IN THE HIGH COURT FOR ZAMBIA **COMP NO. IRCLK/181/2021**

INDUSTRIAL RELATIONS DIVISION

HOLDEN AT LUSAKA

BETWEEN:

SIMON BANDA **1st COMPLAINANT**

NOBLE PARETS MULENGA **2nd COMPLAINANT**

AND

SABLE TRANSPORT LIMITED **RESPONDENT**

Coram: Chigali Mikalile, J this 9th day of August, 2023

For the Complainants: Mr. G. Chombo – Messrs Chombo & Partners

For the Respondent: FM Legal Practitioners

JUDGMENT

Legislation referred to

1. The Employment Act, Chapter 268
2. The Minimum Wages and Conditions of Employment Act, Chapter 276
3. The Industrial and Labour Relations Act, Chapter 269

Cases referred to

1. Clark v. Seedco Zambia Limited, Appeal No. 147/2014
2. Quicksave Ltd v Sarah Mubambe, Appeal No. 30/2016
3. Rosemary Ngorima & 10 Others v. Zambia Consolidated Copper Mines, Appeal No. 97/2000
4. Colgate Palmolive (Z) Inc v. Shemu & Others, Appeal No. 11/2005

5. Zambia Consolidated Copper Mines v. Elvis Katyamba & Others, SCZ Judgment No. 1/2006
6. Jackson Mwape & 61 Others v. ZCCM Investment Holdings Limited Plc

Introduction

1. The complainants, Simon Banda and Noble Parets Mulenga allege that they were employees of the respondent, Sable Transport Limited, for 11 years and 13 years respectively. Their contracts of employment which came to an end on 30th April, 2018 were not renewed. According to the complainants, the respondent only paid them service benefits and leave pay under the last contract ending April, 2018 and neglected to pay for the other years of service. The respondent is adamant that the complainants were paid all their dues.

2. By the Notice of Complaint filed on 1st June, 2018, the complainants are claiming the following:

a. *Service benefits for the uncomputed and unpaid years*
b. *Leave pay for the uncomputed and unpaid years*
c. *Costs and any other benefits the Court may order*

Complainants' affidavit evidence

4. The affidavit was sworn by both complainants. It was deposed that the 1st complainant was employed on 20th March, 2007 as a Radiator Repairer and his contract was terminated on the 30th April, 2018 as it was not renewed. Exhibit "SB1" refers.

5. Despite that the 1st complainant worked for a period of 11 years, the respondent only computed and paid service benefits and leave pay for two years and neglected the other 9 years. The terminal benefits payment form was exhibited as "SB2".

6. The 2nd complainant was employed on 1st July, 2005 as a Panel Beater. His contract similarly came to an end on 30th April 2018 and the respondent only computed and paid service benefits for two years. The other 11 years served were neglected. Exhibited as "NPM1" is the terminal benefit payment form.

Respondent's Answer and affidavit evidence

7. The respondent filed an answer to the complaint on 9th July, 2018 in which it was stated that the complainants are not entitled to any relief at all as their claims were frivolous and vexatious.

8. The affidavit in support was deposed to by Andrew Phiri, the respondent's Human Resource Manager. He asserted that prior to the last contracts which were from 1st April, 2016 to 30th March 2018, the complainants were working on one year fixed term contracts which are exhibited to the affidavit as "AP1" and "AP2" collectively.

9. Mr. Phiri emphasized that the complainants' contracts of employment prior to the contracts covering the period 2016 to 2018 had no provision for service benefits other than leave days accrued. As such, the complainants are not entitled to any benefits other than what was paid to them.

10. On 19th February, 2020, the respondent filed a further affidavit in support of answer in which it exhibited the complainants' leave records. These were marked as exhibits "AP1" and "AP2".

11. The respondent was again granted leave to file a further supplementary affidavit. The affidavit filed on 23rd December, 2022 deposed to by Dona Nyirenda, the respondent's Human Resource Officer exhibited to it a specimen of an approved/attested contract of employment by the labour officer. The contract was marked "DN1".

Trial course

12. The matter came up for hearing on 9th November, 2022. The respondent's advocates were not in attendance, having filed a notice to adjourn on 7th November, 2022. Counsel for the complainants applied that the Court proceeds to render a judgment based on the affidavit evidence as opposed to adjourning to a later date and risk having the matter re-allocated to another Court.

