IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 132 OF 2002

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

MICHAEL SINYANGWE APPELLANT

AND

NATIONAL AIRPORTS CORPORATION LIMITED RESPONDENT

CORAM: LEWANIKA, DCJ, MAMBILIMA AND SILOMBA, JJS.

On 25th March, 2003 and 17th November, 2004

For the Appellant: Mr. N. Chanda, Nicholas Chanda and Associates

For the Respondent: Mrs. Chitoshi, In-house Counsel

J U D G M E N T

Silomba, JS, delivered the judgment of the Court.

Cases referred to:-

1. **Lukama and Others -Vs- Lint Company of Zambia Limited.**

2. **Thomson -Vs- GEC Avionics Limited (1991).**

This is an appeal against the judgment of the High Court of the 23rd of July, 2002. The appellant sued in the court below for the sum of K43,100,000, being the balance outstanding due to an under payment; K1,500,527.00, being housing allowance for the three months notice period and K1,000,000.00, being repatriation allowance. The claim was to attract interest.

From the record of appeal, this case did not go for trial in open court because the parties consented to file an agreed statement of facts, which they did. The agreed statement of issues, pursuant to Order XXII of the High Court Rules, stated that the

appellant was employed by the respondent as commercial director from May, 1989 to April, 1999. That in 1999 the respondent embarked on a restructuring programme under which several positions, including that of commercial director, were to be reviewed. Consequently, the respondent wrote to the appellant on the 17th of March, 1999 declaring him redundant with effect from the 1st of April, 1999; the redundancy included three months pay in lieu of notice as part of the terminal benefits.

The agreed statement of issues further stated that on the 31st of March, 1999 the respondent wrote to the appellant extending the period of employment as commercial director to 30th of April, 1999. In the meantime the appellant did, on the 26th of March, 1999, apply for the new position of director of airport services, which was to replace that of commercial director. On the 21st of April, 1999 the appellant was notified that he had been successful in his application for the post of director of airport services and that his new appointment was to be with effect from 1st of May, 1999. The appellant accepted the new appointment.

Based on the agreed statement of issues, the parties posed two main questions for the determination of the learned trial Judge. The first question related to the effective date of termination of the original contract of employment from which the parties wanted to know if it terminated at the end of the three months notice period or whether it terminated at the point the appellant commenced his new contract of employment. The second question posed was whether the appellant was entitled to a revised terminal benefits package based on changes made to the original conditions in July, 1999.

After the due consideration of the settled issues and the submissions, and in relation to the effective or material date of termination of the first contract, the learned trial Judge had this to say at page 15 (or page 8 of the judgment) of the record of appeal:-

> *The counter-notice and the subsequent offer and acceptance of a new contract of employment in the restructured corporation must be the basic facts and circumstances upon which to determine whether the parties intended to terminate the earlier contract of employment immediately or otherwise. In other words, these are the circumstances upon which it can be decided whether a termination of the plaintiff's contract of employment occurred by agreement.*

Noting that the new contract, in which the appellant became director of airport services, was freely negotiated for and accepted before the end of the counter-notice period the learned trial Judge thought that the appellant was placed in an advantaged position as far as his conditions of service were concerned in that he (appellant) was promoted under the new contract of employment. As far as the learned Judge was concerned, the appellant failed to discharge the onus placed on him to show that he was disadvantaged by offer and acceptance of the new job without his consent. On the basis of his reasoning, the learned Judge proceeded to conclude, from the agreed facts, that the termination of the contract by the respondent was by agreement; that there was no error when the respondent terminated the appellant's conditions of service in the original contract in the manner it did.

We take note that after the learned trial Judge decided in the affirmative that the conditions of service in the old contract were terminated immediately the appellant accepted a new contract of employment with improved conditions of service, there was no need for the trial court to decide on the second question of whether the appellant was entitled to claim a revised terminal benefits package on the basis of the changes made to the original conditions in July, 1999. We would like to assume that he decided not to consider the second question because there was no longer any relationship between the new conditions that came into force in July, 1999 and those that prevailed prior to the termination of the old contract of service.

Originally, the appellant indicated in the memorandum of appeal that he had four grounds of appeal. However, when the appeal came up for hearing a revised three grounds of appeal were put forward and argued. In arguing the appeal the appellant's advocate relied on the filed heads of argument, which he highlighted in his oral submission. The following are the grounds of appeal:-

1. The learned trial Judge erred in law and fact when he made reference to the counter notice as being the determining factor on terminating the contract, which finding was against the weight of evidence on record.

2. The learned trial Judge erred when he held that the appellant was in fact promoted under the new contract of employment and that the appellant failed to prove any disadvantage occasioned to him, if at all, without his consent.

3. The learned trial Judge erred when he held that the termination of the appellant's contract by the respondent was by agreement, which finding was against the weight of evidence on record.

In support of ground one, counsel for the appellant referred us to page 15, lines 5-11, of the record of appeal and stated that the finding that the appellant gave counter-notice to terminate employment was an error because there was no evidence in the record of appeal to show that the appellant gave a counter notice. Counsel submitted that according to the letter of termination of employment the three months notice was supposed to run from 1st of May and end on 31st of July, 1999. However, before the end of the notice period the appellant applied for a job in the respondent's organisation in order to mitigate the loss of employment and, according to counsel, the move taken by his client was legally in order. He said that since the appellant was declared redundant he was not barred from applying for employment even if it was in the same organisation.

Further, we have had occasion to peruse the written heads of argument in which counsel has referred us to a quotation from Mead's Law of Unfair Dismissal and at page 98 the learned author states:-

> *"The counter notice to terminate the contract by the employee must be a notice which within reason either specifies the date of termination or specifies sufficient facts from which the employer can reasonably work out the date of termination."*

Flowing from the quotation, counsel has reiterated that there was no evidence of counter-notice to fit in the description given in the quotation above. It is submitted that there is no evidence on record to show that the appellant gave in a different notice to indicate he was leaving his original employment and abandoning the conditions of service under the original contract of employment for him to be found to have given a counter notice to terminate his employment.

On ground two, counsel argued that the finding that the appellant was in fact promoted under the new contract of employment was a gross misunderstanding of the settled issues. As far as counsel was concerned, what was in issue was the date of termination of the old contract of employment. In his written submission, counsel has referred us to a quotation from the case of **Lukama and Others -Vs- Lint Company of Zambia Limited** (1), which purportedly reads as follows:-

"The payment of salary in lieu of notice did not terminate the employment immediately the salary was paid to the employee, instead same was terminated at the expiry of the notice period and as such though the employee was not reporting for work until the notice expires he was entitled to all salary and other benefits and increment which accrued during the notice period which the defendant company was ordered to pay."

He has forcefully submitted that the **Lukama** case is relevant to the present appeal. The fact that the appellant applied for a new job in response to a public advertisement cannot be used as a bar to deny the appellant the benefits based on the revised conditions of service of July, 1999 because these came into force during the notice period, counsel submitted. Counsel seems to suggest, rightly or wrongly, that the case of the appellant is strengthened by the fact that other fellow directors who responded to the advertisements, but did not succeed, were paid their dues under the new conditions without any references to their applications for the advertised jobs as being counter-notices.

On ground three, it is contended that the finding that the termination of the appellant's contract by the respondent was by agreement was against the weight of evidence on the record. As far as counsel is concerned, there was no agreement between the parties as the letter of retrenchment was unilaterally written by the respondent. It is contended, from the written submission, that the fact that the appellant had to mitigate his loss by applying for a new job in the restructured respondent company could not be said to amount to termination by agreement so as to bring the date of termination forward.

In response to the appellant's oral and written submissions, the respondent's counsel relied on her heads of argument and the written submissions in the court below, which she augmented with oral submissions. Dealing with ground one, counsel submitted that a scrutiny of the whole of the first paragraph of the judgment of the court below, found at page 15 of the record of appeal, clearly showed that the point of termination of the contract of employment was determined by the respondent. Counsel distinguished the **Lukama** case as being irrelevant to the present case because of the new contract of employment that was negotiated for and consequently concluded by the appellant and the respondent even before the period of the notice started to run on the 1st of May, 1999.

It was contended that the payment of salary in lieu of notice and the subsequent offer of employment to the appellant effectively terminated the old contract and extinguished any rights the appellant had under the said old contract of employment. According to counsel, it was not possible to allow two contracts with one employer to run side by side until the 31st of July, 1999. The alternative would have been to suspend the new contract of employment until the 1st of August, 1999 when the old contract would have expired, which course of action would not have been feasible, counsel asserted.

Addressing the court on the issue of counter-notice, counsel referred us to the written submission in the court below and the case of **Thomson -Vs- GEC Avionics Limited** (2) and stated that the counter-notice did not change the reason for the termination, by way of redundancy, but that it affected the effective date of termination and the appellant's entitlement to the subsequent change of conditions of service to the original or old contract. With regard to ground two we note that counsel did not orally say much on this ground. However, in her written heads of argument it was her position that the learned trial Judge was correct in his assessment that the appellant failed to show that he had been disadvantaged, without his consent, by accepting the new contract.

She has argued that the new contract was financially superior to the old contract and she has demonstrated the disparity between the two contracts by comparing the last payslip under the old contract at page 68 and the first payslip under the new contract at page 70 of the record of appeal. From the foregoing, counsel has tried to show that there was no disadvantage suffered by the appellant when he accepted the new contract, effective from the 1st of May, 1999; that although the respondent initiated the termination of the old contract, both parties agreed to rescind or amend the notice period so that the new contract could commence immediately, thereby bringing the date of termination forward than earlier put by the respondent.

On ground three, counsel conceded that the learned trial Judge might not have been correct in stating that the termination of the appellant's initial contract of employment was by agreement. But what was true, counsel submitted, was that the termination was initiated by the respondent by way of a redundancy. However, counsel was of the view that when the parties decided to enter into a new contract during the

notice period they must have intended to bring the first contract to an end before the end of the period of the notice.

We have carefully considered the written heads of argument filed in this court and those that were before the court below, as well as, the oral arguments made before us by counsel. From the statement of settled issues, now at page 93 of the record of appeal, it is common cause that the appellant was declared redundant as commercial director of the respondent on the 17th of March, 1999. The redundancy, if we may repeat, was to take effect from the 1st of April, 1999 and the appellant was to be paid three months salary in lieu of notice. It is also common cause that the respondent extended the appellant's employment as commercial director from the 31st of March, to the 30th of April, 1999 in which case the redundancy was rescheduled to begin on the 1st of May, 1999.

The appellant was declared redundant because the defendant company was to undergo a restructuring programme during which the appellant's job title and other positions were to be reviewed. As the appellant was working and preparing to go on redundancy, the respondent advertised the post of director of airport services that was to replace the post of commercial director. Consequently, the appellant did, on the 26th of March, 1999, apply for the advertised post and on the 21st of April, 1999 he was informed that his application was successful and that his new appointment would be with effect from the 1st of May, 1999, the day he was supposed to be on redundancy.

The appellant accepted the offer of the new post of director of airport services and on the 1st of May, 1999 he took up the new appointment. In July, 1999, the last month of the three months redundancy notice, the respondent published new conditions of service, and in relation to the abolished post of commercial director, the new conditions of service were enhanced to add value to the new post of director of airport services. Rightly or wrongly, the appellant thought that he was entitled to the balance of the redundancy benefits based on these enhanced conditions of service since the review of these conditions was done during the currency of the three months notice period. The case that has been relied upon is the **Lukama** case decided by this court.

Arising from the statement of agreed issues as analysed above, the lower court was asked to resolve two issues. The more important issue was for the lower court to determine which was the effective date of termination of the original contract of

employment. In consequence thereof, the lower court was asked whether the termination of employment was at the end of the three months notice period or at the point when the appellant commenced his new contract of employment.

In consideration of the issue posed before the learned trial Judge, upon which the judgment of the lower court is wholly based, we think that it would be neater to deal with grounds two and three first before dealing with ground one than the other way round. We propose to deal with the appeal in this way because grounds two and three relate to peripheral matters, which the learned trial Judge dealt with as "by the way."

Under ground two, we agree with the appellant that since his appointment as director of airport services was under a new contract of employment the issue of promotion from commercial director to director of airport services did not arise. Similarly, there was no need for the appellant to prove if any disadvantages had been occasioned to him by accepting the new job. We say so because the two contracts were different and independent of each other, with the first contract having run its full term of life.

On ground three, we are obliged again to agree with the appellant that the termination of his first contract was not agreed upon between himself and the respondent. As rightly conceded by counsel for the respondent, it was a unilateral action of the respondent company, which declared the appellant redundant. Both grounds two and three succeed and as we earlier pointed out the learned trial Judge made the remarks or observations *obiter dictum* which may well mean that the success in the two grounds may not positively impact on the final outcome of the appeal.

In dealing with ground one, there are one or two factors we would like to highlight to enable the parties to have a full grasp of the issues at play. The position taken by the appellant seems to be that as commercial director his contract with the respondent was to come to an end, by way of redundancy, on the 30th of April, 1999. He was to be paid a redundancy package, which was to include three months pay in lieu of notice. As far as he is concerned, and he is correct, the three months notice was to begin to run from the 1st of May and end on the 31st of July, 1999.

On the basis of the case of **Lukama and Others -Vs- Lint Company of Zambia Limited** he has argued that his entitlement to a balance of terminal benefits, brought

about by the revised conditions of service published in July, 1999, cannot be a matter for debate. In that case the appellants were terminated in June, 1992 either by way of early retirement or by way of redundancy. The collective agreement relating to the appellants provided for the giving of three months notice or payment of salary in lieu of notice. On termination the appellants were paid compensation packages agreed between the union representatives and the respondents.

What transpired in that case is that in July, 1992 the respondent increased salaries and those workers who were retrenched the following year in 1993 were paid salaries and wages increased in July, 1992, which were 110% more than those of the appellants. The claim of the appellants on their entitlement to the 110% salary increases was not specifically addressed in the lower court. When the matter came on appeal, we ruled that the appellants were entitled to the packages to be worked out on the basis of the increased salaries of 110% more, which were applicable by the end of the notice period. For the sake of clarification we wish to mention that a perusal of the **Lukama** judgment confirms that the quotation given by the appellant's counsel is not contained in our judgment in the form it has been produced.

On the other hand, the respondent does not disagree with the principle in the **Lukama** case and if there were to be compliance with the case, it is argued that the appellant should not have accepted the new job of director of airport services with effect from the 1st of May, 1999. Instead, the appellant should have waited up to the 1st of August, 1999 when the three months notice period would have run its full stretch for him to be entitled to the balance of the terminal benefits prompted by the salary increments of July, 1999. The respondent's counsel did not address us on whether the post would have been kept for the appellant until he had served the notice period and had received the enhanced package but the point that was being made was that other directors who were not re-employed like the appellant were paid extra amounts based on the salary revision of July, 1999 because it was within the three months notice period.

From the two positions of the appellant and the respondent, the point has been made by the respondent, which adequately discredits the position taken by the appellant that seeks to encourage the existence of two contracts of employment with one employer, all running side by side. This is untenable and in the following brief summation, we try

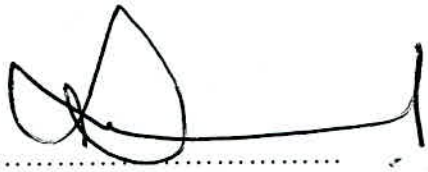
to show that the **Lukama** case would not have been applicable to the circumstances of the present case. The facts are that in the restructured respondent company a new post of director of airport services was created to replace the old post of commercial director. From the agreed statement of issues, it is clearly indicated that on the 26th of March, 1999, well before the appellant ceased to work for the respondent on the 30th of April, 1999, the appellant applied for the vacant post of director of airport services. His application was successful and on the 21st of April, 1999 he was informed that the appointment would be effective from the 1st of May, 1999. The appellant accepted the new appointment.

The picture that comes out is that there was offer by the respondent and acceptance by the appellant of the post of director of airport services resulting in a binding contract of employment that began to run on the 1st of May, 1999. In this arrangement the respondent and the appellant implicitly entered into an agreement to terminate the old contract relating to the post of commercial director by mutual consensus in order to give way to a new contract of employment. We shall now revert to the **Lukama** case in which we discussed various modes of terminating a contract of employment.

In that case, we examined the various modes of termination in consideration of the question whether the facts of the case meant that payment in lieu of notice terminated employment forthwith or it only terminated when the notice in lieu of payment would have expired. As it turned out on the facts of the **Lukama** case, employment terminated when the notice in lieu of payment would have expired. We also looked at the possibility when an employer and an employee can enter into an agreement to terminate a contract by mutual consensus, which we have said was the case here. Of course there was caution to be exercised by courts when consensus is secured at the behest of an employer but there is nothing like that in this case as everything turned out to be beneficial to the appellant.

From our reasoning, we have tried to show that the termination of the old contract could not have been based on a counter-notice as there is no evidence of a counter notice from the agreed statement of issues. Clearly, the facts in this case show that the old contract was terminated by mutual consensus to give way to a new contract. The

termination of the old contract on 30th of April, 1999 meant that the appellant had disentitled himself to the revised conditions of service of July, 1999. This appeal, therefore, fails with costs to be taxed in default of agreement.



D. M. Lewanika,
DEPUTY CHIEF JUSTICE.

I.C. Mambilima,
SUPREME COURT JUDGE.

S. S. Silomba,
SUPREME COURT JUDGE.