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IN THE SUPREME COURT OF ZAMBIA HOLDEN AT LUSAKA **APPEAL NO. 14/2003**

(CIVIL JURISDICTION)

BETWEEN:

ZAMBIA CONSOLIDATED COPPER MINES LIMITED 1ST APPELLANT
DR. IMASIKU SAASA 2ND APPELLANT

AND

MOFFAT SINKALA AND 6 OTHERS RESPONDENT

Coram: Lewanika, DCJ, Chibesakunda and Chitengi, JJS
on 20th November 2003 and 21st September 2004

For the Appellant: Mr. D. Kasote of Messrs George Kunda and Company together with Mr. P Chamutangi Senior Legal Counsel

For the Respondent: N/A

JUDGMENT

Chibesakunda, JS, delivered the Judgment in Court

Cases referred to:

1. **Vincent Mijoni v Zambia Publishing Company, Appeal No. 10 of 1996**
2. **Khalid Mohamed v The Attorney General (1982) ZR 49 at page 51**
3. **Zambia Oxygen Limited and ZPA v Paul Chisakula and 4 Others SCZ Judgment No. 4 of 2000**

Laws referred to:

4. **Industrial and Labour Relations Act, Cap 269 Section 74(now repealed by Act No. 30 of 1997 effective 22nd December 1997)**
5. **Statutory Instrument No. 99 of 1994**
6. **Statutory Instrument No. 171 of 1995, Clauses 2, 4, 7, 9, 10 and 11 under Section 3 of the Minimum Wages and Conditions of Employment Act 25 of 1982**

In this appeal the Appellants, who were the Defendants at the High Court level, are challenging the High Court's decision in favour of the Respondents, who at the High Court level, were the Plaintiffs.

The Respondents had sued the 1st Appellants claiming:-

1. Payment of the balance due on the retirement package based on the formula for non-unionised employees retired on medical discharge or redundancy in February, 1996 in accordance with Statutory Instrument No. 99 of 1994
2. Calculations of the retirement package to be based on and inclusive of the 30% annual increment of salary from January, 1996 in accordance with the adjustments of conditions of employment and service of 20th January, 1989.
3. Transport allowance of K4,000.00 per month from August 1994 to February 1996 in accordance with Statutory Instrument No. 99 of 1994 on Minimum Wages and Conditions of Employment.
4. Injunction to restrain the Appellant from evicting the Respondents from houses until final determination of the claims by the Court, and a right to purchase housing units as sitting tenants.
5. Any other relief deemed fit and costs of this action.

The 2nd Appellant sought to join these proceedings as an intervening party by a notice of motion filed on 27th May 2002 more or less 2 years after this judgment, which is being challenged, was delivered. This application was granted. Initially he joined these proceedings as an intervening party. He comes to us as the 2nd Appellant.

The 1st Appellants' defence at the High Court level was that:

1. The 1st Respondent's contract of employment was terminated on medical grounds and the other five Respondents were declared redundancy respectively in 1996 and were paid or compensated for loss of employment by way of redundancy and medical discharge using the formula of 28 months pay plus one month's pay in lieu of notice in accordance with 1994 Redundancy Agreement and Clause 3.51 of the Standard Conditions of Service and the 1995 Collective Agreement even though the Respondents were not unionized in accordance with

Section 74 of the Industrial and Labour Relations Act (4) which reads:

> **"A collective agreement concluded by a joint council shall bind every employer and employee engaged in the industry concerned notwithstanding that the employer or employee is not a member of the Association or of the trade union concerned or was not a party to the collective agreement".**

2. That by February 1996 when the Respondents services were terminated, **Statutory Instrument No. 99** (5) on Minimum Wages and Conditions of Employment, had been revoked by **clause 5 of Statutory Instrument No. 171** (6) on 27th October 1995 and therefore **Statutory Instrument No. 99** (5) did not apply to the Respondents who were all grade 1 and occupying positions whose wages and conditions were regulated through the process of collective bargaining under the **Industrial and Labour Relations Act** (4) pursuant to **Section 2(b) of Statutory Instrument No. 99** (5).

In addition the 1st Appellants pleaded that none of the Respondents had attained the age of fifty-five (55) years even though they had served the Appellant Company for not less than ten years pursuant to **clause 4 of Statutory Instrument 99** (5) and as such they were disqualified from being paid three months basic pay for each year completed in the service. It was also their defence that the 1st Respondent was not retired but medically discharged.

Before the High Court the Respondents called four witnesses.

Briefly the case for the 1st Respondent was that he was employed by the 1st Appellant Company from 31st August 1971 until 29th February 1996 when he was retired on medical grounds. His letter of discharge stipulated that he was to get medical discharge benefits and that he was to use the Appellant's medical facilities for the rest of his life. However, when his benefits were calculated the Appellants paid him under the unionised employees' package instead of a non-

unionised package. This was a miscalculation as he was non-unionised employee. His claim therefore before the High Court was based on **Statutory Instrument No. 171**, **clause 9 as read with clause 7** (6) under which he should have been paid three months basic pay plus one month's salary for each year served plus transport, lunch and repatriation allowances.

His further contention was that he was entitled to repatriation allowance equal to the current cost of transporting his family to his village or the actual cost of repatriation of his family to his village. He further testified that his pay slip showed a figure of K2,924,036.10 as net pay which was not paid to him and on repatriation allowance the pay slip showed that he was paid a sum of K312,748.10 the sum which was not based on the cost of his repatriation of his family to his village. He also claimed that he was entitled to annual increment of thirty per cent (30%) from January 1989 as per communication from the 1st Appellant in January 1989.

The other five Respondents plus the Administrator of the Estate of the late Peter Chibolya testified that they were employed by the Appellant Company and served the Appellant Company as follows:

The late Peter Chibolya Mine No. 084429 – 26 years;
Richard Chibeza Mine No. 080003 – 21 years;
Robby Simuwelu Mine No. 075395 – 25 years;
Humprey Mfwaenda Mine No. 081057 – 20 years;
Alex Kasompe Mine No. 084599 – 15 years;
Nathan M Mwema Mine No. 073010 – 28 years.
Moffat Sinkala Mine No. 076047 – 25 years

Therefore according to the record all the Respondents had served the Appellant more than 10 years. Their evidence furthermore is that on 20th January 1989 they received letters from the 1st Appellant Company informing them that with effect from 1st January 1989 they were entitled to a salary increment of 30% annually. Therefore the computation of their redundancy packages should have

been based on this enhanced salary. Their main claim is that, other than the 1st Respondent, they as the other claimants were declared redundant on 21st February 1996. Their redundancy packages were therefore calculated on a wrong formula using a unionised formula when they were not unionised employees. They had been graded to Grade G1 and that there were two salary scales. One for unionised and the other one for nonunionised. They had been receiving transport and lunch allowance as stipulated in **Statutory Instrument No. 99** (5) replaced by **Statutory Instrument No. 171** (6).

On lunch allowance they contented that from June 1994 they were supposed to have been paid K2,000.00 per month making a total of K24,000.00 under **Statutory Instrument No. 99** (5) and from June 1995 to March 1996 they were supposed to get K3,000.00 per month making a total of K30 000 00 total as stipulated by **Statutory Instrument No. 171** (6). They claimed that the Appellant Company did not take into account all these entitlements in calculating their redundancy packages.

The last claim for all the Respondents was to purchase the houses they were living in, which they were entitled to as per their conditions of employment. They testified that most of them had been sitting tenants for 24 years and that since their terminal packages had not been paid in full by the time the Appellants started selling institutional houses, they were therefore entitled to buy the houses in which they were living.

The 1st Appellants called two witnesses. They accepted that the 1st Respondent was medically discharged and the other six (6) Respondents were retrenched. However, they maintained that the terminal packages for all the Respondents were properly computed and were based on the right formula. They maintained that they computed the medical discharge terminal benefits for the 1st Respondent and the 6 other Respondents their redundancy packages on a

unionised conditions as according to **section 74 of the Industrial and Labour Relations Act** (4) all collective agreements entered between the 1st Appellant and MUZ were binding on nonunionsed employees. They also maintained that the Respondents under **Statutory Instrument No. 99** (5) and **Statutory Instruments No 171** (6) were bound by any collective agreement entered into between the 1st Appellants and MUZ. They furthermore maintained that all the Respondents were below the age of 55 and that they were all on a pension scheme established by them – the 1st Appellant Company.

Regarding lunch allowance the Appellant maintained in defence that these allowances were not given anyhow but to employees who worked out of the division. On transport they maintained that that was given to certain categories of employees who lived at least 4 kilometers from the shaft where they worked and it was given on a graduated basis depending on the distance. Frontline supervisors who fell within G1 and G8 grades used to get a fixed rate of transport assistance of K1,000.00 per month. On repatriation allowances the 1st Appellant Company maintained that the collective agreement was the one which applied to the Respondents. According to them the conditions of service also indicated that the employees declared redundant had to benefit from the formula of 28 months plus one month's notice.

The 2nd Appellant deposed in his affidavit before the High Court that he had bought the house being claimed by one of the Respondents House No. 52 Mulome Street Chingola after the house was advertised for sale to employees by the 1st Appellant and that he was a bone fide purchaser of the house in question after being offered for sale by the 1st Appellant.

The learned trial Judge accepted the Respondents' story and ordered that they be given benefits stipulated in **Clauses 7, 9, 10 and 11 of Statutory Instrument No. 171** (6).

Basing his ratio decidendi on **Zambia Oxygen Limited and ZPA v Paul Chisakula and 4 others** (3) he entered judgment in favour of the Respondents. He ordered that the 1st Appellant Company pay to the Respondents the difference between what they had received under the formula used by the Appellant Company and what they ought to have received under **Statutory Instrument No. 171** (6). He further ordered that the 1st Appellant Company should sell houses to the Respondents as sitting tenants. This is the Judgment which is being challenged before us.

Before us the Appellants raised three grounds of appeal.

The first ground was that:-

> The court below erred in law in shifting the burden of proof to the 1st Appellant, as it was the duty of the Respondents to prove that they were entitled to be paid their terminal benefits under **Statutory Instrument No. 99** (5), which they pleaded in their pleadings and that it was not for the Appellants to prove that **Statutory Instrument No. 171** (6) did not apply.

It was argued that the burden of proof at all times rests on him who claims. So in the case before us the Respondents themselves had to prove on the balance of probabilities that their terminal benefits had to be calculated under **Statutory Instrument No. 99** (5) or **Statutory Instrument No. 171** (6).

Citing the case of Vincent **Mijoni v Zambia Publishing Company** (1) it was argued that it is a well-established principle that the claimant must prove his case. They also referred to the case of **Mohamed v The Attorney General** (2), where this court held that, "***A plaintiff must prove his case and if he fails to do so, the failure of the opponent's defence does not entitle him to judgment.***" Accordingly they argued, the Respondents should have established that:-

1) They were employees;
2) They worked for more than ten (10) years;
3) They were not employees whose wages and conditions are regulated through the process of collective bargaining; and
4) Zambia Consolidated Copper Mines did not establish a pension scheme.

According to counsel for the Appellants the Respondents failed to establish these requirements. Neither did they prove that their calculation was stipulated in **Statutory Instrument No. 99** (5). The learned counsel went into details of the calculations of each individual claim. He started with the 1st Respondent who was medically discharged, justifying the Appellant Company's calculations of his retirement package. He went on to analyse the claims of Messrs Nathan Mwema, Richard Chibeza, Humprey Mfwaenda, Alex Kasompe, Peter Chibolya and Robby Simuwelu, justifying the calculations of each of the Respondents' terminal package by the Appellant Company.

On the Second Ground:

The learned counsel argued that since the Respondents did not include a plea on the applicability of **Statutory Instrument No. 171** (6) but only included a plea on the applicability of **Statutory Instrument No. 99** (5). At law they cannot seek remedy under **Statutory Instrument No. 171** (6) as they were bound by their own pleadings.

On the Third Ground:

It was their argument that since the Respondents throughout the employment enjoyed the conditions of employment stipulated in the collective agreement they are estopped from coming to court and object to the calculations of their terminal benefits under the collective agreement.

The learned counsel referred to **Section 74 of the Labour and Industrial Relations Act** (3) which we have cited at J2.

Mr. Chamutangi also argued that the terminal benefits, which the Appellant Company actually gave to the Respondents, worked out to be more than what they would have received had the Appellant Company calculated their terminal benefits under **Statutory Instrument No. 99** (5) or **Statutory Instrument No. 171** (6).

Mr. Kasote agreed with Mr. Chamutangi's arguments and urged this court to uphold the appeal. In the written submission for the 2nd Appellant it was argued that the sale of company houses became operational on 22 July 1997 long after all the Respondents had ceased to be employees of the 1st Appellant. They referred to the rules of the sale of company houses rule 20 (iii) which says:-

> ***"Employees who have retired, or have been declared redundant or have been discharged on medical grounds but have not been paid their terminal benefits at the time the scheme is introduced shall qualify."***

and argued that by March 1996 the Respondents had already been paid all their terminal benefits. In addition it was argued that the Respondents had not pleaded for purchase of the houses.

We have considered seriously the arguments before us. We without reservations accept that it is trite law that a claimant has a duty to establish before the court on the balance of probabilities that his claim has merit. So we agree with Mr Chamutangi.

The view we hold, however, in this case is that the main question before us is whether or not the Respondents on the evidence adduced were covered by the collective agreement and or by **clauses 7, 9 and 10 of Statutory Instrument No. 171** (6).

It is common ground that the 1st Respondent was medically discharged on 29th February 1996. It is also common ground that he had worked for the Appellant Company for a period of 25 years. It is also common ground that he was non-unionised employee in grade G1 and that his conditions of employment were not the same as unionised employees. In fact, at page 159 of the Record contrary to the submission of the learned counsel for the Appellant, he said in his testimony that, ***"the reason was that there were G1s who were represented and others were not. This was what was happening. We wanted to rejoin MUZ but Management rejected the idea."*** Under **Statutory Instrument No. 99** (5) as replicated by **Statutory Instrument No. 171** (6), Clause 4 says:

> **"With effect from 1st June, 1995, the minimum wages and conditions of employment shall be as indicated in the Schedule to this Order".....**

We are satisfied that **Statutory Instrument No. 171** (6) had to apply in place of **Statutory Instrument No. 99** (5). We cannot fault the learned trial Judge's reasoning that a wrong citation of a legal provision would not defeat a claim.

It was argued on behalf of the Appellant Company that although the 1st Respondent was non-unionised he had all along enjoyed the conditions stipulated in the collective of agreement. We cannot accept that assertion, as the evidence before us is that there were two salary scales in the 1st Appellant Company. One enjoyed by the unionised and the other by non-unionised employees. The Appellants referred to page 171 in the record as supporting their argument that the Respondents enjoyed the same conditions as unionsed employees. We cannot accept that as we find no such evidence on the pages referred to. We find evidence, which only talks about the miscalculations which were paid to the Respondents.

It was argued that although the 1st Respondent could have enjoyed different conditions from unionsed employees the Appellant Company was correct to have

computed his medical discharge package by using collective agreement provisions.

We have addressed our minds to the provisions of **Section 74 of the Industrial and Labour Relations Act** (4) which rightly in our view has been repealed. We note that this section quite contrary to the spirit of free bargaining and free negotiations in an employee/employer relationship, foisted conditions on strangers to the collective agreements. The 1st Appellant Company has argued that although the 1st Respondent was not a member of the union and hence not a party to the collective agreement, was nonetheless caught by the provisions of this section 74. We agree that should have been the case. However, in this case before us, we have no evidence that the 1st Appellant Company imposed the same conditions in the collective agreement on the 1st Respondent as provided in **section 74**. On the contrary the 1st Respondent was given a better salary than the unionised employees, vide page 160. In our view, therefore, the Appellant Company cannot now in calculating the terminal benefits try to surreptitiously impose on him the conditions they did not impose on him during his employment without discussing that with him. As this court held in the **Zambia Oxygen Limited and ZPA v Paul Chisakula and 4 others** (3) that "***the defendants cannot be heard to complain that the learned trial judge declined to enforce variations unilaterally introduced by them to the disadvantage of the employees.***"

It was argued by the Appellant Company that under **Clause 7 read together with Clause 9 of the Statutory Instrument No. 171** (6) the 1st Respondent was not entitled to terminal benefits to be calculated as argued by him because he was below 55 years.

Clause 9 says:

> **"An employee whose employment is terminated on medical grounds as certified by the employer or by a medical practitioner shall be entitled to benefits in accordance with paragraph 7 of the this Schedule."**

And then Clause 7 says:

> **"An employee who has served with an employer for not less than ten years and has attained the age of fifty-five years shall be entitled to three months' basic pay for each completed year of service:**
>
> > **Provided that where an employer has established a pension scheme approved by the Minister, the retirement benefits shall be paid in accordance with such pension scheme, and this paragraph shall not apply."**

According to **clause 7 of Statutory Instrument No. 171** (6) an employee has to have served the employer more than 10 years and in addition has to attain 55 years before being entitled to terminal benefits of three months' basic pay for each completed year of service plus any other calculations.

As regards to the 1st Respondent it was common ground that he was not 55 years old. We therefore agree with the 1st Appellant Company that he was caught by this provisions of **clause 7**. He was even caught by the proviso to Clause 7 which we have quoted which says, ***"Provided that where an employer has established a pension scheme approved by the Minister, the retirement benefits shall be paid in accordance with such pension scheme,....."*** because he, in his own evidence accepted that he belonged to the pension scheme established by the 1st Appellant Company vide page 160. Therefore the learned trial Judge misdirected himself in concluding that the 1st Respondent was entitled to the terminal package as stipulated in **clause 7 of Statutory Instrument No. 171** (6)

As regards the other Respondents it was common ground that they were retrenched on 29th February 1996. It is also common ground that at the time they were retrenched **Statutory Instrument No. 171** (6) had replaced **Statutory Instrument No. 99** (5).

Clause 2 of **Statutory Instrument No. 171** (6) says:

"This Order shall apply to all employees except employees—

(d) in occupations where wages and conditions of employment are regulated through the process of collective bargaining under the Industrial Relations Act, 1993"

But the Respondents' evidence which was challenged before the High Court but accepted by the learned trial Judge was that they enjoyed different conditions of employment, from those of unionised employees. Their allowances were different. Their salary scales were different. Again basing our conclusion on the evidence on record and the ratio decidendi in **Zambia Oxygen Limited and ZPA v Paul Chisakula and 4 others** (3), we are satisfied that the Appellant Company did not implement **Section 74 of the Industrial and Labour Relations Act** (4). They cannot therefore now at this stage surreptitiously invoke the provision of **Section 74 of the In Industrial and Labour Relations Act** (4). It was argued on behalf of the Appellant that **Statutory Instrument No. 171** (6) could not apply to them as they did not plead that application of Statutory Instrument No. 171.

We have difficulties in accepting that argument. We entirely agree with the learned trial Judge that a wrong citation of a legal provision would not defeat this claim. **Clause 10** of **Statutory Instrument No. 171** (6) says:

"Where an employee is declared redundant, he shall be entitled to at least one month's notice and redundancy benefits of not less than two months basic pay for each completed year of service."

It is common ground that the Respondents other than the 1st Respondent were declared redundant. Therefore, the 1st Appellant Company's argument of invoking retirement provisions is fallacious. We hold therefore that the learned trial Judge in as far as the six Respondents are concerned was on firm ground when ordered that the Appellant Company should pay the difference between what they were paid and what they ought to have been paid as calculated under

clause 10 of Statutory Instrument No. 171 (6).

We need to emphasise that these calculations should be based on the enhanced salaries of 30% increments annually from 1989 to 1996. It should also include all the allowances, which they were entitled to that is, as per conditions of their services. It should include repatriation allowances calculated at the current cost of their repatriation and that of their families to their original homes.

We also order that these calculations should be done at the Deputy Registrar's level taking into account the evidence before the court of each of the Respondent's entitlement as summarized at page J4, J5 and J6 of our Judgment. This should carry interest at the bank deposit rate from the date of writ to the date of this judgment and thereafter at the lending rate as determined by the Bank of Zambia until payment. On the sale of houses we hold the view that since it was common ground that the Respondents were challenging the calculations of their terminal benefits and we have held that since the Respondents were entitled to have their terminal benefits recalculated the Respondents had not been paid their terminal dues by the time of the selling houses to employees by the 1st Appellant. So they qualify under Rule 20(iii) of the Rules of the sale of company houses. The learned trial Judge was on firm ground in ordering that the six Respondents be sold the houses.

As regards the 1st Respondent the only point worthy consideration is whether or not taking into account the annual increment of 30% he was paid all his dues. From the evidence we are satisfied that the calculations excluded the enhanced salary of 30% increment annually. We direct that that should be calculated by the Deputy Registrar.

With regard to the claim by the 2nd Appellant because of the conclusions we have made we hold that he was sold this house properly as he was a bone fide purchaser for value after the 1st Respondent was disqualified to purchase that house. In conclusion the appeal is partially successful. We therefore make no order on costs.

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D M Lewanika
DEPUTY CHIEF JUSTICE

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L P Chibesakunda
SUPREME COURT JUDGE

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P Chitengi
SUPREME COURT JUDGE