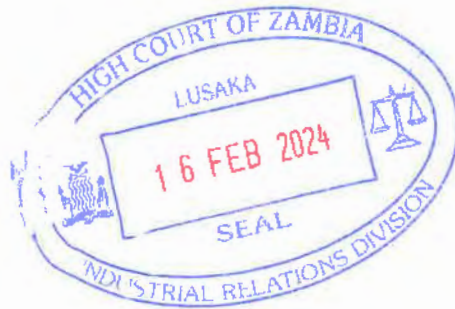


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA

2023/HPIR/0107

BETWEEN:

JOHN BANDA



COMPLAINANT

AND

**JOHN LONDON CARS
(IMPORT & EXPORT LIMITED)**

RESPONDENT

Coram: Chigali Mikalile, J this 16th day of February, 2024

For the Complainant: In person

For the Respondent: No appearance

JUDGMENT

Legislation referred to:

1. The Employment Code Act No. 3 of 2019
2. Minimum Wages and Conditions of Employment Act, Chapter 276

Cases referred to:

1. Robert Simeza (Executor) v. Elizabeth Mzyeche (2011) Z.R Vol. 3

2. Wilson Masauso Zulu v. Avondale Housing Project (1982) ZR 178
3. Tiger Chicks (T/A Progressive Poultry Ltd) v. Tembo & Others, SCZ/18/2020
4. Jackson Mwape & 61 Others v. ZCCM Investments Holdings Limited Plc, SCZ Judgment No. 23/2014

Text referred to:

Chungu, C. & Beele, E. Labour Law in Zambia, An Introduction (2nd Edition) (2020), Juta & company (Pty) Ltd

Introduction

1. The complainant commenced this action by Notice of Complaint and supporting affidavit on 2nd February, 2023 seeking the following reliefs:

- (a) *Gratuity*
- (b) *Underpayment*
- (c) *Lunch allowance*
- (d) *Any other benefits the court may deem fit and costs*

Complainant's case

2. In his affidavit in support of the complaint, the complainant deposed that he was employed by the respondent as cleaner on 5th March, 2020 on contract basis. Exhibited to the affidavit and marked "JB1" is a copy of the contract of employment for the period 1st January, 2022 to 30th December, 2022. According to the complainant, he worked until 28th January, 2023 when he stopped work due to underpayment of salaries by the respondent. Efforts to resolve the

issue proved futile hence he sought assistance from the labour office. He was ultimately referred to Court.

3. At the hearing, the complainant testified that he signed a contract in 2020 with a salary of K 800.00. He produced the contract in evidence and it was marked "JB2". Apparently, there was another contract which had a salary of K 1,698.60 which was hidden from him. He only discovered this contract when cleaning the office. According to the complainant, he was underpaid by half for two years.
4. It was also his evidence that the contract that was hidden from him also provided for gratuity and yet he never received any payment. He further testified that he did not receive his leave days' pay either.

Respondent's case

5. The respondent neither filed an Answer nor appeared at the hearing. I proceeded in its absence as the complainant filed an affidavit of service showing that the respondent was well aware of the hearing date. I was fortified by the case of **Robert Simeza v. Elizabeth Mzyeche**⁽¹⁾ which holds that no procedural injustice is occasioned when a party who is aware of the proceedings does not turn up.

Decision

6. I have considered the complainant's affidavit and oral evidence. I remind myself that he who alleges must prove and failure of a defence

does not entitle the claimant to automatic success. In the case of **Wilson Masauso Zulu v. Avondale Housing Project**⁽²⁾ the Court stated that a plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponents case.

7. From the evidence, I find as a fact that the complainant was employed as a cleaner. It was his testimony that he was employed in 2019 and his affidavit states that he was employed in March, 2020. However, he has not shown proof that he was employed earlier than 20th October, 2020, which is the date of his contract produced in evidence as "JB2". I, therefore, find that his employment start date is 20th October, 2020. I am also satisfied that the complainant stopped working for the respondent, whilst holding the same position of cleaner on 28th January, 2023.
8. What I ought to determine is whether or not he was underpaid and whether or not he is entitled to all the other claims made.

Underpayments

9. It has been established that the complainant was a cleaner. According to the Minimum Wages and Conditions of Employment (General) Order, 2011 as amended by S.I No. 71 of 2018, the complainant was a protected employee entitled to a minimum gross salary of K1,698.60. The court in the case of **Tiger Chicks (T/A Progressive Poultry Limited v. Tembo Chrisford & Others**⁽³⁾ explained that certain

categories of employees need to be protected from vulnerability and exposure to undue exploitation by employers hence the promulgation of Orders.

10. What can be deduced from the above authority is that any agreement is void if it offends the provisions of the above statute which are meant to protect vulnerable workers from being subjected to low wages. The complainant's initial contract dated 20th October, 2020 shows a basic pay of K 800.00. It does not provide for any allowances such as housing, transport and lunch allowances which allowances an employer is mandated to pay a cleaner under the General Order (S.I. No. 71 of 2018).
11. It was the complainant's evidence that he was paid K 800.00 throughout his employment tenure despite the existence of the contract showing that he was getting K 1,689.60. In fact, according to the complainant, the disparity, which he discovered while cleaning the office, is the reason for his resignation. In the absence of evidence to the contrary, I am satisfied that the complainant was indeed underpaid by the respondent. He was getting only K 800.00 and not K 1,698.60 as per law provided. This means he was underpaid by a sum of K 898.60 each month.
12. In the circumstances, I find in the complainant's favour and uphold the claim for salary underpayment for the period 20th October, 2020 to

28th January, 2023. This translates to 26 months x K 898.60 = **K 23,363.60.**

Gratuity

13. The learned authors of Labour Law in Zambia, An Introduction (2nd edition) state as follows at page 84:

Under the previous regime, payment of a gratuity was either at the employer's discretion or a benefit for certain protected groups of employees under the statutory instruments made pursuant to the Minimum Wages and Conditions of Employment Act. The Employment Code Act makes payment of a gratuity mandatory for all employees on long term contracts,...

(underlining mine for emphasis)

14. The complainant was employed at a time the Employment Code was already in force. Thus, the Code is the applicable law.

15. Gratuity is provided for under section 73 of the Code as follows:

(1) An employer shall, at the end of a long-term contract period, pay an employee gratuity at a rate of not less than twenty-five percent of the employee's basic pay earned during the contract period.

(2) Where an employee's contract of employment is terminated in accordance with this Code, the employee shall be paid gratuity prorated in accordance with the period of employment.

16. The authors of the book go on to state that gratuity, as per the above provision, is limited to those employees on long term contracts meaning contracts for a period of 12 months or more.
17. Both contracts exhibited by the complainant indicate that the complainant was employed for one year periods. He is, therefore, entitled to gratuity at the rate of 25% of the basic pay earned during the contract period in accordance with section 73. Basic pay is an amount which excludes allowances. The General Order provides for a basic pay of K 1,050.00, housing allowance of K 315.00, transport allowance of K 153.60 and lunch allowance of K 180.00. This adds up to K 1698.60. Thus, gratuity ought to be calculated at the rate of K 1,050.00 and not the full salary of K 1,698.60.
18. As found, the complainant worked for a total of 26 months. As such, his gratuity is $K 1,050.00 \times 26 \text{ months} \times 25\% = \mathbf{K 6,825.00}$.

Lunch allowance

19. The complainant is also seeking lunch allowance. But as already established, the total pay of K 1,698.60 encompasses lunch allowance. This means that the amount found due under the claim of salary underpayment has catered for this claim. The claim is accordingly dismissed.

Any other benefits

20. The complainant did not claim leave days in his notice of complaint but made mention during the hearing that he is owed leave pay. It is established at law that an employee is entitled to leave days. In the case of **Jackson Mwape & 61 Others v. ZCCM Investments Holding Limited**⁽⁴⁾, the Supreme Court held that leave days in this jurisdiction are an accrued right that cannot be taken away.
21. The complainant herein, however, not only failed to include leave days as a claim in his originating process but also failed to lead evidence at the hearing as to the amount owed to him. There was no evidence on the number of days he allegedly accumulated. As stated earlier in the judgment, he who alleges must prove and just because there is no defence on record does not mean that the complainant ought to succeed automatically.
22. Given the foregoing, the claim for leave days is unmeritorious and is accordingly dismissed.

Costs

23. The respondent neither filed an Answer nor attended trial. This, in my view, is unreasonable conduct envisaged by Rule 44 of the Industrial Relations Court Rules. Thus, it is only proper that the respondent be condemned in costs for this action.

Conclusion

24. The complainant has proved on a balance of probabilities that he was underpaid in terms of salaries and was not paid his gratuity for the contract period. As such, and for the avoidance of doubt, I make the following orders:

i) The respondent shall pay the complainant, the sum of **K 23,363.60** in salary underpayments

(ii) The respondent shall pay the complainant the sum of **K 6,825.00** as gratuity.

(ii) The total sum due shall attract interest at short term bank deposit rate from the date of filing of notice until Judgment and thereafter at current lending rate as determined by Bank of Zambia until full settlement.

(iv) The complainant is awarded cost.

Leave to appeal is granted.

Delivered at Lusaka this 16th day February, 2024



Mwaaka Chigali Mikalile

HIGH COURT JUDGE