IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 59/2016

HOLDEN AT NDOLA SCZ/08/348/2015

(Civil Jurisdiction)

BETWEEN

BUK TRUCK PARTS LIMITED APPELLANT

AND

STANLEY SINYENGA RESPONDENT

Coram: Hamaundu, Kaoma and Kajimanga, JJS

On 4th December, 2018 and 11th December, 2018

For the Appellant: Mr. K.M. Simbao- Mulungushi Chambers

For the Respondent: Mr. S.A.G. Twumasi – Kitwe Chambers

JUDGMENT

Kaoma, JS delivered the Judgment of the Court.

Cases referred to:

1. *Peter Ng'andwe and others v Zamox Ltd and Zambia Privatization Agency (1999) Z.R. 90*
2. *Barclays Bank Zambia Ltd v Mando Chola and another (1999) Z.R. 35*
3. *Zambia China Mulungushi Textiles (Joint Venture Ltd) v Gabriel Mwami (2004) Z.R. 244*
4. *National Milling Company Ltd v Simataa and others (2000) Z.R. 91*
5. *Moonjelly Ouseph Joseph v RDS Investments Ltd (2004) Z.R. 68*
6. *Barclays Bank Plc v Zambia Union of Financial and Allied Workers – SCZ Judgment No. 12 of 2007*
7. *Quicksave Limited v Sarah Mubambe - Appeal No. 30/2016*
8. *Martin Clark v Seedco Zambia Limited - Appeal No. 147/2014*

Legislation referred to:

1. *Employment Act, Cap 268, sections 26(B)*
2. *Minimum Wages and Conditions of Employment Act, Cap 276*
3. *Industrial and Labour Relations Act, Cap 269, section 97*
4. *Minimum Wages and Conditions of Employment (General Order, 2011) (Statutory Instrument No. 2 of 2011)*
5. *Minimum Wages and Conditions of Employment (General) (Amendment Order, 2012) (Statutory Instrument No. 46 of 2012)*

Other works referred to:

1. *Halsbury's Laws of England (reissue), 4th edition, volume 16, paragraphs 658 and 670*
2. *W. S. Mwenda (2004) "Employment Law in Zambia (Cases and Materials: at page 77*

This appeal is against a decision of the Industrial Relations Court which held that the respondent was put on redundancy.

The undisputed facts in the court below were that the respondent was employed by the appellant on 31st October, 2011 as Business Development Manager. He was stationed at Kitwe. On 24th December, 2014 he was put on what was termed "temporal relieve from duty without pay" for a period of four months. The reason advanced for taking such a step was that the appellant was unable to maintain the huge wage bill due to low sales from the respondent's branch and the appellant's other branches.

On 12th May, 2015 the respondent wrote to the appellant asking about the state of affairs concerning his temporal relief from work. In a letter dated 26th May, 2015 the appellant demanded for

reasons why he should be taken back. It was stated in the letter that his official layoff was supposed to expire at the end of April, 2015 but they had not communicated to him on the correct position regarding him and the company work. The letter then touched on issues concerning the respondent's poor performance and lack of initiative. The respondent did not respond to this letter.

By letter dated 4th June, 2014 the appellant purportedly called the respondent back for work after a review of his temporary layoff to be stationed at Ndola as branch manager on the same remuneration. He was required to resume work by 1st July, 2015.

On 30th June, 2015 the respondent took out a court action seeking for the following relief:

1. *An order that his layoff was in fact a redundancy and it be deemed so;*
2. *6 months' salary for each year worked;*
3. *Payment of the salaries whilst he was on temporary leave without pay;*
4. *Payment of his salary until the payment of his redundancy as required by the law; and*
5. *Any other relief the court may grant.*

In his affidavit in support of complaint, the respondent asserted that the appellant's request for him to justify his return to work suggested that he was relieved from employment for reasons other than inability to maintain a huge wage bill and in a manner

contrary to company rules and the law; and the appellant's action was a clear indicator that he had been declared redundant.

In its answer and affidavit in opposition, the appellant denied that the respondent had been declared redundant or terminated. It was averred that his actions showed that he was not interested in the position offered to him as branch manager at Ndola.

The lower court heard evidence and received submissions from the parties. On the first claim for an order that the layoff was in fact a redundancy, the court examined the letter of 24th December, 2014 and found that the temporary relief was not attributed to the respondent's faults (if any) or to his performance. The court also observed that the low sales which were cited in the letter were not only at the respondent's branch but also at other branches.

The court also quoted *section 26B* of the *Employment Act, Cap 268* which defines the concept of redundancy and confers rights on employees who are terminated by reason of redundancy. The court was satisfied that when sales went down at the appellant's branches, the latter faced financial incapacity to maintain the respondent in employment. The court declared that the respondent was put on redundancy because of the following factors:

1. *He was put on temporal relief from work without pay because the respondent was unable to maintain the huge wage bill;*
2. *He was never recalled and there was no evidence to prove that the letter in which he was told to go back for work and transferred to Ndola Branch was ever received by him;*
3. *He was not on any disciplinary charge;*
4. *The transfer to Ndola Branch was in a lower position; it was therefore, a demotion. The appellant did not justify this demotion because the respondent was never charged with any offence warranting a demotion. This amounted to a variation of the respondent's conditions of employment without his consent which amounted to redundancy as held in the case of Peter Ng'andwe and others v Zamox Limited and Zambia Privatization Agency[1].*

On the second claim for 6 months' salary for each year worked, the court referred to clause 30 of the respondent's conditions of service which provided for redundancy payment of one month pay for each year completed.

The court was alive to the fact that the employment relationship between the parties was governed by an employment contract and that the *Minimum Wages and Conditions of Employment Act, Cap 276* which the respondent had referred to would ordinary not apply. However, the court found that the Act applied because it had seen no proof that the contract of employment was attested by a proper officer as required by law.

Therefore, the court awarded the respondent a redundancy payment of two months' basic pay for each year completed on the basis of paragraph 10 of *Statutory Instrument No. 2 of 2011* of the *Minimum Wages and Conditions of Employment Act.* The court directed that the years must be calculated from the date the respondent reported for work to 29th October, 2015 which was the date of judgment. No payment was to be made on pro rata basis.

On the claim for payment of salaries while the respondent was on temporary leave without pay, the court opined that no employee whether on leave or not must be denied his wages without good cause; that the respondent was on temporary relief but was still an employee; that he was not facing suspension or any disciplinary charge; and that there was no good cause to deny him his wages.

Consequently, the court ordered that he be paid monthly salaries and all allowances (if any) that existed immediately before he was put on temporary relief from work. The salaries were to be paid until his redundancy payment was made in full as required by *section 26B (3) (b) of the Employment Act.* The court was aware that this section applies to oral contracts but took the view that it must apply since the contract was not attested by a proper officer.

Under the claim for any other relief the court may grant, the respondent was awarded one month's salary as notice pay.

Aggrieved by this decision, the appellant appealed on four grounds namely:

1. **The court below misdirected itself in law and in fact when it declared that the respondent was actually put on redundancy.**
2. **The court below erred in law and fact when it found that the contract of employment before it was not attested by a proper officer.**
3. **The court below misdirected itself when it held that there shall be no payment calculated on pro rata basis.**
4. **The court below misdirected itself in law and fact when it awarded the respondent wages for the period he was on temporary relief.**

Counsel for both parties filed heads of argument on which they relied. They supplemented these with some oral submissions.

We hasten to state that counsel for the appellant abandoned grounds 2 and 3. We commend him for doing so. He did not address ground 2 in the heads of argument but filed additional heads of argument on 1st November, 2018 without leave of court after the respondent's counsel argued in response that the ground must be dismissed as there were no arguments to support it.

At the hearing of the appeal, counsel for the appellant applied for leave to file the heads of argument out of time. This was opposed

by counsel for the respondent. We refused to grant leave on the ground that the respondent would have no opportunity to respond.

With regard to ground 3, counsel for the appellant conceded that the court had ordered that there would be no payment calculated on pro rata basis, and so, this ground had no basis.

Coming to ground 1, counsel for the appellant predicated his arguments on *section 26B (4)(e)* of the *Employment Act* which states that the provisions of this section shall not apply to an employee who has been offered alternative employment and who has unreasonably refused the offer. It was argued that as the respondent was offered alternative employment with pay, the court erred when it agreed that he was declared redundant. It was irrelevant whether or not the position was a down size.

In support of ground 4, counsel cited *Halsbury's Laws of England, 4th edition (reissue), Volume 16,* at *paragraph 658* which states that:

> *"There is a presumption that employment has been continuous unless the contrary is proved. The continuity of a period of employment is broken where an employee is treated as not having been dismissed by reason of renewal of his contract or re-engagement by his employer after an interval following what would otherwise be a dismissal, unless a redundancy payment is made to the employee, whether in respect of dismissal, layoff or short time."*

Reference was also made to paragraph 670 which states as follows:

> *"An employee is not taken to be dismissed by his employer when his contract of employment is renewed or extended or he is re-engaged by the same employer under a new contract. The renewal or re-engagement must take effect immediately on the ending of the employment under the previous contract when the provisions of the renewed or of the new contract do not differ from the provisions of the previous contract. But, where the provisions of the renewed or new contract differ from the provisions of the previous contract, the employee is not taken to be dismissed so long as the renewal or re-engagement is in pursuance of a written offer made by the employer before the end of the employment under the previous contract and it takes effect either immediately on the ending of that employment or after an interval of not more than four weeks thereafter".*

It was argued that the respondent was never dismissed from employment and therefore, had he been paid during his layoff, the presumption of continuity of employment would have been rebutted but since there was a re-engagement of the respondent with different provisions from the previous contract, the written offer made by the appellant is valid and took effect immediately.

In response, to ground 1, counsel for the respondent cited *W. S. Mwenda's Employment Law in Zambia (Cases and Materials: 2004)* which states at page 77 that:

> *"... redundancy takes place when an employer declares that the employee's services are no longer needed. In such a case, the employee is said to have been declared redundant..."*

Reference was also made to *section 26B (1)* of the *Employment Act* and to the court's finding consequent upon the letter of 24th December, 2014 that what happened to the respondent was a redundancy. As to section *26B (4) (e)*, counsel argued that the court below made a finding of fact on the purported offer of alternative employment and the appellant is attacking a finding of fact which is not permitted by this Court or by *section 97* of the *Industrial and Labour Relations Act.* The case of *Barclays Bank Zambia Limited v Mando Chola and Ignatius Mulenya*[2], among others, was cited.

Furthermore, counsel contended that the court addressed the appellant's argument that the respondent was transferred to Ndola branch when it found that the transfer was in a lower position and, was a demotion which the appellant did not justify and it amounted to a unilateral variation of the respondent's conditions of service. The case *Zambia China Mulungushi Textiles (Joint Venture) Limited v Gabriel Mwami*[3] was cited where we held that:

> *"Demotion, just like termination of employment, is an adverse action against an employee. If reasons for a demotion turn out to be false or cannot be sustained, it follows that such termination is unfair and/or wrongful. Tenets of good decision making import fairness in the way decisions are arrived at. It is certainly desirable that an employee who will be affected by an adverse decision is given an opportunity to be heard."*

The case of *National Milling Company Limited v Simataa and others*[4] was also quoted where we held as follows:

> *"If an employer varies in an adverse way a basic condition or basic conditions of employment without the consent of the employee, then the contract of employment terminates and the employee is deemed to have been declared redundant or retired early as may be appropriate as at the date of the variation and the benefits are to be calculated on the salary applicable."*

In response to ground 4, counsel cited *section 48(1)(a)* of the *Employment Act* which recognises the payment of wages to an employee. In addition, the case of *Moonjelly Ouseph Joseph v RDS Investments Limited*[5] was cited where we held that under *section 48 of the Employment Act*, no one can be employed to work without receiving a wage because that would be illegal. We were urged to dismiss the appeal with costs.

We have considered the record of appeal, the judgment appealed against and the written and oral arguments by the parties. The issue to determine in ground 1 is whether or not the respondent's employment was terminated by reason of redundancy. It is not in dispute that the respondent was laid off without pay on 24th December, 2014 for a period of four months because the appellant could not maintain the huge wage bills due to low sales at the respondent's branch and other branches.

It is also clear that after the four months elapsed the respondent was never recalled and when he inquired over his situation, he was asked to give reasons why he should be taken back. Issues concerning his performance also arose which were never mentioned in the letter of 24th December, 2014.

If indeed issues of performance had arisen, appropriate action should have been taken against the respondent. Instead he was laid off for the specific reason that the appellant could not maintain the huge wage bills due to low sales at its branches. As observed by the court below, the low sales were not just at the respondent's branch but at all of the appellant's branches.

Furthermore, as found by the court below, the respondent was put on temporary layoff without pay, without his consent. This constituted a fundamental breach which could be deemed to have terminated the contract of employment by reason of redundancy with effect from 24th December, 2014 when he was laid off. According to the *Peter Ng'andwe*[1] case, the respondent was entitled to redundancy payment if his conditions of service so provided.

Concerning the argument that the respondent was offered alternative employment which he unreasonably refused, the court

accepted the respondent's evidence that he did not receive the letter and found that there was no proof of service of the letter on him. Although the email at page 70 of the record of appeal referred to by counsel for the appellant, questioned whether the respondent had refused the transfer to Ndola, and why he had chosen not to reply to the last mail, the document is silent as to when the letter was delivered to the respondent.

Moreover, the letter in which the respondent was supposedly offered alternative employment to be stationed at Ndola was written in June, 2015 long after he had been laid off although it was dated 4th June, 2014. Therefore, the passages cited by the appellant from *Halsbury's Laws of England,* cannot help its case.

In addition, the court found as a fact that the move to Ndola as branch manager was in a lower position. That this amounted to a demotion for no perceptible reason and therefore, resulted in termination of his employment by reason of redundancy.

As we held in *National Milling Company Ltd v Simataa and others*[1], if an employer varies in an adverse way a basic condition of employment without the consent of the employee, the contract of employment terminates and the employee is deemed to have been

declared redundant or retired early as at the date of the variation. In our view, the court below was on firm ground when it held that the respondent's employment was terminated by reason of redundancy.

Turning to the redundancy payment, it is now settled that *section 26B* of the *Employment Act*, does not apply to written contracts and the court below was alive to this trite position. In the case of *Barclays Bank Plc v Zambia Union of Financial and Allied Workers*[6], we said that in enacting this provision parliament intended to safeguard the interests of employees who are employed on oral contracts of service which by their nature would not have any provision for termination by way of redundancy.

In this case, the employment relationship between the parties was governed by a written contract and counsel for the respondent conceded that the validity of the written contract was never in issue. There was, therefore, no valid reason for the court to apply section 26B of the *Employment Act* which it acknowledged applies to oral contracts.

Furthermore, the court was alive to the fact that since there was a written contract, the *Minimum Wages and Conditions of*

Employment Act would ordinary not apply but proceeded to apply it on the basis that the written contract was not attested by a proper officer. We understand that ground 2 was abandoned, but this does not stop us from addressing a serious misdirection by the court which is apparent on the face of the record which resulted in the erroneous application of section *26B* of the *Employment Act* and the *Minimum Wages and Conditions of Employment Act* and the *Orders*.

It is plain that Orders have been issued under the *Minimum Wages and Conditions of Employment Act* to provide for redundancy benefits for certain occupations. Statutory Instruments No. 2 of 2011 which the court applied provides that where an employee's contract of service is terminated by reason of redundancy, the employee shall be entitled to at least one-month notice and the redundancy benefits of not less than two months' basic pay for each completed year of service.

However, the application of this General Order is limited to occupations which do not cover the respondent who was a business development manager. 'Employee' in the General Order means a protected worker specified in the Schedule. The application of the

General Order is also limited by the exclusion of certain other employees such as those in management positions.

In this case, although the provision on redundancy, in the applicable conditions of service, was less favourable than the provisions of the General Order; as an employee in management, the respondent was not a protected employee and it is clear that the General Order does not apply to him.

The court below on its own volition found that the General Order applied because it had seen no proof that the contract of employment was attested by a proper officer. In the case of *Quicksave Limited v Sarah Mubambe*[7], we refused to apply the *Minimum Wages and Conditions of Employment Act* because the respondent was in management and not a protected employee and she did not allege that her written contract of service was not attested by a proper officer.

Further, in *Martin Clark V Seedco Zambia Limited*[8] we held that the Minimum Wages and Conditions of Employment (General) Order 2006 (S.I. No. 57 of 2006) did not apply to the appellant because prior to his retirement, the position which he held in the respondent company was one in management.

Hence, the award to the respondent, in this case, of two months' pay for each completed year of service cannot be sustained. To this extent we set aside the decision of the court below as it was wrong in principle. Under clause 31 of the applicable conditions of service, which the court below in fact referred to, the respondent was entitled to redundancy pay of one monthly salary for each completed year; leave days outstanding; and repatriation fee. This is what we award him. However, ground one has substantially failed as it challenged the decision by the court below that what happened to the respondent was actually a redundancy.

Coming to ground 4, the court was faulted for awarding the respondent wages for the period he was on temporal relief. The court below had ordered that the years be calculated from the date the respondent reported for work to the date of judgment appealed against, being 29th October, 2015.

We have held that the respondent's employment was terminated by reason of redundancy. Thus he is deemed to have been declared redundant as at the date he was laid off being 24th December, 2014. The respondent was actually on temporal relief and not temporal leave. The period the respondent was on temporal

relief is part of the redundancy period and cannot attract a salary particularly that section *26B* of the *Employment Act* does not apply to him. His benefits must be calculated on the salary applicable on 24th December, 2014. Ground 4 has merit and we set aside the award of salary after the respondent was laid off.

We wish to state, as we conclude, that the court awarded interest at the current lending rate without any explanation. This award was also wrong in principle and we set it aside. Instead we award interest on the amount due to the respondent at the average of the short term bank deposit rate per annum from date of complaint to date of judgment and thereafter at the prevailing lending rate as determined by Bank of Zambia until full payment.

In all this appeal has merit only to the extent indicated. Because of the nature of the matter, we order that the parties shall bear their own costs of this appeal.

E. M. HAMAUNDU
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE