IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

APPEAL NO. 63 OF 2003

BETWEEN:

EMMANUEL CHISENGA APPELLANT

AND

ZAMBIA NATIONAL COMMERCIAL BANK Plc RESPONDENT

CORAM: **CHIRWA, CHITENGI AND SILOMBA, J. J. S.**

On the 7th August, 2003 and 15th October, 2004

For the Appellant: Mr. H. Ndhlovu, H. H. Ndhlovu and Company.
For the Respondent: Mr. A. Siwila, In-house-counsel.

JUDGMENT

SILOMBA, J. S., delivered the judgment of the court.

Legislation referred to: Industrial and Labour Relations Act, Cap. 269, Sections 3 (1) and 89 (2)

This is an appeal against the judgment of the full bench of the Industrial Relations Court (hereinafter to be referred to as "the IRC") dated the 25th April, 2002, delivered at Ndola. The background to this appeal can aptly be described as acrimonious and is adequately summarised in the judgment being appealed against. The facts are that sometime in June, 1998 the IRC gave judgment for the appellant in which it ordered the respondent to, among other things, pay the annual increment that had been awarded in April, 1992 to its employees with interest.

The ruling of the learned Registrar of the IRC on assessment did not please the respondent and consequently it appealed to this Court against the said ruling. On appeal, we held, with the consent of the parties, that the matter should go back to the IRC to determine what was due to the appellant. Back at the IRC, the parties attempted, by *ex curia* means, to compute the figures with a view to filing a consent order but this failed and the matter was referred to the learned Deputy Chairman, as a single judge of the IRC. After the learned Deputy Chairman made the assessment, the respondent, being dissatisfied with the ruling, appealed to the full bench of the IRC against an award of K19, 944, 681.23 with interest.

At this stage, it became quite obvious that the appeal to the IRC could not be heard in Lusaka as all Lusaka based judges had a go at the case in previous encounters. Quite correctly, it was decided to transfer the appeal to Ndola Registry so that the judges there could hear and determine the appeal in an impartial manner. Thereafter, the IRC in Ndola set the 4th February, 2002 as the date for the hearing of the appeal but unfortunately the appellant and his advocates from Lusaka did not attend court on the return day.

On the other hand, the advocates for the respondent, who were Lusaka based just like the appellant and his advocates, were present in court. The IRC, on an application by the respondent's counsel, decided to hear the appeal in the absence of the appellant on the basis that he would not be prejudiced as he was aware of the proceedings on that day. After hearing the appeal, the court adjourned to consider its judgment.

Thereafter, a very unfortunate event followed; the then learned Chairman of the IRC intervened, by way of a letter, directing that arrangements be made for a judge from Ndola to travel to Lusaka to constitute the appellate court and re-hear the appeal in Lusaka. Consequently, the IRC in Ndola decided to arrest judgment to facilitate the hearing of the respondent's arguments not in Lusaka but in Ndola. Accordingly, the appellant's advocates were informed that the appeal would be re-opened for hearing on the 14th March, 2002 at Ndola. On the return date, counsel for the appellant did not attend and neither did he file his heads of argument as advised by the court; no reasons for his inability to attend court were communicated in advance. On the other hand, counsel for the respondent was in attendance.

At this stage, the court once again adjourned the proceedings to consider its judgment. However, on the day that followed the court below received a letter, sent by express service on the previous day when the appeal was heard. The letter was addressed to the Marshal of the IRC. The letter was responding to the earlier letter from the IRC in which the court gave directions about the new date of trial and the need to file heads of argument.

We have read the letter. The letter, in our view, is an expression of the disregard for the authority of the IRC, Ndola, to determine the appeal in Ndola following the learned Chairman's directive that the appeal be heard in Lusaka. The tone and language of the letter is rude. We intend to deal with this aspect of the matter later in our judgment when we deal with ground four.

Despite the lamentations and protestations from the appellant, the IRC remained firm and decided to proceed with its judgment; even though counsel for the appellant had indicated that they had filed heads of argument, there was nothing that was forwarded to the court at the time the judgment, the subject of this appeal, was being written. With this background, we wish now to look at the proceedings that took place before the IRC, Ndola. As already pointed out, the proceedings on appeal arose from the ruling of the learned Deputy Chairman, sitting as a single judge of the IRC. The first ground to be argued was that the learned Deputy Chairman erred in sitting alone when assessing the damages instead of sitting as a full court.

In considering this ground, the IRC noted that by our order of the 15th June, 1999 the matter had been sent back for assessment of what was due to the appellant by the IRC; that in terms of Section 86 of the Industrial and Labour Relations Act, Cap. 269 of the Laws, a single judge of the IRC does not constitute the Court. With regard to the second ground, that the learned Deputy Chairman misdirected himself by going outside the substantive judgment when assessing the amount to be paid, the IRC agreed with the respondent. The IRC took note that the learned Deputy Chairman had, in his ruling, found that the appellant had been shortchanged on salary, housing allowance, fuel allowance, servants allowance and entertainment allowance, which were not ordered for assessment by the court of first instance.

On the third and last ground, which was that the learned Deputy Chairman misdirected himself by considering matters extraneous to the calculations of the monies due to the appellant, the IRC upheld this ground as well. From the judgment of the learned Deputy Chairman, he had ordered the respondent to produce the payroll and when it failed to do so the learned Deputy Chairman became of the opinion that they were resisting to produce the payroll and proceeded to draw an inference that if they had tendered the payroll it would have been supportive of the appellant's case.

The full bench of the IRC had occasion to review its first judgment and found that in that judgment there was clear evidence contained in the ZIMCO document that was addressed to ZIMCO chief executives regarding the annual increments that were awarded as at April, 1992. It was the view of the IRC that the learned Deputy Chairman's insistence on the production of the payroll overlooked that evidence, whereby he fell into error by taking into account extraneous considerations not contemplated by the judgment of first instance.

There are four grounds of appeal that have been advanced by the appellant. These are as follows: -

1. That the IRC erred in law and fact when it found that the Supreme Court had ordered that the case be heard by the full bench;

2. That the IRC erred in law and fact when it found that when assessing the amount due to the appellant, the assessing court had gone outside the substantive judgment when in actual fact there was no such a thing;

3. That the IRC erred in law and fact when it found that the assessing judge misdirected himself by considering matters extraneous to the calculations of the monies due to the appellant when in actual fact the assessing judge did not consider extraneous matters;

4. That the IRC erred in law and fact when it made unfounded conclusions on the behaviour of the respondent's advocates and on the respondent's heads of argument.

With regard to ground one, the appellant's counsel submitted that the order of this court dated the 15th July, 1999 sent the matter back to the IRC so that the amount due to the appellant could be ascertained. In the view of counsel, the order did not mean that the matter must be sent back to the IRC for retrial. As far as he was concerned, the definition of the IRC contained in Section 86 of the Industrial and Labour Relations Act, is relevant only when the IRC is hearing complaints and not when the issue is assessment of damages. He argued that when the issue is one of assessment of damages, it was the learned Registrar or the learned Deputy Chairman, sitting alone, who had jurisdiction and not the full bench of the IRC.

Coming to ground two, counsel stated that the assessment by the learned Deputy Chairman was in line with the order of this Court dated the 15th of June, 1999 in that he assessed what was due to the appellant. Counsel did not, therefore, appreciate the reasoning of the full bench of the IRC when it said that the learned Deputy Chairman had gone outside the judgment of the court of first instance when he included into the salary allowances, such as, housing, fuel, servants and entertainment. The argument of counsel was that if the purpose of the order of this Court was to find out what was due to the appellant then there was nothing wrong with the assessment of the learned Deputy Chairman as there was nothing that he added.

Coming to the written heads of argument, counsel has argued that the appellant was not claiming increment of salary made after the 31st May, 1992 but what was due to him as at that date. What was taken into consideration by the learned Deputy Chairman, in assessing the appellant's entitlement, was the appraised salary, which was only paid in October, 1992, he said.

Under ground three, it was canvassed that the order for the respondent to produce the payroll was not extraneous consideration. Counsel said that the payroll was necessary to show what was due to the appellant at the time he was retired. The payroll, according to counsel, was vital and helpful to the lower court because it showed that all employees of the respondent who were appraised for the year 1st April, 1991 to 31st March, 1992 were paid their increased or appraised salaries in October, 1992 except the appellant. He submitted that on the day of assessment the appellant did not have his pay-slip and so an

application was made for the production of the payroll and when this was not produced the assessing court had no choice but to believe the figures given by the appellant.

On ground four, the appellant's counsel did not submit orally but decided to leave the matter to the Court to decide. Briefly, it is contended in the written heads of argument that the full bench of the IRC was so angry with the letter from the appellant's advocates that it decided to punish the appellant without closely looking at the complaint raised in the letter. In the opinion of counsel, the anger of the full bench influenced the decision to declare the decision of the learned Deputy Chairman a nullity.

In its opposition to the appeal, the respondent has filed heads of argument, which it relied upon. The heads of argument have been augmented by oral submissions. With regard to ground one, counsel for the respondent argued that in terms of the law, under Section 86 of the Industrial and Labour Relations Act, the learned Deputy Chairman did not sit as the IRC.

Counsel referred to the consent order granted by this Court on appeal, dated the 15th of June, 1999, and stated that the said order, referring the matter for assessment of what was due to the appellant to the IRC, was clear and an unequivocal. Consequently, it was submitted that if this Court had intended that the assessment must be done by a single judge of the IRC it would have so ordered.

On ground two, the respondent's counsel submitted that the award given to the appellant, as contained in the original judgment of the IRC, was restricted to one automatic salary notch of April, 1992. However, when the learned Deputy Chairman assessed the amount due he took into account various things, including housing, fuel, servants and entertainment allowances. As if this was not too much, he backdated the award to July, 1992 when the appellant had already left employment. As far as counsel was concerned, this was unjust enrichment.

Coming to ground three, counsel argued that the issue of the payroll did not arise in the substantive judgment of the IRC, which awarded the salary notch as at April, 1992. So by taking into account the payroll and various allowances, which were not ordered, the learned Deputy Chairman had considered matters extraneous to the calculations of the terminal benefits due to the appellant, he argued. As far as he was concerned the order of

this Court had not been obeyed and accordingly, he humbly prayed the Court to dismiss the appeal and send back the matter to the IRC for determination.

The respondent's counsel has not commented on ground four both in his oral and written heads of argument. Since counsel for the appellant did not orally argue ground four, there was no need for the respondent's counsel to argue the same.

From the outset, we wish to say that we have given our very anxious consideration of the issues raised in this appeal, both in the heads of argument and oral submissions, as well as, what is contained in the record of appeal. Our view of the presentation given by counsel for the appellant in relation to ground one is one of disbelief, especially by his crusade that issues of assessment of awards or damages are only performed either by the learned Registrar or the learned Deputy Chairman of the IRC while matters of trial of complaints are a prerogative of the full bench of the IRC.

No authority was cited to us to support this proposition, which we have found to be very misleading. We say so because there is nothing to stop the full bench of the IRC, like a judge of the High Court, from assessing an award at the end of a trial of a complaint. In a situation where the IRC feels it cannot do the assessment, because of its busy schedule, it may refer the matter to the Registrar for assessment; this is the position in the High Court as well.

Coming to the issue raised in ground one, we have had occasion to refer to the consent judgment on appeal, now at page 16 of the record of appeal, where this Court ordered: **that the matter is sent back to the Industrial Relations Court to determine what is due to the respondent** (*now appellant*). We find our order to be very clear and in our view it is capable of only one interpretation. Section 3(1) of the Industrial and Labour Relations Act, defines "court" as the Industrial Relations Court.

Further, in Section 89 (2) of the same Act (and not Section 86 as submitted) it is provided that: **The court, when hearing any matter, shall be duly constituted if it consists of three members or such uneven number as the Chairman may direct.** So when we directed that the matter be sent back to the IRC to determine what was due to the respondent (now appellant) we did not mean, by our order, that the matter should be determined by the learned Deputy Chairman. By misunderstanding the direction given in

the consent order, the appellant can be said to be guilty of 'forum shopping' when he filed process before the learned Deputy Chairman.

By our decision in ground one we are, by implication, saying that in attempting to assess what was due to the appellant the learned Deputy Chairman had no jurisdiction to entertain the matter as ordered by this Court. Incidentally, this was the finding of the lower court as well. We wish, therefore, to observe that as soon as it was determined that the learned Deputy Chairman had no jurisdiction to entertain the matter the full bench of the IRC should have not proceeded to deal with the other grounds of appeal because it was not necessary to do so.

In dealing with ground two, we have decided to combine it with ground three because the two grounds raise the issue of importing into an assessment matters that are outside the judgment of first instance. We wish to say, from the outset, that an assessment as ordered by the court is not an inquiry independent of the judgment giving rise to such an assessment. In other words you cannot, during assessment, call for fresh evidence and make fresh findings on matters that are outside the scope of the judgment that ordered the assessment. The rule should be that when the court is sitting as an assessing court it is incumbent upon it to fully comprehend the judgment ordering the assessment in order to appreciate what it is required to do.

To answer the question as to what was ordered, which later became the subject of an assessment, we were surprised to discover that the judgment of first instance was not part of the record. However, we now have the judgment dated the 23rd June, 1998, in which the IRC heard and determined the complaint of the appellant for the first time. The court was presided over by the Hon. Mr. Justice Mwanza, then Hon. Chairman of the IRC. At page J5 of the judgment this is what the learned court said: -

> In our view, this ZIMCO document cuts the whole story short on the applicant's annual increment, which the respondent never paid him in April, 1992. We thus order the respondent to effect the applicant's annual increment of April, 1992, which attracts interest at commercial bank rate effective from the 1st April, 1992 till payment is effected.

From the quotation, it is quite clear that the court ordered the payment of the annual increment of April, 1992. By any stretch of imagination, the lower court did not

order the payment of such things as housing, fuel, servants and entertainment allowances. In addition, to find out what was due to the appellant as ordered in the judgment of the 23rd June, 1998 the parties and the assessing court did not have to call for the payroll but the ZIMCO document. We, therefore, agree with the lower court that the inclusion of allowances and the production of the payroll were matters not in contemplation of the judgment of the 23rd June 1998. In short, these were extraneous considerations. We decline both grounds two and three.

Ground four is on the conduct of the proceedings by the IRC on appeal, which conduct the appellant was not happy with. The appellant thinks that as a result of the letter his advocates wrote to the IRC, Ndola, through the Court's marshal, the full bench was so enraged by the letter that it had no time to look at the complaint raised in the letter. As a consequence to this, the anger of the full bench of the IRC, it is alleged, influenced the decision to declare the decision of the learned Deputy Chairman a nullity.

We do not agree with the sentiments of the appellant. In the first place, we find the steps the lower court took in dealing with the appeal of the appellant to be very accommodating; their reasoning as shown by the disputed judgment was well founded in law with a high degree of impartiality. What should be realized, from the word go, is that the learned Deputy Chairman had no jurisdiction to deal with the issue at hand as this judgment and the judgment of the IRC will confirm but the learned lower court was gracious enough to deal with all the issues raised on appeal.

The problem, as we see it, came about as a result of the letter from the then Chairman of the IRC directing that a judge from Ndola must travel to Lusaka and convene the court here in Lusaka. This letter grossly misled the appellant and his advocate to the point that they became contemptous of the lower court. They were lucky not to be cited for contempt. The point we would like to make is that once a court is seized with a matter, it becomes very irregular and, therefore, an interference with the due administration of justice, for the head of the institution to begin to give certain orders to that court.

As a matter of practice and law, if the appellant was uncomfortable with the venue, for any reason, he should have instructed his counsel to file an appropriate application before the court hearing the matter. Such an application, well supported by

summons and an affidavit, should have been made promptly instead of lobbying the Hon. Chairman.

On the basis of our reasoning, this appeal cannot succeed. It is dismissed with costs, to be taxed in default of agreement. Since the issue of what is due to the appellant has not been resolved as per our order of the 15th June, 1999, we order that the matter goes back to the full bench of the IRC for determination.

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D. K. Chirwa,

SUPREME COURT JUDGE.

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P. Chitengi,

SUPREME COURT JUDGE.

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S. S. Silomba,

SUPREME COURT JUDGE.