

2016/CRMP/863

IN THE SUBORDINATE COURT OF THE FIRST CLASS

FOR THE LUSAKA DISTRICT, HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN

BOYD MULAYA

PLAINTIFF

VELUTEX LIMITED

DEFENDANT

BEFORE: HON.M.K. CHIBANGA, MAGISTRATE CLASS I

FOR THE APPELLANT: IN PERSON

FOR THE RESPONDENT: IN PERSON

JUDGMENT

LEGISLATION REFERED TO:

- 1. S.I. No 3 The Minimum Wages and Conditions of Employment (General) Order, 2011**
- 2. The Minimum Wages and Conditions of Employment Act Cap 276 of the Laws of Zambia**

This matter began on a Default writ of summons and the plaintiff sued for the sum of K9, 865.00 being for Housing allowances, leave pay and subsistence allowances that the defendant owe the plaintiff plus costs.

The defendant denied the claim, it is the responsibility of the plaintiff to prove the matter on a balance of probability.

The plaintiff was Boyd Malama who gave a sworn testimony and told this court that he was employed by the defendant in July 2015 as a driver at a salary of K1000. He told the court that he was promised to have his salary increased later. After 3 months when he became a permanent worker, he tried to discuss with the defendant on the increment but defendant just assured to look into the issue later. After one year he was just paid gratuity without leave pay. He further told this court that he was made to sign a contract under Farmers Union when he was employed under velutex. He signed a contract for one year which was ending in 2016 October.

He also told the court that the defendant accused him of having stolen, on two occasions. One instance was where the defendant said he had left cheques in the vehicle and that the plaintiff got the money and another was when he was accused of having stolen two chickens after having been sent by the defendant to deliver chickens to his friend. In both incidences no investigations were concluded and he told the defendant that he was tarnishing his name.

He further said that there was a time he was sent on a trip to Mongu with the defendant's friend and instead of paying him K390 per day for the five days he was out, the friend to the defendant only paid him K280.00. He also told the court that he was renting his own accommodation and was not paid housing allowance hence he was claiming 30% of his basic pay per month as housing allowance which was totalling to K6, 300. He told the court that he worked for 21 months and was not paid leave pay.

The defendant gave a sworn testimony and told this court that in June 2015 he was approached by his worker Mr Lungu who asked him to employ the plaintiff who had no employment at the time and his uncle. He told the court that he explained to Mr Lungu that his company was a member of the Zambia Farm Employees Association and the salaries, working conditions would be guided by the collective agreement between the Association Members and the workers. He further indicated that later he met the plaintiff and he explained to him what he discussed with Mr Lungu in the presence of Mr Lungu.

They agreed that Mr Malama would be his private driver and that he would pay him K1000 which included all the allowances. The plaintiff worked for one year but during the one year he observed that the plaintiff was not hard working also that he was dishonest. He told the court that there was a cell phone that he had for emergencies which was always in the car and that the said cell phone went missing and it was the plaintiff who was driving the said vehicle. He also said there was a time he took one of the defendant's friends somewhere he did not authorise him to go. Furthermore, there was a set of tools that he kept in the vehicle and some pieces got lost and when he asked him about the same he refused. He was also keeping a bottle of dilutable juice in the car which kept reducing and the plaintiff was always drinking juice. When he asked him about it he refused. He also found K7000 missing from the car and when he asked him he denied. The car was always dirty, he couldn't clean it even once in a week.

At the end of the year, he was not happy with the services but because of the relationship he had with the person who introduced the plaintiff to him. He gave him a second chance and told him that if he improved in his work then he would improve his conditions of service as well. He told the court that at the end of the first year he paid him his leave pay and gratuity which money the plaintiff collected and signed for. He produced a book showing that the plaintiff was paid leave pay K1000 and gratuity also K1000.

He further narrated that in the second year of the contract, there was a time cheque leafs went missing and since the plaintiff was the person who entered the office, he suspected him, also there was a time he had taken chickens to his colleague and he received a report that two chickens went missing. Although the police could not proceed with the matter because the plaintiff was not seen stealing he suspected him to have gotten the chickens. Also his relationship with the plaintiff had not been okay and even though on the other issues I.e. the missing cheque, the defendant left room for another person to have collected the cheques, because of the bad relationship with him he decided to terminate his contract in a normal way.

He told the court that he called his accountants and the calculations were done after which the plaintiff was paid K1725 which included his basic salary and leave pay. He further indicated that because he took it as a normal termination of employment, the plaintiff was paid another K1000 extra salary in lieu of notice so that he stepped aside instantly. The defendant showed court a document where the plaintiff signed having been paid the said money.

Over the Mongu trip, the defendant told the court that when his friend asked for the services of a driver to take him to Mongu, he told the driver to negotiate with his friend as it was a personal issue.

DW2 was Elisha Kalunga who gave a sworn testimony and told the court that he was called by the defendant to make calculations for his dues. He explained that his leave pay was K725 while his notice in lieu was K1000 total money he was given was K1725. He was paid and he signed.

DW3 was Jeremiah who gave a sworn testimony and told the court that on date he could not remember he was told that there was a shortfall on the number of chickens which were delivered by the plaintiff also that they went and confirmed with the defendant's friend that indeed two chickens went missing but when the plaintiff was

asked he denied knowledge. He said later the plaintiff resigned and his dues were calculated which he signed for

The plaintiff submitted that the defendant failed to clear the plaintiffs housing allowance . he referred the court to the employment Act. He also referred to the case of Galaunia Farms Ltd v National Milling Company. He argued that the defendant failed to defend himself on the issue of housing allowance. He also referred the court to section 26 of the Employment Act CAP 268 that an employee summarily dismissed shall be paid his wages and allowances due to him up to the date of the dismissal.

The defendant on the other hand submitted that it was worth noting that the first contract expired and its dues were paid also that the second contract was implemented with serious warning regarding the previous conduct and performance of the plaintiff. he argued that he complied with the section 21 of the employment act by paying the plaintiff notice in lieu of notice. He said everything that was due to the plaintiff was paid. He further argued that he gave the plaintiff an opportunity to be heard. He referred the court to the cases of National Breweries Ltd v Philip Mwenya and Zambia National Provident fund v Chirwa.

In summary this was the evidence in the matter. From the evidence on record it is clear and without any dispute that:

- The plaintiff was employed by the defendant
- There was a contract that was signed a collective Agreement between Zambia Farm Employers Association and National Union of Plantation Agriculture and Allied Workers 2011

The plaintiff claims 30% of his salary as housing allowance for 21 months. On the other hand the defendant argues that the K1000 included the plaintiffs housing allowance. I note that the plaintiff does not claim that at any point he was ever paid housing so as to show the court what amount it was with housing allowance. In the absence of something written, I have difficulties to believe the claim by the plaintiff because

defendant also claims that amount included housing. I have also taken time to look at VL2 a document that was produced by the defendant, it shows that the K1000 which he was given as salary in lieu of notice included housing allowance and the plaintiff signed for it. Also the other issue worth considering is the fact that, if the plaintiff had not been paid housing allowance for the whole period even in the first contract, why didn't he at any time find out from the employer about his housing allowance because he lived in a rented house. There is no information on record to show that the plaintiff had endeavoured to follow up his housing allowance and probably given a negative response. The conduct of the plaintiff in the absence of any other evidence to the contrary persuades me to infer that indeed the K1000 included housing as it appears on the document he signed. I also took time to look at the BM1 the document produced by the plaintiff which is the contract of employment, there is the definition of full pay which is defined as "**basic salary plus housing allowance (where applicable)**"..... the above definition of full pay in the contract entails that a payment of salary may include housing allowance therefore there would be no need for one to sign for the housing allowance separately. I am quick at this point to state that I have adopted the above proposition because of the circumstances of the matter. Where there is evidence to show that the salary does not amount to full pay and proof that housing is not paid I would hold otherwise.

The plaintiff is also claiming K390 by 5 days as subsistence allowance for the trip he went with the defendant's friend to Mongu. It is clear from the evidence on record that the plaintiff complained to the defendant about the trip when he came back from Mongu but the issues seemed to have been resolved. The defendant states that he had told the plaintiff to make his own agreement with the colleague as it was private and that he would still pay him something on top of the salary. The defendant claims he paid the plaintiff an allowance the amount of which he could not remember while the plaintiff argues that he was not given any thing by the defendant apart from K280 which he was given by the friend to the defendant which money he claims was little. What is clear is that his dues for his work as a driver were not reduced by the

defendant for the time he was out. It is very difficult for me to hold the defendant responsible for the subsistence allowance for the five days because, it is not in dispute that the plaintiff went with someone else and also this other person was not even joined or sued.

On the aspect of leave days, the plaintiff claims he was not paid leave days ever since he was employed until termination while the defendant produced a book in this court showing that the plaintiff was paid leave days and gratuity at the end of the first contract and another document was produced before this court showing that the plaintiff was paid leave days for the second contract. The plaintiff has not convinced me that he is still owed leave days.

I have difficulties to agree with the plaintiff when he says he was forced to sign the contract in question. He had every option not to sign it because no evidence of intimidation was brought to the attention of the court.

I have also taken time to look at the prescribed the law on conditions of service:

S.I. No 3 The Minimum Wages and Conditions of Employment (General) Order, 2011

(Category III) – three thousand, one hundred and twenty-five kwacha (K3, 125.00) per hour or six hundred thousand kwacha (K600, 000.00) per month, for a person engaged as a driver;

it is clear that even from the plaintiff was paid above the prescribed minimum wage for drivers despite the fact that there was a contract between him and the defendant.

With the above analysis, the plaintiff has not proved the case and I therefore dismiss the matter.

DELIVERED IN OPEN COURT THIS 9th DAY OF JUNE, 2017.

