IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO.64/2013**
HOLDEN AT KABWE **SCZ/8/050/2013**
(Civil Jurisdiction)

BETWEEN:

GILBERT HIMBAYI HAMALAMBO APPELLANT

AND

ZAMBIA NATIONAL BUILDING SOCIETY RESPONDENT

CORAM: **Mwanamwambwa D.C.J., Muyovwe and Kaoma, J.J.S.,**
On 11th August, 2015 and 29th December 2016

For the Appellant:	*Mr. M. Z. Mwandenga, of Messrs .M. Z. Mwandenga and Company*
For the Respondent:	*Mr. L. Zulu, of Messrs. Tembo Ngulube and Associates*

JUDGMENT

Mwanamwambwa D.C.J., delivered the Judgment of the Court.

Legislation Referred to:

(1) **Section 26 B of the Employment Act, Chapter 268 of the Laws of Zambia**

(2) **Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia**

Cases Referred to:

1. **Anderson Kambela Mazoka and Others v Levy P. Mwanawasa and Others (2005) Z.R. 138**
2. **Mwape v The People (1976) Z.R. 160**
3. **Chikuta v Chipata Rural Council (1983) Z.R. 26**
4. **William Wise v E. F. Harvey Limited (1985) Z.R. 176**
5. **Mususu Kalenga Building Limited v Richman's Money Lenders Limited (1999) Z.R. 27**
6. **Turnkey Properties v Lusaka West Development Company and Others (1984) Z.R. 85**

7. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 173**
8. **Barclays Bank Zambia Plc v Zambia Union of Financial Institutions and Allied Workers (2007) Z.R. 106**

Works Referred to:

1. **Halsbury's Laws of England, (4th Edition) Vol. 16, page 460, Paragraph 667.**
2. **Halsbury's Laws of England, (4th Edition Reissue) Vol. 16, Page 296, Paragraph 285.**

This appeal is from a Judgment of the High Court which dismissed the appellant's case against the respondent.

The appellant is a former employee of the respondent, which was once a subsidiary of the Zambia Industrial and Mining Corporation, (ZIMCO) Group of Companies. The employees of the respondent initially served under the ZIMCO Conditions of Service. On 28th March 1995, the Minister of Finance, Mr. Ronald Penza, instructed that the basic salary and allowances should be merged when computing terminal benefits for employees in the subsidiaries of ZIMCO. Later in 1995, ZIMCO went into liquidation. The respondent revised its Conditions of Service in 1998 and the requirement to incorporate allowances to the salary when computing terminal benefits, was superseded.

In 2002, the appellant went on early retirement. He retired after the respondent invited its employees who had served for a period of 10 years or more, to exercise an option of applying for either voluntary separation or early retirement. He

applied for early retirement and the respondent retired him in October, 2002. In computing his benefits, the respondent calculated them in accordance with its revised conditions of service of 1998. It did not merge the allowances with the salary. The appellant was not happy. He wanted the respondent to compute his retirement benefits in accordance with the ZIMCO Conditions of Service, which required the basic salary to be merged with allowances. He sued the respondent. He was seeking the following reliefs:-

(1) A declaration that the appellant is entitled to have all allowances and fringe benefits that he used to receive or enjoy while in the employ of the respondent, incorporated in his monthly salary for purposes of computing the appellant's terminal benefits;
(2) An order that the appellant's terminal benefits should be re-computed in accordance with the declaration "1" above and with a view also of addressing any other computational errors that were made by the respondent when computing the terminal benefits;
(3) Following a re-computation under "2", an order that the appellant should be paid all sums to be found to be due less whatever sums may have been paid to him by the respondent;
(4) Damages;
(5) Interest on "3" and "4" as the court may deem just and expedient;
(6) Further or other relief; and
(7) Costs for and incidental to these proceedings.

During trial, counsel for the appellant raised an issue concerning redundancy payments. Counsel for the respondent objected on the ground that redundancy was not pleaded. The trial Judge did not immediately rule on the issue. She only addressed it in her judgment. The parties made submissions on the matter. The gist of the submissions by counsel for the

appellant was that the issue of redundancy payments was pleaded and he requested the trial Judge to take judicial notice that early retirement is an euphemistic term for redundancy. In her Judgment, the trial Judge took the view that redundancy was not pleaded. Accordingly, she dismissed the claim.

With regard to the computation of the appellant's retirement benefits, the trial Judge upheld the respondent's decision not to incorporate allowances into the salary. She took the view that the appellant was correctly paid his terminal benefits, in accordance with the respondent's revised conditions of service of 1998. She pointed out that the respondent was entitled to revise its conditions of service in 1998 because it became an independent body after ZIMCO was liquidated in 1995. She found as a fact that the appellant became aware of the revised conditions of service at the time he was still working for the respondent and he did not protest; he continued working.

On the claim for damages, the trial Judge took the view that the claim rested on **Section 26B** of **the Employment Act** which deals with redundancy. She dismissed it because redundancy was not pleaded.

The appellant was not satisfied with the Judgment of the trial Judge. He appealed to this Court, advancing five grounds of appeal. These read as follows: -

1. **That the honourable trial Judge misdirected herself by holding that the issue touching or concerning redundancy had not been pleaded;**
2. **That the honourable trial Judge misdirected herself by failing to take judicial notice of the fact that early retirement is another term, for redundancy;**
3. **That the honourable trial Judge misdirected herself by failing to take into consideration the evidence of the fact that the appellant had been declared redundant through early retirement;**
4. **That the honourable trial Judge misdirected herself when she held that the appellant's claim for breach of contract of employment rested on the provisions of section 26(B) of the Employment Act;**
5. **That the honourable trial Judge misdirected herself by failing to adjudicate on the issues touching or concerning the appellant's claim for damages for breach of contract of employment.**

Both parties filed written heads of argument based on these grounds of appeal. They both relied on their heads of argument. For convenience, we shall address grounds one, two and three together. We also propose to deal with grounds four and five together.

On behalf of the appellant, Mr. Mwandenga argued grounds one and two together. He submitted that the issue of redundancy was pleaded in the court below. He drew our attention to certain portions in the statement of claim. He went on to cite the case of **Anderson Kambela Mazoka and Others v Levy P. Mwanawasa and Others**[1] and submitted that the function of pleadings is to give fair notice of the case which has to be met and to define the issues in dispute. He pointed out that the word 'redundancy' did not appear in the statement of claim but in general, it gave fair notice of the case to the

respondent, which included issues touching on early retirement and redundancy. He submitted that the court below should not have refused to take judicial notice that early retirement is an euphemistic term for redundancy. He cited the case of **Mwape v The People**[2], in which it was held that the court can take judicial notice of matters of common knowledge which are so notorious that it may be unnecessary to lead evidence to establish their existence. He contended that had the court below taken judicial notice that early retirement is an euphemistic term for redundancy, it could have found that the issue of redundancy was impliedly covered in the appellant's pleadings and there was no need to specifically mention it in the pleadings.

In the alternative, counsel for the appellant argued that even if there could have been a variation in the case presented, the variation was not a radical departure from the case pleaded by the appellant and it did not amount to a new and separate case. He submitted that the fact that both parties had adduced evidence which was touching on redundancy was a good ground for the court below to depart from the general treatment of cases where there has been a departure from the pleaded case. He cited the case of **Chikuta v Chipata Rural Council**[3], where it was held that although the trial Court should not radically depart from the case pleaded, in exceptional circumstances it would be incompatible with a Judge's duty to dispense justice on the merits of any given case, for him to allow evidence to be

suppressed on the ground that a relevant issue was omitted from the pleadings.

On behalf of the respondent, Mr. Zulu opposed ground one of this appeal. He submitted that the purpose of pleadings is to ensure that all parties involved know the matters that are in dispute. He cited the case of **William Wise v E. F. Harvey Limited**[4] to support his submission. He contended that the appellant's statement of claim did not state that the appellant was declared redundant for the court to be concerned with the issue of redundancy. He stated that the appellant applied and was given early retirement and the only issue the respondent had proper notice of, was the dispute on the computation of terminal benefits. Counsel submitted that since redundancy was not specifically pleaded, the court below was not obliged to consider it because the court was only tasked to adjudicate on matters that were specifically pleaded.

In opposing ground two, Mr. Zulu supported the decision of the trial Judge to refuse to take judicial notice that early retirement is an euphemistic term for redundancy. He submitted that the two concepts are distinct. He stated that for the court to be moved to take judicial notice of a particular matter, it needs to be a notorious fact or of common knowledge. He relied on the case of **Mwape v The People**[2] for this argument. Counsel pointed out that while retirement and redundancy arise by operation of the law, the two are not the same. He drew our attention to the provisions on redundancy

in **Section 26B** of **the Employment Act** and submitted that redundancy is not the same as early retirement, which is usually regulated by contractual terms. He stated that the appellant voluntarily applied for early retirement and the respondent accepted his application. He submitted that redundancy is never voluntary and as such, it cannot be equated to early retirement. He stated that the court below was on firm ground when it did not take judicial notice of the assertion that early retirement is an euphemistic term for redundancy.

In support of ground three, Mr. Mwandenga submitted that evidence was adduced in the court below, showing that the respondent dealt with the appellant as one who had been declared redundant. He pointed out that both parties adduced evidence touching on redundancy and the court below ought to have considered the issue. He relied on the case of **Anderson Kambela Mazoka and Others v Levy P. Mwanawasa and Others**[1], in which this court held that in a case where any matter not pleaded is let in evidence and not objected to by the other side, the court is not and should not be precluded from considering it. He contended that the failure by the lower court to consider the evidence on redundancy was a misdirection and ground three should be allowed.

Counsel for the respondent, Mr. Zulu, countered ground three of this appeal. He submitted that the court below did not consider the appellant to have been declared redundant

through early retirement, firstly because the issue of redundancy was not pleaded by the appellant; and secondly, because the two concepts are distinct and not the same. He submitted that the appellant is barred from raising issues that were not raised in the court below. He cited the case of **Mususu Kalenga Building Limited and another v Richmans Money Lenders Enterprise**[5] and submitted that where an issue is not raised in the court below, it is not competent for any party to raise it on appeal.

We have considered the issues raised in grounds one, two and three. These three grounds revolve around the issue of redundancy. We agree with counsel for the appellant that pleadings define the issues in dispute. Parties are in fact bound by their pleadings. In this case, the appellant's pleadings show that he had raised the issue of early retirement. As rightly admitted by Mr. Mwandenga, the word redundancy does not appear anywhere in the appellant's pleadings. We, therefore, have no doubt that redundancy was never pleaded by the appellant.

What we have to determine is whether early retirement is indeed an euphemistic term for redundancy. In our considered view, redundancy and early retirement are two different ways of terminating a contract of employment. For redundancy, the circumstances in which it arises have been outlined by the

learned authors of **Halsbury's Laws of England, Vol. 16, 4th Edition, Paragraph 667 at Page 460**, who explain as follows: -

> **"DISMISSAL BY REASON OF REDUNDANCY**
>
> **667. Meaning of "redundancy or dismissal". An employee who is dismissed is taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to the fact that**
>
> 1. **his employer has ceased or intends to cease to carry on the business for which the employee was employed by him;**
> 2. **his employer has ceased or intends to cease to carry on that business in the place where the employee was so employed;**
> 3. **the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish; or**
> 4. **the requirements of that business for employees to carry out work of a particular kind in the place where they were employed have ceased or diminished or are expected to cease or diminish."**

Given the circumstances in the case before us, we do not think that the manner in which the appellant left employment falls within the purview of any of the situations described above. He applied voluntarily, for early retirement, after the respondent invited eligible employees to apply for either voluntary separation or early retirement. The respondent accordingly retired him. In our view, this amounted to termination of employment by mutual consent. Where a contract of employment is terminated by mutual consent, an employee cannot bring an action for redundancy payments. On this issue, the learned authors of **Halsbury's Laws of England, Vol. 16, 4th Edition Re-issue, Paragraph 285 at Page 296** state as follows:

"(iii) Mutual consent

285. In general. As a matter of ordinary contract law, the parties to a contract of employment having made it are equally capable of agreeing to terminate it. This may, however, materially prejudice an employee's statutory rights because, if an employment terminates by mutual consent, there is no dismissal as required in order to bring actions for unfair dismissal or a redundancy payment.... Mutual termination may, however, properly apply where the employee agrees, without compulsion, to accept voluntary early retirement, offered by the employer on terms more generous than under the ordinary redundancy payments scheme and where it is understood that the normal statutory rights are not to apply in addition."

In view of the foregoing, it is very clear that there is a clear-cut distinction between early retirement and redundancy. Therefore, we support the decision of the trial Judge to refuse to take judicial notice that early retirement is an euphemistic term for redundancy. The facts in the case, and the law, clearly show that that the appellant was not declared redundant. Mr. Mwandenga's arguments on the issue of redundancy are misconceived. Grounds one, two and three have no merit. We hereby dismiss them.

We shall now move to grounds four and five.

In support of ground four, Mr. Mwandenga contended that the trial Judge misunderstood the appellant's position in relation to his claim for damages for breach of contract. He stated that the appellant's position was twofold. Firstly, that the relief sought purely rested on a claim that the respondent's failure to pay the terminal benefits due to the appellant on his early retirement was a breach of the appellant's contract of

employment. Secondly, that the relief rested on a claim that the respondent's failure to pay the appellant's terminal benefits on the last day of employment violated **Section 26B** of **the Employment Act**. Counsel for the appellant contended that his claim for damages did not only rest on the provisions of **Sections 26B** of **the Employment Act** but also on the general law relating to breach of a contract of employment.

He stated that generally, a breach of contract is visited by damages. Counsel cited the case of **Turnkey Properties v Lusaka West Development Company and Others**[6] and submitted that damages are a universal remedy for breach of contract. He pointed out that on the other hand, the general statutory sanction for breach of **Section 26B** of **the Employment Act** is payment of full wages of an employee until the actual payment of the terminal benefits. Mr. Mwandenga referred us to the proviso to **Section 26B (3)(b)** of **the Employment Act**, which provides that where an employer is unable to pay redundancy benefits on the last day, the employer shall continue to pay full wages until the redundancy benefits are paid. He submitted that the trial Judge misdirected herself when she held that the claim for damages only rested on **Section 26B** of **the Employment Act** because it in fact rested on these two limbs.

On behalf of the respondent, Mr. Zulu countered ground four of this appeal. He submitted that the appellant's claim for damages for breach of contract fell squarely within the ambit of

Section 26B (1)(b) of **the Employment Act** as it is the only provision which provides for payment of dues on a specific date. He contended that the appellant's claim could not be sustained because he failed to provide evidence to prove that there was an agreement that the appellant would be paid his early retirement dues on a specific date. He supported the finding by the court below that the appellant's claim fell within the ambit of **Section 26B** of **the Employment Act**. He added that redundancy was not pleaded and the court below could not adjudicate on it.

In support of ground five, Mr. Mwandenga submitted that the court below should have dealt with the appellant's claim for damages for breach of contract separately from the fact that the claim rested on the provisions of **Section 26B** of **the Employment Act**. He pointed out that the court below did not deal with the issue of damages for breach of contract which arose from the respondent's failure to pay the appellant his terminal benefits. He stated that the claim was pleaded and evidence was adduced to show that the respondent did not pay terminal benefits on the last day but that it belatedly started paying him in April, 2003.

He submitted that the court below did not adjudicate on the issue of whether the appellant was entitled to damages for breach of contract. That the matter was left hanging. He contended that this was inconsistent with the principle that a trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is

determined in finality. Counsel cited the case of **Wilson Masauso Zulu v Avondale Housing Project Ltd**[7] and **Section 13** of **the High Court Act**, for his submission. He stated that the failure to adjudicate on the claim for damages for breach of contract was a misdirection and ground five should be allowed.

