

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
INDUSTRIAL RELATIONS DIVISION  
HOLDEN AT LUSAKA**

**COMP. IRCLK/316/2019**

BETWEEN:

**JUSTIN MWAPE**

**COMPLAINANT**

**AND**

**JAN JAPAN ZAMBIA LIMITED**

**RESPONDENT**



***Coram: Chigali Mikalile, J this 14<sup>th</sup> day of August, 2023***

For the Complainant: In person

For the Respondent: No appearance

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## **JUDGMENT**

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### **Cases referred to:**

1. Wilson Masauso Zulu v. Avondale Housing Project(1982) ZR 178
2. Salomon v. Salomon & Company Limited [1897] A.C.22.
3. Tom Chilambuka v. Mercy Touch Mission, SCZ Appeal No. 171/2012

### **Introduction**

1. The complainant, Justin Mwape filed his notice of complaint against the respondent, Jan Japan Zambia, on 15<sup>th</sup> August, 2019 seeking the following reliefs:-
  - a) Gratuity for the one year contract in Japan

- b) Leave days
- c) Overtime
- d) Costs and any other benefits the Court may deem fit.

### **Complainant's Affidavit evidence**

2. The accompanying affidavit reveals that the complainant was verbally employed by the respondent in January, 2016 as a Salesman. He signed his first contract of a one year period on 23<sup>rd</sup> April, 2018. Exhibited to the affidavit and marked "JM1" is the stated contract.
3. According to the complainant, on 6<sup>th</sup> May, 2018, he was sent to work in Kobe City, Japan. He came back to Zambia on 11<sup>th</sup> November, 2018. On 20<sup>th</sup> November, 2018, he was given K 30,000.00 proof of which is exhibited as "JM2". The complainant attested that he was given this amount instead of the salary arrears and overtime dues for the period he was in Japan. He stated that he was not getting his salary while in Japan.
4. It was the complainant's evidence that he was sent back to Japan on 30<sup>th</sup> December, 2018. Whilst in Japan, and particularly on 15<sup>th</sup> January, 2019 and 26<sup>th</sup> February, 2019, he sent his wife to collect money from the respondent and she was given a K 3,000.00 on each occasion. The total given to her was K 6,000.00 as shown by exhibits marked "JM 3 & 4".
5. He returned to Zambia on 27<sup>th</sup> June, 2019 and on 8<sup>th</sup> July, 2019, he was paid K 36,840.00 as shown by exhibit "JM5". When he asked the respondent for the balance of his dues, he was informed

that he had been paid already. According to the complainant, this was not true as he only received K 66,840.00 out of K 276,000.00.

**Respondent's Answer and affidavit**

6. In its answer, the respondent stated that the complainant was employed as a Salesman based at its Lusaka office in January, 2016 and was earning a salary of K 5,000.00 per month. In April, 2018, the complainant joined the sister company, Jan Trading Company of Japan as a Salesman. It was expressly agreed between the complainant and the respondent that he would continue on the respondent's payroll for purposes of his family in Zambia being looked after while Jan Trading of Japan would meet his Japanese salary.
7. It was also stated that the respondent herein is not privy to the contract between the complainant and Jan Japan Trading and is therefore not bound by it. The complainant is not entitled to the reliefs sought.
8. The affidavit in support of answer was deposed to by Zahir Muhammad, a Director in the respondent company, who averred that there are several companies under Jan Japan Group of Companies but each one is independent of the others. Jan Japan Trading Company of Japan is different from Jan Japan Zambia Limited. Exhibited to the affidavit and marked "ZM1" is the certificate of incorporation for the respondent.
9. In April, 2018, Jan Japan Trading Company of Japan signed a contract of employment with the complainant for him to work in

Japan at a monthly salary of 200,000 yen. The respondent was not party to that contract.

10. According to Mr. Muhammad. Since the complainant had been working for the respondent for some time and the respondent was aware that he had a family in Zambia, the respondent agreed to maintain him on its payroll for the duration of his stay in Japan for the sake of his family in Zambia. It was common knowledge that the Japanese company would meet its obligations to the complainant while the respondent would maintain him on its payroll at the salary of K 5,000.00 per month.

11. The deponent further averred that the respondent has paid the complainant all the dues due to him under his employment contract with the respondent and he is not owed any other money.

12. According to Mr. Muhammad, if the complainant was not paid by the Japanese company, his recourse is to that company and not the respondent.

### **Evidence at trial**

13. The respondent did not appear at the trial and upon being satisfied that the complainant had duly served the respondent with the notice of hearing, I proceeded to hear the complainant in the respondent's absence. It is after all settled law that no procedural injustice is occasioned when a party who is aware of the proceedings decides not to turn up.

14. The complainant testified in line with his affidavit evidence. He added that his 200,000 yen salary translates to K 20,000.00 per

month in Zambian Kwacha. He emphasized that he never received any pay whilst in Japan. He was away for a total of 12 months which amounts to K 240,000.00. He only received a total of K 66,840.00 in Zambia bringing the outstanding balance to K 173,160.00.

15. It was further his testimony that the respondent and the Japanese company were one and the same and it is not true that the Japanese company was the one obligated to pay him. He stated that the respondent had failed to prove that the Japanese company had paid him all his dues while he had shown the amounts received in the period in issue.

### **Consideration and decision**

16. I have carefully considered the evidence on record. I remind myself that the complainant has a duty to prove his claims and if fails to do so, he cannot be entitled to judgment, whatever may be said of the opponent's case. This was the holding of the Supreme Court in the case of **Wilson Masauso Zulu v. Avondale Housing Project**<sup>(1)</sup>.

17. It is not in dispute that the complainant was employed by the respondent in January, 2016 under a verbal contract. It is also not in dispute that in 2018, the complainant signed a one year contract. The contract, whose start date was 23<sup>rd</sup> April, 2018, is on a Jan Trading Co. letter head and is in Japanese and English languages. The address is Japanese and salary currency is yen. Thus, I find as a fact that the contract entered into in 2018 was between the complainant and the Japanese company called Jan Trading

Company. I further find that the complainant was maintained on a monthly salary of K 5,000.00 by the respondent.

18. In light of the above findings, I ask myself if the complainant is entitled to the claims he makes. I will address the claims as they appear on the complaint.

*Gratuity for the one year contract in Japan*

19. As established, there was a contract signed by the complainant. Strangely enough, the said contract appears not to have been signed by anyone on behalf of Jan Trading Company. Further, the respondent does not appear anywhere on the contract. The contract does not state that the salary of 200,000 yen or any other remuneration shall be paid by the respondent. In fact, the contract does not provide for any other benefits that the complainant may be entitled to such as the gratuity being claimed.
20. However, whether signed or not, the cardinal issue to note is that the contract is not between the complainant and the respondent.
21. The complainant did testify to the effect that the respondent and Jan Trading company are one and the same company but did not bring any proof to support this verbal representation. The evidence from the respondent's director is that the respondent and Jan Trading Company of Japan are two separate entities and to that effect, he exhibited to his affidavit the certificate of incorporation of the respondent dated 9<sup>th</sup> November, 2017.
22. In light of this evidence, I am satisfied that the two companies are different entities each capable of suing and being sued in its name.

It does not matter if the two companies have the same shareholders. This is a principal that is well settled at law and requires no further elaboration. The celebrated case of **Salomon v. Salomon**<sup>(2)</sup> refers.

23. Thus, even if the contract did provide for gratuity, the complainant would not be able to recover that payment from the respondent. He would have to pursue Jan Trading Company of Japan.
24. I note from the testimony that the complainant was claiming salary arrears even if he did not ask for salary arrears in his complaint. However, that claim too cannot stand against the respondent because as stated earlier, the contract on record did not name the respondent as a party under an obligation to pay the 200,000 yen a month to the complainant.
25. The evidence of the respondent is that the complainant was maintained on payroll at K 5,000.00 per month for the sake of his family that had remained in Zambia. It is important to note here that the complainant did not deny the respondent's assertion that his monthly salary in Zambia was K 5,000.00.
26. The complainant's own evidence shows that he received, either on his own or through his wife, K 30,000.00 on 20<sup>th</sup> November, 2018, K 3,000.00 on 15<sup>th</sup> January, 2019, K 3,000.00 on 26<sup>th</sup> February, 2019 and K 36,840.00 on 8<sup>th</sup> July, 2019 which adds up to K 72,840.00. This is way above what the respondent had undertaken to pay during the subsistence of the one year contract between the complainant and Jan Trading Company, that is, K 5,000 x 12 months which is equal to K 60,000.

27. In light of the foregoing, I am not satisfied that the respondent owes the complainant salary arrears or gratuity for work done in Japan.

Leave days and overtime

28. The complainant did not lead any evidence on the two claims. It is in fact not very clear whether the leave days and overtime being claimed are under the one year contract with Jan Trading Company of Japan or for the period the complainant was in the respondent's employ. If it under the one year contract, again the wrong party has been sued.

29. Whatever the case, however, the fact is there is no evidence on record to prove the claims. The complainant did not provide any evidence regarding the number of leave days that had accrued to him and further did not show the number of hours he was claiming as overtime and how that overtime arose. It is after all settled at law that certain conditions must prevail for an employee to successfully claim overtime.

30. In the case of **Tom Chilambuka v. Mercy Touch Mission**<sup>(3)</sup> the Supreme Court guided that the law merely provides a rate of payment to an employee where such employee has actually worked outside the scheduled working hours. To be entitled to that rate, an employee must perform his work outside the scheduled hours and such work must be recognized and approved by the employer as being outside the scheduled working hours. The approval by the employer is important. For example, an employee who decides to perform the tasks assigned to him after scheduled working hours when he could have

performed them during scheduled working hours cannot be entitled to payment of overtime allowance.

31. It is clear to see from the evidence that not only did the complainant fail to provide proof of the overtime worked but also failed to provide proof that that any such overtime was approved by the employer.
32. Clearly, the claims for leave days and overtime are murky and must ordinarily fail.

*Any other benefits*

33. The evidence, in my view, is not revealing any other relief that may be granted to the complainant.

**Conclusion and orders**

34. The complainant has failed to prove that the respondent was responsible for the payment of his monthly salary of 200,000yen later on benefits such as gratuity. Further, the complainant has failed to prove his claims for leave days and overtime. As such, the complaint before Court is dismissed in its entirety.
35. No order is made as to costs.

Delivered at Lusaka this 14<sup>th</sup> day of August, 2023



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M.C. Mikalile  
**HIGH COURT JUDGE**