IN THE SUPREME COURT FOR ZAMBIA - APPEAL NO. 170/2002

HOLDEN AT LUSAKA
[Employment Jurisdiction]

BETWEEN:

ZESCO Limited	-	**Appellant**
and		
Ignatius Muleba Sule	-	**1st Respondent**
Mike Lavu Mondoloka	-	**2nd Respondent**
B. C. Lwamba		**3rd Respondent**
Leighton Mtonga	-	**4th Respondent**
Angelina Chibunga	-	**5th Respondent**
Mark Mwelwa	-	**6th Respondent**
Damien Muma	-	**7th Respondent**
Simon A. J. Banda	-	**8th Respondent**
Flemmings S. Mumba	-	**9th Respondent**
Peter Chela	-	**10th Respondent**
Zacheus Lungu	-	**11th Respondent**
Godfrey Chisenga	-	**12th Respondent**
Herman Zulu	-	**13th Respondent**
Leslie Muyatwa	-	**14th Respondent**
Liberator Daka	-	**15th Respondent**
Fred Itwi Mulonda	-	**16th Respondent**

Coram: **Lewanika, DCJ, Mambilima and Silomba, JJS,**
On the 26th of June 2003, and on the 26th day of October, 2004.

For the Appellant	:	Mr. Mubanga Kondolo and Ms. Kasumpa Mwansa of ZESCO Limited.
For the Respondents	:	Mr. H. H. Ndhlovu of H. H. Ndlovu and Company.

JUDGMENT

Mambilima JS, delivered the Judgment of the Court.

Authorities referred to:

1. **James Nyoni vs the Attorney-General SCZ No. 11 of 2001.**
2. **Hughs vs Metropolitan Railway [1932] AC 169**
3. **Mike Kabwe vs BP(Z) Limited. SCZ No. 115 of 1996**
4. **Marriot vs Oxford and District Co-operative Society Limited (No. 2) (1970) 1 QB 186.**
5. **Development Bank of Zambia vs Mando 1995-97 ZR 89**

Legislation referred to:

1. **The Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia.**
2. **Local Authorities Superanuation Fund Act, Cap. 284 of the Laws of Zambia.**

This is an appeal from the decision of the Industrial Relations Court, which decided that the Respondents' terminal benefits should be

re-calculated using new salaries awarded to ZESCO employees, less what was paid to them. The Court declared null and void, the zero grading which was slapped on the Respondents by the Appellant in December 1995. The Court also Ordered that the amounts due to the Respondents should be paid with interest at 40% from the date of Judgment until the date of payment. In respect of the 1st and 2nd Respondents, the Court ordered that they be sold the vehicles which they were allocated, at 15% of the cost. Finally, the Court also ordered that each Respondent should be paid K10 million, in respect of repatriation.

From the record of appeal, it would appear that the Respondents originally filed a complaint seeking damages and compensation from the Appellant on the ground that their terminal benefits were not calculated in accordance with ZIMCO Conditions of Service. They later applied, before the Deputy Registrar, to add additional complaints. The Deputy Registrar granted the application through a Ruling which appears on page 102 of the Record of appeal. The Respondents now sought an Order, that their retirement be declared null and void, and that they instead be declared redundant under the ZIMCO Conditions of Service, as was done in respect of some of their colleagues.

The evidence which was before the lower Court was that in December 1995, the Appellants' Board of Directors, approved a new salary structure, which was back dated to 1st July 1995. This was after

a job evaluation exercise carried out by Price Water House earlier in the year. All employees were informed of the new salary structure through a circular.

In his evidence to the Court below, the 1st Respondent testified that at the end of December 1995, he noticed that he was zero graded and that his salary was lower than that of his juniors. The Managing Director however informed them that management had identified them to be among those employees to be retired and therefore found it prudent that they should not benefit from the new salaries. According to this witness, the Managing Director promised them that they would get good packages. Together with the 2nd Respondent, they appealed to the Chairman of the Harmonisation Committee and got no response.

It would appear from the evidence on record and documents appearing from pages 410 to 425 of the record of appeal that the Respondents fell into three categories. There were those who had clocked 22 years of service and above with the Appellant. In this group, there were the 2nd, 4th, 5th, 6th, 8th, 9th, 13th, 14th, 15th, and 16th Respondents. The second group comprised those who were below 55 years of age and had a few years, to go before clocking 22 years of service. Lastly, there was the 7th Respondent, who had not served for 22 years service but had a short time to go before attaining the age of 55.

From March 1996, letters were written to all those Respondents who had a few years to go before clocking 22 years service and the 7th Respondent offering them early retirement. The letters stated inter alia:

" As you are aware, the Corporation recently underwent a major re-organisation which has seen some jobs upgraded, other jobs downgraded and others recommended for abolition.

In view of the re-organisation therefore, Management has decided to offer early retirement to some employees who may have served the Corporation for a period of 20 and 21 years before reaching the mandatory retirement of 22 years service. The notice of the retirement is with effect from 1st April 1996.

As it were, you are one of the employees that Management is offering early retirement.

Should you accept to go on early retirement, Management will offer you a retirement package based on your new annual salary of K----------. Management will further ensure that your retirement benefits are expeditiously disbursed in total. Your last working day will therefore be 30th June 1996.

If on the other hand you chose to continue in service until you reach the mandatory retirement service, Management will in that case proceed to evaluate your present job and have you migrate to the appropriate new grade. However, in this event, Management will only guarantee to pay you your retirement benefits based upon what ZESCO's responsibility is, i.e. only to pay the ZESCO portion of the benefits and will not in any way indulge itself in facilitating payment of your LASF portion by LASF.

Management wishes to make it very clear that you are totally free to choose which option you desire".

The 1st Respondent was in this group and he received his letter on 3rd April 1996. He told the Court below that at that time, he was put on a salary of K5.8 million per annum while his colleagues were pegged at K9.9 million per annum. His juniors were receiving K7.7 million per annum. He went on to state that at this stage, he had no choice but to go. He was paid his gratuity, together with the other Respondents based on the union formula. He testified that his other colleagues, namely, Luswanga, Bruno Katuta, Angela Tembo, Chambula and Robinson Mwansa, the then Managing Director of the Appellant, were paid under ZIMCO Conditions of Service and that Luswanga was even paid 48% interest on his package. The 1st Respondent told the Court below that

they had come to Court to seek redress so that they are paid under ZIMCO Conditions of Service; to be given back their normal grades and salaries; and that their benefits should be computed on the basis of those salaries.

PW2, Simon Alex Banda (the 8th Respondent), who was a senior internal auditor, was one of those who were retired after having worked for 22 years and above. He was serving under ZIMCO Conditions of Service. Together with others in his category, they received letters of retirement from the Appellant. The letters were couched in the following terms:

" NOTICE OF RETIREMENT"

This serves to inform you that it has been decided to retire you after serving the Corporation for ------ years in accordance with Cap 476 Section 26 (c) of the Local Authorities Superannuating Fund (Amendment) Act of 1991.

In view of the foregoing, you have been given three (3) months notice with effect from 1st April 1996 in which to prepare for retirement. Your last working day shall be 30th June 1996.

Your retirement package will be based on your new annual basic salary of K----------".

PW2 told the lower Court that at the time of his retirement, he was 49 years old and that although he had contributed to LASIF for 22 years, he had actually worked for 26 years. He told the lower Court that as far as he was concerned, the termination of his employment had to be in accordance with ZIMCO Conditions of Service and not conditions of a pension scheme like LASF. He named those he was retired together with as Mondoloka, Muyatwa, Chibinga, Mumba, Chisenga, Zulu, Mulonda and Daka. He went on to state that they later discovered that they were underpaid since they were zero graded. He told the Court that they were discriminated against from those who remained. With the evidence of this witness, the Respondents closed their case.

The Appellant called two witnesses in its defence. The first witness, Morcome Mumba,(DW1), the Appellant's Senior Manager, Human Resources explained how an employee could be separated from ZESCO; that is, by retirement, dismissal, death, redundancy or resignation. On retirement, he referred to Sections 26 and 28 of the Local Authorities Superanuation Fund Act[2] (hereinafter referred to as the **'LASF ACT')** and testified that an employee retires upon attaining 22 years service. He went on to state that letters were written to the Respondents and they responded, accepting the retirements.

DW1 further testified that the Respondents were governed by ZIMCO Conditions of Service. He however was not sure whether the Respondents were zero graded and he could not explain why the Respondents were paid less than their juniors.

The second witness for the Appellant, Lovely Mwelwa (DW2), a Senior Manager Billing and Accounting Services explained that Mr. Luswanga left ZESCO in 1997 and that he was paid a negotiated package. He did not have an option of remaining. With regard to Charity Bwalya and her colleagues, this witness testified that the Board reversed the decision to dismiss them, to one of retirement. He went on to state that the Managing Director, Mr. Mwansa was on contract whose terms were negotiated with the Board. This witness maintained that the Respondents were retired because of change of law, having served for 22 years. This witness further testified that the Respondents' salaries were never reduced and that the zero grading was done after they had left.

On the long service gratuity, DW2 told the Court that the Respondents were paid a union formula which was more advantageous to them. On repatriation, he told the Court that ZESCO pays K10 million to non represented employees.

After evaluating the evidence before it and the submissions of Counsel, the Court below found that the Respondents were

discriminated against by the Appellant. The Court referred to the position of Luswanga, whom it found to be similarly circumstanced but got his ZIMCO package paid with 48% interest. The Court also took note that Bwalya and another employee who were dismissed were later retired under ZIMCO Conditions without even being disciplined.

Relying on Articles 23 and 24 of the Constitution of Zambia, the Court was of the view that the Respondents, who were not unionized, had the option to elect which pension law would apply to them and in this case, they elected ZIMCO Conditions were more favourable.

On the option which some of the Respondents were given; whether to remain or leave employment; the Court was of the view that no such option existed but instead, that the Appellant was applying duress. The Court stated on page 19 of the record:

> **"In our view, there is no freedom of choice when those with moral superiority make one choice more perilous than the other, they left you with one choice that which is less perilous and so we hold".**

The Court made this observation after observing that the Appellants told the Respondents that if they left employment, they would be assisted to get their terminal benefits but that if they remained, they risked being

down graded and upon retirement, they would not be assisted to get their terminal benefits from the Local Authorities Superanuation Fund (hereinafter referred to as LASF).

After so finding, the Court found that the suppression of the Respondents' salaries together with their zero grading was null and void. It also ordered that all increments given to the other employees also applied to the Respondents and ordered that their terminal benefits be calculated on the basis of salaries earned by their rank mates who had been retained, which benefits would attract 40% interest from the date of Judgment.

The Appellant has appealed to this Court against these orders by the Court below. In its Memorandum of appeal, the Appellant advanced ten grounds of appeal. It withdrew part of the ninth ground of appeal which related to interest.

The first ground of appeal was that the Court below misdirected itself in law when it failed to take into account the retirement provisions of the LASF Act (1) and further erred when it found that the complainants had an option between ZIMCO Conditions of Service and the Act. In arguing this ground, the Appellant referred us to Section 26(1) and (2) of the LASF Act as it was before its amendment in 1996. It provided that :

" 26(1) A member:-

(a) shall retire on attaining pension age;

(b) may, on giving due notice, retire at any time during 5 years before that member attains pension age; or

(c) shall retire after completing 22 years of service.

(2) A member who retires under subsection (1) shall be granted terminal benefits".

The learned Counsel for the Appellant argued that under this Section, it was mandatory for an employee to retire upon the occurrence of any of the events mentioned therein. He submitted further that the 2nd, 3rd, 8th, 9th, 14, 15th and 16th Respondents had worked for more that 22 years, and in accordance with Section 26(1) (c) of the Act, they were properly retired under the Act. According to Counsel, the finding by the Court therefore that these Respondents were redundant due to reorganization was erroneous. He argued that had the Court taken into account the provisions of the LASF Act, it would have found that the Respondents retired, and that they were not declared redundant.

Counsel stated further that the Court also fell into error, when it found that the Respondents could choose between the ZIMCO Conditions of Service and the LASF Act regarding when to retire and what was to be

paid since Section 26(2) of the LASF Act provides for the benefits to be paid. According to Counsel, the Local Authorities Superanuation Act is an Act of Parliament as opposed to ZIMCO Conditions of Service which were mere conditions of service and not law and as such, the LASF Act should have carried the day. According to Counsel, it was therefore a serious misdirection for the Court to have said that a person could choose between an Act of Parliament and mere Conditions of Service. For this submission, Counsel relied on the case of ***Jacob Nyoni vs The Attorney-General*** [1].

In reply to the first ground of appeal, Mr. Ndhlovu, on behalf of the Respondents, submitted that the amended LASF Act of 1991 was used as a smokescreen by the Appellant to retire the Respondents. He argued that the Local Authorities Superanuation Fund is a benefit scheme responsible for pensions of workers in all local authorities as well as ZESCO. It is maintained by contributions from members and participating employers. He went on to state that LASF does not set conditions of service and therefore that the LASF Act did not cancel the ZIMCO Conditions of Service on which the Respondents were serving. According to Mr. Ndhlovu, if this were so, then the Act would have expressly stated that intention. In his view, the case of ***Jacob Nyoni vs The Attorney-General*** has been misapplied.

Mr. Ndhlovu further submitted that after the LASF Act was amended in 1991, to assist local authorities to reduce their labour force, the Appellant did not enforce it, although it is now claiming that the Act is mandatory. He pointed out that after achieving the intended purpose, the Act has now been amended to remove the aspect of 22 years service and peg retirement to the age of 55 years.

We have considered the submissions by Counsel in respect of the first ground of appeal. In our view, there are two limbs to this ground of appeal. The first aspect is that the Court failed to take into account the retirement provisions in the LASF Act. The second aspect is that the Court erred when it found that for purposes of pension, the Respondents had an option between the ZIMCO Conditions of Service and the LASF Act. For reasons which will become apparent later, in this Judgment, we propose to begin by considering the second aspect of the ground of appeal.

It is common cause that the Appellant Company is an associate member of the Local Authorities Superanuation Fund. The primary object of the fund is to **"...provide for the contributions to and pensions and gratuity from such Fund;"** Through the Appellant therefore, its employees qualified to be members of the Fund and made contributions towards their pension. The LASF Act has provided for the

pensions and retirement benefits of its members. Apart from this it does not provide for other conditions of service.

