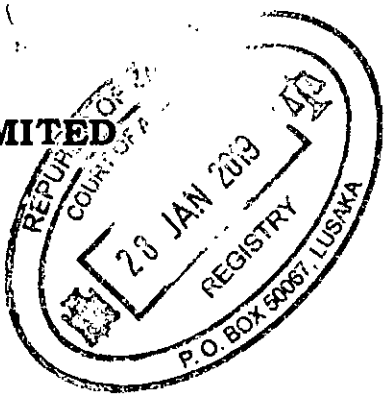
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 63 OF 2018**
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)

BETWEEN:



STRIPES ZAMBIA LIMITED	**APPELLANT**
AND	
IREEN SIAME	**1ST RESPONDENT**
DOROTHY DAKA	**2ND RESPONDENT**
MOFFAT KAKOMPE	**3RD RESPONDENT**

Coram: ***Mulongoti, Sichinga and Ngulube, J.J.A***
On the 27th June, 2018 and 28th January, 2019

For the Appellant: Mr. P.K. Chibundi of Messrs Mosha and Company

For the Respondents: No Appearance

JUDGMENT

Sichinga, JA delivered the Judgment of the Court

Cases referred to:

1. *Minister of Home Affairs, Attorney-General v. Lee Habasonda (2007) ZR 2007 (SC)*
2. *Zambia Telecommunications Company Limited v. Aaron Mulwanda and Paul Ngandwe (2012) 1 ZR (SC)*
3. *Carlil v. Carbolic Smoke Ball (1892) 2 QB 484*
4. *Kitwe City Council v. William Nguni (2005) ZR 57 (SC)*

Legislation referred to:

1. *Employment Act, Chapter 268 Laws of Zambia*
2. *National Pension Scheme Act, Chapter 256, Laws of Zambia*
3. *Minimum Wages and Conditions of Employment (General) Order 2006, Statutory Instrument No. 57 of 2006*
4. *Minimum Wages and Conditions of Employment (General) Order 2011, Statutory Instrument No. 2 of 2011*
5. *Minimum Wages and Conditions of Employment (General) Order 2012, Statutory Instrument No. 46 of 2012*
6. *Minimum Wages and Conditions of Employment Act, Chapter 276, Laws of Zambia*

Other authorities

1. *Writing of Judgment: A practical Guide for Courts and Tribunals, Dato Sayed Ahmad Idid, 2011 edition*
2. *Black's Law Dictionary, 9th Edition*

This is an appeal from a Ruling on assessment of the High Court, Industrial Relations Division delivered on 2nd October, 2017. The assessment was done pursuant to a Judgment of the Industrial Relations Court (as it then was) delivered on 30th August, 2016. In the court below, the respondents herein had complained against the appellant company which was their employer, and they sought the following reliefs:

1. *Service benefits for ten (10) years;*

2. *Housing allowance;*
3. *Leave days due;*
4. *Transport allowance;*
5. *Monies deducted from salaries towards NAPSA contributions;*
6. *Costs incidental to the action; and*
7. *Any other remedies the court may deem fit.*

The salient facts of the case are that the complainants (respondents now) were employed as factory workers/general workers on diverse dates on oral contracts until the company introduced written contracts of employment in 2013. Their contracts with the company expired on 24th February, 2015. Their complaint in the court below was that the company failed to pay them their dues prior to the introduction of written contracts, and terminal dues for the contracts served. They contended that they were contributing to the National Pension Scheme Authority (NAPSA) from about 2006 in respect of the 2nd complainant, and 2010 in respect of the 1st and 3rd complainants. They demanded payment of benefits for the ten years they had worked for the company including housing and transport allowances, as well as leave pay for the year 2014 to 2015 when their contracts expired.

The company in its answer contended that: the 1st complainant, Ireen Siame was employed as a factory worker from February 2006 on a short term contract; the 2nd complainant, Dorothy Daka was employed as a factory worker from February 2008; and the 3rd complainant, Moffat Kakompe was equally engaged on a short term contract as a factory worker from September 2006. That after their initial contracts with the company they entered into further contracts until February, 2015 when the contracts expired. The company further averred that the complainants were on written contracts throughout their employment and not only with the contracts had they entered into in 2013. The company therefore stated that the complainants were paid all their dues and nothing was owed to them. With respect to their NAPSA contributions, the company said the complaints could claim them from NAPSA.

