

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

Appeal No. 239 of 2020

BETWEEN:

ZAMBIA ELECTRONIC CLEARING HOUSE LIMITED

Appellant

AND

JAMES KALENGO

Respondent



CORAM: Kondolo, Sichinga and Sharpe-Phiri, JJA
on 5th April 2022 and 1st November 2022

For the Appellant: Mr. H. A Chizu of Messrs Chanda Chizu &
Associates

For the Respondent: Mr. M. Kalifungwa of Messrs Jonah Sitimela &
Partners

J U D G M E N T

SHARPE-PHIRI, JA, delivered the Judgment of the Court

Legislation referred to:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Court of Appeal Act, No. 7 of 2016 of the Laws of Zambia*
3. *The Constitution of Zambia, Chapter 1 of the Laws of Zambia*

Cases referred to:

1. *Admark Limited v Zambia Revenue Authority (2006) ZR.42*
2. *William David Carlisle Wise v E.F. Hervey Limited (1985) ZR. 179*
3. *Mazoka and others v Mwanawasa and others (2008) ZR.138*

4. *Chate v Chungu* (2014) Vol. 2 ZR 216
5. *Ndola Energy Company Limited v Lamamuda Limited* Appeal No. 62/2014
6. *Communication Authority v Vodacom* SCZ No. 21 of 2009 (Unreported)
7. *Hotel and Tourism Institutes Trust v Happy Chibesa* SCZ No. 58 of 2001
8. *Schmidt v Secretary of State of Home Affairs* (1969)2 CH 149
9. *Holmes Limited v Buildwell Construction Company Limited* (1973) ZRL 97
10. *African Life Finance Services (Zambia LTD T/A Saturnia Regna Pension Trust Fund v Kelvin Fungo* SCZ Appeal No. 112 of 2005 (unreported)
11. *Zambia Bottlers v Enock Njovu* Appeal No. 106/2002 (unreported)
12. *Mashebela v National Breweries Limited* SCZ Appeal No. 23 of 1993 (unreported)
13. *Care International Zambia Limited v Tembo* SJ No. 56 of 2018
14. *Attorney General v Kapwepwe* SCZ Judgment No. 37 of 1974 ZMSC 28 (8 October 1974)
15. *Corbett-Tribe v Zambia Publishing Company Limited* (1973) ZR. 9
16. *Patrick Fungamwango and Zambia Daily Mail Mundia Nalishebo* Appeal No. 133 of 1999
17. *Justince Mbita Silumbwe v Barclays Bank of Zambia Limited* Judgment No. 4 of 2017 (Unreported)
18. *Seventh Day Adventist Church North Zambia Field v Daniel Kabaso and others* Appeal No. 124/2005 (Unreported)
19. *Zambia Consolidated Copper Mines Limited v Matale* SCZ Judgment No. 9 of 1996
20. *Kelvin Hanga'andu and Company v Mulubisha* (2008) ZR. 82

Other works

1. *Halsbury's Laws of England*, Volume 41, page 725
2. *Friedman on the Modern Law of Employment* at page 463

1.0 INTRODUCTION

- 1.1 This is an appeal against the judgment of Mwansa, J of the Industrial Relations Division of the High Court of 18th September 2020.

- 1.2 By that judgment, the lower Court found that the respondent was under a genuine legitimate expectation of renewal of his contract of employment and the Court awarded him punitive damages on that account of twelve (12) months basis salary calculated at the last month's pay.
- 1.3 Further, that the judgment sums were to attract interest at the Bank of Zambia short term deposit rate from 23rd August 2017 being the date of notice of complaint to judgment and thereafter at the rate of 6% from date of judgment to complete payment.

2.0 BACKGROUND

- 2.1 The brief facts of the matter are that by letter dated 21st February 2014, the appellant offered the respondent a two-year fixed term contract of employment as Chief Executive Officer and National Financial Switch Project Manager. The respondent was at the time working in Rwanda on a similar project and by virtue of the offer of employment, he would return to Zambia in that capacity, which he did.
- 2.2 At the end of the two-year period, the project of the National Switch was not completed, and the respondent requested the renewal of his contract of employment by letter to the Board Chairperson of the appellant.

By letter dated 8th February 2016, the Bank of Zambia notified the respondent of the non-renewal of his contract of employment.

2.3 Dissatisfied with the non-renewal of his contract, the respondent filed a Notice of Complaint on 31st October 2017 under cause IRCLK 428/2017.

2.4 In the Notice the respondent sought the following reliefs as against the appellant, namely:

- a. **Compensatory damages for defamation of character;**
- b. **Compensatory damages of 24 months emoluments for Unlawful and Unfair dismissal;**
- c. **Damages of 12 months emoluments for loss of legitimate expectation of employment in the banking, financial and other sectors;**
- d. **An order for 6 months emoluments as exemplary punitive damages;**
- e. **An order for 6 months emoluments in lieu of notice; and**
- f. **Interest, costs and any other benefits the Court may order.**

3.0 DECISION OF THE COURT BELOW

3.1 The matter was heard and determined by the Court below. In its judgment, particularly as relates the issues under consideration

in this appeal, the learned Judge held that the loss of legitimate expectation of employment in the banking, financial or other sectors had no footing and basis of success. The Judge pointed out that he did not see why an unpublicized forensic report for the whole country and not specifically for the said sector which the respondent was employed in could have any bearing on the respondent's prospects of employment. The Court dismissed the respondent's claim for loss of legitimate expectation.

- 3.2 The trial Court however went further to hold at page J7 that by extension of the relief falling under (f) 'any other relief the Court may deem fit', it would consider that other matters.
- 3.3 The trial Court considered that the appellant poached the respondent from Rwanda where he was employed under a similar project. That at the expiration of the 2-year contract period, the National Financial Switch Project had not yet been completed. That the appellant handpicked the respondent for the job and that the respondent in fact believed that he was the only one who was capable of handling the scope of works involved in the implantation of the project. The Court went ahead to conclude that the respondent's legitimate expectation of renewal of employment was breached and accordingly ordered and directed that he be awarded punitive damages for loss of expectation and also punitive damages equal to 12 months of basic salary.

3.4 The learned Judge also awarded interest on the judgment sum at the Bank of Zambia short term deposit rate from the date of the notice of complaint, i.e., the 23rd of August 2017 to date of judgment and thereafter judgment interest to accrue at the rate of 6% per annum from the date of judgment to date of payment, plus costs.

4.0 THE APPEAL

4.1 Dissatisfied with the judgment of the lower Court, the appellant appealed to this Court advancing four grounds of appeal that:

- (i) **The learned trial Judge erred in law by restating and relying on a relief ‘*any other relief the Court may deem fit*’ which was not pleaded and was actually speculative but heavily relied on the same to award damages to the Respondent.**
- (ii) **The trial Court below erred in law and fact and contradicted itself when it dismissed the pleaded claim of ‘*legitimate expectation of employment in the banking, financial and other sectors*’ but went ahead to award the Respondent on an unpleaded claim of legitimate expectation of renewal of contract.**

- (iii) **The trial Court misdirected itself in law and fact by awarding the Respondent punitive damages of twelve months salary.**
- (iv) **The Court below erred in law by awarding costs to the Complainant when in actual legal sense the Respondent's claim or reliefs were unsuccessful or a big proportion of the claims failed.**

6.0 APPELLANT'S HEADS OF ARGUMENT

- 6.1 In their heads of argument of 25th November 2020, the appellant argued in relation to ground 1 that the trial judge erred in law by relying on "*any other relief the Court may deem fit*" which was not pleaded to award damages to the respondent.
- 6.2 In the Notice of Complaint, there was no relief claimed as "*any other relief the Court may deem fit*" which the Court below restated in its judgment on page 7 of the Record of Appeal. The claim under part (f) sought: '*interest, costs and any other benefits the Court may order.*' This was different, hence the Court granted reliefs that were not pleaded.
- 6.3 It was argued that parties are bound by what they plead and that the Court ought not to have awarded what was not pleaded.

In the case of **Admark Limited v Zambia Revenue Authority**¹ the Court stated: *‘the purpose of pleadings is to ensure that in advance of trial, the issues in dispute between parties are defined.’*

- 6.4 The cases of **William David Carlisle Wise v E.F. Hervey Limited**,² **Mazoka and others v Mwanawsa**,³ and **Chate v Chungu**⁴ were cited in support of the contention that the purpose and function of pleadings is to give parties fair notice of the claims that they are to meet; to define the issues for the Court to adjudicate and once the pleadings are closed, the parties are bound by their pleadings.
- 6.5 The appellant argued that the reliefs sought from (a) to (e) upon which the claim was anchored were dismissed. It was therefore odd that the Court would award damages under *“any other relief.”*
- 6.6 The appellant argued that the Supreme Court overturned the judgment in the case of **Ndola Energy Company Limited v Lamamuda Limited**⁵ on the basis that trial judge had awarded a party what it had not claimed in its pleadings. The appellant thus requested this Court to upset the lower Court’s award and set aside the judgment by allowing this ground of appeal on the strength of the above authority.
- 6.7 With respect to ground 2, the appellant submitted that the trial Court had contradicted itself when it dismissed the pleaded claim of *“legitimate expectation of employment in the banking financial*

and other sectors” but went ahead to award the respondent on an unpleaded claim of legitimate expectation of employment.

- 6.8 That this relief was ably considered by the Court but strangely, after dismissing this relief, the Judge proceeded and formulated another relief of *‘legitimate expectation’* which was not pleaded.
- 6.7 That the Court misinterpreted or misapplied the cases on legitimate expectation to the case at hand. The cases of **Communication Authority v Vodacom**,⁶ **Hotel and Tourism Institutes Trust v Happy Chibesa**⁷ and **Schmidt v Secretary of State of Home Affairs**⁸ are distinguishable from the present case.
- 6.8 The appellant argued that the principles discussed in the judgment of the lower Court on the issue of legitimate expectation refers to an employee who was promised something or there was such conduct giving rise to an expectation. The evidence on record was clear that the respondent was never promised that his employment would be automatically renewed. The respondent was on a fixed term contract which was fully performed, and he was paid everything after the expiration of his contract.
- 6.9 The appellant submitted that the trial Court was wrong to import principles of legitimate expectation which were not embodied in the contract of employment. The contract of employment was specific and conclusive.

The respondent was employed on a fixed term contractual basis; hence the award of legitimate expectation was unjustified and should be dismissed with costs.

6.10 The appellant referred to the case of **Ndola Energy Company Limited v Lamamuda Limited**⁵ where it was held that:

'We must also state here that the doctrine of legitimate expectation is associated with a promise, representation, practice, or policy made, adopted, or announced by or on behalf of Government or a public authority. It should not be extended to private individuals to a contract as a basis for awarding damages for breach as was the case in the Court below.'

6.11 The above authority demonstrates that the principle of legitimate expectation cannot be extended to a private individual such as the respondent herein. The request for renewal of the contract was not automatically guaranteed as the appellant could not force an employer to employ him as this defeated the fundamental principle of freedom of contract between parties.

6.12 The case of **Holmes Limited v Buildwell Contraction Company Limited**⁹ was cited where the Court held that: *'where parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally allowed to add to vary, subtract from or contradict the terms of the written contract.'*

6.13 **Halsbury's Laws of England**¹ was also referred to where the learned authors affirmed the position of the law as: *'a contract may be stated to last for a set period of time in which case it is considered to be a fixed term contract and at the end of the relevant period it terminates by expiry.'*

6.14 The appellant also cited page 463 of **Friedman on the Modern Law of Employment**² that states that *'when there is an agreed time for the contract to endure, termination will occur at that end of such period.'* The appellant argued that the refusal to renew the contract was in line with the contract and as permitted by law.

6.15 In relation to ground 3, the appellant submitted that the Judge misdirected himself by awarding the respondent punitive damages of twelve month's salary. The law on damages in employment law or labour law was well settled. In the case of **Care International Zambia Limited v Tembo**¹³ the Supreme Court guided on the principles. On the question of an award of punitive damages when the exit of the respondent was clearly spelt out in the contract, the Court held that it did not call for any damages. The exit was by effluxion of time, i.e., the contract having ended by accord and satisfaction. That the trial Judge misapplied the term of punitive damages which mainly applies in tort cases and not in employment matters.

6.16 It was submitted that punitive damages are damages assessed in the legal process to punish a defendant for negligence. That punitive damages are usually imposed to make an example of the negligent party to deter others from behaving in the same fashion or committing similar wrongful behavior. Several authorities were cited in support of the arguments on punitive damages, including the case of **Attorney General v Kapwepwe**,¹⁴ **Corbett-Tribe v Zambia Publishing Company Limited**¹⁵ and **Patrick Fungamwango and Zambia Daily Mail, Mundia Nalishebo**.¹⁶

6.17 The appellants referred to **Justince Mbita Silumbwe v Barclays Bank of Zambia Limited**¹⁷ where Mwanamwambwa DCJ stated what constitutes exemplary damages and when to award:

'Exemplary damages are punitive. They are awarded where the conduct of the Defendant merits punishment, this is where his conduct is wanton, where he acts in contumelious disregard of the disclosed fraud, malice, vindictiveness, violence, cruelty, insolence, or arrogance or the like. They are mostly awarded in two classes of cases. One is cases of offensive, arbitrary or unconstitutional action by servants of the state. The other is where the Defendant's conduct has been calculated by him to make a profit for himself, which may exceed the compensation.'

6.18 The appellant argued that punitive damages did not arise in this case because of the following reasons:

1. *The claim was not based on the law of tort,*
2. *There was no damage proved as a result of expiry of contract.*
3. *All reliefs giving rise to the way the respondent's employment contract was terminated (effluxion of time) were dismissed.*
4. *Punitive damages could not arise on its own as main damages.*
5. *The respondent had already been paid whatever was due to him therefore any imaginable damages could not even accrue.*
6. *The award of 12 months' pay for punitive damages had just no basis at all.*

6.19 In relation to ground 4, it was submitted that the Judge erred by awarding costs to the complainant when the respondent's claims were unsuccessful as majority of the claims, five out of the six had failed. The appellant was successful in defending more than 90% of the claim, therefore, it was wrong to order the costs wholly against the appellant.

6.20 The appellant argued that whilst costs are in the discretion of the Court, the discretion should be exercised judiciously and taking into account circumstances of the case in line with the **Mbita Silumbwe**¹⁷ case and the case of **Seventh Day Adventist Church North Zambia Field v Daniel Kabaso and others**,¹⁸ where the Supreme Court guided that costs may be apportioned where there is partial success.

6.21 The appellant contended further that the circumstances of this case require that costs in the Court below should have been in the cause or ought to have been apportioned since the appellant was also successful in defending the actual main issues in contention. The appellant urged this Court to allow the appeal with costs.

7.0 **RESPONDENT'S HEADS OF ARGUMENT**

7.1 In his Heads of Arguments, the respondent averred that the trial Judge was on firm ground when he found in favour of the respondent pursuant to the respondent's claim under 'f'. The Judge rightly found that the respondent had legitimate expectation of renewal of his contract for which the appellant must be held liable.

7.2 The respondent conceded that there was a variance in the sentiments expressed by the trial Judge in relation to the claim under 'f'. They argued that the meaning of the words used by the trial Judge and the actual words used by the respondent in his claim under 'f' of the notice of complaint was the same. Therefore, the trial Judge should not be faulted for using different words to convey the same meaning.

- 7.3 The respondent contended that the use of different words did not make the claim under 'f' speculative nor could it be argued that the respondent did not specifically plead it in his notice of complaint. They submitted that the rules relating to pleadings cannot be mechanically applied in the Industrial Relations Division of the High Court while doing substantial justice. They cited the case of **Zambia Consolidated Copper Mines Limited v Matala**¹⁹ to support their contention.
- 7.4 In relation to ground 2, the respondent contended that the trial Court did not err in law and fact and neither did he contradict himself when he dismissed the pleaded claim of "legitimate expectation of employment in the banking financial and other sectors" but awarded the respondent the claim of legitimate expectation of employment.
- 7.5 That the legitimate expectation referred to by the respondent in his claim under 'c' of the notice of complaint referred to employment in the banking, financial and other sectors generally whereas the legitimate expectation as used by the trial Judge relates to the respondent's continued employment with the appellant by way of renewal of the contract of employment. It was contended that the basis of the respondent's claim under 'c' was that he had a legitimate expectation of being employed in the banking, financial and other sector but lost the opportunity of such employment due to some conduct of the appellant, whereas

the relief awarded by the trial Judge pursuant to the respondent's claim under 'f' of the notice of complaint was anchored on the respondent's loss of legitimate expectation of continued employment with the appellant.

7.6 It was further submitted that the loss of legitimate expectation of continued employment with the appellant were distinct and the award for the loss of legitimate expectation of continued employment with the appellant cannot amount to an error or contradiction on the part of the trial Court.

7.7 The respondent contended that the trial Court rightly extended the legitimate expectations principle to it, as the appellant was a public institution and those running it must adhere to the principles of fair play. That an employee with a legitimate expectation of renewal of the contract of employment should only be deprived of such expectation on good reason. They submitted that the cases of **Communication Authority v Vodacom**⁶, **Hotel and Tourism Institutes Trust v Happy Chibesa**⁷ and **Schmidt v Secretary of state of Home Affairs**⁸ were rightly applied by the trial Court.

7.8 That the respondent had written to the appellant requesting to have his contract renewed as Chief Executive Officer and Project Manager. That although his request for renewal of contract did not automatically give a guarantee that the respondent would be given another contract, the respondent was entitled to a response

and the appellant's conduct of not responding to the respondent's letter was in their view wanton.

7.9 That the principle of legitimate expectation should be constructed broadly to protect both the substantive and procedural expectations. The lower Court found that the respondent was unequivocally given to understand that he would be the National Switch Project Manager until it was commissioned and that the failure of the appellant to respond and or give reasons to the respondent constituted an unfair practice. That the award for damages in favour of the respondent was in order.

7.10 That in respect to ground 3, the trial Court was on firm ground when it awarded the respondent punitive damages of 12 month's salary. That damages were pecuniary compensation payable by one party to the other for the injury, loss or damage caused by breach of a legal duty. That the underlying principle of damages was restitution as money could do so to the position a party would have been in but for the breach. That punitive or exemplary damages are intended not merely to compensate a party but to punish the defendant and mark the outrageous nature of his conduct.

7.11 They submitted that the trial Court judiciously exercised its discretion when it ordered for punitive damages after considering all the circumstances of the case which according to the trial

Court was an aggregate award for both legitimate expectation of renewal of contract and punitive damages of twelve months basic salary. Their argument was that the award was not excessive, nor too little and hence there is no merit in this ground of appeal.

7.12 In ground 4, the respondent submitted that the Court below was on firm ground when it awarded costs to the respondent. That the costs of and incidental to all proceedings were in the discretion of the Judge with full power to determine by whom and to what extent such costs are to be paid and that the said discretion was exercised judicially in accordance with practice. That the case of **Justine Mbita Silumbwe v Barclays Bank Zambia Limited**¹⁷ was on point.

7.13 They submitted that the trial Court considered the circumstances of the case and acted within its discretion by awarding the respondent costs. They contended that the trial Court acted judiciously and within its mandate when making the award for costs in favour of the respondent. Further, that the need to apportion costs in this case did not arise and as such, the trial Court was in order by not apportioning costs as contended by the appellant.

7.14 It was their contention that the trial Court was alive to the fact that most of the respondent's claims were not successful except for one. That however, the trial Court firmly made the award as

to costs having regard to all circumstances surrounding the successful claim. They submitted that the trial Court could not be faulted for rightly exercising its discretion as to the award of costs and therefore, ground four of the appeal should be dismissed for lack of merit.

8.0 APPELLANT'S HEADS OF ARGUMENT IN REPLY

8.1 The appellant filed its Heads of Argument in reply on 15th January 2021. We will not repeat these arguments. The appellant urged the Court to allow the appeal with costs.

9.0 DECISION OF THIS COURT

9.1 We have carefully considered the evidence on record and the arguments of the parties herein. We will deal with ground 1 and 2 simultaneously.

9.2 It is clear from the reading of the judgement of the lower Court that the Judge held that there was no basis for the respondent to succeed on a claim of loss of legitimate expectation of employment and accordingly dismissed the said claim. Yet at page J7 went ahead to justify why the respondent was entitled to damages for a genuine loss of expectation of renewal of employment by the appellant.

- 9.3 The trial Court in proceeding in the manner it did, contradicted itself on findings of fact, namely, holding that the claim of loss of legitimate expectation of renewal of employment had no basis in one breath and on the contrary finding that the respondent's legitimate expectation of renewal of contract of employment was justified and awarded damages to the respondent.
- 9.4 We have noted in the case of **Communications Authority v Vodacom**⁶ the Supreme Court established that the legitimate expectation arises where a decision maker, such as an employer makes representations or leads someone to believe that they will receive or retain a benefit or advantage including that a hearing will be held before a decision is taken. In such a scenario, such decision maker or employer is estopped from going back on his well-founded affirmation or representation.
- 9.5 This principle of legitimate expectation cannot be said to be applicable in this case as the respondent had a fixed term contract which came to an end by effluxion of time and without any assurances being given by the appellant that it was committed to renewing his contract for a further term.

9.6 The only fact that the respondent appeared to rely on was that he was brought in from Rwanda on a similar assignment and he was labouring under the mistaken belief that he was the only one capable of developing the National Financial Switch and which project was not completed within contract period. However, this scenario does not represent circumstances under which legitimate expectation may arise. The respondent served his full contract term and was discharged upon maturity of the contract period. The sanctity of a contract ought to be upheld and respected unless there was something more. In this case there was none.

9.7 Given our view, that the substantive grounds 1 and 2 of appeal have succeeded, there is thus no need for us to consider the last two grounds of appeal dealing with ancillary reliefs on awards of costs and damages as they naturally follow the substantive claims. This appeal accordingly succeeds based on ground 1 and 2.

9.8 We accordingly set aside the decision of the learned Judge in the Court below of 18th September 2020 and its respective awards.

9.9 Each party to bear their own costs of this appeal.



M.M. Kondolo, SC
COURT OF APPEAL JUDGE



D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE



N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE

