

IN THE HIGH COURT OF ZAMBIA

2020/HP/1115

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

EXXON PETROLEUM LIMITED

PLAINTIFF

AND

PETROLINK LIMITED

1ST DEFENDANT

MAXWELL KILEWE

2ND DEFENDANT

***BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
OPEN COURT, ON 30TH DAY OF JUNE, 2023.***

*For the Plaintiff: Ms. R. Nyirenda – Messrs. Ferd Jere and
Company.*

For the Defendants: No Appearance.

JUDGMENT

CASES REFERRED TO:

1. *Robert Simeza and 3 others v Elizabeth Mzyeche – SCZ No. 23 of 2011;*
2. *Robinson v Harmen (1948) 1 EX 850;*
3. *Colgate Palmolive (Zambia Limited) Inc. v Abel Shamu Chuka – S.C.Z. 181 of 2005;*
4. *Zambia Railways Limited v Pauline S Mundia, Brian Sialumba (2008) 1 Z.R. 172;*
5. *Mazoka and Others v Mwanawasa and Others (2005) Z.R. 138;*
6. *Union Bank Zambia Limited v Southern Province Co-operative Marketing Union Limited (1997) Z.R. 207 (S.C.);*
7. *Phillip Mhango v Dorothy Ngulube (1983) Z.R. 61; and*

8. *Andrew Tony Mutale v Crushed Stoned Sales Limited – S.C.Z. Judgment No. 17 of 1994.*

LEGISLATION REFERRED TO:

1. *The High Court Rules, High Court Act, Chapter 27, Volume 3 of the Laws of Zambia; and*
2. *The Rules of the Supreme Court of England, 1999 Edition, London Sweet & Maxwell.*

OTHER WORKS REFERRED TO:

1. *Halsbury's Laws of England, 4th Edition re-issue, Volume 20, Butterworths.*

1 INTRODUCTION

1.1 The dispute herein emanated from a credit agreement executed by the Plaintiff, Exxon Petroleum Limited and 1st Defendant, Petrolink Limited, in March, 2020, where the Plaintiff agreed to provide petroleum products to the 1st Defendant. The 2nd Defendant, Maxwell Kiliwe, is alleged to be the Director of the 1st Defendant company and acted as a guarantor, surety and co-principal debtor on the credit allegedly availed under the agreement.

1.2 The Plaintiff has accused the Defendants of failing to settle an outstanding balance of K735,160.00 on the petroleum products supplied by the Plaintiff and has claimed for breach of contract. Accordingly, this Judgment is in respect of the Plaintiff's claims.

2 BACKGROUND

2.1 The background to this matter is that under a credit agreement allegedly guaranteed by the 2nd Defendant, the Plaintiff, a limited liability company incorporated under

the provisions of the Companies Act No. 10 of 2017, agreed to supply petroleum products to the 1st Defendant, which is also a company incorporated in accordance with the said Act. It is alleged that in accordance with the said agreement, the Plaintiff supplied petroleum products to the Defendants for the total sum of K4,899,260.09, but the Defendants breached the said agreement and only paid the Plaintiff the sum of K4,164,100.00, leaving a balance of K735,160.00, which remains unpaid to date. It is against this backdrop that the Plaintiff launched this action.

3 PLEADINGS

3.1 The Plaintiff launched this action by way of Writ of Summons, issued on 15th October, 2020 and endorsed with claims for the following reliefs: -

1. *Payment of the sum of K735,160.00, being the amount due for the supply of petroleum products;*
2. *Contractual interest of 3% per day from the date the sum accrued until the final payment;*
3. *Damages for breach of contract; and*
4. *Costs.*

3.2 In the Statement of Claim, the Plaintiff averred, *inter alia*, that sometime in March, 2020, the Plaintiff and the 1st Defendant entered a credit agreement for the provision of

petroleum products by the Plaintiff to the 1st Defendant. The 2nd Defendant acted as guarantor, surety and co-principal debtor on the credit availed under the agreement. The express terms of the contract were, in part, in this manner: -

1. The Defendant was availed credit payments of 5 days from delivery;
2. Interest rate chargeable at a daily rate of 3 % for later payments (after 5 days); and
3. Indemnification of costs incurred by the Plaintiff in recovery of debts owed.

3.3 Between May and June, 2020, the Plaintiff, in accordance with the agreement, duly performed its obligations and supplied petroleum products to the 1st Defendant for the sum of K4,899,260.09. In the same period, the 1st Defendant paid the Plaintiff the sum of K4,164,100.00, leaving a balance of K735,160.00, which the Defendants have failed to settle and consequently, the Plaintiff has suffered loss and damage.

3.4 By the Defendants' Defence and Counter-claim, filed on 4th May, 2021, the Defendants averred, *inter alia*, that at no time has the 2nd Defendant been a Director in the 1st Defendant company nor has he been guarantor, surety and co-principal debtor on the alleged credit agreement. It

was further averred that no supply agreement was signed between the Plaintiff and the 1st Defendant.

3.5 Furthermore, the Defendants averred that the purported credit agreement was unenforceable for want of a sufficient note of memorandum under the Statute of Frauds 1677 and for charging purported penal interest of 3% for late payments.

3.6 The Defendants, by Notice filed on 15th June, 2023, discontinued their Counter-claim, pursuant to **Order XIII, Rule 1** of **The High Court Rules**¹. Accordingly, the Counter-claim will not be considered by this Court.

4 EVIDENCE AT TRIAL

4.1 At trial, **PW1** was **Kafula Mubanga**, whose Witness Statement filed on 23rd August, 2021, was admitted as his evidence in chief. In the said Statement, PW1 asserted, *inter alia*, that he is the Chairman in charge of bringing business and clients to the Plaintiff Company. PW1 stated that he came to know the 1st Defendant company in early 2020, when the Defendants requested to get a supply contract agreement, which he drafted and sent to the Defendants via WhatsApp. Copies of the WhatsApp conversation and Supply Agreement were produced at pages 17 and 23 to 33, respectively, of the Plaintiff's Bundle of Documents.

- 4.2 The Supply Contract contained a clause that in the event of default, the 1st Defendant needed to pay the sum of 3% interest on the consignment. PW1 referred the Court to the Plaintiff's Bundle of Documents, particularly page 17 showing the agreed 3% interest rate and pages 18 to 22 showing the credit application.
- 4.3 The 1st Defendant through text, informed the Plaintiff that it had signed the copy of the Supply Contract, which it had sent by bus and that the Plaintiff should go ahead with the supply. The signed copy of the contract was never delivered, but the Plaintiff performed its obligation under the contract by supplying the 1st Defendant with the consignment as there had been a concession between them. PW1 referred the Court to page 17 of the Plaintiff's Bundle's Documents containing a copy of the WhatsApp messages exchanged between himself and the Director of the 1st Defendant, who is the 2nd Defendant herein.
- 4.4 PW1 asserted that the 1st Defendant's contact number has been unreachable ever since but that the execution of the contract had already started and that the invoices that the Plaintiff had given the 1st Defendant also indicated the 3% interest to be paid in default of payment. Based on the consensus between the Plaintiff and the Defendants, business transactions between the parties had been going on until the last transactions when the 1st Defendant failed

to pay for 3 trucks delivered to them about a year ago. The Court was referred to pages 3 to 8 of the Plaintiff's Bundle of Documents, which shows the transfer of funds to the Plaintiff's account from the Defendants during the on-going business transaction.

- 4.5 On 3rd July, 2020, PW1 sent a letter of demand for payment of money owed to the Plaintiff but the 1st Defendant did not respond. A copy of the said demand letter was produced at page 15 of the Plaintiff's Bundle of Documents. The Plaintiff reported the matter to Lusaka Central Police and at this point, the 1st Defendant paid the sum of K15,000.00 into the Plaintiff's Bank account. A copy of a bank statement showing the said bank transfer was produced at page 45 of the Plaintiff's Bundle of Documents.
- 4.6 The Plaintiff, through its lawyers, wrote to the Defendants another demand letter dated 31st August, 2020, demanding the sum of K1,017,664.03 from the 1st Defendant, but that there was still no response from the 1st Defendant. The said demand letter was shown at page 16 of the Plaintiff's Bundle of Documents.
- 4.7 There was no cross examination conducted and this marked the close of the Plaintiff's case.

4.8 The Defendants and their Counsel were absent without advancing any just cause, despite being aware of the date of hearing. Therefore, this Court closed the case and gave an opportunity to the parties to file their written submissions.

4.9 It is trite law that where a party does not appear for a hearing, in the absence of sufficient reason justifying their non-appearance, a Court may proceed to hear the matter and give Judgment on the basis of the evidence adduced by the Plaintiff. This is as provided by **Order XXXV, Rule 3 of The High Court Rules**¹, which states that: -

“If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant.” (Court's emphasis)

4.10 My decision to close the matter is further fortified by the case of **Robert Simeza and 3 others v Elizabeth Mzyece**¹, where the Supreme Court stated as that: -

“There is no procedural injustice occasioned when a party who is aware of proceedings does not turn up.”

4.11 I note further, that the apart from Kafula Mubanga, Precious Mwenda, the Chief Executive Officer/Financial

Controller of the Plaintiff Company also filed her Witness Statement on 23rd August, 2021. Additionally, Maxwell Katolo Kilewe, the 2nd Defendant herein, filed a Witness Statement on 26th April, 2022. However, as neither Precious Mwenda nor Maxwell Katolo Kilewe were present at trial, the said Witness Statements shall not be admitted into evidence by this Court. My decision to discard the said Witness Statements is fortified by the explanatory notes under **Order 38, Rule 2A, paragraph 6** of **The Rules of the Supreme Court**², which provide that: -

“If a party who has served statement does not call the witness to whom it relates, then no other party may put the statement of that witness in evidence.”

5 SUBMISSIONS

5.1 By the Plaintiff’s final submissions, filed on 16th March, 2023, the Plaintiff’s Counsel contended, *inter alia*, that the Plaintiff has discharged its burden of proof and as such, is entitled to the reliefs being sought, including damages for breach of contract. Counsel submitted that the Plaintiff has in its Bundles of Documents demonstrated that there was an agreement between the Plaintiff and the Defendants, which agreement the Plaintiff met its end of the bargain. The case of **Robinson v Harmen**² was cited in support of the foregoing submission.

- 5.2 Counsel argued that the Defendant cannot today turn around and state that there was no agreement between the parties as it has been demonstrated on page 17 of the Plaintiff's Bundle of Documents, that there are copies of the WhatsApp messages between the Plaintiff and the Director of the 1st Defendant company, confirming the existence of the said contract and that the 1st Defendant was agreeable to a penalty charge of 3% per day. In fortifying this argument, Counsel cited the case of ***Colgate Palmolive (Zambia Limited) Inc. v Abel Shamu Chuka***³.
- 5.3 The Defendants did not file herein any written submissions as directed by the Court.

6 CONSIDERATION AND DECISION OF THE COURT

- 6.1 I have considered the pleadings and evidence adduced before this Court. I have also considered the Plaintiff's submissions and authorities cited, for which I am grateful to learned Counsel.
- 6.2 The Plaintiff claims, *inter alia*, for the payment of the sum of K735,160.00, being the amount due for the supply of petroleum products; Contractual interest of 3% per day from the date the sum accrued until the final payment, damages for breach of contract and costs. The burden of proof lies with a claimant to prove its claims to the required standard. This is the guidance that the Supreme Court

gave in the case of **Zambia Railways Limited v Pauline S Mundia, Brian Sialumba**⁴, where it held that: -

“The standard of proof in a civil case is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability as opposed to beyond all reasonable doubt in a criminal case. The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable...”

6.3 Additionally, in the case of **Mazoka and Others v Mwanawasa and Others**⁵, the Supreme Court held as follows: -

“As regards burden of proof, the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity.”

6.4 The Plaintiff alleges that the 2nd Defendant is a Director of the 1st Defendant company and that sometime in March, 2020, the Plaintiff and the 1st Defendant entered into a credit agreement for the provision of petroleum products by the Plaintiff to the 1st Defendant and that the 2nd Defendant as Director of the 1st Defendant company acted as a guarantor, surety and co-principal debtor on the credit availed in the agreement. It was alleged that it was a term of the said credit agreement that a charge of 3% interest on the sum due would be charged for late payments.

- 6.5 The Plaintiff further alleges that between May and June, 2020, the Plaintiff supplied petroleum products to the 1st Defendant company for the total sum of K4,899,260.09 and in the same period, the Defendants paid the sum of K4,164,100.00, leaving a balance of K735,160.00, which they have failed to settle to date.
- 6.6 On the other hand, the Defendants by their Defence on record, deny that the 2nd Defendant herein is a Director in the 1st Defendant company and further deny that the 2nd Defendant was appointed as guarantor, surety and co-principal debtor on the alleged credit agreement nor acted in that capacity. It has further been alleged that the 1st Defendant did not sign a supply or credit agreement with the Plaintiff.
- 6.7 Having analysed the evidence on record, it is not disputed that between May and June, 2020, the Plaintiff supplied petroleum products to the 1st Defendant. What is in dispute and requires determination by this Court are the following: -
1. Whether the 2nd Defendant is a Director in the 1st Defendant company;
 2. Whether there is a valid credit agreement between the Plaintiff and the 1st Defendant company and that the

2nd Defendant was guarantor, surety and co-principal debtor on the alleged credit agreement; and

3. Whether the Plaintiff is entitled to the sum of K735,160.00, being the amount allegedly due from the 1st Defendant for the supply of petroleum products.

6.8 In addressing the first legal issue of whether the 2nd Defendant herein is a Director in the 1st Defendant company, I refer to the Patents and Companies Registration Agency computer printout shown on pages 2 to 4 of the Defendant's Bundle of Documents. On my analysis of the said document, I find that the 2nd Defendant, Maxwell Kilewe, is not listed amongst the Directors of the 1st Defendant company. Therefore, I find and hold that the 2nd Defendant is not a Director of the 1st Defendant company.

6.9 I now turn to consider the second legal issue of whether there is a valid credit agreement between the Plaintiff and the 1st Defendant company and whether the 2nd Defendant herein is the guarantor, surety and co-principal debtor on the alleged credit agreement. The Plaintiff herein contends that it entered into a credit agreement with the 1st Defendant herein for the supply of petroleum products to the 1st Defendant and that the 2nd Defendant acted as surety and co-principal debtor on the alleged credit agreement.

6.10 To demonstrate the validity of the alleged credit agreement, at trial, PW1 by his Witness Statement stated that the 1st Defendant requested a supply contract agreement and that he drafted one, which he sent via WhatsApp messaging system to the 1st Defendant to sign. PW1 referred the Court to pages 17 and 23 to 33 of the Plaintiff's Bundle of Documents, containing copies of a WhatsApp conversation and the Supply Agreement, respectively.

6.11 On my analysis of the copy of the WhatsApp conversation on record, I find that the said conversation appears to be between a Director of the 1st Defendant and a representative from the Plaintiff company. Further, I note that in the said conversation, the 1st Defendant is requesting for some amendments to be made to the Supply and Purchase Agreement as a condition precedent to its signing the agreement. Therefore, in my view, the said WhatsApp conversation is merely an indication that the 1st Defendant intended to enter a Supply and Purchase Agreement with the Plaintiff and not a Credit Agreement.

6.12 Further, I note that the said copy of the Supply and Purchase Agreement on record has not been executed by either the Plaintiff or the 1st Defendant. Additionally, the copy of the credit application form on pages 18 to 20 of the Plaintiff's Bundle of Documents has not been executed by

either the Plaintiff or the 1st Defendant. Therefore, the said Supply and Purchase Agreement and the Credit Agreement is not binding on either the Plaintiff nor the 1st Defendant herein. Accordingly, the Plaintiff herein has failed to prove on a balance of probability that there was a valid credit agreement between itself and the 1st Defendant.

6.13 I also note that the Plaintiff's claim for interest of 3% is drawn from clause 6 of Terms and Condition outlined in the said Credit Application Form. The said clause provides as follows: -

"I ... agree that any credit granted to me or the applicant business will carry interest equal to the prime interest rate levied by the Standard Bank Zambia at the time plus 3% on amounts outstanding for longer than 5 days."

6.14 However, having found that the said Credit Application form was not filled in or executed by any of the parties to this action and therefore, not binding, it follows that the said 3% interest charged on any sum due for longer than 5 days is not applicable to the 1st Defendant. In any case, the said 3% charged on amounts outstanding for longer than 5 days amounted to penal interest, which interest is not permissible. My finding is fortified by the case of ***Union Bank Zambia Limited v Southern Province Co-***

operative Marketing Union Limited⁶, where it was held as follows: -

“However, when it comes to unusual rate of interest such as compound interest, express agreement is required, or in the alternative, evidence of consent or acquiescence to such a practice or custom... The phrases relied upon could not conceivably be construed as constituting an agreement to pay penal interest. Above all, even if there had been such agreement, it would have been liable to be struck down and not enforced for being a penalty objectionable at common law.”

6.15 Based on the foregoing, the Plaintiff’s claims for breach of contract and contractual interest of 3 percent per day from the date the sum accrued, cannot be sustained as the Plaintiff herein failed to prove the validity of the alleged Credit Agreement and the Purchase and Supply Contract on record. Further, the said 3 percent contractual interest amounted to penal interest, which is not permissible.

6.16 On the Plaintiff’s claim that the 2nd Defendant is the co-principal debtor, surety and guarantor on the credit availed under the agreement, I find that the only evidence on record alluding to this allegation is the Suretyship Form on page 21 of the Plaintiff’s Bundle of Documents. However, the said Suretyship Form is not filled in or executed by the Plaintiff and the 2nd Defendant and is therefore not binding on the parties herein.

6.17 The learned authors of ***Halsbury's Laws of England***¹ state as follows on a contract of guarantee: -

“The Statute of Frauds (1677) provides that no action is to be brought by which to charge the defendant upon special promise to answer from the debt, default or miscarriages of another person unless the agreement upon which the action is brought or some memorandum or note of it is in writing signed by the party to be charged with it or by some other person thereunto lawfully authorised by him.” (Court's emphasis)

6.18 Based on the foregoing authority, as the Plaintiff herein did not produce any written document to support its contention that the 2nd Defendant acted as guarantor on the alleged credit agreement, it follows that the Plaintiff's contention is not supported by the evidence on record and is accordingly dismissed.

6.19 However, on my analysis of pages 12 to 14 of the Plaintiff's Bundle of Documents, I find that the pages contain three (3) Fuel Orders, dated 19th May, 2020 and 27th May, 2020 issued to the Plaintiff by 1st Defendant and approved by the 2nd Defendant. I note further, from pages 3 to 8 and 45 of the Plaintiff's Bundle of Documents that the 1st Defendant made ten (10) deposits of various sums into the Plaintiff's ZANACO Account between 27th May, 2020, to 10th June, 2020 and one (1) deposit on 21st August 2020. Additionally, I note that the Plaintiff herein has produced

twenty-two Invoices relating to the sale of various quantities of diesel and petrol issued to the 1st Defendant by the Plaintiff in the months of May and June, 2020, as shown on pages 49 to 70 of the Plaintiff's Bundle of Documents.

6.20 The foregoing, in my view, is a clear indication that the Plaintiff and the 1st Defendant herein conducted business of supplying and purchasing petroleum products in the month of May and June, 2020 and in the absence of evidence of a written supply and purchase agreement between them, I am inclined to find on a balance or probabilities that the supply and purchase agreement between the two parties was verbal.

6.21 I now turn to consider the third legal issue of whether the Plaintiff has proved that it is entitled to the sum of K735,160.00, being the amount allegedly due from the 1st Defendant for the supply of petroleum products. In the case of ***Phillip Mhango v Dorothy Ngulube***⁷, it was held as follows: -

“It is, of course, for any party claiming special loss to prove that loss to do so with evidence which makes it possible for the Court to determine the value of that loss with a fair amount of certainty. As a general rule any shortcomings in the proof of a special loss should react against the claimant”

6.22 Additionally, in the case of **Andrew Tony Mutale v Crushed Stoned Sales Limited**⁸, guidance was given as follows: -

“There is need for satisfactory proof to be provided before special damages can be awarded by the court.”

6.23 From the foregoing authority it is clear that for the Plaintiff herein to be entitled to the sum of K735,160.00, being the amount allegedly due from the 1st Defendant for the supply of petroleum products, it has to provide sufficient evidence to enable this Court to determine the value of the claim with a fair amount of certainty.

6.24 The Plaintiff alleges that between May and June, 2020, the Plaintiff supplied petroleum products to the 1st Defendant for the total sum of K4,899,260.09 and that the Defendant paid a total sum of K4,164,100.00, leaving a balance of K735,160.00, which the 1st Defendant has failed to settle to date. By his Witness Statement, PW1 stated that the Plaintiff sent a letter of demand to the 1st Defendant on 3rd July, 2020, demanding for the principle balance in the sum of K735,160.00, which went unanswered. Subsequently, the Plaintiff reported the matter to the police and the 1st Defendant deposited into the Plaintiff's ZANACO Account, the sum of K15,000.00, on 21st August, 2020. Proof of payment of the sum of K15,000.00 was produced on page 45 of the Plaintiff's Bundle of

Documents containing the Plaintiff's Bank Account Statement. This payment in my view is an indication that the 1st Defendant owed the Plaintiff some money for the petroleum products it supplied to the 1st Defendant.

6.25 To demonstrate that the 1st Defendant owed the Plaintiff the sum of K735,160.00, the Plaintiff produced a reconciliation statement and tax invoices on pages 34 and 49 to 70, respectively, of the Plaintiff's Bundle of Documents. On my analysis of the said reconciliation statement, I find that the said statement is a summary of the alleged unpaid invoices issued to the 1st Defendant between 20th May, 2020 and 10th June, 2020, to which the tax invoices produced on pages 49 to 70 of the Plaintiff's Bundle of Documents relate.

6.26 On my analysis of the said reconciliation statement and the copies of the tax invoices on record, I note that two of the invoice numbers, particularly invoice numbers 0045 relating to the sum of K159,686.00 and 0046 relating to the sum of K344,180.00, indicated in the summary at page 34 of the Plaintiff's Bundle of Documents, have not been produced amongst the copies of the tax invoices produced on record. Further, I note that invoice number 0026, relating to the sum of K816,450.00 and shown at page 49 of the Plaintiff's Bundle of Documents, is not captured in the Summary shown at page 34 of the Plaintiff's Bundle of

Documents. Therefore, this Court cannot determine with a fair amount of certainty that the sum indicated on the summary of the invoices with regards the three invoices referred to above is the correct value of the petroleum products sold to the 1st Defendant by the Plaintiff.

6.27 By the Plaintiff's Statement of Claim, the Plaintiff indicated that it supplied the 1st Defendant with Petroleum Products worth K4,899,260.00 and that the 1st Defendant paid the sum of K4,164,100.00, leaving a balance of K735,160.00. However, on my analysis of the evidence on record, I find that the total value of the alleged unpaid invoices shown at pages 49 to 70 of the Plaintiff's Bundle of Documents is K5,323,049.67, taking into consideration the missing two invoices captures as invoice number 0045 and invoice number 0046 relating to the sums of K159,686.00 and K344,180.00, respectively and shown at page 34 of the Plaintiff's Bundle of Documents.

6.28 Further, as the Plaintiff's claim is for the sum of K735,160.00, the Plaintiff has not shown by its evidence which of the unpaid invoices produced form part of the claim for the sum K735,160.000, from which this Court can determine with a fair amount of certainty the value of the sum owed to the Plaintiff.

6.29 On my further analysis of pages 3, 4, 5, 6, 7, 8 and 45 of the Plaintiff's Bundle of Documents, I find that the 1st

Defendant paid the following sums into the Plaintiff's ZANACO Account: -

1. K132,000.00 on 27th May, 2020;
2. K330,000.00 on 27th May, 2020;
3. K338,000.00 on 27th May, 2020;
4. K150,000.00 on 29th May, 2020;
5. K287,000.00 on 2nd June, 2020;
6. K50,000.00 on 3rd June, 2020;
7. K185,000.00 on 4th June, 2020;
8. K424,000.00 on 8th June, 2020;
9. K136,000.00 on 9th June, 2020;
10. K120,000.00 on 10th June, 2020;
11. K15,000.00 on 21st August, 2020 (paid following police complaint).

6.30 From the above payments shown in paragraph 6.29 above, the sum total proved to have been paid by the 1st Defendant to the Plaintiff is K2,167,000.00.

6.31 The foregoing payments on record do not prove the Plaintiff's contention that the 1st Defendant paid the sum of K4,164,100.00 out of the sum of K4,899,260.00 debt, leaving a balance of K735,160.00. However, as the 1st

Defendant paid the sum of K15,000.00 to the Plaintiff following the Plaintiff's complaint to the police for the payment of the debt owed by the 1st Defendant, I find that the Plaintiff has proved on a balance of probability that the 1st Defendant herein owed the Plaintiff some money for the petroleum products it supplied to it.

6.32 I note that the 1st Defendant has also produced a summary of the money it allegedly paid to the Plaintiff via mobile money payment on page 10 of the Defendant's Bundle of Documents but has not produced a copy of the source documents from which the said summary was created. Therefore, it is not sufficient proof that the sums indicated on the summary was money had and received by the Plaintiff through Mobile Money payment.

6.33 Additionally, the 1st Defendant has produced an acknowledgment of receipt of the sum of K10,000.00 from the 1st Defendant signed by a Dr. Kafula on page 11 of the Defendant's Bundle of Documents. However, as the said document does not indicate that the payment is in relation to the petroleum products supplied by the Plaintiff or in what capacity the said Dr. Kafula was receiving the said sum, I shall not consider this acknowledgment of receipt in relation to the claim before this Court.

6.34 Based on the foregoing, I find that the Plaintiff herein has failed to demonstrate that the 1st Defendant owed it the

sum of K735,160.00 in accordance with the case of ***Dorothy Ngulube v Phillip Mhango***⁷ cited above. However, as the Plaintiff has proved on a balance of probability that there was an agreement for the purchase and supply of petroleum products between itself and the 1st Defendant and that the 1st Defendant herein owed the Plaintiff some money for the petroleum products it supplied to it, I order that the sum due and owing be assessed and determined by the Deputy Registrar. The sum found due shall carry interest at the short-term bank deposit rate from date of Writ to date of Judgment and thereafter, at the current bank lending rate as determined by the Bank of Zambia until full payment.

6.35 Since the Plaintiff has partially succeeded in its claims, costs are for the Plaintiff, to be taxed in default of agreement.

6.36 Leave to appeal is granted.

**SIGNED, SEALED AND DELIVERED AT LUSAKA THIS 30TH DAY
OF JUNE, 2023.**



**P. K. YANGAILO
HIGH COURT JUDGE**