

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

2016/HP/0139

BETWEEN

PHIRI VALENTINO

AND

MR. UNIS
KAUSHA INVESTMENT LIMITED

1st DEFENDANT
2nd DEFENDANT



PLAINITFF

Before the Hon. Mrs. Justice N.A. Sharpe-Phiri on this 27th day of April 2017

For the Plaintiff:

Mr. V. Phiri, in Person

For the Defendants:

No appearance

JUDGMENT

Authorities referred to:

1. *The Minimum Wages & Conditions of Employment, Act, SI No. 1 of 2011*
2. *The Minimum Wages & Conditions of Employment, Act, SI No. 47 of 2012*

The Plaintiff commenced this action by way of writ of summons and statement of claim on the 25th January 2013.

The claim endorsed on the writ is for:

1. **An order that the Defendants pay the Plaintiff's social security funds to National Pensions Scheme Authority (NAPSA) and pay Tax for the Plaintiff to Zambia Revenue Authority (ZRA) from 30 January 2009, the month he was first employed to June 2015, the month he stopped work;**
2. **Payment of severance benefits and allowances;**
3. **Payment of accrued leave day;**
4. **Payment of repatriation allowance;**
5. **Payment of arrears, being salary, transport, lunch and housing**
6. **Damages for inconvenience and trauma suffered by the Plaintiff;**
7. **Costs and incidental to this proceedings plus interest on the amount found due;**
8. **Any other relief the court may deem fit.**

The contentions of the Plaintiff in the statement of claim are that on 5th January 2009, he was engaged as a Shop Worker in the employ of the 2nd Defendant, a company registered under the Laws of Zambia and owner of a trading shop at Kamwala. The 1st Defendant was a Sole Director of the 2nd Defendant Company. That he served diligently for the 2nd Defendant until his resignation on 1st July 2015. Throughout the period of his employment, he earned a monthly salary of K700 and the 2nd Defendant refused to increase his salary in the years of 2011 and 2012 in line with the minimum wages prescribed by Law. In 2011, the prescribed minimum monthly salary for a shop and general worker was K1,445=10.

The Plaintiff also contended that he was entitled to receive transport, lunch and housing allowance but that the Defendant deliberately neglected to provide this. He alleged further that the 2nd Defendant subjected him and the other workers to poor working conditions, thus forcing him to resign from employment. The Plaintiff also contends that the Defendants have failed to pay him his salary, transport, housing and lunch allowance, arrears of leave days, benefits or gratuity, repatriation allowance plus remittances of taxes to Zambia Revenue Authority (ZRA) and Social Security funds to National Pensions Scheme Authority (NAPSA) despite repeated reminders to do so. Lastly, the Plaintiff contended that he had suffered injury, inconvenience and trauma as a result of the Defendants' actions.

The Defendants responded by way of a defence filed on 8th April 2016 in which they admit that the Plaintiff was paid a monthly salary of K700 and that the Plaintiff resigned from employment on his own accord. The Defendants denied paragraph 9 of the statement of claim that the Plaintiff's conditions of employment entitled him to a payment of transport, lunch and housing allowance. They averred that the Plaintiff accepted the conditions of service offered to him and that he was never coerced into entering into a contract of employment.

The Defendants denied paragraph 10 of the statement of claim that the Plaintiff is entitled to gratuity, severance benefits, leave pay and allowances from the Defendants. They contended that all payments were made to the Plaintiff. They also denied paragraph 11 of the statement of claim that they forced the Plaintiff to resign from employment and the

allegations that they had subjected him and other workers to inhumane treatment or slavery during their employment. They further denied defaulting in submitting social security contributions for their workers or owing the Plaintiff allowances and benefits as alleged. Finally, the Defendant's denied that the Plaintiff had suffered any inconvenience as a result of their actions.

The trial of the matter was scheduled for commencement on the 2nd December 2016. It was rescheduled to the 6th December 2016.

On the said date, both the Plaintiff and Counsel for the Defendants were before court. Counsel for the Defendants applied to withdraw as Advocates representing the Defendants, she notified the court that the proprietor of the 2nd Defendant had left the country. The application was granted.

The trial was scheduled for hearing on 21st February 2017. On the said date, the Plaintiff was present, in person but there was no attendance for the Defendant. The Plaintiff informed the court that the notice of hearing was served on the 2nd Defendant. My attention was drawn to an affidavit of service of 17th February 2017 which showed service of process on the 2nd Defendant.

Being satisfied that the 2nd Defendant was duly served with the notice of hearing and thus was aware of the hearing date. I accordingly allowed the Plaintiff to proceed with the trial.

The Plaintiff testified on his own behalf as PW1, his evidence was that, he was employed by the 2nd Defendant in 2009 to undertake stock takes for the company. In or about 2015, he had complained about his salary and his boss had threatened to fire him. The Plaintiff concluded by contending that he was dismissed from employment and urged the court to grant the reliefs claimed.

Timothy Mwamba was the second witness for the Plaintiff, **PW2**. His evidence was that he was a relative of the Plaintiff and that following the Plaintiff's termination of employment he had accompanied the Plaintiff to meet with his former employers. He confirmed that the Defendants had been served with the court process.

At the end of the testimony of PW1 and PW2, the matter was adjourned to the 23rd February 2017 for continued hearing. On the said date, only the Plaintiff was in attendance. Counsel for the Defendant was absent I allowed the trial of the matter to continue as a notice of hearing of the matter had been issued.

Kancholi Emmanuel Mwewa was the third witness for the Plaintiff, **PW3**. He testified that he was a shop keeper of the 2nd Defendant and that he had worked with the Plaintiff at the company. He confirmed that the Plaintiff had had an argument with the boss over his salary and that soon thereafter the Plaintiff had stopped working in June 2015. He confirmed that their initial boss had passed away and that the 1st Defendant had replaced him in 2014.

PW3 concluded by stating that he was still employed by the 2nd Defendant and did not know why they had not paid the Plaintiff.

Lovemore Phiri was the fourth witness for the Plaintiff, **PW4**. His evidence was that he had joined the 2nd Defendant's company in 2009 the same year that the Plaintiff had joined and they had worked together for the company until 2014 when the Plaintiff stopped working being aggrieved over his salary. He concluded by naming his employers as Mr. Unis and Mr. Tabis.

That marked the close of the Plaintiffs case. The Plaintiff intimated that he did not wish to file submissions. The Defendants not being in attendance, I closed the defence.

At the time of writing this Judgment I had not received submissions from either of the parties.

I have carefully considered the evidence of the Plaintiff. The contention of the Plaintiff is that during the period of his employment with the Defendant, his salary was below the minimum wage and the Defendant did not provide him with transport, lunch and housing allowances as required by Law. He also contended that the Defendants did not remit statutory contributions to ZRA and NAPSA and that following the termination of his employment, the Defendants have failed to pay him his benefits, accrued leave days and repatriation allowances. In response, the Defendant denied owing the Plaintiff any monies as alleged.

From the contentions of the parties, the issues for my consideration are:-

- 1. Whether the Defendants have breached their statutory duty to pay social security contributions to NAPSA and Taxes to ZRA in respect of the Plaintiff for the period of 2009 to 2015; and**
- 2. Whether the Plaintiff is entitled to amounts of money in respect of severance benefits, accrued leave days and repatriation allowances;**
- 3. Whether the Plaintiff is entitled to payment of arrears of salary, transport, lunch and housing allowance from January 2009 to June 2015;**
- 4. Whether the Plaintiff is entitled to damages for the inconvenience and trauma.**

As a starting point, I wish to address the claim against the 1st Defendant. The Plaintiff contends that he was employed by the 2nd Defendant and that the 1st Defendant was at all material times a Director of the 2nd Defendant but there is no evidence that the 1st Defendant is indeed a Director of the 2nd Defendant. Also, the evidence of PW3 and PW4 contradicts that of the Plaintiff. The Plaintiff stated that the 1st Defendant was at all material times a sole director of the 2nd Defendant whereas PW3 testified that the 1st Defendant had only joined in 2014 following the death of their original boss. Further, the Plaintiff does not appear to have made any claims against the 1st Defendant. The specific claims are directed at the 2nd Defendant as his employer, a limited liability company under the Laws of Zambia. Even assuming that the 1st Defendant is a director of the 2nd Defendant, which fact was not proved, the 1st and 2nd

Defendants have separate and distinct legal personalities. In view of the foregoing, the 1st Defendant ought not to have been made a party to action. I find that there is no valid claim against the 1st Defendant and I dismiss the case against him accordingly.

I now turn to address whether the 2nd Defendant has breached its statutory duty to remit social security contributions to NAPSA and Taxes to ZRA on behalf of the Plaintiff. The Plaintiff contends that the Defendant has failed to remit social security contributions to NAPSA. NAPSA was constituted under **Chapter 256 of the Laws of Zambia** for the purpose of collecting pension contributions on behalf of employees and to pay out the same at some later point:

Section 12 (a) of NAPSA Act states:

'Subject to subsection (2) of section eleven, contributing employer shall mean -

A person, association, institution or firm registered as a tax payer with a contract of service with an employee...'

The above authority, stipulates that any person, firm or association having a contract of service with an employee and registered as a tax payer is considered to be contributing employer. The 2nd Defendant being a company required to pay tax and having a contract of service with the Plaintiff, is a contributing employer within the meaning of **Section 12 of the NAPSA Act**.

In relation to the obligations of a contributing employer, **Section 14(1)** and **15(1)** of the Act require a contributing employer to pay to the Scheme a contribution in respect of an employee at the end of each month. Further, **Section 15(2) of the NAPSA Act** states that if a contribution is not paid within the prescribed period, a penalty shall be applied and the amount and penalty shall be recoverable as a debt owing to the scheme by the employer. Clearly therefore an employer is required to make monthly contributions to NAPSA on behalf of its employees.

In order to succeed with this claim, the Plaintiff must demonstrate that whilst in employment with the 2nd Defendant, it failed to remit monthly contributions to NAPSA on his behalf. A statement of contributions from the NAPSA Service Centre would show whether or not contributions were made on the Plaintiff's account by his employer. The Plaintiff has not provided any documentation to prove this allegation that the 2nd Defendant has not remitted monthly contributions on his behalf for the period of his employment with it. I find therefore that the Plaintiff has failed to prove this claim and it fails accordingly.

The next question is the whether the 2nd Defendant has failed to pay taxes to ZRA, a statutory body constituted under **Chapter 321 of the Laws of Zambia**. The core function of this governing board is to assess charge, levy and collect all revenue due to the Government under the respective laws. An employer is required by law, to deduct from an employee's salary, such taxes that are due and payable to the Government of the Republic of Zambia and to remit to ZRA on behalf of the Government of the Republic of Zambia.

Employee

The Plaintiff alleges that the 2nd Defendant has not paid taxes to ZRA on his behalf for the duration of his employment. In considering whether the 2nd Defendant has failed to remit taxes to ZRA, the starting point is to ascertain whether the Plaintiff is liable to pay tax and whether taxes were deducted from the Plaintiff's salary.

It is trite law that salaries less than K3,000 are not subjected to taxation as Pay As You Earn (PAYE). The Plaintiff would not therefore be liable to tax on a monthly salary of K700. Further, there is no evidence whatsoever that the 2nd Defendant deducted taxes from the Plaintiff's salary. In any event, the Plaintiff is not and would not be a beneficiary of such taxes. It would be due and payable to the Commissioner General of Taxes on behalf of the Government of the Republic of Zambia. In view of the foregoing, I find that the Plaintiff has failed to prove that the 2nd Defendant had deducted taxes from his salary which it has not remitted to ZRA. This claim therefore fails and I dismiss it accordingly.

The next question is whether the Plaintiff is entitled to severance pay, leave days and repatriation allowance. The Plaintiff contends that he is entitled to these benefits but that the 2nd Defendant has failed to settle the same. The 2nd Defendant denies that the Plaintiff is entitled to these dues.

Severance pay is defined by Black's Law dictionary as:

'the amount paid to an employee on termination of his work contract'.

Severance package is pay and benefits an employee receives when he terminates employment with a company. This may include a payment based on the duration of service, leave days or any other benefits due to the employee at the time of termination of employment. This is usually determinable by the employment contract. Normal circumstances that warrant the payment of severance pay is where the employee has been laid off or where the termination is by mutual agreement. In the present case, the evidence of the Plaintiff is that he did not have a formal contract of employment and that he had resigned from employment and his services were not terminated by the 2nd Defendant. There is therefore no legal basis upon which the Plaintiff is entitled to severance pay following his resignation from employment. I find therefore that the Plaintiff has failed to prove an entitlement to severance pay and this claim fails.

With regard to the claim for payment of outstanding leave days due and owing to him, the claim by the Plaintiff is that he is entitled to leave days. The particulars of this claim have not been specified and the Plaintiff has not indicated the number of leave days unpaid or the amounts due and owing by the 2nd Defendant to him. This claim therefore fails.

On the question of repatriation benefits, **Order 12 of the Minimum Wages and Conditions of Employment Statutory Instrument No. 1 of 2011** on Shop Workers provides as follows:

'An employer shall transport an employee the employee's family and their personal effect to the employees' place of recruitment

or pay the employee a repatriation allowance sufficient to cover the cost of fares for the employee, the employee's family and their personal effects if the employee is (a) discharged on medical grounds, (b) is declared redundant, (c) retires or (d) dies in service, in which case the benefits shall accrue to the family of the deceased employee'.(underlining mine for emphasis only)

By the foregoing provision, an employer is at the termination of a contract of employment required to repatriate an employee, the employee's family and their personal effects to the employee's place of recruitment or to pay a repatriation allowance sufficient to cover the cost of fares for the employee, his family and personal effects if such employee falls within the category of persons provided for under the section.

Further, repatriation is defined by **Black's Law Dictionary** as **'the return of someone to their country'**. Therefore, the obligation by an employer to transport an employee only arises where the employee was recruited from a different location. In such a case, an employer is obligated to return the employee, his family and personal belongings to such place or to pay him such allowance to cover the cost of fares for the employee, his family and personal effects to return to their place of recruitment. In the present case, although the Plaintiff has contended that he is entitled to a repatriation allowance, he has not demonstrated that he was recruited from a place that was different from the location of his work and that he requires repatriation back to such place. Having failed to prove this, his claim for repatriation allowance therefore fails.

The next question is whether the Plaintiff is entitled to arrears of salary, transport, lunch and housing allowance from the date of his employment to the date of termination of employment. The Plaintiff contends that he is entitled to these allowances plus arrears of salary.

I will start with the question of allowances. **Order 14 of Statutory Instrument No. 1 of 2011** of the **Minimum Wages and Conditions of Employment Act** provides on transport allowance as follows:

'An employee whose duty station is beyond a three kilometre radius from the employee's area of residence shall be paid a monthly allowance of one hundred and two thousand, four hundred Kwacha for transport expenses, unless the employer provides transport for that employee'.

The foregoing provision clearly stipulates that where the place of employment is further than three kilometres away from the employee's place of residence, the employer is required to provide the employee with transport to and from his place of work or a monthly transport allowance in lieu thereof.

With regard to lunch allowances, **Order 15 of Statutory Instrument No. 1 of 2011** reads as follows:

'An employee shall be entitled to a lunch allowance of one hundred and twenty thousand kwacha per month unless the employer provides a canteen at which the employees may

obtain wholesome and adequate meals provided free of charge'.

What is clear from the above provision is that an employer is required to provide its employees with wholesome and adequate meals free of charge. In default thereof, the employer shall provide the employee with a lunch allowance.

Turning to the question of housing allowance, **Order 19 of Statutory Instrument No. 1 of 2011** provides a housing allowance as follows:

'An employer shall, where the employer does not accommodate an employee pay the employee a housing allowance at the rate of thirty percent of the employer's basic salary'.

Clearly from the forgoing provision, an employer is required to accommodate an employee or to pay the employee a housing allowance in default thereof.

In the case at hand, the Plaintiff claims to be entitled to transport, lunch and housing allowances from the 2nd Defendant. On the transport allowance, the Plaintiff has not alleged that his place of employment was more than three kilometres from his residence. He has also not stated that the 2nd Defendant failed to provide transport to him to his place of work if such distance was more than 3km away.

Similarly, in relation to lunch allowance the Plaintiff is only entitled to lunch allowance if the employer has failed to provide a canteen to obtain meals. In the present case, the Plaintiff has not indicated whether or not the 2nd Defendant had a canteen at which its employees could obtain regular meals. He has also not stated the basis on which he is entitled to a lunch allowance. Further, in relation to the housing allowance, the Plaintiff has not stated whether the 2nd Defendant provided him with accommodation or not. There is no evidence of the location of his place of residence or what arrangements existed with the 2nd Defendant in relation to his accommodation. From the foregoing, I am not satisfied that the Plaintiff has demonstrated that he was entitled to transport, lunch and housing allowances from the 2nd Defendant during his period of employment.

