

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA**
(CIVIL JURISDICTION)

20009/HP/1152

BETWEEN:**LILLIAN KASONKOMONA & 69 OTHERS****Plaintiffs****And****METAL FABRICATORS OF ZAMBIA PLC****Respondent**

Before : E. M. Hamaundu, J.

For the plaintiffs : Mr R. Malipenga, Messrs Robson Malipenga & Co

For the defendant: Mr K. Msoni, Messrs J.B Sakala & Co and Mr K
Mwondela, Messrs Lloyd Jones & Collins

JUDGMENT

The plaintiffs, who are in two categories, that is, non-unionised and unionized former employees of the defendant claim the following: With respect to the non-unionised employees;

- (i) Gratuity for long service under ZIMCO conditions of service up to 1st April, 1997

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- (ii) Gratuity for long service under the defendant's conditions of service from 1st April 1997 up to the time of exit, based on the basic salary
- (iii) Redundancy benefits calculated at 15 months plus 2 months pay for each completed year of service in accordance with the 2001 conditions of service
- (iv) Retirement benefit in accordance with the ZIMCO conditions of service
- (v) Compensation for loss of employment at 15 months pay plus 2 months pay for each completed year of service
- (vi) Cash allowances be included in the computations
- (vii) Salary arrears from date of retirement or redundancy until payment
- (viii) A declaration that Section 13.2 of the defendant's 2001 conditions of service is illegal, unlawful and null and void.

With respect to the unionised employees;

- (i) Underpayment on the accrued retirement benefits in accordance with the 1995/97 conditions of service in terms of;
 - (a) Months for each year served

(b) Allowances incorporated into basic pay in accordance with the ZIMCO circular

- (ii) Underpayment on redundancy benefits in terms of allowance which were excluded
- (iii) Allowances on all terminal benefits
- (iv) Calculations based on salary which includes allowances
- (v) Salary arrears from redundancy to full payment

In a subsequent amendment to the writ and statement of claim, the plaintiffs added as their main claim, a claim for breach of contract.

According to the statement of claim, the plaintiffs who were on permanent and pensionable establishment were entitled to the following benefits;

- (a) Long service gratuity accrued as at 1st April, 1997 under ZIMCO conditions
- (b) Compensation for loss of employment
- (c) Redundancy
- (d) Retirement
- (e) Long service gratuity after 1st April, 1997 under ZAMEFA conditions

The plaintiffs averred that the gratuity under the ZIMCO conditions was to be computed at 24 months lump sum plus one month for each year served; and this was to be computed using a salary that was merged with allowances in accordance with the ZIMCO directive to all subsidiaries. All these benefits were provided for under the ZAMEFA conditions of 2001. Retirement was provided for under clause 12, long service gratuity under clause 13, compensation for loss of employment under clause 17 and redundancy under clause 19.

The plaintiffs complained, however, that clause 13.2 took away their accrued rights under the ZIMCO conditions. According to the plaintiffs, when their employment ended, they were only paid a package of 15 months pay plus 2 months pay for each year served, as well as one month's pay in lieu of notice. The plaintiffs averred further that the benefits package used the word **"pay"** and not **"salary."** In their view, the word **"pay"** had a wider meaning which included allowances. The plaintiffs argued that since their benefits were not paid in full, they are entitled to a salary until the payment of the balance.



The plaintiffs who were represented by the union averred thus: At the time that the defendant was privatized in 1997, they were entitled to retirement and redundancy benefits under the collective agreement of 1995/1997. However, after privatization the new owners of the defendant bargained with the plaintiffs' union for inferior conditions of service which took away the plaintiffs' accrued rights under the 1995/1997 collective agreement. According to the 1995/1997 agreement, the retirement or redundancy package was computed at 2½ months' pay for each completed year of service for those employees who had served between one and thirteen years while for those who had served fourteen years or more, the package was computed at 3 months pay for each completed year of service. However, between September and October, 2007, the defendant paid them what was termed accrued retirement benefits up to 30th June, 2007. This was provided for in the collective agreement of 2007/2009. That provision was to have applied only upon an employee requesting to go on early retirement. To the contrary, the defendant retired the plaintiffs in the absence of any request. The defendant nevertheless kept the plaintiffs in employment only to retrench them barely two years later.

It was the plaintiffs' contention that the provision in the 2007/2009 collective agreement took away their accrued retirement benefits under the ZIMCO conditions of service. It was the plaintiffs' further contention that the word "**pay**" in their conditions meant a salary that was inclusive of allowances but that the defendant computed their benefits using only the basic salary.

In the circumstances, the plaintiffs contended that since their benefits were underpaid they should be paid a salary until the balance is paid.

In its statement of defence, the defendant agreed that the plaintiffs were its former employees. According to the defendant, the employees left employment through various modes; that is, retrenchment, retirement, medical discharge and on disciplinary grounds.

According to the defendant, one particular employee on the list of permanent and pensionable employees had never worked for the defendant. His name was Chanda Joseph. The defendant averred that the employees on permanent and pensionable establishment used to enjoy conditions of service determined by the defendant while those who were unionised used to enjoy conditions of service



which were negotiated by their union. The defendant went on to aver as follows:

The employees were paid their benefits in full according to their respective conditions of service and their mode of separation. To that effect, all the plaintiffs signed an acceptance of receipt of all the money due. The defendant stopped applying the ZIMCO conditions of service in 1994, upon privatization. The package that was paid under ZIMCO conditions was to those employees whom the defendant did not take on at the time of privatization. The 1st plaintiff, in particular, was engaged in 1996, long after privatization.

The first witness for the plaintiffs was Francis Mwila, a former unionised employee. His testimony was thus:

He had worked for the defendant company as a machine operator for twenty years. On the 19th June, 2009 his services were terminated. The letter of termination set out the package that he was to receive. He immediately noticed that the package was not in line with what he was entitled to under the collective agreement. The letter stated that he would receive one month pay for each year of service when his entitlement under the collective agreement was

one and a half months' pay for each year of service. According to the letter, the years of service were from 1st July, 2007; when they were supposed to be from 1989 when he had joined. The collective agreement that was applicable at that time was the one for the period 1st July, 2007 to 30th June, 2009. The emoluments that he was receiving per month comprised a salary and a cash allowance. He started receiving the cash allowance in 1997. His grievance was that the cash allowance was not added to the salary when the benefits were being calculated. It was his grievance, also, that the terminal gratuity which was to be calculated at one and a half months' pay for each year served was not included in his package. In 2007, the defendant had paid him and other employees a package comprising ten months' salary as a lump sum and also one and a half months' pay for each year served. No explanation was given by the defendant for that payment.

In cross-examination, the witness replied as follows: He served in the executive committee of the union. The union had negotiated payments of benefits to employees up to the 30th June, 2007. This was because the employees had felt insecure due to the constant change of ownership of the defendant company. In this case the

employees wanted to be paid their benefits up to 2007, so that thereafter they would be put on fixed contract terms. However, the idea that employees should proceed on contract terms did not materialize. Hence, the payment of 2007 became merely an advance to be deducted at the end of employment.

The second witness for the plaintiffs was Moses Chanda, a former employee on the permanent and pensionable establishment. The witness testified as follows: He had joined the defendant company on the 2nd August, 1983. By then the defendant was under the ZIMCO group of companies. Consequently, the witness enjoyed ZIMCO conditions of service. In 1997, the ZAMEFA conditions of service came into force after the company was privatized. The witness started enjoying those up to 2009. When he moved over from the ZIMCO conditions, the new conditions stipulated that the gratuity which he had earned under the ZIMCO conditions would be frozen and paid to him at the end of his employment with the privatized ZAMEFA. However, when his services were terminated in 2009 the frozen gratuity was not paid. The ZAMEFA conditions had been revised in 2001 and they provided that gratuity frozen from the ZIMCO conditions of service



would be paid by a formula in clause 13.2 while the gratuity earned under the ZAMEFA conditions of service would be paid by the formula in clause 17. In this case however he did not receive either of the gratuities. Instead, he was only paid compensation for loss of employment at fifteen months' lump sum plus two months' pay for each year served, without allowances.

