I.T

IN THE HIGH COURT FOR ZAMBIA **2012/HP/1539**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MARTIN SIMUMBA **PLAINTIFF**

AND

HIGH COURT OF ZAMBIA PRINCIPAL 13 JUL 2020 REGISTRY P.O. BOX 50067, LUSAKA

FRUIT AND VEG CITY HOLDINGS (PTY) LIMITED **1ST DEFENDANT**

FOOD LOVERS MARKET LUSAKA LIMITED **2ND DEFENDANT**
FOOD LOVERS MARKET NDOLA LIMITED **3RD DEFENDANT**

Before Hon. Mr. Justice Mathew L. Zulu, at Lusaka the 10th day of July, 2020

For the Plaintiff: *Mr. P. Chungu and Mr. M. Lisimba of Messrs Mambwe, Siwila & Lisimba Advocates & Messrs Ranchhod Chungu Advocates.*

For the 1st, 2nd & 3rd Defendants: *Mr. L. Linyama and Mr. A. Simunyola of Eric Silwamba, Jalasi & Linyama Legal Practitioners.*

JUDGMENT

Cases referred to:

1. ***Rossiter v. Miller (1878) 3 App Cas 1124.***
2. ***Branca Cobbaro (1947) KB 854; (1947) 2 ALL ER 101.***

3. ***D.P. Services Limited v. Municipality of Kabwe (1976) ZR 110.***
4. ***Promart Investments Limited T/A Chas Everitt v. African Life Financial Services (2) Ltd and 2 Others, Appeal No. 98 of 2011.***
5. ***May and Butcher v. R (1929) 2 KB 1721, HL.***
6. ***Hussey v. H-Payne (1879) 4 App Cas 311, HL.***
7. ***De Groot v. Attala (1973) ZR, 77.***
8. ***William David White v. E.F. Hervey (1985) ZR 17.***
9. ***Inter Market Banking Corporation (Z) Ltd v. Graincoin Investment Ltd, SCZ Judgment No. 14 of 2014.***
10. ***Attorney General v. D.G. Mpundu (1984) ZR 6.***
11. ***Harry Mwaanga Nkumbula and Simon Mwansa Kapwepwe v UNIP (1978) ZR 388.***
12. ***Christopher Lubasi Mundia v. Sentor Motors Limited (1982) ZR 66.***
13. ***Zambia Safaris Limited v. Jackson Mbao (1985) ZR 1.***
14. ***William Lacey (Hounslow) Ltd v Davis (1957) 2 All ER 712; (1957) 1 WLR 932.***
15. ***British Steel Corp v Cleveland Bridge & Engineering Co. Ltd (1984) 1 ALL ER 504.***

<u>Legislation referred to:</u>

1. ***Chitty on Contracts, Volume 1, 28th Edition, (1999) at Paragraph 1-001.***
2. ***Halsburys Laws of England, 5th edition on Contract at paragraph 275.***
3. ***McGregor on Damages, 14th Edition Paragraph 955, page 651.***

The Plaintiff commenced this action against the Defendants on 12th June, 2012, by way of Writ of Summons accompanied by a statement of claim, and later amended, seeking the following reliefs:

(i) A sum of K 9, 333, 345, 993.60 for various claims as per details in (a) to (x).

(ii) Interest on all amounts found due to the Plaintiff at the current Commercial Bank Lending Rate.

(iii) Costs.

The case as pleaded by the Plaintiff in his statement of claim is that the 1st Defendant is a South African Company which is in the business of sale of fresh farm produce trading as Fruit and Veg City Holdings/Food Lovers' Market. The Plaintiff explained that around May 2010, he engaged the 1st Defendant via email on the possibility of doing business with it in Zambia under Fruit and Veg City/Food Lovers Market, and that as a result of the discussions, agreements were made that the contract and business were to be performed in Zambia.

It was pleaded that the 1st Defendant through its agent, Frans Van Der Koff requested the Plaintiff to create a special purpose vehicle

called Ilanzi Management Services Limited (Ilanzi), for purposes of establishing Fruit and Veg/Food Lovers' Market in Zambia. The Plaintiff pleaded that Van der Koff requested him to meet Chris Linder and Aidan Oosthuysen in Protea at his own expense, and was later asked to dilute his shareholding in Food Lovers Market, Lusaka, from 100% to 30%.

He pleaded that after several negotiations with the 1st Defendant, he indentified possible sites for store locations, long before actual construction, including Levy Mall in Lusaka and Z-Mart in Ndola. The Plaintiff said the 1st Defendant's representatives gave him *'a go ahead'* to secure retail space and commence preparations for the shop. The 1st Defendant sent the Project Manager, Vernon Castle, to begin the preparation of the Lusaka store.

The Plaintiff pleaded that Norman Michael Coppin, the representative of the 1st Defendant nominated him to be the Tenant in terms of a Lease Agreement concluded between the National Pensions Scheme Authority (NAPSA) and Fruit and Veg City Holdings on 17th May, 2011, which nomination he later revoked verbally without giving any justification.

It was his claim that the 1st Defendant had instructed and directed him to incorporate Ilanzi which was going to hold a Master Franchise. He claimed to have incurred costs when preparing all the tax compliance documentation, the accommodation of the Project Manager at Protea Hotel and Chita lodge. The Plaintiff also claimed to have engaged contractors to work on the Lusaka site and paid for some materials used, so much that by the time the 2nd Defendant was brought on board, substantial ground works had been done such as floor preparations, plumbing works, ceiling painting, floor polishing and the office lay out had been completed.

It was his claim that after all the ground work had been done at the Lusaka store, the Defendant decided to terminate the relationship with the Plaintiff on the grounds that he had an outstanding loan with a financial institution in Zambia. The Plaintiff pleaded that as a result, he suffered loss and damage as the reason for terminating the contract was not an issue detrimental to the finalization of the franchise in favour of the Plaintiff and that the Defendants wrongly converted the Plaintiff's equity and interest in Food Lovers Market Lusaka Limited, hence the reliefs he seeks.

The Defendants filed into court their defence stating that the 1st Defendant entered into negotiations with the Plaintiff on the understanding that the Plaintiff would secure funds, either from banks or his personal resources in order to set up Fruit and Veg City in Zambia. They averred that the Plaintiff failed to secure the necessary financing required due to his questionable credit record.

The Defendants state that the 1st Defendant allowed the Plaintiff to secure retail space and commence preparations for the shop because at the time, the Plaintiff was in effective partnership with other parties including Chris Linder, who eventually withdrew. They said that they were not privy to the Plaintiff's partnership with any other persons.

The Defendant however admitted that the 1st Defendant and the Plaintiff were in negotiations over the Master Franchise agreement but the said negotiations were never concluded. They said that the 1st Defendant negotiated and concluded a Master Franchise agreement with the 2nd Defendant.

