SELECTED JUDGMENT NO.36 OF 2016

P.1318

APPEAL NO.27/2014

IN THE SUPREME COURT OF ZAMBIA **SCZ/8/301/2013**

HOLDEN AT NDOLA

(CIVIL JURISDICTION)

BETWEEN:

CHARLES MAMBWE AND OTHERS **APPELLANTS**

AND

MULUNGUSHI INVESTMENTS LIMITED (In Liquidation) **1ST RESPONDENT**

MPELEMBE PROPERTIES LIMITED **2ND RESPONDENT**

Coram : Malila, Musonda and Mutuna, JJS

On 6th September 2016 and 9th September 2016

For the Appellants : In Person

For the Respondents : Mr. S.A.G. Twumasi of Messrs Kitwe Chambers

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J U D G M E N T

Mutuna, JS delivered the Judgment of the court.

Cases Referred to:

1) *Ndongo vs Moses Mulyango and Roostico Banda (2011) ZR Volume 1 page 187*
2) *Wilhem Roman Buchman vs A.G. SCZ No. 14 of 1994*
3) *Roland Leon Norton vs Nicholas Lostorm (2010) ZR Volume 1, 358*
4) *Bank of Zambia vs Richard Nyambe and Others (2006) ZR page 132*

Other authorities referred to:

1. *High Court Rules, Chapter 27 of the Laws of Zambia*

Works referred to:

1. *Black's Law dictionary by Bryan A. Garner, 8th edn (2004) Thomson west: USA*

This is an appeal against the decision of the Deputy Registrar sitting at Ndola dismissing the Appellants' application on assessment of the balance on terminal benefits. The Deputy Registrar found that the Second Respondent had paid the Appellants their terminal benefits in full and as such their application had no merit.

The background leading up to the decision of the Deputy Registrar is that the Appellants were employed in various capacities in the Second Respondent, a subsidiary of the First Respondent. When the Second Respondent went into liquidation, the Appellants and other employees were laid off.

At the time the Appellants were laid off they were paid certain amounts as terminal benefits but they were aggrieved because they claimed that there were certain

sums of money still owing to them. They, therefore, instituted proceedings against the two Respondents in the High Court at Ndola.

In the course of the proceedings in the High Court, the matter was referred to mediation by a High Court Judge and a mediation settlement order was entered into by the parties which was referred to as a consent settlement agreement.

The gist of the mediation settlement order was that the claim by the Appellants was to be settled in accordance with the judgment in an earlier case by one ***Charles Mwale and others*** against the Second Respondent, which was under cause number 1999/HN/166. The said Charles Mwale and his co plaintiffs in the said cause were also former employees of the Second Respondent.

The relevant portion of the Charles Mwale judgment is as follows:

> *"In the premises I order that for the period the Individual Collective Agreements (ICA) was in force, the Plaintiff's benefits be calculated in accordance with the ICA and thereafter with the Joint Industrial Council Agreement (JICA). In*

P.1321

default of agreement between the parties, these are to be assessed by the Learned District Registrar.

Secondly, the Defendant has conceded that the 20% salary increment was not effected in favour of the Plaintiffs. I order that this be paid for the period 1st October, 1993 to the date of termination.

Thirdly, it appears to me that there are anomalies in the leave days earned by and actually paid to the Plaintiffs, as exemplified in the case of BENJAMIN CHABU.

I order that these be re-calculated and paid to the deserving Plaintiffs. All amounts found to be due to the Plaintiffs under the above headings shall attract interest at 50% per annum from the date of the writ to the date of this judgment, and thereafter at 6% per annum till final payment. For the avoidance of doubt, I hereby declare that the Plaintiffs are not entitled to repatriation allowance ..."

This was the basis of the mediation settlement order upon which the parties were supposed to determine the amounts due to the Appellants, if any. The parties proceeded to make computations to justify their respective positions but failed to agree on what was due to the Appellants.

After the parties failed to reach settlement, they went back to the High Court Judge to seek intervention. Pursuant to this, and on 24th November, 2010, the parties appeared before a High Court Judge at Ndola who directed them to file submission to justify their respective computations following which the Judge would render her decision on the matter. On 23rd November, 2011, the matter was re-allocated to another Judge because the earlier dealing Judge was transferred to Lusaka. After the second Judge considered the matter, he found that the matter had been settled by the mediation settlement order. He then considered the finding in the ***Charles Mwale*** case, which was the basis of the mediation settlement order and held that the Plaintiffs in that case were entitled to their benefits being calculated under two formulae, that is, the ICA and JICA formulae, for the two years period they were in force; and that the said formulae applied to the Appellants. He also found that the Defendants in the ***Charles Mwale*** case had conceded that they had not paid the Plaintiffs 20% salary increment for the period 1st October 1993 to date of termination. He went on to hold that the 20% salary increment was only applicable to those

Appellants who had not been paid the said increment. He accordingly ordered the Respondents to pay the Appellants the increment unless evidence could be produced to show that they were paid.

Lastly, the Learned High Court Judge considered the issue of leave entitlement and held that it was to be resolved by scrutinizing all the documents filed by the Respondents.

After the Learned High Court Judge made the foregoing decision, the matter was remitted to the Deputy Registrar whose role was to determine whether or not the Appellants were paid their benefits in full and to ascertain how much was due, if any.

At the hearing before the Deputy Registrar, the Second Respondent tendered affidavit evidence showing a list of the persons it alleged had been paid, the amounts and the basis for the payments. The Second Respondent also filed heads of argument supporting its position. It essentially argued that it had paid all the Appellants all their terminal benefits in accordance with the two formulae. The Appellants filed heads of argument in response in which

they reiterated that there was an under payment in their terminal benefits. The point of departure by the parties was the effective date of the ICA and JICA.

After considering the application, the Learned Deputy Registrar quoted from the ruling of the Learned High Court Judge and the holding in the ***Charles Mwale*** case. He then considered the affidavit evidence and submissions tendered by the Second Respondent, and found that the evidence proved that the Appellants were paid the salary increments and leave days entitlement. It was his further finding that the Appellants were paid all their terminal benefits in accordance with the holding in the ***Charles Mwale*** case. He listed the evidence that proved this and found that the Appellants had no further claim from the Respondents.

The Appellants were unhappy with the decision of the Learned Deputy Registrar and have lodged this appeal, advancing four grounds as follows:

1) *The Deputy Registrar erred that the evidence adduced by the Defendants (Respondents) shows that the Plaintiffs (Appellants) were paid all their dues in*

2) *accordance with the holding in the Charles Mwale cause.*
3) *The Deputy Registrar erred that evidence adduced for the proof of payment, the oral contract of service record of engagement, engagement advice, pay advice and termination advice as per exhibits "FN1" to "FN3".*
4) *The Deputy Registrar erred that pay sheet exhibit "FN7" and acknowledgement of the amounts exhibits "FN4 to FN5 as shown that the Plaintiff (Appellants) were paid in full.*
5) *The Deputy Registrar erred by overlooking the mediation settlement order and the High Court ruling of 19th March 2012.*

Not only did this court have difficulty in discerning what most, if not all these grounds actually meant, but the drafting style was a departure from the rules of this court. We however, granted them indulgence because the Appellants are lay and were unrepresented.

The parties filed Heads of Argument which they relied upon at the hearing of the appeal. In the case of the Appellants, and on application by counsel for the

Respondents, we expunged from the record their further arguments titled Appellants' response to the Respondents' Supplementary Heads of Argument and list of authorities because they did not comply with the rules in terms of content, and no leave was sought to file them.

The Appellants Heads of Argument were not arguments in the strict sense but were a summary of the Appellants perception of the evidence tendered before the Deputy Registrar. The arguments essentially concluded that the Deputy Registrar erred at law in finding that the correct formulae had been applied by the Respondents in payment of the Appellants' terminal benefits and that all the payments were made. Further, apart from reference to the ***Charles Mwale*** case, the arguments made no reference to any legal authorities.

In the Respondents' Heads of Argument filed on 24th February 2015 it was argued that the Deputy Registrar was on firm ground in making the findings he made in view of the evidence presented before him. We were, in this regard, reminded of our decision in the case of ***Ndongo vs Moses***

Mulyango and Roostico Banda[1] in which we restated the instances when we will reverse findings of fact by a trial judge.

In the Respondents' Supplementary Heads of Argument filed on 14th July 2016, the Respondents arguments were two fold. Firstly, it was argued that the arguments advanced by the Appellants in their reply raised issues that were not advanced before the Deputy Registrar. We were, therefore, urged not to consider them in accordance with our decisions in the cases of ***Wilhem Roman Buchman vs A.G.***[2] and ***Roland Leon Norton vs Nicholas Lostorm***[3]**.**

The second limb of the Respondents' arguments was an acknowledgment that the mediation settlement order executed by the parties and endorsed by the mediator did not settle all the issues. It was argued that this is what prompted the parties to refer the matter back to court in accordance with our decision in the case of ***Bank of Zambia vs Richard Nyambe and Others***[4] which was quoted as follows:

"The mediation conducted in the High Court and the Industrial Relations Court is court annexed mediation; meaning it is part of the judicial system".

At the hearing the first Appellant advanced arguments on behalf of the other Appellants. In doing so he relied entirely on the heads of arguments filed.

We were urged to allow the appeal.

In his *viva voce* arguments, counsel for the Respondents, Mr. S.A.G. Twumasi conceded that the mediation settlement order executed by the parties and the mediator ought not to have been signed because it was not practically enforceable. He also acknowledged that he and counsel for the Appellants had a duty when they appeared before the mediator to guide him to prepare a mediation settlement order that was practical for enforcement purposes and that settled all issues in dispute.

We were urged to dismiss the appeal.

We have considered the record of appeal, ruling appealed against and the arguments by counsel. The undisputed facts of this case that we have outlined in the

earlier part of this judgment reveal that the judgment of the Learned High Court Judge of 19th March, 2012 and the ruling appealed against were as a consequence of the mediation settlement order dated 4th October 2007. The said order followed a referral of the matter to mediation by a High Court Judge in accordance with the Rules on court annexed mediation and it reveals that the matter was settled by mediation by the parties. The agreement of the parties, in terms of settlement of the dispute, as is reflected by the mediation settlement order, is as follows:

1) *This matter has been settled in accordance with the judgment of the Charles Mwale and other vs Mpelembe Properties Ltd cause number 1994/HN/116*

2) *The liquidator of the 1st and 2nd Defendants will compile a list of those persons who are to be paid and those who are not eligible and the said list will be verified by the Plaintiffs. This will be done by 14th October, 2007.*

3) *The list mentioned in No.2 above will include those former employees who are not Plaintiffs in this matter but were in employment at the time of the liquidation and are entitled to be paid according to the judgment mentioned in paragraph 1 above.*

P.1330

4) *The actual payment will be subject to the liquidator receiving funds from the Government of the Republic of*

5) *Zambia and the Plaintiffs will be at liberty to lobby the Government for the payment to be made to the Liquidators.*

6) *The parties will each bear their own costs of and incidental to this action.*

The questions that arise from the foregoing mediation settlement order are: what is its effect as regards the dispute between the parties?; and what is its effect on the applications that were before the Learned High Court Judge and Deputy Registrar from which this appeal arises? The answers to these questions will determine the fate of this appeal.

As a starting point it is important that we trace the genesis of court annexed mediation in Zambia and the objectives that it seeks to achieve. We feel compelled to do so because the answers to the two questions we have posed lie in the genesis and objectives of court annexed mediation.

Court annexed mediation is not unique to Zambia. It is applied in most courts in this region and indeed in the United States of America and the United Kingdom. It is by definition, a process by which a trial court refers the parties to a neutral third party called, a mediator, to help them resolve their dispute. The said neutral third party plays a facilitative role by merely providing a forum for the parties to explore options for settling their disputes. The process is party driven and as such, the parties structure the agreement that they finally come up with.

Court annexed mediation is distinct from *ad hoc* or private mediation, because whilst the latter is non binding, court annexed mediation is binding. To demonstrate the non binding effect of *ad hoc* or private mediation, ***Black's Law Dictionary*** by Bryan A. Garner, defines mediation at page 1003 as follows:

> *"A method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution".*

It is clear from the foregoing definition that the process is non binding in that it does not compel a party to

participate in the process and neither is any agreement reached by the parties binding and enforceable upon them.

On the other hand, the Rules on court annexed mediation in Zambia, under Order 31 of the ***High Court Rules,*** compel a party to attend before a mediator and any settlement reached is binding upon the parties and final. As such, no appeal lies against such settlement and to this end, sub rules 8, 12 and 14 of Order 31 of the ***High Court Rules*** state as follows:

> "(8)*The parties shall appear in person at the mediation. If they are represented, their advocates shall accompany them ..."*
>
> *"(12) A mediation settlement in form 28D in the First schedule to these Rules shall be signed by the parties and the mediator and registered under Order XXXVII, rule 1, and shall have the same force and effect for all purposes as a judgment, order or decision and be enforced in the like manner".*
>
> *"14) No appeal shall lie against a registered mediated settlement".*

(The underlining is ours for emphasis only).

As such binding and final order, a mediation settlement order, signed by a mediator and the parties, marks the end of the proceedings. The order cannot be subject to appeal, interpretation or review, nor can the proceedings from which it arises be re-opened.

As regards the objective or rationale for court annexed mediation, the same is that it helps decongest the courts, thereby reducing the work load on judges in the High Court. This eventually ensures that there is speedy dispensation of justice. Furthermore, by referring the parties to mediation, the court also seeks to ensure that the parties have recourse to a cheaper, faster and amicable method of resolving their disputes. It also ensures that the parties have resort to a process in which they play a major role in structuring their settlement in accordance with terms and conditions they can abide by.

Having set out the genesis and objective of mediation, we now turn to determine the questions we posed in the earlier part of this judgment. The first was the effect of the consent settlement order entered into by the parties on

their dispute. Our discussion on the effect of a mediation settlement order reveals that such an order is final, binding and not subject to appeal, interpretation, or review. The consent settlement order, entered into by the parties in this matter, being such an order, is, therefore, final and binding upon the parties to this dispute. The consent settlement order marked the close of the proceedings and cannot be the subject of appeal, review or interpretation by any court. This arises from the fact that a court cannot adjudicate upon a decision it has not made by way of appeal, review or interpretation. We therefore reject the argument by Mr. S.A.G. Twumasi that where a mediation settlement order is not practical for enforcement purposes it can be referred back to the court.

Further, by referring the parties to mediation, the court ceases to have jurisdiction over the matter if it is settled as was the case in this matter. The court can only assume jurisdiction where mediation fails, pursuant to Order 31 rule 11 of the ***High Court Rules*** which states as follows:

P.1334

"(1) If the mediation fails, the mediator shall not more than ten days after the close of the mediation proceedings, return the record to the mediation office or proper officer with a report in form 28C in the First Schedule to these Rules, stating that the mediation has failed.

(2) The mediation officer or proper officer shall, not more than seven days after receipt of the report referred to in sub rule (1), submit the record to the trial Judge who, shall not more than fourteen days after receipt of the record from the mediation officer or proper officer summon the parties in terms of rule 5".

This is the only situation under which a record can be referred back to a trial judge from mediation. A record cannot, under any circumstances, be referred back to the trial judge where the dispute is settled in mediation and a settlement order filed with the court in the prescribed form. We are, therefore, of the considered view that it was a misdirection on the part of the Learned High Court Judge to have adjudicated upon a dispute that had been settled by mediation and render the ruling dated 19th March 2012. As such, by adjudicating upon the dispute after the consent settlement order was executed by the parties and

endorsed by the mediator, in an effort to explain its effect to and guide the parties, the Learned High Court Judge was reviewing or interpreting the consent settlement order. It is also our considered view that by referring the matter to the Deputy Registrar for assessment, and the latter proceeding with the assessment, amounted to a misdirection on the part of both the Learned High Court Judge and Deputy Registrar for the same reasons we have given in the preceding sentences. These acts by the Learned High Court Judge and Deputy Registrar defeated the objectives of mediation of decongesting the court system, speedy resolution of the matter and cost saving on the part of the parties. This can be discerned from the fact that the litigation arising from the consent settlement order has been raging in the courts from the year 2007 when the settlement order was executed. This is a period of nine years, which is not only an unnecessary delay occasioned to the parties but also a costly one to them. The matter also clogged the already congested diary of the court below and indeed this court. The situation is very unfortunate because its effects are the very reason that court annexed mediation was introduced to remedy. In answer, therefore,

to the first question posed of the effect of the consent settlement order on the dispute between the parties, the same is that, it is final and binding upon the parties, terminates the proceedings and is not subject to appeal, review or interpretation.

We now turn to consider the second question which is the effect of the consent settlement order on the applications that were before the Learned High Court Judge and Deputy Registrar from which this appeal arises. Our considered view is that it renders both those hearings, and decisions a nullity. This is the view we take on account of our finding that the matter, having been mediated and settled, could not be referred back to the trial court. Further, what the Deputy Registrar purported to do was to determine what amounts, if any, were due to the Appellants by way of assessment. This power of assessment conferred upon the Deputy Registrar is for the purpose of complementing or completing a judgment. That is to say, it assists in ascertaining damages awarded. Resort to the Deputy Registrar in this matter was, therefore, inappropriate because, whilst there can be an

assessment following a judgment, there can be no assessment to follow a mediation settlement order because such an order is supposed to be complete and self explanatory especially that it is structured by the parties themselves. For this reason, the parties, their counsel and indeed, the mediator, need to ensure that there is clarity in a mediation settlement order such as the one executed in this matter. As Mr. S.A.G. Twumasi conceded, counsel for the parties play the pivotal role in mediation to ensure that such clarity is achieved. In this case, although the mediator, parties and counsel cannot be faulted for agreeing on the formulae to be applied in ascertaining and computing the terminal benefits due to the Appellants, (i.e. as in the ***Charles Mwale*** case), there was need for them to go further and identify which particular Appellants were entitled to payment and how much each one was entitled to. It was, therefore, not enough for them to agree only on the formulae because this did not assist them to reach a practical solution that can be implemented in the absence of further mediation. For this reason, the mediation office must ensure that it selects an appropriately qualified mediator from its multidisciplinary panel of mediators. In

this case, the record reveals that the mediator appointed was in the employ of the Law Association of Zambia, National Legal Aid Clinic For Women, which would suggest that she is a lawyer by profession. The view we take is that the mediation office should have appointed an accountant as mediator because the dispute involves calculating or computing amounts due to the Appellants (if any) by application of the formulae in the ***Charles Mwale*** case. The dispute is, therefore, one which resides in the accounting discipline.

The matter however, does not end with our finding that the applications and decisions by the Learned High Court Judge and Deputy Registrar are a nullity because *the dispute* cannot by any stretch of imagination be said to have been settled by the consent settlement order. The background we have given, leading up to this appeal, indicates that the mediation settlement order is not complete for purposes of enforcement because there were clearly some outstanding issues. This is what prompted the parties to seek the guidance of the court. Further, the fact that a mediation settlement order is said to be final does

not, in our considered view, preclude us, as the final court of justice, from giving guidance in a situation such as this one where all the players, that is, the parties, their lawyers and the mediator were at fault in agreeing to an uncertain and, therefore, unenforceable consent settlement order. This is the view we take because the mediation from which the consent settlement order arose is annexed to our court system and, therefore, part of the system as we pronounced in the ***Bank of Zambia vs Nyambe and others***, case, referred to us by counsel for the Respondents. Therefore, having exposed the parties to this process we must, in exceptional cases such as this one, and in the interests of justice, cure any defects arising from such process. As a consequence of this, it is our view, that rather than interpret, review or cause an assessment of the consent settlement order, the court below should have invoked its inherent jurisdiction under Order 3 rule 2 of the ***High Court Act*** which states as follows:

> *"Subject to any particular rules, the court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order*

has been expressly asked by the person entitled to the benefit of the order or not".

The effect of this order is that it gives a Judge of the High Court and a court, such as the Deputy Registrar, wide discretionary powers to grant any interlocutory order that the justice of the case deserves. Such an interlocutory order may be given whether or not the beneficiary party has requested for it. This demonstrates how wide the powers of the Judge and court are in this regard.

Applying the law as we have stated it and the reasoning we have given in the preceding paragraph, we are of the view that the Learned High Court Judge should have taken cognizance of the fact that he had no power to interpret, review or even refer the consent settlement order to the Deputy Registrar for assessment. Consequent upon this, the Deputy Registrar ought not to have adjudicated upon the matter. The Learned High Court Judge or indeed the Deputy Registrar should have invoked the powers under Order 3 rule 2 by granting an order that the justice of the case deserved by referring the matter back to

mediation with specific guidance that the mediator, the parties and their counsel should: identify which of the Appellants were entitled to payment of terminal benefits; the formulae to be used in computing such terminal benefits; amounts due to each Appellant, if any; and investigate whether or not there was an underpayment in the moneys paid. (We use the word *"guidance"* in the preceding sentence and not *"instruction"* because mediation is party-driven and as such no instructions can be given to the parties by this or any other court). Prior to this, an appropriate mediator should have been identified from the list of mediators kept by the mediation officer in terms of Order 31 rule 5 of the High Court rules, with the appropriate accounting qualification.

In arriving at the foregoing decision, we are alive to the fact that the mediation rules do not provide for referral of matters back to mediation by the court where there is a settlement. We are still of the firm view that our decision has the support of Order 3 rule 2 of the ***High Court Act***, especially that, the circumstances of this case are such

that the matter can only best be resolved through mediation.

By way of conclusion and in view of the observations we have made in the preceding paragraph: we are of the view that the proceedings both before the Learned High Court Judge and Deputy Registrar were a nullity; and since the appeal questions the ruling by the latter court, as if it were a ruling properly so made; it must fail on all four grounds and we accordingly dismiss it. In doing so, we, order that the matter be referred back to mediation in terms of the guidance we have given in the earlier part of this judgment. As regards the costs, of this appeal and for the proceedings in the court below, subsequent to the consent settlement order, we are of the considered view that the ends of justice dictate that they rest where they have fallen.

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M. MALILA SC
SUPREME COURT JUDGE

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M.C. MUSONDA SC
SUPREME COURT JUDGE

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N.K. MUTUNA
SUPREME COURT JUDGE