

SELECTED JUDGMENT NO 27 OF 2017

P954

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

APPEAL NO. 23/2012
SCZ/8/295/2011

BETWEEN:

JOHN MUNSANJE

APPELLANT

AND

FAMILY HEALTH TRUST REGISTERED TRUSTEES

RESPONDENT

CORAM: Mwanamwambwa, DCJ., Kajimanga, Kabuka, J.J.S.
On the 6th of June, 2017 and 15th June, 2017

*For the Appellant: Mr. Frederick Mudenda of Messrs Chonta, Musaila and Pindani
Advocates*

For the Respondent: No appearance

JUDGMENT

Mwanamwambwa, DCJ., delivered the Judgment of the Court.

Cases referred to:

1. Kabwe Transport v. Press Transport (1984) ZR 43,
2. Annard Chibuye v. Zambia Airways Corporation (1985) ZR 4
3. Zambia Bata Company v. Mtambalika (2010) ZR, Vol. 2 p. 244
4. Societe Nationale Des Chemis De Pur Du Congo (SNCC) and Joseph Nonde Kakonde, SCZ Judgment No. 19 of 2013.
5. Livingstone v Rawyards Coal Company (1880) App Cas. 25, at page 39.
6. NFC Africa Mining Plc v. Jimmy Stewart Jilombo, Evason Muchuzi Simukoko - Appeal No. 84/2009

This is an appeal, from the Judgment of the Industrial Relations Court, dated the 1st of December, 2011.

The brief facts of the matter are that in 1995, the Appellant was employed by the Respondent as Project Manager for the Children in Distress Project. He was employed under permanent and pensionable conditions of service. He worked in this position for eight (8) years. In 2003, he was appointed to act as Executive Director for 6 months. The Appellant was confirmed in this position. As a result, he was retired from his earlier position and paid his terminal benefits. He was then given a 3 year contract as Executive Director. The Contract was with effect from 1st April, 2004 to 31st March, 2007. This contract expired on the 31st of March, 2007, and he was given another 3 year contract. The new contract was to run from 1st April, 2007 to 31st March, 2010.

The Appellant's conditions of service, as Executive Director, under the renewed contract, were as follows:

1. **US\$4,900 as monthly salary;**
2. **US\$200 as monthly air time allowance;**
3. **ZMW500 as monthly medical allowance;**
4. **US\$1,000 per month as an allowance from the Gift in Kind Project; and**
5. **ZMW800 as monthly fuel allowance.**

On the 28th of August, 2009, the Appellant received a letter of suspension from Dr. Roger Chongwe, one of the Board Members of the Respondent. The letter stated that the decision to suspend the Appellant was taken in order to facilitate

impartial and independent investigations by the Drug Enforcement Commission, into the financial transactions of the Respondent. After his suspension, the Appellant was arrested and he began appearing in court facing charges of theft by servant and money laundering. During the period of his suspension, he did not receive his salary and allowances. The suspension continued until 31st March 2010, when his contract came to an end, by effluxion of time.

As a result of the above events, on 24th June 2010, the Appellant took out a complaint in the Industrial Relations Court, for the following reliefs:

- 1. Payment of all allowances and salaries due in arrears;**
- 2. 25% gratuity under the terms of the employment contract;**
- 3. Damages for wrongful withholding of his salary and allowances;**
- 4. Leave days;**
- 5. Any other relief the Court may deem fit; and**
- 6. Interest and costs.**

After hearing the matter, the Court below was of the view that the Appellant was entitled to half salary during the period of his suspension. The Court held that the Appellant should be paid his half salary in arrears, from 28th August 2009, the date of suspension to 31st March, 2010, when his contract came to an end. The Court stated that the payment of his other half salary would depend on the outcome of the criminal prosecution that was in Court. The lower Court refused to order payment of his allowances on the ground that the allowances were connected to

the Appellant's performance of his duties. The court reasoned that when the Appellant was suspended, all the duties which entitled him to the payment of the allowances were equally extinguished.

As regards gratuity, the trial Court refused to grant payment of gratuity on the ground that the pending matter in the Subordinate Court may have an effect on the gratuity once concluded.

The court also ordered that the Appellant be paid his accrued leave days, interest on the amounts found due and costs of the proceedings.

As regards the claim for damages for wrongful withholding of the Appellant's salary and allowances, the trial Court refused to grant it. The Court stated that since the Appellant was not entitled to allowances, the claim for damages on the allowances could not stand. In relation to the half salary, the lower Court held that damages would amount to making double orders in favour of the Appellant since it had awarded interest on the amount.

The Appellant was unhappy with the above decision by the trial Court. He appealed to this Court on the following four grounds: -

Ground one

The court below erred in law and in fact when it declined to order the payment of gratuity due to the Appellant on account of a pending criminal matter in the Subordinate Court involving the Appellant.

