

IN THE HIGH COURT FOR ZAMBIA

2017/HK/04

AT THE DISTRICT REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)

BETWEEN:

LIGHTSON SILWEYA

AND

KONKOLA COPPER MINES PLC

APPLICANT

RESPONDENT

Before; Mrs. Justice C. B. Maka-Phiri

**For the Applicant: Mr. K. Musukwa of Messrs Nyirongo &
Co**

**For the Respondents: Mr. E. C. Banda, SC, of Messrs ECB Legal
Practitioners**

J U D G M E N T

Legislation referred to:

- 1. The Public Service Pensions Act, Chapter 260 of The Laws of Zambia**
- 2. Statutory Instrument No. 63 of 2014, The Public Service (Retirement Age) Regulations, 2014**
- 3. Statutory Instrument No. 24 of 2015, The Public Service (Retirement Age) (Amendment) Regulations, 2015**
- 4. The National Pensions Scheme Act, Chapter 256 of The Laws of Zambia**
- 5. The National Pensions Scheme(Amendment)Act No. 7 of 2015**
- 6. The Income Tax(Amendment)Act, No. 19 of 2015**

This matter was commenced by way of originating summons on the 5th day of January, 2017. The applicant is seeking the following reliefs;

- 1. A declaration that the applicant was retired or his services were terminated by the respondent based on non-operative, otiose and obsolete law being the Repealed Retirement Act which provided inter alia for a person to retire from employment services at the age of 55 years, that the said Applicant's retirement is null and void.**
- 2. A declaration that the retirement or the termination of services of the applicant by the respondent was unlawful and premature, as it failed to entrench the spirit embodied in Statutory Instrument No. 63 of 2014 which led to the Amendment Act No. 7 of 2015 and Amendment Act No. 19 of 2015, which collectively call for mandatory retirement of a person after attaining the age of 60 years.**
- 3. A declaration that the applicant is still in the active time frame of employment and that he is lawfully entitled to any remunerations and any other allowances from the time he was retired by the respondent.**
- 4. An order for the relief of compensation for the inconvenience done and for declaring the applicant as retired by the respondent.**
- 5. Any other relief the court may deem fit.**
- 6. Interest on any amount found due.**
- 7. Costs.**

The summons was accompanied by an affidavit deposed to by the applicant and dated 5th January 2017. The applicant's skeleton arguments were filed into court on the 26th April 2017.

According to the said affidavit the applicant was employed by the then ZCCM as a Trainee Electrical Engineer in April, 1985. The applicant rose through the ranks and at the time of termination of

his employment on 31st January, 2015 he was holding the position of Sectional Supervisor Electrical. The advice on normal retirement was exhibited as "LS1" in the affidavit in support.

The applicant contended that the respondent retired him on 31st January 2015 at the age 55 years based on the repealed Retirement Act. The applicant's contention is that he should have been retired at the age of 60 years being the normal retirement age following the enactment of Statutory Instrument No. 63 of 2014 which led to the Amendment Act No. 7 of 2015 and Act No. 19 of 2015. It was the applicant's further contention that the aforementioned Statutory Instrument and Amendment Acts were enacted prior to his due date of 31st January, 2015. The applicant deposed further that he has made several correspondences to the respondent's Manager and National Pensions Scheme Authority over the amendment of the old Act and that the new retirement age is 60 years and not 55 but this has fallen on deaf ears. In conclusion, the applicant asked the court to grant him the reliefs sought.

The respondent opposed the application and filed an affidavit in opposition sworn by Priscilla Phiri, the Manager Human Capital Management-Corporate in the Respondent Company. The respondent's arguments and submissions were filed into court on 28th April, 2017.

It was deposed that the applicant was employed by the respondent in April, 1985 by the then Zambia Consolidated Copper Mines

(ZCCM) as Trainee Electrical Engineer and crossed over to the respondent on 31st March, 2000. The applicant rose through the ranks until he retired on 31st January, 2015. The respondent advised the applicant in a letter dated 14th August, 2014 that he was due to retire on 31st January, 2015 upon attaining the age of 55 years as per his conditions of employment. The said letter was shown as exhibit "PP1" in the affidavit in opposition. Subsequent upon his retirement, the applicant accessed his retirement benefits through Regina Saturna and he was duly paid all his dues.

It was deposed further that the National Pension Scheme (Amendment) Act No. 7 of 2015 that revised the retirement age was enacted on 14th August, 2015. Further that Statutory Instrument No. 63 of 2014 is the Public Service (Retirement Age) Regulations which only applied to the public service and not to private entities such as the respondent. The respondent's position was that Act No. 7 of 2015 did not have a retrospective application on employees and therefore did not apply to the applicant. It was further contended that the Act did not contain mandatory provisions to all employers in the country to revise the retirement age. It was the respondent's deposition that the applicant was lawfully and legally retired as per his conditions of service on attaining the age of 55 years. In view of the foregoing the respondent urged the court to dismiss the application for want of merit with costs.

I have considered the evidence and the written submissions by both parties. From the evidence, it is not in dispute that the applicant

was employed by the respondent until the 31st January, 2015 when he was retired in accordance with the terms and conditions of his employment. The applicant was notified of the normal retirement on 14th August 2014 in a letter exhibited by both parties as “LS1” and “PP1” respectively. The applicant has since been paid his retirement benefits.

The only issue for determination in this matter is whether or not the termination of the applicant’s employment by way of retirement was unlawful and premature in view of the changes in the law on the retirement age. To answer this question, I need to ascertain the law that was applicable to the applicant at the time of his retirement in January, 2015. The starting point is to note that the applicant persistently made reference to the repealed Retirement Act (old law) in both the originating summons and affidavit. Perusal of the laws of Zambia shows that such Act does not in fact exist. The applicant also referred to Amendment Act No. 19 of 2015 being the Income Tax (Amendment) Act. The said Act has no relevance to this case.

The applicant in this matter has heavily relied on Statutory Instrument No. 63 of 2014 which is The Public Service (Retirement Age) Regulations. According to regulation 4 of Statutory Instrument No.63 of 2014, the mandatory retirement age was 65 years. Prior to this regulation, the retirement age under section 33 of The Public Service Pensions Act was 55 years. The question therefore is whether Statutory Instrument No. 63 of 2014 which came into effect on 21st November 2014 is applicable to the applicant.

According to regulation 2, Statutory Instrument No. 63 of 2014 **only** applies to officers in the public service. Public Service means Judicial Service, The Civil Service, the Defence Forces, the Police and Prisons Service, the Teaching Service and the Zambia Security Intelligence Service. The applicant in this case was working for the respondent mining firm which entity does not fall in the public service as defined. What this means is that Statutory Instrument No. 63 of 2014 is not applicable to the applicant. The applicant cannot therefore rely on the said Statutory Instrument to advance his cause.

The applicant's argument however is that Statutory Instrument No.63 of 2014 led to the enactment of Amendment Act No. 7 of 2015. This argument is fundamentally flawed and misconceived at law. This is because a Statutory Instrument is delegated legislation premised on a principal Act of Parliament. As a form of legislation, a Statutory Instrument allows the subsequent bringing into force of an Act of Parliament or its amendment without Parliament having to pass a new Act. Therefore Statutory Instrument No.63 of 2014 was intended to amend the law on retirement in The Public Service Pensions Act being the principal Act of Parliament. The said Statutory Instrument cannot and was not intended to amend the law on pensionable age as was contained in The National Pension Scheme Act. This explains why Parliament had to enact The National Pensions Scheme (Amendment) Act No. 7 of 2015 to specifically amend the law as contained in the principal Act and to synchronize the retirement age in public service and private sector.

It is important to note that Statutory Instrument No. 63 of 2014 was subsequently amended by Statutory Instrument No. 24 of 2015; The Public Service (Retirement Age) (Amendment) Regulations for the sole purpose of synchronizing the retirement age in the public service and private sector.

According to Amendment Act No. 7 of 2015 which is applicable to the applicant, pensionable age means the age of 60 years with the option of retiring at either 55 years or 65 years. Prior to the amendment, the applicable law was The National Pension Scheme Act and according to section 2 of the said Act, the pensionable age for employees who made contributions to NAPSA was 55 years.

Amendment Act No. 7 of 2015 was assented to on 14th August, 2015. This is the day when it came into effect. It is therefore not in dispute that at the time when Amendment Act No. 7 of 2015 came into effect, the applicant had long reached the then mandatory retirement age of 55 years. I agree with the respondent's submissions that the law cannot apply retrospectively and as such Amendment Act No.7 of 2015 cannot apply retrospectively. It is therefore my considered view that Amendment Act No.7 of 2015 does not and cannot apply to the applicant who had reached the mandatory age of 55 years in January, 2015 way before the amendment. The applicant's employment was therefore lawfully terminated as it was in accordance with the law that was applicable at the time; being The National Pensions Scheme Act.

With the foregoing, I come to the inevitable conclusion that this case has no merit and it is hereby dismissed with costs to the respondent to be taxed in default of agreement.

Leave to appeal is hereby granted.

Dated at Kitwe; this 8th day of June 2017.



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CHILOMBO MAKAPHIRI
HIGH COURT JUDGE