

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



2016/HP/0287

B E T W E E N :

MARY LYOMBO

PLAINTIFF

AND

INYATSI LIMITED

1ST DEFENDANT

MERKABA PROPERTY DEVELOPMENTS
(ZAMBIA) LIMITED

2ND DEFENDANT

**Before Honorable Mrs. Justice M. Mapani-Kawimbe on the 8th day of June,
2017**

For the Plaintiff : *Mrs. M. Mwanawasa, Messrs Mwanawasa &
Company*

For the Defendant : *Mr. C. M. Sianondo, Messrs Malambo & Company*

J U D G M E N T

Case Authorities Referred To:

1. *Dunlop Pneumatic Tyres Company Limited v Selfridge and Company Limited (1915) AC 847*
2. *Danien Peyala v Zambia Consolidated Copper Mines Appeal No. 81/2012 (unreported)*
3. *Musengule v Attorney General (2009) ZR 359*
4. *Wilson Masauso Zulu v Avondale Housing Project Ltd. (1982) ZR 174*
5. *Khalid Mohamed v Attorney General (1982) ZR 49*

By Writ of Summons and Statement of Claim, the Plaintiff seeks the following reliefs:

- a) Benefits due to the deceased***
- b) Interest calculated at current bank rate***
- c) General damages***
- d) Special damages***
- e) Costs; and***
- f) Any other relief the court may deem fit.***

The Statement of Claim discloses that the Plaintiff is the widow of the late Bostone Lyombo, the 1st Defendant's former employee who died on duty on 25th May, 2010. The Plaintiff states that as compensation for the deceased's death, the 1st Defendant pledged to pay his two months full salary, a bonus and a contribution of K300 towards rental expenses for twelve months. However, the 1st Defendant only made contributions for six months.

The Plaintiff states that she is responsible for seven orphans who have all dropped out of school, following the 1st Defendant's failed obligations. She also states that the family has no permanent residence and as a result live in shame in the community. The Plaintiff avers that the 1st Defendant prevented her from accessing a post-mortem inquiry of the deceased, and has as a result suffered emotional distress with no proper closure of her husband's death.

The 1st Defendant settled a Defence and avers that the late Bostone Lyombo never worked for it. It denies that it pledged to pay the deceased's full salary for two months, a bonus and a contribution towards the Plaintiff's rentals. It states that it has no obligation towards the Plaintiff because the deceased was not in its employment.

The 2nd Defendant did not enter appearance.

At trial, **Mary Nankamba Lyombo**, the Plaintiff, testified as **PW**. Her testimony was that on 25th May, 2010, Bostone Lyombo fell down whilst climbing a building at work, and died spontaneously. Following his death, the 1st Defendant never paid the Plaintiff compensation benefits. Instead she was paid the deceased's salary at half rate for three months. PW stated that even after undertaking to make a contribution towards the Plaintiff's rentals of K300, the 1st Defendant only made payments for three months instead of twelve months.

PW testified that this was contrary to the undertaking made in the letter at page 8 of the Plaintiff's Bundle. It was PW's testimony

that her husband was an employee of the 1st Defendant and his employment was proved by the pay slips at pages 2-5 of the Plaintiff's Bundle. She asserted that she was entitled to compensation.

In **cross-examination**, PW stated that she had never seen her husband's contract of employment, but was in the 1st Defendant's custody. She testified that the letter at page 8 of the Plaintiff's Bundle was written by Mr. Albert Van Rooyen and that he according to page 7 of the Defendant's Bundle was the 2nd Defendant's representative.

It was PW's testimony that the pay slips at page 26 of the Defendant's Bundle and page 2 of her Bundle were different. The earlier bore a logo, while the later did not. In addition, the description of the payment date was different.

In **re-examination**, PW stated that the pay slips at pages 2 - 5 of the Plaintiff's Bundle were issued by the 1st Defendant.

Wayne Adrian Longmore the Commercial Director of the 1st Defendant's Company testified as **DW**. His testimony was that he was employed in January, 2009 by the Company and prior to the execution of the joint venture agreement between the 1st and 2nd Defendants. He testified that under the joint venture agreement, the 1st Defendant a civil engineering company was engaged by Lumwana Mine to carry out earth works, road construction, water and sewerage reticulation. On the other hand, the 2nd Defendant, a housing construction company was entrusted with the housing portfolio. The joint venture agreement was shown at pages 1-25 of the Defendant's Bundle.

DW testified that both companies operated as separate legal entities under the joint venture agreement, and that Bostone Lyombo was employed by the 2nd Defendant. DW testified that the Defendants employed two project managers namely, Mr. Paul Lawson representing the 1st Defendant, while Mr. Albert Van Rooyen represented the 2nd Defendant as shown at page 7 of the Defendant's Bundle. DW referred the Court to the "*Employment and Provision of Staff*" at page 14 clause 12.1 and page 15 clause 12.6 of the Defendant's Bundle.

According to DW under those clauses the Defendant companies were entitled to employ their own staff and were responsible for meeting their costs. He went on to state that Bostone Lyombo was never employed by the 1st Defendant Company and it only became aware of him when the Plaintiff commenced litigation. DW stated that after the 1st Defendant was sued, it inquired from the 2nd Defendant Company if it was aware of Bostone Lyombo.

At page 29 of the Defendant's Bundle, DW referred to an email written by Mr. Richard Cunningham dated 9th April, 2015, to Hannes Soll, a Director in the 2nd Defendant Company, which disclosed that Bostone Lyombo was 2nd Defendant's employee.

It was DW's further testimony that when the 1st Defendant was sued, its Managing Partner informed the Plaintiff's Advocates that it had no obligation towards Bostone Lyombo's estate. DW went on to testify that the pay slips at pages 2-5 of the Plaintiff's Bundle, had no basis and did not belong to the 1st Defendant given that, all its payments are generated by PASTEL. He referred the Court to

page 26 of the Defendant's Bundle, which bore a sample pay slip of Lewis Katunga, the 1st Defendant's employee.

In **cross-examination**, DW stated that Bostone Lyombo fell in the category of seconded staff under clause 12.1 of the joint venture agreement. He testified that he did not know the difference between complimentary and second staff, adding that Bostone Lyombo did not belong in the category of complimentary staff.

DW testified that the pay slip at page 26 of the Defendant's Bundle did not show that Lewis Katunga was an employee of the joint venture. He insisted that the email at page 29 of the Defendant's Bundle confirmed that Bostone Lyombo was employed by the 2nd Defendant. Further, that if Bostone Lyombo was employed by the 1st Defendant then his pay slip would have been generated by PASTEL.

DW went on to state that he did not know whether the letter at page 8 of the Plaintiff's Bundle was issued under the joint venture. He testified that Bostone Lyombo died after suffering from a headache. Further, that Lumwana Mine thoroughly investigated the

circumstances of Bostone Lyombo's death and the conclusion was that his death was not a result of a work accident.

In **re-examination**, DW stated that 2nd Defendant was responsible for compensating Bostone Lyombo's estate.

Both Learned Counsels filed written submissions, for which I am indebted. Counsel for the Plaintiff submitted under clause 12.1 of the Joint Venture agreement provided the basis for the employment of staff as follows:

“it is intended that the management staff and personnel involved in the works, with the exception of advisors or consultants, will be employed by the parties and hired to the Joint Venture as seconded staff, and that the joint venture will directly employ locally general labourers and complimentary employee only.”

She submitted that each of the Defendants was entitled to employ staff under their respective companies and whom they subsequently hired as seconded staff to the joint venture. She submitted that, if the deceased was employed by the 1st Defendant, then he was later hired to the joint venture as a seconded staff and on the terms of clause 12.3 of the agreement which stated that:

“the seconded staff to be hired by the joint venture from any party shall be hired at rates and on terms agreed by the parties. It is recorded that the second staff, insofar as possible, shall carry

remuneration package commensurate with the position. The amount to be recovered from the joint venture shall include, inter alia, the actual salary paid, plus a further percent of the person's basic monthly salary to cover cost to company expenses such as pension or provident fund contribution, medical aid society contributions, annual leave pay, thirteenth cheque, plus car travel allowances, plus any other allowance as agreed by the Management Board."

Counsel submitted that the 1st Defendant was the company under which the deceased was employed and therefore was the correct company to pay out the claims to the Plaintiff. She added that the pay slips before Court were generated in the 1st Defendant's name and there was no dispute as to whether the deceased was employed and died on site while carrying out the works of the joint venture.

Counsel further submitted that the 1st Defendant was not able to produce the contract of employment of the deceased to prove that the deceased was still employed by the 2nd Defendant despite having worked for the joint venture till his death.

In response, Learned Counsel for the Defendant contended that the cumulative effect of clause 12 was that each party to the joint venture would second its employees and the seconding party would be responsible for meeting the obligations of the employees

so seconded. He submitted that the email of the Chief Executive Officer of the 2nd Defendant Company at page 28-29 of the 1st Defendant's Bundle dated 9th April, 2015, revealed that the 2nd Defendant patently admitted that the deceased was its employee. He averred that the 1st Defendant never committed itself to paying Mr. Lyombo's estate as he was not under its employment but that of 2nd Defendant.

Counsel submitted that the Plaintiff was estopped from making any claims under the joint venture agreement on account of privity of contract. He added that the principle of privity of contract provided that a contract could not confer rights or impose obligations arising therefrom on to other persons except the parties. He reiterated that only parties to a contract can sue, enforce rights or claim damages in a contractual situation. Counsel reinforced his submission by citing the case of **Dunlop Pneumatic Tyres Company Limited v Selfridge and Company Limited**¹ where the rule of privity of contract was restated by Lord Haldane as follows:

“In the law of England certain principles are fundamental. One is that only a person who is party to a contract can sue on it. Our laws know nothing of justiquaestitumterntio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred a stranger to a contract as a right to enforce the contract in personam.”

Counsel added that the principle of privity of contract was also to be found in the case of **Danien Peyala v Zambia Consolidated Copper Mines**².

Counsel went on to contend that the pay statements at page 2-5 of the Plaintiff's Bundle of documents were not originated by the 1st Defendant. On the lack of the contract before the Court, Counsel argued that the responsibility resided with the Plaintiff. The 1st Defendant could not be expected to produce a contract of a person it never employed. In his view, the non-production of the contract reacted against the Plaintiff. He cited the case of **Musengule v Attorney General**³ where the Supreme Court on commenting on the non-production of a document guided that:

“we note that at page 54 of the record, DW1 did refer to the hand book which was not produced before the Court. In our view, since the evidence about the hand book was already before Court, we therefore cannot fault the Learned trial Judge in resorting to seek assistance from that hand book to enable her reach a fair conclusion by directing that the hand book be brought to Court. In our view, there was no misdirection on that point. In addition, even if we accepted a view that there was lacuna in the evidence presented by the appellant company, the trite position is that the Learned trial Judge should have resolved that lacuna in favour of the party who was not responsible for that lacuna. In the case it would have been in favour of the Respondent.” (underlining my own)

All in all, Counsel submitted that the Plaintiff's claims had no basis.

I have anxiously considered the pleadings, evidence adduced and the submissions filed on behalf of the respective parties. It is common cause that Bostone Lyombo died on 25th May, 2010. A death notice was issued by Dr. Dixon C. Tembo of Lumwana Construction Camp Clinic. There is no dispute that the Defendants executed a joint venture agreement on 1st September, 2009 to perform works for Lumwana mine.

The issue that falls for determination, in my considered view, is whether Bostone Lyombo was the 1st Defendant's employee, whose estate is entitled to claim compensation from it.

In the case of **Masauso Zulu vs. Avondale Housing Project**⁴ it was stated that where a plaintiff makes any allegation, it is generally for him to prove those allegations. That a plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent's case. Further in **Khalid Mohamed v The Attorney-General**⁵ it was held that a plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. It follows that for the

plaintiff to succeed in the present case, it would not be enough to say that the Defendant has completely failed to provide a defence or to call witnesses, but that the evidence adduced must establish the issues raised.

The Plaintiff contends that Bostone Lyombo was employed by the 1st Defendant and the proof of his employment is supported by the pay slips at pages 2 -5 of her Bundle. On the other hand, the 1st Defendant argues that Bostone Lyombo was never its employee and states that if that was the case, then his pay slip would have been generated by PASTEL. Further, it relies on the emails of the 2nd Defendant's representatives who state that Bostone Lyombo was their employee.

In assessing the juxtaposed arguments, I have had to pay closet attention to the 2nd Defendant representative's email at page 29 of the 1st Defendant's Bundle. It reads as follows:

"Bostone's death came as a shock to us as he was a key member of staff. If I have the name right and I hope I do (Merkaba only had one person, pass away during the employment) I clearly recall the event. A normal working day had transpired and during a break (I think lunch) Bostone had indicated that he had a headache. Whilst seated he literally fell over and died onsite if I recall. There was no work injury of any kind and that everyone knows. Lumwana as

part of their stringent protocols did a full report and again no work injury."

From this email, it is quite easily discernable that Bostone Lyombo was an employee of the 2nd Defendant. It also stated that Bostone lyombo died from a headache and after stringent protocols, Lumwana mine produced a report confirming that his death did not result from a work injury. This evidence was not gainsaid even though there was an averment in the Statement of Claim that the Plaintiff was prevented from accessing a post mortem inquiry of her husband's death. In my considered view, the fact that the Plaintiff did not lead evidence on this claim quite speedily resolves the issue and in the 1st Defendant's favour. That is to say, Bostone Lyombo's death did not result from a work accident.

I am also inclined to the evidence of DW that the pay slips in the Plaintiff's Bundle do not belong to the 1st Defendant. In my considered view, there is probative value in the evidence led by DW that the 1st Defendant Company's pay slips are generated in PASTEL. DW is the Commercial Director of the 1st Defendant Company and he holds a senior position, and I have no reason to doubt his credibility and prefer his evidence over the Plaintiff's. If

the pay slips in the Plaintiff's Bundle had a logo or other Company identity, then I might have formed a different opinion, but this is not the case.

I am fortified to assert that Bostone Lyombo was an employee of the 2nd Defendant and this is evidenced by the letter at page 8 of the Plaintiff's Bundle, which is reproduced here below:

***"Mrs. Mary Nakamba
Luanshya
Ndola***

9 August 2010

Re: Company Assistance - the late Mr. Lyombo

Dear Mrs. Nankamba,

Once again, kindly accept our sincere condolences with the passing of Mr. Bostone Lyombo. We pray God's Grace and Peace upon you and the family.

In response to our earlier conversations and subsequent request from you I would like to confirm arrangements with regard to our company's commitment to you and the family.

- 1. The company has paid the full salary of May 2010 as well as leave pay due to the late Mr. Lyombo.***
- 2. The Company has in addition decided to pay out full salary for the months of June 2010 and July 2010.***
- 3. The company will calculate what bonus would have been due to the late Mr. Lyombo and make payment in this regard at the end of August 2010.***
- 4. In addition to the above, the company has agreed to make a monthly contribution of K300,000.00 towards your rental expenses. Contribution towards the rental starts after the July 2010 salary contribution. This means that the first rental contribution will be done on the 31 August 2010 and continue for 12 consecutive months thereafter.***

The above concludes all financial assistance by the company.

Your further request to the company for assistance with buying a house is under consideration from our Board of Directors and I will inform you on the outcome of this decision as soon as I am advised thereof.

Sincerely,

***Albert Van Rooyen
PROJECT MANAGER”***

This letter authored by Mr. Albert Van Rooyen the 2nd Defendant's Project Manager, undoubtedly compliments my finding that Bostone Lyombo was the 2nd Defendant's employee and not the 1st Defendant. On the basis of the foregoing, I hold that the Plaintiff has failed to prove any of her claims against the 1st Defendant.

Although costs abide the event, each party must bear their own costs. The Plaintiff is indigent and it is unnecessary to confound her situation.

Leave to appeal is granted.

J17

Dated this 8th day of June, 2017.

M. Kapani
M. Mapani-Kawimbe
HIGH COURT JUDGE