IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

Appeal No. 15/2014
SCZ/8/009/2014

BETWEEN:

ZVONKO SANKOVIC **APPELLANT**

AND

AFRICA SUPERMARKETS LIMITED T/A SHOPRITE **RESPONDENT**

Coram : Mwanamwambwa, DC.J., Hamaundu and Kabuka, JJS, on the 7th June, 2016 and the 13th June, 2016

For the appellant : Ms T. Marietta, Messrs Sharpe & Howard Legal Practitioners
For the respondent : Mr S. Mambwe, Messrs Mambwe, Siwila & Lisimba Advocates

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases Referred to:

1. **Lawrence Muyunda Mwalye V Bank of Zambia [2010] 2 ZR 387**
2. **Indo-Zambia Bank Limited V Mushaukwa Muhanga [2009] ZR 266**

Legislation referred to:

1. **The Minimum Wages and Conditions of Employment Act, Chapter 276 of the Laws of Zambia, Section 3**
2. **The Minimum Wages and Conditions of Employment (Shop Workers) Order, 2011, Regulations 2, 8(i)**
3. **The Minimum Wages and Conditions of Employment (General) Order, 2011**

Other Works referred to:

1. **Employment Law in Zambia: Cases and Materials, Dr. Winnie Sithole Mwenda, page 40**
2. **Chitty on Contracts: General Principles, Sweet & Maxwell, 1999 edition, para 12-002, page 583**

This is an appeal against a judgment of the Industrial Relations Court which dismissed the appellant's action for gratuity, incentive bonus, accrued leave days and terminal benefits based on the **Minimum Wages and Conditions of Service Act, Chapter 276** of the **Laws of Zambia**.

The background to this appeal is thus:

The appellant was employed by the respondent in the position of Maintenance Manager on the 2nd March, 1999. The initial contract was for a period of three years. During the subsistence of that contract, the respondent added to the appellant's salary a sum of US$193 per month for the appellant to use as contribution towards a pension scheme of his choice.

The initial contract ended in 2002. From then on, the appellant started entering into one year employment contracts with the respondent for the next ten years. The contracts contained the same terms. The salient terms were these:

(i) Each contract provided that it would be not renewed and neither would it continue beyond the expiration date.

(ii) Each contract provided, also, that, upon its expiration, the appellant's employment would come to an end, unless a further written contract was entered into.

(iii) Each contract further provided that, upon its expiration, the appellant would not be entitled to any benefit in terms of the respondent's retrenchment policy or to any pay in lieu of notice;

(iv) Each contract provided that the appellant would be eligible to participate in the respondent's Incentive Bonus Scheme, the sum achievable was constantly revised over the years until it rose to K110,000,000 in the final contract, and;

(v) From about 2008, the contracts started providing that the appellant's employment would terminate automatically in the month in which he attained the age of fifty-five years.

In the course of his employment, the appellant was given an award for long service on the 8th March, 2009, for having completed ten years of service. Sometime that year, the respondent introduced a local pension scheme for its employees. The appellant was not joined to that scheme. The appellant's final contract commenced on the 1st September, 2011 and was set to expire on the 31st August, 2012. However, before it came to an end, the appellant's advocates wrote to the respondent, pointing out that according to employment legislation in Zambia, the appellant, who had served for a continuous period of thirteen

years, was entitled to terminal benefits and other contractual entitlements such as gratuity and pension. The advocates also accused the respondent of having breached its statutory obligation to make contributions to the National Pensions and Security Authority Pension Scheme in respect of the appellant. The advocates, therefore, demanded; payment of gratuity for the whole period of employment at 25% of the total salary, payment of the unremitted pension contributions for the whole period of employment, and; payment of a sum of K110,000,000 as incentive bonus.

The respondent passed on the correspondence to its advocates who responded thus;

(i) that the appellant was not eligible to contribute to the National Pensions and Security Authority Pension Scheme because he was not a Zambian and that it was for the same reason that the appellant was not joined to the respondent's local pension scheme;

(ii) that none of the contracts that the appellant had signed provided for gratuity and;

(iii) that the appellant's contracts had been for fixed terms and

that the fact that their periods aggregated to thirteen years did not make the employment, or service, unbroken.

The appellant filed a complaint in the Industrial Relations Court. Initially, the appellant sought payment of gratuity, pension contributions, terminal benefits, incentive bonus and accrued leave days. Subsequently, however, the appellant abandoned the claim for payment of pension contributions. The amended complaint now sought only the following relief;

(i) payment of gratuity at 25% for the whole period of Employment,

(ii) payment of terminal benefits,

(iii) payment of incentive bonus for the last contract, and;

(iv) payment of 37 accrued leave days.

At the hearing the appellant said that the agreement to pay him 25% gratuity was made orally. Testifying on the claim for terminal benefits, he said that he sought to be paid benefits computed at three month's salary for each year served; covering the whole period of thirteen years. He justified this claim by saying that he had reached the retirement age of fifty-five years during his last contract and that all the managers who had retired had been paid on that formula. The appellant did not lead

any evidence to prove that the incentive bonus was due or had accrued. He admitted that he had been paid for the leave days accrued.

The respondent denied any oral agreement to pay the appellant 25% gratuity.

The trial court found the following as facts, among others:

(i) that the written contracts that the appellants signed with the respondent did not provide for payment of any gratuity, and;

(ii) that the complainant received payment for his accrued leave days.

The trial court held the view that the main issue for its determination was whether or not the appellant was entitled to be paid 25% gratuity. After considering several leading authorities on the subject, the trial court held that extrinsic evidence was not admissible to add to, vary, subtract or contradict the terms of a written document. With that holding, the trial court rejected the appellant's contention that the parties had orally agreed to payment of gratuity. Consequently, the court dismissed the claim for gratuity.

The trial court went on to consider the claim for terminal benefits. In particular, the trial court considered the argument advanced on behalf of the appellant on this claim, which was that the appellant; having served for thirteen years; having carried forward leave days from one contract to the other; having had a reasonable expectation of permanent employment created by the provision which was inserted in the latter part of his employment and stated that his employment would end at the end of the month in which he attained fifty five years, and; having reached retirement age at the time that this last contract came to an end, was entitled to terminal benefits calculated at three months pay for each completed year of service, in line with the **Minimum Wages and Conditions of Employment Act**.

After considering a leading authority on employment law, namely, *Friedman: Modern Law of Employment*, the court construed the terms of the series of contracts to mean that upon the termination of those contracts on the 31st August of every year, the appellant's employment was deemed to have been fulfilled with no continuing liability whatsoever from either party.

The trial court held the view that although the appellant had reached retirement age during his last contract and he had

earlier received an award for long service, those factors had no bearing on his conditions of service, as provided for in the written agreements. The trial court also held the view that, because the contracts expressly stated that the employment was of a temporary nature and they had a specific duration within which the parties' employment relationship was to endure, this was explicit evidence that the parties did not intend to create a permanent and pensionable relationship. Consequently, the court held that the appellant's claim for terminal benefits in line with the **Minimum Wages and Conditions of Employment Act** was not tenable.

The trial court went on to consider the abandoned claim for payment of pension contributions and dismissed it.

The trial court did not make any pronouncement on the claim for incentive bonus for the last contract.

All in all, the trial court dismissed the appellant's action.

The appellant filed two grounds of appeal.

The first ground is couched as follows:

"The learned judge and Members of the Industrial Relations Court erred in law and fact when they held at Page J16 of the judgment that the appellant was not

entitled to rely on the provisions of the Minimum Wages Act and particularly the provisions of the applicable order thereof governing the entitlement and payment of Retirement Benefits.

The second ground is couched as follows:

"The learned Judge and Members of the Industrial Relations Court erred in Law and fact when they held at pages J15 and J16 of the judgment that the appellant's 'thirteen years non-stop service....[was] a summation of a series of distinct and individual period[s] of employment' and that the 'contracts executed between the [appellant] and the Respondent were completed on the 31st August of every year [and] that the employment was deemed to have been fulfilled with no continuing liability whatsoever from either party".

The appellant filed written heads of argument, which learned counsel relied on entirely at the hearing.

In those heads, learned counsel referred us to the case of **Lawrence Muyunda Mwalye V Bank of Zambia**[1] where we held that:

"The Minimum Wages and Conditions of Employment, which are amended from time to time, are meant to apply to non-unionised workers, whose organizations do not have clear guidelines on certain aspects of employment such as payment of redundancy packages"

Counsel also referred us to a passage in a book by Dr. Winnie Sithole Mwenda entitled **"Employment Law in Zambia: Cases and Materials".** The passage reads: **"The Minimum Wages and Conditions of Employment Act generally applies to those areas which are outside the scope of collective bargaining or where trade unions do not exist, or technically, where the bargaining unit has failed to agree on a particular issue. In such a case, the Act and regulations made thereunder may provide a general guide in so far as what could constitute a minimum standard on any particular issue. It must be emphasized that these are only minimum standards. There is, therefore, nothing to stop employers from improving upon the minimum standard".**

Counsel further referred us to **Regulation 2(f)(ii)** of the **Minimum Wages and Conditions of Employment (Shop Workers) Order, 2011** which states that the order shall not

apply to an employee in any occupation where the employee-employer relationships are governed by specific employment contracts attested by a proper officer but also states that the wages and conditions shall not be less favourable than the provision of the order.

With those authorities, learned counsel submitted that the appellant's contract provided that it would terminate automatically at the end of the month in which he attained the age of fifty-five years. Counsel further submitted that the retirement age specified in the **Minimum Wages and Conditions of Employment (Shop Workers) Order 2011** is fifty-five years. Counsel argued that since the age at which the appellant's service with the respondent was terminated was fifty-five years, this entitled the appellant to have recourse to the **Minimum Wages and Conditions of Employment (Shop Workers) Order, 2011** for his terminal benefits.

The respondent also filed written heads of argument which learned counsel relied on entirely at the hearing, together with the submissions advanced in the court below.

In those heads of argument and submissions, counsel, in response to the first ground of appeal pointed out that it was not

correct to state that the contracts between the parties herein did not have a provision regarding retirement benefits, thereby inviting the application of the **Minimum Wages and Conditions of Employment Act**. Learned counsel referred us to a term in the contracts which stipulated that upon its lapse, the appellant would not be entitled to any benefit in terms of the respondent's retrenchment policy or to any pay in lieu of notice or otherwise. Counsel argued that, in its plain and ordinary meaning, the term showed that the parties understood that there were to be no terminal benefits due at the end of each contract.

To lend further support to the respondents argument, we were referred to the case of **Indo Zambia Bank Limited V Mushaukwa Muhanga**[2], and in particular to the following holdings:

> **"1. It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the legislature that recourse can be had to other forms of interpretation.**
>
> **3. Courts should be reluctant to accept that linguistic mistakes have been made unless it can be shown that the parties did not have the intention ascribed to them"**

Counsel substituted the word *"legislature"* for the word *"parties"* in the first holding.

In the same vein we were also referred to a passage in **Chitty On Contracts, General Principles**. The passage reads:

> **"proof of terms. Where the agreement of the parties has been reduced to writing, and the document containing the agreement has been signed by one or both of them, it is well established that the party signing will ordinarily be bound by the terms of the written agreement whether or not he has read them and whether or not he is ignorant of their precise legal effect".**

Those were the arguments in the first ground.

We wish to deal with the first ground right away as the appellant's appeal entirely hinges on it.

The appellant's argument can be broken down thus: that, because the contracts of employment provided for termination upon the appellant reaching fifty-five years of age; that, because the contracts did not provide for retirement benefits; that, because the appellant did reach the age of fifty-five years, after having served for a continuous period of thirteen years, then the

Minimum Wages and Conditions of Employment Act was applicable to him so that he was entitled to retirement benefits at the rate provided by the **Act**.

Section 3 of the **Minimum Wages and Conditions of Employment Act, Chapter 276** of the **Laws of Zambia** provides:

> **"3(1) If the Minister is of the opinion that no adequate provision exists for the effective regulation of minimum wages or minimum conditions of employment for any group of workers he may, by statutory order, prescribe—**
>
> **(a) rates of wages to be paid to workers by the hour, day, week or month...."**

The section goes on to set out to the minimum wages or conditions that the Minister is empowered to prescribe. By virtue of this section, the Minister has promulgated two statutory orders. These are: (i) **The Minimum Wages and Conditions of Employment (General) Order and**; (ii) **The Minimum Wages and Conditions of Employment (Shop Workers) Order**.

These two orders are amended by the Minister from time to time by Statutory Instrument. The last major amendment to both Orders was in 2011. The General Order was amended by Statutory Instrument No. 2 of 2011, while the Shop Workers

Order was amended by Statutory Instrument No. 1 of 2011. These orders were the ones applicable during the appellant's last contract of employment.

The appellant seeks to rely on the **Minimum Wages and Conditions of Employment (Shop Workers) Order, 2011. Regulation 8(i)** of that Order provides:

> **"An employee who has served with an employer for not less than ten years and has attained the age of fifty-five years, shall be entitled to retirement benefits of three months' basic pay for each completed year of service".**

However, *Regulation 2* of the same order provides:

> **"This Order shall apply to employees employed in any shop or in connection with the business of any shop, but shall not apply to----**
>
> **(a) a person employed in, or in connection with, the motor trade industry or the petroleum industry;**
>
> **(b) a person employed in---**
>
> **(i) a bazaar or sale of work for charitable or other purposes from which no private profit is derived**
>
> **(ii) the hawking of newspapers**

(iii) the running of coffee stores; or

(iv) the sale of agricultural produce on behalf of a bona fide farmer or market gardener on any land occupied by the farmer or market gardener or in the hawking of agricultural produce on behalf of the farmer or market gardener.

(c) a person who holds a hawker's licence

(d) a person employed in—

(i) the manufacture of bread or bread stuff

(ii) the reception, storage and treatment of fresh milk products

(iii) the reception, storage and treatment of fish, meat, poultry, game, fruit and other perishable foodstuff

(iv) the printing of newspaper

(v) the delivery of ice to hospitals and nursing institutions during the day or night; or

(vi) the sale, before midnight, of any programmes,

catalogues or refreshments in a theatre, concert hall or other place of amusement during any performance;

(e) <u>a person in management</u>; and ....”
(underlining ours for emphasis)

Clearly, this order does not apply to employees in management positions.

The appellant was employed as a Maintenance Manager, a position which, no doubt, is in management. Therefore, this order does not apply to him. Consequently, the first ground of appeal fails.

The second ground of appeal is founded on the issue whether the appellant should be deemed to have served the respondent for a continuous period of thirteen years or should be deemed to have served on several separate contracts which were not continuous. It is clear that the whole object of deeming the appellant to have served for a continuous period of thirteen years was to enable the appellant to qualify for the benefit under the **Minimum Wages and Conditions of Employment (Shop Workers) Order**, which requires an employee to have served at least ten years. Now that we have found that the Order is not applicable to the appellant, the object is completely defeated.

Therefore, it serves no useful purpose to delve into that ground. In short, the second ground of appeal falls away.

Therefore, the appellants' whole appeal has failed. We award costs to the respondent, to be taxed in default in agreement.

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M.S. Mwanamwambwa
DEPUTY CHIEF JUSTICE

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E. M. Hamaundu
SUPREME COURT JUDGE

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J. K. Kabuka
SUPREME COURT JUDGE