IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.199/2013**
HOLDEN AT KABWE/LUSAKA **SCZ/8/160/2013**
(Civil Jurisdiction)

BETWEEN:

CHRISTOPHER MUTALE BESA **APPELLANT**

AND

ZAMBIA NATIONAL BUILDING SOCIETY **RESPONDENT**

CORAM: Mwanamwambwa DCJ, Musonda and Chinyama, JJS.
On 5th April, 2016 and on 31st August, 2017.

Appearances:

For the Appellant: *Mr. F. Besa of Besa Legal Practitioners.*
For the Respondent: *Mr. O. Sitimela of Fraser Associates.*

J U D G M E N T

Chinyama, JS delivered the Judgment of the Court.

Cases referred to:

1. *Arthur Nelson Ndhlovu and Another v Al Shams Building Materials Company Limited and Another (2002) ZR 48*
2. *Shamwana v Attorney General (1988 – 1989) ZR 44*
3. *James Mankwa Zulu and 3 Others v Chilanga Cement – Appeal No. 12 of 2004*
4. *Jonathan Musialela Ng'uleka v Furniture Holdings Ltd (2006) ZR 19*
5. *Krige and Another v Christian Council of Zambia (1975) ZR 152*
6. *City Express Services Ltd v Southern Cross Motors Ltd (2007) ZR 263*
7. *Kettman v Hansel Properties Limited [1987] AC 189*
8. *Gertrude Chibesakunda Mwila Kayula v Family Health International, SCZ Appeal No. 145 of 2012*

Statutes and works referred to:

1. *The Industrial and Labour Relations Act (as amended by Act No. 8 of 2008), Chapter 269 of the Laws of Zambia, section 85(3).*
2. *The Limitations Act, 1939, section 2 (1).*
3. *The Rules of the Supreme Court, 1999 Edition, Orders 14A and 42/5A.*
4. *Constitution of Zambia, Act No. 2 of 2016.*

This is an appeal from the judgment of the Industrial Relations Court (IRC) sitting at Lusaka. The appellant (complainant in the court below) had sued the respondent, his former employer, in that court by way of a Notice of Complaint filed on 19th September, 2012 for several reliefs. On 22nd February, 2013 the parties filed a "STATEMENT OF AGREED FACTS AND LEGAL ISSUES TO BE DETERMINED".

On 16th April, 2013, or thereabouts, as the date stamp on the copy of the document is not very clear, the parties filed an Amended Consent Settlement Order in which judgment was entered in favour of the appellant to recover Non-Private Practice Allowance (payable to lawyers employed in the public service) for the period January, 2007 to September, 2012 in the total sum of K346,590,320.04 (ZMW346,590.32) together with interest at the short term deposit

rate from the date the same became payable up to the date of judgment and at current bank lending rate from the date of judgment until date of full payment, on terms stated in the order. It was further agreed that the appellant would abandon and forfeit his claim for payment of 10% of basic pay profit sharing bonus for the period (December) 2004 to (September) 2012.

The parties also narrowed down the issues for the determination of the court to the following: (i) Payment of a car allowance in lieu of personal-to-holder motor vehicle at the rate of K7,500,000 (K7,500) per month from (December) 2004, when the Complainant became Company Secretary to July, 2010, when the Respondent started paying the allowance; and (ii) Payment of a redundancy package computed on gross earnings.

The statement of agreed facts and other common evidence relevant to the matters in contention disclosed that the appellant, a qualified legal practitioner in possession of a valid practicing certificate, worked for the respondent from November, 2002 as Legal Officer and Legal Counsel. In December, 2004 the appellant was appointed as the respondent's Company Secretary. In June,

2005 the appellant's employment was converted from permanent and pensionable terms to a term contract. He thus became entitled to a redundancy payment for the period served up to the conversion of his employment in June, 2005. On 9th March, 2012 the appellant gave six (6) months' notice to terminate his employment contract.

