IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 92/2015**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ZAMBIA NATIONAL COMMERCIAL BANK PLC **APPELLANT**

AND

JASON MWEEMBA **RESPONDENT**

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

On 1st October, 2015 and 18th January, 2016.

For the Appellant: *Mr. B. Gondwe- Messrs Buta Gondwe and Associates.*

For the Respondent: *Mr. M Mwitumwa- Messrs M.L. Mukande and Company.*

JUDGMENT

Wood, JS, delivered the Judgment of the Court.

CASES REFERRED TO:

1. *William David Carlisle Wise v E.F. Hervey Limited (1985) Z.R.179.*
2. *Barclays Bank Zambia Limited v Mando Chola and Ignatius Mubanga (1997) Z.R. 35.*
3. *Zambia Oxygen Limited and Zambia Privatisation Agency v Paul Chisakula and others (2000) Z.R.27.*

4. *Strom Bruks AktieBolag v Hutchson (1905) A.C. 515.*

LEGISLATION REFERRED TO:

Section 85 (9) and Rule 55 of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia.

OTHER WORKS REFERRED TO:

1. *Halsbury's Laws of England, Volume 9(1), 4th Edition.*
2. *Odgers' Principles of Pleadings and Practice, 21st Edition.*

This is an appeal against a decision of the Industrial Relations Court which ordered that the respondent was entitled to a life pension to be paid in monthly installments.

The brief facts of this case are that the respondent was employed as a caretaker by the appellant on 2nd January, 1990. On 19th January, 2002, he was involved in a road traffic accident which left him with injuries that caused him to suffer permanent disability. Following a recommendation by the Ministry of Health Medical Board, the respondent was retired on medical grounds on 23rd June, 2003. Upon his discharge, he was paid the sum of K53,816.22, from the appellant's Group Life Insurance Policy, one

month's pay in lieu of notice, repatriation, leave days as well as an immediate pension amounting to K22, 678.85.

The respondent was not satisfied with his retirement package. On 10th October, 2004, he filed a complaint in the Industrial Relations Court claiming payment of his retirement benefits from the date of employment up to 25th June, 2002, interest on the package to be found due and payable, any other relief the court may deem fit, interest and costs. In his affidavit in support of the complaint, the respondent contended that the manner in which the appellant computed his benefits was irregular and resulted in an underpayment of his benefits. He argued that the appellant only addressed the issue of compensation for the accident under the Group Life Insurance Policy, while neglecting to pay him his retirement dues as provided for under the Employment Act. He contended that he was entitled to three months basic pay for each year served for the duration of the 12.5 years that he was in service.

In its answer, the appellant denied the respondent's claim, stating that he was paid his retirement benefits in full in accordance with the Pension Scheme to which he contributed. It

was argued that the respondent could not be paid according to the Employment Act, since he belonged to a union and his conditions of service were negotiated through the process of collective bargaining.

In its judgment, the Industrial Relations Court found in favour of the respondent. It found that the respondent was retired pursuant to Rule 5(d) of the appellant's Pension Scheme Rules which stated that a member may retire from the employer's permanent service at any time before his 55th birthday if such retirement is on account of ill health. It also stated that such a member was to be paid a pension in accordance with Rules 5(a) and (c) of the Pension Scheme Rules. Rule 5(a) of the Pension Scheme Rules provided for payment of a yearly pension equal to 1/45th of a member's final pensionable salary, multiplied by the pensionable service. In addition, the rule provided for a further pension of such amount as secured by the members and the employer's additional contributions towards the scheme. The court also took into account Rule 5(c) of the Pension Scheme Rules which stated that the pension due to a member shall be paid in monthly arrears of 1/12th of the pension until the demise of the member. The Court found that Rule 5(d) could only be implemented in accordance with Rules

5(a) and (c) of the Pension Scheme Rules and subsequently ordered that the appellant pays him a life pension as provided for under Rules 5(d) as read with Rules 5(a) and (c). It refused to accept the appellant's argument that it had paid the respondent his lump sum pension as provided for under Rule 9 of the Pension Scheme Rules. The basis for the refusal was that there was no proof that the respondent had consented to receiving a lump sum payment as required under Rule 9. The appellant was not satisfied with the judgment of the Industrial Relations Court and filed in four grounds of appeal.

Ground one of the appeal was that the Industrial Relations Court erred in law and fact by allowing the complainant to depart from his case in the pleadings and/or varying his case from the one that was pleaded in the complaint.

In this ground of appeal, Mr. Gondwe submitted that in his complaint, the respondent's prayer was for an order for payment of his retirement benefits, interest on the sums found due, costs and any other relief the court may deem fit. He contended that the respondent only shifted his claim to pension dues in his

submissions and it is upon these submissions that the court below found that the respondent was entitled to a monthly pension. Mr. Gondwe argued that terminal dues as settled in the pleadings and the pension referred to in the judgment were two separate severance packages. He observed that in his pleadings and evidence, the respondent never raised issue over his pension entitlement, but rather appeared to claim other payments arising from his service with the appellant. He also pointed out that in his evidence, the respondent admitted that he had been paid his pension dues, accident compensation, leave days, repatriation and notice pay. Therefore, the claim relating to pension dues was a new claim raised in the respondent's submissions, and the Industrial Relations Court erred when it based its decision on submissions that were at variance with the pleadings and the evidence adduced at trial. In support of his argument that submissions are arguments in support of pleadings and not meant to set new claims or grounds of response, he cited the case of *William David Carlisle Wise v E.F. Hervey Limited*[1].

In response, Mr. Mwitumwa conceded that the main claim by the respondent was for terminal benefits. However, in order to

determine the veracity of the claim, the Industrial Relations Court had to look at his conditions of service, which included the Pension Scheme Rules. He argued that despite the flaws in the respondent's pleadings, the main aim of the Industrial Relations Court was to do justice after establishing whether or not the respondent had been paid his terminal dues in full. He contended that flawed pleadings cannot stand in the way of the Industrial Relations Court to exercise its power under *Rule 55 of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia,* which states that:

> *"Nothing in these rules shall be deemed to limit or otherwise affect the power of the court to make such order as may be necessary for the ends of justice or prevent the abuse of the process of the court."*

Mr. Mwitumwa also cited the case of *Barclays Bank Zambia Limited v Mando Chola and Ignatius Mubanga*[2] in which we held that:

> *"In the process of doing substantial justice, there is nothing in the Act to stop the Industrial Relations Court from delving behind or into reasons given for termination in order to redress any real injustices discovered."*

We have considered the submissions in respect of ground one of the appeal and the authorities cited in support. Our view is that the Industrial Relations Court did not err when it delved into issues

dealing with the respondent's Pension Scheme Rules despite the respondent's claim being for terminal benefits at 3 months pay for each year served. Even though the respondent's pleadings did not include a claim for a pension, the evidence on record shows that the appellant raised the issue of the respondent's pension dues in defence of the respondent's claim that the appellant owed him further benefits. All of the appellant's three witnesses based their testimony on the appellant's Pension Scheme Rules. The issue was, therefore, not raised in the respondent's submissions for the first time as claimed by the appellant.

Further, the fact that the respondent did not plead payment of his pension dues did not prevent the Industrial Relations Court from determining whether or not he had been paid according to the appellant's Pension Scheme Rules. As correctly argued by Mr. Mwitumwa, flawed pleadings cannot stand in the way of the Industrial Relations Court in its exercise of the powers under *Rule 55 of the Industrial and Labour Relations Act.* Further *Section 85(5) of the Industrial and Labour Relations Act* also states that:

"The Court shall not be bound by the rules of evidence in civil or criminal proceedings, but the main object of the Court shall be to do substantial justice between the parties before it."

Further, in the case of *Barclays Bank Zambia Limited v Mando Chola and Ignatius Mubanga*[2], we rejected the appellant's argument on pleadings when we stated that:

"While, undoubtedly, it would be desirable that a recognisable cause of action should be manifest in the originating documents including the affidavits in order that the opponent may have reasonable notice of the case to be met and so prepare adequately, nonetheless, it is not wrong for a court of substantial justice to entertain a complaint however inadequately couched-especially by a lay litigant - and to make a decision or give an award on the merits of the case, once it is heard. The hearing is frequently a summary one and there is no need to depart from such practice. It follows that we do not accept the argument based on the "pleadings," such as they are."

We find no merit in ground one of the appeal.

Ground two of the appeal was that the court below failed to fully appreciate and construe the pension rules applicable to the respondent.

In this ground of appeal, Mr. Gondwe argued that the respondent was paid his lump sum pension dues according to Clause 9 of the Pension Scheme Rules as opposed to monthly installments as provided for under clause 5 (c). He submitted that

according to clause 5 (a), the pension was calculated at 1/45th of the last salary multiplied by the number of years an employee had been a member of the pension scheme. Clause 5 (c) provided that the minimum period for the rate above was 10 years or 120 monthly payments. After applying the two clauses to the respondent, the pension manager's workings showed that the respondent was entitled to K22, 678. 85 and this money was paid in one lump sum. If the respondent was to receive his pension entitlement in installments, it was contended that his annual entitlement for a minimum period of 12 months would reduce to K1, 665, 726.00. This would translate into a monthly pension of K13,881.05 for a minimum period of 10 years. Mr. Gondwe contended that the acceptance of the lump sum payment was evidence of the respondent's consent. It was, therefore, an error on the part of the Industrial Relations Court to award the respondent a monthly pension despite having received his full pension under Clause 9.

Mr. Gondwe also argued that the tone of the judgment of the court indicated that it felt that the pension pay was insufficient. He contended that it was not the place of the court to create or vary

conditions of service but merely to interpret agreements as provided under *Section 85 (9)* of the *Industrial and Labour Relations Act.*

In response, Mr. Mwitumwa submitted that the appellant cannot argue that the respondent was paid his full pension under Clause 9 because his consent was not obtained. He contended that the Industrial Relations Court was on firm ground when it found that the respondent had not been paid his pension dues in accordance with Rules 5(a) and (c) of the Pension Rules. His point was that Rule 5 (d) clearly stated that on retirement, an employee shall be entitled to an immediate pension on the basis of Rule 5 (a), which provided for a yearly pension equal to 1/45th of the members final pensionable salary, multiplied by his pensionable service. He observed that Rule 5 (c) envisaged a monthly pension payment equal to 1/12th of the pension and the first payment being made immediately after the normal pension. Mr. Mwitumwa contended that the appellant's imposition of Clause 9 on the respondent amounted to a unilateral variation of his terms and conditions of service, a proposition that this court rejected in the case of *Zambia Oxygen Limited and Zambia Privatisation Agency v Paul Chisakula and others*[3].

We have considered the arguments in relation to ground two of the appeal. The main issue in this ground as we see it is whether the respondent consented to payment of his pension dues in one lump sum as required under Clause 9 of the Pension Rules. Clause 9 reads as follows:

> *"The company may on the retirement of a member, and with the consent of the member:*
>
> *(a) Where the pension to which the member is or will become entitled is K2,000.00 per annum or less, pay to such a member the actuarial equivalence of such pension in the form of an immediate lump sum payment."*

In a letter of demand dated 28th January, 2013, addressed to the appellant, the respondent's counsel confirmed that the respondent's yearly pension was K1,667.73. This brings the respondent's yearly pension entitlement within the ambit of Clause 9. The computations of the respondent's pension by the Zambia State Insurance Corporation in the record of appeal also showed that the respondent was paid 100% cash value of his pension which amounted to K22, 678.85. The respondent did not question the computation of his pension dues in his pleadings or during trial. We have noted that Clause 9 did not specify the mode of

communication of the consent. Our view is that the respondent consented to payment of the lump sum pension when he accepted the payment. The learned authors of *Halsbury's Laws of England, Volume 9(1), 4th Edition* stated the following in paragraph 701 on consent:

> *"A party may be taken to have assented if he has so conducted himself as to be estopped from denying that he has assented."*

In view of what we have stated above, Mr. Mwitumwa's argument that the appellant did not comply with Clause 9 of the Pension Scheme Rules fails. We find merit in ground two of the appeal.

Ground three of the appeal was that the Industrial Relations Court misdirected itself by awarding general damages that were not pleaded in the complaint and neither was there any breach of contract committed by the appellant of the complainant's conditions of service.

Hereunder, Mr. Gondwe submitted that the general rule is that the object of an award of damages is to compensate the claimant for loss suffered. He contended that the effect of an award

of general damages is to put the injured party in the same position as they would have been had the wrong not been committed. Mr. Gondwe referred us to the case of *Strom Bruks AktieBolag v Hutchson*[4] in which Lord McNaughton defined general damages as:

> *"Such as the law will presume to be the direct natural or probable consequence of the action complained of."*

He submitted that the Industrial Relations Court did not give any reason for the award of general damages or show any loss suffered by the respondent. The court appeared to have based the award on the respondent's claim for any other relief the court may deem fit. Mr. Gondwe contended that since there was no breach of contract, the respondent did not suffer any damages to warrant the award. He urged us to quash the award as being wrong at law.

In response, Mr. Mwitumwa contended that the award of general damages was not without basis. It arose from the fact that the appellant breached the respondent's conditions of service with impunity because he was not consulted as required under Clause 9 of the appellant's Pension Rules, on whether he could be paid his pension in full. He contended that the award was not shocking

given the fact that the respondent's case arose from an accident situation.

We have considered the arguments in respect of ground three of the appeal. We have stated before that general damages need not be specifically pleaded as they are presumed to be a natural consequence of a breach. The learned authors of *Odgers' Principles of Pleadings and Practice, 21st Edition* state the following at page 164 on general damages:

> *".....General damage such as the law will presume to be the natural and probable consequence of the defendant's acts need not be specifically pleaded. It arises by inference of the law and need not, therefore, be proved by evidence and may be averred generally."*

The issue as we see it, is whether the respondent proved any loss suffered on account of the appellant's conduct. We do not think so. At trial, the respondent admitted that he was paid all that was due to him and failed to produce evidence to show that the appellant owed him 3 months pay for each year served. The award for damages was, therefore, not supported by evidence on record. Having found in ground two that the respondent was properly paid his pension dues, we accordingly set aside the award of general damages. Ground three of the appeal has partial merit.

Ground four of the appeal was that the lower court misdirected itself by dealing with the question on the adequacy of the respondent's pension.

In ground four of the appeal, Mr. Gondwe repeated the arguments in grounds one and two of the appeal, save for the submission that even though the court appeared to warn itself against the danger of dealing with the question of the adequacy of the appellant's pension scheme, this consideration still influenced the court's decision.

Mr. Mwitumwa's brief response was that the comments about the adequacy of the appellant's pension scheme were not part of the judgment.

We have considered the arguments relating to ground four of the appeal and the authorities cited. We have observed that despite warning itself over expressing its views on the adequacy of the appellant's pension scheme, the Industrial Relations Court proceeded to state that:

> *"We are quiet shocked, from the evidence before us, that the system obtaining from within the respondent's establishment was, apparently such that when one retired from employment, then one was not entitled to*

any other benefits apart from payments under the pension scheme, which was voluntary. We are, in this regard, quiet at a loss as to what happened in the event that an employee opted not to be part of that voluntary pension scheme and ask ourselves whether that person would leave employment with only payment for leave days, repatriation and payment in lieu of notice, where that was applicable regardless of the period served. If the answer is in the affirmative, then that was a most blatant breach of the concerned employee's rights which ZUFIAW should have curbed."

The court went on to state that:

"In terms of relief, the Notice of Complaint shows that the complainant seeks to be paid retirement benefits up to 25th June, 2002 the date of his retirement. However since we have found that apart from leave days, repatriation and payment in lieu of notice where applicable, the respondent did not pay its retired unionised employees any retirement benefits per se, but only paid them from its pension scheme, we order that the complainant be paid a life pension as provided for under Rule 5 (c) of the respondent's Pension Rules."

(Emphasis ours)

Contrary to Mr. Mwitumwa's argument in this ground, the above statements certainly formed part of the judgment of the court as they clearly influenced the award of the monthly pension. The Industrial Relations Court felt that other than the pension benefits, repatriation, leave pay and the pay in lieu of notice, there ought to have been other benefits accruing to the respondent from the appellant. As correctly argued by Mr. Gondwe, the jurisdiction of

the Industrial Relations Court is clearly spelt out in *Section 85(9) of the Industrial and Labour Relations Act* and it does not include the jurisdiction to vary conditions of service as it attempted to do in this case. Ground four of the appeal succeeds.

The net result is that this appeal succeeds in part. In the circumstances of the case, we order that parties bear their respective costs of the appeal.

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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
SUPREME COURT JUDGE