THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2018/HP/1066

BETWEEN:

BOB MATHEWS MUBANGA **PLAINTIFF**

AND

LUSAKA WATER AND SEWERAGE COMPANY LIMITED **DEFENDANT**

Before The Hon. Justice M. D. Bowa on 27th of January 2020

For the Plaintiff Mrs. M Mwenya Legal aid counsel with Mrs. Z Mulenga, and Mr. O Kalaba probono legal aid counsel from Legal aid Board
For the Defendant. A Shansonga In house counsel

JUDGMENT

Cases referred to:

1. National Drug Company Limited and Zambia Privatization Agency v Mary Katongo SCZ Judgment no 79 of 2001

2. Attorney General vs. Phiri and 10 Others (Appeal No 68 of 2009)

3. National Housing Authority vs. Machaweni (SCZ Appeal No 89 2011)

4. Sililo vs. Mend a Bath and another (Appeal no 198/2014)

4. Sililo vs. Mend a Bath and another (Appeal no 198/2014)

5.Miyanda v Handahu (1993-94)ZR 187

The Plaintiff commenced this action on the 18th June 2018 by writ of summons and statement of claim seeking the following reliefs:

(i) *Payment of gratuity at 40% of the gross salary per month for the period of 14 years and 11 months the Plaintiff served in the Defendant Company.*

(ii) *Payment of long service bonus that accrued to the Plaintiff*

(iii) *Payment of the Lusaka Water and Sewerage Pension Contribution.*

(iv) *Damages for the mental distress and inconvenience.*

(v) *Any relief the court may deem fit.*

(vi) *Interest.*

(vii) *Costs.*

The Defendant denied the claims as set at in the originating process stating that the Plaintiff was not entitled to any damages and put the Plaintiff to strict proof. At the trial which was held on the 3rd of May 2019, Mr. Mathews Bob Mubanga, the Plaintiff herein gave

evidence in support of his claims and called no other witness. His evidence was that he was employed by the Defendant as a plumber on the 4th April 2005 under its conditions of service. He served the Company diligently and rose through the ranks. In 2011 he was appointed billing and revenue officer under grade 6 salary scale. In the year 2018, the Plaintiff resigned from the company. He gave a months' notice of resignation as per conditions of service and the Company accepted his resignation.

Prior to his departure in 2014, he recalled that the Company introduced an administrative manual for non-unionized and management conditions of service evidenced at page 6 of the Defendants bundle of documents. He explained that the letter he received elevating him to billing and revenue officer stated that he was in grade 6 which is a management position. In relation to the referenced manual, section 1.1 titled "scope and application" states that grades 1-6 shall be entitled to the conditions of service contained in the manual.

The court heard that section 13.1 and 13.3 states that where an employee resigns or his employment is terminated, such employee

is entitled to 40% gratuity. The Plaintiff testified that he was basing his claim on the said section 13.3. He was thus claiming for gratuity for the period 2014 to 2018 as the manual was only introduced in the year 2014.

The Plaintiff made reference to the Defendant's supplementary bundle of documents which exhibits a long service bonus schedule of payment. He testified that he was paid a long service bonus when he served as a plumber. On page 4 of the Defendant's bundle of documents is a statement confirming he received such payment in April 2015. He thus stated for the record that in spite of its inclusion in the statement of claim he was dropping that claim as he had been paid. He emphasized that his only claim before the court was for gratuity which he contended must be paid as per administrative manual. He reiterated that his claim was for 4 years from 2014 to 2018.

When cross examined the Plaintiff confirmed he was no longer claiming the long service bonus on the pension contributions. He insisted though that he was claiming the damages. When referred to page 9 of the Plaintiff's bundle of documents, the Plaintiff

testified that this was an administrative manual and that the only difference with the manual in the Defendant's bundle of documents was in the dates.

When referred to clause 27.1.2 of the manual in the Plaintiff's bundle and clause 27.1.2 in the Defendants bundle, the Plaintiff confirmed that the two were different in content. He nonetheless insisted that the manual applicable in his case that entitled him to the long service bonus and gratuity is the one dated 1st September 2014.

When re-examined the Plaintiff stated that there is nowhere in his appointment letter where it was stated he was engaged on permanent and pensionable basis or contractual employment for that matter. He further testified that he did not receive any letter from the Defendant informing him about the manual on page 6 of the Defendant's bundle of documents. He clarified that his claim was not for 14 years 11 months but 4 years from 2014 to 2018 when he resigned.

That was the case for the Plaintiff.

In its Defence, the Defendant called Christopher Siame the Human Resources Manager as its sole witness. He referred the court to the manual on page 6 of the Defendant's bundle of documents and the Plaintiff's manual at page 9 in the Plaintiff's bundle of documents. He testified that the document in the Defendant's bundle is the one in force in the company and was effected on 1st of September 2014. He explained that the other manual in the Plaintiff's bundle is also a Company document that was used to come up with the manual that was effected on the 1st of September. In short, that the manual in the Plaintiffs bundle was a draft to the approved document in the Defendant's bundle.

He testified further that the document in the Plaintiff's bundle is referenced HRA/430/16672. DHRA/PBM January 2014. The court was informed that the solicitation for comments from employees started in January and was circulated in March 2014 to all categories of employees covered in the document. This was done before a meeting was convened that consolidated the document at the Mulungushi International Conference Center.

Mr. Siame testified further that consensus was reached at that meeting and the document was subjected to management approval and later to the board. Mr. Siame explained further that the main feature to differentiate the 2 documents was the dialogue box that appears in the approved version which is absent in the draft. Further that at the end of the approved manual on page 45 are 3 signatures, 2 in the dialogue box and a third at the bottom. He clarified that the document was approved on 14th October 2014 through the effective date was backdated to 1st of September 2014.

Moving on Mr. Siame testified that the Defendant has 2 categories of employees. The first has grades 4 to 10 which he explained, are permanent and pensionable grades under the conditions of service. Grades 1-3 on the other hand serve or are employed on fixed term contracts. He testified that long service bonus applies to employees on permanent and pensionable employment and this was why the Plaintiff was eligible and was paid for the 2010-2015 period. Category G1-G3 which is contractual employment is entitled to gratuity at the end of every contract or in the event of separation before the end of the contract for the period served.

Mr. Siame testified further that at the time the company was developing the manual dated 1st September 2014, there were proposals from employees to introduce a private pension scheme to operate side by side with the statutory one. A cost analysis was done and it was concluded that the Company would require a colossal startup capital which it could not afford at the time. The proposal was therefore dropped.

When referred to Plaintiff's appointment letter at page 6 of the Plaintiff's bundle of documents Mr. Siame explained that the status of the employee by that letter changed from unionized to management category although it was a continuation of service on permanent and pensionable basis. He clarified that the Plaintiff resigned from employment and that a resigned employee is entitled to accrued leave days and days worked for up to the last day of employment. Lastly it was his testimony that it was possible for a person in management scales to be appointed on contract.

In cross examination, Mr. Siame testified that clause 7.0 on page 16 of the Defendants bundle does give detail for the types of employment contracts whilst paragraph 2 and 3 makes provision

for the grading of contracts and those on permanent and pensionable basis. He acknowledged that the Plaintiff's letter of appointment is a management position and that it did not state whether this was permanent and pensionable.

Referred to the manual on page 9 of the Defendant's bundle of document the witness acknowledged that nowhere in the document was there indication that it was a draft. He contended that the approved version was circulated to employees and put on the HR file which is accessible to employees. He added that employees were sensitized on the conditions. He accepted that he had not brought any evidence to court to show that the Plaintiff received the approved document.

Cross-examined further, Mr. Siame acknowledged that he did not know when the board for the Defendant Company was put in place but disagreed that this was only in 2016. He was unaware which board chairperson signed the manual but was sure it was the board chair at the time. He maintained that the approved document was circulated in 2014 immediately after approval although he did not

know the exact date. He testified further that clause 27 only existed in draft format.

When re-examined Mr. Siame testified that the appointment letter on page 6 of the Plaintiff's bundle indicated salary scale grade 6. which is a permanent and pensionable position. Further that the administrative manual makes this position clear. He clarified further that not everything that accrues to an employee is indicated in his appointment letter. He explained that when one is elevated, he or she is aligned to the conditions of service associated with a particular scale. It is therefore not necessary to state everything in the letter. He added that clause 7.1 paragraph 3 in particular makes this very clear and that if there were any exceptions it would have been stated.

Mr. Siame clarified further that the Plaintiff's document is not approved and has no dialogue box whereas the Defendant's does. He clarified further that issues to do with the board are handled by the Company secretariat. Further that the reason why there was a difference between clause 27.1.2 in the 2 documents is that the

Plaintiff's version are proposals. Not all were adopted in the final approved document contained in the Defendant's bundle.

That was the close of the Defendant's case.

I have carefully considered the evidence before me and the parties respective filed submissions. I am grateful to both parties for their effort in this regard. I propose to deal with the submissions as I go along in this segment of my judgment. The issues for my determination as I see them are centered on establishing which conditions of service were applicable to the Plaintiff in this case and what category of employment he fell under. It is from a determination of these questions that a conclusion of what he was entitled to can be drawn.

The Defendant's aptly submit that it is trite than an employment relationship is a contractual relationship and is therefore governed by the contract and other documents the parties intend to apply to them. I was referred to the case of ***National Drug Company Limited and Zambia Privatization Agency v Mary Katongo*** [1]wherein the Supreme Court held that:

"It is trite that once the parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contract and that the rule of the court is to give efficiency to the contract when one party has breached it by respecting, upholding and enforcing the contract."

In the case of ***Attorney General vs. Phiri and 10 Others***[2] the Supreme Court commenting on the approach to be taken in such cases observed:

"It is trite that employment relationships and the payment of salaries, dues benefits and allowances are anchored in contract, with clear terms governing such contracts. Where the terms of the contract are not clear, the court has power to ascertain the contention of the parties and give effect of the contract by enforcing the provisions of the contract when called upon to do so by a dissatisfied party through litigation...Where the contract is deemed repudiated, the court must decide on the rights of the parties including what the employee must be awarded as a result of unilateral repudiation of a contract of employment."

It is not in dispute that the Plaintiff was employed in the Defendant Company from March 2003 to March 2018 when he resigned. He was initially employed as a plumber and elevated to billings officer in grade 6 at the time of his resignation. 2 documents have been

exhibited by the Plaintiff and Defendants respectively each arguing that their respective document contained the conditions of service that was applicable. The Plaintiff submits that his document is what was communicated to him and that he accepted. Reliance was placed on the case of ***National Housing Authority vs. Machaweni*** [3] in which it was held that:

"There has been a series of decisions...although said to be cases of estoppel, are not really such, they are cases of promises which were intended to create a legal relations and which, in the knowledge of the person making the promise, were going to be acted on by the party to whom the promise was made, and have in fact been acted on, such cases the courts have said these promises must be honoured."

Relying on this holding, the Plaintiff argues that the document on page 8 of his bundle of documents constituted a promise of the conditions of service and the Plaintiff continued to work on these until he resigned. It was also submitted that the Plaintiff has no sight of the Defendant document and in my event in reliance of the case of ***Sililo vs. Mend a Bath and Another*** [4] argued that it amounted to nothing more than a unilateral variation of the conditions of service.

I do not agree with the Plaintiff's position in this regard in the wake of the evidence before me. There is nothing in the evidence to suggest that the Plaintiff's document on page 3 which was unsigned was ever communicated to the employees as the applicable conditions of service. I find credible the Defendant's evidence that the document relied upon by the Plaintiff was in fact a draft that was used to come up with the conditions defined in the Defendant's manual. It was duly executed by the managing director and approved by the board effective September 2014. The argument of unilateral variation of the contract and failure in meeting of the minds does not therefore find support based on the evidence before me and I dismiss it.

The letter of appointment on page 1 of the Defendant's bundle defines the conditions that were applicable to the Plaintiff upon first appointment. The clause on probationary period indicates on p 2 that

"You will be required to serve six (6) months probationary period and your successful completion, you will be confirmed and transferred to the permanent establishment and become a member of the pension

scheme (NAPSA) where your contribution will be 5% of your basic pay."

It is clear to discern therefore that the position was a permanent and pensionable one in grade 7/8 salary structure.

On page 4 of the Defendant's bundle, also page 6 in the Plaintiff's bundle is a letter of appointment upgrading the Plaintiff to the position of billing and revenue officer dated July 2011. The letter also laid out the conditions of service under which he was appointed. Importantly, that this was considered a management Grade 6 position. There is nothing in the letter to suggest that this was a contractual position. DW1 informed the court that all the conditions associated with the position could be found in appointment letters and that clause 7.1 of the administrative manual for senior contract and non-unionized management staff conditions of service as approved by management dated 1st September 2014 on page 6 of the Defendant's bundle adequately addressed this issue. For ease of reference, the clause provides that:

"7.1 employment contracts

The Company employs non-represented employees on two types of contracts. Namely fixed term employment and permanent and pensionable employment. All employees in grade 1-3 shall be hired on fixed term employment. Employees hired in grades 4-6 shall be employed on permanent and pensionable conditions of services unless determined otherwise by management for certain categories or positions.

The criteria of determining which positions to place on contract for the G4-G6 group shall consider various factors including operational requirements duration of work projects etc."

There is no doubt based on the above that grade 6 under which the Plaintiff fell was a permanent and pensionable position in spite being in management. Even assuming I were to find persuasion that the manual relied upon by the Plaintiff was the applicable conditions which I do not, page 17 of the Plaintiff's document indicates that the position fell into the permanent and pensionable category as well. In fact the provision is exactly the same as clause 7.1 in the Defendant's document.

That said, what are the conditions of service that were applicable to the Plaintiff visa a vis his claim as defined for grade 6 employees and granted that he had resigned from employment on March 2014? In posing this question I am mindful that the Plaintiff both in examination in chief and cross examination confirmed that he had abandoned his claim for long service bonus and was now only pursuing a claim for gratuity. Clause 13.1` of the Administrative manual provides the following in relation to gratuity.

"The Company shall pay gratuity at the conclusion or termination of the contract. This gratuity is calculated at the rate of 40% of his/her terminal gross salary by the number of months covered by the contract."

Clause 1.4 defines contract employment as *"employees appointed on contracts as the employer may determine."*

Furthermore clause 27.1.2 provides that the terminal benefits for employees who resign will be as follows.

(a) Commutation of accrued leave days.

(b) Payment of gratuity for contractual staff

The Defendant aptly refers me to the case of ***Miyanda v Handahu***[5] in which the Supreme Court held that:

"When the language is plain and there is nothing to support that any words are used in a technical sense or that the context requires departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms on ground of policy, expediency, justice or political exigency, motive of farmers and the like."

Based on the above therefore, I would agree with the Defendant that a literal and ordinary interpretation of clause 27.1.2 clearly shows that gratuity on resignation will only be paid where an employee is a contractual staff engaged on a fixed term contract. This is not the position in the present case as I have found the Plaintiff to have been a permanent and pensionable employee. His claim on gratuity thus fails.

I must state that I find surprising the tone of the Plaintiff's submissions that proposed to make a case for all the claims as endorsed in the writ notwithstanding that counsel led the Plaintiff on the stand who had in both evidence in chief and cross more or less stated he would only be pursuing his claim on gratuity. Suffice

to state no evidence was led in support the other claims and in any event as they were anchored on a document that I have held was inapplicable cannot stand and must fail. Having said that, I find that the Plaintiff has failed to establish his case and to discharge his burden of proof .I would dismiss this case with costs as applicable to a legal aided person to be taxed in default of agreement.

Dated at Lusaka the 27th day of January 2020

HON. JUSTICE M.D. BOWA
JUDGE.