IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

APPEAL NO. 122/2015
SCZ/8/157/2015

(Civil Jurisdiction)

BETWEEN:

CHARLES MUSHITU **APPELLANT**
(Sued in his capacity as Secretary-General of Zambia Red Cross Society)

AND

CHRISTABEL M. KAUMBA **RESPONDENT**

Coram: **Mambilima, CJ, Malila and Kaoma, JJS**
on 15th May, 2018 and 20th November, 2018

For the appellant: Ms. I. Suba of Messdame Suba Tafeni & Associates

For the respondent: Mr. G. Cornhill of Messrs Wilson & Cornhill

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JUDGMENT

Malila, JS, delivered the Judgment of the Court

Cases referred to:

1. *Kitwe City Council v. Ng'uni (2005) ZR 57.*
2. *Zambia National Provident Fund v. Nyambe Mwangala SCZ Appeal No. 122/2000.*
3. *Colgate Palmolive (Z) Inc. v. Chuka, Appeal No. 18/2005.*
4. *Kapembwa v. Maimbolwa and Attorney-General (1981) ZR 127.*
5. *Davis v. Gurynne (1810) 12 East 381.*
6. *Hon Kong Fir Shipping Co. Ltd. v. Kawasaki Kaisen Kaisha Ltd. (1962) 1 ALLER 474 .*
7. *National Milling Co. Ltd v. Grace Simataa & Others SCZ No. 21 of 2000.*
8. *Mike Musonda Kabwe v. BP (1995-97) ZR 218.*
9. *Kenny Sililo v. Mend-a-Bath Zambia Ltd. & Spencon (Z) Ltd, Appeal No. 168/2014.*
10. *Allan v. Robles (1969) 3 ALL ER 054.*

Legislation referred to:

1. *Employment Act, chapter 268 of the laws of Zambia.*

Other works referred to:

1. *Cheshire, Fifoot & Furmston's Law of Contract 16th ed. 678.*
2. *Gwyneth Pitt in his book, Employment Law 2nd ed. (Sweet & Maxwell, London 1995) at p. 78.*
3. *Halsbury's Laws of England, 4th ed. p. 348 paras 557-558.*

This appeal challenges a decision of the High Court given on 27th March, 2015 whereby it was adjudged that the appellant had breached a fundamental term of the respondent's contract of employment. In consequence of that finding, the respondent was granted certain relief.

The material facts were that the respondent was in July, 1994 employed by the appellant as a Typist on permanent and pensionable terms. Following her confirmation, the respondent worked her way up the ranks, becoming at some point, the in-charge of the Street Kids Project in Lusaka. She was subsequently attached to a United Nations High Commission for Refugees (UNHCR) Project from where she drew her emoluments.

When the project at UNHCR terminated, the respondent was placed on 'indefinite leave', a development communicated to her by letter dated 28th January, 2009.

Enlivened by this development, the respondent, on 26th February, 2009, wrote to the appellant, applying for early retirement quoting clause 14.3 of her conditions of service as the basis for the application. The appellant declined the respondent's request.

The respondent remained on unpaid leave for another nine months up to 21st September, 2009 when the appellant, by letter of that date, recalled the respondent to work for a European Union funded project. She was, by the same letter, appointed as Office Administrator to be based at Choma. The respondent, however, declined that recall and transfer to Choma, citing the imminent disruption her transfer would bring forth to her matrimonial arrangement.

It was under the foregoing circumstances that the respondent commenced legal proceedings against the appellant claiming: (a) an order that the indefinite leave on which she was placed was in breach of her conditions of service; (b) an order

that she had been constructively dismissed by the appellant; (c) an order that she be declared redundant; (d) lost wages, terminal benefits and redundancy benefits; and (e) interest and costs.

A fairly short trial was conducted by the learned lower court judge involving one witness on either side. In her judgment, now being assailed, the learned judge was of the view that the real question to be decided related to the mode of exit of the respondent from the appellant's employment; was it a constructive dismissal, a redundancy, a resignation or any other form of separation?

The judge found that the act of sending the respondent on forced indefinite and unpaid leave constituted a breach of a fundamental term of the contract. Given this finding, she opined that the questions whether the plaintiff's contract of employment was determined by way of redundancy or resignation were obviated.

She ordered that the respondent be paid terminal benefits for the fifteen years that she had served in accordance with clause 14.0 of her conditions of service along with all other accrued benefits. The learned judge also held that the

respondent was entitled to all other accrued benefits, and further that the actual amount due to the appellant should be agreed between the parties failing which the same was to be assessed by the Deputy Registrar.

Aggrieved by that judgment, the appellant filed the present appeal fronting two grounds. The first alleges that the court misdirected itself in fact and law when it held that the actions of the appellant amounted to a fundamental breach of the conditions of service which could be deemed to have terminated the contract with effect from 26th February, 2009.

The second ground assigns error of law on the part of the trial judge in ordering payment of terminal benefits to the respondent for a period of fifteen years services.

Heads of argument were filed by the respective learned counsel for the parties. The respondent's counsel also filed a list of authorities. Both counsel intimated they would place reliance on those heads of argument.

The contention under ground one, as we understand it, is that granted that the respondent was placed on unpaid leave for

the understandable reason that the project to which she was attached had come to an end, it was wrong for the lower court to conclude, as it did, that the appellant breached a fundamental term of the contract of employment. According to counsel for the appellant, not only was the appellant justified to place the respondent on unpaid leave in the prevailing circumstances, which the appellant herself well understood, but it was also warranted to find the respondent alternative employment placement in Choma. The respondent had, on the contrary, no justifiable reason to decline a posting to Choma which was done with the best of intentions. In declining that job placement, the respondent was herself in fundamental breach.

It was also submitted that the respondent was not entitled to be paid for the period she was not working. The case of *Kitwe City Council v. Ng'uni*[1] was cited for this submission. In particular counsel relied on the following passage from that judgment:

> *"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 as unjust enrichment."*

Counsel also cited the case of *Zambia National Provident Fund v. Nyambe Mwangala*[2] to buttress the same point.

Turning to the second ground of appeal, it was submitted that the award of benefits for fifteen years of service came to the appellant with a sense of shock since it was not supported by any evidence or law. It was contended that there was a glaring disconnect between the court order and the provision of the conditions of service relied upon by the court to found its order. The portion of the lower court's judgment which caused offence to the appellant read as follows:

> *"I accordingly find the plaintiff is entitled to payment of terminal benefits for the 15 years served, in accordance with clause 14.0(b) of her conditions of service appearing on page 14 of her Bundle of Documents."*

The learned counsel then reproduced clause 14.0 of the respondent's conditions of service which reads as follows:

> ***14.0 RETIREMENT, PENSION SCHEME AND GRATUITY.***
>
> *I. All full-time or pensionable employees shall contribute towards their retirement and pension schemes in accordance with standard pension scheme.*
>
> *II. Employees on fixed contract shall be entitled to Gratuity at 25% of annual basic salary. A resettlement benefit of 5% of annual basic salary for contracts above three (3) years shall be paid at the end of a contract if it is not renewed ....*

The appellant took issue with the court's conclusion on a number of fronts. First, clause 14.0(b) quoted by the court does not exist. Second, that clause 14.0 deals with retirement, pension scheme and gratuity and, as such, does not apply to the respondent who was not retired. Third, that the respondent was not entitled to gratuity as this only applied to employees on contract. Finally, that there was no evidence regarding any pension scheme – which one it was – and whether contribution to it was made and, if so, why it should not be for such pension scheme to pay the respondent.

Counsel then adverted to the case of *Colgate Palmolive (Z) Inc. v. Chuka*[3] where we upheld the principle of freedom of contract to support her submission that the court, in upholding freedom of contract, is only to assign contractual obligations where these have been voluntarily assumed. In this case the agreement did not cover what was ordered by the court.

The learned counsel for the appellant concluded her submission by referring to the case of *Kapembwa v. Maimbolwa and Attorney-General*[4] on the principles animating interfering by an appellate court with a lower court's decision. She submitted that

here, the lower court failed to take into account the fact that the respondent had rejected an alternative offer of employment and was thus herself in breach.

Counsel fervidly prayed that we uphold the appeal.

As mentioned earlier on, Mr. Cornhill placed absolute reliance on the heads of argument and list of authorities filed.

In responding to ground one of the appeal, the learned counsel started by adopting the definition of 'fundamental breach' from Cheshire, Fifoot & Furmston's *Law of Contract,* 16th ed. 678. Counsel also went further to cite the cases of *Davis v. Gurynne*[5], *Hon Kong Fir Shipping Co. Ltd. v. Kawasaki Kaisen Kaisha Ltd.*[6] and *National Milling Co. Ltd v. Grace Simataa & Others*[7] merely to stress the point that a fundamental breach is one that destroys the basis of the agreement between the parties entitling the other party to treat the contract as repudiated.

Relating that definition to the facts, counsel submitted that the appellant unilaterally and forcibly sent the respondent on indefinite, unpaid leave. In doing so, the appellant abrogated two fundamental obligations, namely, to provide work for the

respondent and to pay for the respondent's labour. According to Mr. Cornhill, the obligation to pay remuneration for work done is so key that failure to honour it is criminalized under section 55 of the Employment Act, chapter 268 of the laws of Zambia.

We were urged to dismiss ground one of the appeal.

In regard to ground two, the learned counsel for the respondent submitted that after finding that there was a fundamental breach, a court could deem an employer to have been placed on early retirement pursuant to the conditions of employment. In doing so in the present case, the lower court was entirely correct.

Mr. Cornhill submitted that reference by the court to clause 14.0 was a clerical slip. However, the finding of the lower court is consistent with the authority of *Mike Musonda Kabwe v. BP*[8] where this court held that where an employer unilaterally varies the conditions of service of an employee to the employee's detriment then the contract is terminated and the employee is deemed to have been declared redundant on the date of variation.

We were implored to dismiss ground two as well.

The appellant's learned counsel filed heads of argument in reply. In that rejoinder, it was contended that a party that repudiates a contract based on a fundamental breach should rely on such a breach as the operative cause of the termination of the contract. In the present case, while indeed the respondent was placed on unpaid leave – which the court below found amounted to a breach of a fundamental term, it was not the reason for the termination of employment.

Counsel argued that the termination of employment in the instant case, was at the instance of the respondent. She resigned long after the alleged fundamental breach had occurred and did so without giving the requisite notice.

Mrs. Suba contended that the respondent's case is distinguishable from the ones referred to in the submissions by the respondent's advocates in a number of respects. These include first, that the appellant's organization had undergone an initial transformation while the respondent was on secondment to another organization. During that period some positions, including that of the respondent, were phased out. This,

notwithstanding, the respondent was accorded special treatment by being offered an appointment under the United Nations tenable at Choma.

Second, there was no suggestion or evidence that the position which the respondent was being offered was inferior to the one she had held or that her conditions of service would be any less favourable. In this respect, the situation of the respondent was different from that which prevailed in the *Mike Musonda Kabwe v. BP*[8] case.

Another area of differences identified by Mrs. Suba was that in the present case, the respondent specifically pleaded for a redundancy payment and not one for retirement. According to counsel, damages for any breach should only be equivalent to the loss that an employee has suffered. Anything beyond that would be a penalty payment which would amount to unjust enrichment.

Mrs. Suba reiterated that the respondent's resignation was not instigated by her being placed on unpaid leave. It was her transfer to another station that did. The learned counsel also invoked the spirit of equity, contending that it would be unjust

enrichment to reward the respondent with a pension that she did not work for, particularly when she walked out on her employer.

The final point Mrs. Suba made in reply was that concerning affirmation of breach and loss of right to repudiate contract. Quoting from *Halsbury's Laws of England*, 4th ed. p. 348 paras 557-558 and from the case of *Allan v. Robles*[10], Mrs. Suba submitted that a party to a contract will be taken to have affirmed or acquiesced to a breach of contract if they do not rescind the contract within a reasonable period. She did not develop this argument further, though we understood her as arguing that the respondent lost the opportunity to treat the contract as breached when she did not do so earlier in time.

We have considered the conflicting positions of the parties in this appeal. The issue determinative of the appeal, as we see it, is whether the appellant had abrogated a fundamental term of the contract of employment by the act of placing the respondent on indefinite, unpaid leave. Conversely was it the respondent's refusal to take up a fresh appointment as Office Administrator at Choma that terminated the contract of employment?

It is common cause that the respondent was a permanent and pensionable employee. It equally is indisputable that the appellant, perhaps for quite understandable reasons, unilaterally placed the respondent on forced, indefinite and unpaid leave. Was there any fault in placing the respondent on such leave?

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. Even statutory law gives recognition to the employer's obligation to pay wages. Section 48 of the Employment Act, chapter 268 of the laws of Zambia provides as follows:

> *"(1) Subject to the provisions of subsection (3) and (4), the wages of an employee shall be due*
>
> > *(a) in the case of a contract of service from month to month, on the last day of each month; ....*
> >
> > (f) *in any other case, in accordance with the terms of the contract of service."*

The duty of the employer to pay the employees 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.

Where the employer fails to pay an employee the full amount that the employer owes under the contract and in accordance with the payment period set out in the contract or prescribed in the law, the employer is in breach of the terms of the contract. Where such failure is deliberate, then it is a fundamental breach and the employee can choose to treat the contract as terminated and raise a claim for constructive or unfair dismissal. Alternatively, the employee can choose to waive the employer's breach.

The learned author Gwyneth Pitt in his book, *Employment Law*, states, in relation to changing contractual terms including those relating to payment of wages, as follows:

> *".... Any variation must be agreed between the parties as with any other contract. Should the employer insist on unilateral variation, it will be a breach of contract, usually a fundamental breach."*

In *Kenny Sililo v. Mend-a-Bath Zambia Ltd. & Spencon (Z) Ltd*[9], we stated that contractual obligations are not to be overlooked merely because it is convenient for one party to do so. An employer is not at liberty to alter an employee's terms and conditions of employment to the employee's detriment without the concurrence of the employee. A unilateral alteration of the conditions of service which negatively impacts on any employee amounts to a breach and a wrongful termination of the contract of employment.

Our view is that by placing the respondent on forced, indefinite leave without pay, the appellant unilaterally altered the express or implied condition of employment that for as long as the employment relationship subsisted, the respondent would be entitled to receive her monthly wages. The appellant was obliged to provide the respondent with work to do. If it was no longer able to do so, it should have brought the employer/employee relationship to an end in a legally sanctioned manner.

In agreeing with Mr. Cornhill's submissions, we hold that there was here a fundamental breach of the contract of employment by the appellant when it failed to pay the respondent her wages while the employment relationship subsisted.

We appreciate the thrust of Mrs. Suba's arguments in reply that if a fundamental breach occurs in an employer/employee relationship, it ought to be established that the termination of employment in referable to that breach. Here, as we have already noted, there was a fundamental breach when the respondent was placed on unpaid, forced, indefinite leave. In our view, the employer/employee relationship fractured at that very moment. Waiver of that breach or acquiescence could only legally hold if the respondent had done or taken any action in the nature of performing her obligations as an employee post that breach. There is no evidence whatsoever in the record of appeal to suggest that the respondent did any act, as employee of the appellant, to adopt the unilaterally amended conditions of service.

The purported transfer of the respondent to Choma under a differently designated position, came after the breach had occurred. The action by the respondent to redress the breach could wait for as long as the respondent desired, provided always that such action was taken within the permissible limitation time and provided also that she did not otherwise lose the right to do so.

Although the respondent waited until after her purported transfer to Choma by the appellant to exercise her right to treat the contract as terminated, she had taken no action in the meantime which could properly be construed as one of adopting the unilaterally altered conditions of service amounting to acquiescence or acceptance of the breach. We do not thus agree with Mrs. Suba's submissions on this point. We are of the firm view that the learned trial judge was on firm ground and can thus not be faulted.

As regards the award of terminal benefits for the entire period of fifteen years, we find no reason to disturb that award given what we have stated above.

The net result is that this appeal fails and is dismissed with costs.

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I.C. MAMBILIMA

CHIEF JUSTICE

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M. MALILA

SUPREME COURT JUDGE

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R. M. C. KAOMA

SUPREME COURT JUDGE