The Defendants also admitted that the relationship between the 1st Defendant and the Plaintiff was terminated due to the fact that the Plaintiff lamentably failed to raise the equity contribution as per agreement. The 1st Defendant pleaded that they approached Barclays Bank Zambia Plc with the Plaintiff for a local debt component, but the Bank advised that it would not lend any money to a project that the Plaintiff was involved in as his other business company accounts were under care. The Defendants denied all the other allegations contained in the statement of claim.

The Plaintiff testified as the only witness in support of his case and was PW1. He testified that he is claiming money for the expenses that he incurred during the preparation of the store at Levy Mall, and to be paid for the time he spent in executing all the activities that related to the culmination of the opening of the store at Levy Junction. He was also claiming for the money he paid in rentals before the shop was opened and part of the Tenancy installation costs paid by NAPSA towards the project.

The plaintiff said he was further claiming for funds that should have accumulated on his part as the business progressed or as future earnings of the business and consultancy fees.

PW1 testified that in May, 2010, he sent an email to the 1st Defendant's Business Development Manager, Graham Livenberg, expressing interest in bringing a Fruit and Veg City Holdings/Food Lovers Market Franchise to Zambia. It was his testimony that after an exchange of emails, he learnt that the owners of the franchise, Mike and Brian Koping, were also interested to come to Zambia. He testified that he was invited by the 1st Defendant and met the two brothers during a store opening in Bolsberg in June, 2010, and later was invited to make a presentation in Cape Town.

It was the Plaintiff's testimony that upon his return to Zambia, he was given conditions needed to implement the project, by Graham Liverberg in conjunction with the two brothers. The witness said he was requested to come up with R 8, 000, 000 unencumbered as an indicative budget; a business plan for opening about 12 to 14 stores in Zambia, in Lusaka, Ndola, Kitwe, Chingola and Solwezi; and to find two immediate sites at Lusaka and Ndola.

PW1 told the court that while all this was happening, he was again invited to Livingstone, where the 1st Defendant had come together with all its franchisees as part of their training program. The Plaintiff met Frans Van der Koff at this event, where he was to be introduced as the appointed focal point person for the Zambia project.

PW1 testified that he informed the 1st Defendant, with regard to financing, that he was going to experience difficulties to come up with the R8, 000, 000 unencumbered. He explained that the 1st Defendant proposed that it was going to bring in a partner, Chris Linda, who was going to introduce 70% of the funds required and the Plaintiff needed to dilute himself to 30%, to which he agreed.

The Plaintiff testified that he found a store site at Levy Mall in Lusaka and another one at Z-Mart Mall in Ndola. It was his testimony that Mike Kopin flew into Zambia in May, 2010 to see the site at Levy Mall which he said was fine and said the 1st Defendant was ready to proceed with giving the Plaintiff a license for the Master Franchise and to negotiate for a Tenancy Agreement with

Liberty Properties Limited and NAPSA. He testified that the owners of the Fruit and Veg City Holdings signed a tendency agreement to occupy Store No. 48 at Levy Mall.

The Plaintiff further testified that he received an email from Dale Henson, who wrote on behalf of the 1st Defendant's Director Legal, Nigel Mentis, stating that after signing the tenancy agreement, the 1st Defendant only had up to 16th July, 2010 to elect a nominee to be the tenant. Therefore, they gave an instruction to the Plaintiff to register a special purpose vehicle to be used and given the master license to sign a franchise agreement, resulting in the incorporation of Ilanzi by the Plaintiff.

PW1's testimony was that once the Franchise agreements were signed, the partners who were brought in to occupancy of 70% of the shares would bring in funds and the shareholding was going to be rearranged. He stated that the partners who were supposed to bring in the 70% of the funds were: Chris Linder; Mr. Aidan Oosthuysen and Frans Van der Koff. It was his evidence that he was going to provide the 30% of the funds.

The Plaintiff testified that upon registration of Ilanzi, the 1st Defendant sent him nomination forms to sign which he sent back via DHL. He said the 1st Defendant then issued a letter stating that Ilanzi had been issued with master license to hold the Fruit and Veggies license in Zambia.

PW1 testified that what followed was NAPSA giving a date to him and his partner, to set up the store at Levy Mall on 22nd August, 2010, for Ilanzi to occupy. PW1 added that he received an email from Frans Van der Koff informing him that they were sending a Project Manager to Zambia, Vernon Castle, to supervise the civil works and was going to be part and parcel of the people to receive the gray box from NAPSA, the others being Frans Van der Koff, Chris Linder, Aidan Oosthuysen and PW1 himself.

The Plaintiff testified that Chris Linder and others were however refusing to take beneficial occupation of the shop, because they had not secured the funds from the bank, but were later convinced to take occupation under the special purpose vehicle. It was also his

testimony that they agreed to use their personal monies to start the civil works in the shop and take care of the Project Manager.

PW1 told the court that the other partners went back to South Africa but he remained alone to take care of the Project Manager. It was his testimony that he accommodated the Manager at Protea Hotel for a week and later at Chita Lodge which provided a better rate for another 2-3 months. The Plaintiff said he provided the Project Manager with a vehicle for his use; and paid for all the expenses during the civil works for about 3-4 months.

PW1 gave a detailed testimony of the works at the store to have included opening up the floor to allow plumbing works; hiring of equipment, paint works; block work and other things to bring the shop to ready occupancy. It was the Plaintiff's testimony that the process of taking beneficial occupancy meant paying rent in the sum of $ 24, 000, of which he paid his 30% contribution amounting to $ 7, 000.

The Plaintiff testified that one afternoon he went to the store and found a lot of people that he did not know and was not told would be coming and upon inquiring from the Project Manager, the

Plaintiff was told that it appeared the share holding had changed. He sent an email to Chris Linder and copied Frans Van der Koff inquiring what was going on, and they responded stating that they had been arranging for a facility with Absa, who referred them to Barclays Bank Zambia to arrange because of the restrictions to pull out money from South Africa. He testified that a meeting had been arranged at Barclays Bank with Waseem and Chungu Kaunda at which the Plaintiff ran though the business proposal that had been prepared.

It was his evidence that Barclays Bank came back after a few days via an email indicating that a company called Fresh Direct Zambia Limited in which the Plaintiff held shares was owing money and was in default, and the Plaintiff's name had been put up at Credit Reference Bureau, and therefore, could not advance any money to the project.

PW1 testified that after the chapter with Barclays Bank was closed, he received an email from the 1st Defendant's Director Legal, stating that the agreement for the Master Franchise license had been terminated. But upon further inquiry as to why the license had

been terminated, he was told that: *"you have not raised the money you were supposed to raise";* and that, *"you are not acceptable to any joint venture partners."*

PW1 added that when he sought clarity form the owner of the franchise, Mike Kopin, he promised to sort it out at his next visit to Zambia, but when they met, the Plaintiff was offered a distribution centre to run until position gains were reviewed. It was the Plaintiff's further evidence that he tried to recover the money he had put into the project, but all his efforts have hit a brick wall. The Plaintiff testified that he was barred from going to the shop, and the owners of the franchise took back the ship which became a corporate store. The witness clarified that he is claiming a 30% of the Tenancy installation occupancy costs which were paid by NAPSA.

