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Zambia Electronic Clearing House Limited v. James Kalengo CAZ Appeal No. 239 of 2020

Chanda Chungu¹

Facts

The Respondent or the employee, Mr. James Kalengo was recruited from Rwanda by the Appellant or the employer to work on the National Financial Switch Project ('the Project'). The employee was given a two-year fixed term contract of employment as Chief Executive Officer and National Financial Switch Project Manager. At the time, he was working on a similar project in Rwanda and was recruited to work on the project in Zambia.

The employee worked diligently for a period of two years. Prior to the expiration of his contract of employment, the employee sought for and requested the renewal of his contract of employment as the Project had not been finalised. He was subsequently informed of the non-renewal of his contract.

The High Court, in a judgment delivered by Mwansa J held that: -

All told, such circumstances – the hand picked recruitment from abroad of the Complainant the incompleteness of the project for which he had been brought back to do, the failure of the completion of the project as at 2018, surely go to show that the Complainant was not only hand-picked to do the job for nothing, but was probably one of the best people to do the job. Infact he believes so himself. So it was genuinely legitimate that he should expect to continue with the project until it was commissioned.

The High Court thus held that the employee had a legitimate expectation of renewal because he was engaged to work on the project. They reached this conclusion notwithstanding the fact that his contract was expressly for a two-year duration. They were of the view that because the employee was recruited and employed for the project, he was entitled to a new contract to conclude the project.

The employer subsequently appealed the matter to the Court of Appeal for determination.

Holding

The Court of Appeal in a judgment delivered by Justice Sharpe-Phiri JA held that: -

The trial court in proceeding in the manner it did, contradicted itself on findings of fact, namely, holding that the claim of loss of legitimate expectation of renewal of employment had no basis in one breath and on the contrary finding that the respondent's legitimate expectation of renewal of contract of employment was justified and awarded damages to the respondent.

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We have noted in the case of *Communications Authority v. Vodacom* the Supreme Court established that the legitimate expectation arises where a decision maker, such as an employer makes representations or leads someone to believe that they will receive or retain a benefit or advantage including that a hearing will be held before a decision is taken. In such a scenario, such decision maker or employer is estopped from going back on his well-founded affirmation or representation.

The principle of legitimate expectation cannot be said to be applicable in this case as the respondent had a fixed term contract which came to an end by effluxion of time and without any assurances being given by the appellant that it was committed to renewing his contract for a further term.

The only fact that the respondent appeared to rely on was that he was brought in from Rwanda on a similar assignment and he was labouring under the mistaken belief that he was the only one capable of developing the National Financial Switch an which project was not completed within contract period. However, this scenario does not represent circumstances under which the legitimate expectation may arise. The respondent served his full contract term and was discharged upon maturity of the contract period. The sanctity of a contract ought to be upheld and respected unless there was something more. In this case there was none. (Emphasis author's)

The Court was clear that a legitimate expectation of renewal can only arise where an employee is given assurances that his contract would be renewed, or the employer conducts themselves in such a manner that leads an employee to believe his contract will be renewed. Based on the above, the Court of Appeal held that in the circumstances, the employee did not have a reasonable expectation of renewal of his contract as there was no conduct by the employer that suggested his contract would be renewed.

Significance

The law as it relates to expiration of fixed term contract is as follows. In *Zambia Consolidated Copper Mines v. James Matale*,² the Supreme Court held:

...where the contract expressly or impliedly provides that the relationship of the employer and employee is to endure for a certain time, the contract will be determined at the conclusion of such period...

This has been fortified in section 52 (7) (a) of the Employment Code Act states that a written contract of employment shall expire at the end of the term for which it is expressed to be made. It is essential to note that in *Zambia Revenue Authority v Dorothy Mwanza and Others*,³ the Supreme Court held:

...the condition of service relating to offer of a new contract does not provide for automatic renewal of contract, as the offer of a new contract is in the employer's discretion.

² (1995-1997) Z.R. 157 (S.C.).

³ (2010) 2 ZR 181.

Based on the above, when a contract expires, the employer has the prerogative to decide whether to extend the short or fixed-term contract. This notwithstanding, there may be instances where an employee has a legitimate expectation of renewal.

The case before the Court of Appeal is significant because it recognises that an employee can have a legitimate expectation of renewal, in certain circumstances, when their contract is due to come to an end.

In the subsequent case of *David Evans Kasonde v Zambia Revenue Authority*,⁴ the Court held that while the employer has the discretion to extend a fixed-term contract or offer a new contract, a legitimate expectation of renewal of a fixed-term contract can be created in certain circumstances, particularly where the contract of employment itself provides criteria based on considerations of:

...performance, awards, or salary increment that would be taken into account as conditions precedents to offering an employee a new contract.

Thus, the Court held that if a fixed-term contract includes conditions for renewal such as performance targets, if an employee meets these, a legitimate expectation of renewal could possibly arise.

In *David Evans Kasonde v Zambia Revenue Authority*,⁵ an employee's fixed-term contract came to an end, but he claimed that he had a legitimate expectation of renewal because the contract had been renewed on two previous occasions. The Supreme Court, per Kabuka JS., stated as follows:

...our perusal of all the contracts entered into between the parties to this appeal show that, they were all independent of each other and offered at the sole discretion of management without any input whatsoever required from the appellant (the employee). The appellant did not claim that he was assured of a new contract by anyone acting on behalf of the respondent (the employer) or that the contract referred to any other condition precedent to be met by himself. And, none of the subsequent contracts, in any way, referred to the previous one, meaning they were stand-alone contracts, each with its own independent terms and conditions.

The court held that the employee did not have a legitimate expectation of renewal because there was no evidence that the employer created such an expectation or there was any assurance from anyone acting on behalf of the employer that the contract would be renewed. In this regard, the Supreme Court was correct; an employee can only have a legitimate expectation of renewal if the employer through its express or implied conduct, creates such an expectation, particularly where an employee leads evidence that he was given an assurance by someone with authority. Crucially, the *David Evans Kasonde* case did not disregard the principle of legitimate expectation of renewal of the contract that they seemingly suggested could apply in certain circumstances.

Whereas the Court of Appeal endorsed the concept of legitimate expectation of renewal of the contract in certain circumstances, it would have been helpful if they gave additional factors that would have guided employers and employees in future. This is where the case of *Heather*

⁴ SCZ Appeal No. 84/2015.

⁵ SCZ Appeal No. 84/2015.

*Musariri v ISchool Zambia Limited*⁶ come in. In that case, the Industrial Relations Division per Musaluke J (as he was then) guided that

It follows that, it is now possible that the relationship between the employee and the employer be construed as aiming at a permanent duration despite an official description to the contrary in an employment agreement, when one continues to work after the expiry of the fixed agreed period. An employee who continues to work and is dismissed after expiry of the fixed-term contract now has a right to sue based on legitimate or reasonable expectation that the contract would be renewed. The jurisdictional fact that the employee has to prove is that there was reasonable expectation of the renewal of the fixed-term contract created in the mind of the employee by the employer.

The court held that if the conduct of the employer in dealing with the relationship objectively leads to a conclusion that there was a reasonable expectation of renewal, then the employment relationship shall be deemed not to have terminated.⁷

Thus, whereas termination of the employment relationship occurs on the expiration a fixed-term contract, the employment relationship may continue if there is a reasonable expectation of renewal. The Court of Appeal in *James Kalengo* guided that: -

the legitimate expectation arises where a decision maker, such as an employer makes representations or leads someone to believe that they will receive or retain a benefit or advantage including that a hearing will be held before a decision is taken. In such a scenario, such decision maker or employer is estopped from going back on his well-founded affirmation or representation.

The Industrial Relations Division per Musaluke J (as he was then) in *Heather Musariri* endorsed the following:

The notion of reasonable expectation clearly suggests an objective test: the employee must prove the existence of facts that would lead a reasonable person to anticipate renewal. The facts that found a reasonable expectation will clearly differ from case to case but will mostly commonly take the form of some prior promise or past practice. The conduct of the employer in dealing with the relationship, what the employer said to the employee at the time the contract was concluded, and the motive for terminating the relationship has been cited as factors to be considered. It follows that the expectation of a renewal of contract cannot be based on the subjective say-so or perception of the employee. It is the totality of the evidence together with surrounding circumstances that serve to indicate whether or not objectively existed a reasonable expectation on the part of the employee. (Emphasis author's)

From the above, legitimate expectation of renewal exists under Zambian law and can be created by a prior promise or past practice. According to the Court of Appeal, a prior promise can be gleaned from any assurances or behaviour of the employer that creates an expectation of renewal. A past practice will examine the employer's policies and custom in how renewal of

⁶ Comp No. 391/2016.

