**IN THE SUPREME COURT OF ZAMBIA**
**HOLDEN AT KABWE**
*(Civil Jurisdiction)*

**APPEAL NO. 145/2012**
**SCZ/8/270/2012**

**BETWEEN:**

GETRUDE CHIBESAKUNDA MWILA KAYULA — APPELLANT

**AND**

FAMILY HEALTH INTERNATIONAL — RESPONDENT

**CORAM: Mwanamwambwa, Musonda, Hamaundu, J.J.S.**
On the 9th of April, 2013 and1st August 2014

*For the Appellant:* *Mr C. Sianondo, of Malambo and Co.*
*For the Respondent:* *Mr C. Chula, of Chibesakunda and Co.*

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# JUDGMENT

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**Mwanamwambwa, J.S., delivered the Judgment of the Court.**

***Cases referred to:***

1. **Chilanga cement Plc V. Kasote Singongo (2009) Z.R. 122.**
2. **Zambia Consolidated Copper Mines Limited V. James Matale (1996) Z.R. 144.**
3. **Norwich Union V. British Railways Board (1989) E.G.LR 137.**
4. **Mazoka and Others V. Mwanawasa and others (2005) ZR 138.**
5. **James Mankwa Zulu and others V. Chilanga Cement, Appeal No. 12 of 2004(unreported).**

***Legislation referred to:***

1. **The Employment Act, Cap 268 of the Laws of Zambia, Section 26B.**
2. **The Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia, Section 97**

***Other Work referred to:***

**Norman Selwyn: Law of Employment, 13th Edition, Oxford University Press.**

When we heard this Appeal, Hon. Mr Justice P. Musonda, was part of the Court. He has since resigned. Therefore, this Judgment is by the majority.

This is an appeal against the Judgment of the Industrial Relations Court dated the 26th of July, 2012. In that Judgment, the learned trial Judge dismissed the Appellants claim for constructive dismissal.

The brief facts of the matter are that the Appellant was employed as Administrative Officer by the Respondent in 2005, on a five year contract. When this contract expired, the Respondent granted the Appellant another five year contract in 2009. On the 28th of February, 2011, the Respondent instituted disciplinary proceedings against the Appellant for dishonest conduct. However, the Appellant was cleared of these disciplinary charges. On the 19th and 21st September, 2011, the Appellant was informed that her position had been abolished and that she was being offered another position. The Appellant refused to take up the position she was offered on grounds that it was lower than the one of Administrative Officer. On the 28th of September, 2011, the Appellant was given a notice of redundancy stating that in

two months' time, her position would be abolished. The two months was to expire on the 28th of November, 2011.

On the 9th of November, 2011, the Appellant took out a complaint in the Industrial Relations Court, for the following reliefs:

1. **Damages for constructive dismissal;**
2. **Alternatively, damages for unfair and/or wrongful dismissal;**
3. **Damages for loss of employment;**
4. **Costs; and**
5. **Any other remedy that this court may consider fit.**

On the 26th of July, 2012, the Industrial Relations Court delivered its Judgment in this matter. The Court was of the view that the Appellant was properly relieved of her duties through redundancy. That there was no constructive dismissal because the Appellant was declared redundant. The learned trial Judge was also of the opinion that there was no dismissal in the case because the Appellant was declared redundant. That since the Appellant was declared redundant, there cannot be either unfair or wrongful dismissal. Finally, the Industrial Relations Court awarded the Appellant a redundancy package of two months

basic pay for each completed year of service if she was not already paid.

Dissatisfied with the above Judgment, the Appellant appealed to this Court against the above Judgment. There are four grounds of appeal. These are:-

**Ground one**

**The Court below erred both in law and in fact in holding that the termination was as a result of redundancy when the said termination was short of conditions when redundancy can be declared in the Respondent's firm**

**Ground two**

**The Court below erred both in law and in fact by failing to go behind the reason for declaring the Appellant redundant which reason is that she refused to accept a demotion.**

In the alternative, the Appellant advanced the following ground of appeal:

**Ground three**

**The Court below erred both in law and in fact in failing to order that redundancy package be paid from 2005 when the Appellant joined the Respondent up the time of termination.**

**Ground four**

**The Court below erred in law and in fact when after finding that the Appellant was declared redundant failed to order that she be paid salaries until all terminal benefits which include allowances, which were not paid by the Respondent, are paid in full.**

In ground one of the appeal, Mr Sianondo submitted that in accordance with the Respondent's Local Employee Manual, there are conditions that are to be satisfied before declaring any employee redundant. He stated that clause 2.5.1 of the manual provides that there should be reduced or a stoppage of funding to the Respondent. He argued that since the reasons are written, resort cannot be to **section 26(B) of the Employment Act, Cap 268 of the Laws of Zambia** and that strict adherence to the contract is the only way out. He stated that the need to adhere to the conditions of service was stated in the case of **Chilanga Cement Plc V. Kasote Singongo** [1] and particularly on page 140 where the Court reasoned that:

> **"it is our view that the Appellant certainly did not honour its duty to minimise the impact of the redundancy on the respondent contrary to the undertaking in the conditions of service. This, in our view, was a breach of its duty."**

Counsel argued that according to page 195 of the Record of Appeal, the Respondent breached its duty. He stated that the advertisement that appeared in the local newspapers was increasing the number of employees and not reducing them. Counsel submitted that the non-compliance with the manual by

the Respondent is fatal and that this Court should allow this ground of appeal.

On behalf of the Respondent, Mr Chula submitted that clause 2.5.1 of the Respondent manual points out the fact that the Respondent is dependent on donor funding and that loss of funding may result in the reduction of the work force and redundancy. That the clause does not in any way limit the redundancy process only to when there has been loss of funding. He argued that **Selwyn's Law on Employment, 13th Edition, page 443** states that:-

> **"a dismissal shall be for reason of redundancy if it is wholly or partly attributed to:**
>
> **(a) The fact that the employer has ceased, or intends to cease to carry on that business for the purposes for which the employee was employed;**
>
> **(b) The employer has ceased or intends to cease to carry on that business in the place where the employee was employed;**
>
> **(c) The fact that the requirements of that business for the employees to carry out work of a particular kind or for them to carry out that work in the place where they were so employed, have ceased or diminished or are expected to cease or diminish."**

Mr Chula submitted that redundancy can arise because the work has been reorganised, thus requiring fewer employees to do the same work or because of the introduction of labour saving

devices or a change in the work pattern which requires the same number of employees but a different kind of skill or one to whom different terms and conditions of employment apply.

Counsel stated that the Respondent carried out the redundancy in line with the provisions of the manual. He argued that the Appellant was given one month notice which was extended by another one month. He added that the Appellant was also paid her two months' pay for each completed year of service.

We have looked at the evidence on record and considered the submissions filed by both parties. The Respondent's Local Employee Manual, appearing on page 128 of the Record of Appeal sets out three issues which can lead to reduction in force. These are funding reduction, project or program completion or discontinuance and redundancy. Therefore, we are of the view that the manual does not limit declaring an employee redundant only when there is a reduction in funding. Counsel for the Appellant argued that Section 26B of the Employment Act cannot apply in this case because the conditions of service are written down. We agree with this argument to the extent that section 26B

does not apply to written contracts. This Court held in the case of **Chilanga Cement Plc V. Kasote Singogo**, referred to above that-

> **"S. 26 B of the Employment Act, dealing with termination of employment by way of redundancy does not apply to written contracts. In enacting this provision, Parliament intended to safeguard the interests of employees who are employed on oral contracts of service, which by nature would not have any provision for termination by way of redundancy."**

From the above, it is clear that section 26B of the Employment Act does not apply to this case.

However, even looking strictly at the provisions of the manual, which is part of the Respondent's conditions of service, the Respondent is not precluded from declaring an employee redundant as in the circumstances of this case. Counsel for the Appellant argued that the Respondent breached its duty of minimising the impact of the redundancy. We do not agree with this argument. This is because the evidence on record shows that the Appellant was offered an alternative position which she declined. In our view, this was a way of trying to minimise the impact of the redundancy by the Respondent.

Further, the trial Court found as a fact that the Appellant was declared redundant. **The Industrial and Labour Relations**

**Act, Cap 269** of the Laws of Zambia, under **Section 97** provides that-

> **"Any person aggrieved by any award, declaration, decision or judgment of the Court may appeal to the Supreme Court on any point of law or any point of mixed law and fact."**

The above position of the law was confirmed by this Court in the case of **Zambia Consolidated Copper Mines V. Matale**[2] and many other cases.

We note that this ground of appeal is against the lower Court's finding of fact that the Appellant was declared redundant and not constructively dismissed. This is against the spirit of section 97. Therefore, this ground of appeal fails for lack of merit.

In Ground two, Mr Sianondo submitted that the Industrial Relations Court failed to use its jurisdiction in as far as redressing the injustices discovered as stated in the case of **Zambia Consolidated Copper Mines V. James Matale**[2]. Counsel argued that though the Appellant was cleared of the charge of dishonest conduct, the Respondent continued to bring up the matter. He added that after the Appellant was given notice of redundancy, she was offered a lower position in the Respondent organisation. Counsel argued that according to the

notice of redundancy and the evidence of the Respondent's witness at page193 of the Record of Appeal, the Appellant was declared redundant because she refused to accept the lower position.

He submitted that the redundancy in this case was used as a scape goat on the Appellant when she refused to accept an inferior position. He stated that the Supreme Court frowns upon such conduct. He cited the case of **Chilanga Cement Plc V. Kasote Singogo**[1] to support his argument.

On behalf of the Respondent, Mr Chula submitted that in line with the **Chilanga Cement Plc V. Kasote Singogo**[1], redundancies are planned activities. He added that since they are planned activities, the employee needs to be prepared for the loss of a job. He stated that an employer needs to take reasonable measures which should include notices and consultations which are vital in the planning process. Counsel added that according to Selwyn's Law on Employment, a dismissal for reason of redundancy should be fair, the employer generally must show:-

**(a)That there was adequate consultation with the employees and their trade union or other representatives;**

**(b)That the system selection was fair; and**

**(c)That there was no alternative employment which could be offered.**

Counsel submitted that an offer of alternative employment is one of the reasonable measures that may be taken in order to prevent the loss of employment by reason of redundancy. That in complying with this, the Respondent offered the Appellant alternative employment, which though was in a lower grade, was on the same terms and conditions and on the same pay. That having rejected the alternative offer of employment, the Respondent had no choice but to declare the Appellant redundant.

We have looked at the evidence on record and considered the submissions filed by both parties. In trying to mitigate the impact of the redundancy, the Respondent offered the Appellant an alternative position which position the Appellant refused to take up. The Appellant's position was abolished. She was

offered a lower position but with the same conditions of service as the position she held. She refused to take up the alternative position. Therefore, the Respondent cannot be faulted for the action it took.

The lower court found as a fact that there was neither wrongful nor unfair dismissal on the part of the Respondent. The lower court found as a fact that the Appellant was declared redundant. Therefore, this court cannot begin to proceed in the manner suggested by the Appellant because this ground of appeal is also on findings of fact. As we have already stated in ground one that an appeal to the Supreme Court should be on points of law or mixed law and fact. Not on facts only, as it is in this case. Therefore, this ground of appeal fails as well for lack of merit and we dismiss it.

Mr Sianondo advanced two alternative grounds of appeal.

In the first ground, he submitted that the Appellant was employed on contract in 2005. That the contract ended in 2009 and that she was re-employed on a new contract from October 2009 to November 2011, when she was declared redundant.

He stated that in ascertaining as from which period the redundancy should have been calculated, he invited this court to resort to the proposition in the case of **Norwich Union V. British Railways Board** [3]. He argued that the proposition in that case was applied in the case of **Mazoka and Others V. Mwanawasa and others** [4] where it was stated that:

> **"it is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the legislature that recourse can be had to other principles of interpretation."**

He submitted that the correct interpretation of the payment of the severance package should have been the period within which the Appellant was with the Respondent and not from 2009 as it was in this case.

On behalf of the Respondent, Mr Chula submitted that the Appellant's first contract expired in 2005. That the Appellant, during cross examination at page 188 of the record of appeal stated that the first contract had expired and that the claims she was making were in respect of the contract signed in 2009. That having been re-engaged on a new contract, her redundancy package was calculated and rightly so on the 2009 contract of employment.

We have looked at the evidence on record and considered the submissions on this ground. The Appellant was employed on her first contract in 2005 and this contract came to an end in 2009. The Appellant was given another contract which is the subject of this matter.

Counsel for the Appellant argued that the Appellant should be paid her redundancy package from the date of the first contract. He stated that the there is some ambiguity in the interpretation of the payment of the redundancy package. However, we do not know what clause counsel finds ambiguous in the Local Employee Manual which requires us to interpret. We find the words used in the Local Employee Manual plain and clear and need no interpretation. Further, it is our view that the first contract cannot be subject of this case because it was fully served by both parties. The contract ended. So why should the Respondent pay redundancy package for a contract that was fully served? We do not agree with the argument by the Appellant on this ground. We find no merit in this alternative ground of appeal and we accordingly dismiss it.

In the second alternative ground of appeal, Mr Sianondo submitted that there were two payments into court. He stated that these payments were made on the 12th of January, 2012 and 29th June, 2012. He added that these are found on pages 24 and pages 167 of the Record of Appeal. He submitted that the Respondent's salaries should have been paid up to the 29th of June, 2012. He added that according to a letter at page 64 of the record of Appeal, the Appellant's salary is supposed to include health coverage, dental coverage, funeral benefits and all other allowances and that the redundancy package should include all the allowances the Appellant was entitled to. He argued that in the case of **James Mankwa Zulu and others V. Chilanga Cement** (5), the Court held that-

> **"terminal benefits shall include all allowances and shall be calculated accordingly, to be paid less what has already been paid. Outstanding payments of salaries shall be paid as prayed until benefits withheld are paid in full."**

He submitted that it was a misdirection on the part of the trial court to fail to order that redundancy package should include allowances and that salaries be paid until the redundancy package is paid.

On behalf of the Respondent, Mr Chula submitted that the Appellant's redundancy package was paid out on the 11th of January, 2012. That the Appellant was paid her salary dues for the period between 28th November, 2011 and 11th January, 2012 which was the date when her redundancy package was paid out. Counsel added that benefits such as Health coverage, dental coverage, funeral benefits, education are not part of the salary.

We have looked at the evidence on record and considered the submissions filed by both parties. We wish to state that an employer's conditions of service are what determine how a redundancy package is to be calculated. In the case before us, the Respondent's conditions of service provided that the severance benefits are two months basic pay for each year of service and in addition, any vacation leave days accrued by the employee. The Respondent's conditions of service do not provide that the redundancy package will include all the allowances the employee was entitled to.

Counsel argued that according to the Appellant's letter of employment, the salary is supposed to include health coverage, dental coverage, sick leave, paternity leave, education allowance

and counselling services. We do not agree with this argument. This is because the Respondent's conditions of service provide that the severance benefits are two months **basic pay** for each year of service. According to the Appellant's letter of employment, appearing on pages 64 of the record of appeal, the annual basic pay is separate from the other allowances. The letter does not state that the allowances being claimed by the Appellant would be part of the basic salary. Therefore, there is no basis for the Appellant to argue that the basic pay should include all the allowances the Appellant was entitled to when calculating the redundancy package.

Further, the Appellant submitted that the Appellant was entitled to a salary up to the time all the money owed to the Appellant was paid. We have already stated in ground one that section 26B does not apply to this case. The Respondent's conditions of service also do not state that an employee who is declared redundant shall continue to receive a salary until the redundancy package is paid. Therefore, the Appellant is not entitled to be paid any salary from the date of redundancy to the

date when the redundancy package is paid. Therefore, this ground of appeal also fails for lack of merit and we dismiss it.

The net result is that the whole appeal is dismissed. We order that each party bears its own costs.

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M. S. Mwanamwambwa
**AG/ DEPUTY CHIEF JUSTICE**

.....
P. Musonda
**SUPREME COURT JUDGE (Rtd.)**

.....
E. M. Hamaundu
**SUPREME COURT JUDGE**