IN THE HIGH COURT FOR ZAMBIA **COMP/IRCK/607/2020**

AT THE PRINCIPAL REGISTRY

INDUSTRIAL RELATIONS DIVISION

HOLDEN AT LUSAKA

BETWEEN:

HIGH COURT OF ZAMBIA
LUSAKA
30 APR 2024
SEAL
INDUSTRIAL RELATIONS DIVISION

FLORENCE MULENGA & 4 OTHERS **COMPLAINANTS**

AND

FWIBBA MOTEL **RESPONDENT**

Coram: Chigali Mikalile, J this 30th day of April, 2024

For the Complainants: In person

For the Respondent: Mr. H.M Munsanje - Messrs H.M Munsanje & Co

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JUDGMENT

Legislation referred to

1. The Employment Code Act No.3 of 2019

Cases referred to:

1. Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172
2. Zambia Consolidated Copper Mines Limited & Ndola Lime Company Limited v. Emmanuel Sikanyika & Others (2000) ZR 105
3. Jackson Mwape & 61 Others v. ZCCM Investments Holdings Limited Plc, SCZ Judgment No. 23/2014

Texts referred to:

1. Mwenda, W.S. & Chungu, C. A Comprehensive Guide to Employment Law in Zambia, 2021, UNZA Press
2. Chungu, C. & Beele, E. Labour Law in Zambia, An Introduction (2nd Edition) (2020), Juta & company (Pty) Ltd

Introduction

1. When changes in the management of a company occur, it often has far reaching consequences. It may cause dynamic changes to the work environment and sometimes the structure of the organisation. Some employees may be promoted whilst other may lose their employment. In casu, the respondent, when confronted with financial challenges, decided to sell the company to another organisation. The five complainants namely Florence Mulenga, Judith Makukula, Iness Silungwe, Atalia Mbewe and Chiluba Tembo filed a Notice of Complaint on the ground that they were declared redundant by the respondent. They will be referred to as 1st to 5th complainant respectively where necessary.

Complainants' affidavit evidence

2. The affidavit in support of the complaint was sworn by the 1st complainant, Florence Mulenga. She deposed that the complainants were verbally employed by the respondent on different dates in their respective capacities as indicated in exhibit "FM1".

3. She further deposed that the respondent was not paying them transport allowance despite the fact that they were living beyond the radius of 3 kilometres from the work place.

4. On 5th April 2020, the respondent unfairly and unlawfully dismissed them without paying them. The respondent also failed to pay them salary arrears for nine months from July, 2019 to March 2020. They had made follows up with the respondent for their dues, however, they kept receiving empty promises. All efforts to resolve the matter amicably proved futile.

5. As a result of the forgoing, the complainants are seeking the following reliefs:
   a. Leave days
   b. Gratuity
   c. Salary arrears
   d. Redundancy package
   e. Any other costs and damages the court may deem fit

Respondent's affidavit evidence

6. In rebuttal, the respondent filed its answer on 8th December, 2020 asserting that the complainants were not employed on contract basis, therefore, they are not entitled to be paid gratuity.

7. In terms of leave days, the respondent's position was that the complainants had exhausted their leave entitlement as they were going on leave after each year served. The respondent further stated that the complainants absconded work, consequently, they were not entitled to salary arrears as they dismissed themselves.

8. In relation to the claim for redundancy, the respondent stated that it did not declare the complainants redundant, therefore, the complainants are not entitled to a redundancy package or other payment. The respondent's position was that the complainants dismissed themselves as they stopped reporting for work.

9. In the same vein, the respondent counter claims damages for breach of clause 4.1 of the terms and conditions of service, interest, costs and any other relief the court may deem fit. In a nutshell the respondent denied all of the complainants' claims asserting that the complainants are seeking justice with dirty hands.

10. The affidavit in support of the answer was sworn by Kabinga Mwaba the respondent's Managing Director. In augmenting on the answer, Mr. Mwaba averred that the complainants were not verbally employed. He elaborated on the employment history of each one of them.

11. He deposed that the 1st complainant was initially employed on 1st June, 2006 as a Bar Lady. She was subsequently laid off on 30th April, 2007 and paid all her dues as indicated in the exhibits marked "KM1" to "KM4". The 1st complainant was re-engaged in 2010 as per exhibits "KM5" to "KM12". These are leave application forms showing that she used to go on leave.

12. With respect to the 2nd complainant, Mr. Mwaba attested that she was engaged as a Chef on 21st October, 2011 as per contract exhibited as "KM13". In like manner, this complainant used to go on leave after each year served as evidenced by exhibits "KM14" to "KM20".

13. As regards the 3rd complainant, he deposed that she was originally engaged on 15th September, 2010 and subsequently resigned on 28th February, 2014. She was paid all her dues. Exhibited as "KM21" is her application for employment letter dated 15th September, 2010, "KM22" is her contract of employment dated 21st October, 2011 and "KM23" is her resignation letter dated 28th February, 2014. On 1st December 2014, she was re-engaged as Assistant to the Executive Director/Management Secretary as per exhibit "KM24". Mr. Mwaba added that this complainant also used to go on leave for every year served as per leave application forms exhibited as "KM25" to "KM27".

14. With respect to the 4th complainant, Mr. Mwaba attested that she was engaged as a house keeper on 8th May, 2002 as per exhibit "KM28". Exhibits 29 and 30 show in-house transfers. On 1st July, 2006, she was re-engaged as Head Chef as per contract exhibited as "KM31". He added that this complainant also used to go on leave after every year served as evidenced by leave forms exhibited as "KM32" to "KM40".

15. Mr. Mwaba deposed that the 5th complainant was engaged on 28th April, 2017 as a Receptionist. Exhibited as "KM41 is her application letter. He added that she also used to go on leave for every year served as seen in the leave form also exhibited as "KM41".

16. It was Mr. Mwaba's further averment that the terms and conditions of service were willingly signed for by the respondent and the complainants. The said conditions did not provide for transport

allowance. The complainants, therefore, could not raise an issue which was not contained in the terms and conditions of employment.

17. The thrust of his deposition was that the complainants were not employed on contract basis. It was emphasised that they were taking leave after each year of service and that they absconded from work or quit on their own without giving the respondent notice. In support of this averment are minutes of the meeting with the employees held on 2nd April, 2020. According to Mr. Mwaba, the complainants are not entitled to any of the claims before Court.

18. In a further affidavit filed on 20th September, 2023, Mr. Mwaba deposed that the shares of the respondent company were sold to Dr. J. Okeke and the company continued to operate under the new management. The complainants and other employees continue to work for the respondent under new management.

19. According to Mr. Mwaba, the new and old management agreed that salary arrears of the employees which accrued under the old management will be deducted from proceeds of the sale of shares of the respondent company and the new management would pay the employees. Exhibited as "KM1" is a copy of the contract of sale.

20. The respondent admits owing the complainants as follows: Florence Mulenga - K 6,962.50; Judith Mulenga – K 6,470.00; Iness Silungwe – K 6,536.00; Atalia Mbewe – K 6,535.00; and Chiluba Tembo – K 4,767.00. Exhibited as "KM2" is an extract of the respondent's salary arrears schedule showing these figures.

Trial Course

21. Two complainants took to the stand but only the lead the complainant testified. The second complainant simply adopted the first complainant's evidence. At the close of the complainants' case, the matter was adjourned as the respondent's witness was reported to be unwell on that date. At the next trial date, he was a no show again and no reason was advanced for his absence. Counsel for the respondent was absent too. The matter was accordingly adjourned for judgment.

22. CW1 was Florence Mulenga, the lead complainant who testified that the complainants worked for the respondent but were not paid salary arrears of 9 months from July 2019 to May 2020. Elaborating further on the salary arrears, CW1 told court that Atalia Mbewe and Judith Makukula both had a monthly salary of K 1,615.00 and are, therefore, claiming K 14,535.00 each for the 9 months. Iness Silungwe, whose monthly salary was K 1,614.00 per month is claiming K14,526.00. Chiluba Tembo whose salary was K 1,425.00 is claiming K 12,825.00 as arrears for 9 months. Florence Mulenga, who used to receive K 1,662.50 monthly, was claiming K14, 962.50 as total arrears for 9 months.

23. On leave days, CW1 acknowledged that the complainants used to go on leave but that they all had balances which were yet to be paid. It was her evidence that she is claiming 46 days' pay, Iness Silungwe is claiming 17 leave days, Chiluba Tembo is claiming 36 days, Judith Makukula is claiming 46 days while Atalia Mbewe is claiming 62 days.

