IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

SCZ/8/252/2014
Appeal No. 028/2015

(Civil Jurisdiction)

BETWEEN:

MUTAPULO SONGOLO **APPELLANT**

AND

ZAMBIA NATIONAL BUILDING SOCIETY **RESPONDENT**

Coram: Wood, Malila and Musonda JJS,
on 5th September, 5th December 2017, and 8th December, 2017

For the Appellant: No Appearance

For the Respondent: Mr. B. M. Kang'ombe of Messrs Kang'ombe & Associates

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JUDGMENT

Malila, JS, delivered the judgment of the court.

Case referred to:

1. *Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172.*
2. *John Kanyanta Mutale v. Access Financial Services Limited [Appeal No. 24 of 2011[(unreported).*
3. *Kiddax Limited and Narash Chavda v. Zambia National Commercial. Bank [Appeal No. 139 of 2005] (unreported).*
4. *Robin v. National Trust Company (1927) AC 515.*
5. *Barclays Bank Zambia Limited v. Mando Chola and Ignatius Mubanga (Selected Judgment No. 8 of 1997).*
6. *Gerald Musonda Mumpa v. Maamba Collieries Limited (1988-1989) ZR 217.*

7. *William Harrington v. Dora Siliya and Attorney-General (SCZ judgment No. 14 of 2011).*
8. *Attorney-General v. Mutembo Nchito (Selected judgment No. 1 of 2016).*

Legislation referred to:

1. *Industrial and Labour Relations Act, chapter 269 of the laws of Zambia.*

This matter first came up on appeal on 5th September, 2017. On that occasion, Mr. Kang'ombe, learned counsel for the respondent rose to inform us that he had information to the effect that the appellant had died sometime in December, 2016. He applied that, in those circumstances, we should strike the matter off with liberty to restore when the administrator of the appellant's estate or his personal representative made the relevant applications.

We considered Mr. Kang'omb'e application but declined to grant it. There was no formal notification to court about the appellant's demise nor had there been any application to substitute parties to the appeal. We directed instead that as Mr. Kang'ombe appeared to know where the appellant's wife worked, he should make contact with her and bring the matter about this

appeal to her attention. This way, we were certain the administrator or personal representative of the appellant if indeed the appellant had died, would be prompted to take the necessary steps to continue with the appeal or discontinue it as the case may be. We thus adjourned the matter to December, 2017.

When the appeal was called on 5th December, 2017, Mr. Kang'ombe, with much regret on his part, reported that his effort to communicate with the appellant's wife through the respondent – where we understand she presently works – yielded nothing positive as the appellant's wife and other close relatives of the appellant appeared disinterested in the appeal.

We thus found ourselves in a situation where we have no formal notification or proof regarding the reported death of the appellant, nor do we have any application by the appellant's personal representatives to step in the shoes of the deceased, if he indeed died, to continue the appeal. We, however, have the appellant's heads of argument which were filed on 23rd February, 2015. In these circumstances, the option that readily presented itself as being in the best interest of justice was to proceed to

hear the appeal, and in the appellant's case, based solely on the written arguments set out in the heads of argument which he filed.

The background facts to this appeal were these. In August 1998, the appellant was engaged by the respondent as Inspector-Grade 6, on permanent and pensionable terms and conditions of service. At the time of his separation from the respondent in December 2010, he was a contract employee, having been promoted to Grade S7 as Branch Manager.

Following the change in his employment status from permanent and pensionable to contract, he was paid gratuity and redundancy benefits covering eleven years service. He alleged that the computation of those benefits did not accord with his permanent and pensionable conditions of service. According to him, as the computation was done using his basic salary only, it excluded 50 weeks of his previous service. Had those 50 weeks been taken into account, the total length of his service would have been twelve years and not eleven years, and this would have translated into enhanced terminal benefits.

Mr. Songolo believed that the use of the basic salary rather than the gross salary unfairly worked to his detriment. His further complaint was that corporate terms and conditions of service, which he enjoyed at the time, did not stipulate that the benefits should be calculated using the basic salary. It was these and other issues incidental to his transfer from one position to another within the respondent's employ, that motivated Mr. Songolo to write to the respondent with a view to persuading the latter to rectify the anomalies that he perceived.

Following a protracted period of the appellant's unsuccessful engagement with the respondent over these issues, the respondent invoked clauses 8, 13 and 14 of the appellant's employment contract and terminated his employment, giving the appellant three months pay in lieu of notice and other entitlements payable alongside his salary. The appellant was also given gratuity calculated at the rate of 35% of the last drawn basic salary including all allowances up to termination.

Aggrieved by these developments, the appellant headed to the Industrial Relations Court where he launched a complaint against the respondent. He claimed a medley of relief. These

claims related to payment of: (a) damages for wrongful and unfair termination of employment; (b) the shortfall on terminal benefits which were calculated at eleven years rather than twelve years service; (c) fuel and acting allowances for the period when he acted as Manager, Corporate Planning; (d) fuel, car and acting allowances which were subject of the grievance procedure; (e) allowances payable to Associates of the Zambia Institute of Chartered Accountants from the time he qualified to the time of his separation from employment; (f) interest on all these claims at commercial banking lending rate; (g) any other relief and (h) costs.

After hearing the parties and considering the evidence deployed before it, the Industrial Relations Court came to the conclusion that all the appellant's claims were destitute of merit and dismissed them accordingly.

Disenchanted by that judgment the appellant launched the present appeal seeking the intervention of this court to correct what he considered as multiple errors and misdirections on the part of the Industrial Relations Court. In his amended

memorandum of appeal, he had framed four grounds of appeal as follows:

> **GROUND ONE**
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> **The court erred in law and fact when in its judgment, dealt with only a part of the Amended Notice of Complaint and only a part of the hearing at trial instead of the whole of these, thereby leaving many matters unresolved in finality and misdirecting itself on the issues and matters therein.**
>
> **GROUND TWO**
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> **Court erred in law and fact when it did not consider equity and the whole law as pronounced by this court and statute on matters before it in the judgment pronounced.**
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> **GROUND THREE**
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> **Court erred in law and fact when it did not consider the whole evidence on record in the judgment pronounced.**
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> **GROUND FOUR**
>
> **Court erred in law and fact when it used undisclosed evidence in the judgment instead of what was placed on record and then applied biased undisclosed requirements and standards for additional evidence on the appellant.**

The appellant submitted self-authored heads of argument covered in eighty-one pages. Much of these, however, are a narration of the facts and evidence before the lower court. Furthermore, these submissions are rather unconventional. After making his prayer, the appellant proceeded to set out

additional arguments under what he headlined 'Pervasive Findings,' 'Consent Matters' and 'Matters of Interest Claims.' The submissions are convoluted and repetitious. They in many instances read like a chronicle of frustration. In many cases, the connection of the submissions to the grounds of appeal as framed, is not immediately obvious. We have nonetheless taken due note of those submissions.

The respondent's learned counsel also relied on the heads of argument filed. He closely followed the pattern employed by the appellant. He sought in his thirty-five paged heads of argument, to respond to virtually all the arguments raised by the appellant. As we shall demonstrate, this was unnecessary as some of the arguments raised by the appellant either orbited outside the thrust of the issues raised in the grounds of appeal and were thus irrelevant, or were too trivial to merit in depth and extended individual attention.

We now turn to consider the arguments made by the parties.

In regard to ground one of the appeal, the appellant submitted that the trial court did not deal with all his grievances

as presented to court in his pleadings. He drew our attention to his claims as set out in the Amended Complaint and the submissions filed in the lower court. The relief claimed in that court were twelve in all and read as follows:

(a) Damages for discrimination, unfair treatment and wrongful and unfair termination of employment;

(b) An order to compel the respondent to recompute the complainant's benefits at 12 years prorata, instead of 11 years prior to his re-engagement on contract;

(c) Payment of car, fuel and corrective acting allowances for the period the complainant acted as Manager for Corporate Planning;

(d) Payment of car, fuel, newspaper and phone allowance as paid to other Zambia Institute of Chartered Accountants (ZICA) associates from time of qualification to date of appointment as Branch Manager – Permanent House, Cairo Road, Lusaka;

(e) Damages for lost benefits and status, from date of withdrawal of allowances and car on lateral transfer to time of appointment to higher conditions or qualifications to ZICA Associateship whichever is higher;

(f) Order to pay terminal benefits or redundancy based on gross emoluments like done at termination of contract and applied to other staff, instead of basic pay erroneously used;

(g) Order for joint review and mutual agreement of salary and utility arrears of payment schedule furnished unilaterally;

(h) Order to pay interest on monies so held as utility and salary arrears due, for the time the respondent was holding on to the money, at ruling mortgage rates in place at each respective material period and commercial bank rates thereafter if any;

(i) An order that all periodic salary increments be converted into percentages to reflect real value of increments at material and comparative time;

(j) Order that salary increments granted to unionized staff in period be also extended to the complainant.

(k) Any other relief the court may deem fit in the circumstances.

(l) Costs.

Relying on our decisions in the case of **Wilson Masauso Zulu v. Avondale Housing Project Limited**[1], **John Kanyanta Mutale v. Access Financial Services Limited**[2] and **Kiddax Limited and Narash Chavda v. Zambia National Commercial Bank**[3], the appellant submitted that a trial court ought to determine all matters in dispute in finality. In the present case, the court should have adjudicated upon all the claims as tabulated in the twelve items set out above. According to the appellant, the court did not do so despite having acknowledged the existence of the amended

claims. We were referred to the lower court's judgment where the court mapped out the issues for determinations as follows:

> **We consider that the following questions need to be resolved by the court:**
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> 1. **Whether or not the complainant is entitled to the allowances claimed.**
>
> 2. **Whether or not the termination of the complainant's employment was wrongful or unfair.**
>
> 3. **Whether or not the complainant's benefits can be recomputed at 12 years instead of 11 years using the gross emoluments and not basic salary.**
>
> 4. **Whether or not the complainant is entitled to gratuity provided under clause 23 of the terms and conditions.**

The lower court then proceeded to consider these issues individually and dismissed each one of them. The appellant's position was, however, that not all the claims as he originally framed them were addressed.

In response to ground one, the respondent's learned counsel filed equally detailed heads of argument which attempted to address each and every argument that the

appellant had raised. We have already intimated that this was unnecessary for reasons that will become apparent shortly.

In responding to ground one of the appeal, the respondent's learned counsel maintained that all the appellant's claims were considered, adding that the burden of proving any allegation or claim rested with the appellant. The case of **Robin v. National Trust Company**[4] was cited as authority for this submission. Counsel pertinently observed that the appellant had not, in his arguments, shown which matters or claims were not adjudicated upon by the lower court, but had made a general assertion which is not very helpful to his case.

The respondent's learned counsel also raised a point regarding the nature of issues that should be canvassed in appeals from the Industrial Relations Court to the Supreme Court. He cited section 97 of the Industrial and Labour Relations Act, chapter 269 of the laws of Zambia. That section provides that an appeal to the Supreme Court from the Industrial Relations Court can only be on a point of law or a point of mixed law and fact. He also referred us to the case of **Barclays Bank Zambia Limited v. Mando Chola and Ignatius Mubanga**[5] in which the

import of section 97 of the Industrial Relations Act was explained.

Counsel made the point that the appellant's appeal in respect of gratuity and retention allowance was raised by the appellant in the lower court by way of submissions though those heads were not pleaded. Those issues were factual and could, therefore, not be perverse. He also argued that redundancy benefits paid at 11 years and not 12 years were properly paid on the evidence before the court as this complied with clause 42 of the conditions of employment applicable to the appellant.

We have paid full attention to the arguments made relative to ground one of the appeal. The issue raised under this ground is simply whether the lower court did address all the grievances raised by the appellant. To answer this question, it is necessary to consider each of those claims and how the court dealt with them, if at all it did.

In regard to the first claim on damages for discrimination, unfair treatment, wrongful and unfair termination of employment, we can state immediately that the lower court dealt with the issue and considered the reasons for the termination. It

found that the appellant's employment was terminated pursuant to a termination clause and not on any of the grounds alleged in the complaint. It also found that the appellant did not provide any evidence of discrimination. The Court concluded as follows:

> **It is trite law that it is the giving of notice or pay in lieu thereof that terminates the employment. A reason is only necessary to justify a dismissal without notice or pay in lieu as held in Gerald Musonda Mumpa v. Maamba Collieries Limited[6]. On the basis of this authority and the evidence in the present case, we take the view that the complainant's fixed term contract of employment was lawfully and fairly terminated.**

The court, therefore, clearly dealt with the first claim by the appellant. Once it found that the termination was grounded in the contractual provision allowing termination by notice or payment in lieu of notice, the need to consider all other grounds upon which the appellant alleged the termination was anchored, abates.

As regards the second claim requiring recomputation of the complainant's benefits at 12 years instead of 11 years, the court observed [at J23] that:

> **The undisputed evidence is that the complainant completed 11 years of service with the respondent ... on the basis of this evidence, we take the view that the respondent complied with clause 42 in calculating the complainant's redundancy pay. ... The claim by the complainant is, to this extent, misguided.**

This leaves no doubt whatsoever that the second claim was addressed by the lower court. The contention that the lower court did not consider the claim is therefore fanciful.

The appellant's third claim in the lower court was in respect of car, fuel and corrective allowances for the period the appellant acted as Corporate Planning Manager.

The lower court did specifically deal with the issue of the acting allowance. It stated on this particular allowance as follows:

> **On this claim, we note that the complainant did not adduce, before court, evidence to prove that K528,000 paid to him by the respondent was on the lower side compared to the difference in salaries.**

After quoting clause 29.0 of the Corporate Terms and Conditions of Service, the court dismissed the appellant's claim regarding acting allowance.

As regards retention allowance, again, the lower court under the subheading in its judgment "Retention Allowance" dealt with the appellant's complaint under this head. It dismissed the appellant's grievance, stating that:

> **We hold the view that one may attain the qualification but implementation need not be automatic. We say so because we are alive to the fact that vacancies in institutions may not necessarily be available.**

Other allowances were also considered and the appellant's claims dismissed as being without merit. There can, therefore, be nothing further from the truth that the claims relating to the allowances as set out under (c) (d) and (e) of the appellant's list of claims were not addressed. The court held that the appellant was not entitled to all or any of these allowances.

As regards the appellant's claims under (f) and (g) on computation of redundancy benefits, we have carefully examined the lower court's judgment and note that the court meticulously considered the issue of gratuity and quoted from the appellant's conditions of service. The claims premised on computation of gratuity were dismissed. Again no question can be raised as to whether or not these claims were adjudicated upon.

Our reading of the rest of the appellant's claims as structured in the pleadings submitted in the lower court is that they were consequential only to a favourable finding on the substantive claims had those claims succeeded. Claims for interest and costs clearly could not be maintained in isolation from the principal claims that were floated by the appellant. A dismissal of the key claims put forth by the appellant inevitably meant that these subsidiary claims could not stand.

Although we have stated in cases such as **Wilson Masauso Zulu v. Avondale Housing Project Limited**[1] that a trial court ought to determine all issues in controversy in an action before it, there is no obligation whatsoever for a trial judge to pronounce himself or herself on each and every issue before the court where the full import of the judgment is discernible and the rights of the parties to litigation distinctly pronounced. This is what we in fact meant when we stated the following in the case of **William Harrington v. Dora Siliya and Attorney General**[7]:

> **We wish to add that a trial or appellant court, is at liberty not to rule on an issue raised before it, if it is of the view that ruling on such an issue is unnecessary or would go beyond what needs to be adjudicated upon. Of course, we still stand by our earlier decision that a court should adjudicate on all issues placed**

> **before it; so as to achieve finality. However, we wish to emphasise that such an issue must be necessary or relevant, or properly brought or raised before the court...**

We carried similar sentiments in **Attorney-General v. Mutembo Nchito**[8].

As we have demonstrated in this judgment, the real issues in controversy in this case were carefully adjudicated upon by the trial court. There was no need to get into trivia, irrelevant and legally inconsequential issues that would in any event not change the overall decision of the court.

It is our considered view, therefore that the lower court did in fact deal in full with the appellant's grievance as presented in his complaint and there is no question of any significant aspect of the appellant's grievance remaining unattended to. Ground one of the appeal is without merit and it is dismissed.

Under ground two, the appellant complained that the court did not consider equity and the whole law as pronounced by this court. Not only do we find this ground of appeal to be vague, the submissions in the heads of argument were incomprehensible. It was quite unclear to us what the appellant's real grievances was.

He appeared to have been taking issue with the court's assessment of evidence before it. He also accused the lower court of delaying in delivering judgment after the trial. The appellant, above all, raised many other disjointed arguments and allegations and quoted a few cases out of context. The bottom line is that the arguments the appellant made under this ground were incomprehensible and totally devoid of logic. In the circumstances we hold that ground two has no merit and it is dismissed.

Ground three alleges that the lower court did not consider all the evidence on record before it, when it came up with its judgment.

Here again the appellant in his submissions engaged in wide peregrination, raising all manner of arguments, most of them incoherent and which, as a matter of fact, do not build any tangible legal point to help this ground of appeal. In truth, in his argument under this ground, the appellant embarked on what can fairly be described as an expedition in frivolity and vexation. The arguments were scattered, incomprehensible and illogical. This ground is frivolous and cannot succeed.

Ground four of the appeal alleges that the lower court erred "when it used undisclosed evidence in the judgment instead of what was placed on record..."

A reading of what purported to be the arguments in support of this ground reveals a glaring inability on the part of the appellant to put across and sustain an argument in any meaningful way. We, of course, sympathise that the appellant may have prepared the heads of argument himself. However, the arguments in the heads of argument read like a chronicle of complaints. This ground of appeal can suffer no better fate than the other ground. We have no option but to dismiss it.

The net result is that the whole appeal is destitute of merit. It should fail in its entirety.

Considering the amount of time that the appellant invested in this futile exercise, given also that his action had to necessarily excite an expensive reaction in both time and costs on the part of the respondent, we would ordinarily have ordered costs against the appellant. Given, however, the peculiar

circumstances animating this appeal, we make no order as to costs.

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A. M. WOOD

SUPREME COURT JUDGE

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Dr. M. MALILA, SC

SUPREME COURT JUDGE

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M. C. MUSONDA

SUPREME COURT JUDGE

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