

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

COMP NO. IRCLK/02/2022

BETWEEN:

INNOCENT MUMBA

COMPLAINANT

AND

**REFRIGERATION AGENCIES
ISSAC DILLION CHIPUNGU**

1ST RESPONDENT

2ND RESPONDENT

24 NOV 2023

**Coram: Before Hon. Lady Justice M. S. Ngoma on the 24th day of
November, 2023**

For the Complainant: In Person

For the Respondents: No appearance

JUDGMENT

Legislation referred to:

1. Rule 44(1) of the Industrial Relations Court Rules, Chapter 269 of the Laws of Zambia.

Cases referred to:

1. Robert Simeza & 3 Others V Elizabeth Mzyece (2011) ZMSC 3.
2. Khalid Mohamed v The Attorney General (1982) Z.R 49(S.C).
3. BJ Poultry Farm Limited V Nutri Feeds Zambia Limited SCZ Appeal No. 166 of 2015.

1.0 Background

- 1.1 This matter commenced with a notice of complaint filed by Mr. Innocent Mumba, the Complainant, on 5th January 2022, claiming

leave pay, salary arrears, transport allowance, interest and costs for the period from 15th August, 2018 when he was employed by the Respondents until he resigned on 1st October 2021.

- 1.2 The Respondents admitted that the Complainant was indeed employed by the 1st Respondent as Project Supervisor during the stated period.

2.0 **Complainant's Affidavit Evidence**

In his affidavit in support of complaint, the Complainant averred that he was employed by the Respondents on 15th August 2018 as a Project Manager/Property Manager until he resigned on 1st October, 2021 due to non-payment of salaries. The tabulation of the unpaid salaries, totaling K270,000, at the rate of K7500 per month, is exhibited in his affidavit in support of complaint as exhibit "IM1".

3.0 **Respondents' Answer and Affidavit Evidence**

- 3.1 The Respondents filed an answer on 17th February, 2022 accompanied by an affidavit deposed to by the 2nd Respondent, Isaac Dillion Chipungu. The 2nd Respondent averred that the Complainant was indeed employed by the 1st Respondent as Project Supervisor on a project undertaken by the 1st Respondent for construction of 30 houses for Government in Chinsali in Mulyangolo area, but was never an employee of his.
- 3.2 He averred that the only interaction he had with him was that he, the Complainant, leased a house from him at a monthly rent of K3,500 which he failed to pay for during the entire period he was in employment, as a result of which the Complainant owes him K133,000 in respect of unpaid rent.
- 3.3 He further averred that the Complainant owes him K103,700 in respect of rent he collected from his other tenants without his authority and never accounted for it.

3.4 It was further averred that the Complainant appropriated building materials worth K164,339.00 meant for the Government project leading to delay of the project and loss of business on the part of the 1st Respondent.

3.5 The Respondents, therefore, counter-claimed the following and prayed that the same be off-set against what is found due to the Complainant:

- i) Damages for loss of business occasioned by the Complainant holding on to building materials thereby delaying the 1st Respondent's works on the Government Project for the construction of 30 houses;
- ii) Payment of rentals amounting to K133,000 due to the 2nd Respondent; and
- iii) Payment of K103,700 being unauthorized rental collections made by the Complainant.

4.0 **Evidence at Trial**

4.1 Prior to trial, this matter was scheduled for a status conference on 15th June, 2023 at which both parties were absent without explanation. I proceeded to schedule the matter for trial on the 27th June, 2023. The record shows that the notice of hearing was issued and the Complainant was requested to serve it on the Respondents.

4.2 On the date of trial, the Complainant was present in court while the Respondents were absent. The Complainant stated that he had duly served the Respondents' advocates, Messrs. Haimbe Legal Practitioners, with the notice of hearing as evidenced by the date stamp affixed on the copy of the notice of hearing which he submitted to the court on the day of trial. I examined the date stamp on the copy of the notice of hearing and was satisfied that it was, indeed, served on the Respondent's advocates. I, therefore, proceeded with trial on

the basis that the Respondents were aware of the date of hearing and absent from court without any reason. I was fortified in taking this course by the case of **Robert Simeza & 3 Others V Elizabeth Mzyece**¹ in which the Supreme Court guided that there is no procedural injustice occasioned when a court proceeds where a party who was aware of proceedings did not appear before Court.

- 4.3 At trial, the Complainant gave oral testimony and did not call any witness. It was his testimony that he was employed by the 1st Respondent as a project manager and as property manager from 15th August 2018 to 1st October, 2021 when he resigned. The reason for his resignation was non-payment of his salaries. Details of the salary arrears are shown on exhibit “**IM1**” in his affidavit in support of complaint.
- 4.4 He testified that as property manager he had oversight, technically and administratively, of a project to construct 30 houses for Government in Chinsali in Mulyangolo area. This project was being undertaken by the 1st Respondent while the 2nd Respondent was a Director in the 1st Respondent company.
- 4.5 The Complainant averred that it was agreed that for the technical services he would be paid K7,500 per month while for his services as property manager he would be paid K5000 per month. In addition, he was also accommodated in a 3-bedroomed house belonging to the Respondents.
- 4.6 It was his further testimony that the Respondents defaulted in paying his salaries until the figure accumulated to K425,000, prompting him to give notice to resign. The 2nd Respondent made promises to pay, which promises he did not fulfill, and eventually stopped taking his calls.
- 4.7 He testified that after he resigned, the Respondents locked him and his family out of the house he occupied as an incidence of his

employment and denied him access to the house to enable him retrieve his household goods which include laptops, sofas, fridge and car. He prayed for an order to compel the Respondents to allow him access to his previous house to enable him retrieve his goods.

4.8 He ended by submitting that from the time of his employment, he never went on leave except for the recess taken during Christmas period which was never counted as leave.

4.9 As the Respondents did not attend trial, their case remained as stated in the answer and affidavit verifying answer as summarized above.

5.0 **Determination of Issues**

5.1 The Complainant seeks an order for the payment of leave days, salary arrears and transport allowance for the period of his employment, together with interest on amounts found due to him and costs. In their answer, the Respondents admitted that the Complainant was indeed a former employee of the 1st Respondent. The amount claimed by the Complainant as shown in the affidavit in support of complaint was not admitted and neither was it specifically traversed. The Respondents filed a counter-claim and urged this court to offset the amounts due to the Complainant against what is owned to them.

5.2 With regard to the claim for leave days, the Complainant testified that he did not take leave for the entire period he was in employment. This evidence was uncontroverted. As such, in the absence of proof that he did take leave or that he recieved leave pay, I find that his claim for leave pay has succeeded. The Complainant did not lead any evidence as to how many days he accumulated to enable me determine the quantum due to him. This does not take away from the fact that he is owed leave pay. I, therefore, enter judgment for the Complainant for leave pay for the period 15th August 2018 to 30th October, 2021, to be computed by the Deputy Registrar.

- 5.3 The second claim is for payment of salary arrears. Exhibit "IM1" shown in the affidavit in support of complaint is a schedule of the salaries due, the months in respect of which salaries were payable and the amounts paid to the Complainant. The outstanding amount shown in the exhibit is K270,000. However, at trial the Complainant testified that the Respondents' default was to the tune of K425,000. No effort was made to explain the discrepancy between the K270,000 deposed to in his affidavit and the K425,000 claimed at trial. This left me wondering whether he was tempted to inflate the claim for salary arrears when he noticed that the Respondents were not in court to defend themselves.
- 5.4 It is trite law that a plaintiff or complainant cannot automatically succeed whenever there is no defence or when a defence has failed as he has to prove his case because the mere failure of the defence does not entitle him to judgment. See **Khalid Mohamed V The Attorney General⁽²⁾** and **BJ Poultry Farm Limited V Nutri Feeds Zambia Limited⁽³⁾**.
- 5.5 In view of this, I find that the claim for K425,000 has not been proved. I, accordingly, enter Judgment for the Complainant for the lesser sum of K270,000 whose breakdown was clearly tabulated in exhibit "IM1".
- 5.6 The claim for transport allowance was not substantiated. Apart from listing it among the reliefs, the Complainant said absolutely nothing about it. For the reason stated in paragraph 5.4 above, this claim must fail.
- 5.7 The plea for access to the house previously occupied by the Complainant with his family is granted. No reason has been put before me as to why the Respondents should continue holding on to the Complainant's household goods. The Respondent is ordered to grant access to the Complainant to enable him retrieve his household goods from the house.

5.8 The Complainant's complaint is against both his former employer, the 1st Respondent, and Mr. Isaac Dillion Chipungu, the 2nd Respondent. He, however, did not adduce any evidence to show how the 2nd Respondent can be personally liable for the salary arrears payable by the 1st Respondent. As such, I find that the sums awarded to him shall be paid by the 1st Respondent.

5.9 The Respondents' counter-claims are dismissed for want of prosecution.

5.10 After trial, but before the date scheduled for Judgment, the Respondents, by Summons filed on 26th July, 2023, applied to this court to arrest its own Judgment. This application was heard on 12th September, 2023 and subsequently dismissed. This unsuccessful application by the Respondent only served to delay this judgment. Ordinarily, this court does not award costs in favour of one party. However, Rule 44 of the Industrial Relations Court Rules gives an exception where one party has been guilty of unreasonable delay or of taking improper, vexatious or unnecessary steps in any proceedings, or of other unreasonable conduct. I am of the view that the failure by the Respondents to appear before this court on the day fixed for trial and later seeking to arrest the judgment fall within the ambit of unreasonable behavior envisaged in Rule 44 of the rules of this court. For these reasons, I am awarding costs to the Complainant, to be taxed in default of agreement.

6.0 **Conclusion and Orders**

6.1 In conclusion, the Complainant has succeeded in his claim for leave days and salary arrears. The claim for transport allowance has failed. The application for access to the house he previously occupied during the period he worked for the 1st Respondent has succeeded.

6.2 Judgment is entered for the Complainant for the following:

- i. *Leave pay to be computed by the Deputy Registrar;*
- ii. *Salary arrears in the sum of K270,000;*
- iii. *The Respondents are ordered to allow the Complainant access to the house he occupied when he was in employment for the purpose of retrieving his household goods and car;*
- iv. *Interest on the amounts due in paragraph (i) and (ii) above at commercial bank deposit rate from the date of filing of the Notice of Complaint until Judgment and thereafter, at the ruling lending rate as determined by Bank of Zambia until payment; and*
- v. *Costs to the Complainant to be taxed in default of agreement.*

6.3 Leave to appeal is granted.

Dated at Lusaka this 24th day of November, 2023.

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Hon Lady Justice M.S Ngoma

HIGH COURT JUDGE.

