IN THE HIGH COURT FOR ZAMBIA 2015/HK/232
AT THE DISTRICT REGISTRY
HOLDEN AT KITWE
(CIVIL JURISDICTION)

REPUBLIC OF ZAMBIA JUDICIARY HIGH COURT 07 JUN 2017 DISTRICT REGISTRY 2. P.O. BOX 20135, KITWE.

BETWEEN:

BENNY MACHONA PLAINTIFF

AND

MSA SELECT ZAMBIA LIMITED DEFENDANT

Before; Hon. Madam Justice C. B. Maka-Phiri

For the Plaintiff: Mr. F. Chalenga of Messrs Freddie & Co

For the Defendant: Mr. M. Nsampato of Messrs Chibesakunda & Co.

JUDGMENT

Legislation referred to:

1. The Employment (Amendment) Act, No.15 of 1997

Other works referred to:

1. Halsbury's Laws of England Fourth edition, Para 667
2. W. S. Mwenda, Employment Law in Zambia: Cases and Materials (University of Zambia Press, Lusaka 2011).

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Cases referred to:

1. Chilanga Cement PLC v Kasote Singogo (2009) Z. R. 122.

The plaintiff commenced this action by way of writ of summons dated 20th April, 2015. His claims are as follows;

i) An order for damages for wrongful and unfair termination of employment.

ii) A declaration that the plaintiff be retired and entitled to early retirement benefits.

iii) An order for interest on all amounts found due.

iv) An order for costs incidental to these proceedings.

The Plaintiff's case

The plaintiff's evidence was that he was employed by the defendant as an issuing clerk on 1st November, 2010. The contract of employment was shown at pages 1-3 of the plaintiff's bundle of documents. He was later on 3rd October,2012 promoted to the position of Stores Coordinator and was given charge of all the Mopani Copper Mines sites whilst another Stores Coordinator by the name of Musonda Fwati was given charge of the KCM sites. What the plaintiff did not mention was that he was also in charge of a KCM Nkana smelter site. The plaintiff testified further that when KCM terminated its contract with the defendant in December, 2014, all KCM sites were closed and all the employees at KCM sites Musonda Fwati inclusive were moved to Head Office. By end of January, 2015, Musonda Fwati started working at the Mopani sites while the plaintiff proceeded on annual leave in line with Management's advice. On 18th February 2015, the defendant issued a Notice to consult on redundancy to the plaintiff as shown at pages

5-6 of the plaintiff's bundle of documents. The plaintiff however declined to go on voluntary retrenchment because his sites at Mopani were fully operational. On 2nd March, 2015, the plaintiff reported back for work from his leave and worked with Musonda Fwati in Mopani sites where they were both performing the same duties. The plaintiff's position was subsequently declared redundant on 7th April, 2015 and he was retrenched. It was the plaintiff's contention that on 13th April, 2015, Musonda Fwati took over the Mopani sites and was doing the routine work of a Stores Coordinator.

When cross examined, PW1 admitted that according to his contract of employment, the employer could deploy him to any site it deemed necessary. PW1 conceded that management held consultation meetings with all the employees and explained the procedure that was to be followed when lying off some employees. He further conceded that at one meeting, management explained that the criteria that was to be used was LIFO (**L**ast **I**n **F**irst **O**ut) which means that the employee who was last to be employed was the first to be laid off. PW1 told the court that Musonda Fwati was employed earlier than him.PW1 also confirmed that management had offered him an option of early retirement but he declined the offer. PW1 further testified that the challenges that the company was facing were explained to the employees in the consultation meetings.

The Defendant's case

DW1 Wessel Pieter Gouws is the Regional Manager at the defendant company. He testified that the defendant was in the business of supplying safety equipment to the mines and industries within Zambia. The defendant's biggest customers were Mopani copper Mines and KCM which both had onsite stores. Subsequently, the defendant lost the KCM contract and this affected the companies operation and revenue base. The defendant had more employees than it could accommodate with work which became financially unsustainable. This was on account that all the employees who were stationed at the KCM sites were assigned to work at Mopani sites. This situation prompted the defendant to issue a notice to all the employees for the restructuring of the company. The notification to all the employees on the imminent restructuring of the defendant is shown at page 1 of the defendant's bundle of documents. The defendant also sent a notification on redundancy to the labour office, Kitwe on 18th February 2015 as shown on page 2 of the defendant's bundle of documents.

DW1 explained that the restructuring was intended to align the manpower levels to the operational needs of the company. The defendant consulted with its employees for suggestions on what cost saving measures could be considered. Subsequently, an invitation to consultation was sent to the plaintiff and a one on one meeting was held. The invitation to consult is shown at page 3-4 of

the defendant's bundle of document. After several consultation meetings with the employees, the defendant decided to follow the LIFO criteria in the redundancy process and therefore in each category of employment, the person last employed was the first to be taken out.

DW1 explained that the company had two stores coordinator being the plaintiff and Musonda Fwati and this category of employees was to be affected by the redundancy. When the defendant applied the LIFO criteria, it was apparent that the plaintiff who was last employed was to be laid off. The plaintiff was subsequently served with the Retrenchment Notice shown at page 9 of the defendant's bundle of document. DW1 further explained that in line with what the defendant had reiterated during the consultations that when any position opened up, the retrenched employees were to be considered first, the plaintiff was contacted when a position of issuing clerk opened up but has declined to take up the position o account that it was a demotion.

When cross examined DW1 explained that according to the company structure, there were two positions at supervisory level of Stores Coordinator and Trainee Area Manager. The plaintiff was a Stores Coordinator at Mopani sites while Musonda Fwati was a Trainee Area Manager at KCM sites and both directly reported to the Regional Manager. DW1 further explained that the position of Stores Coordinator at KCM was elevated to Trainee Area Manager and as such there was no position of Stores Coordinator at KCM.

DW1 further explained that when KCM cancelled the contract, the defendants' employees who were stationed at KCM sites were still in employment and that was the reasons why they were brought to Head office. DW1 denied assertions that the employees at KCM sites had no work following cancellation of KCM contract. DW1 further conceded that according to the retrenchment notice issued to the plaintiff, the company was declaring the position of Stores Coordinator at Mopani redundant. DW1 confirmed that the work that Musonda Fwati was doing was the same as the one the plaintiff was doing. He however reiterated that the position of Stores Coordinator does not exist at the defendant as Musonda Fwati performs his supervisory role in his position as Trainee Area Manager.

In re-examination, DW1 that the two positions at supervisory level were those of the Stores Coordinator and Trainee Area Manager. The two positions had however same responsibilities. DW1 explained that the position of stores coordinator was declared redundant and it has still not been filled. DW1 further explained that all the defendants' employees worked for the defendant and not for KCM or Mopani. These mining firms were the defendant's customers with whom they had service contracts.

DW2, Haggai Kapula, is the Finance Manager at the defendant company. He testified that in December, 2014, the defendant lost its contract with KCM which constituted 60% of the defendant's business. DW2 explained that since the payroll was the company's

biggest expense, when the defendant could not get new business, it notified all the employees that there will be redundancy/restructuring. Labour office was equally notified and in February, 2015 the redundancy process was implemented using the LIFO criteria (Last In First Out.) DW2 explained that the plaintiff joined the defendant company later than Musonda Fwati and as such the plaintiff was retrenched.DW2 explained that following the retrenchment, the plaintiff was paid his retrenchment package.

When cross examined, DW2 confirmed that only the plaintiff was retrenched at the Mopani site. He further reiterated that when the KCM contract was cancelled, Musonda Fwati and all employees came to head office. In the meantime, the company was deciding on what cause of action to take and in January, 2015 Management encouraged employees to take leave as a cost saving measure.

In re-examination, DW2 emphasized that it was the company that was carrying out redundancy regardless of where one was stationed using the Last in First out criteria.

Findings of Facts

I have considered the evidence adduced in this matter and the following are my findings of facts. It is not in dispute that the defendant employed the plaintiff as an Issuing Clerk on permanent and pensionable conditions of service on 27th October, 2010. This is according to the permanent contract of employment shown at page

1 of the plaintiff's bundle of documents. The plaintiff however started working for the defendant company on 1st November, 2010.

On 3rd October, 2012, the defendant promoted the plaintiff to the position of Stores Coordinator and assigned him to be in charge of five sites at Mopani Copper Mines Plc. stores department. The sites being Mopani Central Shaft, Mopani Cobalt Plant, Mindolo North shaft, Mindolo Sub-Vertical shaft and Mopani South Ore Body Shaft. The plaintiff was also assigned a KCM Nkana Smelter site.

It is further not in dispute that the defendant had service contracts with Mopani Copper Mines and Konkola Copper Mines which both had onsite stores. The two mining firms were the biggest customers for the defendant. It is not in dispute that Konkola Copper Mines terminated the defendant's contract in December, 2014. The termination had impacted the defendant's business and resulted in the closure of all the KCM sites. The defendant brought all its employees including Fwati Musonda who were based at KCM to its Head Office in Kitwe. It is therefore a fact that the defendant had more employees than the work could afford as its business had diminished.

It has further been established that both the plaintiff and Fwati Musonda held supervisory positions in the defendant company and were reporting to DW1. Though Fwati Musonda's designation was Trainee Area manager, his responsibilities and those of the plaintiff

were the same. Musonda Fwati was employed on 8th January 2009 as issuing clerk whereas the plaintiff was employed on 27th October, 2010. It is therefore a fact that Musonda Fwati was employed earlier than the plaintiff.

On 18th February, 2015, the defendant issued a Notice to consult on redundancy to all its employees and to labour office, Kitwe. The employees were informed that following the cancellation of the KCM contract and other new businesses not materializing; it had no alternative but to declare positions redundant. It is therefore established as a fact that the defendant consulted with the plaintiff on the issue of redundancy prior to his retrenchment. Following the invitation to consult shown at page 3 of the defendant's bundle of documents, the plaintiff had a one on one meeting with the defendant at which his impending redundancy was discussed. The plaintiff conceded in his testimony that he attended the consultation meeting at which he turned down the offer to go on early retirement. It is important to note that in the invitation to consult, the defendant had clearly stated the categories of employees who would be affected by the redundancy and the position of Stores Coordinator was one of them. The plaintiff was therefore fully aware of the redundancy program that the defendant was to implement.

On 7th April, 2015, the defendant issued a Notice of redundancy and or Retrenchment Notice to the plaintiff terminating his permanent and pensionable employment. The plaintiff's last day of

service was the 10th April, 2015. It is established that the plaintiff was paid his redundancy package, Leave days, Payment in lieu of Notice and Gratuity. The formula used to calculate redundancy package was two months basic pay for every completed year of service in employment of the defendant company. This is evident by document shown at page 8 and 9 of the defendant's bundle of document.

Issues for determination

The issues for determination following my findings of fact are:

1. Whether a redundancy situation arose at the defendant company following KCM's termination of the service contract.
2. Whether the plaintiff's position of Stores Coordinator based at Mopani Copper Mines became redundant following KCM's termination of its contract with the defendant.
3. Whether the defendant's termination of the plaintiff's employment by way of redundancy was unfair.
4. Whether the defendant's termination of the plaintiff's employment by way of redundancy was wrongful.
5. Whether or not the plaintiff should be declared as having retired to be entitled to early retirement benefits.

The Law

The learned author W.S Mwenda in her book Employment Law in Zambia: Cases and Materials, revised edition 2011 at page 159 states that redundancy arises by operation of law. It takes place when an employer decides that the employees' services are no

longer needed. By declaring an employee redundant, the employer announces to the world that he does not need anybody to do that job. The learned author noted further that in practice the term redundancy and retrenchment are taken to mean one and the same thing. In this case, the defendant had in fact used the terms redundancy and retrenchment interchangeably.

The learned authors of Halsbury's Laws of England Fourth edition, Para 667 states that an employee is taken to be dismissed by redundancy if the dismissal is attributed wholly or mainly to the fact that:

(1) **his employer has ceased or intends to cease to carry on the business for which the employee was employed by him;**

(2) **his employer has ceased or intends to cease to carry on that business in the place where the employee was so employed;**

(3) **the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish; or**

(4) **the requirements of that business for employees to carry out work of a particular kind in the place where they were employed have ceased or diminished or are expected to cease or diminish."**

The plaintiff in his submission dated 20th May, 2016 has stated that the law on redundancy is provided for under section 15(2) of the Employment Act. I have perused the said section and I agree with the defendant's submission that section 15(2) does not in any way provide for termination of employment by way of redundancy. What the plaintiff's counsel has quoted and I believe this is the section

that he meant to cite is section 26 B (1) of the Employment (Amendment) Act No.15 of 1997. It is trite law that section 26B which falls under part IV of the Act applies to oral contracts and does not apply to written contracts. In the case of **Chilanga Cement PLC v Kasote Singogo**[1], cited by the defendant, the Supreme Court held inter alia that:

"Section 26B of the Employment Act, dealing with termination of employment by way of redundancy does not apply to written contracts. In enacting this provision, Parliament intended to safeguard the interests of employees who are employed on oral contracts of service, which by nature would not have any provision for termination by way of redundancy."

It is not in dispute that the plaintiff was employed on a written contract of service shown at pages 1-3 of the defendant's bundle of contract. It follows therefore that the plaintiff's submissions based on section 26B of the Employment Act cannot be sustained.