In cross-examination the witness replied that the cash allowance was only introduced in the ZAMEFA conditions.

The third witness for the plaintiffs was John Kanyakula another former employee on the permanent and pensionable establishment. The testimony of this witness was thus:

He was among the nine or ten plaintiffs who had been in management positions in the defendant company. His position was that of Cost Accountant. He had joined the defendant company in 1993. He retired on 30th April, 2007. One of his duties was payroll management. Terminal benefits were paid according to the mode of termination. For those who retired one formula for retirement benefits was the one under the ZIMCO conditions which comprised; twenty-four months' salary lump sum, plus a graduated number of months' salary per each year of service depending on the length of



service. He knew of one person, a Mr Alex Ngosa, who was retired by the defendant under that formula. In this case, when the time of his retirement came he was notified by letter that gratuity would be paid under the ZIMCO conditions of service. To his amazement, he was paid a lump sum of fifteen months' pay. He was also paid gratuity for service up to 31st May, 1997 and then another gratuity for service from 1st June, 1997 to 30th April, 2007. The frozen gratuity was not paid to him. The benefits did not include allowances.

In cross examination, the witness said: The formula for calculating gratuity earned up to 1997 was incorporated in the ZAMEFA conditions of 2001.

The fourth witness for the plaintiffs was Andson Malipilo, yet another former employee on the permanent and pensionable establishment. The testimony of this witness was as follows: He retired from the defendant company on 31st July, 2007. On the same day, a colleague of his John Sabika also retired. At that time, the defendant's management was in the process of working out an increment for all employees on permanent and pensionable establishment. The witness's benefits, however, were calculated on

the old salary scale. Management promised to re-calculate them as soon as the new increment was effected. The increment was implemented in August, 2007, although the effective date was 1stFebruary, 2007. All efforts by the witness to follow up payment of the difference were to no avail.

In cross examination, the witness replied as follows: By the time the increment was implemented, he was no longer in employment.

With those witnesses, the plaintiffs closed their case.

The only witness for the defendant was Albert Bwembya Chilufya. The witness testified as follows: He was employed by the defendant as Human Resources Manager for twenty-two years; that is from 1988 up to 2010. At first, the defendant was under the ZIMCO group of companies. In 1996, the defendant was privatized. Under ZIMCO, the company had two categories of employees; the unionised ones and those that were said to be on permanent and pensionable establishment. The conditions of service for unionised employees used to be arrived at by collective bargaining every two years while those for employees on the permanent and pensionable establishment used to be determined by ZIMCO. Upon privatization,

the defendant continued with the process of collective bargaining for unionized employees. For employees on the permanent and pensionable establishment, however, the defendant came up with its own conditions. In the case of unionized staff, the definition of "salary" in their collective agreement did not include allowances.

The witness continued as follows:

In 2007, the collective agreement was due for negotiation for the period 2007 – 2009. At that time, the defendant's holding company had acquired a plant in South Africa. Since the defendant company was the closest to the plant in South Africa, it was ordered to assist the plant with various items. This brought a feeling among the employees that the defendant was closing down. Consequently, the proposals for negotiation that came from the union included a proposal that the employees should be paid their accrued benefits up to the 30th June, 2007 and, thereafter, they would start fresh contracts of service. The proposal was agreed to and a formula for calculating the benefits was put in the collective agreement.

The witness continued: As regards non-unionised employees, the defendant put in place its own conditions of service with effect from the 1st April, 1997. These were revised in 2001. Payment of

benefits to the non-unionised employees depended on the mode of exit. There was no provision which supported the employees' demand that the cash allowance be included in the salary when computing terminal benefits. The formula for calculating benefits in the case of separation by normal retirement, medical discharge, early retirement, redundancy and death was 15 months pay plus 2 months pay for each completed year of service.

