IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 151/2011**
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

RICHARD NDASHE CHIPANAMA **APPELLANT**

AND

ZAMBIA RAILWAYS LIMITED **RESPONDENT**

Coram: Chibesakunda, Ag. CJ, Mwanamwambwa, Ag. DCJ and Muyovwe, JS, on 5th June, 2012 and 23rd May, 2014

For the Appellant: In Person

For the Respondents: Messrs. L. M Matibini & Company

J U D G M E N T

Muyovwe, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Yonnah Shimonde and Freight and Liners v. Meridian BIAO Bank (Z) Limited, SCZ Judgment No. 7 of 1999;**
2. **Bank of Zambia v. Caroline Anderson and Andrew W. Anderson (1993-1994) Z.R 47;**
3. **Nkhata and Others v. Attorney-General (1966) ZR 124;**
4. **Augustine Kapembwa and Another v. Danny Maimbolwa and Attorney-General (1981) ZR 127; and**
5. **Wilson Masautso Zulu v. Avandale Housing Project Limited (1982) ZR 172.**

Legislation referred to:

The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia

This is an appeal from a judgment of the Industrial Relations Court, in its appellate jurisdiction, delivered on 31st October, 2011. The said judgment followed an appeal against a judgment of the learned Deputy Registrar of the Industrial Relations Court dated 24th December, 2010, which awarded the Appellant an assessed sum of K46, 874, 407.00, as employer's contributions due to the Appellant, inclusive of interest.

The history of this case, in so far as it is relevant to this appeal, is that the Appellant was employed by the Respondent until 7th June, 1993. In 1997, the Appellant filed a complaint in the Industrial Relations Court claiming, *inter alia,* payment to him of the Respondent's employer's contributions to the Zambia Railways Limited Pension Scheme. On 10th December, 2001, the Industrial Relations Court ordered that the Appellant be paid the employer's contribution in accordance with the rules of the Scheme. The Court below also awarded interest, on the amount due, at the rate of 12%, from the date of commencement of the action to the date of judgment, and thereafter at 6% per annum.

Dissatisfied with the judgment of the Industrial Relations Court, the Respondent appealed to this Court. The Appellant also counter appealed on the interest rates. In our judgment dated 4th July, 2003, under Appeal No. 143 of 2002, we upheld the Industrial Relations Court's judgment on the order to pay the Appellant the employer's contributions. We said that the Industrial Relations Court did not misdirect itself when it found, as a fact, that two other employees in similar circumstances as the Appellant had been paid the employer's pension contributions. Accordingly, we held that the Industrial Relations Court properly directed itself when it ordered that the same treatment should be extended to the Respondent.

In relation to the cross-appeal by the Appellant, we accepted his contention that the interest rates awarded to him were not the appropriate rates in the circumstances of the case. We accordingly quashed the said interest rates and replaced them with interest at the Bank of Zambia short term deposit rate from the date of the cause of action to the date of judgment and thereafter at the current lending rate from the date of judgment until payment.

After our judgment of 4th July, 2003, aforesaid, the parties went for assessment of the employer's contributions before the learned Registrar of the Industrial Relations Court. On 18th August, 2004, the learned Registrar rendered her judgment awarding the Appellant a sum of K 135, 539,183.29, as the employer's contributions, inclusive of short term interest at 11% per annum from the date of the Complaint (6th June, 1997) to the date of the Industrial Relations Court judgment of 10th December, 2001; as well as lending rate interest at 35% per annum from the date of the judgment to the date of the assessment. She ordered that the lending rate interest of 35% would continue until the judgment debt was extinguished.

The Respondent appealed, against the learned Registrar's assessment, to the Industrial Relations Court. The Industrial Relations Court overturned the judgment of the learned Registrar on the ground that what was tabled for assessment was not the pension benefits but a refund of the employer's contributions. The Industrial Relations Court then ordered that the Appellant should

be paid what the employer actually contributed to the Pension Scheme plus interest.

Dissatisfied with the Industrial Relations Court's judgment, the Appellant appealed to this Court. In our judgment of 22nd October, 2008, under Appeal No. 166 of 2006, we dismissed the appeal and ordered the parties to go back to assessment with the knowledge that it was the employer's contributions to the Pension Scheme that was the subject of the assessment.

Following our judgment of 22nd October, 2008, there was a re-assessment of the employer's contribution before the learned Deputy Registrar of the Industrial Relations Court, who on 24th December, 2010, awarded a total employer's contribution of K46, 874,407.00, inclusive of interest. The Appellant appealed, against this assessment, to the Industrial Relations Court. It was that appeal which led to the Industrial Relations Court's judgment of 31st October, 2011, the subject of this appeal.

In its judgment, the Industrial Relations Court said that the Supreme Court's judgments, in Appeal No. 143 of 2002 and Appeal

No. 166 of 2006, clearly indicated that it was the employer's monthly contributions to the Scheme that were the subject of the assessment. That the approach adopted by the Appellant and the learned Deputy Registrar did nothing to assess the total contributions paid into the Pension Scheme, on behalf of the employee, by the employer. That the document marked RNC 13, in the Appellant's bundle of documents, showed that what was to be paid to Mr. Musyani and Mr. Sikazwe was the employer's 100% cash value. That the Appellant's documents, RNC 8 and RNC 11, calculated a reduced pension as opposed to the 100% cash value.

Accordingly, the Industrial Relations Court concluded that the computations contained in the Appellant's documents, as well as those arrived at by the learned Deputy Registrar, did not comply with the directives contained in this Court's judgments in Appeal No. 143 of 2002 and Appeal No. 166 of 2006.

The Court below ruled that the idea behind the Respondent's computations, in their exhibit CP2, was the spirit of the directives in this Court's judgments aforesaid. That in exhibit CP2, the

Respondent tabulated all the Appellant's monthly salaries since he joined the Scheme in May, 1977, until June, 1993, when he left employment. That the Respondent then worked out the employer's monthly contributions at 15.632% of the Appellant's monthly salary in terms of clause 4(b)(i) of the Pension Scheme Rules. That then 15% per annum was added for each month on a compounding basis.

The Court below concluded that the Respondent had computed the employer's contributions, inclusive of internal interest at 15% per annum, for the entire period the Appellant contributed to the Scheme. The Industrial Relations Court accordingly found that the employer's contribution stood at K 442, 005.84 as at 30th June, 1993, when the Appellant left employment. After applying interest at short term deposit rate of 24% per annum from the date of the cause of action (1st July, 1993) to the date of the judgment (21st December, 2001) and interest at the bank lending rate of 35% per annum from the date of the judgment to the date the money was paid into Court (10th January, 2011), the Industrial Relations Court arrived at K5, 621,246.07 as the amount

which should have been paid to the Appellant on 10th January, 2011. The Court below concluded that the Appellant was over paid by K41, 253, 160.93 and that he must refund that amount to the Respondent with interest at the current bank lending rate until full settlement.

The appeal to this Court is against that judgment of the Industrial Relations Court. The Appellant has raised 16 grounds of appeal. We must state, however, that most of the Appellant's grounds of appeal have departed from the main issue on which we provided guidance in our judgments in Appeal No. 143 of 2002 and Appeal No. 166 of 2006. We do not, therefore, see it necessary to reproduce all the 16 grounds of appeal in this judgment. It suffices to say that the only issue on which this Court must decide, in this appeal, is the assessment of the Respondent's employer's contribution. This is clear from our judgments in Appeal No. 143 of 2002 and Appeal No. 166 of 2006. In the said judgments, this Court provided very clear guidance on the issues that were to be determined by the Industrial Relations Court. In Appeal No. 143 of 2002, we said that-

"We have said before that the Industrial Relations Court is a Court which has to do substantial justice, not bound by the rules of evidence. The Court found as a fact on the evidence on record that two other employees in similar circumstances as the Respondent had been paid the Employer's Pension Contributions. The Court held that the same should be extended to the Respondent. We find no misdirection. The appeal based on this ground is, therefore, dismissed." (Emphasis ours)

In appeal No. 166 of 2006, we said that-

"Our position of 2003 has not changed an inch in 2008. The parties are strongly advised to go back to assessment with the knowledge that it is the employer's contributions to the Pension Scheme that is the subject of assessment and not otherwise. In the course of the assessment, the parties are advised to take note of the useful comments of the lower court in its judgment of 21st July, 2006 and avoid bringing in extraneous considerations." (Emphasis ours)

Clearly, our judgments guided that the assessment should only be confined to the employer's contributions to the Pension Scheme and nothing more or less. So the only question in this

appeal, in our view, is whether or not the Industrial Relations Court properly directed itself when it computed the employer's contribution due to the Appellant. In the circumstances, we do not see it necessary to reproduce arguments, by either side, which do not relate to the computation of the employer's contribution.

The Appellant filed his written heads of argument on which he entirely relied. The gist of his arguments is that he should be paid employer's contributions in the same way that Mr. Sikazwe and Mr. Musyani were paid by the Respondent. That the same formula which was used to compute the payments made to Mr. Sikazwe and Mr. Musyani should be used in his case. He has referred this Court to the computation of Mr. Musyani's pension at pages 216 and 218 of the record of appeal. He has argued that he approached the Respondent's Pension Scheme Fund Managers, Zambia State Insurance Corporation Limited (ZSIC), to calculate his employer's contributions. That ZSIC calculated his benefits as shown on the document appearing at page 213 of the record of appeal. That the formula which ZSIC used in calculating his benefits was the same one that was used to compute the retirement benefits for Mr.

Musyani, at page 216 of the record of appeal. That, therefore, the amount of **K 2, 523, 044.33,** arrived at by ZSIC, as the employer's contribution payable to him, is accurate.

The Appellant has gone on to argue that accordingly, his calculation of interest, appearing on pages 214 and 215 are equally correct.

Counsel for the Respondent, Messrs. L. M. Matibini & Company, did not appear at the hearing of this matter as they had filed a notice of non-appearance. They, however, filed their written heads of argument on which they relied.

In the said written heads of argument, Counsel argued that the documents appearing at pages 213-215 of the record, which the Appellant has relied on, relate to calculations of a reduced pension and not the employer's contribution. Counsel submitted that the employer's contribution is a creation of clause 4(b) (i) of the Pension Scheme Rules and that it can only be determined with reference to the said clause. Counsel further submitted that the computations done by the Respondent, appearing at pages 315 to 319 of the

record of appeal, comply with clause 4(b) (i) of the Pension Scheme Rules. That this is so because the said computations are based on the employer's monthly contributions at 15.632%, and then interest is applied at the rate of 15% in accordance with clause 9(i) of the Pension Scheme Rules. That, therefore, the amount of **K 442, 005.84** is an accurate computation of the employer's contribution due to the Appellant. Counsel further contended that the Industrial Relations Court properly computed the interest due on that amount as it complied with the legal position established in the cases of ***Yonnah Shimonde and Freight and Liners v. Meridian BIAO Bank (Z) Limited***[1] and ***Bank of Zambia v. Caroline Anderson and Andrew W. Anderson***[2]**.** Counsel submitted that the total amount of the employer's contribution should therefore be as determined by the Court below, namely, **K5, 621,246.07**.

In conclusion, Counsel submitted that the findings of the Industrial Relations Court were not, therefore, perverse nor founded on a misapprehension of facts. Counsel cited the cases of ***Nkhata and Others v. Attorney-General***[3], ***Augustine Kapembwa and***

Another v. Danny Maimbolwa and Attorney-General[4] and ***Wilson Masautso Zulu v. Avandale Housing Project Limited***[5].

We have considered the evidence on record, the judgment appealed against and the submissions by Counsel for both parties. We have also carefully studied the various judgments that have been delivered in this case by this Court, the Industrial Relations Court and the learned Deputy Registrars of the Industrial Relations Court.

After painstakingly studying the judgment appealed against, we are of the view that the Court below misdirected itself when computing the employer's pension contribution due to the Appellant. It is our considered view that the Industrial Relations Court misconceived what we said in our judgments in Appeal No. 143/2002 and Appeal No. 166/2006. The essence of our guidelines in the two judgments was that the Appellant should be treated in the same way that Mr. Musyani and Mr. Sikazwe were treated.

We, therefore, are of the opinion that the determination of the employer's contribution due to the Appellant cannot be based on a formula that was not used when calculating Mr. Musyani and Mr. Sikazwe's employer's contribution. This is even more plausible when one considers the fact that the computation, which was adopted by the Industrial Relations Court, led to the Appellant being awarded less employer's contribution than he would have been granted had the Industrial Relations Court used the formula that was employed in calculating Mr. Musyani's employer's contribution.

It must be noted that this matter is not about what the Appellant would, under ideal circumstances, be entitled to. The record of appeal clearly shows that it is settled that the Appellant should be treated in the same way that his colleagues, who were similarly circumstanced, were treated. Indeed this is in line with the spirit of section 85 (5) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia which provides that the Industrial Relations Court should not be bound by the rules of evidence in civil or criminal proceedings, but the main object of the

Court should be to do substantial justice between the parties before it.

When the Industrial Relations Court first tried this matter it found, at pages J9-J10 of its judgment of 24th December, 2001, (pages 132-133 of the record of appeal) that the evidence before it proved that Mr. Musyani and Mr. Sikazwe had not reached pensionable age when they retired from the Respondent's service. That Mr. Musyani and Mr. Sikazwe were in circumstances similar to those of the Appellant. That since the Respondent paid the duo employer's contributions; they ought to have extended that treatment to the Appellant.

In its judgment of 21st July, 2006, the Industrial Relations Court again reiterated, at page J2 of its judgment (pages 228 of the record of appeal) that the assessment should relate to the refund of the employer's contribution in the same manner that Mr. Musyani and Mr. Sikazwe were paid.

In our judgment in Appeal No. 143/2002 we said, at page 5 (page 122 of the record of appeal) that because the Industrial

Relations Court is a Court which has to do substantial justice, not bound by the rules of evidence, it did not misdirect itself when it held that the Appellant should be treated in the same way the other two employees, in similar circumstances, were treated.

The foregoing clearly shows that the resolution of this matter depends on ascertaining how the employer's contributions for Mr. Musyani and Mr. Sikazwe were computed. We do not agree with the finding by the Industrial Relations Court that none of the documents in this case shows the actual computation of the employer's contributions paid to Mr. Musyani (and possibly Mr. Sikazwe).

A study of the record of appeal plainly establishes that the employer's contribution that was paid to Mr. Musyani was K 1, 511, 493.25 (see page 290 of the record of appeal). Although the document at page 290 of the record of appeal does not show the actual computation of Mr. Musyani's employer's contribution, there is an elaborate calculation of the said contribution at page 216 of the record of appeal. From the dates of the two documents, it is

clear that the computation at page 216 of the record of appeal was done before the document at page 290 of the record of appeal was generated. The computation at page 216 of the record of appeal was done on 12th October, 1992 while the document at page 290 of the record of appeal was prepared on 22nd October, 1992. The document at page 290 of the record of appeal also contains a figure for the employee's contribution amounting to K 41, 958. 15.

The document at page 216 of the record of appeal contains the actual calculation of the employer's contribution due to Mr. Musyani. That document shows that after the employers contribution of K 1, 511,493.25 was arrived at then the employee's contribution of K41, 958.15, was added to that amount to arrive at the total of K 1, 553,451.40.

Accordingly, it is our considered view that the formula for calculating the employer's contribution is that at page 216, before the addition of Mr. Musyani as an employee's contribution.

In the circumstances, we do not accept the formula used by the Respondent to compute the Appellant's employer's contribution (See pages 315-319 of the record of appeal). That formula is different from the formula that was used to compute Mr. Musyani's employer's contribution.

With regard to the interest applicable, the Appellant has argued that the 15% internal interest should continue to apply up to the 10th January, 2011, the date of payment into Court by the Respondent. That the Court awarded interest rates should be applied on the amount arrived at after applying the internal interest. In support of his arguments, he has referred us to this Court's decision in the ***Yonnah Shimonde Case***[1],.

We have read our decision in the ***Yonnah Shimonde Case***[1], and we do not agree with the Appellant's contention that the decision in that case supports his arguments. In fact that case ruled against what the Appellant is advocating for. This Court said the following:

> **"However, when a judgment of the court is given, any principal and interest merge into the judgment debt and the relationship of banker and customer is clearly at an end. It follows from the foregoing that the indebtedness has to be computed as indicated in this judgment. There can be no question of continuing with commercial interest or compounding it after the judgment below."**

Clearly, once judgment is passed the interest that becomes applicable is the interest awarded by the Court. We, therefore, are of the view that the 15% internal interest cannot be applied after the date of the Industrial Relation's Court judgment of 10th December, 2001.

In the premises, we hold that this appeal must succeed on the grounds relating to the computation of the employer's contribution. The appeal, however, fails on the grounds relating to the calculation of interest.

In the circumstances of this case, we will refer this matter to the learned Deputy Registrar for assessment. At assessment, the

learned Deputy Registrar should take into account the following guidelines:

1. **The proper formula to be used is that appearing at page 213 of the record of appeal, which is the computation done by ZSIC. This is the formula that was used to compute Mr. Musyani's employer's contribution.**

2. **The employer's contribution, therefore, as calculated by ZSIC, is K 2, 523, 044.33.**

3. **The interest to be applied on the K 2, 523, 044.33 should be as follows:**

(i) **internal interest at the rate of 15% on the employer's contributions from the date the Appellant joined the Pension Scheme up to the date he retired from the Respondent Company. The amount calculated here should be the principal amount upon which interest awarded by the Court should be applied. This is in accordance with Rule 9(i) of the Zambia Railways Limited Pension Scheme Trust Rules;**

(ii) **Court awarded interest, at the rate of 24% from the date of the cause of action (date of retirement) to the date of judgment (10th December, 2001), should be applied on the amount arrived at under (i).**

(iii) **Court awarded interest at the rate of 35% from the date of judgment (10th December, 2001) to the 10th January, 2011 when the Respondent paid K46,874,407.00 into Court, should be applied on the amount arrived at under (i).**

4. The employer's contribution calculated under 1. plus the interests calculated under 3 (i), (ii) and (iii), should be the total amount due to the Appellant.

The appeal having succeeded on some grounds and failed on others, we make no order as to costs.

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L.P. CHIBESAKUNDA
ACTING CHIEF JUSTICE

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M.S. MWANAMWAMBWA
ACTING DEPUTY CHIEF JUSTICE

.....
E.N.C. MUYOVWE
SUPREME COURT JUDGE