IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA

COMP/IRCLK/114/2022

BETWEEN:

MIKE CLEMENT KUNDA CHIKWANDA & 23 OTHERS **COMPLAINANTS**

AND

R.P AFRICA FLEET SERVICES LTD **RESPONDENT**

Coram: Chigali Mikalile, J this 24th day of May, 2024

For the Complainant: Ms. C.K. Puta – Messrs Robson Malipenga & Company

For the Respondent: Ms. S. Banda – Messrs ECB Legal Practitioners

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JUDGMENT

Legislation referred to:

1. The Minimum Wages and Conditions of Employment (Truck and Bus Drivers) Order, 2020, Statutory Instrument No. 106 of 2020
2. The Industrial and Labour Relations Act, Chapter 269
3. The Interpretation and General Provisions Act, Chapter 2
4. The Employment Code Act No. 3 of 2019

Cases referred to:

1. Albert Mupila v. Yu-wei COMP/IRCLK/222/2021
2. Zambia Consolidated Copper Mines v. Jackson Munyika Siame & 33 Others (2004) Z.R 193
3. Nawa v. Standard Chartered Bank Plc, SCZ Judgment No. 1/2011
4. Bank of Zambia v. Vortex Refrigeration Company & Dockland Construction Company Limited, Appeal No. 004/2013
5. Jacob Nyoni v. Attorney General (2001) Z.R 65
6. National Drug Company Limited & Zambia Privatisation Agency v. Mary Katongo, Appeal No. 79/2001
7. Colgate Palmolive (Z) Inc. v. Able Shemu & Others, Appeal No. 11 of 2005
8. ZCCM Investment Holdings v. Cordwell Sichimwi [2017] ZMSC 51
9. Nyambe Martin Nyambe & Others v. Konkola Copper Mines Plc (In liquidation) Appeal No. 2 of 2022
10. Bonham-Carter v. Hyde Park Hotel Ltd (1948) 65 TLR 177
11. Philip Mhango v. Dorothy Ngulube and Others (1983) ZR 61
12. Tom Chilambuka v. Mercy Touch Mission, SCZ Appeal No. 171/2012

Text referred to:

Chungu, C. & Beele, E. Labour Law in Zambia, An Introduction (2nd Edition) (2020), Juta & company (Pty) Ltd

Introduction

1. At the heart of this matter is Statutory Instrument (S.I) No. 106 of 2020. The complainants allege that they were employed as drivers by the respondent on diverse dates but between June, 2017 and December, 2020. They resigned from their employment on different dates but between December, 2021 and January,

2022 due to xenophobic attacks in South Africa. The respondent did pay them separation packages but the complainants contend that they were not paid in accordance with S.I No. 106 of 2020.

2. On its part, the respondent alleges that the complaints were paid all their dues and that S.I 106 is not applicable to them as at the time of its enactment, the complainants were operating under contracts that had not yet run their course.

3. In their notice of complaint filed on 17th February, 2022, the complainants are seeking the following reliefs:

   (a) Underpayment in line with S.I 106 of 2020

   (b) Gratuity underpayment

   (c) Leave benefits underpayment

   (d) Overtime allowance

   (e) Any other benefits the court may deem fit and costs

Affidavit in support of complaint

4. The affidavit was deposed to by the lead complainant, Mike Clement Kunda Chikwanda. He averred that the complainants were employed by the respondent on written contracts and on different dates as demonstrated by the contract exhibited as "MCKC1" and attached list exhibited as "MCKC2".

5. In December, 2021, the complainants begun experiencing difficulties as foreigners in South Africa. They were working under threat. As a

result, they decided to stop work. Exhibit "MCKC2" shows the date when each one of them handed over his respective truck.

6. After they stopped work, the respondent paid them gratuity, leave days and prorated salary. However, gratuity and leave days were underpaid. As such, after handing over the trucks, they begun claiming for underpayments. Exhibited to the affidavit as "MCKC4" is a letter written by the deponent claiming underpayments in line with SI 106 of 2020. However, all efforts to settle the issue proved futile hence this action.

Respondent's affidavit

7. The respondent filed its answer and affidavit on 1st June, 2022. The affidavit was sworn by Kaikwano Wamunyima, the respondent's Country Manager. He averred that the complainants were employed between July, 2017 and June, 2020 and in aid of this averment produced contracts of employment collectively marked "KW1".

8. According to the deponent, the complainants were rightfully paid all their dues and the respondent is not indebted to the complainants. Exhibited as "KW2" are the tabulations of payments made to all complainants.

9. On the averment of underpayments pursuant to SI 106 of 2020, the deponent attested that the S.I came into effect on 18th December, 2020 on which date the complainants were already operating under

contracts of employment which were signed between July, 2017 and June, 2020. Thus, the claim is non-applicable to the complainants. In essence, the deponent denied all claims made by the complainants.

