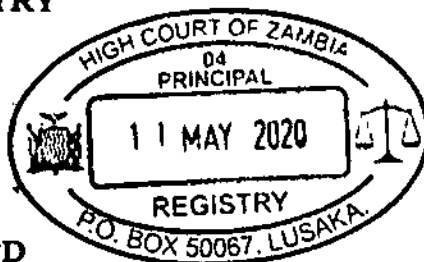


**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

2018/HP/0939



BETWEEN:

**JOHNNY'S TRADING CO LTD****PLAINTIFF**

AND

**YEWONDWEOSSEN MENGISTU****DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 11<sup>th</sup> DAY OF MAY,  
2020**

*For the Plaintiff : Mr C. Ngoma, Simeza Sangwa & Associates*

*For the Defendant : Ms S. Sakajila, Tembo Ngulube & Associates*

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## **J U D G M E N T**

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### CASES REFERRED TO:

1. *Miller v Minister of Pensions* 1947 2 ALL ER 372
2. *Ameer Mohammed v Baker Ali* RWL (9) Raj 2354, 2002 (4) WLC 425
3. *Colgate Palmolive Zambia (Inc) v Shemu and others* Appeal No 81 of 2005
4. *Kasepa v Mulenga* (Appeal No 235/2013) [2016] ZMSC 196
5. *Grizzly Business Limited v Stena Drilling Limited & Another* 2017 EWCA Civ 94
6. *Phiri BHB Contractors Limited and others* (Appeal No 136/2017) [2018] ZMCA 249

In a writ of summons and statement of claim filed on 17<sup>th</sup> May, 2018, which was amended on 2<sup>nd</sup> May, 2019, the plaintiff claims the following;

- i. *A declaration that the plaintiff is entitled to occupy the unit constructed at the defendant's property for ten years rental free.*
- ii. *Specific performance of the oral agreement.*
- iii. *Alternatively,*
  - a) *Payment of the sum of US\$ 150, 000.00 spent on constructing the unit.*
  - b) *Damages for breach of contract;*
  - c) *Damages for loss of use of the money.*
- iv. *Interest on the sums due.*
- v. *Any other relief the court may deem fit.*
- vi. *Costs.*

According to the statement of claim, sometime in 2017, the plaintiff and the defendant entered into an oral agreement, wherein it was agreed that the plaintiff would construct a shop/unit on the defendant's property, and in return, the plaintiff would occupy the defendant's property for a period of ten (10) years. The particulars of the oral agreement are stated as;

- i. *The plaintiff to construct a shop/unit at the defendant's premises.*
- ii. *The plaintiff to use its own resources and materials.*
- iii. *The plaintiff to occupy the shop/unit rent free for a period of ten years for purposes of its business; and*
- iv. *The plaintiff to utilize the shop/unit to run a bar and a restaurant.*

It is stated that the plaintiff commenced the construction works of the shop/unit as per the oral agreement, and that it used its own resources and materials without any contribution from the defendant. The plaintiff states that it spent well over US\$150, 000 on building materials, labor and installation of fittings such as tiles and toilets. It further spent valuable time and resources which would have been diverted towards other projects and use.

The averment is that the construction of the unit/shop was completed sometime in 2018, and the defendant was informed that the plaintiff would open a bar and restaurant in the newly constructed shop as per the oral agreement. However, shortly before the plaintiff opened the bar and restaurant, the defendant informed the plaintiff that it was required to pay rentals, which was contrary to the terms of the oral agreement, between the parties.

