IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA

Appeal No. 204/2022

(Civil Jurisdiction)

BETWEEN:

RICHARD NDONJI **APPELLANT**

AND

LAFARGE ZAMBIA PLC **RESPONDENT**

Coram: Kondolo SC, Majula, Patel SC, JJA
On 20th June, 2024 and 18th September, 2024

For the Appellant: *No Appearance*

For the Respondent: *Mr. C. Chungu of Nsapato & Associates with Mr. M. H. Mwaba & Mrs M. Kavota Mukupa — In House Counsel*

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *James Mankwa Zulu and Others vs Chilanga Cement - SCZ Appeal No.12 of 2004.*
2. *Mike Musonda Kabwe vs B.P Zambia Limited (1997) ZR 42.*
3. *Nyambe and Others vs Konkola Copper Mines - SCZ Appeal No. 2 of 2022.*
4. *Chilanga Cements Plc vs Kasote Singogo (2009) ZR.122.*

5. *Zambia Telecommunications Company Ltd vs Felix Musonda & 29 Others - SCZ Appeal No. 57 of 2014*
6. *Helen Besa Temba & Others vs Cavmont Bank Limited - SCZ Appeal No. 93/2016.*
7. *Pickard vs Sears (1837) 6 A & E 469*
8. *Rosemary Ngorima vs Zambia Consolidated Copper Mines - SCZ Appeal No. 149/2011.*
9. *Dangote Cement vs Michael Mwaba - CAZ Appeal No. 35/2022*
10. *Maamba Collieries vs Douglas Siakalonga and Others - SCZ Appeal No.51 of 2004*
11. *Henry Nsama & Others vs Zambia Telecommunication Company Limited – SCZ Appeal 21 of 2012*

Legislation referred to

1. Constitution of Zambia (Amendment) Act, No 2 of 2016
2. Employment Act, Chapter 268 (Now Repealed)
3. Employment Code Act, No. 3 of 2019

1.0 Introduction

1.1 In this appeal, the appellant is contesting the judgment of Mwansa J. of the Industrial Relations Division of the High Court dated 24th March, 2022 wherein he dismissed the appellant's claim for a recalculation of the redundancy package. We shall be interrogating the circumstances under which the calculation of redundancy benefits can include allowances. Furthermore, we shall discuss when an employee can be said to have acquiesced to the variation of terms of employment. Finally, we shall consider an employee's entitlement to repatriation under **section 13(1)** of the **Employment Act.**

2.0 Background

2.1 The appellant was in the employ of the respondent from 7th February, 1994. The appointment was initially on a fixed-term basis but was, however, converted to permanent and pensionable employment.

2.2 During the appellant's employment, the respondent offered for sale some of its houses to its employees who were sitting tenants. The appellant was offered plot No. 225 of Farm 1881 by a letter dated 17th April, 2014. The appellant accepted the offer and one of the conditions was that the full purchase price was to be paid within one (1) year from the date of acceptance.

2.3 Due to challenges in settling the purchase price within one year, the appellant requested the respondent to deduct payment for the house from his retirement package. The respondent approved the application for voluntary separation on 5th January, 2016 and advised the appellant that his last day of service would be 31st March, 2016.

2.4 During this period, the respondent was undergoing some structural changes, and as such some employees were declared redundant and separated from the respondent company. Consequently, the appellant was issued with a letter of redundancy on 30th March, 2016 which was later retrieved and replaced with one for voluntary separation.

2.5 The appellant was initially contributing to a ZSIC Pension Scheme which started on 1st April, 1996 where the total contribution was 30%. The contribution was later reduced to 22.5% owing to a shift to the Lafarge Pension Trust which took effect on 1st January, 2002.

2.6 The respondent ultimately paid the appellant what it considered were his dues. Dissatisfied with the package the appellant brought a complaint to the High Court claiming he was underpaid and in certain instances not paid.

2.7 In summary, he claimed redundancy, long service gratuity, pension scheme underpayment, repatriation, and retention on the payroll until final payment.

3.0 High Court Decision

3.1 The learned Judge in the court below isolated the issues for his determination as being whether the appellant was underpaid his redundancy package and pension benefits. In addition, whether he was entitled to repatriation as well as long service gratuity. Finally, the lower court considered whether the appellant was entitled to be retained on the respondent's payroll.

3.2 On the first issue, the learned Judge examined clause 11.3 of 2015 terms and conditions for non-unionised staff which provides that where an employee is terminated by way of redundancy, he shall be given one month's notice and paid benefits of 2.5 months basic pay for each year served. The

court was of the view that the respondent acted within the applicable terms when it calculated the appellant's redundancy pay in accordance with clause 11.3 of the staff conditions.

3.3 On the non-inclusion of the initial two years served on a contractual basis, the lower court held that the respondent incorrectly omitted this period without providing any evidence that there was a discontinuity in his employment service.

3.4 Regarding the underpayment owing to the shift to the new Lafarge Pension Scheme, it was the position of the lower court that the appellant did not object to the new pension scheme hence he had willingly acquiesced to it and could therefore not succeed under this claim.

3.5 On the issue of repatriation, the court below found that the appellant did not come from Chavuma when joining the respondent but was based in Lusaka and did not therefore qualify to be paid cash for repatriation. The claim for long service gratuity in accordance with the 1997 terms and conditions of service was dismissed on the basis that the 2015 terms and conditions were the ones prevailing at the time of exit.

3.6 The aspect of retention on the payroll was also rejected on the premise that gratuity in the context of the current case does not amount to a pension benefit.

4.0 Grounds of appeal

4.1 Disconsolate with the judgment, the appellant appealed fronting the following grounds:

"1. The learned trial Judge erred in fact and in law when he held that the respondent acted within the applicable terms when they calculated the Claimant's redundancy pay based on his basic pay instead of his gross pay.

2. *The learned trial Judge erred in fact and law when he held that the complainant could not claim for the difference in the Pension Scheme due to the reduced contributions the respondent made.*
3. *The learned trial Judge erred in fact and law when he held that the Claimant was not entitled to repatriation in the form of cash payments.*
4. *The learned trial Judge erred in fact and law when he held that the Claimant's claim for long service gratuity failed because the terms and conditions applicable to him were for 2015 and not for 1997.*
5. *The learned trial Judge erred in fact and law when he held that the long service gratuity did not amount to a pension benefit and as such the Claimant was not entitled to be retained on the payroll."*

5.0 Appellant's Arguments

5.1 The thrust of the submission in ground one was that the lower court erred in law and fact when it held that

redundancy pay had been correctly calculated by the respondent when they did not include allowances. He cited the case of ***James Mankwa Zulu and Others vs Chilanga Cement***[1] for the proposition that terminal benefits should be calculated inclusive of allowances.

5.2 Pertaining to ground two, the appellant asserted that the shift from the ZSIC Pension Scheme to the Lafarge Scheme was not done with his consent as can be seen in an email addressed to the respondent on page 242 at paragraph 33 of the record of appeal. **Article 187 (2) of the Constitution** was called in aid which provides that a pension benefit shall not be withheld or altered to an employee's disadvantage. We were also referred to the case of ***Mike Musonda Kabwe vs B.P Zambia Limited***[2] where the Supreme Court held that any conditions introduced by an employer which are detrimental do not bind the workers.

5.3 As regards ground three, the gist of the appellant's argument was that the refusal to award him repatriation was unfair considering the fact that the respondent had been paying some of its former employees the same.

5.4 In relation to ground four, the kernel of the appellant's contention was that the 1997 conditions of service which provided for long-serving gratuity were more favourable to him and should have been used instead of the 2015 conditions. Reliance was placed on the case of ***Nyambe and Others vs Konkola Copper Mines***[3] where it was opined that

existing terms to an employee cannot be altered without his consent.

5.5 Based on the foregoing, the appellant, was of the view that he should have been retained on the payroll until he is paid all his dues as highlighted.

6.0 Respondent's Arguments

6.1 In response to ground one, the respondent's Counsel asserted that **section 26B (3) of the Employment Act Chapter 268** which the appellant has sought to rely on, does not apply to written contracts. To buttress the position, the court was referred to the case of ***Chilanga Cement Plc vs Kasote Singogo[4].***

6.2 It was observed that what applied to the appellant is clause 11.3 of the conditions of employment for non-unionized staff of 2015 which provides that on termination by way of redundancy, an employee shall be paid one month pay and benefits of 2.5 months basic pay for each year of service.

6.3 It was argued that the ***James Mankwa Zulu and Others vs Chilanga Cement Plc[1]*** stipulated that where the terms of employment were clear that calculation must be based on the basic salary, then that is what will prevail. The ***James Mankwa Zulu and Others vs Chilanga Cement Plc*** (supra) merely defined the term salary. Further that where the terms of employment are clear that calculations must be based on the basic salary, then it is that calculation that must prevail

as was the case in ***Zambia Telecommunications Company Ltd vs Felix Musonda & 29 Others***[5]. It was strongly contended that the ***James Mankwa Zulu and Others vs Chilanga Cement Plc*** did not introduce a general proposition that allowances must alsways be included when calculating redundancy pay as each matter should be considerd on its own merits. It was argued that the case in casu was distincguishable from that of ***James Mankwa Zulu and Others vs Chilanga Cement Plc.*** It was therefore asserted that the lower court could not be faulted for having found that the appellant's benefits had been correctly calculated using the basic pay excluding allowances.

