

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

2014/HP/1778

BETWEEN:

JOHN MUYABI

AND

THANDIWE BANDA

ATTORNEY GENERAL



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

BEFORE HON. MR. JUSTICE E.L. MUSONA

For the Plaintiff:

*Ms. L. Mushota of Messrs Mushota &
Associates*

For the 1st Defendant:

*Mr. C. Changano of Messrs A. Findley and
Advocates*

For the 2nd Defendant:

Ms. D. Shamabobo senior State Advocate

JUDGMENT

Date: 28th June, 2019

Cases referred to:

Robert Simeza Vs Elizabeth Mzyeche (2011) ZR

This matter was commenced by Writ of Summons on 7th April, 2014. The statement of claim shows that the Plaintiff was claiming against the Defendants General damages, aggravated damages and special damages. These were summed up in that statement of claim as hereunder;

1. Damages
2. Interest on the amount the Court may award
3. Further or other remedies the Court may deem fit
4. Costs

The Plaintiff testified in aid of his case. I shall, therefore, refer to the Plaintiff as PW1.

The evidence by PW1 was that he was a designer tailor. PW1 then proceeded to testify in respect to a claim for breach of contract which formed part of the claim for General Damages under paragraph 17 of the Plaintiff's Statement of Claim.

Under this head, PW1 testified that he used to stay in Kitwe, and that in 2009 a Mrs. Kalila, wife of Christopher Kalila who was a Government Minister then, told PW1 that Thandiwe Banda, who then was Zambia's first lady wanted to see PW1 because the said Thandiwe Banda had seen the designs which PW1 had made for Mrs. Kalila and Thandiwe Banda had liked them.

PW1 later met Thandiwe Banda in Kitwe at a meeting facilitated by Mrs Kalila. Some material was given to PW1 for trials and made five suits, Thandiwe Banda liked all the five suits.

On 17th September, 2009, Mrs Kalila picked PW1 and took him to Thandiwe Banda in Lusaka. Thandiwe Banda gave PW1 a room at state house to work from. They agreed verbally that PW1 would get a monthly salary of K5000.00.

PW1 used to work from 08:00 hours to 18:00 hours but sometimes up to 19:00 hours. The police used to drive PW1 to and from the home of Mrs. Kalila where PW1 was lodging.

When PW1 left Mrs. Kalila's home, Thandiwe Banda paid rentals for PW1 at the rate of K1,500.00 per month for 3 months which translated to K4,500.00. When the 3 months for which he had paid rentals expired, Thandiwe Banda did not again pay rentals for PW1, instead Thandiwe Banda would give PW1 a paltry K200.00 or K500.00 at a time.

PW1 explained that he was employed by Thandiwe Banda but that the contract of employment was verbal, PW1 further told this Court that in addition to being offered transport to and from work he also used to eat breakfast and lunch at the President's house called Nkwazi house where PW1 used to execute his duties from which is

on state house grounds. According to PW1, the contract of employment ended on 12th December, 2012.

PW1 also claimed for loss of earnings. Under this head PW1 stated that he wanted to be paid K5,000.00 per month as loss of earnings. He stated that his landlord confiscated his sewing machines worthy K12,000 because of none payment of rentals and also his business in Kitwe had ended.

The other claim was for damages for mental torture, humiliation and embarrassment. Under this claim PW1 testified that he worked not only for Thandiwe Banda who then was first lady but also for the President and their children. But that, because Thandiwe Banda was not paying PW1, PW1 encountered problems with respect to payment of rentals adding that he consequently started failing to pay school fees for children, and that even when PW1 fell sick and went to Lusaka trust hospital, Thandiwe Banda never helped PW1 with hospital bills.

His final claim was for special damages. Under this head PW1 claimed that his business collapsed when he worked for Thandiwe Banda and that his sewing Machines were confiscated by the land lord when he defaulted on rentals. He also stated that when he fell sick he failed to go to hospital.

PW1 concluded by saying that he wanted to be paid the money which he worked for 3 years. He also wants to be paid rentals and benefits. He further stated that he risked working in the President's house and that even his witnesses had declined to come and testify because of fear of the Government.

Under cross examination PW1 narrated that he was on oral contract with Thandiwe Banda and that she had no claim against the Government. PW1 stated that he worked at state house for 3 years up to December 2012, but when reminded that Thandiwe Banda left state house in December, 2011 after former President Rupiah Banda conceded defeat to PF Government PW1 conceded. He also admitted that he was not working on daily basis.

The Defendants called four (4) defence witnesses. I shall refer to these witnesses as DW1, DW2, DW3 and DW4 respectively.

DW1 was M/Kawila Lushinga Eliazer a Human resources Director at Independent Broadcasting Authority.

DW1 told this Court that in 2009 he was permanent secretary at state house in charge of Administration, finance and Human resource. Among other duties DW1 was in charge of transport, controlling officer of all finance, budgeting and employment of civilian staff at state house.

DW1 stated that there were positions at state house which would be advertised. Interested people would respond to the advert, they would be shortlisted and interviewed. The names of successful candidates would be sent to the Office of the President (OP) special division for clearance to ascertain that they were Zambians and that they had no criminal record. Other employees served on contract. There was no need to advertise for positions on contract because these were only identified either by the Government or by the first family. Even candidates for employment on contract also needed to be cleared by Office of the President (OP) special division.

Referring to PW1 who is the Plaintiff in this case, DW1 stated that he was not aware of PW1 unless Thandiwe Banda employed him in her own private capacity and not to operate from state house.

DW1 stated that he only saw PW1 in Court and had no knowledge of having processed any employment contract for PW1. DW1 who used to be controlling officer at the material time told this Court that he never introduced PW1 on Government payroll.

Under cross examination DW1 told this Court that it was him who prepared contracts of employment even for staff who were identified by the first family for employment. He also contracted for the first family with tailors and designers but that he never contracted PW1. DW1 reiterated that PW1 was never employed by the state.

DW2 was F/Nora Hara Kalila. The evidence for DW2 was that in 2009 she used to live in Kitwe but that she used to travel to Lusaka for meetings of Minister's wives club of which she was a member. It was during those meetings that DW2 used to meet Thandiwe Banda. Thandiwe Banda used to ask DW2 who used to make chitenge outfits for DW2. DW2 told Thandiwe Banda that the chitenge outfits for DW2 were made by a Kitwe based Congolese tailor and another a Senegalese also based in Kitwe. The Senegalese tailor was known only by the Knick name of Baba, and the Congolese was John Muyabi who is the Plaintiff in this case.

When Thandiwe Banda visited Kitwe the two tailors were introduced to her by DW2.

DW2 gave chitenge materials to the two (2) tailors so that they make chitenge out fits for Thandiwe Banda on trial basis. Thandiwe Banda liked the outfit which was made by PW1. From that time onwards, Thandiwe Banda used to give chitenge materials to DW2 to deliver to PW1 and PW1 used to make the outfits for Thandiwe Banda. DW2 encouraged PW1 to move to Lusaka where he could do more business with Thandiwe Banda and Minister's wives and PW1 agreed. Towards the end of 2009 DW2 offered PW1 free accommodation at the home of DW2 in Lusaka and PW1 took up that occupation. Thandiwe Banda had her own sewing machines at state house. It was agreed that PW1 would be using those sewing machines at state house. It was further agreed that PW1 would

continue as a freelancer as before making outfits for Thandiwe Banda, Minister's wives, his Kitwe based customers as well as other customers. PW1 remained a freelancer and was to be paid by Thandiwe Banda per outfit made. PW 1 confirmed to DW2 that he was being paid per outfit made. PW1 later found a house in Kabwata because he wanted to relocate his wife from Kitwe to Lusaka.

The house rentals were K1,500.00 per month. Thandiwe Banda gave PW1 K4,500.00 to cover rentals for three (3) months, this was a free offer from Thandiwe Banda.

DW3 was F/Mirriam Chilongo. The evidence for DW3 was that PW1 was introduced to DW3 by Thandiwe Banda, and that PW1 used to make dresses for Thandiwe Banda. The work schedule for PW1 was dependent on when Thandiwe Banda wanted some outfit to be made. DW3 who is young sister to Thandiwe Banda said that she was living in PHI residential area but was a constant visitor to Thandiwe Banda and sometimes used to live with Thandiwe Banda, and every time Thandiwe Banda was away from home DW3 would move to Nkwazi house on the grounds of state house to take care of Thandiwe Banda's twins who then were young. DW3 recalled that PW1 never worked on daily basis adding that, in particular, when Thandiwe Banda was away, PW1 never worked.

DW3 also stated that even on the days when PW1 worked, PW1 knocked off even as early as 10:00 hours if he had finished the tailoring which he was assigned to do.

