

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO 172/2019

BETWEEN:

JOHN MUYABI



APPELLANT

AND

THANDIWE BANDA
ATTORNEY GENERAL

1ST RESPONDENT
2ND RESPONDENT

CORAM: MCHENGA DJP, NGULUBE AND SIAVWAPA JJA

On 23rd SEPTEMBER 2020 and 28TH JANUARY 2021

FOR THE APPELLANT: MRS. L. MUSHOTA OF MUSHOTA AND ASSOCIATES

FOR THE 1ST RESPONDENT: MRS. D. FINDLAY OF D. FINDLAY AND ASSOCIATES

FOR THE 2ND RESPONDENT: MR. C. MULONDA, PRINCIPAL STATE ADVOCATE

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Market Investigations Ltd v Minister of Social Security* (1960) 2QB 173.
2. *O'Kelly and Others v Trust House Forte PLC* (1983) ICR 728.

Legislation referred to

1. *Employment Code Act No. 3 of 2019*
2. *Employment Law in Zambia; cases and materials: W.S. Mwenda UNZA Press 2004*

1.0. INTRODUCTION

1.1. This appeal is against the Judgment of the Industrial Relations Division of the High Court presided over by the Hon. Justice E. L. Musona dated 28th June 2019. In his Judgement, the learned Judge dismissed all the claims the Appellant had made against the Respondents.

2.0. BACKGROUND

2.1. On or about 17th December, 2009, the Appellant was verbally engaged by the 1st Respondent, who at the time was the first lady, as her fashion designer and tailor.

2.2. The Appellant was allocated a room at State House from which he used to work between 08:00 and 18:00 hours. The engagement lasted until December 2012 following the exit of the 1st Respondent from State House in 2011 following the loss by President Rupiah Banda in the general elections earlier that year.

2.3. The Appellant received a total of K20, 000.00 during the period of engagement for the work done and accommodation.

2.4. In November 2014, the Appellant commenced an action against the 1st Respondent making the following claims;

1. Damages for breach of contract of employment.
2. Interest on the amount the Court may award.
3. Further or other remedies the Court may deem fit
4. Costs.

3. **APPELLANT'S EVIDENCE IN THE COURT BELOW**

3.1. The Appellant's evidence was that he was employed by the 1st Respondent on 17th December 2009 on a verbal contract of employment. His salary was K5, 000.00 per month plus housing allowance pegged at K1, 500.00 per month.

3.2. He said that in the three years that he worked, the 1st Respondent only paid him the sums of K15, 000.00 as salaries and K4, 500.00 as housing allowances. He said that several reminders for payment of the unpaid salaries and allowances yielded nothing.

3.3. He claimed that as a result of non-payment of his salaries and allowances, he lost his sewing machines to his landlord for failure to pay his rentals. He valued the sewing machines at K12, 000.00.

4.0. **THE DEFENCE**

- 4.1. The 1st Respondent's defence was that she never employed the Appellant because he was a free-lance fashion designer and tailor engaged by different clients.
- 4.2. She said that for the Appellant to be working from State House, he needed to have been a full time employee of the 2nd Respondent. Allowing a person employed by her to operate from State House would be in breach of security procedures, she said.
- 4.3. Further in her defence, she said that as first lady, she was not responsible for payment of salaries for staff engaged to assist her as that was the responsibility of the 2nd Respondent.
- 4.4. She lamented that the Appellant sued her in order to embarrass her and damage her reputation. She went on to anchor her counter-claim on that premise.

5.0. **COUNTER CLAIM**

- 5.1. The 1st Respondent counter-claimed damages for wrongful suit and abuse of civil process against the Appellant. She also sought a declaration that she was entitled to the services rendered to her by the Appellant as first lady and that the 2nd Respondent was liable for the payment of emoluments to the Appellant.

6.0. **DEFENCE TO COUNTERCLAIM**

6.1. The Appellant denied ever having been employed by the 2nd Respondent but maintained that she was employed by the 1st Respondent. He also said that he had opposed the application for joinder of the 2nd Respondent for the same reason in the court below.

