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

2015/HPC/0247

BETWEEN:

PH YANGAILO & COMPANY (Suing as a Firm) **PLAINTIFF**

AND

STEAK RANCH LIMITED **1ST DEFENDANT**

NICK MOYO **2ND DEFENDANT**

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

For the Plaintiff:	*Mr. C. K. Bwalya – Messrs D.H. Kemp & Company*
For the Defendants:	*Mr. B. Mosha- Messrs Mosha & Company.*

JUDGMENT

LEGISLATION & OTHER WORKS REFERRED TO:

1. ***S.I No. 9 of 2001, the Legal Practitioners (Costs) Order, 2001.***
2. ***Halsbury's Laws of England 4th Edition, 2003 Reissue Volume 6, par 1.***
3. ***Jack Beatson. Ansons Law of Contract (28th Ed Oxford University Press: London, 2002).***
4. ***Chitty & Beale. Chitty on Contracts (29th Ed Sweet & Maxwell: London 2004).***
5. ***Second Schedule, Supreme Court of Zambia Act Chapter 25 of the Laws of Zambia.***

CASES REFERRED TO:

1. ***Indeco Estates Development Company Limited V Marshall Chambers (2002) ZR 16.***
2. ***Holmes v Buildwell Construction Company Limited (1973) ZR 97.***
3. ***Masauso Zulu V Avondale Housing Project Limited (1982) Z.R 172.***
4. ***Mohamed V Attorney General (1982) ZR 49.***
5. ***Cavmont Capital Holdings Plc V Lewis Nathan Advocates (Suing as a Firm) SCZ Judgment No. 06 of 2016 (Appeal No. 159/2014).***
6. ***William David Carlisle Wise V Hervey Limited (1985) ZR 179.***
7. ***Majory Mambwe Masiye V Cosmas Phiri (2008) ZR 56.***

By Writ of Summons taken out on 4th June, 2015, the Plaintiff is claiming the following:-

(i) The sum of K254,185.00 being outstanding legal fees due to the Plaintiff from the Defendants;

(ii) Interest on monies due as allowed under the law, and

(iii) Costs of and incidental to this action.

According to the Statement of Claim, at the instance of the 2nd Defendant, the 1st Defendant sought legal services from the Plaintiff relating to two matters involving the 1st Defendant and Manda Hill Centre Limited, under Cause No. 2011/HP/0325 and the 1st Defendant and Steak Ranches International BV, under Cause No.2011/HPC/0183.

It is stated that the Plaintiff accepted to render the legal services, sought by the 1st Defendant related to the 1st Defendant's said two cases on the undertaking of the 2nd Defendant that all legal bills that would be incurred would be settled without difficulties because it was the 2nd Defendant that was known to the Plaintiff, rather than the 1st Defendant.

In consideration of the undertaking made by the 2nd Defendant to the Plaintiff, after considerable and successful work undertaken by the Plaintiff, on behalf of the 1st Defendant, in relation to the case involving Manda Hill Centre Limited, under Cause No. 2011/HP/0325, whereby the tenancy of the 1st Defendant

was secured and it continued to trade unfettered, as a result thereof, a Bill for services rendered was issued to the 1st Defendant, on 21st June 2011 in the sum of K306, 765.00 and on the same date another Bill of K102,960 was issued in respect of the work done in the Steak Ranches International BV case under Cause No. 2011/HPC/0183.

The Defendants received both Bills, and undertook to pay them and between 22nd February, 2011 and 11th March, 2013 the Defendants made payments (over a long period of time) which added up to K155, 540.00 towards the total Bills rendered of K409, 725.00 leaving an outstanding balance of K254, 185.00 as at 11th March, 2013.

That the Plaintiff had since that time made several attempts to collect the long outstanding payment from the Defendants without success and the 2nd Defendant had continuously assured the Plaintiff that the outstanding bills would be settled by him but to no avail.

It is also stated that the Plaintiff relies on the full import and effect of the written assurances, personally given by the 2nd Defendant to the Plaintiff on payment of the outstanding bills.

The Defendant filed a Defence on 2nd July, 2015 and stated that the 2nd Defendant instructed the Plaintiff to act for the 1st Defendant on the two matters under cause numbers 2011/HP/0325 and 2011/HP/0183 in his capacity as Director of the Company and not in his personal capacity.

Moreover that the two bills of K306,765.00 and K102,960.00 were not commensurate to the work actually done by the Plaintiff and the Defendants assert that the value of the work done was significantly less than what the Plaintiff billed.

Furthermore the Defendants assert that Cause No. 2011/HP/0325 upon which the Plaintiff issued a bill of K306, 765.00 did not go for trial and that the

Plaintiff at its maximum charge out rate could not have spent 666 hours on a matter that only spanned a period of 8 months.

That the Defendants did not voluntarily undertake to pay the bills and that the 2nd Defendant paid the sum of K155,540.00 but states that the alleged balance was disputed on the basis of being excessive and not reflective of the work done by the Plaintiff.

It was also contended by the Defendants that the Plaintiff was not entitled to the Bills as presented as they were excessive and not reflective of the work done.

On this basis the Defendants denied that the Plaintiff was entitled to any of the reliefs sought or at all.

The Plaintiff filed a Reply on the 29th of June, 2016 and stated that if the Defendants seriously wished to dispute the bills rendered to them they should have done so at the time they received them but instead they accepted them and started to pay towards their settlement.

Further that at this stage of the mater, to allege that the bills rendered by the Plaintiff, did not reflect the actual work done was unjustifiable, wrong and just mischievous.

The Plaintiff contended that the amount of time spent in litigation matters was not only determined by the fact whether the matter went to trial or not.

Rather that the cost was determined by the actual time spent, urgency, complexity and skills of the Advocates attending to the matter and that the time spent on this matter and billed for reflected the actual time and skill expended on the same by the Plaintiff.

The Plaintiff asserts that by paying the sum of K155,540.00 towards the bills, in this matter the Defendants impliedly accepted them and could not protest

that they were excessive at this stage of the matter. That by their own conduct the Defendants vitiated their right to dispute the bills rendered.

During Trial on 10th April, 2017, the Plaintiff called one witness who had filed a Witness Statement into Court on 23rd August, 2016. The witness was Mr Pengani Yangailo, (PW1) the Managing Director of the Plaintiff.

He testified that on or about February, 2011, at the instance of the 2nd Defendant and through the 2nd Defendant, the 1st Defendant (the Defendants) sought legal services from the Plaintiff relating to two very urgent matters involving the 1st Defendant and Manda Hill Centre Limited under cause number 2011/HPC/0183 and the 1st Defendant and Steak Ranches International BV, under Cause 2011/HPC0183. The Plaintiff accepted the Defendant's very urgent instructions and personally had conduct of both matters.

Further that the Plaintiff accepted to render the legal services, sought by the 1st Defendant on the undertaking of the 2nd Defendant that all legal bills that would be incurred would be settled without difficulties because it was the 2nd Defendant that was known to the Plaintiff rather than the 1st Defendant.

Moreover, that in consideration of this undertaking the Plaintiff did considerable and successful work on behalf of the 1st Defendant to secure its tenancy in the case involving Manda Hill Center Limited in Cause number 2011/HP/0325 rendered a Bill of K306,765.00 to the 1st Defendant on 21st June 2011 and on the same date issued another one of K102,960.00 for work done in the Steak Ranches International BV case, under Cause number 2011/HPC/0183.

It was also his evidence that the Defendant received both bills and undertook to pay them without any dispute whatsoever and between 22nd February, 2011 and 11th March, 2013 the Defendants made payments to the Plaintiff, in tiny instalments over a very long period of time adding up to K155, 540.00 from the

total sum of the Bills rendered of K409, 725.00 leaving an outstanding balance of K254,185.00 as at 11th March, 2013.

That the Plaintiff through him had since that date made several attempts to collect the long outstanding sum of K254, 185.00 from the Defendants without success.

PW1 also stated that the 2nd Defendant consistently assured him that the outstanding bills in this matter would be settled by him, but to no avail. In support of these assurances the 2nd Defendant personally wrote emails to him confirming his intention to settle the outstanding bills.

That the two bills in this matter were never disputed by the Defendants, otherwise the Plaintiff would have gladly proceeded to Taxation rather than wait for over 4 years for its hard earned income. He also testified that the Defendants accepted the Bills without any written protestation and started, to pay the Bills, until they fell on apparent harder financial times.

According to PW1 by starting to make payments towards the said bills the Defendants expressly and impliedly accepted the Bills and yet they had now, apparently refused to pay the Plaintiff the said sum of K254, 185.00 without any proper cause to the financial detriment of the Plaintiff over the many years that had gone by.

Additionally he stated that since the Defendants stopped making payments towards the outstanding Bills, the Plaintiff also decided to stop acting for the 1st Defendant in the still on-going matter under Cause No. 2011/ HPC/0183 because it did not want to accumulate more outstanding legal fees from the Defendants.

That after the 2nd Defendant pleaded with the Plaintiff and assured it that he would pay the outstanding amount on the Bills, the files were released to the 2nd Defendant in good faith on the part of the Plaintiff. Further, that the Plaintiff through him at the request of the 2nd Defendant, even made a referral

of its case to the firm of Messrs Tembo Ngulube and Associates sometime in May, 2013.