In opposing ground five, Mr. Zulu submitted that the court below adjudicated on the issue of damages for breach of contract when it found that there had been no breach. He stated that there was no need for the court below to delve into the issue of damages when it rightly found that there was no breach founded on **Section 26B** of **the Employment Act** on which the claim for damages would have rested.

He further submitted that the appellant's claim for breach of contract of employment with respect to the revision of the conditions of service without his consent was unfounded. He contended that the appellant did not leave employment after the conditions of employment were revised but he continued and even benefitted from the enhanced education and housing benefits from the revised conditions of service. He submitted that it was clear from the evidence that the appellant did not protest against the revised conditions at the time they were changed. He argued that this appeal has no merit and it should be dismissed.

We have considered grounds four and five. The issues in these grounds are centred on the appellant's claim for damages

for breach of contract. It has been argued that the trial Judge failed to adjudicate on this claim and she misdirected herself when she held that the claim rested on **Section 26B** of **the Employment Act**. We have examined the evidence and the Judgment of the court below in relation to these issues.

The evidence shows that the appellant is alleging that the respondent breached his contract of employment because the respondent computed his benefits in accordance with its revised conditions of service of 1998, and that his benefits were not paid on his last day of duty at work. It is very clear that he wanted the respondent to compute his terminal benefits in accordance with the ZIMCO conditions of service which required allowances to be merged with the salary.

We note that the court below came to the conclusion that the appellant was not entitled to have his benefits computed in accordance with the ZIMCO conditions of Service. We agree with the court below, because the ZIMCO conditions of service were superseded when the respondent revised its conditions of service in 1998. We also agree with the trial Judge that the respondent was entitled to come up with its own conditions of service after ZIMCO went into liquidation. We do not see how the respondent could have continued using the ZIMCO conditions of service when ZIMCO was no longer in existence.

Further, there is evidence to support the trial Judge's finding that the appellant became aware of the revised

conditions of service at the time he was still working for the respondent and he did not protest. He continued working for the respondent until his early retirement in 2002. In our view, the appellant acquiesced to the revised conditions of service of 1998. We, therefore, take the view that the respondent did not breach his contract of employment when it computed his benefits in accordance with those conditions.

We also find that there is no merit in the appellant's contention that he is entitled to damages for breach of contract because the respondent violated the provisions of **Section 26B (3)(b)** of **the Employment Act**. We hold this view for two reasons. Firstly, **Section 26B (3)(b)** of **the Employment Act** deals with the payment of redundancy benefits and we have already found that redundancy was not pleaded. Further, we have already found that the appellant's employment was not terminated by reason of redundancy. Secondly, **Section 26B** of **the Employment Act** does not apply to this case because the respondent's revised conditions of service, which applied to the appellant, contain provisions on redundancy. **Section 26B** of **the Employment Act** applies only to employees who are on oral contracts of employment that do not have provisions on redundancy. This is what we said in **Barclays Bank Zambia Plc. v Zambia Union of Financial Institutions and Allied Workers**[8] where we held that:

> **"Section 26B of the (Employment) Act contains detailed provisions on termination by redundancy. In enacting this provision, Parliament intended to safeguard the interests of employees who were employed on oral contracts of service**

which by nature would not have any provision for termination of employment by way of redundancy."

Therefore, we are convinced that claims relating to redundancy were misconceived. We take the view that the respondent did not breach the appellant's contract of employment in any way. The appellant is not entitled to damages for breach of contract. Whether or not the appellant's claim for damages rested on section 26 B of the Employment Act is totally irrelevant in this case. We are of the considered view that the learned trial Judge adequately addressed the issues pertaining to the claim for damages for breach of contract. There is no substance in the appellant's argument that the trial Judge failed to adjudicate on this claim. Ground four and five have no merit. Accordingly, we dismiss them.

On the totality of issues, this appeal fails, for lack of merit. We award costs to the Respondent, to be taxed in default of agreement.

M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

E. N. C. MUYOVWE
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT JUDGE