

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
(Civil Jurisdiction)

2008/HK/01

BETWEEN:

ZCCM INVESTMENTS HOLDINGS PLC

PLAINTIFF

AND

WOODGATE HOLDINGS LIMITED

DEFENDANT

Before the Honourable Mrs. Justice R.M.C. Kaoma in Open Court this 18th day of March 2011

For the Plaintiff: Mr. P. Chamutangi & Ms. S. Namwinga - Legal Counsels

For the Defendant: Mr. K. Sianondo - Messrs Malambo & Company

J U D G M E N T

Cases referred to:

1. *Khalid Mohamed v The Attorney General (1982) Z.R. 49 at 51*
2. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172 at 175*
3. *Anderson Mazoka and Others v Levy Mwanawasa and Others (2005) Z.R. 138*
4. *K.B. Davies and Company (Zambia) Limited v Andrew Masunu – Appeal No. 181 of 2006*
5. *Lt Gen. Geojago Robert Chaswe Musegule v The Attorney General- 2004/HP/0589*

On 2nd January 2008 the plaintiff, ZCCM Investments Holdings Plc issued proceedings by writ of summons against the defendant, Woodgate Holdings Limited claiming for the sum of US\$1,900,430.00 in respect of the sale proceeds of copper concentrates to the defendant, for interest and for costs.

According to the statement of claim the plaintiff and defendant entered into a transaction whereby the plaintiff sold the defendant copper concentrates; as of April 2002 the defendant owed the plaintiff the sum of US\$1,950,430.00 and the plaintiff proceeded to write a letter of demand to the defendant for the said amount. Further, that the defendant sometime in October 2002 paid the plaintiff the sum of US\$50,000.00 leaving a balance of US\$1,900,430.00; that the defendant has refused, failed or neglected to pay the outstanding balance; and that the plaintiff has suffered loss and damage as a result of the defendant's conduct and claims the sum of US\$1,900.430.00.

On 29th January 2009, by the letter at page 15 of the Bundle of Pleadings the defendant requested for further and better particulars under paras 3, 4 and 6 as outlined in that letter and on 1st February 2008 entered conditional appearance. When there was no response from the plaintiff, on 16th May 2008 the defendant filed summons for further and better particulars pursuant to Order 18, rule 12 (3) RSC 1999. On 2nd July 2008 the Deputy Registrar ordered that the plaintiff supplies the defendant with the information the defendant was asking for in the letter of 29th January 2008 within 21 days, failure to which the claim would stand dismissed and that the defendant files a defence (if any) within 21 days of receipt of further and better particulars, failure to which, would result in the plaintiff being allowed to enter judgment in default of defence.

On 22nd July 2008 the plaintiff filed the notice of further and better particulars at page 27 of the Bundle of Pleadings. On 1st August the defendant obtained an order from the Deputy Registrar dismissing the plaintiff's action for failure to supply further and better particulars. On 15th August the plaintiff filed summons to set aside that order pursuant to Order 2 rule 2 RSC 1999. In a ruling delivered on 7th October 2008 the Deputy Registrar set aside the order dismissing the action on the ground that it was erroneously signed. He also acknowledged that such particulars as the date of transaction and actual full price for purchase was unascertained due to loss of contractual document which could not deny the defendant to defend themselves and that the defendant could file the defence within the confines of such particulars. On 21st October 2008 the defendant appealed to a Judge-at-Chambers. On 14th April 2009 I heard the appeal having taken over conduct of the matter following the transfer of Mr. Justice Hamaundu.

In dismissing the appeal on 2nd June 2009 I stated that the fact that the transaction date and purchase price were not specified because the contractual document was missing did not mean that the action ought to fail. The defendant was given 14 days within which to file a defence. The details of the defence filed on 16th June 2009 are at pages 57 to 59 and 63 to 65 of the respective Bundles of Pleadings. The defendant has also counterclaimed the sum of K19,422,182.74 on the basis that the demand letter from the plaintiff dated 28th April 2000 stated that the defendant owed them K2,101,327,817.21; that between 7th September 2000 and 16th October 2002 the defendant paid a total of K2,120,750,000.00 leading to an excess payment of the K19,422,182.74. The defendant has also counterclaimed interest, any other relief and costs.

The plaintiff has joined issue with the defendant's defence, but has denied paras 1 to 4 of the counterclaim and averred that as of April 2002 the defendant owed the plaintiff the sum of US\$1,950,430.00; that the defendant paid US\$50,000 leaving a balance of US\$1,900,430.00 which the defendant has refused, failed or neglected to pay.

The evidence I heard during the course of the trial on the 10th June and 27th August 2010 is as below. The plaintiff called two witnesses. Mr. Fackson Phiri (PW1) is an accountant with the plaintiff and had worked for ZCCM Limited up to 1999 in the Finance Department. He told me that between 1998 and 1999 they received a written contract between ZCCM Limited and Woodgate Holdings Limited for the sale of refined copper; that the payment was to be in instalments; and that the instalments came regularly until the year 2000 when ZCCM Limited was disbanded.

When referred to page 1 of the defendant's Bundle of Documents he said that there was an overdue payment of K2,101,327,817.00 and that they had the indebtedness captioned. When referred to page 2 of the plaintiff's Bundle of Documents, he said that as at June 2000 the defendant was owing US\$2,396,860.00 equivalent to K6,817,174,425.00 which appears at the bottom of the document. When shown pages 4 and 5 of the same Bundle he said that the amounts reflected in the receipts of K180,750,000.00 and K500,000,000.00 respectively and the amounts of K1,200,000,000.00 and US\$50,000.00 reflected in the receipts at pages 4 and 5 of the defendant's Bundle of Documents were received from the defendant by the plaintiff.

Mr. Phiri further told me that the defendant was written to over the debt on 3rd April 2002 by the letter at page 7 of the plaintiff's Bundle of Documents which indicated an outstanding debt of US\$1,950,430.00; that there was a reply on 10th April 2002 by E.P. Kavindele, MP, then Republican Vice President as reflected at page 8 of the same Bundle; and that at page 9 of that Bundle is a Visitor's Pass in the name of John Kaite to see the Vice President. He said that the letter at page 10 of that same Bundle is another letter to the defendant's Executive Chairman concerning an outstanding debt to ZCCM of US\$1,896,924 and another one at page 11 showing an outstanding amount of US\$1,846,924.

He said that the defendant responded by paying US\$50,000 on 10th October 2002; that by the letter at page 12 of the plaintiff's Bundle of Documents Mr. Kavindele was asking for a receipt for that particular payment; and that the receipt No. 00253 at page 14 was issued and sent to him by the letter at page 13 of the same Bundle. He said that the defendant still owes the plaintiff a sum of US\$1,846,924 and that the defendant was given a copy of the contract and would not have started paying without it.

In cross examination he admitted that the defendant had applied for further and better particulars of the statement of claim as shown under para 3 at page 17 of the defendant's Bundle of Pleadings. He also admitted that from para 4 of the affidavit in opposition at page 20 of the same Bundle there is a gap in the evidence as far as the contract is concerned. He further admitted that from para 2 of the notice of further and better particulars at page 31 of the same Bundle the plaintiff did not know the full purchase price and that if one does not know the value of the contract, one would not know the amount remaining unpaid. He also admitted that there is no basis for the balance of US\$1,950,430.00 stated in para 4 of the statement of claim.

He told the court that he started working for ZCCM on 30th July 1974 and that he was aware of a department called Contract Serving and Payment Metal Exports and Sales Department which was in charge of contracts and that he belonged to Finance Department. He admitted that the contract in question was entered into before ZCCM was privatised and that the Contract Servicing and Payment Metal Export and Sales Department were the one to know about all contracts.

He also admitted that the letter at page 1 of the defendant's Bundle of Documents dated 28th April 2000, addressed to the Managing Director of the defendant, demanding for an overdue payment of K2,101,327,817.26 was written before the privatisation of ZCCM and that since there is no contract the authors of the letter are the ones to rely on. He further admitted that the receipt at page 2 of the same Bundle in the sum of K500,000,000.00 is dated 7th September 2000, after the demand letter; that the receipt at page 3 in the sum of K180,750,000.00 is dated 1st November 2000, also after the demand letter, the same with the receipt at page 4 in the sum of K1,200,000,000.00 dated 11th December 2000, and at page 5 in the sum of US\$50,000 dated 16th October 2002, which when converted to kwacha using the exchange rate of K4,800 as appears at page 7 of the same Bundle, amounts to K240,000,000.00.

He said that the amounts at pages 2 to 5 add up to K2,120,750.00 while the amount in the demand letter at page 1 is K2,101,327,817.26 giving an excess of K19,422,182.74. He admitted that in so far as the demand letter is concerned this amount must be returned to the defendant. At the same time he said that the difference in the figures should not be returned to the defendant because there is a balance.

In re-examination he insisted that the defendant still owes the plaintiff and that all the documents on the defendant's Bundle do not show any reply by Mr. Kavindele between 2002 and 2003. He reiterated that the letter at page 1 of the defendant's Bundle was written before privatisation of ZCCM Limited. Finally he said that he is not able to tell what happened after the Deputy Registrar's ruling at page 29 of the defendant's Bundle of Pleadings and that there is no document opposing the affidavit in opposition at page 20 of the same Bundle.

Mr. John Kakungu Kaite the Legal Manager for the plaintiff company is PW2. He testified that he had instructions from the accounts department, as appears at page 1 of the plaintiff's Bundle of Documents, that the defendant owed the plaintiff the sum of US\$1,896,924.00; and that later he wrote the letter at page 7 of the same Bundle demanding a sum of US\$1,950,340.00. He said that the defendant responded by the letter at page 8 of the same Bundle dated 10th April 2002 written by Mr. Kavindele; and that he had a meeting with him upon his return.

He said that the Visitor's Pass dated 1st August 2002, at page 9 of the same Bundle, was one occasion when he went to see Mr. Kavindele. He said that he asked Mr. Kavindele how he intended to settle the outstanding amount and that while he disputed the figure that they were demanding, he indicated that he would settle some amounts and that he had settled certain amounts which should not be in the amount demanded, and that the amount was probably less by US\$50,000 or US\$100,000 and suggested that they reconcile the figures. He said that he told Mr. Kavindele that according to their records that was the sum he owed and that Mr. Kavindele advised that he would look up his records for some receipts to show that he had actually made some payments and that the amount was not all that large; and that he agreed to the proposal, but Mr. Kavindele never gave him any receipts even after several follow-ups.

He said that he wrote to the defendant again the letter at page 10 of the same Bundle on 29th August 2002, but there was no reply; that he followed up with the letter at page 11 of the same Bundle dated 14th August 2003 and met him on a number of occasions or twice after that; and that on both occasions there was no indication that he would not settle the amount. He said that Mr. Kavindele felt that the amount should be about US\$1,700,000 and not US\$1,800,000.00.

He testified that Mr. Kavindele responded by making a partial payment of US\$50,000 and demanded for a receipt by the letter at page 12 of the same Bundle and that the plaintiff issued the receipt at page 14 as confirmed also in the letter at page 13 of the same Bundle of Documents. He confirmed that the letter at page 1 of the defendant's Bundle of Documents seems to be telling the defendant that there was an overdue payment of K2,101,327,817.26. On the defendant's letter to Malambo and Co. at page 7 of the defendant's Bundle of Documents, he said that the debt has not been fully serviced and that they sent the receipt for the US\$50,000.00 to the defendant.

In cross-examination he told me that he started working for ZCCM in 1994 before privatisation. He too agreed that there was a metal export department (which does not exist today) and that part of the function of the department was sealing the contracts which ZCCM was engaging in and partly to see that contracts were honoured.

He agreed that the defendant had asked for further and better particulars; that there was a date of contract being asked and the value and type of the contract; and that in the notice of further and better particulars at page 31 of the defendant's Bundle of Pleadings the plaintiff is saying that they do not know the total value of the contract. He stated that they knew the balance owing; that the accounts department was handed over a schedule of debts owing by various companies and prepared the documents; that the difficulty alluded to in para 4 of the affidavit in opposition at page 20 of the defendant's Bundle of Pleadings arises because of privatisation; and that the people involved before the privatisation must know the position.

He said that he is not sure if the letter at page 1 of the defendant's Bundle of Documents was written before privatisation as there was a change of name from ZCCM Limited to ZCCM-IH at the same time as the privatisation. He admitted that the letter was written on 28th April 2000 by WL Kapambwe, Head-Contract Servicing and Payments Metal Exports and Sales Department; that the receipts at pages 2 to 5 of the same Bundle are all dated after the demand letter at page 1; that US\$50,000 at the rate of K4,800.00 given in the letter at page 7 of the same Bundle gives K240,000,000.00; and that the amount in the demand letter at page 1 is K2,101,327,817.26.

He conceded that there is a difference of over K19,000,000.00 in the figures in the demand letter and the total amount paid by the defendant, but refused that the excess amount should be paid to the defendant. He admitted that he had no personal knowledge of the figures and that the information was supplied by accounts department and that he would adopt whatever the accountants said. He insisted that he saw Mr. Kavindele on the Visitor's Pass at page 9 of the plaintiff's Bundle of Documents although he has no similar documentary evidence for the other visits to Mr. Kavindele.

In re-examination he said that the notice of further and better particulars under para 3 states that the defendant has a copy of the said contract; that the document at page 1 of the defendant's Bundle of Documents does not in his understanding state that the amount of K2,101,327,817.26 was all that was owing to the plaintiff; and that the receipt that the defendant said was not received in the letter at page 7 is the one at page 5 of the same Bundle of Documents. This in summary is the evidence by the plaintiff.

Mr. Enoch Percy Kavindele, a businessman of Lusaka and chairman of the defendant company is the only defence witness. He testified that the defendant bought copper concentrates, cathode form from ZCCM Limited; that the payments were made in three instalments when they received the demand notice of payment; and that the defendant was given the receipts at pages 2 to 5 of the defendant's Bundle of Documents. He testified that they received a letter of demand from ZCCM Limited dated 3rd April 2002 stating that there was an overdue payment and that based on that letter they wrote back to ZCCM the letter at page 7 of their Bundle informing them that they did not owe any monies as the amount claimed had been paid in full as stated in the defence at page 64 of the defendant's Bundle of Pleadings. He said that there is a counterclaim at page 65 of the same Bundle and that he is adopting those calculations as his own. On the notice of further and better particulars at page 31 of the same Bundle of Pleadings, he said that the defendant has no copy of the contract because there was none at all.

In cross-examination by Mr. Chamutangi, counsel for the plaintiff he said that as far as he knows he met Mr. Kaite only once at the time he was the Republican Vice President. He admitted that he was still Vice President when he paid the sum of US\$50,000 and that he is the Chairman and Chief Executive Officer of the defendant company. He said that he received the letters that were sent to him and responded and that one such response appears at page 6 of the defendant's Bundle of Documents.

In relation to the letter at page 8 of the plaintiff's Bundle of Documents he said that he responded as he was travelling outside the country as Vice President and that he again responded by the letter at page 12 of the same Bundle. He said that all along the figures were disputed; and that he disputed the figures in his letter to his lawyers and indicated that the amounts claimed were paid. He admitted that there is nothing in his response to ZCCM-IH disputing the amounts.

In re-examination he stated that in the letter at page 6 of the defendant's Bundle of Documents addressed to the plaintiff, he was disputing the demand letters that were sent to him; and that he also disputed the claim when he wrote to his lawyers the letter at page 7 of the same Bundle. This in brief is the defendant's evidence.

Both sides have filed written submissions. In addition counsel for the defendant has filed a list of authorities, for which I am most grateful. In her submissions Ms. Namwinga, who is also counsel for the plaintiff, has alluded to the defendant's request for further and better particulars and the plaintiff's notice for further and better particulars. She has also alluded to the dismissal of the case by the Deputy Registrar and the appeal to this court which was dismissed. Counsel has then submitted that at no time did the defendant dispute that the contract was in writing or that the defendant did not have in its possession a copy of the said contract or that the defendant did not owe the plaintiff.

She has urged that if the defendant did not owe the plaintiff the conditional appearance should have been followed by an application to dismiss the case because no money was owed; instead the defendant went on a tortuous exercise of trying to put hurdles in the way of justice. She has questioned why Mr. Kavindele was asking for further and better particulars if he knew that the contract was oral.

Ms. Namwinga has further submitted that the evidence on record is that there was an agreement between the plaintiff and the defendant for the sale of copper concentrates; that though there is no contract, there was a statement produced by the plaintiff's accounts department, at page 1 of the plaintiff's Bundle of Documents, indicating the debt owed; that when PW2 met with DW1 on 1st August 2002, the former asked the latter how the defendant intended to settle the outstanding debt of US\$1,896,924.00; and that DW1 did not dispute the debt, but he stated that what was demanded was more by US\$50,000.00 or US\$100,000.00 and offered to look at his records for some receipts to show that he had made some payments and that the account was not that large, but no receipts were forthcoming.

Counsel has also submitted that after the said meeting the plaintiff wrote to the defendant the letter at page 10 of the plaintiff's Bundle of Documents indicating the outstanding debt as US\$1,896,924; that there was no response prompting the plaintiff on 14th August 2003 to write another letter to the defendant as appears at page 11 of the same Bundle demanding for the said sum of US\$1,846,924.

She says that the defendant's reply at page 12 of the same Bundle shows that the US\$50,000.00 paid on 10th October 2002 was an instalment with monies still outstanding and that in the said letter the defendant did not dispute owing the plaintiff the sum of US\$1,846,924.00. Counsel says that if the defendant was of the view that it had cleared the debt as alleged, DW1 would have responded to the plaintiff's letters of 29th August 2002 and 14th August 2003 and categorically stated that he did not owe the amount disputed. Counsel contends further that in the meetings with the plaintiff the defendant would have denied that he owed the plaintiff any monies and that if he was genuine he would have produced receipts at the time or soon after the meetings showing that he had cleared all the outstanding amounts due to the plaintiff.

She contends that though the defendant is trying to convince the court that the amount indicated on page 1 of the defendant's Bundle of Documents is the contract amount, that amount is an instalment payment and that the letter merely states that the amount of K2,101,327,817.26 was due for payment at the time the letter was written. She says that this is proved by the fact that on 16th August 2002 the plaintiff's accountant wrote to PW2 as appears at page 1 of the plaintiff's Bundle of Documents indicating that as at 29th June 2000 the balance outstanding was K6,817,174,425.00 which was converted to US\$2,396,860.00 and that such a letter would not have been written had the defendant paid all the outstanding debt. In conclusion she has urged that the plaintiff has proved its case on a balance of probabilities and is entitled to the claim while the defendant has failed to prove its case and that the counterclaim should be dismissed with costs.

In his submissions, Mr. Sianondo has contended, in answer to the issues raised by Ms. Namwanga as to why further and better particulars were requested if the debt had been settled, that the defendant knew that the debt had been liquidated, but the plaintiff was still demanding for an unimaginable amount of money beyond the defendant's knowledge; that it later transpired that there was no basis upon which the said amount was being demanded as the amount had already been paid in full and in excess of what was owed to the plaintiff; and that the contract from which the plaintiff alleged the amount demanded originated from has not been produced because it does not exist.

Counsel has contended that the letter at page 1 of the defendant's Bundle of Documents is clear and does not require exotic interpretation as the plaintiff would like to give it; that it was a demand letter for the full amount which was to be paid; that there is no mention of it being an instalment; and that no witness in fact described it as such. He urged me to take the letter as it is and says that the defendant responded and over paid. Mr. Sianondo has refuted that the letter at page 12 of the plaintiff's Bundle of Documents was indicative of the fact that the defendant still owed the plaintiff.

He says that the letter does not refer to what number of instalment it was and has urged me to take it as a fact that there was no further amount paid beyond the letter which the plaintiff has referred to. He says that when the letter dated 18th August 2003 is read together with the one on page 6 of the defendant's Bundle of Documents dated 13th April 2004, it leads to the inescapable conclusion that the instalment referred to in the letter of 18th August 2003 is the last one; and that the defendant in the letter at page 6 disputed the debt by stating that full payment on the account had been made and that this was restated to the defendant's advocates in the letter at page 7.

On the law regarding the proving of cases in civil matters Mr. Sianondo has referred me to *Khalid Mohamed v The Attorney General* (1), *Wilson Masauso Zulu v Avondale Housing Project Limited* (2) and *Anderson Mazoka and Others v Levy Mwanawasa and Others* (3). Counsel contends that the burden to prove that the defendant owed the money is on the plaintiff; that the plaintiff has failed to discharge this burden as no contract has been produced to prove the amount being claimed; and that no document has been produced to counter the strength of the document at page 1 of the defendant's Bundle of Documents. He submits that the plaintiff's claim should be dismissed with costs as there is no evidence of convincing character to entitle the plaintiff to judgment.

On the non-production of a document where one party alleges that it exists, Mr. Sianondo has referred me to *K.B. Davies and Company (Zambia) Limited v Andrew Masunu* (4) and to *Lt Gen. Geojago Musegule v The Attorney General* (5). He submits that the accountants allege that they had the contract when they prepared handover to PW2 the Legal and Investments Manager and that the letter at page 1 of the plaintiff's Bundle of Documents, representing hand over was written on 16th April 2002.

He says that if the handover notes were found by the plaintiff and used as exhibits; the contract from which the alleged information was extracted ought to have been found as well. He argues that going by the Musengule case, non-production of the contract by the plaintiff must react against the plaintiff as regards the value of the contract; that the lacuna in as far as the absence of the contract is concerned should be resolved in favour of the defendant which is not responsible for that lacuna; and that the non-production of the contract has been caused by the plaintiff which alleges that it exists and wants to benefit from it.

In relation to the counterclaim counsel submits that the defendant has demonstrated that the amount of K19,422,182.74 was overpaid by the defendant to the plaintiff and that the same should be sustained and the plaintiff be directed to pay it back with interest. He has urged that the plaintiff's case should be dismissed with costs and that the counterclaim be upheld as prayed.

I have considered both the oral and documentary evidence and the submissions by both sides. On the evidence I find the following facts not to be in dispute:

- (1) There was a contract between ZCCM Limited and the defendant before ZCCM was privatised under which the defendant, whose Chairman and Chief Executive Officer is Mr. Enoch Percy Kavindele (DW1) bought copper concentrates from ZCCM Limited, the predecessor of the plaintiff. The contract has not been produced on the ground that it is missing.
- (2) At the material time the Contract Servicing and Payment Metal Exports and Sales Department was in charge of contracts and was mandated with the function of sealing the contracts which ZCCM Limited was engaging in and to see that contracts were honoured. The department no longer exists.
- (3) The payment for the copper concentrates bought by the defendant was to be in instalments. According to PW1 who was in the Finance Department the instalments started coming regularly, but in 2000 ZCCM Limited was disbanded.
- (4) ZCCM Limited was privatised around April 2000 and the change of name to ZCCM-IH occurred at the same time.

- (5) On 28th April 2000 one WL Kapambwe, Head-Contract Servicing and Payments Metal Exports and Sales Department wrote to the Managing Director of Woodgate Holdings Limited the letter at page 1 of the defendant's Bundle of Documents, reminding the latter that the sum of K2,101,327,817.26 was overdue for payment and that arrangements be made for immediate settlement. The letter does not refer to the contract price and does not refer to the overdue payment as an instalment.
- (6) Following the letter of demand at page 1 of the defendant's Bundle of Documents, the defendant made three payments, on 7th September 2000 in the sum of K500,000,000.00, on 1st November 2000 in the sum of K180,750,000.00, and on 11th December 2000 in the sum of K1,200,000,000.00, making a total of K1,880,750,000.00. The three receipts appear at pages 2 to 4 of the defendant's Bundle of Documents.
- (7) On 3rd April 2002, PW2 wrote to the defendant, the letter at page 7 of the plaintiff's Bundle of Document demanding payment of an outstanding debt of US\$1,950,430.00 (the amount claimed in the writ) and intimated that should the same not be paid by return of post, they shall issue court process to recover the said amount plus interest and costs.
- (8) On 10th April 2002 DW1 responded by the letter at page 8 of the same Bundle indicating that he was travelling out of Zambia for 10 days and would appreciate a meeting upon his return. At that time DW1 was the Republican Vice President.
- (9) On 16th April 2002, one P.M. Kumwenda, an assistant accountant at Lusaka wrote the letter at page 1 of the plaintiff's Bundle of Documents to the Legal Investment Manager (PW2) indicating details of the debt owed by the defendant and put the balance outstanding as at 29th June 2000 at K6,817,174,425 which was converted to US\$2,396,860.00. The letter indicated that the detail was in the May 2000 accounts and handover notes to the accounts by the Manager Finance ZCCM Limited and set out payments made by the defendant of K1,880,750,000.00 which was equated to US\$499,936.00.

- (10) The said letter also indicated that the balance in the revised accounts was US\$1,896,924.00 and that copies relating to the transaction were attached for ease of reference.
- (11) The document at page 2 of the plaintiff's Bundle of Documents has listed Woodgate Limited as one of the metal debtors as at 29th June 2000 and the amount of US\$2,396,860.00 or equivalent of K6,817,174,425.00 is indicated against Woodgate Limited.
- (12) Neither WL Kapambwe the author of the letter of demand at page 1 of the defendant's Bundle of Documents, nor PM Kumwenda the author of the letter at page 1 of the plaintiff's Bundle of Documents have been called by the plaintiff as witnesses.
- (13) On 1st August 2002 PW2 met DW1 at Cabinet Office as shown by the Visitor's Pass at page 9 of the plaintiff's Bundle of Documents. The issue of the outstanding debt was discussed and DW1 disputed the amount claimed by the plaintiff and offered to provide receipts, but did not do so.
- (14) On 29th August 2002, PW2 wrote another reminder to DW1 and put the outstanding debt at US\$1,896,924 as appears in the letter at page 10 of the same Bundle.
- (15) On 16th October 2002 the defendant paid a further amount of US\$ 50,000.00 as appears on the receipt at pages 5 and 14 of the defendant's and plaintiff's Bundles of Documents respectively which payment amounts to K240,000,000.00 following the rate of K4800 indicated in the letter at page 7 of the defendant's Bundle of Documents, which rate the plaintiff agreed to at trial, bringing the total amount paid by the defendant to K2,120,750,000.00.
- (16) The difference in the amount of K2,101,327,817.26 in the letter at page 1 of the defendant's Bundle and the total amount of K2,120,750,000.00 paid by the defendant is K19,422,183.00, which the defendant counterclaims as excess payment. The plaintiff continued to demand for payment of an outstanding debt of US\$1,846,924.00 as appears in the letter dated 14th August 2003 at page 11 of the defendant's Bundle.

- (17) In the letter dated 18th August 2003 which appears at page 12 of the same Bundle DW1 requested for the receipt representing the instalment payment of US\$50,000.00 made on 10th October 2002 and the receipt No. 00253 was sent on 4th September 2003 as appears in the letter at page 13 of the same Bundle.
- (18) Following further demands by the plaintiff for payment DW1 wrote the letters at pages 6 and 7 of the defendant's Bundle of Documents advising that full payment on the trading account had been made as evidenced by ZCCM receipts 19619, 19590, 19607 and 00253.
- (19) Subsequently, on 2nd January 2008 the plaintiff issued the current proceedings claiming for the sum of US\$1,900,430.00 in respect of the sale proceeds of copper concentrates to the defendant. The defendant denied the claim and counterclaimed the sum of K19,422,182.74.

In my view the issue for determination is whether the plaintiff has proved on the balance of probabilities that the defendant still owes the amount of US\$1,900,430.00 in respect of sale proceeds of copper concentrates. If the claim is clearly established then the defendant's counterclaim falls away. On the other hand, if the plaintiff's claim fails then the defendant's counterclaim should succeed.

As rightly submitted by Mr. Sianondo the burden is on the plaintiff to prove that the amount claimed is still outstanding. Indeed in *Khalid Mohamed v Attorney-General* (1) the Supreme Court held that a plaintiff cannot automatically succeed whenever a defence has failed; he must prove his case. Ngulube, D.C.J, (as he then was) in delivering the judgment of the Court refused to accept a proposition that even if a plaintiff's case has collapsed of its inanity or for some reason or another, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. He emphasised that quite clearly a defendant in such circumstances would not even need a defence. I agree entirely with that holding.

Ngulube, DCJ, restated that same principle in *Wilson Masauso Zulu v Avondale Housing Project Limited* (2) at page 175 lines 16 to 20 as follows:

"I think that it is acceptable 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."

Further as submitted by Mr. Sianondo, the two cases cited were considered with approval in *Anderson Mazoka and Others v Mwanawasa and Others* (3) when the Supreme Court held that as regards burden of proof, the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity.

In the present case, the fact that the defendant applied for further and better particulars of the statement of claim instead of applying to dismiss the matter after entering conditional appearance, does not in my view, establish that the amount claimed by the plaintiff was still owed. As submitted by Mr. Sianondo the defendant was prompted to ask for further and better particulars because it believed that the debt had been liquidated in full and in excess and did not understand where the plaintiff got the figures it was demanding.

Para 18/12/2 RSC 1999 states clearly that the requirement to give particulars reflects the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly, without surprises and, as far as possible, so as to minimise costs. Further, the said para states that the purpose of pleadings is not to play a game at the expense of the litigants, but to enable the opposing party to know the case against him, and that there is a tendency to forget this basic purpose and to seek particulars which are not necessary when in truth each party knows the other's case.

In this case, it is clear from the evidence, that the learned Deputy Registrar made an order for the plaintiff to supply further and better particulars of the statement of claim which culminated in the notice of further and better particulars at page 31 of the defendant's Bundle of Pleadings. Under para 3 of the said notice, the plaintiff stated that the transaction took place on an unknown date in Lusaka and that the full purchase price cannot be stated because the contract went missing following the privatisation of ZCCM Limited and that the defendant has a copy of the said contract. The plaintiff also stated that the contract was in writing and that the parties were ZCCM Limited on one part and Woodgate Holdings Limited on the other part.

Further, under para 4 of the notice, the plaintiff stated that the actual debt owing by the defendant is the sum of US\$1,900,430.00 and not US\$1,850,430.00, being the balance of the full purchase price. It is quite clear that to prove its case the plaintiff is relying heavily on the documents at pages 1 and 2 of its Bundle of Documents and the many efforts made by PW2 to recover the debt. In my judgment the author of the document at page 1 should have been called as a witness to explain to the court how he arrived at the balance outstanding as at 29th June 2000 of K6,817,174,425.00 or the equivalent of US\$2,396,860.00, which amounts also appear in the handover notes at page 2.

Although the fact that PM Kumwenda, assistant accountant gave PW2 the amounts indicated in the two documents as still owed may not be in dispute, this court cannot, without the evidence of the author of the documents, accept as the truth the fact that the amount of US\$1,896,924.00 remained outstanding after the defendant had settled the total amount of K1,880,750,000.00, which payments are supported by receipts. In my view the balance outstanding of K6,817,174,425 shown in the documents at pages 1 and 2 of the plaintiff's Bundle of Documents is nothing, but hearsay. Admittedly PW2 had no personal knowledge of the figures; he simply relied on the figures as given to him by the accountant.

I also strongly believe that WL Kapambwe should have been called to explain the contents of the letter at page 1 of the defendant's Bundle of Documents. It is a fact that the letter of demand does not refer to the overdue payment of K2,101,327,817.26 as an instalment nor does it refer to any other outstanding amount or balance. On the evidence WL Kapambwe was the Head-Contract Servicing and Payments Metal Exports and Sales Department, the department mandated to ensure that contracts engaged in by ZCCM Limited were sealed and honoured.

As conceded by PWs 1 and 2 this is the person in the best position to tell this court what actually transpired; as head of department he must have been directly involved in the transaction. Unfortunately for the plaintiff the two witnesses have been omitted for reasons best known to it. There is no evidence before me that the two witnesses have left employment or are dead or could not be found.

Suffice to add that the plaintiff's claim involves a colossal amount of money, but the evidence has been presented in a casual manner, omitting two crucial witnesses, without whose testimony I am inclined to accept the defence evidence that the amount of K2,101,327,817.26 was the only outstanding amount on that account.

On the non-production of the contract on the basis that it missed during the privatisation of ZCCM Limited, as properly submitted by Mr. Sianondo this must react against the plaintiff. Although Ms. Namwinga has submitted that the defendant never disputed that the contract was in writing, and there is evidence that the defendant has a copy of the contract, it is a fact that the contract has not been produced. I am inclined to agree with the defence that if the handover notes at page 2 of the plaintiff's Bundle of Documents were found by the plaintiff in April 2002, two years after the privatisation of ZCCM Limited and used as exhibits, the contract or other documents from which that information was extracted ought to have been found and produced.

I have made the point that the plaintiff has alleged that the defendant has a copy of the contract. On the other hand the defendant says that there was no contract as it never existed. Before me there is no documentary proof of when the defendant obtained a copy of the contract or what the other terms of the contract were. Even if I were to accept the plaintiff's position that the contract was in writing that would not shift the burden on the defendant to prove that it does not owe the amount claimed by the plaintiff. PW1, the plaintiff's own witness has admitted clearly that there is a lacuna in the plaintiff's evidence and that there is no basis for the balance of US\$1,950,430.00 stated in para 4 of the statement of claim.

To borrow from the language of the Supreme Court in *K.B. Davis and Co. (Zambia) Limited and Andrew Masunu* (4) referred to me by Mr. Sianondo, even if I accepted, which I have done, that there is a lacuna in the evidence presented by the plaintiff, the trite position is that I should resolve that lacuna in favour of the party who was not responsible for that lacuna and in this case it is the defendant. I equally adopt what my learned brother Mr. Justice Mwanamwambwa, now Supreme Court Judge said in the case of *Lt. Gen. Geojago Musengule v Attorney General* (5) and apply it to this case.

Of course, PW1 also rightly conceded in cross-examination that if the plaintiff does not know the contract price of the copper bought by the defendant, it cannot know the balance outstanding; and that the people in the contract department were better placed to know. These are the people that have not been called to testify, as I have said for reasons best known to the plaintiff.

There is then the argument by the Ms. Namwinda that the defendant did not at any time dispute indebtedness to the plaintiff and that when DW1 met with PW2 he only said that the amount was less by US\$50,000 or US\$100,000. In my judgment it is a fact that PW2 met with DW1 on 1st August 2002 as shown by the Visitor's Pass at page 9 of the plaintiff's Bundle of Documents and PW2 testified that on the occasions he met with DW1 there was no indication that he would not settle the amount and that DW1 felt that there was an amount to be knocked off and that the amount should be about US\$1,700,000. I am inclined to believe that the two may have met on other occasions as stated by PW2 although in the absence of documentary evidence, DW1 denied any other subsequent meetings.

However, there is documentary evidence although it was written subsequently, showing that the defendant has disputed indebtedness. This is seen in the letters at pages 6 and 7 of the defendant's Bundle of Documents in which DW1 advised the assistant legal officer and Malambo and Company respectively that full payment had been made as evidenced by the receipts produced. The defendant continued to dispute indebtedness in the defence filed in these proceedings. DW1 may not have provided receipts to the plaintiff to show that he had made some payments as he told PW2, but that cannot be conclusive of the defendant's indebtedness in the amount claimed.

Moreover, there is one piece of evidence by PW1 which I think is of vital importance. This is that following the contract or transaction between the plaintiff and the defendant, instalments started coming regularly until ZCCM Limited was disbanded. For me this is a clear indication that the defendant had made payments towards the debt before the letter of demand at page 1 of the defendant's Bundle of Documents was written. It is also quite clear to me that the letter of demand was written before the privatisation of ZCCM Limited, a fact categorically stated by PW1.

However, the difficulty I have in my judgment is that there is no evidence of the actual contract price or the total amount paid by the defendant before ZCCM Limited was disbanded. It seems to me that different figures have been given by the plaintiff in the letter at page 1 of the plaintiff's Bundle of Documents, in the writ and statement of claim and in the letters of demand to the defendant. The lacuna in the evidence shall again react against the plaintiff.

On the whole of the matter, I am not satisfied that the plaintiff has proved on a balance of probabilities that the defendant is indebted to it in the sum of US\$1,900,430 as an outstanding balance in respect of sale proceeds of copper concentrates. In conclusion on this aspect of the matter and regrettably so, the plaintiff's claim fails and is dismissed with costs to the defendant.

I turn lastly to the defendant's counterclaim. On the evidence before me, it is a fact that an excess amount has been paid by the defendant amounting to K19,422,183.00. This represents the difference between the amount of K2,120,750,000.00 paid by the defendant and the K2,101,327,817.26 in the letter of demand at page 1 of the defendant's Bundle of documents. As PW1 admitted, in so far as the demand letter is concerned this amount must be returned to the defendant. Having dismissed the plaintiff's claim, and on the totality of the evidence, I am satisfied that the defendant is entitled to recover the amount overpaid to the plaintiff. Accordingly I enter judgment in favour of the defendant for the amount of K19,422,183.00 with interest at 10% from the date of writ to the date of judgment, with costs to be taxed if not agreed.

Delivered in Open Court at Kitwe this 18th day of March 2011

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R.M.C. Kaoma
JUDGE