

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

**2023/HPIR/0560**

*(Civil Jurisdiction)*

**BETWEEN:**

**MUTINTA MALAMBO**



**COMPLAINANT**

**AND**

**TAU RISK SECURITY**

**RESPONDENT**

**Coram: Before Hon. Lady Justice Mrs. Mwaka. S. Ngoma this 13<sup>th</sup> day of  
March, 2024**

*For the Complainant* : *In Person*

*For the Respondent* : *No Appearance*

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## **JUDGMENT**

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**Legislation referred to:**

1. Minimum Wages and Conditions of Employment (General) Order, 2011 as amended in 2012 and 2018.
2. The Employment Code Act, No. 3 of 2019
3. The Employment Act, Cap 268 of the Laws of Zambia
4. The Minimum Wages and Conditions of Employment Act Cap 276 of the Laws of Zambia
5. Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia

**Text Referred to:**

Mwenda, W.S and Chungu, A Comprehensive Guide to Employment Law in Zambia (UNZA Press, 2021) at page 288

**Cases referred to:**

1. Robert Simeza & 3 Others V Elizabeth Mzyece (2011) ZMSC 3
2. Wilson Masauso Zulu v Avondale Housing Project(1982) Z.R 172(S.C)

**1.0 Introduction**

The complainant commenced these proceedings against the respondent by way of notice of complaint and supporting affidavit on 13<sup>th</sup> April 2023 seeking the following reliefs:

- a. Gratuity;
- b. Leave days;
- c. Terminal Benefits;
- d. Salary Arrears for 13 months;
- e. Costs and any other benefits the court may deem fit.

**2.0 Complainant's Affidavit Evidence**

- 2.1 In her affidavit in support of complaint, the complainant averred that she worked for the respondent as a security officer from June 2018 until January, 2023 when she fell ill and could not carry on working. She averred that the respondent did not pay her terminal benefits despite her making demands on numerous occasions.
- 2.2 She further averred that prior to commencement of this action, she sought the intervention of the Labour Office to have the respondent pay her dues, but was unsuccessful. Aggrieved by the respondent's non-payment of her dues, she commenced this action, claiming the reliefs listed above.

**3.0 The Respondent's Case**

The respondent did not file an answer to the complaint.

#### 4.0 Hearing

- 4.1 At the hearing held on 12<sup>th</sup> October, 2023, the respondent did not appear before court. I noted from the record that the complainant did file an affidavit of service on 2<sup>nd</sup> October, 2023 in which she deposed to having served the respondent with the notice of hearing on the same day. Having satisfied myself that the respondent was aware of the date of hearing, I proceeded to hear the matter on the basis that the respondent was absent from court without any reason. I was fortified in taking this course by the case of **Robert Simeza & 3 Others V Elizabeth Mzyece**<sup>1</sup> in which the Supreme Court guided that no procedural injustice is occasioned when a court proceeds where a party who was aware of proceedings did not appear before Court.
- 4.2 The complainant's oral testimony was that she worked for the respondent as a security guard from July 2018 to January 2023. She fell ill in January 2023 and had surgery as a result of which she could not carry on working. It was her testimony that the respondent had not paid her salaries for 13 months and that when she fell ill and needed money to buy medicine, the respondent did not assist her. That, in fact, the respondent had, on at least 4 occasions, assured her that it had deposited money in her account causing her to rush to an automated teller machine to get some cash, but on each occasion, she found that the deposit had not been made, causing her much stress.
- 4.3 It was her testimony that she sought the intervention of the labour office who summoned the respondent, but the respondent did not avail itself for the meeting, leaving her with no choice but to commence this action.
- 4.4 It was also her testimony that her basic salary was K1,650, and that she never got any allowances. She told the court that in 2021, she was not paid her salaries for the months January to March, inclusive; in 2022, the only salary she was paid was the September one; and that she was not paid for January 2023. That the salary arrears amounted to K19,800.

- 4.5 It was her further testimony that she never went on annual leave, save for the few days she applied for occasionally to attend funerals. Hence, her accrued leave days at the time of termination were 54.
- 4.6 Finally, the complainant asked the court to order a refund of the uniform bond which was deducted from her salary and was supposed to be refunded at the end of her employment, but was not. She, however, could not say how much it was.
- 4.7 The complainant's lone witness, her sister, did not add much value to her case, save to confirm that the complainant fell sick while in the employ of the respondent.