The court below found that the 1st, 2nd and 3rd complainants were initially orally employed by the company on 6th December, 2005, 4th December, 2004 and 20th September, 2005 respectively as they had claimed. As to the duration of the oral contracts, the court found that they were for a period of two (2) to six (6) months before the written contracts were introduced. That in the case of the 1st

complainant she signed her first written contract on 21st February, 2006, the 2nd complainant signed hers on 2nd February, 2008 and he 3rd complainant signed his on 24th March, 2006.

The court found that the complainants had attested written contracts as follows:

- *For the 1st complainant – 21st February, 2006 to 7th May, 2010*
- *For the 2nd complainant – 2nd February, 2008 to 20th April, 2010*
- *For the 3rd complainant – 24th March, 2006 to 20th April, 2010*

The court then went on to state that these contracts were not attested and as such they were not enforceable in accordance with ***Section 29 of the Employment Act*** *(1)* which requires written contracts to be read over and explained to an employee in the presence of a proper officer where the employee is illiterate. In this case the court found the complainants to be illiterate.

Notwithstanding the fact that the said contracts were unattested, and as such not enforceable, the trial court found that the complainants had performed their work under the contracts and awarded each complainant compensation on a *quantum meruit* basis for the period of the unattested contracts from June 2010 to

February 2015. The court noted that during this period the complainants were being paid. It therefore ordered that the parties agree on compensation, and in default, to be assessed. The amount due would attract interest at the current bank lending rate from the date of complaint to date of Judgment and thereafter 6% per annum till full settlement.

The court dismissed all other claims for service benefits, transport and housing allowances and leave days.

On the claim for NPSA contributions, the court directed the complainants to pursue the matter of unremitted contributions with NAPSA which had sufficient means at its disposal under the ***National Pension Scheme Act*** [2] to ensure the employer's compliance. The result was that this claim was equally dismissed.

The parties failed to agree upon the *quantum* of damages and referred the matter to assessment before the learned Deputy Registrar of the High Court.

Employing a formula of the daily amount earned x 26 days x twelve (12) months x four (4) years, 8 months, the learned Registrar of the court below found that: Ireen Siame was awarded a sum of K53, 808.01; Dorothy Daka was equally awarded K53, 808.01; and Moffat Kakompe awarded a sum of K66, 826.66.

Dissatisfied with the assessment, the employer has advanced three (3) grounds of appeal, namely:

1. ***That the court below erred in law and fact by making selective references to the evidence before him and totally ignoring the portions of the Respondent's (Appellant herein) affidavit.***
2. ***That the court below erred in law and infact when he awarded the Respondents' herein the amounts he did when the evidence before him clearly showed that the Respondents were not entitled to any compensation as they were adequately paid during the period of the unattested contracts.***
3. ***That the court below erred in law and in fact when he made awards that contradicted the substantive Judgment.***

At the hearing, the respondents and their advocates were not in attendance. However, we proceeded with the hearing upon

satisfying ourselves that the respondents' advocates were daily served.

On behalf of the appellant, Mr. Chibundi relied on the heads of argument filed herein on 17th April, 2018. In ground one, it is submitted that the assessment was not based on all the pieces of evidence placed before the court. That no reference was made to the contracts exhibited by the appellant on the court's record. We were referred to the case of Minister of ***Home Affairs, Attorney-General v. Lee Habasonda*** [1] where the Supreme Court stated as follows:

> ***"Every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities, if any, to the facts. Finally, a judgment must show the conclusion. A judgment which only contains verbatim reproduction and recitals is no judgment. In addition, a court should feel compelled or obliged and moved by any decided cases without giving reasons for accepting those authorities.***

It is submitted that the learned Registrar did not fully explore the evidence before him when he concluded that the respondents were entitled to the amounts in the unenforceable contracts without making reference to the affidavit in opposition filed by the appellant. Counsel submitted that since submissions of the appellant were not referred to in the assessment, the conclusion arrived at was prejudicial as it displayed a selective reference of evidence by the court which contradicted the position of the law cited above.

It is submitted that the learned Registrar did not analyze the documents he relied upon to justify the awards given to the respondents. That this is against the principles of judgment writing as revealed by the learned author of ***Writing of Judgments: A Practical Guide for Courts and Tribunals (Data Sayed Ahmad Idid) 2011 edition***[1] at page 49 which states as follows:

> ***"The decision must show the parties that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic...The...opinions of the parties in a case should not be copies verbatim and adapted to the judgment of the court. It is not just acceptable for a judge to mention***

in his judgment that he agrees with the submission of a party and he has nothing to add. A judge should tower above the parties and their counsel by applying some level of judicial reasoning logic in evaluating a case..."

The learned Registrar in his assessment did not make any attempt, according to counsel's submissions, to sieve the evidence or analyze, access or apply judicial reasoning logic to it, *vis a vis* the amounts claimed by the respondents. We were referred to the case of ***Zambia Telecommunications Company Limited v. Aaron Mulwanda and Paul Ngandwe*** [2] where the Supreme Court held:

".....there are seven essential elements of a judgment, namely: an introductory structure, setting forth the nature of the case and identifying the parties; the law relevant to the issues; the application of the law to the facts; the remedy; and the order."

Counsel submits that *in casu*, the assessment delivered did not meet the criteria set out by the Supreme Court as the evidence before the lower court was not explored exhaustively. That the court did not make any reference to the affidavit evidence that the respondents were being paid for the period of the unenforceable contracts in arriving at the assessment.

Under ground two, it is argued the evidence placed before the court below showed that the respondents were being paid their wages in the period of the unenforceable contracts amounting to a basic salary of K419.00 as well as other allowances which brought the said salaries to a total of K820.00 for the 1st and 2nd respondents and K850.00 for the 3rd respondent. Counsel asked the question whether the respondents were entitled to the claimed amounts in light of the circumstances showing that they were paid.

It was further submitted that the judgment of the court below delivered on 29th August, 2016 reveals that the respondents relied only on oral evidence whereas the appellant's submissions were supported by documentary evidence providing proof that the respondent's claims were baseless. That the said judgment of the court below clearly shows that the appellant did not breach any of the contracts entered into with the respondents, and that they were always paid their dues at the expiration of each contract.

As regard the claims for the refund of the respondents contribution, the appellant submits that it performed its due diligence by

remitting contributions on behalf of its employees, and as such the claim should be laid with the National Pensions Scheme Authority (NAPSA). That the judgment refers to the ***National Pension Scheme Act*** [2] whose purpose is to provide financial support to employees after they leave employment. Therefore with regard to the NAPSA remittances, the judgment remains *terra firma* by stating that the same should be claimed from NAPSA and not the appellant.

Under ground three, it is submitted that the effect of the judgment of the court below was that the respondents were to be awarded compensation on a *quantum meruit* basis for the work done during the unenforceable contracts with interest as stated therein. That the compensation was to be agreed between the parties and in default, be assessed before the learned Registrar of the High Court. It is argued that the respondents were entitled to compensation for 'reasonable value of services', a judicial doctrine which allows a party to recover losses in the absence of an agreement and thus preventing unjust enrichment of the other party. That it is not in dispute that the respondents entered into contracts with the

appellant for the provision of services, and that they were paid for the said services they provided to the appellant.

The appellants submitted that when a contract is not characterized by some essential elements that make it valid, it is deemed in the eyes of the law as unenforceable. For a contract to be valid it must show that there is a valid offer which was accepted and as a consequence, consideration was exchanged with the parties intending to be legally bound by it. We were referred to the case of ***Carlil v. Carbolic Smoke Ball*** [3] as one which illustrates the principles of contract.

It is submitted that in the present case the evidence showed that the unenforceable contracts referred to are essentially enforceable contracts as they met the requirements of a valid enforceable contract. That they contain an offer of employment which was validly accepted by the respondents. There was consideration as there was a distinct detriment at the behest of the appellant and an advantage to the respondents. Further both parties had indicated their intention to be legally bound as evidenced by the number of years the respondents remained in the employ of the appellant. It

is therefore submitted that the order by the court to pay the respondents the entire period worked would be unjust enrichment to the respondents and prejudicial to the appellant, since the respondents do not dispute that they were paid throughout their employment with the appellant. Arising from these submissions, the appellant's position is that the respondents are not owed any money on any unenforceable contract as no such contract exists.

As earlier stated, neither the respondents nor their advocates attended the hearing.

We have scrutinized the record of appeal and the submissions made on behalf of the appellant. In our considered view, the grounds of appeal are interdependent. Therefore we shall deal with them as one ground.

It is common ground that the issue between the parties is the settlement of employment benefits, if any, by the appellant to the respondents. Therefore, the central question in these three grounds of appeal is whether the respondents are entitled to any compensation for the period they worked under unattested

contracts. Having awarded damages on a *quantum meruit* basis, the court below considered that the compensation due to the respondents could best be determined by way of assessment. The basis of the assessment is first found at page J14 where the court said:

> ***"The written contracts that we have referred to above were not attested as we have said. As such they are not enforceable.***
>
> ***The follow up consideration is whether the complainants are entitled to any recompense bearing in mind that even if the unattested contracts are not enforceable, work was still done for the respondent."***

Further, at page J16 the court held:

> ***"Therefore, with respect to the contracts that came after the attested contracts, the complainants are entitled to compensation by way of quantum meruit. This is on the premises that the complainants provided their labour from which the respondent benefitted and it was implied that the respondent would pay for that labour. We will, accordingly, award each complainant compensation on a quantum meruit for the periods of the unattested contracts worked from June, 2010 as the contracts show up to February, 2015.***

We are aware that in the period covered by the unattested contracts the complainants were being paid wages. What we are not sure of is the adequacy of the wages that were being paid for the type of work performed by the complainants. Obviously, the dictates of the industry and the minimum wage law applicable, if need be would have to be taken into account. This is a matter that would suitably be dealt with in assessment proceedings before the Registrar of the court if the parties are not able to agree on the compensation."

This was the holding of the court that informs of the parameters of assessment. In assailing the assessment, the first point the appellant makes is that the learned Registrar overlooked portions of its affidavit evidence. The said affidavit by the appellant is at page 47 of the record of appeal. The gist of its content is that the respondents were being paid their wages in the period covered by the unattested contract. That they received a wage of K419.00 as well as other allowances which brought the total to a sum of K820.00 per month each for the 1st and 2nd respondent and K850.00 per month for the 3rd respondent. Further, it was deposed in the appellants affidavit that the respondents received amounts above the legal requirements.

It is clear from the ruling on assessment that the learned Registrar did not refer to this affidavit evidence in his evaluation of the evidence. The learned Registrar, it would appeal, did not review the evidence because he considered that to have been done by the court in its Judgment. However, it is trite that an assessment is an evaluation, and as such a judgment which equally ought to reveal a review of the evidence. We accept the appellant's submissions to the extent that the learned Registrar ought to have reviewed the appellant's affidavit evidence and made an appropriate finding. The case of ***Minister of Home Affairs, The Attorney General v. Lee Habasonda supra*** refers.

The next consideration is whether or not the respondents are entitled to any compensation. The lower court in its judgment awarded the respondents compensation on a *quantum meruit* for the period of the unattested contract from June, 2010 to February, 2015. The court also found that the respondents were being paid wages. The basis of the award was to ensure that the respondents were adequately paid for the services they had rendered to the

appellant. ***Black's Law Dictionary (9th Edition)*** [2] describes ***'quantum meruit'*** as a phrase meaning ***"as much as he deserved***

> ***1. The reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship."***

Turning to the evidence in respect of Ireen Siame, the 1st respondent, it is not in dispute that her first unattested contract in June, 2010 was executed on the 10th June, 2010 for the period 11th June, 2010 to 10th December, 2010. Thereafter, she entered into a series of seven other contracts with the last one for the period 25th February, 2014 to 24th February, 2015. Contracts from pages 82 to 107 of the record of appeal reveal that her remuneration package was K820 gross per month. She received a daily rate of K16.36 (rebased) from June 2010 to July, 2012. Thereafter her daily rate increased to K26.79 (rebased) in August 2012. In her last contract with the appellant, her remuneration package was K31.54 per day. The record shows her pay statement from October 2013 to February, 2015 at a daily rate of K31.54.

With respect to the 2nd respondent, Dorothy Daka, she executed her first unattested contract on 9th June, 2010 for the period 9th June, 2010 to 9th December, 2010. In like manner as the 1st respondent, her contracts reveal that in the period of assessment she was paid a gross monthly pay of K820 or a daily rate of K16.36. Her pay statements for the period October, 2013 to February, 2015 reveal that she was paid at a rate of K31.54 per day. Pages 141 to 175 of the record of appeal refer.

The 3rd respondent, Moffat Kakompe, executed his first unattested contract on 22nd June, 2010 as a factory worker at a daily rate of K16.36 (rebased). In November 2013, his daily rate increased to K31.54, and May 2014 to the end of his contract he was paid at a daily rate of K32.69.

In our view the crucial authority informing consideration of this evidence are the ***Minimum Wages and Conditions of Employment (General) Order 2006***[3]***, Minimum Wages and Conditions of Employment (General) Order 2011***[4] ***and the Minimum Wages and Conditions of Employment (General)***

Order 2012. [5] These Orders were application in the period of assessment.

Under the ***Minimum Wages and Conditions of Employment (General) Order 2006***, the minimum wages applicable for a general worker, which is the category in which the respondents fell, was an hourly rate of K1.40n (rebased) or K268.80n (rebased) per month. This provision was repealed by the Minimum Wages and Conditions of Employment (General) Order 2011 which increased the daily hourly rate to K2.18 (rebased) or K419.00 (rebased) per month.

In 2012, ***Minimum Wages and Conditions of Employment (General) Order 2012*** amended the previous Order. The minimum hourly rate became K3.64n (rebased) or a minimum wage If K700 (rebased) for the category of workers in which the respondents fell.

IREEN SIAME

From June 2010 to February 2015, a period of 4 years and 8 months, the 1st respondent was paid an average K820.00 per month.

Thus K820.00 X 56 months = K 45,920.00.

DOROTHY DAKA

The 2nd respondent was similarly circumstanced as the 1st respondent. She earned on average the sum of K820.00 per month during the period under review.

Thus K820.00 X 56 months = K 45,920.00.

MOFFAT KAKOMPE

The 3rd respondent earned, on average a sum of K850.00 monthly in the period under review.

Thus K850.00 X 56 months = K 47,600.00.

Following the applicable Minimum Wages and Conditions of Employment (General) Orders the respondents would have earned the following:

- 10th June 2010 to December 2010 (Order 2006)

  K268.80 X 7 months = K1, 881.60 (Wages)

  K70.00 X 7 months = K490.00 (lunch allowance)

- 1st January, 2011 to December, 2011 (Order 2011)

  K419.00 X 12 months = K5, 028.00 (wages)

  K120.00 X 12 months = K1, 440.00 (lunch allowance)

- 1st January, 2012 to February, 2015 (Order, 2012)

  K700.00 X 37 months = K25, 900.00 (wages)

  K120.00 X 37 months = K4, 440.00 (lunch allowance)

WAGES

K	1,881.60	
	5,028.00	
+	25, 900.00	
K	**32, 809, 60**	Total for 56 months

LUNCH ALLOWANCE

K	490.00	
	1,440.00	
	4,440.00	
K	**6, 370.00**	Total for 56 months

TOTAL

K	32,809.60	(Wages)
+	6,370.00	(Lunch)
	39,179.60	Total for 56 months

As determined earlier, the 1st and 2nd respondents were paid K45, 920=00 during the period of assessment and the 3rd respondent was remunerated the sum of K47, 600.00 for the same period.

Clearly the respondents were paid more for the period of the unenforceable contracts than what they would have been paid for the same period under the respective orders. It is evident that the appellant met the threshold required by the law by paying the respondents wages above the minimum prescribed.

In our assessment we have identified, in respect of the assessment by the learned Registrar, a misdirection by reasons of misapplication of the facts and evidence. The decision that the respondents were entitled to the mounts assessed cannot stand because they were remunerated during the period of the unattested contracts and were paid more than they would have been paid during that period based on the applicable General orders in force.

Awarding the respondents the amounts assessed by the lower court would amount to them receiving double payments, and this would amount to unjust enrichment.

We accordingly set aside the awards of the lower court. This appeal is upheld. Each Party to bear their own costs in this court.

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J.Z. MULONGOTI
COURT OF APPEAL JUDGE

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D.L.Y. SICHINGA
COURT OF APPEAL JUDGE

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P.C.M. NGULUBE
COURT OF APPEAL JUDGE