IN THE SUPREME COURT OF ZAMBIA **APPEAL No. 029/2013**
HOLDEN AT KABWE

(CIVIL JURISDICTION)

BETWEEN:

GOODWIN MUNGALA **APPELLANT**

(Suing in his capacity as General Secretary

of the National Union of Plantation and

Agriculture Workers)

AND

KALEYA SMALL HOLDERS COMPANY LIMITED **RESPONDENT**

CORAM: Chibesakunda, Ag. CJ, Wood J.S and Lengalenga, Ag. J.S

On the 8TH of April, 2014 and 12th May, 2014

For the Appellant: Mr. C. Sianondo, Messrs Malambo and Company.

For the Respondent: Mr. I. C. Ng'onga, I.C Ng'onga and Company.

JUDGMENT

Wood, J.S, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Peter Ng'andwe and Others v Zamox Limited and Zambia Privatization Agency (1999) Z.R. 90.**
2. **Council of The University of Zambia v University of Zambia and Allied Workers Union (Through its General Secretary Michael Kaluba) (2003) Z.R. 24.**
3. **Cosmas Phiri and Others v Lusaka Engineering Company Limited (In Liquidation) (2007) Z.R. 1.**
4. **Attorney General v Nachizi Phiri and 10 Others, SCZ Judgment No. 10 of 2014.**

5. **Chilanga Cement, Plc v Kasote Singogo (2009) Z.R. 122.**
6. **Marcus Kampumba Achiume v The Attorney General (1983) Z.R.1.**
7. **Anthony Khetani Phiri v Workers Compensation Control Board (2003) Z.R.9.**

LEGISLATION REFERRED TO:

1. **Industrial And Labour Relations Act, Cap 269 Of The Laws Of Zambia.**
2. **The Employment Act, Cap 268, Of the Laws Of Zambia.**

This is an appeal against a Judgment of the Industrial Relations Court dated the 15th of November, 2012. By that Judgment, the trial court dismissed the appellant's claim against the respondent for payment of a redundancy package. The appellant brought this action in a representative capacity, as Secretary General of the National Union of Plantation and Agriculture Workers, on behalf of 27 of the union's members.

The brief facts of this case are that on the 19th of December, 2008, the National Union of Plantation and Agriculture Workers signed a collective agreement with the respondent, which was to run from the 1st of April, 2008 to the 31st of March, 2010. This collective agreement was duly registered on the 16th of January, 2014, in accordance with **Section's 70 and 71 of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia.**

On the 23rd of February, 2009, the respondent wrote to the appellant's Union stating its intention to migrate the union conditions of service to the Industrial Association, by joining the Zambia Farm Employers Association with effect from 1st of April, 2009. The conditions of service under the Zambia Farm Employers Association are lower than the conditions of service in the collective agreement.

On the 16th of March, 2009, the respondent terminated the contracts of employment for 27 permanent and pensionable employee's belonging to the appellant's union to facilitate the migration to the Zambia Farm Employers Association. The appellant's Union then sought the intervention of the labour officer from Mazabuka, who advised the respondent to halt the terminations as they were unlawful. On the 25th of March, 2009, the union and the respondent held a meeting with the labour commissioner to resolve the dispute. The labour commissioner gave the parties guidance as shown by the letter appearing at page 77 of the record of appeal. In this letter, the labour commissioner advised the parties of the respondent's right to migrate to industry based

negotiation, but also advised the parties on the need to vary the existing collective agreement. The labour commissioner also advised the parties to discuss the modalities of how the redundancies would be effected in the event of the termination of the contracts of employment.

On the 31st of March, 2009, the parties signed a consent agreement appearing at page 79 of the record of appeal, allowing the respondent to migrate to industry based negotiation. When this consent agreement was submitted to the labour commissioner, he advised the parties to submit a signed addendum to vary the termination clause of the existing collective agreement, in order for the Minister of Labour and Social Security to approve the consent agreement. Based on the said consent agreement, the respondent proceeded to terminate the employment of the 27 unionised workers, and paid them a severance package which included one month's notice pay, leave pay and long service gratuity.

The appellant's Union did not sign the addendum to vary the termination clause of the collective agreement. The 27 workers thereafter demanded payment of a redundancy package based on

the fact that their contracts of employment were terminated due to the financial difficulties that the respondent was facing. The respondent refused to pay them the redundancy package. On the 13th of October, 2011, the appellant filed in an amended complaint claiming the following relief:

i. Payment of redundancy package;

ii. Any other order or award as the court may consider fit in the circumstances of the case;

iii. interest; and

iv. Costs.

In its answer, the respondent denied that the 27 unionised workers were entitled to a redundancy payment. The respondent stated that the workers' contracts of employment were terminated pursuant to the consent agreement that the parties had executed. The respondent denied that the contracts of employment of the 27 workers were terminated mainly due to the financial crisis it was facing as a result of global recession. The respondent contended that the main reason for the termination was the persistent pressure from the union to pay the workers long service gratuity.

Another reason for the termination of employment cited by the respondent was its desire to join the Zambia Farm Employers Association, which move would help it cut down on costs during negotiations. The respondent contended that it had fulfilled its obligations to the 27 workers, and that the redundancy claim had no basis as it was outside of the consent agreement freely executed by the union and the respondent.

In its Judgment, the trial court found that there was no redundancy in this case. The trial court found that there was no intention on the part of the respondent to declare the workers redundant, as their jobs were still available and some of them were re-engaged by the respondent. The Court further adjudged that the there was no redundancy as the respondent did not cease the operations for which the employees concerned were employed. It also found that there was no evidence adduced to show that the requirements for the employees ceased or diminished at all. The court further found that the contracts of employment for the 27 workers were terminated in order for the respondent to comply with, and facilitate the payment of long service gratuity provided for

in clause 10.0 (d) of the existing collective agreement as demanded by the union.

Dissatisfied with the judgment, the appellant filed in two grounds of appeal.

The first ground of appeal was that the Court below erred in law and in fact when it held, against the weight of evidence and the law, that the termination of the contracts of employment of the twenty seven (27) unionised workers did not amount to redundancy because there was no intention on the part of the respondent to declare them redundant.

In ground one of the appeal, learned counsel for the appellant, Mr. Sianondo, submitted that the Court below fell into error by adopting a narrow view of the meaning of redundancy. He argued that redundancy may occur even in the absence of intention on the part of the employer to declare employees redundant or cease its operations. Mr. Sianondo further argued that the court below did not take into account the fact that the conditions of service for the unionised employees were unilaterally varied by the respondent, which act amounts to a redundancy. In support of his argument,

Mr. Sianondo cited the case of **PETER NG'ANDWE AND OTHERS v ZAMOX LIMITED AND ZAMBIA PRIVATIZATION AGENCY**[1] in which we held that:

> **"If an employer varies the basic conditions of employment without the consent of the employee, then the contract of employment terminates, and the employee is deemed to have been declared redundant on the date of such variation and must get a redundancy payment if the conditions of service do provide for such payment."**

Mr. Sianondo submitted that the consent agreement executed by the parties to vary the existing collective agreement could only be valid if it was duly registered with the labour commissioner in accordance with **Section's 70 and 71 of the Industrial and Labour Relations Act, Chapter 267 of the Laws of Zambia.** He submitted that RW1, Mr. Melvin Mubita, admitted in his evidence appearing at page 355, lines 17 to 20 of the record of appeal, that the said consent agreement was not registered. In support of his submission, Mr. Sianondo referred us to the case of **COUNCIL OF THE UNIVERSITY OF ZAMBIA v UNIVERSITY OF ZAMBIA AND ALLIED WORKERS UNION (Through its General Secretary Michael Kaluba)**[2] in which we held that:

"The Collective Agreement as agreed upon by the parties was not registered and the Industrial Relations Court never ordered that it be registered. Therefore, it has no legal force."

Mr. Sianondo also pointed out that a registered collective agreement could only be amended by a document equal or superior in effect. He submitted that the purported agreement was inferior as the labour commissioner did not approve it.

Further, Mr. Sianondo submitted that the trial court turned a blind eye to the evidence on record showing that the respondent migrated from the conditions of service prevailing in the collective agreement to inferior ones, on account of the global economic recession, as shown by a letter written by the respondent, at page 45 of the record of appeal. He submitted that this was an act of survival by the respondent company, as opposed to reducing the number of employees on its workforce. This, he argued, amounted to a redundancy in terms of clause 10(f) of the collective agreement entered into by the parties.

In response to ground one of the appeal, learned counsel for the respondent, Mr. Ng'onga submitted that the trial court was on firm ground in its finding against the appellant. He submitted that

the termination of employment of the 27 unionised workers was a result of a consent agreement freely bargained between the union representatives and the respondent. He argued that this consent agreement was a result of the longtime agitation from the unionised workers to be paid long service gratuity. Mr. Ng'onga submitted that C.W1, Mr. Goodwin Mungala conceded that the union had authority to bind the workers to the consent agreement that the union signed with the respondent on the 31st of March, 2009. In support of this submission, he cited the case of **COSMAS PHIRI AND OTHERS v LUSAKA ENGINEERING COMPANY LIMITED (IN LIQUIDATION)[3].**

Mr. Ng'onga contended that in fact, the long service gratuity that was paid to the 27 workers was superior to the redundancy package that they were now claiming. Mr. Ng'onga submitted that the 27 workers signed disclaimers after receiving their severance pay, waiving any further right of claim to a redundancy payment, or any other claim not enshrined in the consent agreement.

In his heads of argument in reply, Mr. Sianondo submitted that it was not in dispute that the 27 workers were entitled to a long service gratuity, which the respondent had accordingly paid.

He argued that the question was whether after receiving the long service gratuity under clause 10(d), the workers were entitled to a redundancy payment under clause 10(f) of the collective agreement. Mr. Sianondo contended that according to clause 10 (f) of the collective agreement, redundancy was payable in addition to other contractual benefits, which include long service gratuity. Mr. Sianondo further contended that there was no evidence on record to show that the workers waived their entitlement to a redundancy package.

We have considered the submissions and the authorities cited by counsel in respect of ground one of this appeal. We have also considered the judgment appealed against.

The gist of the argument advanced by Mr. Sianondo in this ground of appeal is that the trial court erred when it found that the 27 workers were not declared redundant. He argued that the respondent had declared the 27 workers redundant when it unilaterally varied the workers conditions of service without the consent of the said workers. He further argued that the consent agreement upon which the respondent was relying was invalid as it

was not duly registered in accordance with **Section's 70 and 71 of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia. Section 70** reads as follows:

"70. (1) The parties to a collective agreement shall, within fourteen days of signing, lodge five signed copies of the collective agreement with the Commissioner.

(2) The Commissioner shall, within fourteen days of receipt of the copies referred to in subsection (1), submit such copies, together with his comment to the Minister."

Section 71 reads as follows:

"71. (1) The Minister may, after considering a collective agreement lodged in accordance with section seventy together with the comments of the Commissioner received under subsection (2):

(a) direct that a copy of the collective agreement be returned to the parties together with his reasons for not directing the registration and give instructions to re-submit the collective agreement to the Commissioner; or

(b) direct the Commissioner to register the collective agreement.

(2) The Minister shall not direct the registration of a collective agreement unless he is satisfied that:

(a) the agreement contains the statutory clauses referred to in section sixty-eight; and

(b) the clauses in the agreement do not contain anything which is contrary to any written law.

(3) Every collective agreement which has been approved by the Minister shall:

(a) come into force on the date on which it is approved or on a later date specified in the collective agreement;

(b) remain in force for such period as shall be specified in the agreement;

(c) be binding on the parties to it."

In response, Mr. Ngonga submitted that the workers had not been declared redundant. He argued that the workers conditions of service were changed pursuant to the consent agreement between the appellant's union and the respondent. He submitted that this change in the workers conditions of service was as a result of the pressure from the union to pay the workers long service gratuity, and that this could only be achieved by migrating the conditions of service to the Zambia Farm Employers Association. He denied that the migration was mainly due to the economic difficulties that the respondent was facing.

We agree with the submission by Mr. Sianondo that the 27 employees were declared redundant. The evidence on record shows that the appellant's union entered into a collective agreement with the respondent, which agreement was to run from the 1st of April, 2008 to 31st of March, 2010. This collective agreement is at page

127 of the record of appeal. By letter dated the 23rd of February, 2009, the respondent wrote to the union, expressing its intention to migrate the existing conditions of service to the Zambia Farm Employers Association. This letter appears at page 45 of the record of appeal. The conditions of service under the Zambia Farm Employers Association are lower than those provided for under the existing collective agreement. In its letter, the respondent gave the following reasons for the migration to the Zambia Farm Employers Association:

"The Board had recently reviewed the performance of Kascol in light of global economic recession and the sugar industry in general and Kascol performance in particular. With the escalating input costs and no matching revenue increase, we may have to resort to short term financing to tide over the crisis.

The Board has come up with a survival plan to ensure continuity of employment and sustain the operations of the company during this crisis period. It is in this connection that the Board has thought of migrating the union conditions to the Industrial Association, the Zambia Farm Employers Association effective 1st April, 2009.

As evidenced by the letter dated the 23rd of February, 2009, the respondent's migration to the Zambia Farm Employers Association was necessitated by the economic crisis that the

respondent was facing. We therefore, do not agree with Mr. Ng'onga's submission that the migration was as a result of the pressure from the union to pay the workers long service gratuity. The evidence on record indicates that at the time the respondent decided to migrate to the Zambia Farm Employers Association, there was no pressure from the union to pay the workers long service gratuity. The pressure from the union that Mr. Ng'onga was referring to was exerted on the respondent in 2004. This demand by the union had been met, as the long service gratuity is provided for under clause 10(d) of the existing collective agreement. The respondent decided to vary the conditions of service that were provided for in the collective agreement, to the detriment of the 27 workers, to tide over the economic crisis it was faced with.

We acknowledge that an employer has the right to alter the conditions of service of its employees. However, this can only be done with the express consent of the employee. In the case of **ATTORNEY GENERAL v NACHIZI PHIRI AND 10 OTHERS**[4], at page J21, we stated as follows:

"We must add that conditions of service for any kind of employment can be amended, but this must only be with the clear and express consent

of the employee. It is our view that express consent of an employee must always be a major pillar in the principles of employment law, in the safeguarding of the terms of an employee's contract of employment already being enjoyed..."

The consent agreement to vary the conditions of service upon which the respondent has placed reliance on was not duly registered. This means that the union did not consent to the migration of conditions of service to those existing under the Zambia Farm Employers Association. On the authority of **COUNCIL OF THE UNIVERSITY OF ZAMBIA v UNIVERSITY OF ZAMBIA AND ALLIED WORKERS UNION (Through its General Secretary Michael Kaluba)**[2] we hold the view that the consent agreement has no legal force and cannot be relied upon by the parties.

Having found that the consent agreement is invalid, it follows therefore, that the respondent cannot rely on it. We therefore agree with Mr. Sianondo that the respondent unilaterally varied the workers conditions of service. On the authority of **PETER NG'ANDWE AND OTHERS v ZAMOX LIMITED AND ZAMBIA PRIVATIZATION AGENCY,**[1] we hold the view that the 27 workers were declared redundant as their conditions of service were varied to their detriment, without their consent.

We also agree with Mr. Sianondo's argument that the trial court took a narrow view of the meaning of redundancy. In our view, the trial court in its judgment at pages 21 to 22 of the record of appeal, restricted itself to redundancy as provided under **Section 26 (B) of the Employment Act, Cap 268 of the Laws of Zambia** which reads as follows:

"(i) The contract of service of an employee shall be deemed to have been terminated by reason of redundancy if the termination is wholly or in part due to:

(a) The employer ceasing or intending to cease to carry on the business by virtue of which the employee was engaged; or

(b) The business ceasing or reducing the requirement for the employees to carry out work of a particular kind in the place where the employee was engaged and the business remains a viable going concern."

In the case of **CHILANGA CEMENT, PLC v KASOTE SINGOGO**[5] we held that:

"S. 26(B) of the Employment Act, dealing with termination of employment by way of redundancy does not apply to written contracts. In enacting this provision, Parliament intended to safeguard the interests of employees who are employed on oral contracts of service, which by nature would not have any provision for termination by way of redundancy."

The contracts of employment of the 27 workers are written contracts as their conditions of service are contained in the collective agreement. Therefore, **Section 26(B) of the Employment**

Act, Cap 268 of the Laws of Zambia does not apply to them. In this case, clause 10(f) of the existing collective agreement provides for instances in which a redundancy would occur. Clause 10(f) of the collective agreement upon which the appellant is relying on reads as follows:

> **"When due to circumstances beyond the company's control, redundancy is inevitable, the company after obtaining approval from the Ministry responsible for labour, may effect redundancy....."**

The respondent cited economic reasons as the basis for terminating the contracts of employment. In our view, this is an instance which is beyond the respondent's control as envisaged by clause 10 (f) of the existing collective agreement.

We have, however, observed that under clause 10(f) of the collective agreement, the respondent had a duty to obtain approval from the ministry responsible for labour before it could effect any redundancies. The evidence on record shows that the respondent did not obtain the necessary approval. Our considered view is that failure by the respondent to obtain the necessary approval from the ministry responsible for labour does not render clause 10(f) of the collective agreement invalid. Further, the failure by the respondent

to obtain the necessary approval should not affect the workers' redundancy status under this clause. This was a mistake on the part of the employer and the workers should not be punished for this mistake.

In our view, the finding by the trial court that the 27 workers were not declared redundant is not supported by evidence on record. In the case of **MARCUS KAMPUMBA ACHIUME v THE ATTORNEY GENERAL**[6], we held as follows:

> **"The appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make."**

We accordingly set aside this finding of fact by the trial court. Ground one of the appeal has merit and accordingly succeeds.

The second ground of appeal was that the court below erred in law and in fact when it held that the twenty seven (27) unionised workers were not entitled to payment of redundancy packages upon the termination of their contracts of employment in accordance with clause 10 (f) of the collective

agreement between the said workers and the respondent which entitled them to payment of redundancy packages.

Mr. Sianondo submitted that the reasons for the abrogation of the existing collective agreement as disclosed in the document at page 45 of the record of appeal, included global recession, escalating input costs and no matching revenue. He argued that these were circumstances beyond the respondent's control. Mr. Sianondo referred us to clause 10(f) of the collective agreement that reads as follows:

> **"When due to circumstances beyond the company's control, redundancy is inevitable, the company after obtaining approval from the Ministry responsible for labour, may effect redundancy .....**
>
> **The redundancy pay shall be in addition to the application salary in lieu of notice, and in addition to any other contractual terminal benefits."**

Mr. Sianondo contended that the economic crisis was beyond the control of the respondent, therefore the decision to terminate the workers contracts of employment was a redundancy.

Mr. Sianondo also pointed out that the respondent did in fact prepare the payment schedule of the redundancy payment due to the 27 workers as could be seen from the computation at page 115

of the record of appeal. He argued that RW1 confirmed this in his evidence in the court below. He contended that clause 10 (f) of the collective agreement clearly entitled the workers to a redundancy pay.

In response to ground two of the appeal, Mr. Ng'onga submitted that the consent agreement dated the 31st of March, 2009, appearing at page 79 to 80 of the record of appeal was the basis upon which the respondent paid the unionised workers their dues. He contended that the consent agreement had replaced clause 10(f) of the collective agreement and became the only authoritative document for paying the money that the workers were demanding. He argued that there was no redundancy as the jobs were still available to the unionised workers, and those who wished were re-employed. Mr. Ng'onga denied that global economic recession was the principal ground for terminating the employment contracts of the 27 workers. He argued that it was the insistence of the unionised workers to be paid the long service gratuity outside of the collective agreement, which could only be done by invoking the termination clause in the collective agreement. Mr. Ng'onga

contended that clause 10 (f) of the collective agreement was not breached as the existing circumstances were not in conformity with the provisions of clause 10(f) on redundancy.

Mr. Ng'onga invited us to accept and endorse the principle in the case of **ANTHONY KHETANI PHIRI v WORKERS COMPENSATION CONTROL BOARD**[7] in which we held that:

"The sequence of the events show that the respondent did not declare the appellant to be redundant or retrenched."

Mr. Ng'onga also argued that the case of **PETER NG'ANDWE AND OTHERS v ZAMOX LIMITED AND ZAMBIA PRIVATISATION AGENCY**[1] could be distinguished from the case at hand as this case deals with the issue of the unilateral variation of the conditions of service. He argued that in this case, the change in the conditions of service was agreed upon by the union and the respondent before the consent agreement was executed.

In his argument in reply, Mr. Sianondo insisted that the employees were declared redundant as the respondent was going through a financial crisis. He submitted that where the circumstances of a case do not fit in **Section 26(B) of the**

Employment Act, Cap 268 of the Laws of Zambia, the court should look at what the conditions of service stipulate. In support of his submissions, he cited the case of **CHILANGA CEMENT PLC. v KASOTE SINGOGO**[5].

He submitted that there was a redundancy in view of clause 10(f) of the collective agreement.

In ground one of the appeal we held that the workers were declared redundant. Having so held, it follows that they are entitled to a redundancy payment. This is in addition to the long service gratuity that was paid by the respondent. The basis for the payment for redundancy is clause 10(f) of the collective agreement which states *inter alia* that:

"The redundancy pay shall be in addition to the application salary in lieu of notice and in addition to any other contractual benefits."

This provision of the collective agreement does not give the workers an option between the redundancy pay and the long service gratuity. It therefore does not matter that the redundancy payment that the workers are claiming is lower than the gratuity already paid.

Further, we do not agree with Mr. Ng'onga's submission that by signing disclaimers after receiving the long service pay, the 27 workers waived their claim to a redundancy payment. In our view, the entitlement to the redundancy pay accrued at the time the respondent terminated the contracts of employment for the 27 workers. The respondent therefore cannot take away the entitlement to the redundancy pay as it is an accrued right. It is trite law that one cannot take away a right that has accrued. Ground two of the appeal has merit and accordingly succeeds. The appeal is allowed with costs to the appellant to be taxed in default of agreement.

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L.P. Chibeskunda

ACTING CHIEF JUSTICE

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A.M. Wood

SUPREME COURT JUDGE

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F.M. Lengalenga

ACTING SUPREME COURT JUDGE