During cross examination, PW1 told the court that he came to know about the 1st Defendant through research and the 2nd and 3rd Defendants after finding strange people as the new owners of the franchise. He could not confirm that the 2nd and 3rd Defendants

were registered long after the termination of his arrangement and did not know if they had a master license or master agreement.

PW1 told the court that when dealing with the 4th Defendant, he had signed as Martin Simumba, a nominee of Ilanzi in which he owned 99% shares and that Ilanzi is not a party to these proceedings. It was also his testimony that the master licence was awarded to Ilanzi prior to the signing of the tenancy agreement.

PW1 further testified that the master license was given with a view to conclude the franchise agreement.

When asked if his equity was converted by the new shareholders, PW1 said he was not deprived of any shareholding, but was deprived of what he had put into the shop.

When asked if he signed a Franchise agreement with anyone relating to the Food Lovers brand, PW1 responded in the negative. The Plaintiff also told the court that when negotiating with the 4th Defendant, he operated in his personal capacity and also as a bearer and shareholder of Ilanzi as the resources expended belonged to him and Ilanzi.

PW1 confirmed that Ilanzi was the tenant of NAPSA for Shop No. 48 and that the 2nd and 3rd Defendants were not part of the lease agreement in respect of which he had paid the first rental of $ 24, 000 to NAPSA, but that the 1st Defendant was the one which signed the tenancy agreement with NAPSA. He added that the 1st Defendant was not a shareholder of Ilanzi. PW1 testified that when his partners paid their 70% rental contribution for the store, Ilanzi was credited as the tenant.

PW1 confirmed under cross examination that despite Ilanzi having paid the rentals to NAPSA, he did not question the center management as to ask why the shop had been given to another occupier.

He further testified that he was never an agent of the 1st Defendant in Zambia, but that the 70% joint venture partners were official representatives of the 1st Defendant. He further testified that it was the Master license between Ilanzi and the 1st Defendant that was severed, which was going to lead to the Franchise Agreement. According to the Plaintiff, he met his obligations of finding two sites and raising 30% of the R 8, 000, 000 which amounted to R2, 400,

000 in form of his input through the hours he put into the project for a period of 2 years. PW1 stated that the condition to raise the money was not for him to deposit cash in the 1st Defendant's account, as there were many ways this cash could be raised.

The witness denied ever being engaged as a consultant by the 1st Defendant, but said it was the only way he could justify the hours spent on the project for two years writing a business proposal and others things. He also denied ever being told that he was going to be refunded any money by any of the Defendants for his efforts.

PW1 confirmed that his claims *(i) c-i*, were in respect of the resources he injected in Shop 48 in which Ilanzi was a tenant at the material time. As regards claim *(i) j*, PW1 testified that he wanted to be paid for his own interest and for the air travel during the negotiations. This was despite the Plaintiff not having an agreement with the Defendant at the time that they would refund the monies spent. PW1 stated that his claims *(i) k* and *i*, were in respect of the money he paid to Mint Advisory Services who were responsible for recruitment of staff.

PW1 confirmed that he was seeking 30% equity in Food Lovers Market Lusaka amounting to K3.5 Billion as per claim *(i) m* based on his business proposal as compensation value of what was in the store, but he conceded that the use of equity in claim *(i) m* is not exactly what he was saying.

As regards the claim in *(i) n*, PW1 confirmed that NAPSA paid the money but he never released it.

PW1 conceded that while in his testimony he said that he gave his personal vehicle to the Project Manager, his pleadings stated that he hired a car because he could not use the vehicle for free. He said he got the prevailing rate on the market to come up with the figure that he is claiming.

PW1 stated that he did not have any receipts or invoices for his claims in the statement of claim because he was not allowed to file. He testified that the 1st Defendant was communicated to when he and his colleagues decided to advance personal money in the civil works for the shop and look after the Project Manager.

The witness refused that Chris Linder was a representative of the Franchise holder but that Frans Van der Koff was, with whom he went with to the beneficial occupation of the store after getting the go ahead from Michael Kopin. The Plaintiff testified that he got concerned when Chris Linder stated that he did not want to take beneficial occupation, because he was supposed to be a shareholder with him in Ilanzi.

PW1 denied that he had taken a risk, with all the red flags after the partners went back to South Africa, because they continued to communicate and he got permission to spend money but not permission to get a refund as he was a shareholder implementing a project.

The Plaintiff insisted that while the 1st Defendant said that it terminated the agreement because of his debt and his name having been referred to the Credit Bureau of Reference, that was not the real reason for terminating the contract.

In relation to his claim against the 3rd Defendant, PW1 stated that he negotiated and took possession of the site which the 1st Defendant took over. He however stated that he neither paid for the

Ndola store nor developed it. He also conceded that there was no minute to show that the expenditures he made were authorized, but he could not have dreamt about things he did not have a basis for spending money.

During re-examination, PW1 testified that the lease agreement was made between the 1st Defendant and NAPSA so that the 1st Defendant could appoint a nominee within 60 days, and at the time, Ilanzi was not registered. It was also his testimony that after the tenancy agreement had been signed, he made the first payment representing 30% of the rentals amounting to US$ 7, 000, but the 70% amounting to $24, 000 was made by the 1st Defendant and their consortium.

PW1 further testified that he met the costs for the civil works at Shop No. 48 in his personal capacity. As regards capital contribution, the witness testified that the issue of making specific capital contribution had not arisen because the shareholding in Ilanzi had not been finalized, but the money had been raised and part of it was his money that he expended.

PW1 confirmed that there was a verbal agreement before a Franchise agreement was signed. He also confirmed that the master license was issued subject to concluding all the paper work leading to the franchise agreement by the 1st Defendant's Director Legal.

The Plaintiff testified that it was the consortium which owned the 70% shares that wanted to borrow money from ABSA South Africa, but were referred to Barclays Bank Zambia, which refused to lend them money because he was a party to the company that was going to run the brand and was indebted to Barclays Bank Zambia resulting in his name appearing at the Credit Reference Bureau. He testified that it was not him who wanted to borrow the money but the consortium.

PW1 testified that he was claiming consultancy fees to quantify the time and effort he invested to bring Shop No. 48 to a standard acceptable to the landlord. The Plaintiff stated that he used a rate which a consultant of his standing would have charged for the work.

PW1 also testified that his claims under paragraph *23(i)c-i*, were in respect of the works done at Shop No. 48 for the benefit of the 1st Defendant and its nominees.

This marked the close of the Plaintiff's case.

Kelvin Meintjes was the sole witness for the Defendants and testified as DW1. He told the court that he is the Legal Director of BT4 Holdings, the holding company of Food Lovers Market. He testified that the store which is not a corporate store owned by the holding company is held by a franchise agreement and operates as a franchise. He said that a master license agreement is a territorial based agreement, which confers on its holder the right to open numerous stores in a territory such as Zambia, but a franchise agreement would have to be signed in respect to each store.

He testified that in order to obtain a Master licence agreement, his Company can be approached by any company or individual with ambitions to open more than one store in the territory. The criteria used is a candidate's industrial related experience and their ability to secure appropriate sites, locations, buildings and stores. He said there is nothing to stop an individual from opening one store under

a franchise agreement without first obtaining the master license, but one has to have an appropriate site and access to adequate funds in the range of 10 to 12 million Rands, comprising of building works for the gray box.

DW1 went on to testify that the building costs would cost between 2 to 3 million Rands and would be covered by the tenant installation allowance which is provided by the landlord as part of the negotiated terms of the lease agreement. He stated that the balance of the cost would be that of the equipment needed to finalize the shop and would be sourced from the Franchisee, being the operator and owner of the store.

In respect of the present case, the witness explained that the estimate was R8,000,000.00 that was supposed to have been provided by the Franchisee from his resources or by way of borrowing.

DW1 stated that the equipment component is provided on the date of occupation as deposited for the equipment and full expenditure would made when the store opens. He went on to explain that the

Franchise agreement should be in place before the store opens and preferably before beneficial occupation.

The witness testified that Mr. Van der Koff was employed by the 1st Defendant to develop the African business, while Mr. Chris Linder and Mr. Oosthuysen were introduced by Van der Koff as potential joint venture partners with the Plaintiff. He stated that Van der Koff was facilitating the joint venture as a representative of the 1st Defendant.

He further testified that Van der Koff suggested to the Plaintiff to create or incorporate a special purpose vehicle, which resulted in the incorporation of Ilanzi which was to hold the interest in both the Master license agreement and the store at Levy Mall. DW1 testified that the Plaintiff was to dilute his shareholding in Ilanzi to 30% shares while the group represented by Christ Linder was going to have 70% shares.

He explained that there was neither a contractual, shareholding nor equitable relationship between the 1st Defendant and Chris Linder's group who were merely introduced to the Plaintiff as potential shareholders of Ilanzi.

DW1 told the court that the store was introduced to Michael Kopin, one of the founders of the 1st Defendant, by the Plaintiff. It was his testimony that Michael Kopin who is experienced in tenancy agreements, assisted with the negotiations of the lease agreement for the benefit of the Franchise, with competitive rentals and significant installation allowance. He stated that while the lease agreement provided that the lessee was Fruit and Veggie Holdings Pty Limited, there was a provisions to substitute the tenant within a period of 60 days from the date of execution to allow Ilanzi to become the tenant.

DW1 testified that in late June, 2011, he issued a letter addressed to *"whom it may concern"* at the Plaintiff's request, indicating that Ilanzi would be granted a Master license for the territory of Zambia. It was his evidence that this was made conditional upon the conclusion of the appropriate agreement.

DW1 also told the court that the works in the shop would commence on the beneficial institution allowance and would have been paid out to facilitate the building works. It was his evidence

that any works done before the beneficial occupation date would be done at a risk.

DW1 testified that the question of securing fruits became central around September, 2011, and a funding application was made to Barclays Bank Zambia. It was his testimony that a person he could not remember forwarded him the bank documents that the loan had been refused, because the Plaintiff's accounts were under care and he had been reported to the Credit Reference Bureau.

It was DW1's testimony that the 1st Defendant notified the Plaintiff in October 2011, that it was no longer going to continue with finalizing the master license or its relationship with the Plaintiff, as he had been unable to secure funding. He said in response to the Barclays Bank Zambia's decision, Mr. Linder and his group withdrew from the project.

DW1 denied that the Plaintiff suffered loss and damage, stating that it was central for the Plaintiff to raise the money in order for Ilanzi to become a license holder. He went on to testify that he was not aware of the funds which the Plaintiff raised, noting that if the

funds had been raised, the 1st Defendant would not have taken the action that it took.

DW1 testified that the 1st Defendant had no consultancy agreement with the Plaintiff. He added that looking at the Plaintiff's claims, it would appear to be work the Plaintiff would have done at his own risk in either trying to secure a master license agreement or in preparation of the Shop at Levy Mall. It was his evidence that none of this was done either by agreement with or for the benefit of the 1st Defendant.

DW1's testified that he had no idea on how the Plaintiff was entitled or how the claim was based on a 30% equity in Food Lovers Market Lusaka Limited being K3.5 billion. He explained that the 2nd Defendant became a Franchisee of the 1st Defendant and concluded a lease agreement with the landlord for Store 48, but was unsuccessful leading to the 2nd Defendant's liquidation. He stated that the 1st Defendant was not part of the shareholding of the 2nd Defendant.

DW1's testimony was that he was not aware of any conversion of the Plaintiff's stake in the 2nd Defendant's company as the Plaintiff was not a shareholder in the 2nd Defendant.

Regarding the Plaintiff's claim for 30% of the tenancy installation costs, he said that the Plaintiff created an impression that the allowance paid to the tenant was for them to keep to themselves, when the money was invested in the store as lease improvement and remains in the store even after the tenant has left.

During cross examination, DW1 confirmed that the Plaintiff expressed an interest in their brand of stores in early 2010, and that the lease agreement was signed on 18th April, 2011. DW1 testified that he was sent the documents which stated that Barclays Bank Zambia had declined the loan in September, 2011. He also confirmed that he sent a letter to the Plaintiff at end of October, 2011. He further explained that the 1st Defendant had no Master license agreement with the 2nd Defendant, but had a Franchise agreement signed. He however stated he did not know when the said agreement was signed. Further, DW1 said he did not know

when the 2nd Defendant took occupation of Shop No. 48 at Levy Mall.

DW1 confirmed that the Plaintiff was given conditions by the 1st Defendant in writing in early May, 2010. He further confirmed that the Plaintiff was given written information with regards to the conditions.

DW1 maintained that during the course of the relationship, arrangements, and negotiations, there was no written agreement signed between the Plaintiff and the 1st Defendant.

Under continued cross examination, DW1 stated that he was not sure if any of the works at the shop were at owner's risk. He said that he was not aware that there was an indication made to the Plaintiff informing him that there was any component of the work which would be at risk. DW1 testified that he did not know the date of the beneficial occupation between the 1st Defendant and NAPSA, but recalls that the lease was signed on 18th April.

DW1 conceded that he was not aware of the works at Store No. 48, Levy Mall, and that his only role was related to the conclusion of the contract.

DW1 further concluded that his only role was in respect of the the letter regarding the license agreement and the letter terminating the relationship. He added that he was involved in the conclusion of the lease agreement relating to Store No. 48 and the nomination of Ilanzi as a tenant. DW1 reaffirmed that he notified the Plaintiff that the 1st Defendant was no longer able to conclude the Master license agreement and the relationship would be terminated.

DW1 acknowledged hearing about Vernon Castle who was appointed Project Manager to prepare Shop No. 48, but was neither involved in his appointment or the works that he did. DW1 reaffirmed that the reason for the termination of the relationship as stated in the letter was that the Plaintiff was not able to establish a joint venture partnership.

DW1 confirmed that he was not privy to the arrangement between the Plaintiff and Chris Linder, but was aware that Chris Linder had withdrawn, but could not remember who told him.

He conceded that funding was the reason for the termination and not Chris Linder, because of the Plaintiff's questionable credit record. He said that he determined that funding was not forth coming because of the documents from Barclays Bank Zambia.

DW1 concluded that he did not investigate whether the Plaintiff had the means to finance the project from his personal funds. He could not explain whether there was a time in which the funds were supposed to be mobilized, but that it was supposed to be before the opening of the store. DW1 could not confirm if the store was ready for opening in October, 2011.

DW1 confirmed that he did not make any formal communication with the Plaintiff to request him to come up with the funds. DW1 testified that he did not know if the Installation allowance was paid by the landlord. He however confirmed that the allowance was to be paid by the tenant, who at the time was Ilanzi, but he did not know if it was paid to them.

DW1 confirmed that between April and October, 2011, he had no knowledge of works that were done in shop 48 but works could have been done towards its opening. He conceded that the Plaintiff

was allowed to do works in Shop No. 48 in preparation for the opening of the store.

DW1 confirmed that the store at Levy Mall is owned as a corporate store. He however stated that he did not know who incurred the initial building costs, but he confirmed that the Plaintiff found the site at Lusaka and said he did not know who found the store at Ndola.

This marked the close of the Defendant's case.

After the close of trial, the Plaintiff filed into court his submissions on 29th July, 2019. The gist of the Plaintiff's submissions is that it is important to establish the existence of an agreement in order to justify his claims and determine what remedies he would be entitled to. Counsel for the Plaintiff submitted that even when the court determines that no agreement existed per se, the Plaintiff could still be entitled to damages on a quantum meruit basis.

Counsel cited the learned authors of **Chitty on Contracts Volume 1 at Paragraph 1-001**, who define a contract as ***"an agreement giving rise to obligations which are enforced or recognized by***

law." He said it is an accepted principle of law that where there is an informal agreement which expressly requires or envisages subsequent execution of a formal contract, the effect of that prior informal agreement depends on the intention of the parties. In support of this submission, he relied on the case of **Rossiter v. Miller**[1] and the case of **Branca v Cobbaro**[2]**.**

Counsel submitted that the Plaintiff and the 1st Defendant envisaged that their negotiations would ultimately result in the issuance of a Master License Agreement. He stated that throughout the negotiation process, the Plaintiff issued his declaration that he intended to do business with Fruit and Veg City/Food Lovers Market, and the 1st Defendant had showed the same intent towards the Plaintiff. Therefore, the Defendants could not claim that it did not intend to enter into contractual relations with the Plaintiff. He asked this court to conclude that the oral agreements entered into between the Plaintiff and the 1st Defendant were binding on them and that is why the Plaintiff executed his obligation thereunder. He exhorted this Court to give effect to the intention of the parties.

Counsel contended that whereas the Plaintiff conceded that there was no finalization of the final contract, this court should give effect to the intention of the parties from the start. He cited the learned authors of **Halsbury's Laws of England, 5th edition on Contract at paragraph 275** in support of his argument.

Counsel went on to argue that the 1st Defendant is precluded from denying its liability to the Plaintiff on the basis that the Plaintiff commenced and did all the civil works on Shop No. 48 at his own risk. He stated that the Plaintiff had implied authority from the 1st Defendant. Counsel contends that throughout the negotiations, the 1st Defendant was aware of the activities of the Plaintiff and therefore cannot deny liability by claiming that it did not authorize the activities of the Plaintiff.

Counsel submitted that the Defence witness showed that the 1st Defendant had always intended to give the Plaintiff the Master licence agreement and therefore, the Plaintiff acted on the good faith shown by the 1st Defendant.

It was his further submission that even if this Court determines that the 1st Defendant is not liable in contract; the Plaintiff is

entitled to reimbursement or damages on a quantum meruit basis. To substantiate this argument, he cited the authors of **McGregor on Damages 14th edition paragraph 955, page 651** and the case of **D.P. Service Limited v. Municipality of Kabwe[3].** He said the circumstances of this case prove the inescapable conclusion that there was indeed an intention to remunerate the Plaintiff for his work or that this court ought to order that he be so remunerated or reimbursed as prayed. He also cited the case of **Promart Investments Limited T/A Chas Everitt v. African Life Financial Services (z) Ltd and 2 Others[4]**, where the Supreme Court stated that:

> ***"If services are rendered and accepted in pursuance of an agreement which is unenforceable, remuneration is payable on the basis of quantum meruit."***

It was further submitted that the works that were done by the Plaintiff were for the benefit of the Defendants who had occupied the premises, and therefore the Plaintiff is entitled to damages on a quantum meruit basis.

Counsel for the Plaintiff also submitted that the 1st Defendant's decision to terminate its relationship with the Plaintiff was premature, because the time or the events which the 1st Defendant could have based its decision to terminate the relationship had not occurred. His contention was that the 1st Defendant's acts amounted to a breach of contract and therefore, the Plaintiff is entitled to damages for breach of contract.

The Defendants filed into court his submissions on 14th August, 2019, whose crux is that the discussions between the Plaintiff and 1st Defendant for the Master Franchise Agreement did not yield or culminate into an agreement and there there was no holding out of any binding arrangements.

Counsel for the Defendants submitted that the negotiations between the Plaintiff and 1st Defendant did not in any way amount to a legal binding contract, as they were mere intentions to come up with a binding contract which needed to be concluded. He pointed out that the issues of securing sites for the locations of the shops and the preparation of the shop for occupation were some of the primary steps which were to be carried out by the Plaintiff before

signing of the Master Franchise Agreement, as it was incumbent on the Plaintiff to demonstrate his capacity prior to agreement.

It was submitted that certain bench marks were supposed to be achieved before the Master Franchise Agreement could be signed and among them were for the Plaintiff to secure funds to finance the project, and preparing the building where the store would be situate. The two were said to be responsibilities of the Franchisee which needed to be achieved towards the signing of the contract. Counsel made reference to the learned authors of **Chitty on Contracts, General Principles Volume 1, 28th Edition (1999) paragraph 1001** on page 1, which defines a contract as:

> ***"An agreement giving rise to obligations which are enforceable or recognized by law."***

He further referred to **paragraph 12.002 on page 583**, which states that:

> ***"when a document is signed the parties are bound by the terms of that document whether or not they had been ignorant of their precise legal effect."***

The thrust of Counsel's contention was that in this case there was neither a finalized verbal agreement nor a signed contract which would have given rise to the obligations being sought to be enforced. He submitted that what constitutes a valid and enforceable contract was aptly summed up in the case of **May and Butcher v. R.**[5], in which Viscount Dunedin J, said that:

> ***"To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties."***

He also referred to the case of **Hussey v. H-Payne**[6], where the Court said:

> ***"this requirement may be express by way of a general rule that for the parties to be bound they must have finished reaching an agreement, so that it is possible to infer an intention on the part of both of them to be bound immediately."***

Counsel for the 1st Defendant contended that there was no agreement concluded or contract executed between the Plaintiff and the 1st Defendant, and this was conceded by the Plaintiff in his own

submissions. It was his argument that the mere fact that the Plaintiff commenced the works at Shop No. 48 does not in itself constitute the existence of contract, adding that the works were subject to the finalization of the Master Franchise agreement and were taken at owner's risk.

