NEWSTON SIULANDA AND 36 OTHERS AND FOODCORP PRODUCTS LIMITED

SUPREME COURT
NGULUBE CJ, SAKALA, JS AND MAMBILIMA, AG. JS
5TH DECEMBER, 2001 AND 24TH APRIL, 2002
(SCZ JUDGMENT No. 9 OF 2002)

Flynote:

Employment – Issues arising in the trial court:- different causes of action.

Headnote:

37 workers formally employed by the respondent brought action against it in relation to breach of contract. Others were still in employment, some had retired, some had resigned and others dismissed on disciplinary grounds. In this cause, they all claimed they had a common position and maintained a uniform submission. They all wanted a declaration that there had been a change of employer without their consent when all the shares in Zamhort Products (Z) Ltd.

Held:

(i) That the appellants should have had their case prosecuted separately. (Kabwe V. B.P) distinguished

(ii) Further that it cannot be for the advancement of justice if issues arising in the appellant court were not raised in the court below.

Appeal dismissed.

Cases referred to:

1. Kabwe-v- BP (Zambia) Limited (1995-97) ZR 218

2. **Marriot-v- Oxford and District Co-operative Society Limited (No. 2) (1970) 1 QB 186.**

3. **Salomon-v- Salomon (1897) 22.**

4. **ZCCM and Ndola Lime Company Limited-v- Sikanyika and Others SCZ Judgment No. 24 of 2002.**

For the Appellants: In Person

For the Respondents: NIL

Judgment

Ngulube, C.J, delivered the judgment of the Court.

On 5th December, 2001, we went ahead to hear this appeal despite the absence of the respondent when we were satisfied with the proof of service offered by Mr. Siulanda. Even before reciting what the appeal was about, we must express surprise that the thirty seven workers who brought a joint suit considered that they had a common claim, and a common position in the case so as to maintain a uniform argument or submission. As the trail Court observed, some were still in employment; some had retired as and when they reached retiring age; some had resigned whilst others had been dismissed on disciplinary grounds. Yet they all wanted a declaration that there had been a change of employer without their consent when all the shares in **ZAMHORT PRODUCTS (ZAMBIA) LIMITED** were bought by **FOODCORP PRODUCTS LIMITED** or when the name was changed from the former to the latter. Some of the arguments below and repeated here were that the workers asked for a finding that there had been disadvantageous alterations to the former ZIMCO Conditions without their concurrence such that the changes have been held to be a breach by the employer entitling the workers to treat the contract as repudiated. The cases of **KABWE –v- BP (ZAMBIA) LIMITED** (1) **and MARRIOT –v- OXFORD AND DISTRICT CO-OPERATIVE SOCIETY LIMITED** (2) were called in aid. Yet those cases can only arise if there has been a termination of employment to the alleged breach. The cases are inapplicable in the case of those who choose to continue working and are still opting to accept or acquiesce in the changes. They are also of little assistance to those whose separation was on disciplinary grounds. We repeat what we have said in a number of cases in the past: Disadvantageous and unilateral alterations to a basic condition entitles the aggrieved employee to treat the same as a breach and repudiation of the employment contract by the employer, thereby entitling the employee to the appropriate separation package.

In the case at hand, the mixture of plaintiffs who are differently circumstanced precludes the making of any pronouncements based on the principle in cases like the KABWE case. Another argument advanced sought to assert that the change of ownership of the shares brought about a new employer. The Court below quite correctly directed itself on the law which has long recognized the separateness of the corporate entity from those behind it, owning it and directing its affairs. The celebrated case of **SALOMON –v- SALOMON** (3) on the point is still good law. Similarly, our holding in **ZCCM and LIME COMPANY LIMITED –v- SIKANYIKA AND OTHERS** (4) that the change of ownership of shares cannot result in the corporate entity becoming a new employer is still valid and applies with equal force to the case at hand. Indeed, the learned Judge cited these same authorities.

The representative of the appellants in person submitted in writing that there were some who were retired on new meagre packages who ought to have been held to be entitled to retire on the better ZIMCO packages. The positions of the plaintiffs here were so varied that again, it is impossible to say there were any who were shortchanged in the manner alleged. The joinder of varied plaintiffs in this action was inappropriate if in fact, there are any who can establish that they were deprived of accrued rights. The plaintiffs who did testify did not cover such grounds. Unfortunately, this is one case in which the separate and different cases being canvassed should have been prosecuted severally and separately. The representative submitted that the Court should in the interests of justice allow claims which were not covered by the pleadings and by the scope of the case attempted to be made out below. It was said we had inherent jurisdiction to resolve substantial questions of law and fact even if not canvassed below. On the contrary, it cannot be for the advancement of justice if a case not pleaded, not advanced and not canvassed in the Court below – and on which no evidence was led on either side-can be sprung in this Court for the first time.

In truth, the appeal was without merit. We dismiss it but make no order as to costs.
