IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. 160/2013**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

AFROPE ZAMBIA LIMITED	**APPELLANT**
AND	
ANTHONY CHATE	**1ST RESPONDENT**
SYLVIA CHALI	**2ND RESPONDENT**
PATSON MUSHISHA	**3RD RESPONDENT**
WELLEM NGOSA	**4TH RESPONDENT**
DAINESS CHEMBE	**5TH RESPONDENT**
STANELY MUKANDAWIRE	**6TH RESPONDENT**

Coram: Mambilima, CJ, Wood and Malila, JJS.

On 2nd March, 2016 and 9th March, 2016

For the Appellant: *Mr. R. Mwanza-Messrs Robert and Partners.*

For the Respondents: *In person.*

JUDGMENT

Wood, JS, Delivered the judgment of the Court.

CASES REFERRED TO:

1. *Anderson Kambela Mazoka & 2 others v levy Patrick Mwanawasa and 2 others (2005) Z.R. 138.*
2. *William David Carlisle Wise v E.F. Hervey Limited (1985) Z.R. 179.*
3. *Lazarous Mumba v Zambia Publishing Company (1982) Z.R. 53.*

4. *Augustine Kapembwa v Danny Maimbolwa, Attorney General (1981) Z.R. 127.*
5. *Waghorn v Geo. Wimpey & Co. Ltd. [1969] 1 W.L.R. 1764.*
6. *J. K. Rambai Patel v Mukesh Kumar Patel (1985) Z.R. 220.*
7. *General Nursing Council of Zambia vs Ing'utu Milambo Mbangweta (2008) Z.R, 105, volume 2.*

LEGISLATION REFERRED TO:

1. *The Employment Act, Cap 268 of the Laws of Zambia.*

This is an appeal against a decision of the High Court to award repatriation and interest on accrued terminal benefits to the respondents.

The brief facts of this appeal are that the respondents were, prior to retirement, employees of the appellant company serving in different capacities and based in Kitwe. The respondents were not unionised workers. In March, 1998, the appellant transferred the respondents' accrued terminal benefits to the Saturnia Regna Pension Scheme under the African Life Financial Services (Z) Limited, which all of the respondents began to contribute to. The balance of the respondents' accrued terminal benefits as at 31st March, 1998, was only communicated to the respondents in a letter dated 20th December, 2001.

On or about 31st December, 2005, the respondents were retired by the appellant upon attainment of the statutory retirement age. The respondents were not satisfied with the computation of their pension benefits and commenced an action claiming underpayment of terminal benefits, interest on the amounts found due and costs.

In their amended statement of claim, the respondents averred that since they were not unionised employees, they were entitled to have their accrued terminal benefits or pension benefits calculated under the provisions of the *Employment Act, Cap 268 of the Laws of Zambia,* at the time of remittance to African Life Financial Services (Z) Limited on 31st March, 1998. They contended that the appellant based the computations on the provisions of a collective agreement applicable to unionised workers which resulted in underpayment of the monies due to them.

In its amended defence, the appellant denied the respondents' claim and averred that the respondents were paid their respective retirement benefits by the fund managers in accordance with the pension scheme rules and actuarial valuations which took into

account all accrued rights and contributions of each member prior to conversion in 1998.

In her judgment, the learned trial Judge found that the appellant introduced the Saturnia Regna Pension Scheme in 1998 to which all its employees began to contribute. She found that the respondents' claim that the accrued benefits were wrongly calculated lacked merit on grounds that the respondents did not adduce any evidence to show that prior to the Saturnia Regna Pension Scheme, their benefits were to be calculated at 3 months pay for each year served. She also found that there was nothing in the *Employment Act* to support the respondents' claim of three months' pay for each year served and neither did they produce their respective contracts of employment in support of the claim. She held that the appellant properly used the then existing collective agreement to compute the respondents' accrued terminal benefits, because the respondents themselves admitted that it was an accepted practice to use the collective agreement for the unionised workers when negotiating for management salaries. The learned trial Judge held that the respondents' benefits were remitted to the

