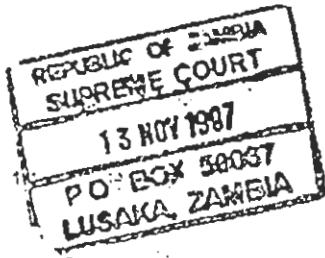


IN THE SUPREME COURT OF ZAMBIA

SCZ Appeal No. 59 of 1996

HOLDEN AT LUSAKA

(Civil Jurisdiction)



STANDARD CHARTERED BANK ZAMBIA LIMITED Appellant

and

PETER ZULU AND 118 OTHERS Respondent

CORAM: Chaila, Muzyamba and Lewanika JJ.S.

21st November, 1996 and 10th November, 1997

For the Appellant : Messrs. N.K. Mubonda and G.K. Chisanga of D.H. Kemp & Co.

For the Respondent : Mr. W.A. Mubanga of Permanent Chambers, Lusaka

J U D G M E N T

Chaila J.S. delivered the judgment of the court.

Cases referred

- (1). Fred Nmembe and another vs The People: SCZ Appeal No. 11 of 1996
- (2). Kitching vs Ward and Taylor (1967) ITR464
- (3). Shakespeare vs. C.L. Blyindell (1966) ITR464
- (4). Pambakian vs Brentford Nyolons Limited (1968) ICR665

In this appeal the main issues are:- that the lower court erred in concluding that the appellant contravened the provisions of Article 14 (2) of the Constitution of Zambia; (2) that the appellant legally justified in transferring the respondents and their contracts to Finance Bank; (3) that the exercise did not amount to redundancy.

The brief facts of the case were that the respondents had been employed by the appellant company. The respondents worked for various periods and in various branches. The appellant company embarked on some restructuring exercise. It was decided to transfer the respondents to the Finance Bank. It entered into

an agreement with the Finance Bank to take over some obligations and liabilities of the appellant bank. The appellant attempted to get consents from employees but that exercise was abandoned when this matter went to court. The lower court considered the facts and documents and evidence placed before it and concluded that the appellant had not complied with the provisions of the Constitution in that it ignored to obtain consents from the respondents when the appellant company transferred its branches to Finance Bank. The lower court ruled that the appellant was trying to compel the respondents to work for Finance Bank by force. The court concluded that that practice violated the Constitution of Zambia and International Labour Conventions which the Zambian Government has ratified. The court ordered the appellant company to pay - (a) redundancy package (b) pension (c) repatriation fees and (d) leave benefits.

Messrs Mubonda and Chisanga for the appellant advanced four grounds of appeal. We will deal with these grounds in the manner in which they were argued. The first ground was that there was no evidence on record to support the lower court's finding that Article 14 (2) was not complied with. Mr. Mubonda argued that there was no evidence at all on record to lend support to the finding by the learned trial court that this transaction was in contravention of Article 14 (2) of the Constitution of Zambia. This transaction, the counsel argued was effected in accordance with Sections 26 (2) and 29 (2) (c) of the Banking and Financial Services Act (Act No. 21 of 1994). The counsel submitted that in effecting a corporate restructuring transaction the party has a statutory right, inter alia, to transfer contracts of employment in force between it and its employees.

In reply Mr. Mubanga counsel for the respondents argued that the evidence in support of violation of Article 14 (2) of the Zambian Constitution was abundant as was shown by the respondent's Affidavit in Support of complaint which was before the lower court and was on record. The evidence showed that at the time the respondents were made to work for the Finance Bank, their consents had not been procured as was required under Section 35 of the Employment Act to which he referred the court. Section 35 reads:-

- (1) No rights arising under any written contract of service shall be transferred from one employer to another unless the employee bound by such contract consents to the transfer and the particulars thereof are endorsed upon the contract by a proper officer.
- (2) ~~Before endorsing any particulars of transfer on a written contract of service, the proper officer shall satisfy himself -~~
 - (a) that the employee has fully understood the nature of the transaction and has freely consented to the transfer and that his consent has not been obtained by coercion or undue influence or as the result of misinterpretation or mistake;
 - (b) that where there is any change in the nature of the work to be performed or in the place where such work is to be performed, and a medical examination of the employee is desirable, that such employee has been medically examined in accordance with the provisions of section thirty-four."

He argued further that the appellant's affidavit clearly showed that there was no dispute that no consents were obtained from the respondents. He supported the holding that Article 14 (2) of the Constitution had been breached. Mr. Mubanga in the sale of the appellant's grounds, argued that the respondents would have been liable to the appellant if they

corporate restructuring in terms of Section 25 (b) of the Banking and Financial Services Act No. 21 of 1994 except that the provisions of Section 29 (2) (b) and (c) as read with Section 29 (3) (b) of the Banking and Financial Services Act were not complied with. Mr. Mubanga argued that as the law stands the arguments by the appellant would have been correct if there had been the transplanting to the new employer of the respondents' terms and conditions of service the respondents enjoyed with the appellant as is required by the said Act. He argued further that the terms and conditions under which the respondents served the appellant company and those of the new employer by way of comparison showed many differences which were quite substantial and fundamental. The counsel maintained that ~~Section 29 (3) (b) of the Act and Section 29 (2)~~ (b) and (c) of Act 21 of 1994 were strict and mandatory in that they required a complete transfer of the terms and conditions in their unchanged state as any amount of alterations however small such alteration would be, would not amount to a strict compliance with the requirement of Section 29 (2) (b) and (c). Mr. Mubanga argued further that in the absence of compliance by the appellant with the provisions of the said Act the appellant was obliged to obtain the consents of the respondents under Section 35 of the Employment Act before the transfers were effected. He argued further that the appellant's failure to obtain the respondents' consents before the respondents were made to become employees of another employer, Finance Bank Limited, breached and violated the constitutional rights of the respondents under Article 14 (2).

We will deal with the learned Advocates' submissions later in our judgment.

The second ground is closely connected to the first ground. The ground is that by virtue of Section 29 (2) of the said Banking and Financial Services Act a bank effecting a corporate restructuring transaction has no statutory obligation to obtain the consents of its employees because the Act safeguards positions of the employees by stipulating that their contracts of employment shall remain of full force and effect and shall be deemed to have been made with the new Bank. The learned Advocate argued that notwithstanding the above and being aware of the provisions of Section 35 of the Employment Act Cap 512 the appellant explained the effect of the transfer on the respondents' rights to the respondents in the presence of the prescribed proper officer and obtained the respondents consents to the said transfer. In any case the provisions of the said Banking and Financial Services Act being an Act enacted on a later date prevail over the provisions of the Employment Act Cap. 512 in the event of conflict. The learned Advocate referred us to the following authorities:-

- (1). Craies on Statute Law, 6th Edition at page 365
- (2). Halsbury's Laws of England 4th Edition,
paragraph 966

For the respondents Mr. Mubanga argued that where compliance with Section 29 (2) (b) and (c) as read with Section 29 (3) (b) of the Banking and Financial Services Act has been effected the law demands a transfer in total of the Contracts of Employment to the new employer. The only change in the agreement which is effected to take place in accordance with the provisions of the said Act is that the contracts of employment

the new employer which replaces that of the previous employer. Where the Terms and Conditions vary in addition to the replacement of the name of the new employer, then, in that event Section 29 (2) (b) and (c) of the said Act would not have been complied with in which event compliance with Section 35 of the employment Act would be a legal necessity. This is the position which obtained in this matter according to the evidence on record. In the circumstances the appellant cannot rely on the provisions of Section 29 (2) (b) and (c) of the Act which it failed to comply with.

Mr. Chisanga argued grounds three and four on behalf of the appellant. Ground 3 is that International Labour Conventions to which the trial court referred are not relevant **to the matter in issue. The counsel argued that the corporate restructuring transaction was absolutely nothing to do with** Convention 92, Convention 105, Convention 122 and Convention 158. He argued further that in the alternative the above International Labour Conventions are not applicable laws before Municipal Courts unless there is evidence beyond mere ratification that they have become part of our domestic law. He has relied on the authority of J.G. Stark, Introduction to International Law pp. 74 - 85. He further argued that the court misdirected itself by stating that the Constitution and Conventions were contravened. He maintained that, having regard to the Financial Act, the appellant complied with the law.

Ground 4 is that the transaction pursuant to which the respondents were dismissed does not give rise to redundancy. Mr. Chisanga argued there was no redundancy. He relied on

Section 15A (3) (b) of the Employment Amendments Act of 1989. He argued that the transactions were properly done. There was no redundancy. He maintained that any one who refused to go on transfer deemed himself dismissed. He argued further that the respondents consented to go on transfers and should have not withdrawn their consents. The counsel further relied on the following authorities:-

- (1) Employment Protection Act (U.K.) 1975 Memorandum of collective Agreement Clause 28 (2)
- (2). Kitching vs Ward and Taylor (1967) ITR464
- (3). Shakespeare vs. C.L. and H.L. Blyindell (1966) ITR464
- (4) Pambakian vs Brentnoro Nyolons Limited (1966) ICR665

~~Mr. Mubanga~~ **Mr. Mubanga** in reply in respect of grounds three and four relied on his heads of arguments. He argued that the provisions in Convention 105 (abolition of forced labour), Convention 122 (employment policy) and Convention 158 (termination of employment) have been interpreted and fortified in our laws as may be seen under Article 14 (2) of the Constitution and Section 35 of the Employment Act. These conventions have received the support of our legislature and that Zambia's domestic legislation has been synchronised with international instruments and reference to them by the learned trial court was relevant. Mr. Mubanga further argued that the appellant was in serious breach of Section 29 (2) (b) and (c) of the Banking and Financial Services Act because there was no continuation of the respondents terms and conditions of employment which they had enjoyed with the appellant. Similarly Section 35 of the Employment Act was not complied with in that

made to become employees of the Finance Bank. The action on the part of the appellant amounted to the dismissal of the respondents by virtue of the appellant having sold its business. He drew the court's attention to what the learned author Cyril Grunfeld says in his book "The Law of Redundancy Sweet and Maxwell 1971 Edition at page 76:-

"A dismissed employee shall be taken to be dismissed by means of redundancy if the dismissal is attributable wholly or mainly to the fact that his employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed by him. Section 25 (3) states that 'cease' means cease either permanently or temporarily and from whatsoever cause while business would appear to include a part or at least a self-contained part of a business for the purpose of which the employee was employed by the employer".

~~The learned author goes on to say:~~

"A dismissed employee shall be taken to be dismissed by reason of redundancy if the dismissal is attributed wholly or mainly to the fact that his employer has ceased or intends to cease to carry on the business for the purpose of which the employee was employed by him in the place where the employee was so employed."

The counsel argued that the appellant had sold part of its business and ceased to carry on the business in the places where the respondents were employees. The counsel maintained that the respondents must be taken to have been dismissed by means of redundancy and were and still are entitled to redundancy payments.

* We are greatly indebted to the detailed submissions of the learned counsel for the parties. These submissions have greatly assisted us in considering this appeal. We are further indebted to the authorities given to us by the learned counsel ~~as we~~ have considered carefully these authorities. *

We will treat grounds one and two together. These grounds deal with the provisions of Employment Act and Banking and Financial Services Act No. 21 of 1994. In the lower court the case was decided on more or less agreed facts. The contention by the appellant as shown by the first ground is that the transaction was effected in accordance with Section 26 of the Banking and Financial Services Act. Section 26 (2) reads:-

"A bank shall not effect a corporate restructuring transaction with another bank without the prior written consent of the Bank of Zambia."

The appellant contends that they carried out the transaction with the consent of Bank of Zambia. This is not in dispute.

The appellant consulted the Bank of Zambia on its programme and they were given a go ahead. On the other hand, the

respondents' Advocate has argued that the exercise was in violation of Article 14 (2) of the Zambian Constitution. They have further argued that at the time the respondents were made to work for the Finance Bank their consents had not been procured as was required under Section 35 of the Employment Act. The appellant has further argued that they complied with Section 29 (2) (c) of the Banking and Financial Services Act in effecting corporate restructuring. The Section reads:-

"all agreements, appointments, transactions and documents relating to the subject-matter of the transaction and made, entered into, drawn or executed by, with or in favour of the old bank, and in force immediately before the transaction took effect, shall remain of full force and effect and shall be deemed to have been made, entered into, drawn or executed by, with or in favour of the new bank; and ..."

The appellant's Advocate has maintained that in effecting a corporate restructuring transaction it has a statutory right.

inter alia, to transfer contracts of employment in force between it and its employees to the new Bank. The other side has argued that the appellant did not comply with the provisions of Section 29 (2) (c) in that the appellant's bank did not comply with the section since the respondents had not been transplated to the new employer with the terms and conditions of service they were enjoying with the appellant. They maintained that the terms and conditions of the new employer were different. In one vein the appellant's Advocate argued that they obtained necessary consents of the respondents. He has argued that the appellant, being aware of the provisions of Section 35 of Employment Act, explained the effects of the transfer on the respondents' rights and they did this in the presence of the prescribed officer and obtained consents of the said transfer. The appellant has contended that the provisions of the Banking and Financial Services Act being an Act enacted on a later date prevail over the provisions of Employment Act. On the conflicts of the two statutes, the learned counsel referred us to the 6th Edition of Craies on statute law. We have read the 7th Edition at page 366. The learned author says that where two Acts are inconsistent or repugnant, the later will be read as having impliedly repealed the other. He states, however, in his book the court leans against implying a repeal. The learned author says: "unless two Acts are so plainly repugnant to each other effect cannot be given to both at the same time, a repeal will not be implied. - Special Acts are not repealed by general Acts unless there is some express reference to the previous legislation or unless there is a necessary inconsistency in the two Acts standing together." The learned author continues "before coming to the conclusion that there is a repeal by implication the court must be satisfied that the two

enactments are so inconsistent or repugnant that they cannot stand together before they can, from the language of the later, imply the repeal of an express prior enactment i.e. the repeal must, if not express, flow from necessary implication." The learned author continues "to determine whether a later statute repeals by implication an earlier, it is necessary to scrutinise the terms and consider the true meaning and effect of the earlier Act. Until this is done, it is impossible to ascertain whether any inconsistency exists between the two enactments."

The Employment Act provides for transfers of personal contracts. Section 35 provides that no rights arising under any written contract of service shall be transferred from one employer to another unless the employee bound by such contract ~~consents to the transfer and the particulars thereof are~~ endorsed upon the contract by a proper officer. The provisions of Sections 28 and 29 of the Banking and Financial Services Act provide that where restructuring occurs in the banking services assets and liabilities of the old bank or in case of transfers and liabilities agreed upon to be transferred become part of the new bank. It further provides that all the agreements, appointments, transactions and documents relating to the subject matter of the transaction and made, entered into, drawn or executed by with or in favour of the old bank, and in force immediately before the transaction took effect shall remain in full force. According to the Orissa Statute law, the courts lean against implied repeal of the Act.

* The Employment Act deals with employment in general. The Banking and Financial Services Act 1994 was enacted to provide

for regulating and conducting of banking and financial services, to provide safeguards for investors in and customers of banks and financial institutions, and to provide for matters connected with or incidental to the foregoing. This Act is restricted or limited to the banking and financial services. It does not apply to general employment in Zambia. The Sections referred to by the appellant do give certain rights and obligations to the Bank. The Sections take or make recognisance of the appointments. They impose an obligation to honour the appointments and to take on workers found in the institutions transferred to the bank.

We have seriously read the two Acts. We have been **unable to find any inconsistencies in the two Acts.** We are **therefore unable to accept the appellant's submission that two** Acts are inconsistent. Counsel for the appellant has further argued that the Banking and Financial Services Act is a later Act and that its provisions do prevail over Employment Act. It is true that the Banking and Financial Services Act is a later Act but we have found that the provisions are not inconsistent with the provisions of Employment Act. We have found further that the provisions of Banking and Financial Services Act have not repealed the corresponding sections in the Employment Act. We find therefore that the appellant's argument cannot be sustained.

We now turn to the third ground which deals with International Labour Conventions. The conventions referred to by the parties will not have force of law in Zambia unless they have been made into law. We had an occasion of considering what the law is in Zambia in the case of Fred Mwanza and another v. Zambia National Council for Labour Unions, 1977 (1) ZLR 101 (S).

was decided on agreed facts and it appears the court assumed that there was no major objection to either party making reference to the International Conventions. Zambia has ratified some of these conventions but for them to become part of our laws they must satisfy the conditions laid down in the Constitution and in the Mmembe's case. Since the case was decided on agreed facts, it cannot be argued in this court that the lower court erred in referring to the conventions. The Conventions which have been ratified may have a bearing on interpretation of Article 14 (2) of the Constitution. It talks about forced labour. Article 14 (2) provides:-

"A person shall not be required to perform forced labour."

~~The Article has attempted to define 'forced labour'~~
but an occasion may arise when the definition may not cover new situations and it may be necessary or desirable to look at conventions to which Zambia is a member for guidance. The judgment of the lower court was mainly based on non compliance of the relevant provisions of the two Acts on obtaining consent. The appellant may have some point in saying that the respondents did not adduce evidence to show that relevant conventions have become domestic law; but as we have said this case was decided on agreed set of facts. The appeal in our view can not succeed on this ground.

We now turn to the fourth ground. The appellant has argued that the bank complied diligently with the statutory provisions and ensured that the respondents' jobs were secured and that the respondents were transferred in the same posts to Finance Bank. The appellant has argued further that they obtained consent from some respondents. The evidence is that

consulted and must give their consents before they are deemed to be transferred to the new employers. The provisions of Employment Act are very clear on the procedure. In the present case the employees consents were not obtained before the agreement to transfer the respondents to Finance Bank was reached and implemented. The appellant did not follow the provisions of Employment Act. The appellant's argument that they complied with the statutory provisions cannot succeed.

The appellant has further argued that the respondents jobs were secured and that the exercise did not therefore amount to redundancy. The appellant has relied on Section 15 (A) (3) Employment (Amendment) Act No. 15 of 1989. Section 15 (A) (3) reads:

~~"An employee shall not be entitled to a redundancy payment under this section if -~~

- (a) for any reason he terminates the contract under which he was employed;
- (b) his employer, being entitled to terminate the employment without notice by reason of the employee's misconduct, so terminates it;
- (c) the employer terminates the contract of employment and offers suitable alternative employment to the employee without break in service and with similar terms and conditions of employment and the employee has unreasonably refused that offer; or
- (d) the employee is employed for a fixed term and the redundancy coincides with the end of the term.

The respondents have relied on the learned author Cyril Grunfeld already referred to in our judgment where the learned author discussed the meaning of a dismissed employee. The facts in this case show that the respondents were offered by the appellant other jobs which they unreasonably turned down. The section relied upon does not help the appellants.

For the reasons we have given this appeal is dismissed
with costs.

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M.S. Chaila
SUPREME COURT JUDGE

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W.M. Muzyaaba
SUPREME COURT JUDGE

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D.M. Lewanika
SUPREME COURT JUDGE