Selected Judgment No. 60 of 2017

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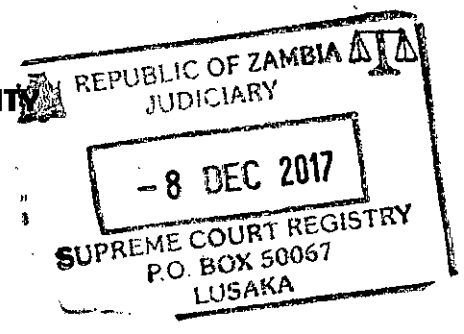
IN THE SUPREME COURT OF ZAMBIA **SCZ/8/314/2014**
HOLDEN AT NDOLA **Appeal No. 88.2015**

(Civil Jurisdiction)

BETWEEN:



ZAMBIA REVENUE AUTHORITY **APPELLANT**

AND

GILFORD MALENJI **RESPONDENT**

Coram: Wood, Malila and Musonda, JJS
on the 5th December, 2017 and 8th December, 2017

For the Appellant: Mr. M. J. Chitupila, In-house Legal Counsel, Zambia Revenue Authority

For the Respondent: Mr. M. Mando of Messrs Mukande and Co.

JUDGMENT

MALILA, JS, delivered the Judgment of the Court.

***Cases* referred to:**

1. *Jennifer Nawa v. Standard Chartered Bank Zambia Plc. (SCZ Judgment No. 1 of 2011).*
2. *Butler Machine Tools Limited v. Ex-cell-o Corporation (1977) 1WLR 401.*
3. *Henry (H. M. Inspector of Taxes v. Arthur Foster, Joseph Foster (167C 605).*
4. *Dole (H. M. Inspector of Taxes) v. De Soissons (32 TC 118).*
5. *Moll v. Inland Revenue Collections (1955) TC 38.*
6. *Nkhata and Others v. Attorney-General (1966) ZR 124.*

7. *Colgate Palmolive Zambia Limited v. Abel Shemy Chuka and 10 Others, SCZ No. 181/2005*

Legislation referred to:

1. *Industrial Relations Court (Arbitration and Mediation Procedure) Rules (Statutory Instrument No. 20 of 2002).*

Other works referred to:

1. *Craies on Statute Law by S. G. Edgar, 17th ed. (London, Sweet & Maxwell).*

The genesis of this appeal is a disputed taxation made in respect of the respondent's income due upon his separation from his former employer – Stanbic Bank Zambia Limited ('the Bank'). The dissension was on a fairly narrow point as to what tax rate was applicable on the respondent's separation package.

The background facts were plain. The respondent worked for the Bank for nearly twenty years. His position at the time of his separation from the Bank was that of Senior Manager – Special Projects. On 11 January 2010, the Bank wrote a letter to him terminating his services with immediate effect, citing provisions in the Bank's terms and conditions of employment as

the basis for the termination. Earlier in time, around June/July 2009, the respondent had been subjected to what he considered an 'orchestrated disciplinary process' on allegations of negligence in the performance of his duties. As it turned out, he was cleared of those charges in August, 2009. The letter of termination of his services, coming as it did after that clearance, thus riled the respondent so much so that he launched legal proceedings in the Industrial Relations Court, claiming among other reliefs, an order that he be deemed to have been mutually separated or prematurely retired from the Bank. That court action was in due course settled through court annexed mediation under terms whereby the respondent agreed with the Bank that the Bank's letter of termination would be withdrawn and the respondent and the Bank would thereafter be deemed to have been mutually separated.

The Bank, in due course, paid the respondent a separation package and computed the tax payable on the package using the rate set out in the Pay As You Earn (PAYE) tax table. The respondent resolutely disputed the rate used, insisting that his

tax liability should have been computed according to section 21(5) of the Income Tax Act, chapter 323 of the laws of Zambia as read with section 2(1)(b) of the Charging Schedule. For the avoidance of doubt, computation of tax payable on a separation package based on the PAYE tax table was less favourable to the respondent in that the tax payable would be computed at 35% whereas under section 21(5) of the Income Tax Act, the first K25,000 would be tax exempt and the remainder would be taxed at 10%. In truth and in fact, the formula proposed to be used to compute tax on the respondent's separation package would invariably result in less net payment to him.