It was also his evidence that since that time the Plaintiff constantly sought to be paid the outstanding balance of the Bills as promised whilst the 2nd Defendant consistently pleaded for more time and assured the Plaintiff that he would settle the outstanding bills as promised.

Moreover that the 2nd Defendant appeared grateful to the Plaintiff's disposition to him, even sometimes apologetic for his apparent impecuniosity and at the same time repeatedly, personally, committing himself to settle the Bills as shown in the email dated 18th February, 2015 written by the 2nd Defendant to him.

Further that the 2nd Defendant could not now attempt to dispute his own written commitments to settle the Bills and to allow him to do so could only mean three things: he was a calculating liar; very ungrateful and a deceitful human being or he just wanted to use the company as a sham or façade to avoid the responsibilities he committed himself to.

It was lastly pointed out by the witness that the Plaintiff was entitled to payment of the outstanding bills from the Defendants together with interest and legal costs of this apparently needless litigation and that the Defendants clearly did not have any valid defence to the Plaintiff's claims in this matter.

In cross- examination PW1 stated that his law firm entered into an agreement for the provision of legal services based on a verbal understanding. That the letter from the Plaintiff to the 1st Defendant dated 7th February, 2011 which he wrote contained part of the terms and showed that the charge out rate was K460,000.00(un-rebased) per hour and any charge above this would be unlawful unless agreed.

That the Plaintiff tendered two bills relating to two different matters and that in Cause No. 2011/HP/0325 the matter did not go to trial but he spent 639 hours

on it and the Defendants did not complain or raise the issue of the Bill being too high.

Further that the 2nd Defendant indicated that they had fallen in financial difficulties and wanted the bill to be discounted which he agreed to provided he made a one off lump sum payment.

It was also his evidence that he attended the meeting with the Advocates for the 1st Defendant's Landlord and the narration of the tasks done was clear from pages 4 to 6 of the Plaintiff's Bundle of Documents.

Moreover that the amount paid on the Bill of 21st June, 2011 was K52, 580.00 and the Defendants were bound to pay the amounts billed. Lastly he pointed out that the amounts billed represented the tasks that had been undertaken.

There was no re-examination.

The Defendants also called one witness who filed a Witness Statement on 24th August, 2016. The witness is Mr Nick Moyo (DW1) the Managing Director of the 1st Defendant. In his Evidence in Chief the Defendant stated that all acts undertaken by him in connection with this matter were done in such capacity i.e. as Managing Director of the 1st Defendant Company.

That he secured the services of the Plaintiff on behalf of the 1st Defendant and the parties to this effect entered into a written agreement that was authorised by the Plaintiff and was exhibited at pages 1 to 3 of the Defendant's Bundle of Documents.

Moreover that the agreement between the Plaintiff and the 1st Defendant provided inter alia that the 1st Defendant would be billed on an hourly rate in accordance with the Legal Practitioners (Costs) Order 2001 of the Legal Practitioners Act, Cap 30 of the Laws of Zambia.

That the matter under Cause No. 2011/ HP/0325 was commenced by Originating Notice of Motion and was concluded by consent and that the Plaintiff rendered his Bill for this case amounting to K306, 765.00.

That on the same date he issued another bill in Cause No. 2011/ HPC/0183 in the sum of K102, 969.00 and when they received the bills they were shocked and requested to negotiate and the Plaintiff agreed in principle but said the Defendants needed to pay off a significant amount before he would consider their request.

DW1 went on to state that given this understanding between them the company began paying the bills on the strength of the demand made by the Plaintiff not that they accepted the number of hours claimed by the Plaintiff which he in any case did not disclose to him in the Bill.

That after reflection and consultation, he had come to the realization that the amount claimed by the Plaintiff was not commensurate to the time actually spent and a cursory perusal and computation and the hours spent on Cause 2011/HP/0325 shows that at the maximum rate chargeable, the Plaintiff spent 666 hours on his case.

Moreover that the fact of the matter was that the Plaintiff did not spend anywhere near the time claimed and it was apparent that the Plaintiff was imposing a rate outside the agreement made by the parties.

Further that the 1st Defendant had thus paid the sum of K155,540.00 towards the services rendered by the Plaintiff and he verily believed that this was a true reflection, more or less of the value of the legal services rendered to him.

That he had never been averse to settling his bill for services rendered, but he objected to making payments that were outside the agreement between the parties.

Thus it was his evidence that the Plaintiff should provide a breakdown of the time spent on his cases if at all there was justification for the fees demanded.

In cross examination DW1 stated that there was work done by Messrs Yangailo & Co and the bill was rendered in 2011. He also admitted having written to the Plaintiff requesting time within which to pay and also recalled having agreed to defer the discussion on discount until a payment was made.

He added that there was no written document on the record disputing the amounts in the Bill (s) and that none of the emails had the 1st Defendant's email account but that he said "I" in the email of 18th February, 2015.

That all along he had been asking for time to pay and only raised the issue of the bill being excessive in the Defence.

In re- examination DW1 told the Court that the 1st Defendant was a small company and did not have an email address and so in the email of 18th February, 2015 he used the word I to refer to the Company.

Further that although the part payment indicated in the Defence was handed over by him it did not come from him personally and when the bills were presented to him he expressed shock at the amount but since the matters were still on going and he was behind in payments PW1 told him it would be better if he started paying then discuss the issue of the quantum of the bills later.

Lastly that he raised issue with the quantum of Bills after he got advice but since the relationship he had with the senior partner was professional he could not insist on a discount.

Counsel for the Plaintiff filed Skeleton Arguments and Written Submissions into Court on 23rd August, 2016 and 17th March, 2017 respectively.

In the Skeleton Arguments Counsel submitted that the Plaintiff's claim in this matter was a proper chose in action against the Defendants and relied on the

definition of the phrase set out in the Halsbury's Laws of England, 4th Edition, 2003 Reissue, Volume 6 at paragraph 1:

> **"The expression chose in action or thing in action in the literal sense means a thing recoverable by action, as contrasted with a chose in possession, which is a thing of which a person may have not only ownership but also actual physical possession."**

Counsel further contended that the initial debt due to the Plaintiff was K409,725.00 as at June, 2011 and was never disputed by the Defendants. That against this the Defendant made partial payments amounting to K155, 540.00 leaving an outstanding balance of K254, 185.00 as at March, 2013 as well as at the start of this matter.

According to Counsel it was clear that the Defendants had made payments against the initial debt as at June, 2015 therefore the amount being claimed by the Plaintiff in this action had accrued and was well founded in this action.

In the written submissions Counsel for the Plaintiff contended that there was evidence in fact which suggested the existence of an agreement to settle the fees:

Firstly, that in the email of 18th February, 2015 from the 2nd Defendant to PW1 the 2nd Defendant proposed the terms of payment and repeated his personal undertaking to start payments within three months of the email and deferred the discussion on the bill to a future date after he had cash to pay.

That the email dated 28th April, 2015 also from the 2nd Defendant to PW1 which was sent almost four years from the date of the bills, the 2nd Defendant communicated in essence that the failure to settle the debt was as a result of the macro economic difficulties and proposed to settle the bill in monthly instalments of about K8,000.00 to K10,000.00.

Whilst in the email of 11th May, 2015 from the 2nd Defendant to PW1 the 2nd Defendant was proposing to double his first offer to pay in monthly instalments from June, 2015.

He went on to state that during cross examination, the 2nd Defendant admitted that the issue of the bills being excessive was only raised for the first time in the Defence and that no form of objection had been raised on the bill in the four years from the time the debt accrued.

Moreover that during the cross examination of PW1 he stated that the Plaintiff entered into the agreement for the provision of legal services to the 1st Defendant on the understanding that the 2nd Defendant undertook to pay the bills.

That this understanding was not reduced into writing and was obviously absent from the letter dated 7th February, 2011 from the Plaintiff to the 1st Defendant. According to him, the letter contained part of the terms of engagement. That it was not exhaustive of the agreement between the parties which was not a unique phenomena when it came to agreements. In fact it presented an exception to the parole evidence rule which was explained with its exceptions as follows in Anson's Law of Contract (28th Edition) at page 132:

> **"It has often been said that "it is firmly established as a rule of law that parole evidence cannot be admitted to vary, contradict a deed or other written instrument, including a contract. Although the purpose of this rule is to promote certainty and to save time in the conduct of litigation, it has long been the subject of a large number of exceptions which have resulted in uncertainty. Thus, extrinsic evidence is admissible to prove the factual background to the contracting parties. Apart from the previous negotiations of the parties, the background includes anything reasonably available to the parties which would have affected the way in which the language of the document would have been understood by a**

reasonable person. Extrinsic evidence is thus admissible to prove the aim of the transaction, to ascertain the true meaning of ambiguity in a written agreement, to prove the existence of a collateral agreement to establish implied terms and, more importantly, if it is shown that the document was not intended to express the entire agreement between the parties."

He went on to state that there was nothing that militated against PW1's testimony that suggested that the said letter was not intended to express the entire agreement of the parties.

Clearly even the conduct of the parties, particularly the partial settlement of the bill by the 2nd Defendant supports the conclusion of the existence of an understanding by the parties that the 2nd Defendant personally undertook to pay for the legal services rendered to the 1st Defendant by the Plaintiff. That he was and is the party primarily liable for their settlement in accordance with the Supreme Court decision in **INDECO ESTATES DEVELOPMENT COMPANY LIMITED V MARSHALL CHAMBERS (1)** applied by this Court in its interlocutory decision of 29th December, 2015.

PW1 admitted in cross examination that he was the advocate at the Plaintiff's chambers that was processing the Defendant's instructions and his hourly rate at the time was K460,000.00 (un-rebased).

PW1 also stated that the bill presented was reasonable and justified under the circumstances considering the work that had been done by him and that there had been no displeasure to the bill expressed by the 2nd Defendant after it was presented to him on 21st June, 2011 as if it had been there, he would have gladly applied for the taxation of the bills.

Moreover that during trial the Court reminded the parties that this was not a taxation thus it would not proceed as such tacitly. Counsel further submitted that both Defendants relied on the testimony of the 2nd Defendant and in the

Defence they assumed the onus of proving that the value of the Plaintiff's work was significantly less than what was billed for and further that the assertion that the Plaintiff could not have spent 666 hours for a matter that only spanned 8 months was quite preposterous.

In any case they did not even lead any evidence on behalf of the Defendants in support of their allegations. To the contrary the evidence of the 2nd Defendant had the opposite effect of reinforcing the Plaintiff's position.

Counsel also pointed out that during cross examination of the 2nd Defendant, he admitted that he was the one that engaged the Plaintiff and that the bills were presented for payment by the Plaintiff in June of 2011 and he recalled having written to PW1 asking for time to settle them and he deferred the discussion of a discount until he made payment.

Further that this Deferment was requested for in his email dated 18th February, 2015 which coincided with the difficult macro economic situation. Thus it was a reasonable inference to state that the discount was requested for on the grounds of lack of adequate financial resources on the Defendant's part and had nothing to do with the reasonableness or excessiveness of the bill.

Moreover, that DW1 had been categorical in stating that he had not disputed the bill but simply wanted time to pay and that during re- examination, he admitted that he and the first Defendant were one and the same.

Regarding the cause of action Counsel for the Plaintiff contended that the Plaintiff was to prove ultimately that the bills were due and payable by the Defendants and this was on the date when the Writ was issued on 4th June, 2015.

Moreover, it was argued that Order 50 Rule 2 of the High Court Rules, Cap 27 of the Laws of Zambia on Costs did not present any difficulties in this case as the bills in this matter were presented on 21st June, 2011 which made the cause of action to have been fully accrued as at 4th June, 2015 when the Writ

was issued out of the Commercial Court Registry which was way beyond a month from 21st June, 2011 and therefore this matter was properly before Court.

On the issue of the Debt, Counsel raised similar arguments to what he had already outlined in the Skeleton Arguments that the fact that the balance on the bills was a debt was not disputable and the 2nd Defendant in the email at page 5 of the Defendant's Bundle of Documents stated that:

> **"However in order to demonstrate our continued resolve to liquidate the debt we would like to propose to start paying at however rate the business can handle from May... "**

Counsel then added that a debt was a chose in action and recoverable by action and after an initial debt of K409,725.00. The Defendants, more specifically the 2nd Defendant made part payments amounting to K155,540.00 leaving a balance of K254,185.00 exclusive of interest. Thus there was no justifiable reason why a fully accrued debt such as this would not be settled by the Defendants.

In conclusion, Counsel stated that the Plaintiff had proved its case on the balance of probability and was therefore entitled to judgment on its claims against the Defendants. In passing Counsel also mentioned that there were no special circumstances shown by the Defendants to warrant an order for taxation of the Plaintiff's bill, let alone no application before Court for taxation was even brought. That even if it were otherwise, Order 50 rule 5 of the High Court Rules, Cap 27 would stand in the way of an order for taxation if it had been applied for.

The Defendant's Counsel Mr. Mosha also filed written submissions into Court on 31st March, 2017 where he raised a number of issues from the evidence adduced at trial.

He pointed out that PW1 contradicted himself because at first his evidence was to the effect that he entered into a contract to provide legal services which was not reduced to writing and that all the understandings were orally made but later stated that the letter on pages 1 to 3 of the Defendants Bundle of Documents from the Plaintiff to the Defendant's Managing Director partly contained the terms.

Counsel was of the view that the letter did not make reference to any other terms and only referred to the ones outlined in the letter. Whilst the Plaintiff stated that the letter on page 1-3 partly contained the terms of the agreement which amounted to extrinsic evidence.

Counsel further stated that extrinsic evidence was defined in Chitty on Contracts, 29th Edition Volume 1 at page 752 paragraph 12- 095 as evidence of matters outside the document.

Further that on the parole evidence rule the same author states that:

> **"That it is often said to be a rule of law that 'if there be a contract which has been reduced to writing, verbal evidence is not allowed to be given.... So as to add to or subtract from, or in any manner to vary or qualify the written document..."**

He also relied on the case of **HOLMES V BUILDWELL CONSTRUCTION COMPANY LIMITED (2)** where it was stated in respect of admission of extrinsic evidence, as follows:

> **"Where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add, vary, subtract from or contradict the terms of the written contract."**

Counsel for the Defendant also laid out the exceptions to the admissibility of extrinsic evidence as explained in Ansons Law of Contract page 132 and highlighted in the Plaintiffs submissions.

Moreover, that there was no evidence that was laid by the Plaintiff to show that the letter on page 1-3 was not intended to express the whole agreement between the parties, further the letter as can be seen in paragraph one is worded in simple terms and no reference was made to any oral agreement.

Moreover, that the Plaintiff should be bound by what was written in the letter and should not make reference to any oral agreement.

Counsel also added that PW1 stated that the letter showed that the billing was regulated by S.I No. 9 of 2001, the Legal Practitioners (Costs) Order, 2001 of the Legal Practitioners Act.

Counsel submitted that it was trite law that in determining matters in any civil proceedings the burden of proof was on he who alleged and a party claiming was under a duty to lead evidence to prove his case on a balance of probabilities as was stated in the case of **MOHAMMED V ATTORNEY GENERAL (4).**

He further stated that the import of the authorities on the burden of proof was that even in the absence of a defence a Plaintiff seeking relief must prove his claim by bringing evidence that would enable the Court satisfying that the Plaintiff was entitled to the claim he had made.

Lastly, that the Plaintiff had failed to prove to this Court how he arrived at the amount he was claiming as the amount was excessive and did not reflect the work done for a matter that did not go for trial and only spanned for 8 months.

On this basis Counsel stated that the Plaintiff was not entitled to the reliefs being sought and that the Defendants should not be made to pay an amount

outside the agreement as that would amount to unjust enrichment, and the Plaintiff's action should be dismissed with costs.

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

It is not in dispute that the parties entered into a Contract for the Plaintiff to provide legal services for the 1st Defendant in two matters under Cause No. 2011/HP/0325 and under Cause No.2011/HPC/0183.

It is also not in dispute that the Plaintiff issued a total bill of K409, 725.00 to the Defendants for the said legal services.

It is also common cause that the Defendants made several payments amounting to K155, 540.00 leaving an outstanding balance of K254, 185.00 as at 11th March, 2013.

What is in dispute is whether the Defendants owe the Plaintiff the sum of K254,185 as an outstanding payment for legal fees.

The gist of the Plaintiff's case is that after being requested by the 2nd Defendant it provided legal services to the 1st Defendant in two matters under Cause No. 2011/ HP/0325 and Cause No. 2011/HPC/0183.

That thereafter the Plaintiff presented 2 bills to the Defendants who did not request for taxation of the bills but merely asked the Plaintiff to give them more time to pay the bills and also made some payments which amounted to K155, 540.00 leaving a balance of K254, 185.00.

The Defendants on the other hand have contended in sum that in determining civil matters the burden of proof was on he who alleged and a party claiming was under the duty to lead evidence to prove his case on a balance of probability.

Counsel cited the cases of **MASAUSO ZULU V AVONDALE HOUSING PROJECT LIMITED (3)** and **MOHAMED V ATTORNEY GENERAL (4)** to support his submission.

According to Counsel for the Defendants, the Plaintiff had failed to prove to this Court how it arrived at the amount he was claiming, that the amount was excessive and not reflective of the work done for a matter that did not go to trial and only spanned for 8 months and was therefore not entitled to the reliefs it sought.

Counsel for both parties made submissions on the admission of extrinsic evidence or the parole evidence rule. The authorities cited by the parties all state the legal position which is that parole evidence cannot be admitted to vary or contradict a deed or other written instrument, including a contract. However the parole evidence rule is subject to a large number of exceptions. Extrinsic evidence is admissible to prove the factual background known to the contracting parties. Extrinsic evidence is thus admissible if it is shown that the document was not intended to express the entire agreement between the parties.

Learned Counsel for the Defendants submitted that no evidence was laid by the Plaintiff to show that the letter at pages 1 – 3 of the Defendants' Bundle of Documents was not intended to express the whole agreement between the parties. He pointed out that the letter is worded in simple terms and no reference is made to any oral agreement. He argues that the Plaintiff should be bound by what was written in the letter and should not make reference to any oral agreements.

The letter at pages 1 to 3 of the Defendants' Bundle of Documents is indeed worded in simple terms and makes no reference to an oral agreement. However, at paragraph 1 the letter makes reference to the Defendants' instructions to the Plaintiff firm having been by the 2nd Defendant's verbal intimation. Further the aforesaid letter does not state that it is the entire

agreement between the Defendants and the Plaintiff. Given the conduct of the parties, particularly the emails of the 2nd Defendant to PW1 dated 18th February, 2015, 28th April, 2015 and 11th May, 2015 in which the 2nd Defendant undertook to settle the fees and the partial settlement of the Bills by the 2nd Defendant, I do not accept the Defendants' submission that PW1's testimony that suggests that the letter at pages 1 to 3 of the Defendants' Bundle of Documents was not intended to express the entire agreement of the parties should be discounted. I am of the considered view that the 2nd Defendant's emails to PW1 proposing terms of payment must be taken into account and have been taken into account.

I am of the view that the 2nd Defendant made verbal assurances to PW1 that the outstanding Bill of Costs would be settled before he prepared and sent to PW1 each of the emails dated 18th February, 2015, 28th April, 2015 and 11th May, 2015. As a consequence, PW1's evidence that the 2nd Defendant continuously and consistently assured the Plaintiff that the outstanding Bill is this matter would be settled by him is admitted into evidence. Also admitted into evidence is PW1's evidence that he released to the 2nd Defendant the files relating to Cause No. 2011/HPC/0183 and Cause No. 2011/HPC/0325 because he was assured that he (the 2nd Defendant) would pay the outstanding amount on the Bills. Parol evidence, as is the case here, may be admitted to show that a written agreement is subject to a collateral oral warranty – the case of **MAJORY MAMBWE MASIYE V COSMAS PHIRI (7)** is followed.

I take cognizance of the fact that the dispute in this matter arose from a relationship of Counsel and a Client. As such, the Plaintiff was obliged to comply with the provisions of Order 50 of the High Court Act, Chapter 27 of the Laws of Zambia prior to commencing this action. Order 50 Rules 2 and 3 of the High Court Act state as follows:

> **"2. No practitioner shall commence any suit for the recovery of any fees for any business done by him until the expiration of one month**

after he shall have delivered to the party to be charged therewith or sent by registered letter to or left for him at his office, place of business, dwelling house or last known place of abode a bill of such fees, such bill either being signed by such practitioner (or, in the case of a partnership, by any of the partners, either in his own name or in the name of the partnership or being enclosed in or accompanied by a letter signed in like manner referring to such bill.

3. Upon the party to be charged applying to the Court or a Judge, within such month as in the last preceding rule mentioned, it shall be lawful for the Court or a Judge to refer the bill and the demand of the practitioner to be taxed and settled by the taxing master of the Court, and the Court or a Judge shall restrain such practitioner from commencing any suit touching such demand pending such reference."

In the case of **CAVMONT CAPITAL HOLDINGS PLC V LEWIS NATHAN ADVOCATES (SUIRING AS A FIRM) SCZ Judgment No. 06 of 2016 (Appeal No. 159/2014)** the Supreme Court stated thus regarding the provisions of Order 50 Rules 2 ad 3:

"The view we take is that Order 50 Sub-rule 2 makes it mandatory among other things, for a practitioner to render a bill after he has concluded instructions. Further that such practitioner can only institute proceedings for the recovery of any fees after the expiry of one month from the date of rendering the bill. On the other hand, Sub rule 3 empowers a Judge before whom proceedings for recovery of legal fees, are before, to refer the bill to be taxed. It also provides that whilst such taxation is pending, the practitioner shall be barred from commencing any suit in relation to the bill."

This decision of the Supreme Court is binding on this Court. It is clear that the Defendants received both bills for legal fees dated 21st June, 2011 and that

the Defendants did not dispute the bills. It is also clear that at the date that the Plaintiff issued the writ of summons i.e. 4th June, 2015 and up to date of trial i.e. 3rd March, 2017 the Defendants had not made any application to have the Bills rendered by the Plaintiff taxed. In terms of Order 50 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia the Plaintiffs cause of action for payment of its legal fees by the Defendants fully accrued after the expiry of one month from 21st June, 2011. The Plaintiffs' claim instituted on 4th June, 2015 is therefore properly before this Court.

It is clear from the evidence on record that the Plaintiff successfully provided legal services for the Defendant in Cause No. 2011/HP/035 and even began working on Cause No.2011/HPC/0183.

It is also clear that upon receiving the bills from the Plaintiff, the Defendants did not make any request for them to be taxed which right can no longer be exercised considering the number of years that have passed.

Further evidence on record has shown that the 2nd Defendant apart from asking the Plaintiff to give the Defendants a discount he also on a number of occasions just wrote e-mails assuring the Plaintiff that the outstanding bill would be settled.

The assertion by DW1 (the 2nd Defendant) in his evidence in chief that the 1st Defendant started paying the Bills on the strength of the demand made by the Plaintiff not that the Defendants accepted the number of hours claimed by the Plaintiff which he in any case did not disclose to him in the Bill is not true. A perusal of the Bills at pages 2 and 6 of the Plaintiff's Bundle of Documents shows or reveals that the Bills of Costs disclose that PW1 spent 208 hours on Cause No. 2011/HPC/0183 and 639 hours on Cause No. 2011/HP/0325. Both Bills also disclose that the hourly rate charged was an average of K450.00 (then K450,000.00).

I therefore find and hold that the Plaintiff properly and correctly billed the Defendants for legal services provided as per the agreed rate of between K360.00 to K460.00 per hour.

In my view the Plaintiff has shown this Court that it provided legal services for the 1st Defendant in two cases and that there is no doubt that the Defendants owe it the sum of K254,185.00.

Although the Defendants argued that this burden had not been proved because the Plaintiff had not shown how it arrived at the sum it was claiming, in my view the Plaintiff can only show in detail how they arrived at the amount they are claiming if these were proceedings for taxation which is not the case.

It is in taxation proceedings that a legal practitioner is obliged to provide a bill of costs in a format prescribed under Clause 17 of Part 1 of the Second Schedule to the Supreme Court Act, Chapter 25 of the Laws of Zambia. The Format and Content of the Bill of Costs for Taxation is designed so as to enable the Taxing Master assess the professional cost of the work done by the practitioner on the basis of the prescribed value of the work at the time it was done.

As this stage the only duty of the Court is to determine whether the Plaintiff performed the legal services it was instructed to perform by the Defendants and whether the legal fees charged by the Plaintiff are in accordance with the fee structure agreed to between the Plaintiff and the Defendants. The Court must also determine whether or not the Defendants have paid for the legal services performed by the Plaintiff.

I have found and held that the Plaintiffs cause of action was fully accrued as at 4th June, 2015 when the Writ of Summons was issued out of the Commercial Court Registry. It follows that in order for the Plaintiff to obtain the remedy it seeks against the Defendants it must prove that the cause of action was in existence at the date of the Writ of Summons. This position was espoused by

the Supreme Court in the case of **WILLIAM DAVID CARLISLE WISE V HERVEY LIMITED (6)** in which Mr. Justice Ngulube Ag. CJ (as he then was) said at page 180:

> **"The learned trial judge referred to Letung V Cooper and cited with approval the meaning assigned to the phrase *'cause of action'* by Lord Diplock when he said the words meant 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.**
>
> **The learned trial judge further referred to Order 15/1/2A RSC 1979, Edition, in which the words 'cause of action' have been said to refer to every fact which it will be necessary for a party to prove, if traversed, to support his right to the judgment of the court. We agree entirely with these expositions of the legal requirements as to what should be alleged in order to disclose a cause of action."**

It is clear from the evidence on record that initially, the aggregate of the Plaintiffs' bills against the Defendants was K409,725.00. The Defendants made part payments amounting to K155,546.00. After these payments, the balance due and payable by the Defendants was adjusted to K254,185.00 exclusive of interest. I accept the Plaintiffs' submission that the balance on the bills is a debt beyond dispute. In the email dated 28th April, 2015 at page 5 of the Defendants' Bundle of Documents, the 2nd Defendant writes to the Plaintiff in the second paragraph thus:

> **"However in order to demonstrate our continued resolve to liquidate the debt, we would like to propose to start paying at however rate the business can handle from end of May....."** (Emphasis Supplied)

In the circumstances, I find that the Plaintiff has proved its case on a balance of probabilities.

As regards who is to be held liable for payment of the legal fees or costs, it is my considered view that since the 2nd Defendant instructed the Plaintiff he should be held primarily liable or ought to ensure that the legal fees are paid by the 1st Defendant as the 2nd Defendant was a director in the 1st Defendant Company and he (the 2nd Defendant) undertook to settle the legal costs in question to the Plaintiff in this matter. This is as per the case of **INDECO ESTATES DEVELOPMENT COMPANY LIMITED V MARSHALL CHAMBERS (2)** cited by learned Counsel for the Plaintiff.

I therefore enter Judgment in favour of the Plaintiff against the Defendants for the payment of the sum of K254,185.00. The said sum is payable with interest at the commercial bank short term deposit rate from the date of Writ of Summons to date of Judgment thereafter at the commercial bank lending rate as determined by the Bank of Zambia.

Costs are awarded to the Plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 17th day of August, 2017.

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WILLIAM S. MWEEMBA
HIGH COURT JUDGE