During the subsistence of his employment contract with the respondent, the appellant was subject to the Corporate Terms and Conditions of Service (CTCS) of 1998, 2006 and 2008. In relation to personal-to-holder motor vehicles, it was provided uniformly in these CTCS that "**Where eligible employees are not provided with personal to holder cars Management will grant loans to such employees to purchase motor vehicles. Such employees will also be availed the facility of fuel or appropriate allowance as is the case with employees with personal to holder cars inclusive of maintenance allowance**" (sic). The appellant was not given a personal to holder motor vehicle. He was, however, given a loan to purchase a motor vehicle. The loan was later recovered through deductions from the appellant's emoluments with interest. On 16th July, 2010 the respondent's board of directors resolved that **"on account of weak financial condition and limitation by the Bank of Zambia on capital expenditure"**

the respondent had not provided the personal to holder motor vehicles to the eligible employees. Therefore, that in lieu of providing the said motor vehicles, an allowance of K7.5 million (K7,500) be paid monthly to the affected employees with effect from 16th July, 2010 which was the date when the board resolution in question was passed.

The following year, 2011 the respondent issued the "POLICY ON THE ZAMBIA NATIONAL BUILDING SOCIETY PERSONAL TO HOLDER MOTOR VEHICLES" which provided in respect of the payment of an allowance in lieu of a personal to holder motor vehicle that **"Where the Society shall not be able to provide a personal to holder motor vehicle ... the Society shall pay an allowance to the affected officer in lieu of a vehicle. Such allowance shall, on provision of the motor vehicle cease to be paid forthwith. The quantum of an allowance shall be determined from time to time by the Board"**. Suffice to point out that the appellant's claim is only for the period up to 16th July, 2010 when the board resolution was passed and which the policy did not cover. The policy, however, clearly affirmed the board resolution of 16th July, 2010.

On the computation of redundancy pay, the 1998 CTCS, which were in force at the time of the conversion of the appellant's employment terms from permanent and pensionable to term contracts, carried a stipulation, as in fact did the 2006 and 2008 CTCS, that the **'last drawn "basic salary" shall be the basis for calculation of the redundancy pay.'** In computing the redundancy package the respondent used the appellant's basic salary instead of his gross earnings.

In its judgment, the IRC found, on the claim for payment of the car allowance for the period (December) 2004 to July, 2010, that the CTCS did not make provision for any payment of an allowance in lieu of a motor vehicle; that it was only in July, 2010 that the Board decided to introduce a policy that an allowance be paid in lieu of a personal to holder motor vehicle, effective from that date. Therefore, that the policy cannot be applied retrospectively because the effective date for implementing payment of the allowances was (16th) July, 2010 as determined by the Board. The court noted that the appellant got a loan to purchase a motor vehicle in accordance with the terms and conditions agreed upon thereby satisfying the requirements of the CTCS as to what was to

happen where the respondent defaulted in providing a personal to holder motor vehicle to an eligible employee, as we were made to understand. The claim for payment of car allowance for the period 2004 to 2010 was found to have been misconceived and was dismissed.

Concerning the claim for payment of redundancy benefits, the IRC decided that it was statute-barred; that the ninety days within which the appellant should have presented the complaint as required under section 85(3) of the **Industrial and Labour Relations Act** as amended by **Act No. 8 of 2008** or the six years periods within which the appellant should have sued under contract pursuant to section 2(1) of the **Limitation Act, 1939** respectively, started running from the date he was paid his redundancy package in 2005. The IRC in dealing with the argument that the question that the claim was statute barred had not been pleaded, relied on the principle of law that **"There can be no estoppel against a statute. A litigant can plead the benefit of a statute at any stage of the proceedings"** which this court applied in the case of **Arthur Nelson Ndhlovu and Others v Al Shams Building Materials Company Limited and Another**[1]. The lower court found

that the claim for wrongful computation of redundancy benefits was way out of time and it was dismissed. Consequently, the claim for recalculated redundancy benefits was not determined on its merits.

Unhappy with the decision of the lower court, the appellant appealed to this Court setting down five (5) grounds of appeal as follows:

1. **The learned trial judge and honourable members erred in fact and in law when they failed to appreciate and adjudge that the appellant became entitled to a personal to holder motor vehicle in December, 2004 but did not receive such motor vehicle and/or an allowance in lieu therefore until July, 2010 and hence the implementation date of the ZMW7,500.00 allowance which was intended to address this default ought to have been effected back dated to December, 2004 as the loan the appellant received to buy a vehicle prior to July, 2010 was not an incident of his conditions of service and was repaid from his own salary.**

2. **The learned trial judge and honourable members erred in both law and fact in considering the respondent's arguments that the claim for redundancy package to be computed on gross earnings was statute barred when this was not one of the agreed facts consented to by the parties for determination and hence the respondent in bringing this arguments at the stage of written submissions when trial had already been concluded by way of agreed facts was wrong and irregular as it fundamentally offended the rules on pleadings which only calls upon the parties to advance arguments contained in their documents and litigated upon at trial.**

3. **The learned trial judge and honourable members erred in both law and fact when they completely ignored and/or neglected to pronounce themselves on the effect of the consent order executed by the parties on 1st February, 2013 which bound the parties to proceed to argue the matter only on the basis of the contents of the agreed facts despite being availed sufficient arguments in the submissions in reply which clearly stated that the parties were bound by what they consented to in a consent order and such provisions of a consent order could only be impeached, disregarded and/or abandoned either by subsequent consent of both parties**

and/or through commencement of fresh proceedings wherein a subsequent judgment would be rendered impeaching the consent order.

4. **Upon erroneously disregarding the contents of the consent order executed by the parties on 1st February, 2013 which bound the parties to only adjudicate on the basis of the agreed facts, the learned trial judge and honourable members fell into further grave error in finding that the claim for redundancy package underpayment arose in 2005 when the said underpayment was effected and not in May, 2012 when the appellant left the employ of the respondent in that the learned trial judge and honourable members failed to appreciate the fact that whilst the appellant was still working for the respondent, any claim against his employer, the respondent was an administrative matter and only arose as a cause of action to be considered in courts of law for the purposes of statute of limitation when the appellant left employment with the respondent.**

5. **The learned trial judge and honourable members, upon erroneously disregarding the contents of the consent order executed by the parties on 1st February, 2013 which bound the parties to only adjudicate on the basis of the agreed facts, fell into further grave error and offended established laws on corporate governance in stating that the appellant who is on record as having been a legal practitioner and company secretary of the respondent and thus the Chief Legal Advisor to the respondent should have sued for the underpayment of his earlier redundancy package when this would have certainly created serious conflict of interest in pursuing a claim against the respondent in courts of law and at the same time remaining in employment as the respondent's Company and Board Secretary.**

It is our considered view that the five grounds of appeal, long winded as they are, raise only two issues, namely:

i. **Whether the IRC erred in law and fact when it refused to backdate the implementation of the car allowance to December, 2004; and**

ii. **Whether the IRC erred by holding that the claim for payment of the redundancy package computed on gross pay was statute barred.**

We will, consequently, address ourselves to the parties' arguments that deal with the two issues.

Both Mr Besa, on behalf of the appellant, and Mr Sitimela, on behalf of the respondent relied on their respective Heads of Argument filed in the appeal.

In relation to the first issue, the thrust of the submission on behalf of the appellant was that the effective date for payment of the car allowance ought to have been December, 2004, when the appellant became entitled upon his appointment as Company Secretary and not 16th July, 2010 as determined by the board of directors. It was argued to the effect that the loan did not absolve the respondent from its contractual obligation to provide a personal to holder motor vehicle; that, in any case, the respondent was required to pay an appropriate allowance in lieu of the personal to holder motor vehicle which should also have taken care of the loan given to the appellant; that the loan should not have been recovered from his salary.

In response to the foregoing, it was submitted for the respondent that the appellant became entitled to the allowance of K7,500,000.00 (K7,500) per month as of the 16th July, 2010, when the respondent's Board resolved to pay it in lieu of the personal to holder motor vehicles. It was submitted that in the case before us the CTCS did not provide for payment of an allowance in lieu of a motor vehicle and the appellant only became entitled to it from 16th July, 2010 onwards when the Board resolution was implemented and cannot be applied retrospectively. It was argued that although the appellant was not availed a personal to holder car, he was given a loan from which he purchased a vehicle in accordance with the CTCS. It was submitted that the word "loan" literally means that the beneficiary of it must repay it; that it was never the intention of the respondent to give the appellant a car for free.

We have considered the arguments regarding the appellant's claim for a backdated car allowance. Our view is that the resolution of this issue rests on the construction that is to be placed on the provision that entitled the appellant to a personal to holder motor vehicle. It was provided, as already noted in the various CTCS that

"**Where eligible employees are not provided with personal to holder cars**

Management will grant loans to such employees to purchase motor vehicles. Such employees will also be availed the facility of fuel or appropriate allowance as is the case with employees with personal to holder cars inclusive of maintenance allowance". It is a fundamental principle of law that in construing a written instrument, words must be given their grammatical and ordinary meaning. The only time this approach is departed from is when doing so would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument. In such a case the grammatical and ordinary usage of the words may be modified, so as to avoid the absurdity and inconsistency, but no more (see **Shamwana v Attorney General[2]).**

Our view is that the provision at issue is clearly expressed. All it says is that in the event that an employee who is entitled to a personal to holder motor vehicle is not provided with one, a loan will be provided. That the employee will then be provided with fuel or an allowance for the purchase of fuel. The allowance would include an amount for the maintenance of the vehicle bought from the loan. It, certainly, does not say that the allowance was meant to "take care of the loan" repayment. As the respondent contended,

such an allowance as contemplated by the appellant would have the effect of giving the car to the appellant *gratis* which was not the intention of the respondent.

In our appreciation of the conditions of service it is clear that the intention of the respondent was to provide its eligible employees with vehicular transport of their own more or less at minimal cost to the employee but not as a gift to the employee. The argument in this matter is not that the appellant was not being given the facility of fuel or an allowance for the purchase of fuel or maintenance of the vehicle bought from the loan. It is that an allowance to take care of the loan and in lieu of the personal to holder motor vehicle was not being paid when it should have been. Our position is that such an allowance was not part of the appellant's conditions of service and was not payable at the time of his appointment in December, 2004. The allowance which the board of directors resolved to start paying in lieu of a personal to holder motor vehicle came into being as a new condition of service only on 16th July, 2010, the date of the resolution. It cannot, therefore, take effect retrospectively. The conditions of service which were in existence in December, 2004 up

until 16th July, 2010 only allowed the appellant to obtain a loan to purchase a motor vehicle, in lieu of a personal to holder motor vehicle, irrespective of whether it was second hand or new. The one ground relating to this aspect of the appeal cannot, therefore, succeed and we dismiss it.

Turning to the second issue, the substance of the arguments for the appellant is that dismissing the claim for recalculation of the redundancy pay on the basis of the limitation statutes offended the rules on pleadings and amounted to an ambush on the appellant by the respondent which in civil matters is not allowed. Counsel submitted that by filing an Answer and executing a consent order, the respondent waived its right to challenge the regularity of the action, as we understood the argument, and bound itself on what issues were to be argued. It was, therefore, contended that the respondent had the option to commence proceedings to impeach the consent order on the ground that it was procured by misrepresentation or fraud by the appellant.

On the computation of the redundancy benefit using gross pay, it was submitted that this court in the case of **James Mankwa**

Zulu and 3 Others v Chilanga Cement Plc[3] stated that **"there is no debate anymore that the word "Salary" includes allowances that are paid together with the Salary on periodical basis by an employer to his employee"**. Further, the case of **Jonathan Musialela Ng'uleka v Furniture Holdings Limited**[4], was also cited to support the same proposition that the redundancy package should have been based on the gross salary.

In response to the second issue it was submitted that the lower court was on firm ground because the question whether the claim was statute barred was relevant. That the lower court cannot be faulted for considering it on the basis that there can be no estoppel against a statute; that the IRC has an inherent jurisdiction to determine whether a matter is properly before it. It was contended that a litigant can plead the benefit of a statute at any stage of the proceedings as decided in the cases of **Krige and Another v Christian Council of Zambia**[5], and **Arthur Nelson Ndhlovu & Another v AL Shams Building Materials Company Limited**[1], among others. It was argued that as far as the limitation period is concerned the lower court correctly found that time started running from 2005 when the alleged underpayment

occurred. We were, in the alternative, asked to consider the respondent's submissions in the court below should we form the opinion that the court erred in considering whether or not the claim for redundancy computation was properly before it.

We have considered the parties arguments. We note that on 7th March, 2013 the respondent filed into court a Notice to Raise Preliminary Questions of Law pursuant to Order 14A, **Rules of the Supreme Court (RSC) 1999** in which the issue that the claim for a recalculated redundancy package was statute barred was raised. The record does not, however, show that the preliminary issue was ever given a hearing. Notwithstanding, it seems that the preliminary issue was overtaken by events when the amended consent order was filed. The terms of the order were clearly articulated. It left for the determination of the court only the two issues we set out above. In the case of **City Express Service Limited v Southern Cross Motors Limited**[6] relied on by the appellant the English case of **Kettman v Hansel Properties Limited**[7] was cited where it was held that **"If a defendant decides not to plead a limitation defence and to fight the case on the merits he should not be permitted to fall back upon the pleas of limitation as a second defence at the end of the trial when it**

appears that he is likely to lose on the merits". It is obvious in this case that the amended consent order bound the parties to litigate the issues framed for the determination of the court. By participating in the consent settlement it can be and is imputed on the respondent that it abandoned the preliminary issue raised earlier. Therefore, the IRC misdirected itself when it resolved to dismiss the redundancy package claim for being statute barred when the defence had clearly been abandoned. The court should have determined the claim on the merits. Fortunately, in this matter there is ample evidence to enable us resolve the issue.

We did state at the beginning of the judgment that the CTCS had a term that redundancy pay would be calculated on the basis of the basic salary. It is indeed settled law now, that in computing terminal benefits, allowances and perquisites valued in money terms are included as decided by this court in cases such as **James Mankwa Zulu and Others v Chilanga Cement Plc**[3]. The exception is, however, where the terms of the contract clearly exclude the incorporation of allowances and perquisites of monetary value provided in the contract as happened in the case of **Gertrude Chibesakunda Mwila Kayula v Family Health International**[8]

where the sum due was restricted to the basic pay or basic salary because the conditions of service said so. In this case there is an express stipulation that redundancy pay was to be calculated on basic pay. Therefore, the claim for payment of the redundancy pay based on gross salary is clearly untenable. All grounds pertaining to this claim cannot succeed and we dismiss them.

Before we conclude we would like to point out that for purposes of complaints filed in the IRC it is not necessary to plead the limitation period under the **Limitation Act 1939**. This is because the **Industrial and Labour Relations Act** deals with the matter under **section 85(3)** as amended by **Act No. 8 of 2008** which limits the period within which applications and complaints in that court can be filed. This position applies notwithstanding that the IRC is now a division of the High Court by virtue of **Article 133(2)** of the **Constitution of Zambia Act No. 2 of 2016**. The IRC still derives its jurisdiction from the **Industrial and Labour Relations Act,** which has not yet been amended or repealed.

The appeal is thus dismissed altogether with costs to the respondent to be taxed in default of agreement.

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M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

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M.C. MUSONDA
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE