

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2013/HP/0311

(Civil jurisdiction)

BETWEEN:

CHISANGA MUSHILI MULENGA

PLAINTIFF

AND

ZESCO LIMITED

DEFENDANT

Before: Hon. Judge B.M.M. Mung'omba on this 5th day of February, 2015.

For the Plaintiff: Mr. A. Mbambara of Messrs A. Mbambara Legal Practitioners

For the Defendants: Mr. A. Sike; In house Counsel

JUDGMENT

Cases referred to:

- 1. *Dunlop Tyre Co.-V-Selfridge (1915) Ac 847***
- 2. *Lovell and Christmas Limited vs. Wall (1911) WLR 896***
- 3. *Bank of India vs. K. Mohanda (2009) A.C. 1942***
- 4. *Indo Zambia Bank Limited vs. Mushaukwa Muhanga (2009) Z.R. 266***
- 5. *The Attorney General vs. Moyo [2007) Z.R 267.***
- 6. *General Nursing Council of Zambia vs. Mbangweta (2008) Z .R Vol 2 105.***

Legislation referred to:

- 1. *Act No.1 of 2004, an Amendment to the Income Tax Act.***

2. National Pensions Scheme Act, Cap 265 of the Laws of Zambia.

Other Works referred to H.G. Beale

Chitty on Contract 30th Edition - Sweet & Maxwell Thomson Reuters

This action was commenced by way of writ of summons on 11th March, 2013 and amended on 11th April, 2013. The endorsement on the Writ reveals that the Plaintiff claims for:

- (1) The sum of K22, 041. 16 being monies due from the Defendant to the Plaintiff in respect of Employer and Employee pension contributions which the Defendant has refused, failed or neglected to pay the Plaintiff upon the Plaintiff having separated from the Defendants provided for in the conditions of service;
- (2) Damages for the breach of the said conditions of services and suffering of the Plaintiff;
- (3) Interest;
- (4) Any further or ancillary relief; and
- (5) Costs.

In the statement of claim that accompanied the writ of summons also dated 11th March, 2013 and amended on 11th April, 2013, the Plaintiff avers that he was at all material times an employee of the Defendant having started work with the Defendant on or about 1st day of October, 2000, at Lusaka. The Defendant is a power utility company registered and incorporated in Zambia and having its registered office at Stand No. 6949 Great East Road, Lusaka.

He avers that on 7th September 2000, the Plaintiff was employed by the Defendant as Senior Internal Auditor on permanent and pensionable

conditions of service in the M8 salary grade. The Plaintiff rose in ranks to the position of Principal Economist in the M9 salary grade by 2004.

He states that he diligently contributed to the pension scheme in accordance with the Defendant's conditions of service for all the years he worked for the Defendant until September 2007 when he resigned from employment. He resigned in accordance with the Defendant's conditions of service.

The Plaintiff, the amount due to him at the time of separation (resignation) from the Defendant.

He contends that the Plaintiff's pension contributions upon separation was K22,041=00; broken down as follows; the total sum of his contribution amounting to K11,020.58 and the employers contribution of K 11,020.58=00.

He avers that upon separation, he was not paid or refunded his and pension contributions. When he inquired from the Defendant, he claims to have been wrongly told to pursue the same with National Pensions Scheme Authority (NAPSA).

The Plaintiff alleges that the Defendant has, to date, neglected, failed or refused to pay him the amount of K22, 041.16 in accordance with both the law and conditions of service under which he worked.

The Defendant entered their memorandum of appearance and defence on 28th March, 2013. Save as expressly admitted in the defence, the Defendant denies each and every allegation contained in the statement of claim as though the same were set out one by one and denied seriatim. The Defendant however states that it only pays out the pension contributions based on the refund from the respective Pension Body.

