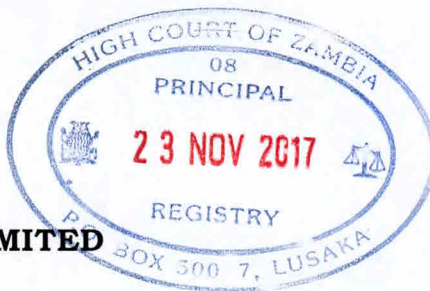


**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**2013/HP/1622**



BETWEEN:

**PEARL OF HEALTH CLINIC LIMITED**

**PLAINTIFF**

AND

**DR SHARIF MOHAMMED BADIUZZAMAN**

**DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 23<sup>rd</sup> DAY OF  
NOVEMBER, 2017**

*For the Plaintiff : Messrs T.S Chilembo Chambers*

*For the Defendant : Ms I. Suba, Suba, Tafeni and Associates*

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## **J U D G M E N T**

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### CASES REFERRED TO:

1. *Zambia Airways Corporation Limited V Gershom B. Mubanga* 1990/ 1992 ZR 149
2. *Nsansa School Inter Education Trust V Gladys Mtonga Musamba* 2010 Vol 1 ZR 457
3. *Albert Mwanaumo and others V NFC Africa Mining PLC Que Nelson Jilowa* 2011 Vol 1 ZR 30
4. *Attorney General V John Tembo* 2012 Vol 1 ZR 1
5. *Samson Katende, Crosby Bernard V NCF Africa Mining PLC* 2011 Vol 2 ZR 112

This action was commenced by the Plaintiff on 1<sup>st</sup> November, 2013, by way of writ of summons in which it claimed;

1. *A declaration and order that it is entitled to the payment of K38, 704.00 by the Defendant being the total expenses that it incurred.*

2. *An order for the payment of K90, 250.00, being six months' pay in lieu of notice, as per the contract.*
3. *Damages for breach of contract by the Defendant.*
4. *Aggravated damages.*
5. *Any other relief that the court may deem fit.*
6. *Interest at the current bank rate.*
7. *Costs.*

The statement of claim shows that by a contract dated 15<sup>th</sup> March, 2012 executed between the Plaintiff and the Defendant, the Defendant was employed as a resident doctor for a period of four years, effective 2<sup>nd</sup> April, 2012. That it was a term of the contract that if the Defendant terminated the contract, he would be liable to pay the Plaintiff six months' pay in lieu of notice which comes to K90, 250.00, costs incidental to the acquisition of temporary registration, supervision authority and examination fees to the Health Professionals Council of Zambia in the amount of K4, 000.00.

Other costs stated as payable by the Defendant were immigration fees for the acquisition of the Defendant's work permit from the Department of Immigration in the amount of K6, 000.00, air tickets for the Defendant and the spouse at a cost of K16, 254.00, and K12, 450.00 being the lodging and living expenses from the date of entry into Zambia to the date of formal start of employment.

It was also stated in the statement of claim that the Defendant was entitled to 2.5 leave days for each completed month, and that such leave would be taken at the Plaintiff's permission. The averment in paragraph 6 of the statement of claim, was that on or about 10<sup>th</sup> May, 2013, the Defendant applied for leave which was approved, but the Defendant opted not to take the said leave, despite it being approved. The statement of claim went further to state that the Defendant on 3<sup>rd</sup> June, 2013 applied for leave again, but the same was denied, as it was not convenient for the Defendant to proceed on the same.



That the Defendant in breach of the contract, and in total disregard of the Plaintiff's instructions proceeded on leave, and went to Bangladesh without informing the Plaintiff, and stayed away from work until the 23<sup>rd</sup> of August, 2013 when he purported to report for work. Further in the statement of claim, the Plaintiff stated that the Defendant had only accumulated thirty (30) leave days, but he stayed away from work for eighty five (85) days.

It was also stated that the contract of employment provided that if the Defendant stayed away from work without authority, he was liable to be summarily dismissed, and he was so dismissed on 23<sup>rd</sup> September, 2013, for gross misconduct and indiscipline.

That the Defendant refused to pick up his dues, stating that he could not sign any acknowledgment slip, despite complaining about his dues and overtime allowance. The Plaintiff also alleged that the overall conduct of the Defendant became serious and a source of concern, especially his psychological state of motivation to attend to patients, had he continued in employment. It was alleged that prior to his dismissal, the Defendant had acted in such a way that owing to the nature of the Plaintiff's business, they could not reasonably be expected to continue employing him, and was hence compelled to dismiss him.

Further that the Defendant had consistently complained about his dues and over time allowance, and he became insubordinate and refused to follow the work place instructions on several occasions, and unilaterally went on leave.

The statement of claim went on to state that the Defendant gave the Plaintiff six months' notice to terminate the contract, but he absconded from work, and did not work a single day during the notice period. Therefore the contract of employment was terminated by way of dismissal.

The Defendant filed a defence on 19<sup>th</sup> November, 2013 in which he denied that the contract was terminated, stating that he was dismissed firstly by conduct, and secondly through a letter written to him by the Plaintiff on 20<sup>th</sup> September. Therefore the Plaintiff was not entitled to the monies claimed, and that in any

event it was the Defendant's assertion that the requirement to give six months' notice to terminate the contract was not only unnecessary and unreasonable, but was also discriminatory, as the Plaintiff as employer was only required to give three months' notice, when the law prescribes only thirty (30) days' notice, as the Defendant was not in an executive position.

Further that the Defendant having served a substantial part of his contract should disentitle the Plaintiff to a full refund of the professional fees, and that the Defendant should only recompense a proportion of the K6, 000.00 claimed, commensurate with the unserved term of the contract. The same argument was advanced with regard to the re-imbursment of the air tickets, and that the expenses claimed for lodging being pre-employment, would only have been refundable had the Defendant not taken up employment with the Plaintiff, and not when breach post-employment happened.

