

**IN THE HIGH COURT FOR ZAMBIA**

**COMP NO. IRD/ND/85/2017**

**INDUSTRIAL/LABOUR DIVISION**

**HOLDEN AT NDOLA**

**(LABOUR JURISDICTION)**

*BETWEEN:*

**FRAZER SEMU**

**AND**

**LUMWANA MINING COMPANY LIMITED**



**COMPLAINANT**

**RESPONDENT**

**Before: The Honourable Mr. Justice D. Mulenga this 27<sup>th</sup> day of July, 2018.**

For the Complainant : Mr. K. Msoni of Messrs J.B. Sakala & Co.

For the Respondent : Mr. C. Ngaba of Messrs Corus Legal Practitioners

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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. Evans Chongo Musonda v African Explosives Limited 2007/HK/45
3. Smith and Others v Moore Paragon Australia Limited (2004) A I R C 57

The Complainant filed his Notice of Complaint on 27<sup>th</sup> July, 2017. The Complaint is supported by an affidavit sworn by the Complainant. The grounds upon which the Complaint is presented is that the Respondent's

termination of his employment on alleged medical grounds is wrongful, unfair and unlawful.

The Complainant, therefore seeks the following relief:-

- (a) An order that the termination of his employment is wrongful, unfair and unlawful
- (b) An order for payment of damages for wrongful, unfair and unlawful termination
- (c) Interest from the date of termination to date of payment
- (d) Costs of and incidental to the proceedings herein
- (e) Any other order the Court may deem fit.

The Complainant deposed through his affidavit in support of the Notice of Complaint that he was employed by the Respondent on 11<sup>th</sup> February, 2008 as a Machine Operator until the 27<sup>th</sup> April, 2017 when his services were terminated on alleged medical grounds. The Complainant deposed also that termination of his employment on alleged account of medical reasons was done after a letter from the Respondent's Medical Superintendent was written to the Respondent's Human Resources Manager recommending that he be redeployed from Mine Scheduled Areas.

The Complainant averred that prior to the termination of his employment he had attended the Respondent's medical Clinic at Lumwana with a complaint of a cough and chest pains.

Despite being given medication at the Respondent's Clinic, the Complainant's condition did not improve and the following day he returned to the Clinic because coughing had worsened upon which he was advised to return home until his conditions stabilized.

According to the Complainant, few days of being at home awaiting review of his condition, he was called by the Respondent's Human Resources Manager who handed him a letter of termination of employment.

The Complainant deposed that he was shocked to learn that his contract of employment had been terminated for unknown reasons.

It is the Complainant's contention that in October, 2016 he had attended the Occupational Health and Safety Institute for medical tests and a Certificate of Fitness was issued to him certifying him fit to work in the Mines, as per exhibit "FS3".

The Complainant argued that he had not suffered any illness before the termination of employment, except that in 2011, he had a Seizure Disorder which was cured in the same year. The Complainant not being satisfied with the termination of his employment on alleged medical reasons reported the matter to the office of the Labour officer and the Assistant Labour officer by letter dated 21<sup>st</sup> June, 2017 addressed to the Respondent's Human Resources Manager, raised some Legal issues, under General Order No. 2 of 2011 of the Minimum Wages and Conditions of Employment, Act, Chapter 276 of the Laws of Zambia (Ref exhibit "FS4").

The Complaint is opposed and to that effect the Respondent filed an Answer and an affidavit in support of the same, on 14<sup>th</sup> September, 2017.

The Respondent denied the Complainant's claim and averred that the Complainant was not fit to work in a Scheduled Area and owing to the non-availability of positions in non-scheduled Areas he was discharged on medical grounds following the recommendation of a qualified medical practitioner and

was accordingly paid his terminal benefits. The Respondent therefore, argues that the Complainant is not entitled to any of the relief sought.

The Respondent by an affidavit sworn by one Pamela Chizuni Pio, the Country Legal Manager in the Respondent Company, deposed that indeed the Complainant was employed by the Respondent on 11<sup>th</sup> February, 2008 as a Machine Operator, however he was later redeployed from Machine Operator to a Cable Handler following a recommendation by the Solwezi Medical Board to the effect that the Complainant should cease to handle Mechanical equipment.

Whereas the Respondent agrees with the Complainant's deposition in paragraph 5 of his affidavit in support of the Notice of Complaint to the effect that his employment was terminated on alleged account of medical reasons after a letter to the Respondent's Human Resources Manager from the Respondent's Medical Superintendent. However, that the facts that led to the Complainant's termination from employment on medical grounds contrary to Complainant's averments are as stated here under.

In 2011, the Respondent's Medical officer one Dr. C.C Muselepete referred the Complainant to Dr. Triverdi of Nchanga Mine Hospital. In the referral letter, Dr. Muselepete, stated the Complainant's medical history. It is imperative therefore that the said referral letter is reproduced, the same was couched in the following terms:-

*14<sup>th</sup> October, 2011*

*Dr. Triverdi  
Nchanga Mine Hospital  
CHINGOLA*

*Dear Sir/Madam,*

*RE: FRAZER SEMU (E 0671)*

*Mr. Frazer Semu presented to our clinic two days ago after having a seizure at work. While being examined he fittted again.*

*The history of seizures goes back six months ago, prior to this patient is said to have been well. The seizure at the clinic was the third in six months. A month before his first seizure patient was involved in a road traffic accident and he claims all was well (he came out of accident without any form of injuries) and he was certified fit.*

*Before a fit the patient is said to experience severe generalized heaches followed by irrelevant talk and then a generalised fit involving loss of bladder and bowel control as well as frothing at the mouth. The postictal stage involves a deep sleep.*

*The baseline investigations are normal (FBC/U\$E/LFT). The antiretroviral test is negative.*

*Patient has been started on Phenorbarbitone 30mg nocte.*

*The patient is a Heavy Duty (Dozer)Driver. He has since been pulled off his duty.*

*We refer for assessment and expert advice (including on the way forward with his work).*

*Dr. C.C. Muselepete*

*Medical Officer*

*Contact: 097 9 900166*

The Respondent averred that the road traffic accident which was referred to in the referral letter of Dr. Muselepete, was as a result of a seizure suffered by the Complainant while on duty which led him to lose consciousness, a condition that he experienced approximately six (6) months prior to the accident.

The Respondent deposed further that the Complainant was examined and subjected to a brain scan at Nchanga Mine hospital, which revealed that he had lesions in his brain consistent with cerebral cysticercosis, a worm acquired through consumption of undercooked pork products. (Ref to exhibit *P4*). That the Complainant was placed on a 28 days course medication and a specialist at Nchanga Mine Hospital recommended that the Complainant be removed from operating any machine. The Complainant successfully completed his treatment which reduced the seizure attacks and he returned to his duties but while on duty experienced another seizure in January, 2012.

The Complainant on 24<sup>th</sup> August, 2014, appeared before the Ministry of Health Medical Board which convened at Solwezi and the Board also recommended that, the Complainant be removed from operating any machinery, the report of the medical Board is exhibit "*PCP5*".

According to the Respondent, the Complainant was redeployed from the position of Machine Operator to Cable Handler in the same active Mine Area, pending recommendation from the Occupational Health and Safety Institute (OHSI), on whether the Complainant could continue working in the active Mine (Scheduled) Area. The Complainant remained relatively seizure free and on 15<sup>th</sup> September, 2016, the Complainant requested his supervisor to redeploy him to his previous job as Machine Operator and on a follow up of the said request, the Complainant was sent to the Bumi Clinic for examination before a decision could be made in relation to his request. The Complainant did as was advised by his Supervisors, he went to Bumi Clinic, on 16<sup>th</sup> September, 2016 for examination to ascertain his fitness. The Medical Doctor at Bumi Clinic, referred the Complainant to Fairview hospital for a magnetic resonance imaging (MRI) scan and specialist review but the Complainant failed, refused and/or neglected to go to Fairview hospital. The request letter for specialist examination and recommendation is exhibit "*PCP7*" the Complainant elected

not to go to Fairview hospital, therefore no recommendation was made by a Consultant Physician.

I find paragraph 9 (l) and 9 (m) of the Respondent's affidavit in support of its Answer misleading as the same refers to periodical examination at the Occupation Health and Safety Institute, on 10<sup>th</sup> October 2010, and purports to produce a copy of periodic certificate and report on medical examination, exhibit "**PCP8**". However, the said exhibit is a letter from the Respondent's Medical superintendent to the Human Resources Manager of same Respondent.

According to the Respondent the Complainant continued working as a Cable Handler in the active Mine Scheduled Area following the recommendation by the OHSI, and was not operating any machinery. On 23<sup>rd</sup> February, 2017 the Complainant was taken to Bumi Clinic by an emergency team as he had experienced another seizure attack.

It is the Respondent's deposition that whereas the Complainant was referred to Fairview hospital for the Specialist review and MRI scan, he admitted that he had not travelled to Fairview hospital Lusaka for the medical attention.

The Respondent averred that, on 23<sup>rd</sup> February, 2017, its Medical Superintendent wrote to the Respondent advising that the Complainant was certified unfit to continue working in active Mine area otherwise known as Scheduled Area and recommended that he be redeployed from the said Area to non-active Mine Area (Non-Scheduled area) or be discharged on medical grounds, in the event of non-availability of suitable vacancies in non-active mine areas.

According to the Respondent, following the advice of the Medical Superintendent it took steps to find alternative position for the Complainant to work in a non-scheduled area but no vacancies could be found to accommodate him (Ref exhibit *PCP10*). The Complainant was therefore on 20<sup>th</sup> March, 2017 informed of the non-availability of alternative position for him in the non-active mine area and that he was going to be discharged on medical grounds as it was recommended.

According to the Respondent, the Complainant had agreed that the doctor who attended to him at Bumi Clinic had explained to him and that he was ready for medical discharge.

The Complainant was the only witness for his case, he told the Court that he was employed by the Respondent on 11<sup>th</sup> February, 2008 until the 22<sup>nd</sup> February, 2017 when he was discharged on medical grounds.

According to the Complainant as he puts it in his own oral evidence, the background to his discharge from employment by the Respondent, on medical grounds is that on 22<sup>nd</sup> February, 2017, he had a cough and went to Bumi Clinic at Lumwana Mine where he was given medicine and returned home.

On 23<sup>rd</sup> February, 2017, the cough did not improve, it worsened therefore, the Complainant returned to Bumi Clinic, having seen Clinical officers the previous day the Complainant on the second visit to the said Clinic, saw the Medical Superintendent one David Muchila, otherwise hereinafter referred to only as R/W1 (Respondent Witness One). Then RW1 advised the Complainant to return and stay at home until he was communicated to by the Human Resources officer.



After a few days the Complainant received a phone call from the Human Resources inviting him to their offices, the Human Resources officer who invited him is one Gloria (RW2 herein).

The Complainant testified that when he went to Human Resources offices and met RW2, she informed him that as he had been communicated to by the Medical Superintendent, the Respondent had only two options that is to transfer him from Scheduled Area of the Mine to a non-scheduled area, or to terminate his employment on medical grounds. However, because they did not have a place where to place the Complainant in non- scheduled area, the only option was to terminate his employment on medical grounds.

According to Complainant, the news of terminating his employment on medical grounds shocked him as it came to him unexpectedly, He contended that he was not sick to be discharged on medical grounds therefore, he found the said termination of his employment unfair. The Complainant told the Court that he complained against the medical discharge because procedure was not followed, especially that his employment was terminated on medical grounds within one month of suffering from a cough. According to him, he was required to be placed on sick leave for at least six months before such a decision could be made.

The Complainant explained that RW2, told him that there was nothing she could do about his complaint because she had just received a letter from the Medical Superintendent. At the time the letter of termination was not ready but that it was to be ready in a week's time. On 27<sup>th</sup> April, 2017 the Complainant received a letter of termination of employment on medical grounds.

The Complainant averred that when he received the letter of termination of employment, he was not happy and he reported the matter to the Labour officer.

The Complainant told the Court that the Labour officer also found, the termination of his employment on medical grounds to be unfair as the Respondent was required to place him first on three months' sick leave on full pay and if he did not improve, on a further three months' sick leave but on half pay before arriving at the decision to terminate his employment for medical reasons. The letter of the Labour officer is exhibit "FS4" in the Complainant's affidavit in support of Complaint.

The Complainant maintained that at the time the Respondent decided to terminate his employment on medical reasons, he was not sick and the Respondent did not avail him any documents to show the history of his sickness leading to the termination of employment.

The Complainant, told the Court that the only time he had a health problem was in 2011, when he experienced headaches and was referred to Nchanga hospital then to Fairview hospital in Lusaka.

The Complainant had constant headaches and was diagnosed, at Fairview hospital with a worm in the brain and was place on medication from December, 2011 to January, 2012 and he recovered.

Later the Complainant was referred to Solwezi General hospital for review instead of Fairview hospital in Lusaka and it is his position that he had recovered and he returned to work.

The Complainant referred to a letter dated 27<sup>th</sup> February, 2017 under the hand of Dr. David Muchila (RW1) as a recommendation for him to be redeployed to a non-scheduled area or to be discharged on medical grounds. However, he denied having met the said doctor prior to the making of the said recommendation.

The Complainant also denied that he suffered or complained of convulsions on 23<sup>rd</sup> February, 2017 as alleged by the Respondent.

The Complainant also denied having been taken to the Bumi Clinic on 22<sup>nd</sup> February, 2017, but that he went there by himself because he had a cough and had returned to the Clinic on 23<sup>rd</sup> February, 2017.

The Complainant attacked the genuineness of the documents produced by the Respondent (exhibit *PCP9 (c)* and *PCP9 (d)*) that the same are not true by their contents. He identified the job title on exhibit *PCP9 (c)* indicating that he was a “blaster” to be incorrect as his substantive position was that of a Machine Operator and at the time of his termination from employment he worked as a Cable Handler.

In cross-examination by Learned Counsel for the Respondent, the Complainant told the Court that he worked as Machine Operator from 2008 to 2011 when he started working as Cable Handler.

He averred that the Respondent changed his job from Machine Operator to Cable Handle because he was found with a worm in the brain which led to his suffering from brain disorder otherwise diagnosed as Epilepsy.

The Complainant admitted having been attended to by doctors at Bumi Clinic, Nchanga hospital and Fairview hospital in Lusaka. The Complainant testified that he was put on medication for a month.

In 2012, the Complainant was presented before the Medical Board and the Medical Board recommended that he should be reviewed by Specialist Physician at University Teaching Hospital for possible CT scan, EEG and further management.

The Medical Board also advised that the Complainant should not handle mechanical equipment until evaluated by the specialist physician at UTH(as per exhibit "*PCP5*").

The Complainant admitted that he had suffered epileptic seizure again in January, 2012. Further that because of his condition he was not fit to handle machines as an Operator. He told the Court that he was not told of the Medical Board's recommendation to go for specialized review and treatment at UTH, until he was discharged from employment on medical grounds.

As regards the 22<sup>nd</sup> and 23<sup>rd</sup> February, 2017 visit to Bumi Clinic, Complainant reiterated that he had gone there because he had a cough and denied having suffered another attack of seizures and that he was attended to by being given medication and he returned home. He explained that he stayed home under the advice of the Doctor.

The Complainant also admitted that he was attended to by RW1 in 2011 and in 2017. However, denied ever suffering a seizure or epileptic fit in 2017, he insisted that he had suffered a cough.

The Respondent called two witnesses one Dr. David Muchila (RW1) and Gloria Chanda (RW2) aforesaid.

RW1 is the Medical Superintendent of the Respondent herein. According to him the Complainant herein had been his long time patient.

According to RW1 he came to know the Complainant through Dr. Muselepete who had attended to him when he suffered a first seizure attack. The Said Dr. Muselepete had written a note touching on the Complainant which RW1 had to authorise, the same is exhibit "*PCP3*".

"*PCP3*" shows that the Complainant had suffered seizure attacks in October, 2011. That the Complainant had three seizure attacks in six months period.

According to RW1, their protocol is that a patient who presents seizure attacks must be subjected to Imaging Investigations by CT Scan and specialist evaluation immediately. Therefore, the Complainant was referred to Fairview hospital for CT Scan and review by a Senior Consultant at Nchanga hospital, Chingola. Senior Consultant Dr. Chibete diagnosed the Complainant with a worm in the brain and commenced him on a 28 days course of treatment and the same was administered at Bumi Clinic.

The Complainant was put on anti-convulsant medication. The said medication was meant to kill the worm in order to reduce the frequency of the seizure attacks but does not cure. Immediately it was recommended that the Complainant be removed from Machine Operator for safety reasons.

According to RW1, the Complainant was again attended to in 2012 when he suffered a repeat seizure attack. It was learnt that the supervisor had taken him back to normal duties despite the earlier recommendation. At that stage a

recommendation was made to the Human Resources department to convene a Medical Board to advise on the Complainant's ability to work in the active Mine area. The Board was constituted and it made a report as per exhibit *PCP5 (a)* and *(b)*.

RW1 further testified that the Complainant had remained relatively seizure free and approached him in September, 2016, when he demanded reinstatement to his Heavy Equipment Operator, therefore he was referred by the Human Resources department. The Complainant believed that he had been cured and was fit to get back to operating machinery. RW1 explained that he advised the Complainant that there was risk of him suffering the seizure attacks. However, he wrote a referral letter for the Complainant to Fairview hospital Lusaka, so that an MRI Scan could be conducted and the Complainant reviewed by a Consultant Physician who could guide whether or not the Complainant could go back to operating machinery. The referral letter dated 16<sup>th</sup> September, 2016 was given to the Complainant. However, the Complainant did not go to Fairview hospital as RW1 was to come to learn later in February, 2017.

RW1, told the Court that the next time he saw the Complainant was on 22<sup>nd</sup> February, 2017 around 21.30 hours the Complainant was brought with a history of having had a seizure attack at home. He was in the company of his wife and a relative who works under the Emergency response Team.

RW1 testified that when the Complainant was brought to the Clinic he was in the postical state which a person who just had a seizure attack goes through such as deep unarousable sleep. The Complainant was treated and kept overnight for observation until the following morning. During the clinical meeting on 23<sup>rd</sup> February, 2017, the Medical team reviewed the Complainant's medical history and in view of the resumptions of the seizure attacks they were of the view that it was in the interest of the Complainant that he be

recommended to be deployed from active Mining area to a safer work environment.

RW1 denied that the Complainant had complained of a cough on the 22<sup>nd</sup> and 23<sup>rd</sup> February, 2017 and he referred to exhibit *PCP 9(a)* and *(b)* as the recording of the events.

In cross-examination by Learned Counsel for the Complainant, RW1 told the Court that he attended to the Complainant on 22<sup>nd</sup> and 23<sup>rd</sup> February, 2017. Learned Counsel took issue with the notes made on the documents marked as exhibit *PCP9 (c)* and *(d)* in the Respondent's affidavit in support of the Answer. However, RW1 explained that notes on *PCP9 (c)* were made after the group meeting, after a group round in the morning and review of the Complainant after an overnight observation, therefore, a Clinical Officer recorded the happenings.

RW1 admitted that on the first day of attending to the Complainant, he recommended for his redeployment. Further, that nothing was prescribed for the Complainant except to recommend redeployment because according to him they knew the history of the Complainant's medical condition.

As regards the question as to why he rushed to make a recommendation, RW1 explained that he discussed with the Complainant when he woke up from slumber and it was established that the Complainant had not followed through the earlier recommendation.

RW1, admitted that the record to the effect that the Complainant was brought to the Clinic by the emergency response team, was made in err, but that he was brought.

According to RW1, he referred the Complainant issue of his sickness to the Medical Board for safety reasons and the Medical Board made recommendation to the Respondent as employer. There was a recommendation of the Medical Board to refer the Complainant to University Teaching Hospital (UTH), however, RW1, did not refer him to University Teaching Hospital.

RW1's explanation for not referring the Complainant to UTH as per recommendation of the Medical Board is that he clarified the issue with the Board's President Dr. Ng'ambi and the Medical Superintendent at Solwezi General Hospital because it had appeared to him that when he received a report, maybe the Board had not seen that the CT Scan was already done and it was agreed that since the CT Scan was already done, there was no point of moving forward since the cause of seizures had already been established by the Senior Consultant at Nchanga South Hospital.

RW1 concluded under cross-examination that he had made two recommendations, for redeployment from active mine area and the second one was discharge of the Complainant on medical grounds, in the event that there was no vacancy found in the non-scheduled area.

RW2 was Gloria Chanda, Senior Human Resources officer in the Respondent Company.

The gist of RW2's evidence is that she is the person who dealt with the Complainant during the process that led to his termination of employment on medical reasons.

Pertinent to her role is that when a recommendation was received from the Medical Board in August, 2012 to the effect that the Complainant should not operate any mechanical equipment, he was moved from Machine Operator to



Cable Handler. Also that in 2016 the Complainant approached her and requested that he be reinstated to his position of Machine Operator because he felt that he had healed. RW2, explained that she referred Complainant to the doctors for evaluation. However, when the Complainant was given a letter to present himself to Fairview hospital for specialists review, he did not go.

The rest of RW2's evidence in relation to the seizure attacks of the Complainant and his treatment is not very different to that of RW1 and the Complainant's own testimony. However, crucial to this case is the events of 22<sup>nd</sup> and 23<sup>rd</sup> February, 2017.

The evidence of RW2, as regards the termination of Complainant's employment for medical reasons is that, in February, 2017, they as Human Resources department learnt through a report from Bumi Clinic of the Complainant being unwell.

The report from Bumi Clinic was to the effect that the Complainant had suffered a fit at his home and was taken to the said Clinic. RW2, testified that she received a recommendation from the Clinic that the Complainant should cease to work from an Active Mining area, therefore, there was need to have him redeployed in non-scheduled area and that if no place was found, then the Complainant's employment should be terminated on medical grounds.

RW1, testified that she embarked on looking for a place in the non-scheduled area. According to her at the time she was doing this, she had invited the Complainant and explained to him the doctor's recommendation. According to RW1, the Complainant understood and confirmed to her that the doctor had explained to him prior to issuing a sick note to him.

RW1, averred in reference to exhibit *PCP10* the same being e-mail correspondences between her and other respondent's employees, as regards an issue of finding alternative vacancy in a non-scheduled area. RW1 testified that she did not find any vacancy in a non-scheduled area, therefore, the only option available was to terminate the Complainant's employment on medical grounds in April, 2017. The position of not finding an alternative position in a non-scheduled area was explained to the Complainant, and according to RW2, the Complainant was ready to leave.

RW2, explained that she discussed with the Complainant his entitlement on discharge from employment on medical grounds. Further that the Complainant was worried about his terminal pay being swallowed by a bank loan he obtained from Stanbic Bank. Therefore, RW2 assisted the Complainant with a form which he filled and took to Bumi Clinic for signing so that the Bank loan could be taken care of by an Insurance Company. This piece of evidence was called to demonstrate that prior to placing the Complainant on medical discharge from employment, he was talked to.

In cross-examination by Learned Counsel for the Complainant, RW2 told the Court that Dr. Muchila referred the Complainant to the Medical Board which is a Government Institution because he needed to undergo some further investigations for the condition he suffered. Further, that in 2012, the Complainant's condition had not been established whether it was a chronicle seizure or not, the reason he was presented before the Medical Board. However, RW2 did not know whether or not the recommendation of the Medical Board was complied with by referring or sending the Complainant to University Teaching Hospital (UTH).

At the time of writing this judgment, I had only received Respondent's Learned Counsel's submissions and I shall refer to the same as and when necessary.

It is uncontroverted that the Complainant was employed by the Respondent herein on 11<sup>th</sup> February, 2008, as a Machine Operator and that whilst on duty in 2011 he suffered seizure attacks which led to the Respondent's Bumi Clinic to refer him to Nchanga Mine Hospital, Chingola for Medical assessment and expert advice.

There is no dispute that the Complainant had suffered seizure attacks in 2012 and he was referred to Fairview, Medcross and Optimal Hospitals for specialized investigations, review and treatment.

It is also a fact that the Complainant's medical condition was presented before the Medical Board sitting at Solwezi General Hospital, which recommended among other things that the Complainant should not operate or work with machinery equipment and accordingly, the Respondent was removed from Machine Operator to work as Cable Handler.

It is a fact that the Complainant was diagnosed with having a worm in the brain and that he had suffered epilepsy and that the said epileptic fit recurred.

It is a fact that the Complainant presented with a medical condition at Bumi Clinic on 22<sup>nd</sup> and 23<sup>rd</sup> February, 2017, which led to the Medical Superintendent one Dr. Muchila (RW1) to make a recommendation to the effect that the Complainant be removed from active Mining area and placed in non-scheduled area and if no vacancy in the non-scheduled area was found his employment be terminated on medical grounds.

Clearly, what is in dispute is whether the Complainant had suffered a condition on 22<sup>nd</sup> and 23<sup>rd</sup> February, 2017 befitting a Doctor's recommendation to have his employment terminated on medical grounds. Further, whether the

Respondent's Medical Superintendent was a proper person to recommend termination of employment on medical grounds.

This Court is called upon to make a determination on the aforesaid issues in dispute in order to ascertain whether or not the termination of the Complainant's employment on medical reasons is unfair.

I hasten to state at the outset that it is a well settled principle in many cases decided by the Supreme Court one of which is **Wilson Masautso Zulu v Avondale Housing Project**<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 his case cannot be entitled to a judgment whatever may be said of the opponent's case*

Equally in the case in casu the onus is on the Complainant to prove his complaint on the balance of probabilities.

Clearly, in this case the Complainant makes very serious allegations of lack of integrity and professionalism at the instance of the Respondent's medical facility (Bumi Clinic), and in particular its Medical Superintendent Dr. David Muchila. The Complainant, claims that he never suffered any seizure or epileptic fit, on 22<sup>nd</sup> February, 2017, but a mere cough, however, the Respondent's Medical Superintendent proceeded on making a recommendation based on the wrong reason that the Complainant had a relapse of an epileptic seizure, therefore he should be redeployed from the Scheduled Area of the Mine to a non-scheduled area and if no vacancy in a non-scheduled area was found to be discharged from employment on medical grounds.

I have critically applied my mind to the allegation raised by the Complainant, and in making a position I peruse the documentary evidence produced in this

case. I find as a fact that the medical condition history of the Complainant was well known to the Respondent's medical team. Further the events and facts of 22<sup>nd</sup> and 23<sup>rd</sup> February, 2017, goes to show that there would be no reason or malafide on the part of RW1, to cause the Complainant to stay home from February to April, 2017, unless he was unwell. There is also evidence on record that the Complainant was talked to by RW2 before implementing the recommendation of the Medical Doctor to discharge him from employment. My observation is that it is also not deliberate that the Complainant believed that he had not suffered a seizure attack on 22<sup>nd</sup> February, 2017 as the same can be attributed to the nature of the said medical condition the Complainant suffered.

There is also a contention by the Complainant that appears to suggest that the Respondent's Medical superintendent had no authority at law to recommend a medical discharge of the Complainant. It is apparent from the Complainant's oral testimony and pleadings that in his view the only body which can recommend his discharge on medical grounds from employment is the Government's Medical Board.

In the unreported case decided by the Court of Coordinate jurisdiction of **Evans Chongo Musonda v African Explosives Limited**<sup>2</sup>, Kaoma, J as she then was observed that:-

*In my view a contract of employment may be validly terminated on the basis of an employee's illness when the illness had demonstrated a adverse impact on the employee to perform the inherent requirement of his job.....*

*In this case a medical Board was not instituted to determine whether or not the late Charles Kabesha was fit to work and that there was no recommendation by a Certified Medical Practitioner. I ought to add that this requirement is not mandatory.*

It is my considered view that the position expressed by her Ladyship in the **Evans Chongo Musonda** case is sound at law, as was held in the Australian case she referred to of **Smith and Others v Moore Paragon Australia Limited**<sup>3</sup>, that-

*The traditional view was that when an employee is so incapacitated by illness or injury that he or she cannot work at least in the longer term, the contract may be frustrated and thus terminated by operation of law and at the initiative of the employer. This is the doctrine of frustration of contract.*

In the case in casu, it is uncontroverted that due to the Complainant's medical condition, it was recommended that he ceases to perform his role of a Machine Operator, and subsequently to be redeployed from the Scheduled Mining area.

I have also applied my mind to the letter under the hand of the Assistant Labour Commissioner (North-Western Province) dated, 21<sup>st</sup> June, 2017) otherwise Exhibit "**FS4**", where he observed that the Respondent had failed to follow the provision in the **General Order No. 2/2011 of the Minimum Wages and Conditions of Employment Act, Chapter 276 of the Laws of Zambia** which provides under Section 6 (1) (a) (b) (2), that:-

*An employee who is unable to execute the employee's normal duties due to illness or accident not occasioned by the employee's default shall, on production of a Medical Certificate from a Registered Medical Doctor or health facility designated by the employer, be granted paid sick leave at the following rate:*

- (a) At full pay during the first three months, and*
- (b) Thereafter, at half pay for the next three months.*

The applicability of the Minimum Wages and Conditions of Employment Act, Chapter 276 to the Complainant is not certain in the light of Clause 20.4 of the Respondent's Conditions of Service to which the Assistant Labour Officer was referred to by the Respondent in *exhibit "PCP5"* to the effect that, the said clause provides that:-

*An employee may be discharged on medical grounds when the Company Medical officer recommends that the employee is unfit to carry out his/her normal or similar duties as a result of ill health.*

The above notwithstanding, as alluded to herein above the Complainant's medical history shows that he had been suffering from epileptic seizures since 2011 though there was a period of stability however, he suffered from the same in 2012 and February, 2017.

In any case Section **36(2)** of the **Employment Act, Chapter 268** of the **Laws of Zambia** provides that:-

*36 (2); Where owing to sickness or accident an employee is unable to fulfill a written contract of service, may be terminated on the report of a registered Medical Practitioner.*

The Respondent's Medical Practitioner is one such registered Medical Practitioner as there is no evidence to the contrary, who is empowered by law to make a report or recommendation of medical discharge.

Having analysed the evidence and facts herein, and perused the law and authorities cited herein, I have come to the conclusion that the Respondent did not wrongly, unlawfully and unfairly discharge on medical ground, the Complainant from employment. I therefore, find and hold that the Complainant has failed to prove his complaint on the balance of probabilities, the same is accordingly dismissed for lack of merit.

Each party shall bear their own costs.

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

Delivered at Solwezi this **27<sup>th</sup>** day of **July, 2018.**

.....  
Hon. Justice D. Mulenga  
**JUDGE**