IN THE SUPREME COURT OF ZAMBIA Appeal No. 93/2016
HOLDEN AT NDOLA SCZ/8/347/2015
(Civil Jurisdiction)

BETWEEN:

HELEN BESA TEMBA	1ST APPELLANT
ASTRIDA CHOMBA WILOMBE JASEBA	2ND APPELLANT
BWANGA KAPUMPA	3RD APPELLANT
AND	
CAVMONT BANK LIMITED	RESPONDENT

Coram: Hamaundu, Malila and Kaoma, JJS.
On 5th March, 2019 and 19th March, 2019

For the Appellants: N/A

For the Respondent: Mr. R. Petersen – Chibesakunda and Company

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J U D G M E N T

Kaoma, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Attorney General v Nachizi Phiri and others-SCZ Judgment No. 10 of 2014.**
2. **Zambia Oxygen Limited and Another v Paul Chisakula and others-SCZ Judgment No. 4 of 2000**
3. **Kitwe City Council v William N'guni (2005) Z.R. 57**
4. **Jenipher Nawa v Standard Bank Zambia Plc (2011) Z.R.1.**
5. **Anthony Khetani Phiri v Workers Compensation Control Board-SCZ Judgment No. 2 of 2003**
6. **National Milling Company Limited v grace Simataa and others - SCZ Judgment No. 21 of 2009**

Legislation referred to:

1. **Statutory Instrument No. 119 of 1997, paragraph 8**
2. **Minimum Wages and Conditions of Employment Act, Cap 276**

This is an appeal against a judgment of the Industrial Relations Court (IRC) which dismissed the appellants' claims against the respondent bank.

The facts leading to this appeal are that the appellants were employed by the respondent on diverse dates between 1992 and 1997. They served on management conditions of service. The 1st appellant worked for seventeen years before she retired on 7th August, 2014, upon attainment of the statutory retirement age of fifty five years. The 2nd appellant worked for twenty two years before she resigned on 17th August, 2014. The 3rd appellant worked for twenty one years before he retired on 10th March, 2010 also upon reaching the statutory retirement age of fifty five years.

Normal retirement was provided for in clause 4(n)(iv) of the management conditions of service. On attainment of the statutory retirement age, an employee was entitled to a retirement package as per section 8 of the Employment Act Statutory Instrument No. 119 of 1997. It was agreed that the reference to section 8 of the Employment Act Statutory Instrument No. 119 of 1997 was in fact a reference to paragraph 8 of the Schedule to the said Statutory Instrument which stipulated that:

"An employee who has served with an employer for not less than ten years and has attained the age of fifty-five, shall be entitled to three months basic pay for each completed year of service:

Provided that where an employer has established a pension scheme approved by the Minister, the retirement benefits shall be paid in accordance with such pension scheme, and this paragraph shall not apply."

In January, 2007 the respondent established an employer contributory pension scheme called CCBL Pension Fund, which was approved by the Minister of Labour and registered with the Pensions and Insurance Authority. The appellants were formally informed of the establishment of the pension scheme by letter dated 4th August, 2011 which also stated that the Bank would discharge its liability by transferring 10% annual salary for each year in service of each member of staff employed before 1st January, 2007 who were still in employment to the current pension scheme. Attached to the letter was a statement of transfer as at 31st December, 2006. The appellants were required at the bottom of the letter, to confirm acceptance of the transfer of service.

The appellants were also asked to sign a deed of consent to indicate their consent to join the pension scheme and for their pension to be paid according to the provisions of the pension scheme at their retirement or at their death to their dependants.

They did not sign the letters or deed of consent. However, the respondent implemented the pension scheme. The appellants continued in employment and upon their separation from the bank were paid benefits in accordance with the pension scheme rules.

Unhappy with the calculation of their benefits, the appellants took out court action against the respondent in the IRC. The 1st appellant filed her notice of complaint on 7th November, 2014. Her grounds of complaint were that on her retirement, she was paid benefits as per the 2007 Pension Trust Scheme which did not take into account the accrued benefits prior to its introduction; and that she did not consent to join the pension scheme. She asked the court to order the respondent to pay her correctly calculated terminal benefits and all dues in line with the management conditions of service and any other benefits the court may order.

The 2nd appellant filed her notice of complaint on 14th November, 2014. She asserted that without any notice or consent, the respondent paid her a pension whose calculations she did not agree with and which pension scheme did not take into account the correct accrued benefits prior to its introduction. She claimed that she did not consent to join the scheme and the respondent did not

respond to her numerous requests as to how her pension was calculated so that she could compare with what she expected for her long service of 22 years. She too urged the court to order the respondent to pay her correctly calculated benefits taking into account accrued benefits up until 2011 when the respondent introduced a new pension scheme and all dues in line with the respondent's management conditions of service.

When the matter came up for commencement of trial the court took the view that the only issue to deal with was the consent for the pension scheme that was lacking in the matter and asked the parties to try an out of court settlement and if that failed the matter would then proceed in court on the basis of submissions without viva voce evidence as the issues involved interpretation of legal provisions. The parties were in agreement with the court. The court gave directions on how to proceed and also ordered the consolidation of the two causes.

Later, the 3rd appellant and one Obed Kapesa (who has not appealed) applied for leave to join the proceedings pursuant to Rule 32 of the Industrial Relations Court Rules. They asserted in their joint affidavit in support of the application that the respondent's

pension scheme reduced their retirement benefits from 25% of one's monthly pay to 10%; and that they did not consent to join the pension scheme. Since there was no objection by the respondent, the application was granted. However, they did not file any documents in support of their claim.

The gist of the submissions by the appellants was that since they did not consent to the transfer of their service to the pension scheme prior to 1st January, 2007; and they did not sign the deed of consent, the respondent forfeited its right to establish the pension scheme. Further, as they were serving on management conditions which entitled them to three months' basic pay for each year served; their retirement packages were accruing on that basis, and by introducing the pension scheme, the respondent unilaterally varied their accrued right to prospective retirement packages from 25% of annual salary to 10% of annual salary for each year served.

To support this argument they relied on the cases of **Attorney General v Nachizi Phiri and others**[1] and **Zambia Oxygen Limited and another v Paul Chisakula and others**[2] which discussed the consequences of unilaterally altering conditions of service of employees to their disadvantage.

The respondent denied that the establishment of the pension scheme was a variation of the terms of employment because this was a term of the relationship between the parties. It was argued that the respondent was entitled to introduce a pension scheme to cater for benefits to be paid to management employees on retirement and since the respondent did not vary the terms and conditions of employment, the appellants were members of the pension scheme and upon payment of their dues from the scheme; they had been fully paid all amounts due to them.

The respondent admitted that the appellants did not sign the deed of consent, but contended that in terms of clause 4(n)(iv) of the management conditions of service, the existence of the pension scheme itself was for retirement benefits to be paid in accordance with the scheme and having imported paragraph 8 of Statutory Instrument No. 119 of 1997 into the terms of employment, the respondent was to be treated as any other employer to whom the statutory instrument applied.

It was submitted that it could not have been the intention of parliament that the employer was to be precluded from relying on

the proviso to paragraph 8 if they did not have an approved pension plan at the date an employee was engaged.

It was further submitted that the appellants were members of the senior management team and thus in a stronger position than an ordinary employee. They were not uninformed sufferers of the respondent's decisions and they never claimed that they had refused to join the scheme. Hence, it would be unfair to later allege that they were never willing participants in the pension scheme.

It was also argued that as the right to establish a pension scheme was already a term of the contract, there was no requirement at law that the employees should consent to it. Thus, the failure by the appellants to give consent for the establishment of the pension scheme did not abrogate the employer's right to create the scheme. The case of **Attorney General v Nachizi Phiri and others**[1] was distinguished on the basis that there, there was an actual amendment to the contracts by the creation of a term that did not exist while in this case there was no amendment at all.

As to the 2nd appellant, it was submitted that she was not entitled to retirement benefits under the management conditions as she resigned and while she raised issue with computation of the

money transferred into her pension account, she did not deny being a member of the scheme and at separation she withdrew the contributions paid by the respondent to the pension scheme. The case of **Kitwe City Council v William N'guni**[3] was relied on.

The court identified the first issue for decision as whether by establishing a pension scheme approved by the Minister the respondent unilaterally changed the conditions of service of the appellants. Of course, the court was alive to the decisions on alteration of the conditions of service without the express consent of the employee. The court also considered the respondent's argument that the appellants should have regarded themselves as redundant when their conditions of service were altered by the introduction of the pension scheme which they did not consent to and that they acquiesced to the alteration of their conditions of service by continuing to work under the 2007 pension scheme.

In effect, the court found that there was no express consent by the appellants to the new pension scheme but applying the case of **Attorney General v Nachizi Phiri and others**[1], it held that the appellants were at liberty not to have considered their contracts as terminated when their conditions of service were unilaterally

changed without their consent by introduction of the pension scheme.

