IN THE HIGH COURT FOR ZAMBIA **IRC/ND/17/2022**
AT THE DISTRICT REGISTRY
HOLDEN AT NDOLA
(Industrial Relations Division)

BETWEEN:

AMOS KALELA & 46 OTHERS **COMPLAINANT**

AND

CHIMWENDA INVESTMENTS LIMITED **RESPONDENT**

Before the Hon. Mr. Justice Davies C. Mumba in chambers on the 8th day of December, 2022.

For the Complainant: Mr. H. Chinene, Messrs Lumangwe Chambers.
For the Respondent: Mr. T. Chabu, Messrs Terrence Chabu & Co.

JUDGMENT

Cases referred to:

1. Eston Banda and another v The Attorney-General, Appeal No. 42 of 2016.
2. Redrilza Limited v Abuid Nkazi and Others, SCZ Judgment No. 7 of 2011.
3. National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo, Appeal No. 71 of 2009 (S.S).
4. Kawangu Kayombo and Others v Quattro Company Limited, Appeal No, 23/2018.

Legislation referred to:

1. The Employment Code Act No. 3 of 2019.

Other works referred to:

1. Winnie Sithole Mwenda and Chanda Chungu: A Comprehensive Guide to Employment Law in Zambia: UNZA Press. 2021.

By notice of complaint filed into Court on 11th April, 2022, the complainants commenced this action against the respondent seeking the following reliefs:

(i) Damages for unfair dismissal, wrongful dismissal and unlawful dismissal from employment.
(ii) Payment in lieu of Notice
(iii) Payment of Redundancy package and other Statutory accrued benefits.
(iv) Interest on sums due.
(v) Costs.
(vi) Any other order the Court may deem fit.

In support of the notice of complaint, the complainants relied on their combined affidavit in support of the notice of complaint and summons for leave to file complaint out of time, filed into Court on 30th March, 2020, sworn by the 1st complainant herein, Amos Kalela.

It was deposed that the 1st complainant was employed by the respondent on 17th September, 2009 as a Boiler Maker while the other complainants were employed on diverse dates and in different capacities. To that effect, the 1st complainant produced their contracts of employment, exhibits "AK1" to "AK48". That

the complainants of them were given written contracts of employment whilst some of them were working without written contracts. That their contracts of employment were terminated on diverse dates by way of redundancy and the respondent calculated their dues as shown by their letters of termination, pay slips and records of service marked "AK49" to "AK81". That, however, the respondent backtracked and wrote to notify them that it would not pay their redundancy packages, as shown by some of the letters, "AK82" to "AK85", contrary to the Laws of Zambia. That they had suffered damage and loss for which they were seeking payments from the respondent.

On 23rd May, 2022, the respondent filed an answer and an affidavit in support of their answer sworn by Charles Chikwelete, Managing Director in the respondent company. He deposed that the complainants were singularly employed by the respondent on diverse dates on contracts, with specific terms of contract. That, therefore, their conditions of employment and termination from employment were governed by their specific contracts. To that effect, the deponent produced the complainants' contracts of employment, collectively marked as "CC1". That under clause 12 of the said contracts, it was an express term that their contracts of employment would be terminated if the Principal, Mopani Copper Mines Plc. canceled the main contract between the respondent and itself. That the Mopani Copper Mines terminated the contract sometime on 12th July, 2019 as shown by the notice

of termination "CC2". That as a result of the cancellation of the contract by the Principal, the employees' contracts were terminated as shown by the memo and the notices of termination collectively marked, 'CC3'. That by the letter dated 27th August, 2019 the respondent's Human Resource Personnel erroneously informed the complainants that they were entitled to a redundancy package when in fact not. That on the 1st November, 2019 the complainants interned that they were not entitled to any redundancy package at all. Further, that the complainants are not entitled to any redundancy payment because the contract of employment was terminated by the operation of clause 12 of their contracts.

At the trial, the 1st complainant testified on behalf of the other 45 complainants.

He testified that he started working for the respondent on 17th December, 2009 and the other complainants started working for the respondent on different dates and in various positions.

He testified that between 11th August and 31st October, 2019, he and the other complainants received letters of termination of employment from the respondent. That after issuing them with the termination letters, the respondent started preparing their redundancy packages at the rate of two months' salary per each completed year of service. That, however, the respondent did not

pay them the said money. The 1st complainant also informed the Court that he was relying on the various documents, 'AK1' to 'AK85' exhibited to the affidavit in support of the notice of complaint.

He informed the Court that the complainants were requesting the Court to order the respondent to pay them their redundancy packages and the reliefs sought in their notice of complaint. He testified that the respondent had given them the letters where it had declined to pay them their redundancy packages. He referred the Court to the letter, exhibit 'AK76' and stated that in the said letter, the respondent stated that it was not supposed to pay him his redundancy package. That all the other complainants received similar letters. He also testified that so much time had elapsed from 2019 and asked the Court to take that time into consideration. He also prayed for costs.

During cross-examination, the 1st complainant confirmed that their employment was governed by specific contracts. That his contract was the one exhibited as 'AK1' in the affidavit in support of the notice of complaint. That the said contract was for the period 1st April, 2012 to 31st December, 2012. That under the said contract, the notice period for termination was 10 days. He confirmed that the contract expired on 31st December, 2012 and that he was not dismissed by the respondent during the period of that contract. That there was no other contract that he signed

with the respondent. He stated that he was not aware that some of the complainants had signed contracts stating that their employment could be terminated in three ways. When referred to Mr. Mashisha's contract, the 1st complainant stated that Mr. Mashisha had not informed him that he had signed a contract. He stated that he was aware of the contracts the other complainants had signed which were exhibited as 'CC1'. When referred to paragraph 3 of one of the contracts, the 1st complainant stated that he was not aware of that clause. When further referred to clause 10 of the contract, the 1st complainant admitted that it provided for three ways in which their contracts could be terminated, that is, by notice; upon termination of the contract between the respondent and its customer, Mopani Copper Mines; and summary dismissal. That their contracts were terminated because of the termination of the contract between the respondent and Mopani Copper Mines. He stated that they used to work from the Mopani Copper Mines premises. That Mopani Copper Mines terminated its contract with the respondent as show by notice of termination, 'CC2'. That as a result, the respondent was not able to carry on with the complainants' contracts. He stated that there was no provision for redundancy in their contracts. That the letter, 'AK76' was written by the respondent after a recommendation from the Labour office, Kitwe. That the said letter, 'AK76' was similar to the letter, 'AK85'. That he understood the contents of the letter and that was why they brought the matter to Court. He confirmed that the

letter, 'AK56' was his letter of termination. That according to the said letter, he was given one month's notice. He confirmed that the letter did not indicate that they were going to be paid redundancy packages. He stated that the letter, 'AK57' stated the reasons why they were not entitled to redundancy payment. He stated that they were not dismissed but they were given notices of termination of their employment.

In re-examination, when referred to his contract, 'AK1' which was for the period 1st April, 2012 to 31st December, 2012, the 1st complainant stated that the reason why he stated that he was employed on 17th September, 2009 was because sometimes they used to sign one year contracts and other times they never used to sign. That from 2009 to 2019, they signed contracts which varied in terms of duration such as three months, six months, one year and sometimes they never even used to sign contracts.

When the matter came up for defence on 8th November, 2022, the respondent and their Counsel did not appear before Court despite being fully aware of the hearing date, having been present on the date the matter was adjourned for defence. I, therefore, to adjourned the matter for judgment.

I have considered the affidavit evidence from both parties and the *viva voce* evidence by the complainants. I have also considered the final written submissions filed by both parties.

The facts which were common cause are that the complainants were employed by the respondent on diverse dates and in different capacities. The complainants were deployed to work at Mopani Copper Mines which had a contract with the respondent. It was a term of the complainants' contracts that their employment was subject to the continuity of the contract between the respondent and Mopani Copper Mines; and that their contracts would be terminated upon the termination of the said contract. Between 11th August and 31st October, 2019, the respondent terminated the complainants' contracts of employment based on the reason that Mopani Copper Mines had terminated the respondent's contract. Upon termination of the complainants' contracts, the respondent wrote to them that their redundancy packages had been calculated at two months' pay for each complete year served and that they were to be paid their packages upon receipt of compensation from Mopani Copper Mines. Before they could be paid, the respondent again wrote to the complainants and informed them that upon perusal of their contracts of employment, the complainants were not entitled to redundancy payments.

From the evidence on record, the following are the issues for determination:

1. Whether the termination of the complainants' contracts of employment was wrongful and unfair thereby entitling them to damages.
2. Whether the complainants are entitled to the payment redundancy packages; other statutory benefits; and one month's pay in lieu of notice.

I will start with the first issue, whether the termination of the complainants' contracts of employment was wrongful and unfair thereby entitling them to damages.

The complainants have claimed that their dismissal from employment was unfair, wrongful and unlawful.

In the case of **Eston Banda and Another v the Attorney General**[1], the Supreme Court has guided that:

> **"There are only two broad categories for dismissal by an employer of an employee, it is either wrongful or unfair. *'Wrongful'* refers to a dismissal in breach of a relevant term embodied in a contract of employment, which relates to the expiration of a term for which the employee is engaged; whilst *'unfair'* refers to a dismissal in breach of a statutory provision where an employee has a statutory right not to be dismissed. A loose reference to the term *'unlawful'* to mean *'unfair'* is strictly speaking, in employment parlance, incorrect and is bound to cause confusion. The learned author, Judge W.S. Mwenda, clarifies on the two broad categories, in her book Employment Law in Zambia: Cases and Materials, (2011), revised edition UNZA Press, Zambia at page 136. She opines that, in our jurisdiction, a dismissal is either wrongful or unfair, and that wrongful dismissal looks at the form of the dismissal whilst unfair dismissal is a creature of statute."**

Further, in the case of **Redrilza Limited v Abuid Nkazi and Others**[2], the Supreme Court guided that there is a difference between 'dismissal' and 'termination'. That dismissal involves the loss of employment arising from disciplinary action while termination allows the employer to terminate the contract of employment without invoking disciplinary action. That, therefore, the terms 'termination' and 'dismissal' cannot and should not be used interchangeably.

In the present case, I have noted that the complainants were not dismissed from employment as no disciplinary action was taken against them. Therefore, their claim does not border on dismissal but should be anchored on the termination of their employment.

Whereas the distinction in the case of *Banda*[1] was about dismissal, I believe the same also applies to termination. Therefore, I am of the view that the relief that the complainants are seeking is that the termination of their employment was wrongful and unfair, and I will proceed to determine their claim as such.

The learned authors, Judge W.S. Mwenda and Chanda Chungu, in their book entitled: **A Comprehensive Guide to Employment Law in Zambia,** state at page 22 as follows:

> **"Where a termination is not carried out in line with the law, or where the employer terminates employment without**

giving a reason, such termination will be referred to as unfair termination and for termination contrary to the contract of employment as wrongful termination."

On the above authority, for the complainants to succeed in their claim that the termination of their contracts of employment was unfair, they must show that the respondent breached a specific statutory provision or that the respondent did not give a valid reason for the termination of their contracts. With regard to their claim for wrongful termination, it must be shown that the respondent breached the terms of their contracts of employment when it terminated their contracts.

In *casu*, it is not in dispute that the reason the complainants' contracts were terminated was because Mopani Copper Mines, under which they were working had terminated the contract it had with the respondent. Therefore, I find that the action that was taken by the respondent was in compliance with one of the terms of the complainants' contracts of employment which was to the effect that once the contract between Mopani Copper Mines and the respondent came to an end, it automatically followed that the complainants' contracts with the respondent would also be terminated. This meant that the complainants' contracts of employment were dependent on the subsistence of the contract between the respondent and Mopani Coppers Mines. On the evidence in this case, I am quite satisfied that the complainants knew from the outset that their employment was

directly linked to the continuous existence of the contract between the respondent and Mopani Copper Mines. They had also freely and voluntarily consented to such a term with the full knowledge of its ramifications. It is settled that parties to an agreement are bound by the terms and conditions embodied in their contract.

In the case of **National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo**[3], it was held that;

> **"It is trite law that once parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contract and that the role of the Court is to give efficacy to the contract when one party has breached it by respecting, upholding and endorsing the contract.**

Further, in the case of **Kawangu Kayombo and Others v Quattro Company Limited**[4], the Court of Appeal held that:

> **"In terms of the doctrine of freedom of contract, each party is bound by the terms of the contract they have entered into voluntarily to the extent that the same do not offend against statute and not tainted by illegality."**

On the above authorities, I find that the complainants were bound by the aforestated term of their contracts as the same did not offend against any statute and was not tainted by legality. Therefore, the respondent had properly terminated the complainants' contracts of employment since it had complied with the terms of the complainants' contracts of employment. As a result, the complainants' claim that the termination of their

employment was wrongful has failed and is accordingly dismissed.

Further, I am satisfied that the reason given by the respondent for the termination of the complainants' contracts was valid. In this regard, therefore, the complainants' claim that the termination of their employment was unfair has failed and is accordingly dismissed.

Having found that the termination of the complainants' employment was not wrongful and was not unfair, it has become otiose to determine whether the mode of separation of the complainants from the respondent's employment was by reason of redundancy. Suffice it to say that the decision by the respondent not to pay the redundancy packages to the complainants was well founded. Therefore, their claim for the payment of redundancy packages has failed and is accordingly dismissed.

Regarding the claim for the payment of 'any accrued statutory benefits', the complainant did not lead any evidence to show the type of statutory benefits that they had intended to claim. It is noteworthy that there are a variety of statutory benefits that may accrue to an employee during the employment relationship. It is, therefore, the duty of the claimant to lead cogent evidence in proving those claims. In this regard, in the absence of the

complainant's evidence proving their claim, the claim has failed and is accordingly dismissed. However, their entitlement to leave days, being an accrued right, cannot be ignored. Therefore, I hold that the complainants are entitled to the payment for accrued leave days, if any. There being no evidence as to the number of leave days that could have accrued to the complainants at the end of their employment, I refer this matter to the learned Deputy Registrar for assessment of accrued leave days if any, and the amount payable to the complainant in respect of the accrued leave days.

With regard to the complainants' claim for one month's pay in lieu of notice, I note that it was a term of their contracts that the contracts would be terminated upon the termination of the contract between the respondent and its customer, Mopani Copper Mines. I am satisfied that their contracts were terminated because of the termination of the contract between the respondent and Mopani Copper Mines. Therefore, when Mopani Copper Mines terminated its contract with the respondent, it automatically followed that the complainants' contracts with the respondent were also to be terminated. Under those circumstances, I find that the complainants were not entitled to one month's notice or one month's pay in lieu of notice and their claim is accordingly dismissed.

I make no order for costs.

Leave to appeal is granted.

Delivered at Ndola this 8th day of December, 2022.

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Davies C. Mumba
HIGH COURT JUDGE