The last question relates to the claim for arrears of salary. The Plaintiff contends that his monthly salary was K700 and that this sum was below the minimum monthly wage prescribed by Government for a shop and general worker. He contended that in 2011 and 2012, a shop worker ought to have been paid K1,445=10 per month with effect from 2012 but the 2nd Defendant refused to increase his salary from 30th January 2009 to the date of his termination in June 2015 to this amount, forcing him to resign from employment. A review of the evidence before me reveals that although the Plaintiff has intimated that his monthly salary was K700 from 2009 to 2015 he did not provide any documentary proof in the form of payslip or pay statement of his employment to show his actual monthly salary with the 2nd Defendant.

Notwithstanding the above, the 2nd Defendant has admitted at paragraph 3 of the defence that the Plaintiff was employed by the 2nd Defendant and that he was paid the monthly salary as alleged. I am therefore satisfied that the Plaintiff was indeed employed by the 2nd Defendant as a shop worker from 2009 to 2015 and that during the period of his employment with the 2nd Defendant, he earned a monthly salary of K700.

Statutory Instrument No. 1 of 2011, which took effect on the 30th December 2010, the date of publication prescribes in Schedule 1 (c) (iv) the minimum wage for shop worker, particularly a shelf packer as K600. The Plaintiff's monthly salary in 2011 was K700. This was in excess of this minimum wage. Therefore, the claim for salary arrears for 2011 is misconceived and I dismiss it forthwith.

Further, **the Minimum Wage and Conditions of Employment (Shop Workers) Statutory Instrument No. 47 of 2012** is applicable to persons employed in any shop or in connection with the business of any shop. It sets out the minimum monthly wage to be paid to employees. **Order 5(1) (c) of Statutory Instrument No. 47 of 2012** reads as follows:

'The minimum monthly wages shall be as follows:

(c) grade III – One million two thousand, three hundred and eighty-six Kwacha (K1,002,386.00) per month, for a person engaged in any of the following occupations:

(iv) Shelf packer..'

The provision above which came into effect in July 2012 prescribes that a person employed as a shop worker particularly one engaged as a shelf packer should earn a minimum monthly wage of K1,002,386.00 (rebased K1,002.39). The evidence of the Plaintiff was that he was engaged as a shop worker from 2009 to 2015. His main job description was to pack goods on the shelves. During the period of his employment with the 2nd Defendant he earned a monthly salary of K700. Despite the coming into effect of a Minimum Wage for shop workers, his salary was not increased as prescribed by law. The Defendant admitted that the Plaintiff only earned K700 per month. It is clear that with the effect from July 2012 (the publication of Statutory Instrument No. 47 of 2012) the minimum wage payable to a shop worker (shelf packer) was K1,002.39. Following the coming into effect of this Order in July 2012, the Plaintiff ought to have been paid a minimum wage as prescribed by law. Despite the introduction of the minimum wage for shop workers, the 2nd Defendant continued to pay the Plaintiff a sum of K700 per month in contravention of the provisions of the law. Clearly, therefore the Plaintiff earned a monthly sum of K302.40 below the prescribed minimum wage for the period from 4th July 2012 to June 2015. The Plaintiff is entitled to salary arrears of K302=40 for 35 months for the period from July 2012 to June 2015. I find therefore that the 2nd Defendant is truly indebted to the Plaintiff in the sum of K10,582.25 being the short fall of salary paid to him. I accordingly enter judgment in favour of the Plaintiff against the 2nd Defendant for the said sum of K10,582=25 plus interest at the short term average bank rate from date of writ to date of judgment and thereafter interest shall accrue on any unpaid sums at the bank lending rate from date of judgment to date of full payment.

The last claim is for damages for inconvenience and trauma suffered by the Plaintiff. In order to succeed with a claim for damages, the Plaintiff must prove that he has suffered inconvenience and trauma. In the present case, the Plaintiff has not provided any particulars whatsoever of the inconvenience and trauma that he has purportedly suffered at the hands of the 2nd Defendant. I therefore find that the Plaintiff has failed to prove that he has suffered any inconvenience and trauma. This claim for damages therefore fails.

The Plaintiff having succeeded in one of his claims against the 2nd Defendant, I accordingly order that the 2nd Defendant shall bear the Plaintiff's costs of this action, to be agreed and in default to be taxed.

Delivered at Lusaka this 27th day of April 2017


N.A. SHARPE-PHIRI
HIGH COURT JUDGE