IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

APPEAL NO.184/2014
SCZ/8/262/2014

BETWEEN:

CALLISTER KASONGO — APPELLANT

AND

MANSA MILLING LIMITED
(Now APG Milling Ltd) — RESPONDENT
NAOMI TETAMASHIMBA — 1ST THIRD PARTY
RACHAEL TETAMASHIMBA — 2ND THIRD PARTY
CHRISTOPHER MULUSA — 3RD THIRD PARTY
NATHAN KABWITA MULONGA — 4TH THIRD PARTY

CORAM: Mambilima, CJ, Kaoma and Kajimanga, JJS

On: 11th July, 2017 and 14th July, 2017

For the Appellant: In Person
For the Respondent: N/A
For the Third Parties: N/A

JUDGMENT

Kaoma, JS delivered the Judgment of the Court

Cases referred to:

1. **Mohamed v Attorney General (1982) Z.R. 49**
2. **Zambia Consolidated Copper Mines v Matale (1995-97) Z.R. 144**
3. **Paddy P. Kaunda and others v Zambia Railways Limited-Appeal No.13 of 2001**
4. **Zambia Consolidated Copper Mines v Siame and others (2004) Z.R.193**
5. **Kitwe City Council v Nguni (2005) Z.R. 57**

team, the appellant remained part of the minority shareholders and continued to work for the respondent. On 5th November, 2008 he was appointed by Mr. Tetamashimba to act as General Manager for administrative convenience but was confirmed in that position on 28th February, 2009 and offered a new salary and allowances.

After the demise of Mr. Tetamashimba, his heirs (the four third parties) took over his 80% shares. On 31st July, 2010 the appellant went on voluntary retirement and a retirement package amounting to K60,569,250 (unrebased) was calculated using the formula of three months' pay for each year served for the two years four months he served as General Manager.

On 9th August, 2011 the four third parties sold the 80% shares to APG Milling Company Limited. One of the liabilities listed in the Sale of Shares Agreement Schedule to be taken over by APG Milling was the sum of K60,569,250 owed to the appellant. On 26th August, 2011 the appellant was paid a sum of K59,569,250 which he signed for as final payment indicating that he would have no other claims thereto. It seems that he had earlier on been paid a sum of K1,000,000 which reduced the amount earlier calculated.

However, the appellant was aggrieved with the omission by the respondent to pay him benefits for nineteen and half years, having served the respondent for a continuous period of twenty two years nine months. The respondent's accountant calculated the balance of benefits due to the appellant at K456,000,000 and repatriation money at K6,000 but the appellant's efforts to have the respondent pay the benefits failed. Therefore, he sought relief in the IRC.

In his Notice of Complaint he claimed for: payment of the sum of K456,000,000; salary arrears and allowances; repatriation; and interest. The respondent asserted in its Answer and affidavit in support of the Answer, that the appellant's claim was not part of the liabilities assumed by APG Milling upon purchasing the 80% shares; that the sum owed to the appellant according to the Agreed Schedule of liabilities was K59,569,250 which was cleared in full and the appellant agreed to having no other claims against APG Milling; and that his claims were a trick meant to mislead the court.

After hearing the parties the IRC found as a fact that the appellant worked for the respondent for a continuous period from 13th November, 1987 until his voluntary retirement on 31st July, 2010 and agreed with the appellant that changes in the ownership

of the company did not affect the benefits of employees who continued to work for the company as long as there were no changes to the contracts and that despite changes in the majority ownership of the company the corporate entity continued to be the same employer. Therefore, the court rejected the respondent's argument that the third parties should pay any liabilities found due and took the view that the issue was what the respondent into which the majority shareholders bought was obliged to pay under the contract of employment.

The court then identified the question for decision as what the appellant was entitled to upon voluntary retirement. In dealing with this question, the IRC considered, among others, the case of **Mohamed v Attorney General**[1] on the principle that 'he who asserts must prove' and took the view that the appellant's contracts of employment over the years and the terms and conditions under which he served were not availed and that there was no evidence as to what he was entitled to. For that reason, the court dismissed all of the appellant's claims.

