

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
(CIVIL JURISDCITION)

2007/HK/311

BETWEEN:

**ANTHONY CHATE
SYLVIA CHALI
PATSON MUSHIBA
WELLEM NGOSA
DAINESS CHEMBE
STANLEY MKANDAWIRE**

**1ST PLAINTIFF
2ND PLAINTIFF
3RD PLAINTIFF
4TH PLAINTIFF
5TH PLAINTIFF
6TH PLAINTIFF**

AND

**AFROPE ZAMBIA LIMITED
AFRICAN LIFE FINANCIAL SERVICES LTD**

**1ST DEFENDANT
2ND DEFENDANT**

Before the Honourable Mrs. Justice R.M.C. Kaoma in Open Court this 22nd day of March, 2013

For Plaintiffs: Mr. F. Nsokolo - Legal Resources Foundation

For 1st Defendant: Mr. R. Mwanza - Robert & Partners

For 2nd Defendant: Mr. S. Simuchoba - NKM and Associates

J U D G M E N T

Cases referred to:

- 1. *Khalid Mohamad v The Attorney General [1982] Z.R. 49***
- 2. *Zulu v Avondale Housing Project Limited [1982] Z.R. 172 and***
- 3. *Galaunia Farms Ltd v National Milling Company Ltd and Another (2004) Z.R. 1***
- 4. *Mazoka and Others v Mwanawasa and Others (2005) Z.R. 138***

By writ of summons and amended statement of claim issued on 20th July, 2007, the six plaintiffs claim against the defendant, underpayment of terminal benefits upon normal retirement on or about 31st December, 2005 after serving the defendant in different administrative positions on contracts commencing on different dates, interest on the amounts found to be due and costs. The plaintiffs are represented by Legal Resource Chambers. The amounts claimed by each of the plaintiffs are set out in paragraph 6 of the statement of claim.

On 4th September, 2008, the defendant filed the amended defence at pages 9 to 10 of the Plaintiffs' Bundle of Pleadings. The reply to the defence appears at page 11 of the same Bundle. On 17th July, 2009 upon application by the plaintiffs, African Life Financial Services Limited was joined to the proceedings as 2nd defendant by the order of the Deputy Registrar. On 22nd September, 2011, Messrs NKM and Associates filed a notice of appointment as advocates for the second defendant, but no defence was filed.

The trial commenced on 31st July, 2012 in the absence of counsel for the plaintiffs and the second defendant. Two of the six plaintiffs testified. Anthony Chate, born in 1948 of Bulangililo in Kitwe, a farmer is PW1. His evidence is that all the plaintiffs were employed by the first defendant. They were in middle management. When they retired, their benefits were supposed to be calculated as management and not as unionised workers. They discovered their benefits were under calculated when the calculations were sent to Saturnia Regna. Instead of three months' salary for every completed year of service, the company calculated at one month's salary for each year served.

He testified that they received letters informing them that their benefits were sent to African Life Assurance, but the money was not remitted. When they stopped work, they were not given the calculations. They requested for audience with their employer. They were told that they had been paid all their dues. They made their own calculations as appear in para 6 of their statement of claim. They based their calculations on one pay slip because they did not have pay slips for all the years served. They compared their calculations with those sent to African Life Assurance which was based on a 1998 pay slip which gave them one month salary for each year served. He reiterated their claims as per para 8 (i) to (v) of the statement of claim. He also wanted the court to establish for them if they were entitled to repatriation as they were not paid anything. When asked by counsel for the first defendant he accepted that a sum of K13,000,000.00 was sent by the company to African Life Assurance as terminal benefits and that he walked away with a monthly salary of about K3,000,000.00 to K4,000,000.00. He said the pension was in two parts, the first half was received from African Life Assurance. The second half was received later. The total came to K81,533,484.58.

He said his personal contribution was K47,000,000.00. The employer's contribution was K33,081,000.00. He said this was in addition to the K13,000,000.00 which was paid as terminal benefits after working for twenty six years and that he got the money from the pension scheme. He said the K13,015,712.80 indicated in para 5 (a) of the statement of claim was supposed to open the account at the pension scheme after which they were to continue paying the employee's contribution, but his member statement does not reflect that amount. He insisted that at that time, for everyone in management it was three months' salary for each year served. He said they based their calculations on the Employment Act as indicated in para 4 of the statement of claim. He admitted that when they started work there was no pension scheme. They all joined the scheme in 1998 and they understood the purpose of the scheme.

He said he expected terminal benefits at the time of termination and that the employer was not absolved of the responsibility to pay benefits after they were paid by the pension scheme. He said the employer should have worked out benefits as if there was no pension scheme and if the money sent to the pension scheme was not enough, the employer would top up. He said four people were paid in that way, one of them being Selisho who was in the union and retired earlier as seen in the document at page 33 of their Bundle of Documents although documents for other people are not included. They engaged the Fund managers. They wanted proof that they had received the initial K13,000,000.00. He said they have no problem with pension for 1998 to 2005 which they are not claiming. Their problem is with their employer and the calculation of their terminal benefits for the period up to 1998. He said the K13,015,712.80 accrued terminal benefits as at March 31, 1998 indicated at page 1 of their Bundle of Documents should have been multiplied by three. He said after he received the letter, he continued working like everybody else and that the pay statement at page 11 of their Bundle shows that they continued to make contributions to the scheme as they had agreed.

Sylvia Chali aged 62 years a business woman of Chimwemwe is PW2. She confirmed that they worked for the first defendant in management and that in 1998 their terminal benefits were calculated, but she does not know if the benefits were calculated at one or one and half years per completed year of service.

She too said the benefits should have been worked out at three months' pay for each year served and should have been taken to Saturnia Regna in 1998, but were only remitted in 2001. She said because of that, they did not get interest on the benefits that were even wrongly calculated. She said when they retired; they got the pay for the month, leave days, pension from Saturnia Regna, but not repatriation. She said when they tried to claim for the three months' pay, they were told that they could only get as per rules of the pension scheme.

In cross examination by Mr. Mwanza, she agreed that she was paid about K80,000,000.00 by Saturnia Regna. She said the three months' pay for each year served was based on the collective agreement. She said her salary at termination was about K2,500,000.00, but she cannot remember her salary in 1998. She reiterated that the terminal benefits were calculated in 1998 and sent to Saturnia Regna in 2001 after which they started receiving certificates every year. She agreed that the benefits were included in the pension she received. She said their claim is that the terminal benefits were not properly calculated in 1998. This is the plaintiffs' case.

John Lungu, aged 54 years a resident of Riverside and Sales Manager with the first defendant company is the only defence witness. His evidence is that the company has met all its obligations to its workers. He said in order to safe guard the interest of the workers after retirement, in 1998 the company decided to join a pension scheme with African Life Assurance. The company was to contribute three times what the employees had to contribute. The benefits were worked out and put into the scheme as the initial deposit. At the time, the average salary was K250,000.00 and it was used for the plaintiffs. He said as soon as the company remitted the contributions which included the employer's contributions, its obligations was discharged. From that time onwards, the scheme was independently administered and the company had no control. When the plaintiffs retired in 2005, they were paid according to the scheme rules. He said there was no written agreement for workers in management as regards what they should get upon retirement, so the company used the collective agreement. He said some employees were unionised while others were in management. For management staff it was for the individual employee to negotiate the conditions of service.

He said the company felt that since there was no written agreement, it was for the benefit of the employees that they use the collective agreement. He said in terms of annual salary increments they would use the collective agreement as a guide, but management would always get a lower percentage than awarded to unionised workers. He said the documents at pages 25 to 29 of the first defendant's Bundle informed the workers of the transfer of their benefits to the pension scheme and that the workers got different amounts. He said the company was not involved in the preparation of member statements by the second defendant and that they heard about the plaintiffs' claims in 2006 after they had retired.

When asked by Mr. Nsokolo, counsel for the plaintiffs, he said before the pension scheme, the plaintiffs enjoyed management conditions and that had the pension scheme not come into operation, they would have gotten their benefits on management conditions, but there are no blanket conditions for management. He denied that the plaintiffs were entitled to three months' pay for each year served at retirement. He insisted that the company used the collective agreement to calculate the benefits and that there was no agreement to use the formula the plaintiffs have used which did not exist at the time. In re-examination, he said from the pay slip in the name of Patson Mushisha, dated 24th April, 1998, at page 19 of the plaintiffs' Bundle of Documents, the gross salary was K234,169.00. This is the first defendant's case.

