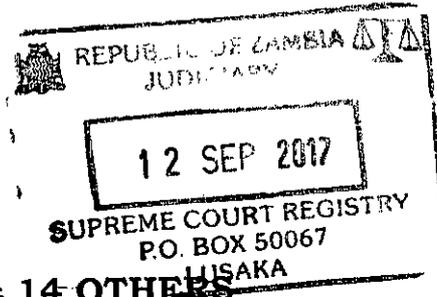


IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 25/2015
HOLDEN AT NDOLA
(CIVIL JURISDICTION)



BETWEEN:

CATHERINE CHAVULA & 14 OTHERS APPELLANT

AND

BARCLAYS BANK ZAMBIA PLC STAFF PENSION FUND RESPONDENT

CORAM : Hamaundu, Kaoma and Musonda, JJS
On the 6th September, 2017 and 12th September, 2017

For the appellant : Mr M. Chitambala, Messrs Lukona Chambers

For the respondent : Mr M Chiteba, Messrs Mulenga Mundashi and Kasonde, Legal Practitioners

JUDGMENT

Hamaundu, JS delivered the Judgment of the court.

Cases referred to:

1. **Godfrey Miyanda v The Attorney General No. 1 (1985) Z.R 185**
2. **Jacob Nyoni v Attorney General (2001) Z.R 65**
3. **The Attorney General v E.B. Machinist Limited [2000] ZR 114**
4. **Salomon v Salomon & Co Limited [1897] A.C. 22**
5. **Associated Chemicals Limited v Hill & Delamain and Ellis & Co [1998] ZR 9**

6. **Standard Chartered Zambia Plc v Williard Solomon Nthanga & Others (2008) Z.R 127 at 151**
7. **Barclays Bank Zambia Plc Staff Pension Fund and Barclays Bank Zambia Plc v Augustine Mwanamuwila and 58 others and Hector Cyprian Phiri and 63 others, SCZ/8/5/2009**
8. **Cooker v Child (1673) 2 Lev. 74; 83 E.R. 456**
9. **Sunderland Marine Insurance Co. v Kearney (1851) 16 Q.B. 923**
10. **Stamp Duty Commissioners v African Farming Company Limited [1966] Z.R 32**
11. **Kitwe city Council v William Nguni [2005] ZR 57**
12. **Development Bank of Zambia v Mambo [1995/1997] ZR 89**
13. **Mususu Kalenga Building Ltd and Another v Richman's Money Lenders Enterprises [1999] ZR 27**

Legislation referred to:

1. **Pension Scheme Regulation Act No. 28 of 1996**
2. **Income Tax Act, Cap 323 of the Laws of Zambia**

Work referred to:

Chitty on contracts Volume 1 General Principles 30th Edition, (Sweet and Maxwell, Thomson Reuters, 2008)

The appellants have appealed against a decision of the High Court which stated that they had lost entitlement to further interest on their retirement accounts being the difference between an interim rate of 10% that was paid to them and the actual rate of 33% that was declared subsequently.

The appellants were among the plaintiffs in an action in the court below led by one Jeremiah Njovu. The plaintiffs sought two claims, namely:

- “(1) The balance of outstanding interest on their pension**

benefits at the rate of 33% per annum for the period 1st January, 2002 to 31st December, 2002 in respect of Joseph Mukuka, Catherine Nangomba, David Musunga and Darlingston Kapasu and for the period 1st January, 2003 to 31st December, 2003 in respect of the other twenty-eight plaintiffs.

- (2) The re-investment values of the balance on interest in (1) above for the years 2003 and 2004 respectively with interest thereon at the rate of 33% per annum compounded and re-invested annually up and until the date of payment to the plaintiffs in full”**

At the trial, the following was established:

That all the plaintiffs had been employees of Barclays Bank PLC by virtue of which they were members of the respondent Pension Fund. That the plaintiffs' employment with Barclays Bank PLC terminated either by redundancy or on voluntary early retirement. That following the termination of their employment, the plaintiffs opted to leave the pension fund before the retirement benefits had matured. That, at that time, the respondent's accounts for the years in which the plaintiffs had left the fund had not yet been audited, hence, the interest or bonus to be credited to all the participating accounts for those respective years had only been declared at an interim rate of

10%. That upon leaving the pension fund, the plaintiffs were paid the sums of money that were in their accounts, plus the interim interest of 10% thereon.

It was further established that, of the twenty-four plaintiffs, the fifteen appellants herein had, prior to receiving the lump sums of money, signed disclaimers purporting to relinquish some benefits due to them under the rules of the respondent's pension Fund. When the respondent's accounts for the years 2002 and 2003 were finally audited, somewhere between 2004 and 2005, the respondent's Trustees declared that the actual interest or bonus to be credited or applied on the retirement accounts for the years under review was 33%. This is what prompted the plaintiffs to commence the action and demand that the balance of 23% be applied on their accounts, and paid to them.

The learned judge in the court below found as a fact that, during the period under review, the plaintiffs' accounts were active and participating in the Fund. She further found, that in determining the final rate of interest to be applied, the Funds actuaries, Messrs Watson, Wyatt International Limited took into account the performance of the Fund as supported by the

contributions of all the accounts which were active, or participating. These included those of the plaintiffs. On those grounds, she dismissed the respondent's argument that the plaintiffs were not entitled to the final rate of interest declared by the Trustees because it was declared after the plaintiffs had ceased to be active members of the Fund.

On that reasoning, the court below granted both claims of the action; but this was only with respect to the nine plaintiffs for whom no evidence was adduced that they had signed disclaimers.

Coming to the fifteen plaintiffs, who are now the appellants, the judge took a different position. She rejected the appellants' contention that the validity of the Deeds of Disclaimer was premised on the fulfillment by the respondent of two conditions and that the respondent had failed to fulfill at least one condition. She found, instead, that the wording of the disclaimers did not reveal any condition precedent; but that they revealed a voluntary decision on the appellants' part to irrevocably agree to relinquish the benefits due to them under the pension fund upon being paid a lump sum of money plus interest thereon at that time. Consequently, the learned judge held that the appellants

had lost their entitlement to the final rate of interest that was subsequently declared.

Initially, the appellants moved us on three grounds of appeal. In the end, however, the appeal was argued on two grounds, namely;

- (i) **That the learned trial judge erred in law and fact when she completely ignored the position that the appellants had their right to full pension interest accrued to each one of them by the date of execution of the Deeds of Disclaimer.**
- (ii) **That the trial judge in the court below misdirected herself when she failed to take into account the fact that the Deeds of Disclaimer executed by each of the appellants were prepared and procured by their former employer who was not privy to the pension interest; that being a matter between the appellants and the respondent.**

We wish at this early stage to point out a salient feature of this appeal. The dispute concerning entitlement to the final rate of interest was resolved in favour of the plaintiffs in the court below, culminating in a judgment in their favour in which the court below held that only the nine plaintiffs that did not sign the disclaimers should enjoy the same. As matters stand, the nine plaintiffs are out there enjoying the judgment because the respondent has not appealed against that judgment. In the

circumstances, the only issue that we are being called upon to determine in this appeal is whether or not the court below rightly denied the appellants enjoyment of the court's judgment on account that they had signed deeds of disclaimer. Consequently, we shall deliberately avoid being drawn into arguments that seek to impugn the lower court's general proposition that all retirement accounts that were active and participating during the period under review were entitled to the bonus interest of 33% that was subsequently declared; meaning thereby that those accounts that had only received 10% interest at the time they ceased to be active were entitled to the balance of 23%.

The arguments on behalf of the appellants on the first ground of appeal were founded on the provisions of two statutes: The **Pension Scheme Regulation Act, No. 28 of 1996** and the **Income Tax Act, Chapter 323** of the **Laws of Zambia**. While the applicability of the former **Act** is self-explanatory, the latter **Act**, it was argued, applied because the respondent's pension fund, upon its creation, was approved by the Commissioner General of Taxes. The provisions relied on in the **Pension Scheme Regulation Act** are to be found in **Section 18** thereof.

These provide that:

“18(1) A pension scheme shall—

- (f) grant to a member leaving the scheme before a benefit has become payable full portability of the accrued retirement benefit at the time the member leaves the scheme.
- (2) for the purposes of this section and the defined contribution scheme ‘portable benefits’ means the total of the retirement contributions paid by the employee and the employer on the leaving member’s account plus interest during his participation under the plan.
- (3) where a member leaves a scheme under paragraph (f) of subsection (1), in the case of—
 - (a) A defined contribution scheme, the portable benefits shall be the total of the retirement contributions paid by the member and the member’s employer on the leaving member’s account plus interest during his participation under the plan”

The provisions relied on under the **Income Tax Act** are to be found in the **Fourth Schedule** thereto. These provide that:

- “(2) The Commissioner-General shall not approve any fund or scheme unless he considers that the rules relating thereto have as their main object the provision of pensions to employees on their retirement from the service of the employer on or after attaining a specified age and unless the Commissioner-General is satisfied—
 - (c) that the rules do—
 - (iii) provide that no pension, annuity or

other sum payable out of the fund or under the scheme shall be capable of surrender or assignment except as provided for in subparagraph (2) (c) (vii)

- (iv) provide that no contribution made to the fund or scheme by the employer shall be returnable to him”

The argument on behalf of the appellants based on these provisions, is that the two pieces of legislation created for the benefit of the appellants an accrued right to pension which could not be taken away by the execution of the deeds of disclaimer. On this point, Mr Chitambala, for the appellants, referred us to a number of our decisions such as **Godfrey Miyanda v The Attorney-General⁽¹⁾** and **Jacob Nyoni v The Attorney-General⁽²⁾**. Reliance was placed on the latter case for the submission that a right that accrues by operation of an **Act** of parliament can only be varied or extinguished by amending the particular law that creates the right. We were further referred to the case of **The Attorney General v E.B. Jones Machinists Limited⁽³⁾** to support the argument that since the appellants' entitlement to the balance on the interest was a creature of the two statutes, the deeds of disclaimer executed by the appellants could not set up an estoppel against those statutes.

In the second ground of appeal, which the appellants advanced in the alternative, learned counsel argued that the respondent, though not being a Limited Company, was a legal entity. He drew support for this submission from the definition of "Pension Trust" in the **Pension Scheme Regulation Act**, as amended by **Act No. 27 of 2005** which states:

"Trust' means the legal entity, separate from the employer, in which the pension scheme funds are accumulated and includes a multi-employer trust or single- employer trust."

While on this point counsel referred us to **Salomon v Salomon & Co Ltd⁽⁴⁾** and **Associated Chemicals Limited v Hill & Delamain and Ellis & Co⁽⁵⁾**; these are cases which discuss the effect of the distinct legal personality of a company.

Counsel then pointed out a certain aspect of the deeds of disclaimer, namely that their execution was procured by the appellants' employer, Barclays Bank Plc, as evidenced by the fact that they were witnessed on its behalf. It was argued that, in view of the separate legal entity of the respondent, Barclays Bank Plc was not privy to the arrangement concerning the payment of interest, which issue was strictly between the appellants and the respondent. Referring us to the doctrine of privity of contract, as set out in **Chitty on Contract, 20th edition, paragraph 18-003**,

counsel submitted that, in these circumstances, the deeds of disclaimer should have no legal consequences.

With the foregoing arguments we were urged to allow the appeal.

The respondent's counter-arguments to the first ground of appeal were these: The balance on the pension interest claimed by the appellants was not an accrued right within the meaning of the two statutes which they rely on because the appellants could not be said to have had immediate enjoyment of the final interest rate. Mr Chiteba, for the respondent, argued on this point that a right can only accrue where a person is legally entitled to have immediate enjoyment of it, but it is suspended for the time being. It was pointed out that the trial court found that the final interest was declared in 2005 when the appellants were no longer members of the fund. In the circumstances, counsel argued, the appellants could not be said to have had immediate enjoyment of the final interest rate. For the foregoing reasons counsel submitted, the cases of **Miyanda v Attorney General**⁽¹⁾ and **Jacob Nyoni v Attorney General** relied on by the appellants did not apply to their case. For similar reasons, counsel submitted that the case of **Standard Chartered Bank Plc v Willard**

Solomon Nthanga & others⁽⁶⁾ which held that a member leaving a pension scheme was entitled to full portability of the benefits by either immediate payment or transfer to a pension scheme of his choice, did not apply to the facts of this case.

As regards the disclaimers themselves, counsel submitted that the appellants had voluntarily signed them and, thereby committed themselves to unequivocally relinquish any future claims against the respondent. Therefore, it was argued, the respondents could not now go back on their undertaking, due to a change in circumstances. Counsel further submitted that the signing of deeds of disclaimer is not against public policy.

Counsel was alive to the fate visited to similar deeds of disclaimer in the case of **Barclays Bank Zambia Plc Staff Pension Fund** and **Barclays Bank Zambia Plc v Augustine Manamuwila & others**⁽⁷⁾ wherein we agreed with the trial judge that where a document is executed in a way that it leaves a party under a fundamental apprehension as to the nature of the document entitles that party to plead *non est factum*; and that such contract is voidable. Counsel, however distinguished that case from this one on two grounds; that the appellants in this case did not plead *non est factum*; and, that the trial court in this

matter found as a fact that the deeds of disclaimers were not oppressive or procured through fraud or undue influence by the appellants' employer.

In response to the appellants' arguments in the second ground, counsel for the respondent submitted that, unlike a contract, a deed of disclaimer is made in one's individual capacity; consequently it does not require consideration and can bind third parties. For this argument, we were referred to cases such as **Cooker v Child**⁽⁸⁾, **Sunderland Marine Insurance Co v Kearney (1851)**⁽⁹⁾ and **Stamp Duty Commissioners v African Farming Company Limited**⁽¹⁰⁾.

Learned counsel then went on to advance arguments to the effect that the appellants could not be entitled to the final interest that was declared in 2005 because they were not members of the Fund at the time of that declaration. He backed his arguments with cases such as **Kitwe City Council v William Nguni**⁽¹¹⁾ and **Development Bank of Zambia v Dominic Mambo**⁽¹²⁾. We shall not delve into these arguments in detail because they address the very points that were before the trial judge; and upon which the trial judge held to the contrary. We have earlier said that there

has been no cross-appeal to the trial court's holding on those points.

Otherwise, those were the arguments by counsel for the respondents, as he urged as to hold that the disclaimers were valid and dismiss this appeal.

We must at the outset state that, as counsel for the respondent rightly observed, we did consider similar disclaimers in the case involving the respondent herein together with the appellants' employer against another group of former employers and members of the Fund. That was the case of **Barclays Bank Zambia Plc Staff Pension Fund & Barclays Bank Zambia Plc v Augustine Mwanamuwila & others⁽⁷⁾**. On the facts as were presented in that case, we did agree with the finding of the learned trial judge that undue pressure was brought to bear on the respondents to sign the deeds of disclaimer. In that case, the respondents had pleaded that their employer made the signing of the deeds of disclaimer a condition precedent to the payment of terminal benefits to them. We concurred with the trial judge's holding that the deeds of disclaimer were a nullity.

In this case, the issue concerning the disclaimers was first raised by the respondent as an estoppel in its amended defence.

The appellants made no pleading responding to that defence. However, when the issue arose at the trial, the appellants' position was two-fold. First, that the words in the disclaimers clearly showed that interest was not one of the benefits that the appellants had disclaimed. Secondly, that, in any event, the appellants' understanding was that the disclaimers were premised on two conditions, namely; that the lump sum must be paid and, secondly, that the interest must also be paid.

The issue as to the voluntariness or otherwise of the execution of the disclaimers was not canvassed by the appellants at trial. Therefore, we are not inclined to extend to the appellants the benefit of our holding in the **Barclays Bank Zambia Plc Staff Pension Fund v Augustine Mwanamuwila**⁽⁷⁾ case.

Coming to the grounds of appeal, it is clear from what we have just said above that the issues raised in the appellants' second ground of appeal, namely that the deeds of disclaimer were prepared and procured by the appellants' employer who was not privy to the benefits concerning interest, were not canvassed in the court below. We said in **Mususu Kalenga Building Limited and another v Richman's Money Lenders Enterprises**⁽¹³⁾ that where an issue was not raised in the court

below it is not competent for any party to raise it in this court. For that reason, we would dismiss the second ground of appeal.

As regards the first ground of appeal, it is again clear that the appellants did not canvass, as an issue in the court below, the validity of the deeds of disclaimers in the light of their perceived right as allegedly granted by the two pieces of legislation. This was notwithstanding that they had ample opportunity to do so. Yet the main thrust of the arguments in this ground is on that issue. Clearly, therefore, the arguments on the issue are incompetent before us.

However, we would like to consider the disclaimers from the position that the appellants adopted in the court below, namely; that the disclaimers did not extend to interest; and that the disclaimers were conditional. The second position was contained in the initial first ground of appeal, which the appellants abandoned at the hearing. Therefore, we shall only consider the first position.

A typical deed of disclaimer signed by the appellants, in so far as it is relevant to this issue, read like this:

**“BY THIS DEED I the undersigned of
Zambia HEREBY disclaim those pension or retirement and
other benefits payable under the Rules of the Barclays Bank**

Zambia Plc Staff Pension Fund in relation to both my own contributions and the Bank's (employer's) contributions.

I declare that I have irrevocably agreed for the Bank's pension contributions to my Retirement Account to be paid to me now and tax deducted at a rate of 30%.

I further declare that I have irrevocably agreed to relinquish those benefits due to me under the Rules of the Barclays Bank Zambia Plc Staff Pension Fund in relation to both my own contributions and the Bank's contributions voluntarily without any pressure from Barclays Bank Zambia Plc or any inducement save for the lumpsum payment of K.....plus interest thereon to be paid to me from my Retirement Account."

Upon reading the contents of the disclaimers, it is clear to us that the appellants did not disclaim the lump sum in the retirement account together with the interest due thereon. The disclaimers did not categorically state that the appellants were accepting payment of interim interest, there and then, and would fore-go any balance arising from the final interest that was yet to be declared. This position was further fortified, rather unwittingly, by counsel for the respondent who, in his argument that the appellant had voluntarily disclaimed the final interest, said that the disclaimers had, as their origin, a letter that was written to each of the affected employees by their employer. For

the effect of that letter to be fully appreciated, we hereby reproduce it:

Head Office
Kafue House
Cairo road, P.O. Box 31936
Lusaka, Zambia .
Tel) 260(1) 228858/66
227659/63
Tel: +260 (1) 222519, 26185,
237036, 224853, 237034
BARCLAYS

BARCLAYS BANK ZAMBIA PLC STAFF PENSION FUND – YOUR PENSION BENEFITS

The Rules of the Defined Contribution Section of the Staff Pension fund allow for both employee and employer contributions to be refunded/paid to the employee on leaving employment before reaching retirement age subject to the agreement of:

- *The Trustees of the Staff Pension Fund*
- *The Pensions and Insurance Authority (the PIA)*
- *The Zambia Revenue Authority (the ZRA)*

We have the approval of the Trustees and the Pensions and Insurance Authority to pay both employee and employer contributions to all ex-staff who were members of the Defined Contribution Section of the Staff Pension Fund. The Zambia Revenue Authority on the other hand has agreed for the Bank to refund the employees' pension contributions to be taxed at 10%. Regarding the employers pension contributions, the Zambia Revenue authority have advised that payment of these should be deferred to retirement age (namely 50 years) in accordance with the Fourth Schedule of the Income Tax Act, Chapter 323 of the Laws of Zambia.

We have asked the ZRA to reconsider its position and allow the Bank to pay out the Bank's contributions as it is unfair that early leavers/retirees can only get back their own pension contributions and could be destitute or deceased before the Bank can pay its pension contributions. The ZRA agree with the Bank but advise that as the Law stands now, there are no discretionary powers to permit the refund of employers pension contributions before reaching retirement age. They have suggested that the Bank lobby the Government to change the Fourth Schedule of the Income Tax Act. Recommendations have been made to the Government for the Fourth Schedule to be amended.

As the legislative process takes long the ZRA have suggested that the employer pension contributions be paid and taxed at 30% in order for the payments to be within the law.

We are arranging to refund you your own pension contributions plus interest thereon to be taxed at 10%. As regards the Bank's pension contributions please advise whether you want these to be paid now to be taxed at 30% or payment should be made when you reach age 50 to be taxed at 10%.

If you decide that the Banks pensions contributions be paid now to be taxed at 30%, please sign the enclosed waiver or deed of disclaimer and return it to Mullar Moonga, Human Resource Administrator – Pensions at the above address.

If you have any questions please contact Mullar Moonga on (01) 224865.

Yours faithfully

Signed

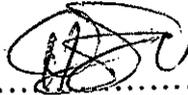
Andy Deller

HEAD OF HUMAN RESOURCE

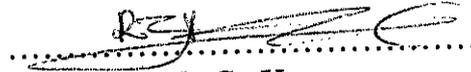
**Cc: The Legal Counsel
Barclays Bank Zambia PLC**

The letter makes it abundantly clear that the waivers or disclaimers were procured in order to find a solution to the impediment that was contained in the Tax law. Therefore, the appellants were on firm ground, in the court below, when they said that the deeds of disclaimer did not extend to the interest due on their lump sum payment. This means that, the plaintiffs' claims on the interest having succeeded in the court below, the fifteen appellants should not have been denied the fruits of that judgment merely on the ground that they had signed the deeds of disclaimer.

We, therefore, allow this appeal and set aside the lower court's judgment, only in so far as it relates to the appellants. We order that the appellants are and were at material times entitled to the benefit of that judgment in the same way that their nine co-plaintiffs were. We award costs, both here and in the court below, to the appellants.



.....
E. M. Hamaundu
SUPREME COURT JUDGE



.....
R. M. C. Kaoma
SUPREME COURT JUDGE



.....
M. Musonda, SC
SUPREME COURT JUDGE