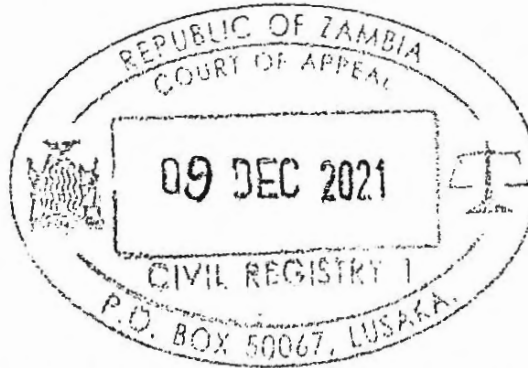


**IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT NDOLA**

Appeal No. 69/2020

*(Civil Jurisdiction)*



**B E T W E E N:**

**ZAMBIA NATIONAL COMMERCIAL BANK PLC**

**APPELLANT**

**AND**

**HASTINGS PHIRI**

**RESPONDENT**

*Chishimba, Majula and K. Muzenga, JJA  
On 18<sup>th</sup> November 2021 and 9<sup>th</sup> December 2021*

*For the Appellant:*

*Mr. N. Nchito SC, Mr. C. Hamwela of Nchito & Nchito, Mr.  
Buta Gondwe of Messrs Buta Gondwe & Associates & Mr. N.  
Siamoondo - In-house Counsel.*

*For the Respondent:*

*Mr. A. Chileshe of Kasama Chambers*

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**JUDGMENT**

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MAJULA JA, delivered the Judgment of the Court

**Cases referred to:**

- 1. Zambia National Commercial Bank Plc vs Geoffrey Muyamwa & 88 Others  
Selected Judgment No. 37 of 2017.*
- 2. Zambia National Commercial Bank Plc vs Misheck Chanda SCZ No. 14 of  
2017.*
- 3. City Express Service Ltd vs Southern Cross Motors Ltd (2007) ZR 263*
- 4. Savenda Management Services vs Stanbic Bank (Z) Ltd SCZ SJ No. 10 of  
2018.*

5. *Admark Limited vs Zambia Revenue Authority* (2006) ZR 43.
6. *Macfoy vs United Africa Co. Limited* (1961) 3 ALL ER 1169.
7. *Zambia National Commercial Bank vs Masauso Nyantando & 88 Others* SCZ Appeal No. 62 of 2018.
8. *Zlatan Zlatko Arnautovic vs Stanbic Bank Zambia Ltd* SCZ/8/2019/2006
9. *Wilson Masauso Zulu vs Avondale Housing Project Ltd* (1982) ZR 172

### **Legislation Referred to:**

*The Limitations Act, 1939*

## **1.0 INTRODUCTION**

- 1.1 This appeal emanates from a decision of the industrial relations division of the High Court. The long and short of the matter is that the respondent had been employed by the appellant from the year 1981 to 1998. He migrated to new conditions of service on 19<sup>th</sup> December 1996 and on 31<sup>st</sup> July 1998 he was placed on a severance scheme where he was paid in accordance with Appendix 'H' of the appellant's scheme.
- 1.2 Disgruntled with the formula used to effect payment which excluded allowances, he graced the doors of the courts. Among the reliefs sought was payment of terminal benefits to include allowances in accordance with the directive made by the then Minister of Finance, Mr. Penza, in a letter dated 28<sup>th</sup> March 1995 (the Penza letter) and also based on the new conditions of service of 19<sup>th</sup> December 1998 from 1991 to the date of settlement. He also cried foul over the exclusion of allowances such as housing, furniture, water, electricity and fuel among

others. In addition, his plea was for payment of interest on the amounts due and payment of costs.

## **2.0 DECISION OF THE COURT BELOW**

- 2.1 After careful scrutiny of all the respondent's claims, the court below (Musona J.) found that the respondent was not entitled to be paid under the ZIMCO conditions of service as what was obtaining at the time of exit of employment were the ZANACO conditions of service which in essence superseded the ZIMCO conditions. The court held that the respondent should be paid under the ZANACO conditions of service under which he was serving at the time of exiting employment.
- 2.2 Regarding the grievance of non- payment of allowances in the severance package, the trial court examined the formula provided for in Appendix 'H'. The court was in agreement with the respondent that his monthly pay should have been with the allowances that had been left out. Accordingly, this claim succeeded.
- 2.3 The other claims sought were dismissed apart from the award of interest and costs in favour of the respondent.

## **3.0 GROUNDS OF APPEAL**

- 3.1 The above findings are what has triggered the appeal before us. The appellant has appealed to this court fronting three grounds of appeal structured as follows:

- “1. That the court below erred in law and fact by failing to follow the Supreme Court precedents of *Zambia National Commercial Bank Plc v. Geoffrey Muyamwa & 88 others* Selected Judgment No. 37 of 2017 and *Zambia National Commercial Bank Plc v. Misheck Chanda* SCZ No.44 of 2017 cited in cases of similar claims and the fact that such claims are now *res judicata*.
2. The court below erred in law and fact by misinterpreting the *Zambia National Commercial Bank Plc* conditions of service which clearly defines monthly salary and salary.
3. That the complainant’s complaint was in any event statute-barred.”

#### 4.0 APPELLANT’S ARGUMENTS

- 4.1 In support of the ground one, learned Counsel for the appellant submitted that the lower court erred when it ruled in favour of the respondent that allowances should be paid to the latter as part of the terminal benefits. Counsel contended that the lower court thus failed to follow the Supreme Court precedents of *Zambia National Commercial Bank Plc vs Geoffrey Muyamwa & 88 Others*<sup>1</sup> and the case of *Zambia National Commercial Bank Plc vs Misheck Chanda*<sup>2</sup> where the Supreme Court held that claims for inclusion of allowances to be part of the terminal benefits under the old ZANACO conditions of service are now *res judicata*.
- 4.2 Counsel pointed out that the respondent was paid his terminal benefits according to the *Zambia National Commercial Bank* Conditions subsisting at the time which were introduced in 1996. The conditions did not provide for allowances to be part

of the terminal package. To buttress the argument our attention was drawn to pages J55 and J56 of the ***Zambia National Commercial Bank Plc vs Geoffrey Muyamwa and 88 others***<sup>1</sup> Judgment where it was held:

*“The effect of these two decisions in the light of the respondents’ plight is that upon migration to ZANACO conditions of service, which they did so freely and willingly, they lost the right to the benefit of the “Penza letter”. On termination, their terminal benefits are to be computed in accordance with their conditions of service at the point of exiting which are the ZANACO conditions of service which did not provide for inclusion of allowances in computing terminal benefits.”*

- 4.3 Counsel contended that it was therefore surprising that the lower court allowed the respondent to benefit from both the ZANACO and the ZIMCO conditions contrary to the guidance of the Supreme Court which made a clear distinction between the two conditions of service and made the issue *res judicata*.
- 4.4 In relation to ground two, the main point raised by Counsel for the appellant was that the lower court misdirected itself by misinterpreting the terms ‘monthly salary’ and ‘salary’ as contained in the Zambia National Commercial Bank Plc Conditions of Services. We were referred to pages 95 and 174 of the record of appeal where the ZANACO Conditions of Service are captured particularly at page 98 where it states that salary does not include allowances in the basic pay. It further states that salary shall mean the basic salary or



wages, excluding bonuses, commission, housing allowances, directors' fees, overtime and any other emoluments."

4.5 Counsel argued that to construe month's pay as including allowances is to go back to the ZIMCO Conditions which is against the appellant's established practice from the guidance of the Supreme Court in the *Muyamwa* case. Counsel further submitted that there was no substratum of evidence before the lower court to oust an express term in the conditions of service.

4.6 Pertaining to ground three, Counsel argued that the respondent's action is in fact statute-barred since he left employment on 28<sup>th</sup> July 1998 and only commenced this action in the year 2006. For this point, Counsel relied on the provisions of section 2(1) under part 1 of the Limitation Act which provides that actions founded on simple contract should be commenced within 6 years from the date on which the cause of action accrued. The case of ***City Express Service Ltd vs Southern Cross Motors Ltd***<sup>3</sup> was called in aid where it was held:

*"There can be no estoppel against a Statute. A litigant can plead the benefit of a statute at any stage. It was submitted that the whole action is statute-barred and the appeal should be allowed with costs."*

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liquidated ZIMCO conditions of service by those who remained in employment after liquidation.

- 5.3 Moving on to ground two, counsel observed that the severance package formula at Appendix 'H' of the conditions of service indicates "*month's pay*" and not "*monthly salary*." The appellant failed to indicate where "*months' pay*" is defined. The lower court also made a finding of fact at page J.7 to this effect when it stated:

*"I have looked at the ZANACO conditions of service and I have not seen any definition for month's pay."*

- 5.4 Counsel stoutly argued that this observation of the lower court is a finding of fact which cannot be lightly disturbed by this court on the authority of ***Wilson Masauso Zulu vs Avondale Housing Project Ltd***<sup>9</sup>. Counsel further noted that the appellant's witness Mobbry Mwewa confirmed in cross-examination at trial that as a matter of practice the appellant usually pays month's pay with allowances.

- 5.5 It was asserted that the court below cannot therefore be faulted for arriving at the decision that it did. In concluding on this ground Counsel argued that the appellant unilaterally varied the conditions of service in Appendix H substituting the term month's pay with basic pay. Thus the appellant treated the respondent unfairly by paying his separation package without allowances.



5.6 With respect to ground three, it was contended that the ground was misplaced and misconceived as it was addressed by the lower court in its ruling dated 10<sup>th</sup> May, 2006. The appellant did not challenge the said ruling and it is therefore not tenable for the appellant to bring the issue on appeal.

5.7 With these submissions, we were urged to dismiss the appeal with costs to the respondent.

## 6.0 HEARING OF THE APPEAL

6.1 The hearing of the appeal took place on 18<sup>th</sup> November, 2021 and Mr. Nchito, SC, indicated that they would place reliance on the heads of argument filed. He augmented briefly on the three grounds of appeal.

6.2 Mr. Nchito, SC, tackled grounds one (1) and two (2) together. The thrust of his argument was that the lower court failed to follow clear precedents on the same questions established by the Supreme Court and therefore breached the basic principle of *stare decisis*.

6.3 He pinned his faith on a number of cases dealt with by the Supreme Court concerning the ZANACO conditions of service. He highlighted three in particular, namely:

\* ***Zambia Commercial Bank vs Geoffrey Muyamwa & 88 Others***<sup>1</sup>

\* ***Zambia National Commercial Bank vs Misheck Chanda***<sup>2</sup>.

\* ***Zambia National Commercial Bank vs Masauso Nyantando & 88 Others.***<sup>7</sup>

- 6.4 State Counsel, went on to opine that the question that fell to be determined by the court below is whether the respondent was entitled to have his terminal benefits computed inclusive of allowances at termination. The mode of termination was voluntary separation. It was forcefully argued that what ought to be found under voluntary separation in 1996 is dealt with in the ***Muyamwa*** case. He drew the court's attention to the ***Muyamwa*** judgment and contended that it was dealing with the same issue of voluntary separation. Brimming with confidence, he stated that in the aforecited ***Muyamwa*** case, the Supreme Court made itself abundantly clear on its interpretation of the ZANACO conditions of service.
- 6.5 Adverting to the ***Misheck Chanda vs Zanaco***<sup>2</sup> case he expressed the view that the Supreme Court appeared irritated that the same question keeps coming back. That the apex court has concluded that the issue is now *res judicata*.
- 6.6 Turning to the case of ***Zanaco vs Nyantando***<sup>7</sup>, Mr. Nchito, SC, stressed that the Supreme Court has been very clear on the interpretation of the conditions of service and has frowned upon attempts by litigants to change the interpretation. In winding his arguments pertaining to grounds one and two, State Counsel expressed the view that the court below did not engage the Supreme Court judgments. Further, that a High

Court cannot depart from the guidance of the Supreme Court. In a nutshell the arguments in grounds 1 and 2 speak to the court being caught up with the principle of *stare decisis*.

- 6.7 Progressing to ground three (3) which is premised on the statute of limitations, Counsel immediately pointed out that limitation goes to jurisdiction in line with the decision in ***Zlatan vs Stanbic***<sup>8</sup>. He explained that the apex court has guided that it is still permissible to raise the question at any time.
- 6.8 In reply, Mr. Chileshe counsel for the respondent equally placed reliance on the respondents heads of arguments. He chose to combine all the three grounds and argued them together.
- 6.9 Learned Counsel asserted that the allowances that the respondent is claiming are those found in the **1996 ZANACO Conditions** and that the appellant has conceded in paragraph 2.3 of its skeleton arguments in reply filed on 16<sup>th</sup> June, 2020 that it includes allowances and there is no mention of basic pay. Counsel spiritedly argued that they would call in aid the rule which states that if there is any lapse in drafting of the document, it would be interpreted against the one who drafted it. He went on to argue that the severance contract was drafted by the appellant.

- 6.10 Regarding the *Muyamwa & Misheck* cases, he avowed that the Supreme Court never pronounced itself on the ZANACO severance formula, which is whether months pay included allowances or not. He went on to submit that the fact that a wrong had been perpetrated for a long time did not make it become a right. He maintained that they were before court for justice.
- 6.11 On the question of whether or not the action was statute barred, learned counsel's response was that it was not. This was on account of the fact that there was a Ruling allowing them to file process out of time. He implored us to dismiss the appeal with costs.
- 6.12 Mr. Nchito, SC, in reply alluded to the heads of arguments in reply in paragraph 2.3 and asserted that allowances were payable but in computation these were not included. As regards the *Muyamwa* and *Misheck* cases, he insisted that they were about allowances being included in the computation of terminal benefits. In relation to the plea for costs he stated that there was already clear direction on this.

## **7.0 CONSIDERATION AND DECISION OF THIS COURT**

- 7.1 We have prudently examined the record of appeal and the spirited arguments from counsel for the parties. The grounds of appeal that have been raised relate to the determination of *res judicata*, statute barring and misinterpretation of the

ZANACO conditions of service. For reasons that will become quite evident in the judgment, we propose to deal with the issue of the respondent's action being statute-barred.

- 7.2 The position of the law is that the **Limitation Act 1939** does indicate the period within which an action can be instituted. In this particular case, this matter falls under the realm of contract law and immediately what comes to the fore is part 1 of the **Limitation Act 1939** which make it crystal clear that matters of this nature should be commenced within 6 years from the time that the cause of action had accrued. It is imperative, in our view, to reproduce the provisions of the Limitation Act, in particular, section 2 in so far as it is relevant. It enacts as follows:

*"2(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:*

*a. actions founded on simple contract or on tort;"*

- 7.3 It is abundantly clear from the foregoing that the time limitation on a simple contract or tort is 6 years. We must hasten to add that a party can plead the benefit of the statute at any stage of the proceedings as was expressly pointed out in the cases of **City Express Service Ltd vs Southern Cross Motors Ltd**<sup>3</sup> where the Supreme Court adverted to the case of **Ndhlovu and Another vs Al Shams Building Materials Limited** wherein it was held:



*“There can be no estoppel against a statute. A litigant can plead the benefit of any statute at any stage.”*

In addition, the court observed that:

*“...a litigant can call in aid the benefit of a statute at any stage. In my view, there cannot be a waiver of a benefit conferred on a party by statute.”*

- 7.4 The apex court did not prevaricate from its position on this particular principle in the case of ***Savenda Management Services vs Stanbic Bank (Z) Ltd***<sup>4</sup>. Another insightful case also referred to by counsel for the appellant is ***Admark Limited vs Zambia Revenue Authority***<sup>5</sup> which speaks the same language regarding the principle that a point of law can be raised at any time including on appeal even if it was not pleaded in the court below.
- 7.5 We are guided by the various cases highlighted above. Turning to the case at hand, the facts reveal that the respondent was employed in 1981 and placed on severance on 31<sup>st</sup> July 1998. He commenced the action in the Industrial Relations Court in May 2006 which by our quick computation gives us a period of 8 years later. Clearly, this falls outside the timelines as set out in the Limitation Act for a period of 6 years. It only stands to reason that the matter was therefore statute-barred.
- 7.6 This in itself leads us to the jurisdiction of the court. If it has been demonstrated that an action has been caught up in the statute of limitations, it follows that the court has no jurisdiction. The revered Lord Denning had this to say on the

issue in the case of *Macfoy vs United Africa Co. Limited*<sup>6</sup> at page 1172:

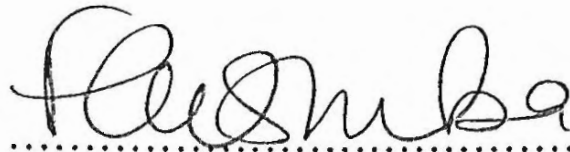
*“...If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”*

7.7 This pronouncement by the erstwhile Lord Denning put paid to the matter as it articulates the position of the law. The matter before us being statute barred made the proceedings on which it was founded to be incurably bad and could not be sustained.

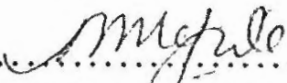
7.8 For the foregoing reasons, we find merit in the third ground of appeal as the matter was statute barred and therefore any decision flowing therefrom was a nullity. The fact that the lower court by its ruling of 10<sup>th</sup> May 2006 allowed them to file the complaint does not cure the proceedings. The act was incurably bad and cannot be sustained. We accordingly uphold this ground of appeal.

7.9 We find it to be an academic exercise in futility to proceed to deal with the other two grounds of appeal. In the view that we have, we lack jurisdiction to entertain the matter.

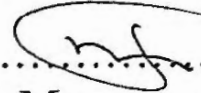
7.10 We order that each party bears their own costs in the court below and in this court.



.....  
F. M. Chishimba  
**COURT OF APPEAL JUDGE**



.....  
B.M. Majula  
**COURT OF APPEAL JUDGE**



.....  
K. Muzenga  
**COURT OF APPEAL JUDGE**

