

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE/LUSAKA
(Civil Jurisdiction)**

**SCZ Judgment NO. 20 of 2008
APPEAL NO. 215/2006**

BETWEEN

CHOLA CHAMA

APPELLANT

AND

ZESCO LIMITED

RESPONDENT

Coram : Sakala, CJ., Silomba, Mushabati, JJS

On 7th August, 2007 and 30th May, 2008

For the Appellant: Mr. H.A. Chizu of I.C. Ng'onga and Co.

**For the Respondent: Ms. K. Mwansa, Principal Legal Officer,
ZESCO**

J U D G M E N T

Sakala, CJ., delivered the Judgment of the Court.

Cases referred to:

- 1. *Goodwell Malawo Siamutwa vs Southern Province Cooperative Marketing Union Limited and Finance Bank (Z) Limited Appeal No.114 of 2000;***
- 2. *Zambia Oxygen Limited and ZPA Vs. Chisekula and Others [2000] ZR 28;***
- 3. *Tosomo Vs Credit Organization of Zambia [1973] ZR 347;***

- 4. *Henley Vs Pease and Partners [1915] IKB69; and***
- 5. *Jacobs Vs Batavia General Plantations Trust [1924] I CH 287.***

For convenience, we shall refer to the Appellant as the Complainant; and the Respondent will remain same, which designations the parties were in the Court below.

This is an appeal against the Judgment of the Industrial Relations Court dated 9th November, 2005 in which, the Court held that the Complainant accepted the reinstatement on the basis of the offer of reinstatement with clear and unequivocal terms, and that the Complainant was not entitled to the salary arrears and allowances for the period he did not work for the Respondent. The Court dismissed the complaint with costs.

The facts of the case leading to this appeal are that the Complainant was employed by the Respondent as a Senior Human Resources Officer. On 1st October, 1998, he was dismissed. He then filed a Notice of Complaint in the Industrial Relations Court seeking, among others, the following reliefs:

“(a) Reinstatement to his position without loss of benefits and grading.

(b) Payment of all due salaries, inclusive of all salary increments and allowances effective 1st October,

1998, with interest at current Bank of Zambia lending rate.

(c) Damages for anguish and anxiety for unfair, unjust and unlawful termination of employment.

(d)A declaration that his dismissal was UNFAIR, UNLAWFUL, UNJUST, MALICIOUS, and therefore, NULL and VOID.

(e)A declaration that his subsequent retirement was UNLAWFUL, UNJUST, ARBITRARY, MALICIOUS, and therefore, NULL and VOID.”

However, while the matter was pending before the lower court, the Complainant was reinstated on condition that he accepted the terms set out in the letter of **RE-INSTATEMENT**. The Respondent’s letter of reinstatement to the Complainant, dated 3rd August, 2001, written **“WITHOUT PREJUDICE”**, stated as follows:

“RE: RE-INSTATEMENT

We refer to the meeting held with yourself on 24th June 2001 and your letter dated 23rd June 2001 requesting for re-instatement.

We wish to inform you that Management has agreed to reinstate you, purely on a without prejudice basis. This is a discretionary decision by Management which has been made inspite of the fact that the offence you were

charged with of gross negligence and its verdict still stands.

The re-instatement is on condition that you accept the following terms, which you are not under obligation to do so:-

- (i) That you will not be paid any money for the period that you were not working for ZESCO Ltd.***
- (ii) That it will be your responsibility to arrange any possible condonation of the break-in-service with the Local Authorities Superannuation Fund (LASF), if you so wish.***
- (iii) That all your retirement, redundancy and repatriation package paid to you by ZESCO Ltd will be recovered from you with interest by deduction from your salary over a period of 36 months. Your total indebtedness to be recovered is K58,133,430.89.***
- (iv) That you will be demoted to Management Grade M7 in salary range K21,602,000.00 – K24,688,000.00 and your entry point will be K21,602,000.00. A suitable position and duty station will be given to you in due course.***
- (v) Your net pay after all recoveries, income tax inclusive will be K1,053,929.55.***

(vi) ***That you will not have any right or power to authorize any payments in the first three years of your employment.***

(vii) ***That on your retirement, the period you have not worked for ZESCO Ltd will not be taken into account in calculating your benefits from ZESCO Ltd.***

Please note that this offer is not negotiable and that you are not under obligation to accept it. If you accept the terms of your re-instatement, please liaise with the Director-Human Resources who will arrange to place you in a suitable position as soon as possible.”

The Complainant accepted the **Reinstatement** through a letter to the Respondent’s Director of Human Resources dated 20th August, 2001 also written **“WITHOUT PREJUDICE”**. The Complainants’ acceptance letter reads as follows:

“ACCEPTANCE OF REINSTATEMENT

I acknowledge receipt of the Managing Director’s letter to me referenced A2/317/2001 and dated 3rd August, 2001, reinstating me to my employment in ZESCO Limited.

I wish to confirm that I accept the reinstatement”

The condition numbered (ii) in the letter of Reinstatement was subsequently waived when the Respondent paid the Complainant

gratuity at 10 years of service, including the period October 1998, to August 2001, when it prematurely retired him on 31st December 2004, whilst this matter was pending in the lower Court.

Again, whilst the matter was still pending before Court, the parties filed a **Statement of Agreed Issues** in which they set out the issues to be tried and resolved as being: balance of arrears, increments, allowances, leave days, interest and costs. But for unexplained reasons, and despite the parties having filed a **Statement of Agreed Issues**, the parties adduced oral evidence and also filed written submissions.

The Complainant testified that the Respondent had reversed all the adverse terms it had made in its letter of reinstatement; except that relating to payment of his salary arrears and leave dues and asked the lower Court to order the Respondent to pay him the balance of his salary arrears, increments, service allowances and leave days during the period October 1998 to August 2001, when he was under dismissal.

Mr. Bornface John Luswanga, the Director of Human Resources and Administration, testified on behalf of the Respondent that the Complainant was employed by the Respondent as Human Resource Officer in 1994 and was dismissed in 1998 from employment; that the Complainant appealed against his dismissal to the Respondent's Management, who substituted the dismissal with retirement; that the Complainant later appealed against the

decision of retiring him from ZESCO Limited; and that Management decided to reinstate him on seven conditions, stipulated in the letter of reinstatement dated 3rd August 2001.

Mr. Luswanga further testified that the Complainant accepted the seven conditions and reported back on duty in September, 2001. He explained that the Respondent subsequently waived clause (ii) of the letter of reinstatement by paying LASF what was not paid to them during the period the Complainant was away to enable him continue in his pension scheme, but that this did not mean that the Respondent had to pay the Complainant salary arrears for the period he did not work for the Respondent.

After summarizing the evidence and the written submissions, the trial Court found that the **Statement of Agreed Issues** outlined the facts not in dispute and pointed out that the main issue for determination was whether or not the Complainant was entitled to the arrears of salary for the period 1st October, 1998 to 3rd August, 2001, when he was under dismissal.

The trial Court pointed out that normally, when a worker is reinstated, it means that the employee is reverted to his previous position with all the attendant benefits. In the instant case, the Court was satisfied that the Complainant accepted the reinstatement on the basis of the offer of reinstatement with clear and unequivocal terms; and found that the Complainant was not reverted to his previous position with all the attendant benefits, and

that the Complainant was not entitled to the salary arrears and allowances, for the period he did not work for the Respondent. The Court cited the case of **Goodwell Malawo Siamutwa vs Southern Province Cooperative Marketing Union Limited and Finance Bank (Z) Limited**⁽¹⁾ in support of the findings. The trial Court concluded that the Complainant had not established his case and dismissed the complaint with costs.

The Complainant, being dissatisfied with the whole Judgment, appealed to this Court. He filed three grounds of appeal; namely:

1. that the Court below erred in law and misdirected itself by failing to distinguish the legal position between reinstatement and re-employment;
2. that the Court below erred in law by considering defence witness's testimony, that the Respondent used its "discretion" and "humanitarian considerations" to pay the Complainant's pension contributions as there are no such principles applicable in employment relations; and
3. that the Court below misdirected itself and erred in law and in fact by failing to consider the evidence of the Complainant which was not rebutted, that the Complainant's pension contributions which the Respondent paid for the Complainant for the period in which the Complainant was separated, was a percentage of, and was deducted from his salary arrears and that

accordingly, the balance of those salary arrears should have been paid to the Complainant .

The parties filed written heads of argument augmented by oral submissions based on the three grounds of appeal.

The gist of the written heads of argument on ground one is that it was erroneous for the Court below to fail to appreciate the legal position of reinstatement, which in its natural and ordinary meaning denotes reverting one to his previous position with all the attendant benefits as if there had been no separation at all in the first place. Several authorities were cited to support the argument on the meaning of the word **“reinstatement.”**

It was submitted that the Court below erred and misdirected itself by failing to apply the principle of reinstatement as expounded by various authorities, to the Complainant who had been reinstated by the Respondent and given back all his previous benefits; but denied his salary arrears and allowances and leave dues.

It was also submitted that the trial Court fell into error when it held that the Complainant was not entitled to his claims because he had accepted the reinstatement on the adverse terms imposed by the Respondent; and that the Court below failed to distinguish the legal position between **“reinstatement”**, which can not be conditional, and **“re-employment”** which may impose new conditions for the employee to either accept or reject.

It was further submitted that **reinstatement** cannot be conditional, otherwise it ceases to be reinstatement; that the Respondent reinstated the Complainant; but denied him one of his due benefits contrary to the principle of reinstatement; and that the Respondent could have offered to **re-employ** the Complainant on the adverse terms if it so desired, and the Complainant could then have been at liberty to either accept the re-employment on the new terms or not; but that the Respondent reinstated the Complainant, but attempted to evade its obligation to the Complainant under the principle of **reinstatement**, by arbitrarily changing his conditions of service to his detriment in order to deny him salary arrears.

It was further submitted that it is trite law that accrued rights cannot be changed to the detriment of an employee without his consent. The case of **Zambia Oxygen Limited and ZPA Vs. Chisekula and Others**⁽²⁾ was cited in support of this submission where we said “**Conditions of Service already being enjoyed by the employees cannot be altered to their disadvantage without their consent**”.

It was submitted that the Complainant did not consent to the arbitrary changes in his conditions of service and that that is why he continued to challenge the changes; that the trial Court erred by allowing the Respondent to evade its obligation to the Complainant; and that following his **reinstatement**, which the Respondent attempted to obscure with adverse conditions, the Complainant accepted only the principle of **reinstatement** “**without prejudice**”

to his right to challenge the objectionable contents contained in the letter of his **reinstatement**. A number of authorities were also cited in support of these submissions.

The summary of the written heads of argument in ground two is that the testimony of the Respondent's defence witness, Mr. Luswanga, that the Respondent had used its "discretion" and "humanitarian considerations" to pay the complainant's pension contributions is not supported by the Respondent's conditions of service under which the Complainant served, or the contract of employment between the parties or indeed any law.

It was submitted that employment contractual relations are not the subject of "discretion" or "humanitarian" considerations unless authorized by the contract or conditions of service or the law, which was not the case in the instant matter.

The summary of the written heads of argument in ground three is that the Respondent having reinstated the Complainant, the Respondent had a duty to meet all its obligations to both the Complainant and the pension authority for purposes of his pension contribution. It was submitted that since the Respondent did compute the contributions and made payments to the pension authority, it meant that there were salary arrears due to the Complainant from which those contributions were derived as percentages, deducted and paid to the pension authority as pension contributions for the Complainant, for the period in issue; and

that the balance of the Complainant's salary arrears were supposed to, and must be paid to him.

In his brief oral submissions, on behalf of the Complainant, Mr. Chizu contended that their understanding was that immediately their client was reinstated, everything followed and nothing could be deducted; that the letters of reinstatement and acceptance were written "**without prejudice**" meaning that more conditions would be agreed subsequently.

The summary of the written response to ground one is that the issue that was before the Court below was not whether or not the Complainant had been reinstated or re-employed, but whether the Complainant, based on the circumstances of this case, was entitled to salary arrears after his reinstatement.

It was pointed out that the Complainant was not being reinstated by an Order of the Court; but as a result of representations he made to the Respondent after his dismissal; that at the time of the reinstatement, the Complainant had commenced proceedings before the Industrial Relations Court, and was, therefore, at liberty to pursue the claims, but chose to abandon the claims; and that in the circumstances, the position still remained that he was found guilty by an internal tribunal.

It was urged that the Court should draw a distinction between a **reinstatement** which is unconditional, for instance, where a Court makes an Order; and a **conditional reinstatement** as in the

instant case. It was pointed out that in the case of an unconditional reinstatement, the Court states the conditions and generally an employee returns to the position he was before he lost his employment. But that in the case of a conditional reinstatement, where an employee makes representations and the employer waives the penalty or substitutes the penalty, the employer has a latitude on the entitlement of an employee.

It was submitted that a reinstatement does not automatically entitle an employee to salaries lost out when not working; that the Complainant here was found guilty by an internal tribunal, which finding was never reversed. The case of **Tosomo Vs Credit Organization of Zambia**⁽³⁾ on suspension of an employee was cited to support the proposition that as a general rule, an employee who is on suspension is not entitled to salaries for the period of his suspension as stated in the case of **Henley Vs Pease and Partners**⁽⁴⁾. But the case of **Goodwell Malawo Siamutwa Vs Southern Province Cooperative Marketing Union V. Finance Bank (Z) Ltd**⁽¹⁾ on termination was cited to support the proposition that an employee was not entitled to salaries for the period when his services were terminated as it would amount to unjust enrichment.

The gist of the written response to ground two is that the Complainant made representations to the Respondent's Management and based on his representations, he was offered reinstatement on the terms contained in the letter; and that the

Court must take it that the Complainant accepted the offer from the Respondent as per his letter of acceptance. It was submitted that since the Complainant wrote a letter accepting the reinstatement on the Respondent's terms; then on the principle of the **Parol Evidence Rule**, the Complainant is estopped from arguing that he did not accept the terms of reinstatement. The case of **Jacobs Vs Batavia General Plantations Trust**⁽⁵⁾ was cited in support of the submission in which the Court said:

“It is firmly established as a rule of law that parol evidence cannot be admitted to vary or add to or contradict a deed or a written document”.

It was submitted that it was clear from the correspondence between the parties that both parties understood what was being discussed, that the Respondent made an offer stating its position which the Complainant accepted; and the Complainant cannot now turn around and claim that he never accepted the terms of the offer. It was further submitted that on the principles of estoppel, the Complainant cannot now be allowed to say that he did not accept the offer from the Respondent on the terms contained in the letter of reinstatement.

The summary of the written response to ground three is that though the Respondent paid the Complainant's pension contributions, it did not amount to a reversal of all the terms of the letter of reinstatement, but was done to bridge the gap so that the

Complainant did not loose out on his benefits with the pension fund.

In her oral submissions on behalf of the Respondent, Mrs. Mwansa contended that the use of “**Without Prejudice**” meant that the letters were not to be the subject of Court proceedings and the reinstatement was not as simple as stated as it was subject to certain conditions.

We have carefully considered the evidence on record, the Judgment of the Industrial Relations Court and the submissions of Counsel on the three grounds of appeal. This appeal, as we see it, succeeds or fails depending on what view we take of the arguments and submissions on ground one.

As already observed earlier in this Judgment, the parties filed a **Statement of Agreed Issues**. In that Statement, the parties agreed and set out facts that were not in dispute. These were that on the 1st October, 1998, the Complainant was dismissed from employment by the Respondent; that on 3rd August, 2001, while this action was pending before Court, the Respondent reinstated the Complainant subject to seven terms set out in a letter of reinstatement written “**Without Prejudice**”; that the Complainant, by letter dated 20th August, 2001, accepted the reinstatement; and that upon further requests by the Complainant, the Respondent exercised its discretion and waived the terms relating to payments to the Local Authority Superannuation Fund and paid the arrears due from the Complainant.

The agreed issue to be resolved was whether the Complainant was entitled to the balance of his salary arrears, increments, allowances, leave days, interest and costs.

