

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

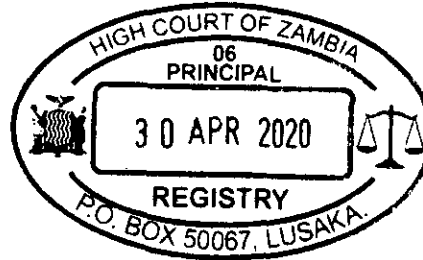
2015/HP/1324

BETWEEN:

ROYD NG'ANDU

AND

ATTORNEY GENERAL



PLAINTIFF

DEFENDANT

Before: The Hon. Mr. Justice Charles Zulu.

For the Plaintiff: Ms. M. Marabesa, Legal Aid Counsel, Legal Aid Board.

For the Defendant: Mrs. N. S. Nchito, State Advocate, Attorney General's Chambers.

JUDGMENT

Cases referred to:

- 1. Zambia Airways Corporation Limited v Geshom Mubanga (1990-1992) ZR 149.***
- 2. ANZ Grindsleys Bank (Zambia) Limited v Chrispin Kaona (1995-1997) Z.R. 85.***
- 3. Rainward Mubanga v Zambia Tanzania Board Services Limited (1987) Z.R. 43.***
- 4. Pamodzi Hotel v Mbewe (1987) Z.R. 56.***

Legislation referred to:

- 1. The State Proceedings Act Chapter 71 of the Laws of Zambia.***
- 2. The Employment Act Chapter 268 of the Laws of Zambia***

The matter was commenced by way of a writ of summons accompanied by a statement of claim dated August 11, 2015, against the Attorney General; sued pursuant to section 12 of the **State Proceedings Act Chapter 71 of the Laws of Zambia**. The Plaintiff seeks the following reliefs:

- 1. An order directing the Defendant to pay the Plaintiff his salary from the date he was removed unfairly from the payroll.**
- 2. An order that the removal of the Plaintiff's name from the payroll was unfair and illegal.**
- 3. An order of reinstatement or in the alternative the Plaintiff to be deemed as retired.**
- 4. Damages for distress caused after being removed from the payroll.**
- 5. Costs.**
- 6. Interest.**
- 7. Any other reliefs the Court may deem fit.**

The Plaintiff, Mr. Royd Ng'andu stated that he was employed by the Ministry of Community Development and Social Services (MCDSS hereinafter referred to as "the Ministry") as a Driver from January 22, 1992. He said he worked with the Ministry at Lusaka until 2007 when he was transferred to Mongu District. It was averred that he did not move to Mongu because he was not given logistics to relocate to Mongu. The letter of transfer in the same capacity as driver was dated October 11, 2007. According to the letter, he was supposed to report to Mongu on October 22, 2007.

The Plaintiff said when he reported to the Director, Community Development following the transfer, he was told that the Ministry had no money to take him to Mongu, and was instead told to wait.

He said while waiting for repatriation to Mongu, in 2008, there was a request for relief drivers from the Electoral Commission of

Zambia (ECZ) to work at the ECZ. He said he was among the five drivers that were selected from the Ministry to provide relief to the ECZ, pending his repatriation to Mongu.

He said over a period of time all his colleagues were recalled by the Ministry except him, and continued working for the ECZ. He said he later discovered that he was removed from the Ministry pay roll. He said his last pay slip was for the month of April 2008. He said his removal from the pay roll meant that he was dismissed and when he asked for his termination letter, the Ministry refused to give him one.

He made reference to a confidential letter by the Ministry to the ECZ dated July 21, 2010, *inter alia* advising the ECZ that the Plaintiff's employment with the Ministry was terminated for being absent from work for two (2) years. And in the same letter it was alleged that the Plaintiff was seen driving private mini buses in town. He said after receipt of the letter, the ECZ advised him to return to the Ministry to sort out his problems.

He said on his return to the Ministry, he followed protocol; he said he went to see the Human Resource Officer, Mr. Kanyuka, who did not want to see him, but instead referred him to his deputy, where he was also referred to the Chief Personnel Officer, who told him to complete Form 44, used to pay bonuses for drivers, since he was not pensionable. He said thereafter he made follow-ups for his payment, but the same was not forthcoming.

He acknowledged that he received a disciplinary charge letter from the Ministry dated November 9, 2010, reproduced here-below:

9TH November 2010

Royd Ng'andu

Driver

Lusaka

Re: ABSENCE FROM DUTY: YOURSELF

The above subject refers.

It has come to the attention of management that you have been absent from duty since your transfer to Western Province in October 2008.

According to the Terms and Conditions of Service for the Public Service No. 60 (a) an officer who is absent from duty without leave to do so for a continuous period of ten (10) or more working days, shall be liable for dismissal. You are hereby given seven (7) days to exculpate yourself in writing, giving reasons why disciplinary action should not be taken against you.

Signed.

Chilaba N. Hamwela

Administrative Officer

For/ Permanent Secretary

MINISTRY OF COMMUNITY DEVELOPMENT AND SOCIAL SERVICES

He said he rendered his exculpation; denying the allegation of absconding. He also recounted that while he was at home, there was a new Administrative Officer who was working on files for drivers, and that he explained to the Officer that he was not absconding and was advised by the Officer that he was going to find out as to why he was stopped from working.

The Plaintiff further testified that after his exculpatory letter, he received another letter dated December 30, 2010, reproduced here-below:

30th December, 2010

Royd Ngandu

Driver

Lusaka

RE: ABSENCE FROM DUTY: YOURSELF

The above subject refers.

Reference is made to your letter dated 16th November 2011 (sic) in which you claimed that the reason for your failure to report to your station was lack of transport. You further claimed that you were sent to work as a relief driver under Electoral Commission of Zambia (ECZ). In this regard, please avail us the letter from the Ministry stating your deployment to ECZ in order to corroborate your claims.

Signed.

Chilaba N. Hamwela

Administrative Officer

For/Permanent Secretary

It was averred that his response to the above was dated January 12, 2011. According to the Plaintiff, the letter from the ECZ requesting for drivers was not personally addressed to him, but the Permanent Secretary.

He added that he kept visiting the Ministry for payment of salaries, long service bonus, and pay in lieu of leave days and damages. He said the claim for unpaid salaries covered a period from 2008 to 2011. And he alleged that, he was never served with a letter of dismissal, and that in the end, officers from the Ministry started shunning him, prompting him to resort to court action. He maintained that he was removed from the pay roll in 2008, but continued to work at the ECZ until 2011. He said his livelihood depended on subsistence allowances drawn from trips assigned to him at the ECZ.

Apart from the Plaintiff (PW1) testifying, he called four Plaintiff Witnesses (PW). PW2 was Joseph Chilekwa, a driver at the Ministry. He said he was one of the five drivers that were assigned to work at the ECZ including the Plaintiff, following the death of President Mwanawasa, to mitigate the shortage of drivers at the ECZ during the presidential election. He said after working for some months at the ECZ, all the drivers returned to the Ministry except the Plaintiff. He said after the Presidential Election, they were supposed to return to the Ministry. He said he did not know why the Plaintiff remained at the ECZ. He explained that their salaries were drawn from the Ministry, and were only paid allowances by the ECZ.

PW3 was Charles Mweemba, a driver at the Ministry, one of the drivers that were assigned to work at the ECZ at the material time. His testimony in this regard recapitulate the testimonies of the Plaintiff and PW2, save to add that, he said the recall of drivers by the Ministry was at different intervals by word of mouth. He said the practice was such that the Administrative Officer would go to the ECZ and direct a particular driver to return to the Ministry. He said his recall was in 2009. He confirmed that the Plaintiff remained at ECZ after his recall.

PW4 was Samuel Chisambi, a Driver at the ECZ. Basically his testimony was that when he joined the ECZ as a driver in March 2009, he found the Plaintiff working for the ECZ, and that the Plaintiff left the ECZ in 2011, after the Tripartite Elections.

PW5 was Martin Moonga, a Chauffer at the ECZ. He said in 2008 he was Transport Officer at the ECZ. He said the Plaintiff was one of the drivers that were released to the ECZ by the Ministry in 2008. He said the release was preceded by a request for drivers by the ECZ to the Ministry. He explained that the Director at the ECZ requested for drivers through Permanent Secretaries in the Ministries. He said the Plaintiff first worked with the ECZ in 2005, and the second time was from 2008 to 2011 under the supervision of the Transport Officer at the ECZ. He said during the period 2008 to 2011, the ECZ had a lot of activities from delivery of election materials, voters' registration, to delivery of ballot papers, including the delimitation programme in 2010.

PW5 said when the above activities ended in 2011, all the drivers from various Ministries were released to their respective Ministries. During his testimony, The Plaintiff's Supplementary Bundle of Documents was filed dated May 20, 2019, and the same contained a letter reproduced here-below.

16th June, 2008

The Permanent Secretary

***Ministry of Community Development and Social Services
LUSAKA***

***RE: REQUEST FOR RELIEF DRIVERS - MR. CHARLES
MWEEMBA AND ROYD N'GANDU***

Authority is hereby sought from your office to release the two drivers mentioned above to perform duties at the Electoral Commission of Zambia during the forth coming Parliamentary and Local Government by- elections which are scheduled to be held on 26th June 2008.

Should this request be granted, the drivers could report to the Commission on Wednesday, 18th June, 2008 at 10:00hours.

Your usual co-operation in this matter will be highly appreciated.

Signed.

P.M. Isaac

For/ Director

ELECTORAL COMMISSION OF ZAMBIA

PW5 said he worked with the Plaintiff at the ECZ from 2008 to 2011. He said at the time the Plaintiff reported at the ECZ, the Plaintiff never mentioned that he was on transfer or that he was not supposed to work in Lusaka.

It must be recorded that after the close of the Plaintiff's case on July 22, 2019, the matter was adjourned to September 19, 2019 for defence. On that return date, the matter could not proceed due to non-availability of defence witnesses, as such an adjournment was sought by the Defendant, and the matter was adjourned to November 20, 2019. And on this return date, defence witnesses were yet again not before court. Mrs. N. S. Nchito then sought for another adjournment, on account that she failed to secure the attendance of witnesses because she was transferred to another department. The application for an adjournment was strongly objected to by the Plaintiff's Counsel, Ms Marabesa, by arguing that the State had ample time to deal with their internal administrative issues, and that the same could not be used as the basis for an adjournment. Indeed there was no compelling persuasion to grant a farther adjournment, as such I deemed the Defendant's case closed and adjourned for judgment. And timelines were given in which the parties were to file their respective submissions, but this was not done by Counsel respectively.

Notably, the Defendant filed its defence on January 21, 2015. The Defendant averred that the Plaintiff was on transfer to Mongu District and was expected to report on October 22, 2007, but did not. It was also stated that the Plaintiff was charged in November 2010, for absconding from duty, and was asked to exculpate. That Management did not accept his exculpation and removed him from the payroll. It was further averred that the aforesaid procedure was in accordance with section 21 (a) (iii) of the Disciplinary Code and Procedure for Handling Offences in the Public Service.

I have carefully considered the evidence adduced, and I am satisfied that the Plaintiff was a civil servant in the employ of the Ministry of Community Development and Social Services, where he was employed as a Driver based at Lusaka. By letter dated October 11, 2007, he was transferred to Mongu District in the same capacity, and was expected to report on October 22, 2007, but never reported. I reckon the Plaintiff's failure to report was not out of his own volition, but that of the Ministry, because no logistics were availed to the Plaintiff to report and take up his post at Mongu.

In the meantime in 2008, the Ministry allowed the Plaintiff to be attached to the ECZ as a relief driver. The Plaintiff was not the only one that was allowed to be attached to the ECZ; he was with four others that included PW2 and PW3. In fact a letter dated June 16, 2008, to the Ministry by the ECZ Director; the Plaintiff alongside his workmate, Charles Mweemba were specifically requested as relief drivers. It was therefore inconceivable that the Ministry

questioned the manner under which the Plaintiff went to the ECZ in 2008, when it was with the Ministry's endorsement.

The release of the Plaintiff to the ECZ was not a secondment *per se*, because his salary was not paid by the ECZ, but was paid by the Ministry, except allowance incidental to his attachment at the ECZ such as subsistence allowance were paid by the ECZ.

While still working from the ECZ, by letter dated November, 2010, the Plaintiff was charged by the Ministry for absence from duty since his transfer to Mongu. The Plaintiff rendered his exculpation stating that he did not report because no logistic were availed to him despite making such a request for logistics. In his exculpation, this is what he said in part:

When the ECZ came to request for drivers I was also selected to go there. I was given a trip to Mongu for 21 days which I went to report to the Deputy Prov Officer. From Mongu I continued with duties at the ECZ of which I worked for 1yr 4m. I was later removed from the payroll at the KDSS, from ECZ I went back to MCDSS where I was told to wait until I will be called. I was instead called back at ECZ through my boss Mr Ndung I then reported back to ECZ and worked until 2010 when I finally discharged from my duties.

After his exculpation, the Ministry responded by latter dated December 30, 2010, in which the Ministry was asking the Plaintiff to avail to them a letter that allowed him to be redeployed at the ECZ.

It is evident that the Plaintiff was removed from the Ministry's pay roll. The removal from the pay roll was effected before he was even

served with the disciplinary charge of absconding. This fact can be discerned from the confidential letter by the Ministry to the ECZ dated July 21, 2010, in which the Ministry *inter alia* advised the ECZ, that the Plaintiff was removed from the payroll and his employment had been terminated because he had not been working from the Ministry for two years. The removal of the Plaintiff from the payroll for alleged misconduct, which in essence terminated the Plaintiff's employment under the circumstance was wrongful and unfair because it was done without affording the Plaintiff a chance to be heard, and in fact no disciplinary charge was formally placed against the Plaintiff. Reference is made to the relevant Act at the material time, namely section 26A of the **Employment Act Chapter 268 of the Laws of Zambia** which provides:

An employer shall not terminate the service of an employee on grounds related to the conduct or performance of an employee without affording the employee an opportunity to be heard on the charges laid against him

Furthermore, in the case of ***Zambia Airways Corporation Limited v Geshom Mubanga (1990-1992) ZR 149*** the Supreme Court held:

Since the appellant (employer) failed to comply with the correct procedure in the purported dismissal of the respondent (employee) the dismissal was wrongful.

The Defendant's averment that the removal of the Plaintiff from the pay roll or /and dismissal was after his exculpation is not true. The

removal from the pay roll and purported dismissal was before he was charged.

In the absence of a letter of dismissal served on the Plaintiff and in the absence of his recall to the Ministry, there was nothing to forbid the Plaintiff from working at the ECZ. It is inconceivable that the Ministry was writing disciplinary letters in November and December 2010, to an employee they previously considered dismissed. This goes to support the inference that in fact the Ministry was aware that the Plaintiff was still working at the ECZ on attachment, based on his employment with the Ministry. It also goes to show that the Plaintiff's affairs were mismanaged and that there was sheer indifference on the part of the Ministry in the manner they handled the Plaintiff. The Ministry cannot *play possum* that the Plaintiff was absconding since 2008, when in fact the Ministry knew that the Plaintiff was working from the ECZ, and did nothing to recall him from the ECZ, to face disciplinary charges, which they allege started running from 2008.

In view of the foregoing, it is my considered opinion that the Plaintiff is entitled to unpaid salaries from the time he was removed from the pay roll up to the time the ECZ was advised that the Plaintiff was no longer an employee of the Ministry, because during that time he lawfully rendered his services to the ECZ by virtue of his lawful attachment. However, by letter dated July 21, 2010, the ECZ was duly advised by the Ministry that the Plaintiff was not an employee of the Ministry. And according to the Plaintiff in his exculpatory letter he acknowledged that he worked at ECZ until 2010. And by letter dated July 21, 2010 there was no basis for the

ECZ to continue engaging the Plaintiff to work for the ECZ on attachment, unless they directly engaged him on their own terms as a separate legal entity. The Plaintiff's continued work at the ECZ at least from July 21, 2010, until his final stoppage in 2011, was for reasons best known to ECZ; therefore the claim for unpaid salaries for the said period is untenable against the Ministry, perhaps against the ECZ, but the ECZ is not a party to the action.

Notwithstanding the fact that the Plaintiff was not served with a letter of dismissal, it is proper to construe that since he was unable to return to the Ministry after his tour at the ECZ; constructively he was dismissed. The Plaintiff made a claim for reinstatement or in the alternative to be deemed to have been retired. Generally, the claim for reinstatement is invariably premised on the fact that the dismissal was either wrongful or unfair. Additionally, reinstatement may be ordered where the dismissal is rendered null and void. In the case of **ANZ Grindsleys Bank (Zambia) Limited v Chrispin Kaona (1995-1997) Z.R. 85** it was held:

Where a dismissal is declared null and void, the Courts have discretion to order reinstatement or damages if appropriate.

In the present action, there was no specific claim for unfair or wrongful dismissal save so adjudged by way of presumption *mero motu*. Even if the dismissal is deemed to have been wrongful and unfair, together with his unfair removal from the pay roll, this does not offer automatic relief to an order for reinstatement. I so hold by making reference to the case of **Rainward Mubanga v Zambia Tanzania Board Services Limited (1987) Z.R. 43** in which Doyle J.S., had this to say.

In that case the president of the country concerned had power to dismiss an employee of the local council, however, the employee was dismissed wrongfully by the use of the wrong procedure. It was held that despite the fact that the dismissal was quite improper there was no reason to grant the applicant a declaration that he was entitled to reinstatement. Similarly in this country in the case of *Miyanda v The Attorney-General (3)*, where this court held that an army officer had been improperly dismissed, contrary to statutory regulations we also held that in the circumstances of that case it was not appropriate to make a declaration to the effect that the officer was entitled to reinstatement in the service.

In the present case the Plaintiff was removed from the pay roll in May 2008, and after his tour of duty at ECZ in 2011, he took no action to sue the Defendant until August 2015. It must be emphasized that in order to judicially obtain an order for reinstatement, the claimant must demonstrate existence of special circumstances (see ***Pamodzi Hotel v Mbewe (1987) Z.R. 56***). In the present case I do not consider it appropriate or compelling to order reinstatement. Similarly, there is no basis to deem the Plaintiff to have been retired.

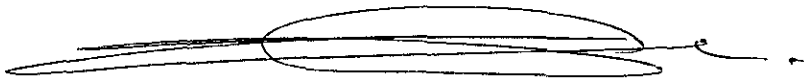
There was a claim for distress. It appears this claim was abandoned because no evidence whatsoever was led to support this allegation. The Court cannot just assume that since it was pleaded it follows it is true, and damages follow, unless evidence is adduced as to the nature of the distress suffered.

All in all, in accordance with the Plaintiff's claims, the reliefs allowed are a declaration that the Plaintiff's removal from the pay roll was unfair and illegal. It follows therefore that he is entitled to be paid salaries from the time he was removed from the pay roll

(around May 2008) up to July 21, 2010, the same to be assessed by the Registrar. The other claims stand dismissed for the reasons aforementioned.

Costs to be borne by the Defendant to be taxed in default of agreement. And leave to appeal granted.

DATED THIS 30TH DAY OF APRIL, 2020.



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THE HON. MR. JUSTICE CHARLES ZULU