

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

SCZ NO. 1/2007
Appeal No.97/2005

BETWEEN:

COSMAS PHIRI AND EIGHTY-FIVE
(85) OTHERS

Appellants

AND

LUSAKA ENGINEERING COMPANY
LIMITED (In Liquidation)

Respondent

CORAM: Sakala, CJ., Chibesakunda and Mushabati JJs

5th October 2006 and 25th January 2007

For the Appellants: Mr. R. Mainza of Mainza and Company

For the Respondent: Mr. G.F. Patel of Musa Dudhia and Company

JUDGMENT

Sakala, CJ., delivered the Judgment of the Court

Cases Referred to:

- 1. Zambia Oxygen Limited and Zambia Privatization Agency Vs Paul Chisekula and Others [2000] Z.R. 27**

2. Peter Ngandwe and Others Vs Zambia Oxygen Limited and Zambia Privatization Agency [1999] Z.R. 90

3. Lusaka Engineering Company Ltd V. Saiton Kamanga SCZ Appeal No. 183 of 2000

This is an appeal against the judgment of the High Court dismissing the appellant's claim for the sum of K325,586,506-99n, being the balance of terminal benefits due to the appellants following upon termination of their employment with the respondent

For convenience, we shall refer to the appellants as the plaintiffs and to the respondent as the defendant which designations the parties were in the Court below.

The facts not in dispute were that the plaintiffs were at the material time employees of the defendant serving under a Collective Agreement of 1993 - 1995 between the National Union of Building Engineering and General Workers on one hand and of the defendant on the other hand.

By a circular letter dated 21st March, 1997, written by the defendant to each of the plaintiff, the plaintiffs' employment was terminated.

According to the documentary evidence, prior to the termination of the employment, the Union, on behalf of the plaintiffs, had entered into an agreement that was commonly referred to as the "Termination Benefits Payment Agreement". It was common cause that the plaintiffs' terminal benefits were paid under this Agreement. From the record, it is also clear

that there were some disagreements over the calculation of the terminal benefits paid to the plaintiffs before the Union entered into the Agreement

The case for the plaintiffs as pleaded was that the defendant retrenched them and paid them terminal benefits inferior to the entitlements under the Collective Agreement; that the inferior benefits suffered unauthorized deductions without the consent of the plaintiffs; and that as a consequence of the inferior benefits, the defendant remains owing the plaintiffs a total amount of the sum as claimed

The defendant pleaded that the plaintiffs were put under an Early Retirement Scheme as agreed upon between the defendant and the plaintiffs' recognized representatives; and that the plaintiffs were paid their terminal benefits in full and in accordance with an Agreement dated 14th March, 1997 made between the defendant and the plaintiffs' recognized representatives. The defendant denied that the deductions made on the plaintiffs' terminal benefits were unlawful or unauthorized but that the same were agreed to between the defendant and the plaintiffs' representatives.

The learned trial Judge reviewed the oral and documentary evidence on record as well as the submissions by learned counsel. He then set out the relevant paragraphs from the pleadings. He pointed out that on examining the Collective Agreement covering the period 1993 -1995, she found that there was a provision for termination of employment through redundancy, normal retirement and early retirement.

From the documentary evidence, the Court noted that prior to the Terminal Benefits Payment Agreement, there was some disagreement over the calculation of terminal benefits to be paid to the employees of the defendant. There were also complaints over low terminal benefits and that management did not want to pay according to laid down conditions of

service. The Court also noted that the Union wrote the Zambia Privatization Agency over the same.

From the correspondence on record, the Court found that the plaintiffs were not serving under ZIMCO conditions of service but under a Collective Agreement; and that on the evidence on record, the Union and the defendant went back to the negotiation table and came up with a Terminal Benefits Payment Agreement dated 14th March, 1997. This Agreement, according to the Court, was signed by both the Management of the defendant and the Union representatives and the Works Committee Chairman who had earlier raised issue with the amounts to be paid as terminal benefits.

The Court observed that the plaintiffs admitted in the statement of claim that while employed by the defendant; they served under a Collective Agreement. This, according to the Court, was an acknowledgment that, as employees, they were represented by the Union and that this was the Union that negotiated the Terminal Benefits Payment Agreement with the defendant and on which basis they were paid the terminal benefits. The trial court pointed out that if the plaintiffs had been dissatisfied with the package they should not have accepted it. They should have declared a dispute with the defendant over the figures instead of accepting the payment.

The Court noted that, as matters stood, each plaintiff received terminal benefits calculated on the basis of the Terminal Benefits Payment Agreement. The Court observed that looking at the Terminal Benefits Agreement voucher, it was clear that at the time of payment and receipt of the money, the plaintiffs had a clear indication of what they were getting because they signed the payment voucher. The Court pointed out that in the circumstances, the plaintiffs could not now turn back and claim that they received an inferior package or that they did not consent to the agreement. The Court found no evidence to show that they were coerced into signing or

accepting the money or indeed that they were misrepresented by their own Union or that the Union did not represent their interests.

The trial Court further pointed out that the plaintiffs were not supposed to go on early retirement at that stage; that the plaintiffs were on the face of it actually retrenched, but for reasons best known to the parties, they entered into a Terminal Benefits Payment Agreement which they called an Early Retirement Scheme.

The court accepted the principle laid down in **Zambia Oxygen Limited and Zambia Privatization Agency Vs Paul Chisekula and Others⁽¹⁾** and in **Peter Ng'andwe and Others Vs Zambia Oxygen Limited and Zambia Privatization Agency⁽²⁾** that conditions of service already being enjoyed by the employees cannot be altered to their disadvantage without their consent. However, the Court observed that the package paid to the plaintiffs in the instant case was negotiated between the Management and the Union and could not, therefore, be said that it was without the plaintiffs' consent as they were ably represented by their Union representatives. The Court accepted that in the circumstances of the present case, it would be inequitable for the plaintiffs to claim different benefits from what they received.

The plaintiffs' case was dismissed; hence the appeal to this Court

The plaintiffs filed a memorandum of appeal based on one ground; namely, that the learned trial Judge misdirected herself in law and fact in holding that the inferior package or terminal benefits negotiated for by the Union was consented to by the employees and binding on the said employees.

On behalf of the parties, both learned Counsel filed written heads of

argument augmented by oral submissions based on the only ground of appeal.

The summary of the written arguments and submissions, on the only ground of appeal, on behalf of the plaintiffs, is that the holding by the trial Court that the package paid to the plaintiffs was negotiated between the Management and the Union and that the same cannot be said to have been arrived at without the consent of the plaintiffs flies in the teeth of the evidence adduced by Cosmas Phiri, PW1, on behalf of the plaintiffs in the course of the trial.

In support of the submissions, Counsel cited, at great length, the evidence of Cosmas Phiri where he stated that they did not agree with the Management that they deduct an amount of money against their terminal benefits; that there was no such agreement; that the Agreement binding was the 1993 Collective Agreement; and that the Terminal Benefits Payment Agreement was signed by the Union on behalf of the employees without the employees consent and authority.

It was contended that from the evidence of Cosmas Phiri, PW1, the inferior package was agreed upon between the Union and the Management without the consent of the employees; and that the evidence of Cosmas Phiri was corroborated by the documentary evidence on record.

The Case of **Lusaka Engineering Company Ltd V. Saiton Kamanga**⁽³⁾ was cited in support of the arguments and submissions on the only ground of appeal. It was contended that it was clear from the evidence on record, and the purported Agreement that none of the employees consented to discount their terminal benefits.

The gist of the oral arguments and submissions by Mr. Mainza on behalf of the plaintiffs was that the ample documentary evidence on record

clearly shows that the employees rejected the package agreed upon by the Union representatives and the Management He pointed out that the case of Lusaka **Engineering Company Ltd V. Saiton Kamanga**⁽³⁾ was on all fours with the present case.

The upshot of the written response to the written heads of arguments by Mr.Patel, on behalf of the defendants, was that in the statement of claim, the plaintiffs admitted being unionized and that they were represented by the National Union of Building Engineering and General Workers. It was argued that it could not be disputed that the Union represented the plaintiffs in its dealing with the company; that the Union negotiated and concluded a Voluntary Early Retirement Scheme with the company with regard to unionized workers who included the plaintiffs; and that the Voluntary Early Retirement Agreement was signed by both the Union and the Company and is dated 14th March, 1997.

It was contended that as authorized representatives of the plaintiffs, the Union had the legal capacity to bind the plaintiffs to the scheme and the plaintiffs are therefore bound to the same; that the scheme was not imposed by the company on the Union; and that the Union, according to the documentary evidence, wanted an Early Retirement Scheme for the benefit of the plaintiffs, hence the negotiations that continued

It was submitted that the Union freely and voluntarily entered into the Early Retirement Scheme on behalf of the plaintiffs; and that as such, the plaintiffs cannot now claim that they did not consent to the terms of the Scheme. It was pointed out that, in fact, all the plaintiffs collected the monies payable under the Scheme and expressly signed their consent to its terms when acknowledging payment; that at no time did any of them complain about the Scheme; and that at no time did they complain that the Union had no authority to negotiate on their behalf. It was submitted that, in these circumstances, the plaintiffs are estopped from arguing that they did

not consent to the terms of the scheme; that it would be extremely inequitable for the plaintiffs to now claim different benefits than what was agreed in exchange for going on Early Retirement in 1997; and that the plaintiffs got what they wanted and it would be unfair for them to expect the Court to change what happened especially that the company had since altered its position to its detriment

Further arguments in response were that there was a very long negotiation process between the company and the Union as to whether and on what terms to allow the unionized employees to go on early retirement; that the reasons why benefits had to be negotiated were firstly; that under the Collective Agreement, it was expressly stated that the plaintiffs had no right to Early Retirement Benefits; and that the plaintiffs' rights to any retirement benefits had not crystallized as they had not attained the ages of 55 and 50 for men and women, respectively and still in employment at mat time; and that consequently, the plaintiffs, through the Union, agreed to accelerate the payment of their retirement benefits through an Early Retirement Scheme.

It was submitted that since the plaintiffs had no right to early retirement benefits and only a contingent and conditional right to retirement benefits in the future, the Early Retirement Scheme was supported by valuable and sufficient consideration to make it a valid accord and satisfaction. The definition of valuable consideration in **Halsbury's Laws of England Vol. 7,4th Edition paragraph 794** that it is "some **right, interest, profit or benefit accruing to the other party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other at his request**" was cited in support of these submissions.

It was also submitted that there is a benefit in getting money today for money that you may or may not become entitled in the future; that the benefit to the plaintiffs was itself sufficient and valuable consideration for the Scheme; and that the Scheme was a **Valid Release** of any further claims

by the plaintiffs for terminal benefits.

It was pointed out that the benefits calculated for the plaintiffs in the Scheme was less than what they would have received as their Retirement package; but that it was given on an earlier date which in effect satisfied the whole claim. For mis contention **paragraph 909** of the same volume, and edition of **Halsbury's Laws of England** was cited where it is stated:

"a right of action for breach of contract maybe discharged by payment, if mis is accepted in satisfaction; but where a liquidated amount is due, payment of a smaller amount cannot be relied on as a satisfaction, unless the payment is made at an earlier date or in a different manner from that to which the creditor is already entitled."

In his oral response, Mr. Patel, on behalf of the defendant, pointed out that on record, the salient points are that the Court found that mere was consent as the defendant negotiated with the Union as the company does not negotiate with individual employees; that it was admitted that the plaintiffs are unionized and represented; and that there is nothing on record that there was no consent

It was submitted that the authorized representatives had legal authority to bind the employees; that the Scheme was not imposed by the defendant; that it was the Union that wanted the Scheme; and that the documentary evidence and the defence witness' oral evidence demonstrated that the defendant was willing to continue with the employees even after post-privatization but the Union did not want this, preferring Early Retirement.

