IN THE HIGH COURT FOR ZAMBIA
AT THE NDOLA DISTRICT REGISTRY
(CIVIL JURISDICTION)

2012/HN/176

BETWEEN:

CHRISTIAN T.N. DIEDERICKS — PLAINTIFF

AND

FRAZER ALEXANDER ZAMBIA LIMITED — DEFENDANT

CORAM : Honourable Mr. Justice M. Kondolo, SC

MARSHAL : Katala M. Nyirenda

For The Plaintiff : Mr. C. Magubbwi of Messrs Magubbwi and Associates

For The Defendant : Mr. D.Mazumba of Messrs Douglas & Partners

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J U D G M E N T

LEGISLATION CITED

1. The Employment (Amendment) Act No. 15 of 1997 of the Laws of Zambia
2. Minimum Wages and Conditions of Employment (General) Order, 2006, Statutory Instrument Number 56 of 2006 of the Laws of Zambia
3. The Employment Act, Chapter 268 of the Laws of Zambia

CASES CITED

1. Attorney General v EB Machinists Limited (2000) ZR at page 117
2. Jeofrey Kapasha Chisha v Emily Holland 2008/HN/160
3. Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd (1942) UKHLA; (1943) A.C. 32, 61.
4. Moses v Maferlane (1760) 2 Burr 1005, 1007

5. **B.P. Exploration Co. (Libya) Ltd v Hunt (No.2)[1979] 1 W.L.R. 783, 799 affirmed by HL in [1983]A.C. 352**
6. **Holmes Limited v Buildwell Construction Company Limited (1973) Z.R. 97 (H.C.)**
7. **Premesh Bhai Megan Patel v Rephidim Institute Limited (S.C.Z. Judgment No. 3 of 2011**
8. **Sempra Metals v HMRC [2007] 4 All ER**
9. **Vortt Exploration Co. v Chevron U.S.A., Inc., 384 S.W.2d 674, 675 (Tex. 1964)**
10. **166 S.W. 3d 100, 106 (Tex. App. – Houston [14th Dist.] 2004, pet. Denied)**
11. **Murray v Crest Construction, Inc., 900 S.W.2d 342, 345 (Tex 1995)**

TEXT CITED

1. **Chitty on Contract. 13th Edition . Vol. 1, General Principles: Thomson Reuters (2008)**
2. **https://www.lexisnexis.com/uk/lexispsl/disputeresolution/document/393747/59TN-**

This is an employment dispute in which the Plaintiff alleged underpayment of employment benefits and commenced proceedings by way of Writ of Summons and the accompanying Statement of Claim seeking the following reliefs;

i) Payment of the sum of USD73,318.13;

ii) In the alternative damages for housing allowance, overtime and standby compensation which damages should be assessed;

iii) Interest on (i) and (ii) as by statute provided

iv) Costs

v) Any other or further relief the Court shall deem fit

The Plaintiff testified that he was employed in a permanent position by Frazer Alexander Zambia Limited, the Defendant Company, in August, 2009 and executed a contract of employment dated 27th July, 2009. The contract of employment was silent on housing allowance but it was later amended on 1st December, 2010, to include housing allowance of USD500 per month.

The Plaintiff said his contract of employment stated that it was subject to Zambian labour law which by implication included any amendments to the labour law. He told the Court that the USD500 paid as housing allowance under the amended contract was less than 30% of his basic pay as prescribed by the Employment Act. As such he is claiming housing allowance in the sum of USD20,580.00 as set out in paragraphs 7 and 8 of his statement of claim, for the entire period of his contract including the period before his contract of employment was amended.

The Plaintiff informed the Court that paragraph 8 of his contract of employment provided for overtime. He said that he used to record his overtime hours, in two (2) books which were used for calculating his time off and one of the books was kept by himself and the other was for the Defendant. He explained that his job was a pressure job so overtime was compensated by being given days off and not cash payments.

