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Mumba Malila, An Advocate for the vulnerable worker: Tiger Chicks (t/a Progressive Poultry Limited) v. Tembo Chrisford and Others SCZ Appeal No. 06/2020 and Kasembo Transport Limited v. Collins John Kinnear SCZ Appeal No. 89/2010
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Facts

Basic conditions of employment refer to minimum conditions of employment that an employer must provide for employees. The law in Zambia has set minimum standards and basic conditions of employment for workers in the Employment Code Act. In addition to the Employment Code Act, specific groups of vulnerable workers have Ministerial Orders in the form of statutory instruments that provide specific basic conditions of employment. These statutory instruments, namely the General Order, Shop Workers Order, Domestic Workers Order and Truck and Bus Drivers Orders provide for the minimum wage and basic conditions of employment for specified, vulnerable workers and together with the Employment Code Act which applies to the majority of employees in Zambia, are the law that provide conditions of employment.

The two cases involved an interpretation of the General Order and their applicability to various groups of employees. This Order is designed for the most vulnerable employees such as general workers, office clerks, cleaners, receptionists and typists, shop workers and domestic employees. In essence, these sought to determine which employees are covered by the Orders and whether they are entitled to benefits under the said Orders.

The Supreme Court in *Kasembo Transport Limited v. Collins John Kinnear* dealt with an employee who was employed as a bookkeeper but enjoyed conditions that were comparably superior to those enjoyed by many employees that carried a similar job title or description. The issue was whether his retirement benefits could be calculated in terms of the General Order.

In *Tiger Chicks*, the Supreme Court was tasked with determining whether employees categorised as a hatchery attendant, poultryman and woman or vaccinator, qualified as employees covered by the General Order and thus entitled to benefit from the minimum conditions of employment provided.

Holding

It is worth noting that whereas the General Order identified a group of employees to whom it applies, the statutory instrument does not apply to any group of employees who work for the government, have better terms and conditions in their own contract, or are management employees. In *Kasembo Transport*, there was a misconception that because he earned far more than the minimum wage, his contract had better terms and conditions and that he was in management and such excluded from benefitting

The holding in *Kasembo Transport* was that an employee is entitled to receive all benefits in terms of the General Order if he qualifies as one of the employees identified in the Order. This is the case notwithstanding the fact that he earns far more than the minimum wage provided for in the statutory instrument. The idea of the Order is that he must benefit from all the benefits and entitlements under the Order. In other words, his entire contract must embody and have better terms for the Order to not apply. If it only has better terms with respect to some aspects

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of employment and not others, an employee can rely on the Order to the extent that his contract has less favourable or non-existent terms on a particular subject.

In both *Tiger Chicks* and *Kasembo Transport*, the Supreme Court held that in such circumstances, it is imperative to examine the employee's job description to properly ascertain his job description and designation.

In *Kasembo Transport* after examining the job description and peculiar circumstances of the case, the court concluded that the bookkeeper, despite enjoying superior conditions of service fitted into the category of qualified clerks and was thus entitled to have his benefits calculated in terms of the General Order as it applied to him. In *Tiger Chicks*, on the other hand, the employees employed hatchery attendant, poultry persons or vaccinators did not qualify under any category of workers identified under the General Order and such could not benefit from them.

Significance

Prior to the decision in *Tiger Chicks*, the Supreme Court in *Jennifer Nawa v Standard Chartered Bank Zambia Plc*,⁶ Mambilima DCJ (as she was then), delivering the judgment of the Supreme Court stated that:

the group of workers envisaged under the Act are those for whom there is no adequate provision regulating their wages and conditions of employment. These are the 'protected workers' referred to in Section 2 of cap 276⁷, and they are the ones 'to whom a statutory order made under this Act applies.' This law was meant to protect such workers because they are prone to being exploited by their employers. For those who are represented by a trade union, Section 3(1) has categorically provided that "...no such order can be made before consulting such trade union." ...The appellant had a clearly defined salary and conditions of service. She could not therefore be a 'protected worker' within the meaning of the Act, and she could not be said to have belonged to a 'group of workers' to whom orders passed under Section 3(2) of cap 276, would apply.

The *Jennifer Nawa* case underscored the fact that the Ministerial Orders made in terms of the Minimum Wages and Conditions of Employment Act do not apply to every employee in Zambia. The Court was at pains to emphasise the fact that the group of workers envisaged under the Act are those for whom there is no adequate provision regulating their wages and conditions of employment and are generally more vulnerable and need protection.

The Supreme Court's decision in *Tiger Chicks* in a landmark judgment had the opportunity to give further context and clarity to the decision in *Jennifer Nawa* on the applicability of these statutory instruments. In this case, the Supreme Court dealt with employees who were employed in various capacities ranging from either hatchery attendant, poultry persons or vaccinators. The employees were summarily dismissed for participation in illegal strike action and sued the employer claiming the payment of housing, lunch and transport allowances in terms of the General Order. The Supreme Court in a judgment delivered by Malila JS (as he was then) held that: -

⁶ SCZ Judgment No 1 of 2011.

⁷ Minimum Wages and Conditions of Employment Act.

Our view that parties to employment contract are still generally entitled to exercise their freedom to determine their own terms and conditions of employment. Where, however, an employee falls within the protected categories, then that freedom to contract is circumscribed to the extent that the conditions to be agreed upon should not be less favourable than the minimum prescribed in the order made pursuant to the Act. The logic of what we are saying is that if an employee is not in the protected category, he cannot use the Act or the Order to introduce additional incentives not agreed upon.

In a powerful statement from the Supreme Court, this decision is resounding in that it confirms that only where an employee is identified and expressly covered by the Order made by way of statutory instrument will they apply to them. The Supreme Court in confirming the decision of Jennifer Nawa confirmed that the statutory instruments or Ministerial Orders do not apply to all workers but only apply to the groups of employees identified by the Minister and expressly covered.

An employee is only entitled to rely on the Orders if they fall into one of the protected workers. Where an employee is protected, an employer must endure that the terms and conditions of service are not less favourable than what is provided in the Order. However, if the employee is not covered, they cannot rely on the Order and their terms and conditions will be governed by freedom of contract to the extent that the Employment Code Act or any other law provides better terms and conditions.

The Supreme Court did state that it is possible for an employee's work designation or job description to be re-categorised into one of the identified categories in the Ministerial Orders – however this must be done with caution and only for good cause, after a careful examination of the circumstances of the case. For example, in *Kenny Sililo*, the employee who was designated as an account was redesignated as a qualified for good reason based on his duties and job description and could thus benefit from the package prescribed under the General Order.

However, in this case, the Supreme Court stated that the employees could not be redesignated to fall within the ambit of the Orders. Malila JS (as he was then) guided that:

It is beyond debate that hatchery men, poultrymen and vaccinators are not mentioned in any of the four categories of the Schedule to the General Order. This much is factual and it is uncontroverted. For the Act to apply to them, there ought to be a basis for bringing them into one or another of the job categories mentioned in the Act. In other words, notwithstanding their work designations, which do not answer to any of the categorised positions, it is possible for good cause, as happened in *Kenny Sililo v. Mend A Bath*, and in *Kasembo Transport v. Kinnear* for non-categorised employees to be recategorised into one or another of the identified categories.

Therefore, as they did not fall within the ambit of workers covered by the General Order, they could not claim the allowances. Therefore, the courts will critically examine whether an employee is covered by the Ministerial Orders or redesignate them based on their job description and the facts and circumstances of the case. Only where the court is satisfied that the employee falls within the categories of workers envisaged under the Ministerial Orders will they be entitled to the benefits under them.

The *Tiger Chicks* decision that brilliantly supplemented the previous decision in *Jennifer Nawa*, by clarifying that these Orders enacted by statutory instrument such as the General Order

cannot apply to all employees if that was the intention, they would have express said so. The fact that the General Order and the other Orders a schedule outlining a specific group of workers means that these orders only apply to those identified and outlined in each Order. This is important and should always be kept in mind when considering the Ministerial Orders.

The *Jennifer Nawa* and *Tiger Chicks* decisions are important because they highlight the fact that the Ministerial Orders made in terms of the Minimum Wages and Conditions of Employment Act do not lay down general conditions of service for all workers in the country. These Orders apply to the specific group of workers, deserving of protection as they are not adequately provided for.

The Supreme Court in *Kasembo Transport Limited* looked at the facts and evidence before it and appropriately held that in the circumstances of the case, the employer was covered by the Order as his job designation was compatible with the identified workers in the General Order. This was the case notwithstanding the fact that he enjoyed seemingly good conditions of service because as the Supreme Court correctly observed, the key test is to identify whether the employee is covered and protected by the Order rather than looking at his terms and conditions of service. It is only after determining whether the Order applies should a Court look to the terms and conditions, and this will only be done to determine whether or not the employer is providing the employee with the appropriate basic terms and conditions prescribed.

Both the *Kasembo Transport* and *Tiger Chicks* decisions are important in demonstrating that where an employee fits the description of a worker covered by the Order, they shall be entitled to full protection of the conditions in the said Order, unless their contract provides more favourable terms, or they are otherwise excluded. The *Kasembo Transport* and *Tiger Chicks* cases are also authority for the position that an employee's job description and the facts of the case will be carefully ascertained to determine if an employee is one of the employees covered by the General Order or not. This is important because it shows that the court can go beyond the employee's job title to look at the job descriptions and circumstances to determine whether the employee is covered and protected by the Ministerial Orders enacted by statutory instruments.

There is a misconception in Zambia that if an employee enjoys superior remuneration and conditions of employment, he has been brought outside the realm of the General Order. The *Kasembo Transport* case clarifies that this is not the case. According to Malila JS (as he was then), notwithstanding the salary earned by an employee, an employee is due to enjoy all benefits in terms of the General Order if he fits into the description of the schedule of employees that the Order applies to. This gives clarity to the position of vulnerable workers and their entitlement from the statutory instruments.

In addition to the above, the cases are important for the following reasons. Employment law is subject to the rules of the law of contract in that the employer and employee are bound to the rules on freedom of contract. Therefore, they can agree to terms that they see fit to regulate the employment relationship. This notwithstanding, legislation provides for terms and conditions of service enjoyed by employees in Zambia. As the Supreme Court in *Tiger Chicks (t/a Progressive Poultry Limited) v. Tembo Chrisford and Others*, where the statute provides for terms applicable to employees, freedom of contract is limited to the extent provides by the law.

Terms imposed by statute can be referred to as 'default' rules that apply to all applicable contracts of employment unless otherwise agreed. The terms provided by the relevant legislation are regarded as setting out the basic minimum or floor of conditions of employment for protected employees. Employers are permitted, if not encouraged, to provide better conditions of service than those set out in the statutes.