In an attempt to break the impasse, the contestation over the applicable tax computation formula was referred to the appellant's Director, Small and Medium Taxpayer Office. After examining the circumstances, the Director, Small and Medium Taxpayer Office advised that the correct formula was that set out in the PAYE tax table, thus in effect agreeing with the Bank. The respondent was not in the least enthused over this advice from

the Tax Man. He appealed to the Revenue Appeals Tribunal ('the Tribunal').

The Tribunal considered the grievance and determined that the sense conveyed by the mediation settlement order concluded by the respondent and the Bank under the auspices of the Industrial Relations Court, was that the separation payment that the respondent became entitled to, came within the meaning of 'compensation for loss of office' or employment as defined by section 21(5) of the Income Tax Act, and as such it was that section and the Charging Schedule that applied to the taxation of the respondent's separation package, rather than the PAYE tax table. Not unexpectedly, the appellant was disconsolate with the Tribunal's decision. It thus appealed to the High Court.

After appraising the arguments of the parties and reviewing the authorities on the matter, the learned High Court judge agreed with the Tribunal's reading of the situation involving the parties and endorsed the Tribunal's interpretation of the relevant law on the issue. She, thus, dismissed the appeal. The appellant, much agitated by that decision, has now mounted the present

challenge, grumbling that the learned High Court judge misapprehended the law when she held that the respondent's separation from, the Bank amounted to a mutual separation or an early retirement which could be construed to fall within section 21(5) of the Income Tax Act and thus warranting treatment as compensation for loss of office under the applicable tax law.

In support of the lone ground of appeal, heads of argument were filed on behalf of the appellant on 15th June, 2015. It is upon these heads of argument that learned counsel for the appellant chiefly relied at the hearing of the appeal.

The first argument that Mr. Chitupila, learned counsel for the appellant, made was that the learned High Court judge failed to make a distinction between mutual separation and early retirement. The case of **Jennifer Nawa v. Standard Chartered Bank Zambia Plc**[1] was cited as authority for this submission. In that case we considered whether or not an employment contract had been terminated by mutual agreement or by early retirement. We endorsed the approach suggested by Lord Denning in **Butler**

Machine Tools Limited v. Ex-cell-O Corporation[2], that the proper approach to determining that question was to examine the documents exchanged between the parties, or to consider the conduct of the parties so as to ascertain whether or not they have reached agreement.

According to the learned counsel for the appellant, an examination of the documents exchanged by the parties in this case, particularly the letter of 29th July, 2010 written by the appellant to the respondent, reveals that what the parties intended to achieve was a mutual separation. Arising from the foregoing argument, counsel contended that it was a misdirection for the learned High Court judge to hold that the respondent's loss of employment amounted to loss of office so as to fall within section 21(5) of the Income Tax Act. In the understanding of the appellant's counsel, in holding as she did, the learned High Court judge expanded and, in the process, distorted the application of section 21(5) of the Income Tax Act to include mutual separation which, in the scheme of things, is not provided for under that section.

Counsel for the appellant also argued, that a proper reading of section 21(5) of the Income Tax Act should disclose that it only applies to situations where an individual receives income as compensation for loss of office or in circumstances where there is: (a) a repatriation allowance or severance pay made; (b) a redundancy; (c) an early retirement; (d) a normal retirement; or (e) death. None of these situations, according to counsel, existed in the present case.

It was Mr. Chitupila's fervid contention that the payment made to the respondent by his employer was not intended to be compensation for loss of office. He cited a passage from the Lord Hanworth's judgment in **Henry (H. M. Inspector of Taxes v. Arthur Foster, Joseph Foster**[3] which reads as follows:

> **..... if he [a man] resigns voluntarily, why should he be paid compensation for loss of his office? It would seem as if those words [in article 109] were put in view of the possibility thereunder of escaping the charge of tax compensation for loss of office is a well-known term.... It means a payment to the holder of an office as compensation for being deprived of profits to which as between himself and his employer he would, but for an act of deprivation by his employer or some third party such as the legislative, have been entitled."**

According to the learned counsel, there was mutual separation in the present case. There can, therefore, not be said to have been any deprivation of office of the respondent at the instance of the appellant so as to attract compensation to him for loss of that office.

To further buttress his argument, the learned counsel also adverted to the case of **Dole (H. M. Inspector of Taxes) v. De Soissons**[4] in which the court stated, among other things, that the proper exercise by a party of an option reserved by a contract of employment itself could not be viewed as an act of deprivation.

The learned counsel then moved on to argue a different point, namely, that when dealing with tax legislation, a court or tribunal must restrict itself to that statute as it is, with no additions or modifications. He cited the case of **Moll v. Inland Revenue Collections**[5] and drew our attention specifically to a passage in the judgment of Rowlatt J to the effect that:

> **.... in a Taxing Act, one has to look merely at what is said. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied, one can only look fairly at tax language used.**

Additionally we were referred to **Craies on Statute Law** by S. G. Edgar, 17th ed. where the author suggested that if the language of an Act of Parliament is clear and explicit, it must receive full effect whatever may be the consequences.

The appellant's learned counsel submitted that in interpreting section 21(5) of the Income Tax Act in the light of the plain facts of the case, the learned judge went against the principle articulated in the **Moll** case[5].

According to the learned counsel for the appellant, although a trial judge is not, as a general rule, to be reversed on findings of fact as the case of **Nkhata and Others v. Attorney-General**[6] illustrates, the trial judge in the present case took into account matters which she ought not to have taken into account when interpreting section 21(5) and her finding of fact should thus be reversed.

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The final argument made by the appellant's learned counsel related to the mediation settlement order. After quoting from the judgment now being assailed, counsel submitted that the court appeared to have been upholding the findings of the Tribunal. However, on close scrutiny of the mediation settlement order between the respondent and the Bank, it is evident that the mediation settlement did not delve into the determination of whether or not the mutual separation amounted to early retirement; that in the correspondence exchanged between the Bank and the appellant's Commissioner, Domestic Taxes, it was never envisaged by the parties that a mutual separation amounted to early retirement. Counsel also referred to the **Industrial Relations Court (Arbitration and Mediation Procedure) Rules (Statutory Instrument No. 20 of 2002)** on the finality of a mediated settlement.

At the hearing of the appeal on 5th December, 2017 Mr. Chitupila orally augmented the heads of argument. In buttressing the argument that the lower court judge fell into error in equating mutual separation and early retirement, Mr.

Chitapula drew our attention to the Mediation Settlement to which he claims the lower court judge made no reference. That document confirms, according to counsel, that the respondent and the Bank had mutually separated. He drew our attention specifically to paragraph 3 of the Mediation Settlement which reads:

> **Stanbic Bank Zambia Limited shall withdraw the letter of termination of Mr. Malenji dated 11th January, 2010 and shall replace the same with one of mutual separation.**

The learned counsel reiterated the biding nature of a mediation settlement. He cited the case of **Colgate Palmolive Zambia Limited v. Abel Shemy Chuka and 10 Others[7],** on freedom of contract.

We were urged to uphold the appeal.

The respondent's learned counsel filed heads of argument on behalf of the respondent on 21st November, 2017. At the hearing, Mr. Mando indicated that he was placing reliance on those heads of argument which he also augmented orally. He supported the judgment of the High Court on a number of fronts.

The first point he made in the heads of argument was that the learned judge in the court below had undertaken a meticulous assessment of the facts and the law to conclude as she did that the respondent did not leave employment on his own volition but was pushed out of employment by termination. In this regard, the package received was compensation for loss of employment and not a profit from his employment and, therefore, not taxable as a profit.

As regards the case of **Jennifer Nawa v. Standard Chartered Bank Plc**[1] which was cited and relied upon by counsel for the appellant, it was the impassioned contention of the respondent's counsel that, that case is distinguishable as the question for determination in that case was whether or not there was a binding agreement between the parties. Here, the question is whether, under the circumstances of the case, the lower court was on firm ground in holding that mutual separation in the context of the present case was synonymous with early retirement. He contended that to the extent indicated the case of **Jennifer Nawa**[1] is inapplicable.

According to counsel for the respondent, even assuming that the case of **Jennifer Nawa**[1] were applicable, the appellant appears to have misapplied it. Contrary to the direction by the court on the need to look at all the documents passing between the parties, and the conduct of the parties, the appellant only restricted the outcome of this matter on two documents, namely the mediation order and the letter of mutual separation.

The learned counsel then quoted section 21(5) of the Income Tax Act and submitted that the subsection has two parts to it; one that clearly deals with ordinary termination - pure and simple, and the other which concerned other types of termination of employment such as redundancy and early retirement. On a proper reading of the section, therefore, the respondent's separation package falls within either of the two.

Turning to the case of **Henry (H. M. Inspector of Taxes) v. Arthur Foster, Joseph Foster**[3], Mr. Mando submitted that this case settled the dispute as to what constitutes 'compensation for loss of office.' He submitted further that there was no contractual obligation on the part of the Bank in the present case to pay any

money upon the termination of the respondent's employment; that the payment that the respondent received was pure compensation for loss of office and did not constitute a profit from his employment. The respondent, according to Mr. Mando, did not agree to leave employment, but had his employment terminated, a development which he resiliently challenged in court.

It was the view of counsel for the respondent that the case of **Nkhata and Others v. Attorney-General**[6] cited by counsel for the appellant was not deployed usefully as the appellant failed to point out any matter that ought to have been taken into account but was omitted or ought not to have been taken into account, but was in fact taken into account

On the final argument regarding the efficacy of a mediation settlement, counsel for the respondent contended that the appellant's arguments were legally flawed as mediation is a compromise which does not define the parties' legal positions.

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In his supplementary oral arguments, Mr. Mando gainsaid Mr. Chitupila's submission that the lower court did not consider the mediation settlement in regard to the use of the term 'mutual separation.' He insisted that the lower court judge did in fact squarely deal with the issue when she stated in her judgment that:

> **I find in the present case, agreement by the parties at mediation to withdraw the termination letter and replace it with a mutual separation letter, did not alter the fact that there was 'premature' or 'early' termination of the respondent's employment...**

Mr. Mando also argued that there was no mention of 'mutual separation' in the Income Tax Act and therefore that mutual separation could legitimately be accommodated under section 21(5) of the Income Tax Act. He ended by reiterating the respondent's belief that the separation package that he received was compensation for loss of office.

According to counsel for the respondent, the appeal is on the whole without merit and ought to be dismissed with costs.

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We have considered the rival arguments of the parties to this appeal. It seems to us that the issue for determination is the narrow one of whether, in the circumstances in which the respondent separated from the Bank, he can be said to have 'lost office' and that his emoluments at separation are 'compensation for loss of office' within the intendment of section 21(5) of the Income Tax Act.

There was in this case much confusion before and during the hearing in the Tribunal and indeed in the High Court regarding the appropriate terminology to describe the respondent's ceasing to be an employee of the Bank. The appellant had initially gone to the extent of classifying it as a resignation. The respondent had called it an early retirement – or a mutual separation with the same effect. The learned judge below, for her part, conflated the terms 'mutual separation' and 'early retirement.' As we shall explain later in this judgment, any focus on terminology carries the risk that we would lose sight of the real issue and distort the bigger picture.

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A proper appreciation of the factual background to the present appeal will no doubt help in ascertaining the real intention of the parties. In our view, it is that intention which should, in the ultimate result, matter in determining the nature of the separation of the respondent from the Bank and what, for tax purposes, the status of the payment received by the respondent upon such separation.

Here we entirely agree that the approach taken in the **Jennifer Nawa**[1] case is the appropriate one to take. In the present case, therefore, we have to take into account the aggregate of the circumstances culminating into the separation of the respondent from the Bank.

There is of course no argument as to how the separation of the respondent from the Bank – his employer – was initiated.

In the proceeding before the Tribunal, the respondent, in giving the background to this matter in relation to how the separation was initiated, stated in his evidence in chief as follows:

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> **Sometime in December, 2009, I was approached by Management, in particular the Managing Director then Mr. Joseph Chikolwa, whether I would be interested to take an early retirement. This event followed the decision by the new Managing Director that he was reorganizing his management team, to which proposal I agreed subject to agreeing the package....**

The respondent added in his testimony that he had agreed to the proposed early retirement subject to agreement on his exit package. He was initially offered 12 months salary which he declined on the basis that it was not consistent with past practice in respect of senior managers who had left the Bank. When he declined this offer, he was then served with a termination letter. That letter of termination, written to the respondent by the Bank, was dated 11th January 2010. This was produced in the record of appeal. As far as relevant it reads as follows:

> **I would like to advise that Management has decided to terminate your employment with the Bank with effect from 11 January, 2010. The termination has been effected in line with the Bank's terms and conditions of employment and service.**

This letter of termination formed the formal foundation of the separation. In other words, the separation was at the behest of the Bank. It is illogical, at this stage at least, to claim that the

respondent initiated or consented to the separation from the very outset. He plainly did not. The subsidiary question to ask is what tax computation formula would have been used if the termination was not contested by the respondent, and matters ended at that point? Would it be the PAYE tax table or that set out in section 21(5) of the Income Tax Act and section 21(b) of the Charging Schedule? To answer this question, it is instructive to recap the provisions of section 21(5) of the Income Tax Act chapter 323 of the laws of Zambia. It enacts as follows:

> **Where upon termination of the service, of any individual in any office or employment, income is received by such individual by way of compensation for loss of office or employment including termination for reasons of redundancy or early retirement, normal retirement or death, the first twenty five million Kwacha of such income shall be exempt from income tax.**

Section 2(1)b) of part II of the Charging Schedule of the Income Tax Act chapter 323 provides that:

> **2(1) Subject to the provisions of this Act, tax in respect of income of an individual for a charge year shall be charged as follows -**

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(b) on any income falling within subsection (5) of section twenty-one which is not exempt from tax under that subsection, at the rate of ten per centum per annum.

We have elsewhere in this judgment already pointed out that computation of tax under the PAYE tax tables is at 35%.

The Bank's letter of termination of the respondent's employment itemised the respondent's entitlement upon such termination of his employment. They included three months salary in lieu of notice. It is easy to appreciate that the three months salary the respondent was to be paid was compensation for his immediate loss of employment. In our considered opinion, if the respondent had not contested the termination, his separation payment would not be categorised as profit or income for holding office; rather it would be compensation for loss of office.

The matter did not, however, end at the Bank writing the letter of termination and the respondent accepting to move on. The respondent took out proceedings in the Industrial Relation Court. From the complaint lodged, a copy of which is on the

record of appeal, the respondent sought, among other things, the following:

> **An order that [he] be deemed to have been mutual separated/early retired on the terms applicable in the respondent Bank or under the relevant employment laws and the relevant package be paid.**

The argument by the appellant in the instant case goes further to attribute consent or concurrence on the part of the respondent to alter what was initially a termination instigated by the Bank into a mutual separation. Mr. Chitupila contended, with verve, that the character of the separation of the respondent from the Bank changed when, through a mediated settlement, the termination was substituted for mutual separation.

We, of course, appreciate the weight of that argument. A person cannot consent to a separation and at the same time pillory it for being a unilateral action by the employer. The situation before us is, however, peculiar. The real intention of the parties is easily discernible from the sequence of events as they occurred part of which we have already recorded in this judgment. The Bank was desirous of getting the respondent out

of its employment ranks. This much is indisputable. It effected this desire by writing a termination letter after negotiations for a premature retirement were aborted. At that stage the respondent would have lost his office – and would be entitled to compensation of sorts, for that loss. Does the position change when the nomenclature of the separation changes from a termination to a mutual separation following the mediation settlement? We think not. The Bank's overall objective of getting the respondent out of its employment still remained. Regardless of the terminology used, the respondent still lost his office – and still had to receive payment in the form of a termination package from the Bank. The only thing that changed was the name of the separation from a termination to a mutual separation. This is the bigger picture which we cannot ignore.

We agree with the analysis of the Tribunal as well as the learned trial judge and her conclusion that the payment that the respondent became entitled to upon separation from the Bank was properly compensation for loss of office or employment. When the matter was subsequently taken to mediation, the

parties agreed that the respondent would receive 32 months salary, far much more than the three months salary in lieu of notice which was intimated in the letter of termination. We agree with the learned counsel for the respondent that the Bank had no legal obligation to pay this package to the respondent at separation. It cannot be explained otherwise than that it was compensation for the respondent's loss of office. The Bank may well have, for its own reasons, sought to buy the respondent's peace in view of the court action. Whatever motivated the settlement, however, the respondent ended up being compensated for loss of office. In his evidence before the Tribunal, the respondent stated as follows in response to the question what settlement was reached:

> **A settlement of 32 months salary. In addition because I intended to pursue my career the letter of termination was equally withdrawn and substituted with mutual separation so as to clear my record.**

No evidence to contradict this testimony was adduced nor was the respondent's testimony shaken in cross examination. This, in our considered view, gives a fairly expanded background to the intention of the parties and what precipitated their actions.

The learned High Court judge cannot be faulted for holding as she did.

We hold, therefore, that section 21(5) of the Income Tax Act as well as the Charging Schedule provide the applicable formula for assessment of tax on the respondent's separation package.

The appeal is thus destitute of merit and it hereby dismissed with costs to be taxed in default of agreement. The respondent shall be entitled to a refund of any excess tax paid to the appellant. The same shall carry interest at short term deposit rate from the date of the appeal to the Tribunal to date of judgment and thereafter at average lending rate determined by the Bank of Zambia up to date of payment.

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A. M. WOOD
SUPREME COURT JUDGE

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Dr. M. MALILA, SC
SUPREME COURT JUDGE

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M. MUSONDA, SC
SUPREME COURT JUDGE