The letter of reinstatement, though written under “**Without Prejudice**”, was produced in Court. However, even if it were not produced, the terms of reinstatement were part of the **Statement of Agreed Issues**.

The trial Court, correctly so in our view, found that the **Statement of Agreed Issues** outlined facts not in dispute and correctly so too pointed out that the main issue for determination was whether or not the Complainant was entitled to the arrears of salary during the period he was under dismissal.

On behalf of the Complainant, it was contended in ground one that the trial Court failed to appreciate the legal position of **reinstatement** which, in the natural and ordinary legal position, denotes reverting one to his previous position with all attendant benefits; that the trial Court fell into error when it held that the Complainant was not entitled to his claims because he accepted the reinstatement on adverse terms; that the trial Court failed to distinguish the legal position between **reinstatement** which cannot be conditional; and **reemployment** which can be conditional; and that the Complainant did not consent to the arbitrary changes in his conditions of service.

On behalf of the Respondent, the contention on ground one was that the issue before the trial Court was not whether or not the Complainant had been reinstated or reemployed; but whether he was entitled to his salary arrears after his reinstatement. It was argued that the Complainant had not been reinstated by an Order of the Court; but as a result of representations he made after his dismissal; that there should be a distinction between a **reinstatement** which is unconditional; for instance, where a Court makes an Order and a conditional **reinstatement** like in the present case. It was submitted that a **reinstatement** does not automatically entitle an employee to salaries lost out when not working.

In the case of **Goodwell Malawo Siamutwa Vs Southern Province Cooperative Marketing Union Limited and Finance Bank (Z) Ltd⁽¹⁾**, the case relied upon by the trial Court, this Court stated as follows:

“The Appellant never rendered any services to the 1st Respondent from the time that his services were terminated on 20th May, 1999, up to the date of Judgment in May, 2002. There would therefore be no consideration for the money which could be paid to the Appellant were such an Order made. In our view, this would amount to unjust enrichment”.

Although **Siamutwa** was not based on reinstatement, it made the point that during the period an employee is on termination

there is no consideration to justify paying the employee, it would be unjust enrichment.

The fact that the Complainant's services were terminated and then reinstated on certain conditions was common cause. Both the letter of **reinstatement** and the **Statement of Agreed Issues** set out the conditions which the Complainant accepted. The reinstatement, in the instant case, was mutually agreed by the parties based on certain conditions as contained in the letter of reinstatement. We agree that there must be a distinction between unconditional reinstatement ordered by the Court and that mutually agreed by the parties on certain conditions.

In dealing with the reinstatement in the present case, the trial Court had this to say:

“Coming to the evidence before us, however, we are satisfied that the Complainant accepted the reinstatement on the basis of the offer of reinstatement with clear and unequivocal terms. As such we find that the Complainant was not reverted to his previous position with all the attendant benefits. We are fortified in so saying because the letter of offer of reinstatement at page 74 of the Complainant’s Bundle of Documents stated that the offer was not negotiable and that the Complainant was not under any obligation to accept the

same but the Complainant went ahead and voluntarily accepted the reinstatement and its terms. In the circumstance we accept the evidence of the Respondent that the Complainant is not entitled to the salary arrears and allowances for the period he did not work for the Respondent.”

These were findings of fact based on the documentary and the oral evidence.

We agree with the foregoing findings. The Complainant accepted the conditions in the letter of reinstatement. In our view, the trial Court adequately addressed the distinction of the legal position between reinstatement and reemployment.

Ground one of appeal, therefore, fails.

Our conclusion on ground one makes it unnecessary to consider the arguments on grounds two and three which merely criticize the oral evidence. We accept that the issue for determination before the trial Court and before this Court was centred on the letter of reinstatement and the letter of acceptance as well as the **Statement of Agreed Issues**. Oral evidence, in the circumstances of this case was irrelevant. We, therefore, dismiss grounds two and three as well.

In the result, all the three grounds of appeal having been unsuccessful, the appeal is dismissed. On the facts of this case, we order that each party will bear its own costs in this Court.

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E.L. Sakala
CHIEF JUSTICE

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S.S. Silomba
SUPREME COURT JUDGE

.....
C.S. Mushabati
SUPREME COURT JUDGE