The Defendant admitted that he was entitled to 2.5 leave days a month, and that he had applied for leave on 10<sup>th</sup> May, 2013, but stated that the same was denied, and added that such leave was ordinary. His defence went on to state that he went on special and urgent leave, which fell outside the provisions alleged, and he could therefore exceed the number of leave days available. Further that he was entitled to take leave, and that in this case he had agreed with the Defendant and the Ministry of Labour that he proceeds on leave.

The Defendant alleged that the Plaintiff contemptuously disregarded his application for leave dated 10<sup>th</sup> May, 2013, and he denied having wilfully disobeyed any lawful instructions given by the Plaintiff, as shown by the circumstances surrounding his departure on leave and his subsequent communication with the Plaintiff.

The Defendant denied that he had only accumulated thirty (30) leave days, or that he absconded from work for eighty five (85) days, and that the contract that he had signed with the Plaintiff provided that if he stayed away from work without permission for over ten days, the sanction was summary dismissal. This defence was based on the assertion that he proceeded on leave as advised



by the Labour Office, and he could not return as scheduled, as he became ill whilst on leave in Bangladesh where he was treated in hospital. That he informed the Plaintiff of his illness by way of e-mail dated 28<sup>th</sup> June, 2013.

With regard to the claim by the Plaintiff, that the Defendant was summarily dismissed from employment, as he absconded from work from 23<sup>rd</sup> September, 2013, and that the Plaintiff was compelled to dismiss him for misconduct and gross indiscipline, the Defendant alleged that the same was unlawful and vindictive, as he did not abscond from work. He further stated that he did not commit any of the offences alleged, and that neither was he charged for the same, in total contravention of the rules of natural justice.

The claim that the Defendant had prior to his dismissal behaved in such a way that owing to the nature of the Plaintiff's business it could not reasonably be expected to continue employing the Defendant, and was hence compelled to dismiss him, was also denied. The Plaintiff's claim that the Defendant refused to collect his dues was also denied. It was the Defendant's defence that he was given a condition that should he accept his dues, he would have to sign a disclaimer form in relation to the balance of his unpaid salary, which would entail that he would not receive it.

He denied having complained about the non-payment of his salary and overtime allowances, as he was entitled to the same. The Defendant also denied that he became insubordinate and that he had refused to carry out any lawful instructions or that he would have been charged or dismissed for the same. It was also stated in the defence that the Defendant tendered notice of his resignation as provided for by his conditions of service, and that he had worked for a full seven days thereafter.

It was further the Defendant's defence that his wife who was in Bangladesh at the time, and pregnant, was advised that she needed to undergo a caesarean section, and the Defendant by a letter dated 10<sup>th</sup> May, 2013 applied for emergency leave so that he could be with his wife as it was her first pregnancy, but the Plaintiff ignored the application for leave.

That he made another application for leave on 23<sup>rd</sup> May, 2013, and the Plaintiff again did not respond, and that by this time the Defendant's wife had already delivered by an emergency Caesar on 16<sup>th</sup> May, 2013. It was stated that the Defendant took the challenges he was facing to the Labour Office, which convened a meeting with the Plaintiff's General Manager, A.R. Chowdhury, who stated that the Plaintiff had no objection to the Defendant proceeding on leave. To that effect, a Ms Mukamusole Mundale an Assistant Labour Officer informed the Defendant that he could proceed on leave.

However the following Sunday on 28<sup>th</sup> May, 2013, the Defendant was handed a suspension letter from work, a day he should have been resting after having worked a full week from Monday to Saturday. It was also stated that the Plaintiff then issued the duty rota for June, 2013, which included the days that the Defendant would be on leave. The Defendant averred that these events stressed him to the extent that he felt that his continuing to work under such an environment would constitute a risk to the patients due to lack of concentration and high stress levels.

The defence went on to state that the Defendant proceeded on leave as advised by the Labour Office, but he could not return to Zambia as scheduled, as he became ill whilst on leave in Bangladesh and underwent treatment. That he informed the Plaintiff of the development by way of a letter dated 28<sup>th</sup> June, 2013. The Defendant stated that when he reported for work on 23<sup>rd</sup> August, 2013, he was blocked from working, as Chowdhury told him to go home, and wait to be called. However the Defendant was only allowed to see the Managing Director on 17<sup>th</sup> September, 2013 and was given three conditions that he needed to comply with before he could resume work.

The conditions were named as;

- 1. The Defendant writing an apology letter to the Managing Director for having made claims against the hospital to the Labour Office.*



2. *The Defendant withdrawing the notice of resignation that he had given the hospital.*
3. *That the Defendant bringing his wife who is also a medical doctor to work at the same hospital.*

That when he did not comply with that instruction, he was served with a letter of absconding from work and going on unauthorised leave, and that he exculpated himself on the charges. However the Plaintiff shortly thereafter wrote a letter to the Defendant demanding various payments, and asked him to surrender the flat that he had been allocated as his official residence, and he did not receive his salary and overtime payment, resulting in him depending on friends for money for food, transport and other utilities. It was also stated that during the Defendant's contract of employment with the Plaintiff, the Plaintiff failed and or neglected to remit both the Zambia Revenue Authority and NAPSA statutory fees deducted from the Defendant's salary.

The Defendant therefore counterclaimed;

1. *Unpaid remuneration from May 2013 until September 2013, being salary arrears in the amount of K64, 625.00, as well the sum of K155, 673.00 being overtime arrears from April 2012 to March, 2013 totaling K220, 298.50.*
2. *Cost of two air tickets to Bangladesh for himself and his spouse calculated as 5, 211.40 X K5.5 totaling K28, 682.70, and other repatriation dues.*
3. *Terminal benefits for the period served at three months' pay for each year served.*
4. *Damages for harassment, humiliation, mental anguish, deprivation and inconvenience.*
5. *That the Plaintiff remits all the monies deducted from his salary.*
6. *Damages and degradation.*

7. *Interest on all the amounts found due at the Bank of Zambia short term deposit rate from date of issue of the writ to judgment, and thereafter at the current lending rate determined by the Bank of Zambia until full payment.*

8. *Costs*

9. *Any other relief that the court may deem fit.*

The Plaintiff filed a reply and defence to the counter claim. In that defence the Defendant's claim that his wife was advised to give birth through caesarian section was denied, as well as the assertion that the Defendant had applied for leave so that he could go to be with his wife, and the application was ignored.

The Plaintiff also denied that the Defendant made a second application for leave on 23<sup>rd</sup> May, 2013, which it again ignored, stating that the second application was made on 3<sup>rd</sup> June, 2013. That the said leave was not approved as it was not convenient due to pressure of work, and it was the Plaintiff's defence that it denied that a meeting was convened by the Labour Office, at which it's General Manager A.R. Chowdhury stated that the Plaintiff had no objection to the Defendant proceeding on leave, and that a Ms Mukamusole Mundale, an Assistant Labour Commissioner Officer informed the Defendant that he could proceed on leave. The Plaintiff denied that the Defendant proceeded on leave on that basis.

The allegation of stress suffered by the Defendant was denied, and the Plaintiff stated that if the Defendant suffered any stress, it was self-inflicted due to his unbecoming behavior, which spoilt the working environment and endangered the lives of his patients. The Plaintiff further denied the allegations by the Defendant that it gave him three conditions on which he could return to work and that it charged him with absconding from work, and going on unauthorized leave when he failed to comply with the said conditions.

The Plaintiff admitted the Defendant's assertions that it demanded various payments from him, and asked him to surrender the flat that he was allocated



as his residence, stating that it did so on account of the fact that he was no longer its employee. The Plaintiff however denied that it did not pay the Defendant his salary or overtime allowances, and as a result he had to survive with the help of friends.

The Plaintiff further denied that it neglected or failed to remit taxes to the Zambia Revenue Authority, and statutory fees to NAPSA, or that the Defendant suffered loss and damages as well as humiliation, inconvenience, embarrassment and trauma. That the Defendant had behaved in an uncooperative and unbecoming manner, as he was desirous of joining another employer, which he had since done, in total disregard of the contract of employment that he had with the Plaintiff. The Plaintiff denied owing the Defendant any money, stating that it was the Defendant that in fact owed it money for breaching the contract of employment.

When the matter came up for trial on 26<sup>th</sup> September, 2017, the Plaintiff and his advocates were not before court, and Counsel for the Defendant applied that the Plaintiff's claim be dismissed, and they be allowed to proceed with the counterclaim. I struck out the Plaintiff's claim with liberty to restore within 14 days, failure to which it would stand dismissed for want of prosecution, and allowed the Defendant to proceed with the counterclaim. To date the Plaintiff has not restored its claim, and it therefore stands dismissed for want of prosecution.

As regards his counterclaim, the Defendant testified, and called no witnesses. It was his testimony that the Plaintiff employed him on a contract that he signed on 15<sup>th</sup> March, 2012, effective 2<sup>nd</sup> April, 2012. He identified the document at pages 2 to 9 of his bundle of documents as the said contract. He went on to state that the said contract states that he would work from 08:00 hours until 18:00 hours from Monday to Friday and half day on Saturday.

That the contract provides that he would work fifty six (56) hours weekly, but he would sometimes be asked to work between thirty six (36) to forty (40) hours extra time. The Defendant stated that he wrote a letter to the Plaintiff over the

overtime on 13<sup>th</sup> November, 2012, as his name would be put on the overtime duty without consulting him, and that in that letter he had talked about the non-payment for overtime worked. The letter at page 10 of the Defendant's bundle of documents was identified as the said letter.

The Defendant testified that he was told that he would be paid at a one and half times more the hourly rate as overtime. It was stated that the full time rate was between K225.00 and K250.00 per hour, and K125.00 for half a day, and that overtime during the week was K45.00. Page 15 of the Plaintiffs bundle of documents was referred to with regard to the payment terms. The Defendant stated that clause 2.8 of that document states that the normal working hours were between 08:00 and 18:00 hours.

That clause 2.9 states that the overtime payment was one and half times more than the hourly rate on ordinary days, and double the hourly rate on Sundays and public holidays. On his entitlement to leave, the Defendant referred to clause 2.4, stating that he was entitled to two and half leave days per month, and that clause 2.2 states that he was entitled to gratuity of \$250 a month.

The Defendant further in his evidence testified that when he wrote the letter at page 10 of his bundle of documents, problems began. He explained that after it was received on the same day that he authored it, and it was stamped, he was called by the Managing Director some two to three days later. That the Managing Director had asked him why he had written the letter instead of talking to him, and he had responded that he had verbally complained to no avail.

The Defendant still in his evidence testified that the Managing director verbally told him that he would look into the matter, and increase his pay, but did not do so. That the said Managing Director continued putting the Defendant on extra duty without consulting him, and he had a problem with that, as it was contrary to his conditions of service, and he was being underpaid. He went on to testify that he then wrote the letter which is at page 11 of his bundle of



documents dated 5<sup>th</sup> April, 2013 to the Managing Director over breach of the contract.

That after he wrote that letter, he was called by the Managing Director on 14<sup>th</sup> April, 2013, a day after the letter was stamped received. He was asked why he had written the letter, and how he had calculated the claim, and he had responded that despite the letter that he had written on 13<sup>th</sup> November, 2012, the Managing Director had not followed the contract, and the overtime rate had not been increased. He referred to pages 12 to 22 of the Defendant's bundle of documents, testifying that it was the calculations for the overtime payments that were due, that he had enclosed in the letter.

