

IN THE SUPREME COURT OF ZAMBIA Appeal No. 1/ 2022
HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ELVIS MULELE NAKWETI

AND

ZAMBIA TELECOMMUNICATIONS

COMPANY LIMITED

APPELLANT

RESPONDENT



Coram: Musonda DCJ, Wood and Kabuka, JJS on the 7th of April, 2022 and 6th July, 2022.

FOR THE APPELLANT: N/A

FOR THE RESPONDENT: Mr. J.C. Kalokoni, Messrs.
 Kalokoni & Company.

JUDGMENT

KABUKA, JS, delivered the Judgment of the Court

Cases referred to:

1. Zambia Revenue Authority v Bruce Kasonde Kaemba (suing in his capacity as Chairperson for the Customs and Freight Forwarders Agents Association of Zambia) Appeal No. 158 of 2016.
2. Zambia National Commercial Bank Plc v Muyamwa and Others (2017) ZR Vol. 2 p. 387.
3. Ketteman & Others v Hansel Properties Limited & Others [1987] A.C. 189.
4. Zambia Telecommunications Company Limited v Amos Chembo SJZ/46 of 2018, Appeal No.156 of 2015.

5. Henry Nsama & 134 Others vs Zambia Telecommunications Company Limited, SCZ Judgment No. 42 of 2014.

Legislation referred to:

1. Supreme Court Rules Cap. 25 rule 19 (1)
2. Limitation of Actions Act, 1939

Introduction

1. The appellant appeals against a judgment of the High Court which declined to award him gratuity at the claimed rate of 3 months' salary for each year served and *pro rata* for any incomplete year, in addition to his pension benefits. The appellant further appeals the dismissal of his claim for payment of housing allowance from the date of his retirement until settlement of his benefits in full.

Preliminary Objection

2. The respondent raised a preliminary objection to the hearing of the appeal, pursuant to **rule 19 (1)** of the **Supreme Court Rules Cap. 25 of the Laws of Zambia**. The objection was anchored on the matter being statute barred. This was taking into account that the cause of action arose on 30th April, 1999 when the appellant was retired, but he only commenced his action in the High Court ten years later, on 15th June, 2010.

3. The respondent submitted that, the action being founded in contract was brought after the six-year time limit and was therefore statute barred. That this Court has no jurisdiction to hear it and cited as authority for the submission, our holding in the case of **Zambia Revenue Authority v Bruce Kasonde Kaemba (suing in his capacity as Chairperson for the Customs and Freight Forwarders Agents Association of Zambia)**¹.
4. Premised on the claim of the matter being statute barred and further relying on the **Bruce Kasonde Kaemba**¹ case, the respondent reiterated that, this Court does not have jurisdiction to hear the appeal as jurisdiction must be acquired before judgment is given. That the absence of jurisdiction nullifies whatever decision follows from such proceedings.
5. The appellant stretched this submission back to the Deputy Registrar before whom the issue was first raised and contended that, he equally lacked jurisdiction to hear the matter that was statute barred. Our decision in the case of **Zambia National Commercial Bank Plc and Geoffrey Muyamwa & 88 Others**,² was relied upon as held that: the

legal principle precluding a party from raising an issue on appeal which was not raised in the lower court, does not apply where the issue is one questioning the very authority or jurisdiction of the Court to have heard the matter. Further, that absence of jurisdiction to hear a matter, results in the ensuing decision being a nullity.

6. The appellant in his written reaction to the preliminary objection averred that, the issue of the matter being statute barred was first raised by the respondent before the Deputy Registrar, who considered and dismissed it in a ruling dated 14th July, 2011. The respondent did not challenge that dismissal by way of an appeal. The appellant further averred that the respondent having thereafter, submitted to the matter being heard on the merits, is precluded from pursuing the same issue under the guise that it is a jurisdictional issue which can be raised at any stage of the proceedings.
7. We have considered the elaborate arguments and submissions on the preliminary objection from learned Counsel for the respective parties as summed up at paragraphs 2 to 6 above. We have also considered the various cases to which we were referred. Our short response to the

question whether or not the matter is statute barred and hence, the appeal emanating from it incompetent, is that the said question must be resolved on the particular facts of this matter.

8. It is noted, in that regard, that whilst the Limitation Act 1939, offers a complete procedural defence to an action caught up in the time limits within which specific actions may be brought; a defendant retains the option to proceed to defend a matter either on the merits or rely entirely on the procedural defence that the matter is statute barred. That position was aptly summed up in the case of **Ketteman & Others v Hansel Properties Limited & Others**³ where it was held that:

"A defence of limitation permits a defendant to raise a procedural bar which prevents the plaintiff from pursuing the action against him. It has nothing to do with the merits of the claim.....

If a defendant decides not to plead a limitation defence and to fight the case on the merits he should not be permitted to fall back upon a plea of limitation as a second line of defence at the end of the trial when it is apparent that he is likely to lose on the merits."
 (at page 219)

9. In the present matter, now subject of this appeal, the respondent did not appeal the ruling of the District Registrar to the trial judge at chambers. The respondent opted to rely on its defence on the merits and submitted to the trial of the

matter by the High Court. As a result, the High Court which had jurisdiction to hear the matter on the merits, proceeded with the trial following which it rendered a judgment.

10. The **Geoffrey Muyamwa & 88 Others³** case that the respondent seeks to rely on in advancing the contention that a jurisdiction issue can be raised at any stage of the proceedings, is distinguishable on those facts. As held in the **Ketteman³** case, the appellant having at trial defended the matter on the merits, cannot now seek to have a second bite at the cherry, by resurrecting the issue of the matter being statute barred, as a jurisdictional issue that can be raised at any time. That issue was raised and heard by the Deputy Registrar who considered, determined and put it to rest in a ruling against which there was no appeal by the appellant.
11. The preliminary issue fails for those reasons.

Background

12. We now return to the substantive appeal, alluded to at paragraph 1, by which the appellant challenges the judgment of Chisanga, J, (as she then was) for dismissing his claims for payment of gratuity, in addition to his pension benefits and declining him payment of housing allowance, pending

settlement of his benefits in full.

13. The history to the matter is that the appellant was an employee of a government department known as the General Post Office (GPO) which he joined on 23rd June, 1969. In 1975 GPO transformed into a parastatal company under the Zambia Industrial and million Corporation (ZIMCO). ZIMCO had its own conditions of service which applied to the appellant.
14. Some twenty years or so, thereafter, GPO was split into two divisions: Zambia Postal Services (ZAMPOST) and the Zambia Telecommunications (ZAMTEL). The appellant worked under the latter division. In 1994, the ZAMTEL Board of Directors approved conditions of service known as the ZAMTEL conditions of service. These are the conditions that were in force at the time of the appellant's retirement on 30th April, 1999. In terms of the ZAMTEL conditions of service, computation of retirement benefits was premised on the employee's monthly basic salary, excluding allowances.
15. The appellant contended that whilst serving under ZIMCO conditions of service there was a government circular authored by then Minister of Finance, Mr. Ronald Penza by

which allowances were to be incorporated in an employee's salary for purposes of computing retirement benefits. The appellant claimed that his benefits were computed excluding allowances, contrary to that directive and he only discovered this anomaly when he came across the new ZAMTEL conditions in 2010. This was after a former colleague by the name of Leonard Mendai, won a case in the High Court granting him his retirement benefits to be calculated on his basic salary, inclusive of all allowances which had earlier been excluded.

16. That judgment is apparently, what prompted the appellant to amend his writ of summons to now claim, not only for a retirement package inclusive of allowances, but also calculation of long service gratuity inclusive of allowances at the rate of 3 months' salary for each year served and *pro rata* for any incomplete year of service. He further claimed payment of housing allowance pending full payment of his benefits.
17. As stated earlier at paragraph 12, the matter was heard by the High Court and upon consideration of the evidence, the learned trial judge determined that the appellant had served

under the ZAMTEL conditions of service which were applicable at the time of his retirement in 1999. The trial judge noted that in terms of the conditions of service in issue, in addition to retirement benefits and benefits accruing from the pension scheme, an employee was on retirement, also entitled to payment of long service gratuity. Her conclusion was that the clauses must be construed harmoniously, to avoid a double payment.

18. On the question whether allowances fell to be included by virtue of ZIMCO's incorporation of allowances into the salary, the learned trial judge found that ZIMCO had indeed made a decision to integrate allowances into the basic salary, but that after migrating to ZAMTEL, employees were at liberty to agree to conditions that varied the said directive. Judicial notice was taken of the consolidated High Court cases of: *Herbert Nathan Mbewe, Joseph Lubinda and Peter Malupande v Zambia Telecommunications Company Ltd 2010/HP/629, 2010/HP/643 and 2010/HP/664*, where employees were said to have demanded a migration from ZIMCO conditions of service to ZAMTEL conditions of service which were perceived to be more favourable.

19. It is on consideration of that evidence that the learned trial judge found that the appellant, having been a sales manager in 1999, held a senior position. She opined that he must have also held a senior position in 1996 and consequently, must have then, known that the ZAMTEL conditions of service were applicable to him. According to the trial judge, the appellant at worst, must be taken to have tacitly accepted or acquiesced to the said conditions.
20. In tandem with the ZAMTEL conditions of service, the learned trial judge, declined to include allowances in the computation of the appellant's pension benefits. The trial judge further declined to grant the claim for payment of gratuity pursuant to clause 8, on the basis that it was already taken care of by clause 9, of the same conditions of service.

