IN THE SUPREME COURT OF ZAMBIA APPEAL NO.224/2013

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ZESCO LIMITED	**APPELLANT**
AND	
IVOR YAMBAYAMBA	**1ST RESPONDENT**
LAWRENCE CHISANGA	**2ND RESPONDENT**
RUTH MWAMUTANDA	**3RD RESPONDENT**
FELIX BWALYA	**4TH RESPONDENT**

CORAM: Mwanamwamba DCJ, Malila, Kabuka, JJS

On the 19th May, 2016 and 7th February, 2017.

FOR THE APPELLANT:	Mrs. N. C. Sikazwe, Chief Legal Officer.
FOR THE RESPONDENTS:	Mr. B. Katuta, Messrs. Luboko Chambers.

JUDGMENT

Kabuka, JS, delivered Judgment of the Court.

Cases referred to:

1. Bank of Zambia vs Jones Tembo and Others (2002) Z.R.103
2. Zimco Limited (in liquidation) and Zambia Privatisation Agency vs Michael Malisawa and 17 Others, SCZ Appeal No. 139 of 2002

3. James Mankwa Zulu and Others vs Chilanga Cement Plc Appeal No. 12 of 2004

4. Sam Amos Mumba v Zambia Fisheries and Fish Marketing Corporation Limited (1980) Z.R. 135 (H.C.)

5. Colgate Palmolive Zambia (Inc) v Able Shemu Chuka and 10 Others Apeal No.181 of 2005

6. Anderson Kambela Mazoka and Others v Mwanawasa, the Electoral Commission of Zambia and Attorney General (2005) Z.R. 140 (SC)

7. Kasengele and 40 Others v Zambia National Commercial Bank Limited Appeal No. 161 of 1999

The appellant appeals against a judgment of the High Court at Lusaka, dated 18th October, 2013, which found that the respondents were entitled to have their retirements benefits computed on their basic salary, merged with allowances.

The background to the matter is that, the 1st, 2nd, 3rd and 4th respondents were at the material time employed by the appellant as Audit Services Manager, Engineer, Accountant, and Manager Insurance, respectively. The respondents worked under non-represented senior staff conditions of service, as revised from time to time.

By letters dated 14th February, 2011, 1st March, 2011, 22nd December, 2010 and 30th May, 2011, the 1st to 4th Respondents were respectively, given six months' normal retirement notices. Their employment was to respectively, terminate on their attaining the retirement age of 55 years, on 7th August 2011, 30th September, 2011, 1st June, 2011 and 30th November, 2011. At the time that the notices were written, the conditions of service applicable to the respondents were the revised conditions of service for non-represented employees of 1st August, 2003.

On 18th March, 2011, whilst the respondents were still working through their last months to their retirement, the conditions of service for non-represented employees were revised and approved by the appellant's Board of Directors, with effect from 16th March, 2011. These revised conditions in clause 11.1 (d) (a) (v) provided for calculation of terminal benefits using 'the basic salary merged with all allowances received monthly, by the employee and which also appeared on his last pay slip'.

On 7th August, 2011, the 1st respondent was retired from employment following which he received his gratuity. Upon examining the documents relating to the payment, however, he

noticed that the appellant omitted to merge his salary with the housing and commuted car allowances he used to receive monthly, and which also appeared on his last payslip, contrary to clause 11.1 (d) (a) (v) of the revised conditions of service. At the trial of the matter in the court below, the 1st respondent produced a document of his own computation showing that the correct gross figure when the salary is merged with the housing and commuted car allowances, ought to have been K3,395,000,000.00 (K3,395,000.00). His contention was that, he was underpaid the long service gratuity by K1,011,369.00.

It was the 1st respondent's further evidence in the court below, that as an Accountant by profession, he similarly calculated the amounts of underpayment resulting from omission of allowances in computations of the long service gratuity, for each of his co-respondents. According to him, the computation of the 2nd and 3rd respondents' benefits did not merge the salary with the housing allowance, which resulted in an underpayment to them in the sums of K310, 292.00 and K213,221.00, respectively. Computation of the 4th respondent's long service gratuity did not incorporate the housing and car allowances, and he too was underpaid by K699, 000.00.

In support of their claim that the 2011 revised conditions of service for non-represented employees were implemented, the respondents used documents relating to Mr. Simfukwe, a fellow employee. The respondents contended that, this employee retired before themselves. Yet it was not in dispute that his allowances were merged with the basic salary, when computing his retirement benefits.

In its defence to the respondents' claims, the appellant's contention was that, the 2011 revised conditions of service for non-represented employees were not wholly approved by the Board of Directors. What was approved were extracts of the same conditions and these were duly signed and circulated for implementation. The appellant also contended that, at the time of the respondents' retirement, clause 11.1 (d) (a) (v) was one of the clauses not yet approved for implementation. In the premises, that the conditions of service which applied to the respondents were the 2003 conditions for non-represented employees, which did not provide for inclusion of housing and car allowances, in the computation of long service gratuity.

In its evidence led at the trial of the matter, the appellant

contended that, prior to 1999, salaries of the non-represented employees were paid together with certain allowances like water, electricity, garden, medical, as well as education allowance for their children. Shortly after the appellant migrated from the ZIMCO conditions of service for non-represented employees, all these allowances were combined into one single allowance known as 'services allowance'. The only allowance that was not included in the services allowance was housing allowance, which applied to employees who were not accommodated by the appellant.

Later, when the appellant stopped providing accommodation, all employees started getting housing allowance under the 2003 conditions of service. For purposes of computing long service gratuity however, only the services allowance was merged with the basic salary. According to the witness, this was the reason that the respondents' long service gratuity which was computed under the 2003 conditions of service, did not merge the basic salary with the housing allowance.

The record shows that the appellant's witness in her evidence, in the court below initially said clause 11.1 (d) (a) (v) was effected from 1st January, 2012, while the last working day

for Mr. Sydney Simfukwe, to whom the respondents were comparing themselves, was 8th January, 2012. When she was cross-examined, this witness retracted this evidence. She instead confirmed, the effective date for implementing clause 11.1 (d) (a) (v) was only communicated by management to the employees, by a circular letter dated 10th January, 2012. She further confirmed, Mr. Simfukwe had by then, already retired. That position notwithstanding, the witness admitted, Mr. Simfukwe's retirement benefits were computed on his basic salary which included services allowance, housing and commuted car allowances, as provided in clause 11.1 (d) (a) (v) of the 2011 revised conditions of service for non-represented employees.

The witness further admitted, that the respondents and all other employees who retired by 31st December, 2011 had their benefits calculated in accordance with the conditions of service of 1st August, 2003. She claimed that, copy of the revised conditions of service for non-represented employees produced by the respondents at the hearing of the matter in the court below, with the words reading **"approved by the ZESCO Board on 18/03/2011"** appearing on the front page, just beneath the heading: **CONDITIONS OF SERVICE FOR NON-REPRESENTED**

EMPLOYEES, is not an approved document as it was not signed. That the document was only prepared for purposes of approval.

On this evidence that was before him, the learned trial judge in the court below noted that, although the appellant did not deny the 2003 conditions of service for non-represented employees were revised and presented to the Board of Directors in March, 2011. The appellant claimed that, not all the clauses were approved. In particular, that clause 11.1 (d) (a) (v) relied on by the respondents to launch their claims for underpayment was one such clause, that was not approved. That this clause was only effected from 1st January, 2012, and could therefore not apply to the respondents who had retired in 2011.

The trial judge also noted, that the respondents claimed they were receiving housing and commuted car allowances, monthly and that these allowances appeared on their last payslips. In computing their long service gratuity however, the appellant omitted to include the housing and commuted car allowances in the basic salary of the 1st and 4th respondents. The appellant similarly omitted to include the housing allowance in the basic salaries for the 2nd and 3rd respondents. As a result of

these omissions, all the respondents were underpaid their long service gratuity.

In resolving the issue whether clause 11.1 (d) (a) (v) applied to the respondents, the learned trial judge found, the issue was one that was a matter of law. It was not about what the employer chooses to include in terms of allowances to be merged into the basic salary. Nor was it about whether clause 11.1 (d) (a) (v) was approved in 2011 or 2012. The judge found it to be trite law, in this jurisdiction, that when calculating terminal benefits, all allowances and/or benefits to which an employee was entitled at the time of termination must be included in the basic salary.

The judge observed that there were a plethora of decisions of this court to support that proposition and cited as authority, the cases of **Bank of Zambia vs Jones Tembo and Others (1), Zambia Privatisation Agency vs Michael Malisawa and 17 Others (2),** and **James Mankwa Zulu and Others vs Chilanga Cement Plc (3)**. On the evidence before him as earlier highlighted, the trial judge found the respondents had, on a balance of probabilities, established their claims that they were underpaid. The appellant was accordingly ordered to re-compute

the respondents' retirement benefits to include housing allowance and commuted car allowance for the 1st and 4th respondents. He further ordered the 2nd and 3rd respondents' long service gratuity to be similarly re-computed, with the inclusion of the housing allowance in their basic salaries.

It is against those findings that the appellant now appeals to this court on the following grounds:

1. **The Learned trial Judge erred in both law and fact by disregarding the provisions of the conditions of service applicable to the Plaintiffs and applying a different interpretation thereof, thereby varying what was embodied in the terms of the contract.**
2. **The Learned trial Judge erred in both law and fact by holding that, when it comes to calculation of terminal benefits it is trite law that a salary or pay ought to include all allowances and/or benefits when the issue before court was not the determination of the salary but merely interpretation of the conditions of service applicable to the Plaintiffs.**

When the matter came up for hearing of the appeal, counsel for the parties informed the court they would wholly rely on the Heads of argument they had earlier filed on record.

The thrust of the arguments by learned counsel for the appellant on ground 1, were that, after migrating from the ZIMCO conditions of service following privatisation; the appellant company came up with its own conditions of service which were issued by the Director Human Resource on 2nd October, 2003.

These conditions gave a clarification on the calculation of retirement benefits upon normal retirement at age 55 and provided as follows: -

> "Payment of gratuity upon normal retirement– pay shall mean **Basic Salary plus services allowance.**" (Emphasis in bold supplied).

It was counsel's argument that, on 16th March, 2011, the Board approved, in part, certain clauses in the conditions of service. Among those approved, was the clause on payment of benefits to employees who died whilst in service, which was made effective from 1st May, 2010.

Counsel further argued, defence evidence in the court below was that on 10th January, 2012, another memorandum was issued from the office of the Director Human Resource. This memorandum stated that payment of retirement benefits was to be computed on the basic pay merged with the services allowance, housing allowance and commuted car allowance.

The submission was that, the trial judge ignored all this evidence relating to what conditions of service were applicable to the respondents and proceeded to apply different conditions altogether. In aid of the submission, counsel referred us to the

holding in the High Court case of **Sam Amos Mumba v Zambia Fisheries and Fish Marketing Corporation Limited (4)** that: -

> **"where the parties have embodied the terms of contract into a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written document except on certain exceptions."**

Counsel further relied on the case of **Colgate Palmolive Zambia (Inc) v Able Shemu Chuka and 10 Others (5)** where we held that: -

> **"the learned trial court erred in unilaterally introducing different conditions other than those agreed between the parties."**

He re-iterated his submission, that the court below erred by ignoring the applicable conditions of service that were produced at the trial and applying terms which were different from what was agreed and binding on the parties.

Counsel noted, it is not in dispute that this court has had the opportunity to determine the meaning of the word salary, as was done in the celebrated cases of **James Mankwa Zulu and Others vs Chilanga Cement, Appeal No. 12/2004** and **Jones Tembo vs Bank of Zambia** to the effect that: -

> **"where the word salary is used, the same means basic pay and all allowances."**

Counsel however argued, that the question the trial court was faced with was not the determination of the meaning of the word 'salary' but rather, the interpretation of the conditions of service applicable to the respondents. It was her submission that, the trial court erred both at law and on the facts by disregarding the terms and conditions embodied in a contract existing between the appellant as employer and the respondents as employees. That the parties in this matter had agreed on terms and conditions that governed their relationship and in this case, one such term was the calculation of retirement benefits at age 55, to be based on basic pay and services allowance, only.

Counsel contended that, according to the evidence before the trial court, the Conditions of Service of 2011-2013 upon which the respondents wished to rely were never approved in their entirety and this was explained by the appellant's witness, at the trial of the matter in the court below. The respondents' witness confirmed that the only portion which was approved from the conditions of service of 2011 relating to calculation of benefits, was that relating to deceased employees. He also failed to bring evidence to show that the 2011-2013 conditions of service were approved by the Board in their entirety. In support

of the submission, counsel referred to the case of **Anderson Kambela Mazoka and Others v The Electoral Commission of Zambia and Attorney General (6)** where we held that: -

> **"evidence adduced must establish the issues raised to a fairly high degree of convincing clarity failure of which the claim ought to be dismissed."**

In his response to ground 1, the arguments of learned counsel for the respondents were that, the court below simply based its decision on what a salary is, in respect of payment of an employee's terminal benefits as by case law established. His submissions were that, this ground of appeal is seriously misconceived as it appears to canvas some findings which were not really part of the conclusion of the court below.

On ground 2, counsel argued, it is common cause that courts in Zambia do make law through the doctrine of ***stare decisis*** or case precedent, which is a process of building the law through decided cases. That this court has, following the said doctrine, determined in a plethora of authorities, what constitutes a salary when calculating an employee's terminal benefits. According to counsel, the case of *Mankwa Zulu and Others v Chilanga Cement Plc* is a ***locus classicus*** on the subject which has been echoed in many subsequent cases and the

principle enunciated therein, is sufficiently familiar to lawyers and judges alike, and need not be re-stated. It determines that, ***"a salary includes all allowances,"*** as acknowledged by the appellant in its submissions in the court below. Counsel further contended, it is therefore preposterous for the appellant to now argue that the court below fell in error when it found for the respondents, based on what a salary is in the Zambian jurisprudence.

Counsel went on to submit, it can infact be argued, that by enacting clause 11.1 (d) (a) (v) of the revised conditions of service, the appellant was in essence codifying the law as stated in the case of *Mankwa Zulu and Others v Chilanga Cement Plc.* That case, counsel stressed, is still good law and its reversal would produce disastrous pecuniary consequences too traumatic to contemplate, for those employees yet to retire nationwide.

On the appellant's argument, that in the court below the respondents failed to bring evidence showing the revised conditions of service were approved in full. Counsel referred to the document indicating the conditions in issue were approved on 18th March, 2011 which appears at page 334 of the Record of

Appeal. He accordingly submitted, the respondents having established at the trial, that the conditions of service were approved on 18th March, 2011, it was incumbent upon the appellant to bring to court a Board resolution of the same date showing that there was no such approval. Counsel concluded by urging us to dismiss the appeal for want of merit.

We have considered the arguments, submissions forcefully presented by counsel and the case law to which we were referred.

In ground 1 of the appeal the appellant argues that the trial judge disregarded the provisions of the conditions of service applicable to the respondents and applied a different interpretation with the result that, he varied the terms of the 'parties' contract. According to counsel for the appellant, the question that the trial court was faced with was not the determination of the meaning of the word 'salary' but rather, the interpretation of the conditions of service applicable to the respondents. The arguments of learned counsel for the respondent were however that, the court below simply based its decisions on what a salary is, in respect of payment of an employee's terminal benefits as by case law established.

We find the real issue raised in this ground of appeal rests on whether the conditions of service that applied to the respondents at the time of their retirement were those of 1st August 2003 or the 2011-2013 revised conditions.

The appellant argues it is the conditions of 1st August, 2003 which applied to the respondents. That clause 11.1 (d) (a) (v) was only approved for implementation on 1st January, 2012 which was long after the respondents had retired in 2011.

The respondents' counter argument on the issue was that, the revised conditions of service allowing for merging of all allowances with the basic salary for purposes of computing retirement benefits, were approved on 18th March, 2011. It was the 1st and 4th respondents' argument that, they were receiving housing and commuted car allowances monthly, which fact reflected on their last payslips. The 2nd and 3rd respondents also argued, they too were receiving housing allowance and it was appearing on their last payslips. According to the respondents, they only retired between 1st June, 2011 and 30th November, 2011. That being the case, they were all still in employment on 18th March, 2011 when the conditions of service allowing for

merging of all allowances with the salary for purposes of computing retirement benefits, were approved. It is for this reason that they maintain their claim, that they were entitled to have their terminal benefits computed on their basic salary, merged with all allowances they were receiving monthly, as provided for in clause 11.1 (d) (a) (v) which states as follows:

> *"for the purpose of calculating the retirement benefits a month's pay shall mean the basic salary and the following allowances being paid to the employee on a monthly basis if they appear on the last payslip; Services Allowance, Housing Allowance, Transport Allowance, Hardship Allowance, Standby Allowance and Shift Allowance."*

The appellant's contrary position on the issue as submitted by learned counsel, was that, the 2011 - 2013 revised conditions of service for non-represented employees were not wholly approved by the Board of Directors. It was only certain extracts of the said conditions, which were approved, duly signed and circulated for implementation. That at the time of the respondents' retirement, clause 11.1 (d) (a) (v) was one of the clauses not yet approved for implementation.

We have perused the record of proceedings from the court below and find that, the learned trial judge did not resolve the question as to which conditions of service actually applied to the respondents at the time of their retirement. The reason he gave

for this omission was that, he considered it irrelevant to the real issue. The judge was of the view that, incorporating allowances regularly received by an employee as part of his basic salary for purposes of computing retirement benefits was well settled by various decisions of this court.

The fact that the appellant's Board of Directors resolved to revise the conditions of service for non-unionised employees in March, 2011 was common cause. We have in this regard considered evidence, that at the time of the said approval by the appellant's Board, the respondents were all firmly in employment as they were only retired between 1st June, 2011 and 30th November, 2011. We have further considered copy of the document in issue which is on record and indicates on the cover, that the appellant's Board approved the revised 2011-2013 conditions, on 18th March, but to take effect from 16th March, 2011.

On the question of when the revised conditions were implemented, we observe from the Record of Appeal that the appellant's witness at trial gave conflicting evidence. She however, admitted that the memorandum informing employees of

the implementation of clause 11.1 (d) (a) (v) was dated 10th January, 2012. We have examined this memorandum which unequivocally states that, it is **'corporate management'** that had made **'the approval',** to give effect to clause 11.1 (d) (a) (v) from 1st January, 2012.

In our view, this evidence only goes to give credence to the respondents' claim, that the appellant's Board of Directors approved the 2011-2013 revised conditions of service with effect from 16th March, 2011 as appears on copy thereof at page 186 of the record of appeal. That it was however, management's decision to implement this Board resolution in January, 2012 as communicated in the memorandum from the Human Resources Manager dated 10th January, 2012.

We also wish to comment on the arguments by learned counsel for the appellant in which she appeared to suggest that, the respondents in the court below did not establish, to a fairly high degree of convincing clarity, that the appellants Board of Directors approved the revised conditions for non-represented employees. Counsel cited our decision in the *Anderson Kambela Mazoka* case as authority for her said submission. Suffice to say,

that, the said case dealt with an election petition and in the earlier case of *Lewanika and Others vs Chiluba* this court had explained the reasons for requiring a higher standard of proof in such matters when we held that:

> **"..... election petitions were required to be proved to a standard higher than on a mere balance of probability and therefore in this case, where the petition had been brought under constitutional provisions and would impact upon the governance of the nation and deployment of constitutional power, no less a standard of proof was required. Furthermore, the issues raised were required to be established to a fairly high degree of convincing clarity."**

The above quotation notwithstanding, it is a trite legal position, that the standard of proof in civil matters, generally, is on a balance of probabilities. A higher standard will only be required depending on the nature of the case or the allegations made. For instance, allegations that are criminal in nature such as fraud or corruption, require a higher standard of proof to establish, than on a mere balance of probabilities. We are satisfied that, the case in *casu,* having arisen from a contract of employment only required to be established on the normal standard of proof in civil matters which is 'on a balance of probabilities.'

In proceeding with the matter, the issue in the present appeal of whether or not the 2011-2013 revised conditions of service for non-unionised employees were approved was not in dispute. The dispute related to whether the approval was wholesome or only related to specific clauses. The respondents who produced a copy of the revised conditions which on the face of it indicates that they were wholly approved by the Board of Directors on 18th March, 2011 with effect from 16th March, 2011 cannot be found to have failed to discharge their burden of proof, on a balance of probabilities. It then, remained for the appellant as the party alleging that the conditions were approved piece meal to produce evidence in rebuttal to prove otherwise.

In the circumstances, this they could only have done, as correctly argued by learned counsel for the respondent, by simply producing the Board resolution in issue, confirming that clause 11.1 (d) (a) (v) was not one of the revised conditions in the copy document approved by the Board at its meeting of 18th March, 2011. This burden could not be discharged by a memorandum from the Human Resources Manager dated 10th January, 2012, indicating that clause 11.1 (d) (a) (v) in issue was to be effected from 1st January, 2012, as the appellant sought to do.

We are accordingly further satisfied, that had the trial judge considered this evidence as highlighted, which is on record, he would still have arrived at the same inevitable conclusion; that the revised conditions of service approved by the appellant's Board of Directors on 18th March, 2011 were effected from 16th March, 2011, whilst all the respondents were still in employment and that the said clause 11.1 (d) (a) (v) of the said conditions applied to them. In the circumstances, they were in terms of that clause, entitled to have their terminal benefits calculated on their basic salary merged with the allowances they were receiving, which also appeared on their last payslips.

In the event, the 1st and 4th respondents' terminal benefits should have been calculated on the salary merged with housing and commuted car allowances which were appearing on their last payslips, while the 2nd and 3rd respondents were also entitled to have their gratuity computed on their respective basic salaries merged with the housing allowance.

Ground 1 of the appeal accordingly fails.

Coming to ground 2, the appellant here attacks the definition of salary, given by this court in previous decisions such

as the holding in the leading case on the issue of *James Mankwa Zulu & Others v Chilanga Cement Limited,* relied on by the trial judge in which we stated that:

> **"there is no longer any debate as to the meaning of 'salary', as the word salary includes allowances that are paid together with the salary on periodical basis by an employer to his employee."**

The submissions of learned counsel for the appellant on this ground were that, upholding the trial judge would result in negatively impacting the freedom of contract, in that the courts would impose on the parties a solution outside their contractual terms. Counsel for the respondent on the other hand urged us to uphold our past decisions on the issue.

Needless to re-state that, it is a basic principle of contract law, that parties of full age and with capacity are bound by the terms of their agreements and the role of the courts is merely to enforce such agreements. Learned authors of **Chitty on Contracts Vol. 1 paragraphs 1-010, at page 10** put it as follows:

> **".....two linked principles remain of fundamental importance, viz the principles of freedom of contract and the binding force of contract. By these two principles, English law has expressed its attachment to a general vision of contract as the expression of choices of the parties which will then be given effect by law."**

And further at page 11, paragraph 1-012:

> **"A basic principle of the common law of contract...is that parties to a contract are free to determine for themselves what primary obligations they will accept."**

The above position of the law notwithstanding, this appeal is however, being considered on its particular facts. In view of our finding on these facts on ground 1, to the effect that, the issue before the trial court was not interpretation of the word salary as found by the learned trial judge. Nor was it interpretation of the 2003 conditions of service in respect of the definition of salary for purposes of computing terminal benefits, as argued by the appellant. The real issue boiled down to, which conditions in fact applied to the respondents as between the 2003 and 2011- 2013 revised conditions of service.

Having come to the conclusion that based on the evidence on record, the non-unionised employees' conditions of service were infact approved on 18th March, 2011. These approved conditions which were made effective from 16th March, 2011 are the ones that applied to the respondents who were employees still serving at the material time. Clause 11.1 (d) (a) (v) of the 2011 – 2013 revised conditions of service allowed merging of salary with all allowances received monthly, by an employee and which were

also appearing on his last payslip for purposes of computing terminal benefits.

In the premises, ground 2 of the appeal inviting us to consider the definition of salary, has been overtaken by our said finding on ground 1 to the effect that, merging of the salary with allowances for purposes of computing terminal benefits was a specific term of the contract of employment between the appellant and the respondents.

We accordingly, uphold the learned trial judge in the court below, *albeit*, for the reasons given in this judgment.

The appellant having been unsuccessful on both grounds of appeal, the appeal is hereby dismissed. Costs will be for the respondents and are to be taxed in default of agreement.

M. S. Mwanamwambwa
DEPUTY CHIEF JUSTICE

M. Malila
SUPREME COURT JUDGE

J.K. Kabuka
SUPREME COURT JUDGE