IN THE HIGH COURT FOR ZAMBIA 2015/HP/932
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Between:

AMOS MWAULA & 39 OTHERS PLAINTIFFS

AND

ZESCO LIMITED DEFENDANT

BEFORE THE HONO CHANDA THIS 31st DAY OF DECEMBER, 2019

Appearances:

For the Plaintiffs : Mr M.P. Muyawala of Dzekcdzekze & Company

For the Defendant: Mrs N.0 Sikazwe and Ms J. Kunda in-house counsel

JUDGMENT

LEGISLATION REFERRED TO:

EMPLOYMENT ACT CHAPTER 268 *OF THE LAWS OF ZAMBIA*

CASES *REFERRED TO:*

1. SAM AMOS MUMBA VS ZAMBIA FISHERIES AND FISH MARKETING CORPORATION LIMITED (1980) Z.R (H.C).
2. COLGATE PALMOLIVE ZAMBIA (INC) VS ABLE SHEMU CHUKA AND 10 OTHERS
3. ROSEMARY NGORIMA AND 10 OTHERS VS ZAMBIA CONSOLIDATED COPPERMINES APPEA NO. 97 (2000)
4. ZESCO LIMITED V RICHARD PHIRI AND OTHER APPEAL NO 87 OF (2009)
5. PERRY SIAME AND 27 OTHERS V ZESCO LIMITED COMPLAINT NO. 34 (2006).

6. KUNDA V KONKOLA COPPER MINES PLC APPEAL NO. 48 (2005)

WORKS REFERRED TO:

1. CHITTY ON CONTRACT VOLUME 1, GENERAL PRINCIPLES, LONDON: SWEET AND MAXWELL, 1989
2. G.H.L. FRIDMAN IN I-IIS BOOK, THE MODERN LAW OF EMPLOYMENT, LONDON: STEVENS, 1963

On 18th June, 2015, Amos Mwaula and 39 others, the plaintiffs herein, issued out of the Principal Registry a Writ of Summons against ZESCO Limited, the defendant. The plaintiffs alleged that they were employed as weed harvesters for a period of three years and their contractual employment was effected by the Kafue Gorge Power Station. It was the plaintiffs' assertion that their contractual employment provided for payments of monthly contributions to the National Pension Scheme Authority (hereinafter called NAPSA), payment of subsistence allowances, monthly salary and hire of canoes. The plaintiffs further alleged that contributions to NAPSA indicated that the defendant only paid the said contributions for five months for the months of June, 2011, February, 2013, March, 2013, May 2013 and June, 2013 as against the 36 months worked. The plaintiffs also alleged that they spent 60 nights away from home to work on the harvest of weed in Muyangana's area along the Kafue river without being paid night allowances.

The reliefs sought by the plaintiffs were as follows:

(i) Payment of all allowances due in the sum of K468, 000.00

(ii) Payment of contributed NAPSA deductions for a period of 3 years 7 months which the defendant has not remitted to NAPSA

(iii) An order for payment of all unpaid and or under payments due to the plaintiffs to be paid

(iv) An order that the defendant herein calculate for each plaintiff his and or her dues in claims i, ii, and iii above.

(v) Any other relief this court may deem fit

(vi) Costs.

The defence was filed on 19th June, 2015 wherein the defendant stated that Kafue Gorge Power Station was not a Legal entity and therefore incapable of employing the plaintiffs. The defendant further stated that the plaintiffs were engaged for specific periods of time as weed harvesters and the Human Resource Officer at Kafue Gorge Power Station was responsible for employee welfare and deployment. The defendant further stated that there was no existing contract which effected the hire of canoes from the three plaintiffs. The defendant contended that the plaintiffs' contracts of employment provided for an hourly wage and housing allowance with no provisions on subsistence allowances, payment of night allowances or hire of canoes. The defendant asserted that contributions to NAPSA were a statutory requirement that the defendant had and was still abiding to for all types of employees. All in all, the defendant argued that the plaintiffs were not entitled to the sum of K 468,000 claimed as it was unsubstantiated either at law or from their contracts of employment with the defendant.

The matter was heard on 29th August, 2017 and both parties were before Court. The plaintiffs called four witnesses while the defendant called two witnesses.

Stephen Chipuka was the plaintiffs' first witness (PW1). PW1 testified that he and the other plaintiffs were recruited as weed harvesters by the defendant. The witness further testified that they worked for three years nine months and used to sign monthly contracts with the defendant as evinced by the plaintiffs' bundle of documents. PW1 went on to narrate that the plaintiffs were assured that the defendant was in possession of other one year contracts at their headquarters but the same were never availed to them. PW1 asserted that during the course of their employment they were assigned to clear the weed at various harbors some kilometers away from Kafue Gorge. It was PW 1's evidence that during the period the plaintiffs worked from Halobo's harbor, Rahims harbor and Muyangana harbor they stayed in thatched houses and were not paid subsistence allowances.

The witness also stated that the defendant used to deduct monthly contribution for NAPSA from the plaintiffs' wages. PW1 explained that upon their unjustified termination of employment by the defendant, they established that only contributions for five months had been remitted to NAPSA.

During cross-examination, PW 1 informed the Court that, he adduced evidence on behalf of his colleagues since they were employed at the same time. When asked to justify his testimony, PW 1 told the Court that there was no document in their bundle of documents to show that all the plaintiffs started work at the same time but that he relied on the pay sheet. PW 1 testified that according to his contract of employment exhibited on page 22 of the plaintiffs' bundle of documents he was employed as a casual worker.

When queried about housing allowance, it was PW 1's response that housing allowance was not applicable according to the contract of employment. He conceded that the contract he signed showed all his entitlements. He said according to the contract, the plaintiffs were entitled to be paid a monthly wage.

When asked about NAPSA contributions, PW 1 asserted that the employer used to deduct NAPSA contributions at 5% from the employee's earnings and the employer also was supposed to contribute 5%. According to him, the remissions made to NAPSA by his former employers did not cover the entire period of their employment.

The record according to PW 1 showed that the defendant remitted 24 to 25 months but the other months were missing. PW 1 further asserted that there were inconsistencies in the remissions made to NAPSA by the defendant. To highlight the inconsistencies, PWI

asserted that for Darius Muwami the payment at NAPSA was higher than what was deducted from the employee.

When referred to page 121 of the plaintiffs' bundle of documents, PW 1 confirmed that a sum of K129.36 was remitted to NAPSA in respect of Chakulunta Victor for the month of February, 2013.

In further cross examination, the witness conceded that while remissions for some months were omitted on the NAPSA statement, there were other months when the defendant remitted more money to NAPSA than what was deducted from the employees as per the documents produced in Court.

When referred to page 27 of the plaintiffs' bundle of documents with regard to his conditions of service, PW 1 asserted that as at March, 2014, he and other plaintiffs were entitled to two leave days, 40% housing allowance and to one day notice of termination of employment.

In Re-examination, PW 1 stated that the plaintiffs were employed as a group and they did not accept the initial contract. He further stated that he was receiving a salary but he did not know whether housing allowance was incorporated in his salary.

Samuel Soda testified as PW2. It was his testimony that in 2010, PW 1 took officials from ZESCO to his village with a view of recruiting 40 weed harvesters and hiring canoes for the exercise. It was his

evidence that upon being recruited the plaintiffs worked for three years, as such they could not be considered as casual employees.

During cross-examination, PW2 testified that he did not have occasion to look at the contract of employment signed between the plaintiffs and defendant. He stated that he did not know what the plaintiffs' entitlements were but he knew that the plaintiffs were entitled to some benefits considering the number of years they had worked for the defendant.

In Re-examination, PW2 told the Court that he was not one of the people who were employed by the defendant.

The plaintiffs' third witness (PW3) was Amos Mwaula whose evidence was substantially similar to that of PW 1. In addition, PW3 informed the Court that apart from the plaintiffs being recruited as weed harvesters, the defendant also hired canoes from some of them. The witness stated that the document exhibited at page 38 of the plaintiffs' bundle of documents showed the names of employees from whom the defendant hired canoes.

During cross-examination, PW3 told the Court that he signed the contracts produced on page 13 and 14 of the plaintiffs' bundle of documents. According to him, the contract showed that he was entitled to a monthly wage of K700.00 in 2003. He stated that page 14 showed that he was entitled to 2 leave days per month, 40°/0 housing allowance and one day notice of termination of employment.

When asked whether his contract of employment entitled him to the payment of night allowances, PW3 answered in the negative.

When further asked about wages for casual workers, PW3 asserted that Page 31 of the defendant's bundle of documents showed wages for their group as casual workers for the month of February 2013. It was his testimony that he signed for his wages as shown on pages 31 to 55 of the defendant's bundle of documents.

When questioned about the percentage of his employer's contribution to NAPSA, PW3 asserted that he didn't know the percentage his employer contributed to NAPSA. He confirmed that page 73 of plaintiffs' bundle of documents showed that some months were missing on his contributions to NAPSA. The witness stated that while page 73 of the plaintiffs' bundle of documents indicated that no contributions were remitted to NAPSA in August, 2013 page 43 of the defendant's bundle of documents revealed that a sum of K97.87 was remitted for the month in question. PW3 however conceded that for December 2013, the figures for the contributions made to NAPSA from his employer were higher than what was showing on his contributions thereby compensating for the missing months.

In re-examination, PW3 stated that the contract on page 14 of the plaintiffs' bundle of documents was not the actual contract they were told was at headquarters. The figures he was referred to by the

defendant's lawyer did not cover the entire period of three years nine months they had worked for.

John Shamangaba testified as the fourth plaintiffs' witness (PW4). He told the Court that like the other plaintiffs he worked for the defendant as a weed harvester along Kafue river for three years nine months, from June, 2010 to March, 2014. PW4 further testified that the plaintiffs did not sign any document but they were told there was a document governing their employment at the defendant's headquarters in Lusaka. According to him, the document the plaintiffs signed merely showed that 40 employees were recruited for the job. It was his evidence that according to government laws one could not be engaged as a casual worker for the duration the plaintiffs served the defendant, as such he urged the Court to consider them as permanent employees.

PW4 further asserted that the defendant never provided them with accommodation whenever they worked away from home and no night allowance was paid to them. It was his assertion that the salary they were getting as casual workers was little since they were permanent workers.

It was PW4's testimony that deductions meant for contributions to NAPSA by their employer were not all remitted because some months were missing on the statement obtained from NAPSA. PW4 stated that the plaintiffs worked for 45 months but the defendant only remitted their contributions to NAPSA for 14 or 25 months.

PW4 summed up his testimony by asserting that according to the law, a person could not work for three years nine months without being given reasons for termination of their employment.

PW4 was not cross-examined and this marked the close of the plaintiffs' case.

The defendant called two witness in aid of their defence hereinafter referred to as DW 1 and DW2.

DW1 was **Kasalwe** Kampamba an Assistant Accountant at Kafue Gorge Power Station. He told the Court that he had worked for the defendant company for seven years and he was responsible for paying the plaintiffs their monthly wages. DWI further told the Court that the plaintiffs' wages were calculated at an hourly rate. He stated that at page 31 of the defendant's bundle of documents was a pay schedule for the plaintiffs and according to him, there were no outstanding allowances due to the plaintiffs.

It was DW 1's testimony that the Plaintiffs were entitled to leave pay which they were paid. It was also his evidence that remissions to NAPSA were made and in some instances the defendant delayed in making payments and was penalized for that. DWI testified that at pages 93 and 94 of the defendant's bundle of documents were receipts issued by NAPSA to ZESCO which showed that penalties were paid for late remissions. According to him, Page 73 of the

plaintiffs' bundle of documents showed the NAPSA statement for Amos Mwaula. It revealed that the amount paid by the employee and employer were equal.

It was DW 1's evidence that in November, 2013, the defendant made a payment more than what should have been remitted to NAPSA which covered for the months of July and August, 2013. It was also his testimony that in December, 2013 the defendant made an over payment of K245.64 covering the outstanding balance of K64.42.

The witness narrated that the evidence he presented showed that remittances were made to NAPSA but late and the defendant was penalized for that. According to him, page 73 of the plaintiffs' bundle of documents, showed instances when the defendant made higher remittances to cover for months when payments were not submitted to NAPSA. In sum, it was his evidence that the differences in the amounts remitted to NAPSA between the employer and employee were reconcilable.

During cross-examination, DWI told the court that he was not among the people who recruited the plaintiffs because he was an accountant. When asked about remittances of contributions to NAPSA, it was his testimony that the figures shown in the table presented to Court were a sample and they demonstrated that remittances were made. He was however quick to point out that the figures did not refer to the entire period of employment of the plaintiffs.

When asked about payment of allowances to the plaintiffs, DW I stated that he was not aware of any other allowances the plaintiffs were entitled to other than those stipulated in their contracts of employment.

When further asked about the period the plaintiffs had worked for the defendant, it was DW 1's response that he was not aware of the period the plaintiffs worked for the defendant. DWI also stated that he was not aware of the alleged permanent contract signed between the plaintiffs and the defendant.

In sum, DWI reiterated that the plaintiffs' dues were correctly calculated.

DWI was not re-examined.

Judith **Nalwenga** Ntungo a Human Resource Manager under Generation Directorate testified as DW2. It was her evidence that she had worked for the defendant for 23 years. Her job involved recruitment, disciplining employees and ensuring that a cordial working atmosphere prevailed at work.

It was her further evidence that the plaintiffs were employed as seasonal casual workers to harvest weed at Kafue Gorge. She narrated that the document at page 12 of the plaintiffs' bundle of documents was a record of the oral contract of employment of the

first plaintiff which was reduced in writing. The contract according to her was for the duration of one month and the wages were calculated at an hourly rate but for convenience the wages were paid per month.

It was DW2's evidence that all harvesters had similar contracts. As years went by, the contracts were revised when the casual workers had better conditions of service as shown on page 27 of the plaintiffs' bundle of documents. She stated that the new contract showed that, the wage was increased from K1.40 to K3.65 per hour. The casuals were also entitled to two leave days per month and 40% housing allowance. The duration of the contract was maintained at one month throughout the plaintiffs' casual employment.

DW2 stated that transport was provided to move the plaintiffs to the site where weeds were to be removed. She further stated that the plaintiffs were not entitled to subsistence allowance because their contracts did not provide for that.

During cross-examination, DW2 told the Court that there were two groups of people engaged at two different times and she would not know what the officer who engaged the plaintiffs said with regard to their contracts. She testified that the revised conditions were reduced into a contract and the plaintiffs agreed to the terms of contract by appending their signatures.

When asked whether she was aware of the existence of the plaintiffs' permanent contracts of employment at ZESCO headquarters in

Lusaka, DW2 responded that she was not aware that the plaintiffs were informed that their permanent contracts were at ZESCO headquarters.

When asked where the plaintiffs were working from, DW2 stated that they were working from within the boundaries of Kafue Gorge but along the river and that she knew where a place called Muyangana was situated. According to her, Muyangana was situated at Kafue bridge not near Kafue Gorge.

It was DW2's testimony that she was not physically present when the plaintiffs were discharging their duties but the Human Resource Personnel at Kafue Gorge would keep her informed of the happenings on the ground.

When asked whether food was provided to the casual workers, DW2 responded in the affirmative. She was however quick to assert that food was provided to the casual workers on humanitarian grounds and she was not aware that the casual workers were fending for their own food.

When asked whether she was aware that the plaintiffs worked for three years nine months for the defendant, her response was in the negative.

In re-examination, DW2 told the Court that casual employees were engaged on a monthly basis and each time they were engaged, they

would sign a new contract. It was her evidence that the contracts the casual employees signed emanated from headquarters.

It was DW2's assertion that there was no policy at the defendant company that casual workers would be employed on a permanent basis because the nature of their work was seasonal. It was her final assertion that probation was not applicable to casual employees but to permanent employees.

At the close of the case, counsel for both parties filed written submissions for which I am indebted.

Counsel for the plaintiffs Mr M.P Muyawala, submitted that the defendant engaged the plaintiffs on a job which they knew could not be done within a short period. Therefore, it was inconceivable that 40 plaintiffs could have finished weed harvesting within a period of one week as purported by the presentation of the contract for casual workers. Mr Muyawala contended that it was with full knowledge of the defendant that the plaintiffs worked for a period of three years and nine months. By law, it was submitted that the plaintiffs became permanent and pensionable employees who were lawfully paid monthly salaries. To support this assertion, counsel cited the provisions of *Section 3 paragraph 2 of the Employment Act.*

Counsel further submitted that under the provisions of the Law of *Employment Act,* since the plaintiffs worked away from their homes for a number of nights as indicated in the statement of claim, they

were entitled to night allowances. Mr Muyawala urged the Court to order the defendant to pay the sum of K 648,000 owed in allowances.

Counsel for the plaintiffs went on to submit that contributions to NAPSA were a mandatory obligation by the defendant in accordance with the *NAPSA Pension Scheme Act.* Therefore, the Court was urged to order the defendant to pay the contributions that were not made as the records showed that out of 45 months, only five months contributions were remitted.

With regard to the issue of underpayment, counsel submitted that the 40 plaintiffs worked for three years and nine months by virtue of which they became permanent and pensionable employees. Mr Muyawala argued that the plaintiffs could therefore not be paid what was initially agreed because over the period indicated herein their salaries would have progressively increased. Thus, the claim to have their salaries worked upwards. On this premise, the Court was implored to order the defendant to pay all under payments. The Court was also urged to award costs of this action in favour of the plaintiffs.

In his final submission, Mr Muyawala asserted that in *Section 3 of the* Employment Act a "casual employee" is defined as *any employee the terms of whose employment provide for his payment at the end of each day and who is engaged for a period of not more than six (6) months.*

It was therefore submitted that the plaintiffs having worked for three years nine months could not be described as casual workers.

In response, Counsel for the defendant, Mrs. N.0 Sikazwe and Ms. J Kunda submitted that the plaintiffs herein neither exhibited contracts nor conditions of service that clearly showed that they were entitled to the allowances being claimed for. Against this background it was argued that there was no basis for the court to award the claims for allowances, terminal benefits and any underpayment.

The attention of the Court was drawn to the case of Sam Amos Mumba vs Zambia Fisheries and Fish Marketing Corporation Limited'. It was submitted that in that case, the High Court held that where the parties have embodied the terms of contract into a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written document except on certain exceptions.

On the strength of this case, counsel asserted that the contracts of employment executed by the plaintiffs did not stipulate the allowances and pension benefits being claimed.

Further, counsel drew the attention of the Court to the case of Colgate Palmolive Zambia (Inc) vs Able Shemu Chuka and 10 Others[2] where the Supreme Court held that ***"the Learned trial Court erred in unilaterally introducing different conditions other than those agreed between the parties".***

Counsel also referred to the case of **Rosemary Ngorima and 10 Others vs Zambia Consolidated Coppermines**[3] which was cited with approval in the case of **ZESCO Limited v Richard Phiri and Other**[4] where the Supreme Court noted that:

> "it is trite law that in any employer/employee relationship the parties are bound by whatever terms and conditions they set out for **themselves".**

From the foregoing, counsel submitted that the holding in the above case meant that the parties were free to agree on whatever terms they wished to include in the contract that governed their relationship.

With regard to the plaintiffs' claim of being permanent and pensionable employees, counsel submitted that there was no evidence before Court to prove that the plaintiffs were permanent and pensionable. It was submitted that it was not in dispute that the plaintiffs were employed during the periods 2010, 2011 and 2013 as weed harvesters on a renewable contract of one month.

Counsel contended that *Section 3 paragraph 2 of the Employment Act* referred to by the plaintiffs had no provision that if one worked for a number of years then they would be considered permanent and pensionable employees. Counsel asserted that the section merely defined an employee which in the circumstances of this case was not in dispute.

Counsel further referred the Court to the case of Perry Siame and 27 Others v Zesco Limited'. Counsel submitted that though not binding on this court, the facts of that case were similar to the case before Court in that the plaintiffs in that case were employed on various contracts through a period of time. Their claim as in this case was that they were permanent and pensionable employees having worked for the defendant for a long period of time. The Industrial Relations Court held that on the basis of the facts and evidence they were employed on various contracts on different projects. Similarly, as in the case before Court, the plaintiffs were employed on various contracts with a provision for payment and termination among others.

With regard to National Pension Scheme Authority (NAPSA) remittances, it was counsels' submission that DW 1, (Mr Allan Kampamba) gave explanations on the alleged "missing months" or months that the defendant did not remit NAPSA contributions. The evidence of DWI outlined clearly how the missing months were accounted for in the subsequent remittances which evidence in chief was not challenged in cross examination.

Counsel for the defendant further submitted that reliance by the plaintiffs on the National Pension Scheme Authority Act chapter 256 of the laws of Zambia was misplaced for the reason that the defendant did not deny late remittances but that it had remitted all that was due for both the employee and the employer's portion.

In winding up his submission, counsel for the defendant referred the Court to the unreported case of **Kunda v Konkola Copper mines PIc**[6] wherein the Supreme Court held that, "he who alleges must prove the allegations. This principal is so elementary, the Court has had on a number of occasions have to remind litigants that it is their duty to prove their allegations."

From the foregoing, counsel asserted that, the plaintiffs failed to prove any of their claims and that on the strength of both documentary evidence and testimony of the defence witnesses, the court was called upon to find in favour of the defendant.

At the close of the defendant's submission, the plaintiffs filed a reply, which I must state I will no recite but will refer to when necessary.

From the evidence led before Court I have found as facts the following:-

It is common cause that the plaintiffs were employed by the defendant as seasonal casual workers on monthly contracts between the period October 2010 to March 2014.

It is also common cause that the plaintiffs' terms and conditions of employment were stipulated in their various record of oral contract of service that they executed with the defendant from time to time.

I find that by statutory requirement the plaintiffs were contributing members of the National Pension Scheme Authority.

I also find that during the course of the plaintiffs' engagement, the defendant hired canoes from Amos Mwaula, Chabwe Lameck, Chimbilwa Tackson, Chimowa Peter, Kalinda William, Ng'andwe Mweengwe, Shamangaba John and Justine Miselo.

It is common ground that by the schedules produced on page 12 to 30 of the defendant's bundle of documents payments towards the hire of canoes to the respective plaintiffs were duly made by the defendant.

Having stated my findings of fact and taking into account the submission by both parties, the main issues for the determination of this Court are twofold, namely;

1. Whether or not the plaintiffs' casual employment can be deemed permanent and pensionable by virtue of them having worked for a period of three years nine months.

2. Whether the High Court has power to award remedies provided for under the *Employment Act Chapter 268 of the laws of Zambia* as submitted on behalf of the plaintiffs.

As for the plaintiffs' claim to be deemed as permanent and pensionable employees, I must firmly assert that the clear construction of the plaintiffs' terms of employment is that they were

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occasionally engaged by the defendant as casual employees to harvest weed from the Kafue river. I must also hasten to state that even though the plaintiffs were retained to work for the defendant for the period June, 2010 to March, 2014 as claimed, it is apparent from their contracts for casual employment exhibited in the plaintiffs' bundle of documents that their duration of service was for one month and their reengagement could not in any way be constructed to entail continuity of service with the defendant.

The position of the law with regard to any contractual relationship is that parties are free to negotiate such terms and conditions as they wish and once having done so, these will bind them until there is a mutually agreed variation. I also wish to re-echo the sentiments of the Supreme Court in the case of Rosemary Ngorima and 10 Others v Zambia Consolidated Copper Mines which was reaffirmed in the case of ZESCO Limited v Richard Phiri and Other wherein it was stated that:

> **"it is trite law that in any employer/employee relationship the parties are bound by whatever terms and conditions they set out for themselves".**

Further, the learned Authors of **Chitty on Contract Vol 1 General Principles** rightly observed, on page 493 paragraph 772, on proof of terms that:

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> **"Where the agreement of the parties has been reduced to writing and the document containing the agreement has been signed by one or both of them, it is well established that the party signing will be bound by the terms of the agreement whether or not he has read them and whether or not he is ignorant of their precise legal effect."**

There is no doubt that the plaintiffs herein freely signed the various contracts for casual employment which stipulated the terms and conditions to govern the employment relations and I am satisfied that they fully comprehended the agreed written terms.

Further, I find the assertion by the plaintiffs that the defendant was in possession of their other one year contracts at their headquarters to be extraneous evidence that cannot be legitimately relied upon. In view of the foregoing, I therefore reject the plaintiff's plea to be deemed as permanent and pensionable workers as it is evident to me that the intentions of the parties in the contracts exhibited before Court were clearly and unequivocally expressed that the plaintiffs were casual employees employed for a duration of one month. It is my firm view that the fact that the plaintiffs' contracts were renewed several times did not override the express intentions of the parties.

In resolving the second issue as relates to the powers of the High Court general list to grant reliefs provided under the *Employment Act,* it is my immediate affirmation that the High Court general list is not clothed with any jurisdiction to award remedies under the said Act. I say so because the *Employment Act* in the definition section clearly names the Supreme Court and Industrial Relations Court division as the only Courts designated to deal with all matters incidental and

consequential to the Act. It is also worth of mention that the jurisdiction of the High Court as relates to employment matters is mainly premised on common law principles. Thus, it must be observed that unlike the Industrial Relations Court division which enjoys wider powers in employment matters, the jurisdiction of the High Court general list is only limited to the interpretation of the employment contract of the parties. I therefore hold that the spirited arguments by counsel for the plaintiffs in relation to the provisions of the Employment Act cannot be entertained as they were directed to the wrong Court.

I shall now move to consider the plaintiffs' claim for night allowances and underpayments as endorsed in the statement of claim. It is apparent from the evidence adduced on record that the parties' contract of casual employment stipulated that apart from the wages of K3.65 per hour which was payable at the end of the month, the other payment the plaintiffs were entitled to was housing allowance at 40%.

Fridman in his book; The Modern Law of Employment at page 389 states that, **"at common law the amount payable to an employee for his services is a matter of agreement between the parties. As long as the contract of employment was valid and legal, the rights of the parties were determined by the bargain they had made in their agreement".**

The clear implication of the afore position is that where there is a valid and legal agreement between two parties, it is not the duty of

Court to arbitrary introduce different conditions other than those agreed between the parties. I find it inconceivable for the plaintiffs to claim night allowances and other payments not provided for by their contracts. I must boldly assert that the plaintiffs' contention that they slept on the floor in small rooms and were bitten by mosquitoes when they worked from the various harbors, cannot be a basis for this Court to grant them night allowances. I entirely agree with the defendant's submission that this claim is baseless.

With regard to the claim of payment of contributions to NAPSA, counsel for the plaintiffs argued that there were lapses on the part of the defendant in remitting the same to the pension scheme. It was submitted that out of a total of 45 months worked by the plaintiffs, only contributions for five months were remitted by the defendant. Counsel for the defendant contended that though their client did not deny late remittances to the pension scheme, but the correct position was that all the outstanding dues were eventually remitted.

From the evidence on record, it is clear that indeed there were inconsistencies on the part of the defendant with regard to making remittances to NAPSA. It is further apparent that to atone for the inconsistencies which manifested in delayed remittances to NAPSA, there were certain months in which the defendant effected higher payments to NAPSA to cover for the months' the defendant did not effect payments. This fact I must state was supported by the testimony of PW3 and DW 1. During cross-examination PW3 conceded that there were months when the defendant made higher

payment to NAPSA. Furthermore, DW 1, testified that the defendant was charged and paid penalties to NAPSA for delayed payments and this is evinced by the documentary evidence produced at page 63 to 154 of the defendant's bundle of documents on record. Against this background, it is my firm view that the defendant made good of the payments for the delayed remittances to NAPSA in respect of both the plaintiffs and the defendant itself.

In sum, I find no merit in the plaintiffs' claims before Court and as such, the entire case is accordingly dismissed. It is further ordered that each party shall bear their own costs.

Dated at Lusaka this *31st* day of December, 2019

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M.CHANDA
JUDGE