

**IN THE HIGH COURT FOR ZAMBIA**

**2016/HPC/0135**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

**(Civil Jurisdiction)**

**BETWEEN:**

**SHECHEM ENTERPRISES**



**PLAINTIFF**

**AND**

**PHONETECH TWENTY-FOUR WHOLESALE**

**DEFENDANT**

**Before the Hon. Lady Justice Irene Zeko Mbewe**

*For the Plaintiff:*

*Ms Mwabi Kasankwa of Messrs Mweemba Chashi and Partners*

*For the Defendant:*

*Mr. B. Chanda*

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## **JUDGMENT**

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### **Cases Referred To:**

1. *Esso Petroleum Co Ltd v Mardon (1976) 2 All ER*

### **Legislation Referred to:**

1. *High Court Act, Cap 27 of the Laws of Zambia.*
2. *Judgments Act, Cap 81 of the Laws of Zambia*
3. *Law Reform (Miscellaneous Provisions) Act Cap 74 of the Laws of Zambia.*

The Plaintiff by way of Writ of Summons dated 30<sup>th</sup> March, 2016 commenced this action against the Defendant herein for the following reliefs:

- 1. The payment of the sum of money of K200, 000*
- 2. Interest on the above sum at the current bank lending rate*
- 3. Damages for breach of contract*
- 4. Interest*
- 5. Costs*
- 6. Any further or alternative relief the court may deem fit*

In the accompanying Statement of Claim the Plaintiff averred that on or about September 2015 it entered into an oral contract with the Defendant whereof it gave the Defendant airtime vouchers worth ZMW200,000 and the Defendant gave two post-dated cheques in respect of the same transaction. That it was agreed that the Defendant would cover the amount on the said cheques on or before the 14<sup>th</sup> of November 2015, which was not done. The Plaintiff averred further that it has on numerous occasions reminded the Defendant to settle the debt but the Defendant has neglected to do so and has to date failed to honor the cheques or pay the value of

the airtime advanced to it. That the Plaintiff pursuant to the terms of the contract with the Defendant deposited the cheques which were dishonoured due to insufficient funds. The Plaintiff therefore contends that as a result of the Defendant's breach of contract it has suffered damage.

The Defendant filed a defence on 12<sup>th</sup> April 2016 in which he averred that the Defendant is a sole trader registered under the name Brian Chanda trading as Phone Tech Twenty-Four Wholesale, and not a limited company. The Defendant averred that he has been trading since 2010 and that the issuance of the ZMW200,000 cheque was collateral or security for the stock of airtime vouchers which the Defendant would collect and later pay for after selling the airtime vouchers.

The Defendant averred that there was no arrangement in place in respect to honouring the amount on the post-dated cheque on or before 14<sup>th</sup> November 2016. The Defendant averred that he only collected stock of airtime worth ZMW120, 000 from the Plaintiff and issued a security cheque of K200,000. The Defendant averred that the failure to pay the amount owed to the Plaintiff of ZMW120, 000



was not deliberate but due to the fact that on 26<sup>th</sup> February 2016 he was robbed at gun point and that Plaintiff's airtime vouchers worth ZMW75,000 together with ZMW126, 375 cash was stolen from him, which fact the Plaintiff is aware of. The Defendant averred that he has no obligation to pay the Plaintiff for the stock of airtime vouchers which was stolen.

When the matter came up for hearing on 9<sup>th</sup> January 2017, the Plaintiff called only one witness Lawrence Nkhosi (PW1) the Managing Director of the Plaintiff Company. PW1 filed a witness statement on 20<sup>th</sup> September 2016 which was submitted as evidence.

In cross-examination, PW1 testified that the Defendant's cheques are proof that the Defendant got airtime vouchers worth ZMW200,000 and conceded that there was no reference that the said amount was in respect to airtime vouchers. PW1 testified that the parties had been transacting prior to 2014, and that the business arrangements between the parties changed from time to time. PW1 testified that the cheques were issued as surety in case the Defendant failed to pay the Plaintiff.



In re-examination PW1 testified that what was agreed between the parties is that once the Defendant pays off the stock he collects, the Plaintiff would give him more stock of airtime vouchers. PW1 testified that when the Plaintiff reduced the stock to half the quantity of airtime vouchers, disagreements arose between the parties. PW1 reiterated that the Defendant was given stock of airtime vouchers worth ZMW200,000 in October 2015.

The Defendant called one witness Brian Chanda who did not file a witness statement. DW1 testified that he issued cheques to the Plaintiff as collateral and that the amount of ZMW200,000 on the cheques did not mean that it was equivalent to the airtime collected from the Plaintiff. DW1 testified that the quantity of airtime vouchers collected was dependent on how the business was running, and at the material time he was required to pay the Plaintiff within a week of collection of the airtime vouchers. DW1 testified that he would issue post-dated cheques to the Plaintiff. DW1 testified that PW1 did not alert him when depositing the cheques which eventually led to the dishonouring of the cheques

due to insufficient funds. That the Defendant defaulted after he was attacked by robbers, and duly informed PW1 about the robbery.

In cross-examination, DW1 testified that he had not filed any documents into Court as proof that the cheques given were not equivalent to the airtime vouchers collected from the Plaintiff. DW1 reiterated that the cheques issued and given to the Plaintiff were merely collateral and not equivalent to the stock of airtime collected. In regard to the cheques, DW1 was referred to pages 1 and 2 of the Plaintiff's Bundle of Documents and in this regard testified that the amounts on the cheques were independent of the airtime vouchers collected and that the cheques only served as collateral.

The parties were directed to file written submissions on 23<sup>rd</sup> February 2017 and 6<sup>th</sup> February 2017 respectively, but both did not comply with this directive.

It is common cause that the parties entered into an agreement whereby the Defendant would collect airtime vouchers from the Plaintiff, sell it and then pay the Plaintiff for the airtime vouchers collected. It is not in dispute that the Defendant herein admitted to



owing the Plaintiff a sum of ZMW120, 000 for the collected stock of airtime vouchers and upon application by the Plaintiff, judgment on admission was entered in favour of the Plaintiff on 10<sup>th</sup> June 2016 on the undisputed amount of ZMW120,000. It is not in dispute that the parties further agreed that the Defendant would be paying monthly installments of ZMW3,000 towards liquidation of the said admitted amount.

What is in dispute is whether the Defendant collected stock of airtime vouchers worth ZMW200,000 and whether he is in breach of his contractual obligation. The gist of the Plaintiff's claim is that the Defendant collected stock of airtime vouchers worth ZMW200,000 which the Defendant was supposed to pay for on or before 14<sup>th</sup> November 2016. Further, as surety the Defendant issued two post-dated cheques amounting to ZMW200,000 which were to be deposited in the event that the Defendant failed to meet his obligations. PW1 contends that when the Defendant defaulted, he proceeded to deposit the post-dated cheques but due to insufficient funds in the Defendant's account, the cheques were dishonoured due to insufficient funds. In this respect, the Defendant contends



that the Plaintiff failed to inform him that the post dated cheques were to be deposited.

The contestation relates to the value of the stock of airtime vouchers collected by the Defendant who averred that it was worth ZMW120,000 and not ZMW200,000 and that the post dated cheques issued were merely collateral and did not represent the amount of stock of airtime vouchers collected. The Defendant contends he was robbed of the airtime vouchers and consequently he defaulted in paying the sum of ZMW120,000 and as such he is not under any obligation to pay for the stock that was stolen.

It is trite law that he who alleges must prove. The learned Authors **Philpson on Evidence, 17th Edition** in paragraph 6 – 06 at page 151 state the following regarding the burden of proof in civil cases:

*“So far as that persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts that affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient*

*rule founded on considerations of good sense and should not be departed from without strong reasons.”*

The above principle is affirmed in the case of **Mohammed v Attorney-General**. The Plaintiff bears the onus of proving that the Defendant collected stock of airtime vouchers worth ZMW200,000 and has breached his contractual obligation. A perusal of the record at page 1 and 2 of the Plaintiff's Bundle of Documents shows that the Defendant issued two cheques No 000001 and 000003 dated 14<sup>th</sup> November 2015 in the sum of ZMW100,000 respectively totaling ZMW200, 000. The Defendant on the other hand contends that he only collected stock of airtime vouchers worth ZMW120, 000 but has not adduced any evidence to that effect.

From the foregoing, I am at pains to appreciate the Defendant's contention that the amount on the cheques is merely collateral and not a representation of the value of the stock of airtime vouchers collected. I opine that the amount of ZMW100,000 on the two cheques was not a random or coincidental amount written on the cheques by the Defendant. The amount of ZMW200,000 correspond to what PW1 testified as the value of the stock of airtime collected



by the Defendant. I am inclined to agree with the Plaintiff that the Defendant collected stock of airtime vouchers worth ZMW200,000 as indicated on the cheques, and the cheques were dishonoured due to insufficient funds as shown by the Cheque Return Advise Slip on page 3 and 4 of the Plaintiff's Bundle of Documents. I find the Defendant's argument that the cheques were mere collateral and had nothing to do with the stock of airtime vouchers collected, untenable.

The upshot is that I am satisfied that the Plaintiff has proved on the balance of probabilities that it is owed ZMW80,000 by the Defendant being the outstanding balance after the admitted sum of ZMW120,000.

The Plaintiff made a claim for damages for breach of contract. It is trite that a failure to comply with the terms of a contract whether written or oral amounts to breach of contract. Damages for breach of contract are compensatory by nature and are intended to put the claimant back in the same position as if the requirements of the contract had been performed.



The evidence on record shows that the Defendant breached its contractual obligations but attributed this to a robbery wherein the airtime vouchers were stolen. The Defendant on page 1 of its Bundle of Documents produced a Police Report in respect to the robbery. According to the said Report, talk time worth ZMW75,000 was stolen. The Defendant is under the mistaken belief that he is no longer under any obligation to pay for the airtime vouchers that were stolen. This argument by the Defendant is unmeritorious as the robbery does not in any way exempt him from performing his obligation towards the Plaintiff. I accordingly find that the Defendant herein is in breach of his contractual obligation towards the Plaintiff.

As a general rule, general damages must be strictly proved. The case of **Esso Petroleum Co. Ltd v Mardon**<sup>1</sup> is instructive where it was held that:

*“The damages available for breach of contract are measured in a similar way as loss due to personal injury. You should look into the future so as to forecast what should have been likely to happen if he never entered into the contract.”*

The Plaintiff has failed to adduce evidence in respect to the claim for damages for breach of damages and therefore this claim is without merit.

The Plaintiff further claims interest on the claimed amount. The law on awarding interest by the Courts in Zambia is provided in the **High Court Act, Cap 27, Judgments Act, Cap 81 and the Law Reform (Miscellaneous Provisions Act, Cap 74 of the Laws of Zambia** and decided cases. The said provisions empower this Court to make awards of interest. On the issue of interest, I am guided by **Order 36 Rule 8 of the High Court Rules, Cap 27 of the Laws of Zambia** which provides that:

*“Where a judgment or order is for a sum of money, interest shall be paid thereon at the average of the short-term deposit-rate per annum prevailing from the date of the cause of action or writ as the court or judge may direct to the date of judgment.”*

Further, section 4 of the **Law Reform (Miscellaneous Provisions) Act Chapter 74 of the Laws of Zambia** provides that:

*“In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that*



*there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.”*

Section 2 of the **Judgments Act Chapter 81 of the Laws of Zambia** provides to the effect that:

*“Every judgment, order, or decree of the High Court or of a subordinate court whereby any sum of money, or any costs, charges or expenses, is or are to be payable to any person shall carry interest as may be determined by the court which rate shall not exceed the current lending rate as determined by the Bank of Zambia from the time of entering up such judgment, order, or decree until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment, order, or decree.”*

I am empowered by the foregoing provisions to make an award of interest. I therefore order that the Defendant pays the Plaintiff a sum of Eighty Thousand Kwacha (ZMW80,000) being the remaining

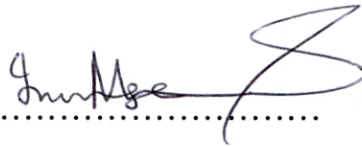


balance of the value of stock of airtime vouchers collected by the Defendant with interest at the average short-term deposit rate per annum prevailing from the date of the Writ of Summons to date of Judgment and thereafter at the current bank lending rate as determined by the Bank of Zambia until full payment.

Costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal is hereby granted.

Delivered in Lusaka this 12<sup>th</sup> day of June, 2017.

A handwritten signature in black ink, appearing to read 'Irene Mbeve', is written over a horizontal dotted line.

**HON. IRENE ZEKO MBEWE  
HIGH COURT JUDGE**