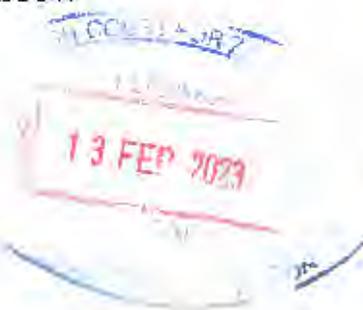


IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

COMP NO. IRCLK/68/2022



BETWEEN:

WANKUMBU SICHIVULA

1st COMPLAINANT

MUTALE MWANGO

2nd COMPLAINANT

AND

ONE LIFE ASSURANCE ZAMBIA LIMITED

RESPONDENT

CORAM:

Hon. E. MWANSA Esq

:

JUDGE

APPEARANCES:

For the Complainant : Mrs. N.B. Chanda and Ms. Martha Kaluba of Messrs AMW and Company Legal Practitioners

For the Respondent : Mr. P. Chomba of Messrs Mulenga Mundashi Legal Practitioners

JUDGMENT

Legislation referred to:

- 1. *Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia***
- 2. *Employment Code Act No. 3 of 2019***

Case referred to:

- 1. *National Milling Company -V- Grace Simataa and Others 2000 ZR 91***

1.0 INTRODUCTION

1.1. This action was commenced by Wankumbu Sichivula and Mutale Mwango hereinafter called CW1 and CW2 respectively. It was commenced by way of Notice of Complaint accompanied by an Affidavit pursuant to Section 85 Rule 9 of the ***Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia***. The Complainants' pleadings were filed into Court on 3rd February 2022.

1.2 The grounds upon which this Complaint was presented are that:

- 1.2.1. Firstly, from the 13th of May 2020, and the 1st of August 2019, the two Complainants were employed by Metropolitan Zambia Limited as Finance Manager and Claims Manager respectively. Furthermore, in October 2020, Momentum Metropolitan Holdings of South Africa transferred 100 percent of its shareholding in the Respondent Company to Finsbury Investments

Limited. Following the transfer, the Respondent Company changed its name to One Life Assurance Zambia Limited.

1.2.2. Secondly, by letters dated 19th and 13th October 2021, the Complainants were given notices of termination of their respective contracts of employment. These took effect on 18th and 12th November 2021 respectively. Additionally, the termination letters stated that the termination was due to the Respondent's operational requirements per clause 6.4 of the Complainants' contracts of employment.

1.2.3. Thirdly, that the same letters of termination had offers of three months short term contract for the first Complainant, and three years long term contract for the second Complainant, which they both rejected.

1.3 Lastly, that the Complainants were supposed to be paid redundancy packages and the Respondent's actions were unreasonable and unfair.

1.4 The Complainants are seeking the following reliefs:

(i) Payment of redundancy package calculated at two months' basic pay for each year served by each Complainant

- (ii) *Damages for unfair and/or unlawful termination of Contract of Employment*
- (iii) *Interest on all sums found and payable*
- (iv) *Costs; and*
- (v) *Any other relief the Court may deem fit*

2.0 COMPLAINANTS EVIDENCE

- 2.1 The Complainants gave their evidence orally at trial and through Affidavits that they each deposed to. In the Affidavits, it was stated that Momentum Metropolitan Holdings South Africa transferred its 100 percent shareholding in Metropolitan Zambia Limited to Finsbury Investments Limited. As a result, the company changed its name to One Life Assurance Zambia Limited the Respondent herein.
- 2.2 Furthermore, **CW 1** was given his notice of termination of contract letter dated 19th October 2021 but effective 18th November 2021 exhibited and marked "WS 2", while **CW 2** was terminated by a letter dated 13th October 2021 but effective 12th November 2021 exhibited and marked "MM 2". It was averred that this termination was due to the Respondent's operational requirements in accordance with clause 6.4 of the contract of employment.
- 2.3 **CW1** added that he was offered a three (3) month short term

employment contract which had different terms from what other employees were given with respect to the duration of employment. On the other hand, **CW 2** was offered a three (3) years contract of employment. Both Complainants turned down the offers of employment made by the Respondent.

2.4 It was also the Complainants' evidence that the Respondent told them that they had the option of being declared redundant and amounts to be paid in the redundancy packages were communicated in meetings as well as through a schedule detailing the actual figures. They also told the court that no valid reason was given by the Respondent as they did not explain what they meant by operational requirements.

2.5 Furthermore, the Complainants testified that they were only paid for the notice period and accrued leave days.

3.0 RESPONDENT'S EVIDENCE

3.1 In response, the Respondent filed their Answer and Affidavit in Support thereof on 14th March 2022. In the Answer, they submitted that they terminated the Complainants' permanent employment contracts because they were carrying out a phase out exercise moving from permanent to fixed term contracts.

3.2 In the Respondents' Affidavit deposed to by Chabala Mumbi

their Managing Director, it was averred that the intention of the company was for no employee to lose their position. The deponent stated that the Complainants were offered fixed term employment contracts after termination of the permanent contracts but they turned down the said contract offers.

- 3.3 The deponent further stated that the contract offers were based on efficiency and individual performance of the employee subject of the contract offer. He added that the contract offers were not dependant on the initial permanent contracts which had been terminated. He further gave evidence that the termination was for operational requirements of the Respondent Company.

4.0 COURT'S POSITION

- 4.1 I have had occasion to review the evidence proffered by both parties and my findings of fact are as follows:
- 4.2 It has been found as a fact that the Complainants, who were employed on permanent basis, were terminated from employment by the Respondent Company on the basis of operational requirements. It is also a fact that the Respondent offered the Complainant contracts of employment after the termination. Furthermore, the reason advanced for the said termination was operational requirements.
- 4.3 The legal issues emanating from the findings of fact are as

follows:

Firstly, whether a claim for redundancy can be sustained based on the circumstances surrounding the termination. Secondly, whether in the present case operational requirements were a valid reason for terminating the Complainants' employment contracts.

4.4 The Complainants seek redundancy payments as a remedy.

Redundancy is initiated when one of the redundancy circumstances arises. Section 55 (1) (c) of the Employment Code Act provides as follows:

(1) An employer is considered to have terminated a contract of employment of an employee by reason of redundancy if the termination is wholly or in part due to -

(c) an adverse alteration of the employee's conditions of service which the employee has not consented to.

4.5 The Complainants have based their claim on section 55(1) (c).

They claim that the termination of their employment contracts was an adverse alteration of their conditions of service.

4.6 In the case of **National Milling Company -V- Grace Simataa**

and others it was stated that:

“If an employer varies in an adverse way a basic condition or basic conditions of employment without the consent of the employee, then the contract of employment terminates and the employee is deemed to have been declared redundant or early retired, as may be appropriate, as at the date of the variation and the benefits are to be calculated on the salary applicable.”

- 4.7 It is my firm view that a permanent and pensionable employment contract like any other employment contract can be terminated as long as it is done within the scope of the law. In the present case, redundancy does not arise because termination of employment is fundamentally different from variation of basic conditions of employment.
- 4.8 With regard to the second issue of whether operational requirements were a valid reason. **Section 52(2) of the Employment Code Act** provides that;
- “An employer shall not terminate a contract of employment of an employee without a valid reason for the termination connected with the capacity or conduct of the employee***

or based on the operational requirements of the undertaking”.

- 4.9 The import of this section is that if an employee cannot continue to be employed for operational reasons, the employer can terminate them validly on that premise. This court shall examine if indeed there were operational reasons in the business' decision leading to the termination.
- 4.10 The operational requirements that lead to a dismissal can result from internal or external circumstances. Internal reasons may include closure of a business, closure of a part of the business or of a department or restriction in the size of the company and organisational changes. On the other hand, external reasons are those that lie outside the company, for example, a decrease in sales or third-party funding.
- 4.11 In the letters of termination exhibited and marked **CM 4** and **CM 5** in the Respondent's Affidavit in Support of Answer, the Respondent stated that the reason for termination was to ensure efficiency in the operations of the company.
- 4.12 From the aforementioned letters, the Respondent also stated that there was no seamless continuation of the company after the acquisition of 100 percent shareholding by Finsbury

Investment Limited. This was apparently what led to the decision to phase out permanent contracts of employment by way of termination. The letters however do not disclose in what way the company with all its employees, assets and liabilities failed to continue seamlessly.

4.13 It is my considered view therefore that the Respondent acted in breach of the provisions of section 52(2) of the Employment Code Act by failing to give a valid reason for termination which is connected to the operational requirements of the undertaking. This is because the letter of termination did not disclose how the business became unsound due to having new shareholders and undergoing the process of name change. It was merely a change of direction by the Respondent that had nothing to do with operational requirements which by their nature should relate to a *bonafide* commercial reason as outlined above.

4.14 Furthermore, the Employment Code Act 2019 section 52 (5) provides an exception to the golden rule of 'he who alleges must prove' and places the burden of proof on the employer, in this case, the Respondent.

4.15 Based on the foregoing, I therefore hold and find that on a balance of probabilities the Respondent has failed to show this court that the termination was fair and for valid reason. The

manner in which the Respondent terminated the Complainants' employment contracts amounts to unfair termination, a statutory remedy, for failing to adhere to the provisions of section 52(2) of the Employment Code Act.

I thus award each of the Complainants damages for unfair and unlawful dismissal to the tune of five (05) months' salary.

I make no order as to costs.

IRA.

Delivered this..... day of..... 2023

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E. MWANSA
HIGH COURT JUDGE