It has been contended that the Pension Body to which the Plaintiff and Defendant made contributions to do not release the same until the person

reaches the retirement age of 55 years. It is averred that the Defendant did not fail and/or neglect to pay the Plaintiffs dues as doing so would be going against the applicable Pension rules and would be tantamount to unjust enrichment for the Plaintiff.

In this respect, the Defendant states that the reliefs sought by the Plaintiff cannot be justified at law owing to the foregoing reasons.

In his reply, the Plaintiff joins issues with the Defendant on its defence. He maintains that it is the duty of the Defendant to ensure that Pension Contributions due to the separating members of staff are refunded to such member of staff. With reference to Paragraph's 3 & 4 of the Defendant's defence, the Plaintiff states that it is an express Condition of Service under clause 11.1 (A) that the Plaintiff ought to have been paid his and his employers pension contributions.

The Plaintiff further avers that, in fact, there are other former employees who separated from the Defendant in a similar way and were paid their pension contributions. He contends that in the case of the Plaintiff, the Defendant has just chosen to act with impunity and withhold, deny, neglect or refuse to pay him his and his employer's pension contributions.

According to the Plaintiff, under the clause stated above, there is no mention of the requirement for the age of 55 years for one to access employer and own pension contributions. The Plaintiff further avers he is not aware of any law that prevents the Defendant from paying the Plaintiff what is lawfully due to him. He stressed that he cannot be said to have been unjustly enriched when what he claims is lawfully due to him.

I heard this matter on 20st October, 2014. Mr. Mulenga Mushili Chisanga, the Plaintiff in this matter, was the only witness in support of his claims. He confirmed much of the averments in the statement of claim. He testified that at the time of his resignation, the Terms and Conditions of

Service dated 1st August, 2003 (at pages 1 - 43 of the Plaintiff's Bundle of Documents) governed his employment relationship with the Defendant.

He particularly drew my attention to the contentious clause 11.1 of the said Terms and Conditions of Service.

Mr. Chisanga proceeded to testify that Clause 11.1 shows the entitlements of employees who leave employment by way of resignation are supposed to be paid out by the Defendant. He testified that he was paid leave benefits. He has however not been paid his employment contributions made to NAPSA.

He maintained that he was claiming, not pension, but his entitlement payable to any employee who resigned from the employment of the Defendant. He told Court that he was not aware of the pension rules because he was not dealing with NAPSA.

This witness read Clause 11.1 (c) which says: *An employee's indebtedness will be deducted from the total of (a) plus (b).* He argued that this clause indicates that the Defendant is supposed to pay the entitlements mentioned in Clause 11.1 (b); that the Defendant will get the sum total of (a) and (b) and deduct his indebtedness.

He also stated that he was aware of an individual named Victor Nyasulu, now the Director of Finance at Zambia National Broadcasting Services, who was paid this type of entitlement. This individual at one time worked for the Defendant and left employment through resignation. He wondered why he was not being paid his dues now that he also left employment with the Defendant through resignation.

Finally, this witness referred to pages 41 to 44 and 52 of the Plaintiff's Bundle of Pleadings and stated that he was claiming K22, 041.00 and other reliefs as per endorsement on the writ of summons.

In cross-examination, Mr. Chisanga admitted that the Defendant used to remit his contributions to NAPSA. He also admitted that once remitted, the contributions came under the custody of NAPSA and that it has its own rules.

However, he maintained that by virtue of Clause 11.1 (c) the Defendant is obligated to pay his entitlements mentioned in clause 11.1 (b).

He further testified that he is now aged 44 and has not yet attained 55 years. He stressed that the claims are his entitlements to be paid by the Defendant upon his resignation. He testified that he had no evidence before Court to prove that one Victor Nyasulu was paid by the Defendant, entitlements similar to his claims.

He maintained in re-examination that the Defendant is responsible for the payment of entitlements mentioned in Clause 11.1 (b). He stated further that the Terms and Conditions of Service do not say NAPSA will pay the contributions when an employee reaches 55 years nor does it say at what age the employee will be paid the claims in clause 11.1 (b).

