IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 132 OF 2004

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

CHOMA MILLING COMPANY LIMITED APPELLANT

AND

MULENGA AUSTIN SIMPEMBA RESPONDENT

CORAM: CHIRWA, CHITENGI AND SILOMBA, JJS.

On the 25th March, 2003 and 18th October, 2004

For the Appellant: Mr. W.M. Kabimba, W.M. Kabimba and Company

For the Respondent: Not Present

J U D G M E N T

Silomba, J.S., delivered the judgment of the Court.

Legislation referred to: Industrial and Labour Relations Act, Cap. 269; Section 97.

This appeal is against the judgment of the Industrial Relations Court (hereinafter to be called "the IRC") of the 20th of October, 2000. The events giving rise to the judgment of the full bench of the IRC can be traced to a complaint filed under Section 85 of the Industrial and Labour Relations Act, Cap. 269 by the respondent, then complainant, on the 8th of February, 1999. In that complaint the respondent prayed for the following reliefs:-

(1) Payment of the whole of terminal benefits amounting to K60,784,162.00 payable on retirement, excluding amounts advanced to the respondent by the appellant.

(2) Declaration that the respondent is entitled to purchase a motor vehicle, Toyota Land Cruiser, on retirement as per clause 22 (i) (ii) of the conditions of service governing the employment of the respondent.

(3) An order that the respondent is entitled to the calculation of the terminal benefits based on the basic salary, which is inclusive of all the allowances; and

(4) Damages for mental distress and inconvenience caused by the respondent's conduct in breach of contract resulting in respondent's stay without taking up new work or going into business because retirement benefits have been withheld without any legal justification.

The appellant denied in the court below, by way of an answer, that it had wrongfully withheld the respondent's terminal benefits and averred that the benefits were to be paid in instalments. The appellant also stated in its answer, that the calculation of terminal benefits was in accordance with the conditions of service.

The evidence before the lower court, as contained in the record of appeal, was that the respondent retired as chief executive officer of the appellant, having been appointed to the post in 1993. As a subsidiary of ZIMCO, the appellant was put up for privatization and subsequent sell in September, 1996. In June, when the new owners took over the running of the appellant, he was retained as general manager, the post he held up to the date of retirement in June, 1998.

The evidence of the respondent was that at the time he retired he was still serving under the conditions of service of Choma Milling Self-Management Enterprise, the fore-runner to the appellant. One of the grievances that he brought to the attention of the IRC was that at the time he retired the appellant did not follow the conditions relating to his separation or cessation.

He illustrated the point by informing the IRC that upon his retirement the appellant demanded the surrender of the personal to holder vehicle, which was supposed to be sold to him; that the appellant used the wrong formula to calculate his leave days; that instead of using the formula for an employee leaving employment on separation the appellant used a formula for an employee who is still in service but is going on ordinary leave, resulting in monetary loss to him.

He also told the IRC that his basic salary on separation did not include allowances when other employees of the appellant company, before and after privatization, were being paid allowances on separation. He gave examples of the former employees who had been paid the basic salary on separation which included allowances. The respondent was duly supported by Elizabeth Jere (CW3), from the Zambia Privatization Agency (ZPA), who told the lower court that the sell of the appellant was by share transfer, which meant that there was no effect on employment contract and conditions of service; that any clauses pertaining to leave were supposed to be followed in accordance with the conditions of service.

On excess leave days CW3 told the lower court that if leave was not taken for reasons the management of the appellant agreed with it, it would be unfair for the company to refuse to pay accrued leave days. CW4, another witness for the respondent, testified before the IRC that the question of excess leave days arose because the appellant was failing to meet the needs of or obligations to employees in terms of leave pay or allowances, the result of which was that leave was suspended and excess leave was allowed to accrue. As a former manager, human resources, CW4 was asked to prepare a provisional separation schedule for the respondent, which he did and submitted it to the director of the appellant. As there was no feed back from the director the respondent continued working since he was not told in writing about his retirement and the last day of duty.

The evidence of the appellant, through the testimony of one witness, was that the respondent's leave was calculated excluding excess leave and that the basic salary never included allowances. The evidence from both sides was duly, considered by the IRC. On the appellant's reluctance or refusal to pay the whole of the terminal benefits on retirement, together with excess leave, the IRC analysed the evidence before it in relation to the conditions of service attaching to the respondent's employment as contained in the Choma Milling Self-Management Enterprise conditions of service, in particular clauses 25.2.6 and 25.4.

Based on the evidence of the respondent, CW3 and CW4, it was noted that excess leave arose because the appellant failed to meet the employees' demands for leave pay or allowances; that consequently, leave was suspended and excess leave was allowed to

accrue. The lower court took note of the evidence of CW3 that there were complaints from the appellant relating to excess leave. Further the IRC took note of her view that if leave was not taken based on the reason agreed to by management it would be unfair for the company not to pay for the accrued leave days.

Based on the analysis of the evidence, the IRC took the position that since the appellant failed to meet the payments for leave days the result was the suspension of leave, which led to the accrual of excess leave; that since leave was suspended at the instance of the appellant the excess leave fell under clause 25.4 of the conditions of service which read as follows:-

> ***"An employee may accrue leave days beyond the allowed maximum accumulation and without limitation only to the extent that his leave is postponed or curtailed by management."***

Consequently, the lower court was of the view that the respondent was entitled to the payment of excess leave days that accrued due to the appellant's postponement or suspension of leave. The IRC was fortified in arriving at that decision in view of the irrebuttable evidence that other named former employees who retired about the same time as the respondent were paid for the excess leave.

On the payment of terminal benefits based on the basic salary, that included all allowances, the IRC had occasion to examine the definition of "basic salary" under clause 1.0 of the Self-Management Enterprise (SME) conditions of service. Under this clause basic salary meant, "the starting salary in the letter of offer of employment or such other subsequent amount as the Enterprise may from time to time notify the employee under clause 36.0. The lower court also analysed the appellant's evidence on the payment of terminal benefits which did not include allowances into the basic salary.

Basically, there were two formulas which were presented to the IRC by the appellant's witness. The first one was "number of accrued leave days multiplied, by the basic monthly salary and then divided by 30 days." This is the formula that was used to calculate the respondent's terminal benefits. The second formula was "number of accrued leave days multiply by annual basic salary divided by 250 working days." The respondent's witness said that the second formula was more favourable to the respondent than the first one because it related to the number of working days but was turned down

by the board of the appellant because the board thought it was an anomaly to use working days as opposed to calendar days.

The view the IRC took was that the appellant did not want to use the second formula because it was favourable to the respondent. Instead, the appellant used the first formula, which was used for ordinary leave by officers still in the service of the appellant. The IRC noted that there was irrebuttable evidence that there were other employees before the respondent, who were paid terminal benefits that included allowances. The lower court, therefore, concluded that it was grossly unfair for the appellant to have computed the respondent's terminal benefits using the first formula. Consequently, the Industrial Relations Court ordered that the respondent be paid his full terminal benefits that included all the allowances for the sake of consistency.

On the purchase of the motor vehicle, referred to as a Toyota Land Cruiser, registration No. AAL 1233, the IRC found that the respondent was entitled to purchase it in accordance with clause 22 (i) (ii) of the Self-Management Enterprise conditions of service. Under this clause an employee is legible to buy a vehicle he has been using on personal to holder basis, if he has been in the company for a minimum of five years and has been using the vehicle for a minimum period of two years, which conditions were fulfilled by the respondent.

The respondent's claim for damages for mental distress and inconvenience could not be sustained because there was insufficient evidence. There are two grounds of appeal that have been advanced in this appeal. These are:-

(1) That the court (Industrial Relations Court) erred in law and fact in deciding that the complainant was entitled to payment of excess leave days contrary to the complainant's conditions of service.

(2) That the court (Industrial Relations Court) erred in law and fact in deciding that the complainant was entitled to payment of terminal benefits calculated and based on his basic salary which is inclusive of allowances contrary to the complainant's conditions of service.

In support of the two grounds of appeal, counsel for the appellant has filed heads of arguments. These were augmented by oral submission. On the other hand, counsel for

the respondent has also filed heads of arguments but was not in attendance when the appeal was heard.

We have carefully considered the two grounds of appeal and the arguments in support, as well as, the arguments in opposition. The record of appeal has also been thoroughly perused.

It is not our intention to delve into what was laid before us in submissions because the view we take of this appeal is that it does not raise any points of law or any points of mixed law and fact as per the requirement under Section 97 of the Industrial and Labour Relations Act. From the grounds of appeal, it is clear that the appellant is appealing against findings of fact only. The appeal is accordingly dismissed with costs to be taxed in default of agreement.

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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.