

**IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

APPEAL NO. 003/2017

BETWEEN:

ISAAC SIMBEYE

APPELLANT

AND

BARCLAYS BANK ZAMBIA PLC

RESPONDENT

CORAM: Hamaundu, Malila and Musonda, JJS.

On 5th May, 2017 and 1st December, 2017

For the Appellant : In person

For the Respondent : Mrs P. Ngoma-Mudwara, Messrs
Chibesakunda & Company

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Nkhata and four others v The Attorney General [1966] ZR 124**
2. **Investors Compensation Scheme Limited v West Bromwich Building Society [1997] UK HL 28**
3. **Burton Construction Limited v ZAMINCO LIMITED [1983] ZR 20**

This appeal is against the High Court's dismissal of the appellant's claim for commission in the sum of K342,388.50. The dispute in this case stems from an agreement which the parties entered into in March, 2014. By this agreement the appellant was appointed *Head Generator*. The appellant was to be paid commission of 5% on any new salaried accounts that he brought to the respondent. The appellant was also entitled to a commission of 25% on sales on loan products that he made.

In June, 2014, the appellant brought in, according to him, 647 salaried accounts from the Zambia Police Service. The total deposits in those accounts came to K6,813,021,75. In the appellant's view, a 5% commission on this figure came to K340,641.08. The appellant also made sales in respect of loan products which ultimately earned him a commission which was not disputed by the respondent; hence, it is not part of the dispute.

The respondent disputed the commission claimed by the appellant because, in its view, the initial deposits made in June included salary arrears. According to the respondent, the true salaries started reflecting in the subsequent months; and these were K1,930.36 per account as opposed to the K10,930.14 per

account that had reflected in June. The respondent also had some issues with the number of accounts that were actually funded but, ultimately, its view was that the appellant was only entitled to a sum of K59,762.13 as commission, based on the true salaries as reflected in 613 accounts that had actually been funded.

The appellant brought the dispute to court. At the trial, the resolution of the dispute turned on the interpretation of what the agreement provided: The appellant contended that the agreement provided for payment of commission on the initial salary deposit only; and argued that the contention by the respondent that commission was payable only on the actual monthly salary was an attempt to vary the agreement by parole evidence.

The respondent, on the other hand, contended that the words "*initial salary deposit*" meant the initial salary deposited, excluding arrears.

The court below acknowledged that the agreement did not provide for the meaning of "*initial salary deposit*." However, the court brought into aid, Annexure "A" of the agreement, particularly the provisions under the heads "*general basis of compensation*" and "*general application of payment*." It came to the conclusion that

the provisions talked about a singular initial salary as opposed to commulative salary occasioned by delay in payment of the first salary, as was the case at hand. The court found that, infact that was what could be discerned as the intention of the parties in the agreement. The court observed that, infact, what brought about the confusion was the delay in funding the accounts, such that, when they were finally funded, payments for salary arrears were also included. It is on that basis that the court dismissed the appellant's claim.

The appellant has advanced three grounds of appeal. These are couched as follows:

“Ground 1

The court below erred in law and fact by failing to take into consideration the fact that the law with respect to the parole evidence rule does not allow parties to a contract to introduce new terms into an already validly concluded and executed contract. The court misdirected itself in this respect when it failed to grasp the distinction between a salary, as in actual monthly entitlement of a person, and a salary deposit, the latter being the contractual term and not the former by which it was swayed.

Ground 2

The court below erred in law and in fact by failing to take into account the fact that parties to the contract were using

amounts or figures of salary deposits as reflected on the customers accounts without adjustments as opposed to basing the calculation of commission based on what the respondent terms actual monthly entitlements or accurate salaries of customers.

Ground 3

The court below misapprehended the meaning of reading the general basis of compensation together with the general application of payout as meaning that when accounts were opened they were supposed to be funded with an initial salary deposit within 30 days of opening. This was a misdirection which seriously influenced the court in arriving at its conclusion when actually there was no requirement that accounts should be funded within 30 days of opening.

The appeal was argued entirely on the written heads of argument filed by the parties.

The appellant has argued in respect of the first ground of appeal that the initial salary deposit being referred to in the contract is nothing but a description of a new bank balance, and commission is payable on all the new bank balances. He argued that it was irrelevant what the new to bank balance was defined at source, prior to being deposited in the bank as a new balance, because the contract expressly stated that the incentive plan covered all new to bank balances. The amounts in question were

undisputedly new to bank balances and, hence, were fully covered by the incentive plan and not partly excluded. He argued that the learned judge's interpretation of initial salary deposit to mean a singular initial salary as opposed to a cumulative salary meant that part of the amount of the new to bank deposits on the sales brought by the appellant were excluded when calculating commission. This interpretation, he argued, was inconsistent with the very root, subject matter and object expressed in the contract; which was that the incentive plan covered all new to bank balances. The incentive plan was concerned with the amounts deposited and, therefore, it covered all new to bank balances. This was totally different from the customers' first salaries in their employment which, in other words, were new to customer income. The agent's commission was, therefore, based on the new balances actually deposited, not on what customers had declared to be their monthly entitlement. The payment of commission was not based on what new customers were worth or entitled to; or on amounts of a customer's first salary, but on new to bank balances as received; and this was not restricted to customers' salary income per month, but was based on how much was credited first as a new balance.

In the second ground of appeal, the appellant has argued that the attempt by the respondent to calculate commission on the second salary deposit of K1,930.36 and not on the sum of K2,600 that was declared by the customers as their monthly salary, infact, supports the appellant's contention that the commission was based on the deposit received. The appellant argued that the employer was the only authentic and conclusive custodian and source of information as to how accurate the salary declared by a customer was: in this case the respondent did not even contact the employer. The comparison of salaries of various months by the respondent only disclosed differences in amounts and could not help detect or establish the exact salary of a customer.

It was the appellant's contention that if it was the respondent's desire to pay commission based on the information the customers in question had declared as being their correct salaries, the respondent should have adjusted the figures from the initial salary deposits of K10,930.14 to K2,700.00 which the customers had declared as their monthly entitlement. Alternatively, the respondent should have consulted the employer

for the correct salaries, instead of relying on the lower figure of K1,930.36 to calculate commission. Otherwise, appellant urged the appellant, the respondent's selection of the figure of K1,930.36 supports the appellants contention that commission was based on the amount deposited and that in this case the initial amounts deposited were those of K10,930.14 per account.

In the third ground of appeal, the appellant has argued that there was no requirement under the contract and incentive plan that accounts be funded with new to bank balances within 30days of opening.

The respondent argued all the grounds together. First the respondent argued that all the three grounds advanced by the appellant, essentially, attack the findings of fact made by the court below. We were referred to the principles upon which an appellate court may set aside or reverse findings of fact made by a trial court, as set out in **Nkhata & four others v The Attorney General of Zambia**⁽¹⁾. Relying on those principles, the respondent went on to argue that the finding by the court below that the average monthly salary was K1,930.36 was not perverse as it was based on credible evidence that had been adduced by the respondent. On that

argument alone, according to the respondent, all the three grounds of appeal must fail.

In the alternative, we were referred to the following cases; **Investors Compensation Scheme Limited v West Bromwich Building Society⁽²⁾** and **Burton Construction Limited v ZAMINCO Limited⁽³⁾** to support the respondent's proposition that the primary source for understanding what the parties meant is their language, interpreted in accordance with conventional usage and as against the background in which the words are written. Relying on that proposition, the respondent submitted that the term "*initial salary deposit*" must not be read in isolation but in the light of the entire Annexure so as to ascertain the true intention of the parties. In the circumstances, it was argued, it does not amount to introducing extrinsic evidence if one resorts to reading the agreement in Annexure A in its entirety.

We have considered the arguments in the first ground of appeal. The Lead Generator agreement provides in Annexure A the general basis of compensation.

It states in clause 1 (b) that:

"Payout will be based on % of initial salary deposit on new to bank accounts."

The dispute that has arisen between the appellant and the respondent is over the meaning of the words "*initial salary deposit*." The appellant has argued that the words *initial salary deposit* should not be limited to the salary of the account but should be taken to mean the first deposit on the new to bank account, regardless of the fact that the initial salary deposit included arrears. The respondent on the other hand has argued that the words "initial salary deposit" do not include any arrears and should be understood to mean an initial salary in the ordinary sense.

The word 'salary' is defined in Black's Law Dictionary as:

"An agreed compensation for services - especially professional or semiprofessional-usually paid at regular intervals on a yearly basis, as distinguished from an hourly basis..."

There is no dispute that the salaries of the over six hundred Zambia Police Service recruits were not immediately paid after their accounts were opened; and there is also no dispute that arrears were included in the initial deposits made. Thereafter, the salaries reverted to a sum which remained constant. The learned trial

judge held in his judgment that when one reads the general basis of compensation together with the general application of payment, the idea was that an account would be opened and funded with an initial salary deposit within 30 days. We agree with the learned trial judge. We further agree with the learned trial judge that the intention of the parties and understanding was that the commission would be based on that one-month salary, being the initial salary. We do not agree with the meaning assigned to the expression initial salary deposit by the appellant. A salary is paid at regular intervals and if, for some reason or other, the accounts were opened but not credited and then later credited with the arrears, this does not mean that the computation of commission should be based on the cumulative initial figure. The arrears were not regular and did not qualify to be defined as an initial salary deposit. What qualified as an initial salary deposit was a portion of the arrears which represented the regular salary. There is, therefore, no merit in the first ground of appeal. We dismiss it.

In the second ground of appeal, it is quite clear to us from the record of appeal and the appellant's own argument that the figure of K2,700.00 that was mentioned by the customers when opening

their accounts with the respondent was a mere estimate of their salaries. An estimate which is at best speculative cannot, in our view, be used as a basis for determining commission. The parties had agreed on a commission based on the initial salary deposited and not on an estimated salary. The appellant also seems to be suggesting in his arguments that the respondent did not contact the employer to verify the accurate salary of the customer. We are of the view that it was incumbent upon the appellant to prove his case by obtaining evidence from the employer to show what the correct salary was. The respondent simply relied on the regular salary that was being credited to the various customers' accounts as the basis for determining the commission due to the appellant. The respondent had no obligation to seek this information and cannot therefore be faulted for not doing so. We, therefore, find no merit in this ground of appeal, and we dismiss it.

Coming to the third ground of appeal, Annexure A to the Lead Generator Agreement states that the general basis of compensation would be based on a percentage of the average balance held for a minimum period of 30 days on new to bank account. The Annexure goes on to state that the payout would be effected in the

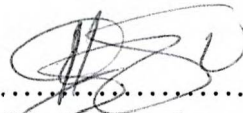
month after the 30 days period analysis of the average balance. The learned trial judge held as follows in his judgment.

“When you read the general basis of compensation together with the general application of payment, the idea was that an account will be opened and would be funded with an initial deposit within 30 days. Therefore, there would only be one single salary in that period and I have no hesitation in stating that the intention of the parties and the understanding was that commission would be based on that one-month salary, being the initial salary.”

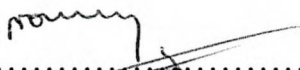
We agree with the appellant that there is no time limit of 30 days imposed by annexure A with which a customer must credit a new to bank account. This does not, however, alter the fact that the commission was to be based on the initial salary deposited which as we have stated earlier did not include arrears. There is partial merit in the third ground of appeal, although it does not affect the main thrust of the appellant's grievance with judgment.

We note from the record of appeal that the appellant had declined the sum of K59,762.13 that was offered to him by the respondent. We also note from the judgment in the record of appeal that the learned trial judge dismissed the appellant's whole claim of K342,388.50. Which, in our view included the admitted sum of

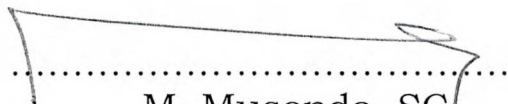
K59,762.13. This was a misdirection on the part of the learned trial judge. He should instead have entered judgment for the admitted sum. When the parties appeared before us, they both informed us that out of that sum, the respondent had paid to the appellant a sum of K15,000. We accordingly enter judgment in favour of the appellant against the respondent for the balance of K44,762.13, together with interest. Interest is payable at the short-term deposit rate from the date of the writ to date of judgment and thereafter at the average lending rate as determined by Bank of Zambia up to date of payment. The appellant appeared in person both in the court below and on appeal. We therefore, order that the respondent pays all the appellants reasonable out of pocket expenses both here and in the court below.



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E. M. Hamaundu
SUPREME COURT JUDGE



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Dr. M. Malila, SC.
SUPREME COURT JUDGE



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M. Musonda, SC.
SUPREME COURT JUDGE