

**IN THE HIGH COURT FOR ZAMBIA
AT COMMERCIAL COURT REGISTRY
HOLDEN AT LUSAKA
(COMMERCIAL JURISDICTION)**

2014/HPC/0444

BETWEEN:

ALON HERSHKOVITZ

PLAINTIFF

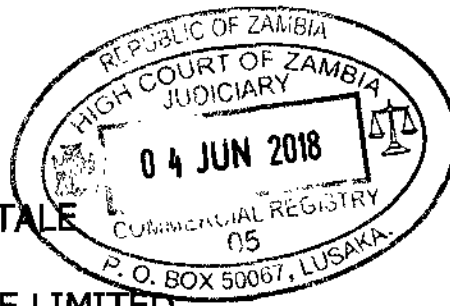
AND

PAMELA BWALYA MUTALE

1ST DEFENDANT

HOME DÉCOR CENTRE LIMITED

2ND DEFENDANT



Before the Hon Madam Justice Mrs. Irene Zeko Mbewe

For the Plaintiff

:

Mr. M. Nzonzo of Messrs ICN Legal Practitioners

For the 1st and 2nd Defendant

:

Ms. Kaoma & Mr. George Chisanga of Messrs KMG Chisanga Advocates

JUDGMENT

Cases Referred to:

1. *Zambia Inside Limited v Electoral Commission of Zambia (2012) ZR 37*
2. *Bourhill v Young [1943] AC 92*
3. *Winn v Bull [1877] 7 CH D 29*
4. *Smith v Hughes [1871] LR 6 QB 597*
5. *Reveille Independence LCC v Anotech International [2016] EWHC 446*
6. *Brian Royle Maggs t/a BM Builders (A firm) v Guy Anthony Stayner Marsh [2006] EWCA Civ 1058*

7. *Rating Valuation Consortium & DW Zyambo & Associates (suing as a firm) v The Lusaka City Council & Zambia National Tender board* (2004) ZR 109
8. *Brogden v Metropolitan Railway Company* (1877) 2 App. CAS 666
9. *Galaunia Farms Limited v National Milling* (2000) ZR 135
10. *JZ Car Hire Limited v Malvin Chala and Scirroco Enterprises Limited* (2002) ZR 112
11. *Wilson M Zulu v Avondale Housing Project* [1982] ZR 172 (SC)
12. *Salomon v Salomon* [1897] AC 22
13. *Associated Chemicals Limited v Hill and Delamin and Ellis & Company* [1988] ZR

Legislation and Other Works Referred To:

1. *Companies Act, Cap 388 of the Laws of Zambia*
2. *Cambridge English Law Dictionary* (online)
3. *Cheshire and Fifoot and Furmstones of Law of Contract. 13th edition, Butterworths 1996*

The Plaintiff by way of Writ of Summons dated 23rd October, 2014 commenced this action against the Defendants claiming the following reliefs:

- i. *Damages for the Defendants' breach of a verbal agreement for the repayment of the Plaintiff's loan capital and for transfer of his shares to the 1st Defendant, such agreement being from the exchange of various correspondence and draft contracts by the parties between August 2010 and September 2011;*
- ii. *Repayment of the Plaintiff's loan capital investment balance of US\$111, 513.00 following the 1st Defendant's sale of the stock and the business of the 2nd Defendant in the sum of K720,000.00;*

- iii. *Payment of the sum of K215,000.00 being the sum due as at 5th October, 2014 under an agreement of 5th October 2012 made between the Plaintiff and the Defendants;*
- iv. *An account of what sums have been received or expended by the 1st Defendant for and on account of the 2nd Defendant from the date of the Plaintiff's capital investment in the Company to the date of the sale of its business and stock;*
- v. *An order for payment by the 1st Defendant to the Plaintiff of the sums found due on the taking of such account in order to fulfil the agreement for the repayment of the Plaintiff's loan capital investment;*
- vi. *Interest on all the sums found due; and*
- vii. *Legal costs.*

The accompanying statement of claim revealed that in December 2008 the Plaintiff and the 1st Defendant incorporated the 2nd Defendant and the Plaintiff injected loan capital into the business of the 2nd Defendant in the sum of US\$176,110.00 between 1st June 2008 and 1st September 2009. Further, the 2nd Defendant was primarily operated by the 1st Defendant who was the Managing Director and had an express or implied duty to account to the Plaintiff on any amounts received or expended by the business. However, the 1st Defendant failed to provide an account of her management of the Company's affairs particularly the income and

expenditure of the Company as well as an account of creditors, debtors and inventory. Consequently, it was then verbally agreed that the Defendants would repay the Plaintiff's capital investment in the business by way of the 1st Defendant buying off the Plaintiff's shares in the initial agreed sum of US\$220,000.00. Following that, draft copies of a written agreement were exchanged but the Defendants failed or neglected to execute the same. On 5th October 2012, the parties executed an agreement for the payment of rebased K5,000.00 by the Defendants being a minimum return on the loan capital investment which was to be paid every month until such a time that the 1st Defendant would buy out the Plaintiff's shares.

The Defendants sold the stock and business of the Company to Mr. and Mrs. Eugenius Mumba for a sum of rebased ZMW720,000.00 between January and February 2013 and that only ZMW130,000.00 was remitted to the Plaintiff by the 1st Defendant. The Plaintiff contended it was never made party to the negotiations on the contract for sale of the stock and business including discussions on the purchase price, which he states was inadequate. That by 30th April, 2013 the amount repaid by the Defendants was US\$64,597.00 from the initial loan capital leaving an outstanding

• balance of US\$111,513.00, and as at 5th October, 2014 the amount due to the Plaintiff on the agreement of 5th October, 2012 was ZMW125,000.00. In a letter dated 8th August, 2014, the Plaintiff through his Advocates demanded repayment of the outstanding sum of US\$130,182.00 of the loan capital and the amount due under the 5th October 2012 Agreement. In a letter dated 19th August 2014, the 1st Defendant through her Advocates admitted owing the Plaintiff the sum of ZMW88,000. It is the Plaintiff claim that as a result of the foregoing he has suffered loss and damage.

The Defendants entered appearance and filed a defence on 10th November, 2014 in which they disputed the Plaintiff's allegation that he had invested loan capital amounting to US\$176,110.00 into the 2nd Defendant. The 1st Defendant's states that she purchased the goods and sourced customers for the 2nd Defendant whilst the Plaintiff was in charge of finance and maintenance of accounts until the time he gave his intention to leave the business. The Plaintiff's assertion that a verbal agreement was reached by the parties was denied, and that the written agreement referred to in paragraph 8 of the statement of claim ceased to be effective when the business stock was sold off.

The defence disclosed that the Company stock was sold at ZMW720,000.00 and US\$64,597 was given to the Plaintiff as part of his share from the proceeds of the stock. The 1st Defendant admitted owing the Plaintiff the sum of ZMW88,000.00 by the 2nd Defendant and that arrangements for payment had been made. The 1st Defendant denied that the Plaintiff has suffered any damage or loss or at all and that he is not entitled to all the claims outlined in the statement of claim.

The 1st Defendant paid the Plaintiff the sum of ZMW88,000.00 by way of a Consent Judgment executed and entered on 1st April 2015.

When the matter came up for hearing on 20th December 2016, the Plaintiff relied on his witness statement filed on 26th March 2016. The salient facts are that on 29th June 2008 the Plaintiff and 1st Defendant executed a Memorandum of Understanding appearing on pages 1-2 of the Plaintiff's bundle of documents. The Plaintiff deposited a sum of US\$109,310.00 in the 1st Defendant's account on diver dates for purchase of goods from China. In December 2008, the Plaintiff and 1st Defendant agreed to incorporate the 2nd Defendant and the Plaintiff made a further investment of US\$66,800.00 in 2009 bringing the total investment to US\$176, 110.00. A shop premises was renovated and recruited staff to run the shop. The

Plaintiff made payments to Micro Source Limited of KR18,128,000.00 and KR9,018,000.00 for the supply of computers and a server for the 2nd Defendant. That the 1st Defendant was in charge of running the business and she kept full details of the account receivables and stock of the business and debt collection, whilst his duty was to deal with the credit lines. That the 1st Defendant in breach of her obligations failed to provide management accounts of the 2nd Defendant's affairs in particular income and expenditure of the 2nd Defendant as well as account of creditors, debtors and inventory. The Plaintiff decided to leave the 2nd Defendant and entered into negotiations with the 1st Defendant , which was verbally agreed upon with a condition that the Defendants' would repay his loan capital investment through the 1st Defendant buying off shares in the sum of US\$220,000.00. The parties prepared a written agreement for repayment of the loan capital but that the 1st Defendant refused to execute the same. On 5th October, 2012 the Defendants executed an agreement for the payment of KR5,000,000.00 (ZMW5,000.00) being interest on the loan capital which was to be paid every month until the time when the 1st Defendant would buy his shares. That the Defendants' failed to honour their obligations under the Agreement of 5th October 2012. The stock and

business of the 2nd Defendant was sold to a Mr. and Mrs. E Mumba for a paltry sum of K720,000.00 between January and February 2013. The understanding was that the Plaintiff would be repaid his balance after the sale. Subsequently, the 1st Defendant remitted a sum of K130,000.00 to him and that as at 30th April 2013, the Defendants had only repaid a sum of US\$64,597.00 from the initial capital loan of US\$176,110.00 leaving a balance of US\$111,513.00. It was the Plaintiff's testimony that the Defendants owe him a sum of K125,000.00 rebased pursuant to the Agreement of 5th October 2012. The Defendants only admitted owing the sum of ZMW88,000.00 which has since been paid. The Plaintiff averred that despite demand letters for payment of the outstanding balance of US\$130,182.00 being the total investment balance and the amount due as at 5th October 2014 under the Agreement of 5th October 2012, the same has not been honoured. The Plaintiff seeks the reliefs set out in the Writ of Summons and statement of claim less the US\$ equivalent of K88,000.00 paid by the 1st Defendant.

In cross-examination, the Plaintiff stated that under the Memorandum of Understanding of 2008, it was agreed that he would invest some money and transferred money to the 1st Defendant's account for her to source the

products from China and sell them locally. That the Memorandum of Understanding did not specify particular costs other than travel and logistics, and custom duties which costs he was supposed to meet. As to whether he paid any cash to the 1st Defendant, the Plaintiff stated that he did not recall paying cash as all payments were made via bank transfers into her Barclays account. That the 1st Defendant failed to furnish any receipts for the goods purchased and expenses for logistics, and despite this, the Plaintiff went ahead to form a company with the 1st Defendant because of the relationship he had established with her and he believed in the business they were engaged in. It was his testimony that in July 2008 he made a payment of US\$10,000 and US\$18,000, and in September 2008 he made a transfer of US\$10,000, adding that the deposition that he made two transfer in July of US\$10,000 was a typing mistake as the payment of US\$10,000 dated 16th July, 2008 was actually paid on 11th September 2008.

It was his testimony that upon formation of the company and it was verbally agreed that business would be done through the 2nd Defendant. The shareholding in the 2nd Defendant was 50/50 between the 1st Defendant and himself. The initial investment in the Company as at March

2009 was US\$26,800.00 and it was agreed that all previous investments for the goods in transit would form part of the business. It was his testimony that the Accountant was unable to get information from the 1st Defendant concerning goods and revenue payable, and that initially, the Accountant was getting invoices issued from the shop but that he was not aware of the revenue. Further, that the 2nd Defendant had an account with Barclays Bank Plc and later opened an account with First National Bank (FNB) of which both himself and the 1st Defendant had access as signatories. He informed the Court that the Bank disregarded the mandate of two signatories by allowing the 1st Defendant to withdraw cash without his signature and he did not take up the matter with the Bank.

In further cross examination, he stated that he purchased computers and a server that were in his office and have since been sold. Further, he had negotiations on the sale of shares with the 1st Defendant and a verbal agreement was reached stating the value of shares and terms of payment. Resulting from the same negotiations, a written agreement was entered into but the same has not been signed. In further cross examination, the Plaintiff averred that the decision to sell shares was due to his loss of faith in the business following his request for the account of the business of

which he got no response from the 1st Defendant. He also denied the assertion that the parties agreed to sell the stock as the agreement was for the whole business to be sold. He stated that when the 1st Defendant communicated that the stock was being sold, he did not disagree but did not get a satisfactory answer about the value of the stock. He informed the Court that he only received a copy of the contract in January 2014 a year after it was agreed upon and received a sum of ZMW130, 000.00 from the proceeds of the sale of stock and later on a sum of ZMW88,000.00 was deposited into his account which he accepted as he was in extreme financial difficulties and after having invested in the business in 2008.

The Plaintiff explained that page 14 of the bundle of documents should show that an amount of US\$16,000.00 was transferred on 17th September 2008 instead of US\$29,000.00 and the US\$29,000.00 was transferred on 12th December 2008. That he made a payment of US\$40,000.00 to the 2nd Defendant. He went on to state that neither he nor the 1st Defendant drew a salary from the 2nd Defendant. That the money he transferred to the 2nd Defendant was for the goods and business logistics and the initial amount of US\$26,800 was given to the 2nd Defendant as a loan although there was no document to that effect. It was also his testimony that the 1st

Defendant ran the affairs of the 2nd Defendant by sourcing for orders and that at one time she sourced business from Mopani Mines but that no money was ever transferred by the 1st Defendant to the 2nd Defendant. He reiterated that there was a verbal agreement at the inception of the business and the 1st Defendant would assume the position of secretary and managing director whilst he would be in charge of financing the 2nd Defendant. He testified further that the 1st Defendant was allotted 50% of the shares for the contribution she made in the 2nd Defendant. That an accountant was hired by the name of Shadreck Sinyangwe who was in charge of the payroll, paying statutory obligations such as Zambia Revenue Authority, National Pension Scheme Authority and attending to other financial issues. On the issue of the US\$26,800.00 loaned to the 2nd Defendant, it was his response that there were no terms of how the said money was to be utilized but it was later agreed that interest of ZMW5,000.00 was to be put on the value of the loan capital. When queried as to why there were no management accounts, the Plaintiff's response was that on several occasions he requested from the 1st Defendant for audits on the Company and made a formal request by way of a letter through his lawyer.

In re-examination, the Plaintiff clarified that in July 2008 two payments of US\$10,000.00 were paid. That pages 48 and 49 of the Plaintiff's bundle of documents shows an agreement for payment of interest in relation to the US\$26,800.00 loan capital. He testified that it was his understanding that he was to get back all the money he had invested in the 2nd Defendant. He further clarified that at the time the 2nd Defendant was formed, there was no stock in place as the goods were in transit and the directors never drew any salary or allowance from the 2nd Defendant at any point. That the only money he received from the 2nd Defendant was US\$40,000.00 which was paid back to him and another sum of ZMW23,000.00.

Defendant's Evidence

The 1st Defendant Pamela Bwalya Mutale relied on her witness statement filed before this Court on 12th May 2015. She testified that she met the Plaintiff in 2008 through a close associate and explained to the Plaintiff the nature of the business she was doing which was the wholesale of porcelain, ceramic tiles, household goods and hardware which she sourced from China at her customers' request. That the Plaintiff expressed interest in her business and the duo entered into a Memorandum of Understanding wherein the 1st Defendant would buy and sell goods on the Plaintiff's behalf

and in return she would get paid a 10% management fee. After execution of the Memorandum of Understanding, the Plaintiff gave her a sum of US\$9,980.00 on 28th May, 2008 for the purchase of ceramic tiles and she undertook her trip to China. It was her testimony that the Plaintiff did not cover her travel expenses which included the ticket and accommodation as the trip was pre-scheduled before she met the Plaintiff.

On 16th July 2008 the Plaintiff paid US\$10,000.00 into her account for shipping a container up to the port of Dar Es Salam and other incidentals. That the Plaintiff made further payments of US\$18,800.00, US\$4,050.00, US\$10,000.00 and US\$16,000.00 for the purchase of two of his containers of ceramic tiles inclusive of freight charges, import tax at Zambia Revenue Authority and transportation from Tanzania to Lusaka. It was her testimony that the Plaintiff transferred a sum of US\$29,000.00 in December 2008 for incorporation expenses, purchase of goods for the 2nd Defendant and initial rentals for the 2nd Defendant. That each time the Plaintiff's goods arrived in Zambia he would be notified, and he would go and check on the goods at the warehouse she was renting. It was her testimony that the Plaintiff never contributed to the rental charges at the warehouse. She refuted the Plaintiff's assertion that the payments he was making to her were loans.

In cross examination, the 1st Defendant recalled signing a Memorandum of Understanding with the Plaintiff for the supply of tiles and hardware. That under the Memorandum of Understanding, it was agreed the Plaintiff would cover costs of freight, duty and transport for his orders. She averred that once the goods were sold, the money realised would be kept in her account and by virtue of the Memorandum of Understanding, she was entitled to a 10% management fee. She stated that the Plaintiff had given her a total sum of US\$64,000.00 for the goods she was to bring from China and at the time of incorporation of the 2nd Defendant, she never received any money from the Plaintiff. In respect to the sum of US\$76,000.00 as exhibited on page 72 of the Plaintiff's bundle of documents, it was the 1st Defendant's testimony that it excluded US\$10,000.00 entered in the month of July, 2008. It was her testimony that the payment of 10th and 16th July, 2008 payment was recorded twice and she received a total amount of US\$109,310.00. The 1st Defendant admitted her account was credited with US\$30,000.00 on 23rd June, 2009, and she used all the money to buy goods, transporting goods and travel expenses. She further stated that she did not have receipts from the transporter of goods of Tanzanian origin.

- When asked about payments for freight, insurance, shipping and logistics, she responded that she equally did not have the receipts.

In further cross examination, the 1st Defendant's stated that out of all the goods she purchased, only tiles valued at ZMW450,000.00 were sold and the purchaser did not pay as he is incarcerated, and the other debtor who purchased hardware in the sum of US\$22,000.00 is deceased. She conceded that this piece of evidence was not included in her pleadings. The 1st Defendant testified that ZMW29,000.00 went towards registration at PACRA and that the monthly rental for the shop and the warehouse was US\$2,150.00 per month which was paid for 4 months in advance. She however stated that she did not have receipts for payment of rentals and for the purchase of goods from China. Further, that at the time of incorporation of the 2nd Defendant, the Plaintiff had already invested US\$100,000 in the business whilst the 2nd Defendant put in all her goods valued at over a million Kwacha, her expertise and goodwill. She informed the Court that she did not have any evidence before Court as to the value of goods she invested in the 2nd Defendant.

It was her testimony that from the proceeds of sale of the goods, she deposited US\$5,000.00 into the Plaintiff's account as per his instruction to

only send that amount and reinvest the rest in the business. Further, that she had a deposit slip to that effect although the same was not produced in the Defendant's bundle of documents. She indicated that there were negotiations for an agreement to pay off the Plaintiff for his shares taking into account his investment in the business which agreement was not reached. As regards pages 48 and 49 of the Plaintiff's bundle of documents, the 1st Defendant admitted that she executed an agreement to pay the Plaintiff a certain amount of money pending execution of a separate agreement for the sell of shares. That in the said agreement it was stipulated that the Defendant would be paying the Plaintiff a monthly sum of five million Kwacha un-rebased of the sales as a minimum return on his investment. The agreement stated that the Plaintiff's investment is loan capital, and the Plaintiff was paid ZMW5,000.00 once on 12th October, 2012 before the sale of stock. Further, only the stock of the Company was sold and not the business or its shares. That the stock was purchased by Mr. and Mrs. E Mumba and the Agreement was prepared by Mr. Mumba, and the 1st Defendant obtained consent from the Plaintiff to negotiate and agree on the price of the stock.

In further cross examination, DW1 testified there is no evidence that she obtained consent for the sale of stock at ZMW720,000.00. It was her testimony that a total of ZMW190,000.00 was payable to Zambia Revenue Authority and ZMW45,000.00 was payable for legal fees, which amounts remain outstanding to date. The 1st Defendant stated that, Zambia Revenue Authority had not been paid due to the fact that a TPIN was not obtained under the incorporated Company. Further, that she informed the Plaintiff about the disbursement of proceeds through an email she sent on 21st January, 2014. In respect to the Plaintiff's request for account books, bank statements, list of creditors and debtors, the 1st Defendant testified that she did not avail the said documents to the Plaintiff.

In re-examination, the 1st Defendant clarified that for the funds that went through her bank account, the Plaintiff would make her sign an acknowledgment of receipt. On 10th July, 2008 she signed an acknowledgment slip but the actual transfer of funds was done on 16th July, 2008. The 1st Defendant maintained she paid the transporter as that is the only way goods could be transported, and stated that some of the receipts were with the Plaintiff whilst others were with the Accountant by the name of Shadrack Sinyangwe. When queried about the receipts for the

goods sold, the 1st Defendant testified she had the receipts particularly for the goods purchased prior to the execution of the Memorandum of Understanding. Further, at the time of incorporation of the 2nd Defendant, her contribution was her experience in marketing, and goods she had at the material time, which the Plaintiff never disputed. She stated the valuation of the goods was done collectively, and accounted the proceeds of sale to the Plaintiff who acknowledged the same.

The parties further filed written submissions as follows:

Plaintiff's Submissions

The gist of the Plaintiff's submissions is following the Memorandum of Understanding entered into by him and the 1st Defendant, he injected loan capital of US\$176,000.00 into the business for the purchase of goods from China. That proof of this contribution can be deduced from the evidence on record for payments to the 1st Defendant of US\$109,310.00 and US\$66,800.00 paid to the 2nd Defendant. It is argued that the evidence before Court shows that the 1st Defendant conceded to repaying a sum of US\$64,597 and that a sum of ZMW88,000 out of the substantive claim of US\$111,513.00. The Plaintiff further submitted that the 1st Defendant

retained legal fees in the sum of ZMW45,000.00 for an unnamed lawyer and ZMW35,000.00 for salaries and rentals, but failed to produce receipts in Court, and failed to account for monies realised from the sale of stock of the 2nd Defendant. The Plaintiff further argued that the evidence on pages 3 to 12 of the Plaintiff's bundle of documents shows the 1st Defendant having received a sum of US\$109,310.00. It is the Plaintiff's submission that the parties considered amounts he invested as loan capital as inferred from pages 48 and 49 of the Plaintiff's bundle of documents.

1st Defendant's Submission

In the 1st Defendant submissions, it is argued that she received monies from the Plaintiff on various dates for the purchase of goods, and the Plaintiff was in charge of accounts and administration, whilst she was responsible for sourcing goods and selling goods. It is contended that after months of carrying on business, the Plaintiff left Zambia and offered to sell his shares in the 2nd Defendant to the 1st Defendant. It is further submitted that after numerous negotiations, the parties failed to reach an agreement but signed an agreement for the Defendants to remit monies to the Plaintiff from the 2nd Defendant business. In January 2013, the parties agreed to sell the stock of the 2nd Defendant to a third party and share the

proceeds less expenses. The 1st Defendant admitted to having received a sum of US\$109,000.00 from the Plaintiff and reiterated that she had goods valued at KR2,000,000.00 at the time of incorporation of the 2nd Defendant. The 1st Defendant contended that the business stock was sold and the Plaintiff was given his share in full less liabilities accumulated by the 2nd Defendant.

In respect to the breach of the verbal agreement, it is submitted that the Plaintiff offered to sell his shares in the 2nd Defendant to 1st Defendant which offer was accepted but that there was no consideration to satisfy the requirements of having a valid contract and relied on the case of **Zambia Inside Limited v Electoral Commission of Zambia (2012) ZMHC 37**.

It is the 1st Defendant's submission that the parties verbally agreed to have a share sale and a draft agreement was exchanged between the parties, but they never agreed on its terms. It is argued that the 1st Defendant cannot be held liable to pay damages for breach of an agreement that was never completed.

Analysis

I have considered the evidence adduced by the parties herein and the following are my findings. It is not in dispute that initially, the Plaintiff and 1st Defendant had an agreement where the 1st Defendant was to purchase goods from China and sell them on behalf of the Plaintiff and the 1st Defendant was entitled to a management fee of 10% of the total goods sold. This is contained in a Memorandum of Understanding dated 30th September 2010. It is not in dispute that the Plaintiff and 1st Defendant formed the 2nd Defendant as a limited liability company on 6th December, 2008 with the Plaintiff and 1st Defendant as its shareholders. It is not in dispute that an agreement dated 5th October, 2012 was signed by the parties herein.

I have carefully weighed the various issues in this case, the conduct of the parties and other circumstances which may have a bearing on the issues to be determined. In my view, the issues for determination are as follows:

1. Whether there was a verbal agreement for the repayment of the Plaintiff's loan capital investment by the Defendants and if so, if there has been a breach by the Defendants?

2. Whether there was a verbal agreement for the Plaintiff's transfer of shares, and if so, has it been breached by the Defendants, and whether the Plaintiff is entitled to damages for breach of the verbal agreement.
3. Whether the Plaintiff is entitled to the reliefs sought.

Repayment of Loan Capital Investment and transfer of shares

The Plaintiff claims damages for the Defendants' breach of a verbal agreement for the repayment of the Plaintiff's loan capital and for transfer of his shares to the 1st Defendant, such agreement being from the exchange of various correspondence and draft contracts by the parties between August 2010 and September 2011. In determining this claim, I find that it has two components, namely the alleged Plaintiff's loan capital investment, and secondly, the verbal agreement for the purported transfer of shares to the 1st Defendant.

It is settled that in order for a contract to be legally binding, there must be an offer, acceptance and consideration. It is trite law that an agreement is not legally binding as a contract unless it shows an intention by the parties to create a legal relationship. Therefore, for a contract to be valid and

enforceable, all essential terms governing the relationship of the parties must be incorporated therein, and the subject matter must be certain.

In determining whether there is an enforceable binding agreement between the parties for the transfer of the Plaintiff's shares to the 1st Defendant, a cursory glance at the 1st Defendant's bundle of pleadings shows a letter appearing on page 27 of the Plaintiff's bundle of documents from Counsel for the Plaintiff dated 25th August 2010 reads as follows:

"Ms Pamela Bwalya Mutale

Plot 577/100 Kabulonga Road

Lusaka

Dear Madam,

*re: ALON HERSHKOVITZ AND YOU - SALE OF HOME DECOR CENTRE
LIMITED SHARES- OUTSTANDING SUM OF USD165,000*

*"..... We are also aware that our client agreed to sell to you the
2,500,000 shares he holds in the company for the sum of
USD170,000 following protracted negotiations.*

We have been further availed your cheque No 00003 dated 30th June 2010 in the sum of USD10,000 issued to our client as first instalment towards the purchase price of the shares aforesaid which we are informed you requested our client not to deposit on the strength of your promise to transfer the sum of USD10,000 into his account. Contrary to the said promise you have to date only deposited the sum of USD5000 into our client's Barclays Bank Account No 1080782. We are also advised that you have since refused, failed and/or neglected to settle the balance outstanding towards the purchase price viz USD165,000 in the agreed instalments despite repeated demands and/or reminders.

In a letter dated 10th September, 2010 from Counsel for the Plaintiff appearing on page 28 of the 1st Defendant's bundle of document, the relevant part and response to the earlier letter dated 25th August 2010 reads as follows:

"We refer to the above captioned matter and advise that we have been engaged by Mr. Alon HersHKovitz to collect from you, the sum of USD165,000.00 being the outstanding balance on the purchase

price of USD170,000 in respect of the sale of shares in Home Decor Centre Limited.

Our client advises that to date you have only paid the sum of USD5000 and have refused, failed or neglected to settle the outstanding balance and accordingly failed to complete the share sale agreement."

In a letter dated 22nd November 2010 to the Plaintiff's Counsel appearing on page 29 of the 1st Defendant's bundle of documents, it reads as follows:

"Our client further instructs that the payment of US\$5000.00 and the giving of the cheque for US\$10,000.00 were acts of goodwill to show a declaration of intent on the part of our client. We are further instructed that alongside the payment of US\$5000.00 the parties arranged a pay out from the proceeds of the Company whereby your Client was receiving seventy five per centum [75%] of the daily takings from the sales in diminution of his share on the Company's assets."

In 2011, are two unsigned agreements on repayment of loan capital and transfer of shares. The recitals state as follows:

"the departing shareholder has injected into the company by way of loan capital and other facilities and accommodation in the aggregate sum (insert amount) which was used by the company in acquiring the initial stock"

1.1 The remaining shareholder and the Company shall repay to the departing shareholder the said US\$200,000.00 in instalments over a period of between 36 to 48 months with effect from mid October 2011. Each instalment not less than US\$5000 shall be directly deposited into the departing shareholders account number 01-1080782."

On 22nd August, 2011, in a letter from Counsel for the Plaintiff to the 1st Defendant appearing on page 38 of the Plaintiff's bundle of documents, the relevant part reads as follows:

"Kindly note that we have been advised by our client that he and your client Ms Pamela Bwalya have agreed on the terms of this subject agreement. Note also that our client has handed to us six (6) copies of the agreement for onward transmission to your client to do her part."

- In my exploration of some good authorities, in the recent English case of **Reveille Independence LCC v Anotech International [2016] EWCA 446**, it was held that:

"the well-established principle that the signature of the parties to a written contract is not a precondition to the existence of contractual relations, as a contract can be accepted equally well by conduct."

In **Brian Royle Maggs t/a BM Builders (A firm) v Guy Anthony Stayner Marsh [2006] EWCA Civ 1058**, the Court held that:

"Determining the terms of an oral contract is a question of fact. Establishing the facts will usually as here, depend upon the recollections of the parties and other witnesses..."

I fully endorse the legal principles as outlined in the cited cases, and opine that these common law principles apply herein.

The 1st Defendant in her defence denies that there was a formal agreement verbally or in writing for the 1st Defendant to purchase the Plaintiff's shares in the 2nd Defendant. In determining this issue, of primary importance is the conduct of the parties. Counsel for the 1st Defendant

argues that before a contract can be binding, there must be an offer and acceptance. That the Plaintiff offered to sell his shares but there was no consideration. Counsel for the Plaintiff went to lengths to show the intention of the parties through the conduct of the parties and through the correspondence between them. A perusal of both draft agreements exchanged between the parties reveals that it was an intention of the parties to have a transfer of shares from the Plaintiff to the 1st Defendant at a sum of about US\$200,000.00 which was to be paid in monthly instalments of US\$5,000.00. Have the elements of a binding contract been satisfied? I find there was a verbal agreement on the transfer of shares between the Plaintiff and 1st Defendant. I am fortified by the fact that the 1st Defendant proceeded to pay the Plaintiff the sum of US\$5000.00 towards the transfer of shares. The 1st Defendant does not deny that a cheque of US\$10,000 was issued to the Plaintiff towards the purchase of his shares, and the said cheque was never deposited upon instruction of the 1st Defendant as appearing on page 27 of the 1st Defendant's bundle of documents. I opine that from the conduct of the parties particularly the 1st Defendant, it evinces a verbal agreement upon which the 1st Defendant acted upon. I am not persuaded by Counsel for the 1st Defendant

argument that this payment of US\$5000.00 was a declaration of intent and a gesture of goodwill. To the contrary, I find that this consummated an offer, acceptance and partial consideration for the transfer of shares from the Plaintiff to the 1st Defendant and constituted a valid contract legally binding on the parties. There was clearly an intention by the parties to create a legal contractual relationship. To argue otherwise would be to push the boundaries of logic too far. I am fortified in my finding by the authority of **Rating Valuation Consortium & DW Zyambo & Associates (suing as a firm) v The Lusaka City Council & Zambia National Tender Board (2004) ZR 109**, where the Supreme Court held that:

"The approach analyzing the process of reaching business relations in simplistic terms of offer and acceptance, gives rise to complications. What is required is for the Court to discern the clear intention of the parties to create a legally binding agreement."

Further that:

"It is generally and legally accepted that parties can reach a provisional agreement and then agree to set it out in a formal document later. Such an agreement is legally binding."

I find persuasive authority in the case of **Brogden v Metropolitan Railway Company (1877) 2 App. CAS 666** whose brief facts are that the Appellant, the Chief of a partnership of three, had supplied the Respondent with coals for a number of years. The Appellant then suggested that a formal contract be entered into by the parties and negotiations ensued. The Respondent drew up some terms of agreement and sent them to the Appellant who filled the blank parts left by the Respondent and wrote approved at the end of the document. The Respondent upon receipt of the draft filed it and did nothing, but both parties acted according to the agreement. Later, disagreements arose, and the Appellant argued that there had been no formal contract established between the parties. The House of Lords held that:

"A contract had arisen by conduct and Brogden (the Appellant) had been in clear breach, so he must be liable."

Their Lordships went further and held that the draft contract that was amended constituted a counter offer, which was accepted by the conduct of the parties. The prices agreed in the draft contract were paid and coal was delivered. Although there had been no communication of acceptance, performing the contract without any objection was enough. Stemming

from the foregoing case, the view I hold is that it is immaterial that no agreement was formally signed. In **Galaunia Farms Limited v National Milling (2000) ZR 135**, the Court stated that:

"The basis of estoppel is when a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular set of affairs another has taken to be settled or correct."

Counsel for the 1st Defendant argues that the parties verbally agreed to have a share sale but never agreed on any terms and in support of this position cited the case of **Winn v Bull [1877] 7 Ch d 29** where the dicta states that where you have a proposal or agreement made in writing expressed to be subject to a formal contract, it means that for it to be valid it is dependent upon a formal contract being prepared. This case is distinguishable from the present one in that partial performance was based on the verbal agreement and from the conduct of the parties. The 1st Defendant proceeded to make a payment to the Plaintiff predicated on the terms indicated in the unsigned agreements of 2011.

From the evidence and documents on record, it leads me to the inevitable conclusion that there was a verbal agreement with all the trappings of a

- valid legal contract, namely, intention to create legal relations, offer, acceptance and partial consideration.

Repayment of Loan capital

A convenient starting point which goes to the heart of this dispute is whether the parties had a verbal agreement for repayment of the purported loan capital investment made by the Plaintiff at the time of incorporation of the 2nd Defendant, or whether this was equity in the 2nd Defendant, and if so, has the 1st Defendant breached such agreement. The Plaintiff averred that the money he invested in the business was loan capital, whilst the 1st Defendant refutes this position and argues that both parties contributed to the business. The Plaintiff relies on the correspondence from August 2010 to September 2011 exchanged between the parties to support his position of a verbal agreement for repayment of the loan capital and transfer of shares. As earlier stated, the parties had two unsigned agreements dated 2011 where it was agreed that the Plaintiff's contribution was loan capital. This was followed by the Agreement of the 5th October 2012 which was post incorporation of the 2nd Defendant. I find this Agreement to be the underlying primary document in terms of the loan capital investment and reads as follows:

"WHEREAS

This Agreement is made the 5th day of October two thousand and twelve

BETWEEN

- 1. ALON HERSHKOVITZ of Lusaka in the Republic of Zambia
(hereinafter called 'Alon') of the first part and*
- 2. PAMELA BWALYA MUTALE of Lusaka in the Republic of
Zambia (hereinafter called Pamela) of the other part and*
- 3. HOME DECOR CENTRE LIMITED a Company incorporated
in Zambia and having the registered office at Lusaka
(hereinafter referred to as "HDC")*

WHEREAS

*Alon has injected into the Company a capital investment by loan
capital and other facilities and accommodation.*

*NOW IN CONSIDERATION of the mutual covenants hereinafter
contained and other valuable consideration the receipt and*

sufficiency of which is hereby acknowledged by the parties IS

HEREBY AGREED AS FOLLOWS:

Pamela and HDC will transfer to Alon on monthly basis a minimum amount of five millions Zambia Kwacha ZMK5,000,000

That amount will count as the minimum return on investment and will deposit directly to Alon Bank account as follows:

Name Alon Hershkovitz

Account Number 55 1002446

Bank Name Barclays Bank of Zambia Plc

In case Pamela will wish to buy out Alon's share in the HDC the parties will agree on the terms and conditions in a separate agreement until such agreement will reach between the parties this agreement will be in force.

IN WITNESS whereof Alon and Pamela have set their hands and the Company has caused its common seal to be hereunto affixed the day and year first hereinbefore written

SIGNED SEALED AND DELIVERED

by the said ALON HERSHKOVITZ

WITNESS

Name

Signature

Occupation

Address

SIGNED SEALED AND DELIVERED

by the said PAMELA BWALYA

Name: Pamela Bwalya

Signature: Signed

Occupation:

Address

THE COMMON SEAL OF

HOME DECOR CENTRE

has hereunto affixed

DIRECTOR/SECRETARY (duly signed)

(underlining by the Court for emphasis only)

Counsel for the 1st Defendant vehemently argued that there was never any agreement between her and the Plaintiff to treat the monies he invested into the 2nd Defendant as loan capital. It is argued that there is a difference between loan and equity capital, and in this case, the Plaintiff's contribution was never a loan but a contribution. In business parlance, loan capital means financing or funding. According to the **Cambridge English Law Dictionary** cited by Counsel for the 1st Defendant, the term loan capital is defined as follows:

"loan capital" is money that a business borrows from banks and other Organisations for an agreed period on which it pays interest."

Counsel for the 1st Defendant's further contended that the Plaintiff and 1st Defendant agreed that all the goods purchased from monies advanced to the 1st Defendant at the time of incorporation of the 2nd Defendant became part of the 2nd Defendant's stock. After a careful scrutiny of the Agreement of 5th October, 2012 and its terms, and correspondence between the Plaintiff and 1st Defendant including pleadings herein, it is evident that the

parties recognised the loan capital investment by the Plaintiff. I base this finding on the following:

Paragraph 8 of the Statement of Claim reads as follows:

"8. On the 5th October 2012, the Plaintiff and Defendants executed an agreement for the payment of rebased K5000.00 by the Defendants to the Plaintiff, being a minimum return (or interest) on the loan capital investment made in the company by the Plaintiff, and was to be paid every month until such a time that the 1st Defendant would buy out the Plaintiff's shares.

The response in the defence reads as follows:

"8. The 1st Defendant admits paragraph 8 of the Statement of Claim but will aver that the said agreements ceased to have force when the stock of the business was sold off."

In construing paragraph 8 of the defence, I find that the 1st Defendant admits the existence of the Plaintiff's loan capital investment which fact was clarified by the Plaintiff's response in re-examination when he averred that the loan capital investment, was an agreed term by virtue of the

Agreement of 5th October 2012. I am persuaded by the learned authors of *Cheshire, Fifoot and Furmstones of Law of Contract, 13th Edition Butterworth's (1996)* in a passage at page 29 where it succinctly states as follows:

"Behind all forms of contract, no doubt, has the basic idea of assent. A contracting party, unlike a tortfeasor, is bound, because he has agreed to be bound. Agreement, however, is not a mental state but an act, is a matter of inference from conduct. The parties are to be judged not by what is in their minds, but by what they have said or written or done."

Instructive is the English case of **Smith v Hughes [1871] LR 6 Q.B 597** where Blackburn J stated that:

"if whatever a man's real intention maybe, he so conducts himself that a reasonable man would believe that he assenting to the terms proposed by the other party, and the other party upon that belief enters into contract with him, the man thus conducting himself would be equally bound as if he had intention to agree to the other party's term."

There is force in the cited authorities, and disagree with Counsel for the 1st Defendant's submission that the Plaintiff's contribution of capital on the business was not a loan but it was a contribution necessary and required by law which enabled the incorporation of the 2nd Defendant. I am not swayed by this line of argument as the Agreement of 5th October, 2012 clearly spells out the agreed terms.

As to whether the Agreement of 5th October 2012 ceased to have effect when the 2nd Defendant's stock was sold as argued by Counsel for the 1st Defendant is a question of fact. The relevant clause reads as follows:

"In case Pamela will wish to buy out Alon's share in the HDC the parties will agree on the terms and conditions in a separate agreement until such agreement will reach between the parties this agreement will be in force."

The parties expressly agreed that the Agreement will remain in force until a separate agreement is reached for transfer of shares from the Plaintiff to the 1st Defendant in the 2nd Defendant. Arising from my earlier finding that there was a verbal agreement for the transfer of shares in 2010 as discerned from the payment of the US\$5000.00 to the Plaintiff, I disagree

with the submission of Counsel for the 1st Defendant that the Agreement of 5th October 2012 was no longer in force, as there is nothing on record to show any subsequent agreement relating to the transfer of shares. Counsel for the 1st Defendant argues there must be a proper transfer of shares as contemplated under Section 64 (1)(a) of the *Companies Act, Cap 388 of the Laws of Zambia* which states that a company shall not register a transfer of shares unless there is a proper instrument of transfer. I opine that a proper instrument of transfer has not been effected following the 1st Defendant's failure to fully pay for the Plaintiff's shares in the 2nd Defendant as per the verbal agreement.

Damages for breach of a verbal agreement

The Plaintiff claims damages for the Defendants' breach of a verbal agreement for the repayment of the Plaintiff's transfer of shares to the 1st Defendant. Counsel for the 1st Defendant argues that before damages can be recovered in an action, there must be a wrong committed whether the wrong be a tort or a breach of contract, and relied on the English case of **Bourhill v Young [1943] AC 92**. It is the 1st Defendant's contention that certain agreements are subject to contract and will be regarded as incomplete until the terms of a formal contract have been settled and in

this respect relied on the case of **Zambia Inside Limited v Electoral Commission of Zambia [2012] ZMHC 37**.

Thus far, it has been established that there was an agreement for transfer of the Plaintiff's shares in the 2nd Defendant to the 1st Defendant and repayment of the loan capital. The follow up question is whether there is breach of agreement? The intention of the parties as can be deduced from the correspondence and conduct of the parties, was for the 1st Defendant to pay the Plaintiff monies for the transfer of shares and ZMW5000.00 per month as a return on investment which the 1st Defendant only paid once. Similarly, the 1st Defendant only paid the Plaintiff the sum of US\$5,000.00 in respect of the transfer of shares. In summation, I find that the Defendants' are in breach of the verbal agreement, and the written agreement of 5th October 2012.

Following from my finding in the preceding paragraph, is the Plaintiff entitled to damages as claimed? The case of **JZ Car Hire Limited v Malvin Chala and Scirroco Enterprises Limited (2002) ZR 112**, states that:

"It is the party claiming any damages to prove the damages"

It is trite law that he who asserts must prove and instructed is the case of **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172 (S.C)**, Ngulube D.C.J as he then was said:

"I think it is accepted that where a Plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegations it is generally for him to prove those allegations. A Plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case."

After an analysis of the evidence, I find that the Plaintiff has not shown what damage he suffered as a result of the breach. The claim is without merit and fails.

Repayment of loan capital investment

The Plaintiff claims for the repayment of the loan capital investment balance of US\$111,513.00 following the 1st Defendant's sale of the stock and the business of the 2nd Defendant in the sum of ZMW720,000.00. Counsel for the 1st Defendant argues that the Plaintiff and 1st Defendant did not agree on any terms for their respective investments in the 2nd Defendant. How does the claimed amount arise and is there any evidence to support

• this claim of US\$111,513.00? The Plaintiff showed evidence of payments made to the 1st Defendant appearing on pages 3-10, 13-27 of the Plaintiff's bundle of documents. The 1st Defendant admitted to having received a sum of US\$109,310.00 from the Plaintiff and reiterated that she too had goods valued at KR2,000,000.00 at the time of incorporation of the 2nd Defendant. The 1st Defendant averred that she had also invested her time and expertise in the business of selling hardware, and contributed her existing stock at incorporation of the 2nd Defendant. At the trial, the 1st Defendant failed to prove the value of the purported stock, nor was the proof that it existed. It is not in dispute that the Plaintiff was repaid a sum of US\$64,597.00 as at April 2013 following the sale of the 2nd Defendant's stock. It is not in dispute that the 1st Defendant paid the Plaintiff the sum of ZMW88,000.00 as stated in paragraph 13 of her defence as follows:

"13. Paragraph 13 and 14 of the statement of claim are admitted.

The 1st Defendant will aver that arrangements have been made to settle the K88,000.00 due to the Plaintiff from the 2nd Defendant."

In paragraph 11 of the defence, the 1st Defendant states as follows:

"The 1st Defendant admits that the Plaintiff has received an amount of about US\$64,597 being part of his share from the proceeds of sale of the stock of the 2nd Defendant."

A perusal of the record and bundle of documents shows the following payments by the Plaintiff to the 1st Defendant as follows:

1. US\$9980 in June 2008 (page 3 Plaintiff's bundle of documents)
2. US\$10,000 on 16th July 2008 (page 5 Plaintiff's bundle of documents)
3. US\$18,800.00 on 22nd July 2008 (page 6, 7 and 14 Plaintiff's bundle of documents)
4. US\$4050.00 on 20th August 2008 (page 8 and 10 Plaintiff's bundle of documents)
5. US\$7000.00 on 1st September 2008 (page 9-10 Plaintiff's bundle of documents)
6. ZMW15,500.00 equivalent of US\$4480 on 8th September 2008 (page 14 Plaintiff's bundle of documents)
7. US\$10,000 on 11th September, 2008 (page 14 Plaintiff's bundle of pleadings)

7. US\$29,000.00 on 16th September 2008 (pages 11-12 and 14 Plaintiff's bundle of documents)
8. US\$29,000.00 on 9th December 2008 (page 12 and 14 Plaintiff's bundle of documents)
9. US\$26,800 to the 2nd Defendant on 24th March 2009 (page 14 Plaintiff's bundle of documents)
10. US\$40,000 to the 2nd Defendant on 1st September 2009 (page 14 Plaintiff's bundle of documents)

The 1st Defendant admits she was paid a total of US\$109,310 prior to the 2nd Defendant's incorporation, and US\$26,800.00 and US\$40,000.00 was paid on 24th March 2009 and 1st September, 2009 respectively, post incorporation. The 1st Defendant admits paying the Plaintiff a sum of US\$64,597.00 as at 30th April, 2013. The 1st Defendant denies she is indebted in the sum of US\$111,513.00 and attempted to show what she had paid to the Plaintiff. The documents exhibited in her bundle of documents showed certain amounts having been transferred without a narrative as to who and for what purposes. On the other hand, the Plaintiff's evidence shows transfers from his account to the 1st Defendant

including a letter from Barclays Bank Plc to the Chief Immigration Office appearing on page 14 of the Plaintiff's bundle of documents summarising payments to the Defendants totalling US\$176,110.00. I have no reason to doubt the veracity of the contents of the said letter.

An interesting issue arose as to whether the 2nd Defendant is bound to pay for pre-incorporation contracts. Counsel for the Plaintiff argues that pre-incorporation contracts do not bind the company as it was not in existence at the time but should bind the 1st Defendant. It is a fact that the 2nd Defendant was incorporated on 6th December 2008 whilst the Agreement acknowledging the loan capital was executed on 5th October, 2012. The question to be answered is, whether the 2nd Defendant is bound by the said Agreement. Counsel for the Plaintiff made reference to Section 28 of the *Companies Act, Cap 388 of the Laws of Zambia* which makes provision for pre-incorporation contracts. I find that the 2nd Defendant entered into an Agreement with the Plaintiff post incorporation and agreed to its terms. I take the view that the 2nd Defendant accepted the agreement and find no reason why it cannot be made enforceable against it. The case of **Salomon v Salomon and Company [1897] AC 22** and **Associated Chemicals Limited v Hill and Delamin and Ellis and Company**

[1998] ZLR were cited in support of the proposition on a company being a separate legal entity whose principles are good law. Conversely, Counsel for the Plaintiff's argued that the monies were paid to the 1st Defendant and she is therefore solely liable. The position I take on this issue is that the 2nd Defendant is a separate legal entity, and as a juristic person, is a party to the Agreement of 5th October 2012. The 2nd Defendant having bound itself to the Agreement of 5th October, 2012 is liable to pay the Plaintiff's loan capital as agreed.

Based on the documentary evidence, I find that the Defendants are indebted to the Plaintiff in the sum of US\$111,513.00.

Payment of ZMW125,000.00 being the sum owing

The Plaintiff claims for the payment of ZMW125,000.00 as the sum due as at 5th October 2014 following the Agreement of 5th October 2012 wherein the parties agreed that the Plaintiff would be paid a monthly sum of ZMW5000.00 as a return on investment. The evidence on record reveals that Company stock was sold at ZMW720,000.00 and only ZMW130,000.00 and ZMW88,000.00 was remitted to the Plaintiff. This position was confirmed by the 1st Defendant in her evidence in chief. The Plaintiff

contends that he was not consulted over the value of the business stock and was only informed that it was sold for ZMW720,000.00. I find this misleading as the Plaintiff accepted a sum of ZMW130,000.00 being part of the proceeds of sale, hence showing that there was admission of the amount at which the stock was sold. I find that from the ZMW720,000.00, the 1st Defendant failed to account for ZMW502,000.00 less the monies paid to the Plaintiff leaving an outstanding balance of ZMW125,000.00 I which I find is due and owing to the Plaintiff. This claim has merit and succeeds.

Rendering accounts and payments of monies due to the Plaintiff

The 4th claim relates to rendering accounts received or expended by the 1st Defendant for and on account of the 2nd Defendant from the date of the Plaintiff's capital investment in the company to the date of sale of its business and stock. The 5th claim is for the order for payment by the 1st Defendant to the Plaintiff of the sums found due on the taking of such account in order to fulfill the agreement for the repayment of the Plaintiff's loan capital investment. The Plaintiff in his evidence averred that the 1st Defendant never showed him how monies were expended for the business. Conversely, the 1st Defendant argued that it was the Plaintiff who engaged

an Accountant who took possession of some of the documents. In cross examination, when the 1st Defendant was asked if she had proof of how monies were expended in the 2nd Defendant, she responded that some documents were in Chinese (mandarin), and argued that logically speaking, such goods would not have reached Zambia without having paid for transportation costs, customs and duties. In the 1st Defendant's bundle of documents, a number of documents having been exhibited showing freighting and transportation related documentation. In a letter written by Counsel for the Plaintiff dated 14th February 2011 at page 33 of the Plaintiff's bundle of documents, the relevant part states as follows:

"We are instructed to advise that our client intends to have a full audit conducted on the company and as such demands the following within ten (10) days from the date hereof"

- 1. All books for the retail and wholesale business;*
- 2. All bank account statements;*
- 3. The full creditor and debtors list and details of the debtors;*
- 4. Income and expenditure accounts; and*
- 5. VAT and all tax returns*

In response to the above letter, Counsel for the 1st Defendant proposed in its letter dated 15th February 2011 appearing on page 34 of the Plaintiff's bundle of documents, that all demands were to be tabulated and addressed as agenda items at a duly convened meeting of the members and directors of the 2nd Defendant. Due to this lapse, there were no management accounts ever prepared, nor was the Plaintiff in a position to know the profits, if any, in the 2nd Defendant.

In cross examination, the 1st Defendant admitted being aware of the Plaintiff's request but had not honored it as at date of trial. The 1st Defendant further gave evidence that some of the money payable to the 2nd Defendant had not been paid by people that owe the Company. She intimated that one customer who is incarcerated purchased goods valued at ZMW450,000.00 and another customer who is now deceased obtained goods valued at US\$22,000.00. These assertions were not supported by any evidence showing that goods were sold to the said persons, and that these amounts are due and owing. I caution the 1st Defendant that this Court does not act on speculation. With that in mind, I opine that the Plaintiff should not be deprived of any monies due to him due on account of what I term the 1st Defendant's hide and seek machinations. I am of

the settled mind that the 1st Defendant is liable to account for what the Plaintiff invested in the 2nd Defendant. The said account is to be rendered before the Registrar within sixty (60) days of this Judgment and thereafter assessed to determine what payments, if any, are due to the Plaintiff.

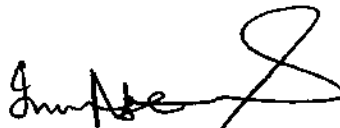
In conclusion, and on the totality of the evidence, I believe the Plaintiff's version of the contractual relationship to be more credible than the 1st Defendant. Judgment is entered in favour of the Plaintiff for -

1. The sum of US\$111,513.00 being the Plaintiff's loan capital investment in the 2nd Defendant with interest at the commercial lending rate from date of the Writ of Summons to date of full payment less the amount of ZMW88,000.00 paid by the Defendants.
2. Payment of the Plaintiff's return on investment pursuant to the Agreement of 5th October 2012 in the sum of ZMW125,000.00 with interest at the commercial lending rate from date of the Writ of Summons to date of full payment.
3. An account of sums expended and received by the 1st Defendant for and on account of the 2nd Defendant from the date of the Plaintiff's loan capital investment in the company to the date of the

sale of its business and stock shall be rendered by the 1st Defendant within sixty (60) days of this Judgment to the Registrar. The Registrar shall thereafter assess what is found due and owing to the Plaintiff in respect of the loan capital investment.

4. Costs to the Plaintiff to be taxed in default of agreement.

Delivered at Lusaka this 4th day of June, 2018.



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HON. IRENE ZEKO MBEWE
HIGH COURT JUDGE