JACOB NYONI *v* ATTORNEY-GENERAL

Supreme Court
Bweupe D.C.J., Chaila and Chirwa J.J.S.
February, 2000 and June 13th 2000
CZ Judgment No. 11 of 2001)

Flynote

Employment law – Conditions of service – Abrogation of – whether permissible.

Constitutional Law – Accrued right- Abrogation of by statute – Whether possible Interpretation and General Provisions Act- Extinguishment of rights and statute amending provision law – Effect of.

Headnote

By an originating summons the appellant sued the Attorney-General seeking two orders namely:

(a) that the Government of the Republic of Zambia pays full plaintiff contrary to the provisions of section 29 of the Civil Service (Local Conditions) Pensions Act Cap. 410; and

(b) that the provisions of section 11 of the Civil Service (Local Conditions) Pensions (amendment) Act 1986 do not apply to the plaintiff.

The learned trial judge dismissed both prayers with costs. The appellant appealed against the dismissal of his action.

Held:

(i) The appellant made an irrevocable option to retire at the age of 60 years and that this became a condition of service he opted to serve on.

(ii) The amendment to the Civil Service (Local Condition) Pensions Act by Act Number 11 of 1986 did not take away the right as the amending Act did not specifically abrogate the acquired or accrued right which became entrenched in the appellant's conditions of service.

(iii) In case of wrongful termination of employment the award of damages is rarely computed on the basis of the remaining period of service. Damages awarded range from the notice period required under a contract to the equivalent of

two years salary.

(iv) Rights may be entrenched in other laws apart from the Bill of Rights in the Constitution or international instruments.

Legislation referred to

1. Civil Service (Local Conditions) Pensions Act, Cap. 410, s. 29
2. Civil Service (Local Conditions) Pensions (Amendment) Act 1986, Cap. 410 s. 11.
3. 1973 Constitution Article 138 (B) and (C).
4. Interpretations and General Provisions Act, Cap. 2 s. 13.

Cases referred to:

(1) *Miyanda* v *The Attorney-General* (1985) Z.R . 185.
(2*) Chitomfwa* v *Ndola Lime, SCZ Judgment No. 28 of 1999.*
(3*) Zambia Consolidated Copper Mines Limited* v *Mutale,* Appeal Number 84 of 1999.

Prof. M.P. Mvunga of Messrs Mvunga Associate, for the appellant.
D.K. Kasote, Principal State Advocate, for the respondent.

Judgment

CHIRWA, J.S. delivered the judgment of the Court.

The hearing of this appeal dragged on for a very long time for various reasons but was finally disposed of in January, 1999.

By an originating summons the appellant sued the Attorney-General seeking two orders namely:

(a) That the Government of the Republic of Zambia pays full compensation to the plaintiff (appellant) for the pre-mature retirement of the plaintiff contrary to the provisions of Section 29 of the Civil Service (Local Conditions) Pensions Act, Cap. 410

(b) That the provisions of Section 11 of the civil Service (Local Conditions) Pensions (Amendment) Act 1986 do not apply to the plaintiff.

The learned trial judge dismissed both prayers with costs. He has now appealed to this court against the dismissal of his action. The appellant joined the then Northern Rhodesia Civil Service as a Clerk on 1st day of August, 1956. He was a member of African Civil Service. The retiring age at the time was 55 years for male workers and 50 years for

females. Local Conditions of service were introduced in 1961 under which the retiring age was increased to 60 for male officers and 55 years for female workers. Officers were given chance to choose to either remain under the old conditions or join the new conditions. From the exhibit "JN2" exhibited to the affidavit in support of the Originating Summons, the appellant stated that "I do not wish to retain the rules that now apply to me regarding my pensionable age". He choose to join the new Local Conditions to retire at the age of 60 years. It is stated on this exhibit that "this option is irrevocable". Under the Zambia Civil Service (Local Conditions) Contributory Pensions Ordinance, Cap. 48 pensionable age under Section 2 is given as:

(a) in case of a male officer, sixty years; and

(b) in case of a female officer, fifty-five years.

In 1986, by Act No. 11 Section 2 of the Civil Service (Local Conditions) Pensions Act, Cap 410 was amended where the pensionable age was reduced to 55 years for male officers from the previous 60 and 50 years for female officers from the previous 55 years. The appellant served in various capacities in the Civil service until in July 1989, at the level of Deputy Permanent Secretary, he was given notice of retirement as provided for under Civil Service (Local Conditions) Pensions Act, Cap. 410 to be retired on 7th March, 1990 at the age of 55 years. He was duly retired and paid his pension due calculated using multiplicant at the age of 55 years. On July, 30th 1990, the appellant wrote the Permanent Secretary, Personnel Division complaining that he had been prematurely retired without compensation; he therefore demanded compensation to reflect the 5 years which he was denied to serve and earn a salary. This was refused, hence the commencement of the action in the court below. In dismissing the action, the learned trial judge accepted that by signing the irrevocable option that the appellant would retire at the age of 60, he and the respondent were bound by that choice. But the agreement did not oust the power of the law, that is, that this irrevocable status would be changed by law, therefore the appellants arguments that the 1998 amendment to the pension law did not affect him could not stand.

On the question of accrued rights, the learned trial judge held that accrued rights were basic human rights and freedoms that are protected in Part III of the 1973 Constitution and guaranteed by multilateral instruments on human rights such as the Universal Declaration of Human Rights or the African Charter on Human and Peoples Rights. He therefore ruled that the right to retire at 60 years was not an acquired or accrued right but a privilege which was liable to be changed by the law. He therefore held that the appellant was rightly retired under the existing law on local conditions pension as amended by Act 11 of 1986.

In arguing the appeal, four grounds of appeal were argued. In addition to the oral arguments and submissions, Prof. Mvunga put in written heads of arguments. In the first ground of appeal it was stated that the learned trial judge misdirected himself in law in holding that the contractual arrangement between the appellant and the respondent could be altered by the Civil Service (Local Conditions) Pensions (Amendment) Act, Act 11 of 1986. It was submitted that the option to retire at the age of 60 was binding and could only be abrogated by the statute if that statute expressly abrogated it and provided for adequate compensation: that Article 138 (B), (C) of the 1973 Constitution guaranteed continued existence of any right, privilege, obligation or liability acquired, accrued or incurred and any provision which a subsequent statute purports to remove the same must expressly do so: the amendment brought in by Act number 11 of 1986 does not extend to irrevocable

contracts such as the one that the appellant and respondent entered into in 1961 and lastly that accrued rights cannot be abrogated by a repealing statute as these rights are protected and for this he relied on the decision of this Court in *Miyanda v The Attorney-General* (1).

The second ground of appeal stated that the learned trial judge erred and misdirected himself at law in holding that the plaintiffs contractual right to retire at the age of 60 was not an entrenched and vested right but a mere privilege liable to be changed at law. It was submitted on this ground that contract of service creates reciprocal rights and obligations and the acquired rights under contract of service become enforceable whenever a breach occurs. This cannot be called a privilege that cannot be enforced and a statute can only alter a contractual relationship in terms expressly stated prospectively and not retrospectively but even then compensation should be provided.

Ground three stated that the learned trial Judge misdirected himself in law in holding that a contractual right was not a common law right which vested in the appellant. It was argued that contractual rights vest in the contracting parties and the same become enforceable and such vested right is called a common law right because it is through the evolution of common law that such a right has been established, recognized and enforced.

The fourth ground was that the learned trial judge misdirected himself at law in holding that Cap. 410 was properly changed and was consistent with the provision of Section 13 of the Interpretation and General Provisions Act. It was argued that Section 13 of Cap. 2 has no bearing on this case as those provisions relate only to when provisions of the repealed law cease to exist and when provisions of the substituted law come into force. In reply on behalf of the respondent, Mr Kasote relied mostly on written heads of arguments.

On the first ground of appeal, it was argued that the learned trial judge was on firm ground when he held that contractual arrangement between the appellant and respondent could be altered by the Civil Service (Local Conditions) Pensions (Amendment) Act number 11 of 1986. It was submitted that it was the intention of Parliament that pensionable age be altered from 60 to 55 for male officers and if Parliament did wish the Act to affect those with irrevocable contracts it should have said so. It was submitted that there were no options in the 1986 Act to be exercised whether to retire at the age of 60 or 55. It was argued that both the 1961 Ordinance, Cap. 48 and the 1986, Cap. 48 and the 1986 Cap. 410 had no optional clauses where one could have exercised that option.

On ground two it was argued that the learned trial judge did not err or misdirect himself at law in holding that the appellants right to retire at the age of sixty was not entrenched and vested, but a mere privilege liable to be changed at law. It was argued that there is nothing in the Constitution which vests the right of one to retire at the age of sixty years and if parliament wished to do so it could have provided so under Part III of the 1973 Constitution. On the third ground Mr Kasote argued that the learned trial judge correctly held that a contractual right is not a common law right vested in the appellant in that although freedom to contract basically arises from common law, it is subject to various statutes passed. In the present case the pension right was subject to the restrictions and limitations imposed by the 1961 Ordinance and the 1986 Act.

With regard to ground four Mr Kasote submitted that the learned trial judge did not misdirect himself when he held that Cap. 410 was properly changed and was amended within the provision of Section 13 of Cap. 2. It was emphasized that as common law rights can be abrogated by statute, here the retiring age was properly changed from 60 to 55 years. It was further argued that the appellant never challenged the reduction in retiring age in the court of below and that the appellant slept on his rights from 1986 up to 1994, when he purported to challenge the change in retiring age.

The issues for consideration in this appeal are whether the appellant was prematurely retired having regard to his irrevocable option to retire at the age of 60 years; and what is the effect of the Civil Service (Local Conditions) Pension (Amendment) Act, No. 11 of 1986 on the irrevocable option made by the appellant on 14th November, 1961.

The learned trial Judge held in his Judgment that both the appellant and the respondent were bound by his irrevocable option made by the appellant to retire at the pensionable age from 60 to 55 years for male officers and if Parliament did not wish the Act to affect those with irrevocable contracts, it should have said so. It was age of 60 years. But he went further and said that the irrevocable option did not oust the powers of the law to change it. The retirement at the age of 60 years is contained in the Civil Service (Local Conditions) Contributory Pensions Ordinance, Cap. 48 of the 1961 and 1965 Edition of the laws, and it is these conditions that the appellant transferred under part E and he opted for these conditions when he stated under part 2 of his exhibit "JN2" attached in his affidavit in support of the Originating Summons, that: "I do not wish to retain the rules that now apply to me regarding my pensionable age."(Under Part D) and "I have completed Part C and D. I wish to transfer to local conditions as a Clerical Officer, Division II with effect from 1st December, 1961." By Section 4 of the Civil Service (Local Conditions) Pensions Act Cap 410 (Act No. 35 of 1968) the pension funds administered under Cap. 48 of the 1961 and 1965 Edition of the Laws continued to be administered under Cap. 410 of the 1972 Edition. It should also be noted that the original Act No. 35 of 1968 contained no definition of "*Pensionable age"* and this was brought in by an Amendment, Act 30 of 1973 and it gave the pensionable age as "*pensionable age"*means:

(a) in the case of a male officer, the sixtieth anniversary of the date of his birth;

(b) in the case of a female officer, the fifty-fifth anniversary of the date of her birth.

This means that the law as up to 1986 still protected and entrenched the appellant's irrevocable option to retire at the age of 60. Equally one would say that the respondent also kept its "bargain". What is the effect of Act No. 11 of 1986 on this declared irrevocable option. The Act amended an Act under which the appellant agreed to retire at the age of 60. To us this means that the appellant acquired or accrued this right and it is necessary to see if this acquired or accrued right still stands or it is extinguished and it is necessary to look at Section 14 (3), (c) and (e) of Interpretation and General Provisions Act, Cap. 2 which reads:

(3) "Where a written law repeals in whole or in part any other written law, the repeal shall not:

(a) ...

(b) ...

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed ; or

(d) affect any investigation, legal proceedings or remedy in respect of any such right, privilege. Obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceedings or remedy may be instituted, continued ,

or enforced and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law has not been made."

The law on accrued rights was exhaustively reviewed and confirmed by this court in the case of *Miyanda* v *The Attorney-General* (1), where we considered decisions of this court and English Courts. The acquired or accrued right in our present case was part of the appellant's condition of service which cannot be altered to his disadvantage. The learned trial judge did accept that the irrevocable option bound both the appellant and the respondent but went further to say that it did not oust the law. We agree that that option did not oust the law but the law interfering with the accrued or acquired right must specifically abrogate that right. The new retiring age affects those who never made irrevocable option to retire at the age of 60 years and those who joined the service after the amendment. In fact, the Permanent Secretary, Establishment Division correctly stated in his letter to the advocates for the appellant dated 27th April, 1994 that: *"On transfer to Local conditions of Service, Mr Nyoni was given an option to either retain the statutory retirement age of fifty-five years that then applied to him or accept the new retirement age of sixty years. The option he made was final in that he would not have an opportunity to change for another option at a later date."*

To re-cap what we have been discussing above, we find that the appellant made an irrevocable option in 1961 to retire at the age of 60 years and that this became a condition of service he opted to serve on. The amendment to the Civil Service (Local Conditions) Pensions Act by Act number 11 of 1986 did not take away this right as the amending Act did not specifically abrogate this acquired or accrued right which became entrenched in the appellant's conditions of service. The learned trial judge misdirected himself when he held that the only entrenched rights are those in Part III of the 1973 Constitution or those guaranteed by multilateral instruments such as the Universal Declaration of Human Rights or the African Charter on Human and People's Rights. There is no magic attached to the word "entrenched" so as to refer only to rights under Part III of the Constitution. Entrench simply means "incorporate"; in the present case, the right for the appellant to retire at the age of 60 years was incorporated in his condition of service. Further, the argument by the state that the appellant slept on his right to seek redress cannot stand. There is evidence that the appellant was retired on 8th March, 1990, and he wrote the Permanent Secretary, Personnel Division, on 30th July, 1990, complaining about his early retirement and asking for compensation equal to what he would have received if he retired at the age of 60 years. A period of four months before complaining can hardly be said that the appellant slept on his rights.

For the foregoing, we allow the appeal. We hold that Act No. 11 of 1986 does not apply to the appellant; that the appellant was prematurely retired thereby making the termination of his service wrongful.

Coming to damages, the appellant in his Original Summons asked the court below for "full compensation...for the premature retirement." In paragraph 16 of his affidavit he prayed that "this honorable court that I be paid compensation and or damages for the last five years of my contract of service as the only remedy available since I will be 60 years of age on 7th day of March, 1995, ruling out re-engagement as alternative remedy." Certainly this is not a proper case to order reinstatement, therefore the only remedy is damages. This is a case of wrongful termination of employment and in awarding damages in such cases, this court has rarely taken the remaining period of service as a basis of calculating damages. Depending on the circumstances of each case we have been awarding damages ranging from notice required under terms of contract to, as to date, two years salary. In the present

case we take into account the long unblemished service from 1956 to when the appellant was prematurely retired in March, 1990; the age of the appellant and in the absence of any evidence of ill health he would still be working or found some employment but taking judicial notice of scarcity of jobs these days he is unable to do so. In line with our awards in the case of *Chitomfya* v *Ndola Lime*, (2), and *Zambia Consolidated Copper Mines v Mutale*, (3) we award the appellant two years salary, calculated at the scale he was holding at the time of his premature retirement.

rry interest at 30% from the date of issue of the Originating Summons to the date of this judgment; thereafter the sum will carry interest at the bank lending rate as advised by the Bank of Zambia up to date of payment. The appellant will have his costs both here in court and in the Court below to be agreed, in default to be taxed.

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