

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

APPEAL NO. 003/2016

BETWEEN:

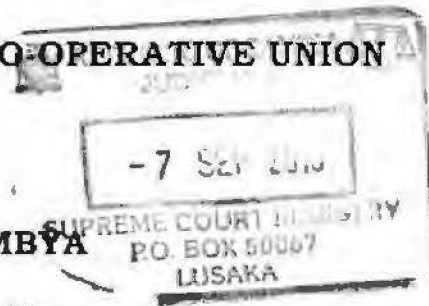
CENTRAL PROVINCE CO-OPERATIVE UNION

APPELLANT

AND

ALISALA AISON MULAMBYA

RESPONDENT



Coram: Mambilima, CJ, Malila and Musonda, JJS
on 4th and 7th September, 2018

For the Appellant: Mr. O. Sinkamba of Messrs Sinkamba Legal Practitioners

For the Respondent: Mr. Chanda Chilufya, appearing on behalf of Mr. E. Chulu of Messrs Enias Chulu Legal Practitioners

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court.

A. CASES REFERRED TO:

1. Barclays Bank Zambia PLC v. Zambia Union of Financial and Allied Workers (2007) Z.R. 106
2. Chilanga Cement PLC v. Kasote Singogo (2009) Z.R. 122

B. LEGISLATION REFERRED TO:

The Employment Act, Cap. 268 of the Laws of Zambia

1.0 INTRODUCTION

1.1 The appellant has approached us to contest the lower court's determination to the effect that the respondent had, as the appellant's former employee, been the subject of a redundancy exercise and, consequently, was entitled to benefit from the statutory respite which the Employment Act, Cap. 268 affords to any (eligible) employee who is caught up in such a predicament.

2.0 HISTORY AND BACKGROUND FACTS/CIRCUMSTANCES

2.1 The history and background facts and circumstances to which the present appeal is owed revolve around a narrow compass and can be recounted with ease.

2.2 The respondent had been employed as a management employee of the appellant from 10th December, 1990 up to 31st March, 1998 when, as we shall demonstrate later on in this judgment, he left the appellant's employ of his own accord.

2.3 During the period of his employment as aforesaid, the respondent had been serving under the appellant's conditions of service for Management employees.

- 2.4 By a letter dated 6th June, 1997, the respondent sought to have the appellant's Board of Directors retire him early.
- 2.5 Concomitantly with his request to be retired early, the respondent also sought to have part of his early retirement benefits applied towards the purchase of the appellant's house which the respondent had been living in by virtue of and as an incident of his employment.
- 2.6 By a letter to the respondent dated 27th September, 1997, the respondent varied his earlier application as stated in 2.4 above to that of seeking to be voluntarily displaced or retrenched. In the same letter, the respondent indicated that the alteration of his application in the manner indicated above was:

"... in line with the advice which [the appellant's General Manager allegedly] gave to all Head Office Senior Management staff at a special management meeting [held] on Tuesday, 16th September, 1997..."

Additionally, the respondent reiterated his desire to have the appellant sell him the house which we referred to above.

2.7 By letter dated 3rd February, 1998 the appellant's General Manager reacted to the respondent's request as alluded to above. That letter was expressed in the following terms:

"Dear Mr. Mulambya,

*Re: APPLICATION FOR VOLUNTARY DISPLACEMENT
AND PURCHASE OF A UNION HOUSE*

I am writing in response to your letters dated 6th June, 1997, 27th September, 1997, 17th November, 1997 and 22nd January, 1998 on the subject matter stated above.

The Board of Directors considered your requests during the sittings of 4th November, 1997 and 16th January, 1998. Subsequently, it was resolved that your request for voluntary displacement be accepted. Therefore, you are to serve for two (2) months as notice period commencing on 1st February, 1998 up to 31st March, 1998.

Further, it was also resolved to sell you house number 58, Natuseko Site and Service, at the cost [sic.] of K7 million which shall be part-payment by the Union towards your terminal benefits. The balance, less your indebtedness, shall be paid to you within a period of not more than nine (09) months starting from 1st April, 1998.

By copy of this letter, the Finance and Administrative Manager is hereby requested to calculate your total package and advise you accordingly."

2.8 Following the respondent's request to have the appellant confirm as to what he could expect by way of his net terminal

benefits, the latter advised him (by letter dated 19th October, 1998) that his net benefits, inclusive of pension contributions, amounted to K1,562,028.66.

2.9 On 27th November, 1998, the respondent's advocates wrote a letter to the appellant demanding payment of the respondent's '*confirmed ... terminal benefits...*' in the sum of K1,562,028.66. This letter was followed by two subsequent reminders dated 18th December, 1998 and 6th January, 1999 in which the respondent's advocates were demanding the recovery of their client's K1,562,028.66 '*outstanding terminal benefits.*'

2.10 On 21st January, 1999 the respondent, acting by his advocates, varied the nature and quantum of his demand against his former employer by seeking to recover an additional sum of K5,297,004.00 representing what was expressed as his unpaid monthly wages for the period April to December, 1998. This additional sum arose as a result of the respondent's decision to invoke the provisions which are now contained in Section 26 B (3) of the Employment Act, Cap. 268 of the Laws of Zambia which enacts as follows:

“An employee whose contract of service has been terminated by reason of redundancy shall-

(a) be entitled to such redundancy payment as agreed by the parties or as determined by the Minister, whichever is the greater; and

(b) be paid the redundancy benefits not later than the last day of duty of the employee provided that where an employer is unable to pay the redundancy benefits on the last day of duty of the employee, the employer shall continue to pay the employee full wages until the redundancy benefits are paid.”

2.11 For completeness, the respondent's advocates indicated in their demand letter of 21st January, 1999 that the appellant had been unable to settle the respondent's “... *full retrenchment benefits for ... nine months*” and that, in consequence, the respondent had become entitled to the relief which the statutory provision cited above affords.

2.12 By a letter dated 25th January, 1999, the appellant contested the respondent's demand founded on Section 26B of the Employment Act, Cap. 268 of the Laws of Zambia thereby leaving the respondent with the last option of proceeding to court.

3.0 THE COURT ACTION

- 3.1 Following the parties' failure to resolve the matter *ex-curia*, the respondent mounted an action in the court below seeking, in the main, the recovery of the K1,562,028.66 earlier mentioned by way of '*outstanding terminal benefits*' together with full wages and all allowances from the date of his exit from the appellant up to the date of payment of his full benefits.
- 3.2 For its part, the appellant pleaded in its defence that a value to the tune of K12,500,000.00 in the form of a house had been extended to the respondent by the appellant on the basis of a mistaken belief that the former was entitled to K12,389,154.25 on account of retrenchment benefits when, in fact, he had not been so entitled. The appellant's contention in the court below was that the respondent was never retrenched nor declared redundant but had voluntarily retired. The appellant accordingly counter-claimed the said sum of K12,500,000.00 by way of seeking to have the respondent yield vacant possession of the house, being No. 606 A, Nehru Crescent, Kabwe, together with all rent for the

period that the respondent had remained in occupation of the house in question.

4.0 TRIAL AND JUDGMENT OF THE COURT BELOW

- 4.1 Following the granting of the respondent's application to have the matter tried without pleadings on the basis that summary judgment had since been entered by the District Registrar on account of the K1,562,028.66 undisputed amount, trial subsequently ensued before the court below in respect of the moneys which the appellant was contesting, namely, those which had been founded on the provisions of Section 26B of the Employment Act as earlier explained.
- 4.2 After considering the evidence and submissions which the parties had respectively placed before him, the learned trial judge found, as fact, that the respondent had, pursuant to his own request, been declared redundant and that the appellant had proceeded to compute a redundancy package for the respondent on the basis of Clause 17.3 of the Conditions of Service under which the respondent had been serving and which provided as follows:

“17.3 An employee who shall be affected by Section 17.1 will receive the redundancy/retrenchment package as follows:

(b) An employee who has worked for more than five (5) years service shall receive five (5) months salary for each year completed or part thereof.”

4.3 Having regard to his findings as set out above, the learned trial judge accordingly concluded that Section 26B (3) of the Employment Act, Cap. 268 applied to the respondent to the extent that the appellant had not disputed the fact that the respondent was not paid his redundancy benefits on his last day of duty, namely, 31st March, 1998. The judge accordingly entered judgment in favour of the respondent whereby the appellant was directed to pay the respondent his full wages until his full benefits were paid to him.

5.0 THE APPEAL AND THE GROUNDS THEREOF

5.1 The appellant was not pleased with the judgment of the court below and has now sought our intervention on the basis of the following grounds:

“1. The learned High Court Judge misdirected himself both in law and in fact by holding that the Respondent was

declared redundant against the weight of evidence on record.

- 2. The learned High Court Judge misdirected himself in both law and fact when he overlooked the amended defence and specific defences raised by the appellant in the court below.**
- 3. The learned High Court Judge erred in both law and fact when he overlooked the fact that the plaintiff was paid all his K1,562,028.00 which was not disputed.**
- 4. Any further grounds as may appear appropriate after perusal of record."**

5.2 At the hearing of the appeal, counsel for either party confirmed having filed their respective Heads of Argument to support the positions which they had respectively taken with respect to the issues at play in the appeal.

5.3 An issue which we feel inclined to immediately displace from further consideration is the projection, in the appellant's memorandum of appeal, of the fictitious ground numbered 4 above. As we have repeatedly said, this purported 'ground' is not, in the eyes of the Rules of this court, a valid ground of appeal at all. Accordingly, we are treating this appeal as having been founded on three grounds.

6.0 ARGUMENTS ON APPEAL

- 6.1. Counsel for the appellant canvassed a variety of arguments around the three grounds which we have identified above. Learned counsel started off by indicating to us that, for the purpose of his arguments, grounds one and two had been consolidated into ground one while the third ground was to be argued as the second ground.
- 6.2 For completeness, Counsel for the appellant also filed Heads of Argument in response to the appellant's Heads of Argument.
- 6.3 As noted above, counsel for the appellant canvassed a variety of arguments in support of the grounds of appeal, which ranged from the assertion that the respondent never retired and was never declared redundant by the appellant, to the assertion that he voluntarily exited from the employ of the appellant on terms which were outside his terms and conditions of employment. The fate of this appeal, however, has to turn on the view we take in relation to the narrow issue as to whether or not, in the light of the undisputed fact that the respondent had been employed under a written contract

of employment and had been serving under written terms and conditions of employment, the whole basis of the judgment now under attack, namely Section 26B of the Employment Act, Cap. 268 is legally tenable.

- 6.4 Learned counsel for the appellant, for his part, contended in his heads of argument that Section 26B of the Employment Act, Cap. 268 of the Laws of Zambia could not be properly invoked by an employee, such as the respondent, who had been serving pursuant to written conditions of service which also covered redundancy.
- 6.5 To drive his point home, the appellant's counsel cited our decision in **Barclays Bank Zambia PLC v. Zambia Union of Financial and Allied Workers**¹ in which we made the point that Section 26B of the Employment Act, Cap. 268 could not be properly invoked in relation to an employee who had been employed pursuant to a written contract.
- 6.6 Reacting to the above contention, counsel for the respondent argued in his heads of argument that Section 26B (2) (a), (b) and (c) of the Employment Act, Cap. 268 of the Laws of Zambia did not apply to the respondent by reason of the fact

that, as a non-unionised employee, he could not have been affected by the said provision to the extent that that provision envisaged the involvement of or consultation with an affected employee's union representative before such employee's redundancy can be effected. However, the respondent's counsel acknowledged that Section 26B (1) (a) and (b) did apply to the respondent.

6.7 At the hearing of the appeal, Mr. Sinkamba, the learned counsel for the appellant, reiterated that the respondent had been serving under a written contract while the terms and conditions under which he was serving were also written.

6.8 Learned counsel also confirmed the fact that the respondent was paid all the money which he had been entitled to in the way of his benefits save for the unpaid wages or salaries which he had been claiming on the faith of Section 26B of the Employment Act, Cap. 268.

7.0 CONSIDERATION OF THE APPEAL AND DECISION

7.1 We have examined the judgment of the court below, the evidence which the two parties placed before the trial court and the arguments which were canvassed in this court on

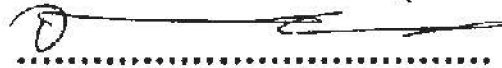
behalf of the parties in regard to the narrow issue with which we are primarily concerned and express our gratitude to counsel involved for their respective and useful exertions.

- 7.2 Given the documentary evidence which was deployed before the court below, it is beyond dispute that the respondent was serving under a written contract and written terms and conditions of employment. In point of fact, sizeable portions of the appellant's Conditions of Service for Management staff under which the respondent was serving formed part of the record relating to the proceedings in the court below.
- 7.3 According to those conditions of service, redundancy was captured in Clause 17. In fact, and as we noted early on in this judgment, the trial judge did interrogate the redundancy Clause in question in his judgment which is now being assailed in this court.
- 7.4 In **Barclays Bank Zambia PLC v. Zambia Union of Financial Institutions and Allied Workers and Others**¹ we made the point that, Section 26B of the Employment Act, Cap. 268 (which contains detailed provisions on employment termination through redundancy) only applied to employees

who had been engaged on oral contracts. Two years later, we reinforced the same observation in our decision in **Chilanga Cement PLC v. Kasote Singogo**².

- 7.5 It should not be doubted, indeed, that what we said in **Barclays Bank Zambia PLC**¹ with respect to the non-applicability of Section 26B of the Employment Act, Cap. 268 to employees who are employed on written employment contracts has been repeated or restated in numerous other cases ever since we made that seminal pronouncement in that case.
- 7.6 For the avoidance of doubt, the applicability or otherwise of Section 26B of the Employment Act, in the manner we pronounced in the **Barclays Bank PLC**¹ case, remains immutable whether or not an employee is unionised or non-unionised.
- 7.7 Needless to say, the invocation of Section 26B of the Employment Act in favour of the respondent by the trial judge in the court below constituted a blatant misdirection.

7.8 In the result, we allow this appeal and set aside the judgment of the court below. The arising costs will follow the event and should be taxed if not agreed.



**I.C. MAMBILIMA
CHIEF JUSTICE**



**M. MALILA
SUPREME COURT JUDGE**



**M. MUSONDA, SC
SUPREME COURT JUDGE**