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

Appeal No.197/2015
SCZ/8/289/2015

BETWEEN:

JOSIAH SUBAKANYA, BERNARD [illegible] APPELLANTS

AND 117 OTHERS

AND

THE ATTORNEY GENERAL RESPONDENT

Coram: Mambilima, CJ, Wood and Kaoma, JJS.
On 10th July, 2018 and on 31st July, 2018

For the Appellants: Mr. W. Mwenya of Lukona Chambers.

For the Respondent: Ms. K.N. Mundia- Senior State Advocate

J U D G M E N T

Kaoma, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Margaret Simeza and 52 others v Society for Family Health - Appeal No. 155/2011**
2. **Chilanga Cement PLC v Kasote Singogo (2009) Z.R. 201**
3. **Peter Ng'andwe and others v ZAMOX Limited and Zambia Privatization Agency – SCZ Judgment No. 13 of 1999**
4. **Anthony Khetani Phiri v Workers Compensation Fund Control Board - SCZ Judgment No. 2 of 2003**

Legislation referred to:

1. **National Health Services Act, Cap 315, sections 11 and 16**
2. **National Health Services (Repeal) Act No. 17 of 2005, sections 3, 4, 5, 6 and 8**
3. **Employment Act, Cap 268, sections 26B and 35**
4. **Public Service Pension Act, Act No. 35 of 1996, section 2**

Circulars referred to:

1. **Public Service Management Division Circular No. B.22 of 2010**
2. **Personnel Division Circular No. B.19 of 1984**

Statutory Instruments referred to:

1. **Statutory Instrument No. 76 of 1997**
2. **Public Service Pensions (Public Service Prescription) Order 1999, Statutory Instrument No. 49 of 1999**
3. **Statutory Instrument No. 119 of 1997**
4. **National Health Services (Commencement) Order, Statutory Instrument No. 36 of 1996**
5. **National Health Services (Repeal) Act (Commencement) Order, Statutory Instrument No. 26 of 2006**

The evidence in the court below, as is relevant to this appeal, was that the appellants were employed by the Mansa Hospital Management Board in different capacities on diverse dates. The hospital management boards were established under **section 11(1)** of the **National Health Services Act, Cap 315 of the Laws of Zambia** for government hospitals or health services. The Act was passed in 1995 to facilitate health sector reforms. The main functions of the Act were to establish the Central Board of Health (CBOH) to oversee the implementation of health management boards and to provide the procedures for establishing management boards and to define their functions and powers.

In terms of **section 11(3)** of the Act, a management board established under **section 11(1)** was a body corporate and in terms

of **section 16,** the management board had power to employ such staff on such terms and conditions as it may determine in consultation with the Minister.

Initially, the health reforms led to improvements in the health sector and quality of health care. However, later, there seemed to have been a reversal in the situation prompting the enactment of the **National Health Services (Repeal) Act No. 17 of 2005** (the Repeal Act) which repealed the **National Health Services Act, Cap 315** and abolished the CBOH and hospital management boards.

The appellants claimed that they had become redundant by the repeal of Cap 315 and demanded to be paid redundancy pay. When the government refused to pay, they commenced an action by writ of summons, claiming inter alia, for a declaration that they were declared redundant by the dissolution of Mansa Hospital Board of Management, pursuant to the Repeal Act; that they be paid redundancy benefits in accordance with **section 26B** of the **Employment Act, Cap 268 of the Laws of Zambia**; and that they should be paid salaries and allowances from date of termination of employment up to and including the last day when benefits are paid in full in accordance with Section 26B.

The basis for using section 26B was that there were no written or approved conditions of service applicable to the appellants. Therefore, their employment contracts were oral in nature.

The respondent's case at the trial was that by the Repeal Act, the appellants and other former Board employees were transferred back to the Government. Reference was made to section 6(1) of the Act which provided for transfer of staff of the CBOH; section 8 which provided for winding up of management boards; and the **Public Service Management Division Circular No. B. 22 of 2010** which clarified the status of former health board employees.

The court below found as a fact that the appellants were employed by the respondent on diverse dates on Board conditions of service and other conditions of service stipulated in the **Personnel Division Circular No. 19 of 1984**, as spelt out in the staff appointment letter for one Happy Mapulanga (PW1).

The court also considered the evidence before it to the effect that when PW1 complained about leave benefits, he was advised, by letter dated 12th July, 2002 from the Human Resource Specialist that he did not qualify to take vacation leave/benefits as he did not have an appointment letter from the Public Service Commission and

could not benefit from the civil service conditions of service. Further, that the conditions of service for all Health Boards were not yet approved; and that Personnel Division Circular B.19 of 1984 did not apply to him as it only applied to non-civil service employees of Government.

The court then examined the appellants' argument that because the respondent had failed to provide signed conditions of service as envisaged in **Statutory Instrument No. 76 of 1997**, they were serving on oral contracts. The court found the said statutory instrument inapplicable to the appellants in the absence of evidence that any of them were transferred from the public service to the Mansa Hospital Management Board.

The court proceeded to discuss **Statutory Instrument No. 49 of 1999** which had prescribed as Public Service for purpose of the **Public Service Pension Act, No. 35 of 1996**, all Health Management Boards established under Cap 315 and opined that as at 30th April, 1999 when the statutory instrument was published, all the respondent's employees now served in the public service on public service conditions. The court found that the letter written to

PW1 misinformed him and that the appellants were not on oral contracts as their terms and conditions of service were in writing.

Additionally, the court examined sections 3, 4, 6 and 8 of the Repeal Act and observed that in terms of section 8, the Minister was to approve arrangements for the transfer or otherwise of the staff of management boards to Government and that the provisions of sections 3, 5 and 6 were to be applicable, with the necessary modifications, to the winding-up of the management boards on the coming into force of the statutory instrument.

The court concluded that the appellants' fate, whether or not they would continue working for the government or otherwise, could only be determined after relevant subsidiary legislation had been passed; and that the action was prematurely commenced.

On the argument that the appellants were entitled to be paid benefits in accordance with section 26B of the Employment Act, the court found that they were not employed on oral contracts. Regarding the argument that some employees were offered new employment and not transfers, the court restated that whether or not the appellants were transferred or retired abided the passing of

the relevant statutory instrument and refused that the appellants' employment was terminated in circumstances of redundancy.

The court noted that the appellants were differently circumstanced and could not maintain the same claim; that those who were dismissed, had died, deserted or resigned, could not claim for redundancy, even if it had applied. Finally, the court found that it was incompetent to make the declarations sought and dismissed all the claims and made no order for costs.

Dissatisfied with the decision, the appellants filed this appeal advancing the following five grounds:

1. **The Court below erred in law and fact by holding that the appellants' termination of employment did not amount to redundancy when the repeal of the National Health Services (Repeal) Act No. 17 of 2005 abolished the existence of the Mansa Hospital Board of Management.**

2. **The Court below erred in law and fact by holding that the appellants were employees in the public service by virtue of Statutory Instrument No. 49 of 1999 contrary to the evidence on record.**

3. **The Court below erred in law and fact in failing to make an order that the appellants were entitled to payment of terminal benefits pursuant to Section 26B of the Employment Act Chapter 269 of the Laws of Zambia in the face of overwhelming evidence that at the time of the dissolution of Mansa Hospital Board of Management there were no approved conditions of service for the appellants.**

4. **The Court below erred in law and fact by failing to recognise that the respondent and consequently the Government of the Republic of Zambia is bound by the provisions of the Employment Act, Chapter 269 of the Laws of Zambia.**

5. **The Court below gravely erred in law and in fact when it held to the effect that the action by the appellants was commenced prematurely in the face of evidence that as at the date of commencement of the action in the Court below, Mansa Hospital Board of Management, their employer, had ceased to exist.**

Counsel for the parties filed written heads of argument on which they relied. We have found it unnecessary to set out the arguments by the parties in much detail except to say that we have fully considered the arguments.

In ground 1, the kernel of the appellants' arguments is that since they were employed by the Mansa Hospital Board of Management, which existed as a legal person in law, separate from the Government, upon the dissolution of the board, their rights and privileges ceased to exist. That their fate was that of redundant employees and all that remained was payment of terminal benefits.

According to the appellants, the issue was not the jobs but the existence of the board as the employer. A number of statutory provisions were cited including section 11 of Cap 315 and section 8 of the Repeal Act. It was argued that there was no evidence that the Government had commenced the process of transferring the appellants into government and that at the time the board stopped to exist, the appellants had no written conditions of service.

In addition, section 26B of the Employment Act was cited, whose significance was stated in the case of **Margaret Simeza and 52 others v Society for Family Health**[1] in the following terms:

> **"... Redundancy is a form of employment termination. It happens when employers need to reduce their workforce. In broad terms, there are two main redundancy situations, namely closure of the business and reduction in the size of the workforce. Closure of business is a recognizable situation in which redundancy may arise."**

In ground two, the core of the arguments by counsel for the appellants is that Statutory Instrument No. 49 of 1999 was promulgated for the sake of benefits that accrue under the Public Service Pension Act but none of the appellants contributed to the Pensions Board. They were contributing to the National Pension Scheme Authority.

In respect of ground 3, the main argument by counsel for the appellants was that since the appellants were in employment at the time, without any written conditions of service, they qualified to be paid under section 26B of the Employment Act.

With regard to ground 4, it was argued by counsel that it was incumbent upon the court to have held the board and the Government liable for payment of terminal benefits as provided under section 26B. Further, that there being no formula for the

payment of redundancy packages to the appellants, the court was also duty bound to order such payment under **Statutory Instrument No. 119 of 1997** as it was the minimum standard set by law that made provision for payment of redundancy package.

Finally, concerning ground 5, it was contended that the operative dates for the appellants' claim lay between 2nd March, 1996 as specified in **Statutory Instrument No. 36 of 1996** and 10th March, 2006 as specified in **Statutory Instrument No. 26 of 2006**. Therefore, any separation from employment after 10th March, 2006 was irrelevant as at that date, the appellants were declared redundant by operation of the law. However, counsel agreed that those appellants, who had left employment before the dissolution of the board, may not be entitled to redundancy pay.

In response to ground 1, counsel for the respondent submitted that the appellants could not fall under the two categories of redundancy as defined by section 26B of the Employment Act since they were transferred back to the government from the Mansa Hospital Board of Management upon its dissolution pursuant to the Repeal Act which abolished the existence of the CBOH and all Provincial and District Health management Boards.

On the court's conclusion that the appellants' fate could only be determined after the relevant subsidiary legislation had been passed, it was argued that the court should have taken into account the evidence of DW1 that the appellants were treated in accordance with section 6(1) of the Act and that the Government did facilitate the transfer back to the public service of those who were at the board at the time of dissolution.

Counsel for the respondent also quoted Circular B.22 of 2010 which clarified that all former board employees were deemed to have been transferred to the public service in line with the provisions of the Repeal Act effective 10th March, 2006 when the Act came into operation. It was argued that the affected appellants were not made redundant because they did not lose their jobs as they were transferred to the public service. The case of **Chilanga Cement PLC v Kasote Singogo**[2] was cited where we held that redundancies are planned activities and being a planned activity, the employee needs to be prepared for the loss of a job.

Further, counsel agreed with the court below that since the appellants were differently circumstanced, redundancy could not apply to some of them.

In response to ground 2, counsel for the respondent submitted that the status of employment of the appellants was categorically clarified by Circular B.22 of 2010. In ground 3, counsel's response was that section 26B of the Employment Act only applies to oral contracts and that the appellants were not on oral contracts.

As to ground 4, the response by counsel was that the ground is misconceived because nowhere in the judgment, did the court say that it did not recognise that the Government is bound by the provisions of the Employment Act. Finally, in response to ground 5, counsel merely restated the arguments in ground 1 and did not comment on the court's decision that the matter was commenced prematurely. We were urged to dismiss the appeal with costs.

In reply, it was contended, in ground 1 that there is no evidence to show that the appellants were transferred from the board to another institution. That the documents at pages 84 to 88 of the record refer to new appointments in the Ministry of Health and no statutory instrument has been issued concerning the fate of the appellants in terms of section 8 of the Repeal Act.

Regarding Circular B.22 of 2010, it was argued that the circular did not change the appellants' status of being declared

redundant by operation of the law and was issued four years after the dissolution of the board, to rectify the non-issuance of a statutory instrument.

It was further contended that the circular is inferior to and cannot override the provisions of **section 35(1)** of the Employment Act which proscribes the transfer of rights arising under any written contract of service from one employer to another unless the employee consents to the transfer; and that it is also contrary to the case of **Peter Ng'andwe and others v ZAMOX Limited and Zambia Privatization Agency**[3] where we held that if an employer varies the basic conditions without the consent of the employee, then the contract of employment terminates.

As to ground 2, it was submitted that the court misinterpreted the meaning of Statutory Instrument No. 49 of 1999 which applies to classification of institutions as public service for purposes of the Public Service Pension Act to mean that employees under the prescribed institutions were employed under public service conditions. Regarding ground 3, counsel referred to the letter from the Human Resource Specialist at the CBOH stating that conditions

of service for all Health Boards were not yet approved to push the argument that the appellants were serving on oral contracts.

In ground 4, counsel replied that the Government's failure to recognise that the board was an independent legal person by enforcing Circular B.22 on the appellants when they were not government employees shows a disregard of the Employment Act.

In respect of ground 5, counsel reiterated that there was no evidence showing that any of the appellants was transferred to the public service. We were urged to allow the appeal with costs.

We have considered the record of appeal and the arguments by counsel. The main issue raised by the appeal is whether the appellants became redundant upon the repeal of the **National Health Services Act**, and the dissolution of hospital management boards including Mansa Hospital Board of Management.

It is common cause that the Mansa Hospital Board of Management was a statutory body endowed with the power to employ staff on its own terms and conditions and that the appellants were employed by the Mansa Hospital Board of Management. It is also common ground that the hospital

management boards were dissolved by the **National Health Services (Repeal) Act, 2005** with effect from 10th March, 2006.

The question the appellants have raised in ground 1 was also raised in the case of **Anthony Khetani Phiri v Workers Compensation Fund Control Board**[4] which was cited by counsel for the appellants in the court below in relation to Circular B.22 of 2010 but which the court did not discuss. The appellants' argument was that the case was distinguishable because none of the appellants was transferred pursuant to the above circular. In that case, the appellant was employed by the Workers Compensation Fund Control Board created under the Workers Compensation Act, Cap 271 of the Laws of Zambia. Cap 271 was later repealed by the Workers Compensation Act No. 10 of 1999, to merge the functions of the Workers Compensation Fund Control Board and the Pneumoconiosis Compensation Board which was created under the repealed Pneumoconiosis Act, Cap 217 of the Laws of Zambia.

Now, under section 149 (1) of Act No. 10 of 1999, employees could be transferred from the dissolved Boards to the new Workers Compensation Board and the appellant had advised his Board on

the mechanism of such transfers. Upon his advice, the transferred employees had to sign signifying consent to the transfer. The appellant, by a letter dated 30th November, 2000 was transferred 'laterally' to the new Workers Compensation Fund Control Board in the same capacity as he was in the dissolved Board but he turned down the transfer. He had argued at the trial that his services should be deemed to have been terminated by redundancy because his former employer ceased to exist. The trial court held that the extinction of his employer was technical.

On appeal, he attacked this finding by the trial court. While we agreed that the repeal of Cap 271 brought in a new entity under the same one, it was clear to us that the new board did not cease to carry on the business for which the appellant was employed and that the appellant kept the same job since he was to be transferred laterally. In refusing to fault the trial judge for finding that the extinction of the old Board was technical, we stated that:

> **"A 'transfer' does not connote a break in employment. ... The use of the word 'transfer' persuades us to agree that employment in that case was continuous. As was held in the case of Secretary of State for Employment v Globe Elastic Thread Co. Ltd (1979) 2 All ER 1077 ..., a person's employment during any period should be presumed to have been continuous unless the contrary was proved."**

Coming back to this case, and applying our decision in the above matter, we do not agree with the spirited but misguided argument by counsel for the appellants that the mere repeal of the **National Health Services Act**, **Cap 315** by the **National Health Services (Repeal) Act** brought about a redundant situation.

Counsel for the appellants conceded at the hearing of this appeal that the appellants who were in employment at the material time did not lose their jobs and that they continued to work in the same positions and on the same conditions of service as they did under the board. Indeed, this is in line with DW1's testimony that none of the appellants lost their jobs as a direct consequence of dissolving the Mansa Hospital Board of Management because they were all transferred to Government and continued to work in the same positions and on the same conditions.

It is clear to us that there was provision in section 8 of the Repeal Act for transfer of the staff of management boards to the Government. For clarity, **section 8** provided as follows:

> **"(1) The Minister shall in consultation with the Secretary to the Treasury, by statutory instrument-**
>
> **(a) provide for the winding up and dissolution of management boards;**

(b) provide for the transfer of any property, rights, liabilities or obligations of a management board to the Government without further assurance on such terms and conditions as may be specified in the statutory instrument;

(c) Approve arrangements for transfer, or otherwise, of the staff of management boards to the Government; and

(d) Provide for such other matters as are connected with or incidental to the winding up of the affairs and dissolution of a management board."

For sure, a statutory instrument was not issued as required by this provision and no transfer letters were written to the appellants. The letters written to some of them by the Ministry of Health in 2009, seemed to offer them new employment. However, as explained by counsel for the respondent at the hearing of the appeal, the winding-up and dissolution of management boards; the transfer of property, rights, liabilities or obligations of management boards to the Government; and the transfer of the staff of the management boards to the Government still went ahead.

It has not been argued by the appellants that the management boards were never dissolved because of the lack of a statutory instrument. In the same way, it cannot be seriously argued that the employees of the management boards were never transferred to Government because there was no statutory instrument.

In our view, the appellants' argument that their employment could not be continuous as they were offered new employment in the Government is untenable because they failed to prove that there was a break in employment. As explained by counsel for the respondent, the new job offers were made three years later in the restructured Ministry of Health. We have no doubt that the affected appellants were moved laterally to Government with similar title, pay and responsibility.

It must be understood that the management boards were running government hospitals on behalf of the Government and that after the dissolution of the management boards, the Ministry of Health continued to run the hospitals and to carry on the business for which the appellants were employed. To borrow words from the **Anthony Khetani Phiri**[4] case, the dissolution of the hospital management boards was technical.

Further, although Circular B.22 of 2010 was issued after the commencement of this matter; its purpose was merely to clarify the status of former health board employees and their placement in the restructured Ministry of Health.

In our view, the conclusion by the court below that the appellants' fate could only be determined after the relevant subsidiary legislation had been passed overlooked clear evidence that the Government did facilitate the transfer of the affected staff to the public service at the time of dissolution of the management boards. However, we are satisfied that the court reached the correct decision when it rejected the contention that the appellants' employment was terminated in circumstances of redundancy.

In addition, for those appellants who resigned or were dismissed or died before the dissolution of Mansa Hospital Board of Management, such as PW1, they had no locus standi and should not have joined the proceedings.

In all, ground 1 must fail for lack of merit and with it the appellants' argument in grounds 3 and 4 that they qualified to be paid redundancy or terminal benefits as provided for under section 26B of the Employment Act.

Suffice to add, for purposes of clarity, that we agree with the conclusion by the court below that the appellants were not on oral contracts of service as their terms and conditions of service were in

writing. The letters of staff appointment for PW1 and one Eunice Mwila at pages 97 and 257 of the record of appeal, dated 24th January, 1996 and 11th February, 1997 respectively show that they were employed on the Board Conditions of Service stipulated therein, and other conditions of service as were stipulated in Personnel Division Circular B.19 of 1984.

Certainly, in the letter dated 12th July, 2002 PW1 was informed that conditions of service for all the health boards were not yet approved and that Personnel Division Circular B.19 of 1984 did not apply to him. However, counsel for the appellants conceded at the hearing of this appeal that this letter was written six years after PW1 was employed; that PW1 enjoyed the conditions of service offered to him in his staff appointment letter, both before and after the letter of 12th July, 2002 and so did all the affected appellants.

However, we do not agree with the reasoning by the court below that the appellants served in the public service by virtue of Statutory Instrument No. 49 of 1999. The said statutory instrument was passed in exercise of the powers contained in section 2 of the Public Service Pension Act and the health management boards were

prescribed as public service for purposes only of that Act. Therefore, the finding by the court below that the appellants started enjoying public service conditions as at 30th April, 1999 when Statutory Instrument No. 49 of 1999 was published was wrong and is set aside. We find merit in ground 2 of the appeal.

Ground 5 equally has merit. We do not agree with the court below that the action was commenced prematurely. The appellants' first claim was for a declaration that they were declared redundant by the dissolution of the Mansa Hospital Board of Management, their employer pursuant to the **National Health Services (Repeal) Act, 2005**. At the time the action was commenced, the said Act had already come into effect.

Besides, the court had recognised that the appellants were working for the government when it said that whether or not they would continue working for the government or otherwise abided the passing of relevant subsidiary legislation. The decision that the action was commenced prematurely was wrong and we set it aside.

In all, the appeal has substantially failed because the facts of the case show that none of the appellants were declared redundant

by the repeal of **National Health Services Act, Cap 315**. Therefore, we dismiss the appeal with costs to the respondent.

I.C. MAMBILIMA
CHIEF JUSTICE

A.M. WOOD
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT OF ZAMBIA