

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

APPEAL NO. 157/2004

B E T W E E N:

JACOB CHIRWA

APPELLANT

AND

ZESCO LIMITED

RESPONDENT

CORAM: LEWANIKA, DCJ, CHITENGI, MUSHABATI, JJS
On 22nd November, 2005 and 26th September, 2006

For the Appellant: B. KATUTA of Lai-Loi Chambers

For the Respondent: Ms K. MWANSA, Legal Counsel

JUDGMENT

LEWANIKA, DCJ delivered the judgment of the Court.

AUTHORITIES REFERRED TO:

1. KASENGELE & OTHERS VS ZAMBIA NATIONAL COMMERCIAL BANK, SCZ APPEAL NO. 161 OF 2000
2. SULE & OTHERS VS ZESCO LTD, APPEAL NO. 170 OF 2002

This is an appeal against the decision of a Judge of the High Court dismissing the Appellant's claim for a declaration that:-

- 1(a) the allowances and salary were merged together into one by operation of the decision of the ZIMCO Board of Directors on 26th August 1994 and further by ZIMCO Circular No. DG2/07/05;

- (b) his 'early retirement' was termination of employment by reason of redundancy within the meaning of Section 26B(1)(b) of the Employment Act, Cap 268 as amended by Act No. 15 of 1967;
- © consequently on the basis of (b) above, the Plaintiff is entitled to redundancy pay in accordance with Clause 40 of the ZIMCO Conditions of Service of 1992 as amended by circular No. HRA/07 of 26th July 1993;

or in the alternative for a declaration that:

- 2(i) the purported "*early retirement*" of the Plaintiff by the Defendant is premature, wrongful, null and void for being contrary to his conditions of service as he has not done the mandatory 22 years for "*early retirement*" or indeed attained 55 years of age.

An order that:

- 3(a) following upon 1(a) above the Defendant recalculates all benefits hitherto paid to the Plaintiff;
- (b) the Defendant pays the Plaintiff redundancy pay or in the alternative damages for loss of employment
- (c) interest and costs.

The evidence before the learned trial Judge, which was not in dispute was that the Appellant was employed by the Respondent in 1975 and served in various capacities up to June, 1996. His last position with the Respondent being that of Safety Officer. By letter dated 29th March, 1996 the Respondent wrote to the Appellant advising him that as a result of a major re-organisation in the Respondent Corporation some jobs were upgraded, others downgraded and other jobs were recommended for abolition. The

Respondent offered the Appellant the opportunity to go on early retirement or to continue in service until he reached the mandatory retirement service. By letter dated 9th April, 1996 the Appellant opted to go on early retirement and was paid his retirement benefits whose computations appear on pages 73, 74 and 75 of the record.

There is evidence on record that the Appellant's position was not down graded or abolished as one Mara Martin MWEEMBA was employed to fill in the same position on 16th May, 1997 as evidenced by the letter on page 76 of the record.

The learned trial Judge found on the evidence adduced before him that the Appellant had chosen to go on early retirement and been paid his retirement benefits and denied the Appellant the declarations that he sought, hence the appeal before us.

Counsel for the Appellant has filed three grounds of appeal namely:

1. that the learned trial Judge misdirected himself in law and fact when he held that the Appellant was under a duty to establish to the court with cogent evidence that the K20 million retirement benefits he received did not include allowances;
2. that the learned trial Judge misdirected himself in law and fact when he held that the Appellant was not made redundant or retrenched;
3. that the learned trial Judge misdirected himself in law and fact when he held that the Appellant was properly retired although

prematurely in terms of Clause 39(b) of the ZIMCO conditions of service.

We are indebted to Counsel for the Appellant and for the Respondent for the written submissions which have been of great assistance to us in arriving at our decision. We do not intend to repeat the submissions in our judgment, as in any case, they are on record.

As to the first ground of appeal, we have perused the evidence on record and we cannot find any evidence to support the claim that the retirement benefits paid to the Appellant did not include any allowances that were paid to him. It was up to the Appellant to adduce evidence at the trial in the court below to this effect. In the absence of such evidence, the learned trial Judge could not have held otherwise. The case of KASENGELE & OTHERS VS ZAMBIA NATIONAL COMMERCIAL BANK LTD (1) quoted to us by Counsel for the Appellant is of no assistance to the Appellant and this ground of appeal is without merit.

As to the second and third grounds of appeal which, in our view, are interrelated, the evidence on record is that the Appellant was offered the choice of either going on early retirement or continuing in service till he reached the mandatory retirement years of service. The Appellant opted to go on early retirement. There was no suggestion that the Appellant's position was going to be abolished, on the contrary the evidence on record is

that the Appellant's position existed after he retired and that somebody else was employed to fill the vacancy created by his retirement. In the light of this evidence there can be no question of the Appellant being declared redundant or being retrenched. The case of SULE & OTHERS VS ZESCO (2) referred to us by Counsel for the Appellant is clearly distinguishable from this case as in that case the positions that were occupied by the Appellants were either downgraded or abolished. These two grounds of appeal have no merit as well. In truth the whole appeal is devoid of merit and we dismiss it with costs. The costs are to be taxed in default of agreement.

D.M. Lewanika
DEPUTY CHIEF JUSTICE

P. Chitengi
SUPREME COURT JUDGE

C.S. Mushabati
SUPREME COURT JUDGE

