

IN THE SUPREME COURT FOR ZAMBIA APPEAL NO. 12 OF 2001

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

ELIST MZENJE BANDA APPELLANT

AND

THE ATTORNEY GENERAL RESPONDENT

CORAM: Ngulube, CJ, Chibesakunda, JS and Mambilima, AJS.

On 15th November, 2001 and 20th February, 2002

For appellant - L.M. Zulu, of Luangeni Chambers

For respondent - S.W. Chirambo, Principal State Advocate.

J U D G M E N T

Ngulube, CJ, delivered the judgment of the Court.

The appellant launched proceedings in the High Court by way of judicial review for declaratory relief as well as for the quashing of the decision of the Public Service Commission retiring him in the public interest and surcharging him a sum of K4 million. The money was considered to have been paid on a procurement and purchase transaction which was

irregular and contrary to the law and practice for buying goods in the public service. The learned trial Judge quashed the surcharge on the ground that the concerned institution – the Hostels Board – had accepted and kept the accounting stationery said to have been irregularly procured and could therefore not be allowed to benefit twice. The other decision terminating the appellant's employment by way of retirement was upheld, hence this appeal.

The appeal as such turned on the facts and on whether or not the findings below were not erroneous. Further, the appeal sought to show that it was the respondent's relevant institutions which were guilty of non-compliance with statutory provisions so that the termination of the appellant's employment became wrongful.

The facts of the case showed that the appellant was a Senior Accountant under the Ministry of Finance who was seconded to the Hostels Board of Management under the Ministry of Works and Supply. The Permanent Secretary of the Ministry of Works and Supply surrendered the appellant back to the Ministry of Finance on allegations that he had without authority, contracted Messrs Kachomba Printers and Stationery Limited to print a large quantity of accounting documents at a cost of K4 million. In this exercise, the appellant was alleged to have violated financial regulations and tender procedures; to have over stepped his area of responsibility when

he ordered the goods without the necessary authority; to have split the payments into smaller amounts in an apparent effort to circumvent the authority of the Executive Secretary of the Hostels Board or of the Ministerial Tender Committee; to have ordered from a private printer vital financial documents which could only be printed by the Government Printer on instructions from the Accountant General. The appellant's parent Ministry called upon him to show cause why they should not recommend to the Public Service Management Division his retirement in the public interest.

The appellant had submitted his exculpatory written statement. He repeated his assertions at the trial denying that it was he who had ordered the stationery. He insisted that it was the Executive Secretary Mrs. P.M. Chirwa Magolo, together with the other authorized officers who had authorized and carried out the transaction, signing on all relevant documents. The learned trial Judge in fact heard the witnesses and examined the documents on record. She accepted the evidence given by the defence that the appellant initiated the transaction, even suggesting to one of the witnesses that he would benefit from a 20% commission to be earned under the table. The Judge accepted that the Executive Secretary became aware only after the event when presented with a *fait accompli* and when she sought and

obtained belated ratification by the Ministerial Tender Committee. The learned trial Judge was on very firm ground and it is not possible to fault her on findings which were clearly based on credibility. Even the supplier had written a letter explaining the role of the appellant which letter fully corroborated the defence witnesses. As is well known, this Court does not interfere with findings made on an issue of credibility save on very good grounds shown. None were shown here and it is not permissible simply to invite this Court to take a different view of the facts from that below. It has not been shown that the Judge did not take proper advantage of seeing and hearing the witnesses at first hand. The evidence of wrongdoing was overwhelming.

Counsel for the appellant indicated that the appellant would not try to argue that there was no wrongdoing, only that the respondent did not comply with statutory provisions before retiring him. Thus, it was argued that the Ministerial Tender Committee was in breach of the Zambia National Tender Board Act, No. 30 of 1982, Section 19 of which required them to ask him for a written explanation if they thought he had caused financial loss for which he should be surcharged. Secondly, the Public Service Commission itself was said to have breached its own regulations and the relevant General Orders when it did not afford him any opportunity to be heard. It further

breached its obligations when it did not call for reports on his work performance from all the places where he had worked before deciding to retire him since the retirement could only have been justified on grounds of failure to perform, or incompetence or any other disciplinary offence. Finally, it was argued that in accordance with the law and the regulations (which were cited in extensio), the purchase of goods involves documentation and signatures: His signature was on none of the documents. This last point can be answered with reference to the issue of credibility already discussed. The Judge was entitled to accept that, although he had signed nowhere, he had introduced the supplier and ordered one of the defence witnesses to process this procurement.

The other points about non-compliance by the respondent were, we consider, a red herring. The appropriate supervisory authority had called upon the appellant to answer the allegations made and to show cause. He was thus afforded ample opportunity to be heard in writing and to make any meaningful representations at his disposal. It would have been very strange if he had to face a multiplicity of disciplinary hearings such as answering the Tender Committee separately in respect of the same transaction already reported to and taken up by his Permanent Secretary. Indeed, it is fallacious to suggest that the Public Service Commission was considering a different

complaint on which the appellant should have again been heard separately when they reacted to recommendations received in the same disciplinary case initiated by the appellant's supervising officer in the parent Ministry. He, the appellant, had been heard in such proceedings.

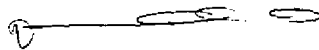
The truth of the matter is that there were no valid grounds for reversing the learned trial Judge. As Mr. Chirambo observed, it was the appellant and not the respondent who had breached the relevant provisions. The appeal is dismissed. As we doubt that the appellant can have the relevant means, we make no order as to costs.



M.M.S.W. Ngulube,
CHIEF JUSTICE.



L.P. Chibesakunda,
SUPREME COURT JUDGE.



I.M.C. Mambilima,
ACTING SUPREME COURT JUDGE.