

SCZ JUDGEMENT NO. 28 OF 1999

IN THE SUPREMENT COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

APPEAL NO. 15/99

B E T W E E N:

JOSEPH DANIEL CHINTOMFWA

APPELLANT

AND

NDOLA LIME COMPANY LIMITED

RESPONDENT

Coram: Ngulube, CJ, Muzyamba and Chibesakunda, JJS
on 2nd June 1999 and 8th September 1999

For the Appellant: Mr Chitabo Chiinga of Messrs Chitabo Chiinga & Associates
For the Respondent. Mr Kabuka of Messrs J Kabuka Company

JUDGEMENT

Chibesakunda, JS delivered the judgement of the Court.

Case Reference

1. Paul Gweze Vs Zambia Consolidated Copper Mines Limited, Appeal No. 38 of 93 (unreported)
2. Zambia Consolidated Copper Mines Limited Vs Moses Phiri & 39 Others, Appeal No. 119/97 (unreported)

For convenience sake we will refer to the appellant as the plaintiff and the respondent as the defendants in keeping with what the parties were before the lower court. The Learned Trial Judge dismissed the plaintiff's claims for a declaration that his purported early retirement was null and void as he did not waive the provisions of Clause 7.3.3(c) by consenting to the retirement. Thus also dismissing the claim that he retired under protest.

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The evidence before the trial court, which was established, was that the defendant employed the plaintiff as an engineering clerk during the month of September 1984. On the 29th of September 1995 the plaintiff was offered an early retirement by the defendant. He had earlier on resisted consenting to this early retirement as it was contrary to Clause 7.3.3(c) of his conditions of service. Later on after protracted persuasion (more or less cohesion) from the management he on 31st of March 1996 requested for an extension of time for him to retire on 30th September 1996. At the end of this extension of this period that he requested for he was retired, he collected his benefits in total and left employment. The defendant's evidence at the trial was that the plaintiff had been offered early retirement package because the defendant company decided to reduce its labour force, the plaintiff had not reached his retirement age of 55 years, together with three others, and that management discussed at length with the plaintiff and those other employees who were affected. In the end, the plaintiff accepted the early retirement. The defendant had testified categorically that the plaintiff had not prematurely aged nor was unable to perform his duties. He had to be presumed to retire. The Learned Trial Judge, even though he accepted that there was reluctance on the part of the plaintiff to go on early retirement, held that, that was nonetheless consent - hence his holding that Clause 7.3.3 (c) of the conditions of service was waived by the plaintiff.

Now before us, Mr Chitabo, learned counsel for the plaintiff, has attacked the trial court's findings on two grounds. First ground of appeal is that the Learned Trial Court erred in law and in fact in failing to conclude that the plaintiff went on early retirement under protest. His other argument is that Clause 7.3.3(c) of the plaintiff's conditions of service is very plain and clear. According to him the plaintiff would only have retired under that clause after attaining the age of 50 years but before getting to 55 years if he was regarded as prematurely aged. Citing the cases of Paul Gweze vs Zambia Consolidated Copper Mines Limited (ZCCM) (1) and ZCCM Limited vs Moses Phiri and 39 Others, (2) he went on to argue that issue of consent to early retirement

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should not and could not have arisen. He pointed out to us that this court in *Paul Gweze vs ZCCM (1)* and *ZCCM vs Moses Phiri (2)* held that the early retirement rule only applied in cases where an employer decided on evidence that an employee had prematurely aged by failing to do his duties. Therefore, his submissions to us were that on the evidence before the court below and before us there was no such proof that the plaintiff had prematurely aged by failing to perform his duties for him to have qualified to be in the category of such employees. He further argued that the plaintiff even pleaded for extension of time before being retired showing that he was still very keen to serve his employers as could be seen on page 15 to 20 in the Record of Appeal.

Mr Kabuka in response to this argument submitted that the court below was on firm ground in dismissing the claim because the conclusions were based on the facts of the case. According to him the evidence showed that the plaintiff had waived the conditions in Clause 7.3.3 (c). He argued that the evidence of acceptance of the new conditions could be found in the fact that the plaintiff collected all his terminal benefits. He furthermore argued that there had been discussions between the plaintiff and the defendant but at the end there was final acceptance by the plaintiff of the new conditions. As such, the trial court was on firm ground.

We have looked at the evidence before the lower court. We have no difficulties in accepting the arguments advanced by Mr Chitabo, contrary to the views expressed by Mr Kabuka, learned counsel for the defendant. We find overwhelming evidence of resistance by the plaintiff to accept the revised conditions and the insistence by the defendant for the plaintiff to accept their waiving of Clause 7.3.3 (c) which says:-

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"Early Retirement -

If in the opinion of the Company an employee who has attained the age of 50 but not 55 is prematurely aged and is unable to perform his full duties, the Company may terminate the employment by early retirement. An employee on early retirement shall be entitled to 9 months pay in lieu of notice, SRG and repatriation expenses."

This early retirement rule can only be invoked when the employer on supportable facts concluded that an employee who has reached the age of 50 years but before 55 years has prematurely aged. This is when there is proof on the balance of probabilities that the employee in question cannot perform his duties, there is no such proof in this case.

In our view the evidence on P55 on the Record of Appeal underscores the point. The plaintiff was still pleading for extension of time and thus his unwillingness to go for an early retirement. For us, therefore, it is clear that it is the defendant who wanted the plaintiff to waive Clause 7.3.3 (c) and thus being in breach of that clause. We therefore find that the Learned Trial Judge misdirected himself on that point. We reverse his finding. The appeal is successful.


Coming to the new order which we substitute, the plaintiff would have been entitled to damages equivalent to his one (1) year's salary plus other perks. However, this court is alive to the fact that job opportunities currently are almost nil. We in reflecting this point order that the plaintiff be paid damages equivalent to two (2) years' salary with all other perks.

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We order interest at an average short term bank deposit rate from the date of issuance of the Writ up to judgement and thereafter at current lending bank rate up to the payment of the same with costs of this appeal to be agreed on, in default to be taxed.



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M S W NGULUBE
CHIEF JUSTICE



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W M MUZYAMBA
SUPREME COURT JUDGE



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L P CHIBESAKUNDA
SUPREME COURT JUDGE