When Thandiwe Banda left state house in 2011, PW1 stopped tailoring for Thandiwe Banda and instead, started business with DW3 and not even once did PW1 ever mention to DW3 that he was owed money by Thandiwe Banda.

DW4 was M/Kelly Uyoya a state police officer.

The evidence for DW4 was that in 2009 he was stationed at state house assigned to work in the office of Thandiwe Banda who then was first lady as a body guard. DW 4 knew PW1 in late 2009 when DW4 was introduced to PW1 that PW1 would be doing some tailoring work for her. When requested by Thandiwe Banda, DW 4 would assign transport to go and pick PW1 to state house. That used to happen when there was work to be done and it was DW4 who used to clear PW1 for his entry into state house. PW1 was not on a permanent clearance because, only state house employees are on permanent clearance. When there was no work for PW1, he never used to come to state house, because what PW1 was doing was part time job. Permanent employees get identity cards (ID^s) but PW1 did not have an ID because he was not an employee of state house and that all the days PW1 went to state house he used to be cleared at the gate.

At the close of hearing it was agreed that the Plaintiff shall file his submissions on or before 7th June, 2019 by 12:00 hours. However, Plaintiff later made application to extend time within which to file his submissions where upon that application was granted and the Plaintiff was allowed to file his submissions on or before 10th June, 2019 by 14:00 hours. This was an extension of three (3) days. However, by 14:00 hours on 10th June, 2019 the Plaintiff had not yet filed his submissions. It follows, therefore, that if Plaintiff filed his submissions after the due date, same were filed without leave of court and cannot be considered. Put simply, no submissions were received from the Plaintiff.

The 1st Defendant too applied for extension of time within which to file their submissions. Their application was premised on the fact that by virtue of the extension by which the Plaintiff was to file his submissions late, the 1st Defendant was afforded less time within which to compile their submissions. Equally, the 1st Defendant was also allowed an extension of time within which to file their submissions. Accordingly, the 1st Defendant who was due to file the submissions on 21st June, 2019 was granted an extension to 25th June, 2019. That was an extension of four (4) days. The second Defendants did not file any submissions. The first Defendant filed the submissions on 24th June, 2019.

I have looked at the submissions for the 1st Defendant and have considered them. As for the Plaintiff I see no prejudice occasioned to him because he was aware of the date by which he was due to file the submissions but did not file. He applied for an extension of time within which to file and an extension was granted. He was aware that he was to file within the extended period but did not. I have looked at the case of **Robert Simeza Vs Elizabeth Mzyeche (2011) ZR**

And I am fortified in my decision.

Under the head for damages the Plaintiff claimed damages for:

- a. Breach of contract
- b. Loss of earnings
- c. Mental torture, humiliation and embarrassment
- d. Special damages

I shall now proceed to determine his claims seriatim;

a. Breach of contract

The Plaintiff (PW1) argued that he was an employee of Thandiwe Banda and that he served under a contract of employment. No copy of the contract of employment was produced and Plaintiff insisted that the contract of employment was verbal. DW1 told this Court that he was in charge of Human resource, Administration, finance and budgeting at state house and that he was not aware of

the Plaintiff being one of the employees at state house, and that the Plaintiff was never on the Government payroll. DW1 also told this Court that it was himself who prepared contracts of employment for all employees at state house including employees who were identified for employment by the first family. He also said he made contracts of employment for tailors at state house but that he never made any contract for Plaintiff.

DW2 stated that the Plaintiff was a free lance tailor. Plaintiff used to make outfits for Thandiwe Banda from Kitwe. He also used to tailor for other customers as well. DW2 encouraged Plaintiff to relocate to Lusaka because Plaintiff gained great business from Minister's wives as well. Even when Plaintiff relocated to Lusaka he remained a free lance tailor and even maintained his clients in Kitwe. Plaintiff was being paid by Thandiwe Banda per outfit made.

Equally, the evidence for DW3 was that Plaintiff never worked full time at state house.

DW4 stated that Plaintiff did not work on full time basis. It is DW4 who used to send transport to pick Plaintiff and that this used to happen only when there was tailoring to be done by Plaintiff. On the occasions when Plaintiff went to state house it was in fact, DW4 who used to clear Plaintiff at the gate for entry into state house. He stated that Plaintiff was cleared from the gate each time he went to state house because he did not have an identity card. Identity

cards are only given to state house employees of which Plaintiff was not.

It is clear from the evidence that the plaintiff has not shown any contract of employment. He has also not shown any identity card given to him (if any) as were given to employees at State House. The Plaintiff has not shown any proof that he was an employee of State House. All the defence witnesses have vehemently denied that the Plaintiff was ever an employee of State House. On the above basis, I find that the Plaintiff was an independent contractor not amounting to an employee. I have also found that contract of employment was breached as no contract of employment ever existed.

There were also no benefits due to the Plaintiff from Thandiwe Banda because the Plaintiff has failed to prove that he was an employee of Thandiwe Banda.

The Plaintiff also admitted that he was not an employee of the Government. It follows, therefore that the claim against the Attorney General who was sued as 2nd Defendant in a representative capacity for the Government of the Republic of Zambia fails.

The net result is that the claim for damages for breach of contract has failed and is accordingly dismissed.

b. *Loss of earnings*

The claim for loss of earnings was premised on the plaintiff's claim that he was an employee of Thandiwe Banda. He is claiming loss of earnings of salary at the rate of K5,000 per month. Having failed to prove that he was an employee of Thandiwe Band, the claim for loss of salaries cannot stand.

The claim for loss of salary is dismissed.

c. *mental torture, humiliation and embarrassment*

The Plaintiff claimed that he did not only work for Thandiwe Banda but also for former President Rupiah Banda and their children but because Thandiwe Banda was not paying the Plaintiff, the Plaintiff encountered problems with respect to payment of rentals, school fees for children and medical fees. For this the Plaintiff claimed payment of damages for mental torture, humiliation and embarrassment.

No proof of mental torture, humiliation and embarrassment was produced. The Plaintiff did also not prove how Thandiwe Banda could have caused the Plaintiff mental torture, humiliation and embarrassment yet Thandiwe Banda was not the employer for the Plaintiff. Having held that, Thandiwe Banda was not the employer for the Plaintiff, and having held also that the Plaintiff has not proved how Thandiwe Banda could have caused him mental

torture, humiliation and embarrassment, his claim fails and is dismissed.

d. *Special damages*

Under special damages, the Plaintiff claimed loss of earnings of salary from December, 2009 to December, 2012 at the monthly rate of K5,000. The Plaintiff made the same claim against Thandiwe Banda under the claim for loss of earnings. I have not seen the purpose of litigating a claim under two sub headings in the same suit against the same Defendant. Having already ruled on this claim and having earlier dismissed it, this claim stands dismissed.

The Plaintiff has claimed housing allowances at the rate of K1,500 per month. Looking at the Plaintiffs evidence, his claim for housing allowance seems to be premised on the claim that he was an employee of Thandiwe Banda. DW2 denied that Thandiwe Banda was ever responsible for payment of rentals for the Plaintiff save only for the first three (3) months when Thandiwe Banda only paid for him as of help because the Plaintiff had just moved from the house of DW2 where he had been offered free accommodation. Having failed to prove that he was an employee for Thandiwe Banda, and having failed to prove any other basis upon which this claim for housing allowance was anchored, I find that Thandiwe Banda was never responsible for payment of rentals or housing allowance for the Plaintiff. This claim fails and is dismissed.

The other claim under the claim for special damages was for loss of business tools seized in distress for rent. A total of 4 Sewing Machines together valued at K26,000 were seized. The Plaintiff want this paid by Thandiwe Banda. These Sewing Machines were seized from the Plaintiff when the Plaintiff defaulted to pay rent.

Having already ruled that Thandiwe Banda was not responsible for the payment of rentals for the Plaintiff, Thandiwe Banda cannot be held liable for the seizure of the Plaintiff's Sewing machines in distress for rent. This claim fails and I dismiss it.

3. *Travelling expenses to and from at a time approximately 50 times.*

When the Plaintiff gave his evidence in Chief, he never traversed on this claim. I have however, considered it and have found that the Plaintiff did not disclose where he was going, where he was coming from and what was the purpose of his travelling approximately 50 times. For the Plaintiff to succeed on this claim he must prove that the travels were connected to these proceedings. Assuming that these expenses were connected to these proceedings, they should, therefore, be treated as costs. It is trite that costs follow the event. I shall, therefore, leave the claim for costs to the principle that costs follow the event.

The net result is that the plaintiff has lost all his claims.

I order costs in favour of the Defendant to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 28th day of June, 2019.



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HON MR JUSTICE E.L. MUSONA
HIGH COURT JUDGE