He told Court that the Defendant did not bring to his attention rules from NAPSA regarding administration of contributions once they are remitted by the Defendant. He concluded by contending that he could not skate with certainty that the Defendant did remit his contributions to NAPSA.

This was the close of the Plaintiff's case.

The Defendant also called one witness, one Mwambo Yuyi, the Corporate Payroll Administrator in the employ of the Defendant. She testified that the Defendant's role after deducting the contributions from the employee is to remit the same to NAPSA. The said contributions are deducted every month. The contributions comprise the employee portion and employer's portion. Both are remitted to NAPSA. This witness stated the

Defendant's obligations ends when the contributions have been so remitted to NAPSA.

According to Ms. Yuyi, the contributions remitted to NAPSA are supposed to be claimed by the individual employee when he reaches 55 years.

She testified that when an employee resigns, the Defendant is only obligated to pay accumulated leave days less the indebtedness the employee may have. On clause 11.1 (b) she told Court that the provision is there to inform the employee of his entitlements and not that the Defendant is obliged to pay the same.

She concluded by stating that she has never come across an employee who was paid the claim under clause 11.1 (b).

When cross-examined by Mr. Mbambara, she did not prevaricate from the evidence given in examination in chief. She conceded however that she had no evidence before Court to prove that contributions were remitted to NAPSA.

Ms. Yuyi admitted that the Terms and Conditions of Service in issue were concluded between the Defendant and the Plaintiff. Under clause 11.1 she testified that the Defendant covenants to pay leave days. She also admitted that what is paid out and not paid out by the Defendant to the employee who resigns is spelt out under clause 11.1. She testified further that expressly, clause 11.1 (b) of the said conditions of service does not state that NAPSA should pay the entitlement.

The witness further told Court that clause 11.1 (c) is correctly framed and that an employee's indebtedness shall be deducted from the sum of (a) and (b). However, she maintained that clause 11.1 (b) is only for the information of the employee.

This marked the close of the Counsel for the respective parties indicated their desire to file written submissions and I so ordered.

I received the written submissions from the Plaintiff on 10th November, 2014. Mr. Mbambara begun by submitting that the questions for determination by the Court were firstly whether the Plaintiff's claim is attainable at law. Secondly whether the Defendants' Defence is premised on any legal basis?

He referred to the contentious clause in the document called the "*Conditions of service for non-Represented employees*" clause 11.1 A as here below:

In this respect Counsel submitted that the contract in this matter is between ZESCO Limited and the Plaintiff. And ZESCO Limited covenanted to pay the Plaintiff in accordance with the contract upon resignation.

Counsel noted that however, ZESCO had now turned on its promise with an excuse that the obligation to pay lies with NAPSA and that if ZESCO paid the Plaintiff; it would breach some Pension Rules. Counsel argued that NAPSA is not a party to this contract and no obligation can be imposed on a party that is not privy to a contract. He backed this proposition with the case of ***Dunlop Tyre Co.-V-Selfridge (1915) Ac 847.***

It is Counsel's position that if, however, there is an ambiguity in the interpretation of the above quoted condition of service, which renders ZESCO incapable of carrying out its obligation to pay, the case of ***Lovell and Christmas Limited vs. Wall (1911) WLR 896*** indicates that a written Agreement stands alone as a solitary express of the parties' intention. Further, he argued that where a promise, agreement or term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording of the contract.

Mr. Mbambara further drew my attention to the case of ***Bank of Indiavs. K. Mohanda (2009) A.C. 1942*** (*Supreme Court of India*). In that case, a question arose with respect to the interpretation of some of the provisions of the voluntary retirement scheme of 2000 workers of the appellant bank. Judge Lodhia stated that as it was the bank who ultimately formulated the terms the contractual scheme which stated “*the optees of voluntary retirement under that scheme will be eligible to pension under the pension Regulation, 1995,*” therefore they bear the risk of clarity, if any. The Judge further said that in these kinds of cases, the interpretation against the party is preferred who have drafted the Agreement.

In this regard Counsel submitted that the contract between ZESCO Limited and the Plaintiff was drafted by ZESCO. Hence, he contends that if I should find any ambiguity in the said ‘Clause 11. 1. A,’ the same should be interpreted against the drafter of the contract.

Learned Counsel further submitted that while ZESCO Limited claimed in its defence that it would be breaching some Pension Rules, the said Rules were not brought to court to show how the feared breach would actually happen.

According to Counsel, the Plaintiff has on the other hand shown that he is not claiming Pension benefits from NAPSA but his own and his employer’s contribution in accordance with the contract. He referred to *Act No.1 of 2004, an Amendment to the Income Tax Act* which came into force on 31st March 2004. In amending the relevant provision relating to an employee’s entitlement upon separation from employment [fourth schedule] under section 7, the law created an amendment to;

- i. “*provide for the payment to any employee during the employee’s life, of any sum except a pension which may, subject to this paragraph, be commuted or, in the event of the employee leaving the services of the employer in*

circumstances in which no pension is payable to the employee, any contributions to:

- a) A defined contributory fund or scheme made by the employee and the employee's employer together with reasonable interest; or*
- b) A defined benefit fund or scheme made by the employee and the employee's employer together with reasonable interest,"*

On the basis of the preceding provision, Counsel maintained that clearly, it was a legal obligation on the part of the Defendant to refund the Plaintiff his own and his employers' contributions in accordance with the above law and the Terms and Conditions of Service. According to Counsel, the Defendant's failure, neglect or refusal to comply with the contract and in effect the law caused a breach of the said contract and must give rise to a claim for damages.

In concluding his submissions Counsel stated that the Plaintiff's claim is well supported by the law implored me to grant the Plaintiff the reliefs sought for in his amended statement of claim.

On 21st November, 2014, I also received written submissions from the Defendant. The Defendant basically denies the claims made by the Plaintiff. The Defendant admits that the Plaintiff resigned from employment in September 2007 but contends that at the time of his resignation, the Plaintiff had not yet attained the retirement age of 55 years.

In the submissions, the Defendant drew my attention to the contentious clause 11.1 (a), (b), (c) and (d) of the conditions of service for non-represented employees. It was submitted that part (b) of clause 11.1 above does not apply to the Plaintiff on account that the Pension Rules under which the contributions were made does not release the contributions to a person who has not attained the retirement age of 55 years. According to the

Defendant the rules applies to both the Employee's and Employers contributions.

Counsel urged me to take Judicial Notice of the fact that the retirement age in Zambia is 55 years as set out in the National Pension Scheme Act of 1996. In this respect, the Counsel argues that once the Employees' and Defendants' contribution to the Pension Scheme (NAPSA), were remitted, the funds are no longer in the custody of the Defendant but the said Pension Scheme.

In view of the above, Counsel contends that it is incontrovertible that the claim of the contributions in issue should be rightly made to the Pension Scheme. According to Counsel, the claim in question cannot be made to the Defendant who presently, has no mandate, authority and or custody to pay the claimed sum to the Plaintiff.

The Defendant submitted further that the contentious clause in this matter, in particular, part (b) should not be read in isolation. It was argued that it is a well-known fact and practice that contributions to a pension scheme are claimable in this case upon the attainment of the retirement age. My attention was drawn to the case of ***Indo Zambia Bank Limited vs. Mushaukwa Muhanga (S.C.Z. Judgment No.26 of 2009)***. It was stated that the Court can be drawn to accept linguistic mistakes if it is clear that the parties to a contract did not have the intention that may seemingly be ascribed to the wording.

On this authority Counsel contended that part (b) should therefore not be read literally but should be given the interpretation subject to the pension rules and principles regarding retirement age.

Counsel further submitted that the Court should depart from the literal understanding of the contentious part (b) of the contentious clause so as to avoid absurdity. He cited the case of ***The Attorney General vs. Moyo***

[2007) Z.R 267 and **General Nursing Council of Zambia vs. Mbangweta (2008) Z.R Vol. 2 105.** Counsel stressed that the Court determines the meaning and application of part (b) of the clause in issue to give it the meaning and legal effect, clearly reflecting the intention of the parties to the Contract. The intention being that the employee and employer's contributions are payable upon attainment of the retirement age by the Pension Scheme.

Counsel concluded by arguing that no record was tendered before Court to demonstrate that the Defendant has ever paid any contributions remitted to the Pension Scheme upon the resignation of an employee. Counsel urged me to wholly dismiss the Plaintiff's claims with costs to the Defendant.

I have addressed my mind to the issues raised and argued in this matter. I have also considered the documentary evidence and the submissions by Counsel.

The issue for determination by this Court arises out of the provisions of the contract which governed the relationship between the Plaintiff and the Defendant. It is not in dispute that the Plaintiff worked for the Defendant from 1st October, 2000 and voluntarily resigned from employment in September, 2007. The Plaintiff's bone of contention is that he is entitled to be refunded his own and his employers' pension contributions in accordance with the provisions of the contract. The Defendant on the other hand is contending that the clause in the contract should not be read in isolation and is subject to pension scheme rules which make provision for payment of contributions upon reaching retirement age. The Defendant has strongly argued that I should not depart from the literal understanding of the part (b) of the contentious clause.

I will begin by reproducing clause 11 of the Terms and Conditions of Service which is the clause in contention.

“11.0 TERMINATION OF EMPLOYMENT

11.1 Termination

A. Resignation

An employee may resign from the company’s employment by giving one month’s notice or forfeiting one month’s salary in lieu of such notice. The period spent on vocational leave shall not form part of the period of notice.

Terminal Benefits

The terminal benefits for employees who resign will be as follows:-

- (a) Commutation of accrued leave days.*
- (b) An employee and employer’s contribution towards the LASF and/or National Pension Scheme Authority.*
- (c) An employee’s indebtedness will be deducted from the total of (a) plus (b).*
- (d) The Long Service Gratuity shall not be payable on resignation.”*

I have also visited the National Pensions Scheme Act. In this regard I am alive to the concept of paramountcy of Statute over contract. The key issue for determination in my considered view is whether the contentious contractual provisions highlighted above is invalidated by the National Pensions Scheme Act of 1996? There is much wisdom to be gleaned from the Income Tax Act.

The relevant provision of the law relating to pensions are contained in schedule 4 of Income Tax. These are under 2(2) which stated as follows:

(2) The Commissioner-General shall not approve any fund or scheme unless he considers that the rules relating thereto have as their main object the provision of pensions to employees on their retirement from the service of the employer on or after attaining a specified age and unless the Commissioner-General is satisfied-

(a) that the fund or scheme is established in the Republic in connection with any business carried on wholly or partly within the Republic in connection with any business carried on within the Republic by the employer, and:

(b) That the rules do not:

- (i) provide for the payment to any employee during his life of any sum except a pension, which may, subject to this paragraph, be commuted or, in the event of the employee leaving the service of his employer in circumstances in which no pension is payable to him, any contributions to the fund or scheme made by him together with reasonable interest thereon.
- (ii) provide for the payment of the pension otherwise than on the retirement of the employee from the service of his employer on or after attaining the age of 55 years or on earlier retirement on account of any infirmly of mind or body.

The effect of these regulations quoted above is that under (2(2)(b)(1) the Commissioner-General (CG) shall not approve a pension fund for any undertaking if it provides for payment to any employee of any sum other than his pension contribution if he leaves employment in circumstances where he is not entitled to a pension. Therefore a pension fund or Contract of employment should not include a provision for payment of pension to an employee before he reaches pensionable age.

This is clarified by 2(2)(b)ii clarified by 2(2)(b) ii which explicitly states that pension shall be paid retirement of an employee from service or after attaining the age of 55. Further that pension shall only be payable before the occurrence of these two events, if any employee is retired on grounds or infirmity of mind or body.

The only exception is where someone is retired on infirmity of mind and body in which case he will be put on his full pension notwithstanding that he will not be entitled to retirement or attained the age 55.

In the current case clause II of the contract purports to grant a right to the Plaintiff on leaving employment as he did in this case to both his and his employers contribution. Whilst it may not be against the provisions of the Fourth Schedule for him to be entitled to his pension contribution he is not entitled to the employers' contribution because he does not fall under the exception I have highlighted in the preceding paragraph.

The situation relating to his pension contribution meets the same fate because the parties have not laid before me a copy of the pension fund Rules for the Defendant to enable me ascertain whether or not under the said Rules the pensioner would be entitled to his pension contribution.

I therefore find the clause in the contract in issue contravenes the law because it is against the spirit of the provisions of the Income Tax Act I have alluded to above. It is therefore, enforceable because on the true construction of the Income Tax Act Schedule 4 of the Act deprives the Plaintiff of his civil remedy under the contract, see Chitty on Contracts 30th edition Vol.1 by H.H. BEALE at paragraph at paragraph 16 - 142 (page 1172) Sweet & Maxwell - Thomson Reuters.

In arriving at the foregoing decision I have made in the preceding paragraph I have considered the argument by Counsel for the Defendant that this Court should depart from the literal meaning of part (B) of the

contentious clause to avoid absurdity; I have anxiously considered this argument as it suggests that there is ambiguity or lack of clarity in the text.

A perusal of the document titled Conditions of Service for Non-Representative Employees at page 1 of the Plaintiff's bundle of documents leads me to believe that it was drafted by the Defendants. That being the case the Defendants would then be caught up in the **contra-proferentum** rule which is that the interpretation in such cases is against the party who drafted the Agreement.

The definition of contra-proferentum can be found in **Black's Law Dictionary** which defines it as follows:

"The doctrine that is interpreting documents ambiguities are to be construed unfavourably to the drafter"

I agree with the observations of Judge Lodhia in the case of **Bank of India vs K. Mohande (2009) Ac 1944 (Supreme Court of India)** cited by Mr. Mbambara. In that case a question arose with respect to the interpretation of some of the provisions of the voluntary retirement scheme of 2000 workers of the Appellant Bank, he expressed the view that it was the Bank who formulated the terms of the contractual scheme and therefore they bore the risk of clarity if any and further that in such kind of cases the interpretation against the party is preferred who have drafted the Agreement.

In the case at hand calling to aid ambiguity or linguistic error does not help the Defendant, they would suffer the consequences of **contra-proferentum**. Having looked at the contentious clause however I am of the view that the clause itself is very clear and unambiguous. I do not find any linguistic mistake or ambiguity requiring departure from the literal interpretation. The cases of **Indo Zambia Bank Limited vs Mushaukwa Muhongo, The Attorney-General vs Moyo and General Nursing**

Council of Zambia vs Mbangweta cited by Mr. Sike, Counsel for the Defendant are distinguishable in this regard. I therefore dismiss the argument.

To sum up my Judgment I find that the Plaintiff has failed to discharge the onus on him to prove his case on a balance of probability. The “contentious clause” in the contract is an illegality and therefore unenforceable with regards the Income Tax Act for reasons aforesaid. The Plaintiff cannot claim his or his employers contributions. I accordingly dismiss the claims in their entirety for want of merit.

I award costs to the Defendant to be taxed in default of agreement.

Dated at Lusaka this 5th day of February, 2015

Betty Majula Mung’omba
HIGH COURT JUDGE