PETER NG'ANDWE AND OTHERS AND ZAMOX LIMITED AND ZAMBIA PRIVATISATION AGENCY

SUPREME COURT
BWEUPE, D.C.J., CHAILA AND LEWANIKA, JJ.S.
3RD MARCH, 1999 AND 2ND JUNE,1999.
(S.C.Z. JUDGMENT NO. 13 OF 1999)

Flynote

Employment - Privatisation - Transfer of Contracts of Employment - Employees' Consent.

Headnote

The appellants were employees of the 1st Respondent which was a parastatal company on behalf of the Government of Zambia. A Company called Africa Oxygen Limited or Afrox Limited a South African acquired a controlling interest in the 1st respondent.

The new owners proposed new conditions and terms of employment for those who were to continue in employment. The appellants were not happy with the new conditions. They contended that the terms of Section 35 of the Employment Act, their contracts of employment were not amenable to be transferred to their new employers without the appellants' consent. The trial court ruled against the appellants.

Held:

(1) If an employer varies the basic conditions of employment without the consent of the employee, then the contract of employment terminates.

Cases referred to:

(1) Mike Musonda Kabwe and B.P. Zambia Limited S.C.Z. Appeal No. 115 of 1996.
(2) R.S. components v Irwin (1974) 1 All E.R. 41.
(3) Hollister v National Farmers Union (1979) I.R.L.R. 238 C.A.
(4) St.John of God (Care Services) Limited v Brook (1992) I.R.L.R. 564, E.A.T.

For the Appellants: Mr V.K. Mwewa, of Mwewa & Company.
For the 1st Respondent: Ms C. Kunda of Corpus Globe, Lusaka.
For the 2nd Respondent: Mr M.Z. Mwandenga, Legal Counsel.

Judgment

CHAILA, J.S.: delivered the Judgment of the court.

This is an appeal against the decision of the High Court Judge by Peter Ng'andwe and others, hereinafter referred to as the Appellants against ZAMOX Limited, hereinafter referred to as 1st Respondent and Zambia Privatisation Agency, hereinafter referred to as 2nd Respondent.

The brief facts as found by the learned trial Judge are that the appellants are employees of the 1st respondent which was a parastatal company on behalf of Government of the Republic of Zambia. A Company called Africa Oxygen Limited or Afrox Limited, a South African Company, acquired a controlling interest in the 1st respondent.

The new owners proposed new conditions and terms of employment for those who were to continue in employment. The appellants were not happy with the new conditions. They contended that the terms of Section 35 in the Employment Act, Chapter 26, of the Laws of Zambia, their contracts of employment were not amendable to be transferred to their new employers without the appellants' consent. Inspite of the above provisions, the 1st respondent worked out new terms and conditions under which the appellants and other workers were required to work. The appellants were further required to complete and sign the continued employment letters containing new terms and conditions of service by 3rd October, 1997. In default of such signing, the appellants were deemed to have resigned. The learned trial Judge found and ruled that the appellants' contracts of employment would be deemed to continue after the change over and despite the change in the share holding, the appellants' contracts of

employment were not affected by the change in the ownership of the 1st respondent and that the appellants were not entitled to be paid off as their terms were deemed to continue with the 1st respondent under the new owners. The learned trial Judge further found that the 1st respondent had a right to revise the appellants' conditions of service subject to their agreeing with the new conditions of service. The learned trial Judge further found that if the appellants did not agree with the new conditions of service, the appellants had a right to separate from the employment, but according to the learned trial Judge, the revision of the conditions of service would not entitle the appellants to be paid off their terminal benefits.

Mr Mwewa, counsel for the appellants, has advanced one ground of appeal. The ground of appeal provides:

> The Honourable Trial Judge erred in law and fact when he held that the applicants were not entitled to be paid their terminal benefits before accepting the new terms and conditions of service offered by the respondent.

In support of this ground, Mr. Mwewa submitted that it is trite law that no employer can vary or alter any basic condition of employment of an employee without the consent of the employee.

As soon as that is done the contract of employment terminates and the employee must be paid a redundancy package, if any, plus any other entitlements is not correct. The correct position is that there is no law that prevents an employer from unilaterally varying or amending the conditions of service of employees. However, should the employer do so, the employer may be guilty of either a fundamental breach of the contract or a breach of a fundamental term of the contract. Should the employer insist on a unilateral variation, it will be a breach, usually a fundamental breach. This is not to say that the employee will always be able to insist on her right to continue on the old terms.

For the 1st respondent, Ms Kunda, their counsel, has contended that the learned trial Judge's finding that the appellants were not entitled to terminal benefits on account of the decision by the 1st respondent to review the conditions of service was sound. Ms Kunda submitted that the legal effect of an employee's refusal to accept revised conditions of service is a termination of the contract of employment. This position was clearly enunciated by the Supreme Court in the case of ***Mike Musonda Kabwe and B.P Zambia Limited*** **S.C.Z. Appeal No.115 of 1996**. In this case, the respondent had increased the appellants'salary and subsequently reduced it two months later. The appellant opted to go on early retirement and in a dispute relating to the applicable salary in computing his terminal benefits, the Supreme Court stated obiter at page J10:

> "We respectfully agree with that decision that if an employer varies a basic or basic conditions of employment without the consent of the employee then the contract of employment terminates."

She concluded that the appellants were not automatically entitled to terminal benefits. Ms Kunda relied further on the following authorities by author **Gwyneth Pitt** and his book **Employment Law, Second Edition, Sweet & Maxwel London 1995 at page 78,** particularly to the following paragraph:

> **"…….. any variation must be agreed between the parties as with any other contact. Should the employer insist on unilateral variation, it will be a breach of contract, usually a fundamental breach. On her right to continue on the old terms; if the employer pushes the issue to the point of dismissing those who will not consent even though there is a breach of contract…."**

The second authority relied upon by Ms Kunda is ***R.S. Components v Irwin*** **(1974) 1 All E.R. 41.** The third authority is ***Hollister v National Farmers Union*** **(1979) I.R.L.R. 238 C.A..** The fourth authority she relied on is ***St. John of God (Care Services) Limited v Brook*** **(1992) I.R.L.R. 564. E.A.T.**

Counsel for the 2nd respondent has endorsed Ms Kunda's submission. He has also relied on the Employment Law Second Edition, already referred to. He has further referred us to another author **Humphrey Wine and Simon Beswick** and their book titled **"Buying and Selling Private Companies and Businesses, Fourth Edition, Butterworths 1992."** The Counsel has further referred us to Secion 26 (b) of the Employment Act, Chapter 268 of the Laws of Zambia which came into force on 14th November, 1997. He had particularly referred

to the following section:

> **"The contract of service of an employee shall be deemed to have been terminated by reason of redundancy if the termination is wholly or in part due to:**
>
> **(a) The employer ceasing or intending to cease to carry on the business by virtue of which the employee was engaged; or**
>
> **(b) The business ceasing or reducing the requirement for the employees to carry out work of particular kind in the place where the employee was engaged and the business remains a viable going concern."**

The learned legal counsel has concluded that in the present case the contracts were not terminated by way of redundancy in the manner envisaged by Section 26 (b) and the appellant are therefore, not entitled to any redundancy benefits or terminal benefits at all. He has maintained that the case of ***Mike Musonda Kabwe v B.P. Zambia Limited,*** **S.C.Z. Appeal No. 115 of 1996,** does not apply to this appeal.

The appellants have further relied on a number of documents which were placed before the lower court when they asked for a review of the judgment; these documents are contained in the Supplementary Record of Appeal. It is interesting to note that the copy of the letter at page 22 of the Supplementary Record which was signed by the Managing Director to Miss Martha Mwale, one of the employees, that the Managing Driector's letter reads as follows:

> **"Dear Miss Mwale,**
>
> **RE: NEW CONDITIONS OF EMPLOYMENT**
>
> **A letter dated 25th September, 1997, was given to you offering you continued employment under the New Conditions of Service. You did not accept the new conditions and as such you have deemed to have resigned. Additional, it should be noted that in accordance with the Judgment handed down at the Open Court at Ndola, on 3rd April, 1998, you are not entitled to any terminal benefits.**
>
> **Consequently your last day of employment with Zamox is 31st July, 1998.**
>
> **Please contact your Line Manager pertaining to outstanding leave encashment, etc.**
>
> **Yours faithfully,**
> **ZAMBIA OXYGEN LIMITED**
>
> **S.F. BRENT**
> **MANAGING DIRECTOR"**

There is Another document at page 9 of the Supplementary Record headed "Conditions of Employment." It was issued by the Chief Executive, Africa Regional Operations. The document reads as follows:

> **"ZAMOX management have concluded its investigations into existing conditions of employment of present non unionised staff.**
> **Before the end of April,1997,every non-unionised staff members will have received an offer of employment on ZAMOX's terms and conditions of employment.**
>
> **Employees whoreceived these offers will have to exercise their ..... of their decisions by the end of April,1997.**
>
> **Employees who decline the offer will receive their retrenchment benefits in accordance with existing conditions of employment. Obviously employees who**

opt for retrenchments will not qualify for any employment at a later stage. All employees' cooperation and support are requested during this exercise to ..... the new Company's conditions of employment.

Yours sincerely,

J.P. FREDERICKS
CHIEF EXECUTIVE AFRICA REGIONAL OPERATIONS"

This document is supplemented by another document at page 10 sent to all non-represented employees from the Managing Director. The document reads in part:

1. **We had hoped to give employees a final offer of employment by the end of April ,1997. However;**

   (a). Further information has been handed to Management which needs to be taken into consideration before finalising the company's conditions of employment. This information has been supplied by both internal and external sources.

   (b). Zamox Management are still in the process of finalising the new organizational structure of the Company. At this stage it is clear that right sizing has to occur which will result in a reduction of staff.

2. **Once we have finalised our conditions of employment and the organizational structure, the required number of employees will be offered these conditions for acceptance. Employees who are retrenched will qualify for the severance benefit as per the existing ZAMOX conditions of employment which will be paid by the Zambia Privatisation Agency.**

From these documents, it is very clear that the respondents felt that they were at liberty to draw up new conditions of service for the employees and that no consultation or consent was required from the employees. They were of the view, presumably from the language of the judgment that the employees who are not willing to accept the new conditions could leave without being considered for any terminal benefits. The documents in the Supplementary Record show that some employees were paid off redundancy packages but persons like Miss Mwale were assumed to have resigned. The appellants have heavily relied on the case of ***Mike Musonda Kabwe and B.P. Zambia Limited,*** already referred to. The facts in that case showed that the respondent had increased the appellants' salary. Later after two months, the salary was reduced. The appellants then decided to go on early retirement and there was some dispute as to the applicable salary in calculating her terminal benefits. In the ***Mike Musonda Kabwe's*** case, the appellant was given his terminal benefits. The dispute was only on the applicable salary. We held in that case that if an employer varies the basic conditions of employment without the consent of the employee, then the contract of employment terminates and the employee deemed to have been declared redundant on the dates of such variation and must get a redundancy payment if the conditions of service do provide for such payment. If the conditions of payment provide for early retirement and not redundancy, then the employee should be deemed to be placed on early retirement.

Ms Kunda, counsel for the 1st respondent, and Mr Mwandenga, counsel for the 2nd respondent, have strongly argued and have urged us to rely on the English authorities. The ***Mike Musonda Kabwe* case** is a Zambian case. The court held that the employee was entitled to an early retirement after his conditions of service had been altered to his detriment and the contract of his employment was deemed to have been teminated. In the present case the employers have embarked on a programme of offering new conditions of service to the employees and had treated those employees who have not accepted them to have resigned.

We have revisited our decision in the *Mike Musonda Kabwe's* case and we believe that the case is still a good law. We still maintain that if an employer varies the basic conditions without the consent of the employee then the contract of employment terminates. In this case the employers have varied basic conditions of employment and have regarded those employees who have not or who are unwilling to continue under the new conditions having resigned. This is a wrong interpretation of the law. We affirm our decision in the *Kabwe's* case. We have read the English authorities referred to us by the Counsel and we are very indebted to them

but as we have said, the decision in the *Kabwe's* case still remains good law. The learned trial commissioner misdirected himself when he decided that the appellants were not entitled to their terminal benefits. In accordance with our decision in the *Kabwe's* case, the contracts were deemed to have been terminated and the appellants were put on early retirement. The appellants were entitled to an early retirement. The appeal is therefore allowed with costs.

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