

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 124/2021

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

GLOBAL INDUSTRIES LIMITED

APPELLANT

(FORMERLY KNOWN AS GOUROCK LIMITED)

AND

DERRICK MUWAYA

1ST RESPONDENT

KENNEDY SIAME

2ND RESPONDENT



**CORAM: KONDOLO, MAKUNGU AND NGULUBE JJA ON 15th June, 2023
and 26th June, 2023**

For the Appellant:

Mr. M.A. Mukupa, Messrs. Isaac & Partners

For the Respondent:

No appearance

J U D G M E N T

NGULUBE, JA delivered the judgment of the Court

Cases referred to:

1. *Kitwe City Council v William Ngu'ni* (2005) ZR 57
2. *Dennis Chansa and Barclays Bank Zambia – Plc SCZ Appeal No. 111 of 2011*
3. *Justin Mwenge v Examinations Council of Zambia SCZ Appeal No. 212/2015*

Legislation referred to:

1. *The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.*

1.0 INTRODUCTION

1.1 This is the appellant's appeal against a Judgment of the Honourable Mr. Justice D. Mulenga, High Court Judge, Industrial Division, that was delivered on 22nd January, 2021. By that Judgment, the Court found that the 1st respondent (1st complainant in the Court below) proved his claim for payment of gratuity for the 2015 period with interest. The Court also found that the 2nd respondent (2nd complainant in the Court below), did not prove his claim for gratuity. This appeal is against a portion of the Judgment which ordered payment of gratuity to the 1st Respondent.

2.0 THE BACKGROUND TO THE DISPUTE IN THIS APPEAL

2.1 The evidence which is common cause is that the 1st respondent was initially employed by the appellant as a general worker on 19th February 2012 and his position was later changed to that of mechanical fitter, the position in which he served until 4th

January 2019. The 2nd respondent served the appellant as a bricklayer from 5th June 2008 to 4th January 2019.

2.2 The respondents commenced an action by notice of complaint on 13th February, 2019 seeking the following reliefs:

- i. Payment of gratuity;**
- ii. Payment of long service award; and**
- iii. Interest and Costs.**

2.3 The respondents contended that they were entitled to be paid gratuity by the appellant every year but stated three years had elapsed and they were not paid. They further argued that they worked for the appellant for more than five years of unbroken service and were eligible to be paid under the Gratuity Scheme at the rate of two months' pay for each year of service in accordance with the collective agreement.

2.4 The appellant contended that the respondents were employed on various fixed term contracts and that it was not all the contracts that entitled them to gratuity. It was contended that the respondents were duly paid gratuity under the contracts that entitled them to gratuity as per conditions of employment. The appellant averred that at the time of leaving employment,

the respondents signed and accepted the said payments as full and final settlement of their entitlements.

2.5 The 1st respondent's evidence at the trial was that after three months of being employed, he was retained as a permanent employee and was placed on a fixed term contract of one year from 19th February 2012 to 18th February 2013 after which the appellant paid him gratuity. It was his evidence that at the end of that contract, he was retained on three or six months' short term contracts. His evidence was that he was not paid gratuity for three years from 19th February 2013 to December 2015.

2.6 It was his further evidence in cross examination that he had no proof of the contract of permanent employment. He stated that he had served the respondent under various fixed term contracts and that the respondent paid him gratuity for the initial one year contract as it was an express term of the contract. It was his evidence that there were other contracts under which he served that did not provide for gratuity but were provided for in the collective agreement. He stated that he became a union member in December 2015 and therefore the collective agreements which were effective prior to 2015 did not

apply to him. He admitted that he was paid gratuity for the periods April 2012 to April 2013 and 2016 to 2017 but was not paid for the period January 2013 to December 2015. He stated that he received gratuity under the contracts that provided for gratuity.

2.7 It was also the 2nd respondent's evidence in the Court below that the appellant did not pay him gratuity for the period 2015 to 2016. That the appellant informed him that the money was paid in his bank account but that he did not receive it.

2.8 It was his further evidence in cross examination that he served the appellant under various fixed contracts, some of which provided for gratuity while other contracts did not. He also stated that the contract for the period 2015 to 2016 provided for gratuity but the appellant did not pay him. He admitted that he was paid gratuity for the periods 2012 to 2013 and 2016 to 2017.

2.9 The lower Court found that the 1st respondent had proved his claim that he was entitled to gratuity as it was provided for in the contract of employment for the period January 2015 to December 2015. With regard to the 2nd respondent, the lower

Court was of the view that he had not proved his claim for payment of gratuity as the appellant had already paid him the said gratuity.

3.0 THE APPEAL

3.1 The appellant was dissatisfied with the judgment of the lower Court, and appealed to this Court advancing one ground of appeal as follows:-

1. ***“The Court below erred in law and fact when it ordered the appellant to pay the 1st respondent gratuity at the rate of 2 months’ pay with interest for the period 5th January 2015 to December 2015 at page J13 of the Judgment without taking into account that the 1st respondent had already been paid his gratuity for this period by the Appellant.”***

4.0 THE APPELLANT’S CONTENTIONS

- 4.1 The appellant filed heads of argument and list of authorities which they relied upon at the hearing of the appeal.
- 4.2 The appellant made reference to page J13 of the judgment and argued that the treatment accorded to the 2nd respondent by the Court below should have been accorded to the 1st respondent with regard to payment of gratuity. The appellant contended that the same document that the lower Court relied upon in

finding that the 2nd respondent was paid gratuity, also included the 1st respondent. It was argued that the respondents were therefore similarly circumstanced as the relevant period for the gratuity payment was for the year 2015 to 2017. It was argued that, both of the respondents respective contracts of employment were for two years. The appellant argued that each of the respondents received a cash payment for the said gratuity and ought to have been treated similarly by the lower Court. He argued further that the respondents were similarly circumstanced for the reasons that their respective contracts of employment provided for a gratuity clause at the rate of two months basic pay for each year completed and that the duration of the contracts was the same. It was also submitted that payment for gratuity was initially made through the bank but it bounced after which the respondents were paid cash through payment vouchers which were signed for. It was submitted that the lower Court ought to have found that the 1st respondent was paid gratuity for the full two year period from 2015 to 2017, just like the 2nd respondent.

4.3 It was submitted that the award of gratuity payment to the 1st respondent amounted to unjust enrichment as it would be double payment since the 1st respondent already received his payment. The appellant made reference to the case of **Kitwe City Council v William Ngu'ni**¹ where it was held that a salary or pension benefit cannot be awarded for a period not worked as this can properly be termed as unjust enrichment.

4.4 The appellant further made reference to **Section 85(6) of the Industrial and Labour Relations Act**¹ which provides that-

“An award, declaration, decision or judgment of the Court on any matter referred to it for its decision or any matter falling within its exclusive jurisdiction shall subject to section ninety-seven, be binding on the parties to the matter and on any parties affected.”

4.5 According to the appellant, the import of the above section, is that when the Court below made a finding in respect of the 2nd respondent, it also ought to have made the same finding in respect of the 1st respondent. In this regard, we were referred to the case of **Dennis Chansa and Barclays Bank Zambia Plc**² where the Supreme Court, in interpreting the provisions of Section 85(6) highlighted above, stated that the said section

gives statutory expression of the doctrine of *res judicata* where parties are similarly circumstanced.

4.6 The appellant submitted further that the payment of gratuity to the respondents was followed by a waiver and discharge where the respondents acknowledged having received their gratuity. The appellant argued that the respondents did not challenge this aspect of the evidence in the Court below.

4.7 The appellant made reference to the case of ***Justin Mwenge v Examinations Council of Zambia***³ where the Supreme Court held that findings of fact become questions of law and are liable to be set aside on appeal where the finding was perverse or made on a misapprehension of facts.

4.8 It was accordingly argued that the finding of the lower Court that the 1st respondent was not paid gratuity was contrary to the oral and documentary evidence and should be reversed.

4.9 The first respondent did not file heads of argument in this Court.

5.0 CONSIDERATION OF THE APPEAL AND DECISION OF THIS COURT

- 5.1 We have considered the evidence and the arguments along with the Judgment of the lower Court. It is not in dispute that the respondents were both entitled to gratuity as seen from their contracts of employment on pages 152 to 155 of the record of appeal. We must hasten to mention that the period in contention is 2015 to 2017 as can be seen from the said contracts of employment.
- 5.2 The question is whether the learned Judge in the lower Court was in error when he did not find that the 1st respondent was paid his gratuity for this period. The appellant argued that the respondents were similarly circumstanced and the lower Court should have accorded them the same treatment since the payment schedule on which the Court found that the 2nd respondent was paid gratuity, also included the 1st respondent. However, Section 85(6) relied on by the appellant is subject to Section 97 which provides for appeals. Therefore, it cannot be said that parties are similarly circumstanced where an appeal has been lodged.

- 5.3 The 1st respondent's evidence during the trial was that he was not paid gratuity for the period 19th February 2013 to December 2015. In order for this Court to conclude that the respondents were similarly circumstanced, they must directly be comparable in all material aspects. Particularly, this means that there must be evidence to prove that the 1st respondent also received payment in similar circumstances as the 2nd respondent.
- 5.4 In finding that the 2nd respondent was not entitled to gratuity, the lower Court considered not only the schedule of payment on pages 106 to 107 of the record of appeal, but also considered the petty cash voucher on page 177 of the said record of appeal. Suffice to state that there is no petty cash voucher which showed the 1st respondent's names on it. The lower Court found that the respondent could not be faulted for alleging that the documents are proof that the 2nd respondent was paid.
- 5.5 We have perused the schedule in question which is on page 178 of the record of appeal. It shows that it related to gratuity for contracts ending January 2017. Suffice to state that the lower Court found that the respondents' contracts in contention ran from January 2015 to January 2017 as shown on pages 152 to

155 of the record. We agree with the appellant that the schedule which the lower Court relied on to find that the 2nd respondent received his gratuity, also includes the 1st respondent as it shows that both respondents signed for having received the money.

5.6 However, it was established in cross examination (page 245 of the record of appeal) and it is not in dispute that the 1st respondent was on short term contracts during the period 2013 to 2015 and was not entitled to gratuity. This was confirmed by the said contracts on pages 54 to 59 of the record of appeal. Non-payment of gratuity for the period 2015 to 2017 was not an issue raised by 1st respondent in the Court below. We are therefore of the view that the fact that the appellant paid the 1st respondent his gratuity for the period 2015 to 2017 went unchallenged and the lower Court awarded gratuity for a period that was not contended by the 1st respondent.


5.7 We are therefore of the view that the lower Court misdirected itself when it found that the 1st respondent was not paid gratuity as it considered the wrong period of gratuity, that is 2015 to 2017.


5.8 In light of the foregoing, we reverse the lower Court's finding in this regard, as it was not supported by the evidence on record.

6.0 CONCLUSION

6.1 The net result is that the appeal is allowed and we make no order as to costs.


M.M. KONDOLO
COURT OF APPEAL JUDGE


C.K. MAKUNGU
COURT OF APPEAL JUDGE


P. C. M. NGULUBE
COURT OF APPEAL JUDGE