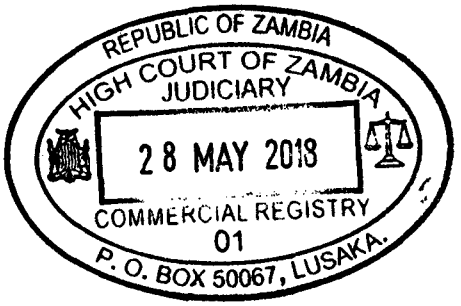
IN THE HIGH COURT FOR ZAMBIA **2015/HPC/0526**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

MARGARET PHIRI **1ST PLAINTIFF**
FRANCIS PHIRI **2ND PLAINTIFF**

AND

HOSSAIN ENTERPRISES LIMITED **1ST DEFENDANT**
HARVEY ACKSON KALALA **2ND DEFENDANT**

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

For the Plaintiffs : *Ms. Melody N. Mayaka – Messrs Mulenga Mundashi Kasonde Legal Practitioners*

For the Defendant : *No Appearance – Legal Aid Board, Kabwe*

JUDGMENT

CASES REFERRED TO:

1. **Addis V Gramophone (1909) AC 488.**
2. **Kitwe City Council V William Nguni SCZ Judgment No. 12 of 2005.**

LEGISLATION REFERRED TO:

1. ***The High Court Act, Chapter 27 of the Laws of Zambia.***
2. ***The Judgments Act, Chapter 81 of the Laws of Zambia.***

By a Writ of Summons filed on 27th November, 2015, the Plaintiff is claiming the following from the Defendants:

1. *The sum of ZMW 345,652.20 as investment costs on account of failed consideration on the part of the Defendants;*
2. *A declaration that the 2nd Defendant accounts for the use of the total sum of ZMW210,000.00 which he collected from the Main Contractor on 11th and 19th August, 2015 respectively.*
3. *Damages for breach of Agreement.*
4. *Interest;*
5. *Costs and any other relief the Court may deem fit.*

According to the Statement of Claim, on 8th April, 2015 the 1st Defendant was subcontracted by a Company called KEC International Limited (the Main Contractor) for the provision of excavation and foundation works (the Project) on the initial 20 locations of 8/64 to 8/83 on Lot 2 from Mumbwa to Itezhi-tezhi.

It is also stated that the Main Contractor had been granted a contract of putting up a 220KV ITT Single Circuit Power Transmission Line at Lot 2 by the Zambian Electricity Supply Corporation on 9th October, 2014.

Thereafter, on 10th June, 2015 the 2nd Defendant being an agent of the 1st Defendant, approached the Plaintiffs for project finance and the parties accordingly entered into a Memorandum of Understanding (the MoU or the Agreement) where they agreed that the Plaintiffs were to fund the full material acquisitions, wage bills and logistics of the Project.

The Plaintiffs also stated that it was a term of the Agreement that they would sponsor the costs of the Project to the value of ZMW130,000.00 in consideration of profit sharing with the 1st Defendant Company.

According to the Plaintiffs on 10th, 17th and 22nd June, 2015 and pursuant to the said Agreement they paid the sums of ZMW60,000, ZMW26,600 and ZMW23,750 respectively to the 2nd Defendant on behalf of the 1st Defendant as part of the costs for the Project.

Moreover, that between the period 10th June, 2015 and 17th August, 2015 and at the request of the 2nd Defendant, they made further payments to different individuals and for other services incidental to the Project, thereby bringing the total sum of costs to ZMW345,652.20.

That it is a term of the Agreement that upon invoicing for payment from the Main Contractor, the parties were to share all profits that would be realised from the Project in the ratio of 51% to the 1st Defendant and 49% to the Plaintiffs.

It is also stated that it was agreed for both parties to manage the risks of the Project for their joint benefit and that a bank account was to be opened with Indo Zambia Bank Branch in Kafue with all the parties as signatories, and in which account all payments realised from the Main Contractor would be deposited.

That on 8th August, 2015 the Defendants invoiced the Main contractor under invoice No. 163 for 10 locations numbered 8/70,8/72,8/73.8/74,8/76,8/77, 8/78, 8/79,8/80 and 8/81 in the sum of ZMW253,119.60.

That the 2nd Defendant purporting to act on the authority of or with the Consent of the Plaintiffs proceeded to authorise the Main Contractor to issue payment of invoice No. 163 and collected cheques in the sums of

ZMW10,000.00 on 11th August, 2015 and ZMW200,000 on 19th August, 2015 respectively.

That as a result of the 2nd Defendant's actions aforesaid on 15th September, 2015 the Plaintiffs decided to pull out of the Project after a total of 13 locations had been completed inclusive of the 10 locations in respect of which the 2nd Defendant had collected Payment from the Main Contractor.

The Plaintiffs lastly stated that on 28th September, 2015 they made a demand that the Defendants pay them back the total sum of K345,652.20 on account of failure of consideration but the Defendants had failed to refund them their investment costs or account for the use of the sum of ZMW210,000.00 which they collected from the main Contractor.

The Defendants filed a Defence and Counter-claim on 28th December, 2015 in which it is stated that there was never a request made to the effect that the Plaintiffs should make several payments to different individuals and for other services incidental to the Project in the total sum of ZMW345,652.20.

According to the Defendants, the Plaintiffs had already pulled out of the Project by 17th August, 2015 and a different financial institution had come on board. The Defendants admitted to the fact of sharing the profits in the percentages mentioned as well as the opening of the Bank account.

It is also stated that the ZMW 210,000 they collected was for the excavators and castings including the access roads already done before the Plaintiffs were sub contracted thus they were not entitled to these amounts of money and there was no need to inform them or deposit the cheque into the mentioned joint account.

Moreover, that the same amount of money was also used to pay for the materials and salaries for works done well before the Plaintiffs were engaged and sub- contracted. That the 10 locations were actually done except for castings on 7 excavations before the Plaintiffs.

It is also stated that the Plaintiffs pulled out way before and the works had already been completed by 5th September, 2015. Further, the Plaintiffs had also left before the 13th location and only participated in few locations whose entitlements were yet to be paid by the project pioneers.

That it is true that a letter of demand was written but the Defendants did not owe the Plaintiff the sum of ZMW345, 652.20 and it is the Plaintiff's lack of understanding on the terms which led to their pulling out which substantially affected the smooth operations of the Project and also the ultimate delays by the Project pioneers to release the money to be paid to the Plaintiffs. The Defendants had thus not failed to refund the ZMW60,000, ZMW26,600 and ZMW23,750,000 mentioned in paragraph 9 of the Statement of Claim.

Accordingly, that the Plaintiffs were not entitled to any of the reliefs in the Statement of Claim save for those specifically admitted.

In their Counterclaim, the Defendants stated that on a date in June, 2015, the Plaintiffs and the Defendants entered into a Contract for the Plaintiffs to finance the Project in the sum of ZMK130,000.00.

It is also stated that the Plaintiffs withdrew and moved out of the Project site without the knowledge of the Defendants, an act which led to several losses in the Project and prompted the Defendants to write to the Plaintiffs on 23rd June, 2015 and even follow them to Kafue.

That on discovery, a lot of money had been misappropriated in the absence of the Defendants by the Plaintiffs which was now to be outsourced from other financers.

Further that the project which started on 8th April, 2015 was to the value of ZMW264,480.00 and the works done before the Plaintiffs were engaged

included 9 excavators, 2 locations, casting foundations and 6.440km access roads.

That it was also agreed that the Plaintiffs would finance 20 locations but they withdrew on the 8th one which was in total breach of the agreement giving rise to a need to source for another financer of the project.

That the remaining 13 locations were completed by the Defendants with borrowed materials from various suppliers which were paid through bank transfers and cash given to individual suppliers without any financial assistance from the Plaintiffs.

That the Plaintiffs in fact knew of the accrued debts before they withdrew. The debts were for Machines to Sadhat Mutaawe in the sum of ZMK65,000.00, hired Prado ZMK 45,000.00 for Mr Ndalameta and ZMW 68,000.00 to Mr Raphael, Salaries at ZMK66,000.00 and the Mumbwa Indian Shop of ZMK13,000.00.

It is lastly stated that as a result of the breach by the Plaintiffs in withdrawing from the site before completion the Defendants suffered damages and incurred more debts with delayed payments on the Project.

The Plaintiffs filed a Reply to Defence and Counterclaim. In the Reply, the Plaintiffs joined issue with the Defendant's Defence.

In the Defence to the Counterclaim the Plaintiffs stated that all the money being claimed was paid by the Plaintiffs at the request of the 2nd Defendant and that by 17th August, 2015 the Plaintiffs had not pulled out of the Project but only left the Project on 5th September, 2015 upon completion of the 13th locations.

Moreover, that the sum of ZMW210,000.00 was for all the work done on the 10 locations numbered 8/70, 8/72,8/73,8/74,8/76,8/77,8/78,8/79, 8/80 and 8/81 under invoice number 163 which work was completed after the Plaintiffs

were subcontracted by the Defendants, therefore they were entitled to the said money as claimed.

Further, the Plaintiffs state that they were entitled to the said money as claimed and that there was need for the 2nd Defendant to inform them of the money and/ or subsequently to deposit it into the joint bank account opened by all the parties with Indo Zambia Branch in Kafue town.

It is also stated that the sum of 210,000.00 was not for the payment of materials and salaries for work done before the Plaintiffs were engaged and sub contracted as alleged by the Defendants but rather for all the works done on the 10 locations and invoiced for by the 2nd Defendant during which time the Plaintiffs had already financed the project.

That the Plaintiffs pulled out of the Project on 5th September, 2015 when all 13 locations were completed and therefore, they were entitled to payment for all the 13 locations and not a few as alleged by the Defendants.

That the Defendants owed them the sum of ZMW345,652.20 and that it was the Defendants breach of agreement that led them to pulling out of the Project.

Further that it was never a term of contract whether written or oral that the Plaintiffs were to monitor the Project site and take care of all issues incidental to the Project and ensure the completion of the Project.

That they only moved out of the Project site when all 13 locations were completed and the losses being alleged to have been suffered by the Defendants as a result of the said breach were in their peculiar knowledge. That the 2nd Defendant only travelled to Kafue on 22nd June, 2015 to collect the sum of K23,750.00.

It is also stated that the Plaintiffs did not misappropriate any money and that the sourcing of funds from other financers by the Defendants was within their peculiar knowledge.

That the Defendants started works in February, 2015 and the Plaintiffs were not exposed to the contract of 8th April, 2015 from KEC International whose value amount was ZMW264,480. That the Plaintiffs were only availed the Letter of Intent from KEC by the Defendants in which the Contract value was not indicated. The works already done by Defendants mentioned were within their peculiar knowledge.

That even though the Plaintiffs had agreed to finance 20 locations, they only managed to finance 13 as 7 locations were withdrawn from the Defendants by the main contractor KEC International and given to another contractor. Thus the reason why the Plaintiffs only financed 13 out of the 20 locations is that before the Defendant approached the Plaintiffs for financing, the former were not capable of financing all 20 locations and 7 were withdrawn from them by the main contractor and they subsequently approached the latter for financing of the 13 locations.

Further that the Plaintiffs were never made aware of the any debts of the Defendants to the individuals listed as alleged in the Counter-claim.

That the Plaintiffs did not breach the agreement as alleged and only pulled out of the Project upon completion of the 13 locations on 5th September, 2015 and were not aware of the alleged debts of the Defendant and therefore, the Defendants were not entitled to all the reliefs being prayed for.

When this matter came up for trial on 29th June, 2017 only the Plaintiffs were before Court. The Defendants despite knowing about the Trial date did not sufficiently excuse their absence and this Court proceeded based on **Order 35 of the Rules of the High Court, Cap 27 of the laws of Zambia**.

The Plaintiff filed three Amended Witness Statements. The first one came from Margaret Phiri the 1st Plaintiff **(PW1)** herein and was filed into Court on 21st June, 2017.

I have read the 1st Plaintiff's Witness Statement which is mostly a repetition of the Plaintiffs' Statement of Claim.

It was also **PW1's** evidence that between the period 10th June, 2015 and 17th August, 2015 and at the request of the 2nd Defendant they made additional payments to different individuals who included the 2nd Defendant who received the highest amounts which included his accommodation, meals and money for fuel whenever he went to collect money from her in Kafue and for other services incidental to the project, thereby bringing the total sum of costs to ZMW345,652.20.

Moreover, that whenever the 2nd Defendant collected additional money from her she made him sign in a book apart from the 3 payments of ZMW60,000.00, ZMW26,600.00 and ZMW23,750.00 which he had earlier acknowledged receipt of.

PW1 also stated that the Project was a viable one save for the dishonest conduct of the 2nd Defendant as a Director in the 1st Defendant company as he collected most of the money from **PW1** almost weekly in the month of June, 2015.

Moreover, that when the 2nd Plaintiff her husband realised that the 2nd Defendant was never at the site and no works were being done they agreed that her husband and Mr Charles Mutakela the engineer who had prior to the Project introduced the 2nd Defendant to her husband decided to go on site and supervised the works until completion.

That her husband would go there for a week or a few days after supervising the works at the site while Mr Mutakela stayed supervising the works and workers at the project site from the first week of July, 2015 to the first week of September, 2015. When the 13 locations were finished he handed them over to the 2nd Plaintiff KEC the Main Contractor. That contrary to the Defendants

Defence and Counter-claim there was no work that was abandoned by the Plaintiffs because the other 7 locations had already been given to a different company before they began to fund the Defendants.

It was also her testimony that the 2nd Defendant did not tell the Plaintiffs that the 7 locations had been allocated to other contractors and he had not shown her the true amounts indicated on the Contract with KEC.

She further stated that for the 2 months plus that her husband and Mr Mutakela were at the site, the 2nd Defendant was nowhere to be seen and even the main contractor could testify that they were there and did the work without him.

The 2nd Defendant only appeared at the time of invoicing and received the payments after which he disappeared and refused to speak to the Plaintiffs or pick their calls. Moreover, that he even sent her a text informing her not to call him anymore and that he was going to bring the money which did not happen and it had now been almost a year.

That on 8th August, 2015 the Defendants invoiced the Main Contractor under invoice number 163 for 10 locations numbered 8/70,8/72, 8/73, 8/74, 8/76,8/77,8/78,8/79,8/80 and 8/81 in the sum of ZMW253,119.60. she also added that the 2nd Defendant purporting to act on her husband's authority authorised the main contractor to issue payment of invoice number 163 and collected cheques of ZMW10,000.00 on 11th August, 2015 and ZMW200,000.00 on 19th August, 2015 respectively.

That subsequently the Plaintiffs made several demands on the 2nd Defendant to deposit the amounts of ZMW210,000.00 into the joint bank account. However, he failed to do so or account for its use.

She went on to add that they left the site on 5th September, 2015 after finishing the 13 locations which included the 10 locations for which the 2nd Defendant had collected payment from the main contractor.

She lastly stated that the total sum of ZMW345,652.20 was paid to the Plaintiffs as investment costs into the Project and that the Defendant had failed to pay this money despite their demands.

The second Witness Statement came from Francis Phiri the 2nd Plaintiff **(PW2)** and it was filed into Court on 21st June, 2017.

His evidence was similar to that of **PW1** and he added that it was a term of the Agreement that upon invoicing for payment from the Main Contractor the Plaintiffs and Defendants were to share all profits that would be realised from the Project in the ratio of 51% to the 1st Defendant and 49% to the Plaintiffs.

That it was also agreed that both parties would manage the risks of the project for their joint benefit and that a Bank Account was to be opened with Indo Zambia Bank Brach with all the parties as signatories and in which account all payments realised from the main contractor would be deposited.

After the 2nd Defendants received some payments from the Main Contractor, the Plaintiff made several demands on the 2nd Defendant to deposit the amount of ZMW210,000.00 into the Joint Bank account but he refused to do so.

That this left him and **PW1** with no choice but to demobilize the project workers and equipment after completion on 5th September, 2015 as assigned by the main Contractor. **PW2** further stated that the completion of the work was certified by the engineers from the Main Contractor who authorised their engineer PW3 to demobilise the workers and the equipment and so there was no need of their continued presence at the site since they would incur extra expenses when and all this while the Defendant was not available.

PW3 was **Charles Mutakela** an Electrical and Mechanical Engineer. He told the Court in his Witness Statement that he came to know the 2nd Defendant in

February, 2015 through a Mr Hastings Mufwaya an agent of Mr Mujuda's firm whose role was to source businesses for the latter.

PW3 further stated that he knew Mr Mufwaya through his frequent visits to the office and later on they came to know each other at a basic level and through their interactions Mr Mujuda asked him to assist in sourcing for tipper trucks following an order from Kalumbila Mines of First Quantum Mines for Mr Mufwaya and the 1st Defendant where the 2nd Defendant was the Director.

That he finally managed to source them from Mr Edward Mwamulima who introduced him to Mr Anthony Bwalya who owned a fleet of buses and tipper trucks.

Although this transaction did not work out despite the buses being inspected the two parties began having discussions on the Mumbwa project and he only later learnt that some advance payments were even made for some of the requirements for the site.

In addition that he did not involve himself in the Project but remained in touch with them on the progress reports of the tipper trucks and buses and he was only approached to assist them to find the machinery they would use, resources and partner with them as they would be working on a World Bank funded project that required the erection of pylons from Mumbwa to itezhi-tezhi.

That in late May, 2015 he and his colleague Mr Chileshe Malama (a mechanical engineer) decided to travel to Mumbwa to see the location sites and met the workers and the 2nd Defendant and visited some of the sites they had excavated and the one they had cast with borrowed materials.

That his report on the project was that it was very viable and required extended hours to catch up on lost time from February to April, 2015. That his meeting and interaction with the workers was proof enough that they were engaged in a contract although the report they received was that for them to access

mobilization funds, they needed to complete one or two more locations to prove their capability and this did not require much of a budget as excavations were already done for the 2 locations.

In addition that what was only remaining for the 2 locations were cement, reinforcement bars, stones, sand and fuel for the concrete mixer on site and the 1st Defendant as a Company was behind schedule as they began works in February, 2015 in another name (North Western contractors) and later changed it to Hossain Enterprises and signed a Contract with KEC in April, 2015.

It was also his testimony that the project required a budget of K210,000.00 so he asked colleagues doing similar work for their equipment or if possible to partner with the 1st Defendant but they wanted collateral which became a challenge as the Defendants were only willing to give collateral to one prospective partner who wanted to supply all that they wanted for any locations or sites ahead.

That to this prospective partner of Asian origin they were willing to declare a Prado Motor Vehicle so that they would collect materials and tools as they had no basic tools to use in their works. However, this transaction could not succeed due to high quotations and little did he know that the Prado and all the other cars they were using to go to Kalumbila were all hired.

That he had approached 5 prospective partners for the project and one even wanted the Main Contractor to replace the Defendants while others wanted to see the signed contract to commit their resources and machinery, or a white book for the vehicle to use as collateral. However no prospective partner was found and the Main Contractor even cautioned the Defendants that if nothing was seen happening at the locations then their contract would be terminated.

That coincidentally, in the 2nd week of June, 2015 he met the 2nd Plaintiff in Kafue estates after a long time and as they were catching up he mentioned the

project which was funded by the Word Bank and that for the 1st Defendant to secure the Contract they were required to find a K10,000.00 or partner with anyone who could work with them and share profits and the 2nd Plaintiff noted that the amount was affordable and agreed to meet the Defendants.

The 2nd Defendant then travelled to Kafue in the company of Mr Munene who PW3 had already met the time he visited the locations in 2015 and during their first meeting he, the Plaintiffs, the 2nd Defendant and Mr Munene were present. That the 2nd Defendant made a good presentation to them and explained that the Contract was for more than 20 locations and these would be handed out by the main contractor depending on the capability of a Contractor. In addition, that it was not only excavations and casting foundations for the pylon towers that was required but also creating access roads and levelling of anthills with heavy machinery along the entire stretch.

That the 2nd Defendant went on to highlight the plight of the workers who had no salaries and food at their camp site and that some had begun with them under the name of North- western Contractors from February, 2015.

The Plaintiffs agreed to partner with the Defendants and since they had no collateral, it was agreed that they open a joint account with Indo Zambia bank Kafue Branch where the Plaintiffs and the 2nd Defendant would be signatories.

That it was also agreed that instead of the 2nd Defendant only asking for K10,000.00 since there were workers that had not been paid in the last 2 months it was agreed that they would be incorporated in the financing and the 2nd Defendant was asked to come up with a budget for all the requirements to accomplish the work on the 20 locations and it amounted to K130,000.00 and would be used to acquire cement; reinforcement bars/ wires, stones, sand, salaries, TLBs, mixer, poker and driver unit, camp food and transport/ fuel.

Moreover, that the 2nd Defendant even received the first payment of K60,000.00 on the day of the meeting from the Plaintiffs and a Memorandum of

Understanding was signed where it was agreed that the two partners were to share profits in the ratio 51% to the 1st Defendant and 49% to the Plaintiffs after recovery of expenses and **PW3** and Mr Munene were witnesses to this on 10th June, 2015.

That in the meeting the actual contract for the work was not presented but the parties were informed by the 2nd Defendant that the main contract was only to be signed after completing one or two locations as proof of capacity to undertake the rest of the works when the two parties were the signatories to the contract they had signed in April, 2015. That what was presented in the meeting was a letter of intent (LOI) indicating the 20 locations and it was dated 2nd May with no amount of the contract. He also stated that if the Contract sum had been known they would have regulated the expenditure and fortunately with his initial visit he was able to come up with expectant amounts by the rates that were availed with enough returns on investments and that the locations were of various sizes.

It was also his evidence that the ZMW60,000.00 which the 2nd Defendant obtained on 10th June, 2015 included wages for workers and the balance went to other requirements to finish up at least two locations and on 15th June, 2015 he took the 2nd Plaintiff to Mumbwa for the first time so he could see the works and that they had received reports of workers unrest even after they were paid as some opted to stop the work completely.

So they carried May salaries in order to harmonise the situation so that from July, 2015 onwards all salary payments would be from the proceeds of the project after invoicing the Main Contractor for the work. On 15th June, 2015 they went to the site in Chipa where the locations for the 1st Defendant were situated in the company of the 2nd Defendant and they found the workers busy as they had just finished working on one location and were shifting materials and equipment to the next one.

That the first location they cast from the time they signed the contract with the Main Contractor in May, 2015 was only completed late in May, 2015 from borrowed materials in order to give the Main Contractor the impression that they had the capacity to continue with the works and when the Plaintiffs came on board these had to be returned.

At the end of the tour the 2nd Defendant addressed the workers and introduced the 2nd Plaintiff who also addressed them and on 17th June, 2015 the 2nd Defendant gave them an update from the time of the first payment on 10th June, 2015 and he explained that some workers had taken him to court due to salary arrears but that most were not his responsibility but that of the earlier company but the workers assumed they were one and the same.

That on this day the 2nd Defendant was given a K26,600.00 to clear the May arrears and other requirements for continuing with the works plus the court fees he was charged and on 22nd June they had a follow up meeting where the 2nd Defendant in the Company of Mr Munene gave them a good verbal report of an opportunity to secure 200 more locations as soon as they were through with the 20. He proposed that more funding be used to purchase additional materials so that these could be placed upfront in order for the main contractor to see their seriousness towards the work but even at this stage the Contract was not shown to them by the 2nd Defendant.

PW3 further stated that he was concerned with the progress reports and on 1st July, 2015 he went to Mumbwa to physically participate in the works in order to ensure accountability and proper monitoring and he also carried K15,000.00 for the 2nd Defendant in order for him to share with his wife and Mr Mufwaya a Director.

Surprisingly the 2nd Defendant and his supervisory team they had found at the site in Chipa had stopped reporting for work so he to take charge of the

administrative and supervisory responsibilities until the project was completed. The main Contractor was even surprised to find that serious work had been done in the bush because according to them the contract had been as good as terminated and they had already grabbed 7 locations from the 1st Defendant and allocated them to other contractors.

He also stated that the construction manager approached him and he explained how he had come to know the 1st Defendant and that he was concerned with the investment that had already been pumped in and how they would collect their payments since the Contract was between the main contractor and the 1st Defendant.

The Construction Manager appreciated their works and told him to ask the 2nd Defendant to write an official letter advising that he was the Site Engineer for the 1st Defendant and this was done on 23rd July, 2015.

Thereafter he left for Kafue briefly and when he returned on 13th July, 2015 he carried a K9,400 meant for the 2nd Defendant so that he could organize a compressor and jack hammer as the last three locations needed these and he was also told to procure stones from the balance of the money for foundation castings and he left the same evening.

PW3 only saw the 2nd Defendant on 8th August, 2015 when it was time to prepare the first invoice came and he had to make new allocations to procure what he should have bought from the K9400 he collected on 13th July, 2015.

Further that such attitudes began to affect the smooth funding of the project and the Construction Manager even approached them and told them that if they had any problem in finances they could invoice the Main Contractor for the locations they had completed and not as had been put to them by the 2nd Defendant on completion of one or two locations as they had done more than 2 at that time.

Thereafter, a meeting was held with the workers on what to invoice and they agreed to separate the rocky locations so that these could be invoiced last and after computation of all materials was made it amounted to over K22,000.00 excluding stones, sand, food and fuel. That a credit facility was obtained from a shop in Mumbwa with an assurance that payment was to come after invoicing the completed locations and materials were collected on 31st July, 2015 and some of these were used to compete location 8/80 which was amongst the first 10 invoiced locations.

The witness went on to state that on the First invoice of the first 10 locations, the 2nd defendant had to travel all the way to Mumbwa with Mr Mufwaya to do this when it could have been done through the 2nd Plaintiff using the agreement that the 2 parties had entered into and the letter introducing the 2nd Plaintiff as the Project Financer.

Moreover that the first invoiced amount was K253,311.60 with a 10% retention amount for six months. According to the agreement of the parties, the cheque amount was supposed to be deposited into the Indo Zambia Bank joint account, but the finance department under the main Contractor did not issue the payment in the name of the Joint account and the 2nd Defendant used other means to convince them to get the payment which he took to the Copperbelt where transactions were done in another account.

PW3 went on to state that this project was viable and the official contract value was about ZMW255,000.00 but what may have been realised from the 13 locations was K380,000.00 and if the 7 locations that had been withdrawn were included close to K500,000 or more would have been realized.

That the budget for each location was K10,000 inclusive of the hire of machinery like the TLBs for excavations and a concrete mixer which meant that there was a misapplication of the resources.

In summation, the meeting in Mumbwa was an opportunity where top management from the Main Contractor and the 1st Defendant were present and they almost lost the last rocky three locations to another contractor. That when the meeting was being discussed he and the 2nd Plaintiff arrived late when it was about to be concluded and the 2nd Defendant despite being present did not know the situation on the ground regarding how much they had done with all the materials secured for all the locations with them. That he did not even dispute the grabbing of the 7 locations by the Main Contractor.

It was also his testimony that what they lacked was the compressor which the 2nd Defendant should have brought with the amount he was given on 13th July, 2015 but did not do so or return the money. Fortunately, after the meeting the Main Contractor agreed to lease them the Compressor and Jack hammers so that they could complete the last 3 locations.

Lastly PW3 stated that he felt indebted to the Plaintiffs for introducing them to the 2nd Defendant and since they provided financing at short notice but had not received any return on their investment.

Counsel for the Plaintiff filed written submissions into Court on 18th July, 2017. She contended that the material issues for consideration before this Court were whether there was breach of contract and whether the Plaintiffs were entitled to Restitution for Unjust Enrichment.

On the issue of whether there was a breach of contract it was submitted that the Defendants herein breached a number of fundamental terms of the agreement which could only be atoned by an award of damages. That it was an established principal of the law of contract that where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably considered to have arisen naturally and according to the

usual course of things from such breach of contract itself or as such as may reasonably be supposed to have been in the contemplation of both parties at the time when they made the contract as the probable result of any breach.

According to counsel, in order for a breach to be considered a contractual breach it must be a fundamental breach of contract and there were two elements used to establish this namely, either the importance that the parties attached to the term that had been broken or the seriousness of the consequences that had in fact resulted from the breach.

Moreover that in analysing the above two points it was a term of the agreement that the Plaintiffs had agreed to fund the project in the amount of K130,000.00 and upon invoicing the main contractor the parties were to carry out the work collectively. It was also another term of the agreement that the parties would share profits in the ratio 51% to the 1st Defendant and 49% to the Plaintiffs and that a new account was to be opened where all payments from the main contractor were to be paid.

She also added that the Plaintiff testified that contrary to this the 2nd Defendant purporting to act with the consent of the Plaintiffs proceeded to authorise the main contractor to issue payment of invoice No. 163 and he subsequently collected cheques of K10,000.00 and K200,000.00 on 11th and 19th August, 2015 respectively.

Further that the 2nd Defendant failed to account for the money or deposit the same into the joint bank account as agreed by the parties. Further the Defendants did not participate in carrying out the work with the Plaintiffs or monitor it with them. Therefore, the Plaintiffs were entitled to inter alia the remedy of breach of contract.

That it is trite law that the object of damages is to put the claimant so far as possible into the same situation as if the contract had been performed. If he had not suffered any loss of profits or if he could not prove what his profits

would have been he would have claimed in the alternative the expenditure which had been thrown away or wasted by reason of the breach.

Counsel relied on the case of **ADDIS V GRAMOPHONE (1)** where the Claimant was employed as a Manager by the Defendant and the Defendant in breach of Contract dispensed with his services and replaced him with a new manager. The Claimant brought an action for breach of Contract claiming that the level of damages should reflect the circumstances in which he was dismissed, damaged his reputation and ability to find suitable employment.

It was held that contract law seeks to put the parties in the position they would have been in had the contract been performed. He was therefore limited to claiming wages and loss of commission during the contractually agreed notice period.

It was thus Counsel's submission that this Court has the power to grant the Plaintiff damages for breach of contract in order to put them in the position they would have been in had the Contract been performed.

Alternatively Counsel argued that this Court has the power to order that the Plaintiffs were entitled to the expenditure that had been wasted by reason of the Defendant's breach. In this regard, Counsel drew this Court's attention to the Witness Statement of the 1st Plaintiff where it was stated that the sum of ZMW345,652.20 had been spent on the cost of and incidental to the project.

That as evidence of this expenditure the Plaintiffs relied on the documents appearing at pages 8 to 9 of the Plaintiff's Bundle of Documents filed before this Court on 16th March, 2015.

Moreover, that a perusal of the same documents showed a schedule of all the money received by the 2nd Defendant with regard to the Project and the 1st Plaintiffs Witness Statement confirmed that the Defendants duly acknowledged receipt of these funds and as such the 1st Plaintiff at paragraph 6 of the

Amended Witness Statement drew this Court's attention to pages 13 and 14 of the Plaintiff's Bundle of Documents duly acknowledging these receipts.

Finally, that the 1st Plaintiff in paragraph 3 of her Amended Witness Statement drew this Court's attention to pages 5 to 7 of the Plaintiffs Bundle of Documents as evidence of further acknowledgments by the Defendants of the sum expended to the Defendants for purposes of the project.

Consequently, that the Plaintiffs were indeed entitled to this sum of money they spent on the Project and damages for breach of contract. The same being what the Plaintiffs expended by reason of the Defendant's breach.

On the issue of whether the Plaintiffs were entitled to restitution for unjust enrichment Counsel contended that in the event that this Court was not persuaded by their arguments on breach of contract, she submitted that an award should be made for the Defendants to return the sum of ZMW345, 652.20 which the plaintiffs had invested in the project on account of the failed consideration of the Defendants.

That to allow the Defendants to retain the funds without any consideration would amount to unjust enrichment and in the case of **KITWE CITY COUNCIL V WILLIAM NGUNI (2)** the term unjust enrichment was said to constitute the following:

> **"it is unlawful to award a salary or pension benefits for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment."**

That it is clear from the testimony of **PW1**, **PW2** and **PW3** the Engineer on the project that the Defendants were never present at the site nor did the 2nd Defendant supervise any of the work done on the 13 locations.

That it is trite law that where an individual is unjustly enriched the law imposed an obligation upon the recipient to make restitution subject to

defences such as change of position. She then submitted that the Defendants should make restitution of the investment sum provided by the Plaintiffs as the former did not provide any consideration to the latter.

She also submitted that it was an unjust enrichment that the Defendants had used the Plaintiffs investment sum on the project without the Plaintiffs getting back any return. Furthermore, the 2nd Defendant misappropriated the sum of ZMW 210,000 he collected from the Main contractor and failed to account for it or deposit into the joint bank account that was opened by the parties. In this regard the Plaintiffs sought a declaration that the 2nd Defendant accounts for the use of the total of ZMW210,000 he collected.

She lastly stated that by reason of the matters aforesaid the Plaintiffs had successfully proved their case and were entitled to the reliefs sought as prayed.

The Defendants did not file any Witness Statements, Skeleton Arguments and List of Authorities. I have however taken into consideration their Defence and Counterclaim and the various documents in the Plaintiff's Bundle of Documents such as the Memorandum of Understanding that was made between the parties and the acknowledgements of receipt of payments from the Plaintiffs amongst others.

The Plaintiff's Witness Statements which were produced and admitted into evidence pointed to the following facts:

1. *The Plaintiffs agreed to finance the project that the Defendants had with the Main Contractor to provide excavation and foundation works on 20 locations from Mumbwa to Itezhi- tezhi.*
2. *The Plaintiffs initially agreed to contribute K130,000.00 to the project but ended up contributing K345, 652.20.*

3. *That the parties signed a Memorandum of Understanding where it was agreed that the Sponsor or Financer would fund the full acquisition of the materials, wage bills, logistics for execution in the sum of K130,000.00.*
4. *That upon invoicing for the payment from the Main Contractor, both the Sub Contractor and the sponsor would collectively carry out the works together and monitor jointly.*
5. *It was also agreed that the costs relating to physical executions would be deducted and paid to the originators whereas the profits would be shared in the ratio 51% to the Hossain Enterprises Limited and 49% to the Plaintiffs.*
6. *It was also a term of the agreement that a new bank account be opened with both parties as signatories.*
7. *However, the 2nd Defendant left the project on 16th June, 2015 and only returned at the time of invoicing the main contractor, leaving the Plaintiffs and PW3 to supervise the works until they were completed.*
8. *That the 2nd Defendant received two cheques in the sum of K10,000.00 and K200,000 from the Main Contractor and did not deposit them in the agreed account.*

On 20th April, 2017 this Court ordered that the Defendants comply with the Order for Directions issued by this Court within 21 days' failure to which trial would proceed. The Affidavit of Service filed into Court on 26th April, 2017 showed that on 24th April, 2017 the Defendant's Advocates acknowledged receipt of the letter dated 20th April, 2017 advising that trial would be held on 29th June, 2017. As stated above the Defendants and their Advocates did not attend the trial.

The Court in the circumstances only has the evidence of the Plaintiffs to rely on and I have no hesitation in accepting the Plaintiffs evidence on the claim and Defence to counterclaim. It is unchallenged. It is incredible that the 1st Defendant has chosen not to file any document or tender other evidence in support of its Defence and Counter-claim.

The Plaintiffs have clearly shown that they invested monies into the project of the Defendants with the expectation that once the Defendants received the payment they would receive their investment as well as a share of the profits in the agreed ratios.

However, this did not happen despite the 2nd Defendant having received payment from the Main Contractor as shown in the facts outlined above. The evidence on record has clearly shown that the Defendants breached the agreement that they entered into with the Plaintiffs.

I therefore find that the Plaintiffs have proved their case on a balance of probabilities.

On 30th May, 2017 I entered Judgment on Admission in favour of the Plaintiffs for the amounts of K60,000.00, K26,600.00 and K23,750.00 mentioned at paragraph 9 of the Statement of Claim. Having entered Judgment on Admission for the Sum of K110,350.00 the balance outstanding from the Sum of K345,652.20 claimed by the Plaintiffs as investment costs is K235,302.20.

I accordingly enter judgment in favour of the Plaintiffs against the Defendants for the payment of the Sum of K235,302.20.

As regards the claim for a Declaration that the 2nd Defendant accounts for the use of the total sum of K210,000.00 which he collected from the Main Contractor, it is adjudged that the Defendants must pay to the Plaintiffs the sum of K102,900.00 being 49% of the said sum and therefore the Plaintiffs share of the sum paid by the Main Contractor.

The Judgment sum herein of K338,202.20 is to accrue interest in accordance with **Order 36 Rule 8 of the High Court Rules, Chapter 27 of the Laws of Zambia** from 27th November, 2015 to date of Judgment and thereafter in accordance with the **Judgments Act, Chapter 81 of the Laws of Zambia**.

In respect of the claim for damages for breach of Agreement, I find that the Defendants did breach the Agreement between the parties. I am however, of the view that the award of interest will suffice for the damages.

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

Leave to appeal is granted.

Delivered at Lusaka this 28th day of May, 2018.

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WILLIAM S. MWEEMBA
HIGH COURT JUDGE