

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

**COMP NO.152/2016**

**BETWEEN:**

**TULA NAYANDA  
SHANTEL SIMWANZA  
ABIGAL KAPISA  
FRED BWALYA  
FRANCIS MAPARA**



**1<sup>ST</sup> COMPLAINANT  
2<sup>ND</sup> COMPLAINANT  
3<sup>RD</sup> COMPLAINANT  
4<sup>TH</sup> COMPLAINANT  
5<sup>TH</sup> COMPLAINANT**

**AND**

**PLESSEY ZAMBIA LIMITED**

**RESPONDENT**

Before the **Hon. Mr. Justice M. Musaluke** in Open Court on the 4<sup>th</sup> day of October, 2017

**Appearances:**

*For the Complainant:* Mr. C.M. Besa and Mr. P. Chileshe of Messrs. Besa Legal Practitioners

*For the Respondent:* Mr. M. Desai and Mr. S. Bwalya of Messrs. Christopher, Russel, Cook & Co.

---

**JUDGMENT**

---

**Legislation referred to:**

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

**Cases referred to:**

1. *Godfrey Kakoma & 11 others vs. Afrisec Management Limited, Comp No. 274/2012 (unreported)*
2. *Bank of Zambia vs. Vortex Refrigeration Company and Dockland Construction Company Limited (Appeal No. 004/2013-SCZ 8/361/2012)*
3. *Rosemary Ngorima and 10 others vs. ZCCM – SCZ Appeal No. 7 of 2000*
4. *ZESCO vs. Alexis Mabuka Matale – SCZ Appeal No. 227/2013*

- 1.0 On 11<sup>th</sup> April, 2016, the Complainants filed Notice of Complaint supported by an affidavit deposed by the Complainants.
- 1.1 On 10<sup>th</sup> May, 2016, the Respondent filed Notice of Complaint supported by an affidavit sworn by Jan Hendrik Kriel its Operations Manager.
- 1.2 On 3<sup>rd</sup> August, 2016, the parties to this suit filed into Court Statement of Agreed facts and legal issues to be determined as follows:

- “1. That the Complainants TULA NAYANDA, SHIMWANZA, ABIGAIL KAPISA, FRED BWALYA and FRANCIS MAPARA are former employees of the Respondent who were first engaged in 2006, 2006, 2007, 2007 and 2010 respectively.*
- 2. The Respondent is a limited company incorporated in Zambia in 2005.*
- 3. That prior to 1<sup>st</sup> October, 2014 when the Complainants entered into permanent contracts of employment with Respondent, the Complainants were initially employed under fixed term written contracts of between 9 months and 12 months.*
- 4. The Complainants’ relationship with the Respondent was governed by their respective individual permanent contracts,*

*which contracts incorporated the Respondent's policies and procedures.*

5. *That in March, 2016, the Respondent decided to eventually close its operations in Zambia following changes in the market that resulted in losses for three consecutive years.*
6. *The Respondent therefore decided to declare the Complainants, among others, redundant effective as follows:*

<i>Tula Nayanda</i>	<i>-</i>	<i>31<sup>st</sup> May, 2016</i>
<i>Shantel Simwanza</i>	<i>-</i>	<i>30<sup>th</sup> April, 2016</i>
<i>Abigail Kapisa</i>	<i>-</i>	<i>30<sup>th</sup> April, 2016</i>
<i>Fred Bwalya</i>	<i>-</i>	<i>30<sup>th</sup> April, 2016</i>
<i>Francis Mapara</i>	<i>-</i>	<i>30<sup>th</sup> April, 2016</i>

7. *That prior to issuing letters of redundancy, all the employees including the Complainants were engaged in meetings where the issue of redundancy was discussed.*
8. *That on 11<sup>th</sup> April, 2016 the Complainants filed a Notice of Complaint seeking the following reliefs:*
  - (a) *Payment of full redundancy packages for the number of years served with the Respondent Company from the date of engagement;*
  - (b) *Unpaid leave days from date of engagement;*

- (c) *Incentive bonus payment for ABIGAIL KAPISA, FRED BWALYA and FRANCIS MAPARA for 300 completed sites;*
- (d) *Payment of monies deducted from medical scheme from 2012 to date;*
- (e) *Payment of salaries from the date of separation to date of full payment of redundancy;*
- (f) *Interest at current bank lending rate on all amounts payable from the time the same became due and payable to date of payment;*
- (g) *Costs of these proceedings;*
- (h) *Any relief the Court may deem fit.”*

1.3 The issues to be determined as outlined in the statement of agreed facts were as follows:

- “(a) Whether the Complainants are entitled to receive redundancy pay for the period commencing from their respective dates of engagement up to 30<sup>th</sup> September, 2014;*
- (b) Whether incentive bonus is payable to Abigail Kapisa, Fred Bwalya and Francis Mapara for 300 completed sites;*

- (c) *Whether the Complainants are entitled to payment of monies deducted for medical scheme in respect of the Complainants' spouses and children from 2012 to date;*
- (d) *Whether the Complainants are entitled to payment of salaries from the date of separation to date of full of redundancy;*
- (e) *Interest at current lending bank rate on all amounts payable from the time became due and payable to date of payment;*
- (f) *Costs of these proceedings."*

- 1.4 On 2<sup>nd</sup> May, 2017 the parties filed a Consent Order to the effect that I should proceed to render judgment based on the pleadings and submissions without holding a full trial in open Court.
- 1.5 On 18<sup>th</sup> May, 2017 and 31<sup>st</sup> May, 2017, the Complainants' and Respondent's Counsel filed submissions for their clients respectively.
- 1.6 I will proceed to determine the issues as they appear on the settled Agreed Statement of facts.

- 1.7 (a) **WHETHER OR NOT THE COMPLAINANTS ARE ENTITLED TO RECEIVE REDUNDANCY PAY FOR THE PERIOD COMMENCING FROM THEIR RESPECTIVE DATES OF ENGAGEMENT UP TO 30<sup>TH</sup> SEPTEMBER, 2014**
- 1.8 In support of this claim, the Complainants have invited me to look at Section 28C (2) of the Employment Act No. 15 of 2015. The argument put forward is that prior to 1<sup>st</sup> October, 2014 when the Complainants entered into permanent Contracts of employment with the Respondent, they were initially employed under fixed term written Contracts of between 9 months and 12 months.
- 1.9 It is argued on behalf of the Complainants that with the authority of Section 28C (2) aforesaid, they should be deemed to have served permanent contracts of service having remained with the same employer until they were declared redundant on 30<sup>th</sup> April, and 31<sup>st</sup> May, 2016 respectively.
- 1.10 The Complainants claim that the redundancy package should take into account all the years of service from the date of engagement.
- 1.11 The Respondent submitted on this issue that Section 28 C(2) is contained in part IV of the employment Act which does not apply to written contracts.
- 1.12 The Respondent further submitted that in any case, the section being relied on was enacted in December, 2015 and that law does not operate retrospectively. The case of

***Godfrey Kakoma & 11 others vs. Afrisec Management Limited and Bank of Zambia vs. Vortex Refrigeration Company, Dockland Construction Company Limited*** were cited to support the Respondent's arguments.

- 1.13 I have carefully perused Section 28 C (2) of the Employment Act. It appears to me that the Complainants have misapplied this piece of legislation to their argument.
- 1.14 The spirit of section 28 C(2) is that when one is on a fixed term employment contract, and at the end of that contract, he continues working without any new contract given to him/her, the law presupposes that he is on a new permanent contract. To understand this spirit, Section 28 c(2) should be read together with section 28 C (1).
- 1.15 In casu, the fixed term Contracts of Employment of the Complainants ended on 30<sup>th</sup> September, 2014 and on 1<sup>st</sup> October, 2014, they entered into new contracts with addendum to those contracts executed on 12<sup>th</sup> December, 2014.
- 1.16 These were new Contracts with new terms and conditions. Therefore, the argument that Section 28 C(2) of the employment Act applies to the Complainants' situation can at best be termed as sagacious imagination.

- 1.17 Further, as rightly argued by the Respondent that Section 28C came into effect in December, 2015, there cannot be retrospective effect of this piece of legislation.
- 1.18 The claim for payment of redundancy for a period when there was no contractual relationship between the Complainants and the Respondent cannot be supported at law. Those contracts up to September, 30<sup>th</sup> 2014 had expired. The events that led to the declaration of redundancy were triggered during the subsistence of the contracts that were entered on 1<sup>st</sup> October, 2014. Rightly so, the redundancy package was in fact paid for the period beginning 1<sup>st</sup> October, 2014 to all Complainants.
- 1.19 This claim is therefore, not supported by any legal or factual arguments and it must fail.
- 1.20 The Respondent's Counsel brought an ingenious argument that Section 28 falls under part iv of the employment Act and therefore does not apply to written contracts.
- 1.21 This argument shows that Counsel for the Respondent either did not read or decided to mislead this Court. Either way, this argument is flawed and frivolous. Section 28 in the Employment Act falls under part V which is a part on written contracts.

1.22 (b) **WHETHER INCENTIVE BONUS IS PAYABLE TO ABIGAIL KAPISA, FRED BWALYA AND FRANCIS MAPARA FOR 300 COMPLETED SITES**

1.23 In support of this claim, the Complainants contend that the incentive bonus emanates from their conditions of service as enshrined in the Respondent's Incentive Policy and Procedures.

1.24 The Respondent's Incentive Policy and Procedures was exhibited at "**JHK1A**" in the further affidavit in support of Answer.

1.25 Perusal of the said Incentive Policy review that it was executed on 20<sup>th</sup> May, 2005 by Fred Bwalya as an addendum to his fixed term contract of employment.

1.26 The addendum for Abigail Kapisa and Francis Mapara are not before Court.

1.27 The Complainants claim that the Respondent used to pay these incentives but stopped doing so and believe they are owed for 300 completed project sites.

1.28 On the other hand, the Respondent disputes that it owes Abigail Kapisa, Fred Bwalya and Francis Mapara any incentives bonuses. The Respondent argues that the incentive was never a mandatory contractual term between the parties.

- 1.29 The Respondent's Counsel has submitted that the Complainants and the Respondent had executed employment contracts dated 1<sup>st</sup> October, 2014 which did not provide for the payment of incentives to employees.
- 1.30 I have perused the Incentive Policy and Procedures document at "**JHK1A**". It is clear this Policy on incentives was executed as an addendum to expired contracts. The contracts under which the Complainants were operating prior to being declared redundant were those executed on 1<sup>st</sup> October, 2014.
- 1.31 The said contracts of employment of 1<sup>st</sup> October, 2014 at exhibits "**JHK2E**"; "**JHK3D**"; "**JHK5A**"; "**JHK5E**"; and "**JHK5I**" for Abigail Kapisa, Francis Mapara, Fred Bwalya, Tula Nayanda (Nakasamu) and Shantell Simwanza respectively were the existing contracts at redundancy.
- 1.32 At clause 27 of all the Contracts for the Complainants it is provided that:
- "This agreement contains the entire agreement between the parties and supersedes all prior arrangements and understandings whether written or oral with respect to the subject matter hereof and may not be varied except in writing signed by both the parties hereto."*
- 1.33 There is no mention of an Incentive Policy in the contracts of 1<sup>st</sup> October, 2014. It follows therefore, that the incentive Policy was not a condition of service.

- 1.34 Clause 27 cited above is clear to the extent that once the parties signed the employment contracts, the arrangements and understandings that were contained in those contracts were the only agreements between the parties.
- 1.35 The Supreme Court has guided in the cases of ***Rosemary Ngorima and 10 others vs. ZCCM*** and ***ZESCO vs. Alexis Mabuka Matale*** that employee/employer relationships are bound by whatever terms and conditions they themselves set in the Contract of Employment.
- 1.36 It follows that since the issue of incentive bonuses was not a condition in the Contracts of employment executed on 1<sup>st</sup> October, 2014 between the Complainants and the Respondent, this claim has no limb to stand on.
- 1.37 The claim by Abigail Kapisa, Fred Bwalya and Francis Mapara for incentive bonuses for 300 completed sites fails as it has not been proved. I consequently dismiss this claim.
- 1.38 (c) **WHETHER THE COMPLAINANTS ARE ENTITLED TO PAYMENT OF MONIES DEDUCTED FOR MEDICAL SCHEME IN RESPECT OF COMPLAINANTS SPOUSES AND CHILDREN FROM 2012 TO DATE**
- 1.39 In support of this argument, the Complainants contend that the Respondent was paying Medical Scheme for its employees, their spouses and children. The Complainants exhibited a letter of appointment for Shantel Simwanza dated 1<sup>st</sup> October, 2009 to support their claim.

1.40 As I have already found, the conditions under which the parties to this suit operated was governed by the Contracts of employment of 1<sup>st</sup> October, 2014. It is therefore, difficult to understand why the Complainants would rely on Contracts of 2009 which have since expired.

1.41 The employment Contract of 1<sup>st</sup> October, 2014 for all Complainants has Clause 12 which provided for medical aid. This claim provided:

*“A hospital plan will be provided to the employee of the Company’s choice. The monthly subscription thereof will be paid by the Company. The employee is not entitled to any other medical claim. For purposes of this contract, the medical plan which has been chosen by the Company is the Metropolitan Health Scheme Extender option, and other claims will not be accepted. Should, at any stage, the Company chose a new scheme or plan all employee will be informed of the changes in writing.”*

1.42 It is clear that at the time of the redundancy, the only clause dealing with Medical Aid was clause 12 in the Complainants’ employment Contracts. The Complainants have not claimed that this clause was breached by the Respondent. To the contrary, they are claiming under some contracts that had expired long before the contracts of 1<sup>st</sup> October, 2014.

1.43 I find that this claim lacks merit and is not founded on any evidence to support it. This claim fails and is dismissed.

1.44 (d) **WHETHER THE COMPLAINANTS ARE ENTITLED TO PAYMENT OF SALARIES FROM THE DATE OF SEPARATION TO DATE OF FULL PAYMENT OF REDUNDANCY**

1.45 I have already handled the aspect of payment of redundancy for the period prior to the Contracts of 1<sup>st</sup> October, 2014. This claim for redundancy has been dismissed and therefore, there are no payments due to the Complainants. That being the case, the claim under this head automatically falls off and it fails.

4.0 **CONCLUSION**

4.1 Arising from the judgment, I make the following order:

- (a) The claim for redundancy pay for the period commencing from the Complainants' respective dates of engagement up to 30<sup>th</sup> September, 2014 fails and is dismissed;
- (b) The claim for incentive bonus for Abigail Kapisa, Fred Bwalya and Francis Mapara fails and is dismissed;
- (c) The claim for payment of monies deducted for Medical Scheme in respect of Complainants' spouses and children from 2012 fails and is dismissed;
- (d) The claim for payment of salaries from the date of separation to date of full payment of redundancy fails and is dismissed;

4.2 All in all, the entire Complaint is dismissed as it lacks merit;

4.3 Parties to bear their own costs.

Delivered this ..... day of ..... 2017



A handwritten signature in blue ink, consisting of a large loop at the top and several smaller loops below, extending downwards.

.....  
**M. MUSALUKE**  
**HIGH COURT JUDGE**