

**IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 197/2008
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

B E T W E E N:

THE ATTORNEY GENERAL

APPELLANT

AND

JONES LUFUNGULO

RESPONDENT

Coram: Sakala, CJ., Chibesakunda & Chibomba JJS.

1st July, 2010 and 17th May 2012

For the Appellant : Col. M. Phiri, Senior State Advocate

**For the Respondent : Mr. S. Mambwe of Messrs Mambwe
Siwila and Partners**

JUDGMENT

Chibesakunda JS., delivered the Judgment of the Court.

Case Referred to

(1) Union Bank of Zambia Limited Vs Southern Province Cooperative Marketing
Union (1997) ZLR at p. 207

Legislation referred to

(1) Defence Act Cap. 106

This is an appeal against the ruling in an application by the Appellant, seeking leave to appeal out of time against CB Phiri J's Ruling of 17th June, 2008. CB Phiri J rejected the application for

leave to appeal out of time. Phiri J grounded her rejection of the application on two reasons; (1) that the application had not been made within reasonable time, (2) that the application was inordinate.

The history of this matter shows that the parties had made several applications counter applications before the lower court and before this court up to date. Some of these applications were the same applications which had first been before the High Court and before this Court and thus prolonging finalisation of this matter.

This matter first came before Mutale J (late) as way back as January, 1993. The claim before Mutale J, as endorsed on the writ of summons by the Respondent, was for;

“(1) A declaration that his retirement from the service of the on the 28th February 1992 was unlawful, sic

- (2) An order of reinstatement and payment of salary and allowance with interest from the date of retirement to the date of reinstatement; alternatively**
- (3) Damages for unlawful retirement from the service**
- (4) Any other or further relief**
- (5) Costs”**

On the 21st February of 1995, Mutale J (late) delivered a judgment in favour of the Respondent. In his concluding remarks, Mutale J. ruled that,

“I will not order reinstatement but allow all other claims to stand and I also order costs”.

It would appear at page 34 that the Appellant had appealed against Mutale J’s judgment of 21st February, 1995. On the 24th November, 1995 the Respondent took out summons to dismiss that appeal for want of prosecution. It would appear that these summons to dismiss the appeal were struck out. At page 32 of the record, Messrs Central Chambers filed in a notice of

restoration of these summons to dismiss the appeal for want of prosecution. There is no documentary evidence to establish whether or not this matter was restored. It is equally not clear as to what happened to this application but at page 40 of the record, there was an application for leave to appeal out of time against Mutale J's judgment. This application was rejected at the High Court so the parties now went before Chirwa JS (as he was then). He, on the 5th September 1996, granted the Appellant leave conditionally to file the record of appeal within 21 days and that failure to do so would result in the appeal being dismissed without further application. There is no record as to whether or not the Appellant complied with this Order that is on record. Next is that the Respondent, because the appeal lay on the appeal record for 2 years without any action being taken, therefore applied to have the matter dismissed for want of prosecution. This application was granted. So the Appeal against judgment on liability was dismissed accordingly.

The Respondent then went before the Learned Deputy Registrar, the late Mr. Munyeme, on the 1st of June, 1998 for assessment of

the judgment debt. The learned Deputy Registrar made a ruling specifying the amount of award which the late Hon. Judge had awarded to the Respondent as terminal benefits. From page 173 to 175, the learned Deputy Registrar calculated the amount due to the Respondent and the total amount calculated was K83,299,080.00. He further remarked at the end of the assessment that;

“It is further ordered that the monthly pension collection of the plaintiff be adjusted in accordance with what the plaintiff should have earned as his pension which was K6,293,297.34 as at April, 1992. Plus costs to be born by the party at fault. Everybody will note that this court has dealt with this case as a special damages case. This is so because all parties are agreeable that all these damages were incurred immediately the plaintiff was wrongfully retired. You will note that the salary award has not been computerised in form of interest as per each relevant year because of the fact that both parties accepted this issue to stand as of today’s date”

He made no order on interest but that was implied because the claim before Mutale J included a claim of interest.

After the ruling of the learned Deputy Registrar, Mr. Munyeme, the Advocates for the Respondent made several follow ups with the Appellant to claim the judgment debt awarded in the ruling without success. Therefore, on the 1st June, 1998, the Appellant applied again for leave to appeal out of time against the ruling by Mr. Munyeme (see page 52). According to the Appellant, prior to this application for leave to appeal out of time, a total sum of K241,569,331.99 had been paid as a judgment debt to the Respondent plus a sum of K12,000,000,000 to the Respondent's advocates as legal costs. On 30th of October, 1998, the learned Deputy Registrar granted leave to the Appellant to appeal against the ruling of Mr. Munyeme DR (see page 55 of the record).

