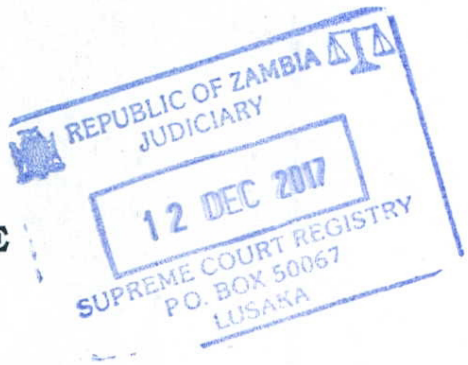
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 84/2015**

HOLDEN AT NDOLA

(Civil Jurisdiction)



B E T W E E N:

DAVIS EVANS KASONDE **APPELLANT**

AND

ZAMBIA REVENUE AUTHORITY **RESPONDENT**

CORAM : Mwanamwambwa DCJ, Hamaundu, Kabuka, JJS;
On 7th December, 2017 and 12th December, 2017.

FOR THE APPELLANT : Mr N. Yalenga, Nganga Yalenga and Associates.

FOR THE RESPONDENT : Mrs. N.K. Katongo, Legal Counsel, Zambia Revenue Authority.

JUDGMENT

Kabuka, JS, delivered the Judgment of the Court.

Cases referred to:

1. Siyumbwa Sitwala v Zambia Revenue Authority, Complaint No.102/2014 (Unreported).

2. SACTWU & Another v Cadema Industries (Pty) Limited [2008] 8 BLLR 790.

3. Zambia Revenue Authority v Dorothy Mwanza and Others (2010) 2 ZR 181.
4. Zambia Privatisation Agency v Matale (1995-97) ZR 157 (SC).
5. Council of Civil Service Union v Minister for the Civil Service [1984] 3 All ER 935.
6. Zambia National Broadcasting Corporation Limited v Penias Tembo (1995) ZR 67 (SC).
7. Francis v Municipal Councillors of Kuala Lumpar [1962] 3 All E.R. 633.
8. Saul Zulu v Victoria Kalima (2014) Vol.1 ZR 14 (SC).
9. Musasu Kalonga Building Limited and Another v Richmans Money Lenders Enterprises (1999) ZR 27 (SC).

Legislation referred to:

The Employment Act Cap. 268 s. 36 (a).

The Industrial Relations Court Rules r. 33.

By a ruling dated 2nd April, 2015, the Industrial Relations Court dismissed the appellant's Complaint on a preliminary point of law which was raised by the respondent. It is that ruling which the appellant has appealed to this Court.

The record of proceedings from the lower court shows that the facts of the case were not in contention. The appellant had

served the respondent company on specific fixed term contracts for a total period of 15 years and 1 month. He was initially employed by the respondent as an Assistant Tax Inspector on a three year fixed term contract with effect from 12th August, 1998. Clause 4 of this contract, headed **OFFER OF A NEW CONTRACT** provided that:

> *" The authority (respondent) in its discretion may offer a new contract or extend the employee's contract for such period as shall be deemed appropriate provided that the employee shall, three months before the expiration of this contract give notice to the authority of his or her intention to be offered a new contract."*

Three months before his first contract was due to expire by effluxion of time the appellant, in compliance with Clause 4 as quoted above, did request the respondent for a new contract. Upon considering the request, the respondent in its discretion offered him a new contract.

On 1st October, 2003 the appellant was offered a second five year fixed term contract which came to an end on 30th September, 2008. The record shows three months before this contract was due to expire, the appellant made a similar written request which he referred to as *'renewal'* of the contract.

In its reply to the letter, the respondent again offered the appellant who by then, had been promoted to the position of Tax Inspector, the third five year contract with effect from 1st October 2008. This contract was expiring on 30th September, 2013. Three months before the expiry of that contract, the appellant, by letter dated 18th June, 2013, again made another application for *'renewal'* of his contract in the position of Tax Inspector. The respondent's Corporate Investigations Divisional Employment Contracts Committee, sat to consider this application on 27th September, 2013 and by letter of even date, the appellant was informed that his application for a new contract was unsuccessful.

The appellant appealed the decision to the Commissioner General of the respondent institution on the ground that, he had not been given prior notice of his termination, contrary to the administrative procedures requiring the respondent to do so. The appellant also contended that, he had always met or exceeded his performance target expectations and had the necessary qualifications and skills for the job. It was his further complaint that he had not been furnished with reasons for the *'non-renewal'* of his contract.

In reaction to the appellant's administrative appeal, the Commissioner General of the respondent, in his letter dated 23rd October, 2013 reminded the appellant that his contract had a commencement date as well as an expiry date. As such, that his contract was not terminated but had expired in accordance with **section 36 (a) of the Employment Act, Cap. 268** in terms of which no notice was required to be given to him. The appellant was further reminded that, consideration for a new contract was at management's discretion and that, he was not entitled to retirement benefits, as he had not attained the age of 55 at the time his contract expired.

Aggrieved with the unsuccessful outcome, the appellant took the matter before the Industrial Relations Court on 14th May, 2014 and filed a Notice of Complaint seeking reinstatement or in the alternative, an order for payment of all his retirement benefits and compensation for loss of employment. In advancing these claims, the appellant contended that, the respondent had used its discretion to deny him a new contract when his five year fixed term contract came to an end on 30th September, 2013. That in doing so, his performance appraisal results for the past five years had been ignored.

In its affidavit in opposition filed in the matter, the respondent denied that the appellant was entitled to the relief of reinstatement he was seeking and maintained that, the appellant's contract had merely come to an end by effluxion of time. The respondent also contended that the appellant was not entitled to any retirement benefits as he had not reached the age of 55 at the time that his contract expired.

Counsel for the respondent thereafter filed a Notice to Raise a preliminary issue that was stated to be premised on Rule 33 of the Industrial Relations Court Rules. In advancing this preliminary issue the respondent relied on a decision of the same court in **Siyumbwa Sitwala v Zambia Revenue Authority**[1], where it was held that, the relief of reinstatement was not tenable for a contract that had expired by effluxion of time.

It was also the respondent's argument that, the appellant in the present appeal was informed that his application for a new contract was unsuccessful and that he had failed to disclose a clear cause of action on the basis of which the court could grant him the relief of reinstatement that he was seeking or indeed the

alternative prayer for retirement benefits when he had not attained the age of 55 at the time that his contract expired.

In opposing the application, the appellant also filed his own application for disposal of case on point of law, which was purportedly made, pursuant to Rules of the Supreme Court (White Book) 1965 Edition Vol. 1. The ground for making the application as stated in paragraph 3 of the affidavit in support sworn by the appellant was that, he had been reliably advised that his matter actually hinges on a point of law which was addressed in skeleton arguments filed on record, thus rendering proceeding to trial an academic exercise and a waste of the court's valuable time.

In his skeleton arguments the appellant stated that the basic facts of the case were not in dispute. That he had served 3 consecutive 5 year fixed term employment contracts, totalling 15 years plus 1 month and was advised to apply for a renewal of his contract by the Assistant Human Resource Director. On 18th June, 2013 he did apply for a renewal of his contract as advised but only received a letter of regret dated 27th September, 2013 which he claims was handed to him on 7th October, 2013. The

appellant did not therefore deny that he was on a fixed term contract. His contention was rather that, he was not availed his right to natural justice, as provided for in the respondent's Human Resources Policies and Procedures Manual.

The appellant further contended that, his contract had been habitually renewed on two consecutive occasions and that he had served the respondent diligently, which was evidenced by a performance based increment awarded to him 3 months before his contract expired. He further claimed to have attained a MET score which meant that he had achieved the respondent's performance objectives and targets. Granted those facts, the appellant contended that, he did have a *legitimate expectation* that his contract of employment would be renewed. The South African case of **SACTWU & Another v Cadema Industries (Pty) Limited**[2] was cited in support of this proposition, where it was held that, repeated renewals of short term contracts over a long period of time gave rise to a reasonable expectation of renewal, such that, the termination of the final contract constituted a dismissal. The appellant argued that, as he was not advised of the respondent's decision before the expiry of his contract, this was a breach of the principles of natural justice and the

respondent's own Human Resource Policies and Procedures which established a regular, consistent and predictable conduct, process or activity as regards the procedures to be followed by the respondent when renewing contracts. This created a reasonable expectation on his part which was legitimate and, reasonable logical and valid. The respondent's failure to follow its own laid down procedure therefore renders its decision null and void. It was the appellant's further contention that, the letter informing him of the non-renewal of his contract was only served 7 days to the expiry of his contract. That had he been informed of the decision not to renew his contract, he would have had the option of applying for early retirement.

Counsel cited various Public law cases in the realm of Administrative law on legitimate expectation and acknowledged that, the concept of natural justice which encompasses legitimate expectation is a novel concept being used in courts too often in recent times. That the concept applies the ethics of fairness and reasonableness in situations where a person has an expectation or interest relating to a long-standing practice or promise.

Counsel's submission on the point was that, the respondent's published Human Resource Policy gave rise to a legitimate expectation on his part and the failure by the respondent to follow the policy by communicating its decision *ex post facto* renders its decision null and void and the expiry of the contract can be said to be a dismissal.

Upon considering the applications to dispose the matter on preliminary issue and on point of law raised by the parties, the lower court took into account the appellant's arguments, that his right to natural justice was denied by the respondent; that he had served the respondent diligently which resulted in him obtaining a performance based increment; and that prior to the appellant's contract expiring by effluxion of time, he had attained a MET score which meant that he had achieved the respondent's performance objectives and targets.

The court also considered Clause 4 of the appellant's contract of employment which grants the respondent discretion to offer an employee a new contract of employment. The court further referred to **section 36 of the Employment Act** which provides for various modes of terminating written contracts,

including termination under **section 36 (a)** which states that expiry of a contract can be *'by expiry of the term for which it is expressed to be made.'*

On the basis of all those considerations, the court found that the appellant's fixed term contract came to an end by effluxion of time. That the South African case of **SACTWU & Another** [2] could be distinguished on the facts, as the contracts in that case were a series of short term contracts whilst in the case subject of the present appeal now before us, the three contracts were five year fixed term contracts. The lower court relied upon the case of **Zambia Revenue Authority v Dorothy Mwanza and Others**[3], where this Court held that, the condition of service relating to offer of a new contract does not provide for automatic renewal of contracts, as the offer of a new contract is in the employer's discretion.

The court accordingly came to the conclusion that, the appellant's contract of employment expired by effluxion of time and the offer of another contract was at the discretion of the respondent. The lower court found that the annual performance appraisal result of MET was not a condition precedent for

granting an employee another contract of employment. It was on those considerations that the lower court upheld the preliminary issue raised by the respondent and on that basis, dismissed the Complaint. Dissatisfied with the ruling, the appellant has come to this Court on appeal and has advanced three grounds stated as follows:

1. **The learned trial judge in the court below erred in law and fact when he proceeded to summarily dismiss the appellant's complaint on a point of law when there were many matters of fact and law which could only be determined at trial;**
2. **the learned judge in the court below erred in law and fact when he ruled that the appellant's contract of employment came to an end due to effluxion of time and the appellant cannot be held to be dismissed.**
3. **the learned trial judge erred in fact when he held that no regulation had been flouted to give rise to the denial of natural justice and that the appellant's claim to a legitimate expectation to have the contract renewed was misplaced.**

Counsel for the parties filed heads of argument in support of their clients' respective contending positions. In his submissions, the appellant argued all his grounds of appeal together.

The thrust of the appellant's arguments was that, he had a reasonable legitimate expectation that his contract would be

renewed as he had received a favourable performance based increment on 27th August, 2013. He was also qualified for the job and his contract had been renewed on two previous occasions. It was his contention that, the letter dated 27th September, 2013 was actually an afterthought by the respondent and was not brought to his attention before the contract expired for reasons that it had not been in existence at the material time. The case of **SACTWU & Another**[2] was again relied upon in emphasising the point that, repeated renewals of short term contracts over a lengthy period gave rise to legitimate expectation of renewal; and that termination of the final contract in those circumstances, constitutes a dismissal.

The appellant reproduced Clause 4 of his contract of employment which gives the respondent discretion to consider offering an employee a new contract of employment, where the employee has given a three months' prior notice for such consideration. The appellant argued that, as he had given the requisite three months' notice, it was incumbent on management to consider him for a new contract in conformity with Clause 4.9 of the Human Resources Policies and Procedures Handbook.

The appellant contended that, the respondent had failed to follow its own laid down procedure thus rendering its actions null and void. In the event, that the contract could not be deemed to have expired due to effluxion of time, but was in effect a termination by way of dismissal. The appellant in this regard argued that, his case can be distinguished from the case of **Siyumbwa Sitwala[1],** as he was handed his letter denying him a new contract after the said contract had expired, which was a denial of his right to natural justice.

The gist of the respondent's heads of argument in response, to the extent of relevance for the determination of issues raised in this appeal is that, the Complaint was misplaced and lacked merit as the appellant's employment expired by effluxion of time on 30th September, 2013 when the subsisting five year contract term came to an end. That any offer of a new contract was in the sole discretion of the respondent's management and employees were not entitled to a new contract as a matter of right. That the appellant's application for a new contract was duly considered by management and he was subsequently informed that it was unsuccessful. Counsel submitted that, the issue in this appeal is not about 'renewal' of contracts. It rather deals with an offer of a

new contract of employment which was for a period of five years and not a short term. This fact is in contrast to the situation in the case of **SACTWU & Another**[2] relied upon by the appellant. Counsel again, cited the case of **Dorothy Mwanza and Others**[3] as held that, the condition of service relating to offer of a new contract does not provide for automatic renewal of contracts as the offer of a new contract is in the appellant's discretion. Counsel further relied on the observations of this Court that were made in the **Siyumbwa Sitwala**[1] case, that as the appellant's contract had come to an end, for the appellant to claim the reliefs being sought was a clear abuse of the Court's powers.

Finally, Counsel referred to the case of **Zambia Privatisation Agency v Matale**[4] where we acknowledged the legal position that a fixed term contract will expire at the end of the period for which it is expressed to run, we quoted: THE MORDEN LAW OF EMPLOYMENT at page 463. The learned author there states that:

> **"where the contract expressly or impliedly provides that the relationship of employer and employee is to endure for a certain time, the contract will be determined at the conclusion of such period....."**

On the appellant's argument that the respondent's flouting of its own regulations resulted in denying him his right to natural

justice when he was denied the opportunity to apply for retirement, the submission was that the said claim was misplaced as the appellant had not attained age 55 at the time his contract expired. That even if this claim was to be considered on the basis that the Collective Agreement provided that the employee an option to apply for early retirement, the appellant had not made such an application and could therefore not be granted such a relief.

Counsel concluded her submissions by urging us to uphold the lower court when it found that the appellant's fixed term contract had come to an end and he was not entitled to the relief of reinstatement that he is seeking.

When the matter came up for the hearing of the appeal both Counsel for the parties relied on their written heads of arguments which were buttressed by oral submissions in answer to questions from the Court. In substance, Counsel did not in their oral submissions depart from their positions as presented in writing. The only point that was highlighted by learned Counsel for the appellant was the alleged impropriety by the lower court of having disposed of the appellant's Complaint, summarily, on a

point of law. As this issue is subject of ground one of the appeal, as amended, we will return to it later in this judgment.

We have otherwise taken time to consider the arguments, submissions and the case law relied upon by Counsel from which we find the real issue raised in grounds two and three of the appeal is whether an employee whose contract has expired by effluxion of time can claim for the relief of reinstatement, amongst others? For convenience we will proceed to first deal with these grounds before reverting to ground one.

According to Clause 2.1 of the contract entered into by the parties on 1st October, 2008 appearing at page 171 of the record, the appellant was to "hold his office for a period of five years" with effect from that date, meaning the contract was to remain in force up to 30th September, 2013. Clause 4 of this contract, reproduced at page 3 of this judgment gave the respondent discretion to offer the appellant a new contract.

The appellant has not disputed that his contract came to an end on 30th September, 2013 as provided for in the contract in issue, yet he raises the argument that, he had a legitimate expectation that his contract would, according to him, *"be*

renewed" as had happened on two previous occasions. In the case of **Council of Civil Service Union v Minister for the Civil Service,**[5] an administrative law decision, the House of Lords considered two situations which may give rise to a legitimate expectation, and held that, the circumstances in issue must be such as to affect:

> **"..... [the] other person... by depriving him of some benefit, or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy, and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received an assurance from the decision-maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."**

Assuming we applied the test espoused above, our perusal of all the contracts entered into between the parties to this appeal show that, they were all independent of each other and offered at the sole discretion of management without any input whatsoever required from the appellant. The appellant did not claim that he was assured of a new contract by anyone acting on behalf of the respondent or that the contract referred to any other condition precedent to be met by himself. And, none of the subsequent

contracts, in any way, referred to the previous one, meaning they were stand alone contracts, each with its own independent terms and conditions.

As correctly argued by Counsel for the respondent, there is nothing in the contracts that could create the impression that there were any other considerations such as performance, awards or salary increment that would be taken into account as condition precedents to offering an employee a new contract. The decision was in each case left entirely to management to exercise its discretion. In short, management reserved the right to either give or not to give a new contract and in doing so, management was not required to provide reasons as the decision was in its sole discretion.

In any event, the appellant's contract was for a fixed term period. Facts on record show that, this position was known to both parties. It is not in dispute that the appellant knew that he needed to apply for a new contract, three months prior to the subsisting contract terminating by effluxion of time and he infact did so. He was also aware that the decision could go either way, in that he could or could not, be awarded a new contract in

management's sole discretion. Even the Human Resource Policies and Procedures Manual on which the appellant so heavily relies, in 4.9 at page 430 of the record of appeal, states that:

> **"Management has full discretion on awarding new employment contracts. To this end it will strictly monitor and regulate all offers of new employment contracts through Divisional Committees.**
>
> **The purpose of setting up divisional committees to consider and approve new employment contracts is: -**
>
> - **to ensure fair and equal treatment of all contract employees**
> - **to protect employees against arbitrary and subjective decisions of managers**
> - **to protect managers from allegations of bias.** (Underlining for emphasis supplied).

The policy also requires the Human Resource Division to advise the concerned employee about the decision before the expiry of the contract. The appellant's grievance in this regard is that he was not informed of the respondent's decision before his contract expired on 30th September, 2013. Even if we were to accept the appellant's grievance as stated, it will still not alter the fact that he was not dismissed. His contract of employment had simply ran its course and was no longer in existence, it had come to an end. This renders the relief of re-instatement that the

appellant is seeking untenable as there is nothing subsisting to which he can be reinstated.

We have stated in numerous cases, amongst them, the case of **Zambia National Broadcasting Corporation Limited v Penias Tembo[6],** that reinstatement is a remedy which is rarely granted and the power to order reinstatement is discretionary, depending on the gravity of the particular circumstances. The circumstances of this case certainly, in our view, do not disclose any such facts as would justify the reinstatement of a contract that had already come to an end. To hold otherwise, would in effect amount to ordering specific performance of a contract which no longer exists. In dealing with that issue, in the case of **Francis v Municipal Councillors of Kuala Lumpar[7]** Lord Morris of Borth-Y-Gest summed up this position in the following observation:

> **"In their Lordships' view, when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court. In their Lordships' view there are no circumstances in the**

present case which would make it either just or proper to make such a declaration."

The appellant, in this appeal now before us, does not dispute that his five year fixed term contract came to an end by effluxion of time; and that the offer of a new contract was entirely in the discretion of the respondent. Unlike the short term contracts that were in issue in the case of **SACTWU & Another**[2] that he relied on, the five year contract period in issue in this appeal can hardly be referred to as short. We have already come to the conclusion that the remedy of re-instatement which the appellant seeks is not, on the facts, tenable at law. We further do not subscribe to the contention that, the facts which disclose stand alone fixed term contracts that expired by effluxion of time, provide us with any material on the basis of which a legitimate expectation could be said to arise. There is nothing in the contract which shows that the appellant would 'automatically' as a mere formality be granted a new contract, as his arguments appeared to suggest.

Going by the above observations, we hold the view that the learned trial judge was therefore on firm ground in dismissing the complaint at interlocutory stage and he was fortified by our

holding in **Zambia Revenue Authority**[3] where we held that the condition of service relating to the offer of a new contract does not provide for automatic renewal of contracts as the offer is in management's sole discretion. It is for the same reason that we do not subscribe to the argument that the respondent breached the rules of natural justice, for having failed to afford the appellant an opportunity to apply for early retirement by not timely communicating its decision not to offer him a new contract of employment.

Grounds one and two of the appeal, accordingly fail.

We will now return to the issue raised in ground one of the appeal, as amended, that the court below erred in law and fact when it proceeded to summarily dismiss the appellant's Complaint on a point of law, when there were many matters of fact and law which he had raised in his Complaint and which could only be determined at trial. Even if we were for argument's sake to accept that by giving him the letter declining him a new contract, belatedly, the respondent denied the appellant an opportunity to apply for early retirement pursuant to Clause 9.0 of his contract; and, in the same vein, that, by proceeding to

determine the matter on a point of law, the lower court compounded the disadvantage caused as the appellant was thereby denied an opportunity to have his matter determined after hearing the evidence, our view is that, the appellant by arguing in that manner, is seeking to have his cake and eat it. We say so as ground one of the appeal, as amended, contradicts the position that was taken by the appellant's own Counsel at the hearing of the preliminary issue where he confirmed that the substance of the appellant's grievance was a proper one to be disposed on a point of law. In Counsel's own words at page 393 of the record of appeal, this is what he told the lower court:

> *".....We believe that in answering the respondent's preliminary issue, we will be stating our case as this matter hinges on a point of law. Therefore upon answering the preliminary issue there will be no need to proceed to Trial as the facts are not in dispute. It is only a point of law..."*

The record shows the appellant's lawyer having narrowed down all the issues that were to be determined by the lower court to a point of law, on facts which he said were not in dispute, proceeded to file his own application for determination of the whole matter on a point of law as earlier outlined at page 7 of this judgment. He cannot now, on appeal, shift goal posts and blame

the lower court for not having availed the appellant the right of adducing evidence as his Counsel is presumed to act on his instructions.

It is also a trite legal position, that a trial court is obliged to only determine issues raised by the parties before it and, on appeal, the appellate Court is also confined to those issues. This is what we said in the cases of **Saul Zulu v Victoria Kalima**[8] and **Mususu Kalenga Building Limited and Another v Richmans Money Lenders Enterprises**[9]. In this case the parties by consent before the trial court below agreed to have the whole matter determined on a point of law and the court proceeded accordingly. Hearing of evidence not having been an issue in the lower court, the appellant is precluded from raising it as an issue in the present appeal now before us. For our part, we entertain no illusion at all that the grievance raised by the appellant that he was not heard has only arisen because the point of law was not determined in his favour. His insistence that the matter be referred back for hearing, undoubtedly, is to seek a second bite at the cherry, so to speak.

It is for the reasons that we have given that we do not accept his attempt to renege on the position that he took in the court below to have the matter disposed of on a point of law and now claim that the matter should have proceeded to trial. Accordingly, ground one of the appeal can equally not succeed.

Having so found, the appellant is, thus, only entitled to the benefits that were payable to him under the contract in issue, upon its expiry on 30th September, 2013 and only to the extent that they remain unpaid, if at all.

As the appeal is wholly unsuccessful, it is hereby dismissed. We award costs to the respondent, to be taxed in default of agreement.

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M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J. K. KABUKA
SUPREME COURT JUDGE