IN THE HIGH COURT FOR ZAMBIA **COMP No. IRC LK/332/2019**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

BETWEEN:

HIGH COURT OF ZAMBIA
LUSAKA
25 JUL 2023
SEAL
INDUSTRIAL RELATIONS DIVISION

CHINGATI MSISKA **1st COMPLAINANT**

(Suing in his capacity as Secretary General of Zambia Union of Financial Institute of Allied workers)

GEORGE CHAINDA AND 35 OTHERS **2nd COMPLAINANT**

AND

YESCASH ZAMBIA LIMITED **RESPONDENT**

Coram: Chigali Mikalile, J this 25th day of July, 2023

For the Complainants: Mr. V. Mapulanga - Messrs M.B Christopher Legal Practitioners

For the Respondent: Mr. L. Yeta - Messrs Central Chambers

JUDGMENT

Legislation referred to

1. The Employment Code Act No.3 of 2019
2. The Industrial Relations Court Rules, Cap 269

Cases referred to:

1. Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172
2. Sobek Lodges Limited v. Zambia Wildlife Authority (2011) 2 ZR 235
3. Frank Malichupa & Others v. Tanzania Zambia Railways (2008) 2 ZR 112.
4. National Milling Corporation v. Silwamba, Appeal No. 171/2015
5. Chilanga Cement Plc v. Kasote Singogo (2009) ZR 122

Works referred to

1. Garner. Black's Law Dictionary (8th Edition): Thompson West, 2004, USA
2. N.M. Selwyn, Selwyn's Law of Employment (14th Edition) 2006, Oxford University Press

Introduction

1. By an amended Notice of Complaint filed on 15th March, 2021, the complainants, the General Secretary of the Zambia Union of Financial Institutions and Allied Workers (ZUFIAW) and 36 employees of the respondent, are seeking the following reliefs:-

    i. *An order to the effect that the purported redundancies in respect of the 36 complainants are null and void for being in violation of clause 5 Appendix A of the Recognition Agreement entered into and signed by the parties to negotiate and agree on redundancy packages payable to the affected employees*

ii. *An order directing the respondent to negotiate and mutually agree on redundancy packages payable to the 36 complainants.*

iii. *An order directing the respondent to pay full salaries to the 36 complainants from the purported date of redundancy to date of conclusion of negotiations and subsequent full payments of negotiated redundancy packages.*

iv. *Interest on the amounts due at current bank lending rate.*

v. *Any other relief the Court may deem fit*

vi. *Costs*

Affidavit evidence

3. The affidavit in support of the notice of complaint was sworn by Chingati Msiska, the 1st complainant and George Chainda, one of the employees (the 2nd complainants).

4. It was deposed that the 2nd complainants have been employees of the respondent, Yescash Zambia Limited trading as Express Credit Zambia, employed on diverse dates in 2018 as sales champions.

5. On or about 17th December, 2018, the respondent and the complainants entered into a Recognition Agreement wherein the respondent recognized the 1st complainant as the sole representative and exclusive bargaining agent for the eligible employees.

6. Sometime in May 2019, the 1st complainant, in his capacity as General Secretary received an undated letter from the respondent notifying the trade union of impending redundancies in respect of the 2nd complainants. The letter is exhibited to the affidavit as "CM1".

7. Subsequently, on or about 31st May, 2019, the 1st complainant wrote a letter (exhibit "CM2") to the respondent requesting for the date and venue for the negotiations over the redundancy packages for the affected unionized members of staff.

8. On 11th June, 2019, the 1st complainant received an undated letter (exhibited as "CM3") from the respondent suggesting the venue and date for a meeting. The 1st complainant responded to the letter (exhibited as "CM4") and suggested an alternative date for the meeting. By a letter dated 13th June, 2019 (marked "CM5") the respondent rescheduled the meeting to 21st June, 2019.

9. On 3rd July, 2019, the 1st complainant communicated the proposal for redundancy package negotiations with the respondent. A copy of the letter is exhibited as "CM6".

10. It was attested that before the parties could meet to negotiate details of the redundancy and packages payable, the respondent proceeded, in total disregard of procedure, to issue an internal memo (exhibit "CM7") addressed to all the unionized

members of staff wherein the respondent informed the 2nd complainants about the impending redundancies.

11. On 24th July, the 1st complainant wrote to the respondent (exhibit "CM8") and also to the Labour Commissioner earlier on 12th July, 2019 (exhibit "CM9") expressing concern regarding the procedure the respondent was adopting in handling the redundancies before negotiations could commence.

12. On 24th July, 2019, the office of the Labour Commissioner wrote to both the 1st complainant and the respondent confirming receipt of the complaint on handling the redundancy and further called for a meeting on 31st July, 2019. The letter is exhibited as "CM10". According to the 1st complainant, on 31st July, 2019, the respondent and the 1st complainant met to commence the negotiations in respect of the redundancy packages payable. At the said meeting the respondent insisted on paying the redundancy package by 2 months' salary per year as indicated in the exhibit marked "CM11".

13. The meeting of 31st July was as a result of the guidance by the Labour Commissioner that the parties should sit and negotiate the redundancy packages payable to the unionized workers before effecting redundancies. The confirmation letter is exhibited as "CM12".

14. Notwithstanding this guidance, the respondent proceeded to effect payment of redundancy packages by crediting the accounts of the 2nd complainants as noted in the letter of complaint to the labour office (exhibit "CM13"). In addition, the respondent issued pay slips to the employees reflecting redundancy payments with a number of anomalies. Exhibited as "CM14" are some of the pay slips.

15. The respondent relied on the answer and affidavit filed on 30th December, 2019. The affidavit was sworn by Simon Mwambazi, the respondent's Human Resources Manager.

16. Mr. Mwambazi deposed that the respondent had been experiencing an economic downturn which led to a weakened financial position and challenges with liquidity flow.

17. In February, 2019, the Bank of Zambia (BOZ), conducted its regulatory compliance inspection on the respondent and issued a final examination report wherein the respondent was declared insolvent and was directed to put measures in place to improve its financial position. Exhibited to the affidavit and marked "SM1" is the letter enclosing the final examination report.

18. Following the directive from BOZ, the respondent held a number of meetings and explored several solutions, including but not limited to offering the employees alternative employment or agency contracts.

19. Later in May, 2019, the respondent resolved to reduce the number of sales champions required to carry out particular kind of work in some selected branches.

20. Subsequently, on 27th May, 2019, the respondent delivered a letter (exhibited as "SM2") to the Ministry of Labour giving 60 days' notice to the authorized officer, of the respondent's intention to terminate employees by reason of redundancy. The notice highlighted reasons for the termination, the number of categories of employees likely to be affected, the period within which the redundancy would be effected and the nature of the redundancy package. A copy of the letter of notice (exhibit "SM3") was also delivered to the 1st complainant.

21. On 29th May 2019, the 1st complainant met with the management of the respondent to discuss measures to be taken to minimize the adverse effects of the impending redundancy. During the meeting, the respondent was notified by the 1st complainant of the need to discuss the quantum of the redundancy package for the 2nd complainants in accordance with the recognition agreement between the parties dated 17th December, 2018. The Recognition Agreement is exhibited as "SM4".

22. It was deposed that between 31st May, 2019 and 13th June, 2019, there was an exchange of correspondence between the 1st

complainant and the respondent relating to the negotiations of the redundancy. The letters are exhibited as "SM5" to "SM8".

23. Owing to the delay and the failure by the 1st complainant in responding to the respondent's letter dated 13th June ("SM8"), the respondent through a letter dated 27th June, 2019 ("SM9") gave another 30 days' notice of the impending redundancy. Additionally, the respondent advised the 1st complainant of its availability for further negotiations to avert the redundancy.

24. On 3rd July, 2019, the 1st complainant responded to "SM9" and proposed a redundancy package of 4.7 months for each year served, a 50% loan write off and one year full medical cover. The proposed redundancy package letter is exhibited as "SM10".

25. On 10th July, 2019, the respondent wrote ("SM11") to the 1st complainant advising on its inability to pay the 2nd complainants the proposed redundancy package and enclosed its financial statements (exhibited as "SM12") to allow the 1st complainant to independently assess the respondent's financial capacity.

26. Mr. Mwambazi attested that following the disclosure of the respondent's financial position, the 1st Complainant neglected or refused to respond to the respondent. Instead, the 1st complainant proceeded to report the respondent to the Ministry of Labour for allegedly mishandling the redundancy process as evidenced by the exhibit marked "SM13".

27. Owing to its weakened financial position, the respondent, through a letter dated 17th July, 2019 ("SM14") applied to the Ministry of Labour for an exemption from paying the redundancy packages as a lumpsum. Further, the respondent wrote another letter dated 19th July, 2019 ("SM15"), to the Ministry of Labour clearly setting out the procedure that it had employed when effecting the impending redundancies.

28. Contrary to the assertions by the complainants, in pursuance of the directive from the Principal Labour Commissioner, the 1st complainant and the respondent held a meeting on 31st July, 2019. However, the parties could not agree on the quantum of the redundancy package.

29. Following the meeting, the respondent wrote to the 1st complainant on 2nd August, 2019 (exhibit "SM16") restating its final position with respect to the quantum of the redundancy package for the 2nd complainants.

30. According to Mr. Mwambazi, contrary to the complainants' assertions, the respondent only effected payments of the redundancy packages to the 2nd complainants after holding a negotiation meeting with the 1st Complainant as prescribed by law and in compliance with the directive of the Principal Labour Officer.

31. It was asserted that the respondent duly followed the redundancy procedure as prescribed by law and the contracts of employment by notifying the complainants and the Labour Commissioner of the pending redundancies and affording the 1st complainant an opportunity to consult on measures to mitigate the effect of the redundancies.

32. In conclusion, it was deposed that the complainants had received their redundancy packages and other contractual benefits in accordance with the law and therefore not entitled to the claims prayed for.

Evidence at the hearing

33. Two witnesses testified in total, one for the complainants and one for the respondent.

34. The complainants' witness was Danny Lyempe who relied entirely on the affidavit evidence before Court.

35. In *cross examination*, Mr. Lyempe clarified that the complainants were asking the Court to declare the redundancy null and void because of clause 5 appendix A of the recognition agreement. He stated that that they did receive a memorandum on 23rd July, 2019 informing them about the redundancy. He, however, conceded that the respondent did not have to notify them but the 1st complainant, their union representative.

36. Still in cross examination, Mr. Lyempe stated that the complainants' contention was that they did not receive the correct packages. To exemplify this, the witness informed Court that his package should have been K 9,300.00 but his pay slip was showing K 6,200.00. He, however, admitted that he had no document to substantiate this allegation. He acknowledged that he signed a contract on 5th November, 2018 and only worked for the respondent for 7 months. He conceded that 7 months was not a full year.

37. Mr. Lyempe stated that when the bargaining agreement does not provide for a particular situation, resort was to be had to the law of the land. He disputed the assertion that there were talks between the respondent and the representative of the complainants.

38. When referred to exhibits "SM5 to SM9", Mr. Lyempe admitted that it was correspondence between the parties and an indication that parties were in talks. He then conceded that section 55(2)(b) of the Employment Code Act had been satisfied.

39. When referred to section 55(3) of the Employment Code, the witness admitted that the law does provide that where there is no agreement, the minimum shall apply which is 2 months' pay for each year served.

40. Further in cross examination, the witness acknowledged that the respondent was within its rights to say no to a package they could not afford to pay. He confirmed that there was no agreement between the parties and that the respondent went ahead to pay the complainants 2 months for each year served. He declined to confirm that the 3rd claim ought to fall off since redundancy was in accordance with the law.

41. In *re-examination* Mr. Lyempe reiterated that there was no negotiation of the package between the respondent and the 1st complainant.

42. The respondent's witness was Simon Mwambazi who also relied entirely on the affidavit he had sworn.

43. In *cross examination* Mr. Mwambazi stated that a negotiation is a discussion between two parties with a view to agree. He stated that not all negotiations end with mutual agreement between the parties involved.

44. When referred to section 55(3)(a) of the Employment Code, he confirmed that the respondent did pay the complainants 2 months' pay for each year served and the respondent had pay slips to prove the said payment. He, however, acknowledged that the proof of payment was not attached to the affidavit in support of answer.

45. In further cross examination, Mr. Mwambazi stated that the recognition agreement between the parties did not indicate that they needed to conclude or agree before the respondent could proceed to make payment.

46. He reiterated that following the guidance from the labour office, the parties met at the respondent's office for negotiations. Each party gave its position. Thereafter, the respondent informed the complainants that the respondent was unable to meet the complainants' demands due to a poor financial position and would pay in accordance with the law.

47. He further explained that it was never the intention of the respondent to pay the complainants in accordance with the law. It is just that the respondent was incapacitated by financial hardship. The 1st complainant was given the audited financial records for 2018 in order to make the 2nd complainants understand the situation.

48. Mr. Mwambazi further stated that BOZ declared the respondent insolvent which meant that the respondent had no financial muscle to meet the complainants' demands. This was the reason why the respondent applied to the Ministry of Labour not to pay the redundancy packages as a lumpsum.

49. When referred to exhibit "SM4", he disputed the assertion that it is possible to follow what is provided for by law and contravene the agreement. He added that favourable terms must be agreed to by both parties.

Submissions

50. Mr. Mapulanga, counsel for the complainants, submitted that exchange of letters between the 1st complainant and respondent did not amount to a negotiation in its ordinary meaning and intent. To this end, reliance was placed on Black's Law Dictionary's which defines negotiation as:

> *A consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. Negotiation usually involves complete autonomy for the parties involved, without the intervention of third parties.*

51. Based on this definition, it was contended that the respondent did not intend to negotiate with the complainants in the spirit of the Recognition Agreement save to insist from the onset that the statutory minimum be applied. This can be deduced from the letters marked "CM2" to "CM8" and "CM11" to "CM12" of the complainants' affidavit in support of the Complaint.

52. Mr. Mapulanga submitted that the procedure for redundancy is provided for under sections 55 to 57 of the

Employment Code Act. He cited section 55(3) which provides that:

> *Subject to section 57, an employee whose contract of employment has been terminated by reason of redundancy shall -*
>
> *(a) unless better terms are agreed between the employer and the employee concerned or the employee's representative, be entitled to a minimum redundancy payment of not less than two months' pay for every year served and other benefits the employee is entitled to as compensation for loss of employment; and*
>
> *(b) be paid the redundancy payment not later than the last day of duty of the employee, except that where an employer is unable to pay the redundancy payment on the last day of duty of the employee, the employer shall continue to pay the employee full wages until the redundancy package is paid.*

53. Mr. Mapulanga submitted that the above provision of the law allows for the variation of the provisions and procedure of redundancy by providing for better terms through avenues such as the contract of employment, recognition agreement or collective agreement between the employer and the employee or their representative.

54. Recourse was also had to section 127 of Employment Code which provides that:

> *Where a contract of employment, collective agreement or other written law provides conditions more favourable to the employee, the contract, agreement or other written law shall prevail to the extent of the favourable conditions.*

55. Counsel submitted that the parties agreed within the recognition agreement that the terms of redundancy would be subject to negotiation. He posited that negotiation of a package is a more favourable condition to the complainants. He added that the parties agreed to be bound by the terms of the recognition agreement through clause 1.2.6.

56. It was contended that despite the statutory procedure on redundancy having been allegedly followed, the respondent breached the conditions of service by failure to negotiate.

57. As it pertains to the payment of the redundancy packages, Mr. Mapulanga submitted that despite the respondent's averment that the complainants were paid all their entitlements, Mr. Mwambazi, under cross examination, admitted that there was no such evidence on record. It was therefore Mr. Mapulanga's contention that the respondent had failed to prove its alleged compliance even with the statutory provisions regarding the payment of the statutory minimum redundancy packages.

58. The gist of the complainants submission was that the respondent did not honour the obligation within the recognition agreement to subject the redundancy terminations to negotiation when it went ahead to issue notice of redundancy in lieu of negotiations. Additionally, the respondent failed to provide evidence that it paid the complainants the minimum redundancy packages.

59. On behalf of the respondent, Mr. Yeta submitted that the burden of proof in civil matters lies on the claimant. To this end, he relied on the cases of **Masauso Zulu v. Avondale Housing project Limited**[1] and **Sobek Lodges Limited v. Zambia Wildlife Authority**[2].

60. Counsel submitted that the complainants set parameters of the issues to be determined in their notice of complaint and according to him, two issues ought to be determined by the Court. Firstly, whether the respondent breached the recognition agreement and secondly, whether the respondent breached section 55 of the Employment Code Act.

61. According to counsel, the respondent's actions fall under section 55(1) of the Employment Code Act as exhibit "SM1" shows that the Bank of Zambia declared the respondent insolvent and this resulted in the respondent diminishing the requirement for employees to carry out work of a particular kind.

62. Counsel further drew this Court's attention to the provisions of section 55(2). He contended that the respondent followed the stipulations regarding redundancy in the aforesaid provision. The respondent duly gave 60 days' notice to the authorized officer and to the complainants' representative on 27th May, 2019 of the intention to terminate employment by redundancy. Further, the complainant's representative were given an opportunity to consult

on the measures to be taken to minimize the adverse effects of the termination on the unionized employees.

63. According to counsel, having adhered to the provisions of section 55(1) and (2), the respondent in consonance with provisions of section 55(3) of the Employment Code Act did pay the employees terminated by redundancy 2 months' pay for each completed year served. The complainants, it was submitted, were just angry because they did not negotiate a higher term. He emphasized that redundancy was one of the modes of termination and it was correctly invoked by the respondent.

64. On whether the respondent breached the recognition agreement, Mr. Yeta's contention was that if clause 5 Appendix A is carefully examined, this Court will come to the inescapable conclusion that the complainants completely misapprehended the effect of this clause. He asked Court to take judicial notice of the fact that construction of any document requires that the literal interpretation be used, in short, the words be given their ordinary meaning. According to counsel, what clause 5 provided was merely that redundancy is one of the subjects that was open to negotiations.

65. It was counsel's submission that nowhere in clause 5 or indeed elsewhere in the collective agreement does it expressly stipulate that the negotiations where supposed be accepted by the complainants first before they could be valid. It was averred

that this position was not only inconsistent with the recognition agreement but also implied that employees could force an unwilling employer to pay fees outsides the confines of the law which was not tenable at law. To buttress this argument counsel relied on the case of **Frank Malichupa & Others v. Tanzania Zambia Railways Authority**[(3)].

66. In summary, Mr. Yeta submitted that a perusal of the entire notice of complaint and the affidavit in support reveals that there is in fact no reasonable cause of action as the complainants were duly terminated and duly paid and this was acknowledged by their witness. Consequently, the complainants were not entitled to any reliefs claimed as none of the allegations had been proved. He also submitted that due to the manner in which this matter was brought before Court, costs ought to be granted to the respondent.

Consideration and decision

67. I have carefully examined the evidence on record, the written submissions and the authorities cited therein for which I am indebted to counsel.

68. From the record, it is undisputed that the 2^{nd} complainants were unionized employees of the respondent. It is also undisputed that the respondent recognized ZUFIAW as the bargaining agent for the 2^{nd} complainants. It is a fact that the 2^{nd}

complainants were declared redundant and the respondent effected redundancy payments.

69. What is in dispute is whether or not, in the redundancy process, the law and the recognition agreement between the parties were breached. Furthermore, there is disagreement regarding the payments made.

70. Thus, the issues for determination as I see them are as follows:

i. *Whether the respondent breached section 55 of the Employment Code Act.*
ii. *Whether the respondent breached the recognition agreement.*
iii. *Whether the 2nd complainants were paid the redundancy package in full.*

(i) Whether the respondent breached section 55 of the Employment Code Act

71. The complainants assail the implementation of the redundancy. To put the issue into proper perspective, it is cardinal to examine section 55 which provides for redundancy.

72. The evidence on record reveals that the respondent embarked on redundancy for the reason that the respondent had financial challenges which resulted in it resolving to reduce the

number of employees to carry out work of a particular kind. Thus, the redundancy herein was carried out pursuant to section 55(1)(b) which states:

An employer is considered to have terminated a contract of employment of an employee by reason of redundancy if the termination is wholly or in part due to –

(b) the business ceasing or diminishing or expected ceasing or diminishing the requirement for the employees to carry out work of a particular kind in the place where the employees were engaged;

73. Section 55 (2) states:

Where an employer intends to terminate a contract of employment by reason of redundancy, the employer shall -

(a) give notice of not less than thirty days to the employee or a representative of the employee of the impending redundancy and inform the representative on the number of employees, if more than one to be affected and the period within which the termination is intended to be carried out;

(b) afford the employee or representative of the employees an opportunity to consult on the measures to be taken to minimize the termination and the adverse effects on the employee; and

(c) not less than sixty days prior to effecting the termination, notify an authorised officer of the impending termination by reason of redundancy and submit to that authorised officer information on

i. the reason for the termination by redundancy;

ii. the number of categories of employees likely to be affected;

iii. the period within with the redundancy is to be effected; and

iv. the nature of the redundancy package.

74. As can be seen, the provision outlines the procedure to be adopted by the employer before embarking on redundancy.

75. I will therefore examine the evidence on record to determine if the respondent followed the procedure outlined above.

76. The evidence on record reveals that the 1st complainant, as representative of the employees was notified of the impending redundancy via a letter which was received on 27th May, 2019. The letter stated that the respondent intended to carry out the mass redundancy between August and September, 2019. It also stated that 68 employees would be declared redundant and further advised ZUFIAW that it was at liberty to consult and engage the respondent on the measures it could take to minimize the mass redundancy and adverse effects it may have on the affected workers.

77. It is further on record that the Ministry of Labour was notified on time of the impending termination by reason of redundancy.

78. In light of the foregoing, it is clear to see that in the main, the procedure prescribed by the law was followed by the respondent. However, the contention lies with section 55(2)(b) which is similar to the second issue for determination. By resolving the second issue, I would have answered whether or not subsection 2(b) was adhered to.

(ii) *Whether the respondent breached the recognition agreement*

79. Counsel for the complainants argued that the respondent breached the recognition agreement by failing to negotiate the redundancy packages for the 2nd complainants. According to counsel, the respondent decided the payment packages long before any engagement could be had and remained adamant that it would pay in accordance with the Employment Code.

80. On its part, the respondent stated that the 1st complainant was engaged. Counsel made reference to several letters between the parties. A perusal of the letters (SM3,SM5 to SM8), however, reveals that it was the actual notification of the impending redundancies and exchanges on trying to agree on when and where the parties could meet to discuss the redundancies.

81. According to the learned author of Selwyn's Law of Employment at paragraph 18.45, page 462, *a warning that the redundancies are being contemplated, coupled with an indication of the selection procedure, does not satisfy the requirements of a fair procedure. Consultations must be fair and genuine. An opportunity must be given to the affected employees to express their views.*

82. Further, in the case of **National Milling Corporation v. Angela Chileshe Bwembya Silwamba**(4), it was held that a

redundancy effected without proper consultation with the employee would be considered to have been done in bad faith.

83. In another case of **Chilanga Cement Plc v. Kasote Singogo**(5) the Supreme Court guided that *"redundancies are planned activities. Being a planned activity, the employee needs to be prepared for the loss of a job. Reasonable measures which should be taken will inevitably include, notices, and consultations which are so vital to the planning process."*

84. It is clear to see from the foregoing authorities that consultations are very cardinal in the redundancy process and must not be taken lightly by the parties involved, especially the employer.

85. As found, notice of the impending redundancies was duly given. The question I ask myself, therefore, is whether or not the respondent did give ZUFIAW an opportunity to negotiate the redundancy on behalf of its members.

86. I have carefully examined the documents on record. I have noted the letter dated 27th June, 2019 from the respondent to the 1st complainant wherein the respondent stated that it would pay the unionized employees the redundancy package of 2 months basic pay for each year served as well as other entitlements as per contracts of employment. The letter further asked the Union to avail a date for a meeting.

87. In its response dated 3rd July, 2019, the 1st complainant made a counter proposal of 4.7 months for each year served, 50% loan write off and 1 year full medical cover. The 1st complainant also proposed 5th July, 2019 as the date for a meeting. It appears that meeting did not take place. However, on 10th July, 2019, the respondent replied to the letter and noted the counter proposal.

88. The respondent did restate that the basis of the mass redundancies was the financial downturn the company was experiencing hence the inability to financially sustain all of its current employees. It is undisputed that the respondent also availed the financial statements for the year ending 2018.

89. The evidence further reveals that a meeting took place on 31st July, 2019. This is evident from correspondence from the respondent dated 2nd August, 2019 which reads as follows:

> *We thank you most sincerely for taking time to come to our offices on 31st July, 2019 as well as for the constructive engagement during the negotiation regarding the redundancy package for your members.*
>
> *We wish to reiterate our final position as advised in the meeting that the company is not in a financial position to pay more than 2 months for each year served plus any other contractual entitlements as redundancy package. This position is borne out by the financial statements of the company which we have shared previously with your union.*
>
> *We regret to advise that on the basis of the foregoing the company is not in a position to adjust the proposed redundancy package upwards as*

any such upward adjustment will negatively affect the continued viability of YesCash Zambia Limited as a going concern, to the detriment of the remaining employees, some of whom are members of your union.

90. The forgoing correspondence is significant as it shows that contrary to the allegation that the respondent failed to negotiate the redundancy packages, the parties met and discussed the issue.

91. The letters which discussed the package and the counter proposal are in my view a valid form of engagement. The respondent not only gave a reason why it could not take on board the counter proposal but also provided evidence to support its financial position.

92. This position is confirmed by the review of the respondent's financials by Bank of Zambia. Exhibit marked "SM1", a cover letter from BOZ, described its findings of the respondent's finances in the following terms:

> *The current examination determined that the financial performance and condition of YesCash was unsatisfactory on account of weakened capital position and high liquidity risk a situation that has resulted in the institution failing to meet its weekly loan obligations as they fall due.*

93. In light of this position, I cannot see what else the respondent could have done. Holding further discussions without there being a positive change in the respondent's

financial situation would not have yielded different results. As rightly argued by the respondent, the employees cannot force an unwilling employer to pay beyond what is provided for by the law.

94. The employees were given an opportunity to express their views through their representative and they were heard. The fact that they did not get what they wanted does not mean the process was unfair.

95. Thus I am of the view that the assertion that the recognition agreement was breached lacks merit. In the same vein, I ma satisfied that section 55(2)(b) was adhered to.

(iii) *Whether the 2nd complainants were paid the redundancy package in full.*

96. It was submitted on behalf of the complainants that the respondent had failed to prove its alleged compliance with the statutory provisions as regards the payment of the statutory minimum payments for redundancy packages.

97. I must mention here that this allegation is misguided. It is the complainants making a claim and they needed to prove that the respondent did not pay the statutory minimum.

98. In any case, the complainants' evidence establishes that the 2nd complainants were duly paid. The letter dated 8th August, 2019 written by the 1st complainant proves this. It reads in part:

We write to express our displeasure in the manner in which Express Credit Zambia has handled the redundancy process for affected unionized members of staff. The union and management met on 31st July, 2019 for negotiations over the redundancy package for affected unionized employees and the two parties did not reach an agreement. Management proceeded to go ahead erroneously credit the accounts of the members 2 (two) months pay for each year served even before the bargaining unit could reach an agreement.

99. In light of the acknowledgment that the respondent paid the members, the allegation that the respondent did not pay in accordance with section 55(3) cannot stand.

100. I now turn to the allegation that there were anomalies with the redundancy payments.

101. Pay slips were produced which pay slips show the redundancy payments. Some of these pay slips have hand written notes at the bottom stating that the payment received was less than the net pay showing on the respective pay slip. However, no bank statements or indeed any other documents were produced by the complainants to show that they received less than what was stated on these pay slips.

102. Without such proof, this Court cannot find for a fact that there were underpayments. The claim is thus dismissed for want of merit.

Conclusion and orders

103. Having carefully reviewed the evidence on record, I am satisfied that the respondent terminated the 2nd complainants' contracts of employment by way of redundancy. This is a legal way to terminate an employment relationship as provided for by the Employment Code Act.

104. I am further satisfied that the procedure provided for by the law was duly followed. Consequently, there was no breach of clause 5 Appendix A of the Recognition Agreement between the parties as negotiations took place, which, unfortunately did not yield the complainants' desired results. The evidence does not suggest bad faith on the part of the respondent in its failure to yield to the complainants' demands. Rather it shows that the respondent was incapacitated by a weak financial position.

105. In the circumstances, the complainants' claim fails in its entirety.

106. As for costs, I am disinclined to condemn the complainants in costs as there was no unreasonable conduct on their part to warrant such an order as per Rule 44 of the Industrial Relations Court Rules. Thus, each party shall bear own costs.

107. Parties are informed of their right of appeal.

Dated at Lusaka this 25th day of July, 2023

Conclusion and orders

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Dated at Lusaka this 25th day of July, 2023

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M.C Mikalile

HIGH COURT JUDGE