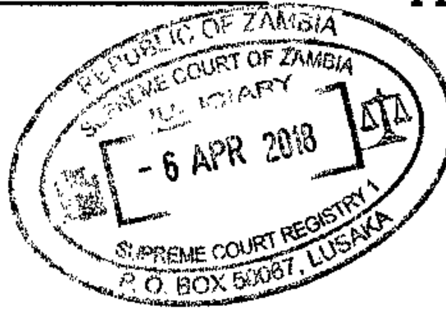
IN THE SUPREME COURT OF ZAMBIA **Appeal No. 19/2009**

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

CEPHAS MOONGA AND 9 OTHERS **APPELLANTS**

AND

CELTEL ZAMBIA LIMITED **RESPONDENT**

Coram: Chibesakunda, Phiri and Muyovwe, JJS
On 17th February, 2011 and on 6th April, 2018

For the Appellants: **Mr. M. Musonda of Messrs M. Musonda & Co.**

For the Respondent: **Prof. Mvunga, SC. Mvunga & Associates**

JUDGMENT

Phiri, JS, delivered the Judgment of the Court

Cases referred to:

1. **Chilanga Cement Plc vs. Kasote Singogo SCZ Judgment No. 13 of 2009**
2. **Zulu vs. Avondale Housing Project (1982) Z.R. 172**
3. **Galaunia Farms Limited vs. National Milling Company Limited and Another (2004) Z.R. 1**
4. **Jacob Nyoni vs. Attorney General (2001) Z.R. 65**

5. **Lusaka City Council vs. Mumba (1977) Z.R. 313**
6. **First Alliance Investments Limited and Another; SCZ Appeal No. 75 of 1999**
7. **Spiros Konidaris vs. Ramlal Kanji Dandiker, SCZ Appeal No. 157 of 1999;**
8. **Zambia Consolidated Copper Mines Limited vs. Matale (1995-97) Z.R. 144.**
9. **National Airports Corporation Limited vs. Reggie Zimba and Savior Konie (2000) Z.R. 154.**
10. **The Central London Property Trust Limited vs. High Trees House Limited (1974) 1 K.B. 130.**

The delay in rendering this judgment is deeply regretted. It was due to a combination of unfortunate factors which included pressure of the backlog of work and imperfect record keeping. When we sat to hear the appeal, Madam Justice L. P. Chibesakunda was with us. She has since retired and this is the majority decision.

This is an appeal against the judgment of the Industrial Relations Court (now a Division of the High Court) dated 18th November, 2008 wherein the 10 appellants' claim for the payment of the acquisition bonus was dismissed on the ground that the respondent company was not a proper party to the proceedings.

The background to this appeal is that the appellants were employed on contracts of employment with the respondent company

of varied durations; ranging from six (6) years and seven (7) months, to four (4) years and three (3) months prior to the sale of the business by the shareholders. Their employment contracts expired on the 30th April, 2005, and their respective applications for renewal or extension of contracts were previously rejected. Prior to the rejections; but unrelated thereto, the respondent's holding company Celtel International BV had accepted a cash offer for the sale of its shares to MTC Kuwait for USD3.4 billion. MTC Kuwait was also known as Mobile Telecommunications Company K.S.C. By reason of this share sale, Celtel International, through its Board Chairman Mr. Ibrahim, announced an acquisition bonus of USD18 million as reward to ".......all eligible Celtel employees in Africa who had worked so hard to build the company's business up to the date of the sale. The exact text of the announcement read as follows:

> **"Acquisition Bonus**
> **London, 26th May, 2005**
>
> **Dear Colleague,**
>
> **I am happy to let you know that the share sale of Celtel to MTC has been successfully completed. MTC of Kuwait recognizes the value of Celtel and has rewarded Celtel's shareholders for their investment in Celtel. This is**

reflected in the generous price they have paid to acquire Celtel.

Celtel's Board and former shareholders realize that to a large extent this success has been achieved through the hard work of Celtel employees in Africa and they are very grateful to you for your contribution.

Therefore, I am delighted to let you know the Board and former shareholders have decided to reward all eligible Celtel employees with an acquisition bonus. What does this mean to you? You will be awarded an acquisition bonus based on the number of years of employment you have with Celtel. From your Human Resources department you will shortly receive information on the amount of your personal bonus.

The bonus will be paid out in two payments:

- **The first half will be paid in June**
- **The second half will be paid at the end of 2005.**

Let me add personally that I am very proud of your contribution to the continued success of Celtel. We have created a strong company and I am delighted Celtel's Board has recognized this in the reward that you have been granted.

Let's celebrate this recognition by continuing to serve our customers as best we can.

Regards.

(signed)
Mo Ibrahim
Chairman of the Board"

As a consequence of the shareholder's decision, all the employees of the respondent company, with the exception of the appellants, were paid their respective shares or entitlements arising from the USD18 million 'acquisition bonus'. The appellants were aggrieved by their exclusion and launched a complaint in the erstwhile Industrial Relations Court seeking the following reliefs:

1. Declaration that the appellants were, individually and severally, entitled to be paid the acquisition bonus in accordance with the periods of service applicable to each one of them.
2. An order directing the respondent company to pay or facilitate the payment of the said acquisition bonus to the appellants together with interest.
3. Any further order or other relief as the Court may deem just; and legal costs.

In defence, the respondent's answer was to the effect that the acquisition bonus had not been distributed to eligible employees until the main instructions were issued through the Human Resource Director in an e-mail dated 27th May, 2005 (which was produced); which e-mail set the criteria for eligibility for the

payment and how to calculate the amounts to be paid subject to approval by Celtel International. It was also pleaded that the criteria was set by the former shareholders of Celtel International BV in agreement with the new shareholders; that the criteria was that employees were eligible if they were in service at and beyond 1st May, 2005; and that the appellants were not included on the list of eligible employees because they were not employed by Celtel Zambia Limited as at 1st May, 2005.

In its judgment, the Court below analyzed the evidence given by both sides and found the following facts established:

"1. That the complainants were employed by the respondent in various capacities and on diverse dates;

2. That the complainants were employed on fixed employment contracts which were renewable;

3. That prior to 30th April, 2005, the complainants individually applied to the respondent for the renewal of their employment contracts;

4. That on 29th March, 2005, Celetel International BV, the holding Company of the respondent, issued a press statement to the effect that the Company had

agreed to a US$3.4 billion offer from Mobile Telecommunication Company (MTC) of Kuwait to buy the former;

5. That in the same press statement, Dr. Mo Ibrahim, the Chairman of the Board of Directors of Celtel International BV stated, among others, that "Former Celtel shareholders have set aside USD18 million of their own money to reward all eligible Celtel employees in Africa who have worked so hard to build the business to date".

6. That on 30th April, 2005, the employment contracts of the complainants came to an end and were not renewed;

7. That on 26th May, 2005, Dr. Mo Ibrahim issued a letter as indicated at page 6 of the complainants' bundle of documents stating the modalities of rewarding the acquisition bonus to eligible Celtel employees in Africa;

8. That on 27th May, 2005, the Chief Human Resources Officer of Celtel International BV sent an e-mail to Mr. David Venn, RW 1, outlining detailed modalities of payment of the acquisition bonus; and

9. That the complainants were denied payment of the acquisition bonus on the ground that they were not

in the respondent's employment at and beyond 1st May, 2005.

On the basis of the foregoing findings of fact, the trial Court concluded that the respondent was a mere conduit for the payment of the acquisition bonus to eligible employees of Celtel in Africa, which was sponsored by the former shareholders of Celtel International BV who had set aside their own money for this purpose. The lower Court agreed with the respondent's contention that they were not the proper party to these proceedings, and declined to deal with the other issue of eligibility of the appellants to receive the bonus. Thus, the trial Court did not find the respondent liable for the payment of the acquisition bonus, and dismissed the case.

Dissatisfied with the trial Court's judgment, the appellants jointly appealed to this Court canvassing six grounds of appeal as follows:

"1. The trial Court erred in law when it took the view that the respondent was not a proper party to the proceedings in the Court below ostensibly because the respondent was

"......a mere conduit for payment of the acquisition bonus to eligible employees of Celtel in Africa...."

2. **The trial Court grossly erred when it declined to adjudicate upon the issue of whether or not the appellants (the complainants below) had been eligible to receive the acquisition bonus which was the subject matter of the complaint in question.**

3. **The trial Court erred when it failed to find or decide that the appellants' right to receive the bonus in question had accrued to each one of them and had become part of each one of the appellants' respective conditions of service following the announcement of the subject bonus in March, 2005.**

4. **The trial Court erred and misdirected itself when it failed to adjudicate upon all or the issues which were actually presented before the Court by the appellants.**

5. **The trial Court grossly erred when it failed to consider or evaluate or assess or to fully or sufficiently or seriously**

consider or evaluate or assess both the evidence which was adduced in Court on behalf of the appellants as well as the detailed submissions which were filed in Court to buttress the appellants' complaint.

6. **The trial Court grossly erred in having adopted an approach in relation to the complaint before it which wholly negated the Court's statutory mandate as a Court of substantial justice.**

We shall deal with grounds one up to and inclusive of ground five of the appeal together because they are interrelated, unless otherwise specifically referred to. Thereafter we shall address ground six which raises the issue of the lower Court's statutory mandate as a Court of substantial justice, and alleges failure by the trial Court to adjudicate upon all issues raised.

The first three grounds assail the trial Court's finding that the respondent was not a proper party to the proceedings; and the Court's failure to decide that the appellants' right to receive the bonus in question had accrued to each one of them and had become part of each one of the appellants' respective conditions of

service following the announcement of the acquisition bonus in March, 2005.

The learned Counsel for the appellants, Mr. Musonda, filed written heads of argument which were extensively augmented with oral submissions due to the novel nature of the case. In essence, the detailed nature of the arguments canvassed in support of ground one of the appeal does also address grounds two, four and five; and no separate arguments were advanced in respect of those grounds. Only grounds three and six were separately advanced.

In support of the first ground of the appeal, it was contended that the trial Court erred in law when it took the view that the respondent was not a proper party to the action because "...it was a mere conduit....". According to the learned Counsel, this specific determination was too simplistic and it ignored the effects of the totality of the evidence that was placed before the Court. It was argued that the word 'conduit' was defined in the 'Oxford dictionary as a mere channel'; meaning that the trial Court concluded that the respondent was a mere channel; yet the evidence deployed before

the trial Court was far from suggesting that the respondent was a mere conduit.

It was Counsel's view that the evidence showed that in fact the respondent played a pivotal role in determining who was to receive the bonus. For instance, it was demonstrated that the respondent was required to provide the information and to make adjustments to the beneficiaries and to indicate to the provider of the bonus whether or not they required more funds to meet this bonus entitlement. In short, it was argued that it was the respondent who was in Zambia who knew the identity of the beneficiaries and not the shareholders in the Netherlands. So, depending on what the respondent did, the provider of the funds would determine what budget was needed for the payments to be arranged. In this process, the respondent was required to make certain determinations, and, because of this, the respondent was not a mere conduit.

Mr. Musonda stated that the ten appellants were employees who had been in the service of the respondent for various periods of more than four and six years. The argument was that the crucial

development accrued on 29th March, 2005 when the appellants were still in the service of the respondent, and it was on that date that the initiating process was released by Celtel International BV to MTC of Kuwait. The press release, apart from announcing the sale of Celtel to MTC Kuwait, also highlighted an issue fundamentally affecting the employees of Celtel in Africa and elsewhere. According to the learned Counsel, this was a crucial development in the appellants' relationship with the respondent, like all other employees of Celtel, at that point in time because the press release generated expectation in their minds. It was argued that there was evidence on record to the effect that the respondent's Managing Director (RW1) conceded under cross-examination that the employees were interested in the money.

It was submitted that the basis upon which the bonus in issue was availed as a reward for hard work is what qualified the appellants to get the money; as stated in the clarifying e-mail from Dr. Mo Ibrahim. So, as far as the appellants were concerned, this reward was intended for their benefit as well since they took part in building Celtel for periods ranging from over four to over six years

from the time Celtel was established – when some of the employees who benefited had been in Celtel's employment for as short as two months by the time the benefit was availed.

It was further argued that the respondent had placed itself in a fiduciary relationship with the appellants and owed them a duty of care. It was contended that the Court below fell in error by taking the route it took because the bonus had accrued to the appellants from the date it was announced; and this right would not be taken away.

In support of this proposition, the case of **Chilanga Cement Plc vs. Kasote Singogo[1]**, was cited, in which this Court unequivocally made the point that "hapless and weak employees.....need to be protected from the whims and caprices of powerful employers by Courts of Law".

Further, regarding the duty of care owed by the employer to its employees, the learned Counsel cited **paragraph 29 of Halsbury's Laws of England, Vol. 16, 4th edition** and submitted that the respondent failed to discharge its duty thereby giving the appellants, individually and severally, an entitlement to seek

redress against the respondent. Counsel also stated that it was not enough for the respondent to assert, through RW1, that although the appellants' names had been on the list of the beneficiaries for the bonus, the words 'zero bonus' had been written against each of their names; when the respondent failed to prove this allegation by producing the relevant attachment before the Court in keeping with the *ratio decidendi* in the case of **Zulu vs. Avondale Housing Project**[2] that:

> **"Where a [litigant] makes any allegations, it is generally for him to prove those allegations".**

Counsel also cited the case of **Galaunia Farms Limited vs. National Milling Company Limited and Another**[3] which affirmed that "the burden to prove any allegations is always on the one who alleges".

Specifically in relation to ground three of the appeal which asserted that the bonus had accrued to each of the appellants and had become part of their respective conditions of service following its announcement in March, 2005; our attention was drawn to the Oxford Dictionary Thesaurus and Word Power Guide which defines

the word 'bonus' as "a sum of money added.....to a person's wages for good performance". We were also led to a similar definition in the **Dictionary of Law by L. B. Curzon (4th Edition Pitman: London)** which defines the term bonus as "that which is received over and above what is expected, e.g. gratuity".

It was argued that given that the bonus had become part of the appellants' conditions of service, the onus was upon the respondent, as the appellants' employer who was in a fiduciary relationship with and owed a duty of care to the appellants to ensure that the bonus was paid to the latter.

Regarding the none renewal of the appellants' contracts of employment, it was stressed that although this was outside the appellants' control, the fact remained that had the appellants' contracts been renewed on 30th April, 2005, they would have received the bonus on 1st May, 2005 (within hours of the respondent's refusal to renew the contracts on 30th April, 2005). It was learned Counsel's contention that the respondent's refusal to renew the contracts was made in bad faith and was deliberately calculated to deny them the opportunity of enjoying the right which

had accrued to them. In support of this proposition, our attention was drawn to two authorities. The first was the case of **Jacob Nyoni vs. Attorney General**[4] where this Court affirmed the position that, in the context of an employment contract, an acquired or accrued right becomes part of an employee's conditions of service 'which cannot be altered to his disadvantage'. The second was the case of **Lusaka City Council vs. Mumba**[5] in which this Court affirmed the proposition that a right may accrue even though the employment of such a right may be dependent on a further contingency.

With regard to ground six of the appeal which asserted that the Court below had wholly negated its mandate as a Court of substantial justice, it was argued that the trial Court adopted an overly technical and simplistic approach to the issues that had been deployed before it when it reached the conclusion that the respondent had been a mere 'conduit' in relation to the payment of the acquisition bonus in question. Our attention was drawn to the case of **Chilanga Cement Plc vs. Kasote Singogo**[1], whose *ratio decidendi* we have already quoted. We were also referred to the

case of **First Alliance Investments Limited vs. Filiae Investments and Another**[6]; where this Court stated that:

> **"In our view, it would be unconscionable to dismiss this appeal and the whole action on the only argument that the alteration of the date invalidated the whole mortgage deed when the respondents benefitted from the money advanced to them....".**

In the context of this case, it was argued that the respondent ought to have been found liable to the appellants not only on account of the bonus having become part of their conditions of service, but also, on account of having breached its duty of care to the appellants. Learned Counsel submitted that the lower Court, being a Court of substantial justice ought to have taken "a realistic view' of what had transpired in the matter as this Court observed in the case of **Spiros Konidaris vs. Ramlal Kanji Dandiker**[7], and in the case of **Zambia Consolidated Copper Mines Limited vs. Matale**[8]. It was argued that although the present case was not dealing with a dismissal or termination, the principle which the Matale and other cases espouse apply with equal force in the context of the appellants' grievance.

It was also argued that the appellants' case should not have remained unredressed in the face of the trial Court's role to

summon its 'equitable intervention' as aptly observed by this Court in the case of **National Airports Corporation Limited vs. Reggie Zimba and Savior Konie[9].** The learned Counsel further argued that the respondent's reliance, in its defence, on the doctrine of consideration was misconceived and could not disentitle the appellants from being granted the relief that they sought. The rationale being that the respondent should not have chosen to have the cake and eating it at the same time by refusing to renew the appellants' employment contracts and, at the same time using the non-renewal of their contracts to deny them the opportunity to benefit from the acquisition bonus. These were the specific and general arguments in support of the appellants' grounds of appeal which we were urged to uphold.

In response to the appellants' submissions, Prof. Mvunga, SC, the learned Counsel for the respondent equally filed written heads of argument which he orally augmented at the hearing of the appeal.

With regard to the first five grounds of the appeal, which are related, Prof Mvunga's submission was, first, that the evidence on

the record of the appeal shows that the acquisition bonus was sponsored by Celtel International BV and not Celtel Zambia Limited as explained in the sponsor's e-mail of the 27th May, 2005; and that the respondent had no input in the said e-mail which they did not originate. This was made clear by RW1, the respondent's Managing Director when he testified that the role of the respondent was to provide employee information to Celtel International and then to make payment to eligible employees following instructions from Celtel International; and that Celtel Zambia had no say in the criteria for eligibility of the payment, or the application of the formula used for the payment. Thus, it was submitted that the lower Court was on firm ground in holding that the respondent was not a proper party to the proceedings.

With specific reference to the second ground of the appeal, the respondent's submission was that the issue raised in the Court below was the question of interpretation of who constituted eligible employees. It was argued that in resolving this question the Court below examined four documents that were tendered in evidence before it. These were:

a) Press Release of the 29th March, 2005;

b) Press Release of the 4th May, 2005

c) Letter from the Board Chairman to all Celtel employees in Africa, of the 26th May, 2005; and

d) The e-mail of the 27th May, 2005.

It was submitted that the lower Court correctly based its interpretation of who constituted eligible employees on the Press Release of the 29th March, 2005 and the e-mail of the 27th May, 2005 which projected the intention of the sponsors of the bonus, Celtel International shareholders who were also the owners of the US$18 million. It was argued that Celtel International, as owners of the Acquisition Bonus were at liberty to define the category of beneficiaries intended to benefit from the bonus. We were urged to uphold the lower Court's finding that Celtel Zambia was not the sponsor of the said bonus; and that they provided no input in the cireteria determining eligibility. It was further submitted that the appellants' grievance should have been placed against Celtel

International in the Netherlands and there was no reason why the latter was not made a party to the proceedings in the Court below.

With regard to ground three of the appeal, the response, in summary, was that this was a proper case of a gratuitous gift that was not supported by any consideration apart from past consideration which is no consideration at all; and that even if there was an apparent injustice against the appellants at the hands of Celtel International, that injustice would be outside the scope of equity in the case before us. In support of this proposition we were referred to a passage by the learned authors of "Contract, cases and materials" (Third Edition, Butterworth P. 93) who state that cardinal to the law of contract is consideration for any offer or promise. The text of the passage reads as follows:

> **"....contractual liability is based on the breach of a promise, but not every promise will be enforced even if it was meant as a binding commitment; in particular, the law of contract appears to be concerned with enforcing promised exchanges, and unless the promise is made by deed, the promise must be supported by consideration if it is to be enforceable".**

We were also referred to a passage from **"Chitty on Contracts"**; which in summary clarifies that past consideration is no consideration. We were further referred to the complimenting

pronouncement by Denning, J. in the English case of **The Central London Property Trust Limited vs. High Trees House Limited**[10].

