IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 227/2013**
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

ZESCO LIMITED **APPELLANT**

AND

ALEXIS MABUKU MATALE **RESPONDENT**

CORAM: MAMBILIMA, CJ, WOOD AND MALILA, JJS;

On 1st March, 2016 and 10th March, 2016.

For the Appellant: **Mr. Nchima Nchito, SC of Messrs. Nchito and Nchito;**
For the Respondent: **No Appearance.**

JUDGMENT

MAMBILIMA, CJ, delivered the Judgment of the Court.

CASES REFERRED TO-

1. **KITWE CITY COUNCIL V. WILLIAM NG'UNI (2005) ZR 57;**
2. **WILLIAM DAVID CARLISTE V. HERVEY LIMITED (1985) ZR 179;**
3. **SIAMUTWA V. SOUTHERN PROVINCE COOPERATIVE MARKETING UNION AND FINANCE BANK (Z) LIMITED, APPEAL NO. 14 OF 2000;**
4. **MUSUSU KALENGA BUILDING LIMITED, WINNIE KALENGA V. RICHMANS MONEY LENDERS ENTERPRISES LIMITED (1999) ZR27;**
5. **J. S. WARDELL V. UNIVERSAL ENGINEERING LIMITED AND NCC LIMITED (1977) ZR 62;**
6. **ZAMBIA OXYGEN LTD AND ZAMBIA PRIVATIZATION AGENCY V. PAUL CHISAKULA, FRANCIS PHIRI, YESANI CHIMWALA, RUMBANI MWANDIRA AND RICHARD SOMANJE, SCZ JUDGMENT NO. 4 OF 2006;**
7. **KITWE CITY COUNCIL V. WILLIAM NG'UNI (2005) ZR 57; AND**
8. **NATIONAL AIRPORTS CORPORATION LIMITED V. REGGIE EPHRAIM ZIMBA AND SAVIOR KONIE (2000)ZR154.**

LEGISLATION REFERED TO-

1. **RULE 69 OF THE SUPREME COURT RULES, CHAPTER 25 OF THE LAWS OF ZAMBIA.**

This is an appeal from the Judgment of the High Court delivered on 24th September, 2013. This followed an action commenced by the Respondent by way of a writ of summons and supporting statement of claim for the following reliefs:

(a) damages for wrongful termination of employment by the Defendant;
(b) salaries and allowances of regular nature covering the period of contract up to 8th August, 2008;
(c) payment of long service gratuity for a period of 16 years from 1992 to 2008;
(d) damages for mental distress and anguish as a result of aforesaid wrongful termination of employment and non-payment of terminal benefits in full;
(e) interest at short term deposit rate as approved by the Bank of Zambia on the amounts owing to the date of payment or judgment and thereafter at the current Bank lending rates to the date of settlement; and
(f) any other relief the Court may deem fit, appropriate and costs." (*sic*)

The facts that are not in dispute are that the Respondent was employed by the Appellant on 1st December, 1992, as a Business Planning Manager. He rose through the ranks to the position of Senior Manager-Distribution Development. On 8th August, 2002, he was appointed Director-Distribution and Supply on a three year contract of employment which expired on 7th August, 2005. When

that contract expired, the parties did not sign a fresh contract but the Respondent continued working.

In his testimony before the lower Court, the Respondent stated that when the contract expired, the Managing Director verbally renewed it and assured him that it would be formally tabled before the Appellant's Board of Directors. That consequently, he continued working under the same conditions of service as stipulated in the contract that expired on 7th August, 2005. His renewed contract was supposed to run up to 7th August, 2008.

The Respondent went on to testify that in addition to his annual salary which was stipulated in the contract, he was entitled to 75% of his basic salary as service allowance; housing allowance at 40% of his basic pay; a one-off furniture allowance of K15 million or cash equivalent on his appointment; a personal-to-holder car with 480 liters of fuel per month and leave at four working days per month. That he was also entitled to seven days social tour with up to six members of his family once every twelve calendar month. That in addition to the above, he enjoyed other conditions of service

which were applicable to members of staff on permanent and pensionable terms of employment.

It was the Respondent's further testimony that on 2nd November, 2005, his performance was appraised by the Managing Director who gave him a fair assessment. After the said appraisal, he proceeded on a social tour with his family from 12th December, 2005, to 16th January, 2006. He told the lower Court that upon his return from leave, he made an appointment with the Managing Director, for the purpose of getting a brief on the systems which, according to media reports, were stressed due to flooding at Kafue Gorge. That in addition, he wanted to get a brief on electricity blackouts which had caused public outcry.

The Respondent stated that at the said meeting, which was also attended by the Director Human Resources and Administration, the Managing Director expressed concern at the attacks and public demonstrations by Trade Unions and the general public against the Appellant's Management. That the Managing Director then informed him that he had decided to terminate his contract of employment.

It was the Respondent's further testimony that the following day, he was given a letter of termination of contract which stated that he would be paid terminal benefits, less any indebtedness to the Appellant, as if he had worked up to the end of the contract. That the letter of termination contained a new clause 5.1.2, which provided that-

> **"Where, however, the Company terminates the contract on grounds other than those stated in clause 5.1.1 the Company shall pay the employee full gratuity excluding monthly salaries and allowances as if the contract period has been duly served."**

According to the Respondent, the contract of 8th August, 2005, did not have clause 5.1.2. He stated that the said clause was contained in a draft contract which the Appellant unsuccessfully asked him to sign a month after it terminated his contract of employment. According to him, the letter terminating his contract should have instead, referred to clauses 8 and 9 of his original contract, which provided as follows:

> **"Clause 8**
>
> **At the end of the contract, gratuity shall be paid at 35% of the last drawn gross salary grossed up for tax.**
>
> **Clause 9**
>
> **In the event that the Company terminates this agreement for any cause other than dismissal for misconduct, the Company will pay**

the employee all his benefits as outlined in clause 8 above up to the end of the contract."

The Respondent testified that his understanding of the Managing Director's letter of termination of contract was that the Managing Director was buying off his contract for the remaining years. That he, therefore, expected to be paid his salary and allowances on a month-to-month basis up to August, 2008.

The Respondent went on to liken his situation to that of one, Dr. AKAPELWA who, according to him, was paid basic salaries, service allowances, housing allowances, PRP allowances and long service gratuity up to the end of his contract.

In response to the Respondent's case, the Appellant filed a defence. It also called one witness, the Director of Human Resources and Administration, Mr. Boniface John LUSWANGA. Mr. LUSWANGA testified that in view of the vacuum created by the absence of the contract of employment, the Respondent was regarded as having served under his old contract. According to him, clause 5.1.2, which was referred to in the letter of termination, was the same as clauses 8 and 9 of the expired contract because they all related to payment of gratuity.

After considering the evidence on the record and the submissions of Counsel, the learned trial Judge held that the Respondent could not claim damages for wrongful dismissal because he was paid all the benefits that the Appellant perceived to be his entitlements.

The Court also found that the draft contract, which the Respondent had refused to sign, did not apply to him.

The lower Court held that clause 9 of the contract introduced much more favourable gratuity payment. That the much more favourable gratuity under that clause was that ***'The Company will pay the employee all his benefits as entitled in clause 8 above up to the end of the Contract'***.

The learned trial Judge stated that it was not plausible to effect clause 9 without taking into account the gross salary which the Respondent would have received at the end of the contract period on 7th August, 2008.

The lower Court further stated that it is settled law that where the word **'salary'** is used, there is no debate that it includes

allowances that are paid together with the salary on a periodical basis by an employer to the employee.

With regard to the Respondent's refusal to sign the draft contract of employment, the learned trial Judge said that it was within the Respondent's right to reject the proposed contract, which was signed and backdated by Management. That the proposal was an attempt by Management to alter the Respondent's terms and conditions of employment without his consent.

On the Respondent's claim to be paid in a manner similar to the way Dr. AKAPELWA was paid, the learned trial Judge was of the view that the Respondent and Dr. AKAPELWA were similarly circumstanced. He, therefore, held that paying the Respondent in the manner Dr. AKAPELWA was paid would not amount to undue enrichment.

In conclusion, the lower Court found that the Respondent had substantially proved his claims.

The Appellant has now appealed to this Court, against the Judgment of the lower Court, advancing three grounds of appeal, namely, that-

1. **the learned trial Judge erred in law and in fact when he construed clauses 8 and 9 of the Respondent's contract of employment as entitling the Respondent to payment of his salary and allowances up to the end of his contract;**

2. **the learned trial Judge erred in law and fact in basing the Respondent's entitlements on what Dr. AKAPELWA was paid when the same was not pleaded; and**

3. **the learned trial Judge erred in law and fact when he distinguished the Respondent's case from the decision in Siamutwa v. Southern Province Cooperative Marketing Union and Finance Bank (Z) Limited, Appeal No. 14 of 2002.**

In support of these grounds of appeal, the learned Counsel for the Appellant, Mr. Nchima NCHITO, SC, filed written heads of argument on which he entirely relied.

On the first ground of appeal, Mr. NCHITO, SC, submitted that the lower Court misdirected itself when it construed clauses 8 and 9 of the contract of employment as entitling the Respondent to payment of his salaries and allowances up to the end of his contract. Counsel argued that clause 8 provided for payment of gratuity at the end of the contractual period. That, on the other hand, clause 9 provided for a situation where an employee, who had

not served the full contract period, would be entitled to the benefits provided for in clause 8. In Counsel's view, the benefits provided for in clause 8 is simply gratuity. He submitted that an examination of clause 8 shows that the clause does not mention salaries or allowances as part of the terminal benefits payable at the end of the contract. That it would amount to unjust enrichment to pay the Respondent salaries for the period he did not work. In support of these arguments, Counsel cited the case of **KITWE CITY COUNCIL V. WILLIAM NG'UNI**[1], where this Court held, among others, that-

> **"It is unlawful to award a salary or pension benefit, for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment."**

Coming to the second ground of appeal, Mr. NCHITO, SC, submitted that the learned trial Judge erred in law and fact when he based the Respondent's entitlements on the terminal benefits that were paid to Dr. AKAPELWA. He contended that the facts relating to Dr. AKAPELWA's payment could not be relied upon by the Respondent because he did not plead the said facts in the lower Court. In support of his submissions, he relied on the case of **WILLAM DAVID CARLISLE V. HERVEY LIMITED**[2], where we said, among other things, 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 ...."**

Counsel went on to argue that the testimony given by Mr. LUSWANGA showed that Dr. AKAPELWA's case was significantly different from the Respondent's case because Dr. AKAPELWA's contract was terminated on the ground of redundancy.

Lastly, with regard to the third ground of appeal, Counsel argued that the lower Court misdirected itself when it distinguished the facts of this case from the facts of the case of **SIAMUTWA V. SOUTHERN PROVINCE COOPERATIVE MARKETING UNION AND FINANCE BANK (Z) LIMITED**[3]. In that case, this Court said the following:

> **"The Appellant never rendered any service to the Respondent from the time that his services were terminated on 20th May, 1999, up to the date of judgment in May, 2002. There would therefore be no consideration for the money which could be paid to the Appellant were such an order made. In our view, this would amount to unjust enrichment."**

The Counsel for Respondent filed a notice of non-appearance pursuant to **RULE 69 OF THE SUPREME COURT RULES**. He did not, therefore, appear before us. He however filed written heads of argument.

In response to the first ground of appeal, Counsel submitted that the lower Court properly directed itself when it interpreted clauses 8 and 9 of the Respondent's contract of employment to mean that the Respondent was entitled to payment of his salary and allowances up to the end of his contract. According to Counsel, this holding was supported by the evidence of the Appellant's only witness, Mr. LUSWANGA.

Counsel went on to argue that the learned trial Judge was on firm ground when he found, as a fact, that the proposed clause 5.1.2 was an attempt to take away the salaries and allowances which the Respondent would have earned up to the end of his contract period in August, 2008. That the learned trial Judge rightly rejected clause 5.1.2 because it was introduced to take away already accrued rights of the Respondent and others who were at the same level as the Respondent. He contended that since Dr. AKAPELWA, who was declared redundant by the Appellant, was paid terminal benefits up to the time his contract would have ended, the Respondent was entitled to be paid in a similar manner.

Counsel further argued that the learned trial Judge rightly rejected clause 5.1.2 because that clause was introduced to take away already accrued rights of the Respondent and others who were at the same level as the Respondent.

On Mr. NCHITO's submissions that the lower Court should have applied the **SIAMUTWA**[3] case to the facts of this case, Counsel agreed with the lower Court that the facts of that case were distinguishable from the facts of this case.

Coming to the second ground of appeal, Counsel contended that the learned trial Judge did not solely base his findings relating to the Respondent's entitlements on Dr. AKAPELWA's benefits. In Counsel's opinion, the lower Court only referred to Dr. AKAPELWA's case to illustrate that salaries and allowances were payable to officers at the level of the Respondent, up to the end of the contract, if the termination of employment was not on account of misconduct. Counsel added that since the documents relating to Dr. AKAPELWA's terminal benefits were agreed documents and were before the lower Court, the learned trial Judge had no choice but to refer to the said documents. Further, that in the lower

Court, the Appellant did not object to the said documents and did not raise the argument that the issue relating to Dr. AKAPELWA was not pleaded. To support his submissions, Counsel referred us to the case of **MUSUSU KALENGA BUILDING LIMITED, WINNIE KALENGA V. RICHMANS MONEY LENDERS ENTERPRISES LIMITED**[4], where this Court stated that-

> **"We have said it before and we wish to retaliate 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."**

Counsel went on to submit that in any event it is trite law that parties plead facts and not evidence with which to prove those facts. According to Counsel, the documents relating to Dr. AKAPELWA were simply documentary evidence and not facts.

Counsel proceeded to contest the amendment that was effected to the Appellant's defence in the lower Court. He contended that the defence that was originally filed by the Appellant's in-house Counsel was a general admission of the Respondent's claims except for slight differences in quantum. He expressed the view that the amended defence, which denied most of the claims that had been admitted earlier, was an after-thought by the Appellant. That the amended defence was not an amendment but a complete change of

the original defence. That the change of the original defence was intended to prejudice the Respondent and to deny him his full benefits as provided for under his conditions of service. In support of the submissions, Counsel referred us to a decision of the High Court in the case of **J. S. WARDELL V. UNIVERSAL ENGINEERING LIMITED AND NCC LIMITED**[5], where MOODLEY, J, said the following:

> **"Amendments to pleadings may be allowed at any stage in the proceedings if they will not do the opposing party some injury or prejudice in some way that cannot be compensated for by costs or otherwise or change the action into one of a substantially different character which would more conveniently be the subject of a fresh action. There would be no prejudice to the 2nd Defendants by allowing the amendments which did not attempt to introduce a new cause of action or change the capacity in which the 2nd Defendants were being sued."**

Counsel argued that the changes from admissions to denials of almost everything that the Respondent claimed was malicious and deceitful. He also accused the Appellant of having been malicious when it back-dated the Respondent's contract of employment.

On the third ground of appeal, Counsel contended that the learned trial Judge was on firm ground when he distinguished this case from the **SIAMUTWA**[3] case.

On the basis of the above submissions, Counsel asked us to dismiss this appeal with costs to the Respondent.

We have carefully considered the evidence on the record of appeal, the heads of argument filed by Counsel and the judgment appealed against. The question for our determination in this matter essentially relates to what separation package the Respondent was entitled to when his contract of employment was terminated.

The gist of the arguments advanced by Mr. NCHITO, SC, in support of this appeal, is that the lower Court misdirected itself when it construed clauses 8 and 9 of the contract of employment as entitling the Respondent to payment of his salaries and allowances up to the time his contract would have ended. According to him, the terminal benefits referred to in clause 8 did not include salaries and allowances.

Conversely, Counsel for the Respondent agreed with the learned trial Judge that the benefits payable under clause 9 included salaries and allowances for the remainder of the Respondent's contract.

The resolution of the issues raised by this appeal depends on the interpretation of clause 8 and clause 9 of the Respondent's contract of employment. In our view, the terms and conditions of employment applicable to the Respondent, at the time of his dismissal, were those contained in his contract of employment which expired on 7th August, 2005. The draft contract that the Appellant wanted the Respondent to sign belatedly is therefore, of no consequence to this matter. An examination of that draft contract reveals that it was intended to change the Respondent's conditions of service to his detriment. He, therefore, cannot be faulted for refusing to sign it. It is settled law that conditions of service already enjoyed by an employee cannot be altered to that employee's disadvantage without his or her consent. We echoed this position in the case of **ZAMBIA OXYGEN LTD AND ZAMBIA PRIVATIZATION AGENCY V. PAUL CHISAKULA, FRANCIS PHIRI, YESANI CHIMWALA, RUMBANI MWANDIRA AND RICHARD SOMANJE**[6] when we held that conditions of service already being enjoyed by an employee cannot be altered to his/her disadvantage without his consent.

Although the Respondent did not sign a fresh contract after the initial contract expired, it is not in dispute that the Managing Director told him to continue working and assured him that his new contract would be tabled before the Appellant's Board in due course. The Respondent, therefore, continued working under the conditions of service contained in the expired contract.

Already alluded to above, the question to be resolved in this case is whether *clause 8 and clause 9 of this contract* entitle the Respondent to the payment of salaries and allowances for the remainder of his contract of employment. According to the learned trial Judge, clause 9 provided for more favourable gratuity payment than clause 8.

We have carefully studied clauses 8 and 9 of the Respondent's contract of employment. We do not agree with the learned trial Judge's interpretation of the two clauses. The heading of clause 8 clearly shows that it provides for **'end of contract gratuity'**. It deals with the gratuity payable to an employee at the end of that employee's contract. As for clause 9, it is clear from its heading that it provides for **'contract termination and permanent separation'**.

A cursory examination of that clause establishes that it deals with the benefits payable to an employee whose contract is terminated for a reason other than dismissal for misconduct. According to that clause, an employee whose contract is terminated, for a reason other than dismissal for misconduct, is entitled to the payment of ***'benefits as outlined in clause 8 to the end of the contract period'***.

From the foregoing, the question that follows for determination is- ***'what kind of benefits are envisaged in clause 8?'*** The answer lies in the language of clause 8 itself. It deals with ***'end of contract gratuity.'*** The language used in this clause does not, expressly or otherwise, include salaries and allowances for the remainder of the period of the employment contract. It provides the formula to be used to calculate the gratuity; which is ***'35% of the last drawn gross salary grossed up for tax.'*** (emphasis ours). We have held, in a number of cases that an employee cannot be paid salaries or allowances for a period he or she has not worked. A case on point, in this regard, is our decision in the case of **KITWE CITY COUNCIL V. WILLIAM NG'UNI**[7] referred to above.

The **KITWE CITY COUNCIL**[7] case was an appeal against a Judgment of the High Court in an action where the Respondent claimed terminal benefits and damages for breach of contract and for loss of earnings, arising from the Appellant's delay in processing his resignation. The learned trial Judge had, among other things, awarded the Respondent terminal benefits equivalent to the retirement benefits he would have earned if he had reached retirement age. On appeal, this Court held that it is unlawful to award a salary or pension benefits, for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment. We stated as follows:

> **"We are, therefore, dismayed by the order to award terminal benefits equivalent to retirement benefits the plaintiff would have earned if he had reached retirement age had he not been constructively dismissed. Apart from the issue of constructive dismissal, which we have already dealt with, we have said in several of our decisions that you cannot award a salary or pension benefits, for that matter, for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment."**

We came to a similar conclusion in the case of **NATIONAL AIRPORTS CORPORATION LIMITED V. REGGIE EPHRAIM ZIMBA AND SAVIOR KONIE**[8]. The brief facts of that case were that the Appellant Company was desirous of employing a Managing Director. The short-listed candidates were interviewed and during

that exercise, the sort of remuneration package to be offered to the successful candidate was discussed. The position was offered to the first Respondent in a letter written on behalf of the Appellant, by the second Respondent who was at the time the Chairman of the Board of Directors of the Appellant Company. The first Appellant was offered a two year contract. The first Respondent worked for four months and a few days before his contract was terminated summarily. The learned trial Judge found for the first Respondent in respect of the claim for breach of contract and awarded him damages. He based the award of damages on a clause in the contract which stated that- ***"If the employer terminates the contract prematurely for reasons other than incompetence or willful neglect of duty, all the benefits under the contract shall be paid as if the contract had run the full term."*** On appeal by the Appellant, we said the following:

> **"We find and hold that the phrase invoked so as to pay damages as if the contract had run its full course offends the rules which were first propounded as propositions by Lord Dunedin in Dunlop Pneumatic Tyre Company Limited v. New Garage And Motor Company Limited (8), especially that the resulting sum stipulated for is in effect bound to be extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. This part of the appeal has to succeed and the damages directed to be assessed as we have indicated and not as ordered below."**

The principles emanating from these authorities are still good law and we agree with them entirely. We, therefore, hold that the learned trial Judge erred when he awarded the Respondent salaries and allowances for the remainder of his contract.

A proper study of clause 9 establishes that the only new component introduced by that clause was that if the Appellant terminated the contract for any reason other than dismissal for misconduct, the gratuity payable, in terms of clause 8, would be calculated to the end of the contract. This means that under clause 9, the Appellant would not base the computation of gratuity on the actual period served by the employee but would calculate it as if the employee had worked to the end of the contract.

As to the ***salary that was supposed to be used in computing the Respondent's gratuity,*** the learned trial Judge held that the last drawn salary was the gross salary which the Respondent would have received at the end of the contract on 7th August, 2008, if the contract had not been terminated. In our view, the learned trial Judge again misdirected himself when he came to that conclusion. The last drawn salary under clause 9 was simply

the last salary that was paid to the Respondent immediately before his contract was terminated.

Coming to the holding by the learned trial Judge that the Respondent's benefits should be computed and calculated in a manner similar to those of Dr. AKAPELWA, we are of the opinion that the learned trial Judge erred when he came to that conclusion. A study of the evidence on the record of appeal establishes that the Respondent did not prove, on a balance of probabilities, that he was similarly circumstanced with Dr. AKAPELWA. To begin with, the testimony of Mr. LUSWANGA establishes that Dr. AKAPELWA's separation from the Appellant was by way of redundancy. As such, what was paid to him was a redundancy package. Secondly, the evidence on record shows that the terms and conditions of employment for the Respondent were not exactly the same as those for Dr. AKAPELWA. For instance, whereas Dr. AKAPELWA was entitled to an allowance called PRP allowance, the Respondent was not. We, therefore, hold that Dr. AKAPELWA and the Respondent were not similarly circumstanced.

In his written heads of argument, Counsel for the Respondent has questioned the validity of the Appellant's amended defence. We have noticed from the proceedings in the lower Court that when Counsel for the Appellant originally made the application to amend the defence, Counsel for the Respondent objected to the application. However, the court proceedings of 3rd March, 2008, show that Counsel for the Respondent later agreed to the amendment being made, subject to an order for costs in favour of the Respondent. Accordingly, the Court allowed the amendment with costs for the Respondent. The Respondent did not appeal against that order. Counsel for the Respondent cannot, therefore, question the validity of the amended defence before us.

On the totality of the issues raised in this appeal, we find merit in the appeal and we allow it. We set aside the judgment of the lower Court and we order that the Respondent's separation package be computed in accordance with clauses 8 and 9 as interpreted in this judgment. Costs shall be for the Appellant to be taxed in default of agreement.

I.C. Mambilima

CHIEF JUSTICE

A.M. Wood

SUPREME COURT JUDGE

M. Malila

SUPREME CUORT JUDGE