

**IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL/LABOUR DIVISION
HOLDEN AT SOLWEZI
(LABOUR JURISDICTION)**



COMP. NO. IRD/SL/11/2018

BETWEEN:

LEONARD MWALE

COMPLAINANT

AND

KALUMBILA MINERALS LIMITED

RESPONDENT

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

For the Complainant : Mr. M. Mwachilenga with Mr. Benwa of Messrs Mumba Malila & Partners

For the Respondent : Mr. H. Pasi of Messrs Pasi Advocates

JUDGMENT

Cases referred:

1. Wilson Masautso Zulu v Avondale Housing Project (1982) Z.R 172
2. Salomon v Salomon & Co. Ltd (1897) AC 22
3. Persuasive Case of J.I. Case Co. v NLRB 2 Q USC 151 – 66 (1970)

The Complainant filed his Notice of Complaint on 10th May, 2018, with an affidavit in support. The grounds upon which the Complainant's complaint is lodged is that the Respondent terminated his employment without a valid reason, in breach of the contract and with an insufficient notice, therefore the termination was unlawful and/or wrongful. Further, that, the Complainant's

employment was terminated in a discriminatory and on the basis of his age and health status thereby making the termination unfair.

The Complainant therefore, seeks the following relief:-

- (a) An order that his employment with the Respondent was unfairly, unlawfully, and/or wrongfully terminated.
- (b) Thirty-six months' salary or such higher amount as the Court may deem fit as damages for loss of employment.
- (c) An order for payment of accrued leave days in the value of K6, 564.15.
- (d) Damages for hardship, mental torture, pain, suffering and anguish inflicted on him by the Respondent's conduct.
- (e) An order that the Respondent refunds the Complainant of all the monies paid under the house loan.
- (f) Interest on all sums due.
- (g) Any other relief the Court may deem fit.

The Complainant deposed through his affidavit in support of complaint that he is currently sixty-one (61) years and he entered into a fixed term contract of employment for twenty four months, as a Company Driver with the Respondent on 15th September, 2016, when he was at the age of sixty years. However, in November, 2017, the Respondent for no apparent reason blocked his access to the work area.

The Complainant deposed further that on or about 8th February, 2018, the Respondent served him with a Notice of retirement giving seven days' notice and 15th February, 2018 was the last day of work.

The Complainant contends that his employment was wrongfully and unlawfully terminated as there is no provision in the fixed term contract of employment for termination by way of retirement and that the reasons given for the termination are invalid, considering the fact that the Complainant had passed his retirement age when he executed the fixed term contract with the Respondent as he was not on Permanent and Pensionable contract.

That the Respondent had not paid the Complainant for his leave dues in the sum of K6, 564.15. The Complainant further, contends that the termination of his employment contract by the Respondent was discriminatory and unfair as there were other employees of the Respondent who were even older than him but were still in employment. The older employees of the Respondent are Wilson Daka who is about 68 years old in Processing Department, Moses Kaputula who is 70 years old in Support Services Department and Wilson Chikalavula who is 66 years old, in the Security Department.

The Complainant also averred that in or about March, 2015, the Respondent working with Quantum Home Loans introduced the rent to own scheme whereby the rentals paid would be treated as a contribution towards the purchase of the house. According to the Complainant he applied for the said rent to own scheme and the said application was successful, to which he made contributions up to or in excess of K55, 000.00 as per exhibit "**LM8**". That he has lost out on the rent to own a home scheme and all the monies paid because of the Respondent's wrongful, unfair and/or unlawful termination of his employment (Ref to exhibit "**LM9**").

The Complainant, deposed that the termination of his employment by the Respondent came to him and family with great shock and resulted into his suffering mental anguish and financial stress, as the said termination was made in total disregard of his conditions of employment and the law.

The Complaint is opposed by the Respondent who by its Answer filed into Court on 29th June, 2018 averred that the Complainant was employed as a Driver during the development and project phases of the Mine on two fixed term contracts for which he was paid gratuity. The Complainant was further employed by the Respondent on a two year fixed contract commencing 15th September, 2015. However, the Complainant was constantly off sick complaining of poor eye sight and ear problems until he asked to have his contract of employment terminated due to his ear illness.

