IN THE HIGH COURT FOR ZAMBIA **2022/HPIR/0995**
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

ROBERT PANICCO **COMPLAINANT**

AND

TECHSERVE LOGISTICS AND CAR HIRE LIMITED **1ST RESPONDENT**

SKYVIEW LODGES LIMITED **2ND RESPONDENT**

SHAMAMBO SAASA WEBSTER **3RD RESPONDENT**

CORAM: Justice Mrs. M. S. Ngoma this 20th day of December, 2023.

For the Complainant	:	Mr. G Tembo of James & Doris Legal Practitioners
For the 1st and 3rd Respondents	:	Mr. C. Ng'andu of Zambezi Chambers
For the 2nd Respondent	:	*N/A*

JUDGMENT

Legislation referred to:

1. Employment Code Act, No. 3 of 2019
2. Employment Act No 268 of the Laws of Zambia
3. The Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia

Cases referred to:

1. Zambia Railways Limited v Pauline S. Mundia, Brian Sialumba (2008) ZR 287 (S.C)
2. John Muyabi V Thandiwe Banda and Attorney General Appeal No. 172 of 2019
3. Market Investigations Ltd V Minister of Social Security (1969) 2 QB 173

4. Stevenson Jordan and Harrison Ltd v McDonald and Evans (1952) 1TLR 101
5. Salomon and Salomon & Co (1895-1899) ALL ER 33
6. Mbazima and others v Vera (2001) Z.R 43

1.0 Background

1.1 The parties entered into a contractual relationship sometime in August 2018. As regards the nature of their relationship, the Complainant, on the one hand, claims that he was engaged as an employee and the contract was one of service while the Respondents, on the other hand, contend that the Complainant was in fact an independent contractor engaged on a contract for service.

1.2 The Complainant asserts that the Respondents breached the contract when they failed to pay what was due to him for the services he provided while in their employ. Consequently, he instituted this action claiming the following reliefs:

i. Unpaid salaries amounting to K84,750;
ii. Leave days amounting to K15,000;
iii. Gratuity of K45,000;
iv. Reimbursement of expenses incurred for repair of motor vehicle he used on personal to holder basis amounting to K18,822;
v. Interest on all sums found due;
vi. Any other relief the court may deem fit; and
vii. Costs of and incidental to this action.

1.3 In their answer, the 1st and 3rd Respondents disputed owing the Complainant anything as he was never an employee of theirs.

The 2nd Respondent did not file an answer.

1.4 The 1st Respondent also counter-claims an amount of K 533,600 in respect of hire charges for a motor vehicle registration no. BAC 6607 availed to the Complainant on personal to holder basis which the Complainant did not return at the end of his contract.

2.0 Complainant's Affidavit Evidence

2.1 In his amended affidavit in support of notice of complaint, the Complainant averred that on or about 17th August 2018, he was verbally employed by the 1st Respondent. His agreed entitlements were a salary of K15, 000 per month, a personal-to-holder vehicle and fuel. The personal-to-holder vehicle given to him was a vehicle registration no BAC 6607 owned by the 1st Respondent.

2.2 The Complainant stated that during his employment, his salary was paid by the 3rd Respondent, and, at other times, by the 1st Respondent's financial personnel. That he was never given a written agreement or a pay slip.

2.3 He further averred that the Respondents operated as one entity. That the work he performed was assigned to him by the 3rd Respondent and was as required by the 1st and

2nd Respondent companies and also works required by the 3rd Respondent at his private properties.

2.4 It was his testimony that his salaries were erratically paid for the years 2018 and 2019 resulting in an amount of K 84, 750 outstanding by the end of his contract. The computation of the unpaid salaries was produced as exhibit **"RP3"** in his affidavit.

2.5 It was the Complainant's further testimony that the vehicle allocated to him was maintained by the 1st Respondent and that, on various occasions, the 3rd Respondent instructed him to pay for the repairs and promised to reimburse the costs incurred. He was never reimbursed. The total cost incurred in this regard was K18, 822.