pension scheme which was administered independently of the appellant and formed part of the package paid to the respondents on retirement. She, however, found that on the basis of the letters dated 20th December, 2001, addressed to the respondents concerning their accrued benefits, the respondents' benefits were only transferred to the pension scheme in 2001. On that basis, she concluded that the respondents lost out on interest which would have accrued on the transferred benefits and granted the respondents interest on the accrued benefits for the period 1998 to 2001. In justifying the award of lost interest, the learned trial Judge held the view that even though the respondent did not plead for lost interest, Ms. Sylvia Chali raised the issue of the lost interest in her evidence and no objection was taken by the appellant to her line of evidence. She also pointed to the fact that the respondents had pleaded for interest on any sums found due. The learned trial Judge also awarded the respondents repatriation allowance on the basis of *Section 13(1) of the Employment Act* which entitles an employee brought from a place within Zambia to a place of employment by the employer, or by an employment agency acting on behalf of the employer, to repatriation allowance as outlined in *sub-section 1 (a)*

to (d). Her view was that even though the respondents did not equally plead for repatriation, Mr. Anthony Chate and Ms. Sylvia Chali both raised the issue in their evidence, and as the case was with the issue of lost interest, no objection was taken by the appellant. Despite the fact that the respondents main claim failed, the learned trial Judge ordered that the appellant pays the costs of the respondents and African Life Financial Services (Z) Limited who were the 2nd defendant in the court below.

The appellants were not satisfied with the judgment of the High Court and filed in 3 grounds of appeal. Ground 1 of the appeal was that the learned trial Judge erred in law and fact in awarding the respondents lost interest in the wake of having dismissed all claims by the respondents, the same claim of lost interest not having been pleaded and in the absence of evidence that the respondents' benefits were transferred in 2001. In ground 2, it was contended that the learned trial Judge erred in law and fact in awarding the respondents repatriation in the absence of evidence to support the claim for repatriation and there being evidence that the respondents were recruited from Kitwe, the base for the appellant

and also in the wake of the same not being pleaded. Ground 3 of the appeal was that the learned trial Judge erred in law in awarding costs to the respondents having concluded that the appellants failed to prove that they were underpaid.

The arguments advanced by Mr. Mwanza in respect of the unpleaded awards are similar. For this reason, we shall combine the arguments advanced in respect of grounds 1 and 2 of the appeal.

In grounds 1 and 2 of the appeal, Mr. Mwanza submitted that it was clear from the judgment of the court below that the respondents had failed to prove their claim for underpayment of terminal benefits upon retirement. Having found that the respondents' main claim had failed, the learned trial Judge should not have awarded the respondents lost interest and repatriation as the same was not pleaded. In support of this argument, Mr. Mwanza cited the case of *Anderson Kambela Mazoka & 2 others v Levy Patrick Mwanawasa and 2 others*[1] in which we held that:

> *"The function of pleadings, is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the*

pleadings have been closed, the parties are bound by their pleadings and the court has to take them as such.

He also drew our attention to the case of *William David Carlisle Wise v E.F. Hervey Limited*[2] in which we held that:

"Pleadings serve the useful purpose of defining the issues of fact and of law to be decided; they give each party distinct notice of the case intended to be set up by the other; and they provide a brief summary of each party's case from which the nature of the claim and defence may be easily apprehended."

Mr. Mwanza contended that the authorities that allow for consideration of unpleaded matters let into evidence without objection by one party do not remotely suggest that such evidence when let in will have the effect of amending or adding to the claims. His view was that to allow parties to amend their claims without notice to the other party during trial would make for uncertainty in court decisions. In support of this submission, Mr. Mwanza referred us to the case of *Lazarous Mumba v Zambia Publishing Company*[3] in which we held that:

"...although the trial Court has a duty to admit and decide a case on a variation, modification or development of what had been averred, a radical departure from the case pleaded amounting to a separate and distinct new case cannot entitle a party to succeed."

Mr. Mwanza submitted that from the pleadings and evidence before court, the issue of lost interest was not in contemplation of the respondents or appellants and neither of the parties directed their minds to it. It was contended that having rejected the respondent's claim for underpayment of the pension dues, the learned trial Judge should not have awarded the respondents lost interest.

With regard to the claim for repatriation, Mr. Mwanza argued that it was not correct to state, as the learned trial Judge did, that the unpleaded claim of repatriation was raised by the respondents through Mr. Anthony Chate and Ms. Sylvia Chali. He asserted that the issue of repatriation was referred to by Mr. Anthony Chate in a pedestrian manner when, in response to a question from the court, he stated that:

> *"We also want the court to establish for us if we are entitled to repatriation. We were not paid anything."*

This statement, it was submitted, could not have amounted to evidence being let in without objection, as the statement was merely a wish and no evidence of the respondents' entitlement to repatriation was adduced. Since no evidence was led to support the

claim for repatriation, the appellant was not in a position to put the respondents to strict proof concerning their entitlement to repatriation.

In reply to grounds 1 and 2 of the appeal, the respondents argued that not all their claims were dismissed, since their claim for repatriation and lost interest succeeded. The respondents argued that the learned trial judge was on firm ground in awarding them lost interest because the amounts of money indicated in the letters of 20th December, 2001 were not reflecting as opening credits on the members' benefit statements as at 1st April, 1998. This, it was contended, showed that the appellant did not transfer the benefits in 1998 as claimed, thereby causing the respondents to lose interest on the monies.

With regard to the claim for repatriation, the respondents admitted that they asked the learned trial Judge to determine their entitlement to repatriation during trial, and she did so. They stated that in any event, they did not have to plead for repatriation as it was their entitlement as per the collective agreement, which the appellant admitted was the yardstick for determining the

respondents' entitlement upon retirement. It was argued that the issue of the base of recruitment had no impact on their claim for repatriation, because it is every employees' legal right to be repatriated on separation. In any event, the appellant had always paid its employees repatriation benefits in the past, and the respondents should not be treated any differently.

We have considered the arguments in respect of grounds 1 and 2 of the appeal, as well as the judgment appealed against. We have also considered the authorities cited in support of these two grounds of appeal. Even though the issue of lost interest on the retirement benefits was not pleaded by the respondents in their amended statement of claim, Ms. Sylvia Chali did state in her evidence that interest was lost because the accrued benefits were remitted in 2001 instead of 1998. As the learned trial Judge correctly observed, there was no objection taken to this statement, thereby rendering it part of the evidence to be considered by the court. This applies similarly to the issue of repatriation which was not pleaded by the respondents, but was raised for the first time in evidence by Mr. Anthony Chate. The appellant did not object to this

statement either. In the case of *Augustine Kapembwa v Danny Maimbolwa, Attorney General*[4] we held that:

> *"(ii) Where a party refers to evidence not pleaded, the proper course is for the other party to object immediately to this reference, thereupon it would be the duty of the court to decide whether or not it is necessary to grant an adjournment to the other party and whether to allow an amendment of the pleadings subject to an order for costs against the defendant..."*

In his arguments, Mr. Mwanza seemed to suggest that the evidence pertaining to lost interest and repatriation was a radical departure from the respondents' claim as it amounted to a separate and distinct new case. We did state in the case of *Lazarous Mumba v Zambia Publishing Company*[3] cited by Mr. Mwanza that a radical departure from the case pleaded, amounting to a separate case cannot entitle a party to succeed. We, however, do not agree with Mr. Mwanza's argument that the inclusion of the claim for lost interest and repatriation was a radical departure from the case pleaded in the amended statement of claim, which resulted in the creation of a separate and distinct new case on which the respondents could not succeed. We find the case of *Waghorn v Geo. Wimpey & Co. Ltd*[5] which we cited with approval in the case of *Augustine Kapembwa v Danny Maimbolwa, Attorney General*[5]

helpful in determining whether or not the plea for lost interest and repatriation was a radical departure from the main claim before the court. In that case, in considering whether the issue raised amounted to a new allegation or a mere variation of the original pleading the learned Judge had this to say:

> *"One must test the plaintiff's submissions in this way: If these allegations had been made upon the pleadings in the first place, namely allegations based upon the facts as they have now emerged, would the defendants' preparation of the case, and conduct of the trial, have been any different?...."*

In applying this test to the appeal before us, our answer would be that, had the respondents pleaded lost interest and repatriation in the first place, the appellant's preparation of the case and the conduct of the trial would have been the same. No additional evidence, other than the evidence before court could have been led to support the new claims. It follows from what we have stated that the learned trial Judge was entitled to consider the testimony regarding the respondents' entitlement to lost interest on the accrued terminal benefits as well as repatriation.

The above notwithstanding, our view is that the learned trial Judge erred when she held that the respondents accrued terminal

benefits were not transferred to the pension scheme in 1998. The 1st respondent's member benefit statement shows that the accrued terminal benefits were transferred to the pension scheme in 1998. In particular, the financial highlights of the statement show that as at 1st April, 1998, the 1st respondent's accumulated fund stood at K13,865.00 with an investment return of 25%. This accumulated figure included the 1st respondent's pension contribution for the month of March, 1998. It would appear that in arguing that the benefits were not transferred in 1998, the respondents concentrated only on the employee credit section of the member benefit statement, which shows the opening credit as at 1st April, 1998 at ZMK 0.00. The letter of 20th December, 2001, was merely communicating to the respondents their terminal benefits as at the date the benefits were transferred to the pension scheme. This letter did not in anyway imply that the respondents' benefits were transferred on 20th December, 2001. We must here state that in order to obtain an accurate reflection of the respondents' accrued terminal benefits as at 1st April, 1998, one must read the entire member benefits statement and not portions of it as the respondents appear to have done.

With regard to the claim for repatriation, our view is that the learned trial Judge erred when she awarded the respondents repatriation in the absence of evidence to substantiate the claim for repatriation. The respondents did not adduce evidence showing that they were employed from a place outside of Kitwe as required by *Section 13 (1) of the Employment Act* whose relevant portion reads as follows:

> *"13. (1) Whenever an employee has been brought from a place within Zambia to a place of employment by the employer, or by an employment agency acting on behalf of the employer, the employer shall pay the expenses of repatriating the employee to the place from which he was brought, in the following circumstances:....."*

Further to the above, the respondents did not produce the collective agreement in place at the time of their retirement, in support of their claim for repatriation.

In view of the foregoing, grounds 1 and 2 of the appeal succeed to the extent indicated.

In ground 3 of the appeal, Mr. Mwanza contended that having found that the respondents' claims had failed, the court below should not have gone ahead to award the respondents costs as it

did. He submitted that on the facts of this case, costs should have been awarded to the appellant.

The respondents' brief reply to ground 3 of the appeal was that the learned trial Judge properly awarded them costs since it was one of the reliefs prayed for.

We have considered ground 3 of the appeal and hold the view that it lacks merit. It is a settled principle of law that a successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted costs. This is what we stated in the case of *J. K. Rambai Patel v Mukesh Kumar Patel*[6]. We have also stated in a number of authorities that costs are in the discretion of the court. In the case of *General Nursing Council of Zambia v Ing'utu Milambo Mbangweta*[7] we held that:

> *"It is trite law that costs are awarded in the discretion of the court, such discretion is however to be exercised judicially. Costs usually follow the event."*

The respondents succeeded on the issue of repatriation and loss of interest on their terminal benefits in the court below. The record of appeal before us has not revealed anything in the conduct

of the respondents or any other reason which could have compelled the learned trial Judge to exercise her discretion by depriving the successful party of their costs. Having found for the respondents in the court below, the learned trial Judge properly exercised her discretion in awarding them costs because they were the successful party. However, in view of our finding in grounds 1 and 2 of this appeal, we accordingly set aside the order for costs made by the learned trial Judge.

This appeal succeeds to the extent indicated. We take the view that in the circumstances of this case, the parties should bear their respective costs both here and in the court below.

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I.C. MAMBILIMA
CHIEF JUSTICE

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A.M.WOOD
SUPREME COURT JUDGE

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M. MALILA SC
SUPREME COURT JUDGE