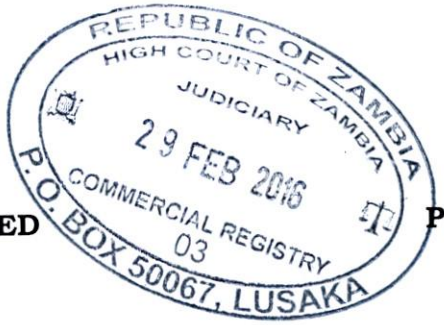
IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2014/HPC/0221



BETWEEN:

UWP CONSULTING ZAMBIA LIMITED **PLAINTIFF**

AND

THE CIVIL AVIATION AUTHORITY **DEFENDANT**

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

For the Plaintiff : *Mr M. C hiteba of Messrs Mulenga Mundashi Kasonde Legal Practitioners.*

For the Defendant : *Mr F. K. Mwale, Acting Snr State Advocate, Attorney General's Chambers.*

Mr S. K. Nkandu- In House Counsel at the Civil Aviation Authority.

J U D G M E N T

LEGISLATION & OTHER WORKS REFERRED TO:

1. ***The Companies Act, Cap 388 of the Laws of Zambia.***
2. ***Law Reform (Miscellaneous Provisions) Act, Cap 74 of the Laws of Zambia.***
3. ***Judgments (Amendment) Act No. 16 of 1997.***
4. ***J. Beatson. Anson's Law of Contract. 28th Edition. New York: Oxford University Press. (2002).***

CASES REFERRED TO:

1. ***The Attorney General, MMD V Akashambatwa Mbikusita Lewanika, Fabian Kasonde, John Mubanga Mulwila, Chilufya Chileshe Kapwepwe, Katongo Mulenga Maine (1994) S.J. (S.C.).***

2. ***Anderson Kambela Mazoka, Lt General Christon Sifapi Tembo, Godfrey Kenneth Miyanda V Levy Patrick Mwanawasa,The Electoral Commission of Zambia & The Attorney General (2005) Z.R. 138 (S.C.).***

3. ***Violet Kasengele Bwalya & Ors V ZAMTEL & the AG Comp/70/ 2010;Comp/75/2010; Comp/ 40/2011.***

4. ***Zambia National Holdings Limited And United National Independence Party (Unip) V The Attorney-General (1994) S.J. 22 (S.C.)***

By Writ of Summons taken out on 16th May, 2014, the Plaintiff is claiming the following:

(i) *Payment of the sum of ZMW 4, 618,809.94 ("Four Million, Six Hundred and Eighteen Thousand Kwacha and Ninety Four Ngwee.") being the money due and owing to the Plaintiff for work done under the consultancy service contract dated 31st August 2009 for the design and preparation of contract documents for the Kasama and Solwezi Airport Runways.*

(ii) *Interest of ZMW2,515,033.94 ("Two Million, Five Hundred and Fifteen, Thirty Three Kwacha Ninety Four Ngwee") accrued on the amount claimed in (i) above as at 31st March, 2014.*

(iii) *Damages for breach of contract dated 31st August, 2009, entered into with the Ministry of Communications and Transport of the Government of the Republic of Zambia and the Plaintiff.*

(iv) *Special damages for costs of Travel, Hotel accommodation, food and transport in Lusaka.*

(v) *Any other relief that the Court may deem fit.*

(vi) Costs.

According to the Statement of Claim, around June, 2009 when the Plaintiff was operating under the name Ng'andu UWP Zambia it was awarded Consultancy Services for Design Preparation of Contract Documents, including Supervision Services for the construction of the Kasama and Solwezi Airport Runways **("The initial contract")**.

Moreover, that on or about 9th June, 2009 at a meeting held between the parties it was agreed that the Kasaba Bay Airport Runway **(Kasaba Bay Runway)** was to be added as the variation order to the initial contract. Moreover, that on about 20th June, 2009 the Plaintiff received a letter from the then Permanent Secretary for the Ministry of Communications and Transport requesting that it submits technical and financial proposals for the Kasaba Bay Runway, which request the Plaintiff complied with.

Moreover, that on or about 31st August, 2009, a formal consultancy service contract was signed between the Ministry of Communications and Transport and the Plaintiff for the design and preparation of the contract documents for the Kasama and Solwezi Airport Runways (the Contract) and at this point the initial contract was formalised.

The Plaintiff also stated that in successful performance of its obligations it undertook to submit on 29th September, 2009 the Design Report and Drawings for the Kasama Airport Runway. Further on 12th November, 2009, it submitted the scoping reports for the Kasama and Kasaba Bay Airports to the Director, Environmental Council of Zambia. The Plaintiff also submitted the Design Report and Drawings for the Solwezi Airport Runway.

Thereafter, on or about 1st February, 2010 it submitted the final Design Report, Environmental Impact Assessment Report and the Drawing for the Kasama and Solwezi Airport Runway. The Plaintiff also submitted invoice

number 185 for the sum of ZMW 2, 103,776 being the remaining 80% of the Lumpsum contract amount.

However despite receipt of this the Department of Civil Aviation had neglected to settle the outstanding sum. The Defendant had in fact admitted its indebtedness to the Plaintiff and did agree in writing on 30th August, 2013 to pay the entire debt by 31st December, 2013 but had not done so to date.

Moreover that the failure by the Defendant to pay the money owed was in breach of clause 6.4 (c) which provided that payment should be made within 60 days after receipt of the Plaintiff's invoices. Further that due to this, the Plaintiff had suffered loss and damage.

The Defendant filed in a Defence on 12th December, 2014 where it stated that the Defendant signed the Contract with Ng'andu UWP Consulting Zambia Limited. Moreover that the principal sum as indicated by the Plaintiff was not in dispute and had to date not been paid which was not due to negligence but factors beyond the Defendant's control.

Further that the Plaintiff's Statement of Claim was admitted for the principal sum of K1,813,600.00 as Clause 1.10 of the Contract placed the obligation to pay taxes, duties, fees and other impositions on the Plaintiff. Moreover that the correct interest would only be determined by this Court in accordance with the Judgments Act, Cap 81 of the Laws of Zambia from the date of issuance of the Writ of Summons to the date of Judgment and thereafter until date of final settlement given that the Plaintiff commenced this action in the High Court for Zambia and had therefore foregone its right to invoke the provisions of Clause 8.1 of the General Conditions and 8.2 of the Special conditions of contract that required that disputes be settled by arbitration.

The Defendant went on to aver that clause 6.4 (c) of the General Conditions of contract provides that payment should be made within 60 days after receipt of the Plaintiff's invoices. However, that this was only applicable to monthly invoices and not to the final report and statement. Further that by clause 6.4 (d), the final payment was only supposed to be made after the final report and statement.

It was also stated that by clause 6.4 (d) the final payment was only supposed to be made after the final report and statement had been submitted by the Plaintiff and approved as satisfactory by the Defendant. Alternatively the services were to be deemed completed and finally accepted by the Defendant and the final report and final settlement deemed approved by the Defendant as satisfactory 90 calendar days after receipt.

The Defendant also stated that the Plaintiff was not entitled to any of the reliefs sought before this Court.

The Plaintiff filed a Reply on 22nd December, 2014. It stated that at the time of signing the contract on 31st August, 2009 the Company's registered name was Ng'andu UWP Consulting Zambia Limited which was subsequently changed to UWP Consulting Zambia on 27th April 2010.

Moreover, that this did not affect any accrued rights and obligations of the Company nor render defective any legal proceedings commenced or continued by or against its former name.

It was also stated that the Defendant had not honoured its obligations to pay the Plaintiff despite the Plaintiff having fulfilled all of its obligations in terms of the contract and having served the Defendant with all the necessary documents, invoices, accounts and statements required for the payment of the debt.

The Plaintiff also denied that the quantum of interest on the Plaintiff's claim could not only be determined by this Court in accordance with the Judgments Act, Cap 81 of the Laws of Zambia. Moreover, that this Act only enjoined the court to determine the interest applicable only from the date of Judgment until final payment and not prior to that date.

It was also stated that the Plaintiff complied fully with all the conditions of the contract and that on 1st February, 2010 it delivered to the Defendant the final Solwezi, Kasama and Kasaba Bay Design Reports and Drawings with electronic copies as required in the contract.

That after submission of these the Defendant appointed the Plaintiff for the Construction and Supervision of the Solwezi Airport Runway. The Defendant also used the final design documentation submitted to it by the Plaintiff to commence with the construction of the Solwezi Airport Runway around April, 2011 and that it was currently in use today.

During trial on 21st May, 2015, the Plaintiff filed one Witness Statement on record. The first witness was Vincent Francis Knox, the Specialist Consultant, Corporate, Financial and Contract Administration of the Plaintiff. He testified in examination in chief that sometime in June, 2009 the Plaintiff was advised that it had been awarded the Consultancy Services for Design, Preparation of Contract Documents, including supervision services for the construction of the Kasama and Solwezi Airport Runways.

Further that on 9th June, 2009 Mr Ngandu, the Country Manager for the Plaintiff and the Permanent Secretary at the time in the Ministry of Communications and Transport had a meeting where it was agreed that the Kasaba Bay Airport Runway was to be added as the variation order to the already awarded contract and after a request that the Plaintiff submit Technical and Financial proposals for this Runway the Plaintiff complied.

It was also his testimony that thereafter on 22nd July, 2009, a negotiations meeting that later formed part of the contract was held between the Ministry of Communications and Transport, the Department of Civil Aviation, the National Airports Corporation Limited, the Road Development Agency and the Plaintiff to agree the terms of reference for the design of the Kasama and Solwezi Runways.

Further, that on or about 31st August, 2009, a formal Consultancy Service Contract was signed between the Ministry of Communications and Transport or the Government of the Republic of Zambia and the Plaintiff for the design and preparation of Contract documents for the Kasama and Solwezi Airport Runways (the Contract).

He also stated that under the contract the rate of interest to be applied on delayed payments was specified under General Condition 6.4 (c) of the contract as read together with clause 6.4 (c) of its special conditions.

Further, that at the time of signing the contract on 31st August, 2009 the plaintiffs name was Ng'andu UWP Consulting but this changed in 2010 when the company representative at that time formed his own company and changed its name to UWP Consulting Zambia Limited. The issue of the Company name was clarified during September, 2012 when the Defendant tried to use it as a reason for delayed payment.

Moreover, on 1st September, 2009 the Plaintiff submitted a letter of submissions of the inception report for the upgrading of the Kasaba Bay, Kasama and Solwezi Airport Runways (the Report) to the Director of the Department of Civil Aviation.

It was also stated in examination in chief that on 2nd September, 2009 the Plaintiff submitted invoice number 169 for the amount of ZMW525,944.00 the same being 20% of the Lumpsum contract amount. This payment was

made by the Ministry of Communications and Transport by way of electronic transfer.

Thereafter, that on or about 21st September, 2009, the Plaintiff submitted its invoice number 175 for an amount of ZMW 1,240,620.00 being 100% of the lumpsum contract amount after it submitted the detailed design report and drawings for Kasaba Bay Airport Runway, which amount was paid by the Ministry of Communications and Transport on 30th October, 2009.

In successful performance of its obligations under the contract, the Plaintiff on 29th September, 2009 under cover of a letter to the Department of Civil Aviation and the Ministry of Communications and Transport submitted the Design Report and Drawings for the Kasama Airport Runway. Thereafter, on 12th November, 2009 the Plaintiff submitted the Scoping Reports for the Kasama and Kasaba Bay Airports to the Director, Environmental Council of Zambia, whilst on 4th December, 2009 under cover of invoice 185 and a letter, the Plaintiff submitted the Design Report and Drawings for the Solwezi Airport Runway.

He also testified that on or about 1st February, 2010 having submitted the Final Design and Report, Environmental Impact Assessment Report and the Drawings for the Kasaba Bay, Kasama and Solwezi Airport Runways, the Plaintiff again submitted invoice number 185 for the sum of ZMW2, 103,776.00 being the remaining 80% of the lump sum contract amount. However, despite doing so the Defendant neglected to settle it.

He also stated that when the parties had a meeting on 8th of July, 2013 at the Defendants offices in Lusaka, the parties agreed to follow the process of amicable resolution. It was further agreed that the Arbitration route would not be followed due to the huge cost implications. According to PW1, the Plaintiff had arduously followed the amicable resolution process.

As a matter of fact, that the Defendant had on a number of occasions admitted its debt to the Plaintiff and made a commitment to settle it by 31st December, 2013 but it had not.

There was no cross examination.

The Defendant did not file any Witness Statements.

Counsel for the Plaintiff made some written submissions where he contended that from the onset the Defendant had elected not to bring any witness to testify on its behalf. Thus in this regard all facts as advocated by the Plaintiff were undisputed and unchallenged and the Witness Statement of PW1 was a true reflection of the facts herein.

Notwithstanding this Counsel also argued that following the Judgment on Admission where this Court confirmed that the principle amount being claimed by the Plaintiff was due, the principle issue that now remained to be determined was the interest due.

It was Counsel's submission that his arguments would be centred on the date from which interest was to be calculated, the rate of pre judgment interest applicable and the method of calculating the interest from the date from which interest was due.

In arguing the first aspect of the date from which interest was to be calculated Counsel submitted that the Plaintiff agreed that the interest in this matter started to run from 4th May, 2010 as submitted by the Defendant.

Then regarding the issue of the pre judgment interest, it was counsel's contention that section 4 (ii) of the Law Reform (Miscellaneous Provisions) Act, Cap 74 of the Laws of Zambia was instructive. It stated that:

"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.

Provided that nothing in the section

(i) Shall authorise the giving of interest upon interest, or

(ii) Shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise."

The effect of this provision according to Counsel for the Plaintiff was that the interest between 4th May 2010 and the date of Judgment was the one embodied in the contract executed by the parties. Further that from the Defendant's Skeleton Arguments it appeared that they had conceded that pre-judgment interest was to be calculated in accordance with the agreement between the parties, except they had questioned the manner in which the rate provided in the contract was to be ascertained and calculated.

When it came to the issue of the method for calculating pre judgment interest under the contract Counsel contended that Special Condition 6.4 (c) in the contract executed by the parties set out the rate of interest applicable as the Bank of Zambia lending rate plus 2% and that this should be used from 4th May 2010 to the date of Judgment.

Counsel further argued that according to the Learned Authors of Anson's Law of Contract:

"an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement and greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent...however if the words of a particular clause are clear and unambiguous, they cannot be modified by reference to other clauses in the agreement".

In this regard it was Counsel's submission that in construing the meaning of the interest clause in the special conditions the Court was to be guided by the general intent of the parties where the words in their natural and ordinary meaning are ambiguous or may lead to absurdity.

Counsel also stated that in this particular case, it was common knowledge that the Bank of Zambia did not lend to the public and therefore the term "Bank of Zambia Lending rate" in its ordinary and natural meaning would lead to absurdity.

Counsel also argued that he had noted that the Defendant had taken the position that special condition 6.4 (c) of the contract referred to the BOZ Policy Rate. However, it came into force in March 2012 nearly 3 years after the contract was executed by the parties on 31st August, 2009 thus it was inconceivable that they would have intended that the BOZ lending rate would refer to the policy rate.

Counsel also urged this Court to also note that the wording of the interest clause of the contract as between the parties is akin to the provision of section 2 of the Judgments (Amendment) Act No. 16 of 1997 which provides that:

"section 2 of the principle Act is amended by the deletion of "at the rate of six per centum per annum" and the substitution therefore of "as may be determined by the court which rate shall not exceed the current lending rate as determined by Bank of Zambia".

Counsel also stated that the Supreme Court had had occasion to consider the principles of law applicable as regards statutory interpretation and categorically stated in the case of ***THE ATTORNEY GENERAL & MMD V LEWANIKA & ORS (1)*** that:

"...Acts of parliament should be construed according to the intention expressed in the Acts themselves. If the words of the Statute are themselves precise and unambiguous, then no more can be necessary than to expand on those words in their ordinary and natural sense. The words themselves alone also in such case best declare the intention of the lawgiver".

Counsel also cited the case of ***ANDERSON KAMBELA MAZOKA, LT GENERAL CHRISTON SIFAPI TEMBO, GODFREY KENNETH MIYANDA VS LEVY PATRICK MWANAWASA, THE ELECTORAL COMMISSION OF ZAMBIA & THE ATTORNEY GENERAL (2)*** where it was stated that:

"In all cases now in the interpretation of statutes we adopt such a construction as will promote the general legislative purpose underlying the provision. It is no longer necessary for the Judges to wring their hands and say: "There is nothing we can do about it." Whenever the strict interpretation of the statute gives rise to an absurd and unjust situation the Judges can and should use their good sense to remedy it by reading words in, if necessary so as to do what Parliament would have done, had they had the situation in mind".

Another case for persuasive value Counsel for the Plaintiff relied on was ***VIOLET KASENGELE BWALYA & ORS V ZAMTEL & THE AG (3)*** where the Industrial and Labour Relations Court was called upon to construe the meaning of section 2 of the Judgments Act which is couched in similar terms as clause 6.4(c). The issue in this case required the Court to interpret the meaning of current lending rate as determined by the Bank of Zambia set out in section 2 of the Judgments Act. The Court stated that:

> ***"From the evidence and facts that I take judicial notice of I believe that the rates published in exhibit "VKB3" are indicative lending rates calculated as averages of lending rates from all commercial banks. It is for this reason that I here hold that whilst I agree that the BOZ did not during the period under consideration determine bank lending rates in the sense of section 2 of the Judgment Act to the extent only that it did not participate in the fixing of any specific rate of interest I am nonetheless of the view that the reference to the current bank lending rate as determined by the BOZ under section 2 aforesaid should not be taken to mean the commercial bank lending rates as published in exhibit VKB3....***
>
> ***In my view section 2 of the Judgments Act empowers the court to award a rate of interest between the Policy rate as the base rate and any other number of points in the lending margin and a factor not exceeding a sum of the base rate, a factor and the maximum percentage points in the margin.***
>
> ***Where the rate of interest is not fixed as in the present case my considered view is that it is to be calculated as an average of the prevailing commercial bank lending rates as indicated by the Bank of Zambia and published from time to time".***

According to Counsel this meant that although the Bank of Zambia does not set lending rates, reference to the Commercial Bank lending rate as determined by the Bank of Zambia is to be taken to mean the lending rates as published by the Bank of Zambia.

Counsel also contended that the holding of the IRC with respect to the construction of Section 2 of the Judgment Act applied with equal force to the construction of clause 6.4 (c) and he urged this Court to uphold it and find as a fact that the BOZ lending rate referred to the average of commercial bank lending rates as published by BOZ fortnightly.

Thus he argued that the pre judgment interest rate would therefore be the commercial bank lending rates as published by Bank of Zambia plus 2%. Counsel also stated that under Section 2 of the Judgment Act, this Court had power to determine the applicable post judgment interest rate up to a maximum of the current lending rate as determined by Bank of Zambia.

However, Counsel was also of the view that the Supreme Court had provided guidance on the award of post judgment interest where the successful party had been kept out of pocket for an inordinately long period of time. Counsel then cited the case of ***ZAMBIA TELECOMMUNICATIONS COMPANY V VIOLET KASENGELE BWALYA (3)*** where the trial court had awarded a post judgment rate of 6% interest. The Court stated that:

> ***"We decided to follow the Chipanama case because the Respondent had been kept out of their Money. We hereby order that the Respondent be paid interest at bank lending rate as determined by the Bank of Zambia from the date of Judgment till payment".***

Counsel then contended that it was undisputed that the Plaintiff herein had unreasonably been kept out of its money for a period of over 5 years,

without any reasonable justification. Thus this was a proper case for the Court to award the post judgment rate applicable at the current lending rate as determined by Bank of Zambia from the date of Judgment till payment as guided by the Supreme Court in the case cited above.

The Defendant also made written submissions and filed them into Court on the 12th of June, 2015. Regarding the prejudgment interest rate, it was their position that it was supposed to be divided into two parts. The first had to do with the period from the day the claim arose, 4th May 2010 to the date the matter was taken to Court on 16th May, 2014. The second had to do with the date of the Writ which was 16th May, 2014 to the date of Judgment.

Counsel contended that the first part above would attract interest according to the terms of the contract signed between the parties. Thus clause 6.4 (c) of the special conditions according to Counsel was instructive on the rate of interest payable under the first part as it provided that **"the interest rate was: Bank of Zambia lending rate plus 2%."** However, with regards to the second part described above the applicable interest would have to be determined in line with section 2 of the Judgments Act, Cap 81 of the Laws of Zambia which provides that:

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

Thus, it followed that the submission by the Plaintiff that the pre- judgment interest should be calculated from 4th May, 2010 to the date of Judgment was a misconception of the law and the facts in this case.

Thereafter, as regards the method of calculating pre judgment interest, Counsel stated that the first part of the interest calculation (4th May, 2010 to 16th May, 2014) the provisions of the Contract were to be followed to the letter. Accordingly, it was argued that Clause 6.4 (c) of the Special Conditions of Contract was instructive on the rate of interest payable which was the Bank of Zambia lending rate plus 2%.

However, from the date of the Writ to that of Judgment, the Court would have to apply the provisions of the Judgments Act already cited above. Further Counsel argued that by the provisions of section 20 of the State Proceedings Act, Cap 71 of the Laws of Zambia the rate of interest from the date of the Writ of Summons to that of Judgment was not supposed to exceed 6%. It states that:

> ***"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".***

Counsel also submitted that he had noted that the Plaintiff had placed heavy reliance on the decision of the Industrial Relations Court in the matter of ***VIOLET KASENGELE BWALYA & ORS V ZAMBIA TELECOMMUNICATIONS COMPANY LIMITED AND THE ATTORNEY GENERAL (3)*** which was not binding on this Court. Moreover that in that case the Industrial Relations Court dealt with the question of interpreting the meaning of current lending rate as determined by the Bank of Zambia.

It was Counsel's submission that the issues before this Court with regards calculation of interest were substantially different from those of the Industrial Relations Court when it dealt with the case cited. Moreover that the IRC was interpreting a judgment passed by the Supreme Court of Zambia on what it meant by ***"current lending rate as determined by the Bank of Zambia."*** However in this case the question before Court was the meaning of ***"The interest rate is: Bank of Zambia lending rate plus 2%."***

Counsel also submitted that in interpreting this question, this Court ought to look beyond the decision in the ***VIOLET KASENGELE BWALYA*** case above to what the intention of the parties could have been at the time of entering into the agreement.

In this connection Counsel also quoted the BOZ press release of 2nd April, 2012 where the bank publicised the introduction of the policy rate. It stated that:

> ***"Following this reform, it is expected that the standard practice of quoting the price of loans and similar credit products by all commercial banks will be the BOZ Policy Rate plus a margin. The margin will be set by commercial banks on the basis of their risk premium assessments. This transparent way of pricing credit products will enhance many stakeholders' business planning processes and assist in effectively managing their financial commitments. Further, this would enable borrowers to understand the basis upon which commercial banks price their credit products".***

In addition, Counsel also referred this Court to the BOZ communiqué dated 29th March, 2012, where the Central Bank set the policy rate at 9%. It was stated that:

"The BOZ policy rate is anticipated to be the key interest rate to signal the Central Bank's monetary policy stance. It is also expected to provide financial markets with a credible and stable anchor for setting of interest rates... The Bank of Zambia has weighed the inflation risks and has determined that average inflation during the policy- relevant period would remain below 7% and the BOZ Policy Rate, consistent with this development had been set at 9%".

Counsel also stated that even after introduction of the policy rate by BOZ, the interest rate calculated by the Plaintiff was excessive. For example, in April, 2012 the interest rate was 24. 96; in May, 2012, 22.15; June, 2012 20.74; July, 2012, 18.62 and August, 2012, 18.61.

According to Counsel, such interest rates were misleading as they did not only fly in the teeth of the BOZ Policy rate but also against Clause 6.4 (c) of the Special Conditions of Contract above. In the circumstances, Counsel urged this Court to use the BOZ Policy rate as a basis for calculating interest from April, 2012 to 16th May, 2014 (the date of the writ).

Moreover that although the Plaintiff had relied on Section 4 (ii) of the Law Reform (Miscellaneous Provisions) Act, Cap 74 of the Laws of Zambia, this proviso could only stand if the payable interest was already ascertained. Otherwise, there would be no need for the parties to be in Court if the interest was already determined.

In view of this, Counsel prayed that the pre judgment period be divided into two parts namely from 4th May, 2010 to 16th May, 2014 and the period after 16th May 2014 (date of the writ) to the date of judgment. Further that the period between 4th May, 2010 and the period after 16th May 2014 be divided into two parts to calculate interest namely the first period from May, 2010 to March, 2012 at which the average bank lending rate plus 2% should be

applied and secondly, from April, 2012 to May, 2014 in which the BOZ policy rate should be applicable. Further that the interest rate awarded after the date of the Writ should take into account the provisions of the State Proceedings Act, Cap 71 of the Laws of Zambia.

Counsel for the Plaintiff also filed submissions in Reply on the 10th of September, 2015.

He contended that the law regarding the calculation and award of interest on debts that are subject of litigation, is principally governed by two pieces of legislation, namely the Law Reform (Miscellaneous Provisions) Act, Cap 74 of the Laws of Zambia (the Law Reform Act) and the Judgments (Amendment) Act of 1997.

The Law Reform Act provides for the power of the Court to award interest on debts under Section 4 as follows:

> ***"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 rates 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."***

Provided that nothing in the section-

i) Shall authorize the giving of interest upon interest; or

ii) Shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise.

According to Counsel for the Plaintiff, the effect of Section 4 was that the Court may award interest on the whole or any part of the debt for the period between when the cause of action arises and the date of judgment. However, where the rate of interest is agreed by the parties, the Court is enjoined to award that rate in accordance with the contract.

Counsel further contended that although under Section 4 above, the Court ordinarily in its discretion may award different rates of interest for the period between the date of the cause of action and issuance of the writ and thereafter from the date of the writ to the date of judgment, the effect of the proviso is that where a rate of interest is agreed by the parties, the Court is enjoined to award that rate of interest for the whole of the period between the date of accrual of the cause of action and the date of Judgment.

Counsel for the Defendant had earlier contended that the proviso to Section 4 of the Law Reform Act above was only applicable if the rate of interest is already ascertained and secondly that this Court was clothed with unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law.

Regarding the first issue Counsel submitted that the contract that was the subject of this action provided a rate of interest applicable. Therefore the rate of interest was ascertained and what was in dispute was the interpretation of the interest provision in the contract. The fact that this had been brought into issue by the Defendant did not entail that it had not been ascertained.

Moreover that inspite of this, the Court would be required to make an interpretation to bring the proviso to Section 4 into effect and the rate of interest would be applicable on the principle debt from the date of the cause of action (4th May, 2010) to the date of Judgment.

Regarding the second issue Counsel contended that the Defendant appeared to suggest that the High Court could disregard the provisions of section 4 of the Law Reform Act and this was contrary to the landmark case of **ZAMBIA NATIONAL HOLDINGS (4)** to the extent that although Article 94 of the Constitution gave the High Court unlimited jurisdiction it was still bound by all the laws that govern the exercise of such jurisdiction.

In line with this case Counsel submitted that the position advanced by the Defendant on this Court's jurisdiction was totally misconceived. Further, that this Court was enjoined to apply the proviso to section 4 of the Law Reform Act which was couched in mandatory terms according to the direction by the Supreme Court in the **ZAMBIA NATIONAL HOLDINGS (4)** case.

Counsel for the Defendant also contended that interest should be applicable from the date of the writ and that this should have been provided by the Judgments Act as read together with the State Proceedings Act. According to Counsel for the Plaintiff, the State Proceedings Act was not applicable because the state was not a party to these proceedings following the order of the substitution of the parties dated 9th September, 2015.

Further that as for the Judgments Act, it was Counsel's argument that its scope was clearly spelt out under section 2 which provides that:

> ***"Every judgment, order, or decree of the High Court or of a Subordinate court whereby any sum of money, or any costs, charges or expenses, is or are to be payable to any person shall carry interest as may be determined by the court which rate shall not exceed the current lending rate as determined by the Bank of Zambia from the time of entering up such judgment, order, or decree until the same shall be satisfied, and such***

interest may be levied under a writ of execution on such judgment, order, or decree".

Counsel also cited the preamble to the Judgment's Act which states that it is:

"An Act to provide for the payment of interest on judgment debts".

Moreover, Counsel for the Plaintiff contended that the argument by the Defendant that the Judgment Act should apply to the period prior to the Judgment was but a red herring and should accordingly be dismissed by this Court. Moreover, that the Plaintiff was entitled to interest in accordance with the contract between the parties from 4th May, 2010 to the date of Judgment and thereafter at the current bank lending rate as guided by the Supreme Court in **VIOLET KASENGELE V ZAMTEL (3).**

Counsel for the Plaintiff also submitted in reply on the issue that in order to construe the intention of the parties with respect to the interest provision in the contract, the court should consider the policy rate introduced by BOZ in April, 2012.

Counsel stated that this position advanced by the Defendant was with the utmost respect, absurd. This is because the contract was executed by the parties in May, 2009 and the policy rate was introduced in April, 2012.It was therefore inconceivable that it would have been the intention of the parties that the "Bank of Zambia Lending rate" would be the policy rate.

Further that the Defendant had also submitted that **"the first period from May, 2010 to March 2012 at average bank lending rate plus 2% should be applied and secondly from April, 2012 to May, 2014 in which the BOZ policy rate should be applicable."** It was Counsel for the Plaintiffs submission that this quotation from the Defendants submissions was

actually a direct admission by the Defendant that at the time of the contract it was the intention of the parties that the reference to the Bank of Zambia Lending Rate meant the average commercial bank lending rate as published by the Bank of Zambia.

Moreover, it was also contended that if the intention of the parties was to use the average bank lending rate as disclosed by the submission of the Defendant reproduced above, that intention would not have been affected by the introduction of the policy rate 3 years later because the policy rate was not the average bank lending rate. The policy rate was a benchmark rate set by individual clients. The lending rate is determined by adding a margin to the policy rate and the average lending rate is the average of lending rates of commercial banks as published by the Bank of Zambia.

It was therefore Counsel's submission that this Court should make a finding that the rate of interest agreed in the contract is to be interpreted as the average bank lending rate as published by the Bank of Zambia plus 2%.

Based on the foregoing arguments Counsel urged this Court to award interest, to the Plaintiff, from the date of accrual of the cause action (4th May, 2010) to the date of Judgment, at the average of the commercial bank lending rate as determined by the Bank of Zambia plus 2% and thereafter at the current average of the commercial bank lending rate as determined by the Bank of Zambia (in line with the decision in **VIOLET KASENGELE V ZAMTEL (3).**

I am grateful to both Counsel for the Plaintiff as well as the Defendant for their written submissions which I have considered together with the evidence on record.

It is not in dispute that Judgment on admission was entered in this matter on the 17th day of March, 2015 and that what remains in dispute is the issue of interest.

Counsel for the Plaintiff rightly submitted that the main issues that remain to be determine with regard to the interest due are the date from which it is to be calculated, the rate of pre- judgment interest applicable and the method of calculating the interest for the said period.

On one hand Counsel for the Plaintiff submitted in sum that this Court should award interest, to the Plaintiff, from the date of accrual of the cause of action (4th May, 2010) to the date of Judgment, at the average of the commercial bank lending rate as determined by Bank of Zambia plus 2% and thereafter at the current average of the commercial bank lending rate as determined by the Bank of Zambia in line with the decision in **VIOLET KASENGELE V ZAMTEL (3).**

On the other hand, Counsel for the Defendant submitted in sum that the prejudgment period be divided into two parts namely; the period from 4th May, 2010 to 16th May, 2014 and the period after 16th May, 2014 (date of the writ) to the date of Judgment. Counsel also contended that the period between 4th May, 2010 to 16th May, 2014 be divided into two further parts in terms of calculating interest namely, the first period from May, 2010 to March, 2012 at which the average bank lending rate plus 2% should be applied and secondly, from April, 2012 to May, 2014 in which BOZ policy rate should be applicable. Further, that the interest awarded after the date of the Writ should take into account the provisions of the State Proceedings Act, Cap 71 of the Laws of Zambia.

I have noted that the issue of the commencement date for calculating interest is no longer in contention as it has already been agreed by both parties to be 4th May, 2010 so the only thing remaining to be dealt with is

that of the pre-judgment interest as well as the method to be used to calculate it.

It is common cause that the contract executed by both parties in its special conditions under clause 6.4 (c) expressly stated that:

"The interest rate is: Bank of Zambia lending rate plus 2%."

Counsel for the Defendant argued that the pre-judgment interest was to be divided into two parts the first being from 4th May, 2010 when the claim arose to the date it was taken to court on 16th May, 2014. Further that the second part was to be from the date of the writ on 16th May, 2014 to the date of judgment. Counsel expanded on his point further when he argued that the first period from 4th May, 2010 to 16th May, 2014 ought to be divided from May, 2010 to March 2012 and the average bank lending rate plus 2% used as a method of calculation for this period whilst from April, 2010 to May, 2014 the BOZ Policy rate should be applicable.

I do not accept the Defendants submission that the pre-judgment interest should be divided into two parts namely firstly the period between when the cause of action arose (4th May, 2010) to the date of the Writ of Summons (16th May, 2014) and secondly the period between the date of the Writ of Summons to the date of Judgment. Whilst the Court is clothed with discretion to award interest on the whole or any part of the debt for the period between the date when the cause of action arose and the date of judgment the effect of proviso (ii) to Section 4 of the Law Reform (Miscellaneous Provisions) Act is that where a rate of interest is agreed by the parties, the Court is enjoined to Award that rate of interest for the whole of the period between the date of the cause of action and the date of judgment.

I find and hold that the contract that is subject of this action provides the rate of interest which is applicable. The rate of interest is ascertained and it is the Bank of Zambia lending rate plus 2%.

It is trite that the Courts of law are entitled to enforce an agreement of the parties as to the applicable rate of interest from the date of the cause of action or writ to the date of Judgment. I find and hold that the pre-judgment interest applicable is the Bank of Zambia lending rate plus 2% and same is to cover the period from the date of the cause of action to the date of judgment.

I have also taken Judicial Notice of the BOZ Circular dated 28th March 2012 and the intention behind the introduction of the Policy Rate under it. According to this Circular:

> ***"The Policy rate was introduced after a recommendation from the Banker's Association of Zambia that the Central Bank should consider setting up a transparent policy lending rate which should be reviewed from time to time by the Monetary Policy Committee. It was further stated that this would provide a link to align the base rates to the policy rate which would be a resilient rate to capture the total strength of the economy and liquidity cost".***

Having considered the submissions of Counsel for the Defendant above as well as the BOZ Circular, I find it as a fact that the Bank of Zambia Lending Rate became the Policy Rate in March, 2010 and on this basis, I agree with the submissions of the Defendant above. I have noted further that at that time in March, 2012 the Central Bank set the policy rate to be 9%. The interest rate applicable on the principal debt from the date of the cause of action (4th May, 2010) to the date of introduction of the Bank of Zambia Monetary Policy (1st April, 2012) is at the current commercial bank lending

rate determined by the Bank of Zambia plus 2%. From 1st April, 2012 to the date of Judgment (17th March, 2015) the interest rate applicable is the Bank of Zambia Policy Rate plus 2%.

It is trite that the Courts of law are entitled to determine the rate of interest payable from the date of judgment until full settlement. The rate of interest in this connection shall not exceed the current lending rate as determined by the Bank of Zambia. I accept the Plaintiffs submission that the scope of the Judgments Act, No. 16 of 1997 is clearly spelt out under Section 2.

With respect to the State Proceedings Act, Chapter 71 of the Laws of Zambia, the record shows that whilst the state is not a party to these proceedings following the order of substitution of parties dated 9th September, 2015 the subject Contract dated 31st August, 2009 was between the Plaintiff and the Ministry of Communications and Transport for the Government of the Republic of Zambia for and on behalf of the Department of Civil Aviation. I take Judicial Notice of the fact that from inception the payment to the Plaintiff for its Consultancy Services were to be made out of the general revenues of the Republic of Zambia. I am therefore of the considered view that the provisions of Section 20 of the State Proceedings Act are applicable.

The Defendants submission that pursuant to the provisions of Section 20 of the State Proceedings Act, the rate of interest from the date of the Writ of Summons to the date of Judgment is not supposed to exceed six (6) per cent is misconceived. The correct position is that interest on a Judgment debt paid out of the general revenues of the Republic is not supposed to exceed sic (6) per centum from the date of the judgment until the money or costs are paid. The interest applicable on the Judgment sum from the date of Judgment (17th March, 2015) until settlement is 6%.

For the avoidance of debt I award the Plaintiff interest as follows:

(a) *On the principal debt of K1,83,600.00 interest at the current commercial bank lending rate determined by the Bank of Zambia plus 2% from 4th May, 2010 to 31st March, 2012.*

(b) *On the principal debt of K1,813,600.00 interest at the Bank of Zambia Policy Rate plus 2% from 1st April, 2012 to 17th March, 2015.*

(c) *On the judgment sum of K2,103,7766.00 interest is at 6% from 17th March, 2015 until full payment.*

In all the circumstances the parties shall bear their respective costs.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 29th day of February, 20116.

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WILLIAM S. MWEEMBA
HIGH COURT JUDGE