IN THE COURT OF APPEAL
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL /35/2017

Between:

NASANDO ISIKANDA AND 3,523 APPELLANTS

AND

ATTORNEY GENERAL RESPONDENT

CORAM: Mchenga, DJP, Chaishi and Mulongoti, JJA

On 6th June 2017, 27th June 2017 and 7th September 2017.

For the Appellant: M.J. Katolo, Milner Paul Legal Practitioners
For the Respondent: F. Chidakwa, Assistant Senior State Advocate, Attorney General's Chambers

JUDGMENT

Mchenga, DJP, delivered the Judgment of the Court.

Cases referred to:

1. Kalyoto Muhalyo Paluku v Granny's Bakery and Others [2006] Z.R. 119
2. William Matsautso Zulu v Avondale Housing Project Limited [1982] Z.R. 172
3. Andrew Mulumba and Another v The Attorney General- Appeal No.117/2005,

Works referred to:

1. The Rules of the Supreme Court, 1999 Edition
2. Chitty on Contracts, Volume 1, General Principles 29th Edition (2004, Sweet and Maxwell)

This is an appeal against the decision of the Registrar dismissing the 12 appellants' application for assessment of their dues following the Judgment passed in their favour on 15th December 2006.

The history of the matter is that in February 1998, the Government, through Cabinet Office Circular No. 2 of 1998, invited a specified category of public service employees to take up an offer of going on "early retirement" in what came to be known as "voluntary separation". The terms for the separation were set out in that circular.

The appellants, who were in a group of 3,523 others, applied to go on voluntary separation and their applications were accepted. By the year 2002, it became apparent that there was disagreement on what the appellants and their colleagues were entitled to under the separation agreement. The group of 3,523, including the 12 appellants, instituted court proceedings seeking the following reliefs against the Government:

1. **A declaration that the purported declaring of the plaintiffs redundant who had reached the age of 50 years but not over 55 years and those who served 20 years or more is null and void.**
2. **An order that the plaintiffs be deemed to have continued in employment until the attainment of the mandatory age of 55 years.**
3. **Payment of the separation package as provided for in both Cabinet Circular No. 2 of 1998 and the Separation Agreement signed by the Government and each of the individual plaintiffs.**
4. **Payment of accrued salary arrears, allowances and other entitlement that the plaintiffs may have continued to enjoy until retirement age of 55 years and refund of home rentals to the plaintiffs occasioned by the late payment of the separation package in full.**

5. **For payment of full pension benefits for those plaintiffs who worked for periods of over 20 years and those who reached 55 years of age and above.**
6. **Payment of the difference in repatriation expenses or amounts paid and actual costs incurred at the actual time of repatriation.**
7. **For commutation of earned leave days accrued as each plaintiff was only allowed thirty (30) days commutation.**
8. **For payment of both salaries and house rentals to the plaintiffs in accordance with their conditions of service up to the date the separation package is paid in full.**
9. **Interest at current bank rate.**
10. **Any other relief the court may deem just and appropriate and**
11. **Costs**

A full hearing followed and on 15th December 2006, the High Court delivered its Judgment. The trial Judge found that the appellants and their colleagues had proved their 3rd, 4th, 6th, 7th, 8th, 9th and 11th claims. The other claims, were found not to have been proved.

On 29th May 2008 and on 19th February 2009, some of the 3523 litigants, through their lawyers, Messrs Lukona Chambers and Messrs Mumba Malila and Partners, signed consent orders with the respondent setting out what was due to them following the Judgment. The parties also agreed that payment of the amounts set out in the orders would settle all the claims in the matter. Payments were then disbursed by the respondents to law firms representing the employees who had gone on voluntary separation.

On 2nd December 2015, the 12 appellants filed in a notice for the assessment of their dues premised on the 15th December 2006, Judgment. The notice was objected to by the respondent on the ground that the appellants had been paid

on the basis of consent orders executed on 29th May 2008 and 19th February 2009. Evidence, in the form of disbursement schedules to law firms was presented to support the claim that the appellants had been paid.

After examining the disbursement schedules, the Registrar found that the application for assessment had no merit because the appellants, had through their lawyers, been paid their dues. She proceeded to dismiss their applications hence this appeal.

Four grounds of appeal have been advanced and they are as follows.

1. **The court below erred in law and in fact when it dismissed the plaintiff's application for assessment on the ground that the Consent Order included the 12 plaintiffs contrary to the evidence on record which shows that the 12 plaintiffs were not part of the two Consent Orders that were executed herein.**
2. **The court below erred in law and fact when she relied on exhibits "RS/2"and "RS/3" in the affidavit in opposition to the Application for Assessment as proof of payment to the 12 plaintiffs when the 12 plaintiffs had refused to be paid under the Consent Orders pursuant to which the alleged payment were made and to which Consent Orders were not a party.**
3. **The court below fell into gross error when she found that the 12 plaintiffs had received payments from various law firms in the absence of specific evidence or proof of receipt of money by the 12 plaintiffs.**
4. **The court below fell into error when she failed to conduct a full assessment and establish whether the payment if (any made to the plaintiffs) were in accordance with the Judgment of the court dated 15th December, 2016 under which the 12 plaintiffs insisted to be paid.**

At the hearing of the appeal, both parties indicated that they would rely on the written submissions.

In support of the first ground of appeal, counsel for the appellants submitted that the Registrar's finding that the document marked "RS/3" (consent order dated 29th May 2008) established that the appellants were covered by the consent orders and had been paid through their lawyers, was not supported by the evidence. He pointed out that the consent order dated 29th May 2008, related to 3495 plaintiffs, while that signed on 19th February 2009, related to 16 plaintiffs. The two groups came to a total of 3511, leaving a balance of 12; the appellants herein.

Counsel also referred to the case of **Kalyoto Muhalyo Paluku v Granny's Bakery and Others (1),** and submitted that since the two consent orders where not signed by the appellants' lawyers, they are not parties to the orders and are not bound by them. In addition, counsel referred to the case of **William Matsautso Zulu v Avondale Housing Project Limited (2),** and submitted that even though this is an appellate court, the Registrar's findings, that the appellants were bound by the consent agreements, which is a finding of fact, can be set aside because it is not supported by evidence.

Coming to the second ground of appeal, counsel referred to **Order 42 rule 5A sub-rule 4 of the Rules of the Supreme Court (1),** and submitted that for a consent order to be effective, it must be endorsed by a party's lawyer. In this case, the consent orders dated 29th May 2008 and 19th February 2009, do not show that the appellants' lawyers appended any signature to them.

As regards the third ground of appeal, counsel referred to **Chitty on Contracts, Volume 1, General Principles, 29th Edition (2)**, paragraph 21-058, at page 1266, and pointed out that payment can be proved by any evidence but a receipt signed by the creditor or his agent is the usual method. He then submitted that in the absence of any proof that the appellants or their lawyers received the payments, the registrar's findings that they were paid is perverse and it must be reversed.

Counsel's submission in support of the 4th ground of appeal was that there was misdirection when the Registrar failed to assess the appellants' claims in line with the 15th December 2006, Judgement. He referred to the case of **William Matsautso Zulu v Avondale Housing Project Limited (2)**, and submitted that presented with the Judgement and the affidavit in support of the application for assessment, the Registrar should have considered the claims of each one of the appellants before coming to the conclusion that they had been paid in accordance with the consent orders. Her failure to do so is a misdirection.

Finally, counsel referred to the unreported case of **Andrew Mulumba and Another v The Attorney General (3)**, and pointed out that in that case, the Supreme Court decided to assess damages after noting that they would not refer the matter back to the Deputy Registrar because the matter had taken too long. He urged us to take a similar approach because this matter has been in court since 2002 and all the documents required to determine what is due to the appellants are on the record.

In response, counsel for the respondent argued the first, second and third grounds of appeal together. Counsel pointed out that the Registrar was on firm ground when she found that the appellants were subject to the consent order dated 28th May 2008 and that substantial amounts of money had been paid to them on its authority. The findings of the court are supported by the disbursement schedule and the consent orders dated 29th May 2008 and 11th February 2009, respectively.

In response to the fourth ground of appeal, counsel submitted that assessment of damages is dependent on the evidence presented before the court. In this case, the assessment must be based on the consent order and the payments that have already been made to the appellants. He referred to **Order 27 rule 1 sub-rule 1 of the Rules of the Supreme Court** and submitted that it would have been improper for the court to award them the K45,232,786.00 they are claiming, without any hearing and evidence proving that they were entitled to that amount. He urged us to find no merit in the four grounds of appeal and to dismiss the appeal.

We have considered the evidence that was presented to the Registrar and her ruling. We have also considered the submissions of counsel. As we see it, all the four grounds of appeal and the arguments in favour of or against them, are concerned with one issue; whether the appellants were parties to the consent agreements that were signed after the Judgment of 15th December 2006 and the implications thereof. We will therefore deal with all the grounds of appeal together as they are premised on the same arguments.

The consent order dated 29th May 2008, was executed by Lukona Chambers on behalf of 3495 plaintiffs. In the case of the consent order dated 19th February 2009, it was executed on behalf of 16 plaintiffs by Messrs Mumba Malila and Partners. When the number of clients the two law firms were representing are added up, there is a balance of 12 claimants who did not sign either of the two consent orders. Other than claim that the 12 appellants were paid, the respondent did not lead any evidence establishing that their lawyers executed any of the consent orders.

We find, as was rightly submitted by counsel for the appellants, that the 12 appellants cannot be bound by the consent orders because they are not party to them. Though the disbursement schedules have the appellants particulars, the moneys were not remitted to their lawyers but to the lawyers who had signed consent orders on behalf of others. There is no evidence that those lawyers at any point represented the appellants.

We find that a proper evaluation of the evidence before the Registrar, would have led the court to a finding that the appellants were not party to the consent orders and are therefore entitled to have their dues assessed on the basis of the 15th December 2006 Judgement. Consequently, the finding by the Registrar that the appellants were bound by the consent orders is set aside as it is not supported by evidence.

Reverting to the grounds of appeal, the first ground of appeal succeeds and we find that the Registrar erred when she found that the appellants were not entitled to have their dues assessed on the basis of the 15th December 2006, Judgement because they were party to the two consent orders signed with the respondent.

The second ground of appeal equally succeeds because we find that there was misdirection when the Registrar found that there was proof that the appellants were party to the consent orders. As we have already indicated, there is no evidence to support that finding.

Coming to the third ground of appeal, it equally succeeds because there is no proof that the 12 appellants were paid. What was proved was that money that was calculated on the basis of consent orders was remitted to law firms that did not represent them. But as previously indicated, they were not party to the consent orders.

Finally, there being no evidence that the appellants were party to the consent orders and that they actually received the money that was remitted to the law firms in their name, the Registrar should have proceeded to assess their dues. The fourth ground of appeal succeeds as well.

The appellants prayed that in the event that their appeal succeeds, we should consider assessing their dues because all the relevant documents are before us. They referred us to the case to the case of **Andrew Mulumba and Another v The**

Attorney General (3), in taking this approach. We have looked at that case and contrary to the submissions by counsel, it was not concerned with the assessment of damages but the determination of the rate of interest payable after Judgement.

In this case, the affidavit in support of the notice of assessment has 73 pages of documents. In addition, there are close to 200 pages of other documents relevant to the assessment that are part of the record of this appeal. With that many documents, we do not think that this is a proper case for us to assess the appellants' dues. Instead, we send the matter back to the Registrar for assessment of the appellants dues as they were set out in the Judgment of 2006.

Costs to the appellants, to be taxed in default of agreement.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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J. Chashi
COURT OF APPEAL JUDGE

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J.Z. Mulongoti
COURT OF APPEAL JUDGE