

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

**2020/HPIR/330**

*(Civil Jurisdiction)*

**BETWEEN:**

**GOODSON NYONI**

**AND**

**STAR GOLD**

**KRISHNA INVESTMENTS**



**COMPLAINANT**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**Coram: Before Hon. Lady Justice Mrs. M.S. Ngoma this 29<sup>th</sup> day of  
January, 2024.**

*For the Complainant* : *In Person*

*For the Respondent* : *No Appearance*

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## **JUDGMENT**

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**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 (SC)
3. BJ Poultry Farm Limited v Nutri Feeds Zambia Limited SCZ Appeal No. 166 of 2015

**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 Relations Court Rules Chapter 269 of the Laws of Zambia

## **1.0 Introduction**

In a notice of complaint filed into court on 19<sup>th</sup> June, 2020, the complainant seeks to recover from the respondents the following reliefs:

- i. Leave days;
- ii. Notice and Severance pay;
- iii. Underpayment for 32 months;
- iv. Costs; and
- v. Any other benefits the court may deem fit.

## **2.0 The Complainant's Case**

- 2.1 In his affidavit in support of complaint, the complainant averred that he was verbally employed by the 1<sup>st</sup> respondent as a driver on 13<sup>th</sup> March, 2017. In 2018, he signed a contract but he was not given a copy of the same. In 2019, he did not sign a contract. In 2020, the 2<sup>nd</sup> respondent took over from the 1<sup>st</sup> respondent.
- 2.2 On 16<sup>th</sup> March 2020, his services were terminated without reasons and without paying him his terminal benefits. The letter of termination is shown in his affidavit and marked "**GN1**".

2.3 The complainant averred that after a long time of waiting for his benefits, he reported the matter to the Labour Office where the 2<sup>nd</sup> respondent was summoned for meetings but all efforts to resolve the matter amicably proved futile, hence the institution of this action.

### 3.0 **The Respondent's Case**

The respondents did not file an answer to the complaint.

### 4.0 **Hearing**

4.1 At the hearing of the matter held on 28<sup>th</sup> September, 2023, the respondents were absent. I noted from the record that the complainant did file an affidavit of service dated 17<sup>th</sup> August, 2023 in which he deposed to having served the respondents with the notice of hearing on 14<sup>th</sup> August, 2023. Having satisfied myself that the respondents were aware of the date of hearing, I proceeded to hear the matter on the basis that the respondents were 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, in many respects, the same as his affidavit evidence. He added that in 2020, he was assigned to drive Dinesh, the brother in law of Patel, the owner of the 2<sup>nd</sup> respondent company. Since the tyres of the vehicle were worn out, the police often impounded it and each time this happened he would be instructed to negotiate with the police to waive the fine. It was all very well when he succeeded but when he was unsuccessful, the boss would threaten him with dismissal from employment.
- 4.3 He also told the court that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were initially one company named Star Gold Krishna Investments until about 2020 when they separated and he remained working for the 2<sup>nd</sup> respondent. He was aware that after the 2<sup>nd</sup> respondent had since changed its name to King Tiles.
- 4.4 It was his testimony that he worked for 3 years without going on leave and that his monthly salary was K1, 200 for the duration of his employment with the respondents instead of K1, 500 as provided by the minimum wage law.
- 4.5 He further testified that he did not get any allowances. That he was staying in Lilanda, Lusaka and his workplace was on Lumumba road.

4.6 The complainant called one witness, Mr. Michael Mwangala, a tile fitter. His testimony was that he worked with the complainant at Star Gold Zambia Limited. He was already working for Star Gold Zambia Limited when the complainant was employed. He told the court that the way the owner of the company operates is that when he sees that employees have worked many years, he will look for faults to justify him terminating their services without benefits.

4.7 It was the witness' further testimony that when he joined the company, it was called Star Gold Limited. After his services were terminated, it changed its name to Krishna Investments.

4.8 The complainant did not call any other witness and this marked the close of his case.

#### 5.0 **Determination Of The Matter**

5.1 As mentioned earlier, the respondents did not file an answer and neither did they appear at the hearing. Rule 11(2) of the Industrial Relations Court Rules, Chapter 269 of the Laws of Zambia, stipulates as follows with regard to filing of an answer by the respondent:

*“A respondent who desires to answer a complaint shall, within the time appointed under sub-rule (1), deliver to the Court the answer in,*

*or substantially in accordance with, Form IRC 10 contained in part B of the Schedule, setting out his answer to the complaint.”*

5.2 Regulation 11(2) is very clear as to what a respondent who desires to answer the complaint should do, that is, file an answer within the specified time. Therefore, by not filing an answer to the complaint, the respondents herein signified to this court that they had no desire to defend themselves against the complaint which thus remained uncontested. Nevertheless, 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**<sup>2</sup> and **BJ Poultry Farm Limited v Nutri Feeds Zambia Limited**.<sup>3</sup>

5.3 And so, the question for determination in this matter, in my view, is whether or not the complainant has proved his claims against the respondents on a balance of probabilities. The testimony of the complainant is that at the time of his employment, the entity which employed him was Star Gold Krishna Investments. Sometime in 2020, this entity split into two, creating the 1<sup>st</sup> and 2<sup>nd</sup> respondents. His witness, however, testified that the employer was Star Gold and then, after he left employment, it changed its name to Krshina Investments.

5.4 After analyzing the testimonies of the two, I am of the view that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have been one and the same entity from the time the complainant was employed. I take this view because the complainant's witness testified that he worked with the complainant and that the complainant found him at the 1<sup>st</sup> respondent company – Star Gold Zambia Limited. The name only changed to Krishna Investment after the witness left.

5.5 The view I have taken is also supported by a letter dated 19<sup>th</sup> June 2020, exhibited in the complainant's affidavit, written by the Department of Labour to the Registrar of this court which made reference to the change of name. The relevant parts of this letter read as follows:

*“19th June  
The Registrar,  
Industrial Relation Court  
Lusaka*

**RE: REFERRED CASE: GOODSON NYONI VERSUS KRISHNA INVESTMENTS) FORMERLY STAR GOLD)**

*Kindly refer to the above captioned matter.*

*The above named person would like to sue his former employer alleging unfair dismissal, non-payment of leave dues, notice and severance pay. Mr. Nyoni worked for the company from April 2017*

*to 31<sup>st</sup> December, 2019 and continued work on 1<sup>st</sup> January 2020, when the company changed to Krishna investments. No benefits were paid from Star Gold, meaning its liability transferred along with the employees.*

*Efforts to resolve this matter have proved futile as the employer has not brought any documentation to help resolve the matter. Hence, the matter is being transferred to your good office for litigation.*

*Yours Faithfully,  
Musonda Mulenga (Mr.)  
Labour Office  
For/ Assistant Labour Commissioner  
Lusaka Province” (Bold mine for emphasis).*

- 5.6 The letter from the Department of Labour supports the view that the 1<sup>st</sup> respondent employed the complainant and later changed its name to the Krishna Investments.
- 5.7 That the complainant was in the employ of the 2<sup>nd</sup> respondent at the time of termination of his services is also evident from **Exhibit GN1**” which reads as follows:

*“KRISHNA INVESTMENTS LTD*

*ON THIS day Krishna Investments Ltd has terminated the contract of Driver Goodson Nyoni as at 15/3/20. He has since been paid his dues K1600 for the month of March, 2020.*



*With effect from today 16/3/20, Mr. Goodson Nyoni ceases to be an employee of Krishna Investments Ltd.*

*SIGN:*

*For/on behalf of  
Management*

*GIVEN*

*Krishna Investment Ltd”*

- 5.8 The complainant testified that he worked as a driver. This is supported by the letter of termination reproduced above where he is referred to as a driver. There is no evidence on record that the complainant belonged to a union. Further, although the complainant testified that he signed a contract in 2018, he stated that he was not availed with a copy of the same. It was his testimony that he did not have a written contract for the first year and the third year. Consequently, since he had oral contracts of employment for at least two terms, and due to the nature of his job, I conclude that he was a protected employee covered by the Minimum Wages and Conditions of Employment (General) Order, 2011 as amended in 2012 and 2018. It is significant to note that even though the Minimum Wages and Conditions of Employment Act, 1982 was repealed by section 138(1) of the Employment Code Act, No.3 of 2019, the ministerial orders enacted pursuant to the same were not repealed

and are still applicable until expressly repealed. Thus, the General Order, 2011 as amended by the 2012 and 2018 Orders applied to the complainant.

5.9 As a protected employee, the complainant was entitled to the benefits provided in the General Orders. In line with the schedule in these Orders, the minimum wages from the date of the complainant's employment, namely 13<sup>th</sup> March 2017 up to 6<sup>th</sup> September, 2018 was K600 per month and from 7<sup>th</sup> September, 2018 to the date of his dismissal, being 16<sup>th</sup> March, 2020, it was K1,503 per month.

5.10 Having made the above finding, I shall now proceed to analyse the individual reliefs claimed in the notice of complaint, in no particular order.

**Whether the Complainant is entitled to payment for Leave Days**

5.11 Paragraph 5(1) of the General Order of 2011 provides for leave at the rate of two (2) days per month. Having completed six months' continuous service with the respondents, the complainant was entitled to leave with full pay at the rate of two days per month. The complainant worked for the respondents from 13<sup>th</sup> March 2017 to 16<sup>th</sup> March 2020. He is, accordingly, entitled to 72 leave days. Leave pay is calculated using the formula in the fifth schedule to the Employment Code Act No. 3 of 2019 as follows:

$$\text{Leave benefits} = \underline{\text{FP X D}}$$

Where FP = Full Pay; D = number of accrued leave days

$$\frac{K1,503 \times 72}{26} = K4,162$$

26

5.12 The complainant testified that his last salary was K1,200. The minimum wage at the date of his dismissal as per paragraph 4(1)(d) of the General Order of 2018 was K1,503. As such, the calculation of the leave pay above has been based on the sum of K1,503. The claim for leave days, therefore, succeeds.

