

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

2016/HP/2230

BETWEEN:



**CITIZENS ECONOMIC EMPOWERMENT
COMMISSION**

PLAINTIFF

AND

MERCY MWAMBAZI AND SUNDAY MWAMBAZI
(Trading as MEMWAZI Enterprises)

DEFENDANT

BEFORE HONORABLE MR. JUSTICE MWILA CHITABO, SC

For the Plaintiff:

*Mr. Musumali of Messrs SML Legal
Practitioners*

For the Defendant:

*Mr. B. Mukatuka of Messrs Robson
Malipenga & Company*

J U D G M E N T

Cases referred to:

- (i) *Khalid Mohamed v. The Attorney General (1982) ZR 49*

Legislation referred to:

- (i) *High Court Rules Chapter 27 of the Laws of Zambia*

The Plaintiffs' claim is for:- (i) a declaration that the defendants were unjustly enriched by retaining payments received on the Plaintiffs' behalf on the amount of ZMW 67, 305.10;

- (ii) *An Order that the sum of ZMW 67, 305 is held by the Defendant on a constructive trust or resulting trust in favour of the Plaintiff;*
- (iii) *An order for the immediate payment of the sum of ZMW 67, 305.70 and any other additional sums of money the defendant may be found to have collected;*
- (iv) *damages for breach of contract;*
- (v) *Interest on the sum to be awarded from the date when the action arose to the date of Judgment, pursuant to Section 4 of the Law (Miscellaneous Provisions) act Chapter 81 of the Laws of Zambia;*
- (vi) *Further or other relief;*
- (vii) *Costs of and incidental to the action.*

The essence of the statement of claim is that by an agreement between the plaintiff and the defendant in 2014, the defendants agreed to perform debt collection services for the plaintiff upon instructions from defendants to be communicated from time to time as provided for under Clause 31 of the agreement.

It was alleged that under Clause 4.6 of the agreement the defendants indemnified and held the plaintiff harmless from any losses, damages or in connection with any negligent act, omission or inaction on the part of the plaintiff (though the paragraph 3.2 of the statement of claim states “defendant”).

That Clause 10.3 required the defendant to render account of all money received from the debtors not later than 7 days at the end of each month.

There was termination clause. Under clause 14.3 the defendants were under an obligation to make immediate and full account of all the funds in their possession received on behalf of the plaintiffs debtors. It was alleged that on or about the 11th April, 2016 it came to the attention of the plaintiff that a sum of ZMW 67, 307.70 was received from various clients broken up as follows from:

- (i) Mphatso Multipurpose Co-operative – ZMW 8, 550
- (ii) George Jonathan Pendwe Enterprises- ZMW 2, 500
- (iii) Women for the aged and Orphan Care Organisation – ZMW31, 455.70
- (iv) Lido Enterprises – ZMW 3, 500
- (v) Twatasha Women’s Club – ZMW 4, 000
- (vi) Whilungu Enterprises – ZMW 300
- (vii) Uweka General Construction – ZMW 17, 000; and the defendant did not remit the same to the plaintiff in breach of the contractual and fiduciary duty.

It was alleged that the defendant subsequently repudiated the agreement which repudiation was accepted by the plaintiff on or about 11th January, 2016 by which the plaintiff terminated the defendant's services and the plaintiff's claims for reliefs sought under the writ of summons.

The Defendant in its defence and counterclaim disputed the claims and instead counterclaimed for a sum of ZMK 110, 396.00 being commission of 10% of sums of ZMK 1, 103, 396 collected on behalf of the plaintiff and claimed for damages, interest and costs.

The plaintiff disputed the counterclaim.

On 26th September, 2017 the parties Advocates appeared and informed the Court that the parties were exploring prospects of excuria settlement of their dispute. The matter was accordingly adjourned to 27th March, 2018 at 09:30 hours and 14:30 hours.

On the return date, the Defendants advocates did not appear and there was no explanation as to their absence and their client. I therefore granted leave to the plaintiff signaling plaintiff to present its case.

PW1 was **Nchimunya Monde** who is a Director of Business Development of the plaintiff. It was his testimony that the claim concerned an agreement for the defendants to undertake debt collection services on behalf of the plaintiff. The salient points of the agreement at page 1 of the plaintiff's bundle of documents were that:

- (1) The defendant was to collect debts on behalf of the plaintiff from a list of clients;
- (2) The Defendants were not allowed to collect actual cash but to deposit funds in the plaintiffs account and produce deposit slips as evidence of deposit and proof of collection.
- (3) Defendant was required to submit reports on monthly basis to claim their commission of 10% of the collected funds.

The defendants did not heed that requirement and instead they were collecting cash from clients and in certain cases they would instruct clients to pay directly into the defendant's account.

Upon conducting a monitoring and valuation exercise, it was discovered that the amounts the defendant had paid was less as to what was actually paid by the clients.

The witness then referred to the following document at page 28 of plaintiff's bundles which revealed the following state of affairs:-

- (i) Jonathan Mwale deposit slip on behalf of workers General Dealers on 13th January, 2015; K10, 000.00
- (ii) Document No. 29 (receipt) from defendant Women for Aged and Orphans deposited in defendants account on 13/1/2015 K20,000.00
- (iii) Document 33 (receipt) Women for Aged and Orphans deposited on 31/1/2015 K11,455.00

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|------|--|-------------|
| (iv) | <u>Document 34</u> from defendant 5/2/2015
in favour of Twatasha Service Club | K 4,000.00 |
| (v) | Receipt in name of Mphaso Co-operative | K 8, 550.00 |
| (vi) | Acknowledgment receipt from defendant
(Signed for by Nelson Mwanza) | K 1, 500.00 |

The total sum of funds collected in this manner amounted to K50,305.70 as prepared by head office.

There were verbal confirmations too

(1) Page 54 Mwilungu Enterprises – K300, 000;

(2) LIDO Enterprises – K3, 500

The plaintiff never received any payments stipulated above. The plaintiff engaged the defendant in resolving the matter. The position taken by the defendant was finally that the commission they were earning was insufficient. In his view, the defendant was trying to justify its appropriation of funds as far as the Plaintiff was being paid agreed contractual commission of 10 per cent on claims made.

Reference was made to page 35 which is letter from defendant to plaintiff claiming commission for K29, 650.00 dated 17th March, 2015 up to 15th March, 2015. This was settled.

Page 37 reflects a collection claim and analysis report dated 24th March, 2015. Page 47 is payment voucher listed in favour of Defendant on 15th June, 2015 for K15, 609.20 in respect of debt

collection charges. These claims were not supported by deposits and were accordingly disallowed.

Page 43 is letter from defendant to plaintiff submitting receipts and they were accordingly paid.

Page 45 is payment voucher by plaintiff to defendant for K15, 100.00 on 5th June, 2015 amounts totaling K30, 000.00. It was the witnesses' evidence that the plaintiff was not aware of any outstanding amounts.

After discovering the defendants' transgressions, the plaintiff terminated the agreement as per letter at page 54 in the plaintiffs' bundles, the reason for termination was on account of violations pursuant to Clause 11.1.2.

The witness dismissed the defendants' counterclaim of over K100,000.00 stating that there was no evidence of recovery in the sum of K1, 103, 396 on behalf of the plaintiff and prayed that the Court upholds the plaintiffs claim with costs and dismisses the defendants counterclaim with costs.

On the outset, I have disclosed my mind to the requirement that the burden of proof lies on he who alleges and the standard of proof in case like this one is on the balance or preponderance of probability.

The debate on the burden of proof was long settled in our jurisdiction in the case of ***Khalid Mohamed v. The Attorney General*** where his Lordship Ngulube, DCJ (as he then was)

succinctly and authoritatively pronounced himself on the subject matter.

On the evidence of PW1 and on the documentary evidence submitted before Court, I make the following findings of facts

- (1) That there was a valid debt collection agreement signed between the plaintiff and the Defendant in 2004.
- (2) Under the agreement the defendant was obligated to collect debts from assigned debtors of the plaintiff at a rate of 10%.
- (3) The payments were to be receipt by cheque mode and not cash and the payments were to be deposited in the plaintiffs account.
- (4) The defendant was to be paid commission after submitting claims supported by deposit slips upon which the plaintiff payment of the due earned commission to the defendant.
- (5) A total sum of K67, 305.70 was directly received by the defendants from the plaintiffs' debtors which payments were ordinarily supposed to be paid directly to the plaintiffs account.

On the impeccable and uncontroverted documentary evidence proving receipts of the total sum of K67, 305.70, I hold and find

that the said sum justly and rightly is owing to the plaintiff by the defendant.

Any proven collection made by the defendant on behalf of the plaintiff was subject to a debt recovery commission of 10 per cent. I will therefore deduct a sum of 10 per cent from the sum of K67,305.70 which leaves a balance of K60, 575.20.

I accordingly

(1)enter Judgment in favour of the plaintiff in the sum of K60, 575.20;

(2)I award interest on the awarded principal sum at a rate of Bank deposit interest rate from the date of the writ on 16th November, 2015 to date of Judgment.

(a)The principal award plus interest earned up to date of Judgment will form the Judgment debt, which will attract commercial banking rate interest but not exceeding the Bank of Zambia Bank rate which is to run until the Judgment debt is liquidated.

Damages for breach of contract

This claim has not been vigorously prosecuted. Indeed no suggestion or demonstration of breach of contract has been made. The pleadings in paragraph 11 of the statement of claim state as follows:-

“By their conduct the defendants’ evinced an intention no longer to be bound by the agreement and they wrongfully repudiated the same and refused to be bound thereby, which repudiation the plaintiff accepted by issue and service of a letter dated 21st January, 2016 by which the plaintiff terminated the defendants services”

The evidence reveals that after the plaintiff had become aware of the non compliance and failure on the part of the defendant to deposit collected fund directly in the plaintiffs account, the plaintiff engaged the defendant in correspondence.

By the averment in paragraph 11 of the statement of claim, the defendant repudiated the agreement which the plaintiff accepted and then purported to terminate the agreement.

In my view the plaintiff having accepted the repudiation, nothing remained to terminate or rescind. The contract had come to an end. All what remained to be done was to determine the rights and obligations outstanding at the time of the repudiation as between the parties.

The plaintiff did not exercise its option to terminate the agreement for breach of contract and claim for damages for breach but instead accepted the repudiation.

This claim is destitute of any merit and it is dismissed.

On the foregoing and in conclusion the plaintiff succeeds on the recovery of the sum of K60, 575.20 with interest as awarded above. The costs are for the plaintiff which costs are to be taxed in default of agreement.

Turning to the counterclaim; the record reveals that the defendant and its Advocates elected to keep away from Court notwithstanding that all the parties advocates were present when the return trial date was set.

It is trite law that a counterclaim is an action on its own. I will therefore strike out the counterclaim for non appearance of the defendant with liberty to restore within 14 days from the date hereof and in default the counterclaim to stand dismissed for want of prosecution. I have invoked the provisions of Order XXXV (2) of the High Court Rules.

Leave to appeal against both the Judgment on the plaintiff's action and order made in respect of the counterclaim granted.

Delivered under my hand and seal this 28th day of May, 2018

A handwritten signature in blue ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the left.

Mwila Chitabo, SC
Judge