jayesh Shah¹** payments were made by Zambia Revenue Authority as an entity and not from the general revenue of the republic.
- 5.2 The learned Principal State Advocate cited the case of **Attorney-General, Development Bank of Zambia v Gershom Moses Burton Mumba²** in which the Supreme Court held that interest on foreign currency is generally low and awarded interest at 3%.
- 5.3 Mr. Ndovi cited **section 4 of the Law Reform (Miscellaneous Provisions) Act²** and submitted that it grants power to a court to award interest in accordance with the facts.

5.4 The learned Principal State Advocate agreed with the learned Acting Registrar that the interest rates used by the Secretary to the Treasury were high and not in line with the guidance of the Supreme Court. He however, contended that the lower court departed from the decisions of the Supreme Court by awarding interest at 13% and not within the range of 3% to 10%.

5.5 In conclusion, counsel reiterated the submission that the court below erred in fact and law by awarding the respondent interest at 13% on a dollar denominated amount which is in excess of the prevailing rates awarded in this jurisdiction. He urged us to allow the appeal and award an interest rate not exceeding 10%.

6.0 The respondent's submissions

6.1 The respondent filed in his heads of argument on 6th September, 2021. In his oral submissions, Mr. Tafeni, learned counsel for the respondent contended that the **State Proceedings Act** was inapplicable *in casu* because the funds ordered to be paid were in the Environmental Protection Fund,

administered by the Director of Mine Safety. He argued that the funds were not coming from the general revenues of the republic, but were in fact monies contributed to by mining companies.

- 6.2 He submitted that **Regulation 7.3 of the Mines and Minerals (Environmental Protection Fund) Regulations³** empowers the Director of Mines to use the funds to address mining liabilities and insulate public funds from such liabilities.
- 6.3 Regarding the substance of the appeal on the rate of interest on the dollar denominated award, counsel expressed surprise that the State had appealed on the rate of interest because in its submissions during assessment, the State pointed the Registrar to the rate of 13%. Reliance was placed on the summary of the State's submissions as contained in the impugned Judgment at page 15 of the record of appeal.
- 6.4 It was submitted that the recommendations of the experts were not at variance with **section 4 of the Law Reform (Miscellaneous Provisions) Act** which gives the court discretion to depart from the rate of interest contained in other

provisions. Mr. Tafeni argued that the State was attempting to pluck the interest rate of 11% from the sky without any basis. It was argued that in her judgment of 27th November, 2017, Makubalo J ordered that the interest be at the current bank lending rate of which bank lending rates within the jurisdiction are guided by the Bank of Zambia.

6.5 Mr. Tafeni argued that the Registrar could not alter a judgment passed by the court. Therefore, in reference to the appeal, the Registrar could not order an interest rate different from that which was ordered in the judgment of 27th November, 2017. We were urged to award interest at the current bank lending rate as ordered by the learned Judge as her judgment was never challenged.

6.6 It was submitted that the Supreme Court's dictum in the case of ***Attorney-General, Development Bank of Zambia v Gershom Moses Burton Mumba*** that "*interest on foreign currency is generally low*" was not mandatory in view of the terminology used "*generally*" and therefore the discretion of the court is paramount. It was submitted that the Registrar

ought to have determined what the current lending rate was and not award her own rate.

6.7 It was submitted that in the case of **Zambia Revenue Authority v Jayesh Shah** the court arrived at the rate of 10% per annum in the absence of a prior agreement by the parties, by meeting them halfway. That the appellant had proposed a rate of 2.5% to 3.1% and the respondent had proposed 12%, 18% and 21%, and the court adjudged and ordered that the interest would be at the current lending rate.

6.8 The respondent's submissions ended on this note.

7.0 The Appellant's submissions in reply

7.1 In reply, Mr. Ndovi contended that the **Mines and Minerals (Environmental Protection Fund) Regulations** empower the Director of Mines to operate the Environment Fund. That the regulations do not state that the funds are not from the revenues of the republic. Counsel repeated his argument that this Court should not be swayed by the expert's report because they were not aware that interest on a dollar debt is

low. He urged us to quash the judgment of the lower court and award interest at 6%.

8.0 The consideration and decision of the Court

8.1 We have carefully considered the sole ground of appeal together with the record and the opposing submissions by counsel for the parties.

8.2 At the hearing, the respondent argued the cross appeal as part of the opposition to the appeal as the issue is the same on the rate of interest. We shall therefore consider the cross appeal as if it were submissions in opposition.

8.3 The gist of the appellant's argument is that the rate of interest applied by the learned Acting Registrar on a dollar rate was high.

8.4 Mr. Ndovi relied on statutory provisions on the prescription of the rate of interest. **Section 20 of the State Proceedings Act** provides as follows:

“20. The Minister responsible for finance may allow and cause to be paid out of the general revenues of the Republic to any person entitled by a judgment under this Act to any money or costs,

interest thereon at a rate not exceeding six per centum from the date of the judgment until the money or costs are paid.”

8.5 It is clear from the wording of the above provision that the rate of interest for a judgment debt pursuant to the **State Proceedings Act** shall not exceed the rate of 6%. Mr. Tafeni argued that the monies subject of this judgment were not from the general revenues of the Republic but were collected from mining companies and only administered by the Director of Mines.

8.6 According to the **Public Finance Act**⁴ the terms:

“General revenues” includes income accruing to the Republic through taxes, fees, fines, levies, charges, sale of Government property and shares, loans, donations and grants raised from within or outside Zambia due to the Republic.

“Public funds” means funds received electronically or in any other form in person, through the bank or any other financial institution or on behalf of the Central or local Government by an office holder’s employment, and includes public monies.

“Public monies” means money received by an office holder electronically or in any other form in the course of the office holder’s employment or any other person directly or indirectly for the purpose of the Central or local Government, and includes all stores, stamps, negotiable instruments, bonds, debentures, investments, donations and other securities raised by or received by or on behalf of, or for the benefit of the Republic.”

8.7 We need not review the functions of the Director of Mines. However, suffice it to say that it is not in dispute that the office of the Director of Mines is a public one under the Central Government and the funds he administers under the Environmental Protection Fund are for the benefit of the Republic. The monies received in the fund are therefore public funds.

8.8 Mr. Tafeni raised the point that the lower court’s judgment delivered by Mukabalo J on 27th November, 2017 could not be altered as the appellant did not appeal against it. In the case of ***Mumba v Lungu***³ where the Supreme Court held that:

“This Court will however affirm or overrule a trial court on

any valid legal point presented by the record regardless of whether that point was considered or even rejected.”

8.9 The question we pose here is whether the lower court could award interest on the judgment sum at the current bank lending rate to run from date of writ to date of Judgment and thereafter at six percent until final settlement.

8.10 We take the view that the lower court's award of interest at the current bank lending rate cannot be sustained in light of the provisions of the ***State Proceedings Act*** as it is not only non-existent to judgment debts pursuant to the *Act*, but would equally be unconscionable. We come to the inescapable conclusion that there was an error on the part of the lower court to grant interest at the current bank lending rate.

8.11 We therefore set aside that portion of the award on grounds that it has no basis at law. In its place, we award interest on the principal judgment debt at six percent (6%) per annum from the date of writ to the date of final settlement pursuant to the ***State Proceedings Act***.

9.0 Conclusion

9.1 For the reasons given, we conclude that there is merit in the sole ground of appeal, and it is therefore allowed.

9.2 We order each party to bear own costs.



M.M. Kondolo, SC
COURT OF APPEAL JUDGE



F.M. Chishimba
COURT OF APPEAL JUDGE



D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE