

**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**2023/HP/1070**

**BETWEEN:**

**WILSON BANDA**

**AND**

**ZESCO LIMITED**



**PLAINTIFF**

**DEFENDANT**

**Before the Honourable Lady Justice S. Chocho, in Chambers.**

*For the Plaintiffs : Mr S.C. Mwanashiku Messrs M & M Advocates*

*For the Defendant : Mrs. M. Simalambo- Siamutwa (In House Counsel)  
Mr. K. Mweemba (Head of Legal)*

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## **R U L I N G**

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**Cases referred to:**

- i) *Antonio Ventriglia V Finsbury Investment LTD SCZ NO. 2/2019*
- ii) *NFC Africa Mining PLC V Techro (Z) LTD (2009) ZR 236*
- iii) *Zesco Ltd V Alexis Mabuku Mutale SCZ NO 184/2014.*
- iv) *Cosmas Mukuka (Sued In his Capacity as Secretary General of Zambia Congress of Trade Unions) V. Jason Mwanza (Suing in His Capacity as General Secretary of The University of Zambia Lecturers and Researchers Union) SJ NO. 13 OF 2019*
- v) *P.C. Cheelo and Others V. Zambia Consolidated Copper Mines Limited (1999) ZR 162*
- vi) *Florence Mbwili and Another V Zesco LTD 2023/HP/1270*

**Legislation referred to:**

- i) ***Order 14A of the Rules of the Supreme Court (White Book) 1999 Edition***
- ii) ***Section 52 (6) of the Employment Code Act***

1. **INTRODUCTION**

1.1. This Ruling is in respect of the application under *Order 14A of the Rules of the Supreme Court* (White Book) in which the Defendant seeks an order for determination of issues on point of law ie to dismiss the action.

1.2. The questions posed, requiring the Court's determination are :-

1.2.1. ***Whether this Honourable Court has the requisite jurisdiction to entertain and determine an Employment dispute which is statute barred as the said action was commenced outside the prescribed statutory period of thirty (30) days from the date the cause of action had accrued.***

1.2.2. ***4.3.1 Whether the Plaintiff's assertion that he should be paid 12 years salary as the period that remained on his employment under the Defendant's permanent and pensionable conditions of service before being eligible for retirement at the age of 60 years. That the Plaintiff has failed to disclose a cause of action under this relief because he is not entitled to claim for a period not worked for, and the same has already been pronounced on by the Supreme Court in a plethora of authorities.***

2. **BACK GROUND**

2.1. The background to this matter as per pleadings and affidavit evidence on record is that the Plaintiff is a former employee of the Defendant company whose contract was terminated on 28<sup>th</sup> December, 2021.

- 2.2. The Plaintiff commenced litigation against the Defendant claiming breach of contract of employment, wrongful, unlawful and unfair termination of contract, shortfall on severance pay, exemplary and punitive damages, costs.
- 2.3. The Defendant defends the action by defence claiming the termination was lawful and that the Plaintiff was duly paid his dues.

3. **AFFIDAVIT EVIDENCE**

- 3.1. The Defendant avers in it's affidavit dated 19<sup>th</sup> February, 2024 that the Plaintiff's action was commenced approximately 540 days (1 year and 175 days). after termination of his employment.
- 3.2. The Defendant avers that the Plaintiff's action was commenced outside the statutory 30 days period.
- 3.3. The Defendant avers that the Plaintiff's action is incompetent.
- 3.4. The Defendant's application is opposed by the Plaintiff who filed an affidavit in opposition dated, 15 May, 2024.
- 3.5. The Plaintiff avers that his action includes claim for breach of contract of employment and sum of K 503,637.85 being shortfall on his severance pay.

4. **THE LAW/SUBMISSIONS**

- 4.1. I have had occasion to review and consider the application having heard counsel for the Plaintiffs and Defendant, read the parties' affidavits, skeleton arguments and list of authorities filed herein.
- 4.2. This Court has jurisdiction to determine a matter on point of law under ***Order 14A of the Rules of the Supreme Court (White Book) 1999 edition.***

- 4.3. I shall not reproduce the Parties skeleton arguments. Suffice it to state that I have read and considered them.
- 4.4. The Defendant submits that this Court lacks jurisdiction to hear and determine the Plaintiff's action on basis that the same is statute barred as it was filed contrary to section 52(6) of the Employment Code Act.
- 4.5. The Defendant relies on various authorities in support of it's application some of which are :-

**ANTONIO VENTRIGLIA V FINSBURY INVESTMENT LTD SCZ NO. 2/2019<sup>1</sup>, NFC AFRICA MINING PLC V TECHRO (Z) LTD (2009) ZR 236<sup>2</sup> AND ZESCO LTD V ALEXIS MABUKU MUTALE SCZ NO 184/2014<sup>3</sup>.**

- 4.6. The Defendant further submits that the rest of the Plaintiff's action does not disclose any cause of action on the basis that it has been held that it is unlawful to award a salary/ terminal benefits for a period not worked for.
- 4.7. The Defendant submits that the Plaintiff's action must be dismissed with costs.
- 4.8. The Plaintiff submits that section 52 (6) of the Employment Code Act does not apply to the Plaintiff's claim as his claims do not fall under Industrial relations matter but under the general law of breach of contract and debt collection.
- 4.9. The Plaintiff relies on the authority the cases of **COSMAS MUKUKA (SUED IN HIS CAPACITY AS SECRETARY GENERAL OF ZAMBIA CONGRESS OF TRADE UNIONS) V. JASON MWANZA (SUING IN HIS CAPACITY AS GENERAL SECRETARY OF THE UNIVERSITY OF ZAMBIA LECTURERS AND RESEARCHERS UNION) SJ NO. 13 OF 2019<sup>4</sup>, P.C. CHEELO AND OTHERS V. ZAMBIA CONSOLIDATED COPPER MINES LIMITED (1999) ZR 162<sup>5</sup>.**

- 4.10. The Plaintiff further submits that the Defendant ought to have filed his application before filing defence and before matter having closed pleadings.
- 4.11. The Plaintiff submits that Defendant's application be dismissed and issues determined at trial.

5. **COURT'S ANALYSIS AND DECISION**

- 5.1. In dealing with the question of whether or not the Plaintiff's action offends section 52(6) and therefore is statute barred. I will place reliance of the provisions of section 52 in full. The section provides: -

***"52. (1) A contract of employment terminates in the manner stated in the contract of employment or in any other manner in which a contract of employment is deemed to terminate under this Act or any other law, except that where an employer terminates the contract, the employer shall give reasons to the employee for the termination of the employee's contract of employment;***

***(2) An employer shall not terminate a contract of employment of an employee without a valid reason for the termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.***

***(3) An employer shall not terminate the contract of employment of an employee for reasons related to an employee's conduct or performance, before the employee is accorded an opportunity to be heard.***

***(5) An employer shall bear the burden of proof that the termination of a contract of employment was fair and for a valid reason.***

***"(6) An employee who has reasonable cause to believe that the employee's services have been terminated contrary to this section may report the matter to an authorized officer under section 121 or,***

*within thirty days of the termination lay a complaint before the court."*

- 5.2. The Defendants rightly state that the Plaintiff's contract was terminated on 28<sup>th</sup> December 2021, clearly the 30 days as provided by section 52 (6) have since past.
- 5.3. I am of the considered opinion that all the claims by the Plaintiffs as offends section 52(6) should and must be expunged, they are incompetently before me. However, the Plaintiffs do in their Originating Process show cause of action/claims that do not offend Section 52 and these are competently before me as, for instance the claims at (ii), (iv), (v) through to (x) can be heard and determined by this Court.
- 5.4. As refers to the second question raised by the Plaintiff, it is my considered opinion that case law cannot at this stage be used to summarily determine an action. This is evident from the number of matters on this same question that the Supreme Court and Constitutional Court has pronounced itself on.
- 5.5. I have had occasion to review the case of my learned sister Honorable Lady Justice Chawatama in the case of **FLORENCE MBWILI AND ANOTHER V ZESCO LTD 2023/HP/1270<sup>6</sup>**.

I must state for the record that the case/authority is but merely persuasive and not binding to me. I am of the opinion that the said case can be distinguished from the one in casu primarily because of the claim in the Florence Mbwili case. To borrow the words of the Defendant herein, the claim in the Florence Mbwili case, fell squarely within section 52.6 of the Employment Code Act. In casu, the Plaintiff's other claims are not strictly industrial relations disputes.

6. **CONCLUSION**

- 6.1. For the foregoing reasons, I find that the preliminary issue raised by the Defendant succeeds in part.
- 6.2. For the avoidance of doubt I find that the Plaintiff's claims as appears at (ii), (iii), (iv) and part of (v) on the Writ of Summons **BE** and **IS** hereby expunged from the record.
- 6.3. I further order that leave **BE** and **IS** hereby granted to the Parties to amend their originating process (Writ and Statement of Claim, Defence).
- 6.4. Each party to bear it's own costs
- 6.5. Matter stands adjourned to 28<sup>th</sup> August at 15:30 for Scheduling Conference.

**Delivered at Lusaka on 25<sup>th</sup> July, 2024.**



**S. CHOCHO  
HIGH COURT JUDGE**

