

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

2017/HP/2149

**BETWEEN:**

TRANSACTION PAYMENT SOLUTIONS ZAMBIA LIMITED

PLAINTIFF**AND**

BRUNELLI CONSTRUCTION COMPANY ZAMBIA LIMITED

DEFENDANT

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 25th day of
July, 2018**

For the Plaintiff : Mr. L. Phiri, C. Chonta Advocates
For the Defendant : Mr. G.C. Musonda, Dzekedzeke and Company

J U D G M E N T

Cases Referred To:

1. *Zambian Breweries Plc v Lameck Sakala* (2012) ZR 460 (Vol.2)

Legislation Referred To:

1. *Law Reforms (Miscellaneous Provisions) Act, Chapter 74*

Other Works Referred To:

1. G. Monahan on *Essential Contract Law*, 2nd Edition, Cavindesh Publishing (Australia) Pty Limited 2001
2. Chitty on *Contracts*, Volume 1 (General Principles) 26th Edition, Sweet & Maxwell, London (1999) by Beale H G
3. *Law of Contract*, 7th Edition by P. Richards, Pearson Longman, 2006
4. *Treitel on the Law of Contract*, Edwin Peel, 13th Edition, 2011

The Plaintiff commenced this action against the Defendant by way of Writ of Summons and Statement of Claim seeking the following reliefs:

- i. The sum of ZMW305,311.78 due in respect of internet services provided to the Defendant by the Plaintiff at the Defendant's own request.*
- ii. Interest on the said sum.*
- iii. Costs of and incidental to this claim.*
- iv. Any other relief the Court may deem fit.*

The Defendant's response was by way of Memorandum of Appearance and Defence filed on 16th January, 2018. The facts as they are revealed in the pleadings were that sometime in January, 2015, the Defendant asked the Plaintiff to provide it with internet services. The Plaintiff installed, commissioned, tested and delivered the service to the Defendant. The Defendant accepted the Plaintiff's service through a "Service Order" form dated 22nd January, 2015.

On diverse dates but between January, 2015 and September, 2017, the Plaintiff provided internet services to the Defendant, which were not paid for and accumulated to a debt of ZMW305,311.78. The Plaintiff demanded payment from the Defendant but it failed to liquidate the amount. As a result of the Defendant's actions, the Plaintiff suffered loss and inconvenience.

In the defence, the Defendant contended that the Plaintiff never furnished it invoices and statements reconciling its account despite several reminders. It asked the Plaintiff to terminate the service on 24th April, 2017, and was surprised that the Plaintiff ignored its request and continued to unjustifiably bill it until September, 2017.

The matter came up for trial on 20th June, 2018. Both parties were represented and only the Plaintiff called witnesses. The first witness **PW1** was **Thomas Zulu** its Financial Accountant. He is responsible for preparing the Plaintiff Company's monthly and yearly financial statements and invoices, making payments to the Plaintiff's supplier as well as preparing statutory returns. PW1 testified that the Plaintiff issued the Defendant monthly invoices on behalf of CEC Liquid Telecom for internet services because the later did not have a retail licence. It relied on the Plaintiff to bill its clients and it received a commission of 8% for its services.

According to PW1, the contractual relationship between the Plaintiff and Defendant Companies was stated in the "Service Order" contract at page 1 of the Plaintiff's Bundle of Documents.

PW1 concluded his testimony by stating that the Plaintiff provided internet services to the Defendant Company at a monthly rate of K11,397.24 between January, 2015 and July, 2017. The service was not paid for and the Defendant accumulated a bill of K305,311.78.

The witness was not **cross-examined**.

PW2 was **Rehma Kintu** an Assistant Accountant at CEC Liquid Telecom. Her evidence was that CEC Liquid Telecom engaged the Plaintiff Company to sell optic fibre services prior to obtaining a retail licence. On termination of internet services, PW2 stated that when a client desired to terminate the service, the terms of contract obliged a client to put the notice on a letter head and physically deliver the same to the Plaintiff Company. In this case, the Defendant company terminated the internet service via email and that was not proper course. PW2 told the Court that the Defendant was advised of the procedure on termination at page 3 of the Plaintiff's Bundle of documents but did not comply with it.

arrears according to the statement of account at page 9 of the Plaintiff's Bundle of Documents. The invoices issued to the Defendant for August and September, 2017 were reversed in view of the termination. PW2 concluded her testimony by referring to an email at page 4 of the Plaintiff's Bundle of Documents, where her superior Ms. Namuchiya Kalikita informed the Defendant of the balance on its account. The email was acknowledged by the Defendant's employee, Mr. Keagan Mwanza.

The witness was not **cross-examined**.

Learned Counsel filed written submission for which I am indebted. He submitted that according to the Learned Author of Essential Contract Law at page 9, a contract is defined as:

"An agreement giving rise to obligations which are enforced or recognized by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties. A legally binding agreement made between two or more persons by which rights are acquired by one or more to acts or forbearances on the part of the other or other."

Counsel further submitted according to the Learned Author of Essential Contract Law at page 27 that:

"A valid contract is a contract that the law will enforce and creates legal rights and obligations. A contract valid *ab initio* (from the beginning) contains all the three essential elements of formation:

Agreement (offer and acceptance). Intention (to be bound by the agreement). Consideration (for example, the promise to pay for goods or services received.)”

Counsel submitted on the basis of that authority and the evidence on the record, that the Plaintiff and the Defendant created a contractual relationship. Further, the terms and conditions of contract were binding on the parties and enforceable at law. Counsel referred me to the Learned Authors of Chitty on Contracts who state the general rule relating to the performance of a binding contract at paragraph 22-001 as follows:

“The general rule is that a party to a contract must perform exactly what he undertook to do. When an issue arises as to whether performance is sufficient, the Court must construe the contract in order to ascertain the nature of the obligation (which is a question of law); the next question is to see whether the actual performance measures up to that obligation (which is a question of ‘mixed fact and law’ in that the Court decides whether the facts of the actual performance satisfy the standard prescribed by the contractual provisions defining the obligation.”

Counsel went on to submit that the parties in this case, agreed on the terms and conditions of the contract and their performance. The Plaintiff was under obligation to provide internet services while the Defendant was required to pay for the services.

According to Counsel, there was sufficient evidence on record to show that internet services were provided by the Plaintiff to the

Defendant from January 2015 to July 2017. However, the Defendant failed to pay for the internet services. Counsel went further to cite the Learned Author of **Law of Contract**, P. Richards on the effect of non-performance of a binding contract who states at page 113 as follows:

“Where a person fails to perform their side of the contract then subject to the mitigating factors, they will be in breach of contract. A breach of contract will always give rise to a claim in damages, no matter how minor or serious the nature of the breach. Whether an innocent party is entitled to treat the contract as at an end, so that they can treat the contract as discharged, depends on whether the breach is so serious that it goes to the root of the contract, that is there is a breach of a primary obligation.”

Further, at page 319, the Learned Author of **Law of Contract** stated thus on the effect of non-performance of a contract:

“The innocent party has the right to elect to accept the repudiation as discharging the contract with the result that all future obligations under the contract come to an end, as do the obligations of the guilty party. Once the innocent party has decided to accept the repudiatory breach that party is entitled to recover for the loss of the benefit that the performance would have brought. The loss of these benefits accrues at the time of the repudiations.”

Counsel submitted that the Defendant breached its primary obligation in the contract by failing to pay for the internet services provided by the Plaintiff. In consequence, the Plaintiff terminated the internet services in July, 2017. Hence, the Plaintiff was entitled to recover its loss of the benefit under the contract.

I will now proceed to make my determination and state from the onset that I have anxiously considered the pleadings, evidence adduced and the submissions filed herein. The facts of this case are uncontested and can be summarized thus: the Plaintiff executed a contract "Service Order" with the Defendant on 22nd January, 2015 for the provision of internet services. The Plaintiff was engaged by CEC Liquid Telecom to sell its internet services because it did not have a retail licence. The internet service to the Defendant was provided between January 2015 and July 2017 at a monthly rate of K11,397.24. The Defendant did not pay for the internet services between July 2015 and July 2017. It subsequently accumulated arrears of ZMW305,311.78 on its internet account.

The Defendant decided to terminate the contract via email but it was informed by officials from CEC Liquid Telecom that termination could only be done by a formal notice written on a client's letter head and physically delivered to the Plaintiff's offices. Due to the Defendant's non-payment of the internet services, the Plaintiff terminated the facility and brought this dispute to Court to recover the money owed to it.

Arising from the facts, I find that the issue that falls for determination is whether the Plaintiff is entitled to recover the money owed by the Defendant for the internet services?

In determining this issue, the first question I will address my mind to is ***whether there was a valid contract between the Plaintiff and the Defendant?*** In this regard, I am grateful to the Learned Counsel for the Plaintiff who extensively recited the law of contract. I nonetheless find it necessary to restate that a contract is an enforceable agreement and the Learned Author of the **Law of Contract**, Edwin Peel, in the 13th Edition, states the position at page 1, paragraph 1-001 as follows:

“Contract as enforceable agreement:

A contract is an agreement giving rise to obligations, which are enforced or recognized by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties.....”

From that authority, it is clear that a contract gives rise to obligations that are enforceable or recognized by law. Further, that contractual obligations arise from the agreement of the parties concerned. It is trite law that for a contract to binding, there must

be an offer and acceptance, an intention to create legal relations and consideration.

From the facts before me, I find that the parties entered into a contractual relationship when the Plaintiff offered to provide internet services to the Defendant through the "Service Order", which the Defendant accepted. The parties agreed on the terms that would regulate their relationship and by so doing created a legal relationship, which they intended to be bound by. The consideration of the contract was through the monthly payments of ZMW11,397.24 that the Defendant was expected to make. All these factors rendered the contract valid and enforceable at law.

The second issue I must address is ***whether the Defendant breached the contract between the parties?*** From the evidence on record, I find that the Defendant did not pay for the internet services between the months of July 2015 and July 2017 after having accepted to do so in the contract. The Plaintiff produced a statement of account at page 9 of the Bundle of Documents, which confirmed the Defendant's indebtedness. This evidence was not disputed by the Defendant and I am fortified by the content of

paragraph 3 of the Defence, that the Defendant did not deny it owed the Plaintiff money. Rather it complained that it did not receive invoices and statements from the Plaintiff. In my considered view, the Defendant's complaint does not absolve it from liability.

The evidence on record show emails that were exchanged between the parties at pages 3-8 of the Plaintiff's Bundle of Documents and they all point to invoices for internet services provided by the Plaintiff and not paid for by the Defendant. Thus, there is sufficient proof in the emails to further confirm that the Defendant was aware of its contractual obligations upon which it was required to make payments for the internet services provided. By failing to pay for the internet services, I further find that the Defendant breached the contract between the parties and by the time that the breach occurred, the arrears on the Defendant's account accumulated to ZMW305,311.78. The Learned Author Edwin Peel on the Law of Contract states at page 828 paragraph 17-049 that:

"A breach of contract is committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract, or performs defectively or incapacitates himself from performing. A breach of contract may entitle the injured party to claim damages...."

From that authority once a breach of contract occurs, an injured party is entitled to claim damages. I therefore, find that there was a breach of contract between the parties and it occurred when the Defendant failed to pay the Plaintiff for the internet services.

The third question, which arises is ***what are the consequences for the Defendant's breach of contract?*** In his submissions, Learned Counsel for the Plaintiff referred me to the Learned Author on the **Law of Contract** who elucidates the effect of breach of contract and I am in total agreement with exposition of the law. It is sufficient to state that when a breach of contract occurs, a party affected is entitled to damages and in a case of serious breach, a party can terminate a contract.

In this case, the contract between the parties was solely for the provision of internet services and the Plaintiff was expected to benefit from the Defendant's payments. Instead, the Defendant failed to pay for the internet services and accumulated arrears of ZMW305,311.78, which is a substantial amount. I therefore, find that the Plaintiff was entitled to terminate the contract and to

receive payment of ZMW305,311.78, which is outstanding and due to it.

On the claim of interest, Learned Counsel prayed to Court to award interest from the time that the cause of action arose and referred me to section 4 of the Law Reforms (Miscellaneous Provisions) Act, which says:

"In any proceedings tried in any Court of record for recovery of any debt or damages the Court may, if it thinks fit, order that there shall be included in the sum for which Judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of Judgment".

According to that provision, a Court has discretion in determining the date when interest should be awarded. Interest can be granted from the date when the cause of action up to the date of judgment.

In the case of **Zambian Breweries Plc v Lameck Sakala¹**, the Supreme Court held inter alia that;

"...As to the rate of interest, and the effective date, the standard practice on debts, is to award interest on the sum owing, at the average short term bank deposit rate, from the date of issue of the writ of summons to the date of Judgment. This is pursuant to Order 36, Rule 8 of the High Court Rules. Thereafter up to the date of settlement, interest is awarded at the current lending rate, as

determined by the Bank of Zambia. This is pursuant to Section 2 of the Judgments Act, CAP 81..."

After carefully considering the facts of this case, I have decided to adopt the standard practice of awarding interest as stated by the Supreme Court. Accordingly, I award the Plaintiff interest at the average short term deposit rate from the date of issue of Writ to the date of judgment. Thereafter, up to the date of settlement, interest is awarded at the current lending rate as determined by the Bank of Zambia.

For the avoidance of doubt, the Plaintiff succeeds in its claim for ZMW305,311.78, with interest as awarded by the Court. Costs are for the Plaintiff to be taxed in default of agreement.

Dated this 25th day of July, 2018.


M. Mapani-Kawimbe
HIGH COURT JUDGE