Hon. Justice Mambilima

IN THE SUPREME COURT OF ZAMBIA — SCZ Judgment No. 16 of 2004

HOLDEN AT NDOLA — APPEAL NO. 149 OF 2002

(Civil Jurisdiction)

B E T W E E N:

RODGERS CHAMA PONDE AND 4 OTHERS — APPELLANT

AND

ZAMBIA STATE INSURANCE CORPORATION LIMITED — RESPONDENT

CORAM: LEWANIKA, DCJ, CHIBESAKUNDA AND SILOMBA, JJS.

On 4th December, 2002 and 1st June, 2004.

For the Appellant: NIP

For the Respondent: Mr. K. Musongo, York Partners

J U D G M E N T

Silomba, JS, delivered the judgment of the Court.

Case referred to:-

Bank of Australasia -Vs- Parmer (1897) AC 540.

This is an appeal against the judgment of the High Court, sitting at Ndola, in which the appellants' claims for gratuity benefits in respect of the months worked and housing allowance were rejected.

The facts of the case, as presented before the trial court, were that the appellants were invited to apply and they actually applied for voluntary early retirement. The conditions attaching to the voluntary early retirement programme were as outlined below:-

1. That the employee will volunteer on own accord to take early retirement.

2. That when the application has been accepted, that will effectively form the termination of contract by early retirement

3. That retirement benefits will not be paid immediately. These would be paid when funds for restructuring become available. However, no interest whatsoever will accrue on the benefits for the period before the time of payment.

4. The benefits payable will be based on the current conditions of service and last drawn salary.

5. That those who occupy a Corporation house/flat which may be offered for sell will be given the option to buy the house/flat when the decision to sell the property has been made.

6. That those living in Corporation property will be allowed to stay rent free for twelve months and those on own arrangement or in rented property will receive housing allowance for the same period.

On the issue of early retirement benefits, the claims of the appellants were referred to mediation where it was partially agreed and settled that:-

a) Mr. Emmanuel Ndoki Mutale had worked for 17 years and 6 months. He was to be paid for 17 years but there was disagreement as to whether terminal benefits were payable *pro rata* in respect of the six months;

b) Mr. Derrick Ntinda had worked for 19 years and 7 months. He was to be paid terminal benefits for the 19 years worked but there was disagreement as to whether terminal benefits were payable *pro rata* in respect of the seven months.

c) Mr. Rodgers Mhonda had worked for 26 years and 7 months. It was agreed that he was entitled to be paid terminal benefits for the 26 years worked. There was, however, disagreement as to whether terminal benefits were payable *pro rata* for the seven months.

d) Mr. Rodgers Chama Ponde worked for 16 years and 6 months. He was to be paid terminal benefits for 16 years. There was, however, disagreement as to whether terminal benefits were payable *pro rata* in respect of six months.

e) Mr. Jerrod Banda worked for 15 years and 9 months. He was to be paid terminal benefits for 15 years. There was, however, disagreement as to whether he was entitled to terminal benefits for the 9 months work on a *pro rata* basis.

The issue whether the appellants were entitled to be paid *pro rata* for the months each one worked was referred to the trial court for resolution. Also referred to the trial court was the issue of housing allowance claimed by Derrick Ntinda, Rodgers Mhonda and Emmanuel Ndoki Mutale.

Going by condition 5 of the voluntary early retirement scheme, the respondent offered to sell the houses to the three appellants as sitting tenants on the 16th of June, 1999. The record shows that the two appellants accepted the offers. The record further shows that it was agreed in advance that in paying the terminal benefits to each appellant for the years worked, the respondent was to knock out the cost of the house to indicate payment for the house. Consequently, upon acceptance of the offer each appellant was informed by the real estate manager of the respondent that the obligation to pay ground rent and rates for the houses was to be bone by them individually.

The brief evidence of Derrick Ntinda (PW1), which Rodgers Mhonda (PW2) adopted as his, was that after paying for the flat he became the owner of the flat and that as a consequence he was entitled to be paid housing allowance from the date he paid for the flat. The evidence on housing allowance of Emmanuel Ndoki Mutale is missing; it is possible that he may have died at the time trial commenced. Also missing from the record of appeal is the evidence of the respondent; the record, however, shows that counsel made a written submission at the conclusion of trial for and on behalf of the respondent. The evidence on the payment of gratuity for the months worked was sufficiently summarized in the terms of the settlement as indicated above and that being the case we have no intention to repeat it under this paragraph.

The evidence and the written submissions were evaluated by the learned trial Judge. On the claim for gratuity for the months worked which was not calculated on *pro rata* basis, the learned Judge had occasion to look at clause 29.4 of the conditions of service applying to employees of the respondent. This particular clause, among others,

deals with the computation of "eligible service" for purposes of calculating long service gratuity. After the due consideration of the clause and the relevant authorities the learned Judge came to the conclusion that the "expression used in the conditions of service makes it clear that any period less than a whole year is to be disregarded" and on that basis he threw out the claims for gratuity in respect of the service in months.

On the claim for housing allowance, the learned Judge found as a fact that the two appellants, that is, Derrick Ntinda and Rodgers Mhonda were entitled, according to their respective letters accepting their applications for voluntary early retirement, to occupy the houses of the respondent rent free until their benefits were paid. In rejecting their claim, the learned Judge concluded that it would have been illogical to keep the two appellants in the respondent's houses rent free while at the same time pay them housing allowance as that would have been tantamount to paying them double.

There are two grounds of appeal and these are:-

1. The court below erred in law and in fact in finding that Emmanual Ndoki Mutale, Derrick Ntinda and Rodgers Mhonda were not entitled to housing allowance.

2. The court below erred in law and in fact in failing to take account of the wrong computations of the gratuity payments and consequently dismissing the claim.

Counsel for the appellants was not in court when the appeal came up for determination and so, in disposing of this appeal, we shall have recourse to the appellants' heads of argument, which are before us. In the absence of counsel for the appellants, the respondent's counsel simply relied on the submission in the court below and the heads of argument filed in court.

The argument in support of housing allowance and why Messrs Mutale, Ntinda and Mhonda are entitled to be paid is, according to the appellant's counsel, to be found in conditions 5 and 6 of the voluntary early retirement scheme. These conditions are outlined at the beginning of this judgment but for the sake of emphasis we shall reproduce them as follows:-

5. That those who occupy corporation houses/flats which may be offered for sell, will be given the option to buy the house/flat when the decision to sell the property has been made.

6. That those living in corporation property will be allowed to stay rent free for twelve months and those on own arrangement or in rented property will receive housing allowance for the same period.

It is submitted that when the three appellants were offered the houses and they actually paid for them through deductions of purchase prices from their gratuities the house became theirs. It is further argued that from the day the houses became theirs they became privately accommodated and were, therefore, entitled to be paid housing allowances until the date of payment of their gratuities. We have been urged to uphold ground one.

With regard to ground two, counsel has submitted that the disputed amount in respect of the excess period of less than a year of service ought to be paid on *pro rata* basis. The excess period worked by each appellant is: Rodgers Chama Ponde, 6 months; Jerrod Banda, 9 months; Mutale, 6 months; Ntinda 7 months and Mhonda 7 months. The excess period was subject of mediation but no settlement was reached.

The submission of the respondent in relation to ground one was that the process of early retirement as it applied to the appellants was negotiated for between the appellants and the respondent; that the appellants accepted the terms and conditions of voluntary early retirement as put to them by the respondent and proceeded on early retirement on those terms. With the foregoing in mind, counsel has argued that it was unfair for the appellants to claim housing allowance, which was not part of the terms of early retirement.

As far as counsel is concerned the appellants should not be allowed, by parol evidence, to vary, add to or contradict that which they had acceded to in writing. As for ground two, counsel is in full support of the conclusions of the learned trial Judge in rejecting the appellant's claims for payments of gratuity in respect of periods of less than one year on *pro rata* basis.

We have anxiously considered the two grounds of appeal in the light of written arguments and the evidence that was before the lower court. Before we deal with the two grounds, we would like to discuss one or two issues that we consider to be relevant in this appeal. It is on record that Emmanuel Ndoki Mutale passed away in the year 2001. The information is given by counsel for the respondent in his submission before the lower court. According to the record, PW1, PW2, PW3 and PW4 testified on the 11th of July, 2002 after Mutale had allegedly passed away. On his part no one testified on his behalf.

The information is a mere allegation which has not been verified but if it is true, why is it that Mutale was not substituted by an administrator of the estate or executor? It may be a matter that can be taken lightly because the appeal has no merit, as we shall soon show. However, in a matter where the prospects for success are predictable counsel for the appellant should have promptly attended to the substitution of the party so that the new party can have *locas standi* to testify and also attend to the appeal to this court if he is not happy with the decision of the trial court.

Secondly, this appeal has only two grounds. In the first ground of appeal it is Emmanuel Ndoki Mutale, Derrick Ntinda and Rodgers Mhonda who are the appellants. This conclusion is taken from the reading of the ground. With regard to the second ground, we shall take it that it is all the appellants, i.e. Mutale, Ntinda, Mhonda, Banda and Ponde.

Coming to ground 1, our view is that in deciding this ground regard should be had to the conditions regulating the voluntary early retirement scheme. A cursory look at the conditions that are outlined at the beginning of this judgment shows that conditions 5 and 6 are very relevant. Condition 5 assures those occupying the respondent's houses that they may be offered the houses to buy while on voluntary early retirement. Condition 6, among others, assures the prospective retirees that the houses they occupy will be rent free for 12 months while they are on voluntary early retirement.

In all, there were six conditions of the programme of voluntary early retirement, which were circulated in a memorandum dated 7th of April, 1998 asking for volunteers to go on early retirement. Mutale, Ntinda and Mhonda volunteered to go on early

retirement and their applications were accepted. In the acceptance letters to the three appellants there are five conditions which are common in all the letters. Conditions 4 and 5 are also relevant to this ground of appeal. The conditions are slightly different in wording from conditions 5 and 6 contained in the above memorandum of the 7th of April, 1998, even though they convey the same message. They read as follows:-

> 4. As there is a possibility that the corporation house you currently occupy may be offered for sell, you will be given the option to buy the house should the decision to sell the property be made.
>
> 5. You will be allowed to continue occupying the house free of rent for 12 months or until the benefits are paid.

On the 16th of June, 1999 standard letters of offer for the sell of the houses were extended to the three appellants. This was slightly over a year after their applications to go on voluntary early retirement were accepted and during this past period they were staying in the houses rent free. In the letters of offer the three appellants were notified the purchasing prices of the houses. They were also told, as stated in the previous letters from the respondent (including the letters accepting their voluntary early retirement) that the purchase prices of the housing units were to be knocked off from their retirement packages, which were yet to be disbursed. All the three appellants accepted the offers for the sell of the houses to them unconditionally in writing.

We have endeavoured to state the stages the appellants and the respondent went through and the written conditions applying to each stage in order to show that it was never a term of the agreement that once they had purchased the houses they would be entitled to be paid housing allowances until their retirement packages were disbursed. We, therefore, agree with the respondent's counsel's submission, as supported by the case of **Bank of Australasia –Vs- Parmer** that parol evidence being canvassed by the appellants is inadmissible because it tends to add to, vary or contradict the terms of a written agreement validly concluded by the parties herein in the course of their negotiations. This ground fails.

Finally, we shall now deal with ground 2 but very briefly. The ground relates to a condition of service on the computation of gratuity. We shall begin by looking at what was provided in the voluntary early retirement scheme or programme released on the 7th of April, 1998. Condition 4 of the program stipulated as follows:-

> 4. The benefits payable will be based on the current conditions of service and last drawn salary.

The condition is standard in form and content as it is to be found in all the letters that were later written to the appellants accepting their applications for voluntary early retirement. The condition of service that was to apply in the case of the appellants was Clause 29.4 of the ZIMCO Group Conditions of service. This was the position, we believe, because the respondent was part of the ZIMCO Group. Clause 29.4 was couched in the following terms:-

> 29.4 In computing the "eligible service" the service under any other public sector institutions (civil service, UNZA and statutory boards) will be included. However, the long service gratuity shall be payable only for those number of years served within the ZIMCO Group.

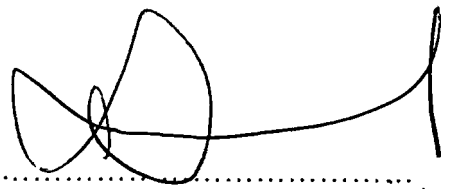
The quoted condition of service was relied on by both parties to the dispute. In interpreting the clause the appellants wanted their gratuity for the periods of service of less than one year to be calculated on a *pro rata* basis. In agreeing with the reasoning of the learned trial Judge when he rejected their claim, our view is that the appellant's claim would have been maintainable if the last sentence of the condition of service in Clause 29.4 had been couched in the following terms:-

> "... However, the long service gratuity shall be payable only for those number of years, or parts thereof, served within the ZIMCO Group.

Since the payment of gratuity was strictly limited to the number of years served, which did not include parts of those years, we can clearly see the attempt by the

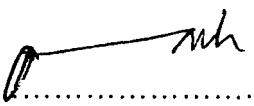
appellants, through their parol testimony, to vary, add or contradict Clause 29.4 as stipulated in the ZIMCO Group Conditions of service. On the basis of the authority of **Bank of Australasia –Vs- Parmer** we decline to accept the parol testimony. Ground two is accordingly dismissed.

On the totality of the evidence, as contained in the record of appeal, this appeal has no merit and it is dismissed. Costs shall follow the event, to be taxed in default of agreement.



D. M. Lewanika,
DEPUTY CHIEF JUSTICE.

L. P. Chibesakunda,
SUPREME COURT JUDGE.



S. S. Silomba,
SUPREME COURT JUDGE.