The Plaintiff informed the Court that on 8th February, 2011 he gave the Defendant one month's notice that he was resigning from employment which meant that his last day of work was to be 7th March, 2011. On the same day he requested that he be given his time off as recorded in the Defendant's Time Book and the Human Resource Manager replied on 18th February, informing him that he would be given time off from 14th February 2011 to March. He said that the Defendant did not dispute the overtime due to him as stated in the overtime book but the overtime given to him only amounted to three weeks. Further queries regarding the overtime hours still owing to him yielded no response from the Defendant

The Plaintiff said he was claiming cash because apart from the three weeks given to him at the end of his contract he never got time off. He said he was owed 1,867 overtime hours which he had calculated as equating to the total sum of USD37,693.37 as set out in Paragraph 10 of his Statement of Claim.

The Plaintiff also said that even though his contract was silent, he was claiming standby allowance for 36 days which was the total number of days for the period he was asked to be on standby. He said he was claiming this allowance because if the Defendants went looking for him and he was not found at home he could have been disciplined.

He concluded his examination in chief by stating that his total claim against the Defendant was for USD73,318.13 plus interest, costs and any other relief the Court may deem in fit.

Under cross examination, the Plaintiff stated that housing allowance was included in his initial contract and he accepted that he had agreed to the terms of the overtime as provided in the contract. He however said that the Defendant only opposed his claim for overtime verbally but never opposed it in writing.

The Plaintiff explained that notice for overtime was given daily and it was verbal because there was no time for writing notices and there were no approvals in writing. He said he recorded overtime in a book for the purpose of calculating time off because there was no requirement to fill in time sheets. He agreed that the overtime was not verified but he said that the Defendant's book was compiled for the Defendants verification and the information presented to court was from the Defendants book.

He told the Court that the Defendant's book also contained the information of the other employee (the Plaintiff's son). He said the book kept by him only contained his information. When asked by the Court how others would know that he had not created fictitious hours and information, he replied that he shared the site office with Stephen Mountford, the Area Manager of Zambia who initiated all the overtime. He reiterated that the Defendant never disputed the hours he was claiming. He also said that the Defendant's overseas business manager had earlier told him that there was no need for him to sign the overtime book because they trusted the Plaintiff and his records.

When pressed as to why he only asked for his overtime at the end of the contract and why he didn't raise the issues of overtime, housing allowance and standby allowance when he received his letter of remuneration dated 4th June, 2010[1],the Plaintiff responded by saying that all the emails produced in his bundle of documents were to the bosses in South Africa and that his claims were local issues which were resolved verbally and it would have been improper to raise

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[1] *Plaintiffs Bundle of Documents, p.6, 2nd November,2012*

the issue with the bosses in South Africa. The Plaintiff denied the suggestion that he only claimed overtime at the end of the contract because had he asked for it during the contract the Defendant Company would have disputed it. He repeated that there was never any dispute over it and that he worked overtime as and when asked as it was a high pressure job.

Under further cross examination the Plaintiff said his claim for standby allowance was in accordance with the law and based on the practice obtaining at mines, and that his calculations were based on what he was paid when he worked at the mines.

When pressed over the claim for housing allowance, the Plaintiff said that he accepted the USD500 under protest.

He was re-examined and he said the letter of remuneration stated that the second letter with conditions of service was only informing him of a salary increment and not any other allowances.

The Plaintiff closed his case after his testimony and the Defendant launched its defence with one witness.

The Defence, called one witness, Mr. Constantine Louis Svoronos also known as Dino, DW1. He testified that the Defendant Company employed the Plaintiff after it was awarded a contract by KCM where the Plaintiff was employed but in the process of being retrenched. He said that the Plaintiff executed a Contract and worked with the Defendant Company for about three (3) years before he decided to leave his job.

He stated that after leaving employment, the Plaintiff made claims for stand by allowance, overtime and housing allowance which were not provided for in his Contract. DW1 said that under the contract, overtime was not paid by cash but by giving the Plaintiff time off and it was up to the Plaintiff to liaise on that with his immediate Supervisor.

He further said that the overtime needed to be authorized and recorded by the Plaintiff's Supervisor and he had never come across a request for overtime from the Plaintiff in the three

years that the Plaintiff worked for the Defendant Company. DW 1 said that the first time he saw the Plaintiff's documents' relating to overtime was during this case and the documents were not even signed by the Plaintiff's supervisor, Stephen Mountford.

DW1 told that Court that if the Plaintiff had made the claim for overtime before he resigned they would have given him time off. He said that under the circumstances the Defendant could not do anything about it and that, in any event, the Defendant Company was going through tough times with Konkola Copper Mines. He further stated that paying the Plaintiff overtime would set precedent for the six (6) officers who are currently employed and are not getting overtime.

DW1 further testified that the Plaintiff's contract did not provide for housing allowance but during the course of his employment, the Plaintiff's responsibilities increased. He became both Electrician and Fitter and his salary increased by US$ 500 and the increment which was effected in December, 2010 was recorded as housing Allowance.

Under cross examination DW1 accepted that the Plaintiff's immediate Supervisor, Mr. Mountford, was best placed to know the Plaintiff's input. He agreed that the works on the pumps were heavy but said that the Plaintiff worked with a team and the works on the pipes were quite light. DW1 said he was aware that the Plaintiff and his team worked a lot of overtime but that it fluctuated but that there ought to have been records showing approved overtime. He told the Court that Mr. Mountford no longer worked for the Defendant and his whereabouts were unknown.

DW1 denied knowledge of any agreement between the Plaintiff and his Supervisor on how overtime would be recorded. He also said that he was not aware of and did not verify that the Supervisor was not giving the Plaintiff time off because of the critical nature of his work and the need for his expertise. Whilst agreeing that the payment of overtime was subject to the Laws of Zambia, he insisted that overtime was meant to be compensated by time off.

DW1 accepted that the Defendant Company did not oppose or object to the overtime hours that the Plaintiff claimed he had worked. He also informed the Court that he was aware of the e-mail giving the Plaintiff time-off from February to March, 2011 which time was less than what had been worked[2]. He said that the e-mail was the Defendant's only response in relation to overtime and that the claim of 1723hours is not supported by any proof. He confirmed that the Plaintiff's contract was amended to award him housing allowance and he accepted that his assertion that the US 500 was a mere salary increment is not reflected in the amendment.

In re-examination DW1 clarified that the housing allowance only reflected on the Plaintiff's pay slip for tax purposes. He also said that the three weeks time off given to the Plaintiff was because he had resigned and only had four weeks left to work for the company. DW1 objected to the Plaintiff's calculation of overtime because he did it himself and it was not signed by his supervisor.

This marked the conclusion of the defence and the parties said they would file written submissions which they have done and which I have found very helpful.

Counsel for the Plaintiff, Mr. Magubbwi, submitted that the Defendant was in breach of **Section 141 of the Employment (Amendment) Act 1997**[3] which provided for, the payment of housing allowance and that the Defendant was also in breach of section 19 of the **Minimum Wages** and **Conditions of Employment (General Order) 2006 (Statutory Instrument Number 56 of 2006)**[4]**,** which provided for payment of housing allowance at the rate of 30% of an employee's basic pay in lieu of providing him with housing. He argued that even though Plaintiff's contract was silent on housing allowance the law imputes that the Plaintiff was entitled to either housing or payment of housing allowance in lieu of housing.

Mr. Magubbwi stated that the Plaintiff's basic salary was USD4,179.18 and 30% of that is USD1,253.75 meaning that the Plaintiff was underpaid by USD753.75 per month and was

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[2] *Plaintiffs Bundle of Documents, p.12, 2nd November,2012*
[3] *Section 19 of the Employment (Amendment) Act 1997*
[4] *Statutory Instrument Number 56 of 2006*

consequently entitled to USD22,088.32 in unpaid housing allowances for the duration of his contract. He further stated that during the period before his contract was amended, he did not receive housing allowance at all and was thus entitled to payment of USD1,507.50 for that period being December, 2010 and January, 2011. He submitted that the Plaintiff was owed the total sum of USD22,088 in respect of unpaid housing allowance.

With regard to overtime, Mr. Magubbwi said that Clause 8 of the Contract provided that overtime would be compensated by proportionate time off. He pointed out that the Defendant agreed that the Plaintiff did a lot of overtime work and that he was only given three weeks time off at the end of his contract. He recalled that DW1 conceded that he was unfamiliar with how overtime was approved and/or recorded between the Plaintiff and his supervisor and that DW1 agreed that the supervisor, Mr. Stephen Mountford was best placed to speak to those arrangements. Mr. Magubbwi stressed the point that when the Plaintiff claimed 1867 hours of overtime in his email to the Defendant, the Defendants did not reply to dispute the hours being claimed. He said DW1 merely testified that they considered the hours to be excessive without giving any basis to validate that position. He said that only 144 hours were compensated leaving a total of 1723 hours unpaid.

Mr. Magubbwi further submitted that the Plaintiff's contract was not attested by a proper officer which meant that it was covered by the **Minimum Wages and Conditions of Employment Act**[5]and its subsidiary enactments and in this case as amended by **Statutory Instrument Number 57 of 2006**[6]**.** He pointed out that **Sections 3 and 4**[7]provide, respectively, that normal weekly hours should not exceed 40 weeks**;** and where they did, the excess hours shall be paid at one and half times the normal hourly rate. He submitted therefore, that the Plaintiff was entitled to USD37,963.37 in lieu of time off and with respect to overtime.

Counsel contended that denying the Plaintiff the benefits of the cited legislation on account of strictly abiding by the language in the contract would amount to an estoppel of those laws. He

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[5]*Minimum Wages and Conditions of Employment Act, Chapter 276*
[6]*Ibid 3*
[7]*Section 3 and 4 of Statutory Instrument Number 57 of 2006*

cited the case of **Attorney General v EB Machinists Limited**[8]in which it was held that *"there cannot be estoppel to a statute"*.

Mr. Magubbwi submitted that it was not in dispute that the Plaintiff worked in a critical area where overtime was ordinary and usual and the Defendant's only objection was that the Plaintiff was only entitled to time off and not money payment. He argued that to allow the Defendant not to pay would amount to unlawful enrichment of the Defendant at the expense of the Plaintiff. He reminded the Court that the law frowned upon unjust enrichment and that this was demonstrated by cases such as **Jeofrey Kapasha Chisha v Emily Holland**[9]and **Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd**[10].

He contended that the Plaintiff was entitled to restitution which was a remedy which did not derive strictly from contract and in the instant case it derived from the benefit enjoyed by the Defendant at the Plaintiff's expense on account of the overtime which was not compensated. With regard to standby allowance, Counsel submitted that he will rely on the evidence on record.

On behalf of the Defendant, Mr. Mazumba submitted that the Parties entered into a Contract of employment pursuant to **Section 28(1) of the Employment Act**[11]and that the Defendant provided the Plaintiff with a contract of employment that complied with **Section 30 (h) of the Employment Act** aforesaid, which provides that:

> *"A written contract of service shall not be attested by a proper officer unless it specifies as accurately as possible-*
>
> *(h) the nature of the employment, including working hours and tasks where applicable and practical, and the general operations involved and such additional details as may be necessary to make it clear to the employee the nature of the work for which he contracts."*

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[8] *Attorney General v EB Machinists Limited (2000) ZR at page 117*
[9] *Jeofrey Kapasha Chisha v Emily Holland 2008/HN/160*
[10] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd (1942) UKHLA; (1943) AC 32, 61.*
[11] *Section 28(1) of the Employment Act, Chapter 268 of the Laws of Zambia*

Mr. Mazumba contended that the Contract of Employment clearly addressed the issues raised by the Plaintiff. He argued that Clause 8 of the Contract provided that except in the case of an emergency, overtime should only be given with notice and it also clearly provided that the compensation for such overtime was allowing the Plaintiff time off.

Mr. Mazumba submitted that the Plaintiff did not ask for time off during the course of his employment and that the hours claimed by the Plaintiff were not sanctioned by the Defendant and that, in any event, the Contract did not provide for monetary compensation. He contended that by demanding monetary compensation, the Plaintiff was attempting to incorporate a new term in a written Contract and this was not legally tenable. He added that that the Plaintiff had not produced any evidence showing that the written Contract was not intended to express the whole agreement between the Parties.

Mr. Mazumba further submitted that housing allowance was offered to the Plaintiff as an added incentive when his position changed. He said the Plaintiff's claim was not tenable because it was based on the very amendment which introduced the incentive of housing allowance and the claim was therefore not tenable. He opined that in terms of **Section 41 of the Employment Act** an employer was only obliged to provide housing allowance where an employee's wage was below the threshold prescribed by statute. He stated that the Plaintiff was not entitled to housing allowance as his remuneration was above the statutory threshold.

Learned counsel for the Defendant further contended that the **Minimum Wages and Conditions of Employment Act, SI 56 of 2006** only applies to protected employees as specified in the schedule therein and the Plaintiff did not fall within that category. He submitted that the Plaintiffs claim for USD15,04.74 was an attempt to insert a new term of contract.

He concluded his submission by saying that the Plaintiff could not claim for standby allowance because it was not provided for in the contract of employment.

I commend counsel for both parties for their spirited arguments and for the several authorities cited.

I have considered the evidence on record and the submissions of Counsel, and note that the following facts are not in dispute:

i) *The Parties did on, 27th July, 2009, enter into a Contract of Employment that set out the Plaintiffs entitlements.*

ii) *The Contract of Employment was amended by a letter dated 1st December, 2010 which stated that the sum of USD500 would be added to the Plaintiffs remuneration as a housing allowance.*

The dispute between the Parties arises from the fact that the Plaintiff is claiming non-payment of overtime worked; standby allowance; non-payment of Housing allowance from July 27th 2009 to 1st December, 2010 and; underpayment of housing allowance from July 27th 2009 until he resigned.

I shall begin by saying that the subject contract of employment does not provide for standby allowance. It was not even implied and allowing this claim would amount to rewriting the contract. This particular claim is consequently dismissed.

Mr. Magubbwi argued that the Plaintiffs contract of employment had not been attested by a proper officer and the effect of that was to bring it under the purview of the **Minimum Wages and Conditions of Employment (General) Order, 2006**[12]. I perused the statutory instrument and at section 2(1) (d), it states as follows;

"2. (1) This Order shall apply to protected employees as specified in the Schedule to this Order but shall not apply to employees-

(d) in any occupation where wages and conditions of employment are regulated through the process of collective bargaining conducted under the Industrial and Labour Relations Act; or where employee/employer relationships are governed by specific

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[12] *Minimum Wages and Conditions of Employment (General) Order, 2006 , SI No. 56 of the Laws of Zambia*

employment contracts which shall be attested by a proper officer; and..."[13]

On the contrary, Mr. Mazumba pointed to the **Employment Act**[14] and in particular **Section 28 30 (h)** which provides that:

"30. A written contract of service shall not be attested by a proper officer unless it specifies as accurately as possible-

(h) the nature of the employment, including working hours and tasks where applicable and practical, and the general operations involved and such additional details as may be necessary to make it clear to the employee the nature of the work for which he contracts;

The **Minimum Wages and Conditions of Employment (General Order)** only applies to those protected employees set out in its the Schedule and quite clearly states that it does not apply to employees engaged on specific contracts. As regards the requirement that a contract of employment must be attested by a proper officer, Section 29 of the **Employment Act** provides as follows;

" .....where the parties to a contract of service which has not been attested in accordance with the provisions of this section are literate and entered into the contract in good faith, such contract shall be enforceable as if it had been attested under this section."

Section 29 speaks for itself and in view of the Plaintiff's understanding of the contract and the several emails he referred to, I find as a fact that the Plaintiff is a literate employee as contemplated by the Employment Act. The **Minimum Wages and Conditions of Employment (General Order)** does not apply to the Plaintiff's contract of employment, however, the question still remains as to whether or not the Plaintiff is entitled to payment of USD 37,693.37 for time off, not taken. Mr. Magubbwi submitted that failure to pay the Plaintiff for overtime would amount to unjust enrichment of the Defendant and that his client seeks restitution. Mr.

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[13] *The section and language is exactly the same in the Minimum Wages and Conditions of Employment (General Order) 2011*
[14] *The Employment Act, Chapter 268 of the Laws of Zambia*

Magubbwi agreed that restitution only arose where there was no written contract and he argued that the in the instant case it derived from the benefit enjoyed by the Defendant at the Plaintiffs expense on account of the overtime which was not compensated.

Unjust enrichment is not based on an express contract and is an avenue normally trodden by litigants when they have no written or verbal contract to support their claim for relief. The remedy available for a claim of unjust enrichment is restitution whose aim is to restore to an innocent party the gains that someone else has obtained from him.[15] Restitution can be divided into two distinct categories namely, restitution for unjust enrichment; and, restitution for wrongdoing.[16] Where the unjust enrichment is in the form of services or goods received by the defendant, then the claimant may be able to pursue a more specific claim for *quantum meruit* (services) or *quantum valebut (goods).*[17]

Quantum Meruit is an equitable remedy that does not arise out of a contract, but is independent of it. Breach of Contract Claims and *Quantum Meruit* claims are exclusive and incompatible with each other and must be claimed in the alternative. In the American case of **Vortt Exploration Co. v Chevron U.S.A., Inc.,**[18] it was held that, generally, a party may recover under *quantum meruit* only where there is no valid express contract covering the services or materials furnished.

This was echoed in **Re Kellogg Brown & root, Inc.,**[19]where it was said that generally, a party may recover services for which compensation is sought. It follows therefore that, as a general rule, a party seeking to recover the equivalent value of services and materials provided to another can recover in *quantum meruit* only if there is no express contract for those services and materials.[20]

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[15] *https://www.lexisnexis.com/uk/lexispsl/disputeresolution/document/393747/59TN-*
[16] *Sempra Metals v HMRC [2007] 4 All ER*
[17] *Ibid,*
[18] *Vortt Exploration Co. v Chevron U.S.A., Inc., 384 S.W.2d 674, 675 (Tex. 1964)*
[19] *166 S.W. 3d 100, 106 (Tex. App. – Houston [14th Dist.] 2004, pet. Denied)*
[20] *Murray v Crest Construction, Inc., 900 S.W.2d 342, 345 (Tex 1995)*

Mr. Magubbwi argued that the Plaintiff's claim to be paid for time off is not based on the contract but on the benefit the Defendant derived from the Plaintiffs labour which was not paid for. Whilst being creative, the argument is not tenable because the agreement regarding time off was created by the contract of employment. The **Fibrosa Case**[21] which Mr. Magubbwi cited in support of his argument against unjust enrichment does not apply to the circumstances of this matter. The claim in the **Fibrosa case** was founded on frustration of contract and its effect on partially paid consideration and based on unjust enrichment or restitution.

A distinction must be drawn between "unjust enrichment" as a concept and its use as an avenue to seek legal relief. Various courts in Zambia and perhaps elsewhere utilize the concept of unjust enrichment purely as a barometer when determining quantum or ordering specific performance or other award under a Judgment. It is an entirely different matter when a claim for unjust enrichment forms the basis of a cause of action because, at that point, the law as it relates to restitution comes into play.

I find that this particular claim is founded on a written contract of employment. Learned Counsel for the Plaintiff has provided no reason as to why this case should be an exception to the general principles of restitution. Further, the claim for restitution was not specifically pleaded and is therefore refused.

The law of contract postulates that parties are ordinarily bound by the terms of their contract and a written contract is presumed to contain and express the full intentions of the parties.[22] the following was said in the case of **Holmes Limited v Buildwell Construction Company Limited**[23]

> *"Where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add to, vary, subtract from or contradict the terms of the written contract."*

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[21] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd (1942) UKHLA*; (1943) AC 32, 61.
[22] *Ibid 19*
[23] *Holmes Limited vBuildwell Construction Company Limited (1973) Z.R. 97 (H.C.)*

In casu, the claim for overtime derives from paragraph 8 of the contract of employment which reads as follows;

> *"8. overtime is deemed a feature of the job you will be engaged in and you may be required to work overtime from time to time. When this is the case, reasonable notice will be given where practicable, other than where there is an emergency. Compensation for such overtime worked will be made by allowing you time off in accordance with the provisions of the Employment Act, Chapter 268 of the Laws of Zambia and any subsequent amendments"*

The intention of the parties was clearly that overtime would be compensated by allowing the Plaintiff time off. Mr. Mazumba argued that the contract provided that overtime could only be taken when notice was given whilst the Plaintiff testified that the work he did was constantly "high pressure" and there was never any time to give written notice so the notice was given verbally. He further argued that the Defendant did not provide any time sheet which is why he took the initiative to create the Time Books, one for himself and the other for the Defendant company.

I note that the clause does not specify that the notice should be in writing, it simply specified that it should be "reasonable notice". This means that the notice was subject to the circumstances prevailing at any given moment. Whilst agreeing that the Plaintiff did take overtime and was owed time off, the Defendant did not produce any evidence showing how "reasonable notice" was required to be given and whether it was meant to be given at the request of the employee or by instruction of the employer. Further, the Defendant did not even explain how and where overtime records were recorded.

I further note that the clause says that "*Compensation for such overtime worked will be made by allowing you time off* ***in accordance with the provisions of theEmployment Act, Chapter 268 of the Laws of Zambia and any subsequent amendments***" (emphasis mine). DW1 did not

explain how time off was to be given in accordance with the Act[24] and neither did Mr. Mazumba submit in this regard.

Section 30 of the Employment Act[25] provides that a written contract should include details on working hours and details as may be necessary to make it clear to the employee the nature of the work for which he contracts. **Section 29**[26] provides that where parties who are literate enter into a written contract in good faith such contract shall be enforceable. These two sections guarantee freedom of contract over matters relating to working hours and the Plaintiff and Defendant exercised this right and entered into a written agreement.

I understand the Plaintiff's position to be that he had a written contract which provided for time off but the work environment prevented him from taking time off. This forced him to request it at the end of his contract but there were not enough days to cover the time off he was entitled to and thus demands cash in lieu thereof.

The Plaintiff has not produced compelling evidence to show that he asked for time off at any point during his contract and that the Defendant declined to give it to him. He only asked for time off when he decided to give notice that he was resigning. The Plaintiff opted to resign on his own volition and thereafter decided to raise the issue of time off when he knew very well that the remaining period of his employment would not cover the time off he was entitled to. There is no indication that the Plaintiff was forced to resign and neither did he ask for time off to be considered as part of his notice period or serve his time off and resign thereafter.

I agree that the Plaintiff did work overtime and I also agree that before these proceedings commenced, the Defendant did not dispute the claimed hours. However, the contract is very clear that overtime shall be compensated by time off and there is no provision for payment in lieu. To order that the Plaintiff be paid cash in lieu of overtime would equate to the court importing terms into a contract.

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[24]The Employment Act, Chapter 268 of the Laws of Zambia
[25]*Ibid 25*
[26]*Ibid 25*

The Plaintiff elected to sit on his rights by failing to claim time off during the subsistence of the contract and is now attempting to enforce that which cannot be enforced. His claim for overtime allowance in the amount of USD 37,693.37is accordingly dismissed.

I now direct my mind to the claim for housing allowance. Both Parties are in agreement that the Plaintiff's initial contract of employment made no mention of housing allowance but this was amended by a letter from the Defendant to the Plaintiff dated 01st December, 2010 which gave the Plaintiff a housing allowance of USD500 per month. The letter speaks for itself and the housing allowance only became due after 01st December, 2010 and did not provide for payment of the housing allowance in arrears.

Mr. Magubbwi argued that the Defendants failure to provide the Plaintiff with housing allowance before 01st December, 2001 was in breach of the section 41 of the Employment Act which reads as follows;

> *"41. An employer may, as agreed under-*
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> *(a) a collective agreement registered under the Industrial and Labour Relations Act;*
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> *(b) a contract of employment;*
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> *(c) the general conditions of service of that institution or organization;*
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> *provide to an employee either housing, a loan or advance towards the purchase or construction of a house, guarantee facility for a mortgage or house loan on behalf of an employee or pay housing allowance."*

The **Section** uses the word 'may' which means that payment of housing allowance is it is not mandatory and can be negotiated by the parties.

Learned Counsel for the Plaintiff further argued that his client was entitled to benefit from **Section 19** of the **Minimum Wages and Conditions of Employment (General Order**) which provides that an employee shall be entitled to housing allowance at the rate of 30% of his salary. Earlier in this Judgment I found that the cited legislation does not apply to employees

with written contracts of service as is the case with the Plaintiff. The claims regarding housing allowance are consequently denied.

In view of the foregoing, I am not satisfied that the Plaintiff has proved his case on a balance of probabilities and accordingly his claims are dismissed. Costs are awarded to the Defendant and to be taxed in default of agreement between the Parties.

Leave to appeal is granted.

Dated this 12th day of February, 2016

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M. M. KONDOLO, SC
JUDGE