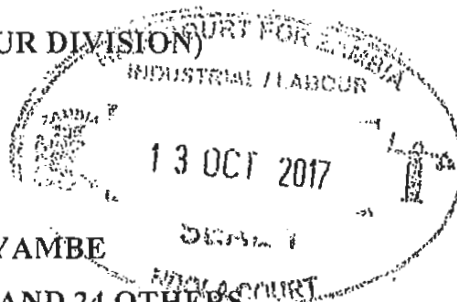


11 copy

Law in order
@ 607011.
Yes

IN THE HIGH COURT FOR ZAMBIA
AT THE NDOLA DISTRICT REGISTRY
HOLDEN AT NDOLA
(INDUSTRIAL/ LABOUR DIVISION)

COMP NO. IRC/ND/65/2016



BETWEEN

NYAMBE MARTIN NYAMBE
GABRIEL MWELWA AND 24 OTHERS
LEVYSON LWESELA
EVANS MWENYA
AND

1ST COMPLAINANT
2ND COMPLAINANT
3RD COMPLAINANT
4TH COMPLAINANT

KONKOLA COPPER MINES PLC

RESPONDENT

BEFORE: Hon Judge E.L. Musona

For the 1st and 4th Complainants: Mr Q. M. Kalonde of Messrs Quintino M. Kalonde & Co

For the 2nd Complainants: Mr B. Katebe of Messrs Kitwe Chambers

For the 3rd Complainants: Mr. K. Musukwa of Messrs Nyirongo & Company

For the Respondent: Mr E. C. Banda(SC) with Mr H. Zulu and Ms G. Kumwenda of Messrs
ECB Legal Practitioners

JUDGMENT

Date: 13th day of October, 2017

LEGISLATION REFERRED TO:

1. Article 187 (3) of the Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by Act No. 2 of 2016
2. Section 2 of the National Pension Scheme Act No. 40 of 1996 of the Laws of Zambia
3. Sections 2 and 18 of the National Pension Scheme (Amendment) Act No. 7 of 2015
4. Income Tax (Amendment) Act No. 19 of 2015

CASES REFERRED TO:

1. Lightson Silweya v Konkola Copper Mines Plc 2017/HK/04
2. Jacob Nyoni v Attorney General SCZ Judgment No. 11 of 2011
3. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172 (SC)
4. Khalid Mohamed v Attorney General (1982) Z.R. 49
5. Galaunia Farms Limited v National Milling Corporation Limited (2004) ZR 1 SC
6. Bank of Zambia v Kasonde (1995 - 1997) Z.R. 238 (S.C.)
7. Zambia Railways Limited v Oswell Joseph S.C.Z. Judgment no. 2 of 1995
8. ANZ Grindleys Bank (Zambia) Limited v Chrispin Kaoma SCZ Judgment No 12 of 1995
9. Zambia Airways Corporation Limited v Gershom Mubanga SCZ Judgment No. 5 of 1992
10. Swarp Spinning Mills v Sebastian Chileshe SCZ Judgment No. 6 of 2002
11. Zambia Consolidated Copper Mines v Ennedie Zulu S.C.Z. judgment no. 9 of 1999
12. Munkansemu Nyirenda v Zambia Forestry and Forest Industries Corporation Limited Appeal No. 127/ 2013

This action was commenced by way of Notice of Complaint and Affidavit in Support thereof filed into this Court on the 23rd day of June, 2016. The Respondent made an application for consolidation of actions as there were other actions before Court raising the same questions of law

and facts. I ordered that all actions relating to this matter should be consolidated and I also ordered for joinder of Gabriel Mwelwa and 24 others to the proceedings on the 7th of April, 2017. In view of the foregoing, the Complainants herein on or about 11th May, 2017 filed into Court a Consolidated Notice of Complaint and Affidavit in Support. The Complaint was filed by Nyambe Martin Nyambe, Gabriel Mwelwa and 24 others, Levyson Lwesela and Evans Mwenya. The Complaint was filed against Konkola Copper Mines Plc. I shall therefore refer to Nyambe Martin Nyambe and 27 others as the Complainants and to Konkola Copper Mines Plc as the Respondents which is what the parties to this action actually were.

The Complainants' claim is for the following reliefs :-

1. An order that the Complainants' retirement at the age of 55 years by the Respondent was premature and therefore unlawful, null and void without legal effect.
2. An order of reinstatement of the Complainants in the Respondent Company, payment of salaries accrued plus perks from their last shift dates and/ or
3. An order that the Complainants be deemed to have been retired by the Respondent at the age of 60 years
4. An order of immediate payment of the appropriate benefits at 60 years
5. Damages for breach of retirement laws/ contract and
6. Any other Order or award as the Court may consider in the circumstances of the case
7. Interest on all monies found due
8. Costs of and incidental to the proceedings

The duty for this court is to ascertain whether or not the Complainants have proved their claims.

The parties to this action proceeded by way of an Agreed Statement of Facts and Settlement of Issues, therefore, the evidence that was relied upon is the affidavit evidence. In their evidence, the Complainants stated that they were employed by the Respondent on permanent and pensionable conditions of service on various dates in different positions. The 1st Complainant was employed by the Respondent on 10th July 2008 as an Information Technology executive and was promoted to the position of Head Information Technology. This evidence was exhibited as "GM 29". The 3rd Complainant was employed by the Respondent as Trainee Programmer in 1985 and rose through the ranks to the position of Manager Human Capital- Corporate, the position he held until 30th June 2016. This was exhibited as "GM 33". The 4th Complainant was employed by the Respondent as Head Corporate Manpower Services on 5th May 2004 and he rose through the ranks to the position of Manager Human Capital Management-Corporate which is the position he held until 31st January 2016. The evidence was exhibited as "GM 36". At the time that the Complainants were employed by the Respondent Company, the pensionable age for all employees under the National Pension Scheme Act No. 40 of 1996 of the Laws of Zambia was 55 years.

The Complainants' evidence was that on the 14th of August, 2015 the National Pension Scheme Act No. 40 of 1996 was amended by Act No. 7 of 2015 which increased the retirement age from 55 years to 60 years. Between 13th February 2015 and 4th November 2015 the Complainants received letters from the Respondent advising them that they had reached 55 years and were eligible for retirement and these were exhibited as "GM1 -25" in the Affidavit in Support of Notice of Complaint filed into Court on 11th May, 2017. Pursuant to the said letters, the Complainants were retired by the Respondent.

The Complainants deposed in their Affidavit in Support of Notice of Complaint to the fact that they protested to this retirement by the Respondent because they were members of the National

Pension Scheme hence they had been retired contrary to the new act which revised the retirement age from 55 years to 60 years. However, the Respondent maintained that they were lawfully retired in accordance with the law that was applicable at the time they joined the Respondent Company.

The Complainants' evidence was that there was correspondence between the 4th Complainant and the Respondent wherein the 4th Complainant protested against being retired at the age of 55 years instead of 60 years and these were exhibited as "GM 37 -39". The Complainants stated that their retirement by the Respondent was less favourable to them as it denied them the right and opportunity to have worked and earned a salary plus perquisites up to 60 years as well as a better pension benefit. The Complainants attached correspondence marked "GM 41- 42" dated 7th October 2015 and 21st October 2015 between the management of the Respondent Company and National Pension Scheme Authority wherein it was clarified to the Respondent Company that the new retirement age was 60 years and not 55 years effective from 14th August, 2015.

The Complainants in their Affidavit in Support of the Notice of Complaint also stated that the Income Tax Act Chapter 323 of the Laws of Zambia which provides for retirement age for the Occupational Pension Scheme of the Respondent to which they were members was amended by Act No. 19 of 2015 with effect from 1st January 2016 to revise the retirement age from 55 to 60 years. This evidence was exhibited as "GM 44". The Complainants' evidence was that the Respondent's Senior Legal Counsel wrote to management advising them that the new retirement age is 60 and not 55 years, this was exhibited as "GM 46". Further the Respondent Company in its Management brief dated 22nd August 2016 to all employees of the Respondent confirmed that the retirement age was 60 years effective 14th August 2015 and this brief was exhibited as "GM 47"

The Respondents' evidence was that the Complainants were employed on diverse dates in different positions on or before 2010 but before 14th August 2015 and this was exhibited as "PP1 to PP29".

The Respondents deposed that the Complainants were lawfully retired on various dates between 2015 and 31st April 2016 upon attaining the age of 55 years as per individual contracts of employment. This evidence was exhibited as "PP30 to PP 44". The Respondents further stated that the Complainants joined the Respondent Company before the National Pension Scheme (Amendment) Act No. 7 of 2015 was enacted on 14th August 2015 hence the amendment did not apply to them and the opinions exhibited by the Complainants in the affidavit were internal opinions for purposes of debate by management and did not constitute company policy.

Having considered the evidence in this case, I must now consider the reliefs sought.

1. An order that the Complainants' retirement at the age of 55 years by the Respondent was premature and therefore unlawful, null and void without legal effect.

I have considered the evidence and written submissions by both parties. I have seen the Complainants' individual contracts of employment of service which were exhibited by the Respondents as "PP 1" to "PP 28" in their Affidavit in Support of Answer. Clause 27 of the Complainants' individual contracts of employment with the Respondent provides that the normal retirement age for all employees will be 55 years. It is therefore clear that the conditions of service at the time the Complainants were employed were that normal retirement was upon reaching the age of 55 years.

From the evidence, I have noted that the Complainants are members of the National Pension Scheme Act and the Respondent is also a contributing employee registered under the National Pension Scheme Act No. 40 of 1996 of the Laws of Zambia which provided in Section 2 that:-

"pensionable age" means the age of fifty-five years"

J7

On the 14th of August 2015, the National Pension Scheme Act No. 40 of 1996 of the Laws of Zambia was amended by Act No 7 of 2015 which provides in Section 2 that:-

“pensionable age” means the age of sixty years”

Further section 18 provides that:-

“18 (1) Subject to the provisions of this Act, a member shall retire upon attaining pensionable age

(2) A member may retire on attaining the age of

(a) Fifty-five years if, twelve months before attaining that age, the member notifies the contributing employer of the member’s intention to retire at that age; “

My observation from the evidence on record exhibited as “GM1” to “GM25” by the Complainants and “PP 29” to “PP 44” by the Respondents which are letters from the Respondents to the Complainants advising them that they were eligible for retirement is that none of the Complainants had turned 55 years on the 14th of August 2015. The Complainants were only going to turn 55 years between September 2015 and July 2016. At the time the Complainants were going to reach retirement age of 55 years as per their conditions of employment, the law had already been amended to place the retirement age at 60 years in Act No. 7 of 2015. It is therefore clear that the Respondents prematurely retired the Complainants at 55 years when the law in force as at 14th August 2015 was that pensionable age was 60 years.

In the case of *Lightson Silweya v Konkola Copper Mines Plc* 2017/HK/04 , it was held that:-

“Amendment Act No. 7 was assented to on 14th August, 2015. This is the day when it came into effect. It is therefore not in dispute that at the time when Amendment Act No. 7 of 2015 came into effect, the applicant had long reached the then mandatory retirement age of 55 years. I agree with the respondent’s submissions that the law cannot apply retrospectively. It is therefore my considered view that Amendment Act No. 7 of 2015 does not and cannot

apply to the applicant who had reached the mandatory age of 55 years in January, 2015 way before the amendment. The applicant's employment was therefore lawfully terminated as it was in accordance with the law that was applicable at the time; being the National Pensions Scheme Act."

It is my considered view that the above cited case can be distinguished from the case at hand on one point of fact which is that the Complainants in the matter in casu had not reached the age of 55 years on or by 14th August, 2015 when Amendment Act No. 7 which changed the retirement age to 60 years came into force hence their retirement at 55 years was premature.

Further in the case of Jacob Nyoni v Attorney General SCZ Judgment No. 11 of 2011 , it was held that:-

"The new retiring age affects those who never made irrevocable option to retire at the age of 60 years and those who joined the service after the amendment. In fact, the Permanent Secretary, Establishment Division correctly stated in his letter to the advocates for the appellant dated 27th April, 1994 that: "On transfer to Local conditions of Service, Mr Nyoni was given an option to either retain the statutory retirement age of fifty-five years that then applied to him or accept the new retirement age of sixty years. For the foregoing, we allow the appeal. We hold that Act No. 11 of 1986 does not apply to the appellant; that the appellant was prematurely retired thereby making the termination of his service wrongful"

My considered view based on the aforecited case is that National Pension Scheme (Amendment) Act No. 7 of 2015 only affects those who never made irrevocable options to retire at the age of 55 years before the amendments and those who joined the Respondent Company after the amendments. There is no evidence on record to show that the Complainants opted to retire at 55 years, however, there is overwhelming evidence that the Complainants actually protested against being retired at 55 instead of 60 years and this evidence was exhibited as "GM37" to "GM 39"

The Complainants in their affidavit evidence deposed that they were also members of the Occupational Pension Scheme Act. The Fourth Schedule to the Income Tax Act Chapter 323 of the Laws Zambia which provides for the retirement age for Occupational Pension Scheme members was amended by Income Tax (Amendment) Act No. 19 of 2015 with effect from 1st January 2016 to increase the retirement age from 55 years to 60 years. Consequently, the Registrar of Pensions and Insurance Authority issued a circular directing all pension schemes to amend their rules to revise the retirement age to 60 years and this evidence was exhibited as "GM 45"

Article 187 (3) of the Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by Act No. 2 of 2016 provides that:-

" (3) The law to be applied with respect to a pension benefit-

- (a) before the commencement of this Constitution, shall be the law that was in force immediately before the date on which the pension benefit was granted or the law in force at a later date that is not less favourable to the employee, and
- (b) after the commencement of this Constitution, shall be the law in force on the date on which the pension benefit was granted or the law in force at a later date that is not less favourable to that employee."

I am inclined to agree with the Complainants' submission that the law in force at a later date being the National Pension Scheme (Amendment) Act No. 7 of 2015 and Income Tax (Amendment) Act No. 19 of 2015 provide for retirement age to be 60 years. This is the law applicable to Complainants who opted to retire at 60 but were denied the right to do so by the Respondent.

The onus in a civil matter is for the Complainant to prove his or her case. This principle has been articulated in a plethora of authorities such as **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172 (SC)**, **Khalid Mohamed v Attorney**

General (1982) Z.R. 49 and Galaunia Farms Limited v National Milling Corporation Limited (2004) ZR 1 SC.

I am satisfied that the Complainants in this case have proved their claim that their retirement by the Respondent at the age of 55 years was premature and therefore unlawful, null and void. The reason is that, at the time the Complainants were turning 55 years between September 2015 and December 2016, the National Pension Scheme (Amendment) Act No. 7 of 2015 and Income Tax (Amendment) Act No. 19 of 2015 had already come into force and the new retirement age of 60 years, therefore, applies to the Complainants.

2. An Order of reinstatement of the Complainants in the Respondent Company, payment of salaries accrued plus perks from their last shift dates

In the case of *Bank of Zambia v Kasonde* (1995 - 1997) Z.R. 238 (S.C.), it was stated that:-

"It is trite law that the remedy of reinstatement is granted sparingly, with great care, jealousy and with extreme caution. Reinstatement is a remedy rarely granted unless special circumstances are present"

In another case of *Zambia Railways Limited v Oswell Joseph S.C.Z.* Judgment no. 2 of 1995 it was stated that:-

"Reinstatement is rarely ordered in master and servant cases. for such an order to be made, the case would have to be exceptional to the general rule as for example, in the case of *Mubanga v Zambia Airways Corporation Limited* (1992) S.C.Z. Judgment No. 5 in which the court found that the employee had been dismissed for no reason at all except the malicious vindictiveness of the Managing Director of the employing company, which Managing Director had since left the employing company so that no personal difficulty would

be caused by the re-instatement of the employee. It follows therefore, that in this case, it is not likely that an order for re-instatement will be made and in any event the depriving of the respondent of this house and car is not an irreparable injury which cannot be adequately remedied or atoned for by damages."

In ANZ Grindleys Bank (Zambia) Limited v Chrispin Kaoma SCZ Judgment No 12 of 1995, it was held that:-

"Where a dismissal is declared null and void, the courts have a discretion to order reinstatement or damages if appropriate. "

Having read the law cited above, I am well guided and have not seen any special circumstances in the facts of this case from the evidence that is before Court to warrant an order of reinstatement. Therefore, the claim for an order of reinstatement is dismissed as this is not an appropriate case for an order of reinstatement but one for damages only.

The next claim is for payment of salaries accrued plus perks from the Complainants' last shift dates. I am guided by the case of Zambia Airways Corporation Limited v Gershom Mubanga SCZ Judgment No. 5 of 1992 where it was held that:-

"For the court to order that a complainant be paid the full salary and arrears from the date of the purported dismissal, there must be evidence called to show that the complainant had actually suffered damages to the extent of his former full salary. It is the duty of the complainant to mitigate his loss following the dismissal. In the absence of evidence to justify the payment of a full salary and arrears, the court must do the best it can to award fair recompense"

The Complainants have not called any evidence to show that they actually suffered damages to the extent of their former salary. Therefore, the claim for salary arrears and perks from the last shift date is dismissed accordingly.

3. An order that the Complainants be deemed to have been retired by the Respondent at the age of 60 years
4. An order of immediate payment of the appropriate benefits at 60 years

I have chosen to consider the Complainants' third and fourth reliefs together

Section 85A (c) of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia provides that:-

"85A. Where the Court finds that the complaint or application presented to it is justified and reasonable, the Court shall grant such remedy as it considers just and equitable and may-

(a) award the complainant or applicant damages or compensation for loss of employment;

(b) make an order for reinstatement, re-employment or re-engagement;

(c) deem the complainant or applicant as retired, retrenched or redundant; or

(d) make any other order or award as the court may consider fit in the circumstances of the case.

Having established that the Complainants were prematurely retired at 55 years thereby making the retirement unlawful, null and void for being contrary to the existing law which has placed normal retirement age at 60 years, I hereby exercise my discretion in deeming the Complainants as having been retired at the age of 60 years and order payment of appropriate benefits they would have received at 60 years. This also settles the Complainants fourth relief hence I will move on to the fifth relief asked for.

5. Damages for breach of retirement laws/ contract

In the case of **Swarp Spinning Mills v Sebastian Chileshe SCZ Judgment No. 6 of 2002**, it was held that:-

"The normal measure of damages applies and will usually relate to the applicable contractual length of notice or the notional reasonable notice where the contract is silent. The normal measure is departed from where the termination may have been inflicted in a traumatic fashion which causes undue distress or mental suffering"

In the case of **Zambia Consolidated Copper Mines v Ennedie Zulu S.C.Z. judgment no. 9 of 1999**, it was held that:-

"in cases where the dismissal is held to be null and void, and where reinstatement might have been ordered if feasible within strict principles, compensatory damages beyond the notice period have been approved by the Supreme Court depending on the position held by the plaintiff and the diligence he exercised in his job."

Further, in the case of **Munkansemu Nyirenda v Zambia Forestry and Forest Industries Corporation Limited Appeal No. 127/ 2013** it was held that:-

"In our view, the circumstances of this case would justify a departure from the normal award of one months' salary in lieu of notice as damages. The Appellant was dismissed on the basis of an offence which was not committed by him. In light of these circumstances, we find merit in the appeal and we award the Appellant damages for unlawful dismissal equivalent to his three months' salary including all allowances and perquisites"

In the matter in casu, the Complainants were employed by the Respondent on different dates and various positions on permanent and pensionable basis. Between 2015 and 31st April 2016, all the Complainants were retired from employment at the age of 55 years. At the time the Complainants

J14

were being retired, the National Pension Scheme (Amendment) Act No. 7 of 2015 and Income Tax (Amendment) Act No. 19 of 2015 had already come into effect and had revised the retirement age from 55 years to 60 years.

The Complainants wrote a letter of demand to the Respondent stating that they had been retired contrary to the law but the Respondent insisted that they were lawfully retired in accordance with the law that was applicable at the time they joined the Respondent Company. The Respondent was advised by National Pension Scheme Authority that retirement age was 60 years and not 55 years effective 14th August 2015 but the Respondent still went ahead to retire the Complainants prematurely at 55 years and contrary to the law.

The circumstances of this case therefore justify a departure from the normal measure of damages. I hereby award the Complainants damages for breach of retirement laws equivalent to six months' salary including all allowances and perquisites. These damages shall attract interest at the short term deposit rate prevailing from the date of the Notice of Complaint to the date of Judgment and thereafter at the current Bank of Zambia lending rate until full payment.

Costs of these proceedings go the Complainants to be taxed in default of agreement.

Leave to appeal within 30 days from today is granted

Delivered and signed at Ndola this 13th day of October, 2017

Hon E.L. Musoha

JUDGE