⁷ In *Choonga v. ZESCO Recreation Club, Itezhi Tezhi*, the Supreme Court held that the conduct of the employer in allowing the employee to continue with his duties after the contract expired due to effluxion of time, implied that the contract of service was extended on the same conditions as the expired fixed term contract.

the contract is carried out, inclusive of whether the employer carries out hearings before the decision to renewal. Additionally, the past practice criteria examines whether the employer considers targets or performance appraisal as requirements for renewal.

In addition, the Court in *Heather Musariri* identified several factors that should read together with the *James Kalengo* decision to determine a reasonable expectation of renewal such as the:

- Significance of the contractual stipulations, agreements or undertakings by the employer;
- Practice or custom in regard to renewal or the reason for concluding the fixed-term contract;
- Any assurances that the contract would be renewed;
- Conduct of the employer;
- Any failure to give reasonable notice of non-renewal; and
- Inconsistent conduct.

The above factors will be weighed objectively and in totality to deduce if the employee on fixed-term contract had a legitimate expectation to have her contract renewed. Where an employer makes a promise and the employee acts upon that promise the court will seek to ensure that the promise is honoured.⁸ This was confirmed by the Court of Appeal in this James Kalengo matter where they held that: -

We have noted in the case of Communications Authority v. Vodacom the Supreme Court established that the legitimate expectation arises where a decision maker, such as an employer makes representations or leads someone to believe that they will receive or retain a benefit or advantage including that a hearing will be held before a decision is taken. In such a scenario, such decision maker or employer is estopped from going back on his well-founded affirmation or representation.

The above explains the justification for the legitimate expectation of renewal of the contract in our law – the doctrine of estoppel. The Supreme Court in *Galaunia Farms Limited v. National Milling Company Limited*⁹ asserted that:

In order to succeed under the doctrine of estoppel, there must be a representation of fact intended to be acted upon by the person to whom it is made; the person to whom it is made must actually act on the representation; and by so acting it must be to his detriment.

Under the principle of estoppel, a party to an arrangement who subsequently insists on his or her legal rights can only be barred from his or her legal rights when it would be inequitable for him or her to insist upon them. This is because where one party makes an undertaking which is acted on by another person, the promisor is prevented (or estopped) from going back on that promise.

In the *Jacques Chisha Mwewa* case, the court opined that the employer was barred by doctrine of estoppel from disputing or denying the extension of the contract by his previous conduct. This was because by its conduct, the employer caused the employee to believe in the existence

⁸ See the definition of promise in *National Housing Authority v. Kelvin Macwami* SCZ Appeal No. 89/2011.

⁹ SCZ Judgment No. 1 of 2004.

of a certain situation that induced him to believe that his contract would be renewed and thus the employer was precluded from averring a different state of affairs.

For the employer to have successfully defeated the application of estoppel in the circumstances of this case, it had a duty to inform the employee that the contract would not be renewed when he applied for renewal, and this would have extinguished his legitimate expectation of renewal. In the absence of such communication, the employer was estopped from denying the extension and the court held that the employer acted unfairly when it did not extend the employee's contract.

It should also be noted that an employer is obliged to treat similarly circumstanced employees the same. In *Hotel and Tourism Training Institute Trust v Happy Chibesa*,¹⁰ the Supreme Court held that: -

...at law, if an employer raised legitimate expectation to any employee by the employer's conduct that employer is estopped from refusing to extend the same treatment to that employee in the similar circumstances.

The above principle fortifies that employees who are in similar circumstances should be treated the same. This is equally based on the contractual principle of estoppel where an employer is stopped by denying a situation that they have created by their conduct. This principle was also confirmed by the Supreme Court in *Zesco Limited v. Ignatius Muleba Sule*,¹¹ where Mambilima JS (as she was then) held that: -

...the Appellant has a duty to treat similarly placed employees equally and fairly.

As such they would be estopped from treating employees equally. Therefore, where an employee is similarly circumstances to another who receives a particular benefit, the employer is restricted from not extending the same benefit to other the other employees.

It is also important to note that whilst the employer maintains the discretion to renew or not renew the contract of employment, such discretion must not be exercised in bad faith, unreasonably or with malice. In *Mallone v. BPB Industries Plc*,¹² the court held that even though discretion may be expressed in unfettered or absolute terms, there are limits on such management prerogatives and discretion should not be exercised in a manner that no reasonable employer would act in that manner.

Therefore, the employer's discretion is not unfettered but must be exercised in a fair manner, with good faith. Whereas the employer does have the leeway to use this discretion to the employer's advantage, this power must not be exercised in a capricious or biased way or based on resentment of employees.

In *Pius Maambo (sued in his capacity as Chairman and Representative of the Board of Governors of Mpelembe Secondary School) and Others v. Frank Mulonda*,¹³ an employee employed as a Boarding Master by Mpelembe Secondary School had his fixed-term contract of employment terminated after working for a cumulative period of more than 18 years. As it

¹⁰ SCZ Appeal No. 51/2001.

¹¹ SCZ Appeal No. 170/2002.

¹² (2002) EWCA Civ.

¹³ SCZ Appeal No. 112 of 2008.

transpired, the decision was driven by an incident of assault. The employee was assaulted by another employee, Keith Lungu. When he reported this to the Headmaster, the Headmaster determined that he was making false allegation and threatened to charge him. The employee was subsequently charged and appeared before a disciplinary hearing that cleared him of the charged.

Subsequently, a committee was constituted to carry out an investigation of the assault. Following the investigation, he was demoted from Boarding Master to classroom teacher by the headmaster. He was then later dismissed before his fixed-term contract came to an end.

The Supreme Court held that: -

...we agree with the conclusion of the IRC that the non-renewal of the Respondent's contract was a direct result of the incident between him and Keith Lungu. A contract that deserved to be renewed automatically, according to the 2nd Appellant, was suddenly rejected.

The Supreme Court went on to state that: -

Even though the renewal or non-renewal of the contract was a the discretion of the Board of Governors, we find that the discretion not to renew the Respondent's contract was heavily prejudiced by the fight in which the Respondent was regarded as the villain and Keith Lungu the innocent. The board was clearly biased against the Respondent, when it believed the 2nd Appellant's recommendation against renewal of the Respondent's contract when it could have easily rejected it as it (Board of Governors) was seized with all the evidence surrounding the fracas.

Based on the above holding, an employer cannot make a decision to not renew the contract based on bad faith or in an unreasonable manner. If it is found that an employer decided to not renew a contract based on mala fides, the non-renewal of the contract will be deemed to be unfair and unlawful.

The above is important because sometimes an employer may attempt to dismiss, terminate, or not renew an employee's contract for an invalid or impermissible reason but disguise it as a legitimate dismissal. For example, where an employer dismisses an employee for insubordination when the real reason for dismissal is participating in trade union activities or being pregnant. In such cases, the court has the power to delve behind the real reason given for the dismissal or termination to remedy any injustice caused to the employee.¹⁴ In *Zambia Consolidated Copper Mines v. James Matale*,¹⁵ the Supreme Court held that:

In the process of doing substantial justice, there is nothing in the Act to stop the Industrial Relations Court from delving behind or into the reasons given for termination in order to redress any real injustices discovered: such as the termination on notice or payment in lieu of pensionable employment in a parastatal on a supervisor's whim without any rational reason at all as in this case.

¹⁴ *Zambia Consolidated Copper Mines v. James Matale* (1995-1997) Z.R. 157 (S.C.).

¹⁵ *ibid.*

Looking at the real reason for dismissal entails a great deal of judicial discretion, and judges must exercise this power judiciously in a bid to ensure substantial justice and arrive at a just decision.¹⁶ A court should not rush to delve behind the real reason unless it is apparent that the employer dismissed an employee maliciously.¹⁷ As the court in *Redrilza Limited v Abuid Nkazi and Others*¹⁸ stated:

The Industrial Relations Court is empowered to delve into the reasons for terminating a contract of employment. But that should not be done in every instance, or case...while the Industrial Relations Court is empowered to pierce the veil, this must be exercised judiciously and in specific cases, where it is apparent that the employer is invoking the termination clause out of malice.

Thus, where evidence is led that brings to the fore ulterior motives behind the termination of employment, the court can go behind the notice to ascertain the real reason behind the termination.¹⁹ The way the court will exercise its discretion depends solely on the facts of the case. In *Fredrick Mukuka v. ZCCM Investment Holdings Plc*,²⁰ the Supreme Court, per Kaoma JS., stated thus:

This was a lawful and acceptable way to terminate the contract unless the appellant could prove malice to enable the court to delve behind the notice clause.

Accordingly, even when the contract of employment permits termination by way of notice, a court has the power to delve behind the termination to deduce if it was conducted in a manner contrary to the law.

In *Giles Yambayamba v Attorney-General and National Assembly of Zambia*,²¹ the Supreme Court explained how the court should exercise its discretion to delve behind the reason for dismissal as follows:

Judicial discretion is a sacred power which inheres in the court. It is an armour which the court should employ judicially and judiciously to arrive at a just decision. The exercise of the same should not be left to the whims and caprices of a party to an action. In cases involving the exercise of judicial discretion...it should be noted that the facts of two cases are never always the same. This court does not, therefore, make it a practice to lay down rules or principles to fetter the exercise of discretion. A court cannot be bound by a previous decision to exercise discretion in a regimented way, because that would be, as it were, putting an end to the discretion.

Crucially, the Supreme Court in *Pius Maambo* guided that: -

In the circumstances, we find it unacceptable for the Appellants to argue that the case of *Zambia Consolidated Copper Mines Limited-VS-James Matala* could not apply because the non-renewal of the contract was not a termination of employment or a

¹⁶ *Giles Yambayamba v. Attorney-General and National Assembly of Zambia*, SCZ/8/004/2012.

¹⁷ *Redrilza Limited v Abuid Nkazi and others*, SCZ Judgment No. 7 of 2011.

¹⁸ SCZ Judgment No. 7 of 2011.

¹⁹ *Mwambazi v Food Reserve Agency*, SCZ Appeal No. 128/2009.

²⁰ SCZ Appeal No. 149/2016.

²¹ SCZ/8/004/2012

dismissal. Clearly, the IRC was entitled to delve into the background of the case, in order to give substantial justice to the parties and it did not matter whether it was non-renewal of a contract, dismissal or termination.

From the above, the Supreme Court was clear that the law in relation to the power of a court to delve behind the reason given also applied to renewal and non-renewal of the contract. What emerges from the authorities is that:

- The court has the power to delve behind the reason given for the dismissal to deduce what the real reason for dismissal was;
- The power to delve behind the reason is part of the discretion of the court;
- This discretion should not be exercised lightly and hastily;
- The court should not apply its discretion in a straight-jacket or one size fits all manner; and
- The decision should suit the circumstances of the case.

Where the court find that there is enough evidence to justify looking for the real reason for the non-renewal of the contract, it will do so an examine the facts and circumstances to find the primary reason for the non-renewal. This was confirmed by the Supreme Court in *Zambia National Broadcasting Corporation Limited v Penias Tembo, Edward Chileshe Mulenga and Moses Phiri*.²² This case clarified that where dismissal occurs substantially or in part due to an unlawful or unfair reason, such termination will be found to be unfair. The Supreme Court per Gardner J.S held that:

the proper construction of the intention of this law is that no person who is of a certain political opinion or affiliation shall have his services terminated substantially for that reason. We use the word "substantially" because, of course, there may be many other legitimate reasons for an employer being entitled to terminate the services of an employee who is a member of a political party and whose actions may be prompted by his loyalty to that party.

The objective of the court's role is to deduce the main, dominant, approximate, or most likely cause of the dismissal to determine the true reason for the termination. Consequently, the Supreme Court adopted the phrase, "substantially" in relation to reasons for dismissal as the basis for determining if the termination was for an ulterior motive and hence disguised. This is important and illustrates that under our law, the Court will look to find the primary or substantial reason for the non-renewal.

It is also worth noting that where an employer permits an employee to continue working beyond the date of expiration of his contract, the Supreme Court in *Moses Choonga v. Zesco Recreation Club, Itezhi Tezhi*,²³ held that the contract automatically renews on the same terms and conditions and for the same duration as the recently expired contract.

Lastly, the author would like to emphasise that a legitimate expectation of renewal can only arise where it is in line with the provision of any enabling legislation applicable to an employee. In some institutions or entities, it is a requirement to comply with certain provisions of statute. For example, the renewal of the contract of the position of Director-General of certain

²² (1995-1997) Z.R. 68 (S.C.).

²³ (Appeal No. 168/2013)

government entitles requires the Board of Directors and no other body to approve the appointment.

This is supported by the Court of Appeal of Zambia's decision in *Paul Chukeh Kapotwe v. Water Resources Management Authority*.²⁴ In this case the Director General of the Water Resources Management Authority made an application for renewal to the Minister, who exercised discretion and renewed his contract of employment. However, the law provided that the appointment of the Director-General was to be made by the Board of Directors and not the Minister. The Court of Appeal held that:

It is not in dispute that the Water Resources Management Authority is a body corporate with perpetual succession, established by virtue of section 7 of the Water Resources Management Act. Whilst the Minister is responsible for appointing a Board of Directors by virtue of section 11, we note that the Act does not avail the Minister any delegated power to act in the absence of a Board of Directors. The application to renew the contract of employment was made by the appellant to the Minister. Page 75 of the record of appeal refers. In turn, the Minister unilaterally renewed the appellant's contract. (Page 47 of the record of appeal refers). This was contrary to the provisions of section 15 of the Water Resources Management Act, which explicitly provides that the Director-General of the authority shall be appointed by the Board of Directors on such terms and conditions as the Board may determine.

The Court of Appeal held that the renewal of the Director-General of the Water Resources Management Authority was without any legal effect as it was made by the Minister as opposed to the Board of Directors as required by enabling statute.

Conclusion

The Court of Appeal's decision in *James Kalengo* is crucial because it demonstrates that the concept of a legitimate expectation of renewal, as a principle and concept exists under Zambian employment law. Whilst an employer does retain the discretion to renew a contract of employment or not when it is due to expire, an employee may have a legitimate expectation of renewal if there is any past practice, prior promise or bad faith/mala fides in relation to the renewal.

The Court of Appeal in this *James Kalengo* decision guided that: -

The sanctity of a contract ought to be upheld and respected unless there was something more. In this case there was none. (Emphasis authors')

As the Court of Appeal put it, a contract will ordinarily expire on the date prescribed in the contract and not automatically renewal, unless there is something more – which gives rise a legitimate expectation of renewal. Based on what has been outlined above, a legitimate expectation of renewal arises in three circumstances: -

1. Prior promises, such as assurances or behaviour by the employer or a practice that relates to the same;
2. Past practice in relation to renewal of the contract of the employment, such as performance appraisals, meeting of targets, and the practice and custom of the employer prior to renewing the contract of employment;

²⁴ SCZ Appeal No. 245 of 2020.

3. Where the decision to not renew the contract of employment is made in bad faith or in unreasonable and unjustifiable manner

Lastly, it is important to note that a legitimate expectation of renewal can only arise if it legal and in line with the provisions of the law. This was the holding of the Court of Appeal in *Paul Chukeh Kapotwe v. Water Resources Management Authority*.

The reasoning of the Court of Appeal can be read together with the case of *Heather Musariri* where the following criteria was given when considering a legitimate expectation of renewal, namely: -

- Significance of the contractual stipulations, agreements or undertakings by the employer;
- Practice or custom in regard to renewal or the reason for concluding the fixed-term contract;
- Any assurances that the contract would be renewed;
- Conduct of the employer;
- Any failure to give reasonable notice of non-renewal; and
- Inconsistent conduct.

Where an employee is not offered a new contract, but it is determined that an employee had a legitimate expectation of renewal of the contract, the employer will be liable to pay damages, granted at the discretion of the court.

In addition, the employer is not permitted to refuse to renew the contract of employment for any reason connected to bad faith or exercise their discretion in an unreasonable manner. The court has the power to find the real reason for the non-renewal and if they find that the reason was mala fides, the court may hold the employer liable and grant damages.