## **5.0 Determination**

- 5.1 I have considered and reflected on the pleadings and the oral evidence by the complainant. What needs to be determined is whether the complainant is entitled to the reliefs claimed as listed in her notice of complaint.
- 5.2 The respondent did not file an answer and neither was it represented at the hearing, aforesaid. That, notwithstanding, it must be noted that the complainant has to prove her case and will not succeed automatically on account of the respondent's absence or failure to defend the case. I am guided by **Wilson Masauso Zulu v Avondale Housing Project<sup>(2)</sup>** where the Supreme Court restated the principle of law that he who alleges must prove; and Ngulube DCJ (as he then was), said the following at page 175:

*"...I think it is accepted 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 those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent's case."*

- 5.3 This principle will guide the determination of the reliefs sought. Before I delve deeper into the determination of the issues, I must state that the law

in Zambia has set minimum standards and basic conditions of employment for workers in the **Employment Act, Chapter 268 of the Laws of Zambia** (now repealed) and in the **Employment Code Act No.3 of 2019**. In addition to the Employment Act, specific groups of vulnerable workers have ministerial orders in the form of statutory instruments that provide specific basic conditions of employment.

5.4 Under the now repealed **Minimum Wages and Conditions of Employment Act, Chapter 276 of the Laws of Zambia**, the Minister of Labour issued statutory instruments to give effect to minimum standards for protected groups of employees who were not adequately covered by any effective mechanism of regulating wages and other terms and conditions of employment. I must hasten to add that even though the Minimum Wages and Conditions of Employment Act was repealed by section 138 (1) of the Employment Code Act, the ministerial orders enacted under it were not repealed and were still applicable for the duration of the complainant's employment. Thus, the Minimum Wages and Conditions of Employment (General) Order, 2011 as amended in 2012 and 2018 which applies to vulnerable workers such as security guards and general workers applies to the complainant and covers her terms and conditions such as annual leave, retirement benefits, etcetera.

5.5 I now turn to the reliefs in the order I consider most convenient.

## **6.0 Whether the Complainant is entitled to Terminal Benefits and/or Gratuity**

6.1 In order to determine whether the complainant is entitled to any terminal benefits, and, if so, the nature and quantum of the benefits, a determination of the type of employment contract she served under needs to be made at the outset. It was the complainant's testimony that she was employed on contract but was not given a copy of the contract. I must pause at this point to express my displeasure at this undesirable behavior

by some employers of denying their employees copies of their contracts of employment, which, regrettably, is becoming common. One can only speculate as to the motives behind this action. In my view, the motives are suspiciously sinister.

- 6.2 No evidence was led as to the duration of the contract. I will assume it was one which, if not terminated as provided by the Employment Code Act, would have expired on the complainant's attainment of the retirement age specified in a written law. Such a contract would fall within the ambit of section 3 of the Employment Code Act where it is described as a "permanent contract" and defined as:

*"a contract of employment, if not terminated in accordance with this Act, expires on the employee's attainment of the retirement age specified under a written law."*

- 6.3 Going by this definition, I take the view that a permanent contract passes as a contract of fixed duration as it is certain to expire on retirement date. Accordingly, employees on permanent contract also get severance pay provided for in section 54(1) (b) and (c) of the Employment Code Act. I am supported by the learned authors Winnie Sithole Mwenda and Chanda Chungu, who state, at page 288 of their book **A Comprehensive Guide to Employment Law in Zambia: (2021), the University of Zambia Press**, that:

*"A contract for a fixed duration includes permanent contracts and thus, although the definition of gratuity provides the entitlement for long term employees, permanent employees get this benefit in the form of severance pay when their employment terminates for a reason other than redundancy, medical discharge or death".*

- 6.4 In the light of the above, the complainant is entitled to severance pay at the rate of not less than twenty-five percent of her basic pay earned during her employment as provided in section 54(1)(c) of the Employment Code Act. However, since the entitlement to severance pay does not apply



retrospectively, the severance pay is payable from 9<sup>th</sup> May, 2020 when the transition period in which to comply with the Employment Code Act expired. Thus, the complainant is not entitled to this benefit from the date of her engagement, but only from 9<sup>th</sup> May, 2020 to the date of the termination of her employment.

- 6.5 The complainant did not state the exact date in January 2023 when she stopped going for work. She, nevertheless, included the month of January on the list of months for which she was not paid her salary. Consequently, I shall take it that she worked the whole month otherwise she would not be demanding a full salary for the month. So, from 9<sup>th</sup> May 2020 to 31<sup>st</sup> January 2023 gives a total of 31 months and 22 days. Hence, the gratuity payable at the applicable rate of 25% on her last salary of K1, 650 is K13, 090.50.
- 6.6 With regard to the years served by the complainant prior to the enactment of the **Employment Code Act, the provisions of the Minimum Wages and Conditions of Employment (General) Order, 2011** shall apply. Paragraph 8(1) of this Order provides for retirement benefits of three months' basic pay for each completed year of service where an employee has served for more than ten years and has attained the age of fifty-five. An employee must have fulfilled two conditions in order to be entitled to retirement benefits. Firstly, the employee must have served with an employer for more than ten years and, secondly, he or she must have attained the age of fifty-five. The complainant was employed in June 2018, and she left the employ of the respondent in January 2023. This means she only served for about four and a half years. Further, at the hearing, she told the court that she was 50 years old. My conclusion is that she did not fulfill both conditions, and therefore, she is disqualified from receiving terminal benefits for the period prior to 9<sup>th</sup> May 2020. The claim for benefits, therefore, succeeds to the extent discussed above.

**9.0 Whether the Complainant is entitled to any other Benefits as the Court may deem fit**

Uniform Bond

- 9.1 Although the complainant did not include this claim on the list of reliefs in her notice of complaint, she, nonetheless, asked the court during her evidence in chief to order a refund of her uniform bond. The complainant has not adduced any evidence as to the amount claimed in this regard. She has also not told the court if there were any conditions attached to the refund of the bond and, if so, whether she fulfilled those conditions. As such, I am of the view that she has failed to discharge her burden of proof and this claim must fail for lack of merit.

Allowances

- 9.2 I have also enquired into allowances which the complainant was entitled to, but was not being paid. I am mindful that the complainant has not made an express claim for transport, lunch and housing allowances but has asked this court to order the respondent to pay her any other benefit the court may deem fit. Section 85A of the Industrial and Labour Relations Act, cap 269 of the Laws of Zambia has endowed this court with the discretion, where it finds that the complaint or application presented to it is justifiable and reasonable, to grant such remedy as it considers just and equitable, including an award for damages for loss of employment and make any other order or award as the court may consider fit in the circumstances of the case. This provides the basis upon which this court can award housing, transport and lunch allowances which the complainant has not explicitly asked for in her complaint.
- 9.3 At the hearing, the complainant testified that she did not get any allowances. She submitted a copy of her pay slip for January 2020 to prove that no allowances were included. She told the court that her residence was in chaisa compound, Lusaka. She, however, did not state where her duty station was



and how far it was. She merely said "it was very far". I am not satisfied that the distance between the two is beyond three kilometers and, thus, falls within the ambit of paragraph 14 of the General Order of 2011, which entitles an employee to transport allowance where his or her duty station is beyond a three kilometer radius from his area of residence. Consequently, I find no basis for awarding the complainant transport allowance.

9.4 The housing and lunch allowances are quite straightforward. Paragraph 15 of the General Order of 2011 provides for a lunch allowances of K120 per month where an employer does not provide a canteen. This amount was increased to K180 by the Amendment Order of 2018 issued on 7<sup>th</sup> September 2018. Paragraph 19 of the Order of 2011 provides for a housing allowance of thirty percent of the employee's basic salary. The unpaid allowances due to the complainant are as follows:

- i. From the date of employment to 6<sup>th</sup> September, 2018, the complainant is entitled to K120 per month as lunch allowance and from 7<sup>th</sup> September 2018 to the date of termination of her employment, she is entitled to K180 in respect of lunch allowance.
- ii. The complainant is entitled to 30% of her basic salary as housing allowance from the date of her employment to the date of the termination of her employment.

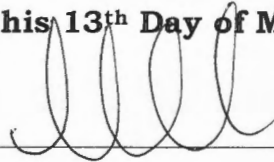
## **10.0 Conclusion and Orders**

10.1 The complainant has, on a balance of probabilities, proved her case to the extent shown above. Therefore, judgment is entered for the complainant for the following:

- i. Leave days totaling 54, amount to be assessed by the Deputy Registrar.

- ii. Severance pay at 25% of earnings from 9<sup>th</sup> May 2020, to the date of termination of the employment being 31<sup>st</sup> January, 2023, to be assessed by the Deputy Registrar.
- iii. Salary arrears of **K19,800**.
- iv. Housing allowance at 30% of the basic salary of K1650 from 1<sup>st</sup> June 2018, being the date of employment to the date of termination of employment, to be computed by the Deputy Registrar.
- v. Lunch allowance at the rate of K120 per month from the date of employment to 6<sup>th</sup> September, 2018 and at the rate of K180 per month from 7<sup>th</sup> September 2018 to 31<sup>st</sup> January 2023, being the date of termination of her employment to be assessed by the Deputy Registrar.
- vi. The Judgment sums shall attract interest at short term bank deposit rate from the date of the notice of complaint to the date of judgment and thereafter, at current lending rate as determined by the Bank of Zambia from the date of Judgment until full payment.
- vii. Each party shall bear its own costs.
- viii. Leave to appeal is granted.

**Delivered at Lusaka this 13<sup>th</sup> Day of March, 2024.**



**Hon. Lady Justice Mrs. M.S Ngoma  
HIGH COURT JUDGE.**

