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

APPEAL NO. 84/2004

B E T W E E N:

INDENI PETROLEUM REFINERY COMPANY LIMITED — APPELLANT

AND

V.G. LIMITED — RESPONDENT

CORAM: LEWANIKA, DCJ., MUMBA, MUSHABATI, JJS
On 7th November, 2006 and 4th September, 2007.

For the Appellant: J.L KABUKA of J.L. Kabuka & Co.
For the Respondent: Mrs. A. PATEL of Abha Patel & Associates

JUDGMENT

LEWANIKA, DCJ delivered the judgment of the Court.

LEGISLATION REFERRED TO:

1. LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, CAP. 74
2. LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1934
3. SUPREME COURT ACT, 1981

AUTHORITIES REFERRED TO:

1. LONDON CHATHAM AND DOVER RAILWAY CO. VS SOUTH EASTERN RAILWAY CO.1893, A.C. 429
2. JEFFORD & ANOTHER VS GEE, 19770 1AER, 1202
3. ADMINISTRATOR GENERAL VS LUCAS ALBASINI, 1971, ZR 10
4. UNITED BUS COMPANY OF ZAMBIA VS JABISA SHANZI, 1977, ZR 397

5. EMMANUEL MUTALE VS ZCCM, 1994, SCZ 67
6. MCGREGOR ON DAMAGES, 17TH EDITION
7. CHITTY ON CONTRACTS – SPECIFIC CONTRACTS VOL. II 25TH EDITION

This is an appeal from a decision of a Judge of the High Court on appeal from a Ruling of the Deputy Registrar awarding the Respondent interest on money owing to the Respondent by the Appellant. The short history of this matter is that the Respondent on 15th August, 2001 instituted proceedings against the Appellant by way of writ of summons claiming:-

1. **The sum of K310, 245,808.00 owing and outstanding as at 31st December, 2000 being in respect of maintenance work and other services rendered to the Defendant at its own request and instance which sum of money the Defendant has failed or neglected to repay;**

2. **Interest at short term deposit rate from 31st December, 2000 till judgment and thereafter at current bank lending rate till full payment.**

It is common cause that after the issuance of the writ of summons herein, the parties entered into an ex curia agreement to discharge the principal amount owed in monthly installments of K30,000.000.00 each. The principal amount owing was cleared over a period of ten months, the final installment being made on 3rd September, 2002. The ex curia agreement entered into by the parties did not address the issue of interest.

After payment of the last instalment, the advocates for the parties entered into correspondence on the issue of payment of interest but could not reach agreement as a consequence of which on 12th June, 2003 the Respondent took out a summons for payment of interest pursuant to Order 6, Rule 2 and Order 18 of the Rules of the Supreme Court. The learned Judge in the court below found that the Respondent is entitled to interest payable on the principal sum of K310,245,808.00 at short term bank deposit rate from 15th August, 2001, being the date of issue of the writ, on the reducing balance during the period of negotiations and instalment payments up to 3rd September, 2002, being the date of payment of the last installment, hence the appeal now before us.

Counsel for the Appellant has filed two grounds of appeal, namely:-

1. **that the learned Judge in the court below misdirected himself by deciding that he had power to impose interest on a matter which is resolved by negotiated settlement in the absence of any agreement between the parties for payment of interest;**

2. ***that the Court below erred in fact and in law by holding* that Section 4 of the Law Reform (Miscellaneous Provisions) Act, Cap 74 conferred on a court of record discretion to award interest on any matter including proceedings not tried by the court.**

At the hearing of the appeal, Counsel for the Appellant and for the Respondent relied on the heads of argument which they augmented with oral submissions.

Arguing the first ground in his heads of argument, Counsel for the Appellant stated that the position on interest at common law was restated in the leading case of **JEFFORD AND ANOTHER VS GEE** (2) where Lord DENNING said that ***"the rule of the common law of England was that, in the absence of express agreement, interest could not be recovered on a debt or damages and equity in this respect followed the law."***

Counsel further referred us to paragraph 3171 of Chitty on contracts where the learned authors stated as follows:-

> ***"At common law, the general rule is that interest is not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect. Thus in the absence of express stipulation, it has been held that interest is not payable on the price of goods sold....nor on money due on a building contract for work done by the Contractor, payment of which is in arrear."***

Counsel further submitted that negotiated settlements are like payments into court and do not, as a rule attract interest. He referred us to a passage by Lord DENNING in the case of **JEFFORD & ANOTHER VS GEE** (2) where Lord DENNING stated that, ***"if a Plaintiff takes the money (paid by the Defendant into Court) out of court in satisfaction of the claim,***

that is the end of the case. He gets no interest because there is no judgment." He also referred us to another passage in the same case where Lord Denning stated that, ***"it is only compulsory to award interest on judgments....it is very different with settlements."***

Counsel submitted that in the absence of any agreement by the parties to pay interest on the settlement they had negotiated out of court the position at common law that no interest was payable must prevail.

In his oral submission Counsel submitted that the learned Judge in the court below appeared to have turned the common law position upside down and referred us to page 10 line 12 of the record. However, Counsel conceded that no notice of discontinuance was filed after the ex curia settlement and that no consent order of settlement was prepared or filed.

As to the second ground of appeal, Counsel pointed out that Section 4 of the Law Reform (miscellaneous provisions) Act, Cap 74 provides as follows:-

Section 4

> ***In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any***

part of the period between the date when the cause of action arose and the date of judgment.

Counsel said that this section is a replica of Section 3 of the English Law Reform (Miscellaneous Provisions) Act, 1934 which he said had modified the general common law position by conferring on courts of record discretion to award interest on money judgments given after trial. He submitted that for the court to exercise discretion the proceeding must have been tried by a court of record. He referred us to the case of **ADMINISTRATOR GENERAL VS LUCAS ALBASINI** (3) where the High Court held that a judgment entered in default was not a trial on the merits and could not entitle the court to exercise statutory discretion to award interest. He also referred us to the case of **UNITED BUS COMPANY OF ZAMBIA VS JABISA SHANZI** (4) where we gave a broader interpretation to the word ***'tried'*** by finding that assessment of damages (whether before a Judge or a Deputy Registrar) is a trial within the meaning of Section 4 of Cap 74 so as to entitle the Court to award interest on the amount of the judgment.

Counsel submitted that notwithstanding the statutory intervention through Cap 74 to provide for interest on debts or damages, the court's discretion to award such interest is specifically restricted to arise if and only

if judgment is given. He also referred us to MCGREGOR on damages where the learned author observed under the heading '***sums paid after commencement of proceedings and before judgment'*** that, ***"Section 3 of the 1934 Act permitted interest to be awarded only on the amount for which judgment was given and the House of Lords was reluctantly unprepared in the PRESIDENT OF INDIA VS L.A. PINTADA CAMPANIA NAIGACION, 1985, A.C. 104 to depart from LONDON CHATHAM & DOVER RY VS S.E.R. 1893, A.C. 429 so as to allow recovery of interest on payment made in the course of litigation."***

Counsel said that the learned Judge in the court below defied the authorities when he awarded interest in proceedings where there was no judgment given. Counsel informed us that in England there has been subsequent statutory reform that has superseded the 1934 Act and in particular Section 35A of the Supreme Court Act, 1981 which specifically extends the discretion of the High Court to award interest in proceedings before it, even on any sum paid before judgment. He however, pointed out that as we observed in **EMMANUEL MUTALE VS ZCCM(5)** the provisions of the English Supreme Court Act, 1981 do not apply to Zambia

with the result that the Statutory Law is still governed by Section 4 of Cap 74.

In his oral submissions Counsel said that he would like to give emphasis to the words ***'tried'*** and ***'judgment'*** in Section 4 of Cap 74. He said that a ***'trial'*** has been defined by the court in the case of **UNITED BUS COMPANY OF ZAMBIA VS JABISA SHANZI** (4) and that in this case apart from the exchange of pleadings by the parties there was no trial as envisaged by Section 4 of Cap 74. He said that furthermore there was no judgment as required by Section 4 of Cap 74 and that it was a misdirection on the part of the learned Judge in the court below to hold that he had a discretion to award interest. He urged us to allow the appeal and set aside the Ruling of the learned Judge in the court below.

