

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

APP/IRCLK/284/2014

BETWEEN:

GEMSTONES AND ALLIED WORKERS
UNION OF ZAMBIA

COMPLAINANT

AND

CHISTEEL ZAMBIA LIMITED

RESPONDENT



Before the **Hon. Mr. Justice M. Musaluke** in Open Court on the 23rd day of November, 2017

Appearances:

For the Complainant: Mr. S. Nyumbu – Union President of the Complainant

For the Respondent: Mr. B.C. Mutale and Mr. E. Banda of Messrs. BCM Legal Practitioners

JUDGMENT

Legislation referred to:

1. *The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia*

Cases referred to:

1. *Justine Mbita Silumbwe vs. Barclays bank of Zambia Limited, SCZ Judgment No. 4 of 2017*
2. *The Council of the University of Zambia vs. The University of Zambia Allied Workers Union (1999) Z.R. 1. S.C.*
3. *Wilson Masauso Zulu vs. Avondale Housing Project (1982) Z.R. 172*

1.0 **COMPLAINANT'S CASE**

- 1.1 On 17th November, 2014, the Complainant, a Union representing its members through its President filed Notice of Complaint against the Respondent pursuant to **Section 85 (2) of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia.**
- 1.2 The grounds on which the Complaint was presented were that the Respondent had violated the Collective Agreement from the date it became effective on 12th June, 2009 and that the violated clauses in the said Collective Agreement were 10, 17 and 20 respectively.
- 1.3 The Notice of Complaint was supported by an Affidavit deposed by Mr. Sifuniso Nyumbu, the Complainant's Union President.
- 1.4 At trial, Mr. Sifuniso Nyumbu and Mr. James Chongo were the witnesses for the Complainant. They gave evidence on oath.
- 1.5 The gist of Nyumbu's testimony was that before the notice of Complaint was filed in Court, a conciliation process was initiated by the parties to this suit. Issues were resolved and conciliation report was endorsed by this Court in accordance with the law.

- 1.6 He testified that prior to the conciliation agreement, the Complainant and the Respondent had entered into a Collective Agreement in 2009 which eventually expired in 2010.
- 1.7 That once the Collective Agreement had expired, parties engaged in conciliation and certain things were agreed upon. Some of those issues that were agreed upon included:
- (a) *Payment of overtime to workers from 17:00 hours to 17:30 hours;*
 - (b) *Overtime for night shifts workers from 17:30 hours to 07:00 hours; and*
 - (c) *Payment of shift differential of K10.00 to night shift workers;*
 - (d) *Payment of statutory contributions to National Pension Scheme Authority (NAPSA) and Workers Compensation Fund control Board (WCFB);*
 - (e) *Remittance of Union subscription for its members;*
 - (f) *Provision of milk to its employees.*
- 1.8 Mr. Chongo (**CW2**) a Machine Operator of the Respondent told Court that union contributions are still being deducted but not remitted to the union and that overtime allowance was no paid to the workers.

1.9 Under cross-examination, he told Court that he does not belong to the Complainant's Union.

1.10 As a result the Complainant sought the following reliefs:

- “(i) An order that the Respondent commences review of expired collective agreement;*
- (ii) An order that the Respondent abides by and respects a conciliation report endorsed by the Court;*
- (iii) An order that the Respondent pays overtime to night shift workers who work from 17:30 hours to 07:00 hours the following day, from the date the collective agreement was signed;*
- (iv) An order that the Respondent pays overtime to day time workers who work from 07:00 hours to 17:30 hours, from the date the collective agreement was signed.*
- (v) An order that the Respondent pays differential of K10.00 per night to night shift workers, from the date the collective agreement was signed;*
- (vi) An order that the Respondent pays Mr. Paul Shafungulo at the rate as per directive from Labour Office with arrears for days absent from work and contributions of payments to NAPSA and Workers Compensation fund, after dismissing the above mentioned.*
- (vii) An order that the Respondent's decision to retrench workers and only pay them K175.00 for every completed year served was illegal;*

- (viii) *An order that the Respondent's decision of not presenting full names and details of employees when remitting contributions to NAPSA and WCFCB, in some cases is illegal;*
- (ix) *An order that the Respondent's insistence on using their drafted conditions of service instead of the Collective Agreement is illegal;*
- (x) *An order that the Respondent remits subscriptions according to names on recruitment forms.*
- (xi) *An order that the proper channels be followed when handling labour matters;*
- (xii) *Exemplary charges;*
- (xiii) *Any other relief the Court may deem fit;*
- (xiv) *Interest at the current bank rate's decision;*
- (xv) *Costs."*

2.0 **RESPONDENT'S CASE**

- 2.1 On 10th December, 2014, the Respondent filed its Answer to the Complaint supported by an Affidavit deposed by Xu Yan its Public Relations Officer.
- 2.2 In its Answer, the Respondent stated that is was wrong for the Complainant to state that it was not paying union subscriptions as it was up to date with union subscription.

- 2.3 That it had in fact been giving its workers who were entitled to milk, a daily allowance of between K3 to K5 depending on the conditions under which each employee was working.
- 2.4 That all its employees were registered with both NAPSA and Workers Compensation Fund Control Board (WCFCB) and monthly contributions were up to date. (**Exhibit “X3” and X7”** in the affidavit of Xu Yan refers).
- 2.5 That it was up to date with all union subscriptions as per exhibit **“X4”** in the affidavit of Zu Yan.
- 2.6 That the Respondent had paid and continues to pay night shift allowance to all employees that work during night shift (**exhibit “X5” refers**).
- 2.7 At trial, the Respondent opted to rely on the Answer and affidavit in support and did not call any witness to give viva voce evidence.

3.0 **SUBMISSIONS**

- 3.1 I have perused submissions filed by the parties to this suit. I will not recite them but will be referring to them as and when necessary.

4.0 **OPINION**

- 4.1 The claims by the Complainant hinge on the facts that the parties to this suit had signed a Collective Agreement on 20th

October, 2009 which became effective on 12th June, 2009 and expired on 11th June, 2010.

4.2 When this Collective Agreement expired, the parties proceeded to invoke the statutory provision for conciliation. A conciliation settlement of collective disputes was executed and it became effective on 1st January, 2011.

4.3 Among the issues that were settled by conciliation were the following:

- (a) Funeral grant;
- (b) Milk for workers employed in hazardous conditions;
- (c) Non remittance of union subscription; and
- (d) Over payment of union subscription.

4.4 The Complainant claimed that the Respondent had not fulfilled the terms of the conciliation settlement as the following were not being done:

- (a) *payment of overtime to workers from 17:00 hours to 17:30 hours;*
- (b) *Overtime for night shift workers from 17:00 hours to 17:30 hours, and*
- (c) *payment of shifts differential of K10.00 to night shift workers;*

- (d) *non-payment of statutory contribution by the Respondent to NAPSA and WCFCB;*
- (e) *non-remittance of union subscription for its members;*
- (f) *non-provision of milk to its employees;*
- (g) *that Mr. Paul Shafungula was to be paid arrears for the days absent from work as directed by the Ministry of Labour;*
- (h) *That the payment of K175 for each year served for retrenched workers was illegal;*

4.5 I will deal with each of these claims individually.

(a) Funeral Grant

This claim by the Complainant is countered by the Respondent which exhibited a document showing that funeral grants are given to employees that endure bereavement. (**Exhibit "X6"** in the Respondent's affidavit in support of Answer refers).

Clearly, this claim by the Complainant has no limb to stand on as there is evidence that funeral grants are in fact given to the Respondent's employees. This claim fails and is dismissed.

(b) Payment of overtime from 17:00 hours to 17:30 hours

This claim was not supported by any evidence. I agree with the Respondent's Counsel in his reference to the case of ***Wilson Masauso Zulu vs. Avondale Housing Project*** that the Plaintiff has to prove his case whatever may be said of the opponent's case. The Complaint has failed to bring any evidence to support this claim. This claim fails and it is dismissed.

(c) Payment of overtime for night workers from 17:30 hours to 07:00 hours

The Complainant did not bring any evidence to support this claim. Conversely, the Respondent in its evidence (see **exhibit X5** in the affidavit in support of Answer) proved that in fact the night shift allowances were being paid to its employees. Ultimately, this claim has no limb to stand on and fails.

(d) Non-payment of Statutory Contributions by the Respondent to NAPSA and WCFCB

The claim by the Complainant is that the Respondent does not remit statutory contributions to both NAPSA and WCFCB for its employees.

Exhibits 'X1', 'X2', and 'X3' in the Respondent's affidavit in support of Answer, clearly put the picture different. These exhibits show that the Respondent in fact had registered its

employees and regularly remits these statutory contributions to the statutory bodies. The Complainant's claims are frivolous and are dismissed.

(e) Non-remittance of union subscriptions

This claim for non-remittance of union subscription is interesting. CW2 Mr. Chongo testified that the workers at the Respondent no longer belong to the Complainant.

Further, there is evidence on record to show that there is neither a Collective Agreement nor Recognition Agreement in place between the parties to this suit. How then can union contributions be paid to the union which has no relationship with the Respondent. Evidence was led to the fact that most members had in fact resigned from the union membership of the Complainant. (Notice to produce by the Complainant filed into Court on 4th December, 2015 refers).

Evidence is on record pointing to the fact that when a relationship between the Complainant and the Respondent was in existence, union subscription used to be paid. This evidence is produced at **exhibit "X4"** in the Respondent's Affidavit in support of Answer.

I, therefore, agree with the submission by the Respondent's Counsel that the Complainant cannot claim under an expired Collective Agreement. The citation of the case of **The Council**

of the University of Zambia vs. The University of Zambia Allied Workers Union by the Respondent in its submission on this issue is on point. The claim fails and is dismissed.

(f) Non-provision of milk to the Respondent's employees

The Complainant alleged that no milk was being provided to the employees of the Respondent that were working in hazardous conditions. The Respondent countered this claim by starting at paragraph 4 of its Answer that an allowance of between K3 and K5 for milk was being paid daily to such employees that qualified. The Complainant did not challenge this evidence by the Respondent. This claim therefore, fails and is dismissed.

(g) Payment of K175.00 for each year served as retrenchment package is illegal

This claim was not supported by any oral or written evidence. I wonder how it even found itself on the claims by the Complainant. I find that this claim is frivolous and therefore, fails.

(h) Claims for Mr. Paul Shafungula

This claim though pleaded, was not supported by any evidence by the Complainant. It fails.

(i) Claim for exemplary damages

The law is settled on the claim for exemplary damages. The case of ***Justine Mbita Silumbwe vs. Barclays bank of Zambia Limited*** is instructive.

The Respondent's conduct in this matter does not merit punishment as it never acted in a contumelious disregard to the Complainant's rights. The Complainant did not provide any evidence to justify the grant of these damages. I am therefore, persuaded not to award these damages.

4.6 All in all, the Complainant has failed in all its claims against the Respondent. The Complaint is dismissed in its entirety.

4.7 Each party to bear their own costs



Delivered this day of, 2017

.....
M. MUSALUKE
HIGH COURT JUDGE