The appellant was not happy with that decision and has appealed to this Court on four grounds as follows:

1. **The Industrial Relations Court (IRC) erred in law and fact when it dismissed the claim for payment of retirement benefits on voluntary separation on account of alleged failure to adduce evidence to show terms and conditions which applied when on the contrary these were availed to the honourable Court by way of exhibit letters marked 'CK6' and 'CK7' which clearly indicate ZIMCO terms and conditions of service and 'CK1' which says "you will be paid your terminal package as stipulated by law".**

2. **Their Lordships misdirected themselves when they elected to ignore failure by the respondent to rebut evidence adduced, particularly respecting the execution letter to the complainant dated 3rd August 2010 contents of which are self-explanatory and unequivocal on the terms and conditions applied to the complainant as a protected worker.**

3. **By electing to ignore the formula which the respondent had used to compute the terminal benefits for two years four months of service, which terminal benefits were paid to the complainant, the court erred in law and fact as the said payment was in itself a precedent bearing the clear formula and the implied terms and conditions for such payments.**

4. **The honourable court failed to provide substantial justice to unrepresented complainant by failure on its part to invoke the provision of section 24(5) of the Employment Act, CAP 268 of the Laws of Zambia as relates to terms and conditions of employment and section 13(1)(c) and subsection (2)(a) of the same law as relates to repatriation. Essentially this was a miscarriage of justice.**

In support of the above grounds of appeal, the appellant filed written heads of argument. On 17th March, 2017 he filed an amended memorandum of appeal containing ten grounds of appeal and additional heads of argument to support the extra grounds of appeal. Although at the hearing of the appeal the appellant informed us that he had obtained leave from a single Judge of this

Court to file an amended memorandum of appeal, there is no such leave on the record of appeal and the appellant failed to avail us with any document to prove that he had obtained leave. As such the amended memorandum of appeal is improperly before us and we expunge it from the record. In any case, grounds 5 to 10, in the amended memorandum of appeal, contain narrative or argument contrary to **Rule 58(2) of the Supreme Court Rules, Cap 25**. We shall proceed to determine this appeal on the basis of the initial four grounds of appeal.

In respect of ground 1, the gist of the appellant's arguments is that the IRC should not have dismissed his claim on account of his alleged failure to adduce evidence of his terms and conditions of employment because these were availed to the court by way of exhibited letters marked 'CK6' and 'CK7' which clearly indicate ZIMCO terms and conditions of service and 'CK1' which indicates that he would be paid his terminal package as stipulated by law. He contends that the court acknowledged the letters as having been exhibited but ignored the contents in the judgment, even when the language is clear.

In ground 2, the appellant submits that the terms and conditions which applied to him were given in the letter marked 'CK1' as three months' pay for each year completed as calculated by the accountant. He argues that whilst the said letter stated that he would be paid his terminal package as stipulated by law; there was no law that the respondent quoted but merely paid him for the two years four months he worked under the supervision of Mr. Tetamashimba in disregard of the ZIMCO conditions of employment which applied to the employees even after ZIMCO had been dismantled as the conditions were adopted at the MBO meeting held on 25th November, 1995. It is the appellant's argument that if these documents were asked for during cross-examination, he would have produced them.

Regarding ground 3, the appellant merely restates the ground of appeal. In respect of ground 4, he argues that section 85(5) of the Industrial and Labour Relations Act, provides that in carrying out substantial justice the IRC should not be restrained by any technicalities. To support this argument, he cites the case of **Zambia Consolidated Copper Mines v Matale**[2] where we said, inter alia, that:

"The mandate in subsection 5 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 in the process of doing substantial justice ..."

The appellant contends that it is unfair for the IRC to fail its mandate of delving into the clear contents of the exhibited letters but elected to dismiss his claim by misapplying the law as found in, inter alia, the case of **Mohamed v Attorney General**[1]. He submits further that the onus to avail the terms and conditions of service is on the employer and having observed that the terms and conditions were not produced, the court should have pointed that out during the proceedings instead of remaining silent so as to use that lapse as a technicality, putting him at a disadvantage by dismissing all his claims. He has urged us to allow the appeal.

We have not received heads of argument from the respondent and there was no appearance at the hearing of the appeal, although there was proof of service of the Cause List by the Court staff on its advocates, Dzekedzeke and Company. Essentially, the third parties should not have been joined to this appeal.

We have considered the record of appeal, the arguments by the appellant and the judgement appealed against. In our view, the core issue raised on this appeal is whether the appellant's failure to

produce his terms and conditions of employment justified the IRC's dismissal of all of his claims. In other words, was there no other means of establishing the appellant's entitlement upon voluntary separation?

There was no dispute at all, as found by the IRC, that the appellant worked for the respondent for a continuous period from 13th November, 1987 until his voluntary retirement on 31st July, 2010. RW1 confirmed in cross-examination that the period of service was twenty three years. The IRC also agreed with the appellant that changes in the majority shareholding of the company did not affect the appellant's benefits and or accrued rights and that the respondent continued to be the same employer.

The Certificate of Exhibits at page 25 of the record of appeal shows that the appellant annexed a number of documents to his affidavit in support of the Complaint which were marked 'CK1' to 'CK16'. Indeed, the letter dated 3rd August, 2010 which the appellant has been referring to as 'CK1', accepting his application for voluntary retirement stated that he would be paid his terminal package as stipulated by law. However, it was common ground that the appellant was paid terminal benefits only for the two years four

months he worked as General Manager from February, 2008 to June, 2010. This is clear from the document marked 'CK5'.

Whilst the appellant did not dispute that he signed the document marked 'CK12' stating that the amount of K59,569,250 was his final payment and he would have no other claims thereto, the note he made later on that document and the documents marked 'CK2' and 'CK16' show that he was still questioning the non-payment of his benefits for the remainder of nineteen and half years of service. And in his evidence in cross-examination he explained that he accepted that amount as full and final settlement because it related to the period February, 2008 to June, 2010.

RW1 also acknowledged in his testimony that the appellant was still claiming for nineteen and half years of service but according to him, the claim should have been directed to the third parties (as former owners) although he did not know why he was told to pay for only two years four months. Moreover, the document marked 'CK3' written by the respondent's accountant Danny Mbulo confirmed that the appellant was entitled to be paid terminal benefits for the entire period he worked for the respondent, including repatriation.

Whilst the letter marked 'CK10' dated 28th February, 2009 confirming the appellant's appointment as General Manager set out his new salary and allowances, it did not make any provision for calculating the appellant's terminal benefits upon separation or override the ZIMCO conditions of service under which the appellant said he had served before his appointment as General Manager.

Of course, it is trite that it is for a complainant to prove his case irrespective of whether or not the opposing party has mounted a viable defence. However, we are satisfied, from the record, that there was material before the IRC on which the court could have established the appellant's entitlement upon voluntary separation instead of dismissing all of his claims on the basis that he did not adduce any evidence to show his conditions of service and what he was entitled to as terminal benefits in accordance with the conditions of service. In our view, the IRC did not conduct a proper assessment and evaluation of all of the evidence before it.

The IRC has a mandate to do substantial justice to both parties before it. And as a court of substantial justice, the IRC has power, **where necessary**, to call for further information or evidence from either party, for purposes of the proceedings in order to ensure

that the matter is handled in a fair and just manner (Emphasis again ours). Therefore, nothing could stop the IRC from asking the appellant to provide more information relating to the ZIMCO conditions of service, referred to in "CK6' and 'CK7' under which he served prior to his appointment as General Manager.

In any case, there was plain evidence before the court that the terminal benefits paid to the appellant for the two years four months he worked as General Manager were calculated using the formula of 'three months' pay for each year completed'. In **Paddy P. Kaunda and others v Zambia Railways Limited**[3], we stated that where there is a known formula for calculating dues, that formula must be used. In this case, the IRC did not explain why it failed to apply this formula to the rest of the appellant's period of service.

Since the IRC accepted that the appellant had served a continuous period from 1987 to 2010, it erred by not ordering that he be paid terminal benefits for that entire period. By dismissing the claim for terminal benefits, the IRC failed to exercise its mandate to administer substantial justice unencumbered by technicalities or rules of procedure (See the case of **Matale**[2] and **Zambia Consolidated Copper Mines v Siame and others**[4]).

If the IRC had found itself in a position where it could not determine the amounts due to the appellant, it ought to have referred the matter to assessment instead of dismissing all the claims, particularly that there was no dispute that the appellant was owed benefits for the remainder of his period of service, the only question being, who should pay, between the respondent (now calling itself APG Milling Limited) and the former owners. Since the respondent has never appealed against the dismissal of its argument that the third parties should pay any liabilities found due, the respondent is liable to pay the appellant's benefits in full.

We find merit in this appeal and set aside the order of the IRC dismissing the appellant's claims for the balance of his terminal benefits and for repatriation. We remit the record back to the court below for purposes of assessing the balance of the benefits due to the appellant using the same formula of three months' pay for each year served. The repatriation amount should also be determined. The amount found due shall carry interest at the average of the short term bank deposit rate, from the date of the complaint to the date of this judgment and thereafter at the current bank lending rate as determined by the Bank of Zambia till payment.

There is no appeal against the dismissal of the claim for salaries and allowances for the period during which the appellant's benefits remained unpaid. However, this claim was doomed to fail on the basis of our decision in the case of **Kitwe City Council v Nguni**[5] that it is unlawful to award a salary for a period not worked for because such an award has not been earned and might properly be termed unjust enrichment.

The appellant shall have his costs here and below.

I.C. MAMBILIMA
CHIEF JUSTICE

R.M.C. KAOMA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE