IN THE HIGH COURT FORZAMBIA **COMP N0. IRD/SL/28/2017**

INDUSTRIAL/LABOUR DIVISION

HOLDEN AT SOLWEZI

(*LABOUR JURISDICTION*)

BETWEEN:

MOSES LUAPULA **COMPLAINANT**

AND

KANSANSHI MINES PLC **RESPONDENT**

Before: **The Honourable Mr. Justice D. Mulenga this 27th day of July, 2018.**

For the Complainant : In Person

For the Respondent : Mr. J. Kalokoni of Messrs Kalokoni & Company

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JUDGMENT

Cases referred to:

1. **Wilson Masautso Zulu v Avondale House Project (1982) Z R 172**
2. **J.I Case Co. v NLRB 2 Q USC 151 -66 (1970)**
3. **Railroad Telegraphers v Railway Express Agency INC 321 US 342 (1944)**
4. **Evans Bornwell Chilambe v Jimbara Merchants – Appeal No. 101/2015**

The Complainant herein presented his Notice of Complaint on 13th September, 2017. The said Complaint is supported by an affidavit. The Complainant's Complaint is grounded on the facts here under stated, the same are not disputed by the Respondent, otherwise the same are common cause.

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The Complainant was employed by the Respondent on 8th May, 2009, as a Fireman on a Salary Scale of G5, and under Clause 2.6 and 2.8 of the employment contract for the period 2009 to 2011, the Complainant was required to work forty eight (48) hours per week or simply twelve (12) hours per day. The Complainant's contracts of employment were renewed and he worked up to 9th May, 2015 when he decided not to renew his contract with the Respondent.

It is also noteworthy that the Complainant was also a member of the Mine Workers Union of Zambia (MUZ), therefore, his conditions of service with the Respondent were also determined by both his contract of employment and the Collective Agreements signed from time to time between MUZ and the Respondent.

It is clear from the affidavit evidence and oral testimony of both the Complainant and the Respondent's witness that working forty-eighty (48) hours per week or twelve (12) hours per day was considered as normal working hours in the Respondent Company until September, 2012 when this Court presided over by Chinyama J as he then was, signed an order which prompted the Respondent and MUZ to agree to change the status from forty-eight hours per week or twelve hours per shift to eight hours per shift or day.

The same was provided for in the Collective agreement signed between MUZ and the Respondent in September but took effect from January, 2012.

From 2012 thereafter, the Respondent's workers performed eight hours per shift but due to shortage of manpower in the Respondent's essential department where the Complainant was placed, he continued to work twelve hours per shift.

The Complainant therefore, claims under paragraph 5 of his Notice of Complaint, payment from the Respondent of four (4) hours overtime per shift from 2014 to 2016. However, under paragraph 12 of his affidavit in support, he deposed that the Respondent deliberately and with impunity denied him payment for the excess four (4) hours (overtime) from 1st January, 2012 to 31st July, 2014, the same being a period of thirty (30) months, the claim the Complainant presented via his paragraph 7 of his affidavit in Reply to Respondent's affidavit in opposition.

The Respondent's Answer to the Complaint is that the Complainant was employed as an essential worker and was compensated for the hours that he worked as an essential worker, being paid thirty (30%) percent of his Basic Pay, as shift allowance, which other employees were not getting.

The Respondent through an affidavit sworn by its Human Resources Superintendent, one Eustace Kwaleyela, deposed that the Complainant worked twelve (12) hours shift from 1st January, 2009 to 31st July, 2014 and always rested for four (4) days, he worked as such due to labour shortage in the ERT Section as he was an essential worker. The twelve (12) hour shift cycle went up to August, 2014 when the situation was normalized to eight (8) hour shift.

Further that the Complainant was paid thirty (30%) per cent shift allowance to compensate for the twelve hour shift worked as opposed to six and half per cent which was paid to those who worked eight hours shift. The Complainant was paid six and half (6.5%) per cent shift allowance when the work hour shift

normalized to eight (8) hours, as from 1st August, 2014 to the time when his contract expired.

Quite clearly the issue for determination of this Court is whether in the light of the amendment or the agreement between the Respondent and the Complainants Union (MUZ) as regards the change of normal working hours from twelve hours per shift to eight hours per shift, the Complainant was entitled to overtime pay for the four (4) hours extra worked per shift as from 1st January, 2012 to 31st July, 2014 or January 2014 to 31st July, 2014. Further, whether the thirty (30%) shift allowance paid to the Complainant by the Respondent was compensation for the overtime he worked in each shift as an essential worker.

I am greatly indebted to both Learned Counsel for their submissions, I may refer to the same as and when necessary.

Germane to this case is the contracts of employment between the Complainant and the Respondent, and the Collective agreement between the Complainant's Union and the Respondent.

As a starting point, when the Complainant was offered employment on a two years fixed contract from 11th May 2009 to 10th May, 2011, it was an express condition or term of employment under Clause 2.8 of the contract, that he was to work 12 hours shift alternating between day and night shifts also that he was entitled to shift allowance. Further that as a Shift worker, the Complainant was not entitled to overtime rates for any scheduled shift hours, except where he worked overtime outside the normal shift schedule or where he was scheduled to work on a paid public holiday.

By Clause 2.6 of the said contract, the normal working hours per week was 48 hours which may be set on any day of the week, (Ref to exhibit "***ML1***" in the Complainant's affidavit in Support of Complaint). It is evident that there is no dispute as regards the contract of 2009 to 2011, between the parties herein.

In the second contract from 11th May, 2011 to 10 May 2013, otherwise exhibit ***ML2***, Clause 2.6 and 2.8 were retained unaltered and or unamended, so the status in respect to hours of work per shift, remain twelve hours and so was payment of shift allowance. The contract of 11th May, 2013 to 10th May, 2015, did not alter or amend Clause 2.6 and 2.8 aforesaid. However, the Collective Agreement between the Respondent and the Complainant's Union (MUZ) for the period 1st January, 2012 to31st December, 2013, made some changes pertinent to the Complaint herein, is clause 6.5 (exhibit "***ML4*** "), the same provides:-

6.5 Continuous Shift Roster

This Section applies exclusively to employees working in continuous operation, that being permanent rotating-shift worker.

Currently there is a three-shift operation whereby employees work four twelve-hour day shift, four twelve hour night shifts and four days off. It is agreed that shift system will change to a four-shift system with shift of eight normal hours per shift, incorporating morning, afternoon, night and off-shifts.

The current 30% (thirty percent) shift allowance, associated with the twelve hour shifts will be adjusted to 5% (five percent) for the eight hour shift roster.

In the Collective Agreement executed between the Respondent and the Complainant's Union (MUZ), for the period 1st January, 2014 to 31st December, 2016, Clause 12 therein, provided that shift differential allowance shall be paid at the rate of 6.5 % of basic pay per month for shift workers. The Collective

Agreement aforesaid had effect from 1st January, 2014, therefore, it means that at the time it came into effect, the Complainant had already worked twelve hours per shift or per day and was paid shift allowance at the rate of thirty (30%) per cent of his basic salary as was provided for both in Clause 6.5 of the Collective Agreement for the period 1st January, 2012 to 31st December, 2013 and Clause 2.8 of the Fixed Contract of employment for the period 11th May, 2013 to 10th May, 2015.

By Clause 6.5 of the Collective Agreement for 2012 to 2013 period, the Complainant was supposed to receive five (5%) per cent shift allowance and work the eight-hour shift roster. In addition, Clause 6.5 provided that the new shift system was to be formulated and implemented as soon as reasonably practicable. However, that the period for implementation was influenced by the time to be taken to recruit and train any additional staff that may have been required. Further, that management was committed to expedite the said process and it expected the implementation to occur by 28th February, 2013. Until implementation of the revised shift roster, the roster that existed was allowed to remain in force.

Clearly from the evidence adduced before this Court, the eight normal hours per shift was not implemented as far as the Complainant's essential department or section was concerned until 1st August, 2014. The said implementation was in fulfillment of Clause 17.17 of the 2013 to 2015 Collective agreement which recognised the earlier amendment to Clause 6.5 of the Collective Agreement for the period 2012 to 2013.

On implementation of Clause 12 of 2013 - 2015, Collective Agreement by the Respondent by letting the Complainant work eight (8) hour shift roster and pay him shift differential allowance at the rate of 6.5% of the basic pay per month. The Complainant on leaving employment embarked on making demands for

payment of four (4) hours overtime allowance per shift, the same being the excess time worked, when he worked twelve hours instead of the eight hours per shift.

I have critically perused the letters of demand for payment of the four (4) hours per shift overtime allowance and what is common in the said letters be it those written by the Complainant personally or on his behalf by his former Learned advocates Lumangwe Chambers, the demand is for four (4) hours overtime allowance for the period 1st January, 2014 to 31st July, 2014, obviously this was because Clause 6.5 of the Collective agreement (2013 – 2015) was only implemented from 1st August, 2014, though the same in this Court's view could have been implemented from 28th February, 2013 under Clause 6.5 of the Collective Agreement 1st January, 2013 -31st December, 2014.

Learned Counsel for the Respondent submitted in reference to the case of **Wilson Masautso Zulu v Avondale Housing Project Limited**[1], where Ngulube D.C.J as he then was, said:-

> ***I think that it is accepted that where a Plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegation, it is generally for him to prove allegations. A Plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of his opponent's case. As we said in Khalid Mohamed v The Attorney General that "quite clearly, a defendant in such circumstances would not even need a defence".***

That, the question is whether, the Complainant herein, has proved his case on the balance of probabilities. Indeed, the decision in the case of **Wilson Masautso Zulu** alluded to herein above underscores the principle that he who alleges must prove, therefore, in the matter in casu the onus is on the Complainant to prove his complaint against the Respondent on the balance of probabilities.

In determining whether or not the Complainant is entitled to four (4) hours over-time allowance per shift either from 1st January, 2012 to 31st July, 2014 or 1st January, 2014 to 31st, July, 2014, I firstly, ascertain the status of the Fixed Term contract between the parties herein and the Collective Agreement between the Complainant's Union (MUZ) and the Respondent. I have found comfort in the **Persuasive American Case of J.I Case Co. v NLRB**[2] where it was held that:-

> ***Individual agreements were superseded by the terms of a Collective Bargaining Agreement negotiated with a properly certified Union representative . . . .***
>
> ***An employee becomes entitled by virtue of Labour Relations Act, somewhat as a third party beneficiary to all benefits of collective agreement, even if on his own he would yield to less favourable terms . . . Individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under a Collective Agreement.***

Further, in another American Case of **Railroad Telegraphers v Railway express Agency INC**[3], the Court refused to individual contracts even though voluntary, to supersede terms of an earlier Collective agreement.

The case of **J.1 Case Co. v NLRB** cited herein above simply goes to demonstrate that it is possible that and employee can individually enter into a contract with an employer, when, at the same time may belong to a Union and can be a beneficiary from the benefits of Collective agreement between his Union and his employer.

I am mindful of the submissions by Learned Counsel for the Respondent to paraphrase that the Complainant was receiving 25% differential shift allowance when the other employees who worked eight hours shift received only 5% of their basic salaries as differential shift allowance therefore, according to

Learned Counsel for the Respondent 25% difference was the Complainant's compensation for his overtime for working in an Emergency Department.

Further, Learned Counsel for the Respondent has referred this Court to the case of **Evans Bornwell Chilambe v Jimbara Merchants4,** where the employee wanted to be paid subsistence allowance separately from Trip allowance which both served the same purpose. The appellant in that matter was claiming for inter alia subsistence allowance of K195, 000 (unrebased) which is provided for in the Minimum Wages (Amendment) Order 2012, but the employer was paying him the minimum of K150.000 per trip within Luapula and K250.000 per trip outside Luapula Province. The employee claimed for subsistence allowance for the entire period that he worked for the Company which the Court found unrealistic as the employee was not working all the time because he had to spend sometime at home resting. On appeal to the Supreme Court, it was held:-

> ***Although "trip allowance" for trips within Luapula Province was fixed at the lower level of K150,000 relative to the K195,000 which was fixed on account of subsistence allowance, the arising variance as between the two allowances was well compensated by the much higher allowance to K250,000 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 trip allowance, which the appellant had been receiving.***

Learned Counsel for the Respondent laboured to demonstrate the similarities between the case in casu and the **Chilambe** case, most importantly is the observation made by him that the 25% difference between 30% shift allowance the Complainant herein was getting and the 5% reduced shift allowance negotiated by the Union is certainly enough compensation for overtime claim and that it served the same purpose of compensating the Complainant.

The view of this Court is however, different in that whereas the *ratio decidendi* in the **Chilambe** case is sound, it is distinguishable to the case in casu. Firstly, that for the period January, 2012 to 31st December, 2013, whereas Clause 6.5 of the Collective Agreement changed or amended the normal shift roster from twelve hours per shift to eight hours per shift, the Complainant continued to work twelve hours per shift and continued to receive 30% of his basic pay as his shift allowance as per Pay Statements for January, 2012 to 31st December 2013 produced in the Respondent's Notice to Produce of 9th July, 2018.

It is the view of this Court that the Complainant cannot be heard to claim for overtime allowance for work done during the period 1st January, 2012 to 31st December. 2013 simply because, implementation of Clause 6.5 of Collective Agreement (2012-2013), as regards effecting the eight hours per shift was not firmly specified or made certain. Part of Clause 6.5 provides that:-

> ***The new shift system will be formulated and implemented as soon as reasonably practicable. The period for implementation is influenced by the time taken to recruit and train any additional staff that may be required. Management commits to expediting this process and expect implementation to occur by 28th February, 2013 until implementation of the reviewed shift roster, existing rosters and allowances will remain in force.***

The uncertainty in the implementation of the amended work shift roster from twelve hours per shift to eight hours per shift, was only cleared from 1st August, 2014, when the Complainant started working eight hours per shift and paid shift differential allowance at the rate of 6.5% of basic pay per month, this was under Clause 12 of the Collective Agreement for the period 1st January, 2014 to 31st December, 2016 (exhibit "***ML5***").

It must be appreciated that Clause 12 of the Collective Agreement (January, 2014 to 31st December, 2016) was effective from 1st January, 2014 and the Complainant had worked twelve hours per shift up to 31st July 2014 therefore, he had worked four (4) hours per shift above the normal shift of eight hours.

Under Clause 17.9 of the said Collective Agreement (2014-2016) and employee who is on call-out is entitled to overtime allowance.

With the implementation of Clause 6.5 of the Collective Agreement (January, 2012-December, 2013) in August, 2014 and payment of the Complainant of 6.5% of his basic salary as shift differential under Clause 12 of Collective Agreement (1st January, 2014 -31st December, 2016) clearly shows that, the over time of four hours per shift worked by the Complainant from 1st January 2014 to 31st July, 2014 cannot be ignored.

I am mindful, though that the Complainant received shift allowance at 30% of his basic pay per months during the said period 1st January, 2014 to 31st July, 2014, which he ought not to have received but overtime as per Clause 17.9 of the Collective Agreement.

I therefore, find and hold that the case in casu is distinguishable to the case of **Chilembe** referred to and relied upon by the Learned Counsel for the Respondent. Further, I am persuaded by the American case of **J.I. Case Co.** to the effect that the Complainant should benefit from the Collective Agreement as regards overtime, but for the period 1st January, 2014 to 31st July, 2014. The Complainant has therefore, proved his case for the payment of four (4) hours overtime per shift for the period 1st January, 2014 to 31st July 2014. Also being alive to the fact that the Complainant was entitled to payment of 6.5% of his basic pay per month as shift differential from 1st January, 2014 to 31st July, 2014, but received 30% instead, I hereby order and direct as follows:-

1. That the Complainant be paid by the Respondent over-time allowance for four (4) hours per shift (per day) from 1st January, 2014 to 31st July, 2014.
2. The sum to be found in (1) above to deduct there from the value of 25.5% (30% less (6/5) of the basic pay per month paid to the Complainant as Shift allowance for the period 1st January, 2014 to 31st December, 2014.
3. Should the parties fail to agree on the computation of the award herein, the same should be presented to the Learned Deputy Registrar for assessment.

I further award the Complainant interest on the amount that shall be found to be payable to him at short term commercial deposit rate approved by the Bank of Zambia from the date of the complaint to full payment.

Costs shall be to the Complainant in default of agreement to be taxed by the Court.

Informed of Right of appeal to the Court of Appeal within thirty (30) days from the date hereof.

Delivered at Solwezi this **27th** day of **July, 2018**.

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Hon. Justice D. Mulenga
JUDGE