

IN THE HIGH COURT FOR ZAMBIA

2013/HP/0250

AT THE PRINCIPAL REGISTRY

AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

NORAH KOYI AND 39 OTHERS

AND

THE ATTORNEY GENERAL



PLAINTIFFS

DEFENDANT

Before the Hon. Mrs. Justice F. M. Chisanga, this 18th day of August 2017

For the Plaintiffs: Mr. R. Malipenga of Messrs Robson Malipenga & Company

For the Defendant: N/A

JUDGMENT

Cases cited:

- 1. Khalid Mohammed vs The Attorney General (1982) ZLR P 49***

Works referred to:

- 1. Chitty on Contracts Specific Contracts Vol - II Twenty-Fifth Edition London Sweet and Maxwell 1983 state on page 631 paragraph 3358***

This is a claim for payment of a reward in the sum of K200,000.00 to each of the plaintiffs for services rendered by them to the Government, through the Ministry of Local Government and Housing.

The circumstances in which the claim allegedly arises are presented as follows, in the statement of claim:

The Ministry of Local Government and Housing approached the plaintiffs to form Soweto Market Development Committee, to assist in the implementation of the Government programme in the construction of the New Soweto Market. A series of meetings were held, and terms of reference agreed. In September 2005, a statement was issued on the collection of levies at Soweto Market which mandated the plaintiffs to collect market levies from marketeers, and the levies were being deposited in a Special Bank Account. The plaintiffs' duties were inter alia, collection of levies from marketeers, sensitization of Government policies with regard to Soweto Market development, mobilization of marketeers to encourage community participation, to employ and supervise guards, cashiers and cleaners, registration of all marketeers or traders before demolition of Old Soweto Market, coordination and preparation of fellow marketeers to pave way for the construction of the new market, and to be a link between government and the marketeers.

The plaintiffs as a committee worked to such an extent that they were full time workers and were given Ministry of Local Government and Housing Identify Cards. They were asked to demolish their own shops first as an example of good leadership three months before other marketeers could demolish their shops. They were also tasked to look for an alternative site or place where the marketeers could trade from, and found Esaq Company which signed a contract with Soweto Market Development Committee at Ministry of Local Government and Housing to accommodate 3000 marketeers.

The plaintiffs as a committee together with Esaq Transport and Government ensured traders moved to the temporal site, and ensured that facilities such as electricity, security, water and sanitation, warehouses and wall fence were provided. A lot of work was done by the committee.

When construction of the new Soweto Market was completed, the plaintiffs worked with the Ministry of Local Government and Housing in the allocation of new stalls to the registered marketeers. The government promised to reward the plaintiffs for the services they provided to the Ministry of Local Government upon completion of construction works at the new Soweto market. Several meetings about the reward were held, and at one time, at a meeting at State House with the Late President Mwanawasa, they were promised a reward.

The Ministry of Local Government and Housing has neglected, ignored and sidelined or discriminated against the plaintiffs after completion of the construction of Soweto Market and allocation of stalls to the registered marketeers, in that, the defendant has refused to pay for the services rendered while cashiers, guards, cleaners, casual workers and the temporal allocation committee (Shanambe and Company) have all been paid a lot of money as rewards.

The plaintiffs were requested to write their grievances to the Minister of Local Government and Housing which they did on 27th December 2012 and on 30th

January 2013 the Permanent Secretary under the Ministry of Local Government and Housing responded that the plaintiffs worked as volunteers, and could not as a result be paid for their services. Hence the claims before the Court.

In its Defence, the defendant admits paragraphs 1 to 6 of the statement of claim, but avers that the Soweto Market Development Committee members were not employees of the Ministry of Local Government and Housing as they worked on voluntary basis and no remuneration of any kind was agreed. The defendant, whilst admitting paragraphs 8 to 10, denied admission of any agreement of remunerating the plaintiffs from the voluntary work the committee was doing. Further, that after completion of the new market, it was handed to the Lusaka City Council and the Committee dissolved. It was admitted that the plaintiffs were informed that the Soweto Market Development Committee had worked on a voluntary basis. The plaintiffs were put to strict proof of all claims not admitted.

