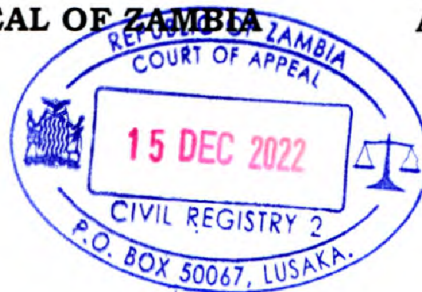


IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 216/2020

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

ZAMGUARD SECURITY SERVICES LIMITED

APPELLANT

AND

DARSON CHITEMBO & 46 OTHERS

RESPONDENTS

CORAM: KONDOLO, SC, NGULUBE AND BANDA BOBO, JJA.
On 24th August, 2022 and 15th December, 2022.

For the Appellant: *In person*

For the Respondent: *In person*

J U D G M E N T

NGULUBE, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Kitwe City Council vs William Nguni* (2005) ZR 57
2. *Masauso Zulu vs Avondale Housing Project* (1982) ZR 172
3. *Zambia Privatization Agency vs James Matale* (1996) ZMSC 27
4. *Philip Mhango and Dorothy Ngulube and others*, (1983) ZR 81
5. *Access Bank (Zambia) Limited vs Group Five/ZCON Business Park Joint Venture* (Suing as a firm), Appeal No. 76/2014

Legislation and other works referred to:

1. *The Employment Act, Chapter 268 of the Laws of Zambia*
2. *The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia*
3. *Minimum Wage and Conditions of Employment (General order) Statutory Instrument Number 2 2011*
4. *The Court of Appeal Rules, Statutory Instrument Number 65 of 2016*

INTRODUCTION

1. This is an appeal against the Judgment of Hon. Mr Justice D. Mulenga of the Industrial Relations Division of the High Court delivered on 24th February, 2020.
2. In the said judgment, the learned Judge held that the respondents had proved on a balance of probabilities their claim for payment of redundancy packages. The court accordingly entered Judgment in favour of the respondents and further found that the respondents had proved their claims on a balance of probabilities to be retained on the respondent's payroll from 1st January, 2019 to the date of Judgment, 24th February, 2020.
3. The court also ordered that the respondents be paid the difference between the salaries paid and the minimum wage for the months September, October and November, 2018. The court awarded the respondents interest on the sums of money payable at the short

term commercial deposit rate as approved by the Bank of Zambia from date of complaint to full payment.

BACKGROUND

4. The respondents who were the complainants in the court below filed a Notice of Complaint against the appellant who was the respondent on the grounds that-
 - (i) They were declared redundant on 12th December, 2018 and were not paid their redundancy packages.
 - (ii) That they were removed from the payroll before their redundancy packages were paid.
 - (iii) That during the period they were employed, they were paid below the minimum wage.
 - (iv) They sought the payment of their redundancy packages and an order that they be paid their salaries until the redundancy packages would be fully paid. The respondents also sought costs and interest on the sums found due.
5. The respondents' evidence in the lower court was that after they were declared redundant, they reported the matter to the Labour Office where the appellant offered to pay them their redundancy packages in instalments. The Labour Office advised the appellant

to maintain the respondents on the payroll until their terminal benefits would be paid in full. However the appellant only paid the respondents salaries from 12th to 31st December, 2018.

APPELLANT'S CONTENTION IN THE LOWER COURT

6. The appellant filed an Answer in which it argued that the respondents were paid some of their dues after their employment was terminated.
7. The appellant argued that the respondents were employed under written contracts which embodied all the terms and conditions of employment and that as such, they could not rely on the Minimum Wages Act. Regarding the retainment of the respondents on the payroll, the appellant argued that they could not be retained on the payroll as part of their dues were paid to them, namely those relating to days worked as well as leave days after they had ceased employment with the appellant.
8. The appellant stated that the respondents were only entitled to leave days, days worked and gratuity.

DECISION OF THE LOWER COURT

9. The lower court heard the parties and found that the appellant, in consultation with the respondents prepared a redundancy

payment schedule for each of the respondents, which was at two months per each completed year of service.

10. The court further found that the respondents agreed to be paid according to the schedule and went on to grant the claim for payment of redundancy packages. The court found that the respondents were employed on oral contracts as the written contracts which the appellant relied on were not executed as the appellant did not sign them.
11. The lower court went on to opine that where an employee is employed on an oral contract, **Section 26 (b) (3) of the Employment Act**, applies. The court further stated that if such an employee is declared redundant, he should be paid his full redundancy package on his last day of employment. In the event that the employee is not paid, he or she must be retained on the employer's payroll until he or she is fully paid. The court found that the respondents were not paid their full redundancy packages on 12th December, 2018 when they were declared redundant and that they still awaited payment of the said redundancy package. The court then ordered that the respondents be maintained on the appellant's payroll from 1st January, 2019 to the date of Judgment.

The court also ordered that the respondents be paid their salary arrears for the stated period.

12. Regarding the claim for the payment of the difference between salaries paid and the minimum wage, the court found that the respondents were paid below the minimum wage from September, 2018 to December, 2018.
13. The court granted the claim for payment of the difference between salaries paid and minimum wage for the months September to November, 2018 with interest on all the amounts found due. The appellant was dissatisfied with the Judgment of the trial court, and appealed to this court, advancing the following grounds of appeal.

GROUND OF APPEAL

- 1 ***That the trial court erred in law and fact when it ruled that the respondents herein be retained on the appellant's payroll from January, 2019 to the date of judgment without considering the fact that the appellant had no means to maintain them on the payroll as the contract it had with Global Industries Limited was terminated and this affected the respondent's employment above all the dues were paid to the respondents with regards to days worked, leave dues etc as shown in the bank statements and outlined in the contracts of employment and I strongly believe that these payments were not considered by the trial court as final;***

2. *That the trial court erred in law and in fact when it ruled that the respondents be paid of the difference between salaries paid and minimum wage for the months of September, October and November, 2018 without realizing that the respondents entered into written contracts with the appellants and the remunerations agreed upon in the contracts were far above the minimum wage, and the said contracts were self-explanatory but were no considered and also the mode of exit was necessitated by the unexpected termination the contracts the appellant had with global industries where the employment for all the respondents were relied on to offer services to them on behalf of the appellant;*
3. *That the trial court erred in law when it held that the respondents be paid redundancy package with interest when in fact not because the appellant had a contract with Global Industries Limited where the respondents used to provide security services in accordance with the contractual terms agreed upon and at no point were they were employed on permanent and pensionable basis as their employment was seasonal but due to the termination of the contract which the appellant had with Global Industries Limited the respondents employment was affected and also the trial court imposed the figures on the appellant without considering that the figures in question were computed by the Labour officer without consent from the appellant; and*
4. *That the trial court did not consider the vital issue regarding contracts of employment which was not put into consideration and it was a grave error to award them all the claims to the respondents who had signed contacts as their job was seasonal and based on the contract the appellant had with Global Industries Limited that of providing security services to them*

which was later on terminated and the respondents were all paid accordingly.

THE HEARING

14. At the hearing of the appeal, Mr Besa, the Director of the appellant submitted that he would rely on the record of appeal and the heads of argument filed. The court's attention was drawn to pages 84 to 89 of the record as well as pages 150 to 165 of the said record of appeal. He stated that the heads of argument were filed on 30th November, 2020. He relied entirely on the said heads of argument.
15. Mr Besa stated that the lower court made an erroneous finding of fact that the contracts of employment were not signed as they were duly signed. He referred the court to pages 150 to 165 of the record to prove that the contracts were signed.
16. The court informed Mr Besa that what was contained on page 151 of the record was a letter of offer of employment and was not a contract of employment.

APPELLANT'S CONTENTIONS

17. In arguing ground one, which was that the trial court erred when it ruled that the respondents be retained on the appellant's payroll from January, 2019 to the date of Judgment, it was contended that

the lower court did not consider that the appellant had no means to maintain the respondents on the payroll as the contract that it had with Global Industrial Limited was terminated and that this affected the respondent's employment. The appellant further argued that the respondents were paid all their dues as was shown in the bank statements.

18. It was contended that the appellant had no capacity to maintain all the respondents in employment and on its payroll as the business would have run at a loss and the company risked going into bankrupt. Accordingly, it was decided that the forty seven employees be separated from the employ of the appellant by way of voluntary separation on 12th December, 2018.
19. The appellant submitted that the respondents were only entitled to leave days and gratuity for those who qualified for the same. According to the appellant, the respondents were paid their dues on 4th January, 2019, amounting to K77,413.00. They were also paid K6,050.80 on 8th January, 2019 and were paid the last instalment of K41,200.00 on 16th April, 2019, which constituted the full and final payment that was due to them.

20. Turning to ground two, it was submitted that the contracts that the appellant entered into with the respondents were written and the remuneration was agreed upon between the parties, which was far above the minimum wage. It was submitted that the respondents failed to understand the fact that the contract that the appellant had with its client, Global Industries Limited was terminated prematurely and that as such, the appellant had no capacity to keep the respondents in employment due to the unfortunate circumstances that it found itself in.
21. In arguing ground three, it was submitted that the respondents were not employed on permanent and pensionable basis as their employment was dependent on the appellant's contract with Global Industries Limited which was terminated. This affected their employment as they could not provide security services to the client, Global Industries Limited. It was further argued that the lower court imposed figures on the appellant without considering that these were computed by the labour office without obtaining consent from the appellant. It was submitted that the respondents were not ill-treated and were paid all that was due to them.

22. In arguing ground four, it was submitted that the appellant had no capacity to keep the respondents in employment due to the termination of its contract with Global Industries Limited, the appellant argued that the computations that were done by the labour office were wrong and misleading and not done in good faith. According to the appellant, the lower court erred when it considered these computations in deciding the matter.
23. The court's attention was drawn to the case of **Kitwe City Council vs William Nguni**¹ where it was held that-

"It was unlawful to award a salary or pension benefits for a period not worked for because such award has not been earned and might be properly termed as unjust enrichment."

24. The case of **Masauso Zulu vs Avondale Housing Project**² was referred to, where the court stated 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 acceptable 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 by his opponent's case."

25. The appellant submitted that the respondents had not produced any evidence to prove the claims and that they were not entitled to

judgment on any of the claims that they advanced. We were urged to allow the four grounds of appeal and uphold the appeal for the aforestated reasons.

RESPONDENTS' CONTENTIONS

26. The respondents filed heads of argument in response to those of the appellant on 13th October, 2020.
27. Responding to ground one, it was submitted that the lower court did not err in law and fact when it ordered that the respondents be put on payroll from January, 2019 to date of Judgment as this was in line with **section 26(b) (3) of the Employment Act**. The court's attention was drawn to **section 97 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia** which prohibits appeals that are based on points of law or mixed law and facts. It was argued that the lower court was on firm ground when it ordered that the respondents be retained on the appellant's payroll until they would be paid their terminal benefits in full.
28. Responding to ground two, it was submitted that the lower court was on firm ground when it found that the respondents should be paid the difference between their salaries and minimum wage for the months of September, October and November, 2018.

29. Reference was made to the ***Minimum Wage and Conditions of Employment (General order) Statutory Instrument Number 2 2011*** which provides that-

“Where an employee’s contract of service is terminated by reasons of redundancy, the employee shall be entitled to at least one month’s notice and redundancy benefits of not less than two months pay per year served.”

30. The respondents referred to the case of ***Zambia Privatization Agency vs Matale***³, where the court stated that in the absence of any express term, the period of notice must be reasonable and regarding what constitutes reasonable notice depends on the facts of each case.

31. Responding to ground three it was submitted that the learned trial Judge was on firm ground when he ordered that the respondents be paid redundancy packages with interest. The court’s attention was drawn to the case of ***Philip Mhango and Dorothy Ngulube and others***⁴, where the court guided that-

“Interest should be paid at short term deposit rate per annum from the date of the cause of action to the date of Judgment in accordance with Order 36 of the High Court Rules.”

32. Responding to ground four, it was submitted that the lower court was on firm ground when it awarded all the respondents’ claims as

this was supported by the evidence on record. We were urged to dismiss the appeal with costs for lack of merit.

DECISION OF THIS COURT

33. We have considered the appeal before us, the authorities cited and the arguments advanced by the parties. We shall deal with all four grounds of appeal together, as they are interrelated.
34. Having perused the four grounds of appeal, we are of the view that they are not properly drafted. A perusal of the grounds of appeal in the memorandum of appeal shows that they are not concise as they contain arguments and narratives **Order X Rule 9(2) of the Court of Appeal Rules** provides that a memorandum of appeal shall be set forth concisely and without distinct heads, without arguments or narratives the grounds of objections to the judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided. There are numerous authorities, such as the case of **Access Bank (Zambia) Limited vs Group Five/ZCON Business Park Joint Venture (Suing as a firm)**⁵, in which the Supreme Court has held that where grounds of appeal contain arguments and narratives, the appeal may be dismissed.

Nonetheless, we will consider the grounds of appeal and heads of argument in the interest of justice.

35. The decision of the lower court is supported by the evidence and the law. We agree with the trial judge that if an employee is employed on an oral contract, **Section 26 (b) (3) of the Employment Act, Chapter 268 of the Laws of Zambia**, applies and if such an employee is declared redundant, he should be paid his full redundancy package on the last day of work. Failure to which, he or she must be retained on the employer's payroll until such a time that he is fully paid.
36. The appellant in the other three grounds of appeal is relying on the purported contracts of employment between the appellant and the respondents. However, the appellant's own witness admitted that the contracts were not signed and that there was an error on the part of the appellant's management. We are in agreement with the lower court that the respondents were employed on oral contracts as the evidence on record is that the written contracts were not signed by the appellant. We therefore do not find merit in grounds two, three and four for the aforesated reasons and they accordingly fail.

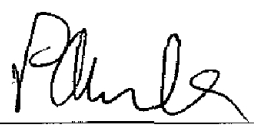
CONCLUSION

37. For the foregoing reasons the appeal is dismissed for lack of merit.


We will not make an order for costs.



M.M. KONDOLO, SC
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE



A. M. BANDA BOBO
COURT OF APPEAL JUDGE