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IN THE SUPREME COURT OF ZAMBIA

SCZ JUDGMENT NO. 22 OF 2010

HOLDEN AT KABWE

APPEAL NO. 33 OF 2009

(Civil Jurisdiction)

BETWEEN:

LAWRENCE MUYUNDA MWALYE — APPELLANT

AND

BANK OF ZAMBIA — RESPONDENT

CORAM: **Chirwa, Silomba and Chibomba, JJS**
On the 12th August, 2009 and 16th August, 2010

For the Appellant: Mr. M.L. Mukande of M.L. Mukande and Company
For the Respondent: Mr. M.M. Mundashi, SC, Assisted by Mr. B.C. Mutale both of Mulenga Mundashi and Company

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J U D G M E N T

SILOMBA, JS, delivered the judgment of the Court.

Cases referred to:-

1. **ZIMCO Limited (In liquidation) -Vs- Michael Malisawa and Others SCZ Appeal No. 139 of 2002.**
2. **Small Enterprises Development Board -Vs- Grace Kasese Chibwa, SCZ Appeal No. 127 of 2005.**
3. **James Zulu and Others -Vs- Chilanga Cement PLC Appeal No. 12 of 2004.**
4. **Mike Musonda Kabwe -Vs- BP Zambia Limited (1997) SJ, 42.**
5. **Kafue District Council -Vs- James Chipulu (1997) SJ, 13.**
6. **Zambia Privatization Agency -Vs- James Matale (1995/1997) ZR, 157.**

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This appeal is against the judgment of the High Court in which the learned trial Judge, sitting at Lusaka, partially upheld the Appellant's claims. From now and henceforth, the Appellant will be referred to as the Plaintiff and the Respondent as the Defendant as these were their designations at trial.

The Plaintiff filed a writ of summons and among the reliefs he sought from the lower Court were a declaration that he was effectively declared redundant on the 21st of March, 2006 and an order that he was entitled to be on the payroll and be paid all salary arrears and increments until the final settlement of his redundancy benefits.

The facts giving rise to the dispute are clear and straightforward. The Plaintiff joined the Defendant on the 8th of August, 1992 and rose to the position of Coordinator - Charge at director's level. At the time he was declared redundant on the 21st of March, 2006, he was still serving the Defendant at director's level. Sometime in 1999, the Defendant bank embarked on a restructuring and reorganization exercise. The exercise was completed on the 5th of January, 2005. Under the new structure, the post of Coordinator - Charge was abolished and the Plaintiff was given a new post of Assistant Director, Organization and Development under Human Resources. His salary remained the same.

The Plaintiff was not happy with the developments as he felt that he had been demoted. According to the Plaintiff, the incentives or perquisites and facilities he enjoyed in the position of Coordinator - Charge were completely removed from the new position of Assistant Director. He did not have a Secretary or Secretarial facilities, refrigerator, water glasses, office furniture, telephone facilities, etc. The facility of a personal-to-holder car was removed and he could

not access the personal-to-holder car loan. As far as he could recollect, he was the only one who was subjected to that kind of humiliation.

Accordingly, the Plaintiff refused to take up the position and appealed against the decision to demote him but the appeal was never heard and determined one way or the other. As he awaited the outcome of the appeal, the Plaintiff was, on the 21st of March, 2006, served with a letter of redundancy. The letter was accompanied by a redundancy payment amounting to K814,288,437.90. The letter explained how the computation of the redundancy benefits were computed but the Plaintiff thought that the computation was at variance with the Defendant bank's staff handbook, which contained the terms and conditions that regulated his employment with the Defendant. For example, the computation was based on the basic salary and not on salary as defined in the staff handbook; only some allowances such as capital, repair and maintenance, security guard and fuel were included and not entertainment, leave travel, cell phone, land telephone, newspaper and journal, club and professional membership and land rates, etc, allowances.

Accordingly, the Plaintiff claimed to be paid three months salary in lieu of notice, three months housing allowance, free cost of repatriation to the place of origin, damages for humiliation and for anguish and agony he suffered as a result of the demotion. He also demanded to be paid thirty two months salary, plus five months salary for each completed year of service and the foregoing claims, he told the trial Court, were in accord with the memorandum of settlement which extended to management. Apparently, the memorandum of settlement was

negotiated for by the unionized employees in 1994 before it applied to management and directors.

The Defendant, on the other hand, confirmed that the Plaintiff refused to take up the new position of Assistant Director and appealed against the decision to demote him and that at the time the appeal was heard and before it (Defendant) could communicate the decision the Plaintiff was already in Court. According to the Defendant, the decision to place the Plaintiff on redundancy was at his request through an appeal letter to the Deputy Governor in charge of Administration. Further, that in calculating the Plaintiff's redundancy package, the Defendant bank was guided by Clause 13.4 of the staff handbook and the Employment (Minimum Wages) Act. As far as the Defendant was concerned, the Plaintiff was fully paid his terminal dues.

The evidence of the Defendant was an admission that after the restructuring of the bank the Plaintiff was given an office with furnishings which were old; that he was subsequently supplied with a computer rather belatedly due to a technicality. According to the Defendant, journals were not part of the Plaintiff's conditions of service; that medical payments were only made when one was sick and that club membership was on request.

The further evidence of the Defendant was that the effective date of the redundancy, which the Plaintiff also demanded, was the 5th of January, 2005, the date when the restructuring officially ended. As at 5th of January, the applicable salary was K30,000,000.00 on which computation for redundancy package was based and not K35,000,000.00 demanded by the Plaintiff.

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The learned trial Judge (the late Hon. Mr. Justice J.A. Banda, MHSRIP) considered the evidence in its entirety. With regard to the claim to be placed on the payroll until the final settlement of his redundancy benefits, the learned trial Judge declined to entertain the claim considering that the Plaintiff had been paid his redundancy package; that if there was any dispute as to quantum of damages, he would not place the plaintiff on the payroll as doing so would not find support under his conditions of service contained in the staff handbook.

With regard to the claim for damages for humiliation and agony suffered as a result of the demotion, the learned trial Judge opined that the Plaintiff did not suffer any humiliation and agony since he did not take up the appointment to the post of Assistant Director. On the claim for six months salary in lieu of notice, the learned trial Judge found that the Plaintiff was not entitled to the claim because he was the one who chose to go on redundancy.

Having found as outlined above, the learned trial Judge declared that the Plaintiff was effectively declared redundant on the 21st of March, 2006 with redundancy benefits to be paid under Clause 13.4 of the staff handbook. Among other several orders he made was the payment of repatriation at current level; calculation of benefits, based on the last salary, including monthly payroll allowances less what had already been paid. The learned trial Judge referred the assessment of the quantum to be paid to the Plaintiff to the Deputy Registrar. In calculating the quantum, the 1994 Bank of Zambia Collective Agreement was deemed not to apply to the Plaintiff.

Dissatisfied with the outcome of the case, the Plaintiff appealed to this Court advancing four grounds of appeal. These are:-

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1. **The trial Judge misdirected himself both in law and fact when he failed to hold that the correct formula applicable to the Appellant is that contained in the 1994 Collective Agreement as applied to other management staff.**

2. **The trial Judge misdirected himself both in law and fact when he failed to order incorporation of monthly allowances into salary for purposes of redundancy package.**

3. **The trial Judge misdirected himself in fact and law when he held that the Appellant chose to go on redundancy and therefore not entitled to six months pay in lieu of notice.**

4. **The trial Judge misdirected himself both in law and fact when he held that the Plaintiff could not suffer humiliation, anguish and agony because he did not take the post of Assistant Director.**

Both parties filed their written heads of argument in support of and in opposition to the grounds of appeal. There were no oral arguments from counsel representing the parties who indicated to us that the parties were relying entirely on the written heads of argument.

From the heads of argument filed by the Appellant, it was submitted, under ground one, that it was a misdirection for the learned trial Judge to order the payment of redundancy benefits under Clause 13.4 of the Bank of Zambia staff handbook when it did not contain any formula for payment of redundancy benefits. After quoting the entire Clause 13.4, the Appellant submitted that in the absence of a detailed formula the last known formula applied to previous redundancies ought to have been applied to him.

As far as the Appellant was concerned, it was a misdirection for the trial Court to hold that the 1994 Collective Agreement signed between the Respondent and 30 claimants did not apply to the Appellant. He further submitted that the Respondent not having produced the requisite formula,

Musonda Kabwe -Vs- BP Zambia Limited [4] the Appellant submitted that at the time he was demoted he was also made redundant and as a consequent to that he was entitled to notice and in lieu thereof to payment of salary. In that case we said that if an employer varies a basic condition of service without the consent of the employee, the employee must be deemed to have been declared redundant on the date of such variation and must get redundancy payment if conditions of service provide for such payment.

When it came to ground four, the Appellant decided to merge the ground with ground one so that he could argue it in the alternative. The Appellant, submitted that at law and as decided by this Court in the case of ***Kafue District Council -Vs- James Chipulu*** [5] damages for mental anguish and agony were recoverable in a case of breach of contract of service. He submitted that the way the Respondent conducted itself and the treatment he was subjected to as per the evidence on record entitled him to an award of damages for mental distress and anguish. He urged us to allow the appeal as a whole.

From the written heads of argument in response, the Defendant submitted that the Plaintiff, as a non-unionized employee, was under a contract of service whose conditions of service were contained in the staff handbook; that under Clause 13.4, the staff handbook provided for redundancy. It was submitted further that under Clause 13.4, the staff handbook was silent on the calculation of the redundancy package in areas, such as the notice period and the actual formula. As a result of this lacuna, the Defendant submitted that it had recourse to the Minimum Wages and Conditions of Employment (General) Order 2002 contained in Statutory Instruction No. 2 of 2002.

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The Defendant contended, after quoting from Regulation 2 of the aforesaid Statutory Instrument No. 2 of 2002, that the Plaintiff as a non-unionized employee was not an employee contemplated to be covered under a Collective Agreement between unionized employees and the Defendant. Since there was no specific condition of service applying to the Plaintiff it was legitimate for the Defendant to resort to the Statutory minimum, with some improvement.

With regard to the argument by the Plaintiff that the memorandum of agreement of 1994 between the Defendant and ZUFIAW should apply to him, the Defendant submitted that the life of the said agreement was from the 2nd of January, 1994 to the 31st of December, 1994 and could not be extended; that if it were to be extended, it could only cover unionized employees; that during the life of the 1994 agreement, it was used to effect an out of Court settlement in respect of non-unionized employees who had left employment in 1994 when there was no staff handbook.

On ground two, the Defendant submitted that the majority of non-payroll allowances, such as entertainment, cell phone, journals and newspapers, membership to professional bodies, club membership, land office telephone, land rates, medical fees, etc that the Plaintiff claimed were not paid to him but to service providers. As for Christmas bonus, it was a one off payment which was paid annually as determined by management. After distinguishing the case of **Grace Kasese Chibwa** [2] (supra), the Defendant contended that a facility given to an employee to enable that employee to discharge his duties could not be treated as an emolument even if it had value. In the case of medical fees as an example, the Defendant submitted that it was only paid to the service provider when an

employee, such as the Plaintiff, fell sick and could not be taken into account as part of the monthly emolument of the employee.

Coming to ground three, the Defendant submitted that it gave one month notice as provided for in Statutory Instrument No. 2 of 2002; that the Plaintiff sought to be laid off by way of redundancy and the request was granted and the statutory one month notice could not be regarded as unreasonable. The case of ***Zambia Privatization Agency -Vs- James Matale*** [6] was distinguished because in that case the three year contract did not make provision for notice on termination while in the case at hand there was statutory provision for the notice period under Statutory Instrument No. 2 of 2002.

On the last ground of appeal, the Defendant submitted that there was no basis for the learned trial Judge to sustain a claim for damages for humiliation and mental anguish. The Defendant submitted that this was a case in which the position of the Plaintiff was re-designated from director to Assistant Director with no reduction in salary but the Plaintiff got so miffed at what he termed a 'demotion' and requested that he be declared redundant and the Defendant subsequently acceded to his request. With this background, the Defendant distinguished the case of ***Kafue District Council -Vs- James Chipulu*** [5] in which Chipulu was made to resign from his previous employment on being offered a job by Kafue District Council only to find that the Council had changed its position. At the prospect of getting the job, Chipulu relocated his family from Chipata to Kafue at great expense and he could not be taken back by his previous employer. The Defendant contended that such were the aggravating circumstances which were not to be found in the case at hand.

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We have carefully considered the evidence and the arguments advanced in this case. With regard to ground one, we find that the staff handbook came into operation in 2004. Prior to that, there was the 1994 Collective Agreement and the memorandum of settlement that the Plaintiff wants to apply to him. In our view, the Collective Agreement of 1994 and the memorandum of settlement were ad hoc in their application as they were meant to apply to specific periods and circumstances and that it was not the intention of the parties to those agreements that the life of the agreements would be extended and indefinitely be applied to all future cases.

The 1994 Collective Agreement was, by law as provided for in the Industrial and Labour Relations Act, meant to benefit the unionized employees of the Defendant bank and could not, by any stretch of imagination, be extended to a non-unionized employee of the Defendant. In the case of 1994 memorandum of settlement, our understanding of the arguments is that the agreement was worked out as an out of Court settlement for a class of employees who had been laid off by the Defendant and was to run from January, 1994 to December, 1994. With its life limited in the document itself, there was no need for formal termination of the document by another act.

Having said the foregoing, the only documentary evidence that is relevant to the case at hand is the staff handbook that contained the conditions of service for the period the Plaintiff was made redundant at his own request. Clause 13.4 that applied to the Plaintiff read as follows:-

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13.4: REDUNDANCY

The Bank may be compelled to terminate an employee's contract due to an inevitable requirement to reduce its workforce, arising from various factors including re-organization, responding to business environmental factors and other inevitable exigencies. As a matter of policy, the Bank will endeavour to avoid involuntary redundancy but when this is investable, it will follow the statutory provisions faithfully.

An employee declared redundant will be entitled to a 'redundancy package', which will embody the following minimum factors:

a) Recognizing the service period of the employee;
b) Taking into account the employee's salary at the time of termination;
c) All accrued leave days.

From the wording of Clause 13.4, it is quite clear to us that by itself it could not meet the various aspects of the Plaintiff's case. In such case, it made provision for resort to be made to the Minimum Wages and Conditions of Employment (General) Order, 2002 published under Statutory Instrument No. 2 of 2002. The Minimum Wages and Conditions of Employment, which are amended from time to time, are meant to apply to non-unionized workers whose organizations do not have clear guidelines on certain aspects of employment, such as the payment of redundancy packages.

At this stage, we want to caution that it is too late for a non-unionized employee to condemn the lack of or inadequate conditions of service on severance. While in employment, it is important for non-unionized employees to work hand in hand with their employers to ensure that the conditions of service they work under are properly formulated for their mutual benefit so that on severance of employment they are not made to grop in the dark for their entitlements.

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In our view, there was nothing wrong in the Defendant invoking Statutory Instrument No. 2 of 2002. Even if there was no provision in Clause 13.4 to resort to the statutory provision on minimum wages and conditions of employment, the statutory instrument would have still applied by virtue of Regulation 2 so long as the conditions of service in force at the time did not make provision for the payment of a redundancy package. For the foregoing reasons ground one is unsustainable.

We do not understand or appreciate the complaint in the second ground of appeal. As the Plaintiff rightly said, the holding by the learned trial Judge was favourable to him in all respects. The allowances that were left out were outside the monthly payroll and were allowances that were triggered by an event, and which could only be paid to the service provider on the happening of an event. Medical fees, for example, could only be paid to an institution that provided treatment to the Plaintiff and there is no evidence that the Plaintiff was permanently sick for the medical allowance to be part of the monthly payroll. Ground two has no merit.

On ground three, we are in difficulty, once again, to appreciate what the Plaintiff is seeking to achieve. The redundancy was initiated by the Plaintiff and all that the Defendant did was to formalize it. Since the conditions of service in the Defendant's staff handbook did not provide for what was reasonable notice period, Statutory Instrument No. 2 of 2002 was invoked and one month salary was paid in lieu of notice. The case of **James Matale** [6] (supra) is distinguishable and cannot apply to the facts of the case at hand. Again, ground three has no merit and it is, accordingly, dismissed.

As for the last ground of appeal, we wish to say that the choice to go on redundancy lay with the Plaintiff after his conditions of service were substantially altered without his consent following the abolition of the post of Coordinator - Charge. If he had not exercised the option, he would have continued in employment in the lesser position of Assistant Director with the same salary. By opting to go on redundancy, the Plaintiff avoided humiliation and agony that he would have been made to endure as an Assistant Director. In our view, there is no parity with the **James Chipulu** [5] case (supra) as that case was decided on very different facts.

The totality of our reasoning is that the appeal is unmeritorious and it is dismissed in its entirety with costs to the Defendant to be taxed in default of agreement.

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D. K. Chirwa,

SUPREME COURT JUDGE

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S. S. Silomba,

SUPREME COURT JUDGE

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H. Chibomba,

SUPREME COURT JUDGE