However, the court considered the real issue for decision as interpretation of clause 4(n)(iv) of the management conditions of service. The court's interpretation of the proviso in paragraph 8 was that immediately an institution establishes a pension scheme approved by the Minister, that institution is obliged to pay retirement benefits in accordance with such pension scheme and in that case the payment of retirement benefits based on three months' pay would not apply.

The court applied the case of **Jenipher Nawa v Standard Bank Zambia Plc**[5] where it was stated that where there is a pension scheme approved by the Minister, the retirement benefits are paid in accordance with that scheme and if the concerned employees were worried about the terms of the scheme, it was up to them to enter into negotiations with their employer if they wanted to change the rules of such scheme. The court opined that as the appellants opted to continue working, their option was to negotiate the terms of the pension scheme so as to accommodate their concerns.

Therefore, the court held that immediately the respondent established a pension scheme approved by the Minister, the retirement benefits of the appellants were to be paid in accordance with that scheme only and that for the period prior to the introduction of the pension scheme that had been taken care of by the letter dated 4th August, 2011.

The court observed that in fact the 1st and 3rd appellants had accessed their retirement benefits from the pension fund and the 2nd appellant had been refunded the employer's contributions upon resignation. Finally, the court dismissed all of the claims.

Aggrieved by this decision, the appellants filed this appeal advancing two grounds namely:

1. **The trial court erred both in law and fact when it held that immediately the respondent established a pension scheme approved by the Minister, the retirement benefits of the appellants were to be paid in accordance with that scheme and no other methods; including those that accrued in the period prior to the introduction of the pension scheme.**

2. **The trial court erred both in law and fact when it held that the letter of 4th August, 2011, wherein the respondent stated that it would discharge its liability by transferring 10% annual salary for each year in service of each member of staff employed before 1st January, 2007 to the new pension scheme approved by the Minister, had taken care of the period prior to the introduction of the pension scheme.**

The appellants did not appear at the hearing of the appeal but had filed heads of argument which we have taken into account. The grounds of appeal were argued together. The respondent also responded to the grounds of appeal together. The arguments are to a large extent a repetition of the submissions made in the court below. Therefore, we shall not restate them in detail.

The contention by the appellants is that in reaching the decision which is assailed in ground 1, the court ought to have taken into account the respondent's letter of 4th August, 2011 which gave the appellants an opportunity to accept or refuse the transfer of service prior to 1st January, 2007, especially that it is a court of substantial justice. They reiterated that none of them accepted this invitation and they were only formally informed about the establishment of the pension scheme on 4th August, 2011.

It was argued that they were in essence invited to join, retrospectively, a pension scheme established four years earlier and evidently, they were effectively prejudiced by a reduction of their terminal benefits. They again cited the cases of **Attorney General v Nachizi Phiri and others**[1] and **Zambia Oxygen Limited and another v Paul Chisakula and others**[2].

We were urged to give due recognition to the effect of the respondent's unilateral variation of the basic term which had been applicable to the appellants' employment and grant such relief as their circumstances demand.

In contrast, the respondent's position is that the court did not err as alleged by the appellants in the grounds of appeal. In fact, the respondent agreed with the court on the interpretation of paragraph 8 of Statutory Instrument No. 119 of 1997.

Counsel for the respondent restated that the proviso in paragraph 8 was an express term of contract that the respondent could establish a pension scheme, and in doing so, it did not vary the terms of employment but enforced a right accorded to it by contractual terms. That there was no requirement for the appellants to consent and lack of consent did not abrogate the right to create the scheme as expressly provided for in the conditions of service.

An analogy was drawn from the case of **Anthony Khetani Phiri v Workers Compensation Control Board**[6] where we held that there was no requirement in the law that consent was needed for the transfer of employment in the circumstances of that case.

It was argued that the appellants should not seek to rely on one part of paragraph 8 while glossing over the proviso; and that contractual terms must be read in their entirety and given effect as such unless where such interpretation would result in ambiguity which is not the case here. Counsel again distinguished the cases of **Attorney General v Nachizi Phiri and others**[1] and **Zambia Oxygen Limited and another v Paul Chisakula and others**[2], on the basis that in those cases; there was an actual amendment to the contracts by the creation of terms that did not exist while in the current case there was no variation as the employer invoked a term that was already in the contracts.

It was submitted on the authority of the case of **Jenipher Nawa v Standard Bank Zambia Plc**[5], that since the appellants had opted to continue working, they should have entered into negotiations with the respondent if they wanted to change the rules of the scheme.

It was further argued that since the appellants knew about the establishment of the pension scheme as early as 2011, they should have raised objection and claimed redundancy benefits. However, they chose to acquiesce to the establishment of the scheme and

even contributed to the scheme. They cannot now contend that there was a unilateral variation or that they did not consent to the scheme. The case of **National Milling Company Limited v Grace Simataa and others**[7] was quoted to support this argument.

For the period prior to the establishment of the pension scheme, it was argued that no prejudice was suffered by the appellants because they were informed in the letter of 4th August, 2011 on how the respondent would discharge its liability. They did not object to the contents of the letter thereby accepting the contents thereof. Furthermore, they accessed their benefits from the pension fund upon retirement and upon resignation, respectively.

In his oral arguments, counsel emphasised that the appellants had no accrued right to have their benefits calculated in accordance with management conditions of service after establishment of the pension scheme since the parties imported paragraph 8 of Statutory Instrument No. 119 0f 1997 into the conditions of service.

He spiritedly argued that had the parties intended that until the introduction of the pension scheme the appellants would be entitled to accrual of benefits at 25% of annual salary or three

months' pay for each year served, that should have been clearly stated in the conditions of service.

It was contended that the particular wording in paragraph 8 has already been interpreted by this Court in the **Jenipher Nawa**[5] case and that that interpretation must be applied to this case. Counsel reiterated that there is no ambiguity in the wording of paragraph 8 or clause 4(n)(iv) of the management conditions of service. Hence, the agreement of the parties must be given effect as they did not provide for an accrued right and the law does not provide for such a right where a pension scheme has been created.

As for the 2nd appellant, it was submitted that the pension scheme rules gave her an entitlement which she was otherwise not entitled to under the management conditions of service as she resigned and if she is challenging the pension scheme then she is not entitled to anything at all.

We have considered the record of appeal and the arguments by the parties. As we see it, the only issue in this appeal, is whether the appellants had any accrued right to have their retirement benefits for the period prior to the establishment of the pension scheme calculated on the basis of three months' pay for each year

served in light of the proviso in paragraph 8 of Statutory Instrument No. 119 of 1997 which was imported into their conditions of service.

We notice that the parties are still arguing on the question of the appellants not having consented to the establishment of the pension scheme. However, the court below resolved this matter and the grounds of appeal as framed, do not, in any way, attack the decision of the court on that issue.

The court below did consider, whether by establishing a pension scheme approved by the Minister, the respondent unilaterally changed the appellants' conditions of service and whether the appellants acquiesced to the alteration of their conditions of employment by continuing to work under the newly introduced pension scheme.

The court found that there was no express consent by the appellants to the new pension scheme and that the appellants were at liberty not to have considered their contracts as terminated when their conditions of employment were unilaterally changed without their consent by introduction of the pension scheme.

However, the court took the view that the real issue was the interpretation of clause 4(n)(iv) of the management conditions of

service and its reference to Statutory Instrument No. 119 of 1997. Certainly, had the respondent not established the pension scheme in January, 2007 the appellants' retirement benefits would have been computed on the basis of three months' basic pay for each year served. Likewise, if the appellants had retired on the eve of the establishment of the pension scheme, their retirement benefits would have been calculated on the basis of that same formula.

However, the respondent established the pension scheme on 1st January, 2007 which was approved by the Minister and on 4th August, 2011, formally informed the appellants, who were all senior managers, that it would discharge its liability by transferring 10% annual salary for each year of service of each member of staff employed before 1st January, 2007 into the current pension scheme. According to the court below, that took care of the period prior to the establishment of the pension scheme. We understand that the 10% was provided for in the pension scheme rules.

Now, the court's interpretation of Statutory Instrument No. 119 of 1997, was that an employee who has attained the age of 55 and has worked for not less than 10 years would be paid retirement dues based on three months' basic pay for each completed year of

service and that this formula can only be applied if an institution does not have a pension scheme approved by the Minister.

As we said earlier, the argument by the appellants was that since they did not consent to the transfer of their service to the pension scheme and they declined to sign the deed of consent, the respondent forfeited its right to establish the pension scheme. The court took the view that the requirement is not whether or not an employee consents to the establishment of the pension scheme; that it is the establishment itself that makes it mandatory to pay retirement benefits in accordance with the scheme.

What we understood the court as saying is that the employee's consent is not necessary, meaning it accepted that the failure by the appellants to give consent for the establishment of the pension scheme did not abrogate the employer's right to create the scheme. Clearly, there was no requirement in the proviso in paragraph 8 of Statutory Instrument No. 119 0f 1997 for employees to consent to the establishment of a pension scheme and there was no such prerequisite in clause 4(n)(iv) of the management conditions of service. It is also clear that the right to establish a pension scheme was incorporated into the conditions of service by importing

paragraph 8 of Statutory Instrument No. 119 of 1997. As we have said earlier the court's decision on this point has not been assailed.

Furthermore, the court's understanding of the proviso in paragraph 8 was that immediately an institution establishes a pension scheme which has been approved by the Minister, the institution is obliged to pay retirement benefits in accordance with such pension scheme. There is no flexibility, there is no other method and in such case the payment of retirement benefits based on three months' pay would not apply. We cannot fault this interpretation by the court as it is on point.

The appellants' argument is that the court should have taken into account the letter of 4th August, 2011 which gave the appellants an opportunity to accept or refuse the transfer of service prior to 1st January, 2007. We are satisfied that the court was alive to the contents of that letter just as it was alive to the appellants' argument that by not consenting to the transfer to the pension scheme, the proviso in paragraph 8 did not apply to them and they should, therefore, be paid terminal dues at three months' pay for each year served.

In the **Jennifer Nawa**[5] case, which the court below followed, an argument was made that the benefits under the pension scheme were inferior to the conditions contained in the Minimum Wages and Conditions (General) Order. In that case, the pension scheme was established before the General Order was passed but the wording of the paragraph which was discussed is the same as in the current case. We stated that even if it was assumed that Cap 276 applied to the appellant, where there is a pension scheme approved by the Minister, the retirement benefits are paid in accordance with that scheme and it was up to those affected members of a pension scheme to enter into negotiations with their employer if they wanted to change the rules of such schemes.

In the present case, the establishment of the pension scheme was in the contemplation of the parties when they imported paragraph 8 of the Statutory Instrument into the management conditions of service. We are inclined to agree with the respondent that if, indeed, it was the intention of the parties that the appellants should be entitled to accrued benefits at three months' basic pay for each year served for the period before the establishment of the

pension scheme, they ought to have included such provision in the conditions of service.

We cannot assume, in the absence of evidence to the contrary, that clause 4(n)(iv) of the management conditions of service did not capture the real intention of the parties. As rightly submitted on behalf of the respondent, this was a contractual term which bound the parties and must be read in its entirety and not piecemeal. We are satisfied that there is no ambiguity in this clause.

We must add, that although the appellants claimed that they were not aware of the existence of the pension scheme until 4th August, 2011 and that they were not members of the scheme, the record shows, at least in the case of the 1st appellant, that the issue of the employer's 10% pension contribution came out in the promotion letter dated 15th October, 2009 at page 36 of the record, and in the remuneration packages at pages 41 and 55.

For the 2nd appellant, she complained about the calculation of the pension money that was put in her pension account in several correspondence with the respondent but she never claimed that she was not a member of the pension scheme. Thus, her assertion in the notice of complaint that the respondent without any notice or

consent paid her a pension whose calculations she did not agree with is not true as she was aware of her membership of the scheme.

With regard to the 3rd appellant as we said earlier on he did not file any documents to support his claim.

In any case, the appellants were by their own admission formally informed about the establishment of the pension scheme in 2011; contributions were made on their behalf by the employer from 2007 under the rules of the pension scheme; and they all accessed their benefits from the pension scheme upon retirement and resignation, respectively.

We agree that they acquiesced to the alteration of their conditions of service by continuing to work under the new pension scheme when they could have demanded that they had been terminated by the respondent's conduct. As held by the court below, as the appellants opted to continue working after they became aware of the existence of the pension scheme and how the respondent intended to discharge its liability for the period prior to 1st January, 2007, their option was to negotiate the terms of the pension scheme so as to accommodate their concerns and not seek for a better package under the management conditions of service.

Although we sympathise with the appellants that they ended up being disadvantaged after the establishment of the pension scheme, we do not see how we can fault the court below for arriving at a decision supported by the law and by a decision of this Court.

As we conclude we wish to state that it is quite sad that the pension scheme provided for conditions that were inferior to what the appellants would have earned had the pension scheme not been established. We implore those that are tasked with the responsibility to approve pension schemes to look into such issues seriously, so that long serving employees are not disadvantaged.

All in all, this appeal fails and is dismissed. In the circumstances of this case, we make no order as to costs.

E.M. HAMAUNDU
SUPREME COURT JUDGE

M. MALILA
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT JUDGE