

J1



**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**2015/HP/2047**

**B E T W E E N :**

TIMMY BANDA

**PLAINTIFF**

**AND**

LAFARGE ZAMBIA PLC

**DEFENDANT**

**Before Honorable Mrs. Justice M. Mapani-Kawimbe on 2<sup>nd</sup> February, 2017**

*For the Plaintiff* : Dr. O.M. Banda, Messrs O.M. Banda &  
Company

*For the Defendant* : Ms. G.C Chilekwa and Mrs. B. M. Chanda,  
Messrs AB & David

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## **J U D G M E N T**

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**Case Authority Referred To:**

1. *Wilson Masauso Zulu v Avondale Housing Project Limited* (1982) Z.R. 172

On 29<sup>th</sup> October, 2015 the Plaintiff issued Writ of Summons endorsed with the following claims:

- (a) *An order that retiring the Plaintiff normally when he was sick was null and void.*
- (b) *An order cancelling the normal retirement.*

- (c) *An order compelling the Defendant to retire the Plaintiff on medical grounds under clause 15.2 of the Defendant's Terms and Conditions of Service.*
- (d) *Damages for permanent disability.*
- (e) *Interest and costs.*
- (f) *Any other relief the Court may deem fit.*

The Plaintiff filed a Statement of Claim where he states that he joined the Defendant Company on 1<sup>st</sup> October, 1981, under INDECO in the Mechanical Department, as an Assistant Fitter. Further, the Defendant is a Limited Company and is engaged in the production of cement. The Plaintiff also states that in 2007 he underwent training as a Field Patroller and later held that position until he retired in 2015.

The Plaintiff claims that in 2004 his health started failing him. A C.T scan was performed on him on 22<sup>nd</sup> November, 2013 on the recommendation of the Doctor Manda, formerly of Lusaka Trust Hospital. The Plaintiff avers that he was subsequently operated on at Lusaka Trust Hospital on 12<sup>th</sup> December, 2013. His right kidney was removed whilst his left kidney and bladder were treated. The Plaintiff states that his doctor told him that his health problems had been caused by cement dust.

The Plaintiff's avers that on 27<sup>th</sup> January, 2014 his doctor wrote a letter to the Defendant in which he recommended the Plaintiff to be redeployed to light duty. Instead of redeploying the Plaintiff, the Defendant sent him home. Further, that On 10<sup>th</sup> March, 2014, the Defendant informed the Plaintiff of his date of normal retirement.

On 13<sup>th</sup> March, 2014 the Plaintiff states that his doctor advised the Defendant to constitute a medical board to review his condition, which advice was not taken by the Defendant.

On 13<sup>th</sup> May, 2014, the Plaintiff avers that he was retired in breach of his doctor's advice and denied the benefit of clause 15.2 in the Defendant's Terms and Conditions for Non-Unionized Staff.

The Defendant settled a Defence on 24<sup>th</sup> November, 2015, where it states that the Plaintiff held the position of Field Patroller up to the time that he retired. The Defendant also states that the Plaintiff's doctor recommended him to be redeployed to light duty. The Defendant avers that since the nature of its operations are of a

heavy type it did not have light work. It thus sent the Plaintiff home to recuperate.

The Defendant further avers that the Plaintiff's doctor only provided a contact at the hospital in the event that it decided to retire him on medical grounds. Further, that the Plaintiff was not eligible to be retired on medical grounds and was properly retired on 31<sup>st</sup> May, 2014 under the normal procedure.

At trial, the Plaintiff **Timmy Banda** testified as **PW1**. His evidence was that he worked at Lafarge firstly as an Assistant Fiter and later as a Field Patroller in the Production Section until his retirement. PW1 testified that he fell critically ill on 29<sup>th</sup> June, 2013, when he collapsed at work.

PW1 told the Court that he was taken home by his colleagues and later to Musamba Trust Clinic in Chilanga. From there, he was referred to Lusaka Trust Hospital where he received medical attention from the late Dr. Manda, a Specialist doctor. Dr. Manda referred him to the University Teaching Hospital and the Cancer Diseases Hospital for further medical investigations.

After the medical investigations, PW1 stated that Dr. Manda diagnosed his health problems, which were a blocked bladder, damaged right kidney and a cyst on the left kidney. It was PW1's evidence that his doctor told him that his health problems had been caused by cement dust.

PW1 testified that he went to Lusaka Trust Hospital for review on 27<sup>th</sup> January, 2014. It was his evidence that his doctor told him that six months had elapsed from the date of his initial visit. As such, he could no longer give him off-sick notes and he had to return to work. PW1 also stated that his doctor wrote the Defendant Company a letter in which he recommended him to be redeployed to light duty.

PW1 testified that after he reported for work, the Defendant told him to go back home to recuperate because he was in bad condition. He also testified that he never returned to work up to the time of his retirement.

It was PW1's evidence that on 6<sup>th</sup> March, 2014, Dr. Manda wrote the Defendant Company another letter stating that Lusaka

Trust Hospital was ready to constitute a medical board, in the event that it decided to retire PW1 on medical grounds. PW1 testified that the Defendant did not respond to the letter and instead informed him of his date of normal retirement on 10<sup>th</sup> March, 2014. He was subsequently retired on 31<sup>st</sup> May, 2014.

PW1 concluded with a prayer to the Court to order that he should have been retired on medical grounds and not under normal retirement.

In cross-examination, PW1 stated that he never worked from June to December, 2013, because he was unwell. Further, that the off-sick notes issued to him whenever he attended hospital were submitted to the Defendant. PW1 repeated his evidence given in chief on the medical examinations, diagnosis of his health problems and treatment. He added that he used to attend scheduled hospital reviews on Mondays at Lusaka Trust Hospital from the time that he fell ill.

PW1 could not recall his attendance at the Occupational Health and Safety Institute. However, when prompted by the

Defendant, he conceded that he attended periodical examinations at the Institute as shown at pages 2 - 9 of the Defendant's Bundle. It was PW1's testimony that the pneumoconiosis examinations performed on him were to check his chest and not the other health problems he was experiencing.

In re-examination, PW1 told the Court that Dr. Manda stopped issuing him off-sick notes in January 2014, since six months had elapsed from his first hospital visit.

**PW2** was **Jessica Zingwe Banda** the wife of PW1. She testified that PW1 went to work on 29<sup>th</sup> June, 2013, and collapsed whilst at work. His colleagues took him back home where after he was taken to Musamba Trust Clinic. PW2 repeated PW1's evidence on his referrals to Lusaka Trust Hospital, the University Teaching Hospital and the Cancer Diseases Hospital. She confirmed PW1's testimony on his medical diagnosis and his eventual operation of 12<sup>th</sup> November, 2013.

PW2 further confirmed that PW1 was issued off-sick notes which she submitted to the Defendant. PW2 also confirmed PW1's

evidence that Dr. Manda refused to issue PW1 off-sick notes after their hospital visit of January, 2014. PW2 testified that PW1 was in very bad health and had never fully recovered from the time that he fell ill.

In cross-examination, PW2 stated that it took long for PW1 to be operated on because of the considerable intervals between the appointment dates and medical examinations at the various hospitals that PW1 attended.

The witness was not re-examined.

**Mwape Chisanga** the only witness called by the Defendant testified as **DW1**. He regurgitated PW1's evidence on his employment up to the time of his retirement in 2014. He told the Court that PW1 attended hospital on 15<sup>th</sup> November, 2013, and that a C.T scan was performed on PW1. According to DW1 the C.T scan showed that PW1 required attention and was operated on 12<sup>th</sup> December, 2013.

DW1 testified that on 27<sup>th</sup> January, 2014 the Defendant received a letter from PW1's doctor which requested the Company to

place PW1 on light duty. By light duty, PW1 was not to climb stairs or to do heavy work given the nature of his operation. DW1 also testified that since the Defendant Company's operations were of a heavy nature, it was not possible to place PW1 on light duty. Instead, the Defendant Company requested PW1 to go home to recuperate.

DW1 stated that since PW1 was about to attain the age of 55, the Company issued him a notice of retirement on 10<sup>th</sup> March, 2014, as per Company policy. He also stated that the Company received a letter from Lusaka Trust Hospital, which offered to constitute a medical board in the event that it decided to retire PW1 on medical grounds.

DW1 testified that on 13<sup>th</sup> May, 2014 the Defendant Company issued PW1 a termination notice for normal retirement. Upon clearance of the exit clearance formalities, PW1 was paid his dues in full. DW1 further, testified that PW1 was not entitled to a medical board examination because he only fell sick in November, 2013.

DW1 also stated that PW1 annually attended the Occupational Health and Safety Institute where he was issued silicosis certificates, affirming that he was fit for work. It was DW1's evidence that only employees who are certified fit were allowed to operate at the Defendant Company.

DW1 told the Court that all employees underwent mandatory pneumoconiosis examinations at the time of employment and exit to determine whether an employee may have contracted any illness during their time of service with the Defendant Company.

In cross-examination, DW1 conceded that PW1's doctor recommended that he was to be redeployed to light duty. However, he insisted that since the Defendant Company does not have light work, PW1 was sent back home. DW1 maintained that PW1 was not entitled to be retired on medical grounds and was properly retired under the normal procedure.

In re-examination, DW1 stated that the Company only received one letter dated 27<sup>th</sup> January, 2014, from Lusaka Trust Hospital.

Learned Counsels for the Plaintiff and Defendant filed written submissions. I am very grateful for their submissions. I shall not reproduce them suffice to state that I will take them into account in this judgment.

I have seriously considered the pleadings, evidence adduced and the written submissions. In my considered view, the issue that falls for determination is whether the Plaintiff was eligible to be retired on medical grounds? I wish to point out that once the issue is resolved it will have an effect on the balance of the Plaintiff's claims.

The facts not in dispute are that PW1 was an employee of the Defendant Company from 1<sup>st</sup> October, 1981 to 13<sup>th</sup> May, 2014, when he retired. PW1 retired at the age of 55 and was paid his terminal benefits for normal retirement. Before his retirement, PW1 underwent an operation on 12<sup>th</sup> December, 2013 at Lusaka Trust Hospital and was not in a state to return to work right up to the time of his retirement.

PW1's contention is that he should have been retired on medical grounds because he fell ill on 29<sup>th</sup> June, 2013, which was

way before the date of his normal retirement. PW1 also contends that the Defendant decided to retire him as it did and in doing so ignored his doctor's recommendation. PW1 referred the Court to his Bundle where the medical costing sheets, invoices and bills issued by the Lusaka Trust Hospital showing proof of his hospitalization were displayed in support of his claim.

On the other hand, the Defendant argued that PW1 was properly retired under the normal procedure because he only fell ill in November, 2013. Further, the periodical silicosis certificates issued between 2005 and 2013 by the Occupational Health and Safety Institute, all affirmed that PW1 was fit to up to the time of his retirement.

As rightfully pointed out by Counsel for the Defendant, it is trite law that he who alleges must prove. In the case of **Masauso Zulu v Avondale Housing Project**<sup>1</sup>, the Supreme Court stated that where a Plaintiff makes any allegation, it is generally for him to prove the allegation. A Plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the

opponent's case. It follows therefore, that the evidence adduced by the Plaintiff must establish the issues raised against the Defendant.

From the onset, I wish to state that the Defendant's Terms and Conditions for Non Unionised Staff dated 1<sup>st</sup> May 2010 create two modes of retirement.

The first mode is set out in clause 11.1.2 of the Terms and Conditions and sets out thus:

**"11.1.2      *The normal retirement age shall be fifty five (55) years. The company will give retiring employees six (6) months notice of the date of retirement. However, an employee may, with the consent of the employer, voluntarily retire from permanent service at any time within five (5) years before the normal retirement date.*"**

The second mode of retirement is set out in clause 15.2 and provides thus:

**"15.2      *An employee whose employment is terminated on medical grounds as certified by a registered medical practitioner or by a medical institution shall be entitled to a lump sum of two (2) months basic pay for each completed year of service.***

The issue therefore, comes down to the mode of retirement that the Plaintiff should have been subjected to. The evidence tendered by PW1 and PW2, was that PW1's health complications

The evidence led by DW1 was that PW1 only fell ill in November, 2013. Thereafter, PW1 required attention and was subsequently operated on in December, 2013. DW1 averred that PW1 was fit to work given the silicosis certificates that were periodically issued by the Occupational Health and Safety Institute on him. Thus, he was not entitled to retire on medical grounds.

After seriously considering the contested arguments of the parties, I find that there is credence in the evidence tendered by PW1 and PW2 that PW1 fell sick on 29<sup>th</sup> June, 2013. The evidence is supported by the hospital visits and medical examinations issued in respect of PW1.

On the other end, I find that the Defendant did not lead evidence to show that PW1 was well and working and not sick as he claimed to be. If that evidence had been adduced by the Defendant, then I might have arrived at a different conclusion. Since this is not the case, I have no reason to disbelieve PW1.

Taking the issue further, I am of the view that if PW1 had not submitted off-sick notes, then the Defendant would have probably

terminated his employment before his retirement, as absenteeism in most organisations is generally regarded as an offence liable to dismissal. The fact that the Plaintiff was retired without incident confirms that the Defendant was fully aware of his poor health condition and as a result maintained him in the Company up to the time of his retirement, in line with clause 3.2.1 of its Terms and Conditions.

I am mindful that neither party called medical experts to give evidence. That being the case, I am bound to consider the cause of PW1's health problems on the evidence adduced before Court. According to PW1, his evidence was that his doctor told him that his health problems had been caused by cement dust.

PW1 also testified that on 25<sup>th</sup> February, 2014, his doctor wrote a letter to the Defendant, where he informed it that PW1 had undergone a major operation for renal agenesis and was to be redeployed to light duty. The Defendant acknowledged PW1's doctor's letter on 6<sup>th</sup> March, 2014, and undertook to revert to him in the event of clarification.

On 10<sup>th</sup> March, 2014, the Defendant informed PW1 of his normal retirement. On 13<sup>th</sup> March, 2014, PW1's doctor wrote a letter to the Defendant where he provided a contact in the event that the Defendant Company decided to retire PW1 on medical grounds. The Defendant did not respond.

I find it most confounding that it never occurred to the Defendant to refer PW1's case to a medical board when quite clearly PW1 had a history of poor health.

In my considered view, had the Defendant, invoked clause 3.2.2 of the Terms and Conditions, which obliges it refer an employee to a medical board, then it would have easily settled the issue whether PW1 was entitled to a medical board examination or not in accordance with clause 3.2.2 of the Terms and Conditions, which provides thus:-

**3.2.2      *Notwithstanding the above paragraph, if the employee has not recovered from illness or accident after six months from the date of illness or accident, the employer shall refer the employee to the Medical Board for further investigations. On the recommendation of a registered medical practitioner or medical institution designated by the employer, discharge the employee, whereupon the entitlement to sick leave shall cease.***

I therefore, have no hesitation in holding that the Defendant failed to comply with clause 3.2.2 of its Terms and Conditions, by not subjecting the Plaintiff to a medical board examination. In consequence, I deem the Plaintiff to have retired on medical grounds.

Accordingly, I order the Defendant to settle the Plaintiff's outstanding benefits in accordance with clause 15.2 of its Terms and Conditions for Non Unionised Staff forthwith.

Let me state that pneumoconiosis or silicosis examinations are relevant for detecting lung diseases. They cannot be substituted for the detection and or diagnosis of other health problems outside their scope. As a result, I find that the silicosis certificates are of no value in determining the Plaintiff's claim.

The Plaintiff's claim for damages for permanent disability has not been proved and is therefore unsuccessful.

I award the Plaintiff interest and costs to be taxed in default of agreement.

J19

Leave to appeal is granted.

Dated this 2<sup>nd</sup> day of February, 2017.

*Mapani*  
M. Mapani-Kawimbe  
**HIGH COURT JUDGE**