The Respondent appealed to the High Court in chambers against the Learned Deputy Registrar's order of granting leave to the Appellant to appeal out of time. Imasiku J directed on the 17th

December, 1998 that the application was wrongly before him and that it should be presented before the Supreme Court.

So the parties came to court applying to dismiss the appeal for want of prosecution. Muzyamba JS (late) on the 12th February, 1999 made an order that the application to dismiss the appeal for want of prosecution was to be deemed to be withdrawn. But the application for leave to appeal out of time was granted to the Appellant. He ordered that the record of appeal had to be filed within 30 days and that failure to file the record of appeal within that period was going to result in the appeal being dismissed.

Now the Appellant went before Chinyama J (then the Deputy Registrar) for interpretation of the ruling on assessment by Mr. Munyeme which was delivered on 1st June, 1998. Chinyama J rendered the ruling on the interpretation of the assessment order on the 19th May, 2006. In the ruling, Chinyama J ruled that the K83,299,080.00 attracted compound interest of 30% per annum as per the ruling of the then Deputy Registrar (Mr. Munyeme). He further ruled that the money, which had been paid to the

Respondent had to reflect the compound interest as part of the order of the Deputy Registrar. He went on also to rule that Mr. Munyeme's order did not include interest with respect to the pension sum of K6,293,297.32. He further ordered costs to be in the cause.

The Appellant aggrieved by this Ruling now sought leave from the Deputy Registrar (Chinyama J) to appeal against his ruling of 19th May, 2006. In the ruling delivered on 31st August, 2006, Chinyama J refused to grant them leave. The Appellant then sought the intervention of this court in trying to prosecute the appeal. Chitengi JS (late) directed that that the application for leave to appeal out of time had to be presented before the High Court Judge in chambers.

This is what prompted the Appellant to go before CB Phiri J seeking leave to appeal out of time. CB Phiri J ruled on the 17th June 2008 that the application was not made within reasonable time. That the time taken between the ruling of Chinyama J and the application for leave was not reasonable. She ruled that the

application for leave was inordinate. She also rejected the Appellant's ground that what contributed to the delay for them to appeal was because they had applied to seek leave under a wrong order. She refused to grant them leave. This is what has brought them to this court.

Before this court, the Appellant raised three grounds of appeal; that,

“(1) The court below misdirected itself in law and infact when it held that the Appellant’s Application for leave to appeal was wrongly before the Court

(2)The Court below misdirected itself in law and infact when it held that the Appellant’s Application for leave to appeal out of time had not been made within a reasonable time

(3)The Court below erred in law and infact when it failed to rule on the issue of the compound interest.”

At the hearing of the appeal, both parties relied on their written heads of argument. Col. Phiri in his submissions emphasised only one point namely that the matter which was

meant to come to this court on appeal was on the award of compound interest by Chinyama J, when the Appellant had already discharged its judgment debt obligation by paying the full judgment sum plus simple interest and legal costs. Citing the case of **Union Bank v Southern Province**¹, he argued that it was a misdirection on the part of the learned Deputy Registrar to have held that the award included compound interest. Col. Phiri argued on grounds 1 and 2 that it was a misdirection in law and in fact for the court to have held that the appeal was wrongly before the court and that the application for leave to appeal out of time had not been made within reasonable time. Counsel traced the history of this application by referring to the portion of the ruling of Chinyama J. in which he said;

“under that rule there is no requirement for leave. As it is therefore the Defendant should have appealed within 7 days of date of my delivery the Ruling. The Defendant did not do so and to their own detriment”

Counsel, following these remarks by Chinyama J submitted that when interpreting the Ruling of Munyeme, the learned Deputy Registrar, on the assessment of damages awarded, the Appellant sought leave to appeal against that Ruling. Then the parties appeared in chambers before Chinyama J, who refused to grant the Appellant leave. This is what prompted the Appellant to come to the single judge of this court, Chitengi JS. Chitengi JS directed that the Appellant ought to have gone before the High Court to seek leave from the Judge in chambers. In pursuant to this order, the parties now appeared before CB Phiri J in chambers seeking leave to appeal against Chinyama's refusal to grant them leave to appeal against his ruling out of time. Given this background, Col. Phiri, argued that the application was therefore rightly before C. B. Phiri J.

Col. Phiri further argued that the court below misdirected itself when it held that the application for leave had not been presented within reasonable time. He pointed out that the ruling appealed against was rendered on the 19th of May, 2006 by Chinyama J. Now the application for leave was filed on the 17th

July, 2006, a period of 1 month and some days between. So there was no inordinate nor inexcusable delay. Counsel also canvassed the view that since the Respondent had already been paid the judgment sum plus simple interest, the finding by CB Phiri J in her ruling that;

“the only application made by the Defendant was for interpretation of the ruling which was brought under a wrong section”,

was erroneous as it was not the Appellant who had made an application for interpretation of the Ruling by the Deputy Registrar, but the Respondent who was dissatisfied with the payment which he received in the sum of K241,569,331.99 inclusive of simple interest.

On ground 3, Counsel argued that the lower court erred in law and fact when it failed to rule on the issue of compound interest. Counsel argued that the provisions of Order 30 of the High Court Rules which are similar to the provisions in Order 58(13) of the RSC 1999 Edition, give a mandate to the judge in chambers, when hearing an appeal from the Deputy Registrar,

namely to treat the hearing of that application as rehearing de novo. A judge in chambers has power to treat the matter as though it was coming to him or her for the first time. In the view of Counsel; in line with this provision C. B. Phiri J ought to have heard the appeal on compound interest denovo and to have made a ruling on that issue on compound interest. C. B. Phiri J, instead of dealing with that application and the question of compound interest, rejected the application for leave and even the application to rule on whether or not the Respondent was entitled to compound interest as part of his terminal benefit package. He argued that this was a misdirection. According to Col. Phiri, the learned trial Judge should have granted leave to the Appellant to file its appeal out of time. She should also have looked at the judgment of Mutale J and compared it with the assessment ruling by the learned Deputy Registrar which awarded compound interest. So Counsel asked this court to grant leave because this point of whether or not compound interest is provided for in Regulation 9 of the Defence Act, is an important and novel point that this court should pronounce itself on. Against this background, Counsel urged this court to find merit in the appeal.

The Respondent's response, as augmented by written arguments, filed five days after the court's sitting, provided the following argument that the lower court was on firm ground to have rejected the application for leave to appeal out of time.

On grounds 1 and 2, Counsel argued that the Appellant firstly filed an application pursuant to a wrong rule. The Appellant had brought the application under Order 47 of the High Court Rules instead of Order 30 of the High Court Rules. Order 47 of the High Court Rules deals with appeals and matters originating from the Subordinate Courts; while Order 30 deals with applications and proceedings in the High Court whether before a Judge, the Registrar or a Deputy Registrar. So the appropriate provision to have been invoked ought to have been order 30 r 10. In her ruling, CB Phiri J agreed that the right provision to have been invoked was Order 30r10.

Counsel further argued that in the case before the court, there was no requirement to seek leave had the Appellant filed the notice within seven days of the ruling.

On the other point namely that the court misdirected itself when it held that the application for leave to appeal out of time, had not been made within reasonable time, and that it was without due regard to the actual date when ruling appealed against was delivered and when the appeal was filed, Counsel argued that there was unreasonable and inordinate delay on the part of the Appellant to apply for leave to appeal out of time. The fact that they made an application under a wrong rule was not sufficient reason for the Appellant to have delayed in the application for leave. Counsel argued that this delayed appeal had resulted in the Respondent being prejudiced by causing delay in the enjoyment of the fruits of his judgment. Counsel also pointed that from the record, this court will note that the Appellant have been in a habit of filing a number of applications which have had the end result of delaying due process of law. Counsel submitted that it has taken this matter more than 17

years up to date without finality thus delaying the Respondent's enjoyment of the fruits of his judgment. Counsel explained that this inordinate delay resulted from the fact that the Appellant applied wrongly for leave to file the appeal out of time to the Supreme Court instead of the High Court. They were then directed to go before the High Court. By the time they now applied before the High Court, there was inordinate delay. Additionally, Counsel argued that in our civil justice system, an Appellant who sits back without taking any steps to prosecute his appeal until the other side applies to dismiss that appeal before making his own application for extension of time to appeal, does so at his own peril. This is what the Appellant did in this case. He therefore urged this court to uphold the High Court's ruling.