In reply counsel for the Respondent in her heads of argument submitted that it is not in dispute that the Respondent in this case did specifically plead interest in its writ of summons and statement of claim. She said that it is not also in dispute that the court below, firstly under the hand of the District Registrar, and then before a Judge, did exercise its discretion and after considering the application before it, did properly award interest to the Respondent. She submitted that the application filed by the

Respondent under the summons for payment of interest which led to a Ruling by the District Registrar and the Ruling on appeal by a Judge of the High Court were an exercise of the discretionary powers of the court to award interest. Counsel referred us to our decision in **JACOB MULENGA VS RUCOM INDUSTRIES LTD, 1978 Z.R. 21** where we stated that an award of interest is at the trial Judge's discretion and the only ground for varying such an award is if the Judge failed to exercise his discretion judicially. She referred us to the Ruling of the Judge in the court below where he stated that, ***'I do not see how I can exercise my discretion and refuse to award interest to the Respondent. The Deputy Registrar may not have given sufficient reasons or authorities for his Ruling but he was right in arriving at his decision that interest ought to be paid.'***

As to the second ground of appeal Counsel said that the case of **ADMINSTRATOR GENERAL VS LUCAS ALBASINI** (3) was overruled by **UNITED BUS COMPANY OF ZAMBIA VS JABISA SHANZI** (4) where we held that the word ***'tried'*** does not only mean that the matter was tried on the merits but would also include an assessment of damages carried out by a Judge or Deputy registrar following upon a default judgment. Counsel submitted that although interest under Section 4 of Cap

74 can be awarded in proceedings that are ***'tried,'*** the word ***'tried'*** in this context should not be given too narrow a construction, and that proceedings may for this purpose be said to be 'tried' where there is a judicial decision or where the court acts upon evidence before it, such as proceedings under Order 14 or proceedings to set aside a judgment in which the court judicially considers the evidence relating to the claim and that in such cases the court has power to award interest under Section 4 of Cap 74. She submitted that the Respondent's application before the District Registrar by summons for payment of interest was a matter which had undergone Judicial consideration and an Order of the court by the Ruling of the District Registrar of 13th October, 2003. She further submitted that the Ruling of the District Registrar was the subject of further judicial consideration by way of an appeal to a Judge in chambers whose Ruling was delivered on 15th March, 2004.

Counsel submitted that both these Rulings were a result of a judicial consideration and that it would be inequitable and unjust to suggest that the proceedings did not fall with the meaning of the word ***'tried'***; as provided by Section 4 of Cap 74. She said that the court below was on firm ground in

holding that it had the discretionary and statutory power to award interest in this matter and urged us to dismiss the appeal.

We are indebted to both Counsel for the submissions that have been of great assistance to us in coming to a decision in this matter. In our judgment, we shall deal with the two grounds of appeal together, as in our view, they are interrelated. There can be no doubt that the position at common law, as a general rule, is that interest is not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect. This position at common law was varied by the English Law Reform (Miscellaneous Provisions) Act, 1934 from which our Law Reform (Miscellaneous Provisions) Act, Cap 74 was derived.

Section 4 of our Cap 74 provides that:-

> ***4. In any proceedings tried in any court of record for the recovery of any debt of damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.***

In these proceedings, it is common cause that the Respondent on 15th August, 2001 issued a writ of summons against the Appellant to recover the sum of K310,245,808.00 which had been outstanding since 31st December,

2000. It is also common cause that after the issuance of the writ of summons and the exchange of pleadings the parties entered into an ex curia agreement to discharge the principal amount owed in monthly installments of K30,000,000.00. The writ of summons had included a claim for the payment of interest whereas the ex curia agreement was silent on the payment of interest. The principal amount was repaid over a period of ten months, the final installment having been paid on 3rd September, 2002.

The main thrust of Mr. Kabuka's argument is that for the court to exercise its discretion under Section 4 of the Law Reform (Miscellaneous Provisions) Act, Cap 74 the proceedings must have been tried by a court of record and there must be a judgment. The case of **UNITED BUS COMPANY OF ZAMBIA VS JABISA SHANZI** (4) settled the issue as to whether or not for Section 4 of Cap 74 to apply the proceedings should have been tried on the merits. In that case Baron, DCJ, stated thus:-

> **"The second matter of importance relates to the meaning of the word 'tried', on which I have only one point I wish to add. I agree that GROVE & ALBASINI (II) was wrong on this point and in particular I agree that there is no warrant for the view expressed by the learned author of the Supreme Court practice that the word 'tried' 'imports a**
> **trial on the merits'. But whatever support there may have been for this view the matter seems to me to have been concluded by JEFFORD VS GEE (2), a leading case on the issue of interest. That case was on all fours with the present save that the issue of**

damages was tried before a Judge; in that case also liability was admitted, and although the report does not make it clear by what procedure the matter came before the Judge it is clear that there was no trial on the merits. JEFFORD V GEE (2) was decided on the law as it was before the 1st January, 1970, after which date it became compulsory, in the absence of special circumstances, to award interest in certain personal injury cases; but in an event this change in the law had no bearing on the present point since, whether discretionary or compulsory, interest can be awarded only in 'proceedings tried in any court of record.' It was not even argued in that case that there had been no trial, and it cannot seriously be suggested – certainly it was not suggested before us – that there is a distinction between a trial of an issue of damages before a Judge and a similar trial before a Deputy Registrar."

In the case before us the Respondent had instituted proceedings for the recovery of monies that were owed to it by the Appellant, and the writ of summons included a claim for interest. Although the parties entered into an ex curia agreement for the payment of the principal sum, the agreement did not address the issue of interest. The evidence on record is that after payment of the principal sum the parties entered into correspondence on the issue of interest but were unable to reach agreement. This prompted the Respondent to issue a summons for payment of interest pursuant to Order 6 Rule 2 and Order 18 of the Rules of the Supreme Court returnable before the District Registrar. In our view, there can be no doubt that the issue of whether or not interest was payable was in the first instance determined by the District Registrar and we are satisfied that this amounted to ***'proceedings***

tried in any court of record' to satisfy the requirements of Section 4 of Cap 74.

On the question of whether or not there was a ***'judgment'*** within the meaning of Section 4 of Cap 74, we have looked at the 9th edition of Black's Law Dictionary and the word judgment is defined there as ***'a court's final determination of the rights and obligations of the parties in a case. The term judgment includes an equitable decree and any Order from which an appeal lives.'*** We have also looked at the 2nd edition, Volume 3 of Words and Phrases legally defined and the word judgment is defined as follows:-

> **"The terms *'Judgment'* and *'Order'* in their widest sense may be said to include any decision given by a court on a question or questions at issue between the parties to a proceeding properly before the court."**

We are satisfied that the Ruling of the District Registrar amounted to a judgment within the meaning of Section 4 of Cap 74. We wish to add that the underlying principle and the basis for an award of interest is that the Defendant has kept the Plaintiff out of his money and the Defendant has had the use of it himself, so he ought to compensate the Plaintiff accordingly. In this case the sum of K310,245,808.00 was owing to the Respondent as at 31st December, 2000 and we have no reason to suppose that this money

would have been paid to the Respondent if it had not instituted these proceedings. As we have already pointed out the last instalment of the principal amount was only paid to the Respondent on 3rd September, 2002 and the Respondent had been kept out of its money for some two years. Had these proceedings been allowed to continue up to their logical conclusion, there would have been no argument as to the payment of interest. It would be absurd to allow the Appellant to escape from paying interest simply because it had compromised the action and entered into an ex curia settlement. For the reasons we have given, we find no merit in the appeal which we dismiss with costs. The costs are to be taxed in default of agreement.

D.M. Lewanika
DEPUTY CHIEF JUSTICE

F.N.N. Mumba
SUPREME COURT JUDGE

C.S. Mushabati
SUPREME COURT JUDGE