IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 104/2017

BETWEEN:

NDOLA LIME COMPANY LIMITED	**APPELLANT**
AND	
ALBERT KATONGO	**1ST RESPONDENT**
DAVIS KAPELEMBE	**2ND RESPONDENT**
WHITESON MWIINGA	**3RD RESPONDENT**
HANDSON D. MALUBA	**4TH RESPONDENT**
WILLIAM BANDA	**5TH RESPONDENT**
MORTON NGONGOLA	**6TH RESPONDENT**
CHINYANTA N. JOSWA	**7TH RESPONDENT**
MIKATAZO SIMAMBWE	**8TH RESPONDENT**
MIKE NKATA	**9TH RESPONDENT**
GEORGE CHINDIMA	**10TH RESPONDENT**

CORAM: CHASHI, SIAVWAPA AND NGULUBE, JJA

On 28th March 2018 and 13th July 2018

FOR THE APPELLANT: T. SHAMAKAMBO, MESSRS T. SHAMAKAMBO & COMPANY

FOR THE RESPONDENT: NON APPEARANCE

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

CASES REFERRED TO:

1. ***Bank of Zambia v Caroline Anderson and Andrew Anderson (1993) ZR 41***

2. ***Ignatius Muhau v Attorney-General, National Airports Corporation and Basil Mutinta - SCZ Appeal No. 181 of 2003***

3. ***George Chishimba v Zambia Consolidated Copper Mines Limited (1999) ZR***

4. ***Chilanga Cement PLC v Kasote Singogo (2009) ZR 122***

LEGISLATION REFERRED TO:

1. ***The Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia***

2. ***The Judgment Act, Chapter 81 of the Laws of Zambia***

This is an appeal against part of the Judgment of the High Court by which the Respondents were awarded interest on their accrued terminal benefits and costs.

The background facts of the appeal are that the Respondents were employed by the Appellant on various dates under a Defined Benefits Pension Scheme DBPS ran and administered by the Appellant.

The scheme was non-contributory and wholly financed by the Appellant with benefits computed on a set formula for unionized and non-unionized employees upon retirement.

In 2011 the Appellant's Board passed a resolution to dissolve the DBPS and instead introduced a Defined Contribution Pension Scheme DCPS to which both the employer and the employees would contribute.

The migration to the new scheme was with effect from 1st November, 2011 for non-unionised employees and 1st April 2012 for unionised employees.

Further to that, the Appellant undertook to migrate the accrued benefits under the dissolved DBPS to the new DCPS over a period of three (3) years effective the dates of the employees' migration to the new scheme.

In her Judgment the learned trial Judge found as a fact that the payment of interest had not been agreed between the Respondents and the Appellant.

She however found that the Appellant had conceded that had the accrued benefits under the dissolved scheme been migrated to the new scheme immediately upon dissolution of the former scheme, the same would have accrued interest.

According to the Memorandum of Appeal filed into Court on 16th June 2017, the Appellant has advanced two grounds of appeal and a third in the alternative to ground 1.

The two main grounds are as follows;

1. *The trial Court erred in law and in fact when it held that the Respondents are entitled to have their terminal benefits recalculated to include interest at the commercial bank short deposit rate in the absence of an express agreement between the parties.*
2. *The Court below erred in awarding costs to the Respondents when each party was successful on two claims and in the alternative to ground 1;*
3. *The trial Court erred in law and in fact when it ordered that the accrued terminal benefits for the Plaintiffs be calculated to include interest at the commercial bank short term deposit rate from date of joining the pension scheme to date of retirement instead of applying the actual interest rates that would have been applicable from the relative Pension Fund Managers for the said period which was 3% per annum.*

In its heads of argument the Appellant poses the question for our consideration as whether interest is payable on the Respondents' accrued benefits from the dates of joining the new scheme to the date of retirement of each Respondent, the question which the learned trial Judge answered in the affirmative. In opposing that finding by the court below, the Appellant has argued that according to the signed minutes, the actuarised terminal benefits accruing

under the dissolved Pension Scheme would be remitted to the new scheme over a period of three years.

The record of appeal shows that after the Appellant's Board passed the resolution to dissolve the DBPS in 2011, several meetings were held between the Appellant's management and the Respondents' union leaders which discussed among other issues, the migration of the accrued benefits to the new scheme and interest there upon.

The record also reveals that the parties took polarised positions with the Appellant taking the position that it would migrate the employees' accrued benefits to the new scheme managers over a period of three years and that interest could not accrue on the unremitted benefits from the expiry of the three year period.

The union leaders, on the other hand took the position that the migration of the accrued benefits to the new scheme managers should be with effect from the date of the dissolution of the DBPS and that interest should accrue on the unremitted benefits with effect from the same date.

To underscore the above, the following are extracts from the minutes of the meeting between the parties held on 12th September 2014 occurring from page 238 to 247 of the record of appeal in particular at page 240.

INTEREST

They further pointed out that if the parties had met as per their arrangement in 2013, the parties would have sorted out the issue of interest saying that it was not proper to let the money sit the way it was without safeguarding it from the effect of inflation. The union also observed that if the money had remained in the Defined Benefits Pension Scheme, their members would have benefited with the adjustments in the salaries.

The union concluded that they would want to get their moneys at the rate the money that was with Mukuba Pension Scheme was gaining.

MANAGEMENT RESPONSE

The Chairman thanked the union for the submission and stated that the Company had decided to change from the Defined Benefit Pension Scheme to Defined Contribution Pension Scheme so as to strengthen the Company's capacity to borrow and engage in developmental projects. He stated that the company meant well by so doing such that employees were informed of their accrued moneys in writing and that for those who have left the company such money has been paid to them but with no interests as this was the understanding of the company that the accrued benefits would have no interest paid on it from 0-3 years.

The Chairman pointed out that it was still the understanding of the Company that interest or returns on the accrued benefits would only apply should the company fail to remit the money after 31st March 2015.

The Chairman implored the union to understand Management's position on the matter.

UNION SUBMISSION

The Union stated that they were disappointed with the way management had come out on the matter saying that it would look like management wanted to disadvantage their members in preference to strengthening the capacity of the Company to borrow or clear their books so that the Company could be put in a strong position for developmental projects.

Having said this, the Union requested management to allow them time to do some consultations and proposed that the parties should meet on Tuesday 16th September 2014 and called upon management to look at the issue of interest on accrued benefits with a humane heart.

MANAGEMENT SUBMISSION

The Chairperson said that the Company did not want to disadvantage the employees saying that the pre-occupation of the Company was to remove employee liability from the books as it disadvantaged both the employee and the Company

adding that if the company had money the whole amount would have been remitted to Mukuba without any hesitation. On the date for the meeting the Chairman said that he would not be available from Wednesday 17th September 2014 saying that the earliest day the parties could meet was 22nd September 2014.

No evidence of another meeting having taken place either on 22nd September 2014 or later is available on the record implying that the parties remained deadlocked on the issue of interest with the learned trial Judge finding to the same effect, she called into aid the case of *Bank of Zambia v Caroline Anderson and Andrew Anderson*[1] in which the Supreme Court stated that;

> ***".....Interest should be awarded to compensate a Plaintiff for being deprived of the use of money until Judgment".***

In claiming the authority of the afore cited case, the learned trial Judge went on to state in her Judgment at page 28 paragraph 3 lines 1 to 20 of the Record of Appeal;

> ***"In the present case the Defendant by failing to transfer the accrued benefit to the private fund managers prevented or inhibited the said accrued benefits from accruing interest to the detriment of the Plaintiff".***

The Appellant has on the other hand argued that the Anderson case addressed the principle behind the awarding of pre-judgment and post-judgment interest.

We agree with that argument by the Appellant as the issue in that case was not whether or not interest should be awarded but whether or not it should be awarded from the date of the cause of action or the date of the writ until date of Judgment. This was in relation to a Plaintiff who was successful in a claim for damages arising out of motor vehicle accident.

The point being advanced by the Appellants is that post litigation interest can only be awarded if it is contractual, whereas pre-judgment interest is provided for by Statute namely; the Law Reform (miscellaneous provisions) Act[1] and the Judgment Act[2].

The Respondents, have argued in the heads of argument that the Appellant's failure to transfer the Respondents' accrued benefits to the new Pension Manager resulted in the Respondents not benefiting from the scheme thereby losing out on interest and other benefits.

In-pursuing this line, the Respondents maintained their reliance on the case of Anderson which we have already stated addressed a different issue from what the Respondents are claiming.

On costs the Respondents have argued that the same being in the Judge's discretion were properly awarded to the Respondents and relied on the cases of *Ignatius Muhau v Attorney-General, National Airports Corporation and Basil Mutinta*[2] and *George Chishimba v Zambia Consolidated Copper Mines Limited*[3].

In these cases, the Supreme Court of Zambia held that costs are at the discretion of the Court and always awarded to the successful litigant.

To the issue of costs, the Appellant has argued that because the Respondents were successful partially each party ought to have borne their own costs.

In pushing this argument, the Appellant has pointed out that out of the claims put forward by the Respondents, the Appellant was successful in two and half.

According to the Appellant the measure of its success is in the sense that out of the ten Respondents, only the 1st, 3rd and 9th were successful on one claim.

This argument does not represent the position of the law as the success of a litigant is not measured by the number of the litigants, if more than one who succeed but on the claim itself.

The fact that some litigants fail does not render the claim a partial success but a full success with respect to the claimants who have succeeded on a particular claim and the same shall be entitled to costs.

However, if a multiple of grounds or claim have been advanced and only some are upheld, the Court can use its discretion to order each party to bear their own costs.

In the case of *Chilanga Cement PLC v Kasote Singogo*[4] which the Appellant has sought to rely upon, the Supreme Court of Zambia held as follows;

> ***"From the above, three out of the five grounds of appeal have failed. In the net result, the appeal is dismissed. In the circumstances of the case, in which we have found that the Respondent's employment was wrongfully terminated through redundancy, we award costs to the Respondent, to be taxed in default of agreement".***

In this case, the Appellant's case was dismissed because three out of the five grounds of appeal failed and as a consequence costs were awarded to the Respondent.

We believe that this case is not supportive of the argument being advanced by the Appellants because it deals with the number of

unsuccessful grounds of appeal while the case before us is about the number of successful litigants on a claim. The other and more profound distinction between the two cases is that one was dismissed while the other was successful. We would therefore find no merit in ground two and dismiss it. We however, find merit in ground one for the reasons that in the absence of an agreement on interest on the unremitted accrued benefits, the Appellant did not have an obligation to pay any interest at all.

The Common ground however, is that at the expiry of the three years within which the Appellant had undertaken to remit the full accrued benefits to the new Pension Managers, any unremitted funds would attract interest until full remittance.

The argument by the Respondent that the accrued benefits would have accrued interest from the new Pension Manager is not helpful as it is not by the Appellant's default that the benefits were not remitted in full.

It was by design that the process takes a three year period in order to safeguard the Appellant against what would have been a severe financial haemorrhage that could have caused it to shut its operations.

We further find that in the absence of an undertaking by the Appellant to migrate the accrued benefits immediately, there was no

basis upon which the learned trial Judge came to the conclusion that the Appellant had deprived the Respondents of funds for which compensation by way of interest ought to be paid to the Respondents before the expiry of the three years.

In view of our position on ground one, ground three falls away.

The sum total of our Judgment is that the appeal is allowed and the Judgment of the lower Court is hereby set aside. Consequent to our reversal of the lower Court's Judgment, we order that costs here and in the Court below be for the Appellant.

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J. CHASHI
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE

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P. C. M. NGULUBE
COURT OF APPEAL JUDGE