IN THE SUPREME COURT FOR ZAMBIA -APPEAL NO. 49/2003

HOLDEN AT NDOLA/LUSAKA

B E T W E E N:

ZAMBIA FLYING DOCTOR SERVICES	-	**APPELLANT**
AND		
TAISON LUNGU	-	**RESPONDENT**

Coram: Lewanika, DCJ, Mambilima, JS, and Munthali, AJS.
On the 2nd of September, 2003 and 1st June, 2004.

For the Appellant	-	Mr. C. Magubbwi of Lloyd Siame and Company.
For the Respondent	-	Mr. A. Mushingwa of A. M. Mushingwa And Associates.

JUDGMENT.

Mambilima JS, delivered the Judgment of the Court.

The case referred to:

(1) Mfubu Ranch vs The Attorney-General, Appeal No. 172 of 2000.

This is an Appeal against the decision of the Industrial Relations Court sitting at Ndola, in which it was adjudged that the "Respondent had

proved his claim for Long Service Bonus, calculated on the basis of the formula I n the Public Service Management Division Circular No. B2 of 1997. The Court Ordered that the Long Service Bonus be paid with interest at 20% up to the date of Judgment and thereafter at 6%.

The Respondent filed a complaint in the Industrial Relations Court ,claiming an amount of K3, 393,109.90 as long service bonus, and K2,000.000.00 as repatriation allowance. He also claimed for costs and interest. According to the evidence which was before the lower Court, the Respondent was initially employed on temporary basis as an indoor servant on 12th July 1987. In October 1997 he was placed on permanent employment and started enjoying conditions of service applicable to unionized employees. He worked for the Appellant Company up to October 1999 when he resigned. At the time of his resignation, he was getting a salary of K141,379.08 per month.

The Respondent testified in the lower Court that when he received his terminal benefits, he was paid K700,000 representing one half month's salary for each year saved plus leave pay. He complained that he was not paid the long service bonus and repatriation allowance. He testified that the Appellant's Human Resources Manager told him that they were unable to pay him on these claims because the negotiations on the Collective Agreement were not yet concluded. The Respondent told the lower Court that the Public Service Management Division Circular No.

B21 of 1997 made him an eligible employee and he was entitled to claim a long service bonus of K3 million based on 24 months of basic wages times 10 years service. The Respondent also stated that he was entitled to the long service bonus under Clause 40 of the Collective Agreement which stated that the long service bonus shall be paid to eligible employees for the first 10 years service and in subsequent 5 years **"as per Government Circulars".** The Respondent maintained that having worked for 10 years continuously and having been a unionized member to whom the conditions of service in the agreement applied, he was entitled to be paid the long service bonus. He did not pursue his claim for repatriation allowance after being referred to Clause 12 of the Collective Agreement which made it clear that this allowance is only paid on retirement or redundancy.

While giving evidence, the Respondent was referred to Government Circular No. B1 of 1971. He told the Court that he knew nothing about this Circular and that it did not apply to him. The Appellant called the Acting Provincial Secretary for the National Union of Public Service Workers, a Mr. Masauso Mwale, as his witness. This witness told the Court that the long service bonus was paid to unionized employees who had worked for 10 years under Clause 40 of the Collective Agreement. It was computed on the basis of the Public Service Management Division Circular No. B2 of 1997. According to this witness, the Respondent

qualified for the bonus and that the Appellant had been paying the bonus to the workers who qualified.

The Appellant called one witness in the Court below who was its Acting Human Resources Manager a Mr. Martin Chikoti. This witness told the Court below that the Respondent was not entitled to repatriation allowance under Clause 12 of the Collective Agreement since he had resigned from employment. He also maintained that the Appellant was not entitled to long service bonus, after having worked for 10 years because he was a permanent employee and therefore not eligible for the bonus under the Industrial and Labour Relations Act of 1993. The justification he gave for this position was that the long service bonus is only paid to classified daily employees who are not eligible for pension benefits and who contribute to the Zambia National Provident Fund. According to this witness, the Zambia National Provident Fund was a pension scheme. He admitted that the Appellant used to pay long service bonus to separated employees but, according to him this was a mistake. He went on to state that after the mistake was later rectified, separated employees are no longer paid the bonus on the basis of the Collective Agreement with the Union and in line with the guidelines in Government Circulars.

After evaluating the Respondent's claim and the evidence on record, the Court agreed with the Appellant that as a resignee, the Respondent was

not entitled to repatriation allowance. On the long service bonus, the Court referred to Clause 40 of the Agreement which entitled eligible employees to draw long service bonus for the first 10 years service and any subsequent 5 years. The Court then considered the grounds upon which the Appellant was refusing to pay the bonus to the Respondent. In the first ground, the Appellant was contending that the Respondent was not entitled to the bonus because he was not an eligible employee under the Industrial and Labour Relations Act of 1993 since he was not a temporary worker but a permanent employee contributing to the Zambia National Provident Fund which is a Pension Scheme. The Court found that **"eligible employee"** under the Act referred to union membership. The Court concluded that the Respondent was an eligible employee since he was a member of the Union contributing to the Zambia National Provident Fund which was not a pension but a social security saving scheme.

The second ground of objection to pay was based on Personnel Circular No. B1 of 1971. It was the Appellant's position that an employee is not entitled to a bonus as of right under this circular when it is read together with Clause 40 of the 1996 Collective Agreement. On the Circular of 1971, the Court stated that it did not believe that this Circular had remained un amended over the years, having been issued at a time when Conditions of Service for non Civil Servants were not negotiated. The Court stated inter alia that **"with the recognition of Trade Unions as**

bargaining partners in the Public Service, the question of negotiated Long Service Bonus not being a right to an employee member of a Union is not only unthinkable but an anathema to Trade Union principles and practices". According to the Judgment, the long service bonus is meant for, and paid to non Civil Servants who do not contribute to the Civil Service Pension Fund. These non Civil Servants also contribute to the Zambia National Provident Fund and the bonus ceases to be payable upon employees being upgraded or promoted to be Civil Servants. The Court thus decided that the Appellant was entitled to the long service bonus and ordered that it be paid to him with interest.

The Appellant has appealed to this Court advancing one ground of appeal which is that the Court below erred in law and fact when it observed that **"it is not correct to state that the bonus is only paid to temporary employees. It is equally not correct to state that a Classified Daily Employee is a temporary employee. The fact is that Long Service Bonus is meant for, and paid to non Civil Servant employees ranging from Labourers, etc, who do not contribute to the Civil Service Pensions Fund."**

Mr. Magubbwi, in his written heads of argument stated that the finding by the Court that the Appellant did not prove the Respondent's ineligibility to the claim for long service bonus was wrong in fact and law and it defied the weight of evidence on record. He referred us to the

evidence on record on pages 50-55 and submitted that the basis for the Respondent's claim for long service bonus was GRZ Circular No. B2 of 1997. Mr. Magubbwi also referred us to the evidence of the Appellant's witness to the effect that the Respondent, having been a permanent and pensionable employee, was not entitled to long service bonus. He also referred us to the Notice to Produce which was filed in the lower Court appearing on page 17 of the Record of Appeal and submitted that this document categorically stated that the Long Service Bonus was not paid to permanent employees. He submitted that the lower Court's direct linkage of union eligibility and that of the long service bonus qualification was manifestly erroneous. Mr. Magubwwi also referred us to GRZ Circular No. B1 of 1971 and submitted that this Circular spelt out employees who qualified for long service bonus and the same does not encompass permanent employees. He submitted that in the face of the documents which were before the Court, the Court fell into error when it stated inter alia that Circular No. B1 of 1971 has not remained un amended over the years. He went on to state that the Court made this finding in the absence of any documents and evidence to contradict Circular No. B1 of 1971. He submitted further relying on the case of **Mfubu Ranch vs The Attoney-General,** that the Supreme Court in this case, in faulting a trial Judge who adjudged on the basis of grounds not argued by the parties, stated that it was a misdirection on the part of the learned Judge to have refused to grant the remedy sought on a ground not argued by the parties. Mr. Magubbwi stated further that the

Court erred when it observed that the letter of 18 June 2002 was caught out of context by the Appellant when the said letter is unequivocal. According to Mr. Magubbwi, on the totality of evidence before it, the Court drew wrong inferences when it ruled in favour of the Respondent.

In reply, Mr. Mushingwa for the Respondent contended that the lower Court was on firm ground when it held that **"eligible employee"** meant a unionised employee as defined by the Industrial and Labour Relations Act. In this respect, he referred us to Clause 1 of the Collective Agreement which appears on page 22 of the record of appeal. This Clause states that the conditions, benefits and allowances in the Collective Agreement applied to unionized employees who are in employment as defined under the Industrial and Labour Relations Act 1993, and/or seconded and pensionable staff on Zambia Flying Doctor Service payroll. Mr. Mushingwa also referred us to Clause 2.7 of the Collective Agreement which defines eligible employees and Clause 40 which stipulates as to who is entitled to long service bonus. On the argument that the Respondent was not eligible to draw the Long Service Bonus because he contributed to the Zambia National Provident Fund, Mr. Mushingwa submitted that this was incorrect and that the Government Circular of 1971 which is being relied upon by the Appellant was inapplicable because it was superceded by the Collective Agreement.

We have considered the submissions by Counsel and the Judgment of the lower Court. It is common cause that at the time when the Respondent resigned from employment on 28th October 1999, he was unionized. From the documents on record, the applicable Collective Agreement is the one which was signed on 6th November 1996. This agreement contains conditions of service for eligible employees. According to Mr. Mushingwa, this agreement defines eligible employees as those who are eligible under Section 3 of the Industrial and Labour Relations Act of 1993. Section 3 defines an eligible employee as **"... a unionized employee other than a member of the Management of an undertaking".** The Appellant argued in the Court below that an employee enjoying permanent status and contributing to the Zambia National Provident Fund was not eligible under the Act.

The Appellant has invoked the Government Circular B1 of 1971 which provides for the payment of bonus to classified employees, labourers, etc. The circular states inter alia that **"...no employee shall be entitled to claim a bonus as of right".** The Appellant also seems to draw strength from the letter from the Public Service Management Division dated 18th June, 2002 headed **"Re: REQUEST FOR ADVICE ON LONG SERVICE BONUS" which** in paragraph 2, sates:

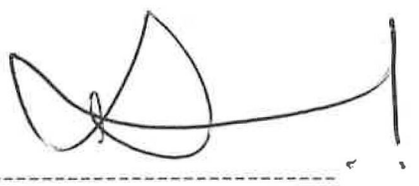
> **"I wish to advise that long service bonus is paid to classified employees in the public service who are not eligible for**

pension benefits on being separated as they are not permanent and pensionable staff."

It is clear to us that the conditions which govern the employment of the Respondent were to be found in the Collective Agreement. Under Section 3 of the Industrial and Labour Relations Act, all that was needed for the Respondent to be eligible was that he should be unionized and not be part of Management. Clause 2.7 of the Collective Agreement adopted this criteria in the Act for eligibility. Clause 40.0 clearly stated that long service bonus would be paid to eligible employees for the first 10 years of service and any subsequent 5 years as per Government Circulars. Once an eligible employee has clocked 10 years, they were entitled to the bonus which was to be calculated in accordance with Government Circulars. At the time when the Respondent resigned in 1999, the applicable Government Circular was B2 of 1997. This Circular clearly stated that long service bonus for the first ten years was 24 months of basic wage. We cannot fault the Court below therefore for having stated that **"it is not correct to state that bonus is only paid to temporary employees..."** The 1971 circular which was invoked by the Appellant was clearly inapplicable as under its provisions, a bonus was not even a right. Also, the letter of 18th June, 2002 is on the situation prevailing in the public service where there is a clear distinction between a classified daily employee and a civil servant on permanent and pensionable conditions. The Respondent's employment was governed by a Collective

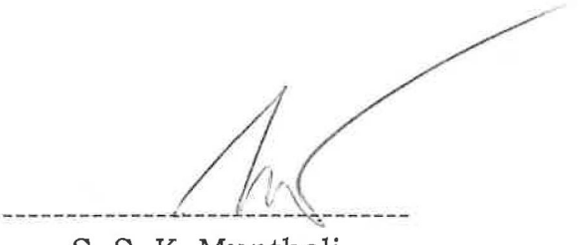
Agreement and by the time he resigned, he had already accrued the right to be paid a long service bonus.

We find no merit in this appeal. It is dismissed. The Respondent will have his costs in this Court and in the Court below.



D. M. Lewanika
DEPUTY CHIEF JUSTICE

I. C. Mambilima
JUDGE SUPREME COURT



S. S. K. Munthali
JUDGE SUPREME COURT