The rest of Mr. Patel's oral submissions were a repetition of the Respondent's written heads of argument. Suffice it to point out that Mr.

Patel distinguished the case of **Kamanga**⁽³⁾ heavily relied upon by the plaintiffs in their arguments and submissions by pointing out that in the **Kamanga case**⁽³⁾ the employees were not unionized. The employment was governed by ZIMCO conditions of service, while in the present case; the employment was governed by a Collective Agreement, making the Union a proper body to represent the employees.

Mr. Patel further pointed out that in the **Kamanga case**,⁽³⁾ employment was terminated; while in the present case, it was an Early Retirement Scheme Package and there was no protest by the employees and the Union; while in the **Kamanga case**,⁽³⁾ there was protest.

Mr. Patel further pointed out that the protest to the National Assembly in the instant case was made before the negotiated package and before the accelerated payment. Further, there was, in the instant case, a signed Agreement, incorporating terms of the Scheme, while in the **Kamanga case**⁽³⁾ there was no signed Agreement.

It is hereby stipulated and agreed as follows:

In view of the financial and economic predicament the company is in and the need to rationalize the labour and financial resources of the company, restructuring of the company is inevitable. In view of the economic constraints, both parties have mutually agreed to crystallize the employee liability and payable under the following terms:

- a. Benefits shall be paid at the rate Current Salary less Housing Allowance according to the provisions of the Collective Agreement and Early Retirement Scheme agreed upon for those who qualify for the scheme and redundancy benefits for those*

who do not qualify.

- b. Benefits shall be discounted at the rates of 10% for those that shall not be offered jobs under New Contracts and 20% for those that shall be offered jobs under New Contracts.*

In witness thereof the Parties have set their hands at Lusaka Engineering Company on 14th March 1997 in the presence of the subscribing witnesses

ON BEHALF OF THE COMPANY

ON BEHALF OF THE UNION

***FEBIAS H. MUWEZWA
ASSISTANT TO
MANAGING DIRECTOR***

***LOUIS MUKEYA
UNION PRESIDENT***

VIPOOL PATIDAR

RICKY NYIRENDA

FINANCIAL CONTROLLER

ORGANISING SECRETARY

WITNESSES

***PASCAL KAIBELE
GENERAL MANAGER***

***LIWELUKA NDOLO
WORKS COMMITTEE
CHAIRMAN***

The arguments and submissions on behalf of both parties have clearly set out each party's stand on this document. The case for the plaintiffs is that they served under a Collective Agreement of 1993 - 1995. This agreement was entered on their behalf between their Union and the defendant. In 1997, their employment was terminated; but they were paid terminal benefits that

were inferior to the entitlements under the Collective Agreement And the benefits suffered unauthorized deductions without their consent and further without lawful cause.

The plaintiffs do not dispute the existence of the Terminal Benefits Payment Agreement. They also do not dispute that the same was signed by their Union. Their position is that the Agreement was signed by the Union on their behalf but without their consent and authority. In support of this position, the plaintiffs rely on the evidence of PW1 and the documents on record, which show that before the Agreement was signed, they protested and even petitioned the National Assembly.

The short case for the defendant, as we understand it, is that although the plaintiffs served under a Collective Agreement, they were put under an Early Retirement Scheme as agreed upon between the defendant and the plaintiffs recognized representatives, the Union. Under the Agreement, according to the defendant, the plaintiffs were paid their terminal benefits in full and in accordance with the Agreement made between the parties dated 14th March, 1997. It is also the defendant's case that the deductions made on the plaintiffs terminal benefits were agreed between the defendant and the plaintiffs' representatives.

The learned trial Judge accepted the evidence that prior to the Terminal Benefits Payment Agreement, there were disagreements over the calculation of the terminal benefits. We agree with her. The Court also found that the plaintiffs were not serving under the ZIMCO conditions of service, but under a Collective Agreement We also agree with this finding. The Court also made a finding based on the evidence that the Union and the defendant went back to the negotiation table and came back with the **Terminal Benefits Payment Agreement, dated 14 March, 1997**. The Court further found that this Agreement was signed by both the Management

of the defendant, the Union representatives and the Works Committee Chairman. We totally agree with these findings.

In our view, it could not be seriously argued that the Union did not sign on behalf of the plaintiffs. In any event, in their own pleadings, the plaintiffs admitted being represented by the Union, the Union that went back and negotiated the **Terminal Benefits Payment Agreement of 14th March, 1997.**

We take note of the oral and documentary evidence that before 14th March, 1997, there were disagreements between the parties. There is no evidence that after the Agreement was signed, there were any disagreement

Before concluding her judgment, the trial Judge had this to say: ,

"The package paid to the plaintiffs was negotiated between management and the union and in my view, it cannot be said therefore that it was without the plaintiffs' consent as they were ably represented by their union representatives and I would agree with the learned defence counsel that it is inequitable for me plaintiffs to claim different benefits from what they received,"

Mr. Mainza submitted that this holding flies in the teeth of the evidence of PW1, Cosmas Phiri, on behalf of the plaintiffs. We have considered the evidence of PW1. The evidence of Mr. Phiri merely consists of denials of an agreement. In our view, the document, Terminal Benefits Payment Agreement speaks for itself. Above all, PW1 does not deny the existence of this document, but that it did not bind the plaintiffs. We cannot accept mis evidence and the trial Judge's holding cannot be criticized. If anything, the submissions on behalf of the plaintiffs are the ones that fly in the teeth of the evidence.

The case of **Kamanga**⁽³⁾ relied upon by Mr. Mainza, cannot be said to be on all fours with the facts of the instant case. That case dealt with and specifically centered on the ZIMCO conditions of service. Here, we are dealing with a scenario of the plaintiffs, through their Union, negotiating with the defendant; ending up with a signed Agreement

We agree with Mr. Patel that, as authorized representatives of the plaintiffs, the Union had the legal capacity to bind the plaintiffs to the Scheme. The plaintiffs are therefore bound to the Agreement. Indeed, we find no evidence that the Agreement was imposed on the plaintiffs. As we see it, the Early Retirement Scheme was in fact to the advantage of the plaintiffs as they received accelerated payments earlier. It is too late for the plaintiffs to claim that they did not consent to the Scheme.

As argued by Mr. Patel, we accept that the Scheme was supported by valuable and sufficient consideration to make it a **valid accord and satisfaction** as defined in **Halsbury's Laws of England Vol. 7, 4th edition paragraph 794**. The Scheme was a truly **Valid Release** of any further claims by the plaintiffs for their terminal benefits.

We are satisfied that on the salient facts as found by the court, Mr. Patel adequately distinguished the present case from that of **Saiton Kamanga**.⁽³⁾ In the **Kamanga** case,⁽³⁾ the employees were not unionized. The employment was governed by the ZIMCO conditions of service; while in the instant case, the employment was governed by a Collective Agreement, making the Union a proper legal body to represent the plaintiffs. In the **Kamanga case**,⁽³⁾ the employment was terminated while in the present case it was an Early Retirement Scheme Package and after signing the Scheme, there were no protests, while there were protests in the **Kamanga case**.⁽³⁾ In the present case, the evidence of protests is that the

protests were done before the Agreement was signed and before payment of the accelerated package which was accepted. As we see it, the protests came too early.

More importantly, there was in the instant case, a signed Agreement, incorporating the terms of the Scheme. There was no signed Agreement in the **Kamanga case**.⁽³⁾

Having considered all the arguments and submissions in support of the only ground of appeal, we are of the strong view that this appeal has no merit. It is accordingly, dismissed. We make no order as to costs.

EX. Sakala
CHIEF JUSTICE

L.P. Chibesakunda
SUPREME COURT JUDGE

C.S. Mushabati
SUPREME COURT JUDGE