

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



**BETWEEN:**

**LUKONDE CHOLA MFULA**

**AND**

**TAJ PAMODZI HOTEL LUSAKA**

**DEFENDANT**

***Before the Hon. Mr. Justice M.D. Bowa on 15<sup>th</sup> of April 2020***

*For the Plaintiff: Mrs. Mrs. M Mwenya legal aid Counsel Legal Aid Board*

*For the Defendant: Miss EL Sitali of Mulenga Mundashi Kasonde Legal Practitioners*

---

## **JUDGMENT**

---

### **Cases referred to:**

- 1. National Drug Company Limited and Zambia Privatization Agency v Mary Katongo SCZ Judgment no 79 of 2001*
- 2. Attorney General vs. Phiri and 10 Others SCZ (Appeal No 68 of 2009)*
- 3. Indo Zambia Bank Limited v Mushanlwa Muhanga (2009) ZR 49*
- 4. Khalid Mohammed v the Attorney General 1982) ZR 176*
- 5. Wilson Masauso Zulu vs. Avondale Housing Project Ltd (1982) ZR 172.*
- 6. Galunia Farms Limited v National Milling Company and National Milling Corporation Ltd (2004) ZR*

The Plaintiff Mr. Lukonde Chola Mfula commenced this action by writ of summons and statement of claim dated 3<sup>rd</sup> April 2018 seeking the following reliefs.

- i. An order for payment of gratuity on the contract of services for the period served by the Plaintiff*
- ii. An order for payment of his months' salary including two weeks' salary for the month of September, 2012.*
- iii. An order for payment of unpaid allowances due to the Plaintiff in the contract of employment.*
- iv. An order for payment of leave days and leave allowance.*
- v. An order for payment of \$200,000.00 due as commission on the KLM contract he negotiated on behalf of the Defendant.*
- vi. Damages for mental anguish and inconvenience*
- vii. Any other reliefs the court may deem fit.*
- viii. Interest*
- ix. Costs*

The Defendant on its part filed a defence and counter claim dated 17<sup>th</sup> July 2018. The Defendant denied the claims and averred that the Plaintiff resigned without giving any notice thus in breach of the

employment contract. Further that the hotel did not owe the Plaintiff any money at all or his claim to 20% commission on the KLM agreement that he concluded on behalf of the Defendant. It was further claimed that gratuity was only payable if the Plaintiff successfully completed his contract which he did not.

In its counterclaim the Defendant prays for:

- (i) *Damages for breach of the contract of employment*
- (ii) *An order for payment of the sum of K5, 000,000 (unrebased) owing to the Defendant from the Plaintiff.*
- (iii) *An order for payment of the sum of K3, 732.794 as monies due from the Plaintiff in respect of services offered by the Defendant.*
- (iv) *An order for repayment of the sum of K642,069.80 (unrebased) in respect of the days the Plaintiff did not work in the months of September 2013 despite being paid for the same.*
- (v) *An order for repayment of the sum of K1250,000 (unrebased) which was paid to the Plaintiff as leave travel allowance;*

- (vi) An order for repayment of the sum of K976,811.28 (unrebased) as monies paid to the Plaintiff in advance as education allowance for the month of September 2012;*
- (vii) Interest on all sums found to be due to the Defendant*
- (viii) Costs*
- (ix) Any other relief the court may deem fit.*

The Plaintiff filed a defence to the counterclaim denying the claims and put the Defendant to strict proof:

At trial, the Plaintiff gave evidence as PW1. He testified that he started work in the Defendant hotel as a sales and marketing manager on the 4<sup>th</sup> of February 2011. He was responsible for the sales office in Zambia and reporting to the corporate office in Mumbai India. He signed his contract of employment on the 4<sup>th</sup> of February 2011 on page 1 of the Defendant's bundles of documents.

By the said contract, he was entitled to a basic pay, fuel allowance, airtime allowance, an education allowance payable quarterly, housing allowance and leave pay. He added that he was also entitled to 25% gratuity and a maximum 2 months basic salary bonus payable after payment of gratuity. Furthermore, the Plaintiff

contended that he was also entitled to 20% for achieving the key result area targets. In addition, that he was entitled to a uniform allowance which was paid annually.

In October 2012, the Plaintiff gave 1 months' notice of his intention to leave the Defendant's employ. He testified that he was not paid any money at all after he subsequently left employment. He referred the court to page 10 of his bundle of documents being a document he claimed the Defendant set out what it asserted was due to him prepared by the Human Resources Department. He dismissed it as not being an accurate document.

He stated for example that the months in service indicated he had worked for 1 year 6 months when it is supposed to be 1 year 10 months. Further, that the document purports that he was not eligible to get gratuity as per contract. He however insisted that this should have been paid on a prorata basis. He testified that other persons that had left employment earlier than him were being paid in this way.

Moving on, the Plaintiff contended that in so far as accrued leave days was concerned, the document states he was entitled to 45

days which he acknowledged was correct but lamented that he was not paid the said leave days. He testified further that he was not paid his utility allowance. In addition that the performance bonus was also not paid.

The Plaintiff explained that from 2011-2012, he achieved his targets and brought business for the hotel from KLM airlines which was worth 1 million United States dollars. A two year contract was sourced with the airline to use hotel facilities. Going by his contract, the Plaintiff was supposed to receive 20% weighted average on the 1 million dollars. He testified further that the contract with KLM did run and was still subsisting at the time that he left employment.

The Plaintiff testified further that in spite of the K335, 000 depicted in the gratuity document as being his paid utility allowance, he did not receive this money nor did he receive the K2601.04 indicated as leave pay on the document. He added that he was not paid the K2, 784,375 for the performance bonus for 2011-2012. Further that the bonus for the 1000,000 US dollars KLM contract was not even reflected on the document. The Plaintiff went on to testify that

according to the document the tax deducted was K1267, 994.00 and he was to receive K975,441.9 He denied receiving this money.

There were also some loans that were deductible and he settled the amount of K4, 745,972.16. He therefore did not know where the staff loan of K5000,000 indicated on the gratuity document came from. He further expressed ignorance how the staff recovery bill of K3, 732,794.01 came about.

The Plaintiff testified further that he resigned on the 30<sup>th</sup> October 2012 so it was not true that he received 3 days salary paid in excess in September 2012. He clarified that he gave 1 months' notice though the contract indicated it had to be 3 months. He further informed the court that there was also a deduction on education allowance purportedly paid to him in advance amounting to K976, 811.28. He denied receiving this money. He added that in the last line of the Defendant's claims, it was asserted that he received K1250, 000 as leave travel allowance. He denied ever being paid this amount as he never went on leave.

He added that the total deductions show an amount of K36, 585,183.17 which was not correct. He insisted he was not paid the

amounts claimed by the Defendant and that he did not receive what he is claiming as per conditions of service as well as his bonus on the KLM contract.

He referred the court to page 18 of his bundle of documents being what he perceives he should have been paid. In particular he seeks payment of gratuity on the contract for the period served being 4<sup>th</sup> February 2011 to 30<sup>th</sup> October 2012. He argued that according to the law, the Defendant was still supposed to pay him on a prorata basis. He therefore prayed for a 2 months' salary from September to October 2012.

His next claim was for unpaid allowances that included education allowance, airtime, fuel allowance and 45 accrued leave days. He also sought the 20% for the KRA which translated into 200,000 US dollars. The Plaintiff testified further that he was also claiming damages for the stress that he had been subjected to financially. He contended that he could have used the money for educational purposes as well as his own development. He also prayed for interest, costs and any other relief the court may deem fit.



