

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 91/98

HOLDEN AT NDOLA

(CIVIL JURISDICTION)

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

**ZAMBIA RAILWAYS LIMITED**

**APPELLANT**

**AND**

**AUSTIN STANLEY PHIRI AND OTHERS**

**RESPONDENT**

**CORAM:** Chaila, Chirwa and Lewanika, JJS on 2nd March, 1999 and 8th December, 1999.

**For the Appellants:** Mr. M.A. Nsefu, Legal Counsel, Zambia Railways

**For the Respondent:** Mr. A.M. Mushingwa, Chah Chama & Co.

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**J U D G M E N T**

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**Chirwa, J.S. delivered the judgment of the Court:-**

This is an appeal against the High Court award made in favour of the respondent, AUSTIN STANLEY PHIRI, PHILLIP KENNETH SHIPOTA and MUNDU LOYD NGOMA of 100% of basic annual salary as repatriation allowance. The trial of the matter proceeded as a short listed case on agreed statement of issues, the case centred on the interpretation of Clause 11.1 of the ZIMCO Conditions of Service as at First October, 1992 and also whether these

conditions were implemented by the Appellant. Clause 11.1 reads as follows:-

**“11.1 Passage**

**Between places of recruitment and place of work paid by the company for employee and his dependants at the beginning and end of employment. Further, in the case of Zambians the company shall bear the cost of repatriation of employee to his home on retirement at the prevailing Zambia Railways and United Bus company of Zambia fares but not on separation on disciplinary grounds. Transportation relating to personal effects will be restricted to 100% of employees annual salary.”**

According to the agreed statement of issues, the respondents contended that they were entitled to 100% annual salary for transportation of personal effects and equivalent fares for “human” transport of employee and dependants. On the other hand the Appellant contended it was not obliged to pay 100% annual salary for transportation of personal effect, its obligation was to provide transport from place of work to retirement home and such transportation costs limited up to 100% of employees basic annual salary. The Appellants further contended that the said internal memorandum containing clause 11.1 had never been implemented and that the practice had been to provide transport or meet transportation costs up to K120,000-00-00 (one hundred and twenty thousand kwacha) only.

At trial, the First Respondent gave evidence which was generally to the effect that the internal memorandum addressed to all heads of departments (including himself as Chief Accountant) was discussed at a Seminar organised by the Appellant and his scope of work included payments of salaries, allowances and other benefits. He also did admit that at the time he was retired or retrenched, no employee had been paid 100% basic annual salary for transportation of personal effects because no employee had been discharged or retrenched before then.

For the Appellant there was evidence by head of Human Resources. His evidence was to the effect that the ZIMCO Conditions of Service in which 100% basic annual salary was given for

transportation of personal effects was never implemented and in fact was superseded later by another circular limiting the amount to K120,000-00-00 (one hundred and twenty thousand kwacha)

In arguing this appeal before us Mr. Nsefu submitted that the learned trial Judge should have requested that the parties proceed on a full trial, complete with pleadings in view of the many self contradictions from the Respondent as to whether the repatriation had been paid before; that the learned trial Judge misunderstood the Appellants witness on the question of ability to pay. The witness said that the new ZIMCO Conditions were never implemented because of inability to pay and from this the Judge wrongly concluded that the Appellant did not pay the repatriation because it had no money. Lastly it was argued that the issue was whether the ZIMCO Conditions were applicable or not.

In answer to these arguments, Mr. Mushingwa argued that the learned trial Judge did not err to proceed with the case as the parties had agreed on the manner the trial was to proceed. It was further argued that the finding by the trial Judge that ZIMCO Conditions applied and that the Respondent were entitled to 100% basic annual salary for transportation of the personal effects.

We have looked at the evidence on record, both the viva voce evidence at trial and the various affidavit evidence on record. We note that the parties agreed on issues to be resolved and agreed to proceed without pleadings. Parties decide how best to present their cases before Court and it is not the duty of the Court to decide on behalf of the parties how best to present their case. Here the parties agreed on issues to be resolved and agreed to proceed without pleadings. The Court cannot be blamed for the parties' own decisions if later it turns out that the party's case was not well presented. The parties themselves must bear full responsibility for this. The first ground of appeal is dismissed as being without merit.

We will now deal with the second and third grounds of appeal together. In doing so, we have carefully looked at the circular at page 36 of the record dated 3rd November, 1992 from Chief Personnel Manager to the General Manager and a host of other people; the circular of the acting Managing Director at page 55 of the record dated 9th February, 1995 and the oral evidence of the parties. The circular at page 36 and dated 3rd November, 1992 to us is very clear. It does

not need any special understanding and skill to get its meaning. The circular introduces new conditions of service as issued by ZIMCO to employees of the Appellant. In its paragraph one it states:-

**“Please be advised that effective First October, 1992 the revised ZIMCO Conditions of Service should be implemented to all affected management represented employees.”**

It was never suggested by the appellant that the respondent were not management represented employees. This circular goes on to elucidate itself by saying in paragraph 2 that :-

**“This means that all revised ZIMCO corporate terms and conditions of service as contained in appendices 1, 2, and 3 and those reflected in ZIMCO Circular No. DG2/07/7 of 6th August, 1992 should be paid.”**

Nowhere does the Circular state that the conditions are subject of further discussion or consideration except for retention allowance. It is clear that new ZIMCO Conditions of Service were introduced into Zambia Railways.

Coming to the Circular at page 55 from the Managing Director, this Circular must be read as a whole and not in pieces. It is clear from paragraph one that before the ZIMCO Conditions were introduced on First October, 1992 the Appellant used to pay K120,000-00-00 (one hundred and twenty thousand kwacha) for the transportation of personal effect. The new ZIMCO Conditions having been introduced, they proved a serious drain on financial resources of the Appellant and this is clear in paragraph 2 of the Circular. Paragraph 3 shows that the ZIMCO Conditions introduced with effect from First October, 1992 were applicable to the Appellant and the Managing Director says:-

**“This notice supercedes Chief Personnel Manager’s Circular of 3rd November 1992, Manager Human Resources notice of 5th September, 1994 and all other notices on this subject.”**

One cannot supercede something that does not exist. It is like repealing an Act that does not exist. The circulars and notices referred to in paragraph 3 of the Managing Directors Notice were effective to the Appellant and the Managing Director superceded them. As to the effect of that supercession as far as the Respondents are concerned will be discussed shortly. From what we have said, it is clear that the new ZIMCO Conditions of Service introduced on First October, 1992 were applicable to the Appellant; these proved a financial drain on the Appellant and they were withdrawn. The conclusion of the learned trial Court that the conditions were applicable cannot be faulted. Neither can her finding that the Appellant failed to practically implement them because of the financial inability cannot also not be faulted in view of the Managing Directors notice at page 55. The evidence of the appellant's witness was not misunderstood by the learned trial Judge. It was a fact and it is in fact that the Appellant cannot practically implement them because of the financial difficulties but that cannot be said that the Respondents are not entitled to their dues, which issue we will now consider.

Having found that the First October 1992 ZIMCO Conditions applied to the Appellant, we will now consider the effect of the Managing Director's notice of 9th February, 1995 as far as the respondents rights are concerned. In this regard the answer is easily provided by their letters of retirement. The First Respondent's letter of retirement is dated 22nd May, 1993; for the second and third the letters are dated 12th May, 1993. It is clear to us that at the time the Appellants were retired the First October 1992 ZIMCO Conditions of employment applied to them. The notice of the Managing Director dated 9th February, 1995 did not affect these Respondents' rights and dues. We therefore uphold the learned trial Judges findings that the Respondent are entitled to 100% of their annual basic salary as transportation of their personal effect. This appeal is therefore dismissed with costs to the Respondent to be agreed, in default to be taxed.

**M. S. CHAILA**  
**SUPREME COURT JUDGE**

- J6 -

**D. K. CHIRWA**  
**SUPREME COURT JUDGE**

**D. M. LEWANINKA**  
**SUPREME COURT JUDGE**