

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

APPEAL NO 192 OF 2004

BETWEEN

JOVITO JERE

Appellant

and

ZAMBIA ELECTRICITY CORPORATION LTD

Respondent

**Coram: Chirwa, Chitengi JJS and Kabalata, Ag. JS on 29th June 2006 and
16th February 2007**

**For the Appellant: Mr C Mabutwe, Mabutwe & Associates
For the Respondent: Ms K Mwansa, Legal Officer, ZESCO**

JUDGMENT

Chirwa, JS delivered the judgment of the Court:-

Cases referred:

- 1. Mohamed V Attorney-General [1982] Z.R 49;**
- 2. Wilson Zulu V Avondale Housing Project Ltd [1982] 172,**
- 3. Philip Mhango V Doroty Ngulube & Others [1983] Z.R. 61**

This is an appeal by the appellant, **JOVITO JERE**, against the dismissal of his claims for a number of claims against the respondent, **ZAMBIA ELECTRICITY CORPORATION LTD (ZESCO)** by the Industrial Relations Court. The claims before the Industrial Relations Court were for orders that:-

- 1) The applicant's incremental date of November 1st be observed from November 1st 1988.

- 2) The applicant's gratuity be restored and LASF Contribution paid back.
- 3) The applicant be appropriately placed in equivalent to ZESCO grades
- 4) The applicant's contract of employment be clarified
- 5) The Security Guard facility be reinstated at the application residence
- 6) The utility vehicle to be restored to the applicant
- 7) The applications conditions of employment be made no less favourable than they were on 1st April 1987.

After hearing evidence from the parties, the Court made a number of findings and at the end of the day found no merits in the appellant's claims. From the findings, the appellant filed three grounds of appeal as per the amended memorandum of appeal. These grounds are:-

1. The Court below misdirected itself in law and in fact when it held that the Zambezi River Authority Act No. 17 of 1987 did not apply to the appellant as same came into effect on 1st October 1987 after the appellant had allegedly already been transferred to the Respondent Company with effect from 1st April 1987.
2. The Court below misdirected itself in law and fact when it held that Central African Power Corporation (CAPCO) conditions of Service which the appellant used to enjoy came to an end when CAPCO ceased its operations.

3. The Court below misdirected itself in law and fact when it held that in light of the above findings the appellant was not disadvantaged nor suffered injustice when the respondent withdrew and stopped honouring certain conditions which the appellant used to enjoy at CAPCO.

These grounds of appeal were argued in great detail in the written heads of arguments which were also augmented by oral submissions. The respondents also filed detailed heads of arguments and also made some oral submissions.

Before we consider these arguments in details, it is proper that some common facts be set out. The appellant was employed by the Central African Power Corporation (CAPCO) in November 1980 as a technician and was based in Harare, Zimbabwe. He was serving under certain conditions. CAPCO has two divisions, one in Zimbabwe and the other here in Zambia.

In February 1987, the Zimbabwean authorities did not renew the appellant's work permit and CAPCO Zimbabwe transferred the appellant to CAPCO Zambia to work under CAPCO Zambia conditions with effect from 1st April 1987.

In September 1987, in view of the pending re-constitution of CAPCO in October 1987, the appellant was offered employment by the respondent at a salary of K23,904.00 per annum on a personal-to-holder

basis. Our understanding of this "personal-to-holder basis" is that the appellant was offered a job on less than K23,904.00 and the appellant was to carry his higher salary from CAPCO. Other terms and conditions of service under CAPCO applicable to Zambia professional Technical Administrative and Accounting Staff were to apply to the appellant until 31st May 1988. In the letter of offer of employment, the appellant was asked to indicate his acceptance. Further, there is on record, a letter from his former employers, CAPCO, dated 28th August 1987 which in part reads:-

"The Corporation has been informed that you have received a letter from Zambia Electricity Supply Corporation Limited offering you employment from 1st October 1987 on your existing salary and conditions of service.

Arising from the above offer from ZESCO the Corporation gives you notice of its intention to transfer your employment to ZESCO, your last day of service with the Central African Power Corporation being 30th September 1987. All rights and obligations in relation to your conditions of employment, accrued service and leave with CAPCO will be transferred to ZESCO. For your information your accrued benefits referred to are as follows:-".

The only accrued benefit carried forward, according to his letter were leave days valued at K1,593.60. The letter further gives notice to the appellant that if he did not accept the offer from ZESCO, the Corporation, the Corporation gave him notice of termination of his employment with effect from 31st October 1987. There is nothing on record that he wrote

ZESCO, the respondent, accepting the offer but from the conduct, one can safely say that he accepted the offer as communicated to him.

From this scenario, therefore, it can safely be said that the appellant became a ZESCO employee from 1st October 1987 at a salary of K23,904 with other terms and conditions of service applicable to CAPCO Zambia Professionals technical, Administration and Accounting Staff applicable then, applying to the appellant.

As other terms and conditions under CAPZO continued to apply to the appellant, the Zambezi River Authority Act, Cap 467 is relevant because it has under Article 10 of the Schedule thereto, by-laws were made by Council of Ministers prescribing terms and conditions of service of some employees of CAPCO. The Zambezi River Authority Act, Cap 467 was enacted and assented to on 24th September 1987 and came into effect on 1st October 1987 by Statutory Instrument No 205 of 1987. These may be relevant up to 31st May 1988 according to the letter of offer of employment from the respondent.

While on conditions of service applicable to Zambia for CAPCO employees, these we note are at pages 48-53 of the record of appeal. Also relevant is a letter of transfer of the appellant from CAPCO Zimbabwe to CAPCO Zambia conditions which appear at Page 4-5 of the Supplementary Record of appeal and memorandum on Regulations governing the use of Corporation Transport in Zambia at Page 54-58 of the Record of appeal.

This is the evidence that was before the Court below and before we consider whether this evidence supports the findings of the Court below, we note from the record at Page 30 that claim 2 in the complaint relating to graduity was withdrawn. On the evidence, we feel it was properly withdrawn.

The Court below found, on the evidence, that the appellant was transferred from CAPCO to ZESCO by letter dated 16th February 1987. This, we find was a complete misunderstanding of the letter of transfer. The appellant was transferred from CAPCO Zimbabwe to CAPCO Zambia because the Zimbabwe the Zimbabwean authorities did not renew the appellant's work permit. The appellant, therefore moved to Zambia to continue working for CAPCO but in Zambia under Zambian terms and conditions of service for Zambia Professional, Technical, Administrative and Accounting Staff. This finding at Page 18 of the record of appeal is wrong and unsupported by evidence in as far as it finds that the appellant was transferred from CAPCO to ZESCO in February 1987.

However, within this finding, there is a fussed finding that the terms and conditions offered by ZESCO to the appellant were accepted by the appellant. This finding is only supported if it is said that the appellant accepted the offer of employment made to him by ZESCO by their letter dated 2nd September 1987, which letter we have already referred to. He was on K23,904.00 per annum salary which as we have already observed was on personal-to-holder meaning that his colleagues doing the same

job were not getting that much and the respondent did not want to disadvantage him.

The conditions of service applicable to CAPCO Zambia Professional, Technical, Administrative and Accounting Staff are set up from Pages 48 to 53. These conditions applied to the appellant until 31st May 1988. The Terms and Conditions of Service prescribed under Article 10 of the Schedule of Zambezi River Authority Act were promulgated by the Statutory Instrument No. 2 of 1995 well after the CAPCO terms and conditions of Service ceased to apply to the appellant. Technically, Zambezi River Authority Act does not apply to the appellant, because CAPCO conditions ceased to apply and he was no longer a CAPCO employee.

It is the law that he who asserts must prove his case. This we have said in a number of cases, cases like **MOHAMED V ATTORNEY-GENERAL (1)**, **WILSON ZULU V AVONDALE HOUSING PROJECT LTD (2)**, **PHILIP MHANGO V DOROTY NGULUBE & OTHERS (3)** where in the MOHAMED case where Ngulube, DCJ (as he then was) said at Page 51:-

"An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept a proposition that even if a plaintiff's case has collapsed of its inanity or for some reason or other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed.

Quite clearly a defence in such circumstances would not even need a defence”.

He reiterated this statement of the law in the MHANGO case on Page 175 where he put it in the following words:-

“It appears that the appellant is of the view that the burden of proof lay upon the respondent and it is on this that I would like to say a word. I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponents case”.

The appellant put forward a number of claims but at trial he withdrew claim number 2 where he claimed that his graduity be restored and LASF Contribution be refunded. We now have to consider two grounds of appeal as against the evidence and findings of the Court below.

The first appellant's claim was that incremental date of November 1st be observed from November 1st 1988. This, from the evidence was his incremental date whilst he was working for CAPCO. This we take it was his condition of service under CAPCO, but we have already found that these conditions ceased to apply to the appellant as from 31st May 1988 in terms of his letter of employment already referred to. On the evidence, this claim could not succeed.

The next claim was that the appellant be placed in equivalent to ZESCO grades. There was no evidence led by the appellant as to what was the appropriate and equivalent grade in ZESCO. If anything, the appellant continued to enjoy higher salary which carried over from CAPCO on personal-to-holder. If he were to be placed in an equivalent post in ZESCO grades, he was going to get less. To us the appellant failed to prove his claim.

The next claim was that his contract of employment be clarified. What is vague in his letter of offer of employment and conditions that needed to be clarified? The Courts are not here to formulate terms and conditions of employment or indeed any other contract. The parties must agree to these. The appellant never led any evidence as which terms of his employment were vague for the Court to try and give meaning to them.

The fourth claim was that Security guard facility be reinstated at the at the applicant's residence. The conditions of service under CAPCO on which the appellant was transferred and continued to enjoy up to 31st May 1988 are at Pages 48 to 53 of the record of appeal as we have already pointed out. We find no term or condition entitling the appellant to Security guard facility. This was, it seems, a term and condition under ZESCO and he continued enjoying it until when this was withdrawn and the appellant started receiving an allowance in lieu of a security guard.

This borne out by letter dated 3rd February 1994 at Page 89 of the record. The appellant cannot both have his cake and eat it. He is in receipt of security guard allowance. This claim was not proved.

The next claim was that utility vehicle be restored to the appellant. The CAPCO regulation on the use of utility vehicle is at pages 54-58 of the record. The utility vehicle is provided and this is not a personal to-holder vehicle. The evidence of appellant on Page 28 and CW2 at Page 32 of the record flies into the teeth of the conditions of service. There was no provision of personal-to-holder vehicle under CAPCO. There were utility vehicles to be used on official duties. There was no evidence led by the appellant that he was not given a vehicle for use on official functions. Further we have not seen any condition of service that the appellant was entitled to free telephone service at his residence.

On the totality of the evidence on record, we cannot fault the non-suiting of the appellant by the Industrial Relations Court. The appellant never proved his case. The appellant was never transferred from CAPCO to ZESCO. He merely transferred from CAPCO Harare to CAPCO, Lusaka and later he was employed by ZESCO as per letter of offer of employment dated 2nd September 1987 to work on the same conditions as at CAPCO up to 31st may 1988. When the Zambezi River Authority Act came into being in October 1987, the appellant was already an employee of ZESCO and therefore not affected by the Act. The appellant's case failed on its own inanition. He failed to prove the conditions of service which were less favourable to him.

This appeal is dismissed with costs to be agreed and in default, to be taxed.



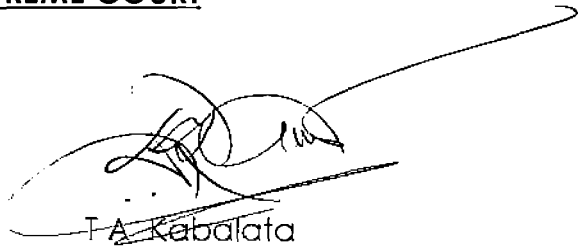
D K Chirwa

JUDGE OF THE SUPREME COURT



Chitengi

JUDGE OF THE SUPREME COURT



T A Kabalata

JUDGE OF THE SUPREME COURT

