



**ZFE INTERPRETATION OF
SECTION 35 OF THE EMPLOYMENT ACT CAP 268:
WHAT IS THE 'TRANSFER' OF AN EMPLOYEE THAT REQUIRES THEIR
CONSENT?**

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Employment Act Chapter 268 of the Laws of Zambia

3. "Employer" means any person, or any firm, corporation or company, public authority or body of persons who or which has entered into a contract of service to employ any person...

35. (1) Rights arising under any written contract of service shall not 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 labor officer.

(2) Before endorsing any particulars of transfer on a written contract of service, the labor 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.

A. General points

1. Section 35 has its foundation in Article 14 of the Republican Constitution. Article 14 outlaws slavery and forced labor. It is a Constitutional recognition of the freedom of contract in employment. That is, that employment is a consensual relationship.
2. Section 35 only applies to written contracts of employment.
3. Who an 'employer' is depends on its legal personality. Some examples are as follows.
 - A firm is an unincorporated body that ideally should be registered under the Registration of Business Names Act No. 16 of 2011. As an unincorporated body, even if it trades under a firm name (e.g. Banda & Sons), the 'employer' under the law is the person behind the trading name.
 - Other types of unincorporated bodies are political parties under the Societies Act Cap 119; and trade unions and employers' organizations under the Industrial and Labor Relations Act Cap 269. These are peculiar in that it is the party or the union that is the 'employer', but only an individual identified by the statute under which the party or union is registered and by their internal constitution, can be sued or take suit. For instance, political parties and trade unions are usually represented by the Secretaries-General in Court cases.
 - A company is a body corporate under the Companies Act Cap 388. It is the 'employer' under the law, regardless of its shareholders, name, corporate



branding, etc. Under the Companies Act, a company is legally represented by its directors as registered with the Patents and Companies Registration Agency.

- A public authority is usually created by statute. That Act will provide for its functions, powers and officers.
 - A cooperative society is registered as a body corporate under the Cooperative Societies Act No. 20 of 1998. This means that like a company, it is the Society that is the employer and not its members in their individual capacity.
4. The legal personality of the employer as defined by the applicable law is what determines whether section 35 will apply. Some examples in relation to companies and statutory bodies follow.

B. What constitutes 'transfer' to another employer?

1. Transfer of assets

Supreme Court of Zambia judgment: *Standard Chartered Bank Zambia Limited v Peter Zulu and 118 Others (1997)*.

- **Facts:** Standard Chartered Bank engaged in corporate restructuring through the transfer of some of its branches to Finance Bank. The employees in those branches were transferred along with the branches.
- **Held:** Standard Chartered Bank did not follow section 35 because they did not obtain the employees' consent to the transfer. Finance Bank was a completely different company. In effecting the transfer without the employees' consent, Standard Chartered had equally violated Article 14 (2) of the Republican Constitution, which prohibits forced labor and is a domestication of various ILO Conventions on the subject. The corporate restructuring was validly done in terms of the Banking and Financial Services Act Cap 387. Still, that did not override the Employment Act Cap 268 requirements in this case because the Employment Act deals specifically with employment relationships.
- **Comment:** The import of this judgment is that employees are not assets that can be transferred like any other. They have specific protections under the Constitution and section 35. This case is the seminal authority on the application of section 35.

2. Change of shareholding in a company

2.1 Supreme Court of Zambia judgments:

- (a) *Ng'andwe and Others v Zamox Limited and Zambia Privatization Agency (1999)*
- (b) *National Milling Company Limited v Simataa and Others (2000)*
- (c) *ZCCM and Ndola Lime v Sikanyika and Others (2000)*

- **Facts:** Zamox, National Milling and Ndola Lime, respectively, were all parastatals that were subsequently privatized through the purchase of shareholding by private companies. In each case, the employees claimed



that they had to be paid redundancy packages for the 'transfer' to the new shareholder as they had not consented to it. Another complaint was that the new shareholder unilaterally varied their conditions of service to their detriment.

- **Held:** This quote from the *Ndola Lime* case summarizes the various judgments succinctly:

We must affirm right away that a change of ownership of shares cannot result in the corporate entity ... becoming a new employer; they will still be the same employer and they will be bound by the contracts of employment which they already have with each of their workers individually and collectively. We must also dispel the notion held by some that new shareholders are at liberty to breach with impunity existing contracts of employment without sanction or redress for the employees: While a contract of employment – just like any other contract – can be varied, any unilateral variation to an important term which is non-consensual and which is unacceptable to the workers would justify the aggrieved workers treating the same as a repudiation and breach of the contract by the employer which terminates the employment and which warrants the payment of redundancy or other terminal benefits, as appropriate... The attempt to make a change of shareholding itself a terminating event cannot be entertained and terminal benefits cannot be paid for employment which has not terminated.

- **Comment:** The separate corporate personality of a company is maintained by the Companies Act Cap 388 and case law dating back centuries. That is why, for instance, a public limited company changes shareholders everyday on the stock exchange and yet no one even considers invoking section 35.

3. Amalgamation / merger of different companies into one

3.1 Supreme Court of Zambia judgment: *Munsanje and 63 Others v Zambian Breweries and Others (2015)*.

- **Facts:** Zambian Bottlers Ltd, Copperbelt Bottling Company Ltd, Northern Breweries (1995) Plc and Zambian Breweries Ltd were to be amalgamated or merged into "Zambian Breweries Plc". Employees of the individual companies were advised to seek further clarification from their line managers. Any matters arising thereafter would be dealt with by management and their trade union NUCIAW.

Prior to the amalgamation, Zambian Breweries Plc asked all the employees of Zambian Bottlers Ltd, Copperbelt Bottling Company Ltd and Northern Breweries (1995) Plc to sign transfer of contract forms over the course of three days in the presence of a Labor Officer. The conditions of



the transfer were that there would be no change to their conditions of service or their positions, and no loss of their accrued period of service. In some instances, conditions of service would improve. However,

“Employees not willing to consent will be deemed to have resigned of their own accord and will be paid in accordance with the law.

The choice to either consent or refuse is purely an individual decision.”

Four of the affected employees engaged a lawyer, who alleged that the transfer would actually result in a unilateral variation of the employees’ conditions of service and was accordingly refused. The employees contended that they should be deemed redundant. *Zambian Breweries Plc* declined and reiterated that substantively, there would be no change to any aspect of the employees’ work. The employees refused to sign the consent forms. Their contracts were terminated after the deadline for signing the forms on the basis of resignation. The aggrieved employees filed a Complaint in the Industrial Relations Court and lost. They appealed to the Supreme Court and lost there as well.

- **Held:** On the point of whether an amalgamation brings about a ‘new’ employer, the Court noted that the four different companies each had their own separate legal personality. Upon consolidation into the new *Zambian Breweries Plc*, all four ceased to exist or were extinguished. *Zambian Breweries Plc* was a new company with a distinct legal personality. In line with the decision in *Standard Chartered Bank v Peter Zulu*, the employees were being transferred to a new employer with whom they did not have a contract of employment. Such a move had to be done with their consent.

To that end, the spirit of section 35 of the Employment Act was fully complied with. The employees were availed all documentation on the amalgamation several weeks before the deadline for consent to the transfer. Management was available for consultation and the trade union was involved in the process. Furthermore, signing of consent to the transfer was in the presence of a labor officer.

4. Change of name and general corporate rebranding

- 4.1 Companies are identified in the Companies Register by their incorporation number. This is why, for instance, section 40 (7) of the Companies Act Cap 388 provides:

A change of name by a company shall not affect any rights or obligations of the company nor render defective any legal proceedings that could have been continued or commenced against it by its former name, and any such legal proceedings may be continued or commenced against it by its new name.

- 4.2 Supreme Court of Zambia judgment: *Kankomba and Others v Chilanga Cement Plc (2002)*



- **Facts:** Chilanga Cement Limited was a parastatal wholly owned by ZIMCO. The Commonwealth Development Corporation (CDC) had a minority shareholding in Chilanga Cement Limited. CDC later became the majority shareholder in the company, turned it into a public limited company and changed its name to 'Chilanga Cement Plc'. It also changed the management of the company. The employees alleged that their consent was not obtained in accordance with section 35 to work for the 'new' company and that their conditions of service had thereby been unilaterally altered to their disadvantage.
- **Held:** Change of shareholding does not change the company even if there is in place a new management. Therefore, the change in shareholding does not change the employer to make section 35 of the Employment Act apply.
- **Comment:** The Supreme Court used the term, "*the new look Chilanga Cement Limited*" to underscore that what had happened was a rebranding and change of management, but not a change of 'employer' for the purposes of section 35.

5. Repeal and replacement of statutory authority

- 5.1 A public authority is usually created by statute. Where the creating statute is repealed and replaced, there will be transitional provisions that provide for how employees will be treated.
- 5.2 For instance, the Zambia Wildlife Act No. 14 of 2015 dissolved the Zambia Wildlife Authority (ZAWA) and reintegrated it into the Ministry of Tourism as the 'National Parks and Wildlife Department'. The Act provided that the permanent employees of ZAWA were to be transferred to the Department "*to continue their service*" and the fixed duration contract employees' contracts were to be terminated and their gratuity paid, but with the option of them reapplying to be employed by the Government.
- 5.3 Section 35 of the Employment Act is therefore inapplicable in such situations because the 'transfer' is provided for by a law applicable directly to those employees. This follows the principle of statutory interpretation that 'specific overrides general'. Section 35 is general; the transitional provisions in the repealing Act are specific.
- 5.4 The same principle was applied in the ***Standard Chartered Bank v Peter Zulu*** case, albeit in 'reverse'. In that case, the main piece of applicable legislation was the Banking and Financial Services Act Cap 387. On transfer of assets, it had provided that all contracts transferred from one bank to another would continue as if the transferee was the original contractor. That provision however made no specific mention of employment contracts. The Court therefore applied section 35 as the specific provision in relation to the employees.
- 5.5 Supreme Court of Zambia judgment: ***Phiri v Workers' Compensation Control Board (2003)***



- **Facts:** The employee had been employed by the Workers' Compensation Fund Control Board under the Workers' Compensation Act Cap 271. Cap 271 was subsequently repealed by Act No. 10 of 1999, which also repealed the Pneumoconiosis Act Cap 217 and merged the Boards under the two Acts into the new Workers' Compensation Fund Control Board. The employee refused to be 'transferred' to the new Board and asked for his redundancy package. The new Board treated the request as a resignation and accepted it as such.
 - **Held:** The extinction of the original Board by the repeal of Cap 271 was only 'technical'. This was because the new Board was in the same business as the original one, with only the addition of the pneumoconiosis activities. The employee kept the same job and was therefore only "transferred laterally". Act No. 10 of 1999 itself provided for the transfer of the employees from the old Board to the new one in a manner that showed that there was no break in the employee's service; that is, that the employment was continuous. The new Board was therefore correct to consider the employee's 'refusal' to be 'transferred' as a resignation and accordingly paid him the benefits due to him on such a termination as there was no redundancy.
 - **Comment:** The misunderstanding of the law in this case likely prompted the greater clarity in repealing statutes such as the Zambia Wildlife Act 2015 discussed above. We reiterate that in such cases, section 35 is inapplicable. It is the repealing statute as the specifically applicable one that will provide for how the employee's contract of employment will be treated. The effect of this case is also that if an employee is not willing to be 'laterally transferred' in accordance with the repealing statute, they are considered to have resigned and not been declared redundant.
- 5.6 The *Phiri v Workers' Compensation Control Board* case was considered in the *Munsanje and Others v Zambian Breweries* case (see 'amalgamation' above). In *Munsanje*, the Supreme Court held that the same principle of 'lateral transfer' applied, regardless of whether one case was based on a repealed statute and the other not. We consider that a contradiction. It would mean that section 35 was both applicable and yet not in the circumstances of the *Munsanje* case – a position that the Supreme Court itself identified as a weakness in the employees' arguments. In our view, the two cases are distinct on the basis of whether section 35 applied because of it being an 'ordinary' transfer; and whether section 35 is superseded by the repealing Act as being more specific, as is currently the practice.

6. Secondment to another company

- 6.1 In the Supreme Court case of *Zambia Electricity Supply Corporation Limited v Muyambango (2006)*, one of the issues was whether Zesco had the power to discipline Mr. Muyambango despite the fact that at the time of the alleged commission of the offences, he was seconded to the Kafue Gorge Regional Training Center. The Court held that Zesco did indeed have that power because a secondment did not mean that the employee had been



transferred to another employer. The Court held:

It is clear to us that, notwithstanding the provisions of the memorandum of understanding, the complainant from the evidence, was an employee of the respondent and was merely on secondment to the Kafue Gorge Regional Training Center. As an employee of the respondent, it was open to the respondent to discipline the complainant for any offences that he committed whilst on secondment to the Training Center. The Court below was being naïve in the extreme by holding that the respondent could not discipline the complainant for offences committed by him whilst on secondment to the Training Center.

- 6.2 The gist of the decision was that secondment does not sever the employment relationship. It therefore follows that secondment cannot be considered a 'transfer' to another employer for the purposes of invoking section 35.

C. What are the requirements for a valid 'transfer' under section 35?

1. Section 35 requirements

- (i) The employee has fully understood the nature of the transaction;
- (ii) The employee has freely consented to the transfer and his consent has not been obtained by coercion or undue influence or as the result of misinterpretation or mistake;
- (iii) A Labor Officer counter-signs against the employee's consent to the transfer as proof that the requirements of section 35 have been met; and
- (iv) 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 of the Employment Act.

2. Best practice inclusions

- 2.1 *Zambian Breweries Plc* in the ***Munsanje*** case had a detailed memorandum that set out all the terms of the transfer and the consequences of not consenting to it. The Supreme Court upheld that and the consultations with the employees' trade union to be sufficient evidence that section 35 had been complied with.
- 2.2 Therefore, best practice requires that it is not only the black letter of section 35 that is followed. Employers should also:
 - (i) involve the trade union, if any, and a Labor Officer, from as early in the process as possible;
 - (ii) make as much information available to the affected employees as possible, including the legal basis, if any, for the intended transfers. Legal basis in this context refers to, for instance, the effect of amalgamation under the Companies Act Cap 388 of the ***Munsanje*** case or the transfer of bank assets under the Banking and Financial



Services Act Cap 387 of the *Standard Chartered Bank v Peter Zulu* case;

- (iii) prepare line managers and human resources personnel to be available for consultation by ensuring that they too fully understand the transaction;
- (iv) provide sufficient time for the employees to analyze the information and consult on its implications;
- (v) state in full what will happen to accrued benefits and period of service, current conditions of service, etc; and
- (vi) state clearly the consequences of refusing to consent to the transfer by a stated deadline.

2.3 Everything must be duly documented for evidentiary purposes.

D. What are the consequences of not obtaining the employee's consent before a 'transfer'?

1. In our view, this depends on the conditions of service existing at the time of the purported transfer. The Supreme Court decisions discussed above held that if a transfer is not consented to, the employee would be declared redundant or given early retirement "as may be appropriate".
2. However, following the more recent Supreme Court judgment in the *Chilanga Cement Plc v Singogo (2009)* case, it has become clear that 'redundancy' for written contracts is only possible where section 26B of the Employment Act Cap 268 has somehow been incorporated into the written contract of employment. Where it has not, the ordinary termination provisions in that contract will apply.
3. As for early retirement, that too would depend upon whether the employee in question qualified for it under their conditions of service.
4. We believe that in that light, an unconsented-to transfer such as that under the *Standard Chartered Bank v Peter Zulu* case may now be decided differently as regards the consequences of the transfer. In our view, the Court would find that their contracts had been unlawfully terminated (for breach of section 35 and perhaps even section 36) and potentially wrongfully terminated (for breaching the termination provisions of the contract of employment).
5. Whatever the case, the employees would be entitled to the standard measure of damages for such termination, being the equivalent of the notice period under their contract of employment. They may also be granted additional damages to compensate them for the manner in which the termination was effected such as if it caused them mental distress.

E. Concluding note

1. The basis of section 35 is the Constitutional prohibition under Article 14 (2) of forced labor. Employment is a consensual relationship; and an employee is not an 'asset' that can be transferred like machinery. Their consent must be obtained before transferring them to another employer. After all, *who* the employer is, is a fundamental term of the



employment contract. It is as important as remuneration and other benefits. It therefore cannot be changed unilaterally.

2. The application of section 35 of the Employment Act must be done very carefully. It cannot be viewed in isolation but with all of the laws that govern the 'employer' in question, in relation to the circumstances in question. A change of shareholding has no effect under the Companies Act Cap 388 as far as the legal personality of the 'employer' is concerned. Similarly, where the employer is a statutory entity, it is the creating or continuing statute that will determine whether a 'transfer' takes place for the purposes of invoking section 35. Lastly, a secondment does not sever the employment relationship. There is therefore no 'transfer' to speak of in such circumstances.
3. Ultimately, what may seem like a 'transfer' in a common perception may actually not be one for the purposes of section 35. Given the serious Constitutional ramifications of legally 'transferring' an employee without their consent, it is imperative to fully understand the factual and legal details of the transaction before taking any action in relation to the employees that may or will be affected by it.

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2. Companies Act Chapter 388 of the Laws of Zambia
3. Constitution of the Republic of Zambia, Schedule to Chapter 1 of the Laws of Zambia
4. Cooperative Societies Act No. 20 of 1998
5. Employment Act Chapter 268 of the Laws of Zambia
6. Industrial and Labor Relations Act Chapter 269 of the Laws of Zambia
7. Pneumoconiosis Act Chapter 217 of the Laws of Zambia (repealed)
8. Registration of Business Names Act No. 16 of 2011
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