IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 13/2021**
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN

ZAMBIA NATIONAL COMMERCIAL BANK PLC **APPELLANT**

AND

ERNESTINA SAKALA & 62 OTHERS **RESPONDENT**

CORAM: Musonda, DCJ, Hamaundu and Kabuka, JJS
On 18th January, 2022 and 9th February, 2023

For the Appellant: Mr M Nchito, S.C, and Mr M Chakoleka of Mulenga Mundashi Legal Practioners, Messrs Nchito and Nchito, Mr M. Siamoondo, Legal Counsel

For the respondent: Mr M. Lisimba, Messrs Mambwe, Siwila and Lisimba, advocates

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Attorney General v Nachizi Phiri (2014) 1 ZR 302**
2. **National Milling Limited v Simataa and others (2000) ZR 91**
3. **Zambia Oxygen Limited and another v Chisakula & others (2000) ZR 27**
4. **Mwamba v Nthange and 2 others, SCZ No. 5 of 2013**
5. **Colgate Palmolive(Z)Inc. v Able Shemu Chuka and 110 others, SCZ 181 of 2005**
6. **Mundia v Sentor Motors Limited (1982) ZR 66**
7. **Mazoka and 2 Others v Mwanawasa and Another (2005) ZR 138**
8. **James Mankwa Zulu and Others v Chilanga Cement, Appeal No.12 of 2004**
9. **Kabwe v BP(Zambia) Ltd (1995/1997) ZR 218**

10. Marriot v Oxford and District Co-operative Society Ltd (No.2)[1970] 1QB 186

Works referred to:
Selwyn's Law of Employment: 14th Edition: Norman Selwyn: Oxford University Press Inc: New York: 2006

1.0 INTRODUCTION

1.1 This appeal is against the decision of the Court of Appeal. It comes to us as a second appeal from a decision of the High Court. There are three grounds on which the appeal is brought, and they read as follows:

> **"1. The Court of Appeal erred in law and in fact when it held that the High Court judge cannot be faulted for finding that there was a unilateral variation to conditions of service to the detriment of the respondents despite the court finding as a fact that the variation of the conditions of service was to the benefit of the respondents.**
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> **2. The Court of Appeal erred in law and in fact when it held that the High Court judge cannot be faulted for ordering that the respondent's terminal benefits be calculated using the multiplying factor in the old conditions and the gross salary in the new conditions.**
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> **3. The Court of Appeal erred in law and in fact when it held that the documents signed by the respondents at the point of exit from the appellant did not amount to consent when no consent was required to alter the respondents'**

conditions of service to their benefit and the said documents stood as separate contracts regarding the computation of the separation package".

2.0 THE FACTS AND BACKGROUND OF THE CASE

2.1 The respondents are former employees of the appellant bank, and held management positions in the appellant's structure. They left employment either by way of early retirement or through the voluntary separation scheme. To be precise, four of the sixty-three respondents exited through early retirement while the rest of the respondents did so via the voluntary separation scheme.

2.2 In 2011, while all the respondents were still in employment, the appellant released a circular to all members of staff. The circular which was dated the 25th February informed the members of staff that the appellant's Board of Directors had approved a review of the formula for the computation of the voluntary separation scheme. The review changed the multiplier in the formula from monthly basic pay to monthly gross pay; that is, basic pay plus housing and fuel allowances, in the case of those

employees in management, like the respondents. The multiplier in the formula however was reviewed downwards. Hence, in the case of the respondents, the formula looked as follows:

> **"(i) 10 years service = 0.83 of monthly gross pay for each completed year of service**
>
> **(ii) Over 10 years up to 20 years service =1.11 of monthly gross pay for each completed year of service**
>
> **(iii) Over 20 years service =1.40 of monthly gross pay for each completed year of service".**

2.3 The appellant then set out restrictions regarding eligibility to the scheme. To qualify, an employee must have served a minimum of 10 years; he or she must have been of the age of 51 years or below; and he or she must have had a good disciplinary record. The circular went on to inform the members of staff that the window for application to the Voluntary Separation Scheme had opened as of 28th February, 2011, and was to close on 4th March, 2011. The circular invited members of staff who wished to be separated through that scheme to lodge their

applications. None of the respondents herein took up that option at the time.

2.4 As noted above, the factor in the formula that existed prior to this review was higher. For example, for the longest serving employees the factor was 2.5. However, it was to be applied on the multiplier of basic pay only. All the respondents had served for 20 years or more, which meant that they were entitled to the highest factor in the formula.

2.5 There was evidence from the respondents at the hearing that they saw the circular but did not protest the review. The respondents continued working.

2.6 In 2014, the appellant reviewed the *ex-gratia* payment that the appellant was using to give to employees who retired either normally or on medical grounds, by; first, abolishing the *ex-gratia* payment with respect to all employees who were employed after 2013; secondly, reviewing the factor in the formula downwards from 1 to 0.58, while increasing the multiplier from monthly basic pay to monthly gross pay. On 10th April, 2015, a letter from concerned employees/staff was written to the Managing Director,

raising concern on a number of issues, one of which was the reduction of the factor in the formula for *ex-gratia* payment from 1 to 0.58. However, nothing came out of that intervention, and the employees continued to work. The record of appeal does not have the list of names of those employees who penned this letter. Hence it is not known whether four of the respondents herein who fell in that category were among them.

2.7 We should mention here that, in the same year 2015, there were amendments to statutes that deal with pension; the retirement age was reviewed from 55 years to 60 years. There was a provision in the statute for an employee to apply for early retirement at 55 years, and also to apply for late retirement in order to go up to 65 years. The four respondents herein who went on retirement were at this time approaching the age of 55 years. Believing that the retirement age was now 60 years, each one of them applied to the appellant in 2016 to go on early retirement at 55 years of age, citing the amended law as their basis for making those applications. The appellant allowed them to

proceed on early retirement. They were given *ex-gratia* payment at the factor of 0.58 of gross monthly pay for each year served, in addition to the normal retirement benefits.

2.8 There was evidence at the hearing that, in 2016, the appellant again opened a window for those who wished to leave employment by way of the Voluntary Separation Scheme. There was further evidence, both oral and documentary, that all the respondents who left on voluntary separation opted to apply during this window. Their applications were accepted by the appellant. At the bottom of each acceptance letter, the appellant included a portion for each applicant to sign, indicating that they had accepted the terms and conditions of their separation as regards the formula and principle applied towards the computation of the terminal benefits, and that such applicant would have no further claims against the appellant arising out of such payment.

2.9 On 30th June, 2017, the respondents commenced an action in the Industrial Relations Division of the High Court, on a complaint which stated that the appellant

retired the respondents with inadequate terminal benefits; and that the appellant had unilaterally changed the conditions of service and forced the complainants to consent to the change. The respondents sought an order that they be paid terminal benefits which were calculated inclusive of allowances; and an order that the factor in the formula should be the one that was applicable during their tenure of employment.

2.10 At the hearing it became clear that the respondents were in three groups: first, there was that group of four employees that we have mentioned who left on early retirement. Secondly, there was a group of five employees who, although they were part of the group that left on the Voluntary Separation Scheme in 2016 and 2017, claimed that they had not consented to the earlier reduction of the factor from 4.5 as reflected in the 1996 conditions of service to 2.5 in the 1999 conditions of service, which was later further reduced to 1.4 in 2011. Their demand was that their benefits be calculated on the factor of 4.5. Thirdly, there was a group of fifty-four employees who

claimed that, although they had consented to the reduction of the factor from 4.5 to 2.5 in 1999, they did not consent to its further reduction to 1.4 in 2011. Their demand was that their benefits be calculated on the factor of 2.5, but applied on the gross monthly pay.

2.11 The three groups presented their collective testimony through one representative witness for each group. The witness, Henry Musheka (CW1), who was complainant number 9, testified on behalf of the group that exited through early retirement. His testimony was that the group's grievance before the court was that, since they had left before the retirement age of 60, and the appellant's conditions of service did not contain a provision for early retirement, they fell under the Voluntary Separation Scheme and should have been paid in accordance with that scheme. According to the witness, the group's demand was that they be paid accordingly.

2.12 The second witness, Jordan Maliti (CW2), who was complainant number 36, testified on behalf of the group of five. His testimony, and their demand, was as we have

stated above, that is that they wanted to be paid on the factor 4.5

2.13 The third witness, Samuel Ngosa Chabuka (CW3), who was complainant number 56, testified on behalf of the group of fifty-four. His testimony was that the group did not consent to the reduction of the factor to 1.4, and therefore wanted to be paid on the factor of 2.5.

2.14 For its part, the appellant called one witness who testified that, by the amendment of the formular in 2011, the separation package improved overally from what it would have been under the formula of 1999.

2.15 In addition to the testimony of the appellant's witness, there was testimony from Jordan Maliti (CW2) that the separation package, on the whole, improved with the review of 2011.

2.16 In his judgment, the learned trial judge held that the reduction of the factor from 1 to 0.58, in the case of retirement, in 2014 and from 2.5 to 1.4, in the case of voluntary separation, in 2011, was without the consent of the employees in their respective categories. In so holding,

the judge rejected the forms of consent that the employees had signed upon receipt of their benefits on the ground that consent which is obtained in such circumstances is frowned upon, and is no consent at all.

2.17 Applying some of our decisions such as **Attorney General v Nachizi Phiri**[1] and **National Milling Limited v Simataa and Others**[2] in which we have held that where an employer varies, in an adverse way, basic conditions of service without the consent of the employee then the contract terminates, the judge held that the benefits ought to be re-calculated using the multiplier of 1, in the case of the retired group, and 2.5, in the case of the other two groups.

2.18 We should point out that in his judgment, the trial judge did not address the only issue that the group of four who left on early retirement raised in their testimony at the hearing as we noted above. Similarly, the trial judge omitted to address the issue raised by the group of five who claimed that they had not consented to the reduction of the factor from 4.5 to 2.4 in 1999.

2.19 The appellant appealed to the Court of Appeal, which court, however, upheld the High Court's judgment.

3.0 THE APPPEAL TO THIS COURT AND THE ARGUMENTS

3.1 For the appellant

3.1.1 On behalf of the appellant, learned State Counsel, Mr Nchito, submits that there is no dispute that the appellant did not seek the express consent of the respondents when it varied the payment packages in 2011 and 2014. However, learned counsel argues that this is because the variation resulted in a package which was superior to that which the respondents would have received had the 1999 conditions of service been applied. Counsel argues further that, on the authority of cases such as that of **Zambia Oxygen Limited and Another v Chisakula and Others**[3] and that of **National Milling Limited v Simataa and Others**[2], the consent of the employee is only required when the variation is to the detriment of the employee. It is Mr Nchito's argument that, in this case, although the factor was reduced, the package, however, resulted in an increase because the factor was now

being applied on the gross pay, unlike in the case of the 1999 conditions of service where the factor was applied on the basic pay only. We have been referred to the testimony of two witnesses, Jordan Maliti (CW2), one of the respondents, and Mobbray Mwewa (DW1), a witness for the appellant, which was that the package had actually improved with the variation in the 2011 conditions of service. Mr Nchito points out that, while the Court of Appeal did acknowledge the existence of that evidence, it still went ahead to uphold the High Court's decision that the appellant had revised the conditions of service to the detriment of the respondents. According to learned counsel, this was baffling. It is therefore learned counsel's argument that the case of **Attorney General v Nachizi Phiri & Others**[1] would not be of much application here.

3.1.2 In the second ground of appeal, learned State Counsel submits that, even assuming that the variation was indeed to the detriment of the respondents, the effect of that variation should have been to terminate their contracts of employment so that their benefits were to be calculated on

the 1999 conditions of service; and not to apply one provision in the 2011 conditions of service and another in the 1999 conditions of service, as the High Court did in this case. Mr Nchito amplifies this submission by pointing out the errors that the trial judge fell into in this regard. First, he argues that the trial judge, by proceeding as he did, re-wrote the contract between the parties. On this point, learned State Counsel has emphasized the common law principle of the sanctity of contract, and has submitted that once parties enter into contracts, such contracts must not be interfered with by the courts, or parliament; and must be respected, upheld and enforced; particularly, by the courts. For this proposition, we have been referred to cases such as **Mwamba v Nthenge and 2 Others**[4] and **Colgate Palmolive(Z)Inc. v Able Shemu Chuka and 110 others**[5].

3.1.3 Secondly, Mr Nchito submits that the claim which the respondents presented to the court did not include any pleading that the court should combine the factor from the 1999 conditions of service with the gross pay from the 2011 conditions of service. We have been referred to cases such

as **Mundia v Sentor Motors Limited**[6] and **Mazoka and 2 Others v Mwanawasa and Another**[7], which explain the function of pleadings; and also emphasize the binding effect of those pleadings on the parties, and the Court.

3.2 For the respondents

3.2.1 Mr Lisimba, learned counsel for the respondents, argues that the factor and the monthly pay are to be regarded as two stand alone conditions of service. Learned counsel submits that the appellant should not be heard to claim that it improved the monthly pay to include allowances in 2011 because, at that time, the law had already made it mandatory for employers to include allowances when paying terminal benefits. For this proposition, Mr Lisimba has referred us to our decision in the case of **James Mankwa Zulu and Others v Chilanga Cement**[8]. He then argues that, in the real sense, the only variation that the appellant made to the payment of terminal benefits in 2011 and 2014 was a reduction in the factor from 2.5 to 1.4 and from 1 to 0.58 respectively; which reduction the respondents did not consent to. On that ground, Mr Lisimba submits, the Court

of Appeal cannot be faulted for upholding the trial judge's decision that the appellant reduced the conditions of service without the consent of the respondents.

3.2.2 To the appellant's argument that the trial judge ordered a re-calculation of the terminal benefits using two sets of conditions of service, thereby re-writing the contract between the parties, Mr Lisimba essentially maintains the same argument, which can briefly be summarised thus; that because the appellant was already obliged by law to include allowances to the salary in calculating terminal benefits, the only condition of service that was varied, and to the detriment of the appellants for that matter, was the factor in the formula. Hence, what the trial court did was to merely order that the benefits be re-calculated on the factor which was applicable as at 1999, since the gross pay cannot be said to have been a new creation of the 2011 conditions of service. In the circumstances, argues Mr Lisimba, the trial court did not re-write the parties' contract, or cherry-pick the conditions of service between the two sets of 1999 and 2011.

4.0 OUR DECISION

4.1 It is not in dispute that, at the time of the review of the formula in 2011 and 2014, the appellant did not obtain the express consent of its employees, who included the respondents herein. The appellant of course contends that the consent was not necessary because the review improved the package.

4.2 At this point, we wish to begin by quoting a passage from the work titled **Selwyn's Law of Employment, 14th edition**. There, the learned author, N.M. Selwyn, writes:

> " **C.** *Variation of contractual terms*
>
> **3.92 The terms of the contract of employment may only be varied with the consent of both parties, and there is no power which enables one side to act unilaterally, unless the contract unambiguously provides for a unilateral variation. It follows that a unilateral variation which is not accepted amounts to the repudiation of the contract. Thus if an employee is demoted, this will be repudiatory conduct by the employer, and a consequent resignation by the employee will be an acceptance of the repudiation and hence, in law, a dismissal by the employer** *(see Marriott v Oxford and District Co-Operative Society [No.2])*. **But if, subsequent to the variation, the employee stays on with the firm for a considerable length of time, it is likely that he will be regarded as having accepted the change, and**

> **the modified contract will be in existence. Where an employee protests about the change, but continues with the employment, it is a question of fact in each case as to whether or not he has accepted it (albeit under protest). If an employee continues to work under revised terms and conditions, albeit under protest, for a considerable length of time, it will be extremely difficult to conclude other than that he has accepted the revised terms".**

4.3 Indeed, the above is the position at law, and we have stated it in many cases, starting from the case of **Kabwe v BP (Zambia) Ltd**[9], where we applied the principle as it was stated in the case of **Marriott v Oxford and District Co-operative Society Ltd (No.2)**[10].

4.4 Now, the group that left by way of the Voluntary Separation Scheme actually applied to leave employment by way of that scheme. They had a choice to remain in employment, but they chose to leave. At the time they exercised their discretion, they were fully aware that, in 2011, the appellant had revised the formula for computing the separation package to 1.4 of a month's gross pay for each year served. Clearly, their voluntary option to exit through the scheme, while being alive to the revised

formula, was very strong evidence indicating that they had accepted the revised formula. These observations apply with equal force as well to the group of five respondents who claimed that they did not consent to the earlier revision of the factor from 4.5 to 2.5 in 1999. The fact is that they did not opt to leave by way of the scheme at that time, in 1999. Instead, they remained in employment; and in 2011 they became aware that the formula was revised further to the factor of 1.4. So, when they came to choose, of their own volition, to leave by way of the scheme in 2016 or 2017, they were fully aware of the revision that was made to the formula in 2011, but they still opted to leave on that scheme. This is evidence that they had accepted the revision of 2011. And so, at that point, it was immaterial whether or not in 1999 they had not accepted the revision from 4.5 to 2.5: what mattered most was the fact that they left employment in 2016 or 2017 and were paid on the formula which they had accepted, that is, the 2011 formula.

4.5 Hence, given the peculiar facts in this matter we do not

think that the case of **Attorney-General v Nachizi Phiri and Others**[1], which the learned trial judge relied on, is applicable, because in that case the employees did not exhibit the unequivocal conduct signifying acceptance of the variation, as it was in this case.

4.6 We would also go on to say that, on the facts of this case, it is immaterial whether the revised formula improved the package or not. The conduct of the respondents shows simply that they accepted the revised formula for what it was; and it is therefore unnecessary to go on to consider what the effect of that revision was.

4.7 Therefore, the trial court erred when it approached this issue solely from the premise that the appellant in 2011 did not obtain the express consent of its members of staff when it revised the formula. The court should have looked at the conduct of the respondents as a whole; that conduct would have definitely informed the court that the respondents had accepted the revised formula.

4.8 We now turn to the group that left on early retirement. As

we have earlier observed, the trial judge in this case completely overlooked what the grievance of this group was. The group, through their witness, Henry Musheka (CW1) clearly told the court that their dispute with the appellant was that they should not have left by way of early retirement because that provision was anchored only on the amended statutes; otherwise, their conditions of service did not provide for early retirement, and for that reason they should have been separated from the appellant by way of the Voluntary Separation Scheme. The trial judge did not resolve this issue, but instead lumped them together with the rest of the respondents who were complaining about the revised formula. The point we wish to make is that, by their own testimony, the group of four were not raising the issue of the revised formula: They had no issue with it. All that they wanted was for them to have been paid their separation package under the Voluntary Separation Scheme. Hence, in their case, the question whether or not they had accepted the revised formula of 2014 did not arise. And this shows that when drafting the

complaint, the respondents' advocates failed to capture the grievance of this group in the complaint.

4.9 Now, to resolve their grievance, we shall say that their claim was untenable for a number of reasons. First, in their letters of application to go on early retirement, this group made it clear that they were making those applications on the strength of the amended statutes, which now provided for early retirement; and not on the strength of the appellant's conditions of service, which did not contain a provision for early retirement. We would also add that the amended statutes could not apply to them retrospectively. Hence the issue of early retirement did not even arise in their case. Secondly, by proceeding to retire at the age of 55 which in terms of their conditions of service was the normal retirement age, this group received their full pension benefits whereas their colleagues who left on the Voluntary Separation Scheme received a package under that scheme and not the full pension benefits. The *ex-gratia* payment was thus only an additional benefit to employees who left under the

Voluntary Separation Scheme. Thirdly, in any event only employees who were 51 years and below qualified to go on the Voluntary Separation Scheme: the group of employees who went on retirement had already exceeded the maximum age, and therefore, did not qualify.

4.10 Otherwise, we hold that the trial judge erred when he ordered that the *ex gratia* payment for this group should be recalculated on the previous factor of 1, because that is not what the group was claiming before the court.

5.0 CONCLUSION

5.1 In conclusion, we sum up by saying that the trial judge erred when he ordered a re-calculation of the separation package on the factor of 2.5 for the two groups of respondents who left employment on the Voluntary Separation Scheme because their conduct clearly showed that they had accepted the revised formula, whose factor was now 1.4.

5.2 Again, we say that the trial judge erred when he ordered a re-calculation of the *ex gratia* payment on the factor of 1 for the group that left on early retirement because they did not bring to court any issue that they had rejected, or not accepted, the revision of the factor from 1 to 0.58; their issue was on a different subject matter, altogether.

5.3 In view of the way the issues in this case have been resolved, we find it unnecessary to answer the question raised by the appellant in one of the grounds of appeal, namely whether it was correct to order the packages to be computed by cherry picking the factor of 2.5 or 1, as the case may be, in the old formula and the gross pay in the revised formula. This is because the question has become moot. Similarly, the arguments raised by the respondents, such as whether the factor of 2.5 or 1 was a stand alone condition of service; or whether there is authority that payment of terminal benefits shall include allowances, have become moot.

5.4 All in all, we find merit in this appeal. We reverse the judgments of the trial court and the Court of Appeal. This being a labour matter, we order that the parties shall bear their own costs.

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M. Musonda

DEPUTY CHIEG JUSTICE

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E. M. Hamaundu

SUPREME COURT JUDGE

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J. K. Kabuka

SUPREME COURT JUDGE