**Whether the Complainant is entitled to notice Pay and Severance Pay**

5.13 With regard to the claim for notice pay, section 20 (2)(c) of the Employment Act cap 268 of the laws of Zambia provided for 30 days' notice to terminate a contract of employment where the contract is for a period of one week or more. Section 21(b) of the same Act provided for payment of wages, and all benefits, in lieu of notice. The complainant having been dismissed without notice, his claim for notice pay succeeds and he is accordingly awarded one month pay together with applicable allowances.

5.14 With respect to severance pay, the complainant did not substantiate this claim. It is not uncommon for complainants appearing in this court to neglect to adduce evidence in support of their claims in the hope that

the court will do the research on their behalf. I take judicial notice that with the enactment of the Employment Code Act No. 3 of 2019, some litigants assume that they are automatically entitled to gratuity on termination of their employment. I hasten to mention that this Act became effective on 9<sup>th</sup> May, 2020 when the transition period in which to comply with it expired. As this Act cannot be applied retrospectively, I find it pointless to discuss its provisions with respect to severance pay which would have been payable to the complainant had he come under its ambit. Consequently, I find that the complainant's claim for severance pay fails for lack of merit.

**Whether the Complainant is entitled to payment of underpayments for 32 months**

5.15 The minimum wage provided by paragraph 1(c) of the Schedule to the General Order of 2011, as amended in 2012, is K600 per month. The complainant's salary for the duration of his employment was K1,200. Hence, it was above the minimum wage and, therefore, in compliance with the law. It must be noted that even though the complainant was paid more than the minimum wage from 13<sup>th</sup> March, 2017 to 8<sup>th</sup> September, 2018 when the Order was further amended, the additional K600 cannot be deducted from the complainant's salary because the General Order, in paragraph 2(1), forbids the reduction or adverse

alteration of wages or any benefit enjoyed by an employee as a result of the application of the Order.

5.16 With the issuance of General (Amendment) Order 2018 on 7<sup>th</sup> September, 2018, the minimum wage was increased to K1,503 per month. Since the complainant's wage was K1200 it was below the minimum wage by K303. He is thus, entitled to recover the underpayments of K303 per month from 8<sup>th</sup> September, 2018 to the date of dismissal, being 16<sup>th</sup> March 2020.

5.17 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 respondents to pay him 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 his complaint.

5.18 At trial, the complainant testified that his residence was in Lilanda, Lusaka, while his duty station was on Lumumba road. He did not state the distance between the two. However, I take judicial notice that the distance is beyond 3 kilometers, and thus, falls within the ambit of paragraph 14 of the General Order of 2011, as amended, which entitles an employee to transport allowance where his duty station is beyond 3 kilometer radius from his area of residence.

5.19 Consequently, I find that the complainant is entitled to payment of unpaid housing, transport and lunch allowances which the respondents were under obligation to pay to him. The unpaid allowances are as follows:

- i. From the date of employment to 6<sup>th</sup> September, 2018, the complainant shall be paid K102.40 and K120 per month as transport and lunch allowance, respectively.
- ii. From 7<sup>th</sup> September 2018 to 16<sup>th</sup> March 2020, the date of his dismissal, the complainant shall be paid K153.60 and K180 in respect of transport and lunch allowance, respectively.
- iii. The complainant shall be paid 30% of his basic salary as housing allowance which salary was K1,200 from the date of his employment to 7<sup>th</sup> September, 2018. The basic salary from 8<sup>th</sup> September, 2018 to 16<sup>th</sup> March, 2020, the date of dismissal, ought to have been K1,500.

## 6.0 Conclusion and Orders

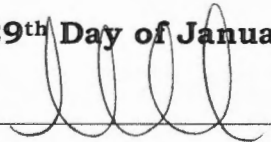
From the evidence on record, I am satisfied that the complainant worked for the respondents as a driver from 13<sup>th</sup> March, 2017 until 16<sup>th</sup> March 2020 when his services were terminated without notice. I find that the complainant has proved his claims against the respondents on a preponderance of probabilities. Therefore, judgment is entered against the respondents, in favour of the complainant for the following:

- i. Leave days at the rate of 2 days per month from 13<sup>th</sup> March 2017 to 16<sup>th</sup> March, 2020: **K4,162;**
- ii. One month's salary in lieu of notice together with all allowances, giving a total of **K2,283.60;**
- iii. Underpayments of K303 per month from 8<sup>th</sup> September, 2018 to 16<sup>th</sup> March, 2020 (total 18 months) giving a total of **K5,454.**
- iv. Housing allowance at 30% of the basic pay, from the date of employment, being 13<sup>th</sup> March 2017, to the date of dismissal, being 16<sup>th</sup> March, 2020 (total 36 months) to be computed by the Deputy Registrar.
- v. Transport and lunch allowances at K102.40 and K120, respectively, from the date of employment being 13<sup>th</sup> March, 2017 to the 7<sup>th</sup> September, 2018 (17 months) and at K153.60

and K180, respectively, from 8<sup>th</sup> September, 2018 to the date of dismissal being 16<sup>th</sup> March, 2020 to the (18 months) to be computed 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 29<sup>th</sup> Day of January, 2024.**



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