The Defendant explained the basis of his calculations, testifying that page 12 shows the amount of overtime that he worked from the time that he had joined the Plaintiff. That the contract of employment provided for pay at \$2, 750 per month, and forty five hours weekly. He stated that payment per hour was \$15, \$30 at the weekend and on holidays and at one and half rates the ordinary days as overtime, amounting to \$22.5.

It was further explained that he had started working overtime in April, 2012 and the total overtime pay for April 2012 was at the bottom of page 12, while the overtime for May, 2012 was on page 13 with the total at the top of page 14. The Defendant told the court that the overtime payment for June 2012 was missing from the documents, as the May, 2012 overtime was at pages 12 and 13, while that for July, 2014 was at page 14. He testified that the documents went right up through to page 22, which contains a summary for the months claimed. It was stated that on that page the summary for June 2013 was at number 3.

With regard to his leave, the Defendant testified that on 10<sup>th</sup> May, 2013 he had applied for leave after he had completed fourteen months in service, and he had accumulated twenty nine (29) leave days. That the letter is at page 23 of his bundle of documents, and his testimony was that the Plaintiff did not respond to the said letter. Then on a date he did not recall, he was called by

the Managing Director who told him that he could not be granted leave as he had earlier written a letter.

He stated that he then engaged the Labour Office, and on 21<sup>st</sup> May, 2013 he met Assistant Labour Commissioner Mrs Kasanda, and the Plaintiffs General Manager and he was allowed to go on leave. That the Labour Officer had told him he could proceed on leave, and he then wrote a fresh application for leave on 23<sup>rd</sup> May, 2013, which application was at page 25 of the Defendant's bundle of documents. It was explained that the leave applied for was to commence on 3<sup>rd</sup> June, 2013, but that even that application was met with no response.

However prior to that on 24<sup>th</sup> May, 2013, the Defendant had written a letter of resignation to the Plaintiff, giving six months' notice, in line with clause 7.1 of the contract of employment. Thus the notice period would run up to 24<sup>th</sup> November, 2013. The Defendant told the court that both the Plaintiff and the Labour Office received the letter.

He went on to state that the Managing Director put his name on the extra duty rota even on the days that he was scheduled to be on leave, entailing that he had not approved his leave. It was stated that the duty rota for June, 2013, which is at page 28 of the Defendant's bundle of documents shows that the Defendant appeared as being on duty on the 1<sup>st</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 22<sup>nd</sup>, and 30<sup>th</sup> June, 2013.

He also referred to the holidays and weekend rota which is at page 29 of the Defendant's bundle of documents stating that the document indicates that he would be on duty on 1<sup>st</sup>, 6<sup>th</sup>, 15<sup>th</sup>, 22<sup>nd</sup>, 29<sup>th</sup> and 30<sup>th</sup> June, 2013.

It was the Defendant's evidence that he then wrote the letter at page 27 of the Defendant's bundle of documents stating that he was unwell and could not work, but he was charged. He told the court that he was stressed psychologically as his wife had miscarried the first child, and he wanted to be there for the second child, and the Plaintiff kept referring him to the Labour Office.



Further in his testimony, the Defendant testified that he went back to the Labour Office where he found that the Labour Commissioner was unwell, and he was referred to another Labour Officer Mr Chikula who wrote a letter to the Plaintiff's Managing Director on 29<sup>th</sup> May, 2013. The letter at pages 30 to 31 of the Defendant's bundle of documents was identified as the said letter.

He stated that he then wrote the letter which is at page 32 of the Defendant's bundle of documents stating that he would proceed on leave. The said letter is dated 31<sup>st</sup> May, 2013, and the Defendant testified that he would report for work but the Plaintiff would endorse in red that he had delayed to report, yet they had sent him the Labour Office over his leave.

The Defendant testified that the Plaintiff's Managing Director on 31<sup>st</sup> May, 2013 wrote him the letter which is at page 33 of the Defendant's bundle of documents, stating that he had unilaterally decided to proceed on leave, and the Defendant went to see Mr Chikula of the Labour Office who told him that as he had already bought the air ticket, and they had discussed his leave, he could proceed. That that is how he had gone on leave and went to see his wife and baby in Bangladesh, and was to resume work on 29<sup>th</sup> June, 2013.

His testimony was that he however fell sick in mid-June, and he wrote an e-mail to the Plaintiff on 28<sup>th</sup> June, 2013, asking for an extension of his leave. The document at pages 34 and 35 of the Defendant's bundle of documents was identified as the said letter. He also stated that the document at pages 36-37 of his bundle of documents is laboratory report showing that he had viral hepatitis, and that his doctor wrote the letter at page 38 of his bundle of documents. He explained that the document at page 39 of his bundle of documents is a letter written by another who doctor who saw him after he developed a growth on his neck.

That he returned to Zambia on 22<sup>nd</sup> August, 2013, and he reported for work the next day and wrote the letter at page 40 of his bundle of documents to the Plaintiff's Managing Director, asking to resume work. He testified that he was not given an office to work from, and that when he saw the General Manager he

was informed that the Managing Director was out of the country and he should go home and rest. The Defendant also in his testimony testified that he continued reporting to the General Manager who kept telling him the same thing, and on 17<sup>th</sup> September, 2013 the Managing Director returned but he declined to see the Defendant. However he managed to see him and was given three conditions that he needed to meet in order to resume work.

He named the same as firstly that he had to write an apology letter to the Managing Director for having complained, secondly that he withdraws the resignation letter, and lastly that he brings his wife who is also a doctor to come and work. The Defendant's evidence was that he told the Managing Director that he could not decide for his wife, and he then wrote the letter at page 41 of his bundle of documents to Mr Chikula of the Labour Office, explaining the situation, but Mr Chikula assigned another Labour Officer to deal with the issue as he was busy. He was summarily dismissed on 22<sup>nd</sup> September, 2013 for absconding from work in excess of ten days, as evidenced on the letter at page 43 of the Defendant's bundle of documents.

