

**IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**APPEAL No. 97/2021**

**BETWEEN:**

**INDO ZAMBIA BANK LIMITED**

**AND**

**CECILIA LUKUTATI BYARUHANGA**



**RESPONDENT**

**CORAM: CHASHI, MAJULA AND NGULUBE, JJA.**  
**On 16<sup>th</sup> February, 2022 and 8<sup>th</sup> April, 2022.**

**For the Appellant:** *N. Nchito, SC and C. Hamwela of Messrs Nchito & Nchito  
with M. Siansumo of Messrs Malambo & Company*

**For the Respondent:** *S.L. Chisulo, SC Messrs Sam Chisulo & Company with  
D. Musonda of Messrs Mulilansolo and Company*

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## **J U D G M E N T**

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**NGULUBE, JA**, delivered the Judgment of the Court.

**Cases referred to:**

1. *Access Bank Zambia Limited vs Group Five/Zcon Business Park Joint Venture (Suing as a firm), SCZ/8/52 of 2014*
2. *Ram Auerbach vs Alex Kafwata, SCZ Appeal Number 65 of 2000*
3. *NFC Mining Plc vs Techpro (Zambia) Limited (2009) Z.R.236*
4. *Fruit and Veg City Holding (PTY) Limited vs Martin Simumba, SCZ Appeal Number 10/2012*

5. *Corpus Legal Practitioners vs Mwanadani Holdings Limited*, SCZ Judgment Number 50 of 2014
6. *Charles Kajimanga (Hon. Judge) vs Marmetus Chilemya*, SCZ Appeal Number 50/2014
7. *Lloyd Bank Limited vs Bundy* (1975) QB 326
8. *YB and F Transport Limited vs Supersonic Motors Limited* (2000) Z.R.22
9. *Kapoko vs The People* (2016/CC/0023)
10. *Twampane Mining Cooperative Society Limited vs E and M Storti Mining Limited* SCZ Judgment Number 20 of 2017
11. *Finance Bank Zambia Limited and Another vs Simataa Simataa*, Selected Judgment Number 21 of 2017
12. *OTK Limited vs Amanita Zambia Limited, Diego Gan Mawa Casilli, Amanita Premium Oils Limited and Amanita Milling Limited*, (2005/HPC/0199) (2011) ZMHC, 23

**Legislation and other works referred to:**

1. *The Rules of the Supreme Court, 1965 (White Book) RSC, Volume 1, 1999 Edition*

## **1.0 INTRODUCTION**

- 1.1 This is an appeal against a Ruling of the High Court delivered by Banda-Bobo, J (as she then was) on 2<sup>nd</sup> March, 2021 in which the court allowed the respondent to produce a document so that the court could consider all the matters before it in arriving at a just decision. This was inspite of the fact that pleadings had closed and that the matter had proceeded to trial.

1.2 The court allowed the production of the document that the respondent desired to have produced as the application was made before the trial was concluded. The court formed the view that the document was relevant to the respondent's case and would assist the court in arriving at a just decision. It granted leave and allowed the production of the document as a supplementary document for the respondent, who was the plaintiff in the lower court.

## **2.0 BACKGROUND**

2.1 The brief background to the matter is that the respondent commenced a matter by way of writ of summons and statement of claim on 24<sup>th</sup> February, 2017, seeking a declaration that under the terms and conditions of service for management staff introduced by the appellant, effective from 1<sup>st</sup> January, 1997, the respondent was, as per Clause 7, entitled to gratuity as prescribed, upon termination of employment.

2.2 The respondent further sought a declaration that the introduction of revised terms and conditions of service for staff in grades MS6 to MS11 by way of the appellant's internal memorandum dated 31<sup>st</sup> December, 2012 was a unilateral

decision by the appellant and that it be deemed that the appellant terminated the respondent's employment based on the 1997 terms and conditions of service.

2.3 The respondent also sought a declaration that the omission of the provisions relating to gratuity in respect of which the respondent had already accrued irrevocable rights from the 2013 terms and condition of service was unlawful. This was because it offered neither reasonable notification of such omission nor explanation of reasons for an omission of such fundamental terms and conditions of employment, which according to the respondent, was wrongful, unlawful and deceitful.

2.4 The respondent sought an order that she be paid gratuity accrued from the date of employment to 1<sup>st</sup> January, 2013, to be calculated on the basis and in accordance with the provisions of Clause 7 of the terms and conditions of service for management staff of 1997. She also sought interest of the total sum payable as gratuity at the average short term bank deposit rate from the date of the writ of summons to the Judgment and

at the Bank of Zambia lending rate applicable from the day after judgment is delivered, until full payment.

- 2.5 In the statement of claim, the respondent averred that by an internal memorandum dated 31<sup>st</sup> December, 2012 and issued by the appellant's chief manager, Human Resource to all staff in grade MS6 to MS11, the appellant introduced revised terms and conditions of service which it categorically stated would be effective on 1<sup>st</sup> January, 2013.
- 2.6 She averred that the conditions of service which were introduced were detrimental to the respondent's accrued rights to gratuity as the new conditions omitted the provisions of Clause 7 of the terms and conditions of 1997.
- 2.7 The appellant filed its defence and stated that in the 2013 revised conditions of service, the respondent was not entitled to gratuity and stated that there was interaction between management, representatives and the Board in all the revisions. It was submitted that the respondent was given a copy of the revised conditions of service which she consented to and signed, indicating that she understood and accepted the change.

- 2.8 It was averred that the respondent approached the chief manager, Human Resources to seek clarity on four items which were changed by the internal memorandum of 8<sup>th</sup> January, 2013.
- 2.9 The parties exchanged pleadings in the usual way and the matter proceeded to trial with the respondent giving evidence as PW1. Under cross-examination by the appellant's counsel, in relation to the respondent's promotion as branch manager, the witness recalled that before she accepted the letter of promotion, she had endorsed her signature on a copy of a letter which informed her of the said promotion. She stated that the said letter had revised amendments which were effective from 1<sup>st</sup> January, 2014.
- 2.10 The respondent stated that at the commencement of the action, the document in issue was only in the possession of the appellant. She averred that the appellant filed the list and bundle of documents but failed to include the important document which had specific amendments from the previous revised terms and conditions of service. She prayed for leave to

produce the document which the appellant had intended to conceal from the court.

2.11 The respondent's chief Human Resource manager, Christopher Wakun'guma opposed the application and was of the position that if the respondent was aware of the document, she should have requested for its production. Mr Wakunguma deposed that the respondent had already given evidence and that pleadings had closed.

2.12 He stated that the respondent should be stopped from producing documents at this stage of the proceedings. It was averred that inspection of the documents was conducted at the request of the respondent who should have asked for a better list of documents after inspection. It was contended that the procedure proposed by the respondent to produce documents at a late stage would not be in the interest of justice.

2.13 On behalf of the respondent, Mr Chisulo, SC submitted that the High Court has jurisdiction to apply common law principles and rules of equity in deciding all matters. State Counsel contended that the appellant filed its bundles without discovery. The court was urged to allow the application so that the document sought

be admitted into evidence and the parties can then address its contents in the interest of justice.

2.14 Counsel for the appellant submitted that the respondent should have made an application for better list of documents as opposed to waiting for trial to proceed. It was contended that the respondent wanted the document to be produced so that she could revive her case, which is against the rules of procedure.

2.15 The court considered the affidavit evidence and the skeleton arguments as well as oral submissions. The lower court opined that the document which the respondent desires to have produced has an effect on the respondent's case relating to the conditions of service. The court was of the view that notwithstanding the fact that pleadings had closed and that the matter had proceeded to trial, with the respondent having testified, she would allow the production of the document as it would assist the court in arriving at a just decision. The lower court accordingly granted leave to the respondent and allowed the production of the document as a supplementary document.

### **3.0 THE APPEAL**

3.1 The appellant was dissatisfied with the Ruling of the lower court and appealed against the said ruling advancing four grounds of appeal couched as follows-

- 1. The court below erred in law by allowing the production of the documents despite the court accepting that the same does not aid in the process of fair, just, certain and even handed adjudication and thereby prejudicing the appellant.***
- 2. The court erred both in law and fact in admitting the documents when the same were in violation of the rules and procedure.***
- 3. The court below erred both in law and fact considering the lower power of bargain which has no application the process of production of document thereby taking wrong considerations.***
- 4. The court below erred both in law and fact in awarding costs to the respondent instead of the appellant, despite finding the respondent did not use the procedure when discovery and inspection of documents had been conducted.***

### **4.0 APPELLANT'S CONTENTIONS**

4.1 The appellant argued grounds one and two together because they are interrelated. The court was referred to page 23 of the record of appeal, where the lower court stated that-

***"It is clear that the plaintiff did not make use of this procedure when discovery and inspection of documents***

*had been conducted at the plaintiff's lawyers office premises. At this juncture the plaintiff had every opportunity to request for the document she now seeks to produce. This is in my view on exhibition of scant respect for rules of procedure. This is not acceptable and in line with the cases cited above does not in any way aid in making the process of adjudication fair, just, certain and even handed for both parties, especially coming from state counsel."*

- 4.2 The court was referred to **Order 24 Rule 3(8) of the White Book, 1999 edition** which provides that-

*"An order may be made for a further and list of documents where it appears (a) from the list itself, or (b) from the documents referred to in it or (c) from admissions made either in the pleadings of the party making discovery or otherwise, that the party making discovery has or has had other relevant documents in his possession, custody or power."*

- 4.3 The case of **Access Bank (Zambia Limited vs Group Five/Zcon Business Park Joint Venture (Suing as a firm)<sup>1</sup>** was referred to where the Supreme Court stated that-

*"We have in many cases consistently held the view that It is desirable for matters to be determined on the merits and in finality rather than on technicalities and piece meal. The cases of Stanley Mwambazi vs Morester Farms Limited vs Jackson are authority on this position. We reaffirm this position. Matters should as much as possible be*

***determined on their merits rather than being disposed on technical and procedural points.”***

4.4 Counsel also referred to the case of ***Ram Auerbach vs Alex Kafwata***<sup>2</sup> where the Supreme Court stated that-

***“Litigants default at their own peril since any rights available as of course to a non-defaulter are usually jeopardized.”***

4.5 The court was further referred to the case of ***NFC Mining Plc vs Techpro (Zambia) Limited***<sup>3</sup> where the Supreme Court stated that-

***“Rules of the court are intended to assist in the proper and ordinary administration of justice and as such must be strictly followed.”***

4.6 It was contended that the lower court, having found that the respondent's approach was against fair, certain and even handed adjudication for both parties erred to allow the respondent to produce the document she desired to produce. The court's attention was drawn to the case of ***Fruit and Veg City Holding (PTY) Limited vs Martin Simumba***<sup>4</sup> where the court stated that-

***“The question that arises is whether it was competent for him to do so. Our considered response to this question is that it was not competent to proceed in the manner done.”***

- 4.7 It was argued that the respondent should have asked for a further and better list and that the lower court should have ordered an inspection of documents which it did not do, but merely ordered that the document be admitted.
- 4.8 According to Counsel, the lower court erred because this was in violation of the Rules which provide for the steps to be taken by a party who believes that the other party has a document in its possession which it has not produced. We were urged to allow grounds one and two of the appeal.
- 4.9 Turning to ground three, it was submitted that the lower court violated the equality of parties appearing before it when it took a posture that appeared to tilt the rules towards one party at the expense of the other.
- 4.10 Counsel contended that the lower court did not elaborate how the respondent would be prejudiced and further failed to consider whether the appellant would be prejudiced in admitting the document at cross-examination stage. It was contended that by referring to the bargaining power of the parties, the lower court made wrong considerations and then erroneously admitted the document in issue into evidence. We

were urged to reverse the decision of the lower court for the aforestated reasons.

4.11 In arguing ground four, it was submitted that the lower court granted costs to the respondent for the application. Referring to the case of ***Corpus Legal Practitioners vs Mwanadani Holdings Limited***<sup>5</sup>, it was submitted that the lower court misdirected itself when it awarded costs of the application to the respondent.

4.12 It was argued that the application was necessitated by the omission of the respondent and that she should not have been awarded costs but that the same should have been awarded to the appellant. This is because the respondent was in breach of the rules. We were urged to allow ground four of the appeal and allow the appeal in its entirety because it is meritorious.

## **5.0 RESPONDENT'S CONTENTIONS**

5.1 Responding to grounds one and two, it was submitted on behalf of the respondent that the respondent filed its list of documents on 1<sup>st</sup> August, 2017 in accordance with the orders for directions that were issued on 26<sup>th</sup> May, 2017. It was submitted that the appellant's Advocates filed their list of documents and bundle of documents on 27<sup>th</sup> June, 2017, without the respondent's

knowledge, before conducting discovery and inspection, contrary to the usual procedure and against the orders for directions that were issued by the court.

5.2 It was further submitted that the Court that was hearing the matter at the time, Hon. Lady Justice Mwamba Chanda then issued an order for inspection of documents, which was done at the respondent's Advocates' chambers on 28<sup>th</sup> September, 2017.

5.3 It was contended that the respondent believed that the appellant would disclose all the documents in its custody that were of evidential value but the appellant concealed the document in issue which is important to this case, as it intended to mislead the court.

5.4 It was argued that the respondent had earlier discovered that the appellant intended to conceal an inter-office memo dated 8<sup>th</sup> January, 2013 that was shown to her by the appellant's chief manager Human Resource when he showed her the clauses of the terms and conditions of service that had been revised, which was omitted in the appellant's list and Bundle of Documents.

5.5 It was contended by the respondent's Advocates that the appellant and its Advocates concealed the documents entitled

“Schedule of Changes of The Terms and Conditions of Service” which was issued by the chief manager-Human Resource, with the intention to misled the trial court regarding the revised conditions of service in relation to officers in Grades MS11 – MS6, as at 1<sup>st</sup> January, 2014.

5.6 It was argued that the appellant neglected its duty, during inspection to bring to the attention of the trial court and the respondent all documents in its custody, power and possession that would affect the outcome of the case before the court.

5.7 It was submitted that the lower court was on firm ground when it allowed the production of the document. The case of **Charles Kajimanga (Hon. Judge) vs Marmetus Chilemya<sup>6</sup>**, was referred to when the Supreme Court stated that-

***“An objection to a document must be made timely to allow the opposing party to respond and, if possible to make any relevant application. The objection cannot be validly made after the trial of the matter has closed.”***

5.8 We were urged to uphold the lower court’s Ruling because the respondent’s application was made during trial and before cross-examination of the first witness was closed. According to

the respondent's Advocates, there is no dispute on the existence and authenticity of the document in issue.

5.9 This court was urged to draw its own inferences from facts or dispute and the documents on record, and make its decision based on its own inferences. We were urged to uphold the lower court's Ruling to allow the meeting of the ends of justice. The court was urged to dismiss grounds one and two of the appeal.

5.10 Responding to ground three, it was submitted that the decision of the court being challenged by the appellant was made in the interest of justice. The case of **Lloyd Bank Limited vs Bundy**<sup>7</sup> was referred to, where the court stated that-

***“ . . . the (English) law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair.... or transfers property for a consideration which is grossly inadequate. When his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue inference or pressure brought to bear on him by or for the benefit of the other.”***

5.11 It was contended that the appellant as the respondent's employer withheld an important document, displaying that the respondent had a weaker bargaining power as the concealed

document was authored by the appellant. We were urged to dismiss ground three for lack of merit.

5.12 Responding to ground four, it was submitted that the respondent's application for the production of the concealed document was brought about as a result of the conduct of the appellant, to the detriment of the respondent who was disadvantaged.

5.13 The court's attention was drawn to the case of ***YB and F Transport Limited vs Supersonic Motors Limited***<sup>8</sup> where the Supreme Court held that-

***"The general principle is that costs follow the event, in other words a successful party should normally not be deprived of the costs, unless the successful party did something wrong in the action or in the conduct of it."***

5.14 It was submitted that the lower court was on firm ground when it awarded costs to the respondent as the application before court was necessitated by the appellant's neglect to disclose all the material documents in this matter. The court was urged to dismiss the appeal for lack of merit and uphold the decision of the lower court.

5.15 The appellant filed heads of argument in reply to those of the respondent. Responding to the respondent's contentions in ground one and two, it was submitted that the respondent only filed list of documents on 1<sup>st</sup> August, 2017. The cases of **Kapoko vs The People**<sup>9</sup> and **Twampane Mining Cooperative Society Limited vs E and M Storti Mining Limited**<sup>10</sup> were referred to on the issue of Rules of Court being obeyed, with parties who disregard rules doing so at their own peril.

5.16 Further, the case of **Finance Bank Zambia Limited and Another vs Simataa Simataa**<sup>11</sup>, was referred to, where the Supreme Court stated that-

***"In an adversarial system of justice such as we have in Zambia, being a witness of one party to a dispute may often entail siding with that party in the dispute against the other."***

5.17 It was submitted that the issue of the production of the document by the respondent was an afterthought which was referred to by the respondent during cross-examination. Counsel also contended that the appellant did not conceal any documents counsel contended that the application of law and

equity is for both parties who must abide to the procedure of the court.

5.18 Counsel for the appellant submitted that all the documents which were produced by the respondent were in the possession of the respondent and she sought to produce them after she was cross-examined. It was argued that the issue of concealment does not arise as the respondent had the document in her possession and then made an application to have it produced and admitted.

5.19 Responding to ground three it was submitted that the document subject to this appeal was produced by the respondent and that the same was an afterthought. Counsel argued that the lower court allowed the application which had no footing in basis in relation to Rules of Procedure.

5.20 Under ground four, the appellant submitted that costs follow the event. It was submitted by counsel for the appellant that the respondent should have been condemned in costs and we were urged to find for the appellant, in the interest of justice.

## **6.0 OUR CONSIDERATION AND DECISION**

- 6.1 We have carefully considered the record, the arguments and the Ruling from the court below as well as the grounds of appeal, upon which it is sought to impugn the decision of the court below. It is clear to us that the dispute revolves around the decision of the lower court to allow the respondent produce a document which she opined is relevant to the determination of the case and ought to be produced in the interest of justice.
- 6.2 The argument is elementary as it seeks to enlist our support of the view that the lower court erred in law and fact when it allowed the production of a document when, according to the appellant, it was in violation of the rules of procedure.
- 6.3 The issue that we must determine is whether it is necessary and in the interests of justice for the court to order the production of document which the respondent opines is important and must be considered by the court for the just and expedient delivery of the Justice.
- 6.4 We will deal with grounds one and two together because they have raised related issues. We will then deal with the third and fourth grounds of appeal.

6.5 The kernel of the arguments by Counsel for the appellant, on the first and second grounds of appeal is that the lower court erred in law and fact when it ordered the admission of the document in issue, against the rules of procedure. It was contended that the respondent should have asked for a further and better list of documents. The issue raised in the first and second grounds of appeal is whether the learned trial Judge properly directed herself when she allowed the production of the document in issue during cross-examination. The respondent's counsel submitted that the respondent filed her list of documents on 1<sup>st</sup> August, 2017, while the appellant's Advocates filed their list of documents and bundle of documents on 27<sup>th</sup> June, 2017 and that this was prior to conducting discovery and inspection.

6.6 In the case of ***OTK Limited vs Amanita Zambia Limited, Diego Gan Mawa Casilli, Amanita Premium Oils Limited and Amanita Milling Limited<sup>12</sup>***, Mutuna J (as he then was) emphasized the importance of discovery and inspection of documents. Counsel for the respondent contend that the appellant concealed the document in issue from the respondent. From the facts of this

case, we are able to conclude that the appellant did not include the relevant document during discovery and inspection when it was clear that the said document was relevant to the respondent's case.

- 6.7 In our considered view, the learned trial Judge had jurisdiction and took control of the proceedings when she ordered the production of the document in issue which is critical for the trial court to arrive at a fair and just decision in the matter.
- 6.8 We are of the firm view that it was proper for the lower court to order the production of the document. We note that there was discovery and inspection of documents between the parties but the crucial document was not included on the appellant's list of documents. Notwithstanding that the respondent's application to produce the document was made well after discovery and inspection and after the trial had commenced, our considered view is that the lower court was on firm ground when it ordered the production of the document because it is a crucial document and is necessary for the fair determination of the matter. We do not find merit in grounds one and two of the appeal and they accordingly fail.

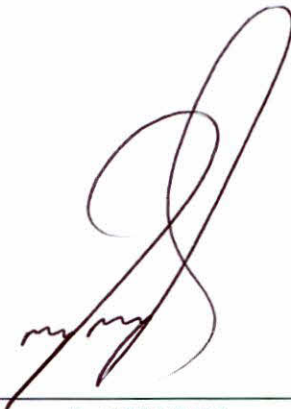
6.9 Coming to the third ground of appeal, the gist of the argument by Counsel for the appellant is that the learned trial Judge misdirected herself when she took a posture that appeared to tilt towards the respondent at the expense of the appellant, when the lower court stated that the respondent had a lower bargaining power than the appellant. The court then granted leave to allow the production of the document sought as a supplementary document.

6.10 In our view, the question for our decision on the third ground of appeal is whether the lower court properly directed itself when it stated that the respondent had a lower bargaining power and that it would be prejudiced to the respondent if the application was denied. We are of the view that the appellant, as the respondent's employer is in a stronger position than that of the respondent who was an employee. We therefore agree with the lower court that the respondent was in a weaker position and it was therefore in order for the lower court to allow the production of the document in issue in the interest of justice.

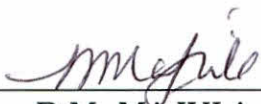
6.11 Ground four is that the lower court erred in law and fact when it granted costs to the respondent as the application was

necessitated by the omission of the respondent. The view that we take is that had the appellant included the document in issue on its list of documents the respondent would not have made the application to produce the document in issue. The said application was made when the respondent realized that it was not included, and was necessary to the respondent's case. Ground four, therefore, is dismissed for lack of merit.

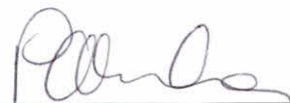
6.12 The appeal has failed on all four grounds and we accordingly dismiss it with costs to the respondent, to be taxed in default of agreement. The matter is referred back to the High Court for continued trial.



J. CHASHI  
**COURT OF APPEAL JUDGE**



B.M. MAJULA  
**COURT OF APPEAL JUDGE**



P.C.M. NGULUBE  
**COURT OF APPEAL JUDGE**