In cross-examination, the witness admitted that in 2007 when an employee John Kanyakula retired, the witness wrote a notification of separation which stated that John Kanyakula would be paid benefits according to the ZIMCO conditions of service. The witness also admitted that he had written a similar notification, in 2006, in respect of an employee named Alex Ngosa. The witness said, however, that the defendant company did not continue with the ZIMCO conditions of service. The witness went on to say that the frozen gratuity was that which employees had accrued under the ZIMCO conditions of service up to 1997. He continued thus: At that time in 1997 the defendant did not have money to pay the employees. Hence the gratuity was frozen and kept in terms of months. The gratuity was only paid to those that had clocked a

minimum of 10 years' service as at 1997. In his case, he was not paid that gratuity because he had not clocked that minimum service. The formula for the ZIMCO gratuity was twenty four months' lump sum. This also applied to employees who had been retrenched. As regards unionised employees, the union had demanded in 1997 that their members be paid the benefits. Therefore, their employment came to an end and then they were re-engaged.

In re-examination, the witness clarified that he had written that Mr Kanyakula was to be paid according to ZIMCO conditions of service because there was frozen gratuity to be paid up to 1997.

That was the case for the defendant.

The following facts are not in dispute:

- (i) That the plaintiffs are former employees of the defendant
- (ii) That the plaintiffs left employment under different modes of exit, namely; retirement, retrenchment and discharge
- (iii) That some plaintiffs were members of the union and were, therefore, serving under conditions of service contained in a collective agreement while others were on the management

establishment and, therefore, served under conditions of service set by the defendant for such employees

- (iv) That some plaintiffs had joined the defendant before privatization when it was still under the ZIMCO group of companies, while other plaintiffs had joined it after it had been sold to private owners.

From the viva voce evidence adduced, the following have come out as the grievances of the respective groups:

With respect to employees on the permanent and pensionable establishment their grievances were these:

- (i) That the gratuity earned when they were enjoying ZIMCO conditions of service and was frozen when they moved on to the ZAMEFA conditions of service was not paid:
- (ii) That the gratuity that was to be paid under clauses 13, 17 and 19 of the ZAMEFA conditions of service was not paid and instead only compensation for loss of employment at the rate of fifteen months' pay lump sum plus two months' pay for each year of service was paid:
- (iii) That the cash allowances were not added to the salary in computing the benefits: and



- (iv) That, for some employees, their retirement dates fell due when salary increments were in contemplation and that when the increments were implemented in August, 2007, the effective date was backdated to February, 2007, a date when they were still in employment, and yet the defendant has refused to re-calculate the benefits and pay them the difference.

As regards the unionised employees, the issues that arose from the viva voce evidence led were these;

- (i) That terminal benefits were calculated at one month pay for each completed year of service instead of one and a half months' pay for each completed year of service according to the collective agreement;
- (ii) That the period of service over which the benefits were calculated was from 2007 up to date of exit when they should have been calculated from the date of engagement; and
- (iii) That cash allowances were not included to the salary in the computation of the terminal benefits.



As regards the first grievance by the employees of the permanent and pensionable establishment, namely the alleged non-payment of the frozen gratuity, I have looked at the final pay statements produced by the parties. The final pay statements of Moses Chanda and John Kanyakula, the two witnesses who gave evidence on the grievance, show the following: With regard to Moses Chanda, no separate calculation was made for the gratuity frozen for him under ZIMCO service from 1983 up to 1997. Instead, the gratuity under the ZAMEFA conditions of service which was supposed to be calculated from 1997 was calculated from 1983. The rate under the ZAMEFA conditions of service was two months' pay for each year served. This effectively meant that Moses Chanda was paid the frozen gratuity from 1983 to 1997 at the rate of two months' pay for each year served. The ZIMCO conditions of service which the plaintiffs produced stipulated that an employee who had served for fourteen years under ZIMCO, like Moses Chanda had done as at 1997, was entitled to gratuity at the rate of one and a half month's salary for each year served. That provision was incorporated in clause 13.2 of the ZAMEFA conditions of service and it provided in the same manner. Clearly, Moses Chanda ended

up being paid more for the frozen gratuity than he was entitled to. His claim that the frozen gratuity was not paid is unfounded.

With regard to John Kanyakula, the final pay statement shows that two computations were made for gratuity; one for the frozen gratuity under ZIMCO conditions and the other for service under ZAMEFA conditions. The service under the ZIMCO conditions was from 1993 up to 1997. The ZIMCO conditions of service stipulated that only employees who had served a minimum of ten years were eligible for long service gratuity. John Kanyakula had only served about three years as at 1997. Therefore, he had not qualified to earn gratuity under ZIMCO conditions. In his case, he was not even entitled to frozen gratuity. Consequently, the same was erroneously paid to him. The tone of his complaint though appears to be that he wanted the whole of his benefits to be computed according to the ZIMCO conditions of service. There is no document on record which supports his contention because the evidence clearly shows that the only benefit that was to be computed according to the ZIMCO conditions of service was the frozen gratuity; John Kanyakula was not even entitled to that. I have looked at the final pay statements of the other plaintiffs on the permanent and pensionable

establishment. Some, such as Lillian Kasonkomona and Silvia Hachilensa, joined the defendant after it had ceased to be under ZIMCO. This grievance does not, therefore, apply to such employees. Of those that served under ZIMCO conditions of service, some employees such as Broscovia Banda had their gratuity computed in the same manner that Moses Chanda's was. Consequently, their frozen gratuity was paid at a higher rate than they were entitled to. In some cases, such as that of Andson Malipilo, the defendant adopted the correct approach by computing the frozen gratuity separately and in accordance with the ZIMCO conditions and then computing the gratuity earned under the ZAMEFA conditions of service.

Whatever the case, however, all the final pay statements show that the frozen gratuity was paid; even in cases where the employees were not entitled to it. Therefore, I can say that the first grievance is unfounded.

I wish to however consider one particular case; the case of Alex Ngosa. The gratuity for this employee was purportedly computed according to the ZIMCO conditions of service as follows:

First a lump sum of twenty four months' pay. Then a number of months pay for each year served.

This appears to have been John Kanyakula's grievance. Similarly, in their pleadings the plaintiffs appear to raise this grievance. According to the ZIMCO documents produced by the plaintiffs, the payment of a lump sum of twenty four months' salary was with respect to compensation to those employees who, upon privatization of companies under ZIMCO, would not be taken on by the new owners and would, consequently, be declared as surplus labour. In this case, all the plaintiffs herein, including Alex Ngosa, were not declared surplus labour because they were taken on by the new owners. Therefore, the payment to Alex Ngosa was wrong. That does not mean that the plaintiffs herein should now be entitled to that wrong.

The second grievance is that the plaintiffs in this category were paid only compensation for loss of employment and not the gratuity under Clauses 13, 17 and 19 of the ZAMEFA conditions of service.

The witness who testified on this grievance was Moses Chanda. The witness said that the gratuity accrued under ZIMCO conditions of service was to be paid under clause 13.2 in the

ZAMEFA conditions of service while the gratuity accrued under the ZAMEFA conditions of service was to be paid under clause 17 of the same conditions. The witness went on to say that because he was retrenched, he should have received gratuity under ZIMCO conditions, gratuity under ZAMEFA conditions and a redundancy package under clause 19 of the ZAMEFA conditions. He said that none of these benefits were paid but that he was merely paid compensation for loss of employment at the rate of 15 months' pay for each completed year of service.

The ZAMEFA conditions of service as revised in 2001 had the following clauses, among others;

“ Clause 13. Long Service Gratuity

13.1. Employees who have worked for ten years continuous service shall be eligible under the following circumstances:

- Normal retirement
- Death
- Retirement on medical grounds
- Retirement at the request of the company

13.2. Service prior 1 June 1997 will be paid as below using current basic pay. Service after that date will accrue gratuity as in clause 17 below:

- for the first 10 years : 1 month's pay for each completed year served

- for the next 10 years : 1 ½ months' pay for each completed year served (11 - 20 years)
- for the next 10 years : 2 months' pay for each completed year served (21- 30 years)
- for service in excess : 2 ½ months' pay for each completed year served of 30 years

17. Compensation for loss of employment

17.1 Employees qualifying for the redundancy and retirement package will be eligible for compensation as follows:

<u>Exit Type</u>	<u>Provision</u>
Medical discharge	15 month's pay plus
Normal retirement	2 months' pay for
Redundancy	each completed year of service
Death	

17.2 Repatriation will be paid as in clause 16 above.

In computing the long service gratuity, the last drawn monthly basic salary shall be the amount to be used.

19. Redundancy benefits

Where an employee is declared redundant he shall be entitled to one month's notice or pay in lieu of and redundancy benefits as in clause 17 above "

With regard to the contention by Moses Chanda that the ZIMCO gratuity was not paid, I have already found that all the

plaintiffs who were affected were paid in one form or another. Infact, in the case of Moses Chanda, I have found that he was even overpaid. However, on this grievance the plaintiffs on the permanent and pensionable establishment, through Moses Chanda, seem to suggest that, with regard to benefits under the ZAMEFA conditions of service, two packages (in the case of those declared redundant, three packages) should have been computed; these being

- (i) Long service gratuity under clause 13.1 computed at 15 months' pay plus 2 months' pay for each completed year of service;
- (ii) Compensation for loss of employment under clause 17, also computed at 15 months' pay plus 2 months' pay for each completed year served; and in the case of those terminated by redundancy or retrenchment
- (iii) Redundancy benefits under clause 19, again computed at 15 months' pay plus 2 month's pay for each completed year served.

The question is; was that the intention of the conditions of service and was it how the plaintiffs, as employees, understood the conditions to mean?

According to the defendant's witness, the only benefits that were paid under the ZAMEFA conditions of service for normal retirement, medical discharge, early retirement, redundancy and death was a single package computed at 15 months' pay plus 2 months' pay for each completed year of service. Even in cross-examination, the witness said that long service gratuity and the retrenchment package were one and the same thing.

There are compelling grounds to support the position that the benefits, whatever the eligible mode of exit, comprised a single package. That single package was infact the long service gratuity comprising 15 months' pay plus 2 months' pay for each completed year of service. This can be seen from the following:

- (i) Although clause 17 is headed "**compensation for loss of employment,**" there is a provision in that clause which refers to the computation therein as "long service gratuity";

- (ii) Again, although clause 17 is headed "**compensation for loss of employment,**" it also applies to employees whose employment has come to an end by medical discharge, normal retirement, early retirement and death.

I do not see how an employee whose working life has come to an end by normal retirement can be said to have lost employment. Neither can I see how an employee who's incapacitated from working on medical grounds, or who opts to retire early, or who has died, can be compensated for loss of employment.

In my view, it goes to show that clause 17 was the clause that set out the formula for computing the gratuity that was payable to eligible employees upon termination of employment by medical discharge, normal retirement, early retirement, redundancy and death.

There are also compelling grounds to support the view that that is how the plaintiffs, as employees, understood the conditions. That support is to be found in; first the testimony of Moses Chanda who said that according to his understanding, clause 13 was for service under the ZIMCO conditions while clause 17 was for service under the ZAMEFA conditions; secondly, but perhaps more

important, is that all the plaintiffs received their final pay statements which showed the computation of their benefits. All the pay statements show that for the gratuity under the ZAMEFA conditions, only a single package of benefits was computed. Yet all the plaintiffs signed the pay statements, accepting that the benefits were correctly computed. It means that the plaintiffs understood the conditions to mean that only a single package was to be computed for service under the ZAMEFA conditions. In my view, therefore, the plaintiffs current contention that there were to be separate packages under clause 13, 17 and 19 is an afterthought.

Consequently, the plaintiffs' second grievance is unfounded as well.

The third grievance is that the cash allowances were not included to the basic salary in the computation of benefits.

I will start with the gratuity earned under ZIMCO conditions of service. For those employees who were not declared surplus labour and were taken on by the new owners, which include those of the plaintiffs who are eligible, the ZAMEFA conditions of 1st April 1997 state in clause 14 as follows:

"14. Long Service Gratuity

Gratuity as at 31st March 1997 is frozen. The accrued months' as at 1st April 1997 shall be paid at the time of termination."

In the revised ZAMEFA conditions of 2001, the service under ZIMCO conditions was covered in clause 13.2 and provided as follows:

"13.2 Service prior 1 June 1997 will be paid as below using current basic pay"(underlining mine for emphasis)

There is an attempt by the plaintiffs to argue that the gratuity accrued under the ZIMCO conditions should be computed using a salary merged with allowances in accordance with the shareholders resolution and directive of 1995. In this regard, the plaintiffs have relied on the case of *Kasengele & Ors v Zambia National Commercial Bank Ltd [2000] ZR 72*. When one reads this case it is clear that the employees affected were those that retired or were retrenched between 1995 and 1996 under the ZIMCO conditions of service. Hence the directive was with respect to those employees who were going to leave employment under the ZIMCO conditions of service. In this case, however, the plaintiffs did not leave employment. They continued under new owners. The entitlement to gratuity that those who qualified had earned under the ZIMCO conditions was deferred

and kept in months' to be paid at the end of the employment. Clearly, the plaintiffs were not retired or retrenched when the ZIMCO conditions ceased to operate. They continued under the ZAMEFA conditions of service which also provided how the entitlement to gratuity earned during the service under ZIMCO conditions would be paid. The ZAMEFA conditions in clause 13.2 clearly stated that service prior to 1st June, 1997 would be paid using current basic pay. That clause does not state that allowances would be added to the basic pay. Therefore, the plaintiffs' contention, in so far as it relates to gratuity under ZIMCO conditions is unfounded.

I now come to the gratuity for service under ZAMEFA conditions. Clause 17, which I have set out above, clearly stipulates that in computing long service gratuity the last drawn basic salary shall be used. There is no mention of allowances being merged with the salary. Again the contention, with regard to gratuity under the ZAMEFA conditions, is unfounded,

In sum the third grievance by the plaintiffs has no basis.

The fourth grievance is with regard to a few employees who retired and were paid benefits when salary increments were in

contemplation. When the increments were finally implemented, they were backdated to a day prior to the retirement of the affected employees. Their demand is simply that the benefits be re-calculated using the new salary so that they are paid the difference.

The answer to this grievance is in the Supreme Court decision in the case of **Development Bank of Zambia v Mambo [1995/1997] ZR 89**.

In that case an employee's services were terminated by payment of three months' salary in lieu of notice. Subsequently, salary increments were implemented and backdated to a day before his services were terminated. His contention then was that the three months' salary in lieu of notice should be re-calculated on the new salary scale. The Supreme Court held:

"When the respondent received his notice on 6 November the only way of calculating his entitlement was to use his then existing salary scale: Whatever happened to other employees who continued in employment could not affect the completed obligations between the parties. There was no consideration and no continuing contract between the parties."

This is the position in this case. The plaintiffs were retired and paid their benefits according to the existing salary scale. At that

point, the obligations of the defendant and the plaintiffs were completed. What happened afterwards to those employees who remained in employment had no bearing on the plaintiffs' retirement packages. This grievance, therefore, is unfounded.

Having considered and determined the above grievances, I have resolved almost all the claims by the plaintiffs on the permanent and pensionable establishment. There is only one claim that I have not considered; that is the declaration that clause 13.2 of the 2001 ZAMEFA conditions of service is illegal, unlawful and null and void.

The plaintiffs led no evidence to explain why they would like the clause to be declared in that manner. On that ground alone that particular claim ought to be dismissed. Be that as it may, I have looked at the clause in detail as I was resolving the other grievances. It is clear that the purpose of the clause is to explain how the gratuity accrued under the ZIMCO conditions would be paid. I do not see what is illegal or unlawful about that. That claim is also unfounded

All in all, the whole claim by the plaintiffs on the permanent and pensionable establishment against the defendant is without merit.

I will now deal with the grievances by the unionised employees.

The first grievance that emerged from the viva voce evidence was that the unionised employees were paid their benefits at the rate of one month pay per completed year of service when they should have been paid at the rate of one and a half months' pay for each completed year of service, in accordance with the collective agreement.

To start with, this grievance is not among the claims in the amended writ and statement of claim. On that ground it ought to be dismissed. However, I have looked at the collective agreement for the period 2007 – 2009. There is clause 4.3.3 which sets out the retrenchment package. The package is as follows:

- (i) 15 months' lump sum
- (ii) 1 month's pay per each year served
- (iii) 1 month's pay in lieu of notice

- (iv) Terminal gratuity, minimum 5 years of service at 1 ½ months' pay per each completed year of service.

With regard to retirement benefits, the collective agreement of 2007 -2009 in clause 4.4.2B introduced the Saturnia Pension Scheme to which the employer and the employees contributed. Therefore, pension benefits were no longer paid by the defendant. Therefore, the only package payable under that collective agreement was the redundancy or retrenchment package. Notable in that package is the terminal gratuity for those employees who have clocked a minimum of five years' service. The rate was one and a half months' pay per each completed year of service.

The defendants witness testified that, at the request of the union, all unionised employees were paid benefits for their service in 2007 and that, from there on, their employment service started afresh. That evidence was not disputed and, to some extent, was confirmed by Francis Mwila, who testified on behalf of the unionised plaintiffs. There is confirmation of that evidence in clause 4.4.2A of the 2007 - 2009 collective agreement. In the circumstances, none of the unionised employees would have clocked five years' service in 2009 when the retrenchment exercise

was carried out. Francis Mwila, for example, testified that he was retrenched in 2009; and that; at that time; he had worked for the defendant for twenty years. Hence his complaint is that he was not paid the terminal gratuity of one and a half months' pay per each completed year of service. What Moses Chanda has over-looked is that in 2007 all the years that he had served with the defendant were paid for and that from July, 2007, he was starting fresh service. Therefore in 2009 he had only served for about 2 years under the new contract of service. Consequently he was not entitled to the terminal gratuity.

Therefore this grievance is without merit.

The second grievance is that the period of service over which the benefits were being paid was only from 2007 instead of starting from the date of engagement.

I have just shown what happened to the unionised employees in 2007 which made them start service afresh. This grievance is without merit as well.

The third grievance is that the cash allowances were not included to the salary in the computation of their benefits.

The retrenchment package uses the word **“pay.”** According to *Collins English Thesaurus, 6th edition, Harpercollins Publisher (Glassow, 2008)* some of the alternative words for **“pay”** are **“wage”** and **“salary.”** The collective agreement of 2007-2009 defined wage/salary as the basic monthly salary fixed as remuneration for the type of work upon which the employee is employed. The basic salary is a salary without allowances. Therefore there has to be more evidence to show that the word **“pay”** in the retrenchment package meant a salary that was inclusive of allowances. The plaintiffs have not provided that evidence. Therefore, this grievance, too, is without merit.

With the resolution of the foregoing grievances, almost all the claims have been dealt with. The only claim remaining unresolved is that for underpayment on accrued benefits in accordance with the 1995/1997 conditions of service in terms of;

- (a) months for each year served and
- (b) allowances as per ZIMCO circular incorporating allowances into basic pay.

The unionized plaintiffs did not lead any evidence on this claim. As a result I am unable to see its basis. The claim must, therefore, fail.

All in all the action by the unionized plaintiffs against the defendant is without merit, as well.

In the end, the whole of this action stands dismissed, with costs to the defendant.

Dated 12th day of January 2017


E. M. Hamaundu
JUDGE