Ground two

The Court below erred in law and in fact by failing to adjudicate on the payment of the other half salaries due to the Appellant during his suspension period (leading up to the expiry of the employment contract) by holding that payment of the other half salary may, though not necessarily, depend on the outcome of the criminal case.

Ground three

The court below erred in law and in fact when it declined to order the payment of accrued leave days for the duration of the Appellant's suspension leading up to the expiry of his employment contract.

Ground four

The Court below misdirected itself in law and in fact by declining to order the payment of allowances to the Appellant during the suspension period leading up to the expiry of his employment contract on the ground that those allowances were directly tied to or connected to the Appellant's performance of his duties.

When this appeal came up for hearing, there was no appearance on behalf of the Respondent. We decided to proceed with the hearing as there was proof of service on counsel for the

Respondent. He was served with the notice of hearing by both Counsel for the Appellant as well as the Court staff.

In proceeding with the appeal, Mr. Mudenda indicated that he would entirely rely on the Appellant's written heads of argument filed into Court on 11th November, 2016. On the view that we take of this matter, consideration of the arguments relating to grounds two, three and four will depend on our determination of ground one as the issues in those grounds are peripheral to the issue in ground one.

The issue in ground one is whether, at the time of hearing and determination of this case, in November and December 2011, the Appellant was entitled to payment of gratuity for two years. This was the period he was suspended, investigated by the Drug Enforcement Commission (DEC) for theft by servant and money laundering, arrested, prosecuted and tried for the two charges.

The issue in ground two is non-payment of the other half of the Appellant's salary, during the suspension period up to the end of his contract.

The issue in ground three is non-payment of accrued leave days, for the duration of the Appellant's suspension, leading up to the expiry of his employment contract. The issue in ground four is non-payment of the Appellant's allowances over the same period.

On ground one the gist of Mr. Mudenda's submission is that the trial Court erred in law and fact, when it declined to order payment of gratuity to the Appellant, on account of a pending criminal matter in the Subordinate Court, involving the Appellant. In support of his submission, he cited the following cases:-

(a) Kabwe Transport v Press Transport ⁽¹⁾

(b) Chibuye v Zambia Airways Corporation Ltd ⁽²⁾

(c) Zambia Bata Company Ltd v Mtambila ⁽³⁾

These cases hold that the result of a criminal trial cannot be referred to as proof of a fact which must be established in a civil court; and that this applies whether the criminal trial resulted in a conviction or an acquittal.

We must say that we do not agree. Under Clause 5 (f) of the Appellant's contract of service, the Respondent had the right to summarily terminate the contract of service, without liability for compensation or damages, if the Appellant was convicted of any criminal offence other than an offence which in the reasonable opinion of the Respondent, did not affect his position as Director of the Trust. If the Appellant was eventually convicted of theft by servant and money laundering, the Respondent would have been entitled to instantly terminate his contract of service, with effect from the date of his suspension. In that case, he would not have

been entitled to payment of gratuity for the two years he was on suspension. The Appellant was suspended pursuant to Clause 28 of the Respondent's conditions of service, which reads as follows:-

"28. SUSPENSIONS

28.1 An employee maybe suspended from work during the investigations of a complaint/charge against him/her or as a disciplinary measure per se. The purpose of the suspension in the former case is to allow free and fair investigations to be carried out before a final decision is made.

28.2 The time spent on suspension may be on half pay. If the employee is found to be innocent, he shall receive the balance of his pay."

From the evidence on record, the Appellant was suspended solely on the basis of investigations by DEC. The Respondent did not carry out its own investigations on the allegations of financial mismanagement of the Trust's fund, upon which the Appellant was later charged, arrested and prosecuted. The Respondent never administratively charged him over these allegations.

In answer to our question at the hearing, Mr. Mudenda said that the Appellant was eventually acquitted of the charges of theft by servant and money laundering. He was acquitted on the 17th of April 2015, after this case was heard and determined by the trial Court. We took judicial notice of the certificate of acquittal because it is a Court document. We ordered its production as

further evidence. We found it necessary or expedient to order its production, in the interest of justice, pursuant to our powers under Rule 25 (1) (b) of the Zambian Supreme Court Rules, 1975.

In our view, the principle stated in the cases of Kabwe Transport Company Limited v Chibuye ⁽¹⁾, Annard Chibuye v Zambia Airways ⁽²⁾, and Zambia Bata Company v Mtambalika ⁽³⁾, must be confined to the facts of those cases. It does not apply to this case. Applying it, would have meant barring production of the certificate of acquittal, which shows that the Appellant was innocent of the charges of theft by public servant and money laundering. Non production of this certificate would have occasioned injustice to the Appellant because it is the only way his innocence could be proved, given the fact that the Respondent never laid administrative charges against him over alleged misuse or misappropriation of its money. Most importantly, this case was heard by the Industrial Relations Court, a Court of substantial justice, which is not bound by technical Rules of evidence. This case involves application of specific conditions of service on suspension of an employee. It was in light of this that the trial Court said that the Appellant was free to sue for the withheld dues, after Judgment, if he was later found to be innocent. As Mr. Mudenda correctly argued, doing so would have amounted to multiplicity of actions. And we would add that the subsequent claim would have been

res judicata: See Society Nationale Des Chemis Du Congo v Joseph Nonde Kakonde ⁽⁴⁾.

Clause 28.2 of the Respondent's conditions of service, as set out above, as read with the certificate of acquittal, provides the short answer to this appeal. The Appellant having been found innocent and acquitted of theft by servant and money laundering, he is entitled to all the benefits he was deprived of by his suspension, pursuant to Clause 28.2 of the Respondent's conditions of service.

There was no attendance on the part of the Respondent at the trial. However, we note that an affidavit in opposition was filed on its behalf, whose veracity was not tested by way of cross-examination. Paragraph 19 of the opposing affidavit alleges that Clause 28 of its general conditions of service, dealing with suspensions, did not apply to the Appellant, who was employed under a specific contract of service. That what applied to him was Clause 5 of the same conditions. The Appellant denied this averment and maintained that Clause 28 applied to him.

We have examined the Appellant's contract of service. There is no clause dealing with suspension. Clause 5 specifically deals with termination of the contract and not suspension.

*as he would have been in, if he had not sustained the wrong for which he is now getting his compensation or reparation": See **Livingstone v Rawyards Coal Company** ⁽⁴⁾.*

In the present case, had the Appellant not been suspended, he would have been paid up to the end of his contract, the following: -

1. US \$4,900 as monthly salary;
2. US \$200 as monthly talktime;
3. US \$1,000 per month, as an allowance from the gift in kind project.
4. K800 (rebased), as monthly fuel allowance.

In accordance with the principle for awarding damages, as stated above, we order that the Appellant be paid the four benefits set out above.

We are of the view that the Appellant was not automatically entitled to K500 as medical facility, per month. This depended on him incurring medical expenses, for which he was entitled to reimbursement. In the absence of evidence such medical expenses, we will not award him anything. Indeed, Mr. Mudenda correctly conceded that he would not pursue the claim for medical allowance.

Finally, on the claim for gratuity, the trial Court stated as follows:-

"We shall not allow payment of gratuity now because of that pending criminal matter in the Subordinate Court, whose conclusion might have an effect on the payment of gratuity".

According to Clause 3 (b) of the Appellant's contract of service, he was entitled to payment of "25% gratuity on his gross annual earnings, for every successfully completed year of service, on annual basis...."

In terms of the above Clause, there can be no doubt that the Appellant was entitled to payment of 25% gratuity for each of the two years that remained on his contract of service.

We are of the opinion that after the Appellant was acquitted and found innocent of the two charges, he should have been paid the four claims, plus gratuity, even after the trial Court had delivered Judgment. We say so because the charges in question were the basis for his suspension and withholding of the money claimed.

We agree with Mr. Mudenda's argument on grounds two, three and four that it is not clear what the trial Court meant by

holding that: *"payment of the other half salaries, may, though not necessarily, depend on the outcome of the criminal case."* We equally find the holding vague. **NFC Africa Mining Plc v Jimmy Stewart Jilombo and Eveson Muchuzi Simukoko (5)**, which he cited in support of his argument on the issue, is on point. In that case, we held that *"a Judgment should not need interpretation. It should be clear and be able to address all the issues in contention"*. The holding in this case deviated from our decision in that case.

For the reasons given above, though different from those raised in the grounds of appeal, we allow this appeal.

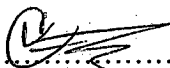
We award interest on the total Kwacha sum of the four claims, at the average short term Bank deposit rate, from the date of issue of the writ of summons to the date of this Judgment. This is pursuant to **Order 36, Rule 8 of the High Court Rules**. Thereafter, up to the date of settlement, we award interest, at the current lending rate, as determined by the Bank of Zambia. This is pursuant to Section 2 of **Judgment Act, No.16 Of 1997,CAP 81** of the Laws of Zambia.

On the facts of this case on the principle of compensation stated above, we will not award the Appellant general damages for wrongful withholding of the salary and allowances. This is because these have been restored to him with interest.

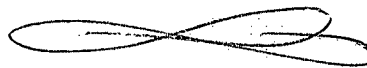
We award costs to the Appellant, to be taxed in default of agreement.



M.S. MWANAMBWA
DEPUTY CHIEF JUSTICE



C. KAJIMANGA
SUPREME COURT JUDGE



J. K. KABUKA
SUPREME COURT JUDGE