

3/10/2017

Yes

IN THE HIGH COURT FOR ZAMBIA
AT THE NDOLA DISTRICT REGISTRY
HOLDEN AT NDOLA
(INDUSTRIAL/ LABOUR DIVISION)

COMP NO. IRC/ND/84/2016

19 OCT 2017

BETWEEN:

CHRISTOPHER MWIMBA & 16 OTHERS

COMPLAINANTS

AND

LAFARGE CEMENT ZAMBIA PLC

RESPONDENT

BEFORE: Hon Judge E.L. Musona

For the Complainants: Mr. T.T. Shamakamba of Messrs Shamakamba & Associates

For the Respondent: Mrs P.M. Kapaipi of Messrs Abha Patel & Associates

JUDGMENT

Date: 20th October, 2017

LEGISLATION REFERRED TO:

1. Section 108 of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia as amended by Act No. 30 of 1997

CASES REFERRED TO:

1. Zambia Electricity Supply Corporation v Alexis Mabuku Matale Appeal no 227/2013

2. **Zambia Privatisation Agency v James Matale (1995-1997) Z.R 157**
3. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172 (SC)**
4. **Khalid Mohamed v Attorney General (1982) Z.R. 49**
5. **Galaunia Farms Limited v National Milling Corporation Limited (2004) ZR 1 SC**
6. **Colgate Palmolive Zambia Limited v Chuuka SCZ Appeal No. 182/ 2005**
7. **Longwe v Northrise University (2014) ZR 385**
8. **Zambia Revenue Authority v Dorothy Mwanza & Others (2010) 2 Z.R 194**
9. **Attorney General v Chibaya SCZ/8/44/2011**
10. **Paddy Kaunda and others v Zambia Railways Limited Appeal No. 13 of 2001**

OTHER WORKS REFERRED TO

1. **G.H.L. Friedman, The Modern Law of Employment: London-Steven and Son, 1963**
2. **Halsbury's Laws of England, Volume 41, paragraph 725**

This complaint was filed by Christopher Mwimba and 16 others. The Complaint was filed against Lafarge Cement Zambia Plc. I shall, therefore, refer to Christopher Mwimba and 16 others as the Complainants and to Lafarge Cement Zambia Plc as the Respondents which is what the parties in this case actually were.

The Complainants' claim is for the following reliefs:-

1. An order that the Complainants were unfairly treated and discriminated in the payment of dues.
2. An order that the Respondent recalculates the Complainants' dues to incorporate the period they were on contracts.
3. Interest
4. Costs

The duty for this court is to ascertain whether or not the Complainants have proved their claims.

The Complainants called two witnesses and relied on the evidence on record for the rest of their evidence. I shall refer to the first witness as CW1 and to the second witness as CW2. CW1 was Christopher Mwimba. The evidence for CW1 who also testified on behalf of his Co- Complainants was that he and the other Complainants were employed by the Respondents on various dates and held various positions. At the time they were employed, they were placed on contracts but later on the Respondent placed them on permanent and pensionable conditions of service. CW1 was employed by the Respondents on 1st, January, 2000 as a Stores Clerk on contract basis. He told the Court that at the end of each contract he and the other Complainants were paid gratuity. After

being paid gratuity, they could then renew their contracts with the Respondent. He was referred to page 1 of the Respondents' Notice of Intention to Produce and he told the Court that on 24th January, 2013 he was engaged on a contract for 2 years. He further told the Court that after that contract for 2 years, he was then placed on permanent and pensionable conditions of service by the Respondents on 2nd February, 2015 and he only worked for 1 year, on permanent and pensionable conditions of service before he was declared redundant on 28th, February, 2016.

When the Complainants were declared redundant, they were only paid terminal benefits for the various durations that they served the Respondents under permanent and pensionable terms and not the durations they served under short contracts. CW1 told the Court that he worked for the Respondents for a total of 15 years but he was only paid a redundancy package for the 1 year that he worked on permanent and pensionable basis and not the 14 years that he served on short term contracts. He told the Court that some of the Complainants' fellow workmates were paid a redundancy package which included the period they served on short term contracts as well as on permanent and pensionable terms. He said Ireen Nang'ambi, Felicity Mbulo and Elizabeth Ntema are his fellow workmates who were paid redundancy packages for both periods they served on contracts and permanent basis.

CW1 referred to pages 1, 4, 6 and 7 of the Complainants Supplementary bundle of documents filed into Court on 3rd, February, 2017 and told the Court that Ireen Nang'ambi was paid K59, 681. 68 as a redundancy package when she was engaged on permanent and pensionable terms by the Respondents on 18th March, 2015. She was declared redundant on 29th, February, 2016 which shows that she only worked for one year on permanent and pensionable terms. He told the Court that Ireen Nang'ambi's salary was K3, 214.99 per month and using the formula the Respondents were using to calculate redundancy pay of 2.5 months' basic pay for each year served, if her redundancy package was only calculated for the 1 year that she served on permanent and pensionable terms, the amount would have been less than K59, 681. 68. However, in cross-

examination he told the Court that he did not have Ireen's contract of employment before court in order to prove that she had the same conditions of service with all the Complainants.

He told the Court that he and the other Complainants were unfairly treated and underpaid hence they should be paid for the whole period including the contract period like the Respondents' paid some other employees like Ireen Nang'ambi, Felicity Mbulo and Elizabeth Ntema.

CW2 was Ireen Nang'ambi and her evidence was that she worked for the Respondents as a Packer Operator from 13th, March, 2013 on a contract for two years. She told the court that at the end of that contract she was given gratuity and was then placed on permanent and pensionable conditions of service by the Respondent. She was declared redundant on the 29th of February, 2016 after working for 11 months on permanent and pensionable terms. She referred to page 1 of the Complainants' supplementary bundle of documents which was her termination letter and told the Court that her salary was K4, 475.78. If she was to be paid 2.5 months basic pay for each completed year of service as a redundancy package, she was only going to get about K10, 000.00 for the 11 months she had served on permanent terms. However, she told the court that she was paid K33, 239.02 by the Respondents as redundancy pay because she was paid for 3 years including the contract period that she served.

The only defence witness called was Mwape Chisanga a Plant Human Resource and Industrial Relations Manager. I shall refer to this witness as RW1. His evidence was that the Complainants were employed on fixed term contracts and in different positions. At the expiration of each contract, they were paid all applicable dues which included gratuity, leave days and all shifts worked. After payment of dues, then the Complainants' contracts would be renewed and it was indicated what the new contract periods were as well as the conditions of service under which they were employed. Later on, at different dates, the Complainants were employed on permanent and

pensionable terms. In 2016, the Respondent undertook a re-organisation exercise in which the Complainants and other employees were declared redundant.

RW1 told the Court that the Complainants were issued with letters of redundancy which indicated how much was due to each of them. The computations covered severance packages of 2.5 months basic pay for each completed year of service on permanent and pensionable terms as well as leave days and one month pay in lieu of notice among other things. He testified that there was no discrimination in the computation of redundancy packages due to the Complainants as all employees were paid according to the prevailing conditions of service. Felicity Mbulo and Elizabeth Ntema left the Respondent Company in 2014 while the 17 Complainants left in 2016. He told the court that the redundancy package for Felicity Mbulo did not include the period she was on fixed term contract which was from 2005 to 2007. The severance package of K323, 111.89 only included the time she was on permanent and pensionable terms from 1st January, 2008. Her basic pay minus 35% housing allowance was K20 437. She was paid 2.5 months basic pay by 6.5 years of service. RW1 referred to page 3 of Respondent's Notice to Produce which is a redundancy payout to Felicity Mbulo

Elizabeth Ntema was engaged on fixed term contract in 2004. She was placed on permanent and pensionable conditions of service on 24th June, 2013. She was declared redundant on 3rd September, 2014. RW1 referred to page 7 of the Respondent's Notice to produce filed into court on 17th August, 2017 which shows the redundancy package paid out to Elizabeth Ntema. She was paid K17, 011.18 as severance package of 2.5 months basic pay by 1 year served on permanent terms. This did not cover the period that she was on fixed contract from 2004 to 2013.

RW1 further told the Court that Ireen Nang'ambi who was CW2 was erroneously paid a redundancy package which included the 2 years she was on fixed term contract. Close to 30 other employees also had their redundancy packages erroneously calculated to include the periods they

served on fixed term contracts, and when the mistakes were discovered, they were corrected before payment was made. There was no discrimination and Ireen Nang'ambi was only overpaid by mistake, the mistake was discovered when she had already been paid hence on humanitarian grounds she was not pursued.

Having considered the evidence in this case, I must now consider the relief sought.

1. An order that the Complainants were unfairly treated and discriminated in the payment of dues.

I have considered the evidence from both parties. **Section 108 of the Industrial Relations Act Chapter 269 of the Laws of Zambia as amended by Act No. 30 of 1997** provides that:-

"108. (1) No employer shall terminate the services of an employee or impose any other penalty or disadvantage on any employee, on grounds of race, sex, marital status, religion, political opinion or affiliation, tribal extraction or status of the employee.

(2) Any employee who has reasonable cause to believe that the employees' services have been terminated or that the employee has suffered any other penalty or disadvantage, or any prospective employee who has reasonable cause to believe that the employee has been discriminated against, on any of the grounds set out in subsection (1) may, within thirty days of the occurrence which gives rise to such belief, lay a complaint before the Court"

The Complainants are claiming that they were discriminated against in the payment of dues but they have not established any of grounds for discrimination as set out in Section 108(1)

of the Industrial and Labour Relations Act being race, sex, marital status, religion, political opinion or affiliation, tribal extraction or status of the employee. The evidence on record shows that all the Complainants were initially employed on fixed term contracts, at the end of each contract, they were paid all their dues which included gratuity, leave days and all shifts worked. Page 1 of the Respondents' Notice to Produce filed into Court on the 14th of September, 2016 is an Appointment Notice to the 1st Complainant which shows a fixed term contract for 2 years from 24th January, 2013 to 23rd January, 2015. Page 2 of the Respondents Notice to produce shows that the 1st Complainant was placed on permanent and pensionable conditions of service on 2nd February, 2015. Further evidence on record shows that the 9th Complainant Derrick Kapambwe, had a 2 year contract from 9th September, 2010 to 8th September, 2012. This was exhibited as "PCM1" in the Respondent's Affidavit in Support of Answer.

The 9th Complainant was placed on permanent and pensionable conditions of service by the Respondent on the 17th of September, 2012 and this was exhibited as "PCM2" in the Respondent's Affidavit in Support of Answer. Further evidence on record is that at the end of each fixed term contract, the Respondent duly issued Termination Notices and made payments to the Complainants of the benefits due to them at the expiration of each contract. Exhibit marked "PCM4" in the Respondent's Affidavit in Support of Answer shows that the 9th Complainant was paid 15% gratuity for the period of his fixed term contract from 2010 to 2012. The same applies to all the Complainants and this evidence is in the Respondents Notice to Produce filed into Court on the 14th of September, 2016.

There is also evidence on record that the other employees the Complainants were referring to like Elizabeth Ntema and Felicity Mbulo had their employment relationships with the Respondent terminated on different terms and times from that of the Complainants. I am guided by the case of **Zambia Electricity Supply Corporation v Alexis Mabuku Matale Appeal no 227/2013** where the Respondent was claiming terminal benefits similar to the

ones that were paid to another employee of the Appellant, the Supreme Court of Zambia held that:-

“Coming to the holding by the learned trial Judge that the Respondent’s benefits should be computed and calculated in a manner similar to those of Dr. Akapelwa, we are of the opinion that the learned trial Judge erred when he came to that conclusion. A study of the evidence on the record of appeal establishes that the Respondent did not prove that he was similarly circumstanced with Dr. Akapelwa. To begin with, the testimony of Mr. Luswanga establishes that Dr. Akapelwa’s separation from the Appellant was by way of redundancy. As such, what was paid to him was a redundancy package. Secondly the evidence on record shows that the terms and conditions of employment for the Respondent were not exactly the same as those for Dr. Akapelwa. For instance, whereas Dr. Akapelwa was entitled to an allowance called PRP allowance, the Respondent was not. We, therefore, hold that Dr. Akapelwa and the Respondent were not similarly circumstanced.”

The Complainants in the matter in casu have not produced any evidence before Court to show that they were serving under the same terms and conditions of employment that the other employees they have mentioned like Felicity Mbulo, Elizabeth Ntema and Ireen Nang’ambi were serving to prove unfair treatment. CW1 conceded in cross-examination that he did not have Ireen’s contract of employment before court in order to prove that she had the same conditions of service with all the Complainants. In as much as Felicity Mbulo and Elizabeth Ntema were also declared redundant, they were declared redundant in 2014 based on their prevailing conditions at that time while the Complainants were declared redundant in 2016.

Clause 11.3 of the Respondent’s Terms and Conditions for Non Unionised Staff which was effective from 1st January, 2015 to 31st December, 2016 provides that:-

"11.3: REDUNDANCY BENEFITS

Where an Employee's contract of service is terminated by reason of redundancy, the Employee shall be given one (1) month's notice and shall be entitled to redundancy benefits of two and a half (2.5) months basic pay for each completed year of service."

The Complainants after serving for various periods on permanent and pensionable terms were declared redundant. They were issued with notices of redundancy and they were paid what was due to them. Exhibit "PCM7" in the Respondent's Affidavit in Support of Answer which is a notification of redundancy to the 9th Complainant shows that he was paid two and a half (2.5) months basic pay for each completed year of service, 1 month pay in lieu of notice, leave days and pension benefits. This was in accordance with Clause 11.5 of the Respondent's Terms and Conditions for Non Unionised Staff. The Respondent went further to pay the Complainants a support package in addition to their redundancy package which consisted of education, housing, medical, death as well as social and business counselling support. "PCM8" in the Respondent's Affidavit in Support of Answer shows the actual amounts paid to the 9th Complainant being K74, 171.14 as 2.5 month's basic pay for the 4 years he served on permanent terms, 1 month's salary in lieu of notice, leave days, education allowance of K29, 904.36 as a lump sum and a medical support programme.

This shows that the Complainants were not unfairly treated because all that was due to them was paid to them accordingly. In the case of **Zambia Privatisation Agency v James Matale (1995-1997) Z.R 157**, it was held that:-

"We have no hesitation in agreeing with the Industrial Relations Court that the respondent did not prove discrimination as none of the reasons for discrimination as set out in section 108 (1) had been established. As we said in the cases of Posts and Telecommunications Corporation Limited and Phiri(1) and Ngwira Vs Zambia National Insurance Brokers(2) that discrimination must come within the subject matter of section 108"

A complainant has to prove his or her claim in order to succeed. I am well guided by the cases of **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172 (SC)**, **Khalid Mohamed v Attorney General (1982) Z.R. 49** and **Galaunia Farms Limited v National Milling Corporation Limited (2004) ZR 1 SC** where it was held that:-

“A plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to Judgment.”

The Complainants in the matter in casu have lamentably failed to prove any unfair treatment or discrimination in the payment of dues by the Respondent. The Complainants have not produced any evidence before Court to show that they were serving under the same terms and conditions of employment that the other employees they have mentioned like Felicity Mbulo and Elizabeth Ntema and hence they were unfairly treated. To the contrary, the evidence on record is that Elizabeth Ntema and Felicity Mbulo were not paid redundancy packages for the period they were on fixed term contracts and that these employees were not declared redundant at the same time as the Complainants in this matter. Ireen Nang'ambi on the other hand was erroneously paid a redundancy package which included the period of her fixed term contract, the Respondents witness testified that she was not pursued on humanitarian grounds and in my view this does not in any way amount to unfair treatment. Further, the Complainants have not established on what grounds they are claiming to have been discriminated against as enshrined in Section 108 of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia.

The claim for unfair treatment or discrimination in payment of dues is therefore destitute for lack of merit and I hereby dismiss it.

2. An order that the Respondent recalculates the Complainants' dues to incorporate the period they were on contracts.

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It is trite law that a contract is binding on the parties that have legally entered into it. A contract of employment is a contract between an employer and employee that regulates the relationship between the two parties. The duty of the Court is simply to give effect to that contract if it is in conformity with the law. In the case of **Colgate Palmolive Zambia Limited v Chuuka SCZ Appeal No. 182/ 2005** it was stated that:-

“men of full age and competent understanding have the liberty of entering into free and voluntary contracts and the court's duty is merely to enforce such contracts.

In the case of **Longwe v Northrise University (2014) ZR 385**, it was held that:-

“It is trite that where an employee is engaged for a specific period expressed in his contract of employment, that contract comes to an end at the end of that period by effluxion of time. The contract is said to have come to an end automatically and therefore, there is no need for notice to be given as there is nothing existing anymore to be terminated.”

In the case of **Zambia Revenue Authority v Dorothy Mwanza & Others (2010) 2 Z.R 194** it was held that:-

“The Respondents’ contracts ended at the expiration of their contract period. It is therefore correct to say that once the contract period expired, there was no other contract to talk about as the offer of a new contract was a separate issue and would be at the appellant’s discretion.”

Further, **Friedman on The Modern Law of Employment**, at page 463 states that,

“when there is an agreed time for the contract to endure, termination will occur at the end of such period, but that termination may take place lawfully or wrongfully before the agreed date.”

The learned authors of **Halsbury's Laws of England, Volume 41**, at paragraph 725 affirm that position of the law in the following words:

"A contract may be stated to last for a set period of time in which case it is considered to be a fixed term contract and at the end of the relevant period it terminates by expiry."

I am also well guided by the case of **Attorney General v Chibaya SCZ/8/44/2011**, it was held that:-

"It is settled that an employee on fixed term contract is not entitled to pension benefits or redundancy pay as such employee can only be entitled to gratuity at the end of his contract. If the contract is wrongfully terminated before it ends by effluxion of time, all the employee may be entitled to are damages for breach of contract."

The evidence on record shows that the Complainants were initially engaged on fixed term contracts by the Respondent and they were later placed on permanent and pensionable employment. It is not in dispute that the Complainants were paid their dues which included gratuity each time their contracts expired and before there was any renewal of contract. There is also undisputed evidence on record that it is when the Complainants were placed on permanent and pensionable conditions of service that they were later declared redundant. The Complainants were all paid redundancy packages for the various periods they served the Respondent on permanent and pensionable terms. The Complainants would now like this court to order a recalculation of their dues in order to include the various periods they served on fixed term contract.

It is my considered view that it would amount to unjust enrichment if the Complainants are paid twice for the periods they served on fixed term contracts as at the end of each contract, they were paid all their dues under those contracts which included gratuity. The contracts were stated to last for a set period of time in which case they were considered to be a fixed term contracts and at the end of the relevant period they terminated by expiry. Based on the aforecited plethora of

J14

authorities, once the contract period expired, there was no other contract to talk about and an employee on fixed term contract is not entitled to pension benefits or redundancy pay as such employee can only be entitled to gratuity at the end of his or her contract.

In the case of **Paddy Kaunda and others v Zambia Railways Limited Appeal No. 13 of 2001**, it was held that:-

"where there is a known formular for calculating dues, that formular must be used"

The Complainants dues were correctly calculated excluding the periods they served on fixed term contracts for which they had already been paid their respective dues including gratuity. I hereby dismiss this claim for lack of merit.

I have seen no relief available to the Complainants and I accordingly dismiss this complaint.

I shall make no order as to costs.

Leave to appeal within 30 days from today is granted.

Delivered and signed at Ndola the 20th day of October, 2017.

