

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

APPEAL NO. 56/2015



BETWEEN:

UNITED BANK OF AFRICA ZAMBIA LIMITED

APPELLANT

AND

MAXWELL SICHILONGO

RESPONDENT

CORAM: Phiri, Muyovwe and Chinyama, JJS.

On 7th November, 2017 and on 7th May, 2018.

For the Appellant:	No appearance.
For the Respondent:	In person.

J U D G M E N T

Chinyama, JS delivered the Judgment of the Court.

Cases referred to:

1. **Charles Zavare v United Bank for Africa Zambia Limited, Comp/267/2011**
2. **Joseph Kafwariman & 14 Others v United Bank for Africa Zambia Limited, Comp/41/2013**
3. **United Bank for Africa Zambia Limited v Joseph Kafwariman & 14 Others, Appeal No. 138/2014**
4. **Rodgers Chama Ponde & 4 Others v Zambia State Insurance Corporation Limited (2004) ZR 151**
5. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172.**
6. **Ndongo v Moses Mulyango, Roostico Banda, S.C.Z. Judgment No. 4 of 2011.**

7. Timmins v Moreland Street Property Co Ltd [1957] 3 ALL ER 265

Statutes referred to:

- 1. The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, section 85(6).**

This is an appeal against the decision of the Industrial Relations Court (IRC) that awarded the respondent, a former employee of the appellant, annual leave allowance at the rate of 12% of his annual basic salary as provided in clause 2.4.1 of the United Bank of Africa (hereafter, "UBA") Group Employment Handbook of 2009. Under the clause, the allowance was payable to confirmed employees in the month of May each year at the rate of 12% of the annual basic salary.

This case is the third in a trilogy of complaints by employees against the respondent in the IRC at Lusaka relating to payment of the said annual leave allowance which they claimed applied to

them. The first case was **Charles Zavare v United Bank of Africa Zambia Limited**¹ while the second case was **Joseph Kafwariman and 14 Others v United Bank of Africa Zambia Limited**². In these two cases, the complainants had been employed under terms and conditions of service purportedly contained in the UBA Zambia Employee Handbook. It transpired that the said handbook was not in existence and did not come into being until July, 2013. After the complainants separated from their employment with the appellant, they claimed payment of the annual leave allowance provided in clause 2.4.1 of the UBA Group Handbook on the basis that it applied to them. There was, however, no mention of the UBA Group Handbook in the contracts of employment.

In the **Charles Zavare**¹ case the employees' entitlement to the allowance was affirmed by the IRC which found that:

".... the complainant's conditions of service were derived from the UBA Group Handbook since the UBA Zambia Handbook was non-existent. We therefore agree with the complainant that he was entitled to leave allowance as per clause 2.4.1 of the UBA Group Employee Handbook which provided for the payment of leave allowance to confirmed employees once a year in May at the rate of 12% of the annual basic salary."

The IRC, accordingly, awarded the complainant the annual leave allowance for the duration of his period of employment and the decision was never appealed against.

In the **Joseph Kafwariman**² case, the IRC determined the matter in the following manner:

“We find and hold that the complainants have proved their case that they are similarly circumstanced with Charles Zavare and are therefore entitled to be paid the 12% annual leave allowance. We are not persuaded by the argument of the respondent that the Group Handbook was never part of the contract or conditions of service ...”

This decision was appealed against to this court. In the ensuing case of **United Bank of Africa Zambia Limited v Joseph Kafwariman and 14 Others**³ we resolved the appeal in the following manner:

“The issue which decides this appeal was already decided in the Zavare case; namely that, an employee who resigned prior to the coming into effect of the UBA Zambia Employee Handbook was entitled to the 12% annual leave allowance provided for in clause 2.4.1 of the UBA Group Employee Handbook.

... We hold that the lower Court was on firm ground when it held that the respondents were similarly circumstanced with Zavare; and that the appellant was bound by the Zavare judgment by virtue of Section 85(6) of the Industrial and Labour Relations Act, Cap. 269 ...”

The decision of the IRC was thus upheld.

The basic facts in the case before us are similar to those in the two cases above. The respondent was also employed by the appellant Bank in October, 2009 as Service Officer and was confirmed in his appointment on 26th April, 2010 after successfully completing a six months' probation period. The employment was subject to terms and conditions stated in the letter of offer of employment and "the Bank's policies and procedures as contained in the UBA Zambia Employee Handbook". The said UBA Zambia Employee Handbook was not in existence, as it were, and only came into being in June, 2013. The UBA Group Handbook was in existence although it was not mentioned in the letter of offer of employment. The respondent resigned from his employment on 23rd October, 2013 having given prior written notice in a letter dated 16th September, 2013. By then he was serving as Branch Manager, at the respondent's Kamwala Branch. It was after leaving the respondent's employment and equally spurred by the outcome in the **Charles Zavare**¹ case that the respondent went to the IRC and lodged a complaint claiming payment of his annual leave allowance, among other reliefs, from the date that he was employed to the date of separation from employment.

The respondent's evidence in the Court below was briefly that his employment with the appellant was governed by the terms and conditions of service under the UBA Group Handbook because the UBA Zambia Employee Handbook referred to in the service agreement was non-existent. Further, that these terms and conditions similarly applied to Charles Zavare on the basis of which Mr Zavare was awarded the claim for payment of the annual leave allowance; therefore, that he too is entitled to the allowance and that the parties in this case should be bound by the judgment in the **Charles Zavare** case in terms of section 85(6) of the **Industrial and Labour Relations Act**.

In its response and evidence, the appellant stated that the respondent's conditions of service were not regulated by the UBA Group Handbook but the UBA Zambia Employee Handbook as per employment contract executed between the parties and that the said UBA Zambia Employee Handbook was already in place since 24th June, 2013 before the resignation of the respondent. It was, in any case, contended that the UBA Group Handbook was amended in 2010 dropping, among other provisions, the annual leave allowance provided in clause 2.4.1.

In its judgment, the IRC sustained the respondent's claim on the basis that when the respondent was employed in 2009 the UBA Zambia Employee Handbook was not yet in existence even if reference was made to it (in the employment contract); that what was in existence at the time was the UBA Group Handbook; that the UBA Zambia Employee Handbook was introduced and availed only in 2013 and could not be given retrospective effect; and that the introduction of the UBA Zambia Employee Handbook amounted to a unilateral variation of the contract of employment. The IRC thus ordered the appellant Bank to pay the respondent annual leave allowance at the rate of 12% of his basic salary as was held in the **Charles Zavare**¹ case as Mr Zavare and the respondent were similarly circumstanced both having worked during the period when the UBA Zambia Employee Handbook was not in existence. The annual leave allowance was to be effective from the date the respondent was employed to the date he separated from his employment.

Dissatisfied with the decision of the IRC, the appellant Bank appealed to this Court raising four (4) grounds as follows:-

1. The court below erred in holding that the UBA Group Handbook applied to the employment relationship between the Appellant and the Respondent by virtue of the fact that the Zambia UBA staff book was not in existence contrary to the documentary and direct evidence on record.
2. The court below erred in law and in fact by placing heavy reliance on bare assertions that were made by the Respondent that the UBA Group Handbook applied to him and that mere assertions are not enough as it is the duty of the Court to make a thorough investigation as it may consider necessary to satisfy itself that indeed there is sufficient evidence before it to entitle the Respondent to the remedy he sought.
3. The court below erred in holding that the introduction of the Zambia UBA Staff handbook in 2013 by the Appellant constituted a unilateral variation of the contract between the Appellant and the Respondent.
4. The court below erred in fact and in law when it held that the Respondent herein was similarly circumstanced as Charles Zavare in the case of Charles Zavare v United Bank for Africa Zambia Limited, COMP/267/2011 in particular that both employees worked under the terms of the UBA Group Handbook.

At the hearing of the appeal, the appellant was not represented. However, heads of argument speaking to the appeal had been filed. In support of ground one, it was argued that the employment contract between the parties neither incorporated the UBA Group Handbook that the respondent relied on nor was it in any way meant to be part of his contract of employment. It was

submitted, among other things, to the effect that the respondent's evidence that the UBA Group Handbook was to regulate the parties' relationship is a mere attempt to introduce extrinsic parol evidence in a written contract which is not admissible. The case of **Rodgers Chama Ponde & 4 Others v Zambia State Insurance Corporation Limited**² was relied on in which we held that "parol evidence is inadmissible because it tends to add to, vary or contradict the terms of a written agreement validly concluded by the parties." It was submitted that the IRC erred in law and in fact when it admitted extrinsic evidence and further failed to give evidential value to the evidence on record regarding the contradiction as to which Handbook was to govern the relationship between the appellant and the respondent but rather proceeded to merely rely on the **Charles Zavare**¹ case.

In support of ground two of this appeal, the substance of the submission was that the court below erred in law and fact when it failed to take into account that at no time were the conditions of service derived from the UBA Group Handbook. Counsel stated that there is no evidence on record to support a finding that the UBA Group Handbook was the one in existence at the time.

Counsel was of the position that the respondent had not established his case and cited the case of **Wilson Masauso Zulu v Avondale Housing Project Ltd**⁵ in which we held that “a plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent’s case”.

In support of ground three, it was reiterated as argued under grounds one and two that the UBA Group Handbook did not apply to the respondent’s employment with the appellant. It was submitted that it was an express term of the agreement that the terms of the respondent’s employment were to be governed by the UBA Zambia Handbook which was subsequently introduced in 2013 and could, therefore, not amount to a unilateral variation of the terms of employment but satisfaction of the appellant’s obligations under the contract of employment.

In support of ground four, the main argument was that the case of Charles Zavare was distinguishable from the current case in that in that case there was evidence before the court that certain provisions of the UBA Group Handbook were applied to Charles Zavare and as such the provisions of the UBA Group Handbook were considered to have been introduced into the relationship

between the Bank and Charles Zavare and it was on that basis that he was entitled to leave days allowances as provided for in the UBA Group Handbook and not merely because Charles Zavare worked for the appellant Bank. It was thus contended that to prove that he was similarly circumstanced as Charles Zavare, the respondent ought to have shown that not only was he an employee of the appellant Bank but also that the UBA Group Handbook was applied to him in some fashion which he did not do. With these submissions, we were urged to allow this appeal.

The respondent who attended the hearing in person told us that he would rely on the heads of argument that he had filed in response to the appeal. A perusal of the written arguments which the respondent appears to have written for himself, shows that they contain items of evidence not adduced at the trial in the lower court but which the respondent employs to justify his submissions. Obviously, such evidence cannot be admitted at this stage of the proceedings because it was not available to the trial court and did not influence the court in arriving at the decision now appealed against. Further, that it is unfair to the appellant who will have no opportunity to respond to the evidence. We shall, accordingly

consider only the arguments founded on the material that was placed before the trial court.

With regard to ground one, the respondent submitted that the handbook in use in the appellant Bank up to the time of his resignation in September, 2013 was the UBA Group Handbook of (June) 2010. He quoted the introduction to the same Handbook which had the following statement:-

“This Handbook shall be applicable to all employees of United Bank for Africa Plc”

The respondent submitted that the appellant Bank is a subsidiary of the UBA Plc and as such was, together with the entire workforce of the UBA, covered by the UBA Group Handbook and all employees were entitled to the conditions/benefits therein and that all staff matters were being handled in accordance with the same Handbook. He pointed out that the appellant Bank failed to show which Handbook was in use in Zambia as there were several versions all marked “2.1 June 2010” including the one that came into effect after September, 2013, as we understood him. He contended to the effect that the critical handbook was the one that took effect in 2009 which was amended in 2010. The respondent

submitted that contrary to the UBA Group Handbook of 2010, he together with others were not paid their annual leave pay.

In response to ground two, the respondent reiterated that the UBA Group Handbook of 2010 was the policy document that was used on all staff matters as it was the only document that provided the terms and conditions of service for employees. He submitted that UBA Zambia automatically used the UBA Group Handbook of 2010 in order to be compliant with the Bank of Zambia and Ministry of Labour regulations on terms and conditions of service.

With regard to ground three, the respondent again reiterated his arguments under grounds one and two. He submitted that the UBA Zambia Employee Handbook only came into effect in October, 2013 after he had already resigned from the Bank. Therefore, all terms and conditions in the UBA Group Handbook of 2010 applied to him and was thus entitled to leave allowance at 12% of annual basic salary payable every May.

In opposing ground four of this appeal, the respondent submitted simply that he was in a similar circumstance not only with Charles Zavare but also with the respondents in the case of **Joseph Kafwariman and 14 Others v United Bank for Africa**

Zambia Limited². On the basis of the foregoing responses, the respondent prayed that we uphold the decision of the court below and dismiss the appeal.

We have considered the grounds of appeal, the evidence in the court below, the judgment of the court and the arguments by the respective parties. The four grounds advanced by the appellant in this appeal, in our view, revolve around the one issue whether the UBA Group Handbook applied to the respondent's employment contract with the appellant Bank before the UBA Zambia Employee Handbook came into being. The court below made a finding of fact that the UBA Group Handbook applied to the respondent in the absence of the UBA Zambia Employee Handbook. We cannot interfere with this finding of fact made by the lower court unless we are satisfied that the finding in question was either perverse, or made in the absence of any relevant evidence or upon a misapprehension of the facts, or that the finding is one which, on a proper view of the evidence, no trial Court acting correctly can reasonably make, as held by this court in the case of **Ndongo v Moses Mulyango, Roostico Banda**⁶.

The evidence before the lower court given by the respondent was that when the employment contract which referred to the UBA Zambia Employee Handbook was signed between the appellant and the respondent, that handbook was not in existence. What was in existence was the UBA Group Handbook of 2009 and later that of June 2010. The evidence from the appellant was that the 2009 handbook did not apply to the appellant's employees in Zambia and, in any case, that the handbook was amended in June 2010 resulting in the provision on the payment of the annual leave allowance being removed. The decision of the IRC in the case involving Charles Zavare and the appellant (respondent in that case) meanwhile, was that in the absence of the UBA Employee Handbook, the UBA Group Handbook was applicable. This decision was followed in the latter case of **Kafwariman and 14 Others**² which we also upheld on appeal.

The issue to determine is whether the finding made by the lower court can be interfered with. It is clear to us from our reading of the judgment of the court below that in arriving at its finding, the court did not deal with the appellant's evidence that the 2009 Group Handbook was amended and that the provision relating to

the payment of the annual leave allowance was removed. This evidence is, however, not material to determining whether the lower court's finding that the UBA Group Handbook of 2009 applied to the respondent was proper. The evidence is only relevant to the question of ascertaining the period for which the annual leave allowance is payable to the respondent if we find that he was entitled to it. We shall accordingly, return to address the matter at an opportune time.

Regarding the question whether there is cause to interfere with the finding by the court below that the UBA Group Handbook applied to the respondent in this case, we will begin by saying that we do not agree with the argument in ground one by the appellant that relying on the provisions of the UBA Group Handbook is tantamount to admitting extrinsic parol evidence. The issue whether parol evidence should be admitted arises where the terms of what was agreed and embodied in a written contract is in dispute and evidence is asserted of matters not captured in the contract that tend to add to, vary or contradict its terms. The following statement of Jenkins LJ in the Court of Appeal case of **Timmins v Moreland Street Property Co Ltd**⁷ is instructive on the point:

I think it is still indispensably necessary, in order to justify the reading of documents together for this purpose, that there should be a document signed by the party to be charged which, while not containing in itself all the necessary ingredients of the required memorandum, does contain some reference, express or implied, to some other document or transaction. Where any such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to, or, as the case may be, to explain the other transaction, and to identify any document relating to it. If by this process a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document signed by the party to be charged, then the two documents can be read together so as to constitute a sufficient memorandum for the purposes of s 40 of the Law of Property Act, 1925.

We wholly adopt the statement. This case is not about the ascertainment of the terms and conditions in the UBA Zambia Employee Handbook and reading them together with those in the UBA Group Handbook. There is no contest, in this case, that the respondent's contract of employment was to be regulated under the UBA Zambia Employee Handbook. Only that it was non-existent at the material time. The respondent's case is simply that in the absence of the UBA Zambia Employee Handbook, the UBA Group Handbook was resorted to. Ground one of the appeal cannot succeed and we dismiss it.

The court below besides making the finding of fact that the UBA Group Handbook applied to the respondent also applied the

case of **Charles Zavare**¹ to reach its decision on the ground that the complainants in the two cases were similarly circumstanced. The basic facts in the **Charles Zavare**¹ case, as already highlighted, are that the complainant was offered employment on terms and conditions of service purportedly contained in the UBA Zambia Employee Handbook which was not in existence at the time. The appellant was without doubt a member or subsidiary of the global UBA Group. When faced with a case that required invoking disciplinary procedures, the appellant turned to the UBA Group Handbook. The Handbook was not mentioned anywhere in the letter of offer of employment and yet the appellant resorted to it to address a situation that was at the time not covered in the prevailing contract of employment. Because the appellant was able to make use of the provisions of the UBA Group Handbook to fill in the gap created by the absence of the UBA Zambia Employee Handbook, there was nothing to stop the complainant from claiming any other benefit provided in the Group Handbook including payment to him of the annual leave allowance. In other words the appellant introduced the UBA Group Handbook provisions to the employment contract that was intended to be

regulated under the non-existent UBA Zambia Employee Handbook. The court was thus, obligated to enforce the provisions of the handbook. It appears to us that it was on that basis that the decision in the **Charles Zavare** case is justified.

The appellant has tried to distinguish the present case from the **Charles Zavare** case. It was argued in this appeal that the UBA Group Handbook was applied in the **Charles Zavare** case because certain provisions in that handbook were invoked in dealing with Mr Zavare; that in the instant case it has not been established that any of the provisions of the handbook were applied to the respondent. We take the argument as an unnecessary clouding of the issue. We have explained that the appellant in the **Charles Zavare**¹ case resorted to applying the (disciplinary) provisions in the UBA Group Handbook to resolve a matter that was not covered in the prevailing terms and conditions of employment, the UBA Zambia Employee Handbook having been non-existent. We have also said that because the appellant could turn to the UBA Group Handbook which was never a part of the contract of employment, there was nothing to stop Mr Zavare from claiming benefits provided in the handbook. That is how he successfully claimed

payment of the annual leave allowance provided in the UBA Group Handbook. In the case before us, the respondent was employed in similar circumstances as Mr Zavare. We do not see how he can be denied a benefit given to a co-worker when they both served under the same terms and conditions of service. He is clearly, similarly circumstanced as Mr Zavare. The argument in ground four of the appeal against the finding of the lower court that the respondent was similarly circumstanced is, therefore, without merit. In the same fashion, the argument in ground two that the court relied on mere assertions that the UBA Group Handbook is also without merit. The court below may have been terse in its conclusion, the substance of it is clearly supported by the evidence.

With regard to the arguments in ground three relating to whether or not the introduction of the UBA Zambia Handbook in 2013 constituted a unilateral variation of the contract of employment between the respondent and the appellant, consideration of it can only amount to an idle exercise. Suffice to state that it is our firm view that the introduction of the UBA Zambia Handbook so late in the day after the employees had been subjected to the provisions in the UBA Group Handbook would be a

variation of the terms and conditions under which the relationship had been regulated. We will not protract this discussion as its merits will not affect the outcome of the appeal.

Having concluded in the foregoing manner, we are of the view that the lower court's finding that UBA Group Handbook and hence, the entitlement to payment of the annual leave allowance applied to the respondent cannot be interfered with.

In our considered view, this case is ultimately, on all fours with the cases of **Charles Zavare v United Bank for Africa**¹ and **United Bank for Africa Zambia Limited v Joseph Kafwariman and 14 Others**³. There is, therefore, no need for us to try and re-event the wheel in this case whose basic facts are similar to those in the two cases above and we have no doubt that the respondent is as much similarly circumstanced as his colleagues in those cases. The issue for determination in this appeal was already resolved in the two cases. We accordingly find no merit in any of the four grounds of appeal and the respondent is clearly entitled to payment of the annual leave allowance subject to what we say below regarding the appellant's evidence that the UBA Group Handbook was amended in 2010.

The fact that the 2009 handbook was amended was not contested by the respondent. As a matter of fact, his own position was that he expected to benefit under the 2009 handbook as amended in 2010. He appeared to be of the position that clause 2.4.1 continued to appear in the 2010 amended version as it had in the 2009 version. In his submission, the appellant, while acknowledging the introduction of the 2010 version, also attempted to put the blame on the appellant for producing several 2010 versions of the handbook, thereby stoking the impression that there was one which retained clause 2.4.1 of the 2009 version. Well, we did peruse the record of appeal. What we found is only one version of the 2010 handbook exhibited as "EO1" in the appellant's affidavit in support of Answer to the respondent's Notice of Complaint. A copy of it is also exhibited in the appellant's Notice to Produce at pages 194 to 261 of the record of appeal. Clearly, the clause 2.4.1 contained in the 2009 version of the UBA Group Handbook is not in the 2010 version of the handbook. The result of this is that there was only one version of the 2010 handbook and in that handbook the provision entitling employees to the payment of an annual leave allowance formerly appearing in clause 2.4.1 of the 2009 handbook

had been removed. This means that the respondent is entitled to payment of the annual leave allowance for the duration of the 2009 handbook up to June, 2010 when the entitlement was removed. Save for what we have said above, we dismiss the appeal with costs to the respondent, to be taxed in default of agreement.



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G.S. PHIRI
SUPREME COURT JUDGE



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E.N.C. MUYOVWE
SUPREME COURT JUDGE



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J. CHINYAMA
SUPREME COURT JUDGE