IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

APPEAL No. 130/2009
SCZ/8/140/2009

BETWEEN :

LLOYDS FINANCIALS LIMITED **APPELLANT**

AND

P. G. BISONITE ZAMBIA PLC **RESPONDENT**

Coram: **Mambilima CJ, Malila and Musonda JJS, on 6th March 2018 and 13th March, 2018.**

For the Appellant: Mr. Nchima Nchito SC, Messrs MNB Legal Practitioners and Mr. K. Nchito, Messrs KPN Legal Practitioners

For the Respondent: Mr. C. Muneku, Messrs Charles & Charles

J U D G M E N T

Malila JS, delivered the judgment of the court.

Cases referred to:

1. *Planche v. Colburn (1831) 8 Bing 14*
2. *DP Services v. Municipality of Kabwe (1976) ZR 110*
3. *Sumpter v. Hedges (1898) IQB 673*
4. *Wilson Masauso Zulu v. Avondale Housing Project Limited (1882) ZR 172*
5. *Konkola Copper Mines Plc v. Jacobs Keune, Appeal No. 29 of 2005*
6. *Bolton v. Mahadeva (1972) 2 ALL ER 1322*

7. *.Z. Car Hire Limited v. Chaila and Scrocco Enterprises Limited (SCZ No. 26/2002)*
8. *Phillip M'hango v. Dorothy Ngulube (1983) ZR 61.*

Legislations referred to:

1. *Corporate Insolvency Act No.9 of 2017*
2. *Companies Act, chapter 388 of the laws of Zambia*
3. *Halsbury's Laws of England, 4th ed. Vol. 9(1)*

This is an old case. It traces its roots to an agreement dubbed 'Business Mandate' and dated 12th March, 2006 concluded between the appellant and the respondent (the agreement). In terms of that agreement, the appellant undertook to perform certain professional services and the respondent agreed to pay for those services. These services contemplated the sourcing of US$5,000,000 for the respondent and the production of a document termed 'bankable document' intended as a selling tool in the respondent's bid to raise funds for its operational growth.

About one year and four months into the contract, the respondent terminated it, thus prompting the appellant to commence proceedings in the High Court. The claim by the appellant (then plaintiff) was lodged in the Commercial Registry a decade ago. It was for US$320,000 being the invoiced sum for professional work allegedly performed by the appellant pursuant to the agreement. The

alternative claim was for payment of a reasonable sum for work done at the request of and for the benefit of the respondent. There were also incidental reliefs claimed, namely interest and costs.

The respondent not only resisted the claims as being without any legal justification, but also counter claimed damages for breach of the agreement and a refund of US$2,000 paid by the respondent to the appellant towards the said contract.

In a judgment delivered a year after the launch of the proceedings, the learned High Court judge dismissed both the appellant's claim and the respondent's counter claim.

Aggrieved by that judgment, the appellant appealed, fronting three grounds structured as follows:

1. **The learned trial judge erred in law and in fact when he found that there had been a total failure of consideration as the respondent had received no benefit from the mandate entered into with the appellant.**

2. **The learned trial judge erred in law and in fact when he found that the appellant's claim could not succeed on a quantum meruit basis as the respondent had taken no benefit from the appellant's work**

3. **The learned trial judge erred in law and in fact when he found that no bankable document was ever produced by the appellant, which finding was not supported by the evidence on record.**

The respondent did not cross appeal against the dismissal of its counterclaim.

The appellant filed heads of argument in support of the appeal while the respondent filed theirs opposing the appeal.

Prior to the hearing of the appeal, Mr. Muneku, learned counsel for the respondent, rose to make an application. He sought leave to file out of time, a notice of the respondent being in liquidation. By way of information, he disclosed that the respondent company had been placed into liquidation on 25th May, 2016 and the process of liquidation was presently under way. According to Mr. Muneku, in terms of section 66 of the **Insolvency Act, No.9 of 2017**, there was need for the appellant, if it desired to maintain the current appeal against the respondent, to apply for leave from court to proceed with its action, hence the notice sought to be filed.

In response, Mr. Nchito SC intimated that he was at a loss as to what was expected of him given that this appeal had been argued in 2012 and the parties were awaiting judgment when they received

notices that the appeal had to be heard *de novo* owing to the departure from the Bench of members of the panel that had initially heard the appeal.

We considered the application and allowed Mr. Muneku to file the Notice regarding the respondent being in liquidation. Mr. Nchito SC thereupon applied for leave on behalf of the appellant to proceed with an action against a company in liquidation. Mr. Muneku did not object to the application.

We considered Mr. Nchito's application. We were mindful of the fact that contrary to Mr. Muneku's position that the **Corporate Insolvency Act No.9 of 2017** was in force, it is in fact not yet in force as no Statutory Instrument prescribing the commencement date has of this date been issued. However, under section 317(2) of the **Companies Act, chapter 388 of the laws of Zambia** which deals with voluntary liquidations, it is provided that:

> **After the commencement of the winding up, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court directs.**

Notwithstanding the non-operationalisation of the **Corporate Insolvency Act** therefore, the leave of court is still required for a party

to proceed with an action against a company in liquidation. For the avoidance of doubt 'court' in the context of the Companies Act is the High Court.

An examination of the documents attached to the notice filed by Mr. Muneku show that what the respondent was placed under was a voluntary winding up and that Mr. Chintu Mulendema, of Messrs CYMA Chartered Public Accounts and Management Consultants, was appointed as Liquidator for the respondent on 5th October, 2016. There is also an Agreement for the Provision of Liquidation Services between the Public Service Pension Fund Board and Chintu Melendema dated 11th November, 2016. An application for the appellant to continue against the respondent in liquidation was, therefore, necessary. As we have intimated already, such application lies to the High Court. Yet, Mr. Nchito SC made the application before us.

In considering Mr. Nchito's application we took into account the fact that this appeal was heard in 2012, some four years before the respondent was placed in liquidation, and, therefore, that judgment should have long been delivered before the commencement of the

liquidation. Furthermore, the respondent's counsel did not object to the action of the appellant continuing following the placing of the respondent in liquidation. In the peculiar circumstances of this case reference of the appellant to the High Court to seek leave would delay further the re-hearing of an appeal that has been delayed through no fault of the parties. We also believe that given the appellant's non-objection to the continuation of the appeal, such application would be no more than a routine or mere formality. In order, therefore, to avert delay and escalation of costs for the parties and to further the cause of justice, taking into account the peculiar and exceptional circumstances of this case, we allowed Mr. Nchito SC to proceed with the appeal.

In the appellant's heads of argument, the appellant's learned counsel submitted, in respect of ground one of the appeal, that the learned trial judge was wrong to hold that there was no consideration to support the contract and with it, the claim of US$320,000. He quoted two passages from the High Court judgment as follows:

> **I find that the plaintiff is not entitled to the sum of US$320,000 as claimed because there is no consideration for this claim. In terms of the contract what the plaintiff would have been entitled to would have**

> **been the sum of US$125,000 if the contract had been performed by the plaintiff sourcing for the defendant the sum of US$5,000,000.**

And

> **In the matter before me, the plaintiff has given nothing of value to the defendant to entitle the plaintiff to be paid the money claimed and the defendant has received no benefit for which they should pay the sum claimed.**

The learned counsel suggested that these were irrelevant considerations in determining the dispute before the court. What was relevant, according to Mr. Nchito SC, was clause 7 of the agreement which provides that:

> **Should the client (PG Bisonite Zambia Plc) wish to terminate this business mandate a cancellation fee for premature termination of the contract will be charged on the amount of work done before the termination of the contract.**

Mr. Nchito colourfully argued that in view of the wording of clause 7 of the contract, it was not for the court to question a bargain negotiated by the parties. The only question open for the court's determination was 'how much work was done before termination?' and not whether the appellant was entitled to payment for such work, or whether indeed there was any consideration for the claim.

He advanced two more arguments on this ground of appeal: first, that the appellant's sole witness in the court below outlined the various tasks undertaken by the appellant in the performance of the contract; that these included a technical audit and a human resource and management capacity assessment – and this evidence went unchallenged. Counsel's argument was that properly construed, clause 7 of the agreement entitled the appellant, as of right, to a cancellation fee upon cancellation of the agreement by the respondent. That cancellation fee, according to counsel, was not dependent on the success of the assignment because the clause, in fact, envisaged a situation where the agreement would be terminated before the funds were raised.

Second, the learned counsel, attributed inconsistency in logic to the learned trial judge. He referred us to a portion in the judgment where the learned judge stated that:

> **There is no dispute that the defendant did accept and signed the Mandate Letter. I see no good reason for me to rewrite the agreement for the parties.**

Counsel submitted that having so stated, the judge below should have, by the same token, held that the respondent was bound

to comply with the termination provision of the contract which entailed a payment as the parties themselves structured it.

The learned counsel urged us to allow ground one of the appeal.

Turning to ground two, which counsel had in his heads of argument indicated was argued in the alternative to ground one, but which he intimated at the hearing was being argued substantively in its own right, it was submitted that the appellant would still be entitled *ex contractu*, to payment on a *quantum meruit* basis for work it had actually done. The argument by counsel was that where a party to an entire contract performs part of the work that he is obliged under the contract to perform but is prevented by the other party from proceeding further, the law allows such party to recover on a *quantum meruit* basis. We were referred to the case of **Planche v. Colburn**[1] where it was stated that the plaintiff might, without rendering his completed work, sue to recover reasonable remuneration for work already done.

It was further submitted that although indeed the appellant did not raise the funding envisaged by the parties, it was nonetheless entitled to remuneration for services rendered, particularly given that

the delay in producing a bankable document was occasioned by the respondent. Counsel also argued that the appellant rendered its services as financial advisor and arranger in a professional capacity and should, on that basis alone, be remunerated. We were referred to our judgment in **DP Services v. Municipality of Kabwe**[2] where we stated that:

> **The employment of a person in a professional capacity raises a rebuttable presumption that he is to be paid for those services.**

The learned counsel also referred us to paragraph 348 of **Halsbury's Laws of England, 3rd ed. Vol. 8** and quoted the following passage:

> **Where a party has disabled himself from performing the contract or has repudiated it, the other party is entitled to treat the contract as at an end. In that case he is not only entitled to damages for breach of contract, but if he has performed his part of the contract wholly or in part he has the right to sue on a *quantum meruit* for what he has done. This right does not arise out of the original contract, but is based on an implied promise by the other party arising from the acceptance of an executed consideration.**

Counsel also cited the case of **Sumpter v. Hedges**[3] to buttress the same point.

Mr. Nchito SC contended that the respondent in this case took a benefit from the work done by the appellant in the form of a bankable document and financial advisory services – which fact the

appellant did not contest. We were thus urged to uphold ground two of the appeal.

Ground three of the appeal raised a purely factual issue. The appellant contests the finding by the trial judge that no bankable document was produced and given to the respondent. In specific terms, the learned judge stated as follows in his judgment:

> **on the evidence before me, I can safely say no bankable document was ever produced and given to the defendants.**

It was submitted that the judge did not take into account a vital piece of evidence on the record in coming up with the statement quoted above. The result is that the finding of fact by the trial judge was perverse and should be over turned. In this regard, counsel relied on our judgment in **Wilson Masauso Zulu v. Avondale Housing Project Limited**[4]. Counsel maintained that a bankable document was produced at trial and the respondent's witness in the lower court did, in fact, speak to it. Quoting from our judgement in **Konkola Copper Mines Plc v. Jacobs Keune**[5], counsel submitted that based on a misapprehension of facts, ground three of the appeal ought to be upheld.

Mr. Nchito SC augmented the heads of argument orally. He referred us to a document in the record of appeal titled 'Private Placement Information Memorandum Business Plan for the Five Years Ended March 2007-2011 in respect of PG Bisonite Zambia Plc' and submitted that, that was the bankable document contemplated in the contract. The document we were referred to, together with its annexures and appendices, runs into 132 pages. Mr. Nchito SC also submitted that as a result of the work done by the appellant for the respondent, the respondent benefited from an injection of additional capital by the shareholders.

Mr. Nchito SC also referred us to the letter dated 3rd April, 2007 in the record of appeal with the subject 'Progress Report' as being a demonstration of what the appellant, among other things, did in furtherance of its mandate under the agreement. In that letter, the appellant reported that it was unsuccessful in getting finance for the respondent from SONAE NOVOBORD as the document it placed with that entity could not go through. The appellant also reported that HSBC was still reviewing the document and would get back to the

appellant. It was also reported that AUREOS were still in the process of carrying out a due diligence and would revert to the appellant.

As for the expenses incurred by the appellant in its effort to source financing, Mr. Nchito referred us to the appellant's witness' statement of Sabera Khan, which he maintained was not controverted in cross examination. He, however, conceded that there was no formular to cost the works done by the appellant and that the agreement was not in that regard very helpful to the court. He maintained nonetheless that this did not change the contractual position that the appellant was entitled to a termination fee based on the works done.

Counsel ended by fervidly praying that we allow the appeal.

Against the appellant's formidable range of arguments, the respondent robustly resisted the appellant's claim. It did, of course, not agree with the appellant's argument which it resolutely countered. Mr. Muneku, relied on the heads of argument filed in court. After reproducing the material parts of the agreement, it was submitted in those heads of argument in respect of ground one, that the learned judge in the court below was right to hold that there was

a total failure of consideration as the respondent had received no benefit from the appellant. The learned counsel further submitted that the agreement between the parties clearly stipulates that remuneration was to be paid to the appellant upon achieving the objectives of the agreement. According to the respondent, default or failure was not anticipated. In this connection, upon successful completion of the assignment the appellant was to be paid 2.5% of the US$5,000,000 which the appellant agreed to raise for the respondent.

The learned counsel submitted that by suing 'for work done' rather than claim under the agreed remuneration clause, the appellant was clearly admitting that it had failed to deliver in accordance with the agreement. With that failure, the respondent gained nothing of value and it is, thus, illogical to expect the respondent to pay the appellant who had plainly admitted failure to deliver. According to counsel for the respondent, the agreement does not contain any provision for fragmenting the remuneration in the event of termination yet, the appellant was claiming US$200,000 being 1% of the success fee when, in fact, there was no success. The

claim was not premised on any provision of the agreement and neither was the whole claim for US$320,000. There were no receipts and other supporting documents furnished to back the claim.

It was also submitted that the termination of the agreement by the respondent was prompted by the appellant's failure to deliver for almost a year after the agreement, and there was no positive indication that delivery was in sight. It would have been, according to counsel, 'suicidal' for the respondent to have waited indefinitely for the appellant's effort to source US$5,000,000 to materialise. We were urged to dismiss ground one.

Under ground two of the appeal, counsel for the respondent agreed with the lower court in its holding that the appellant's claim could not succeed on a *quantum meruit* basis. He quoted clause 2.5 of the agreement which states that on success, the appellant would be paid US$125,000. In quoting that clause, the learned counsel also took into account the notes to that clause which include one that states that travelling and accommodation outside Lusaka as well as direct disbursements linked to the deliverables, would be to the respondent's direct account.

He contended that there were, however, no expenses that were brought to the attention of the respondent. Referring to the letter dated 25th July, 2007 by which the appellant accepted the respondent's termination of the agreement, counsel noted that the said letter contained no mention of expenses incurred, but merely made reference to costs for work done. Counsel further contended that in its costing, it is not at all clear how the appellant arrived at a claim of 1% success fee, particularly given that there was no provision regarding part payment in the agreement.

Turning to the import of clause 7 of the agreement on termination and the consequences thereof, counsel for the respondent argued that clause 7 would only come into play in the event that the respondent terminated the agreement prematurely. This, according to counsel, would occur when the appellant was not at fault at all. However, in the present circumstances, termination was done due to the appellant's failure to deliver for a year. Even though there was no time limit set in the agreement, the appellant, through its sole witness, admitted that time was of the essence as the respondent faced the risk of collapsing. Counsel also argued that

it would be stretching the words 'cancellation fee' too far if they were to be understood to include such items as 1% success fee and other unknown items presented in the appellant's invoice.

The failure by the appellant to produce a bankable document, according to counsel for the respondent, was fundamental and went to the core of the engagement. Relying on the case of **Bolton v. Mahadeva**[6], the learned counsel submitted that where a breach goes to the root of the contract, there can be no recovery on the basis of *quantum meruit* under the doctrine of substantial performance.

The final argument counsel made in relation to ground two was that there was no evidence on record to show that the respondent benefited from whatever the appellant's works produced, if any. Counsel cited the case of **Sumpter v. Hedges**[3] where it was stated that for a claim based on *quantum meruit* to succeed it must be shown that the defendant got a benefit in the deal, or that the work done by the plaintiff gave the defendant an option to take or not to take the benefit of the work done. In the present case, no such benefit or opportunity accrued to the respondent. We were implored to dismiss ground two of the appeal for lacking merit.

In responding to ground three of the appeal, counsel for the respondent defended the factual finding of the lower court judge that there was no bankable document ever produced. The learned counsel referred us to the evidence of PW1 in the lower court in which she told the court that she was not sure when the document was produced, let alone whether or not a copy was given to the respondent. Counsel reproduced clause 1 of the agreement by which the appellant was expected to produce a bankable document, and submitted that the appellant failed to intimate in its pleadings that a bankable document was ever produced. It was counsel's submission that the lower court judge was thus correct to hold that no such document had been produced.

In orally augmenting the heads of argument, Mr. Muneku, in very few words, urged us to uphold the decision of the lower court and dismiss the appeal with costs. In what appears to us to have been a negation of all the arguments that were so eloquently made in the heads of argument on behalf of the respondent against the appellant's claim, Mr. Muneku, in answer to a question from the court whether the respondent acknowledges that some work

beneficial to the respondent was performed by the appellant in pursuance to the agreement, answered in the affirmative. In further attenuation of the respondent's position, Mr. Muneku agreed that the appellant was entitled to some payment for work done though such payment could not be anywhere close to the sum of US$320,000 claimed by the appellant.

Counsel nevertheless urged us to dismiss the whole appeal for lacking merit.

We have paid close attention to the rival submissions of counsel for the parties and have scrupulously examined the documents in the record of appeal. We have in particular perused the agreement.

A full appreciation of the agreement is imperative if the appellant's claims are to be measured against the contractual expectations of the respondent. We note that the agreement is titled as one for 'rendering financial services to PG Bisonite Zambia Plc.'

Clause 1 of the agreement defines the mandate assumed by the appellant as being:

To produce a bankable document that will facilitate the sourcing of US$5,000,000 for the refinancing of a saw mill factory and particle boards manufacturing for local and export markets, in the context, terms of reference outlined below.

The full range of service to be offered by the appellant under the agreement were set out in clause 3. They were to:

(a) source US$5 million;

(b) provide financial advisory services;

(c) develop a long term financial strategy for expansion of the appellant's business.

Remuneration for the appellant's services was structured in two forms as follows:

(i) a success fee of 2.5% of US$5,000,000 (i.e. US$125,000);

(ii) a non-refundable commitment fee of US$2,000

In terms of the Notes to clause 5.2, travelling costs, accommodation expenses and other disbursements were to be on the account of the respondent. Perhaps more importantly for the present purpose is the provision of clause 7 of the agreement. It states that:

Should the client (PG Bisonite Zambia Plc) wish to terminate this business mandate, a cancellation fee, for premature termination of the contract will be charged on the amount of work done before the termination of contract.

Neither Clause 7 nor any other provision of the contract, however, contains any formular to be employed in placing a monetary value on any work undertaken by the service provider on invocation by the recipient of services of clause 7. This appears to us to be the root of the parties' present predicament. What is noteworthy is that clause 7 refers to a fee *on*, rather than *for*, the amount of work done before the termination. We shall revert to this point shortly.

It is also worth observing that the contract was not time bound so that there was no time prescribed for the provision of the services undertaken to be performed by the appellants. This, as we shall demonstrate shortly, makes any argument by the respondent regarding the appellant having been in breach of the agreement through delay, rather illusory. Delay can only be properly and objectively measured against set time lines.

We turn now to consider the first ground of appeal. The question is whether as held by the lower court indeed there was a total failure of consideration as the respondent received no benefit from the agreement entered into with the appellant. Mr. Nchito SC argued that the contract envisaged that the agreement could be

terminated by the respondent prematurely. Mr. Muneku agreed with this position but argued that the termination in the present case was for breach arising from the delayed delivery by the appellant. We have already intimated that this argument cannot hold in circumstances where no time for delivery of the contract outputs were set.

Our reading of clause 7 indeed confirms that the parties contemplated premature termination, that is to say, termination by the respondent before the appellant achieved the chief purpose of the mandate, namely, the raising the US$5,000,000.

The next question we pose is: what was to happen when there was a premature termination in accordance with clause 7? To us, the answer is plain. The respondent was obliged, upon such termination, to pay a cancellation fee. The cancellation fee was tied to the amount of work done before the termination of the contract. Three questions are then raised by this position. First, did the appellant prove that any work was done? Second, if such work was done, did the appellant prove the value of such work? Finally, is the

cancellation fee equivalent to the value of the work done or merely chargeable on the value of such work?

The appellant's learned counsel took us through the record of appeal in an effort to show that the appellant had done some work including preparation of a bankable document which was in two volumes. We were also referred to the record of proceedings and shown the evidence of PW1 where the witness spoke to a technical feasibility and a technical audit as having been done by the appellant pursuant to the agreement. The evidence of the witness also showed that although the bankable document was prepared it was not formally handed over as the respondent was engaged throughout the process of its preparation.

Although the written heads of argument gainsaid the appellant's position, Mr. Muneku, as we have already pointed out, conceded that work was done by the appellant under the agreement and that such work should be paid for.

Our inclination, therefore, is to agree with both counsel that the appellant did indeed undertake some work short of sourcing the US$5,000,000 the appellant had undertaken to raise. That work

included the preparation of a bankable document, a technical feasibility and a technical audit. We are in no doubt whatsoever that considerable time was expended on these assignments undertaken at the instance of the respondent for the respondent's own business interests. The lower court judge was, therefore, wrong to hold that there was a total failure of consideration on the part of the appellant. To that extent ground one is bound to succeed.

We turn to the question whether the appellant did prove the value of the work performed. Both counsel are agreed that there was no formular provided in the agreement regarding the assessment of the value of the work done. Clause 7 of the agreement is plainly deficient in this regard. The appellant claimed the sum of US$320,000 for work done and expenses. Had they completed the mandate and secured US$5,000,000 for the respondent, they would have been entitled only to a maximum of US$125,000, representing 2.5% of the amount sourced. To us, the claim for US$320,000 is clearly inflated and plainly incredible. It was not supported by any evidence. It can thus definitely not be sustained.

While, therefore, some work was done for the benefit of the respondent, the monetary value of that work was not proved. In a situation where a party is claiming damages from another, he must prove them. This is the settled position of the law as is to be found in numerous decisions of this court. We affirmed that position in **J.Z. Car Hire Limited v. Chaila and Scrocco Enterprises Limited**[7]. So significant is the requirement for proof of damages by the claimant that the obligation abides even where there is failure of any defence put forth by the opponent. However, in order to avoid the possibility of passing judgments which are of no practical effect in circumstances where it is indisputable that the party claiming is entitled to some damages, the courts in appropriate instances are urged to make some intelligent or inspired guesses as was stated in the case of **Phillip M'hango v. Dorothy Ngulube**[8].

The situation that confronts us in this appeal is, however, somewhat different. There is no claim for damages being made here. Indeed the termination of the contract did not amount to any breach of contractual or other duty to justify a claim for damages. The claim is for a termination fee properly located within the contract. It seems

to us that had the parties focussed on determination of the quantum of the termination fee in the lower court rather than the issue whether or not liability to pay it had arisen in the first place, the perceived difference between them would have significantly narrowed.

As regards the third question that we posed, namely whether the cancellation fee was equivalent to the value of the work performed prior to the cancellation of the contract, we need to turn to the wording employed in clause 7 of the agreement. We have pointed out already that the cancellation fee was chargeable *on* and not *for* the work done. The provision is in this respect rather unclear. It could give rise to two possible interpretations namely, first that the cancellation fee was equivalent to the value of the work done, and second, that the cancellation fee is a charge on the value of the work done. In practical terms, the adoption of the former interpretation would favour the appellant since the full value of the work performed would be charged as a cancellation fee. The latter interpretation would, however, disfavour the appellant in that the cancellation fee

would not equal the value of the work performed prior to cancellation, but would only be an amount charged on the value of such work.

In the circumstance as described above, in deciding which of these two interpretation should be adopted, resort to the *contra proferentem* rule is justified. That rule of contract states that any clause in a contract considered to be ambiguous should be interpreted against the interests of the party that drew up the contract, or that requested that the clause be included. We note in this case that the contract originated from the appellant. Construing the agreement *contra proferentem* against the appellant, we adopt the interpretation of clause 7 that imply that a cancellation fee was to be charged on the value of the work performed by the appellant. In other words, the cancellation fee is not equivalent to the value of the work, rather it is a percentage of that value. Such percentage is nowhere mentioned. Doing the best we can in the circumstance and employing to the situation before us by analogy, the concept of intelligent or inspired guess in assessment of damages as suggested in **Phillip M'hango v. Dorothy Ngulube**[8], we settle for 2.5% like the parties did in respect of a success fee.

As regards ground two, it should follow from our finding under ground one that work was done for the respondent at the latter's request. A fee on such work ought to be paid for in accordance with clause 7. As no formular was set out in the contract to ascertain the value of the work, it follows that such work has to be assessed on a *quantum meruit* basis.

The learned authors of **Halsbury's Laws of England, 4th ed. Vol. 9(1)** in paragraph 1155 use the term *quatum meruit* in three distinct senses as follows:

> **(1) a claim by one party to a contract, for example on breach of the contract by the other party, for reasonable remuneration for what has been done;**
>
> **(2) a mode of redress on a new contract which has replaced a previous one; and**
>
> **(3) a reasonable price or remuneration which will be implied in a contract where no price or remuneration has been fixed for goods sold or work done.**

We believe that it is in the third sense that the issue of *quantum meruit* is raised in this case. There was in the contract in issue no remuneration fixed by the contract itself and no formular for working out the fee. What is clear from a reading of clause 7 is that the

cancellation fee was tied to the value of the work done at the time of cancellation. It was to be charged *on* the amount of work done before the termination. The fee was intended to constitute reasonable remuneration *on* and not *for* the amount of work done. As was properly pointed out in **DP Services Limited v. Municipality of Kabwe**[2], where a person is engaged in a professional capacity, barring any contractual provision to the contrary, he is entitled to be remunerated on a *quantum meruit* basis for work actually carried out in execution of the assignment. Ground two therefore succeeds.

Turning to ground three, we have already referred to the fact that the learned counsel for the appellant showed us the bankable document in the record of appeal. That document was also available in the documents produced in the trial court and was talked to by the appellant's witness in that court. Inspite of all this, the trial judge found that there was no bankable document. Such a finding clearly went contrary to the evidence adduced before the court. It was, in our view, a perverse finding. Ground three of the appeal has merit and we uphold it.

The net result is that the appeal succeeds. We refer the matter to the High Court Deputy Registrar for purposes of assessing on a *quantum meriut* basis, the reasonable value of the work done. Following such assessment, the value of the work will attract a cancellation fee which we place at 2.5% of the total value of the work. The Deputy Registrar shall also assess and the appellant shall recover, all reasonable expenses linked to the deliverables incurred by the appellant pursuant to the contractual mandate.

Costs to the appellant.

.....
I. C. Mambilima
CHIEF JUSTICE

.....
Dr. M. Malila SC
SUPREME COURT JUDGE

.....
M. Musonda SC
SUPREME COURT JUDGE