

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPLE REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2013/HP/065

BETWEEN:

ELIAS KABWE

1ST PLAINTIFF

HAPPY SIMWINGA

2ND PLAINTIFF

LLOYD NYIRENDA

3RD PLAINTIFF

AND



ASK INTERNATIONAL LIMITED

1ST DEFENDANT

JOHN NGA'ANDU (sued in his capacity as Trustee of
Grace Ministries International)

2ND DEFENDANT

PETER MUTALE

(sued in his capacity as Trustee of Grace Ministries International)

3RD DEFENDANT

STANLEY SIMUNYOLA (sued in his capacity as Trustee
of Grace Ministries International)

4TH DEFENDANT

PENELOPE SILUMESI (sued in her capacity as Trustee of
Grace Ministries International)

5TH DEFENDANT

KAKU MWABA

6TH DEFENDANT

STEVE KALUBA (sued in his capacity as Trustee of
Grace Ministries International)

7TH DEFENDANT

**Before Honourable Mrs. Justice S. M. Wanjelani on the 25th day
of April, 2019.**

For the Plaintiffs: Ms. I. Nambule, Messrs Sharpe & Howard Legal
Practitioners

For the Defendants: Mr .I. Chali, Messrs H.H. Ndhlovu & Company

JUDGMENT

Cases referred to:

- 1) *Lee v Lee's Air Farming Ltd* (1961) AC 12.
- 2) *Zambia Revenue Authority v T and G Transport* (2007) ZR 13.
- 3) *Zambia Railways Limited V Pauline S Mundia, Brian Sialumba* (2008) Z.R. 287 Vol. 1 (S.C)
- 4) *Rosemary Chibwe v Austine Chibwe* SCZ Judgment No. 38 of 2000

Legislation and Materials referred to:

1. The Companies Act Cap 388 of the Laws of Zambia
2. G.H.L. Friedman, *The Modern Law of Employment* (London, Steven and son, 1963)

This matter was commenced by way of Writ of Summons and Statement of Claim which was amended on 11th June, 2014. The 3rd Plaintiff was later made a party to the proceedings through an Order for Joinder. The Plaintiffs seek the following reliefs:

- i. A declaration that the 2nd, 3rd, 4th, 5th, 6th and 7th Defendants had no authority to interfere with the operations of the 1st Defendant Company and that he acted in defiance of procedure by terminating the Plaintiffs as Company Directors;
- ii. An order of injunction restraining the 2nd, 3rd, 4th, 5th, 6th and 7th Defendants from taking over the operations of the 1st Defendant Company ;
- iii. An Order that the Plaintiffs be paid for all material and pecuniary loss, anguish and mental torture they have suffered

as a result of the decision by the 2nd, 3rd, 4th, 5th, 6th, and 7th Defendants to take over the operation of the 1st Defendant;

iv. Payment of all accrued salaries;

v. Any other relief the Court may deem fit; and

vi. Costs

The facts as revealed by Statement of Claim are that the 1st and 2nd Plaintiffs were shareholders and directors in the 1st Defendant Company and Secretary and Senior Deacon respectively of Jubilee Centre a branch of the Grace Ministries Mission International (the Mission), while the Defendants were the Registered Trustees of the Mission.

It was averred that in line with the Constitution of the Mission, the leadership of Jubilee Centre, started operating a community School inside the Church building but resolved that since the church had a big piece of underutilised land, a school building should be constructed. It was averred that as the church had no funds to commence the construction and operations of the 1st Defendant, the 1st Plaintiff loaned a sum of seventy- eight thousand Kwacha.

They stated that the money loaned to the Centre was not enough, resulting in the Church selling part of the land and they were further advised to incorporate a company in order to comply with the requirements of Banks and the Patents and Company Registration Agency (PACRA). In this vein, the 1st Defendant was incorporated on 11th May, with the three Plaintiffs and the Church being equal shareholders. It was contended that it was resolved by

the Office of the Midlands Overseer, Bishop Peter Mutale, and the local Pastor, Lloyd Nyirenda, to appoint the Plaintiffs as Directors in the 1st Defendant due to being church leaders and having professional expertise and experience.

The 2nd Plaintiff added that he loaned the school educational materials amounting to Kwacha Fifty Thousand Kwacha (Rebased) on 18th February, 2011. In addition, the Plaintiffs stopped pursuing other life sustaining businesses in order to concentrate on building and running the school, on the understanding that they would be entitled to salaries which would be consistent once the operations of the school stabilised.

It was contended that on 7th December 2012, the 2nd to 7th Defendants, in defiance of the Articles of Association and advice of the Company Secretary, terminated the Directorships of the Plaintiffs and took over the operations of the school.

The Defendants filed a joint Defence wherein it was averred that no money was borrowed from the Plaintiffs in the construction of the School; that there was no shortage of money that warranted the selling of land for the construction of the School and that the incorporation of the 1st Defendant was not connected to the issues of funding; and further that it was done without prior approval of the mother church.

The Defendants also vied that the Plaintiffs were not directors but employees and that the Defendants had the right to terminate the contract of employees. The Defendants further filed a Counterclaim

seeking various amounts of allowances received by the Plaintiffs as well as the proceeds arising from the sale of plots. However, the said counterclaim was abandoned during the trial and the position was reiterated in the Defendants' submissions.

The matter proceeded to trial wherein the Plaintiffs called two witnesses while the Defendants called one witness.

The first Plaintiff, **Elias Kabwe** was the first witness (PW1). He stated that following a break away at the Jubilee Centre, began to have financial difficulties and could not financially sustain the Pastor who, then had to paid allowances by the National Office.

According to PW1, a Reverend Munshya came up with an idea to build a School and a skills Centre to resolve the financial difficulties the Centre was facing and after he left, the 3rd Plaintiff, Reverend Lloyd Nyirenda, was brought as Pastor. He stated that Reverend Nyirenda continued with the idea of building a School and to drill a borehole to cope with the water shortages and thus raise money for the Branch.

He said Reverend Nyirenda advised that the National Office should be made aware of the projects and consent was to be obtained. They, then engaged the National Office, particularly Bishop Peter Mutale and Doctor David Nama. PW1 further informed the Court that they called other Trustees to Jubilee Centre to discuss the proposal and it was unanimously agreed that the School project should commence but when they asked for assistance, they were told that each branch had its own projects.

PW1 also stated that they were expected to float ideas on how they were going to build the School. He added that himself, Happy Simwinga, Reverend Nyirenda, Kennedy Chisenga, Lazarus Mwandila as well as the Trustees of the Mission like Bishop Peter Mutale, David Nama, Beckley Mwaba proposed to sell part of the church land which had been encroached upon by cadres so that the proceeds could go towards the development of the School. He stated that Dr. Nama also contributed a small amount to help and that they were given a letter of mandate to sell off part of the land as residential plots.

In his continued testimony, PW1 stated that after obtaining permission from the highest office, he loaned the church the sum of ZWK78, 000.00 (rebased) to commence the project. He added that Reverend Nyirenda, standing in the leadership of the local branch invited PW1 and Happy Simwinga to spearhead the building of the School and at this point the ZWK78,000.00, PW1 had loaned to the church had been exhausted and they sold the land and realised K501,600.00 (rebased). He added that Bishop Mutale advised that they apply the proceeds of the sale to the development of the School and open a bank account to put in the balance left over.

PW1 stated that he was a Church member, a deacon and Secretary at Jubilee Centre and was fully involved in the daily business of the School and that they were not given salaries but allowances. It was his testimony that in August of 2010, they partially completed construction and in 2011 they began to recruit for Grades 1-10. He

stated that not all the pupils were fee paying as some were orphaned and others vulnerable. He added that Happy Simwinga and Reverend Nyirenda, as Directors came up with a resolution to only be paid allowances and salaries in 2015 after the School had been running for a while. PW1 further stated that upon advice of Bishop Peter Mutale, they registered the 1st Defendant, Ask International School Limited.

PW1 then referred to page 122 of his Bundle of Document, on which was a letter of termination from one of the Trustees and that a similar letter was given to Happy Simwinga who then sought counsel from the Company Secretary who advised Grace Ministries to follow the procedure. He stated that since his dismissal, his family had suffered a great deal as his money was held in the School. He added that he had been subjected to mental torture as his children missed School for two years and that he had to move from Emmasdale to Kabanana, a shanty compound.

In cross examination, PW1 stated that the plot on which the School was situated belonged to the Mission and that according to the Mission Constitution, real property vested in the Trustees of the Mission. He added that the School was owned by the shareholders of Ask International School Limited and that there was a resolution transferring the School to Ask International School Limited. He stated that the Church leadership had given the mandate over the School to Reverend Nyirenda who worked with Bishop Mutale, and further that Reverend Nyirenda signed as shareholder on behalf of

the Church as they had the blessing of the Church. He admitted that the construction of the School amounted to K403,829,315.00 (unrebased)

PW1 denied that the allowances paid to him were salaries disguised as allowances and argued that despite having been paid allowances his loan of K78,000.00 (rebased) was not repaid. He conceded that he was removed as Director of the School and not of Ask International Limited. He stated that he did not agree that the Church did not consider the School as a business program. He added that Lloyd Nyirenda was a representative of Mission when he signed documents. It was also PW1's testimony that Happy Simwinga provided education materials to begin running the School.

In re-examination, PW1 stated that the K403,829,315.16 (unrebased) was a summary for the construction expenses but did not include labour. He also testified that he had an interest to ensure that the School was run properly. He added that the amounts on record tabulated in the documents as payments to them were meant to allow the directors know how much was allocated up to 2015.

PW2 was **Happy Simwinga**, the 2nd Plaintiff who testified that at the relevant time of this matter, he was a Senior Deacon at Jubilee Centre. He stated that in 2010, they had a Mission Council meeting which comprised the Pastor in charge, Senior Deacons, Secretary,

Treasurers, Deacons and Deaconesses and members of the Mission team.

PW2 rehashed the financial challenges that the Branch faced following the departure of the breakaway faction, as alluded to by PW1 including the solutions arrived at, the consultation and involvement of the Midland's Overseer, who at the time was Reverend Pastor Peter Mutale.

PW2 explained that a diaconate meeting was called and when asked if there was person who would loan the church some money, Elias Kabwe (PW1) agreed and loaned the church ZMK78,000.00 (rebased)

PW2 added that he was the Director of Academics at the School prior to his termination. PW2 stated that he was teacher prior to joining the school project but had resigned and that he had gone through pain and anguish in building the School. He stated that he felt used in this whole enterprise by the clergy, that he was humiliated by his termination as senior deacon, director and manager. He added that his children who were at the said School suffered as he had to find alternative School places for them.

It was also PW2's testimony that the incorporation of Ask International School Limited as company limited by the shares, was undertaken with the approval of the Midlands Overseer who referred them to the Mission Constitution, which according to him, stated that the Mission Centre was sovereign and thus the business entity was for Jubilee Centre and not for the Mission.

PW2 added that when the School started operating they had challenges with education material and having been in education for decades, he had acquired books and other education material which were used to begin the education process. He stated that he loaned books to the School valued at K50,000.00 (rebased) as reflected on Page 103 of the Plaintiff's Bundle of Documents. Further, PW2 said he had loaned the School a sum of K8, 500.00 (rebased) for salaries.

He vied that he fully understood the directorship of employment and of the Company and that he was not employed by the Mission but he was Director in Ask International School Limited. When it came to the termination of senior deacons, PW2 stated that recourse was to the Mission Constitution which provided for procedure in disciplining any ailing member whereas the Articles of Association of the Company determined procedures for termination of directorship in a Company.

Under cross examination PW2 stated that Lot 2429/M upon which the School was built was owned by the Mission, that the 25% shares he owned was in the Company and not in the School and further that the School building was one of the assets of the Company, even though there was no documentation to show that the land moved from the Mission to the Company.

PW2 added that they passed a resolution as per Page 104 of the Plaintiffs' Bundle of Documents, that they would cease to be shareholders in 2015 after they had recouped their investments.

He conceded that according to PACRA records, the Plaintiffs were still Directors of the 1st Defendant Company but argued that the Defendants could not change the name of the School as it was registered at PACRA. He contended that the School was being run in line with the Mission's policies and it was established on profit making basis pursuant to Clause 2.9 of the Constitution.

In re-examination, PW2 stated that when signing the loan agreements there was a lot of consultation with the Office of the Midlands Overseer. He also stated that the School was for the local Centre and not the Mission and further that all the decisions in running the School fell exclusively in the hands of the Executive at the Centre.

The Defendant's only witness was **Buckley Mwaba** (DW) who testified that between 2004-2016, he had held the position of Trustee in Grace Ministries Mission International. He added that his duties as Trustee were to be responsible for all assets of the Mission both movable and immovable; ensuring that the properties held in trust were in serviceable condition and to handle legal matters on behalf of the Church.

DW1 testified that in 2010, he was approached by Reverend Lloyd Nyirenda who oversaw Jubilee Mission Centre, a branch of the Mission, to tell him that the church would like to start a School, not only to service the members at the local Centre but also other communities but they had no money. He SAID Rev Nyirenda floated the idea that part of the land owned by the Mission where the

Jubilee Centre was situated, could be sold to raise the required funds to build the School.

DW stated that after the meeting, they consulted his colleagues and the top leadership, and a decision was made that part of the land could be subdivided and sold to the public. DW explained that at the time the proposed cost for building the School would was K300 million (unrebased) but after part of the land was sub divided sold a total of about K500, million (unrebased) was realised.

DW testified that in 2010 the leadership at Jubilee Centre stated construction works for the School which was to be run by the leadership at Jubilee Centre and it cost about K400 Million (unrebased). He said the outstanding amount was used to put up a borehole, toilets and to buy the materials such as books and other necessary requisites to run the School. DW stated that to their surprise, the School Board which had been formed was being sidelined by three members, namely Reverend Lloyd Nyirenda, the Pastor in Charge, Mr Elias Kabwe, the Secretary and Mr. Simwinga, the Senior Deacon.

DW1 stated that they started hearing complaints to the effect that three Plaintiffs were not following laid down procedures in the running of the School. He said that towards the end of 2012, the Trustees were informed by the Overseer that there was a problem at Jubilee Centre regarding the School and this prompted the Midlands Overseer Bishop Peter Mutale to go to Jubilee Centre for a meeting.

It was DW's testimony that the Trustees, with the top leadership, then agreed to carry out investigations and that Bishop Dr David Nama who was then the Overseer responsible for projects was tasked to carry out investigations. He said Dr. Nama brought a report of that investigation which showed income and expenditure of the School and on examination of that document, it was discovered that a lot of money had been paid to the three local leaders namely Rev Nyirenda, Mr Kabwe and Mr Simwinga. He said the payments were indicated as allowances and salaries. DW stated that these payments were contrary to the laid down procedure in the Mission as the local leadership was expected to provide voluntary service to the School.

In his continued testimony, DW informed the Court that the Mission Constitution only allows the mother body to establish business entities to support the work of the Mission, while the local branches did not have authority to establish business entities. It was his evidence that the Constitution further did not allow the Mission to establish a School for profit making purposes as it gave mandate to the Mission to establish Schools or colleges for the purpose of equipping the saints and improving appropriate attitudes and skills as per Clauses 2.8 and 2.9 of the Constitution.

DW stated that the top leadership with the Trustees came up with the decision to remove the local pastor because it was felt that he had failed to run the Centre in accordance with the Constitution

which provided that Mission Centre would operate in accordance with the Mission policies of the church.

Consequently, on 7th December 2012, Mr. Simwinga and Mr. Kabwe were written to and were requested to exculpate themselves and provide justification for money indicated as loaned to the School. He said they did not exculpate themselves resulting in their removal from leadership at the Centre and at the School as communicated to them by the Regional Overseer, who was responsible for communicating decisions.

DW stated that from the records provided by the local Centre, there was an indication of K78,000.00 (rebased) as having been loaned by Mr. Kabwe and a further the sum of K8,000.00 (rebased) by way of School materials. He added that the amount of money raised from selling the church plots was enough to build a School and ensure that it started running. DW also said that the amounts indicated that they were loaned to Ask International School Limited for the three individuals to be used by way of salaries and allowances paid to them. He added that, ordinarily these loans were not supposed to be contracted without the involvement of the National Office especially that the collateral was a piece of land at Jubilee Centre. DW explained that these were matters that should have been handled by the Trustees and it was not the first time that the three men had committed the Church to loans procured without authority of the Church.

It was DW contention that the School at Jubilee Centre was built using the proceeds from the sale of land owned by the church. He added that the three gentlemen made a private arrangement, allotted shares away from the National Office and cannot claim the School, as all property was owned by the members of Mission. DW also stated that Page 360 of the Plaintiff's Bundle of Documents showed that 25% of the shares allotted to the Jubilee Centre was signed for by Rev Nyirenda, which he should not have done as it should have been the Regional Overseer on behalf of the Mission. DW argued that the School belongs to the Mission and not Ask International Limited and thus the Church could change its name.

DW also explained that the loans were not contracted in line with laid down procedure, as such the Mission was not liable to repay them. DW vied that the Defendants had abandoned the counterclaim for allowances and the K500,000.00 (rebased) realised from the sale of the church plots.

In cross examination DW stated that there was no evidence of acknowledgement of allowances by the Plaintiffs, while adding that the Pastor was paid from free will offering and tithe received by the Mission Centre, as the Head Office did not pay salaries to Pastors running Mission Centres. He however admitted that some of the Mission Centres, like Jubilee Centre, were not financially equipped to take care of the Presiding Pastor.

DW also testified that the Regional Overseer was obliged to report to the Trustees on matters concerning land. DW added that Bishop

Peter Mutale was involved in the matters at Jubilee Centre but not actively. He agreed that the leaders dedicated their time to the building of the School.

In re-examination DW explained that there was never a discussion of formation of the Company, that the people that signed any documents were signing for and behalf of Ask International School Limited. He also stated that the collateral issues were not discussed in the meeting with Bishop Peter Mutale.

At the close of the case, the Plaintiffs indicated that they would not file submissions but would rely on the evidence on record. The Defendants filed in submissions the gist of which was that according to the Constitution of the Church, all property was vested in the Trustees on behalf of the Mission and any transaction concerning land belonging to the Mission had to be done by Trustees.

The Defendants contended that based on the entries on Page 130 of the Plaintiffs' Bundle of Documents, the Plaintiff had raised K501,600,000.00 (unrebased) from the sale of plots and only used K403,829,315.16 (unrebased) leaving a balance of K97,770,684.00 (unrebased) which was used to drill a borehole, buy office furniture and there was still some money left over.

The Defendants also submitted that the loans obtained by the Plaintiffs were borrowed without the authority of the church and that the money from Mr Kabwe was a donation to the church which Rev Nyirenda insisted was a debt and added further terms. The

Defendant further stated that Ask International Limited was a separate legal personality and should not be attached to the School building, and reference was made to the case of **Lee v Lee's Air Farming Ltd**⁽¹⁾. The Defendants further submitted that the Plaintiffs' termination was from the School and not the Company as they claimed.

I have considered the evidence before me including the witnesses testimonies and the Defendants' submissions. The Defendants having abandoned their counterclaim, the only issues for determination therefore, relate to the Plaintiffs' claims.

In determining this matter, I bear in mind the guidance of the Supreme Court in a plethora of authorities, regarding the burden of proof including, in the case of **Zambia Railways Limited v Pauline S Mundia, Brian Sialumba**⁽²⁾ that:

"The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable."

Both PW1 and PW2 categorically stated that they were not employees of the Defendants, that is the Mission and thus Reverend Mutale had no authority to remove them as Directors in the 1st Defendant Company. However, it has also been shown and conceded by both sides that the 1st Defendant is an independent legal entity. The question is whether the letter of termination dated 7th December, 2012, terminated the Directorship of the 1st and 2nd Plaintiff in the 1st Defendant Company.

Section 211 of the **Companies Act** provides guidance on the removal of directors of a company and states:

"(1) A company may, by ordinary resolution at a general meeting of the company remove from office all or any of the directors, subject to their rights to claim damages from the company if removed in breach of contract."

The law above succinctly provides that directors may be removed but for such removal to occur, there must be an ordinary resolution at a general meeting. It is not in dispute that no general meeting or such resolution was ever made in relation to the 1st Defendant Company.

Thus the letter of termination dated 7th December, 2012, terminating the Plaintiffs from their Church positions and the running the School, did not extend to their removal as Directors from the 1st Defendant Company, which is guided by the Articles of Association and by the above cited legal provisions. I, therefore find that the declaration being sought by the Plaintiffs that the 2nd – 7th Defendants had no authority to interfere with the operations of the 1st Defendant and to terminate their Company directorship is misconceived and is thus declined.

The Plaintiffs in their evidence, stated that Article 2.9 of the Mission Constitution empowered them to form a profit-making venture, while the Defendants argued that the provision allows the mother body to establish businesses to support the work of the Missions and the Branches do not have such authority. Article 2.9 of the

Grace Ministries Constitution, which falls under the main heading of "***The purposes of the Mission***" provides:

"To establish independent Business Entities to support the work of the Mission."

According to the Plaintiffs' evidence the Midlands Overseer Reverend Peter Mutale brought to their attention Article 2.9 for them to form a company so they could access loans as the Banks could lend money to the Company but not to the Church. The Plaintiffs said after a Deaconate meeting, they went ahead and registered Ask International School Limited. However, DW stated that no such authority was given and they only learnt that the Plaintiffs had formed the said Company afterwards.

Having heard the evidence from the Plaintiffs and having observed their demeanour and how they fared under cross examination, I am inclined to believe that Reverend Peter Mutale was aware of the plans to form the 1st Defendant Company. However, it is strange that if the said Reverend Mutale had authorised the registration of the Company, and the Plaintiffs being conversant with the Constitution of the Mission that all property vests in the Trustees on behalf of the Mission, they opted to give 25% shareholding in the Company to the Centre which had no legal personality or authority to hold property. In all this, no evidence was adduced to show what consideration the "shareholders" gave in return for the shares.

I therefore find that although Reverend Mutale was aware of the formation of the Company, it was not sanctioned by the Mission, as

the appropriate Trustees would have been aware and signed for the 25% shares on behalf of the Mission.

It is not in dispute that the School was built on the land owned by the Mission and built using funds raised from the sale of plots of part of the Mission land. The Plaintiffs in their testimony and pleadings averred that the 1st Defendant owns the School.

In addition, it is not in dispute that the both the 1st Defendant and the Mission are legal entities capable of owning property, the latter holding the land in question under the Land (Perpetual Succession) Act. Further it is not in dispute that the 1st Defendant Company was formed after the School had already been built. No evidence was adduced before me to show that the Mission had transferred the property or the land to the 1st Defendant. I therefore find that the 1st Defendant does not own the School and the Defendants had the right to take over its operations and change its name.

With regard to the loans advanced to the School, the Defendants submitted that PW1 had voluntarily given the money to the Church, and further that the alleged loans, if any, were advanced to the 1st Defendant and thus the Defendants are not liable. PW1 in his evidence stated that he is owed ZMK78,000.00, (rebased) which was obtained for the ground breaking and commencement of the School building project.

The record shows on pages 99- 101 of the Plaintiffs' Bundle of Documents, that there was a "*Leadership Meeting*" held on 15th May 2012, in which Reverend Peter Mutale was present and participated

in the deliberations. I note that the meeting discussed the loan from Mr. Simwinga and directed that there should be an agreement in writing and that there should be a 20% interest added on the investment. This, I believe, culminated in the "*the Borrowing Agreement*" dated 18th May, 2012 on Page 102 of the Plaintiffs' Bundle of Documents, setting out the terms of the Loan albeit, it includes the collateral in form of land, which was not discussed in the meeting.

I, therefore find that the 1st Plaintiff loaned the Defendants the sum of K78,000.00 (rebased) with interest at 20% per annum. I however, find that the collateral was not agreed upon and cannot be enforced. There was no evidence presented before me or acknowledgment of the K8,000.00 (rebased), that was allegedly advanced by the 1st Plaintiff.

As for the sum of ZMW 50,000.00 (rebased) in educational materials and K8,500.00 (rebased) for salaries advanced by 2nd Plaintiff to the School, the Defendants deny the claim and allege that the money realised from the sale of the plots not only covered the cost of construction of the School but there was enough money left over for procurement of items such as desks and books. The Defendants further claim that the Plaintiffs had no authority to contract any loans.

The 2nd Plaintiff produced "*Acknowledgment Receipt*" on page 103 with respect to the education materials and another "*Acknowledgment Receipt*" with respect to the K8,500.00 (rebased)

at Page 105, alluded to as *"short term loan for the purpose of clearing of September, 2012 and October, 2012 salaries and wages"*.

I have perused the documents at page 103 and 105 of the Plaintiffs Bundle of documents and note that the receipt was acknowledged by Reverend Nyirenda, with the 1st Plaintiff as a witness. In my view, there is no dispute that Reverend Nyirenda was the Defendants' representative and no reason was advanced before me as to why he would falsely acknowledge receipt of these items and amounts from the 2nd Plaintiff. I therefore find that the 2nd Plaintiff did give the School K50,000.00 (rebased) worth of educational materials and the K8,500.00 (rebased) for salaries.

The Plaintiffs also sought damages for material and pecuniary loss, anguish and mental torture arising from the decision of the Defendants to take over the running of the School. They contended that they had given up their other pursuits and devoted their time fully to the development of the School. They further contended that their children's school lives were disrupted and for 1st Plaintiff, that he now lives in what may be termed a shanty compound as opposed to the suburb Emmasdale where he used to live.

A perusal of the evidence does not show what the Plaintiffs were earning prior to starting to run with the Church projects. There is no evidence of any agreement with the Church on emoluments arising from this relationship. There is no contract of employment or any form of agreement on the conditions pursuant to which the Plaintiffs were engaged or the duration. In addition, there is no

indication that when the Plaintiffs' were terminated from their positions, their children were equally expelled from learning at the School and that the Plaintiffs were no longer members of the Church who could not benefit from the Church facilities.

It has been stated time and again that the burden of proof lies on the Claimant as alluded to in the case of **Zambia Railways Limited V Pauline S Mundia, Brian Sialumba⁽³⁾** that:

"The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable."

Further, the Plaintiffs had categorically stated in their testimonies that they were not employees of the Defendants while the Defendants argued that the Plaintiffs were employees and also that they were expected to offer their services on a voluntary basis. According to the Learned author G.H.L. Friedman, The Modern Law of Employment:

"A Contract of employment may be wholly or partially in writing, or completely oral or the offer may be in writing and the acceptance thereof may be by the employee's entering into the service of the employer showing by his conductor that he has accepted the terms expressed by the employer in the document containing the offer. The contract intended by the parties by their offer and acceptance must be a contract of employment. If it is some other kind of contract, or it is not a contract at all

but a relationship then there is no contract of employment...."

I note that on page 95 of the Plaintiff's Bundles of Documents, there was an Ordinary Resolution by the Directors of the 1st Defendant Company wherein it was resolved that Reverend Lloyd Nyirenda would be Chairperson of Directors of the Company and Director Nominee to represent the Church; Mr Elias Kabwe would be Director of Finance; and Mr Happy Simwinga would be Director of Academics. Having found already that the School belongs to the Church and not the 1st Defendant, this Resolution related to the relationship between the Plaintiffs and the 1st Defendant.

I, therefore find that the Plaintiffs have failed to prove on a balance of probability, how the termination of a non-employee/employer relationship caused pecuniary loss and damage. It was incumbent upon the Plaintiff to prove their loss and they have failed to discharge this burden. This Court is mandated to make a determination of matters based on the evidence presented as stated in the case of **Rosemary Chibwe v Austine Chibwe SCZ⁽⁴⁾** that:

"the Court can only make a decision based on the evidence on record"

The sum total of this matter is that the 1st and 2nd Plaintiffs have proved their claims on the loans advanced to the Defendants. I therefore direct that the Defendants shall pay back the 1st Plaintiff the loan of K78,000.00 (rebased) with interest as agreed of 20% per

annum from the date it was advanced to the date of this judgment and thereafter at Bank of Zambia lending rate until full payment.

The Defendants shall also pay the 2nd Plaintiff the loaned total amount of K58,500.00 (rebased) with interest at the average short term deposit rate from date of Writ to the date of Judgment and thereafter a Bank of Zambia lending rate until full payment.

Cost are for the Plaintiffs to be taxed in default of agreement. Leave to appeal is granted.

Delivered at Lusaka this 25th day of April, 2019.

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S.M.WANJELANI
JUDGE