We find it to be common cause also that apart from being members of the Fund, some employees of the Appellant, including the Respondents, were governed by ZIMCO Conditions of Service. In terms of Pension, Clause 17.1 of the ZIMCO Conditions of Service provided that **"All Zambian employees will, wherever possible be members of the ZIMCO Group Pension Scheme".** There is an option for a certain category of staff to be on contract terms, in which case they become entitled to gratuity under Clause 16. It would appear from the wording of Clause 17 that a person who opts for a contract could receive both gratuity and a pension **"subject to prior approval by ZIMCO".** We have found no evidence on record, to show that any of the Respondents contributed to the ZIMCO pension scheme. Copies of pay slips in the record of appeal, appearing from page 327 show that the Respondents contributed to LASF. We would therefore agree with Mr. Ndhlovu , that the LASF Act did not cancel the ZIMCO Conditions of Service applicable to the Respondents. In our view, the two instruments complimented each other; while the LASF Act governed pension, the ZIMCO conditions of service conferred other conditions which were not provided for under the LASF Act.

The Appellant has taken issue with the finding by the Court below that the Respondents had an option to elect which pension law should be applicable to them; between the LASF Act and the ZIMCO Conditions of Service. As we have stated above, there is no evidence on record to show that the Respondents belonged to any other pension scheme apart from LASF. In our view therefore, the question of an option to choose a more favourable scheme did not arise. In the event that the Respondent had belonged to any other scheme created by the ZIMCO Conditions of Service, our view would have been that LASF ACT which carries the force of law, would have carried the day. An Act of Parliament cannot give way to a circular. We agree with Appellant's argument that the Court below fell into error when it found that a retiree could choose the pension law which would be favourable, between the LASF Act and the ZIMCO Conditions of Service.

Coming to the first limb of the first ground of appeal, we are of the view that it raises similar issues as in the seventh ground of appeal, which is that the Court below misdirected itself when it made a blanket Ruling, without taking into account the particular circumstances of each Respondent. The issue in our view is whether, the LASF Act similarly applied to all the Respondents.

Arguing in support of seventh ground of appeal, Counsel for the Appellant submitted that the Judgment of the Court below effectively

grouped all the Respondents in the same class and yet among those grouped there were those who were already due for retirement on service; the 7th Appellant who was due for retirement on account of age in a few months; and the other Respondents who were due for retirement in a few months on account of service. Counsel argued that a person due for retirement on account of age cannot claim that he was redundant.

Mr. Ndhlovu's response on the seventh ground is that under the ZIMCO Conditions of Service the retirement age is 55 and that all the Respondents had not reached that age on the date that they were separated. According to Counsel, the use of the word **"early retirement"** and **"22 years service mandatory retirement"** by the Appellant was a euphemism for labour reduction under the GRZ/ZESCO performance contract of May 1996.

It is evident to us that the Appellant invoked Section 26 of the LASF Act to retire the Respondents. According to this provision, a member can retire on attainment of pension age, which is 55 years; or after completing 22 years of service; or upon the member giving due notice at any time during 5 years before that member attained 55 years of age.

From the evidence on record, none of the Respondents had attained pension age. The 7th Respondent is said to have had a short

while to go before attaining the age of 55. For him to retire under Section 26 1 (b), he ought to have given the notice of retirement himself of his intention to do so and not the Appellant. Section 26 1 (b) cannot therefore be used to justify his early retirement. According to the Provisions of Section 26(1) (b), a notice of early retirement can only be given during the 5 years before the employee attains pension age.

As pointed out earlier, the documents on record show that the 1st, 3rd, 10th, 11th and 12th Respondents had not yet clocked 22 years of service. According to the Appellant, they had a few months to go before reaching the 22 years service threshold. In our view, for as long as these Respondents had not completed 22 years of service, Section 26 (1) (c) cannot be relied upon to legalise their retirement. We also find that Section 26(1) does not provide for early retirement on account of period of service but only on account of pension age.

The 2nd, 4th, 5th, 6th, 8th, 9th, 13th, 14th, 15th and 16th Respondents had worked for 22 years and above. Having been members of LASF, they were caught by Section 26 (1)(c) of the LASF Act. They were to retire upon serving for 22 years. Since most of these Respondents had served for more than 22 years, the inescapable conclusion is that the Appellant did not apply the law to the letter, lending credence to the allegation that the Act was selectively applied. On this evidence, it is clear to us that the Respondents were not all similarly circumstanced. They fell into

three different categories. They could therefore not all be treated the same.

We agree with the Appellant that the lower Court erred to have treated all the Respondents the same. In this vein therefore, it can be said that the Court failed to take into account, the retirement provisions of the LASF Act in so far as their applicability to the different categories of the Respondents was concerned.

The second ground of appeal is that the Court below misdirected itself when it found that the long service gratuity formula for unionized employees was disadvantageous to the complainants. We are of the view that this ground of appeal can be dealt with together with the third ground of appeal, which is that the Court below misdirected itself when it found that the Respondents were redundant and not retired.

In arguing the second ground of appeal, Counsel referred us to the formula for gratuity under clause 30.4 of the conditions for unionized, as well as non unionized employees. He submitted that non represented employees receive one month for each completed year of service for the first ten years; one and a half months for each completed year of service from 11 to 20 years; and thereafter, two months salary for each completed year of service between 20 and 30 years. Unionised employees receive two months pay for each completed year of service for

the first 10 years; three months salary for the next 10 years and four months salary for any year exceeding 20 years. Counsel submitted that what was paid to the Respondents was more advantageous and better than what they were entitled to under ZIMCO. According to Counsel, the Order by the Court was embarrassing and confusing. He urged us to quash it as it was complied with before the hearing of the matter.

In reply to the second ground of appeal, Mr. Ndhlovu submitted that the Appellants were serving under ZIMCO Conditions of Service. According to Mr. Ndhlovu, the Respondents were entitled to be paid under the ZIMCO 1993/1995 Formula which was more advantageous. He argued that the Appellant negotiated the long service gratuity formula with the unions before retiring the unionized employees in 1995 but never bothered to work out a better formula for its management retiring employees.

In arguing the third ground of appeal, Counsel for the Appellant referred us to Circular HRA/07/1 of 26th July, 1993, a copy of which appears on page 526 of the record of appeal. This circular is headed **"Revised Compensation Package for surplus labour for Employees on ZIMCO Conditions of Service".** The circular gives a formula used for payment of terminal benefits for people separated from employment on grounds of being surplus to the requirements of the employer.

Counsel for the Appellant argued, relying on the definition of the word **surplus** in the Longman Dictionary of contemporary English; the definition of the term **"redundancy"** in the Employment Act and in Clauses 40 & 39 of the ZIMCO Conditions of Service; that the determining factor for the Respondents being offered early retirement was not related to work but the fact that some of them were due for retirement in the next few months on account of service and age. Counsel argued that for an employee to claim a redundancy package, he must prove on a balance of probability that he was dismissed by reason of redundancy. He went on to state that in a real situation of redundancy, there is no option given to an employee. Counsel submitted that in this case, the Respondents accepted the option of leaving and did not complain about their separation. He pointed out that their initial claim in the Court below was for payment of terminal benefits. According to Counsel, the employment of those Respondents who were due to retire in a few months was terminated by mutual consent. With regard to the Respondents who had served more than 22 years with the Appellant, the learned Counsel submitted that their retirement was mandatory under Section 26 of the LASIF Act.

The learned Counsel for the Appellant further argued that it would be inequitable to allow the Respondents claim that they were retired before they attained the required years of service or retirement age because they accepted the offers to retire. For this submission, he relied

on the case of **Hughs vs Metropolitan Railway**[2] in which the Court held that where a party leads another to suppose that the strict legal rights arising under the contract will not be enforced, he will not be allowed to enforce them where it will be inequitable. He argued that it will be inequitable to enforce the Respondents' rights in this case because of financial implications. Counsel also submitted that in this case, the question of compensation does not arise in the case of the 2nd 4th, 5th, 7th, 8th, 13th, 14th, 15th and 16th Respondents because they were due for retirement. He argued further that the question of redundancy does not exist in this case and he asked the Court to quash the Order of the Court below and remove the redundancy payment. In the alternative, he submitted that this Court should find that the Respondents were wrongly terminated and entitled to damages and not redundancy package.

In reply, Mr. Ndlovu submitted that the Respondents were serving under the ZIMCO Corporate Terms and Conditions of Service and not under LASF. He went on to state that according to these conditions, the retirement age was 55 and not 22. According to Mr. Ndlovu, the 22 years service in the LASF Act was with regard to the payment of terminal benefits. He submitted further that the letters of early retirement which the Appellant wrote to the Respondents clearly referred to a major re-organisation of the corporation and according to Mr. Ndhlovu, this meant redundancy even under Section 28 of the LASF Act. He went on

to state that in May 1996, the Appellant was committed to reduce its employees from 5,200 to 3,000 by the year 2000. He argued that the re-organisation or restructuring was taken by the Appellant in order to reduce the labour force.

On the argument that the Respondents accepted the offers of retirement, Mr. Ndhlovu submitted that the acceptance of the offers was under duress because the Chief Executive threatened not to pay them the LASIF component of the terminal benefits if the Respondents refused to accept the offers of retirement. He went on to state that in addition, while Respondents were still in employment in July 1995, the Appellant approved and implemented new grades and salaries and went on to give the Respondents grade zero, which grade did not even exist in the new salary structure. He argued that gratuity and pension are salary graded and down grading of the Respondents' salaries meant loss of remuneration and terminal benefits. He argued further that this variation of the salaries of the Respondents was a basic condition of employment which entitled them to redundancy. He relied on the case of **Mike Kabwe vs BP (Z) Limited**[3] in which we quoted the case of **Marriot vs Oxford and District Society Ltd**[4] where it was held that where an employer varies a basic condition of employment without the consent of the employee, a contract of employment terminates and the employee is deemed to have been declared redundant on the condition of such variation.

We have considered the submissions of Counsel in respect of the second and third grounds of appeal. Having found that the Respondents were not all similarly circumstanced, it goes without saying that different conditions applied to their different categories;

With regard to the 2nd, 4th, 5th, 6th, 8th, 9th, 13th, 14th, 15th and 16th Respondents who had clocked 22 years of service and above, it cannot seriously be argued that they ought to have been declared redundant. As earlier observed, they were caught by the provisions of Section 26 1(c) of the LASF Act. They were therefore entitled to their retirement packages, and in accordance with the ZIMCO Conditions of Service, a long service gratuity. According to the evidence before us, the Respondents were paid on the basis of a unionized formula which was definitely more advantageous to them than the formula applicable to them undo their conditions of service. According to the evidence of DW2, on page 560 of the record of appeal, the Respondents were paid on the basis of the unionised formula after negotiations. The Memorandum from the Appellant of 7th August 1996 and appearing on page 525 of the record lends credence to DW2's evidence. It states in part:

> **"At a meeting on 23rd July 1996 between Corporate Management and the non-represented employees on retirement, it was agreed to align the Long Service Gratuity**

payable to non represented to the one paid to the represented employees.

The effective date of the revised Long Service Gratuity is 1st July 1995."

In respect of the Respondents who had clocked 22 years of service and above, we find that it was erroneous for the Court below to have found that the use of the unionized formula was disadvantageous to them.

The same cannot be said however with regard to the rest of the Respondents who were retired early; before attaining 22 years of service or reaching the retirement age. The letters in which they were offered early retirement clearly referred to **"a major reorganization which has seen some jobs upgraded, other jobs downgraded and others recommended for abolition".** It would appear to us that the affected Respondents were separated due to the said reorganization In fact, in later correspondence which the Appellant authored to give a Notice of Redundancy, it was stated that the Corporation was **"... currently undergoing structural as well as personnel reorganization..."** (see page 28 of the record of appeal). Reorganisation of an entity is usually a prelude to redundancies. The choice of words used denoted that some employees would be redundant to the new structure. The affected employees had to be separated to create the framework for the new

reorganized structure. In our view, the notice of early retirement was in fact a notice of redundancy. Had this not been so, the Appellant would not have rushed to separate employees who had a few months to go before qualifying for normal retirement.

We also find that the option given to Respondents, whether to remain in employment or leave was completely negatived by the threats contained in the offers of retirement. In our view, these Respondents were forced out. We therefore agree with the Court below that there is no freedom of choice where those in authority make one choice more perilous than the other. To all intents and purposes, the Respondents who had not yet qualified for retirement were casualties of the Appellants reorganization exercise and therefore redundant. They ought to have been separated under Section 28 of the LASF Act and paid redundancy benefits. Having been rendered redundant and being governed by the ZIMCO Conditions of Service, it is our view that Circular HRA/07/01 of 26th July 1993 which is a compensation package for surplus labour, applied to them. The benefits to which they are entitled under this circular are clearly more advantageous than the unionized formula which the Appellant used.

The 4th ground of appeal is that the Court below erred in fact and thus contradicted itself by holding that the ZIMCO circular applied yet it ordered that each complainant be paid a sum of K10 million. In support

of this ground, Counsel for the Appellant referred us to page 20 of the record of appeal where the Court below ordered that the Respondent be paid in accordance with the ZIMCO Circular. Counsel submitted that the said Circular in its paragraph ii (a) provided for a repatriation amount of K200,000.00 for married employees. He submitted that by ordering that each Respondent be paid K10 million repatriation, the Court created rights and condition which did not exist. According to Counsel, the role of the Court was to interpret the rights of the parties and to give them what was due under the contract.

Mr. Ndhlovu's short response to this submission is that the Appellant's own witness in the Court below, confirmed that the Appellant paid K10 million as repatriation to its own employees. He submitted that the Court therefore did not err to have ordered that the same amount be paid to the Respondents because it would have been unfair to pay the Respondents K200,000 which amount was no longer applicable.

We have perused the portion of the Judgment of the Court below on page 20 of the record of appeal on which the fourth ground of appeal is premised. It is evident to us that the Court, in this portion of the Judgment was considering the pension law which should be applicable to the Respondents. As to the figure of K10 million which the Court ordered to be paid to the Respondents, we find that there was evidence before the Court from DW2 that the Appellant was paying other

employees K10 million for repatriation. The figure of K10 million which the Court ordered to be paid in respect of repatriation was not plucked from the air. In this regard therefore, it cannot be said that the Court created new conditions and rights which did not exist. The Order of the Court is supported by the evidence on record. As a public company, The Appellant has a duty to treat similarly placed employees equally and fairly. We find no merit in this ground.

The fifth ground of appeal is that the Court below erred in fact when it held that the Respondents be given increment similar to those who were retired, without giving a specific period. In support of this ground of appeal, Counsel for the Appellant submitted that this Court has, on several occasions, stated that trial Courts must deal with matters conclusively and resolve all matters between the parties relating to the case. According to Counsel, the Court below did not give a specific period of the said increment. He argued that this could mean salaries applicable currently or those applicable at the time of separation. He referred us to the case of **"Development Bank of Zambia vs Mambo** [5] where the Court held that whatever happens to employees who stayed in employment did not affect those who had left before the changes were effected.

In reply, Mr. Ndhlovu submitted that Ground 5 is a matter of interpretation. He stated that the Respondents are not claiming

increments on current salary grading because they know that they have not been in the employment of the Appellant since 1996 but that they are claiming for increments effected during July 1995 to July 1996 because their salaries were zero rated, whilst they were in full employment.

We have considered the arguments by Counsel in respect of the fifth ground. The Court below Ordered that the Respondents' terminal benefits be calculated using the new salaries less what had already been paid. The Respondents were in employment up to 30th June 1996. They held specific posts or ranks. It is not disputed that in December 1995, they were zero graded. The Appellant's witnesses gave contradictory evidence on this point. DW1 was not sure whether the Respondents were zero graded while DW2 testified that the zero grading was done after the Respondents had left.

Since the Respondents held specific posts and ranks, they are therefore entitled to all the increments awarded to employees in those ranks up to 30th June 1996 and not after that date. The benefits to which they are entitled should have been calculated on the basis of those salaries. The zero rating of the Respondents by the Appellant which had the effect of dis-equating them from their contemporaries in terms of salaries was clearly malafide. The date when the Respondents left employment is known. There can be no confusion therefore as to the

material period in issue. We find the arguments by the Appellant on this ground of appeal to be untenable.

The sixth ground of appeal is to the effect that the Court below erred in law and fact when it found that the conditions applicable to Mr. Luswanga be applied to the Respondents. Counsel submitted that Mr. Luswanga left due to re-organisation and his package was a negotiated one. He submitted, further that the Respondents left because they were due for retirement on service and the others accepted offers of early retirement. According to Counsel, Mr. Luswanga was in the true sense of the word redundant due to lack of option to stay. Counsel argued further that there was no basis for the comparison of the Respondents on one hand and Mr. Luswanga and Mr. Mwansa on the other hand.

Mr. Ndhlovu's response is that the Appellant is misdirecting itself by applying double standards in the application of conditions of service, retirement; calculation of gratuity and separation packages. He pointed out that Mr. Luswanga and Mr. Mwansa worked under the ZIMCO conditions of service and yet Mr. Luswanga as an individual, was given a package which was negotiated with the Appellant and the others were not given the same terms.

On perusal of pages 95 to 102 of the record of appeal, we find that Mr. J. Luswanga was added as a complainant to this case in the lower

Court through a Ruling of the Court given on 16th September 1998. It is not clear to us, as to how the said Mr. Luswanga left the case, but according to the Appellant, Mr. Luswanga was given a negotiated package. According to the letter on page 527 of the record of appeal, Mr. Luswanga was retired under Section 28 of the LASF Act on 28th February 1997. According to the letter of retirement, he was paid six months salary in lieu of notice and **"other terminal benefits will be as agreed".** We take judicial notice that in November 1996, the LASF Act was amended to remove the mandatory retirement after 22 years service. In our view, his position was not different from that of the 1st Respondent, Ignatius Sule; 3rd Respondent B. C. Lwamba; 7th Respondent D. Muma; 11th Respondent Z. Lungu; and 12th Respondent G. Chisenga who, at the time they were separated, had not reached pension age and/or had not clocked 22 years service. In fact, they would have all outlived the amendments of November 1996. As officers working for the same public company, they were similarly placed and it was incumbent that they be treated equally. With regard to these Respondents, the Court below was therefore on firm ground to have found that the conditions applicable to Mr. Luswanga should also have applied to them since they were governed by the same legal regime. The same cannot be said of the other Respondents.

The 8th ground of appeal was that the Court below misdirected itself when it held that the 1st and 2nd Respondents should purchase

their motor vehicles at 15% of the cost. Counsel submitted that what was applicable to the two Respondents was Appendix A3 of the ZIMCO Conditions of Service. He stated that Clause 19 (ii) (d] provides that the selling price of a motor vehicle shall be the net value or 15% of the original cost, whichever is higher. He referred us to the letter written to the 1st Respondent at page 187 of the record of appeal in which the Appellant stated that they were selling the motor vehicle to the 1st Respondent in accordance with this Clause. Counsel argued that the Court was not provided with evidence of the original price of the motor vehicles. He argued that it was for the party who alleged to prove that this vehicle was sold at a higher price and in this case no such evidence was provided before the lower Court.

Mr. Ndhlovu's reply is that the 1st and 2nd Respondents, who knew the original prices of the motor vehicles, were sold the vehicles at market value and that is why they complained. He submitted that the Court was on firm ground when it held that the vehicles be sold to the two Respondents at 15% of the original prices. Mr. Ndhlovu further submitted that it is irresponsible for the Appellant to say that complying with the Judgment on the question of the motor vehicles is a problem when it is the Appellant who purchased the motor vehicles in question and they have the records for the said vehicles.

In our view, the conditions attached to the sale of the vehicles were very clear. It is the net value of the vehicle or 15% of the original cost whichever is higher. The Court below therefore fell in error to have restricted the value of the motor vehicles to 15% of the cost. Since the Appellant ought to have the original cost of the vehicles in their records, we Order that they should sell the motor vehicles to the 1st and 2nd Respondent at the net value or 15% of the costs, whichever is higher. If the parties will not agree on the price after using this formula, we order that the cost of the vehicles be assessed by the Deputy Registrar.

In the 9th ground of appeal, the Appellant is arguing on costs. Counsel submitted that the Appellant should not be penalized by being threatened to pay costs because the Appellant's defence in the matter was that the Respondents were retired by operation of the law. According to Counsel, the point raised was cardinal and it could not have been resolved amicably by the parties as it required strict interpretation of the law which could only be done by the Court. Counsel also argued that through no fault of the Appellant, the matter was pre-maturely heard and a Judgment given which was later overturned on appeal.

In Response, Mr. Ndhlovu submitted that there is no cardinal point of law raised in this matter, and that had the Appellant properly applied the conditions of service, the matter would not have ended up in Court. He argued further that the behaviour of the Appellant shows

clearly that it deliberately wanted to deny the Respondents their dues and caused this matter to end up in Court.

We wish to state that costs are granted in the discretion of the Court. Such a discretion can be properly invoked to deny a successful litigant his costs if the case raises a novel point of law which can only be settled by Court's intervention. In our view however, we find no novel point of law raised in this case. What we have seen is ineptitude and a lack of understanding of the law and conditions of service applicable to the Respondents. In our view, there was no basis to deny the successful litigants their costs.

The last ground of appeal is that the Court below seriously misdirected itself in both law and fact when it took into account extraneous matters relating to the management of the Appellant when it delivered its Judgment. Counsel referred to page J.8 of the Judgment on which the Court referred to the Managing Director of the Appellant as a **"corporate despot".** According to Counsel, the Court was using certain information outside the proceedings to arrive at the Judgment and that there is no record to show that the Managing Director individually handled, master-minded and designed the departure of the Respondents. He submitted further that there was no evidence that the then Managing Director was acting on his own when sanctioning the retirements without the approval of the Board. According to Counsel,

these comments were not fair. It was his view that these statements influenced the Court to arrive at its Judgment.

In Response Mr. Ndhlovu submitted that the Court did not misdirect itself at all when it commented on the management of the Appellant company. He went on to state that the Appellant's Managing Director was the one addressing the Respondents and making promises and also authorizing a different discriminatory policy. He went on to state that the argument that the Appellant had financial problems should not be accepted.

In considering this ground of appeal, we are alive to the fact that the actions of the Appellant are conducted through the Board of Directors. However, some actions undertaken by the Appellant with regard to the Respondents border on irrationality. One such action is the Respondents **"zero grading",** effectively reducing their salaries for the purpose of retirement. It is not only baffling and unjust but strange. There is also the seeming discrimination in the way similarly placed employees were treated, let alone the selected application of the law. The Appellant is a public utility company and as such it has to conduct its affairs fairly and treat all employees who are similarly circumstanced equally. While the language used by the Court could be said to have been on the stronger side, we cannot help but agree that the handling of the Respondents' retirements left a lot to be desired. It would appear to

us that the Court below was influenced by these unjust and discriminatory practices to comment in the manner it did. We would however agree that in as far as the Managing Director works under a Board of Directors, the wrath of the Court should not have been directed at him alone.

For the avoidance of doubt, the sum and substance of our Judgment is that the 2nd Respondent M. L. Mondoloka; the 4th Respondent L. Mtonga; the 5th Respondent A. Chibunga; the 6th Respondent M. Mwelwa; the 8th Respondent S. A. J. Banda; the 9th Respondent, F. Mumba; the 13th Respondent H. Zulu; the 14th Respondent L. Muyatwa; the 15th Respondent L. Daka; and the 16th Respondent F. I. Mulonda; having served for 22 years and above, they were properly retired under the LASF Act. Their Long Service Gratuity was properly computed on the basis of the formula for unionized employees after negotiations.

The 1st Respondent, I. Sule; the 3rd Responde B. C. Lwamba; the 7th Respondent D. Muma; the 10th Respondent P. C. Chela; the 11th Respondent Z. Lungu; and the 12th Respondent G. Chisenga, having not reached pension age and/or having served less than 22 years, they ought to have been retired under Section 28 of the LASF Act and their compensation packages ought to have been paid in accordance with Circular HRA/07 dated 26th July 1993 and we accordingly so Order.

We confirm the Order of the Court below that the retirement benefits for all the Respondents should be calculated on the basis of salaries attached to their ranks as at 30th June, 1996, taking into account all increments given up to that date and that these benefits should be paid to them less what has already been paid. We uphold the lower Court's Order that the balance of the benefits should attract interest of 40% from the lower Court's date of Judgment up to the date of payment.

We Order that the 1st and 2nd Respondents be sold their personal-to-holder motor vehicles at 15% of the cost or net value, whichever will be higher and that if parties will fail to agree, they should go for assessment before the Deputy Registrar. We uphold the lower Court that each Respondent is entitled to K10 million repatriation.

In the circumstances of this case, we award costs of this appeal to the Respondents.

D. M. Lewanika
DEPUTY CHIEF JUSTICE.

I. C. Mambilima
SUPREME COURT JUDGE.

S. S. Silomba
SUPREME COURT JUDGE

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