6.4 The main point avowed in ground two was that by virtue of the appellant continuing to work and even contributing towards the new pension scheme at the reduced rates, he is deemed to have accepted the new terms and conditions and he cannot claim the difference. The cases of ***Helen Besa Temba & Others vs Cavmont Bank Limited,***[6] ***Kabwe vs BP Zambia Limited***[2] and ***Pickard vs Sears***[7] were cited as authority for this position of law.

6.5 On the issue of repatriation in ground three, Counsel noted that the appellant admitted in the court below during cross-examination that he did not come from Chavuma when joining the respondent. As such he did not qualify to be repatriated from Lusaka to Chavuma in terms of **section 13 (1) of the Employment Act Cap 268**.

6.6 Turning to the last ground, the respondent forcefully argued that the lower court was on firm ground when it held that the appellant was not entitled to long service gratuity as it did not constitute part of the terms and conditions of employment that were applicable at exit. The case of ***Rosemary Ngorima vs Zambia Consolidated Copper Mines***[8] was referred to for the principle that parties are bound by whatever terms and conditions they set for themselves.

6.7 Based on the foregoing, the respondent contended that the appellant was not entitled to retention on the payroll as he was paid all his dues. Any further payment would result in unjust enrichment.

7.0 Hearing of the appeal

7.1 When the matter came up for hearing on 20th June, 2024, the appellant was not in attendance despite having been served with the notice of hearing for the appeal.

7.2 On behalf of the respondent, Mr. Chungu relied on the heads of argument in response and also made brief oral submissions for emphasis. The essence of his argument was that since the appeal was filed, this Court delivered a judgment in the case of ***Dangote Cement vs Michael Mwaba***[9] which he invited us to consider when determining this matter.

7.3 He further submitted that the facts in the present case transpired before the enactment of the **Employment Code**

Act, hence the new law cannot be applied retrospectively to the appellant's case. All in all, Mr. Chungu urged us to dismiss the appeal.

8.0 Analysis And Determination

8.1 In arriving at our decision we have taken into consideration the arguments advanced by the respective parties and the authorities relied upon. We propose to deal with the four grounds of appeal in the manner they have been set out.

9.0 Ground 1 - Applicable conditions/redundancy pay excluding allowances

9.1 In the first ground of appeal, the appellant's grievance emanates from the manner in which the redundancy pay was calculated. He contends that this ought to have included allowances and should have been based on the gross pay and not the basic pay.

9.2 The respondent on the other hand strongly refutes this assertion and avers that the court below was on *terra firma* in holding that it had acted within the applicable terms when calculating the redundancy pay.

9.3 We have reflected on the two positions and from our perspective the starting point is to determine what conditions governed the relationship between the parties. In this regard, we have perused the conditions of employment for non-

unionized staff which were obtaining, these being the 2015 conditions. The relevant clause is 11.3 which provides that:

> *"Where an Employee's contract of service is terminated by reason of redundancy, the employee shall be given one (1) month notice and shall be entitled to redundancy benefits of two and a half (2.5) months basic pay for each year of service."*

9.4 It is plain from the foregoing, that the redundancy benefits were to be calculated using the basic pay and not the gross pay. This is what the parties had signed up for and now cannot cherry-pick what is applicable. Clause 11.3 is very clear and therefore inclusion of allowances and also calculation based on gross pay is not tenable. We are fortified in this regard by the case of ***Maamba Collieries vs Douglas Siakalonga and Others***[10] where the apex Court held that:

> *"...Not all benefits enjoyed during his period of service must be integrated into the basic salary before computing that employee's terminal benefits except where the conditions of service state so. As such, the respondent's calculation of basic pay without the inclusion of allowances is accurate as the Conditions of Employment for Non-Unionised staff did not provide for the inclusion of allowances when calculating an employee's basic pay."*

9.5 We should hasten to point out that in the ***James Mankwa Zulu & Other vs Chilanga Cement***[1], the Supreme Court included allowances because the word salary was not defined. In a latter case of ***Zambia Telecommunications Company Limited vs Felix Musonda and 29 Others***[5] the Court of last resort gave clarity on their decision in the aforecited ***James Mankwa Zulu***[1] case when they held that:

> *"As regards the case of* ***James Mankwa Zulu and Others vs Chilanga Cement Plc,*** *we agree with the submission on behalf of the appellant that the case is distinguishable from the case at hand. In that case, the word salary was not defined, hence the court defined it to include allowances. The situation is different in this case because the conditions of service expressly stated that the basic salary shall not include allowances."*

9.6 In light of the foregoing, the court below cannot be criticized for having found that the applicable conditions of service (2015) did not include allowances. We accordingly find no merit in ground one and dismiss it.

10.0 Ground 2 - Difference in Pension Scheme

10.1 In the second ground, the appellant has raised an issue with the finding by the trial Judge that he could not claim for the difference in the pension scheme due to the reduced contribution the respondent made. The argument put across is that the reduced scheme contributions by the respondent

were not accepted by the appellant. That being non-unionized he had no platform to air his grievances. Our attention has been drawn to an email sent on 22nd November, 2010 where it has been asserted that there was an attempt to register the displeasure with the changed pension scheme.

10.2 On the other hand, the respondent has argued that the appellant had acquiesced to the new pension scheme as he had continued to work and contribute towards it. The question that falls for determination in our view is whether or not the appellant had acquiesced to the new pension scheme as contended by the respondents.

10.3 It has not been disputed that initially, the pension scheme that was in place to which the appellant contributed was the ZSIC pension scheme. The appellant and other employees were subsequently moved to the Lafarge pension scheme in 2002. The consequence of the move was that the pension scheme contributions were reduced by 15%. The respondent made a pension contribution of 22.5% whereas the employees contributed 7.5 %.

10.4 The question is, could the employer vary the pension contribution? The celebrated case of ***Kabwe vs BP Zambia Limited***[2] explains clearly that if an employer, varies adversely, a basic condition of employment without the consent of an employee, then the contract of employment terminates and the employee is deemed to have been declared redundant or early retired.

10.5 It is clear from the foregoing that an employer cannot unilaterally vary the terms and conditions without the consent of an employee. In an instance where the term has been varied and the employee continues to work, the principle of acquiescence kicks in.

10.6 The principle of acquiescence in employment contracts refers to the implicit acceptance or agreement by an employee to certain terms, conditions, or practices within the workplace through their continued employment and behavior, despite not explicitly agreeing to them in writing or verbally. If an employer introduces new terms or changes existing terms, such as in this instance, the change from ZSIC to Lafarge Cement pension scheme which had reduced contributions and the appellant continued to work without objecting, it may be inferred that the appellant had acquiesced to these changes.

10.7 In this case, what is to be taken into consideration is the behavior of the employee. The Supreme Court had occasion to deal with the question of conditions of service by an employer and the employee continuing to work under the revised conditions of service in the case of ***Helen Besa Temba vs Cavmont Bank Limited***[6] where they held that the employees were bound by the variation on account of the fact that they had become aware of the variation and notwithstanding, they had continued to work. The respondent has also drawn to our attention the case of

Pickard vs Sears[7] on the principle of acquiescence where it was stated as follows:

> *"Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his previous position, the former is precluded from averring against the latter a different state of things as existing at the same time."*

10.8 The argument that the appellant being a non-unionized employee, did not have a platform to air his grievance, in our view, has no legal leg to stand on as he had the option to have the employment relationship terminated by virtue of the respondent's conduct and at that stage he could have been declared redundant or early retired by virtue of the variation of terms of employment.

10.9 On account of the foregoing, we are disinclined to agree with the criticism of the court below by the appellant as the argument advanced does not hold water and we dismiss the second ground for want of merit.

11.0 Ground 3 - Repatriation

11.1 The appellant is displeased with the fact that he was not awarded repatriation in the form of cash payments and this forms the basis of the third ground of appeal. We quickly turn to the provisions of **section 13** of the **Employment Act Chapter 268**

"13. (1) Whenever an employee has been brought from a place within Zambia to a place of employment by the employer, or by an employment agency acting on behalf of the employer, the employer shall pay the expenses of repatriating the employee to the place from which he was brought...

(2) The expenses of repatriation shall include-

(a) reasonable travelling expenses, unless the employer provides transport as provided in subsection (1) of section fourteen, and subsistence expenses or rations during the journey."

11.2 Our reading of the above section is that repatriation is provided for when an employee has been brought by an employer from a different place from that of employment. In other words, if an employee has been recruited from another town, the employer is then obligated to repatriate the employee to a place from where he was recruited.

11.3 In *casu*, the appellant was not recruited from Chavuma and cannot therefore claim for repatriation to his home district of origin in the form of cash payments or at all. The Judge cannot be faulted for having rejected the appellant's claims for repatriation in the form of cash payments.

11.4 The appellant has drawn to our attention to instances where other employees were paid repatriation in monetary value. He has argued that it was a norm that the respondent would still

pay for repatriation despite the fact that the employee was still going to live within Lusaka. From our perspective, the law as provided for in **section 13(1)** of the **Employment Act Chapter 268** is clear that the obligation to repatriate an employee is when that employee was recruited outside that location. The fact that other employees may have been paid cash in our view, we can only state that it was discretionary on the part of the employer as they were not bound by the **Employment Act** to do so. In any event, there was no evidence led to substantiate this claim.

11.5 The bottom line is that ground three is devoid of merit and is dismissed accordingly.

12.0 Ground 4 - Long service gratuity

12.1 Pertaining to the fourth ground, the decision by the court below not to grant long service gratuity in accordance with the 1997 conditions is what has agitated the appellant. The first argument on the entitlement to long-service gratuity is that it falls within the ambit of a pension benefit and he has relied heavily on the provisions of **Article 266** of the **Constitution (Amendment) Act No. 2 of 2016** which defines the pension benefit to include, "**pension, compensation, gratuity or similar allowance in respect of a person's service."** In addition, the appellant has sought refuge in the provisions of **Article 187(3)** of the **Constitution** to argue that the 1997 conditions were more favourable to him as opposed to the 2015 hence they should have been

applied to the calculation of his redundancy package. **Article 187(3)** enacts as follows:

> *"187(3) The law to be applied with respect to a pension benefit-*
> *(a) before the commencement of this Constitution, shall be the law that was in force immediately before the date on which the pension benefit was granted or the law in force at a later date that is not less favourable to that employee; and*
> *(b) after the commencement of this Constitution, shall be the law in force on the date on which the pension benefit was granted or the law in force at a later date that is not less favourable to that employee."*

12.2 We are of the view that the appellant was aware that the long service gratuity had been removed in the 2015 conditions. The changes were consented to. There was therefore no contravention or violation of **Article 187(3)** of the **Constitution** as alleged.

12.3 Moving to the other argument under this ground, we have pondered over what conditions were applicable to the appellant and found the 2015 terms and conditions of non-unionized employees are what were in force at the time (page 168 ROA). A close scrutiny of the aforementioned 2015 terms and conditions reveals that there was no provision for long-service gratuity when it comes to redundancy. We stand by our earlier observation as guided by the ***Rosemary Ngorima***

vs ZCCM[8] case where it was opined that in any employer and employee relationship, the parties are bound by whatever terms they set for themselves.

12.4 Simply put employers and employees are bound by the terms they have entered into. It is not within our purview to rewrite or improve the express terms of the contract the parties have signed up for. We are further fortified by the case of ***Henry Nsama & Others vs Zambia Telecommunication Company Limited***[11] where the Supreme Court refused to award long service gratuity under redundancy on account of the fact that there was no express provision for the same.

12.5 Stemming from the fact that long service gratuity was not part of the contract entered into between the parties, it compels us to state that the lower court was on firm ground not to award this claim. Therefore, the argument for retention on the payroll becomes otiose based on our finding that he was duly paid his dues in accordance with the applicable conditions under which he was serving.

12.6 The fourth ground therefore suffers the fate of dismissal for being bereft of merit.

13.0 Conclusion

13.1 In summary, we are of the view that all the grounds of appeal are devoid of merit and are dismissed for the following reasons:

1. Calculation of the redundancy pay is based on the basic pay excluding allowances as provided for by the conditions of service for non-unionised workers (2015).

2. The appellant acquiesced to a variation of the pension scheme and is therefore not entitled to claim for the difference due to the reduced contributions made by the respondent.

3. The appellant is not entitled to repatriation in the form of cash payment and the provisions of **section 13(1)** of the **Employment Act** only obligates the employer to repatriate an employee if he had been brought from a town outside the place of employment. The appellant herein was recruited from Lusaka and not Chavuma.

4. The long service gratuity was part of the 1997 conditions but the 2015 terms and conditions which were applicable at the time of exit made no provision for the same and were therefore inapplicable. In addition, long service gratuity did not constitute a pension benefit.

5. In light of the fact that the appellant was duly paid his dues at the time of exit, retension on payroll is untenable.

13.2 Costs to be borne by the respective parties.

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M.M. Kondolo, SC

COURT OF APPEAL JUDGE

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B.M. Majula

COURT OF APPEAL JUDGE

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A.N. Patel, SC

COURT OF APPEAL JUDGE