

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

2012/HP/0954



BETWEEN:

**ZAMBIA MUSIC COPYRIGHT
PROTECTION SOCIETY**

PLAINTIFF

AND

MOBI T.V. INTERNATIONAL

DEFENDANT

*Before the Hon. Mrs. Justice A.M Banda on theday of,
2015*

For the Plaintiff: F.M. Chani, Messrs Chongo Manda Associates.

For the Defendant: Sinkamba Legal Practitioners (N/A)

J U D G M E N T

Case referred to:

- 1. The Performing Rights Society Ltd v Francis Anthony Hicky
T/A Bar-B-Que Drive In Restaurant (1979) ZR 66 (HC).***

Legislation Referred to:

- 1. Copyright and Performances Rights Act, Cap 406 of the
Laws of Zambia.***

This judgment had been reserved to 29th August, 2014. However due to my work schedule as a result of my transfer, the same has delayed, a delay which is deeply regretted.

The Plaintiff, Zambia Music Copyright Protection Society (ZAMCORPS), by Wirt of Summons accompanied by a Statement of Claim, brought a suit against Mobi T.V. International claiming the following reliefs:

- a. An Order for the payment of K31, 000 (Rb) being Copyright Royalties due for the period between 8th January, 2007 and 7th January, 2012 as per invoices No 1713 dated 10th November, 2010, No 1712 of the same date, and 2069 dated 26th October, 2011;
- b. Further or other relief as the Court may deem fit;
- c. Interest on the amount found to be due at the current Bank of Zambia rate; and
- d. Costs.

In their Statement of Claim the Plaintiffs stated that they are a Collecting Society and a creature of an Act of Parliament whose mandate is to protect copyrights of local and international artists and to collect royalties on musical works on behalf of the artists. It was said that the defendant is a Television Station which provides music or advertises with music content to the general public.

It was the plaintiff's averment that it possesses deeds of assignment between itself and its local and international members, and that it had been agreed with these members that the Plaintiff herein shall collect monies in respect of the member's musical works.

It was averred that the Defendant has failed to pay copyright royalties for the music or music content it has been providing to the general public, hence the claim herein.

There was appearance and defence filed by the Defendant. In its defence under paragraph 4 thereof, the Defendant admitted paragraph 5 of the Statement of Claim only to the extent that it has not paid Copyright royalties to the plaintiff and that at trial, would aver that the Plaintiff is not entitled to royalties as the Defendant merely provides music on behalf of musicians who in turn are entitled to pay the Plaintiff royalties. All other claims were denied.

The Plaintiff in its reply joined issue with the Defendant on its defence. I must stated that despite various dates of hearing having been set and affidavits of service being filed, the Defendants, who were defended by Messrs Sinkamba Legal Practitioners, never showed up for the hearing of the matter. Eventually, I heard the Plaintiff's witness as the record will show.

PW1 was Mutale Kaemba, the General Manager for the Plaintiff, who had as at that time held the position for six years. He repeated in his testimony why the matter was before Court, namely, the inability by the Defendant to pay royalties for music used. It was his evidence that the plaintiff had been licensed to collect and distribute royalties on behalf of composers, authors and publishers

of music in Zambia and other jurisdictions who are the Plaintiffs members.

It was his evidence that the Defendant was approached on behalf of the members to pay broadcast royalties, and the defendant had promised to consider the documentation brought to their attention. To that effect, they had issued invoices as shown in the Statement of Claim, for the amount shown, and which documents appear in the bundle of documents. It was his evidence that the invoices had remained unpaid. He prayed the Court grants the reliefs sought.

The matter was adjourned for cross-examination of the witness by the Defendant, and continued trial. The record will show that not only were Court notices issued, but affidavits of service were filed, served and acknowledged by defence Counsel's Firm. However the Defendant, did not appear on any of the scheduled dates. Upon application by the Plaintiff's Counsel, I allowed the Plaintiff to close their case due to the non appearance by the Defendant and Counsel on three prior occasions. I asked the Plaintiff's Counsel to file written submissions in aid of their case.

In their submissions, the Plaintiff's Counsel reiterated the basis on which they made this claim and as appear in the Statement of Claim. They went further to state that the defendant had basically admitted not paying royalties. They then went over the evidence of PW1.

It was submitted that the role of Collecting Societies is to collect royalties on behalf of their members. Counsel went on to submit that a **“Collecting Society”** is defined by Cap 406 in Section (1), in the following terms:

“Collecting Society” means an association, partnership or body corporate whose principal purpose, or one whose principal purpose, is the representation of copyright owners in the negotiation and administration of collective agreements.”

Counsel went on to submit that the Plaintiff was formed by composers, authors and publishers of music, and is mandated by the Act and its members to collect royalties from business entities that communicate music to the general public in the course of their business through radio, television, jukeboxes, and satellite among others. Thereafter, Counsel submitted, the royalties are distributed to the owners of the music. Counsel contended that it was clear from the evidence on record that the Defendant has not been paying the requisite royalties to the Plaintiff, and that the Defendants had admitted as much in their defence. The Court was urged to grant all the reliefs sought.

I have carefully considered the evidence and submissions in this case.

As has already been stated, the Plaintiff is registered as a society with the Registrar of Societies as well as by the Ministry of Information and Broadcasting Services as a collecting society in line with the Copyright and Performances Rights Act, Cap 406 of the Laws of Zambia. Among its responsibilities, and as enumerated in Section 22 (1) of the above Act, the Society represents copyright owners in the negotiation and administration of collective copyrights agreements. Collective copyrights agreements have been defined in the Act under the cited Section as ***“an agreement between a group of owners of copyrights and another person licensing the person to use the material.”***

It is not in dispute that artists, like musicians, hold Copyrights in their works and that the use of their works by entities like the Defendant herein are subject to the payment of royalties. In most instances, the Collecting Societies are mandated to negotiate and administer agreements, collect royalties and distribute to the intended artists. However, to do so, they have to have been mandated by the copyright holder.

Section 22 (3) of Cap 406 is pertinent on this issue. It states that:

“The owner of a copyright may authorize a collecting society, (whether or not registered) to negotiate and administer collective license agreements on behalf of the owner and other copyright owners.”

The section goes further in subsection (4) to provide that **“subsection (3) shall not have the effect of limiting any other rights of an owner of a copyright under this Act.”**

The reading of the above section is that it is not mandatory for a copyright owner to authorize a collecting society to act on his behalf with regard to the particular copyright that he holds. Section 17(1) of the above cited Act would seem to confirm this position, as it talks about the owner of a copyright who shall have the exclusive right to do or authorize others to do any controlled act in Zambia, at sea or in a plane, namely, the broadcasting or inclusive in a cable program service and communication to the public by any means, among others.

Section 11(1) of the same Act states that:

“a Copyright shall be transferable by assignment, testamentary disposition or by operation of the law.”

Section 11(4) states:

“11.4. An assignment of a copyright shall be in writing signed by or on behalf of the assignor.”

As can be seen from the law, the Collecting Society, despite having a mandate to collect royalties, cannot do so if the owners of the copyright have not mandated them to do so. This fact was acknowledged by the Plaintiff under paragraph 3 and 4 of their Statement of Claim. In paragraph 3, it is stated that:

“3. The Plaintiff possesses deeds of assignment between itself and its local and international members.”

“4. The Plaintiff has agreed with its members that it shall collect all monies in respect of their musical works on behalf of members.”

From the above cited paragraphs, it is safe to assume that before the Society can collect any royalties on behalf of a copyright holder, that holder will have to have signed a deed of assignment, on which basis the society will collect royalties.

Secondly, that the royalties are collected on behalf of those copyright holders who are members of the collecting society and not just from any copyright holder. It is safe to assume that not every copyright holder is a member of the Collecting Society, though this, I am sure would be an ideal situation. It follows therefore that there are copyright holders who are not members of the Society, who may negotiate and administer their own copyrights directly with some users of their works.

As already alluded to, the Collecting Society can only collect royalties from entities such as the Defendant herein on behalf of its members, as there would be no basis on which they would anchor their demand to collect royalties, and how or to whom they would disburse it. It is therefore cardinal that in all instances, there must be membership and deeds of assignment. This is because there is

no automatic membership to the Collecting Society by a Copyright holder, and one can only come under its umbrella by virtue of membership.

Having said so, I now turn to consider the evidence on record. I must state at the outset that in their submissions, Plaintiff's Counsel did not point the Court to any Zambian case to buttress their case. Counsel stated that the Plaintiff holds deeds of assignment between itself and its local and international members; in which it was agreed that the Plaintiff shall collect all monies in respect of their musical works on their behalf.

In the case of **The Performing Rights Society Ltd v Francis Anthony Hicky T/A Bar-B-Que Drive In Restaurant (1979)**¹, a matter relating to an infringement, the Defendant had played three musical records in public without obtaining a license from the Plaintiff, who was the owner of the Copyright. The music played was ***"Kung Fu fighting", "House of Exile"*** and ***"Money won't save you."*** In support of the claim, PW1, an accountant with Lightfoot Advertising told Court that he was also the agent for the Performing Rights Society Limited, the Plaintiff. In dealing with that case Sakala J, as he was then stated:

"It will be observed from the evidence and the documents available that the only musical works specifically pleaded and testified to are the three records, namely "Kung Fu fighting", "House of Exile" and "Money won't save you." The

other musical works have not been named and this Court does not know them. The repertoire allegedly sent to the Defendant containing the other works the copyright of which is vested in the Plaintiff was not produced to this Court. In the circumstances, I cannot speculate or assume that the Defendant infringed any other musical works of which the copyright vests in the Plaintiff. It will also be observed from the bundle of agreed documents that in all the letters sent to the Defendant, the three records were not mentioned. It will also be observed that nobody from the Plaintiffs side specifically told the Defendant the records whose copyright he was infringing”

Sakala J went on to state that

“for my part, there was nothing impracticable or even impossible for the Plaintiff to produce the repertoire and list of its members for which they are seeking...royalty fees. At the least evidence of specific other works other than the three would have been adduced.”

I consider the above case to be on all fours with the matter in casu. I have carefully perused the record, including the evidence of the single witness, PW1. He never at any time laid before Court any of the deeds of agreement before Court as proof that indeed the Plaintiff holds those deeds by which it is mandated to collect royalties on behalf of its members. Further, the Plaintiff has not laid before Court any names of copyright owners on whose behalf they

purport to act, or indeed the titles of the songs which the Defendant used in its broadcast for it to be required to pay royalties. Even the correspondence exchanged between the parties as appear in the Plaintiff's Bundle of Documents at pages 1, 2, 6, 7 and 8 do not mention who their members are nor the copyright on which they claim royalties. The letter at page 1 is on synchronizing rights, at page 2 is on commitment to the Defendant's Copyright obligations and other administrative issues. The letter at page 6 is a demand letter from the Plaintiff's Counsel being **"for copyright royalties for music content that you have been providing to the general public."** One would have expected that in the letter of demand, there would have been an outline of the basis for the demand, other than what was said.

There is no indication in all the above as to whose music content the Defendant was providing to the public and what that music was. It will not suffice, in my opinion and as guided in the cited case to merely state that a Defendant must pay royalties. The Plaintiff ought to state with precision and certainty who they represent and the content which was alleged to have been used by the Defendant. The demand for royalties cannot be in a vacuum. It has to be specific as to the copyright owner, and his content, namely the music or works on which the demand for royalties is predicated or anchored. Sadly in this case, there is neither. Counsel did not indicate why this was not done. The Court will not therefore speculate as to the availability of the deeds of assignments held by

the Plaintiff and on whose behalf the same are held and or indeed what works the Defendant is supposed to pay royalties on.

The Defendant admitted that they have not paid royalties to the Plaintiff. They argue that infact they are not obliged to pay to the Plaintiffs, but rather that they promote music on behalf of musicians to whom they pay royalties for their works. This argument was not controverted, but sadly enough it was viewed as an admission of the nonpayment of royalties to the Plaintiff. My reading and interpretation of this assertion by the Defendant is that they are not obliged to pay to the Plaintiff but to individual musicians who they deal with directly as they want their music promoted. Obviously, if these individual right holders have not assigned their copyrights to the Plaintiffs, by way of deeds of assignment, which deeds the Defendant may not be aware of, there can be no basis on which the Plaintiff can claim royalties from the Defendant. In the above cited case, Sakala J, held that:

“Infringement is actionable at the suit of the owner.”

I want to believe that those individual right holders, who deal directly with the Defendant and who are not members of the Collecting Society herein if aggrieved by the nonpayment of royalties by the Defendant would sue for these royalties in their own capacities. This is because they have not assigned their copyrights to the collecting society.

To reiterate, there is no evidence before me of any assignment of rights by any copyright owner to the collecting society. There is also no evidence before Court of the content allegedly used or given to the public on which the demand for royalties is based.

In my judgment, this is not a case where it would be proper and justifiable to grant the reliefs sought by the Plaintiffs. The action by the Plaintiff is dismissed for lack of evidence.

Each party to bear their own costs. Leave to appeal is granted.

Delivered at Lusaka thisDay of, 2015.



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MRS. JUSTICE A. M. BANDA-BOBO
HIGH COURT JUDGE