

IN THE HIGH COURT OF ZAMBIA

2009/HN/126

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

MOSES CHAPAKWENDA & 312 OTHERS

PLAINTIFFS

AND:

THE ATTORNEY GENERAL

DEFENDANT

CORAM: SIAVWAPA J.

FOR THE PLAINTIFFS: MR. KABUKA OF MESSRS J. KABUKA & CO.

FOR THE DEFENDANT: COLONEL M. MAANGA, STATE ADVOCATE

J U D G M E N T

AUTHORITIES REFERRED TO

A. Cases

1. Brian Kaunu & others V Attorney General 2001/HN/411
2. Evans Siwale, Davy Ng'ombe & others V Attorney General 2002/HN/365
3. Minister of Home Affairs & Attorney General V Lee Habasonda (suing on his own behalf & on behalf of the SACCORD) SCZ Judgment No. 23 of 2007
4. Nelson Musonda & 468 others V Attorney General 2001/HN/409
5. Samuel Mwangala & others V Attorney General 2004/HP/0092

6. Tweddle V Atkinson (1981) 1 B & S 393
7. WO' Thom Kajimbala & 1015 others V Attorney General 2003/HN/12

B. Legislation

1. Constitution of Zambia Chapter 1 of the Laws of Zambia
2. Statutory Instrument No.7 of 1994

C. Other

Memorandum of Understanding between the United Nations and the Republic of Zambia contributing resources to UNMIS

The Plaintiffs were at the material time members of the Zambia Defence Force who were deployed on a United Nations peace keeping mission in Sudan between May 2008 and February 2009. It is their claim for a declaration that they were individually and severally entitled to full payment of the allowances they earned under the said mission to Sudan for the stated period. They also seek an order for the recovery of the sum of US \$2, 469,600 from the Defendant being the aggregate sum of the allegedly wrongfully withheld allowances as well as interest on the sum and costs.

In their statement of claim they have stated that it was a term of their secondment to the mission in Sudan that each of them would earn the following allowance;

- | | |
|----------------------|-------------|
| a) Troop allowance | US \$1, 028 |
| b) Uniform allowance | US \$ 68 |
| c) Trade allowance | US \$ 300 |

Total US \$1, 396

payable upon completion of their assignment.

They further state that upon their return, each of them was paid only the sum of US \$514 which is equivalent to 50% of the troop allowance under (a) above thereby resulting in an under payment of US \$882 to each of them for every month of their stay in Sudan.

They have further stated that the United Nations paid the allowances in full to the Government of the Republic of Zambia an aggregate sum of US \$2, 469, 600 for the use of the Plaintiffs.

The Plaintiffs' evidence was through the testimony of the first Plaintiff, Moses Chapakwenda, a Warrant Officer, class two in the Zambia Army based at Kalewa barracks in Ndola, who also serves as assistant chaplain. He testified that on 16th February 2008, he was part of the contingent drawn from the Zambia Army, Zambia Air force and Zambia National Service that was assembled in Lusaka to undergo training in readiness for the United Nations Peace Keeping Mission in Sudan. The training finished on 7th May 2008 for the first group and 18th May 2008 for the second group which were also the departure days for the respective groups.

He testified that the conditions of their deployment were that each troop was entitled to a monthly cost of US \$1,028, US \$68 uniform allowance, US \$296 and US \$303 per month trade pay for the two categories. He said that the Mission was governed by a Memorandum of Understanding entered into between the Defendant on behalf of the troops and the United

Nations. In supporting the claim, he relied on Articles 6.1 and 6.4 of the said Memorandum of Understanding which is exhibited at page 5 of the Defendant's bundle of documents which he said entitled them to full reimbursement. He referred to the Annex exhibited at pages 10 and 11 in the Defendant's bundle of documents and Article two thereof as the authority for full reimbursement.

