

THE SUPREME COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

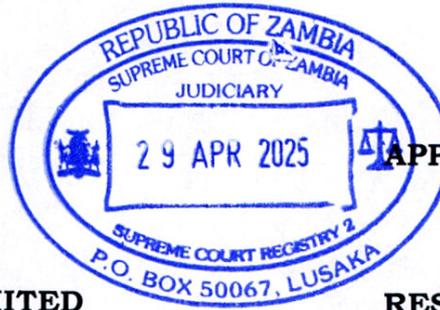
APPLICATION NO. SCZ/7/34/2024

BETWEEN:

HENRY NYAMBE AND 9 OTHERS

AND

LUMWANA MINING COMPANY LIMITED



APPLICANTS

RESPONDENT

Coram : Musonda DCJ, Kabuka and Mutuna, JJS

On 4th day of March, 2025 and on 29th day of April, 2025

For the Applicants : Mr. C. Chungu of Messrs Nsapato and Co. Advocates

For the Respondent : Mr. K. Phiri of Messrs Corpus Legal Practitioners

RULING

Mutuna, JS, delivered the Ruling of the Court

Cases Referred to:

1. *First Quantum Mining and Operations Limited V Yendamoh Appeal 206 of 2015*
2. *Chimanga Changa Limited v. Export Trading Limited SCZ/8/21/2021*
3. *Zesco limited vs Nyondo (Suing in the capacity as Administrator of the estate of the late Wilson Sinyinza) CAZ/08/263/2017*
4. *Chinganga v. Shava and 2 others, Supreme Court Judgment No. SC 12 of 2022*
5. *Bidvest Foods Zambia Limited and Others v CAA Import and Export Limited, SCZ/08/038/2018*

Legislation referred to:

- 1) *The Constitution of Zambia (Amendment) Act No. 2 of 2016*
- 2) *The Court of Appeal Rules 2016*
- 3) *The Supreme Court Rules, Cap 25*
- 4) *Employment Act, Cap 268*
- 5) *Arbitration Act No. 19 of 2000*
- 6) *Arbitration (Court Proceedings) Rules, S.I. No.75 of 2001*

Introduction

1. This ruling arises out of a motion by the applicants for leave to appeal to the Supreme Court against the decision of the Court of Appeal handed down on 4th July, 2024. The motion was referred to the court by a single judge of this Court pursuant to the powers vested in her by **Rule 48(3)** of the **Supreme Court Rules**, (the **Rules**).
2. The motion also follows a refusal by the Court of Appeal to grant leave to appeal to this Court and is thus a renewal of the motion which was before the Court of Appeal.

Background

3. The applicants' case, which was before the High Court and the Court of Appeal, arose from a decision by the respondent to declare them redundant. Following this decision, the

applicants were paid their redundancy packages but they commenced an action against the respondent based on the contention that the respondent breached their conditions of service when effecting their termination of employment by way of redundancy.

4. After hearing the evidence and arguments by the parties, the High Court found that, in terms of clause 22.8 (g) of the applicants' conditions of service, the respondent was compelled to enter into negotiations with the applicants prior to terminating their employment by way of redundancy and agree on their packages. According to the Court, the respondent had breached this provision because it merely notified them of its intention to declare them redundant by way of letter dated 8th October, 2018.
5. The High Court Judge concluded that the termination of the applicants' services was wrongful, unfair and unlawful and awarded them damages equivalent to twelve months' salary. This prompted the respondent to appeal to the Court of Appeal which, while agreeing with the High Court Judge that there

was a breach of contract, reduced the award of damages from twelve months salary to three months' salary.

6. The applicants sought leave of the Court of Appeal and subsequently a single Judge of this Court, to appeal to our Court.

The motion before us, determination and decision

7. In presenting the motion, the applicants filed an affidavit in support and skeleton arguments. The respondent's response was by way of an affidavit in opposition and skeleton arguments. The approach we have taken is that we will not reproduce the evidence and arguments in these documents but rather set out the questions which the applicants contend the motion raises and determine whether they, indeed, meet the threshold under **section 13** of the **Court of Appeal Act**.
8. In advancing his arguments, Mr. C. Chungu, counsel for the applicants, contended that the questions which this motion raises are:

- 8.1 Whether this Court has adjudicated upon a matter involving the interpretation of **section 55** of **The Employment Code**;
- 8.2 Whether this Court has determined the quantum of damages which are payable in the event of a finding by the Court that the employees' services were unlawfully terminated because **The Employment Code** was contravened; and, arising from 8.2;
- 8.3 Whether this Court has determined the basis of the award of damages arising from a breach of **section 55** of **The Employment Code**. That is to say, whether it is on the net salary or gross salary of the ex-employee.
9. In respect of the questions under 8.1 and 8.2, counsel argued that the issue of appropriate damages to be awarded in the case of unlawful termination of employment has not been adjudicated upon by this Court since the enactment of **The Employment Code**. He contended that the last decision by this Court on the issue was handed down on 15th August, 2018, based on the repealed **Employment Act**, in the case of

FIRST QUANTUM MINING AND OPERATIONS LIMITED v

YENDAMOH¹. Counsel, therefore, submitted that there is need for this Court to adjudicate upon the intended appeal to set the law regarding the provisions of this new law.

10. Advancing his argument, counsel contended that we have stated that where a new piece of legislation stands to be interpreted, the threshold of point of law of public importance is surmounted. He drew our attention to the case of **CHIMANGA CHANGA LIMITED v EXPORT TRADING LIMITED**² in which leave to appeal was granted on the basis that there was a need to interpret the provisions of the new **Corporate Insolvency Act** which, hitherto, had not been interpreted for purposes of guiding lower courts because the issues it raised were bound to arise in other matters and were not limited to the parties in that case.
11. As regards the question under 8.3, counsel argued that there is contradiction in the provisions of **section 54** and **55** of **The Employment Code**. While the former section speaks to payment of severance pay based on the basic salary, the latter is silent on the issue. It was his contention that the Court of

Appeal did not resolve this contradiction by determining whether severance pay and indeed damages in the form of monthly salaries would be based on the net or gross pay. We were urged to allow the motion.

12. In opening the arguments for the respondent, Mr. K. Phiri contended that the grounds of the intended appeal do not meet the threshold set by **section 13** of the **Court of Appeal Act** because they raise issues which were not pleaded and considered in the High Court and Court of Appeal. For this reason, he urged us to dismiss the motion. He drew our attention to the decision of the Court of Appeal in the case of **ZESCO LIMITED v NYONDO (Suing in the capacity as Administrator of the estate of the late Wilson Sinyinza)**³ where the Court of Appeal declined to entertain arguments on an issue which was not argued in the High Court in considering whether leave to appeal should be granted.
13. The second argument which counsel advanced was that ground 2 of the intended appeal is too vague and has the effect of attempting to persuade the court to reopen the case which was before the High Court. He urged us not to grant the motion

on this score and referred to a decision of the Supreme Court of Zimbabwe in the case of **CHINGANGA v SHAVA AND 2 OTHERS**⁴.

14. At the hearing, we engaged counsel for the respondent and drew his attention to a portion of our decision in the case of **BIDVEST FOODS ZAMBIA LIMITED AND OTHERS v CAA IMPORT AND EXPORT LIMITED**⁵. In that case, we, among other things, stated that leave to appeal will be granted where there is need for our Court to interpret a new piece of legislation because the public at large is bound to benefit from such interpretation. We stated further that this approach is not unique to Zambia.

15. As for the case with which we are engaged, we reminded counsel for the respondent that the new piece of legislation which fell for interpretation in the intended appeal involves redundancy, an issue which is frequently presented before the Courts. We invited him to address us on whether the issue was not one which was within the realms of the **Bidvest**⁵ test in terms of public importance.

16. Mr. Phiri's response was that, while the issue of redundancy is indeed an important one, there is nothing novel about it. According to counsel, the issue was simple and elementary and did not deserve to be escalated to this Court which should focus on more weighty issues. He argued further that, although this Court had not adjudicated on the issue of the basis and amount to be paid as a redundancy package since the enactment of **The Employment Code**, the issue which the intended appeal raises is too simple and obvious and thus not deserving of consideration by this Court. Counsel went on to say that **The Employment Code** has not drastically changed the law on redundancy but merely broadened it. There is, therefore, no need for this Court to interpret these provisions because they have been interpreted before and the law is settled on redundancy package of two months' pay for every year served.

17. In response to another query raised by the Court, Mr. Phiri argued that **The Employment Code** is clear as to what happens where the redundancy package prescribed in the contract of employment is in conflict with the package

provided for under **section 55**. The contract of employment will prevail if its conditions are better than those under **section 55 of The Employment Code**. We were urged to dismiss the motion.

18. In the arguments in reply, Mr. Chungu countered the argument by Mr. Phiri to the effect that we should only entertain appeals which raise novel issues. He contended that in the past we have dealt with appeals on issues which have been dealt with before such as interpretation of **section 17** and **Rule 23** of the **Arbitration Act** and **Arbitration (Court Proceedings) Rules**, respectively. These provisions of the law, he argued further, came into force in the year 2000 but we still interpret and re-interpret their meaning.
19. Our consideration of this motion begins with addressing the argument by counsel for the respondent that the motion is lacking in merit because the grounds of the intended appeal raise issues which were not pleaded or discussed in the two Courts below and are vague. The grounds of the intended appeal are at page 4 of the motion. Grounds 1 and 2 question the manner in which the applicants' termination of

employment were effected while grounds 3 and 4 question the measure of damages awarded to them. These are all issues which were not only pleaded, but considered by both the High Court and Court of Appeal. The arguments by Mr. Phiri to the contrary are, therefore, untenable and we dismiss them.

20. Coming to the thrust of this motion which is the three questions posed at sub paragraphs 8.1 to 8.3, we are in agreement with the arguments advanced by Mr. Chungu that the Supreme Court has not yet adjudicated upon a matter involving the interpretation of **section 55 of The Employment Code**. This section involves the procedure to be used in effecting termination of employment by way of redundancy and the package payable under the new regime. It is undoubtedly an issue which affects, not only the parties before us, but will affect others in future given the frequency with which redundancies are effected in our country. Hence the need for this Court to settle the law with finality on the matter.
21. We also agree that regarding the questions under sub paragraphs 8.2 and 8.3, there has been no determination by this Court on what is the appropriate measure of damages in

the event of the employer breaching an employment contract by failing to follow the procedure laid down in **section 55(2)(a)(b) and (c) of The Employment Code**. This is an issue requiring clarity especially that it arises from a new piece of legislation. Tied to this is a need to clarify whether an award of damages arising from such breach will be net or gross of one's salary.

22. As Mr. Chungu has quite rightly argued, **section 54(1)(b)** is specific that an award of severance pay shall be based on one's basic pay but **section 55(3)(e)** is not clear as to whether the pay stipulated therein is basic pay or net pay. There is, therefore, need for this Court to harmonise the conflict in the provisions of the two sub sections.

Conclusion

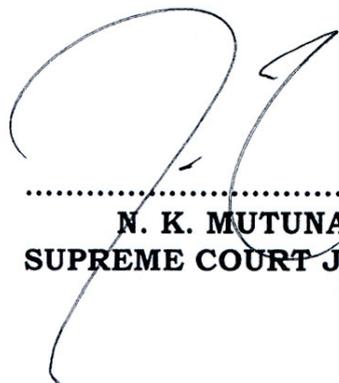
23. The interpretation of employment law in Zambia has varied from court to court. One cannot say with confidence that the measure and basis of award of damages arising from breach of an employment contract is clearly defined by our jurisprudence. This position has been compounded by the enactment of **The**

Employment Code Act which has significantly altered the employment law landscape, hence the need for this Court to provide guidance on the new regime.

24. For the reasons we have given earlier in this ruling, we find merit in the motion and accordingly grant the applicants leave to appeal. The costs shall lie where they fall.


.....
M. MUSONDA, SC
DEPUTY CHIEF JUSTICE


.....
J. K. KABUKA
SUPREME COURT JUDGE


.....
N. K. MUTUNA
SUPREME COURT JUDGE