Selected Judgment No. 59 of 2018
(P.2209)

IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.62/2016**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

ZAMBIA NATIONAL COMMERCIAL BANK PLC **APPELLANT**

AND

MASAUTSO E. NYATHANDO & 88 OTHERS **RESPONDENT**

Coram: Hamaundu, Kaoma and Kajimanga, JJS

On 4th December, 2018 and 11th December, 2018

For the appellant : Mr B. Gondwe, Messrs Buta Gondwe & Associates and Mr M. Sakala, Messrs Corpus Globe Legal Practitioners

For the Respondents: Mr M. Lisimba, Mr S. Mambwe and Mr A. Siwila, Messrs Mambwe Siwila & Lisimba, Advocates

---

JUDGMENT

HAMAUNDU, JS, delivered the judgment of the Court.

Cases referred to:

1. **Kasote v The People (1977) ZR, reprint, 101**
2. **Yakub Falir Mulla & Ors v Mohamed Jabi, SCZ Judgment No.1 of 2018**

(P.2210)

The appellant appeals against the decision by the Industrial Relations Court to allow the respondents to file their complaint out of time. The background to this matter in our view dates back to about 1994/1995. The respondents herein, and many others who are not part of this matter, were employees of the appellant from way before the period 1994/1995. Through several cases of this nature that have come before us, we now possess the knowledge of the following facts: That, at that time, the appellant was under the ZIMCO group of companies and firms, whose ultimate shareholder was the Government of the Republic of Zambia. In the early 1990's, the Government decided to dismantle the ZIMCO group of companies and privatize the individual companies thereunder. It became obvious that, in that exercise, a number of employees would lose their employment. Consequently the Government, as shareholder, came up with a directive in 1994 that, in calculating terminal benefits of such employees, the allowances that they had been receiving should be merged with the basic salary. That directive was communicated by the Minister of Finance to the

Chairman of the ZIMCO group of companies in a letter of the 28th March, 1995. The directive was passed on to the companies under the ZIMCO group. It is common cause now that the ZIMCO group of companies ceased to exist in March, 1995, leaving the companies under it to operate as individual units. The respondents, and indeed many others, continued in employment with the appellant, even after the group was dismantled. It is not in dispute that in December, 1996, the appellant introduced its own conditions of service. By those conditions, retirement packages were to be computed on the basic salary only. From 1998 onwards the appellant started removing some of its employees from the permanent and pensionable establishment, and placing them on fixed term renewable contracts. The respondents herein were among such employees. The exercise entailed retiring the employees and paying them terminal benefits for the service they had rendered thus far; and then putting them on fresh fixed term contracts of service. The retirement benefits were paid on the appellant's own conditions of service which it had set up in December 1996; that is, they were computed using the basic salary only.

(P.2212)

Two employees of the appellant who are not part of the group herein, named Saeli Ricky Kalaluka and Michelo Special Georges Mwiinga, took the appellant to the Industrial Relations Court on a complaint, mainly, that their retirement benefits upon their move to fixed contract service were not calculated according to the directive that was given when the appellant was still under the ZIMCO group of companies. The Industrial Relations court held that the appellant ought to have incorporated allowances into the basic salary when computing the terminal benefits. That judgment was not appealed against.

Apparently encouraged by the outcome in the Saeli Ricky Kalaluka case, another group of employees led by Geoffrey Muyamwa filed, in the Industrial Relations Court, summons to file their complaint out of time. The Registrar who first heard that application rejected it on the ground that the complaint was statute barred by the provisions of section 85(3) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia. The full court on appeal, however, held the view that the Registrar had overlooked the fact that the complainants were coming to court

under section 85(6) of the Act, on the ground that they were similarly circumstanced with those, particularly, in the Saeli Ricky Kalaluka case. The appellant then appealed in that case to this court. Here we upheld the Industrial Relations court's decision. In so doing, we held that section 85(6) was a stand-alone section and, therefore, any complaint brought under it was not subject to the limitation placed by section 85(3).

Upon that decision of ours the complaint in the Muyamwa matter was heard substantively by the Industrial Relations Court. That court held that the conditions of service applicable to the Muyamwa group were those of the appellant introduced in December, 1996 and not the ZIMCO conditions of service. The court, however, held that the Muyamwa group should be paid under the ZIMCO conditions of service because there was evidence that an employee named Kalaluka, and another named Mary Moyo, had been paid under the ZIMCO conditions of service; and that, in 2011, the appellant had modified its conditions of services, and was now paying in line with the ZIMCO conditions of service.

(P.2214)

The appellant appealed to this court again in that case. In our judgment delivered on 27th February, 2015, we upheld the judgment of the Industrial Relations Court. It is that judgment which spurred the current group of employees to also seek redress from the Industrial Relations Court. To that end, the respondents filed a summons to file their complaint out of time under section 85 (6) of the Industrial and Labour Relations Act, on the ground that they were similarly circumstanced with other employees in the Saeli Ricky Kalaluka and the Geoffrey Muyamwa cases. That application was vigorously opposed by the appellant, who also raised a preliminary issue requesting counsel for the respondents to recuse themselves from the matter on the ground that they had all, at one time or another, been in-house counsel for the appellant.

In the application to file the complaint out of time, several arguments were put forward regarding the effect of the Limitation Act, 1939 and the limitation placed by section 85(3) of the Industrial and Labour Relations Act. Arguments were also advanced on the question whether or not, in our judgment allowing the Muyamwa group to file their complaint, we had ousted the

provisions of the Limitation Act, 1939. In the end, the Industrial Relations Court held that the effect of our decision in the Muyamwa case, and others on the same subject, was that both section 85(3) of the Industrial and Labour Relations Act and the Limitation Act, 1939, did not apply to a complaint that was brought under section 85(6) of the Industrial and Labour Relations Act.

We must state here that we do not understand why the parties and the court below brought into play the Limitation Act, 1939, because section 32 of that Act says that it does not apply to an action where the limitation period is prescribed by another statute. So, in this case, the only limitation that the parties and the court ought to have been considering is that which is placed by section 85(3) of the Industrial and Labour Relations Act.

The appellant appealed to this court against that decision.

In the application for the respondent's advocates to recuse themselves from the matter, the appellant's grievance was that the advocate who was appearing for the respondents then, Mr Amos Siwila, together with his partners in the firm, Mr Silas Mambwe and Mr Mutakela Lisimba, had at one time or other been employees of

the appellant as in-house counsel. The argument for the appellant was that there was a significant risk and likelihood that confidential information relating to the appellant, which all three counsel may have become aware of in their capacity as the appellant's in-house counsel, could be used to the disadvantage of the appellant.

The respondents opposed that application, arguing; that in this case the complaint was merely premised on the fact that the respondents were similarly circumstanced with those of the Kalaluka and Muyamwa cases, which cases were matters of public knowledge; that the claim has nothing to do with the operations of the appellant, and; that, in any case, the period of separation between the appellant and the bank was at least 10 years and above, so that whatever knowledge they may have had of the inner operations of the bank had become obsolete with the passage of time.

The court below held that, given the length of time that had passed since the separation, it was difficult to see how the advocates could take undue advantage of their former client. The court also found that the complaint had nothing to do with the

appellant's operations. That the documents intended to be used where not confidential, and, therefore, no prejudice would befall the appellant by allowing the documents to be relied on; and allowing the advocates to continue acting for the respondents. On the Legal Practitioners Rules, the court held that the remedy for an aggrieved client against his former lawyer, who acts in breach of the rules, lies in the client invoking the disciplinary process under the rules. On those grounds, the court below allowed the respondent's advocates to continue representing the respondents. The appellant appealed to this court against that decision.

In the meantime, the Muyamwa case had gone back to the Industrial Relations Court for assessment. The appellant, being dissatisfied with the outcome of the assessment proceedings by that court, appealed to this court. In a judgment rendered on 18th August, 2017, we decided to reverse our decision of 27th February, 2015. In arriving at that decision, we had reviewed some of our decisions in which we had considered the effect that the Minister's directive to the Chairman of the ZIMCO group of companies still had on former subsidiaries thereof that have since set up their own

(P.2218)

conditions of service. We came to the conclusion that, in those other cases, we had held that the directive did not apply to those employees who had migrated to new conditions of service. For that reason we held that, in so far as our judgment of 27th February, 2015 upheld the Industrial Relations Court's judgment that the computation of terminal benefits be inclusive of allowances in accordance with the ZIMCO directive, it was a misdirection. Consequently we reversed that aspect of our judgment.

Obviously, our subsequent reversal of that portion of the judgment of the 27th February, 2015, has materially changed the complexion of this appeal; and rendered the arguments that the parties had prepared redundant. It cannot be disputed that the only reason why the respondents wish to file a complaint based on the ground that they are similarly circumstanced with the employees in the Kalaluka and Muyamwa cases is because they would like their terminal benefits to be re-computed using a salary that is incorporated with allowances. As at 2015, before the judgment of 27th February, 2015 was reversed, that position was tenable; and we would not hesitate to say that, as at that time, the court below

(P.2219)

was on firm ground in allowing the respondents to file their complaint. We say so notwithstanding that the appellant had raised other points of objection, such as that some of the respondents had sought to join the Muyamwa case but their bid had been rejected by the court, because such issues should have been properly raised and determined at the substantive hearing where it would have been possible to adduce sufficient evidence showing which of the respondents could not benefit from the judgment in the Muyamwa case.

Now, as at 18th August, 2017, when we reversed the crucial portion of the Muyamwa case, the position of the respondents has become completely untenable. As a result, at the hearing, we asked the advocates to address us on the effect of our judgment of the 18th August, 2017, with regard to their respective positions in this appeal. Mr Sakala, on behalf of the appellant, conceded that the judgment had completely changed the complexion of this appeal. Consequently, his only argument was that, in view of that judgment, the respondents could not proceed with the complaint. Mr Lisimba, for the respondents, on the other had, did not seem to

(P.2220)

want to come to terms with the turn of events. He argued; first, that since the court below had allowed the respondents to file their complaint and that, since, at that time, the decision was correct, the respondents should be allowed to proceed with their complaint in the Industrial Relations Court and take their chances as regards our latest judgment on the Muyamwa case. Secondly, in what was obviously an afterthought, he argued that the respondents were also arguing that our latest decision was wrong.

We shall deal with Mr Lisimba's second argument first. We have held in the case of **Kasote v The People**[1] and the latest case of **Yakub Mulla & Ors v Mohamed Jabi**[2] that, as the final court of appeal, once we have made a decision on a point of law, we will rarely depart from it, even when it is wrong, unless it can be shown that there has been manifest injustice. So a party that seeks to persuade us to reverse our decision must satisfy the above two conditions. In this case the latest judgment in the Muyamwa case shows that Mr Lisimba and Mr Mambwe participated in those proceedings as counsel for the Muyamwa group. So, they must have become aware as at 2017 that the case on which they sought to rely

(P.2221)

in this matter had been reversed and was now adversely affecting the position of their clients in this case. If they felt that the latest decision in the Muyamwa case was wrong, they had all the time to re-cast their approach to this appeal in order for their heads of argument to reflect the fact that they were challenging the correctness of the latest decision. They did not. We, therefore dismiss that argument.

Coming to the argument that the respondents would like to be heard in the Industrial Relations Court and take their chances, first, we wish to say that no lower court, properly guided, would go against the latest judgment in the Muyamwa case and grant the respondents herein what they seek. It follows that, even if they want to be heard in the Industrial Relations Court, the fate of this complaint has already been sealed: it is doomed to fail. Secondly, we believe that counsel's duty to their client is not merely to argue cases; counsel must advise their clients as to the strength of their claims. Where a client's case is doomed, it is counsel's duty, in the best interest of their client, to advise them to cut their losses; at least by not incurring further costs to the advocates themselves and

to the opponents. In the circumstances, we find Mr Lisimba's argument very puzzling, indeed. We dismiss that argument.

The net result is that this appeal will succeed; not on the points as originally argued in the appeal, but because of the subsequent reversal of the decision in the Muyamwa case on which the respondents relied for their complaint. We, accordingly, set aside the lower court's order allowing the respondents to file their complaint.

With regard to costs, Mr Lisimba argued that, even if the appellant were to succeed in this appeal, the costs should be awarded to the respondents because the appellant's appeal initially had no merit. Mr Sakala, on the other hand, argued that no ground had been shown for the court to depart from the rule that costs abide the outcome.

We must say that, in the peculiar circumstances of this case, Mr Lisimba's argument is very persuasive. However, as we have pointed out, Mr Lisimba was aware of the latest judgment in the Muyamwa case when it was delivered last year. He was aware that the judgment had rendered the case of the respondents herein

(P.2223)

untenable. It was his duty to concede defeat to the other party and make overtures to find a way of curtailing the appeal, probably by some consent order. However, he did not. Instead he came to court, prepared to argue the appeal on the strength of the position which this court held in the judgment of 27th February, 2015. Therefore, it was very much the respondent's fault that the appeal was not curtailed much earlier. In the circumstances, the appellant should have costs of the appeal.

With regard to the appeal concerning the recusal of the respondent's advocates from this matter, our view is that in the light of the way this matter has been resolved there will be no need for the respondents' advocates to recuse themselves. We, therefore, find it unnecessary to give our opinion on the issues raised as it will be obiter.

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

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

.....
C. Kajimanga
SUPREME COURT JUDGE