Affidavit in reply

10. The affidavit was sworn by one of the complainants, Obin Sichula and filed on 13th July, 2022. He averred that the respondent was well aware of the happenings in South Africa and was fully aware that the complainants worked without work permits. According to the deponent, the respondent promised to have the matter sorted out as it was working on necessary documentation for the complainants' safety. The promise went unfulfilled hence the complainants were compelled to hand over the trucks as their lives were in eminent danger.

11. It was also averred that complainants neither consented nor agreed to the contents of the letters titled 'full and final settlement'. According to the deponent, some were coerced into signing the letter while other signatures were forged.

12. It was further averred that the gratuity and leave days were only calculated on one contract instead of all the contracts starting from the period the S.I came into force. According to the deponent, the Ministry of Labour wrote to the respondent requesting it to comply with the S.I and section 75 of the Employment Code Act, 2019 and to

pay gratuity and leave days in full. Exhibited to the affidavit is the letter from the labour office advising the respondent to pay terminal benefits as calculated by them.

Hearing

13. Two complainants testified on their own behalf and on behalf of the other complainants while the respondent called one witness.

14. The first witness for the complainants or CW1 was Obin Sichula who told court that he worked for the respondent from 1st May, 2018 to 14th January, 2022. It was his testimony that he stopped work when there were killings of foreigners in South Africa. Foreigners were stopped from driving South African vehicles and since he did not have a work permit, he feared for his life, hence surrendering his vehicle and all other company assets.

15. However, the terminal benefits paid him were incorrect as gratuity and leave benefits were less than what was due. According to CW1, he was not permitted to go on leave throughout his tenure of employment. Further, S.I 106 enacted by the Government in 2020 was not considered when calculating the benefits.

16. When *cross examined*, CW1 stated that he did not produce his contract as the respondent never used to avail copies to employees. He also stated that he signed the 1 year or 12 months contract freely and without any coercion. He further stated that his basic pay was K

5,000.00 and that he was receiving K 5,000.00 at the end of each contract as gratuity.

17. Still in cross, CW1 denied the assertion that he resigned. According to him, he had to stop work because of the happenings in South Africa. He was in Livingstone when he handed over the truck. He also denied the assertion that drivers went on strike before stopping work. It was his evidence that he handed over his truck on 14th January, 2022 and he was not forced to surrender it. He admitted to receiving K 9,713.30 after stopping work and that he freely received it as per document at page 276 in the respondent's bundle of documents. He, however, stated that Mr. Kaiko forced him to sign the acknowledgment of receipt as he threatened not to give him the money if he refused to sign. He admitted that he was told that the company could not pay him without signing for the money.

18. In *re-examination*, CW1 told court that he was signing yearly contracts and the terms were the same every year.

19. CW2 was Bernard Siyachibuye who told court that he started working for the respondent in September, 2017 and that he stopped on 8th December, 2021 for the same reasons given by CW1. It was his testimony that they had dragged the respondent to court because of underpayment of salary, leave days and gratuity contrary to S.I 106.

20. When *cross examined*, CW2 stated that he was receiving gratuity of 1 month's salary. Thus, if one's salary was K 5,000.00, then they would receive K 5,000.00 as gratuity. When referred to the respondent's affidavit in support of answer, CW2 admitted that his contract dated 21st March, 2019 was for 2 years. He also stated that the contract prohibited him from going on strike.

21. Still in cross, CW2 stated that he decided to stop work due to fear of happenings in South Africa. He, however, admitted that he was not in South Africa but in Zambia at the time he decided to stop work. He was in Kafue from Congo. He also admitted that his life was not in danger while he was in Zambia. It was his evidence that they agreed as drivers to stop work upon seeing the situation in South Africa. He accepted that they did not write to the company to inform them that they were stopping work. He, however, denied the assertion that they went on strike. He admitted that the work stoppage caused delay in the transportation of the assets on the trucks.

22. Further in cross examination, CW2 admitted to receiving K 9,000 as terminal benefits but that he refused to acknowledge receipt by signing as per page 6 in the respondent's bundle. He stated that he was due to receive gratuity in December, 2021. He also stated that he had issue with the 12.2 leave days as well as the loan of K 18,310.94 indicated on the document. According to CW2, his loan with the respondent was about K 9,000.00. He admitted to not

producing a document showing actual leave days. He also admitted to not writing to the respondent about stopping work.

23. When referred to the letter attached to the complainants' affidavit that he wrote to the respondent on 8th December, 2021 and copied to Ministry of Labour, CW2 admitted that the issue was underpayment and he neither complained about the loan nor leave days. He also stated that at the time he stopped work, he was serving under a contract which was supposed to end in 2021. He said he was aware that S.I 106 came into effect on 18th December, 2020. He admitted that the respondent used to pay them trip allowance but it was of varying amounts. They would receive K 1,500 or K 1,800 and at times K 2,000. In a good month, he could receive up to K 3,800.00 in allowances.

24. The respondent's witness (RW) was Eon Greeff Schlechter, the Group Human Resource Manager who filed a witness statement on 28th September, 2022. He told court that the respondent is engaged in cross boarder transportation and also undertakes human resource management and consultancy for companies that are involved in cross border fleet services. One such client is CONMAC and the complainants were employed by the respondent as drivers to undertake the provision of services to CONMAC.

25. It was his testimony that on 3rd December, 2021, the respondent was informed by the client CONMAC that drivers were taking part in

an illegal protest/strike action. The client identified Bernard Siyachibuye, Maybin Kaunga, Ophen Mweemba and Alex Simusokwe as the early instigators of the protest/strike action. These employees incited fellow drivers on a whatsapp group to join the illegal strike. No issue/concern or complaint was communicated to the respondent as per company procedure.

26. In furtherance of the strike, some drivers parked at Kafue and others opted to park in Livingstone. The drivers were informed that they were embarking on an illegal strike and advised to proceed with their trips but they refused. The client then instructed the respondent to stop all convoys coming to South Africa in order to prevent more trucks parking at Kafue.

27. The complainants did not issue any formal demands or issues of concern but insisted on maintaining the illegal stoppage. It took several weeks and the intervention of the labour office for the drivers to communicate their demands and concerns. In those weeks, the company incurred a huge financial loss due to the delays caused by the illegal strike. Page 339 of the respondent's bundle of documents itemizes the stoppage penalties incurred. The company also had to engage replacement drivers so as to avert any further financial loss and penalties from the client.

28. The respondent's position is that the illegal strike could have been avoided had the employees followed company procedures and

raised their concerns with the country manager, Mr. Kaiko Wamunyima. The respondent would have provided required feedback to the drivers in due time.

29. The main instigators, namely Simusokwe, Mweemba and Siyachibuye were each issued with a notice of suspension and notice to attend disciplinary hearing. The respondent was then informed that the drivers formally lodged a complaint at the labour office in Lusaka. The General Manager, Mr. Johann Van Aswegen travelled from South Africa to assist Mr. Wamunyima in addressing both the illegal strike and concerns at labour office. At the meeting, the drivers refused to continue driving to South Africa as cross border drivers and the Labour Commissioner assisted in ensuring that the handovers took place.

30. As regards the letters of demand by the complainants, it was the witness's evidence that the respondent looked into all payments made to each employee through the course of their employment. These included food moneys over a period of one year paid on a weekly basis, trip bonuses as well as monthly salaries paid to each driver. Each of the 23 complainants' payments made over a year were calculated and an Excel Sheet was created to reflect all payments. Pages 340 to 344 of the bundle refer.

31. According to the witness, the Excel Sheet submitted has a column for the drivers' names, how many months they served and

what was payable under S.I 106. Under the Statutory Instrument, the highest monthly amount payable to a driver is K 12,615.50. This computation takes into account the routes undertaken by the respondent's clients for delivery of goods, the number of trips per month and the nature of goods usually transported. The sheet demonstrates that what was actually paid to the drivers was more favourable than the K 12, 615.50 per month.

32. The column marked 'number of trips' shows that the drivers all undertook 9 trips during the December, 2020 to December, 2021 period. All complainants incurred standing time penalties which affected their total income as reflected at page 342 of the bundle. However, Tom Sichimwi and Boyd Sinkala serve as examples of drivers who were able to reach the 9 trips in the respective period without incurring any penalties and received a full income including allowances that exceeded the total payout under the S.I.

33. The trip bonus that can be reached and is reached by some drivers works out to K 3,400.00 per trip which translates to a yearly amount of K 30,600.00 for 9 trips as was the case with Sichimwi and Sinkala.

34. The witness further testified that the respondent's understanding was that S.I 106 was not applicable if the drivers were enjoying favourable conditions under their respective contracts of employment. The S.I provided that the wages and conditions should not be reduced. Therefore, the respondent's position was and remains that

the drivers were already enjoying more favourable conditions than what the S.I provided for and there was no need for the company to amend its payment structure.

35. In relation to payment of gratuity, it was stated that following the illegal strike, the company sought to undertake disciplinary hearings against the complainants. However, in most instances, before the same could be undertaken, the complainants herein elected to resign and sought to be paid their dues. In other instances, because of confusion created by the drivers undertaking the illegal strike, there were both disciplinary hearings and a resignation. This was the case for Ophen Mweemba who refused to attend the disciplinary hearing and elected to resign. His suspension letter and notice of disciplinary hearing are exhibited at pages 296 and 297 of the bundle. At page 299 is a Whats App screenshot of Ophen's communication.

36. In some instances (for example Obin Sichula), the respondent proceeded to agree with the respective employee to mutually separate as per page 277 of the bundle. Other employees elected not to participate in any form of formally terminating the contract of employment and merely wanted to be paid their dues.

37. In all these instances, the respondent computed what was due to the employee and all complainants were paid their leave days and gratuity. For example, page 277 of the bundle shows that Obin Sichula was paid his leave days and prorated gratuity and he signed for the payment and so did Ophen Mweemba who had a loan with the

respondent and it was deducted. Bernard Siyachibuye also had a loan which, when deducted, left him with no dues. According to the witness, some employees such as Yotham Kaya got their dues but refused to sign as shown by the document at page 10 of the bundle.

38. In conclusion, the witness testified that the respondent does not owe any of the claimants any outstanding gratuity, leave days or overtime.

39. When *cross examined*, RW stated that he is aware that there were xenophobic attacks in South Africa between 2020 and 2021. He also stated that they did inform the drivers of this through the WhatsApp group. He admitted that not all drivers had work permits to work in South Africa and neither did they have traffic registers. According to RW, they did not need those documents. Drivers' safety was ensured through security cameras installed on trucks and constant monitoring of their movements.

40. RW stated that the reasons for downing of tools as understood by him were NAPSA contributions, gratuity and xenophobic attacks. According to RW, the complainants were expected to continue working even with the attacks. They were informed that if they did not wish to continue, they were to communicate to the Operations Manager. They resigned at this point.

41. Still in cross examination, RW stated that SI 106 came into effect on 18th December, 2020. When referred to Joy Chikwekwe's contract

exhibited to the respondent's affidavit, RW stated that it was signed on 6th December, 2019 and it was for 2 years. The basic salary indicated is K 5,840.00. When shown Mr. Chikwekwe's pays lip at page 329 of the respondent's bundle, RW stated that his basic salary was K 3,000.00.

42. RW also stated that the K 3,400.00 trip bonus was only paid if the driver achieved the target. RW maintained that the respondent's conditions were more favourable than those in SI 106. For instance, the S.I provides for meal allowance of K 180.00 which was paid via pay slip but the respondent also paid food money of K 700 per week. He did admit that the pay slip at page 329 shows a monthly cross border allowance of K 2,506.50 and yet the SI provides for $25 per night.

43. On the deductions effected on the drivers for demurrages and penalties, RW stated that this was done pursuant to clause 14 of the contract. He, however, stated that he was unaware of any damages on the vehicles that were parked. RW could not respond whether or not an employee who worked long irregular hours but did not meet the target could be compensated.

44. In *re-examination*, RW testified that work permits and traffic registers were for employees employed in South Africa and the complainants did not require these documents as they were employed in Zambia. He reiterated that the strike instigations were dealt with as provided for by the disciplinary code.

Submissions

45. Counsel for the complainants submitted that as protected workers, the complainant's employment was governed by the Minimum Wages and Conditions of Employment S.I 106 of 2020 which was promulgated on 18th December, 2020. According to the SI, the complainants were entitled to a basic salary of K 3,000.00. Their evidence was that they were getting K 5,000.00 per month and therefore in compliance with the law. However, the complainants were not given $ 25 per night as cross border allowance and where also not given risk allowance for carrying an abnormal load or dangerous goods in accordance with sections 14 and 15 of the S.I.

46. According to counsel, the complainants are entitled to recover underpayments from 18th December, 2020 to the date when their respective contracts came to an end. Reference was made to the High Court case of **Albert Mupila v. Yu-wei**[1] (for persuasive purposes) where my Learned Sister, Mwenda, J held that the court will order underpayment of an employee's salary and benefits where an employer has been paying the employee below what the law prescribes.

47. Counsel then submitted on leave pay and overtime allowances. She argued that the complainants were entitled to annual leave with full pay at the rate of 2 days per month. They were also entitled to overtime pay, housing allowance and food allowance. The leave was under calculated as the complainants never went on leave throughout

their employment. Overtime was only paid in terms of bonus which also required an employee to complete his trip within a specified number of days in order to be paid.

48. Counsel noted that the complainants had not made an express claim for food, overtime and housing allowances but urged court to consider these claims in any case. Section 85A(d) of the Industrial and Labour Relations Act, Cap 269 was cited in aid.

49. On behalf of the respondent, it was submitted that the burden of proof is on the complainants and they ought to prove their claims on a balance of probabilities. Reliance was placed on Phipson on Evidence (17th edition) paragraph 6-06, page 151. Counsel argued that the complainants had failed to discharge this burden.

50. On the claim of underpayment in line with SI 106 of 2020, counsel submitted that the claim has no merit as the SI is not applicable to the complainants. This is because the complainants had consummated their employment contracts with the respondent prior to the commencement of the SI. It was submitted that where the law has been amended after the parties to an employment relationship have consummated their relationship, there are settled principles of law that guide on the effect of such changes. It is the cardinal principle of law that all statutes must be construed as operating only on the cases where or on facts which came into existence after the statutes were passed unless a retrospective effect

is clearly intended. A cursory perusal of the S.I shows no retrospective effect that was intended.

51. Reference was made to section 14(3) of the *Interpretation and General Provisions Act, Chapter 2* as well as the case of **Zambia Consolidated Copper Mines v. Jackson Munyika Siame & 33 Others**[2] in aid of the argument on the general presumption against retrospection.

52. This position, it was argued, was reiterated in the case of **Jennifer Nawa v. Standard Chartered Bank Plc**[3] and restated in **the case of Bank of Zambia v. Vortex Refrigeration Company & Dockland Construction Company Limited**[4] in which the Court of Appeal held that:

> *The law is not intended to trap the unwary or the unsuspecting by insisting that today's relations shall without more, be governed and determined on the basis of a future law, or conversely that a law that comes into effect today should generally apply to relations consummated in the previous year. That is exactly the position that the parties to these proceedings find themselves.*

53. To drive the point further, counsel also relied on the case of **Jacob Nyoni v. Attorney General**[5] in which the Supreme Court had occasion to consider the effect of amendment to the law in respect to retirement age.

54. Counsel further submitted that even if the complainants were entitled to the conditions under the S.I, the evidence shows that the

complainants were enjoying more favourable conditions than what was provided for in the S.I. Counsel referred to the excel sheets at pages 340 to 344 of the respondent's bundle which show that under the S.I, the highest monthly amount payable to a driver is K 12,615.50. This computation, it was argued, takes into account the routes undertaken by the respondent's clients for delivery of goods, the number of trips per month and the nature of goods usually transported. The worksheet, according to counsel, also shows that what was actually paid to the drivers was more favourable than the K 12,615.50 per month. The law is clear that if the conditions of employment are more favourable than that provided under the law, the more favourable conditions shall prevail.

55. On the claim for overtime underpayment, it was submitted that this claim was unfounded. Court was referred to clause 7 of the complainants' contracts of employment and it was submitted that the complainants were paid overtime in form of trip bonuses as stipulated in their respective contracts. It was contractual and the parties were bound by this agreement. The cases of **National Drug Company Limited & Zambia Privatisation Agency v. Mary Katongo**[6] and **Colgate Palmolive (Z) Inc. v. Able Shemu & Others**[7] were called in aid. In the former case, the Supreme Court espoused that:

> *"It is trite law that once the parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contract and that the role of the Court is to give efficacy to the contract*

when one party has breached it by respecting, upholding and enforcing the contract".

56. On the claim of underpayment of gratuity and leave days, it was submitted that the complainants had failed to prove that they were underpaid.

57. In conclusion, counsel urged court to dismiss the complaint with costs.

Analysis and decision

58. I have considered the affidavit and oral evidence as well as the written submissions from both sides. I remind myself that the burden of proof rests on the complainants and they ought to prove their claims on a balance of probabilities.

59. I find as a fact that the complainants were employed as truck drivers by the respondent on different dates but between June, 2017 and December, 2020. The respondent contends that they were employed between July, 2017 and June, 2020, however, a perusal of exhibit "MCKC2" and the contracts of employment produced by the respondent shows that one of the complainants, Mulele Malambo, was employed on 22nd December, 2020.

60. I also find that the complainants all decided to stop work following what they referred to as threats to their lives due to xenophobic attacks in South Africa. Some downed their tools in December, 2021

while others stopped work in January, 2022. It is common cause that the complainants were paid terminal benefits in the form of prorated salary, gratuity and leave days.

61. The complainants contend that their gratuity and leave benefits were underpaid and that they were not paid overtime, claims which, as seen above, are denied by the respondent.

62. Thus, first and foremost, I ought to determine whether or not the Minimum Wages and Conditions of Employment (Truck and Bus Drivers) Order, 2020, S.I No. 106 of 2020 is applicable to the complainants. Thereafter, I shall determine the underpayment and nonpayment claims that they make. I shall not delve into how the complainants stopped work or whether or not there was an illegal strike as these are not issues in contention.

Whether or not S.I 106 of 2020 is applicable to the complainants

63. The complainants contend that following the promulgation of S.I 106 in December, 2020, they were entitled to the benefits under that S.I which include cross border subsistence allowance, risk allowance for carrying abnormal load or dangerous goods, meal allowance, overtime and housing allowance.

64. The respondent argued that all complainants had subsisting contracts at the time the S.I came into being, hence it is not applicable to them. Various authorities were cited in aid of this argument. It was also

argued in the alternative that the complainants were receiving far better conditions than those set by the S.I.

65. I have carefully considered the opposing views on the applicability of the S.I or lack thereof. In determining this issue, I have examined the provisions of Section 14(3) of the Interpretation and General Provisions Act, Chapter 2 as well as the cases cited by the respondent. Section 14(3)(b) provides as follows:

> *(3) Where a written law repeals in whole or in part any other written law, the repeal shall not-*
>
> *(b) affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed;*

66. The above provision aptly sets the position that legislation is not intended to operate retrospectively. In the case of **Zambia Consolidated Copper Mines v. Munyika Siame** (supra) cited by the respondent, the Supreme Court had this to say:

> *We accept that it is a well settled principle of law that there is always a presumption that any legislation is not intended to operate retrospectively but prospectively and this is more also where the enactment would have prejudicial effect on vested rights... Side by side with this presumption of prospective application is the well-established principle of law that all statutes must be construed as operating only on the cases where or on facts which came into existence after the statutes were passed, unless retrospective effects are clearly intended.*

67. This was the position of the court of apex jurisdiction even in the fairly recent case of **ZCCM Investment Holdings v. Sichimwi**[8]. This essentially means that any contract of employment entered into under old law is not affected by the new law unless that new law explicitly states that it has retrospective effect.

68. The Supreme Court recently (October, 2023) had occasion to once again look into the effect of an amendment to the law on already existing contracts of employment. This was in the case of **Nyambe Martin Nyambe & Others v. Konkola Copper Mines Plc (In liquidation)**[9] whose brief facts are that the appellants were employed by the respondent on various dates from 1985. At the time of being employed, they all executed individual contracts of employment which among other things, set the age of retirement at 55 years. This was in accordance with the governing law at the time, the National Pension Scheme Act, No. 40 of 1996. The Act was amended by Act No. 7 of 2015 which defined pensionable age to mean the age of 60 years. The appellants sought to invoke the provisions of Act No. 7 of 2015 contending that they should be retired at the age of 60 in accordance with the new law as opposed to 55 years as provided for by their respective contracts. The Supreme Court held that:

1. *Parties to a contract are bound by the terms they agree between themselves which must be within the confines of the relevant laws in force at the material time of contracting.*
2. *A subsequent amendment or repeal of the law has no bearing on existing contracts unless the amendment explicitly so provides.*

3. *Amendments to the law introduced by Act No. 7 of 2015 and Act No. 19 of 2015 did not explicitly provide for retrospective application.*
4. *There having been no mutual variation of the retirement age by consent of the parties from fifty-five to sixty years, the appellants were bound to retire upon attaining age fifty-five as stipulated in their respective contracts of employment which were binding on them.*

69. The above decision affirms the position that a law that comes into effect after parties have contracted cannot apply and accrued rights based on the conditions of their contract of employment cannot be altered unless by mutual consent of the parties.

70. The net effect of the foregoing in relation to the case herein is that the complainants who had contracts existing at the time of the coming into force of S.I 106 of 2020 cannot make claims based on the S.I which has no retrospective effect.

71. A perusal of the schedule of the complainants exhibited to their affidavit as well as the contracts of employment produced by the respondent in respect of 20 of the 24 complainants reveals that all but Mulele Malambo signed their contracts before the S.I came into being. Mulele Malambo signed his contract on 22nd December, 2020, a few days after the S.I sprung to life. Thus, he is the only one that was entitled to be remunerated in accordance with the S.I up to the date of his resignation which is 12th December, 2021.

72. I note the respondent's contention that the complainants were receiving more than what was provided for in the S.I and went on to

produce excel sheets to prove this assertion (page 340 to 344 in the bundle of documents). However, a quick scrutiny of the figures on these sheets does not support this assertion. Mulele Malambo, according to the excel sheet, ought to have received K 151,386.00 for the period December, 2020 to December, 2021 under the S.I and yet when one adds up the food moneys, trip moneys and basic salary he is alleged to have received in the said period, one gets less than the K 151,386.00 computed by the respondent. Furthermore, the excel sheet does not reflect the cross border subsistence allowance of $ 25 provided for by the S.I.

73. Clearly, therefore, Mulele Malambo was underpaid and is entitled to the difference between what he was entitled to under the S.I and what he actually received in the period 22nd December, 2020 and 12th December, 2021. The learned Registrar shall assess the amount due.

74. The rest of the complainants, as found, are not entitled to claim under the S.I.

Underpayment of gratuity

75. The learned authors of *Labour Law in Zambia, An Introduction* (2 edition) state as follows at page 84:

> *Under the previous regime, payment of a gratuity was either at the employer's discretion or a benefit for certain protected groups of employees under the statutory instruments made pursuant to the Minimum Wages and Conditions of Employment Act. The*

Employment Code Act makes payment of a gratuity mandatory for all employees on long term contracts,...

(underlining mine for emphasis)

76. It will be noted that the Employment Code Act came into operation on 9th May, 2019 by virtue of S.I No. 29 of 2019. However, employers were given a transition period in which they were to align themselves with the Code Act. This was to be done, by 9th May, 2020. This means that as at that date, all employers were to begin paying gratuity in accordance with provisions of the Code Act (see section 138(2) *(fourth schedule, paragraph 5(3))*.

77. Gratuity is provided for under section 73 of the Code as follows:

> *(1) An employer shall, at the end of a long-term contract period, pay an employee gratuity at a rate of not less than twenty-five percent of the employee's basic pay earned during the contract period.*
>
> *(2) Where an employee's contract of employment is terminated in accordance with this Code, the employee shall be paid gratuity prorated in accordance with the period of employment.*

78. The contracts exhibited by the respondent indicate that the complainants were employed for one or two-year periods. Therefore, the complainants were entitled to gratuity at the rate of 25% of the basic pay earned during the contract period in accordance with section 73.

79. A perusal of the complainants' pay slips in the respondent's bundle of documents reveals that all of them were receiving a basic salary of K 3,000.00 per month. This is the figure to be used in computing gratuity.

80. The respondent is on record as stating, and its evidence was not challenged, that it was paying the complainants gratuity at the end of each contractual year and that it had paid the complainants for the year 2020. It should be noted that the complainants did not produce evidence to show that they were not paid or that they were not paid correctly for the year 2020 commencing May, 2020. The documents available to this court were produced by the respondent and they show terminal benefits allegedly paid to the complainants and these benefits include gratuity payments for the year 2021. These are exhibited to the respondent's affidavit as "KW2" as well as in the respondent's bundle of documents.

81. I have examined each of these documents to see if any of the complainants was underpaid. As for Joseph Musa Mwale, Mulele Malambo, Sande Banda, Christopher Zulu, Mike Chikwanda and Henry Chavandula, the documents show that these complainants were entitled to K 8,250.00 each as gratuity. This was for the period January to November, 2021 where they worked in full. The calculation is K 3,000 x 11 months x 25%.

82. As regards Ricky Machena, Maybin Kaunga, Martin Banda, Yotham Kaya, Alex Simusokwe, Most Mutemwa, Fred Himboole, Andrew

Mutale and Ophen Mweemba, a payment of K 3,750.00 was made to each as gratuity for the period July, to November, 2021. Exhibits collectively marked "KW2" in respect of these complainants show that they were paid gratuity earlier in the year in June, 2021 and none of them produced evidence to the contrary.

83. The terminal documents in respect of Jonathan Biyela, Fidelis Museisei and Obin Sichula show a prorated gratuity payment of K 4,500 for the period July, 2021 to December, 2021.

84. As for Joy Chikwekwe, the terminal payment document shows that he stopped work on 17th January, 2022 and was paid his gratuity in December, 2021. Mr. Chikwekwe did not rebut this evidence.

85. As for Bernard Siyachibuye, the terminal dues document in his name shows that gratuity was due in December, 2021 and that he had not received any money because he was indebted to the respondent. Under cross examination, Mr. Siyachibuye stated that his loan was about K 9,000.00 and not the K 18,310.94 indicated on the terminal dues document. However, he did not produce any evidence to support that assertion.

86. Daniel Tembo's final settlement document shows that he received K 9,000.00 as gratuity for 12 months.

87. There are no documents on record in respect to Paul Malambo and Tirza Malawo.

88. From the foregoing, it is clear that the respondent calculated gratuity using the basic salary of K 3,000.00 which all complainants were entitled to and at the rate of 25% in accordance with the Code Act. Thus, if these figures highlighted above were paid as gratuity to each of the complainants, then there was no under payment. It will be noted that most of the complainants did not sign their final settlement documents as proof of receipt of the sums indicated thereon. Nevertheless, this does not necessarily mean that they did not receive the money. In fact their affidavit shows that they were paid gratuity but only that the gratuity was underpaid.

89. In the absence of documents to show that they received less than what the respondent calculated and indicated on the final settlement documents, I am disinclined to agree with the complainants' assertion that they were underpaid.

90. In the case of **Bonham-Carter v. Hyde Park Hotel Ltd**[10] Lord Goddard said:

> *Plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and so to speak throw them at the head of the court saying "this is what I have lost, I ask you to give me these damages." They have to prove it.*

91. Similarly in casu, the complainants should have done more than simply state that the respondent had underpaid them their gratuity and expect the court to agree with them. They ought to have produced evidence in support of their claim.

92. In the circumstances, I dismiss the claim for gratuity underpayment for lacking merit.

Leave benefits underpayment

93. As with gratuity, the complainants did not produce any evidence to prove that the leave days computed by the respondent were incorrect. The witness for the respondent was not challenged on the aspect of the complainants not having gone on leave throughout their employment tenure. In fact, an examination of the letters written by the complainants to the Human Resource Manager and copied to the labour office (attached to their affidavit) reveals that the complainants did not complain about underpayment of leave days or even gratuity. They all just complained about underpayment in line with S.I 106 of 2020.

94. As earlier stated, he who alleges must prove. In the case of **Philip Mhango v. Dorothy Ngulube and Others**[11] it was held that-:

> *Any party claiming a special loss must prove that loss and do so with evidence which makes it possible for the Court to determine the value but with a fair amount of certainty. As a general rule, therefore, any shortcomings in the proof of a special loss should react against the claimant.*

95. All in all, I agree with the respondent's submission that the complainants have failed lamentably to prove their leave benefits underpayment claim. The claim is accordingly dismissed.

Nonpayment of overtime

96. This claim was not elaborated on in the affidavit in support of the complaint but mention of it was made in the affidavit in reply to the respondent's affidavit. According to the deponent, Obin Sichula, the complainants worked over and above the normal working time contrary to the law.

97. In the written submissions, counsel for the complainants indicated that the complainants had not made express claim for overtime but urged court to make an order as it deems fit.

98. The respondent's counsel submitted that the claim is unfounded. He argued that the respondent's answer at paragraph 6 shows that the complainants were paid overtime in form of trip bonuses as stipulated in the respective contracts. He went on to cite clause 7 of the contract exhibited to the complainants' affidavit in respect to Mike Chikwanda which reads:

Working Hours and Overtime

a) The employee will be required to perform their duties working hours laid down by the clients of RP Africa Fleet Services Zambia Limited which are 6:00hrs to 18hrs.

b) Working hours may be adjusted from time to time to suit the demands of the organization. Should the need arise, the employee will be expected to work overtime.

c) Due to the nature of the position the employee will be compensated for having to work irregular, long hours and on weekends in the form of trip bonuses based on the criteria determined by the company and adjusted from time to time.

99. Counsel submitted that this is consistent in all the contracts of the complainants. It was contractual and the parties were bound by this agreement.

100. I have carefully considered the evidence and arguments of each side. I agree with the submission that parties are bound by the terms of their agreement. This is settled law. However, an agreement has to be in conformity with the law in force. As highlighted earlier in the judgment, all employers were expected to conform to the Employment Code Act by 9th May, 2020. This means that the respondent was obligated to pay overtime in accordance with the Code from 9th May, 2020 and not in accordance with what was agreed on in the existing contracts.

101. The Code provides for overtime in section 75. It states (quoting only the relevant portions):

> *75. (1) Subject to subsection (2), an employer shall pay an employee who works in excess of forty-eight hours in a week, one and half times the employee's hourly rate of pay.*
> *(2) -*
> *(3) An employer shall pay an employee who works on a public holiday or on a weekly rest day, where the public holiday or weekly rest day does not form part of the employee's normal working week, double the employee's hourly rate of pay.*
> *(4) -*

102. Section 76(1) provides that an employee is entitled to a rest day of at least twenty- four consecutive hours in every period of 7 consecutive days.

103. The above provisions are clear that any work in excess of 48 hours a week and any work performed on public holidays and rest days will attract extra pay. Therefore, if it is established that the complainants worked in excess of 48 hours a week, then they could be entitled to overtime allowance as claimed.

104. As seen earlier, the complainants did not provide proof of the excess hours they worked. It was incumbent upon them to show how many excess hours each one had accumulated and that these extra hours were sanctioned by the respondent. It is after all settled that not all work done outside the normal hours is deserving of overtime pay.

105. In the case of **Tom Chilambuka v. Mercy Touch Mission**[12] the Supreme Court had this to say:

> *Coming to the claim for overtime, the law merely provides a rate of payment to an employee where such employee has actually worked outside the scheduled working hours. To be entitled to that rate, an employee must perform his work outside the scheduled hours and such work must be recognized and approved by the employer as being outside the scheduled working hours. The approval by the employer is important. For example, an employee who decides to perform the tasks assigned to him after scheduled working hours when he could have*

performed them during scheduled working hours cannot be entitled to payment of overtime allowance; in such a case the employer will be justified not to approve the claim for overtime payment.

106. The guidance of the Supreme Court is clear that only work recognized and approved by the employer beyond the normal working hours will attract overtime pay.

107. In light of the foregoing, it becomes clear that the claim must fail on two fronts. Firstly for failure by each complainant to show the excess hours he worked and secondly for failure to provide evidence that the respondent had approved all the excess hours as overtime.

Any other benefits and costs

108. The complainants did not claim food allowance and housing allowance in their notice but counsel in her submissions urged court to consider ordering the respondent to pay these allowances in it discretion. Indeed section 85A(d) of Chapter 269 does give court such discretionary powers. It reads:

Where the court finds that the complaint or application presented to it is justified and reasonable, the court shall grant such remedy as it considers just and equitable and may make any other order or award as the court may consider fit in the circumstances of the case.

109. However, a perusal of the pay slips in the respondent's bundle of documents (which were not disputed) reveals that the complainants were paid housing allowance at 30% of basic pay and meal allowance

of K 180.00 per month. I am, therefore, at a loss as to why I was implored to make this award.

110. Given the foregoing, the claim for housing and food allowances is unmeritorious and is accordingly dismissed.

111. As for costs, in this division, these are only awarded as per rule 44 of the Industrial Relations Court Rules, Cap 269. In the matter at hand, no unreasonable conduct as envisaged by rule 44 was exhibited by either party to warrant condemnation in costs.

Conclusion

112. The complainants, whose contracts of employment were entered into earlier than 18th December, 2020, were not entitled to be remunerated in accordance with S.I No. 106 of 2020 as the S.I. has no retrospective effect. Only Mulele Malambo was entitled to benefit from the S.I as his contract came into existence after the enactment of the S.I.

113. All in all, the complainants have failed to prove on a balance of probabilities that that they were underpaid in terms of gratuity, leave days or that they were entitled to payment for overtime. As such, and for the avoidance of doubt, I make the following orders:

i) The respondent shall pay Mulele Malambo any underpayments in line with S.I 106 of 2020 for the period 22nd December, 2020 to 12th December, 2021. The sum shall be assessed by the Registrar.

(ii) The sum due shall attract interest at short term bank deposit rate from the date of filing of the notice until Judgment and thereafter at current lending rate as determined by Bank of Zambia until full settlement.

(iii) All other claims are dismissed.

(iv) Each party shall bear their own costs.

Parties are informed of their right to appeal.

Delivered at Lusaka this 24th day of May, 2024

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Mwaaka Chigali Mikalile

HIGH COURT JUDGE