



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

2016/HPC/0049

BETWEEN:

CHABU MWAMULIMA
DOREEN CHINKULI
NELO MWANAMWESHI
KALONGA MWAMULIMA
JANE SIAMIYANZE
PHILLIS SIZIBA
MARJORY NJOMWA

1ST PLAINTIFF
2ND PLAINTIFF
3RD PLAINTIFF
4TH PLAINTIFF
5TH PLAINTIFF
6TH PLAINTIFF
7TH PLAINTIFF

AND

ROSECO BUREAU DE CHANGE LIMITED
HASSAN KIBONA

1ST DEFENDANT
2ND DEFENDANT

Before: Hon. Lady Justice Dr. W. S. Mwenda at Lusaka this 10th day of August, 2020

For the Plaintiffs: Mr. K. Nchito of Messrs. Kapungwe Nchito Legal Practitioners

For the Defendants: N/A

JUDGMENT

Cases referred to:

- 1. Khalid Mohammed v. The Attorney General (1982) Z.R. 49 (S.C.).*
- 2. Wilson Masautso Zulu v. Avondale Housing Project (1982) ZR 172 (SC).*
- 3. Galaunia Farms Limited v. National Milling Corporation Limited (2004) Z.R. 1 (S.C.).*

4. *Zambia Electricity Supply Corporation Limited v. Redlines Haulage Limited (1990- 1992) Z.R. 170 (S.C.).*
5. *OTK Limited v. Amanita Zambiana Limited, Diego Gan-Maria Casilli, Amanita Premium Oils, Amanita Milling Limited, 2005/HPC/0199.*

The Plaintiffs commenced this action against the Defendants on 8th February, 2016 by way of Writ of Summons and Statement of Claim, claiming the following relief:

1. An order that the Plaintiffs are immediately repaid the US\$41,250 (K462,000.00 at the rate of K11.20 to US\$1.00) or the Kwacha equivalent of the US Dollar on the date of repayment, by the 1st and 2nd Defendants;
2. Damages for loss of business;
3. Interest at current commercial bank lending rate on all sums due and payable to the Plaintiff;
4. Any other relief the Court may deem fit; and
5. Costs.

The Plaintiffs aver in the Statement of Claim that they were, at all material times, business ladies involved in the supply of groceries, while the 1st Defendant was, at all material times, a Bureau De Change carrying on business at COMESA market in Lusaka; and the



2nd Defendant was a director and shareholder in the 1st Defendant company.

The Statement of Claim further discloses that on or before 3rd July 2015, the 1st to 6th Plaintiffs entered into an agreement with the Defendants, and the 2nd Defendant, acting for and on behalf of the 1st Defendant and on his own behalf, committed to repay to the 1st to 6th Plaintiffs US\$61,250 (K686,000.00 at the rate of K11.20 to US\$1.00), being money advanced to the 1st and 2nd Defendant by the 1st to 6th Plaintiffs.

The Plaintiffs state further, that by another agreement dated 20th September, 2015, between the 1st to 6th Plaintiffs and the 1st and 2nd Defendants, the 2nd Defendant on behalf of the 1st Defendant and on his own behalf paid US\$30,000.00 (K366,000.00 at the rate of K11.20 to US\$1.00) towards the amount due to the 1st to 6th Plaintiffs, leaving an unpaid balance of US\$31,250.00 (K350,000.00 at the rate of K11.20 to US\$1.00).

The Statement of Claim also discloses that, by an agreement dated 15th July, 2015 between the 7th Plaintiff and the 1st and 2nd Defendants, the 2nd Defendant acting on behalf of the 1st Defendant

and on his own behalf, committed to repay US\$20,000 (K224,000.00 at the rate of K11.20 to US\$1.00), being money advanced to the 1st and 2nd Defendants by the 7th Plaintiff. That, the Defendants have only repaid US\$10,000.00 (K112,000.00 at the rate of K11.20 to US\$1.00) to the 7th Plaintiff.

The Plaintiffs aver that despite several reminders and many assurances from the 2nd Defendant, the Defendants have failed, refused, ignored and/or neglected to repay the US\$41,250.00 (K462,000.00 at the rate of K11.20 to US\$1.00), due and payable to the Plaintiffs; and that the Plaintiffs being suppliers of groceries have lost out on income due to them because of the failure by the Defendants to repay the sums owed. That, as a result of the Defendants' refusal to repay the sum owed to the Plaintiffs, the Plaintiffs have suffered loss and damage.

The Plaintiffs also filed Skeleton Arguments on which they are relying, dated 24th April, 2018, the gist of which is that the Defendants did not act in the best interest of the Plaintiffs and therefore, the Defendants must be ordered to pay the Plaintiffs what they owe. Further, that the Defendants must be ordered to pay

damages for loss of business. To fortify this, Counsel for the Plaintiff relied on the case of *Zambia Electricity Supply Corporation Limited v. Redlines Haulage Limited*⁴.

It was contended, in the said Skeleton Arguments, that the Defendants have breached the terms of their contractual agreement with the Plaintiffs. That, several attempts have been made by the Plaintiffs in an effort to recover the monies owed to the Plaintiffs, but the Defendants have failed, refused, ignored and/or neglected to repay the Plaintiffs, the contractual sum.

On 19th February, 2016, the Defendants filed their Defence and Counterclaim.

In their Defence, the Defendants averred that the agreement of 3rd July, 2015, was not entered into voluntarily, but under immense pressure and undue influence from the Plaintiffs and without the 2nd Defendant clearly understanding the document; and was not properly advised by the lawyer handling the matter for the parties.

It was also claimed that the 2nd Defendant is not conversant with the English language as well as the local language of this Country, and as such, he has a serious language barrier and therefore, he had no

clear understanding of the matter and his rights, and options available to him.

As regards the payment said to have been made under the 20th September, 2015 agreement, the Defendants averred that the said payment was made as a result of pressure and harassment that the 2nd Defendant was receiving at the hands of the Plaintiffs and that, the same should not have been made had the Defendants been properly advised and guided at the time.

The Defence further disclosed that the Defendants allege that the agreements that the 2nd Defendant was made to sign are illegal and/or voidable as they are meant to launder an illegal transaction allegedly made between the Plaintiff and one Sandra Phiri. That, the background to this matter is that the Plaintiffs allege to have given money to the 1st Defendant's cashier and supervisor at the 1st Defendant's bureau de change, by the name of Sandra Phiri.

The Defendants asserted that the Plaintiffs did not give any money to the 2nd Defendant personally, but the money was allegedly given to the employee of the 1st Defendant at the time. That, the money

Phiri, with the view to milking the Defendants of their hard-earned income. Further, that in light of the criminal matter and the unclear circumstances in which the amounts in issue were allegedly given to the 1st Defendant's employee facing criminal charges, the Plaintiffs are not entitled to payment of the amounts claimed as they could have colluded with the employee in issue to stage manage a loss which may not be real.

The Defendants further averred that during the period when the money is alleged to have been given to the 1st Defendant's employee, the 2nd Defendant was out of the country. That, the transactions the Plaintiffs had, if any, with the 1st Defendant's employee are illegal and unenforceable. The Defence further states that the Plaintiffs are not entitled to the reliefs sought as the Defendants are denying receiving any money from the Plaintiffs; and that alternatively, the plaintiffs' entitlement if any, should be the Kwacha amounts allegedly given to the 1st Defendant's employee.

In their Counterclaim, the Defendants repeated the averments in their Defence and added that the Plaintiffs had no valid agreement with the Defendants, to give huge sums of money to the 1st Defendant's employee without the knowledge and/or approval of the

2nd Defendant or any of the directors or shareholders of the 1st Defendant. With this, the Defendants have Counterclaimed the following:

1. Refund of the sum of US\$30,000.00 paid to the 1st to 6th Plaintiffs;
2. Refund of the sum of US\$10,000.00 paid to the 7th Plaintiff;
3. Costs; and
4. Interest.

To augment their pleadings, the Defendants filed into court a List of Authorities and Skeleton Arguments, dated, 5th December, 2016; the gist of which is that the Plaintiffs have failed to satisfy their burden of proof, thereby rendering this action to be without merit; and as regards the Counterclaim, that there is no dispute that the Plaintiffs received money from the 2nd Defendant, dubiously and therefore, the Counterclaim must be upheld.

Counsel for the Defendants, in this regard, cited the cases of *Khalid Mohammed v. The Attorney General*¹, *Wilson Masautso Zulu v. Avondale Housing Project*² and *Galaunia Farms Limited v. National Milling Corporation Limited*³, as support for his submission that 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. In this regard, Counsel for the Defendants contended that the burden of proof on the Plaintiffs is that they must prove their case on a preponderance of evidence.

It was further contended that the documents that the Plaintiffs have produced were made after the claims herein were made against the Defendants. That, there is no document produced, prior to the illegal giving of the money to the 1st Defendant, or executed at the time the Plaintiffs allege that they gave money to the 1st Defendant. It was further contended by Counsel for the Defendants that the Plaintiffs' documents were executed under the guidance of their lawyers and the Defendants did not seek independent legal advice on the matter, hence, there was undue influence on the Defendants. That, the documents in issue were not signed by the 2nd Defendant freely and thus, the documents were not intended to create a contract, and cannot be relied on to legitimise the Plaintiffs' claims.

The Plaintiffs filed their Reply on 14th March, 2016 in which they denied there having been any undue influence and pressure from them which made the Defendants enter the agreements, or that the

agreements were illegal and/or voidable for seeking to launder an illegal transaction between the Plaintiffs and Sandra Phiri. Further, that the Defendants cannot plead ignorance of the law as a defence and that the issue of the Defendants not having been advised properly by their lawyers is within the peculiar knowledge of the Defendants.

The Plaintiffs also claimed that they did business with the Defendants, which was under the charge and care of the Defendants at all times, and that the money involved was in Zambian Kwacha with the sole intention of converting it to US Dollars.

With respect to the Defendants' allegation that the Plaintiffs were still working with Sandra Phiri, with a view to milking the Defendants of their hard-earned income, the Plaintiffs responded that the said allegation is offensive and libelous.

The Plaintiffs denied that the transactions were illegal or that the Defendants are entitled to the any counterclaim or any money at all from the Plaintiffs.

On 17th July, 2018, before the matter came up for trial, the advocates for the Defendants, initially on the record, withdrew from acting for

the Defendants. On the first scheduled date of trial, being 21st August, 2018, the Defendants were not in attendance, which necessitated the Plaintiffs' advocates to apply for leave to serve the Notice of Hearing on the Defendants, by substituted service, as the Defendants were now unrepresented. Leave for substituted service by advertisement in a daily newspaper of wide circulation was, thus, granted and the matter adjourned to 3rd September, 2018 for status conference, and to 24th September, 2018 for trial.

On 29th August, 2018, the Plaintiffs' Counsel filed an Affidavit of Service, in which proof of substituted service by way of advertisement in the Daily Mail Newspaper, was exhibited as "NM1".

On 3rd September, 2018, when the matter came up for status conference, only the Plaintiffs' Counsel was in attendance, despite proof of substituted service of the Notice of Hearing, on the Defendants. At the said status conference, Counsel for the Plaintiff stated that they had served the Defendants the Notice of Hearing by substituted service, and this Court having been satisfied that that was so, adjourned the matter to 24th September, 2018, for trial.

On 24th September, 2018, when the matter came up for trial, the Plaintiffs' Counsel was in attendance while the Defendants were still not in attendance. The Court being satisfied that the Defendants had been adequately served with the Notice of Hearing, but not in attendance, the Court proceeded to hear the Plaintiffs.

The Plaintiffs had one witness by the name of Chabu Mwamulima (PW1), a business woman and 1st Plaintiff herein. The Witness Statement of PW1, dated 25th April, 2017, was tendered into evidence, along with the Plaintiffs' List of Documents and Bundle of Documents dated 6th October, 2016; and Plaintiffs' Supplementary Bundle of Documents dated 25th April, 2017. The said documents were duly admitted in evidence.

It was PW1's testimony that the Plaintiffs are business women who import groceries from South Africa to supply to grocery shops, and that the said business necessitates that the Plaintiffs have access to foreign currency, especially US Dollars, which is required to import the groceries.

It was PW1's further testimony that the Plaintiffs had established a relationship with the Defendants in which the Defendants would

supply the United States Dollars, whenever the Plaintiffs needed the currency to import the groceries. That, it was as a result of the relationship between the Plaintiffs and the Defendants, that on various dates in or about June 2015, the Plaintiffs left various amounts in Kwacha, with the Defendants amounting to the equivalent of US\$61,250.00 at the material time.

PW1 testified that it was orally agreed that the money would be collected at various times until the full US\$61,250.00 was collected, but the Plaintiffs were unable to collect the money in US Dollars as agreed and that, on 17th June, 2015, the staff from the 1st Defendant requested a meeting which was attended by PW1 and the 2nd and 3rd Plaintiffs, and the 2nd Defendant and two of its staff, namely, Sandra Phiri and Liston Sichula.

PW1 stated that at the said meeting, the 2nd Defendant explained that the US\$61,250.00 had gone missing. PW1 requested to be shown the safe to which she was taken by Liston Sichula and she found that there was money there. PW1 testified that at the conclusion of the meeting, she and her colleagues were assured by the 2nd Defendant

that the missing money would be refunded as it was in the safe at the time of the meeting.

It was PW1's further testimony that the following week, the Plaintiff received a phone call from the Defendants' lawyer at the time, Mr. Masha of Masha and Company, who requested for a meeting. That, at the meeting the 2nd Defendant explained that the Plaintiffs' money which was in the safe had been released to other unknown clients and that the matter had been reported to Chawama Police. PW1 averred that the 2nd Defendant then signed an agreement on how he would pay back the money and requested that PW1 testify in the case against the employees of the 1st Defendant. To fortify this assertion, PW1 referred the Court to pages 3 and 4 of the Plaintiffs' Bundle of Documents.

PW1 testified that on or about 26th June, 2015, the Defendants repaid the first amount of US\$10,000.00, after which PW1 was named as witness in the case of *The People v. Sandra Phiri*. That, on or about 28th September, 2015, the Plaintiffs got the second payment of K200,000.00, which was at the agreed rate of K10.00 to US\$1.00,

translating to US\$20,000.00. As proof of this assertion, PW1 referred the Court to pages 1 and 2 of the Bundle of Documents.

It was PW1's testimony that on 16th January, 2016, PW1 testified against Sandra Phiri in the case of *The People v. Sandra Phiri*.

It was further averred by PW1 that there is a balance of US\$31,250.00 remaining unpaid, which the Defendants have refused and/or neglected to pay and as a result, the Plaintiffs' advocates wrote a demand letter to the Defendants, to which the Defendants responded on 2nd February, 2016. As proof of this assertion, PW1 referred the Court to pages 4 and 5 of the Plaintiffs' Supplementary Bundle of Documents.

There was no cross-examination of the Plaintiffs' evidence and that marked the close of the Plaintiffs' case. Further, no evidence was led by or on behalf of the Defendants herein. Therefore, the Plaintiffs' evidence stands unchallenged, in the circumstances.

The Plaintiffs' Counsel requested for 30 days from the day of trial, within which to file written submissions on or before 25th October, 2018. I have perused the court record and it appears that Counsel for the Plaintiffs did not file the promised written submissions.

From the facts as presented above, the questions for determination by this Court, in my view, are simply the following:

1. Whether the Plaintiffs have proved their case(s) on a balance of probabilities, so as to warrant the grant of the relief sought in this case; and
2. Whether the Defendants have sufficiently rebutted the Plaintiffs' claims and proved their Counterclaim on a balance of probabilities to warrant its success.

In order to determine the above issues, I shall proceed to examine the facts before this Court as well as the evidence tendered in support thereof.

With regard to the first issue, PW1 has averred that the 2nd Defendant signed an agreement on how he would pay back the money and to fortify this assertion, PW1 referred the Court to pages 3 and 4 of the Plaintiffs' Bundle of Documents. I have perused the said document at pages 3 and 4 of the bundle, and in the light of no rebuttal by the Defendants, I am satisfied on a balance of probabilities that the Defendants did, in fact agree to pay the sum of US\$61,250.00 collectively and individually to the Plaintiffs. Further, the said

amount was to be the refund of funds advanced to the 1st Defendant by the said Plaintiffs therein. However, I should hasten to state that this finding of fact is only with respect to the 1st to 6th Plaintiffs and not the 7th Plaintiff, as the latter is not on the list in the document produced at pages 3 and 4 of the bundle.

It was also averred by PW1 that on or about 26th June, 2015, the Defendants repaid the first amount of US\$10,000.00 and that, on or about 28th September, 2015 the Plaintiffs got the second payment of K200,000.00, which was at the agreed rate of K10.00 to US\$1.00, translating to US\$20,000.00. As proof of this assertion, PW1 referred the Court to pages 1 and 2 of the Bundle of Documents.

I have examined the said documents at pages 1 and 2 of the bundle and I am satisfied that the document at page 1 clearly speaks to the Plaintiffs' assertion that on 28th September, 2015 the Plaintiffs got the second payment of K200,000.00. The document clearly states that the 2nd Defendant paid the sum of K200,000.00 as part payment of US\$61,250.00, on behalf of the 1st Defendant. However, from the document, it is not clear that the parties agreed to a rate of K10.00 to US\$1.00, translating to US\$20,000.00, as alleged by the Plaintiffs. What seems to appear at page 2 of the bundle, as regards the Dollar

currency, are the rates of 12.4308 for buying the currency, and 12.6774 for selling the currency.

It was further averred by PW1 that there is a balance of US\$31,250.00 remaining unpaid, which the Defendants have refused and/or neglected to pay and as a result, the Plaintiffs' advocates wrote a demand letter to the Defendants, to which the Defendants responded on 2nd February, 2016. As proof of this, PW1 referred the Court to pages 4 and 5 of the Plaintiffs' Supplementary Bundle of Documents.

I have perused the said letter at pages 4 and 5 of the Plaintiffs' Supplementary Bundle of Documents, and find that while the letter seems to make reference to a commitment issued between the 1st Defendant and some purported customers, the same does not mention any amount of US\$31,250.00, and in this case, it is hard to ascertain where the said sum is coming from. However, it appears that the facts as disclosed in the Statement of Claim, reveal two transactions leading up to two similar claims (which have been lumped together as the "Plaintiffs' claim"), the first being brought by the 1st to 6th Plaintiffs, and the second one involving the 7th Plaintiff, both against the same Defendants. In this regard, it was recounted

that on or before 3rd July 2015, the 1st to 6th Plaintiffs entered into an agreement with the Defendants, and the 2nd Defendant, acting for and on behalf of the 1st Defendant and on his own behalf, committed to repay to the 1st to 6th Plaintiffs US\$61,250 (K686,000.00 at the rate of K11.20 to US\$1.00), being money advanced to the 1st and 2nd Defendant by the 1st to 6th Plaintiffs. That, by another agreement dated 20th September, 2015, between the 1st to 6th Plaintiffs and the Defendants, the 2nd Defendant on behalf of the 1st Defendant and on his own behalf paid US\$30,000.00 (K366,000.00 at the rate of K11.20 to US\$1.00) towards the amount due to the 1st to 6th Plaintiffs, leaving an unpaid balance of US\$31,250.00 (K350,000.00 at the rate of K11.20 to US\$1.00).

The portion of the pleadings and evidence, as relates to the 1st to 6th Plaintiffs, has been addressed above, when the Court considered the evidence led by one Chabu Mwamulima, the 1st Plaintiff herein.

Still on the first issue and specifically with respect to the 7th Plaintiff's case, the Statement of Claim discloses that by an agreement dated 15th July, 2015 between the 7th Plaintiff and the 1st and 2nd Defendants, the 2nd Defendant acting on behalf of the 1st Defendant

and on his own behalf, committed to repay US\$20,000 (K224,000.00 at the rate of K11.20 to US\$1.00), being money advanced to the 1st and 2nd Defendants by the 7th Plaintiff. That, the Defendants have only repaid US\$10,000.00 (K112,000.00 at the rate of K11.20 to US\$1.00) to the 7th Plaintiff.

While the 7th Plaintiff has made the above allegations, she has not led sufficient evidence to substantiate her claims. There appears, however, a document at page 3 of the Plaintiffs' Supplementary Bundle of Documents, being a commitment by the 2nd Defendant, on behalf of the 1st Defendant to pay the sum of US\$20,000.00 to 'Happy In Time Enterprises', being a refund of funds advanced to the 1st Defendant. The said agreement makes reference to the 7th Plaintiff, only as the person signing on behalf of 'Happy In Time Enterprises'. It is not clear from the said document at page 3 of the Supplementary Bundle, whether the entity to whom the Defendants committed to pay the sum of US\$20,000.00 and the 7th Plaintiff are one and the same person. No mention of 'Happy In Time Enterprises' was ever made in the Plaintiffs' pleadings and no explanation has been provided to this Court, of how this new entity has been introduced into evidence. Therefore, I find it hard to appreciate the relevance of

the said document, to the 7th Plaintiff's case. Further, the said document is not dated and thus, difficult to ascertain when the same was authored and which facts alleged by the 7th Plaintiff, it is intended to speak to.

As for the documents appearing at pages 1 and 2 of the Supplementary Bundle of Documents, I have examined the same and find as follows:

- (i) With regard to the document at page 1 of the Supplementary Bundle of Documents, the same is dated 16th June, 2015 and bears the name "MAJORY" at the head of the page. The documents also state the following:

100 -----	91 600
50 -----	<u>43 400</u>
	<u>K135,000</u>

Received by Sandra Phiri on behalf of Roseco Bureau.

The contents of the document above, in my view, do not serve the 7th Plaintiff in any way because the same appears to be abstract and does not seem to substantiate anything the 7th Plaintiff has alleged. The document does not make much sense, in light of the 7th Plaintiff's story in the pleadings. Neither the date therein or the figure mentioned is proof of anything that the 7th Plaintiff has alleged.

- (ii) With regard to the document at page 2 of the Supplementary Bundle of Documents, the said document simply states as follows:

Received amount of

K135,000 16/06/2015

K13,000 18/06/2015

Received by Sandra Phiri.

Roseco Bureau

Just like the document at page 1 of the Supplementary Bundle of Documents, the document above does not serve the 7th Plaintiff to any end. The contents therein, in my view, are abstract and do not demonstrate any nexus to the Plaintiffs' allegation.

Precedent has been set in the case of *Khalid Mohamed v. The Attorney-General*¹, where the supreme Court 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 a proposition that even if a plaintiff's case has collapsed of its inanity 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. Quite clearly a defendant in such circumstances would not even need defence.”

On the strength of the above, I find that the 7th Plaintiff has failed to discharge her burden of proving her claims on a balance of probabilities.

I now move on to the second issue, namely, whether the Defendants have sufficiently rebutted the Plaintiffs' claims and proved their counterclaim on a balance of probabilities to warrant its success.

The Defendants averred in their pleadings that the purported agreements between the Plaintiffs and the Defendants were not entered into voluntarily, but under immense pressure and undue influence from the Plaintiffs and without the 2nd Defendant clearly understanding the document; and was not properly advised by the lawyer handling the matter for the parties. Further, that the Plaintiffs had no valid agreement with the Defendants, to give huge sums of money to the 1st Defendant's employee without the knowledge and/or approval of the 2nd Defendant or any of the directors or shareholders of the 1st Defendant. Thus, the Defendants Counterclaimed as follows:

1. Refund of the sum of US\$30,000.00 paid to the 1st to 6th

Plaintiffs;

2. Refund of the sum of US\$10,000.00 paid to the 7th Plaintiff;
3. Costs; and
4. Interest.

In the case of *OTK Limited v Amanita Zambiana Limited, Diego Gan-Maria Casilli, Amanita Premium Oils Limited, Amanita Milling Limited*⁵, which I note is of only persuasive value and in respect of which I am swayed, my learned Brother Mutuna, J., (as he then was), held as follows:

“Witness statements are a means of ensuring that the evidence-in-chief is received with ease and speed to facilitate speedy disposal of matters. The procedure as it relates to reception of evidence-in-chief on the Commercial List is, therefore, not distinct from that of the General List. The same rules of evidence apply to both Lists.”

It is my considered view, therefore, that a witness who fails to physically appear at trial and expressly indicate that they wish to tender their witness statement into evidence, is as good as a witness who completely fails to appear before court to give their examination in chief. In other words, it is as good as there being no evidence at all. It is not enough that a witness statement is filed into court.

While the Defendants outlined their allegations against the Plaintiffs, the Defendants failed to tender in their witness statement(s) and/or adduce any evidence to support their allegations and also failed to appear at trial. Thus, the Defendants have failed to substantiate both their defence and their counterclaim, in this respect.

It is trite law that the burden of proof lies on he who alleges. In this regard, the cases of *Wilson Masautso Zulu v. Avondale Housing Project*², and *Khalid Mohamed v. The Attorney General*¹ are instructive. In the former case the Court held that:

“Where a plaintiff makes an allegation, it is for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent’s case.”

In my view, as far as the Defendants’ allegations leading up to the counterclaim are concerned, the Defendants have simply failed to provide any proof for the same. Their Defence is equally unsubstantiated and the whole defence and counterclaim must fail, for these reasons.

This brings me to the final order. As already alluded to earlier, the Supreme Court guided, in the case of *Khalid Mohamed v. The*

*Attorney General*¹, that the mere failure of the opponent's defence does not entitle a plaintiff who has failed to prove his case to judgment. I have already found above that the 7th Plaintiff has failed to prove her case against the Defendants, while the 1st to 6th Plaintiffs have only proved part of their claim and have not adduced any evidence to prove their claim for damages for loss of business. Thus, no judgment will be entered in favour of the 7th Plaintiff. On the other hand, judgment is entered for the 1st to 6th Plaintiffs for payment of the sum of US\$61,250.00, less K200,000.00, being part payment of the said sum, duly received by the 1st Plaintiff, on 28th September, 2015, and further, less the sum of US\$10,000.00, being the initial sum averred by the Plaintiffs, in their own pleadings, to have been already settled by the Defendants.

The Judgment sum which shall be calculated at the rate of K11.20 to US\$1.00, shall carry interest at 12% per annum being the average of United States Dollars current lending rate of Standard Chartered Bank Zambia, Stanbic Bank Zambia and First National Bank Zambia, from the date of the Writ of Summons until full payment.

Costs are awarded to the 1st to 6th Plaintiffs, to be taxed in default of agreement.

Leave to appeal is denied.

Delivered at Lusaka this 10th day of August, 2020.



**DR. W.S. MWENDA
JUDGE**