

SCZ APPEAL 122/2000

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

ZAMBIA NATIONAL PROVIDENT FUND BOARD

APPELLANT

AND

NYAMBE MWANGALA

RESPONDENT

CORAM:

**Lewanika, DCJ, Chirwa and Mambilima JJs
at Lusaka on 20th March 2001 and 13th June
2002.**

For the Appellant:

**Mrs. M.V. Mulonda, Assistant Legal Counsel,
NAPSA**

For the Respondent:

Mr. C. Mundia, Mundia & Co.

JUDGMENT

Chirwa, J.S. delivered judgment of the Court: -

Cases referred to:

- 1. ZAMBIA AIRWAYS CORP. LTD. V GERSHOM MUBANGA [1990/92] Z.R. 149**
- 2. ATTORNEY-GENERAL V KAMOYO MWALE, Appeal 79/96**
- 3. GOODSON MICHELO & OTHERS V ZNPF BOARD SCZ 37/2000**

This is an appeal against an assessment of damages by the Deputy Registrar on a successful judgment in favour of the respondent against the appellant. The respondent was awarded K6,492,922.28, the sum calculated by

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the appellant as due to the respondent as at 30th November 1996. The memorandum of appeal has one ground of appeal, namely, that the learned Deputy Registrar erred in law in deciding that the respondent be compensated for the remaining period of service by payment of his salary and regular allowances up to the time he would rightly have retired. There is also a cross-appeal by the respondent in which the first ground of appeal is that the learned Deputy Registrar erred in law and in fact by awarding the respondent 10% interest on the sum of K6,492,922.28 with effect from January 1997; (b) the learned Deputy Registrar erred in law and in fact by not awarding costs to the respondent on assessment of damages when there was in fact a judgment granted by the High Court in favour of the respondent and in fact the assessment was to establish the quantum and not liability; (c) the learned Deputy Registrar erred in law and fact when he refused to award the respondent the claim in respect of the difference between Scale S8 and PF5 which latter scale was effected at the time when the respondent was serving his notice of termination. Further that his benefits were worked out on a wrong scale and therefore an adjustment ought to have been made on his pension and gratuity; (d) the learned Deputy Registrar erred in law and in fact by denying the respondent all allowances of regular nature when those allowances were fully pleaded and never specifically denied and traversed by the appellant in its defence but only denied at the assessment in spite conceding to judgment in favour of the respondent.

The brief background to the matter is that the respondent was employed by the Board, (ZNPF). By letter dated 11th November 1992 his services were terminated under Sections 11 (5) and 12 of the Civil Service (Local Conditions) Pensions Act. Cap. 410 on attaining the age of 55 years and his last day of service was 31st December 1992. While the respondent was serving his notice, his scale was up-graded but when his terminal benefits were calculated this factor was not taken into account. The respondent in his action also claimed that

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he be paid salary up to the age of 60 years when he would have properly retired under his conditions of service.

When the case came up for trial, the appellant told the court that they did not wish to proceed with the trial and asked that the case be sent for assessment of damages. Basically the appellant accepted liability but disputed the quantum and the learned trial judge correctly entered judgment in favour of the respondent and referred the case to the Deputy Registrar for assessment of damages.

At assessment the respondent gave evidence and evidence was led on behalf of the appellant from one witness. In making his awards the learned Deputy Registrar took into account the fact that the appellant paid the respondent terminal benefits based on Grade S8 and that there was no evidence before him to show what the co-relation there was between Scale S.8 and PF5 and he dismissed the respondent's claim that he had been paid at a lower scale.

Coming to the claim of payment of benefits using a formula of six and half (6½) months salary multiplied by 5 years was wrong and therefore resulted into underpayment. The learned Deputy Registrar found that the appellant conceded to this claim as they re-calculated the respondent's benefits by awarding him 5 years salary. He therefore awarded the respondent the re-calculated benefits based on the 5 years he would have served before reaching the retirement age. He considered the claims of allowances item by item and dismissed them giving detailed reasons for dismissing them.

The appeal by the appellant is on one ground only and it is as we have stated already, that the learned Deputy Registrar erred in law in deciding that the respondent be compensated for his remaining period of service by paying him his salary and allowances up to the time he would have retired. In arguing this ground, it was submitted that the learned Deputy Registrar made the award contrary to this Court's decisions in such cases as **ZAMBIA AIRWAYS CORP. LTD. V GERSHOM MUBANGA (1)** where the court awarded 12

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months pay. Further it was submitted that this court in the case of **ATTORNEY-GENERAL V KAMOYO MWALE (2)** held that one cannot be compensated for the remaining period of service on being wrongfully retired or services wrongfully terminated.

In answer to this ground on behalf of the respondent, it was argued that the evidence of the appellant's witness clearly supported the findings of the Deputy Registrar in that this witness admitted that the respondent was wrongfully paid without taking into account the revised salary and that the appellant owed the respondent the difference. It was also submitted that the decisions referred to by the appellant do not preclude parties from negotiating the mode and quantum of damages and that this was what was done in the present case.

We have considered this ground of appeal and we see no merit in it. The evidence of the appellant's own witness is full of admissions of wrong calculations of terminal benefits. Further the appellants in re-calculating the terminal benefits based the calculation on the 5 years unserved before retirement. We agree with counsel for the respondent that this court's previous awards do not preclude the parties from coming to awards higher than what we have awarded.

Courts will always encourage ex-curia settlements and that although the offer at page 47 seems not to have been respondent to but it is this court's understanding that it was made genuinely to effect an amicable settlement. It was in fact made not under "without prejudice". This show of acamically settling the matter is further strengthened by the appellant's admission of liability. What this court has said on paying one for services not rendered is a legal principle and it does not abrogate the parties' wish to settle otherwise. Following this, we cannot fault the learned Deputy Registrar's decision in his award following the parties wish and we confirm this award thereby dismissing the appeal.

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Coming to the cross-appeal's first ground on the complaint of 10% interest on the award. We agree with what we stated in the case of **GOODSON MICHELO & OTHERS V ZNPF BOARD SCZ (3)** that the award of interest is at the discretion of the court taking into account such factors as inflation and how the court decided on the figure awarded. Also that the money is the claimant's money which he could have invested somewhere. We have generally been awarding interest at short-term deposit rate as advised by the Bank of Zambia. We note that the learned Deputy Registrar did not give reasons for awarding interest at 10%, we have to consider whether this 10% award is unreasonable and we have to consider what is contained in the award. The offer by the appellant to settle the matter, from which the Deputy Registrar adopted the award was for 5 years for the period the respondent would have served before retiring at the age of 60 years. The respondent's monthly pay then was K30,571.00 and this was multiplied by 60 months and it came to K1,834,260.00. From this sum was deducted an amount already paid of K993,557.50 leaving a balance of K840,702.50. Then the due allowances for 5 years were awarded including unearned leave days of 240 days and the total amount came to K2,797,880.42. On this sum the appellant awarded interest at 36% and interest came to K3,695,041.86 and this was added to total compensation for 5 years awarded of K6,492,922.28. The award of 10% interest by the Deputy Registrar was in fact an award on a sum already containing interest. These points were never brought up in the appellant's appeal which we have dismissed. Having offered no reason for awarding 10% interest on the award, the learned Deputy Registrar misdirected himself in making this award. This is quashed and the respondent is awarded interest at short-term deposit rate from the date of writ to date of assessment thereafter 10% up to date of payment. The first ground of cross-appeal is allowed.

The second ground in the cross-appeal is that the learned Deputy Registrar erred in law and fact by not awarding costs to the respondent on

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assessment. We have looked at the judgment and written heads of arguments, we must say the reason assigned for not awarding costs to the respondent that since the award given is the same amount that was offered cannot stand. Having admitted liability, the appellant should have made a fresh offer of settlement or paid into Court the amount they thought was reasonable. They never did this and the case went for assessment. The award of the sum of K6,492,922.28 although offered cannot disentitle the respondent his costs. We allow this second ground of cross-appeal.

The third ground of cross appeal is that the Deputy Registrar erred in law and fact when he refused to award the respondent the claim in respect of the difference between Scale S8 and PF5 which latter scale was effected when the respondent was serving notice. This fact was conceded by the appellant's witness at page 99 that they owed the respondent the difference between the salary he was receiving and the salary increase he ought to have received on leaving. This ought to be paid to him. This ground of cross-appeal is allowed. The respondent should be paid the difference between what he was getting before the salary revision and the revised salary multiplied by 60 months. This balance is to carry interest at the short-time deposit rate from the date of the writ to date of assessment.

On the last ground of cross-appeal where the learned Deputy Registrar disallowed some allowances, we agree with him, they were disallowed on very firm grounds. This ground cannot stand, it is dismissed.

In the totality, the appeal is dismissed and cross-appeal allowed on grounds 1-3 but dismissed the fourth ground. We award costs to the respondent at assessment and in this Court to be agreed, in default to be taxed.

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D. M. LEWANIKA
DEPUTY CHIEF JUSTICE

D. K. CHIRWA
SUPREME COURT JUDGE

I. C. M. MAMBILIMA
SUPREME COURT JUDGE