

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

2022/HP/1376



BETWEEN:

**JOHN MUKANDAASA CHIFUNDA
AND**

PLAINTIFF

**AFRICAN BANKING CORPORATION ZAMBIA LIMITED
ALSO TRADING AS ATLAS - MARA**

DEFENDANT

Before the Honourable Ms. Justice S. Chocho, in Chambers, on the 22nd May, 2024

For the Plaintiff(s): Mrs. ET Changugu – Messrs Robson Malipenga and Co
For the Defendant(s): Mr. R. Ngulube – Messrs Tembo Ngulube and Association

JUDGMENT

Cases referred to:

1. *Colgate Palmolive Inc V Able Shemu & others Appeal No. 181 of 2005*
2. *Maamba Collieries Limited V Douglas Siakalongo & Others SCZ Appeal No. 51/2004*
3. *Attorney General V Austin Chirwa SCZ Judgment No. 38 of 2000*
4. *Kasote Singogo V Chilanga Cement PLC SCZ 13 of 2009.*
5. *Zambia Oxygen Limited V Paul Chisakula and Others*
6. *Barclays Bank Plc Vs Zambia Union of Financial and Allied Workers Judgement No. 12 of 2007*
7. *Chilanga Cement Vs Kasote Singogo Judgment No. 13 of 2009.*
8. *Anderson Mwale & Others V Zambia Open University 2021/CCZ/001*
9. *Lubunda Ngala & Jason Chulu V Anti-Corruption Commission CCZ Select Judgment No. 4 of 2018.*

Legislation referred to:

1. *Employment Act Chapter 268 of the law of Zambia (Revised August 2017)*
2. *Section 55 of the Employment Code Act, 2019 of the Laws of Zambia.*

1. **INTRODUCTION**

1.1. This Judgment is in respect of the Plaintiff's claim against the Defendant. The Plaintiff by Writ of Summons and Statement of claim dated 07th September, 2022 claims the following :-

- i) An order for an underpayment of redundancy package worth the sum of ZMW 132, 064.40.*
- ii) An order for payment of ZMW 150, 338.40 for the 222 days not paid*
- iii) An order for salary arrears from the 10th August 2017 to date of judgement.*
- iv) Damages.*
- v) Costs.*

1.2 The Defendant by appearance and Defence dated 21st September, 2022 denied the Plaintiff's claims stating that it had discharged all of its responsibilities to the Plaintiff upon redundancy. That the Plaintiff's package was correctly calculated.

1.3 The Plaintiff's Reply dated 26th October, 2022 stated that it would put the Defendant to strict proof that his package was not miscalculated.

2. **BACKGROUND TRIAL COURSE**

2.1. Trial was scheduled and heard on the 20th March, 2024.

2.2. The Plaintiff called one witness in aid of his claims/case. Plaintiff's Witness 1 the plaintiff himself filed a witness statement dated 19th January, 2023 and leave was granted for the Plaintiff to file an amended witness statement, which statement the Plaintiff relied on dated 20th March, 2024.

2.3. The Plaintiff testifies that he was an employee of Finance Bank (Z) Plc, a company which was later sold and merged with the Defendant's bank.

2.4. The Plaintiff testified that he was employed on the 26th January, 2004 as a Clerk in Facilities Department rose through the ranks to position

- of Officer FB58 which grade was of Management status on permanent basis, a position he held until his retirement.
- 2.5. The Plaintiff testified that his last salary under Management Conditions was ZMW 10,158.00.
 - 2.6. The Plaintiff testified that his contract was terminated by reasons of redundancy on 10th August, 2017 having worked for the Defendant's Company for 13 years and 222 days.
 - 2.7. The Plaintiff testified that he was under paid his packaged which was miscalculated at rate of one-month salary for each year served and the 222 days were not considered.
 - 2.8. The Plaintiff testified that by reason of under payment he was entitled to his salary from 10th August, 2017 to date of Judgement.
 - 2.9. Under cross-examination the Plaintiff's Witness 1 confirmed that he was employed by Finance Bank Zambia Limited on 26th January 2004 and was serving in a Management position salary grade FB58 at date of redundancy which was 10th August, 2017.
 - 2.10. Plaintiff's Witness 1 confirmed under cross-examination that he could not remember formula the bank used to calculate his package but that he received a total of ZMW 132,064.40.
 - 2.11. Plaintiff's Witness 1 conceded that Finance Bank Zambia Limited paid him one-month salary for each completed year served. Plaintiff's Witness 1 further stated that he understood the law provided for redundancy package calculate at 2 months salary for every complete year served and thus his claim of underpayment.
 - 2.12. Plaintiff's Witness 1 refused that the Finance Bank Zambia Limited had discretion to decide what rate to use in calculating his package.
 - 2.13. Plaintiff's Witness 1 insisted that he was entitled to be paid for the 222 days on prorate basis.

- 2.14. Plaintiff's Witness 1, conceded that he was paid his pension under the Pension Scheme and that the Finance Bank Zambia Limited, had or was paying his salary over or for the 222 days, that he worked.
- 2.15. Plaintiff's Witness 1 was not subjected to re-examination and the Plaintiff closed his case.
- 2.16. The Defendant called one witness in aid of its defence, one Cynthia Katongo Chanda Defendant's Witness 1 who filed Witness Statement dated 17th October, 2023.
- 2.17. Defendant's Witness 1, testified that the Plaintiff was employed by Finance Bank Zambia Limited on 26th January, 2004, rose through the ranks and was on 10th August, 2017 declared redundant.
- 2.18. Defendant's Witness 1 testified that the Finance Bank Zambia Limited's Management Terms and Conditions did not provide a formula for calculating redundancy package and thus it used its discretion to pay out one-month salary for each complete year served.
- 2.19. Defendant's Witness 1 testified that the Plaintiff never worked under the terms and conditions as provided by the Defendant bank (African Banking Corporation Limited).
- 2.20. Under cross-examination Defendant's Witness 1 conceded that the Plaintiff was serving in Management at the time he was declared redundant, by Finance Bank Zambia Limited.
- 2.21. Defendant's Witness 1 testified that the Finance Bank of Zambia Limited terms and conditions for management were applicable to the Plaintiff at the time of redundancy.
- 2.22. Defendant's Witness 1 testified that the merger process between Finance Bank of Limited and the Defendant bank commenced in June, 2016 and the former employment conditions fell off in August, 2017 at time of redundancy, after completion of assessment process of human capital and determination for suitability into the new merged entity.

- 2.23. Defendant's Witness 1, confirmed that by 08th August, 2017 the Plaintiff was already listed for redundancy.
- 2.24. Defendant's Witness 1, conceded under cross-examination that the Defendant Bank's terms and conditions of employment did not provide for discretion on payment of redundancy package.
- 2.25. Defendant's Witness 1, testified that the Plaintiff was not paid for the 222 days as the same did not constitute a complete year to be considered for redundancy payments, and therefore the Plaintiff was paid for 13 years.
- 2.26. In re-examination Defendant's Witness 1 clarified that the assessment of human capital was necessary because both banks had employees in similar positions and there was for the sake of objectivity, online assessment and interviews, of all human capital to determine suitability.
- 2.27. Defendant's Witness 1 confirmed that the Plaintiff did not serve under the Atlas-Mara terms and conditions of service as he was declared redundant by Finance Bank of Zambia Limited in August, 2017.

3. THE LAW AND SUBMISSIONS.

- 3.1. The Parties filed written submissions dated 30th April, 2020 and the Defendants had not filed any "by date of Judgment.
- 3.2. I shall not reproduce the Plaintiff's submissions as the same are on record. The Plaintiff has relied and cited the authority in the cases of **COLGATE PALMOLIVE INC V ABLE SHEMU and OTHERS APPEAL NO.181 OF 2005¹, MAMBA COLLIERIES LIMITED V DOUGLAS SIAKALONGO & OTHERS SCZ APPEAL NO. 51/2004². ATTORNEY GENERAL V AUSTIN CHIRWA SCZ JUDGMENT NO.38 OF 2000³ AND KASOTE SINGOGO V CHILANGA CEMENT PLC SCZ 13 OF 2009⁴.**

- 3.3. I have struggled to understand/relate the Plaintiff's submissions to the facts /claims of the case 2022/HP/1376. The Plaintiff concedes that he worked for 13 years and 222 days, was paid redundancy package at the discretion of Finance Bank Z Limited as his management contract was silent on package. In his submissions, the Plaintiff acknowledges that section 26B of the Employment Act Chapter 268 of 2017, did not apply to written contracts but submits that Employment Code Act 2019 should apply to his case and he be paid 2 months salary for each year served and the 222 days on pro-rata basis.
- 3.4. The cases cited by the Plaintiff **MAAMBA COLLIERIES LIMITED V DOUGLAS SIAKALONGO AND OTHERS²**, also **ZAMBIA OXYGEN LIMITED V PAUL CHISAKULA AND OTHERS⁵**, do not apply to the facts in casu.

4. COURT'S DECISION

- 4.1 The clear and undisputed facts are as follows:
- i) That the Plaintiff was an employee of Finance Bank of Zambia Limited.
 - ii) That Finance Bank Zambia Limited did merge with Atlas – Mara Bank Z Limited, into an entity known as African Banking Corporation Z Ltd (the Defendant Bank) in 2017.
 - iii) That the Plaintiff was declared redundant on 10th August, 2017 at which point he was serving on management terms and conditions of Finance Bank Zambia Limited.
 - iv) That the Plaintiff was paid a sum of ZMW 132,064.40 as redundancy package, at rate of one-month salary for each complete year served).
- 4.2 The questions that need to be answered by this Court and appear to be in dispute between the parties are:

- i) Was Plaintiff an employee of the Defendant bank?
 - ii) What redundancy rate was Plaintiff entitled to?
 - iii) Is the Plaintiff entitled to salary arrears?
- 4.3 It is abundantly clear in my mind that the crux of this case lies on whether or not the Plaintiff was in fact an employee of the Defendant Bank whose redundancy package calculations were based on section 26B of the Employment Act Chapter 268 of the Laws of Zambia. (applicable rates of separation shall be the statutory minimum or as prescribed by the Minister from time to time)
- 4.4 The Parties by their testimony state that the Plaintiff was an employee of Finance Bank Z Ltd and this bank merged with Atlas-Mara Bank to form the Defendant bank.
- 4.5 Defendant's Witness 1 testified that the merger processes as relates to human capital concluded in August, 2017 and such as the employee determined as employed by the Defendant Bank were entitled to terms and conditions of the Defendant' Bank. This testimony is believable when one considers that the merger of two banks presented with duplicated positions and human capital and thus a redundancy was inevitable. I believe Defendant's Witness 1 testimony that assessments were carried out and those that passed these assessments were offered employment/positions in the Defendant bank and those that did not pass were declared redundant. It is not in dispute that the Plaintiff fell in the latter category.
- 4.6 The Plaintiff in his bundles of documents exhibits his letter of offer, of employment and contracts of service from the period 2004 to 2007, the documents indicate employer as Finance Bank Z Ltd. He further exhibits terms and conditions of service for Management staff of the Defendant bank.
- 4.7 The terms and conditions of service in the Plaintiff's bundle is inscribed with words "Revised August 2017". The said terms and conditions at page 5 under introduction and application provide:

“The terms and conditions of service cover employees who have been appointed to the Bank’s permanent and pensionable service as well as employees on fixed term contract of employment and must be adhered to by all the covered employees of the Bank”. (emphasis my own).

- 4.8 The Plaintiff has not provided evidence to show that he was indeed an employee of the Defendant Bank no letter of offer, no contract of employment, no letter of transfer from Finance Bank (Z) Ltd to the Defendant Bank, no payslip or any manner of document to show relationship between the Plaintiff and Defendant Bank, whatsoever.
- 4.9 I am inclined to believe that the Plaintiff did not meet the standard of an employee of the Defendant’s bank and thereby was not an employee of the Defendant’s bank but rather the Plaintiff was employee of Finance Bank (Z) Ltd and did not join the merged entity, as Finance Bank (Z) Ltd declared him redundant.
- 4.10 Having answered/determined who the Plaintiff’s employer was, I now cast my mind to the question of, what rate of redundancy package the Plaintiff was entitled to. I have perused the terms and conditions of service for management staff under Finance Bank (Z) Ltd as appears in the Defendant’s supplementary bundle of documents. The said terms and conditions at page 23 provide as follows:

“32.6 Redundancy

“Where through force of circumstances, it is necessary to reduce the number of employees, the Bank shall declare employees redundant. In such an even, the employees affected shall be notified, at least one month in advance or paid one month’s salary in lies of notice. Further, the labour Commissioner /his nominee shall be notified at least 60 days prior to effecting the termination”.

The clause is silent on the rate of redundancy or package payable at redundancy.

- 4.11 The Defendant suggests that this denotes that the Finance Bank (Z) Ltd was entitled to, in its own discretion to determine the rate payable. The Plaintiff on other hand suggest he is entitled to Defendant Bank rate of provisions and under section 54(1)(d) and section 55 of the Employment Code Act, 2019 of the Laws of Zambia.
- 4.12 It is my considered opinion that the Plaintiff cannot be entitled to provisions of the Employment Code Act of 2019, which Act came into effect 2 years after his redundancy, which Act makes no provision to render it applicable retrospectively. This then means one has to look at the Legislative provisions as at 2017 and examine applicability and whether/not the rate used to pay the Plaintiff was below the Legislative minimum. The minimum wages and conditions of Employment (General Order) 2011 was also not applicable to the Plaintiff.
- 4.13 The Law as governed employment relationships in 2017 was the Employment Act Chapter 268 of the laws of Zambia. This Act has been referred to by the Defendant and in particular section 26B. I shall not belabour the point that is settled case Law, that section 26B of the repealed Employment Act did not apply to individuals employed under written contracts. Reference is made to the cases of **BARCLAYS BANK PLC VS ZAMBIA UNION OF FINANCIAL and ALLIED WORKERS SUPREME COURT JUDGEMENT NO. 12 OF 2007⁶ AND CHILANGA CEMENT LTD VS KASOTE SINGOGO SUPREME COURT JUDGMENT NO.13 OF 2009⁷.**
- 4.14 It would appear that the Plaintiff has no legal provision now or then that could answer the question of rate applicable. It leaves to reason that the employer Finance Bank (Z) Ltd could decide on its own discretion what rate to use as the contract and terms and conditions signed and agreed to by both Plaintiff and Finance Bank (Z) Ltd did not

specifically mention the rate. It is not for this Court to go outside the four corners of the employment contract or determine without legal provision, a rate to be used. I find that the Plaintiff's employer was well within their rights in determining rate of redundancy package, particularly so where the contract is silent/does not provide for any payment at all I find that the Plaintiff was not underpaid.

4.15 The decision in 4.14 automatically denotes that the claim for salary arrears fails. I will not delve into explanation suffice it to state that the Constitution Court has pronounced itself on the issue in the cases **ANDERSON MWALE & OTHERS V ZAMBIA OPEN UNIVERSITY 2021/CCZ/001⁸**, **LUBUNDA NGALA & JASON CHULU V ANTI-CORRUPTION COMMISSION CCZ SELECT JUDGMENT NO. 4 OF 2018⁹**.

5. CONCLUSION

- 5.1. For the foregoing reasons and on a balance of probability I find that the Plaintiff's case fails in its entirety.
- 5.2. Costs for and incidental to this action are awarded to the Defendant. The same to be taxed in default of agreement.
- 5.3. Leave to appeal is granted.

Delivered at Lusaka on 22nd May, 2024.



**S. CHOCHO
HIGH COURT JUDGE**