Counsel cited **Halsbury Laws of England at page 114, paragraph 242 on Occurrence of Terminating Condition**, which provides that:

> ***"where an offer is made subject to a terminating condition, there is no power to accept the offer after the occurrence of that condition. The terminating condition of that may be express; for instance, that an offer remains open for a specific time."***

He submitted that the Plaintiff's failure to meet his obligations as per offer of the Franchise led to the termination of the intended relationship. In support of this argument, Counsel referred the Court to the case of **De Groot v. Attala**[7], where it was held that:

> ***"In the absence of an agreement as to the prices of material and labour to be supplied under a contract, a party is entitled to a reasonable amount for the same."***

Counsel further submitted that notwithstanding the discussions between the Plaintiff and the 1st Defendant, the negotiations were not concluded and the Master Franchise Agreement was not signed. He argued that the failure to conclude was necessitated by the Plaintiff's inability to secure the finances for the project. He stated that the Plaintiff and his joint venture partners failed to honour their obligations and meet the conditions precedent which would have resulted in the satisfaction of all prerequisites to the finalization of an enforceable agreement.

Counsel submitted that the Plaintiff had conceded in his submissions that there was no finalization of the agreement and as such, the Plaintiff cannot place reliance on the citation from **Halsbury's Laws of England, 5th Edition on Contract Paragraph 275**. He argued that the claims by the Plaintiff that the court should give effect to the intention of the parties from the start, does not arise in this case. He also argued that the Plaintiff's contention that he had implied authority from the 1st Defendant does not arise in this case as there was no agreement. It was his further contention that notwithstanding that there was no written

agreement between the Plaintiff and the 1st Defendant, the Plaintiff ought to have provided funds to finance the project as a way of meeting the condition precedent.

Counsel for the 1st Defendant contends that the aspect of an agreement is critical to this case and it must have been pleaded. In support of his submission, Counsel cited the case of **William David White v. E.F. Hervey**[8] where the Supreme Court held as follows:

> ***"A further suggestion was that the claims in the counterclaim can be supported by an agreement between the parties. Here again it is an elementary rule of pleading than an agreement must be specifically pleaded."***

It was further argued that since the Plaintiff conceded that there was no agreement, the relief being sought cannot be sustained as it is not premised on any tangible evidence and there is no pleading of a material nature. Counsel for the Defendants contends that the relief being sought are in the main within the realm of special damages, but the statement of claim omits the particulars of special damages. His submitted that since special damages were not specifically pleaded, this Court is precluded from even entertaining

the plea. In aid of his position, Counsel referred me to the case of **Inter Market Banking Corporation (Z) Ltd v. Graincoin Investment Ltd**[9], and the case of **Attorney General v. D.G. Mpundu**[10] where in the Supreme Court held as follows:

> ***"It is thus trite law that, if a plaintiff has suffered damage of a kind which is not a necessary and immediate consequence of a wrongful act, he must warn the defendant in the pleadings that the compensation claimed would extend to this damage, thereby showing the defendant the case he has to meet and assisting him in computing a payment into court...."***

He submitted that the central condition of the awarding the Master Franchise Agreement was dependant on the Plaintiff financing the project, which he failed to raise. He stated that this was a condition precedent the Plaintiff should have fulfilled for the Agreement to have been concluded.

Counsel for the Defendant went on to argue that the Plaintiff is not entitled to any of the claims as he was not privy to the negotiations as the evidence would show the 1st Defendant had dealings with

Ilanzi Management Services Limited, which is not a party to these proceedings.

Counsel cited the case of **Harry Mwaanga Nkumbula and Simon Mwansa Kapwepwe v UNIP**[11], where it was held as follows:

> ***"An unincorporated body is not a legal entity and is therefore not capable of suing or being sued in its name."***

Counsel submitted that Ilanzi is a company limited by shares and incorporated under the Companies Act which is still operational and should have been a party to these proceedings. Therefore, the Plaintiff is a wrongful party and cannot assert the rights of a legally constituted entity.

In response to the Plaintiff's argument that the Defendants are liable to reimbursement or damages in quantum meruit, Counsel submitted that there was no contract which was concluded to entitle the Plaintiff to claim on a quantum meruit basis. He submitted that the Plaintiff did not plead the claim of quantum meruit in his pleading, citing the case of **Christopher Lubasi Mundia v. Sentor Motors Limited**[12] and **Zambia Safaris Limited**

v. Jackson Mbao[13], which espouses the principles on how pleadings ought to be settled. It was his submission that the claim of quantum meruit should be dismissed.

Counsel for the defendant went further to argue that the 1st Defendant had not benefited from the works carried out at the store at Levy Mall, as the occupant of the store was the 2nd Defendant who executed a lease with the 4th Defendant. He implored this Court to dismiss the Plaintiff's claim for refund of the costs and expenses that he purportedly incurred, on grounds that the Plaintiff had failed to support his claims with cogent evidence.

He submitted that there can be no damages for breach of contract as there was no contract or agreement concluded. It was his contention that the Plaintiff failed to demonstrate how he liquidated the claims contained in the endorsement of his Writ of Summons, and therefore failed to discharge the burden of proof in order to be entitled to a payment.

I have considered the pleadings in this matter, the oral evidence and the submissions by Counsel, for which I am indebted. From the evidence before me, the following facts are not in dispute. The

Plaintiff contacted the 1st Defendant via email, expressing interest in bringing Fruit and Veg City/Food Lovers Market to Zambia. The Plaintiff and the 1st Defendant entered into negotiations for purposes of signing a Master Franchise Agreement which was going to facilitate the opening of franchise stores in Zambia.

In the course of the negotiations, the 1st Defendant gave the Plaintiff two conditions that needed to be met in order for them sign a Master Franchise Agreement and implement the project. The first condition was that the Plaintiff was required to identify possible sites for store locations in Zambia and find two immediate sites at Ndola and Lusaka. The 1st Defendant also told the Plaintiff to come up with a business plan for the opening of 12 to 14 stores at Kitwe, Chingola, Solwezi, Ndola and Lusaka. The second condition was to raise a sum of R8,000,000.00 unencumbered, either from banks or his personal resources.

The Plaintiff met the first condition. He identified sites at Levy Mall in Lusaka and Z-Mart Mall in Ndola, both of which were approved by the 1st Defendant who told the Plaintiff to secure retail space and commence preparations.

The 1st Defendant requested the Plaintiff to create a special purpose vehicle for establishing the franchise stores in Zambia, as a result of which the Plaintiff incorporated Ilanzi Management Services Limited, a company in which the Plaintiff became the major shareholder. The Plaintiff however intimated to the 1st Defendant that he was going to have difficulties raising the R8, 000, 000.00 unencumbered, and the 1st Defendant introduced Chris Linder and others as potential joint venture partners with the Plaintiff. The 1st Defendant then told the Plaintiff to dilute his shareholding in Ilanzi to allow the potential joint venture partners to hold 70% shares so that the Plaintiff could remain with 30% shares. The potential joint venture partners later withdrew from the partnership.

It is common cause that the Plaintiff commenced the preparation for Store No. 48 at Levy Mall in Lusaka. Thereafter, the 1st Defendant signed a lease agreement with NAPSA, in which NAPSA granted the 1st Defendant beneficial occupation of Store No. 48, Levy Mall. The lease provided for the substitution of the tenant within a period of 60 days from the date of the lease, and the 1st Defendant nominated Ilanzi to be the tenant but it later revoked the

nomination. The 1st Defendant then entered into a Master Franchise Agreement with the 2nd Defendant, which was granted beneficial occupation of Store No. 48 at Levy Mall.

The 1st Defendant later withdrew from negotiations and terminated its relationship with the Plaintiff on the grounds that the Plaintiff failed to raise the equity contribution and that Barclays Bank Zambia had refused to lend money to a project which the Plaintiff was involved in, because his other business company accounts were under care. The 1st Defendant told the Plaintiff that the decision was premised on a variety of reasons, including that the Plaintiff was not acceptable to the joint venture partners and that no alternative person had come forward and was prepared to enter into a joint venture with him. The other reason which was highlighted was that the Plaintiff's bank record indicated that he was substantially indebted to Barclays Bank Zambia which had in turn refused to extend further facilities to the Plaintiff or any partnership or entity with which the Plaintiff was associated.

As a result, the Master Franchise Agreement was not signed and it fell through. The Plaintiff brought this action in which his

Advocates contend that although the Master Franchise Agreement was not signed, the Plaintiff entered into a binding oral agreement with the 1st Defendant which the 1st Defendant breached. Counsel for the Plaintiff implored this Court to give effect to the intention of the parties because the Plaintiff executed his obligations under the said contract. They also argued in the alternative, that if this Court is to find that no contract existed, the Plaintiff is entitled to damages on a quantum meruit basis.

Counsel for the Defendants on the other hand contend that the Master Franchise Agreement was not signed and there was no agreement between the Plaintiff and the 1st Defendant. They have argued that the negotiations that took place did not amount to a binding contract but were mere intentions to enter into the Master Franchise Agreement which needed to be signed. The thrust of their submissions was that the Master Franchise Agreement was not signed because the Plaintiff failed to meet the conditions precedent, and that the mere fact that the Plaintiff commenced the preparatory works at Store No. 48 at Levy Mall did not in itself constitute the existence of an agreement. They further argued that the Plaintiff is

not entitled to recover on a quantum meruit basis because no contract existed and the Plaintiff commenced the preparation of Store No. 48 at his own risk.

Therefore, the issues I have to determine which are at the heart of this case, are whether there was a contract that existed between the Plaintiff and the 1st Defendant; and whether the Plaintiff is entitled to the reliefs that he is seeking.

The evidence that is before me clearly shows that the 1st Defendant withdrew from negotiations with the Plaintiff before the Master Franchise Agreement could be signed. In the circumstances, I have no difficulties in finding that there was no final contract concluded between the Plaintiff and the 1st Defendant.

The thrust of the Defendants' argument is that because the Master Franchise Agreement was not signed, there was no contract that existed between the Plaintiff and the 1st Defendant and as such, the Plaintiff did the preparatory works and incurred expenses at his own risk. I must state that as a general rule, a party can withdraw from pre-contractual negotiations without incurring any liability for doing so. However, there are a number of English cases in which

the courts have held that a party who withdraws from negotiations prior to the conclusion of a contract is under an obligation to pay the other party the reasonable value of benefits which he has obtained from that party in the course of these negotiations. One such case is that of **William Lacey (Hounslow) Ltd v Davis**[14], in which Barry J stated at Page 719:

> ***"I am unable to see any valid distinction between work done which was to be paid for under the terms of a contract erroneously believed to be in existence, and work done which was to be paid for out of the proceeds of a contract which both parties erroneously believed was about to be made. In neither case was the work to be done gratuitously, and in both cases the party from whom payment was sought requested the work and obtained the benefit of it. In neither case did the parties actually intend to pay for the work otherwise than under the supposed contract, or as part of the total price which would become payable when the expected contract was made. In both cases, when the beliefs of the parties were falsified, the law implied an obligation-and in this case I think the law should imply an obligation-to pay a reasonable price for the services which had been obtained. I am, of course, fully aware that in different circumstances it might be held that work was done gratuitously merely in the hope that the building scheme would be carried out and that the person who did the work would obtain the contract. That, I am satisfied, is not the position here. In my judgment, the proper inference from the facts proved in this case is not that the work was done in the hope that the building might possibly be reconstructed and that the plaintiffs might obtain the contract, but that it was done under a mutual***

belief and understanding that the building was being reconstructed and that the plaintiffs were obtaining the contract."

This principle was adopted in the case of **British Steel Corp v Cleveland Bridge & Engineering Co. Ltd**[15]. In that case, the defendant had successfully tendered for the fabrication of steelwork to be used in the construction of a building. It entered into negotiations with the plaintiff for a sub-contract, under which the plaintiff would supply certain steel nodes that would form part of the relevant steelwork. It was proposed that the sub-contract would be in a standard form used by the defendant. The defendant requested the plaintiff to commence work on the steel nodes immediately 'pending the preparation and issuing to you of the official form of sub-contract'. The intended formal contract was not entered into, because the parties failed to agree certain terms to go into it. The plaintiff produced and delivered to the defendant all but one of the steel nodes.

The defendant refused to pay for them, and instead sought to recover from the plaintiff damages for late delivery of the nodes. The plaintiff sued for the value of the nodes it had supplied by way of

quantum meruit. The defendant counterclaimed for damages for, inter alia, late delivery of the nodes, alleging that a binding contract came into being between the parties. Robert Goff J rejected the defendant's argument that a contract existed between the parties. He then considered the plaintiff's quantum meruit claim and stated at page 511:

> ***"In my judgment, the true analysis of the situation is simply this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter, as anticipated, a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi contract or, as we now say, in restitution. Consistently with that solution, the party making the request may find himself liable to pay for work which he would not have had to pay for as such if the anticipated contract had come into existence, eg preparatory work which will, if the contract is made, be allowed for in the price of the finished work (cf William Lacey (Hounslow) Ltd v Davis [1957] 2 All ER 712, [1957] 1 WLR 932)."***

Coming to this case before me, the principles espoused in these authorities demonstrate that there is no merit in the argument by Counsel for the Defendants that because the Master Franchise Agreement was not signed and no contract existed, the Plaintiff did the preparatory works and incurred expenses at his own risk. I take the view that even though there was no final contract signed between the Plaintiff and the 1st Defendant, the 1st Defendant requested the Plaintiff to commence preparatory works in anticipation of the Master Franchise Agreement. There is overwhelming evidence on record that the Plaintiff did preparatory works as requested by the 1st Defendant and that is what led him to incur some expenses.

I have already found that the Plaintiff incorporated Ilanzi at the instruction of the 1st Defendant and there is no doubt that the Plaintiff incurred expenses associated with the incorporation and the preparation of tax compliance documentation. Similarly, I have already made a finding that the Plaintiff found store locations at Levy Mall in Lusaka and Z-Mart Mall in Ndola, which were both

approved by the 1st Defendant who permitted the Plaintiff to secure retail space and commence preparations.

The uncontroverted evidence of the Plaintiff is that he commenced preparation for Store No. 48 at Levy Mall, and engaged contractors and paid for the materials used for substantial ground works such as floor preparations, plumbing works, ceiling painting, floor polishing and office layout. Throughout the process, the 1st Defendant was aware of the civil works that the Plaintiff carried out to prepare the Store for occupation, through the Project Manager who was appointed by the 1st Defendant to supervise the works.

I have no cause to believe that these works were done gratis and it is clear to me, that the 1st Defendant obtained a benefit from the works done by the Plaintiff. I say this because after terminating the relationship with the Plaintiff, the 1st Defendant, in total disregard of the works done by the Plaintiff and without the Plaintiff's consent, entered into a Master Franchise Agreement with the 2nd Defendant, who was given beneficial occupation of Store No. 48 at Levy Mall.

The Plaintiff told this Court, in his evidence, that he arranged and paid for the Project Manager's air travel; accommodation at Protea Hotel and Chita Lodge; and provided the Project Manager branded motor vehicles for his use while he was in Zambia. The Plaintiff adduced further evidence that after the 1st Defendant signed a lease agreement with NAPSA and Ilanzi was granted beneficial occupation of Store No. 48, Levy Mall, the Plaintiff paid 30% of the rentals which were payable to NAPSA. I accept this evidence, because the Defendants did not challenge the Plaintiff's evidence.

I have further considered the argument by Counsel for the Defendants that the Plaintiff is not entitled to the claims he is seeking because the 1st Defendant was dealing with Ilanzi which is not a party to these proceedings. While I agree with Counsel that Ilanzi is a company with a separate legal personality and is not a party to these proceedings, I take the view that this does not absolve the 1st Defendant from liability because it does not take away the fact that the Plaintiff did the preparatory works which led her to incur expenses from which the 1st Defendant derived a benefit. It is my considered view that the 1st Defendant cannot

circumvent liability using Ilanzi's separate legal personality, considering that Ilanzi was incorporated by the Plaintiff at the behest of the 1st Defendant.

Counsel for the Defendants have also argued that the Plaintiff did not specifically plead for quantum meruit and is therefore disentitled from recovering on that basis. I find no merit in this argument. The law does not necessarily require a party seeking to recover on a quantum meruit basis to specifically use the words *'quantum meruit'* in his pleadings. I am guided by the Supreme Court in the case of **D.P. Services Limited v Municipality of Kabwe[3],** which held that:

> ***"Although the words 'quantum meruit' have not been used in the pleadings, this in no way debars a party from being entitled to judgment for such a claim."***

I accordingly find that although the Plaintiff did not specifically use the words *'quantum meruit'* in his pleadings, this does not bar him from being entitled to a judgment on a quantum meruit basis. In my view, it is sufficient that the reliefs sought by the Plaintiff enumerate his claims which on the evidence before me, entitle him to recover on a quantum meruit basis.

I have addressed my mind to the Plaintiff's claims as against the 2nd and 3rd Defendants. I am of the considered view that the Plaintiff has failed to prove his case against the 2nd and 3rd Defendants. The Plaintiff has not established privity with either the 2nd or the 3rd Defendant. I do not see how the 2nd Defendant can be held liable even though there is evidence that the 1st Defendant entered into a Master Franchise Agreement with the 2nd Defendant after the negotiations between the Plaintiff and the 1st Defendant failed. I take the view that this does not in any way assist the Plaintiff's case against the 2nd Defendant. I accordingly dismiss the Plaintiff's claims as against the 2nd and 3rd Defendants.

The corollary of the foregoing is that the Plaintiff has proved his case on a balance of probability as against the 1st Defendant, and is entitled to recover the expenses he incurred at the behest of the 1st Defendant. This notwithstanding, the view I embrace is that some of the reliefs endorsed on the Plaintiff's claim cannot be sustained. One such relief is under paragraph 23(i)(d), for the recovery of expenses that the Plaintiff incurred in the preparation of Store No. 48 at Levy Mall. I find this claim vague because it is too general.

The claim for compensation for 30% equity in Food Lovers Market Lusaka Limited cannot stand, because there was no evidence adduced to substantiate this claim. Similarly, there is no basis on which this Court can award the Plaintiff's claim for 30% of the tenancy installation costs because the Plaintiff was not a party to the lease agreement to which this claim relates.

For the avoidance of any doubt, the expenses recoverable from the 1st Defendant are those that the Plaintiff incurred in respect of the following: consultancy fees for the work done in setting up Fruit and Veg City in Zambia; preparation of the business plan; identification of Shop No. 48 at Levy Mall in Lusaka; equipment hire; plumbing; labour; transportation of materials to the site; fuel for the equipment hired from Coastal Plant Hire; rentals paid by the Plaintiff in respect of Shop No. 48, Levy Mall; air travel for negotiations; charge for engaging and negotiating with Mint Advisory Services; payment to Mint Advisory Services for recruitment of staff; phone bills; accommodation for the Project Manager at Chita Lodge and Protea Hotel; transport for the Project Manager; car hire for the Project Manager, accommodation for

Chris Linder's Assistant; airport pick-ups and driving the 1st Defendant's officials who came to Zambia; branding of motor vehicles; legal fees for the incorporation of Ilanzi; and advertising on the Plaintiff's vehicles.

In light of the foregoing, I enter judgment in favour of the Plaintiff against the 1st Defendant and accordingly refer this matter to the learned Registrar for the assessment of the amounts due to the Plaintiff, which shall carry interest at the short term bank deposit rate from date of writ to date of judgment and, thereafter, at the current bank lending rate as determined by the Bank of Zambia until full payment. I award costs to the Plaintiff, to be taxed in default of agreement. The 2nd and 3rd Defendants shall bear their respective costs.

Leave to appeal is granted.

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

MATHEW L. ZULU
HIGH COURT JUDGE