

**IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT NDOLA
(Industrial Relations Division)**

2022/HN/IR/21



BETWEEN:

**SOLOMON OBRIAN MAZILA
DICKSON R. CHISENGA**

1ST COMPLAINANT

2ND COMPLAINANT

AND

MWALIN INVESTMENTS LIMITED RESPONDENT

Before the Hon. Mr. Justice Davies C. Mumba in chambers on the 20th day of January, 2023.

For the Complainants: In Person
For the Respondent: No appearance

JUDGMENT

Cases referred to:

1. Fridah Kabaso Phiri (sued as Country Director of Voluntary Services Overseas Zambia) v Davies Tembo, SCZ Appeal No.4 of 2012.

Legislation referred to:

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

Other works referred to:

1. Winnie SitholeMwenda and ChandaChungu: A Comprehensive Guide to Employment Law in Zambia: UNZA Press. Lusaka, 2021

By notice of complaint supported by an affidavit sworn by the 1st complainant filed into Court on 21st April, 2022, the complainants commenced this action against the respondent. With leave of the Court, the said notice of complaint was amended and filed into Court on 5th October, 2022 supported by an amended affidavit of even date. The respondent did not file an answer and a supporting affidavit neither did they appear at the trial despite being served with the notice of hearing.

In their amended notice of complaint, the complainants are seeking the following reliefs:

1. A Court order for payment of redundancy packages.
2. A Court order for payment of one month salary in lieu of notice.
3. A Court order for payment for all accrued leave days.
4. An order for payment of all accrued benefits owed to the complainants.
5. Interest
6. Costs.

In his affidavit in support, the 1st complainant who also deposed on behalf the 2nd complainant, averred that they were verbally employed by the respondent company as Drivers on 12th September, 2011 and 6th June, 2006, respectively. That they executed their duties diligently and worked well with the respondent until the respondent decided to terminate their

employment by way of redundancy on 15th December, 2019 for the 1st complainant and 4th April, 2020 for the 2nd complainant. That the termination of their employment was communicated to them verbally by the respondent's officer, Mr. Kalizya Musonda who informed them that it was with immediate effect. That the reason stated for the termination of their employment was that the respondent could no longer afford to pay them their salaries. That the respondent had not paid them their redundancy package in full. That the respondent had only paid K5,000.00 to each one of them in July, 2020 and in October, 2020, respectively, even though the breakdown of the said money was not disclosed. Further, that they were claiming to be paid one month's salary in lieu of notice as there was no notice for the termination of their employment. Furthermore, that during the tenure of their employment they never went on leave and were, therefore, claiming for payment for all their accrued leave days. That the respondent proceeded to remove them from its payroll upon termination but never paid their redundancy package contrary to the Laws of Zambia. They urged the Court to order to the respondent to pay their redundancy package including payment for accrued leave days and one month salaries in lieu of notice.

At the trial, the 1st complainant, who also testified on behalf of the 2nd complainant, stated that they started working for the respondent as Drivers on 12th September, 2011 and on 6th June, 2006, respectively. That on 12th December, 2019, he was

formed that 15th December, 2019 would be his last day of work. That the 2nd complainant was told to stop work on 4th April, 2020. That their last salaries were K6,300.00. That they did not have any pay slips because the respondent never used to give them any pay slips. That they used to get paid through the bank but they did not also have bank statements showing their last salaries. That the respondent told them that the reason they were being asked to stop work was because it did not have money to be paying them. It was the witness's further testimony that the respondent's business remained a going concern but the respondent decided to reduce the workforce. That the termination of their employment was done verbally. That the 1st complainant stopped work on 15th December, 2019 while the 2nd complainant stopped on 4th April, 2020. Thereafter, they started going to the respondent's office to pursue payment of their dues but to no avail. They then went to the Labour Office but the respondent's Director did not go there hence they commenced this action.

From the available evidence, the following are the issues for determination:

1. Whether the respondent terminated the complainant's contracts of employment by reason of redundancy thereby entitling the complainants to the payment of redundancy packages.
2. Whether the complainants are entitled to the payment of one month salary in lieu of notice; payment for all accrued

leave days; and payment of other accrued benefits owed to the complainants.

Regarding the first issue, the Supreme Court in the case of **Fridah Kabaso Phiri (sued as Country Director of Voluntary Services Overseas Zambia) v Davies Tembo¹** held that:

“A redundancy takes place when an employer decides that the employee’s position and/or services are no longer required, and, therefore, the position must be abolished.”

On the above authority, for an employee to succeed in his claim that the termination of his/her employment was by reason of redundancy, it should be proved that the employee’s position and/or services were no longer required by the employer and, therefore, the employee’s position was abolished.

Further, a redundancy is considered to have occurred when the termination is due, wholly or in part, to one of the reasons provided for in section 55(1) of the Employment Code Act No. 3 of 2019. The said Employment Code Act applies to both written and oral contracts of employment. Section 55(1) 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-

- (a) The employer ceasing or intending to cease to carry on the business by virtue of which the employees were engaged;**
- (b) The business ceasing or diminishing or expected ceasing or diminishing the requirement for the employees to carry out work of a particular kind in the place where the employees were engaged; or**

of the above statutory provision is that a redundancy is triggered if it is conducted in terms of section 55(1) of the Employment Code Act. Other than that, a redundancy cannot be said to have occurred.

In the instant case, I am satisfied that the complainants served the respondent at all material times under oral contracts of employment. According to the complainants' evidence, the reason given by the respondent for the termination of their employment was that the respondent did not have money to continue paying them salaries although the company remained a going concern. It is, therefore, my considered view that the respondent's financial incapacity to continue paying salaries to the complainants did not mean that the complainants' positions or their services were no longer required. There is also no evidence that the complainants' positions were abolished. Further, it has not been shown that any of the incidences outlined under section 55(1) of the Employment Code Act had occurred.

On the totality of the evidence, I am of the firm view that a redundancy situation in respect of the two complainants did not occur in this case. So far as the complainants' evidence in this case is concerned, the respondent cannot be deemed to have

declared the complainants redundant when the essential elements of redundancy have not been proved. Therefore, the complainants' claim for redundancy payment (package), which is an entitlement for only those employees whose employment has been terminated due to redundancy as provided by section 3 of the Employment Code Act No. 3 of 2019, has no leg to stand on. In this regard, the complainants' claim is accordingly dismissed.

On the available evidence in this case, it is my considered view that the complainants' contracts of employment were terminated for a valid reason based on the operational requirements of the respondent's undertaking. I find that there was nothing irregular, on the part of the respondent, in terminating the complainants' contracts of employment on account of its financial constraints in a bid to maintain its company as a going concern. The learned authors, Hon. Judge Dr. Mwenda and Chanda Chungu, of the book entitled: A Comprehensive Guide to Employment Law in Zambia, state at page 301 that:

"With termination for operational reasons, the employer continues to exist and the need for the employee's services has not ceased, but the employer simply cannot sustain that employee in its enterprise.... In such situations, the employer is justified in terminating the services of the employee based on operational requirements as required by section 52(2) of the Employment Code Act."

I fully endorse the above learned authors' position and accordingly find that the respondent cannot be blamed for having terminated the complainants' contracts of employment on

account of its financial difficulties to sustain the complainants' employment.

As regards the claim for payment of one month in lieu of notice, I am satisfied that the two complainants were not given the requisite notice before the termination of their contracts of employment. Section 53(1) and (2) (c) of the Employment Code Act provides as follows:

"(1) An employee whose contract of employment is intended to be terminated is entitled to a period of notice, or compensation in lieu of notice, unless the employee is guilty of misconduct of a nature that it would be unreasonable to require the employer to continue the employment relationship.

(2) An employer shall, where the contract of employment does not provide for a period of notice, give—

(c) thirty days for a contract of employment of more than three months, except that notice to terminate a contract of employment of more than six months shall be in writing."

In the present case, I am satisfied that the respondent did not give the complainants the requisite notice of 30 days before terminating their contracts of employment. Therefore, I find that the complainants are entitled to be paid one month in lieu of the 30 days' notice for the termination of their contracts of employment. I enter judgment in their favour accordingly. The amounts due to the complainants are to be agreed or assessed by the learned Deputy Registrar in default of such agreement.

The complainants have also claimed for payment for all their accrued leave days. Their evidence was that they never went on

leave during the whole period that they worked for the respondent.

It is settled by a plethora of authorities that even when an employee is summarily dismissed or the contract of employment is terminated in any other manner, the employee does not lose his or her accrued benefits.

In *casu*, I am satisfied that the complainants did not proceed on leave during their time of service with the respondent. Therefore, I hold that the complainants are entitled to the payment for their accrued leave days. There being no evidence as to the number of leave days the complainants were entitled to earn per month, and the total number of leave days that could have accrued to them at the end of their employment, I refer this matter to the learned Deputy Registrar for the assessment of the total accrued leave days and the total amount payable to the complainants in respect of the said accrued leave days.

As regards the claim for the payment of all other accrued terminal benefits, the complainants did not lead any evidence to show the type and the nature of the accrued terminal benefits that the complainants were entitled to. However, by the enactment of the Employment Code Act No. 3 of 2019 employees, whether serving under oral contracts or written contracts, are entitled to the payment of gratuity at the end of a long term contract. This was not the case prior to the enactment of the said

Employment Code Act as gratuity at that time was only an entitlement of an employee if it was provided for in the contract of employment.

Section 73 (1) of the Employment Code Act provides as follows:

(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.

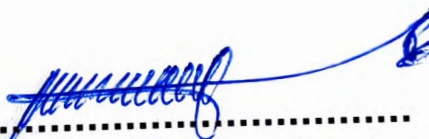
In the present case, I am satisfied that the complainants served under oral contracts of employment. The complainants having adduced no evidence as to whether they were entitled to the payment of gratuity, I find no basis on which I can award them any payment for gratuity for their period of service upto 8th May, 2019, that is, before the Employment Code Act came into effect. As for the period from 9th May, 2019, a date on which the Employment Code Act came into effect, to the date of the termination of their contracts of employment, that is, 15th December, 2019 for the 1st complainant; and 4th April, 2020 for the 2nd complainant, they are entitled to the payment of gratuity calculated at the rate of not less than 25% of their basic pay earned during the period of their service upon the coming into effect of the Employment Code Act. Since there is no evidence as to how much basic pay the complainants were earning from 9th May, 2019 to the dates of the termination of their contracts, I refer the matter to the learned Deputy Registrar for assessment of gratuity.

In summary, I have entered judgment in favour of the complainants for the payment for their accrued leave days and gratuity. The total sum to be found due and payable to the complainants shall attract interest at the short-term commercial deposit rate, as determined by the Bank of Zambia, from the date of the notice of complaint to the date of the judgment and thereafter, at 10% per annum until full settlement.

I make no order as to the costs.

Leave to appeal is granted.

Delivered at Ndola this 20th day of January, 2023.


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Davies C. Mumba
HIGH COURT JUDGE