

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**

APPEAL No. 185/2021

(Civil Jurisdiction)

B E T W E E N:

MR. CLEAN ZAMBIA LIMITED

AND

PETER LUYANGA & 16 OTHERS



APPELLANT

RESPONDENTS

CORAM: Kondolo, Majula and Chembe, JJA
On 21st September, 2023 and 25th October, 2023

For the Appellant : *Mr. K. Bota with Mrs. S.M. Kalikeka,
both of Willaim Nyirenda & Company*

For the Respondents : *No Appearance*

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Legislation referred to:

1. *The Employment Code Act, No. 3 of 2019*

Cases referred to:

1. *Choonga vs ZESCO Recreation Club, Itezhi-tezhi - SCZ Appeal No. 168 of 2013.*
2. *Sylvester Musonda Shipalo vs Shadrack Maipambe - SCZ Appeal No. 1 of 2016.*

3. *Zambia Airways Corporation Limited vs Gershom Mubanga (1990/92)* ZR 149 (SC).
4. *Jennifer Nawa vs Standard Chartered Bank Zambia Plc - SCZ judgment No. 1 of 2011.*
5. *Kawimbe vs Attorney General (1974)* ZR 244 SC.
6. *Rose vs Willey (1951)* CA 221.
7. *Attorney General vs Fred Chileshe Ngoma (1987)* ZR 80 (SC).
8. *Alro Engineering Limited vs Himuyandi (1987)* ZR 83 (SC).
9. *Dennis Chansa vs Barclays Bank of Zambia Plc - SCZ Appeal No. 111/2011.*
10. *Hildah Ngoma vs World Vision Zambia - CAZ Appeal 159/2019.*

Other authorities referred to:

1. *Lord Hailsham of St. Marylebone, Halsbury's Laws of England, 4th edition, , Butterworth, London 1978*
2. *Bryan A. Garner, **Black's Law Dictionary** 9th Edition, Thomson West, USA*

1.0 Introduction

1.0 The parties to this appeal were in an employment relationship which was later terminated at the behest of the appellant. The termination triggered an immediate challenge in the Industrial Relations Division of the High Court which was heard and determined by Mr. Justice Davies Mumba on 26th February, 2021. The learned Judge ruled in favour of the respondents.

1.1 In this appeal, we have been called upon to determine whether the respondents' contracts of employment were validly renewed after expiration by effluxion of time. The

appeal interrogates whether the **Employment Code Act No. 3 of 2019** was applicable to the respondents' contracts of employment.

2.0 Background

- 2.1 The facts of this case were that the respondents were employed by the appellant on various dates in their dissimilar positions of bricklayers, cleaners, gardeners and bricklayer assistants. Some of the respondents were employed under written contracts while others under oral contracts.
- 2.2 On 30th September, 2019 the respondents' fixed-term contracts expired. However, the appellant allowed the respondents to continue working for a further one month which run from 1st to 30th October, 2019. During this period, they were paid a full salary.
- 2.3 On 28th January, 2020 the appellant called for a staff meeting at which all the respondents attended. Subsequently, the respondents were each issued with a notice of termination of their employment and they were informed that their short-term contracts were to come to an end on 31st January, 2020. Additionally, the respondents were informed that the appellant was to pay them one month's salary which was to serve as a notice of termination.
- 2.4 Unhappy with the conduct of the appellant, the respondents approached the High Court seeking a declaration that the

termination of their employment contracts was wrongful and unlawful. They also sought damages and costs.

3.0 Decision of the court below

- 3.1 After considering the evidence that was presented before him, the learned Judge identified the issue for determination as being whether the termination of the respondents' contracts of employment was unlawful and unfair.
- 3.2 In addressing the issue, the court below held that the fixed-term contracts that had expired on 30th September, 2019 were renewed for a similar period of one year on the same terms and conditions of their previous contracts on the authority of the guidance of the Supreme Court as stated in the case of ***Choonga vs ZESCO Recreation Club, Itezhi-tezhi***.¹
- 3.3 The lower court was further of the view, that the new contractual relationship could only be terminated in a legally sanctioned manner and in accordance with the terms and conditions of their contracts. In this case, the appellant could terminate the contract of employment by giving notice or payment in *lieu* of notice in accordance with clause 17 of the respondents' contract of employment.
- 3.4 The learned Judge further opined that in line with **section 52(1) and (2) of the Employment Code Act**¹, the appellant was obliged to specify a valid reason related to the employee's conduct or capacity or the employer's operational

requirements for the termination to be valid. Ultimately, the court below found that since no valid reason was given for the termination of the respondents' employment which was automatically renewed by the appellant's conduct on 30th September, 2019, the termination was unlawful and unfair entitling them to an award of damages. He awarded each respondent six months' salary plus all allowances as damages for the unlawful and unfair termination of their employment, with interest.

4.0 Grounds of appeal

4.1 The appellant was greatly disconsolate with the judgment of the lower court and appealed to this court on the following grounds:

“1. The court below erred in law and fact when it held that by the Appellant allowing the Complainants to continue working for the month of October, 2019, that automatically renewed the previous contracts for a year on the same terms and conditions when such renewal was impossible in light of the undisputed non-existence/severance of the Contract between the Appellant and Kansanshi Mining Plc that served as a pre-condition to the existence of the employer-employee contracts between the Appellant and the Respondents coupled with the overwhelming evidence regarding the parties' conduct prior to September, 2019 and after – being the notices for non-renewal of contracts and signing of fixed-term contracts by the parties.”

2. *The court below erred in law and fact, when it awarded six months damages to the Complainants for the unlawful and unfair termination of employment when no such damages were suffered and/or proven as the said employees were in employment under the same terms and conditions at the time.*

3. *The court below erred in law and fact when it held that the termination of the said contracts were unlawful and/or wrongful for having infringed the Employment Code Act No.3 of 2019 when the said Act was inapplicable in the circumstances.”*

5.0 Appellant’s arguments

- 5.1 In support of ground one, the appellant argued that the respondents were under fixed-term contracts tied to the existence of the contract between the appellant and Kansanshi Mining Plc. This was the condition precedent for the appellant to be able to employ the respondents. In support of this proposition, we were referred to the case of ***Sylvester Musonda Shipalo vs Shadrick Maipambe***² as well as clause 2.5 of the contract of employment. It was contended that the lower court erred when it glossed over the provisions of the cited authority and the contract.
- 5.2 In relation to ground two, the main point taken by the appellant was that damages in the form of salaries should not have been awarded to the respondents as they did not

demonstrate that they suffered any loss attributable to the appellant. To reinforce the argument, our attention was drawn to the case of ***Zambia Airways Corporation Limited vs Gershom Mubanga***³ where it was held that there must be evidence to enable any court to calculate the losses that may be awarded to a respondent.

- 5.3 In relation to ground three, the thrust of the appellant's argument was that the **Employment Code Act of 2019** was inapplicable to the respondents at the time the contracts of employment expired. As far as the appellant is concerned, a law that comes into effect after the parties have contracted cannot apply to relations that were consummated previously. We were referred to the case of ***Jennifer Nawa vs Standard Chartered Bank Zambia Plc***⁴ where the Supreme Court held as follows:

“It is trite law that unless expressly stated a law does not operate retrospectively. It could therefore not have been the intention of the framers of this law to invalidate agreements that were perfectly legal at the time they were executed.”

- 5.4 We were accordingly implored to allow the appeal and reverse the judgment of the court below.

6.0 Respondent's Arguments

- 6.1 In response to ground one, the respondents argued that the Court below was on firm ground when it held that the respondents' contract of employment was legally renewed on 30th September, 2019 following the expiration of the previous contract. This was on account of the fact that the appellant allowed the respondents to continue working after the expiration of the initial contract. As authority for this assertion, we were referred to the holding of the Supreme Court as stated in the case of ***Choonga Moses vs ZESCO Recreation Club, Itezhi-tezhi***¹.
- 6.2 The respondents further averred that the **Employment Code Act** was applicable to the parties on the premise that the **Act** became operational on 9th May, 2019 while the respondents' contracts were renewed on 30th September, 2019. Based on the foregoing, they argued that there was no condition precedent to the continuance of the contracts of employment for the respondents. That in any case, no valid reason for the termination of the respondents' contracts was proffered by the appellant.
- 6.3 In relation to ground two, the respondents submitted that this Court should not lightly interfere with an award of damages made by the trial Court merely because it would have awarded a different sum had it tried the case. It was contended that to warrant interference, the appellant must show that the award was hopelessly wrong in principle. To reinforce the submission, our attention was drawn to the cases of ***Kawimbe vs Attorney General***⁵, ***Rose vs Willey***⁶,

Attorney General vs Fred Chileshe Ngoma⁷ and Alro Engineering Limited vs Himuyandi⁸.

6.5 Pertaining to ground three, the respondent submitted that the appellant has not demonstrated any wrongdoing on the part of the lower court in relation to the damages awarded to warrant interference by this Court. Relying on the Supreme Court case of ***Dennis Chansa vs Barclays Bank of Zambia Plc⁹***, counsel implored us to take into account the fact that global economies keep on deteriorating with the passage of time and that damages should be adjusted upwards. On the basis of the above submission, counsel urged us to dismiss the appeal with costs.

7.0 Hearing of the Appeal

7.1 At the hearing of the appeal, Mr. Bota substantially placed reliance on the heads of argument and also made brief oral submissions.

7.2 He submitted that the present case ought to be distinguished from the case of ***Choongo vs ZESCO Recreation Club, Itezhi Tezhi¹*** relied on by the lower court, on the basis that the case in *casu* involved a contract whose perpetuation was anchored on a contingency or happening of an event without which there could be no job or work for the respondents. Counsel buttressed his arguments by citing our decision of ***Hildah Ngoma vs World Vision Zambia¹⁰***. He beseeched us to set aside the judgment of the court below.

7.2 There was no attendance on the part of the respondents following their filing a notice of non-appearance.

8.0 Decision of the Court

8.1 We have carefully considered the record and the arguments from the parties to this appeal. We shall deal with each ground as set out in the memorandum of appeal.

9.0 Implication of condition precedent - Ground one

9.1 Regarding the first ground of appeal, the contention by the appellant is that embedded in the contracts of employment was a condition precedent specifically set out in clause 2.5. That this contract expressly indicated that the respondents' employment was contingent on the existence of the contracts between the appellant and Kansanshi Mining Plc. It has been argued that therefore, it could not be asserted that their contracts were automatically renewed after the expiration of the contract as they awaited approval of the tender by Kansanshi Mining Limited.

9.2 We have critically examined the provisions of the contract of employment and in particular clause 2.5 (see page 120 of ROA) which states as follows:

"2.5 Already on signing this agreement the EMPLOYEE takes note of the fact that this contract runs out and expires on the last day on which the EMPLOYER'S contract with its CLIENT expires and the parties

agree that no silent/legitimate expectation in respect of reemployment can/shall be applicable.”

9.3 It is plain from the aforesaid provision that a condition precedent was provided for in the contract of employment. In terms of the law regarding the net effect of a condition precedent, the case of **Sylvester Musonda Shipalo vs Shadrick Maipambe**² relied on by counsel for the appellant is instructive. The Supreme Court cited with approval a quotation from the learned authors of Halsbury's Laws of England, 4th edition, paragraph 962, on the nature of conditions precedent. It was stated as follows:

“A contractual promise by one party (A) may be either unconditional or conditional. A conditional promise is one where the liability to perform depends upon something or event; that is to say, it is one of the terms of the contract that the liability of the party shall only arise, or shall cease, on the happening of some future event, which may or may not happen, or one of the parties doing or abstaining from doing some act... The major categories of conditional promises are:

(1) Conditions precedent to the formation of the contract; and

(2) Conditions suspensive of performance... A condition precedent to the formation of a contract... should be distinguished from a condition precedent to the performance of the contract. In the former case, no contract comes into existence until the contingency

occurs; [while] in the latter case there is a contract but the obligations of one or both of the parties are suspended.

Where the liability to perform only arises on the happening of the contingency or the performance of the condition, the condition is called a condition precedent...”

The same learned authors have stated that:

“More commonly, performance of a promise is subject to a condition precedent in which case neither party may waive the condition unless it is exclusively for his benefit. Such conditions precedent to performance may be subject to:

(a) a purely contingent condition; or

(b) a promissory condition.

Where the performance of this promise is subject to a contingent condition precedent, it is not liable to perform his promise unless that condition occurs.”

9.4 We adopt the aforesaid reasoning. Another insightful definition of a condition precedent is articulated in **Black’s Law Dictionary 9th Edition** at page 334 where it states as follows:

“An act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises. If the condition does not occur and is not

excused, the promised performance need not be rendered.”

- 9.5 Our understanding of a condition precedent in an employment contract is that it refers to a requirement that must be met before certain obligations or rights within the contract become effective. If the condition is not met the specified obligations or rights may not come into play.
- 9.6 In the context of the employment contract between the appellant and the respondent it involved in terms of clause 2.5, the contract between the appellant and its client Kansanshi Mining Plc. This means that the condition that needed to be satisfied was that the respondents' employment was contingent on the appellant having a contract with their client.
- 9.7 Taking into account the facts of this case, it is clear that when the respondents' contracts came to an end by effluxion of time, the appellant was in the process of awaiting for the success of the tender with its client, Kansanshi Mining Plc. This fact is not in dispute. Whilst in the process of waiting they paid the respondents for the month of October, 2019. As fate would have it, the appellant was unsuccessful (see page 158 ROA). This therefore impacted the employment relationship between the parties as the condition precedent was not satisfied.

9.8 Having reflected on the above state of affairs, we take the view that this matter is distinguishable from that of **Choonga vs ZESCO Recreation Club, Itezhi-tezhi**¹ which held that:

“Since the respondent allowed the appellant to continue his duties for one month after the contract expired due to effluxion of time on 31st July, 2020, it can be implied and properly so, that the contract of employment was extended for the same period and on the same conditions as those contained in the expired fixed-term contracts of employment.”

9.9 The condition precedent is what distinguishes the **Choonga** case and this case and therefore makes it inapplicable. The liability to perform on the part of the appellant was dependant upon being awarded a contract by Kansanshi Mining Plc. Since it was contingent on this event, the liability could only arise upon the happening of the aforestated condition. It therefore follows that the appellant was not liable to perform its promise unless that condition occurred.

9.10 In light of the foregoing, we find merit in the first ground of appeal and uphold it.

10.0 Damages for unlawful and unfair termination - Ground two

10.1 Having reflected on the arguments before us, it is clear to us that the success of the second ground is dependant on the success of the first ground. We say so because the damages

that were awarded to the respondents were as a result of the finding by the Honourable learned trial Judge that the termination of the employment was unlawful and unfair. It stands to reason that having found for the appellant in the first ground that in actual fact the termination of the employment contract was not unfair and unlawful regard being had to the condition precedent. Ground two consequently succeeds.

11.0 Applicability of Employment Code Act No. 3 of 2019 — Ground Three

11.1 The grievance in the third ground of appeal emanates from the finding by the trial court that the appellant was in contravention of the **Employment Code Act**¹. In the judgment, it was held that:

“In the present case, there was no valid reason that was given for the termination of the complainants’ employment which was automatically renewed by the respondent’s conduct on 30th September, 2019. The respondent’s non-compliance to the statutory provisions resulted in the termination of the complainants’ employment being unlawful and unfair for which the complainants are entitled to damages.”

11.2 The question we are being called upon to answer is whether or not the appellant could be said to have infringed this Code in light of the provisions of **section 5(3) of the Fourth Schedule** to the aforesaid **Act** which provides that:

condemned for non-compliance with the **Act**. This ground of appeal therefore succeeds.

12.0 Conclusion

12.1 All in all, we have found all three grounds of appeal to be meritorious and accordingly uphold them. For the avoidance of doubt, we hereby set aside the judgment of the lower court.

12.2 The matter having originated from the Industrial Relations Division of the High Court, we order that each party bears their own costs.

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M.M. Kondolo, SC
COURT OF APPEAL JUDGE

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B.M. Majula
COURT OF APPEAL JUDGE

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Y. Chembe
COURT OF APPEAL JUDGE