He said that the allowances in articles 6.1 and 6.4 were paid to the Government while those in paragraph 3 of page 11 were paid directly to the troops on a monthly basis. He said that each troop was given an advance of US \$200 three months into the Mission. He computed the balance owed to each Plaintiff at US \$12, 364 based on the allowances set out under paragraph 2 (a) and (d) at page 11 of the Defendant's bundle of documents for the nine months they spent in the Mission area.

He stated that upon their return from the mission, they were each paid an amount of US \$4,964 as appears on his payslip dated 18th February 2009 exhibited at page 25 in the Plaintiffs' bundle of documents. He said the amount shown on the payslip represented 50% of the troop entitlement of US \$1, 028 per month and that the uniform and trade allowances were not reflecting on the payslip. He further expressed ignorance as to what had happened to the other 50%. He however, said that during training, the Plaintiffs were made to sign a document suggesting that the Government would get 50% of the allowance.

He contended that Government employees are not required to share their allowances with the Government except through taxes which was not the

case in the case at hand. He also stated that during his service with the Zambia Army, similar Peace Keeping Missions were undertaken in the past and the Government had withheld 50% from the troop allowances. He cited the mission to Mozambique stating that the withheld allowances in that case were paid to the troops following the entry of a consent Judgment in the case of **Brian Kaunu and others V Attorney General** at page 34 of the Plaintiffs' bundle of documents. He further referred to the amended consent order consolidating five cases including Brian Kaunu exhibited at page 42 of the Plaintiffs' bundle of documents. He also referred to the documents at pages 52 and 53 confirming settlement of the consent judgment.

In cross-examination he said that it was part of the conditions of service that Government can send its troops anywhere within and outside the country. He further confirmed that the parties to the Memorandum of Understanding were the United Nations and the Government of the Republic of Zambia and that the troops were not parties thereto and no mention of troops is made therein. He further stated that in terms of Article 6 of the Memorandum of Understanding, reimbursement is to the Government for the troops contributed and not to the troops. He also said that at page 11(a), the Government is to be reimbursed troop costs and under (b) the personnel kit (uniform) is given to the troops free of charge as well as the equipment by the Government. He further stated that the weapons and ammunition assigned to each troop is owned by the Government.

He admitted that under paragraph 2 of page 11, the United Nations undertakes to pay the Government with no undertaking by the Government to pay the troops. He said that while in the Sudan, his full salary was being paid while his family continued occupying his official accommodation. He further said that while in Sudan, the troops were accommodated and provided with meals. It was his position that the guidelines marked 13 in the Defendant's bundle of documents are meant for use by Government. He however, dismissed the contents, particularly paragraph 3 (a) (1) to (3) of the document marked 26 to 30 as representing the author's opinion. He however, stated that money paid as reimbursement belonged to the Government and that it was wrong for the Government to share its money with the troops other than through the tax system.

In re-examination he said that troops are employed and not owned by Governments and that they were not paid anything under clause 2 (a) and (b) and further that they make no claim under (c) of page 11 of the Defendant's bundle of documents. As regards the guidelines marked pages 26 to 30 of the Defendant's bundle of documents, he said that the same were invalid as the Government entered consent judgments and paid the withheld allowances to the troops after the guidelines were issued. He then said that he understood the last bullet point at the bottom of page 12 of the Plaintiffs' bundle of documents to imply that overseas allowances were payable to the troops.

It was his concluding prayer that the Plaintiffs be treated the same way as the other troops who got paid the withheld allowances after serving in other similar United Nations Peace Keeping Missions.

In defence, the Defendant called Colonel Joe Hanzuki, who is the Director of Finance and Records for the Zambia Army. He outlined his duties as including receipt and payment of moneys on behalf of the Zambia Army and maintaining records of financial and personnel matters for the Zambia Army. He said that the Zambia Army receives funds from the Government and the United Nations as reimbursements and contributions for personnel and equipment for United Nations Missions. He further testified that the Government of Zambia and the United Nations sign Memoranda of Understanding to contribute troops and equipment to troubled spots of the world.

He also said that the Government is reimbursed the costs incurred on the troops and for use of its equipment in foreign Missions. He then identified the document marked 1 to 12 in the Defendant's bundle of documents as the Memorandum of Understanding between the Government of the Republic of Zambia and the United Nations as the parties thereto. He also referred to Article 2 as setting out the constituent components of the Memorandum of Understanding and Article 4 as recognizing the guidelines in conjunction with which it is to be applied.

The witness then gave an overview of the various relevant Articles of the Memorandum of Understanding and what he understood them to mean as they relate to the issues in the matter. He made a distinction between the monies paid to the Government as reimbursement for troop and equipment contribution and the monies payable directly to the troops. He also said that the guidelines referred to in Article 4 provide authority to a Government to deploy troops to the United Nations Mission in Sudan

(UNIMIS) in the absence of a Memorandum of Understanding. He further stated that as Director of Finance, he had the occasion to read the Memorandum of Understanding for UNIMIS and that the document marked 11 in the Plaintiffs' bundle of documents did not form part thereof.

As for the pay statements exhibited as 25 to 33 in the Plaintiffs' bundle of documents, he said that the same reflected the entitlement of a soldier who has served on a United Nations Mission. He said the same was based on a Statutory Instrument authorizing the payment of 50% of the reimbursement to the Government or the troops contributed. He also said that without the Statutory Instrument, all the reimbursed funds would fall to be appropriated by the Government.

In cross-examination he said that the Plaintiffs served on the United Nations Mission in Sudan in 2008 and that upon their return, they were paid 50% while the Government retained the other 50%. He also admitted that at the time the letter marked 26 to 30 in the Defendant's bundle of Documents was written on 1st October 2002, there was no Memorandum of Understanding for Missions to Mozambique, Rwanda and Angola. As for guidelines, he said that while the United Nations Missions to Mozambique, Rwanda and Angola had guidelines the Mission to Sierra Leone had none.

He further said that the United Nations reimburses the Government for the expenses incurred in deploying the troops. He maintained that the Government did not profit from the reimbursements received from the United Nations. He however, admitted that the troops signed a document in which they committed 50% to the Government but that according to the

Memorandum of Understanding reimbursement is to the Government. As regards the said commitment form marked 1 in the Plaintiffs' supplementary bundle of documents and particularly paragraph 2, he said that at the time they did not fully understand the Memorandum of Understanding.

As regards the consent judgments entered into with respect to the other cases, he said that the same were entered into erroneously. As for the Judgment marked J1 to J10 in the Defendant's further bundle of documents, he said that the Memorandum of Understanding had not yet been signed at the time the Judgment was delivered. When he was referred to the consent Judgment marked 56 in the Plaintiffs' bundle of documents which was entered into in 2006 after the Memorandum of Understanding was signed, he said that the said consent judgment and the others were made without the knowledge of the Zambia Army and that payments were made by the Government.

As to why the Government decided to pay 50% of the reimbursements to the troops, he said the Government wanted to motivate the troops.

In re-examination he said that he served as Deputy Director of Finance for 7 years prior to his appointment to his current position. He said that no troop allowances were withheld as they were all paid to them during their service in the Missions by the United Nations. He said that the Judgment marked J1 to J10 was passed with the Government not having defended the action and that no reasons were given for the entry of the consent Judgments.

The gist of Mr. Kabuka's final submission on behalf of the Plaintiffs is that in terms of the Memorandum of Understanding, the Government is responsible for the payment of the troop allowances on foreign Missions while the United Nations simply reimburses it for the expenses incurred. It is further his submission that the participating troops are the sole beneficiaries of the allowances and no part thereof can be legitimately withheld by the Government.

On the other hand, Colonel Maanga's final submission on behalf of the Defendant is to the effect that since the troops were not party to the Memorandum of Understanding, they have no rights under it and he referred me to the case of **Tweddle V Atkinson** for that proposition. It was further submitted that contrary to the Plaintiff's assertions that the allowances pertaining to equipment, uniform and weapons were earned by the troops, the same were to be reimbursed to the Government in accordance with the provisions of Annex 2 paragraph 3 exhibited as page 11 in the Defendant's bundle of documents.

Colonel Maanga has also submitted that the Judgment marked J1 to J10 together with the consent judgments has no precedential value as it was not decided on merits and therefore, being not binding for being a decision of a court of equal jurisdiction. The cases of **Nelson Musonda & 48 others V Attorney General** and **Evans Siwale & others V Attorney General** were cited.

Finally, Colonel Maanga has urged me to follow a recent decision of the High Court in the case of **Samuel Mwangala & others V Attorney General**

decided by my brother Mr. Justice Nigel Mutuna whose facts appear to be on all fours with this case.

From the evidence on the record and the submissions filed by both sides, I must hasten to agree with Mr. Kabuka's submission that the dispute hinges on the interpretation of the word "reimbursement" as all the other facts and circumstances of the case are not in dispute. It is a fact that all the Plaintiffs were at the material time members of the Zambia Defence Force who served on a United Nations Peace keeping Mission in Sudan. It is also a fact that this particular Mission was governed by the Memorandum of Understanding made between the Government of the Republic of Zambia and the United Nations whose terms and conditions are specifically set out in its 15 Articles. It is also significant that whereas by Article 2 all the Annexes constitute the Memorandum of Understanding, Article 4 incorporates the Guidelines (Aide-Memoire) in its application. It is therefore, the position that the Memorandum of Understanding comprises the Memorandum itself, All the Annexes thereto and the Guidelines.

It is noted at the outset that the Memorandum of Understanding establishes a relationship between the Government and the United Nations that sets out the terms and conditions under which the Government shall contribute as required to assist the United Nations Mission in Sudan (UNMIS). It follows therefore, that if any individual benefit is to be derived, the same should be clearly provided for within the three constituent documents of the Memorandum of Understanding.

In paragraph 2 of the preamble to the Memorandum, it is provided as follows;

“Whereas, at the request of the United Nations, the Government of the Republic of Zambia (hereinafter referred to as the Government) has agreed to contribute personnel, equipment and services for an Infantry Unit, a Transport Unit and an Engineering Unit to assist the UNMIS to carry out its mandate.”

There is no iota of doubt from the above provision that the sending of personnel and equipment to the UNMIS was an act of the Government under the terms and conditions agreed upon between itself and the United Nations. It is further common cause that the Zambia Defence Force is subject to the civilian authority as provided by Article 100 (2) of the Constitution of Zambia. Article 3 of the Memorandum of Understanding further makes it clear that the personnel, equipment and services are a contribution provided by the Government to UNMIS. Subsequently, Article 5 stipulates the type and extent of contribution to be provided by the Government.

In return for the said contribution, the United Nations undertakes to reimburse, not the troops, but the Government in terms set out under section 6 of the Memorandum of Understanding. It is the said Article 6 that points to Annex A and Annex B for the specifics of the extent, type and quantum of the reimbursement. Article 2 of Annex A is very critical to the resolution of this matter and as such, I hereby reproduce the relevant portions thereof for ease of reference.

“The Government will be reimbursed as follows;

- a. Troops costs at the rate of \$ 1,028 per month per contingent member**

- b. Personnel clothing, gear and equipment allowance at the rate of \$ 68 per month per contingent member. -----**
- c. Personal weaponry and training ammunition at the rate of \$ 5 per month per contingent member ;and**
- d. An allowance for specialists at the rate of \$ 303 per month for 25% of troop strength of logistics units (Transport Platoon, Engineering Platoon)and 10% of troop strength of infantry units, Force Headquarters, Sector Headquarters and other units.**

3 The contingent personnel will receive directly from the peacekeeping mission a daily allowance of \$ 1.28 plus a recreational leave allowance of \$ 10.50 per day for up to 7 days of leave taken during each six month period."

The glaring different between the Plaintiffs and the Defendant in so far as the above provisions are concerned is that the former believes that the reimbursed monies, other than those under sub Article c should be appropriated by themselves while the latter believes the same belongs to the Government. This is where the interpretation of the word "reimbursement" comes into play. As already noted however, the provision identifies the Government as the recipient of the reimbursement. Mr. Kabuka has also provided definitions of the word from the Oxford Advanced Learner's Dictionary of Current English, 5th Edition, and Black's law Dictionary, 8th Edition. The aggregate of the definition from the two sources is "**paying back what has been spent.**" Additionally, the words "**repayment**", "**refund**", "**compensation**" are among the many synonyms to the word "reimbursement" and I find no need to belabour its definition.

So having established that the Memorandum of Understanding designates the Government as the party to be reimbursed, and based on the definition of the word reimbursement, the question that arises is, were the Plaintiffs

entitled to all or part of the money the United Nations paid to the Government under clause 2 of Appendix A of the Memorandum of Understanding? The answer to this question is in the negative for the reason that the principle of reimbursement is based on putting the one who has spent resources for the benefit of another in the position they were in before they spent their resources.

It is a fact in this case that the Government of the Republic of Zambia spent its resources in preparing its military personnel and equipment for the Mission in the Sudan on behalf of UNMIS. Further, all the expenses connected and incidental to the tour of duty of the Plaintiffs in Sudan under UNMIS, were met by the Government. The troops, could not therefore, derive any personal benefits out of the Mission. It is further to be noted that the Plaintiffs never negotiated any personal terms with the United Nations as the entire Memorandum of Understanding was thrashed out between the Government and the United nations.

In his final submission, Mr. Kabuka's ingenuity came to the fore when he sought to rely on the wide definition attached to the word "reimbursement" by Black's Law Dictionary with reference to actions in tort. He submitted in that regard that;

**"the party primarily liable to pay the standard rated troop allowances on foreign missions is GRZ and in accordance with the MOU, the UN simply reimbursed the GRZ those expenses incurred. The sole beneficiaries of the allowances are therefore, the participating troops and GRZ does not have any moral let alone legitimate justification to retain any part thereof. -----
--."**

I must state that I find the above proposition contradictory in the sense that while it admits that it is GRZ that is primarily liable for the expenses

that are liable to be reimbursed by the United Nations, it purports to appropriate the same to the troops. The position espoused by the Plaintiffs could only be tenable at law if it had been shown that the troops themselves incurred the expenses envisaged by clause 2 of Annex A. I think that the correct position at law is that it is the one who incurs a loss that is entitled to a refund or reimbursement.

Let's put it this way, if I have in my employ a mechanic, and you ask me to send him to your farm, kilometres away, to repair your broken down tractor, using the tools I have provided him with for the maintenance of my fleet of tractors on the understanding that you will reimburse me for the expertise, the tools, and the workshop clothing the mechanic will be wearing while repairing your tractor, my mechanic cannot claim the reimbursement as of right as it belongs to me.

The Plaintiffs have then asked why the Government caused them to sign a declaration form in which they consented to the sharing of the allowances payable to them with the Government at 50%. Clearly I have no idea why that was the case. I however, note that the form comprises two parts with paragraph one being a declaration to serve in Sudan while paragraph 2 is the said consent to share the allowance. This part specifically refers to **"the money paid to me as allowance by the United nations -----."** In line with the Memorandum of Understanding the allowances payable to the Plaintiffs by the United Nations while in Sudan are those occurring under Clause 3 of Annex A and paid directly to the Plaintiffs. It is however, a fact that these allowances were not shared with the Government. The only possible reason for this is a misunderstanding of the Memorandum of

Understanding by the authorities at the time as stated by DW1 during cross-examination.