When cross examined and referred to his contract of employment on page 1-5 of the Defendant's bundle of documents, the Plaintiff acknowledged that the contract indicated he was to receive 25% of his basic pay as gratuity, upon successful completion of the contract. He testified that his contract was 2 years and that he worked for 1 year 9 months. He was referred to his resignation letter on page 9 of the Defendant's bundle. He accepted that the letter indicated that his resignation was with immediate effect and that he had worked for 1 year 9 months.

He further accepted that page 4 of his contract indicates that salaries were to be paid on the last day of the month and that in accordance with the account statement on page 26 of the Defendants bundle, he received his pay on 29<sup>th</sup> August 2012. He insisted he was not paid for the month of September 2012 in spite of the copy of his September pay slip on page 27 of the Defendants bundle. In fact that he did not even receive the pay slip.

Cross-examined further, the Plaintiff was referred to page 2 of his contract. This he admitted, details the allowances he was to receive. Accordingly, that the education allowance was paid termly. He

agreed that his pay slip on page 25 of the Defendant's bundle shows the education allowance. He accepted that he was still working for the hotel in August and according to the pay slip he received both his allowance and salary though he contended that he did not see the pay slip. He maintained he did not receive the leave travel allowance.

He accepted that his claim for the 20% is based on what he described as KRA bonus. He agreed that the KRA provision is not in the contract of employment or exhibited terms and conditions of service. He however referred the court to a letter from the Defendant on page 22 of the Plaintiff's bundle of documents which in paragraph 5 speaks about the existence of the KRA on individual contracts. He maintained that the bonus and KRA are inter related.

Asked what the basis of his claim for payment on a pro rata basis was, the Plaintiff stated that he placed reliance on the Constitution of the Republic of Zambia. He accepted he did not complete the 2 year contract and that the conditions state gratuity was payable after 2 years.

In re-examination the Plaintiff testified that at the beginning of the year each head of department was given targets for revenue to meet in line with the year's sales strategy. Failure to meet the target meant no KRA was payable. However once met, the money would be paid in addition to the bonus. The Plaintiff clarified further that the existence of the KRA had been acknowledged in the letter but the Defendant's twisted their response to avoid paying the Plaintiff.

He explained further that the KRA is not in the contract but it is related to the bonus hence part of the package. He insisted that the Republican Constitution states that gratuity payment must be paid on a prorata basis. He further maintained that the KRA provision sits on a system which is encrypted hence he could not take it out explaining why he didn't have the document before court.

He further maintained that he was not aware that he owed the K5000,000 claimed in the gratuity document at page 10 of the Plaintiff's bundle of documents. He further insisted that he was not paid the August education allowance in spite of it showing on his pay slip. He insisted that he actually stopped work in October 2012 as he had to do handovers.

That was the case for the Plaintiff.

In its defence and in prosecuting its counterclaim, the Defendant called Clive Nyambe the Human Resources Manager as its witness. Mr. Nyambe testified that he had been with the Hotel for about a month prior to his testimony. He explained that he had sight of the documents relating to the present matter as his predecessor left the documents with him being new office holder.

He testified that there is a contract of employment between the Plaintiff and Defendant in which he(the Plaintiff) was confirmed on the 7<sup>th</sup> November 2011. The Plaintiff resigned as per resignation letter in the Defendant's bundle without giving notice. According to the contract, he was supposed to give 3 months' notice hence he did not satisfy this condition.

The witness explained that KRA means key result area. It is a formula used to arrive at paying a bonus paid once in a year. He explained further that there are standard requirements that each individual employee is supposed to meet in order for a bonus to be payable. Where the target is not met the employee does not get the bonus. The witness testified further that Taj Pamodzi hotel does not

pay any other bonus except for what is stated in the contract. In this regard that clause 5 on page 22 provides that the bonus is paid once every year and does not relate to a single performance or achievement.

He referred the court to the pay slips included in the Defendant's bundle of documents from pages 15 to 27. He testified that the August 2011 pay slip shows recoveries of K470, 000 with a carried forward amount of K1880, 000. The month of May 2012 shows that the Plaintiff had a staff loan of K2, 500,000 and a recovery of K500,000 was made. A total of K2000,000 was carried forward. In June 2012 on page 23 shows the total indebtedness increased to K7,000,000. K500,000 was recovered and K6,500,000 was carried forward.

According to DW1 page 27 of the Defendant's bundle confirms that as at the date of resignation, the amount owing on the staff loan was K5,500,000. K500,000 was deducted leaving a balance of K5,000,000. The court was informed that the September pay slip being the last pay indicates the full pay. The Plaintiff owed K5,000,000 and a salary advance of K2,000,000 which was

recovered. The pay slip further shows that the Plaintiff owed Invest Trust Bank a loan amounting to K1,186,493.040.

Utilities advanced amounting to K335,000.00 was recovered. The pay slip further shows that the Plaintiff had a staff bill of K500,000. Other deductions were statutory. DW1 testified further that leave travel allowance is normally paid when an employee is going on leave once a year. According to the contract, there is a fixed amount plus the basic pay of about K3,851,043.00.

He clarified further that page 25 of the Defendants terms and conditions of service for non-unionized employees states that education allowance is payable 3 times a year with a financial year commencing in April. He explained that the August pay slip shows that the allowance of K1,953,622.560 was paid for the 2<sup>nd</sup> quarter. He added that the Plaintiff only worked for 1 month after receipt of this money. The money was however given to him on the assumption that he would see out the rest of that quarter.

The witness referred me to the document prepared by the hotel when an employee is leaving employment at pages 29 and 10 of the Defendant's and Plaintiff's bundles of documents respectively. He

testified that the document shows that the Plaintiff was paid his performance bonus of K2,764,375. It further confirms the education allowance was paid in advance and that a leave travel allowance was advanced to him in the amount of K3851,043. This allowance, it was explained, is only payable when a person sees out his contract. The Defendant therefore recovered the sum of K1,250,000 as he had not completed the 24 months contract. Lastly that at the time the Plaintiff was leaving he had a loan balance of K5000,000 as indicated in the September 2012 pay slip.

When cross examined, DW1 testified that he had worked for the Defendant for a year and 3 months. He would not therefore know how many HR managers had been employed between the Plaintiff's departure and his arrival. He testified that he would further not know if the Plaintiff did not get his last pay slip as claimed. He accepted that he would not know whether the loans were disbursed as cash or transmitted to the account at the time.

He acknowledged that the June 2012 pay slip does not show that the Plaintiff received a K5,000,000 loan. He further accepted that since he was not in employment he would not know if the Plaintiff

was called back to work in October 2012 as claimed. He maintained that the Plaintiff was paid K213,925 on the 28<sup>th</sup> September 2012 a day after he resigned. He accepted he had not brought any document to prove when the financial year in the Defendant hotel starts but insisted that his earlier statement on the matter was the standard that he found in the system when he joined and has been in existence before he joined.

He testified further that the termination clause 16 does not say anything about gratuity. He maintained that KRA is a formula that is used to arrive at paying performance bonus. It is not a separate allowance. He admitted he did not know what the formula was at the time.

He was not re-examined and that was the close of the case for the Defendant.

I have carefully considered the evidence before me and the party's respective positions. The relationship between the Plaintiff and Defendant was undisputedly that of master and servant premised on a contract of employment. Being a contract, the rights of the



parties and claims to breaches must be anchored on the terms agreed by the parties themselves.

In the matter of **National Drug Company Limited and Zambia Privatization Agency v Mary Katongo**<sup>1</sup> the Supreme Court observed that:

***“It is trite that once the parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contract and that the rule of the court is to give efficiency to the contract when one party has breached it by respecting, upholding and enforcing the contract.”***

In the case of **Attorney General vs. Phiri and 10 Others**<sup>2</sup> the Supreme Court commenting on the approach to be taken in such cases observed:

***“It is trite that employment relationships and the payment of salaries, dues benefits and allowances are anchored in contract, with clear terms governing such contracts. Where the terms of the contract are not clear, the court has power to ascertain the contention of the parties and give effect of the contract by enforcing the provisions of the contract when called upon to do so by a dissatisfied party through litigation...Where the contract is deemed repudiated, the court must decide on the rights***

*of the parties including what the employee must be awarded as a result of unilateral repudiation of a contract of employment.”*

In the case of *Indo Zambia Bank Limited v Mushanlwa Muhanga*<sup>3</sup> referred to me by the Defendant the Supreme Court held that the general principle to be applied when interpreting contracts and other legal instruments is that the starting point is the document itself. The court further held that it is assumed that parties to a legal instrument have expressed themselves through the natural meaning of the words. The document which defined the relationship between the parties in this case was primarily the contract of employment at page 1 of the Defendants bundle of documents which spelt at his conditions of service.

That said, I proceed to consider the parties respective claims.

### ***1. The Plaintiffs claim***

The Plaintiff claims specific breaches of his contract of employment. It is not in dispute that he signed a contract of employment. In the first of his claims, the Plaintiff seeks payment of gratuity on the contract for the period served in the contract. Evidence on record is that the Plaintiff's contract was a period of 2 years. His resignation

letter dated 27<sup>th</sup> of September 2012 indicated his resignation was with immediate effect. This meant that at the time of his resignation he had served for a period of 1 year and 7 months.

The contract of employment makes clear that 25% gratuity on basic pay was payable upon successful completion of the contract. The Plaintiff accepts he did not complete the contract though attempts to suggest he carried on work post resignation and up to the month end of October 2012 to do handovers. There is no evidence to support this position. He is therefore tied to the date he himself endorsed on the resignation letter which I find was the 27<sup>th</sup> September 2012 which was 4 months shy from completion of his contract.

He further tries to make a case that he should have been paid his gratuity on a prorata basis. Asked what the basis for this claim was in cross-examination, the Plaintiff stated his claim was anchored on provisions in the Constitution of the Republic of Zambia. However I note and find as a fact that there is no provision in the contract or elsewhere that supports his claim for the payment of gratuity on a prorata basis. The Constitution of Zambia referred to does not

impose on employers the liability to pay gratuity on a prorata basis as seemed to be suggested by the Plaintiff. No reference was made to any specific provision in the Constitution through evidence or submissions to support that claim. I would accordingly dismiss this claim.

In his second claim the Plaintiff asks for payment of a month's salary including 2 weeks' pay for the month of September 2012. Again in this case no evidence was led to support the basis of this claim. He resigned without notice which by the contract of employment meant he forfeited three month's salary in lieu of notice. He further did not lead any evidence on the 2 weeks' pay he claims for the month of September 2012. The termination clause in the contract of employment reads as follows.

*"16. TERMINATION AFTER CONFIRMATION*

*After confirmation, your services can be terminated by giving three months' notice on either side or three months' salary in lieu thereof"*

The Plaintiff was clearly in breach of the notice requirement.

In the 3<sup>rd</sup> claim the Plaintiff seeks payment of unpaid allowances due to him as per contract of employment. In his evidence, the Plaintiff asserted he was not paid his leave travel pay and leave days. Evidence before me as led by the Defendant include a pay slip for the month of August 2012 which confirm that the Plaintiff was paid a leave allowance and education allowance in advance. The Plaintiffs only response when confronted with this evidence was that he did not receive the allowances nor did he see the pay slip. This can hardly amount to proving that he did not receive the money. It remains the burden of the Plaintiff to prove his or her case. As succinctly put by the Supreme Court in the case of ***Khalid Muhammad vs Attorney General***

***“A Plaintiff must prove his case and if he fails to do so the mere failure of the opponents defence does not entitle him to judgment.”***

In the case of **Wilson Masauso Zulu vs. Avondale Housing Project Ltd**<sup>5</sup>Ngulube DCJ as he was stated that:

***“I think it is acceptable that where a Plaintiff alleges that he has been wrongfully or unfairly dismissed as indeed in any other case where he makes any allegations, it is generally for him to prove these allegations***

***a Plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent's case."***

The Supreme Court reaffirmed this position in the latter case of **Galunia Farms Limited v National Milling Company and National Milling Corporation Ltd**<sup>6</sup> and concluded:

***"We re-affirm that position. The burden to prove any allegation is always on the one who alleges."***

A refusal of the existence of a state of being does not and cannot amount to proof that it does exist. The Plaintiff needed to show that he was not paid. This he did not and I am prepared to find that the allowances were paid based on the documentary evidence by way of the August 2012 pay slip before me.

The Plaintiff proceeds in his next claim to pray for the payment of \$200,000 as commission on a KLM contract that he negotiated on behalf of the Defendant. In his evidence the Plaintiff acknowledges that there is no reference to the payment of this commission in his contract of employment nor did he present any document in support of the KRA based commissions that he claims were payable and due to him. He in fact suggests the KRA sat on the Defendant's

system that was encrypted which was why he did not have a document in the bundles to support his position.

The Defendant's only witness did in fairness, acknowledge that there was a bonus paid based on key result area but that this was payable once a year and not evaluated on an individual account brought in. He further went on to testify that the Plaintiff was paid performance based bonus amounting to K2,764,375. The Plaintiff did not present any evidence before the court to justify his claim that he was entitled to 20% of business brought in on the KLM account which he pegged at US\$ 200,000 this claim invariably fails as well.

In his 6<sup>th</sup> claim, the Plaintiff pleads for damages for mental anguish and inconvenience. No evidence of this was led at trial and as he has not established any of the other claims I would dismiss his prayer for damages as well. In sum and for the avoidance of doubt the Plaintiff's claims fail in toto.

***The Defendants counter claim***

The Defendants counter claim is premised on payments the hotel asserts that it made to the Plaintiff on the assumption that he would see out the rest of his contract which he did not. Further that he received various loans and monetary benefit that to date remains owing to the Defendant. The last pay slip confirms that the Plaintiff owes the Defendant K5, 000 000 (unrebased) in a staff loan.

There was no evidence led to support the claim for repayment of the sum of K642,009.80 or how that amount was arrived. I further find no evidence to support the claim for the payment of K3732.794 as staff utilities allegedly offered to the Plaintiff. No evidence was led on what those facilities were and how that sum was arrived at. The requirement for a claimant to prove his case and authorities cited above apply in equal measure to the Defendant and its counterclaim in this case. The claims for K642,009.80 and K3,732,794 are needless to say, dismissed.

The gratuity document on record indicates that K1250,000 was a deductible amount from the money paid as leave travel allowance. K976,811.8 was also paid as education allowance payable in advance for September to December 2012. I am satisfied that these



sums were paid out on the assumption that the Plaintiff would serve the rest of his contract. The Defendant is thus justified to demand the repayment as it is evident there was a negative balance after computation of the Plaintiffs dues against his outstanding obligations.

It is well appreciated that the witness called on behalf of the Plaintiff was not in the Defendant's employment at the time these payments were being made so he testified in his capacity of custodian of the documents left to him by his predecessor as head of the HR department. The Plaintiffs only evidence in defence is as I have stated earlier a bare denial that he never received the pay slip showing the payments or the money in issue.

I would in the premises find for the Defendant on the counterclaim only in respect for the payment of K5, 000, 000, K1, 250,000 and K976, 811.28 set out in the counter claim with interest at average short term deposit rate from date of writ till date of judgment and thereafter at commercial bank lending rate from date of judgment till date of final payment. I make no order on the claim for damages for breach of contract as claimed as no proof of damage was led.

Costs will follow the event to be taxed in default of agreement and as applicable to a legal aided litigant.

Dated at Lusaka this <sup>15<sup>th</sup></sup>.....day of <sup>April</sup>..... 2020.



---

**JUDGE.**

