

IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 054/2020

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

PASCALYNE LUNGU

AND

WORKERS COMPENSATION FUND

1ST RESPONDENT

CONTROL BOARD

WORKCOM PENSION REGISTERED TRUSTEES 2ND RESPONDENT

CORAM: Chashi, Ngulube and Muzenga, JJA

ON: 16th November and 9th December 2021

*For the Appellant: C. Magubbwi, Messrs Magubbwi and
Advocates - standing in for Messers Tembo
Ngulube & Associates*

*For the 1st Respondent: L.M. Matibini, Messrs L.M Matibini and
Company*

*For the 2nd Respondent: K. Kamfwa, Messrs Wilson & Cornhill
Advocates*

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. *James Mankwa Zulu and Others v Chilanga Cement Plc – SCZ Appeal No. 12 of 2004*

2. *Gertrude Chibesakunda Mwila Kayula v Family Health International – SCZ Appeal No. 145 of 2012*
3. *Nkhata and 4 Others v The Attorney General (1966) Z.R. 124*
4. *Rodgers Chama Ponde and 4 Others v Zambia State Insurance Corporation Limited (2004) Z.R. 151*
5. *Zambia Telecommunications Company Limited v Felix Musonda and 29 Others – SCZ Appeal No. 51 of 2014*
6. *Zesco Limited v Linus Chanda – CAZ Appeal No. 024 of 2016*
7. *Rosemary Ngorima and 10 Others v Zambia Consolidated Copper Mines - SCZ Appeal No. 149 of 2011*
8. *Zesco Limited v Alexis Mabuka Mutale- SCZ Appeal No. 227 of 2013*

1.0 INTRODUCTION

- 1.1 This appeal emanates from the Judgment of Honourable Lady Justice P.K Yangailo, delivered on 22nd October 2019.
- 1.2 In the said Judgment, the learned Judge dismissed all the Appellant's claims, who was the plaintiff in the court below.

2.0 BACKGROUND

- 2.1 The Appellant who had worked for the 1st Respondent for a period of 24 years, was upon normal retirement paid her terminal benefits, under the pension scheme, which was being managed by the 2nd Respondent.

2.2 The calculations in respect to the payment were based on the Appellant's basic salary as provided for by the 2nd Respondents Trust Deed and Scheme rules which under clause 1 defined salary as follows:

"Salary shall mean basic salary or wages excluding bonuses, commissions, housing allowance, directors fees, over time, special allowances and any other emoluments of an inconsistent nature."

2.3 Unsatisfied with the formula used in the calculation of her pension benefits, the Appellant on 26th July 2011 commenced an action against the Respondents by way of writ of summons claiming the following reliefs:

- (i) Recalculation and payment of her terminal benefits to include fringe benefits and special allowances for the 24 years of service.
- (ii) Interest on (i) above
- (iii) An order that the 2nd Respondent pays the re-calculated pension due to the Appellant
- (iv) Costs and any other relief the court may deem fit.

- 2.4 It was the Appellant's averment in the statement of claim that sometime in October 2008, the 1st Respondent consolidated salaries for unionized employees into one basic pay which incorporated fringe benefits and special allowances. That however, this was not reflected on the pay slips, although it was acknowledged in the 1st Respondent's letter dated 4th May 2009 and memorandum of 5th August 2009.
- 2.5 In its defence, the 1st Respondent averred that, the salaries were only consolidated for ease of administration, but that did not extend to the basic salary that was used to pay contributions to the 2nd Respondent
- 2.6 According to the 1st Respondent, basic salary and allowances were separate and could only be consolidated for purposes of pension payments after obtaining consent to do so from the Commissioner General, Zambia Revenue Authority (ZRA)
- 2.7 The 1st Respondent further averred that, it had previously up to 2008, made contributions to the pension fund which included allowances; but the same were refunded to the employees after ZRA vide letter dated 16th May 2008

advised that, according to the approved Trust Deed and the Scheme rules approved in October 2008, basic salary excluded allowances. Authority to refund the employees was thereafter sought and was granted by Pensions and Insurance Authority (PIA)

3.0 DECISION OF THE COURT BELOW

- 3.1 After considering the evidence, the submissions by the parties and the cited authorities, the learned Judge formulated the cardinal issue for determination as *“whether the 1st Respondent should have calculated the Appellant’s pension benefits by excluding her allowances.”*
- 3.2 The learned Judge referred to the definition of salary as provided under the scheme rules and regulations. She also analyzed the pay slips from January 1999 to November 2009 and noted that apart from the basic pay, the pay slips also reflected numerous allowances
- 3.3 The learned Judge observed that, as at November 2009 the basic pay was reflected as K3,548, 233.00 (un rebased) with separate special allowances of K2,552,233.00 (un rebased). The learned Judge was of the view that the contention by the 1st Respondent that the basic pay and

allowances were consolidated into one, to form her salary was not reflected on the pay slips.

3.4 The learned Judge was further of the view that it was bound by the terms agreed and entered into by the parties to a written contract. The learned Judge then made reference to several Supreme Court Judgments on the intention of the parties to a written contract.

3.5 The learned Judge noted that the Appellant placed heavy reliance on the holding by the Supreme Court in the case of **James Mankwa Zulu and Others v Chilanga Cement Plc¹** for the contention that basic pay includes allowances. The learned Judge observed that the rules and regulations defined salary to mean basic pay, excluding allowances and therefore agreed with the 1st Respondent in the manner in which it made the calculations. To fortify that position, she relied on the case of **Gertrude Chibesakunda Mwila Kayula v Family Health International²**

3.6 The learned Judge concluded that, where the conditions are specifically provided for in the scheme or deed, the court is bound by the terms encapsulated therein. That in **casu**, the scheme specifically provided for the

Appellant's terminal benefits to be calculated based on her basic pay excluding allowances.

4.0 THE APPEAL

4.1 Disenchanted with the Judgment, the Appellant has appealed to this Court on the following grounds:

- (i) The court below erred in law and fact when it held that the 1st Respondent was correct in calculating the Appellant's benefits by strictly applying her basic pay minus allowances, contrary to the evidence on record.
- (ii) The court below misdirected itself when it held that the allowances that the Appellant was receiving despite the fact that they were consistent cannot constitute part of her basic pay for purposes of calculating her pension benefits.
- (ii) The court erred in law and fact when it held that the true and practical effect of the trust deed was to exclude allowances from the basic pay for purposes of defining the term salary.

5.0 APPELLANTS ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 At the hearing of the appeal Mr. Magubbwi, relied on the Appellant's heads of argument filed into Court on 6th April, 2020. All the three grounds of appeal were argued together. According to Counsel, the rules and regulations defined salary and based on the definition, the 1st Respondent when making contributions to the fund would only make contributions with regard to the basic salary without having regard to the allowances.

5.2 It was contended that the 1st Respondent should have had regard to the allowances when making the contributions to the pension fund; as the unionized employees salaries were consolidated. That therefore when calculating the Appellant's terminal benefits, her allowances should have been included, as at the time they were part of her basic salary

5.3 Our attention was drawn to the memorandum of 5th April 2009 and the letter from the Respondent to the Appellant

of 7th August 2009 in respect to the consolidation aforestated.

5.4 It was submitted that despite the pay slips showing basic salary and allowances under separate titles, that was not the intention of the employer for them to be treated differently as there was no actual distinction between the two as they had been merged.

5.5 It was the Appellant's submission that the **Gertrude Chibesakunda Mwila Kayula**² case can be distinguished from the Appellant's case, in that the Appellant's letter of appointment and the memorandum earlier alluded to combined the basic salary and allowances

6.0 1ST RESPONDENT'S ARGUMENTS IN OPPOSING THE APPEAL

6.1 In responding to the three grounds of appeal, Mr Matibini Counsel for the 1st Respondent, submitted that the Appellant was employed on 2nd December 1985 and retired on 31st December, 2009. That she was a contributing member of a pension scheme administered by the 2nd Respondent. The Appellant and the 1st Respondent both

made contributions to the 2nd Respondent that factored in allowances up to April 2008.

- 6.2 It was submitted that, following clarification that was provided by ZRA, pension contributions attributable to allowances that were erroneously made were refunded to all employees including the Appellant. The reason for the refunds was that the term “salary” as defined in the Trust Deed and Scheme rules excluded allowances. According to the 1st Respondent, pension contributions by both the Appellant and the 1st Respondent post 2008 were premised on the basic salary tabulated on the pay slip.
- 6.3 In respect to the allegation of merging the salary and allowances it was submitted that the 1st Appellant was bound by the directive of ZRA and PIA.
- 6.4 The case of **NKHATA AND FOUR OTHERS v THE ATTORNEY GENERAL**³ was cited and submitted that the court below cannot be faulted in arriving at the decision it did. That it is trite law that the Appellate courts will not reverse decisions of lower courts lightly or merely because

they would have come to a different decision if they had adjudicated the matter.

- 6.4 It was further submitted that the Appellant was refunded and upon receipt of the refund she continued making contributions to the fund based on the basic pay minus allowances. That it would therefore be unjust enrichment if this Court were to reverse the Judgment of the court below.
- 6.5 It was submitted that the facts as established, shows two components of payment as having been made to the Appellant on monthly basis. That in dealing with the cardinal issue before it, the court below, not only identified the core issue but also cited the correct principles of law.
- 6.6 According to Counsel, the second ground of appeal flies in the teeth of the **Gertrude Chibesakunda Mwila Kayula**² case as well as the definition of “salary” in the Trust Deed and the Scheme rules. According to Counsel the wording of the definition is clear and therefore the 1st Respondent discharged its obligation

7.0 THE 2ND RESPONDENT'S ARGUMENTS IN OPPOSING THE APPEAL

7.1 In responding to the three grounds of appeal, Mr. Kamfwa Counsel for the 2nd Respondent submitted that, it is evident from the Appellant's arguments that she has issues with the 1st Respondent and not necessarily with the 2nd Respondent.

7.2 According to Counsel, the 2nd Respondent managed the pension Scheme in accordance with the Scheme rules which were approved by ZRA and PIA. That the salary to be used in calculating the pension benefits was clearly defined. It was submitted that the definition was never amended. Counsel contended that, the attempt by the 1st Respondent to base the employees' contributions on the salary that included allowances was overruled by ZRA.

7.3 It was further submitted that allowing the arguments by the Appellant that her salary included allowances for purposes of computing pension benefits, would amount to amending the Scheme rules using parole evidence against the principle laid down in the case of **Rodgers Chama**

Ponde and 4 Others v Zambia State Insurance Corporation Limited⁴, where it was held that parole evidence is inadmissible because it tends to add, vary or contradict the terms of a written agreement validly concluded by the parties.

7.4 Our attention was drawn to the case of **Zambia Telecommunications Company Limited v Felix Musonda and 29 Others⁵** and submitted that, though the case dealt with calculating long service gratuity, it gave the Supreme Court an occasion to comment on its earlier decision in **James Mankwa Zulu¹** case, regarding the definition of salary. They had in that case the following to say at page J12:

*“As regards the case of **James Mankwa Zulu and Others v 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 condition of service*

expressly stated that the basic salary shall not include allowances.”

7.5 On the basis of the foregoing, Counsel submitted that, where a definition of the term such as in this case **“Salary”** is defined in the instrument or document governing the relationship, rights and obligations of the parties, the definition should be respected.

8.0 APPELLANT’S ARGUMENTS IN REPLY

8.1 In reply to the Respondents’ arguments, Counsel submitted that the appeal goes beyond the merging of the salary and allowances to the fact that the wrong figure was used in the calculating of the allowances.

8.2 The Appellant reiterated the arguments on the merging of the basic salary with the allowances. We were urged to order the recalculation of the Appellant’s pension benefits in respect to the merging of the allowances into basic salary and also regarding the Appellant’s exit salary.

9.0 THIS COURT’S CONSIDERATION AND DECISION

9.1 The three grounds of appeal are basically challenging the finding by the learned Judge in the court below that the

1st Respondent was correct in calculating the Appellant's benefits by strictly applying her salary as defined by the Trust Deed and Scheme rules, as basic salary excluding allowances.

9.2 We have considered the Judgment being impugned and the arguments by the parties. We note from the pleadings which were in the court below, that the court was being asked to make a determination on a very narrow issue. As correctly identified by the learned Judge, the issue before her was whether the 1st Respondent should have calculated the Appellant's pension benefits by excluding her allowances.

9.3 It is common cause that the relationship between the three parties was governed by the Trust Deed and the Scheme rules in respect to the pension fund as approved by ZRA. The Trust Deed and the Scheme rules as earlier alluded to, defined salary for purposes of calculating pension benefits, as basic salary, excluding allowances. In the absence of any amendments to the Trust Deed and the Scheme rules, the parties are bound by the definition contained therein. There was therefore, no basis on which

the learned Judge could divert from what was provided for in the Trust Deed and the Scheme rules.

9.4 We have also noted and we agree with the learned Judge that, all the Appellant's pay slips, from 1999 to 2009, which were analyzed by the learned Judge provided for a separate basic pay and allowances. There is no pay slip which at any time shows the merging of the basic pay and allowances into one salary.

9.5 There is indeed evidence, which again is common cause, that prior to 2008 the 1st Respondent made contributions to the pension fund, which included allowances. It is not in dispute that after ZRA through their letter dated 16th May 2008, advised that according to the approved Trust Deed and Scheme rules salary was defined as basic salary, excluding allowances; all the employees were refunded their contributions upon advise from ZRA and approval from PIA. It is worth noting that the Appellant acknowledged receiving the refund. In that regard, we agree with the 1st Respondent that it would be unjust enrichment to Order a re calculation of the benefits.

- 9.6 In the case of, **Zesco Limited v Linus Chanda**⁶ the complainant in the Industrial Relations Court had alleged that the education and housing allowances, which were part of his entitlements were not included in the calculation of his terminal benefits contrary to his contract of employment.
- 9.7 In that case, we had occasion to examine various Supreme Court cases, amongst them the case of **Rosemary Ngorima v Zambia Consolidated Copper Mines**⁷ where it was held that, it is trite law that in any employer/employee relationship, the parties are bound by whatever terms and conditions they themselves set. Equally in the case of **Zesco Limited v Alexis Mabuka Mutale**⁸, the Supreme Court opined that, the resolution of the issues raised depended on the interpretation of clauses in the contract of employment. Therefore, in the **Linus Chanda**⁶ case, in calculating his gratuity, we strictly followed the formula which was provided for in the contract of employment. In the said case, we held that the gratuity did not include the education and holiday allowances. Our position has been fortified by the


Supreme Court in the case of **Felix Musonda and 29 Others**⁵, which explained the Supreme Court's reasoning in the **James Mankwa Zulu**¹ case which was heavily relied upon by the Appellant in the court below.

9.7 In view of the aforesaid, the learned Judge in the court below cannot be faulted for strictly following what was provided for in the Trust Deed and Scheme rules, which formed the basis of the parties relationship in respect to the pension scheme; and for not admitting any extrinsic evidence.

9.8 In the view that we have taken, the appeal has no merit and it is accordingly dismissed, with costs to the 1st and 2nd Respondents. Same are to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE



K. MUZENGA
COURT OF APPEAL JUDGE