IN THE COURT OF APPEAL OF ZAMBIA APPEAL No. 66/2019

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

PHINATE CHONA **APPELLANT**

AND

ZESCO LIMITED **RESPONDENT**

CORAM: **Chashi, Mulongoti and Lengalenga, JJA**

On 18th February and 26th February, 2020

For the Appellant: *N/A*

For the Respondent: *Mr. P. Mulenga, Zesco Legal Officer*

J U D G M E N T

Mulongoti, JA, *delivered the Judgment of the Court*

cases referred to:

1. ***Zesco Limited v Peter Nga'ndu CAZ Appeal No. 002/2017***
2. ***Development Bank of Zambia v Dominic Mambo (1995/1997) ZR 89***
3. ***Printing and Numerical Registered Company v Simpson (1875) L.R 19 EQ 462***

4. ***National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo SCZ Appeal No. 79 of 2001***
5. ***Mwamba v Ntenge, Kainga Chekwe SCZ Appeal No. 174 of 2010***
6. ***Chola Chama v Zesco Limited SCZ Appeal No. 215 of 2006***
7. ***Ford v Beach [1848] 11 BC, 852***
8. ***Investors Compensation Scheme Limited v West Bromwich Building Society (1997) UKHL 28***
9. ***Bank of Credit and Commerce International v Ali [2001]UKHL 8***

Books referred to:

1. ***Michael Jefferson, Principles of Employment Law, 4th edn (2000) Cavendish Publishing Limited at page 55***
2. ***Norman Selwyn, Selwyn's Law of Employment, 14th edn (2006) Oxford University Press p.85 para 3.25***

Legislation referred to:

1. ***The Income Tax Act, Chapter 323 of the Laws of Zambia***

1.0 Introduction

1.1 This is an appeal against the Judgment of his lordship, M.L. Zulu,J which dismissed the appellant's claims for underpayment of retirement benefits.

2.0 Background

2.1 The appellant, Phinate Chona, was employed by the respondent as a secretary on 12th March, 1984. She held this position until 25th September, 2014 when she retired at age 55. The termination was preceded by a 6-month notice of retirement

dated 20th March, 2014. Her last payslip showed that she was receiving a basic pay of K9,879.79 and a service allowance of K9,404.80. The respondent computed her retirement package which pegged her net pay at K1,934,468.32. She was paid in full on 30th September, 2014.

2.2 The appellant, sued the respondent in the High Court, after she noticed that she had been underpaid her retirement benefits, upon computation of her long service gratuity. Allegedly, that the calculation revealed that the respondent applied the rate of K7,409.84 as her service allowance when it should have been K9,404.80, which was the figure appearing on her last payslip. Basing her recalculation on the rate of K9,404.80 as service allowance, the appellant claimed that she was underpaid by K183,854.97.

2.3 The respondent denied the appellant's claim and maintained that the rate of K7,409.84 at which the appellant's retirement benefits were calculated was the correct rate and not the grossed up figure of K9,404.80 as alleged by the appellant.

3.0 **Evidence Adduced in the Court Below**

3.1 At trial, the appellant testified that, the Zesco conditions of service for non represented employees effective 1st April, 2013, were the correct conditions applicable to her. She stated that her retirement benefits were supposed to be paid in accordance with clause 12.1 (e) of the 2013 conditions. In addition, that the service allowance should have been calculated based on her last payslip for August, 2014.

3.2 It was her testimony that the figure of K7,409.84 used to calculate the service allowance was wrong as it was lower than the monthly allowance of K9,404.80 which she used to receive while in employment.

3.3 The respondent's witness (DW1) testified that service allowance is an allowance that a Zesco employee would get on a monthly basis and is derived at 75% of the basic pay.

3.4 DW1 explained that: "***When someone is employed, My Lord, the entitlement is 75% that the employee should go home with. But when somebody is working, the 75% amount is supposed to be taxable but then the employer cushions the employee on half of the tax, so that she pays tax on one and she does not pay on the other, so if she paid tax on both, it means that she would be entitled to 75% but taxed. So the purpose of***

grossing it up is to inflate the amount so that ... she still remains with the 75%...the net amount is still 75% at the point of leaving employment because there is no tax involved so in both circumstances the employee goes home with 75%."

