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

2015/HPC/0471

**BETWEEN:**

SPANCRETE ZAMBIA LIMITED — PLAINTIFF

AND

ZESCO LIMITED — DEFENDANT

**Before the Honourable Mr Justice W. S. Mweemba in Open Court at Lusaka**

*For the Plaintiff:* *Mr Friday Besa- Messrs Besa Legal Practitioners.*

*For the Defendant:* *Mr Paul Mulenga– Principal Legal Officer- ZESCO*

# JUDGMENT

**OTHER WORKS REFERRED TO:**

1. **Halsbury's Laws of England (4th Edition) Vol 44 page 801.**
2. **Edwin Peel, Treitel Law of Contract, (13th Edn Sweet & Maxwell: London 2011)**

**CASES REFERRED TO:**

1. **Colgate Palmolive (Z) Limited V Chuka & Ors Appeal No. 181 of 2005. Unreported.**
2. **Attorney General V Moyo (2007) ZR 38.**
3. **Cooperative Insurance Society Limited V Argyll Stones (Holdings) Limited (1998) AC. 1.**
4. **Jigry Auto Works Limited V M. H. Patel (1993) ZR 65.**
5. **Conlon V Murray (1958) NI 17.**
6. **Philip Mhango V Dorothy Ngulube and Others (1983) ZR 61**
7. **Holmes Limited V Buildwell Construction Company Limited (1873) ZR 97**

By Writ of Summons taken out on 29th October, 2015, the Plaintiff is claiming the following:-

(i) An Order for Specific Performance on the part of the Defendant for the Contract executed between the parties for the Delivery of 1000km of

Cables by the Plaintiff to the Defendant by the Defendant performing its obligations under the contract.

(ii) Damages for Breach of Contract.

(iii) An Order of injunction restraining the Defendant from terminating the Contract herein and collecting the refund of the Advance Performance Guarantee from Cavmont Bank.

(iv) Interest

(v) Costs

According to the Statement of Claim, the Plaintiff entered into a Contract with the Defendant on 17th September, 2014 for the supply and delivery by the Plaintiff to the Defendant of 1000km of Aerial Bundle Conductor and Accessories on a one year running contract.

That this Contract was for the sum of K38,937,180.00 which was to be as per solicitation documents to be paid to the Plaintiff as follows:

(i) 10% advance payment to be paid within 30 days from the date of signing contract and upon submission of claim and a bank guarantee for the equivalent amount valid until the goods are delivered.

(ii) 40% on shipment of the shipped quantity of the goods paid through open account (irrevocable) confirmed letter of credit.

(iii) On acceptance 50% of the goods received should be paid within 30days of receipt of the goods upon submission of the claim supported by the acceptance certificated issue by the Defendant.

However in its contract finalisation meeting the Defendant varied its terms and it was agreed that the payment terms should be based on open account basis and that the Advance payment of 20% of the Contract value shall be paid to the Plaintiff within 30 days after presentation of the invoice and Advance Payment Guarantee to the amount being claimed.

Secondly, that upon shipment, 50% of the contract value was to be paid to the supplier upon presentation of shipping documentation in favour of the Defendant. Thirdly, that upon delivery and acceptance, 30% would be paid within 30 days on presentation of delivery note and acceptance of the goods by the Defendant at the final destination delivery stores.

In compliance with these terms, the Plaintiff presented a valid Advance Payment Guarantee to the Defendant from Cavmont bank and a 20% deposit of K7, 787,436.00 was paid to the Plaintiff by the Defendant late in July, 2015 and at this time, the Plaintiff through its contracted manufacturer of the Aerial Bundled Cables in China Zhengzhou Jin Hang High Tech Com. Limited had already obtained a credit facility in China and had already manufactured 25% (250KM) which was ready for shipment to Zambia and was merely awaiting pre- shipment inspection by Engineers from the Defendant Company.

The parties further agreed at the proposal of the Plaintiff that prior to the commencement of production, a Factory Acceptance Test (FAT) be conducted by representatives from both parties so that the Defendant could satisfy itself that the Manufactured 120mm 4 core Aerial Bundled Conductor met the minimum specifications needed by the Defendant and also that it complied with International Standards.

Moreover that after Factory Acceptance Testing was done by the Defendants engineers the Defendant recommended that the Plaintiff should go ahead with execution of the contract awarded and supply the 120mm 4 core Aerial Bundled Conductor manufactured by Zhengzhou Jin Hang High Tech Co. Limited as the same complied with contract specifications.

Further that in the said Factory Acceptance Testing report, it was further recommended that the Plaintiff, at its cost, should arrange a pre shipment Factory Acceptance Test (FAT) prior to the shipment of the first consignment of the manufactured cable by mid- February, 2015 as per contract terms.

However, in or around mid- February 2015 when the first 250km cable (25% of the contract amount) was ready for Pre Shipment FAT, the Plaintiff in compliance with what was agreed asked representatives from the Defendant to go and conduct the FAT. The Defendant without justification changed the list of its representatives to travel and did not avail them on time and due to this the consignment in China missed the ship on which it was to be transported to Africa and back to Zambia and the Plaintiff incurred penalties with the airline in cancelling the old air tickets and having new ones issued.

It was also stated that after cancellation of the first scheduled travel to China, a second travel date was arranged and the Defendant delayed travelling to go and perform the pre shipment FAT and that this failure was in clear breach of contract which occasioned the following losses to the Plaintiff.

First, the Plaintiff lost USD 176,000.00 which it had paid to shipping companies to transport the cables as the ship left without carrying them prior to inspection.

Second, the said 250KM of cable remained in storage in China for a long time and the Plaintiff incurred an additional USD 52,000.00 in storage charges.

Third, since the express terms of the contract were that 50% of the payment on the contract sum was to be paid upon shipping of the cables, the wilful delay by the Defendant prevented it from claiming this on the merchandise.

Further, that due to the Plaintiff's failure to claim this 50% aforesaid, it was prevented from meeting its payment obligations with the manufacturer of the cables.

Moreover that the Plaintiff wrote to the Defendant explaining these dire circumstances that the Defendants delay had put the Plaintiff in and asked for payment to be made so that the manufacturer could be paid but the Plaintiff refused to pay.

Due to this failure to pay the manufacturer of the cables for the 250KM (25%) that was ready for shipment, the financier in China terminated the facility to fund the manufacture of 1000km of the cable.

It was also stated that the Plaintiff had now been informed by Cavmont Bank that the Defendant had written to it calling on the Advance Performance Guarantee and demanding to be paid K7,787,436.00.

That the Defendant defaulted on its obligations in the Contract and thus maliciously set the Plaintiff up for failure to meet its obligations with the manufacturer and failure to deliver the shipment herein.

Further that from the conduct of the Defendant apart from its breach, it now intended to illegally terminate the Contract and due to all this the Plaintiff had suffered damage, loss and inconvenience.

The Defendant filed a Defence on 11th November, 2015 and admitted having paid the Plaintiff the 20% advance payment. Further that the testing mentioned in the Statement of Claim was incomplete owing to miscommunication between the Plaintiff and the Manufacturer on the nature of the visit by the Defendants representatives and that without this, the manufacturer would have been ready for the testing at the scheduled time.

Moreover that the Pre- Shipment test was only suggested because the initial test carried out from the 1st to 5th of December, 2014 was incomplete as the Plaintiff's manufacturer had not produced sufficient cable for the Defendant's representatives to inspect owing to a miscommunication between the Plaintiff and the manufacturer.

Further that the change in the travel dates was as a result of the Defendants internal procedures and not due to unjust cause or reason.

That the pre-shipment test was conducted and concluded at the Manufacturers' premises to which a report was produced and signed by the Manufacturer, the Defendant and the Plaintiff on 13th May, 2015.

The Defendant admitted that 50% of the contract sum was to be paid upon shipment of the cable, but denied that delay was wilful and averred that the Plaintiff's failure to ship the Cables after successful conclusion of the pre-shipment testing meant that the Plaintiff did not put itself in a position to claim the 50% payment.

Moreover that its refusal to pay was based on a letter clearly outlining the reasons the Defendant refused to make any payment. It was also stated that as a result of the Plaintiffs failure to ship and deliver the Cable despite the pre-shipment test having been concluded, the Defendant was well within its rights to make a call on the Advance Payment Guarantee.

The Defendant also averred that following the pre- shipment test to which a report dated 13th May, 2015 was signed by all parties including the Plaintiff, there was no reason for the Plaintiff to fail to ship and deliver the Cables.

At the trial, both parties called one witness each. In his Witness Statement which was filed on 7th December, 2016, Mr Davies Chola Kataya stated that he is the Managing Director of the Plaintiff.

He testified that on or about 17th September, 2014 the parties contracted and agreed that the Plaintiff would supply and deliver to the Defendant 1000KM of Aerial Bundled Conductor and Accessories on a one year running contract.

The contract was for the sum of K38, 937,180.00 which amount was to be paid according to the solicitation documents. However in the contract finalisation meeting the Defendant varied the terms and stated that:

An Advance payment of 20% of the Contract value was to be paid to the Plaintiff within 30 days after presentation of the invoice and Advance Payment Guarantee equipment to the amount being claimed.

Secondly, that upon shipment, 50% of the contract value was to be paid to the supplier upon presentation of shipping documentation in favour of the Defendant. Thirdly, that upon delivery and acceptance, 30% would be paid

within 30 days on presentation of delivery note and acceptance of the goods by the Defendant at the final destination delivery stores.

In compliance with these terms, the Plaintiff presented a valid Advance Payment Guarantee to the Defendant on 29th April, 2015 from Cavmont bank whereupon 20% deposit of K7, 787,436.00 was paid by the Defendant to the Plaintiff.

Moreover that despite this Advance Payment Guarantee Bond being granted in April 2015, the Defendant only paid the 20% advance payment late in July, 2015 which was contrary to the expressly agreed terms of the contract which required the Defendant to pay it immediately upon presentation of the said Guarantee.

That by this time, the Plaintiff through its contracted manufacturer of the Aerial Bundled Cables in China Zhengzhou Jin Hang High Tech Com. Limited had already obtained a credit facility in China and had already manufactured 25% (250KM) which was ready for shipment to Zambia and was merely awaiting pre- shipment inspection by Engineers from the Defendant Company.

The parties further agreed at the proposal of the Plaintiff that prior to the commencement of production, a Factory Acceptance Test (FAT) would be conducted by representatives from both parties so that the Defendant could satisfy itself that the Manufactured 120mm 4 core Aerial Bundled Conductor met the minimum specifications needed by the Defendant and also that it complied with International Standards.

Moreover that after the first FAT was done by the Defendants engineers in December 2014 the Defendant recommended that the Plaintiff should go ahead with execution of the contract awarded and supply the 120mm 4 core Aerial Bundled Conductor manufactured by Zhengzhou Jin Hang High Tech Co. Limited as it complied with contract specifications.

Further that in the said FAT Report, it was further recommended that the Plaintiff, at its cost, should arrange a pre shipment FAT prior to the

shipment of the first consignment of the manufactured cable by mid-February, 2015 as per contract terms.

However, in or around mid- February 2015 when the first 250km cable (25% of the contract amount) was ready for Pre Shipment FAT, the Plaintiff in compliance with what was agreed asked representatives from the Defendant to go and conduct the FAT and the Defendant without justification changed the list of its representatives to travel and did not avail them on time and due to this the consignment in China missed the ship on which it was to be transported to Africa and back to Zambia and the Plaintiff incurred penalties with the airline in cancelling the old air tickets and having new ones issued.

It was also **PW1's** testimony that after cancellation of the first scheduled travel to China, a second one was arranged and the Defendant delayed travelling to go and perform the pre shipment FAT and the Plaintiff incurred further charges in rescheduling the travel and that storage charges began accumulating.

That this failure to conduct pre shipment testing was in clear breach of the Contract which occasioned the following losses to the Plaintiff.

First, the Plaintiff lost USD 176,000.00 which it had paid to shipping companies to transport the cables as the ship left without carrying them prior to inspection and that this happened twice.

Second, the said 250KM of cable remained in storage in China for a long time and the Plaintiff incurred an additional USD 52,000.00 in storage charges.

Third, since the express terms of the contract were that 50% of the payment on the contract sum was to be paid upon shipping of the cables, the wilful delay by the Defendant even after the Plaintiff met the travel and lodging expenses for its representatives prevented him on behalf of the Plaintiff from claiming this on the merchandise.

Further, that due to the Plaintiff's failure to claim this 50% aforesaid, it was prevented from meeting its payment obligations with the Manufacturer of the cables.

Moreover that the Plaintiff wrote to the Defendant explaining these dire circumstances that the Defendants delay had put the Plaintiff in and asked for payment to be made so that the Manufacturer could be paid but the Plaintiff refused to pay.

Due to this failure to pay the Manufacturer of the cables for the 250KM (25%) that was ready for shipment, the financier in China terminated the facility to fund the manufacture of 1000km of the cable.

That arising from the results of the Defendant's own default, the Defendant wrote to the Plaintiff's bank, Cavmont calling on the Advance Performance Guarantee and demanding to be paid K7,787,436.00.

Mr Kataya told the Court that the Plaintiff had now been informed by Cavmont Bank that the Defendant had written to it calling on the Advance Performance Guarantee and demanding to be paid K7,787,436.00.

**PW1** testified that it was the Defendant that defaulted on its obligations in the Contract and thus maliciously set the Plaintiff up for failure to meet its obligations with the Manufacturer and failure to deliver the shipment herein, by deliberately refusing to avail its representatives to go and conduct the Pre shipment FAT, which was a requirement for the Defendant to issue a shipment certificate before the Plaintiff could demand 50% payment from the Defendant.

He told the Court that it was clear from the conduct of the Defendant that over and above its breach, the Defendant proceeded to terminate the Contract which resulted in severe injury to the Plaintiff, its relationship with its bank and overall business reputation and liquidity.

Moreover that even the Defendant's Defence that the Contract could therefore not be specifically performed because it expired on 15th September,

2015 could not work to benefit them because they were the ones who breached the Contract and set the Plaintiff for failure.

In cross examination the Witness told the Court that the parties entered into a Contract on 17th September, 2014 for the supply of aerial bundle cables and associated facilities which was to run for a year and since he signed it he was bound by its terms.

He added that the Contract prevailed over the Minutes of the Contract Negotiation Meeting and that the Defendant actually paid the 20% advance payment. It was also his evidence that the Factory Acceptance Test was supposed to be conducted and according to the Contract the cost was to be borne by the Plaintiff although, when the test was done in December 2014 it was not completed and this was because the manufacturer had not made enough quantity of the ABC cable.

Further that this mistake was due to miscommunication between him and the Manufacturer and due to this there should have been a second FAT to be conducted. This second one should have been before Shipment of the cables and that the Pre-shipment was delayed and this was because the Defendant changed the staff on a number of occasions.

He also added that the Pre-shipment Test was for purposes of inspecting the aerial bundles and cables before shipment and to determine if the goods were in line with what the Defendant wanted as these could only be shipped it was happy with them.

That he did not pay US$176,000 for shipment of the goods without knowing if they would be accepted by the Defendant and that after this Pre-shipment Test they did not ship the goods to the Defendant which put them in a position where they failed to claim the 50% of the contract in terms of the Contract. Further that the goods were not delivered to the Defendant and therefore they could not claim the 30% of the contract amount.

**PW1** also stated that ZESCO terminated the Contract although he had no proof of such termination in writing before this Court. He also added that

this Contract commenced in September, 2014 for a year which had since elapsed without any attempt to extend it by way of notification, evaluation and amendment.

In Re-examination **PW1** told the Court that his understanding of clause 2 and 3 in relation to the Contract with ZESCO was that the list of documents comprised a contract and if three or four were missing then it would mean the contract was not formally followed.

Further that the variation of payment terms he had referred to meant that the parties had a meeting where the terms of the Contract were agreed to before signing it. The minutes of this meeting were arrived at and signed for by all parties. Unfortunately, when the Contract was given to them eventually after they signed it they found that those minutes were not there and the terms had changed.

Thus the whole purpose of having a pre contractual meeting was not followed because the terms they had agreed to were not eventually part of the contract. Further that since this was a selective tender, the terms that were attracting every bidder were those that were in accordance with the solicitation tendered documents and those were also the terms that they had settled for in the Contract.

Moreover that the initial payment terms they agreed to were 10% advance payment to be paid within 30 days and 40% on shipment of the shipped quantity paid through an open letter of credit and 50% to be paid within 30 days of submission of the claim.

However **PW1** stated that the Defendant removed the open account and stated that they would give them 20% as advance payment and 50% upon shipping and 30% upon delivery. Further that upon receipt of the Contract with those changes the Plaintiff asked how the Contract terms had changed and they were given a verbal response that they had a choice whether to take up the Contract or leave it.

He also added that the Plaintiff signed the Contract on 22nd August, 2014 and ZESCO signed their part on 17th September 2014 whilst the 20% advance payment was only made on 3rd July, 2015.

It was his testimony that the first FAT was conducted sometime in December, 2014 although it was not completed due to the nature of the high value of the contract and technical requirement to be attached to the goods and the sensitivity of parameters required in case they were not done according to the requirements.

That after the inspection they agreed on a lot of things that were missing and they asked for a Pre-shipment inspection which should have been done upon completion of manufacturing a quarter of the cable which was 250km.

Moreover that the cable which represented 25% of the Contract constituted almost 20 containers could not just be stored anyhow. The inspection should have been done on 15th of February, 2015 as the goods were ready for inspection.

That, at that time all travel arrangements, accommodation and per diem for the ZESCO staff had all been covered and yet the Defendant changed the schedule of inspection dates and the staff that should have travelled several times and yet his colleagues in China kept waiting and the parties only went on 12th May, 2015. The signature to flag off the manufacture of all the cables was given in December, 2014 but the Pre-shipment FAT was only to be done in mid- February, 2015.

According to **PW1** they were set up to fail and due to this the inspection was delayed by four months and a further two months for the senior Managers of the Defendant to sign the Contract to manufacture and yet they had signed their part as Plaintiff in December, 2014. All in all that the Defendant caused the Plaintiff to lose out half of the Contract period.

That he paid for shipment before inspection because the Contract was compound as they were referring to 250km of cable that would be stored in 500 drums each constituting 500meters with a value today of 1.6 million

and would be stored in about 20 containers about 20km and due to this they would have to pay in advance for a section of the ship to transport it so if it had been inspected on 15th February it would have been shipped early enough.

He also added that he paid for the ship before ZESCO inspected the cable because after paying cost, insurance and freight they would have ensured that they concluded the contract in good time so it was expected that they pay in advance as a performance procedure.

He also stated that upon inspection they could not demand the 50% because they did not come to inspect on time and also failed to present the shipping documentation.

Moreover that the Plaintiff did not push in the demand because the goods were not shipped from the place of manufacture and that the performance guarantee was significant to guarantee the performance of the Contract and a letter was written to them to extend the guarantee for another 6 months.

In addition he stated that the extension of the guarantee was premised on the subsistence of the Contract and it could not subsist for a further six months if the contract was not there as what would pay the guarantee was the money from the Contract.

He also testified that before ZESCO wrote to them to extend the working guarantees they had written some letters to ZESCO management and from that letter in response they had a meeting after which they began waiting for direction requesting them to extend the guarantees for another 6 months but after that they (ZESCO) called for the guarantees.

Lastly it was his evidence that there should have been an extension of the contract due to the delay on the part of the Defendant.

Mr. Chiti Mulenga filed a Witness Statement on 22nd August, 2016. He stated that he was the Defendant's Principal Procurement Officer. In his Evidence in Chief **DW1** stated that his duties related to procurement of

goods and services as assigned by his Supervisor in line with the Public Procurement Act.

Moreover that the Concentric Cable, Aerial Bundled Conductor and Accessories (ABC) constituted one of the new critical materials in the operations of the Defendant.

It was also his evidence that on 5th April, 2013 he participated in calling for an open tender process under tender number ZESCO/001/2013 which was advertised by the Defendant through the print media and that even though bids were received, no award of tender was made.

He also stated that on 6th December, 2013 the ZESCO Procurement Committee resolved to cancel the tender number ZESCO/001/2013 for the supply and delivery of ABC, due to the need to improve on the technical specifications.

That thereafter the Committee directed that the tender be re- invited through Limited bidding by inviting a short-list of companies that expressed interest in the bidding process that was floated on 5th April, 2013.

Moreover, that on 6th January, 2014 the Defendant invited bids from the Plaintiff and other shortlisted candidates and following an evaluation, the Plaintiff was among the best evaluated bidders and was recommended for the award of the ABC and on 26th March, 2014 the Defendant approved the award of a Contract to the Plaintiff for the supply of ABC valued at K38,937,180.00.

Thereafter a preliminary notification of award was written to the Plaintiff notifying them that they were successful and on 17th September, 2014 the parties entered into a contract No. ZESCO/003/2/14 for the supply and delivery of ABC.

Further that due to the nature and high value of the ABC, it was necessary to conduct a Factory Acceptance Test (FAT) in accordance with the provisions of the Contract and this was done by him and other team members from 1st to 5th December 2014 in Zhengzhou, Henan Province,

China together with a team of two of the Defendant's engineers namely Mr Bright Kombe- the Divisional Manager- CBD and Mr Ezilon Luka the Principal Engineer Technical Services.

Further that they could not conduct a physical inspection at the time of the visit because the manufacturer had not manufactured ABC for ZESCO Limited to facilitate inspection due to miscommunication between the supplier and manufacturer on the FAT.

That despite this he and others present agreed that the Manufacturer should proceed to manufacture the ABC as contracted because it had demonstrated the capability to design and manufacture in line with the Defendant's requirements and this was premised on the understanding that the Plaintiff would arrange for a Pre-shipment FAT by Mid- February, 2015 at its own cost which it did but it only happened in May, 2015 due to rescheduling on the part of ZESCO.

It was also his evidence that the Plaintiff made a claim of K7, 787,436.00 as the advance payment amounting to 20% of the Contract price and this claim was supported by an Advance Payment Guarantee of the same amount.

In addition the Defendant paid an Advance payment to the Plaintiff and also obtained a Performance Bond of K3,893,718.00 issued by African Grey Insurance Company as security for performance of the Contract.

That the Plaintiff made a claim for the payment of 50% and 30% of the Contract sum in a letter dated 8th May, 2015 and the Defendant responded in a letter dated 29th May, 2015 where they outlined that the payments claimed were milestone payments which ought to be supported by the relevant shipping documents and certified delivery notes.

Moreover that the failure to deliver the ABC and provide shipping documentation was an indicator that the Plaintiff used the Advance Payment for purposes other than delivery of the ABC as if it had been used for the intended purpose the Plaintiff would have made the delivery after the Pre-shipment FAT was conducted and concluded.

That in view of this, the Defendant made a call on the Advance Payment Guarantee in a letter dated 22nd October, 2015 and due to this Cavmont Bank Limited honoured the call and transferred K7,778,436.00 to the Defendant's Bank Account held at Indo- Zambia Limited as a full refund of the advance payment claim.

According to **DW1**, the Defendant had performed the Contract according to its provisions as they conducted all the FAT's and paid the Advance Payment. Further that the Defendant did all that was necessary to enable the Plaintiff perform its end of the Contract, but the Plaintiff had neglected to do so.

Further that the Defendant would not be restrained from terminating the Contract because it expired on 17th September, 2015.

In cross examination **DW1** stated that he was the Procurement Officer who handled this transaction from the beginning to the end and that the Contract was signed by ZESCO on 17th September, 2014 and it was valid for a period of one year.

He also stated that the Plaintiff was to supply 20% of the Advance Guarantee which was done and was complied with in good time and that there was a FAT that should have been done in December, 2014 and he was part of the team that travelled to China.

Moreover that the miscommunication was between the Plaintiff and the Manufacturer because they misunderstood the pre factory test from a due diligent visit. Nonetheless during the meeting between the Manufacturer, Spancrete and ZESCO it was noticed that there was no cable manufactured for ZESCO so it was agreed that a second pre shipment inspection would be done after the manufacturer made 250km of aerial bundle cable.

The parties agreed that they would go back in mid-February 2015 at the Plaintiff's cost however they did not immediately avail their staff on two occasions after tickets had been sent to them which all cost the Plaintiffs money.

That it was eventually proposed that they would travel in May after first suggesting that they would travel on 25th March and the total ticket fare for all 4 tickets was K49, 480.00 and the Plaintiff spent K10,945.00 for a staff change and K1,330.00 on invoice number GL6755 dated 7th of May, 2015 for the change of date of travel. He also added that as ZESCO they delayed the pre shipment by 4 months which delayed the contract.

He also confirmed that this was after agreeing upon the initial 250kms of cable and that according to the conditions of the Contract, Plaintiff could only claim payment after they had inspected and shipment was done.

He also stated that the Plaintiffs claim of 50% was not approved and that the Plaintiff informed them that the cable had already been manufactured and was in China and that he was not sure how much space would be needed to store it but that it was valuable.

Thus he did not know if the Plaintiff paid to store this cable or for shipment and could not argue if the Plaintiff said it did. That the cable was ultimately inspected and they found 250kms manufactured and a Pre-shipment Inspection Report was made.

It was also his evidence that time was of the essence in this Contract and any loss of time would lead to defaulting and that the source of this credit was on the understanding that the Plaintiff had a Contract with ZESCO. Further that after shipment with supporting documentation they were entitled to be paid 50% and this is what was delayed by 4 months.

He also stated that he was not aware that the Plaintiff had a Financing Contract in China which was premised on the Contract it had with ZESCO and the Plaintiff was obliged under that contract to pay the manufacturer upon receipt of the Finances in February or March thereabout.

It was also his evidence that he did not know that the Plaintiff defaulted on this contract due to ZESCO's delay and could not recall if he was informed and the Financing Contract was not brought to his attention so he could not dispute that the contract was terminated.

Further that they did not pay the 50% of the contract sum to the Plaintiff and yet they did not go for inspection on time and that from May when they went to inspect the cable the remaining period of the contract's validity was 4 months.

**DW1** stated that according to the Contract they were to make the payment within 30 days after signing the new Contract but the supplier's payment claim was only made on 29th April and the payment claim was valid though late.

Additionally that the advance payment should have been made upon signing of the Contract although it was not stated in the Contract and ZESCO only made the payment on 4th July, 2015 within 60 days and not the 30 days as set out in the Contract.

Mr. Mulenga also stated that the Defendant requested the Plaintiff to extend the Guarantee by six months because the advance payment made to the Plaintiff was due to expire when the Advance Payment Guarantees purpose was to safe guard the interest of the payee.

Further that had they called upon the Advance Guarantee they could have claimed it and the letter confirmed that by a further 6 weeks ZESCO's interest was protected. Thus for the purposes of ZESCO there was a requirement to extend the bond for 6 months.

Moreover that the Contract was not extended and no cables were delivered to date and that he did not know the remedies available to the Defendant.

According to **DW1** ZESCO did not conduct itself in line with the two clauses in GCC 18.

In re- examination **DW1** told the Court that this was a one year contract and the liquidated damages clauses related to what ZESCO would be entitled to in relation to delays by the supplier or manufacturer whose amounts due would be deducted and this was to be done during the subsistence of the Contract and not after.

It was also his evidence that when ZESCO realised that the contract period was about to end, they notified the Plaintiff in good time requesting them to extend the validity period for the Advance Payment Guarantee and Performance Guarantee.

And in turn they expected that the Plaintiff would further request ZESCO for time extension in accordance with the provision of the Contract but that was not done and instead they received a letter from the Bank stating that the Guarantee would be delivered by 30th of September, 2015 and when that date came the Defendant never received an extended Advance Payment Guarantee.

Counsel for the Plaintiff filed Written Submissions into Court on 16th May, 2017. He submitted that it was not in dispute that there was a binding Contract between the two parties and that at law the position of a binding contract was well settled.

He cited the Learned authors of Treitel: Law of Contract, 13th Edition who state that:

> **"A Contract is an agreement giving rise to obligations which are enforced or recognised by law. The factor which distinguishes contractual from other legal obligations is that they are based on Agreement of Contracting parties.**

According to Counsel this position was upheld by numerous decisions of the Supreme Court including the unreported case of **COLGATE PALMOLIVE (Z) LIMITED V CHUKA & ORS (1)** where the Court stated that:

> **"If there is anything more than another which Public Policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting and that, their contracts when entered into freely and voluntarily shall be enforced by Courts of Justice."**

Based on this, Counsel submitted that this Court should enforce the Contract between the parties. That despite the Plaintiff complying with the

terms, the Defendant deliberately and without just cause breached its obligations under the contract and consequently set the Plaintiff up for failure to deliver the cables as per Contract.

According to Counsel for the Plaintiff some of the activities of the Defendant that were express breaches of contract that were intended to set up the Plaintiff for failure as shown by the evidence include:

Firstly despite the Defendant being presented with the Advance Payment Guarantee Bond by the Plaintiff in April, 2015, the Defendant only paid the 20% advance payment late in July, 2015 which was contrary to the expressly agreed terms of the Contract which required the Defendant to make this payment immediately upon presentation of the Advance Payment Guarantee but not exceeding 30 days from such presentation.

Further that by the time the Defendant was making this payment, the Plaintiff through its contracted Manufacturer of the Aerial Bundled Cables in China Zhenzhou Jin Hang High Tech Co. Limited had already obtained a credit facility in China and already manufactured 25% (250km) which was ready for shipment to Zambia but was merely awaiting Pre-shipment Inspection by Engineers from the Defendant Company.

It was also submitted that the parties further agreed at the proposal of the Plaintiff that prior to the commencement of production, a FAT be conducted by representatives from the Plaintiff and the Defendant so that the latter could satisfy itself that the Manufactured 120$mm^2$ 4 core-Aerial Bundled Conductor met the minimum specifications needed by the Defendant and also that it complied with International Standards.

Mr Besa also pointed out that a FAT was accordingly done by the parties at Zhengzhou Jin Hang High Tech Co. Limited and the Defendant recommended that the Plaintiff goes ahead with the execution of the Contract awarded and supply the 120$mm^2$ 4 core Aerial Bundled Conductor since it complied with the Contract specifications.

Counsel also added that in the said FAT Report, it was expressly agreed that the Plaintiff, at its cost, should arrange a Pre- shipment Factory Acceptance Test (FAT) prior to the shipment of the first consignment of the Cable by mid -February, 2015.

That in or around mid-February 2015 when the first 250km of cable was ready for pre- shipment FAT the Plaintiff in compliance with what was agreed asked representatives from the Defendant to go and conduct the Pre-shipment FAT and met all their travel and perdiem expenses; but without just cause or reason, the Defendant changed the list of its representatives to travel and did not avail them on time and consequently delayed the execution of the contract by over four months.

In China the consignment missed the ship on which it was to be transported to Africa and back in Zambia, the Plaintiff incurred penalties with the airline in cancelling the old air tickets and having new ones issued to the new representatives from the Defendant and this was way before the month of September, 2015 when the Contract was to be fully performed.

Furthermore that following the cancellation of the first scheduled travel to China to go and inspect the said cables, a second travel date was arranged and for the second time, the Defendant without just cause delayed travelling to go and perform pre- shipment FAT where the Plaintiff incurred further charges in rescheduling the Travel and storage charges started accumulating.

In addition that it was clear that these delays by the Defendant continued to eat into delivery time which was to be done in full by September, 2015 aforesaid. Further that this delay by the Defendant to conduct Pre-shipment inspection and allow for the shipment of the consignment was so fundamental in the sense that, even if the Plaintiff wanted to ship without inspection to comply with the delivery period, they were unable to do this on account of the fact that as stated in the contractual terms, 50% of the Contract value was only going to be paid to the Plaintiff on shipment after the Defendant had inspected the cables and issued a Pre-shipment

inspection certificate which was to be presented to the Defendant to approve payment of the said 50% aforesaid.

It was also submitted that as a result of the Plaintiff's failure to claim the 50% payment it was prevented from meeting its payment obligations with the Manufacturer of the cables in China who in turn was unable to meet its obligation from a local Bank in China which was financing the massive production of this colossal amount of the cables. The Chinese Bank then terminated the financing which led to the entire contract being rendered incapable of being performed.

Moreover that arising from the Defendant's failure to go and conduct pre-shipment factory acceptance testing above, the Defendant was in clear breach of contract which breach occasioned the following losses to the Plaintiff:

(i) The Plaintiff lost USD 176,000.00 money which it had paid to shipping companies to transport the cables as the ship left without carrying them prior to inspection twice.

(ii) That the said 250km cable remained in storage in China for a long time and the Plaintiff incurred an additional USD52,000.00 in storage and charges.

(iii) That since the express terms of the contract was that 50% payment on the Contract sum was going to be paid upon shipping of the cables, the wilful delay by the Defendant even after the Plaintiff met the travel and lodging expenses for its representatives prevented the Plaintiff from claiming this.

(iv) The Plaintiff wrote to the Defendant to explain these dire circumstances the Defendant's delay had put the Plaintiff in and asked for payment to be made so that the manufacturer could be paid, but the Defendant refused to make this payment.

Mr Besa also pointed out that arising from this failure by the Plaintiff to pay the manufacturer of the cables for the 250km (25%) that was ready for

shipment, the financier in China terminated the facility to fund the manufacture of the entire 1000km of cables aforesaid.

That arising from the results of the Defendant's own default the Defendant wrote to the Plaintiff's bank, Cavmont Bank calling on the Advance Performance Guarantee and demanding to be paid K7,787,436.00.

According to learned Counsel, the Defendant therefore orchestrated and executed the Plaintiff's default. He argued that the written Contract in the supplementary Bundle of Documents constituted the only terms of the Contract between the parties and no other explanations outside the written Contracts could be entertained as the law was that where parties have embodied their terms in a written document, extrinsic evidence is not admissible to contradict it as was set out in the case of **ATTORNEY GENERAL V MOYO (2)**.

Thus it was not permissible for the Defendant to present a contrary story that contradicted the written Contract that was executed between the parties. That the Defendant to admit that there was a contract between it and fail to go for a pre- shipment test on time in accordance with the express agreement of the parties and then say it is the Plaintiff who breached the Contract amounts to not only contradicting the express terms of the agreement but also to blowing Hot and Cold at the same time.

Moreover that The Defendant led evidence at trial which had the effect of suggesting that because the one year contract period had elapsed, the matters claimed by the Plaintiff had been overtaken by events and as a result, that ***"owing to the fact that the matters claimed by the Plaintiff had been overtaken by events aforesaid, the Plaintiff should be without remedy".***

Counsel for the Plaintiff went on to state that the Defendant's argument lacked merit and legal basis given that the Plaintiff had demonstrated that the delivery time elapsed on account of the Defendant's failure to perform its part of the obligations under the Contract.

At the very least that the contract should be restored and the Defendant ordered to perform it specifically or indeed the Plaintiff should be awarded damages to the tune of the profit the Plaintiff would have made if the Defendant had respected the terms of the Contract.

Arising from the default of the Defendant, the Plaintiff had suffered damage and loss of unimaginable proportions. Both the Plaintiff and the Defendant led evidence in Court which established that, at the instigation of the Defendant, Cavmont bank recalled the Advance payment guarantee.

Consequently the Plaintiff lost two properties that he had pledged to the Bank which is untold loss. Furthermore the Defendant also made a call on the performance bond with African Grey Insurance Company but the effects to the Plaintiff are well known.

In view of this the Plaintiff urged the Court to grant the Plaintiff the reliefs sought, to order specific performance or where the Court found it impracticable in its well-considered legal wisdom to order damages for breach of contract which will atone for the loss and suffering the Plaintiff has been exposed to by malicious and well calculated actions of the Defendant to orchestrate and induce default.

Counsel also prayed that the Defendant be condemned in costs for the Plaintiff.

The Defendant's Counsel Mr Mulenga also filed written submissions into Court on the 30th of May, 2017. He submitted that the submissions of the Plaintiff could be classified into the following major topics (a) delay, (b) loss of shipping and storage costs, (c)loss of financing in China and (d) claim for the 50% and 30%.

On the issue of **Delay** Mr Mulenga stated that it was alleged at trial that the Plaintiff failed its obligations under the contract because these were occasioned by the Defendant's delay to make the advance payment and conduct the pre- shipment FAT. However, he added that it was notable that the advance payment guarantee was nonetheless paid; and the pre-

shipment FAT was recommended owing to a miscommunication on the part of the Plaintiff and its manufacturer, therefore, the delay of the contract especially in terms of FAT was originally occasioned by the Plaintiff.

Counsel also stated that had there been no miscommunication between the Plaintiff and the Manufacturer, the first FAT could have been completed on time and that Clause 5.15, of the Report on Factory Acceptance Testing (the Report) appearing at page 26 of the Defendants Bundle of Documents expressly showed that there was.

In addition that it had been shown during cross examination that PW1 signed the report thereby confirming its contents. Counsel also submitted that the Pre- Shipment FAT was only required because of the failure of the first FAT which was attributable to the Plaintiff.

Therefore it was only fair that another FAT be conducted at the expense of the Plaintiff and in this respect it was argued that the Plaintiff also played a significant role in the delay of the Contract.

Lastly it was stated that the Plaintiff made no attempt to extend the Contract in order to take into account any lapses in time. PW1 Admitted under cross examination that the requirements under Clause 30.1 of the Contract were not evoked in order to effect an extension of time which could only be set into motion at the instance of the Plaintiff. Therefore an extension of the financial instruments could not be equated to an extension of the Contract as alleged by the Plaintiff.

On the issue of **Loss of Alleged Shipping and Storage Costs** Counsel argued that during cross examination, PW1 admitted that the goods would only be shipped upon inspection (by way of FAT in this case) and acceptance by the Defendant that the goods manufactured complied with the requirements.

Thus the Plaintiff should not have proceeded to make any shipping payments until after goods were inspected and certified as compliant by the

Defendant. The alleged loss in terms of shipping costs was therefore attributable to the Plaintiff's own carelessness.

Further that the Defendant could not be held responsible on a contract (which was not exhibited before Court) it was not party to in respect of shipping and storage costs.

Regarding the issue of the Loss of Financing in China Counsel argued that even though the Plaintiff claimed to have lost financing in China, there was no financing contract exhibited, nor was any correspondence relating to the same referred to at trial. In any case the Defendant was not a party to the said facility and could not be held liable for any breach of the same. Further that there was no application by the purported Chinese financier to be a party to the proceedings at Court.

On the issue of the **Claim of 50% and 30% of the Contract price**, Counsel stated that according to the Defendant following the payment of the advance payment and the conclusion of the pre- shipment FAT, the Plaintiff was left with the responsibility of shipping the goods to the Defendant after which it could properly claim the 50% outstanding amount.

He also added that Clause GCC 15.1 of the Contract on page 16 of the Defendants Bundle of Documents clarified that on shipment, 50% of the Contract value would be paid upon the Plaintiff presenting shipping documentation in favour of the Defendant. This was not done despite the pre- shipment FAT being conducted. Therefore the Plaintiff was not entitled to any payment until this was done.

Further and as regards the payment of the concluding amount of 30%, GCC 15.1 of the Contract provided for the payment of 30% on presentation of a delivery note and acceptance of the goods by the Defendant at the final destination delivery stores. It further stated that the payment shall be based on the invoices and delivery notes for the delivered consignment.

According to learned Counsel, it was clearly shown during cross examination, that none of the clauses relating to the payment of the 50%

and 30% of the Contract price were complied with by the Plaintiff so there was no basis upon which the Defendant could pay any of the outstanding amounts.

Regarding the claims of the Plaintiff on the Writ of Summons Counsel submitted that Specific Performance was an equitable remedy which was available in certain cases to the disappointed party to the Contract. That in the case of **JIGRY AUTO WORKS LIMITED V M. H. PATEL (3)** the Supreme Court stated that:

> **"A Court will not grant a decree for specific performance of a contract if the party seeking the decree can obtain a sufficient remedy by a judgment for damages and such decree will not be made when it would be impracticable to secure compliance with it."**

According to Mr Mulenga, it was clear from the above case law that Specific Performance may not be granted as matter of right and is an equitable remedy which may be granted at the discretion of the Court. Further that since this remedy was not granted where it would be impracticable to do so, this Court was implored not to grant such an order as the contract in this case had expired leaving no proper basis upon which the Defendant would comply with its provisions.

On the relief of Damages for Breach of Contract, Mr Mulenga contended that the Defendant did not breach the terms of the Contract as alleged by the Plaintiff. Further that after the Defendant made the advance payment, the necessary pre- shipment tests were conducted and as such, the Plaintiff was expected to ship the Cables to the Defendant but this was not done.

He also stated that there was no plausible argument to support the claim that the Defendant was in breach when in fact it was the Plaintiff that breached the Contract by its failure to ship the Cables after the conclusion of the pre- shipment test.

On the relief of an Injunction Mr Mulenga stated that the Plaintiff had claimed for an order of injunction restraining the Defendant from terminating the contract and collecting the refund of the Advance Payment from Cavmont Bank.

Further that the claim that the Defendant be restrained from terminating the Contract had been overtaken by events as the contract expired on 17th September, 2015 way before the Plaintiff brought this matter before Court and it was also clear that the advance payment the Plaintiff sought to prevent the Defendant from obtaining was already obtained.

He also contended that this claim was inapplicable to this case and should not be granted. Further that the Plaintiff did not amend the pleadings to take into account the change in status quo, and as such, this claim was irrelevant.

Lastly, Mr Mulenga stated that it was not justifiable for the Plaintiff to receive costs and interest on a Contract whose terms the Defendant complied with to the fullest extent possible.

I am grateful to both Counsel 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 supply and Delivery of Concentric Cable, Aerial Bundled Conductor and Accessories on 17th September 2014 which was to run for a year.

It is also not in dispute that the Defendant did not pay the Advance Payment of 20% within 30 days as agreed in the Special Conditions of the Contract.

It is common cause that the Special Conditions of the Contract stated that the Factory Acceptance Test (FAT) was mandatory for the cable and the supplier was to make arrangements for this. However, that this was not done in December, 2014 due to miscommunication on the part of the supplier and the manufacturer so the parties agreed that it would be done in February, 2015.

That after staff changes at the Defendant Company and delays on the travel date, the FAT was eventually conducted on 13th May, 2015.

Lastly, it is common cause that the Plaintiff did not manage to ship the ABC cable from China to Zambia.

What is in dispute is whether the delay on the part of the Defendant to avail their staff and set a date to travel for the FAT as well as its failure to pay the 20% Advance Payment within 30 days was a breach of contract.

The Plaintiff has asked this Court for a number of reliefs such as an Order for Specific Performance, Damages for Breach of Contract, an Injunction and other claims.

I will deal with each relief sought independently.

The Plaintiff asked this Court for an Order of Specific Performance on the part of the Defendant for the Contract executed between the parties for the delivery of 1000km of cables by the Plaintiff to the Defendant.

Mr Besa learned Counsel for the Plaintiff argued that since a valid contract existed between the two parties then this Court should enforce it. According to him despite the Plaintiff complying with the terms as enumerated above the Defendant deliberately and without just cause breached its obligations under the contract and consequently set the Plaintiff up for failure to deliver the cables as contracted.

Mr Besa also contended that the Defendant paid the Plaintiff the 20% advance payment late contrary to the term which required it to make the payment immediately upon presentation of the Advance Payment Guarantee but not exceeding 30 days.

Further that the Defendant delayed the travel date to go and perform the Pre-shipment FAT twice and due to this the Plaintiff incurred further charges in rescheduling the travel dates and storage charges began to accumulate. That these delays ate into the delivery time which should have been done by September, 2015.

That this Pre-shipment test was so cardinal that the Plaintiff could only be paid 50% of the Contract value after the Defendant inspected the cables and issued them with a Pre-shipment Inspection Certificate.

Due to this failure to claim the 50% payment the Plaintiff was prevented from meeting its payment obligations with the Manufacturer of the cables in China.

It was also contended that the Defendant's breach of contract made the Plaintiff lose USD176,000.00 which had been paid twice to shipping companies to transport the cables as the ship left without them and USD52,000.00 in storage charges. That despite its default, the Defendant wrote to Cavmont Bank to call on the Advance Performance Guarantee and demand to be paid K7,787,436.00.

Mr Mulenga learned Counsel for the Defendant stated in defence that Specific Performance was an equitable remedy that was available in certain cases to the disappointed party to the contract.

He also stated that Specific Performance would not be granted as a matter of right but on the discretion of the court based on the cases of **COOPERATIVE INSURANCE SOCIETY LIMITED V ARGYLL STONES (HOLDINGS) LIMITED (4)** and **JIGRY AUTO WORKS LIMITED V M. H. PATEL (3).**

In this case he argued that it was impracticable to make such an order as the Contract had since expired and there would not be any proper basis upon which the Defendant would comply with its provisions.

It is trite law that Specific performance is an equitable remedy under the law of Contract that is awarded in the Court's discretion. According to the Halsbury's Laws of England Volume 44 (1) 4th Edition page 801 it is:

> **"Equitable relief, given by the court to enforce against a defendant the duty of doing what he agreed by contract to do. Therefore it would appear that technically a claimant may obtain judgment for specific performance even though there has not, in**

the strict sense, been any default by the defendant before the issue of the writ. ...

In early times a court of equity assumed jurisdiction to compel a party to a contract to perform his part of the contract when damages recoverable at law were not an adequate remedy. The remedy of specific performance is thus in contrast with the remedy by way of damages for breach of contract, which gives pecuniary compensation for failure to carry out the terms of the contract.

The remedy is special and extraordinary in its character, and the court has a discretion either to grant it or to leave the parties to their rights at law. The discretion, however, is not an arbitrary or capricious one; it is to be exercised on fixed principles in accordance with the previous authorities though a court is not in modern times perhaps so constrained as once it was by black letter rules. The judge must exercise his discretion in a judicial manner.

If the contract is within the category of contracts of which specific performance will be granted, is valid in form, has been made between competent parties and is unobjectionable in its nature and circumstances, specific performance is in effect granted as a matter of course, even though the judge may think it is very favourable to one party and unfavourable to the other, unless the defendant can rely on one of the recognised equitable defences. Where such a defence is available, the existence of a valid contract is not in itself enough to bring about the interference of the court. The conduct of the claimant, such as delay, acquiescence, breach on his part, or some other circumstance outside the contract, may render it inequitable to enforce it, or the contract itself may, for example on the ground

**of misdescription, be such that the court will refuse to enforce it."**

I have also considered the case of **CONLON V MURRAY** (5) where it was stated that:

> **"Specific performance is a discretionary remedy which may be withheld in cases where the court, having regard to the conduct of the parties and all the circumstances of the case considers in its discretion that the remedy ought not to be granted.**

Mr Mulenga also cited the case of **JIGRY AUTO WORKS LIMITED V M. H. PATEL (3)** where the Supreme Court stated that:

> **"A Court will not grant a decree for specific performance of a contract if the party seeking the decree can obtain a sufficient remedy by a judgment for damages and such decree will not be made when it would be impracticable to secure compliance with it."**

In this case the facts show that the Contract between the parties expressly stated that it would run for a duration of one year which expired on 17th September, 2015 which is more than two years ago and would therefore make it impracticable to perform.

Further as argued by Mr Mulenga, the Plaintiff also contributed to the delay of the Contract because of its miscommunication with the Manufacturer. It is common cause that the original FAT conducted from 1st to 5th December, 2014 was incomplete because no cable had been manufactured by the Plaintiffs' manufacturer Zhengzhou Jin Hang High Tech Com. Limited. The Manufacturer was required to manufacture a quarter of the cable (250 Km) which was to be inspected by the Defendant during the original FAT. According to the report on the Factory Acceptance Testing the expectation of the Defendant was to inspect the quality of the Aerial Bundled Conductor before it's mass production in December, 2014, but this was not done and the parties agreed that the Plaintiff should arrange a Pre Shipment FAT by

mid- February, 2015. Although the Manufacturer had not manufactured ABC for ZESCO it was agreed that the Manufacturer proceed to manufacture ABC as contracted because it had demonstrated the capability to design and manufacture in line with the Defendant's requirement.

I therefore find that the Plaintiff played a significant role in the delay of the Contract. If the first FAT had been completed on time in the first week of December 2014 the second Pre-shipment FAT which was scheduled for February 2015 would not have been required.

Apart from this I have also noted that the Contract General Conditions in Clause 30.1 set out the condition for Extensions of Time of the Contract. This clause stated that:

> **"If at any time during performance of the Contract, the Supplier or its sub-contractors should encounter conditions impeding timely delivery of the Goods or completion of Related Services pursuant to GCC 11, the Supplier shall promptly notify the Purchaser in writing of the delay, its likely duration, and its cause. As soon as practicable after receipt of the Suppliers notice, the purchaser shall evaluate the situation and may at its discretion extend the supplier's time for performance, in which case the extension shall be ratified by the parties by amendment of the Contract."**

This Clause should have been effected by the Plaintiff to extend the Contract once it realised that the delays on the part of the Defendant were going to affect the performance of the Contract but it chose not to exercise this right under the Contract and only wrote a letter to the Defendant on 15th June, 2015 explaining the challenges it had been experiencing following the Payment Delays and Exchange Rate Losses.

In these circumstances I find no merit in this case to exercise my discretion to award the relief of Specific Performance. The Plaintiff is not entitled to Specific Performance.

The Plaintiff pleaded damages for breach of Contract. It is stated that the Defendant breached the Contract when it failed to send its representative to go and conduct a Pre-shipment FAT in mid February 2015. That the Pre-shipment FAT was only performed on 13th May, 2015. That as a result of the delay in conducting the Pre-shipment FAT the Plaintiff suffered the following losses:

(i) It lost US U176,000.00 which it paid to shipping companies to transport the cables because the ship left without carrying them prior to inspection.

(ii) The 250 Km of cable remained in storage in China for a long time and the Plaintiff incurred the sum of US $52,000.00 in storage charges.

(iii) It incurred penalties with the airline in cancelling the old tickets and having new ones issued and flight rescheduling charges.

(iv) It was prevented from claiming 50% of the payment of the contract sum by the Defendant's wilful delay in conducting the FAT.

(v) It was prevented from meeting its payment obligations with the manufacturer of the cables. As a result the financier in China terminated the facility granted to fund the manufacture of 1,000 KM of the cable.

The purpose of damages is to compensate the injured party for any consequences of the breach of Contract. As indicated above the delay in Contract performance in terms of the FAT was originally occasioned by the Plaintiff. I find that the Plaintiff delayed the Contract performance in terms of FAT by 2 months 2 weeks while the Defendant delayed it by 3 months. The delay by the Defendant is indeed a breach of the Contract as submitted by learned Counsel for the Plaintiff. However this breach was not fundamental and was in fact acquiesced to when the Plaintiff decided to continue with the Contract by travelling to China in May, 2015 for the Pre-shipment FAT.

It is trite that a party who is claiming damages must specifically plead those damages and lead evidence on them so that a Court is able to ascertain the said damages in monetary terms. This is as per the case of **MHANGO V NGULUBE AND OTHERS (6)** where the Supreme Court held at page 66 as follows:

> **"It is, of course, for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the Court to determine the value of that loss with a fair amount of certainty."**

Regarding the sum of US $176,000.00 that the Plaintiff asserts it paid to the shipping companies to transport the cables to Zambia, the shipping companies involved are not named and no proof of payment to the shipping companies has been provided to the Court. Apart from this the Plaintiff ought not to have made any shipping payments because the goods were only to be shipped after the Pre-shipment FAT had been done and after the Defendant certified that the goods were compliant. In cross-examination **PW1** confirmed that the goods would only be shipped after the Pre-shipment FAT. There was therefore no justification in the Plaintiff making the shipping payments without notifying the Defendant.

I also accept the Defendant's submission that it could not be held responsible on a contract it was not a party to regarding shipping costs and which were not exhibited before this Court.

For the foregoing reasons and because the loss was not proved, I find and hold that the Defendant is not liable for the purported loss of US $176.000.00.

On the issue of the sum of US $52,000.00 that was paid as storage charges, the Plaintiff has not named who it paid and no proof of payment has been provided to the Court. As this loss has not been proved, I find and hold that the Defendant is not liable for the purported loss of US $52,000.00.

With respect of losses incurred because of penalties charged by the airline for cancellation of tickets etc. **DW1** admitted in Cross-Examination that the Plaintiff met the following costs.

- 4 tickets K49,480.00
- Defendant staff change K10,945.00
- Change of date of travel K1,330.00

Since the travel dates were changed at the instance of the Defendant and as the Defendant changed the names of its staff who had to travel to China for the Pre-shipment FAT, I order that the Defendant should reimburse the Plaintiff the monies that were spent on changing the travel dates and paying for the air ticket that was purchased after ZESCO changed the names of its staff that went to China. The amount to be reimbursed is K12,275.00.

The Contract provided that an Advance payment of 20% of the Contract Value was to be paid to the Plaintiff within 30 days after presentation of the Invoice and Advance Payment Guarantee. It is common cause that although the Plaintiff made a claim to be paid the Advance payment on 29th April, 2015 the sum of K7,787,436.00 was paid to it by the Defendant on 4th July, 2015 which is after the 30 days within which it ought to have been paid. The Advance payment was made 35 days after the date on which it should have been paid.

The failure by the Defendant to pay the Advance Payment within the time specified by the Contract was a breach of Contract. However, I am of the view that the breach was not fundamental and in any event the Plaintiff acquiesced to it when it decided to continue with the Contract and accepted the payment. Correspondence passing between the parties such as the Plaintiff's letter to the Defendant dated 12th August, 2015 relating to proposed converting of the Contract from Kwacha to US Dollars shows that the Contract had continued.

It is clear that the Plaintiff was out of pocket for 35 days, the period that it waited to be paid the said sum of K7,787,436.00 after expiry of the 30 days

within which it should have been paid. The Plaintiff was put out of the use of the sum of K7,787,436.00 by the Defendant for 35 days. As the Defendant delayed in paying the Advance Payment it is ordered that the Defendant is to pay to the Plaintiff interest on the sum of K7,787,436.00 at the average Bank of Zambia Short Term Deposit Rate per annum for 35 days. The applicable rate is that in place in May/June 2015.

The Plaintiff states that because of its failure to claim the 50% payment it was unable to meet its payment obligations with the manufacturer of the cables in China which in turn was unable to meet its payment obligation to a local bank in China which was financing the production of the cables. That the Bank consequently terminated the financing facility leading to the contract being rendered incapable of being performed.

I have perused the record and note that the Financing Contract was not exhibited and no correspondence relating to the same was referred to at trial. Further as submitted by Counsel for the Defendant, the Defendant was not a party to the said Financing Facility and cannot therefore be held liable for any breach of the same.

The Plaintiff contends that the Defendant deliberately and maliciously set the Plaintiff up for failure. I do not accept this contention because no evidence has been adduced to prove it. As already indicated above delay in contract performance in terms of conducting FAT was originally occasioned by the Plaintiff. Had there been no miscommunication between the Plaintiff and the manufacturer the FAT could have been completed in December 2014 and the FAT would not have been moved to February, 2015. The Plaintiff delayed the FAT by 2 months 2 weeks while the Defendant delayed the FAT by 3 months. The fact remains that both the Plaintiff and the Defendant contributed to the delay in contract performance.

Having lost 5 months 2 weeks in the time for completion of the Contract due to the delay in having the FAT concluded, the Plaintiff was at liberty to request an extension to the Contract. The Plaintiff ought to have evoked the process for extension of the Contract under Clause 30.1 of the Contract.

**PW1** admitted in cross examination, that the process for extension of the Contract was not evoked. As there was no notice given by the Plaintiff, no consideration of an extension was made by the Defendant. The Contract was not extended.

The request for an extension in the Advance Payment Guarantee by the Defendant was an indicator that more time was required for performance of the Contract and ought to have put the Plaintiff on notice that it needed to have the Contract extended. During re-examination **PW1** testified that he believed that because the Advance Payment Guarantee and the Performance Guarantee were extended by 6 months the Contract was also extended by 6 months. As submitted by Mr. Mulenga, an extension of the financial instruments cannot be equated to an extension of the Contract as alleged by the Plaintiff. I find and hold that the Contract herein was not extended beyond its expiry date of 17th September, 2015.

Regarding the Plaintiff's claim for payment of the 50% and 30% of the Contract price the Defendant's position is that following the conclusion of the Pre-shipment FAT on 13th May, 2015 and the payment of the Advance Payment of K7,787,436.00 on 3rd July, 2015 the Plaintiff was left with the responsibility of shipping the goods to the Defendant. That it is only after shipment of the goods that the Plaintiff would be entitled to claim the 50% and 30% outstanding amounts. I agree with the Defendants' submission in this regard which are in accordance with Clause 15.1 of the Contract.

As none of the Clauses relating to the payment of the 50% and 30% of the Contract price were complied with by the Plaintiff, there was no basis upon which the Defendant could pay any of the outstanding amounts. I therefore find and hold that the Plaintiff is not entitled to any of the said payments.

Regarding the Advance Payment Guarantee, I find and hold that the Defendant was within its rights to write to Cavmont Bank Limited to demand and obtain a refund of the sum of K7,787,436.00.

Mr. Besa learned Counsel for the Plaintiff urged the Court to not accept explanations outside the Contract between the parties herein. This on account of the fact that, where the parties have embodied the terms of their agreement or contract in a written document, extrinsic evidence is not admissible to contradict it. The cases of **ATTORNEY GENERAL V MOYO (2)** and **HOLMES LIMITED V BUILDWELL CONSTRUCTION COMPANY LIMITED (7)** were cited for this Submission. I agree with the Plaintiff's Submission and I confirm that in arriving at my Judgment herein, I did not look to extrinsic evidence but at the terms of the Contract between the Defendant and the Plaintiff.

Although the Plaintiff asked this Court for an order of Injunction restraining the Defendant from terminating the Contract herein and collecting the refund of the Advance Payment Guarantee from Cavmont Bank. I find that it is not possible to grant such an injunction because the Contract expired on 17th September, 2015 and the Advance Payment Guarantee from Cavmont Bank had already been called on and a refund obtained by the Defendant. There is nothing to restrain as the Contract expired and the refund of the Sum of K7,787,436.00 took place long before the Plaintiff commenced this action.

In the premises the Plaintiff has failed to prove its case against the Defendant on a balance of probabilities.

In all the circumstances, I shall make no order as to costs.

Leave to appeal is granted.

**Delivered in Open Court at Lusaka this 29th day of December, 2017.**

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**WILLIAM S. MWEEMBA**
**HIGH COURT JUDGE**