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IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 34/2013**

HOLDEN AT KABWE **SCZ/8/386/2012**

(Civil Jurisdiction)

BETWEEN:

COL. NOBLE HANDROS GONDWE APPELLANT

AND

ATTORNEY-GENERAL RESPONDENT

CORAM: Mwanamwambwa, D.C.J, Muyovwe, Kaoma, J.J.S.

On the 11th August, 2015 and 12th August, 2016

For the Appellant: *Mr V. Kabonga, Messrs Paul Pandala Banda and Company*

For the Respondent: *Brig. General M. Phiri and C. Mulenga, State Advocate and Principal State Advocate respectively in the Attorney-General's Chambers*

JUDGMENT

Mwanamwambwa, DCJ, delivered the Judgment of the Court.

Cases referred to:

1. **The Hannah Blumenthal (1983)1 AC 854**
2. **Smith V. Hughes (1871) LR 6 QB 597**
3. **Eccles V. Bryant and Another (1947) 2 ALL ER 865 at 866-867**

Legislation referred to:

Regulation 9(4) of the Defence (Regular Force) (Officers) Regulations of the Defence Act, Cap 106 of the Laws of Zambia

Other works referred to:

1. **G H Treitel, the Law of Contract, 7th Edition, Steven and Sons**

This appeal is against a High Court judgment delivered on 13th November 2012. By that judgment, the trial court dismissed the Appellant's claim for a sum of K61, 129,408.48. The Appellant claimed that the said amount was his entitlement upon the expiration of his contract of employment.

The background to this matter is that the Appellant was employed by the Zambia Air Force in 1968. Before the Appellant retired, he bought a government pool house and was residing in the said house after his retirement.

On the 4th of May 2000, the Appellant retired upon reaching the mandatory retirement age of 55. At that time, he had attained the rank of Lieutenant Colonel. Upon retirement the Appellant's service in employment was immediately extended for a period of three years, renewable every twelve months. During the period of his contract, the Appellant was promoted to the rank of Colonel. The Air Force Commander backdated his promotion to the 1st of May, 2000. The Air Commander backdated the effective date of the Appellant's promotion at the

Appellant's request so that he could get enhanced benefits. The Appellant's service on contract ended on the 4th of May 2003, and he was paid benefits totalling K36, 545, 472.74.

After receiving his benefits in the sum of K36,545,472.74, after his service on contract, the Appellant disputed the figure on grounds that it was less than what he was entitled to. He contended that his benefits should have been calculated using an annual salary of K24,403,572.00 which was provided in a contract containing his terms and conditions of service. The Appellant contended that although he was promoted to the rank of Colonel, he continued to receive a salary of a Lieutenant Colonel.

As a result of the above events, the Appellant took out an action against the Respondent, by way of Writ of Summons. According to his statement of claim, at the rank of Colonel, his benefits should have been broken down as follows:

a) Housing allowance at 40% of the salary- K29,284, 286.40
b) Settling in allowance at 25% of the annual salary- K6, 100, 893.00
c) Salary differential on rank- K17,599,215.92
d) Gratuity based on contract of K8,145, 013.16
e) Total- K61, 129, 408.48.

Upon hearing the matter, the learned trial Judge took into consideration the Appellant's alleged contract of re-engagement which stated his rank as "Colonel" and his salary as K24, 403, 572.00 per annum. The court found that the said contract was

not signed. That however, the Appellant's payslips, for the months of September, 2002, January 2003 and April, 2003, produced by the Respondent, reflected the Appellant's rank as Colonel. The payslips showed that prior to that, the Appellant as a Colonel was in receipt of a monthly basic salary of K1, 945, 733.00 and that as a Lieutenant Colonel, in April and May 2001 was in receipt of a monthly basic salary of K658, 748.26. The court further stated that the Appellant did not produce any evidence to show that he ever complained to the authorities that he was being paid the salary of a Lieutenant Colonel instead of that of a Colonel. According to the learned trial Judge, this raised two presumptions being; that the sum of K1, 945, 733.00, which the Appellant was receiving, prior to September, 2002, was the correct salary for a Colonel at the time; and secondly, that the subsequent rise of the salary to the sum of K2, 033, 631.00 was as a result of a general salary raise.

According to the trial judge, the Appellant did not adduce sufficient evidence to rebut the presumptions, and as such the judge was not satisfied with the Appellant's argument that he was not paid the salary of a Colonel but that of a Lieutenant Colonel. Accordingly, the Appellant's claim for the salary differential on rank, was dismissed.

On the claim for gratuity based on contract, the trial court found that the salary indicated on the Appellant's payslips for April, 2003, was exactly the same as the one on the contract produced by the Appellant. Further, the trial court stated that the presumption raised was that the Air Force's calculation was

based on that salary, and the Appellant did not adduce evidence to show that the Air Force used any other salary other than that one. The learned trial judge, therefore, held that the Appellant did not rebut the Air Force's defence that it used the correct salary in calculating his gratuity, and as such, his claim for gratuity based on contract, did not succeed.

As regards housing allowance, the learned trial judge was of the view that the Appellant lived in his own house which he bought from the Government under a house empowerment policy. The learned trial Judge stated that according to the rules under that scheme, civil servants who bought houses under the policy would not be entitled to housing allowance. And in that regard, the trial judge found that the Appellant did not prove his entitlement to housing allowance, therefore, this claim was also dismissed.

Finally, the trial court turned to the Appellant's claim for settling in allowance. The court was of the view that settling in allowance, in accordance with the conditions of service, is paid to those who need to be assisted to settle such as employees on transfer or those that are being employed for the first time. And the court stated that in this case, the Appellant was not being transferred to work at another station, which would require him to move homes. The court went on to state that the Appellant retired on 4th of May, 2000 and his appointment on contract commenced on 5th of May, 2000. That practically there was no break in service to warrant him to be assisted to settle in.

Consequently, the learned trial judge held that the Appellant was not entitled to settling in allowance.

Dissatisfied with the decision of the High Court, the Appellant has appealed to this court. There are five (5) grounds of appeal. These read as follows:

Ground one

> **The judge erred in law and fact when he stated that the Appellant had been paid his Colonel salary based on the September, 2002, January, 2003 and April, 2003, payslips and failed to take into consideration that terms and conditions of service under the contract offer of December, 2002, between the Appellant and Defendant which was clear that he be paid an annual salary of K24, 403, 573.00, that is, a 3rd year Colonel salary from the 5th May, 2000.(sic)**

Ground two

> **That the judge erred in law and fact when he held that the Appellant had failed to rebut the presumption that the Appellant received the correct salary of K1, 945, 733.00 prior to September, 2002 since he did not make a complaint to the authorities that he was being paid a salary of a Lieutenant Colonel and that the Appellant failed to rebut the presumption that the subsequent rise of the salary to K2, 033, 631.00 was as a result of general salary rise.**

Ground three

> **That the judge erred in law and fact when he held that the Defendant had made correct calculations when calculating his gratuity and failed to take into consideration the fact that the Appellant's contract which he produced showed that he was supposed to be paid a salary of K24,403,572.00 per annum from the 5th of May, 2000 and thus rebuts the presumption that the Respondent used the correct calculations.(sic)**

Ground four

> **The judge erred in law and fact when he held that the appellant was not entitled to Housing Allowance because he had benefited from Government Housing Empowerment Scheme Policy although the terms of the contract stated that he would be provided with suitable government housing.**

Ground five

> **The judge erred in law and fact when he held that the Appellant was not entitled to Settling in Allowance as it is paid only to those who needed assistance to settle, such as employees on transfer and those that are being employed for the first time.**

The Appellant argued grounds one and two together. It was submitted that the trial judge erred in law and fact when he held that the Appellant had failed to rebut the presumption that he received the correct salary of K1, 945, 733.00 prior to September, 2002, since he did not make a complaint to the authorities that he was being paid a salary of a Lieutenant Colonel as this was

already rebutted by the evidence of the terms and conditions of service which were under negotiation from the date of re-engagement to December, 2002, when the same came into being and were given to the Appellant which stated that the date of appointment would be with effect from the 5th May, 2000, at an annual salary of K24, 403, 575.00 to which the Appellant agreed.

Counsel submitted further that complaints had been made to the Air Force over the terms and conditions of service and this led to the contract offer which became effective from the 5th of May, 2000.

Counsel for the appellant also submitted that the trial judge erred in law and fact when he held that the Appellant failed to rebut the presumption that the subsequent rise of the salary to K2, 033, 631.00 was a result of a general salary raise in that the Judge overlooked the fact that the appellant was under a special contract and not as a result of a general rise in salary. It was the appellant's contention that there was in existence a contract whose terms and conditions were agreed upon by both parties.

It was submitted on behalf of the Appellant that the parties had a binding contract. **G H Treitel, the Law of Contract, 7th Edition, Steven and Sons,** was cited on the proposition that a contract is an agreement giving rise to obligations which are enforced or recognized by law. That an agreement is made when one party accepts an offer made by the other. Counsel added that a person is bound if he has agreed to the terms proposed by the other party and the other party knows this or actually believes

that he agreed. The case of **The Hannah Blumenthal** [1] **and that of Smith V. Hughes** [2] were also cited to support this position.

On behalf of the Respondent, it was submitted that the Appellant retired from the regular Air Force on the 5th of May, 2000, and that on the same day, his service was extended for a period of 3 years. That this is in accordance with the Personnel Occurrence Report on page 81 of the Record of Appeal. It was submitted that the Appellant's service was extended for him to continue serving in the regular Air Force pursuant to **Regulation 9(4) of the Defence (Regular Force) (Officers) Regulations of the Defence Act, Cap 106 of the Laws of Zambia.**

It was the submission of the Respondent that the above regulation provides for continuous service. That there was no separate contract that was entered into or contemplated by the parties. That since the Appellant's service was extended, he continued to enjoy the same terms and conditions of service that he enjoyed prior to his retirement at the age of fifty five. That the argument, therefore, by the Appellant that he was re-engaged on contract was incorrect. It was submitted further that the purported contract referred to by the Appellant was only in draft form and was only drafted in 2002, two and a half years later.

The Respondent went on to submit that in 2001 when the Appellant was promoted, he requested the Air Commander to backdate his promotion to 1st May, 2000 so that he could draw financial benefit from enhanced terminal benefits which, as a consequence, would be computed from the 5th of May, 2000.

We have considered the submissions on grounds one and two. We have examined **Regulation 9(4) of the Defence (Regular Force) (Officers) Regulations of the Defence Act, Cap 106 of the Laws of Zambia,** and the draft contract relied upon by the Appellant. We have also looked at the authorities cited by both parties.

At the centre of the two grounds are the following issues: Firstly, which salary was supposed to be used in the calculation of the Appellant's gratuity, secondly, whether the draft contract was binding on the parties, and lastly, whether the Appellant served on contract or continuous service after attaining the age of fifty-five years.

We shall start with the issue as to whether the correct salary was used in calculating the Appellant's gratuity.

The payslips on record, for the months of September, 2002, January, 2003 and April 2003 show that the Appellant was in receipt of a monthly salary of K2,033,631.

The payslips also show the Appellant's rank as Colonel. When this amount is multiplied by 12, it gives K24,403,572, the exact amount the Appellant claimed was provided for in his contract. Before September, 2002, the Appellant, still as colonel, received a salary of K1,945,733. Therefore, it is clear that the rise from K1,945,733 to K2,033,631, was as a result of a general salary increase and not as a result of any contract. The draft contract was drafted two and a half years after the Appellant's services were extended. It would appear that the Appellant put the amount of K24,403,572 in the draft contract after calculating

his annual salary using the salary he was receiving at the time. Therefore, we agree with the holding of the learned trial Judge that the above evidence showed and raised the presumption that the sum of K1,945,733, which the Appellant was receiving prior to September, 2002, was the correct salary for a Colonel at that time and that the subsequent rise of the Appellant's salary to K2,033,631, was as a result of a general salary raise.

Further, the Appellant failed to rebut the Respondent's evidence that the salary appearing on the payslips was what was used to calculate the Appellant's gratuity. Accordingly, we agree with the finding by the learned trial Judge that the Respondent used the correct salary in calculating the Appellant's gratuity.

We now come to the issue as to whether the unsigned contract was binding.

Lord Greene, in **Eccles V. Bryant and Another** [3] said the following:

> **"When parties are proposing to enter into a contract, the manner in which the contract is to be created so as to bind them must be gathered from the intentions of the parties express or implied. In such a contract as this, there is a well-known, common and customary method of dealing; namely, by exchange, and anyone who contemplates that method of dealing cannot contemplate the coming into existence of a binding contract before the exchange takes place. It was argued that exchange is a mere matter of machinery, having in itself no particular importance and no particular significance. So far as**

> **significance is concerned, it appears to me that not only is it not right to say of exchange that it has no significance, but it is the crucial and vital fact which brings the contract into existence. As for importance, it is of the greatest importance, and that is why in past ages this procedure came to be recognised by everybody to be the proper procedure and was adopted..."**

We were referred to a number of authorities on the enforcement of contracts. According to decided cases, a contract is binding on a party if that party agrees to the terms proposed in a contract or one conducts oneself that they are agreeable to the terms. The case of **Eccles and Bryant**[3] cited above, shows that the manner in which the contract is to be created, so as to bind the parties, must be gathered from the intentions of the parties, express or implied. One of the customary methods of gathering the intentions of the parties is through exchange of contracts. That exchange of contract is a crucial and vital fact that brings a contract into existence.

In the case before us, the contract relied upon by the Appellant was in draft form. It was not signed by either party. Therefore, this crucial aspect of a contract coming into existence was missing. We note that a party must agree to the terms of a contract in order for it to become legally binding. Although this is usually done by the signature of those with authority to enter into the agreement, it is commonly recognised that parties can enter into a contract by course of dealing, signifying their acceptance of the terms of the contract. However, in this case, the Appellant was employed in the Zambia Air Force. He was a

Colonel. We believe that there are standard conditions of service that apply to all persons in the Zambia Air Force who are at the rank of Colonel. Therefore, we are of the view that if the Zambia Air Force, intended that the standard conditions should not apply to the Appellant, and that he should have his own conditions of service, then this would have been made clear and embedded in a contract. In addition, there is no evidence that there was consensus on the terms of the contract.

Accordingly, on the authority of **Ecclas V. Bryant**[3], we hold that the contract relied upon by the Appellant was not binding on the Respondent and that there was no intention that the Appellant's employment would be governed by terms and conditions of service outside the standard terms and conditions of service that applied in the Zambia Air Force.

We now come to the issue as to whether the Appellant's employment was continuous or not.

The Occurrence Report, relating to the Appellant, after he attained fifty-five years, read as follows:

> **"extended service for three (03) years after attaining the mandatory retirement age of 55 (fifty five) years as per the Defence Act, Cap 106 of the Laws of Zambia, Regulation 9(4) of the Defence (Regulation Force)(Officers) Regulation 1960, read in conjunction with section 33(11) of the Public Service Pension Act No. 35 of 1996. The effective date of extension of service is 5th May, 2000..."**

Regulation 9(4) of the Defence (Regulation Force)(Officers) Regulation 1960, deals with extension of service in the regular Air Force. This Regulation provides that-

> **"(4) A permanent service officer who has continued to serve in the Regular Force in terms of subsection (3) shall retire from his employment in the Regular Force on attaining the age of 55 years:**
>
> **Provided that, if the President considers that it is desirable in the public interest, he may allow that officer to continue to serve in the Regular Force for further periods, not exceeding 12 months at a time, until he attains the age of 60 years."**

In our view, the occurrence report referred to above shows that the Appellant's employment was extended. There were no separate terms of conditions as his extension amounted to continuous service in the regular Air Force. In addition, a reading of **Regulation 9(4)** referred to above, also confirms that the extension of the Appellant's employment amounted to continuous service in the Regular Force.

Accordingly, we find no merit in grounds one and two of the appeal and we dismiss them.

We shall deal with grounds three, four and five together because the issues are interrelated.

In ground three, the Appellant submitted that the lower Court overlooked the fact that the contract whose terms and conditions are laid out in the contract dated December, 2002,

bears a date on which the Appellant's appointment became effective, that is, from the 5th of May, 2000. That, therefore, the Respondent based its calculation on the general salary terms and not what was agreed upon in December, 2002, as per terms and conditions of the contract. The Appellant submitted that as a result, his gratuity was supposed to be calculated using an annual salary of K24,403,572.00 as contained in the contract.

In ground four of the appeal, it was submitted on behalf of the Appellant that even if the Appellant benefited from a government pool house, he was entitled to housing allowance under the contract.

In ground five, it was submitted on behalf of the Appellant that the Appellant did take a break from his employment when he retired at the age of 55 years and that the subsequent re-engagement should be treated as a new appointment under private contract which entitled him to settling-in-allowance.

The Respondent on the other hand submitted that the purported contract relied upon by the Appellant was in draft form and was drafted two and a half years into the extended service. That as a result, it was only logical that the gratuity benefits were calculated on the actual salaries that the Appellant received whilst in employment.

As regards the settling-in-allowance, counsel for the Respondent added that since the Appellant benefited from the sale of government pool houses, he was not entitled to housing allowance. It was argued that the learned trial Judge was on firm ground when he refused to grant the Appellant housing

allowance on the ground that he had benefited from the housing empowerment scheme. It was argued that since the Appellant's service was continuous; he was not entitled to draw a settling-in-allowance. Counsel added that the terms and conditions of service for the public service issued by the Secretary to the Cabinet in 2003 provide in paragraph 163, as follows:

> **"(a) a settling-in-allowance shall be paid by the Government to compensate an officer in part for the unavoidable incidental expenses he or she has to meet on initial appointment to the public service or when the officer is transferred from one district to another or from one rural station within a district.**
>
> **(b) a settling-in-allowance shall be paid to an officer on first appointment and on transfer as may be agreed upon from time to time at the married or single rate as the case maybe..."**

Counsel added that the Appellant did not satisfy the above conditions for him to qualify to draw the allowance because he was staying in the same house and was not transferred anywhere else when his service was extended.

We have considered the submissions on grounds three, four and five. We have also looked at the authorities cited. We have stated in grounds one and two, that the contract relied upon by the Appellant was not binding and that there was no intention, on the part of the Respondent, to give the Appellant different conditions of service outside those which were applicable in the Regular Zambia Air Force. We have also stated that the extension of the Appellant's employment was continuous. Having said that,

it follows that the argument by the Appellant that his gratuity should have been calculated using the annual salary that was contained in the contract cannot stand.

Further, we have already stated in grounds one and two that the Appellant's service was continuous. It was an extension of his services. We agree with the learned trial Judge that the Appellant was not being employed for the first time and neither was he being transferred to work at another station which would require him to move homes. In any case, if the Appellant's service was broken, we do not see how the Air Commander would have backdated his promotion to 1st May, 2000, a date before his retirement. If it was broken service, the promotion would have been backdated to the date when his purported contract commenced and not to a date before he retired. Therefore, we uphold the decision of the learned trial Judge that the Appellant was not entitled to a settling-in-allowance.

We now come to the issue of the Appellant's housing allowance. We have already stated that the Appellant's employment was continuous. This means that the condition of service for the Regular Air Force on housing allowance, applied to the Appellant. Therefore, we feel that whatever conditions the Appellant was enjoying before his employment was extended, are what applied to him during the period of extension. The record of appeal has a document termed **"payment of housing allowance to Defence Force Personnel."** This document states that-

> **"In this regard, the following categories of employees are not eligible to draw housing allowance (owner occupier):**

Employees who have been advanced with a housing loan and mortgage by Government; and

Employees who purchased pool or council houses under the Government Housing Empowerment Scheme.

However, on transfer to another unit but not within the same town, such employees become eligible for drawing housing allowance."

From the above, it is clear that beneficiaries of government pool houses are not entitled to a housing allowance. The evidence on record shows that the Appellant bought and lived in a government pool house. Accordingly, we agree with the holding of the learned trial Judge that the Appellant was not entitled to housing allowance.

For the reasons we have given above, we hereby uphold the decision of the lower Court and dismiss this appeal for lack of merit. We order that each party bears its own costs.

M.S MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

E.N.C MUYOVWE
SUPREME COURT JUDGE

R.M.C KAOMA
SUPREME COURT JUDGE