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THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 12 OF 2018

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

KONKOLA COPPER MINES PLC

APPELLANT

AND

NYAMBE MARTIN NYAMBE

1ST RESPONDENT

GABRIEL MWEWA AND 24 OTHERS

2ND RESPONDENT

LEVYSON LWESELA

3RD RESPONDENT

EVANS MWENYA

4TH RESPONDENT

CORAM: MULONGOTI, SICHINGA AND NGULUBE JJA

On 27th June and 10th December, 2018.

For the Appellant: *E.C. Banda SC, Chibeleka, Messrs ECB Legal Practitioners*

For the Respondents: *B. Katebe, Kitwe Chambers*

J U D G M E N T

NGULUBE, JA *delivered the Judgment of the Court.*

Cases referred to:

1. *Colgate Palmolive (Z) Inc vs. Shemu and Others, Appeal Number 11 of 2005.*
2. *Rosemary Ngorima and 10 Others vs. Zambia Consolidated Copper Mines, Appeal Number 97 of 2000.*
3. *Zesco Limited vs. Richard Phiri and Others Appeal Number 87 of 2009.*

3. *Zesco Limited vs. Richard Phiri and Others* Appeal Number 87 of 2009.
4. *Jacob Nyoni vs. The Attorney General* SCZ Judgment Number 11 Of 2001.
5. *Jennifer Nawa vs. Standard Chartered Bank Zambia Plc*, SCZ Judgment Number 1 of 2011.
6. *Kitwe City Council vs. William Ng'uni* (2005) ZR 57 (SC).
7. *Goodwell Malawo Siamutwa vs. Southern Province Cooperative Marketing Union and Finance Bank Zambia Limited*, Appeal Number 114 of 2000.
8. *Chola Chama vs. Zesco Limited*, SCZ Judgment Number 20 of 2008.
9. *Masheke Akalilwa and Zambia Revenue Authority* Comp/50/2005.
10. *Indo Zambia Bank Limited vs Mushaukwa Muhanga*, SCZ Judgment Number 26 of 2009.
11. *Paul Roland & Harrison vs The Attorney General* (1993) S.J 58 (S.C).
12. *Charles Chipoya Vs The Attorney General* (1988-1989) ZR 72 (S.C).
13. *Butter Mechanic Tools Limited Vs Excelllo Corporation (England) Limited*, (1977) EWCA Civ 9

Legislation referred to:

1. *National Pensions Scheme (Amendment) Act* Number 7 of 2015.
2. *Income Tax (Amendment) Act* Number 19 of 2015.
3. *The Constitution of Zambia (Amendment) Act* Number 2 of 2016.
4. *The Constitution of Zambia (Amendment) Act* Number 18 of 1996.
5. *The National Pensions Scheme Act*, Chapter 256 of the Laws of Zambia.
6. *The Income Tax Act*, Chapter 323 of the Laws of Zambia.
7. *The Interpretation and General Provisions Act*, Chapter 2 of the Laws of Zambia.
8. *The English Law (Extent of Application) Act*, Chapter 11 of the Laws of Zambia
9. *The National Pensions Scheme Act*, Number 40 of 1996.

This is an appeal against the Judgment of the High Court delivered on 13th October, 2017, in which the learned Judge found that the

respondents were prematurely retired at fifty-five years and that their retirement was unlawful, null and void for being contrary to the existing law which has placed normal retirement age at sixty years. The Court deemed the respondents as having been retired at the age of sixty years and ordered the payment of retirement benefits they would have received at the age of sixty years. The Court went on to award the respondents damages for breach of retirement laws equivalent to six months' salary including all allowances and perquisites, with interest and costs.

The brief background to this matter is that the respondents were employed by the appellant on different dates on permanent and pensionable establishment and having duly served the full term of their various contracts, they were retired by the appellant upon attaining the age of fifty-five years.

The respondents commenced an action in the Industrial Relations Division of the High Court contending that their retirement was premature, as at the time of their separation, the mandatory retirement age had changed from fifty-five to sixty years with an additional option of late retirement at the age of sixty-five years, as a result of the enactment of the *National Pension*

(Amendment) Act, Number 19 of 2015² and Article 187(3) of the Constitution as amended by Act Number 2 of 2016,³ respectively. As earlier stated, the Court rendered Judgment in favour of the respondents. The appellant, being dissatisfied with the Judgment filed a notice of appeal with five grounds of appeal as follows –

- (1) That the learned trial Judge erred in law and in fact when he held that the appellant prematurely retired the respondents at the age of fifty-five years, or that the retirement was premature.
- (2) That the learned trial Judge erred in law when, after citing Article 187(3) of the Constitution, Chapter 1 as amended by Act Number 2 of 2016, held that the National Pension Scheme (Amendment) Act, Number 7 of 2015 as well as the Income Tax (Amendment) Act, Number 19 of 2015 was the law in force at a later date and thus applicable to the respondents, retrospectively.
- (3) That the learned trial Judge erred in law when he held that the new retirement age of sixty applied to the respondents as opposed to fifty-five which was incorporated in the respondents' contracts of employment

Counsel submitted that grounds one, two and three would be argued together as they are interrelated. It was submitted that, a perusal of the various contracts of employment shows that the respondents were employed by the appellants between the period before 2010 and afterwards, but not later than July, 2015. Our attention was drawn to the pieces of legislation that formed part of the regulatory regime on pension benefits at the time the respondents were employed. These were the Constitution Amendment Act, Chapter One of the Laws of Zambia⁴ as amended by Act Number 18 of 1996, the National Pension Scheme Act⁵, Chapter 256 of the Laws of Zambia and the Income Tax Act⁶, Chapter 323 of the Laws of Zambia. At the time when the respondents were employed, the legal regime provided for retirement of employees at the age of fifty-five years.

It was submitted that in August, 2015, the National Pension Scheme (Amendment) Act Number 7 of 2015¹ was enacted, which amended section 2 of the National Pension Scheme Act⁵ by substituting the retirement age from fifty-five to sixty years. Further, section 18 of the principal act was amended with provisions that a member can retire at fifty-five years under early retirement, sixty years as normal retirement or sixty-five years as late retirement.

It was further submitted that the Income Tax (Amendment) Act² Number 19 of 2015 provides that the retirement age shall be sixty years.

Additionally, Article 187(E)(3) (b) provides that-

“the law to be applied with respect to a pension benefit (b) after the commencement of this Constitution shall be the law in force on the date on which the pension benefit was granted or the law in force at a later date that is not less favourable to that employee.”

It was submitted that the legal regime provided for retirement at the age of fifty-five years at the material times the respondents were employed by the appellant. It was contended that this was what was agreed upon by the appellant and the respondents in the various contracts of employment and is therefore binding on the parties.

It was submitted that the Court below at page J7 held that none of the complainants had turned fifty-five years on 14th August 2015 and that they would only turn fifty-five years between September, 2015 and July, 2016. The Court found that at the time that the complainants were going to reach the retirement age of fifty-five years, the law had already been amended to place the retirement age at sixty years, thus making the complainants prematurely retired.

The Court found that the respondents were denied the right to retire at sixty years by the appellant.

It was submitted that the lower Court's holding was totally against the established principles of freedom of contract. Counsel referred us to the case of **Colgate Palmolive (z) Inc vs. Shemu and Others¹**, where the Supreme Court held that-

"parties shall have the utmost liberty in contracting and their contracts when entered into freely and voluntarily shall be enforced by courts of justice".

It was submitted that the respondents are bound by the terms of their contracts, that they would retire at the age of fifty-five years which was what was agreed upon at the time that they were employed.

We were referred to the case of **Rosemary Ngorima and 10 Others vs. Zambia Consolidated Copper Mines²**, where the Supreme Court stated that-

"...in an employer-employee relationship the parties are bound by whatever terms and conditions they set out for themselves."

It was submitted that the above position of the law was reiterated by the Supreme Court in the case of **Zesco Limited vs. Richard Phiri and Others.**³

The appellant's advocates submitted that the respondents are bound by the terms of their contracts executed with the appellant, that they would be retired at the age of fifty-five years. Counsel referred to the case of **Jacob Nyoni vs. The Attorney General**⁴ in which the Supreme Court held that –

“the law is not intended to trap the unwary or the unsuspecting by insisting that today the relations shall, without more, be governed and determined on the basis of a future law, or conversely, that a law that comes into effect today shall generally apply to relations of parties consummated in the previous year.”

It was submitted that the respondents' retirement age should be viewed in respect of the contracts of employment which as stated, incorporated the statutory retirement age of 55 years and therefore cannot now be subject of a totally new legal regime brought about by the National Pension Scheme (Amendment) Act¹ and the Constitution of Zambia (Amendment) Act³.

Counsel referred us to the case of **Jacob Nyoni vs. The Attorney-General⁴**, in which the Supreme Court had occasion to consider the effect of amendments to the law in respect of retirement age on contracts of service. The Supreme Court stated inter alia that-

“To us, this means the appellant acquired or accrued this right and it is necessary to see if this acquired or accrued right still stands or it is extinguished and it is necessary to look at section 14(3)(c) and (e) of the Interpretation and General Provisions Act, Cap 2.”

It was submitted that at the time when the respondents executed the contracts of service incorporating the statutory retirement age of 55 years at as it stood at the time, the said retirement age became an entrenched condition of the contract of service which cannot be altered by the recent amendment of the law. We were further referred to the case of **Jennifer Nawa vs. Standard Chartered Bank Zambia Plc⁵**, in which the court held that –

“it is trite law that unless expressly stated, a law does not operate retrospectively. It could therefore not have been the intention of the framers of this law to invalidate agreements that were perfectly legal at the time that they were executed.”

Counsel urged the Court to confirm that the respondents and the appellant agreed that their retirement age would be fifty-five years as this was perfectly legal at the time that the contracts were executed.

On grounds four and five, it was submitted that the holding by the Court below that the respondents be deemed to have retired at the age of sixty and that they be paid pension benefits that they would have received at that age would amount to unjust enrichment on the part of the respondents as they have not done any work for the appellant to justify payment of pension benefits at the age of sixty years instead of fifty five years for which they served.

Counsel referred to the case of **Kitwe City Council vs. William Ng'uni**⁶ where the court held that –

“It is unlawful to award a salary or pension benefits for a period not worked for because such award has not been earned and might be properly termed as unjust enrichment.”

Counsel further referred to the cases of **Goodwell Malawo Siamutwa vs. Southern Province Cooperative Marketing Union and Finance Bank Zambia Limited**⁷, as well as the case of **Chola**

Chama vs. Zesco Limited,⁸ in emphasizing the issue of unjust enrichment. It was submitted that the burden to prove their case fell on the respondents, which they failed to do in the Court below.

On the award of six months' salary to the respondents, it was submitted that the lower Court misdirected itself in making the said award as at the time the respondents were going to reach retirement age of 55 years as per their conditions of employment, the law had already been amended to place the retirement age at sixty years by Act Number 7 of 2015¹.

Counsel referred to the case of **Masheke Akalilwa and Zambia Revenue Authority** ⁹ where the Court held that –

“its mandate with regard to unfair dismissal, is to examine the reason for termination of the complainant’s employment and determine whether or not statutory provisions were breached by the respondent.”

It was submitted that the appellant had established that the parties herein were governed by written contracts which incorporated the statutory age of 55 years for retirement at the time of execution and that the said contracts of employment mandated the appellant to give notice of retirement to an employee approaching the age of 55

years which was duly given by the appellant to all the respondents, who were paid their retirement benefits as per the provisions of their contracts.

It was submitted that the appellant properly followed the contractual provisions in retiring the respondents and that as such, there can be no basis for payment of damages for unlawful retirement as the amendments to the law do not apply to the respondents. Counsel accordingly prayed that the appeal be allowed.

Counsel for the respondents, in responding to the first ground of appeal, submitted that the Court below was on firm ground when it held that it was satisfied that the complainants had proved their claim, that their retirement by the appellant at the age of fifty-five years was premature and therefore unlawful, null and void.

On ground two, Counsel submitted that the Court below was on firm ground when it held that the National Pension Scheme and Amendment Act, Number 19 of 2015¹ was the law applicable to the complainants who opted to retire at sixty years but were denied that right to do so by the appellant.

On ground three, Counsel submitted that the Court below was on firm ground when it held that the new retirement age of sixty years applied to the complainants.

It was submitted that grounds one, two and three would be argued together since they are interrelated. Counsel contended that the Court below properly addressed its mind to the retirement age applicable to the respondents at the time they were employed. We were referred to the case of *Indo Zambia Banka Limited vs Mushaukwa Muhanga*,¹⁰ where the Court held that-

“It is trite law that an employment relationship is contractual. It can be oral, for a fixed term or on permanent basis. In modern parlance, it has been taken to mean up to the time when one attains retirement age.”

Counsel referred to Section 2 of the English Law (Extent of Application) Act, Cap 11 of the Laws of Zambia which provides that-

“2. Subject to the provisions of the Constitution and to any other written law-

(a) The common law;

(b) The doctrines of equityshall be in force in the Republic.

Counsel submitted that the contracts of service that were executed between the appellant and the respondents are subject to the Constitution of Zambia and any other written law on the issue of normal retirement age or pensionable age. It was submitted that the law is binding on the appellant and the respondent despite the fact that contracts of service that were executed by the parties provided for retirement at fifty-five years.

It was submitted that the National Pension Scheme Act⁵ as read with all other pension laws cited above applies to all employees in Zambia. Counsel referred to Section 2 of the National Pension Scheme Act Number 40 of 1996 as amended by the National Pension Scheme Act, Number 7 of 2015 which defines pensionable age as-

“pensionable age means the age of sixty years”

Counsel further referred to ***Section 18(1) and (2) of the National Pension Scheme Act¹ Number 7 of 2015*** which provides that-

“18.(1) Subject to the provisions of this Act, a member shall retire upon attaining pensionable age.

(2) A member shall retire on attaining the age of-

- (a) fifty-five years if, twelve months before attaining that age, the member notifies the contributing employer of the member's intention to retire at that age; or
- (b) sixty years if, twelve months before attaining the pensionable age, the member notifies the contributing employer of the member's intention to retire at the age of sixty years and the employer approves the retirement.

Counsel submitted that the Court below was on firm ground when it found that the complainants were only going to turn 55 years between September 2015 and July 2016. The Court found that the law had already been amended to place the retirement age at sixty years. The Court found that the appellant prematurely retired the respondents at fifty-five years when the law in force at 14th August, 2015 was that the pensionable age was sixty years.

Counsel submitted that the Court below was on firm ground when it held that the respondents had proved their case, that their retirement at the age of fifty-five years was premature, unlawful, null and void as the new retirement age of sixty years had already come into force at the time the respondents were turning fifty-five years.

Referring to the case of ***Jacob Nyoni vs Attorney General***⁴, Counsel submitted that the Court below properly applied the principle of this case when it stated that Act Number 7 of 2015 only affects those who did not make irrevocable options to retire at the age of fifty-five years before the amendment. The Court found that the respondents protested their retirement at the age of fifty-five years instead of sixty years.

Counsel submitted that grounds one, two and three of the appeal are devoid of merit and he accordingly prayed that they be dismissed.

On ground four, Counsel submitted that the Court below was on firm ground when it exercised its discretion in deeming the respondents as having been retired at that age of sixty years and ordered the payment of appropriate benefits that the respondents would have received at sixty years.

On ground five, it was submitted that the Court below was on firm ground when it held that the circumstances of this case justify a departure from the normal measure of damages and awarded the respondents damages for breach of retirement laws at six months salaries.

Counsel accordingly prayed that the appeal be dismissed with costs. The respondents filed a cross appeal against the Judgment on the following ground-

“That the damages equivalent to six months salary including all allowances and perquisites awarded by the Court below be increased to twenty-four months salary including all allowances and perquisites as a departure from the normal measure of damages to justify the circumstances of this case”

Counsel referred to the case of ***Paul Roland & Harrison vs The Attorney General***¹¹ where the Supreme Court held that-

“In Zambia, exemplary damages may be awarded in any case where the defendant has acted in contumelious disregard of the plaintiff’s rights.”

Counsel further referred to the case of ***Charles Chipoya vs The Attorney General***¹² where the Supreme Court held that-

“where aggravated damages are justified, the compensatory damages should contain an exemplary element”

Counsel prayed that the award of damages equivalent to six months salary including all allowances be increased to twenty-four months

salary including all allowances and perquisites as a departure from the normal measure of damages to justify the circumstances of this case. Counsel prayed that the cross appeal be sustained with costs.

We have carefully considered the Judgment of the Court below, the heads of argument and the submissions by both learned Counsel.

The first ground of appeal gravitates on the determination of whether the learned trial Judge erred in law and fact when he held that the appellant prematurely retired the respondents at the age of fifty-five years or that the respondents' retirement was premature.

In resolving this dispute, the words of Lord Denning in the case of *Butter Mechanic Tools Limited vs Excelllo Corporation (England) Limited*¹³ provide wise counsel. He stated that-

"The better way is to look at all the documents passing between the parties and glean from them, or given the conduct of the parties, whether they have reached agreement on all material points."

In our view, the relevant documents to the matters in issue are the contracts of employment that the appellant entered into with the respective respondents when they were employed.

The said contracts of employment show that the respondents were employed by the appellant between the period before 2010 and others afterwards. They provided that-

“normal retirement age for all employees would be fifty-five years.”

Further, during the period in which the respondents were employed, the National Pensions Scheme Act⁹ provided for retirement of employees at the age of fifty -five years. In August, 2015, the National Pension Scheme Amendment Act¹, Number 7 of 2015 was enacted. It amended section 2 of the National Pension Scheme Act⁹ by substituting the retirement age of fifty-five years with that of sixty years. It amended the normal retirement age to sixty years and put the late retirement age at sixty-five years.

We form the view that the appellant and the respondents agreed to the retirement age of fifty-five years in the various contracts of employment, which are binding on the parties. As was stated by the Supreme Court in the case of ***Colgate Palmolive (Z) Inc vs Shemu and others***, it was held that - public policy requires that men of full age and competent understanding shall have the utmost liberty in

contracting and when the said contracts are entered into freely and voluntarily, they shall be enforced by Courts of justice.

We are therefore of the view that the lower Court misdirected itself in finding that the respondents were retired prematurely at the age of fifty-five years because this is what the parties agreed upon at the time they were employed. The parties were bound by the terms and conditions that they set for themselves. We therefore find merit in this ground of appeal and it accordingly succeeds.

On ground two, whether the National Pension Scheme (Amendment) Act Number 7 of 2015 as well as the Income Tax (Amendment) Act, Number 19 of 2015 are applicable to the respondents, we refer to the case of **Jacob Nyoni vs the Attorney General**⁴, and state that laws do not operate retrospectively. It could not have been the intention of the framers of the law to invalidate agreements that were perfectly legal at the time they were executed. The respondents' contracts of employment, which provided that they would retire at fifty-five years are binding and cannot be varied on the basis of the amendment to the National Pension Scheme Act of 2015. A law that comes into effect after parties have contracted cannot apply to relations that were consummated previously. It therefore follows that the

respondents cannot rely on the retirement age in the amended National Pension Scheme Act as it does not apply to them. The respondents accrued rights based on the conditions of their contracts of employment which they cannot alter subsequently.

We find merit in this ground and it accordingly succeeds.

On ground three, the issue is whether the learned trial Judge erred in law when he held that the new retirement age of sixty applied to the respondents as opposed to fifty-five which was incorporated in the respondent's contract of employment.

As already stated, it is not in dispute that the legal requirement at the time the respondents were employed by the appellant was fifty-five years. This was what was agreed upon in the various contracts of employment. The parties are therefore bound by it. As was stated by the Supreme Court in the case of ***Rosemary Ngorima and 10 Others vs Zambia Consolidated Copper Mines Limited***, in an employer/employee relationship, the parties will be bound by whatever terms and conditions they set out for themselves. The Court below failed to appreciate that the retirement age of fifty-five years became an entrenched condition of the contract of service which cannot be altered by the recent amendments to the law. The

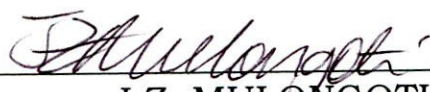
said amendments only affect those who never made irrevocable options to retire at the age of fifty-five years before the amendment and those who joined the appellant after the amendments. We find merit in ground three and it succeeds.

Regarding grounds four and five, we are of the view that the learned trial Court fell into error when it deemed the respondents to have been retired at the age of sixty years and that they be paid pension benefits they would have received had they worked up to the age of sixty years. We are of the view that the respondents were awarded pension benefits for periods that they did not work for and this amounted to unjust enrichment.

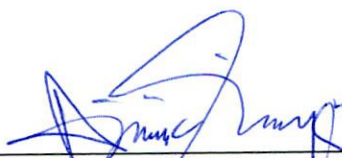
Regarding the award of six months' salary including all allowances and perquisites for breach of retirement laws, we are of the view that the Court misdirected itself when it made the said awards. The respondents did not establish that their respective contracts of employment were breached by the appellant and were therefore not entitled to an award of damages. As such, grounds four and five of the appeal succeed.

The appellant's four grounds of appeal having succeeded, the respondent's cross appeal is dismissed for lack of merit. The net

result is that the appeal succeeds. The appellants are awarded costs in this Court and in the Court below, to be taxed in default of agreement.



J.Z. MULONGOTI
COURT OF APPEAL JUDGE



D.L.Y. SICHINGA
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE