

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)
B E T W E E N:

MIKE MUSONDA KABWE

APPELLANT

AND

B.P. ZAMBIA LIMITED

RESPONDENT

Coram: Sakala, Chirwa and Muzyamba, JJS

22nd May 1997 and 14th July 1997

For the Appellant: W. Mubanga, Permanent Chambers'

For the Respondent: E.J. Shamwana, SC, appearing with A.J. Shonga,
Shamwana & Co.

J U D G M E N T

Muzyamba, J.S. delivered the judgment of the court.

CASE REFERRED TO:

1. MARRIOTT v OXFORD AND DISTRICT CO-OPERATIVE SOCIETY LIMITED
(No.2) 1970 1 QB 186

This is an appeal against a High Court decision refusing to declare that the appellant was entitled to terminal benefits based on the increased salary of K42,262,488 per annum and to purchase his personal to holder car at book value. There is also a cross appeal against the award of B.P. Africa bonus or allowance and other allowances due and payable under the conditions of service applicable to the appellant.

Briefly the facts of the case are that the appellant was employed by the respondent as a Sales Manager and in that capacity was part of Management. In 1994 there was a general increase in salaries for all employees of the respondent. By letter dated 13th May 1994 the appellant's salary was increased to K42,262,488 per annum with effect from 1st April 1994. The increments were reversed on 9th June 1994. Then on 26th August 1994 the appellant offered to retire early after serving the respondent for 22 years. He requested that his terminal package be worked on the basis of the Personnel Administration Manual. This was accepted and his last working day was 26th August 1994. His terminal benefits were then worked out on the basis of the old salary and was sold his personal to holder car not at book value. This displeased him. He then took out originating notice of motion in the High Court seeking the declarations set out above. He lost, hence this appeal.

There are eight grounds of appeal, thrust of which is that the learned trial Judge erred in his finding that the appellant was part of the decision that reversed or led to the reversal of the salary increments and in holding that the price of the car was negotiable.

As we see it the real issue is:

"Did the appellant agree that his salary be reduced and if not what is the effect or consequence of an employer varying or cancelling a basic condition or basic conditions of service without the employee's consent."

Before we consider the issue and the arguments we wish to state here that although Mr. Shamwana's name appears on record as leading Counsel for respondent, he did not in fact argue the appeal. His sole purpose for appearing in court was, to use his own words, 'to launch and let loose' Mr. Shonga who had worked under his close supervision for a period of 4 years and upwards and who was appearing in the Supreme Court for the first time. We wish to commend Mr. Shamwana for this and it is our hope that other Senior Counsel will emulate him.

We now turn to the issue and the arguments. Mr. Mubanga argued that the appellant did not agree that his annual salary be reduced. That by reducing his salary without his consent the appellant is deemed to have been declared redundant by the respondent and ought therefore to have been paid a redundancy package based on the increased salary. In support of his argument he cited the case of MARRIOTT (1). In response Mr. Shonga argued that the salary increments were made by management without the approval of the respondent's Board of Directors and were never ratified. That the consequence of these excessive salary increments is that the respondent made a huge loss of K879 million. That had the increments not been reversed the respondent would have collapsed. That the reversal or reduction of the salaries was validly done and therefore bound all employees including the appellant. That the appellant was not the only one who opted for early retirement. That Mr. Lishomwa also retired early and was paid his terminal benefits on the old and not on the increased salary. To support his argument he referred the court to document 85 - 87 of the record of appeal. In reply Mr. Mubanga said that the lack of Board approval for the increments was not an issue in the court below and that Mr. Lishomwa testified that his terminal benefits were based on the increased salary.

We have carefully considered both documentary and oral evidence on record and the arguments by both Counsel. It is common cause that the appellant's salary was increased to K42,262,488 per annum effective from

1st April 1994 and that for 3 months he was paid the increased salary. It is also common cause that the increase was reversed on 9th June 1994 and that the appellant was paid a reduced salary in July 1994. The learned trial Judge found as a fact that since the appellant took part in management discussions to reverse the salary increments he must have consented to the reduction of his salary.

DW4, Peter Knoedel, then Managing Director of the respondent said in his evidence at page 186 of the record of appeal:

"In February 1994 we agreed on salary increase, to be effected on April 1st 1994. Mr. Kabwe, as Senior Manager of the Company, was a party to the negotiations for salary increase. We agreed on an increase which was higher than what we had budgeted for. And the Company was doing badly. Later a dispute arose which led to an industrial action. I called for a Board Meeting in which I refused to effect the high salary increase. The employees then went on strike.

All this was after the Company had paid the new salary. We subsequently reversed the implemented salaries. The reverse was made in June 1994. The Management Team and the Board were aware of the reversal. These bodies held meetings about the reverse. We promised a new salary structure. We told all staff, both verbally and in writing about the change. Mr. Kabwe knew this reversal. He was part of the Functional Management.

I am not sure if the Plaintiff got a letter about the reversal.

I knew Mr. Lishomwa. He was one of our Managers. His package was not related to that of Mr. Kabwe. The circumstances were different.

I would like the Court to consider my two Affidavits."

Paragraphs 7 and 8 of his affidavit in opposition in the supplementary record of appeal read as follows:-

"7 That the applicant may not have received the Respondent's letter of 27th June 1994 but was party, as a member of the respondent's Management Team to several discussions on the subject, some of which were conducted in the presence of the majority of.

After lengthy discussions Management was of the view that due to the seriousness of the issue at hand it would not be prudent to rush into a decision. A careful study should be carried out by HRM in line with the instructions given to him by the Managing Director in his note to him which was not copied to other members of the Management Team and instructed him and restrained him from discussing the issue with anybody else. To this end General Manager volunteered to report to the Board accordingly and also to the government and staff.

GM observed that the entire Management Team over the past one month have paid no attention to the business i.e. accounts were getting out of hand, customers were not being attended to effectively and sales were falling. It was necessary to pay very serious attention to the state of the company because what happens to B.P.Z will have serious consequences to the economy of Zambia as a whole. He further said that the country will not give credit to Management if the Mines came to a grinding halt and Railways stopped operating just because Management were busy talking about salaries only.

The priority is to focus on ensuring that the company gets back on track and if necessary a request to the Board to call an emergency Board Meeting to discuss salaries at a later date should be made. Meanwhile a detailed study on salaries should be initiated by the Human Resources Manager and completed by him as soon as possible for management discussion.

The Chairman should be requested to make an announcement to staff regarding salaries after the Board Meeting so as to ease the staff's anxieties over the issue".

On 8th June 1994 there were three Management Meetings. The relevant part of the minutes of ^{the} 1st Meeting read as follows:-

"The Chairman informed the meeting that the purpose of the meeting was to discuss the recent salary increments in BPZ which during the recent meeting of the Cabinet chaired by the President, Mr. Chiluba were viewed as excessive and should be reversed/cancelled.

He further said that Government reaction to BPZ salary increases had nothing to do with methodology, but that the increases were abnormal and would affect the dividends to be declared, and as a result the Board is requesting Management to come up with options.

The Chairman said that he has developed a system to meet the Government's request as follows which he felt if implemented he would be able to defend with the Government:

- Cost of living increase to be removed completely
- Recently reintroduced reduced House Rent recovery to be retained
- Recently reintroduced Housing allowance to remain in total
- Merit increment at 10% to remain."

Those of the 2nd Meeting read as follows:

"The Managing Director informed the meeting of the Management's decision as follows:-

- Due to the differing views of management on the proposals and the underlying fact of the repercussion of the implementation of such proposals Management agreed that there should be no change to the existing salary structure but should the Board decide otherwise, they are at liberty to do so and should explain that decision to the employees.
- The above decision was communicated to the Chairman in the presence of Directors Sampa, Bonga, Greensmith, and Withey
- The Chairman said that since there has been no change of opinion the Chairman would request the Board at tomorrow's

: J7 :

Board Meeting to adopt his proposal he had made in the morning's meeting viz

- complete cancellation/reversal of Cost of Living
- and retention of the merit increase, housing allowance payment and recent house rent recoveries at current levels.
- Mr. Sampa remarked that on our fears of legal implications Mr. Musonda, the Company Secretary would advise on that, Government can not run on fears and demotivation can only be a factor if there is lack of explanation to staff. We should try to avoid news to break to the public's eye about these salaries.
- The Chairman said that the current salaries were too high and he saw great difficulties for the future if the current position/stance was adopted. As the Board it has to proceed without any further delays.
- Mr. Greensmith said that several things have happened over the last 24 hours, he had been in touch with Cape Town and the 'B' Shareholders have expressed great exception to this which would yield great consequences. We should make every endeavour to resolve the issue at hand.
- Since no solution had been found the Chairman advised Management to meet again and reconsider their stance and report their decision through the MD at the Board Meeting scheduled for 09.00 hours tomorrow."

And those of the 3rd Meeting read as follows:

"MD invited views from Management. Mr. Hanakowa put a proposal of leaving Housing Allowance, Rent Recovery, Merit increase at current levels but reducing the Cost of Living allowance to 25% with a provision for review in October 1994 based on company results for this half year.

The other members of the Management team proposed to defer the meeting to tomorrow at 07.45 hours, so as to sleep on it and come back fresh. The meeting was therefore postponed to Thursday 9 June 1994 at

: J8 :

On 9th June 1994 Management held another meeting and the relevant portion of the minutes of that meeting read as follows:-

"This was the third and final meeting of this Management Team following two meetings which were chaired by Mr. Kasunga Chairman of BPZ Board at which Management Team and Directors Sampa, Greensmith, Bonga and Withey (the last one) were in attendance.

The purpose of the meetings as mentioned by the Chairman Mr. Kasunga was to discuss the recent increments in BP Zambia which during the recent Cabinet Meeting chaired by the President Mr. Chiluba were viewed to be excessive and should therefore be reversed/cancelled. This instruction was communicated to Zimco by the Cabinet, and Zimco would like BPZ Management to come up with proposals on how to meet this instruction before the next Board Meeting scheduled for 09.00 hours on Thursday 9 June 1994.

Management expressed their anxiety over the short notice given in which to come up with an option that will be acceptable to staff and the Board without causing work disruptions, political repercussions, litigations etc and stand the test of time.

The final proposal was that:

- (a) The Board should ratify the approvals made by the Chairman, the Managing Director in the presence of the Company Secretary and the Management Team.
- (b) If not ratified, the Board should decide on the new structure and how that should be implemented. Or,
- (c) The Board should give Management time to study the matter and make proposals to the Board after thorough consultations with the employees and other relevant organs."

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On the same day, 9th June 1994 a Special Meeting of the Board of Directors was held at which the salary increments were reversed. The relevant part of the minutes of that meeting read as follows:

"Reference Minute No.1528.5 of the Special Meeting of the Board of Directors of the Company held on 2nd June 1994. The Chairman reported that Management had not worked out the various options for reversing the excessive salary increments recently awarded to employees as directed by the Board and that no explanation had been given for the non-compliance.

The Directors noted with great concern the negative attitude of senior members of management in carrying out the decision of the Board and stressed that the situation could not be allowed to go unabated.

After due and careful consideration, the Board
RESOLVED

- (i) THAT the salary increase of 125% effected on 1st April 1994 be revoked forthwith.
- (ii) THAT the salary increase of 25% comprising of 10% merit annual increment and 15% decrease in rental recoveries be awarded instead to all categories of employees with effect from 1st July 1994
- (iii) THAT no recoveries for monies already paid be done
- (iv) THAT management be and is hereby directed to inform all workers about the decision of the Board".

It is quite clear from the minutes of the management meetings that management did not agree or resolve to reverse the salary increments. It is also quite clear from the minutes of the special meeting of the Board of Directors of the respondent that the Board of Directors took it upon themselves to reverse the salary increments after management had failed to make a decision. It took this decision due to Government pressure and not because the increments were without its approval. This is quite clear from documentary evidence on record. On these facts we

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are unable to support the learned trial Judge's finding that the appellant consented to the reduction of his salary. In MARRIOTT case (1), cited by Mr. Mubanga the facts are that the appellant was employed by the respondents as Electrical Maintenance Foreman. The respondent decided to reduce the work force in its Works Department and wrote to the appellant that because of this his status would be reduced and that his salary would be reduced by £3 a week. The appellant protested and continued working. After sometime the respondent wrote to him again that instead of reducing his wage by £3 they would reduce it by £1. The appellant protested again and gave a week's notice to take up another job. He claimed redundancy payment which was refused. He then took the matter to court. The trial court held that since he had continued working before taking up a new job he had accepted the new conditions and was therefore not entitled to a redundancy package. On appeal it was held that since the parties had not agreed to the variation of the appellant's wages and reduction in status the contract of employment terminated on the date of variation of the essential terms of the contract and that the appellant was entitled to a redundancy payment. We respectfully agree with that decision that if an employer varies a basic or basic conditions of employment without the consent of the employee then the contract of employment terminates and the employee is deemed to have been declared redundant on the date of such variation and must get a redundancy payment if the conditions of service do provide for such payment. We would add here that if the conditions of service provide for early retirement and not redundancy then the employee should be deemed to be on early retirement. The facts of this case are similar to MARRIOTT case (1). The fact that the appellant continued working after his salary was reduced cannot be said that he accepted the new condition. We hold therefore that the contract of employment between the parties terminated on 9th June 1994 when the respondent reduced the appellant's salary without his consent. Although the conditions of service provide for redundancy and not early retirement the parties agreed, as a matter of company policy that the appellant be on early retirement. The only issue between them therefore is what salary was applicable in calculating his benefits. Was it the increased or reduced salary? It was argued by Mr. Shonga that Mr. Lishomwa who also retired early was paid terminal benefits on the old or reduced salary and therefore that this applied to the appellant as well. Document 85 relied upon by Mr. Shonga reads in part:

"Dear Mr. Lishomwa
EARLY RETIREMENT

: J11 :

Further to discussions in respect of the above, I now wish to confirm after consultation with both shareholders that your request for early retirement has been accepted as an exception to company policies. You will be retired from the Company and your last working day will be 30 June 1994.

1 In consideration of the long service you have rendered to the Company, your retirement benefits have been negotiated and will consist of three components.

1.1 A lump sum payment calculated in line with the company's policy for early retirement, based on your Base Salary as of 31 March 1994, increased by 15% (merit) and a special payment of 15% on one annual such Base Salary."

Mr. Lishomwa was PW.3 and at page 157 of the record of appeal he said, in examination in chief:

"In May, I also received a similar letter from the Board increasing my salary.

I left the company on 30th June 1994, when I left the company I was paid on the basis of personnel Administrative Manual contents. (see MMK1(a) and 1(b). This manual contains the procedure and formula for calculating retirement benefits.

I see "MMK1(a) and "MMK1(b). When I left S.P. I was paid on the increased salary and not on the old salary. This should have applied to everybody else whose salary was increased".

In cross examination document 85 was never put across to him. Neither was the computation of his terminal benefits put across to him nor was it produced in evidence by the respondent for the court to see how his benefits were calculated. We are unable therefore to accept Mr. Shonga's submission that Mr. Lishomwa's benefits were based on the reduced salary.

We have already held that the contract of employment between the parties terminated on 9th June 1994 when the respondent reduced the appellant's salary without his consent. His benefits therefore ought to have been calculated on the increased salary applicable to him then. The appeal on this ground therefore succeeds.

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We now turn to the sale of the personal to holder car. Mr. Mubanga argued that the learned trial Judge erred in law in holding that the price of the car was negotiable. That at the time the appellant retired the conditions of service relating to the sale of personal to holder cars had not been varied and therefore that the appellant was entitled to buy the car at book value. On the other hand, Mr. Shonga argued that the car was less than four years old and therefore could not be sold at book value. He referred us to the evidence of DW.3, Mr. Mumbuluma at pages 177-178 of the record of appeal who said that personal to holder cars which were four years old were sold to holders at 10% of their original value and that cars which are less than 3 years are never sold and those between 3-4 years are sold at the Managing Director's discretion. That this particular car was acquired in August 1989.

Mr. Shonga concluded by saying that on the evidence before him the learned trial Judge was right in his finding that the price of the car was negotiable.

We have considered the evidence on record and the arguments by both Counsel. The relevant condition is at page 49 of the record of appeal and it reads as follows:

"Company Car

The company to provide a personal-to-holder company car, of not less than 2600 cc, or in line with the existing market environment, replaced every four years. Fuel free. Option to purchase it at 10% of original Dollar price at the exchange rate ruling at the time of disposal".

It is common cause that the appellant's last working day was 26th August 1994 and on the evidence on DW.3 we find that the car in question was four years old at the time the appellant retired. He was therefore entitled to buy it at book value. We would therefore allow the appeal on this ground.

We now turn to the cross appeal. It was argued by Mr. Shonga that the learned trial Judge erred both in law and fact in awarding the appellant 3.P. Africa bonus and allowances which were not claimed because the bonus was not payable to employees who had left employment and that it was never paid on pro rata basis. That in any event the bonus was not part of the retirement package agreed upon between the parties. As regards

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other allowances he argued that the appellant was not entitled to these since they were not pleaded. On the other hand Mr. Mubanga argued that the learned trial Judge was on firm ground when he awarded the appellant the bonus and other allowances. That the bonus was provided for in condition 5 (d) of the conditions of service at page 49 of the record of appeal and that it was payable without asking for it as it was not discretionary.

We have considered the evidence on record and the arguments by both Counsel. Condition 5 (d) of the conditions of service provides:

"BP Africa annual allowance revised yearly
in line with the UK inflation rate."

The fact that this allowance was payable is common ground. What is in dispute is whether or not it was payable on pro rata basis even to those who had left employment. PW3, Mr. Lishomwa who held the position of General Manager before he retired said at page 168 of the record of appeal:

"Yes, the Plaintiff was entitled to the
"B.P. Africa Bonus". It was over 7,000
Pounds. This was part of the Conditions
of Service for Senior Managers. If one
left early before getting fully entitled,
one would receive something on the "Pro
rata" basis."

And at page 169 he said that he was paid the bonus on pro rata basis as part of the retirement package. He said:

"Yes, there have been persons who benefited
from "Africa Bonus" on pro-rata basis.
I am the example myself, I benefited."

And DW1, Mr. Chipelo said at page 171:

"I also enjoyed the Bonus benefit, paid to
Senior Staff. I had worked for 11 years
in 1992 - 1993 and got less than the complete
year entitlement. I got less, not complete.
I never experienced the payment of Bonus on a
"Pro-rata basis."


Quite clearly, although this witness said that he never experienced payment of the bonus on pro rata basis he conceded that at one time, during his 11 years of service with the respondent he got the bonus on pro rata basis. On this evidence we are satisfied that the appellant was entitled


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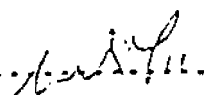
to BP Africa bonus on pro rata basis. As regards other allowances these were not claimed and therefore not awardable. The cross appeal therefore succeeds only to the extent that the award for other allowances is set aside. We affirm the award for BP Africa bonus.

The net result is that we order the respondent to pay the appellant the sum of K135,606,357-66 claimed in the amended originating notice of motion. We award interest at average short term bank deposit rate from the date of the amended notice of motion to the date of this judgment and thereafter 6% until the judgment sum is paid.

Costs in this court and in the court below to the appellant.


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E.L. SAKALA
SUPREME COURT JUDGE


.....
—D.K. CHIRWA
SUPREME COURT JUDGE


.....
W.M. MUZYAMBA
SUPREME COURT JUDGE