Supreme Court Judgment No.54 of 2018

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IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

APPEAL NO. 70/2016
SCZ/8/375/2015

BETWEEN

ELVIS MTONGA — APPELLANT

AND

BANK OF ZAMBIA — RESPONDENT

Coram: Hamaundu, Kaoma and Kajimanga, JJS
On 4th December, 2018 and 11th December, 2018

For the Appellant: N/A
For the Respondent: Dr. L. Kalinde – General Counsel and Mr. C. Sikazwe – Senior Legal Counsel both of Bank of Zambia

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JUDGMENT

Kaoma, JS delivered the Judgment of the Court.

Cases referred to:

1. *Rosemary Ngorima and 10 others v Zambia Consolidated Copper Mines - Appeal No. 97 of 2000.*
2. *Kitwe City Council v William Ng'uni (2005) Z.R. 57.*
3. *Gondwe v B.P. Zambia Limited (1995/ 1997) Z.R. 178*
4. *Charles Mushitu (sued in his capacity as Secretary-General of Zambia Red Cross Society) v Christabel M. Kaumba – Appeal No. 122/2015.*
5. *Moonjelly Ouseph Joseph v RDS Investments Limited - SCZ Judgment No. 7 of 2004*

Legislation and works referred to:

1. *Employment Act, Cap 268 of the Laws of Zambia, ss. 3, 47 and 48*
2. *Black's Law Dictionary, 9th edition, Bryan A. Garner*

This appeal challenges the decision of the High Court that the salaries the appellant received during his paid study leave was an expense incurred by the respondent in sponsoring him for his PhD programme at the University of Cape Town, South Africa and was due and payable, in accordance with the bonding agreement.

The facts of this matter were common cause. The appellant was employed by the respondent as an economist. In December, 2001 he applied for paid study leave and sponsorship to enable him pursue a PhD programme at the University of Cape Town. The application for a full time bank sponsorship was approved by the respondent. The terms and conditions of the sponsorship were outlined in a sponsorship letter dated 18th March, 2002.

The duration of the sponsorship was for a period of four years and was with immediate effect until the end of February, 2006. Under clause 6 of the sponsorship letter, the respondent was to pay the University of Cape Town tuition fees for the four-year period of study. The appellant was to be paid during the same period certain

allowances namely monthly upkeep, settling in, warm clothing, book and excess baggage allowances.

The sponsorship letter also specified in clause 2 that the appellant would be bonded to serve the Bank for a period equivalent to that of his sponsorship upon completion of his degree and should he decide to leave the Bank during the period of bonding, he would pay all expenses incurred by the Bank during his training period.

In May, 2002 the parties signed the bonding agreement, clause 1 of which stated that the respondent had undertaken and agreed to grant to the appellant assistance in terms of paid study leave for the duration of the course, maintenance and book allowances. Clause 3 (e) explicitly provided that in consideration of the financial assistance to be accorded to the appellant, he was, upon completion of his course required to serve the respondent for a continuous period of at least four years commencing not later than six months after the writing of qualifying examinations, if called upon to do so during that period.

Clause 5 also stated in very clear terms that all the amounts paid to or on behalf of the student in terms of the agreement shall,

subject to the provisions of clause 7, become immediately repayable by him, if, inter alia, he resigned during the bonding period. In terms of clause 7, the amount repayable in such circumstances was not to exceed the total amount granted to the student in any four complete years.

The appellant proceeded to undertake his studies in June, 2002. On 4th April, 2006 he applied for extension of the study leave from July, 2006 to June, 2007 but the respondent's Training Committee resolved to extend the study leave for six months from July, 2006 to December, 2006. The appellant was informed that should he wish to extend his studies further, he would be placed on unpaid study leave and bear all costs relating to his studies.

On 13th November, 2006 the appellant confirmed that he would terminate his studies at the end of December, 2006 but since the bonding agreement granted him the right to report to work not later than six months after completion of his studies, he would report for work on 2nd July, 2007 or soon before that.

The appellant also pointed out that the bank bound itself to pay him a full salary under the bonding agreement and had no jurisdiction to vary the terms of the agreement. That such unilateral action was unlawful because the bonding agreement was a legally binding and enforceable contract. Hence, he expected to continue to receive his full salary. On 18th December, 2006 he was advised that the bank had declined his request to report for work on 2nd July, 2007 and expected him to begin work a week after 31st December, 2006 when he completed his studies.

The appellant only reported for work on 20th August, 2007 and on 24th August applied for 60 days unpaid leave to allow him to relocate his home from South Africa. On 30th August, 2007 he gave notice of resignation from employment effective 1st October, 2007. He indicated in the resignation letter that he stood ready to pay back the expenses incurred as called for by the bonding agreement. A dispute arose as to whether or not the salaries he received during his paid study leave were expenses repayable under the bonding agreement. This prompted the respondent to commence court action to recover a sum of K1,420,413,325.89 (unrebased) payable

by virtue of the bonding agreement. The amount was the total of all sums paid in support of the appellant's studies up to June, 2006.

Later, the parties executed a Consent Order by which they agreed that the appellant pays a sum of K234,705,273.50 representing training costs. The disputed amount proceeded to trial. The lower court held that the salaries the appellant received during his study

leave were an expense incurred by the respondent and was due and payable by the appellant in terms of clauses 5 and 7 of the bonding agreement.

Unhappy with this decision, the appellant filed this appeal advancing one ground that the learned judge of the High Court erred in law and in fact when he held that the respondent's disputed claim for salaries amounting to ZMW 1,163,200.00 was one of the expenses that the respondent incurred in sponsoring the appellant and thus due and payable to the respondent.

The appellant filed heads of argument in support of the appeal. He also filed a notice of non appearance. The gist of his

arguments is that the salaries paid to him during his period of study were part of his entitlement as an employee and not part of the amounts repayable to the respondent under the bonding agreement. He relied on the following factors:

1. The sponsorship letter did not, in clause 2, envisage the salary as part of the training expenses.
2. The bonding agreement only provided for paid study leave, maintenance and book allowances. The bulk of training costs the appellant was bonded to repay were provided for in clause 6 of the sponsorship letter.
3. In the minute at page 63 of the record of appeal, the Director-Economics, noted the understanding of the parties in lines 25-27 that the appellant was prepared to meet the training costs himself provided he was granted paid study leave.
4. The respondent stopped paying training costs in December, 2006 but continued paying the salary until the appellant resigned. This confirmed that the salary was considered as an incident of employment rather than a recoverable grant.

The appellant also advanced an argument based on *section 47* of the *Employment Act*, which proscribes an employer from making any deductions from wages payable to an employee or any amount paid to such employee as an advance of wages in consideration of, or as a reward for, providing employment for such employee or for retaining such employee in employment. The argument is that the bonding agreement is illegal as much as it may be held to have

retained a clause for recovery of the salary in the event of leaving the bank prior to completion of the bonding period.

Counsel acting for the respondent also filed heads of argument in response. The gist of the arguments is that the appellant agreed at trial that he was never forced or tricked into accepting the terms and conditions of the sponsorship; and that the consequences of not completing the bonding period were clearly spelt out in the sponsorship letter and the bonding agreement, that is all amounts paid to the appellant during the period of his study became due and payable upon his resignation.

The case of *Rosemary Ngorima and others v Zambia Consolidated Copper Mines*[1] was cited where we held that in an employer/employee relationship, the parties are bound by whatever terms and conditions they set out for themselves. The case of *Kitwe City Council v William Ng'uni*[2] was also cited where we held that it is unlawful to award a salary or pension benefits, for a period not worked for because such an award has not been earned and might be properly termed unjust enrichment.

As to *section 47* of the *Employment Act*, it was contended that there was no deduction made by the respondent to bring this case within the ambit of this section; that wages were not payable to the appellant during the period he was not rendering any service, the wages were being paid to him in consequence of the bonding agreement; and that the claim for refund is not being made for the purpose of retaining him in employment but for breach of a valid and legally binding agreement from which he derived a benefit.

In his heads of argument in reply, the appellant repeated his earlier arguments. He added that the court failed to distinguish payment he received as an incident of his employment and payment he received by way of sponsorship. He cited the case of *Gondwe v B.P. Zambia Limited*[3] where we highlighted the distinction that exists between benefits arising as an incident of employment and benefits enjoyed in the course of or at termination of employment.

It was argued that the appellant was entitled to various kinds of leave, including study leave. It was the practice of the respondent to subject all kinds of leave to eligibility and approval. The approval

of the paid study leave entitled him to receive his normal salary paid on regular basis. This cannot amount to unjust enrichment. According to the appellant, it is trite that employees are paid when on leave despite that they are not reporting for work such as when on annual leave, sick leave, maternity leave, etc. and the payment of salary in such circumstances cannot legally be deemed unjust. The appellant sought to distinguish the case of *Kitwe City Council v Ng'uni*[2] on the basis that in that case, the respondent resigned and claimed for terminal benefits inclusive of the period he did not work while here, he was on paid study leave, which was approved by the respondent.

At the hearing of the appeal, General Counsel for the respondent reinforced the argument that an employee is only entitled to a salary for services rendered. He quoted the definition of salary from *Black's Law Dictionary, 9th edition*, as *'agreed compensation for services rendered'*. He further referred us to page 172 of the record of appeal to show that the respondent had two types of study leave; paid leave and unpaid leave. In this case, the

appellant was granted paid study leave under which he covenanted through the bonding agreement to serve the respondent for a period equivalent to the sponsorship period, failure to which all expenses incurred by the respondent would be repaid.

In answer to a question by the Court as to why the respondent continued to pay the appellant's salary after the training costs were terminated in December, 2006 counsel responded that there was a great reputation risk for the respondent because the appellant was in a foreign country. He would have been stranded there with his family had the respondent terminated his salary. It was simply a humanitarian and discretional act and the appellant was returning to work for the respondent.

On his part, senior legal counsel for the respondent referred us to page 98 of the record of appeal. This is a letter written by the appellant to the Director, Human Resources at the respondent bank on 26th January, 2007 wherein at lines 20 to 21, he appreciated the concern of the bank, namely the cost being incurred in terms of the salary paid and the need to expeditiously return to work.

Counsel also referred to page 182 of the record, at lines 2 to 4, where the appellant agreed that the salary was a fixed cost for the respondent. Lastly, he cited the definition of *'wages'* in *section 3* of the *Employment Act.* The argument is that the lower court was on firm ground when it found in favour of the respondent.

We have considered the record of appeal and the arguments by counsel for the parties. The issue for our decision is simple. Was the salary an incident of the appellant's employment to which he was entitled for the entire period of study leave or it was an expense that was repayable by the appellant?

The appellant admitted that in clause 1 of the bonding agreement, the respondent undertook and agreed to grant him assistance in form of paid study leave and maintenance and book allowances for the four year period of his PhD studies while other allowances were provided for in clause 6 of the sponsorship letter.

It is indisputable that in consideration of the financial assistance the respondent undertook and agreed to grant to the appellant under the bonding agreement and the sponsorship letter, the appellant agreed to be bonded to serve the respondent for a

period equivalent to the sponsorship period, failure to which all expenses incurred by the respondent would be repaid by him.

The appellant confirmed in his evidence in cross-examination that he understood the bonding agreement and that he was not forced or coerced to sign it. He argued and we agree with him that since not all training costs he was bonded to repay were provided for in the bonding agreement, the two documents must be read together to ascertain what constituted the training costs repayable by him to the respondent.

There can be no dispute whatsoever that paid study leave was part of the financial assistance granted to the appellant under the bonding agreement. It is insignificant that salary was not specifically mentioned in the sponsorship letter.

As submitted by counsel for the respondent, the appellant acknowledged in his letter to the Director, Human Resources dated 26th January, 2007 that the salary was a cost being incurred by the respondent. The appellant also conceded in his evidence in cross-examination that the salary was a fixed cost for the respondent. How can he now argue that it was not a repayable expense?

The appellant contended that an employee is generally entitled to a salary whether or not he has worked for the period he receives the salary. This is a fallacy. In *Charles Mushitu (sued in his capacity as Secretary-General of Zambia Red Cross Society) v Christabel M. Kaumba*[4], we said any contract of employment is underpinned by two mutual and complementing obligations of the parties: that of the employee to provide his or her labour in the manner prescribed by the contract, and that of the employer to pay reasonable and or fair remuneration for the employee's services.

We also referred to *section 48* of the *Employment Act,* which recognises the employer's obligation to pay wages. We further stated that the duty of the employer to pay the employee wages is a continuing duty during the subsistence of the employment relationship unless the employee is in repudiatory breach of contract or has agreed to waive the contractual right to be paid for whatever reason.

Further, in the case of *Moonjelly Ouseph Joseph v RDS Investments Limited*[5], we held, inter alia, that under *section 48* of

the *Employment Act*, no one can be employed to work without receiving a wage as that would be illegal.

However, it must be emphasised here that the duty of the employer to pay the employee wages is a continuing duty for as long as the employee continues to provide his or her labour in the manner prescribed by the contract. If an employee does not render any services to the employer, unless the employer consents, the employee is not entitled to a salary or benefits for the period not worked. This is the underlying principle in *Kitwe City Council v Ng'uni*[2]. The principle applies to this case although the salaries in issue were paid to the appellant whilst he was still in employment.

The appellant agreed that he did not render any service to the respondent during the entire period of his study and nowhere in his testimony did he say that he was entitled to paid study leave as of right and this is not an entitlement set out in the Employment Act.

Indeed, the evidence shows that the respondent had discretion whether or not to grant the appellant paid study leave. The study leave system provided the appellant with a chance of studying for

his continuous professional development and the bank sponsored him as a way of capacity building for itself, hence the bonding agreement. Much as the appellant's employment relationship with the respondent continued during the period of study, the only reason he was paid a salary was because he was granted study leave with pay. If not, he would not have been entitled to a salary for the period he did not render any services to the respondent.

As we held in *Rosemary Ngorima and others v Zambia Consolidated Copper Mines*[1], in an employer/employee relationship, the parties are bound by whatever terms and conditions they set out for themselves. In this case, the bonding agreement was very clear. The appellant's argument that the salary was not part of the repayable expenses must fail.

The appellant also argued that the bonding agreement was illegal in terms of *section 47* of the *Employment Act*, in so far as it may be held to have retained a clause for the recovery of the salary in the event that he resigned before completing the bonding period.

The above argument must equally fail. Firstly, it was never canvassed in the lower court. Secondly, there was nothing illegal in the respondent providing financial assistance to the appellant on condition that he worked for it for a period equivalent to the sponsorship period upon completion of his studies. Thirdly, the appellant conceded that he breached the bonding agreement and that all expenses under the agreement were repayable.

Additionally, as we said earlier, when reacting to the warning that he would be placed on unpaid study leave if he extended his leave beyond the approved period, the appellant indicated emphatically that the bank bound itself to pay him a full salary under the bonding agreement and that it had no jurisdiction to vary the terms of the agreement. He termed such unilateral action unlawful because the bonding agreement was a legally binding and enforceable contract. Hence, he cannot now claim that the bonding agreement is illegal.

The appellant also argued that despite withdrawing training costs under the bonding agreement in December, 2006 the respondent continued paying his salary until his resignation, thus confirming his position that the salary was considered as an incident of his employment as opposed to a recoverable grant.

It is clear that the financial assistance granted to the appellant covered only the period of study and the amount repayable was not to exceed the total amount granted to the appellant in any four complete years. General Counsel for the respondent explained, and we accept his explanation, that the respondent continued to pay the appellant's salary after December, 2006 because he was in a foreign country. He would have been stranded with his family had the salary been terminated. This was plainly a humanitarian and discretional act. In any event, he was still an employee and was expected to return to work.

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In conclusion, the appellant breached the bonding agreement by resigning shortly after returning to work. The period he worked thereafter is irrelevant. He was obliged to pay back all the amounts paid to or on his behalf in terms of the bonding agreement. Therefore, the lower court was on firm ground when it held that the salary was an expense covered under the bonding agreement. The appeal has no merit and we dismiss it with costs here and below.

E.M. Hamaundu
SUPREME COURT JUDGE

R.M.C. Kaoma
SUPREME COURT JUDGE

C. Kajimanga
SUPREME COURT JUDGE