4.0 **Consideration of the Evidence and Decision of the Court Below**

4.1 After analysing the evidence, the trial Judge made several findings of fact. Chiefly, that the conditions of service that applied to the appellant were the 2013 conditions exhibited in the agreed bundle of documents.

4.2 The trial court, correctly, formed the view that the issue for determination was, whether the appellant's service allowance should have been calculated at the rate of K9,404.84 which appeared on her payslip.

4.3 In so doing, the lower court found that clause 12.1 (e) of the 2013 conditions was crucial as it outlined the allowances to consider in calculating retirement benefits. The trial Judge noted however that, the clause did not disclose whether the rate or figure to be used was the figure as it appeared on the last payslip which was the gross allowance. In that regard, the court reasoned that it would be ***"guided to look within the contract itself to decipher the meaning of clause 12.1(e) and also the factual background against which it was made."***

4.4 With that approach, the trial court accepted the respondent's evidence (DW1's evidence) and found that the appellant's service allowance was grossed up to relieve her of the tax burden so that her take home service allowance would remain at 75% of her basic pay.

4.5 The trial court reasoned that, the tax was applied differently at retirement, as the tax that was applied was the tax applicable by law per clause 2.6 of the 2013 conditions of service. And, that there was clear evidence that the respondent took on the tax obligation per clause 12.1(e) of the conditions of service.

4.6 Furthermore, that **section 21(5) of the Income Tax Act,** provides that on termination of employment, income received by way of compensation for loss or repatriation or severance pay by reason of *inter alia* normal retirement, the first K35,000.00 of the total is tax free. The remainder is taxed according to the charge schedule in section 2 (b), which provides that the rate of tax on the remainder is 10%.

4.7 The trial Judge found that based on the evidence before him, Zesco had grossed up the appellant's long service gratuity which was inclusive of the service allowance by 10%. Thus, Zesco took

on the tax burden on the appellant's retirement benefits in line with clause 12.1(e). This notwithstanding, the appellant received 75% of her service allowance.

4.8 The court concluded that the applicable rate was therefore, K7, 409.84 and not K9,404.80 as contended by the appellant.

4.9 Accordingly, the appellant's claim was dismissed with costs.

5.0 **The Appeal**

5.1 Dissatisfied, the appellant appealed to this Court on the following grounds:

1. ***The court below misdirected itself in law and fact when it held that Clause (i.e 12.1 of the Conditions of Service) does not state whether the rate or figure to be used is as it appears on the last payslip, which is the gross allowance;***
2. ***The court misdirected itself when it held that it was guided to look within the contract itself to decipher the meaning of the Clause (i.e 12.1 of the Conditions of Service) and also the factual background against which it was made;***
3. ***The court below misdirected itself in law and fact when it held that the employee was therefore not entitled to the gross service allowance; and***
4. ***The court below misdirected itself in law and fact when it failed to determine whether the sum of K9,404.80 formed part of the plaintiff's conditions of employment and whether the plaintiff had a legitimate expectation that she would be paid the Service Allowance on that rate.***

6.0 **The Arguments**

6.1 The appellant's advocates filed heads of argument dated 15th April, 2019 in support of the appeal. The respondent filed heads of argument in response dated 16th May, 2019.

6.2 In support of ground one, the appellant's counsel submitted that the answer to the dispute lay in the interpretation of clause 12.1 (e) of the appellant's conditions of service. Counsel argued that clause 12.1 (e) is explicit that the applicable rate is, the rate or amount which the appellant was being paid on a monthly basis which appeared on her monthly payslip.

6.3 It was submitted that the appellant used to receive K9,404.80 as a service allowance and this was the amount that appeared on her last payslip. Thus, according to clause 12.1 (e) of the conditions of service, the respondent should have used K9,404.80 to compute the appellant's retirement benefits, as testified by DW1.

6.4 Counsel pointed out that clause 12.1 (e) was drafted by the respondent and if it had a different intention, it would have been expressly stated that it required the service allowance to be computed at the rate of 75%.

6.5 As such, the respondent was obliged to apply the rate of K9,404.80 which was the amount appearing on the appellant's last payslip. To support this argument, counsel relied on our Judgment in the case of **Zesco Limited v Peter Nga'ndu**[1] where we stated that the applicable rate for computing gratuity was the amount appearing on the respondent's last payslip as service allowance. As such, any amount which was not appearing on the last payslip such as the K7,409.84, was unjustified.

6.6 Accordingly, the lower court erred when it held that clause 12.1 (e) does not provide the rate or figure for computing the appellant's benefits.

6.7 As regards ground two, it was submitted that clause 12.1 (e) of the contract is clear and does not contain any ambiguity to require interpretation beyond the literal sense. The lower court did not have to look elsewhere in the contract. By that clause the applicable rate was K9,404.80 which was the only rate existing and known to the parties. It is the rate which the appellant expected the respondent to use. Counsel relied on the case of **Development Bank of Zambia v Dominic Mambo**[2] in support of this argument.

6.8 He maintained that, the lower court erred by failing to look at the plain meaning of clause 12.1 (e) and went at large to find the meaning of the clause, elsewhere in the contract.

6.9 With respect to ground three, it was submitted that in terms of clause 12.1 (e), the respondent agreed to bear the tax on the appellant's retirement, which tax was cast upon the appellant by clause 2.6. This fact was confirmed by DW1 in cross examination. Learned counsel argued that the respondent's tax burden extended to tax payable on the service allowance because clause 12.1 (e) superseded clause 2.6. Not to mention, that the appellant's retirement benefits are tax free. Consequently, the appellant was entitled to receive the whole service allowance at 95% translating into K9,404.80 and not at 75% translating into K7,409.84, as found by the trial judge.

6.10 Ground four was abandoned.

6.11 In response to ground one, the respondent's counsel submitted that the lower court was on firm ground when it took a holistic approach to the contract to decrypt the true meaning of clause 12.1 (e).

6.12 Learned counsel argued that, in essence, clause 2.6 of the conditions of service provided that the respondent would gross up the service allowance by 50% and that this would not constitute the employee's pay. However, when computing retirement benefits, the percentage applicable by law would apply.

6.13 Likewise, that the letter on page 101 of the record of appeal, dated 17th March, 2003, confirmed that service allowance was calculated at 75% of the employee's salary. It was counsel's submission that this letter indicated the appellant's salary adjustment is what constituted the contract of employment. Therefore, the trial court was correct in considering the conditions of service together with this contract. To support this argument, the case of **Printing and Numerical Registered Company v Simpson**[3] was cited where it was held that:

> ***"...if there is one thing more than another which public policy require, it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of justice."***

6.14 We were also referred to the case of **National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo**[4] where the Supreme Court held that:

> ***"It is trite law that once parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contract and that the role of the Court is to give efficacy to the contract when one party has breached it, by respecting, upholding and enforcing the contract."***

6.15 On the strength of these authorities, counsel argued that the appellant is bound by the 2013 conditions of service including the letter dated 17th March, 2003.

6.16 As regards interpretation of contracts, learned counsel like the trial Judge referred to the case of **Mwamba v Ntenge, Kainga Chekwe**[5] where the Supreme Court, citing Chitty on Contracts, said that ***"the factual background leading to the execution of agreements, is an important part when considering the meaning of an agreement, as an agreement is not made in a vacuum."*** He argued that when applied to the present case, it entails that clause 12.1 (e) of the conditions of service ought to be read with the appellant's contract on salary adjustment as stated in the letter of 17th March, 2003. Hence, the figure used by the

respondent in calculating the appellant's retirement benefits was not fictitious.

6.17 In relation to ground two, it was submitted that, the trial court was on firm ground to look within the contract to decipher the meaning of clause 12.1 (e) of the conditions of service. And, it rightly concluded that the essence of grossing up was to cushion the appellant's tax liability so that the take home truly reflected a net service allowance of 75% of her salary. Not to mention, that the tax adjustments during employment and at retirement were different.

6.18 It was the further submission of counsel that the amount appearing on the appellant's payslip did not constitute a salary for purposes of computing terminal benefits. The appellant's basic pay was K9,979.79, 75% of which amounted to K7,409.84, which was her service allowance. The employer grossed up this sum by 50 percent so that the payslip reflected K9,404.80 for tax purposes. According to counsel, this is not the figure applicable by law. He distinguished the present case from the case of **Development Bank of Zambia v Dominic Mambo[2]**, where the contract itself guided the parties on how to treat tax on service allowance.

6.19 With respect to ground three, learned counsel argued that the trial court was on firm ground in holding that the appellant was not entitled to the gross service allowance because her claim was for underpayment and not a tax refund. The tax was borne by the respondent when paying the retirement benefits, as the service allowance at retirement, could not be grossed up. Therefore, the appellant's argument that clause 12.1(e) superseded clause 2.6 is devoid of merit.

6.20 Learned counsel amplified that, the rate agreed by the parties was used to calculate the service allowance and as per clause 2.6 of the conditions of service the percentage of tax used was the rate applicable by law and borne by the respondent as the employer.

6.21 It was further argued that the appellant did not adduce any evidence at trial to demonstrate that her salary or the percentage for calculating her service allowance was adjusted upwards.

6.22 To allow the appellant to use a figure which contains more than what she was entitled to, would amount to unjust enrichment because the correct gross pay as applicable should be used. The

case of **Chola Chama v Zesco Limited**[6] was relied upon in that regard.

6.23 At the hearing of the appeal held on 18th February, 2020, only Mr. P. Mulenga, the respondent's counsel was present. He augmented the respondent's heads of argument, by submitting that the case of **Zesco Limited v Peter Nga'ndu**[1] is distinguishable from the appellant's case. According to Mr. Mulenga at the time of Peter Nga'ndu's retirement in 2010, the 2013 conditions were not in existence, hence our finding that grossing up was not supported by any law, or conditions of service. Secondly in *casu*, the computation of tax on retirement had the legal backing of the **Income Tax Act**, as held by the trial Judge. Finally, that in the **Zesco Limited v Peter Nga'ndu**[1] case, we held that the 2003 conditions which were applicable did not support removal of 35% tax. However, in *casu* clause 2.6 of the 2013 conditions provides support and explains how tax would be computed when computing terminal benefits.

7.0 Issue on Appeal

7.1 The cardinal issue this appeal raises is, whether the respondent correctly calculated the appellant's service allowance upon her

retirement, using K7,409.84 and not K9,404.80 which was reflected on her last payslip?

8.0 **Consideration and Determination of the Issue on Appeal**

8.1 We have considered the record of appeal, the Judgment appealed against and the arguments advanced by both parties. We shall deal with all the three grounds of appeal simultaneously because they are interrelated.

8.2 To resolve the issue as, to the applicable rate, it is imperative to peruse the provisions of the conditions of service applicable to the appellant, as correctly determined by the trial Judge. It was not disputed that the 2013 conditions were applicable, as read together with the salary adjustment letter dated 17th March, 2003 which provided for the service allowance.

8.3 Clauses 2.6 and 12.1(e) of the appellant's conditions of service provided thus:

> ***"2.6 Taxation***
> ***All employees will pay all personal taxes due in Zambia. ZESCO will deduct all such taxes from the employee's emoluments. ZESCO shall gross up 50% of an employee's service allowance to cushion the employee but this does not constitute an employee's salary.***
> ***When calculating retirement benefits, however, the percentage applicable by law will be used."***

8.4 Clause 12.1 (e) is couched thus:

> ***"12.1 Normal Retirement***
>
> ***(e) The employee shall be paid Retirement Benefits as follows:***
>
> ***i. For the first ten (10) years of service, two (2) months' pay for each completed year of service.***
>
> ***ii. From eleven (11) to twenty (20) years of service, three (3) months pay for each completed year of service.***
>
> ***iii. Above twenty (20) years four (4) months' pay for each completed year of service.***
>
> ***iv. An employee shall be paid on a pro rata basis the remainder of the months for any uncompleted year of service.***
>
> ***For purposes of calculating retirement benefits, a months' pay shall mean the basic salary and the following allowances being paid to the employee on a monthly basis, if they appear on the last payslip service allowance, housing allowance and commuted car / car allowance (where applicable). No allowances paid in an acting capacity shall be included.***
>
> ***The tax on retirement benefits shall be borne by the company."***

8.5 We note that the letter dated 17th March, 2003 and referencing the appellant's salary adjustment states in paragraphs one and two as follows:

> ***"We write to inform you that Management has decided to adjust your salary from K27,110,100.00 to K28,341,000.00 per annum with immediate effect. You will also be paid 75% of this figure as service allowance.***
>
> ***All other terms and conditions of service remain unchanged."***

8.6 The trial Judge found that the appellant's retirement benefits were to be calculated in accordance with clause 12.1(e). The Judge observed that the clause is silent on what rate was applicable, which issue was at the core of the dispute; as the appellant contended that it was K9,404.80 which was reflected on her last payslip and Zesco argued it was K7,409.81 which was 75% of her monthly salary in line with the 2013 conditions.

8.7 To give effect to clause 12.1(e) as to the applicable rate, the trial Judge resorted to case law in **Mwamba v Ntenge, Kainga Chekwe**[5], where the Supreme Court cited with approval the authors of Chitty on Contracts, who opine thus:

> ***"The cardinal presumption is that the parties have intended what they in fact said, so that their words must be construed as they stand. That is to say, the meaning of the document or a part of it is to be sought in the document itself: one must consider the meaning of the words used, not what one may guess to be the intention of the parties. However, no contract is made in a vacuum. In construing a document, the court may resolve the ambiguity by looking at its commercial purpose and the factual background against which it was made."***

8.8. The trial Judge reasoned therefore, that to determine the applicable rate, he needed to look into the factual background and within the contract itself to decipher clause 12.1(e). Bearing in mind the 17th March, 2003 letter, that the appellant

was entitled to 75% of the adjusted salary as service allowance, the Judge on the evidence before him found that the appellant's salary was K9,879.79. He further found that 75% of K9,879.79 translated to K7,409.84 which was correctly used by Zesco to calculate the appellant's retirement benefits. Additionally, that the service allowance on her payslip was higher as it included the tax amount hence the confusion.

8.9 Furthermore, that the evidence of DW1 that grossing up, enabled the employee to take home the benefit of the actual 75% of the service allowance by increasing the allowance by the tax amount payable to ZRA, was unchallenged. This was also in line with clause 2.6 of the conditions of service that the grossed up amount did not constitute an employee's salary.

8.10 The trial Judge, reasoned, furthermore, that the appellant equally agreed that she was only entitled to grossing up of her service allowance by 50% during employment and on retirement the tax applicable was in accordance with the law.

8.11 The Judge in that regard found **section 21(5) and 2(b) of the Income Tax Act** to be the applicable law as stated at paragraph 4.5 of this Judgment.

8.12 Having perused the 2013 conditions of service and the 2003 letter, we cannot fault the trial Judge for the findings of fact he made. These were supported by the evidence and even the Income Tax Act.

8.13 We also note that the trial court in making its findings was guided by the principles of construction of contracts.

8.14 A contract of employment is generally considered to be like any other contract. The author, Michael Jefferson, in his book Principles of Employment Law, at page 55 states that:

> ***"Lord Evershed MRF in Laws v London Chronicle (Inditor Newspapers) Ltd (1959) aptly summarised this idea: 'A contract of service is, but an example of contracts in general, so that the general law of contract is applicable."***

8.15 Thus, a contract of employment should be interpreted the same way as any other contract. We cannot find fault with the court below for taking a holistic approach and factual background to the contract and the conditions of service to determine what the applicable rate was.

8.16 This approach has been favoured from as far back as the decision in **Ford v Beach**[7] where it was held that:

> ***"The common and universal principles ought to be applied; namely that (an agreement) ought to receive the construction which its language will admit, and which***

will best effectuate the intention of the parties, to be collected from the whole agreement and that greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent".

8.17 Thus, the trial Judge was on firm ground when he also considered the factual background. To reinforce the consideration of the background facts, Lord Hoffmann in **Investors Compensation Scheme Limited v West Bromwich Building Society**[8] stated that *"**interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract...**"* The background is famously referred to as the matrix of facts. And in **Bank of Credit and Commerce International v Ali**[9], Lord Hoffmann held that *"**...there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law...**"*

8.18 We therefore, cannot criticize the trial Judge for the approach he took. It is also noteworthy that the appellant did not lead any evidence at trial to demonstrate that she was entitled to a service allowance at the rate of about 95% of her basic pay at K9,404.80. Her evidence was simply that as the sum of

K9,404.80 was what was reflected on her last payslip, that is the amount she expected to be applied, without question.

8.19 DW1 shed light on this apparent disparity in figures, which evidence was supported and accepted by the trial Judge. If the service allowance of K7,409.84 being 75% of the appellant's basic pay was directly inputed, the net amount would be lower than that which the appellant was entitled to. Conversely, if the higher figure was applied at retirement, the appellant would receive more than she was entitled to because at that stage, clause 12.1 (e) is clear that the tax burden lay on the respondent as employer.

8.20 It is thus not realistic for the appellant to insist on a literal interpretation of what the rate was, simply by glancing at the pay slip because it is not a true reflection of what the parties agreed that the appellant would be entitled to. By clause 2.6 of the conditions of service, the respondent had agreed to gross up 50% of the appellant's service allowance. The conditions are clear that this was intended to cushion the appellant so that she took home the entire 75%. The appellant cannot insist on construing the import of clause 12.1 (e) in isolation to the rest of the terms of her engagement. The argument that clause

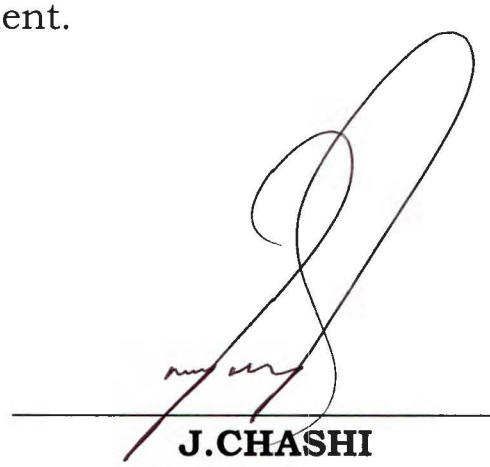
12.1(e) superseded clause 2.6 is without merit. No where was it stated in the conditions that this was the case.

8.21 As we stated earlier, contracts should not be interpreted purely on internal linguistic considerations because they ought to be placed in their proper context. In addition, the learned author of Selwyn's Law of Employment, profer some guidance on page 85 at paragraph 3.25 that ***"the task of the courts and tribunals is to interpret the meaning of such express terms in a manner consistent with industrial realism."***

8.22 We must also state that we agree with Mr. Mulenga as stated at paragraph 6.23 of this Judgment, that the case of **Zesco Limited v Peter Nga'ndu**[1] is distinguishable from the appellant's case and thus not applicable.

8.23 In light of the foregoing, we find that the trial court was on firm ground in its decision. The applicable rate is K7,409.84 and not K9,404.80.

8.24 In sum, this appeal is devoid of merit and is accordingly dismissed. Costs, here and below to the respondent, to be taxed failing agreement.



J.CHASHI
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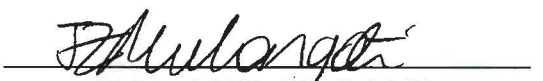

J.Z. MULONGOTI
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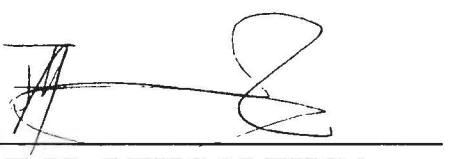

F.M. LENGALENGA
COURT OF APPEAL JUDGE