IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO 002/2017**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ZESCO LIMITED **APPELLANT**

AND

PETER NGA'NDU **RESPONDENT**

CORAM: CHASHI, LENGALENGA AND SIAVWAPA, JJS

On 23rd May and 22nd August 2018

FOR THE APPELLANT: Ms. D.C. MACHONA – LEGAL COUNSEL

FOR THE RESPONDENT: NOT IN ATTENDANCE

J U D G E M E N T

SIAVWAPA, JA, delivered the Judgment of the Court

Cases referred to:

1. ***Zambia National Commercial Bank PLC v Geoffrey Muyamwa and 88 Others SCZ/8/262***
2. **Robbie Mumba and *Others v ZPA and ZCBC, Appeal No. 149 of 2001***
3. ***Nkhata and 4 Others v Attorney General (1966) ZR 124***
4. ***Wilson Zulu v Avondale Housing Project and Others (1982) ZR 172***

5. ***YB and F Transport Ltd v Supersonic Motors Ltd (2002)***
6. ***Attorney-General v Seong San Company Ltd (2013) 2 ZR at 327***

This is an appeal against the Judgment of the High Court by which the Appellant was ordered to compute the Respondent's terminal benefits to include the sum of K6, 776.74 and not the sum of K5, 339.25 earlier used by the Appellant to compute his terminal benefits.

In his sole ground of appeal, the Appellant has contended that:-

> ***"The court below erred in law and in fact when it awarded payment of service allowance to be calculated and computed into the Respondent's terminal benefits at a rate of K6, 776.74 as opposed to K5, 339.25 in its Judgment dated 30th October, 2017 as the same was outside the law, decided cases and conditions of service applicable at the time."***

The Respondent filed a cross-appeal in so far as he sought to challenge the High Court's decision to make no order as to costs and sought it to be varied on the basis that having succeeded the lower court ought to have awarded him costs.

Both parties filed heads of argument in the main and in reply respectively.

The brief facts of the case are that, the Respondent, who was an employee from June 1980, received his notice of retirement on 23rd August 2010. Among the allowances due to him during his tenure of employment was the service allowance. He was finally retired on 11th March 2011 at the age of 55 years.

According to his terminal payslip, his services allowance was K6, 776.74. However, on the computation schedule of his terminal benefits, his services allowance was pegged at K5, 339.25.

Upon inquiring about the variance in the two figures, he was informed that the figure of K5, 339.25 reflecting on the terminal computation schedule was the equivalent of 75% of his last salary of K7, 119.00.

In her judgment dated 30th October 2017 the earned trial Judge granted the reliefs sought by the Respondent on the following basis;

(a) *That it was the position of the law that upon termination of employment, the only rate payable was that existing and known to the parties at that given time (page 27 of the Record of Appeal)*

(b) That the services allowance payable upon retirement was the amount grossed up for tax as appears on the payslip.

(c) That the Respondent and one Robert Kalumba who was paid his services allowance as appeared on his payslip at the time of termination, were similarly circumstanced (page 30 Record of Appeal).

In the heads of argument, the Appellant has contended that it was erroneous for the learned trial Judge to have held that the Respondent and Robert Kalumba were similarly circumstanced because, the two were retired fourteen months apart in which case the two cannot be held to have retired ***"almost at the same time"*** as found by the trial Judge.

Reliance was placed on the case of *Zambia National Commercial Bank Plc v Geofreey Muyamwa and 88 others*[1] in which the Supreme Court of Zambia stated as follows;

> ***"However, this is the case only in cases where the affected person's services were terminated at the same time and in the same manner".***

As regards the conditions of service, it has been argued that the learned trial Judge gave an award outside the Respondent's applicable conditions of service of 2003 which provided that, the Respondent was only entitled to 75% of his monthly basic pay as services allowance. With regard to the grossing up for tax, the Appellant has argued that the same was only applicable during service period as tax laws apply upon termination.

Further, it was argued that not all benefits enjoyed during service apply upon termination unless expressly so incorporated in the computation of terminal benefits and that it was not the case for Respondent's grossing up for tax of the services allowance. The case of *Robbie Mumba and Others v ZPA and ZCBC*[2], was called into aid.

In his heads of argument in opposition, the Respondent has submitted that the learned trial Judge made a finding of fact that he was similarly circumstanced as Mr. Kalumba on the basis that they both retired upon attaining the age of 55 years and they served under the same conditions of service of 2003. To that

extent, this Court could not interfere with the findings of fact unless they were perverse, not supported by relevant evidence made due to misrepresentation.

He relied on the principles set out in the cases of *Nkhata and 4 Others v Attorney General*[3] , *Wilson Zulu v Avondale Housing Project and Others*[4]. He also argued that the learned trial Judge did not only rely on the principle of similarly circumstanced persons but the doctrine of legitimate expectation as well.

On the conditions of service, he argued that the integration of his services allowance into the basis salary on computing terminal benefits was a condition of service pursuant to Item 4 of the memorandum from the Director Human Resource which defined 'Pay' as "Basic Salary plus Services Allowance" at page 151 of the Record of Appeal. This item specifically related to payment of gratuity upon normal retirement. He further submitted that in the absence of a provision in the Income Tax Act prohibiting grossing-up for the tax on the services allowance the learned trial Judge was on firm ground.

On the cross-appeal, he submitted that the position at law is that costs follow the event at the direction of the court but that only a successful party who is adjudged to have misconducted himself may be deprived of costs. He relied on the cases of *YBand F Trasnsport Ltd v Supersonic Motors Ltd*[5] and *Attorney-General v Seong San Company Ltd.*[6].

In reply to the Respondent's head of argument and cross-appeal, the Appellant has contended that the court below exercised its discretion judiciously by not awa4rding the Respondent costs because he was only partially successful in his claims.

We have carefully considered the arguments proffered by both sides in this appeal and cross-appeal and shall deal with all the issued raised together.

The two questions raised by the two sides are as follows;

1. *Was the learned trial Judge wrong to have ordered that the Respondent's terminal benefits be computed together with the services allowance grossed up for tax?*

2. *Was the learned trial Judge wrong not to have awarded costs to the Respondent?*

In answering the first question, we shall rely on the Respondent's conditions and terms of employment to determine whether or not the learned trial Jude interpreted the same properly in her Judgment. We not that services allowance is not reflected in the 2003 conditions of service for non-represented employees which document occurs at page 57 of the Record of Appeal.

However, a memorandum from the Human Resource Directorate of the Appellant dated 2nd October 2003 in lines 18 and 19 at page 150 of the Record

of Appeal retains services allowance at 75% of monthly basis salary grossed up for tax.

The memorandum was meant to clear the air over lthe stated allowance which was already being enjoyed by non-represented employees at the time although not reflected in the 2003 conditions of service which came into force on 1st August 2003.

Further, at page 151 lines 23 and 24 of the Record of Appeal, the said memorandum states as follows under payment of Gratuity upon Normal Retirement;

"Pay shall mean basic salary plus services allowance".

This circular clearly provided for payment of services allowance as part of gratuity upon normal retirement.

The Respondent's entitlement to the allowance was confirmed in 2009 when he was promoted as reflected in the letter at page 115 ad in the letter confirming his promotion dated 29th March 2010 exhibited at page 110 of the Record of Appeal.

Therefore, the only bone of contention is whether, upon computing gratuity, the tax component of the services allowance is removed so that the allowance is fully exposed to tax without the cushion provided while the employee is in service.

As properly stated by the Appellant in the heads of argument, the rationale for grossing-up services allowance for tax is to cushion the employee from the tax burden. It has however been submitted that this is only effective during service. Of course that makes logical sense in that once an employee is terminated, they are also removed from the payroll and as such all taxable emoluments cease to apply to the employee.

The question however, is, on what basis would the last pay cheque be exempt from the condition applicable during the service? A thorough examination of both the 2003 conditions of service and the relevant memoranda exhibited reveal no such exemption.

The Appellant has also sought recourse to the Zambia Revenue Authority, Practice Note No. 1 of 2010 exhibited at page 136 of the Record of Appeal. This is a document which sets out the tax regimes on income pursuant to the Income Tax Act and the VAT Act.

What is of note upon perusal of the extracts exhibited is that, clearly terminal income is subjected to tax upon normal retirement u der Clause 5.1.5 (d), occurring at page 139 of the Record of Appeal. The Notice of retirement at page 101 of the Record of Appeal dated 23rd August 2010, states that the notice period began to run with effect from 12th September 2010 until 11th March 2010. We believe this was an error as it should have been 11th March; which was the Respondent's last working day.

As at 1st December, 2010, the Respondent's payslip exhibited at page 102 of the Record sof Appeal, reveals that his services allowance was K6, 776,7450.35 un-rebased, which is K6,776.74 rebased. This was the same amount reflected in the Februry 2011 payslip at page 104 of the Record of Appeal.

At page 104 of the Record of Appeal is exhibited a manual payslip for Terminal Benefits date 18th February 2011 which still reflects the same amount as services allowance. This figure only changes under computation of long service gratuity at page 105 of the Record of Appeal where it is reduced to K5, 339,250 un-rebased translating to K5, 339.25 rebased.

The computation of long service gratuity at page 105 is in line with the formula provided for by the Income Tax Act in so far as the exemption of the first K25,000 from tax is concerned. However, the removed of the 35% tax component that the Respondent had been enjoying as a tax cushion on the services allowance is not supported by any law or the conditions of service applicable to the Respondent while in employment.

As a matter of fact, the computation document at age 105 of the Record of Appeal clearly shows that, at the time of its preparation the Respondent was still in employment as the same was approved by the Internal Auditor on 2nd Mach 2011, nine days before his exit. We are therefore in full agreement with

the learned trial Judge's finding that the Respondent was entitled to have his terminal gratuity computed on the amount appearing on his last payslip as services allowance.

We further note that the purpose for which the allowance was grossed up for tax did not terminate until the Respondent ceased to be an employee of the Appellant on 11th March 2011 and clearly at the time the computation of gratuity was made, the Respondent was still in the employ of the Appellant. the fact that the services allowance was subjected to tax on his terminal benefits entitled the Respondent to the grossed up for tax to cushion the tax impact on his terminal benefits.

In the view that we have taken, the argument whether or not the Respondent was similarly circumstanced with Mr. Kalumba become otiose. Similarly, the issue of legitimate expectation becomes irrelevant.

As regards the cross-appeal which is a claim for costs not awazrded by the High Court, there is no disopute that a successful party is entitled to costs incurred during the proceedings unless the Judge or Court orders otherwise. The argument by the Respondent is that he was substantially successful in the low court and therefore entitled to costs.

The Appellant on the other hand, has argued that the learned trial Judge in the court below used her judicial discretion by making no order as to cost. We were referred to Order 40 Rule 6 of The High Court Rules which provides in art;

> ***"the costs of every suit or matter and of each particular proceeding therein shall be in the discretion of the court or a Judge, and the Court or a Judge shall have full power to award and apportion costs, in any manner it may deem just and, in the absence of any express direction by the Court or a Judge, costs shall abide in the event of the suit or proceeding."***

In the case herein the earned trial Judge ordered as follows;

> ***"I make no order as to costs".***

What does the above statement mean? Did the Judge prohibit the successful party from claiming costs?

We think not as if that were the intention, the Judge would have made an order for each party to bear their own costs. We think that the discretion conferred by Order 40 Rule 6 is for the Judge to determine whether in the interest of justice costs should not be for the successful party as the proviso to Order 40 Rule 86 states.

The position was very well stated by Ngulube CJ as he then was in *YB and F Transport Ltd v Supersonic Motors Limitied (supra)* when he said;

> ***"The general rule is that costs follow the event. In other was words a successful party should normally not be deprived of his costs unless the successful party did something wrong in the action or in the conduct of it."***

A perusal of Order 62 Rule 2 (10) of the Rules of the Supreme Court (RSC) 1999 edition reveals through various Court decisions that the real intention of the discretionary power conferred upon the Court as to costs is as to who, or which party, or indeed a non-party is entitled to costs. It's not so much about the Court deciding not to award cots to anybody for no reason as this would defeat the general principle that the successful party is entitled to costs. It also seems to us that the duty of the Court is to make an order as to where the costs should go.

We are fortified in our view by Order 62 Rule 3 (2) and (3) RSC which states as follows;

> ***"No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the Court".***

> ***"If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case, some other order should be made as to the whole or any part of the costs".***

In view of the above cited provisions of the law, we note that the ***"no order as to costs"*** statement does not debar the successful party from claiming costs as the costs will follow the event.

We would therefore, allow the cross-appeal and award costs to the Respondent in the court below.

In the result, the main appeal has failed and we dismiss it with costs to the Respondent. Costs both here and below to be taxed in default of agreement.

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J. CHASHI
COURT OF APPEAL JUDGE

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F. M. LENGALENGA
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE