

IN THE SUPREME COURT FOR ZAMBIA APPEAL No.134/2009

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

CHARLES MVULA

AND

ZAMBIA BREWERIES PLC



APPELLANT

RESPONDENT

CORAM: Hamaundu, Kaoma, Kabuka, JJS.

On 6th March, 2018 and 13th March, 2018.

FOR THE APPELLANT: Mr. L.M. Chikuta, Messrs I.C. Ng'onga and Company.

FOR THE RESPONDENT: Mr. B. Bwalya, Messrs Christopher Russell, Cook and Company.

JUDGMENT

Kabuka, JS, delivered the Judgment of the Court.

Cases referred to:

1. BP Zambia Plc v Interland Motors Limited (SCZ) 2001.
2. Zambia Sugar Plc v Wincho Gumboh, Appeal No. 69 of 1996.
3. Febby Nsanje & 38 Others v Worker's Compensation Fund Control Board SCZ Appeal No. 1 of 2009.

4. Zambia Revenue Authority v Dorothy Mwanza and Others (2010) 2 ZR 181.
5. Davies Kasonde v Zambia Revenue Authority, SCZ Appeal No. 84 of 2015.

Legislation and Other Works referred to:

1. The Minimum Wages and Conditions of Employment Act, S. I No. 99 of 1994.
2. Halsbury's Laws of England, 4th Edition, Re-issue, Vol. 29 (3) page 275 paragraph 433.
3. Bryan Garner's BLACK'S LAW DICTIONARY, 10th Edition, (2014) Thomson West.

The appellant did not report for work for a period exceeding ten days and was dismissed. He took the matter to the Industrial Relations Court, which by a Judgment delivered on 17th June, 2007 found his absence amounted to desertion and that he was properly dismissed. The appellant has now appealed to this Court, challenging that decision.

The facts of the case are that the appellant was employed by the respondent in September of 1986 as a

general worker. He rose through the ranks to the position of Brewery House Manager.

On 1st November, 1996 when he had served the respondent for ten years, the appellant applied to the respondent to consider him for early retirement, as provided for in clause 30.1 (iv) of the Zambia Industrial and Mining Corporation (ZIMCO) Terms and Conditions of Service. In its reply communicated by a letter to the appellant dated 22nd November, 1996, the respondent rejected the request. In paragraph 2 of this letter, the respondent's Director of Human Resource explained that, **'early retirement was in the discretion of management and is only considered in very compelling circumstances.'** Aggrieved by that response the appellant attempted to appeal by writing another letter dated 28th November, 1996 in which he confessed that he had already made the decision to leave his employment with the respondent, on early retirement.

On 17th December, 1996 the respondent issued a Circular letter under the hand of its Managing Director which in Clause 4.3 provided for early retirement and stated

that: **“employees who requested for early retirement before 1.1.97 may do so under ZIMCO conditions of Service as they were stated at the time of takeover in August, 1994”**. Armed with this Circular the appellant wrote another letter dated 26th December, 1996 applying for early retirement, yet again. In the said letter, the appellant also indicated to the respondent that he had already given the required 2 months’ notice (from 1st November, which was the date of his initial application for early retirement) to 31st December, 1996 as the proposed date for his last day of work.

In line with his stated intention, the appellant thereafter proceeded for further studies without waiting for a formal communication from the respondent, on his application for early retirement. As a result, the appellant stopped reporting for work from 2nd January, 1997.

On 31st January, 1997 the respondent was prompted to write the appellant a letter informing him of its decision to dismiss him for absenteeism from work for a period exceeding 10 days. A further letter dated 3rd of February,

1997 was sent to the appellant declaring him a deserter and confirming he had for that reason been dismissed from employment.

The appellant replied by a letter dated 5th February, 1997 updating the respondent that he had since started classes. He also 'advised' the respondent to refer to his letter dated 26th December, 1996 which contained details concerning his decision to leave work to enable him pursue further studies, starting from January, 1997. The appellant further claimed that, he was in the circumstances, entitled to be considered as having taken early retirement. In the exchange of letters that followed however, the respondent maintained its position that the appellant had been dismissed for desertion.

When all his effort to try and convince the respondent otherwise, failed, the appellant took his complaint before the Industrial Relations Court, claiming the following substantive relief:

- (i) *A declaration that his dismissal of 3rd February, 1997 is null and void.*

- (ii) *An order that the Respondent do retire him and that he be paid gratuity and all terminal benefits.*
- (iii) *Interest on moneys found due to him at the bank rate from 1st January, 1997 to the date of judgment.*

In its answer filed in response to the complaint, the respondent averred that, the Circular dated 17th December, 1996 did not state that persons or employees who wished to retire would be allowed to retire. That in terms of the ZIMCO Conditions of Service at the time of takeover in August, 1994, on which the Circular was premised, early or voluntary retirement was at the request or discretion of the employer. That this was in conformity with paragraph 5 of S.I. No. 99 of 1994, which similarly stated that, early or voluntary retirement before the attainment of 55 years was at the will of the employer. The respondent asserted, that the appellant's complaint was misconceived and without basis.

At the trial of the matter in the court below the appellant in his evidence persisted with his claim that the respondent wrongfully dismissed him from employment when he had merely acted on its Circular letter of 17th

December, 1996 which requested the respondent's employees who wished to proceed on early retirement to do so before 1st January, 1997. It was the appellant's contention that this Circular had in fact shifted the discretion to proceed on early retirement from the employer to the employee who wished to do so, to apply by 31st December, 1996. That he responded to this request by his letter dated 26th December, 1996 in which he indicated the effective date of his retirement as 31st December, 1996.

In defence of the matter, the respondent called two witnesses, one being the Director of Human Resource, who testified that his knowledge of the matter was based purely on the documents availed to him, one such document being the Conditions of Service for the respondent's employees. That, Clause 39 (a) of the said Conditions of Service relates to *premature retirement*, in the *national interest* while Clause 39 (b) states that any other *premature retirement* would be treated as termination of service. The same conditions of service in Clause 35 provided that, 'the pensionable age shall be 55 years.'

It was the witness' further testimony that paragraph 4.3 of the Circular dated 17th December, 1996 on early retirement was in conformity with paragraph 5 of S.I. No. 99 of 1994 which was the law obtaining at the time. He underscored the fact that the Circular in issue did not inform employees who wanted to retire to proceed on retirement but was merely requesting employees who wished to apply for early retirement to do so.

The other witness called by the respondent was its former employee, a Quality Manager, who was the appellant's immediate supervisor. The gist of his evidence was that the appellant worked under his supervision for about 4 years. In 1996, the appellant informed him that, as he intended to go for further studies, there was need to look for someone to replace him as Brewery House Manager. It was this witnesses' further evidence that he advised the appellant that he could only act on his request after it was put in writing to the Human Resource Manager. The appellant then wrote a letter to the Human Resource Manager informing him of his intention to retire early.

Acting on the appellant's application for early retirement, the witness found someone to replace the appellant as Brewery House Supervisor and the appellant handed over his work to the said person. Thereafter, the witness came to learn that the appellant had been dismissed.

After considering this evidence, the trial court also took into account two documents that were in issue being the Circular letter and ZIMCO Conditions of Service, the relevant parts of which read as follows:

Paragraph 4.3 of the Managing Director's Memorandum/Circular

"4.3 Early Retirement: Employees who requested for early retirement before 1.1.97 may do so under ZIMCO Conditions of Service as they were stated at the time of take over-August, 1994."

Clause 39 (a) and (b) of the ZIMCO Limited Corporate Terms and Conditions of Service, states as follows:

"39 PREMATURE RETIREMENT

- (a) Where an employee is required to retire in the *National interest* the benefits will, where applicable, be as laid down in the ZIMCO Pension Scheme."
- (b) Any other *premature retirement* will be treated as a termination of service."

On the basis of the terms of employment as quoted above, the trial court found that:-

- (i) Any request for early retirement under clause 39 (b) of the ZIMCO Corporate Terms of Service was subject to approval by the employer.
- (ii) The respondent did not authorise the appellant to proceed on early retirement and therefore, his decision to stay away from work from 2nd January, of 1997 to 3rd February, 1997 amounted to desertion.
- (iii) Having found that he was a deserter, the issue of the appellant being heard by the respondent prior to his dismissal, did not arise.

It is against those findings that the appellant has now appealed to this Court. The appellant initially filed four grounds of appeal but later abandoned grounds two and three, leaving grounds one and four only, which are couched in the following terms:

- 1. That the court misdirected itself in law and in fact when it found that the appellant had deserted from work when there was evidence led that the respondent had given authority and consent by finding someone to replace him as new Brewery House Supervisor.**
- 4. That the court misdirected itself in fact and in law when it held that any request for early retirement under clause 39 (b) of the ZIMCO conditions of service was subject to approval by the employer when infact there was implied approval from the conduct of respondent's servants.**

When the matter came up for hearing of the appeal, Counsel for the appellant indicated that he would be relying on his written Heads of argument earlier filed into Court, which he augmented with oral submissions.

The substance of his arguments on ground one of the appeal were to the effect that the appellant did not desert but left employment with the respondent's full consent. The cases of **BP Zambia Plc v Interland Motors Limited**¹ and **Zambia Sugar Plc v Wicho Gumboh**² were relied upon to stress the point that the respondent, although a legal entity, acted through its servants or agents to approve the appellant's application. In the premises, it cannot run away from consensual approval and say that the appellant's application for early retirement was not approved.

The submission on the point was that there were three requirements which were necessary for the respondent to give consent and authority for an employee to proceed on early retirement, which were:

- (i) Finding a replacement for the applicant.

- (ii) Discussing the matter or the application with the Human Resource Manager who was the final authority.
- (iii) Endorsing on the applicant's application for early retirement.

That the above conditions were all satisfied and the respondent went a step further by finding the person to replace him to whom he smoothly handed over his functions. Counsel went on to submit that, considering the conduct of the respondent in the matter, desertion did not arise at all, as the appellant left employment with the full consent and authority of the respondent acting through its agents.

On ground four, the argument was that Clause 39 (a) was wrongly applied by the trial court as according to counsel, it deals with "*premature retirement*" in the "*national interest*," whereas the intention of the parties was "*early retirement*" at the request of the employee, made pursuant to paragraph 4.3 of the Circular letter issued by the respondent dated 17th December, 1996. In terms of this Circular, employees who wished to retire "before 1.1.97 were

requested to do so under the ZIMCO Conditions of Service as they were at the time of takeover in August of 1994.” That by citing Clause 39 (b) which refers to such a retirement as a ‘*termination*’ the Court relied on the misleading evidence of the respondent’s Human Resource Manager.

The submission was that, the Circular letter expressed the will of the respondent to allow its employees to proceed on early retirement pursuant to ZIMCO Conditions of Service Clause 30.1 (iv) which provided for “*voluntary or early retirement at the request of the employer.*” This Circular further conformed with S.I. No. 99 of 1994 which provides for early retirement at the will of the employer and that this is what the appellant responded to, in his application letter dated 26th December, 1996.

Thereafter, the formal process of approval was complied with by the respondent and the appellant was allowed to proceed on early retirement. A replacement was duly found and the matter was fully discussed between the Human Resource Manager and the appellant’s immediate

Supervisor, following which a handover was smoothly done under the latter's oversight before the appellant finally left.

In concluding his submissions on ground four, counsel for the appellant maintained that approval was clearly implied which was also clearly consensual and the respondent cannot run away from that fact, to now claim that the appellant's application for early retirement was not approved.

In response to the appellant's heads of argument on ground one, Counsel for the respondent argued that, although the appellant's supervisor had found a replacement for the appellant's position, it was the Human Resource Director that had the final say on whether or not to accept an employee's request to proceed on early retirement. That the appellant was aware of this requirement is confirmed by his application for early retirement where he states that he had a chat with the Human Resource Director who seemed to be undecided on whether to retire him or not. He went further to state that, this was the reason he was now directing his application for

retirement to the Managing Director and who in his own words was expected to: *“relieve (him) from psychological torture and victimisation (he) (had) endured since 1st November 1996 when (he) first applied for retirement.”*

The submission was that, from the tone of the appellant's letter, it was clear that he had made up his mind to leave employment by 31st December, 1996 to pursue his studies. Granted that background, it cannot be contended that the decision to find a person to perform the appellant's role can be taken as consent, on the respondent's part, to the appellant's application for early retirement, but was rather, a mere business measure to ensure continued smooth running of the respondent's business.

On ground four, the submission was to the effect that, whether it was under early or premature retirement, the appellant was still not automatically allowed to proceed on retirement. Hence, the use of the word 'request' in the enabling provision, which denotes that an employee's desire to proceed on early retirement may or may not be granted and the final decision is in the employer's discretion. The

respondent maintained that at no point was the appellant granted permission to proceed on early retirement.

The appellant filed a reply, the substance of which was that his desire to be considered retired by 31st December, 1996, should not have been taken in isolation. It was rather to be considered in the context of the respondent's decision to implement new conditions of service with effect from 1st January, 1997. Against that backdrop, the appellant could not be faulted for considering himself retired by 31st December, 1996, as he had not only chosen to go to school but did not also wish to serve under the new conditions of service. That staying on in the circumstances of this case would have meant that the appellant had acquiesced to the new conditions of service.

In his oral submissions made at the hearing Counsel attempted to advance an alternative argument, not raised in the court below, that the reason his client left employment without waiting for a response to his early retirement application letter was because the employer was attempting

to unilaterally change his conditions of service and he did not want to be adversely affected by the changes.

We have considered the arguments by the appellant and the respondent and the evidence on record. We find the issue raised in both grounds of the appeal is whether the appellant was properly dismissed for desertion. We will for that reason deal with the two grounds together.

It is not in dispute that the appellant applied to the respondent to consider him for early retirement in November, 1996 to enable him pursue further studies. In its reply contained in a letter dated 22nd November, 1996 the respondent declined the appellant's said request and advised him that such applications were only granted at management's discretion and in compelling circumstances. That, as his services were still required, the reasons given by the appellant were not compelling.

It is further not in dispute that the appellant was nonetheless insistent on going on early retirement, such that on 26th December, 1996 he made a second application

giving the same reasons as before, which the respondent had rejected.

It is equally not in dispute that thereafter from 2nd January, 1997 to 3rd February, 1997 the appellant stayed away from his place of work without waiting for a formal communication from the respondent advising him on whether or not his request for early retirement had been approved. That the appellant was alive for the need to receive a formal response to his application is confirmed by his own evidence in re-examination given at the trial in the court below where he testified as follows:

"I re-applied for early retirement before 31/12/1996. I did not receive any reply from the Managing Director to go on early retirement to this day.

The Managing Director was supposed to either allow me to go (on) retirement or refuse to allow me proceed on early retirement." (At page 135 of the Record)

In our view, what that evidence discloses is that the appellant proceeded to pursue his desire for further studies without his employer's authorisation. This is also reflected by the tone of finality in the last paragraph of his letter dated 26th December, 1996, that 'he should be considered

retired by 31st December, 1996' as he needed two weeks to prepare for his studies.

In response to that stance taken by the appellant, the respondent through a letter dated 31st January 1997, dismissed the appellant from employment for being absent from work for more than 10 days. The appellant however tried to justify his action to abscond from work by contending that the Circular of 17th December, 1996 allowed him to go on early retirement, unilaterally, by merely informing management.

In dealing with the position that was taken by the appellant, we can only point out that the issue of construction of provisions relating to early retirement which are embodied in contracts of employment has been dealt with by this Court, previously. In the case of **Febby Nsanje & 38 Others v Worker's Compensation Fund Control Board**³ we confirmed that, where an employee triggers an early retirement provision, the right to place the employee on early retirement still remains with the employer. From the evidence on record, we cannot fault the lower court

when it found that the respondent in the present appeal did not authorise the appellant to proceed on early retirement. The appellant's decision to stay away from work from 2nd January, 1997 to 3rd February, 1997 certainly amounted to desertion, which as defined in **Bryan Gardner's Black Law Dictionary, 10th Edition, (2014) Thomson West** 'is the wilful and unjustified abandonment of a person's duties or obligation'.

In **Zambia Revenue Authority v Dorothy Mwanza and Others**⁴ we again held that an offer of a new contract or an extension of a contract was not as a matter right nor automatic, but was in the employer's discretion. We confirmed this position in our recent judgment of **Davies Kasonde v Zambia Revenue Authority**⁵.

What the cited cases go to underscore is that the same principle applies to this case; that an employment provision such as that for early retirement which is left to management's discretion cannot be claimed by an employee as a matter of right. As demonstrated by the cases earlier referred to, this Court has persistently, and consistently so,

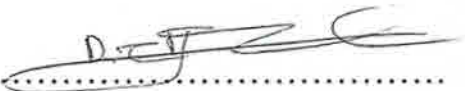
held that, where a contract of employment provides for early retirement, the decision to place an employee on early retirement ultimately rests with the employer. We accordingly do not subscribe to the alternative argument put forward by counsel for the appellant that, as the prevailing conditions of employment were coming to an end by 31st December, 1996, the appellant who was not consenting to their variation, effective from January, 1997, could still be deemed to have been retired at the end of 1996.

In our view, failure to await a response on the facts of this case can only go to confirm that the appellant could, at the most, only have proceeded in that manner by placing himself on early retirement, which is untenable. It is for the said reasons that we find the appeal totally devoid of any merit and we dismiss it with costs.


Appeal dismissed.



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E.M. HAMAUNDU
SUPREME COURT JUDGE



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R.M.C. KAOMA
SUPREME COURT JUDGE



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J.K. KABUKA
SUPREME COURT JUDGE