It is stated that the plaintiff moved into the unit and began running its bar and restaurant business, but the defendant has insisted, in breach of the oral agreement between the parties, that the plaintiff should be paying rentals, and has on numerous occasions threatened to close the bar and restaurant. That as a result, the plaintiff has suffered loss and damage. The particulars of the loss and damage are stated as;

1. Loss of profit on the bar and restaurant business for a period of ten (10) years.

The defendant entered appearance and filed a defence and counterclaim on 17<sup>th</sup> May, 2019. It is stated therein that the assertion that the parties entered into an oral agreement that the plaintiff would construct a shop at the defendant's premises is admitted to the extent that it was agreed

that the plaintiff would construct a shop on the defendant's property known as Hillview Shopping Mall. The defendant denies that it was agreed that the plaintiff would occupy the shop rent free for ten (10) years, stating that the plaintiff was advised that it would be paying rent at US\$500 per month.

It is further stated that when the plaintiff wanted to occupy a unit at the defendant's property, all the shops at the mall had been leased to other tenants, and the defendant was unable to construct a shop for the plaintiff at the time, as he did not have enough funds. That it was on that premise, that the plaintiff and the defendant entered into the agreement that the plaintiff would cover the cost of building the shop/unit that it wanted to occupy.

In terms of what the agreement was with regard to the construction of the shop/unit, the defendant avers that he was to reimburse the plaintiff the cost of the construction after the work had been valuated, and the cost of the construction ascertained. It is the defendant's defence that the agreement did not include a clause that the plaintiff would occupy the shop/unit rent free for a period of ten (10) years, as the sole purpose of construction of the shopping mall was for the defendant to realise profit.

It is contended that the plaintiff at all times was required to pay rentals for the shop or unit known as Shop No 8 of Lot No 15263/M, Lusaka, at US\$500 per month, with an additional US\$150 for use of the open area slab which was constructed by the defendant for the purpose of constructing another shop thereon. The defendant denies that the plaintiff used its own resources and materials to construct the shop/unit without contribution from the defendant, stating that sometime in 2018,

the plaintiff requested a loan of US\$5000 from the defendant, as it had a shortfall when constructing the unit/shop.

The assertion that the plaintiff spent over US\$150, 000.00 to construct the shop/unit is denied, and the averment is that the same is within the plaintiff's peculiar knowledge, and it will be put to strict proof thereof. The averment that the plaintiff spent valuable time and resources on the project which could have been diverted to other projects, is said to be within the plaintiff's peculiar knowledge.

The defendant admits that the plaintiff completed the construction of the shop/unit sometime in 2018, to the extent that the plaintiff informed him that it would open a bar and restaurant in the newly built shop/unit. The defendant however denies that shortly before the bar and restaurant were opened, he informed the plaintiff that it was required to pay rent, contrary to the oral agreement, the defence being that the agreement was always that the plaintiff was required to pay rent. Therefore, the request for the plaintiff to pay rent was consistent with the oral agreement.

The defendant agrees that the plaintiff moved into the shop/unit and started operating the bar and restaurant, but he denies that he is in breach of the agreement, and has threatened to close the bar and restaurant. He contends that it is the plaintiff that is in breach of the agreement by not paying rent as agreed.

The assertion that the plaintiff has suffered loss is denied, but rather that it is the defendant that has suffered the said loss and damage, as he has been unable to productively use the money that the plaintiff is supposed to pay as rentals. The defendant counterclaims as follows;

- i. *An order that the plaintiff yields vacant possession of Shop No 8 of Lot No 15263/M Lusaka and the open area slab surrounding it to the defendant.*
- ii. *Rental arrears at the rate of US\$500 per month from April, 2018 until the plaintiff relinquishes possession of Shop No 8 and rental arrears for the use of the open area slab at the rate of US\$150 for the period April, 2018 until the plaintiff vacates the premises.*
- iii. *Payment of US\$5000 being the amount that the plaintiff owes the defendant for the loan that was advanced to cover the shortfall for construction of Shop No 8.*
- iv. *Interest.*
- v. *Any other relief the court may deem fit.*
- vi. *Costs.*

In the defence to the counterclaim that was filed on 6<sup>th</sup> June, 2019, the plaintiff maintains that the agreement was that it would occupy the shop/unit rent free for ten (10) years. It states that it is not true that at the time of the agreement, all of the shops at the defendant's premises were occupied, its defence being that most shops were not occupied.

The averment that it was agreed that the defendant would reimburse the plaintiff for construction of the shop/unit is denied, with the plaintiff maintaining that the agreement was that it would occupy the shop/unit rent free for ten (10) years upon completion.

Therefore, the cost of construction of the shop/unit was in exchange for rentals, and the plaintiff denies that it was required to pay rent. Whilst agreeing that the plaintiff obtained a loan of US\$5000 from the

defendant, it is denied that the same was to cover the shortfall for construction of the shop/unit. The plaintiff states that the said US\$5000 was for a project that was unrelated to construction of the shop/unit, and has since been paid in full. The plaintiff adds that it was a usual practice between the parties to advance each other money.

The plaintiff avers that the claim for vacant possession and payment of rentals is contrary to the oral agreement between the parties, and that the US\$5000 has since been repaid to the defendant. Therefore, the defendant is not entitled to the reliefs sought.

At the trial, the plaintiff called one (1) witness, and the defendant testified as the sole witness for his case. Kuw Song Tan was PW1. His evidence was that he is the director of the plaintiff, and that he currently runs a bar. He stated that sometime in 2017, he assisted the defendant to get a tenant for one of his shops. PW1 also decided to take up one unit of the shops at the defendant's premises, and he was offered the shop at the corner.

It was his testimony that the defendant told him that if he built a shop on the land after the shop that he was to occupy, he could occupy it rent free, although the defendant did not tell him for how long he could occupy it rent free. PW1 stated that he agreed to build the shop, and he told the defendant that upon completion, he would occupy it rent free for ten (10) years.

Further in his testimony, PW1 testified that the defendant was agreeable, and he started the construction, without the defendant objecting. In the meantime, PW1 chased the defendant for a contract, and the defendant's eldest son told him not to worry, as he was their good friend. He stated

that he used his own resources to construct the bar, and that the defendant's second son even helped him in the construction, and he would be there every day.

That by the time he finished the construction, the contract had not been executed, and PW1 obtained the licences for operation. His evidence was also that for the bar, he needed a contract, and he even wrote a letter to the defendant. PW1 later approached a lawyer, and he told the court that it was not possible that he would be reimbursed after he finished the construction of the bar, as it did not make sense.

On how much was spent on the construction, the plaintiff said that it is US\$150, 000.00, which cost includes labour, transport, materials and salaries among others. With reference to page 9 of the plaintiff's bundle of documents, PW1 testified that it is the valuation report for the shop that he constructed. He stated that it does not include the labour and transport costs.

PW1 told the court that the US\$5000 that the defendant gave him had nothing to do with construction of the shop, stating that he would get money from the defendant and vice versa, although he is the person that mostly got money from the defendant. He stated that this money was paid back to the defendant.

As proof of that payment, PW1 referred to page 9 of the defendant's bundle of documents, as the text message dated 5<sup>th</sup> January, 2018, that he had sent before he paid the US\$5000. He also testified that at pages 13-14 of the defendant's bundle of documents, which is a bill of quantities for the shop, the valuers put the valuation at K439, 789.00,



which was not correct, as the valuator that he engaged had put the value at over K700, 000.00.

PW1 further testified that if the defendant wanted him to vacate the shop, he should compensate him US\$500, 000.00. He also asked the court to order specific performance of the oral agreement that he occupies the shop for ten (10) years, and that he claimed damages, which are included the US\$500, 000.00.

When cross examined, PW1 testified that the defendant needed a tenant at his shop, and it did not have to be the plaintiff. He stated that the plaintiff is a duly registered company. PW1 agreed that he proceeded to construct the shop without a contract, justifying this on account of the fact that he had known the defendant for seventeen (17) years, and he was his senior advisor. His testimony was that he obtained the valuation report at pages 9-32 of the plaintiff's bundle of documents at his own will.