At the trial, the 1st plaintiff, Nora Koyi testified on behalf of the plaintiffs. She testified that the plaintiffs belonged to different associations and groups. Some belonged to Market Cooperative, some to Soweto Markets Association, while others belonged to Market Advisory Committee which worked in the Council. In 2004, they were approached by the Minister of Local Government and Housing Silvia Masebo, on the need to build a modern Soweto market. The three

associations were brought together and formed one committee, the Soweto Market Development Committee. The plaintiffs refused to render assistance because the other groups at Kamwala, Town Centre and City Market were not rewarded. As a result, they were invited to State House in January 2004. They were informed that the construction and development of Soweto Market was cardinal and government needed to work with marketeers. When the plaintiffs expressed their concern at not being rewarded, the President promised that they would be rewarded at the end of the construction. The plaintiffs believed the President and started working.

Firstly, the plaintiffs were told to sensitise marketeers of the need for a modern market, which entailed demolition of Old Soweto Market. They were also told to monitor the security situation at the market. And because there was a lot of refuse needing collection, the plaintiffs were engaged and requested to come up with a way of collecting refuse. They as a result engaged casual workers who were collecting primary refuse from and around the market. The plaintiffs were also required to find a temporal trading site as the marketeers were going to be displaced.

The plaintiffs engaged cashiers to collect levies so that they could meet their financial obligations. The plaintiffs were given terms of reference by the Ministry of Local Government and Housing through the Director of Infrastructure and Social Services, Mr. Lubambo. The 1st plaintiff referred to

page 36 of the plaintiffs bundle of documents, wherein were outlined the terms of reference.

The plaintiffs completed their duties and allocated the stalls. They requested the Ministry of Local Government and Housing to reward them for the work done. Government's response was that the plaintiffs should write to the director of the permanent secretary indicating that they now wished to be paid. They accordingly requested the Permanent Secretary for payment in writing, as shown by letter at page 14 of the plaintiff's bundle of documents.

The 1st plaintiff also informed the court that they had been called to a meeting at Ministry of Local Government on 24th January 2005 by the Minister. It was attended by a number of stakeholders in the construction of the market. The 1st plaintiff also referred to page 32, paragraph 7, and explained that they were co-opted in various sub committees at the ministry. They were also given identify cards which were signed by the permanent secretary, and bore the plaintiffs' names, national registration cards and the positions the plaintiffs held in those committees. The identify cards were valid for six months. They were intended to identify the plaintiffs as persons working with the government. The work was so demanding that the plaintiffs were unable to do their business.

In the year 2008, President Mwanawasa inspected the construction of Soweto market and re-assured the committee of Government's commitment to reward the plaintiffs. The witness referred to pages 22-23 of the plaintiffs' bundle of documents and read paragraph 6.3. The 1st plaintiff was of the view that they should be paid, for services rendered for five years, from 2005 to 2009 because other committees who came after them were paid. The casual workers employed by the Soweto Market Development Committee were also paid by the Ministry of Local Government and Housing, and the second committee was paid. The 1st plaintiff went on to state that they were not informed they were volunteers, and that is why they refused to assist in the first place. They were convinced they would be paid, and that assurance was given at state house. No other witness was called on behalf of the plaintiffs. The defendant did not lead any evidence, and I adjourned the matter for judgment.

I have considered the evidence led in this matter. It is established that a modern market was constructed at Soweto market by Government. The plaintiffs used to trade at the premises where the new market was built. Before commencement of construction, the Minister of Local Government and Housing made a statement to the following effect:

"As the nation may be aware, that Government is implementing a programme to improve selected markets in three of our cities, Lusaka, Ndola and Kitwe. We are confident that the construction of the western part of Soweto Market in Lusaka will commence in October 2005. We are therefore taking the necessary

steps to relocate the marketeers from the current Soweto Area to a new temporary, trading site.