It is should be noted that the decision to declare an employee redundant is made by the employer once a redundancy situation arises as a matter of fact. The Supreme Court in the **Singogo case** had this to say on redundancies;

"Redundancies are planned activities of which the employee needs to be prepared for the loss of the job. Reasonable measures which should be taken will inevitably include notices and consultations which are so vital to the planning process."

Wrongful termination of employment occurs when the employer fails to follow the procedure as stipulated in the terms and conditions of employment or in the law when terminating employment. Wrongfully termination is in essence breach of contract of employment.

Unfair termination of employment on the other hand relates to the merit of the termination. The Court will look at the reasons for the termination and ascertain whether or not the employer was justified to terminate the employment.

Application of the law to the facts

In the case in casu, the findings of facts show that a redundancy situation arose as a matter of fact at the defendant's company. The cancellation of the KCM contract meant that the work which the employees were to carry out had diminished. The defendant's decision to carry out redundancies was justified and supported by the law. The plaintiff has not in fact disputed the fact that a redundancy situation arose at the defendant company. His contention was that he should not have been the one to be retrenched because his position of Stores Coordinator at Mopani did not fall redundant. According to the plaintiff the position that fell redundant was that of Stores Coordinator at KCM sites following the cancellation of the KCM contract. The plaintiff's argument is flawed in my considered view because as earlier noted it is the employer who determines what positions in the company would be declared redundant once a redundancy situation arise. It is

important to note that the plaintiff was employed by the defendant and not Mopani Mines where he was simply assigned to work from. The defendant's decision in this case was to declare the plaintiff's position redundant after the LIFO criteria showed that he was the one to be retrenched as he was the last to be employed in his category of employment. According to DW1, the position does not exist anymore in the defendant's establishment and it has not been filled. I am therefore satisfied that the plaintiff's position of Stores Coordinator was declared redundant following the redundancy situation that arose at the defendant company when KCM terminated its contract.

The issue therefore is whether the plaintiff's termination of employment by way of redundancy was wrongful and unfair? To answer this question, I have to look at the procedure adopted when the plaintiff was declared redundant. The starting point is to note as already noted that section 26 B of the Employment Act which provides for termination by redundancy is not applicable to the case in casu because the plaintiff was serving a written contract. The plaintiff's contract of employment on the other hand does not also have any provision on redundancy. The question therefore of whether or not there was breach of the terms and conditions of the contract of employment does not arise in the case in casu.

What then guided the redundancy process in this case? It is important to note that on the facts of this case the defendant as employer adopted a procedure akin to the one in section 26 B of the

Employment Act and followed it to the later. This is notwithstanding the fact that the section was not applicable to the plaintiff who served a written contract. The employees who were consulted throughout the process did not raise any objection to the procedure. The process was transparent and the defendant acted in good faith and took reasonable measures as required in the redundancy process. The defendant had therefore prepared the plaintiff for the job loss as it was not abrupt. It should be noted that plaintiff has not raised any issue with the redundancy procedure that was adopted neither did he fault it.

It is trite that the defendant had engaged in fair and genuine consultation with all the employees, the plaintiff inclusive prior to the redundancy exercise. The defendant had put in place a proper selection procedure which was made known to all the employees. Suffice to note that the Last In First Out (LIFO) selection criterion is an objective criterion with international recognition. The plaintiff has in fact not faulted the procedure that the defendant used in the selection process and conceded that he was consulted and as such was prepared for the job loss. The plaintiff's termination of employment was therefore not wrongful in my considered view. The termination was further not unfair because according to the selection procedure that was adopted, the plaintiff's position was to be declared redundant. As already noted a redundancy situation arose at the defendant company and as such the defendant was justified to effect the redundancies.

The plaintiff was duly paid his redundancy package in accordance with the Minimum Wages and Conditions of Employment Regulations of 1997 which was the applicable law. The plaintiff did not in fact raise any issues with the redundancy package that was paid to him.

Can a declaration that the plaintiff be retired and be entitled to early retirement benefits be made on the facts of this case? My answer is no. The plaintiff in this matter was declared redundant and was paid his benefits. The plaintiff had in fact declined the option of going on early retirement which the defendant had offered him during the consultations. The plaintiff cannot have both worlds as the circumstances were for either early retirement or redundancy. The plaintiff cannot seek to be retired now when he had declined the option.

With the foregoing, I come to the conclusion that the plaintiff's case has no merit. It is dismissed in its entirety with costs to the defendant to be taxed in default of agreement.

Leave to appeal is hereby granted.

Delivered at Kitwe this 7th day of June, 2017.

CHILOMBO MAKA-PHIRI (MRS)
HIGH COURT JUDGE