IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 144/2020
HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ALEX CHENGA **APPELLANT**

AND

FIRST QUANTUM MINING LTD **RESPONDENT**

Chashi, Majula and Sharpe-Phiri, JJA
On 15th February, 2022 and 10th March, 2022

For the Appellant : *In Person*

For the Respondent : *Mr. H. Pasi of Mando & Pasi Advocates*

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Attorney-General vs D.G. Mpundu (1984) ZR. 8.*
2. *Swarp Spinning Mills Limited vs Sebastian Chileshe and Others (2002) ZR.23*
3. *Barclays Bank of Zambia Ltd vs Mando Chola and Ignatius Mubanga (1997) SJ 35 (SC);*
4. *Zambia Consolidated Copper Mines vs Richard Kangwa & Others (SCZ Judgment NO.25 of 2002);*
5. *Amiran Limited vs Robert Bones (SCZ Appeal No.42 of 2010).*

6. *Mususu Kalenga Building Limited vs Richmans Money Lenders Enterprises (1999) ZR 27.*

1.0 INTRODUCTION AND BACKGROUND

1.1 This is an appeal from a judgment on assessment of damages that was rendered by the Deputy Registrar from the Industrial and Labour Relations Division of the High Court. The facts of the case are that the appellant was employed by the respondent as a machinist on 5th September, 2008.

1.2 On 24th February 2011, the appellant underwent an annual Medical Examination at the Occupational Health, Safety and Research Bureau (OHSRB). The Bureau found the appellant with a chronic lesion in the chest and accordingly certified him unfit to work as a miner in any part of the respondent's company. Following receipt of a report, from (OHSRB) the respondent terminated the appellant's employment on medical grounds on 15th June, 2011.

1.3 Being dissatisfied with this decision, the appellant immediately filed a complaint in the High Court (IRC) claiming reinstatement, payment of salary arrears and regular allowances. In its determination of the complaint, the lower court held that occupational disease left lower zone (OD-LLZ) was not one of the two diseases upon which a miner could be dismissed under the Workers Compensation Act, No.10 of 1999. The lower court accordingly declared the appellant's

dismissal as null and void and ordered reinstatement of the appellant.

1.4 Aggrieved by this decision, the respondent appealed to the Supreme Court. The apex court dismissed the appeal and ordered a fresh medical examination to enable the Bureau certify whether or not the appellant was fit to work. The Supreme Court further directed that the appellant be paid his salaries from the date of the purported termination to the date of judgment.

1.5 On 5th March, 2014, the appellant was given a letter of re-instatement in line with the Court Order, and paid his salary arrears from 15th June, 2011, the date of his termination to 5th March, 2014, the date of judgment. He was then taken to the OHRSB for re-examination. The results issued on 7th May, 2014 diagnosed the appellant with fibrosis and rendered him unfit to work.

1.6 Unhappy with the payments made by the respondent, the appellant filed a notice for assessment of damages and salary arrears. This claim was dismissed by the learned Registrar on the basis that the appellant had been paid all his dues by the respondent.

1.7 It is against this judgment that the appellant has come to this Court on the following grounds of appeal:

"1. The lower court erred in law and fact when it ruled that the respondent had complied with the judgments of the High Court and the Supreme Court without considering that the application for assessment of salaries and regular allowances brought before this court was in line with the Court Order in Judgment on page J25 paragraph 2 stating that for purposes of complying with ACT 1 direct that the complainant be re-examined by OHSRB in terms of section 35 of the Workers Compensation Act and certify whether or not he is suffering from pneumoconiosis or tuberculosis of the first, second or third stage and if so, that he is not fit for work in which case a certificate of fitness may not be issued. In the event that the complainant shall be found not to be fit to work in the mine, and the respondent decides to terminate the contract of employment, the respondent and OHSRB shall comply with the discharged formalities contemplated under section 39 of the Workers Compensation Act. The respondent has not complied with the above despite them advising me that I am not fit to work in the mine according to the medical report. There is no evidence of formal medical discharge in accordance with the Court directive above.

2.The lower court did not consider and misdirected itself by not awarding me salaries and regular allowances during assessment for the period from 2015 to date contrary to her contradicting statement in her judgment on assessment as in one breath she states that: there seems to be no indication

that the contract of employment was formally terminated. I agree with her because I was reinstated, re-examined and found not fit to work in a scheduled area which should have resulted in termination of employment on medical ground in line with section 38 of Workers Compensation Act as per the said judgments, hence the application for Assessment for the above stated period.

3.The lower court erred in law when it failed to consider what is contained in the said two judgments that: The salaries and allowances shall of course continue to accrue until the Complainant is actually restored to his former position. There will be interest on the unpaid salaries at the rate of 9% per annum from the date of judgment until settlement. It is in line of the above why the salary assessment was before the Deputy Registrar as the matter is not yet settled which implies that I am still an employee of the respondent as I am not yet medically discharged in accordance with the two Judgment's directive.

4.The lower court did not consider the vital issue that her role is to do assessment contrary to her assertion that she is not mandated by the Judgment to do so and make such an assessment would be to import an interpretation outside the scope of the court's Judgment when in fact the earlier indicated that there seems to be no indication that the contract of employment was formally terminated, then he is

still on the respondent's payroll which entitled him to salaries and allowances for the period 2015 to date. When in fact I am not on the respondent's payroll as I was removed from payroll in 2014 as a result she was duty bound to do Assessment as per amendment filed on 22nd May, 2020 amounting to K1,429,163.48 for which the respondent did not dispute."

2.0 APPELLANT'S SUBMISSIONS

2.1 Both parties filed heads of argument and list of authorities in support of their respective positions.

2.2 The gist of the appellant's submission in relation to grounds one and two was that the lower court misdirected itself when it held at assessment that the respondent had complied with the judgments of the High Court and Supreme Court on payment of salaries and regular allowances from 2015.

2.3 The appellant further asserted that the respondent's conduct was a breach of contract and he was therefore entitled to damages for breach of contract and mental anguish. To buttress the argument, the appellant referred to the cases of ***Attorney-General vs D.G. Mpundu***[1] and ***Swarp Spinning Mills Limited vs Sebastian Chileshe and Others.***[2]

2.4 Ground three was simply a regurgitation of what is already stated in the memorandum of appeal. We shall not therefore reproduce it here.

2.5 The complaint in ground four was that the learned Registrar did not assess what was due to the appellant correctly. According to the appellant, he was entitled to salaries and allowances until he is properly discharged.

3.0 RESPONDENT'S ARGUMENTS

3.1 In opposing the appeal, Mr. Pasi the respondent's Counsel, submitted in relation to ground one that the learned Registrar was on firm ground when she ruled that the respondent had complied with the judgment of the court. That this finding was supported by the evidence on record and should therefore not be set aside.

3.2 Counsel further contended that this ground of appeal is incompetent as it is based on a finding of fact contrary to the provisions of Section 97 of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia.

3.3. To support his argument on this point, learned Counsel called in aid the cases of ***Barclays Bank of Zambia Ltd vs Mando Chola and Ignatius Mubanga[3]; Zambia Consolidated Copper Mines Limited vs Richard Kangwa & Others[4];*** and ***Amiran Limited vs Robert Bones.[5]***

3.4 Learned Counsel for the respondent further asserted that the argument for damages for breach of contract and mental distress should not be considered as they have just been raised on appeal. The case of ***Mususu Kalenga Building***

Limited vs Richmans Money Lenders Enterprises[6] was cited as authority.

3.5 Pertaining to ground two, Counsel submitted that the court below was on firm ground when it found that the respondent had complied with the judgments of the court. That the appellant in *casu* has not shown any reason why this court should interfere with the findings of fact by the lower court.

3.6 The thrust of the respondent's argument in ground three was that the judgments ordered reinstatement and payment of salary arrears and the respondent paid the appellant in full. There was therefore nothing to assess under this head.

3.7 As regards the fourth and final ground, the respondent's Counsel submitted that the Registrar's mandate is derived from the rules and the judgment of the court. Further, that, the Registrar had no jurisdiction to make any assessment where damages were not awarded. We were accordingly urged to dismiss the appeal with costs.

4.0 HEARING OF THE APPEAL

4.1 When the matter came up for hearing, both parties relied on the heads of argument that were filed. The appellant also made brief oral supplementation on what we have already prefaced.

5.0 CONSIDERATION AND DETERMINATION

5.1 We have thoroughly examined the record of appeal, the submissions of counsel and the authorities cited. We have noted that the grounds of appeal have not been couched in line with the provisions of Order X Rule 9(2) of the Court of Appeal Rules which provides as follows:

> *"A memorandum of appeal 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."*

5.2 The grounds of appeal are not concise and contain arguments and narratives and thus not in accordance with the above cited rule. That notwithstanding we shall proceed to deal with them. From the arguments, we deduce that the appellant has taken issue firstly, with the failure by the respondent to comply with OHSRB formalities for discharge. Secondly, the appellant complains about the failure to be awarded salaries and allowances for the period 2015 to date. This is tied to the third ground which is a repetition of the second ground for the payment of salaries and allowances. And the last ground pertains to the appellant's dissatisfaction of his being removed from the payroll in 2014 and that he was entitled to

assessment. We propose to deal with ground one and thereafter grounds two, three and four compositely.

6.0 GROUND ONE - Failure to comply with OHSRB formalities for discharge (pursuant to Section 39 of Workers Compensation Act)

6.1 In the first ground of appeal, the appellant has faulted the court below for holding that the respondent had complied with the judgments of the High Court (IRD) and the Supreme Court. The appellant has argued that the respondent has failed to comply with the two judgments. He referred the Court to a number of cases on damages for mental distress and inconvenience in an action for breach of contract. Amongst the cited cases are the ***Attorney General vs D.G Mpundu***[1] and ***Swarp Spinning Mills Limited vs Sebastian Chileshe And Others.***[2]

6.2 The arguments raised appears to suggest that the appellant was entitled to damages for mental distress.

6.3 Having reviewed the judgment in the court below in relation to this particular ground of appeal, we are of the view that this ground faults a finding of fact and not law. We have considered the provisions of Section 97 of the Industrial and Labour Relations Act which enacts as follows:

> *"97. Any person aggrieved by any award, declaration, decision or judgment of the Court may appeal to the Supreme Court on any point of law or any point of mixed law and fact."*

6.4 We are also mindful of the guidance of the Supreme Court in relation to the interpretation of Section 97 of the Industrial and Labour Relations Act as stated in the case of ***Barclays Bank Zambia Limited vs Mando Chola and Ignatius Mubanga***[3] where it was held:

> *"Parties can only appeal in terms of s 97 of the Act on a point of law or any point of mixed law and fact. There was evidence to support the finding complained of so we cannot say that it was a finding which was unsupported or which was made on a view of the facts which could not reasonably be entertained. In short, no question of law or of mixed fact and law arose in the ground of appeal advanced. We reject this aspect also."*

6.5 Another case which articulates this principle is that of ***ZCCM vs Richard Kangwa***[2] drawn to our attention by the respondent's Counsel. The case of ***Amiran Limited vs Robert Bones***[3] is yet another illuminating case where the Supreme Court held that decisions emanating from the Industrial Relations Court based on facts alone are incompetent and should be dismissed.

6.6 We are persuaded by the solidity of the arguments advanced by counsel for the respondent that the court's holding on whether the respondent complied with the judgment is a finding of fact and not law. As the aforecited authorities have

guided, we cannot interfere with the judgment of the court below purely on findings of fact. Further the appellant has not advanced any point of law upon which the Judge erred to warrant our interference.

6.7 The net effect of the foregoing is that the first ground of appeal being based on facts alone fails and we accordingly dismiss it.

6.8 The appellant has argued that he was awarded damages by both judgments from the High Court and the Supreme Court. On the question of damages Justice D. Mulenga said the following at page 26 of the record:

> *"It is therefore, this court's considered opinion that the appellant took a very narrow view of the meaning of damages. Both this court's judgment and the Supreme Court ordered the appellant not only to reinstate the respondent to his erstwhile position but to also pay him salary and regular allowances in arrears from the date of medical discharge of employment to date of reinstatement. The said orders are consequential damages which the respondent suffered directly as a result of being out of employment at the instance of the appellant which the court found to be improper."*

6.9 We have examined the Supreme Court judgment. It is clear that the appellant was awarded salary arrears and allowances and no other damages. The salary arrears and allowances

were duly paid and the respondent thus adhered to the judgment.

6.10 We have reviewed the record and have not observed any additional damages awarded in either of two judgments. We find the assertion that damages awarded misconceived. In any event, the argument for damages for mental anguish caused by breach of contract are being raised for the first time in this court. From what we have gleaned from the evidence on record, the aspect for mental distress and anguish was never pleaded in the court below. This argument cannot, therefore, be sustained in this court. We are fortified in our view by the holding of the court in the case of ***Mususu Kalenga Building Limited vs Richmans Money Lenders Enterprises***[4] which precludes a party from raising issues on appeal which were never raised in the court below.

6.11 In light of the foregoing, we find no merit in this ground of appeal and we dismiss it accordingly.

7.0 GROUND TWO - Failure to award salaries and allowances for the period 2015 to date

7.1 In the second ground of appeal, the appellant is aggrieved by the refusal of the learned Registrar to award him salaries and regular allowances for the period 2015 to date. The appellant has argued that he is entitled to an assessment of these salaries and allowances for the period from 2015. This ground

is linked to the third and fourth grounds of appeal and we shall deal with them together.

8.0 GROUND THREE - Accrual of salaries and allowances until settlement or discharge

8.1 The contention in the third ground the argument is that the salaries should continue to accrue with interest at the rate of 9% per annum from the date of judgment until settlement.

9.0 GROUND FOUR - Removal from payroll in 2014, entitled to assessment

9.1 In the fourth ground, the appellant is displeased with the Registrar's refusal to carry out an assessment. He argues that by virtue of the judgment, the Registrar ought to have assessed his salaries and allowances for the period 2015 to date. According to him, the dismissal of the application for assessment was done in bad faith, illegal, null and void. The appellant urged the court to set aside the judgment on assessment.

9.2 The question that arises from the three grounds of appeal is whether or not the lower court misdirected itself by not awarding the appellant salaries and allowances during assessment for the period 2015 to date? This is against the backdrop that the learned Registrar declined to make an assessment of the salaries and allowances for the aforestated period on the basis that the same had been paid to the appellant after the two judgments.

9.3 To put this into context, this is what the learned Registrar stated at pages J6 and J7:

> *"The respondent, as earlier stated had in fact reinstated the complainant and paid him all salaries and allowances due from the date of the purported termination until judgment...*
>
> *It is further clear that the salaries and allowances which accrued up until his letter of reinstatement restoring him to his former position were also paid by the respondent.. I am of the view that this may be an issue to do more with the enforcement of the judgment of the court...*
> *Nevertheless, I cannot find that because of the non-compliance, the Complainant then is still on the respondent's payroll which entitles him to a salary and allowances and proceed to make an assessment from 2015 to date... This is because I am not mandated by the judgment to do so and to make such an assessment would be to import an interpretation outside the scope of the court's judgment."*

9.4 It is plain from the foregoing, that the Registrar found as a fact that the salaries and allowances which accrued up until he was reinstated to his former position had been paid. She saw no basis upon which she could find that the appellant was still on the respondent's payroll entitling him to salaries and allowances. It was for this reason that she indicated that she

could therefore not make an assessment from 2015 to date because she was not mandated by the judgment to do so.

9.5 The record reveals that the appellant was referred to Occupational Health Safety and Research Bureau and the Medical Board where he was declared unfit to work in a secluded area. This was in compliance with Section 39 of the Workers Compensation Act. Following on from this determination, documents were submitted for assessment of the appellant's eligibility for compensation. The Supreme Court in this matter held as follows:

> *"On the basis of the foregoing, we hold that the Industrial Relations Court was on firm ground when it ordered the appellant to pay the respondent all his salaries arrears and regular allowances from the date of the purported termination until the date he is restored in his former position less any monies paid by way of termination benefits."*

9.6 Further the Supreme Court of Zambia upheld the holding of the lower court that:

> *"For purposes of complying with the Act, we direct that the Complainant be examined by the OHSRB in terms of section 35 of the Workers Compensation Act and certify whether or not he is suffering pneumoconiosis of the first, second or third stage or tuberculosis and if so, that he is not fit for work in which case a certificate of fitness may*

not be issued. In the event that the complainant shall be found not to be fit to work and the respondent decides to terminate the contract, the respondent and the OHSRB shall comply with the discharge formalities under the Workers Compensation Act."

9.7 Our understanding of the foregoing is that the Supreme Court ordered firstly, that the appellant was to be paid his salary arrears and regular allowances from the date he was purportedly terminated to the date he was reinstated to his position. Secondly, it was directed that the appellant be re-examined by the OHSRB and certified fit or otherwise for work. The court further guided that where the employee was not found fit to work and the respondent desired to terminate the contract of employment, they were to comply with the discharge formalities under section 39 of the Workers Compensation Act.

9.8 What transpired in this case is that the appellant was reinstated to his former position and in compliance with the court's directive, the respondent paid the salary arrears and regular allowances from the date of termination to the date of reinstatement. Further, the respondent did send the appellant to be reexamined by the OHRSB in terms of section 35 of the Workers Compensation Act. Upon being examined, he was found to be unfit for work and the respondent consequently

decided to terminate the contract of employment. What is important to note is that the reinstatement that the Supreme Court had ordered was conditional upon the appellant undergoing a full medical examination and being certified fit to work. Therefore, when the appellant was found unfit by the OHSRB and the Medical Board, they had complied with the provisions under Section 39 of the Workers Compensation Act.

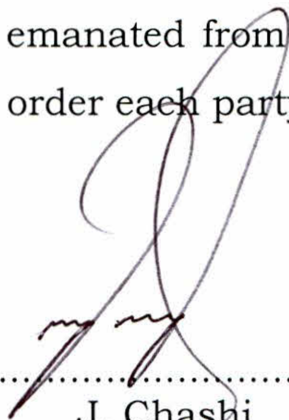
9.9 We are, therefore, of the considered view that the respondent having complied with the judgment of the Supreme Court and having paid the salary arrears, the learned Deputy Registrar cannot be faulted for declining to award salaries and regular allowances during assessment for the period 2015. In light of what we have stated in the preceding paragraphs, she was on firm ground by holding that she had no jurisdiction or mandate to make an assessment on damages not awarded by the court. Her mandate was restricted to damages which had been awarded to be assessed.

9.11 The claims therefore in the second, third and fourth ground of appeal which revolve around the claim for payment of salaries and allowances from 2015 and for the appellant to be maintained on the payroll have no legal basis. We accordingly find no merit in the second, third and fourth grounds of appeal and dismiss them accordingly.

10.0 CONCLUSION

10.1 The net result is that we have found the entire appeal to be bereft of merit and we accordingly dismiss it.

10.2 This matter having emanated from the Labour and Industrial Relations Court, we order each party to bear their own costs.



J. Chashi
COURT OF APPEAL JUDGE

B. M. Majula
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