

IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT NDOLA  
(Civil Jurisdiction)

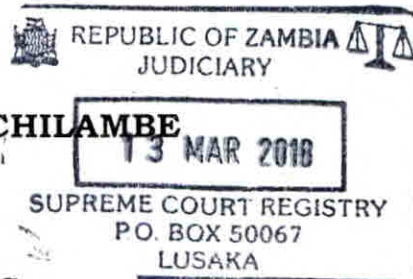
APPEAL NO. 101/2015

**BETWEEN:**

**EVANCE BORNWELL CHILAMBE**

**AND**

**JIMBARA MERCHANTS**



**Coram: Mambilima, CJ, Malila and Musonda, JJS**  
**on 6<sup>th</sup> and 13<sup>th</sup> March, 2018**

For the Appellant: In person

For the Respondent: Major (Rtd) Mubanga, Mubanga & Associates

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## **JUDGMENT**

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**MUSONDA, JS, delivered the Judgment of the Court**

**Case referred to:**

1. **Buchman v. A-G: (1993-94) Z.R. 131**

**Legislation referred to:**

1. **The Minimum Wages and Conditions of Employment Act, Chapter 276 of the Laws of Zambia**
2. **The Minimum Wages and Conditions of Employment (General) Order, 2011**
3. **The Minimum Wages and Conditions of Employment (General) (Amendment) Order, 2012**

This is an appeal by the appellant by which he seeks to have this court disturb the judgment of the Industrial Relations Court dated 22<sup>nd</sup> September, 2014, in terms of which that court dismissed, as frivolous, a complaint which the appellant and one Edwin Ng'andwe (the two are referred to in this judgment as "the complainants" while the appellant is referred to as such) had instituted in that court seeking a variety of reliefs, the details of which shall be adverted to shortly.

The history and background circumstances surrounding this appeal are that the appellant was employed as a truck driver by the respondent on 27<sup>th</sup> January, 2012. By a letter dated 17<sup>th</sup> October, 2012 addressed to the respondent's Managing Director, the appellant demanded to be paid a number of allowances which he deemed to have been due to him on the basis of the provisions which were contained in Statutory Instrument No. 2 of 2011 which had been promulgated pursuant to the provisions of the Minimum Wages and Conditions of Employment Act, Chapter 276 of the Laws of Zambia.

The record relating to this appeal revealed that, by the time the appellant was writing his said letter of 17<sup>th</sup> October, 2012, he

had abandoned his employment with the respondent and had since taken up employment with another company called Talwaka Lumo Company Limited.

Between 18<sup>th</sup> February and 25<sup>th</sup> March, 2013, the respondent, with the blessing of the Labour Office at the Ministry of Labour and Social Security, Mansa, paid a total sum of K2,473.71 to the appellant by way of addressing his complaints over his unpaid allowances.

On 5<sup>th</sup> April, 2013, the appellant and one Edwin Ng'andwe, his co-complainant, filed a complaint in the court below against the respondent. In his Affidavit in Support of that complaint, the appellant confirmed having resigned from his employment but sought to be paid allowances as follows:

- (a) Subsistence allowance;
- (b) Housing allowance;
- (c) Repatriation allowance;
- (d) Gratuity;
- (e) Medical allowance;
- (f) Clothing allowance;
- (g) Transport allowance; and
- (h) Lunch allowance.

In its Answer to the complaint, the respondent averred that the appellant had absconded or deserted from work sometime in September, 2012 and that, following his desertion, the appellant got employed by a company called Talwaka Lumo Company Limited.

The respondent further averred that, in spite of having absconded from work, the appellant was paid allowances as follows:

- (a) Housing allowance at the rate of K180,000 per month for 7 months... Total: K1,260,000;
- (b) Housing allowance at the rate of K300,716.00 per month for two months ... Total: K601,432.00;
- (c) Transport allowance at K102,000.00 per month for 9 months ... Total: K918,000.

In addition to the above payments, the appellant was paid a gratuitous 2 days' pay for each of the 9 months that he had worked for the respondent together with a commutation of his 18 leave days.

It was further averred in the respondent's Answer that, in terms of the terms and conditions under which the appellant had been employed, he was not entitled to any other allowances other than the ones which have been specified above.

The complaint was subsequently tried before the court below in the usual way with the then complainants (one of them being the appellant) calling one witness while the respondent called two witnesses.

According to the evidence which was laid before the trial court on behalf of the complainants (by "CW1"), the grievances which had prompted the appellant (and his colleague) to haul up the respondent before the court below revolved around non-payment of allowances as set out below. The first such allowance was subsistence allowance which the appellant had computed at K52,065 (unrebased) over a period of 267 days which the appellant claimed to have worked for from the time he was engaged. Other allowances whose non-payment had aroused the appellant's disaffection were housing, medical, lunch, transport and clothing allowances.

According to the appellant's evidence in the court below, the respondent's Managing Director's inaction over his allowances forced him to lay his grievances before the Labour Office in Mansa.

The appellant further testified that, following his complaint to the Labour Office against the respondent on 9<sup>th</sup> November, 2012, he decided never to report for work again. The appellant also told the trial court that he subsequently received a telephone call from the Luapula Province Labour Office by which he was requested to report to the Labour Officer on a particular day.

The appellant further testified that when he got to the Labour Office, he was given three post-dated cheques as follows:

- (a) A cheque dated 20<sup>th</sup> February, 2013 for K773.71;
- (b) A cheque dated 10<sup>th</sup> March, 2013 for K1,000.00; and
- (c) A cheque dated 25<sup>th</sup> March, 2013 for 700.00.

According to the appellant, the above cheques did not have any accompanying documentation for the purpose of explaining what the money was being availed to him for and that his attempt to secure an explanation from the respondent proved futile on account of the respondent's servants' or agents' unwillingness to engage in any discussion with him.

The appellant concluded his evidence-in-chief by telling the trial court the following:

*“I realised that the money [which had been] paid to me was not enough as it did not explain what it constituted. The money obviously did not include allowances...”*

Under cross-examination, the appellant’s core testimony was expressed in the following terms:

*“I do not know what the money in the cheques was for. The Labour Officer told us that we had been complaining [over] allowances and he gave us the cheques.*

...

*The Labour Officer said that the cheques were payment from our former employer. We were not satisfied with the payment, that was why we came [to court]”.*

Following the closure of the complainants’ case in the court below, the respondent presented its two witnesses. The first witness was the respondent’s Managing Director (“RW1”) who told the trial court that he personally dealt with the matter of engaging the appellant and discussed the terms and conditions of his engagement.

RW1 also told the court below that the appellant's monthly salary was K700.00 which was the prevailing minimum wage at the time. The appellant's other terms of engagement were:

- (a) Trip allowances - K150.00 per trip within Luapula Province and K250.00 per trip for trips outside Luapula Province;
- (b) Medical - This was to be met by respondent as and when necessary;
- (c) Clothing allowance - This was not availed because it was deemed unnecessary;
- (d) Transport allowance - This was not availed because the appellant lived within a radius of less than 3 km from his work place;
- (e) Housing allowance - A sum of K180.00 (later increased to K300.00).

RW1 further testified that although the appellant had been working fairly well, he used to lose the respondent's properties such as batteries. RW1 also complained before the trial court that the appellant even used to make under-deliveries whenever he was required to deliver goods to the respondent's customers.



It was RW1's further testimony that the appellant even absconded or deserted from his employment with the respondent and joined another company called Talwaka Lumo without formally resigning from the respondent.

RW1 also testified that, following the complaint which the appellant had presented to the Labour Office at Mansa, he instructed the respondent's accountant ("RW2") to go to the Labour Office at Mansa for the purpose of securing that Office's guidance over the matter.

According to this witness, all the payments which were due to the appellant were agreed upon with the Labour Office in accordance with the applicable law and were subsequently paid to the appellant.

For his part, RW2 confirmed in his evidence before the court below that he did go to the Mansa Labour Office to attend to the complaint which the appellant had lodged with that Office. The witness further testified that while at the Labour Office, he and the Labour Officer worked out all the allowances which were due to the appellant and his colleague in accordance with the prevailing

labour laws. After working out the amounts which were due, the complainants received their respective entitlements via post-dated cheques which the duo subsequently encashed. This witness concluded his testimony by telling the trial court that whatever had been due to the appellant was duly paid.

After examining the evidence which had been placed before it, the trial court noted in its judgment that there were pieces of evidence which were common to the two sides and over which there was no dispute between them. These pieces of evidence were that, the appellant was employed on the basis of an oral contract. Secondly, the two parties to the oral employment contract agreed that, in addition to receiving a monthly salary, the appellant was going to be receiving allowances and that the appellant's conditions of service were going to conform to the requirements of the Minimum Wages and Conditions of Employment (General) Order, 2011 as amended by the Minimum Wages and Conditions of Employment (General) (Amendment) Order, 2012.

After addressing the evidence which the trial court considered to have been common to the two sides, it proceeded to consider the manner in which the appellant had left the respondent's employ

and came to the conclusion that the appellant had been guilty of desertion from his employment and that the respondent was entitled to withhold a month's salary from his dues as it had done on account of that desertion.

With respect to the appellant's claim for allowances, the trial court reasoned that all the allowances which the appellant was entitled to were computed on the basis of the guidance which the Labour Office had offered and that the same were duly paid.

In particular, the trial court noted that what the appellant had packaged and claimed as subsistence allowance was, in fact, what the appellant had been receiving in the shape of trip allowance.

This trip allowance was being availed to the appellant whenever he undertook a trip away from his home and was not payable on a daily basis as a daily subsistence allowance. Accordingly, the court dismissed the claim. The court also dismissed the appellant's claim for medical allowance on the basis that it was only payable whenever an employee was sick and that,

in the case of the appellant, he was never sick over the entire period of his employment with the respondent.

With regard to the appellant's claim for lunch allowance, this claim was also dismissed by the court on the basis that it was not payable as the respondent had only agreed to be providing the same to the appellant while he was on duty within Mansa. Given that the nature of the appellant's job entailed travelling outside Mansa, it stood to reason that his lunch allowance was incorporated in the trip allowance.

The trial court also dismissed the appellant's claim for clothing allowance on the basis that it was not available to him.

The trial court also dismissed the claims for gratuity, repatriation and terminal benefits. In this regard, the lower court reasoned that, as the appellant had been in breach of his employment contract by deserting, he could not legitimately or justly claim those rewards.

In sum, the trial court dismissed the whole complaint with costs as having been frivolous.

The appellant was not satisfied with the judgment of the court below and has now appealed to this court on the basis of the following grounds which are set out in the memorandum of appeal:

- “1. That the Court below misdirected itself when it dismissed my Complaint and yet the Respondents agreed to pay me K2,144,687=00 (unrebased). The main argument was to pay me interest on the amount mentioned and that’s how I brought the matter to Court.**
- 2. That the below Court erred in law and fact when it failed to order the Respondent to pay me all the underpayments.**
- 3. That the below Court erred in law and facts when it failed to order the Respondent to pay me my subsistence allowance.**
- 4. That the below Court erred in law and fact when it failed to order the Respondent to pay me upset allowance. I was made to go and work in Mansa from Luanshya.**
- 5. That the below Court erred in law and fact when it failed to order the Respondent to pay me repatriation allowance, since I was employed in Luanshya and posted to Mansa.**
- 6. The other facts will be adduced in Court at the hearing of this appeal.”**

The appellant, who continues to appear in person, filed a document which he styled and described as ‘Heads of Argument’ to support his appeal while counsel for the respondent also filed the respondent’s counter arguments.

The two sides confirmed their reliance upon their respective Arguments when we heard this appeal.

In his arguments around the first ground of appeal, the appellant complained that it was a misdirection for the lower court to refuse to order that he be paid interest on the K2,144,687.00 (unrebased) which the respondent had agreed to pay.

For his part, counsel for the respondent countered the above contention by arguing that the lower court was on firm ground when it declined to award interest on the K2,144,687.00 (unrebased) payment on the basis that this money was paid to the appellant before the court action was instituted.

We have considered this ground and have no difficulty in agreeing with counsel for the respondent that the issue of recovering interest on the moneys which had been the subject of an *ex-curia* settlement was properly declined by the court below in exercise of the discretionary power which was available to it in that regard. Accordingly, we are on no difficult to dismiss this first ground of appeal.

The brief grievance which the second ground of appeal exudes is that the trial court erred when it failed to order the respondent to pay the appellant what he described as “...all [his] underpayments”. According to the appellant’s Heads of Argument, the underpayments which the appellant was complaining about via this ground related to salaries and housing allowance which the Labour Office had directed the respondent to pay.

In its Heads of Argument in response, the respondent does not appear to have directly or specifically reacted or controverted the appellant’s claim on account of the alleged underpayments save that the respondent supports the lower court’s dismissal of all the appellant’s claims.

We have examined this ground of appeal in the context of the appellant’s complaint as it was presented and prosecuted in the court below, the evidence with which that court had been confronted and the judgment which it handed down and have formed the view that the appellant’s search for any salary-related relief is only arising for the first time and in this court. As we have previously and repeatedly said in decisions such as **Buchman v. A-G**<sup>1</sup> and others, we cannot countenance the appellant’s clearly

inappropriate and improper invitation to have us pronounce ourselves upon an issue which was neither deployed nor canvassed in the court below.

Secondly, the issue of housing allowance was specifically addressed by the trial court in its judgment when it observed, at page J13, as follows:

*“The complainants have conceded that housing and transport allowance was paid as part of the monies computed with the collaboration of the Labour Office, the only sticking issue being the payment of interest.”*

The appellant has not appealed against the above finding and conclusion by the trial court. Under the circumstances, we find the appellant's search for the relief which constitutes the subject matter of his second ground of appeal both misconceived and mischievous. Accordingly, we dismiss this ground.

The third ground of appeal revolves around the appellant's complaint over the trial court's refusal to award him subsistence allowance.



In arguments filed on its behalf, the respondent is in full support of the trial court's rejection of the appellant's search for subsistence allowance.

