ANTHONY KHETANI PHIRI v WORKERS COMPENSATION CONTROL BOARD

Supreme Court
Lewanika, DCJ, Chibesakunda, Mambilima, JJS
4th June 2002 and 4th March 2003
(SCZ Judgment No. 2 of 2003)

Flynote

Employment Law – Technical extinction of former employer – Employee of one board taken into employment of another board, with assurance that his employment would be continous – Whether employee continuously employed by the second board is declared redundant.

Headnote

This is an appeal against the Judgment of the court below dismissing the appellant's counter claim in the sum of K108,979,380.00 against the respondent in an action in which the respondent had through a writ of summons claimed the sum of K34,876,531.67 in respect of balances on loans which the appellant obtained from the respondent on various dates between 30th April, 1995 and 15th February 2001. The trial judge found that the respondent's claim had been proved since the appellant had admitted obtaining the said loans. What was in issue was the net amount owing in that the appellant had contended that deductions for the said loans for the month of February, 2001 had been effected and were not offset from the total amount claimed. The learned trial Judge referred the matter to the Deputy Registrar for assessment of the contract amount owing to the respondent.

In his counter-claim, the appellant claimed for a separation package in form of redundancy as provided by Clause 7.5 of his conditions of service, together with interests and costs. in rejecting this claim the learned trial Judge examined various definitions of the word "redundancy". He was of the view that although the Employment Act included in its definition of redundancy, a situation where the employer ceased to exist or carry on business by virtue of which the employee was engaged, the appellant in this case was not declared redundant and that the extinction of his former employer was a technical one.

Held:

1. The sequence of the events show that the respondent did not declare the appellant to be redundant or retrenched.

   The new Board in as far as the former Workers Compensation Fund Control Board was concerned, was in the same business and the appellant maintained the same job since he was to be transferred laterally.

Cases referred to:

1. *Kay v Godwin* ([1830] 6 Bing 576 at 582 cited in Orders Construction of Deeds and Statutes, 5th Edition page 357.
2. *Altocorse Ltd v Orrell* [1968] 2 QB 98 and 101.
3. *Lloyd v Brassey* [1968] 2 QB 98.
4. *Marriot v Oxford and District Co-operative Society* (No.2) [1970] 1 QBD 186 at page 191.
5. *Secretary of State for Employment v Globe Elastic Thread Co. Ltd* [1979] 2 All ER 1077.

Legislation referred to:

1. Workers Compensation Act Number 10 of 1999
2. Pneumoconiosis Act Chapter 217 of the Laws of Zambia
3. Workers Compensation Fund Control Board Chapter – of the laws of Zambia
4. Employment Act Chapter 268 of the Laws of Zambia

Z. M. Muya of Muya, Musaluke and Co. for the appellant
J. Kabuka (Mrs) of J. Kabuka and Co. for the respondent.

Judgment

MAMBILIMA, JS, delivered the Judgment of the Court.

This is an appeal against the judgment of the court below dismissing the appellant's counter-claim in the sum of K108,979,380.00,against the respondent in an action in which the respondent had, through a Writ of Summons claimed for the sum of K34,876, 531.67 in respect of balances on loans which the appellant obtained from the respondent on various dates between 30th April, 1995 and 15th February, 2001. The trial judge found that the respondent's claim had been proved since the appellant had admitted obtaining the said loans. What was in issue was the net amount owing in that the appellant had contended that deductions for the said loans for the month of February, 2001, had been effected and were not off-set from the total amount claimed. The learned trial judge referred the matter to the Deputy Registrar for assessment of the correct amount owing to the respondent.

In his counter-claim, the appellant claimed for a separation package in form of redundancy as provided by Clause 7.5 of his conditions of service, together with interest and costs. In rejecting this claim, the learned trial judge looked at various definitions of the word "redundancy,. He was of the view that although the Employment Act included in its definition of redundancy, a situation where the employer cased to exist or carry on business by virtue of which the employee was engaged, the appellant in this case was not declared redundant and that the extinction of his former employer was a technical one.

According to the evidence which was before the lower Court, the appellant was employed by the Workers Compensation Fund Control Board, which was established under the Workers Compensation Act, Chapter 271 of the Laws of Zambia. This Act was repealed by Section 153 of the Workers Compensation Act (Act No. 10 of 1999) passed on 4th October, 1999. It came into force on 1st December, 2000. Act Number 10 of 1999 also repealed the Pneumoconiosis Act, Chapter 217 of the Laws of Zambia. It merged the functions of the Workers Compensation Board and the Pneumoconiosis Compensation Board. The employees of the former Boards were transferred to the new Workers Compensation Fund Control Board under section 149 of the new Act. According to this section, such employees upon transfer

were to "be engaged on such conditions as the Workers Compensation Board shall determine".

The appellant testified in the Court below that he was a Board Secretary of the new Board. Top Management of the Board met shortly after the coming into force of Act Number 10 of 1999 and resolved that a circular letter be written to all employees, informing them of their transfer to the new Board. On the advice of the appellant, the said circular letter had a provision for the employees to show whether they consented to transfer to the new Board. The appellant, upon receipt of his circular letter on 12th December, 2002 did not sign that he was willing to transfer. He went to see the Commissioner and informed him of the same. Efforts by the Commissioner to persuade the appellant to stay proved futile. On 3rd January, 2001, the appellant asked the Board to pay him his separation and redundancy package, but the Board declined to do so.

The appellant's contention is that the repealing of the previous Workers Compensation Act, Cap 271 of the Laws of Zambia, a new employer was created and since he did not wish to transfer to the new employer, he was entitled to a redundancy package under Section 26B (1)(3) of the Employment Act Chapter 268 of the Laws of Zambia as amended by Act Number 15 of 1997. He also argued that the new Board was obliged to pay him his package under Section 147(1) of the Workers Compensation Act Number 10, of 1999. This is the provision which vests the assets and liabilities of the dissolved Boards into the new Board. After evaluating the evidence and the applicable law, the learned trial Judge found that since the appellant was in the employment of the Workers Compensation Fund Control Board and not in the Pneumoconiosis Compensation Board, he was not called upon to work under totally different conditions of service. He maintained the same job and the same conditions of service under the new Board and therefore had not lost his job. According to the learned trial judge, the provisions which the appellant relied on to support his contention that his termination was under redundancy were inapplicable and irrelevant. He found that the appellant had resigned and was therefore only entitled to a package of an employee who had resigned. He consequently dismissed the counter-claim.

The appellant has appealed to this Court against this finding by the Court, below advancing four grounds of appeal namely:

(i) that the learned trial judge misdirected himself in law and in fact when he held that the extinction of the defendant's employer was a technical one;

(ii) that the learned trial judge erred in law in failing to hold that the contract of employment of the defendant terminated on repeal of the Workers Compensation Act, Cap 271; and that

(iii) therefore the defendant was entitled to a separation redundancy package;

(iv) that the learned trial judge erred in law in failing to hold that the defendant, not having consented to be transferred to the Plaintiff's employment, he was entitled to the payment of separation redundancy package; and

(v) that the learned trial judge misdirected himself in law and fact when he held

that the defendant had resigned from the Plaintiff's employment.

Submitting in support of the first ground of appeal, counsel for the appellant in his written heads of argument stated that the court below had recognized that the appellant had a former employer who had ceased to exist. This was the Workers Compensation Fund Control Board, which had employed the appellant on 1st October, 1995. The Act which established the Board was repealed by Act Number 10 of 1999 and therefore, the said Board was extinct. He referred us to the case of *Kay v Godwin* (1) *in which it was stated that "the effect of repealing a statute is to obliterate it completely from the records of Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law"*. Counsel argued that the intention of the Legislature in repealing the Workers Compensation Act, Cap 271 of the Laws of Zambia, was not to bring about a superficial change, but a radical one to the administration of the law relating to compensation for industrial diseases and accidents. To this effect, all institutions created by the former Act were abolished and there is no provision in the savings section of Act number 10 of 1999, for continuity by another institution. Counsel argued that although the name of the employer was carried over, it is in law a completely different entity from the previous employer. In the light of these changes, Mr Muya argued that it was a misdirection for the trial Judge to hold that the extinction of the appellant's employer was merely a technical or superficial one.

In support of the second ground of appeal, Mr Muya stated in his heads of arguments that upon dissolution of the appellant's employer on repeal of the Workers Compensation Act Cap 271, the appellant had accrued rights arising under his employment , and Act Number 10 of 1999, was not entitled to take away these rights, and in this respect, the trial Judge ought to have strictly interpreted the Act so as not to take away or encroach on the subsisting rights of former employees of the dissolved Board. He referred us to Section 14(3) (c) of the Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia, which provides that repeal of a law does not affect any right, privilege, obligations or liability accrued, acquired, or incurred under any law so repealed. According to Mr Muya, the learned trial Judge merely glossed over the accrued rights of the appellant thereby falling into error by not protecting the said rights.

In reply to Mr Muya's submissions on the first and second grounds of appeal, Mrs Kabuka for the respondent argued both grounds together. She stated in her oral submissions and written heads of argument that the appellant proceeded on a wrong premise, by taking a literal interpretation of the words "ceasing" or "intending to cease". She submitted that under Section 26B (1)(a) of the Employment (Amendment Act No. 15 of 1997), these words are used in relation to "carrying on the business by virtue of which the employee was engaged". On the meaning of "employer ceasing to carry on business", Mrs. Kabuka referred us to the case of *Altocorse Ltd v Orrell* (2) in which the Court, considering similar provisions to our Section 26B(1) (a) said:

"The provision under the Act is first to ascertain under S.1 (1) that the claimant was employed by an employer and then under Section 1(2) to see whether the employer has ceased to carry on business in which the claimant was employed. The "business" is made up of "assets" and "activities" carried on with those assets. Neither can, by itself, be the business."

Mrs. Kabuka submitted on the authority of this case that notwithstanding the repeal of the

Workers Compensation Act, Cap 271 of the Laws of Zambia, the operations or business activities of the respondent organization continued without any interruption. The respondent did not declare the appellant redundant because it still needed his services. Mrs Kabuka also referred us to the case of *Lloyd v Brassey (3)* in which Lord Denning observed that "If the new owner takes the business as a going concern so that the business remains the same business but in different hands and the employee keeps the same job with the new owner, then he is not entitled to redundancy payment". Mrs Kabuka submitted further that the evidence on record had clearly established that:

(a) The respondent did not cease to carry on the business by virtue of which the appellant was engaged. She argued that consequently, the appellant's contract of service was not terminated in the manner envisaged by section 26b(1)(a) of the Employment Act and he is therefore not entitled to any payment for redundancy;

(b) For an employee to successfully claim termination of his contract by reason of redundancy under section 26B(1) (a) his case must not fall within the sections enumerated under section 26B(4) (a) to (e);

(c) where an employee had been offered alternative employment as envisaged by section 26B(4) (e) and has unreasonably refused the said offer, he shall not be deemed to have been terminated by reason of redundancy under section 26B91)(a); and

(d) Mrs. Kabuka accordingly argued that the appellant, having been offered continued employment which he refused, the respondent cannot be held liable to pay him the redundancy separation package.

The appellant argued grounds 3 and 4 together. According to Mr. Muya, the trial judge misdirected himself by implying consent from the appellant's conduct. According to Mr. Muya, the fact that the appellant continued working and receiving salary after 1st December, 2000, cannot be construed as consent to work for the respondent. For this submission, he referred us to the Judgment of Lord Denning in the case of *Marriot v Oxford and District Co-operative Society (no.2) (4)* in which he asked: "Does Mr. Marriot lose his redundancy payment simply because he stayed on for three or four weeks whilst he got another job? I think not. He never agreed to the dictated terms". According to Mr. Muya, the appellant never agreed to work for the respondent. He invited us to take Judicial notice of the fact that a smooth handover of the office was necessary and hence the necessity for the appellant to ensure that that was done. He submitted further that it was a misdirection on the part of the trial Judge to hold that the appellant resigned from the respondent's employment and that the transfer of the appellant to the new Workers Compensation Fund Control Board was not an offer of alternative employment.

In reply to the last ground of appeal, Mrs. Kabuka argued that the facts in the case of *Marriot* on which the appellant seeks to rely are distinguishable in that, in that case, the status and wages of Mr. Marriot were reduced. This adversely altered his basic conditions of service and Mr. Marriot tried to obtain work elsewhere which he secured after two to three weeks. The Court found on this evidence that Mr Marriot had not accepted the terms despite his continuing to work for the respondent for three to four weeks. In the appellant's case, he was the legal advisor of the former Board during the process of transferring the employees

to the new Board. Mrs. Kabuka submitted, that the essence of Section 149 (1) of Act Number 10 of 1999, was to ensure the continued employment of certain employees so that there was no break in the continuity of the employees' employment. She argued that on this premise, the finding by the learned trial Judge which presumed the employment to have been continuous cannot therefore be faulted. She referred us to the case of *Secretary of State for Employment v Globe Elastic Thread Co. Limited (5),* in which it was held that a person's employment during any period should be presumed to have been continuous unless the contrary was proved.

Mrs. Kabuka further submitted that in the circumstances of this case, the respondent's action was on the basis of advice given by the appellant. The appellant should therefore be estopped from attacking the same. She pointed out that the appellant initiated the termination of his contract of service on his own accord by way of resignation when he communicated his intention to cease to be in employment on 15th February, 2001. According to Mrs. Kabuka, the learned trial Judge therefore properly found that the only accrued rights due to the appellant were those payable on termination of employment by way of resignation. In the circumstances, she urged this Court to uphold the decision of the Court below by dismissing the appeal for lack of merit with costs.

We have considered the evidence on record, the Judgment of the Court below and the submissions by counsel. It is common cause that the appellant was employed by the defunct Workers Compensation Fund Control Board created under the Workers Compensation Act, Cap 271, of the Laws of Zambia. It is also common cause that when Cap 271 was repealed by Act. No. 10 of 1999, it was inter alia, to merge the functions of the Workers Compensation Fund Control Board and the Pneumoconiosis Compensation Board which was created under the repealed Pneumoconiosis Act, Cap 217 of the Laws of Zambia.

Under Section 149 (1) of Act No. 10 of 1999, employees could be transferred from the dissolved Boards to the new Workers Compensation Board. It is on record that the appellant advised his Board on the mechanism of such transfers. Upon his advice, the transferred employees had to sign signifying consent to the transfer. The appellant, by a letter dated 30th November, 2000, appearing on page 114 of the record of appeal, was transferred "laterally" to the new Workers Compensation Fund Control Board in the same capacity as he was in the dissolved Board. In his reply to the transfer dated 4th January, 2000, the appellant wrote, inter alia:

".....I DO NOT consent to the transfer to the Workers Compensation Fund Control Board created by Act No. 10 of 1999. To this end therefore, I advise that upon completion of my outstanding work, but in any event not later than February 15 2001, I will cease to be in employment".

The appellant ended his letter by requesting the Board to work out and pay his separation package constituted in his accrued rights under clause 7.5 of the conditions of service by the dissolved Board. The said clause 7.5 which appears on page 69 of the record of appeal is on Redundancy and Retrenchment payments.

The respondent in its reply to the appellant's letter on 8th January, 2001 stated that:

"The transfer of all members of staff to the new institution was effected last year on 1st

December, 2000, pursuant to a Board resolution on 30th November, 2000. Since then all staff including yourself have been receiving emoluments under the new Workers Compensation Fund Control Board following an appropriate notification."

By another letter on 24th January, 2001, the respondent treated the appellant's letter of 4th January, 2001 as a resignation which had been accepted. The sequence of these events show that the respondent did not declare the appellant to be redundant or retrenched. The evidence on record suggests that the services of the appellant as legal Officer were still needed.

The appellant has forcefully argued before us that his services should be deemed to have been terminated by redundancy because his former employer ceased to exist. He attacks the finding of the learned trial Judge that the extinction of his former employer was technical. Much as we would agree that the repeal of Cap 271, by Act No. 10 of 1999 brought in a new entity under the same one, it is clear to us that the new Board did not cease to carry on the business in which the appellant was employed. What was added to the new Board were the activities of the Pneumoconiosis Compensation Board. The new Board in as far as the former Workers Compensation Fund Control Board was concerned, was in the same business and the appellant kept the same job since he was to be transferred laterally. We cannot therefore fault the Judge when he found that the extinction of the old Board was technical.

The rest of the grounds of appeal cannot also stand because, as Mrs. Kabuka pointed out, the appellant needed to prove that in terms of Section 26B (1) (a), his employer ceased to carry on the business by virtue of which he was employed and that his case did not fall within the exceptions in Section 26B (4) (a) to (e). Section 26 B(4) (e) provides that section 26 B will not apply if the employee was offered alternative employment and has unreasonably refused the offer. The appellant was transferred to the new Board but he refused to accept the transfer. The transfer was in the same capacity and to carry out the same job that he had with the old Board. Clearly, he was offered employment and he turned it down.

Section 149(1) of Act No. 10 of 1999, provides for the transfer of employees from the old Board to the new Board. A "transfer" does not connote a break in employment. It is on record that it is the appellant who advised the respondent on adding a provision of consent to the transfer. This is not provided for in the law. The use of the word "transfer" persuades us to agree that employment in this case was continuous. As was held in the case of *Secretary of State for Employment v Globe Elastic Thread Co. Ltd (5),* to which we were referred by Mrs. Kabuka, "a person's employment during any period should be presumed to have been continuous unless the contrary was proved." Having indicated that he would cease to be in employment on 15th February, 2001, we cannot fault the trial Judge for having found that the Appellant terminated his employment by resignation and he was entitled to benefits on resignation up to the time that he stopped work.

We find no merit in the whole appeal and it is dismissed with costs to the respondent to be taxed in default of agreement.

Appeal dismissed