IN THE SUPREME COURT OF ZAMBIA **Appeal No. 215/2014**

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

HAMBALI M HATONTOLA **APPELLANT**

AND

THE COUNCIL OF THE UNIVERSITY OF ZAMBIA **RESPONDENT**

CORAM: Mwanamwambwa DCJ, Hamaundu, Kabuka, JJS,
On the 1st day of August and 22nd September, 2017.

FOR THE APPELLANT: Mr. L. M. Mwanabo, Messrs. L.M. Chambers.

FOR THE RESPONDENT: N/A

JUDGMENT

KABUKA, JS, delivered the Judgment of the Court.

Cases referred to:

1. American Cyanamid Company v Ethicon Limited(1975) A.C. 396.
2. Fellowes v Fisher (1996) Q.B. 122.

3. Turnkey Properties v Lusaka West Development Co. Ltd and Others (1984) ZR 85 (SC).
4. Post Newspapers Limited v Rupiah Bwezani Banda (SCZ Judgment No. 25 of 2009).
5. Jane Chikwata v Itezhi-tezhi District Council (SCZ Judgment No. 42 of 2006).
6. Doctor J.W. Billingsley v J.A. Mundi (1982) Z.R. 11 (S.C.).
7. Zambia Oxygen Limited and Zambia Privatisation Agency v Paul Chisakula and Others, (2000) ZR 27 (SC).
8. Shell and BP v Conidaris and Others (1975) ZR 174.
9. National Milling Company Limited v Grace Simataa & Others, (2000) ZR 91 (SC).
10. Hastings Obrian Gondwe v BP Zambia Limited (1997) ZR 1.
11. Zambia Railways v Oswell Simumba (1995/1997) ZR 41 (SC).
12. Mubanga v Zambia Airways Corporation Limited (1990/1992) 149 (SC).
13. Zambia State Insurance Corporation Limited v Denni Mulikelela (1990/1992) 18 (SC).

The appellant appeals against a ruling of the Industrial Relations Court dated 28th October, 2014 which declined to grant him an order of interim injunction, to restrain the respondent from retiring him at the age of 55.

The facts of the case are that, by letter dated 28th May, 1994 the appellant was offered employment by the respondent as an

accountant, on a permanent and pensionable basis. The offer was subject to a probationary period of 6 months, at an entry salary of K1,113, 624.00 per annum, 20% retention allowance of basic salary, amongst other emoluments. It was a term of the offer letter that a document headed: "**Terms and Conditions of Service for Academic Staff negotiated between the University of Zambia Council and the University of Zambia Lecturers and Researchers Union (UNZALARU) for the period 1st January, 1993 to 31st December, 1993"** would constitute part of the contract of service between the appellant and the respondent.

Although the agreement stated that it was valid for the period 1st January, 1993 to 31st December, 1993; documentary evidence appearing at pages 26 and 27 of the record, shows there was no dispute that both parties had adopted it as part of the appellant's terms and conditions of service, with effect from 27th June, 1994. By clause 10 of this agreement the retirement age was stated as 60 years while early retirement was placed at 55 years.

In 2002, the **University of Zambia Professional Administrative and Technical Staff Association (UNZAPROSA),**

which was then, representing the appellant and other members of staff, negotiated another agreement which brought down the retirement age from 60 to 55 years while early retirement was now at 50 years. This agreement also introduced an increment in salaries at 25 % and enhanced allowances, gratuity, tuition fee waiver, settling in allowance, amongst others. Apparently, everyone was happy as there is no evidence on the record or indeed in the appellant's affidavit, suggesting that any member of staff had protested against any of the variations to the prevailing terms and conditions of service.

In 2007, there was another collective agreement executed between the **University of Zambia Council** and **UNZAPROSA** for the period 1st April, 2007 to 31st March, 2008. This agreement also retained the clause on retirement age, at 55 years. There was a further salary adjustment upwards of 15% across the board, as well as considerable enhancement of other benefits.

There is again, no indication anywhere on the record or in the appellant's affidavit, that any staff member or the appellant himself, was aggrieved with any of the amendments or that there was any

challenge registered to their representative, **UNZAPROSA**, for entering into the agreement on their behalf.

There were similarly no protests of any kind, when there were further variations introduced by yet another agreement executed between the same parties, for the period 1st April, 2012 to 31st March, 2013 enhancing the emoluments further, but retaining the retirement age at 55 years.

On 18th April, 2013, the respondent gave the appellant a notice, informing him that pursuant to clause 12 of the 2012-2013 **UNZAPROSA** terms and conditions which he was enjoying at the time, he was due to retire at age 55 on 28th August, 2013.

In his response to that notice, the appellant wrote a letter dated 25th April, 2013 in which he countered that, the 1993 terms and conditions of service applicable to him, provided for retirement at the age of 60. The appellant argued to the effect that, in terms of clause 1 of the same conditions, the respondent could not unilaterally amend, alter or vary any term or condition without his personal written consent.

In its reply, the respondent reiterated its position, reminding the appellant that, as a member of **UNZAPROSA**, all members of staff, himself included, had mandated the executive committee of the organisation to negotiate and agree to terms and conditions on their behalf. It was the respondent's further argument that, if the appellant was disputing being a member of the Union, then, he equally should have rejected all other benefits he had enjoyed from the various amendments in several agreements executed by the Union executive over the years, which enhanced the conditions of service.

That response prompted the appellant to appeal to the Registrar of the University of Zambia against what he termed his premature or early retirement. When this did not succeed, he appealed further to the Vice Chancellor; then to the Chairperson of the Council of the University of Zambia and finally, he referred his grievance to the Legal Counsel of the University of Zambia.

All this effort having been unsuccessful, on 29th August, 2013 which was the day following his 55th birthday, the appellant rushed to file a Complaint before the Industrial Relations Court (IRC) and

immediately, filed an application for an injunction which was granted ex-parte, subject to an inter-parte hearing. The effect of the ex-parte order was to restrain the respondent from retiring him upon his having attained 55 years and to compel them to allow him to continue enjoying all his entitlements and all those applicable to his children and his spouse, under his conditions of service.

The inter-parte application for an injunction was heard by another judge of the IRC.

In his affidavit in support of the said application, the appellant alleged that, the respondent had unilaterally changed his retirement age from 60 to 55 years, without his consent. The appellant stated that, he had been employed by the respondent on 28th May, 1994 as an accountant on permanent and pensionable basis. That the terms and conditions of his employment were set out in a separate document, being the 1993 Conditions of Service for Academic Staff of the respondent. These conditions provided for ordinary retirement of a member of staff at 60 years.

The appellant contended that, the respondent had unilaterally varied the retirement age from 60 to 55 years, without notifying him and to his detriment. As a result, he stood to lose certain entitlements like the tuition fees waiver that his children enjoyed and his plea was for the court to sustain the ex-parte order of injunction.

The respondent filed an affidavit in opposition sworn by the University Deputy Registrar. The deponent averred that, all the reasons given by the appellant as to why he was seeking an injunction could be atoned for by damages. The trial court was accordingly, urged to discharge the ex-parte injunction, on grounds that, it posed a serious risk to the assets of the respondent.

In its ruling on the matter, the trial court observed that, injunctions are equitable remedies granted in the court's discretion and went on to quote the principles that apply, as stated in the case of **American Cyanamid Company v Ethicon Limited**[1]. The court outlined the three considerations that inform the court whether or not to grant an injunction, as being:

(i) whether the plaintiff has raised a serious question to be tried;

(ii) whether damages would be adequate to compensate the plaintiff for damages suffered for potential loss he would have sustained had the defendant carried out the wrongful act;

(iii) which party the balance of convenience favours after taking into account the status quo before the application.

The court considered that, the conditions of service the appellant was relying on had expired on 31st December, 1993. That thereafter, they were replaced by a number of other agreements which were signed by the Union on behalf of its members, who included the appellant. In the premises, the trial court found there was no serious issue to be tried. The case of **Fellowes v Fisher**[2] was relied upon for the finding. Having gone into the merits of the case to some considerable detail, the trial court concluded that, there was no need to further consider the other two principles cited in the *American Cyanamid* case, as from the onset, it had determined that there was no serious issue to be decided. The interim injunction order was accordingly discharged. Hence, this appeal by the appellant, on three grounds couched in the following terms:

1. **"That the court erred in law and fact when it refused to confirm the ex-parte order of injunction and made adverse and**

derogatory comments regarding the appellant's case at injunction level before full trial.

2. **That the court erred in law and fact in holding and concluding that the document the complainant was relying on for his claims to retire at 60 years, the 1993 terms and conditions of service for academic staff, had expired in 1993 without the court having regard to the fact that the 1993 agreement was only made part and parcel of the appellant's contract of employment on 27th June 1994 and thereby also making it uniquely distinct from other collective agreements and the issue of validity, relevance and applicability of that agreement had to be determined at full trial after hearing the parties on the same vis-à-vis clause 1 of all the terms and conditions titled Authority;**

3. **That the lower court went beyond the mere assessment of whether the complainant had an arguable case by making conclusions that his case was hopeless due to subsequent agreements with amendments that benefited the appellant without regard as to whether those subsequent agreements were capable of taking away appellant's vested and/or accrued rights or have adverse effect against his rights as these are matters to be decided at trial: therefore these conclusions rendered trial of the main matter otiose."**

When the appeal came up for hearing before us, only Counsel for the appellant was in attendance. The respondent did not defend the appeal and was not represented by Counsel. Upon confirming that service had been duly effected on the respondent, we allowed learned Counsel for the appellant to proceed with his client's appeal.

Counsel proceeded by indicating that he would rely on written heads of argument he had earlier on 31st December, 2014 filed on record.

On ground one of the appeal, the contention was that, in line with the *American Cyanamid* case, an interlocutory injunction is a remedy granted to maintain the status quo of the parties until the dispute before the court is settled. Counsel acknowledged the principle that, before a court can grant an interlocutory injunction, it must be satisfied that the case before it has triable issues and that the claimant's claim cannot be atoned for by damages.

Counsel's submission was that, in the process of weighing whether or not a case has merit for purposes of considering granting an injunction, the court should restrain itself from making comments that may pre-empt the decision to be reached on the merits at full trial. The cases of **Turnkey Properties v Lusaka West Development Co. Ltd and Others**[3] and **Post Newspapers Limited v Rupiah Bwezani Banda**[4] were relied upon to support the submission.

In ground two of the appeal, Counsel continued with the grievance expressed in ground one and further submitted that, the court was partial against the appellant, which approach was condemned in the case of **Jane Chikwata v Itezhi-tezhi District Council.**[5] Learned Counsel also argued that, the court below erred in its preview of the strength of the appellant's case, when it concluded that, the document the appellant was relying on for his claim to retire at the age of 60, had expired in 1993. The argument here, was that, the court in reaching its conclusion overlooked the fact that the 1993 agreement was made part and parcel of the appellant's contract of employment on 27th June, 1994, thus making it uniquely distinct from all the other collective agreements. In aid of the submission, Counsel referred to the holding in the case of **Billingsley v J.A. Mundi**[6] to the effect that, the purported final determination of all the issues at the stage of an application for interim injunction is a nullity.

In ground 3, the argument was repeated, that the trial court went beyond the mere assessment of whether the appellant had an arguable case by drawing conclusions that his case was hopeless.

Counsel further relied on the cases of **Zambia Oxygen Limited and Zambia Privatisation Agency v Paul Chisakula & Others[7],** amongst others, which decided that, conditions of service already being enjoyed by an employee cannot be varied to his disadvantage and without his consent. The submissions in this regard were that, the trial court misdirected itself by holding that the appellant's claim was vexatious and frivolous because he benefitted from some conditions that were changed without his consent. As a result, the conclusions made rendered trial of the main matter otiose, since all issues which should have been determined during trial, had already been exhausted.

We have considered the grounds of appeal, the arguments and submissions by Counsel for the appellant, as well as the case law on which he relied.

As we see it, the first point to note is that, there is a common thread linking the three grounds of appeal. This is the grievance that, the trial court made comments with a tone of finality on issues that should properly be decided at the trial after hearing the evidence.

Our short response to this grievance is that, the issue is one that was addressed by this Court in the case of *Turnkey Properties* relied on by Counsel. Trial courts were there, guided to desist from making comments whose effect would be to pre-judge matters that should properly be decided on the merits after hearing evidence at the trial. We thus have no difficulty in agreeing with the contention that, the trial court did indeed express itself, and wrongly so, on issues that must be determined at the main hearing of the matter.

The second point is on the substantive issues raised in each of the three grounds of appeal. Ground one faults the trial court for having declined to confirm the ex-parte order of injunction after the inter-parte hearing. The grievance in ground two is directed at the finding of the trial judge that the 1993 conditions of service could not be relied upon by the appellant, as they had expired on 31st December, 1999. While ground three addresses the appellant's disdain on 'conclusions made by the trial judge that his case was hopeless due to subsequent agreements.'

In our view, the issues raised in grounds two and three, that the 1993 conditions of service could not be relied on as they had

expired on 31st December, 1999; and that the appellant's case was hopeless due to subsequent agreements; are most certainly the very issues that are to be decided at the hearing and on which the appellant's case has been deployed. It is for the said reason that we decline to take the bait inviting us to consider these issues, as proceeding that way would be falling in the same trap as the trial court. We have no doubt that our decision, either way, would have the effect of pre-empting the trial court from resolving these very issues which are in contention between the parties, after hearing the evidence.

Grounds two and three of the appeal must accordingly fail.

We now turn to ground one of the appeal. The gist of this ground is that, it faults the trial court for declining to confirm the ex-parte order which was earlier granted by another judge. This brings into question considerations to be taken into account by a trial court in the exercise of its discretion, whether or not to grant an order of interim injunction. In **Shell and BP v Conidaris and Others**[8] we did hold that:

> **"A Court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the Plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury means injury which is substantial and cannot be adequately remedied or atoned for by damages, not injury which cannot be possibly repaired."**

The record shows, the appellant in his affidavit evidence in this matter contended that, on commencement of his contract of employment on 27th June, 1994, he was given a document which constituted part of his conditions of service. The heading of this document reads: **Terms and Conditions of Service for Academic Staff negotiated between The University of Zambia Council and The University of Zambia Lectures and Researchers Union (UNZALARU) for the period 1st January 1993, to 31st December, 1993**.

The appellant relies on clause 1 of the document to argue that, it could not be varied without his personal consent. The relevant part of clause 1 provides that:

> **".....no term of condition herein contained shall be unilaterally amended, altered or varied by either party, without the written consent of the other party."**

A consideration of the heading of the document discloses that, the only parties to the agreement are identified as **the University of Zambia Council** and **UNZALARU**, the Union which was representing members of staff, at the time.

In view of the parties to the agreement who actually executed it as identified. Whether the appellant's contention can be sustained, that his personal written consent was required before the retirement age could be varied by reducing it from 60 to 55, will to a large extent depend on the construction of clause 1, as quoted above.

In this respect, we have further considered that the appellant in his affidavit evidence, did not deny he was a member of the Union being the same Union which was a party to the 1993 conditions aforesaid and signed it on behalf of the members. The appellant did not also deny, that it is the Union which in 2002, 2008 and 2013 negotiated and signed agreements on behalf of all its members, including himself, that saw the enhancement of the emoluments contained in the 1993 conditions and not a single member, complained against those agreements.

The variations or amendments to the terms and conditions of service only became an issue when the respondent wrote the appellant a letter dated 18th April, 2013 notifying him that in terms of clause 12 of his conditions as varied in 2012-2013, he was due to retire on 28th August, 2013 upon attaining the age of 55. It is then only, eleven (11) years after the amendment was effected, that the appellant raised a protest on the issue, for the very first time. His contention was that, the 1993 conditions which still applied to him provided for retirement at the age 60. Whether this is a sustainable argument, as already stated, is for the trial court to determine on the evidence, after trial of the matter.

In the case of **National Milling Company Limited v Grace Simataa & Others**[9], we did however state to the effect that, an employee whose employer introduces a unilateral variation to a fundamental term of his subsisting contract to his disadvantage, has two options: either (i) to take the variation as a breach of contract which entitles him to treat the contract as having been thereby terminated; or (2) consent to the variation and accept to continue working on the contract as varied.

In his affidavit evidence in support of the application for an interim injunction, the appellant did not show that he protested the variation that reduced the retirement age from 60 to 55 years. What the said evidence confirms instead, is that the appellant continued working for the next eleven (11) years as though all was well, until he was notified of his impending retirement.

After taking the matter to court challenging his retirement as premature, he proceeded to obtain an injunction ex- parte in terms that allowed him to continue working and to go on receiving benefits in form of perquisites extended to him as an incident of his employment. The injunction having been discharged following an *inter- partes* hearing, in this appeal the appellant seeks that it be restored pending hearing and final determination of the main matter. This Court has previously, considered whether it is appropriate to grant injunctions in such circumstances.

In **Hastings Obrian Gondwe v BP Zambia Limited**[10], the respondent had agreed to sell the appellant the personal-to-holder car which he was using during his employment as part of the appellant's retirement package. A dispute arose relating to the value

of the car, which ended in the appellant suing the respondent and he applied for an interlocutory injunction to restrain the respondent from claiming repossession of the car pending the outcome of the main action.

We, in that matter held that, re-instatement was a rare remedy, and the courts ordinarily refuse to grant interlocutory injunctions in relation to claims that fall in the category of perquisites. However, as what the appellant was seeking to continue enjoying was the use of a car which was a benefit that would subsist even after termination of his employment, the injunction could be granted.

The case went further to distinguish between perquisites enjoyed as an incident of employment that terminate with the employment, and conditions and benefits enjoyed after a certain period while in employment or can be enjoyed after termination of employment. That, while the latter category would more likely entitle one to an interlocutory injunction the former, perquisites, would not. In remarks made *obiter*, it was agreed that, where there is nothing on the facts to suggest that a case is a rare one where reinstatement

should be ordered, it was not appropriate to grant an interlocutory injunction.

The same observations were made in another earlier decision, **Zambia Railways v Oswell Simumba**[11], where we held that, it is not likely that an order for reinstatement will be made in a master and servant case; and for that to happen, the case would have to be exceptional such as where an employee is dismissed based on malicious vindictiveness of the employer. We gave as an example the case of **Mubanga v Zambia Airways Corporation Limited**[12]. Similarly, in **Zambia State Insurance Corporation Limited v Denni Mulikelela**[13] the respondent had sought an injunction to restrain the appellant from taking any steps to recover possession of a company house and a company car and from making any alterations in the conditions of service of the respondent. This injunction had the effect of nullifying the dismissal of the respondent by the appellant. We again held that, there was nothing in the facts to make us consider that the case was a rare one, where it would be appropriate to grant an injunction based on perquisites that were dependent on the appellant's employment as these could be atoned for by damages.

What the above decisions underscore is that, a court will not generally, grant an interim injunction to an employee for the continued enjoyment of benefits falling in the category of perquisites that are tied to the duration of the employee's employment, as such benefits can be atoned for in damages. That a court hearing such a matter must take into account all relevant facts, before exercising its discretion in favour of granting an injunction.

On the particular facts of the case subject of the present appeal, the relevant facts are that, the appellant sought and obtained an injunction a day after his official retirement. In effect, the order of injunction reinstated him, as according to the respondent's interpretation of the applicable conditions of service, he had for all intents and purposes been retired on 28th August, 2013.

The rights or conditions which were directed to be protected by the ex-parte order of injunction granted to the appellant, included tuition fees waiver for spouses and biological children. These were benefits which clearly, fall in the category of perquisites that are only tied to the duration of the employee's employment and can be easily quantified and atoned for by damages.

All in all, this was not a proper case in which the court should have granted an order of injunction *ex-parte* in the first place, as there was nothing in the facts to suggest that the appellant would suffer irreparable injury if the same was not granted.

For the reasons given, we are unable to fault the conclusion reached by the trial court, that in circumstances of this case, the appellant's right to the relief he is seeking in the main matter cannot be said to be clear, as to entitle him to protection by way of an interim injunction, pending trial. Further, and in any event, that even if he were to succeed at the trial, damages would still adequately recompense him for any loss relating to non enjoyment of perquisites that he might suffer.

Ground one of the appeal faulting the trial court for having declined to grant the appellant the interim injunction he was seeking fails. Accordingly, the matter is hereby remitted back to the Labour Division of the High Court for trial to proceed before another judge.

Costs will abide the outcome of the matter in the court below.

M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

E.M. HAMAUNDU
SUPREME COURT JUDGE

J. K. KABUKA
SUPREME COURT JUDGE