The trial court, in dismissing the appellant's search for subsistence allowance, observed in its judgment that the appellant used to receive what was dubbed as 'trip allowance' whenever he undertook a trip on account of the respondent's business. In this regard, the appellant used to receive a 'trip allowance' in the sum of K150,000 (unrebased) on account of a trip undertaken within Luapula Province and K250,000 (unrebased) on account of a trip undertaken outside Luapula Province.

The trial court went on to explain that, 'subsistence allowance' was a creation of the Minimum Wages and Conditions of Employment (General) Order 2011 which, in Section 16 of the Schedule to this Order, had described subsistence allowance as an allowance payable to an employee for each night that the employee spent away from home for the purpose of attending to the business of the employer within Zambia. This allowance was fixed at K195,000.00 per night under that law.

Although the trial court dismissed, as 'unrealistic', the appellant's search for the relief in question on the basis that the appellant was seeking to recover the same for each day of the entire period that he had remained in the employ of the respondent (when the evidence before the court suggested that the appellant used to return and spend some time at home), the court noted that the 'trip allowance' which the appellant used to receive was not the subsistence allowance which the order we referred to above provided for.

We have, with much alacrity, considered the issues in the record around the third ground of appeal in the context of the reasoning and conclusion of the trial court in relation to the same.

It seems to us that, although the trial court had reached the correct conclusion, it appeared to have been blowing hot and cold in its analysis, while its reasoning was also somewhat inconclusive. We say this because, on the one hand, the trial court noted in its judgment that, an allowance, which was dubbed 'trip allowance' was availed to the appellant whenever he was away from home on duty while, on the other, the court expressed the view that the subsistence allowance which was provided for in the law which we

earlier quoted and which had been fixed at K195,000.00 (unrebased) could not have been the trip allowance in question.

In the view which we have taken, leaving aside the differences in nomenclature and the amounts involved K150,000/K250,000 (trip allowance) -vs- K195,000.00 (subsistence allowance), **the purpose** which the money (trip allowance or subsistence allowance) was intended to serve was the same. Indeed, this purpose was neither discounted nor negated by the differences in the amounts involved. We are also of the considered view that although 'trip allowance' for trips within Luapula Province was fixed at the lower level of K150,000.00 relative to the K195,000.00 which was fixed on account of subsistence allowance, the arising variance as between the two allowances was well compensated by the much higher trip allowance of K250,000.00 for trips outside Luapula Province. In our view, the appellant could not have been awarded subsistence allowance when, to all intents and purposes, the purpose which this allowance was intended to serve was being served by the trip allowance which the appellant had been receiving. The third ground must, consequently, fail.

The fourth ground of appeal revolved around the appellant's search for upset allowance which he felt entitled to on account of the fact that he was working in Mansa following his engagement at a time when he was living in Luanshya. The position which the trial court took, which was supported by counsel for the respondent, was that, under Section 20 of the Schedule to the 2011 Order which we earlier referred to in this judgment, an upset allowance was only available to an employee who was permanently transferred to another town. In the context of the matter which was before the court below, the issue of an upset allowance could not have arisen as the appellant was never the subject of a transfer. Clearly, the appellant's search for this relief was misconceived. Accordingly, we dismiss the fourth ground.

The fifth ground revolved around the appellant's search for repatriation allowance. In this regard, the appellant faulted the court below for having outrightly rejected the appellant's plea for repatriation allowance.

For his part, the respondent's counsel emphatically supported the lower court's conclusion and its reasoning for the same.

In dismissing the appellant's search for repatriation allowance, the trial court reminded the appellant that, not only had he breached his employment contract with the respondent through his act of desertion, he was not a legitimate subject of repatriation as he had taken up a job with another local employer.

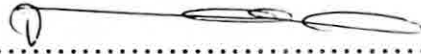
We have considered the fifth ground and are in complete agreement with both the reasoning as well as the conclusion of the court below. Accordingly, we would dismiss this ground.

In conclusion, we have looked at what is numbered as ground '6' in the memorandum of appeal. This is clearly anything but a ground of appeal. We decline to take note of this patent fiction numbered 6.

In sum, this appeal fails in its entirety.

We note that the lower court mulcted the appellant in costs. We shall leave this pronouncement undisturbed. As to the costs in this court, we note that counsel for the respondent opted to leave this matter in our hands. We have patiently pondered over the

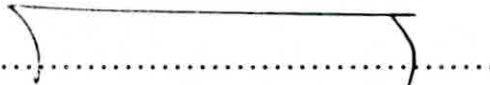
issue and have come to the conclusion that we should spare the appellant from the costs which have arisen in this court.



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**I. C. MAMBILIMA**  
**CHIEF JUSTICE**



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**DR. M. MALILA, SC**  
**SUPREME COURT JUDGE**



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**M. MUSONDA, SC**  
**SUPREME COURT JUDGE**