

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2011/HP/1307

BETWEEN:

DAVIS MANYANDO MUYUNDA

AND

UNITURTLE INDUSTRIES (Z) LIMITED



PLAINTIFF

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 25th DAY OF
SEPTEMBER, 2017**

*For the Plaintiff : Ms E. Sakala D Bunting and Associates for Malipenga,
Malipenga and Company*

For the Defendant : Mr M. Mulenga, AMC Legal Practitioners

J U D G M E N T

LEGISLATION AND OTHER WORKS REFERRED TO:

- 1. Selwyn's Law of Employment 14th edition, N.M Selwyn, 2006**
- 2. The Rules of the Supreme Court, 1999 edition**

The Plaintiff commenced this action on 19th December, 2011 which was amended on 16th February, 2017 claiming:

- i. Exemplary Damages*
- ii. Damages*
- iii. Salary arrears from July, 2007 until determination of the matter*

- iv. *Gratuity for the 2006 – 2008 contracts, and 2008 to 2010 contracts*
- v. *Leave days*
- vi. *Interest*
- vii. *Costs*
- viii. *Any other relief that the court may deem fit.*

The statement of claim filed shows that the Plaintiff was employed as a Stores Clerk by the Defendant on a two year contract in 2004, which contract was renewed on 1st March 2006 for another two years until 28th February, 2008. That the Plaintiff was taken to Kanyama Police on 15th August, 2007 by the Defendant on the allegation that he had stolen 1040 bags of cement worth ZMW57, 275.98, and that he was charged and arrested for the offence of theft, and released on police bond.

The statement of claim further states that the Plaintiff used to report to Kanyama Police until 25th July, 2011 when Detective Inspector Munsanje wrote to the Plaintiff's advocates and informed them that the matter would not proceed, as there was insufficient evidence to prosecute the case. It is stated that on 15th July, 2011 the Defendant had written to the Plaintiff asking that they sit to reconcile, and the Plaintiff was requested by Mr Zimba on behalf of the Defendant to apologise, but the Plaintiff declined to do so.

It is alleged in the statement of claim that the Plaintiff was neither charged nor dismissed by the Defendant but was ordered not to report for work until the case was disposed of by the Zambia Police, and he had not been paid his salary from July, 2007 to date. It is further alleged that the Plaintiff was deprived of his dignity on account of the false allegations

made against him by the Defendant and it failed to prosecute its allegations.

That the Plaintiff suffered abuse by having to report to the Police for about five years until 2011, and it was only after his advocate's intervention that the Police wrote that there was insufficient evidence to prosecute the matter. Further that he was tortured, harassed, maliciously prosecuted and falsely imprisoned in police custody for two days, and was not paid his salary.

In the defence filed on 13th January, 2012, the Defendant admits that the Plaintiff was charged with the offence of theft, but denies that the allegation was false. That the ZMW57, 275.98 was the initial amount reported to have been stolen, but upon further investigations being conducted, it was found the amount alleged to have been missing was ZMW38, 745.00. The Defendant denies the allegation that the Plaintiff used to report to the police after he was released on police bond, as this was solely in the hands of the prosecution, and further denies that Maxon Zimba asked the Plaintiff to apologise to the Defendant.

The Defendant further denies that it ordered the Plaintiff to stop reporting for work until the matter was disposed, alleging that the Plaintiff deserted his employment from 22nd March, 2007 after being notified that he was suspected of having stolen from the Defendant, and that he had not reported for work since.

The Defendant admits not having paid the Plaintiff his salary and wonders why he had not claimed his March, April, May and June 2007 salaries, adding that he had not claimed the March 2007 salary, as he had deserted his employment. On the allegation in paragraph 9 of the

statement of claim that was deprived of his liberty, the defence is that the Plaintiff was finally apprehended in August, 2007, after having been on the wanted list. That the Plaintiff could only be prosecuted after a statement was given by his supervisor who was not available until November, 2007, when he gave his statement. The contention is that police discontinued the investigations without informing the Defendant of the reasons why.

The Defendant expresses ignorance of the fact that the Plaintiff was reporting to the police for five years, as his prosecution was not in the Defendant's hands. The allegations of torture, harassment, malicious prosecution and false imprisonment for two days is denied stating that the Defendant had reasonable and probable cause to lodge the complaint with the police.

At the trial the Plaintiff testified as the only witness on his behalf, while the Defendant called three witnesses.

In his testimony, the Plaintiff told the court that he was employed in May 2004 and on 22nd March, 2007. That he had applied for the job after he saw an advertisement in the newspapers, and after he was interviewed, he was employed on a contract. He identified the document at pages 12 to 14 of his bundle of documents as the said contract.

Further in his testimony, the Plaintiff testified that he was called by the Human Resources Manager Mr Hamubotu around 16:30 hours and told to stay away from work as there were investigations pending against him, which were not serious. That after he left, the Defendant did not get back to him and when he went to get his March, 2007 salary at the month end, Mr Dinesh Cheuchen declined to pay him, stating that

investigations in the matter were still on going. That he had stayed away from work from 2007 to date.

It was the Plaintiff's testimony that he was taken to the police and released on 15th August, 2007 after being charged with the offence of theft by servant, and that this was after he met his boss Mr Dinesh Cheuchen as he was going for work on a part time job. That he was asked to jump into Mr Dinesh's vehicle and they proceeded to the Defendant where he was directed to see the Human Resources Manager. That the Human Resources Manager had directed the Security Officer Mr Maxon Zimba to take the Plaintiff to the police, and the Plaintiff was taken to Trisha Police where he was detained, and the Defendant was asked to provide evidence to support its claims.

His evidence was that he was released on police bond on 17th August 2007, and was required to be reporting to the police, and that in November 2007, the matter was transferred to Kanyama police, where he was asked to be reporting. He identified the document at page 1 of his bundle of documents as the police bond form. He also identified the letter at page 4 of his bundle of documents as the letter that the police wrote to his advocates informing them that there was insufficient evidence to prosecute him. That thereafter on 25th July 2011 the police wrote another letter which is at page 9 of his bundle of documents also making reference to there being insufficient evidence, and after he sued the Defendant, Mr Zimba in 2012 wrote him asking him to go for a reconciliatory meeting. He identified the letter at page 7 of his bundle of documents as the said letter, and he stated that he went for the said meeting. His evidence was that Mr Zimba had asked him to apologise for stealing but he declined to do so.

With regard to allegations levelled against him, the Plaintiff testified he was informed at Trisha police that had stolen 600 bags of cement, but his immediate boss said they could be over 370 bags, and when the matter was transferred to Kanyama police, he was told that he had stolen 1050 bags.

With reference to pages 12 to 14 of his bundle of documents, the Plaintiff testified that this document contains the terms of his employment contract. That when there were problems, the Human Resources Manager would handle them, but depending on the nature of the problem, security would become involved.

He also explained that the security officers would check the goods and enter them at the gate and in their books before he received them, and thereafter the invoices would be taken to Accounts. The Plaintiff also testified that when knocking off all of them would be searched at the gate.

Still in his evidence, the Plaintiff outlined the procedure for issuing goods stating that a requisition would be raised by the department that was seeking them, and take it to the Stores Manager who would authorize the request. Then thereafter the Plaintiff would issue an issue note, indicating that what was requested was received, and the receiver would sign.

In terms of security of the goods, the Plaintiff's evidence was that the keys would be given to Mr Dinesh Cheuchen to keep, and if he was not there, the Security Officer would take charge. That if there was demand for goods in the night, the security officer would open the stores and give out the cement, and they would only be informed the next day. He stated

that he used to work up to 11:00 hours on Saturday. He ended his testimony by stating that the Defendant paid him up to February, 2007, and he was told that he would only be paid his salary when the police said that he had done nothing wrong.

In cross examination, the Plaintiff testified that he is a procurement officer, and that he worked for the Defendant as a Stores Clerk. He named his duties as issuing and receiving goods, and raising claims for orders when stock ran out. He maintained that he was ordered to stay away from work by the Human Resources Manager, Mr Hamubotu, and that at that stage the police were not involved.

He recalled that a truck load of cement was received by the Defendant on 22nd March 2007, and that it was possible that he could have received it. He agreed that he last worked for the Defendant on 22nd March, 2007, a Friday. His evidence was that security was to receive the truck load of cement first, and that in the morning the truck had gone in and after the security officers jumped on it, he had called Mr Dinesh Cheuchen to attend to it. That Mr Dinesh Cheuchen had told him that 130 bags of cement were missing.

The Plaintiff stated that the driver of the truck was confronted over the cement, and he was aware that the 130 bags of cement were recovered at Embassy Mall in Makeni, but denied that the driver was instructed to give him some money. He stated that he was unaware that the driver had implicated him.

He further denied having stopped reporting for work on his own volition, stating that the Human Resources Manager verbally told him to stop reporting. The Plaintiff agreed that he was arrested on 15th August, 2007

after he met Mr Dinesh Cheuchen, and he had asked that he goes and leaves the keys for where he was working, before they proceeded, but this was declined. The Plaintiff also denied that he resisted apprehension, and that he was only apprehended with the assistance of the members of the public.

He further testified that the letter at page 9 of his bundle of documents states that the police were not proceeding, as there was insufficient evidence. He denied having been on the run, and that is why the police had arrested him, or that when he was taken to police it was just to answer a call out, saying that he was arrested when he went there.

As regards the payment of gratuity, the Plaintiff testified that clause 7.1 of the said contract states that he was entitled to two months' pay for each completed year of service, and his evidence was that he claimed the money as he had worked up to the end of the contract. When referred to clause 18 (g) on page 13 of the Defendant's bundle of documents, he testified that it talks about summary dismissal without gratuity for illegal work stoppage. He denied having stopped reporting for work illegally.

His evidence when referred to page 12 of the Defendant's bundle of documents was that entry 5 on that page is his name, and that the Director had signed against his name. That when he went to claim that money the director refused to give it to him. He denied having asked to reconcile with the Defendant so that he could clear his name. That clauses 23 and 23.6 of the contract state that gratuity is paid upon the successful completion of the contract, except where an employee is summarily dismissed, and that on page 10 of the Defendant's bundle of documents under offence 15, is absenteeism for ten or more consecutive

days, which is a dismissible offence. He stated that he was a unionized worker.

In re-examination it was stated that the Plaintiff got onto the vehicle when he met the Manager who was with two security guards. He denied that he was given a call out to go the police when he was arrested in August, 2007. He further stated that he has not received any letter terminating his employment. He also stated that even at the meeting that was called to reconcile the parties, no reference was made to him not going for work.

DW1 was Maxon Zimba. He testified that he used to work for the Defendant from 2005 until 2015, as a Chief Security Officer. DW1 told the court that on 22nd March, 2007 he had reported for work around 07:30 hours, and later on that day between 14:00 and 15:00 hours, he was informed that a truck delivering cement had been received, but did not contain the usual load of 600 bags of cement or 30 tonnes equivalent.

It was his evidence that he rushed to the offloading bay near Stores, where the Plaintiff was in charge, and found the documents, being the delivery notes and the invoices, were in the hands of the Plaintiff. DW1 testified that the normal procedure was that the guard at the gate would check the truck when it arrived, and compare the quantities brought against the documents, and enter the details in the security books. That thereafter the driver would report to the person in charge, in this case the Plaintiff.

Further in his evidence, DW1 testified that the bags of cement on that date were scattered in a strange manner, and he ordered that the cement

be counted, and that the Plaintiff gives him the delivery note, and the invoice. That 130 bags of cement were found to be missing, and the driver told him that he had left 130 bags at Embassy Supermarket, on the instructions from the head driver at Chiz Transport where he worked, and which company had delivered the cement.

Further, that the driver had also told him that the person who would receive the cement at Stores was aware of the arrangement, as it was the first time that the said driver was making deliveries to the Defendant, and the driver was given ZMW1, 800.00 to give the person who would receive the cement. DW1 also testified that the driver being new did not know who was at Stores and who would receive the money.

Still in his evidence, DW1 testified that he reported the matter to Trisha Police, and proceeded to the place where the driver of the truck had stated that he had left the cement, and recovered the 130 bags of cement. That by that time all the employees had left as it was after 17:00 hours. He went on to further state that the suspect they had in mind was the Stores Clerk, who is the Plaintiff, as he had received the cement. That the next day he expected the Plaintiff to report for work, but he did not do so, and that he had not seen him since. He identified the documents at pages 14 to 30 of the Defendant's bundle of documents as the register of employees that was kept, stating that it shows that the Plaintiff did not report for work from 23rd March, 2007.

DW1 stated that efforts to trace the Plaintiff proved futile, and that he even sent text messages to his friend, but was told that the Plaintiff's wife was unwell. That the Plaintiff could not be reached on his phone, as it was off. That after three months the Plaintiff was seen by one of the

Defendant's guards, Felix Tembo, and was apprehended, and taken to DW1 who stated that he should be handed over to the police.

It was also DW1's evidence that after the police investigated the matter, they had challenges proceeding with it, as the Plaintiff's immediate boss was in India, and took long to return. During that time the Plaintiff was employed by Chat Breweries which is neighbours with the Defendant, and DW1 would meet him at a restaurant. He added that the Plaintiff would complain that people were talking ill about him, and he wanted to clear his name. DW1 went on to state that it was on that basis that he had informed his bosses, and wrote to the Plaintiff requesting that they reconcile.

Further in his evidence, DW1 told the court that a meeting was held at which the Plaintiff was present, and he was accompanied by a woman, while DW1 was in the company of the director Mr Patel, and his son Aman Patel. He stated that the Plaintiff was asked to apologise, but he declined stating that he needed to consult, but from that time up to 2015 when DW1 left work, the Plaintiff did not get back to him.

When cross examined, DW1 told the court when referred to clauses 7.1 and 7.2 at page 7 of the Defendant's bundle of documents that he was aware that there are procedures that the Defendant was supposed to follow. He told the court that he did not apply that procedure to the driver, as he was not an employee of the Defendant. He denied having investigated the Plaintiff although his duties included investigating cases and reporting them to the police.

It was further his evidence in cross examination that the disciplinary procedure could only be invoked when the suspect was available. He

expressed ignorance over the Plaintiff having been dismissed, and maintained that the Plaintiff approached him to reconcile. DW1 testified that the matter was left in the hands of the police to investigate, and that he recovered money from the driver of the truck, and that the cement was also recovered. That his suspicion of the Plaintiff was based on the fact that he had stayed away from work, and he was on the run.

DW1 also maintained that the Plaintiff was apprehended some months later, and that the person who was supposed to give a statement was out of the country. That as the Plaintiff as Stores Clerk received the cement, he was deemed a suspect.

In re-examination DW1 told the court that the Plaintiff could only be spoken with after investigations were instituted, and thereafter the terms of the collective agreement would kick in. That however the Plaintiff disappeared during the investigations, and the police were involved.

DW2 was Felix Tembo. This witness told the court that he used to work for the Defendant as a security guard from 1998 until 2016. That on 17th August, 2007 he was working from Kamwala at the residence of Mr Dinesh Cheuchen, the boss. That he had knocked off after working in the night shift, and had asked for a lift around 07:00 hours from the boss, as the company where the boss was going was near where he lived. He stated that when they reached the road between Lumumba and Mumbwa road, he saw the Plaintiff and pointed him out to the boss, as they were looking for him in connection with a shortage of cement that was delivered to the Defendant.

It was stated that the boss asked DW2 to go and speak with the Plaintiff, and when DW2 disembarked at Nyangu Filling Station the boss had

driven off. It was stated that when the Plaintiff saw him, he started walking fast. He testified that he had called out to the Plaintiff who increased his pace, and started running, and DW2 asked him to stop. That the Plaintiff ran from Nyangu Filling Station to Family 24 where DW2 grabbed him, but the Plaintiff shouted that DW2 was a thief, and people gathered, but he told them that he was not. DW2 also stated that he asked two members of the public to assist take the Plaintiff to the Defendant, and he did so by taxi after having phoned the boss who authorised him to do so.

It was stated that at the Defendant, the Plaintiff was handed over to the Chief Security Officer, Mr Zimba, and DW2 left for his home.

DW2 in cross examination told the court that when he approached the Plaintiff, the Plaintiff did not tell him that he had the keys for the offices where he was working, but that he was just holding a blue folder. He also stated that the Plaintiff did not tell him that he was going for work, but asked he DW2 why he was following him. DW2 stated that at the time he did not know where the Plaintiff lived, and maintained that he booked a taxi to take the Plaintiff to the Defendant.

He also testified that he was familiar with the disciplinary process at the Defendant, stating that where an officer had a small shortage, it would be deducted from his salary, and the officer spoken to. Where however the shortage was big, an enquiry would be made over the same, and the Storeman would explain. That where however the shortage was due to production nothing would happen, but that shortages in deliveries was considered as theft, and the disciplinary process would be invoked by Human Resources.

DW2 stated that this process was not followed as the Plaintiff ran away. He agreed that when a person is employed, they supply their residential address, but stated that at the time the houses they live in were not numbered. DW2 had no knowledge of how many Stores Managers were in the Defendant's employ in 2008, but that there was one person at Stores, although each department has a Stores person.

The last defence witness was Dinseh Cheuchen, the Production and Maintenance Manager at the Defendant. He stated his duties as planning production, quality control checking and maintenance. That the Defendant is in the business of producing paving bricks and agricultural lime.

As regards this case, his evidence was that on 22nd March, 2007, he was at the brick plant checking on the quality of the production when they received a truck load of cement. He stated that he informed the Plaintiff who was the Stores Clerk to go and count it, but he did not do so. That he reminded him to do so, and he raised security on the radio, and that is how the Security Officer Mr Zimba went to count it.

That on 17th August, 2007, as he was going to the factory in the company of DW2 whom he had given a lift, he saw the Plaintiff. It was his testimony that he stopped at Engen Filling Station where DW2 dropped off the vehicle to go and see the Plaintiff, as the Chief Security Officer was looking for him, as he had stopped reporting for work from 22nd March, 2007 when they received a truck.

He continued stating that DW2 then called him, asking to book a taxi and he agreed, and that DW2 went to the factory with the Plaintiff in a taxi, and there the Plaintiff was handed over to Mr Zimba. He denied

having given a lift to the Plaintiff at Nyangu Filling Station on 17th August, 2007. He also denied having seen him at the month end, and told him that he could not get paid as the investigations were still on going, as he had gone into the plant.

In cross examination, whilst agreeing that he saw the Plaintiff on 17th August, 2007, which is a period of ten years ago, he still recalled the events of that day. That he did not speak with the Plaintiff on that day and ask him to get onto the vehicle that he was driving, and that even when the Plaintiff went to the factory with DW2, DW3 did not speak with him, as he was in the plant. That on 22nd March, 2017 he only spoke with him when he asked him to go and count the cement.

He agreed that the cement that was stolen was recovered the same day, but that he did not speak with the Plaintiff after the recovery even though he was his immediate supervisor. When referred to clause 8 at page 8 of the Defendant's bundle of documents, he agreed that one of his duties included sitting on any disciplinary committee that was formed against the Plaintiff. That he was not involved in human resources issues, and he did not read the Plaintiff's contract of employment. He further testified that security handled the Plaintiff's case, and that he was in India for six weeks when the Plaintiff was arrested, so he could not give them a statement.

DW3 told the court that he gave a statement to the police at Kanyama on his return, and that he was aware that the Plaintiff was taken to Trisha police but he did not go there. He expressed ignorance over the Plaintiff's claims on the basis that he was not dismissed, adding that Mr Hamubotu was in the human resources department, and he did not know that he had told the Plaintiff to stay away from work. DW3 also

expressed ignorance over the police dropping the case against the Plaintiff or it being discontinued.

I have considered the matter. It is common cause that the Plaintiff was employed as a Stores Clerk by the Defendant, and that on 22nd March, 2007 a truck load of cement was delivered to the Defendant, which had less 130 bags of cement. It is not in dispute that the 130 bags of cement were recovered at Embassy Supermarket, and that the Plaintiff did not report for work after 22nd March, 2007.

It is not in contention that on 17th August, 2007 the Plaintiff was taken to the police where he was later released on police bond, after he met DW2 and DW3. The question is whether the Plaintiff is entitled to the reliefs claimed?

The first claim is for exemplary damages and the second for damages. I will consider them together. The basis of the claim as can be seen from the statement of claim is that on 15th August, 2007, the Plaintiff was taken to Trisha Police where he was detained on the allegation that he had stolen bags of cement. That he was released on 17th August, 2007 on police bond, and was reporting to the police up to 25th July, 2011, when Kanyama police wrote to his advocates stating that they would not proceed with the case, as there was insufficient evidence to prosecute the matter.

It is the Plaintiff's claim that he has been deprived of his dignity as he was falsely accused by the Defendant who failed to have him prosecuted. The background leading to the Plaintiff's arrest is that on 22nd March, 2007, a truck load of cement was received by the Defendant, and DW1, the Defendant's security officer on counting the delivery discovered that

130 bags of cement were missing. This witness told the court that upon asking the driver of the truck that had delivered the cement, he was told that the head driver where he worked had told him to take the 130 bags of cement to a place at Embassy Supermarket, and to give ZMW1, 800.00 to the person who would receive the cement.

That the driver did not know who this person was as it was the first time that he was delivering cement there. DW1 also told the court that the 130 bags of cement were recovered at the place where the driver had told him he had left them. The evidence on record which has not been disputed is that the Plaintiff was the Stores Officer where the cement was delivered. Therefore based on this, and the fact that the cement that was stolen was in fact recovered, the Defendant had a reasonable belief that the Plaintiff was involved in the theft as he was the person to receive the cement.

The Plaintiff testified that on that day 22nd March, 2007, the Human Resources Manager Mr Hamubotu had told him that he should not be reporting for work until the investigations were concluded. The attendance register at pages 14 to 30 of the Defendant's bundle of documents shows that from 23rd March, 2007 the Plaintiff was not reporting for work. The Defendant attributed his non-attendance to his having deserted work after the cement was found to be missing. The Plaintiff bears the burden of proving on a balance of probabilities that Mr Hamubotu told him not to be reporting for work until the investigations were concluded.

He told the court that Mr Hamubotu's instructions were verbally given, and the question is whether this evidence is true? DW2 who was with DW3 on 15th August, 2007 testified that he is the person who saw the

Plaintiff and when he approached him, he had ran away and was only apprehended with the help of members of the public. While the Plaintiff denied this, DW2 was not cross examined on if indeed the Plaintiff did run away, as what was put to the witness was whether the Plaintiff had told him that he had keys to where he was working and whether he was going for work.

Then there is the evidence given by DW2 that the Plaintiff had in fact shouted that DW2 was thief when DW2 chased him, prompting members of the public to gather, and that it was only when DW2 explained why he was following the Plaintiff that the Plaintiff was apprehended. This evidence was also not challenged in cross examination, and it is credible.

Further, while DW2 was asked on whether a person who is employed does not supply their residential address to the employer, DW2 had answered in the affirmative, but had explained that the houses where they were staying at the time, were not numbered and this statement was not challenged further. Then there is the evidence given by DW1 the Defendant's security officer that efforts to trace the Plaintiff were made to no avail, and that he in fact he even sent messages to the Plaintiff's friend who told him that the Plaintiff's wife was unwell. He also stated that the Plaintiff could not be reached on his phone as it was off. This witness when cross examined was not challenged on this evidence, and it is also credible.

The Plaintiff did not call Mr Hamubotu as his witness to confirm that he verbally asked him to stay away from work pending the investigations. Mr Hamubotu was critical in establishing the Plaintiff's allegations in that regard.

Taking all this evidence into account it can only be reasonably concluded that the Plaintiff was not told to stop working while the investigations were being conducted and he was only seen next on 15th August, 2007, when he was apprehended and taken to the police. It is therefore my finding that the Plaintiff stayed away from work not because Mr Hamubotu verbally told him not to do so, but because he had deserted his employment.

It is arising from the detention in police custody that the Plaintiff claims damages and exemplary damages. The exact nature of the general damages pleaded is not stated, but from the facts of the case, it can be assumed that they are damages for false imprisonment. Looking at the evidence as a whole, it cannot be said that the Plaintiff was falsely imprisoned. His apprehension and arrest was on account of the fact that he could not be found after 22nd March, 2007 so that he could be questioned about the 130 bags of cement that were stolen and recovered, as he was implicated in the same.

The only recourse that was available was to take him to the police when he was found so that he could be investigated. The fact that the police did not proceed to prosecute him for the offence of theft by servant due to the fact that they considered that there was insufficient evidence does not take away the reasonable basis upon which the Defendant reported him to the police. The claim for damages and exemplary damages will fail on that basis.

The next claim is for the payment of salary arrears from March 2007 until determination of the matter, as well as payment for gratuity for the 2006 to 2008 contract and the 2008 to 2010 contract. As regards the salary arrears claimed, the Plaintiff's last working day was 22nd March

2007. The evidence on record as given by himself is that he was paid his salary for February 2007. He was not paid his March 2007 salary on account of the fact that he had deserted his employment. He is entitled to be paid his salary for the days that he worked in that month, as this is an accrued right.

The Plaintiff at page 8 of his bundle of documents exhibited his February 2007 payslip. While this document is evidence of his earnings in a month, he did not lead any evidence to show when he was paid or how many hours he had worked in that month. He did not complete work for the entire month, and I will award him the March pay less the number of days he did not work in that month. He also claims salary arrears from March 2007 to date. This is on the basis that he has never been dismissed from employment. However the evidence on record shows that he did not report for work from 23rd March, 2007, on his own accord.

At page 10 of the Defendant's bundle of documents is an extract of the disciplinary code. Under offence 15 it states that an officer who is absent from work without permission for a period of ten or more consecutive days without written permission, will be deemed to as a deserter, and therefore dismissed. In this case the Plaintiff was away from work from 23rd March, 2007 and was only apprehended on 15th August, 2007, which is a period of more than ten days since he last reported for work. He had no authority to stay away from work.

It was prudent for the Defendant to formally invoke disciplinary proceedings against the Defendant on the basis of the ten days absenteeism, and the argument by DW1 that the said disciplinary process could not be invoked as the Plaintiff was absent cannot stand. By absconding from work without permission, the Plaintiff had

committed an offence, and he should have been charged appropriately, and process served at his last known address, and a hearing held even in his absence, if he could not be found, as then procedure would have been complied with. In this case the Plaintiff was located on 15th August, 2007, and at that time the theft case was still in the hands of the police. DW3 testified that he only returned from India in November, 2007 and that is when he gave his statement to the police. It is however not clear why he did not give the statement immediately after the Plaintiff was arrested on 15th August, 2007, as he was in the country, and there is no evidence on record to show when he left for India.

The theft case that was being handled by the police was distinct from the absenteeism, and therefore the absenteeism could have been dealt with independently of the theft case, unless the disciplinary code for the Defendant provides that an employee who is facing criminal charges connected with his employment cannot be disciplined for any other breach pending the outcome of the criminal proceedings. The Defendant through the evidence on record tried to argue this, as it was stated that the police did not inform it that the case against the Plaintiff had been discontinued due to lack of evidence.

However no provision in the disciplinary code was cited to support the assertion. As such the Defendant should have proceeded to charge the Plaintiff with absenteeism and hear the matter, rather than leave him in abeyance over his fate. Looking at the fact that the Plaintiff did abscond from work in excess of ten working days, the failure to charge him for the offence is not fatal, as he did desert his employment, and was therefore deemed dismissed, and therefore stands dismissed. He cannot therefore claim any salary arrears after 23rd March, 2007, and that claim will fail.

With regard to the claim for the payment for gratuity for the 2006 to 2008 contract and the 2008 to 2010 contract, there is at pages 12 to 14 of the Plaintiff's bundle of documents the contract for his employment. It states that the contract would run from 1st March 2006 until 28th February, 2008. Under Clause 7.1 the Plaintiff was entitled to be paid gratuity calculated at two months basic pay for each year served, at the end of each successful contract. Clause 7.6 states that no gratuity shall be paid where the Plaintiff's contract of employment is terminated on the basis of gross indiscipline or misconduct, while clause 18 provides that the Plaintiff would be summarily dismissed without gratuity being paid where he inter alia stops work illegally.

The Plaintiff deserted work and the contract of employment was terminated and he was therefore not entitled to the payment of gratuity. This is irrespective of there being no formal disciplinary hearing that was held, as he was deemed to have been dismissed as he had breached the disciplinary code, and thereby committing a fundamental breach of the employment contract.

Further the Plaintiff's contract of employment was for a period of two years. According to *Selwyn's Law of Employment*, by N.M Selwyn, 14th edition 2006 at page 66, such a contract was a fixed contract. It defines a fixed contract as **"a contract of employment for a specified period of time, ie, with a defined beginning and a defined end"**, which was the case with the contract that the Plaintiff had signed with the Defendant. When such a contract comes to an end, and it is not renewed, it terminates automatically by effluxion of time.

That being the position, there was no guarantee that the Plaintiff's contract would have been renewed after 2008, when the contract he was

serving under would have come to an end. The Plaintiff having deserted his job, he cannot claim the payment of gratuity as he did not successfully complete the contract for the period 2006 to 2008. He cannot assume that he is also eligible to be paid on a contract from 2008 to 2010, as he did not sign such a contract, and there was no guarantee that he would have signed it. The claims for the payment of gratuity fail.

The amended writ dated 16th February, 2017 also has a claim for leave pay. The writ was amended after the matter had been set down for trial, pursuant to Order 20 Rule 1 of the Rules of the Supreme Court, 1999 edition. It provides that;

(1) Subject to paragraph (3) the plaintiff may, without the leave of the Court, amend the writ once at any time before the pleadings in the action begun by the writ are deemed to be closed.

Paragraph 3 on the other hand states that;

“(3) This rule shall not apply in relation to an amendment which consists of -

(a) the addition, omission or substitution of a party to the action or an alteration of the capacity in which a party to the action sues or is sued, or

(b) the addition or substitution of a new cause of action, or

(c) (without prejudice to rule 3 (1)) an amendment of the statement of claim (if any) indorsed on the writ, unless the amendment is made before service of the writ on any party to the action”.

My understanding of the above provisions is that the Plaintiff may only amend the writ without the leave of the court once before pleadings have closed, where the amendment sought does not relate to the matters listed in paragraph 3.

Order 20/1/3 of the said Rules of the Supreme Court states that;

“This rule applies only to amendments the object of which is to correct mere or accidental mistakes, errors, slips or omissions. Thus, where a date or a figure has been wrongly stated or the name of a party has been wrongly spelt, or a Christian name requires to be altered or a description such as "male" or "married woman" to be added or altered, provided in all such cases that the identity of the party is the same, or generally where the amendment is merely formal in character or in its effect, the amendment may be made without leave. On the other hand, where the amendment sought to be made comes within paras (3)(a) or (3)(b) the amendment may be made without leave before service of the writ, but it cannot be made without leave after service of the writ, and such leave must be obtained under r.5”.

The Plaintiff in the amended writ added a claim for leave days which in my view could not be done without the leave of the court, as the writ had already been served and the matter had in fact been set down for trial, after the parties had complied with the orders for directions. This entails that even the pleadings had closed when the amendment was filed, as Order 18 Rule 20 of the Rules of the Supreme Court provides that;

“1) The pleadings in an action are deemed to be closed -


(a) at the expiration of 14 days after service of the reply or, if there is no reply but only a defence to counterclaim, after service of the defence to counterclaim, or

(b) if neither a reply nor a defence to counterclaim is served, at the expiration of 14 days after service of the defence.

(2) The pleadings in an action are deemed to be closed at the time provided by paragraph (1) notwithstanding that any request or order for particulars has been made but has not been complied with at that time.

Therefore the writ that was amended without the leave of court is improperly on the court, and cannot form part of the pleadings before court, and this particular claim cannot be considered. On the whole, the Plaintiff partially succeeds on his claim for the payment of the March 2007 salary, and I award him costs to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 25th DAY OF SEPTEMBER, 2017


S. KAUNDA NEWA
HIGH COURT JUDGE