**IN THE COURT OF APPEAL FOR ZAMBIA**
**HOLDEN AT NDOLA**

Appeal No. 63/2019

*(Civil Jurisdiction)*



**B E T W E E N:**

**KINGSLEY KABIMBA** **1ST APPELLANT**

**CHRISTOPHER SIMUKOKO** **2ND APPELLANT**

**AND**

**CONCRETE PIPES & PRODUCTS LTD** **RESPONDENT**

***Mchenga DJP, Chishimba and Majula, JJA***
***On 19th February 2020 and 27th February 2020***

*For the Appellants* : *Mr. K. Muzenga – Deputy Director, Legal Aid Board*

*For the Respondent* : *Mr. V. K. Mwewa of VK Mwewa & Company*

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# J U D G M E N T

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MAJULA JA, delivered the Judgment of the Court.

## Cases referred to

1. *Wilson Masauso Zulu vs Avondale Housing Project Limited (1982) ZR 172*
2. *Christopher Mwamba vs Clara Mbulu Mwamba and Patrick Ng'andwe Appeal No. 141/2017*
3. *Costa Tembo vs Hybrid Poultry Farm (Z) Limited Appeal No. 141/2017*
4. *Amiran Limited vs Robert Bones Appeal No. 42/2010.*
5. *Kitwe City Council vs William Nguni (2005) ZR 57.*

6. *Mutale vs Zambia Consolidated Copper Mines (1993 – 1994) ZR 94 (SC)*
7. *Zyambo vs Abraham Sichalwe Ntharzy SCJ No 16 of 2016*
8. *Collect Van Zyl Brothers Ltd (1966) ZR 65. (CA)*
9. *Scherer vs Country Investments Limited (1986) 1 WLR 615*
10. *Engen Petroleum Zambia Limited vs Willis Mwamba and Jeremy Lumba Appeal 117/2016*
11. *Standard Chartered Bank Plc vs Celine Meena Nair (Appeal No.14/2018)*
12. *Zambia Telecommunications Company Limited vs Mirriam Shabwanga & 5 Others (Appeal No. 78/2016).*

**Legislation Referred to:**

Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia

## 1.0 Introduction

1.1 This appeal arose from a judgment of Mr. Justice D. Mulenga of the Industrial and Labour Relations Division of the High Court sitting at Ndola. In the court below, the appellants filed a complaint against the respondent alleging constructive dismissal. They also alleged that the respondent's conduct caused them to suffer embarrassment, anguish and loss of income for which they sought damages.

## 2.0 Background

2.1 The background facts and circumstances surrounding this appeal are not in dispute. Both appellants were employees of the respondent. The 1st appellant was employed on 13th October 2008 as a Sales Assistant while the 2nd appellant was employed on 9th

January 2003 as a Production Foreman. During the course of employment, the 2nd appellant was allocated house no. 72, Petauke crescent, Kansenshi in Ndola.

2.2 On 14th April, 2011 there was an allegation of theft at the respondent's company that resulted in the appellants being arraigned at the Subordinate Court for theft charges. In the meantime, the respondent's General Manager a Mr. Bill Chimbalanga verbally informed the appellants that they were suspended from work pending the outcome of the criminal proceedings which were before the court.

2.3 On 2nd April, 2013, the appellants were acquitted of charges of theft by the Subordinate Court. They then engaged the respondent through their advocates over salary arrears for the time they were appearing in the courts. However, they were advised that their concerns could only be attended to after the matter was concluded in the High Court on appeal.

2.4 On the 22nd August, 2013 the state withdrew the appeal in the criminal matter before the High Court. On 18th April, 2013, the appellant's advocates sent a letter of demand to the respondent seeking salary arrears considering that the criminal case was now concluded. The respondent's reaction through its General Manager was that before any payments could be made, the appellants would still have to be subjected to the disciplinary process of the respondent.

2.5 In light of the aforestated, the appellants proceeded to institute legal proceedings against the respondent seeking a number of reliefs couched as follows:

*a) A declaration that the conduct of the respondent amounts to constructive dismissal;*

*b) Damages for constructive dismissal;*

*c) A declaration that they were still employees of the respondent company;*

*d) An order that they be paid unpaid salaries for the period April, 2011 to date of complaint.*

*e) An order that they be paid accrued leave days for the period stipulated in (d);*

*f) Damages for loss of expectation of income, embarrassment, pain and anguish;*

*g) An interim injunction restraining the respondent from evicting the 2nd complainant from house No. 72 Petauke Crescent, Plot 1419, Kansenshi, Ndola which he is occupying by virtue of his employment;*

*h) Unpaid salary for February, 2011.*

*i) Any other relief which the court deems fit and just under the circumstances;*

*j) Interest; and*

*k) Costs.*

## 3.0 Evidence in the court below

3.1 The appellants' action in the court below was subsequently tried. Two witnesses were lined up on behalf of the appellants. The gist of the evidence that was deployed in support of the appellants' case was that they were accused of stealing concrete pipes from the respondent on 14th April 2011. They were then taken to the police station where they were detained until 16th April, 2011. On 17th April, 2011 around 08.00 hours, they reported for work but were, however, denied access into the company premises by the General Manager by the name of Bill Chibalanga. They were then ordered not to report for work until the law had taken its course on the allegations of theft.

3.2 In April 2013 they were acquitted by the Subordinate Court of all criminal charges. With respect to house No.72 Petauke Crescent, the evidence from Kingsley Kabimba was that the 2nd appellant was allocated the said house by the founder of the respondent (the late Mr. B.Y. Mwila) by virtue of his employment and not to occupy it as a caretaker.

3.3 It was the position of the appellants that they did not stop reporting for work on their own but were told to do so by the General Manager who also chased them like dogs. In view of this, they were before court seeking the reliefs as set out in their complaint.

3.4 The respondent for its part denied sending the appellants' away from work, but that they refused to avail themselves before the respondent's disciplinary process. It was in evidence that the appellants were advised of a mutual separation and their terminal benefits were computed together with one months' salary.

3.5 On the issue of house No.72, Petauke Crescent, the respondent maintained that the 2nd appellant was only occupying the property as a caretaker.

**4.0 Findings of fact by the trial Judge**

4.1 The lower court considered the evidence that had been deployed before it in the context of the pleadings and submissions by Counsel. It then proceeded to make the following findings: the appellants were employees of the respondent on a permanent and pensionable basis. Following the allegations of theft, the appellants were charged and prosecuted in the Subordinate Court. During and after the criminal trial, the appellants were not working normally. After their acquittal, the complainants engaged the respondent demanding payment of their salaries from April 2011 to April 2013 in view of the fact that they were neither suspended nor subjected to any disciplinary process.

4.2 He identified the issue for determination as being, whether the appellants were constructively dismissed by the respondent or whether they had resigned on their own accord. After analyzing the evidence and authorities on the law before him, the learned

Judge was of the view that the elements of constructive dismissal were not established by the appellants to entitle them to damages under this head. The trial Judge further found that the employment contract of the appellant was frustrated due to their absence from work attributable to the criminal proceedings.

4.3 As regards the mode of separation, the trial judge deemed the appellants to have been retired early from the respondent's employment from the date of the complaint. He then ordered that they be paid three months basic salary for each completed year of service together with interest.

4.4 Furthermore, the learned judge dismissed the claim for payment of salary arrears form April, 2011 to the date of complaint, reasoning that it would amount to unjust enrichment. As regards, house no. 72, Petauke Crescent, Kansenshi Ndola, the learned Judge directed the 2nd appellant to yield vacant possession to the respondent upon receipt of full payment of the judgment sum.

## 5.0 Grounds of appeal

5.1 The appellants were greatly displeased with the decision of the learned High Court Judge and have now appealed to this court advancing three grounds set out in the memorandum of appeal as follows:

1. *The learned High Court Judge erred in law and in fact when he failed to adjudicate on all the matters raised in the appellant's complaint.*
2. *The learned High Court Judge erred in law and fact when he failed to award costs to the appellants.*
3. *Further and other grounds to be advanced at the hearing of the appeal.*

## 6.0 Appellants' heads of argument

6.1 With respect to ground one, it was argued that the appellants sought 11 reliefs in the court below, but the trial judge only adjudicated on 4 issues. It was contended that the failure by the trial Judge to adjudicate upon the other 7 claims was a misdirection. We were referred to the case of ***Wilson Masauso Zulu vs Avondale Housing Project Limited***[1] where it was held that a trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined with finality. We were also referred to our decision in the case of ***Christopher Mwamba vs Clara Mbulu Mwamba and Patrick Ng'andwe***[2] where we echoed the position espoused in ***Masauso Zulu***[1] case.

6.2 Pertaining to ground 2, it was submitted that the trial Judge erred when he failed to award costs to the appellants after being successful in the matter. In advancing the foregoing argument Counsel for the appellants relied on Supreme Court case of ***Costa Tembo vs Hybrid Poultry Farm (Z) Limited***[3] where it was held

that a successful litigant is entitled to costs. Counsel accordingly invited us to allow the appeal and award costs to the appellants.

## 7.0 Respondent's heads of argument

7.1 With respect to ground one it was contended that the learned trial Judge did adjudicate on all matters and claims that were material to the appellants. Mr. Mwewa went on to identify the claims that were allegedly omitted by the trial Judge and then made submissions on each one of them. With respect to the claim for a declaration that the appellants were still employees of the respondent Mr. Mwewa submitted that the learned trial Judge analyzed the employment status that was between the respondent and the appellants. He then discussed the principles relating to frustration of contracts and counsel was of the view that these issues had been addressed by the Judge when he observed as follows:

> *"However it can be seen from the evidence on record that whereas the Respondent did not formally suspend from work or charge the Complainants with any disciplinary offence, it had expressed a desire or intentions to amicably separate with the Complainants from employment contract. The said intention was fulfilled with other employees who were similarly placed with the Complainant CW2 one Fred Kasana Kasonka is one such employee who was similarly circumstanced. He confirmed in cross examination that he separated from the Respondent and was paid.....*

*This being a court of substantial justice finds the principles of equity cardinal. Equity deems that which ought to be done to have been done. I therefore come to the conclusion that the employment contract between the Complainants and the Respondent was frustrated, but for the said intention on the part of the Respondent to separate with the complainants, I find and hold that to be a just position."*

It was therefore contended that there is no basis for the assertion that the employment status of the appellants was not addressed.

7.2 On the issue of the claim for an order for payment of accrued leave days and damages for loss of income it was argued that there was no evidence anywhere on the record where the appellants addressed the issue of leave pay and as such this claim should fail.

7.3 On the claim for un-paid salary for February 2011 it was submitted that this issue was dealt with by the trial Judge and was also computed and assessed by the Deputy Registrar at assessment stage.

7.4 Turning to the claim for any other reliefs the court deems fit, Mr. Mwewa submitted that the appellants did not plead the issue of separation but the learned trial Judge gave an order that they be deemed to have been mutually separated. With regard to the claim for costs, counsel referred us to page 29 of the record where

the trial Judge awarded the appellants interest at the short term commercial deposit rate.

7.5 In relation to ground two which was a claim for costs, Mr. Mwewa contended that the court below was on firm ground when he made no order as to costs considering the circumstances of the present case. He went on to argue that although the position of the law with respect to costs at the general list is that a successful litigant is entitled to costs, the position is however different in the Industrial Relations Division of the High Court. To buttress his submission, Mr Mwewa referred us to the holding of the Supreme Court as stated in the case of ***Amiran Limited vs Robert Bones***[4] where it was held, inter alia, that in the Industrial Relation Court costs can only be awarded against a party if such party is guilty of unreasonable conduct. In concluding, Mr. Mwewa firmly argued that the respondent has not been guilty of any conduct aforesaid to warrant being condemned to pay costs. He accordingly implored the court to dismiss the appeal.

7.6 At the hearing of the appeal, counsel for the parties entirely relied on their respective heads of argument.

## 8.0 Our analysis

8.1 At the heart of the appellants' grievance with respect to ground one is the contention that the trial Judge failed to adjudicate on all matters in controversy. That he only dealt with four out of the eleven issues raised. They do not take issue with the manner in

which the four grounds were dealt with and we shall go straight into the grounds they allege were not adjudicated upon.

8.2 **A declaration that they are still employees of the respondent company**

It is clear to us that by having found that the appellants were not constructively dismissed and having deemed that their mode of separation was by early retirement, it only stands to reason that a declaration that they are employees of the respondent is untenable. It would be illogical. Therefore even though not specifically pronounced upon, this issue is resolved by the finding of the trial Court to the effect that they were not constructively dismissed.

8.3 **An Order that they be paid their salaries for the period April 2011 to date of complaint.**

The invitation was declined as it lacked legal basis. The only payment ordered was for the April, 2011 salary with interest. We see no basis upon which we can fault the trial Judge for having rejected this claim as the only salary that remained to be paid was for April 2011.

8.4 **An Order that they be paid accrued leave days for the period stipulated above.**

Having dismissed the claim for unpaid salaries, this claim automatically falls away as it is anchored on the success of the claim above.

8.5 **Damages for loss of expectations of income, embarrassment, pain and anguish.**

We have combed the record and find that the appellants did not adduce evidence in respect of this claim. It would appear the appellants may have forgotten to address this aspect. The claim not having being substantiated let alone raised its little wonder that the trial Judge did not refer to it and would therefore not fault him.

8.6 **An interim injunction restraining the respondent from evicting the 2nd complainant from the house.**

Contrary to the assertion that the Judge did not deal with this issue, a perusal of the judgment reveals that the injunction was to remain in place until receipt of full payment of the judgment sum. For ease of reference thus portion of the judgment is hereunder reproduced.

> *"The position of this court is that the 2nd complainant must upon receipt of full payment from the respondent of the judgment sum herein surrender to the respondent, house No. 72 Petauke Crescent, Kansenshi, Ndola, whereupon the injunction shall stand discharged"*

In light of the foregoing, the claim, therefore, that this aspect was not dealt with flies in the teeth of the evidence. The court specifically adjudicated on house No. 72 Petauke crescent.

8.7 **Unpaid salaries for February 2011**

This was declined on the basis that it would amount to unjust enrichment. The court below referred to the case of ***Kitwe City Council vs William Nguni***[5] which is authority for the principle that you cannot be paid for a period not worked for. He found that the claim for payment of salaries could not be sustained except for the salary of April 2011, which the appellants had worked for. We hold the view that the aspect of unpaid salaries for February 2011 was as a matter of fact addressed by the court.

8.8 **Any other relief the court deems fit.**

The relief in the manner it is couched speaks for itself. It is a passionate appeal to the court to consider what in its wisdom it could consider 'fit and just' in the circumstances. The fact that the Judge remained mute means he did not find any other relief to give other than what he had he given. This is a discretionary remedy and the Judge cannot be faulted for exercising his discretion in the manner he did. Therefore, this claim falls away.

8.9 **Interest**

The court below deemed the appellants to have been retired early and the formula he made applicable for payment was that contained in the Respondent's General Terms and Conditions of Employment and service for Non-unionized Zambian staff, specifically clause 33.0. This award attracted interest. At page J21 of the judgment it reads:

*"The Complainants are also awarded interest at the short term commercial deposit rate as approved by the Bank of Zambia, from the date of complaint to full payment"*

For the April 2011 salary the Judge ordered as follows:

*"The Respondent shall, therefore pay the complainants' April, 2011 salary with interest as herein above awarded."*

In view of the foregoing the claim that interest was not dealt with does not hold water.

8.10 Having considered all the claims that were advanced in the court below, we have arrived at the inescapable conclusion that ground one lacks merit in its entirety for reasons advanced in this judgment and we accordingly dismiss it.

8.11 In relation to ground two, the appellants unhappiness stems from the Judge's refusal to grant an order for costs when he stated that:

*"I make no order as to costs."*

As a general rule - a successful party should not be deprived of his costs unless his conduct in the course of proceedings merits the court's displeasure; or unless his success is more apparent than real, for instance where only nominal damages are awarded: ***Mutale vs Zambia Consolidated Copper Mines[6].***

8.12 There are numerous cases which articulates the principle that costs follow the event including the ones cited by the appellants of ***Costa Tembo vs Hybrid Poultry Farm (Z) Limited[3]*** and ***Zyambo vs Abraham Sichalwe Ntharzy[7].*** In 1966 the Court of Appeal in ***Collect Van Zyl Brothers Ltd[8]*** observed that:

> *"The award of costs in an action is at the discretion of a trial judge, such discretion must be exercised judicially. A trial judge, in exercise of his discretion, should, as a matter of principle, view the litigation as a whole and see what was the substantial result, where he does not do so, the court of appeal is entitled to review the exercise of his discretion."*

8.13 Flowing from the above it is plain that the award of costs is at the discretion of the Judge and a successful party is not automatically entitled to costs. There are some principles which governs the award of costs. There principles were eloquently summarized in the case of ***Scherer vs Country Investments Limited***[9] by Dudley LJ when he opined that:

> *"The normal rule is that costs follow the event. The party who seems to have unjustifiably brought another part before the court or given another party cause to obtain his rights, is required to recompense that other party in costs, but; the judge has unlimited discretion to make what order as to costs he considers that that the justice of the case requires, consequently, a successful party has a reasonable expectation of obtaining an order to be paid the costs by the opposing party but has no right to such an order for it depends upon the exercise of the court's discretion."*

8.14 The appellants not having succeeded in all the claims, the trial Judge had therefore exercised his discretion judiciously in our view. There was nothing untoward by making no order as to costs. Perhaps before we leave this point, we wish to point out that the Supreme Court has guided that in employment matters the rule of thumb is that parties should bear their own costs.

8.14 In the case of ***Engen Petroleum Zambia Limited vs Willis Mwamba and Jeremy Lumba***[10], Mambilima CJ explained that costs in matters from the Industrial Relation Division are awarded in line with the provisions of Rule 44 (1) of the **Industrial and Labour Relations Act** which is couched as follows:

> *"Where it appears to the court that any person has been guilty of unreasonable delay, or of taking improper, vexatious or unnecessary steps in any proceedings, or of other unreasonable conduct, the court may make an order for costs or expenses against him".*

8.15 The rationale behind rule 44(1) of the Industrial Relations Court Rules (which is now a division of the High Court) was aptly explained. We had occasion in ***Standard Chartered Bank Plc vs Celine Meena Nair***[11] to apply the rationale as guided by the Supreme Court.

8.16 The apex court followed its earlier decisions in the cases of ***Amiran Limited vs Robert Bones***[4] and ***Zambia Telecommunications Company Limited vs Mirriam Shabwanga & 5 Others***[12] in which it explained that the IRC was initially established as an employment tribunal and the Rules were intended to guard against the abuse of the court process through unreasonable delays, unnecessary or vexatious applications while ensuring that genuine litigants are not

discouraged from asserting their rights on account of cumbersome rules of evidence and litigation costs to which they could be condemned.

8.17 The Supreme Court found that none of the parties, in the ***Engen Petroleum Zambia Limited vs Willis Mwamba and Jeremy Lumba***[9] case, *"were guilty of unreasonable delay, or taking improper, vexatious or unnecessary steps in the proceedings nor were they guilty of other unreasonable conduct as stipulated in Rule 44 (1). It concluded that there was therefore no basis for the court below to have awarded costs to the respondent. The order on costs was set aside. And the Supreme Court then directed each party to bear its own costs on appeal and in the court below."*

9.0 **Conclusion**

9.1 The long and short of **Rule 44(1)** of the **Industrial and Labour Relations Act** is that unless one is guilty of unreasonable delay or improper conduct, there is no basis to award costs. We have seen no such contravention of Rule 44(1) and align ourselves to the ***Engen Petroleum, Amiran and Zambia Telecommunications***[9] case. The appellants have misapprehended the entitlement to costs. This entitlement is not as a matter of course, there are some governing principles. The appellants have not demonstrated that the Judge's exercise of his discretion was not judicious. On account of the foregoing we find the second ground of appeal to be equally destitute of merit and dismiss it accordingly.

9.2 In the net result we find both grounds of appeal have no legal legs to stand on and therefore the entire appeal is dismissed.

9.3 We order that each party bears their own costs.

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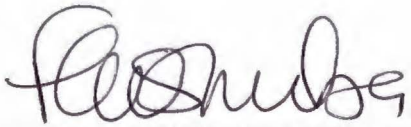
C.F.R. Mchenga

**DEPUTY JUDGE PRESIDENT**



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F. M. Chishimba

**COURT OF APPEAL JUDGE**

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B.M. Majula

**COURT OF APPEAL JUDGE**