IN THE HIGH COURT FOR ZAMBIA **2015/HP/1822**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

WANG XING CAN **PLAINTIFF**

VS

GRACE LUSHINGA CHANDA **DEFENDANT**

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiff: *Mr. R. Msoni of Messrs Willa Mutofwe & Associates*

For the Defendants: *Mr. Mwangala Mutemwa of Messrs Mutemwa Chambers*

JUDGEMENT

Cases Referred to:

1. *DeGroot v Attals (1973) ZR 77*
2. *Galaunia Farms Limited v National Milling Company Limited and National Milling Corporation Limited (2004) Z.R. 1 (S.C.)*
3. *J.Z. Car Hire Limited v Chala and Another SCZ No. 25 of 2002*
4. *Khalid Mohamed v The Attorney General (1982) ZR 49*
5. *Tijem Enterprises Limited v Children International Zambia Limited2010/HPC/0121*
6. *Wilson Masauso V Avondale Housing (1982) Z.R. 172.*

Works Referred to:

1. *Chitty on Contracts (23rd Edition) Volume 1.*

This matter was instituted by way of writ of summons supported by a statement of claim. The Plaintiff sought the following reliefs:

a) Payment of the sum of US$58,000 for the works done.
b) Payment of the sum of US$5,000 for the material left on site used by the new constructor
c) Interest on the sum found due

The Plaintiff's statement of claimed revealed that the Plaintiff was Chinese national resident in Zambia in the construction industry. The statement further revealed that by an agreement dated 6th August 2014, the Plaintiff was contracted by the Defendant to construct two bedroomed flats and a one bedroomed cottage up to completion and commissioning. It was an express term in the agreement that the contractor would provide materials for the works.

It was asserted that the total contract sum of the works was US$134,640. The Plaintiff stated that he had done works up to lintel level all valued at US$58,000. It was further revealed that the Defendant advised the Plaintiff to halt further construction as he had no money at the time as she had only paid K139,000 from the sum total. To the Plaintiff's shock, the Defendant had engaged another contractor who had done work from where the Plaintiff left off up to completion using some materials left by the Plaintiff on site

all valued at US$5,000. The Plaintiff contended that the Defendant was in breach of the agreement.

The defendant filed in her defence and counter claim. In her defence it was averred that at the time the contract was being signed between the parties, the Plaintiff and the Defendant did not adhere to the mode of payment in the contract as they subscribed to a more convenient means of payment. It was contended that the works done were slightly below lintel level and were far below the claimed US$58,000 and that the same could not exceed K80,000.

The Defendant contended that it was the Plaintiff who deserted the construction site demanding payment even without producing a full bill of quantities despite numerous requests from the Defendant for the same. It was the Defendant's contention that after the Plaintiff deserted the construction site, another contractor was engaged to complete the construction works that should have been performed by the Plaintiff had he not breached his agreement with the Defendant.

The Defendant stated that the new contractor did not use any tool left by the Plaintiff as the only thing left was a tarpaulin tent which was never used and could not cost US$5,000. It was her further contention that the Plaintiff willfully deceived the Defendant into thinking that she entered into a contract with a company known as "Wang Xin Can" and that the two parties agreed to abandon the mode of payment stipulated in the contract and adhered to an orally agreed mode of payment. She stated that the works done by

the Plaintiff did not amount to US$ 58,000 nor did the Plaintiff have any materials valued at US$5,000.

The Defendant counter-claimed against the Plaintiff's claim for the following:

1. An Order that the contract of 6th August, between the Plaintiff and the Defendant is void.
2. An order that the Plaintiff renders an account of the works done.
3. An order and declaration that the same is within the K139,000 paid to the Plaintiff so far.

In the Plaintiff's reply and defence to counterclaim he averred that the mode of payment was agreed upon in the contract and there was no agreement as to a more convenient means of payment. It was the Plaintiff's assertion that the total works done on the houses corresponded to his claim of US$58,000 excluding the US$22, 240 which the Defendant had paid bring the total due to US$40, 760.

The Plaintiff responded that there was no requirement for him to produce the Bill of Quantities as was noted from the contract. The Plaintiff denied abandoning the works but that the works were halted because the Defendant failed to make payment in accordance with the contract.

The Plaintiff further contended that the Defendant engaged another contractor after failing to make payments according to the agreed terms in the contract as the Plaintiff demanded that the payments

be done on time and in line with the contract. He stated that since he was not informed about the engagement of another contractor by the Defendant, he had no time to go and remove his materials left on the premises and that the new contractor had used the same materials in the value of US$5,000.

He stated that the issue of whether the Plaintiff had deceived the Defendant into believing that she entered into the contract with a company had already been settled by the Court.

In his defence to the counterclaim the Plaintiff stated that the issue of whether the contract was void had been adjudicated upon by the Court in a ruling dated 3rd June, 2016. He further stated that he had rendered account of the works done which the Defendant kept disputing even though the contract did not stated that the Plaintiff was to give an account as the Defendant was supposed to make 40% advance payment which she failed and amounted to a clear breach of contract.

The Plaintiff denied that the works one on the houses fell within the K139,000 paid by the Defendant to the Plaintiff.

At trial the Plaintiff gave evidence and called one witness. It was the Plaintiff's testimony that he signed a contract with the Defendant where it was agreed that the amount for construction of three houses in Kalikiliki Dam area. He narrated that the two signed a contract and the Defendant was to pay 40% of the amount. She paid the initial K100,000 equivalent to about US$15,000. This was about 10% of the total amount. When they went on site they

cleared the area and removed 400 tonnes of black soil because it was near the dam. He said they did emergency planning, marked and made foundation.

He further explained that the area was water logged therefore when digging the foundation they dug a hole where the water was directed. They asked for a second payment but the Defendant refused to make the second installment. She told him that she would pay only after completing the entire concrete slab floor. According to the Plaintiff they delivered 40 loads of gravel at the site, prepared quarry dust, stones, plastic pipes, anti-ant poison, 257 can force wire and they finished concrete slab.

The Defendant then put K20,000 and the Plaintiff complained that it was too little and she subsequently added a further K19,000. He explained that they started using their money to build 2metre walls for the houses. When the Plaintiff asked for 40% upfront payment the Defendant said she had no money and the Plaintiff started waiting on her. He said he called her regularly but she still said she had no money. In 2014, before the Plaintiff went to China for the 2015 new year he again called her and received the same response. Upon his return he inquired about the money but the Defendant continued saying she had no money. Three months later, his workers came to inform him that there was someone else working on the project.

The Plaintiff testified that he then reported the matter to woodlands police but he never met with the Defendant. He went on site to

inspect the premises as they had materials in the storeroom to which the Defendant had keys. According to the Plaintiff they had about 6 wheel barrows, shovels, 20 bags of cement and the list of the items was produced in evidence on page 9 of the Plaintiff's bundle of documents. A photograph of the storeroom was produced on page 5 of the Plaintiff's bundle of documents. He said the value of the material left was equivalent to US$5000.

The Plaintiff explained that the total expenses incurred totaled US$58,000 less the US$22,240 that was paid which according to him gave a balance of US$40,760 including the sum owing of the Plaintiff's building materials left on site. The Plaintiff was therefore claiming for the sum of US$40,760 plus interest.

In cross examination the Plaintiff stated that he had not produced receipts to support his claim neither had he produced the stock records to show that the material was indeed there.

He admitted that the Plaintiff had paid K100,000, a further K20,000 and an additional 19,000. He denied abandoning the site after receiving the K19,000. When asked if was register as a contractor with the National Council of construction. He stated that that the contract did not provide for time frame within which to conclude and neither were they any guarantees.

He stated that the contract did not provide for a pricing module comprising the rate of basis of the price list for the material and labour. He said he had built about lintel level but that he did not

obtain council approval and therefore there was a risk of demolition.

In re-examination the Plaintiff stated that they were not keeping invoices as it had taken long. He added that there was no bill of quantities as they had agreed on a holistic sum.

The witness told the Court that the Defendant told her to use his money as she was expecting money but he was cheated. Further that the Defendant did not want to pay the 16% tax if the contract went through ZRA.

PW2 was Alipot Mwanza who worked for the Plaintiff as an electrician and supervisor. He narrated that his boss informed him that they had a contract to build three flats. They started with clearing the land and dug the foundation. They built up to lintel level and the Plaintiff informed him and his colleagues to stop building until further notice and that the owner would tell them when to proceed.

He testified that from that time he heard that there was someone else who had continued building on the structure. According to him they left some quarry dust, stones and building sand as well as other small things in the storeroom. When they went on site they found that they were finishing with the roofing and there was no material just merely a tent on site.

In cross examination the witness explained that he was testifying on behalf of Lujing construction but would not be in a position to

tell whether the contract with the Defendant was entered into by the Plaintiff or the company.

The Defendant opted not to give evidence and called no witness. She relied entirely on written submissions.

The plaintiff filed in written submissions where he submitted that the parties entered into a contract which was voluntarily entered into. He referred to clause 1 of the contract under the head "Material and Labour stated as follows:

> *"The contractor agrees to provide all materials and labour required to perform the following work for:*
>
> *Construction of 2 No. Two bedroom Units and 1 No. One bedroom cottage up to completion and commissioning.*
>
> *The Contractor agrees to provide and pay for all materials, tools and equipment require for the prosecution and timely completion of the work. Unless otherwise Specified, all materials shall be new and of good quality.*

It was his argument that from the clause above the Plaintiff was responsible for buying all the materials, tools and equipment required for construction works. There was nowhere where the Plaintiff was required to provide receipts for the materials, tools and equipment.

With regard to the payment, the contract stipulated as follows:

The owner hereby agrees to pay the Contractor for a presaid materials and labour, the sum of US$134,640 in the following manner:

US$51,300.00 2 No. Units91No. Block) +US$102, 600

40% Advance payment amounting to US$41,040

60% to be paid upon completion amounting to US$61,560

US$ 32,040 for construction of cottage

40% advance payment amounting to US$12,810

60% to be paid upon completion amounting to US$ 19,224"

It was submitted that the Defendant was in breach of the contract and failed to make the 40% advance payment of the contract in accordance with the provisions of the contract. According to the Plaintiff the Defendant only paid K139, 000 but the Plaintiff continued working using his own money as advised by the Defendant in the hope that the Defendant would pay the 40% advance payment.

It was also submitted that the contract also provided from modification of work and it stated that all changes and deviations in the work ordered by the owner were to be in writing. The Plaintiff argued that the clause was very clear that any variation of the terms of the contract had to be in writing. He therefore disagreed with a portion of the Defendant's defence where she stated that the parties had subscribed to a more convenient mode of payment and not the 40% advance payment agreed upon in the contract.

The contract also provided that:

> *"neither the owner nor the contractor would have the right to assign any rights or interest occurring under this agreement without the written consent of the other, nor shall the contractor assign any sums due, or to become due, under the provision of the agreement."*

He argued that the unchallenged evidence on record was that the Defendant was in breach of this clause as she assigned the contract to another contract to the detriment of the Plaintiff. He said this cause him great loss after having done the works up to lintel level. The Plaintiff cited authorities to support the argument that parties are bound by the contents of the contract they sign.

He argued that the total amount was pegged at US$134,640 and the Defendant paid K139, 000 when the contract required the Defendant to pay 40% of the total amount which the Defendant was in breach of. She went further to assign another contractor to the detriment of the Plaintiff. He added that he had left materials worth US$5000 and that his evidence was unchallenged as the Defendant did not counter it. He prayed that his claim be allowed in the sum of US40,760 for expenses incurred and the US$ 5,000 for the building materials left on site.

The Defendant in her submissions argued that it was for the party claiming damages to prove the damage and cited the case of ***JZ Car Hire v Chala Scirocco SCZ No. 25 of 2002***. It was submitted that since the burden of proof was on the one alleging the opponent

could elect to remain silent and not adduce any evidence at all. She argued that the main issue in dispute related to the quantum of work done by the Plaintiff. It was the Defendant's position that it all fell within the K139,000 paid to the Plaintiff.

She argued that there was not a single receipt that was produced to justify his claim as his claim represented a reasonable estimation of the work done and invited the Court to make an intelligent guess in his favour. She submitted that the Court in this jurisdiction do not and have never made intelligent and inspired guesses from a vacuum. She further argued that the contract did not incorporate a pricing module comprising rates and basic price list of materials and labour. She cited the case of ***De Groot v Attals (1973) ZR 77*** where it was held that *there was no evidence that parties ever agreed as to the prices for material and labour and therefore this Court was left with the task of finding out what amount was reasonably due to the Plaintiff for the work done by him for the defendant.*

It was the Defendant's submission that the in the present case the least the Plaintiff could have done in a situation where he had no receipts, was to call for an independent expert Quantity Surveyor. The report of such a quantity surveyor would have gone a long way in assisting the Court to make an intelligent and inspired guess.

The Defendant argued that the Plaintiff admitted that he abandoned the site because the Defendant delayed in paying the required monies as agreed as she was in breach of contract. However, the

Plaintiff also admitted that there was no time frame that was set for completion and that no guarantees were called for prior to the advance payment to the contractor. She cited the case of ***Galunia Farms Limited v National Milling Company Limited (2002) Z.R. 135***. Where it was held that the basis of estoppel is when a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular set of affairs another set of affairs another has taken to be settled or correct."

She argued that the Plaintiff was infact in breach of the contract because he admitted that he abandoned the site the same day. The same day he received the last installment of K19, 000. She referred to page 8 of the Plaintiff's bundle of documents where there was the Plaintiff's tabulation of the materials used. She stated that the Plaintiff was precluded from relying on that document to aid his case as that would be tantamount to attempting to vary a written contract. She cited the case of ***Holmes Limited v Buildwell Construction Company Ltd. (1973) Z.R. 97*** where it was held that *where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add, vary subtract from, or contradict the terms of the written contract.*

I have considered the evidence on record and the submissions by both parties.

This matter was brought by the Plaintiff claiming the amount of money that he spent to construct the Defendant's two houses and a

cottage up to lintel level. He was further claiming materials that he left on site and his total claim was US$ 40,760 with interest.

I will begin by noting that it is a fact that the parties entered into written a contract for the Plaintiff to construct three houses for the Defendant. It is also not in dispute that the Plaintiff began construction and that the Defendant did not pay the agreed 40% advance payment. It is a fact that the Defendant did however pay the sum of K139, 000 which amount was paid in installments. The Plaintiff admitted that he left the site and the Defendant admitted to hiring a different contractor to finish the construction.

The Defendant did not give any evidence at trial and cited that it was the Plaintiff's burden to prove the allegation he was making and it was not for her to dispel them by giving evidence to that effect. I completely agree with the Defendant's argument in this regard. The law is very clear from the case of ***Khalid Mohamed v The Attorney General (1982) ZR 49*** where **Ngulube D.C.J**, as he then was, held as follows:

> *"An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept proposition that even if a plaintiff's case has collapsed of its inanition or for some reason or other, judgment should*

nevertheless be given to him on the ground that defence set up by the opponent has also collapsed."

The same principle was emphasized in the case of ***Wilson Masauso V Avondale Housing (1982) Z.R. 172.*** Further in the case of ***Galaunia Farms Limited v National Milling Company Limited and National Milling Corporation Limited (2004) Z.R. 1 (S.C.)*** it was held that a plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to Judgment. The Defendant was therefore on firm ground when she said it was for the Plaintiff to prove his case and not her.

Having established this I will now begin by dealing with the terms of the contract. The contract was very clear that the Defendant was to pay a total of US$134,640 for the construction of the houses and 40%of the said amount was to be an advance payment. The Plaintiff argued that the contract provided that any variation of the terms of the contract was to be in writing.

The Defendant argued that in as much as she did not pay the 40% advance payment, the Plaintiff still received the amounts she paid in installments and continued working on the project. According to her this was a variation of the terms of the contract. According to Chitty on Contracts, at page 1451 *acquiescence by the claimant amounts to the waiver of his rights and raises a species of estoppel preventing him from subsequently enforcing them.*

It is clear from the Plaintiff's undisputed evidence that the Defendant did in fact breach the terms of the contract when she did

not pay the 40% advance payment. However, it is the Plaintiff's evidence that despite this he continued to work on the project. This in my view was a deviation from the terms of the contract which the Plaintiff acquiesced to by virtue of him continuing to work on the project after receiving the various installments. The terms of the contract were therefore varied by conduct. There was therefore no breach on the part of the defendant. It therefore follows that when the Plaintiff left the site, the Defendant was at liberty to bring in another contractor because the varied terms with the Plaintiff meant h could work on a flexible payment plan.

Having said this, it is the undisputed evidence on record that the Plaintiff did infact construct the three structures up to lintel level. What is now left for the Court to determine is how much the Plaintiff is entitled to recover from the works done. The Plaintiff on page 8 of the Plaintiff's bundle on documents has produced of the items he alleges were used in the project as well as the material that were left on site. I find great difficulty in considering this evidence because it does not appear to have been prepared by a professional quantity surveyor. It just appears to be a document which could have been prepared by anyone. I therefore cannot place any reliance on that document as it has in my view has little or no evidential value.

As earlier noted it is for the Plaintiff to prove damages suffered. This was stated by Justice Mutuna in the case of ***Tijem Enterprises Limited v Children International Zambia Limited*** where he cited

the case of ***J.Z. Car Hire Limited v Chala and Another*** cited by the Defendant, where I was held that it is the party claiming any damages to prove the damages.

In the present case there was no quantity surveyor called or report given from a quantity surveyor to give a correct assessment of the costs involved in the construction. As correctly argued by the Defendant citing the case of ***De Groot v Attala*** the Court in the present circumstances cannot be expected to make intelligent and inspired guesses as to how much could have been used by the Plaintiff in the construction without the assistance of a professional quantity surveyor.

The Plaintiff as has already been stated has to prove that the construction cost the amount stated in his claim. However, as I have already established there has been no evidence to establish that the amount he is alleging is what was spent on construction. The Defendant has insisted that the sum of K139, 000 covered the entire construction that was done by the contractor.

The Plaintiff has brought nothing before this Court to show that he in fact spent the amount being alleged. This Court can therefore not be expected to make intelligent guesses as to the actual amount that was used without any proof. I accordingly find that the Plaintiff has not proven his case on a balance of probabilities.

The Defendant on the other hand has counter-claimed asking this Court to order that the contract entered into by the parties was void and that the Plaintiff should render an account for the works done.

Further, that this Court makes a declaration that the works done were within the sum of K139, 000 paid to the Plaintiff so far. Having established that this Court cannot be expected to make intelligent and inspired guesses as to how much was spent, the Defendant cannot equally expect this Court to make such a declaration without any proof. She has not produced any evidence that would warrant this Court to make such a declaration.

As regards the contract being declared void the Learned Authors of Chitty on contracts have guided that a void contract is one that has no legal effects by virtue of illegal terms of a contract or a lack of capacity of the parties. However, the present contract was legally binding as both parties had capacity to enter into a contract and nothing about the contractual terms was illegal. The same contract has been relied on to establish the relationship between the parties. I therefore find no cause to declare it a void contract. As such this claim also fails.

With regard to the Plaintiff rendering an account of the works done, I find that the Defendant has a legitimate claim because money was paid to the Plaintiff for the construction of the three structures and there has been no Bill of Quantities that was produced or given to the Defendant. There is therefore nothing that should stop this Court from making this order.

I accordingly order that the Plaintiff renders an account for the works done by him before the Learned District Registrar.

With regard to the cost in the Plaintiff's claim I have already held that the parties had by their conduct varied their original terms of contract of payment of the contractual schedule of payments. The costs therefore ought to be in the cause.

In respect of the successful portion of the counterclaim; the evidence is that there was no legal obligation to provide evidence of payment for constructions works.

The justice of the case is that I make no order as to costs. In sum and in conclusion in this action each party will bear its own costs.

Leave to Appeal is granted.

Delivered under my hand and seal this 11th day of December, 2017

Mwila Chitabo, S.C.

Judge