7.0. **DECISION OF THE COURT BELOW**

7.1. After considering all the evidence before him and the submissions by Counsel, the learned Judge found it as a fact that the Appellant had failed to prove that he was employed by the 1st Respondent.

7.2. On the basis of that finding of fact, the learned Judge came to the conclusion that there could be no breach of contract of employment. Subsequently, because all the other claims hinged on a presumed existence of a contract of employment, they were left with no leg to stand on. He dismissed the claims in totality.

8.0 **THE APPEAL**

8.1. Disenchanted by the outcome of his claims, the Appellant moved us on 8 grounds of appeal as listed hereunder;

1. *The Court below erred in fact and law when it held that the Appellant was an independent contractor not amounting to an employee when one cannot work for three years as an independent employee and that there was no*

breach of contract as no contract of employment ever existed when the Appellant clearly stated that he was employed under an oral contract and it was the duty of the Respondent to formalize.

2. *The Court below erred in law and in fact when it held that the claim for loss of earnings must be dismissed as it was premised on the Appellants claim that he was an employee of the Respondent ignoring the fact that the Appellant did not receive any salary for the three years he worked for the Respondent.*
3. *The Court erred in fact and in law when it stated that the Appellant had failed to produce proof of mental torture, humiliation and embarrassment as the Respondent was not his employer when the Appellant had shown that he could not pay school fees for his children, could not pay hospital bills when sick and he could not pay his rentals when the Appellant was known to be an employee at State House.*
4. *The Court below erred in fact and in law when it held that the Respondent was never responsible for payment of rentals or housing allowance for the Appellant, when it was established that the Respondent had paid rentals for the Appellant before based on the oral agreement made between the Appellant and 1st Respondent.*

5. *The Court below erred in law and in fact when it held that the Respondent could not be held responsible for the loss of business of the Appellant when it was due to lack of payment of salaries and rentals by the Respondent that caused the Appellant's machines to be seized leading to loss of business, including the re-location of the Appellant from Kitwe where he had many clients to Lusaka where he was not being paid.*
6. *The Court below erred in law and in fact when it held that the claim against the government must fail owing to the Appellant having admitted that he was not an employee of the Government, when the Appellant had opposed the joinder application made by the Respondent, maintaining that he was employed by the Respondent.*
7. *The Court below erred in law and in fact when it held that the Appellant did not prove how the travels connected to the proceedings, when the travels were in relation to the Appellant going to buy materials for tailoring to as far places as Congo.*
8. *The Court erred in law and in fact when it learned more on the submission by the Respondent and never used the Appellant's submissions in spite of signing the order on 11th June when the submission was also filed.*

9.0. **ARGUMENTS**

- 9.1. Counsel for the Appellant filed Heads of Argument by which it is sought to show the existence of an employee/employer relationship between the Appellant and the 1st Respondent.
- 9.2. In that regard, we were referred to two cases namely; Market Investigations Ltd v Minister of Social Security¹ and O'Kelly and Others v Trust House Forte PLC².
- 9.3. Both cases speak to the degree of control as the distinguishing feature between an independent contractor and an employee. Reliance was further placed on the Employment Code Act No. 3 of 2019 in Section 3 which sets out the characteristics of an employment relationship.
- 9.4. There was further reference to Section 18 of the Act which directs the maintenance of a record of contract of employment by the employer for each employee in the case of an oral contract. This provision gave rise to the argument that since no record of employment was maintained by the 1st Respondent the Appellant's version ought to be adopted as the correct one that he was in a contract of employment.
- 9.5. Further reliance was placed on the statement made by the learned author of *Employment Law in Zambia; cases and materials: W.S. Mwenda UNZA Press 2004* where it is stated at page 3 that;

“In the absence of the record and in the event of a dispute concerning the terms and conditions of employment, the Courts will rely on the employee’s version of the events or statement unless the employer proves contrary”.