24. Further, they are claiming redundancy packages as the company was sold.

25. When cross examined by Counsel for the respondent, Mr. Munsanje, CW1 clarified that she was verbally employed by the respondent on 12th February, 2006 but only signed a written contract in August 2007. She was, however, shown a contract marked "KM2" dated 1st June, 2006 that she signed. She said she was basing her claims on the signed contract. She clarified that they had not exhibited their respective contracts of employment because they were not availed copies. She further acknowledged that the complainants had not exhibited their pay slips. She nevertheless beseeched this court to assist the complainants in accordance with what they had exhibited before Court which is basically the list of complainants showing their respective positions and duration of employment.

26. When referred to her leave forms, CW1 clarified that she did go on leave but that she had remaining days. She referred to "KM7" which depicts that she was entitled to 28 days but she only got two days. She further referred to exhibit "KM8" showing that she was entitled to 78 days but she was forced to go on leave for 60 days. This left her with a balance of 18 days. She explained that the complainants were unable to provide the details as some of the relevant documents were with the respondent.

27. CW1 vehemently denied the assertion that the complainants just stopped work. She denied resigning saying she stopped work when the company was sold on 5th April, 2020. It was her evidence that the

complainants were called and told that there was no money to pay them. Consequently, the respondent had no option but to sell the company. She further clarified that the complainants were advised to stop reporting for work as salary arrears owed to them would continue to accumulate. She added that the complainants were asked to help find a buyer for the company.

28. She further stated that after the complainants went to the labour office, they were advised that they would be paid after the company was sold.

29. In re-examination, CW1 told court that she made an error in relation to Iness. She said Iness is owed 56 leave days and not 17 as earlier stated.

30. CW2 was Iness Silungwe who simply informed the Court that the other complainants would rely on the evidence and the documents produced by CW1. There was no cross or re-examination of this witness.

Analysis and decision

31. I have carefully considered the evidence from both sides. It is not in dispute that the complainants were employed by the respondent on various dates and in various capacities. The respondent asserts in one breath that the complainants were not verbally employed and in another breath, states that they were not employed on contract. Clearly, the respondent is operating under a misapprehension of facts.

32. An employee is employed either verbally or in writing. When one agrees to perform certain duties for another and the latter agrees to pay for the performance of those duties, a contract of employment is entered into

between the parties. When reduced in writing, it becomes a written contract of employment.

33. The respondent has exhibited documents marked "KM2", "KM13", "KM22" and "KM31" which documents show that the respondent entered into employment agreements with the complainants. The said documents provide for terms and conditions of employment. Clearly, therefore, the 1st to 4th complainants were employed under written contracts.

34. I note that the 5th complainant's contract is not on record but that is not to say she was not employed under a contract. The written contract could have been inadvertently left out by the respondent or it could be that she was employed verbally. Whatever the case, however, I find that the 5th complainant was a legitimate employee of the respondent.

35. I also find as a fact that the complainants' employment determined at some point. On the one hand, the complainants claim that they were advised to stop reporting for work as the respondent was no longer in a position to pay their wages and the company was eventually sold. The respondent, on the other hand, alleges that the respondent company was sold as a going concern and continued to operate under new management, therefore, there was no redundancy.

36. From the foregoing, the issues for determination as I see them are twofold:

    (1) The mode of exit of the complainants from the respondent company

(2) *Whether or not the complainants are entitled to the payments claimed namely redundancy package, leave benefits, gratuity and salary arrears.*

37. In determining the forgoing, I am cognisant of the fact that a claimant must prove their case as has been articulated in a number of authorities. In the case of **Wilson Masauso Zulu v. Avondale Housing Project Limited**[1], the Supreme Course expressed itself as follows:

> *I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case.*

<u>Mode of exit</u>

38. At the heart of the controversy between the parties is the mode of exit from employment. The complainants have taken the position that their employment was terminated by way of redundancy. The nub of the complainants' averment was that on 5th April, 2020 the respondent unlawfully dismissed them without paying them. The respondent's position is that the complainants were not declared redundant but that they decided to abscond from work of their own accord.

39. According to the respondent's further affidavit in opposition to the complaint, when the respondent company was sold, it continued to operate under new management. The respondent was adamant that

the changes that took place did not result in the complainants being declared redundant.

40. I have carefully considered the opposing arguments. In resolving the conflict, I have carefully examined the contract of sale exhibited to the respondent's further affidavit and note that the respondent company was indeed sold as a going concern to a limited company called Good Living Investment. This was on 1st February, 2021 and not 5th April, 2020 as submitted by the complainants. In the absence of concrete evidence to the contrary, it is safe to conclude that the respondent company was operational at the time the complainants stopped work on 5th April, 2020.

41. In the case of **Zambia Consolidated Copper Mines Limited & Ndola Lime Company Limited v. Emmanuel Sikanyika & Others**(2) it was held inter alia that *"change of ownership of shares cannot result in the corporate entity becoming a new employer; it will be still the same employer and will be bound by the contracts of employment"*

42. According to section 55 the Employment Code, termination by redundancy occurs when the employer itself terminates the employment contract. In this instance, the minutes of the meeting of 2nd April, 2020 ("KM42") whose authenticity was not challenged, show that the respondent tried to engage the complainants on the issue of outstanding arrears. The complainants, however, were disenchanted with the solution suggested by the respondent and opted to quit or resign from their employment. This was despite pleas from management not to quit.

43. Resignation, according to the learned authors Mwenda and Chungu in their book 'A Comprehensive Guide to Employment Law in Zambia' at page 267 is:

> *"the voluntary and unilateral termination of the contract of employment by an employee by either giving the required notice specified in the contract of employment or payment of money to the employer in lieu of notice."*

44. From the foregoing, it is clear to see that the respondent did not terminate the complainants' employment. The complainants stopped work long before there was even a change in shareholding of the company and as seen from the Sikanyika case cited above, change in shareholding does not terminate employees' contracts. Thus, even if the complainants had not taken the step to stop reporting for work, mere change in shareholding would not have amounted to a redundancy situation.

45. Quite clearly, therefore, the mode of separation from the respondent was resignation effective 5th April, 2020 and not redundancy. This resignation was accepted by the respondent as indicated in the exhibited minutes. The claim for a redundancy package is therefore dismissed as it is devoid of merit.

Leave days

46. The lead complainant testified that the complainants were owed leave benefits. The thrust of the respondent's rebuttal to this claim was that the complainants used to go on leave every year. The respondent exhibited leave forms for each of the complainants as evidence of this fact. CW1, while agreeing that that assertion was true maintained that

there were balances left as follows: 46, 46, 56, 62 and 36 leave days respectively. It is worth mentioning here that the complainants did not produce any documents to support the balances claimed.

47. It is trite that an employee is entitled to leave days as per statute and as emphasised in the case of **Jackson Mwape & 61 Others v. ZCCM Investments Holdings Limited PLC**(3). The Supreme Court in that case underscored that accrued rights cannot be taken away.

48. Perusal of the leave forms exhibited by the respondent indeed reveals that the complainants went on leave from time to time. Significantly, the leave forms, (particularly the last one for each complainant) also reveal that the complainants had outstanding leave balances. To exemplify this using the 1st complainant, exhibit "KM12" reveals that she had a balance of 30 days as at 15th August, 2019 and in the absence of evidence to the contrary, the conclusion is that that was the last time she went on leave. Thus, by the date of resignation, which is 5th April, 2020, she had more than 30 days outstanding.

49. I am satisfied from the final leave form in respect of each complainant that all complainants are entitled to the residue of their leave days. The leave benefits shall be computed by the learned Registrar in accordance with the formular in the fifth schedule of the Act.

Gratuity

50. In order to determine whether the complainants were entitled to gratuity, it is cardinal to examine their conditions of employment as well

as the law. Payment of gratuity was made mandatory with the enactment of the Employment Code Act in May, 2019.

51. The learned authors of Labour Law in Zambia, An Introduction 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,...*

52. Clearly, therefore, the complainants would only be entitled to gratuity prior to the coming into force of the Employment Code Act if their conditions of service provided for such a payment. Further, it is trite that employers were given a transition period of one year. This means that they were all obligated to become compliant by 9th May, 2020.

53. The contracts of employment produced by the respondent, which contracts were not disputed by the complainants, did not provide for gratuity. As established, the complainants resigned on 5th April, 2020 and since no change had been effected to their contracts by that date, then they have no basis for claiming gratuity. The claim, therefore, fails.

54. Similarly, the contracts did not provide for transport allowance. As such, I am disinclined to find that the complainants are entitled to the allowance.

Salary Arrears

55. The complainants claim that the respondent owes them salary arrears for 9 months from July, 2019 to March 2020 as follows: 1st complainant - K14,962.50; 2nd complainant - K14,535.00; 3rd complainant - K14,526.00, 4th complainant - K14,535.00 and the 5th Complainant - K12,825.00. The respondent admitted to owing arrears as per salary arrears schedule exhibited to the further affidavit. This document shows arrears of K 6,962.50; K 6,470.00; K 6,536.00; K 6,535.00 and; K 4,767.00 respectively.

56. I must state here that I have my misgivings regarding the salary schedule produced by the respondent. Firstly, the lead complainant testified on what each complainant was receiving monthly. This evidence was not in any way rebutted. When one divides the amounts stated on the schedule by the salary that each complainant received, one gets odd figures. For instance, for Iness Silungwe, her salary was said to be K 1,614.00. When the arrears stated of K 6,536.00 are divided by the monthly salary of K 1,614.00, one gets 4.05 months. There is no explanation for this uneven figure. If the arrears were for 4 months, the amount owed should have been K 6,456.00.

57. Secondly, the document is devoid of signatures for the complainants to signify acceptance that those were the salary arrears as at 5th April, 2020 in respect of each complainant. Lastly, this document was produced after the complainants had testified, therefore they were not given an opportunity to challenge it.

58. In the circumstances, I am disinclined to accept the salary schedule as the true reflection of the arrears. I, therefore, uphold the 9 months' salary claimed by the complainants. The question that arises then is, who is to pay these arrears?

59. The respondent alleged in paragraph 5 of the further affidavit that the salary arrears for the complainants would be deducted from the proceeds of the sale of the company and that the new management would be liable to pay. To buttress this argument, reliance was placed on the contract of sale. It is noteworthy, that clause 16 of the said contract is categorical and provides that all the debts, losses and liabilities which the respondent accumulated prior to the sale are the respondent's responsibility and have nothing to do with Good Living Investments Limited.

60. The cumulative effect of the forgoing evidence is that the respondent cannot avoid liability for the salary arrears as it is bound by the contracts between the parties. The averment that the complainants are not owed salary arrears because they absconded from work is not supported by the law. As stated in the Jackson Mwape case cited above, accrued rights cannot be taken away. Salary arrears are accrued rights which cannot be taken away from the complainants just because they resigned.

Counterclaim

61. The respondent is seeking damages for breach of clause 4.1 of the contract.

62. I have perused clause 4.1 of exhibits "KM2", "KM13", "KM22", "KM31", contracts of employment in respect of the 1st to the 4th complainants. This is a clause on notice to terminate while the employee is serving probation. It is common cause that none of the complainants was on probation. Thus essentially, the clause in issue is 4.2 which reads as follows in part:

> *After probation notice to terminate employment will be one month on either side...*

63. From the foregoing clause, it is clear that the respondent is claiming damages for failure by the complainants to give the respondent one month's notice as provided for by the contract. Indeed by resigning with immediate effect, the complainants failed to adhere to this term of the contract on notice. This ordinarily would entitle the respondent to damages for breach.

64. However, the evidence has established that the major reason why the complainants resigned was because they were not being paid their salaries as and when due. As found, the respondent was lagging behind by 9 months. Thus, the respondent was itself in breach of clause 3 of the complainants' contracts which obligated the respondent to pay a salary each and every month.

65. In the circumstances, I am disinclined to award the respondent any damages.

Conclusion and orders

66. The complainants have proved on a balance of probabilities that they are entitled to salary arrears for a period of 9 months and have also proven that they are entitled to leave benefits. The claims for redundancy payment and gratuity are unsuccessful as I have found that there was no redundancy in this case and that there is no basis for payment of gratuity.

67. The amounts due to each complainant shall be assessed by the Registrar.

68. Each party shall bear their own costs.

Parties are informed of their right to appeal.

Date at Lusaka this 30th day of April, 2024

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M.C Mikalile

HIGH COURT JUDGE