

IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT MONGU
(CIVIL JURISDICTION)

2014/HT/08

GUENTHER WIDMAIER
(trading as M-J Bakery and Commodities)



PLAINTIFF

AND

MIYOBA CHAABA

DEFENDANT

CORAM : Honourable Mr. Justice M. M. Kondolo, Sc

FOR THE PLAINTIFF : In Person

FOR THE DEFENDANT : In Person

J U D G M E N T

AUTHORITIES

CASES

1. Anderson Kambela Mazoka and 2 others Vs Levy Patrick Mwanawasa and 2 Others (2005) ZR 172
2. Galaunia Farms Limited Vs National Milling Company Limited and National Milling Corporation Limited (2004) ZR 1 (SC).

TEXT

1. Phipson & Elliot, Manual of the Law of Evidence, 11th Edition (2001)

This is a matter in which the Plaintiff seeks the following reliefs:

1. *The sum of K64,560.20 being the balance due and owing from the Defendant to the Plaintiff in respect of the price of various Airtel products subcontracted to be sold by the Defendant on behalf of the Plaintiff pursuant to an oral contract made on 13th March 2014 between the parties herein;*
2. *Interest thereon at the current bank lending rate from the date of the Writ of Summons to the date of full payment or at such rate as the Court may determine, and;*
3. *Costs;*
4. *Further or other relief as the Court may deem fit and just.*

In his statement of Claim, the Plaintiff alleged that by an oral agreement made on the 13th day of March 2014 between the Parties, the Plaintiff subcontracted the Defendant to sell, on behalf of the Plaintiff, to the public various Airtel products all valued at ZK214, 305.00. He averred that the Defendant sold products worth ZK149,744.80 on diverse dates but has neglected or failed to account for the balance in the sum of ZK64,560.20 despite demanding payment by a letter to the Defendant dated 30th April, 2014.

The Defendant filed a Defence denying having received stock worth ZK214,305.00 but that the Plaintiff made one direct delivery to the Defendant valued at ZK79,825.00 and that the last two deliveries were made by third parties who tampered with the consignment. He further stated that the Plaintiff did not approach the Defendant for purposes of figuring out what had been sold and what remained unsold and therefore the amount was arrived at unilaterally. Lastly, he averred that the Plaintiff sent two people to collect the unsold products before conducting a stock-taking with the Defendant.

At the hearing, the Plaintiff testified that among other businesses he was an Airtel Distributor in Itezhi Tezhi. He engaged the Defendant to manage distribution on the ground in Itezhi Tezhi. He made an oral contract with the Defendant in the presence of 3 witnesses being 2 Airtel Representatives and a friend to the Defendant who had a bit of experience in selling Airtel

products. The Plaintiff informed the Court that the Airtel representatives and himself explained the conditions under which the Defendant was going to work. The Defendant was told how he would sell the products; at what price; his remuneration and it was emphasised to the Defendant that stocks should not be given to anybody on credit. The Plaintiff further explained to the Defendant how he would deposit money into the Plaintiff's ZANACO business account.

After the briefing, they went to the house where the Defendant lived with his parents and briefed his parents on the contract they were about to execute with Defendant. A safe was mounted onto his bedroom wall and stocks worth ZK79,825.00 were handed over to the Defendant via the first delivery note of which he acknowledged receipt. The Plaintiff told the Court that the 2nd and 3rd consignments were sent through a representative in Mumbwa and that there were always 2 copies of delivery notes, one of which was to remain in Itezhi Tezhi and the other with the Plaintiff.

The Plaintiff explained that another mode of delivery of airtime was by way of an electronic top-up directly to a phone number that the Defendant sent on the understanding that the Defendant had already received payment from the customer who required the top-up.

He further stated that in the first 2 weeks the Defendant deposited money into his account on a regular basis but slowed down in the 3rd week. He said he still sent the third consignment to the Defendant but he also decided to go there physically to reconcile the figures. He added that between the 10th and 20th April, he sent his son Daniel there to reconcile the stocks and figures with the Defendant of which a handwritten reconciliation was arrived at together with the Defendant.¹

Lastly, the Plaintiff further explained that he only received the total sum of ZK149,744.00 including stocks returned from a total delivered of ZK214,305.00 leaving a balance of ZK64,560.02 which the Plaintiff now claims from the Defendant and is clearly shown by the delivery notes exhibited in the Bundle of Documents.

¹ Plaintiff's Bundle of Documents, p7

In cross examination the Plaintiff maintained that the Defendant received the quantities in the 1st delivery note and he signed for them. He said he was not aware that the Defendant sold the consignment without shortage but maintained that deposits were not made on the basis of consignments but on the basis of sales. He further added that he could not know when a consignment was exhausted. When pressed as to why he sent the next consignment, he retorted that it was normal to stock up before the existing consignment was exhausted. He agreed with the Defendant that if the disparity was very large he would not have sent the next consignment, but added that he could not be accurate to the last kwacha.

In further cross examination, he was asked why he trusted the couriers in Mumbwa and the Plaintiff responded by saying that the Defendant was supposed to count and verify the products upon receiving them and in this instance, the Defendant had signed the delivery notes and sent them back to the Plaintiff. The Plaintiff denied having been told by Mr. Chunga, the agent from Mumbwa, that he had removed some phones and sim cards from the consignment worth K15,000.00. He agreed that the said Mr. Chunga carried out an audit before his son went to see the Defendant.

The Plaintiff closed his case.

The Defendant did not call any witnesses but he testified that on 13th March, 2014, the Plaintiff travelled to Itezhi Tezhi and engaged him to sell Airtel products for him and left products worth ZK79,000 which he signed for. The agreement was that all monies from the sales were to be deposited into the Plaintiff's ZANACO account.

On 28th March 2014 he said he phoned the Plaintiff and told him he was running out of scratch cards and asked him to send more and subsequently Mr. Chunga came in the evening and he brought in the second consignment of Airtel products worth ZK69,000 plus and he signed for it.

He told the Court that on 8th April 2014 he called the Plaintiff and requested for ZK1.00 scratch cards and on 9th April Mr. Chunga took the products to the Defendant and told him to sign on a paper as he was rushing to Lusaka. The Defendant said that he signed on the paper without

counting the product which was worth about ZK53,000 plus. When asked by the Defendant why some of the product was missing, Mr. Chunga told him that he sold them in Mumbwa and apologised for not telling the Defendant earlier. Mr. Chunga told the Defendant that he would go to Itezhi Tezhi to reconcile the 2nd and 3rd consignments.

The Defendant told the Court that he later sent ZK1,000 of the Plaintiff's money to Mr. Chunga who promised to pay back within 3 days. He added that he finally met with Mr. Chunga who told him, after an audit, that he had a shortage of ZK19,000.

He further testified that Mr. Chunga asked him for talk time of ZK15,000 since he had run out of talk time in Mumbwa so that he sells it there and promised to bring the said amount together with the money for phones and talk time he got from the 2nd consignment, which value the Defendant did not know. He continued selling the products until Danny conducted an audit and informed him of a shortage of ZK64,000 plus and the Defendant explained to Danny that he gave Mr. Chunga talk time worth ZK15,000 and he also told him about the phones and sim cards Mr. Chunga had kept. Danny said he wasn't aware of those transactions and told him to contact Mr. Chunga and ask him to send the things that very day. The Defendant said that he failed to contact Mr. Chunga until a few days later when Mr. Chunga called him saying that he would go to Itezhi Tezhi.

The Defendant informed the Court that the same evening he was called to Itezhi Tezhi police station where he was told that there was a complaint about the shortage and he was placed in the cells.

In cross examination, the Defendant admitted that the signature on the 3 delivery notes as well as the reconciliation was his. He said that despite the fact that he signed the reconciliation, paragraph 4 of the Defence showed that he denied the allegation of failing to account for K64,560 because the reconciliation was not done with the Plaintiff but with his son.

When asked why he stopped depositing monies as agreed he said that he kept the money because he had a funeral but after the funeral he deposited K35,000 plus. He said he

remembered the warning that no stocks should go out on credit but maintained that he gave Mr. Chunga the products on credit under the belief that he was the Defendant's boss. He added that he told Danny about the products given to Mr. Chunga and that's why he did not tell the Plaintiff.

In further cross examination, the Defendant agreed that the 3rd consignment was ZK69,000 plus and that the whole problem arose because Mr. Chunga removed items from the consignment and that he was unable to notice the K64,000 as he didn't know how many phones were missing. It was put to him that the shortfall on the 3rd delivery was ZK2000, ZK15,000, ZK1,000 and ZK675 which added up to a shortage of only K19,000. The Defendant replied that it simply meant that Mr. Chunga had been doing it since the first consignment.

The Defendant said it was possible for half the consignment to be missing without him noticing it and still sign for it. In closing the Defendant clarified his statement in paragraph 5 of his Defence that he meant that Danny and the other boy were sent to collect the stock.

The Plaintiff in his Arguments though not citing any points of law, pointed out that 2 consignments of the stock were sent to the Defendant through Mr. Chunga who was an Airtel Sales Representative and that the Defendant made no deposits after the last deposit as he claimed he did. The rest of his arguments were evidence obtained by the police in their criminal investigations which I shall not delve into.

The Defendant on the other hand did not file in any arguments to support his defence.

I have considered the evidence on record and the arguments of the Plaintiff and I find that the following facts are not disputed, namely:

- i) That there was an agreement between the Parties dated 13th March 2014 for purposes of selling various Airtel products;
- ii) That the Defendant received the 1st consignment delivered directly by the Plaintiff in the amount of ZK79,825.00 and he signed a delivery note to this effect;

- iii) That a reconciliation conducted by the Plaintiff's son Danny and the Defendant showed that there was a shortage of ZK64,000.

The facts that remain disputed are as follows:

- i) The 2nd and 3rd consignment of products delivered by a third party, one Mr. Chunga, were not accurate as some products were missing and were not reflective of the amounts on the delivery notes signed by the Defendant;
- ii) The Defendant disputes responsibility for the shortage of about ZK64,000 on the basis that Mr. Chunga is responsible for the missing products.

It is rather unfortunate that the Defendant did not file in a bundle of documents to support his evidence and his predicament is compounded by the fact that he did not dispute the production of the documents in the Plaintiff's bundle of documents which I have considered as part of the evidence on record.

The Defendant in his own testimony has admitted to having signed the delivery notes on pages 3, 4 and 5 as well as the Reconciliation exhibited at page 7 which confirms the shortage of ZK64, 792. It is rather difficult to understand why he is disputing having received the products to the amounts indicated thereon when he signed for them confirming that the details were correct. The Defendant has not adduced any documentary evidence to support his evidence that he deposited the sum of ZK34,000 as he stated in examination in chief or that he made a record of the products he had received after he noticed a shortage in the 2nd and 3rd consignments from Mr. Chunga.

It is trite law that he who alleges must prove the allegations. The Learned Authors of *Phipson & Elliot, Manual of the Law of Evidence*², appropriately stated this position as follows:

"The general rule is that a party upon whom the persuasive burden of proof rests (i.e. usually the Plaintiff) is entitled to a verdict if his evidence establishes a preponderance of

² Phipson & Elliot, Manual of the Law of Evidence, 11th Edition (2001)

probability in his favour, i.e. if he persuades the tribunal of fact that his version of the facts is more probable than that of his opponent”.

This position has been aptly stated on numerous occasions by our very own Supreme Court in the cases of **Anderson Kambela Mazoka and 2 others Vs Levy Patrick Mwanawasa and 2 Others**³ and **Galaunia Farms Limited Vs National Milling Company Limited and National Milling Corporation Limited**⁴.

In as much as the Plaintiff alleges in his Statement of Claim to have given the Defendant products of ZK214,305, the evidence on Record, that is, the delivery notes signed by the Defendant, shows that the amount received was in fact ZK202, 800 comprising of ZK79,825, ZK53,000 and ZK69,375. In light of the overwhelming documentary evidence submitted by the Plaintiff, I am satisfied that the Defendant did in fact receive Airtel products valued at ZK202, 800.

With respect to the second issue, the Defendant has alleged that when the reconciliation was carried out, he informed Danny that he had given some products to include airtime worth ZK15,000 , phones and smart cards to Mr. Chunga. The said Danny denied having been aware of these transactions. I have looked at the record and as I have stated there are no documents adduced by the Defendant to support his evidence. However, the Plaintiff at page 7 of his Bundle of Documents exhibited a reconciliation which was carried out by his son Danny and the Defendant. The Defendant in cross examination admitted to having signed the Reconciliation therefore admitting the details thereon and consequently admitting to the shortage of ZK64,972.52.

The Defendant has failed to adduce any documentary evidence to rebut that of the Plaintiff's and having admitted to signing the delivery notes and the Reconciliation, I am satisfied that the

³ Anderson Kambela Mazoka and 2 others Vs Levy Patrick Mwanawasa and 2 Others (2005) ZR 172

⁴ Galaunia Farms Limited Vs National Milling Company Limited and National Milling Corporation Limited (2004) ZR 1 (SC).

Plaintiff has proved his case on a balance of probabilities and I find that the Defendant, does indeed owe the Plaintiff the amount of ZK64,972.52 as monies that were not paid back in accordance with the agreement between the Parties.

The Plaintiff's case succeeds and is granted the following reliefs;

1. The Defendant must pay the sum of ZK64,972.52 being the balance due and owing to the Plaintiff .
2. The awarded sum shall attract interest at the average short-term bank deposit rate from date of writ to date of Judgment and thereafter until date of payment, at the current bank lending rate as determined by Bank of Zambia.
3. Out of Pocket Expenses incurred by the Plaintiff in prosecuting this matter.

Dated at Lusaka this 02nd day of June, 2016



M.M.KONDOLO, SC
JUDGE