IN THE HIGH COURT OF ZAMBIA APPEAL NO. 107/2009
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

B E T W E E N:

AMOS JOHN MULEMENA APPELLANT

AND

NIEC AGENCIES LIMITED 1st RESPONDENT
ZAMBIA PRIVATISATION AGENCY 2ND RESPONDENT

CORAM: MAMBILIMA, DCJ; CHIRWA AND CHIBOMBA, JJS
On the 2nd of March 2010 and 13th November 2013

For the Appellant: Mr. D. MAZUMBA, of Douglas and Partners
For the 1st Respondent: No Appearance
For the 2nd Respondent: No Appearance

JUDGMENT

MAMBILIMA, DCJ, delivered the Judgment of the court.

AUTHORITIES REFERRED TO:

1. **ZAMBIA PRIVATISATION AGENCY VS HUDDEL CHISENGA CHIBICAHBO AND ZAMCARGO (Z) LTD, SCZ JUDGMENT NO. 13 OF 2005**
2. **KING FARM PRODUCTS LTD AND MWANAMUTO INVESTMENT LIMITED VS DIPTI KANI SEN (EXECUTRIX AND ADMINISTRATRIX OF THE ESTATE OF AJIT BARON SEN) (2008) ZR 80**
3. **ZAMBIA UNION OF ALLIED WORKERS UNION VS BARCLAYS BANK PLC, APPEAL NO. 209 of 2004**

LEGISLATION REFERRED TO:

1. **THE INDUSTRIAL RELATIONS COURT RULES CAP 269 OF THE LAWS OF ZAMBIA**
2. **THE HIGHCOURT ACT CAP 27 OF THE LAWS OF ZAMBIA**

When we heard this appeal, we sat with our brother CHIRWA, JS, who has retired. This is, therefore, the majority decision of the court.

This appeal is from the decision of the Industrial Relations Court (IRC) of the 11th day of July 2008, in which the Court quashed an earlier Order given by the learned Registrar on 22nd January 2008, joining the Zambia Privatisation Agency as 2nd Respondents to the these proceedings between **AMOS JOHN MULEMENA,** as the Appellant, and **NIEC AGENCIES LIMITED**, as the 1st Respondent.

The facts of the matter are that the Appellant was in the employment of the 1st Respondent from the 18th of February, 1972, to the 31st of March, 1993, when management decided to retire him from employment under an early retirement scheme. He was paid his retirement benefits. The benefits were calculated up to 31st March 1993. The 1st Respondent revised salaries for all members of staff on the 1st of April 1993.

The Appellant lodged a complaint in the Industrial Relations Court. He contended that his retirement was not done in conformity with the ZIMCO conditions of service. He alleged that his date of retirement should have been 30th June 1993, and consequently, that his benefits should have been calculated up to that date. After trial, the IRC decided as follows:- ***"...since early retirement is not to be regarded as punitive, the employee that opts for that ought to be entitled to the normal period of ninety (90) days' notice. To that extent we find that the complainant hereof was entitled to that period therefore his last day of service ought to have been 30th day of June. Consequently, the complainant's terminal benefits should be worked on the basic salary then in place as at 30th June 1993."***

After the judgment was delivered, the 1st Respondent, NIEC Agencies Limited, was de-registered and the 2nd Respondent, Zambia Privatisation Agency, took over its assets. As a result of the said de-registeration, the 1st Respondent did not settle the entire retirement package for the Appellant as the company was no longer

operational. The Appellant then applied to join the 2nd Respondent to these proceedings based on the fact that the winding up of the affairs of the 1st Respondent had been taken up by the 2nd Respondent. It had sold the assets and was in possession of the proceeds from the said sale. It is apparent that the decision to join the 2nd Respondent to the proceedings was to facilitate the execution of the judgment.

The initial application for joinder was made to the Registrar of the Court who ruled in favour of the Appellant and ordered that the Zambia Privatization Agency be joined to the proceedings as the 2nd Respondent. The 2nd Respondent then appealed against the joinder to the full Court. In its judgment of the 11th July 2008, the Court held:-

> ***"After careful analysis of Rule 32 of the Industrial Relations Court Act, our understanding is that the Court shall exercise the powers when proceedings are on-going either to add a party or to remove a party to the proceedings. Our view is that delivery of judgment marks the end of proceedings in the Industrial Relations Court. We are therefore not persuaded by the arguments by Counsel for the complainant that since the rule does not have the words 'after judgment', then a party can be joined even after judgment."***

Rule 32 of the **INDUSTRIAL RELATIONS COURT RULES**[1] that was referred to states as follows:-

> ***"The Court may, on the application of any person or of its own motion, direct that any person not already a party to proceedings be added as a party or that any party to proceedings shall cease to be a party, and in either case may give such consequential directions as it considers necessary."***

In support of its view, the Court relied on the case of **ZAMBIA PRIVATIZATION AGENCY (ZPA) VS HUDDLE CHISENGA CHIBICHABO AND ZAMCARGO (Z) LTD**[1] in which it was held that once the IRC renders a judgment, it becomes functus officio.

The Court also alluded to Rule 55 of the Industrial Relations Court Rules which states:

> ***"Nothing in these Rules shall be deemed to limit or otherwise affect the power of the Court to make such order as may be necessary for the ends of justice or to prevent the abuse of the process of the Court."***

It cited our decision in the case of **ZAMBIA UNION OF FINANCIAL INSTITUTIONS AND ALLIED WORKERS (ZUFIAW) V BARCLAYS BANK OF ZAMBIA PLC**[2] in which we held that:-

> **"Under Rule 55 of the Industrial Relations Court Rules the Industrial Relations Court has powers to review its own judgment...in our view Rule 44 of the Industrial Relations Court Rules is a rule of procedure drawn from the same Act to facilitate the administration of justice in the Industrial Relations Court. ....and it only comes into being if such judgment is not clear and is ambiguous."**

Arising from this decision, the IRC then stated:-

> **"We therefore find that even though the Industrial Relations Court does have powers of review under Rule 55 its powers of review are limited to interpretation in circumstances where the judgment is not clear and is ambiguous. It is prudent to note that in the High Court under Order 39 of the High Court Rules, a High Court Judge may review any judgment or decision made by him or her and may rehear the case wholly or in part.**

Unfortunately, this is not the case with the Industrial Relations Court whose powers of review are limited to interpretation."

Seemingly realizing the harshness of its decision in this case, the Court ended by saying:-

"We hasten to mention that we do empathize with the complainant but as a Court, we have to do substantial justice to both parties before us."

Dissatisfied with the decision of the Court, the Appellant has now appealed to this Court citing three grounds of appeal, namely:

Ground One

That the Deputy Chairman erred in law in not distinguishing this case from the ZAMBIA PRIVATISATION AGENCY VS HUDDEL CHISENGA CHIBICHABO AND ANOTHER SCZ No. 13 of 2005 in that the said case was under management buy-out and Zambia Privatization Agency never took over the assets but the case at hand, Zambia Privatisation Agency took over the assets of the 1st Respondent.

Ground Two

That the Honourable Deputy Chairman erred in law and fact when she could not appreciate the context in which Zambia Privatisation Agency was being joined and also did not take into account that when this action was commenced the 1st Respondent was a going concern and that Zambia Privatisation Agency took over the assets after judgment had already been passed.

Ground Three

That the learned Deputy Chairman failed to exercise substantial justice when she failed to join Zambia Privatisation Agency to the proceedings when there was no dispute that Zambia Privatisation Agency sold the assets of the 1st Respondent.

The learned Counsel for Appellant filed written heads of arguments in which he argued all the grounds of appeal together. He submitted that since it was not in dispute that the 2nd

Respondent took over and sold the assets of the 1st Respondent after it was de-registered, it should also take over its creditors. The case of **ZAMBIA PRIVATISATION AND CHISENGA**[1] was cited and distinguished from the case at hand. Counsel stated that the case of **ZAMBIA PRIVATISATION AGENCY VS CHISENGA**[1] involved a management buyout and ZPA never took over the assets of **ZAMCARGO** Zambia Limited. Counsel argued that in this case, it was necessary to join the 2nd Respondent to the proceedings because it took over and sold the assets of the 1st Respondent after judgment had already been passed; that consequently, it should be liable to make payment to the Appellant from the proceeds realized from the sale of the said assets. Counsel contended that it would be unjust for the Appellant to suffer when the Judgment was in his favour just because the 1st Respondent had been deregistered and its assets taken over by the 2nd Respondent.

The learned Counsel for the Appellant further relied on the case of **KING FARM PRODUCTS LTD AND MWANAMUTO INVESTMENTS LIMITED VS DIPTI RANI SEN (Executrix and**

Administratrix of the estate of Ajit Baran Sen)[2] where the Supreme Court stated that:-

> **"On whether the 2nd Defendant was accorded an opportunity to be heard or not, we must say the very fact that the 2nd Defendant was to be cross examined on the liquidation of the debt under review we find no prejudice caused to it. The Respondent was entitled to recover or levy execution either on the money or on the property due to the 1st Appellant which may have been held by the second Appellant..."**

It is the prayer of Counsel that the 2nd Respondent should be joined to these proceedings so that the Appellant can be paid on his judgment, on the ground that the 2nd Respondent took over and sold the assets of the 1st Respondent.

There was no appearance on behalf of the 2nd Respondent and neither were any submissions filed on its behalf.

We have considered the judgment of the Court below and the submissions that have been made on behalf of the Appellant. It is not in dispute that the Appellant was placed on early retirement on 31st March 1993, and that his benefits were initially calculated up to that date. He contested the matter in the IRC and in its judgment of 6th June 1996, the Court adjudged that an employee who opts for early retirement ought to be entitled to the normal period of 90 days' notice because early retirement should not be

regarded as punitive. The Court, consequently, ordered that the Appellant was entitled to this notice period and his last day of work ought to have been 30th June, 1993. It ordered that his terminal benefits should be calculated on the basis of the basic salary that was in place as at 30th June 1993.

It is common cause that the 1st Respondent Company was de-registered effective 20th March 1997. This means that as at the time that the IRC passed its judgment on the 7th of June 1996, the 1st Respondent was still a going concern and settling the judgment debt was, therefore, one of its obligations. It goes without saying, that whatever entity took over the assets and affairs of the 1st Respondent also took over the obligation to settle this judgment debt.

The Court below declined to join the 2nd Respondent to the proceedings on the ground that judgment had already been passed. It opined that joining the 2nd Respondent at that late hour would be tantamount to condemning it without being heard. The Court heavily relied on the case of **ZPA VS CHIBICHABO**[1] and that of

ZAMBIA UNION OF FINANCIAL INSTITUTIONS AND ALLIED WORKERS UNION VS BARCLAYS BANK PLC[3] referred to above.

The decision in the case of **ZPA VS CHIBICHABO**[1] was premised on different facts. As pointed out by the learned Counsel for the Appellant, the matter involved a management buy-out and the ZPA did not take over the assets of the company. In this case, the ZPA took over the assets of the 1st Respondent after it was deregistered and at that time, judgment in this case had already been rendered. In the ordinary course of events, this judgment was one of those obligations that was on the plate at the time of de-registration. We agree with the Appellant's contention in the first ground of appeal, that the **CHIBICHABO** case ought to have been distinguished from the case at hand. While the **CHIBICHABO** case involved a management buyout, the case at hand involved the enforcement of a judgment.

The decision in the **CHIBICHABO** case, that once a judgment is rendered, the IRC becomes functus officio is sound at law. This is because unlike the High Court, which has been granted express power under **ORDER 39 OF THE HIGH COURT ACT**[2], the IRC

cannot reopen a case, rehear or re-evaluate the evidence to come up with a different verdict. The IRC's powers of review can only be exercised within the context of Rule 55 of the Industrial Relations Court Rules; that is, to clarify issues in the judgment; and facilitate the administration of justice; and to prevent the abuse of the process of the Court.

The process of litigation starts with the filing of a case in Court, the processing of the case, the hearing followed by the determination or judgment. The process ends with the enforcement of the said judgment. The administration of justice is concerned with the entire process, from beginning to the end. This concept is captured under Rule 55 of the Industrial Relations Court Rules when it alludes to the fact that nothing in the Rules should be deemed to limit the power of the Court to make any order that may be necessary for the ends of justice or to prevent the abuse of the process of the Court.

In this case, what was sought was not to reopen the case, but to complete the judicial process by enforcing a judgment that had already been rendered by the Court. The issue of liability had

already been settled. There was thus, a novel situation where a judgment that was duly given by the Court in favour of a litigant was rendered nugatory or could not be enforced because the judgment debtor had been deregistered. The Court, through a rigid interpretation of the Rules, looked the other way and refused to assist the litigant to enforce the judgment to complete the process of litigation; more so that the 1st Respondent was a going concern when the judgment was rendered. By declining to be involved, the Court effectively allowed the assets of the 1st Respondent to be placed beyond the successful litigant by virtue of the de-registration.

It is our view that a successful litigant must be enabled to enjoy the fruits of litigation. It is not in the public interest that an artificial person, like the 1st Respondent, should be allowed to make itself judgment proof by evading its obligations under a judgment by deregistering itself. Those who take over its assets must make good on the liabilities and obligations of the company. Rule 55 enables the IRC to make any order that ***"...may be unnecessary for the ends of justice or to prevent the abuse of the***

processing of the Court." In our view, this was an opportune case for the IRC to invoke this rule to ensure that the ends of justice are met. It is in the interest of justice that the process of litigation up to the enforcement of a judgment must be protected and allowed to take its course; and, the winning party to reap the fruits of the judgment. This, in our view, is the issue in this case and not a review of the substance of the judgment. The fear by the Court below, that joining the 2nd Respondent to the case would be tantamount to condemning it without being heard can be mitigated by ordering it to show cause why it should not be ordered to pay the remainder of the judgment sum.

We, therefore, allow this appeal and order that the 2nd Respondent or its successor be joined to this case. The matter is sent back to the IRC for the said 2nd Respondent or its successor to show cause why they should not pay the remainder of the judgment sum in this case.

We award costs to the Appellant.

I.C. Mambilima
DEPUTY CHIEF JUSTICE

H. Chibomba
SUPREME COURT JUDGE