The Respondent, explained that the Complainant was referred to a Medical Practitioner to be examined and to certify whether he was fit for work or not, and the Medical Practitioner's certification was that the Complainant was not fit to carry out his duties. That there were no alternative job openings for which the Complainant was qualified to undertake, therefore the only alternative was to discharge the Complainant on medical grounds, however the Respondent decided to retire him so that he may get more money as terminal benefits than he would have, on medical discharge. Therefore, the Respondent denied that it terminated the Complainant's employment without valid reason and or in breach of contract, neither did it terminate the said employment in a discriminatory manner on the basis of his old age and health status.

The Respondent also denied owing the Complainant any money in leave pay in the sum of K6,564.15, maintaining that it paid for all his accrued leave days.

The Complainant was the only witness for his case and for ease of reference he is hereinafter referred to only as "**CW1**". CW1 relied on his affidavit in support of Complaint and the exhibits produced therein.

Further in his oral testimony CW1, told the Court that whilst in the employment of the Respondent as a driver, he started experiencing an ear problem and upon being attended to at the Respondent's Clinic, he was referred to Optimal hospital in Lusaka.

CW1 testified that he on 7th December, 2017 he went to Optimal hospital in Lusaka. At Optimal hospital he was advised that he required an operation on the ear. However, CW1 refused to undergo an ear operation at Optimal hospital, because he had travelled to the said hospital in Lusaka from Kalumbila without an escort by any of his family members.

CW1 contended that he could not undergo an operation in Lusaka in the absence of any of his family members to witness the same. When CW1 returned and reported for work, he was advised by his boss one Mr. Phiri, to see the Human Resources Officer one Ms. Suzyo Chanda (RW1 herein). According to CW1, he was advised to continue staying at home until he was informed. However, he was surprised that thereafter his access to the Respondent's plant was blocked. CW1, continued to be at home but he was not advised that he had been placed on sick leave.

When referred to paragraph 7 of the Respondents affidavit in support of its Answer, which is to the effect that before, giving him a letter of retirement, CW1 was talked to and the process to terminate his employment was explained to him, CW1 told the Court that he did not understand the letter clearly as he had an ear problem.

CW1 contended that he only sat with the Respondent's Human Resources officer for a discussion only for five minutes, where he explained to the Respondent's Human Resources officer that he still had a problem as he was

not able to hear properly and could not see clearly. However, that he did not agree to the Respondent's suggestion of retiring him from employment.

CW1, testified that the Respondent referred him for treatment of his eye problem. He was treated and given spectacles. CW1, denied that he requested for his employment to be terminated, but averred that it was the Respondent's decision. It is apparent from CW1's testimony that he preferred medical discharge from employment than retirement.

CW1 also complained against the amount of K1, 000.00 which he was paid as repatriation. According to him he was entitled to K4, 000.00 as repatriation as he was employed from Solwezi. In respect of his claim for payment of leave dues, CW1 averred that the same was only paid to him at the month-end of May 2018, when he had already filed his complaint herein.

In cross-examination by Learned Counsel for the Respondent, CW1 told the Court that he wrote the letter to the Respondent, the same is exhibit "SC5" in the Respondent's affidavit in support of Answer. CW1, also admitted that he had a number of fixed term contracts of employment before he entered the one in issue in the matter herein and that he did not have any grievances with the previous contracts of employment.

When asked whether he had decided to stop work, CW1 told the Court that because of his ear problem he did a lot of thinking and reached an extent where he said that he should just quit. CW1 further told the Court that he did not know whether or not the Doctors at Mary Begg ever recommended that he should be discharged on medical grounds.

CW1 also confirmed that he lived in Kalumbila where he had signed a lease agreement and was paying rent of K1, 424.00.

The Respondent called one witness one Ms. Suzyo Mwila Chanda, its Human Resources Business partner, she is hereinafter referred to as "RW1". RW1 told the Court that the Complainant (CW1) herein was one of the employees in support services department which was under housing and camp.

RW1 testified that CW1 was sick, he had eye sight and hearing problems. CW1 was attended to at Mary Begg Clinic and for his eye sight he was referred to Vision Hire where he received spectacles. Then CW1 was referred to Lusaka for his ear problem.

It was the testimony of RW1 that when CW1 returned from Lusaka for treatment, Mary Begg placed him on sick leave during the treatment period.

RW1, explained that CW1 used to see her at her office as Human Resources Practitioner. On one of those visits, RW1 told the Court that CW1 asked her to allow him rest from work as he had been sick for a long time. CW1, wanted to stop work. Therefore according to RW1, she asked CW1 to have a formal meeting with him.

RW1 explained that since CW1's access to the plant where her office is situated, was blocked during his sick leave, a meeting took place outside the plant, at the foundation offices. At that meeting, CW1 requested that he be allowed to stop work. RW1, then requested that CW1 puts his request in writing.

According to RW1, CW1 wrote a letter where he stated that he wanted to do something else from being a driver. Because of the nature of the request, the Respondent tried to see if there was any opening in the organisation where CW1 could be redeployed. However, CW1 was only qualified as a driver.

RW1 further explained that the Respondent remained with three options to deal with CW1's problem, that is to place him on garden leave where he could have stayed home until his contract expired and paid his gratuity which was only two (2) months' pay plus wages and leave dues. The other option was medical discharge and the third was retirement.

The Respondent decided to place CW1 on retirement and pay him for the whole period he worked despite the fact that he had received gratuity for each and every previous contract he served in the past.

CW1 was paid six months basic pay, repatriation and leave dues. Whereas CW1 was paid his benefits in April, 2018, RW1 explained that leave dues were not paid because in that month the Respondent's pay roll system experienced a problem where employees' leave information was dropped, therefore, CW1 was paid his leave dues in May, 2018 which was the next month from the month in which his terminal benefits were paid.

In cross-examination by Learned Counsel for the Complainant, RW1 confirmed that at the time the Complainant entered into a Fixed Term contract of employment with the Respondent he had already passed the retirement age of 55 years.

Further, when RW1 was referred to Clause 5.1 of the said contract of employment, she confirmed that retirement is not one of the modes of ending the contract of employment.

Learned Counsel for the Complainant in cross-examination of RW1, took issue with the retirement of the Complainant, expressing the view that it was more favourable to have the Complainant discharged from employment on medical

grounds. Therefore the packages under “retirement” and medical discharge were compared.

Under Clause 15.3 of the Collective Agreement (exhibit “SC6” in the Respondent’s affidavit), a person medically discharged from employment is entitled to 4 months basic pay for an employee on fixed term contract. Further under Clause 3.3 of the same Collective Agreement there is an entitlement to Repatriation of K4, 000.00 for an employee recruited from outside Kalumbila District and those recruited within Kalumbila District, K1, 000.00.

On the other hand, retirement package at Clause 15.1 of Collective Agreement is 1 month of basic salary per each completed year of service plus an additional 1 month basic salary.

In respect of the Complainant’s claim for refund of money paid under the house loan, RW1 testified that that did not fall under the Respondent. Except that employees sign tenancy agreements with KTDC.

On being referred to exhibit “LM8” which is the letter from Quantum Homes Loans Limited, dated 30th June, 2016, RW1, explained that she only heard that there shall be offers for purchase of houses in issue. However, that the Respondent only deducted rentals from the Complainant for the house which he occupied.

Only Learned Counsel for the Respondent filed written submission on behalf of his client and I shall refer to the same as and when necessary.

The issues to be determined in this case are whether the Respondent’s termination of the Complainant’s contract of employment via retirement is wrongful, unfair and or unlawful, whether the Respondent owes the

Complainant the sum of K6,564.15 in leave accrued dues and whether the Complainant is entitled to a refund of money paid toward a house loan. Further, whether there is any relief which this Court may deem fit.

I must state at the outset that within the meaning of the Supreme Court's holding and guidance in the case of **Wilson Masautso Zulu v Avondale Housing project**¹, the onus is on the Complainant herein to establish and prove his claims against the Respondent, on the balance of probabilities.

I shall address the issues herein in the order they are made above, as follows:-

1. Wrongful, unfair and or unlawful dismissal

The claim for an order that the Complainant's termination of employment by the Respondent is wrongful, unfair and or unlawful, arises from the facts not in dispute that, the Complainant and the Respondent entered into a fixed term contract of employment for the duration of 24 months. In the said contract the Complainant was employed as a driver, which contract was to run from 15th September, 2016 to 14th September, 2018.

However, during the course of the said contract, the Complainant developed some medical problems.

He developed an ear and eye sight problem. The extent of the ear problem was that the Complainant was even referred to University Teaching Hospital, where an operation was recommended, but the Complainant declined to undergo an operation.

As regards the eye sight problem, the Complainant was referred to the eye specialist and spectacles were recommended and the same was acquired at the expense of the Respondent.

It is also uncontroverted that the Complainant who is now sixty-two years of age, was placed on sick leave and had, discussions with RW1, the Human Resources Business Partner, on the way forward with respect to his status of his employment.

Whereas, the Respondent through RW1 contends that the Complainant had expressed willingness to leave employment as he could no longer perform his function of a driver effectively and that there was a letter to that effect, the argument by the Complainant is that, retirement is not one of the modes of exits provided for under the contract of employment otherwise, the Complainant argued that he was discriminated against on account of age.

It is imperative to consider the nature of the request which was made by the Complainant, emanating from the discussion he had with RW1.

The Complainant in his letter to the Respondent (exhibit "SC5" in the Respondent's affidavit in support of Answer) clearly confirmed that his letter was a follow up to the meeting between him and the Respondent which was held at foundation offices. In that letter, the Complainant expressly confirmed that he was not able to drive a motor vehicle a job he was employed to perform due to his damaged ear. The Complainant confirmed that driving a vehicle in his health state, was not only a danger to himself but to others as well. Therefore, he requested for redeployment to other jobs.

The evidence of RW1 was that the Respondent tried to find an alternative vacancy for the Complainant, however, it was difficult to fit the Complainant in any other position because the only qualification he had is that of a driver. Therefore, the Respondent decided to terminate the Complainant's employment by way of retirement as, according to them, it was a mode which was more

beneficial than placing him on garden leave and subsequently terminating by notice, whereby the Complainant could have only been paid gratuity. Further that Medical discharge was not preferred because there was no recommendation from any registered medical practitioner.

Learned Counsel for the Respondent submitted that under Section 36 of the Employment Act Chapter 268 of the Laws of Zambia the contract of employment can be lawfully terminated by notice. However, under the amendment of the said section by, Employment (Amendment) Act, No. 15 of 2015 there is a requirement that the employer gives a valid reason for terminating the employee's contract of employment.

I agree with Learned Counsel's submission. However, it must be made clear that the International Labour standards make a very interesting observation in the Protection against **Unjustified Dismissal: - International Labour Conference – 82nd Session 1995 at page 36**, that:-

“Valid reasons for termination of employment must be connected with capacity or conduct of the worker, or based on the operational requirements of the undertaking or service..... For example, incompetence or unsatisfactory performance, which may be caused by lack of skill or natural ability, constitutes a reason for termination connected with capacity of the worker.

I am of the considered view that the health problems which inflicted the Complainant falls within the meaning of the above observation, as the same affected the natural ability of the Complainant to perform his duty as a driver. Therefore, even if the Respondent was to terminate his employment based on the said reasons, the same should have been taken to be valid at law. I therefore, do not think that the Respondent can be faulted for exercising compassion in terminating the Complainant's employment by way of retirement in order to pay him even for the period he did not deserve. For the

very reason that I have found the Respondent to have been compassionate in the manner it treated the Complainant, the issue of discrimination raised on account of age cannot be sustained.

On the whole, I find and hold that the Complainant has failed to prove on the balance of probabilities the claim that his employment was wrongly, unfairly and or unlawfully terminated by the Respondent. This claim is dismissed for lack of merit.

2. Payment of Leave Dues

There is no dispute that the claim for leave pay was discounted during oral testimonies of both the Complainant and the Respondent's witness. Exhibit "SC9" in the Respondent's affidavit in support of the Answer, shows that the Complainant was paid an amount of K6, 564.15 the same being terminal leave pay. The said terminal leave pay was paid to the Complainant through a pay statement dated 31st May, 2018. There is no doubt, however that the said amount was paid after this action was commenced on 10th May, 2018. I have no reason therefore to doubt the explanation of the Respondent for its failure to pay terminal leave dues in April, 2018 due to the failure of its pay roll system. This claim cannot therefore, stand.

3. Refund of House Loan

In respect of this claim, the only evidence the Complainant has adduced before this Court is exhibit "**LM8**" in his affidavit in support of complaint. The said exhibit is a letter from Quantum Homes Loans Limited and the tenor of the said letter is that the said entity had deducted an amount of K18, 512.00 towards the home ownership scheme. However, the same scheme was expected to be launched soon, obviously from the date of the said letter that is 30th June, 2016.

Further, the said letter spelt out certain conditions to be fulfilled for one to participate in the said home ownership scheme such as passing credit scoring, being confirmed in the position by the employer and not being subject to a shared accommodation.

Further, apart from Quantum Home Loans Limited, there is also Kalumbila Town Development Corporation Limited who by the letter dated 13th March, 2018, (exhibit "**LM9**"), notified the Complainant of the termination of tenancy agreement as from 12th April, 2018.

The facts thus far, show that there are four parties to the issue of the home ownership scheme, the employer (Kalumbila Minerals Limited, the Respondent herein), Quantum Home Loans Scheme, Kalumbila Town Development Corporation Limited and the Complainant here.

It is difficult to tie together the entities alluded to herein above considering their legal status, that each of them is a separate entity at law. The celebrated case of **Salomon v Salomon & Co. Limited**², emphasises the doctrine of corporate personality. Clearly in the case in casu all the three companies may be connected in one way or the other, but at law they are separate persons who should be sued in the individual capacity. The complaint failed on that score.

On the other hand the claim for refund of K55, 000.00, is a claim of special damages and it is a requirement of the law that special damages are not only specifically pleaded but must be specifically proved as well.

It is expected, for a claim of a refund of an amount of money being made by the Complainant to produce documentary evidence to show how much rentals he was required to pay per month and how much out of the said rentals was going

towards the purchase of the property in issue. Further, the Complainant did not produce any contract as regards the home ownership scheme.

Having analysed the evidence and facts herein, I have come to the conclusion that the Complainant's claim for refund of K55, 000.00 has no limb to stand on. The Complainant has failed to prove this claim on the balance of probabilities, the same is dismissed for lack of substance.

Any Other relief

Whereas, the Complainant did not specifically claim for payment of an amount of K3000.00 being the difference between an amount of K4, 000.00 and K1, 000.00 which was paid as repatriation, the said evidence was adduced via oral testimony of witnesses and was not objected to.

I have perused the contract of employment between the Complainant and the Respondent, Clause 5.6 of the said contract shows that repatriation for persons employed outside Solwezi is K4, 000.00 and those within Solwezi K1, 000.00. However, under Clause 33 of the Collective Agreement between NUMAW and the Respondent for the period 1st May, 2017 to 30th April, 2020, repatriation is K4, 000.00 for employees recruited outside Kalumbila District and K1, 000.00 for those recruited within Kalumbila district.

The evidence before this Court is that the Complainant was recruited from Solwezi, however, he worked and lived at Kalumbila. On termination of his employment, he has since returned to Solwezi as per address he gave to the Court. That notwithstanding, I take judicial notice of the fact that Kalumbila district is a recently declared district, not long from now it was under Solwezi district, hence the mix up in the two clauses.

Further, where there is a conflict between the individual contractual clauses and one under a collective agreement, the one in the collective agreement will prevail. The **Persuasive Case of J.I. Case Co. v NIRB³** is in point, as it held:-

Individual agreements were superseded by terms of a Collective Bargaining Agreement negotiated with a properly certified Union representative.....

Individual contract cannot be effective as a waiver of benefit to which the employee otherwise would be entitled under a Collective Agreement.

Having considered the facts, evidence and the authorities cited herein above, I have no difficulty to find and hold that the Complainant is entitled to payment of K3, 000.00 the same being the difference between the repatriation sum which he ought to have been paid, but the Respondent had only paid him K1, 000.00 instead of K4, 000.00.

The amount of K3, 000.00 payable to the Complainant by the Respondent shall attract interest at a short term commercial rate approved by the Bank of Zambia from the date of complaint to full payment.

Considering that the Complainant's main claims have not succeeded, I make no order as to costs.

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