NATIONAL MILLING COMPANY LIMITED *v* GRACE SIMATAA AND OTHERS

Supreme Court
Ngulube, CJ, Muzyamba and Chibesakunda, JJS
10th February, 2000 and 1st June, 2000
(SCZ Judgment No. 21 of 2000.)

Flynote

Employment-Employers unilateral variation-basic Conditions of Service-effect thereof.
Company law-shareholders-change of - effect.

Headnote

The appellant was, prior to its privatisation one of the subsidiary companies in the ZIMCO group of Companies which were parastatals. The respondents were employees of the appellant who were employed under what were known as ZIMCO Conditions of Service for non-unionised workers.

Meanwhile, the appellant company got privatised whereby the shareholding went to new owners. The appellant notified the workers that it had moved away from the ZIMCO conditions of service and would have and use its own. The salaries were increased but a few months later the respondents were declared redundant. The respondents were paid redundancy benefits in accordance with the statutory instrument number 99/94 in force on Minimum Wages and conditions of the Employment Act because the appellant's conditions were in this respect far below the statutory minimums. It was also common cause that the statutory instrument was in certain respects inferior to the ZIMCO revised package which guaranteed to the eligible employees twenty four months pay plus a months' pay for each completed year of service.

The respondents felt short-changed and launched proceedings in the High Court claiming to be given the separation packages awarded to them under the ZIMCO conditions. The learned trial judge agreed with the respondents, finding that the appellant had changed the conditions of service for worse and without the consent of the affected employers. The appellant appealed.

Held:

(i) If an employer varies in an adverse way a basic condition 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 or early retired as may be appropriate – as at the date of the variation and the benefits are to be calculated on the salary applicable.

(ii) The alteration of a basic condition if consensual and probably beneficial would result in bringing about a replacement contract different from the former.

(iii) Change of ownership of shares did not result in the appellants becoming a new employer; they were still the same employer and they were bound by the contracts of employment they already had with each one of their workers severally and collectively.

Legislation referred to:

1. Constitution of Zambia Cap 1 Article 124
2. Privatisation Act Cap 386 Section 39.

Cases referred to:

1. *Kabwe* v *BP Zambia Limited* (1995-1997) Z.R 218.
2. *Marriot* v *Oxford and District Co-operative Society Limited* No. 2 [1970] 1 QB 186.
3. *Re: Williams Porter and Company Limited* [1937] 2 ALL ER 361.

P. Matibini and M. Nchito of MNB Legal Practitioners for the appellant. *S. Sikota of Central Chambers* for the respondents.

Judgment

NGULUBE, CJ, delivered the judgment of the court.

The appellant was, prior to its privatisation, one of the subsidiary companies in the ZIMCO group of companies, which were parastatals. The respondents were employees of the appellant who started work in the parastatal days and were employed under what were known as ZIMCO conditions of service for non-unionized workers, being conditions laid down by the parent company and which had to be implemented by the boards of directors in the subsidiaries. Among the conditions of service were provisions to cater for redundancies and the payment to be made in such eventuality to employees who had served for not less than five years. In addition to payment in lieu of notice and the payment of any other contractual terminal benefits, there was to be redundancy pay ranging from six months' to thirty-six months' basic salary depending on the length of service in the range of five years to thirty years or more. For the purposes of this judgment, the foregoing will be referred to as the original ZIMCO redundancy benefits. By a circular letter of 26th July 1993, ZIMCO revised the compensation package for redundancies so that the eligible employees would receive twenty-four months' pay plus one months' salary for each completed year of service; a fixed repatriation allowance; three months' pay in lieu of notice; four months rent free continued occupation of company accommodation or housing allowance; and a long service gratuity for those who had served for ten or more years. In the same circular, ZIMCO made it clear that subsidiary companies with a superior separation package would continue to apply such better package. Again by a circular letter of 25th January 1995, ZIMCO called upon its subsidiaries to take heed and implement the contents of Statutory Instrument No. 99 of 1994, made by the Minister of Labour under the Minimum Wages and Conditions of Employment Act, with liberty to the subsidiaries to pay or award even better terms than the Government–prescribed minima if they were able to do so.

The provisions of this Statutory Instrument are relevant to this case and applied until the government repealed and replaced it with a later one with which we need not concern ourselves here. This Instrument provided that the minimum wages and conditions of employment *"shall be as indicated in the schedule"* and went on to provide for among other things a repatriation benefit equal to the current cost of travelling by public transport (as opposed to the fixed repatriation allowance set by ZIMCO) and redundancy benefits of *"at*

*least one months' notice"*and redundancy pay, *"of not less than two months basic pay for each completed year of service."*

Meanwhile, the appellant company got privatized whereby the shareholding has gone to new owners. The appellant notified the workers that it had moved away from the ZIMCO conditions and would have and use its own; the salaries were increased but a few months later, the respondents were declared redundant. The appellant's own new conditions were, on the issue of redundancy, a replica of the original ZIMCO redundancy benefits. Ultimately, the appellant did not follow its own conditions which were in this respect far below the statutory minima but instead opted to pay the redundancy benefits in accordance with the Statutory Instrument in most respects except for the repatriation benefit where they followed the ZIMCO revised package of 26th July, 1993. It was common cause that the Statutory Instrument was in certain respects inferior to the ZIMCO revised package which guaranteed to the eligible employees twenty-four months' pay plus a month's pay for each completed year of service.

Taking PW1 who served for fifteen years as an example, the Statutory Instrument gave thirty months' pay while the ZIMCO package awarded thirty-nine months' pay. There were also other perks like housing or an allowance in lieu which were better under the ZIMCO package.

The workers felt short-changed and launched proceedings in the High Court claiming to be given the separation packages awardable to them under the ZIMCO conditions. The employer resisted the claim, arguing that it had the right to change the conditions and adopt its own and to opt to pay the package prescribed by the Statutory Instrument which was better than that applicable under the contractual new conditions. The learned trial judge agreed with the workers, finding that the appellant had changed the conditions of service for worse and without the consent of the affected employees. The learned judge rejected an ingenious attempt to argue that the conditions formulated by ZIMCO which became the conditions followed by the parties somehow automatically ceased to bind upon privatization. It was pointed out that the change of shareholders and management did not change the employer who continued to be the corporate entity National Milling Company. The learned trial judge concluded, citing our decision in *Kabwe* v *BP (Z) Limited* (1)that any conditions that are introduced which are to the detriment of the workers do not bind the workers unless they consent to them. Of course, Kabwe did not specifically formulate any proposition in those terms, it having been concerned with an adverse downward alteration to a fundamental condition – namely the salary – which the employee had for a while already began to enjoy. The thrust of the holding in the *Kabwe* case, which cited with approval the decision in *Marriot* v *Oxford and District Co-Operative Society Limited* (2), was that if an employer varies in an adverse way a basic condition 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 or early retired – as may be appropriate – as at the date of the variation and the benefits are to be calculated on the salary applicable then. That was a situation where – as in the *Marriot* case – an employee never agreed to the new terms and the adverse change to an essential term amounted to a termination of the contract of employment by the employer. As a corollary, it is possible to have adverse changes, and it frequently happens – for instance as part of a survival plan or plan to avoid or mitigate job losses – that such changes are accepted by the workers and become consensual so that no actual termination or repudiation of the contract of employment results from the mere alteration of one or more basic conditions. It follows also that changes to non-essential, non-fundamental or non-basic terms may attract wholly different considerations.

Several grounds and arguments were advanced before us. Under the first ground of appeal, it was submitted that the court below was in error to have held that the respondents'

redundancy benefits were supposed to have been paid pursuant to the revised ZIMCO conditions. It was said the court erred because at the material time the appellants had already long introduced new conditions for permanent and pensionable staff. It was pointed out that following the previous dissolution of ZIMCO and the subsequent privatization of the appellant, the conditions of service were changed and this was explained to the workers. The witnesses for the complainants had testified that following the change, the salaries had been enhanced, which was clearly not a change for the worse and the respondents had enjoyed such increased salaries for a period of seven months before the redundancies. It was argued that the workers had acquiesced in the new conditions where the redundancy provisions were the same as the original ZIMCO provisions so that there was nothing wrong when the appellant opted to use the higher formula under the Statutory Instrument even if it was in some respects less favourable than the revised ZIMCO conditions. It was submitted that because of acquiescence, the respondents ought to have been estopped from claiming the accrued revised ZIMCO terms after they had enjoyed the enhanced salaries and after they had failed at the opportune time to elect to be declared redundant or retired.

Under the second ground of appeal, it was submitted that the learned trial judge had wrongly applied the *Kabwe* case (1) where there was a non-consensual reduction to the salary, a basic condition, while here the same basic condition had been increased and accepted by the workers. Counsel submitted that a redundancy benefit cannot be a basic condition of service; that it is a contingent condition which may or may not happen. Under the third ground, it was submitted and argued that the court below was wrong to find that the conditions of service had been altered to the detriment or disadvantage of the workers when in an important aspect, that of the salary, the conditions had changed for the better.

In response, Mr. Sikota pointed out that most of the workers never actually got sight of the new conditions which were promised so that there was no question of the respondents consenting or acquiescing to any disadvantageous alterations to the conditions. It was further pointed out that acquiescence had not been pleaded and that in any case the conditions of service comprise much more than just a salary, even if this has been enhanced. Mr Sikota suggested that the conditions dealt with in the Statutory Instrument No. 99/94 be regarded as the important conditions of service. In that respect, it was submitted that after the promulgation of the Statutory Instrument, it was not tenable to argue that the workers could acquiesce to something illegal which was the effect of the introduction of new conditions which were below an existing statutory minimum. The submission was that the purported changes to the redundancy provisions in the new permanent and pensionable conditions would therefore have been void ab initio. Counsel further submitted that acquiescence to the reduced redundancy benefits could not be inferred from acceptance of the enhanced salary when the workers did not know about the reduction and accordingly when they did not have “full notice” of the new conditions within the dicta in *Re Williams Porter And Company Limited* (3), a case relied upon by the appellants. It was submitted that no estoppel could arise when the workers had not accepted the new conditions and when the redundancies supervened even before some of them could have sight of the new conditions.

In answer to the argument that a redundancy benefit is not a basic condition, Mr Sikota submitted that there was nothing in the *Kabwe* case and the other cases to limit what was basic only to the salary so that the principle should apply whether or not the condition was contingent upon something else happening, as in a redundancy. We were requested to look at all the surrounding circumstances, including the economic realities and the prevalence of the much dreaded redundancies in the country leading to a Statutory Instrument having to deal with the subject. It was suggested that the matters dealt with in the statutory instrument should be regarded as the basic conditions. In response, Mr Matibini argued that minimum conditions are not necessarily basic conditions; with Mr Nchito pointing out how absurd it would be if even the provision for a funeral grant which is in the Statutory

Instrument could be called a basic condition.

We have considered the matters raised and argued in this case. We can affirm immediately that the change of ownership of the shares did not result in the appellant becoming a new employer; they were still the same employer and they were bound by the contracts of employment they already had with each one of their workers severally and collectively. We affirm also that, just as in the case of any other contract, a contract of employment can be varied for better or for worse with a variety of consequences, depending on whether or not the variation is consensual or accepted or rejected. In the cases to which the principles in the *Kabwe* case and the *Marriot* case apply, the unilateral changes were adverse and unacceptable to the employee who became entitled to treat the breach by the employer as terminating the contract and warranting the payment of redundancy or other terminal benefits, as appropriate. Those cases dealt with changes to a basic condition and the issue which arose here was whether a redundancy benefit could be such a basic condition. In the first place, the reference to basic condition must surely be to a fundamental or essential term, one affecting the essential character of the bargain and the breach of which would justify the innocent party to treat the contract as repudiated or rescinded by the party in breach. The alteration of a basic condition if consensual and probably beneficial would result in bringing about a replacement contract, different from the former. It is thus necessary to look at the nature of the condition breached and the consequences of such a breach in order to determine whether a condition is basic or one that is relatively minor and not crucial to the contract. Variations to non-basic conditions even if unilateral and disadvantageous would not affect the essential viability of the contract and would in all probability not discharge it or justify the innocent party to treat the breach as effecting a termination by repudiation or rescission or otherwise. In the next place, we consider that it is necessary to distinguish the position in this case and that in the cases where the innocent party has the opportunity to make an election whether to treat the breach as a repudiation by the other party which terminates the contract or not. In this regard, we do not agree with Mr Matibini that the respondents here had any such opportunity to elect, what with the breach or repudiation complained of only being known upon the termination by the redundancy itself. Since the breach of the previously existing redundancy terms related to the package to be received and played no role in bringing about the actual termination of the employment contract, the arguments about whether or not this was a basic condition were, in the event, unnecessary and a red herring. In the same category fall the arguments about acquiescence when there was no prior and real opportunity to the affected workers to affirm the contract with those precise variations. The position would have been otherwise if the evidence was that clear notice had been given covering the alterations and that the workers with full knowledge had opted to continue in employment in the knowledge that their terminal benefits would be on a reduced package if the separation came by way of redundancy. In this regard, we accept that to a person leaving employment the arrangements for terminal benefits – such as pension, gratuity, redundancy pay and the like – are most important and any unfavourable unilateral alteration to the disadvantage of the affected worker and which was not previously agreed is justiciable and in this connection it is unnecessary to place a label of basic or non-basic on it. It is no wonder that in the public service for example the constitution of the land itself saw fit in Article 124 to protect pension benefits of public workers which may not be altered to the disadvantage of an employee. Equally in the case of the parastatals being privatized, it is not surprising that the legislature anticipated that there would be redundancies some companies could not manage on their own so that the Privatization Revenue Account could be resorted to in supporting redundancy payment schemes: See Section 39, Privatization Act, CAP. 386.

When all is said and done, the learned trial judge was on firm ground and we affirm him. The appeal is unsuccessful. Costs follow the event and will be taxed if not agreed.

Appeal dismissed.