

IN THE HIGH COURT FOR ZAMBIA  
INDUSTRIAL RELATIONS DIVISION  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

2023/HPIR/0495



**BETWEEN:**

**STEVEN CHABALA CHABOBA AND 34 OTHERS**

**COMPLAINANT**

**AND**

**ELITE INDUSTRIES LIMITED**

**RESPONDENT**

Coram : Before Hon. Lady Justice Mrs. Mwaka. S. Ngoma this 15<sup>th</sup>  
day of April, 2024

*For the Complainant* : *In Person*

*For the Respondent* : *N/A*

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## **JUDGMENT**

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**Legislation referred to:**

1. *Employment Code Act No. 3 of 2019*
2. *Industrial Relations Court Rules, Cap 269 of the Laws of Zambia*

**Text Referred to:**

1. *Mwenda, W.S and Chungu, A Comprehensive Guide to Employment Law in Zambia (UNZA Press, 2021) .*

**Cases referred to:**

1. *Robert Simeza & 3 Others V Elizabeth Mzyece (2011) ZMSC 3*

2. *Wilson Masauso Zulu V Avondale Housing Project (1982) Z.R 172(S.C)*
3. *Sarah Aliza Vekhnik V Casa Dei Bambini Montessori Zambia CAZ Appeal No. 129 of 2017*
4. *Chansa Ng'onga V Alfred H. Knight (Z) Ltd SCZ Selected Judgment No. 26 of 2019*
5. *Swarp Spinning Mills V Sebastian Chileshe and Other (2002) Z.R 23*

### **INTRODUCTION**

1. The complainants commenced this action against the respondent by way of notice of complaint and supporting affidavit on 16<sup>th</sup> May 2023 seeking the following reliefs:
  - a. Leave days;
  - b. Gratuity
  - c. Salary arrears for 5 months
  - d. Damages for termination of contracts
  - e. Notice Pay
  - f. Costs and any other benefits the court may deem fit.

### **COMPLAINANTS' AFFIDAVIT EVIDENCE**

2. Mr. Steven Chabala Chaboba deposed to the affidavit in support of complaint on his own behalf and on behalf of the 34 others in which he stated that he was the lead complainant and therefore duly authorized to swear the affidavit on behalf of all the complainants.

3. He averred that the complainants were employed by the respondent on different dates and in different positions on contract basis as shown in exhibit marked **“SCC1”**.
4. It was his testimony that the complainants worked well with the respondent until 20<sup>th</sup> March, 2023 when they were verbally dismissed from employment without any notice and without being paid their dues. That their dues remain unpaid and efforts by the department of labour to resolve the matter proved futile. This was supported by a letter from the labour office addressed to the registrar of this court and exhibited as **“SCC2”** in which it was stated that efforts to have the matter resolved proved futile as the employer failed to heed guidance given by the labour office.

### **THE RESPONDENT’S CASE**

5. The respondent did not file an answer to the complaint.

### **Hearing**

6. At the hearing of this matter held on 22<sup>nd</sup> November, 2023, the respondent did not appear before court. I noted from the record that the lead complainant did file an affidavit of service on 20<sup>th</sup> September, 2023 in which he deposed to having personally served the respondent with the notice of hearing on 19<sup>th</sup> September, 2023. Having satisfied myself that the respondent was aware of the date of hearing, I proceeded to

hear the matter on the basis that the respondent was absent from court without any reason. I was fortified in taking this course by the case of **Robert Simeza & 3 Others V Elizabeth Mzyece**<sup>1</sup> in which the Supreme Court guided that no procedural injustice is occasioned when a court proceeds where a party who was aware of proceedings did not appear before Court.

7. Mr. Chaboba's oral testimony was that he was employed by the respondent in 2019 as a plant fitter, and that his major duty was fitting of machines. That sometime in May 2022, the respondent company was closed for a period of two months and when the company re-opened in July 2022, the complainants also resumed work. However, in November 2022, the respondent stopped paying the complainants their salaries. That they did not get their December 2022 salaries and on 10<sup>th</sup> January, 2023, the respondent company was closed again. He averred that although the complainants were on 2-year contracts, they had only worked for one year at the time of closure of the respondent company. As such, they were claiming for their unpaid salaries of 2 months and gratuity for the year 2022.

8. Mr. Chababa told the court that the contract exhibited in his affidavit in support of complaint is the one he had signed with the respondent and that all complainants had signed similar

contracts, albeit he did not exhibit them. It was his testimony that his salary was K3200 per month and that all the complainants used to get different amounts as shown on the copy of the payroll which he said was submitted to the labour office by the respondent. A copy of the said payroll was submitted to the court at the hearing and it was prayed that the same be admitted as part of the complainants' evidence, which was done.

9. It was Mr. Chaboba's further testimony that the months in respect of which the complainants were claiming unpaid salaries were November 2022 to March 2023.

10. Mr. Chaboba further told the court that the complainants were claiming leave days for one year. It was his testimony that the complainants all used to accrue 24 leave days per year. He further stated that they were entitled to one month's notice to terminate in line with clause 20.1 of the contract of employment. With this, Mr. Chaboba closed his testimony and called one witness.

**COMPLAINANT'S WITNESS NO. 2**

11. The Complainant's second witness was Gift Shatamba, a 29 year-old marketeer. It was the witness' testimony that the respondent stopped the complainants from working and owed them 5 months unpaid salaries, hence they

were claiming their unpaid salaries as well as gratuity for the year 2022. She added that the respondent company makes mineral water and drinks. When she worked for the respondent, she was operating a machine used to label water bottles and her monthly salary was K1, 750.

12. It was the witness' further testimony that she did not know why the respondent company was closed and that the complainants had asked the Human resource officer, Mr. Isaac Chitambo, as well as a Mr. Younus Pandor the reasons for the closure of the company and neither of them explained it to them. She told the court that the owner of the company was Mr. Bokoni Soko, and that the respondent's head office was still operating at Manda Hill under the name Infinity.

### **Determination**

13. I have considered and reflected on the pleadings and the oral evidence by the complainants. What needs to be determined is whether the complainants are entitled to the reliefs claimed as listed in their notice of complaint.
14. I am mindful that although the respondent neither filed an answer nor appeared at the hearing, the complainants still have to prove their case and will not succeed automatically on account of the respondent's absence or

failure to defend the action. I am guided by the case of **Wilson Masauso Zulu V Avondale Housing Project**<sup>(2)</sup> where the Supreme Court restated the principle of law that he who alleges must prove; and Ngulube DCJ (as he then was), said the following at page 175:

*“...I think it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent’s case.”*

15. Having laid the above principle, I now proceed to examine the reliefs claimed in the order in which they appear in the notice of complaint.

**WHETHER THE COMPLAINANTS ARE ENTITLED TO PAYMENT FOR ACCRUED LEAVE DAYS**

16. Clause 11.1 of Mr. Chaboba’s contract of employment exhibited in his affidavit in support of complaint provides for 2 days’ leave for every month served. Clause 11.6 of the same contract provides for payment of wages in lieu

of leave to an employee whose contract has terminated or expired.

17. It was Mr. Chaboba's testimony that all the complainants signed contracts with terms and conditions similar to his. I have studied Mr. Chaboba's contract and have observed that it is couched in general terms as it contains terms that are applicable to both gender. For example, to name but a few, the contract has provisions relating to maternity leave and mother's day which only apply to female employees and provisions relating to paternity leave which only apply to male employees. Further, the contract is printed and only details which apply specifically to Mr. Chaboba such as name, position, national registration card number, residential address, salary and allowances are handwritten. In view of this, I find that the complainants have proved that they all enjoyed similar conditions of service as shown in Mr. Chaboba's contract. Further, even were I in doubt of this, which I am not, I would turn to the Employment Code Act No 3 of 1999 which, in section 36(1), provides for paid leave of 2 days per month and payment of wages for accumulated leave at termination of contract. As such, I am satisfied that all the complainants are entitled to 2 days' leave for each month served. Their claim for 24 days accumulated leave days in 2022 is granted. The



leave pay shall be assessed by the Deputy Registrar of this court. The amounts payable shall be less any leave that may have been taken.

**WHETHER THE COMPLAINANTS ARE ENTITLED TO GRATUITY**

18. Clause 25 of the contract provides for gratuity of 25% of total basic pay for each completed contract period. It further provides that where a contract is not completed no gratuity shall be payable unless on the death of the employee where gratuity will be payable on prorated basis. It was Mr. Chaboba's testimony that the complainants all signed two year contracts which were prematurely terminated by the respondent after only one year. Notwithstanding the provision of the contract, the complainants seek gratuity for the year served. To determine this, I, once again, look to the provisions of the law for guidance. Section 73 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.***

***(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".***

Section 3 of the same Act defines a long term contract as:

***"long-term contract" means a contract of service for—(a) a period exceeding twelve months, renewable for a further term; or (b) 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;"***

19. Clause 1 of the contract provides that it was for a maximum of 2 years with the option to renewal on the part of the employer. No doubt this brings the contract well within the ambit of the definition of a long term contract as it is for a period exceeding twelve months, renewable for a further term. Consequently, section 73 of the Act is applicable to the complainants' contracts and as it provides for gratuity to be prorated, I find that the clause 25 of the contract denying the complainants' gratuity when contract is terminated before its expiry flies in the teeth of the law which clearly provides for gratuity to be prorated. I, accordingly, find that the

complainants are entitled to gratuity for one year. The amounts due to each complainant shall be assessed by the Deputy Registrar.

**WHETHER THE COMPLAINANTS ARE ENTITLED TO SALARY ARREARS OF 5 MONTHS**

20. In paragraph 4 of the notice of complaint it is stated that the complainants' services were verbally terminated on 16<sup>th</sup> December, 2022. However, in paragraph 5 of the accompanying affidavit, Mr. Chaboba deposed to the complainants' employment having been terminated on 20<sup>th</sup> March, 2023. Further, in his oral testimony given at the hearing of this matter, Mr. Chaboba told the court that the respondent company was closed on 10<sup>th</sup> January, 2023 and that the complainants are owed salary arrears from November 2022 to March 2023.
21. I have also noted that the list of complainants exhibited as "SCC1" indicates 16<sup>th</sup> December, 2022 as the last day worked by each complainant. Consequently, I am not satisfied that the complainants have proved that they are owed salary arrears for 5 months from November, 2022 to March 2023 as I do not see how they can be owed salaries for months they did not work. As such, I award the complainants salaries for the month of November, 2022 and for the 16 days worked in

December, 2022. The complainants' claim for salary arrears succeeds to the extent shown above. The amounts due shall be assessed by the Deputy Registrar.

**WHETHER THE COMPLAINANTS ARE ENTITLED TO DAMAGES FOR TERMINATION OF CONTRACT**

22. It was the complainants' testimony that the respondent did not inform them the reason for terminating the contracts. That they were aware that the respondent company was closed and yet they were not told the reason for the closure of the company. To determine whether the complainants are entitled to damages for the termination of their employments, a determination has to be made whether the termination was unlawful or unfair. The first thing is to consider whether or not the respondent carried out the termination in accordance with the provisions of the law, as I now do.

23. Section 52(1) and 52(2) of the Employment Code Act provide as follows:

***“52. (1) A contract of employment terminates in the manner stated in the contract of employment or in any other manner in which a contract of employment is deemed to terminate under this Act or any***

*other law, except that where an employer terminates the contract, the employer shall give reasons to the employee for the termination of the employee's contract of employment; and*

*(2) 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.”*

24. I draw from the wisdom of the learned authors **Winnie Sithole Mwenda and Chanda Chungu**, in their book **A Comprehensive Guide to Employment Law in Zambia**, who in commenting on the above sections, state, at page 228, that *“Where a termination is not carried out in accordance with the law, or where the employer terminates employment without giving a valid reason, such termination will be referred to as unfair termination, and for termination contrary to the contract of employment as wrongful termination.”* (Emphasis mine)

25. The Court of Appeal decision in **Sarah Aliza Vekhnik v Casa Dei Bambini Montessori Zambia**<sup>(3)</sup> endorsed the position that employers must give valid reasons when they terminate by way of notice. The court was clear that:-

***“Employers are no longer at liberty to invoke a termination clause and give notice without assigning reasons for the termination. What is of critical importance to note, however, is that the reason or reasons given must be substantiated”***

26. In the light of the above, it is established that the position of the law, as contained in the Employment Code Act, is that where the employer initiates termination of the employee’s employment, even if they do so by invoking the notice clause in the contract of employment, they must give a valid reason. Consequently, I find that the termination of the complainants’ employments was unlawful and unfair as no valid reason was given to the complainants.

27. Having held as such, I now come to the question of the quantum of damages due to the complainants. In **Chansa**

**Ng'onga V Alfred H. Knight (Z) Ltd**<sup>(4)</sup> the Supreme Court confirmed that the normal measure of damages to be paid to an employee who has been unlawfully, unfairly or wrongfully terminated or dismissed is an employee's notice period in the contract of employment or as provided by law. However, exemplary damages may be awarded depending on how the termination was effected, that is, whether it was oppressive, infringed the employee's rights, inflicted in a traumatic manner, and caused mental anguish or stress and where the prospects of future employment by the employee are bleak.

28. Further, the Supreme Court in **Swarp Spinning Mills V Sebastian Chileshe and Other** <sup>(5)</sup> held that the normal measure is departed from where the termination may have been inflicted in a traumatic fashion which causes undue distress or mental suffering. In this case, the Supreme Court departed from the normal damages.

29. In the matter at hand, I do not discern any evidence of the termination being done in a traumatic fashion which causes undue distress or mental suffering. As such, I do not see any justification for departing from the normal measure of damages, which is the complainants' notice period in their contracts of employment, being 1 month's notice as per clause 20.1 of the contract exhibited in the

affidavit in support of complaint. The amounts due to each complainant shall be assessed by the Deputy Registrar.

**WHETHER THE COMPLAINANTS ARE ENTITLED TO NOTICE PAY**

30. Clause 20.1 of the contract provides for either party to give one month's notice to the other to terminate the contract. It was the complainant's testimony that their contracts were terminated without the requisite notice. I am satisfied that it was indeed so. Consequently, I find that the complainants' claim for notice pay has merit and they are awarded one months' pay in lieu of notice, the amounts to be assessed by the Deputy Registrar.

**WHETHER THE COMPLAINANTS ARE ENTITLED TO COSTS**

31. Costs in this division are only slapped on a party in accordance with rule 44 of the Industrial Relations Court Rules, Cap 269 of the Laws of Zambia. According to this provision, a party may bear costs or expenses if he is guilty of unreasonable delay, or of taking improper or vexatious or unnecessary steps in the proceedings or indeed if he is guilty of other unreasonable conduct. I am not satisfied that the respondent herein was guilty of conduct outlined in rule 44 to warrant an order of costs



being made against it. So, each party shall bear its own costs.

### **CONCLUSION AND ORDERS**

32. The complainants have succeeded in most of their claims and I, accordingly, award them the following:
- (i) Leave days for the year 2022 at the rate of 2 days per month served.***
  - (ii) Gratuity at the rate of 25% of basic pay for the period served being 1<sup>st</sup> January 2022 to 16<sup>th</sup> December, 2022.***
  - (iii) Salary arrears for November, 2022 and 16 days in December, 2022.***
  - (iv) Damages for unlawful termination of the complainants' employment being one month's gross pay.***
  - (v) One month's pay in lieu of notice for each complainant.***
  - (vi) All the awards made shall be assessed by the Deputy Registrar.***
  - (vii) The Judgment sum shall attract interest at short term bank deposit rate from the date of the notice of complaint to the date of judgment and thereafter, at current lending rate as determined by the Bank of Zambia from the date of Judgment until full payment.***

**(viii) Each party shall bear its own costs.**

33. Parties are informed of their right of appeal.

**Delivered at Lusaka this 15<sup>th</sup> Day of April, 2024.**

**Hon. Lady Justice Mrs. Mwaka S. Ngoma  
HIGH COURT JUDGE**

