

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

2011/HP/265

BETWEEN:

BRIG GEN. AGGREY NKANDU CHILUBA

PLAINTIFF

AND

LEONARD MBAO

DEFENDANT



**Before the Hon. Mrs. Justice J.Z. Mulongoti
in Open Court on the 5th day of February, 2016**

For the Plaintiff:

Mr. V. Kabonga of Paul Pandala Banda
& Co.

For the Defendant:

In Person

J U D G M E N T

Cases referred to:

1. Mohammed V Attorney General (1982) ZR 49
2. Zulu V Avondale Housing Project (1982) ZR 172

The plaintiff sued the defendant to recover the sum of K265,000.00 with interest and costs. The plaintiff alleges that sometime in 2008/2009, the defendant a supplier of goods and services to the Zambia Prisons persuaded him to lend him funds to increase the supply of goods to the

prisons in Kabwe after which they would share the profits. He lent the defendant a total sum of K265,000.00 and they supplied goods worth K260,000.00 to the prisons. The defendant collected the money but has not repaid the plaintiff's K265,00.00 or given him any money realised from the transaction.

The defendant filed a memorandum of appearance, defence and counterclaim. He averred that contrary to the plaintiff's allegation, it was the plaintiff who approached him to supply goods using his (defendant's) company called LAFRIM General Dealers, at a commission. The plaintiff invested K30,000.00, K50,000.00 and K70,000.00 on various dates totalling to K150,000.00 and not K265,000.00 as claimed. The defendant further averred that the plaintiff has been repaid a total sum of K47,000.00 as part payment received from the Prison Headquarters pending further payments.

The defendant is counter claiming K35,000.00 as commission for use of his company with interest and costs.

In reply, the plaintiff denied the defendant's counter claim and joined issue.

At trial, the plaintiff (PW1) gave oral evidence and called one witness. He testified that he retired from the Zambia Army on 18th June, 2008 and received his terminal benefits at the end of the same year. In early 2009, he received a call from the defendant asking for financial assistance to finance a project he had with Legal Aid. He testified that he knew the defendant through a Mr. Chisanga and that he found him to be trustworthy. He met with the defendant who explained and showed him the contract he had with Legal Aid to construct houses. He then lent him K20,000.00 for the said project. The defendant later contacted him to ask for more money saying he was required to extend the houses. He gave him another K45,000.00. The defendant assured him that he knew someone at Legal Aid who would help him to process the payment. By the end of the year, the defendant had collected about K84,000.00 from the plaintiff. When he contacted him for repayment, the defendant told him that there were problems at Legal Aid which affected the payment process.

PW1 testified that the defendant informed him that he was a director in a company called IFRIM General Dealers and suggested that he could use the company to supply goods to the prisons and use the money to repay him. Due to desperation, he agreed and gave the defendant an extra sum of K70,000.00 to facilitate the supply business. After he was shown the contract, he gave him another K50,000.00 and later a K30,000.00. This was on mutual understanding that if he failed to pay, he (plaintiff) would contact the Commissioner of Prisons to pay him instead of the defendant.

It was PW1's further testimony that he received a letter from Mulungushi Chambers on page 5 of his bundle of documents stating that the defendant admitted owing him K84,000.00 and requesting to be given more time within which to settle the debt. However, the defendant still failed to settle his indebtedness. He then contacted a Mrs. Mutiti from Prisons to inquire on the payment. She informed him that the amount involved could not be paid at once. She also informed him that she would contact the Commissioner, to ensure that payments were processed but that the payment will be in the defendant's name. A month later, the commissioner contacted him to collect a cheque of K40,000.00 from Kabwe. When he got

there, he found that the defendant had already collected the cheque. He also discovered that the defendant had collected a total sum of close to K90,000.00 without his knowledge.

PW1 testified that he was shocked that the defendant only agreed to owing him K150,000.00 excluding the sum of K84,000.00 which he lent him earlier and the sum of K31,000.00 which he gave him to buy cement. He testified that his lawyers requested the Kabwe Prisons office to pay the K265,000.00 owed to him by the defendant through their bank account but to no avail.

In cross examination, PW1 agreed that he informed the Court that the defendant borrowed a total of K84,000.00 for the Legal Aid Project.

He denied that he was engaged in the business of money lending commonly known as '*Kaloba*' as alleged by the defendant.

PW2, Colonel Martin Adani Tshuma (retired) testified that he knew the plaintiff in about 1970 when they were both junior officers in the Zambia Army. In 2009, the plaintiff asked him to accompany him to meet the defendant who he was arranging to do business with. The plaintiff

agreed to provide capital for a business venture. The parties then signed an agreement form in January, 2009 which he witnessed. In September, 2009, the plaintiff asked him to accompany him over another transaction with the defendant involving K84,000.00 in which he also signed as a witness. His understanding of the transaction was that the plaintiff would advance money to the defendant to supply goods to the government and the money realised would be paid back to the plaintiff with interest.

That was the evidence on behalf of the plaintiff.

The defendant Leonard Mbao (DW1) gave oral evidence and called one witness. He testified that he knew the plaintiff through Colonel Chisanga who used to run a restaurant behind Findeco House in Cairo Road, Lusaka. They would meet and discuss business ideas at the restaurant. During those meetings, they decided to come up with a money lending business commonly known as 'Kaloba' in which the plaintiff expressed interest. They conducted the business until the uncollected sum came to K84,000.00 inclusive of interest. The plaintiff then instructed him to recover the money by collecting property from the debtors. He collected three industrial

hair driers and 20 computers which were delivered to the plaintiff's house which the plaintiff accepted.

DW1 testified that he later approached the plaintiff to lend him K150,000.00 to enable him finance his orders to supply goods to the prisons. He was given the money between September and December, 2009 in instalments of K30,000.00, K50,000.00 and K70,00.00. He promised to repay as soon as he received payment. In February, 2010, he received a payment of K20,000.00 which he gave to the plaintiff. In March, 2010, he received K12,000.00 which he gave to the plaintiff. In July, 2010 he received another payment of K20,000.00 which he also gave him. In September, 2010, he organised cash of K10,000.00 and gave it to him. In November, 2010, the plaintiff called him asking for money but he did not have money. He organised a K20,000.00 which he paid him in December, 2010. He later received cheques totalling K40,000.00 from Kabwe Prisons. He paid the plaintiff K40,000.00 after the cheques cleared in the presence of a witness. Sometime in 2012, he paid the plaintiff K10,000.00 through his former lawyer Mr. Eyaa.

Sometime in September 2014, the plaintiff sued him in the Small Claims Court for the balance of K18,000.00. The plaintiff and his children then took possession of his car which they said they would return upon settlement of the balance of K18,000.00. Two days later, he organised the K18,000.00 and paid the plaintiff off and they released the car. According to DW1, he paid off the plaintiff the whole sum of K150,000.00 which he borrowed. However, they did not sign anywhere that the debt had been paid off.

Under cross examination, DW1 testified that he was not recording anywhere whenever he paid the plaintiff despite knowing how to read and write. He testified that if the plaintiff was honest enough, he would confirm receipt of the money. He said that when he paid him the K40,000.00 a witness was present. The other instalment of K10,000.00 was paid through his former lawyer Mr. Eyaa.

Further in cross examination, DW1 testified that they did not recover the K84,000.00 in full but that they only seized goods which were delivered to the plaintiff.

It was DW1's testimony that the K150,000.00 was not part of the joint venture.

In re-examination, DW1 explained that he fully trusted the plaintiff which is why he did not record the payments made to him.

DW2, Philip Chilembo Siwale testified that he witnessed the payment of K40,000.00 by the defendant to the plaintiff which was made at the plaintiff's house in Chalala. The defendant asked the plaintiff to sign for the money but he refused saying they would sign for the money later together with other previous payments.

He testified that previously, DW1 had informed him of the three hair driers and 20 computers which they seized from clients that had defaulted. He escorted him and they delivered the items to the plaintiff who received them.

That was the evidence on behalf of the defendant.

Learned counsel for the plaintiff, Mr. Kabonga made viva voce submissions at the close of the trial. The gist of his submissions is that the parties entered into the transaction which they did not reduce to writing but that

it was suicidal for the defendant not to record the alleged payments. No evidence was led to show how the K84,000.00 was reduced after goods were seized and that the defendant's evidence that he owed the plaintiff nothing is a misstatement of fact. He urged the Court to find that the defendant owes the plaintiff a sum to be assessed.

I have considered the evidence on record and the submissions by learned counsel. It is common cause that the plaintiff and defendant entered into various business transactions in which the plaintiff was the financier. The transactions were never reduced to writing. The plaintiff claims that the defendant agreed to pay back his (plaintiff's) money in full plus interest or profit realised from the business. The plaintiff claims the defendant never paid him back this money which is why he sued him. The defendant on the other hand acknowledges that he did owe the plaintiff some money but contends that he paid the plaintiff back in full. The question that arises for determination is whether or not the defendant owes the plaintiff the sum of K265,000.00 and whether or not the plaintiff paid back that money in full.

The plaintiff (PW1) testified that the defendant borrowed money from him between 2008 and 2009 to finance a project he had with Legal Aid. He gave him this money in instalments until it amounted to K84,000.00 by the end of 2009. The defendant (DW1) on the other hand testified that he was conducting a money lending business commonly known as '*Kaloba*' with the plaintiff and that the K84,000.00 was the accumulated figure owed by other debtors. And that the money was recovered when they seized the debtors' goods including three hair driers and 20 computers which he delivered to the plaintiff. I note that the defendant acknowledged that he borrowed money from the plaintiff. According to the document on page 4 of the plaintiff's bundle of documents, it is clear that the defendant borrowed the sum of K84,000.00 from the plaintiff on 9th January, 2009 and made a proposal on how he intended to pay back the money. Both parties signed on this document in the presence of their witnesses. The defendant never challenged this document during trial. Hence the parties were bound by that document. Further, PW2 who witnessed this document on behalf of PW1 testified that the defendant received K84,000.00 from the plaintiff although his understanding was that the money was being invested as capital in a business after which the parties would share

the profits. This was also confirmed by the letter on pages 5 to 6 of the plaintiff's bundle of documents where the defendant's advocates wrote to the plaintiff requesting for more time for him to settle his indebtedness of K84,000.00 to the plaintiff. I therefore, find as a fact that the defendant owed the plaintiff the said sum of K84,000.00.

It is immaterial what this money was used for. The fact is the defendant acknowledged owing the plaintiff the said sum. I am alive to the defendant's testimony and that of DW2 that they collected hair driers and 20 computers which they delivered to the plaintiff to cover that debt. The defendant did not challenge this evidence. DW1 and DW2 corroborated each other on this score. I note also that the claim by the plaintiff is for money used to supply goods to the prisons. Yet at trial he testified K84,000.00 was for the defendant's legal Aid Project. I note that the K84,000.00 was not pleaded. However, the defendant did not object at trial. I also find that on the facts and evidence before me, I find that it was settled as testified by DW1 and DW2 partly by driers and computers given to the plaintiff. The document at page 1 shows how the plaintiff was to pay the K84,000.00. Apart from the driers and computers, he testified that the

plaintiff at one time sued him in the small claims court for K18,000.00 and confiscated his car. He later paid him the K18,000.00. Again the plaintiff did not challenge this evidence. I must state that I found the defendant to be a more credible witness than the plaintiff. He admitted that he borrowed from the plaintiff and that he never recorded anywhere when he paid the defendant because he trusted him. The defendant on the other hand is claiming K265,000.00, money the plaintiff used to supply goods. I note that the plaintiff has failed to adduce evidence to show the defendant borrowed K265,000.00. He is simply relying on the letter the defendant wrote to the prisons dated 22nd March, 2010, captioned *'payments of outstanding bills amounting to K265,600,000.00 (unrebased) towards supply of various commodities to prisons'*. In the letter the defendant informs the prisons that the outstanding bills be paid to the plaintiff who financed the purchasing of food stuffs less amount paid. It is unclear if the amount due to the plaintiff was K265,600,000.00 or it was less what had already been paid. I am of the considered view that the plaintiff has failed to prove that K265,000.00 was received by the defendant. The invoices at pages 8, 9 and 10 do not prove that the plaintiff gave the defendant K265,000.00. The evidence before me is that the

defendant was to supply the goods at a profit. Thus, I take it the amounts on the invoices included the said profits. I therefore, accept the defendant's testimony that he borrowed K150,000.00. I note that the plaintiff's testimony was that he gave the defendant K70,000.00 then K30,000.00 and later K50,000.00 for the supply of goods. According to him the defendant was still owing K84,000.00 at the time.

I find as a fact that the defendant borrowed K150,000.00. I note further that the defendant called DW2 whose testimony was that he witnessed the payment of K40,000.00 to the plaintiff at his house in Chalala. His evidence was not challenged by the plaintiff as he was not cross examined. His testimony supports the defendant's evidence that he repaid a sum of K40,000.00 to the plaintiff. It is worthy to note that the defendant in his defence stated that he had repaid the plaintiff the sum of K47,000.00 from payments he had received from the prisons. However, only the payment of K40,000.00 is supported by evidence. Be that as it may I accept that he has been paid K47,00.00. I note the parties were in the habit of giving each other money without signing for it. The question is, has the defendant paid in full? It is trite that he who alleges must prove

never mind the opponent's case. See the cases of **Mohammed v Attorney General (1)** and **Zulu v Avondale Housing Project (2)**. Having found that the plaintiff has failed to prove that he was owed K265,000.00 and that the defendant has paid back K47,000.00. I am inclined to find that the plaintiff is owed K103,000.00. I therefore, find that the defendant has repaid the plaintiff the said sum of K47,000.00 reducing the total amount owed to the plaintiff by the defendant to K103,000.00.

The plaintiff also claimed that the defendant borrowed the sum of K31,000.00 from him which he used to buy cement. Though the defendant neither disputed this claim nor challenged it in anyway. It is trite that he who asserts must prove. Apart from the verbal assertion, the plaintiff did not adduce any evidence of this debt. And his claim is for money used to supply goods. It is therefore, unsuccessful.

Regarding the counter-claim, for payment of K35,000.00 as commission, no evidence was adduced to support the same. The counterclaim is therefore, un successful.

In the net, I enter judgment for the plaintiff in the sum of K103,000.00 with interest at short term deposit rate from the date of the writ to the date of judgment and thereafter at the current bank lending rate until full and final payment. Costs to the defendant, to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 5th day of February, 2016.



J.Z. MULONGOTI
HIGH COURT JUDGE