IN THE SUPREME COURT OF ZAMBIA **Appeal No.66/2016**
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

MUBEMBA KENNEDY KUNDA **1ST APPELLANT**

SHANGAI MAKASA **2ND APPELLANT**

AND

CNMC LUANSHYA COPPER MINES PLC **RESPONDENT**

CORAM: **Hamaundu, Kaoma and Kajimanga, JJS**

On 4th December 2018 and 10th December 2018

For the Appellants: In Person

For the Respondent: Mr. K. Botha of Messrs William Nyirenda & Co

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J U D G M E N T

Kajimanga, JS delivered the judgment of the court

Cases referred to:

1. **Kankomba and Others v Chilanga Cement Plc (2002) Z.R. 129**
2. **Stanley Kingaipe and Charles Chookole v Attorney General (2010) Z.R. 94**
3. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172**

Legislation referred to:

1. **Employment Act, Chapter 268 of the Laws of Zambia; section 36(2)**
2. **Employment (Amendment) Act No. 15 of 2015; section 5**

Introduction

1. This is an appeal from a judgment of the Industrial Relations Court delivered on 22nd May 2015, dismissing the appellants' claims against the respondent.

2. It calls upon the court to discuss whether an employee whose employment is terminated by medical discharge is at all times entitled to a medical discharge payment.

Background

3. The facts giving rise to the appeal are that the appellants were employed by the respondent on 31st December 2009. Sometime in 2011, the 2nd appellant suffered an injury to his right hand following which he underwent an operation. After a recurrence of the problem, he was transferred to another department to perform light duties and was subsequently discharged on medical grounds on 27th March 2013. The 1st appellant, on the other hand, developed an eye problem in the course of his duties which led to various medical examinations and these culminated in his being medically discharged in September 2013.

4. Upon being discharged, the appellants were paid a separation

package comprising of one month's pay in lieu of notice, leave days and a christmas bonus. They were also paid their pension contributions under the respondent's pension scheme in accordance with the collective agreement which governed the terms and conditions of their employment. Dissatisfied with the quantum of their separation packages, the appellants sought the intervention of the labour office and later instituted proceedings against the respondent in the court below after their efforts proved futile.

Pleadings before the Industrial Relations Court

5. In their notice of complaint dated 31st July 2014, the appellants sought a medical discharge package, voluntary contributions, interest and costs. The basis upon which the appellants made the claim was that they had not been paid a medical discharge package following the respondent's decision to terminate their employment by way of medical discharge in March and September 2013 respectively.

6. The respondent denied the claim and contended that the

appellants were only entitled to a package provided by the pension scheme at the end of their contracts and this package had already been paid to them. Further, that at no time were the appellants entitled to or given any reason to believe that they were entitled to any medical discharge package as no such package was due to them.

Evidence of the parties in the Industrial Relations Court

7. The evidence of the 1st appellant was that he was employed as a Change House Attendant. Sometime in February 2010, while on duty, some chemical substance from a nonel plastic bag went into his eyes which then became red. After a series of treatment in an attempt to rectify the problem failed, the chief medical officer at Luanshya Hospital informed him that he was going to be medically discharged as he was blind.

8. He testified that he held a number of consultative meetings with the respondent regarding his termination. During one of these meetings, he was told to go and collect his separation package from Mukuba Pension Trust who paid him the sum of K25,000.00 (rebased). Being dissatisfied with what transpired at the

respondent's premises and the money he collected from Mukuba Pension Trust, he went to the labour office. The respondent was then summoned by the labour office and a meeting was convened between its representatives and the 1st appellant where it was suggested that the 1st appellant starts a business enterprise which suggestion he declined. It was during his second visit to the labour office that he met the 2nd appellant who was also seeking an explanation over his benefits.

9. The 2nd appellant testified that he worked for the respondent as a timber handyman/helper (described in the letter of employment as Workman-Mining). In 2011, he had an injury which rendered his right hand numb. He later went to Luanshya Hospital where they found a blood clot, which was removed after an operation. After going for review, the doctor advised that he be transferred to another department where he could perform light duties. On 15th December 2012, the same right arm developed another problem. The medical team found, after investigations, that the sutured nerves had disjoined. After the second operation, the 2nd appellant was transferred from Baluba Mine to the general offices so that he could only do light duties.

10. On 27th March 2013, he was called by the personnel officer, who told him to immediately stop working as he had been medically discharged. He testified that the letter recommending his discharge was not given to him. He later met with the senior personnel officer who advised him to collect his pension contributions from Mukuba Pension Trust, where the sum of K28,148.52 was paid to him.

11. He stated that despite the fact that he was fit and not declared medically unfit by a medical doctor, he was given a medical discharge. He decided to follow up the issue with the labour office where he met the 1st appellant in April 2014 but nothing came out of this as the respondent and the labour office told him that he was only entitled to Mukuba Pension Trust benefits which also covered his voluntary contributions. He was also told that he was eligible for NAPSA contributions.

12. Loti Chola, the respondent's vice manager - human resources, testified that following the termination of the appellants' employment, he had met the 2nd appellant three times. On two occasions, he had informed the 2nd appellant that it was

impossible to re-engage him as he was medically discharged. On the second occasion, in the company of the respondent's manpower planning officer, the senior labour officer explained to the appellants that a medical discharge did not attract two separate packages. The witness stated that the union which had negotiated with the respondent on the existing conditions had come back to review this issue and discussions on improving workers benefits by adopting a defined contribution scheme had commenced.

13. He also testified that the respondent had paid what it owed the appellants and that the paid out benefits were provided for under the appellants' terms and conditions of employment. In relation to the 2nd appellant, the hospital authorities had written a letter to management recommending that the contract be terminated on medical grounds in conformity with section 36(2) of the Employment Act Chapter 268 of the Laws of Zambia.

14. It was also his testimony that he did acknowledge at the labour

office that the appellants did not receive any medical discharge package but only a refund of the contributions to Mukuba Pension Trust which included the employees' voluntary contributions.

Consideration of the matter by the trial court and decision

15. After considering the evidence and submissions of the parties, the trial court found that the issue for its determination was whether or not the appellants were entitled to medical discharge packages in addition to the benefits provided under their contracts of employment and collective agreement.

16. It found that under the appellant's individual contracts and the collective agreement governing their employment, there was no provision for a medical discharge. That however, an employee could be discharged on medical grounds pursuant to section 36(2) of the Employment Act notwithstanding the absence of any provision on medical discharge in the contract of employment.

17. The trial court opined that the source of the misconception by the appellants that they were entitled to medical discharge packages was presumably paragraph 9 of the Minimum Wages and

Conditions of Employment (General) Order 2011 which provides that:

> **"An employee whose employment is terminated on medical grounds as certified by a registered medical doctor shall be entitled to a lump sum of not less than two month's basic pay for each completed year of service."**

18. It reasoned, however, that the above provisions did not apply to the appellants by virtue of paragraph 2 (1) (d) (i) of the Order as they were employees whose conditions of employment were regulated through the process of collective bargaining conducted under the Industrial and Labour Relations Act.

19. The trial court further found that both appellants were paid their pension contribution which they made to the Mukuba Pension Trust. Therefore, their claims for voluntary contributions fell off as they had already been settled.

20. The trial court concluded that the appellants had failed to prove their case and the complaint was accordingly dismissed.

The grounds of appeal to this Court

21. It is against that decision that the appellants have launched this

appeal anchored on five grounds as follows:

1. **The learned honourable court in the court below erred in law and fact for not ordering the respondent to pay the appellants their medical package when evidence [was] there to show that they were discharged on medical grounds.**

2. **The learned honourable court erred both in law and fact for dismissing the complaint when the court proved that the 1st appellant lost sight because of the acidic dust which [was] found at the premises the appellants used to work.**

3. **The learned honourable court erred both in law and fact for stating that there was no agreement of medical discharge package and siding with the respondent when the court knew that there was no agreement of removing the appellants on medical grounds.**

4. **The court discovered that there was indeed a lacuna in the bargaining agreement which the respondent acknowledge but the court never reacted over the issue at hand.**

5. **The learned honourable court erred in the court below for dismissing the complaint and not having [a] heart for the 1st appellant for the torture he would go through [after he] lost sight because [of] the job he was [doing] and ended up being discharged on medical grounds without being paid [a] medical package.**

The arguments presented by the parties

22. Both parties filed written heads of argument which were briefly augmented at the hearing. The appellants argued all their five

grounds of appeal as one. In their brief arguments they submitted that the court below erred in law and fact for stating that there was no agreement signed to show that they should be given medical packages, without considering that there was also no signed agreement to terminate their employment on medical grounds. It was also argued that the court below erred by not considering the lacuna which was there. The appellants accordingly prayed that this court allows the appeal.

23. In response, counsel for the respondent submitted with respect to ground one, that the court below did not err at all in declining to award the appellants a medical package as there was no basis on which to hold that the appellants were entitled to any medical discharge package as alleged by the appellants. Further, that the onus to prove any entitlement to the said package lay upon the appellants, which onus was not discharged. The case of **Kankomba and Others v Chilanga Cement Plc**[1] was called in aid of this argument.

24. It was his contention that the appellants have failed to prove or otherwise substantiate their entitlement to a medical discharge

package from their terms and conditions of service contained in their respective letters of employment as well as their collective agreement. As both the letters of employment and collective agreement are silent on the issue of payment of medical packages upon termination of employment, the appellants were not entitled thereto; and that the appellants' case is devoid of any basis upon which to derive any assumption that a medical package would be paid by the respondent.

25. In response to ground two, counsel submitted that the fact that the 1st appellant lost sight is not, and was not a matter in contention and therefore, did not need to be proved before the Court. The only issue for determination by the court was whether or not the appellants were entitled to be paid medical discharge packages. It was his argument that the 1st appellant is misdirected in linking his loss of sight to the dismissal of his complaint by the trial court as the complaint was dismissed because it had not been sufficiently proved by the appellants that they were entitled to payment of a medical discharge package upon their termination from employment on medical grounds.

26. In arguing ground three, counsel submitted that the court below cannot be faulted for holding that the medical discharge is provided for under the law. Our attention was drawn to section 36(2) of the Employment Act, Chapter 268 of the laws of Zambia which provides that:

> **"Where owing to sickness or accident the employee is unable to fulfill a written contract of service, the contract may be terminated whether under the provisions of this Act or otherwise."**

27. We were also referred to section 5 of the Employment (Amendment) Act No. 15 of 2015 which amends the principal Act by inserting the following after section 36(2):

> **"(3) The contract of service of an employee shall not be terminated unless there is a valid reason for the termination connected with the capacity, conduct of the employee or based on the operational requirements of the undertaking."** [Emphasis added by counsel]

28. On the basis of the foregoing, he contended that the termination of a contract of employment for reasons of illness or incapacity of the employee to perform the task for which they are employed, falls well within the confines of the law and it cannot, therefore, be argued to be unlawful. Thus, termination on medical grounds is provided for under the law. He relied on the case of **Stanley Kingaipe and Charles Chookole v Attorney General**[2], where this

court in considering whether or not the petitioners were permanently unfit to perform their duties, opined that:

> **"...the initial decisions to discharge them was because the doctors could not see any hope of improvement and were of the opinion that the petitioners were likely to remain in the condition they were in permanently."**

29. That the court in that case therefore found that:

> **"The petitioners were medically unfit at the time they appeared before the Medical Board and the decision to discharge them cannot be said to have been premature, unfair or lawful."**

30. Counsel referred us to the diagnosis of Dr. Kwendakwema on record which states that:

> **"...Mr. Mubemba is a glaucoma patient with Advanced End Stage Glaucoma. He has already lost the right eye and vision in the only eye (left eye) is mere finger counting at 2 metres. Therefore visual prognosis is poor. Mr. Mubemba could lose sight in the only eye anytime...It is strongly recommended that he be retired on medical ground."**

31. It was argued that according to the recommendation of the doctor, it was unlikely that there would be any improvement in the condition of the 1st appellant's eye sight as it was permanently damaged. It follows, therefore, that the 1st appellant could, rightly

be termed medically unfit for his duties and thus discharging him on these grounds was not unfair or unlawful.

32. The respondent's arguments in response to ground four are that the issue of the lacuna in the collective agreement regarding medical separation packages was in fact aptly addressed by the court below. He referred us to the judgment of the trial court at page J13 where it was stated as follows:

> **"The witness for the Respondent (RW) acknowledged that there is a lacuna concerning medical separation package in the Collective Agreement. We cannot tell whether the lacuna was by design or error but that is an issue which the union concerned must take up with management for rectification."**

33. Counsel, therefore, submitted that the lacuna in the collective agreement is in fact a matter for the Mineworkers Union of Zambia to take up with the respondent and not one for adjudication by this Honourable Court. That in any event, statute does fill up the lacuna, hence section 36(2) of the Employment Act.

34. It was submitted in response to ground five that the ground is misconceived insofar as the appellants accuse the court below of being heartless. Counsel argued that appeals before this court ought to be on matters of law or law and fact and not of the heart.

To buttress his argument, he cited Rule 58(2) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia which provides that:

> **"The memorandum of appeal shall be substantially in Form CIV/3 of the Third Schedule and shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively."**

35. In the circumstances, he contended that this ground ought not to be countenanced at all as it is disparaging and disrespectful of the court.

Consideration of the matter by this court and decision

36. We have considered the record of appeal, the judgment appealed against and the arguments of the parties. As all the five grounds of appeal are centred on the medical discharge package and therefore interrelated, they will be determined together.

37. In the grounds of appeal, the appellants attack the findings of fact by the learned trial court. This court's approach in dealing with appeals of this nature is well settled. In the case of **Wilson**

Masauso Zulu v Avondale Housing Project Limited,[3] we had expressed ourselves on this issue in the following terms:

> **"Before this court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make."**

38. The gist of the grounds of appeal in the present case is that the appellants, having been discharged on medical grounds, should have been paid a medical discharge package as part of their terminal benefits. In their arguments, the appellants allege error on the part of the trial court in finding that there was no agreement showing that the appellants were to be given a medical discharge package, without considering that there was no agreement to terminate their employment on medical grounds.

39. The question for our determination in this appeal is, therefore, quite simple. The issue, as we see it and as properly identified by the trial court, is whether the appellants were entitled to the medical discharge packages they are claiming. It is on this sole issue that the entire appeal hinges.

40. The evidence deployed in the trial court reveals that the employment of the appellants was governed by their respective contracts of employment and the collective agreement. It also reveals that their employment was terminated by way of medical discharge. Termination of employment was provided for under clause 21 of their contracts of employment as follows:

> **"<u>Termination of employment</u>**
>
> **(a) This employment is subject to termination by either party giving to the other not less than one month's notice in writing or one month's pay in lieu of notice; or**
>
> **(b) By the Company without allowing any period of notice or making any payments in lieu of notice if you shall fail to perform, or breach the rules of discipline, observe or comply with any of the terms of this contract."**

41. We observe that although there is no specific clause on termination in the collective agreement applicable to the appellants, reference is made under clause 9.20 thereof, to there being various modes of exiting the respondent's employment and the same included medical discharge. This clause is reproduced below as follows:

> **"<u>Repatriation</u>**
>
> **An employee will be entitled to repatriation at the company expense when he/she separates under the following modes of exit:**

(i) Retirement

(ii) On the expiry of fixed term contract of employment (if the contract is not extended)

(iii) <u>Medical discharge</u>

(iv) Death

(v) Termination of contract by Company for reasons not related to discipline..." [Emphasis added]

42. Further, clause 9.11 states in relation to medical discharge as follows:

> **"<u>Access to Medical facilities</u>**
>
> **Employees who separate through the medical discharge and retirement modes of [exit] will be allowed to access the Company medical facilities for a period of one (1) year from the date of separation."**

43. From the foregoing excerpts, it is clear that termination of employment by way of medical discharge had been envisaged when the collective agreement was entered into by the respondent and the appellants' union representatives. The argument by the appellants that the court below ought to have considered that there was no agreement with respect to termination being effected on medical grounds is, therefore, flawed. In any case and as rightly observed by the court below, the absence of specific provisions for medical discharge in the employment contracts and collective agreement meant that recourse could then be made to the

Employment Act which provides for medical discharge under section 36 (2) quoted earlier at paragraph 26 above.

44. Coming to the issue of the medical discharge package, the finding of the court below was that there was no legal basis for upholding this claim as the appellants' employment contracts and the collective agreement did not make any provision for payment of the same. Having examined the said contracts and collective agreement, we wholly agree with the court below that there is no provision for the payment of medical discharge packages in these documents.

45. It was submitted by counsel for the respondent that the onus to prove any entitlement to the said package lay upon the appellants and that the onus had not been discharged. We cannot agree more with this argument. The absence of proof by the appellant that their contracts of employment and collective agreement entitled them to a medical discharge package renders their claims as being tenuous. In the circumstances, the learned trial court was on firm ground in declining to award the appellants the medical discharge packages they sought in the court below. Of course we sympathize

with the appellants' situation and desire that they should have been specifically compensated for having lost employment on account of being found medically unfit. However, absent provision of such compensation in their respective contracts of employment or the collective agreement, the trial court could not be faulted for rejecting their claim.

Conclusion

46. For the reasons stated above, we do not find any justifiable grounds to interfere with the findings of the trial court. The upshot of this conclusion is that the judgment of the court below is upheld and this appeal is dismissed as it is bereft of merit. We, however, order that the parties shall bear their own costs.

E. M. HAMAUNDU
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE

R. M. C. KAOMA
SUPREME COURT JUDGE