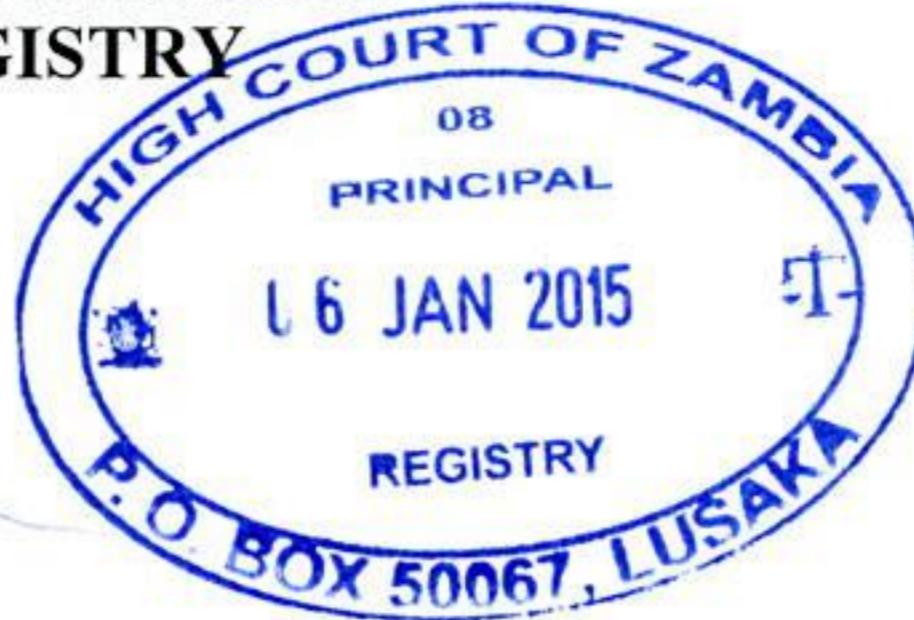


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**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2009/HP/1370



BETWEEN:

ABONY MUNSAKA

PLAINTIFF

AND

CITIZENS ECONOMIC EMPOWERMENT COMMISSION

DEFENDANTS

Before the Hon. Mrs. Justice A.M. Banda-Bobo on the , 2015.

For the Plaintiff: Messrs M.L. Mukande & Co.

For the Defendant: Messrs Kalokoni & Co.

RULING

Cases Referred to:

1. Golden Yobe Mwale V Zanaco/ZRA
2. Henry (H.M Inspector of Taxes) V Arthur Foster, Joseph Foster (2)
3. Henley V Murray, (31 TC 351)
4. Zambia Revenue Authority V. Gilford Malenji (2012/HP/A.0013,

Legislation Referred to:

The Ruling in this matter was scheduled for August, 2014. However, due to matters beyond the Court's control, the same was delayed, which delay is deeply regretted.

The Defendant, CEEC herein filed ex parte Summons accompanied by an affidavit in Support, to stay execution of a Writ of *fifa* and sale of seized property pursuant to order 47 rule 1 of the Rules of the Supreme Court of England 1999 Edition.

In their affidavit in Support, the Defendant indicated that after the court ruled in favour of the Plaintiff that he be paid all monies due to him, they had computed his dues to be K902,012.17. It was contended that this amount was subject to taxation at 35%, and that the Plaintiff was only entitled to be paid the sum of K586,907.70 after taking into account the 35% tax payable to the Zambia Revenue Authority, and advances he had obtained from the Defendant during his employment. It was stated that K550,00.00 had been paid towards liquidating the Judgment sum. Further, that the Defendant was willing to pay the K36,907.70 remaining. It was argued that the Plaintiff's advocates did not consider the tax payable when they computed the Judgment sum payable by the Defendant.

In pursuing the remaining amount, the Plaintiff issued a writ of *fifa* and caused to be seized three motor vehicles belonging to the Defendant, hence this application for stay of execution.

I granted the application ex-parte. Before the appointed date for hearing the matter inter-parte came up, the Defendant filed a further affidavit sworn by Victor Zimba, director of Finance in the Defendant's institution. His affidavit was to the effect that ZRA had advised on how to levy income tax on gratuity payable to the Plaintiff, and their advise was that income tax is levied from the source, meaning

the amount due to the Plaintiff had been paid net of tax, "VZ1" was the letter from ZRA.

Further, that based on that advise, the Defendant, issued a cheque for K20,180.76 being the outstanding balance on the Plaintiffs gratuity, and that the Defendant is no longer indebted to the Plaintiff as it has discharged all its obligations, and that the amount being claimed is what is due to the ZRA on behalf of the Plaintiff.

The Plaintiff opposed the application in an affidavit sworn by the Plaintiff himself. He contended that the Court did not order that the amounts in the Judgment debt be taxed, and that the monies recovered under the Judgment are not taxable at 35%.

When the matter came up for hearing, Counsel for the Defendant stated that ZRA had advised that the plaintiff was to be paid gratuity net of tax as it is non-qualifying gratuity which is taxable at 35% as it was grouped together with other earnings that attracted Pay As You Earn (PAYE). Based on that, the Defendant opined that they were no longer indebted to the plaintiff as it paid as per advise from ZRA.

It was his further contention that in fact the Plaintiff owed the Defendant monies which should have been deducted on the amounts that accrued and were paid to him. He then made submissions on the issue of interest and drew the court's attention to the Case of Golden Yobe Mwale V ZANACO/ZRA for the

proposition that Court awarded interest is taxable, though the same case was merely cited for its persuasive value. Counsel contended that the issues it addressed were applicable to the Case at hand as it related to the issue of interest.

Counsel then went to cite the provisions of Section 17(e) and 18 of the Income Tax Act. He then referred to the Plaintiff's assertion that since what he had claimed was loss of employment and that the same was not taxed at 35%, Counsel argued that there was no deduction on the damages; but that the only issue they claimed was on interest, as they understood that much and they did not levy tax on the damages payable. He contended that interest on damages is taxable and hence their claim. Counsel contended that according to their calculations, they needed to be refunded K6,845.45 in terms of over payments. Further, that an amount of K26,240.81 is owed to the Defendant as withholding Tax (WHT) payable to ZRA.

Counsel went to state that it was while they sought ZRA advise on how to treat the amount due to the Plaintiff for tax purposes that the writ of *fifa* was issued to levy execution which execution saw the capturing of two utility vehicles. Counsel contended that the said execution was improper and not justifiable as the Defendant never disputed being indebted to the Plaintiff as shown by the payments made to the plaintiff in accordance with the law and as advised by the ZRA. Counsel asked the Court to maintain the status quo and the execution to be set aside.

Counsel for the Plaintiff said that the application before court was based on advise from ZRA. He contended that the exhibits on which reliance has been placed from ZRA did not address the issue at hand, which issue according to him is the **rate of tax applicable.**

Counsel stated that there is no dispute at this point that tax is due and payable. **What is in Contention, so he said, is the rate at which it is due.** He referred to exhibit "VZ1" and said the Court would note that the only advise from ZRA relates to the fact that

- (i) Tax is payable, and
- (ii) That the charge year is 2013.

He also drew the court's attention to exhibit "VZ2", a letter from ZRA where ZRA advised that the rate of tax payable on interest stands at 15%. He indicated that there was an extract from Note No. 1 of 2013 where the interest rates are indicated. Counsel argued that based on these exhibits, there is no where where ZRA advised or indicated that tax due is at 35%; which the Defendant used to tax the Plaintiffs package. He wondered where they got the 35% from as tax due. Counsel contended that he who alleges must prove. Consequently, he argued, the onus is on the Defendant to demonstrate the basis of the 35% which they had failed to do.

His third point was that in as much as they agreed that tax was due, they did not think the same was pegged at 35%. He argued that the correct taxation of the Plaintiffs package is that the 1st K25,000.00 was tax free. The remainder of the amount due is taxed at a flat rate of 10%. To support his argument, he placed

reliance on Section 21 (5) of the Income Tax Act, Cap 323 of the Laws of Zambia, which provides that

“whereupon termination of the services of any individual in any office or employment, income is received by such an individual by way of compensation of such office or employment, including termination for reasons of redundancy, or early retirement, normal retirement or death, the first K25 million of such income shall be exempt from such tax”.

Counsel went on to rely on Section 2(1) (b) of Part II of the Charging Schedule of the same Act, which he stated that in addition to the earlier section provides that

“Subject to the provisions of this Act, tax in respect of an income for an individual shall be charged as follows-

“(b) on any income falling within subsection 5 of section 21 which is not exempt from tax under the subsection at the rate of 10% per annum”.

Counsel argued that the combined effect of Section 21 and the charging schedule is that where the services of an employee are terminated, any income received by an individual as in this Case is taxable at 10% flat rate after the deduction of the first K25 million. Counsel contended that as exhibited at “AM1”, the plaintiff’s

services were terminated by way of a termination letter. Counsel said that in view of the above, his client was entitled to every ngwee due to him as a result of that termination.

Counsel invited the court to take note of the Common Orders that Courts make in employment cases where the court may give damages to be paid twelve months salary. He contended that that does not invite the tax bands as if it is a salary. He argued that it is just a measure of damages. He submitted that the whole award by the court was intended to compensate the Plaintiff for the termination of his contract, which made him fall squarely in Section 21(5) of the Income Tax Act.

In conclusion, Counsel drew the court's attention to the calculations done by the Defendant, where they allege that they owed the plaintiff K20,180.77 as per the initial affidavit in support. He also drew the court's attention to the Defendant's last affidavit, where they allege that the plaintiff owes them as per exhibit V 3 in the affidavit dated 27th June, 2014. Counsel contended that although they claim that they are only taxing gratuity, they have actually lumped together all the other awards except damages, and taxed the total K609,288.41 at a flat rate of 35%. Counsel contended that salaries are taxed at a graduated rate and not a flat rate.

Further, that the court would note from exhibit "V3", that interest, instead of being calculated on the whole Judgment sum has been calculated on the net amount after deduction of tax, which he claimed was wrong. Counsel argued that this is what resulted in the reduction of the total amount due under the component of interest.

He prayed the application be dismissed as the Defendant still owed the Plaintiff, save for the 10% tax that is due on the remainder after deduction of the first K25,000.00 as already submitted.

In reply, Counsel for the Defendant alluded to the fact that the Plaintiffs Counsel made reference to exhibits "VZ2 and VZ3" on their indebtedness to the Plaintiff. He explained that these exhibits showed the amount paid to the Plaintiff and that that was an acknowledgement of the amount paid.

On the issue of gratuity, and the legal basis for the 35%, Counsel drew a distinction between qualifying and non qualifying gratuity. He contended that qualifying gratuity has three (3) elements, namely;

- (i) Paid upon termination of written contract of employment
- (ii) Upon the duration of contract not being less than two years.
- (iii) Gratuity should not be more than 25% of the basic salary earned during the period of employment.

Counsel argued that if any gratuity does not meet all the three conditions, it is then called non-qualifying gratuity.

In closing, Counsel emphasized that the dispute is not whether damages are taxable or not, but rather on what the tax rate on the gratuity is payable under the

circumstances, bearing in mind that he only served the Defendant for eleven(11) months.

He prayed that the court sets aside the execution and seizure of property and order the Plaintiff to repay the monies over paid to him, if any, especially on interest.

I have carefully considered the evidence before me, both oral and written. I find that the following are not in dispute, vis, that the plaintiff herein had his contract of employment terminated by way of a letter of termination as appear at exhibit "AM1" of his affidavit in opposition to this application filed into court on 12th June, 2014. It is further not in dispute that as a consequence thereof, he took his termination to court and he was awarded damages and other reliefs as per his statement of claim.

It is also not in dispute that the Defendant herein computed his dues and levied tax on the computed amounts at 35%, because, according to them the gratuity claimed by the Plaintiff falls under the category of non qualifying gratuity and was therefore taxable at 35%. It was argued that this 35% was arrived at upon advise of the Zambia Revenue Authority, (ZRA), and to buttress, the Correspondence from ZRA was exhibited at "VZI -V3".

The Plaintiff on the other hand argued that though tax is paid on court awarded interest, and that other taxes are payable, the bone of condition is the rate at which

tax is due. They dispute that the tax due is at the rate of 35%. Further that according to the Income Tax Act, Cap 323, the first K25,000.00 is exempt from tax and that any amount remaining thereafter is taxed at a flat rate of 10%.

As already stated, the Plaintiff had his services or contract of employment terminated at the instance of the Defendant herein. This clearly amounted to loss of office for which he went to court and was awarded damages to compensate him for such loss of office. In the Case of **Henry (H.M Inspector of Taxes) V Arthur Foster, Joseph Foster (2)** Lord Hanworth opined when addressing the issue of loss of office that *“compensation for loss of office is a well known termit means payment to the holder of an office as compensation for being deprived of profits to which as between himself and his employer, he would, but for an act of deprivation by his employer or some third party, such as the legislature have been entitled.”*

From the above, it is clear that the purpose of compensation for loss of office is to make restitution to someone for loss of office at the hand of the employer where employment is terminated. The act of termination in this case warranted compensation as it was an act of deprivation.

Section 21(5) of the Income Tax Act Cap 323 of the Laws of Zambia as read together with Section 2(1)(b) of Part II of the Charging Schedule of the same Act provides that:-

“21(5) where upon the termination of the services of any individual in any office or employment, income is received by such individual by way of compensation for

loss of office, or employment, including termination for reason of redundancy or early retirement, normal retirement or death, the first twenty five million kwacha of such income shall be exempt from Income tax.”

“Section 2 (1) – subject to the provisions of this Act, tax in respect of the income of an individual for a charge year shall be charged as follows:-

(b) On any income falling within Subsection (5) of Section Twenty One which is not exempt from tax under that sub section, at the rate of ten per centum per annum.”

The Act does not define what compensation for loss of office is in the cited Section. However, in the Case of **Henley V Murray, (31 TC 351)**, the court considered the circumstances where there is a dismissal followed by legal proceedings challenging the dismissal and the matter is resolved by court or by agreement and it was observed in that case by **Sommerville, LJ** that:

“If in the case of dismissal where the employee says, “I am wrongfully dismissed” and sues for damages, he is admittedly outside schedule E and un taxable. It seems to me to follow from that, if one goes by stages, that if one takes a case where equally the employer dismisses his employee and the damages are agreed without litigation the fact that they are agreed instead of being awarded by a Judge or jury cannot affect their legal position in regard to the income tax code. It seems to me on the evidence that that is what happened here. The employer said “you must go” The Appellant was forced into going at their request. The sum which he stipulated

for must be in precisely the same position as would have been a sum for damages for wrongful dismissal.”

In the Zambian Case of **Zambia Revenue Authority V. Gilford Malenji (2012/HP/A.0013 (unreported))**, a matter decided by my elder sister Kabuka J. where a similar issue was dealt with, the Court found that “where termination of employment is initiated by the employer outside an employee’s terms and conditions of service as a result of which the employee suffers loss of earnings or profits relating to his said employment, such loss amounts to loss of office, and the tax rate applicable to the payment he receives falls within the meaning of “Compensation for loss of office” as defined in section 21 (5) of the Income Tax Cap 323 of the Laws of Zambia and Section 2(1)(b) of the charging schedule applies.”

The above case is on all fours with the matter in casu and therefore I am properly guided. I find that having been awarded damages by the court as a result of the premature termination of his contract of employment, the Plaintiff herein falls squarely within the provisions of Section 21(5) and Section 2(1)(b). The combined effect of these two cited provisions is that any income received by an individual as in this case is taxable at a 10% flat rate after the deduction of the first K25,000.00.

Having settled that, I want to state that I agree with Counsel for the plaintiff that Courts award damages in certain instance as payment for a certain period of months. The same cannot be treated as a salary, as to invite tax bands as was done

in this case to justify the tax bands used. It is still just a measure of damages to compensate the Plaintiff for loss of office.

Further, it is true and was not denied that in the calculations appearing at "V3" of the further affidavit in reply dated 27th June, 2014, all the awards have been lumped together, and taxed at 35% except for damages. Clearly, this cannot be correct as salaries are taxed at a graduated rate and not a flat rate as was done in this case.

Counsel for the Plaintiff argued that tax is payable on court awarded interest, and this is not in dispute: However, he contends that the same should be calculated on the whole Judgment sum and not on the net after taxing the whole amount.

As earlier indicated, the Defendant herein relied for its calculations on the advise given to it by the ZRA. One of the exhibits relied upon was "V2" in the further affidavit dated 27th June, 2014. In "V2" it states that

"Interest Income is to be regarded as a separate source and taxed as such. In our current law, interest income is taxed at 15% of the **gross value** and this is the final tax." Table 8 and the notes thereto and attached to "V2" shows the rate to be paid on interest.

Under note (1) thereof, it says that

“When interest is awarded by courts of law, it is still regarded as “interest” and withholding tax is deductible in accordance with the appropriate rate as above.” Under table 8, of the same, it appears that this interest is classified as “other interest” and is pegged at 15%.

It is patently clear from the above that tax on interest can only be calculated on the gross value and not on the net as was done in this case. Counsel for the Defendant urged the court to consider the rate of tax payable under the circumstances bearing in mind that the Plaintiff only served the Defendant for eleven months. I am at a loss to understand where Counsel was heading with this argument, for the simple reason that the court found the Defendant culpable and awarded damages. The issue of length of service therefore does not arise and did not arise in awarding damages. I do not see how the length of service impacts on the tax due to the Plaintiff. In sum I find that the correct rate for calculating the rate of tax on the amounts due should be as under Section 21(5) as read together with Section 2(1)(b) of Part II of the Charging Schedule. The tax rate of 35% used should be revised accordingly.

Further, that tax on the court awarded interest should be calculated on gross value as per “V2”. I order accordingly.

It was not in contention that the amounts due as tax should be collected at source and be remitted to the Zambia Revenue Authority. The Plaintiff will therefore be paid his amounts net of taxes.

Finally, the application was for stay of execution. I granted the stay ex-parte. However, and in view of what I have said above, it is clear that there will be need to conduct a recalculation of the monies due to the Plaintiff. In the interest of justice, I will confirm the Stay of execution, but for a limited period of sixty (60) days from the date of Judgment to allow the Defendant recalculate the amounts owing, if any and pay.

Costs are in the cause.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS DAY OF, 2015.



**MRS. JUSTICE A.M. BANDA BOBO
JUDGE**