My Ministry has reached an agreement in principle with Esaq Transport to make available an area of about 3.5 hectares which will accommodate around 3000 stalls. However before marketeers can move to this new location, it is necessary for the plot owners to clean up the area and improve its infrastructure. Storage facilities and offices will be constructed, while electricity and water will have to be extended to the plot.

To contribute to the cost of this infrastructure and meet other operational costs, I have authorized the collection of market levies as from 30th September 2005, under very strict supervision of officials of the Ministry of Local Government.

The following guidelines shall therefore apply:

- 1. Market levies will be collected from all of Soweto Market at a rate between 1000 -1500 per stall, depending on the type of business.*
- 2. Only Soweto Market Development Committee (SMDC) is authorized to collect the levies.*
- 3. Only market levies and no other fees or levies are to be collected by anyone.*
- 4. The collected levies will be deposited in a special SMDC Bank Account.*
- 5. All withdrawals from the accounts will be countersigned by the Ministry's market administrator.*
- 6. This collection system will stay in force till further notice.*
- 7. The Ministry will regularly inform the Soweto Market Stakeholders on the progress being made on this important construction programme and trust that all persons with an interest in Soweto Market will loyally support our action and follow our guidelines.*

I thank you."

Following that statement, the programme coordinator and his counterpart applied to open a current account with Zambia National Commercial Bank in the name of the Soweto Development Committee. The Committee was to use the account for its transactions regarding the operations at the market. Any account transaction was to have three signatures: That of Mr. Kasempa the Market Administrator from the Ministry of Local Government and Housing and two others. The other signatories were Mrs. N. Koyi, Mr. L. Mulinda, Mr. I Nkonde and Mrs. Lima Ndovu. It will be observed that the other signatories were not referred to as representatives of the Ministry in that letter.

The 1st plaintiff referred to page 32 of the plaintiff's bundle of documents, which is part of the minutes of a meeting held on 24th January 2005 at 10:00 hours. None of the plaintiffs were in attendance, as that meeting was attended by senior personnel from institutions. Only Mr. Kasempa was in attendance. The Minister informed the meeting that she had met the market leadership from Soweto Market and expressed the need to work with them by co-opting them in the various committees at the Ministry. This was before terms of reference had been agreed upon.

On 8th December 2005, about eleven months later, Mr. Lusambo the Director of Infrastructure and Social Services wrote to Soweto Market Development Committee. It is appropriate to reproduce the letter:

REPUBLIC OF ZAMBIA
MINISTRY OF LOCAL GOVERNMENT AND HOUSING

P.O. BOX 50027
15101 RIDGEWAY
LUSAKA

Telephone: 253192/25388
Telegrams: LOC GOVT LUSAKA
TELEX: ZA 40241
Fax: 252680

Lusaka, 8th December 2005

The Soweto Market Development Committee
Soweto Market
Lusaka

Subject: Terms of Reference Soweto Market Development Committee

During discussions between the Ministry of Local Government and Housing and the Soweto Market Development Committee, the need for Terms of Reference was agreed upon as the position of the Committee and the support they are to offer to the Ministry needed further elaboration.

Last September draft Terms of Reference were made available to the Committee. The Committee submitted their comments which in turn were studied by us. Regarding the committee's suggestion to manage the financial aspects of the market, I would like to recall that as from the 18th January 2005, the management of Soweto Market is the direct responsibility of the MLGH and as such the Ministry carried also the final responsibility regarding its financial management.

Because of the scheduled construction activities and general management duties to be carried out at Soweto, we will shortly engage a Market Manager who will be introduced to you once administrative procedures have been finalized.

I have attached the Terms of Reference of the Soweto Market Development Committee and look forward to receiving your views.

The Minister greatly appreciates the efforts made by committee members to improve Soweto Market and trusts that she can count on your continued support during the construction phase of the new Soweto market.

Ministry of Local Government and Housing

(signed)
P. Lubambo
Director of Infrastructure and Social Services

Cc Hon. Andrew Mulenga, Minister MLGH
Mr. Maswabi Maimbolwa, Permanent Secretary MLGH
PMU UMDP

The terms of reference are at page 36 of the plaintiff's bundle of documents and were signed on the 8th December 2005.

It is rendered clear by these terms of reference, that Soweto Market Development Committee (SMDC) was formed in January 2005 at the request of the Ministry of Local Government and Housing. It was to advise the Ministry on how to improve the market. The SMDC consisted of 40 members, representing all marketeers of the market. It had 4 co-chairpersons and 5 sub-committees to deal with the secretariat, finance, security, funeral, garbage, registration and health. Once government had completed the required legislation, urban markets, including Soweto would be managed by Market Boards. Before this, the SMDC was to continue to advise and assist the MLGH with the management of Soweto. As from 19th January 2005, the management of Soweto Market was the direct responsibility of the Ministry of Local Government and Housing, and at the instruction of the Ministry, between 19th January and 1st October of 2005, no market levies were collected.

What emerges from the functions of the SMDC as expressed in the terms of reference is that it was to initiate cooperation between all groups operating in Soweto and suggest improvements in managing the market. It was to communicate government policies to the marketeers and coordinate discussions about future development of the market between the various groups of marketeers. The committee was tasked to monitor the security situation at the market and suggest improvements to the Ministry. It was to

support the Ministry with the preparation of a market business plan. It was to assist or organize the smooth transfer of about 3000 marketeers from their current trading stall to the new area at Emaq Transport. It was to assist the Ministry with the registration of all marketeers and assist the Ministry of Local Government and Housing with the selection of members to be nominated to the Soweto Market Management Board.

The agreement between Emaq Transport and the Soweto Market Development Committee appears at page 44 of the plaintiffs' bundle of documents. That agreement states that to facilitate the relocation of the marketeers from Soweto to a new temporary trading site, the Soweto Market Development Committee (SMDC) representing the marketeers trading at Soweto market had examined a number of options and decided to accept the area offered by Emaq Transport. This agreement was dated 20th September 2005.

I note that some of the Soweto Market Development Committee members were issued with identification cards. The 1st plaintiff's card indicates that she was co-chairperson of the Soweto Market Development Committee. The card was issued by the Ministry of Local Government and Housing, and was valid from 2nd June 2006, to some unclear date.

Peter C. Mwandu was issued with a card, indicating that he was a member of the Soweto Market Development Committee. The validity period is not clear on the document produced.

Lucky Mulinda was equally issued with a card that indicated that he was co-secretary of the Soweto Market Development Committee. The validity period was stated to be 1st June 2005 to 1st June 2006.

The plaintiffs did their part, as per the terms of reference and the stalls were allocated to the marketeers. It should be noted that at a meeting held on 6th March 2008 and attended by some members of the Soweto Market Development Committee as marketeers' representatives, they informed the meeting that they were still in the process of delivering an official letter of appreciation to Ministry of Local Government and housing on the recently approved construction of 4 extra sheds to the market. The marketeers' representatives further informed the meeting that they would also write to the Ministry of Local government and Housing on the poor state of the access roads to the site.

A letter was accordingly written to the Minister in April 2008. The SMDC expressed their sincere gratitude for the minister's unwavering dedication to the development of trading infrastructure for the marketeers. They also requested that provision be made for construction of access roads in and out of the modern market.

The minister responded by letter dated 19th May 2008. She advised that government was addressing the issue of Access Roads to the new market, but that there was no budget provision for such works. Instead, government was

engaging other stakeholders for support. It appears a proposal had been made, for sixteen named persons to form part of the stall allocation committee. The Minister's view was that four co-chairpersons and two ordinary marketers from different section be part of the committee. This meant that there would be six marketers in the committee, while other stakeholders would have one representative each. The minister pointed out that the work of developing and managing markets including the allocation of stalls was a mandate of government through respective councils. However, in the spirit of transparency, it was considered appropriate that the addressees as marketers be part of the allocation committee with the government in the lead, that is, the Ministry of Local Government and Housing, Lusaka City Council and other government wings. Finally, the minister stated as follows:

"The Soweto Market Development Committee (SMDC) should promote transparency and accountability in the allocation of stalls rather than encouraging anarchy at the market. I look forward to working with you in harmony.

Your cooperation will be appreciated.

Yours faithfully

***Sylvia T. Masebo, MP
MINISTER OF LOCAL GOVERNMENT AND HOUSING"***

At a meeting held on 28th January 2009, attended by members of the SMDC among others, a Mr. Simpasa raised the issue of payment to all SMDC members for the assistance they had rendered to the Ministry since the project

started in 2003. The chairperson however advised that the SMDC should submit their request to the Director DHID (who was present when these issues were initially discussed) and that they should indicate their proposed amounts (which they, SMDC) set at K10,000 million per person).

It appears that on the same date, the co-chairpersons of the Soweto Market Development Committee wrote to the Permanent Secretary in the Ministry of Local Government and Housing. The letter reads:

SOWETO MARKET DEVELOPMENT COMMITTEE

**The Permanent Secretary
Ministry of Local Government and Housing
Lusaka**

28th January, 2009

Dear Sir,

REF: APPEAL FOR A REWARD

The Soweto Market Development Committee (SMDC) is appealing to your ministry to consider rewarding the committee K10,000,000 each for the successful completion of the construction of the New Soweto Market due for opening soon.

The Soweto Market Development Committee (SMDC) consists of 40 members who have worked tirelessly for the last five years assisting the government to build the new market at Soweto without remuneration or reward.

We are therefore appealing for your consideration to reward the Soweto Market Development Committee (SMDC) Members.

Your favourable response on this matter will be highly appreciated.

Yours faithfully,

**(signed)
A. Phiri
CO-CHAIRMAN**

**(signed)
N. Koyi
CO-CHAIRMAN**

**(signed)
I Simpasa
CO-CHAIRMAN**

**(signed)
W. Mwanza
CO-CHAIRMAN**

The response to this letter, if received by the plaintiffs, has not been produced. It appears the plaintiffs wrote to the Permanent Secretary on 27th December 2012 on the same subject, as there is a response on record to that letter, wherein the permanent secretary informed the plaintiffs that there was no legal basis for financial consideration as their work was voluntary. It is that response that triggered this action.

The issue that arises for determination in this matter is whether the plaintiffs were employed on full time basis by the Ministry of Local Government and Housing, and therefore entitled to payment as claimed. It is appropriate to state the law of employment in so far as it relates to this matter. The learned authors of **Chitty on Contracts Specific Contracts Vol II Twenty-Fifth Edition London Sweet and Maxwell 1983** state on page 631 paragraph 3358 that the factors relevant to the process of identifying a contract of employment are:

1. The degree of control exercised by the employer.
2. Whether the worker's interest in the relationship involved any prospect of profit or risk or loss.
3. Whether the worker was properly regarded as part of the employer's organization.
4. Whether the worker was carrying on business on his own account or carrying on the business of the employer.
5. The provision of equipment.
6. The incident of tax and national insurance.

7. The parties' own view of their relationship.
8. The traditional structure of the trade or profession concerned and the arrangements within it.

In ascertaining whether these elements are present in a relationship, the law looks to see who is entitled to give the orders as to how the work is to be done. An employee is usually a regular unit in the complex organization of a business: he is an integral part of the firm, not a casual or temporary person engaged only for the purpose of completing a specific task which is accessory to the main business. See **Chitty on Contracts supra, para 3394**. The payment of a salary is a strong indication of an employment contract between the parties. Although inconclusive, a party who fixes the hours or times when a person is to work may be said to be an employer.

Turning to the facts of this case, it is the Ministry that requested for the formation of the Soweto Market Development Committee. It was a body that represented the marketeers, as clearly spelt out in the terms of reference. Its role was to assist the Ministry in the outlined areas. What emerges from the minutes and letters referred to is that the plaintiffs represented the marketeers at all times. It cannot be said that suggesting improvements in managing the Soweto Market was a job, nor can it be said stimulating cooperation between all groups operating in Soweto was a job. It will be remembered that the Soweto Market Development Committee was drawn from groups that operated in the market. Fostering cooperation among them was, in my consideration, for the

benefit of the various members of those groups, in that orderliness would be promoted.

It is apparent that government was to communicate policies to the committee, who in turn would communicate to the marketeers whom they represented.

The same applies to the requirement to communicate to the marketers of the changes that would take place when the new market is constructed. I doubt that monitoring the security of the market in which they operated, and suggesting necessary improvements to enhance security can be described as a job.

I have seen no evidence that the plaintiffs were involved in the drawing up of a market business plan. The assistance rendered in the transfer of the 3000 marketeers was to ensure that all marketeers were transferred. It should be borne in mind that the committee was composed of the leadership from the organisations that had members in the market. I have seen no indication that these organisations were dissolved. It stands to reason therefore that Soweto Development Committee represented the interests of the groups they headed. Further, contrary to the plaintiff's assertion that the identity cards issued to the plaintiffs indicated the positions in the committees, meaning the committees to which they had been co-opted, the reality of the matter is that the cards issued to the plaintiffs indicated that they were members of the Soweto Development Committee and the respective positions they held in that

committee. Although they were issued with these identify cards, they were not co-opted into any committee at the Ministry.

The facts of this case do not confirm that the prospect of reward was ever contemplated by the parties, contrary to the 1st plaintiff's assertion. I say so because at the meeting held on 28th January 2009, Mr. Simpasa raised the issue of payment to the SMDC members for the assistance they had rendered to the Ministry since the project started in 2003. This conflicts with the evidence that they were engaged in 2005. The evidence shows that terms of reference were only drawn up in December of 2005. Additionally, the letter dated 28th January 2009 indicates that the plaintiffs were appealing for a reward for having assisted the government to build the new market at Soweto without remuneration or reward.

It will be observed that they were asking the permanent secretary to consider rewarding the plaintiffs. The wording of that request demolishes any claim of prior agreement for a reward. Had that been the case, the plaintiffs would not have appealed for a reward, asking the permanent secretary to consider paying them. When parties firmly agree on a reward or remuneration, the promisee does not, in demanding payment, employ words that convey the impression of appealing to the discretion of the promisor. This element negates the claim that a reward was promised. Additionally, there is no evidence that the plaintiffs were reporting for work daily at set times, and knocking off at a prescribed time. Even the levies collected from the marketeers were collected by cashiers

employed for the purpose and those cashiers were paid by government, according to the 1st plaintiff. They were thus not employed by the Soweto Market Development Committee. I have seen no proof that similar committees engaged at other markets, with similar functions, were rewarded.

It will equally be observed that the plaintiffs did not stop trading. The only thing they did was to demolish their shops three months earlier than others as an example of good leadership. This obviously was done after the alternative trading site had been secured for the marketeers. It is clear that the parties themselves viewed the relationship as one of cooperation, for the good of the marketeers, whose interests the plaintiffs represented and secured. It was thus accurate to refer to their assistance as voluntary, and not employment. It is trite that he who alleges the affirmative of a case must prove his assertion on a balance of probabilities in those matters where proof of this standard is applicable, such as the present one. ***Khalid Mohammed vs The Attorney General***¹ articulates the law on the burden cast on a plaintiff.

On the foregoing, I find the plaintiffs' claim devoid of merit and dismiss it accordingly. I make no order for costs.

Dated the 18th Day of August 2017



F. M. CHISANGA
HIGH COURT JUDGE