**IN THE COURT OF APPEAL OF ZAMBIA** **APPEAL NO. 324/2023**
**HOLDEN AT NDOLA**
*(Civil Jurisdiction)*

**BETWEEN:**

**UNITED BANK FOR AFRICA ZAMBIA** **APPELLANT**


**AND**

**M. NDALAMA ENTERPRISES LIMITED** **RESPONDENT**

***Coram: Chashi, Makungu and Sharpe-Phiri, JJA***
***On the 12th and 20th day of November, 2024***

*For the Appellant: Mr. F. Mudenda of Chonta Musaila and Pindani Advocates*
*For the Respondent: Mr. B. Mosha of Mosha & Co*

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## JUDGMENT

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***MAKUNGU JA,*** delivered the judgment of the Court.

***Case referred to:***

1. *Rollop and Colls Limited v. Northwest Metropolitan Regional Hospital Board (1973) 2 ALL ER 260*
2. *African Banking Corporation Zambia Limited v. Plynth Technical Works Limited & 7 Others (2015) 2 ZR 458*
3. *Wootton v. Central Land Board (1957) 1All ER*
4. *BP Zambia PLC v. Expendito Chipasha and 235 Others SCZ Appeal 189/2016.*
5. *Indeni Petroleum Refinery Company Limited v. VG Limited (2007) Z.R 197.*
6. *Zulu v. Avondale Housing Project (1982) ZR 172*

7. *Finance Bank Zambia Limited and Rajan Mahtani v. Simataa Simataa SCZ Appeal No. 21 of 2017*
8. *Nsansa School Inter Education Trust v. Gladys Mtonga Musamba (2010) Vo Z.R 457*

***Legislation referred to:***

1. *The High Court Act, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court of England, 1965, 1999 Edition (White Book,*

***Other authorities referred to:***

. *Black's Law Dictionary, 8th Edition, Bryan A. Garner, Thompson and West.*

## ) INTRODUCTION

l This appeal is against the judgment of Judge Lameck Mwale the High Court Commercial Division. In that judgment, tl plaintiff's claims for payment of commission, on the basis of contract between it and the defendant, and damages for brea of contract with interest and costs were granted. The Jud further ordered that the amount due to the plaintiff be assess by the Registrar. The defendant's counter claim for a set off w also allowed.

2 The defendant is now the appellant, whilst the plaintiff is tl respondent. We shall refer to the parties by their designatio

in the lower court until we begin to discuss the grounds appeal.

**BACKGROUND**

In January 2021, the defendant was engaged by the Ministry Agriculture as a collecting partner for the 2021/2022 Farm Input Support Programme (FISP). The engagement was bas on the already existing Service Level Agreement (SLA) betwe the defendant and the Ministry of Agriculture. The SLA did n specify the fee payable to the defendant.

In order to actualize the agreement, the defendant signed FISP Collection Agreement with the plaintiff on 21st May 20 for the duration of one year.

The parties expressly agreed to share the FISP collection fee the ratio of 80:20, if the per - farmer fee is ZMW15.00 or in t ratio of 75:25, if the per- farmer fee is above ZMW20.00.

Further, the plaintiff and defendant expressly agreed that t plaintiff would be entitled to a commission of 2.5% of the to FISP collected and deposited into a Ministry of Agricultu Account which would be effected after the 2021/2022 farmi season on the average collected funds.

5 Under the agreement, the plaintiff had obligations to provi inter alia; agents to authenticate and collect farme contributions, to transmit cash collected to designat government accounts held with the defendant, to settle agen fees, paying for security and insurance.

5 It was an express term of the Collection Agreement und Clause 5.3.1, that the plaintiff would send invoices to t defendant for its share of the collection fees, every two wee for the defendant to pay within two weeks. The plaint complied with this term. However, the defendant did not set the invoices. The reason for not paying being that the per farmer fee had not yet been agreed to, between the Ministry Agriculture and the defendant.

7 The plaintiff averred that as a result of non-payment of t commission, it had to borrow money from money lenders exorbitant interest rates, in order to settle some of the fe owed to the agents that offered services under the contract.

3 Under the circumstances, on 14th September 2021, the plaint commenced an action against the defendant by way of writ

summons accompanied by a statement of claim. The plaint claimed for:

***(1) An order of specific performance instructing t defendant to pay the plaintiff the sums ZMW3,126,216.00 and ZMW 2,605,180.00;***

***(2) Damages for breach of contract;***

***(3) Interest on all amounts found due;***

***(4) Any other relief as the Court may deem fit; and***

***(5) Costs.***

In the amended defence and counter claim filed on 9th Februa 2022, the defendant admitted to having entered into a contra with the plaintiff, as a collecting partner for the 2021/20 FISP under the SLA between the defendant and the Ministry Agriculture, on the terms and conditions alluded by t plaintiff.

The defendant however, denied having breached the contra and averred that it was impossible to determine the amou payable to the plaintiff, before the collection fee was agreed by the Ministry of Agriculture and/or Ministry of Finance.

11 The defendant denied the plaintiff's claim for the sum of ZMW 605,180.00 as commission of 2.5% of the total FISP collect and deposited into the Ministry of Agriculture Account with t defendant. The defendant averred that the claim was ma prematurely because the parties had agreed that the sa commission was payable at the end of the 2021/2022 farmi season.

12 The defendant further averred that the plaintiff collected farm contribution fees amounting to ZMW 7,549,478.12, as at 1 January 2022, which it failed or neglected to remit to t defendant. As a result, the defendant made the followi counter claim:

> ***Payment of the sum of ZMW 7,549,497.12 plus a sum's that shall be unremitted as at the date delivery of the court's judgment, interest, any oth relief the court may deem fit and costs.***

13 In reply, the plaintiff denied having collected an amount ZMW7,549,497.12 on behalf of the defendant. The plaint disclosed that it collected the sum of ZMW115,159,600.00

at 11th January 2022 and remitted almost all of it to tl defendant by 1st February 2022.

.14 The plaintiff further averred that it is premature for tl defendant to allege that it is entitled to a set-off. Further, a amount of ZMK3,537,097.12 is still under reconciliation l the parties.

.15 The plaintiff denied the counterclaim and averred that upc announcement of the closure of the farming season in Octob 2021, the plaintiff shut down its system and was no long collecting the farmer contribution fees owing to lack payment of its commissions under clauses 5.1 and 5.2 of tl FISP Collection Agreement. However, upon being approach by the Ministry of Agriculture, the plaintiff re-opened i system and collected a total of ZMW115,159,600, as farm contribution fees as at the date of filing the defence ar counter claim.

.16 The plaintiff maintained its claim for breach of contract. Tl plaintiff alleged that there has never been a reminder eith formally or informally from the defendant to remit a amendment of ZMW7,549.497.12.

.17 The plaintiff blamed the defendant for the non-remittance part of the funds stating that some of its agents withheld tl funds since the plaintiff was unable to pay them owing to tl non-payment of the bi-weekly invoices by the defendant.

18 The plaintiff averred that prior to the 1st of February 2022, mobilized itself and collected some funds that were withheld l the agents in the sum of ZMW 4,012,400.00 and remitted tl same to the defendant.

**) EVIDENCE AT TRIAL**

1 Trial took place on 18th January 2022. The plaintiff called tv witnesses, whose evidence was, to a large extent, a repetition the averments in the statement of claim.

2 Additionally, PW1 Jacqueline Inonge Mupupumi, Ch Executive Officer (CEO) of the plaintiff company, testified th as at the date of her testimony, the plaintiff had collected t farmer registration fees at ZMW400.00 per - farmer frc 287,899 farmer's nationwide, through its various network agents, without funds or commission from the defendant. Tha the total sum collected was ZMW115,159,600.00, of whi ZMW 111,661,902.00 was deposited into the designat

account with the defendant, save for the money that has be withheld by the agents in protest for non-payment of the salaries. She went on to testify that as at 22nd August 2021, closing amount of ZMW 107,044,400.00 was reflectin translating 267,611 farmers. 80% of this aggregated amount at that date, meant ZMK3,126,216.00, was payable to t plaintiff.

3 As for the agreed commission of 2.5% of the total FISP collect as at 10th August 2021, the total deposits collected by t plaintiff stood at ZMK104,066,180.00. Two and a half perce (2.5%) of this sum gives an aggregated figure ZMK2,605,180.00, payable to the plaintiff.

4 In cross examination, PW1 confirmed that the per - farmer f was only set in March 2022, at K20.00. She also confirmed th the 2.5% commission was to be effected after the said farmi season, which initially ended in October 2021, but w extended to January 2022.

5 In re-examination, she clarified that the invoices that were se to the defendant were based on ZMW15.00 per - farmer fe This was on the understanding between the parties that t

invoices be based on a fee of ZMW15.00 the minimum amou payable per – farmer as they waited for the fixing of the per farmer fee by the Ministry of Agriculture.

PW2 was Happy Chisenga Munlo, a Director of Busine Administration in the plaintiff company. His evidence will n be rehashed as it merely confirmed PW1's evidence except l added that invoices were being sent bi- weekly to the defenda who failed to pay. Further that the 2.5% commission of the tot FISP collected deposits was not attached to the non-indicati per - farmer fee and therefore the defendant should have pa the plaintiff in the manner highlighted in the Collecti Agreement.

**DECISION OF THE COURT BELOW**

Upon considering the pleadings filed by both parties, the or and documentary evidence presented at trial and the fin submissions filed by both parties, the learned trial Jud identified two questions for determination, these being:

***(1) Whether the plaintiff was entitled to the payment transaction fees under clause 5.1 of the Collecti***

***Agreement as per the bi- weekly invoices issued to t defendant; and***

***(2) Whether or not the plaintiff was entitled to t commission fee under clause 5.2 of the Collecti Agreement at the time of commencement of t action.***

.2 The Judge found that the background to the case as stat herein before. In addressing the issues in contention, examined clauses 5.1, 5.2 and 5.3 (1) and (2) of the Collecti Agreement

3 He found that the need for the plaintiff to issue invoices to t defendant for its share of the collection charges to ea operating and logistics expenses was to ensure that the farm fees collection process was not disturbed once it commenced.

4 He found that the Collection Agreement took effect on 12th Ju 2021, when the agreement was signed, and it was for t duration of one year according to clause 4.1.

5 That, pursuant to clause 5.3.1 of the Collective Agreemer payments were to be made 14 days from the date of receipt monthly invoices. The intention of the parties was to cushi

the operational and logistical costs the plaintiff would inc during the implementation of the Collection Agreement.

5 The Judge further found that according to clause 5.1 of tl Collection Agreement, the per-farmer fee could only be eith ZMW15.00 or ZMW20.00. Since the invoices were issued on tl possible minimum fee of ZMW15.00, the Judge held that payi the plaintiff for the work it did, based on the minimum fe would not have prejudiced the defendant in any way. Th reliance should not be placed on the SLA because the plaint was not privy to it. The Judge held that the rights of tl plaintiff under the Collection Agreement cannot be subservie to the SLA.

7 The Judge further held that the defendant's obligation to p the plaintiff was not suspended because the payment was on dependent on the plaintiff's performance of its obligatio under the Collection Agreement and not on the setting of tl per - farmer fee by the Ministry of Agriculture and /or Finance

3 In addition, the setting of the per-farmer fee was not a conditi precedent to fulfill the obligation to pay the plaintiff, because time frame within which to pay was clearly set ou

Furthermore, the reason for paying the plaintiff in such manner was expressed in the Collection Agreement, namely "ease operations and logistics expenses."

9 Therefore, the plaintiff ought to have been paid at the minimu fee of ZMW15.00, even before the performer fee was set by t Ministry of Agriculture or Finance.

10 Consequently, the Judge found that the defendant breached t Collection Agreement by failing to pay the plaintiff its dues.

11 As regards the second question, whether the plaintiff w entitled to the commission fee under clause 5.2 of t Collection Agreement at the time of commencement of t action, the Judge looked at clause 5.2 which provides that:

> ***"The payment shall be effected after the season the average collection funds."***

12 He found that it was not in dispute that the 2021/2022 farmi season ended in October 2021, but the farmer contributi collection exercise was extended to January 2022. The acti was commenced on 16th September 2021, before the farmi season came to an end.

13 The Judge further found that the plaintiff could not ha reasonably been expected to sit back and wait for the season end before making a claim for the commission under clause 5 of the agreement, because the defendant as earlier found, h breached a fundamental term of the Collection Agreement, not paying the bi-weekly invoices. The Judge therefore held th the plaintiff's claim was not premature but justifiable. He add that, ***"Little wonder the defendant made a payment in court of the sum of ZMW287,901.00 in satisfaction of t plaintiff's cause of action for ZMW2,605,180.00 relati to the 2.5% commission."*** The Judge therefore granted t plaintiff the said commission under clause 5.2 of the Collecti Agreement on pro-rata basis at the time of commencement the action.

14 As regards the counterclaim, the Judge found that the plaint had the right to exercise a possessory lien against the fun retained. It was common cause that the plaintiff's ager withheld some monies that were due to the defenda Therefore, merit was found in the counter claim that t defendant is entitled to the funds withheld by the plaintif

agents. In the absence of a certain amount due in this respe assessment by the Registrar was ordered. Further, a set – o was ordered.

15 In conclusion, the Judge directed *inter alia* that in determini the judgement sum due to the plaintiff, the learned Registr shall consider the provisions of the Collection Agreement und clauses 5.1 and 5.2 as well as the invoices issued to t defendant.

16 The plaintiff was granted damages for breach of contract to assessed by the Registrar. Interest on the judgment sum due the plaintiff was granted at the short-term deposit rate from t date of the writ to the date of judgment, thereafter at t commercial bank lending rate as determined by the Bank Zambia from time to time until full and final settlement. Cos were awarded to the plaintiff and leave to appeal was granted.

## .0 THE APPEAL

.1 The defendant being dissatisfied with the said judgment, h lodged this appeal on the following grounds:

***1. That the court below erred in law and fact by delving into the payment into court prior to the***

***determination of all questions of liability and amount of debt or damages.***

2. ***That the court erred in law and fact by making an order for costs without considering the effect of the payment into court on its exercise of discretion to award costs.***
3. ***That the court below erred in law and fact by awarding interest to the respondent without considering the effect of the payment into court on the award of interest.***
4. ***That the court below erred by considering the payment into court as admission of liability by the appellant despite the notice of payment into court having stated that "liability is denied."***
5. ***That the court erred in law and fact when it held that the respondent was entitled to payment of transaction fees under clause 5.1 of the Collection Agreement.***

6. ***That the court below erred in law and fact when it held that the respondent had proved that it was entitled to the payment of commission under clause 5.2 of the Collection Agreement on pro rata basis at the time of commencement of the matter.***
7. ***That the court erred in law and fact when it directed that in determining the judgment sum due to the plaintiff, the learned Registrar shall consider the provisions of the Collection Agreement under clauses 5.1 and 5.2 as well as the invoices issued to the appellant.***
8. ***That the court below erred in law and fact when it awarded damages to the respondent for breach of contract, the same to be assessed by the learned Registrar.***

## .0 HEADS OF ARGUMENT

1 The heads of argument filed by both parties are on recor However, a summary of the same will only appear in o analysis and determination below.

## .0 ANALYSIS AND DETERMINATION

.1 We have reviewed the record of appeal along with the heads argument submitted by the appellant and the respondent 12th October 2023 and 22nd April 2024, respectively. T grounds of appeal will be addressed as follows: grounds 1 a 4 together, grounds 2 and 3 together. Grounds 5, 6, 7, and separately.

**GROUND 6**

2 Starting with ground 6, which deals with the question whether there was a cause of action for recovery of t commission under clause 5.2 of the Collection Agreement.

3 In the 6th ground of appeal, the appellant argues that t claim for commission under clause 5.2 of the Collecti Agreement was made prematurely because the commissi was only payable after the end of the 2021/2022 farmi season.

4 The appellant contended that the lower court failed in its du to give effect to the unambiguous agreement between t parties concerning the commission under clause 5.2. The fix

date of payment could not be altered by the Court on the bas that the appellant had breached a fundamental term of tl Collection Agreement by not paying the bi-weekly invoices.

5 The appellant relied on the case of **Rollop and Colls Limit v. Northwest Metropolitan Hospital Board D,**[1] where it w held *inter alia* that:

> ***"The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear from ambiguity, there is no choice to be made between different possible meanings; the clear terms must be applied even if the court thinks some other terms would have been more suitable."***

6 The case of **African Banking Corporation Zambia Limited Plynth Technical Works Limited & 7 Others,**[2] was relied

in support of the submission that the lower court failed in i duty to interpret clause 5.2.

7 The respondent's position is that considering the breach contract, the issue of when the payment was to be made immaterial as it does not alter the intention of the parti regarding the commission payable under clause 5.2.

8 Further, the non-payment of the bi-weekly invoices caus financial hardship to the respondent, which was brought the appellant's attention, as can be seen on pages 158 – 168 the record of appeal. Therefore, the lower Court was on fir ground when it found that the respondent could not have be reasonably expected to sit back and wait for the farmi season to end when it had several financial obligations meet.

9 The question raised by the appellant is whether t respondent had the right of action or cause of action agair the appellant for the 2.5% commission of the total FI collected deposits into the Ministry of Agriculture account wi the appellant at the time of commencement of the proceedin

10 **Black's Law Dictionary 8th Edition** cited by the appellar defines **"right of action"** ***as the 'right' to bring a speci case to court and "cause of action" as a group operative facts giving rise to one or more bases for sui a factual situation that entitles one person to obtain remedy in court from another person."***

11 To determine ground 6, it is imperative that clause 5.2 of t Collection Agreement be interpreted following the guidance **Rollop and Colls Limited** supra. The said clause reads follows:

> ***"UBA and M. Ndalama have agreed a commission of 2.5% of the total FISP collected deposits into the Ministry of Agriculture account with UBA. The payment shall be effected after the season on the average collected funds."***

12 This clause is crystal clear. It means that the commission 2.5% of the total FISP collected and deposited into the Minist of Agriculture account with UBA, could only be paid to t respondent by the appellant, on the average collected func after the end of the 2021/2022 farming season. The use of t

word 'shall' in the last part of the clause, indicates that this a mandatory requirement.

13 Therefore, we hold that the appellant had no right to initia action under clause 5.2 on 14th September 2021, as t farming season had not yet ended.

14 Therefore, the lower court misdirected itself in finding that breach of a fundamental term under clause 5.1, justified premature initiation of an action under clause 5.2. V accordingly set aside that finding. The lower Court failed interpret clause 5.2 of the agreement.

15 Consequently, we set aside the portion of the original acti relating to clause 5.2. We leave it open to the respondent to f a fresh lawsuit since the cause of action accrued at the end the 2021/2022 farming season. We find no merit in ground and uphold it.

**GROUNDS 1 AND 4**

16 In both grounds 1 and 4, the appellant is dissatisfied with t lower court's statement on page J22 (paragraph 10.22) of t judgment that: ***"Little wonder the defendant made payment into court of the sum of ZMW287,901.00***

***satisfaction of the plaintiff's cause of action f***
***ZMW2,605,180.00 which relates to the 2.5% commissi***
***under Clause 5.2 of the Collection Agreement."***

17 The appellant submitted that the lower Court misdirect itself in the above excerpt because it had not yet dealt with t question of liability and the amount payable to t respondent. The appellant relied on **Order 29 Rules 3 and of the High Court Rules[1] (HRC)** and **Order 22/1/2 of t Rules of the Supreme Court of England(RSC).[2]**

18 Further, the appellant contended that the lower court erred considering the payment into court as an admission of liabil when the notice of payment into court clearly stated th liability was denied.

19 To counter this, the respondent argued that making statement that liability is denied does not prevent the Cou from making a finding of liability against the maker of th statement. We have examined the following applicable laws:

20 ***Order 29 Rule 3 of the HCR*** on notice of payment into Cou provides that:

***"The notice shall state whether liability is admitted or denied..."***

.21 ***Order 29 rule 6 of the HCR*** provides that:

***"Except in an action to which a defence of tender before action is pleaded or in which a plea under the Libel Acts, 1843 and 1845 of the United Kingdom, has been filed, no statement of the fact that money has been paid into court under the preceding rules shall be inserted in the pleadings and no communication of that fact shall at the trial of any action be made to the Judge or assessor until all questions of liability and amount of debt or damages have been decided, but the Judge shall, in exercising his discretion as to costs, take into account both the fact that money has been paid into court and the amount of such payment."***

.22 ***Order 22/1/2 of the RSC*** describes the nature of a payme into court as simply an offer to dispose of the claim on terms

It further states that: ***"The payment into court implies a admission about the merits of the cause of action. The has been no adjudication on it, and therefore no estopp is created."***

23 Our interpretation of the first part of **Order 29, Rule 6 HCR** that informing the judge or assessors about the money pa into court before all questions of liability and the amount debt or damages have been decided is prohibited.

24 The second part of **Order 29 Rule 6 HCR** requires a Judg when exercising discretion regarding costs, to consider t money paid into court and the amount of such payment.

25 **Order 29 Rule 6 HCR** disallows the parties to state in t pleadings that money has been paid into court. It al precludes the parties from informing the judge or assess that money has been paid into Court before questions liability and quantum of damages have been determined.

26 The appellant has not demonstrated that at the trial, the fa of the payment into Court was inserted in any pleading or th either party to the case informed the trial Judge about t payment.

27 In this jurisdiction, payment into Court cannot be consider to be secret because upon filing a notice of payment in Court, the notice is placed on the Court record for the jud and all parties concerned to see.

28 It seems to us that the notice of payment into Court was record and the Judge was aware of it. We take the view th the statement referred to from the lower Court's judgment w made *per incuriam*. The liability of the appellant was not sole based on the payment into Court but on the evidence record.

29 Notwithstanding the foregoing discourse, a trial judge shou not comment on payment into Court until all questions liability, amount of debt, and damages have been decided.

30 We agree with the appellant that the lower court should n have considered the payment into court as an admission liability because under **Order 22/1/2 of the RSC** payme into court is not tantamount to admission of liability for t cause of action.

31 For the foregoing reasons, we find merit in grounds 1 and 4 the appeal.

**GROUNDS 2 AND 3**

32 Grounds 2 and 3 speak to the effect of the payment made in Court on the awards of costs and interest respectively.

33 The appellant relied on **Order 29 Rule 6 HCR** and **Order 6 Rule 9 (1) (b) RSC** whose provisions are similar as th provide that the Court in exercising its discretion as to cos shall take into account any payment of money into Court a the amount of such payment.

34 On page J25 of the judgment, the Judge ordered *inter-alia* follows:

> ***"I award costs to the plaintiff to be taxed in default of agreement."***

35 The appellant argued that the learned trial Judge did n consider the payment made by the appellant into court a the amount paid in awarding costs to the respondent.

36 On the contrary, the respondent cited the case of **Wooton Central Land Board,**[3] where the Court of Appeal of Engla stated as follows:

> ***"It is commonplace in cases which come before this court relating to the exercise of discretion in***

***regard to costs, that the court is very slow indeed to interfere with such exercise. Put in another way, it can be asserted that there is no question of law which this court is competent to determine relating to the exercise of discretion unless it is clearly shown that in the exercise of discretion, the tribunal appealed from has in some material and substantial respect wrongly exercised the discretion, either by some wrong, some erroneous direction of itself as a foundation for the exercise, or... where the result arrived at is one producing in the opinion of this Court a manifest injustice."***

37 The respondent contended that the appellant had n demonstrated that the lower Court wrongly exercised discretion in some material way.

38 It is our considered view, that the onus was on the appella to show that the discretion of awarding costs was in sor material or substantial respect wrongly exercised.

39 As we have already stated, **Order 29 Rule 6 HCR** makes mandatory for the Court in exercising its discretion as to cos

to consider the fact that money has been paid into Court a the amount of such payment. Failure to take this into accou is a misdirection that cannot be taken lightly.

40 **Section 24 (1) (a) of the Court of Appeal Act**, provides that

> ***"The Court may, on the hearing of an appeal in a civil matter confirm, vary, amend, or set aside the judgment appealed against or give judgment as the case may require."***

41 We have considered the payment made into Court and fou that the appellant paid the sum of ZMW 1,072,518.88 on 2 May 2022. As of 14th September 2021, when the action w commenced, the amount claimed was a total of ZMW 731,396.00 plus interest. The amount paid into Court w significantly lower than the amount claimed. Considering th the cause of action for the commission under clause 5.2 of t Collection agreement had not arisen at the time, the princi amount claimed was ZMW 3,126,216.00.

42 We take the view that since the amount paid into Court w significantly lower than the respondent's claim, even if t lower Court had taken into account the amount paid in

Court, the result would have been the same. We are fortifi by **Order 22/1/10 RSC** which provides *interalia* that, tl defendant must pay into court a sum that covers not only tl debt or damages claimed, but also any interest that might l awarded up to the date of payment. While the defendant is n obligated to pay interest into court, failing to do so puts the at risk regarding costs if interest is ultimately awarded, as tl amount paid may be deemed insufficient. (Paraphrased).

43 Although the trial Judge did not consider the payment in Court, this does not affect the award of Costs as the amou paid into Court was significantly lower than the amou claimed. Therefore, the discretion of the trial Judge awarding costs will not be tampered with. The case of **Woot** applies.

44 As regards the effect of the payment into Court on the awa of interest, the appellant stated that the lower court erred awarding interest to the respondent without considering tl effect of the payment into court on the award of intere Reliance was placed on **Order 22/1/10 of the RSC**.

.45 The appellant also referred us to the case of **BP Zambia Pl v. Expendito Chipasha and 235 Others,**[4] where the Supren Court discussed Order 22/1/8 RSC which provides that:

> ***"Any interest that may be awarded on the debt or damages recovered should be calculated up to the date of payment into Court."***

46 The Supreme Court referred to its earlier decision in **Zamb Revenue Authority v Hitech Trading Company Limit*** ***(SCZ Judgment No.40 of 2000)*** where it was held that:

> ***"In any event, the money paid into Court does not earn interest, which is a point in favour of the appellant in the event they were unsuccessful in their appeal."***

47 On this basis, it was concluded that:

> ***"Money paid into Court should only attract interest from the date of the Writ of Summons to the date of payment into Court."***

.48 In this case, the respondent contended that the amount pa into Court was insufficient as the claim was higher as earli alluded to.

.49 **Order 22/1/10 RSC**, provides to the effect that the tr Judge may have to make a special calculation of interest the end of the trial to determine whether the amount paid in court was adequate at the time of payment. This calculati will influence the decision regarding the order for cos (paraphrased).

50 We hold that the award of interest was justified because t respondent was kept out of its money (see the case of **Inde Petroleum Refinery Company Limited v. VG Limited.**[5])

51 The lower court ordered interest according to the Judgmen Act. However, according to the case of **BP Zambia PLC** supr ***"Money paid into Court should only attract interest fro the date of the Writ of Summons to the date of payme into Court."***

.52 Therefore, the trial court misdirected itself by making general order for interest on the entire judgment debt due the respondent, and because of this, we set aside the order i interest on the amount paid into Court. Instead, we order th the money paid into Court by the appellant shall only attra interest from the date of the writ of summons to the date

payment into Court. Interest on any other amount due to t respondent shall attract interest as ordered by the low Court.

.53 In light of the preceding, grounds 2 and 3 partially succe because the award of costs has not been tampered with.

**GROUND 5**

.54 In ground 5, the appellant faults the lower court for granti the respondent transaction fees under clause 5.1 of t Collection Agreement. The appellant submits that the invoic issued by the respondent were based on a per - farmer fee th was ZMW15.00, when the per – farmer fee was fixed in Mar 2022, at ZMW20.

.55 Clause 5.1 of the Collection Agreement provides as follows:

> ***"5.1 M. Ndalama and UBA have agreed to sha commission of the FISP collection fee in the ratio 80:20 in favour of M. Ndalama if the per - farmer fee ZMW15.00. Above ZMW20.00 per - farmer the ratio 75:25 in favour of M. Ndalama will apply."***

.56 The appellant submitted that the preceding clause is ve clear: It provides for payment of commission based on the pe

farmer fee yet to be fixed. The invoices issued by t respondent based on the per-farmer fee of ZMW15.00 we therefore incorrect.

.57 Further, the appellant's obligation to pay commission und clause 5.1 was suspended until the per-farmer fee w determined. The appellant relied on the case of **Afric Banking Corporation Zambia Limited v. Plynth Technic Works Limited and Others** supra, where it was held that:

***"It is trite that the interpretation of a written docume is a matter of law for the court. The function of t court is to ascertain what the parties meant by t words which they have used; to declare the meaning what is written in the instrument, not of what w intended to have been written; and to give effect to t intention as expressed. The object is to discover the re intention of the parties and the intention must gathered from the written instrument read in the lig of such extrinsic evidence as is admissible for t purpose of construction. It is not permissible to guess***

***the intention of the parties and substitute the presum***

***for the expressed intention."***

.58 The respondent submitted that the above authority does n support the appeal. The operative word under clause 5.1 is ' To state that the invoices were incorrect is merely a ploy delay payment. It would be logical to conclude that t invoices issued at ZMW15.00 were merely not to stray beyo what the parties had agreed to. Further, the accounts wou have been reconciled at the end of the farming season even the said invoices had been paid. That the contract ought have been honoured.

.59 We note that the parties had agreed under clauses 5.3, 5.3. and 5.3.2 that:

***5.3, " UBA shall transfer the applicable transaction fee t M-Ndalama either via the "automated model" manual instruction."***

***5.3.1 "by not later than the 14th calendar day followin the date of receipt of the monthly invoice in the ca of clause 5.1 above and by not later than 14***

***calendar day following the end of reconciliation***

***FISP collected deposits as in clause 5.2 above."***

***5.3.2 " M-Ndalama will invoice UBA every two weeks f***

***their share of collections fee to ease operations an***

***logistics expenses."***

60 It is clear from the above clauses that the parties agreed th the invoices to be issued by the respondent bi-weekly for share of the per-farmer fees, be based on the minimum pe farmer fee of ZMW15.00 and that the appellant would paying the same within 14 days from date of receipt of invoice. This was to assist the respondent with operations a logistics expenses. The respondent performed its part of t contract but there was no payment made on any of t invoices. The appellant's excuse was that it was waiting for t per-farmer fee to be set by the Ministry of Finance or t Ministry of Agriculture.

61 Under the circumstances, we agree with the respondent th the parties intended to use the minimum fee of ZMW15.00 p -farmer, as they awaited setting of the per-farmer fee for t season to be fixed by the Ministry of Finance or Ministry

Agriculture. This makes business sense because t respondent needed funds to continue performing the contrac

.62 The bi-weekly invoices could not have been at ZMW20.00 pe farmer fee during the 2021/2022 farming season because t said fee was not fixed within the season. The fee of ZMW20.( per-farmer was only set in March 2022, after the end of t farming season which ended in January 2022.

.63 Therefore, the invoices that were issued by the respondent the appellant were correct as the appellant was following t agreed terms and conditions. If the same were pa reconciliation of the accounts would have still been possil and neither party would have been prejudiced.

.64 There was no agreement between the parties that the p farmer fee would only be paid after the authorities had fix the fee. The parties expected the per-farmer fee to be fix during the 2021/2022 farming season and not later.

.65 We, therefore, hold that the share of the commission unc clause 5.1 of the Collection Agreement was not suspend until the authorities set that fee. This means ground 5 has merit.

**GROUND 7**

.66 In ground 7, the appellant challenges the lower cour determination that clauses 5.1 and 5.2 and the invoices issu by the appellant should be taken into account in assessing t damages.

67 The appellant contends that the respondent deliberately d not produce the invoices in the joint bundle of documents a therefore failed to prove its case. The case of **Zulu Avondale Housing Project**[6] on the principle that the burd lies on the appellant to prove his case, was relied upon.

.68 To counter ground 7, the respondent submitted that t appellant did not dispute the fact that invoices were given to by the respondent for settlement.

.69 It was submitted that the appellant will suffer no prejudice the invoices are produced during the assessment proceedin because they have already received them. Therefore ground is bereft of merit and should be dismissed.

.70 We observe that although the said invoices were not produc in the joint bundle of documents, it was common ground th the invoices were received by the appellant. Therefore, t

lower court did not err in directing the Registrar to take the into account when assessing the plaintiff's dues. Clause 5 has to be considered as it provides for the share of t commission on the per-farmer fees collected by t respondent.

.71 As we have stated earlier in this judgment, the right to s under clause 5.2, had not yet accrued at the time the case w commenced, therefore clause 5.2 should not be referred to the Registrar.

.72 It follows that ground 7 partially succeeds.

**GROUND 8**

.73 In the 8th ground of appeal, the appellant alleges that the low Court erred in awarding damages for breach of contract to t respondent, to be assessed by the Registrar. Citing the case **Finance Bank Zambia Limited and Rajan Mhatani Simataa Simataa,**[7] the appellant submitted that the purpo of damages is to put the party whose rights have been violat in the same position, so far as money can do so, as if h rights had been observed.

.74 Further, where there is a breach of contract, the aggriev party is only entitled to recover such part of the lo reasonably foreseeable.

.75 The appellant submitted that the award of damages based clauses 5.1 and 5.2 of the Collection Agreement would suffic Given the interest awarded, there is no basis for awardi damages beyond the claims under the said provisions.

.76 In response, the respondent stated that its takeaway from t case of **Finance Bank Zambia Limited and Rajan Mhatani Simataa Simataa,**[7] cited by the appellant is that:

> ***"Damages seek to restore the innocent party to the same economic position that party would have been in had the contract not been breached, thus giving that party the benefit of a bargain."***

.77 We posit that since the respondent had proved on the balan of probabilities that it lost economic benefits due to the brea of contract; it had to borrow money for logistics and oth expenses. It needs to pay interest on the loans. Therefo interest on the judgment debt alone would not suffice to pla the respondent in the same position as if the contract h

been performed. The respondent aptly claimed damages f breach of contract. See **Finance Bank Zambia Limited a Rajan Mhatani v. Simataa Simataa** *supra.*

78 In the case of **Nsansa School Inter Education Trust v Glad Mtonga Musamba,**[8] the Supreme Court held *inter alia* that:

> ***"Entitlement to damages can only arise where there has been a proven breach of a valid contract."***

79 In the present case, the respondent did prove a breach of valid contract and therefore the lower Court was on fi ground to award it damages for the breach, to be assessed the registrar. Thus, we find no merit in ground 8.

## 8.0 CONCLUSION

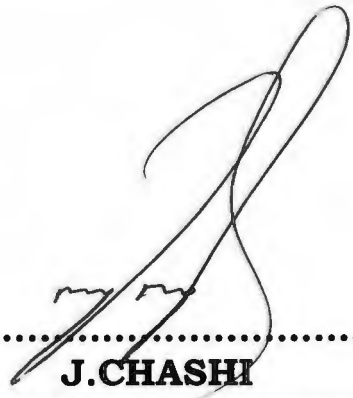
8.1 All in all, the appeal partially succeeds.

8.2 We order that the respondent be paid a commission und clause 5.1 of the Collection Agreement and damages f breach of contract with interest based on the Judgment's A

8.3 We further order assessment of the judgment sum due to t respondent by the Registrar taking into account the invoic

already issued, and the principles on interest applicable the money paid into Court.

8.4 Costs awarded to the respondent in the Court below have r been tampered with. Each party is to bear its costs befc this Court.



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**J.CHASHI**
**COURT OF APPEAL JUDGE**

.....
**C.K. MAKUNGU**
**COURT OF APPEAL JUDGE**

.....
**N.A. SHARPE – PHIRI**
**COURT OF APPEAL JUDGE**