

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

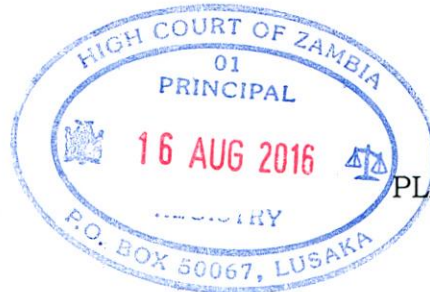
2014/HP/2046

BETWEEN:

MOST CHILUFYA KABALA

AND

SABLE TRANSPORT LIMITED



PLAINTIFF

DEFENDANT

**BEFORE THE HONOURABLE LADY JUSTICE M. CHANDA THIS 16TH DAY
OF AUGUST 2016**

APPEARANCES:

FOR THE PLAINTIFF : IN PERSON

FOR THE DEFENDANT : F. MUTALE FROM F.M. LEGAL PRACTITIONERS

J U D G M E N T

CASES REFERRED TO:

1. Printing and Numerical Registration company v Simpson (1875) LR 19 EQ 462
2. Zambia INC v Abel Shemu Chuka and 110 Others SCZ Appeal No. 181/2005
3. Josephine Mwaka Mwambazi v Food Reserve Agency, Appeal No.128 of 2007
4. Kitwe City Council v William Ng'uni (2005) Z.R. 57 (S.C.)
5. Stooke v Taylor (1880) 5 QBD 569 at page 575

On 29th December, 2014, **Most Chilufya Kabala**, the plaintiff, commenced this action by writ of summons against **Sable Transport Limited**, the defendant herein. The plaintiff alleged that he was employed by the said defendant and that his contract expired on 7th June, 2014 but that he was allowed to work until 30th July, 2014 without being informed that his contract would not be renewed.

The reliefs sought by the plaintiff were as follows:

- 1. Payments of separation package, notice pay, unpaid salaries and leave pay amounting to K54,444.5**
- 2. Costs incidental to these proceedings**
- 3. Any other relief the court might deem fit**

The defendant filed its defence and counterclaim which was amended on 20th October, 2015 denying the plaintiff's entitlement to leave pay, gratuity or a separation package as those were not provided for in any of the contracts. The defendant also stated that the plaintiff had entered into a loan agreement with the plaintiff for the sum of K20,000. He then collected three instalments of K5,000 each and was indebted to the tune of K15,000. The defendant therefore counterclaimed for payment of K15,000 and in the alternative it was pleaded that if claims were proven against the defendant, that they be set-off against the K15,000.

The plaintiff filed a reply on 30th October, 2015 in which he stated that the loan was a different arrangement altogether as it was a soft loan with a relaxed mode of payment. He stated that deducting it from the plaintiff's dues would be an abrogation of the agreement.

The matter was heard on 5th November, 2015. Both parties were before court and called one witness each.

The gist of the plaintiff's testimony in court supported by the statement of claim was that he was retained by the defendant firstly as a warehouse supervisor in June, 2011 and was later elevated to the position of Transport and Logistics Manager. The plaintiff testified that in June, 2013 he was employed by the defendant as Warehouse Manager. The plaintiff testified that he served on a number of contracts with the defendant which were all renewed upon expiry.

He explained that the trend was that every time the contract was coming to an end the defendant would, a month before the expiry of a contract, inform the affected employee in writing whether their contract would be renewed or not. The plaintiff said that in June, 2013, he had entered into a contract with the defendant which expired on 7th June, 2014 but that as per the labour requirement, the defendant did not inform the plaintiff that he would not renew his contract. The defendant in fact continued assigning the plaintiff

his usual duties thereby intimating that the plaintiff had entered into another one year contract.

He narrated that on 30th July, 2014, as he was working, he was handed a letter of expiry of the contract without regard to the labour law provisions. The letter of termination was dated 30th July, 2014 and stated that the contract had expired on 7th June, 2014 and that it would not be renewed. The plaintiff stated that the defendant did not give him notice or pay one month salary in lieu of notice. He also stated that due to no notice, the plaintiff suffered torture from the abrupt loss of income.

The plaintiff asserted that the defendant prematurely terminated the one year contract which was entered into expressly by having him continue performing his duties. The plaintiff also claimed that at the end of the one year contract he had signed, the defendant did not give him leave pay, gratuity nor separation benefits as per requirement of the labour laws. The plaintiff contended that he was at one time sent on unpaid leave and had his leave days subtracted despite being subjected to a month of no salary. He stated that due to the actions by the defendant, he had suffered greatly

The plaintiff as a result claimed for a total sum of K54,444.5 comprising a separation package amounting to K13,470, one month salary in lieu of notice amounting to K2,245, leave pay amounting to K4,144.6, unpaid salary for forced leave amounting to K3,327.90,

unpaid salaries for 11 months amounting to K24,695, one year's basic leave pay amounting to K2,072.

In cross-examination the plaintiff testified that he had accrued 52 leave days which the defendant had not liquidated. He further added that he obtained a loan of K15,000 from the defendant. He stated that he had not been informed on the terms of paying back the loan and proposed that it be paid back in three instalments.

In further cross-examination he conceded that the separation package was not included in his contract. He further admitted that he had not worked for the 11 months he was claiming payment for but that he did so on account that the defendant had breached the contract. The plaintiff further informed the Court that the last contract that he signed with the defendant was due to expire on 7th June, 2014 but that he was only availed the letter of termination of contract a month later.

In re-examination the plaintiff reiterated that the trend was that he was allowed to work after his contracts expired and the contracts would be renewed after the expiry period.

That was the close of the plaintiff's case.

The defendant's witness (DW1) was **Aphet Kambondo**, the defendant's Human Resource Manager who told the court that he had perused the contract signed between the parties and noted that they had not agreed on any gratuity or severance benefits. He stated that the plaintiff was entitled to thirty (30) days' notice or payment of one month's salary in lieu of notice. DW1 also stated that the defendant conceded on the 52 leave days claimed by the plaintiff. DW1 indicated that the plaintiff had obtained a loan from the defendant in the sum of K15, 000. He urged the Court to deduct any amount to be found due to the plaintiff from the said loan.

In cross-examination he emphasised that a separation package could only be claimed if it was agreed on by the parties under the contract.

At the close of the matter I received written submissions from counsel for the defendant. I am indebted to counsel for his submissions. I shall not restate the submissions but will only refer to them as may be necessary.

Having considered the evidence in this matter, the undisputed facts that have arisen from the record are as follows:-

It is common cause that the plaintiff was employed by the defendant on three consecutive one year fixed written contracts in different capacities from June 2011 to June, 2014.

It is also common cause that the plaintiff's terms and conditions of service were governed by the afore contracts of employment.

I find that the plaintiff's final contract expired on 7th June, 2014 but he was allowed to continue working for the defendant until he was notified of his expiry of contract on 30th July, 2014.

It is further not in dispute that the plaintiff was owed a total of 52 accrued leave days by the defendant. I am also satisfied that the plaintiff has not liquidated a loan of K15,000 that was obtained from the defendant after the termination of contract.

After consideration of the evidence on record as well as the submissions by counsel for the defendant, the issue to be resolved herein is whether or not the plaintiff is entitled to the reliefs claimed.

I will now consider the reliefs the plaintiff is claiming in the manner they appear in the statement of claim. The plaintiff has claimed for the payment of a separation package pursuant to the labour laws. The defendant has refuted the claim and asserted that the contract

executed by the parties did not contain any provision for a separation package. I have already established as a fact that the plaintiffs' terms and conditions of employment were stipulated in the contract that he executed with the defendant. In the case of *Printing and Numerical Registration company v Simpson*¹ which was quoted in the case of *Zambia INC v Abel Shemu Chuka and 110 Others*², Sir George Lessel observed that:

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

Further, the case of *Josephine Mwaka Mwambazi v Food Reserve Agency*³ is instructive on the law that parties are bound by the terms and conditions they set out for themselves.

A thorough perusal of the three contracts of employment on which basis the plaintiff calculated the amount he now claims, shows that there is no provision for a separation package. There is no doubt that the plaintiff freely signed the said contracts whose clear and unequivocal terms did not contain any provision for the payment of a separation package. I am satisfied that he fully comprehended the agreed written terms and on this basis, I reject the claim for a separation package.

As regards the claim for the payment in lieu of notice, the plaintiff has contended that he was not given one month notice or any payment in lieu of notice and that the letter of termination was furnished to him after the contract had already expired. The defendant on the other hand has led no evidence to challenge this claim.

It is my affirmation that, the defendant was under a duty to inform the plaintiff as per their usual practice that his contract would not be renewed upon expiry. I opine that by allowing the plaintiff to work in the month of July, the defendant had caused to be created a new *contract implied in fact* on the same terms as the previous written contract, which could be terminated at any time by way of notice. It is apparent that the contract that governed the parties employment relationship allowed for the termination of contract by either party giving 30 days notice or one month's pay in lieu of notice. This term of the contract was not observed by the defendant. Thus, to cure the defective manner in which the plaintiff's subsequent contract was terminated he is entitled to the payment of one month's salary in lieu of notice in the sum of K2,245.

The plaintiff has further claimed to be awarded salaries and other benefits totaling K54,444 that would have accrued to him had he been allowed by the defendant to complete a full term of the

contract implied in fact. The defendant in its submissions has urged the Court not to award the plaintiff's claim under this head as doing so would amount to unjust enrichment. The defendant categorically argues that the plaintiff did not render any service for the period in question. It must be stressed here that as noted above, the *contract implied in fact* that was subsequently executed by the parties herein could lawfully be terminated at any time without any continuing liability whatsoever from either party. In the matter before me the award of the one month's salary in lieu of the requisite notice as indicated above has legally and conclusively severed the employment relationship between the parties herein. The plaintiff cannot therefore be entitled to any payments over and above the notice pay. I concur with counsel for the defendant that there is no basis upon which the plaintiff can be awarded this claim because he had not earned it

I am also fortified by what was observed by the Supreme Court, in the case of *Kitwe City Council v William Ng'uni* ⁴ wherein it was stated as follows:-

“...We have said in several of our decisions that you cannot award a salary or pension benefits, for that matter, for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment.”

I adopt this view as my own.

Lastly, the plaintiff has also implored the Court to compel the defendant to pay him for the period he was sent on forced leave. In aid of his claim the plaintiff produced on page 16 of his bundle of documents a letter written by the defendant informing him of the decision to send him on unpaid leave from 20th March, 2014 to 28th April, 2014. The defendant has not adduced any evidence to refute this claim. I find that the defendant had no legal backing to send the plaintiff on unpaid leave and hold that he is entitled to be paid a sum of K3,327.90 in that regard. The plaintiff is equally awarded a sum of K4,144.60 in respect of his 52 accrued leave days, which claim was conceded by the defendant's witness.

In all the plaintiff is entitled to a total payment of **K9,716.60**

I now turn to consider the defendant's counter-claim. From the evidence laid before Court, both parties agreed that the plaintiff obtained a loan from the defendant upon termination of his contract and that the total amount advanced to him was **K15,000**. The defendant prayed that the plaintiff's claims be deducted from the loan advanced, in other words, he requested for a set-off.

The view of Cockburn CJ concerning a set-off in *Stooke v Taylor* ⁵ was that:

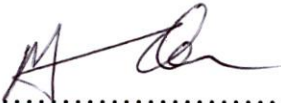
'This plea is available only where the claims on both sides are in respect of liquidated debts, or money demands which can be readily and without difficulty ascertained'.

In casu, the claims are for money which has been readily ascertained. The defendant's plea succeeds and I hereby order that the sum of **K9,716.60** awarded to the plaintiff herein be deducted from the advanced K15,000. The plaintiff is therefore ordered to pay the outstanding sum of **K5,283.40** to the defendant

Each party to bear its own costs.

Leave to appeal is granted.

Dated at Lusaka this16TH.....day ofAUGUST..... 2016



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HONOURABLE JUSTICE M. CHANDA