Grounds of Appeal to this Court and Arguments

21. Dissatisfied with the findings of the learned trial judge, the appellant initially launched 5 grounds of appeal which included faulting the trial court for having declined to allow incorporation of allowances into the basic salary for purposes of computing his terminal benefits. Grounds 2, 3 and 4 in which that issue was raised, have since been abandoned. The

remaining grounds, 1 and 5, have narrowed down the issues to two, which relate to the appellant's claims of entitlement to payment of gratuity and housing allowance. The two grounds are framed as follows:

- 1. The lower court misdirected itself in law and fact when it refused to apply the literal rule of interpretation and refused to award the appellant 3 months' salary for each year served in addition to pension benefits.**
- 5. The lower court misdirected itself both in law and fact when it refused to award housing allowance from the date of retirement until full payment of the benefits.**

22. In their arguments on ground one, Counsel for the appellant contended that the learned trial judge had initially interpreted ZAMTEL conditions of service clause 9 (a) (iii) and (iv) correctly, when she stated that the respondent's pension scheme provided for an employee retiring from service, to be entitled to payment of three months' pay for each year served and *pro rata* for any incomplete year of service. The appellant submitted that he has no issue with the benefits accruing under clause 9 (a) (iii) which were correctly paid to him.
23. According to the appellant, the question for determination is whether or not, the additional benefits under clause 9 (a) (iv) were payable to him. It was at this point where the trial judge was said to have deviated from the provisions in issue. That

the trial judge erroneously, proceeded to construe the document as a whole, to ascertain the meaning of the several clauses and interpret them so as to bring them in harmony with each other.

24. It was further argued that the learned trial judge attempted to harmonise clauses which were independent of each other and did not require interpretation beyond their literal meaning. Reference was made to clause 9 (a) (iv) which provides that, *'in addition to the retirement benefits accrued from the pension scheme, an employee retiring from service shall be entitled to payment of three months pay for each completed year of service and pro-rata for any incomplete year served.'*
25. The submission was that, the clause is very clear and did not need interpretation beyond the literal meaning. That the learned trial judge appeared to want the provision classified as 'long service gratuity' when that was not the intention of the framers of the conditions of service.
26. It was Counsel's further submission, that the same clauses were addressed by this Court in the case of **Zambia Telecommunications Company Limited v Amos Chembo.⁴**

It was there held that, if it was the intention of the framers of the conditions of service to pay gratuity only, on retirement of an employee under clause 8, which was a carryover from the ZIMCO conditions of service, they would not have included a new clause, being clause 9, which introduced another benefit for a retiring employee.

27. Counsel submitted that, inclusion of clause 9 (a) (iv) suggests that it is an additional benefit to the gratuity payable under clause 8. That whereas the latter deals with long service gratuity, the former deals with normal and early retirement benefits, which are in addition to the benefits accruing from the pension scheme. Counsel reiterated our holding in the **Amos Chembo⁴** case for the submission that, the clauses stand on their own and must be construed in their own context.
28. On ground five, the appellant assailed the trial judge as having misdirected herself both in law and fact when, pending resolution of his matter, she declined to award him housing allowance from the date of his retirement until full payment of the benefits in accordance with clause 9 (h) (v).
29. At the hearing of the appeal, only learned Counsel for the

respondent was present. Learned counsel for the appellant was not in attendance having earlier on 21st March 2022, filed a notice to that effect. In answer to questions from the Court, Counsel for the respondent conceded that the appellant was indeed covered by clauses 8 and 9, of the ZAMTEL conditions of service which both provide for payment of three months' salary per completed year of service. Counsel further conceded that the clauses stand alone, are separate and had already been interpreted by this Court in the **Amos Chembo⁴** case relied on by the appellant.

Consideration of the Appeal and Decision

30. We have considered the arguments, submissions and case law referred to by learned Counsel for the parties in support and in opposition to the two grounds of appeal. In our view, the narrow issue in contention and at the heart of this appeal is whether, in addition to normal retirement benefits provided for in clause 9 of the ZAMTEL conditions of service, there was a long service gratuity payable to the appellant under clause 8? This is the issue in ground one of the appeal.
31. The learned trial judge found that there was nothing particularly special about the long service gratuity which was

not based on the number of years served, as one would ordinarily expect, but applied to an employee who retired normally, on medical grounds, was discharged or died whilst in service. The trial judge was of the view that, reading the clauses holistically, the payment was not any different from the one mentioned under clause 8 of the ZAMTEL conditions of service if read together, and was thus, already included under clause 9 (a) (iv).

32. Counsel for the appellant, on the other hand, in their written submissions that were filed on record, asserted that the two clauses are not one and the same. That if the framers of the conditions of service had not intended to provide for a separate provision for long service gratuity, they would not have included it as a separate clause. Counsel for the appellant relied for this assertion, on our decision in the case of **Amos Chembo⁴**.
33. In determining the actual import of the two clauses in contention, suffice to state that the issue goes to the court's duty to enforce a contract within the confines of the terms agreed by the parties. In **Henry Nsama & 134 Others v Zambia Telecommunications Company Limited,⁵** we

underscored that duty, when we said that:

"This Court would be very slow to read in an implied term into an employment contract, or indeed any other contract, that parties make for themselves especially where the terms are unambiguous. We are fortified in this position by the opinion of Lord Pearson (with Lord Guest, Lord Diplock and Lord Cross of Chelsea concurring) in the case of *Trollop and Colls Limited v Northwest Metropolitan Regional Hospital Board*¹⁵ at pp 266-267 that: -

"...I prefer the views of Donaldson J and Cairns LJ as being more orthodox and in conformity with the basic principle that the Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The Court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the Court finds that the parties must have intended that term to form part of their contract: it is not enough for the Court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves." (underlining for emphasis supplied)

34. It is clear from our holding in the **Henry Nsama**⁵ case that where the terms of a contract are unambiguous, they are to be given their literal meaning, for it is not the duty of the court to write into or imply terms on behalf of the parties. In that regard, we note that parts of clauses 8 and 9 that are relevant for determining the issues in contention in this

appeal, provide as follows:

"8 LONG SERVICE GRATUITY

8.1 Eligibility

Long Service Gratuity shall be paid in the following circumstances:

- a. ***Normal retirement***
- b. ***Death while in service***
- c. ***Retirement on medical grounds***
- d. ***Voluntary or early retirement at the request of the employee***

8.2 -

8.3 The level of Long Service Gratuity payment shall be three months pay for each, completed year of service and pro-rata for the incomplete year.

8.4 -"

9. RETIREMENT

a) Normal Retirement

- i) ***An employee shall retire on the last day of the month on which she/he attains the age of fifty-five.***
- ii) ***-***
- iii) ***The benefits on retirement shall be in accordance with the company's Pension Scheme.***
- iv) ***In addition to the retirement benefits accruing from the Pension Scheme, an employee retiring from service shall be entitled to payment of three months pay for each completed year of service and pro rata for any uncompleted year served".***

35. Considering the two clauses in contention as reproduced above, the issue of whether payment of long service gratuity in clause 8.3 and retirement benefits in clause 9 (a) (iv), are one and the same, was indeed settled by this Court in the

Amos Chembo² case, in the following observations:

"We think that in interpreting clauses 8 and 9 of the appellant's conditions of service, regard must also be had to their historical perspective.....clause 30 of the ZIMCO conditions of service.....contained the initial clause on long service gratuity. This clause was maintained in the current ZAMTEL conditions of service as clause 8. These conditions of service, which came into force in 1994, contain an additional retirement package in clause 9....

The two clauses set out separate conditions of service. Clause 8 sets out the entitlement relating to long service gratuity, while clause 9 deals with normal and early retirement benefits, among others. Both benefits under the two clauses are in addition to the benefits accruing from the pension scheme. Stated differently, the two clauses stand on their own feet and to that extent, they must be construed or understood in their own contexts. We, therefore, have no hesitation in accepting the trial Court's opinion that the entitlements in clauses 8 and 9 cannot be equated."

36. In light of our holding in the **Amos Chembo⁴** case, recounted above, and the concession magnanimously, made by the learned Counsel for the respondent at the hearing of the appeal, when he confirmed that clauses 8 and 9 are indeed separate, standalone clauses, ground one of the appeal must inevitably succeed.
37. Premised on the successful outcome of ground one, the appellant in ground five of the appeal also claims for housing allowance, pending full payment of his benefits. He relies for

that claim on clause 9 (h)(v) which provides that:

"Any employee who has been retired shall continue to receive housing allowance until the benefits accruing from the Company have been paid in full, except for benefits from the National Pension Scheme Authority which is not administered by the Company."

38. We have found on ground one of the appeal, that the appellant is entitled to payment of long service gratuity. Accordingly, the appellant is pursuant to clause 9 (h)(v), entitled to payment of housing allowance until the said benefit is paid in full. The entitlement to payment of long service gratuity and housing allowance being premised on the ZAMTEL conditions of service, shall be paid on the basic salary (excluding allowances) and less amounts already received. They shall further take into account the rebasing of the Kwacha.
39. The appellant having succeeded on both grounds of appeal will have his costs of the appeal, to be taxed in default of agreement.

M. MUSONDA

DEPUTY CHIEF JUSTICE

A. M. WOOD

SUPREME COURT JUDGE

J. K. KABUKA

SUPREME COURT JUDGE