It was further submitted that the appellants' arguments based on the allegations of bad faith and unfairness were misplaced and unsupported by the evidence which did not establish a case of accrued rights; neither did the evidence establish a case of wrongful, unfair or unlawful termination of employment. In short, it was submitted that if the appellants had pleaded a case relating to termination of employment or the payment of terminal benefits in the lower Court's general jurisdiction, then the argument that the trial Court should have been unfettered by any technicalities to administer substantial justice, would have been valid. With these submissions, the respondent urged us to dismiss the appeal.

We have considered the record of the appeal, the judgment appealed against and the arguments exchanged by the parties. As we have already intimated, the first five (5) grounds of appeal are related in so far as they assail findings of fact made by the lower Court in as far as the appellants' case relates to the respondent.

It is apparent from the judgment of the lower Court that although it did receive substantial documentary and oral evidence from both parties, as well as multi-pronged submissions, which were all recast in the judgment, the Court's approach and decision is summarized in the following extract from the judgment (J12):

> **"Having considered the foregoing, it is our considered opinion that the respondent were mere conduit for the payment of the acquisition bonus to eligible employees of Celtel in Africa, which was sponsored by the former shareholders of Celtel International BV who had set aside the sum of US$18 million of their own money for this purpose. As such we agree with the contention of Counsel for the respondent that the latter are not the proper party to these proceedings......This being so we find that it is not necessary for this Court to deal with the other issue of eligibility of the complainants".**

The lower Court identified two issues to be resolved. These were:

1. Whether or not the respondent was the proper or correct party to the proceedings; and

2. Whether or not the complainants (now appellants) were eligible to receive the acquisition bonus.

In making its pronouncements, the lower Court, in particular, considered the e-mail addressed to the respondent's Managing Director (RW1) by Celtel International setting the perimeters of eligibility as follows:

"The Acquisition Bonus made available by the shareholders is meant to be a token of appreciation for each individual's contribution to the success of Celtel International BV but is also intended to have some retainer effect on our employees.......

2. The following rules have been observed in calculating the agreed amounts:

a) Employees are eligible if they are in service at and beyond 1st May, 2005.

3. The end responsibility for the allocation of the bonus rests with the COO. Therefore, the final allocation must be approved by the COO before you make any announcement.

4. The Acquisition Bonus budget will be made available to you from Celtel International BV.

............."

It is therefore clear from the documentary evidence on the record of the appeal that the respondent was not the sponsor of the Acquisition Bonus, neither was it the originator of the instructions on eligibility and the payment itself; and that the sponsors were at liberty to define the rules on eligibility.

In relation to the appellants, none of them were in employment of the respondent on 1st May, 2005; and their failure to renew their contracts of employment with the respondent was not linked to the announcement by the former shareholders. We do not agree that the Acquisition Bonus had become part of their conditions of service with the respondent. With these facts before the lower Court, we do not see how we can fault that Court in as far as the appellants' case was pleaded.

To a large extent, the first five grounds of appeal raise questions on findings of fact by the lower Court; which we are reluctant to interfere with because they were neither perverse nor based on wrong principle or misapprehended facts. We find that no useful purpose will be served in addressing the merits or demerits of each of the grounds of the appeal in relation to the arguments and submissions offered.

With regard to ground six of the appeal which is anchored on the provisions of **Section 85(6) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia,** we do acknowledge that this provision of the law does provide that an

award, declaratory decision or judgment of the Court on any matter shall be binding on any parties affected; and that the Industrial Relations Court is a Court of substantial justice, we have been unable to see the efficacy of these provisions in the face of a finding of fact that a wrong party had been sued, and that the party sued is not the sponsor of the Acquisition Bonus. There was no adverse decision or award or declaratory decision against the respondent in this case which would attract the provisions of **Section 85(6) of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia.**

All the grounds of appeal having failed, the net result is that this appeal lacks merit and it is dismissed with each party bearing their own costs.

G. S. Phiri
SUPREME COURT JUDGE

E. N. C. Muyovwe
SUPREME COURT JUDGE