PW1 went on to testify that he would buy some of the materials such sand and stones, and that at other times, he would ask the defendant to do so, and he would thereafter pay him. PW1 also stated that he had some of the invoices and receipts, and that the defendant's second son also had most of the receipts, as he was there most of the times. PW1 agreed that the defendant's second son would use some of the construction workers at the defendant's site to construct the shop, but that he would pay them.

PW1 told the court that the valuation report at page 13 of the plaintiff's bundle of documents puts the market value of the shop at US\$52, 308. He could not say how that figure was arrived at, but that he did not

agree with it. Further in cross examination, PW1 stated that the US\$500,000.00 that he claimed as damages, included the ten (10) years.

It was also his testimony that the US\$150,000.00 that he claims is an estimation of the costs, and that it was not guided by receipts, as there were a lot of cash payments. PW1 testified that it was beneficial for the defendant to allow him to occupy the premises for ten (10) years rent free, as the bar had a lot of clients, which would boost business at the centre, which is the shopping mall.

He agreed that after this action had been commenced, he declined to speak with the defendant, and whilst agreeing that his business had not been disrupted, PW1 testified that the defendant threatened to close the business in or around April-May, 2018. On what the threats were, PW1 told the court that the defendant told him that if he did not go to negotiate, his business would be closed.

He agreed that from the time he opened the bar and restaurant, he had not paid rentals. In conclusion, PW1 stated that he paid the defendant the US\$5000 not too long after he sent him the message, but it was before April. That marked the close of the plaintiff's case.

DW1 was the defendant. He testified that when he was building the shopping mall on Kafue road, which had shops and a slab at the end, PW1 approached him, and he did the frontage and the back. The defendant stated that he wanted to sign a lease with the plaintiff, but PW1 did not want to. He told the court that they agreed that the plaintiff occupies the finished shop, and that it would construct on the slab, and would be reimbursed.

The defendant further testified the plaintiff was to pay rent, but PW1 refused to sign the lease agreement, stating that the plaintiff would occupy it rent free. It was further the defendant's testimony that he agreed that the plaintiff would run a bar and restaurant, and that when the plaintiff refused to sign the lease, it became contentious, and the defendant asked Counsel to tell the plaintiff to vacate the premises. He had further asked that the shop be valued so that the plaintiff could be compensated.

The defendant stated that he had told the plaintiff to vacate the premises if it did not want to sign the lease, but when the action was commenced, he left the plaintiff to continue the business. His testimony was that the US\$5000 was given to PW1 as a loan, so that the shop could be completed, and that it had not been paid in full. The defendant's prayer was that he be paid the US\$5000, and that the plaintiff vacates the premises.

Further, that he be ordered to pay the plaintiff the amount that it had spent on constructing the shop, according to the valuation report, and that in the alternative, an independent valuator values the building, taking into account the fact that they did the slab for the building.

In cross examination, the defendant testified that he had been friends with PW1 for some time, which period exceeded ten (10) years. He initially agreed that they would lend each other money, but then stated that he had never borrowed money from PW1. The defendant agreed that the plaintiff constructed from the slab and that there were other tenants at the mall. The defendant testified that the plaintiff is the only tenant that completed a shop at the premises.

Further in cross examination, the defendant agreed that the plaintiff sent him an email over the issue of the rentals, and that in the response, he had not indicated that he would reimburse him. This he said was because he was responding to the issue of the rentals that had been raised. Still in cross examination, the defendant agreed that it was important for him to say that the agreement was that the plaintiff would not occupy the premises rent free, but that he would reimburse him.

He agreed that in paragraph 3 of the defence, he had pleaded that he did not have money to complete the building, but his defence was that he would reimburse the plaintiff on completing the construction. Further in cross examination, the defendant stated that he did not say that he did not have money to complete the building. However, when referred to paragraph 3 of the defence at page 3 of the defendant's bundle of pleadings, the defendant agreed that it states that he had no money to complete the building.

His evidence was that the plaintiff had no money to lend him, and he agreed that the plaintiff told him that he wanted to build the shop in his own way. On what the plaintiff had constructed, the defendant told the court that it is a sub structure, and he could even demolish it. He stated that he asked the plaintiff to sign a lease agreement before he completed the construction, and that he tried to stop him, but he went ahead and opened the bar.

When referred to the notice to vacate the shop dated 14<sup>th</sup> May, 2018, at page 27 of the defendant's bundle of documents, the defendant denied that the notice was issued so that the plaintiff could vacate the shop, in order that a valuer assesses the developments. He agreed that the notice does not refer to a lease agreement. When cross examined further, the

defendant agreed that the notice asked PW1 to vacate to shop so that a valuer could assess the developments with a view to compensating him.

It was the defendant's evidence that PW1 did not vacate the shop, and that valuers went to do the assessment, adding that it was in his presence. He further told the court that PW1's brother was there at the time, and he agreed that the valuation has no pictures of both the inside and the outside of the shop. The defendant however stated that the report includes the labour cost for the construction, the sub structure, and transport, although they are infused.

It was stated that Sunday Siluonde, the person who did the valuation had not indicated that he is a qualified quantity surveyor, but that a certified quantity surveyor certified the report. Whilst maintaining that PW1 owes him US\$5000, the defendant testified that other than the message on Whats App, he had no evidence to show that PW1 gave him the money.

He agreed that the valuation report that is in the plaintiff's bundle of documents was done by Seeff Zambia Limited, which is in the business of valuation. That at page 13 of the said bundle of documents, the property had been valued at US\$52, 308, which is more than the amount stated in the valuation report that he had produced. The defendant further agreed that at page 27 of the same bundle of documents, are pictures of the building entailing that the valuers went inside the building.

He could not say if the valuation includes transport and labour, as he had not gone through it, but he stated that a valuation report takes into account all the costs. It was agreed that under item 8.0 of the valuation

report at page 22 of the plaintiff's bundle of documents, the value of the property is put at K680, 000.00.

I have considered the evidence and the submissions. It is not in contention that the plaintiff constructed a shop on the defendant's property, which is known as Shop No 8 of Lot No 15263/M Lusaka. It is also common cause that after the construction was complete, the plaintiff occupied it, and started operating a bar and restaurant therein, and has not paid rentals for the said occupation. The question is whether the plaintiff succeeds on its claims, or it is the defendant that succeeds on the counterclaim.

The first claim is for a declaration that the plaintiff is entitled to occupy the unit that it constructed at the defendant's property for ten (10) years rent free. The evidence on record shows that the plaintiff contends that the defendant orally agreed that it would occupy the shop upon completion of the construction for ten (10) years rent free, to recover the costs of the construction.

In the submissions, the plaintiff relies on the case of **Grizzly Business Limited v Stena Drilling Limited & Another** <sup>(5)</sup> in which the issue for determination was whether there was an oral agreement for a success fee of 0.25%. That it was held in that case that;

***“The burden lies on the claimant to prove on a balance of probabilities that Mr Devine and Mr Welo agreed on a success fee of 0.25% in the telephone call in question (that which took place between 18:25 and 18:50 GMT on 29<sup>th</sup> November, 2011 or between 5:25 and 05:50 am on 30<sup>th</sup> November in Australia). It is therefore necessary to consider whether having regard to***

***the context in which that call took place, to the surrounding circumstances, and to the contemporaneous documents, it is more likely than not that Mr Devine's account of the call was correct".***

The plaintiff places further reliance on the case of ***Ameer Mohammed v Baker Ali*** <sup>(2)</sup> where it was stated that when a plaintiff bases his suit on an oral agreement of sale, they have a duty to disclose all the material facts and particulars of the agreement, and the surrounding circumstances, including the fact that if the oral agreement was entered into between the parties, then whether it was in the presence of any person, what negotiations took place, and if the agreement was acted upon, then all the material particulars.

The plaintiff submits that it bears the burden of proving that there was an oral contract, and that it has, by establishing that there was an oral agreement that the plaintiff could occupy the shop for ten (10) years rent free. The submission is also that there is unchallenged evidence that the contract was entered into sometime in 2017, for the construction of the shop at the defendant's premises, and that as consideration, the plaintiff would use its own resources to construct the shop, and would occupy it rent free for ten (10) years upon completion.

The contention is also that the plaintiff performed its part of the contract, as the plaintiff started the construction, and the defendant did not raise any objection while the construction was on going. That if the defendant did not agree that the plaintiff would occupy the shop rent free for ten (10) years, after the construction, then he would have objected while the construction was going on.

It is contended that the assertion that the defendant would reimburse the plaintiff for the construction does not make sense, when one considers the circumstances of the case. This is because it does not make sense that a person would spend so much time and effort to construct a building on another person's premises, just to be reimbursed the cost of that construction, as they would have lost out on the opportunity cost of the funds.

The submission is also that the defendant conceded in cross examination that if the issue was that he did not have money, he would have just borrowed it from the plaintiff or a lending institution, instead of allowing the plaintiff to construct, only to be reimbursed.

The plaintiff submits that it is noteworthy that the defendant played no part in the construction, and that if the agreement was that the plaintiff would be reimbursed on completion of the construction, the defendant would have taken keen interest in knowing the cost of the materials, transport and labour.

Further, that had the agreement been that the plaintiff be reimbursed for the construction, the defendant would not have claimed repayment of the US\$5000 that it claims the plaintiff borrowed in order to complete the construction. Therefore, the defence lacks merit.

The plaintiff also places reliance on the email that PW1 wrote to the defendant which is at page 2 of the plaintiff's bundle of documents, stating that in that email, PW1 raised the issue of occupying the premises rent free, and that the defendant had agreed to the same. Further, that in that email, PW1 noted that the defendant had ignored to execute the contract embodying the oral terms of the agreement.



The submission is that in the email in reply, the defendant denied ever having sat down with PW1 and agreeing on the alleged oral terms. This, the plaintiff submits, is a contradiction of the position that the defendant has taken, that he entered into an oral agreement with the plaintiff that he would reimburse the plaintiff the amount spent on construction of the shop. It is submitted that this points to the defendant's insincerity with respect to the oral agreement.

The plaintiff also submits that most importantly however, in the email in response, the defendant does not mention that the contract was for reimbursement. Therefore, the assertion is an afterthought. Reliance is placed on the case of **Colgate Palmolive Zambia (Inc) v Shemu and others** <sup>(3)</sup> where it was held that;

***"If there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by Courts of justice."***

In this regard, the submission is that there was an oral agreement that the parties entered into freely and voluntarily, that the plaintiff would occupy the defendant's shop for ten (10) years rent free, after it constructed it.

The defendant in his submissions refers to the case of **Miller v Minister of Pensions** <sup>(1)</sup> on the burden of proof in civil cases. Reliance is also placed on the case of **Phiri v BHB Contractors Limited and others** <sup>(6)</sup> in arguing that the plaintiff bears the burden of proving the terms of the oral contract that it alleges. Relying on the case of **Kasepa v Mulenga** <sup>(4)</sup>,

the defendant submits that there are two versions of the oral contract that have been given, and that oral evidence alone cannot be relied upon to prove that the parties agreed that the plaintiff would occupy the defendant's shop rent free after it constructed it.

It is also submitted that it does not make sense that the defendant would agree that he foregoes monthly rentals for ten (10) years, when Seeff valued the cost of the building at K680, 000, as the defendant put the rent at US\$500 per month. The defendant also refers to the two emails that were exchanged between the parties, and the submission is that it is clear from the emails that the plaintiff was reluctant to sign the lease agreement that all the tenants signed. That the only issue that was discussed, was the issue of reimbursement.

