IN THE HIGH COURT OF ZAMBIA **2018/HP/1582**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

HIGH COURT OF ZAMBIA
PRINCIPAL
31 JAN 2020
REGISTRY
P.O. BOX 50067, LUSAKA

BETWEEN:

FELIOUS TERRY KASONDA **PLAINTIFF**

AND

ZESCO LIMITED **DEFENDANT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 31st DAY OF JANUARY, 2020

For the Plaintiff : *Mr B.C. Mutale and Mr E. Banda, BCM Legal Practitioners*

For the Defendant : *Mrs J. Kunda, Legal Officer*

J U D G M E N T

CASES REFERRED TO:

1. ***Printing and Numerical Registering Co V Simpson 1875 LR 19 Eq at 465***
2. ***Kennedy v Thomassen 1929 1 CH D 426***
3. ***L'estrange v F. Graucob Limited 1934 2 KB 394***
4. ***Frank v Knight 1937 O.P.D 113***
5. ***Wilson Masauso Zulu v Avondale Housing Project Limited 1982 ZR 172***
6. ***National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo SCZ No 79/2001***
7. ***Indo Zambia Bank Limited v Mushaukwa Muhanga 2009 ZR 266***

OTHER WORKS REFERRED TO:

1. ***Chitty on Contracts Volume 1 General Principles, 13th Edition, Sweet and Maxwell, 2008***
2. ***Evan Mckendrick's Contract Law, 3rd Edition***

3. Trietel, Law of Contracts, 13th Edition

The plaintiff commenced this action by writ of summons on 13th September, 2018, in which he claims the following reliefs;

1. *Payment of K419, 158.00 being a refund towards the installation of a ZESCO facility by the plaintiff.*
2. *Interest on the said amount.*
3. *Any other relief the court may deem fit.*
4. *Costs.*

The claim as disclosed in the statement of claim is that sometime in April, 2014, the plaintiff approached the defendant for the purpose of connecting power to his premises at Plot No 12869, Kabangwe Lusaka. It is stated that the defendant through the office of the Chief Engineer advised the plaintiff that there were financial challenges that were hindering the connection of a ZESCO line to the plaintiff's premises.

Therefore, the plaintiff needed to either mobilise a group scheme of residents, or use his own resources to construct the ZESCO facilities, which would then be used to facilitate the connection of power to his premises. The plaintiff avers that he settled for the option of mobilizing his own resources, which he used to construct 800 metres MV and 11 KV line covering 1400 metres, and the other ZESCO facilities with the permission of the defendant, through a letter dated 21st July, 2014, to upgrade the then existing ZESCO single phase line.

The plaintiff further avers that in the letter of authorization, the defendant advised him that it would take over the installed equipment

one year after it was commissioned. However, this notwithstanding, the defendant started incorporating other private users before the lapse of the twelve (12) months, contrary to the agreement between the parties.

The plaintiff states that he spent a total sum of K463, 658.00 to have the equipment installed and maintained, in the initial stages, without contribution from any other users, who are now benefiting from the installation. He contends that the defendant should split the cost of K463, 658.00, that he spent alone in having the equipment installed between the plaintiff and the other eight (8) users in the proportions of K44, 500.00, entailing that the plaintiff is entitled to a refund of K419, 158.00.

The plaintiff also states that despite having given the defendant several reminders to pay this amount, it has neglected and or refused to pay the said amount.

The defendant entered appearance and filed a defence on 3rd October, 2018. It is stated therein that it agrees that the plaintiff approached it sometime in April, 2014 with a view to having power connected at his premises. The defendant however denies the assertion that through its Chief Engineer, the plaintiff was advised that there were financial challenges with regard to the connection of power at his premises, and he was given the two options that were available to have power connected to his house.

The defendant agrees that it granted the plaintiff permission through a letter to construct an 11KV overhead line, and to purchase his own 50 KVA transformer. The defendant however denies that it authorized the upgrade of the existing ZESCO facility, or that in the letter of

authorization, it advised the plaintiff that it would take over the installed equipment, one (1) year after it was installed.

The defendant also denies the assertion that contrary to the agreement with the plaintiff, with regard to taking over the installed equipment a year after the installation, it quickly started incorporating private users before the lapse of the period, stating that it was the plaintiff who has been illegally connecting third parties to the facility, and he has been charging them.

The assertion that the plaintiff spent a total sum of K463, 658.00 to have the equipment installed and maintained, is said to be within his peculiar knowledge, and that this amount has not been properly substantiated, and the defendant cannot be expected to pay the said amount claimed.

At the trial, the plaintiff testified and called no witnesses, while the defendant called two witnesses. In his testimony, the plaintiff told the court that in April, 2014, he applied to the defendant for the connection of electricity to his premises. He explained that at the time, the defendant had not reached his house, and his neighbours had informed him that the defendant had advised them to do a group scheme. However, people were not coming on board the group scheme.

That is how in May, the plaintiff applied to the defendant asking that he constructs a line, as the defendant's line was about 800 metres from their line. The plaintiff stated that when permission was granted, the MV line was constructed, but the voltage was low as the defendant's transformer was about one (1) kilometre away. He testified that he applied to the defendant for an upgrade to construct an 11 KV line and buy a transformer, which was granted.

It was the plaintiff's testimony that he bought the transformer and constructed the 11KV line which covered 1450 metres, and the defendant commissioned the line. The plaintiff identified the letter at page 1 of his bundle of documents as the first application that he made to the defendant for the MV line, and page 8 of the said bundle of documents as the second application, which refers to the MV line and construction of the 11KV line, and purchase of the 50KVA transformer.

He further identified page 10 of his bundle of documents as the response that the defendant gave, which had conditions and standards that had to be met, and which the defendant would inspect. The plaintiff also testified that in that letter, the defendant stated that the line would remain under his care for twelve (12) months, during which period, he would make good any repairs, and after that, the defendant would take over the line.

Still in his testimony, the plaintiff told the court that thereafter construction commenced, and that the Planning Department at the defendant told him that as the line was private, they would not issue any other quotations for the line without his consent. He stated that after the electricity was installed, neighbours like Angela went to ask him if they could contribute towards the power. He told her that she had to contribute K15, 000.00, which she did.

Then another neighbour Banda, a lodge owner approached the plaintiff and he contributed K2, 000.00, while Mrs Jere contributed K1, 500.00. The plaintiff's evidence was that he expected the neighbours to approach him, but to his surprise, they went directly to the defendant who started issuing them with quotations and connecting them with power. The plaintiff's evidence was that he confronted a neighbour over the same,

and he went to the defendant to complain, but he was not given a satisfactory response. He then decided to sue.

The plaintiff concluded his testimony by stating that the defendant had advised that they do a group scheme where people contributed to the construction of the line, which is what he did. However, other people are now enjoying the electricity without having paid for it.

In cross examination, the plaintiff testified that he applied for the power in 2014, and that he filled in the form at page 1 of the defendant's bundle of documents, before he was given a P number. He agreed that he was given the quotation at page 6 of his bundle of documents, which makes reference to his application dated 6th May, 2014. The plaintiff testified that he was given the P number after he was given the quotation, and he denied that the power was connected in May, stating that it was in July.

The plaintiff agreed that the application at page 1 of his bundle of documents for the construction of an MV line is dated 4th April, 2014, and that it has a reference number, which was given in May. He denied that the letter at page 1 of his bundle of documents was written to cover up something.

His testimony was that in April, 2014, he had applied to construct a line and he was connected to it. He agreed that he did not have a letter from the defendant which authorised him to construct the first line, and his position was the letter for the upgrade covered the first line. The plaintiff agreed that the line was not inspected, and neither was a completion certificate issued for it. He further agreed that he did have the list of

specifications, and proof of payment for the materials that were used for the 700 metre line.

The plaintiff also agreed that in the letter at page 8 of his bundle of documents, in which he had applied to construct an 800 11KV line and purchase a 50 KVA transformer, he did not refer to having constructed an MV line. When referred to the letter of response from the defendant, which is at page 10 of his bundle of documents, the plaintiff agreed that paragraph 2 of that letter states that he should engage a private contractor to purchase and install all the equipment, and that the defendant would install all the connections.

Further in cross examination, the plaintiff agreed that the letter also states that the list and specifications of all the materials to be used would be provided, and his evidence was that he had not provided the list as the defendant went to the site to supervise.

The plaintiff further agreed that at page 11 of the said bundle of documents, the defendant specified the scope of the works that it would do, and that paragraph 3 of that page states that he was to confirm in writing if the response was acceptable. He told the court that he did not confirm in writing, as the defendant went to the site, and he agreed that at page 12 of his bundle of documents he wrote to the defendant asking it to go and inspect the works done.

The plaintiff's evidence was that the defendant responded as seen at page 18 of his bundle of documents, which was the commissioning document. He agreed that paragraph 2 at page 11 of his bundle of documents states that the defendant would have no authority over the line within twelve (12) months of its being commissioned, but he did not agree that the

paragraph does not state that the defendant would not connect any other people to the line.

The plaintiff also agreed that he started charging people to be connected to the line, but that page 11 of his bundle of documents does not state that he was authorised to charge people. With reference to pages 15-16 of his bundle of documents, the plaintiff testified that it was a receipt for K323, 458.00 for materials that he bought for construction of the line. He agreed that it is dated 10th September, 2014.

The plaintiff further agreed that his letter at page 12 of his bundle of documents to the defendant for construction of the 11 KV line, and to purchase a transformer, is dated 19th August, 2014, advising that the construction was complete. He stated that the letter at page 13 of his bundle of documents, which is a quotation for transformer testing to Colosius Construction, relates to this matter. That marked the close of the plaintiff's case.

The first witness called by the defendant was Duncan Lungu, an electrical engineer. He testified that he became aware of this matter in 2014 when he was leading a Distribution Planning Team, and he was in charge of the area where the plaintiff lives. He testified that the plaintiff approached their office between May and July, 2014 requesting that he be supplied with electricity. DW1 told the court that the request was processed, and the client paid, and he was connected.

Continuing with his testimony, DW1 testified that the client went back and complained about low voltage, and it was discovered that the line that was supplying the client was long, and the options were explored. The first was to extend the high voltage line so that they could reduce the

voltage, and then provide a transformer, and connect the client. DW1 also stated that it was proposed that the defendant does the works, or the plaintiff could engage a reputable contractor who would adhere to the standards.

That under the second option, there are guidelines, which entail that the contractor has to be registered with the National Council for Construction, which is a member of the Engineering Institute of Zambia, and has to be tax compliant. DW1 also testified that before a client is permitted to engage a private contractor, the office has to visit the site to establish the works that need to be done. His testimony was that the plaintiff wrote to the defendant indicating that he wanted to engage a private contractor to do the works, and the defendant responded in July, 2014, indicating the conditions that had to be met.

DW1's evidence was that he did not receive any feed back to the letter that the defendant wrote. However, the plaintiff wrote to the defendant indicating that the works had been completed, and the defendant should inspect and commission them. He explained that when a client writes back, accepting the conditions, the defendant then becomes aware of the works, and it has to ensure that the private contractor does the work to the defendant's standards, and they are safe.

Further, that if the defendant is aware that works are being carried out, it can go and inspect them at any stage before they are completed. It was stated that in this case, there was no inspection of the works that were done whilst they were ongoing, and an issue arose. DW1 testified that the defendant did not respond to the letter asking it to go and inspect and commission the works, and the security department informed them

that the plaintiff was being investigated over the works, and they should not do anything until the investigations were concluded.

On what the issue was with regard to the works, DW1 testified that there was suspicion that the plaintiff may have been using stolen materials, and that he was charging clients within the locality to connect to the defendant's network. He went on to testify that after the investigations were concluded, a report was given to them, which indicated that the plaintiff's premises were on a metre by pass for the security lights, and therefore, he was not being billed for the security lights.

It was also found that the plaintiff had charged four (4) people to be connected to the line, but there was only one (1) metre that was connected to the line. Therefore, the other four (4) people were illegally connected to the line, and it was recommended that they be disconnected. Further, the report recommended that the works done be inspected, and if they were found to be suitable, the plaintiff should be connected, as well as the other four (4) people.

DW1 testified that upon receipt of the report, a team comprising security officers, planning officers, construction and operations personnel was constituted, and the works were inspected, and found to be satisfactory. The plaintiff was advised to apply for connection, and it was found that he was connected to an initial low voltage, and a second line, being an 11 KV line and a transformer had not been connected at the time to the ZESCO line. He also stated that the first line was connected to the ZESCO network, without the defendant's knowledge.

With reference to the application at page 1 of the plaintiff's bundle of documents, DW1 testified that it has a reference number known as a

work reference number, and that it is system generated. He explained that it is given to a client when they apply at the ZESCO customer care centre, and the requisite documents are attached. He added that the client's details are entered on the defendant's computerised system and a work request number is generated.

Still on the work request number, DW1 stated that the numbers follow a pattern depending on the location of a client's premises, and the year that the client makes the application. That as seen from the number at page 1 of the plaintiff's bundle of documents, one could tell that the application was made in Lusaka, as the first number is 1, and then the next numbers 00 connote the region where the place is located, and that the fourth number being 2 is an area in the region, then 2014 is the year and 05, the month.

Therefore, in this matter, the request was made in May, and DW1's evidence was that the last four numbers are unique, and in this case, one number was missing. DW1 also testified that the quotation at page 18 of the plaintiff's bundle of documents was issued by the security department in a bid to treat the plaintiff just like any other client, and the quotation included what works that the contractor would have done.

He explained that paragraph 2 in the second line, states that whatever installations were done before the metering point, remained the defendant's responsibility, and that the defendant was responsible for its maintenance. Further, that the defendant's responsibility ended at the metering point, and the plaintiff did not own the equipment.

DW1 when cross examined agreed that he had gone to the site and was aware that an 11 KV line was constructed in Kabangwe by the plaintiff.

He agreed that the upgrade was done for the supply of electricity, and that the plaintiff paid for installation of the transformer. He also agreed that it is the preserve of the defendant to connect any works done, and that they do not allow installation without consent.

It was DW1's testimony that investigations were done by the security department, which recommended that inspection and determination of the suitability of the works, be done. DW1's evidence was that inspection was done, and the works were found to be suitable. He agreed that at page 18 of the plaintiff's bundle of documents was a quotation for an upgrade of the supply to the plaintiff's premises, and that the defendant did not do the upgrade.

He explained that the quotation does not contain details of the construction works as any construction that is done privately or by the defendant goes through a process called capitalisation, as it will add to the defendant's assets. It was further DW1's evidence in cross examination that the quotation was not from the pole to the house, but for an upgrade of supply, as the plaintiff had initial supply to his house, but the voltage was low. He stated that in order to sort it out, higher voltage had to be put, and to transform it.

When referred to the letter that the defendant wrote to the plaintiff in response to the request to construct the 11KV line and purchase the transformer, which is at page 11 of the plaintiff's bundle of documents, in paragraph 2, DW1 testified that it refers to defects liability for materials that the defendant would provide when constructing. He further stated that the materials are inspected for specifications that are required by the defendant when being manufactured for works done by clients, and a twelve (12) months period is given for any defects.

Still on inspections, DW1 testified that they are visual, and that any inherent defects may not be brought out on the visual inspection, hence the period of twelve (12) months being adequate time for the defects to show. He agreed that other clients were connected to the network that was considered to be the defendant's network. DW1 expressed ignorance on the assertion that other clients were connected to the network constructed by the plaintiff before the lapse of twelve (12) months, stating that he was aware that they were connected to the low voltage line.

He stated that the investigations revealed that the plaintiff was connected to a line that was connected to a ZESCO line without authority, and those clients could have been connected to that line. DW1 concluded by stating that procedure was not followed in constructing the line.

In re-examination, DW1 testified that the first line was constructed by the plaintiff, and it was only discovered that it was connected to a ZESCO network after investigations were done. That the second line was only constructed after the plaintiff approached the defendant complaining about low voltage, and he was supposed to accept the conditions that the defendant gave for the construction. He testified that the plaintiff did not do this, and there was no inspection during the construction.

The last witness was Victor Chisanga, the Regional Manager for the defendant. He began his testimony by telling the court that he oversees the Lusaka West region, supervises construction, maintenance connection works, provides materials to employees and ensures their safety. In terms of how a client has electricity connected to their

premises, DW2 testified that there are two ways in which this can be done, namely;

1. Standard connection;
2. Non standard connection.

On the standard connection, his evidence was that this entails a customer going to any ZESCO service centre, and filling in an application form with the help of a qualified electrician who is registered with the Engineering Institute of Zambia. This electrician will have wired the customers premises, and upon the application form being filled in, it will be taken to any ZESCO service centre, and processed there.

With regarding to the processing of the application, DW2 like DW1 testified that a particular request number is identified for the application which has digits and numbers depicting the area, the year and month, while the last four (4) digits are unique. He continued with his testimony, stating that the application forms are picked up by the planning office which visits the site, and as the service is standard, an engineer or technician is assigned to ensure that the premises are within thirty (30) metres of an existing overhead line or indeed an underground line.

His evidence was that the engineer or technician proceeds to inspect the premises to ensure that the premises are accordingly wired to the ZESCO and Zambian standards. Once satisfied that the requirements have been met, a quotation is processed. He stated that the quotation depends on the area where the premises are located, that is whether they are high density or low density.

DW2 continued with his testimony, stating that once the customer picks up the quotation, they pay, and this has to be done within ninety (90)

days, failure to which the quotation is cancelled, and a new one is issued. He added that where, however, the amount on the quotation is paid, a contract is executed for the supply of electricity, and the defendant moves on site, and the works to connect a customer are commenced within three (3) months.

DW2 then proceeded to explain the procedure with regard to the non-standard service. In this regard, his testimony was that a customer has two options, namely;

1. A customer walking into the ZESCO premises and applying for connection.

2. A customer engaging a private contractor.

Under the first option, the evidence given by DW1 was that this applies to premises that are more than thirty (30) metres from the 400 metres ZESCO line. He stated that once the customer fills in the application form with the electrician, and they submit it to the defendant, a unique reference number is generated.

Then the form is taken to the Planning Department who conduct a site visit, and upon conducting inspection, the Planning Department comes up with a bill of quantities for provision of the service, which include underground poles, and cables to be connected to the customer. Then the technician inspects the premises to see if the premises can be connected, and a quotation is issued, which is availed to the customer. He stated that once the customer pays, a contract is deemed to have been entered into with the defendant, and the quotation has the terms, and the supply is given.

As regards the second option, DW2's testimony was that the customer requests the defendant through the office of the Divisional Manager for permission to construct a line using a recognised contractor. The Divisional Manager accepts or declines such a request in writing. It was explained that where the response is favourable, the Divisional Manager gives conditions to the customer, which the contractor must fulfil. He added that the customer is required to accept the terms and conditions in writing, and once this is done, the works can commence.

The conditions to be fulfilled by the customer were named as;

1. The contractor must be recognised.
2. The contractor and customer should provide proof of purchase of materials and proof of testing of the materials required to be tested.
3. Abide by the safety conditions.

DW2 also testified that while the constructions works are being carried out, the defendant can inspect the premises to ensure compliance with the standards. It was stated that on completion of the works, the customer is expected to write to the Divisional Manager requesting that inspection of the premises be done. On inspecting, and if the defendant is satisfied with the works, it gives a go ahead to pick up an application form requesting that power be connected to the premises.

He also told the court that the client will be charged for connection to the ZESCO grid, and for the metre, as the Planning Department would have already gone to the site. With reference to the letter that the defendant wrote to the plaintiff at page 11 of the plaintiff's bundle of documents in paragraph 2, DW2 explained that it means that during the construction of the works, the contractor and customer are at liberty to procure

materials from different sources that are correct for the installation of power.

He explained that because of this, as the defendant would not per se have tested the materials bought, although this is implied, the defendant ensures that there is a contractual obligation by the customer and the contractor to maintain that installation, and in the twelve (12) months make good any defects, and the defendant will do nothing.

DW2 however added that it is the defendant's property, as it is connected to a ZESCO grid, and he stated that the defendant will take over the maintenance after twelve (12) months. Further in his evidence, DW2 told the court that if the defendant connects a customer to that line then it takes over that installation, and it will be required to maintain it.

He also testified that there is no consent that it is vested in the client or the contractor to connect other customers to the line that the customer constructs. DW2 explained that the defendant is the only entity that is mandated to provide such a service, apart from those institutions that are recognised, such as the Copperbelt Energy Corporation (CEC) and North Western Energy. DW2 also stated that he wrote the report at page 5 of the defendant's bundle of documents, and he asked the court to consider it.

In cross examination, he stated that a contractor that is engaged must be qualified, and the equipment that is used must be tested. He agreed that the equipment that was used in this case was tested, but he did not see the tests for the transformer, although it was taken in for testing. It was his evidence that where procedure is not followed to construct a line,

security investigates, and they advise and make recommendations to management.

DW2 explained that management could take on the recommendations or sue, or indeed enter into arrangements with the customer. He agreed that when the defendant finally commissioned the line, everything was in order. His evidence was that where the defendant connects a customer to a line that it did not construct, this is provided at page 2 of the defendant's bundle of documents under 17.

DW2 told the court that the terms and conditions are attached to the application form, and the customer is expected to read them and ask the defendant where they are not clear. He agreed that the letter at pages 10-11 of the plaintiff's bundle of documents does not refer to the defendant taking over the defect period if it connects a customer during the twelve (12) month period.

He also stated that it is fair for the defendant to benefit from the construction of a line, as those are the supply rules, and that it is expensive to construct a line.

I have taken into account the evidence and the submissions that were filed by the parties. It is not in contention that the plaintiff applied for the construction of an 11 KV overhead line, and the installation of a 50KV transformer to upgrade the supply of electricity to his premises, after he was initially connected to a line that had low voltage. It is further common cause that the plaintiff constructed the said 11KV overhead line and installed the 50KV transformer, which resulted in the upgrade of electricity supply to his premises.

The question is whether he is entitled to the reliefs sought? The plaintiff in arguing that he is entitled to be paid the amount of K419, 158.00 for the construction of the Zesco line, submitted that there was a contract between the parties, and the defendant breached one of its' terms. He stated that this term was that the defendant would only take over the power line one year, after it was installed, called the defects period. However, before that period elapsed, the defendant took over the line.

As to what is breach of contract is, the plaintiff referred to ***Trietel, Law of Contracts, 13th Edition*** in paragraph 17-19 which states that;

> ***"A breach of contract is committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract, or performs defectively or incapacitates himself from performing."***

The plaintiff further submitted that the term of the agreement relating to the fact that the defendant would only take over the installed equipment after one year, was contained in the defendant's letter. That it is a principle of law, which was adopted in the case of ***Indo Zambia Bank Limited v Mushaukwa Muhanga*** [7] that where there is doubt about the meaning of the words in a contract, they will be construed against the person who put them there, called the contra proferentum rule.

The defendant on the other hand argued that the parties did not enter into an agreement that it would refund the plaintiff the amount that he spent on installing the equipment. Its' position was that it only incurs liability for the maintenance of lines after they are commissioned, and it has taken them over.

That in this case, the defendant wrote to the plaintiff authorising him to engage a private contractor to purchase and install all the required materials, provided that the plaintiff adhered to all the ZESCO standards and guidelines, and the defendant would connect the installations that were constructed. It was also the defendant's submission that the plaintiff was advised to submit a list of the specified materials that would be used, as well as proof of purchase of the said materials.

That further, in the authority to construct the line, the plaintiff was advised that the defendant would take over the installed equipment, one year after it was commissioned, implying, that the plaintiff would maintain it, and make good any defects within one year.

It was also the defendant's submission that the plaintiff was supposed to confirm in writing that he had accepted the terms and conditions that the defendant had set, but he did not respond to the defendant's letter. His only response was a letter to the defendant informing it that the construction had been completed and it was ready for inspection.

The defendant argued that its letter to the plaintiff was an offer, with a prescribed mode of acceptance, which the plaintiff did not accept. That in the case of ***Kennedy v Thomassen*** [2], the court stated that;

> ***"No binding contract comes into existence where the acceptance was never communicated or was only communicated to the acceptor's own agent"***.

Further, that in the case of ***Frank v Knight*** [4] it was held that;

> ***"Where an offer stipulates the form of communication, it is the only one which is valid".***

The defendant also submitted that when the plaintiff initially applied for the supply of electricity, he was connected with the works being standard. That this means that there was already an existing medium voltage. However, as seen from DW1's evidence, when the defendant inspected the constructed works that saw the upgrade of the 11 KV overhead line and installation of the 50KV transformer, it was discovered that even the earlier line that connected the plaintiff was installed by the plaintiff, without authorisation from the defendant.

The defendant's argument was that it was that line that the defendant connected the other customers to, and that the upgrade merely fed into that existing line to curb the low voltage. It was also the defendant's submission that DW2 testified that the twelve (12) months after commissioning of the line that upgraded the supply would be the plaintiff's responsibility, did not entail that the installation was not the defendant's responsibility, and therefore it could connect people to the line, even before the lapse of the twelve (12) months.

Moreover, the defendant had no obligation to charge any customers connected to the line in the amount claimed by the plaintiff. That the only thing was that if the defendant connected customers to the line before the lapse of the twelve (12) months, it would take over the liability of the line, and not that it would reimburse the plaintiff, as such is not a policy of the defendant.

It was also the defendant's submission that assuming that the defendant was under obligation not to connect other customers to the line within twelve (12) months, the plaintiff could not benefit from the same, as he did not write to the defendant acknowledging acceptance of the terms of the construction. Further, that the plaintiff had not exhibited any

receipts to show proof of payment for the materials, as the documents that he had submitted in that respect, were outside the period of authorisation by the defendant.

The defendant also submitted that the evidence on record shows that the plaintiff was charging people to be connected to the line. However, no client or contractor is allowed to connect third parties to the line as provided in Section 2 of the ZESCO conditions of supply of electricity, 2012. That doing so is an offence, and the plaintiff was charged and arrested for the offence of fraudulent misappropriation of power.

That even the plaintiff's testimony that the Planning Department informed him that his line was private, and therefore the defendant could not issue any quotation to new customer without the plaintiff's consent, had not been proved.

The evidence on record as testified by DW1 is that the plaintiff initially applied for the supply of power in May, as the reference number P1002201405254 that he put in the letter dated 4th April, 2014 for the construction of a 700 metre MV line, has numbers and letters which identify the area, the month and year when an application is made. The first number is for the area, in this case, 1, which is for Lusaka, while 00 connotes the region, and the 2 thereafter, the area in the region, then the year, and after that the month. Then the last 4 numbers are unique, although the plaintiff only put three in the application.

The quotation at page 6 of the plaintiff's bundle of documents makes reference to the plaintiff's application which was made on 6th May, 2014, with the reference number as P10022014052540, which corrected the error of not putting the last digit in the plaintiff's application. DW1

testified that the plaintiff was connected with power, but he went back to the defendant complaining about low voltage. When advised on the options that were available to rectify the problem of low voltage, the plaintiff opted to engage a contractor to construct the works for the upgrade of the supply. This letter is at page 8 of the plaintiff's bundle of documents.

The defendant responded by way of letter dated 21st July, 2014, which is at pages 10-11 of the plaintiff's bundle of documents, and pages 8-9 of the defendant's bundle of documents. It is clear that this letter stipulated the conditions which were to be met, which are;

1. Providing a list and specifications of the materials that would be used.
2. Proof of purchase of the materials.

The letter also lists the other requirements that had to be met for the works, as well as the other terms and conditions, which include that the defendant would take over the installed equipment after twelve (12) months of it being commissioned. Therefore, during that period, the plaintiff was expected to make good any defects. The letter also asked the plaintiff to confirm in writing if he accepted the conditions.

The evidence which was not controverted is that the plaintiff did not respond to the letter in writing, confirming his acceptance of the conditions. He only wrote the letter at page 12 of his bundle of documents informing the defendant that he had completed the construction works, and they were ready for inspection.

The report at pages 5-7 of the defendant's bundle of documents which was authored by DW2, and indeed the evidence that he and DW1 gave,

was that the plaintiff was investigated over the construction, and it was found that after he had initially applied for supply in May, 2014, he was connected to an already existing medium voltage electrical network which he had constructed without the authorisation of the defendant. After he had applied for construction of the 11KV overhead line and installation of the 50 KV transformer, that line had five premises connected to it, although only two (2) metres were connected.

The investigations established that the plaintiff charged the people to be connected to the network, and as a way forward, security recommended that the defendant inspects the construction, and if it met the requirements, the plaintiff and the others could be connected to it, and this was done. That is how, as a way of regularisation, the plaintiff was given the quotation at page 18 of his bundle of documents, after he filled in an application dated 19th October, 2014 with the reference P10022014103651.

What this evidence reveals, is that, the plaintiff by applying on 29th May, 2014 for construction of the 11KV line and installation of a 50KVA transformer made an invitation to treat to the defendant. The defendant responded to it, by making an offer on 21st July, 2014, which the plaintiff was to accept in writing, as seen at page 3 of the defendant's bundle of documents. He did not do so, and therefore, no contract was executed. He however went ahead to construct the 11KV line and install the 50KVA transformer.

The defendant only offered to regularise that installation, and made another invitation to treat to the plaintiff. The plaintiff responded by making an offer, through an application in October, 2014. The defendant accepted it by giving the plaintiff a quotation for connection, and the

conditions of that agreement are as stipulated in the application at pages 1-2 of the defendant's bundle of documents. By not accepting the terms of construction that the defendant laid out in July, 2014, there was no contract.

Therefore, even if the defendant connected customers to the line after the plaintiff constructed it, as there was no agreement, this was of no effect. Further, had there been a contract in place under which the plaintiff was to maintain the line for twelve (12) months, and if the defendant breached the same by connecting customers to it, the consequence was that it would only take over the line, and not pay the plaintiff.

The plaintiff argued that the consequence of the defendant taking over the line if it connected people to the said line, before the expiration of twelve (12) from its' being commissioned, was not stipulated in the letter at pages 10-11 of his bundle of documents. It is trite that parole evidence is not admissible to contradict or vary the terms of a written agreement, unless it is shown that the written agreement was not the only document that contained the said terms and conditions.

In this regard, paragraph 12-096 of ***Chitty on Contracts Volume 1 General Principles, 13th Edition, Sweet and Maxwell, 2008*** at page 864 states that;

> ***"If there be a contract which has been reduced to writing, verbal evidence is not allowed to be given...so as to add to or subtract from, or in any manner to vary or qualify the written contract".***

Paragraph 12-097 at page 865 of the said Chitty on Contracts states that the above rule, known as the parole evidence rule, is subject to a number

of exceptions, and that extrinsic evidence of terms additional to those contained in a written agreement have been admitted where it is shown that the document was not intended to express the entire agreement of the parties.

Paragraph 12-098 at page 866 of Chitty on Contracts further states that the rule applies only where the parties to an agreement reduce it into writing, and agree or intend that the writing shall be their agreement. That whether the parties so agree or intend is to be decided by the court on consideration of all the evidence relevant to the issue.

It has been seen that page 2 of the defendant's bundle of documents has terms and conditions for the supply of electricity which are at the back of the application form. Therefore, not only the letter that the defendant wrote to the plaintiff when he applied for the construction of the line, had the terms and conditions. The plaintiff argued that the parties entered into the agreement freely and voluntarily.

In this regard, reference was made to ***Evan Mckendrick's Contract Law, 3rd Edition*** which states that;

> ***"The law of contract is perceived as a set of power conferring rules which enable individuals to enter into agreements of their own choice on their terms. Freedom of contract and sanctity of contract are the dominant ideologies. Parties should be free as possible to make their own terms without interference from the courts or parliament and their agreement should be respected, upheld and enforced by the courts".***

The plaintiff also referred to the case of ***National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo*** [6] where it was held that;

> ***"It is trite that once the parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contract, and that the role of the court is to give efficacy to the contract when one party has breached it by respecting, upholding, and enforcing the contract".***

The position as espoused by the plaintiff is indeed the law, and in the case of ***Printing and Numerical Registering Co V Simpson*** [1] it was held that;

> ***"if there is something more that public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracts, and that their contracts, when entered into freely and voluntarily shall be sacred and shall be enforced by the courts of justice".***

Therefore, if the plaintiff did not read the terms and conditions attached to the construction of the 11KV line to upgrade the supply, and the installation of the transformer when he applied to do the same, as well as the terms and conditions that apply for the installation of electricity, that was his own doing. This is because in the case of ***L'estrange v F. Graucob Limited*** [3] it was held that the fact that L' Estrange had not read the clause was immaterial, and the fact that she had signed it meant that she was bound by it, having been deemed to have read and agreed to the terms of the contract.

While the plaintiff did not accept the conditions laid down in the letter written by the defendant, and he cannot be said to have signed the agreement, the principles apply, as he should have read the letter and what is stipulated on the application form.

In the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited*** [5], it was stated that;

> ***"A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponents case. As we said in Khalid Mohamed v The Attorney-General :***
>
> ***a. "Quite clearly a defendant in such circumstances would not even need a, defence."***

Having failed to show that the defendant agreed to refund him the costs of the construction to upgrade the supply of electricity, the plaintiff cannot claim the refund claimed, and it fails. Lastly, the plaintiff benefited from illegally charging customers to be connected to the line, which was contrary to the ZESCO Conditions of Supply of Electricity 2012.

To grant him the relief to be refunded, would entail enforcing an illegality, as that amount is being claimed on the basis of contribution which he feels the other people who were connected to the line should have paid, towards the construction of the upgrade line and installation of the transformer. The plaintiff has not come to court with clean hands, and it is trite that he who comes to equity must come with clean hands.

However, the important issue is that there was no agreement that was entered into between the parties that the plaintiff would be refunded for the construction for the upgrade of the line, if the defendant connected

other customers to the said line. The claim having failed, it is dismissed with costs to the defendant to be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THIS 31st DAY OF JANUARY, 2020

Kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE