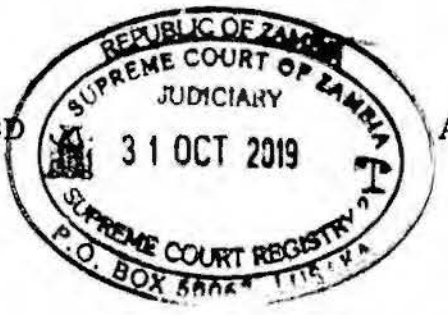
IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

SCZ/8/91/2010
APPEAL NO. 89/2010

(Civil Jurisdiction)

BETWEEN:



KASEMBO TRANSPORT LIMITED **APPELLANT**

AND

COLLINS JOHN KINNEAR **RESPONDENT**

Coram: **Musonda, DCJ, Malila and Kajimanga, JJS**
on 1st October, 2019 and 31st October, 2019

For the Appellant: Notice of Non-appearance by Messrs Jacques & Partners

For the Respondent: N/A

JUDGMENT

Malila, JS, delivered the Judgment of the Court

Case referred to:

1. *George Frank Adams v. Roan Antelope Mining Corporation of Zambia Plc, Appeal No. 73/2001.*

Legislation referred to:

1. *Minimum Wages and Conditions of Employment Act, chapter 276 of the Laws of Zambia.*
2. *Statutory Instrument No. 57 of 2006.*
3. *Industrial and Labour Relations Act chapter 269 of the Laws of Zambia.*

We sincerely regret that this matter has taken unduly long to determine. It was initially heard by a different panel of this court and the parties were awaiting judgment. It has had to be reheard before a reconstituted panel of this court following the depletion of the original panel that heard the appeal before the judgment could be prepared and delivered.

The background facts to the dispute in this appeal are plain. The respondent was employed by the appellant on its permanent staff establishment sometime in 1988 as a bookkeeper and remained in the appellant's employment until 30th September 2008 when he retired. There were, however, two things that were somewhat unusual about the respondent's engagement as an employee. The first was that, he had nearly reached retirement age (then) of 55 years at the time of his engagement. The second was that he enjoyed conditions of employment which were comparably superior to those enjoyable by many employees that carried a similar job title or description as he.

In June 2008, the respondent requested to be retired from his position in the appellant company, having worked for 20

years. He was then 75 years old. In response to that request the appellant wrote to the respondent, notifying him that his last working day would be 30th September, 2008. He was also advised that he would receive three months' pay in lieu of notice; leave days' pay; and possibly an *ex gratia* payment subject to determination by the appellant and approval by the Board of the appellant.

No retirement benefits having been paid to him by December 2008, the respondent took out an action in the High Court, seeking payment of his terminal benefits. Wanki J, as he then was, held that the claim should succeed, and that the respondent was an employee to whom the Minimum Wages and Conditions of Employment (General Order, 2006) applied. He accordingly entered judgment in favour of the respondent with interest.

Unhappy with that judgment, the appellant appealed on one ground alleging that the lower court judge had misdirected himself in law and in fact when he stated in his judgment that the respondent was covered by the Minimum Wages and Conditions of Employment Act.

Both parties had filed their heads of argument for the initial hearing of the appeal which are still on record. At the rehearing of the appeal, there was no appearance by either party. We noted, however, that Messrs Jacques & Partners, who are on record as representing the appellant, had filed a notice of non-appearance pursuant to rule 69 of the Supreme Court rules. The record kept by the Clerk of Court showed that the respondent's advocates, Messrs Kapasa & Co, were duly served with the notice of hearing. In these circumstances, we surmised that the parties' respective positions as articulated in the heads of argument as previously submitted had not changed. We thus proceeded to consider the appeal, assuming that the parties intended to rely entirely on the heads of argument originally submitted on behalf of the parties.

The appellant's argument in support of the sole ground of appeal is simply that the respondent was not covered by the Minimum Wages and Conditions of Employment (General) Order 2006, Statutory Instrument No. 57 of 2006, as he was a middle management employee granted that he enjoyed superior conditions of service relative to those ordinarily enjoyed by persons covered by the Minimum Wages and Conditions of Employment Act. To substantiate that claim, we were referred to

the conditions of service enjoyed by the respondent as set out in a letter from the appellant to him dated 6th April, 1988. On a monthly basis these included:

(a) Housing and servants wages	-	K 2,000.00
(b) Car allowance	-	K 1,500.00
(c) Entertainment (including club fees)	-	K 500.00
(d) Salary	-	K 1,800.00
(e) Cash	-	K 3,000.00

It was contended by counsel for the appellant that by the very superior nature of these conditions of service, the respondent was not in the category of employees envisaged or covered in regulation 3 of Statutory Instrument No. 57 of 2006 which defined a 'qualified clerk.'

To support that submission, counsel for the appellant referred us to the case of **George Frank Adams v. Roan Antelope Mining Corporation of Zambia Plc**[1], in which we held that an expatriate employee, employed on a renewable contract as a consultant surveyor, was not in the category of employees targeted by the Minimum Wages and Conditions of Employment Act and the Statutory Instruments made under it.

The learned counsel contended that the finding by the lower court that the respondent was engaged in specialized clerical duties of ensuring that the financial side of the appellant's business runs smoothly, did not entail that he was covered by Statutory Instrument No. 57 of 2006. In fact, that finding, according to counsel, was against the weight of evidence on record, especially the respondent's own evidence in cross-examination. Counsel argued that what is material in determining whether an employee is or is not covered by the minimum wages and conditions of employment legislation is not only the title but the conditions that the employee concerned enjoys.

In opposing the appeal, the respondent's learned counsel argued that the lower court judge was correct in his holding. According to counsel for the respondent, regulation 2 of the relevant Statutory Instrument, that is to say, Statutory Instrument No. 57 of 2006, specifies the categories of employees covered and has an intimation of those not covered.

Under clause 1 of the Schedule there are four categories of employees as well as a prescription of the minimum wages and

conditions of employment to be availed to each category. Counsel pointed out that in paragraph 1 of the respondent's statement of claim filed in the lower court, he had averred that he was, until his retirement on 30th September, 2008, employed by the appellant as a cashier based at Ndola. Referring us to paragraph 1 of the appellant's defence in the lower court, counsel for the respondent submitted that the appellant did not deny the respondent's averment regarding his employment status as a cashier. This being the case, the fact as regards the position of the respondent as a cashier/bookkeeper was settled.

We were also referred to the oral evidence as recorded by the lower court, particularly that given by the respondent, confirming that he was a cashier-bookkeeper which he said was the position he held until his retirement. That evidence, according to counsel, was not challenged. Counsel for the respondent also submitted that the evidence of the appellant's witness, DW1, Brian Burtohorb Shone, flew in the teeth of the uncontroverted evidence of the respondent when he claimed that the respondent was a middle manager.

Counsel submitted that the nature of the work which the respondent was engaged to perform and which he did in fact perform up until his retirement, properly situated him under category IV of clause 1 of the schedule to of Statutory Instrument No. 57 of 2007 as a **qualified clerk**. The lower court judge was, according to counsel, therefore, right to hold as he did.

After quoting regulation 2(i) of Statutory Instrument No. 57 of 2006 regarding the applicability of the Statutory Instrument, counsel referred to Regulation 3 regarding the definition of "management." He submitted that the respondent was not in management as he was reporting to the Finance Manager and was, according to his own testimony in the lower court, 'not empowered to make any management decision' and was furthermore 'not entrusted with personnel management.'

The learned counsel also submitted that in terms of section 4 of the Industrial and Labour Relations Act, chapter 269 of the Laws of Zambia, the enjoyment by an employee of conditions of service of a superior nature is not one of the requirements for classifying such employee as being in a management position. Counsel further submitted that had it been intended that the

enjoyment of conditions of a superior nature would entitle or qualify an employee to be in a management position, the relevant law or statutory instrument would have expressly so stated.

Counsel pointed out that other than a monthly salary of K1,500,000.00 (One Million Five Hundred Thousand Kwacha – unrebased) which the respondent received, all other payments were allowances – something which the lower court found as a fact. Counsel added that considering the period of honest and unbroken service of more than twenty years which the respondent rendered to the appellant, it cannot be assumed by any stretch of imagination that the salary of K1,500,000.00 (unrebased) per month and other payments, received by the respondent, constituted superior conditions of service. Even assuming that they were superior conditions, that fact in itself did not qualify the respondent to be part of the respondent's management staff.

We were urged to dismiss the appeal.

We are grateful to counsel for their exertions. As we see it, the issue for determination in this appeal is the narrow one of whether the respondent, was or was not part of the management

team of the appellant company so as to qualify for and avail himself of the benefit that accrue to lower level employees under the Minimum Wages and Conditions of Employment Act. This question, in our view, is one of mixed law and fact. It is a factual question to the extent that it solicits an answer as to the actual position occupied by the respondent at the time of his employment and separation from the appellant. It is a legal question because it calls for a determination of the issue whether the factual position occupied by the respondent fitted into the law of minimum wages and conditions of employment.

There is absolutely no dispute in this case that the respondent was employed as a cashier and remained so at the time of his separation from the appellant company. On reaching his retirement, he was still in the position of cashier/bookkeeper. As intimated earlier on the respondent was, however, a cashier/bookkeeper with a difference. Prior to the merging of some of his benefits into his salary he had, as part of his employment conditions, a company motor vehicle with fuel supplied by the company. He also had been receiving a house servant's allowance, entertainment allowance and was entitled to medical facilities at the company clinic. Did this make him a

management employee? The appellant reckons it did. The respondent thinks it did not.

The Minimum Wages and Conditions of Employment Act, chapter 269 of the Laws of Zambia, makes provision for prescribing minimum wage levels and minimum conditions of employment for protected workers. Protected workers are those to whom statutory orders made under the Act apply.

The Minimum Wages and Conditions of Employment (General) Order, 2006, promulgated pursuant to section 3 of the Minimum Wages and Conditions of Employment Act, prescribed minimum wages and conditions of employment for employees (protected employees) identified in the schedules to the Act. Under category I of the schedule, the employees protected are (a) general workers, not elsewhere specified; (b) cleaners; (c) handymen; (d) office orderlies; and (e) watchmen or guards.

In the second category are drivers. The employees protected in category III are typists and receptionists or telephonists. Category four protects qualified clerks

A 'qualified clerk' is defined in section 3 of the Act as an employee engaged in specialized clerical duties who holds a formal certificate or diploma for such qualifications. In less elevated language, the question that falls to be determined here, as was the case in the lower court, is simply whether the respondent was employed as a manager or as a clerk.

Of course, the communication between the parties regarding the employment status of the respondent does not help determine the question. In the letter of offer of employment dated 6th April, 1988, there was absolutely no reference to the issue whether the respondent was in the management category or below it. Even the letter of confirmation dated 14th April, 1988 was equally silent on this aspect. The only time the word 'manager' was used was in the letter of 13th February, 2008 in which the respondent was offered a two-year contract following his nearly twenty years' service with the appellant. The respondent rejected that offer. The learned judge below surmised that the offer to the respondent of a contract job after his retirement which offer mentioned 'manager', was probably promotional in intent.

In terms of clause 3 of the Minimum Wages and Conditions of Employment (General) Order 2006, 'management' has the same meaning as assigned to it by section 4 of the Industrial and Labour Relations Act, chapter 269 of the Laws of Zambia. For its part, section 4 of the Industrial and Labour Relations Act, as amended by Act No. 8 of 2008, provides as follows:

> **(4) (1) An employee shall cease to be an eligible employee if the employee becomes a member of management.**
>
> **(2) Where there is a disagreement as to whether or not an employee is a member of management, either party to the disagreement may refer the matter to the Commissioner for determination.**
>
> **(3) Any party aggrieved by the decision of the Commissioner may, within fourteen days of such decision appeal to the court.**

Clearly, this provision is not very helpful in identifying who a management employee is. If the parties disagree the decision as to whether an employee is or is not in management is to be taken by the Labour Commissioner. Luckily for the parties to the present dispute, there does not in fact appear to be any disagreement on this issue.

In his statement of claim, the respondent pleaded in paragraph 1 that until his retirement, he was employed by the appellant as a cashier based at Ndola. The appellant's reaction to that averment contained in its defence was that of admitting the respondent's assertion that he was employed as a cashier. The appellant added, however, that the respondent was in middle management. That averment was, however, denied by the respondent in his reply. In any case, at trial, no evidence was adduced to either support the appellant's averment or to contradict the respondent's assertion that he was performing clerical duties.

In his evidence in the trial court, the respondent's evidence that he was a bookkeeper/cashier, performing general clerical duties of preparing cheques and banking money and performing such other clerical work as would be assigned to him by the Finance Manager, a Mrs. Fausie, to whom he reported, was not controverted.

The simple question is whether as a cashier/bookkeeper the respondent fitted within the description of a qualified clerk as defined in the Minimum Wages and Conditions of

Employment (General) Order 2006 which we have given earlier on in this judgment.

The respondent testified at trial that the hierarchy of the staff establishment in the appellant company was made up of the Managing Director (a Mr. Kevin Shone); the Operations Director (Mr. Vernon Shone); the Finance Director (Mr. Brian Shone); and the Workshop Director (Mr. Michael Shone). Below the directors were three managers, namely the Operations Manager, the Finance Manager and the Workshop Manager. His further evidence was that he reported to the Finance Manager. He also testified that he was not entrusted with any management responsibilities.

Measured against the meaning assigned to 'management' as may be gleaned from section 4 of the Industrial and Labour Relations Act, we agree with the lower court judge that the respondent was a qualified clerk. We are in no doubt whatsoever that the respondent was not part of management. Although he enjoyed seemingly good conditions of service, befitting of a management employee, he was indeed only but an elevated qualified clerk as defined in the relevant Order. Our decision,

which we reach not without regret having regard to the time it has taken to finally pronounce ourselves on this matter, is that the respondent was entitled to be paid his terminal benefits in accordance with the applicable minimum wages legislation and orders made thereunder. This appeal must therefore fail, and we so order.

The respondent shall thus be paid all his terminal benefits calculated with reference to the Minimum Wages and Conditions of Employment (General) Order, 2006. The same shall carry interest at the average of the short-term deposit rate per annum prevailing from the date of the respondent's retirement to today's date and, thereafter, at six per centum (6%) per annum till final settlement.

The respondent shall have his costs.

M. C. MUSONDA
DEPUTY CHIEF JUSTICE

M. MALILA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE