IN THE COURT OF APPEAL OF ZAMBIA **APPEAL No. 151/2022**
HOLDEN AT KABWE
(Civil Jurisdiction)

BETWEEN:

INNOCENT KAHYATA **APPELLANT**

AND

ZESCO LIMITED **RESPONDENT**

CORAM: ***Chashi, Sichinga, Sharpe-Phiri, JJA***
on 22nd May and 19th June 2024

For the Appellant: *No Appearance*

For the Respondent: *Mrs. J Kunda, In-house legal counsel*

JUDGMENT

Sichinga JA, delivered the Judgment of the Court.

Cases referred to:

1. *Konkola Copper Mines PLC v Mitchell Drilling International Ltd and Mitchell Drilling Ltd (2015) Z.R. vol. 2. 2003*
2. *Spancrete Zambia Ltd v Zesco Limited CAZ Appeal 53 of 2018*
3. *Nkhata and Others v Attorney General (1966) Z.R 124*
4. *Kapata v The People SCZ Judgment 9 of 1984*
5. *Drake and Gorham (Zambia) Limited v Energy Project Limited (1980) ZR 58*
6. *Holmes Limited v Buildwell Construction Company Limited (1973) ZR 97*
7. *Gastove Kapata v. The People (1984) ZR 105*
8. *Dennis v A.J. White & Co. [1916] 2 KB 1*
9. *Faustin Kabwe and Aaron Chungu v The People (2011) ZR Vol. 2*
10. *Abel Banda v The People (1986) ZR 105*
11. *G.F. Construction [1976] Limited v Rudnap (Z) Limited and Another (1999) ZR 134*
12. *The Attorney General v John Tembo SCZ Judgment No. 1 of 2012*
13. *Hydraulic Engineering Co. Ltd v McHaffie (1878) 4 QBD 670*

14. *Verelst's Administratrix v Motor Union Insurance Co Ltd [1925] 2 KB 137*
15. *Hoare v Silverlock (1848) 12 QB 628*

Other works referred to:

1. *Black's Law Dictionary, Bryan A. Garner, 9th Edition, A. Thomson Reuters*
2. *Halsbury's Laws of England, Vol. 9(1), 5th Edition*
3. *Cheshire and Fifoot's Law of Contract, M.P. Furmston (Ed), 10th Edition, Butterworths, 1981*

1.0 Introduction

1.1 The issue in this appeal is whether the respondent, ZESCO Limited, a power utility company, connected electricity power supply to the appellant's premises (the plaintiff in the court below) within a reasonable timeframe. Sinyangwe J, in his judgment dated 10th May 2022, upheld the Subordinate Court's decision that the period of one year and two weeks taken by the respondent to supply electricity to the appellant was reasonable.

1.2 The learned High Court Judge also upheld the Subordinate Court's decision that there was no breach of contract. Further, the High Court Judge took judicial notice of the fact that the respondent is the sole supplier of power to all individuals and companies in Zambia and it is surely overwhelmed.

2.0 Background

2.1 In the introductory part of this judgment, we shall refer to the parties by their designations in the Subordinate Court and High Court. The plaintiff, Innocent Kahyata (appellant now)

was at all material times the owner of a property, House No. H24 ZECCO, Livingstone. On 24th August 2019, he executed a contract with ZESCO Limited, the defendant (now respondent), for the supply of electricity power to his premises.

2.2 This matter was initially commenced, by the plaintiff, in the Subordinate Court on 10th February 2021. Before that Court, the plaintiff's allegations were that he had paid a connection fee to the defendant, for connection of power at his house. That, it was a term of the agreement between him and the defendant (ZESCO) that electricity would be connected within six months from the date of payment and execution of the agreement. However, the power was only connected at his premises over one year later.

2.3 The plaintiff averred, before the Subordinate Court, that he did demand both verbally and in writing to have the power connected, but to no avail, until he engaged his advocates to pursue the defendant for connection. That, during the period of non-connection of power, the rentals he earned for the premises were K100.00 instead of K600.00, which he ought to have received, but for lack of power. He alleged his tenants eventually vacated his house due to lack of electricity. Therefore, the plaintiff alleged he lost business in terms of rentals at K6,000.00 per annum. He further alleged that he suffered special damage owing to the defendant's breach of agreement.

2.4 The plaintiff further alleged that he opted to take legal action after ZESCO's employee, one Mr. Mweemba, informed him that his premises would be connected with power once it had supplied power to clients that paid in 2020.

2.5 Following ZESCO's alleged failure to supply electricity within the said six months, the plaintiff engaged ZESCO in writing, the last of which was on 2nd September 2020. He subsequently commenced an action in the Subordinate Court seeking the following reliefs:

1. *General damages in the sum of K25,000.00;*
2. *Damages for breach of contract in the sum of K30,000.00;*
3. *Special damages in the sum of K6,000.00*
4. *Interest; and*
5. *Costs.*

2.6 The plaintiff testified before the Subordinate Court that he fulfilled his obligation of the contract by paying the sum of K1,710.00 to the defendant in consideration of electricity supply within a period of six months.

2.7 ZESCO's case before the Subordinate Court was that once a customer applies for power connection, a Planning Engineer visits the site to satisfy himself as to the standard of the wiring works, and if the engineer is satisfied, a quotation is processed and the customer is notified accordingly. That, by that quotation, the customer is given three months within which to pay for the quotation and ZESCO will also begin preparing material for the job; and once that is achieved, the job will be executed at the site. Further, that the six months' period

under the conditions is for the customer to ensure that the premises are ready for connection.

3.0 The decision of the Subordinate Court

3.1 On 29th July 2021, the Subordinate Court delivered its judgment. The Honourable Magistrate, Willie Banda, established that the dispute between the parties was the interpretation of *Regulation 14 of ZESCO's conditions of supply*.

3.2 The learned Magistrate found that ZESCO took over twelve months to connect power to the plaintiff's house. He accepted ZESCO's explanation that it took long to connect as it had to source the material required for the connection to be undertaken. He further found as a fact that the parties had never entered into a specific agreement as to the time within which it would take to connect power to the plaintiff's house. On a balance of probabilities, the learned Magistrate found that the plaintiff had not discharged his burden of proof. He therefore, dismissed the plaintiff's claims.

4.0 Decision of the lower court on appeal

4.1 Dissatisfied with the Subordinate Court's decision, the plaintiff appealed to the High Court on two grounds as follows:

1. *The learned trial magistrate misdirected himself both in law and fact when he held one year and some weeks was reasonable time for the defendant to perform the contract of planting one pole and putting a service cable to House No. H24 Zesco Compound in Livingstone;*

2. *The learned trial magistrate erred when he failed to consider that six months was reasonable to plant a pole and service cable as conceded by the defendant.*

4.2 ZESCO responding to the first ground of appeal, submitted that the plaintiff misapprehended the import of the third paragraph of the quotation for electricity supply, which it argued, placed an obligation on the customer to prepare his property in readiness for connection within six months from the customer's payment, and did not communicate the time or date ZESCO would connect the power. That, therefore, the *Regulation* was applicable *in casu*. Further, ZESCO argued that the Subordinate Court considered and accepted the undisputed evidence that it was organising materials needed to connect the plaintiff and that took more than a year. That the learned Magistrate found that a period of one year and a month was reasonable time within which any other customer could be connected.

4.3 Sinyangwe J consolidated the two grounds of appeal into one issue for determination, being, *'whether the contract alleged to have been breached by the respondent was time bound and whether the one year and some weeks it took the respondent to perform the contract was unreasonable.'* The learned Judge highlighted that the essence of the plaintiff's arguments before him was that he had been given six months within which to prepare his premises for power connection, which he complied with, while ZESCO took twelve months and some weeks to

perform its part of the agreement. That, therefore, ZESCO's performance was within reasonable time.

4.4 On 10th May 2022, Sinyangwe J delivered judgment in favour of ZESCO. He held that there was no breach of agreement between the plaintiff and ZESCO. That he did not wish to impugn the learned Magistrate in arriving at the decision that one year and two weeks was within reasonable time of connecting power. Further, the learned Judge took judicial notice that ZESCO is the sole supplier of power to all individuals and companies in Zambia, and that it was clearly overwhelmed.

4.5 The plaintiff had also argued that it gave notice to ZESCO. However, the learned Judge dismissed this argument as misplaced because notice was only applicable in a contract where parties had expressly made time for payment or performance, of the essence, and upon lapse of time, the innocent party could give notice.

4.6 The learned Judge also examined *Regulation 14* of the parties' agreement and found that from the wording of said *Regulation*, he could deduce that it was ZESCO's general rule not to bind itself to a time line when supply would be made available to its clients for reasons known to itself, otherwise, it endeavored to supply power within reasonable time.

4.7 In his judgment delivered on 10th May 2022, Sinyangwe J held that there had been no breach on the part of ZESCO in the

performance of its mandate. He thus, dismissed the plaintiff's entire appeal with costs.

5.0 The appeal to this Court

5.1 Dissatisfied with the decision of the lower court, the plaintiff escalated his appeal to this Court raising the following grounds of appeal:

1. **The learned appellate Judge erred in law and facts on whether six or eight months were within reasonable time for the respondent to perform its obligation under the contract and invoking Regulation 14 of the respondent's general rule not to bind itself to a time line when supply may be made available to its clients for reasons known to themselves otherwise they endeavored to supply within a reasonable time;**

2. **The learned appellate Judge erred in law when he took judicial notice which is biased only to the respondent without considering the appellant's position; and**

3. **The learned appellate Judge erred in fact when he never referred to the court's record of proceedings on notice issued by the appellant and the explanation by the respondent during examination-in-chief and cross-examination on reasonable time.**

6.0 Appellants' arguments

6.1 The appellant filed his heads of argument on 13th July 2022, in which grounds one and three are argued together, and ground two is argued separately. He subsequently filed a

notice of non-appearance on 17th May 2024 to dispense with his and his counsel's presence. We have duly considered his heads of argument.

6.2 With respect to grounds one and three, it was submitted that it was not in dispute that the appellant and the respondent entered into a contract which was to be executed within six or eight months as it was a reasonable time. In support of this submission, we were referred to page 63 of the record of appeal, where DW1, John Nkhoma, the respondent's witness, agreed in cross-examination that a period of six months or eight months was reasonable time to connect power to the appellant.

6.3 We were also referred to page 42 of the record of appeal, exhibiting the quotation for electricity supply from the respondent to the appellant. It was argued that in the said quotation, an obligation was placed on the appellant to be ready for connection of power at his House No. H24 Zesco Compound in Livingstone to which the appellant paid on 12th November 2019, as per receipt issued to him.

6.4 Counsel argued that *Regulation 14* at page 45 of the record of appeal provided for reasonable time to connect power to the appellant or any client. It was contended that the court below failed to analyse this evidence on record to ascertain what constitutes reasonable time as admitted by the respondent during cross-examination. Further, that the appellant gave

notice to the respondent, which the appellate court failed to refer to it. Page 40 of the record of appeal refers.

6.5 To reinforce the above submissions, we were referred to the case of ***Konkola Copper Mines PLC v Mitchell Drilling International Ltd and Mitchell Drilling Ltd***[1] where the Supreme Court held as follows:

> ***"1. Where parties have in an agreement expressly made time for payment of the essence;***
>
> ***2. Where the circumstances of the contract or nature of time subject matter indicate that the fixed time must be exactly complied with;***
>
> ***3. Where the innocent party issues notice making time of the essence."***

6.6 Counsel submitted that where there is no time fixed for performance of a contract then the law presumes that the contract be executed within reasonable time. Reliance was further placed on the case of ***Spancrete Zambia Ltd v Zesco Limited***[2] where we held that:

> ***"It is trite that where no time for performance is fixed by the contract, the law implies an undertaking by both parties to perform the contract within reasonable time."***

6.7 It was advanced that the respondent having agreed that six or eight months was a reasonable time to connect power to the appellant, there was a breach of contract not to connect power to the appellant after eight months. That the law of contract on reasonable time takes the circumstances of each case. That *in casu*, the respondent cannot be heard to say that there are

many reasonable times from six, seven, eight up to twelve months and two weeks. Counsel argued that there was no explanation to persuade this Court, why the respondent failed to do its obligation within six or eight months apart from its procurement process, to which the respondent agreed that could be done within six or eight months.

6.8 Counsel argued that *Regulation 14* in the contract form did not apply in the circumstances of this case as the respondent admitted that six or eight months was a reasonable time to connect power to the appellant. That it took the appellant to engage the respondent's counsel to connect power to the appellant's premises on 1st December 2020. Page 57 of the record of appeal refers.

6.9 Counsel submitted that the court below erred in the assessment of the evidence, which was at its disposal as espoused above. Reliance for this submission was placed on the case of ***Nkhata and Others v The Attorney-General***[3] where it was held that an appellate court can reverse findings of a trial court in the following circumstances:

> "***(a) The Judge erred in accepting evidence or;***
>
> ***(b) The Judge erred in assessing and evaluating the evidence taking into account some matter which he could have ignored or failing to take into account something which he should have considered, or;***
>
> ***(c) The Judge did not take proper advantage of having seen and heard the witnesses;***

(d) External evidence demonstrated that the Judge erred in assessing manner and demeanor of witnesses."

6.10 We were urged to reverse the findings of the court below due to its failure to take into account the evidence on record.

6.11 On ground two, it was submitted that whilst it is a matter of general knowledge that the respondent is the only power supply company, the court below ought to have equally noted that the respondent is and was receiving money from not only the appellant but other clients who are also suffering and poor, and who require to receive a social service from the respondent by acting timely within the reasonable time of six months or eight months. Further, that the respondent ought to offer a proper explanation on the delay to connect power. That the learned Judge failed to balance the judicial notice doctrine which requires to be applied within reasonable and proper limits on the appellant's position as indicated above. To reinforce this submission, reliance was placed on the case of ***Kapata v The People***[4] where the Supreme Court held on judicial notice as follows:

> ***"The extent to which a Judge may use his personal knowledge of general matter has not been clearly defined. As Cross on Evidence, 4th edition puts it at page 141, within reasonable and proper limits a Judge may make use of his personal knowledge of general matters... no formula has yet been evolved for describing those limits."***

6.12 That in the same case, judicial notice was defined as:

"Judicial Notice is the cognizance taken by the Court itself of certain matters which are so notorious or clearly so established that the need to adduce evidence of their existence is deemed unnecessary... it is important, however, that in taking judicial notice of (notorious) facts, Courts should proceed with caution. Thus if there is room for doubts as to whether a fact is truly notorious, judicial notice should not be taken of it."

6.13 On this submission, we were urged to allow ground two of the appeal.

7.0 Respondent's arguments

7.1 At the hearing, Mrs. Kunda, learned counsel for the respondent, relied on the respondent's heads of argument filed on 15th August 2022. The respondent argued grounds one and three together, while ground two was argued separately.

7.2 With respect to grounds one and three, counsel submitted that in order to construe or determine the meaning of any contract, the words used must be relied upon and no terms should be treated as superfluous or useless or unnecessary. In this regard, counsel relied on the case of ***Drake and Gorham (Zambia) Limited v Energy Project Limited***[5], and implored this Court to consider the wording of the agreement between the parties in this matter. Counsel further argued that *condition 14 of the ZESCO Conditions of Supply* supports the argument that the respondent did not commit to supplying

power in six months or a specific time frame. Counsel pointed out that the said *condition 14* had been deliberately not included in the record of appeal. However, counsel reproduced it in arguments as follows:

> ***"The payment of a Capital Contribution and connection fee does not bind ZESCO Limited to make supply available by a given date, but every effort shall be made to provide the required supply within reasonable time. However, in cases where supply must be made by a particular date, specific agreements must be entered into with ZESCO Limited."***

7.3 Submitting in respect of *Regulation 14*, counsel contended that the respondent agreed with the High Court that the appellant was under no obligation to make supply available in six months or by a particular date, save for instances where a specific agreement is entered into. That, at no point on the court record, did the appellant claim or adduce evidence to show such specific agreement.

7.4 It was submitted that the appellant agreed to *the ZESCO Conditions of Supply* and further, that, at the hearing he confirmed the provisions of *Regulation 14* of the conditions, and agreed to be bound by the declaration in *the Customer Application Form* at page 45 of the record of appeal, couched as follows:

> ***"I/WE HEREBY AGREE TO OBSERVE AND BE BOUND BY THE CONDITIONS OF ZESCO LIMITED SEPARATELY ISSUED TO ME/US AND IN THE GOVERNING LEGISLATION AND BY THE***

REGULATIONS AND TARIFFS IN FORCE AND ANY AMENDMENTS THERETO IN ALL MATTERS AFFECTING THE SUPPLY OF ELECTRICITY AND ANY ELECTRICAL INSTALLATION ON THE PREMISES OCCUPIED BY ME/US."

7.5 Citing the case of ***Holmes Limited v Buildwell Construction Company Limited***[6], counsel submitted that where parties have embodied the terms of their agreement in a written document, extrinsic evidence is not generally admissible to add, vary, subtract from or contradict the terms of the written contract. With this, it was argued that the lower court was on firm ground when it held that there was no breach of contract, on the part of the respondent.

7.6 With respect to the appellant's arguments on reasonable time, counsel submitted that reasonable time refers to the amount of time that is fairly required to do whatever is required to be done, conveniently under the permitted circumstances. That, in contracts, reasonable time refers to the time needed to do what a contract requires to be done, based on subjective circumstances. To highlight the subjective circumstances *in casu*, counsel stated that the evidence on the record is that the appellant had to carry out the scope of work outlined in the quotation and the works were not standard in nature. That DW1 had explained that after payment, the respondent took the following steps: finding additional money to cover the true costs of the connection as the appellant only paid K1,710.12, while the total cost of the works was K14,298.63; going

through the legal procurement process to procure the materials which were delayed by COVID 19; and connecting customers who had paid before the appellant, and finally connecting the appellant. Further, that workers were working in shifts during the COVID 19 pandemic. That, under these circumstances, the period of time taken to connect the appellant was reasonable.

7.7 It was also advanced that a review of the contract reveals that there was neither an express term stating that time was of the essence, nor was there any clause in the contract stipulating that the time frame for connection of the appellant's premises must be exactly complied with.

7.8 On ground three, on the issue of notice, it was submitted that the record reveals that there was no notification from the appellant citing undue delay to connect power to his premises within a reasonable time, failing which the contract would be regarded as at an end. That the communication on the record was limited to merely asking for connection and complaining that it had taken long.

7.9 With respect to ground two, counsel cited a number of cases, highlighting several examples of matters that have been taken judicial notice of by courts. Matters such as a Judge taking judicial notice of a road as a public road (***Gastove Kapata v The People***[7]); that the streets of London are full of traffic (***Dennis v A.J. White & Co***[8]); that nowadays it is possible to fly to South Africa as early as 07:00 hours in the morning and

return the same day in the evening at 19:00 hours (***Faustin Kabwe and Aaron Chungu v The People***[9]); that pesticides are harmful to human health (***Abel Banda v The People***[10]); or that a contract of sale of land does not transfer ownership of land to the buyer, unless a deed of assignment is executed by the parties and lodged with the Registrar of Lands and Deeds, together with the necessary licences and consents ***(G.F. Construction [1976] Limited v Rudnap (Z) Limited and Another***[11]). Most notable was the case of ***Attorney General v John Tembo***[12], which counsel relied on in explaining the reasoning behind the doctrine of judicial notice. Counsel thus, submitted that the doctrine of judicial notice is never used to balance a situation between parties, but is a tool that is used by the courts to judicially notice something of fact which is notorious or of such common knowledge that it requires no proof, without having recourse to any extraneous source of information, and treat it as established, notwithstanding that it has not been established by evidence. To this end, it was submitted that the lower Court was on firm ground in taking notice that the respondent is the only company that supplies power to houses in Zambia and is therefore, overwhelmed.

7.10 The respondent, thus, implored this Court to dismiss the appeal for want of merit.

8.0 The decision of the Court on appeal

8.1 We have carefully considered the record of appeal as well as the submissions of counsel on the grounds of appeal.

8.2 The appeal revolves around whether the time taken by ZESCO Limited to connect electricity power to the appellant's premises was reasonable, considering the contractual obligations and the circumstances of the case.

8.3 In the first and third grounds of appeal, the appellant alleges that there was a breach of contract as ZESCO failed to connect power within the agreed-upon timeframe of six to eight months. The appellant argued that ZESCO's admission during cross-examination regarding the reasonable time for connection supports their claim. Additionally, he contended that *Regulation 14 of the ZESCO condition of supply*, which provides for a reasonable time to connect power, should apply. The same was not included as part of the record of appeal by the appellant for the Court's analysis, yet it is at the centre of the contention in grounds one and three.

8.4 We have perused the judgment of the Subordinate Court and observed that the learned Magistrate had reproduced the contentious *Regulation 14 verbatim* to counsel as quoted above in paragraph 7.2. A further perusal of the High Court judgment also acknowledges the wording of *Regulation 14* as quoted in the Subordinate Court judgment. Therefore, there being no objection raised by the appellant, anywhere on the

record, that *Regulation 14* was not couched in these particular words, we shall proceed on the assumption that, indeed, that is how *Regulation 14* was phrased.

8.5 The learned appellate Judge reproduced the said *Regulation 14 of the ZESCO condition of supply* at page J3 of his judgment (page 8 of the record of appeal). It states as follows:

> ***"The payment of a Capital contribution and connection fee does not bind ZESCO LIMITED to make supply available by a given date, but every effort shall be made to provide the required supply within a reasonable time. However, in cases where supply must be made by a particular date, specific agreements must be entered into with ZESCO LIMITED."***

8.6 The learned appellate Judge interpreting the above clause found it to have effect *"where parties have in agreement expressly made time for payment or performance of the essence."* In support of this position the learned appellate Judge relied on the case of ***Konkola Copper Mines PLC v Mitchell Drilling International Ltd and Another*** *supra.* In that case the appellant and 1st respondent executed a service agreement for the carrying out of drilling at the appellant's mine. The 1st respondent sub-contracted the 2nd respondent. The contract provided for monthly payments. The appellant failed to pay invoices and the respondents suspended the work. After some negotiations, the parties reduced their agreement in writing that the respondents would resume work and the appellant would settle the two invoices, which it did.

8.7 It was agreed that in the event that the appellant failed to settle the invoices within 45 days from the date due, the respondents were to give notice to remedy the breach within 15 days, and in the event of the appellant failing to remedy the breach, the respondent had the right to terminate the agreement by giving 15 days' notice. Thus, all settlements due to the respondents were to be paid before settlement of all other dues. The court below awarded the respondents the claimed amount and damages to be assessed.

8.8 On appeal, the Supreme Court upheld the lower court and held *inter alia* that:

> ***"The appellant was in breach of contract resulting in the respondent's failure to meet the completion schedule and a party cannot benefit by taking advantage of the existence of the state of things he himself produced."***

8.9 The above case is distinguishable from the present case. In the ***Konkola Copper Mines case,*** the parties executed an agreement specially allocating timeframes for performance of actions and for rectifying the breach. That is not the position *in casu* where there was no specific agreement entered into on a timeframe by which electricity would be supplied to the appellant. The appellant did not point to the specified timeframe of six to eight months in the *ZESCO conditions of supply* which constituted a breach of contract.

8.10 Under cross-examination, DW1 said that it took the respondent almost a year and a month to source the materials required for the works. He said there was no specific time agreed to connect power. When asked question on a period of six months being a reasonable period to connect power, DW1 answered as follows:

> ***"Yes, the customer's premises must be ready for connection within six months of the customer making his capital contribution.***
>
> ***Yes, six months is a reasonable time for us to connect power.***
>
> ***No, we did not connect power to the plaintiff's house within six months of him paying his capital contribution."***

8.11 In re-examination, DW1 clarified his responses in cross-examination as follows:

> ***"The procurement process in our system takes between 6 months to 8 months and it is not only for one customer but many others.***
>
> ***Once we have made these procurements, we can connect power even for those who paid just 6 months before. For me, the said period of 6 months or 8 months is reasonable therefore."***

8.12 We have examined the respondent's testimony at page 63 of the record of appeal highlighted by the appellant. We are of the view that the witness merely stated what would be the case in an ideal situation. We do not think that by confirming that connection of power could be done within six to eight month,

the respondent's witness was admitting that the respondent committed to connect the appellant's house within six to eight months.

8.13 The witness' response during cross-examination of the reasonable timeframe to connect electricity was not linked to a specified a timeframe of six to eight months as contained in the *ZESCO conditions of supply*, but based on an objective standard once materials had been procured.

8.14 The appellant referred us to *Regulation 14* at page 45 of the record of appeal. In fact, exhibited thereon is a copy of *the Customer Application Form* signed by the appellant right below an acknowledgement by him that he agreed to observe and be bound by the conditions of ZESCO, separately issued to him. This is typed in block letters and has been reproduced earlier in this judgment under paragraph 7.4.

8.15 Regarding the alleged obligation that the respondent placed on the appellant in the quotation at page 42 of the record of appeal, the appellant asserts that, it too, is proof that the respondent should have connected power at his premises within a reasonable time or, as argued, within six to eight months. This line of argument is flawed because the appellant has neglected to appreciate the quotation as a whole. Paragraph two of the quotation at page 42 reads as follows:

> ***"Please note that you will be required to pay a non-refundable capital contribution of K1,710.12 before any works to provide***

supply to your premises can commence. This amount should be paid within a period of 90 (ninety) days from the date of this letter, after which it shall be subject to re-costing. The payment of said amount does not confer on you any ownership or other proprietary interest in any equipment, cable or apparatus so installed. The detailed scope of works is herewith attached."

8.16 Other evidence at page 41 of the record of appeal, bears a copy of the receipt that we are satisfied with, as proof, that the appellant had, indeed, paid the capital contribution or connection fee.

8.17 We do, however, wish to highlight for purposes of full appreciation of the spirit of the quotation, the rest of the paragraphs in the quotation, which are couched as follows:

> ***"Kindly note that our responsibility ends at the metering point and you are required to provide a suitable lockable meter box, complete with lightning arresters and circuit breakers to accommodate the Corporation's metering equipment. <u>In addition, you must ensure that your premises are ready for connection within a period of 6 (six) months from the date of payment, failing which ZESCO reserves the right to revise the quotation as necessary.</u>***
>
> ***Before final connection of supply is carried out, <u>a supply contract must be entered into with us by having the contract form herewith signed and completed in the name the account will operate</u>. After supply is connected and your contract is activated, you will be required to pay a refundable security deposit applicable to your tariff classification.***

We look forward to receiving your capital contribution after which we shall finalise our arrangements and provide the supply <u>at the earliest possible time, subject to our being able to obtain the necessary Way leaves approval and consent for the proposed supply route.</u>

Yours faithfully,
ZESCO Limited" (Emphasis ours)

8.18 Our understanding of the whole electricity supply quotation at page 42 of the record of appeal is firstly, that the appellant was expected to pay a non-refundable capital contribution of K1,710.12 to commence the power connection process and this sum was supposed to be paid within ninety (90) days the quotation being issued. Secondly, the appellant was expected to sign a supply contract form before final connection is carried out. Lastly, the respondent would, once the appellant made the capital contribution or paid the connection fee, make the connection or provide the supply at the earliest possible time, subject to the respondent's ability to obtain the necessary approvals and consents for the proposed supply route.

8.19 A reading of the quotation in its entirety, in our view, cannot be said to be conveying that the respondent was promising or committing to do the supply connection at the appellant's premises within six (6) months. In fact, if any uncertainty is created from the reference to the six (6) months, such uncertainty is settled in the last paragraph that states the

respondent would provide the supply at the earliest possible time, subject to necessary consents and approvals.

8.20 The use of the words *'at the earliest possible time'*, in our view, entails that the agreement did not specify a time by or within which the supply connection was to be performed. This, then, brings us to the question- *'when should a contract be performed where it does not expressly prescribe time for performance?'* In the case of ***Hydraulic Engineering Co Ltd v McHaffie***[13], the English Court of Appeal construed the words *'as soon as possible'* to mean within a reasonable time.

8.21 In another English case, ***Verelst's Administratrix v Motor Union Insurance Co Ltd***[14] where the same words (*'as soon as possible'*) were used in an insurance policy, the words were held to mean, in relation to notice of an accident, as soon as possible having regard to all existing circumstances, including the available means of knowledge of the insured's personal representative as to the existence of the policy and the identity of the insurers.

8.22 The second example, in our view, seems to best illustrate what the final paragraph in the electricity supply quotation at page 42 of the record of appeal intended to mean. We are persuaded by the holding in the ***Verelst's case*** and likewise construe the words *'at the earliest possible time, subject to our being able to obtain the necessary Way leaves approval and consent for the proposed supply route'*, as expressed in the electricity supply quotation to mean that the parties expected the supply

connection to be done within reasonable time. What, then, constitutes 'reasonable time?' one might ask.

8.23 ***Black's Law Dictionary***[1] defines *'reasonable time'* at page 1381 as *"the time needed to do what a contract requires to be done, based on subjective circumstances."*

8.24 The learned authors of ***Halsbury's Laws of England***[2], have commented on the general stipulations as to time, as follows at paragraph 930:

> ***"Where the contract provides that it is to be performed 'as soon as possible' or 'forthwith' or uses similar expressions, the particular stipulation will be construed by reference to what is reasonable in the circumstances. What is a reasonable time in a particular case is a question of fact. Words such as 'immediately' or 'directly' import a more stringent requisition than is ordinarily implied by 'reasonable time'.***
>
> ***In contracts for the sale of goods delivery must be tendered at a reasonable hour; but a stipulation for delivery 'by' a certain date is not met by delivery the next day. In a building sub-contract, where there is no express agreement as to dates, there is an implied term that the work will be begun and completed within a reasonable time."***

8.25 The simple answer to what constitutes *'reasonable time'*, therefore, is that this will depend upon the circumstances surrounding each individual case which are subjective in nature. *In casu*, as was the case in the **Verelst's case**, the circumstances that needed to be considered were, to begin

with, the processes anticipated in the last paragraph of the electricity supply quotation; the procurement process referred to by ZESCO's witness during trial; as well as his testimony that the respondent attends to numerous customers; and the effects of the COVID 19 pandemic on the operations of the respondent.

8.26 Further, even the fact that the lower Court took judicial notice of, that the respondent is the sole electricity supplier in the country and is overwhelmed. All these factors have a role to play in establishing what period could be considered reasonable to effect the connection of supply at the appellant's house.

8.27 We opine that one year and some weeks, since application for connection, is reasonable time in the circumstances of this case. We therefore, cannot fault the learned appellate Judge for the findings he made with respect to a reasonable timeframe.

8.28 On the issue of the notice availed to the respondent, exhibited at page 40 of the record of appeal the appellant alleges that the learned Judge in the lower Court failed to refer to or consider/analyse it. The appellant has thus, tried to advance a line of argument hinged on the case of ***Konkola copper Mines Plc v. Mitchell Drilling International Limited and Mitchell Drilling Limited*** *supra*, reportedly espousing the principle of time being made of essence after an innocent party issues notice to the delaying party.

8.29 On the subject of time being of the essence, the learned authors of ***Cheshire and Fifoot's Law of Contract***[3], state at pages 498 and 499, as follows, on the subject of stipulations as to time:

> ***"Many contracts contain express provision as to the time by which performance is to be completed. In most if not all, others, it would be reasonable to infer that performance was to be within reasonable time. What is the effect of late performance? This obviously presents problems similar to other failures in performance- in some cases a day late will be a disaster; in others, a month's delay will do no harm.***
>
> ***The treatment of the question has not, however, been identical, partly because of differences of terminology and partly because equity has played a much more active role than in relation to other problems of performance and breach. The problem has traditionally been put by asking whether time is of the essence of the contract.***
>
> ***...time is of the essence of the contract if such is the real intention of the parties and an intention to this effect may be expressly stated or may be inferred from the nature of the contract or from its attendant circumstances. By way of summary, it may be said that time is essential firstly, if the parties expressly stipulate in the contract that it shall be so, secondly, if in a case where one party has been guilty of undue delay, he is notified by the other that unless performance is completed within a reasonable time the contract will be regarded as at an end; and lastly, if the nature of the surrounding circumstances or of the subject***

matter makes it imperative that the agreed date should be precisely observed. Under this last head, it has been held that a date fixed for completion is essential if contained in a contract for the sale of property which fluctuates in value with passage of time, such as a public house, business premises, a reversionary interest or shares of a speculative nature liable to considerable fluctuation in value." (Emphasis ours)

8.30 We will now examine the subject notice at page 40 of the record of appeal, and this is how it was couched:

"THE MANAGER
ZESCO LIMITED
LIVINGSTONE

Dear Sir,

<u>RE: RESTORATION OF ELECTRICITY: H24 ZESCO</u>

Refer to the above subject,

I am hereby informing you that on 12/11/19 INNOCENT KAHYATA and ZESCO Limited entered into a contract to restore electricity at my house H24 ZESCO, but up to now nothing has been done. Find attached receipt of payment and quotations for electricity supply.

The contract states that I need to pay a capital contribution within 90 days and within 6 months electricity will be restored failing which ZESCO will revise the quotation.

In the premises, I have visited your offices for many time, on 07/08/20 and on 02/09/20 just promises only, the most painful when Mr. Hamweemba told the security officer that

they are still restoring electricity to those who paid in 2018, for those who paid in 2019 should wait for a date unknown.

Be informed that I have given you 24 hours to restore electricity at my plot, failure to do so action will be taken from the date of receiving this letter.

Yours faithfully,
INNOCENT KAHYATA"

8.31 On the subject of notice making time of the essence, the learned authors of ***Halsbury's Laws of England*** *supra* go on to state, at paragraph 935 as follows:

> ***"In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for performance and stating that, in the event of non-performance within the time so fixed, he intends to treat the contract as broken. The time so fixed must be reasonable having regard to the state of things at the time when the notice is given, and to all the circumstances of the case."***

8.32 From the above, there are clearly elements that need to be satisfied in order for a court to make a finding that a notice has made an initially non-time sensitive contract, one in which time is of the essence. These elements are that there should be undue delay on the part of the defaulting party and the time

now fixed for performance should itself be reasonable. Both of these, while having regard to all the circumstances of the case.

8.33 We have examined the notice of the appellant at page 40 of the record of appeal and find that the same does not satisfy the requirements prescribed by ***Halsbury's Laws of England***. Firstly, it fails on the element of undue delay on the part of the respondent, given our findings earlier herein. Secondly, the notice falls short because, when all circumstances of the case are considered and as it was properly established by the lower Court that the respondent is the sole provider and supplier of power in the whole country, a 24- hour ultimatum is most unreasonable. Finally, the notice is in direct conflict with the spirit of the documents that the appellant accepted and executed when he engaged the respondent, that is, the Application Form, the Quotation for Electricity Supply and the Conditions of ZESCO which include *Regulation 14* referred to in paragraph 8.5.

8.34 This, in our view, is in consonance with the commitment at the bottom of the application form (reproduced under paragraph 7.4 herein) and the last paragraph of the quotation. If the appellant wanted terms that were any different, *Regulation 14* clearly guided that he ought to have made a specific agreement to that end with the respondent. The notice cannot be stretched beyond what *Regulation 14* envisaged as an agreement in the alternative.

8.35 In view of the foregoing, both grounds one and three of the appeal lack merit and accordingly fail.

8.36 Turning to the second ground of appeal, the appellant contends that while it is common knowledge that ZESCO is the sole power supply company, the lower court should have balanced this with the fact that ZESCO serves numerous clients who also require timely service. Counsel argued that the lower court failed to consider this aspect and should have taken a balanced approach.

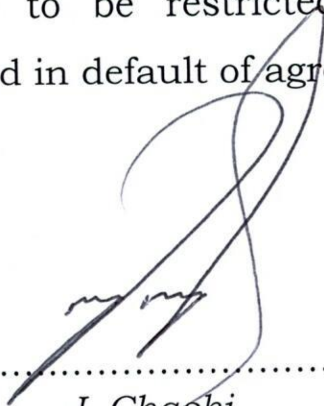
8.37 Both parties correctly highlighted what judicial notice is. The respondent went to great heights in illustrating situations in which our courts and English courts have taken judicial notice of facts considered too notorious to require substantiating evidence. It is trite that courts can take judicial notice of facts when those facts are generally known within the court's jurisdiction or are capable of accurate and ready determination by resorting to sources whose accuracy cannot reasonably be questioned. These facts may be either of the kind that are universally known or are capable of verification from unquestionable sources. In other words, courts can take judicial notice of matters with which men of ordinary intelligence are acquainted. This principle was enunciated in the old English case of ***Hoare v Silverlock***[15].

8.38 In the present case, DW1 gave an explanation for the delay attributable to the procurement process. He further stated

that the delay did not only affect the one customer but many others. The fact that the respondent is the sole supplier of power to all individuals and companies is a well-known fact that could easily be established from any government source. There was therefore no unbalanced evaluation of that fact to merit this Court's intervention in line with the ***Nkhata case.*** Ground two of the appeal is devoid of merit. It is accordingly dismissed.

9.0 Conclusion

9.1 Having considered all the grounds of appeal, we find that they lack merit. The appeal is accordingly dismissed with costs to the respondent, same to be restricted to out of pocket expenses and to be taxed in default of agreement.



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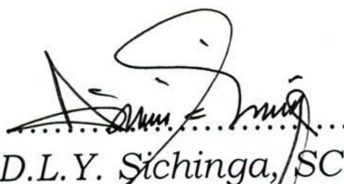
J. Chashi

COURT OF APPEAL JUDGE



....	....
D.L.Y. Sichinga, SC	*N.A. Sharpe-Phiri*
COURT OF APPEAL JUDGE	**COURT OF APPEAL JUDGE**