EDITH TSHABALALA AND THE ATTORNEY-GENERAL

SUPREME COURT
NGULUBE, C.J., CHAILA AND MUZYAMBA, JJ.S.
5TH NOVEMBER, 1998 AND 22ND JULY, 1999.
(S.C.Z. JUDGMENT NO. 17 OF 1999)

Flynote
Citizenship - Non-Zambians - Whether or not they can be appointed to Permanent Pensionable Positions
Legal Process - Interpretation of statute - Literal meaning rule

Headnote
The appellant was originally a Zimbabwean citizen who was employed as an Enrolled Nurse for the government of Zambia from 1975. She only managed to acquire Zambian citizen in 1992. A question arose as to her eligibilty for pension under section 35 Civil Service (Local Conditions) Act. The trial court accepted the respondent's argument that since the conditions stipulated in the Act were designed for Zambian citizens, only a citizen could enjoy them so that the appellant could only enjoy those benefits after she became a citizen. The appellant appealed to the Supreme Court.

Held:
(i) It was not illegal by statute nor contrary to law for a non-citizen to be on permanent and pensionable terms when she was lawfully a permanent resident by virtue of marriage to a Zambian.
(ii) The fundamental rule of interpretation of a statute is that it should be construed according to the intent expressed by parliament.

For the Appellant: Mr. L.P. Mwanawasa, SC., Mwanawasa and Company.
For the Respondent: Mr. D. Kasote, Principle State Advocate.

Judgment
NGULUBE, C.J.: delivered the judgment of the court.

The facts of the case as accepted below were simple and straight forward: The appellant was originally a Zimbabwean national and she was employed as a Zambia Enrolled Nurse in the Civil Service of the Republic of Zambia in 1975. She worked for our government continuously for twenty-two or so years and was still working at the time of the trial in the High Court. She had come to Zambia in 1961 to join her husband who became a citizen of Zambia shortly after independence in 1964. She herself tried to become a Zambian and made application in 1972 when she was officially advised by the Zambian authorities that they had suspended processing applications from Rhodesia nationals to avoid accepting renunciation certificates from the illegal regime (of Ian Smith) in Salisbury. The appellant renewed her application after Zimbabwe attained legitimate independence and she became a Zambian citizen in 1992.

The appellant's first letter of appointment in the Ministry of Health was as a temporary employee. In a little while, we will allude to the significance of appointment as a temporary employee in relation to the dispute which arose concerning her eligibility or ineligibility for pension. However, to continue with the narrative, by letter dated 14th March ,1977, the Permanent Secretary in the Ministry of Health informed the appellant that she was being offered an appointment on probation as a Zambia Enrolled Nurse in Division II on local permanent and pensionable conditions backdated to 3rd November,1975, when she was taken on a temporary employee; that she would be required to contribute to the pension scheme under the Civil Service (Local Conditions) Contributory Ordinance; that she would be subject to the General Orders of the Zambian Government; and she should indicate her acceptance in writing. Her letter of acceptance was dated 22nd June,1977. She continued in this temporary capacity. In 1993, she made arrangements to pay arrears of pension contributions from

November,1975 and also for the monthly deduction of her pension contribution to be effected. By letter dated 18th November,1994, the Permanent Secretary of the Ministry of Health addressed the appellant in the following terms:

> **"Dear Madam,**
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> **I wish to inform you that you have been appointed as a Zambia Enrolled Nurse in Division II of the Civil Service (Local Conditions) on the terms and Conditions set out in my letter No. MH/ZEN/2033/AE. 68698 of the 4th March, 1977 and in the Statement of appointment for officers serving on Local Conditions (Personnel Form 1).**
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> **Your appointment will take effect from 3rd November, 1975.**
> **You would enter the Scale MS/17 at K1680 per year.**
>
> **You may now apply for confirmation."**

She duly applied for confirmation of her admission to the pensionable establishment by completing the appropriate forms which were forwarded to the Establishment Division under cover of a letter from the Ministry of Health dated 4th January,1995. The reply from the Public Service Management Division was dated 27th March,1996, – over one year later – and was in the following terms :

> "STAFF CONFIRMATION: MRS . E. TSHABALALA
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> I refer to your minute No. MH/ZEN/2033 dated 4th January, 1995, on the above subject.
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> 2. I note that in your letter No. MH/ZEN/2033/S.88981 dated 10th March, 1993, addressed to Mrs. Tshabalala, and copied to this Division, you informed the officer of the directives of this Division in connection with her rejected application for admission to the Permanent and Pensionable Establishment. I am surprised to note again that you have resubmitted a recommendation in her favour on the same subject and yet you have not come up with reasons, if any, for doing so.
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> 3. Please inform the officer that the earlier decision from this Division which you conveyed to her still stands."

The appellant was aggrieved by this turn of events, and launched this litigation seeking a declaration that she was entitled to a pension and the other benefits under the Civil Service (Local Conditions) Pensions Act (Cap.410 of the 1972 Edition of the Laws). She also claimed damages, and further or other relief. The appellant came to learn of a letter dated 7th March,1996, from the Permanent Secretary, Public Service Management Division, to the Permanent Secretary, Ministry of Health in which it was said the appellant did not qualify for appointment to the pensionable establishment because she was over forty-five years of age when she became a Zambian citizen. The relevant pension law had a provision that persons could not become members of the pension fund if they were already over that age. The defence put forward was that the plaintiff's service was all contractual; that she would be paid gratuity and refunded all the pension contributions allegedly "erroneously" made to the Pensions Fund Board. The learned trial judge upheld the defence, holding that the Civil Service (Local Conditions) Pensions Act was "specifically provided for public officers who are citizens of Zambia" and that the appellant "did not qualify to be engaged on local conditions which applied only to Zambian Citizens." For that reason, the letter of November,1994, from the Ministry of Health offering the appellant permanent and pensionable employment from when she was not Zambian was contrary to law and therefore null and void *ab initio.*

The learned trial judge came to the conclusion referred to by reference to the definition of "Local Conditions" found in Section 2 (1) which reads:

"Local conditions" means:

(a) in respect of any period before the 24th October, 1964, the terms and conditions of civil service, including service in the police and prison services, as from time to time amended, which were known as Local Conditions and were introduced with effect from the 1st November, 1961, by the Government; and

(b) in respect of any period after the 23rd October, 1964, the terms and conditions of the public service, including service in the police and prison services, but not including the teaching service of the Government, which are known as Local Conditions and are prescribed by the President from time to time for public officers who are citizens of Zambia."

Prior to the litigation and the judgment and in response to letters of demand from counsel for the appellant, the Public Service Management Division by a letter dated 27th November, 1996, conveyed the decision of the Public Service Commission that the appellant would be "deemed" to have been appointed initially on a three year contract from 3rd November, 1975; that her contract would be deemed to have been renewed for the period 3rd November, 1978 to 8th October, 1992 and that she would be deemed to have continued serving on "gratuitable contract" up to 12th December, 1998, when she would "attain the pensionable age of fifty-five years." She would get gratuity for all these "deemed" contracts incidentally, the reference to the deemed contracts running up to age fifty-five "when she will attain…….pensionable age" was rather curious, in the circumstances since from the respondent's point of view no question of pension arose. The Public Service Commission also directed that her pension contributions be refunded.

The question which arose was whether it was contrary to law and so illegal to appoint a non-citizen on permanent and pensionable local conditions. Put another way, did the Civil Service (Local Conditions) Pensions Act, Cap. 410 (No. 35 of 1968) say only Zambian Citizens can be appointed to the permanent and pensionable establishment or that no non-citizen could be appointed on local conditions?

Mr. Mwanawasa advanced three grounds of appeal. The first alleged that the learned trial judge erred in law and misdirected himself in not considering the effect of the appellant's appointment to the pensionable service being made retrospective to 1975. While conceding that the conditions in the Civil Service (Local Conditions) Pensions Act (No. 35 of 1968) were expressed to be "for officers who are citizens of Zambia," it was Mr. Mwanawasa's argument that the appellant was herself a Zambian citizen at the time when the appointment was made. He submitted that there was nothing in the definition section which prohibited the backdating of the terms to the time when she was not a citizen. He also submitted that it was not correct to say that only a citizen could be employed on permanent and pensionable terms. With regard to the finding that her employment must have been contractual, Mr. Mwanawasa submitted that even on that basis, and since all employment is contractual anyway, there was nothing to stop the parties from agreeing to adopt the Civil Service (Local Conditions) Pensions Act terms. On behalf of the state, Mr. Kasote's response to this ground was to point out that pension in the civil service follows appointment by the Public Service Commission, otherwise the officers will be either on contract or on temporary conditions. He submitted that it was a mistake on the part of the Ministry of Health to have written to her when they had no authority to tell her she was pensionable. He conceded though, that there was nothing in the Act which said that non-Zambians could not be employed on local conditions.

We have considered this ground of appeal. The decision below turned on the consequence of construing the definition of "local conditions" given in the relevant Act. The learned trial judge accepted the respondent's argument to the effect that, because the conditions were designed for Zambian citizens, only a citizen could enjoy them so that the appellant could only have enjoyed them after she became a Zambian by which time she was above the age beyond which it was not permissible to join the pension fund. The fundamental rule of interpretation of a statute is that it should be construed according to the intent expressed by Parliament: **See *Miyanda and Handahu* (1993-94) Z.R. 187; *Attorney-General and Another v Lewanika and others* (1993-94) Z.R. 164.** This means that the literal and grammatical meaning will prevail where there is nothing to indicate or suggest that the language should be understood in any other special sense. The question which arises therefore is whether by defining local conditions the Act can also be regarded as having defined or prescribed a requirement of Zambian citizenship for officers to be pensionable under the Act so as to exclude, for example, an established resident. The court below read the Act as saying or implying that only Zambian citizens can be appointed to the permanent and pensionable

establishment; conversely, no non-citizen can be appointed on local conditions. We can see no justification for doing such violence to Act No. 35 of 1968. It was not illegal by statute nor contrary to law for a non-citizen to be on permanent and pensionable terms when she was lawfully a permanent resident by virtue of marriage to a Zambian. What is more, she subsequently became a Zambian. Mr. Mwanawasa was without a doubt on firm ground in his submissions under the first ground of appeal.

It was accepted below that she was overaged for joining the pension fund when she became a citizen. Mr. Mwanawasa argued that it was permissible to backdate the appointment. There is some support for taking such a view and Section 9 of the now repealed Cap. 410 (Act No. 35 of 1968) affords a good example when it authorised voluntary contributions by a temporary employee for previous service upon becoming an officer or probationer. s.9 (1) read:

> **"9.(1) An officer or probationer in Division I, II or III who, immediately prior to his appointment as such officer or probationer, was a temporary employee may, with the consent of the appropriate Commission, elect to contribute in respect of all or any his past continuous service as a temporary employee:**
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> **(a) which was service approved by the appropriate Commission for the purpose of this section;**
>
> **(b) which was immediately followed by service in Division I, II or III as probationer or officer, and**
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> **(c) in respect of which contributions would have been payable under section eight if such service had been as a probationer or officer in Division I, II or III."**

Had the appellant been less than forty-five years old, there would have been no problem accepting her, it seems.

The problem here was that obviously because of misconstruing the law on the part of the respondents, the appellant was infact never confirmed, not even by the Ministry of Health who had simply advised her to apply for confirmation. The Public Service Commission could have quite lawfully confirmed her retroactively but instead they chose to deem a lot of things, including notional contracts under which no one was able to say what the appellant would actually get, despite letters from her lawyers asking for such information. She could have been deemed more agreeably by enabling her to receive a pension instead of foisting a fictitious and uncertain contract. Regrettably, we can not supplant the Public Service Commission's role. They did not confirm her.

The second ground of appeal alleged that there was a misrepresentation on the part of the agents of the Government at the Ministry of Health. Mr. Kasote quite fairly conceded this indisputable fact and the fact that it will cause her to suffer lose.

The appellant had invited the learned trial Judge to make an award, as an alternative to the principal claim, in respect of such loss due to the misrepresentation. It is our considered view that, in the face of an obvious injustice visited upon the appellant – as the evidence disclosed – the court a quo should have made an award of damages for misrepresentation under the plea for damages and further or other relief. We agree that the measure of damages should be the amount which would have been due to her under the provisions of the Civil Service (Local Conditions) Pensions Act, less the gratuity to be paid on the deemed contracts once ascertained. There will be liberty to apply below to a registrar at Chambers in case of need.

The High Court has jurisdiction under s.13 of the High Court Act to offer alternative relief or remedies where justified by the pleadings and the evidence. The appellant was clearly entitled to an award and accordingly we vary the judgment below by entering judgment for the appellant for damages for misrepresentation. She should have been the successful party even below so that the order for costs made at the trial is also set aside. She will have her costs both here and in the High Court, to be taxed if not agreed. The appeal succeeds.