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IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA

APPEAL No. 40/2008

*(Civil Jurisdiction)*

**BETWEEN:**

**ZESCO LIMITED**

**APPLICANT**

**AND**

**CAROLYNE MAPHENDUKA**

**RESPONDENT**

**CORAM: Mwanamwambwa Ag/DCJ, Wood, Kaoma, J.J.S.**

**On 15<sup>th</sup> October, 2013 and 13<sup>th</sup> January, 2015**

For the Applicant: Mr. A. Sike- In House Counsel

For the Respondent: Mr. J. L. Kabuka- J. Kabuka & Company.

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## **RULING**

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**Mwanamwambwa J, delivered the Ruling of the Court.**

### **CASES REFERRED TO:**

- (1) CHARLES MULENGA AND 10 OTHERS V NATIONAL HOUSING AUTHORITY APPEAL NO. 6/2009
- (2) ZCCM LTD. V JACKSON SIAME & 33 OTHERS (2004) ZR 193
- (3) ANTHONY KHETANI PHIRI V WORKERS COMPENSATION CONTROL BOARD (2003) ZR 9
- (4) MUSUSU KALENGA BUILDING LIMITED AND WINNIE KALENGA V RICHMAN'S MONEY LENDERS ENTERPRISES (1999) ZR 27

This is an application which was brought by notice of motion for the interpretation of a judgment we rendered on 19<sup>th</sup> November, 2013. The judgment was from an appeal, against the decision of the Industrial Relations Court dated 28<sup>th</sup> November, 2007. In our judgment, we upheld the decision of the lower court to award the respondent damages equivalent to 12 months salary, at the then 'current' salary of the Chief Accountant.

The applicant now seeks the interpretation of our judgment on whether the current salary of the Chief Accountant should be as at 28<sup>th</sup> November, 2007, when the Industrial Relations Court passed its judgment or the 19<sup>th</sup> November, 2013, when we rendered our judgment. According to the affidavit in support of the motion sworn by Kasumpa Mwansa Kabalata, what was referred to as 'the current rate' in the Supreme Court judgment was the salary of the Chief Accountant as at 28<sup>th</sup> November, 2007, which was the date of the judgment in the lower court.

The respondent opposed this motion and raised a cross-motion. Her affidavit in opposition stated that there was no ambiguity or vagueness to warrant the interpretation of the judgment. The ordinary meaning of the award was that the compensation was tied to the Chief Accountant's salary at the date of the Supreme Court judgment on 19<sup>th</sup> November,

2013. She deposed that the appellant had computed amounts due to her from a manual pay slip, which purportedly represented the monthly earnings of a Chief Accountant. After comparing that manual pay slip with that of the serving Chief Accountant at the appellant, as at November, 2013, she noticed some discrepancies. She wanted the appellant to rectify it. It was against this backdrop that the appellant made the present application.

The respondent further stated that the appellant's correspondence over this matter had raised another issue. She deposed that the appellant had now refused to settle the undisputed terminal benefits which she had earned under her conditions of service, on the pretext that the compensatory award for the loss of employment had released the appellant from any further payment. Therefore, she was raising a cross-motion on whether the compensation had extinguished her right to get her accrued contractual benefits, or it was in addition to her right to recover those benefits, as at the date of the unfair dismissal. The accrued contractual benefits in question, were the leave pay, long service gratuity, performance bonus, unremitted insurance premium, salary underpayment, and repatriation. The payment of these benefits was never in dispute, but had been deferred pending the outcome of the litigation for reinstatement. After judgment was delivered, the appellant refused to pay the terminal benefits, arguing that they were no longer

payable because she had not claimed for them in the proceedings. And that the judgment did not specifically pronounce that they should be paid. She stated that the issue of accrued benefits was never in dispute and she expected the appellant to settle them, irrespective of the outcome of her claim for reinstatement.

For convenience's sake, we will begin by dealing with the main motion before we consider the cross motion. In support of the applicant's motion, Mr. Sike stated that the applicant did not dispute the award made by the court. But he argued that paying the respondent at the current rate of the Chief Accountant at the appellant would, amount to her benefitting from the changes that occurred after she had left employment. He referred us to the case of **Charles Mulenga and 10 others v National Housing Authority**<sup>(1)</sup>, and argued that this court had refused in that case, to extend increased salaries to employees, who had left employment on redundancy because there was no basis for calculating their benefits on the new salary, as their employment had terminated upon redundancy. Based on this authority, he submitted that an employee could not benefit from other conditions that had come after the termination of his employment, unless where there was a provision to the contrary. He argued that the compensation in this case was going to carry interest, as insurance for the loss the respondent suffered. For

these reasons, the applicant was seeking for the interpretation of the judgment.

In response, Mr. Kabuka submitted that there was no ambiguity in the judgment. His argument was that the literal rule of construction should be adopted, as it dictates that words should be given a meaning which the ordinary speaker of the English language would understand them to be. He stated that the judgment of this court was delivered on 28<sup>th</sup> November, 2013 and the compensation was to be at the 'current' rate of the Chief accountant at the appellant. He drew our attention to the definition of the word '*current*' as meaning '*happening now; or the present time.*' Therefore, the judgment of this court simply meant that the rate of a Chief Accountant at the date when our judgment was delivered on 28<sup>th</sup> November, 2013. Mr. Kabuka submitted that this case was distinguishable from that of **Charles Mulenga and 10 others v National Housing Authority**<sup>(1)</sup>, in that it was launched as a complaint of unfair dismissal which was upheld but the court refused to order reinstatement or to award benefits.

We have considered the affidavits in support of the motion together with the heads of argument filed both by parties. The gravamen of Mr. Sike's argument is that the respondent would end up benefitting from the changes that occurred after she had left employment if she was to be

paid at the rate of the Chief Accountant at the date of our judgment. According to him, the respondent should therefore be paid at the rate of the Chief Accountant, at the date of the judgment of the lower court. On the other hand, Mr. Kabuka argues that the fact that our judgment referred to the 'current rate of the Chief Accountant's salary' meant that the respondent was entitled to be paid at the rate of the Chief Accountant as at 19<sup>th</sup> November, 2013 when we delivered our judgment.

From these arguments by both counsel, it is clear to us that the parties in this case misapprehended the context in which we referred to the lower court's order of compensation, at the current rate of the Chief Accountant's salary. A perusal of our judgment will show that we did not make any fresh order on the issue. We simply upheld the order of compensation, as originally awarded by the lower court. In any event, it defies logic to suggest that we could have ordered a higher or different rate, in the absence of any evidence that the rate of the Chief Accountant's salary had changed from the time the lower court delivered its judgment and the time this court rendered its decision. This being the case, we are now making it plain that the respondent is entitled to compensation at the rate of a Chief Accountant's salary in the appellant, as at 28<sup>th</sup> November, 2007, when the Industrial Relations Court delivered its judgment. The main motion is hereby allowed. We will now turn to the cross motion.

In support of the cross motion, Mr. Kabuka's submitted that the award of compensatory damages for unfair dismissal did not extinguish the respondent's right to recover her accrued contractual terminal benefits. He cited the case of **ZCCM Ltd. v Jackson Siame & 33 Others**<sup>(2)</sup>, and argued that the court in that case held that accrued rights could not be retrogressively taken away. He further drew our attention to the case of **Anthony Khetani Phiri v Workers Compensation Control Board**<sup>(3)</sup>, where it was held that the appellant was entitled to recover accrued terminal benefits, up to the time of leaving employment, irrespective of the mode of separation. However, Mr. Kabuka observed that the appellant in this case could not recover redundancy benefits because he had resigned on his own accord. It was his submission that the respondent in the present case was entitled, in addition to the award of compensatory damages, to recover accrued terminal benefits from the applicant.

In response to the cross motion, Mr. Sike argued that the respondent could not raise the claim for accrued contractual terminal benefits at this stage, because it was never pleaded; and the court below did not award it. He stated that the respondent's claim was not supported by law. Counsel referred us to the case of **Mususu Kalenga Building Limited and Another v Richman Lending Enterprises**<sup>(4)</sup>, where we held that matters which were not pleaded before the trial court cannot be raised on

appeal. Mr. Sike observed that the issue of the payment of terminal benefits was never raised before the trial court and therefore the respondent was attempting to bring in new claims through this notice of motion. He concluded by arguing that there was no error in our judgment, and respondent's cross motion was merely an attempt to reopen the case in order to bring matters that were never pleaded in the court below.

We are grateful to both counsel for their submissions on the cross motion. In addressing the issues raised about the payment of accrued contractual terminal benefits, we took time to peruse the record, with a view to ascertain the status of this issue both here and in the court below. The only trace we found was the respondent's claim for 'reinstatement with full benefits or alternatively that she be treated as having been declared redundant'. Clearly, the issue of benefits was tied to the claim for re-instatement. There was no separate claim for terminal benefits. After evaluating the evidence before it, the court below refused to grant both claims for re-instatement, and redundancy.

Given this background, it is crystal clear that the issue of accrued contractual terminal benefits was not separately pleaded. The claim to which it was tied was dismissed by the court below. Therefore, we entirely agree with Mr. Sike that this issue cannot be raised at this stage



because it was never pleaded in the court below. In **Mususu Kalenga Building Limited and Winnie Kalenga v Richman's Money Lenders Enterprises<sup>(4)</sup>**, we held as follows:

**“We have said before and we wish to reiterate here that where an issue was not raised in the court below it is not competent for any party to raise it in this court.”**

The record shows that this court, like the court below, never adjudicated upon the issue of terminal benefits and neither did we rule on it. The respondent's cross motion is purely an attempt to make the Supreme Court re-try the matter on the merits. This we shall not allow. We hereby dismiss the respondent's cross motion.

The parties shall bear their respective costs.

  
 M. S. Mwanamwambwa  
 AG/ DEPUTY CHIEF JUSTICE

  
 A. M. Wood  
 SUPREME COURT JUDGE

  
 R. M. C. Kaoma  
 SUPREME COURT JUDGE