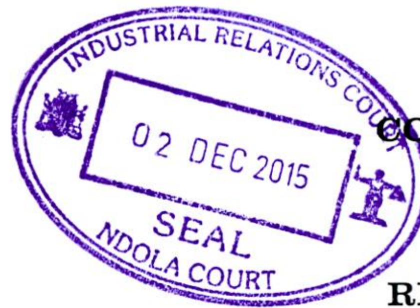
IN THE INDUSTRIAL RELATIONS COURT **COMP/82/2015**
HOLDEN AT NDOLA

BETWEEN:



CHISHIMBA MULENGA **COMPLAINANT**

AND

ZAMBOR J.V. LTD **RESPONDENT**

BEFORE:

Hon. Judge E.L. Musona

MEMBERS:

Hon. W.M. Siame
Hon. J. Hasson

For the Complainant : In Person

For the Respondent : Mr. Kalukuwa Happy – Human Resources Manager

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JUDGMENT

Date: 2nd December, 2015

LEGISLATION REFERRED TO:

1. **S.1 No. 57 of 2006**

CASES REFERRED TO:

1. **Wilson Masauso Zulu v Avondale Housing Project, (1982), ZR, 172**

This Complaint was filed by M/Chishimba Mulenga. The Complaint was filed against Zambor JV Ltd. We shall, therefore, refer to M/Chishimba Mulenga as the Complainant and to Zambor JV Ltd as the Respondents which is what the parties to this action actually were.

The Complainants' claim is for the following relief:

1. Payment of K36,000 being under payment on gratuity.
2. Payment of overtime.
3. Payment of September 2015 salary.
4. Payment of leave days.
5. Interest.
6. Costs.
7. Any other dues the court may deem fit.

The duty for this court is to ascertain whether or not the Complainant has proved his claims.

The evidence for the Complainant was that he was employed by the Respondents on 24th May, 2010 as an Accountant. In August, 2015 the Complainant terminated his contract by giving 30 days' notice. That notice was issued on 13th August, 2015. Upon receipt of this notice the Respondents told the Complainant to stop reporting for work but only report if called by the Respondents. The Complainant handed over his duties on 14th August, 2015.

On 18th August, 2015 the Complainant was called and sent to Chambishi Copper Mines to pick up scrap metal because the Respondents were shifting from there to Konkola Copper Mines. Again, on the afternoon of 18th August, 2015 the Complainant delivered two (2) pilot bits to Konkola Copper Mines number 3 shaft. On 24th August, 2015 the Complainant was called to the office to show the Respondents a file which the Respondents had failed to locate and the Complainant obliged.

The Respondents elected not to call for evidence but relied on their Affidavit in Support of Answer. We have looked at that Affidavit.

It is important now to go into the specific claims for the Complainant.

1. Under payment on gratuity

The Complainant referred this court to Clause 26 of the Contract of Employment. That contract was exhibited as "CM1". We have looked at Clause 26 of "CM1". That clause reads as follows:

> "On termination of this contract, gratuity will be 3 months for each year served."

The Complainant's argument is that although he was paid 3 months' pay for each year served the calculation was based on a wrong rate. According to the Complainant, his basic pay at the time of separation from employment was

K5,100 per month. We have seen exhibit 'HK8' which confirms that at the time of exit from employment in 2015 he was paid on the basis of that salary which the Complainant was receiving in 2015. The problem appears to be with the payment for preceding years. For the year 2010 to 2011, he was paid at the rate of K1,450,000 (unrebased) which was his basic pay during the year 2010 to 2011. This is exhibited as 'HK4'.

For the year ending 2011 to 2012 he was paid at the rate of K2,500,000 (unrebased) which was his basic pay during that period. This is exhibited as 'HK5'.

For the year ending 2012 to 2013 he as paid at the rate of K3,000 (rebased) which was his salary during that period. This is exhibited as 'HK5'.

For the year ending 2013 to 2014 he was paid at the rate of K3,240 (rebased) which was his salary during that period. This is exhibited as 'HK7'.

It is the wish by the Complainant that the rate of K5,100 (rebased) which applied at the time of his exit should have been used to calculate his gratuity for the entire of his working career with the Respondents.

We have looked at the Respondents' Answer and Affidavit in Support thereof, the argument by the Respondents is that the Complainant was not entitled to gratuity in the first contract because that first contract had no clause providing for gratuity. That contract has been exhibited as 'HK1'. We have looked at 'HK1'. On those basis the Respondents have filed a counterclaim, claiming what they perceive to be an over payment.

We have noted that the earlier contract of employment which was entered into between the within parties in 2010 did not have a provision for gratuity. That contract is exhibit 'HK1'. Clause 18 of exhibit 'HK1' shows that other conditions of service will be as provided for in the Government Gazette of 2006, (Minimum Wages and Conditions of Service). We have looked at that. That is Statutory Instrument No. 57 of 2006 (The Minimum Wages and Conditions of Employment). (S.1 No. 57 of 2006). We have gone through S.1 No. 57 of 2006 thoroughly. We have noted that S.1 No. 57 of 2006 does not provide for gratuity payment which by extension would be applicable to the case in casu. We have looked at all other statutes including the statutory instruments which followed S.1 No. 57 of 2006 but have found no provision on gratuity applicable to the Complainant. What this means, therefore, is that prior to the contract which was entered into on 15th April, 2015, the Complainant did not accrue any gratuity because there was no basis for such accrual. The Complainant's

entitlement for gratuity only started accruing effective from 15th April, 2015 after signing the contract which had a provision for gratuity. That contract has been exhibited as 'CM1'. Clause 26 of 'CM1' is what provides for payment of gratuity at 3 months for each year served. We have also noted that Clause 1 of 'CM1' shows that the contract which was entered into on 15th April, 2015 was extending the earlier contract. We have already said that the earlier contract was exhibited as 'HK1'. However, even if it can be said that 'CM1' was extending the operations of 'HK1', 'HK1' had no clause for the payment of gratuity. So, no gratuity clause was extended because it was never there.

For the avoidance of doubt, we repeat, the Complainant was not entitled to gratuity on his contract exhibited as 'HK1' of 2010. He was, however, entitled to gratuity on his subsequent contract which was entered into on 15th April, 2015 and exhibited as 'CM1'.

The claim for under payment of gratuity, therefore, fails. What we have seen is over-payment of gratuity because the Complainant was paid gratuity for the years when he was not entitled to gratuity because the contract under which the Complainant worked during that period had no clause for the payment of gratuity.

On the above basis the counterclaim succeeds.

2. Payment of overtime

This claim fails because although the Complainant gave a detailed account of his claim, the claim was nevertheless destitute of any proof. We have seen 'HK10' which is a time sheet. Every overtime is supposed to be shown on the time sheet. No such proof was exhibited by the Complainant. It does not suffice just to give an account of a claim. The account must be proved. In the case of **Wilson Masauso Zulu v Avondale Housing Project (1)**, the Supreme Court held that a Plaintiff who fails to prove his case cannot be entitled to judgment whatever may be said of the opponent's case.

3. Payment of salary for September 2015

It was the Complainant's evidence that he gave 30 days notice of termination of contract on 13th August, 2015. It is trite law that an employee remains an employee during the notice period and is, therefore, under obligation to discharge and to continue discharging the duties of his office throughout the notice period up to and including the last day of the notice period. The Complainant, however, was advised to stay away during that notice period but to report for work only when called to do so. This assertion has not been disputed. The Complainant was called for duty twice during that notice period, that was on 18th August, 2015 and was sent to Chambishi Copper Mines to pick up scrap metal because they were shifting from there to Konkola Copper Mines, and in the

afternoon of that day the Complainant delivered two (2) pilot bits to Konkola Copper Mines Number 3 Shaft. Secondly, the Complainant was called for duty on 24th August, 2015 to show the Respondents a file which the Respondents failed to locate and the Complainant showed them that file.

It is, therefore, clear that the Complainant worked during his notice period. The Complainant cannot be faulted for the other days on which he did not report for work because the Complainant did so in obedience to the Respondents' instruction that the Complainant should not report for work during his notice period unless asked to do so by the Respondents.

We have, therefore, seen no justification why the Respondents should not pay the Complainant his salary during the notice period. That notice period commenced on 13th August, 2015 when it was issued by the Complainant. By computation, it ended on 13th September, 2015. This period translates into one calendar month. The Complainant worked during this whole period. We order that he should be paid his salary for September, 2015 in full.

This claim succeeds.

4. Payment of leave days

According to the Complainant, he was entitled to 2 leave days per month. This is evidenced by Clause 5 of exhibit 'CM1'. As at July, 2015 his leave days had accumulated to twenty (20). This is evidenced by exhibit 'CM3'. The Complainant worked during the month of August, 2015 and this earned him 2 more leave days. The total number of leave days as at August 2015 rose to 22. The Respondent calendar month ends on the 15th day of each month. This has not been disputed. The Complainant gave notice of termination of contract of employment on 13th August, 2015. He worked up to 13th September, 2015. Since the 15th day of every month is the last day of the Respondents' calendar month, the 16th day of each month is the first day of each calendar month. The Complainant gave notice on 13th August, 2015. For the purpose of computing how many days the Complainant worked after his issuance of the notice, we shall count from 16th August, 2015 which was the commencement of the new month. He stopped work on the expiry of his notice period which fell on 13th September, 2015. By counting of days, the Complainant worked from 16th August, 2015 to 13th September, 2015 which translated into 29 days. Short by 1 day to make a full calendar month, this, cannot be a valid reason for denying the Complainant his leave entitlement at full rate of 2 days. The Complainant's leave days, therefore, accumulated to 24.

The evidence on record shows that the Complainant was paid for only 20 days. This has not been disputed. The balance of 4 days were not paid, this is what the Complainant wants paid now.

We have seen no justification for denying the Complainant payment for the four (4) leave days and we order that he be paid.

This claims succeeds.

5. Interest

We award interest on the sums due to the Complainant at the Bank of Zambia rate from 5th October, 2015 when this Complaint was filed into court until full payment. In default of agreement same shall be referred to the Deputy Registrar for Industrial Relations Court for assessment.

6. Costs

We order costs of these proceedings in favour of the Complainant. In default of agreement same shall be referred to the Deputy Registrar for Industrial Relations Court for taxation.

7. Any other dues the court may deem fit

We have seen no other dues to deem fit.

For the avoidance of doubt, the Complainant has succeeded on the claim for payment of September, 2015 salary, the claim for the payment of four (4) leave days and interest. These successful claims shall be paid to the Complainant less the Respondents' counter claim which we have already ruled that it has succeeded. The payment for the counter claim shall take precedence over the Complainant's claim.

If after computing the payment of the counter claim due to the Respondents, there shall still be a balance due to the Respondents, the balance shall be treated as bad debt because the Complainant should not be pursued to pay beyond what he has earned in this judgment. That is the nature of this court, to rarely order payment against Complainants. Just like this court rarely orders payment of costs against Complainants unless for very good cause, we have not seen very good cause upon which to order the Complainant to pay to the Respondents the counter claim beyond what can be satisfied by the Complainant's successful claims.

We repeat, in default of agreement on any monetary aspect in this case, same shall be referred to the Deputy Registrar for the Industrial Relations Court for taxation or assessment as the case may be.

Leave to appeal to the Supreme Court is hereby granted to both parties within 30 days from today.

Delivered and signed at Ndola this the 2nd day December, 2015.

Hon. E.L. Musona
JUDGE

Hon. W.M. Siame
MEMBER

Hon. J. Hasson
MEMBER