

**IN THE SUBORDINATE COURT
OF THE FIRST CLASS
FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2017/CRMP/445

BETWEEN:

BRIAN MICHELO

PLAINTIFF

AND

HENAN GUANGJIN (Z) LTD

DEFENDANT

FOR THE PLAINTIFF

IN PERSON

FOR THE DEFENDANT

MR. N. SAMPA-MESSRS
NORMAN SAMPA
ADVOCATES.

JUDGEMENT

This matter was commenced by way of Default Writ of Summons and supporting affidavit, by which the Plaintiff claimed terminal benefits, leave pay and payment in lieu of notice in the total amount of K6, 542 against the Defendant Company. It was the Plaintiff's affidavit evidence that he was employed by the Defendant in April 2015 under an oral contract, and his employment was terminated without reasons on 3rd April 2017 after he went home to take money for food, having sought permission from his supervisor. He further stated that the

Defendant refused to pay him his dues in full, and he therefore claimed the following reliefs.

- (a) Notice pay of one month salary in the amount of K1.574
- (b) Terminal benefits in the amount of K4, 160.
- (c) Leave pay in the amount of K450.

At trial, the Plaintiff gave evidence to the effect that in April 2017, he was fired from work by his boss after he was away from work, despite having asked for permission to be away. He then went to the Labour Office and took out Summons against the Defendant, who upon receipt of the said Summons, proposed to reinstate him and pay him his dues within six months. The plaintiff refused this proposal and insisted that he be paid his dues, and the Defendant accordingly paid him K1, 350, although he did not know how this amount was computed whether it was payment of his dues for the period of six (6) months, as per contract executed between himself and the Defendant in January 2017. In this regard, it was the Plaintiff's testimony that when he commenced work in 2015, there was no written agreement. However, the parties signed a contract of employment in January 2017, pursuant to which his monthly salary was K1, 250. The plaintiff emphasised that for the sake of this action, his main concern was the money he worked for two years before he signed a written contract in January 2017.

In cross-examination, the Plaintiff testified that from the time he was employed in 2015, he was paid a salary every two (2) weeks during the tenure of his oral contract and his employment was not at any time terminated. He admitted that when his employment was terminated, he was indeed paid K1,350 and signed in acknowledgment of receipt, on a document produced on behalf of the Defendant titled 'Termination Letter';

One witness was called on behalf of the Defendant, namely Nyumba Terana an Administration Officer at the Defendant Company, whose testimony was that when the Plaintiff was employed by the Defendant Company in April, 2015, his employment was pursuant to an oral contract, whose duration was for a year and a four months until January 2017, when it was reduced to writing. He stated that the regulations in the written contract are such that if an employee absconds from work for three (3) consecutive days without permission for reasons unrelated to his official duties, that employee would be dismissed. The plaintiff was accordingly dismissed in April 2015 when he absconded from work for more than three days without permission after it was discovered that he was not sick or incapacitated during that period.

The Defence witness further testified that the Plaintiff was paid for his leave days for the period he worked, which was computed by multiplying his daily rate by the number of leave days accrued. As a general worker in the carpentry department, the Plaintiff's daily rate was K35 and he had accumulated a total of 52 leave days, bringing his total leave pay to about K1800. When the plaintiff inquired why he was not paid housing and transport allowance, it was explained to him that such emoluments were payable when an employee was not provided with housing and food by the employer, which were provided to the Plaintiff by the Defendant, as he was housed at the working site at the Airport, and therefore did not have to be paid transport allowance. It was the Defence witness testimony that it is Company Policy that employees should hand over their work attire after termination of employment, which the Plaintiff did not do and the value of his work attire was therefore deducted from his dues, in the amount of K350, bringing his total dues collected to K1, 470, which he collected after all relevant issues were explained to him in the

presence of his Labour Consultant. A Letter of termination of employment was given to him, explaining the reasons for termination.

The Defence witness further referred to the rule in the contract of employment that was breached by the Plaintiff, as well as the document on which the plaintiff's dues were computed.

Having analysed the evidence on record, I will now state my finding of facts and facts not in dispute. I find that the plaintiff was employed under an oral contract in April 2015 and later under a written contract in January, 2017 which was terminated by way of summary dismissal in April, 2017. Upon his dismissal, the plaintiff was given a Letter of termination stating the reasons for such termination, and accordingly paid K1, 470 as his dues in respect of accrued leave days. One pertinent issue that is in dispute is whether the Plaintiff sought permission to be absent from work. I must hasten to say that the burden is on the Plaintiff to prove that he indeed sought permission. In this regard, I am guided by the leaned authors of phipson on Evidence, seventh Edition, who state as follows:

“So far on the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons”.

This position was also reiterated by the High Court in the case of **Kankomba and others V Chilanga Cement Plc (2002) 2r52**

In order to establish his claim, the plaintiff must also prove that the Defendant, by summarily dismissing him, breached the contract of employment or the law. In this regard, I am inspired, and in fact

bound by the decision of the High Court in the case of **Sterkinekor v Attorney General (2011) 2R52** where it was held that in a master servant relationship, a master can terminate a contract of employment at any time and for any reason, and where the master dismisses a servant, he can terminate the contract summarily without notice, on the ground of misconduct, negligence or incompetence. If such grounds are justified, the servant forfeits the right to any notice whatsoever, and to a number of other benefits.

I am also alive to the provisions of **Section 5 of the Employment Act No 15 of 2015**, which amended **Section 36 the Employment Act, Chapter 268 of the laws of Zambia**, which provides that an employer is required to give reasons for termination of employment where there is a valid reason for such termination connected with the employee's capacity and conduct.

I will now apply the law to the facts at hand. The Plaintiff, in alleging that he sought permission to be absent from work, merely made this statement in his affidavit and in examination in chief. He did not bring any witness to testify to this effect, nor did he adduce documentary evidence. I find that the Plaintiff has not discharged his burden of proof of this allegation on a balance of probabilities.

The Defendant, on the other hand, produced a letter of termination stating reasons for the termination, the company regulation breached by the Plaintiff, the amount of money paid to the plaintiff after his dismissal and a document showing how the amount was computed, which was signed by the Plaintiff to acknowledge receipt. The documentary evidence on record, and indeed undisputed by the Plaintiff, shows that the Defendant complied with the provisions of **Section 5 the Employment Act No.15 of 2015** and therefore, on the strength of **Sterkinekor V Attorney General**, the Plaintiff forfeited his

his right to benefits such as notice pay as the reason for termination borders on misconduct. In any event, the Plaintiff did not demonstrate how he would have otherwise been entitled to the amounts of money he is claiming.

For the reasons stated above, I find that the Plaintiff's claims lack merit and he has failed to discharge his burden of proof. The Plaintiff's claims are hereby dismissed, with costs to the Defendant. Leave to appeal is hereby granted.

DELIVERED THIS 3RD DAY OF AUGUST, 2017.



P.S. TEMBO (MS)

RESIDENT MAGISTRATE