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# Kenny Sililo v. Mend-A-Bath Zambia Limited and Spencon Zambia Limited SCZ Appeal No. 168/2014

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***Kenny Sililo v. Mend-A-Bath Zambia Limited and Spencon Zambia Limited SCZ Appeal No. 168/2014***

*Chanda Chungu*[1]

## Facts

The employer and employee had entered a written contract of employment. However, during the employment, a statutory instrument made pursuant to the Minimum Wages and Conditions of Employment Act[2] came into effect.[3] As a result of this statutory instrument, certain minimum wages were prescribed for protected employees, of which the employee in question was one.

The employer thereafter offered him a reduced salary as his current salary was above that prescribed by the statutory instrument. The employee complained about the employer's conduct and declined the offer, as he considered it to be a unilateral alteration of his conditions of service.

He was subsequently dismissed.

## Holding

The Supreme Court was categorical that the legislation is not intended to pull down an employee's terms and conditions which are higher than those provided for in the Ministerial Orders.

The Supreme Court confirmed that basic and minimum wages and conditions of employment that are provided for are intended to set the basic minimum for contracts of employment. For protected employees, the conditions of service in the Ministerial Orders apply in the absence of express agreement between the parties. These are terms which are deemed by the court to be present in the contract of employment because they concern employment rights that are created by the Employment Code Act or other relevant statutes.

The court also held that it is implied in the employee's contract that the employer shall provide all the information he possesses in connection with questions from the employee about the conduct of his business. Asking questions relating to the business and how it may affect the employee's continued employment is a legitimate query. As such the employee cannot be dismissed for raising a legitimate complaint with his employer.

## Significance

Where a new law providing for basic conditions of employment is enacted or amended, an employer should not reduce the remuneration or benefits to minimum, on the contrary, if the contract has more favourable terms, these shall apply to the employee. This is significant because as the Supreme Court, per Malila JS (as he was then) aptly put it:

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[1] LLB (Cape Town), LLM (Cape Town), MSc (Oxford), lecturer in law at the University of Zambia.
[2] Chapter 276 of the Laws of Zambia.
[3] The purpose of these statutory instruments that are made pursuant to the Minimum Wages and Conditions of Employment Act is to regulate the terms of vulnerable workers in Zambia and provide basic level of benefits and conditions of service.

> In our view, the passage of Statutory Instrument No. 46 of 2012 cannot be used to justify interference in contractual terms the effect of which interference is a diminution in the emoluments receivable by the employee. As we understand it, the law on minimum wages and conditions of employment are intended to set the very basic minimum below which it will be unlawful to employ. It is never the intention of such legislation to pull an employee's emoluments or conditions of service from a certain high, down to the prescribed minimum.

What the case bring to the fore is that while the statutory instruments relating to minimum wages and conditions are important, employers should not seek to provide the bare minimum. They should merely use them as parameters to provide terms and conditions of employment based on their needs and the requirements of the job the employee has been called to perform.

When new minimum conditions of employment are promulgated, an employer is not permitted to vary the contract by reducing the benefits in the contract to meet the basic minimum. The court guided that statutory terms or terms implied by law are only the baseline entitlement for employees who may enjoy more favourable conditions of service if the contract of employment or indeed any other law provides more favour terms.

The attempt by the employer to vary the terms of the contract to reduce them to those provided by the law amounted to a unilateral variation of the contract of employment. Under Zambian law, where there is a unilateral variation of the contract, the employee is deemed to have been declared redundant based on the case of *Mike Musonda Kabwe v. BP Zambia Limited*.[4] This authority is problematic for several reasons. Firstly, the court in *Mike Musonda Kabwe* created the rule based on an English decision of *Marriot* where there was legislation in place that provided for such relief. Further, the rule does not seem to accommodate the rights employers have to determine their own work practice and make reasonable alterations to work practice and the employee's duty to reasonably adapt. Further, the rule does not sufficiently distinguish between fundamental terms and non-statutory or immaterial conditions of employment

Despite *Mike Musonda Kabwe* establishing a principle that had been applied in several subsequent cases, the Supreme Court took an ingenious approach regarding the ramifications of and remedies available to an employee following a unilateral variation of his or her contract of employment. The Supreme Court, per Malila JS (as he was then) held, *inter alia* that:

> We have already stated that it was the respondent as employer who introduced unilaterally a new condition of employment which affected the appellant as employee adversely. This amounted to a wrongful termination of employment by the employer…

Instead of treating the unilateral variation of the contract as a redundancy, the Supreme Court treated it as a breach that amounted to wrongful termination. This is the correct view when one views unilateral variations of the contract under the ordinarily law of contract which applies to employment law. In the subsequent cases of *Charles Mushitu (sued in his capacity as Secretary General of Zambia Red Cross Society) v. Christabel M. Kaumba*,[5] also penned by Justice Malila, an employee worked under a project that terminated and was then placed on unpaid leave. The Supreme Court, in a judgment also delivered by Malila JS (as he was then) held:

[4] S.C.Z Appeal No. 115 of 1996.
[5] SCZ Appeal No. 122/2015.

> A unilateral alteration of the conditions of service which negatively impacts on any employee amounts to a breach and a wrongful termination of the contract of employment.

The Supreme Court thus confirmed that placing the employee on forced, unpaid leave was an adverse unilateral alteration of the contract – but refused to treat it as a redundancy, despite the question being before the Supreme Court.

The Supreme Court's approach in *Kenny Sililo* and *Christabel M. Kaumba* that ascribes contract of law principles to a unilateral variation of contractual terms; not only did the court recognise that a unilateral variation was a breach of contract, it also provided that for material breaches of contract, the contract terminates. Thus, the court awarded damages for the breach, rather than ordering redundancy or early retirement package. The above notwithstanding, the law in Zambia is now clear in statute; unilateral and adverse variations of the contract of employment are a redundancy situation.

In relation to dismissal, or adverse treatment for raising a complaint, Malila JS (as he was then) on behalf of the Supreme Court held that:

> We do not accept the position taken by the lower court that an employee in the appellant's position who questions and disagrees with the employer on issues to do with his emoluments and his contractual rights commits a dismissible wrong. We do not believe that for an employee to be alert and vigilant is insubordination.

The Supreme Court held that it is not a dismissible offence for an employee to disagree with his employer or merely question the issues related to his contractual rights. This judgment is fortified by the enactment of section 52(4)(c) of the Employment Act which provides that loss of employment due to an employee filing a complaint or participating in proceedings against an employer involving the employer's violation of laws, would automatically amount to unfair dismissal.

If the employee understands the contract of employment, the failure to meet the requirement for attestation of the contract by an authorised officer as provided for in Section 25 of the Employment Code Act, would not be fatal.[6] The Supreme Court in the *Kenny Sililo v. Mend-a-Bath and Spencon Zambia Limited*[7] case in interpreting an identical provision that existed under the recently repealed Employment Act in relation to a literate employee held as follows:

> In our view, his contract of employment with the respondents falls within the proviso to Section 29 of the Employment Act. He understood the contract of employment he entered into and thus did not require the protective intervention of a proper officer as envisioned in Section 29 of the Employment Act. Even assuming that the contract of employment required attestation, we have serious reservations as to whether failure to present a contract of employment for attestation could divest only one party of his rights under the contract of employment against the other party. The mutuality of the obligations assumed by the parties, which in effect create the contractual bond, would be lost were the interpretation ascribed to Section 32 by the appellant to be correct. In fact, there would be no contract to talk about.

[6] *Sililo v Mend-a-Bath and Spencon Zambia Limited* SCZ Appeal No. 168/2014.
[7] SCZ Appeal No. 168/2014.

There is an assumption that literate people enter contractual obligations with full knowledge of what they are doing and of the natural consequences of their actions and as such, do not need the protection of the law as much as people who are not literate. We opine that this assumption is not misplaced.

Further, we are of the view that it would be ironical for an employee to be unable to enforce his rights under a contract of service for failure to have the contract attested when the provision on attestation is meant for the employee's protection in the first place. This is precisely why the drafters of the Employment Code Act saw it fit to insert a proviso to the attestation requirement to the effect that where an employee is literate and the contract was entered into in good faith, attestation would not be required.

The Supreme Court was doubtful of the notion that failure to attest a written contract of employment would lead to an employee not being able to enforce his rights under a contract of service – especially where the employee is literate and understands the terms of the contract. We are of the view that the position of the Supreme Court is sound.

This notwithstanding, and despite the guidance from the Supreme Court, section 26 (4) of the Employment Code Act states that if the authorised officer refuses to attest a written contract, the contract is void and the authorised officer shall give the employer a chance to rectify the contract and re-submit it for attestation. As such, employers should take due to care to ensure that their contracts are properly drafted so as to avoid the contract being deemed void.

The statutory provision could have a negative effect on employees, particularly vulnerable ones where the employer does not rectify the contract, thus leaving them unemployed. Therefore, an employee cannot enforce his rights as the statute makes it clear that if it is not attested, it is void.

In this regard, the approach of the Supreme Court is preferable as the failure to attest or ensure the basic minimums are guaranteed can be easily rectified without invalidating the entire contract, which could have dire consequences for employees who are deprived of an income if the contract is not rectified.

This case will have an impact on issue that plagued employment relationships where an employee complains about an issue or differs with his/her employee on a particular point. By virtue of this judgment, an employer is not justified in dismissing an employee for questioning him on these matters[8] and must provide reasonable answers, insofar as they relate to the employee's employment relationship with the employer.

The court took the occasion to clarify that an employee has no claim for wrongful dismissal or a declaration that a dismissal is a nullity when he or she commits a serious offence[9] The courts have held that in such situations, dismissal without giving notice or following the correct procedure is justified. In a recent case of *Kenny Sililo*,[10] the Supreme Court added further

[8] Confirmed in *Swain v West (Butchers) Limited (1936) 1 All ER 224* and *Sililo v Mend-a-Bath and Spencon Zambia Limited* (Appeal No. 168/2014) (2017) ZMSC 54 126.
[9] See also *Vincent Chimuka v Stanbic Bank Zambia Limited* (2017) ZMSC 23.
[10] *Kenny Sililo v. Mend-a-Bath and Spencon Zambia Limited,* SCZ Appeal No. 168/2014.

clarity to the position in *Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa*[11] when it held:

> The position of the law is quite clear. Where an employee has committed a dismissible offence and he has been dismissed, the fact that there is failure to comply with a procedure prescribed for dismissing him does not make the dismissal *ipso facto* invalid. The critical issue here, as we see it, is not whether or not there was a set procedure for dismissal which may or may not have been followed. It is whether there was a dismissible offence committed by the employee.

Therefore, where an employer does not follow the disciplinary procedure, but the employee has committed a serious offence warranting dismissal, such action will not be wrongful. Although this did not assist the employer in this case as the dismissal was fair and wrongful for raising a complaint, the clarity assists future courts in applying this rule under Zambian law.

As of 2019, the position has changed because of the introduction of section 127 of the Employment Code Act which provides that:

> Where a contract of employment, collective agreement or other written law provides conditions more favourable to the employee, the contract, agreement or other written law shall prevail to the extent of the favourable conditions.

This new provision remedies the problem that existed before and ensures that where more favourable terms exist elsewhere, those will prevail. This further underscores the point in this case that what is provided for by the law is the bare minimum or baseline – but where there is more favourable provision in another law or the applicable contract of employment or collective agreement, that provision should prevail and apply to the employees in the circumstances.

Lastly, at the time of the judgment, the Employment Act (which has since been repealed) only provided for an opportunity to be heard prior to dismissal for misconduct or poor performance only for those serving on oral contracts. The *Kenny Sililo* v. *Mend-a-Bath* case seemingly suggested and confirmed that regardless of the type of contract, when termination is based on disciplinary grounds, the employee should be given an opportunity to be heard, as this case dealt with an employee on a written contract. Malila JS took the same approach in Rabson Sikombe by guiding on an opportunity to be heard even for employees on written contracts. The new Employment Code Act has since rectified this discrepancy.

Above all indicates how the approach of Malila JS in relation to applying the most favourable term to an employee, attestation, unilateral variations of the contracts, dismissal for raising a complaint and the opportunity to be heard show that Justice Malila was ahead of his time as most of his pronouncements from this case alone have been codified in statute.

[11] (1986) Z.R. 70 (S.C).