A LEGAL ANALYSIS OF LABOUR DISPUTE PREVENTION AND RESOLUTION UNDER INDIVIDUAL EMPLOYMENT LAW IN ZAMBIA*

***Willard Mutoka v Chambeshi Water and Sewerage Company Limited* (Comp. IRCLK/382/2018)**

1 Introduction

This case note is a legal review and analysis of *Willard Mutoka v Chambeshi Water and Sewerage Company Limited*, a Zambian case relating to a labour dispute under the individual employment law sphere. The authors/reviewers herein were retained as counsel for the respondent company in the matter *in casu*. Appreciating that Zambia has both individual and collective labour dispute prevention and resolution mechanisms, the authors/reviewers in consultation with all parties involved opted to pursue the alternative dispute resolution approach under the High Court for Zambia (Amendment) Rules, 1997 (Court-Annexed Mediation Order XXXI Rule 4), instead of litigation, resulting in the faster, cheaper and final settlement of the case in full satisfaction and accord of both parties as discussed hereinafter. Unlike arbitration awards which are conclusive and final, mediation agreements or settlements need to be registered in the courts for them to be recognised as binding.

2 Background information

2 1 Synopsis of the case

The complainant entered into a contract of employment with a respondent company on a three-year contract renewable based on performance from 2015 to 2018. Upon expiry of the said contract, the complainant applied for the renewal of the contract through the Permanent Secretary (PS) of the Portfolio Ministry as there was no board of directors in place then; which application was denied by the PS. The complainant then approached the Parliamentary Select Committee to complain that the non-renewal his of contract was based on political discrimination.

The Parliamentary Select Committee ordered the PS to renew the complainant's contract of employment and acting on that purported instruction, the PS renewed the complainant's contract for a further three

* Based on a paper presented at the Nelson Mandela University Labour Law Conference on "Labour Dispute Resolution, Substantive Labour Law and Social Justice Developments in South Africa, Mauritius and Beyond" from 19–21 July 2019 in Mauritius.

years. The complainant took office and three weeks thereafter the PS received legal opinion from the Attorney General of the Republic of Zambia that the Parliamentary Select Committee had no power to order the PS to renew the contract of employment for the complainant. The PS wrote to withdraw the complainant's renewed contract. Being aggrieved by the said withdrawal, the complainant commenced an action against the respondent company alleging unfair and wrongful dismissal. The matter was referred for mediation by the High Court Judge with the authors herein being retained counsel for the respondent.

2 2 Possible dispute prevention/resolution avenues

Labour dispute resolution is regulated by statute as well as through court-annexed mediation and conciliation. Arbitration is also provided for under the Arbitration Act No 19 of 2000 of the Laws of Zambia. The effect of social justice and access to justice in labour disputes have been made possible through a fast track process under the Small Claims Court which is a creature of Small Claims Court Act, Cap 47 and Industrial Relations Division of the High Court created by the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia.

2 3 Identified legal issues

The following were the pertinent legal issues identified as to beg for resolve by the honourable mediator:

1 Whether or not the PS was a competent authority with the legal mandate and backing to take charge of overall supervision of the respondent company in the absence of the board of directors;
2 Whether or not the PS was under a legal obligation to obey a directive from the Parliamentary Select Committee compelling him to renew the contract of employment for an employee whose contract had expired;
3 Whether or not the correct procedure was followed by the respondent company in offering and subsequent withdraw of the "renewal" of contract of employment;
4 Whether or not there was both unfair and wrongful dismissal in the manner the complainant was separated from the respondent employer; and
5 Whether or not the complainant was entitled to the relief that he was seeking including payment of all allowances, salaries and increments for a period of three years amounting to more than two and a half million Zambia Kwacha (ZMW2.5 million) which was equivalent to US$ 200,000.

2 4 Discussion of the applicable law

The following legal discourse was presented before mediation:

1 With respect to the first legal issue of whether or not the PS was a competent authority to take charge of a government institution in the absence of the board of directors:

- First, it is a matter of common practice for purposes of giving efficacy to the continuation of company operations and existence. It is trite law that a company operating without a board of directors for a period of more than 90 days, must be wound up (closed) otherwise its subsequent "decisions" would be illegal.
- Secondly, this legal issue falls under the scope and ambit of equitable estoppel. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption (Brooke "An Estoppel Case Review" https://www.newlawjournal.co.uk/content/estoppel-case-review (accessed 2019-01-19)). The case of *Africast (Pty) Ltd v Pangbourne Properties Ltd* ((2010/2117) [2013] ZAGPJHC 39) is authoritative hereon.

2 Turning to the issue of the Parliamentary Select Committee's directive to the PS to renew the complainant's contract of employment, it was opined that the Parliamentary Select Committee acted *ultra vires* its powers. The National Assembly Powers and Privileges Act (Cap 12 of the Laws of Zambia) is very clear on what immunities and protections parliament can confer on persons that appear before it. The powers and privileges do not include the powers to have parliament or any of its Committees directing or ordering a limited company to renew any employee's contract.

3 Regarding the third legal issue herein:

The general considered view was that the respondent breached the law on legitimate expectation by withdrawing the purported renewal of the "subsequent" contract. However, considering the timeframe in which the events occurred, a legitimate expectation may be circumvented and/or atoned for by paying a salary prorated for the number of days worked under the mistaken renewal prior to the learned Attorney General's advice.

4 Pertaining to unfair dismissal and/or wrongful dismissal:

It was contended that there was a slight chance for the courts to find in favour of the complainant on matters of wrongful dismissal for the reason that there was error on procedural matters of communicating to the complainant about the erroneous "renewal" and its subsequent withdrawal. The Industrial and Labour Relations Act (Cap 269 of the laws of Zambia) may be authoritative hereon. Wrongful dismissal has been held to be illegal dismissal for want of following due/correct procedure (*Phiri v Bank of Zambia* (198/2005) [2007] ZMSC 21 (20 August 2007)). It was further held that for cases of wrongful dismissal the only remedy available is the award of compensation if the form of damages to which both parties agreed to.

In terms of unfair dismissal, it was heard that any termination which falls under Section 108 of the Industrial and Labour Relations Act (Cap 269 of the Laws of Zambia), would be deemed to be unfair dismissal whose automatic remedy is reinstatement, re-employment and compensation for loss of employment. However, in mediation the parties agreed that ordering reinstatement or re-employment would undermine the freedom

of employment contract which espouses for the view that parties should not be forced to continue working together if they do not wish to as doing otherwise would entail converting a contract of employment into a contract of slavery.

5 Concerning entitlements:
Based on the philosophy of labour income as buttressed by law, it is clear and settled legal principle that paying a former employee for services not worked for is deemed not only speculative but also unjust enrichment. The mediator's attention was drawn to a plethora of cases wherein the above position has been repeatedly held by the courts of law; with the latest decision being that of the Supreme Court of Zambia in the case of *ZCCM Investments Holdings v Sichimwi* ((Appeal No. 172/2014) [2017] ZMSC 51 (12 June 2017)).

2 5 Application of the law to the facts

Applying the law relating to dispute prevention and resolution, through mediation, the parties resolved the dispute by consent agreement within two weeks thereof premised on the following:

1 Taking into consideration the law pertaining to the first legal issue herein identified, it is clear that the PS in charge of a particular portfolio where a government institution falls must take charge of such a company for purposes of efficacy in the continued operations of the institution in the absence of a Board so as to avoid the negative effect as espoused in the *Emirates case.*

In any case, it was the complainant who initiated the process of placing the PS in the place of authority by writing to the PS requesting for renewal of his complainant's contract of employment on his own assumption that the PS was a competent authority to renew or not to renew the contract.

It was thus espoused that the complainant was, therefore, equitably estopped by law from denying his own assumption following his argument that the PS did not have the power to terminate the contract of employment when in the same breath the said complainant asked the same portfolio PS to renew his contract.

2 Applying the law to the second legal issue herein it is trite and clear that not only did the Parliamentary Select Committee exceed its legal powers but also breached the Constitutional separation of powers and seriously violated the fundamental tenets of company law by interfering in the internal operations of a limited company by ordering the company to renew an expired contract of employment for a former employee. This can also be said to be a clear case of breach of freedom of contract which is premised on the principle of mutual consent (as espoused in the case of *The Council of the Copperbelt University v Akombelwa* 2009/HK/609) whereby each contracting party has a right to exercise the freedom to continue or terminate the contract of employment if either or both parties desire to do so. It is also a settled legal principle within the employment and labour law sphere forcing an employer to continue employing an employee when one party to that contract does not desire

to continue to be bound by that contract is like converting a contract of employment into a contract of slavery. This could be seen to be contrary to spirit, purport and object of article 14 of the Zambian Constitution, Cap 1 of the Laws of Zambia and international labour standards.

Although the PS ought not to have complied with an "illegal" instruction from parliament, it seems to us that he might have operated under the basic requirement to obey seemingly lawful instructions to avoid being cited for contempt of parliament contrary to the provisions of the said National Assembly Powers and Privileges Act (Cap 12 of the Laws of Zambia).

3 With respect to the 4th legal issue, the complainant averred that the decision by the PS not to renew the complainant's contract had three conflicting dates namely: the date on the letter itself, the date on the envelope and the date of service/delivery to the complainant. He contended that the decision not to renew was an afterthought by the PS, he the complainant sounded the weaknesses obtaining in the company including the delayed appointment of the Board of Directors.
The complainant's contention was going to be that the conflicting dates were not accidental but evidence of ill-intent on the part of the respondent hence, "backdating the response not to renew his contract." Such an act if proven in court would be tantamount to unlawful dismissal.

In the premises and for that fact that the complainant was erroneously communicated to about the purported renewal, of course at the coercion and duress of parliament, it is regrettable that the respondent did flout any procedure(s). The ideal position should have been to first consult the Attorney General about the directive from parliament before communicating to the complainant.

4 Applying the law to the facts it is likely that the court would find in favour of the complainant and possibly hold unfair dismissal, from the perspective of dismissing an employee by taking into account irrelevant factors, his reporting the company's shortcomings to parliament without approval of the PS.

There is also a slight chance that the court might find for the complainant on wrongful dismissal on procedural errors on the part of the respondent.

5 From a legal point of view, as enunciated in point 4 above, the defence team for the respondent held a legal opinion that even if the complainant succeeded in proving his case at trial, the court would not award complainant the speculative and unjust enrichment of the claim of more than ZMW2.5 million(US$190,000.00). The defence team contended that the complainant might be compensated damages for either unfair dismissal and/or wrongful dismissal, as elucidated above, which quantum legally could not reach the claimed ZMW 2.5 million (US$190,000.00) or anything close to that spectrum. In the case of *ARB Electrical Wholesalers (Pty) Ltd v Hibbert N.D* (Case No. DA3/13 (Judgment delivered on 21 August 2015)), the court distinguished compensation from damages and stated that where an employee has suffered embarrassment (such as reporting to the office only to be removed thereafter), equitable and just compensation may be given on reasonable

scales. The respondent averred that reasonable scales are not equal to payment equivalent to the end of the contract as herein claimed.

It is, therefore, at the discretion of the court to decide what scales may apply on a case-by-case basis.

In the case *SBV Services (Pty) Ltd v CCMA* (2013 34 ILJ 996 (LC)) it was stated that only in matters of proved unfair dismissal that reinstatement of an employee may be ordered but considering soured relations, the employee may be awarded damages that are equivalent to what they could have earned as a total sum at the end of their terminated/dismissed contract.

Our view was that it would be an uphill battle for the complainant to prove unfair dismissal, except for the alleged backdating of the non-renewal letter as allegedly contradicted by the date on the envelope. If they proved their case, then the complainant would be entitled to 36 months' payment without consideration of the unjust enrichment doctrine as espoused in the case of *ARB Electrical Wholesalers (Pty) Ltd v Hibbert N.D* ((DA3/13)[2015] ZALAC 34) where the court stated that compensation in labour suits ought to be just and equitable- payable for the period served.

Ordinarily, if the employee had a validly renewed contract, which he didn't have herein, and it was to be withdrawn immediately without notice, he would have been entitled to 3 months' salary compensation in lieu of notice to terminate as per section 20 of the Employment Act provided (Cap 268 of the laws of Zambia (now amended and replaced by *"The Employment Code Act, No 3 of 2019 of the Laws of Zambia"*)).

In instances where a former employee has been paid his dues such as gratuities, the court may only award very nominal damages – usually four months equivalent of salaries as held in the cases of *Jonathan Musialela Ng'uleka v Furniture Holding Limited* ((2008) Z.R. 19), and *Chintomfwa v Ndola Lime Company Limited* ((1999) Z.R. 172).

Therefore, considering that the former employee herein has been retained on the payroll and duly receiving his monthly salary pursuant to the *2016 Amended Constitution*, he is only entitled to nominal damages of about 4 months. The case of *Banda v Medical Council of Zambia* (Appeal No 116/2012) together with the above-discussed cases applies by implication and analogy herein *mutatis mutandis.*

2 6 Final submissions

The gist and thrust of submissions by the defence team for the respondent were that case bordered on procedural or mutual mistake. As such, it was deemed to be a proper case for alternative dispute resolution, through the mediation as opposed to the costly litigation.

From the foregoing and indeed on a *plethora* of authorities, it is clear that the respondent was on firm ground in the manner it acted and the Parliamentary directive to have the complainant's contract renewed was an illegality on the part of parliament as it has no legal backing to do so.

However, it is clear that the respondent had also made a procedural mistake in offering a renewal of contract to the complainant before seeking legal opinion from the Attorney General. This procedural error could be atoned for in law by the award of damages as opposed to reinstatement as pleaded by the complainant herein.

The main thrust of our averments was that the complainant's contract of employment had expired by effluxion of time and the purported subsequent renewal was an illegality prompted by parliament thus constituting mutual mistake at law.

For the above reasoning, we advised our client to consider an amicable settlement to be negotiated and pegged at a just and reasonable sum of six months' salary equivalent in the spirit of cost-benefit settlement based on the principle of a win-win situation. We further advised our client to offer the claimant an additional payment of a pro-rated monthly earning for the period that he worked before the withdrawal of the purported "renewed" contract.

3 Case outcome

A consent agreement was reached in less than two weeks where the claim of ZMW 2.5 million (US$ 190,000.00) was reduced to ZMW 180, 000.00 (US$ 14,000.00) all inclusive (including lawyers' fees).

4 Legal analysis of key findings

The postulation and promotion of labour dispute resolution through court-annexed mediation led to speedy and expeditious conclusion of the matter leading to the progressive realisation of social justice and access to justice through a fast track court system, the Labour Court Division, being a court of substantial justice in Zambia.

5 Conclusion

It is clear from the foregoing and on a *plethora* of authorities that Zambia is making commendable strides in the prevention and resolution of labour disputes under individual employment law sphere. The *Mutoka* case *in casu* is demonstrative of such strides just like the recent case of *Professional Teachers Union of Zambia v Labour Commissioner & Attorney General* (Comp/IRC/LK/AP/2/2018) in which the courts allowed a labour dispute under individual employment law to be commenced under judicial review and not by traditionally filing a complaint. This is widening the scope of judicial review intervention encompassing the settlement of labour disputes in the individual employment law sphere. Similarly, in *Konkola Copper Mines Plc v Martin Nyambe* (Appeal No 12 of 2018), the court espoused, *inter alia*, that wages when due and payable can be promoted and guaranteed even under alternative dispute resolution and not only through litigation.

The afore-stated legal principles applicable to dispute prevention and resolution mechanism, as demonstrated herein, can be effective and function as cost-saving mechanisms in resolving court disputes if well applied, resulting in a mutually agreed win-win situation.

It must be noted that *Rule 21(1) of the Industrial Relations Court* (*Arbitration and Mediation Procedure*) (*Amendment*) *Rules 2007* states that where mediation fails, the record of proceedings must be returned to court. Therefore, refusing to reach an agreement through mediation attracts sanctions in Zambia.

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