I have received written submissions from counsel for the plaintiffs and the first defendant. The second defendant did not adduce any evidence in defence. Counsel for the plaintiffs has submitted that the amounts of pension which the plaintiffs were paid by the second defendant falls below what they should have been paid since they were non-unionised members, and that their pension benefits were supposed to be calculated in accordance with the Employment Act, Cap 269 of the Laws of Zambia. He submitted that PWs 1 and 2 testified how the company collected their respective contributions and handed it over to the second defendant for the payment of their pension, so it was incumbent upon the company to ensure that the plaintiffs were paid correctly and to approve the mode, ratio, interest and amount of money to be paid to them.

He argued that by merely transferring the plaintiffs' contributions to the second defendant for final payment, the company fell short of the duty of care if owed the plaintiffs. He said the two should have collaborated and that both are to blame and they should not shift the blame on each other. Counsel urged that the plaintiffs have proved their claim against both defendants and that they be paid the sums they are each claiming with interest and costs.

On the other hand, it is the submission of counsel for the first defendant that in their statement of claim, the plaintiffs when calculating what each claimed subtracted what they were arguing had not been paid into the scheme by the company which is a clear admission that the defendant had fulfilled its obligation of paying into the scheme in 1998. He said the only contention coming from the plaintiffs was that the company was supposed to have paid the benefits into the scheme in 1998 using three months' pay for each year served. Counsel submitted that the only plausible conclusion is that the plaintiffs have failed to prove their case on a preponderance of probability. He referred me to **Khalid Mohamad v The Attorney General** [1], **Zulu v Avondale Housing Project Limited** [2], and **Galaunia Farms Limited v National Milling Company Limited and Another** [3], where the Supreme Court enunciated that it is for the plaintiff to prove his case on a balance of probability even where the defence case had failed.

I have considered the evidence and submissions. It is not disputed that the six plaintiffs were employees of the first defendant serving in middle management. They were employed on diverse dates, but they retired on 31st December, 2005 upon attaining retirement age. It is not in dispute that upon retirement they received pension benefits from the 2nd defendant in various amounts. It is a fact that they were all members of the Saturnia Regna Pension Scheme which is administered independently by the second defendant. It is common ground that the pension scheme was introduced by the first defendant in 1998 when all its employees, both including unionised and management joined the scheme. It is not disputed that the company had to contribute three times what the employees had to contribute to the pension scheme. This is clear even from the plaintiffs' member benefit statements on their Bundle of Documents.

The principal argument advanced in support of the claim is that the employer ought to have calculated the plaintiffs' benefits in 1998 using the formula of three months' pay for each year served as provided under the Employment Act, Cap 268 instead of one month's pay for each year served. Therefore, the issue to decide is whether the plaintiffs' accrued terminal benefits were wrongly calculated. I observe that the plaintiffs have no issue with the pension contributions from 1998 to 2005. There is evidence before me by the defence which is not disputed, that there was no written agreement for workers in management as regards what they should get upon retirement, so the company used the collective agreement. It is also in evidence and not disputed that in management, it was for the individual employee to negotiate the conditions of service. For that reason, the company felt that it was beneficial to the employees that they use the collective agreement. It seems to me that the use of the collective agreement as a guide for management staff for issues of salary increment was an accepted practice in the company, though management staff would always get a lower percentage than awarded to unionised workers under the collective agreement.

I am quite satisfied that in 1998, when the pension scheme was introduced, the company calculated the benefits to which the employees were entitled from their respective dates of employment. I accept that these accrued benefits were remitted to the pension scheme, which as I have said, was administered independently by the second defendant. I accept that the accrued benefits should have formed the opening balances for the pension scheme. I further accept that when the plaintiffs retired in 2005, they were paid the accrued benefits and the pension contributions.

PW1 wants me to believe that his accrued benefits calculated at K13,015,712.80 were not remitted to the pension scheme or paid out to him. However, as submitted by counsel for the first defendant, in their calculations which are reflected at para 5 of their statement of claim, the plaintiffs have deducted the amounts purportedly paid into the scheme to arrive at the amounts claimed as under payments. I agree entirely with the submission of counsel for the first defendant that this is a clear admission by the plaintiffs that the accrued benefits were remitted to the pension scheme.

There is also evidence by PW2 to confirm that her accrued benefits of K11,124,540.00 were taken to the pension scheme and were included in the pension she got from Saturnia Regna. In fact she told me that PW1 may have forgotten. Therefore, I find as a fact that all the plaintiffs received their accrued terminal benefits with their pension.