Indeed as submitted the parties, the plaintiff bears the burden of proving on a balance of probabilities, that the parties entered into an oral contract, under which it was agreed that the plaintiff would construct the shop at the defendant's premises, and thereafter occupy it for a period of ten (10) years rent free. Further, in establishing this, all the material terms of the oral agreement need to be established, as well as the circumstances surrounding the agreement, and whether there were any witnesses to the agreement.

The contention by the plaintiff is that when PW1 approached the defendant, and took up one of the shops at the end of the building, the defendant's eldest son also told him that he could construct on the slab that next to the shop that he occupied, and that if he did so, he would occupy it rent free. PW1 stated that he was not told the duration for which he would occupy the shop rent free, once he constructed it. He

had then proposed to build, and then occupy the said shop rent free for ten (10) years.

He also stated that the defendant agreed to his proposal, and PW1 started chasing the defendant for a contract embodying those terms, but it was not executed. The plaintiff contends that the defendant did not raise objection when the construction of the shop was on going, and that the defendant only demanded rent shortly before the plaintiff occupied it on completion.

When cross examined, PW1 stated that he proceeded to construct without a contract as he had known the defendant for seventeen (17) years. It is therefore clear, that the plaintiff alleges that the defendant orally agreed that it would occupy the shop after it had constructed it for ten (10) years rent free, as he did not raise any objection to the proposal made by PW1, and he started the construction. PW1 was not cross examined on his assertion that the defendant agreed that he would occupy the shop rent free after he constructed it.

However, as can be see from the emails in the plaintiff's bundle of documents, at page 1, the defendant on 20<sup>th</sup> April, 2018 wrote to the plaintiff over the non resolution of the issue of the rental payments. Then at page 2, PW1 had responded to that email indicating that he was saddened with the defendant's dishonesty especially that they had been friends for seventeen (17) years.

PW1 had also in that email stated that he wished to remind the defendant of the numerous times that he had confirmed the verbal agreement of no rental charge before he proceeded to build the bar, and that the defendant's son Netsanet had told him that he had raised the

issue with him more than once. Further, that based on their solid friendship, PW1 believed that he had confirmation to go ahead, and also on account of the fact that the defendant did not raise objection.

The email goes further to state that after the construction commenced, PW1 attempted to get the defendant to sign the contract based on the verbal agreement, but the defendant had ignored the same. Then two weeks before the bar was opened, the defendant had asked PW1 to pay rent.

At page 3 of the said bundle of documents is the reply to PW1's email, dated 24<sup>th</sup> April, 2018. In that email, the defendant states that no agreement had been signed for the shop that the plaintiff had occupied, and that they had not verbally agreed as alleged by PW1. The defendant also makes reference to the plaintiff not having signed the agreement like other tenants at the mall which were given to it sometime back.

The defendant also in that email refers to the fact that PW1 went to his office two (2) weeks earlier, claiming that he would occupy the shop for five (5) years rent free. However, the defendant had asked him how much he had spent on constructing the shop, as it was the basis on which the rentals could be discussed. It states that PW1 walked out of that meeting.

From these conversations, it can be seen that when the plaintiff started constructing the shop at the defendant's premises, he had proposed that that he would occupy it rent free on completion, although the duration was not certain. It can also be seen from these emails that the defendant did not agree that the plaintiff would occupy the premises rent free for ten (10) years after the said completion.

The evidence in these emails also shows that no agreement was signed as the defendant wanted the plaintiff to sign a lease agreement like the other tenants, but the plaintiff did not want to do so. When the defendant was cross examined, he agreed that out of all the tenants that were at the premises, only the plaintiff had constructed a shop there. Therefore, logically speaking, the plaintiff having constructed a shop at the defendant's premises at its own cost, was not in the same position as the other tenants.

The plaintiff had provided a service to the defendant by constructing a shop for him at its own cost, and the question is whether the construction of the shop at the plaintiff's expense was free of the rent charge? Further, the plaintiff also occupied the shop. Clearly, the cost of construction of the shop had to be taken into account, if the plaintiff was to sign a lease with the defendant for the payment of rentals. On that basis, the plaintiff could not sign a lease agreement like the other tenants.

The cost of how much was spent on constructing the shop was not given to the defendant, and it is on record that the defendant had put the rent at UDS\$500 for the shop. The defendant also counterclaims the payment of US\$150 per month for use of the open area at the premises.

There are valuation reports that both parties produced, with the one by the plaintiff at pages 9-32 of the plaintiff's bundle of documents, and puts the value of the shop at K680, 000.00 or US\$52, 308. The one for the defendant is at pages 13-26 of the defendant's bundle of documents, putting the value at K439, 789.00.

Clearly there is variance in the values. I accordingly order that an independent qualified quantity surveyor assesses the value of the construction works done by the plaintiff, at the cost prevailing at the time of the said construction. The valuator if not agreed by the parties, shall be sourced from the government valuation department.

The valuation shall be completed within six (6) months from today, and the cost of the construction works done by the plaintiff shall exclude the value of the slab that was on the site, before the plaintiff did the construction.

The value once ascertained, shall be determined as the value of the rentals that the plaintiff would have paid, had the defendant constructed the shop himself. Thereafter, if the parties are agreeable that the plaintiff continues to occupy the said shop, the value of the construction works shall be offset from the rentals, starting from the date that the plaintiff occupied the shop.

If, however, there is no agreement that the plaintiff should continue occupying the shop, the value of the construction works shall be refunded to the plaintiff, after deducting the value of the rent for the period that the plaintiff has occupied the shop since its completion.

The first claim having been determined, the claim in the alternative falls off. The same goes for the first two claims on the counter claim. The defendant counterclaims the payment of US\$5000, being the money that he lent to PW1 for completion of the shop in issue. There is no dispute that the defendant lent PW1 this money. PW1 only denied that the money was meant to complete the shop, stating that it was for another project.

In arguing that the plaintiff paid back the money to the defendant, reliance is placed on the text message at pages 9-10 of the defendant's bundle of documents. PW1's testimony was that he paid back the US\$5000 shortly after he sent the defendant that text message, saying that he paid back before April, 2018. The text message is dated 5<sup>th</sup> January, 2018, and in that message, PW1 admits owing the defendant the said amount, and he promises to pay the same without delay.

When he was before court, PW1 just told the court that he had paid back the money to the defendant, but he did not go on to state how he had done so, whether by bank transfer, cash payment or other means and whether the defendant had acknowledged receipt of the payment. In short, the plaintiff has not raised any defence to the defendant's assertion that it has not paid back the money.

Therefore, the defendant succeeds on his claim that the plaintiff owes him US\$5000, which amount is admitted. I accordingly enter judgment in favour of the defendant for the sum of US\$5000 at the exchange rate that was prevailing at the time it was advanced to the plaintiff.

The amount like the amount that will be found due to the plaintiff as refund for the construction of the shop, should the parties not agree to continue the lease agreement, shall carry interest at the average short term deposit rate from the date of issue of the writ until judgment, and thereafter at the Bank of Zambia lending rate until payment.

Further, if the parties shall not agree that the plaintiff shall continue to occupy the shop, and the costs of construction of the said shop will be refunded to the plaintiff, the US\$5000 shall be off set from the amount

due. The plaintiff is awarded costs of the proceedings, to be taxed in default of agreement. Leave to appeal is granted.

**DATED AT LUSAKA THIS 11<sup>th</sup> DAY OF MAY, 2020**

S. Kaunda  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**