

**IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA**

COMP/274/2012

BETWEEN:

**GODFREY KAKOMA
GODFREY CHILESHE
ALLAN MUTOBA
MARTIN KAPUPA
BRIGHT KANGWAYI
CHARLES MUKUKA
PETER BANDA
CLEMENT MULENGA
MARTIN NJOVU
MPALA DANIEL
KELVIN SHABA
VICTOR CHIMPAMPWE**



**1ST COMPLAINANT
2ND COMPLAINANT
3RD COMPLAINANT
4TH COMPLAINANT
5TH COMPLAINANT
6TH COMPLAINANT
7TH COMPLAINANT
8TH COMPLAINANT
9TH COMPLAINANT
10TH COMPLAINANT
11TH COMPLAINANT
12TH COMPLAINANT**

AND

AFRISEC MANAGEMENT LIMITED

RESPONDENT

Before the **Hon. Mr. Justice M. Musaluke** in Open Court on the 26th day of January, 2017

Appearances:

For the Complainant: In Person

For the Respondent: C. Ngulube (Mrs.) of Messrs. Victoria Dean Advocates

JUDGMENT

26th January, 2017

Authorities referred to:

- 1. The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia***

Cases referred to:

1. ***Jennipher Nawa vs. Standard Chartered Bank Zambia Plc (2011)1, Z.R.1***
2. ***Masauso Zulu vs. Avondale Housing Project (1982) Z.R. 172***

1.0 COMPLAINANTS' CASE

- 1.1 On 13th December, 2012, the Complainants filed a Notice of Complaint against to Respondent.
- 1.2 On 1st October, 2015 the Complainants amended their Notice of Complaint by removing some Complainants from the Cause with only Nine (9) remaining from the original 30 Complainants. On 23rd March, 2016, the Notice of Complaint was amended with leave of Court to increase the number of Complainants to twelve (12).
- 1.3 The grounds on which the Complaint was presented were that the Complainants were employed by the Respondent as Asset Controllers and Static Guards on different dates and the period ranged between eight (8) months to five (5) years respectively. The Complainants stated that on 28th November, 2012, they were declared redundant by the Respondent and that they have never been paid their Redundancy Packages, Leave Pay accrued and underpayment on Subsistence Allowances.
- 1.4 Trial was held on 19th and 20th September, 2016.

- 1.5 Two witnesses namely **Mr. Godfrey Chileshe (CW1)** and **Mr. Godfrey Kakoma (CW2)** testified on behalf of the Complainants.
- 1.6 CW1 testified that he was employed by the Respondent on 29th December 2009 as an Asset Controller to control movements of goods from Zambia to various destinations within the Southern African Development Community (SADC).
- 1.7 He testified that he was employed on a two year written Contract from 28th December, 2009 to 14th December 2011.
- 1.8 On 24th June, 2011, during the course of his employment, he was involved in a Road Traffic Accident between Chirundu and Lusaka. He broke his leg and spent most of the time visiting the Italian Orthopaedic Hospital for medical and physiological treatment.

It was his testimony that on 24th December, 2011, his Contract was terminated and he believed it was as a result of the accident he was involved in.
- 1.9 CW1 claimed that he was not paid his Terminal Benefits upon the termination of his employment save the K50 he gets per month from the Workers Compensation Fund Control Board.
- 1.10 CW1 further testified that the Respondent owed him and his colleagues arrears on Subsistence Allowance which they were owed when travelling in and out of the Country.

- 1.11 CW1 narrated that the Subsistence Allowances applicable was K195 per day for those who worked outside their homes but within Zambia and K490 per day for those who worked outside Zambia.
- 1.12 CW1 also testified that he had suffered distress, and mental torture as a result of the termination of employment which was done after he was involved in an accident. He stated that as a result of his accident, he has been rendered helpless as he can no longer do work he used to do and cannot even find alternative employment because of the pain he experiences.
- 1.13 Under cross-examination, CW1 testified that he was employed on a Fixed Term Contracts of one year, and that the 1st Contract ended in December 2011 and he worked for 11 months on his second Term.
- 1.14 He agreed that the Respondent used to give him money for food, airtime and accommodation whenever he travelled outside the country.
- 1.15 It was his testimony that Mr. Charles Mukuka's Contract was terminated by giving him a month's notice (see exhibit V8 'b').
- 1.16 CW1 further testified that Mr. Clement Mulenga, Mr. Charles Mukuka, Mr. Peter Banda and Mr. Martin Njovu were paid Terminal Benefits as evidenced by a letter of 5th October, 2012 (letter at page 51 in the Respondent's Affidavit in support of Answer).

- 1.17 CW1 stated that he had no documents to show how he came up with tabulations on the Subsistence Allowance arrears.
- 1.18 CW1 conceded that according to the Contract the Complainants used to sign, and in particular at page 47 of the Respondent's Affidavit in support of Answer, there is a provision for payment of per diem, K50 per day was paid for travel within Zambia and US\$15 per day for travel outside Zambia.
- 1.19 In re-examination, CW1 disowned the letters from Ilondola Associates who acted for Messrs. Charles Mukuka, Peter Banda and Martin Njovu. He testified that he was seeing the letters for the first time in Court.
- 1.20 CW2 was Mr. Godfrey Kakoma who testified that he was employed by the Respondent between 2006 and 2012.
- 1.21 It was his testimony that the Respondent terminated his Contract and that of his colleagues and put them on Contracts for Services as subcontractors.
- 1.22 He testified that the Complainants were claiming for payment of Redundancy Package as their services were terminated without notice.
- 1.23 Under cross-examination, CW1 stated that the Complainants claim for Subsistence Allowance was premised on the

provision of the Minimum Wages and Conditions of Employment Act.

1.24 He further testified that he was engaged on a one year Fixed Contract which was not renewed at its maturity.

1.25 He further told Court that after his Fixed Term Contract expired, he was engaged as an Asset Controller as a subcontract and paid daily wage of K62.50. This daily wage was being paid for actual days he worked.

1.26 CW2 testified that his circumstances were similar to that of Mr. Bright Kangwayi.

1.27 CW2 stated that arising from the Notice of Complaint and the testimonies of CW1 and himself, they were claiming for the following:

- “(a) Redundancy Packages;
- (b) underpayment of Subsistence Allowance;
- (c) Leave pay accrued;
- (d) Costs;
- (e) Interest;
- (f) Any other relief the Court may order.”

2.0 **RESPONDENT'S CASE**

2.1 On 21st January, 2016, the Respondent filed its Amended Answer with a supporting Affidavit.

- 2.2 In its Amended Answer the Respondent stated that the 3rd and 4th Complainants were contracted on different dates ranging between December, 2011 to May 2012 as subcontractors whose assignment was to secure the safe passage of goods being transported from one destination to the other by trucks on road.
- 2.3 The Respondent further stated that relationship that governed the Parties was such that the obligations were discharged at the end of the assignment and the Complainants were not expected to report for work on a daily basis, as the 3rd and 4th Complainants were not in full time employment with the Respondent.
- 2.4 As regards the 1st and 5th Complainants the Answer stated that these were employed on fixed one-year Contract which upon expiry were not renewed. Upon expiry of the Fixed Term Employment Contract, the 1st and 5th Complainants were engaged as subcontractors and were paid upon successful completion of any assignment given.
- 2.5 As regards the 2nd Complainant, he was employed as an Asset Controller on a one-year Fixed Term Contract which was terminated on medical grounds.
- 2.6 The Respondent stated that it provided accommodation to the Complainants that used to travel outside Zambia, as it owned flats throughout the routes which the trucks normally take

and that per diem was being paid to the Complainants on those trips, including airtime. It further stated that after the trip, the Complainants would then reconcile their accounts on money spent in the event that they spent more than the allocated per diem and the Respondent would then reimburse them.

- 2.7 As regards the 6th, 7th, 8th and 9th Complainants, the Respondent stated they were employed on one-year Fixed Contracts as Static Guards whose Contracts were lawfully terminated and their issue was settled ex-curia through their appointed Labour Consultant, Ilondola Associates.
- 2.8 At trial, three witnesses testified on behalf of the Respondent.
- 2.9 The Respondent's witness number one (**CW1**) was Mr. Dennise Nkhoma, the Supervisor at the Respondent. His major role at the Respondent was to supervise at Boarder Posts and counter check the time sheets for Asset Controllers and give them per diem.
- 2.10 He testified that he had worked for the Respondent since October, 2007. At first he was engaged as sub-Controller. Thereafter, he started signing one-year Fixed Contracts as an Asset Controller up to 2009. Thereafter, he worked as a Static Guard and his workmates in that department were: Charles Mukuka, Clement Mulenga and Aaron Simbule.

Thereafter, he went back to being an Asset Controller until later in the year 2009, when he was promoted to Supervisor, the position he held up to the time of trial.

- 2.11 It was his testimony that each Asset Controller was given per diem of US\$15 per day for the whole trip.
- 2.12 He referred the Court to page 11 of the Respondent's Affidavit which was a list of the amounts of per diem given to each particular trip for the Asset Controllers.
- 2.13 He testified that if there was need of overstaying in case the truck broke down, he would inform the Office in Lusaka through Short Messaging System (sms) and then he would follow up with the call. The office would then deposit the money in one of the Asset Controller's Account for them to share.
- 2.14 He testified that since he joined the Respondent in 2007, each time the one-year Fixed Contract expired, he was paid his full Salary, Gratuity and Leave days but could not state whether the Complainants were paid Gratuities at end of each Contract as was the custom at the Respondent.
- 2.15 The second witness for the Respondent (**RW2**) was **Mr. Benson Chewe Nunkwe**, an Asset Controller employed by the Respondent.

- 2.16 He testified that he worked for the Respondent since 2011.
- 2.17 He testified that he started work as a Sub-Contractor where he was called for duties as and when there was work at the Respondent and that as a Sub-Contractor, there was no obligation to report for work every day.
- 2.18 He supported RW1's testimony on the issue of payment of per diem for those that went on trips and the procedure to follow in case one over stayed because of any break down on the trip.
- 2.19 In cross-examination, he testified that he was on one-year Fixed Contract as an Asset Controller and that he was one of the individuals that initially took the case to the Labour Office with other Complainants.
- 2.20 He testified that he had mistakenly believed that as Sub-Contractor he was an employee of the Respondent when in fact he was not.
- 2.21 It was his testimony that no other Conditions of Employment as regards Subsistence Allowance were applicable for those that were serving under written Contracts.
- 2.22 RW2 testified that he had been paid Gratuity at the end of each Fixed Term one year Contract.
- 2.23 The third Respondent's witness (**RW3**) was Cedric Kirstier, the Managing Director of the Respondent.

- 2.24 He testified that the Respondent had paid the Complainants in accordance with the Terms of their Contracts.
- 2.25 He testified that Complainant 1, 3, 4 and 5 had their contracts terminated in accordance with the Contracts of employment.
- 2.26 As regards the 6th, 7th, 8th, and 9th Complainants, he testified that these sought legal representation and the parties settled their differences amicably and they were paid what was due to them.
- 2.27 As regards the 2nd Complainant, RW3 testified that he was discharged on medical grounds six month after he was involved in a Road Traffic Accident. He testified that the Respondent paid all medical bills for the 2nd Complainant and was paid Terminal Benefits.
- 2.28 He supported the testimonies of RW1 and RW2 as regards the issue of payment of per diem.
- 2.29 He urged the Court to dismiss the Complainants' Claims as they lacked merit.
- 2.30 Under cross-examination, he conceded that there was no medical advice that was given to the Respondent as regards the fitness of the 2nd Complainant's suitability for continued employment.

2.31 He stated that all dues were paid to all employees at the end of each Fixed Contract.

2.32 He conceded that December, 2011 Salary was not paid to the 2nd Complainant, stating that all other dues were paid to him.

3.0 **SUBMISSIONS BY THE PARTIES**

3.1 At the end of trial, Complainants through the 1st and 2nd Complainants (Mr. Godfrey Kakoma and Mr. Godfrey Chileshe), made oral submissions.

3.2 It was their submissions that the termination of their Employment Contracts amounted to redundancy and, therefore, were entitled to Redundancy Packages.

3.3 The Complainants also submitted that failure to pay the Subsistence Allowance made them suffer damages and it was a Breach of Contract on the part of the Respondent.

3.4 The Complainants also claimed that failure to pay them leave pay was in breach of Clause 8 of the Contracts of Employment that provided for such payments.

3.5 The Complainants cited Section 9 of the Minimum Wages and Conditions of Employment Act Cap 276 as the principle Statute that provided for payment of Subsistence Allowance.

3.6 Mr. Chileshe specifically argued that his Contract was terminated without the consent of the Labour Commissioner

or the Certificate of a certified Medical Doctor, contrary to S.62 of Act No. 10 of 1999.

3.7 The Complainants asked the Court to find for them.

3.8 On 14th October, 2016, the Respondent Counsel filed detailed submissions to support her client's case. I will not recite these here but will take them into consideration in my opinion.

4.0 **FINDINGS OF FACTS**

4.1 From the evidence led before this Court, I have found as facts the following:

- (a) The 1st to 5th Complainants were employed as Asset Controllers by the Respondent on one-year Fixed Contracts ranging from 2009 to 2012.
- (b) The 6th to 9th Complainants were engaged as Static Guards by the Respondent on one-year Fixed Contracts ranging from 2006 to 2012.
- (c) The 1st, 3rd, 4th and 5th Complainants' Fixed one-year Contracts came to an end and were later engaged as Sub-Contractors.
- (d) The 2nd Complainant was discharged on Medical grounds after he was involved in a Road Traffic Accident whilst on duty.

- (e) The 6th, 7th, 8th, and 9th Complainants' Contracts were terminated after giving Notice to terminate as per Contract of Employment.
- (f) The 6th, 7th, 8th and 9th Complainants later engaged a Labour Consultant and their matter was settled ex-curia as per documents at pages 51 – 54 in the Respondent's Affidavit in support of Answer.
- (g) The Complainants contend that they were infact declared redundant and ought to be paid Redundancy Packages.
- (h) The Complainants also claim to be paid Subsistence Allowance in accordance with the Minimum Wages and Conditions of Employment Act, Leave Pay and Gratuity.
- (i) The Respondent refutes the Claims by the Complainants save the non-payment of December, 2011 Salary for the 2nd Complainant.
- (j) No evidence was led as regards the claims by the 10th, 11th and 12th Complainants, therefore, their claims were not proven and fail.

5.0 **MATTERS FOR DETERMINATION**

5.1 Having stated the findings of facts and taking into account submissions by both parties, the gist of this case rests on the following:

- (a) Whether the Complainants' termination of employment can be termed as Redundancy;
- (b) Whether the Complainants are entitled to Subsistence Allowance;
- (c) Whether the Complainants are entitled for payment of Gratuity and Leave pay;
- (d) Whether the 2nd Complainant's discharge on Medical grounds was justifiable.

6.0 **OPINION**

6.1 **(A) WHETHER THE COMPLAINANTS' TERMINATION OF EMPLOYMENT CAN BE TERMED AS REDUNDANCY**

6.2 The Complainants urged the Court to find for them to the extent that their termination of Employment Contracts should be deemed to have triggered Redundancy Packages. The Complainants had based their argument on the authority of S.26B of the Employment Act.

6.3 Apart from relying on S.26B aforesaid, no evidence was brought forward as to why I should declare that the termination of their Contracts was redundancy.

6.4 It must be mentioned that S.26B in the Employment Act falls under part IV which deals with Oral Contracts. Any stretch of imagination cannot justify application of Section 26B to a Written Contract.

- 6.5 The evidence on record showed that all the Complainants were on one-year Fixed Written Contracts. It follows then that Section 26B of the Employment Act cannot be applicable to their situation.
- 6.6 It is, therefore, my finding that the Complainants were serving under Written Contracts and the termination of these Contracts by effluxion of time cannot trigger the invocation of S. 26B of Cap 269. The Complainants' Claim to be declared redundant fails.
- 6.7 As regards the issue of Complainants being engaged as Sub-Contractors after their Fixed Term Written Contracts expired, all the witnesses from both parties testified that this was the norm at the Respondent.
- 6.8 Evidence was led that once one was engaged as a Sub-Contractor, he was on contract for services and was paid as and when he was hired.
- 6.9 The relationship that existed between the parties when the Complainants were engaged as sub-Contractors was not that of employee/employer.
- 6.10 The Complainants' Claims to be paid Redundancy Packages whilst working as Sub-Contractors fail.

6.11 **(B) WHETHER THE COMPLAINANTS ARE ENTITLED TO
SUBSISTENCE ALLOWANCE**

- 6.12 Evidence was led that all Complainants were engaged on Written Contracts which made provisions on Out of Station Allowances commonly known as per diem.
- 6.13 Exhibit 'VZ4' was produced in Court to show that a sum of US\$15 was paid per day to the Complainants when they travelled outside the Country. This evidence was not challenged by the Complainants.
- 6.14 The Complainants' claim for payment of Subsistence Allowance is premised on the authority of the Minimum Wages and Conditions of Employment Act.
- 6.15 As I have already found, the Complainants were engaged on Fixed Term one-year Contracts. It follows, therefore, that their reliance on the Minimum Wages and Conditions of Employment Act is misplaced.
- 6.16 The Complainants had written Fixed Employment Contracts which had specified what would be paid to them in case they travelled out of their station. The fact that they served under Written Contracts, they cannot be said to be protected workers to which the Minimum Wages and Conditions of Employment Act apply.

6.17 In the case of **Jennipher Nawa vs. Standard Chartered Bank Zambia Plc**, the Supreme Court guided that:

“The Appellant had a clearly defined Salary and Conditions of Service, she could not, therefore, be a ‘protected worker’ within the meaning of the Act.”

6.18 As the Complainants had define salary and Conditions of Service that provided for payment of per diem, I find that Statutory Instrument No. 1 and 2 of 2011, did not apply to them. The claim for payment of Subsistence Allowance fails.

6.19 **(C) WHETHER THE COMPLAINANTS ARE ENTITLED TO PAYMENT OF GRATUITY AND LEAVE PAY**

6.20 The Complainants testified that they were not paid Gratuity and Leave days after the expiry of their Fixed Term Contracts.

6.21 No proof was presented that Gratuities and leave pay were not paid to the Complainants.

6.22 It is trite that he who alleges must prove. In the case of **Masauso Zulu vs. Avondale Housing Project**, it was held that:

“When 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 opponents case.”

- 6.23 The Complainants in this case failed to prove that their claims for payment of Gratuity and Leave days were genuine. RW1, RW2 and RW3 all testified that once Contracts expired, Gratuities, Leave pay and all other benefits were paid. The Complainants did not seriously challenge the evidence of RW1, RW2, and RW3 on this aspect.
- 6.24 The Complainants failed to prove their Claims and, therefore, they fail.
- 6.25 (D) **WHETHER THE 2ND COMPLAINANT’S DISCHARGE ON MEDICAL GROUNDS WAS JUSTIFIABLE**
- 6.26 Evidence was led that the 2nd Complainant (Mr. Godfrey Chileshe) was on 24th June, 2011, whilst on duty involved in a Road Traffic Accident along the Kafue-Chirundu Road.
- 6.27 It was also evidence before Court that as a result of the accident, he could not perform the normal duties of an Asset Controller and was eventually discharged on Medical grounds.
- 6.28 The 2nd Complainant contended that the Medical discharge was done in contravention of the Worker’s Compensation Act which prohibits such discharge without getting a Medical Certificate.

6.29 The 2nd Complainant had testified that he was not paid any Benefits by the Employer as the Respondent told him that the Workers Compensation Control Fund would pay him the Benefits.

6.30 The starting point in dealing with this aspect is to look at what the Statute provides.

6.31 Section 62 of the Act No. 10 of 1999 provides that:

“An employer shall not, without the consent of the Commissioner, terminate a Contract of Service of a worker who has suffered disablement in circumstances which entitle the worker to compensation under the provisions of this Act until:

(a) The worker has been certified by a Medical Practitioner to be fit to resume the work for which the worker was employed at the time of the accident or disease concerned;

or

(b) Compensation for permanent disablement becomes payable to the worker under the provisions of this Act”.

6.32 There was no evidence that was presented to show that prior to termination of Mr. Chileshe’s Contract, there was consent from the Commissioner to the extent that he was certified to resume work or not by a Medical Practitioner; or that the compensation for his permanent disablement had become payable.

- 6.33 RW3 just told Court that Mr. Chileshe was discharged on Medical grounds, he could not also confirm whether Terminal Benefits were paid to him save the December, 2011 Salary which he was sure was not paid.
- 6.34 I have carefully considered the evidence on this aspect. From evidence on record, I find that the Respondent breached Statutory provisions by terminating the 2nd Complainant's employment without following the provision of Section 62 of Act No. 10 of 1999.
- 6.35 In light of the forgoing, I have no difficulty in finding that the 2nd Complainant was unfairly dismissed from employment when the Respondent failed to follow provisions of Statute in dealing with his case.

7.0 **DAMAGES FOR UNFAIR DISMISSAL OF 2ND COMPLAINANT**

- 7.1 Since I have already found that the dismissal of the 2nd Complainant was unfair, a remedy has to be ordered.
- 7.2 Section 85A of the Industrial and Labour Relations Act provides for the remedies that can be ordered by this Court. The Act provides:

*“Where the Court finds that the Complaint or Application presented to it, is justified and reasonable, the Court **shall** grant remedy as it considers just and equitable and may:*

- (a) Award the Complainant or Applicant damages or compensation for loss of employment;*
- (b) Make an order for reinstatement, re-employment or re-engagement;*
- (c) Deem the Complainant or Applicant retired or retrenched or redundant;*
- (d) Make any other Order or Award as the Court may consider fit in the circumstances of the case.”*

7.3 Clearly, the law gives me powers to exercise my discretion on what remedy I would grant taking into circumstance of the case.

7.4 I have considered evidence that was led by the 2nd Complainant on the suffering he had to endure and continue to endure as a result of the unfair termination, and also his request to be given lighter duties in the Respondent.

7.5 I have also taken into account the claim for reinstatement by the 2nd Complainant. Reinstatement entails that the employee would be put back to his position before the termination occurred. In casu, evidence was put forward by the 2nd Complainant that as a result of the accident he suffered, he had challenges with his physicality. That would mean that he was not able to perform duties as an Asset Controller.

7.6 Taking into account the 2nd Complainant's own submission that he could perform duties as an Asset Controller, then the remedy for Reinstatement falls off.

7.7 I, therefore, find that damages would be appropriate remedy in this case.

7.8 I order that the 2nd Complainant be paid 12 months' salary (as of the time of dismissal) as Compensatory Damages for unfair dismissal.

8.0 **CONCLUSION**

8.1 Arising from the Judgment, I make the following Orders:

- (a) The claims by the Complainants for Redundancy Packages are dismissed;
- (b) The claims for payment of underpayment on Subsistence Allowance for the Complainants are dismissed;
- (c) The claims for payment of leave pay and gratuities to the Complainants are dismissed;
- (d) The Respondent is ordered to pay the December, 2011 Salary to the 2nd Complainant;

- (e) The Respondent is ordered to pay the 2nd Complainant (Mr. Godfrey Chileshe) 12 months' salary as Compensatory Damages for unfair dismissal.

- (f) The December, 2011 Salary and 12 months' salary damages for the 2nd Complainant will attract interest at short term Commercial lending rates from 13th December, 2012 (Date of filing of Notice of Complaint) until the date of Judgment, thereafter, at the current lending rates as determined by the Bank of Zambia from time to time until full payment.

8.2 Parties to bear their own costs.

8.3 Informed of Right of Appeal.

Dated the 26th day of January, 2017

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M. MUSALUKE
HIGH COURT JUDGE

