

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

2017/CRMP/593

BETWEEN:

MWIYA KAKULUBELWA

PLAINTIFF

AND

CHARLES CHOOMBE

DEFENDANT

JUDGMENT

CASES REFERRED TO :

1. KHALID MOHAMED V ATTORNEY GENERAL AND ANOTHER (1982) ZR 49
2. WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT (1982) ZR 172

The plaintiff issued out of this court a default writ of summons claiming against the defendant a sum of K 25,000= being monies the defendant owes him.

In civil cases the standard of proof is on a balance of probabilities and he who asserts the claim must prove it.

In the case of Khalid Mohamed v Attorney General and another (1982) ZR 49 Ngulube DCJ as he was then stated that “..... a plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to judgment”.

In wilson Masauso Zulu v Avondale Housing Project (1982) ZR 172 the supreme court stated that “ a plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent’s case”.

The Plaintiff was PW 1 who testified that in July 2016 there was an advert in Mwandi district where he comes from, to build 3 fish ponds and one for rehabilitation. Since he is a known builder having built a police post there he was given the advertisement papers and the qualification was that one needed to have documents from NCC, ZRA and PACRA. He told them he was not qualified for the job but was told to find someone who had documents with whom he would work with on this job.

PW 1 then informed his friend about this and also that the person would be given commission for the job. The friend told him that he had someone in mind whom PW 1 met as they were going to Mwandi to see the project.

In Mwandi the contractor was introduced and PW 1 paid the bidding fee as the contractor did not have money. The contract was then given to him using Choombe’s construction company and part of the money for this project was paid in the constructor’s account. They came back to Lusaka to buy materials and to agree on amounts to be paid. That is how the defendant changed his mind and said the plaintiff was now his worker then agreed for K 70,000= each with his

friend. The plaintiff was paid K 33,000= from the K 70,000= leaving a balance of K37,000=

In November 2016 the defendant started processing the request for payment and agreed for K20,000= each from the balance of K37,000=. The defendant was paid K100,000= and only paid the plaintiff K5,000= instead of K 20,000= and promised to pay in a weeks time but he never paid. The plaintiff then went to Mwandi and got 10 pockets of cement and informed the defendant, that it would be used if he does not pay him but to no avail.

In December 2016 defendant was paid K140,000= but did not pay the balance of K 32,000= as he claimed to have used money on materials. The plaintiff then asked him to pay K 25,000= as he was forfeiting the K 7,000= to go towards the materials.

The defendant was supposed to pay him this money by 30th May 2017 as per exhibit MK 2. He wants the money paid with interest.

In cross examination he stated that he had forfeited the K 7,000= for the materials that defendant had complained about as he had gotten 10 pockets of cement. He was never paid a K 5,000= or a K2,000= as they used to sign for the monies so defendant has not paid him anything.

PW 2 was Mubita Wakumelo who testified that on 26th May 2017 plaintiff rang him to meet in Matero with a Mr Charles Choombe who was owing him K 25,000= they met and went to Chunga at defendant's home where they discussed and the defendant assured the plaintiff that he would pay him the K25,000= by 30th May 2017 and an agreement was signed to that effect.

Further the defendant told plaintiff that if he fails to pay by that date then plaintiff could sue. He signed on this agreement MK 2 however the monies were not paid to date even though defendant at a next meeting promised to pay once he was paid for the another tender he won in shangombo district.

In cross examination he stated that on 26th May 2017 defendant never told him that plaintiff never used to report for work nor was he aware of this development. He was not aware that plaintiff got some cement before they met but he was told it was resolved. They were the 3 of them when they when they went to his home and he was a witness on MK 2.

There was no re-examination and this was the close of the plaintiff's case.

In his defence the defendant testified that they were given a contract by inyambo development trust and it was signed on 2nd August 2016, which he was going to work with plaintiff and Jackson Miti as supervisors. There was a down payment of K197,100= for mobilization. He then had a meeting with these two supervisors whom he told that they would not be working as general workers. They agreed and signed a contract for K 70,000= each up to the end of the contract which was 3 months. The agreement was that they pay the general workers K 20,000= per month.

The plaintiff kept absounding in the second month and other experts from Lusaka were engaged by C.Choombe Enterprise for the sum of K10,000= . The plaintiff then demanded for his balance of K33,000= but the money had not been paid until completion of the project.

On 4th November 2016 he was paid K100,000= and paid plaintiff K 5,000= instead of K 15,000=. Plaintiff went to Mwandi and got 20 pockets of cement which he diverted that is how defendant went to Mwandi and found there was no cement as plaintiff got it and the police summoned him and the cement was recovered.

On 19th November 2016 he paid plaintiff K5,000= then on 16th December 2016 he paid plaintiff's wife K 2,000 and also plaintiff K2,000= to buy a plot in Mwandi.

On 15th January 2017 the plaintiff was charged for misconduct in the sum of K 8,500= leaving a balance of K14,500 as they incurred a loss.

In cross examination he stated that the tender was advertised and it was won by them. The plaintiff was employed as a supervisor as they came to know each other through his friend. The plaintiff had signed for K5,000= on 19th November 2016 in Mwandi. He was charged in January 2017 and an amount of K8,500= was to be deducted even though he was still working as supervisor. He had paid plaintiffs wife a K2000= and the court will decide on MK 2

In re-examination he stated that he paid plaintiffs wife K2000= and only owes the plaintiff K 14,500= not K 25,000=

DW 2 was Mickton Syakalyamali a supervisor at C.Choombe Construction who testified that he was working in Mwandi from September 2016. He is the one who apprehended the stores man who claimed plaintiff had sent him to steal these pockets of cement. When plaintiff went to Mwandi he confided in him not to reveal to the boss of the incident. The 20 pockets of cement was recovered. He was not aware that the plaintiff was a supervisor as he only saw him work one day. He did not see the plaintiff in Mwandi from January 2017 until the project was finished

In cross examination he stated that it was true about the stores man and would testify.

There was no re-examination and this was the close of the case as wife to plaintiff declined to come and testify over the K2,000= which plaintiff acknowledged.

In this case there is no dispute that it was the plaintiff who had been informed of this advert and asked the defendant to be the bidder on their behalf as they had no documentation for this type of job. There is no dispute that the job was given to defendant's company. There is no dispute that the plaintiff and defendant had agreed on K 70,000= as payment for the project. There is no dispute that plaintiff was paid K33,000= as down payment leaving a balance of K37,000. There is no

dispute that the plaintiff was paid a further K5,000= leaving a balance of K 32,000=. There is no dispute that the project was in mwandi. There is no dispute that defendant signed MK 2 promising to pay a balance of K25,000= to the plaintiff. There is no dispute that the plaintiff forfeited K 7,000= from his K32,000= balance.

The issue to be resolved by this court is whether the plaintiff is owed this money by the defendant.

The defendant claims he owes defendant K14,500= as he deducted K8,500 from the balance of K 25,000= as a charge fee for the misconduct of the plaintiff at site. I disagree, as the defendant in May 2017 acknowledged the sum of K25,000= which he was supposed to pay to the plaintiff. If at all it was K14,500= as at January 2017 why did he acknowledge for this amount. It just shows that he was indebted to the plaintiff in the sum of K25,000= that is why he signed MK 2.

The issue of the cement was resolved and the cement recovered. I note that of the K25,000= he gave plaintiff's wife K2,000= which plaintiff acknowledges.

I therefore order that the defendant is indebted to the plaintiff in the sum of K23,000= which should be paid to plaintiff who went further to forfeit his K 7,000=00

This sum of money will attract interest at current Bank of Zambia lending rate from today until liquidation of the debt

Costs are awarded to the plaintiff in default of agreement to be taxed

IRA within 30 days

DELIVERED IN OPEN COURT THIS DAY OF 2017

IREEN TILISA WISHIMANGA
SENIOR RESIDENT MAGISTRATE

