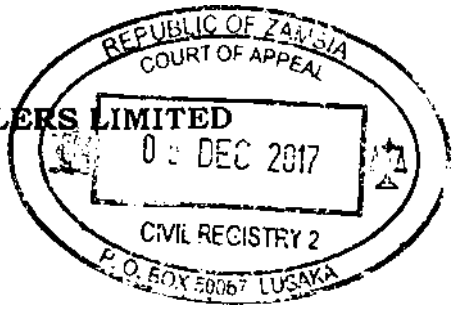
File copy

cr2/8/0115/2016

IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 013/2017**

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)



BETWEEN:

AL AZIZI GENERAL DEALERS LIMITED **APPELLANT**

AND

LUSAKA CENTRAL MEAT PROCESSING LIMITED **RESPONDENT**

CORAM: MAKUNGU, CHISHIMBA, KONDOLO SC, JJA

On 4th May, 2017 and on 5th December, 2017

For the Appellant *: Messrs Philsong and Partners*

For the Respondent *:Mrs. I. Kunda of Messrs George Kunda and Company*

J U D G M E N T

KONDOLO SC, JA delivered the Judgment of the Court

CASES REFERRED TO:

1. **National Drug Company Limited and Zambia Privatization Agency v Mary Katongo Appeal No. 79 of 2001**
2. **Mwamba v Nthenge Kaing'a Chekwe SCZ Judgment No. 5 of 2013**
3. **Base Chemicals v Zambia Air Force SCZ Judgment No. 9 of 2011**

5

4. **William Jacks and Co.(Zambia) Ltd. v O'Connor, (In His Capacity as Registrar of Lands and Deeds) and Construction and Investment Holdings Ltd. Intervening (1967) ZR 109 (CA)**
5. **Barret& Others v Morgan [1874-80] All ER Rep 388**
6. **Minos Panel Beaters Limited v B. Chapasuka (1986) Z.R. 1**

LEGISLATION REFERRED TO:

1. **Lands and Deeds Registry Act, Chapter 185, Laws of Zambia Section 5.51(1)**
2. **The Landlord and Tenant (Business Premises Act) Chapter 193, Laws of Zambia Section 2, 3(2)(g)(ii)**

OTHER WORKS REFERRED TO:

1. **Halsbury's Laws of England 4th Edition (reissue) Vol. 27(1)**
2. **Woodfall – Landlord & Tenant, Volume 1, Release 35. Sweet & Maxwell (1996)**
3. **McGregor on Damages, 8th Edition. Sweet & Maxwell (2009)**

This is an Appeal against a Judgment of the High Court which dismissed the Appellant's (Plaintiff in the Court below) claims against the Respondent (Defendant in the Court below) for payment of ZMW119,900 for outstanding rentals and ZMW22, 000 being water and security charges arising from a tenancy agreement entered into by the Parties commencing 1st June, 2010.

In the High Court proceedings, the Appellant averred that the monthly rental was ZMW2,500 per month and the Respondent stopped paying in October 2012 thus incurring the said arrears. The Respondent, on the other hand, contended that it was not operating from the premises and had vacated.

The Appellant's Managing Director, Abdelaziz Farah Isse PW1, testified that the parties entered into an agreement under which the Respondent was to pay a monthly rental of ZMW2,500. He explained that one Abdi Qaali, a shareholder, invested the sum of USD20,000 into the Plaintiff Company of which, it was agreed that USD5, 500 would go towards the purchase of building materials and the balance of USD14, 500 would be applied to the rentals due from the Respondent Company and deductible on a monthly basis. He testified that the tenancy agreement did not specify a life span but it provided for termination.

On 1st October, 2012, the Appellant wrote to the Respondent informing that the monthly rental had been increased from ZMW2,500 to ZMW5, 450. The Respondent did not pay any of the revised rentals and was still in occupation of the premises because their equipment was still on site, though not operational.

PW1 also informed the Court that the Plaintiff Company had allowed him (PW1) to reside in part of the premises and that he had been exempted from paying rent.

The Respondent's witness DW1, Edward Sakala told the court that he was a Tenant operating on the Appellant's property and that he was the only tenant operating a business thereon.

DW2, Abdinassir Osoble who is a Director in both the Appellant and Respondent Companies, testified that the Tenancy with Abdi Qaali allowed him to operate from the premises using the Respondent's name. He stated that

when the Plaintiff increased the rentals on 1st October, 2012 the Defendant refused to sign the new agreement and removed its equipment although he conceded that some of the equipment was still on the premises. He told the court that he thereafter moved onto the premises as a resident, joining PW1 who also lived on the property as a resident without paying rent.

The Appellant submitted that the Tenancy was still subsisting and the Respondent was bound by its terms. The Respondent on the other hand, opined that the Tenancy was null and void because it did not conform with the provisions of the **Lands and Deeds Registry Act**.

The Learned Trial Judge placed reliance on **Halsbury's Laws of England** and on the case of **William Jacks and Co.(Zambia) Ltd. v O'connor, (In His Capacity as Registrar of Lands and Deeds) and Construction and Investment Holdings Ltd (Intervening)** [4] and made a finding that in this instance, the parties had entered into a Tenancy Agreement with a certain duration. She further held that the Tenant vacated the premises at the expiration of the tenancy and it was immaterial that some of the Respondent's property was still on the premises because the Parties had been released from their obligations.

The lower Court expressed surprise that DW2 having signed the Tenancy Agreement on behalf of the Appellant was called to testify on behalf of the Respondent. In her view, he was better poised to testify for the Appellant.

The Appellant appealed against the whole Judgment and advanced ten (10) Grounds of Appeal but only argued 9. We therefore take it that ground 10 has been abandoned and we shall not consider it. The said grounds are as follows:

1. ***That the Honourable Judge misdirected herself in both law and fact when she held that the Tenancy Agreement signed between the Parties came to an end in October, 2012 contrary to evidence of admission by the Defendant that the Defendant has not vacated the Plaintiff's premises in accordance with the Tenancy Agreement.***
2. ***That the Honorable Judge misdirected herself in both law and fact when she held that Mr. Abdi Qaali vacated the Appellant's premises, when the evidence on record shows that Mr. Abdi Qaali has never been the Appellant's Tenant and neither has he ever vacated the Appellant's premises according to the Tenancy Agreement.***
3. ***That the Honourable Judge misdirected herself in both law and fact when she held that DW2 was not a proper witness for the Respondent because he was the one who signed the Tenancy Agreement and a letter increasing rent on behalf of the Appellant and yet the Hon. Court went ahead and relied on his evidence.***
4. ***That the Honorable Judge misdirected herself in both law and fact when she held that the Respondent vacated the premises***

contrary to the evidence adduced before Court namely that the Cold room, butcher boy (meat cutting machine) mincer and bore cutter are still at the Appellant's premises.

5. *That the Honorable Judge misdirected herself in both law and fact when she held that it matters less that the Respondent's equipment is still at the Appellant's premises contrary to the express Agreement in the Tenancy Agreement and the evidence adduced by DW2 that he found the equipment at the Appellant's premises which was rented to the Respondent.*
6. *That the Honorable Judge misdirected herself in both law and fact when she held that there was no enforceable Tenancy Agreement contrary to the Court's findings that the Tenancy Agreement between the Parties met the ingredients of a Lease Agreement.*
7. *That the Honorable Judge misdirected herself in both law and fact when she held that PW1 dragged DW2 to Court and that PW1 and DW2 have equal shares to the spoils of the Company as Directors contrary to the evidence before the Court that the Parties to the proceedings are legal entities and that the true owners of the property are shareholders, as opposed to directors, in accordance with the Law.*
8. *That the Honorable Judge misdirected herself in both law and fact when she held that if the Appellant's premises were turned*

into residential property both PW1 and DW2 should be entitled to live there on equal terms contrary to the evidence that Companies operate through resolutions and which resolutions were not before court and further the fact that the property belongs to the Plaintiff and not PW1 or DW2.

9. ***The findings of fact by the Honorable Judge in this matter were perverse, made in the absence of any relevant evidence and/or made upon misapprehension of the facts, which on a proper view of the evidence, no trial court acting correctly, can reasonably make.***
10. ***The Honorable Judge misdirected herself both in law and fact when she dismissed the Appellant's application and awarded costs to the Respondent...***

The Appellant filed written Heads of Arguments and Grounds 1, 4 and 5 were argued as one. The gist of the argument was that the agreement between the parties was a Contract for a Lease, and not a Tenancy Agreement and that it did not come to an end in October 2012 as held by the Lower Court.

The Appellants contended that the references in the Agreement to *"the transaction ending in 29 months"* referred to the period over which monthly rentals would be deducted from the USD14,500 paid by Mr. Abdi Qaali and not the duration of the Contract for Lease. It was further contended that it was a

term of the agreement that the rentals would only be increased after two years when the USD14,500 was exhausted.

It was argued that bullets 6 and 7 of the Agreement indicated that the Respondent could only terminate the tenancy after removing all of its equipment from the rented premises. The fact that the Respondent had conceded that some of its machines were still on the premises, demonstrated that the Respondent has not vacated and for that reason, rentals were payable as agreed. Mrs. Kunda relied on the cases of **National Drug Company Limited and Zambia Privatization Agency v Mary Katongo** [1] and **Mwamba v Nthenge Kaing'a Chekwe** [2] and opined that the parties were bound by the terms of the agreement and the Court should have given effect to the terms and found the Respondent liable to settle the outstanding rentals due up to the date of vacation of the Appellant's premises.

Learned Counsel for the Appellant further submitted that the lower Court's finding, that it mattered less that the Respondent's equipment was still on site, was a misdirection. It was further argued that the rented property belonged to the Appellant Company which was a legal entity and as such, shareholders or directors of either Company could not claim or occupy the Company's property in the manner that DW2 did and which action the lower Court seemed to endorse. The Appellant contended that the Respondent's decision to continue occupying the premises meant that the contract was not terminated.

In arguing grounds 2 and 3, the Appellant urged this Court to exercise its authority to interfere with the lower Court's finding that Abdi Qaali vacated the premises because all he did was to pay the rentals for the benefit of the Respondent as the Agreement was between the Appellant and Respondent only.

With respect to the evidence presented by DW2, the Appellant submitted that it is trite law that the Court cannot rely on the evidence of witness it has discredited. It was argued that the trial Court should not have relied on DW2's evidence after having discredited him as shown on page J22 of the trial Court's Judgment.

The Appellant, in Ground 6, merely disagreed with the finding of the lower Court that there was no enforceable contract despite the presence of the elements necessary to constitute a lease, namely that: there is an expressive form in writing; identification of lessor and lessee; commencement and duration of the term and: lastly, the rent or consideration.

In grounds 7 and 8, it was argued that companies are artificial persons and the Court's reference to PW1 dragging DW2 to Court, was a misdirection because they were not parties to the action but only witnesses called in their capacities as shareholder/director. It was further submitted that the holding by the lower Court that directors have equal entitlements to live on the property was a misdirection at law.

In Ground 9 it was argued that the findings of the Court below were based on a misapprehension of the evidence and the facts before it and in some

instances on matters not led in evidence and as such those findings were perverse. It was pointed out that the evidence of both PW1 and DW2 showed that the Respondent was informed of the increment and by continuing to occupy the premises, the Respondent demonstrated that it had accepted the offer. On the basis of **Base Chemicals v Zambia Air Force** (3) it was further submitted that instead of taking an objective approach in considering whether or not the Respondent Company accepted the increment of rentals, the lower Court had misdirected itself by relying on DW2's testimony, whom she had discredited as being an unreliable witness,

Lastly, on the strength of **Allan Muyambango Muyambango v Clement Banda** (4) the Appellant submitted that, despite the principles set out in that case with regard to conflicting evidence, the lower Court did not explain why it believed the testimony of DW2 over that of PW1 and on that basis, the Judgment must not be allowed to stand.

The Respondent filed Heads of Arguments in response to the nine grounds of appeal. With regard to grounds 1, 4 and 5 Mrs. Kunda argued that the lower Court was on firm ground when it found that the Agreement signed by the Parties ended in October 2012 as this was after the court analyzed and accepted the evidence of DW1 who testified that the Respondent had stopped operations on the premises. It was contended that in its statement of claim, the Plaintiff admitted that the monthly rental was to last for 29 months until October, 2012 and the Court was entitled to refer to that evidence.

She argued that the Respondent did not accept to sign the notice increasing the rentals and opted to vacate whereupon the lease terminated. The only items that remained on the premises were a butcher boy, ball cutter and mincer which were in the custody of DW2 who was part owner of the premises. Rent could not accrue merely because those properties have remained on the premises. It was submitted that even though the Respondent did not directly inform the Appellant that it was leaving the premises, business tenancies can be terminated by implication.

Apart from repeating the above arguments, the main thrust with regard to grounds 2 and 3 was that DW2's evidence was relevant to the proceedings and the Court's reliance on it was therefore not a misdirection. It was submitted that where such evidence was indirectly discredited, the issue became one of credibility which merely affects the weight or value to be attached to the evidence but does not render it inadmissible or irrelevant.

On Ground 6, the Respondent supported the lower Courts finding that there was no enforceable contract and thus no rental or service charge arrears were owed by the Respondent.

Mrs. Kunda submitted that Grounds 7 and 8 were premised on *obiter dicta* which does not form part of the Judgment therefore the Learned Trial Judge did not misdirect herself. In support of the said *obiter*, and in the alternative, she argued that **Section 51(1) of the Lands and Deeds Registry**

Act allows for joint tenancy thus PW1 and DW2 being joint tenants have equal rights to the premises in contention.

Lastly, in response to ground 9, she repeated her earlier arguments and submitted that the Respondent did not accept the increment in rentals and vacated the premises.

We have carefully perused the Judgment of the Lower Court, the Record of Appeal and the submissions by the parties.

It is not in dispute that there was an agreement entered into by the Parties on whose terms rentals were to be paid by the Respondent for the use of the Appellant's premises located at Plot No. B3-/863210 in Emmasdale, Lusaka. This is evidenced by the Agreement exhibited at page 113 of the Record of Appeal. The dispute between the parties, as we perceive it, is as to whether or not the agreement terminated when the Respondent vacated the premises.

We shall proceed by addressing grounds 1,2,4,5 and 6 simultaneously and we foresee that our decision on these will directly affect the remaining grounds.

The gravamen of the five grounds is that the Court below erred when it held that the Agreement terminated in October, 2012 and that the Respondent vacated the premises despite the evidence on record which showed that the Respondent did not vacate. The basis of the argument is that the Respondent's

equipment still remains on the Appellants property meaning that the tenancy agreement is still subsisting. The Respondent insists that it vacated the premises thus terminating the Tenancy Agreement and whatever property remained thereon was under the custody of DW2, who was residing at the premises in his capacity as a shareholder in the Plaintiff Company.

Relying on **Halsbury's Laws of England** and the case of **William Jacks & Company Limited** (4) the Court established that the fundamental elements of a lease were, namely: a commencement date; description of the parties; description of the property to be leased; length of term; and, description of rent. The trial judge found that the all the above elements were present in the Agreement executed between the Appellant and the Respondent. The lower Court referred to bullet 9 of the Agreement, which according to her, specified that the transaction was for a period of 29 months thereby establishing a certain duration. The said bullet 9 reads as follows;

> *"Mr. Abdi Qaali:-*
>
> *He has invested his initial shares to AL-AZIZ General Dealers Limited amounting to US$20, 000.*
>
> *AL-AZIZI General Dealers is refunding his initial shares as follows.*
>
> - *AL-AZIZI General Dealers supplied building materials amounting to $5, 500 to Lusaka Central Meat Process Limited in 2009 toward the building of the cold room. This is part of the shares of his money.*

- *The remaining balance of $14, 500 US dollars, AL-AZIZI General Dealers will be deducting every month two million five hundred thousand kwacha (2, 500, 000) from Mr. Abdisamad's initial shares as rental charges for Lusaka Central Meat Process Limited. The transaction will be settled after 29 months. That is in the year October, 2012."*

We fully agree with the trial Judge's holding as to the ingredients of a valid lease. We have scrupulously looked at the Agreement in contention and agree it clearly defines and describes the parties to the Agreement, the rent payable and the commencement date and note that the dispute revolves around the duration of the tenancy and the mode of termination. The parties to this action have described the agreement as a Contract for a Lease and as a Tenancy Agreement. We shall refer to it as a Tenancy Agreement because it contains all the ingredients necessary for an enforceable tenancy agreement.

The trial Court herein seized on the reference to 29 months and held that to be the duration of the agreement. The 29 months appears in bullet 10 of the agreement. The bullet has been reproduced above and the relevant sentence states that, "*The transaction will be settled after 29 months*". The question is asked; which transaction would be settled in 29 months?

The agreement is in two parts, the first part being from the Parties clause and comprising bullets 1 to 8. The second part comprises bullets 9 and 10. It was quite clear that the second part is with respect to an investment of

US$20,000 into the Appellant company by one of its shareholders Mr. Abdi Qaali and which investment was being refunded to him by the Appellant company. Bullets 9 and 10 specify that the money was to be paid back in kind with US$5,500 having been paid in the form of building materials supplied to the Respondent Company by the Appellant Company. The balance of US$14,500 would be applied against the rentals payable by the Respondent Company to the Appellant Company to be deducted at the rate of ZK2, 500 per month and the transaction would be settled after 29 months in October, 2012.

Mr. Abdi Qaali was not a party to the agreement and we can thus only speculate as to why he offered to pay off the rentals on behalf of the Respondent and indirectly invested US$5,500 into the Respondent Company. It is, however, abundantly clear that the 29 months was not the duration of the Tenancy Agreement but the period over which monthly rentals would be deducted from the US$14,500 owed by the Appellant Company to Mr. Abdi Qaali.

It is therefore our view that the Tenancy Agreement did not provide for a termination date, it had no specific duration. The learned authors of **Halsbury's Laws of England** state that the "*duration of term*" must be fixed by a specific number of years or by reference to a collateral matter in itself certain or capable of being rendered certain before the lease takes effect but, whatever the case, there cannot be a lease in perpetuity except by virtue of statute.

Where a tenancy agreement does not clearly state its duration, the duration can be inferred from the conduct of the parties. In *casu*, the rentals were paid monthly giving rise to the inference that this was a monthly tenancy renewable from month to month. In short, it was a periodic tenancy. On periodic tenancies the learned authors of **Halsbury's Laws of England** state as follows;

> ***"A weekly or other periodic tenancy is a tenancy by the week or the period, and does not expire without notice at the end of the first week or period or at the end of each succeeding week or period, there being not a reletting at the beginning of every week or period but a springing interest which arises and which is only determined by a proper notice to quit. A weekly or other periodic tenancy arises either by express agreement or presumption of law."***

And;

> ***"A weekly or other periodic tenancy is determinable by notice to quit, which in the absence of special stipulations, should be given so as to expire at the end of any complete period of the tenancy and should ... Be equal to the length of the period, that is ... In a monthly tenancy, a month's notice."***

In the House of Lords case of **Barret & Others v Morgan** [5], the manner in which periodic tenancies are determined was explained by Lord Millet as follows;

"A lease or tenancy for a fixed term comes to an end by effluxion of time on the date fixed for its determination. A periodic tenancy comes to an end on the expiry of a notice to quit served by the landlord on the tenant or by the tenant on the landlord. As Lord Hoffmann explained in Newlon Housing Trust v Alsulaimen [1998] 4 All ER 1 at 4–5, [1999] 1 AC 313 at 317 it also comes to an end by effluxion of time. In each case the tenancy is determined in accordance with its terms.

By granting and accepting a periodic tenancy with provision, express or implied, for its determination by notice to quit, the parties have agreed at the outset on the manner of its termination. The parties and their successors in title, including those who derive title under them, are bound by their agreement." *(emphasis ours)*

A notice to quit, according to **Halsbury's Laws of England at para 190**, need not be any particular form, it need only be properly served on the tenant or landlord and if the tenancy was created orally, the notice may be given orally.

It must be pointed out that the tenancy agreement in *casu* was between two corporate entities and was to all intents a tenancy for business purposes. In the case of **Minos Panel Beaters Limited v B. Chapasuka** [6] Ngulube D.C.J. delivered the Judgment of our Supreme Court which clarified that

Sections 2 and 3 (2) (g) (ii) of the Landlord and Tenant (Business Premises) Act cover tenancies with a duration of less than three months where the tenant has been in occupation of the premises for more than six months. The Court described such tenancies as periodic tenancies. Whilst acknowledging that the drafting of the Act might cause uncertainty as to whether or not periodic tenancies are provided for under the Act, the Supreme Court stated as follows;

> ***"... Of course, we do not seek to pretend that there is no distinction between a periodic tenancy as such and one simply for a term certain - the latter has a definite and fixed duration while the former is reckoned by the period agreed or implied (such as by the conduct of the parties) and does not expire without notice at the end of the period or at the end of each succeeding period. The critical point here is that there is in fact an initial definite period and the springing interest which arises at the beginning of the next period results in the tenant remaining in occupation, as envisaged by section 3 (2) (g) (ii) which can reasonably be interpreted in this vein if it is to be given any effect at all. In any case, if the legislature intended to exclude such periodic tenancies, it would have plainly said so. In which event, there would have been no need to make any reference to "a periodical tenancy" under the definition of "notice to quit" in section 2".*** *(emphasis ours)*

The import of the **Minos Case** (supra) is that all periodic tenancies, even those to which the **Landlord and Tenant (Business Premises) Act** applies, as a general rule can only be terminated by notice to quit. It is abundantly clear that the Tenancy Agreement, in *casu*, was a monthly tenancy and could thus only be terminated by notice to quit. According to the learned authors of **Woodfall - Landlord and Tenant** *"In the absence of a notice to quit a periodic tenancy continues to be held by the tenant and his assigns or representatives and the immediate reversion continues in the landlord and his assigns or representatives, unless and until extinguished by the Limitation Acts".*

Woodfall further states that it is the nature of periodic tenancies to be brought to an end by the unilateral act of either party and it states, at paragraph **17.214**, that:

> **"the fact that a tenant has vacated property does not dispense with the need for a notice to quit unless the inference can be drawn that a surrender has taken place"**

Despite notice to quit not having been given, it is evident that the Respondent Company did in fact vacate the premises and it is clear from the conduct of the parties that the Respondent does not wish to continue with the Tenancy. That notwithstanding, the Respondent was obligated by law to tender a Notice to Quit equivalent to the duration of the tenancy. This being a

periodic monthly tenancy, one months' notice to quit would have been required.

In our view, though not properly done, a surrender of the property took place in that the Respondent refused to pay the revised rentals and stopped operating his business at the premises. The Appellant was aware of the fact that the Respondent, had for all intents and purposes abandoned the premises and there is no evidence that the Respondent prevented the Appellant from taking possession of the premises. Further and most important of all, there is no evidence that the Appellant took any steps to mitigate the situation.

It is unrealistic to make a finding that the periodic tenancy would continue and rental arrears would accumulate *ad infinitum* until written notice to quit was given. We opine that after a period of six months had elapsed, the Appellant should have realized that the premises had been abandoned and should have made efforts to mitigate its losses. The Respondent having breached its duty to give notice to quit would be liable in that regard. We therefore find the Respondent liable to pay six months' rent.

The Appellant's claim for payment of rent arrears was based on the increased monthly rental of ZM5,450 which was rejected by the Respondent Company. Bullet No.2 of the Tenancy agreement simply states that "... *an increment will be made after the period of two years*" from the commencement

of the tenancy (i.e. from 1st June, 2010). The law is settled that an increment in the rentals can only be effected in accordance with the tenancy agreement or by mutual consent of the parties. Bullet No. 2 does not empower the Appellant to effect a unilateral increment of the rentals. The increment of rent in the sum of ZM5, 450 per month is thus null and void and of no effect and the monthly rent shall be calculated at the original rent of ZM2, 500 per month.

Towards the end of the Judgment, the learned trial Judge expressed herself in an *obiter dictum*. We would normally ignore comments made in *obiter* except for the worrying impression that in this particular instance, the learned trial Judge seemed to make findings of fact, which might leave a party wondering whether what was said in *obiter* was actually part of the *ratio decidendi*. Courts must be wary and ensure that what is said in *obiter* is quite distinct from the *ratio decidendi*.

For the sake of clarity, we repeat our finding that the disputed tenancy is in fact a monthly tenancy which was not terminated in accordance with the law. Ground one therefore succeeds and because all the remaining grounds spring from ground one, they are rendered otiose. The Appellant is awarded the following;

1. Rental arrears of ZMW2, 500 from 1st November, 2012 to 30th April 2013;

2. Service charges as provided by bullet 8 of the Tenancy Agreement and to be assessed by the Deputy Registrar for the said period of 6 Months;
3. The awarded sums shall attract interest at the average short-term bank deposit rate from date of writ to date of Judgment and thereafter until date of payment, at the current bank lending rate as determined by Bank of Zambia.

Costs in both the High Court and in this Court, are awarded to the Appellant.

DATED AT THIS 5TH DAY OF DECEMBER, 2017

.....

C.K. MAKUNGU
COURT OF APPEAL JUDGE

.....

F.M. CHISHIMBA
COURT OF APPEAL JUDGE

.....

M.M. KONDOLO SC
COURT OF APPEAL JUDGE