

SCZ Judgment No. 10 of 2014

(231)

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

**Appeal No. 68/2009
SCZ/8/59/2009**

BETWEEN:

ATTORNEY-GENERAL

APPELLANT

AND

NACHIZI PHIRI AND 10 OTHERS

RESPONDENTS

Coram: Chibesakunda, Ag. CJ, Mwanamwambwa and Phiri, JJS
On 17th January, 2012 and 18th February, 2014.

For the Appellant:

- 1. Mr. Musa Mwenye, SC,
Solicitor General**
- 2. Mrs. M. Kombe,
Chief State Advocate**

For the Respondents:

**Professor M. P. Mvunga
Of Messrs Mvunga Associates**

JUDGMENT

Phiri, JS, delivered the Judgment of the Court

Cases referred to:

- 1. Attorney-General vs. Thixton (1966) ZR 10**
- 2. Godfrey Miyanda vs. Attorney-General (1985) ZR 185.**
- 3. National Milling Co. Limited vs. Grace Simataa & Others SCJ No. 21 of 2009.**

(232)

4. **Newstone Siulanda & Others vs. FoodCorp Products Limited SCJ No. 9 of 2002.**
5. **Armstrong and Whitworth Rolls Limited vs. Mustard (1971) 1 ALL ER 598.**
6. **Jacob Nyoni vs. Attorney-General SCZ Judgment No. 11 of 2001.**
7. **Mike Musonda Kabwe vs. BP Zambia Limited SCZ Judgment No. 10 of 1977.**
8. **Zambia Oxygen Limited and Zambia Privatization Agency vs. Paul Chisakula and Others (2000) ZR 271 page 31.**

This is an appeal against the Judgment of the High Court dated the 19th of February, 2009; by which Judgment the trial Court ordered that the joint Respondents be paid “ex-gratia” payments under ***Clause 9.5 of the National Assembly Conditions of Service and Disciplinary Code of 1996.*** The trial Court also awarded the joint Respondents interest at short term Bank deposit rate with effect from the date of issue of the Summons to the date of the Judgment; and thereafter at Bank of Zambia lending rate until final payment, with costs.

The brief facts of this case, which are in common cause, are that the Respondents were all ex-employees of the National Assembly who served that institution for more than ten years, and opted to

(233)

retire early, in and after 2002. However, when their retirement benefits were calculated and paid, they excluded “ex-gratia” payment. Ex-gratia payment was provided for in **Clause 9.5 of the National Assembly Conditions of Service and Disciplinary Code of 1996** (exhibited as ‘NP2’) as follows:

“9.5 Ex-Gratia Payment

- (a) An officer who resigns from the National Assembly, or opts for early retirement, or is retired in the public interest, or is appointed to another office, or is declared redundant before reaching the retirement age shall be entitled to an ex-gratia payment calculated at the rate of three (3) times of gross annual earnings, including salary and allowances being drawn at the time of leaving the service. The qualifying period is ten (10) years.**

Provided that an officer who is confirmed in his/her appointment resigns or is retired in the public interest or appointed to another office, or is declared redundant before reaching minimum qualifying period of ten (10) years shall be entitled to an ex-gratia payment equal to two and half months of basic salary for each completed year of service.

- (b) An officer whose services are terminated on disciplinary grounds either by way of discharge or dismissal shall not be entitled to any ex-gratia payment”.**

The uncontested history of “ex-gratia” payment is that it was introduced for the National Assembly employees under the National

(234)

Assembly Conditions of Service. The Conditions of Service were amended, in the ex-gratia payment eligibility clause, in 1986, 1994 and 1996. In 2000, **National Assembly Circular No. 5 of 2000** repealed the afore-quoted **Clause 9.5 of the 1996 Conditions of Service** in the following text:

“CONDITIONS OF SERVICE

Some aspects of the National Assembly Conditions of Service have also been revised as follows:

EX-GRATIA PAYMENT

- (a) Clause 9.5 of the National Assembly Conditions of Service is hereby repealed.**
- (b) Notwithstanding the repeal of Clause 9.5, the ex-gratia payment shall be made to an officer entitled or eligible to the ex-gratia payment before the date of the repeal where the officer:**
 - (i) Resigns from the service of the national Assembly**

- (ii) Opts for early retirement**
- (iii) Is retired in the public interest**
- (iv) Is declared redundant before attaining retirement age, or**
- (v) Attains statutory retirement age.**

(235)

For purposes of Clause 9.5, eligible officers means Heads of Departments and above, who were in employment before its repeal”.

The Respondents launched their individual lawsuits against the Appellant, which lawsuits were later consolidated under one representative action. Their claim was for the payment of “ex-gratia’ payment which was denied to them. Their contention was that each one of them was eligible to receive this payment in addition to their terminal benefits as provided for in the 1996 Conditions of Service. On the other hand, the Appellant’s contention, in their defence, was that the “ex-gratia” payment was not an accrued right under the repealed Conditions of Service. Both parties relied on affidavit evidence.

After evaluating the affidavit evidence and the exhibited documents on record, the trial Court found in favour of the Respondents. The Court found as a fact that the Respondents were not affected by **Circular No. 5 of 2000** (afore-quoted) which repealed **Clause 9.5 of the 1996 National Assembly Conditions of Service and Disciplinary Code**, by restricting the eligibility for “ex-gratia”

(236)

payment to Heads of Departments and upwards, with effect from the year 2000. The trial Court found that, ‘eligible officers’ for this payment before **Clause 9.5** was repealed, included or meant any person holding or acting in any post in the National Assembly and included a person serving on contract prior to the repeal. The trial Court found that the Respondents were eligible to receive ex-gratia payment as **Clause 9.5** was repealed while they were employees of the National Assembly as officers and therefore, that ex-gratia payment was an accrued right which could not be altered unilaterally by the employer; that the Respondents were not consulted and that the Respondents’ conditions of service

could not be altered to their disadvantage and, finally, that the repeal of year 2000 could only affect future employees and not those who were engaged before the repeal.

Dissatisfied with the trial Court's Judgment, the Appellant appeals to this Court, against the whole Judgment. By Consent Order, the Appellant filed an amended Memorandum of Appeal on the 2nd of February, 2010, advancing two grounds as follows:

(237)

- 1. That the Court below erred in both law and fact when it held that the ex-gratia payment was an accrued right which could not be abrogated by the employer unilaterally.**
- 2. The Court below erred in both law and fact when it failed to consider the nature of the "ex-gratia" payment and the condition's precedent for an employee to be liable to the "ex-gratia" payment.**

With leave of the Court; and without objection, the Appellant filed amended Heads of Argument. Both grounds were argued together. On behalf of the Appellant, it was argued that the trial Court did not consider the Appellant's explanation in paragraphs 11 to 17 of the Appellant's affidavit in opposition, on the nature of the ex-gratia payment and how it was administered. It was

submitted that the Court merely interpreted **clause 9.5 of the 1996 Conditions of Service**, without the benefit of the facts giving rise to those conditions and the manner in which they were implemented; that the ex-gratia payment was dependent upon certain condition precedents being fulfilled and that the entitlement was preceded by receipt of a letter itemizing the entitlement in the same manner the employees received letters for each increment awarded or other entitlements accrued to them; that the ex-gratia payment was

(238)

therefore, not an accrued right because of the condition precedent, namely, the exercise of the employees' option to retire early; that the ex-gratia payment had not accrued to the Respondents in 2002 when they retired two years after **clause 9.5 (a)** was amended; that eligibility was contingent upon an employee exercising the option to retire early and that the Respondents had not satisfied the necessary conditions at the time the ex-gratia payment was abolished in the year 2000.

It was further argued for the Appellant, that in view of the foregoing, the ex-gratia payment in the present case had not yet

vested in the Respondents when the 2002 amendment was made, contrary to the finding made by the trial Court.

In further support of the foregoing argument, we were referred to the ***Learned Authors of Blacks Law Dictionary 9th edition*** who define an accrued right as follows:

“A matured right; a right that is ripe for enforcement (as though in litigation)”.

(239)

It was further argued that the trial Court failed to appreciate the Supreme Court decision in the case of ***Attorney-General vs. Thixton***⁽¹⁾ which was referred to in the later case of ***Godfrey Miyanda vs. Attorney-General***⁽²⁾ in which ***Ngulube, DCJ***, as he then was, said the following:

“.....The Appellant never joined the Army as a private but it was, in the contemplation of the parties at all material times that, provided he was successful as a cadet officer, he would become a commissioned officer. He had thus, an inchoate and contingent right to the terms of section 13 which would vest upon becoming a commissioned officer. The rights we are here discussing were the Conditions of Service

governing the Appellant's employment and the very fact that he joined the Army on that footing was a sufficient event occurring during the currency of the 1955 Act to vest those conditions and terms in him.....".

It was further contended that the trial Court wrongly applied the rules relating to statutory rights to an ordinary employment contract. We were also referred to this Court's decision in the case of ***National Milling Company Limited vs. Grace Simataa and Others***⁽³⁾ as follows:

"As a corollary, it is possible to have adverse changes and it frequently happens for instance as part of a survival plan to avoid or mitigate job loses that such changes are

(240)

accepted by the workers and become coessential so that no actual termination or repudiation of the contract of employment results from one or more basic conditions".

It was argued that the amendment in the present case was consensual because ***Circular No. 5 of 2000*** which amended the Respondents' entitlement was issued in August of that year; when the first Respondent retired in the year 2002 and all the other Respondents retired after the year 2002; that the Respondents

accepted the variation in their conditions of employment by their conduct. Reliance was placed on the decision in the case of ***Newstone Siulanda and Others Food Corp Products Limited***⁽⁴⁾ in which it was held as follows:

“Disadvantageous and unilateral alteration 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”.

It was argued that the Respondents acquiesced to the alteration of their conditions of employment by continuing to work under the amended terms for at least two years without complaining about the amendment. In support of this position, further reliance was

(241)

placed on the decision in the English case of ***Armstrong and Whitworth Rolls Limited vs. Mustard***⁽⁵⁾ where it was held as follows:

“Although there was no express mutual agreement to vary the terms of the Respondents’ contract of employment, it was impliedly varied by the conduct of the parties”.

Finally it was the Appellant's contention that ***Circular No. 5 of 2000*** was a directive of the Speaker provided for under ***Clause 1 of the National Assembly Conditions of Service and Disciplinary Code (1996)*** which states as follows:

“All officers are subject to the conditions set out in this Booklet, and to such Orders, Regulations and general instructions as are issued from time to time by Mr. Speaker or on his behalf”.

It was the Appellant's contention that the Respondents were also subject to any regulations and general instructions of the Speaker, in addition to serving under the ***National Assembly Conditions of Service and Disciplinary Code of Conduct, 1996.***

Responding to the Appellant's Heads of Arguments, on the two grounds of appeal, Learned State Counsel, on behalf of the

(242)

Respondents, contended that the relevant question in this appeal is whether the ***National Assembly Conditions of Service and Disciplinary Code (1996)*** applied to the Respondents at the

time they took their options in or after 2002. It was the Respondents' argument that the answer is found in the very Conditions of Service, which in accordance with **Clause 1.0** thereof, must be **“interpreted in accordance with the Laws of the Republic of Zambia (sic) Standing Orders of the House and Regulations laid down from time to time by the National Assembly through Mr. Speaker”**.

It was argued that the law as it currently stands in Zambia, is that an accrued right cannot be abrogated by the employer unilaterally (**see Godfrey Miyanda vs. Attorney-General (1985) ZR 185 (SC), and Jacob Nyoni vs. Attorney-General SCZ Judgment No. 11 of 2001**).

It was further argued that a contract of employment between the parties terminated when the employer alters the employees' conditions of service without that employees' consent, and that the

(243)

benefits payable must be calculated on the basis of the better conditions of service enjoyed prior to alteration. In support of

this position, Learned State Counsel referred us to the case of ***Mike Musonda Kabwe vs. BP Zambia Limited***⁽⁷⁾ It was contended that on the same basis of judicial reasoning, the ***National Assembly Circular No. 5 of 2000*** could not alter the conditions of service which had been agreed to; and the repeal could only have effect on future employees who joined the National Assembly after the Circular came into force.

Regarding Ground 2, it was the Respondents' contention that the trial Court did not error in both law and fact as it did consider the nature of the ex-gratia payment and conditions precedent for an employee to be eligible to the ex-gratia payment. The trial Court achieved this approach by quoting eligibility under ***Clause 9.5 of the 1996 National Assembly Conditions of Service*** and comparing it to the eligibility clause under the ***2000 National Assembly Conditions of Service*** which repealed and replaced ***Clause 9.5 of 1996***. The trial Court correctly concluded that the

(244)

Respondents were eligible for ex-gratia payment under the 1996 Conditions of Service.

It was further argued that the Respondents' eligibility could not depend on any letter written to them to indicate that they were eligible or entitled to the ex-gratia payment. It was argued that the Respondents' letters of appointment did not itemize all their entitlements and that did not mean that those entitlements provided under **clause 9.4 (long service benefit) 9.6 (National Provident Fund), 9.7 (contract of employment (a), (b), (c) and (d) and 9.8 (medical insurance scheme)** as shown on page 24 of the record were not payable. All these benefits are not shown in the Respondents' letters of offer, but cannot be said to be excluded because of not having been explicitly spelt out in the letters. It was also argued that the requirement of first being written to before eligibility could be established, is the Appellant's afterthought contained in their affidavit filed two years after the dispute arose; and that this requirement is not spelt anywhere in the conditions of service. It was the Respondents' contention therefore, that the

(245)

Court below was on firm ground in deciding this case in their favour.

We have considered this appeal together with the arguments advanced in the respective heads of arguments and the list of authorities cited. We have also considered the Judgment of the trial Court; in particular, the findings of fact, the law discussed and the conclusion arrived at.

According to the affidavit evidence exchanged by both parties in the Court below, the Appellant does not seem to have had any difficulties with its employees regarding the provisions of **Clause 9.5 of the National Assembly Conditions of Service of 1996**. The problem commenced with their issuance of **Circular No. 5 of 2000**. To put this problem into its correct perspective, we will put it this way: prior to **Circular No. 5 of 2000**, all illegible employees of the National Assembly who qualified for the ex-gratia payment were paid in accordance with their entitlement as defined in the 1996 conditions of service. The illegible

employees included the Respondents' categories of employees. The problem appears to us

(246)

to have arisen from the ***National Assembly Circular No. 5 of 2000*** which repealed and replaced ***Clause 9.5 of the 1996 Conditions of Service*** by withdrawing ex-gratia payments from the Respondents' categories of employees who were no longer within the eligibility provisions of the new conditions of service. It was on that basis that the Appellant took the view that the Respondents were no longer entitled to the ex-gratia payment. The Appellant's reply to the Respondents' letter of demand dated 1st June, 2006 (exhibited as **"NP5"** of Nachizi Phiri's affidavit at page 28 of the record of appeal), in our view, sums up the Appellant's case. The relevant portion of the Appellant's response reads as follows:

"I wish to advise that the ex-gratia being referred to was expressly applicable to eligible officers only, namely, officers in the executive and super salary scales. At the time of retirement Mr. Phiri served as an administrative officer, the position which was in

division 3 and as such he was not entitled to the ex-gratia payment.

In fact, the ex-gratia payment being demanded by Mr. Phiri was officially abolished from National Assembly Conditions of Service by Circular No. 5 of August of 2000.

From the foregoing, you will note that Mr. Phiri has never been entitled to ex-gratia payment as he did not fall in any of the mentioned categories of eligible officers.

(247)

I hope and trust that my explanation will help in advising your client accordingly.”

Eligible officers under the amended **clause 9.5** were in the executive and Super Salary Scales: these were; the Clerk of the National Assembly, Clerk Assistant, Senior Clerk Assistant and the Heads of Departments. In its unrepealed format, the **1996 National Assembly Conditions of Service** did not restrict eligible officers to the Clerk of the National assembly, Assistant Clerks and Heads of Department. It applied to all officers of the National Assembly, including all the Respondents in this appeal. This inclusion was achieved through **Clause 1.1** under **Chapter 1 (Interpretation, Definitions and Divisions) of the National Assembly Conditions of Service of 1996.** That

clause defines eligible officers to include all qualifying officers including the Respondents, and states as follows:

“Officer means any officer holding or acting in any post in the National Assembly and includes a person serving on contract”.

(248)

Therefore, **Clause 9.5** applied to all officers of the National Assembly. The Respondents’ eligibility was taken away from them by the 2002 repeal and replacement which restricted, for the first time, the eligibility for ex-gratia payment to the Clerk, Clerk Assistants and Heads of Department. In this way, the 2002 amendment clearly disadvantaged the Respondents by taking away their eligibility for ex-gratia payment with effect from the year 2000.

It is trite that employment relationships and the payment of salaries, dues, benefits and allowances are anchored in contract; with clear terms governing such contracts. Where the terms of the contract of employment are not clear, the Court has power to

ascertain the contention of the parties and give effect of the contract by enforcing the provisions of the contract when called upon to do so by a dissatisfied party through litigation. Where the contract is deemed repudiated, the Court must decide on the rights of the parties including what the employee must be awarded as a result of unilateral repudiation of a contract of employment.

(249)

Arising from the two grounds of appeal that have been advanced in the present case, the main issues to be resolved is whether having found that the year 2000 repeal and amendment to **clause 9.5** of the **National Assembly Conditions of Service and Disciplinary Code, 1996** did not affect the Respondents, the trial Court was on firm ground to conclude in the Respondent's favour as it did.

As already noted, it was the trial Court's finding of fact, which we cannot interfere with, that the amendment of the year 2000

clearly brought a new qualification which was not in effect at the time the Respondents were in service; before that year. The new qualification was the criteria of eligibility which excluded the Respondents since the year 2000.

In our view, the Respondents should not have been disadvantaged by subjecting them to a term and condition which did not exist in 1996; but which was created in the year 2000 after they had rendered more than ten years service and were about to exercise their options of separation. Having worked for so long, the Respondents were entitled to bear legitimate expectations of

(250)

terminal benefits including ex-gratia payment under the 1996 conditions of service. The ex-gratia payment was within their contemplation and was, therefore, an accrued right.

We have stated in many employment cases that employees should not be subjected to conditions of service which did not exist during their service; and that no employees' conditions of

service should be altered to his or her disadvantage without consent.

It has been argued by the Appellant that the Respondents acquiesced to ***the National Assembly Conditions of Service and Disciplinary Code of 2000***. We have addressed our mind to the question of the employees' consent by conduct. The appellant's argument is basically that when the conditions of service were altered in the year 2000, the respondents who had been on the 1996 conditions of service, continued to work without repudiating their contracts of employment and claim damages or protest against the new conditions. We note from the Judgment that the Learned Trial Judge found, on the basis of the affidavit evidence before her, that when the **1996 Conditions of Service** were altered, the

(251)

Respondents were not consulted (page J6 lines 3 to 6 of the Record of Appeal).

The Learned trial Judge, in effect, rejected the application of the amended Conditions of Service of 2000 which unilaterally abolished the Respondents' entitlement to ex-gratia payment without any notice to them, for worse, and to their disadvantage. It was on this basis that the Learned trial Judge concluded that the 2000 amendment could only apply to the employees who were recruited from the time those amended conditions of service became applicable.

We have already stated that conditions of service already enjoyed by the employees cannot be altered to their disadvantage without their consent (***see also Zambia Oxygen Limited and Zambia Privatization Agency vs. Paul Chisakula and Others⁽⁸⁾***).

We must add that conditions of service for any kind of employment can be amended, but this must only be with the clear and express consent of the employee. It is our view that express consent of an employee must always be a major pillar in the principles of

(252)

employment law, in the safeguarding of the terms of an employee's contract of employment already being enjoyed; the other pillar being job security for that employee which is also a prominent feature of the present day Government policy on employment. These pillars go side by side with the predictability of the employee's retirement or separation package; founded on the principle of good conduct on the part of that employee.

We say all this because the personal consequences which befall an employee, who does not accept unilaterally downgraded conditions of service made by the employer, invariably react to the greater disadvantage and prejudice of the employee, whose livelihood immediately comes under threat and stress without any fault or misconduct on his part. In a situation where fair and reasonably paying jobs are scarce, it is not right to expect an employee who disagrees with the unilateral downgrading of the conditions of service to simply opt out of employment and wait for the payment of separation package or the payment of damages for breach of contract. It must be recognized that the employer is always in a

(253)

stronger position than the employee and therefore, the safeguarding of the employee's rights must be based on favourable interpretation of the principles of employment law. In any event, from the numerous cases that we have dealt with, it is apparent to us that the employer often chooses to downgrade the employees' conditions of service without really giving that employee much choice about it. It is for this reason, among others, that we hold, in this case, that it was desirable that each of the Respondents should have given their express consent to the downgraded conditions of service; and the purpose of such a measure and its effects should have been made plain and clear to the Respondents.

While we agree that the presence or absence of employees' consent to downgraded conditions of service must be considered as a matter of fact, to be established in the circumstances of each particular case; and that in appropriate cases, consent by conduct may be considered sufficient, in the present case we have not

seen any evidence suggesting the presence of express consent or consent by conduct. Failure by employees to parade and protest against

(254)

conditions of service offered by one of the three arms of Government should not amount to their consent by conduct. If it happens, it would in fact amount to indiscipline.

To this extent, we endorse what we said in the ***Godfrey Miyanda and Jacob Nyoni cases*** as well as what we stated in the ***Mike Musonda Kabwe case***⁽⁷⁾ which is still good law.

We are satisfied in this case that the Respondents were eligible for ex-gratia payment under the 1996 conditions of service. We reject the suggestion that they had not satisfied the necessary conditions at the time the ex-gratia payment was abolished for their categories of employees in 2000. We also reject the Appellant's suggestion that the Court below wrongly applied the principles relating to statutory rights to an ordinary employment contract.

In this connection, we wish to emphasize that the ***National Assembly Conditions of Service and Disciplinary Code*** clearly provide that same shall be interpreted in accordance with the Laws of Zambia; this, we believe, includes the ***Interpretation and***

(255)

General Provisions Act, Chapter 2 of the Laws of Zambia and other written laws including the ***Defence Act Chapter 106 and the Civil Service (Local Conditions) Pensions Act No. 11 of 1986*** on the basis of which the ***Miyanda and Jacob Nyoni cases*** were respectively dealt with. On this basis, we find no reason to fault the findings and conclusion of the Court below. This appeal fails on both grounds and we dismiss it with costs to the Respondents, to be taxed in default of agreement.

L. P. CHIBESAKUNDA
ACTING CHIEF JUSTICE

M. S. MWANAMWAMBWA
SUPREME COURT JUDGE

G. S. PHIRI
SUPREME COURT JUDGE