

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA

COMP/IRCLK/45/2022

BETWEEN

FALA MBEWE



COMPLAINANT

AND

POSEIDON CONSTRUCTION COMPANY LTD

RESPONDENT

Coram: Chigali Mikalile, J this 1st day of March, 2024

For the Complainant: Mrs. C. Banda Kanga – Messrs Legal Aid Board

For the Respondent: Mr. C. Chunga – In House Counsel

JUDGMENT

Cases referred to:

1. Nitrogen Chemicals of Zambia Ltd v. Boyd Chomba Mutambo, SCZ Appeal No. 75/2014
2. Chilanga Cement Plc v. Kasote Singogo, SCZ Judgment No. 13/2009
3. Standard Chartered Bank v. Celine Nair, CAZ Appeal No. 14/2019
4. Jackson Mwape & 61 Others v. ZCCM Investment Holdings Limited Plc, SCZ Judgment No. 23/2014
5. Galaunia Farms Ltd v. National Milling Co. Ltd & Another (2004) Z.R. 1
6. Miller v. Minister of Pensions (1947) 2 All ER 327
7. Kasengele v. Zambia National Commercial Bank (2000) ZR 72
8. Tiger Chicks (T/A Progressive Poultry Limited v. Tembo & Others, SCZ Appeal No. 08/2020

Legislation referred to:

1. Industrial and Labour Relations Act, Cap 269 (Court Rules)
2. The Employment Code Act No. 3 of 2019
3. The Minimum Wages and Conditions of Employment (General) Order, 2018

Texts referred to:

1. Mwenda, W.S. & Chungu, C. A Comprehensive Guide to Employment Law in Zambia, 2021, UNZA Press
2. Chungu, C. & Beele, E. Labour Law in Zambia, An Introduction (2nd Edition) (2020), Juta & company (Pty) Ltd
3. Selwyn's Employment Law, 14th Edition, Oxford University Press

The delay in the delivery of this Judgment is deeply regretted. This was due to pressure of work.

Introduction

1. The complainant was employed by the respondent for about 33 years. He was injured on the job in 1989 and this necessitated the change in his role from general worker to cleaner. Due to declining health, he stopped reporting for work in March, 2021.
2. The complainant alleges that he took leave on medical grounds as a result of the occupational accident injury of 1989. The respondent, however, regarded his compassionate leave as resignation. This, according to the complainant, was not only

inhuman but also unlawful in view of the circumstances of the injury and medical condition which resulted in his failure to report for work. He also alleges that the respondent failed to pay his dues hence this action.

3. The respondent asserts that the complainant resigned of his own free will and was duly paid his termination benefits and dues in accordance with the collective agreement that governed his employment.

Background

4. The complainant filed his Notice of Complaint on 26th January, 2022, in which he sought the following reliefs:

(i) Damages for unlawful and wrongful termination of employment on grounds of alleged absconding from work or unilateral resignation

(ii) Compensation for the occupational related accident suffered on 28th October, 1989 amounting to K 100,000.00

(iii) An order of payment of 3 full basic monthly salaries from 31st March, 2021 to June, 2021 during his sick leave at K 3,253.45 totalling K 9,760.35 as well as 3 half salary payments at K 1,626.73 from July, 2021 to September, 2021 totalling K 4,880.18.

(iv) An order of payment of accrued leave days from 28th June, 1989 to 31st March, 2021 at 2 months by 33 years by

K 3,253.45 basic salary totalling K 214,727.7 as well as gratuity and other entitlements

(v) An order of payment of retirement package

(vi) Interest on all sums found due and payable

(vii) Costs

(viii) Any other order the court may deem fit.

5. On 20th June, 2022, the respondent filed a notice for the determination of a question of law pursuant to Order 14A RSC and section 85A(d) of Cap 269 in which it sought the determination of the following questions:

(a) Whether the complainant can claim damages for unlawful and wrongful termination of his contract of employment when the complainant voluntarily resigned from employment

(b) Whether or not the complainant can claim compensation for an occupational related accident from the respondent

(c) Whether the complainant can claim sick leave pay for a period when he was not an employee of the respondent

(d) Whether the complainant can claim accrued leave days and retirement benefits from the complainant

(e) Whether the complainant has a reasonable cause of action against the respondent

(f) That if the said questions be answered in the negative, the action against the respondent may be dismissed and the complainant to pay the costs of this action and if the question be answered in the affirmative, judgment be entered for the complainant against the respondent.

6. By a ruling dated 23rd August, 2022, the Court concluded that the only meritorious questions were those on the claim for compensation for the occupational related accident and sick leave pay. It was found that the occupational related accident claim is statute barred and the claim for sick leave pay was frivolous and vexatious. The two claims were accordingly dismissed and the matter was set down for trial for the remainder of the claims.

Affidavit in support of complaint

7. The complainant deposed that he was employed on 28th June, 1989 on a monthly basic salary of K 3,252.45 until March, 2021 when, owing to the occupational accident resulting in injury to his right arm and leg, he decided to take leave on medical grounds.
8. The accident occurred on 28th October, 1989 when he was on duty under the respondent's control and supervision whereby he suffered an injury on the right radius ulna and broken right forearm resulting in continuous pain and loss of capacity to lift objects and reduced activity on the right leg. Exhibited as "FM1" is the medical record.
9. According to the complainant, he could not continue to perform his daily activities or report for work and decided to take sick leave under the respondent's notification in March, 2021. The

respondent, through its human resources manager, fraudulently and with ill intention to deprive him of his accrued leave days and other entitlements issued a letter (exhibited as "FM2") and made him sign on it under false pretences that he would be paid all his dues once he signed. However, to date, he has not been paid.

10. The complainant averred that the decision to regard his compassionate leave as resignation was inhuman and unlawful considering the circumstances of the injury.
11. At the time he went on compassionate leave, he had worked for a continuous period of 33 years and had already reached the age of 55 years whereby he would be deemed to have reached retirement age. Exhibited as "FM3" is a copy of his last payslip dated 31st March, 2021 and bearing his employment history with the respondent.
12. All his efforts to recover payment of his dues made between October and December, 2021, proved futile as the respondent ignored all pleas and took offence with his approach. The respondent's failure to pay had resulted in loss of earnings, economic detriment and irreparable damage on his part. Exhibited to the affidavit as "FM4" is his demand letter.

13. According to the complainant, the respondent wilfully and deliberately neglected to pay him and prematurely terminated his contract even when there was no disciplinary hearing or an opportunity to exculpate himself.

Affidavit in support of Answer and Counterclaim

14. In the amended affidavit dated 7th April, 2022 and deposed to by Chileshe Shimoomba Chanda, the respondent's Human Resources Officer, it was averred that the complainant was employed on oral contract on 28th August, 1988. The employment record form is exhibited to the affidavit as "CSC1".
15. The complainant was at all material time a unionised employee and his terms and conditions of employment were governed by the Collective Agreement exhibited as "CSC2".
16. In or around October, 1989, the complainant suffered an occupational injury and subsequently proceeded on sick leave. He returned to work after receiving the requisite medical attention and upon being discharged. Exhibited as "CSC3" is the final medical report.
17. Upon his return to work, the respondent reasonably accommodated him by providing him with suitable alternative employment as a cleaner. This role was convenient and light in

nature and would not further aggravate his injury. The complainant continued to work until 12th March, 2021.

18. On 8th July, 2020, the complainant applied for one month sick leave and financial assistance due to pain in his arm and leg. The application is exhibited to the affidavit as "CSC4". According to the deponent, at the time, he advised the complainant to seek medical discharge but the complainant opted for the sick leave and voluntarily returned to work after 6 days.
19. On 11th March, 2021, the complainant expressed his desire to resign from work as he asserted that he was experiencing pain when carrying out his duties. On 12th March, 2021, the complainant formally submitted his letter of resignation (exhibited as "CSC5"). His desire was to leave employment by resignation as opposed to medical discharge. According to the deponent, the complainant resigned freely and voluntarily and as such, the respondent did not act in an inhumane manner.
20. The complainant's averment that he applied for sick or compassionate leave was denied. It is alleged that he neither provided a valid medical certificate signed by a health practitioner nor did he seek permission to proceed on sick leave from the respondent at the time of his resignation.

21. When the complainant reached the retirement age of 55 years, he was only entitled to his pension from the National Pension Scheme Authority (NAPSA) as provided for by clause 28 of the collective agreement that governed his employment with the respondent. It was the complainant's responsibility to obtain his benefits from NAPSA.
22. According to the deponent, at the end of each year, the complainant was paid a sum of money equivalent to his accrued leave days. As such, at the date of termination of employment, he was paid his accrued leave days for 2021 and is not entitled to any further payment. Exhibited to the affidavit and marked "CSC6 - 8" are true copies of the complainant's December, 2019, December, 2020 and March, 2021 payslips which all reflect payment of all accrued leave days to the complainant.
23. The complainant's assertion that the respondent wilfully disregarded the complainant's benefits was denied. The deponent averred that the complainant was duly paid his accrued dues and termination benefits on 25th March, 2021 which payment he freely and voluntarily acknowledged as his full and final benefits. The proof of confirmation of receipt of the final dues is exhibited as "CS9". The final benefits appear as "CS8".

24. The deponent further denied the assertion that the complainant was constructively dismissed as his resignation was not due to any intolerable conduct or breach of contract by the respondent.
25. The deponent averred that the complainant was born on 22nd October, 1966 and had not reached retirement age at the date of resignation. Thus, the respondent is not liable for any retirement benefits. Exhibited as "CSC10" is a copy of the complainant's NRC which according to the deponent should be read with exhibit "CSC1" which confirms the complainant's date of birth.
26. It was further averred that the complainant is not entitled to any salary for any period he did not work following his resignation. At the labour office, it was determined that the respondent is not liable to pay the complainant any further sums following resignation. However, despite this, the complainant wrote two letters ("CSC11 and 12") making a claim for his retirement benefits. He was explained to in a response dated 30th March, 2022 that he was not owed anything.
27. Lastly, the deponent averred that the complainant resigned from employment without giving the respondent one month notice and as a result, he is liable to pay the respondent

the equivalent one month's salary amounting to K 3,825.00 for leaving without notice.

Trial course

28. The complainant testified on his own behalf and called no other witness. The respondent also called one witness.

Complainant's case

29. The complainant relied entirely on the affidavit evidence. He added that he was complaining about his arm and leg. His cries were dismissed as noise by Mr Chanda. He said he stayed home for two weeks grieving over his arm. He then concluded that he needed to stop work.

30. When *cross examined*, the complainant stated that he was born in 1964 but subtracted two years at the time of obtaining his NRC. He, however, did not have proof of this assertion. He admitted that according to the *Zambian records*, he was born in 1966. The complainant also stated that the respondent did not break the terms of his oral contract. His only complaint was his injury.

31. On the resignation, it was his evidence that he did put it in writing that he was resigning. He said he was forced to resign due to the injury on his arm and leg. He did not get anything other than his monthly salary.

32. The complainant also admitted that he was a member of the union. He said he was not aware that his benefits were calculated in accordance with the Collective Agreement.

33. The complainant was not *re-examined*.

Respondent's case

34. The respondent's witness was Chileshe Shimoomba Chanda who testified that the complainant was employed in 1989 as a general worker at a construction site and suffered an accident whilst on duty. He was admitted and went under rehabilitation. He was away from work for almost a year. On his return, he was given lighter duties of a cleaner which duties he performed until his resignation.

35. In 2020, he was approached by the complainant who informed him that he was feeling some discomfort. Mr. Chanda advised him to make an application for an advance which he did and was given K 6,000.00. The money was recovered in 8 months without interest. He was further given one month leave outside his terms but he only stayed away for 2 weeks.

36. In March, 2021, the complainant again approached him and informed him about the discomfort in his arm and leg and that he was proceeding home. The following day, he handed over his resignation letter ("CSC5") and instructed that his dues

be prepared. According to Mr Chanda, the complainant's dues were paid and he signed for them as per "CSC9"

37. It was Mr. Chanda's evidence that the respondent has a policy that no leave days should roll over to the next year. If an employee did not proceed on leave, the leave days are commuted. At the time of the complainant's resignation, only the leave days accrued in that year were due. Exhibits "CSC6 and 7", that is, payslips for 2019 and 2020, are proof that the complainant was paid at the end of each year.
38. It was further his evidence that the complainant had not reached retirement age when he terminated his employment contract. Had he reached retirement age, he would have only been entitled to NAPSA contributions in accordance with the collective agreement. The agreement does not provide for any other benefits.
39. Under *cross examination*, Mr. Chanda stated that the complainant was a diligent employee despite his injury occasioned in 1989. On age, Mr. Chanda could not confirm that the complainant had attained 55 years at the time of resignation. When shown "CSC1", he admitted that it indicates the year 1966 but not the actual date.

40. Mr. Chanda admitted that the complainant was a permanent employee and that retirement age is 55 years. He also admitted that a person who attains 55 years is entitled to a retirement package. He, however, could not confirm that unionised employees such as the complainant are entitled to NAPSA contributions as well as a retirement package because that is not what the Collective Agreement provides for.
41. Mr. Chanda further confirmed that the complainant approached him and informed him that he was unwell in 2020 and leave was offered to him.
42. Under *re-examination*, Mr. Chanda told court that retirement benefits are dependant on the contract of employment. In the absence of the contract, the consideration is what is provided for in the legislation.
43. He further told court that no amount is due to the complainant. All calculations are contained on the last payslip. The basis of the payment was the collective agreement and the law. The witness also reiterated that the complainant resigned.

Submissions

44. Both parties filed written submissions for which I am most grateful. I shall not reproduce the submissions but shall refer as and when required.

Analysis and decision

45. I have carefully considered all of the evidence and authorities cited in the submissions.
46. From the evidence, it is not in dispute that the complainant was employed by the respondent as a general worker on oral contract. Due to the injury suffered at work, his position was changed to that of a cleaner and he held this position until 12th March, 2021.
47. Each party cited a different date of engagement in their affidavit with the complainant asserting that he was engaged on 28th June, 1989 while the respondent asserted that it was 28th August, 1988. However, a perusal of the record of oral contract produced by the respondent reveals that the complainant was engaged in November, 1988. As such, I find that he was engaged in November, 1988.
48. It is not in dispute that the complainant was a contributing member of the National Union of Building, Engineering and General Workers.
49. The issues in contention are firstly, the complainant's mode of exit from the employment relationship. This will determine whether or not he is entitled to any damages. Secondly, whether or not the complainant is owed leave days'

pay for the entire 33 years he was in employment and lastly whether or not he is entitled to gratuity or a retirement package.

Mode of exit

50. The complainant in his affidavit alleged that he proceeded on sick leave but that the respondent went ahead and regarded his leave as resignation. However, it was clear at trial that he had abandoned that line of argument. He outrightly testified that he resigned but that he was forced to resign due to the injury on his arm and leg.

51. In the submissions, counsel advanced the argument that the complainant was constructively dismissed. She cited the case of **Nitrogen Chemicals of Zambia Ltd v. Boyd Chomba Mutambo**⁽¹⁾ where the Supreme Court stated as follows:

“Constructive dismissal is anchored on the concept that an employer must treat his employee fairly and not act in a manner that will compel the employee to flee his job.”

52. Counsel also cited the case of **Chilanga Cement Plc v. Kasote Singogo**⁽²⁾ where the Supreme Court explained that:

An employee can claim to have been constructively dismissed if he resigned or was forced to leave employment as a result of his employer’s unlawful conduct which conduct amounts to a fundamental breach of the contract of employment. It is the employee who makes the decision to leave.

53. According to counsel, the respondent created a hostile environment for the complainant to an extent of him being chased by the manager.
54. Counsel for the respondent submitted that the complainant resigned freely and voluntarily and has shown no evidence to prove that it was as a result of any intolerable conduct on the part of the respondent. Counsel called to aid the text; A Comprehensive Guide to Employment Law in Zambia by the learned authors Mwenda and Chungu. He also relied on the case **Nitrogen Chemicals** case (cited above) for the ingredients in a constructive dismissal.
55. I have carefully considered the foregoing arguments. The learned authors of 'A Comprehensive Guide to Employment Law in Zambia' have this to say about constructive dismissal at page 269:
- Constructive dismissal occurs when an employee, seemingly on his own volition terminates his contract of employment by resigning, while the real reason for that action is that he is protesting against management's conduct. For constructive dismissal to be claimed the employer's conduct must be so serious that it amounts to a repudiation of the contract and the employee must clearly indicate that he is resigning or being forced to leave employment due to such conduct.*

56. Further in the **Nitrogen Chemicals** case, the Supreme Court outlined the elements of constructive dismissal when it stated as follows:

It is also plain there are three basic requirements for a constructive dismissal claim (1) the employee must resign (2) the Resignation must be in response to a fundamental breach of contract (3) the employee must act promptly and in response to the breach, so that he or she is not taken to have implicitly agreed to continue with the contract. (underlined for emphasis)

57. What can be gleaned from the foregoing authorities is that an employee can properly claim to have been constructively dismissed if he is forced to resign as a result of employer's conduct amounting to a fundamental breach of the contract of employment.

58. But, has it been shown that the respondent in the matter at hand was guilty of breaching the employment contract with the complainant in such a grave manner that the breach goes to the root of the contract or that the respondent was guilty of conduct that made it difficult for the complainant to continue working? Further, can the complainant be said to have acted reasonably in deciding that the environment was no longer conducive for him to continue working?

59. It is common cause that the complainant stopped work on 12th March, 2021. I find it expedient for the sake of clarity to

reproduce the letter he wrote to the Human resources Manager.

It reads as follows:

Dear sir/ madam

Greetings to you. I am writing this letter to you to inform you since I was involved in that accident which I falled in the scaffold, I had my arm and my leg dislocated. Therefore, I am experiencing the pains in my arm and leg. So, whenever I come for work, my supervisor sends me back home.

So, I think I will not manage to continue working since it has been a problem for so long. Your consideration will be highly appreciated.

(sic)

60. The letter is clear that the complainant resigned from his employment. He did not take leave. The letter is also clear that the reason cited for resignation was that he could not manage to continue working as he was in constant pain. Nowhere in the letter is it indicated that he had decided to stop work because of some ill treatment he was receiving from his superiors or employer. If anything, the letter shows that he had his supervisor's utmost sympathy. The supervisor would at times send him back home when he reported for work. This shows that the supervisor understood the complainant's plight and did not force him to work while in pain.

61. The only conduct that the complainant complained of was that the respondent made him sign a letter under false

pretences that he would be paid all his dues and further that the respondent ignored his pleas to pay him his money. The letter complained of reads as follows:

I Fala Mbewe, holder of NRC number 221074/53/1 confirm that I have received my FINAL DUES IN FULL owed for the days worked and accrued leave days to me by POSEIDON CONSTRUCTION LTD on this 25th day of March, 2021.

62. As can be seen, this letter was authored after his resignation. Further, according to the complainant, the pleas that were ignored by the respondent were made between October and December, 2021. Thus, the conduct complained of occurred after his resignation. However, it is settled law that conduct complained of in a claim for constructive dismissal is conduct before resignation and must be the reason for the resignation.

63. I note counsel's submissions that the respondent created a hostile environment for the complainant to an extent of him being chased by the manager. However, this is evidence at the bar and not supported by the complainant's own affidavit evidence or his testimony in court.

64. Quite clearly, there is no conduct on the part of the respondent that the complainant can point to as having been so bad that it compelled him to flee his job.

65. I have perused the collective agreement but I am not satisfied that any of the clauses were breached by the respondent.

66. I have further asked myself if perhaps there was breach of an implied term of the contract as was discussed in the case of **Standard Chartered Bank v. Celine Meena Nair**⁽³⁾. The Court of Appeal had this to say:

It is well settled that implied terms are not expressly stated in the contract. They are those terms which are so obvious that they need not be stated. For instance, treating employees with respect and not abuse them physically or otherwise is implied in every contract of employment. The Courts, custom or stature can assume that such terms are intended to be included in the contract although not expressly stated.

67. Further, the learned author of Selwyn's Employment Law had this to say about the breach of implied terms at page 401

It will be recalled that there is an implied duty of mutual respect and therefore any action by or on behalf of the employer which runs contrary to that duty amounts to constructive dismissal. This could be use of foul and abusive language, making unjustifiable complaint or giving unjustified warnings, making statements which destroy or seriously damage the relationship of trust and confidence which must exist between the parties, such as ill-founded allegations of theft , offensive and insensitive conduct by a supervisor and so on.

68. None of the conduct outlined in the foregoing authorities has been shown to have existed against the complainant. It appears the complainant was treated fairly well or decently. He was given an alternative role after his injury, that is, one that would not aggravate his injury. There is no evidence that the respondent at any given point attempted to hound him out of the work space because of his injuries. He stayed on for a further 32 years.
69. It is quite evident that the real reason for the Complainant's resignation was the pain which was making it difficult for him to work. There was no breach of contract either express or implied. Thus, I hold the firm view that the complainant's resignation was unreasonable. The option of a medical discharge was after all open to him.
70. In the circumstances, the claim for unfair, wrongful, constructive and unlawful dismissal must fail for want of merit. As such, the respondent is not liable for damages.
71. I shall now deal with the other reliefs sought by the complainant.

Payment of accrued leave days

72. The complainant is claiming leave pay from date of engagement to 31st March, 2021 totalling K 214,727.70. It was

submitted on the complainant's behalf that the respondent paid the leave days for the years 2019, 2020 and 2021 and that the respondent had not shown proof of payment for the period 1989 to 2018. The complainant relied on the case of **Jackson Mwape & 61 Others v. ZCCM Investment Holdings Limited Plc**⁽⁴⁾ where it was held that an employee is always entitled to their accrued benefits.

73. Indeed, leave pay is an accrued benefit that cannot be taken away from the employee. However, it is established at law that the burden to prove any allegation is always on the one who alleges (see **Galaunia Farms Ltd v. National Milling Co. Ltd**⁽⁶⁾) and so the complainant had the duty to establish that he never went on leave or that he was not paid leave commutation in the entire 33 years.
74. The respondent did of course show through the production of end of year payslips for 2019 and 2020 as well as the final payslip of March, 2021 that the complainant was paid leave commutation. Thus, the complainant's assertion that he is owed for the entire 33 years has been discredited.
75. The foregoing presents two possibilities. The first is that the complainant was paid his leave dues throughout his employment. The second is that the respondent never used to pay but only began to do so in 2019. Clearly, the burden has

not been discharged. The complainant needed to do more to prove his claim. I am persuaded by the English case of **Miller v. Minister of Pensions**⁽⁶⁾ where the Court stated with regard to the standard of proof as follows:

“It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal says: we think it more probable than not, the burden is discharged but if the probabilities are equal, it is not.”

76. There being no concrete proof, I am disinclined to find that the complainant is owed leave pay. The claim is accordingly dismissed.

Gratuity/Retirement package

77. The complainant alleges that he attained the age of 55 years which is the age of retirement, as such he is entitled to gratuity or a retirement package.

78. On its part, the respondent denied the assertion that the complainant had attained the age of 55 years and submitted a copy of his NRC with a hand written birth date of 22/10/1966. It was further submitted that the complainant was a unionised employee and this means that his employment was governed by the collective agreement exhibited as “CSC2”. He was bound by the terms of the agreement.

79. Counsel for the respondent further argued that it is frivolous and unreasonable for the complainant to claim benefits outside the scope and ambit of the collective agreement. The complainant seeks a retirement package in terms of the General Order but it is clear that the Order does not apply to him.
80. I have carefully considered the opposing arguments. As regards the aspect of age, there is no proper evidence as to the actual date the complainant was born. The NRC produced is not clear at all and in fact, the respondent's lone witness admitted during cross examination that the actual date was not indicated.
81. This Court was asked to read the NRC copy together with the record of oral contract, however, this record does not provide any clarity as it also simply indicates the year of birth and not the day and month. Therefore, I am disinclined to agree with the respondent that the complainant was born on 22nd October, 1966.
82. Since the NRC does not have the full date of birth, I will hold in favour of the complainant that he had attained the age of 55 years at the time of his resignation on 12th March, 2021.

83. Having made the above finding, the question still remains if the complainant is entitled to gratuity or a retirement package.

84. As rightly submitted by the respondent and as conceded by the complainant, the complainant was a unionised employee. His payslips clearly show that he was a paying union member. This means the collective agreement for the period 1st January, 2020 to 31st December, 2021 produced in evidence is applicable to the complainant. Clause 28 of the agreement provides for retirement benefits and states as follows:

28.1 An employee who has attained the statutory retirement age of 55 years shall be notified in writing 6 months prior to the date of retirement. The retirement benefits due to the employee shall be such as are due to the employee from such employer-employee contributions from NAPSA that are due to such employee.

28.2. Retirement benefits shall be such benefits as provided under the NAPSA scheme the employer contributing fifty per cent of such amount of contribution, as the employee is to contribute to the aforementioned scheme.

85. It is cardinal to mention here that the complainant is bound by the collective agreement and therefore bound by the above provision on retirement.

86. The authors of the book: Labour Law in Zambia: An Introduction at page 215 opine that in addition to the retirement benefits that are provided for under the statutory schemes, the employer can provide additional benefits. Additional benefits outside the compulsory schemes and repatriation benefits are payable in accordance with the conditions of service.
87. In the case of **Kasengele v. Zambia National Commercial Bank**⁽⁷⁾ the Supreme Court was categorical that that terminal benefits for retiring employees should be calculated on the basis of what was expressly agreed to in the contract of service that the employee served under until his departure from the employer.
88. The complainant herein did not bring to the attention of the Court any provision in the collective agreement that entitles him to the benefits claimed. The Court's attention was drawn only to clause 28. Thus, there is no basis upon which it can be held that the respondent provided for additional benefits. The complainant's retirement benefits, therefore, are those to be paid by NAPSA in accordance with the collective agreement and the claim is to be made by the complainant and not the respondent.
89. As regards gratuity, I do note that the Employment Code Act, 2019 does make payment of gratuity mandatory. However,

only specified employees are entitled. Section 73 makes reference to employees on long term contract.

90. The learned authors of Labour Law in Zambia further opine that even though section 73 of the Act refers to employees on long term contracts, employees on permanent and pensionable contracts are entitled to a gratuity if they are protected workers covered by the General and Shop Workers Orders.
91. Having been employed as a Cleaner, the complainant would ordinarily be covered by the Minimum Wages and Conditions of Employment (General) Order, 2011 as amended in 2018. According to Regulation 8 of the General Order, an employee who has served with an employer for not less than ten years and has attained the age of 55 years must be entitled to three months' basic pay for each completed year of service.
92. However, not all workers can benefit from the General Order as it sets out exceptions as follows:
2. (1) *This Order shall apply to employees as specified in the Schedule but shall not apply to employees.*
- (a) *of the Government of the Republic of Zambia;*
 - (b) *of a local authority;*
 - (c) *engaged in domestic service;*
 - (d) *in any occupation where –*

(i) wages and conditions of employment are regulated through the process of collective bargaining conducted under the Industrial and Labour Relations Act; or

(ii) where employee-employer relationships are governed by specific employment contracts attested by a proper officer;

and such conditions shall not be less favourable than the provisions of this Order...

(underlined for emphasis)

93. It is clear from the above provision that unionised employees are excluded as their conditions of service are regulated through the process of collective bargains. This position was affirmed by the Supreme Court in the case of **Tiger Chicks (T/A Progressive Poultry) Limited v. Tembo & Others**⁽⁸⁾ wherein it was stated that the Order is inapplicable where either employees are unionised or where their employment relationship is covered by specific contract of employment which is attested by a proper officer.

94. Therefore, as correctly argued by the respondent, the complainant cannot rely on the General Order to claim long service gratuity. He was a unionised employee who was represented by the union in as far as his conditions of employment were concerned and thus does not require the additional protection offered under the Act.

95. In the circumstances, the claim for gratuity or retirement package fails.

Costs and any other Order the Court may deem fit

96. Costs in this division of the High Court are awarded under certain circumstances. **Rule 44(1)** of the Industrial Relations Court Rules, Cap 269 provides that:

Where it appears to the Court that any person has been guilty of unreasonable delay, or of taking improper, vexatious or unnecessary steps in any proceedings, or of other unreasonable conduct, the Court may make an order for costs or expenses against him.

97. Both parties prayed for costs. In fact, the respondent was emphatic that the complainant's action is frivolous, vexatious, unreasonable and without merit deserving of the Court's condemnation. However, I am of the view that the complainant genuinely believed that he would succeed and cannot be faulted for having such a belief. Indigent litigants such as the complainant should not be deterred from exercising their right to take out an action due to fear of being slapped with an order for costs. That is not the spirit with which the law was enacted. I therefore refuse to term the complainant's insistence on Court intervention as unreasonable conduct to warrant condemning him in costs.

98. Finally, the evidence has not established any other relief that the complainant could be entitled to.

The counterclaim

99. The respondent alleges that the complainant resigned from work without giving notice. As such, he is liable to pay the respondent the equivalent one month's salary.

100. I have carefully reflected on this claim. I note that the respondent paid the complainant in March, 2021 knowing full well that it was paying him for the last time and yet did not recover the alleged notice pay. Quite clearly, the respondent did not deem it fit to do so. I am of the considered view that the respondent did not deduct from the last pay because there was nothing to deduct. The counterclaim is accordingly dismissed.

Conclusion and order

101. The Complainant has failed to prove on a balance of probabilities that he was constructively dismissed or unlawfully terminated. I find that he resigned of his own free will before exploring the options that may have been available to him as an employee incapacitated by ill health.

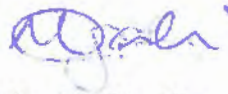
102. The complainant has also failed to prove that he was not paid all his leave dues. Further, he has failed to establish that

he is entitled to additional benefits over and above the contributions made to NAPSA.

103. In the circumstances, the Complainant's case fails entirely and so does the respondent's counterclaim.

Each party shall bear their own costs and is informed of the right of appeal.

Delivered at Lusaka this 1st day of March, 2024



M. Chigali Mikalile

HIGH COURT JUDGE