

Lib.

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

Appeal No.22/2011

BETWEEN:

COSTER MAGUSWI

AND

**ZESCO LIMITED (Successors in Title to
Kariba North Bank Company Limited)**

APPELLANT

1st RESPONDENT

ZSIC LIMITED

2nd RESPONDENT

CORAM: Musonda DCJ, Malila and Kajimanga JJS

On 1st October 2019 and 9th October 2019

For the Appellant : No Appearance

For the 1st Respondent: Mr. K. Mweemba, In-house Counsel

For the 2nd Respondent: No Appearance

J U D G M E N T

Kajimanga, JS delivered the judgment of the court

Cases referred to:

1. **Unyimbi Musiuluko v Kariba North Bank Company Limited and Zambia State Insurance Corporation Limited - Appeal No. 58 of 1999**
2. **Kariba North Bank Company Limited v Unyimbi Musiuluko and Others - Appeal No. 57 of 2004.**
3. **Nkhata and 4 Others v Attorney-General (1966) Z.R. 124**
4. **Augustine Kapembwa v Danny Maimbolwa and Attorney General (1981) Z.R. 127**
5. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172**
6. **Attorney General v Marcus Kampumba Achiume (1983) Z.R. 1**
7. **Joseph Banda v Kariba North Bank Company Limited and Zambia State Insurance Corporation Limited – Appeal No. 55 of 2008**

8. **Kitwe City Council v William Ng'uni (2005) Z.R. 57**
9. **Mususu Kalenga Building Limited and Another v Richmans Money Lenders Enterprises (1999) Z.R. 27**
10. **Khalid Mohamed v Attorney General (1982) Z.R. 49**
11. **Shoprite Holdings and Another v Lewis Mosho and Another (2014) Z.R. 935**
12. **Jason Yumba and 22 Others v Luanshya Municipal Council – Appeal No.005/2015**
13. **Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (Suing as a firm) – SCZ/8/52/2014**
14. **July Danobo T/A Juldun Motors v Chimsoro Farms Limited (2009) Z.R.148**

Legislation referred to:

Supreme Court Rules, Supreme Court Act Chapter 25 of the Laws of Zambia; rule 58(4) and rule 68(2)

We wish to express our regret on the delay in delivering this judgment. The delay has been caused by the depletion of the coram that initially heard this appeal.

When this appeal came up for hearing *de novo* on 2nd September 2019, we dismissed it and indicated that we shall give our detailed reasons later, which we now do.

Introduction

1. This appeal is against the judgment of the High Court (Matibini, J. as he then was) handed down on 15th September 2010 which dismissed the appellant's action against the respondents in which he was seeking payment of withheld pension.

2. The appeal discusses the consequences of a record of appeal not being drawn up in accordance with Rule 58(4) (h) and (i) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia.

Background to the appeal

3. The facts of the case as can be discerned from the statement of agreed facts filed in the court below are that the appellant is a former employee of Kariba North Bank Company Limited. The assets and liabilities of the company were, however, taken over by the 1st respondent with effect from June 2006. The appellant served the company for several years under permanent and pensionable conditions of service for unionized staff. The relevant conditions of service provided that the retirement age for both men and women was 55 years or 20 years of continuous service. In addition, the 1st respondent maintained a pension scheme with the 2nd respondent. The pensionable age under the Rules of the Pension Scheme was 60 years.
4. After 20 years of continuous service, the appellant received a letter from the 1st respondent giving him six months' notice of retirement in which, among other things, he was to receive his

terminal and repatriation benefits from the 1st respondent and a pension which was to be paid by the 2nd respondent. The appellant in due course received his terminal benefits and other incidentals such as a plough and planter but no pension was paid to him. Instead, the appellant was refunded his pension contributions that had been previously deducted from his salary as stipulated by the Pension Scheme Rules of the 2nd respondent. Aggrieved by that turn of events, the appellant commenced an action against the respondent in the High Court.

Pleadings in the lower court

5. By an amended writ of summons dated 26th May 2000, the appellant sought the following relief as against the respondents:

- 5.1 Payment of his unpaid or withheld pension while he was in continuous service with the 1st respondent company as per [the] applicable conditions of service for permanent and pensionable unionized staff for Kariba North Bank Limited 1997;**
- 5.2 Further or alternatively, payment of damages to be assessed in respect of his pension which the appellant lost or suffered as a result of the 1st respondent's unlawful and/or illegal termination of his services before he had reached the retirement age of 60 years.**

5.3 The 2nd respondent is sued as scheme manager for the Kariba North Bank Company Limited Pension Scheme;

5.4 Further or other relief;

5.5 Costs;

5.6 Repatriation costs.

6. The basis of the claim was that the respondents, in breach of the appellant's conditions of service, neglected or refused to pay him his pension on grounds that he had not reached the retirement age of 60 years as stipulated in the Pension Scheme Rules of the 2nd respondent. Further, that the refund of his pension contributions was contrary to his conditions of service and the retirement scheme which provided for a full pension on retirement.
7. The appellant asserted that the reduction of pensionable age by the 1st respondent from 60 to 55 years of continuous service for both men and women was at variance with the Pension Scheme Rules. Consequently, he sought payment of his pension as if it had matured under the said Rules; or alternatively, payment of damages equivalent of pension ordered by the Supreme Court in the case of **Unyimbi Musiuluko v Kariba North Bank Company Limited and Zambia State Insurance Corporation**

**Limited¹ and Kariba North Bank Company Limited v
Unyimbi Musiuluko and Others.²**

8. The respondents denied the claim and contended that the appellant had the option under the Pension Scheme Rules to either claim his pension upon attaining the pensionable age of 60 years, or to receive refunds of his own pension contribution and the appellant opted for the latter.

Consideration of the matter by the lower Court

9. After considering the evidence and arguments by the parties, the learned trial judge found that the **Musiuluko** case relied on by the appellant was distinguishable from the present case. According to him, the critical distinction lay in the fact that in the **Musiuluko** case, the trial judge confused the six months' notice to be given as notification of termination which was available under clause 13 of the conditions of service. Consequently, the trial judge ruled that Musiuluko and others had been given the appropriate six months' notice, and that the termination by notice was lawful because it was one of the lawful ways of terminating a contract of employment. As a result

of the error, the plaintiffs in that case got absolutely nothing because they had not served for twenty or more years and further, there were no facts to support early retirement. This, he opined, was the background against which the Supreme Court decided that the loss to the employees was real and could be compensated by damages to be assessed by the Deputy Registrar, however, equal to the benefits that would have been payable under the pension scheme had it matured.

10. The learned trial judge reasoned that in the instant case, the appellant was properly retired after 20 years of continuous service and the retirement was preceded by a six months' notice as prescribed by the conditions of service following which he was paid the terminal benefits due. And in relation to the pension scheme, the appellant elected to receive a refund of his contributions. The learned trial judge concluded that on the facts of the case, the appellant was not entitled to the claim for pension, or damages that were awarded in the **Musiuluko** case.

The grounds of appeal to this Court

11. Dissatisfied with this decision, the appellant has now appealed

to us on four grounds as follows:

- 11.1 The Honourable Judge in the Court below misdirected himself both in law and fact when he held that the appellant exercised his option to be refunded his pension contributions.**
- 11.2 The Honourable Judge in the Court below misdirected himself both in law and fact when he held that the facts in the appellant's case were different from the facts in the Musiuluko case.**
- 11.3 The court below erred in both fact and law when it ignored the appellant's claim of repatriation benefits which were part of the appellant's conditions of service.**
- 11.4 The court below erred in both fact and law by awarding legal costs to the respondents, taking into consideration all the circumstances surrounding the appellant's case.**

The arguments presented by the parties

- 15. Both parties filed written heads of argument. In arguing in support of ground one, the learned counsel for the appellant submitted that there is no evidence on record to support the lower court's finding that the appellant elected to receive a refund of his own pension contribution. According to him, the purported refund of the appellant's pension contributions by the 1st respondent was without his consent and was lumped on his terminal benefits without explaining to him through his

union representatives of the repercussion of receiving a refund of pension contributions as this would lead to forfeiture of his entire pension, as it did.

16. In arguing ground two, it was submitted that the facts in the present case and the **Musiuluko** case are the same. In the **Musiuluko** case, the plaintiffs wanted to be paid their pension and were offered a refund of their pension contributions, which offer was rejected because a mere refund of their pension contribution was not a life pension. Similarly, in this matter, the appellant wanted a pension at the end of his service but after serving a continuous period of 20 years, he was retired by force. He was only entitled to receive his terminal and repatriation benefits but the same were not given to him. As such, he never opted to receive a refund of his pension contribution at all. Counsel, therefore, contended that the appellant was entitled to be paid his full pension as if he had reached the pensionable age of 60 years, in conformity with the Pension Scheme Rules of the 2nd respondent. Alternatively, he was entitled to damages in lieu of his pension which was

frustrated by the variance in the respondent's conditions of service which was frustrated by the variance in the 1st respondent's conditions of service and the Pension Scheme Rules.

17. In arguing ground three, counsel stated that under the 1st respondent's conditions of service, the appellant was entitled to repatriation to his home of origin or any place in Zambia as his retirement home. However, this benefit was denied to the appellant even though it was specifically pleaded.
18. In support of ground four, counsel submitted that an award of costs to any party in proceedings is always at the discretion of the court. However, the discretion should be exercised judiciously taking into consideration all the surrounding circumstances of each case and that in the present case, the trial judge should have ordered that each party bears their respective legal costs. He argued that the appellant had no means to bear the costs to pay the successful parties who in Zambia are regarded as financial giants. Secondly, the appellant was denied his pension and repatriation benefits. Hence, it was

unfair for the presiding judge to order that costs should follow the event. He, accordingly urged us to allow the appeal with costs to be borne by the 1st respondent.

19. In response to grounds one and two, the learned counsel for the 1st respondent submitted that this court has held in a plethora of cases that it cannot reverse findings of fact made by the court below unless it can be positively demonstrated that the court below erred in accepting the evidence before it, or in assessing and evaluating the evidence by taking into account some matter which ought to have been ignored. The cases of **Nkhata and 4 Others v Attorney-General**³, **Augustine Kapembwa v Danny Maimbolwa and Another**⁴, **Wilson Masauso Zulu v Avondale Housing Project Limited**⁵, **Attorney General v Marcus Kampumba Achiume**⁶ were cited in support.

20. He argued that the finding of fact relating to the fact that the appellant exercised his option to be refunded is based on the evidence in the court below and properly evaluated by the trial judge. As such, this is not a proper case in which this court should interfere with the findings of fact made by the court

below despite the fact that the matter was not tried on *viva voce* evidence but on agreed facts, supported by submissions made by all parties concerned. It was his contention that the findings of fact that the appellant opted to be refunded his pension contributions and that the facts of the **Musiuluko** case were distinct from the facts of the case at hand were not perverse and were not made in the absence of relevant evidence or upon a misapprehension of facts.

21. In response to ground three, it was submitted that the awarding of costs is discretionary and generally follows the event and that the trial judge having delivered his judgment against the appellant, he properly used his discretion to hold that costs should follow the event. For this argument, the learned counsel for the 1st respondent relied on the case of **Joseph Banda v Kariba North Bank Company Limited and Zambia State Insurance Corporation Limited**⁷.
22. In response to ground four, the 1st respondent submitted that the matter upon which the appeal is before this court was not decided on *viva voce* evidence but on agreed facts to which all

the parties concerned consented; and the parties further made submissions to support their respective cases. That nowhere in the statement of agreed facts is it stated that the appellant was not paid repatriation benefits. To the contrary, paragraph 3 of the statement of agreed facts stated that the appellant duly received his terminal and other incidentals such as a plough and a planter but no pension. This, counsel contended, clearly shows that the respondent was paid his terminal benefits including repatriation benefits. The respondent's claim was, therefore, based on the pension and not repatriation benefits.

23. Further, it was pointed out that the issue of repatriation benefits was not addressed in the appellant's submissions in the court below. Counsel argued that although the court is not bound to consider counsel's submissions as held in the **Kitwe City Council v William Ng'uni**⁸, the appellant ought to have raised the issue of repatriation benefits in his submissions to assist the court below in arriving at a judgment, if indeed such a claim was in issue. Having not done so, the appellant should not have raised this issue before this court. In the premises,

ground four ought to be struck out as the issue of non-payment of repatriation benefits was not raised in the court below. The case of **Mususu Kalenga Building Limited and Another v Richmans Money Lenders Enterprises**⁹ was called in aid.

24. It was submitted, in the alternative, that the burden of proof was on the appellant to prove that he was entitled to repatriation benefits which he did not do. According to counsel, this proof could have been *viva voce* or on documentary evidence and that the mere pleading of repatriation costs in the writ of summons and statement of claim was not enough to justify an entitlement to the repatriation costs. Relying on the case of **Khalid Mohamed v Attorney General**¹⁰, it was contended that the appellant having failed to prove his claim for repatriation cost/benefits is not entitled to a judgment as regards the same. Consequently, the appeal should be dismissed with costs.

Decision of this Court

25. We have considered the record of appeal, the judgment appealed against and the arguments of the parties.

26. Rule 58(4) of the Supreme Court Rules, Supreme Court Act Chapter 25 of the Laws of Zambia prescribes what documents a record of appeal should contain. The rule states in part that:

“(4) The record of appeal shall contain the following documents in the order in which they are set out:

.....

(h) copies of all affidavits read and all documents put in evidence in the High Court, so far as they are material for the purposes of the appeal, and, if such documents are not in the English language, copies of certified translations thereof; affidavits, together with copies of documents exhibited thereto, shall be arranged in the order in which they were originally filed; other documentary evidence shall be arranged in strict order of date, without regard to the order in which the documents were submitted in evidence;

(i) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant to the appeal.”

25. The consequence of non-compliance with the requirements of rule 58(4) is set out under rule 68(2) of the Supreme Court Rules as follows:

“If the record of appeal is not drawn up in the prescribed manner, the appeal may be dismissed.”

26. Our perusal of the record of appeal before us reveals that the same is incomplete as it does not contain any of the documents put in evidence in the court below. To be specific, it does not contain the appellant's conditions of service and the Pension Scheme Rules which documents are material and necessary for the proper determination of this appeal. Instead, what appears in the record are the list of documents filed by the plaintiff and the 2nd respondent respectively in the court below. In the case of **Shoprite Holdings and Another v Lewis Mosho and Another**¹¹ we held that:

"The primary duty is on an appellant to file a record of appeal which complies with Rule 58 (4) of the Supreme Court Rules... A properly compiled record of appeal is of assistance to the parties and the court, as this aids in the proper and orderly administration of justice."

27. The question that arises in this case is whether the appeal is properly before us in view of the appellant's non-compliance with the provisions of rule 58(4)(h) and (i) of the Supreme Court Rules. In the case of **Jason Yumba and 22 Others and Luanshya Municipal Council**¹¹ we said:

"Time without number, we have emphasized in our various decisions the inescapable requirement by parties to comply

with the rules of this court and the attendant consequences of failure to do so. For example, Malila, JS in the case of Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture¹² stated as follows:

“In NFC Mining Plc v Techro Zambia Limited 2009 ZR 236 we warned that failure to comply with court rules by litigants could be fatal to their case. We dismissed the appeal in that case on account of the appellant’s failure to comply with the rules. We stated among other things that: Rules of the court are intended to assist in the proper and orderly administration of justice and as such must be strictly followed.”

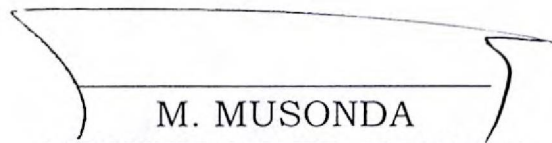
Similarly, in the present case, we conclude that failure by the appellant to comply with rule 58(2) of the rules of the Supreme Court is fatal to this appeal.”

28. Further, in the case of **July Danobo T/A Juldan Motors v Chimsoro Farms Limited**¹³, we held that:

“As afore-stated, failure to compile the record of appeal in the prescribed manner is visited by sanctions under Rule 68(2) of the RSC. The sanction is that the appeal may be dismissed. In this case there is no doubt and as admitted by the learned counsel for the appellant that the record of appeal is incomplete as the record of proceedings in the Court below is missing. It follows that the record of appeal has not been prepared in the manner prescribed by the Rules of this Court. We therefore invoke the provision of Rule 68(2) and dismiss this appeal.”

Conclusion

27. In light of the foregoing and the facts before us, the view we take is that the failure by the appellant to comply with rule 58(4)(h) and (i) of the Supreme Court Rules is fatal to this appeal. The consequence of this default is that the appeal is improperly before us and we dismiss it accordingly. Costs shall follow the event and in default of agreement, to be taxed.



M. MUSONDA
DEPUTY CHIEF JUSTICE



M. MALILA
SUPREME COURT JUDGE



C. Kajimanga
SUPREME COURT JUDGE