In turning back to consider the principal argument with which I am concerned, namely that the plaintiffs accrued terminal benefits should have been calculated at three months' pay for each year served, it is apparent that no specific provision of the Employment Act has been cited by the plaintiffs in evidence. Counsel for the plaintiffs in his submissions has also simply stated that the plaintiffs were non-unionised members and as such their pension benefits were supposed to be calculated in accordance with the Employment Act, Cap 269 of the Laws of Zambia (sic). He has not drawn my attention to any specific provision of the Act that entitled the plaintiffs to three months' pay for each year served. I have perused the Employment Act, Cap 268 and the Employment (Amendment) Act No. 15 of 1997, but I have not seen any such provision.

I should add that in para 5 of their statement of claim, the plaintiffs pleaded that contrary to statutory provisions and in breach of contract, the defendant company calculated their terminal benefits based on the provisions of the collective agreement applicable to unionised workers resulting in underpayment of the moneys due. However, no specific statutory provisions have been cited. Furthermore, the plaintiffs were serving in different administrative positions on contracts, but they have not produced their contracts of employment or any other documents to show their conditions of service or the actual provisions breached. Let me concentrate for a moment on the question of the first defendant having based the calculations of the plaintiffs' accrued benefits on the provisions of the collective agreement applicable to unionised workers. In my judgment, there was no written agreement for management staff with regard to what they should get upon retirement. It was also a practice to use the collective agreement as a guide in respect of management staff whenever salaries were increased, so the company, as usual resorted to the collective agreement to calculate benefits. In truth, the plaintiffs had no problem with the company using the collective agreement until after they retired.

I am fortified in this conclusion by the document at page 12 of the Plaintiffs' Bundle of Documents. This is a letter written by PW2 to the company on 12th December, 2006 over service benefits discrepancy. The letter reads in part:

"I have noted the discrepancy in the service benefits lump sum given to me as outlined in the letter dated 15th February, 2006. The stated amount was K66,983,557.06. The collective agreement states in part:

"The employee shall receive a terminal benefit of 1½ (one and half) of month pay for each complete year of service as basic of pay on the employee"

....."

In that letter, PW2 was not questioning the use of the collective agreement by the company. In actual fact she was reminding the company about a specific provision in the collective agreement that entitled the employee to one and half of month pay for each completed year of service. PW2's grievance then was that the benefits lump sum should have been based on a salary of K2,530,957.10 for 35 years. In these circumstances, I must confess to being perturbed as to how the plaintiffs can later successfully argue that the company ought not to have used the collective agreement.

I accept the defence evidence that the accrued terminal benefits were not under calculated and that the plaintiffs were paid their pension benefits in accordance with the rules of the pension scheme. I propose to decline to accept the submission by counsel for the plaintiffs that it was incumbent upon the company to approve the mode, ratio, interest and amount of money to be paid to the plaintiffs. The pension scheme was independently administered and it had its own rules. When the plaintiffs joined the pension scheme they understood its purpose, so I do not agree with them that the company should have worked out benefits as if there was no pension scheme and that if the money sent to the pension scheme was not enough the company should have topped up. The document at page 33 of their Bundle in the name of Fidelis Selisho does not show that the company was topping up. It related to final payment of pension benefits previously considered as deferred on his pension account with Saturnia Regna.

As I have already said the plaintiff's grievance is not with the pension scheme, of which they were happy as it worked well, but rather with the manner the accrued benefits were calculated. On the basis of the foregoing, I find and hold that the plaintiffs have failed to prove on a reasonable balance of probabilities that they were underpaid or that they are entitled to the difference in monies purportedly paid as terminal benefits into the pension scheme. I dismiss this aspect of the plaintiffs' claims.

In paragraph 6 of their statement of claim, the plaintiff pleaded that the defendant wrote to them on 20th December, 2005 stating that they had remitted their accrued terminal benefits (indicated in the particulars as purported payments) into the pension scheme when in fact not. The letters of terminal benefits transfer to pension scheme dated 20th December, 2001 are on the Plaintiffs' Bundle of Documents. The letters all read in part as follows:

“This serves to advise you that your accrued terminal benefits as at March, 31 1998 subsequently transferred to your Pension Scheme stood at.....”

It is the plaintiffs' position that their accrued benefits were not sent to the pension scheme in 1998, but in 2001. In my judgment this fact is not disputed by the company, but the plaintiffs' plea that the accrued terminal benefits were not paid into the pension scheme has failed. It is quite clear that the money was subsequently transferred to the pension scheme and I accept that the transfer was done in 2001. The question I consider important is whether the plaintiffs lost out on interest on the accrued benefits. I draw attention to the fact that there is no claim either on the writ or in the amended statement of claim for lost interest. Both on the writ and in para 8 of the statement of claim, the plaintiffs have claimed interest on the amounts to be found due. For me this is interest on judgment. Of course, as held in **Mazoka and Others v Mwanawasa and Others** [4] pleadings are meant to give fair notice of the case which has to be met and to define the issues on which the court has to adjudicate in order to determine the matters in dispute between the parties and once pleadings have been closed the parties are bound by their pleadings and the court has to take them as such.

Although the claim for lost interest has not been pleaded, PW2 raised this issue in her evidence and no objection was taken by the first defendant. Therefore, I am not precluded from considering the issue. Even though the plaintiffs have not adduced detailed evidence to show that interest accumulated on their contributions to the pension scheme, a scrutiny of their member benefit statements and claims processing certificates from pages 2 to 32 of the Plaintiffs' Bundle of Documents show that both the employee and employer contributions attracted interest. I am persuaded that the plaintiffs lost interest on their accrued terminal benefits which should have been remitted in 1998 to form the opening balances, but were only remitted in 2001.

Therefore, under the plaintiffs' claim for any other relief the court may deem fit, I enter judgment in favour of the plaintiffs as against the first defendant for interest on the accrued benefits that were remitted to the pension scheme in 2001. I direct that both defendants should calculate the interest for the period 1998 to 2001, within the next 21 days and the first defendant should immediately pay the same to the plaintiffs. In default the plaintiffs should apply for assessment by the Deputy Registrar.

The last issue I want to deal with is that of repatriation allowance. This claim again was not pleaded, but it was raised by both PWs 1 and 2. Again no objection was taken by the first defendant. I will therefore consider this claim. Section 13 (1) of the Employment Act clearly specifies that whenever an employee has been brought from a place within Zambia to a place of employment by the employer, the employer shall pay the expenses of repatriating the employee to the place from which he was brought in the circumstances following, including on the expiry of such period of service as may be specified in the contract of service. The expenses of repatriation are provided for under sub-section (2) and includes reasonable travelling expenses, unless the employer provides transport and subsistence expenses or rations during the journey and reasonable subsistence expenses or rations during the period, if any, between the date of termination of the contract of service and the date of the start of the journey. It has become customary now for employers to pay a lump sum as repatriation allowance. Under the Act I am satisfied that the plaintiffs were entitled to repatriation.

By sub-section (3) a proper officer may exempt an employer from liability for all or any of the expenses of repatriation where the employee does not wish to exercise his right to repatriation or the employee has been settled elsewhere at his request or consent or where in fixing the rate of wages proper allowance has been made for the payment of repatriation expenses by the employer; and suitable arrangements have been made by means of a system of deferred pay or otherwise to ensure that the employee has the funds necessary to defray such expenses. Under sub-section (5) if the employer fails to comply with any of these provisions, the duty laid on him thereby shall be discharged by or under the directions of a proper officer and any reasonable expenses thereby incurred shall be a debt due by the employer to the Government.

In this case the company has not raised any defence to the plaintiffs' evidence that they were not paid any repatriation allowance. Nor has it been suggested that the company was exempted by the proper officer from liability under sub-section (3) or that the duty laid on the company was discharged by or under the direction of a proper officer. Nor has it been argued that proper allowance was made for payment of repatriation expenses in fixing the wages and that suitable arrangement had been made by means of deferred pay or otherwise to ensure that the plaintiffs had the funds to defray such expenses. When the plaintiffs were paid the last pay and leave days they should have been paid repatriation as well. I am persuaded again to enter judgment for the plaintiffs for repatriation allowance against the first defendant. I direct that this should be calculated by the company within 21 days. In default the plaintiffs should apply before the Deputy Registrar for assessment. The award will attract interest at 12% from date of writ to date of judgment and thereafter at 20% until fully paid. Although the plaintiffs' main claim has failed they have succeeded in part. Therefore I award them the costs against the first defendant. The latter shall also bear the costs of the second defendant.

Delivered in Open Court this 22nd day of March, 2013

R.M.C. Kaoma
JUDGE