BARZEM ENTERPRISES (PVT) LTD
versus
TARCON (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 15, 26 July 2016 and 6 July, 2017

Civil trial

N Mahori, for the plaintiff
F Chimwamurombe, for the defendant

CHITAKUNYE J. On the 10th September 2015 the plaintiff sued the defendant for among others:

1. Payment of the sum of US$203 355.88
2. Interest on the above amount at the rate of 22% per annum reckoned from the date each invoice became due and payable to date of payment in full.
3. Collection commission calculated in accordance with by-law 70 of the Law Society of Zimbabwe By-Laws, 1982; and
4. Costs of suit from the defendant on a legal practitioner and client scale.

The defendant disputed the claim and denied that it owed the plaintiff the sum claimed. The Defendant also disputed the rate of interest and the claim for collection commission and costs on a legal practitioner- client scale.

On the 22nd February 2016 the plaintiff amended its summons and declaration. The sum owed was amended to now read US$ 203 160.65.

The defendant filed an amended plea in which it denied liability as previously contended.

The background

On the 27th August 2014, the plaintiff and the defendant entered into a written agreement for hire of Articulated Dump Trucks. The agreement commenced on the 1st September 2014 and was to end on the 31st December 2014.

The terms of the contract included the following:

The plaintiff was to provide four Articulated Dump Trucks (ADTs) with each truck working a minimum of 500 hours per month for the duration of the contract. Charges for the hired trucks were to be done on an hourly basis at an agreed rate of US$75.00 for an agreed number of hours per day.

The trucks were for the use by the defendant in its contract at Murowa Diamond mine.

All payments would be due by the 15th of every month whether or not an invoice would have been issued by the plaintiff. In the event of the defendant failing to pay hiring fees in terms of the agreement, interest would accrue on the outstanding amounts at the overdraft rate of interest charged by Barclays Bank of Zimbabwe;

In furtherance of the contract the plaintiff supplied on hire to the defendant 3 Articulated Dump Trucks (ADTs). The plaintiff later issued 3 invoices to the defendant totalling US$ 203 160.65 as follows:

1. Invoice 016633 dated 19 January 2015 for US$ 88 448.14
2. Invoice 016634 dated 19 January 2015 for US$ 75 356 .63 ; and
3. Invoice 016732 dated 14 April 2015 for US$ 39 355.88.

It would appear that there were problems between the parties as soon as the contract came into effect. Firstly, instead of delivering the four ADTs plaintiff delivered 3. Secondly, the ADTs delivered had constant breakdowns hence did not perform to the expected standard. The defendant on its part did not pay by the 15th day of each month stipulated in the contract. the defendant made some payments but not adequate to cover for all the hours worked by the trucks. As a result of the defendant's failure to pay in full the invoiced amounts the plaintiff issued summons claiming the above mentioned sums.

The defendant on its part alluded to the failure by the plaintiff to perform in terms of the contract as the cause for the dispute. This failure included supplying 3 ADTs instead of 4, supplying ADTs that were not in good working condition for the task at hand and failing to remedy the breaches in this regard. The defendant pleaded that the trucks supplied were not fully functional and their operations were unsatisfactory. The trucks broke down on most of the times and failed to meet the target the parties had agreed to in their agreement. In short, the plaintiff supplied trucks that were not suitable for the work and performance that the parties had contracted for.

The defendant further contended that despite these problems with the trucks, the plaintiff raised various invoices based on the worked hours which amounted to US$ 295 578.76. This figure was later revised upon its representation to US$292 215.00. It then made

various payments towards the amount due totalling US$ 119 516.63 leaving a balance of US172 698.37.

The defendant contended that it then exercised its rights in terms of clauses 16, 18 and 19 of the Agreement and charged the plaintiff the sum of US$ 110 292.19 for the hours which the plaintiff's trucks were on breakdown. The defendant also contra-charged a further sum of US$ 64 538.65 which was payable to JR Goddard Contracting for completing the project, in terms of clause 16, leaving the plaintiff owing the defendant the sum of US$ 2 132.47.

As far as the defendant was concerned it did not owe the plaintiff any money.

At a pre-trial conference held on the 9th March 2016 the following issues were identified:

1. What were the terms and conditions of the contract?
2. Did the Plaintiff breach those terms?
3. Whether the Defendant is entitled to a set off and the quantum thereof.

In an endeavour to prove its case the plaintiff called three witnesses after which the defendant called one witness.

It was clear from the evidence that parties were agreed that the terms and conditions of their contract were as per the written contract signed on the 27th August 2014.

The clauses whose interpretation the parties haggled over included clause 6; 12; 16; 18; 19 and 30.

Thus the question of what were the terms and conditions of the contract was answered by reference to that contract document. Those terms remained valid to the end of the contract.

The contentious issue pertained to the application of those terms and conditions to the disputes that arose when the contract came into effect. This was whether the plaintiff breached the terms and conditions of the contract.

The question as to whether a party breached the terms of a contract or not is dependent on what was expected of that party. *In casu*, the question would be did the plaintiff (as Owner) perform according to the contract?

Clause 2.1 of the contract provides that:

"The Owner shall perform the contract:-
(a) In accordance with, and to the standards specified in the Contract; and
(b) To the reasonable satisfaction of the Hirer; and
(c) So as to meet any criteria for performance specified in the Contract or guaranteed by the Owner.

(d) The expected performance by the plant shall be the haulage of mining ore/ waste by the Hirer for MDPL on its 24hr (2 shift) mining operation with a minimum expected availability of 500 hours per month for each machine."

The plaintiff's witnesses testified that there were problems in the performance of the contract from both parties. The plaintiff had challenges of breakdowns of its ADTs which hindered the achievement of the originally projected hours. It was thus common cause that the trucks provided could not perform 500hrs each per month. The trucks did not thus perform to the standards specified in the Contract and to the satisfaction of the hirer. The Trucks did not perform to the minimum expected availability of 500 hours per month for each truck.

The evidence adduced clearly confirmed this aspect. In this regard evidence was tendered by both parties of communications on the numerous challenges with the Trucks supplied by the plaintiff. There were teething problems from the inception. It is clear from e-mail messages that the plaintiff's trucks were not performing to expected standards. In this regard exhibits 5 and 6 are clear testimony of this. Exhibit 5 is an e-mail message dated 7 September 2014 from the defendant to the plaintiff wherein the defendant's representative (A Dingembira) states, *inter alia*, that:

> "I tried to call you but it seems you are busy. I'm making a follow on our Friday discussion in which I was requesting that you send your senior mechanics to attend the trucks. Today is day number 10 and we still have one truck working. By now I would have expected all the 4 machines to be in production but it would appear problems are mounting. Any hope of getting 4 machines there seems remote. A potential third machine could also be miles away from commissioning as it still has a cylinder problem. I had requested that one of your Bulawayo guys should bring this spare to site but that still hasn't happened. I am getting worried each and every passing day. We are losing time and surely the whole objective of hiring the trucks is being defeated big time."

On the next day the plaintiff's representative (Mr. Gumbo) responded to the above message in these terms:-

> "I appreciate your sentiments. As Barzem we are determined to make this project work. There is something we need to correct and I am not sure how exactly. Somehow information does not seem to be flowing correctly. In our discussion yesterday you had indicated that there was no truck operating but when I contacted the Barzem team they said that two trucks had been working and up to 30 minutes ago they were working. There was a time when there was just one truck yesterday whilst they changed a broken steering cylinder. From the guys it would seem the operator hit something, let us not get bogged down on this issue for now. Our Service Manager is on site to ensure that the third and fourth trucks are running before end of the week and also investigate the steering cylinder failure."

Exhibit 6 is an e-mail dated September 03, 2014 from defendant to plaintiff in which defendant's representative addressed Mr Gumbo of plaintiff as follows:

> "I have had a meeting with your operations Manager and Service Manager on site this afternoon to discuss the availability of the CAT 740s. What was quite evident was that there is too much reliability on JRG to sort out Barzem problems. Yes, there could have been a verbal arrangement with JRG for the provision of old tyres from their fleet to your trucks but there was no checking of the condition of the JRG tyres. There was no follow up on the release of studs from JRG to go to site. Although we are trying to *kiya kiya* on site to commission the trucks, I believe we could have achieved good progress if there was good coordination of the JRG deal. As of now nothing has arrived from Byo although I'm made to understand that there is a truck on its way to site.
> The main concern is we have lost a week of production and that is not good for both Tarcon and Barzem. Let's up our game and ensure the availability of the ADTs improves, otherwise we risk tarnishing our reputation with the client."

It is pertinent to note that the above complaints were made a few days after the commencement of the contract. The problems mirrored in the above communications persisted as evident from further e-mail exchanges between the parties.

As a consequence of the plaintiff's failure to perform as expected, on the 27th January 2015, the defendant wrote a letter to the plaintiff expressing its concern at the plaintiff's failure to perform in terms of the contract in these terms:

> "Dear Sir,
> Following our agreement for the hire of ADT for our Laud & Haul mining operations at Murowa we write to express our concern at your failure to meet the productivity targets as agreed. According to our agreement and productivity targets committed to by Barzem, each of the ADTs was supposed to work for 500 hours a month as a minimum. Please find below table showing the hours worked by each of your machines up to the end of December 2014. The hours highlighted are based on the hours invoiced by Barzem.

Name	Sept. 2014	Oct.2014	Nov. 2014	Dec. 2014	Total	Target	%achieved
CAT740#18	138.2	211.70	344.60	408.6	1103.10	1590	69.38%
CAT740#19	0	286.90	420.4	465.10	1172.4	1590	73.74%
CAT740#20	91.4	327.7	396.20	0	815.30	1590	51.28%
CAT740#21	297.9	0	0	0	297.9	1590	18.74%

> As per the above table you can appreciate that none of the machines actually met the agreed productivity targets. This means not only lost revenue to us but other unwarranted costs too. Of greater concern to us is the fact there does not seem to be any indication or communication from Barzem of your plans, willingness or ability to address this situation.
> In view of the shortfall noted above, may you kindly process a credit note of no less than $92,000.00 (excluding VAT) against balances due to yourselves."

The above letter shows clearly that the plaintiff did not perform as expected and was thus in breach of the terms of the contract. The plaintiff was required to provide 4 ADTs in good enough a condition to perform 500 hrs each per month of work but alas in no month did plaintiff provide 4 ADTs in functional state. At the most for September to November only three ADTs were functional and even then none clocked the minimum required 500 hours per month. As for December only two ADTs were functional. The plaintiff's witnesses did not

rebut the contents of the above letter on the hours performed and the fact that none of the trucks met the agreed minimum monthly target. Mr Ruston Gumbo for the plaintiff confirmed as much when under cross examination he stated as follows:

> "Q. Do you confirm that in most cases your equipment had problems?
> A. In some instances.
> Q. what percentage would you place the period of malfunction?
> A. I would say 30 to 40 percent due to problems."

Besides the percentage alluded to due to problems with the machines the witness also indicated that at times they would withhold some equipment for non payment. Unfortunately this withholding for none payment was not borne out by the numerous correspondences between the parties already referred to that shows that the malfunction of the equipment was the predominant issue from the inception of the agreement to the termination of the agreement.

I thus conclude that the plaintiff breached the terms of the contract as it failed to perform in terms of the contract.

The next contentious issue is whether or not the defendant was entitled to set-off.

The plaintiffs' evidence was to the effect that despite the problems encountered in the performance of its side of the contract it was entitled to payment in the sum of US$ 203 160.65. The plaintiff argued that the defendant was not entitled to set-off. It was the plaintiff's further argument that if the defendant had a counter claim against the Plaintiff, it ought to have filed a counter claim at the time it filed its plea in terms of Order 18 Rules 116(2), 120(1) and 121(1).

The defendant on the other hand contended that this was not a case of a counter claim but of a set off. A counter claim is a claim by a defendant opposing the claim of the plaintiff and seeking some relief from the plaintiff for the defendant. It contains assertions that the defendant could have made by starting a lawsuit if the plaintiff had not already begun the action. In *casu*, the defendant is not claiming any payment from the plaintiff because it was already compensated as pleaded. This is a case of set-off.

The doctrine of set-off was explained by INNES CJ in *Schierhout* v *Union Government (Minister* of *Justice*) 1926 AD 286 at 289-290 as follows-

> "The doctrine of set-off with us is not derived from statute and regulated by rule of courts, as in England. It is a recognized principle of our common law. When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* as effectually as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of compensation by bringing the facts to the notice of the court- as indeed

> the defence of payment would also have to be pleaded and proved. But, compensation once established the claim would be regarded as extinguished from the moment the mutual debts were in existence together."

see –*Southern Cape Liquors (Pty) Ltd* v *Delipcus Beleggings* BK 1998 (4) SA 494(C)

In *Commissioner of Taxes* v *First Merchant Bank Ltd* 1997 (1) ZLR 350(S) at 353C, GUBBAY CJ had this to say on set-off:-

> "At common law, set-off or *compensatio* is a method by which mutual debts, being liquidated and due, may be extinguished. It takes place *ipso jure*. If the debts are equal, both are extinguished; if unequal, the smaller is discharged and the larger is proportionally reduced."

In casu, it is upon the defendant to show that plaintiff is indebted to it and such debt is fully due. The defendant's evidence was to the effect that having established that the plaintiff was in breach of the contract, the defendant was entitled to contra charge plaintiff in terms of the contract. In this regard defendant relied on clauses 6, 16 and 19 of the contract.

The plaintiff on the other hand contended that for set-off to apply the agreement required the defendant to give a written notice to plaintiff of its intention to act in terms of the clauses cited. In this regard plaintiff referred to clauses 16 and 19 of the agreement.

In its evidence through Mr Gudo, the defendant, testified that it is true that the plaintiff raised various invoices based on the worked hours which amounted to US$ 295 578.76. This amount was adjusted to a sum of US$ 292 215.00. The defendant made various payments amounting to US$ 119 516.63 thus leaving a balance of US$ 172 698.37.

He testified that the defendant exercised its rights in terms of the contract and contra charged the plaintiff the sum of US$ 110 292.19 for the hours which the plaintiff's machines were on breakdown. In this regard he referred to the workings exhibit 9 which is a tabulation of the worked hours for each of the machines hired and the amounts earned by each of the machines at a rate of US$ 75.00 per hour. The second page of that exhibit is a tabulation of standby hours for reverse charge as calculated by the defendant. The table shows the breakdown hours of each of the machines for the duration of the contract period and the amount contra charged at a rate of 50% of the hourly rate of US$ 75.00 per hour (that is US$37.50). The total contra charged based on the standby hours is US$ 110 292.19.

The witness went on to state that the defendant further contra charged a further sum of US$ 64 538.65 which was payable to JR Goddard Contracting for completing the project, in terms of Clause 16 leaving the plaintiff owing the defendant the sum of US$ 2 132.47. He testified that in terms of clauses 18 and 19 of the contract the defendant was allowed to

engage a third party to complete the work the plaintiff's machinery would have failed to complete.

The clauses that the defendant relied on for the set off included clause 6,

Clause 6 states that:

> "Any sum due from the owner to the Hirer in accordance with the Contract may be deducted by the Hirer from any sum due or becoming due to the owner under the Contract without prejudice to any other rights the Hirer may have.'

The defendant's witness contended that it was entitled to contra charge for the periods of the breakdowns as provided for in Clause 19 of the Contract. Clause 19 provides that:

> "19.1 If the Plant at any time is damaged, breaks down or is working unsatisfactorily, the Hirer shall immediately notify the Owner and shall forthwith confirm such notification in writing to the Owner.
> 19.2 The Owner shall immediately remedy any unsafe or unsatisfactory operations of the Plant or shall within 24 hours provide acceptable substitute Plant.
> 19.3 If the Owner fails to act as aforesaid the Owner shall reimburse the Hirer an amount which shall be charged at 50% of the standard rate at a minimum amount of 6 hours per day.
> 19.4 No hire charges shall be payable in respect of the duration of any period which the Plant is unsafe or unsatisfactory."

From the evidence adduced it was common cause that in no month did the plaintiff deliver 4 ADTs at any one time and those delivered constantly broke down to an extent whereby none performed 500 hours in any month of the Hire agreement. In terms of clause 19 the defendant was entitled to contra charge for the breakdown hours at 50% of the contract rate. In that regard the defendant worked out the standby hours for the contra charged and using the rate allowed raised a charger of $110 292.19

This was arrived at as follows for the CAT 740 ADTs:

	740#18	740#19	740#20	740 #21	Total breakdown	Rate	Amount
Sept. 2014	156.00	402.00	120.00	126.20	804.20	$37.50	$30 157.50
Oct.2014	0.00	54.00	0.00	450.00	504.00	$37.50	$18 900.00
Nov. 2014	60.00	0.00	0. 00	504.00	564.00	$37.50	$21 150.00
Dec. 2014	69.00	1.00	615.30	0.00	685.30	$37.50	$25 698.75
						Sub-total	$95 906.25
						VAT 15%	$14 385.94
						Total due	$110 292.19

This is the total defendant claimed as set off in respect of the standby hours when plaintiff's trucks were on breakdown.

The plaintiff's argument was basically that for the defendant to be entitled to set off it ought to have given written notice of its intention.

It is however my view that evidence is abundant that besides the telephone conversation the parties agreed to have engaged in there were also written correspondence of the numerous breakdowns of which the plaintiff did not make good. The documented breakdowns were clearly acknowledged by the parties in their evidence. It is also not in dispute that before purporting to give notice to terminate the agreement in February 2015, the defendant had on the on the 27th January 2015 written to plaintiff seeking a credit note in the following terms (last paragraph):

> "In view of the shortfall noted above, may you kindly process a credit note of no less than $92 000.00(excluding VAT) against balances due to yourselves."

The plaintiff in its response dated 29 January 2015 responded to the claim for a credit note in these terms (2nd last paragraph):

> "On the issue of the credit note of no less than $92 000.00 that you want us to process please provide clarification. I am unsure why you would want us to do that. Which clause in the contract compels us to do that?"

Under cross examination Mr Gumbo confirmed that the issue of set-off had indeed been discussed but not agreed in the following exchange:

> "Q. So can I say that even the set off was discussed at length but was not recorded?
> A. I have e-mails that corroborated that issue of set-off was discussed but we never agreed."

Clearly therefore plaintiff was made aware of the set –off during discussions and the exchange of e-mail messages. The grounds for the set-off were made clear as the breakdowns of the ADTs. In terms of the contract the defendant was entitled to the set–off.

The other contra charges raised by the defendant pertained to the engagement of a 3rd party. The defendant's witness testified that in cases where the plaintiff defaulted, clause 16 of the contract entitled it to contra-charge. Clause 16 provides as follows:

> "16.1 If the Owner shall fail to execute the Contract with due diligence and expedition or shall refuse or neglect to comply with any reasonable order given to him in writing by the Hirer in connection with the Contract or shall contravene any provisions of the Contract, the Hirer may give notice to the Owner to remedy the same and shall confirm this in writing.
> 16.2 Should the Owner fail to comply with the notice referred to in Clause 16.1 within 24 hours from the date of its service, in the case of matters capable of being made good within that time or otherwise within such time as may be reasonably necessary for making good, then, without prejudice to any other right under the Contract the Hirer may at the Owner's cost either:
> (a) employ others to or itself execute that part of the Contract which the Owner shall have failed to execute; or

(b) take the Contract in whole or in part out of the Owner's hands and contract with any other person to complete the same.
(c) Owner shall reimburse the Hirer an amount which shall be charged at 50% of the standard rate at a minimum amount of 6 hours per day.
16.3 The Hirer, with the Owner's written consent may retain any sum which may otherwise be due to the Owner and to apply that sum towards the payment of the cost of carrying out any work referred to in Clause 16.2."

There is no dispute that the plaintiff's Trucks had constant breakdowns. It is these breakdowns and failure to provide 4 ADTs at any given time that the defendant alluded to in its hiring of a third party's ADTs. As the breakdowns were common cause the defendant was of the view that the contract did not require it to notify plaintiff of the engagement of a third party.

The plaintiff on the other contended that the defendant could only engage a 3rd party after giving written notice to the plaintiff. *In casu*, no such written notice was given and so the purported engagement of a third party JRG Contracting was not in accordance with the contract.

The defendant's witness under cross examination in fact confirmed that the defendant proceeded to hire a third party without the plaintiff's knowledge. All that the defendant would do was to inform the plaintiff of its failure to perform and thereafter proceed to engage a third party. He argued that this was so because in terms of the contract their obligation was to inform the plaintiff of the breakdown and no such obligation extended to notifying the plaintiff of the intention to hire a third party.

Clause 16 that the parties relied on shows clearly that the notice the defendant was expected to give pertained to the breach and the need for the plaintiff to remedy the same and this was to be confirmed in writing. As already alluded to above, there is no denying that the breaches were communicated and confirmed by the various correspondences between the parties including e- mails. Despite this notification of the breach and demand for plaintiff to remedy the same, the plaintiff failed to. In the circumstances clause 16.2 is to the effect that the defendant had the option to employ others to execute that part of the contract which plaintiff would have failed to execute or to take out the whole or in part out of the plaintiff's hands and contract with any other person to complete the same.

In the event of such an occurrence the plaintiff was required to reimburse the defendant an amount which was to be charged at 50% of the standard rate at a minimum amount of 6 hours per day.

Clause 16.2 does not require that the defendant must notify the plaintiff of the hiring of another entity to complete its contract. The notification is only on the breach and demand to remedy the breach. Once the plaintiff failed to remedy the defendant was entitled to act in terms of clause 16-2 of the contract.

The requirement for a written consent from the plaintiff would also arise where the defendant wished to retain any sum and apply it towards the payment of the cost of carrying out any work referred to in clause 16.2.

The defendant could thus not unilaterally withhold the payment but had to seek the plaintiff's written consent. In the absence of such consent then the defendant would have to prove its case for the retention of such a sum. It is upon the defendant to prove that it hired ADTs from a third party at a time plaintiff failed to meet its obligation and despite notice in the regard.

In casu, the defendant merely came up with figures of the alleged hire of ADTs from a third party at the end of the contract. The correspondence exchanged by the parties during the tenancy of the agreement besides the issue of the breakdowns and failure to deliver 4 ADTs did not allude to the hire of ADTs from a third party or for which particular periods such hire could have been done.

I raise this issue because the defendant was already in a consortium with the alleged third party, JRG Contracting, whose terms and conditions only defendant knew. That relationship meant the two parties were already in some working relationship over the same project. If JRG Contracting was hired to perform work that plaintiff was supposed to perform then surely the periods when such work was performed ought to have been clearly spelt out so as to ascertain whether the hiring at that particular time was because plaintiff had failed to perform. The times when the third party's trucks were hired needed to be aligned to the times the ADTs from plaintiff had broken down. To merely come up with monthly figures at the end of the contract was not good enough. It does not show that there was necessity at the time of such hiring.

It is my view that whilst the defendant was entitled to be reimbursed for the hire of equipment from a third party, it has not shown that such hire was during the hours or times the plaintiff had failed to perform. In the circumstances I conclude that defendant has not established that the sum in this regard was due and fully owing for it to be set off against plaintiff's claim.

Clause 18 which the defendant also referred to provides that:

> "In the event of the Owner failing to deliver the Plant or any part thereof in accordance with the Contract and within 10 days of written request to do so, the Hirer may obtain subsititute Plant from any other source and the Owner shall reimburse any costs or expenses thereby incurred by the Hirer."

The defendant's witness could however not point out to any written notice given to the plaintiff which would have entitled it to hire from another source substitute plant in terms of this clause. The substitute Plant itself was not identified serve to refer to payments allegedly made to JRG Contracting. As already alluded to above, the relationship between defendant and JRG Contracting made it difficult to distinguish Plant hired as substitute from that used as part of the parties contractual working relationship. It was necessary in my view to clearly identify the plant hired as substitute for plant plaintiff had failed to deliver and clearly state the period such plant was hired. This the defendant did not do.

It may also be noted that whilst the defendant's witness contended that out of the initial debt of US$ 295 578.76, it made various payments towards that amount totalling US$119 516.63 thus leaving a balance of US$172 698.37 from which the amounts for set off must be deducted, the witness did not tender proof of such payments other than the plaintiff's concession leading to the amendment of the sum due to US$203 160.65. It was incumbent upon the defendant to establish that it had indeed made payments that reduced the debt to the sum it was alleging. In the absence of such proof it is only proper to deduct the set-off sum from the sum shown by the plaintiff to have been due as at the time of summons.

I thus conclude that the defendant is entitled to a set –off in the sum of US$110 292.19. In the circumstances the debt that remains to the plaintiff is the sum of US$92 868.46.

In its claim the plaintiff claimed interest on the sum due at 22% per annum reckoned from the date of each invoice. The plaintiff's witnesses testified that in terms of the contract the rate of interest for outstanding amounts was to be calculated base on the overdraft rate of Barclays Bank of Zimbabwe. This is the rate they claimed at 22%. When asked to tender proof that the overdraft rate for Barclays Bank was 22% at the time the sums became due, the witness could not tender any. It was thus their word of mouth only. It is my view that the onus was on the plaintiff to prove that at the time the sums became due the overdraft interest rate for Barclays Bank of Zimbabwe was 22%. In the absence of any such evidence confirming the overdraft rate of interest it is unsafe to accept such a rate. I thus find that plaintiff has not proved the rate of interest.

As regards cost of suit, it is apparent that each party has been partially successful and so it is only just that each party bears their own costs of suit.

No insistence was placed on the collection commission I thus take it plaintiff abandoned this claim upon defendant's opposition to it.

Accordingly it is hereby ordered that judgement be and is hereby entered for the plaintiff in the sum of US$92 868.46 with interest at the prescribed rate from the date of this order.

Each party will bear their own costs of suit.

Machinga and Partners, plaintiff's legal practitioners
Mberi Chimwamurombe Legal Practice, defendant's legal practitioners