

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 127 OF 1999

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

ZESCO LIMITED

APPELLANT

AND

**IGNATIUS MULEBA SULE
AND 16 OTHERS**

RESPONDENT

CORAM: NGULUBE, CJ, CHIRWA AND LEWANIKA, JJS.

On 26th September and 18th October, 2000.

For the appellants - Mr. G. Zulu, ZESCO Legal Counsel

For the respondents - Mr. H.H. Ndhlovu, Ndhlovu and Company

J U D G M E N T

Ngulube, CJ, delivered the judgment of the court.

On 26th September, 2000, when we heard this case we allowed the appeal and ordered a retrial before the Industrial Relations Court. We made no order as to costs in this court. We said we would give our reasons in a judgment to be rendered in due course and this we now do.

The respondents were senior employees of the appellant whose services were terminated by “early” retirement. It was on record that the respondents were covered by what were known as ZIMCO conditions of service but at the same time the Local Authorities Superannuation Fund Act, (now Chapter 284 of the Laws) also applied in respect of the pension and other matters with which that Act is concerned. The complaint was supported by affidavits and bundles of documents. The respondents included computations showing what in their view should have been paid to them and the amounts by which they considered they had been short changed. Some also claimed the right to purchase their official cars at a fraction of their value. The appellants filed a response and opposing affidavits the burden of which was to contend that the respondents had been paid all their dues from the appellant and had been paid or would be paid all their dues from the Superannuation Fund (LASF). It transpired also that some were early retired before the qualifying period of service (which was twenty-two years) while others were early – retired in relation to the age of retirement (which was fifty-five). Indeed, some had already clocked the minimum qualifying service when they were retired under a package communicated to each affected worker by letter. The letter also explained that the company was being reorganized so that some jobs would be re-

graded either upwards or downwards while some would be abolished. The employees were offered the option of staying on or early retiring on an allegedly attractive package.

No trial infact took place and the whole case was resolved on the documents and on written submissions. The record shows that the advocates for the parties consented to proceeding in that fashion. The Court considered that there was no dispute that the ZIMCO conditions applied and that because they were terminated in a reorganization exercise, the complainants became redundant or surplus labour in accordance with the 1992 ZIMCO Corporate Terms of Service for non-unionised employees. Accordingly, they should get the ZIMCO redundancy benefits. The Court considered that, as there was no reference to early retirement in the ZIMCO circular, the complainants were simply made redundant and there could be no question of early retirement, especially that no early retirement formula or package was put in place, as far as the Court was aware.

The Court lamented that no one had exhibited any documents relevant to the Local Authorities Superannuation Fund Pension Scheme nor had anyone exhibited the new and old salary scales plus their progression and conversion. The complainants contended for salary scales which were not those reflected in the letters of termination by retirement.

During the hearing before us, Mr. Ndhlovu informed us that, although not reflected on the record, it had been agreed in the Court below that the respondents' terminal benefits had been underpaid and that they be paid under the ZIMCO formula, not the LASF formula. On the other hand, this was not Mr. Zulu's recollection of what had transpired and he lamented that the parties had been deprived of a trial.

We looked at the submissions filed below. Far from discussing any alleged agreed facts or issues, the submissions showed that the parties were miles apart on virtually every front. The submissions only served to highlight even more areas of disagreement, some of which could only have been resolved after conducting a trial which would have involved making findings of fact and coming to a conclusion one way or the other on some of the hotly disputed matters. The attempt to resolve on submissions alone some of the highly contentious issues and much disputed facts was clearly an impossible task, as witness even the Court itself lamenting the absence of certain evidence.

It was no wonder that some of the grounds of appeal alleged misdirection on law arising from the failure to consider the provisions of an Act of Parliament, namely the Local Authorities Superannuation Fund Act leading to a finding of redundancy which may or may not have been

competent for all or some of the complainants. It was even less wonder that Counsel for the appellants in effect attempted to adduce further evidence under the guise of Heads of Argument to place the complainants into their various categories after the Court below had itself recognized – without specifying - that there would have been those who had in any event qualified for retirement over which the Court would have no quarrel. What is certain is that the complainants' positions were not all identical and the Court did not make any finding which salaries were applicable at the time of receipt of the severance notice between those proposed by the suitors and those indicated in the letters sent by the appellants.

For our part, we were satisfied that whatever had been discussed which is not on record which led to an order by consent to dispense with a trial, the parties were infact not ad idem – of one mind – on the subject. The Court below should have ordered a formal trial after perusing the submissions and noticing that nothing was infact agreed and that certain issues lacked evidence which was essential for a just decision amounting to substantial justice.

It was for the foregoing reasons that we allowed the appeal and ordered a retrial.

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M.M.S.W. Ngulube
CHIEF JUSTICE.

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D.K. Chirwa
SUPREME COURT JUDGE.

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D.M. Lewanika
SUPREME COURT JUDGE.