

IN THE HIGH COURT FOR ZAMBIA

COMP NO. IRC/SL/03/2018

INDUSTRIAL/LABOUR DIVISION

HOLDEN AT SOLWEZI

(LABOUR JURISDICTION)

BETWEEN:



SUMAILI MBEWE (Suing in his capacity as President of the Consolidated Miners and Allied Workers Union of Zambia-CMAWUZ)

COMPLAINANT

AND

LUMWANA COMPANY LIMITED

RESPONDENT

Before: The Honourable Mr. Justice D. Mulenga this 27th day of July 2018.

For the Complainant : Mr. M. Mwachilenga and Mr. M. Benwa of Messrs Mumba Malila and Partners

For the Respondent : Mr. I. Siame of Messrs Corpus Legal Practitioners

JUDGMENT

Cases referred to:

1. Wilson Masautso Zulu v Avondale Housing Project (1982) ZR 172
2. United National Union of Private Security Employees, Sailas Kunda and Others v Panorama Security and Zambia Union of Security Officers and Allied Workers SCZ Appeal No. 96 of 2013

3. **Mutale and Chomba v Newstead Zimba (1988-1989) ZR 64.**
4. **Scientific Research International and Allied Workers Union v Kenya Agricultural Research Institute and Another [2013] e-KLR**

Legislation referred to:

1. **Article 21(1) of the Constitution of the Republic of Zambia, Chapter 1 of the Laws of Zambia**
2. **Sections 5, 22, 63 and 64 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.**
3. **Industrial and Labour Relations(Amendment) Act No.30 of 1997 and No.8 of 2008**

The Complainant in his capacity as President of Consolidated Miners and Allied Workers Union of Zambia filed a Notice of Complaint on 15th January, 2018 with an affidavit in support of the said Complaint. The grounds upon which the complaint is presented are that the Consolidated Miners and Allied Workers Union of Zambia (hereinafter referred to only as "CMAWUZ") is a duly registered trade union whose membership includes more than twenty-five employees of the Respondent. CMAWUZ has on several occasions approached the Respondent to enter into a recognition, however, the Respondent has deliberately failed and/or neglected to enter into the said recognition agreement.

The Complainant union consequently declared a collective dispute and the matter was referred to conciliation. The conciliator ruled in favour of the Complainant union and stated that there was no justifiable reason for the Respondent's refusal to recognize CMAWUZ but the Respondent has still neglected to enter into a recognition agreement. The Complainant therefore seeks the following relief:-

- (a) An Order to compel the Respondent to enter into a Recognition Agreement with the Complainant union

- (b) An order that the Respondent begins to remit union dues to the Complainant union as and when they fall due.
- (c) An order that the Respondent pays the union dues that are so far due with interest
- (d) Punitive damages
- (e) Any other relief the Court may deem fit
- (f) Costs of an incidental to this action.

The Complainant vide his Affidavit in Support of Complaint deposed that CMAWUZ is a duly registered trade union mandated to represent employees in the mining sector and the certificate of registration is "SM1". CMAWUZ has members who are employees of the Respondent but the Respondent has neglected to sign a recognition agreement, even after a ruling of the Conciliator holding that the Respondent had no justifiable reasons for refusing to recognise CMAWUZ as a union. The said ruling is exhibit "SM6". The Complainant further deposed that unless the Respondent is compelled to enter a recognition agreement with CMAWUZ, union members who are employed by the Respondent will continue being deprived of the right to be represented by a union of their choice and the constitutional right to freedom of association.

The Complainant union's president one Sumaili Mbewe (hereinafter referred to only as "CW1") was the only witness for its case and the gist of his testimony was that CMAWUZ clearly demonstrated to the Respondent that it had the requisite number of members who were in its employment by presenting joining and cancellation forms. The said forms indicate that some of the Respondent's employees withdrew their membership from National Union of Miners and Allied Workers (NUMAW) and Mine Workers Union of Zambia (MUZ) in order to join the Complainant union.

CW1 averred that despite instructions from its employees to start remitting union fees to the Complainant union, the Respondent decided to ignore those instructions and continued remitting union fees to other unions against the choice of the employees. He cited an example of one employee by the name of Issac Chilubala who withdrew union membership from MUZ and instructed the Respondent to pay his union fees to CMAWUZ but the Respondent neglected to do that.

CW1 further averred that the assertion by the Respondent in its Answer that national executive members of CMAWUZ were employees of entities which are not in the mining industry or sector such as Mr. Clean Zambia Limited and Silk Engineering Company was not correct. He averred that the said entities provide services to the mines and the Complainant union has members from both the mines and entities connected to the mines like the said Mr. Clean Zambia Limited which provides cleaning services to the Respondent. It was therefore not up to the Respondent to dictate which people should make up the executive of CMAWUZ as the said executive was duly elected into office and recognized by the Ministry of Labour and Social Security.

CW1 told the Court that because of the Respondent's conduct of refusing to sign a recognition agreement with the Complainant union, employees have suffered victimization and intimidation at the hands of the Respondent. According to him, one of the Respondent's former employees by the name of Stephen Semeki who joined CMAWUZ was charged and dismissed from employment without union representation.

In cross-examination, CW1 testified that payment of union subscription fees is not the only proof of membership as a union member becomes one upon signing a stop order form. He told the Court that none of the Respondent's employees have paid subscription fees to the Complainant Union because the

Respondent has contravened instructions from the concerned employees to remit union fees. According to CW1 however, upon withdrawal of membership by some of the Respondent's employees who belonged to NUMAW and MUZ, the Complainant sent an email to those two unions to notify them that the said employees had joined CMAWUZ. The two unions have not raised any objection hence it is not the Respondent's role to dictate where subscription fees should be paid.

The Complaint is opposed and to that effect the Respondent filed an Answer and affidavit in support of Answer on 5th March, 2018. In its Answer aforesaid, the Respondent contends that the Complainant union does not have the requisite twenty-five employees working for the Respondent as members, hence the Respondent refused to enter into a recognition agreement. The Respondent further contends that the Complainant Union comprises employees from sectors other than mining and that is contrary to the law.

To buttress the defence, the Respondent in its affidavit sworn by one Kelvin Ng'andwe Chibesa, its Human Resources Manager deposed that the executive membership of the Complainant union comprises of employees not belonging to the mining industry. It was further deposed that from the thirty one (31) employees the Complainant union was claiming as its members, only ten had joined the said union and the other twenty one belonged to NUMAW and MUZ hence the threshold for entering into a recognition agreement was not met

For the aforesaid reasons, the Respondent deposed that it was therefore justified in refusing to enter in a recognition agreement with the Complainant union and the Conciliator who ruled on the collective dispute between the parties did not properly apply the law to the facts in issue. That notwithstanding, according to the Respondent, it has not deprived its employees of their right to belong to a union of their choice.

The Respondent called three witnesses. The first witness was Kelvin Ng'andwe Chibesa the Human Resources Manager aforesaid (hereinafter referred to only as "RW1"). RW1 averred that the Respondent has recognition agreements with NUMAW and MUZ and its employees are free to join either of these two unions as they represent employees in the mining industry.

RW1 further averred that the Respondent has not received any forms of withdrawal of membership from employees indicating that they have withdrawn from NUMAW and MUZ to join the Complainant union instead.

In cross-examination, RW1 testified that when an employee withdraws membership from a union, they complete a form on that union's headed paper indicating that they have resigned. RW1 also averred that a union member remains as such until membership is cancelled in writing and the said employee instructs the Respondent to pay union fees to the union he is joining. RW1 admitted that notwithstanding, when employees for instance one Isaac Chilubala instructed the Respondent to remit his subscription fees to the Complainant union, the Respondent still went ahead to pay MUZ instead, because Chilubala did not instruct the Respondent personally but through the Complainant union which it does not recognise as a union.

RW2 was Reuben Kalaluka and RW3 was Leonard Kanayi. Their evidence was not different from that of RW1 on the procedure of withdrawing membership from a union, except to add that a member needs to give three months' notice prior to withdrawing from a union, therefore, I will not belabor to restate the same.

Both Learned Counsel for the Complainant and Learned Counsel for the Respondent filed written submissions and I shall address the same as and when need arises.

Clearly from the pleadings and the evidence adduced in this case, the Court is called upon to determine whether or not the Respondent is justified in declining to enter into a recognition agreement with the Complainant union and whether the Respondent is restricting the rights of the Complainant union's prospective members to belong and be represented by that union.

I am alive to the Supreme Court's guidance in its holding in the case of **Wilson Masautso Zulu v Avondale Housing Project Limited**¹, 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 a fact in this case that Consolidated Miners and Allied Workers Union of Zambia (CMAWUZ) is a duly registered trade union that was issued with a certificate of registration on 14th December, 2010. The Complainant union has approached the Respondent to enter into a recognition agreement but the Respondent has declined to recognize it as a union. The reasons for not recognizing the Complainant that have been given by the Respondent are that the Complainant union does not have the requisite number of members who are employed by the Respondent, the union has members who do not belong to the mining industry and some of the union executive members are not eligible for membership.

In considering the issues for determination, I am alive to the provisions of Article 21(1) of the Constitution of the Republic of Zambia, Chapter 1 of the Laws of Zambia which provide that:-

Except with his own consent a person shall not be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to any political party, trade union or other association for the protection of his interests.

I am also alive to the provisions of section 5 as amended by the Industrial and Labour Relations(Amendment) Acts No 30 of 1997 and No. 8 of 2008, of the Industrial and Labour Relations Act, chapter 269 of the Laws of Zambia which provide that:-

5. Notwithstanding anything to the contrary contained in any other written law and subject only to the provisions of Constitution and this Act every employee shall have the following rights:

(a) the right to take part in the formation of a trade union;

(b) the right to be a member of a trade union within the sector, trade, undertaking, establishment or the industry in which the employee is engaged.

The aforecited law emphasises the right of freedom of association and the right to belong to a trade union within the sector or industry in which an employee is engaged. In the matter in casu, the Respondent herein is a mining conglomerate and therefore belongs to the mining sector. That notwithstanding, article 2 of the Complainant union's constitution which has been duly registered with the Labour Commissioner and is exhibited as "SM2" in the Complainant's Affidavit in Reply provides that:-

Article 2: Classification and Composition

The membership of the union shall be composed of all workers employed in the mining and allied companies of Zambia including all union officers and full time employees.

Further the Complainant union's constitution in its interpretation section has defined 'mining and allied companies' as *"mining companies involved in copper mining, other related minerals and such allied activities."* The said constitution has also defined 'allied employee' as *"a worker engaged in mining related industry"*.

Based on the foregoing, it is this Court's considered position that the Complainant union herein was registered with the mandate of representing employees in the mining and allied industry and the class of employees that the Complainant can represent was approved by the Labour Commissioner. The Respondent's submission that the Complainant union cannot represent its employees because the union has members from other sectors, cannot therefore hold any water. The reason is that the companies being cited by the Respondent in order to support its argument, for instance Mr. Clean Zambia Limited and G4S Secure Solutions Limited have employees who provide cleaning and security services to the mines respectively.

In relation to the Respondent's contention that the Complainant union does not have the minimum number of employees from the Respondent belonging to the union, I apply my mind to the provisions of sections 63 and 64 of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia which provide that:-

63. (1) Every employer employing twenty-five or more eligible employees, or such lesser number as may be prescribed by the Minister, shall register himself with the Commissioner within a period not exceeding three months from the date of coming into operation of this section or, from the date upon which this section becomes applicable to the employer, as the case may be.

64. (1) Not later than three months from the date of registration under section sixty-three a registered employer and a trade union, if any, to which the employees belong, shall enter into a recognition agreement at sector, trade, undertaking, establishment or industry level as the case may be.

(2) Not later than three months from the date of issue of a certificate of registration, an employers' organisation and trade union to which the employees belong, shall enter into a recognition agreement.

It is this Court's considered view that the meaning of the aforesaid law is that, in as much as the twenty-five eligible employees referred to in section 63 relates to the requirement of an employer to register himself with the Labour Commissioner, when the said section is read together with sections 64(1) and (2), it can be imputed that it is also a requirement that, a union should have a minimum of those twenty-five eligible employees as its members, before it can be recognized by the employer.

In the matter in casu, the Complainant contends that it has more than twenty-five members who are employees of the Respondent. The Respondent on the other hand contends that the Complainant has not met the requirement of having twenty-five eligible employees from the Respondent company as its members for it to qualify for a recognition agreement. The evidence on record is that some of the Respondent's employees filled in cancellation and joining forms with the Complainant (Ref to exhibit "SM2" in the Complainant's affidavit in support of complaint and pages 1-14 of the Complainant's notice to produce).

Suffice to state here that under the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, there is no specific procedure provided for joining or resigning from a trade union. That notwithstanding, section 22 of the said Act provides that:-

22. (1) An employer may, by agreement with an eligible employee, deduct the amount of subscription prescribed by the constitution of the trade union from

the wages of such eligible employee if the employee is a member of such trade union.

(2) An eligible employee may, at any time, withdraw the agreement referred to in subsection (1), by giving three months notice, in writing, to the trade union concerned.

The import of the aforesaid law is that, payment of subscription fees being one of the prerequisites of union membership, an employee may withdraw membership from a union he belongs to by asking his employer to stop deducting union subscription fees and giving three months' notice in writing to the trade union concerned.

I am further guided by the case of *United National Union of Private Security Employees, Sailas Kunda and Others v Panorama Security and Zambia Union of Security Officers and Allied Workers*² cited by Learned Counsel for the Complainant where the Supreme Court of Zambia held that:-

In this case, the 2nd appellants did send notices to both respondents of their withdrawal from the 2nd respondent union. However, the notices were composite ones; where on one notice the names of employees giving that notice together with their signatures were indicated. In our view that notice was in writing and the signatures of the employees named thereon signified that they had adopted the notice in their individual capacity. Certainly, the 2nd respondent was left in no doubt that those employees had decided to withdraw their membership. When we read Section 22, we do not see the provision that stipulates that each employee who intends to withdraw must write his own letter. Neither do we see any provision which bars employees from writing a composite notice.

The decision in the above case does not depart from the decision in the case of *Mutale and Chomba v Newstead Zimba*³ cited by the Respondent's Learned advocates, to the effect that the issue of withdrawal of membership from the

union is between the member and the union concerned, and that composite notice of withdrawal is as good as one done individually.

In the matter in casu, the Complainant's cancellation and joining forms filled in by some of the Respondent's employees, have an instruction to the Respondent Company to deduct 1.5% of an employee's basic salary and remit the same to the Complainant union. There is also information on the said forms that the employees have cancelled their membership with either NUMAW or MUZ. The evidence on record is that the said forms were brought to the attention of the Respondent and notification was given to the NUMAW and MUZ that some of their members had now joined the Complainant union, like one employee by the name of Isaac Chilubala. However, the Respondent has still continued remitting subscription fees to NUMAW and MUZ against the concerned employee's instructions.

It is this Court's considered position that in as much as an employee cannot belong to more than one union, it is not for the Respondent to decide which union an employee should join or not join. I draw some comfort from a persuasive Kenyan case of *Scientific Research International Technical and Allied Workers Union v Kenya Agricultural Research Institute and Another*⁴ where it was held that:-

Recognition of trade unions rests on freedom of association. Employees have the right to join and leave trade unions. Recruitment is a continuous process. Even where an Employer has formally granted trade union recognition, employees belonging to that recognized trade union are not barred by any law from shifting allegiance to another trade union. Freedom of association acknowledges the right to associate is co-joined to the right to dissociate; just as the right of recognition includes the right of de-recognition. Employees look at the trade union that is best placed to articulate their collective rights and interests of the moment, and do not take a lifelong vow of fidelity, by joining any one trade union.

In the matter in casu, the Respondent has persistently argued that its employees belong to NUMAW and MUZ as it has not received any withdrawal of membership forms from those two unions. I must state here that even though the concerned employees have not filled in withdrawal forms with NUMAW and MUZ, they have however filled in cancellation and joining forms on CMWAZ headed paper which show that they have withdrawn from the other two unions and joined the Complainant union. This has been brought to the Respondent's attention as well as the attention of the other two unions. It is this Court's considered position that by continuing to remit subscription fees to NUMAW and MUZ in respect of employees who have joined the Complainant union, the Respondent is infringing on the concerned employees' right of freedom of association and belonging to a trade union of their choice.

The Respondent has also raised an issue that some of the Complainant's union executive members are not qualified to be members and only one of its employees is part of the Complainant's union executive. I must hasten to state here that the elections of national executive members for any union are regulated by the Labour Commissioner within the confines of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia. It is therefore not the preserve of the Respondent to decide who should hold executive office in the Complainant union.

I therefore find and hold that the Respondent does not have any justifiable reasons for its refusal to recognize the Complainant as a union. Further, the Respondent is infringing on its employees' right of freedom of association and belonging to a trade union of their own choice. I further find and hold that the Complainant union has proved its complaint on a balance of probabilities.

I now hereby order and direct as follows:-

1. The Respondent should forthwith without fail embark on a process of entering into a recognition agreement with the Complainant, which process should be concluded within thirty (30) days from the date hereof.
2. That by end of September, 2018, the Respondent shall start to remit union member contributions of the concerned employees, through its payroll to the Complainant.

As regards the Complainant's claim for punitive damages, I must emphasise that the issue of employees' freedoms and rights should not be belittled or trivialized by employers. Employees rights and freedoms like any human rights are not only fundamental and constitutionally protected but have further been restated in the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.

The Respondent having without justification refused and or neglected to enter into a recognition agreement with the Complainant, is hereby condemned in punitive damages to the Complainant in the sum equal to the contributions which the initial prospective thirty- one union members who were listed at the time of the application or proposal for entry into a recognition could have made from 2nd May, 2017 when the Complainant's advocates wrote to Respondent, to the end of August, 2018.

Costs to the Complainant to be taxed in default of agreement.

Informed of the right to appeal to the Court of Appeal 30 days from the date hereof.

Delivered at Solwezi this **27th** day of **July, 2018**.


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Hon. Justice D. Mulenga
JUDGE