

**IN THE SUBORDINATE COURT  
OF THE FIRST CLASS  
FOR THE LUSAKA DISTRICT  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)**

**2017/CRMP/ 300**

***BETWEEN:***

**ABUBARKAR PHIRI**

**PLAINTIFF**

**AND**

**JONATHAN CHAPEMBA**

**DEFENDANT**

**FOR THE PLAINTIFF**

**Mr. Innocent Nyambe of Legal Aid Board**

**FOR THE DEFENDANT**

**From Brean Singoyi of Chifumo Banda  
& Associates.**

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**JUDGMENT**

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Cases Referred to:

1. Buildwell Construction Company Limited V Holmes Ltd (1973)ZR 97
2. Boc Gases .....V Phesto Musonda (2005 ZR 119

Legislature Referred to:

1. Partnership Act 1890
2. Fall V London 2008 WL 37598

The Plaintiff in this matter commenced this action by Defendant writ of Summons seeking the following:

1. An amount of K12, 500 from the Defendant being monies owed to him from an agreement signed after the Dissolution of the partnership.
2. K200 credit advance to the Defendant by the plaintiff.
3. 50% shares of the motor vehicle.
4. 50% shares of all the secret profit that the defendant made.

5. Costs and any other orders the Court may deem fit.

At commencement of this matter, the plaintiff also filed an application for an interim injunction. When the matter came up for hearing, the plaintiff gave evidence as follows:

In March 2016 he entered into an agreement with the defendant involving buying and selling of computers and related equipment. He registered that he had a 50% share and the defendant owned the other 50%. He stated that the Defendant owned the other 50% share and that he was the active partner controlling most aspects of the business. He testified that it was in December 2016 that he and the Defendant got together to bring an end to the partnership business as a result of the defendants failure to account for all partnership resources including capital and profit.

The plaintiff testified that at the time, the partnership was worth K25, 000 and that it would be settled equally between the two parties. The plaintiff testified further that the agreement was reduced to writing in which the Defendant agreed to pay the plaintiff K12, 500 as his share on 31/01/17. The agreement was signed by both parties and their witnesses, for the plaintiff one Mr. Alick Longwe and for the Defendant by his mother. The plaintiff stated that the Defendant had not paid him the K12, 500 up to date.

In cross examination of the plaintiff by him Defendant counsel, he testified that he and the Defendant had never reduced their partnership agreement into nothing. When asked if he had a copy of the agreement he said .....agreement was verbal and he had no copy to present before the Court. When asked if he and the defendant had registered the partnership, he testified that no registration had been done at PACRA since the Partnership was a verbal one.

Still under cross examination, when asked if he had any evidence that the defendant used the proceeds of the business to purchase a motor vehicle. The plaintiff testified that the Defendant's older brother had sent him a text message which the plaintiff out to the court. In the text Message, the Defendants' older brother acknowledges that the defendant owes the plaintiff monies proposes to help the Defendant sale the remaining computers in Order to pay the plaintiff the money owed as per agreement. The plaintiff further read out that the defendant's brother was ..... of a motor vehicle which the defendant bought from his in-laws. The Defendants older brother in his message stated that the Defendant still owed his in-laws a balance of K11,000 and that no document of the value had been passed to the Defendant because of the said balance.

The plaintiff read further that the Defendant had spent a large sum of money in..... to repair the said motor vehicle which monies are believed to have come from the business and that is why there was a loss of Capital.

When asked by the Defendant Counsel whose names the said Vehicle was, the plaintiff testified that he did not know but the vehicle was not in the partnership name as he was unaware of the purchase. He testified that he very much believed that the proceeds from the business were used to purchase the vehicle.

When asked how much he had advanced to the Defendant towards the capital, he testified that he gave the Defendant in total K8,420. When asked if those records were under a partnership account, the plaintiff testified that there was no partnership account but that he deposited he deposited these monies directly into the Defendants bank account.

The plaintiff called one witness. Mr. Alick Longwe who was on oath testified that he had known the plaintiff and the Defendant for some time and knew the



two to be in business together. He said it was in December when he was approached by the plaintiff who explained to him that the Defendant and himself had a dispute and that he wanted their partnership to come to an end. He testified that the plaintiff showed him an agreement and he advised the plaintiff that it was before the agreement was signed in the presence of the Defendant. He says, the plaintiff asked him to accompany him to witness the signing of the agreement and that the two went to the Defendant's shop in city Market.

He testified that when he and the plaintiff arrived at the shop, they found the defendant with his mother, and his brother as he was introduced to him and the Defendants wife. PW1 together that whom they brought up the agreement and asked that they sign it there, the Defendant threatened him saying he would be arrested if he involved himself in signing the agreement. He further testified that it was only until the plaintiff explained to him that he would merely witness the agreement and he went through an agreement that he agreed to sign it. PW1 stated that they all went through the agreement and that the plaintiff signed and the Defendant's mother signed as a witness on behalf of the Defendant.

On cross examination by counsel for the Defendant when PW1 was asked where the agreement was signed it was signed in city market at the Defendant's shop. When asked if the environment was conducive he said yes. When asked if the Defendant signed freely. When asked if he was aware of what the agreement involved and how much was in dispute, PW1 stated that he was aware of what the agreement involved and how much was in dispute, PW1 stated that he was aware of the agreement and the monies in dispute was K12,500=00.

This was the close of the plaintiff's case. The defendant also gave evidence on oath as follows:

In March 2016 I was coming from the passport office and I met the plaintiff. He saw me with a passport in my hands and asked me if I was travelling. I told him I wanted to travel to South Africa.

He asked me what I was travelling for and I told him I was going to order some computers and desktop accessories. He responded that the plaintiff told him that he wanted a laptop from South Africa and that he worked in the Copperbelt and wanted laptops and there was market for laptops. He said that he told the plaintiff that if he wanted laptops he could buy him one provided he sent him the money.

He testified that the plaintiff gave him an amount of K1,700=00 and sometime later the Defendant testified that the plaintiff sent him an amount of K9,000=00 and he travel to South Africa on the 6<sup>th</sup> of April, 2016.

While in South Africa on the Defendant testified that he found the market and instead of buying the 20 computers planned for, he was able to buy 12 computers. He stated further that incurred costs on loading in computers on to the bus and offloading and as seen he ran out of all the money he had including the money advanced to him by the plaintiff. He stated that he borrowed an extra K1, 000=00 from a third party to pay for offloading of the goods from the bus at city market. The Defendant further testified that after a few days the plaintiff went to the Defendant's shop where he explained how the transactions had taken place in in South Africa and that he was unable to buy the laptop or number of Computers he had intended. The Defendant later sold the realized an amount of K10, 000=00 from the sale. The Defendant testified that the plaintiff complained of the profit regardless of the amount invested but the Defendant assured him saying "This is my business I know how to balance things". The Defendant testified that he used the plaintiff's money to buy the Computers. The Defendant testified that in June, 2016 he made another trip to South Africa. This time the Plaintiff gave him K600=00 for a suit which the



Defendant was not able to buy the suit and that he wanted to refund the money. He testified that the plaintiff told him to keep the money together with a K4, 500=00 which he had advanced to him earlier.

The Defendant further testified that he had borrowed a Motor Vehicle from his father in law which had a leakage has cost him a huge amount of money to repair. He testified that he approached that plaintiff to lend some money for the same but the plaintiff said he had no money. Further on his last trip to South Africa. The plaintiff gave the Defendant K1,000 which he sent through e-wallet bringing it to a total of K6,000=00. Computers were bought and sold for the third time.

After sometime the Defendant asked the plaintiff for more money to help him during the funeral of his father which the plaintiff responded saying he had no money. Later the Defendant testified that the plaintiff and himself started having disagreement because he was unable to take him around while he was in Lusaka. He said it is after this that the plaintiff started to request for the money he had given to the plaintiff. He said that the plaintiff and himself valued the computers at K25, 000=00. The plaintiff demanded 10 computers which the Defendant denied and the following day the plaintiff demanded K12,500 which was half of the value of the computers. The Defendant testified that he told the plaintiff that he had no money but I could give him the money in a period of three months. The Defendant testified that the plaintiff refused and they later agreed that the Defendant would pay the Defendant K12,500-00 by December, 2016.

The Defendant further testified that the next day the plaintiff came to his shop with an agreement which the Defendant signed and his mother signed as his witness. In the agreement the Defendant agreed to pay the plaintiff the sum of K12,500=00 and on 31/01/17 and the agreement was witnessed by his mother.

On cross examination by the plaintiff Counsel the Defendant testified, when asked if he had entered into a partnership, he said he did not.

When asked how much he had agreed to pay the plaintiff K12, 500=00. When asked if he agreed to pay the K12, 500 out of a partnership which came to an end the Defendant said yes.

When asked if his relationship with the plaintiff was that of a partnership, the Defendant said No.

When asked if the K12, 500 was for the dissolution of the partnership the Defendant said yes.

When asked if he signed the agreement the Defendant said yes.

In further cross examination by the plaintiff counsel, the Defendant agreed that the .....the plantain agreed money and that in signal in agreement. When asked whether he had made any payment towards the K12,500 the Defendant said No. He also agreed that when he signed the agreement was a witness.

When asked if the agreement was signed in the presence of police office the defendant said No.

When asked further if he signed the agreement he said yes then later said he was pressured into signing the agreement. When asked if a gun was pointed to his head the defendant said no. When asked if the environment was a condusive one he said yes and that it was signed at his shop in the market where it's an open place.



In Re-examination the Defendant then changed his statement when asked if the atmosphere was conducive he said no. He further confirmed that he knew the amount of money he signed for in the agreement.

The Defendant called on witness DW1 Marrian Kazoka aged 39 who testified that she did not know much about the matter but in December, 2016 she heard the Defendant and plaintiff having an argument at city Market where she also operated a shop. She testified that the two came to her stand and explained to her that they disagreed over money. She said she did not pay too much attention to the transaction but she was interested in creating peace between two persons. She testified that she asked the Defendant to pay the plaintiff his money. She said she asked the Defendant when he would do so and he said he would only be able to pay it on 31/1/17. She stated further that since she had heard the Defendant make that statement, the plaintiff asked her to sign as a witness to what the Defendant had said. She signed the agreement. DW1 further testified that the Defendant's brother had approached her and told her that he had offered the computers to the plaintiff refused to get her said computers. He said that the plaintiff had told him that the for which he was being owed was overdue and that he wanted to teach her Defendant a lesson so that he could never do the same to another person.

On cross examination by the plaintiff Counsel DW1 testified that she was aware that the dispute between the two. This was overdue money and not about machines she said yes. When asked if she knew anything about the computers she said all she knew is that the Defendant owed the plaintiff money. When asked how much money was in dispute she said the forms mentioned two different figures. The defendant was saying he owed K6,000 and the plaintiff was saying K12,000.

When asked if she signed as a witness she said yes but stated that she did not go through the document. On further cross examination, she stated that her



purpose for signing the agreement was to verify what the parties had agreed on her present. When questioned further she testified that she was not threatened to sign neither was the defendant.

Under re-examination DW1 confirmed that she did not go through the document she signed but she signed because she heard the parties agree in her presence. She also testified that the environment which the agreement was signed was a conducive one and that no threats were used.

This was the evidence of all the parties as a whole. I have carefully examined all the evidence on record. From the evidence adduced I find the following facts not in dispute.

1. It is not in dispute that the plaintiff advanced money to the defendant. The amount advanced has been a subject of his action but both paths are agreeable that money passed from one party to another.
2. It is not also in dispute that the monies advanced to the Defendant by the plaintiff was for the purchase of computers except the K600 which in this case was advanced for the purchase of a suit.

What I do find in dispute (in this matter) is this:

1. Whether the relationship that existed between the plaintiff and the Defendant can be said to partnership.
2. Whether or not the plaintiff is entitle to the amount of K12,500 embedded in the act inde..... a partnership does not require to be in writing. Simply two people in c.....on a business with a view of a profit. Therefore an agreement made for that purpose establishes a partnership. It is only later that parties would reduce such agreement to writing. The question therefore of whether a partnership exists and ..... of the agreement between two separate issues to determine.

A partnership agreement .....shall be said to exist by verbal agreement of the paths who have agreed to associate in common business for a

profit. The issue within .....will arise for example were a dispute for example were a dispute arises and one needs to ascertain what the terms were.

The question before me is not to ascertain the terms but established is to determine whether a partnership can exist in the affirmative agreement to dissolve the partnership which the parties entered into on 15st December, 2016.

The partnership Act 1890 defines a partnership as relationship which subsist between persons company on a business in common with a view of prompt.

From the facts before me, the parties had no agreement for partnership in writing from which more .....can be assessed. However, Secondly it is also important to ascertain what the intention of the persons was at the time that monies were being advanced to the Defendant by the plaintiff or what mere actions foretold.

In doing so, I borrow the holding of a manager .....in the case of Fall V London in which he stated that the .....of the parties is not regard in creating a partnership of the acts and conduct of the parties on a business as co-owners for a profit.

From the facts before me, the Defendant goes to and from Zambia and South Africa buying computers and related equipment for a period of time using monies advanced to him by plaintiff. Upon each return, the Defendant takes out time to explain to the plaintiff how he bares the goods bought, the ..... and when sold, the Defendant explains to plaintiff profits realized and insures the plaintiff that .....the profits seem low, he knows his way around the business. From this, I would conclude that there is a form of co-ownership which exists between the parties in which parties hold themselves accountable to each other. It does not seem possible for the



Defendant to claim that he is unaware of a partnership relation between himself and the plaintiff yet feel obliged to give explanation on how monies are spent, how equipment is sold and the profits realized. Arising from the above, I am inclined to believe that though there was no partnership agreement in writing there was a verbal partnership agreement between parties which is legally binding on both parties.

Further, the plaintiff in his evidence exhibited an agreement referred to as an agreement to liquidation partnership shares (Dissolution if Partnership) which the partners entered into on 15/12/16. They said agreement categorically status the names of the partners, the percentage of shareholding that the parties held in the business, the total value of the partnership at the date of the agreement. In further makes reference to the amount to be paid out to the plaintiff. I note further that the agreement is signed by both the defendant and the plaintiff together with parties who witnessed on their behalf.

The Defendant in his evidence testified that he was under pressure when he signed the agreement.

However, there was no evidence brought before the court by the Defendant to show that there was undue influence or duress used in making him sign the agreement. Neither did his witness testifying to the effect that the Defendant was in any way forced to sign the agreement as he has not proved this before the court contrary to the well-established legal principle that he who alleges must prove.

I find therefore that the Defendant signed the agreement freely and willingly.

In addition the existence of his agreement which the parties freely signed, only validates that there was indeed a partnership between the plaintiff and the Defendant Kamanga not reduced to writing as one cannot be said to dissolve

that which does not exist, it is shocking that the Defendant would say that he was unaware of the partnership between himself and the plaintiff yet freely sign an agreement to dissolve it and pay the plaintiff half of the value of the assets. It is like one answering to a person for divorce when they are not married to the partner.

I will go further to consider the law .....to documentary evidence safer as is revelation to his case. The ex..... evidence .....is of much guidance in this regard, it states that once parties enter into an agreement it is the exclusive record of the terms of the agreement which cannot be verbal, contractual or added by other evidence outside the agreement.

The Zambian Courts have given effect to this principle in the case of Build well construction company limited V Hotlines limited. The Court in this case disallowed evidence that sought to vary, add or subtract from the terms of a written agreement. I am alive to the fact that there are certain exceptions to this rule that is where the document is void for fraud, illegally and mistake as well as different ..... of parties inter alia. The court further would in the case of Boc gases limited V Phesto Musonda that it was jurisdiction to order .....of a document when it can be shown that it is terms do not match the parties .....

From the facts before me, However, it has been established that the parties freely and willingly entered into the agreement with full understanding that the agreement was for the .....of dissolving the partnership which existed between the two of them and to facilitate for the payment to the plaintiff of the 50% share that he held in the said partnership. As such in evidence rule must be applied. The agreement must be constituted as it is and no evidence to vary add or subtract can be entertained in this regard.



Having found therefore that a valid partnership agreement existed between two parties and having found that the Defendant and plaintiff family signed the agreement to dissolve the partnership and further that the agreement should be constituted as agreed between the parties. I hold the plaintiff is entitled to the K12, 500 as his 50% share arising from the partnership that existed between the parties and the subsequent agreement to dissolve the said partnership. I therefore order the Defendant to pay the plaintiff the sum of K12, 500=00.

Parties shall bear their own costs of this action. Leave to appeal is granted.

DELIVERED THIS 22<sup>ND</sup> DAY OF JUNE, 2017.

Hon. T.H MUSONDA  
Resident Magistrate  
22/06/17.