

IN THE HIGH COURT FOR ZAMBIA

2018/HP/0830

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

CLEMENT TEMBO

PLAINTIFF

AND

**SAFETY ZONE SECURITY SERVICES
LIMITED**

DEFENDANT

***BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO,
IN OPEN COURT, ON 8TH JULY, 2020.***

For the Plaintiff: In Person

*For the Defendants: Ms. J. Mulenga - Messrs. Isaac and
Partners.*

JUDGMENT

CASES REFERRED TO:

1. *Zambia Breweries vs. David Chibwe SCZ No. 41/2017;*
2. *Mazoka and Others vs. Mwanawasa and Others (2005) Z.R. 138;*
3. *Phillip Mhango vs. Dorothy Ngulube and others (1983) Z.R. 61 (S.C.);*
4. *Zambia State Insurance Corporation Limited vs. Zambia Bottlers Pension Scheme and 4 others - Appeal No. 181/2009; and*
5. *Chaplin vs. Hicks (1911) KB 786 (CA).*

OTHER WORKS REFERRED TO:

1. *Phipson on Evidence, Seventeenth Edition, (Thomson Reuters Legal Limited, 2010).*

1 BACKGROUND



1.1 By a Writ of Summons and Statement of Claim filed on 30th April, 2018, the Plaintiff seeks the following reliefs:

- 1) *The sum of K201,620.00 being in respect of outstanding salary arrears due from the Defendant to the Plaintiff for the period from 2013 to April 2018 relating to services rendered by the Plaintiff under the Plaintiff's contract of employment with the Defendant;*
- 2) *Interest on the sum found to be due; and*
- 3) *Costs.*

1.2 It should be noted that upon application for Judgment on Admission by the Plaintiff, following the Defendant's admission in its Defence that it owed the Plaintiff the sum of K71,550.00 in salary arrears, a Judgment on Admission was entered on 11th September, 2018, in respect of the said admitted amount. Therefore, this Judgment is in respect of the balance due, if any, after the deduction of the admitted sum.

2 PLEADINGS

2.1 According to the Statement of Claim, the Plaintiff avers that in or about June, 2009, he was engaged by the Defendant in the capacity of General Manager at the agreed monthly salary of K5,500.00 to be paid in arrears on or before the last day of each month. The Plaintiff further avers that during the period of his employment, the Defendant failed and continues to fail to meet its obligations of paying the Plaintiff's salary when it has fallen due or at all, despite several written and verbal requests and demands. The Plaintiff also

avers that as at April 30, 2018, the Defendant was in salary arrears of K201,620.00.

- 2.2 In its Defence filed on 26th June, 2018, the Defendant denied that the Plaintiff was employed in the terms as aforesaid and further averred that it was unable to pay the Plaintiff his salary because it was not generating any income as a consequence of the Plaintiff's inability to meet his responsibilities as General Manager. Further, the Defendant denied that it owed the Plaintiff the sum of K201,620.00 and stated that the salary arrears only amounted to approximately K71,550.00. The Defendant also denied the Plaintiff's assertions that he had made requests and demands for payment of his salary arrears and that as a consequence the Plaintiff has suffered loss and damage.
- 2.3 In his Reply, filed on 2nd August, 2018, the Plaintiff averred that he fulfilled all his responsibilities as General Manager at all times.

3 EVIDENCE AT TRIAL

- 3.1 At trial, the Plaintiff, Clement Tembo, testified as PW1. His testimony was that he was employed by the Defendant in 2009, through a verbal contract between himself and Defendant's Shareholder Mr. Katamba Mwansa, until his contract came to an end in June, 2018. According to PW1, the initial terms of the contract were that he would only be put on a salary when the Defendant Company had achieved a strong financial base as it was a small Company at the time.

- 3.2 PW1 further testified when the Defendant Company landed a contract with ZESCO, it was agreed that his salary would be K5,500.00 per month effective October, 2012. That from January 2013 to April 2013, the company was remitting his salary into his personal account at First National Bank. Shortly afterwards, he stopped receiving his salary consistently and made enquiries from Mr. Mwansa, concerning his salary but did not receive a satisfactory response.
- 3.3 Furthermore, PW1 stated that he requested Mr. Mwansa to draw up a formal contract of employment as the Defendant Company was now stable. A two year term formal contract was drawn in 2016, which is shown at page 2 of the Plaintiff's Bundle of Documents. PW1 also testified that it is the salary payment inconsistencies that led him to commence this action as he wants the Court's intervention for the payment of K201,620.00, which has not been paid to him to date.
- 3.4 During Cross Examination, PW1 testified that he had contributed to the growth of the Defendant Company and referred to pages 8 to 10 of the Plaintiff's Bundle of Documents, which contains information about where the company was at the time that he joined it to where it is now. When shown page 21 of the Defendant's Bundle of Documents, PW1 testified that it raised the issue of his non-performance but stated that it did not confirm that he did not improve the financial status of

the company. He further testified that the allegation of his *laissez faire* attitude towards work shown on page 24 of the Defendant's Bundle of Documents, was not confirmed by a performance review.

- 3.5 When referred to page 27 of the Defendant's Bundle of Documents, which contained the letter suspending the Plaintiff with immediate effect, PW1 testified that it was not his unsatisfactory work performance that led to his suspension but that it was a result of the Plaintiff approaching Mr. Mwansa concerning complaints of salary arrears from the employees of the Defendant Company stationed at Nkana Water and Sewerage Company Limited. According to PW1, doing that incensed Mr. Mwansa and that as a consequence the said suspension letter was written to him.
- 3.6 PW1 referred to page 13 of the Plaintiff's Bundle of Documents, which shows a payment schedule with inconsistencies. He testified that he had not fully been paid his salaries that were due before 2016 and that he only got his salary consistently from January to April, 2013.
- 3.7 In Re-examination, PW1 testified that the poor performance referred to was actually attributed to Mr. Mwansa's office, as he was responsible for the disbursements of finances. That he had reminded Mr. Mwansa that it was the lack of payment of salaries to the Defendant's employees that was questioned by the customers and not the service provision.

- 3.8 The Plaintiff did not call any other witnesses and that marked the close of the Plaintiff's case.
- 3.9 Mr. Katamba Mwansa, the Chairman and Chief Executive Officer (CEO) of the Defendant Company testified as DW1. His testimony was that the Plaintiff was employed as General Manager in 2009 until his contract expired in 2018. As General Manager, he was responsible for day to day management, including Planning, Organising, Directing, Budgeting and other Management functions, while DW1 being the CEO, was involved in getting the big contracts and that the growth of the company can be attributed to the input made by DW1.
- 3.10 DW1 further testified that the Plaintiff was entitled to K5,500.00 on a monthly basis and that these funds were based on payments from clients to the Defendant Company. He referred to pages 1, 3 and 5 to 19 of the Defendant's Bundle of Documents which contained the Plaintiff's Account Statement from First National Bank, that highlighted portions indicating the payments made to the Plaintiff by the Defendant. That from 2012 to 2015, the Defendant Company had sufficient funds to run its operations. He referred to page 20 of the Defendant's Bundle of Document's containing a letter dated 14th November, 2016, that he wrote to the Plaintiff and the Management Team. According to DW1, the said letter registered his concerns over their failure to bring in revenue to cover staff salaries and

the general costs of operations, yet they expected to be paid.

3.11 Furthermore, DW1 testified that he wrote to the Plaintiff again on 1st September, 2017, highlighting the Plaintiff's various weaknesses and his refusal to be evaluated using the Management Performance System that the Defendant Company had introduced. He referred to page 21 of the Defendant's Bundle of Documents containing the said letter. That he wrote a final warning to the Plaintiff on 7th February, 2017, as he had reported to work drunk and that this had become a habit. DW1 referred to page 25 of the Defendant's Bundle of Document's containing a copy of the said letter.

3.12 DW1 stated that on 24th November, 2017, following a report that a client was terminating its contract due to poor performance, he discussed this development with the Plaintiff. That following the said discussion, it was decided that the Plaintiff be suspended. DW1 referred to Page 27 of the Defendant's Bundle of Documents containing the said suspension letter.

3.13 According to DW1's testimony, the amount of K201,620.00 that was being claimed by the Plaintiff was too high and that following the Defendant Company's reconciliation of its records, it was discovered that the Plaintiff had missed out certain months and bank statements and that he did not account for payments that were not paid through

accounts. DW1 testified that the Plaintiff had obtained two laptops from the company's vendor and that the Defendant Company had paid for. That pursuant to the table showing the reconciliation of salary arrears drawn by the Defendant Company on pages 28 and 30 of the Defendant's Bundle of Documents, the Defendant Company owed the Plaintiff the following:

- i) K1,200.00 in 2013;
- ii) K10,900.000 in 2014;
- iii) K7,950.00 in 2015;
- iv) K35,000.00 in 2016; and
- v) K28,500 in 2017.

3.14 DW1 also testified that his final table is a schedule which shows that the Defendant Company owed the Plaintiff K83,550.00 and after the subtraction of the cost of two laptops and a cash payment it left an outstanding payment of K61,550.00. He stated that that said amount has not been paid and that the Defendant Company tried to reach out to the Plaintiff's lawyers, but were unsuccessful. DW1 later found out that the Defendant Company's accounts were garnished and therefore it became difficult to make any payments.

3.15 According to DW1, the Defendant Company intends to pay the outstanding amount in monthly instalments of K5,500.00, as the Defendant Company has had a financial turnaround. DW1 requested the Court to

enter judgment for the amount of K61,550.00 and dismiss the claim for K201,620.00 with costs.

- 3.16 During Cross-examination, DW1 confirmed that the Defendant owes the Plaintiff salary arrears. He testified that in a letter to the Plaintiff's Counsel, the Defendant was contesting the amount being claimed as after carrying out its preliminary investigations, it had been determined by the Defendant that the amount owed to the Plaintiff was K61,550.000. He referred to page 16 of the Plaintiff's Bundle of Documents, which contained the said letter and testified that the amounts indicated therein will change to K61,000.00+ after reconciliation.
- 3.17 There was no re-examination and the Defendant closed its case.

4 SUBMISSIONS

- 4.1 The parties were given a period of 30 days within which to file their written submissions. At the time of writing this Judgment, only the Plaintiff filed his submissions.
- 4.2 In his submissions, the Plaintiff gave an account of the back ground of this case particularly in relation to the Judgment on Admission that was entered in his favour for the sum of K71,550.00, being the sum that was admitted to be owed to the Plaintiff by the Defendant Company. He further stated that the disputed amount at trial is K130,090.00, which is the balance being claimed after deducting the Sum obtained from the

said Judgment on Admission and not the sum of K201,620.00. The Plaintiff submitted that to avoid the possibility of conflict of decisions, regard should be given to the Judgment on Admission which was passed by the Deputy Registrar.

- 4.3 The Plaintiff gave an account of the evidence adduced at trial and stated that the issues for determination are the salary arrears and not the shortcomings in relation to his employment. He submitted that at trial he had availed his Bank Statements to show the extent to which his salary was paid in his bank account by the Defendant but that the Defendant did not tender any evidence to show how it was paying the Plaintiff and to what extent. He prayed that the salary arrears be assessed on the basis of *quantum meruit*.

5 THE LAW

- 5.1 I have considered the Pleadings and evidence adduced at trial. I have also considered the submissions by the Plaintiff. The legal issue for determination is whether the Plaintiff has proved that the Defendant owes him salary arrears of K130,090.00. From the facts of the case and the evidence adduced at trial, it can be determined that the issue in dispute between the parties is to determine the correct sum total of the salary arrears owed to the Plaintiff by the Defendant.
- 5.2 The Supreme Court in the case of ***Zambia Breweries vs. David Chibwe***¹, stated as follows: -

"It is a time honoured principle in civil proceedings that it is for a Plaintiff to prove its case against the Defendant even when it is difficult to do so."

5.3 Further, in the case of ***Mazoka and Others vs. Mwanawasa and Others***², the Supreme Court pointed out that: -

"As regards burden of proof, the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity."

5.4 Furthermore, the learned authors of ***Phipson on Evidence***¹, state the following regarding the burden of proof in civil cases: -

"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons."

6 ANALYSIS AND FINDINGS

6.1 From the authorities cited above, it is clear that although it is not in dispute that the Defendant owes the Plaintiff salary arrears, it is required of the Plaintiff to sufficiently prove that the Defendant owes the claimed sum of K130,070.00, because the Defendant disputes the amount being claimed and asserts that it only owes the Plaintiff the sum of K61,550.00, in salary arrears following the reconciliation of its accounts.

- 6.2 At trial, the Plaintiff asserted that the Defendant paid his salary of K5,500.00 to his personal account held at First National Bank (FNB). It should be noted, however, that at trial the Plaintiff did not lead any oral evidence regarding the Bank Account Statements from FNB and their purported interpretation, which are exhibited in his Bundle of Documents. On perusal of the various entries on his Account Statements, after April, 2013, they indicate that during the course of the Plaintiff's contract there were various months in which the payment of his salary of K5,500.00 were not made. Therefore, it is determined that the Defendant was not making consistent monthly payments of K5,500.00 to the Defendant.
- 6.3 It should be noted however, that there are also various entries on the Plaintiff's Account Statements shown in the Plaintiff's Bundle of Documents that indicate that he was paid various sums ranging from K1,000.00 to K241,585.00 at various dates during the course of the contract. The said payments also have various descriptions ranging from "salaries", "payment" to "late salary payment" among others but do not indicate the source or the purpose for which the said payments were being made to his account. The Supreme Court in outlining the law relating to proof of special damages which I am of the view can be applied to this case stated as follows in the case of **Phillip Mhango vs. Dorothy Ngulube**³: -

"It is, of course, for any party claiming a special loss to prove that loss to do so with evidence which makes it possible for the Court to determine the value of that loss with a fair amount of certainty. As a general rule, therefore, any shortcomings in the proof of a special loss should react against the claimant. However, we are aware that in order to do justice, notwithstanding the indifference and laxity of most litigants, the Courts have frequently been driven into making intelligent and inspired guesses as to the value of the special losses on meagre evidence. In this case, it would have been easiest thing to call an expert witness, but the first Plaintiff chose not to do so. The result is that the evidence presented to the Court was unsatisfactory, and, in our opinion, the Learned trial Judge would have been entitled either to refuse to make any award or to award a much smaller sum, if not a token amount in order to remind litigants that it is not part of the Judge's duty to establish for them what their loss is. Be that as it may, the learned trial Judge in this case had agreed to do the best he could on the available and unchallenged evidence." (Court's emphasis)

6.4 Further, in the case of **Zambia State Insurance Corporation Limited vs. Zambia Bottlers Pension Scheme and 4 others**⁴, the Supreme Court held as follows: -

"It is settled law that the Courts will not award a claim for special damages unless the same is specifically proved."

- 6.5 Based on the foregoing cases, the lack of oral evidence from the Plaintiff to substantiate the entries on his Bank Account Statement, demonstrates a failure by the Plaintiff to satisfactorily prove that the Defendant owes him the sum of K130,090.00. This is because, although the Plaintiff has produced his Bank Account Statements for the period of his employment as evidence, it is not for the Court to determine which entries on the Bank Account Statement reflect salary deposits from the Defendant or not and thereby establish the amount of money owed to him.
- 6.6 With regards the Defendant's assertion at trial that it only owed the Plaintiff salary arrears of K61,550.00, DW1 adduced evidence to try and demonstrate how the said amount was calculated. He referred to the highlighted portions of the Plaintiff's Bank Account Statement from April, 2014 to January, 2018, but did not account for the period from May, 2013 to April, 2014, which was included in the Plaintiff's claim. Further, at trial DW1 referred to a table in the Defendant's Bundle of Documents showing the Defendant's reconciliation of the Plaintiff's salary arrears from the year 2013 to December 2017. But on perusal of the said table, particularly on page 28 of the Defendant's Bundle of Documents, there is a statement indicating that a payment of K40,000.00 was made to the Plaintiff's Account but that there was need to confirm if the Plaintiff received the payment or

not. This is an indication that the accuracy of the entries on the said table are questionable. Therefore, the Defendant has not sufficiently proved that it only owes the Plaintiff the sum of K61,550.00. In the English case of **Chaplin vs. Hicks**⁵ it was held that: -

"...the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of necessity of paying damages."

6.7 Similarly, although the Plaintiff has not sufficiently proved the amount owed to him in salary arrears, the Defendant having admitted that it owes him cannot be relieved of paying him and therefore the determination of the sum of money owed to the Plaintiff should be done by assessment. Therefore, I Order an assessment to be made by the Registrar to determine the sum of money owed to the Plaintiff in salary arrears.

7 CONCLUSION

7.1 Having found that it is not in dispute that the Defendant owes the Plaintiff salary arrears and that the actual sum owed to the Plaintiff has not been proved by the parties at trial, the Court enters Judgment in favour of the Plaintiff for the Sum to be assessed and determined by the Registrar taking into consideration the admitted Sum contained in the Judgment on Admission endorsed on 11th September, 2018.

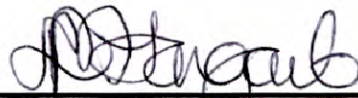
7.2 I award interest on the amount that will be assessed as due at average short term bank deposit rate from the

date of the Writ to the date of this Judgment and thereafter, interest will accrue at current Bank of Zambia lending rate up to the date of payment.

7.3 Costs are for the Plaintiff to be taxed in default of agreement.

7.4 Leave to Appeal is granted.

DELIVERED AT LUSAKA ON 8TH JULY, 2020.



**P. K. YANGAILO
HIGH COURT JUDGE**