

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

IRC/ND/102/2016

BETWEEN:

MATHEW NG'AMBI

COMPLAINANT

AND

FQM LIMITED

RESPONDENT



Before: Hon. Judge D. Mulenga this 22nd day of July, 2016.

For the Complainant : Mr. Njobvu of Messrs Luso Chambers

For the Respondent : Mr. D. Lubati of Messrs Abha Patel & Associates

JUDGMENT

Cases referred to:

1. Wilson Masautso Zulu v Avondale Housing Project (1982) ZR 172.
2. Elisha Kunda v G.S Trucking Limited Comp/106/201 (unreported).
3. Powell v Lee (1908) 99 L.T 284.
4. Nsansa School Inter Education Trust v Gladys Mtonga Musamba (2010) ZR Volume 1, 457.
5. Zambia Airways v Gershom Mubanga (1990/92) Z R 149.

Works referred to:

1. Sutton and Shannon on Contract, 17th Edition published by Butterworths (London)

The Complainant filed a Notice of Complaint and Affidavit in Support on 11th August, 2015 against the Respondent on the grounds that pursuant to clauses 1.2 and 5.2 Complainant's initial 12 months contract was renewed to run from 16th June, 2015 to 16th June, 2016. However, without giving any reason and without any case hearing Respondent summarily dismissed the Complainant on 16th July, 2015 and did not pay him for the last two shifts worked.

The Complainant therefore seek the following relief:

- (a) K56, 176.00 basic salary for the remaining eleven (11) months of the contract.
- (b) K334.40 for the two shifts worked but not paid.
- (c) Damages for wrongful dismissal.
- (d) Interests at 20 percent per annum on all monies found due from the date of the complaint up to date of payment, and
- (e) Costs.

Complainant deposed through his affidavit in support of the Notice of Complaint that he was employed on an initial twelve (12) months contract by the Respondent from 16th June, 2014. However, upon expiry of the said twelve months contract of employment, the Respondent decided to continue with the contract and on 6th July, 2015 his immediate supervisor Peter Musonda assessed him in order for him to continue in employment, the said assessment was signed by both the Complainant and the Supervisor aforesaid.

Complainant also deposed that on 16th July, 2015 he was instructed by a Superintendent Brian Macdonald to enter a place charged (with explosives) to drill and he refused because that was against the Drilling Regulations which required that the place to be drilled should be not less than three metres from the charged Area, reference is made to exhibit "*mn2*", however, perusal of the affidavit in support of complaint shows that its exhibit "*mn3*" which is a Guide to the Explosives Act and the Explosives Regulations document.

Complainant contends in his affidavit that the Area where he was instructed to drill was less than a metre from the charged Area and that if he drilled, the same could have caused an accident which may have killed him and his work mates. He therefore deposed that it was because of his refusal to enter a charged Area that caused the Respondent to immediately give him a summary dismissal letter, which dismissal was not reported to the Labour Office contrary to the requirements of the Law.

The Complainant deposed further that in anticipation of end of contract on 16th June, 2015 he applied to join Mopani Copper Mines however, he could not attend interview on 3rd July, 2015 because the Respondent had promised to employ him on permanent basis.

The Complainant believed that the only reason he was dismissed from employment was because he had refused to enter the area which was charged with explosives. He deposed also that he was not paid for the two shifts worked and referred to the pay statement marked "*mn2*".

The Respondent filed its Answer and affidavit in support on 15th February, 2016. The Respondent in its Answer aforesaid denied the Complainant's complaints and stated that it had sent a notice for non-renewal of the contract of employment a month late, however, the Complainant was paid for days worked from 17th June, 2015 to 15th July, 2015.

The Respondent further contended that it has a three step approval process for contract renewals which entails that a contract renewal needs to be approved by the immediate Supervisor, Superintendent and Head of Department, the same process led to the delay in notifying the Complainant of its decision not to renew the contract.

Respondent further stated that it finally made a decision not to renew the Complainant's contract of employment and all payments were made to him. The Respondent denies that the non-renewal of the contract of employment amounted to summary dismissal of the Complainant.

Respondent by the affidavit in support of the Answer sworn by one Sayapi Hopkins Mapulanga, deposed that the Complainant was employed as a Driller from the 16th June, 2014 and non-renewal of the contract was notified to the Complainant though late. However, the Complainant was paid for the days worked from 17th June, 2015 to 15th July, 2015.

The Respondent's affidavit in support of the Answer is a repetition of the Answer to the complaint except that the Respondent has referred to the exhibits such as the employment Agreement between FQML - Kalumbila Minerals Limited (The Respondent) and Mathews Ng'ambi (the

Complainant) marked "*shm1*", End of Contract Letter dated 16th July, 2015 marked "*smm2*" Paymaster General System marked "*shm3*" and certificate of service marked "*shm4*".

The Complainant was his own witness. He testified that he was employed by the Respondent on 16th June, 2014 as a Drill Operator, on a one year contract of employment.

The Complainant pointed out in his testimony that the contract of employment had made provision for three months' probation and that when employment is terminated one should be made to undergo exit medical tests before a package is paid in form of repatriation and gratuity.

Complainant contends that the Respondent failed to give him one (1) month notice before termination of his employment, the same should have been given in May 2015.

Complainant told the Court that when the contract expired on 15th June, 2015 he continued working, also that he had also done the assessment whereupon he was advised that his contract of employment was going to be renewed.

Complainant testified on 16th July, 2015, a Mr. Brian McDonald Superintendent, assigned him to drill in an area which was earlier on charged with explosives under the same Superintendent's instruction. He contended that as a person with Blasting Licence (BL) he refused to enter and drill in an area which was already charged with explosives as the same was against the Explosives Act and the Explosives Regulations.

He explained that according to the Regulations, where explosives are set or charged, one cannot drill in such an area unless three metres away. It was for the said reason the Complainant refused to enter the charged Area as it was less than a metre away. It was at that point Superintendent McDonald ordered Complainant to go and report at the Human Resource office and he obliged.

Complainant reported at the Human Resource office and upon giving an explanation of what had taken place, he was told by the Human Resource Officer that his Boss Macdonald did not want to work with him. The Complainant was then advised to go home.

On 16th July, 2015 the Complainant was handed a letter of notification of end of contract of employment. After a week the Complainant was given a Record of Service and last payslip shows that the Complainant worked from 15th June, 2015 to 14th July, 2015 when he had worked up to 16th July, 2015.

Under cross-examination by learned Counsel for the Respondent, CW told the Court that he was dismissed from employment through a letter dated 16th July, 2016. However, upon being referred to the said letter the same being exhibit “shm2” in the Respondent’s affidavit in support of the Answer, he corrected himself that the contract was not renewed.

Complainant, argued that the said termination was a dismissal because the initial contract had come to an end.

Complainant admitted having talked to Kafula Chisanga, a Human Resources officer who handed him the last pay slip and a record of service and that the Respondent failed to take him for exist medical test.

The Respondent through its Answer filed into Court on 1th February, 2015 denied that it dismissed the Complainant from employment but that it sent a notice of non-renewal of contract of employment to the Complainant a month late. However, it paid him for the days worked from 17th June, 2015 to 15th July, 2015.

Respondent cited the reason for the delay in notifying the Complainant about the non-renewal of contract to its processes which has a three step approval processes. That a contract renewal needs to be approved by the immediate Supervisor, Superintendent and Head of Department.

As regards the claim for payment for the days worked on 16th and 17th of July, 2015, the Respondent indicated that it needed to revisit the applicable time sheet as the Complainant may have a case to that effect.

The Court is indebted to the Complainant and the Learned Counsel for the Respondent for their submissions.

This Court is called upon to determine whether or not the Complainant is entitled to Damages for wrongful dismissal from employment, payment of K55, 176.00 basic salary for the remaining eleven (11) months of the contract of employment, and K334.40 for the two shifts worked in the month of July, 2015.

It is apparent from the evidence of the Complainant and his submissions that his claim for Damages for Wrongful dismissal from employment arises from his belief that upon the expiry of the contract which ran from 16th June, 2014 to 16th June, 2015, the fact that he continued to work for a month, the said contract was automatically renewed especially that he was assessed by his immediate supervisor for the purposes of renewing the same.

The Complainant also feels that the purported renewed contract was wrongfully terminated because he refused to enter and work in an area which was charged with explosives against the instructions of one Mcdonald.

The onus of proof is on the Complainant to prove on the balance of probabilities that he was wrongfully dismissed from employment. The Supreme Court in the case of ***Wilson Masautso Zulu v Avondale Housing Project (1)*** held that:-

Where a plaintiff alleges that he has been wrongfully 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 holding of the Supreme Court in the case of ***Wilson Masautso Zulu*** (supra) is instructive to this Court.

In ascertaining whether or not there was a new contract of employment between the Complainant and the Respondent, it is imperative to peruse the clauses in the contract of employment of 16th June, 2014 to 16th June, 2015.

Clause 5.2 of the contract of employment 16th June, 2014 to 16th June, 2015 otherwise exhibit “shm1” of the Respondent’s affidavit in support of Answer, provides:

Renewal of Contract: On completion of twelve (12) month’s satisfactory service under this Agreement, the employer may, with the consent of the employee, renew the contract by an agreed period and it shall be deemed as a new contract. This contract becomes null and void at the end of twelve (12) months service from commencement date as indicated in clause 1.1 of this contract.

The import of the above clause is that the discretion to renew the contract of employment is on the employer (Respondent) but in exercising its discretion to renew the contract the employee (Complainant) is at liberty either to accept or refuse to have the contract renewed.

The clause expressly states that a contract which has come to an end is null and void and the import of the said provision is that the contract which has come to an end is not operational or cannot be deemed to have force or be said to be automatically renewed.

As this Court observed in the unreported case of *Elisha Kunda v G.S Trucking Limited Comp/106/2015*, the learned Authors, *Sutton and Shannon on Contract, 17th Edition published by Butterworths (London)* at page 21, wrote as regards discharge by performance on a particular day, or within a specified time, that the contract must be performed on that day or within that time. At Common Law, when a time is named for performance of the contract e.g. within a week, performance within that time is deemed of the essence of the contract. That is to say, a stipulation as to time is a condition and goes to the root of the contract.

The Complainant has argued that since he had been assessed by his immediate supervisor one Peter Musonda, for him to continue in employment and that both signed the assessment, then he was serving under a new contract which was to run from 16th June, 2015 to 16th June, 2016.

The Complainant's argument is not attainable at law. The case of *Powell v Lee (3)* puts it clearer, whose facts and the decision is thus:

Powell applied for a vacant post as Headmaster of a school. The managers passed a resolution appointing him, one of the managers, however, unofficially told him that he was appointed. Subsequently the managers rescinded their resolution, and it was held that there was no contract, as the acceptance had not been communicated by or by the authority of managers.

In like manner, the Supreme Court of Zambia in the case of ***Nsansa School Inter Education Trust v Gladys Mtonga Musamba (4)*** held among other things that:

Verbal assurance that a contract of employment would come into existence could be described as a declaration of intent which never crystallized into a valid contract.

It is clear from the two authorities cited herein above that unless the parties conclude the terms of contract and or have a contract in place can it be said that there is valid contract.

In the case in casu, the contract of employment of 16th June, 2014 to 16th June, 2015 had expired therefore, null and void as it related to the future. The said contract cannot be deemed to have been renewed simply because the Complainant continued to work for a month thereafter.

The alleged conduct of the Respondent through one Macdonald towards the Complainant notwithstanding, the Respondent made a decision not to renew the contract with the Complainant, the said option was an entitlement which either party herein could exercise.

Learned Counsel for the Complainant submitted on reliance on the case of ***Zambia Airways v Gershom Mubanga (5)*** where the Supreme Court said among other things that dismissing an employee on a reason which is not true will make the dismissal wrongful. It is this Court's considered position that there was no contract of employment between the Complainant and Respondent for the issue to arise of whether or not the termination of employment amounted to the wrongful dismissal.

In the circumstances, therefore, I find and hold that the Complainant has failed to prove his complaint of wrongful dismissal from employment, and the same is accordingly dismissed for lack of merit.

Having made the above finding and conclusion that there was no wrongful dismissal from employment of the Complainant, the claim for K55, 176.00 the same being the sum of the remaining eleven months basic salaries cannot stand. The said claim cannot stand because as there was no contract of employment after 16th June, 2015. The said claim is also dismissed for lack of merit.

In respect of the Complainant's claim for payment of K334.40 the same being money for the two shifts worked but not paid to him by the Respondent, Respondent Witness (R/W1) admitted in cross examination when she was referred to exhibit "*mn2*" (pay statement) that whereas the Complainant worked up to 16th July, 2015 he was only paid up to 14th July, 2015. Further that he was supposed to be paid for the two days shift.

I am mindful of the Respondent's Answer in respect of the Complainant's claim for payment of K334.40, that it was going to revisit his applicable time sheet as he (Complainant) may have a case for payment of days worked on the 16th and 17th of July, 2015. Arising from the testimony of R/W1 in cross examination and in the light of exhibit "*mn2*" it is clear that the Complainant was paid up to 14th July, 2015 when he had worked on the 15th and 16th July, 2015. The Complainant has therefore, proved his claim for the claim, for payment of K334.40 and I have accordingly found for him. The Complainant is awarded interest on the amount of K334.40

at the current Bank Lending rate from the date of the Notice of Complaint up to payment. Costs to the Complainant.

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

Delivered at Ndola this 22nd day of *July*, 2016.

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Hon D. Mulenga
JUDGE

