IN THE SUPREME COURT OF ZAMBIA - APPEAL NO. 120/2002

HOLDEN AT NDOLA SCZ/8/157/202
[CIVIL JURISDICTION]

BETWEEN:

Rex Zephania Ngoma - **Appellant**

And

Mukuba Hotel Limited - **Respondent**

Coram: Sakala, CJ, Mambilima and Chitengi, JJS. On the 3rd of December, 2002 and 4th June, 2003.

For the Appellant - In Person

For the Respondent - Mr. Ndandulo of C.F.N. Chambers.

JUDGMENT

MAMBILIMA, JS, delivered the Judgment of the Court.

This is an appeal against the Ruling of the Court below which dismissed the Appellant's appeal against the Judgment of the Subordinate Court refusing to grant his claims for various allowances, payments and refunds and other claims.

From the documents in the record of appeal, the Appellant started this matter in the Local Court. It was transferred to the Subordinate Court because

the Respondent as a corporate entity could only be represented by a Counsel in Court. Before the Subordinate Court, the Appellant had claimed uniform allowance from 10th December, 1999, education allowance, pension employees contributions to Zambia National Provident Fund, duty Manager's uniform, duty Manager's shoes, laundry allowance, newspapers, and repatriation allowance from Ndola to Chipata. The total amount claimed amounted to K19,068,600.00. In his Judgment, the Magistrate, after evaluating the evidence before him dismissed the Appellant's claim on the ground that it had no basis.

The Appellant then appealed to the High Court against the Judgment of the Subordinate Court. At the High Court, the Appellant, apart from claiming the allowance and refunds, also alleged that the learned Magistrate in the Subordinate Court was hostile to him. He accused him of bias on the ground that he was a former school mate of the Respondent's General Manager and the Respondent's Counsel Mr. Ndandula. The learned Judge in the Court below, after considering the grounds of appeal allowed the Appellant's claims for education allowance and the employees contributions which were not remitted to Zambia National Provident Fund. She Ordered that the amounts be paid with interest at Bank of Zambia lending rate.

The Judge dismissed the Appellant's claim for repatriation allowance on the ground that the Appellant was not being repatriated to any place since he desired to stay in the same town so that the question of repatriation did not arise. She also dismissed the Appellant's allegations that some employees who were similarly placed had been paid cash in lieu of transport because no evidence

was adduced to prove the allegations. The learned Judge found in favour of the Appellant in his claim on the education allowance and ordered that the Appellant be paid this allowance up to 31st October, 1999. On the claim for a refund of K216,000.00 which the Appellant claimed was wrongly deducted from him in respect of uniforms, the learned Judge found, after considering this claim in line with the Appellant's conditions of service, that the Appellant had not provided any evidence to show that he was entitled to two suits and two pairs of shoes. The claim for housing allowance was equally thrown out because the Court found that the Appellant had left the company accommodation on his own free will.

The Appellant has now appealed to this Court citing three grounds of appeal namely: that the Court below misdirected itself both in law and fact when it held that the Appellant was not entitled to repatriation allowance payment in cash by the Respondent; that the Court below erred to hold that the Appellant was not entitled to a refund of money deducted from his benefits in respect of uniforms which he was given while in employment and lastly, that the Court fellow into error when it held that the Appellant was not entitled to housing allowance for period when he was forced out of the company rented accommodation before the expiry of three months after his retirement.

In his written heads of argument. the Appellant urged on the first ground of appeal that there is no clause in the Mukuba Hotel Limited conditions of service which prohibited the payment of cash as repatriation allowance to retired employees. The Appellant contended that some employees, namely Mr. Lighton Sakala was paid repatriation allowance in form of a refund after he had hired his

own vehicle to repatriate himself without the approval of Management. He submitted further that the Respondent does not own a vehicle suitable to repatriate employees. In order to do so, they have to hire suitable transport for which it has to pay much more than what the Appellant was claiming on his quotations.

The Appellant further urged that the Respondent company is wholly owned by the Government of the Republic of Zambia, which pays cash to its retirees as repatriation allowance in all Government Ministries, Parastatal Organisations and other Government controlled companies. According to the Appellant, the Respondent by virtue of being owned by the Government is further obliged to pay cash repatriation allowance to its employees as well. He argued further that such cash payments would be in accordance with the applicable conditions of service.

On the claim for housing allowance, the Appellant submitted that he was given three months to stay in company rented accommodation but that he was removed from the said accommodation before the expiry of three months He went on to state that as a result, he was forced to pay rent elsewhere; and hence his claim for K338,800. He denied that he moved out of the accommodation at his own free will and contended that the Respondent's witness who testified on this issue cheated. He referred us to the evidence of Bright Zulu on page 45 of the record of appeal in which the said Zulu testified that using the Respondent 's vannette, he shifted the Appellant from his accommodation on 18th December,

1999. He also referred us to letters on page 65 and 68 in which it is stated that the Appellant moved out of company accommodation on 18th December, 1999.

On the third ground of appeal, the Appellant submitted that he was entitled to 3 uniforms per annum and that on the date of his retirement, the Respondent recovered the cost of the employee uniforms from his benefits. He went on to state that the Respondent did not prove in the trial Court that he got extra uniforms or that upon retirement he was supposed to surrender back the uniforms or pay the cost of the uniforms he received from the Hotel. He urged that other hotel employees who retired like himself did not suffer such deductions. He named some of them as Mr. Caleb Sinkala who retired in 1995, Mr. Toma Lusala, who retired in 1996, and Mr. Jameson Kapelembe who retired in 1998. He therefore seeks an Order from this Court that the sum of K216,000.00 which was recovered from his terminal benefits should be refunded to him.

The Appellant is also claiming for costs. He submitted that the Court below did not make an Order for costs because the appeal had partly succeeded. He contended however that costs should have been apportioned and he should have been granted costs for the successful part of the appeal. He prays before us that he should be granted costs for the whole matter. He also claimed interest on all the monies to be paid to him.

In reply, Mr. Ndandulo in his written and oral heads of argument submitted on the 1st ground of appeal that the conditions of service which were applicable to the Appellant are specific. There is no alternative to payment of money in lieu

of repatriation. On the statement that the Respondent is owned by the Government which pays repatriation allowance in cash to its employees, Mr. Ndandulo submitted that the Respondent is a separate entity from the Government and it is also separate from ZIMCO whose conditions of service the Appellant was referring to. He pointed out that the Appellant is not desirous of living Ndola but wants money equivalent to the cost of repatriation to Chipata. On the claim that the Respondent has paid money to other employees, Mr. Ndandula submitted that the case referred to by the Appellantis in respect of an employee who was actually repatriated and came back to claim for money.

On the third ground of appeal that refer to housing allowance, Mr. Ndandula submitted that although the Appellant had in fact over-stayed in the accommodation, he left the place on his onw accord. He also referred us to the evidence of the driver on page 45 of the record of appeal which states that when the driver went to shift the Appellant, there were no beds, sofas, fridges, or a stove. He went on to state that the 3 months which the Appellant was allowed to stay in the house ended on 5th October, 1999.

On recoveries in respect of uniform given to the Appellant, Mr. Ndandula submitted that the evidence on record shows that the Appellant requested for two pairs of uniform, one of which had to be paid for. The Appellant did not adduce any evidence to show that he was entitled to two pairs of uniforms.

On the claim for costs, Mr. Ndandula submitted that costs follow the event and in this case, the Appellant's claim should be dismissed with costs because of lack of merit.

We have considered the evidence on record, the submissions by the Appellant and Mr. Ndandulo. From the outset, we wish to state that the employment of the Appellant by the Respondent was a matter of contract which was governed by the conditions of service. With regard to the claim for repatriation allowance, the applicable clause provided:

> **".....in the case of Zambians, the Hotel shall bear the cost of repatriation by road or rail of the employee to his home or any place in Zambia, he may wish to go and settle upon retirement."**

This provision is under clause 11 on "PASSAGE". Nowhere is it stated that there will be paid a repatriation allowance. We cannot import into clause 11, a requirement to pay a repatriation allowance. The Respondent is simply obligated to meet the cost of repatriation by road or rail. The instance of Mr. Lighton Sakala alluded to by the Appellant cannot assist him because according to the Appellant's own submission, the said Mr. Sakala actually hired his own vehicle to repatriate himself and only asked the Respondent for a refund of the costs of repatriation. The argument that the Respondent , being owned by the Government should provide for such an allowance cannot be upheld either because as a legal entity with its own personality, the Respondent has its own conditions of service to govern its employees. The first ground of appeal therefore fails.

With regard to the second ground of appeal on the claim for housing allowance, it is common cause that the Appellant was in the rented accommodation up to 18th December, 1999. The initial letter of retirement

appearing on page 78 of the record of appeal pegged the retirement date at 31st October, 1999. The Appellant was supposed to stay in the house for three months from that date. According to Document 65, on 5th June, 1999, the Respondent wrote to the Appellant bringing forward the date of retirement to 5th June, 1999. He was given three months from that date to stay in the house which period expired on 5th September, 1999. According to Mr. Ndandulo, the Appellant was given a certificate of service which corrected the date of retirement to read 5th July, 1999. With this change, the Appellant should have vacated the accommodation on 5th October, 1999.

The Respondent's position however, is that the Appellant moved out of the rented accommodation on his own free will. This was pointed out to the Appellant on 25th January, 2000. The Appellant referred us to the evidence that the Respondent provided transport to move him from the rented company accommodation. The driver told the Subordinate Court that he shifted the Appellant and the items he carried did not include beds, sofas, fridges or a stove. This lends credence to the Respondent's story that the Appellant shifted from company accommodation on his own accord. We cannot fault the Judge in the Court below for having found that the Appellant had not satisfied the Court that he did not have company accommodation on his own free will. This ground of appeal cannot also succeed.

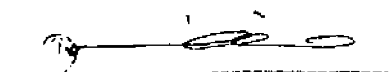
The third ground of appeal attacks the learned Judge's finding that the deduction of K216,000 for extra uniforms was justified. The Appellant needed to prove that under his conditions of service, he was entitled to two pairs of suits

and two pairs of shoes per year. The unchallenged evidence of DW2 on page 45 of the record of appeal was that the Respondent was only supposed to provide one suit and one pair of shoes but that there was a request for two pairs and one pair had to be paid for. The Judge in the Court below therefore correctly observed that the Appellant had failed to prove that he was entitled to two suits. The third ground of appeal must also fail.

On the claim for costs, it is clear from the record that the Appellant partially succeeded before the High Court. His other claims however were thrown out. Costs are awarded in the discretion of the Court and it has not been demonstrated to us that the Court's discretion in this case was unreasonably exercised. This ground of appeal also fails.

From the foregoing, the whole appeal is dismissed with costs to the Respondent to be taxed in default of agreement.

E. L. Sakala
CHIEF JUSTICE



I. C. Mambilima
JUDGE SUPREME COURT

P. Chitengi
JUDGE SUPREME COURT