IN THE HIGH COURT FOR ZAMBIA **COMP/IRCLK/245/2021**

AT THE PRINCIPAL REGISTRY

INDUSTRIAL RELATIONS DIVISION

HOLDEN AT LUSAKA

BETWEEN:

TINASHE TIMOTHY GANDIZE **COMPLAINANT**

AND

NEWREST ZAMBIA LIMITED **RESPONDENT**

Coram: Chigali Mikalile, J. this 6th day of September, 2023

For the Complainant: Mr. R. Musumali – Messrs SLN Legal Practitioners

For the Respondent: Mr. S. Bwalya – Messrs Christopher Russell Cook & Co.

JUDGMENT

Legislation referred to

1. The Employment Code Act No.3 of 2019
2. The Constitution (Amendment) Act No. 2 of 2016
3. The Industrial and Labour Relations Act, Chapter 269

Cases referred to:

1. National Milling Company Limited v. Grace Simaata (2000) ZR 91
2. Mukaba v. The Association of Chartered Certified Accountants (ACCA), CAZ Appeal No. 027/2020.
3. Josephat Chasaya v. Ataur Rahaman Chodhury, Appeal No. 78/2017

4. Zesco Limited v. Salimu Banda & Others, Selected Judgment No. 211/2013
5. Engen Petroluem Zambia Limited v. Willis Muhanga & Another, Appeal No. 117/2016.
6. Vangaletos v. Vangaletos & Others, Selected Judgment No. 35/2016
7. Zambia National Commercial Bank Plc v. Martin Musonda & 58 Others, Selected Judgment No. 24/2018
8. Jackson Mwape & 61 Others v. ZCCM Investments Holdings Limited Plc, SCZ Judgment No. 23/2014
9. Humphrey Kombe Musonda v. Zambia Forestry and Forest Industries Corporation Limited (2015) Z.R 79 vol. 3

Text referred to:

Chungu, C. & Beele, E. Labour Law in Zambia, An Introduction (2nd Edition) (2020), Juta & company (Pty) Ltd

Introduction

1. By Notice of Complaint, the complainant commenced this action against the respondent on 11th May, 2021 for the following reliefs:

   a) Accrued leave pay
   b) Salary for February, 2020
   c) Unpaid terminal dues from the date of dismissal to date
   d) Costs incidental to this action and any other remedy the Court may deem fit.

Affidavit evidence

2. The complainant deposed that he was employed by the respondent on 24th September, 2012 as Chief Accountant on permanent and pensionable basis as evidenced by the exhibit marked "TTG1". He was dismissed on 24th February, 2020 unlawfully and unfairly in that

the consultant company that was engaged to handle his case had no mandate to deal with disciplinary issues of the employees, but to negotiate on behalf of the respondent with the union representatives on collective agreements and salaries. Exhibit marked "TTG2" refers.

3. Following his dismissal, the complainant computed his terminal dues which included accrued leave, unpaid salary for February, 2020 and retirement package as seen in the exhibit "TTG3". He added that his efforts to recover his dues from the respondent proved futile. hence this action.

Respondent's Answer and affidavit evidence

4. The respondent filed its answer on 15th June, 2021 in which it denied dismissing the complainant unfairly. It was stated that attempts had been made to settle the matter amicably but the complainant declined. The respondent urged Court for an order to pay the complainant K 12,771.86 in full and final settlement of the matter and that each party bears their own costs.

5. The affidavit in support was sworn by Abraham Balima, the respondent's General Manager. He confirmed that the complainant was employed on 24th September, 2012.

6. In denying the allegation that the complainant was unfairly dismissed through the consultant company which had no mandate to deal with the complainant's case, Mr. Balima averred that the respondent did hire Beatmas Human Resources Consultants Limited (BHRC) on or around 21st September, 2016 to provide human resource consultancy services. As per exhibit "NZ01", the services included performance management and disciplinary

services. It was on the basis of this appointment that the company had conduct of these proceedings on the respondent's behalf.

7. According to the deponent, exhibit "TTG2" relied on by the complainant does not prove the alleged limitation of the company's mandate to conduct disciplinary proceedings.

8. He further averred that the charge against the complainant was brought by Mr. Pierre Verdier, the then General Manager and most senior employee of the respondent in Zambia who was conflicted in the matter. The complainant was the second most senior employee and so the matter could not be effectively handled inhouse. It was against this background that the General Manager engaged BHRC in this matter to ensure that natural justice prevails.

9. It was also deposed that Mr. Masautso Nyathando of BHRC was a reputable HR Consultant and practitioner with over 43 years' experience hence the respondent disputes the assertion that the consultant dealt with the matter unfairly.

10. The complainant's claim of K 105,246.06 as retirement package is disputed because the complainant was summarily dismissed and not retired therefore he forfeited his entitlement for such benefits in accordance with section 50 and 51 of the Employment Code Act. In the same vein, the complainant was not entitled to one month's salary in lieu of notice.

11. The deponent exhibited to his affidavit as "NZ02" the respondent's calculation of the complainant's full and final settlement according to the respondent's records.

12. In his further affidavit dated 6th January, 2023, Mr. Balima exhibited the complainant's letter of appointment dated 24th September, 2012 ("AB1"). The letter of appointment provided that the conditions of service would form an integral part of the complainant's terms of employment and the conditions were revised or amended from time to time as indicated by exhibit marked "AB2".

13. Mr. Balim averred that on 4th February 2020, the respondent charged the complainant with 6 different charges arising from the execution of his duties. The charge sheet is exhibited to the affidavit as "AB3".

14. On 18th February, 2020, the respondent held the disciplinary hearing through its Human Resource Consultant, BHRC, during which the complainant was accorded the opportunity to exculpate himself. He found guilty of two of the six charges which resulted in his being summarily dismissed on 24th February, 2020. He was advised to appeal to the respondent's vice president within 14 days as denoted in the dismissal letter marked as exhibit "AB4". The complainant did not appeal within the stipulated period and his case was closed.

15. On 4th March, 2020, the respondent received a letter (exhibited as "AB5") from the complainant's Advocates, Messrs. George Kunda & Company advising that they were instructed by the complainant to lodge an appeal against the complainant's summary dismissal.

16. On 10th July, 2020, the complainant's advocates belatedly wrote the letter of appeal (exhibit "AB6") which appeared to admit the charges against the complainant. The respondent replied to the letter of appeal advising that the complainant's appeal against the summary dismissal was time-barred, having being lodged outside the prescribed 14 days. The response is exhibited as "AB7".

17. According to Mr. Balima, the complainant was not unlawfully or unfairly dismissed as alleged. The respondent computed his terminal dues ("AB8"/"NZ2") but the complainant rejected them and insisted on the terminal benefits he computed (exhibit marked "AB9").

18. The respondent disputes the complainant's computation of his terminal benefits for the following reasons: Firstly, the complainant's salary for February, 2020 was K 7,095.45 which the complainant rejected. The respondent would pay this amount into court. Secondly, the complainants housing allowance which constitutes 30% of his basic salary was K 2,128.64, while his transport allowance was K 153.60 which was paid for the period October, 2019 to January, 2020 as evidenced by the complainant's pay slips exhibited as "AB10".

19. Thirdly, the complainant was not contractually entitled to the payment of airtime and as a result, he could not claim the same. Fourthly, by virtue of the summary dismissal, he was neither entitled to one month pay in lieu of notice nor payment of any retirement benefits. Clause 6.4 of the conditions of service ("AB2") refers.

20. Mr. Balima also deposed that the complainant's accrued leave pay is K 9,901.11 which the complainant rejected. The respondent would pay this amount into court.

21. It was further deposed that the complainant filed an application for leave to file complaint out of time and the Learned Registrar proceeded to determine the application in the respondent's absence. He delivered a ruling authorising the complainant to file out of time. The basis was that the requirement for leave was abolished after the enactment of the Constitution (Amendment) Act No. 2 of 2016. The summons, affidavit and ruling are exhibited as "AB11" and "AB12".

Affidavit in reply

22. In the reply dated 12th January, 2023, the complainant averred that the dismissal was not in contention. He admitted that transport allowance for the period October, 2019 to January, 2020 was paid. He also admitted that he was not contractually entitled to airtime. He further admitted that the leave amount was K 9,901.11.

23. He, however, deposed that the respondent did not correctly compute the amount due to him following the dismissal. According to the complainant, the respondent omitted gratuity which he is entitled to. The correct calculation of his dues inclusive of gratuity at 25% is K 177,152.56. The statement of the amount due is exhibited to the affidavit as "TTG1".

Submissions

24. On behalf of the complainant, Mr. Musumali submitted that the main issue for determination is whether the complainant is entitled to payment of gratuity as one of the terminal dues. He highlighted that from the respondent's answer, the respondent concedes that the complainant is entitled to payment of the February, 2020 salary and accrued leave days as confirmed in the further affidavit in support of answer.

25. Mr. Musumali submitted that the respondent had declined to pay gratuity solely because the complainant was subject of a summary dismissal. He argued that there is no legal authority which states that an employee who has been summarily dismissed cannot be paid gratuity or terminal dues. In fact, the Employment Code Act in section 51(1) provides that when an employee is summarily dismissed, he will be entitled to all accrued benefits and wages.

26. In the same vein he submitted that sections 53(6) and 73(1) and (2) of the Employment Code Act provide for gratuity. Counsel's understanding of these provisions was that it is mandatory for an employer to make gratuity payment at 25% of the basic pay upon termination of employment.

27. To reinforce his argument, Mr. Musumali depended on the case of **National Milling Company Limited v. Grace Simataa & Others**(1) in which the Supreme Court expressed itself as follows:

In this regard, we accept that to a person leaving employment the arrangements for terminal benefits - such as pension, gratuity, redundancy

pay and the like - are most important and any unfavourable unilateral alteration to the disadvantage of the affected worker and which was not previously agreed is justiciable and in this connection it is unnecessary to place a label of basic or non-basic on it.

28. Counsel added that the Constitution guarantees an employee of the right to a pension benefit. Article 187 is couched in the following terms:

187 (1) An employee including a public officer and a Constitutional officer holder, has a right to a pension benefit.

(2) A pension benefit shall not be withheld or altered to the employee's disadvantage.

29. It was submitted that the definition of pension benefits in the Constitution in Article 266 includes a pension, compensation, gratuity, or similar allowance in respect of a person's service.

30. On the strength of the forgoing authorities, Mr. Musumali submitted that there was a legal requirement for payment of gratuity by an employer upon dismissal or termination of employment. Counsel therefore prayed that judgment be entered in favour of the complainant in terms of terminal dues. These terminal dues consist of one month's salary, leave days and gratuity at 25% of basic pay of the complainant's salary to be assessed by the Registrar in default of agreement plus interests on all sums found due together with costs of the proceedings.

31. On behalf of the respondent, Mr. Bwalya submitted that leave pay is not in dispute. Similarly, there is no dispute regarding the issue of the salary for February 2020. Nevertheless, the complainant rejected the respondent's desired payment of the salary on the basis

that the respondent did not accept the complainant's computation of his terminal dues in the schedule marked "TTG3".

32. As regards unpaid terminal dues, it was argued that the complainant was not entitled to payment of one month's pay in lieu of notice in the sum of K7,095.25 owing to the fact that his employment came to an end by way of summary dismissal following a disciplinary hearing. It was submitted that the respondent was entitled to terminate the complainant's employment by way of summary dismissal. To this end, the respondent relied on the pronouncement of the Court in the case of **Mukaba v. The Association of Chartered Certified Accountants (ACCA)** (2).

33. On the issue of transport allowance in the collective sum of K585.60, it was contended that the complainant was not entitled as he was paid. This was evidenced by the exhibited payslips which were generated by the complainant in his capacity as accountant. The case of **Josephat Chasaya v. Ataur Rahaman Chodhury**(3) was relied on in which the Court of Appeal held that merely making allegations in the statement of claim is insufficient to prove one's case. The averment must be supported by evidence.

34. In the same vein, Mr. Bwalya denied the complainant's claim for a retirement package in the sum of K 105,246.06 for 7 years and five months. He reiterated that the complainant was summarily dismissed as evidenced by the exhibits marked "AB3" to "AB7" and was thus not retired as provided for in clause 6.4 of the conditions of service marked "AB2".

35. On the question of gratuity for 89 months at the rate of 25% in the sum of K 157,873.76, it was submitted that the complainant disingenuously included the claim in his affidavit in reply. The aforesaid claim was not prayed for in the notice of complaint and no evidence was provided by the complainant.

36. Furthermore, the complainant did not amend or seek leave to amend his notice of complaint to introduce the gratuity claim. It was argued that the complainant's belated introduction of the claim in the affidavit in reply had deprived the respondent of the opportunity of responding to or traversing the same by way of rejoinder. Mr. Bwalya therefore prayed that the court declines to consider the said claim.

37. If, however, the Court is inclined to consider the claim, it was submitted that the evidence before Court does not support the claim for payment of gratuity for 89 months.

38. It was contended that before the introduction of the mandatory payment of gratuity in 2019, the said entitlement was purely contractual. In this regard, the appointment letter of 24th September, 2012 together with the attendant conditions of service marked "AB2" do not provide for the payment of gratuity.

39. Mr. Bwalya anchored this argument on the case of **Zesco Limited v. Salimu Banda & Others**[4], in which the Court opined that the gratuitous payment was not a condition of service, therefore, an employee could not claim it as a matter of right. He further contended that assuming that gratuity was provided for, the

complainant did not produced any evidence to show that his basic pay was K7,095.45 for the entire period of 89 months.

40. Moreover, the Employment Code Act could not be interpreted retrospectively to provide for payment of gratuity to the complainant (for over 80 months) from the date of his employment on 24th September 2012 to 10th May, 2019 when the Act became operational. It was submitted that the complainant was therefore not entitled to payment of gratuity.

41. As for costs, Mr. Bwalya submitted that the complainant is not entitled in the absence of any evidence to the effect that the respondent has been delinquent in its prosecution of its opposition to the complainant's action as required by rule 44(1) of the Industrial and Labour Relations Act, Chapter 269 as affirmed in the case of **Engen Petroluem Zambia Limited v. Willis Muhanga & Another[5].**

42. Counsel contended that the complainant's averment that he was authorised to file his complaint on the basis that the requirement to seek leave of Court to file the Notice of Complaint out of time was abolished after the enactment of the Constitution (Amendment Act) No. 2 of 2016, was misconceived. Thus, the Notice of Complaint was irregularly filed. It was therefore submitted that this Court does not have the jurisdiction to even entertain the complaint.

43. Counsel further argued that leave goes to jurisdiction. Where the Court exercises jurisdiction it does not have, its decision amounts to nothing. He relied on the case of **Vangaletos v. Vangaletos & Others[6].**

Consideration and decision

44. I have carefully considered the affidavit evidence and the final submissions from both parties for which I am grateful. It is worth noting that there was no trial in this matter. Parties agreed to the Court proceeding with the determination of the action based on the documentation on record.

45. Before I delve into the intricacies of the matter, I must determine whether or not I have jurisdiction. It is after all settled at law that jurisdiction is everything and without it, a decision amounts to nothing.

46. It is common cause that the complainant filed an *interpartes* summons for leave to file complaint out of time on 26th March, 2021. The Learned Registrar delivered a ruling in which he pronounced that there was no need to seek leave of Court in view of the Constitution as amended in 2016 and he ordered the complainant to proceed to file his complaint.

47. I agree with the respondent that the reasoning of the learned Registrar is not supported by the law. The Registrar's conclusion did not take into account the decision of the Court mandated to interpret the Constitution. This is the decision in the case of **Zambia National Commercial Bank v. Martin Musonda**(7) wherein the Constitutional Court opined that until new legislation is enacted to provide for the processes and procedures and jurisdiction of the Industrial Relations Court Division pursuant to Article 120(30(a) and (b) of the Constitution as amended, the Court continues to use the existing processes and procedures and enjoy the same jurisdiction.

48. The foregoing decision is clear that Article 133(2) of the Constitution did not take away the mandatory requirement for a complaint to be filed within 90 days and for leave to be obtained where a complainant is out of time.

49. The complainant herein followed the law and sought leave. I am of the firm view that the complainant cannot be punished for the Registrar's decision, which ultimately gave him the go-ahead to file, but which decision was predicated on misapprehension of the law.

50. The upshot of the foregoing is that this matter is properly before me as the complainant took the necessary step in compliance with section 83(3) of the Industrial and Labour Relations Act, Cap 269 before filing his notice of complaint and was authorised to file by a Court of competent jurisdiction. As such, I do have the jurisdiction to determine this matter and I hereby proceed to do so.

51. From the evidence, it is not in dispute that the complainant was employed by the respondent on 24th September, 2012 as an accountant. He was summarily dismissed on 24th February, 2020 following disciplinary proceedings.

52. The parties are agreed that the complainant is entitled to leave pay in the sum of K 9,901.11 and salary for February, 2020 which includes basic salary of K 7,095.45, housing allowance at 30% of the basic salary in the sum of K 2,128.64 and transport allowance in the sum of K 153.60. In the circumstances, judgment is entered in favour of the complainant in relation to the leave pay claim and February, 2020 salary claim.

53. The parties are also agreed that the complainant is not entitled to a salary in lieu of notice as he was summarily dismissed. This is evident from the complainant's final computation exhibited to his affidavit in reply which indicates only gratuity of K 157,873.76, leave pay of K 9,901.11 and February salary of K 9,377.69.

54. Thus, the only issue left for determination is whether or not the complainant is entitled to any other terminal benefits.

55. The complainant's contention is that he is entitled to terminal dues in the form of a retirement package calculated at 2 months' pay for each complete year of service prorated according to the period of employment which is 7 years and 5 months. The respondent on the other hand argued that the complainant was summarily dismissed and not retired hence not entitled to a retirement package.

56. In his affidavit in reply, however, the complainant appears to have abandoned his position on the retirement package but instead stated that he was seeking gratuity. The introduction of gratuity did not sit well with the respondent as it feels that the claim has been introduced late in the day and that the court should not consider it.

57. I have heard the opposing arguments. A critical examination of the notice of complaint clearly reveals that the complainant is seeking unpaid terminal dues. I am of the view that the phrase 'terminal dues' encompasses all benefits due to an employee at the end of a contract. I am fortified by the **Grace Simataa**(1) case cited above

where the Supreme Court defined terminal benefits to include pension, gratuity, redundancy pay and so on.

58. In light of the foregoing, I find that the claim of gratuity was not introduced lately but was there from the onset. It is to be noted that the complainant commenced the action in person and clearly as a lay person, he narrowed down the claim to a retirement package in his affidavit in support of complaint. I agree with the respondent that the complainant is not entitled to a retirement package as he was dismissed. He did not retire.

59. Thus, what falls to be determined at this stage is whether or not the complainant is entitled to terminal dues in the form of gratuity.

60. The case of **Jackson Mwape & 61 Others v. ZCCM Investments Holdings Plc**[8] guides that an employee is always entitled to their accrued benefits. Further in the case of **Humphrey Kombe Musonda v. Zambia Forestry and Forest Industries Corporation Limited**[9] the Industrial Relations Court held that a claim for accrued benefits is not affected by dismissal.

61. The foregoing cases are clear that accrued dues are an employee's entitlement and are to be paid regardless of the manner in which the employee exits employment. Thus, if the complainant had accrued gratuity payment, the fact the he was summarily dismissed does not rob him of this entitlement.

62. In order to determine whether the complainant was entitled to gratuity, it is cardinal to examine his conditions of employment as well as the law. As rightly submitted by the respondent, payment of

gratuity was made mandatory with the enactment of the Employment Code Act, 2019.

63. The learned authors of Labour Law in Zambia, An Introduction state as follows at page 84:

> *Under the previous regime, payment of a gratuity was either at the employer's discretion or a benefit for certain protected groups of employees under the statutory instruments made pursuant to the Minimum Wages and Conditions of Employment Act. The Employment Code Act makes payment of a gratuity mandatory for all employees on long term contracts,...*

64. Clearly, therefore, the complainant would only be entitled to gratuity prior to the coming into force of the Employment Code Act (May, 2019) if his conditions of service provided for such a payment.

65. The complainant produced only his letter of appointment dated 24th September, 2012 which states that the company's conditions of service form an integral part of his terms of employment. He, however, did not attach the said conditions of service. Thus, he failed to justify his allegation that he was entitled to gratuity from the date of appointment.

66. The respondent did produce conditions of service with an effective date of 1st October, 2015. A perusal of the said conditions reveals no provision for gratuity, however.

67. I will thus proceed to look at the Employment Code Act as it was argued on behalf of the complainant that the Act supports his claim. Section 53(6) states that:

"Where an employer terminates a long-term contract of employment under this section, the employer shall pay the employee gratuity which is prorated according to the period of employment."

68. Section 73 states:

    (1) An employer shall, at the end of a long-term contract period, pay an employee gratuity at a rate of not less than twenty-five percent of the employee's basic pay earned during the contract period.

    (2) Where an employee's contract of employment is terminated in accordance with this Code, the employee shall be paid gratuity prorated in accordance with the period of employment.

69. Long term contract is defined in section 3 of the Code Act *as "a contract of service for a period exceeding twelve months, renewable for a further term; or the performance of a specific task or project to be undertaken over a specified period of time, and whose termination is fixed in advance by both parties."*

70. The net effect of the foregoing provisions is that payment of a gratuity is mandatory for all employees on long-term contracts at a rate of not less than 25% of an employee's basic pay. If the contract is terminated prior to the expiration of the fixed term, the employee is entitled to receive a gratuity on a pro-rated basis.

71. Furthermore, section 51 provides that the employee shall be paid his accrued gratuity benefits even if he is summarily dismissed.

72. The key word clearly is 'long-term'. Gratuity is applicable only to those on long-term contracts. The question that arises is: was the

complainant employed on a long-term contract as envisaged by the Act?

73. I again revert to the conditions of service in order to answer this question. I note the contents of clause 4 with the heading: 'Contract of Service/Employment Contract'. Clause 4.1 in particular provides that *"The contract of service shall be in writing and shall be permanent unless otherwise specified."*

74. The letter of appointment did not state otherwise. In fact, the complainant, at paragraph 4 of his notice of complaint as well as paragraph 4 of his affidavit in support of notice of complaint did state that he was employed on permanent and pensionable basis. I accordingly find that the complainant was employed on permanent basis.

75. The Code defines a permanent contract as a contract that expires on the employee's attainment of the retirement age if not terminated in accordance with the Act. Quite clearly, there is a difference between the two types of contracts and as stated earlier, gratuity is applicable only to those on long-term contract.

76. I am, therefore, of the considered view that the complainant is not entitled to a gratuity payment. The claim for terminal dues in the form of retirement benefits or gratuity accordingly fails.

77. In terms of costs, the respondent cannot be said to have conducted itself improperly or unreasonably as envisaged by rule 44 of the Industrial Relations Court Rules, Cap 269 to warrant condemning it in costs.

Conclusion and orders

78. The complainant has succeeded to the extent shown above. For the avoidance of doubt, I make the following orders:

    (i) The respondent shall pay the complainant forthwith leave dues in the sum of **K 9,901.11**.

    (ii) The respondent shall pay the complainant forthwith, the sum of **K 9,377.69** for the February, 2020 salary.

    (iii) The total amount due shall attract interest at short-term bank deposit rate from the date of complaint to the date of judgment and thereafter, at the current bank lending rate as determined by the Bank of Zambia until full settlement.

    (iv) Each party shall bear their own costs

Leave to appeal is granted

Dated at Lusaka this 6th day of September, 2023

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Mwaaka Chigali Mikalile

JUDGE