IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 21/2012**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

HENRY NSAMA AND 1,314 OTHERS **APPELLANTS**

AND

ZAMBIA TELECOMMUNICATIONS COMPANY LIMITED **RESPONDENT**

CORAM: Chibesakunda, Ag CJ, Chibomba, JS and Lengalenga, Ag. JS.
On 3rd September, 2013 and 24th July, 2014.

For the Appellants : Mr. D. Mulenga of Messrs Derrick Mulenga and Company on behalf of Mr. L. M. Matibini of Messrs L.M. Matibini and Company.

For the Respondent : Mr. E. C. Banda, SC, of Messrs ECB Legal Practitioners and Mr. N. Nchito, SC, of Messrs Nchito and Nchito Advocates.

JUDGMENT

Chibomba, JS delivered the Judgment of the Court.

Cases referred to:

1. ***Zambia Railways Limited v Richard Ndashe Chipanama Appeal No. 143/2002***
2. ***Violet Kasenge Bwalya and Others v Zambia Telecommunications Limited Comp 70/2010 and Comp 75/2010***
3. ***Zambia Consolidated Copper Mines v Matale (1995-1997) ZR 145***

4. ***Augustine Kapembwa v Danny Maimbolwa and the Attorney General (1981) ZR 127***
5. ***Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172***
6. ***Tamplin v James (1880) 15 Ch D 215***
7. ***Rodgers Chama Ponde and Others v Zambia State Insurance Corporation Limited (2004) ZR 151***
8. ***Scherer and Another v Counting Instruments Limited and Another [1986] 2 All ER 529***
9. ***Rodwell Kasokopyo Musamba v M.M Simpemba (1978) ZR 175 HC***
10. ***YB and F Transport Limited v Supersonic Motors Limited (2000) ZR 22***
11. ***Post and Telecommunication Corporation Limited and Phiri SCZ Judgment No. 7 of 1995***
12. ***Ngwira v Zambia National Insurance Brokers SCZ Judgment No. 9 of 1994***
13. ***Zambia Consolidated Copper Mines and Ndola Lime Company Limited v Emmanuel Sikanyika and others (2000) ZR 105***
14. ***Water Wells Limited v Wilson Samuel Jackson (1984) ZR 121***
15. ***Trollop and Colls Limited v Northwest Metropolitan Regional Hospital Board [1973] 2 All ER 260***
16. ***Reigate v Union Manufacturing Company (Ramsbottom) Limited [1918-19] All ER Rep 143***
17. ***Duke Westminster v Gould [1984] 3 All ER 144***
18. ***Ali v Christian Salvesan Food Services Limited [1997] ICR CA***
19. ***Bank of Credit and Commerce International SA (in Liquidation) v Ali and others [2001] 1 All ER 961 HL***
20. ***Cosmas Phiri and 85 others v Lusaka Engineering Limited (in Liquidation) 2007 ZR 1***

Legislation referred to:

(i) Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, Sections 85(5), 108 and Rule 55

(ii) High Court Rules, Chapter 27 of the Laws of Zambia, Order 40 Rule 1

(iii) Income Tax Act, Chapter 323 of the Laws of Zambia, Sections 2 and 7

Work referred to:

(a) The principles of Employment Law 4th Edition

(b) Halsbury's Laws of England Volume 32 4th Edition

(c) Black's Law Dictionary 8th Edition

This is an Appeal from the decision of the Industrial Relations Court, dated 9th December, 2011, dismissing, with costs, the Appellants' claim (Complainants in the Court below) for an Order to be paid a redundancy package in addition to Long Service Gratuity and a declaration that the Respondent (Respondent in the Court below) should bear the tax cost on their leave pay.

The brief history of this case is that the Appellants were permanent and pensionable employees of the Respondent who were declared redundant after a decision to partially privatize the Respondent Company. Consequently, Management in the Respondent Company and the Appellants 'recognized representatives negotiated a retrenchment/redundancy package

which was signed on 22nd October, 2009. The Agreement was to the effect that all unionised employees would be paid as follows:

> ***"(i) Three months' pay for each year served and pro rata for any uncompleted year served:***
> ***(ii) Two months' pay for repatriation;***
> ***(iii) One month pay in lieu of notice and that***
> ***(iv) Tax, if any, shall be borne by the Company."***

The Appellants were given termination letters, on diverse dates between 18th August and 6thSeptember, 2010. The letters briefly explained that, in view of the partial privatisation, the Respondent Company had decided to terminate the Appellants' employment under the retrenchment programme. Each letter contained a schedule with a computation of the terminal benefits as well as the mode of payment. In addition, the Appellants were informed that accrued leave days had been commuted for cash and that, in the result, tax would have to be borne by the affected employee.

On 7th October, 2010, the Appellants commenced proceedings against the Respondent in the Industrial Relations Court seeking the following reliefs at paragraph 5 of the Notice of Complaint: -

"(a) An Order of the Court directing the Respondent to re-calculate the Complainants terminal dues on the agreed months' pay as opposed the wrongful months' basic pay.

(b) An Order of the Court for payment of the difference found in (a) above

(c) An Order of the Court compelling the Respondent to pay the Complainants the three months' pay for each completed year of service and pro rata for each (incomplete) year served.

(d) A declaration that tax on leave days be borne by the Respondent and a further Order that the Complainants be reimbursed the deductions on tax.

(e) Interest and Costs".

At trial, the Appellants abandoned the claims in paragraphs 5 (a) and (b) of the Notice of Complaint. The Appellants' case, in a nutshell, was that the Respondent had wrongfully omitted to pay the redundancy package. That the only payment made was for Long Service Gratuity, repatriation, pay in lieu of notice and leave pay. The Appellants also contended that contrary to Clause 9 (e)of the Collective Agreement and Conditions of Service as well as the Agreement signed between the Respondent and the Union on 22nd October, 2009, they were made to pay tax on leave days.

Chilyobwe Kachushya Mwape (CW1) had testified, on behalf of the Appellants that the Respondent's previous record of paying Long

Service Gratuity clearly demonstrated that what they had been paid was Long Service Gratuity, and not the redundancy package. CW1 cited, to the Court, examples of Mr. Ralph Shawa who was declared redundant in 1995; Mr. Kelly Kachenjela who went on early retirement; Mr. Mwansa Shabashaba (CW2) who, despite being discharged for disciplinary reasons, and Mr. Edward Kapapula who, though being non-unionized and not in management, were all paid Long Service Gratuity upon separation.

In its brief Answer, the Respondent had deposed that the Appellants were correctly paid all their dues. As regards tax, the Respondent's evidence was that while it was agreed that all taxes were to be borne by the Respondent, the tax referred exclusively to the retrenchment/redundancy package, and not leave days. The evidence of Gregory Cornhill (RW1), who at the time was a Board Member of the Respondent Company, was much the same. He had testified that what had been agreed and paid was a Redundancy package although in the Letters of termination and Calculation Form, it had been improperly narrated as Long Service Gratuity.

RW1 testified that leave days had been taxed because they were already earned and could not properly form part of the benefits.

The lower Court held that from oral and documentary evidence, and from the submissions before it, it was clear that what was being paid was the redundancy/retrenchment package. The Court found that the narration ***"Long Service Gratuity"*** in the Letters of Termination and Schedule was ***"at worst a careless but harmless, misstatement of what was intended to be and was actually paid"***.

The lower Court also found that there was no merit in the Appellants' argument that there existed in the Conditions of Service, an implied term relating to payment of Long Service Gratuity based on the purported payments made to other former employees. The Court below held that the cases, ***Zambia Railways Limited v Richard Ndashe Chipanama***[1] and ***Violet Kasenge Bwalya and Others v Zambia Telecommunications Company***[2] were incomparable with the present case.

On the issue of tax, the lower Court held that tax was properly deducted because leave pay was not part of the terminal benefits exempted from tax under Clause 9 (e) of the Collective Agreement. The Court concluded in the following terms:

> ***"In summing up the Judgment we will say that the Complainants have failed to satisfy us on a balance of probabilities that they are entitled to the relief which they seek. The Complaint is accordingly dismissed with costs to the Respondents payable upon agreement and in default to be taxed."***

Hence this Appeal. The Appellants raised three grounds of appeal.

These are:

1. **That the Court below erred in law in failing to do substantial justice when it failed to properly evaluate evidence of payment of Long Service Gratuity to the benefit of all parties.**

2. **That the Court below erred in law and misdirected itself when it held that the payment made to the Appellants was the redundancy payment.**

3. **That the Court below erred in law when it ordered costs to be borne by the Appellants.**

At the hearing of this Appeal, Counsel on both sides relied entirely on the Appellants' and Respondent's filed written Heads of Argument.

The summary of the Appellants' submissions was that on the totality of the evidence at its disposal, the lower Court failed to apply provisions of Section 85(5) of the **Industrial and Labour Relations Act** on the need to do substantial justice. The learned Counsel for the Appellant argued that where there were allegations or facts of payments being made to employees, the lower Court ought to have examined the totality of the evidence to ensure uniformity of treatment. For this proposition, he invited us to read the cases of ***Zambia Consolidated Copper Mines v Matale***[3] and ***Zambia Railways Limited v Richard Ndashe Chipanama***[4].

The learned Counsel referred us to the evidence of CW1 and CW2 which demonstrated that Long Service Gratuity was paid to all employees relative to their length of service and even when the Collective Agreement did not provide for it. He urged this Court, in the alternative, to reverse the lower Court's findings of fact on grounds that the findings were not supported by evidence on Record in line with our decisions in ***Augustine Kapembwa v Danny Maimbolwa and the Attorney General***[4] and ***Wilson Masauso Zulu v Avondale Housing Project Limited***[5]. The learned Counsel

also submitted that the Court's findings that the payments made to Mr. Mwansa Shabashaba were terminal benefits notwithstanding his transgressions or that they were *ex gratia* for Mr. Edward Kapapula, were perverse and made upon a misapprehension of the facts.

As regards Ground two, the learned Counsel submitted that Clause 9 (e) of the Appellants' Collective Agreement had provided that firstly, the parties ought to have negotiated the redundancy payment as compensation for premature loss of employment and this was separate and distinct from Long Service Gratuity. Secondly, that the benefits ought to have been tax free and lastly, that the Company ought to have borne the incidence of tax, if any.

The learned Counsel submitted that although the lower Court adjudged that the use of the words ***"Long Service Gratuity"*** in the narration as a ***"careless but harmless misstatement of what was intended to be and was paid"***, there was no averment in the Respondent's Answer of a mistake. He argued that the lower Court was wrong to have accepted evidence that contradicted the terms of a written document. That, in any event, this Court ought to be

persuaded by the case of ***Tamplin v James***[6] where Blaggalary L. J. stated:

> ***"Where there has been misrepresentation and where there is no ambiguity in the terms of the contract, the Defendant cannot be allowed to evade the performance of it by the simple statement that he made a mistake. Were such to be the law, the performance of a contract could seldom be enforced upon an unwilling party who was also unscrupulous".***

The learned Counsel further urged this Court to treat RW1's evidence as inadmissible as it tended to vary the terms of a written agreement. We were referred, for this proposition, to our decision in ***Rodgers Chama Ponde and Others v Zambia State Insurance Corporation Limited***[7]. He also referred to the case of ***Violet Kasenge Bwalya and Others v Zambia Telecommunications Limited***[2], where the Industrial Relations Court rejected the Respondent's argument that the payment categorised as Long Service Gratuity was in fact the Redundancy Payment. It was the learned Counsel's submission that similarly, in the case before us, the negotiated Redundancy Package of three months' basic salary for each year served and pro rata for any uncompleted year served, was not paid.

The learned Counsel put up the following argument for Ground three, that although there was no specific provision relating to costs in the **Industrial and Labour Relations Act**, Rule 55 appeared to clothe the Court with power to make Orders including Orders for costs. He submitted further that under Order 40 Rule 6 of the **High Court Rules**, costs were in the discretion of the Court or Judge provided it (the discretion) was exercised judicially, and that in the absence of any express direction, costs were to abide the event. Further, that a successful party ought not to be deprived of his costs unless he was guilty of misconduct in the conduct of the action. For these principles, we were referred to the following cases: ***Scherer and Another v Counting Instruments Ltd and Another***[8], ***Rodwell Kasokopyo Musamba v M. M Simpemba***[9] and ***YB and F Transport Limited v Supersonic Motors Limited***[10].

The learned Counsel argued that in arriving at its decision, the Court ought to have scanned the whole battle field of the action and the conduct of the parties. But the lower Court failed to dispense the ends of justice even after finding impropriety in the Respondent's

conduct prior to the commencement of the action. The learned Counsel submitted that the lower Court's statement that the narration ***"Long Service Gratuity was the worst careless but harmless misstatement of what was intended to be paid and what was actually paid"*** was a demonstration of wrongdoing on the part of the Respondent for which the lower Court ought not to have ordered costs against the Appellants.

In response to Ground one, State Counsel submitted that the Appellants were building a case of discrimination in the payment of Long Service Gratuity and redundancy pay and had placed reliance on payments made to other employees. State Counsel argued that at law, discrimination was defined as differential treatment of persons in the same category or in the same circumstances. He referred us to the cases of ***Post and Telecommunications Corporation Limited v Phiri***[11] and ***Ngwira v Zambia National Insurance Brokers***[12] where this Court, in interpreting Section 108 of the **Industrial and Labour Relations Act**, held that: -

> ***"Discrimination must come within the subject matter of Section 108 (2)."***

State Counsel submitted that to allege discrimination, the Appellant ought to have shown that they had suffered disadvantage as compared to the other in the same class as provided in Section 108 (2).

He, further, submitted that the case of ***Zambia Railways Limited v Richard Ndashe Chipanama***[1] was inapplicable because, as the lower Court correctly had observed, there was no common ground with the former employees whose payments and modes of exit were different. He submitted, specifically for Mr. Mwansa Shabashaba, that he was paid according to the subsisting Conditions of Service while in the case of Mr. Edward Kapapula, that it was up to the Respondent to pay the same package as the unionized employees. He submitted that the lower Court correctly evaluated the evidence and found that the circumstances under which, the other employees were paid, were different and distinguishable.

He submitted that what was paid was a redundancy package as agreed upon between the Union and Management and was paid to all the Appellants in full. He submitted that the Court below,

correctly found that the reference to Long Service Gratuity in the termination letters was a mistake but nevertheless, harmless. Though State Counsel conceded that Long Service Gratuity and redundancy pay were separate and distinct, he submitted that there was no provision for payment of Long Service Gratuity on redundancy in the Collective Agreement or in the Agreement of 22nd October, 2009. He argued that besides, such payments would have caused serious implications on the privatization of the company. State Counsel submitted that the Appellants were duly paid their severance packages and urged this Court not to interfere with the findings of fact unless there was a misapprehension of facts by the lower Court as stated in ***Zulu v Avondale Housing Project Limited***[5].

On Ground two, State Counsel repeated the arguments in Ground one. He submitted that the lower Court was on firm ground when it found as a fact, that what was paid was redundancy pay and that the reference to Long Service Gratuity in the Letter of termination was a mistake. He submitted that the Appellants could not place

reliance on ***Tamplin v James***[6] because what the Respondent intended to pay was paid and there was no omission whatsoever.

It was State Counsel's submission that the operative agreement was the one signed between the Management and the Union on 22nd October, 2009, and not the letters of termination. He submitted that while he agreed with Counsel for the Appellants that no party had pleaded misrepresentation or mistake, the mistake referred to by the lower Court was in relation to the three months' pay for each completed year of service as Long Service Gratuity instead of redundancy package. He argued that the mistake was not in the payment but merely in the narration of the payment made, and that a mistake in the narration could not, in the interpretation of it, be called extrinsic evidence and neither could it be treated as parole evidence which sought to add, vary or contradict the terms of a written agreement. State Counsel agreed with the lower Court that ***Violet Kasenge Bwalya and others v Zambia Telecommunications Limited***[2] was distinguishable in that the Complainants in that matter were non-represented and their

conditions of service provided for payment of both Long Service Gratuity and redundancy package.

On Ground three, State Counsel argued that there was no basis for the Complaint as the Court below was on firm ground, and properly exercised its discretion to award costs to the Respondents. He submitted that the Appellants had sufficient notice of their redundancy package, from the time the agreement was signed between the Union and Management, to the time when the letters of termination were given. He further submitted that, in any event, the Appellants were rightly condemned in costs because they were told about the erroneous narration of Long Service Gratuity and yet they proceeded to full trial.

In reply, the learned Counsel for the Appellants submitted that contrary to assertions by the Respondent, the Appellants did not allege any discrimination. He re-stated that the Appellants' contention is that the Court below erred when it reclassified Long Service Gratuity as Redundancy payment. The learned Counsel re-iterated that Mr. Edward Kapapula and Mr. Mwansa Shabashaba

were similarly placed with the Appellants. He submitted that the Court below failed to properly evaluate the evidence for the benefit of all parties. He contended that the lower Court ought to have looked beyond the ambit of the words used in the documents into the realms of what was actually done to parties and other employees affected by the decision, if any injustice was to be addressed.

On the issue of costs, the learned Counsel for the Appellants submitted that there were facts before the lower Court that ought to have disentitled the Respondents from the order for costs. We were, additionally, referred to the cases of ***Zambia Consolidated Copper Mines Limited and Ndola Lime Company Limited v Emmanuel Sikanyika and Others***[13] and ***Water Wells Limited v Wilson Samuel Jackson***[14] to support the proposition that where the default was traceable to a party, though successful, there ought not to have been an order for costs.

We have examined the evidence on record, the submissions and the authorities, for which we are deeply indebted to both Counsel. From the facts on Record, it is undisputed that the Appellants were

employees of the Respondent Company and were declared redundant sometime in August and September, 2010 as a result of partial privatization of the Respondent Company. It is undisputed that the Respondent Company and the Appellants' officially recognized representatives negotiated a retrenchment/redundancy payment package. It is also not in dispute that repatriation, payment in lieu of notice, and leave days were paid to the Appellants.

The main contention is firstly, whether what was paid to the Appellants constituted the redundancy package or was merely Long Service Gratuity. Secondly, whether the Appellants were entitled to Long Service Gratuity upon separation by retrenchment/redundancy, and if not, whether a term could be implied so as to entitle them to Long Service Gratuity. Lastly, if the lower Court was in order to award costs in favour of the Respondent Company?

We propose to deal with Grounds one and two together as the issues are inter-related, and then Ground three separately. The

Appellants canvassed, both here and in the Court below, that what they were paid was Long Service Gratuity, and not the negotiated Redundancy Package. They based their argument on the narration of Long Service Gratuity in the Letters of termination and what they considered, an automatic entitlement flowing from what was paid to other former employees upon separation. The Respondent Company, on the other hand, argued that what was paid was the Redundancy Package save that it was inadvertently referred to as Long Service Gratuity.

We have examined the Collective Agreement. for the period between 1st January, 2008 and 31st December, 2009 (at pages 49-79 of the Record) whose life was extended for a further seven months to cover the privatization process (at page 80). We find that the only reference to "Long Service Gratuity" in the Collective Agreement, albeit indirectly, is under clause 10 (at page 58) where it states *inter alia,* that: -

> ***"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."***

It is clear, to us, that Gratuity, under this Agreement, is only payable upon separation by normal retirement, retirement on medical grounds, early retirement and in the case of death where such Gratuity devolves upon the estate of the deceased employee (at page 59). There is no reference to Long Service Gratuity in relation to redundancy/retrenchment.

Clause 9 of the Collective Agreement (at page 57) outlines the policy and gives a step by step procedure of what is to happen in the event of any redundancy/retrenchment. Sub clause (e) which sets out the terms and conditions for termination by retrenchment/redundancy is couched as follows: -

> ***"Where redundancy/retrenchment is effected, the employee shall be entitled to three months' notice and redundancy payment shall be negotiated for between the Union and Management. Payment of the terminal benefits shall be tax free. Tax if any, shall be borne by the Company."***

On examination of the Record, we are satisfied that the requisite negotiations were duly held from 9th to 22nd October, 2009 pursuant to Clause 9 (e), and the terms and conditions, arising there from, are

those contained in Clause 3.1 of the Agreement. The said clause at page 174 of the Record states as follows: -

> ***"In the event that the Relevant Union member is declared redundant or retrenched pursuant to Section 2 above, the Relevant Union member will have the right to receive the Redundancy/Retrenchment Package, subject to the terms of this Agreement as follows:***
> ***(i) 3 months basic salary for each year served and pro rata for any uncompleted year served***
> ***(ii) 2 months basic salary repatriation***
> ***(iii) 1 month basic salary in lieu of notice***
> ***(iv) Tax, if any, shall be borne by the Company"***

It is our considered view that Clause 3.1 was the negotiated Redundancy package referred to in Clause 9 (e). This is confirmed by the Managing Director's circular No. 6 of 2009 (at page 82); the Appellants' representatives' Circular (at page 85) and the joint staff Circular No.1 of 2010 (at page 126). The lower Court did, however, note that repatriation pay was referred to twice, in the Redundancy Agreement and the Collective Agreement, while payment in lieu of notice was, for some reason, adjusted from three months to one month but did not delve, and rightfully so, into the matter. We find no reason to address our minds to them since these were not in dispute. That, notwithstanding, we find that the contents in Clause

3.1 were what formed the retrenchment/redundancy package that was agreed upon between Management and the Union.

The question, therefore, is whether the negotiated retrenchment/redundancy package in Clause 3.1 is what was actually paid to the Appellants. The termination letter of one Henry Nsama (at page 46), which was similarly worded with the letters served on the other affected employees (at page 423), read as follows in the relevant portion: -

> ***"In line with your retrenchment you will be paid the sum of ..... being terminal benefits computed based on the following:***
> 1. ***One (1) month basic salary in lieu of notice; and***
> 2. ***Long service gratuity being three (3) months basic salary for each year served and pro rata for any uncompleted year served; and***
> 3. ***A payment equivalent to two months basic salary as repatriation allowance; and***
> 4. ***Tax, if any on items 1, 2 and 3 will be borne by the company.***
> 5. ***Any, accrued leave days unutilized to date have been commuted for cash, in accordance with the Taxation Laws of Zambia, all tax on any such leave days will be borne by yourselves."***

Clause 2, the source of contention, refers to "Long Service Gratuity" of three months' basic salary for each year served and pro rata for any uncompleted year served. However, elsewhere, we have

found that the Collective Agreement which governed the relationship between the Appellants and the Respondent did not have any express provision for Long Service Gratuity as regards Retrenchment/Redundancy.

The learned Counsel for the Appellant also acknowledged that there was no provision for Long Service Gratuity in the Collective Agreement but argued spiritedly that there was an implied term, entitling the Appellants to, and were in fact paid, Long Service Gratuity, as was done to others before them. So, in essence, we were being invited to read into the Agreement an implied term and treat the Appellants in similar circumstances as, namely, Mr. Ralph Shawa, Mr. Mwansa Shabashaba (CW2), Mr. Kelly Kachenjela and Mr. Edward Kapapula as well as the Complainants in ***Violet Kasenge Bwalya and Others v Zambia Telecommunications Company Limited***[2]**.**

Now, while we approve our decision in ***Zambia Railways Limited v Richard Ndashe Chipanama***[1], we respectfully disagree with the learned Counsel for the Appellants that it is applicable

here. Firstly, in the present case, there was no express provision for Long Service Gratuity under retrenchment/redundancy. Secondly, the law pertaining to implied terms in a Contract is trite. 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." (Emphasis ours)

A similar decision was reached in a much earlier case, ***Reigate v Union Manufacturing Co (Rams bottom) Limited***[16] where Scrutton L. J, in the course of his judgment, said, at p 605:

> ***"The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract."***

It is worth noting that in later years, the House of Lords laid down two distinct circumstances when terms can be implied in a contract. Slade LJ, held in ***Duke Westminster v Guild***[17] at p150,

> ***"The first is where the Court lays down a general rule of law that, as a legal incident of all contracts of a certain type (sale of goods, master and servant, landlord and tenant and so on) some provision is to be implied. The second class is where there is no question of laying down any prima facie rule applicable to all cases of a define type but the Court is being asked to in effect to rectify a particular contract by inserting in it a term which the parties have not expressed."***

However, in the more recent case of ***Ali v Christian Salvesan Food Services Limited***[18], the Court of Appeal reversed a decision of

the Employment Appeal Tribunal to insert a term on the ground that:

> ***"The omission to legislate for every eventuality in a Collective Agreement did not mean that the gap had to be filled by an implied term".***

Similarly, in ***Bank of Credit and Commerce International SA (in liquidation) v Ali and others***[19], the Court declined to read beyond the plain intention of the Agreement. In that case, the employees were compulsorily declared redundant and accepted additional redundancy payment in full and final settlement of all or any claim "in whatsoever nature" against the Bank. Later, the affected employees sought to impugn the document on account of unilateral mistake. Their complaint was that they did not know that they had common law claims which the Agreement had extinguished. Lightman J, held (in a decision which was upheld by the House of Lords in ***BCCI SA (in liquidation) v Ali [2001] 1 All ER 961***), that the normal rules of construction for a written contract were restricted to the parties' intentions as expressed in the document. In that case, the Court held that the language and particular reference

to claims that existed or may have existed was apt for the purposes at that time. Lightman J, made the following comment:

> ***"It is impossible not to feel great sympathy for the plight of the employees and others in a like position, but they are in law bound by the bargain which they made and I am not free to release them from it."***

Similarly, in our jurisdiction, we, as Supreme Court, held in the case of ***Cosmas Phiri and 85 others v Lusaka Engineering Limited (in Liquidation)***[20], that the Plaintiffs were bound by the terms of the Early Retirement Agreement signed between Management and their Union representatives. In the same way, the Appellants, in the case before us, are bound by the Agreement signed on their behalf by their elected representatives. Furthermore, we have already stated there was no term, express or implied, for Long Service Gratuity for employees who were separated from the Respondent Company by way of retrenchment/redundancy. There was, in our view, no doubt, between the parties, as to what was intended to be paid. Therefore, we see no reason or gap to imply any term in the Agreement.

By the same token, we do not agree with the arguments that the Appellants must be treated in the same way as the other former employees. As the lower Court held, the other employees left under totally different circumstances as provided for in their Conditions of Service or in exercise of discretion by the Respondent Company. We also agree, with State Counsel that reliance on the case of ***Violet Kasenge Bwalya and Others v Zambia Telecommunications Company Limited***[2] was not helpful to the Appellants for two reasons. First and foremost, the Complainants in that case were in management and secondly, their Conditions of Service expressly provided for both Redundancy payment and Long Service Gratuity (See pages 140 and 144 of the Record). We, therefore, find that the lower Court was on firm ground when it declined to follow our decision in ***Zambia Railways v Richard Ndashe Chipanama***[1] because the Appellants and those, they sought to compare themselves with, were not similarly circumstanced.

To answer the question as to whether what was agreed was actually paid to the Appellants, we need to determine if the use of the term "Long Service Gratuity" in the Termination Letter was

indeed, a mistake or misrepresentation in the legal sense. The learned authors of **Halsbury's Laws of England** do not define mistake but state that it may arise from ignorance, misconception or forgetfulness. **Black's Law Dictionary** defines mistake as an error, misconception, misunderstanding or an erroneous belief. In terms of contracts, it is referred to as a situation in which either (1) the parties to a contract did not mean the same thing or (2) at least one party had a belief that did not correspond to the facts or law. The effect of which is to render the contract voidable. Misrepresentation is defined as the act of making a false or misleading assertion about something usually with the intent to deceive.

As we have already stated, the Appellants were represented by the Union in the negotiations. We have not found any evidence from the Record of any disagreement or misunderstanding between the Union and Management over the Redundancy Package. If anything, Management and the Union spoke in one accord as demonstrated from the Circulars we referred to earlier. It is clear to us that reference to ***"Long Service Gratuity"*** was a mistake, but not one properly so called. It is not a mistake arising out of parties or one

party holding a different or erroneous belief about the subject matter so as to render the contract voidable nor could it be said to have been a misrepresentation. For this reason, we respectfully disagree with the learned Counsel for the Appellants that claims that the payment was for Redundancy and not Long Service Gratuity was parole evidence which ought to have been rendered inadmissible for adding, varying or contradicting, a written Contract. We agree with the lower Court that there was no variation to the Contract. It was a careless mistake though we do not agree that it was harmless as such conduct has a bearing on the issue of costs. We shall elaborate when we come to deal with Ground three.

In the second limb of the submissions, the Appellants contended that the Respondent Company ought to have borne the tax on leave pay. Under Section 2 of the **Income Tax Act**, leave pay falls under emoluments that are tax chargeable. It is not among income that is exempt from tax in Section 7. This means that unless, otherwise, tax on leave pay ought to be paid by the employee. Quite clearly, the wording of the Clause on tax referred specifically to sums paid under the Redundancy Package, namely

the three months' pay for every year served and pro rata for every incomplete year served, two months' pay repatriation and one month pay in lieu of notice. It did not cover leave pay. We, therefore, find no basis to disturb the lower Court's findings of fact both on the payment of a Redundancy Package and on the issue of tax.

However, before we leave Grounds one and two, we wish to state that we did not address our mind to the Respondent's assertion that the Appellants' cause of action was founded on discrimination under Section 108 of the **Industrial and Labour Relations Act**. We think this was ably explained by Counsel for the Appellants in his reply to the Respondent's Heads of Argument. Therefore, in view of what we have adumbrated above, Grounds one and two are both unsuccessful.

We now turn to Ground three. Both parties have correctly stated the law on costs and the authorities cited to us by Counsel for the Appellants are all on point. The general principle is that costs follow the event and are in the discretion of the Court. It is also true, that, ordinarily, a successful party ought not to be deprived of his

costs unless he does something wrong in the action or conduct of it. Buckley LJ, laid down ten principles on costs in ***Scherer v Counting Instruments Limited***[8] but we find the following principle relevant for our present purposes: -

> ***"The grounds (for the Court to exercise its discretion) must be connected with the case. This may extend to any matter relating to the litigation and the parties' conduct in it and also to the circumstances leading to the litigation, but no further."***

We have determined that reference to Long Service Gratuity instead of Redundancy Payment in the Letter of Termination was a careless mistake. We, however, have declined to accept the lower Court's finding that it was a harmless mistake because we think that this was an error which could have easily been remedied had the Respondent Company not left the matter too late. The Respondent Company ought to have withdrawn the erroneous letters and issued new ones bearing the correct narration. It is our considered view that the Respondent's conduct was detrimental such as to deprive it of its cost. As such, we approve our decision in ***Water Well Limited v Wilson Samuel Jackson***[14] where we deprived the successful party of his costs on account of putting the Plaintiff at great cost and

inconvenience. Also, our decision in ***Zambia Consolidated Copper Mines and Ndola Lime Company Limited v Emmanuel Sikanyika***[13] where the action was provoked by some unhelpful statements in Circulars publicized by the employer. Ground three therefore, succeeds.

For the above-stated reasons, this Appeal is partially successful only to the extent indicated. We reverse the order awarding costs to the Respondent in the Court below, and order that each party bears its own costs in this Court and in the Court below.

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L. P. Chibesakunda

ACTING CHIEF JUSTICE

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H. Chibomba

SUPREME COURT JUDGE

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F. M. Lengalenga

ACTING SUPREME COURT JUDGE