

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

APPEAL NO. 8/2022

BETWEEN:

DAVIES BANDA AND 132 OTHERS **APPELLANTS**

AND

NDOLA CITY COUNCIL

1ST RESPONDENT

KAFUBU WATER AND SEWERAGE COMPANY

2ND RESPONDENT

ATTORNEY – GENERAL

3RD RESPONDENT



CORAM: CHISHIMBA, SICHINGA AND NGULUBE, JJA.
On 10th October, 2023 and 25th October, 2023.

For the Appellant: *Mr. C. M. Mukonka, Messrs Caristo Mukonka
Legal Practitioners*

For the 1st Respondent: *Ms. P. Kaungu, In House Counsel*

For the 2nd Respondent: *No appearance*

For the 3rd Respondent: *Mr. P. S Phiri, Senior State Advocate, Attorney
General's Chambers*

J U D G M E N T

NGULUBE JA, delivered the Judgment of the Court.

Cases referred to:

1. *National Milling Company vs A. Vashee (Suing as Chairman of Zambia Farmers Union), SCZ Judgment Number 23 of 2000*

2. *Barclays Bank Zambia Plc vs Zambia Union of Financial Institution and Allied Workers (SCZ Judgment Number 12 of 2007)*
3. *Mike Hamusonde vs Kamfwa Obote Kasongo and Others (2006) ZR 101*

Legislation referred to:

1. *The Local Authorities Superannuation Fund Act, Chapter 284 of the Laws of Zambia*

1.0 INTRODUCTION

1.1 This is an appeal against a Judgment of the High Court delivered by M. L. Zulu, J. on 19th April, 2021, pursuant to which the learned Judge found that employees who had been in continuous service in the employment of the first respondent, for at least ten years, irrespective of their age, were entitled to a redundancy package and retirement benefits.

1.2 The court went on to find that the employees should have claimed their benefits from the Local Authorities Superannuation Fund Board, which was not a party to the proceedings before it. The court dismissed the appellants' claims for retirement benefits against the respondents as they should have been met by the Board of the Local Authorities Superannuation Fund. The appellants' claims were accordingly dismissed for lack of merit.

2.0 BACKGROUND

2.1 The background to this case is that the appellants commenced an action against the respondents in the court below seeking the following reliefs-

- (i) Retirement
- (ii) Salary arrears
- (iii) Interest on (i) and (ii) above
- (iv) Costs.

2.2 The appellants were employed by the first respondent on different dates and they served in various departments. The third respondent, through the first respondent embarked on a re-organisation program and created the second respondent company by hiving off its water and sewerage department which was incorporated into a limited company.

2.3 The first respondent seconded some of its employees to the second respondent for such period as it would determine. The employees enjoyed the conditions of employment that they served under while in the employ of the first respondent. The second respondent was responsible for the seconded employees' wages, salaries and allowances during the period of secondment.

- 2.4 On 18th July, 2001, the first respondent, by minute number 425/06/0, resolved at a meeting held on 20th June, 2001, to send the appellants on forced leave pending retirement and with effect from 16th July, 2001, the appellants were put on forced leave. They were to receive monthly basic pay, medical and funeral expenses for registered dependents as well as educational allowance during the period.
- 2.5 On 10th July, 2003, the Minister of Local Government and Housing directed that the appellants be reinstated pending retrenchment. Subsequently, the appellants were retrenched from employment with effect from 1st January, 2004 and in the interim, they remained on the second respondent's payroll on a monthly basis until funds from the government were made available to meet their retrenchment packages.
- 2.6 The appellants did not receive any salaries from the second respondent for the period 1st January, 2004 to 23rd October, 2006 and they complained to the first respondent, and interpretation of section 26B was sought from the Labour Commissioner.
- 2.7 On 23rd October, 2006, the Labour Commissioner advised that the employees who were declared redundant should have received their redundancy benefits on the last day of duty and if the

redundancy package was not paid, the employers would continue to be treated as if they were still employed, receiving full wages and allowances.

2.8 The appellants were then paid their salary arrears and retrenchment packages on 4th January, 2008 but they contended that they were not paid their retirement benefits. They argued that in the Collective Agreement that was signed between the appellants, the first respondent and the ZULAWU, it was agreed that the employees would be paid retirement benefits in addition to their retrenchment packages. The appellants then commenced the action in the lower court seeking their retirement benefits and salary arrears, with costs.

3.0 DECISION OF THE LOWER COURT

3.1 The trial Judge found the following to be the issue for determination-

(i) Whether the appellants were entitled to retirement benefits in addition to retrenchment packages.

3.2 The lower court referred to **section 28 of the Local Authorities Superannuation Fund Act¹**, which provides that-

“(1) If the employment of a member who has at least ten years continuous service is discontinued, through no

fault of such member, owing to a reduction in, or re-organisation of the staff of his employer, or to the abolition of his office or posts, or in order to facilitate improvements in efficiency or organisation, or to retrenchment generally-

(a) Such member shall be granted a retirement benefit and

(b) One third of the retirement benefit payable to such member may be commuted for a lump sum at the rate laid down for his age, at the date of the termination of his service, in the first schedule.”

3.3 The lower court found that employees who had served for at least ten years of continuous service and were terminated by retirement were also entitled to receive retirement benefits. The court went on to find that the appellants were supposed to claim their retirement benefits from the Local Authorities Superannuation Fund Board. However, the court was of the view that since the Fund was not a party to the proceedings before it, the claim for retirement benefits could not succeed.

3.4 The lower court went on to dismiss the claim for salary arrears and also dismissed the claim for salary increments that were effected to the second respondent's payroll pending the payment of the appellants' retirement benefits as the appellants were already retrenched at the time of the said increments.

3.5 The Court accordingly dismissed the appellants' claims for retirement benefits as they should have been met by the Local Authorities Superannuation Fund Board which was not a party to the proceedings.

4.0 THE APPEAL

4.1 Dissatisfied with the Judgment of the High Court, the appellants launched this appeal, advancing three grounds of appeal as follows-

- 1. *The trial court erred in law and fact when it held that the Appellants' remaining payment for redundancy package should be paid by Local Authorities Superannuation Fund as that was not what was agreed upon by the parties at the time of agreeing on retirement package and Local Authorities Superannuation Fund is for pension and not retrenchment payments.***
- 2. *The trial court erred in law and fact when it held that the Appellants' are not entitled to payments of salaries until full payment of the Redundancy Package as the holding was contrary to the provisions of Law.***
- 3. *The trial court erred in law and fact when it denied the appellants the salary increment which was made during the period of the severance notice.***

4.2 In arguing ground one, it was submitted that the trial Judge erred when he dismissed the appellants' case on account of non-joinder

of Local Authorities Superannuation Fund Board to the action. It was argued that the appellants' retrenchment program was initiated by the Government of the Republic of Zambia and was funded by the World Bank.

- 4.3 It was submitted that the Government was supposed to meet all the terminal benefits and counsel referred to a letter on page 52 of the record of appeal which stated in part that-

“In the interim, you will continue to remain on Kafubu Water and Sewerage Company payroll on a monthly basis until such a time that funds from the Government are available to meet your terminal benefits.”

- 4.4 It was submitted that it was a misdirection on the part of the lower court to hold that the Local Authorities Superannuation Fund Board was the one that should have paid the appellants the balance of the retrenchment package. Counsel further argued that the Local Authorities Superannuation Fund should have been joined as a party to the proceedings.

- 4.5 This Court's attention was drawn to ***Order 14 Rule 5 (3) of the High Court Rules*** which provides that-

“No suit shall be defeated by reasons of non-joinder or misjoinder of parties.”

4.6 The case of ***National Milling Company vs A. Vashee (Suing as Chairman of Zambia Farmers Union)***¹ was referred to where the Supreme Court guided that-

“... Rule 5(3) specifically prohibits the defeasance of suits for misjoinder or non-joinder which would be the effect of acceding to the arguments by Mr Matibini and Mr Nchito. A perusal through the reported cases shows that the courts have consistently upheld the principle underlying Order 14 Rule 5(3). Even in this case, the learned trial Judge would have been perfectly entitled to have exercised her powers to allow substitution of correct parties: For example of a case dealing with misjoinder or non-joinder we need cite only the case of Mugala and Another vs the Attorney -General.”

4.7 It was submitted that the first respondent and the third respondent should be ordered to pay the balance of the appellants' retirement package. The court was further urged not to dismiss the matter on account of non-joinder of Local Authorities Superannuation Fund Board. We were urged to send the case back for re-trial, with instructions that the Local Authorities Superannuation Fund Board be made a party to the proceedings.

4.8 In arguing ground two it was submitted that as the appellants' waited to be paid their retrenchment packages, they would remain on the payroll of the second respondent on a monthly basis until

the government would provide the funds for the payment of their terminal benefits.

4.9 Counsel emphasized that the appellants were supposed to remain on the second respondent's payroll until their terminal benefits would be paid to them. The case of ***Barclays Bank Zambia Plc vs Zambia Union of Financial Institution and Allied Workers²*** was cited where the Supreme Court held that-

“The court below was supposed to settle a collective dispute arising from a compulsory redundancy scheme.”

4.10 It was submitted that the obligations that the respondents had as per the redundancy package should be honoured by the third respondent.

4.11 Turning to ground three it was submitted that since there was an upward salary adjustment while the appellants were on the second respondents payroll as they awaited the payment of their redundancy packages and terminal benefits, their salaries should also have been adjusted upwards and the difference should have been paid to the appellants. We were urged to allow the appeal.

5.0 THE HEARING

5.1 At the hearing of the appeal, the Learned Counsel for the appellants Mr. Mukonka submitted that he would rely on the

grounds of appeal and heads of argument filed on 24th February, 2022. He urged the Court to pay attention to the documents on pages 72 and 77 to 82 of the record of appeal.

5.2 Ms. Kaungu, on behalf of the first respondent submitted that she had no objection to the appellants' heads of argument.

5.3 Mr. Phiri, on behalf of the third respondent submitted that he would leave it to the Court to decide the matter in its wisdom.

5.4 The second respondent was not represented at the hearing of the appeal.

6.0 CONSIDERATION AND DECISION OF THIS COURT

6.1 We have considered the record of appeal and the submissions of the parties.

6.2 The first issue that calls for determination is to ascertain who is liable to pay the retirement benefits that the appellants are entitled to.

6.3 The lower court, in its Judgment, at page 30 of the record of appeal made a finding of fact that the first respondent's employees who were retrenched irrespective of their age, provided that they had been in continuous service for at least ten years were, in addition to a redundancy package, were also entitled to retirement benefits.

6.4 The court further found that the appellants should have claimed their retirement benefits from Local Authorities Superannuation Fund. The court was of the view that since Local Authorities Superannuation Fund was not a party to the proceedings it could not make an order in favour of the appellants against Local Authorities Superannuation Fund.

6.5 In our view, the lower court was on firm ground when it stated that the appellants should have claimed their retirement benefits from Local Authorities Superannuation Fund. **Section 28 of the Local Authorities Superannuation Fund Act** provides that-

“28 (1) If the employment of a member who has had at least ten years’ continuous service is discontinued, through no fault of such member, owing to a reduction in, or reorganization of, the staff of his employer, or to the abolition of his office or post, or in order to facilitate improvements in efficiency or organisation, or to retrenchment generally-

a) Such member shall be granted a retirement benefit; and

b) One - third of the retirement benefit payable to such member may be commuted for a lump sum at the rate laid down for his age, at the date of the termination of his service, in the First Schedule.

(1)A member entitled to the benefits mentioned in subsection (1) may elect that the provisions of this

subsection shall apply to him instead of the provisions of subsection (1) and if he so elects-

(a) The retirement benefit to which the member is entitled shall be payable annually until the date on which he attains the pension age and shall then cease.”

6.6 We agree with the lower court that the Local Authorities Superannuation Fund is liable to pay the appellants who are eligible, (that is those who served in the employ of the first respondent continuously for at least ten years) their retirement benefits.

6.7 We are of the view that the Local Authorities Superannuation Fund should be joined as a party to these proceedings. We further opine that the lower court erred when it merely declined to make an order in favour of the appellants because the Local Authorities Superannuation Fund was not a party to the proceedings. The lower court should have joined the Local Authorities Superannuation Fund to the proceedings as it has sufficient interest in the matter.

6.8 In the case of **Mike Hamusonde vs Kamfwa Obote Kasongo and Others³**, it was held that-

“A court can order a joinder if it appears that all persons who may be entitled to or claim some share of interest in the subject matter of the suit or who may be likely to be affected by the result require to be joined.”

6.9 We are further of the view that we ought to join Local Authorities Superannuation Fund to the proceedings and then remit the matter back to the lower court so that the Local Authorities Superannuation Fund can be heard on the issue of their liability to pay the appellants their retirement benefits. The Local Authorities Superannuation Fund is accordingly joined to these proceedings. We find merit in the first ground of appeal and allow it.

6.10 Regarding the second ground of appeal which attacks the lower court for finding that the appellants are not entitled to payment of salaries until full payment of the redundancy package, the appellants argue that they should have continued to be on the second respondent's payroll until their terminal benefits were paid.

6.11 The evidence on record, which is not in dispute is that the appellants were paid their redundancy packages in full and what is still outstanding are their retirement benefits. Having been paid

their redundancy package, the appellants cannot be maintained on the second respondent's payroll.

6.12 We find that the appellants were not entitled to remain on the second respondent's payroll after they had been paid their redundancy package. The second ground of appeal fails for lack of merit.

6.13 The third ground of appeal attacks the lower court for denying the appellants salary increments that were awarded to employees who were still in service during the period of the severance notice. The appellant argued that since there was an upward salary adjustment while they were on the second respondent's payroll, as they awaited the payment of their terminal benefits, their salaries should have been adjusted upwards. And further that they should have been paid the difference.

6.14 The lower court considered this issue and came to the conclusion that the appellants could not benefit from an increment that was effected after they were already retrenched.

6.15 We do not find merit in this ground of appeal. This is because the appellants received their notice of redundancy in January, 2004. The appellants were placed on forced leave pending retirement with effect from 16 July, 2001. We are of the view that the

appellants' retirement benefits shall be calculated using the last salary that they received prior to receiving their notice of redundancy. The appellants are not entitled to be paid on the basis of the salary increment that was awarded to employees who were still in service. For the foregoing reasons, we find no merit in ground three of the appeal and it fails.

7.0 CONCLUSION

7.1 Having joined the Local Authorities Superannuation Fund as a party to the proceedings, we accordingly remit this matter back to the High Court so that the Local Authorities Superannuation Fund can be heard regarding their liability to the appellants.

7.2 Costs are awarded to the appellants.



F. M. CHISHIMBA
COURT OF APPEAL JUDGE



D. L. Y. SICHINGA, SC
COURT OF APPEAL JUDGE



P. C. M. NGULUBE
COURT OF APPEAL JUDGE