- 9.6. According to Mrs. Mushota, the 1st Respondent failed to rebut the Appellant’s assertion that there was in place an oral contract of employment and as such the Court below should have accepted the Appellant’s version.
- 9.7. Other arguments relating to ground 2 are that having paid K15, 000.00 and K4, 500.00 in salaries and housing allowances for the first three months, the 1st Respondent did not pay anything else for the rest of the contract period. The suggestion that the said amount could have been for the outfits made for the 1st Respondent was dismissed on account that it would mean 60 to 75 outfits were made within a period of 3 months at K250.00 or K200.00 each.
- 9.8. On the third ground, it was argued that the Appellant suffered mental torture and humiliation for failing to pay school fees and medical bills as a State House employee.
- 9.9. On ground four it was argued that there was evidence that the 1st Respondent paid rentals for three months for the Appellant on the basis that he was her employee.

9.10. On ground five, it was argued that the Appellant lost his sewing machines to the landlord for failure to pay his rentals. As a result, the Appellant lost business as he could not start up his own business without sewing machines. In addition, it was said that the Appellant's relocation from Kitwe meant him abandoning his business and clients in Kitwe to take up a full time job with the 1st Respondent. However, due to non-payment of his salaries, the Appellant suffered loss of business.

9.11. On ground six, it is submitted that the Appellant's claim against the 2nd Respondent could not be said to have failed on account of his admission that he was not a Government employee because he had opposed the application for joinder of the 2nd Respondent because he had no claim against it as he was never employed by it.

9.12. On ground 7 it was argued that the Appellant used to travel from Lusaka to Congo to procure materials for the 1st Respondent's outfits hence his claim for transport refunds and travelling expenses.

9.13. On ground eight, it was simply submitted that the learned Judge ought to have taken the Appellant's submissions into account in his Judgment.

9.14.No Heads of Argument were filed by both Respondents save for the viva voce submissions at the hearing.

10.0.**OUR ANALYSIS AND CONSIDERATION OF THE ISSUES**

10.1.In our view all the grounds are rooted in the question whether or not there was a contract of employment between the Appellant and the 1st Respondent. We therefore choose to deal with the grounds together in our quest to attend to the pertinent issue of the contract of employment.

10.2.What is not in dispute is that the Appellant was contracted by the 1st Respondent to make outfits for her on the recommendation of her friend Mrs. Kalila sometime in 2009.

10.3.It is also a fact not in dispute that upon moving to Lusaka, the Appellant was accommodated by Mrs. Kalila until he moved into his own rented quarters but that the 1st Respondent only paid three months rentals after which she would occasionally given him either a K200.00 or a K500.00.

10.4.According to the Appellant he was engaged on a verbal contract to work from 08:00 hours to 18 or 19:00 hours every day from a room allocated to him at Nkwazi House, the official resident of the President and his family.

10.5.The Appellant also claims that the verbal contract provided for a monthly salary of K5, 000.00 and that the 1st Respondent

only paid him for the first three months the sum of K15,000.00.

11.0 DID THE RELATIONSHIP TRANSLATE INTO A CONTRACT OF EMPLOYMENT

11.1. The learned trial Judge found that there was no contract created based on the evidence of Mrs. Kalila who testified as DW2. This witness clearly stated that the Appellant was persuaded to relocate to Lusaka where a clientele base had been created with the 1st Respondent and the Ministers' wives.

11.2. There was also evidence accepted by the learned Judge from the 2nd Respondent's witnesses that helpers of the first lady are employees of the State and as such the 1st Respondent, in that capacity, could not employ a fashion designer and tailor in her individual capacity.

11.3. We find the learned Judge's findings in that regard unassailable based on the evidence. We say so with the view in our minds that the onus is on a Plaintiff or Complainant to prove his case on a balance of probabilities. In this case, the Appellant had the burden to prove that he was employed by the 1st Respondent on the terms and conditions stated.

11.4. With reference to Section 18 of the Employment Code Act No. 3, of 2019 we make two points; the first being that although the Employment Code Act No.3 of 2019 is not applicable to the case for the reason that it was not yet enacted, Section 24 of

the Employment Act, Chapter 268 of the Laws of Zambia which was the applicable Law at the time, contained a similar provision.

11.5. Secondly, and more importantly; it is without any doubt that the provision was intended to apply to oral contracts of employment. Since the Respondents' argument is that there was no contract of employment, we will revert to it later.

12.0. **WAS THERE CREATED AN EMPLOYER-EMPLOYEE RELATIONSHIP**

12.1. To pursue this argument, the Appellant sought recourse to two cases already referred to earlier in this Judgment in so far as the said cases give determinant factors for employment as ***“degree and extent of control that is exercised over a person’s performance of his task”***.

12.2. The evidence that was before the trial Court in this regard is to the effect that the 1st Respondent allocated the Appellant a room from which he worked when designing and tailoring her outfits. However, the Appellant was at liberty to service other clients and in that regard, there is evidence that he used to service Ministers' wives.

12.3. There is also evidence that DW3, the 1st Respondent's sister, used to spend plenty of time at Nkwazi House and that the Appellant only used to be at Nkwazi House when he had work

for the 1st Respondent. She further said that the Appellant would leave Nkwazi House any time after accomplishing his task even as early as 10:00 hours.

12.4. There is therefore, nothing in the evidence that shows that the 1st Respondent exercised considerable control over the Appellant. In our considered view, the Appellant regulated the way he carried out his assignments with the 1st Respondent. It is therefore our view that the learned trial Judge was on firm ground when he found that the Appellant was not an employee but an independent contractor.

12.5. In the view we have taken, it follows that there was no oral contract of employment created between the Appellant and the 1st Respondent that would fall within the ambit of Section 24 of the Employment Act Chapter 268 of the Laws of Zambia.

12.6. In the same vein, Section 3 of the Employment Code Act No. 3 of 2019 is not applicable.

13.0. **OTHER RELATED ISSUES**

13.1. The Appellant has decried the refusal by the Court below to grant him aggravated damages for loss of his sewing machines, mental torture, embarrassment and humiliation for failure to pay school fees for his children on account of the 1st Respondent's failure to pay his salaries for three years.

13.2. As earlier stated in this judgment, all the above claims would find life only if a contract of employment had been entered into.

13.3. We would however, go further and state that, we find it incredible that having been paid for only the first three months of the contract as claimed, the Appellant was able to continue working from December 2009 until December 2012 without pay and yet still managed to make fifty trips to Congo D.R. to procure materials for the 1st Respondent's outfits. What was the source of the money he used for the trips and procurement of the materials?

13.4. Further; how is it that whereas it is a fact that the 1st Respondent left Nkwazi House in 2011 following the general elections that ushered in President Sata into State House, the Appellant apparently continued reporting to State House until December 2012 when he was blocked?

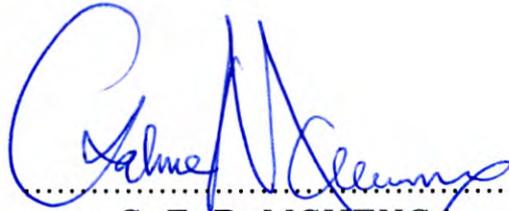
13.5. It is therefore clear to us that the Appellant was an independent contractor who was only paid for the job he did while at the same time he was at liberty to take engagements from other clients as stated by Mrs. Kalila, DW2, and Mirriam Chilonga, DW3, in their evidence.

14.0. **CONCLUSION**

14.1 The Appellant has failed to persuade us to overturn the judgment of the learned judge below. We are satisfied that the

learned Judge was on firm ground when he found that the appellant had failed to prove his case on a balance of probabilities. We therefore, find no substance in the appeal on all the grounds and dismissed it accordingly.

14.2. Parties to bear own costs.


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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT


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P. C. M. NGULUBE
COURT OF APPEAL JUDGE


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M. J. SIAVWAPA
COURT OF APPEAL JUDGE