On ground 3, Counsel argued that this argument is erroneous as the Appellant in the application in the court below did not move the court to make pronouncements on the aspect of compound interest. The application before the court was for leave to appeal out of time. Counsel for the Respondent referred to the affidavits of the Appellants and to the court Order

by Chitengi JS in which the learned Judge ruled that the Application for leave ought to have been filed before the High Court. So Counsel argued that the submissions by Counsel for the Appellant was misleading to the court. Counsel further explained that Chitengi JS' ruling on the 21st January 2010 was misconstrued by the Appellant as the same directed the Appellant to apply for leave to appeal out of time to either the learned Deputy Registrar or High Court Judge in Chambers to determine whether or not to grant leave to appeal out of time not to determine the merits of the appeal. So the question of whether or not the Defence Act provides for compound interest would not arise before the single judge for it to be dealt with *denovo*. Counsel further criticised his colleague on the other side by explaining that Order 20 of the High Court Rules does not relate to this matter or even to the question of compound interest.

Counsel further argued that the case of **Union Bank of Zambia Limited v Southern Province Co-operative Marketing Union Limited**¹ was irrelevant to the issues before the court. He distinguished the case of **Southern Province Co-**

ooperative Marketing Union Limited¹ from the present case and explained that the appeal to be prosecuted is on one point that the unusual rate of interest on the judgment debt (compound interest). He further explained that compound interest requires express agreement or in the alternative evidence to establish consent or acquiescence to such a practice or custom.

Counsel went into details of the provisions of the **Defence Act**¹ and all ZAF Regulations. According to him, the said compound interest was an aspect which both parties had expressly agreed upon as provided in the condition of services stipulated in Regulation 9(2). Counsel explained that this provision carries compensatory value of over 12 months salary in lieu of notice upon termination of employment at the instance of the Authorities. According to Counsel, Regulation 9(2) provides that involuntary regulation has a higher value than voluntary retirement as provided in Regulation 9(1). The Respondent had been forcibly retired and therefore should be adequately compensated and as such covered by Regulation 9(2) and therefore his award had to be calculated taking into account

compound interest. He referred to the portion from Mr. Munyeme's Ruling as supporting this preposition in which the learned Deputy Registrar said;

“Everybody will note that this Court has dealt with this case as a special damage case. This is so because the parties are agreeable that all these damages were incurred immediately the Plaintiff was wrongfully retired. You will note that the salary award has not been computerised in form of interest as per each year because of the fact that both parties accepted this issue to stand as of today's date”.

He, therefore, urged this court to dismiss the appeal and uphold the lower court's Ruling.

We have considered the record of appeal and all the issues raised in this appeal. On grounds 1 and 2, it is common ground that in the judgment of Mutale J, all the prayers, as endorsed on the Writ, as per page J2 of our Judgment, were granted to the Respondent, except for claim 2 that is the prayer for

reinstatement. Mutale J had found that the Respondent was unlawfully dismissed or retired. He ordered salary plus allowances, with interest from the date of the purported retirement to the date of judgment to be paid to the Respondent. In the alternative, he ordered damages for unlawful dismissal. On assessment, the Learned Deputy Registrar made the order which we have already quoted at J2. This is when the element of compound interest was introduced. The issue of compound interest was not even pleaded at High Court.

We also note that this record has a myriad of interlocutory applications and counter applications before the Deputy Registrar, the High Court and the Supreme Court causing a lot of over lapping of rulings and thus causing so much confusion. This in our view has greatly contributed to the delay of disposing this matter for more than 19 years. However, as submitted by the learned Counsel for the Respondent, the application before this court is for leave. The Appellant has argued that granting leave for it to appeal to this court out of time is important because this court being the court of the last

instance should pronounce itself on one issue that is whether or not Regulation 9(2) of the **Defence Act**¹, ZAF Regulations, provides for compound interest. We agree that this is an important point on which this court should pronounce itself. We further agree that at this stage, we do not have to deal with the inquiry as to whether or not leave was required after Chinyama J's Ruling of interpreting Munyeme DR's Ruling. In our view, this was over- taken by the fact that Chitengi JS's Ruling directed that the Appellant should seek leave before a High Court Judge. So the matter was rightly before CB Phiri J. We are also persuaded to accept the Appellant's argument that granting leave will not occasion any injustice to the Respondent taking into account the fact that the Respondent has already been paid the judgment sum plus simple interest. We, therefore, are satisfied that given this background of this case, this court, being the highest court of the land, should pronounce itself on this issue of compound interest.

We, therefore, find merit in the appeal. We grant leave. We order that the Appellant file the records of appeal within 21 days. Costs to be borne by the Appellant.

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E. L. Sakala
CHIEF JUSTICE

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L. P. Chibesakunda
SUPREME COURT JUDGE

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H. Chibomba
SUPREME COURT JUDGE