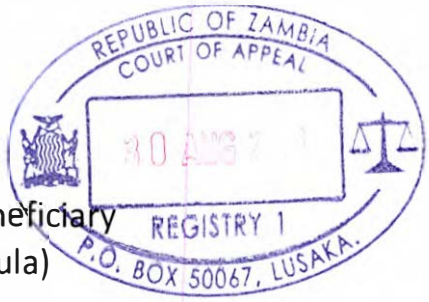
IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 171 /2021

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

GRACE PHIRI KAYULA **APPELLANT**
(Suing as the administrator and beneficiary of the estate of Robert Chewe Kayula)

AND

WORKERS' COMPENSATION FUND CONTROL BOARD **RESPONDENT**

Coram: Chashi, Majula and Patel, JJA
on 23rd August 2023 and 30th August 2023

For the Appellant: Mr. C. Sianondo
Messrs Malambo & Company

For the Respondent: Mr. J. L. Kabuka
Messrs J. Kabuka & Co.

JUDGMENT

Patel S.C., JA, delivered the Judgment of the Court.

Cases referred to:

1. *Harry Chinene vs AON Zambia Limited, Workcom Pension Registered Trustees and Workers Compensation Fund Control Board- SCZ Appeal No. 217 of 2015.*

2. *Febby Nsanje and Others v Workers Compensation Fund Control Board- SCZ Appeal No. 1/2009; [2012] ZMSC 78 (3 April 2012).*

3. *Hakainde Hichilema v The Attorney General- SCZ Appeal No. 4/2019; [2021] ZMSC 35 (18 June 2021).*
4. *Dangote Industries Zambia Limited v Enfin Limited-CAZ Appeal No.53 of 2020; [2021] ZMCA 3 (29 January 2021).*
5. *Workers Compensation Fund Control Board vs Regina Kapwele and Lordwell Kalubankwa- CAZ Appeal No. 148 of 2018.*
6. *Indo Zambia Bank vs Mushaukwa Muhanga -SCZ (2009) ZR 266.*
7. *Derek Mukokanwa v Development Bank of Zambia- SCZ Appeal No. 120 of 2014; [2017] ZMSC 259 (14 March 2017)*

Legislation referred to:

1. *The Pension Scheme Regulation Act, Chapter 255 of the Laws of Zambia.*
2. *The Interpretation & General Provisions Act, Chapter 2 of the Laws of Zambia.*

Other Works:

1. *Mwenda W.S and Chungu C., Employment Law in Zambia, Cases and Materials Revised Edition.*
2. *Mwenda W.S and Chungu C., A Comprehensive Guide to Employment Law in Zambia, (University of Zambia Press, 2021).*

1.0 INTRODUCTION

1.1 This is an appeal against the Ruling of *Mulanda J* of the High Court, delivered at Ndola, on 31 March 2021.

1.2 It is noted that the Plaintiff in the Court below, commenced an action against the Defendant, in her capacity as administrator and beneficiary of the Estate of *Robert Chewe Kayula*, a former employee of the Defendant.

The Plaintiff, being dissatisfied with the Judgment, has launched this appeal. In this Judgment, we will refer to the Parties as Appellant and Respondent, as they appeared in this Court respectively.

1.3 It is not in dispute and the Court has noted that *Robert Chewe Kayula* was an employee of the Respondent company and commenced this action by Writ dated 1st September 2014, which action was thereafter continued, with leave of the court below, in the name of the now Appellant.

2.0 BACKGROUND

2.1 By her amended Writ of Summons and Statement of Claim dated 3rd October 2016, the Appellant commenced an action against the Respondent (*pages 192 to 197 the Record)* claiming the following reliefs:

(i) Damages for breach of contract;

(ii) Damages for mental anguish and anxiety;

(iii) A Court order directing the Defendant to recalculate the early retirement benefits pursuant to clause 7.5 of the relative conditions of service;

(iv) A court order directing the defendant to pay the difference due;

(v) A declaration that part of clause 7.3 of the relative conditions of service pertaining to recovery of early retirement benefits from the Pension benefits is null and void;

(vi) Interest from 30 September 2008 until payment,

(vii) Any relief the Court may deem fit;

(viii) Costs.

2.2 On 17th October 2016, the Respondent did file its defence to the amended statement of claim.

3.0 DECISION OF THE COURT BELOW

3.1 The trial Judge considered the issues in dispute surrounding the mode of exit of the Appellant and the clauses applicable to his separation from the Respondent. At the end of the trial, the learned Judge, identified two main issues which required the determination of the Court as follows:

(a) *"Whether clause 7.3 of the Defendant's conditions of service contained in the Memorandum of Conditions of Service for Senior and Non-unionized Members of the Board 2004 ("the conditions of service") which provided for recovery of early retirement benefits paid by the Defendant Board to an employee who goes on early retirement from that employees' Pension Scheme benefits on his attainment of normal pensionable age, contravened the provisions of section 31 of the Pension Scheme Regulation Act, 1996 and, therefore, was null and void; and*

(b) *"Whether an employee who is early retired under clause 7.3 of the said Defendant's conditions of service is also entitled to separation payments stipulated under clause 7.5 of the same conditions of service."*

3.2 Having considered the evidence brought out at the trial, and applying her mind to the authorities cited, the trial Court found that the first issue had not been satisfactorily proved. The trial Court went further to find that no evidence was adduced to support the argument that *clause 7.3* of the Defendants conditions of service was null and void for violating **section 31**

of the **Pension Scheme Regulation Act**[1]. The Court noted the conspicuous absence of closing submissions on this issue, and also noted that the issue was doomed to fail, on the decision of the Supreme Court of Zambia in the case of **Harry Chinene vs AON Zambia Limited, Workcom Pension Registered Trustees and Workers Compensation Fund Control Board** [1].

3.3 In dealing with the second issue, the trial Court considered the import and effect of *clauses 7.3* and *7.5* of the applicable conditions of service, and found that even before the action was commenced, the Parties were aware that the issue had specifically been adjudicated by the Supreme Court in the case of **Febby Nsanje & 38 others vs Workers Compensation Control Board** [2].

3.4 The trial Court using the settled legal position on these issues as espoused by the decisions of the Supreme Court, found that the action of the Plaintiff to relitigate a matter that has received judicial determination, was an abuse of Court process and dismissed the action.

3.5 The lower court in its Judgment dated 31 March 2021 *(pages 8 to 52 of the Record),* dismissed the Appellant's action and now the subject of this appeal.

3.6 Essentially, we are tasked with the job of determining the applicability of *clauses 7.3 or 7.5*, as being the basis of the payment made to the Appellant by his erstwhile Employer, the Respondent. We are also asked to determine which of the several decisions, referred to by Counsel, will

bind this Court as we analyze the competing arguments offered by learned Counsels.

4.0 THE APPEAL

4.1 Being dissatisfied with the Judgment of the lower Court, the Appellant, filed a Notice of Appeal and Memorandum of Appeal on 1st June 2021 advancing two grounds of appeal as follows:

1. *That the Trial Court erred both in law and fact in failing to find that the Appellant was entitled to payment under clause 7.5 of the applicable conditions of employment and to consequently order the recalculation of benefit, damages for breach of contract and damages for mental anguish.*

2. *The Trial Court below erred in law and fact in failing to give full effect to the evidence on record.*

5.0 APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 The Appellant's heads of argument filed on 30th July 2021 and its arguments in reply of 23 March 2022, have been duly considered and appreciated and will not be recast here save for emphasis as necessary.

6.0 THE RESPONDENT'S HEADS OF ARGUMENT

6.1 The Respondent filed its heads of argument on 6th September 2021. These too, have been duly considered, and will not be recast save for emphasis where appropriate.

7.0 DECISION OF THIS COURT

7.1 At the hearing of the appeal, learned counsel opted to rely on their respective heads of argument filed before Court and briefly augmented their arguments. Counsel Sianondo drew our attention to *page 98* of the Record of Appeal, being the letter dated 25 September 2008 from the Respondent to the Appellant and invited us to consider the four issues brought out by the said letter. We were also reminded that this was a common document which appeared at *page 315* of the Record of Appeal. It was his submission that the only *quarrel*, to use Counsel's terminology, was on the issue of accrued benefits payable to the Appellant, more especially that early retirement was imposed on him, thus invoking the provisions of *clause 7.5* as quoted on *page 214* of the Record of Appeal.

7.2 Counsel went on to argue and distinguish the facts of the case in the **Harry Chinene**[1] and **Febby Nsanje**[2] decisions to attempt to persuade us that the facts in *casu* were distinguishable from those decisions. He implored us to find that the facts in *casu* were on all fours with the decision of this Court in the case of **Workers Compensation Fund Control Board vs Regina Kapwele and Lordwell Kalubankwa**[5]**.** Counsel urged us to uphold the appeal with costs.

7.3 In his response, Counsel Kabuka was quick to urge us to expunge the arguments on estoppel, which was not pleaded, nor evidence led on it in the court below, nor canvassed as an argument in the Appellants submissions. In his oral arguments, to buttress the heads of arguments filed, he invited us to take note that the central issue here is the mode of exit applicable to the Appellant. The letter at *page 315* of the Record of

Appeal identifies *clause 7.3,* and no other clause was applicable herein. Counsel further responded that the applicable cases were those of **Harry Chinene**[1] and **Febby Nsanje**[2]**.** It was further Counsel's submission that reading the sub-heading of *clause 7.5* out of context, is liable to it being misconstrued, the said clause being applicable only in instances of retrenchment or redundancy. He also distinguished the facts in *casu* from that of **Regina Kapwele**[5]. He prayed that the appeal be dismissed with costs.

7.4 We have scrutinized the two grounds of appeal and cannot help but comment that the grounds of appeal, more especially ground 1, appear to be an intent to re-litigate issues that were exhaustively dealt with by the Court below, in the hope of seeking a more favorable outcome. Although Counsel for the Appellant appears to have argued the two grounds together, Counsel for the Respondent has approached the grounds of appeal in reverse order. We will deal with *ground 2* as it appears to have been phrased in a manner such as to cast the net far and wide, without identifying which part of the evidence the trial court had apparently failed to give effect to.

7.5 It is common ground that the Respondent's letter of 25th September 2008, triggered the Appellant's separation from the Respondent's employment. (*letter of separation).* The said letter of separation is on *page 98 & 315* of the Record of Appeal. We have scrutinized the said letter and the evidence in the court below pertaining to the said letter, as it forms the crux of this ground of appeal and the argument that the trial court failed to give full effect to the evidence. The Appellant has advanced the

argument that the letter of separation as drafted gives the Appellant three entitlements. Firstly, his entitlement to accrued benefits, secondly, he was to be advised separately by Workcom Registered Pension Trustees on his pension entitlement, and thirdly, that a subsequent contract of employment could be negotiated separately. The Appellant has referred this Court to the evidence received by the Court below on pages *435/436* of the Record of Appeal in support of its argument that the accrued benefits were not paid to the Appellant by the Respondent. The Appellant has also argued that the *letter of separation* is further strengthened by meetings that took place in July 2011 and has referred to *pages 155 to 160* of the Record of Appeal in support of the argument that the Appellant's name appearing on the list at *page 160,* justifies his entitlement to further monies from the Respondent.

7.6 The Respondent has argued that there was no ambiguity in the evidence pertaining to the Appellant's separation from the Respondent. Evidence of two witnesses was referred to on *pages 410, 418/423* and *426/429* respectively of the Record of Appeal. We have scrutinized the said evidence and note that the trial court did evaluate the evidence and arrived at her conclusion that the Appellant having been retired pursuant to *clause 7.3* of the Respondent's Conditions of Service, his mode of exit was distinct and separate from other modes of separation under the said conditions of service. It is apparent that the Appellant seeks to place emphasis on a document at *page 160* of the Record of Appeal, and which names the Appellant, to seek payments due to the Appellant, while the witness called to speak to the said management papers, was not able to verify or confirm whether it was a legitimate management paper

presented to the Board. It is also noted that the letter of separation and the management papers referred to were dated three years later. There is no evidence at all to support the argument that these documents ought to be considered as part of the same transaction.

7.7 We further note that the court below also relied on the decision of the Supreme Court of Zambia in the case **of Febby Nsanje & 38 others vs Workers Compensation Fund Control Board,**[2] which decision was referred to by the witness, to support the evidence that the Respondents interpretation of the separation provisions and their respective corresponding separation packages had been judicially tested and affirmed by the highest court in the land. We note that the trial court did sufficiently address her mind to this issue. We cannot fault the finding of fact of the court below, who at *page 44* of the Record of Appeal (Page *J37* of the Judgment), did consider the evidence of the witness on this issue and on the doctrine of *stare decisis*, the court below and indeed this court, is bound by the decision in the case of **Febby Nsanje**[2]**.** We have fully considered the appellant's argument, and we cannot by any stretch of imagination, disassociate the facts of this case from the facts in the **Febby Nsanje**[2] matter, both dealing with early retirement at the instance of the Respondent. We will not interfere with this finding.

7.8 We now move to consider the argument in support of *ground 1* of the appeal. We have already determined that the mode of exit of the Appellant was in accordance with *clause 7.3* having noted the clear intent of the *letter of separation.* We have examined the arguments and submissions of the Appellant, in persuading us to find that the Appellant

was entitled to separation benefits in accordance with *clause 7.5* of the Respondents Conditions of Service. The Appellant has referred to the wording of *clause 7.5* in support of its argument that the words *"or retirement measures are applied"* are the words that affect the Appellant and as he did not opt to retire, but was retired by the Respondent, that he ought to have been paid in accordance with *clause 7.5*. The Appellant has relied on **section 4** of the **Interpretation and General Provisions Act**[2] to give true meaning and import to the use of the word *"or"*. The Appellant has also referred to the decision of the Supreme Court of Zambia, in the case of **Hakainde Hichilema vs Attorney General** [3] to proffer the argument that a reading of the actual clause, *(clause 7.5),* confirms that it is applicable to those employees on whom retirement is applied.

7.9 The Appellant has also called in aid the decision of this Court in the case of **Dangote Industries Limited vs Enfin Limited**[4] to further advance its argument above. The Appellant has also referred to our decision in the case of **Workers Compensation Fund Control Board vs Regina Kapwele and Lordwell Kalubankwa**[5] in its bid to convince us that the trial court erred in failing to find that the Appellant was entitled to payment under *clause 7.5* of the Applicable conditions of service. We have considered this argument and also considered our earlier decision. We are of the considered view that the Appellant is attempting to renegotiate the terms of the *letter of separation,* by choosing to be paid out in terms of *clause 7.5*, as opposed to *clause 7.3*, as specified in the said letter of separation. We are of the considered view that the **Regina Kapwele**[5] decision referred to above, is premised on a completely different set of facts and which attracted different considerations, key among them being whether the

employees, in that case, had consented to being bound by their new and varied conditions of service and whether by their acceptance, they had consented to the conditions specified in the letters of 7th and 13th August 2009. That case further dealt with applicable conditions where permanent and pensionable employees were subsequently "converted" without break in service to fixed term contracts.

We also note from the facts of the **Regina Kapwele**[5] case, that neither the trial court, nor this Court, interrogated the different modes of exit and separation packages, as that was not a material issue in contention. In this regard, we hold the considered view that the **Regina Kapwele**[5] decision renders little or no assistance to the Appellant herein. We have no hesitation in stating that the two cases could not be further apart, and any attempt to argue them together on the ground of similarity, is misconceived.

7.10 Counsel for the Appellant has also attempted to distinguish the facts of this case from the **Harry Chinene**[1] matter, and thereby attempt to argue that the court below should not have placed reliance on that decision. The Appellant has referred to the decision of the Supreme Court rendered in the case of **Indo Zambia Bank Limited vs Mushaukwa Muhanga**[6], in support of its argument that under the *'contra proferentem'* doctrine, the document ought to be construed against the Respondent, and in favour of the Appellant. We have noted that the Appellant has urged this Court to distinguish the facts of the case in *casu* and to find that both the decisions of the Supreme Court delivered in the cases of **Harry Chinene**[1] and **Febby Nsanje**[2] are not applicable here. Instead, the Appellant has argued that we

ought to apply the decision we reached in the **Regina Kapwele**[5] case and the case of **Mushaukwa Muhanga**[6].

7.11 We have noted and we reiterate that the Courts have over the years adjudicated several matters relating to employees who have separated from the Respondent Company. We have also noted that each of those cases warranted different considerations, each dependent on its own set of facts and mode of separation. To attempt to attach a *'one size fits all,'* argument is misguided and mischievous. We have already noted that the *letter of separation* was clear, its terms were unequivocal and provided for separation of the Appellant in accordance with *clause 7.3* of the conditions of service. There was no ambiguity as to the evidence relating to the Appellant's separation from the Respondent company in this regard. It is manifestly clear that early retirement may be triggered by either an employee or by the employer. The far-fetched attempt by the Appellant, to accrue benefits under *clause 7.5* by referring to the canons of statutory interpretation cannot be entertained in the face of clear acceptance of the terms of the *letter of separation,* the evidence and findings of fact in the court below, and the clear pronouncement of the Supreme Court on the same issue.

7.12 We are also aware of the argument, that in Zambia, redundancy and retrenchment are taken to mean the same thing, while early retirement refers to a different situation altogether. However, we note that the recent pronouncement by the Apex Court in the case of **Derek Mukokanwa v Development Bank of Zambia**[7] established that the two processes (*redundancy and retrenchment*) are substantially different. It

has further been settled in our jurisdiction that where employment is terminated by either redundancy or early retirement, *''one has to get terminal benefits as provided under the mode under which the employment has been terminated and not on both heads''*[1].

7.13 In the **Febby Nsanje**[2] case, the appellants, also former employees of the Respondent, and who had been placed on early retirement, (as was the Appellant in *casu*,) sought a declaration that they should additionally be paid redundancy benefits. The Supreme Court, per Sakala CJ (as he then was) in dismissing the appeal, stated as follows:

''On the mode of exit, the trial court considered the Appellant's conditions of service and found that the exit by way of early retirement was provided in the Conditions of Service, and that on the evidence, the Appellant's termination was by early retirement, and not by reason of redundancy. Again, on the evidence on record and on a consideration of the relevant conditions of service, we agree with this holding.''

7.14 Our attention has also been drawn to the cited decision in the case of **Harry Chinene**[1] when the Supreme Court considered the same question as to whether an employee who had exited by way of early retirement under *clause 7.3* could legitimately pursue a claim for benefits under *clause 7.5* of the Respondent's conditions of service. In addressing its mind to the issue, the Court stated as follows:

''For the removal of any doubt, there was no suggestion, not even a faint or mild one, in ***Febby Nsanje****, that an employee can be subject to two or more exit modes and consequently can be a beneficiary of each one of the*

different types of compensation which the law permits for each of the exit modes in question. Such an eventuality, needless to say, would not only lead to double (or triple etc..) compensation (in favour of the employee) but double jeopardy (in relative to the employer) each of which is legally objectionable.

In the context of the matter at hand, the appellant successfully sought one employment exit mode namely to be early retired in accordance with clause 7.3 of the Conditions of Service he had been serving. The appellant was, accordingly, paid in accordance with his chosen mode of exit.

Astonishingly, when the appellant instituted his action in the Court below, he deliberately turned a blind eye to and sought to recover terminal benefits on the basis of clause 7.5 which had nothing to do with the mode of employment exit he had successfully invoked as it dealt with employees proceeding on redundancy.

Having regard to what we have highlighted above, we have no doubt that the trial judge was on firm ground when he declined to grant the appellant a second separation package grounded on redundancy package.''

7.15 In the case at hand, we have already noted that the Appellant in its arguments, has sought to cast its net far and wide, and in our opinion, unjustifiably so, in the attempt to reap from two mutually exclusive modes of employment exit or at the very least, the one more favorable to it.

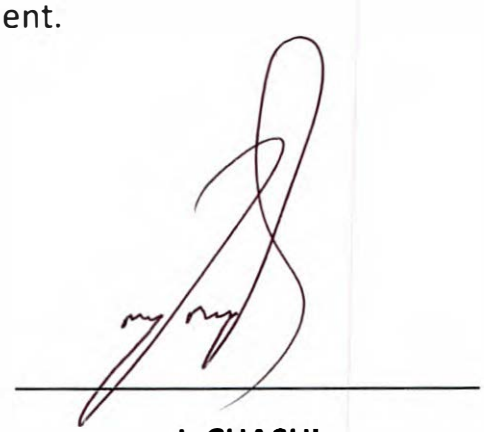
Under these circumstances, and having distinguished the facts of this case from our earlier decision in the case of **Regina Kapwele**[5], we take the view that it was mischievous for the Appellant to have attempted to secure a

separation package founded on *clause 7.5* by attempting to capitalize on the words *''or retirement measures are applied''* to suggest that his exit benefits should have been calculated under *clause 7.5* contrary to the evidence in the court below.

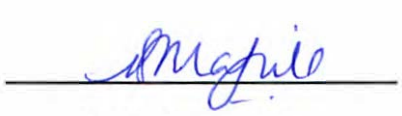
7.16 We have no hesitation in dismissing this appeal in its entirety.

8. CONCLUSION

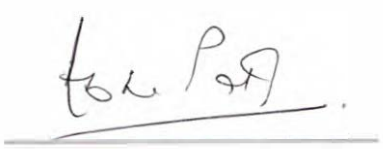
8.1 The appeal having been unsuccessful, we dismiss it with costs to the Respondent, both here and in the Court below. Same to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



B. M. MAJULA
COURT OF APPEAL JUDGE



A. N. PATEL, SC
COURT OF APPEAL JUDGE