The Defendant stated that he received a half salary for June, 2013 and that the Plaintiff claimed payment of six months' salary, the air ticket cost, the costs for the temporary registration, employment permit as well as for lodging and expenses. He further stated that at page 6 of his bundle of documents is the disciplinary code, and at page 10 under clause 6 is the provision for absenteeism for more than ten days. That he had given the Plaintiff the documents at pages 26 to 31 of the Plaintiffs bundle of documents.

The Defendant also referred to page 3 of his bundle of documents stating that clause 2.5 of that page refers to obtaining an authentic sick note from the Plaintiff when sick. However his testimony was that he was treated in Bangladesh, and could therefore not get a sick note from the Plaintiff. In terms the notice required to terminate the contract of employment, the Defendant testified that was required to give six months' notice, and the Plaintiff was required to give three months' notice.



With reference to page 43 of his bundle of documents, which is a letter summarily dismissing him from employment and claiming six months' salary as per clause 7.1 of the contract, the cost of the air ticket for himself and his spouse as well as the costs of acquiring the temporary registration, employment permit and lodging and food, the Defendant testified that the contract he signed states that these were not refundable.

He also told the court that deductions were made from his salary payable to NAPSA and the Workers Compensation, and that he counterclaimed as stated on pages 14 and 15 of his bundle of documents, being K220, 298.50 for unpaid remuneration, the cost of the air ticket, terminal benefits at three months' pay for each completed year of service, damages for unlawful termination of the employment as well as the notice pay.

The Defendant also filed submissions in which it was stated that clause 2.5 of the contract that the Defendant signed with the Plaintiff provides for sick leave requiring the obtaining of an authentic sick note from the duty doctor at the Plaintiff, or sick leave obtained pursuant to labour legislation. However as the Defendant was out of the country, it was not physically possible for him to comply with clause 2.5.

Reference was also made to Clause 2.6 of the contract which provides that where an employee is absent from duty for five consecutive days without the prior permission of the company in writing or without any lawful or reasonable explanation, other than sickness, he commits an offence of gross misconduct and is liable to be summarily dismissed from employment.

It was argued in the submissions that the issue for determination in this case is whether the Defendant absconded from work warranting his dismissal summarily from employment, and whether he is entitled to be paid any terminal benefits. The Defendant argued that the conditions of service that he enjoyed provided for sick leave and for a reasonable explanation for any absence from work. That Clause 4.6 of the contract provides for the investigation of cases, while Clause 4.7 provides for disciplinary hearings and

Clause 4.7.5 gives detailed procedure which reflects the rules of natural justice.

That in this case the Defendant was denied an opportunity to be heard in line with the conditions of service. The case of **ALBERT MWANAUMO AND OTHERS V NFC AFRICA MINING PLC QUE NELSON JILOWA 2011 VOL 1 ZR 30**, was referred to, stating that it was held in that case that a master can terminate a contract of employment at any time, even with immediate effect, and for any reason. That if he terminates outside the provisions of the contract, there is breach of contract, and is liable in damages for breach of contract.

It was further submitted that in that case it was also held that where the procedural requirements for disciplinary action are not statutory, but are merely part of the conditions of service in a contract between the parties, a failure to comply with such procedure would be a breach of contract, and could possibly give rise to a claim for damages for wrongful dismissal.

Further reference was made to the case of **ATTORNEY GENERAL V JOHN TEMBO 2012 VOL 1 ZR 1** which held that ***“the Respondent was wrongfully dismissed from employment as he was not charged with an offence before he was dismissed”***. That in that case the Learned Judge had made a finding of fact that the Respondent had not absconded or deliberately absented himself from work, and that apart from not complying with the provisions of the General Orders, which were part of the Respondent’s conditions of Service, no offence was committed by the Respondent.

As such there was no substratum of facts upon which the disciplinary action was or would be based. That courts have always insisted that there must be a substratum of facts leading to a finding warranting dismissal. The Defendant submitted that in the present case, the Plaintiff summarily dismissed the Defendant pursuant to Clause 6.1.7 of its Disciplinary and Grievance Handling Code, as read with Clause 2.6 of the Defendant’s contract of employment.



However it was their argument that the Defendant did not commit any offence, and as such there was no substratum of facts upon which the disciplinary action was taken. Therefore the termination of his employment was unlawful and merely vindictive.

The case of **SAMSON KATENDE, CROSBY BERNARD V NCF AFRICA MINING PLC 2011 VOL 2 ZR 112**, was referred to, stating that in that case it was held that ***“at common law, an employer may dismiss an employee summarily, that is without notice, if he has sufficient cause to do so”***. Further reference was made to the case of **ZAMBIA AIRWAYS CORPORATION LIMITED V GERSHOM B. MUBANGA 1990/ 1992 ZR 149** where the court that found that improper procedure was used in dismissing the Respondent and held that he was wrongfully dismissed, and that there had been a vendetta against him.

Thus it was submitted that in this case, the summary dismissal of the Defendant was wrongful, and he is entitled to be remunerated for his loss of office as claimed in the counterclaim. The case of **NSANSA SCHOOL INTER EDUCATION TRUST V GLADYS MTONGA MUSAMBA 2010 VOL 1 ZR 457** was cited, stating that the case held that ***“damages for breach of contract committed by the Defendant are compensation to the Plaintiff for the damages, loss or injury he has suffered through the breach. He is as far as money can do it, to be placed in the same position as if the contract had been performed.”***

I have considered the evidence and the submissions before me. That the Plaintiff employed the Defendant on a four year contract as a doctor is not in dispute. The dispute is in relation to how the Defendant's contract of employment was terminated by the Plaintiff. The contract of employment which is at pages 2 to 9 of the Defendants bundle of documents states in clause 1 that the Defendant was employed as a resident doctor for an initial period of four years from 2<sup>nd</sup> April, 2012.

With regard to his remuneration, Clause 2.1 states that it was as provided in Appendix 1 of the contract, while clause 2.2 provides that gratuity was only

payable upon the satisfactory and successful completion of the full contract period, calculated at a rate of USD250.00 for each completed month of service, and taxable as per the Zambia Revenue Authority (ZRA) fixed rate obtaining at the time. Clause 2.3 of the contract states that no proportional rate of gratuity was payable when the employee terminated the contract before the expiration of the full contract term.

With regard to leave, Clause 2.4 states that the Defendant was entitled to 2.5 leave days for each completed month served, and that leave would be taken at such a time as was convenient to the Plaintiff. In relation to sickness and sick leave, the Defendant as per clause 2.5 of the contract was required to obtain an authentic note from the duty doctor of Pearl of Health Clinic or Hospital for the duration of the off duty owing to sickness, and that when unable to perform his duties due to ill health, sick leave approved pursuant to obtaining labour legislation needed to be obtained.

Further that where the Defendant was absent from duty for five consecutive working days without the authority of the Plaintiff, in writing, or without any lawful or reasonable cause other than sickness, he would commit an offence of gross misconduct, and would be liable to summary dismissal from employment.

As regards overtime, Clause 2.9 of the contract states that the Defendant had agreed to work above the normal working hours, depending on emergencies of the Plaintiffs business. That in such an event and provided that management prior to the overtime being worked, approved the same, the said overtime would be paid at one and half times the hourly rate on ordinary days, and double the hourly rate on Sundays and public holidays, or as per shift rate fixed by the company from time to time.

The contract in Clause 4 provides for what amounts to gross misconduct, and Clause 6 states that the Disciplinary and Grievance Procedure Code was an integral part of the contract. As for termination of the contract, Clause 7.1 required the Defendant as employee to give not less than six months' notice in



writing to terminate, and not less than three months' notice for the Plaintiff, and that if either party terminated the contract not in line with that clause, the other party was entitled to payment in lieu of notice.

Clause 7.2 goes further to provide that where the employee terminates the contract contrary to Clause 7.1, in addition to payment in lieu of notice by way of salary, they would refund the Plaintiff costs of acquisition of the temporal registration, registration fees paid to the Health Professionals Council of Zambia in the amount of K4, 000.00, fees paid to certify the employee, fees payable to the Department of Immigration in the amount of K6, 000.00, air tickets for the employee, spouse and children if any in the amount of K16, 254.00, as well as lodging and living expenses at K12, 450.00 from 10<sup>th</sup> January, 2012 to 1<sup>st</sup> April, 2012 for 83 days at K150.00 per day.

The clause also states that the Plaintiff had a right to offset any and all of the said expenses from any payments due to the employee at the time of termination of the contract.

The Defendant in his evidence took the court through the events leading up to his dismissal. At the core is the complaints that he had regard to working overtime, and not being paid for the same, as evidenced in the letter at pages 10 and 11 of his bundle of documents. The calculated overtime payments due are at pages 12 to 22 of his bundle of documents.

The other complaints relate to his applications for leave which are at pages 23, and 25 of the Defendant's bundle of documents, which the Defendant stated that the Plaintiff ignored. He testified that he had applied for the leave so that he could be there when his wife gave birth through caesarian section in Bangladesh, as she had miscarried the first pregnancy. He had further testified that he had involved the Labour Office over his leave, and that Mr Chowdhury who is the Plaintiff's General Manager was summoned by the Labour Office and he had indicated that the Plaintiff had no objection to the Defendant proceeding on leave.

That thereafter the Plaintiff had written a fresh application for leave dated 31<sup>st</sup> May, 2013, which is at page 32 of his bundle of documents. However even that application was not approved, and on 31<sup>st</sup> May, 2013 the Plaintiff wrote the letter at page 33 of the Defendant's bundle of documents stating that the Defendant had unilaterally proceeded on leave effective 1<sup>st</sup> June, 2013, as management had not approved the said leave. Further that management could not approve the leave as the Defendant had a case with the Labour Office and his lawyers.

The Defendant did however proceed on leave, and did not return on 29<sup>th</sup> June, 2013, as scheduled. This he attributed to his having fallen sick, and he wrote an e-mail to the Plaintiff to that effect, and applied for days off as sick leave. The documents at pages 36, 37, 38 and 39 of the Defendant's bundle of documents were stated as evidencing his illness. The Defendant only reported for work on 23<sup>rd</sup> August, 2013, and was not allowed to work. He was summarily dismissed from work on 20<sup>th</sup> September, 2013.

It has been seen from the evidence that the Defendant's leave was not approved by the Plaintiff but he still proceeded with the same. Clause 2.4 of the contract of employment states that the Defendant was entitled to go on leave at such time as was convenient to the Plaintiff. The Plaintiff in paragraphs 3 and 4 of the defence to the counterclaim averred that it did not ignore the Defendant's application for leave, and that in fact the Defendant's second application for leave was not made on 23<sup>rd</sup> May, 2013, but on 3<sup>rd</sup> June, 2013. Their defence was that they did not approve the leave as there was pressure of work.

The Plaintiff had in the statement of claim and the defence to the counterclaim alleged that the Defendant became insubordinate and refused or neglected to carry out lawful instructions which could have led to him either being charged or summarily dismissed. The evidence on record shows that the Defendant complained about the non-payment for overtime worked, and the Defendant in its pleadings did not state the nature of the Defendant's insubordination or refusal or neglect to carry out lawful instructions.



At page 23 of the Plaintiffs bundle of documents is a letter that it wrote to the Defendant warning him for not having reported on duty in the morning shift on 25<sup>th</sup> March, 2013, and at page 23 of the Plaintiffs bundle of documents is a letter dated 23<sup>rd</sup> May, 2013 again written by the Plaintiff to the Defendant stating the he had refused to collect the cheques for the on call/ extra duty payments for March and April, 2013, even after the Labour Office had requested him to collect the same.

The evidence on record shows that there was acrimony between the Plaintiff and the Defendant over the Defendant's working conditions. While the Plaintiff in the defence to the counterclaim stated that the Defendant's last application for leave was on 3<sup>rd</sup> June, 2013, the letter at page 32 of the Defendant's bundle of documents is dated 31<sup>st</sup> May, 2013, and is endorsed as received by the Plaintiff on the same day. Therefore the Defendant's last application for leave was on 31<sup>st</sup> May, 2013.

The letter at page 33 of the Defendant's bundle of documents also dated 31<sup>st</sup> May, 2013 shows that the Plaintiff did not approve the leave. The Defendant still however proceeded on leave stating that he did so on the advice of the Labour Office. In his testimony, the Defendant stated that after the Plaintiff had declined his leave, a meeting was convened by the Labour Office at which Mr Chowdhury who was the Plaintiff's General Manager had stated that the Plaintiff had no objection to the Defendant proceeding on leave. At pages 30 and 31 of the Defendant's bundle of documents is a letter dated 29<sup>th</sup> May, 2013 authored by Chinyanta Chikula, an Assistant Labour Commissioner to the Plaintiff.

This letter makes reference to the violation of the labour laws when it comes to work hours, as well as the disciplinary procedure being compliant with the law. It does not refer to the Defendant's application for leave. However at pages 41 and 42 of the Defendant's bundle of documents is a letter that the Defendant wrote to the Labour Commissioner on 17<sup>th</sup> September, 2013 referring among other things to a meeting held on 21<sup>st</sup> May, 2013 at the office of the Assistant

Labour Commissioner Mrs Mukamasole Mundale Kasanda, the Defendant and a manager from the Plaintiff where Mrs Kasanda had considered that the Defendant was entitled to the enjoyment of his earned leave days, which was not denied by the Plaintiff's manager.

That on that basis the Defendant had bought an air ticket to go and visit his wife and baby in Bangladesh. The letter goes further to state that he had then applied for leave, but he received the duty rota for the following month which had included him, despite anticipating that he would be on leave at the time, and he went back to the Labour Office. That there he was advised to apply for leave attaching the air ticket, and he did so, and proceeded on leave.

This evidence shows that whilst there was a meeting at the Labour Office where the Defendant's right to proceed on leave was recognized, his leave was not approved by the Plaintiff. Further that even the Labour Office had acknowledged that it was the employer that was to approve the leave. It can be said that the act of not approving the leave was unfair as the reason advanced for the Defendant for applying for the same, was that he wanted to visit his wife and new born baby in Bangladesh.

The denial could certainly be attributed to the Defendant having complained about his working conditions and involving the Labour Office, and was therefore meant to punish him. However the approval of the leave was in the Plaintiff's province, and as it was not approved, the Defendant went on leave without authority.

Whilst on the unapproved leave, the Defendant is said to have fallen ill, and he referred to the documents at pages 36 to 39 of his bundle of documents, as evidence of his illness. The Plaintiff in the defence to the counterclaim denied that the Defendant was unwell. However there was no evidence that was led to show the basis of that defence, as it was just a bare denial. The Defendant as Plaintiff on the counterclaim bears the burden of proving on a balance of probabilities that he was unwell, and he provided documentation to that effect, which was not discredited in any way.



However going by Clause 2.5 of the contract, he was required to obtain an authentic sick note signed by a duty doctor from the Plaintiff's clinic or hospital or sick leave obtained according to labour legislation. The Defendant testified that he fell ill whilst in Bangladesh and he could therefore not obtain sick leave as stipulated in Clause 2.5 of his contract of employment. The Plaintiff did not deny this, and therefore in the absence of any evidence to show that the medical evidence pertaining to the Defendant's illness was not authentic, it is my finding that he was unwell, and he did not abscond from work for no reason during the period of his illness. This is in line with Clause 2.6 of the contract signed between the parties.

However it is on record that the Defendant proceeded on leave without the same being approved, and this amounts to gross misconduct as stipulated in Clause 4.1 (e) of the contract. Clause 6 of the contract makes reference to the Disciplinary and Grievance Handling Code as being an integral part of the contract. This document is at pages 1 to 11 of the Plaintiff's bundle of documents. Clause 4.1 of the code provides that once an offence is committed the immediate supervisor will immediately institute investigations.

Under Clause 4.1.1 the immediate supervisor is empowered to either dismiss the case, give an unrecorded warning or lay a formal disciplinary charge. The Plaintiff in this case did not take any of the above stated options in instituting disciplinary proceedings against the Defendant for having proceeded on leave without authority, and absconded from work for more than ten days. What it did was to summarily dismiss him on 23<sup>rd</sup> September, 2013. This was in line with Clause 6.1.7 of the Disciplinary and Grievance Handling Code.

The Defendant citing the cases of **ALBERT MWANAUMO AND OTHERS V NFC AFRICA MINING PLC QUE NELSON JILOWA 2011 VOL 1 ZR 30** and **ATTORNEY GENERAL V JOHN TEMBO 2012 VOL ZR 1** in the submissions, argued that as the disciplinary procedures were not invoked by the Plaintiff before dismissing the Defendant, the said dismissal was wrongful, and the Defendant is entitled to be paid damages. In the **ALBERT MWANAUMO AND**

**OTHERS V NFC AFRICA MINING PLC QUE NELSON JILOWA 2011 VOL 1 ZR 30** case, the Plaintiffs were dismissed without the disciplinary procedures being followed. The Hon Judge noted that the Plaintiffs had engaged in a riot at their work place and stated that;

***“As rightly submitted by Mr. Forrest, it seems to be clear to me from Agholor v Cheesebrough Pond's (Zambia) Limited, that a master can terminate a contract of employment at any time, even with immediate effect and for any reason and that if he terminates outside the provisions of the contract, then he is in breach thereof, and is liable in damages for breach of contract; and further that where a master “dismisses” a servant, he terminates the contract summarily without any notice, on the grounds of misconduct, negligence or incompetence and that if such grounds are justified, the servant forfeits the right to any notice whatsoever, and a number of other benefits.”***

The court went on to state that, ***“Further, it is evident from Zambia National Provident Fund v Chirwa, that where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is also dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract and that the employee has no claim on that ground for wrongful dismissal, or a declaration that the dismissal is a nullity.”***

Therefore a dismissal can only be wrongful where the disciplinary process is not followed where an employee is alleged to have committed an offence for which the appropriate punishment is dismissal, if such dismissal was not justified. In this case the Defendant went on leave without the Plaintiff's approval resulting in him having absconded from work for more than ten days, which was an offence under Clause 6.1.7 of the Pearl of Health Disciplinary and Grievance Handling Code. The Plaintiff was justified in summarily dismissing the Defendant from his employment, as it will be noted that the documents evidencing his sickness at pages 36 to 39 of the Defendant's bundle



of documents show that he was attended to by the hospital on 26<sup>th</sup> June, 2013, when his self-imposed leave was to end on 29<sup>th</sup> June, 2013. From 3<sup>rd</sup> June, 2013 to 26<sup>th</sup> June, 2013 when he fell sick was more than ten days of him being absent from work, and therefore the sickness would not have excused his absence from work.

On that basis the Plaintiff cannot claim that his dismissal was wrongful, as there was a substratum of facts that were in existence that warranted his dismissal from employment, having absconded from work. That claim will fail, and it is dismissed.

The Defendant claims salary arrears from May, 2013 until September, 2013 when he was dismissed. It is not in dispute that he worked for the month of May, 2013, and he is entitled to payment of his salary for that month. I accordingly enter judgment in his favour for the payment of the said salary less any tax payable, and statutory deductions due on the same. As regards the salaries for June, 2013 to September, 2013, the Defendant did not work during this period, as he had absconded from work. He cannot claim to be paid for work that he did not do, as it would amount to unjust enrichment, and the claim for payment for those months will fail. The Defendant is however on record as stating that he was paid for the days that he worked in June, 2013.

As regards the claim for overtime payments, this is for the period April, 2012 to March, 2013. The documents at pages 12 to 22 of the Defendant's bundle of documents are a tabulation for the amounts due in the particular months as overtime payment, and page 22 is a summary of the tabulations which come to K155, 673.50. The Defendant having worked during the said periods is entitled to be paid. In the defence to the counterclaim for payment of the overtime monies due, the Plaintiff just gave a bare denial of the claim without stating the basis for disputing it. Therefore the Plaintiff has no defence to the claim for overtime payment, and I accordingly enter judgment in favour of the Defendant on the counterclaim for the payment of K155, 673.50 as overtime allowance due.

The Defendant also counterclaims payment for two air tickets to Bangladesh for himself and his wife and other repatriation benefits due. A perusal of the contract of employment signed between the parties in this matter shows that it has no stipulation for the Plaintiff to repatriate the Defendant in the event of a dismissal, as in this case. Appendix 1 of the contract shows that the Defendant was entitled on successful completion of the contract to his air fares as well as those of his spouse to be met. As the contract was the agreement binding the parties, and it was silent on repatriation of the Defendant in the event of a dismissal, there was no agreement that the Plaintiff would bear such costs, and the claim will accordingly fail.

The Defendant also claims terminal benefits for the period served. Clause 2.2 of the contract provides that the Defendant was entitled to be paid gratuity at USD250.00 for each completed month of service only upon the successful completion of the full contract period. It further states that where an employee terminates the contract before its expiration, no proportional payments of gratuity would be made.

My understanding of this provision is that gratuity was payable on the successful completion of the contract period at a rate of USD250.00 for each completed month, and that where an employee being the Defendant terminated the contract of employment, he would not be entitled to any pro rata payment of gratuity. In this case the Defendant committed a breach of the contract of employment, by absconding from work, and the Plaintiff terminated the said contract. As the Plaintiff being the employer is the party that exercised the right to terminate the contract, then going by the provisions of Clause 2.2 of the contract, which only prohibits the payment of gratuity on a pro rata basis where the employee terminates it, the Defendant is entitled to pro rata payment of gratuity for the period served. Having worked from 1<sup>st</sup> April, 2012 to 31<sup>st</sup> May, 2013 which is a period of fourteen months, he is entitled to gratuity at USD250.00 a month, which comes to USD3, 500.00 at the rate prevailing when



the contract was terminated by way of dismissal, less any tax payable on the amount.

The Defendant also claims damages for harassment, humiliation, mental anguish, deprivation and inconvenience. This claim was not prosecuted, and therefore has not been proved, and it fails. Then there is the claim for payment of monies deducted for the Defendant's salary, and not remitted to the Zambia Revenue Authority, NAPSA and Workmans Compensation. These are statutory deductions which cannot be paid to an employee but to the relevant bodies they were meant to be paid to. The claim for their payment will fail. The judgment sums awarded shall attract interest at the average short term deposit rate from the date of issue of the writ until judgment, and thereafter at a rate of six percent per annum until payment. The Defendant is awarded costs, to be taxed in default of agreement. Leave to appeal is granted.

**DATED THIS 23<sup>rd</sup> DAY OF NOVEMBER, 2017**

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**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**