IN THE SUPREME COURT OF ZAMBIA **Appeal No. 47/2014**
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)

BETWEEN:

EDWARD KAPAPULA	**1ST APPELLANT**
PASCAL MUSELEMA	**2ND APPELLANT**
JACKSON KAMUNGU	**3RD APPELLANT**

AND

ZAMBIA TELECOMMUNICATIONS COMPANY LIMITED	**RESPONDENT**

Coram: **Muyovwe, Wood and Musonda, JJS**
on 14th July, 2016 and 14th February, 2017

For the Appellants: N/A

For the Respondent: N/A

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Augustine Kapembwa vs. Danny Maimbolwa & Attorney General (1981) Z.L.R. 127.**
2. **Zulu vs. Avondale Housing Project (1982) Z.L.R. 172.**
3. **Zambia Telecommunications Company Limited vs. Violet Kasenge Bwalya: SCZ Appeal No. 104 of 2011.**
4. **Rosemary Chibwe vs. Austin Chibwe (2001) Z.L.R. 1.**
5. **Colgate Palmolive Zambia Limited vs. Able Shemu Chuka & 110 Others Appeal No. 181 of 2005.**
6. **Zambia Consolidated Copper Mines Limited vs. Matale (1995-1997) Z.R. 144**

Legislation referred to:

1. **The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.**
2. **The Income Tax Act, Chapter 323 of the Laws of Zambia.**

Other Works referred to:

1. **Black's Law Dictionary.**

This is an appeal by the Appellants against the entire judgment of the Industrial Relations Court dated 27th December, 2013 whereby that Court adjudged that the Appellants, being on Salary Scales UGS6/5-7 for unionized employees, were not affected by the Respondent's Board of Directors' Resolution dated 28th October, 2009 which had determined the Retrenchment/Retirement package for Non-Represented Employees notwithstanding that the Appellants had ceased being Union-represented employees.

The history and background facts surrounding this appeal are fairly plain and straightforward.

Edward Kapapula, Pascal Muselema and Jackson Kamungu (**"the Appellants"**) had been employees of the Respondent until the 24th day of August, 2010 when the trio's respective employment contracts were terminated by reason of redundancy.

According to the record relating to the proceedings in the Court below, although the Appellants had been members of the National Union of Communication Workers (**'the NUCW'**) at some point during the subsistence of their employment contracts, they had ceased to be such unionized employees at the time when their employment contracts were determined as aforesaid.

Prior to the termination of the Appellants' employment contracts and, in anticipation of the then imminent retrenchments/redundancies which were going to arise on account of the then planned partial privatisation of the Respondent by the Government of the Republic of Zambia, the Respondent had executed an agreement on 22nd October, 2009 with the NUCW (acting on behalf of all unionized employees) in terms of which it was agreed, among other things, as follows:-

"3. REDUNDANCY/RETRENCHMENT PACKAGE

3.1 In the event that the relevant union member is declared redundant or retrenched pursuant to Section 2 above, the relevant union member will have the right to receive the Redundancy/Retrenchment Package, subject to the terms of this agreement as follows:

i. 3 months' salary for each year served and pro-rata for any uncompleted year served;

ii. 2 months' basic salary repatriation;

iii. 1 months' basic salary in lieu of notice.

iv. Tax if any to be borne by the company."

For the avoidance of doubt, the Agreement in question had defined the expression or term "*Relevant Union Member*" as "*an employee who is not in management and belongs to the National Union of Communication Workers*".

Shortly after the execution of the above Agreement, that is, on the 28th October, 2009, the Respondent's Board of Directors resolved to create a retrenchment or redundancy package for non-unionised or non-represented staff. That package was expressed in the following terms:

> **"1. That the Non-Represented employees be paid redundancy/retrenchment packages as follows:**
>
> **a) 3 months' basic salary for each year served and pro-rata for any uncompleted year served;**
> **b) 2 months' basic salary repatriation;**
> **c) 1 months' basic in lieu of notice; and**
> **d) Tax if any shall be borne by the company."**

In crafting the said package for non-represented employees, the Board had proceeded on the basis of the powers which were available to it under Clause 10 of the Terms and Conditions of Service for Non-Represented Employees for the period 1st April, 2009 to 31st July, 2010 and which powers were expressed in the following terms:-

> **"The board shall determine a redundancy package in addition to the following:**
>
> **a) Repatriation costs calculated at two months of the last drawn basic salary;**

b) Three months' pay in lieu of notice;
c) Long service gratuity.

Between January, 2009 and February, 2010 the Appellants ceased to be members of the NUCW.

In August, 2010 the Appellants' employment contracts were terminated by reason of redundancy. In consequence, each of the Appellants was paid their respective redundancy dues which were computed on the basis of the following:

"1. One (1) month basic salary in lieu of notice; and
2. Long service gratuity being three (3) months basic salary for each year served and pro-rata for any uncompleted year served; and
3. A payment equivalent to two (2) months basic salary as repatriation allowance; and
4. Tax if any on items 1, 2, and 3 will be borne by the company."

The Appellants were unhappy with the package which was paid to them and decided to launch a complaint in the Industrial Relations Court pursuant to Section 85(1) 9(b) and (c) of the **Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia**, seeking the following reliefs:-

"(a) An order of the court to annul Management's variation of the determined retrenchment package;
(b) An order of court directing the Respondent to pay the withheld three (3) months basic salary for each year served and pro-rata for any uncompleted year of service;
(c) An order of the court directing the Respondent to bear all tax on leave days;
(d) Any other relief the court may deem fit;

(e) Interest;
(f) Costs."

The gist of the Appellants' complaint as it was deployed before the Court below was that, having left the Union, they qualified and were entitled to be paid their packages as non-represented employees and that, according to this criteria, they were entitled to be paid three months' salary for each year served and proportionately for any uncompleted year served. According to the Appellants, this entitlement flowed from the Board resolution of 28th October, 2009 which we earlier referred to in this judgment. The Appellants accordingly sought to have the Court below pronounce an Order directing the Respondent to pay the said three months' pay for each served year and bear the tax applicable on their leave days' payment.

For its part, the Respondent filed an Answer and an Affidavit for the purpose of fending off or resisting the Appellants' claims as set out in their complaint. The Respondent's resistance mainly revolved around the assertion that the redundancy package which the Appellants were claiming did not apply to them because, at the time when the redundancy package which was applicable to the appellants was crafted and agreed upon between the Respondent's Board of Directors and the Union, the Appellants were still members

of the Union and did not, therefore, qualify for the package which had been crafted for the non-represented employees. It was the Respondent's further contention that the Board Resolution which the Appellants had relied upon to mount their complaint only applied to employees in Grades Z5/4 to Z9. The Respondent also argued that, on the basis of what the Respondent had agreed upon with the Union, the Respondent's obligation to bear the arising tax on the redundancy benefits was limited to the redundancy/retrenchment package itself so that any other tax over and above that, including the tax on leave days, was to be borne by the Appellants as required by law.

The Appellants' complaint was subsequently heard and tried by the Court below which, after hearing the parties and considering the evidence and the submissions by learned Counsel for the parties, made the following determinations which are relevant to the present appeal, namely:-

1. that the Appellants could not benefit from the redundancy package which the Respondent's Board had structured for non-represented employees because they were unionised employees having continued with their unionised scale/grades;

2. that, it was clear from the redundancy arrangements which had been agreed upon that there were some taxes which the Respondent was to bear while others were to be borne by the employees themselves; and
3. that tax on leave pay was not one of the taxes which the Respondent had agreed to bear. The Court reasoned that leave pay was income which is ordinarily subject to tax in terms of Sections 14 and 17 of the **Income Tax Act, Chapter 323 of the Laws of Zambia**, and that the Respondent was entitled to and had proceeded properly by deducting tax from the sums paid in respect of leave days accrued by each of the Appellants.

The Appellants were dissatisfied with the said decision of the trial Court and have now appealed to this Court advancing five Grounds of Appeal which are set out in the Memorandum of Appeal as follows:-

"1. The court below erred in law and fact when it held that on account of the Appellants retaining UGS6/5 and UGS7 scales respectively, they could not benefit from the redundancy package sanctioned by the Board Resolution of 28th October, 2009.
2. The court below erred in law when it failed to properly evaluate the evidence of the Appellants' entitlement to the redundancy benefits sanctioned by the Board Resolution of 8th October, 2009.
3. The court erred in law in failing to do substantial justice when it failed to properly evaluate evidence of payment of Long Service Gratuity to the benefit of all parties.

4. **The court below erred in law when it ordered costs to be borne by the Appellants."**

In supporting this appeal, Mr. L.M. Matibini, the learned Counsel for the Appellants, filed Heads of Argument. We propose to examine each of the Grounds of Appeal as they are presented in the Memorandum of Appeal.

In relation to Ground One, Counsel for the Appellants attacks the Court below for finding that the Appellants could not benefit from the Board Resolution dated 28th October, 2009 as they had retained Salary Scales UGS6/5 and UGS7. Counsel argued that, prior to the termination of their employment, the Appellants had ceased being members of the NUCW and that, consequently, the trio became non-represented but continued to retain their salary classification of UGS6/5 and UGS7. Counsel further submitted that he agreed with the trial Court's finding that the Appellants, having ceased to be members of the NUCW and, therefore, not "*relevant union members*" as defined above and could not benefit under the terms of the Collective Agreement.

Counsel also argued that, based on the evidence of the Respondent's witness (RW1), he was able to deduce that the

Respondent had two categories of employees, namely, unionized and management and two sets of conditions.

According to Counsel, while the unionized staff were governed by a Collective Agreement, those in the management category were governed by the Terms and Conditions of Service for Non-Represented Staff. Counsel further contended that while the employment terms and conditions evidenced by a Collective Agreement was a product of negotiation between the Union and the Respondent, the Terms and Conditions of Service for Non-Represented Staff were determined by the Respondent's Board of Directors.

Counsel further submitted that the salient findings by the Court below were that when the Appellants ceased being members of the NUCW, their conditions of service became those of non-represented employees and were denoted by the letter 'Z". Counsel argued that management employees' conditions of service were also denoted by the letter "Z". He further argued that there were two types of non-represented staff, namely, those who were in Grades Z5/4 to Z9 and enjoyed management responsibilities and those who were in the

second category and were not charged with management responsibilities but were not represented by the Union.

It was Counsel's contention that RW1's evidence and the trial Court's findings were similar save that the duo expressed divergent views on the question of the Appellants' conditions of service.

The Appellants' Counsel further argued that there was no dispute regarding the fact that both the conditions of service enjoyed by the Non-Represented staff in Salary Grades Z5/4 to Z9 as well as those which were enjoyed by the Appellants shared the common denotation of "Z". Counsel argued that the issue, as he understood it, was that the Court below found that these "Z" conditions of service were not defined in relation to employees who were not in the Z5/4 to Z9 category and the Court was of the view that they only applied to those grades mentioned therein but not the Appellants.

The Appellants' Counsel further contended that since there was no such thing as a third set of conditions of service in the Respondent company that could have been applicable to the Appellants' status, the denotation of the conditions for Non-Represented staff in Salary Grades Z5/4 to Z9 as well as those which were enjoyed by the Appellants with the letter "Z" meant or signified that the two

categories of employees enjoyed the same conditions. It was the Appellants' Counsel's contention that it was not unheard of for a lower grade junior employee to enjoy conditions of service that had been attached to a higher grade employee if, as was the situation in the current case, it was the employer's decision. Counsel argued that RW1 had pointed out that the terms and conditions for Non-Represented Staff were determined by the Board of Directors, and that, in so far as this decision was communicated to the Appellants, the Court's function was to give efficacy to the clear and unambiguous terms of the employer's decision. Counsel argued that in the present case, the Appellants had no subsisting conditions after leaving the NUCW membership and were, therefore, appreciative that the Respondent had generously extended the "Z" conditions of service to them. Counsel further argued that the mere fact that the conditions in question were stated to apply to employees in Grades Z5/4 to Z9 did not negative their applicability to employees such as the Appellants to whom the same had consciously been extended. Counsel also argued that when the Appellants ceased to be members of the NUCW, the Respondent wrote to them informing them that they would no longer be represented by the Union on matters relating to their employment contract with them, and then proceeded to change

the Appellants' conditions from "U" to "Z" without consulting the Appellants.

The Appellants' Counsel then proceeded to cite our judgments in the cases of **Augustine Kapembwa vs. Danny Maimbolwa**[1] and **Zulu vs. Avondale Housing Project Limited**[2] wherein we held that appellate Courts will reverse finding of facts made by a trial Court if it is satisfied that the findings were perverse or made in the absence of any relevant facts or upon misapprehension of the facts. According to Counsel, in the instant case, the trial Court's finding that the "Z" terms and conditions of service only applied to employees in Grades Z5/4 and Z9 was perverse, allegedly because there was only one set of "Z" conditions of service which the employer had extended to the Appellants due to their unique position of having relinquished the unionised conditions.

Under Ground Two, Counsel for the Appellants attacks the Court below for allegedly failing to properly evaluate evidence of the Appellants' entitlement to the redundancy benefits sanctioned by the Board Resolution of 28th October, 2009. Counsel submitted that the Respondent issued a number of circulars explaining to the employees the mode, manner and applicable package of separation; that, in

particular, Circular No. 1 of 2010 listed the particulars of the redundancy package for unionised members and that paragraph (d) referred to a redundancy package that was already agreed to be paid to non-unionised and/or non-represented staff; that this package was found in the Respondent's Board Resolution of 28th October, 2009 which stated as follows:-

"IT WAS RESOLVED:

1. **That the Non-represented employees be paid redundancy/ retrenchment packages as follows:-**
   - a) **3 months' basic salary for each year served and pro-rata for any uncompleted year served;**
   - b) **2 months' basic salary repatriation;**
   - c) **1 months' basic salary in lieu of notice; and**
   - d) **Tax if any shall be borne by the Company."**

Counsel submitted that the Appellants' witness (CW1) had testified that the redundancy/retrenchment package in question was for non-represented staff and that the Resolution in question did not segregate against any of the non-represented staff. Counsel argued that the Board Resolution is in simple clear English with no ambiguity and that staff in Grades Z5/4 to Z9 and the Appellants were the non-unionised staff to whom the package referred to related. Counsel submitted that it was important for the trial Court to look at the words of the Resolution and if, and only if, the Resolution was pregnant with ambiguity would the Court have resorted to extrinsic

evidence. That this was the view which was adopted by this Court in the case of **Zambia Telecommunications Company Limited vs. Violet Kasenge Bwalya**[3].

Counsel for the Appellants further submitted that when the Court below stated that the Resolution dated 28th October, 2009 was made pursuant to Clause 10 of the Terms and Conditions of Service for non-represented staff and that these Terms and Conditions of Service were applicable to non-represented staff in Grades Z4/5 to Z9 and not the Appellants who had continued with their unionised scales of UGS5/4 for the 1st and 2nd Appellant and UGS7 for the 3rd Appellant and that, therefore, the Board Resolution did not affect the Appellants and they cannot benefit under it, the Court's *ratio decidendi* was premised on a misapprehension of facts. Counsel forcefully argued that what was stated in the Joint Staff Circular No. 1 of 2010, and quoted above, was a package for non-unionised staff, and that what the Resolution authorised was the payment of a redundancy package to non-represented employees without any restriction as to the salary grade.

While the Appellants' Counsel agreed that the Board Resolution in question was founded on Clause 10 of the Terms and Conditions

of Service for Non-Represented staff, he maintained that the mandate of the Board of Directors to approve separation packages for employees cut across the entire work force. That, in so far as the Resolution was not restricted to any particular category of non-represented staff, the lower Court's finding that the Resolution in question did not affect the Appellants constituted a misapprehension of facts which this Court has the power to overturn. Counsel cited the case of **Augustine Kapembwa vs. Danny Maimbolwa**[1] to support this argument.

Under Ground Three, the Appellants' Counsel attacks the Court below for allegedly failing to do substantial justice by not evaluating the payment of Long Service Gratuity to the benefit of all parties. In his arguments, Counsel reiterated RW1's evidence that the Respondent only had two categories of employees and that, consequently, the company had two sets of conditions of service for the two categories of employees. Counsel repeated his earlier contention that, according to the Appellants' testimony in the Court below, their (that is, the Appellants') conditions had changed from those of unionised (or union-represented) staff to non-represented staff, that is to say, from "U" conditions of service to "Z" conditions of

service. It was Counsel's contention that the evidence to the foregoing effect was not only supported by the documentary evidence which had been deployed before the trial Court but had been supported by that Court's own findings. Counsel further submitted that the Appellants' evidence which suggested that both the Appellants and the employees in Salary Grades Z5/4 and Z9 enjoyed "Z" conditions of service was also not refuted in the Court below.

It was Counsel for the Appellants' further contention that Section 85(5) of the **Industrial and Labour Relations Act, CAP. 269** gives the Court below the mandate to do substantial justice and that, in the context of the present matter, that Court ought to have extended the same treatment to both categories of non-represented staff because they enjoyed the same conditions and, consequently, that court of substantial justice should have ensured that the employees in question received the same redundancy package. Counsel cited the case of **Zambia Telecommunications Company Limited vs. Violet Kasenge Bwalya**[3] and invited us to give effect to the trial Court's finding that the sums which had been sanctioned by the Respondent's Board of Directors' Resolution of 28th October, 2009

were payable to both categories of non-represented employees, which, for the removal of any doubt, included the Appellants.

In conclusion, Counsel for the Appellants indicated that, in addition to his exertions around the Third Ground of Appeal as canvassed above, he was seeking our indulgence to consider his submissions in the court below for the purpose of reinforcing the Third Ground of Appeal. We were accordingly urged to allow the appeal not only on the basis of the arguments which counsel had canvassed in relation to the earlier grounds of appeal but, also, on the basis of the trial Court's alleged failure to discharge its statutory mandate under section 85(5) of the **Industrial and Labour Relations Act, CAP. 269.**

In opposing the Appeal, the learned Counsel for the Respondent also relied on the Respondent's Heads of Argument which were filed into Court on 5th November, 2014.

In response to Ground One, Counsel for the Respondent argued that this Ground ignored the factual evidence on record and was an attempt by the Appellants to try and negotiate for better conditions of service through the judicial process, a practice which, according to counsel, this Court has always deprecated. To reinforce his

argument under this Ground, Counsel relied on the case of **Augustine Kapembwa vs. Danny Aminbo and Attorney General**[1] in which we had restated our general unpreparedness to disturb findings of fact as determined by a trial court.

The Respondent's Counsel further submitted that the lower court was on firm ground when it held that the Appellants could not benefit from the redundancy package which had been sanctioned by the Board Resolution of 28th October, 2009 as they had retained their salary scales of UGS6/5 and UGS7. Counsel submitted that the crucial question that the court below had to address was whether or not the Appellants' dismissal/resignation from the union translated into different, let alone, improved or management conditions of service.

Counsel argued that according to the evidence of CW1, the 3rd Appellant herein, the Appellants had all received letters from the Respondent's Acting Human Resource Manager informing them that they had ceased being represented by the union but that this development (i.e. leaving the Union) did not automatically translate into a variation of the Appellants' conditions of service. To reinforce this point, the Respondent's Counsel pointed to the fact that, even

after the Appellants had left the Union they continued to draw salaries which had been based on their conditions of service as unionized staff.

According to Counsel for the Respondent, CW1 had also testified before the Court below that his employment with the Respondent was not affected as a result of leaving the union. It was Counsel for the Respondent's further argument that, according to CW1, his and the rest of the Appellants' conditions of service changed to "Z" even though what was showing on their pay slips pointed to or suggested that the trio were enjoying unionised conditions of service.

Counsel for the Respondent further argued that the evidence which had been adduced by the Appellants did not show that upon their separation from the Respondent, they were accorded different conditions of service from the conditions they enjoyed before. It was Counsel for the Respondent's further contention that the evidence which had been deployed before the trial Court had revealed that the Respondent only had two categories of employees, that is, unionized employees who were in Grades UGS1 to UGS7 and Management staff in the category Z5/4 to Z9 and that the two categories had different terms and conditions of service; that the determination as to which

group an employee belonged to was mainly inferred from the **Industrial and Labour Relations Act**.

Counsel's final argument around Ground One was that the dismissal/resignation of the Appellants from the union did not automatically translate into changes in their conditions of service because the Appellants continued to draw salaries based on their unionized conditions of service. It was Counsel's further contention that if the Appellants believed then, as they are trying to portray now, that they became management employees upon dismissal/resignation from the union, they ought to have notified the Respondent long before they were retrenched. In the view of Counsel for the Respondent, what the Appellants were now seeking in court was a pure afterthought.

In response to Ground Two, Counsel for the Respondent argued that the court below cannot be faulted for finding as it did when it found as follows:-

> **"...in passing its Resolution on 28th October, 2009, the Board was acting pursuant to Clause 10 of the Terms and Conditions of Service for non-represented staff. The same Terms and Conditions of Service were the ones said to be applicable to Z5/4 to Z9 non-represented employees. The Complainants are not in that category having continued with their unionized scales of UGS6/5 for the 1st and 2nd Complainants and UGS7 for the 3rd Complainant. The Board**

Resolution did not therefore affect the Complainants and therefore they cannot benefit under it."

Counsel further argued that a perusal of the Appellants' payslips clearly showed that the only difference between the payslips which had been designated with the letter "U" and those designated with the letter "Z" was that union contributions were being deducted on those designated with a "U" whilst there were no union contributions deducted on pay slips designated "Z". Counsel further argued that, other than the said difference, the salaries and allowances for the two categories of employees had remained as before and that it was the Appellants' respective salaries and allowances which formed the basis for the computation of their terminal benefits and that, for as long as the Appellants had been enjoying salary scales which fell under the union scales, the Respondent could not apply management scales to them.

Referring to Section 97 of the Industrial and Labour Relations Act, Counsel for the Respondent argued that that piece of legislation only entitles a prospective Appellant to appeal to this Court on a point of law or mixed law and fact. According to Counsel, the present appeal was founded on findings of fact and did not satisfy the

requirements of Section 97. We were accordingly urged to dismiss the appeal on account of section 97.

In response to Ground Three, Counsel for the Respondent argued that the Court below found, as fact that they were only entitled to conditions of service negotiated by the union. Counsel argued that this entire Ground was against the evidence on Record and offended the principle which this court laid down in the case of **Rosemary Chibwe vs. Austin Chibwe**[4] in the following words:

> **"It is a cardinal principle supported by a plethora of authorities that courts' conclusions must be based on facts stated on Record."**

Counsel also repeated his earlier argument that the Appellants' claim as founded on conditions of service which did not apply to them was a complete afterthought.

With regard to the Appellants' claim for long service bonus, Counsel for the Respondent argued that the Appellants' situation was not comparable to the Respondent's employees who had earlier left the Respondent's employment. Counsel relied on the case of **Colgate Palmolive Zambia vs. Able Shemu Chuka and 110 Others**[5] where we stated that:-

> **"It is trite law that in an employer/employee relationship the parties are bound by whatever terms and conditions they set out for themselves."**

Counsel argued that the Appellants cannot opt out of the conditions of service which were applicable to them on the basis of the arguments which they had canvassed in this court. We were accordingly invited to dismiss the Appellants' appeal.

At the hearing of the appeal, neither Counsel was in attendance save that Counsel for the Appellants filed a Notice of Non-Appearance pursuant to Rule 69 of the Rules of the Supreme Court, CAP. 24.

We are grateful to both Counsel for their helpful and insightful arguments which we have carefully examined in relation to the reflections of the learned trial judge as embedded in the judgment now being assailed.

To start with, we have noted from the Appellants' Heads of Argument that Ground Four as set out in the Memorandum of Appeal was not canvassed in the Appellants' Heads of Argument. This ground is accordingly deemed to have been abandoned.

Secondly, to the extent that the issues around Grounds One and Two are interrelated, we propose to approach the two grounds holistically. In doing so, we propose to briefly recount the key elements which characterized the background narrative which we

earlier examined and which we consider cardinal to the resolution of the whole appeal.

The three Appellants had been employees of the Respondent and had also been union members up until January and February of 2010 when they resigned or terminated their union memberships.

On 22nd August, 2010, the trio's employment contracts were terminated by the Respondent by reason of redundancy. Prior to this development and, in anticipation of the Respondent's privatisation, the Respondent had entered into negotiations and reached an eventual agreement with the union regarding the terms and conditions of redundancy for the soon-to-be-retrenched unionised workers (i.e., "the redundancy packages due"). The Respondent, acting by its Board of Directors, had also entered into a similar agreement for management staff.

The central issue which falls to be determined in this appeal and which had similarly confronted the Court below is whether, having left the Union and, thereby, become non-represented employees, the Appellants had drifted into the category of non-represented employees for the purpose of benefitting from the

redundancy package which the Respondent's Board of Directors had determined for non-represented staff.

In its judgment, the trial court reasoned and reacted as follows:

> **"We have considered the evidence and the submissions on the issue. We have already found that the complainants [could not have benefitted] under the agreement executed between the NUCW and the Respondent because they were not 'Relevant Union Members'. It is also clear from the parties' evidence that the complainants were also not in management. They were, however, unrepresented and subject to 'Z' conditions of service which, on the evidence available, are not defined in relation to employees who were not in the Z5/4 to Z9 category.**
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> **We have already stated that in passing its resolution on 28th October, 2009 the (Respondent's) Board was acting pursuant to clause 10 of the Terms and Conditions of Service for non-represented staff. The said terms and conditions were the ones said to [have been] applicable to Z5/4 to Z9 non-represented employees. The Complainants [now Appellants] were not in that category having continued with their unionized scales of UGS6/5 for the 1st and 2nd Complainants and UGS7 for the 3rd Complainant. The Board Resolution did not, therefore, affect the complainants and, therefore, ... they cannot benefit under it"** (at pages J.11-12 of the Judgment).

We have examined the various arguments which were canvassed in support of the Complaint by counsel on behalf of the Appellants (then Complainants) in the Court below and which were repeated before us in the context of Grounds One and Two of this appeal and which arguments have been referred to earlier in this judgment.

The kernel of the arguments which were advanced before us on behalf of the Appellants in relation to the first two grounds of appeal was that, having ceased to be unionised employees, the Appellants had consequentially become disqualified from benefitting from the redundancy package which the Union had negotiated for the Respondent's unionised staff and which package was the subject of an Agreement dated 22nd October, 2009 and made between the Respondent of the one part and the National Union of Communication Workers of the other part; that, by reason of the preceding matters, the Appellants had become non-represented employees of the Respondent, and had, thereby, qualified or become eligible for the redundancy package which the Respondent's Board of Directors had determined for non-represented employees pursuant to a resolution dated 28th October, 2009; and that, the resolution in question applied with equal force to the Respondent's two categories of unrepresented employees namely, those who were in Grades Z5/4 to Z9 and the Appellants. It was counsel for the Appellants' strong contention that, contrary to the position which the trial Court had adopted, the Resolution in question had authorized the payment of the redundancy package which was defined in that resolution to all

non-represented employees without any restriction as to their salary grades.

The Respondent, by its counsel, vehemently resisted the Appellants' claims and maintained that, contrary to the appellants' misapprehensions, the redundancy package which the Respondent's Board of Directors had determined did not apply to the Appellants but only applied to management/employees in Grades Z5/4 to 9; that the Appellants did not ascend to this Grade range merely on account of having left the union but continued to enjoy the same terms and conditions which they had been enjoying when they were in the union.

Having examined the judgment of the Court below in relation to the evidence on record and the competing arguments of counsel around the first two grounds, we have no difficulty in arriving at the conclusion that the trial Court did not misdirect itself when it determined that the Board Resolution of the Respondent which had determined or created the redundancy package for the non-represented employees of the Respondent did not apply to the Appellants.

In reaching the above conclusion, we have respectfully discounted the lukewarm arguments by counsel for the Appellants such as those which suggested that the Respondent had, somehow, *'generously extended'* or *'consciously extended'* the management terms and conditions which were applicable to staff in management grades to the Appellants.

Indeed, we agree with the lower court that the redundancy package which the Respondent's Board of Directors had determined for non-represented employees was to be paid to non-represented employees who:- (a) were at management level; (b) were not only unrepresented by the union but were, in terms of the provisions contained in the Industrial and Labour Relations Act, Cap. 269, legally ineligible to be represented as such and; (c) were in salary grades ranging from Z5/4 to Z9.

Needless to say, even the very basis of the power whose exercise by the Respondent's Board of Directors had culminated in the crafting of the redundancy package in question, namely, clause 10 of the *'Terms and Conditions of Service for Non-represented Employees of the Zambia Telecommunications Company Limited'* only applied to "... ***non-represented employees in the salary grades Z5/4 to Z9".***

For the avoidance of any doubt, it was not in dispute in the Court below that the Appellants were not in the Management Salary Grades of Z5/4 to Z9 at the time when their respective employment contracts were terminated. It was also not in dispute that immediately preceding the termination of their respective employment contracts via redundancy, the Appellants had been in the service of the Respondent on the basis of salary grades UGS6/5 and UGS7 which fell under the unionized salary category. Indeed, the uncontroverted evidence before the trial court amply suggested that the Appellants were at "U" salary grade which had been denoted for unionized employees and no change had arisen in relation to their status as such even after the trio had left their union. In this regard, it was never suggested on the Appellants' behalf that the trio had been promoted or had ceased to be 'unionisable' employees within the meaning of the Industrial and Labour Relations Act, Cap. 269 or that they had ascended to that category of the Respondent's employees whose salary scales fell in Grades Z5/4 to Z9 and had, thereby, become eligible to serve under the terms and conditions for non-represented employees which we earlier referred to in this judgment.

In the light of the foregoing, it can scarcely be doubted that the Appellants did not qualify for the redundancy packages which the Respondent had determined or created for non-represented staff in salary grades Z5/4 to Z9.

An observation worth mentioning as we conclude our reflections around Grounds 1 and 2 is that, in terms of both Article 21(1) of the Zambian Constitution, as amended, and section 5 of the Industrial and Labour Relations Act, CAP. 269, being a member of or belonging to a trade union is a right which is exercised or enjoyed voluntarily. This means that an employee can choose whether or not to join or belong to a trade union. However, the Industrial and Labour Relations Act, CAP 269 does provide, in section 5(f), that an employee can be required to relinquish their union membership under certain prescribed circumstances. Indeed, this statute explicitly provides that trade union membership is only available to eligible or unionisable employees who are not caught or disqualified by the ineligibility criteria which is created in section 4 of the Industrial and Labour Relations Act, CAP 269.

Having regard to the foregoing, it stands to reason that, the Terms and Conditions of Service of the Respondent which applied to

the Respondent's non-represented employees (in the salary grades Z5/4 to Z9) could only have been applicable to employees whom the law rendered ununionisable and not employees, like the Appellants, who, having been unionised and while remaining unionisable, opted against continuing to enjoy this status.

A final point worth making in the context of Grounds Two and Three is that by launching their claim which was predicated on their having withdrawn from the union, the Appellants seem to have been labouring under the misapprehension that the fact of being unionized employees, in itself, went with a particular set of terms and conditions of employment when, in point of fact, it is the nature of the job itself which defined those terms and conditions.

Perhaps we can also mention, albeit in passing, that it is common knowledge that employees in organisations do not cease to be unionized so that they can rise to some higher standing or special status in the organisation (and thereby enjoy better terms and conditions); rather, they cease to be unionised as a consequence of having risen to some higher or special status in the organization. This position finds expression in Section 4 of the Industrial and Labour

Relations Act, CAP 269 which renders an employee who is or becomes part of '*management*' (as defined therein) ununionisable.

By parity of reasoning, the Appellants could not have become entitled to the better redundancy package which they were claiming to have become entitled to merely because they had ceased to be unionised.

For the removal of any doubt, we do not consider that the arguments which were canvassed before us on behalf of the Appellants can draw positive support from our decision in the case of **Zambia Telecommunications Company Limited vs. Violet Kasenge Bwalya**[3] upon which the Appellants strongly relied.

The net effect of the preceding discourse is that both Grounds One and Two are devoid of merit and stand dismissed.

With regard to the Third (and, for our purpose, last) Ground of Appeal, the Appellants contend that the trial Court erred in law in failing to do substantial justice by (allegedly) failing to properly evaluate evidence of payment of Long Service Gratuity to the benefit of all parties.

Although this Ground, as formulated, and the arguments canvassed around it were somewhat obscure in some respects, the

meaning and understanding which we have deduced from the general narrative employed was that, following the cessation of their Trade Union membership, the Appellants became non-represented employees and that, having become such unrepresented employees, the Appellants' conditions of service were denoted with the letter "Z" and that it was this same denotation which had been assigned to the conditions of service of the Respondent's employees who were in Grades Z5/4 to Z9. On the basis of the foregoing, Counsel for the Appellants concluded that since the redundancy package which the Respondent's Board of Directors had determined had targeted non-represented employees whose conditions of service had been denoted with the letter "Z", and given that the conditions of service for both the Appellants and the Respondent's Grades Z5/4 to Z9 employees shared this denotation, it followed that the redundancy package which the Board had determined for non-represented employees applied to both the Appellants as well as the Respondent's Grades Z5/4 to Z9 employees.

Arising from the above narrative, it was Counsel for the Appellants' contention that the Court below ought to have extended the same treatment to the two categories of the Respondent's

employees who, it was further argued, had been similarly circumstanced.

Counsel also contended that the trial court's failure to proceed in the afore-mentioned manner constituted a negation of the statutory mandate which the Industrial and Labour Relations Act, CAP. 269 assigns to that Court in section 85 (5). Counsel accordingly urged us to interfere with the trial Court's judgment and allow the appeal.

In his very brief response, Counsel for the Respondent took the position that Ground Three was totally misconceived as it was not based on the evidence on the Record. Counsel further contended that the Appellants were seeking to benefit from conditions of service which were not applicable to them. We were accordingly invited to dismiss this Ground of Appeal and, indeed, the entire appeal.

We have given anxious consideration to this Ground of appeal. In all seriousness, the substance of this Ground is substantially the same as what we encountered and traversed in relation to the first two grounds. The only substantive respect in which Ground Three is different is that the Court below is being criticised for having allegedly failed to discharge its statutory mandate *"...to do substantial justice*

between the parties before it" as embedded in section 85(5) of its enabling statute.

Having carefully examined the Appellants' Counsel's arguments around this ground of appeal, we have, with all due respect to Counsel, been unable to appreciate how or in which way the trial court failed *to do substantial justice between the parties who had come before it.*

Perhaps we should pause here and briefly consider what, in its proper context, the duty of the Industrial Relations Court *to do substantial justice between the parties before it* really entails. The starting point for this undertaking is Section 85(5) of the Industrial and Labour Relations Act, CAP. 269 itself. This provision enacts as follows:

> **"S.85(5). The Court shall not be bound by the Rules of evidence in civil or criminal proceedings, but the main object of the Court shall be to do substantial justice between the parties before it".**

A literal interpretation of this provision would yield the meaning that the main duty or 'object' of the Industrial Relations Court, that is, the doing or dispensation of "*substantial justice between the parties before it*" must not be fettered by Rules of evidence, be they criminal or civil.

This is precisely the point which we made in **Zambia Consolidated Copper Mines Limited vs. Matale**[6] when we said, at page 147:

> **"The mandate in sub-section 5 (of Section 85 of the Industrial and Labour Relations Act, CAP. 269) which requires that substantial justice be done does not in any way suggest that the Industrial Relations Court should fetter itself with any technicalities or rules...."**

If we turn to the matter at hand, a question can sharply be posed: in which way was the trial court fettered or shackled by Rules of evidence so as to lead to a negation of its object of dispensing substantial justice between the Appellants ***and*** the Respondent? We have here employed the conjunctive *'and'* in order to reinforce the notion which we have repeatedly alluded to, namely, that courts of law have to do justice to all who appear before them, not just those who initiate litigation.

Having scrupulously examined the arguments which were canvassed on behalf of the Appellants in relation both to the complaint which had been deployed before the Court below and the judgment which that complaint yielded, we have no doubt whatsoever that the Appellants lamentably failed to demonstrate how the Court below failed to discharge its duty or mandate under section 85(5) of the Industrial and Labour Relations Act, CAP 269 "...***to do***

substantial justice between the parties **[who had come]** ***before it".*** Consequently, we find no merit in Ground Three.

All said, the entire appeal was devoid of merit. It is dismissed.

On the issue of costs, the fourth Ground which had attacked the awarding of costs against the Appellants having been deemed to have been abandoned as earlier noted, the pronouncement by the trial Court on the matter remains unimpeached.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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A. M. WOOD
SUPREME COURT JUDGE

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M. MUSONDA, SC
SUPREME COURT JUDGE