2.6 That throughout his employment, he never took leave and he was not paid gratuity at the termination of his contract.

2.7 He finally stated that he undertook his work diligently until the 3rd Respondent assigned him to work with the National Housing Empowerment Fund (NHEF) where he was verbally employed in the same capacity and offered the same emoluments as he enjoyed with the 1st Respondent.

3.0 1st Respondent's Affidavit Evidence

3.1 The affidavit filed by the 1st Respondent was deposed to by Mr. Albert Mujinga, the accountant. Mr. Mujinga denied that the Complainant was ever employed by the 1st Respondent. He admitted that the vehicle used by the Complainant was owned by the 1st Respondent and was hired by its sister company, Sky view Lodges Limited, the 2nd Respondent in this action, for use by its contractor. He averred that the 1st Respondent maintained the vehicle at its garage, but the cost of the maintenance was borne by the 2nd Respondent.

3.2 Mr. Mujinga further averred that when the 2nd Respondent terminated the car hire agreement for the vehicle, the Complainant was requested to return the vehicle or start paying hire charges. He did neither, prompting the 1st Respondent to seek police intervention to retrieve the vehicle, by which time the hire charges payable by the Complainant had accumulated to K460, 000, which amount the 1st Respondent counter-claims in this action.

3rd Respondent's Affidavit Evidence

3.3 In his affidavit in support of answer, the 3rd Respondent denied employing the Complainant. He averred that the Complainant was employed as an independent contractor by the 2nd Respondent during the time it had a lease with

Chainama Hotels Limited located in the Chainama area of Lusaka. The copy of the lease was produced and marked **"SSW1"**.

3.4 He further averred that prior to this, he had engaged the Complainant in his personal capacity as an independent contractor to design his personal house in Chudleigh, Lusaka, and that he fully paid him for the services rendered.

3.5 He denied transferring the Complainant to NHEF to work there stating that he simply introduced the Complainant to Mr. Ngulube, the chairman of NHEF, but was not privy to the detailed agreement entered into between them.

3.6 Finally, the 3rd Respondent denied authorizing the Complainant to use the vehicle even after his relationship with the 2nd Respondent ended. He further denied promising to reimburse the Complainant the cost of the repairs to the vehicle.

4.0 Hearing

4.1 At the hearing of the matter held on 9th August, 2023, the Complainant and the 3rd Respondent gave oral testimonies. Their testimonies were largely a repetition of what was contained in their affidavits filed in court. As such, I shall not repeat the contents of their oral testimonies in any significant detail, save for a few highlights.

4.2 It was the Complainant's testimony that he worked for the 3rd Respondent from mid-August 2018 until about 1st September, 2020. At the time of his separation, the 3rd Respondent introduced him to Mr. Ngulube, the chairman of NHEF, which had taken over Chainama Hotel to turn it into offices. He was offered a job on similar terms as what he had been enjoying under the 3rd Respondent.

4.3 In cross examination, the Complainant told the court that apart from the Chudleigh house design, he did not do any other project for the 3rd Respondent. He said he was not aware that the Chainama Hotel and Barn Motel projects were for the 2nd Respondent.

4.4 He further told the court that he was employed by the 3rd Respondent and not the 1st Respondent. That he was aware that the vehicle he used was owned by the 1st Respondent but he did not know that it was a rented car.

4.5 He denied being liable for hire charges because it was agreed between the 3rd Respondent and Mr. Ngulube that he could continue using the vehicle until the latter arranged an alternative vehicle for him. He also denied being a contractor.

4.6 The 3rd Respondent, on his own behalf, and on behalf of the 1st Respondent, told the court that the 2nd Respondent was in the hospitality industry where it focused on leasing, renovating and running hospitality outfits in the country. That it was with this view that the 2nd

Respondent entered into a Lease with Chainama Hotel Limited. Unfortunately, the business of the 2nd Respondent was severely impacted by the effects of COVID-19 to a point where this project, along with others being undertaken under it, became untenable.

4.7 He denied that the Complainant was his employee, stating that he simply hired him to design his house in Chudleigh for which he paid him in full for his services. He also recommended him to a colleague of his, Mr. Soko, who needed architectural services. He averred that, being aware of the services that the Complainant was capable of providing, and also being aware of what the 2nd Respondent was doing at Chainama hotel, he arranged for the Complainant to be hired by the 2nd Respondent to provide similar services at both Chainama hotel and Barn Motel where the 2nd Respondent was carrying out renovations.

4.8 He further told the court that the Complainant was hired as a contractor to supervise the other contractors on site. Further, that in order to manage their cash flow, they agreed that instead of paying the Complainant a lump sum, he would be paid on a monthly basis.

4.9 In cross examination, the 3rd Respondent told the court that the vehicle provided to the Complainant was not an entitlement but an operational requirement. After the

transition to NHEF, the Complainant was supposed to return the vehicle to the 1st Respondent.

5.0 Parties' Submissions

5.1 Both parties filed written submissions in support of their respective cases, for which I am grateful. I have taken into consideration the legal arguments so ably presented by counsel in writing this judgment. I have given a summary of the submissions below.

6.0 Complainant's Submissions

6.1 Counsel for the Complainant opened his written submissions by laying down the law as it relates to the burden and standard of proof in civil matters. He then proceeded to submit that his client has the legal burden to prove his case on a balance of probability while all the parties have the evidential burden, also on a balance of probability, to prove their assertions as contained in their pleadings. In support of this submission, he referred me to the case of **Zambia Railways Limited v Pauline S. Mundia, Brian Sialumba[1] (2008) ZR 287 (S.C)** in which it was stated, among other things, that:

> *"The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable".*

6.2 Counsel then moved on to cite definitions of cardinal terms such as 'employee', 'employer' 'master and servant' as found in Black's Law Dictionary, 9th Edition.

6.3 He further submitted that since the Complainant was engaged in August 2018, the law applicable at the material time, **Section 3 of the repealed Employment Act No. 269, as amended by Act No 15 of 2015** should guide this court in terms of defining who an employee is. This section defines *'employee'* as:

> *"A person who, in return for wages, enters into a contract of service whether on full time, part time or temporary basis or who is engaged to do casual work..."*

An independent contractor is excluded.

6.4 The definition of 'contract of service' makes reference to employment relationship. Employment relationship is defined as a "situation where work is carried out in accordance with instructions and under the control of an employer..."

6.5 On the basis of the above definitions, counsel submitted that the Complainant was an employee of the Respondents as they, the Respondents, operated separate entities as one company.

6.6 He countered the Respondents' argument that the motor vehicle used by the Complainant was hired from the 1st

Respondent by pointing out that no evidence of the hire of the vehicle was adduced in court.

It was argued that, in employment cases, an employee simply has to plead that he was not paid his wages and the employer, who has the statutory duty under section 50 of the Employment Act, to keep records of wages, must disprove the same by the production of the record of wages. Consequently, since the Complainant has claimed salary arrears of K84,750, and the Respondents have not adduced any evidence of having paid all the salaries, the Complainant is entitled to the sums claimed.

6.7 Counsel further submitted that the Complainant was entitled to one month leave for each year served. Since he served for 3 years, from August 2018 to September, 2020, the leave pay owing is K45, 000.

6.8 As for gratuity, it was submitted that the Complainant was entitled to gratuity of K15, 000 for the last year of service in line with the Employment Code Act No. 3 of 2019.

7.0 Respondents' Submissions

1st Respondent

7.1 The Respondents, in their written arguments, pointed out that the Complainant, in paragraph 4(b) of his amended notice of complaint filed on 26th April, 2023, stated that

the 1st Respondent was his employer and yet at trial his testimony was that he was not employed by the 1st Respondent. In the light of this, I was urged to find that by the complainant's own admission, he was not employed by the 1st Respondent and hence he is not entitled to the reliefs claimed against the 1st Respondent.

2nd Respondent

7.2 Counsel for the Respondents cited a number of authorities to highlight applicable tests in determining whether an employment relationship exists. One such authority cited is the case of **Market Investigations Ltd V Minister of Social Security** [3] **(1969) 2 QB 173** where the court held that:

> *"Firstly, the Court stipulated that employment is determined by the degree and extent of control that a company exercises over the person's performance of the task to show 'a master and servant' relationship".*
>
> *Secondly, the Court held that in order to distinguish between a 'contract of service' and 'for services,' the test to be applied is: whether the person is engaging the services 'as a person in business on his own account.' Considering the surrounding circumstances and contractual provisions.*

If the answer to the question is 'no,' the person is an employee."

7.3 The control test was applied in the case of **John Muyabi v Thandiwe Banda and Attorney General**–(2) Appeal No. 172/2019 at page J12 where the court said:

> *"There is, therefore, nothing in the evidence that shows that the 1st Respondent exercised considerable control over the Appellant. In our considered view, the Appellant regulated the way he carried out his assignments with the 1st Respondent. It is therefore our view that the learned trial Judge was on firm ground when he found that the Appellant was not an employee but an independent contractor".*

7.4 It was submitted that the test of whether one is *engaging the services "as a person in business on his own account* was applied in the case of **Stevenson Jordan and Harrison Ltd v McDonald and Evans** (4) (1952) 1TLR 101 where it was held that:

> *"Where one is employed as part of the business and the work is done as an integral part of the business, then he is an employee".*

7.5 The above authorities were relied upon to buttress the argument that the nature of work carried out by the Complainant at the 2nd Respondent's construction site did not require him to be controlled in the manner in which he carried out his work. His task was to ensure that the quantities of materials required by all other contractors were approved prior to their purchase. To achieve this, the Complainant did not get dictated to by the 2nd Respondent as to the time he reported for work and the time he left.

7.6 It was further submitted that there was no evidence to suggest that the Complainant formed an integral part of the 2nd Respondent's business because the Complainant, as quantity surveyor, worked on the construction site while the 2nd Respondent was purely in hospitality business. I was, therefore, urged to find that the Complainant was not an employee of the 2nd Respondent, but an independent contractor, and consequently not entitled to the reliefs sought.

3rd Respondent

7.7 It was submitted that the only work the Complainant did for the 3rd Respondent is the design of the 3rd Respondent's family house in Chudleigh, Lusaka, for which the Complainant was paid K25,000. That the Complainant had failed to show a continuing project to

justify his assertion that he was employed by the 3rd Respondent from August 2017 to 1st September 2020. That by his own admission, the Complainant had testified that he was a contractor when he designed the 3rd Respondent's house. Consequently, I was urged to find that the Complainant was not an employee of the 3rd Respondent.

8.0 Determination of Issues

8.1 I have carefully considered all the evidence, arguments and authorities before me. The nature of the relationship between the Complainant and the Respondents is disputed. While the Complainant states that he was an employee, the 1st and 3rd Respondents dispute this. According to them the Complainant was an independent contractor hired to provide services under the 2nd Respondent Company.

8.2 Of utmost importance in this matter is to determine whether the Complainant was an employee or an independent contractor as this not only has a bearing on whether the Complainant is entitled to the reliefs sought, but also hinges on whether this court has jurisdiction to decide the issues in dispute.

8.3 I shall deal with the Complainant's claims before I come to the counter-claim.

8.4 I have studied the definition of 'employee', together with related terms such as 'employment relationship' in both the Employment Code Act of 2019 and the now repealed Employment Act, cap 268, as amended by Act No. 15 of 2015, which the Complainant's counsel wrongly cited as cap 269 in his submissions. The two definitions are quite similar. Both exclude independent contractor from being an employee. Both define employment relationship, to paraphrase, as a relationship where work is carried out in accordance with instructions and under the control of an employer (underlining mine for emphasis). In view of the similarities, I shall not delve into a discussion on whether the definitions as contained in the now repealed Employment Act or the Employment Code Act should be applied as I find this *otiose.*

8.5 With regard to the 1st Respondent, it was contended that the 1st Respondent is a car hire company and that the only connection it had with the Complainant is that it owned the motor vehicle used by the Complainant. The Complainant himself, in cross examination, admitted that he was not employed by the 1st Respondent. I, therefore, find for a fact that the 1st Respondent was not the Complainant's employer. As such, there is no basis upon which it can be made liable for any of the reliefs claimed by the Complainant.

8.6 In moving on to the 2nd Respondent, I note that while the 1st and 3rd Respondents contended that the Complainant was hired as an independent contractor under the 2nd Respondent, the Complainant himself, under cross examination, denied this and told the court that he knew nothing of the 2nd Respondent. He categorically stated that he was never employed by the 2nd Respondent. I found this intriguing as I wondered why he sued the 2nd Respondent if he knew nothing of them.

8.7 The Complainant further told the court that he was not even aware that the Chainama hotel and Barn Motel projects were for the 2nd Respondent. To support his averment that the Chainama Hotel project was undertaken by the 2nd Respondent, the 3rd Respondent referred to exhibit "**SSW1"** in his affidavit verifying answer which exhibit he described as the Lease between the 2nd Respondent and Chainama Hotels Limited. In truth, this exhibit is better described as an 'extract of the Lease" as it only has 4 pages; that is, the cover page, the page with the index, the page with the parties' clause and definition's and the last page with the signatures. From these 4 pages, I could not decipher what the lease was all about. The Complainant, on his part, did not make any comment on this 'lease' save to confirm, under cross examination, the date of the document and the parties to it.

8.8 Notwithstanding that the Complainant himself denied being employed by the 2nd Respondent, I proceeded to examine the record with a view to determining whether the Complainant could have been employed by the 2nd Respondent without him realizing it, if, indeed, that were possible.

8.9 In cross examination, the Complainant stated that he took over as project manager from a Mr. Adrain Njovu who was the main contractor and that his duties included monitoring the other contractors on site and approving the materials that needed to be bought. He, however, did not give any detail as to how his duties were carried out to prove if there was any considerable control exercised over him. For example, it was not alleged that anyone dictated the time when he reported on site and when he left. It was also not shown how the Complainant's work fitted in the 2nd Respondent's hospitality business. The Respondents' advocates submitted that the work done by the Complainant as a quantity surveyor could not have been done as an integral part of the business of the 2nd Respondent which was purely in hospitality business.

8.10 I agree with the Respondents' arguments here. There is indeed no evidence on record to suggest that the work done by the Complainant became an integral part of the business of the 2nd Respondent. It was not in dispute that the 2nd Respondent was renovating Chainama hotel in

order to modernize it so that it could conduct its hospitality business from there. I do not consider that the work of checking the materials required by the various contractors on site would have become an integral part of the hospitality business of the 2nd Respondent.

8.11 As guided by the authorities above, including the definition of 'employee' in the Employment Act and the Employment Code Act, I find that the Complainant was not an employee of the 2nd Respondent.

8.12 I now move to the 3rd Respondent.

8.13 In paragraph 4(b) of the notice of complaint, the Complainant averred that he was employed by the 1st Respondent. At trial, it was his testimony that he was in fact employed by the 3rd Respondent and not the 1st Respondent. This shows uncertainty on his part as to who his employer was. This uncertainty was reflected in the written submissions filed by his advocates who could not identify their client's actual employer and simply submitted, in paragraph 6.6, that:

> *"It is our position that the Complainant was an employee of the Respondents as they operated separate entities as one."*

They repeated the submission in paragraph 6.8, adding that:

> *"Since the 3rd Respondent was the Managing Director and shareholder of the 1st and 2nd Respondent*

companies, in the absence of specific contracts, all the Respondents must be found to have employed the Complainant, as despite having different personalities at law, they operated as one".

8.14 This submission flies in the teeth of the testimony of their own client who told the court categorically that he was not employed by the 1st Respondent or the 2nd Respondent.

8.15 Further, in my opinion, the record does not have sufficient evidence to justify the argument that the Respondents operated as one, and, as such, are to be considered to have jointly employed the Complainant. Accepting this argument would flout the age old principle laid down in the celebrated English case of **Salomon and Salomon & Co[5]** that generally, a company is a legal entity on its own, separate and distinct from its members.

8.16 In view of the foregoing, I find that the Complainant has failed to prove on a balance of probability that he was an employee of any of the Respondents. What seems more probable is that he was an independent contractor who was paid on a monthly basis for the work he did. The evidence relating to the conditions he enjoyed at NHEF does little to help his case as NHEF is a separate entity from the Respondents.

8.17 The claims for payment of underpaid salaries, leave days, gratuity and expenses incurred on the personal-to-holder vehicle were all premised on the Complainant's claim that

he was an employee of the Respondents. Having failed to prove this, all his claims cannot stand.

9.0 Counter-claim

9.1 The 1st Respondent's company has counter-claimed the sum of K 450, 000 in respect of hire charges at the rate of K920 per day from the date it was informed that the 2nd Respondent would no longer pay for the hire of the vehicle to the date the vehicle was retrieved from the Complainant. The invoice for the hire charges marked "AM1" in the affidavit in support of answer, however, shows a total of K 533, 600 for the period 1st April 2020 to 8th October, 2022.

9.2 It was submitted, on behalf of the Complainant, that the counter-claim is not tenable as this court does not have jurisdiction to determine rights and obligations under the hire agreement. I was referred to section 85 of the Industrial Relations Act, Cap 269 of the Laws of Zambia which limits the court's jurisdiction to industrial relations matters.

9.3 Reliance was also placed on the case of **Mbazima and Others v Vera (2001) Z.R 43(6)** where the Supreme Court held that:

> *(i) Sections 85(2) and 108 of the Industrial and Labour Relations Act show that the jurisdiction of the Industrial Relations Court is limited to*

settling of labour disputes falling under the Act and is an alternative forum to the High Court only in cases of labour disputes

(ii) ..."

9.4 On the basis of the above, it was submitted that if indeed the Complainant hired the vehicle from the 1st Respondent, the same would be a matter for the principal registry as a claim under a hire contract unlike an employment matter which these proceedings are. I was, therefore, urged to dismiss the counter-claim for want of jurisdiction.

9.5 The Respondents did not respond to this argument, perhaps because they knew it was a lost cause. I agree with the Complainant that this counter-claim is not tenable in this court as it is not an employment matter. The 1st Respondent submitted, and successfully so, that there was no employer-employee relationship between it and the Complainant. Thus, clearly, the counter-claim arises out of a business relationship over which this court has no jurisdiction. The counter-claim is accordingly dismissed for want of jurisdiction.

10.0 Conclusion

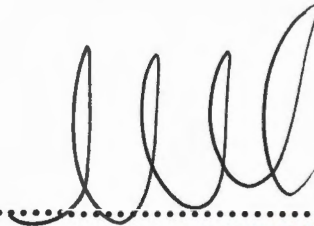
i. The Complainant has failed in all his claims and the same are accordingly dismissed.

ii. The 1st Respondent has failed in its counter-claim which is dismissed for want of jurisdiction.

iii. Each party shall bear its own costs.

iv. Leave to appeal is granted.

Delivered at Lusaka this 20th Day of December, 2023.



M.S. Ngoma
HIGH COURT JUDGE