

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

Appeal 35/2022

(Civil Jurisdiction)

B E T W E E N:

DANGOTE CEMENT ZAMBIA LTD

AND

MICHEAL MWABA



APPELLANT

RESPONDENT

***Coram: Majula and Bobo - Banda JJA
On 18th January 2024 and 14th February, 2024***

For the Appellant : *Mr. L. Siame & Mrs. S. Sikamba -
TMS. Legal Practitioners.*

For the Respondent : *Mr. K. Musukwa & Mr. R. Nkhata – Messrs. N
Nyirongo Company.*

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Owen Mayapi & Others vs The Attorney General 2019/CCZ/003*
2. *Anderson Mwale, Buchisa Mwolongo and Kola Odubote vs Zambian Open University — 2021/CCZ/001.*
3. *Hotel & Tourism Training Institute Trust vs Happy Chibesa — SCZ Appeal No 51/2001*
4. *Konkola Copper Mines vs Nyambe & 3 Others CAZ/08/354/2017*
5. *Zambia Railways vs Pauline S. Mundia & Another (2008) volume 1 ZR 287*
6. *Undi Phiri vs Bank of Zambia - SCZ No. 21 of 2007.*

7. *Galaunia Farms Ltd vs National Milling Company Ltd (2004) SCZ No.1.*
8. *Lubunda Ngala and Jason Chulu vs Anti-Corruption Commission - Selected Judgment No 4 of 2011.*
9. *Mcqueen Zenzo Zaza vs ZESCO Limited (2018/CCZ/006*
10. *Zulu vs Avondale Housing Project Limited (1982)*
11. *Khalid Mohammed vs Attorney-General (1982) Z.R. 49*

Legislation referred to:

1. The Constitution of Zambia (Amendment) Act No. 2 of 2016
2. The Employment Code Act No. 3 of 2019

1.0 Introduction

1.1 This is an appeal against a judgment by Chembe J. (as she then was) sitting at Ndola on the 22nd day of September, 2021. The respondent had been in an employment relationship with the appellant and after his resignation in April 2020, there was a disagreement regarding his entitlements. This resulted in the respondent approaching the Court seeking various reliefs. At the conclusion of the matter, the learned Judge found in favour of the respondent by awarding him gratuity with interest and costs.

2.0 Background

2.1 The facts leading to this appeal are largely incontestable and can be briefly recounted. The respondent was an employee of the appellant from 4th January, 2016 to 27th May, 2020. He was engaged on fixed term contracts of two years each. The employment relationship was governed by, *inter alia*, the

staff handbook of 2016 which was later revised in 2020 to align with the **Employment Code Act**.

2.2 The first two-year contract ran from 4th January 2016 to 3rd January 2018 while the second contract commenced on 4th January 2018 to 3rd January 2020. The third and final contract was from 4th January 2020. However, before its expiration, the respondent gave one month notice of resignation in April, 2020. This was accepted by the appellant in a letter dated 18th May, 2020. At the time of his resignation, the respondent had only served four months in the third contract.

2.3 The respondent was never paid any gratuity for the period that he worked for the appellant. This is what prompted the respondent to issue a writ of summons in the High Court claiming payment of gratuity and retention on the payroll from the date of resignation until final payment.

2.4 The appellant impugned the claims and maintained that the respondent was paid what was due to him.

3.0 Decision of the Court below

3.1 The court below reflected on the evidence and the submissions that were tendered before it, and identified the issue for determination as being, whether the respondent was entitled to gratuity for the contracts that he worked. The court further considered whether the respondent was entitled

to be retained on the payroll owing to the failure to pay him gratuity.

3.2 Regarding the first issue, the court examined clause 7.2.1 of the 2016 staff handbook and made a finding that the respondent was not entitled to be paid gratuity under the first two contracts on account of the fact that he did not meet the 5-year requirement which was in the staff handbook in accordance with the conditions of service. Pertaining to the third contract, the learned Judge found that the respondent was eligible for payment of gratuity by virtue of the 2020 staff handbook as read with **section 73 of the Employment Code Act** payable on a prorated basis.

3.3 The court below was of the view that it was unfair for the appellant to have paid one employee who had not completed 5 years of service and not to have paid the respondent. That the two should have been treated equally. She accordingly found that the respondent was entitled to have been paid gratuity for the period 2016 to date of his resignation. This was on account of him being similarly circumstanced with Kabombe Bwalya who served the appellant from 2016 to 2020 and was paid gratuity when he left employment.

3.4 Based on the foregoing, the learned Judge concluded that the respondent was entitled to be paid gratuity.

3.5 The court below, in answering the question on whether the respondent was entitled to be retained on the payroll critically

examined the provisions of the **Constitution (Amendment) Act No. 2 of 2016** in particular **Article 189(2)**, the case of **Owen Mayapi & Others vs The Attorney General**¹ and arrived at the conclusion that the respondent was entitled to be retained on the payroll from the date of his resignation until final payment.

4.0 Grounds of Appeal

4.1 Dissatisfied with the awards by the High Court as reflected above, the appellant has appealed to this court on two grounds set as follows:

“1 *The learned trial Judge misdirected herself in law when she held at page 17 of the Judgment that the appellant, having failed to pay the respondent his gratuity promptly after he left employment, should have retained him on the payroll until he was paid and that the respondent was entitled to payment of his salary from the date he left employment until the date on which the appellant will pay him his gratuity, contrary to the guidance given by the Constitutional Court in the case of **Anderson Mwale, Buchisa Mwalongo and Kola Odubote vs Zambian Open University.***²

2 *The learned trial Judge misdirected herself in law and fact when she held at page 16 of the Judgment that the respondent was discriminated against for not being paid gratuity for the period 2016 to May 2020 in the absence*

*of sufficient facts that can be said to justify the position that the said Kabombe Bwalya and the respondent were similarly circumstanced to be afforded similar treatment contrary to the guidance given by the Supreme Court in the case of **Hotel & Tourism Training Institute Trust vs Happy Chibesa**³.*”

5.0 Appellant’s Arguments

- 5.1 In support of ground one, Counsel for the appellant submitted that the Constitutional Court had occasion to interpret **Articles 187, 188, 189 and 266** which relate to an employee’s entitlement to a pension benefit and retention on the payroll in the case of **Anderson Mwale, Buchisa Mwalongo Kola Odubote vs Zambian Open University**². Counsel contended that according to the cited case, it is only a pension benefit which is borne out of a relevant pension law or other law that requires retention on the payroll.
- 5.2 It was thus asserted that the appellant did not breach the provisions of the Constitution when it removed the respondent from the payroll. That this is on account of the fact that the lower court relied on the contract of employment and applicable staff handbook to determine the respondent’s entitlement to gratuity. We were thus urged to uphold the principle of *stare decisis* in determining this appeal by not departing from the decision of the Constitutional Court in the case of **Anderson Mwale**² (aforecited).

- 5.3 Pertaining to ground two, the argument by the appellant is that for the first two contracts, the respondent was not entitled to gratuity. Regarding the third contract, the contention is that he was entitled to gratuity from 1st March 2020 to 27th April 2020. It has been submitted that the parties are bound to their contractual agreements. To strengthen this position the court was referred to the case of ***Konkola Copper Mines vs Nyambe & 3 Others***⁴. The grievance by the appellant is the finding that the respondent had been discriminated against by virtue of the fact that another employee by the name of Kabombe Bwalya was paid gratuity despite not having completed the 5-year term under the staff handbook 2016.
- 5.4 The thrust of the appellant's submission was that the respondent bore the burden of proving that he was discriminated against by the appellant on the issue of payment of gratuity when compared to Kabombe Bwalya who was allegedly similarly circumstanced. It was argued that no evidence was adduced in the court below to the effect that the respondent was similarly circumstanced with Kabombe Bwalya. Great store was placed on the case of ***Zambia Railways vs Pauline S. Mundia & Another***⁵ and ***Undi Phiri vs Bank of Zambia***⁶ on the burden of proof being on the party who asserts an issue. In this instance it has been strongly asserted that the respondent did not discharge his burden of proof on a balance of probability proving he was similarly circumstanced with Kabombe Bwalya. Counsel

contended that there was insufficient evidence of discrimination and we were urged to set aside this finding on the authority of ***Undi Phiri vs Bank of Zambia***⁶.

- 5.5 It was further submitted that the appellant was not obligated under the principle of estoppel to pay the respondent his gratuity as there was no proof of representation made by the appellant to the respondent that an employee in similar circumstances would be paid gratuity despite not satisfying the requirements of the contract of employment or the conditions of service. To reinforce this submission, Counsel placed reliance on the case of ***Galaunia Farms Ltd vs National Milling Company Ltd***⁷ where it was held:

“In order to succeed under the doctrine of estoppel, there must be a representation of fact intended to be acted upon by the person to whom it is made; the person to whom it is made must actually act on this representation and by so acting it must be to his detriment.”

- 5.6 Based on the foregoing, Counsel implored us to allow the appeal with costs.

6.0 Hearing of Appeal

- 6.1 On the 18th January, 2023, we sat to hear the appeal, however, before we could proceed Mr. Siame, Counsel for the appellant raised a preliminary objection to expunge the respondent's heads of argument. This was on account of them having filed them on 12th April, 2023, a year and two

months after they had received the appellant's heads of argument. Mr. Siame contended that the arguments had been filed without leave of court and were in violation of **Order 10 rule 9 sub rule 16 of the Court of Appeal Rules.**

- 6.2 On behalf of the respondent, Mr. Nkhata conceded that the heads of arguments were filed out of time and no leave had been sought. He beseeched the court to exercise its discretion and allow the heads of arguments as no prejudice would be occasioned to the appellant.
- 6.3 We took the view that there had been inordinate delay in abiding by the rules of court in terms of filing of the heads of argument. We thus upheld the preliminary objection raised, and ordered that the respondent's heads of argument be expunged from the record and the respondent, would take no further part in the proceedings.
- 6.4 In determining this appeal, we will therefore restrict ourselves to the record and the arguments by the appellant as well as the law.

7.0 Decision of this Court

- 7.1 We have meticulously analysed the record of appeal that is before us and the appellant's arguments. In a nutshell, the two grounds of appeal relate to the continued retention on the payroll of the respondent from the date he left employment until payment of his gratuity. Secondly, we have been called upon to interrogate whether or not the

respondent was similarly circumstanced with another employee by the name of Kabombe Bwalya and thus discriminated against.

8.0 Retention on payroll

8.1 The grievance in the first ground emanates from the holding by the Court below that the failure by the appellant to pay the respondent his gratuity promptly after he left employment was in violation of the provisions of the **Constitution** particularly **Article 189**. The appellant is contending that the Judge in the Court below misdirected herself by having so found. That the provisions of the **Constitution** in particular **Articles 187, 188 and 189** have been interpreted by the Constitutional Court in the case of **Anderson Mwale (supra)**. That the obligation was on the respondent to adduce evidence of the fact that he was entitled to gratuity under a pension law or other law. The appellant has strongly denied that it breached the Constitution when it removed the respondent from the payroll.

8.2 From our perspective, our starting point is **Article 189(1) & (2)** of the **Constitution of the Republic of Zambia** which provides as follows:

“(1) A pension benefit shall be paid promptly and regularly.

(2) Where a pension benefit is not paid on a person’s last working day, that person shall stop work but the

person's name shall be retained on the payroll, until payment of the pension benefit based on the last salary received by that person while on the payroll."

8.3 The definition of a 'pension benefit' is provided for under **Article 266** of the **Constitution** which states that:

"In this Constitution, unless the context otherwise requires:-

"pension benefit" includes a pension, compensation, gratuity or similar allowance in respect of a person's service;"

8.4 It is clear from the above provisions that the Constitution of Zambia makes provision for an employee to be retained on the payroll up until his or her pension benefits are fully paid up. What is termed as a pension benefit also includes gratuity. The Constitutional Court microscopically examined the provisions of the Constitution in relation to pension benefits and retention on the payroll in the case of **Anderson Mwale & Another vs Zambian Open University**² wherein they held that:

"Given that the pension benefits referred to in Article 187, 188 and 189 of the Constitution, is a pension benefit granted by or under a relevant pension law or other laws, it follows that for an employee to be retained on the employer's payroll under Article 189(2) of the Constitution, the pension benefit which is not paid to an

employee on the last day of work should be a pension benefit granted by or under the relevant pension law or other law applicable to that employee's service."

8.5 The critical point here is that a pension benefit is tied to a pension law or other law in order for someone to be entitled to be retained on the payroll. What we have also been able to glean from the **Anderson Mwale²** case is that in order for a party to succeed for retention on the payroll that party must adduce evidence that at the end of the contract, there was a pension benefit due to be paid to them granted in accordance with a pension law or other law. The onus therefore lies on the person claiming the pension benefit to adduce cogent evidence. The burden of proof lies with the party who asserts the affirmative of the issues.

8.6 In leaving no stone unturned, we have examined the rationale behind enacting Article 189(2) contained in the Report of the Technical Committee on drafting the Zambian Constitution. They expressed themselves in the following terms:

"The rationale for the article is that, benefits need to be made promptly for a pension, gratuity and retrenchment package to serve its purpose. The committee observes that public servants suffer hardships due to delays in payment of terminal benefits and need to be cushioned from these hardships by continuing to receive salaries until the Government pays them terminal benefits, and that for the avoidance of doubt this payment shall not be

deducted from the terminal benefits. The committee, therefore, resolves to make provision in the Constitution for prompt payment of pension and retrenchment benefits.”

- 8.7 This is what birthed Article 189. The rationale being after retirement the status quo should be maintained and whilst awaiting payment of their benefits, the retirees ought not to suffer hardships.
- 8.8 We are thus bewildered when the retention on payroll argument is stretched to cover instances where an employee has on his own volition resigned from employment. We do not believe that the drafters envisaged this scenario and extended the provisions of Article 189 to resignation.
- 8.9 In point of fact the Constitutional Court in ***Lubunda Ngala and Jason Chulu vs Anti-Corruption Commission***⁸ stated as follows:

“Clearly what is anticipated with a pension is that it becomes effective on retirement in some cases due to age or other circumstances and certainly not resignation. Therefore, accrued leave days, uniform and settling in allowances claimed by the Applicants do not qualify to be pension benefits that are covered by Article 189 and 266 of the Constitution..... The Applicants are neither pensioners nor are they retrenches who would be entitled to gratuity which would have entitled them to remain on

the employer's payroll until these benefits are paid."
(underlining our for emphasis).

8.10 The argument of retention of payroll for underpayment or non-payment of gratuity cannot be entertained in this context. It does not clearly fall in the ambit of a pension benefit. The esteemed Judges did not prevaricate from this reasoning in the case of **Owen Mayapi & Others vs The Attorney-General¹**, when they expressed themselves as follows:

"We briefly wish to reiterate our observations in the Lubunda Ngala and Another vs Anti-Corruption Commission case that pension benefits are triggered by retirement due to age or other circumstances. We did not venture into defining the other circumstances. It is apparent that the circumstances have to be akin to retirement." (underlining our for emphasis)

8.11 In *casu*, the cessation of the employment relationship was triggered by resignation by the respondent.

8.12 The Constitutional court further clarified on the question of retention on payroll where there has been an underpayment of terminal benefits in **Mcqueen Zenzo Zaza vs ZESCO Limited⁹** where it was stated that:-

"Further, we do not agree with the interpretation of Article 189(2) advanced by the petition that, when terminal benefits are found to have been underpaid after a court

action, the concerned employee should be paid salary for the period of the litigation up to the settlement of the Judgment sum found to have been underpaid. We cannot discern this proportion from the Article in issue.”

8.13 It is clear from the above cited case that the issues on retention on payroll as envisaged in Article 189 of the Constitution has been laid to rest by the Constitutional Court.

8.14 Turning to the **Employment Code Act**, it provides as follows:

“73(2) Where an employee’s contract of employment is terminated in accordance with this Code, the employee shall be paid gratuity prorated in accordance with the period of employment.”

8.15 We stand guided by the decision of the Constitutional Court of **Anderson Mwale²** and the **Employment Code Act**. The question that begs an answer is whether the respondent who resigned from his contract of employment was entitled to gratuity. We have scrutinized the terms of his employment contract in particular, clause 7.2.1 of the 2016 staff handbook which provides:

“Gratuity/end of service benefit shall be payable to every staff who has served the company for a period of 5 years or longer, based on the principle of cumulative computation.

Upon successful completion of the contract the employee shall be paid a gratuity payment of an amount equivalent to 25% of the basic salary earned over this contract. No gratuity will be paid to the employee who leaves before the expiration of the contract.”

8.16 It is abundantly clear that under the terms of the first two contracts, the respondent did not fulfil the requirement to serve for a period of 5 years in order for gratuity to be applicable to him. Therefore, on the basis of clause 7.2.1 of the 2016 staff handbook the minimum of 5 years for gratuity to be paid was not met and he was therefore not entitled.

8.17 Turning to the third contract, the staff handbook of 2020 was what was applicable and it provided as follows:

“All employees on fixed term contract shall at the end of the contract be paid 25% gratuity of the employee’s basic pay earned during the contract period. If the contract is terminated before its term, gratuity will be calculated at the prorated rate.”

8.18 The appellants are not protesting the payment of gratuity for this period. The hotly contested issue is the continued retention on the payroll. It is our perspective; an employee has to prove that the gratuity in issue is payable by or under a relevant pension law or other law. It is clear to us that the respondent seeks to rely on the provisions of the **Employment Code Act** in particular **section 73(2)**. We have

also looked at the contract of employment which governs the relationship. It only stands to reason that this being the case, the respondent's entitlement to gratuity was contractual.

8.19 It is thus our well-considered view that the respondent was not entitled to be retained on the payroll from the date of resignation to payment of gratuity as he did not fall within the provisions of the Constitution entitling him to the same. We are fortified in our reasoning by the case of **Anderson Mwale²** (supra) where the Constitutional Court expressed themselves very clearly in terms of entitlement to pension benefits. It is plain from that judgment that interpretation of pension benefit refers to a pension law or other law. There was a contractual relationship between the parties which was not in any way in conflict with the provisions of the **Employment Code Act** in that, provision has been made for payment of gratuity. The law to be applied in this instance is what the parties had contracted.

8.20 In light of the foregoing, we are of the view that the Judge in the Court below misapprehended the facts and we are inclined to set aside the finding of fact.

9.0 Similarly circumstanced

9.1 The frustration in the second ground emanates from the finding by the trial judge that the respondent was similarly circumstanced with another employee Kabombe Bwalya and

therefore discriminated against by the failure to give him gratuity for all the 3 contracts of employment.

- 9.2 We have combed the record in search of evidence that was adduced regarding Kabombe Bwalya's circumstances relating to payment of his gratuity.
- 9.3 We are alive to what the learned authors of **Phipson on Evidence 17th edition** states regarding the burden of proof in civil cases. They opine in paragraph 6/06 at page 151 as follows:

“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by the parties, the party who bears this burden has not discharged, the decision must be against him.”

- 9.4 In the case of **Zambia Railways vs Pauline S. Mundia and Another**,⁵ the Supreme Court echoed similar sentiments when they held that:

“The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable.”

- 9.5 It is crystal clear from the aforecited that the burden of proof lay on the respondent to prove that he was discriminated against in comparison to Kabombe Bwalya who it is alleged

was similarly circumstanced. Having analysed the evidence on record, the only evidence relied upon by the respondent is the admission by the appellant's witness that Kabombe Bwalya was paid his gratuity from 2016 to 2020 notwithstanding that he did not complete the 5-year term. There is no other evidence on record indicating whether this employee and the respondent were serving on the same terms and conditions of employment.

9.6 We are therefore at pains, in the absence of any other evidence, to see how it can be asserted that he was discriminated against. The onus lay on the respondent to prove his claim that he was discriminated against. The cases of ***Khalid Mohammed vs Attorney-General***¹⁰ and ***Zulu vs Avondale Housing Project***¹¹ make it clear that a plaintiff must prove his case, and if he does not do so, the mere failure of the opponent's defence does not entitle him to judgment.

9.7 We take the view that there was insufficient evidence led to prove the alleged discrimination. In line with the cases we have cited including that of ***Undi Phiri vs Bank of Zambia***⁶ case, we are inclined to set aside the finding by the court below. In the view we have taken it is otiose to interrogate the contractual principle of estoppel raised by the appellant.

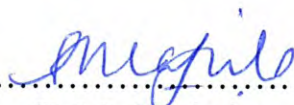
10.0 Conclusion

10.1 In sum, we find that, there is merit in both grounds of appeal and we uphold them. For the avoidance of doubt, in relation

to ground one, the respondent is not entitled to be maintained on the payroll pending payment of his gratuity. There was insufficient evidence led to support the claim for discrimination, the failure to prove discrimination means that he is not entitled to payment of gratuity for the first two contracts.

10.2 As conceded by the appellant we agree that the only entitlement that is due is payment of gratuity for the 3rd contract from 1st March 2020 to 27th May 2020 on pro rata basis in accordance with the staff handbook of 2020.

10.3 Costs follow the event to be taxed in default of agreement.



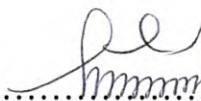
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B.M. Majula

COURT OF APPEAL JUDGE



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P.C.M. Ngulube

COURT OF APPEAL JUDGE



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A.M. Banda-Bobo

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