13. The Court agreed with counsel because the next available date was in July, 2023 and it meant that this court would have lost jurisdiction. It is worthy of note that this occurred before the Supreme Court decision in the case of Citibank Zambia Limited v. Suhayl Dudhia, Appeal No. 6/2022.

14. Consequently, parties were ordered to file written submissions.

15. The complainants' submissions begun by dealing with the issue of non-attestation of the contracts by the labour office. It was submitted that the contracts collectively marked "AP1" and "AP2" were the true contracts signed by the complainants. However, the said contracts were not attested by the labour office as they are not signed or stamped by the said office.

16. Mr. Chombo, counsel for the complainants, relied on the cases of **Martin Clark v. Seedco Zambia Limited**(1) and **Quicksave Ltd v. Sarah Mubambe**(2) authorities to the effect that the Minimum Wages and Conditions of Employment Act, Cap 276 must apply in instances where contracts are not attested and the complainants were not employed in management positions. In this case, the complainants were employed as radiator repairer and panel beater respectively and were not in management positions.

17. Recourse was also had to section 32 of the Employment Act, Chapter 268 which is applicable to this case (section 14(3) of the Interpretation and General Provisions Act, Cap 2 refers).

18. It was then submitted that the complainants were claiming for service benefits because their contracts were unattested. Consequently, they are entitled to a fair value of the services they rendered to the respondent. It was further contended that exhibits "SB1", "SB2" and "NPM1" did not represent a fair value of services rendered and this Court has power to asses a fair value.

19. On the claim for leave days, it was submitted that the claim was based on the provisions of the Minimum Wages and Conditions of

Employment (General) Order 2011 which requires an employer to give an employee leave at the rate of 2 days per month. It was contended that if the accrued leave days are calculated at a rate of 2 days per month, in respect of the 11 years and 13 years which the complainants served the respondent, the exhibits "SB2" and "NPM1" do not show a fair calculation of the unpaid leave days.

20. Counsel therefore urged this Court to order an assessment of a fair value of leave days accrued and unpaid in consonance with the Minimum Wages and Conditions of Employment (General) Order 2011.

21. Mr. Chombo concluded by reiterating that the service benefits and accrued leave days were not correctly computed and paid by the respondent and needed to be assessed by the Deputy Registrar. Counsel also prayed for costs.

22. In its submissions, the respondent argued that the exhibits marked "AP1" and "AP2" in the respondent's affidavit in support of answer were the true and correct contracts which were agreed to and signed by the parties herein. A perusal of these contracts shows that other than the contracts covering the period 1st April 2016 to 31st March 2018, there is no provision for gratuity. As a result, the complainants could not claim for service benefits for the period before 2016.

23. The cases of **Rosemary Ngorima & 10 others v. Zambia Consolidated Copper Mines**[3] and **Colgate Palmolive(Z) Inc v. Shemu & Others**[4] were relied on in which it was held that

parties are bound by the contracts they enter into freely and voluntarily and the said contracts should be enforced by the Courts of law.

24. The submissions then addressed the timeframe of lodging the complaint in relation to the complainants' claim. It was submitted that the complainants lodged the Notice of Complaint on 1st June, 2018 and at that time, the claims for service benefits except for the period 2016 to 2018 had become statute barred. Reference was made to section 85(3) of the Industrial and Labour Relations Act, Cap 269 which provides that:

> *The Court shall not consider a complaint or application unless the complainant or applicant presents the complaint or application to the court:*
>
> *a) Within ninety days of exhausting the administrative channels available to the complainant or applicant or*
>
> *b) Where there are no administrative channels available to the complainant or applicant, within ninety days of the occurrence of the event which gave rise to the complaint or application.*

25. Court was also referred to the case of **Zambia Consolidated Copper Mines v. Elvis Katyamba & Others**[5]. Based on these authorities, it was submitted that the claim for service benefits prior to 2016 to 2018 should have been made at the expiration of each contract of employment or within ninety days of the expiration of the contracts.

26. Thus, it was contended, the respondent could not be faulted for paying gratuity for the period 2016 to 2018 since this was what

was provided for in the contract whose claim was lodged within 90 days of the occurrence of the event leading to the Complaint.

27. It was submitted that gratuity only became compulsory with the invocation of the Employment Code bill which took effect in 2020. The respondent argued that previously it was up to the employer to provide for gratuity or not. Consequently, there was nothing in the contracts prior to the period 2016 to 2018 to compel the respondent to pay service benefits.

28. On the non-attestation of the contracts, it was submitted that the contracts were attested to by the labour office. Counsel referred to the specimen contract exhibited to the respondent's supplementary affidavit marked "DN1" which was approved by the labour officer.

29. Counsel submitted that owing to the nature of its business which includes inter alia road construction in areas where there may be no labour officer, the respondent resorts to specimen contracts which are already approved by the labour office. It was emphasised that it was not possible for each and every individual contract to be attested especially in an organisation that has thousands of employees.

30. On the leave days claim, it was contended that the complainants' contracts of employment provided for 24 days per annum at the rate of two days per month and same were correctly calculated and paid in accordance with the law. It was further contended that the record shows how the complainants utilised their leave days.

31. In addition, the evidence on record shows that the complainants were paid leave days not just for two years but cumulatively as indicated on the exhibits marked "SB1" and "SB2". It was thus submitted that there was no merit whatsoever in the complainants' arguments as they were not supported by the evidence on record.

32. In conclusion, the respondent asked that this Court dismisses the complainants' claims with costs to the respondent.

Consideration and decision

33. I have considered the Notice of Complaint, the Answer and the affidavits thereof. It is trite that in civil matters, the burden of proving the claims before Court lies on the complainant or claimant.

34. From the evidence on record, it is not in dispute that the complainants were employed by the respondent, the first complainant from 20th March 2007 to 30th April, 2018 as radiator repairer and the second complainant from 1st July 2005 to 30th April, 2018 as panel beater.

35. It is also not in dispute that at the time of termination of the employment relationship, the complainants were paid gratuity for the period 2016 to 2018. The gratuity paid was two months basic pay for the contract term which is as stated in the complainants' contracts of employment. It is a fact that the complainants were also paid leave pay.

36. On the one hand, the complainants contend that the respondent should have paid service benefits from commencement of the employment relationship up to 30th April, 2018 as opposed to just the two years considered. The respondent, on the other hand, contends that the contracts of employment between the parties prior to the last contract (covering the period 2016 to 2018) did not provide for gratuity and as such the complainants are not owed any other payments. It was argued that all accumulated leave days were paid for.

37. Thus, what I ought to determine is as follows:

(i) Whether or not the complainants are entitled to service benefits from commencement of their respective employment relationship with the respondent up to 2016.

(ii) Whether or not the complainants have not been paid their leave pay in full.

(i) *Service benefits*

38. Before I delve into this issue, it is cardinal that I address the jurisdictional issue raised by the respondent to the effect that this claim is statute barred. According to the respondent, the claim ought to have been made at the end of each contract of employment or within 90 days of the expiration of the contracts in accordance with section 85(3) of the Industrial and Labour Relations Act, Cap 269 cited above.

39. However, I do not subscribe to this argument for the reason that the complainants only became aware of the benefits they would receive upon being notified of the same. The terminal benefits payment forms are dated 30th April, 2018 therefore, it is safe to conclude that this is the date the complainants became aware of the sums computed by the respondent. That being the case, the complainants were still within time when they filed they claim on 1st June, 2018.

40. I now revert to the main issue, that is, whether the complainants are entitled to service benefits from date of employment to 2016.

41. I have carefully considered the various contracts between the 1st complainant and the respondent from 2007 to March, 2016 and between the respondent and 2nd complainant from 2005 to March, 2016. Indeed, these contracts do not provide for gratuity or end of contract benefits. As rightly submitted by the respondent, parties are bound by the terms they set out for themselves in their contracts.

42. However, the argument on behalf of the complainants is that the complainants did not get a fair value for the services they rendered in the 11 years and 13 years served. Reliance was placed on section 32 (2) to (4) of the Employment Act, Cap 268 which states:

> *(2) A contract of service which requires attestation shall be presented to a proper officer for attestation in triplicate and after attestation thereof*

one copy shall be given to the employer, one copy to the employee and one copy retained by the proper officer.

(3) If a contract of service is not attested by a proper officer within forty days of the making thereof, the employer shall cease to have any rights under such contract.

(4) An employee who is a party to a contract of service shall, in the case of failure by the employer to present the contract for attestation or refusal of a proper officer to attest the contract, be entitled to the fair value of any service rendered by him to the employer and a labour officer may, on the matter coming to his notice, assess and certify in writing the sum to which any employee is entitled under the provisions of this subsection:

Provided that a court may vary or set aside such certificate of a labour officer and itself assess the fair value of such a service.

43. On its part, the respondent argued that the complainants' contracts were attested and proof of this was a specimen contract produced in evidence. This attested specimen contract is in fact similar to the 2016 contracts signed by the complainants which contracts are not in contention. Unlike the previous contracts, the specimen contract provides for gratuity. Thus, the respondent's argument that the contracts from each complainant's date of employment up to 2016 are attested by a proper officer lacks merit and is dismissed.

44. According to the above cited provision of the law, the fact that the contracts were not attested entails that a labour officer may assess and certify the sums to which the complainants are entitled and that a court may vary or set aside such certificate of a labour officer and make an assessment itself.

45. It is cardinal to mention here that the record is devoid of an assessment by any labour officer. The Court is being called upon to make the first assessment. This in my view is unprocedural. The matter should only be escalated to Court after the labour officer has made his/her assessment. Nevertheless, I shall proceed to make a determination.

46. The question I ask myself is whether or not the complainants did not get a fair value for the services they rendered to the respondent in accordance with the above provision.

47. To answer this question, I have again examined the contracts between the parties and note that under all contracts, the complainants were getting a monthly salary which was above the minimum wage set out in the Minimum Wages and Conditions of Employment (General) Orders of 2002, 2006, 2011 and 2012.

48. As stated earlier, the complainants' contracts of employment for the period in issue did not provide for service benefits and as rightly argued by counsel for the respondent, gratuity was not mandatory during that period. I am, therefore, not satisfied that the complainants should have been paid service benefits for the period before 2016.

49. Even if one were to consider the Minimum Wages and Conditions of Employment (General) Orders and particularly the clause on retirement benefits, one would find that it is not applicable for the reason that the complainants mostly worked under one year contracts. The clause on retirement benefits requires that an

employee works for not less than 10 years and must have attained the age of 55 years.

50. All in all, I am not satisfied that the complainants were entitled to more than they got. I am not satisfied that they should have received more than their monthly remuneration for the period up to 2016. As such, this claim fails.

(ii) *Leave pay*

51. It is settled law that leave days are an accrued right and in the case of **Jackson Mwape & 61 Others v. ZCCM Investment Holdings Limited Plc**[(6)], the Supreme Court stated that it is trite that accrued rights cannot be taken away.

52. The complainants are claiming that they were paid for only two years and the respondent neglected to pay for the earlier years of employment prior to 2016. The respondent on the other hand argued that the complainants were paid in full.

53. A perusal of all the contracts of employment on record reveals that the complainants were entitled to 2 leave days per month. Meanwhile, the terminal benefits payment forms reveal that the complainants did receive leave pay. The 1st complainant received K 3,517.69 representing 68 days and the 2nd complainant was paid K 5,423.08 which represents 96 days.

54. From these payments, it is clear to see that the respondent did not just consider the last two years. Having been entitled to 2

days a month or 24 days a year, each complainant could only have accumulated 48 days in the last two years.

55. Furthermore, the respondent produced leave application forms proving that the complainants proceeded on leave on several occasions throughout their employment. The respondent also produced leave commutation forms showing that the complainants at times received cash for their leave days as opposed to proceeding on leave.

56. Clearly, therefore, the complainants have failed to prove that they are owed any leave balance. The claim, therefore, fails.

Conclusion and order

57. All in all, I find no merit in the complainants' claim. As such, the complaint is dismissed in its entirety.

58. Each party shall bear own costs and is at liberty to appeal.

Dated at Lusaka this 9th day of August, 2023

....

M.C. Mikalile

HIGH COURT JUDGE