HIGH COURT FOR ZAMBIA 2015/HK/149

AT THE DISTRICT REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)

BETWEEN:

HASTINGS PASI **PLAINTIFF**

AND

FOOD RESERVE AGENCY **DEFENDANT**

Before the Hon Mrs. Justice C.B. Maka-Phiri

For the Plaintiff: **Mr. T. Chabu of Messrs Terence Chabu & Co.**

For the Defendant: **Mr. Mwondela of Messrs Lloyd Jones & Collins**

JUDGMENT

Cases referred to:

1. **Jacob Nyoni vs. Attorney General 2001 Z.R 65**
2. **Standard Chartered Bank Zambia PLC. vs. Willard Solomon Nthanga and Others (2008)1 Z.R. 127.**
3. **Ringford Habwanda v. Zambia Breweries Plc (2012) 3 Z. R. 75.**
4. **Attorney General vs. Steven Luguru SCZ/No. 20/2001.**
5. **Justin Chansa v Lusaka City Council (2007) Z.R. 256.**
6. **James Mbewe and Another v James Mwanza (2012) 2 Z. R. 87.**
7. **William David Carlisle Wise v Hervey Limited (1985) Z. R. 179 (S.C).**

8. Holmes Limited vs. Buildwell Construction Company Limited (1973) Z.R. 97 (H.C.).

9. Sam Amos Mumba v Zambia Fisheries and Fish Marketing Corporation Limited (1980) Z.R 135 (H.C.).

10. Indo-Zambia Bank Limited v. Mushaukwa Muhanga (S.C.Z. Judgment No. 26 of 2009).

11. Christopher Besa vs. Zambia National Building Society SCZ/8/160/2013.

By writ of summons dated 13th March, 2015, the plaintiff sued the defendant claiming the following:-

i) The sum of K30, 000.00, being underpaid daily subsistence allowance.

ii) The sum of K8,533.32, being underpaid education allowance;

iii) A declaration that the plaintiff was entitled to non-private practice allowance as per Government Circular, Policy and directive;

iv) The sum of K80,640.00 , being the unpaid non-private practice allowance as per Government circular, policy and directive;

v) Any other relief that the court shall deem fit;

vi) Interest;

vii) Costs.

The defendant denied the claims and counterclaimed against the Plaintiff as follows:

i) A declaration that the defendant is not captured within the ambit of the Public Service Management Division Circular No. B,4 of 2006-PSMD/101/18/18;

ii) A declaration that the defendant is not obliged to pay non-private practice allowance to Legal practitioners employed by the defendant

iii) Any other relief

iv) **Costs.**

The facts not in dispute as can be discerned from the pleadings are that the Plaintiff was employed by the defendant as legal officer from 1st November, 2012 to 28th February, 2014 when he resigned. The Plaintiff was employed under a written contract of employment as read with Staff Conditions of Service for Food Reserve Agency(***hereinafter referred to as FRA staff conditions***) shown in both the Plaintiffs and Defendant's bundle of documents. It was further common ground that the Defendant is an autonomous body created under an Act of Parliament with the ability to contract on its own terms and conditions. It is further common ground that the Plaintiff was entitled to daily subsistence allowance (**DSA**) each time he went out of station on official duty and education allowance as per his contract of employment as read with the FRA staff conditions.

The dispute in this matter is on whether the Plaintiff was underpaid the DSA as well as Education allowance for the period that he worked for the defendant. The second issue is whether the Government Circular, Policy and Directive on non-private practice allowance were applicable to the Plaintiff for him to claim entitlement.

At the trial of the matter evidence was led by both parties to resolve the issues in dispute. The Plaintiff's evidence was that his contract of employment with the Defendant provided for DSA as per

government guidelines. His claim was that he was underpaid DSA and he relied on clause (iv.) of the Public Service Management Division Circular No.B12 of 2012 which according to him was the subject government guideline. The circular shows the rates of DSA according to location effective from 1st January, 2013 that the Plaintiff claims to be entitled to.

By way of illustration, the Plaintiff outlined the underpayments as follows: for a trip to Kitwe, he was paid at the rate of K550 per day instead of K700; for a trip to Livingstone, he was paid at the rate of K600 per day instead of K800; for a trip to Mazabuka, he was paid at the rate of K500 per day instead of K600; for a trip to Chipata, he was paid at the rate K550 per day was instead of K700. The total underpayments according to the Plaintiff's computation supported by the expense claim forms and the statement of the trips in the plaintiff's bundle of documents, was K30, 000, the amount that he now claims.

As regards education allowance, the Plaintiff stated that he was entitled to K2, 133.33 net per month payable three times in a year at the beginning of a school term. His contention was that this amount accrued every month but the Defendant paid education allowance for nine months in a year instead of 12 months. The Plaintiff argued that this was contrary to his conditions of service which provided for payment of education allowance per month regardless of whether schools were open or not.

With regards the claim for non-private practice allowance, the Plaintiff's testimony was that according to government policy, all legal practitioners in the public sector are entitled to non private practice allowance because of the loss of the opportunity to engage in private practice. He relied on Public Service Management Division Circular No. B.4 of 2006 and the Attorney General's opinion on Non Private Practice Allowance to Legal Practitioners in Statutory Institutions that he rendered to National Savings and Credit Bank in his letter dated 5th September, 2008. The defendant could not pay the non private practice allowance because it was not approved by the Board. Because of differences in salary scale, the Plaintiff could not state with certainty which rate was applicable to him. He therefore relied on what other lawyers of his standing in government were getting, hence he settled at the rate of K5, 040 per month.

When cross examined, the Plaintiff confirmed that his terms of employment were as approved by the Board and any changes thereto ought to be approved by the Board. He explained that during his tenure of employment, his conditions of service were changed twice; in 2012 and 2014, in accordance with government policy but subject to Board approval. He insisted that he was entitled to non-private practice allowance because it was government policy but conceded that the Board did not approve its payment. He further insisted that his conditions of service were

supposed to be read together with government policies as they were binding on the defendant.

This marked the close of the Plaintiff's case as he did not call any witnesses.

The Defendant called one witness in its defence. DW1, Mike Jalandi, is the Human Resource Officer and custodian of all human resource documents and policies. He was also responsible for the interpretation of conditions of service in the Defendant. He testified that the Plaintiff's conditions of service were embodied in the contract of employment, appointment letter and the terms and conditions of service.

He confirmed that the Plaintiff was entitled to be paid daily subsistence allowance calculated in accordance with the general terms and conditions of service and government guidelines but subject to Board's approval. He explained that the daily subsistence allowance rate as per government guidelines was only approved by the Board on the 20th March, 2014 and this is the day it became effective. This followed the re-alignment of the grading structure of the Government and the Defendant. DW1 denied the plaintiff's claims that he was underpaid daily subsistence allowance on account that the Plaintiff was paid in accordance with what was prevailing in the conditions of service at the time.

DW1 confirmed that the Plaintiff was entitled to education allowance to be paid at the rate of K6, 400 per term. He noted that the staff conditions of service were to be read together with the contract of employment and as such education allowance was payable at the beginning of each school term. The rate applicable to the Plaintiff was K2, 133.33 net of tax per month payable per school term. DW1 explained that there was no conflict between the contract and the defendant's general conditions with regard to education allowance. He denied any underpayments in that regard.

In relation to non-private allowance, DW1's position was that the plaintiff was not entitled to the same because it was not part of his conditions of service as contained in his written contract of employment. Further that nothing prohibited the Plaintiff from engaging in private practice.

With regard to the counter-claim, DW1 stated that the public service circular was for public officers from PMSD and the defendant's officers are not public officers according to the Food Reserve Agency Act.

When cross examined, DW1 confirmed that whenever there was a conflict between the terms of the contract of employment and the General conditions for service, the most favorable terms will prevail. He also confirmed that the Government guidelines were as shown in the Plaintiffs bundle of documents

This marked the close of the defendant's case.

Both parties filed written submissions on 31st May, 2017 and 6th July, 2017 respectively to augment their respective cases.

The Plaintiffs submission was that the rate applied to pay him daily subsistence allowance was lower than the accrued rate and could not be abrogated. The plaintiff cited the cases of **Jacob Nyoni vs. Attorney General** [1], **Standard Chartered Bank Zambia PLC. vs. Willard Solomon Nthanga and Others**[2], which speak to the law that accrued rights of an employee cannot be altered to his disadvantage. The Plaintiffs prayer was that the claim for underpayment of daily subsistence allowance be upheld and the exact figures be assessed by the Registrar. With regard to the claim for underpayment of education allowance, the Plaintiff relied on clause 19 of the Contract on General Conditions of Service. The Plaintiffs contention was that there was a conflict in the interpretation on a clause in the Plaintiffs contract and general conditions and as such the favorable interpretation to the Plaintiff should be applied. The Plaintiff cited the case of **Ringford Habwanda v. Zambia Breweries PLC.**[3] were it was held that; **"Where there is doubt about the meaning of a contract, the words will be construed against the person who put them forward...."**

With regard to non private practice allowance, the submission was that the Plaintiff was entitled to the same as per Government circular, policy and directive which was binding on the defendant being a statutory body. To illustrate the binding effect of

Government circular, the Plaintiff relied on the cases of **The Attorney General vs. Steven Luguru**[4], **Justin Chansa v Lusaka City Council**[5] and **James Mbewe and another v James Mwanza**[6]. It was the Plaintiff's contention that the circular which was addressed to all departments and all permanent secretaries among others was applicable to the defendant and as such the claim should be upheld.

The Plaintiff's conclusion was that the defendant's counter claim should be dismissed on ground that there is no cause of action by other legal practitioners against the defendant and that this court has no jurisdiction to make academic orders to non- parties. The Plaintiff cited the case of **William David Carlisle Wise v Hervey Limited**[7] on meaning of cause of action.

The gist of the Defendant's submission was that the Plaintiff was employed under a written contract which incorporated the FRA conditions and that this court should therefore give effect to the terms of the contract as between the parties without admission of any extrinsic evidence. The cases of **Holmes Limited vs. Buildwell Construction Company Limited**[8] and **Sam Amos Mumba v Zambia Fisheries and Fish Marketing Corporation Limited**[9] were cited to support the argument.

The defendant's contention was that the revised DSA rates as contained in Circular No.B12 of 2012 were not an accrued right as they were not a condition of service offered by the Defendant to the

Plaintiff during his tenure of employment. It was the Defendant's submission that the cases cited by the Plaintiff are distinguishable. It was further submitted that the DSA that was paid to the Plaintiff was as per government guidelines obtaining then and approved by the Board. The revised rates in **Circular No. B12 of 2012** were only approved by the FRA Board on 20th March, 2014 after the rationalization of the grading structure of the Government and the Defendant. The revised rates therefore only became a condition of service offered by the Defendant to its employees from 20th March 2014. It was the Defendant's prayer that the court should find that no underpayment of DSA was made to the Plaintiff.

With regard to education allowance, the defendant's submission was that there was neither ambiguity nor conflict between the FRA conditions and the written contract. Education allowance was payable at the rate of K6,400 per term, that is the rate of K2,133.33 was to be paid for three months being the duration of a school term. It was contended that the contract of employment read as a whole should be given its natural and ordinary meaning as discerned from the words used. The case of **Indo-Zambia Bank Limited v. Mushaukwa Muhanga**[10] was cited to show how the Supreme Court has pronounced itself when dealing with interpretation of a written document. The gist is that the Court will only depart from the ordinary and natural meaning when the words if so taken will result in ambiguity and absurdity. It was the defendant prayer that the

payment of education allowance was in line with the contract and as such there were no under payments.

With regard to payment of non private practice allowance, it was the defendant's submission that circular No. B12 of 2012 upon which the Plaintiff based his claim was not applicable to the Defendant who was not an addressee. It was submitted that the Act which creates the Defendant prescribe how the Defendant is governed and how it interacts with Government. Section 27 of Cap 225 was cited to that effect. It was the defendant's contention that there was no Statutory Instrument that was issued by the Minister prescribing to the Defendant to pay non-private practice allowance and as such the allowance was neither an express nor an implied term within the FRA conditions. It was further submitted that the Plaintiffs contract and conditions of service do not have as a condition the payment of non-private practice allowance. It was contended that the Plaintiff cannot therefore import terms into his contract by extrinsic evidence.

It was submitted in the alternative that even if non-private practice allowance was payable, the Plaintiff was not eligible by virtue of section 8(5) of the Act which enacts that employees of the Defendant Agency shall not be considered as public officers. The circular relied upon was only applicable to Legal practitioners in Parastatals and government service. Lastly, that the Plaintiff was not precluded by his conditions of service to engage in private

practice outside his normal working hours. It was the defendant's prayer that the claim for non-private practice should be dismissed.

It was the defendant's further prayer that the counter claim wherein the defendant seeks declaratory orders should be upheld with costs.

I have considered the evidence and submissions by both parties. It is not in dispute that the Plaintiff was entitled to subsistence allowance as per government guidelines. The Plaintiff was not given these government guidelines at the time he was employed but came across Public Service Management Division Circular No. B.12 of 2012 dated 13th April, 2012 during the course of his employment. The Circular had rates for subsistence allowances higher than the rates that the defendant was paying the Plaintiff.

The question for determination is whether the rates in Circular No. B.12 of 2012 were applicable to the Plaintiff? The defendant has not disputed the fact that Circular No. B12 of 2012 contained government guidelines on subsistence allowance. What this means is that the defendant was duty bound to implement the rates of subsistence allowance as contained in the Circular. It is important to note that the implementation of the revised rates may not be immediate because of financial implication and planning aspects but the Board must work towards the actualization of the government guidelines within a reasonable period. The defendant as a statutory body with Government presence cannot be seen to pay subsistence allowance inconsistent with government guidelines for

prolonged periods without any justification. The role of the Board therefore is to ratify all relevant government circulars, policies and directives so as to actualize government guidelines and or policies.

The defendant's evidence was that the rates for subsistence allowance in Circular No.B12 of 2012 were only approved by the defendant's Board on 20th March, 2014, after the rationalization of the grading structure between Government and the Defendant Agency. This evidence shows that the Defendant acknowledges that it is mandated to actualize government guidelines and this must be done within a reasonable time. The evidence on record shows that it took the defendant a period of one year three months to implement the new subsistence allowances as revised by Government. This period was not inordinate in view of the rationalization exercise that the defendant had to embark upon before implementation. What this means is that at the time when the Plaintiff resigned from the defendant on 28th February 2014, the revised rates as contained in the Circular were not yet effective and had not yet become part of the conditions of service. The Plaintiff cannot therefore claim entitlement to revised rates of subsistence allowance in view of the reasons advanced for the delay in implementation of the guidelines as revised in the Circular. If the delay was inordinate and the evidence showed that the Defendant was dragging its feet to implement the revised rates, I would have agreed with the Plaintiff that he was entitled to subsistence allowance at the revised rates. That not being the case, my

conclusion is that the Circular was not applicable to the Plaintiff at the time he was employed by the defendant. I therefore accept the defendant's position that the Plaintiff was paid DSA at the rate as per government guidelines that was applicable at the time and as approved by the Board. It is therefore my considered view that there was no accrued right in relation to daily subsistence allowance due to the Plaintiff. The Plaintiff's claim for underpayment of subsistence allowance cannot therefore be sustained.

I now come to the claim for underpayment of education Allowance. It is not in dispute that the plaintiff was entitled to education allowance as per clause 9 of the contract of employment and clause 9.10 of the FRA staff conditions. Clause 9 of the contract reads as follows; The Agency shall pay the Employee an education allowance at the rate of K6, 400 net which shall be paid per school term. Clause 9.10 of the FRA Staff condition on the other reads as follows: *The Agency will pay, as approved by the board, from time to time education allowance to all employees at the beginning of each term of the local education schools at the rates as stipulated in the annex.*

The annex reads as follows: **SG4- ZMW 2,133.33 net of tax per month. Note Educational allowance is payable per school term.**

The question for determination is whether there is a conflict in the interpretation of the two clauses. The Plaintiff's argument was that educational allowance was accrued every month but payable per

school term. Further that there is a conflict in the interpretation of the two clauses and as such the provision more favorable to the Plaintiff should apply as per Clause 19 of the Staff Conditions. The Defendant's submission was that there was neither ambiguity nor conflict between the contract and the FRA staff conditions. That education allowance was to be paid only per term and the rate of K2, 133.33 was to be paid for three months being the duration of a school term.

I have carefully considered the two clauses. Firstly I note that it is not in dispute that according to both the contract and the FRA staff conditions, educational allowance was payable per term. I further agree that both clauses are not ambiguous and in giving them their ordinary meaning, I agree with the defendant's position that there is no conflict between the two clauses. According to the annex to clause 9.10 of the staff conditions, education allowance of K2, 133.33 net of tax per month was payable per term. A local term is three months and these were the months that it was to be paid at the rate of K2, 333.33 per month. It should be noted that education allowance is very specific and its purpose as a matter of common knowledge is to cushion the employee with his school expenses. It makes sense therefore in my considered view that educational allowance has to be paid for the duration of the school term, which is for three months. There is no justification for paying educational allowance during the months when schools are closed as no school fees are payable then. I do not therefore agree with the Plaintiff's

interpretation of clause 9.10 of the staff conditions. I entirely agree with the defendant's submission that the Plaintiff was not underpaid his educational allowance as he was paid according to his conditions of service. It is my considered view that this claim has no merit and it cannot be sustained.

The Plaintiff's last claim relates to payment of non private practice allowance. This claim is premised on Public Service Management Division Circular No B.4 of 2006 as read with Public Service Management Division Circular No.B12 of 2012 and the Attorney General's opinion to National Savings and Credit Bank, a statutory body. This is on account that the Plaintiff's conditions of service as spelt out in the contract of employment as read with the FRA Staff conditions did not provide for Non Private Practice Allowance. The gist of the two Circulars is that non-private practice allowance shall be payable to all Legal Practitioners in Government service who are not allowed to engage in private legal practice. Following this new condition of service on payment of Non Private Practice Allowance to Lawyers in government, the Attorney General rendered a well-reasoned opinion on the matter which though directed to a specific statutory body, would apply to all statutory bodies in Zambia. The Attorney General's conclusion was that Lawyers in National Savings and Credit Bank, a statutory body are entitled to a non-private practice allowance. The same can be said of Lawyers at the defendant Agency. This entitlement can further be seen in the case of **Christopher Besa vs. Zambia National Building Society,**[11]

were a consent settlement order was entered in favour of the Appellant to recover Non-Private Practice Allowance payable to lawyers employed in public service. The Respondent in the Besa case is a statutory body just like the Defendant.

What this means is that payment of non-private practice allowance to lawyers in public service and statutory bodies is a matter of Government policy. The Defendant cannot therefore claim that Circular No. B.12 of 2012 does not apply to the Plaintiff because he is not in Government Service when they have implemented the guidelines on subsistence allowance from the same circular. It should further be noted that the Defendant has not demonstrated that it was practical for the Plaintiff to engage in private practice outside his normal service.

The Defendant as a statutory body created by Government is mandated to implement government policy whenever it is pronounced by taking the requisite steps to actualize the policy. Where the defendant is in doubt, it should seek legal opinion of the Attorney General as was done by National Savings and Credit Bank instead of totally disregarding government policy. The Government policy to pay non private practice allowance to Legal Practitioners in public service dates back to 2005 and yet to date the defendant in contumelious disregard of government policy have not taken any steps to actualize this condition of service created by Government. That being the case, it is my considered view that the Plaintiff was entitled to payment of non-private practice allowance being a Legal

practitioner in a statutory body. I therefore make the declaration sought that the plaintiff being a legal practitioner was entitled to non private practice allowance for the duration that he worked for the defendant from 1st November, 2012 to 28th February, 2014.

The Plaintiff's claim of the sum K80, 640 for unpaid non private practice allowance was premised on the rate of K5, 040 per month applicable to lawyers of his standing working in Government at the time. The evidence on record shows that the Defendant has since re-aligned its grading structure to that of the Government. It is thus easy to ascertain the equivalent rate applicable to the Plaintiff. In view thereof, the matter is hereby referred to the Registrar for assessment of the unpaid non private practice allowance due to the Plaintiff. The amount found due shall attract interest at the rate to be determined by the Registrar.

I now come to the counter-claim. The Defendant is seeking a declaration that it is not captured within the ambit of Public Service Management Division Circular No. B.4 of 2006-psmd/101/18/18 and that it is not obliged to pay non private practice allowance to legal practitioners that it employs. As stated above, defendant is mandated to implement government policies and directives. The Defendant being a government statutory body cannot take a position that seeks to oppose government policy. The Defendant wants to use the Court to legitimize and or legalise their contumelious disregard of government policy on non private practice allowance which in my considered view should not be

tolerated. The defendant should therefore seek to align its conditions of service with government policy instead of seeking to perpetuate contrary positions. I also agree with the Plaintiff's submission that this court cannot make a wholesome declaration to non-parties to this action. The counter claim raises no claims against the Plaintiff and as such no cause of action against him. It is my considered view that the counter claim has no merit and it is hereby dismissed.

The Plaintiff is partly successful on his claims. I therefore order that each party will bear its own costs.

Leave to appeal is hereby granted.

Delivered at Kitwe; in open court this 2nd day of March, 2018

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C. B. MAKA-PHIRI (MRS.)
HIGH COURT JUDGE