

IN THE HIGH COURT FOR ZAMBIA

2014/HK/416

AT THE DISTRICT REGISTRY

HOLDEN AT KITWE

(Civil Jurisdiction)

BETWEEN:

VLAHAKIS MARCELLAS

PLAINTIFF

AND

GILBERT CHISHALA

DEFENDANT

ROBSON TEMBO

DEFENDANT

WESTGATE ENGINEERING LIMITED

DEFENDANT



Before Hon. Mrs. Justice C.B Maka-Phiri

For the Plaintiff: Mr. F Chalenga of Messrs Freddie & Co.

For the Respondents: Mr. G. Kalandanya of Messrs GM Legal Practitioners

J U D G M E N T

All the figures or amounts in this Judgment are in old currency and or unrebased.

The Plaintiff's claim as indorsed on the writ of summons is for the payment of the sum of K124, 625,072 being the amount outstanding and acknowledged by the Defendants.

The Plaintiff's averment in the statement of claim that by a written Partnership Agreement the parties had agreed to purchase scrap

metal from Konkola Copper Mines Plc. (KCM) and the Plaintiff was to finance the purchase, transport costs and statutory levies was admitted by the Defendants in paragraph three of their defence. The Defendant's attempt therefore in cross examination to question the parties to the Partnership Agreement cannot be sustained as the issue was not in dispute and was not in issue in this case. The Parties to the Partnership Agreement were therefore the Plaintiff on the one part and the three Defendants on the other part. Suffice to note that the 4th Defendant was simply used a vehicle through which the parties were to conduct their business with KCM.

The Partnership Agreement shown at page 1 in the Plaintiff's bundle of documents was executed on 11th October, 2011 and the following were the terms:

- 1. The 3rd Defendant was to arrange and make available the scrap materials for sale.*
- 2. The 3rd Defendant was to arrange for Labour to load the trucks.*
- 3. The Plaintiff was to make advance payments to pay KCM for scrap metal.*
- 4. The Plaintiff was to pay for transport costs and any other levies.*
- 5. The 3rd Defendant was to load a minimum of two to three loads a week. The delivery schedule was to be agreed by the parties.*
- 6. The profits were to be shared by the three parties.*

How then did the parties conduct the business? How much money did the Plaintiff inject into the business? How much profits were realized from the business? And how much losses were made? Did the Defendants fail to share the profits with the Plaintiff in

accordance with the Partnership Agreement? The answers to these questions would be derived from the testimonies of the Plaintiff and the 1st Defendant before Court. The parties also filed written submissions on 19th January 2016 and 7th December, 2015 respectively which would be taken into account in resolving the dispute between the parties. Suffice to note that the gist of the submissions by both parties was that profits and losses should be shared equally in a partnership.

The Plaintiff's testimony that he deposited a sum of K49, 600, 000 into the 3rd Defendant's account with KCM on 11th October, 2011 was not in dispute. A deposit slip in the sum of K49, 600, 000 was shown at page 4 in the Plaintiff's bundle of documents. The sum of K46, 600,000 was therefore the initial amount that the Plaintiff injected into the business. Other than this amount the Plaintiff made other payments towards logistics and other expenses related to the business.

The Plaintiff told the Court that three trips were made to Lusaka to sale the scrap metal. DW1, the 1st Defendant did not dispute the fact that three trips and or truck loads of scrap metal were made to Lusaka for sale. At page 7-9 of the Plaintiff's bundle of documents are documents detailing the expenses relating to the three loads. According to the said documents the first load was on 11th October, 2011, the date when the parties executed the agreement and the

same date on which the Plaintiff injected an initial sum of K49, 600, 000 into the business.

According to the Plaintiff one of his workers would accompany the truck to Lusaka. The Plaintiff did not however clearly state why his worker would be on the trip to Lusaka. DW1 on the other hand gave a detailed explanation as to why the Plaintiff's worker would be on the trip to Lusaka. His testimony was that he and the Plaintiff's workers would go with the trucks to Lusaka to sale the scrap metal. After the sale, all the receipts and money from the sale would be given to the Plaintiff after which the parties would reconcile the figures. The Plaintiff would thereafter deduct the money spent on buying the scrap metal from KCM and all logistical expenses on each trip. The remainder was what the parties shared as profit. In case of a loss, the parties would incur the loss jointly. This evidence by the 1st Defendant was not challenged and as such I accept it as the truth of what transpired and how the business was conducted. What this means is that the Plaintiff's interests in the business were secured by the presence of his worker in Lusaka were the scrap metal was sold. The Plaintiff was handed all the money and invoices after the sales and it was from the said documents that he was able to tabulate the figures as shown in his bundles of documents at pages 7-9. I therefore agree with the Defendant's submissions that the Plaintiff cannot claim that the Defendants' failed to share the profits when it was the Plaintiff who was in receipt and actual possession of the money after the sales.

The first load as earlier noted was on 11th October, 2011. The cost of the steel was K23, 174,480 and it was paid from the K49, 600,000 that the Plaintiff had injected in the business and which was sitting in the KCM account. The other logistical expenses on this load were totalling K9,550,000. The cash sales of the scrap metal in Lusaka was K36,155,400. The documentary evidence shows that the Plaintiff deducted the money that was spent on buying the scrap metal and all the expenses from the sales. This makes sense because the Plaintiff was the one with the cash after the sales and he obviously gave his interest in the business a priority. What remained as profit was K3, 430,920 which amount was deposited in the KCM account. I say so because the Plaintiff's testimony was that after the first load, money was taken to the bank but he did not state how much money was taken to the bank. The evidence therefore shows that the Plaintiff recovered the amount of K49, 600, 000 that he deposited in the KCM account after the two loads to Lusaka. According to document at page 8 of the Plaintiff's bundle of document, a loss of K1, 597, 996 was made on the second trip but the Plaintiff recovered it under the third load/trip under expenses.

The 1st Defendant's evidence was that after two loads, the Plaintiff deposited another K50, 000, 000 into the KCM Account. This was on the 8th November, 2011. At this stage, the Plaintiff had recovered the K49, 600,000 that he had initially injected into the business

and all associated expenses. This is the reason why the Plaintiff himself considered the sum of K50, 000,000 as initial capital injection in the business. This is shown at page 7 of the Plaintiff's bundle of document.

Following the deposit of K50, 000,000, a third load of scrap metal was taken to Lusaka. According to the Plaintiff's document at page 7 of the bundle of document, the cost of the scrap metal was K23, 450,560, paid from the K50, 000,000 that was in the KCM account. The other associated expenses on this trip were K9, 637,996. The sales in Lusaka were K39, 480,000 out of which the cost of the scrap metal was deducted leaving a balance of K16, 029,440. The expenses of K9, 637,996 were deducted from the sum of K16, 029,440, leaving the sum of K6, 391,444 as profit on this trip. The Plaintiff therefore recovered the sum of K23, 450,560 from the deposit of K50, 000,000 that he made into the KCM account. What remained in the KCM account was therefore the sum of K26, 549,440 which would have cantered for the fourth load had the parties continued with the business. The 1st Defendant's testimony was that after the third load, KCM cancelled the contract due to safety concerns and that subsequently the sum of K26, 549,440 was still with KCM.

The Plaintiff's testimony was that a reconciliation done after the third trip showed a sum of K108, 075,632 as due to him to which he added the sum of K26, 549,440 that was sitting in the KCM

business under KCM. As submitted by the Defendant's these payments relating to Gomes Transport and Lumwana Logistics and other unexplained advance payments are not part of the Plaintiff's claim as pleaded and as such cannot be entertained. It is my considered view that the Plaintiff's reconciliation of the figures as shown at pages 5 of the Plaintiff's bundle of document included other payments which were outside the Partnership Agreement and which were not pleaded in this matter. I am therefore unable to sustain the said calculations totalling to K134, 625,072.

I further wish to note that though the 1st Defendant admitted in cross examination that he was not forced to sign the document at page 7 of the Plaintiffs bundle of documents and he admitted owing the Plaintiff the sum of K69, 875,632, the onus was on the Plaintiff to show how he arrived at the figures that he was claiming before the Court which claim is clearly defined in the Pleadings. It should further be noted that the acknowledgement of the debt was done at Mindolo Police Station under unclear circumstances considering that the dispute between the parties was a civil matter. I would therefore agree with the Defendant's submission that the Police Officers intimidated and threatened the 1st and 2nd Defendants into signing the said acknowledgements. Such evidence even in criminal cases is inadmissible in evidence and or excluded if admitted.

With the foregoing, I come to the conclusion that the Plaintiff has failed to prove his claim of K124, 625, 072 on the balance of

probabilities. The Plaintiff has failed to prove that the Defendants failed to share the profits if any that were realized from the business. The evidence has however established that the amount of K26, 549, 440 that was lying in the KCM account was not utilised in the business. In view of how the parties conducted the business, the Plaintiff was entitled to recover this principal amount from the business. Since the business was cut short, it is my considered view that this amount cannot be considered as a loss as it was never utilised in the business. The 3rd Defendant ought to have recovered this money from KCM and then give it back to the Plaintiff. On his party, the Plaintiff is entitled to recover this money from the Defendants. In view thereof, I hereby enter Judgment in favour of the Plaintiff in the sum of K26, 549, 440 with interest at Bank of Zambia lending rate from date of writ to date of Judgment and thereafter at short term deposit rate until final payment. The Plaintiff's claim is therefore partly successful. I order that each party will bear own costs.

Leave to appeal granted.

Delivered at Kitwe this 14th day of February 2017.

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C. B. Maka-Phiri (Mrs.)
Judge