IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 185/2018**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ELIJAH MUTONGA AND 37 OTHERS **APPELLANTS**

AND

WILDERNESS TOURS LIMITED **RESPONDENT**

CORAM: MAKUNGU, CHISHIMBA, NGULUBE, JJA
On the 25th September, 16th October and 23rd October 2019

For the Appellant: *Mr H. Mulenga, Messrs Philsong and Partners*

For the Respondent: *Mr K. Musabandesu, Messrs M and M Advocates*

J U D G M E N T

NGULUBE, JA delivered the judgment of the Court.

Cases referred to:

1. *Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa (2005) Z.R. 138*
2. *The Minister of Home Affairs and The Attorney-General v Lee Habasonda (2007) Z.R. 207*
3. *Seafood Court Estate Limited v Asher, (1949) 2KB 481*
4. *Samuel Miyanda v Raymond Handahu, SCZ Judgment Number 5 of 1994*
5. *Akashambatwa Mbikusita Lewanika and others v Fredrick Jacob Titus Chiluba (1998) Z.R. 79*

Legislation referred to:

1. *The Tourism and Hospitality (Service Charge) Regulation, Statutory Instrument Number 100 of 2016*
2. *Tourism and Hospitality Act Number 13 of 2015*

1.0 Introduction

1.1 This appeal is from a decision of the High Court, Industrial Relations Division, delivered by Mr. Justice E. L. Musona on 25th October, 2018, in which the court dismissed the appellants' claim for service charge of 10% percent in arrears from 2016 to 2018 as prescribed by **Statutory Instrument Number 100 of 2016**[1] as read with the **Tourism and Hospitality Act Number 13 of 2015**[2]. The appellants sought to be paid a service charge of 10% on the fully inclusive packages. The court found that the tourism activities that the appellants desired to be paid service charge for were not included under Section 2 of the Tourism and Hospitality Act, 2015, and the schedule to Statutory Instrument number 100 of 2016.

2.0 Background

2.1 The appellants commenced an action by notice of complaint on 11th May, 2018. They averred that they were employees of the respondent, having been employed on diverse dates and on different salary scales. They commenced the action to seek the payment of 10% service charge as prescribed by **Statutory Instrument Number 100 of 2016**[1] as read with the Principal Act and the arrears for the said 10% service charge from December, 2016 to 2018.

2.2 In the affidavit in support of notice of complainant, the appellants averred that they had issues with the manner in which the respondent improperly calculated the service charge that was payable to them and prayed for the implementation of 10% service charge on all tourism related activities that were offered by the respondent.

2.3 The respondent filed an Answer on 11th June, 2018, stating that it was aware of the representations that the appellants had made to the Hotel Catering Tourism Workers Union of Zambia regarding the computation of service charge on its services to guests.

2.4 The respondent stated that it charges its guests a fully inclusive package as is standard practice in the safari industry in Zambia and worldwide. It further stated that its computation of service charge is applied and restricted to accommodation, laundry, meals, drinks, village and museum visits as specified in the Tourism and Hospitality (service charge) Regulations 2016, Statutory Instrument Number 100 of 2016.

2.5 The respondent averred that transport services to its guests are offered by a separate business unit. It further stated that for other tourism related services in the package offered, such as falls tours,

game drives, boat cruises and walking safaris, service charge computations are not specifically included in the Tourism and Hospitality (Service Charge) Regulations 2016, Statutory Instrument Number 100 of 2016.

2.6 The respondent contended that the 10% service charge demanded by the appellants cannot apply to them as it does not comply with the Tourism and Hospitality Act.

2.7 The respondent filed an affidavit in opposition to Notice of Complaint on 11th June, 2018 and averred that other services offered to tourists such as falls tours, game drives, boat cruises and walking safaris are not specifically included in the Tourism and Hospitality (Service Charge) Regulations, 2016. The respondent stated that it computes service charge according to governing legislation.

2.8 The respondent stated that even though it offers transport services to its guests, the service is not rendered by its accommodation establishment but by a separate business unit. Other tourism services such as falls tours, game drives, boat cruises and walking safaris are not specifically included in the Tourism and Hospitality (Service Charge) Regulations, 2016, Statutory Instrument Number 100 of 2016. Service charge is computed according to governing

legislation which the respondent has adhered to. It averred that the 10% service charge that the appellants were demanding for cannot be awarded to them.

2.9 The respondent filed an affidavit in opposition sworn by the finance manager of the respondent, Kuhema Chindumba Ngoma, who averred that the respondent's operations are governed by the Tourism and Hospitality Act, 2016, as read with all Statutory Instruments issued under the piece of legislation. She further averred that service charge is computed in accordance with the law as specifically contained in Statutory Instrument Number 100 of 2016.

3.0 Hearing and consideration of complaint by trial court

3.1 The lower court tried the matter and heard Elijah Mutonga as the first witness for the appellants. He testified that the appellants were underpaid the service charge by the respondent as it did not impose a 10% service charge on the fully inclusive packages that they were charging, contrary to the Tourism and Hospitality Act, Number 13 of 2015 and Statutory Instrument Number 100 of 2016. The witness argued that the respondent excluded other tourism-related activities such as tours to the falls, museum, boat cruises, game drives, curio

shop and visit to the village. The second witness for the appellants, Jeremiah Majura Muchoka testified that Statutory Instrument Number 100 of 2016 allows the imposition of service charge on all tourism related activities.

3.2 The respondent's finance manager, Kuhema Chandumba testified on behalf of the respondent that service charge is computed in accordance with the Tourism and Hospitality Act Number 13 of 2015, and that accommodation, food and beverages, laundry services, guided tours are subject to 10% service charge. In cross-examination, the witness stated that service charge is on the net bill and that services that are provided by third parties such as boat cruise, guided safaris, walking tours to the national park are not subjected to service charge.

3.3 In their written submissions, the appellants contended that they were underpaid service charge from 2015 to the date of the filing of the notice of complaint because the respondent based the computation on the net amount and not the gross amount.

3.4 The respondent on the other hand argued that the 10% service charge was added to the total bill for the services offered in the all-inclusive packages and that it was effected on the net amount and

not the gross amount because the respondent has to deduct the tax payable to the Zambia Revenue Authority.

3.5 The court found that in compliance with Section 54 of the Tourism and Hospitality Act of 2015, the Minister had prescribed the rate of service charge at 10% on the total bill on accommodation, food, beverages and other tourism-related activities. The court referred to section 2 of the Tourism and Hospitality Act, 2015 and stated that service charge of 10% shall be added on accommodation, food and beverages, transport, fishing, spa treatment, taxis, arts and cultural centres, carnivals, festivals, fairs and outside catering.

3.6 The court further found that other tourism related activities such as falls tours, game drives, boat cruises and walking safaris cannot be included in the tourism activities that are liable for 10% service charge because they are not included under section 2 of the Tourism and Hospitality Act, 2015 and the schedule to Statutory Instrument Number 100 of 2016.

3.7 The court found that the respondent cannot impose service charge on services that they do not provide, such as transport and concluded that the appellants had not proved their case on a balance of probabilities. It was accordingly dismissed.

4.0 The appeal and the grounds thereof

4.1 The appellants were dissatisfied with the Judgment of the lower court and mounted the present appeal which was inspired by three grounds in the amended memorandum of appeal couched as follows-

1. The learned trial Judge misdirected himself both in law and fact when he held that the appellants were not entitled to service charge underpayment contrary to the evidence on record that the respondent was charging the service charge on the net bill instead of the gross bill presented to the customer.
2. The learned trial Judge misdirected himself both in law and fact when he failed to determine all the issues presented before the court and in particular when he failed to adjudicate on the question whether the service charge should be charged on the net bill or on the gross bill presented to the customer and that if the service charge is to be charged on the gross bill, then the appellants were underpaid.
3. The learned High Court Judge misdirected himself both in law and in fact when he failed to award the appellants service charge on other tourism related activities contrary to the evidence on admission from the respondent that it conducts other tourism-related services.

5.0 Arguments canvassed

5.1 In arguing ground one, it was submitted that this ground hinges on the correct interpretation of **Section 54 (1) and (2)** of the **Tourism and Hospitality Act[2].**

5.2 The appellants argued that the respondent's calculation of service charge of 10% on the net bill of the invoice which a client has paid to the respondent is contrary to the provisions of section 54 of the Tourism and Hospitality Act supra, which requires that service charge of 10% be added to the invoice. That the 10% should be calculated from the gross value of the amount the guest is required to pay. If the 10% is calculated after other taxes and levies are charged, the amount payable to the employees will be lower and contrary to the legislation.

5.3 The appellants urged the court to allow ground one of the appeal and prayed that the respondent be ordered to calculate the service charge on the total bill on the correct invoice and that the same be paid to the appellants.

5.4 The appellants contended that the receipt on page 172 of the record of appeal shows that the respondent was not adding the service charge to the customers' invoices. The appellants argued that the

court was duty bound to use the literal rule of interpretation because there was no ambiguity in Section 54(1) and that the court should have found that the appellants were underpaid because service charge was imposed on the net bill. We were referred to the case of **Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa[1],** where the Supreme Court held that-

> ***"It is trite that the primary rule of interpretation is that words should be given their ordinary grammatical and normal meaning. It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the legislature that recourse can be had to other principles of interpretation."***

5.5 Counsel submitted that the words used in Section 54 of the Tourism and Hospitality Act are very clear, that 10% service charge should be imposed on the total bill and not on the net bill. We were urged to order the respondent to calculate service charge on the correct total invoices from 2016 to date.

5.6 In arguing ground two, it was submitted that the record of appeal at pages 195 and 196 shows that the appellants were underpaid

because the respondent imposed service charge on the net invoice and not on the total invoice, that the 10% service charge was imposed on the net value of the invoice. It was contended that the lower court fell into grave error when it failed to make a decision on the question of the service charge being on the total bill as opposed to the net and that if the matter was adjudicated upon, the court below would have come to the conclusion that the appellants were underpaid. We were referred to the case of **The Minister of Home Affairs and The Attorney-General v Lee Habasonda[2],** where the Supreme Court stated that-

> ***"Every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities, if any, to the facts."***

5.7 Counsel submitted that the lower court did not review all the evidence and the questions brought before it. As a result, the question of the levy of the service charge on the gross or the net bill remained unanswered. We were urged to allow the second ground of appeal.

5.8 In arguing ground three, it was submitted that all services offered by the respondent are tourism-related and that the respondent had excluded some of the tourism-related activities from the imposition of service charge because they are not included in the activities that attract the said service charge.

We were referred to **Section 54 (3)** of the **Tourism and Hospitality Act** which provides that-

> ***"Where service charge is paid in accordance with subsection (1), a person shall not be obliged to give a tip for any service rendered and the proprietor or hotel keeper shall display a notice to that effect, printed in plain type, in a conspicuous place in the accommodation establishment or restaurant or eatery where it can conveniently be read."***

5.9 Counsel submitted that the appellants are not eligible to receive tips from the clients of the respondent because of the service charge that is imposed on the bills. It was further contended that it would be unjust to stop the appellants from benefiting from receiving tips on some tourism-related services and also refuse to give them service charge on all tourism - related services. Counsel further contended

that Section 54 of the Tourism and Hospitality Act enables the appellants to benefit from the payment of service charge and that it would be unfair for the respondent to utilize the service of the appellants and deny them the right to enjoy service charge.

5.10 The appellants' counsel contended that since the respondent has proceeded to offer other tourism-related services before the minister prescribes them, it is just fair that the appellants are paid service charge on all tourism-related services that the respondent is engaged in.

Counsel referred to the case of **Seafood Court Estate Limited v Asher[3],** where Lord Denning stated that-

> ***"A Judge must not alter that of which it (a statute) is woven, but he can and should iron out the creases."***

5.11 We were urged to iron out the creases in this matter, that if the tourism establishment begins to offer tourism services on unprescribed tourism activities, then service charge ought to be charged to satisfy the spirit and intention of the Tourism and Hospitality Act(supra).

5.12 Counsel urged us to reverse the lower court's holding that the respondent should not pay service charge on other tourism activities that it offers on the ground that they are yet to be prescribed because the Principal Act provides for the payment of service charge on all tourism-related services. He that the appeal be allowed with costs to the appellants.

5.13 The respondent's Advocates filed heads of argument on 8th October, 2019. Responding to grounds one and two of the appellants' amended memorandum of appeal, it was submitted that the relevant statutory provision on service charge, Section 54(1) of the Tourism and Hospitality Act (supra) does not expressly prescribe that service charge shall be calculated on the gross amount and not on the net amount of every invoice issued by an accommodation establishment and restaurant for the supply and sale of accommodation, food, beverage and other tourism-related services. Counsel argued that in the lower court, the appellants did not adduce or produce any evidence to show that between December, 2016 to 2018, the respondent calculated service charge on the net amount instead of the gross amount on invoices issued by the respondent to its customers.

5.14 Counsel further contended that the learned trial Judge did not misdirect himself as he adjudicated upon and determined the disputes between the appellants and respondents as pleaded.

It was argued that the dispute between the parties on grounds one and two revolves around the correct interpretation of **Section 54(1)** of the **Tourism and Hospitality Act[2],** which provides that-

> ***"An accommodation establishment and restaurant shall add to every invoice for the supply or sale of accommodation, food, beverages and other tourism-related services a service charge prescribed by the Minister by statutory instrument."***

Section 54(2) of the said Act provides that-

> ***"The service charge shall be paid in equal shares to all employees, except employees in management."***

5.15 Counsel contended that Section 54(1) of Act Number 13 of 2015 does not expressly provide that service charge shall be calculated on the gross and not the net amount of every invoice for the supply or sale of accommodation, food, beverages and other tourism-related services.

5.16 Counsel submitted that the evidence of the respondent's only witness, Kuhema Ngoma, on page 199 of the record of appeal was that the packages sold to their clients are fully inclusive as rates given to guests include all services, service charge and all statutory impositions.

5.17 The witness further stated that the package includes park entries payable to government, tourism levy of 15% on accommodation and Value Added Tax (VAT). It was submitted that the respondent's calculation of service charge is not extended to any statutory outgoings such as VAT due to the government, park and bed night levies due to the Department of National Parks and Wildlife and tourism levy, all of which would constitute the gross amount.

5.18 Counsel contended that Section 54(1) of Act Number 13, 2015 does not provide a formula on how service charge is to be computed but merely states that the charge shall be added to every invoice for the supply or sale of accommodation, food, beverages and other tourism related activity.

Counsel referred to the case of **Samuel Miyanda v Raymond Handahu[4],** where the Supreme Court stated that-

"The object of statutory interpretation is the ascertainment of the intention expressed."

5.19 We were further referred to the case of **Akashambatwa Mbikusita Lewanika and others v Fredrick Jacob Titus Chiluba**[5] where the Supreme Court stated that the fundamental rule on all enactments is that they should be construed according to the intent of Parliament which passed the law. Counsel argued that it was *not* the intention of the legislature that service charge be claimed on government taxes such as Value Added Tax, as well as other statutory payments in the tourism sector such as tourism levy. It was contended that the appellants below failed to put up any evidence to show that between December, 2016 and 2018, the respondent was non-compliant in terms of Section 54(1) of Act Number 13 of 2015.

5.20 Counsel contended that the appellants' first witness conceded in cross examination that the 10% service charge was to be charged on accommodation, food and beverages as agreed in a collective agreement, effective from January, 2017, which was signed between the appellants' union and the respondent. Counsel further argued that the appellants' second witness conceded on page 198 of the

record of appeal that service charge cannot be effected on statutory outgoings.

5.21 Counsel submitted that the notice of complaint filed by the appellants on pages 18 and 19 of the record of appeal shows that the appellants' claim was for underpayment of 10% service charge as they alleged that the respondent did not impose 10% on the fully inclusive packages that they charged their clients. The appellants did not go to court to seek the correct interpretation of Section 54(1) of Act Number 13 of 2015 and that for the period December, 2016 to 2018, no evidence was led before the court to show that during this period, the respondent had flouted Section 54(1) of the Act.

5.22 Counsel submitted that the dispute between the parties relating to the respondent's exclusion of the three activities, these being game drives, boat cruises and walking safaris in the calculation of service charge revolves around the correct interpretation of Section 2 of Act Number 13, 2015. That they are not included in the respondent's computation of service charge as the same are not specifically mentioned in the definition of tourism-related activities and that no statutory instrument has been issued by the Minister declaring the three excluded activities as being "tourism-related services."

5.23 Responding to ground three, Counsel submitted that the appellants did not adduce any evidence to show that for the period in question, December 2016 to 2018, the three activities, these being game drives, boat cruises and walking safaris were conducted by the respondent but not added to the respondent's invoices as provided under Section 54(1) of Act Number 13 of 2015. No invoices were produced by the appellants to prove that the respondent conducted these activities. We were urged to dismiss ground three of the appeal and dismiss the appeal in its entirety, with costs to the respondent.

6.0 **Decision of the court**

6.1 We have carefully considered the arguments proffered by both sides in this appeal and shall deal with grounds one and two together as they are interrelated.

6.2 The issues in grounds one and two of the amended memorandum of appeal are whether the appellants were entitled to service charge on the gross bill as opposed to the net bill presented to the customer, which was the practice that the respondent implemented in interpreting Section 54(1) of Act Number 13 of 2015. The second issue for determination is whether the lower court failed to determine all the issues presented before it.

Section 54(1) of the **Tourism and Hospitality Act** provides that-

> ***"An accommodation establishment and restaurant shall add to every invoice for the supply or sale of accommodation, food, beverages and other tourism-related services a service charge prescribed by the Minister by statutory instrument."***

6.3 Although section 54(1) is silent on whether service charge is supposed to be calculated on the gross bill or the net bill, we take judicial notice of the fact that hotels and other such establishments are obliged to levy Value Added Tax and other statutory outgoings in the tourism sector such as tourism levy on the gross amount of every invoice for the supply and sale of accommodation, food, beverages and other tourism-related activities.

6.4 We are therefore fortified in our view that the interpretation of section 54(1) of the Act is that service charge should be effected on the net bill, after Value Added Tax and other statutory payments in the tourism sector are levied on the gross amount of the invoice. Thereafter, service charge is levied on the net bill, which amount is prescribed by the Minister by Statutory Instrument. From the evidence of the respondent's sole witness, on page 199 of the record

of appeal, the rate given to guests is fully inclusive, as it includes service charge and all statutory impositions.

6.5 We agree with the respondent's counsel that the respondent's calculation of service charge is not extended to statutory outgoings such as VAT due to the government, park and bed night levies due to the Department of National parks and wildlife as well as tourism levy.

6.6 We therefore form the view that service charge can only be effected on the net bill, at a percentage prescribed by the Minister, by Statutory Instrument. We are of the view that the invoices that the appellants exhibited in the record of appeal are not helpful to them because their claim for underpayment of service charge for the period December, 2016 to 2018 was not supported by any evidence.

6.7 Having found that the service charge is calculated on the net and not gross bill, we are of the view that the appellants' claims in this regard cannot stand. There is no evidence that the appellants were underpaid on service charge for the period December, 2016 to 2018.

6.8 On whether the learned trial Judge failed to determine all the issues presented before him, we refer to the Notice of Complaint which indicates that the appellants sought to be paid service charge of 10%

as prescribed by Statutory Instrument Number 100 of 2016 and for the recovery of arrears of 10% from December 2016 to 2018. A perusal of the affidavit in support of Notice of Complaint shows that the appellants merely sought the implementation of service charge of 10%.

6.9 The trial court found that the calculation of the 10% service charge to be paid to the appellants should be on the total bill on accommodation, food and beverages and other related activities that were listed under Regulation 3 of Statutory Instrument Number 100 of 2016. These were listed as accommodation, food and beverages, transport, fishing, spa treatment, taxis, arts and cultural centres, carnivals, festivals, fairs and outside catering.

6.10 We hold the view that although the Court did not clarify what it meant by the "total bill" on accommodation, food, beverage and other tourism-related services, this is actually the net bill after the respondent has deducted all statutory obligations from the gross bill. The appellants did not present the question of whether service charge should be calculated on the net bill or on the gross bill, in the lower court. The lower court cannot therefore be attacked for not reviewing issues which the appellant did not raise in the lower court.

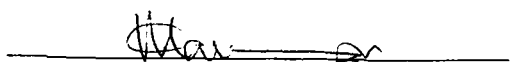
6.11 We do not find merit in grounds one and two of the appeal and they are accordingly dismissed.

6.12 Ground three attacks the lower court for failing to award the appellants service charge on other tourism-related services when the respondent admitted that it conducts other tourism-related services. The lower court, on page J11 of the Judgment held that the respondent cannot impose a service charge on services that they do not provide. An evaluation of the evidence on record indicates that game drives, boat cruises and walking safaris are not included on the activities that have service charge imposed on them. We agree with the respondent's counsel that no Statutory Instrument has been issued by the Minister of Tourism specifically declaring game drives, boat cruises and walking safaris as being liable to 10% service charge.

6.13 Further, no evidence was led by the appellants in the lower court to prove that the respondent did in fact carry out boat cruises, game drives and walking safaris that would warrant the imposition of service charge. As stated by the respondent's witness in the lower court, the Act has defined tourism- related activities that should attract service charge. We therefore do not find merit in ground three of the appeal and it is accordingly dismissed.

7.0 Conclusion

7.1 All three grounds of appeal having failed, the net result is that this appeal is dismissed for lack of merit. Costs are awarded to the respondent, to be taxed in default of agreement.



C.K. MAKUNGU
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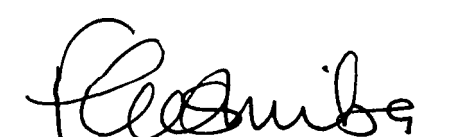

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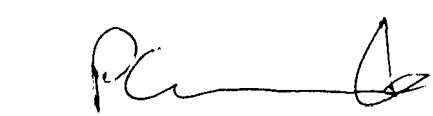

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