Notwithstanding that the Plaintiffs are not entitled to the reimbursements as of right, there can be no issue if the Government, which is the Plaintiffs' employer, and having agreed with the United Nations to deploy them to Sudan, decided to reward them handsomely from the reimbursement received from the United Nations. I therefore, find no basis upon which to find that by paying 50% of its reimbursement to the Plaintiffs, the Government was in fact conceding that the Plaintiffs were the sole legitimate beneficiaries of the whole quantum of the reimbursed standard rated allowances under clause 2 of Annex A of the Memorandum as argued by the Plaintiffs.

The Final issue that has been forcefully canvassed by the Plaintiffs is that they should be treated similarly to their colleagues who were paid the 50% that had been withheld by the Government following a High Court Judgment in their favour in one case and entry of consent judgments in the other cases. I have looked at the Judgment of my learned brother, Mr. Justice Wanki, then, High Court Judge dated 30th August 2004 in cause No.2003/HN/12. The first thing to note is that the case was decided on the evidence of only the Plaintiffs as the Attorney General failed to appear to defend it. For that reason alone, I do not find it of any persuasive value as I believe that if the defence evidence before me had been available to the learned Judge; his decision would have been different.

With regard to the consent judgments, it is beyond debate that the same are not of any precedential value for not being determined on merit. The plea by the Plaintiffs to be treated similarly to their colleagues who were paid 100% of the monies that the Government was reimbursed by the United Nations is misconceived. The difference is that this matter was heard on its merits and falls to be decided thereupon while the consent judgment was a gentlemen's agreement with no reasons advanced for it. There is therefore, nothing in the consent judgment that I can look to for assistance in deciding this case.

Turning to the Judgment of my learned brother, Mr. Justice N. Mutuna, in the case of **Samuel Mwangala & others V the Attorney General**, which I was referred to, I find that the facts of that case were very similar to those in this case. I have also noted that even though the action was commenced in 2004, trial only commenced in February 2010 and concluded in February 2011. In contrast, this action was commenced in 2009 and trial only commenced in January 2011. The Plaintiffs in both cases were members of the Zambia Defence Force who served on United Nations Missions in different parts of Africa at different times. The Defendant in both cases is the Attorney General on behalf of the Government of the Republic of Zambia. The principal relief sought in both cases is the payment of the 50% of the allowances allegedly withheld by the Government. In the premise, I find that the two actions could have been consolidated and heard by one Judge as they have the potential to yield two conflicting Judgments.

Fortunately, however, there is no conflict between my Brother Mr. Justice Mutuna's judgment and mine in this case. I have however, noted that in the case before Mr. Justice Mutuna, Statutory Instrument No. 7 of 1994, was adjudicated upon, presumably because it was pleaded by one of the parties. In this case however, no specific reference was made to it except that in his testimony, DW1 sought to rely on an unnamed Statutory Instrument, as being the authority upon which Government decided to share the funds reimbursed to it with the Plaintiffs on a 50% basis. Having seen Statutory Instrument No 7 of 1994, it is apparent that the witness meant to refer to the same. I will however, not make further comment on it as I have already taken care of the position of the Memorandum of Understanding as to who is entitled to be reimbursed under Clause 2 of Annex A of the Memorandum of Understanding.

It is therefore, clear from the facts and the evidence of the case that the Government, under the authority of the Memorandum of Understanding, is the only party that has a legitimate claim over the reimbursements envisaged by Clause 2 of Annex A of the Memorandum of Understanding. The decision by the Government to pay 50% of the reimbursed funds to the Plaintiffs does not in any way affect the spirit of Clause 2. Similarly, having earlier signed a consent judgment with Plaintiffs in similar cases does not in any way prevent the Government from deciding to defend as it did in this case thereby leaving the case to be decided on its merits.

For the above stated reasons, this claim has not been proved on a balance of probability and I therefore, dismiss it accordingly. I however, note that because of the circumstances under which the action was brought, and

particularly in view of the manner in which other similar cases were settled, I choose not to order any costs to the successful party but for each party to bear its own costs.

DATED THE 26TH DAY OF JULY 2011

**J.M. SIAVWAPA
JUDGE**