IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2015/HP/A013

BETWEEN:

LEOPARD INVESTMENT COMPANY LIMITED **APPELLANT**

AND

JACKSON TEMBO **RESPONDENT**

BEFORE HONOURABLE MRS. JUSTICE P.C.M. NGULUBE ON 20TH DAY OF NOVEMBER 2015

FOR THE APPELLANT : **Mrs. Chanda, Messrs AM Wood and Company**
FOR THE RESPONDENT : **In person**

J U D G M E N T

Cases referred to:

1. **Council of the University of Zambia and Another v University of Zambia and Allied Workers Union (2003) ZR 24**
2. **Contract Haulage v Kamayoyo (1982) ZR 13**
3. **The Alletta (No.2) Groen and Another vs Owners of the Ship England and Others [1972] 2 ALL ER 414**
4. **R.R. Sambo and Others vs Paikani Mwanza (SCZ Judgment no.16 of 2000)**
5. **Jennifer Nawa vs Standard Chartered Bank Zambia Plc, S.C.Z Judgment number 1 of 2011**

Legislation referred to:

1. ***The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia***
2. ***The Minimum Wages and Conditions of Employment Act, Chapter 276 of the Laws of Zambia***
3. ***Statutory Instrument number 2 of 2011, the Minimum Wages and Conditions of Employment (General) Order, 2011***
4. ***Statutory Instrument number 46 of 2012, the Minimum Wages and Conditions of Employment (General) (Amendment) Order, 2012***

This is an Appeal against the Judgment of the Learned Magistrate dated 16th September, 2014 where the Respondent was awarded underpayments on his separation benefits for the period July, 2012 to August, 2013 pursuant to the Minimum Wages and Conditions of Employment (General) Order, 2012.

Dissatisfied with the Judgment, the Appellant appeals on the following grounds;

1. That the Learned Honourable Magistrate misdirected herself in law and in fact when she held that the law applicable to the Plaintiff and the Defendant with regard to wages was the Minimum Wages and Conditions of Employment Act, Chapter 276 of the Laws of Zambia in the face of evidence to the effect that there was a Collective Agreement between the parties and Annexure B of the Collective Agreement thereof [sic], which provided for the wage structure, was valid and in force.

2. That the Learned Honourable Magistrate misdirected herself in law and in fact when she awarded the Plaintiff dues for alleged underpayments for the period from July 2012 to August 2013.

3. That the Learned Honourable Magistrate misdirected herself in law and in fact when she ordered that the Defendant do pay all the costs.

In the Heads of Arguments filed by the Appellant it was advanced on ground one that according to section 2 (d) (i) of the Statutory Instrument no.46 of 2012, the Respondent ceased to be regulated and governed by the Statutory Instrument on Minimum Wages due to the existence of a valid Collective Agreement. That through the process of collective bargaining between Zambia Farm Employers Association (ZFEA), representing the Appellant and National Union of Plantation, Agricultural and Allied Workers (NUPAAW), representing the Respondent, there existed a Collective Agreement dated 1st July, 2008 which governed the relationship between the Appellant and the Respondent.

That in line with **Council of the University of Zambia and Another v University of Zambia and Allied Workers Union**[1] and **section 71 (3) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia**, the said Collective Agreement was approved and registered. Further that the Subordinate Court was not competent to challenge the validity of the Collective Agreement because a party aggrieved with the exercise of a public body's statutory power must do so by way of Judicial review before a competent court.

Further that according to **Contract Haulage v Kamayoyo**[2] and **section 71 (3) of the Industrial and Labour Relations Act** , the Collective Agreement was binding on the parties.

In support of ground two, it was advanced that the Respondent's dues were suppose to be calculated according to the Collective Agreement and not based on the Statutory Instrument on Minimum Wages. That according to the Addendum of the Collective Agreement, the Collective Agreement was in force and therefore it was contended that the Learned Magistrate erred when she awarded dues to the Respondent in accordance with the Statutory Instrument on Minimum Wages.

In support of ground three, the Appellant relied on the cases of **The Alletta (No.2) Groen and Another vs Owners of the Ship England and Others**[3] and **R.R. Sambo and Others vs Paikani Mwanza**[4]. It was argued that the order for costs against the Appellant was a misdirection because there were serious questions which the Learned Magistrate had to determine and that the Respondent was not successful on some of his claims.

The Respondent did not file any written Heads of Arguments in reply.

When the Appeal came up for hearing, Learned Counsel for the Appellant relied on the Notice of Appeal, Record of Appeal and Heads of Argument. She further submitted that the lower Court misdirected itself when it applied the Statutory Instrument number 46 in the light of a valid Collective Agreement between the parties.

That contrary to the finding that the Collective Agreement had expired, Clause 26 which spelt out the wage structure was excluded from the duration. Further that the Collective Agreement was still in force according to section 71 of the Industrial and Labour Relations Act.

That having been approved by the Minister through Statutory Power an aggrieved party can only challenge such a decision through the process of Judicial Review with the competent Court being the High Court.

It was submitted that for this reason, the lower Court should not have awarded the Respondent his claim based on Statutory Instrument number 46. Learned Counsel prayed that the decision of the lower court be overturned.

In response, the Respondent submitted that he had brought an action against the Appellant in the lower court because he was not paid anything on his dismissal. That the Appellant has not paid him because of the Appeal.

I have carefully considered the grounds of Appeal, the Heads of Argument, the respective submissions made as well as the Judgment of the lower Court. In addressing grounds one and two, the key questions to determine are;

1. Whether the Collective Agreement ousted the provisions of the Minimum Wages and Conditions of Employment (General) (Amendment) Order, 2012.

2. Whether there was a valid Collective Agreement in force.

The Minimum Wages and Conditions of Employment (General) (Amendment) Order 2012 as read together with Statutory Instrument Number 2 of 2011 provides as follows;

> **"(1) This Order shall apply to employees as specified in the Schedule but shall not apply to employees;...**
>
> **(d) in any occupation where-**
>
> **(1) wages and conditions of employment are regulated through the process of collective bargaining conducted under the Industrial and Labour Relations Act; or**
>
> **(2)employee- employer relationship are governed by specific contracts attested by a proper officer;**
>
> **and such conditions shall not be less favourable than the provisions of this Order."**

It is clear from this provision that the Order does not apply to employees whose wages and conditions of service are stipulated in a Collective Agreement or Contract provided that such conditions are not less favourable than the ones set down by the Order. Further to this statutory provision the Supreme Court in an earlier decision of **Jennifer Nawa vs Standard Chartered Bank Zambia Plc**[5] have stated obiter that the provisions of the Minimum Wages and Conditions of Employment (General) Order shall not have retrospective effect

by invalidating conditions of service that were perfectly legal before the enactment of the Order. The Supreme Court put it as thus;

> **"If at all it was assumed and accepted that the Statutory Instrument in question applied to the Respondent's pension scheme by implication, the kernel of the argument by the appellant seems to be that until the passing of the Statutory Instrument in 2002, the Respondent's pension scheme was within the confines of the prescribed minimum wages and conditions of service. It picked up illegality along the way and became offensive sometime in 2002 when the Statutory Instrument was passed. In our view, such an argument is flawed. It is trite law that unless expressly stated, a law does not operate retrospectively. It could not therefore have been the intention of the framers of this law to invalidate agreements that were perfectly legal at the time that they were executed..."**

Based on these authorities, employees whose conditions of service are laid down in a Collective Agreement will only be exempt from the dictates of the Minimum Wages and conditions of Employment Order if the Collective Agreement provides better conditions and where the Collective Agreement took effect before the enactment of the particular Minimum Wages and Conditions of Employment Order.

In respect to the validity of the Collective Agreement in issue, Section 68 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia provides that;

"Every collective agreement shall contain clauses, in this part referred to as statutory clauses, stipulating-

(a) the date on which the agreement is to come into effect and the period for which it is to remain in force; and

(b) the methods, procedures and rules for reviewing, amending, replacing or terminating the collective agreement."

The Collective Agreement in the Appeal at hand purports to have been executed on 1st July, 2008 and was to run for a term of three years, which is up to 31st June, 2011. The Collective Agreement had thus lapsed way before the Respondent was dismissed. It was argued that Annexure B provided for the wage structure from 1st March, 2013 to 28th February, 2014 in line with paragraph 26 of the lapsed Collective Agreement.

I find difficulty in seeing how this helps the Appellant's case, in that, the exemption under section 2 (d) of the Minimum Wages and Conditions of Employment 2012 only relates to Collective Agreements. The Collective Agreement between the parties in this matter had lapsed on 31st June, 2011

and there was no valid Collective Agreement on record. Further, the Wage Structure was purportedly executed sometime in March, 2013 which is way after the Collective Agreement had lapsed.

There having been no valid Collective Agreement, the only recourse that an employee will have is the Minimum Wages and Conditions of Employment (General) Order which stipulates the Minimum working conditions that an employee can enjoy. I am further fortified in this position by the fact that the Wage Structure the Appellant relies on as proof of existence of a valid Collective Agreement, which argument I categorically reject, was executed when the Minimum Wages and Conditions of Employment (General) Order was already in effect and being that the Wage Structure provided for lesser wages than the minimum wages stipulated, the exemption envisaged under section 2 (d) could not extend to it. Thus I uphold the findings of the Lower Court that the Collective Agreement had lapsed and the Minimum Wages and Conditions of Employment (General) (Amendment) Order of 2012 as read together with the Minimum Wages and Conditions of Employment (General) Order of 2011 applied to the Respondent.

While the lower Court ordered that the Respondent was only entitled to under payments from the day that Statutory Instrument number 46 came into force, I am of the view that the operative date ought to be 31st June, 2011 when the Collective Agreement lapsed and Statutory Instrument number 2 of 2011 was already in force. The said Statutory Instrument number 2 of 2011 provides for

K700 as the Minimum Wage. There having been no Collective Agreement with better wages than stipulated by Statutory Instrument number 2 of 2011, its provisions applied.

Therefore, the Respondent is entitled to the difference between the stipulated minimum of K700 and the wage that he was getting from 31st June, 2011 when the Collective Agreement in place lapsed till he was dismissed on 12th September, 2013. I remit the question of the exact amount due to the Respondent for determination by the Learned Deputy Registrar.

The third ground of Appeal related to the costs that the Appellant was ordered to pay. It was advanced that as not the entire claim of the Respondent was successful, it cannot be said that the event was in favour of the Respondent for them to be entitled to costs. Further that there were serious questions which had to be determined in the matter.

In **Costa Tembo v Hybrid Poultry Farm (Z) Limited (SCZ Judgment number 13 of 2003)**, the Supreme Court stated as follows;

> **"We are alive to the principle that a successful litigant is entitled to his costs. After noting that in his appeal, the Respondent had partially succeeded, we made no order on costs."**

The decision set down the principle that where a party does not succeed in their claim entirely, each party is to bear its own costs. It follows that the third ground of appeal succeeds and I accordingly quash the Order of Costs pronounced by the Lower Court.

Based on the foregoing, the Appeal partially succeeds.

Each party to bear its own Costs.

Dated this 24th day of November, 2015

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P. C. M. NGULUBE

HIGH COURT JUDGE