

**IN THE HIGH COURT FOR ZAMBIA**

**COMP NO. IRC/ND/20/2017**

**INDUSTRIAL/LABOUR DIVISION**

**HOLDEN AT NDOLA**

**(LABOUR JURISDICTION)**

*BETWEEN:*

**ALBERT CHAPULA  
AND  
ACFR ZAMBIA LIMITED**



**COMPLAINANT**

**RESPONDENT**

**Before: The Honourable Mr. Justice D. Mulenga this 1<sup>st</sup> day of August, 2018.**

For the Complainant : In person

For the Respondent : Not in attendance

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## **JUDGMENT**

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**Cases referred to:**

1. Wilson Masautso Zulu v Avondale House Project (1982) Z R 172
2. Kawambwa Tea Company Limited v Richard Ndashe Chipanama 2011/HN/CA.36

**Legislation referred to:**

1. The Minimum Wages and Conditions of Employment (General) Order of 2011
2. The Employment Act Chapter 268 of the Laws of Zambia

The Complainant herein presented his Notice of Complaint on 11<sup>th</sup> December, 2017, together with an affidavit in support. The grounds upon which the Complaint is presented are that the Respondent laid off the Complainant from employment, with immediate effect and without paying him his dues.

The Complainant therefore seeks the following relief:-

- (a) Payment of one month salary in lieu of notice
- (b) Damages for loss of employment
- (c) Redundancy package
- (d) Housing, transport and lunch allowances
- (e) Leave days accrued
- (f) Interest and Costs
- (g) Any other relief the Court may deem fit.

The Complainant by his affidavit in support of Notice of Complaint deposed that he was employed by the Respondent as a truck driver on 23<sup>rd</sup> May, 2014 on permanent and pensionable basis. He further deposed that on 26<sup>th</sup> November, 2016 the Respondent laid him off from employment and the reason for the lay-off was that, the Respondent was financially unstable.

The Respondent did not file an Answer to the Complainant's Notice of Complaint and despite proof of service of the Notice of hearing by way of affidavit of service, the Respondent did not attend Court on the date set for hearing. Therefore, it was debarred from filing an Answer and leave was granted to the Complainant to proceed with his case.

The Complainant was the only witness for his case and the gist of his testimony was that he was employed by the Respondent as a truck driver and he would transport cement from Zambia to the Democratic Republic of Congo. He also

used to transport cobalt from the Democratic Republic of Congo to Zambia. According to the Complainant, he did not sign any contract of employment with the Respondent which spelt out his conditions of service.

The Complainant averred that he worked with the Respondent for two years and six months before he was verbally informed by the Respondent on 26<sup>th</sup> November, 2016 to stop reporting for work. He stated that his monthly salary was K2,500.00, however from the time that he was employed, he was never paid lunch, transport and housing allowances. The Complainant further averred that he never proceeded on leave but has not been paid leave dues for his period of service.

In this case the Court is called upon to make a determination whether or not the Complainant is entitled to damages for loss of employment or he should be deemed to have been declared redundant and entitled to a redundancy package and other perquisites.

Whereas the Respondent did not put up a defence to the complaint, I still echo the guidance by the Supreme Court in its decision in the case of **Wilson Masautso Zulu v Avondale Housing Project Limited**<sup>1</sup>, where it held that:-

*Where a plaintiff alleges that he has been wrongly or unfairly dismissed, as indeed in any other case where he makes an allegation, it is for him to prove those allegations. A Plaintiff who has failed to prove his case cannot be entitled to a judgment whatever may be said of the opponent's case.*

The import of the above precedent is that the Complainant has a duty to prove on the balance of probabilities his complaint against the Respondent.

It is common cause in the matter herein that the Complainant was employed by the Respondent as truck driver on 23<sup>rd</sup> May, 2014 and on 26<sup>th</sup> November, 2016,

he was asked to stop reporting for work on the basis that the Respondent did not have money to pay him.

The facts of this case clearly indicate that the Complainant's employment was terminated by the Respondent for the sole reason that the Respondent did not have funds to continue paying the Complainant as a driver. Financial instability of an employer that leads to reduction in workforce, does in normal cases amount to redundancy.

I apply my mind to **Section 26B (1) of the Employment Act Chapter 268 of the Laws of Zambia** which provides that:-

*26B. (1) The contract of service of an employee shall be deemed to have been terminated by reason of redundancy if the termination is wholly or in part due to-*

*(a) the employer ceasing or intending to cease to carry on the business by virtue of which the employee was engaged; or*

*(b) the business ceasing or reducing the requirement for the employees to carry out work of a particular kind in the place where the employee was engaged and the business remains a viable going concern."*

I am also guided by the case of **Kawambwa Tea Company Limited v Richard Ndashe Chipanama**<sup>2</sup> where it was stated in reference to Section 26B (1) of the Employment Act that:-

*It was therefore, not open to the trial court to impute redundancy in the termination. It is also noteworthy that the introductory part of section 26B makes it clear that the termination must be wholly or in part due to the two subsections that follow and so, the trial court ought to be on the lookout for an express or implied statement in the letter of termination pointing to the reason for termination as either one or both of the subsections.*

The import of the aforesaid law is that to deem an employee to have been declared redundant, the circumstances or facts leading to his termination should fall within the two subsections of section 26B. It can therefore be said that in normal circumstances, the Respondent herein ceased to require the services of the Complainant within the meaning of section 26B(1)(b) of the Employment Act.

That notwithstanding, I must hasten to point out that I have observed that at the time the Complainant was employed by the Respondent, he had already passed the retirement age as he was 69 years then. He could not therefore have been employed on permanent and pensionable basis. It is therefore, this Court's considered position that the Complainant is precluded from claiming redundancy as redundancy is meant for long serving employees who are employed on permanent and pensionable terms.

I therefore find and hold that the Complainant has failed to prove on a balance of probabilities his claim for a redundancy package. The said claim is accordingly dismissed for lack of merit.

As regards the Complainant's claim for damages for loss of employment, I do note that the Complainant's employment was terminated with a reason as per requirement of the employment law under section 36 of the Employment (Amendment) Act, No. 15 of 2015. The reason given by the Respondent for the termination of the Complainant's employment is one that relates the operational requirements of an undertaking.

I draw some comfort from the International Labour Standards on the Protection against Unjustified Dismissal which provide as follows:

*Valid reasons for termination of employment must be connected with the capacity or conduct of the worker, or be based on the operational requirements of the undertaking, establishment or service.*

It is this Court's considered view that the reason given by the Respondent which is that it does not have money to pay the Complainant is a valid reason that borders on the operational requirements of the business of the Respondent for instance failure to make profits.

I therefore find and hold that the Complainant has not managed to prove his claim for damages for loss of employment. The said claim is accordingly dismissed for lack of merit.

Nevertheless, the facts in the matter in casu reveal that the Complainant was not given prior notice or paid in lieu of notice before his employment was terminated. I must emphasize here that, it is trite law that before employment is terminated, reasonable notice is supposed to be given.

Having found that the Respondent did not give the Complainant requisite notice for termination of employment, I hereby order that the Respondent should pay the Complainant one month salary in lieu of notice.

In relation to the Complainant's claim for housing allowance, I am alive to **Section 19 of the Minimum Wages and Conditions of Employment (General) Order, 2011** which is applicable to the Complainant and provides that:-

*19. An employer shall, where the employer does not accommodate an employee, pay the employee a monthly housing allowance at the rate of thirty percent of the employee's basic salary.*

I have seriously analysed the facts and evidence before me and I have found that the Complainant was entitled to housing allowance as per mandatory provision of the aforesaid law. I therefore find and hold that the Complainant has proved his claim for housing allowance on a balance of probabilities. It is therefore ordered that the Respondent should pay the Complainant his housing

allowance at the rate of thirty percent of his monthly basic pay from May 2014 to November 2016.

In relation to Transport allowance, the Complainant averred that he was not paid any transport allowance. The Respondent has not disputed this claim. I therefore find and hold that the Complainant has proved his claim for transport allowance on a balance of probabilities. The Complainant is therefore awarded transport allowance at the rate of K102.40 per month from June 2012 to July 2016.

Further, in relation to lunch allowance, I am alive to the provisions of **Section 15 of the Minimum Wages and Conditions of Employment (General) Order, 2011** which provide that:-

*An employee shall be entitled to a lunch allowance of one hundred and twenty kwacha per month, unless the employer provides a canteen at which the employee may obtain wholesome and adequate meals provided free of charge.*

The import of the aforesaid provision of the law is that an employee is entitled to lunch allowance if the employer does not provide meals. The Complainant averred that the Respondent did not pay him lunch allowance from the time that he was employed and the Respondent has not controverted this claim. I therefore, find and hold that the Complainant has proved his claim for lunch allowance on a balance of probabilities. I hereby award the Complainant lunch allowance at the rate of K120.00 per month from May 2014 to November, 2016.

The Complainant in his testimony complained that he was not paid his leave dues by the Respondent from the time that he was employed and he never went on leave and the Respondent has not challenged this claim. I therefore find and hold that the Complainant has proved his claim for leave dues on a balance of probabilities. I hereby award the Complainant payment of two (2) leave days

per month from 23<sup>rd</sup> May, 2014 to 26<sup>th</sup> November, 2016 which was his last day of work.

The Complainant is also awarded interest on the sums of money that will be found payable to him at the current Bank of Zambia lending rate from the date of the Notice of Complaint until full payment.

Costs of these proceedings go to the Complainants, to be taxed in default of agreement.

Informed of right of appeal to the Court of Appeal within thirty (30) days from the date hereof.

Delivered at Ndola this **1<sup>st</sup>** day of **August, 2018.**

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Hon. Justice D. Mulenga  
**JUDGE**

