

HC 6690/2000

**LT. COL. P KUJOKA
and
ZIMBABWE DEFENCE INDUSTRIES**

HIGH COURT OF ZIMBABWE
HLATSHWAYO J
HARARE, 25 February 2002 and 19 March 2003

Civil Trial

Mr Mutumbwa, for the plaintiff.
Advocate Morrissi, for the defendant

HLATSHWAYO J: The plaintiff, Lt. Col. P. Kujoka, was at all material times employed as a marketing officer by the defendant, the Zimbabwe Defence Industries (Pvt) Limited (ZDI). In 1998 and 1999 he was sent on marketing assignments in the Democratic Republic of the Congo (DRC). On each trip he would be given a traveling and subsistence allowance at the rate of US\$300 per day. The allowance, or part of it, would be paid in advance or on returning from a trip, upon application to the defendant's accountant.

The facts which have given rise to the present dispute relate to a trip undertaken by the plaintiff from 1st September to 11 November, 1999, amounting to 76 days and for which he was paid an allowance for three days. Upon returning to Zimbabwe, he submitted a claim for 73 days and was advised by the defendant's accountant that the defendant did have the funds to pay the allowance and that at any rate in terms of the company's new policy the defendant could only pay an allowance for a maximum of ten days per trip at the rate of US\$200. Therefore, the issues for determination are firstly, whether the defendant is liable to pay such allowances for periods exceeding ten days, and, secondly, the daily rate for such allowances. The third and final issue pertains to the plaintiff's claim for reimbursement of expenses incurred in respect of the defendant's business amounting to \$172 084.00.

Regarding the first issue of plaintiff's entitlement to an allowance, the defendant's plea was that the plaintiff was not so entitled because he continued to

receive his salary and was given accommodation in the form of a flat which was wholly paid for by the defendant. In addition, the flat was reasonably furnished and some quantity of food was given to the plaintiff as well as an amount of US\$2 200 for out of pocket expenses. Far apart from the facts revealed in evidence that the flat and the provisions supplied to the defendant were used by other members of the defendant on assignments to the DRC, there are two strong reasons why, in agreement with Mr *Mutumbwa's* submissions, I found the defendant's plea in this regard unsustainable. Firstly, the defendant cannot in one breath say that the plaintiff is not entitled to an allowance at all and in the same breath that he is entitled to an allowance for only ten days. The probable position appears to be what was confirmed by the defendant's practice, viz., that allowances were indeed payable. Secondly, and more importantly, plaintiff's continued receipt of his salary in Zimbabwe did not disentitle him to the allowance because the allowance was not a substitute for the salary nor a privilege, but a contractual right. See the dicta of LATHAN C.J. in the case of *Mutual Acceptance Co. Ltd v Federal Commissioner of Taxes* (1944) 69 CLR 389 at pp.396-397:

"When the word (allowance) is used in connection with the relation of employer and employee it means, in my opinion, a grant of something additional to ordinary wages for the purpose of meeting some particular requirement connected with the service rendered by the employee or as compensation for unusual conditions of service."

Indeed, the evidence revealed that the DRC was a hardship station for which an allowance for the unusual conditions would be necessary. The plaintiff's assignments included delivering various types of military hardware to the Congolese Armed Forces (FAC), assessment of the FAC ordinance and logistical requirements and securing from FAC orders for specific items, collecting from FAC payment in respect of orders already delivered. Concurrent with sales of military hardware, the plaintiff was tasked to coordinate the setting up of a joint-venture company with the Congolese Government known as Congo-Dhuka as well as carrying out public relations work for the defendant both in the DRC and also with a view to extending the defendant's market share to neighbouring countries such as Congo Brazzaville.

The real issue, therefore, is not whether the plaintiff was entitled to an allowance at all, but for what period and at what rate he was so entitled. The plaintiff's claim as per the summons is for an allowance of US\$200, for the entire duration of his stay in the DRC, being 76 days, less three days for which payment was made. In his evidence, however, the plaintiff said that he was entitled to US\$300 per day and that he had reduced his claim in the hope for a quick settlement. Consequently, Mr *Mutumbwa*, submitted that the claim as contained in the summons had been corrected by the evidence and moved to amend the summons by increasing the quantum of the claim accordingly. However, I am of the view that such a request cannot be granted at this late stage especially given that no allegation of reasonable mistake were made. Therefore, the plaintiff shall be limited to his claim as originally framed. The defendant's position, on the other hand is that the plaintiff is entitled only to an allowance for ten days at the rate of US\$200.

In support of its position, the defendant produced the following documentary exhibits:

- a) a 7 page Financial Policy Framework
- b) Exhibit 9 being a bundle of documents including two copies of plaintiff's memoranda to the accountant dated 16th December 1998 with certain hand written notes.
- c) Exhibit 10 being a bundle of further documents consisting mainly of plaintiff's memoranda to defendant's accountant.

In addition, the defendant called its only witness, the accountant Mrs Mukazi to give evidence. Mrs Mukazi said the defendant's financial

policy was revised at the end of 1998 establishing the per diem allowances for all destinations at US\$200 and limiting the period for which such allowances could be claimed to 10 days. However, Exhibits 9 and 10 produced by the defendant showed that in December 1998, through January, February and March, 1999 the defendant was paying allowances at US\$300 contrary to the alleged new financial policy framework. Mrs Mukazi's explanation was that one payment related to a period prior to the application of the new policy and that the other overpayments were mistakes. Mr *Mutumbwa* submitted that the new Financial Policy Framework document, which is not dated, was false and was produced specifically for this litigation. However, the alleged falsity of the document was not proved to my satisfaction. All that I can conclude from the evidence is that there was no consistency in the application of the alleged new financial policy framework, nor was its existence, let alone its provisions, generally known to the employees as the evidence of both the plaintiff and his witness, Fanuel Dube, show. It appears that much depended on the discretion of the financial manager.

The plaintiff, as shown in his memoranda, consistently submitted claims for the entire period of each trip he undertook. He consistently claimed US\$300 for each day. However, as pointed out by Advocate *Morris*, the plaintiff did not have a satisfactory explanation for his failure to sue for other trips where claims in excess of 10 days had been disallowed. Nonetheless, his explanation he was not aware of the 10 days limitation is consistent with this and all his other claims. Thus, the balance of probabilities in this matter supports the plaintiff's position that the defendant's policy regarding payments in the DRC is as stipulated in Exhibit 3, which Mrs Mukazi said had been amended.

Regarding reimbursement of expenses incurred on behalf of the

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defendant, I was not satisfied on the submissions made for the plaintiff, that the claim has been proven on a balance of probabilities. Although Mrs Mukazi did not dispute that the expenses were incurred, she clearly said that no receipts were provided. The plaintiff explained that it was impossible to get those receipts in the DRC, but he did not provide other evidence to prove the expenditure.

The plaintiff asked for costs on the scale of legal practitioner and client on the basis that the plaintiff had proffered falsified documents. However, I have already noted that the alleged falsity of the documents was not proved conclusively. Be that as it may, I am satisfied that the plaintiff has been largely successful and is thus entitled to his costs.

Consequently, it be and is hereby ordered as follows:

1. That the defendant pays plaintiff the sum of \$546 800.00 plus interest thereon at the rate of 25% per annum with effect from 1st September 1999 to the date of final payment in respect of allowances due to the plaintiff.
2. That the plaintiff's claim for reimbursement in the amount of \$172 084.00 be and is hereby dismissed.
3. That the defendant is to bear the costs of this suit.

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Plaintiff's legal practitioners: *Mutumbwa, Mugabe & Partners*

Defendant's legal practitioners: *Atherstone and Cook*