IN THE SUPREME COURT OF ZAMBIA **Appeal No.005/2015**
HOLDEN AT KABWE
(Civil Jurisdiction)

BETWEEN:

JASON YUMBA AND 22 OTHERS **APPELLANT**

AND

LUANSHYA MUNICIPAL COUNCIL **RESPONDENT**

Coram: Wood, Kajimanga and Musonda JJS
On the 1st of August 2017 and 17th of August 2017

For the Appellant : Mr. D. B. Mupeta, Messrs D. B. Mupeta and Company

For the Respondent: No Appearance

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Case referred to:

Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (Suing as a firm) SCZ/8/52/2014

Legislation referred to:

Supreme Court Act Chapter 25, rule 58(2)

When we heard this appeal on 1st August, 2017 in Kabwe we dismissed it. We said that we would give our reasons later, which we now do.

This is an appeal against the judgment of the High Court at Ndola delivered on 16th May 2014, dismissing the appellants' claims against the respondent for payment of K1,495,454,291.39 (now K1,495,454.29) being the total sum of balances due on their respective terminal benefits, interest and costs.

The background to this appeal is that the appellants were employees of the respondent who were engaged on various dates and serving in various categories of employment. Sometime in 2000, the appellants were seconded to Kafubu Water and Sewerage Company. In 2001, Kafubu Water and Sewerage Company recruited its own employees following which the appellants were placed on forced leave. In October 2002, the appellants were surrendered back to the respondent and were retrenched without being paid their retrenchment packages. The appellants remained on the respondent's payroll until their retrenchment benefits were paid in

January 2008 as the respondent did not have the money to pay them immediately when they were retrenched.

Following the appellants' retrenchment and whilst awaiting payment of their benefits, the respondent increased the salaries of serving unionised employees by 50% and also adjusted their allowances with effect from 1st June 2004. The appellants, who were still on the respondent's payroll, benefitted from this salary increment as well as the adjustment to the education allowance but were not paid accrued leave days and transport allowance.

In their statement of claim, the appellants asserted, among other things, that they were paid their terminal benefits but each of them was underpaid and the total outstanding balances amount to K1,495,454.29. In its defence, the respondent denied that the appellants were owed any balances on their terminal benefits and asserted that the money paid to them was their full entitlement.

On behalf of the appellants, Jason Yumba (PW1) testified in the court below that sometime in 2004, the Zambia United Local Authorities Workers Union (ZULAWU) made a proposal to the respondent for improvement of 29 specific conditions of service.

Some of the proposals were approved by the council with effect from 1st June 2004 and the appellants began receiving their revised salaries and education allowances thereafter. PW1 stated that their entitlement to such payment was confirmed by the Labour Commissioner in his letter dated 23rd October 2006 which was addressed to the Town Clerk of Ndola City Council. The letter advised that an employee who had not been paid his benefits and was on forced leave was entitled to continue enjoying the benefits attaching to his employment. Contrary to this advice, however, the appellants were not paid their transport allowance and leave days from the time they were placed on forced leave in July 2001 to December 2007.

It was his further testimony that sometime in 2006, the appellants were forced to take their grievance to State House upon which the respondent was requested to calculate the total amount of retrenchment benefits due to them. In response to this request, the respondent wrote a letter and attached a schedule of particulars of the amounts. On the strength of this schedule, the appellants each received advance payments against their outstanding dues and in particular, PW1 received K1,000,000.00 (now K1,000.00). PW1

testified that in the schedule, the amount reflecting as balance due to him was the sum of K101,973,662.31 (now K101,973.66). Out of this sum, he was only paid K63,837,641.84 (now K63,837.64) by cheque dated 2nd January 2008 and his co-appellants were similarly paid on the same day.

PW1 admitted, however, that on 4th January 2008, he signed a letter acknowledging receipt of the said K63,837.64 as full and final payment of his retrenchment benefits and that this was also the position of the other appellants in this matter. He explained that they accepted the underpayments on the various amounts due to them because they were desperate for money as the respondent had delayed to pay them. According to PW1, what was not paid to the appellants were retirement benefits, long service bonus and the balance on their underpaid retrenchment benefits. He stated that the respondent applied the old rate of 2 months pay per completed year of service instead of calculating the retrenchment benefits at the rate revised on 1st June 2004 of 4 months gross pay per completed year of service.

Kingsley Zulu (PW2), the deputy general secretary of ZULAWU, also testified on behalf of the appellants. His evidence was that in 2004, he was working as the Luanshya Branch Secretary for ZULAWU and was part of the negotiating team which fought for improved conditions of service on behalf of unionised employees of the respondent. He stated that the negotiations were successful and the conditions of service were improved. This was confirmed by an internal memorandum from the council director of administration which was addressed to the director of finance, directing him to implement the revised conditions. In January 2008, ZULAWU received a complaint from the appellants that their retrenchment benefits were underpaid. According to PW2, the applicable formula for calculating redundancy or retrenchment benefits, approved by the respondent, was 4 months pay × number of years served. However, in calculating the appellants' entitlements under this head, the formula applied by the respondent was the one applicable before the revised conditions of service were approved, of 2 months × gross salary × years of service.

It was also his evidence that the service of an employee of a

council can be terminated in three ways: by retirement, for disciplinary reasons or through retrenchment. He stated that retirement would apply when an employee attains the age of 55 years; and a dismissal would arise as a result of disciplinary action taken against an employee whereas, retrenchment would occur due to unforeseen circumstances. He admitted, however, that an employee cannot be retrenched and retired at the same time.

Getrude Chibiliti (DW1), the respondent's director of administration, testified that all the appellants' concerns relating to the retrenchment packages were addressed before they were paid and that since the appellants were retrenched and not retired, there was no way the respondent could have paid them retirement benefits and retrenchment benefits at the same time.

The witness also testified that the formula used to calculate the appellants' retrenchment benefits was the one applicable at the time of their retrenchment and that the appellants were first shown how the computation was arrived at and they individually acknowledged that those were the benefits due to them by signing the employee payment records. On the memo dated 4th August 2004 which she

wrote to the director of finance directing him to implement the revised conditions, DW1's evidence was that this memo referred to employees in service as at 1st June 2004 and did not include the appellants who were retrenched in 2001. She, however, acknowledged that after they were retrenched, they remained on the payroll until they received their benefits and that this meant that they were still employees of the respondent although they were not actually working. DW1 also confirmed that she was part of the council meeting which sat to consider the list of 29 revised conditions of service submitted to the respondent by the union as a proposal in 2004 and that the approved conditions were implemented and all the employees who were on the payroll at the time benefited.

Boston Mulambya (DW2), the accountant who computed the appellants' terminal benefits testified on behalf of the respondent that the appellants' dues were computed on the basis of retrenchment which was their mode of exit and that the appellants cannot, therefore, claim for payment of retirement benefits. He pointed out that the basis of the computation was given in detail at

the bottom of the appellants' respective employment payment records as follows:

1. LEAVE PAY = (Basic pay/22) × no. of leave days outstanding
2. REDUNDANCY = 2 months' pay × year served × basic pay
3. PAY IN LIEU OF NOTICE = 3 months' pay
4. REPATRIATION = K1,250,000.00 (now K1,250.00)
5. LONG SERVICE BONUS:

   1st 10 years = 21 months' pay

   Subsequent years = 3 months' pay for each year fully served.

Upon considering the evidence and submissions of the parties, the learned trial judge found that two contentious issues fell for determination namely, whether the appellants who were retrenched are entitled to payment of retirement benefits in addition to retrenchment benefits; and whether the computation of the appellants' benefits should be based on the formula introduced in the revised conditions which became effective from 1st June, 2004. She opined that retirement, retrenchment and redundancy are three different ways in which a contract of employment may be brought to an end and that a contract of employment can only be terminated

once in relation to any one particular period of contractual relationship.

The learned trial judge also found that for an employee to claim entitlement to any of the benefits stated in clause 6.2.7 (erroneously referred to as clause 6.2.5 by the trial judge) such employee must adduce evidence showing that in terms of the applicable condition of service, he or she met the qualification for such payment and was, therefore, eligible for payment of the said benefit at the time of their retrenchment. In her view, the appellants did not lead evidence to show, for instance, which period they worked and earned leave days for which they were not paid or that they had served the respondent for 10 years to qualify for payment of long service bonus. Further, that the appellants did not adduce any evidence showing that at the time of their retrenchment they had all attained the age of 55 years and in terms of the enabling condition of service relating to retirement, they were eligible and entitled to payment of retirement benefits. She, therefore, concluded that the appellants' claim of entitlement to the benefits under clause 6.2.7 was not established by evidence and could not be sustained.

On the formula applied in the computation of the retrenchment benefits, the learned trial judge found that the appellants benefited from the revised conditions and received the 50% salary increment by reason only that they had remained on the payroll in order to comply with the law requiring continued payment of salaries pending settlement of redundancy packages as provided by section 26B (3) (b) of the Employment Act, Chapter 268 of the Laws of Zambia. In the absence of any evidence that there was any specific agreement that the revised formula for computing terminal benefits of employees who were still in employment from 1st June 2004 also extended to those who were retrenched in 2002, the learned trial judge found that there was no basis upon which she could hold that the revised conditions included the appellants. She, accordingly, found that the applicable formula in the circumstances was the one obtaining at the time the appellants were retrenched which was two months' pay for each completed year of service.

The learned trial judge further found that the appellants' claim of underpayment of their retrenchment benefits was not established by the evidence led. Guided by the case of **Khalid Mohamed v**

Attorney General (1982) ZR 49 (SC) she dismissed the action for being without merit but ordered each party to bear their own costs.

Dissatisfied with this decision, the appellants have now appealed to this court advancing seven grounds of appeal couched as follows:

"1. **The Honourable Court at page 16 of the judgment line 19 erred in law and fact by holding that there were only two matters in contention namely:**

(i) **Whether the Appellants who were retrenched were entitled to payment of retirement benefits in addition to retrenchment benefits.**

(ii) **Whether also computation of the Appellants' retrenchment benefits should be based on the formula introduced in the revised conditions which became effective from 1st June 2004.**

When there are other contentious areas of equal importance of the same 2 areas of contention and which should have been treated as distinct issues. In fact the answers to both issues above are in the affirmative.

2. **SECTION 26B (3)(b) OF THE EMPLOYMENT ACT CHAPTER 268**

Appellants strongly feel that the Honourable Court below misinterpreted or narrowed the true meaning of the Employment Act vis-à-vis the expansion or extension by the Local Government Conditions of Service, the Labour Commissioner's letter and the Revised Conditions of Service.

3. **CLAUSES 6.2, 6.5, 6.6 AND 6.7 OF THE LOCAL GOVERNMENT CONDITIONS**

The Honourable Court below at page 18 line 22, page 19 line 19 and 19 line 23 applies the clause wrongly by bringing benefits under that clause. This clause is only about redundancy just as clause 6.2.6. It is only 6.2.7 which talks about benefits or entitlements.

4. **COMPUTATION OF BENEFITS**

At page 21 first line and paragraph, the Court said that in the absence of any evidence of any specific agreement that Appellants were entitled to revised conditions of service. Appellants maintain that the Court erred by importing specific agreement because the revised conditions did not say so.

5. **FAILURE TO TAKE A STANCE ON THE PARTIES' SCHEDULES**

Each party relied on its schedule as evidence of entitlements worked out by the same Respondents and during the hearing. At page J.4 from line 19 and page J.10 from line 25 to line 9 on page 11 of the judgment, the contention on the schedules clearly comes out. But the Honourable Court below attached no importance to the schedules, and yet Appellants for example had their lengths of service, long service bonus, leave days, part payments, all in there. Because of this error of fact, the Honourable Court found itself accusing appellants of having failed to give evidence on some issues.

6. **AUTHENTICITY OF SCHEDULES**

The Honourable Court having ignored the schedules authenticity of the parties' schedules is left for the Supreme

Court to determine and we urge this Honourable Court to agree and accept Appellants' schedule.

7. **"FINAL" PAYMENTS UNDER DURESS**

The Honourable Court erred in both law and fact not to consider whether the payments signed for as final pays and with the additional that none of the Appellants would in future complain of non payment. Had the Honourable Court below done so and especially in the light of the authenticity of the schedules the Court would have found Appellants entitled to the balances of their benefits and that there was no final payments."

A reading of the grounds of appeal clearly reveals that the memorandum of appeal does not comply with rule 58(2) of the Supreme Court Rules, Supreme Court Act Chapter 25 of the Laws of Zambia. This rule states that:

> **"The memorandum of appeal shall be substantially in Form CIV/3 of the Third Schedule and shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively"** (emphasis added).

There can be no doubt that contrary to the mandatory requirements of rule 58(2), the grounds of appeal as couched contain arguments and are in narrative form, a fact conceded by the learned

counsel for the appellant at the hearing of this appeal. Time without number, we have emphasised in our various decisions the inescapable requirement by parties to comply with the rules of this court and the attendant consequences of failure to do so. For example, Malila, JS in the case of **Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture** stated as follows:

> **"In NFC Mining Plc v Techpro Zambia Limited (2009) ZR 236 we warned that failure to comply with court rules by litigants could be fatal to their case. We dismissed the appeal in that case on account of the appellant's failure to comply with the rules. We stated among other things that:**
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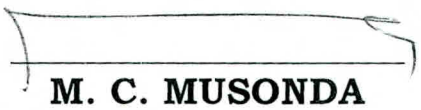
> **"Rules of the court are intended to assist in the proper and orderly administration of justice and as such must be strictly followed."**

Similarly, in the present case, we conclude that failure by the appellant to comply with rule 58(2) of the rules of the Supreme Court is fatal to this appeal. The appeal is, therefore, in competent and we accordingly dismiss it. We, however, make no order for costs.

A. M. WOOD
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE



M. C. MUSONDA
SUPREME COURT JUDGE