

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

2013/HP/1433

(Civil Jurisdiction)



BETWEEN:

CHRISPIN MWABA *(t/a Maxpac Group Investment)*

PLAINTIFF

AND

DAVID ZULU
SOLOMON SIMUSOKWE

1ST DEFENDANT
2ND DEFENDANT

Before the Hon. Mrs. Justice F. M. Chisanga, thisday of2015.

For the Plaintiff:
For the Defendants:

JUDGMENT

Cases referred to:

- 1. Wilson vs Biry 5 QBD 518.**
- 2. Elpis Maritime Co Ltd vs Marti Chartering Co inc The Maria D (1991)**
- 3 ALL E.R. P. 758.**

This is an action for the sum of K 39, 800. It is averred that the second defendant introduced the first defendant to the plaintiff, claiming he was his business associate and colleague, specialized in the sale of laptop computers and cellphones.

At the meeting, the 1st defendant, placed an order with the plaintiff for the supply of laptop computers and cellphones for the total consideration of K 30, 000. The plaintiff supplied the 1st defendant with those goods in the month of June, 2013, and it was an express term of the agreement that the 1st defendant

would settle the whole amount in two monthly installments of July and August 2013: However, the 1st defendant only paid a paltry K 3, 200, leaving an outstanding balance of K 26, 300.

The plaintiff has made several futile attempts to recover the balance from the 1st defendant and his guarantor. In that quest, the plaintiff, who is temporarily resident in the Republic of South Africa has incurred transport, accommodation and upkeep costs now totaling K 13, 500. The plaintiff hence claims the sum of K 39, 800 from both the 1st and 2nd defendant.

The defendants have denied the claim, by Defence and Counter Claim filed on 21st October, 2013. They deny having ever had a business meeting with the plaintiffs. All business arrangements both on the phone and by internet were between the defendants and one Favour Mutale.

The defence is not clearly drawn, but it appears that some items were returned because of defects. It is averred that 1 Acer projector was used, while 1 Sumsung S3 and 2x hp laptops were sold on credit, though faulty. The said Favour Mutale was informed that the Samsung S4 was not an original one.

It is averred that the plaintiff only introduced himself on 4th August, 2013, as the financier of the business when Mr. Favour Mutale was informed that 7 laptops were returned by the NGO which ordered them for lack of funding.

It is counter claimed that on 2nd October, 2013, the said Favour Mutale held a meeting with the defendants where he asked them to ignore the plaintiff and start selling the retuned laptops one by one. The defendants therefore claim an order to compel the plaintiff and said Favour Mutale to collect the 7 laptops as there were no immediate buyers of those laptops.

When the matter came up for hearing on the 29th October, 2014, the plaintiff informed the court that he was ready to proceed although the 1st defendant was deceased. No evidence of his death was placed before me.

He testified that he supplied seven (7) new Lenovo laptops for K 3, 000 each, two (2) second hand laptops at K 2, 800, and three (3) Samsung S3 Galaxies valued at K 3, 000. He incurred transport costs of approximately K10, 000, legal costs in the sum of at least K 5, 500 and communication costs in the sum of K 200.

When cross examined by the 2nd defendant, the plaintiff said his company had dealt both directly and indirectly with the 2nd defendant and Mr. Zulu. Mr. Zulu would indicate 'we' in his communication to the plaintiff, in apparent reference to the 2nd defendant and Mr. Zulu. That contact was being made at the 2nd defendant's place of work signifying that the 2nd defendant was working together with Mr. Zulu as indicated verbally. He said Mr. Zulu communicated to the plaintiff by telephone and email, but communication was also made through the 2nd defendant, who was the point of contact. That he in fact availed the plaintiff Mr. Zulu's contact details. The plaintiff conceded he did not sit down with the 2nd defendant but they did communicate. That the 2nd defendant indicated that he worked with Mr. Zulu. The plaintiff said he had pursued the matter collectively as the defendants operated as an entity. He said the 2nd defendant's argument was that he did not know the plaintiff in the transaction because the person he had dealt with was Favour and the plaintiff explained to the 2nd defendant that he was an employee, just like the plaintiff.

That even though the Doctor was in the forefront in making the payments, the 2nd defendant could not deny his involvement.

In re-examination, the plaintiff said he was insisting that he traded as a business, so everyone involved in the supply chain was part of the business. So the second defendant could not deny it, simply because the plaintiff was not the first point of contract to deliver the goods. That all documents had been delivered through the 2nd defendant.

The plaintiff did not call any witnesses.

The second defendant testified in his defence. He testified that he knew one Favour Mutale in 2013. The said Favour used to supply the 2nd defendant with second hand phones from South Africa. A Dr. Zulu, a good friend of the 2nd defendant, indicated that an organization needed laptops and phones. Favour who lives in South Africa, was around at that time. So the 2nd defendant called Favour to meet Dr. Zulu at a shop at Downtown. The 2nd defendant introduced the two and asked Favour if he was capable of supplying phones to Mr. Zulu. Favour agreed with Dr. Zulu that he would supply laptops to the latter. Favour delivered the laptops at the 2nd defendant's shop, when the latter was not around. He communicated with Mr. Zulu, asking him to pick the laptops up. He also informed the 2nd defendant, who was the point of contact only.

The 2nd defendant was informed Favour delivered seven (7) new laptops and two (2) old ones. The 2nd defendant was informed that payment would be made the following month end. Before the end of the month however, Mr. Zulu informed Favour Mutale that the money was not ready. After that month end, Favour started pressing Mr. Zulu for payment, who as a result decided to withdraw the items supplied as they had not been opened, having not been paid for. He retrieved the computers, and Favour Mutale collected the computers.

Thereafter, the 2nd defendant was served with summons. It was not the supplier of the computers who brought the summons. The 2nd defendant was surprised to be sued by someone he never dealt with and when the supplier had collected the goods. The 2nd defendant said he was not involved in this deal, but just brought the two parties together. The transaction was between Favour and Mr. Zulu.

When cross examined, the 2nd defendant said the plaintiff was introduced to him by Favour as Favour's brother. He was not introduced as owner of the business that supplied all the goods including the watch. He was introduced when Favour took a watch and neck chain to the defendant. The only time the

plaintiff called was when he took some money to the 2nd defendant, saying he was part of the business. He maintained that the goods delivered to Mr. Zulu by Favour were returned and collected by Favour who the 2nd defendant knew as the owner of the business. The 2nd defendant did not know that Favour got the computers from the plaintiff. The 2nd defendant equally closed his case.

I have considered, the testimony tendered by both parties, as well as the documents filed in the plaintiff's bundle of documents, as reference was made to communication by the plaintiff and 1st defendant. At page 1 of the plaintiff's bundle of documents is a request for a quotation addressed to the plaintiff's firm, by David Zulu, dated 19th July, 2013, at 13:17 hours. The email was sent to mwaba@maxpacgroup.com, the plaintiff's firm.

It was addressed to Favour, requested him to quote and supply David Zulu with laptops of corporate standard SPECS x 10, Mobile phone x 5, specifically winding galaxy S3 or S4, and a projector for mobile use, if possible, rechargeable ones, x 2.

That email was acknowledged on 19th July, 2013, the same date, at 3:53 PM, by both Chris/Favour, who stated that they would revert with the necessary costings by the end of the day, and that they preferred a cash on delivery transaction. David Zulu responded on the same date at 19:00 hours by indicating that the order would not be cash on delivery (COD) and that as discussed, his buyers would pay half at the month end and the balance by mid-August.

On 29th July, 2013, at 3:45 pm, Chrispin Mwaba wrote an email to Dr. Zulu, confirming the arrival of Favour Michael Mutale in South Africa, and successful delivery of goods as agreed into Dr. Zulu's care. He also reminded Dr. Zulu of the anticipated payment on 31st July, as indicated by Dr. Zulu, and the balance by mid-August.

David Zulu responded to the email on 30th July, 2013, by stating that Favour appeared not to have relayed the correct picture on the ground concerning the goods sent by the plaintiff. He stated that the order was unsatisfactorily executed. Only 7 laptops were delivered, instead of 10. Only 3 phones were delivered instead of 5 and 1 rechargeable projector. He wrote that these goods did not meet David Zulu's client's expectation, and were not delivered until the shortfall of 3 laptops of similar specifications as the 7, a rechargeable power pack for the projector and the remaining 2 phones were received from the plaintiff by Wednesday, 31st July, 2013, as promised by Favour. He explained that the client had lost interest in the phones because of the delay to supply, and the money used for something else. He further said that whereas K 500 had been indicated as the purchaser's commission per laptop, that position was not reflected in the documents Favour took to David Zulu for signing. David Zulu did not therefore sign them, but instead requested that they be redone to reflect the correct position. He also said he indicated to Favour that his clients needed 15 days in between payments because they use donor funds which are not always available. That David Zulu had dealt with them in that way since 2010, and that that meant that the first payment to him would be 15 days from the day of delivery and the final payment 15 days from the first payment.

On August, 1st, 2013, at 4:07 PM, Chris and Favour wrote back to David Zulu, apologizing for the miscommunication. They agreed that the initial agreement of K 500 commission per notebook stood. They also agreed to the 15 days window period before payment. They indicated they would collect the 3 Samsung phones and 2 HP laptops rejected by Dr. David (as they referred to him). However, if, as agreed with Favour, Dr. David found a buyer, he should feel free to go ahead and deposit the funds in the account whose details were given to him by Favour. He went on to say that the laptops could go at K 2, 800.00, and the phones at K 2, 800.

David Zulu wrote back to the plaintiff's firm, indicating the items were collected by the plaintiff, and confirming that the total monies to be paid was the total sum of K 21, 000, for 7 lenovo laptops at K 3, 000.

The documents referred to are in the plaintiff's bundle of documents, presumably filed after discovery and inspection. The contents thereof therefore, are common cause and were admitted in accordance with order 27 r4: RSC.

The email communication exchanged by the parties indicates that David Zulu's request for a quotation was addressed to the plaintiff's firm, as shown by the email address. The plaintiff responded to those emails, together with Favour. Therefore, both the plaintiff and Favour were involved in the deal, and it is clearly unsustainable for anyone to deny the plaintiff's involvement. It is said the second defendant was the contact person, while the 2nd defendant said he merely introduced Favour and David Zulu. From the evidence, it appears he was the contact person as the items, when delivered, were left at his premises. I use 'his premises' loosely, as it is not indicated whether these were rented or not.

Apart from his being a contact person, the 2nd defendant's involvement in the transaction is not disclosed on the evidence. It should be borne in mind that a contract is a deliberate engagement between competent parties, upon a legal consideration, to do or to abstain from doing some act, per Brett L.J, in **Wilson vs Biry 5 QBD 518**.

The emails were being sent by David Zulu, and nowhere in there is the 2nd defendant's name indicated. Those from the plaintiff contained both Chris and Favour's names. The mere fact of introducing two parties, who later conclude a business deal, cannot translate into personal liability, when the party introduced fails to perform his part of the contract.

It is claimed the second defendant was guarantor of the deal. That claim is not supported by the evidence. A contract of guarantee is unenforceable unless

there is an adequate memorandum signed by or on behalf of the party against whom the action is being brought. This is provided for in the statute of Frauds 1677 in section 4. See also **Elpis Maritime Co Ltd vs Marti Chartering Co inc The Maria D (1991) 3 ALL E.R. P. 758** where it was held that:

“A contract of guarantee could be made enforceable under S. 4 of the Statute of Frauds either by having a written agreement signed by the guarantor or his agent or by having a note or memorandum of the agreement, which could be oral, signed by a guarantor or his agent.”

The plaintiff was not present when the 2nd defendant introduced the 1st defendant to Favour. That being the case, I am left with no option but to take the 2nd defendant's word as true, as it has not been challenged. It is trite that he who asserts must prove his assertion. Mere use of the word 'we' cannot import the 2nd defendant in the business deal between the plaintiff and the 1st defendant, without more. The 2nd defendant says that when the items in issues were delivered, they were collected by the 1st defendant. I do not therefore see how the 2nd defendant can be held to be liable for the debt. The 2nd defendant says the returned items were collected by Favour. If that be the case, I do not see how the present claim can be sustained.

The elements of a contract between the 2nd defendant and the plaintiff have not been demonstrated. Nor have those pertaining to a guarantee by the 2nd defendant been shown. On the foregoing, I am not persuaded that David Zulu carried on business with the 2nd defendant. I thus find the claim unproved and dismiss it against the 2nd defendant with costs.

Dated the

6th

day of

May

2015



**F. M. CHISANGA
HIGH COURT JUDGE**