IN THE SUPREME COURT FOR ZAMBIA APPEAL No. 214/2016

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

RICHARD MUSENYESA **APPELLANT**

AND

INDO ZAMBIA BANK LIMITED **RESPONDENT**

CORAM: Malila, Kajimanga, Kabuka, JJS.

On the 5th day of November, 2019 and 3rd March, 2020.

FOR THE APPELLANT: Mr. L. Kasolo, Messrs. AKM Legal Practitioners.

FOR THE RESPONDENT: Mr. C. Sianondo, Messrs. Malambo & Co.

JUDGMENT

KABUKA, JS, delivered the judgment of the Court.

Cases referred to:

1. Indo Zambia Bank Limited v Mushaukwa Muhanga (2009) ZR 266 (SC).
2. Musonda Kabwe v BP (Z) Limited 1995-1997 ZR 218.
3. National Milling Company Limited v Grace Simataa and 3 Others (2000) ZR 91 (SC).
4. Moses Choonga v ZESCO Recreation Club, Itezhi-tezhi, SCZ Appeal No. 168 of 2013.
5. Hellen Besa Tembo and Others v Cavmont Bank Limited, Appeal No. 93 of 2016.
6. Maamba Collieries v Douglas Sikalonga and Others, Appeal No.51 of 2004.
7. Khalid Mohamed v The Attorney-General (1982) ZR 49.
8. Zambia Daily Mail Limited v Grevesious Mayenga & 2 Others, SCZ Appeal No. 31 of 2010.
9. Indo Zambia Bank Limited v Boaz Kadochi Chinkamba, SCZ Appeal No. 99 of 2013.
10. Kabwe v BP Zambia Limited (1995-1997) ZR 218 (SC).
11. Peter Ng'andwe and Others v ZAMOX and Another (1999) ZR 90 (SC).
12. Zambia Oxygen Limited & Zambia Privatisation Agency v Paul Chisakula and Others (2000) ZR 27 (SC).
13. Engen Petroleum Zambia v Willis Muhanga & Jeromy Lumba, SCZ Appeal No. 117 of 2016.
14. Attorney-General v Thixton (1966) ZR 10 (SC).
15. Godfrey Miyanda v Attorney General (1985) ZR 85.
16. Attorney-General v Nachizi Phiri and 10 Others (2014) (1) ZR 302 (SC).
17. Cosmas Phiri and Others v Lusaka Engineering Company Limited, SCZ Judgment No.1 of 2007.
18. Newtone Siulanda & Others v Foodcorp Products, SCZ Judgment No. 9 of 2002.
19. Peter Bimbe v AMI Zambia Limited, SCZ Appeal No. 104 of 2004.

1.0 Introduction

1.1 The appellant appeals against a judgment of the High Court dated 4th November, 2013, that dismissed his claim for payment of gratuity, on the basis that, he was aware his conditions of service as revised in July, 2006 did not provide for gratuity. The trial court found, by continuing in employment until his retirement in 2010, the appellant acquiesced to the variation.

1.2 The question raised by the appeal is, what evidence would constitute acquiescence by conduct on the part of an employee, to a unilateral variation by the employer, of a fundamental term of his employment?

2.0 Background

2.1 The history to the appeal is that, on 16th May, 1990 the respondent bank employed the appellant as an Assistant Branch Manager on permanent and pensionable terms, in grade Z7 of the ZIMCO conditions of service. These conditions, amongst other entitlements, in clause 7.0, provided for payment of gratuity at the end of the

employment period, calculated at 25% of the employee's total gross salary for the period served.

2.2 After serving for seven years, the appellant was by letter dated 20th March, 1997 under the hand of the Managing Director of the respondent bank, formally notified that the Board of Directors, had approved new conditions of service with a new salary structure, to wholly replace the ZIMCO conditions of service. The new conditions which were made effective from 1st January, 1997 were headed: *Indo-Zambia Bank Limited, Terms and Conditions of Service for Management Staff in grades MS1-MS11 of 1997* ("the 1997 conditions"), and applied to the appellant who was now in Grade MS7. The provision for payment of gratuity to employees serving on permanent and pensionable terms that was enjoyed under ZIMCO conditions was retained in Clause 7.0 of the 1997 conditions.

2.3 When entitlement to gratuity had been retained for sixteen years, the respondent in July, 2006 without giving any formal notification to the appellant, introduced two sets of

revised conditions of service for its management employees. These were titled: *"Indo-Zambia Bank Limited, Terms and Conditions for Management Staff in grades MS1-MS5" of 2006*; and, *"Indo Zambia Bank Limited Terms and Conditions for Management Staff in grades MS6-MS11 of 2006"* ("the 2006 conditions"). The preamble to the 2006 conditions, surprisingly, only stated that they were replacing the ZIMCO conditions and made no reference whatsoever, to the status of the 1997 conditions which were then, subsisting.

2.4 The 2006 conditions of service also glaringly omitted the provision for payment of gratuity for permanent and pensionable employees in grades MS6-MS11. In its place, the respondent introduced a retirement package of 3 months' pay per completed year of service. An employee qualified for such payment upon attaining the age of 55 or providing 20 years' continuous service, whichever was the earlier.

2.5 Three years thereafter, by letter dated 20th November, 2009 the respondent alerted the appellant of his impending retirement effective 1st January, 2010 when he would have attained the age of 55. The letter also stated that the appellant's terminal benefits for the 19.622 years worked, would be paid at a rate of 3 months' pay for each year served and came to a sum of K1, 500, 277, 683.00 net of taxes. The twenty accrued leave days also amounted to K17, 640, 480.00 net of tax; and, less outstanding loans that the appellant had with the respondent bank of K159, 463, 980. 69; the appellant was to receive a total of K1, 517, 868, 118.00 in full and final payment of his benefits.

2.6 In his response to the letter, the appellant disputed the computation as being in full and final payment of his benefits, claiming that, he was also entitled to his gratuity and repatriation allowance, as provided by the 1997 conditions of service.

2.7 In its reply to that letter, the respondent advised the appellant that the conditions of service that were

prevailing at the date of his exit were the 2006 revised conditions which did not have any provision for payment of gratuity. Regarding his claim for repatriation allowance, the respondent requested the appellant to provide them with his intended place of settlement, to enable them process the payment.

3.0 Proceedings before the High Court

3.1 Having failed to resolve the matter with the respondent, the appellant, on 1st March, 2010 commenced an action before the High Court in which he was seeking an order for payment of gratuity, in the sum of K1, 653, 795, 000.00 calculated at 25% of his total gross salary for the 19.622 years served, premised on his basic salary of K28, 270.00 (rebased) per month. The appellant also claimed payment of repatriation allowance based on the 1997 conditions of service; interest on all amounts due, from the date of retirement to the date of payment and costs.

3.2 In its defence to the claims, the respondent denied that the appellant's terms and conditions of employment entitled

him to payment of gratuity on retirement. The respondent averred that, the 1997 conditions that had applied to all management employees in the category MS1-MS11, were revised by the 2006 conditions that did not provide for gratuity. On repatriation, the respondent averred that, the appellant was only entitled to payment of the actual cost of transportation for his family and their personal effects.

3.3 In his reply to the defence, the appellant denied that the 1997 conditions were revised or replaced by the 2006 conditions. He asserted that payment of gratuity under the 1997 conditions, was an accrued right that could not be taken away from him. It was also his contention, that the purported 2006 conditions the respondent was seeking to rely on were only circulated to Branch Managers and Chief Managers on 20th February, 2009 and not to general staff or himself, as an Assistant Manager.

4.0 Hearing of the matter by the High Court and decision

4.1 The matter was heard by the High Court and the appellant's evidence was substantially as earlier outlined in

paragraphs 3.0 to 3.3 of this judgment. He also confirmed that his duties included inspection of the respondent's Branches, Head Office departments and reviewing conditions of service. The appellant further admitted that in 2008, the Chief Manager gave his department the 2006 revised conditions of service, and he was informed that terminal benefits under those conditions were to be paid at the rate of 3 months' pay for each completed year of service. His position on the point was however, that, even the 1997 conditions that provided for gratuity, had in clause 22.3 also provided for a similar payment.

4.2 On behalf of the respondent, the testimony of its former Chief Manager-Personnel, was that, the appellant, together with the rest of the management staff in grades MS1-MS11 were initially serving under the 1997 conditions of service, on permanent and pensionable basis which entitled them to payment of gratuity for long term service.

4.3 In the revised 2006 conditions, however, payment of gratuity only applied to employees in grades MS1-MS5 who were on contract. He contended that, the appellant was aware of those changes as he had, with another colleague, inspected the witness' department between November and December, 2008. In a report written thereafter, the duo acknowledged the three categories of prevailing conditions of service that had been in existence from 2006.

4.4 It is on this evidence that was before him, that Hamaundu, J, as he then was, found the issue to be determined was whether: the conditions of service which were applicable to the appellant were the 1997 conditions or the revised terms and conditions of 2006. The learned trial judge noted that, the appellant claimed the conditions of service applicable to him were the 1997 conditions for grades MS1-MS11 and that, he was not aware of any other conditions of service.

4.5 The learned trial judge, in that regard, considered evidence adduced by the respondent confirming that the 1997 conditions of service were revised in 2006, following our decision in the case of **Indo-Zambia Bank Limited v Mushaukwa Muhanga**[1]. As a result of that revision, there was a set of conditions of service for senior management staff who served on fixed term contracts; another set of conditions for junior and middle management staff to which the appellant belonged; and, a further set of conditions for unionised employees.

4.6 The judge also took into account the appellant's evidence in cross-examination where he conceded that in 2008, the Chief-Manager Personnel had given his department, the 2006 revised conditions of service and had mentioned that the said conditions were applicable. Upon considering the report to the Head office, Personnel Department, compiled by the appellant and a colleague, one P.M. Imakando, setting out three categories of conditions of service in existence in 2008 as identified in paragraph 4.5 of this

judgment; the learned trial judge found, the appellant was aware that the 1997 conditions of service were revised by the 2006 conditions which thereafter, applied to him. Consequently, that he was also aware he was not entitled to payment of any gratuity on retirement under those conditions. It was the trial court's further finding, that the conditions of service that applied to **Mushaukwa Muhanga**[1], also a former employee of the respondent, were different from those of the appellant and as such, could not assist the appellant's case.

5.0 Grounds of appeal to this Court

5.1 The appellant has advanced the following four grounds appeal against that judgment:

5.1.1 That the trial judge erred in law and fact, when he held that, the 1997 conditions of service were revised in 2006 as no such revisions ever took place to the appellant's knowledge to date. As such, the purported 2006 revised terms of conditions were but a unilateral variation of the appellant's basic conditions of service as the appellant did not consent to the said revision.

5.1.2 The trial judge erred in law and fact, when he held that the appellant was not entitled to gratuity on retirement when he had accrued a right to gratuity pursuant to the 1997 conditions of service which were applicable to him at the time of his retirement.

5.1.3 The trial judge erred in law and fact, when he held that the case in *casu* is not on all fours with the case of Indo Zambia Bank Limited v Mushaukwa Muhanga SCZ No. 26 of 2009.

5.1.4 The trial judge erred in law and fact, when he omitted to make a determination on the appellant's claim for repatriation allowance.

6.0 Arguments by the parties on appeal

6.1 Written Heads of argument and submissions were filed on record by counsel for the parties.

6.2 In ground one of the appeal, learned counsel for the appellant pointed to the respondent's internal memorandum dated 20th February, 2009 relied upon as having enclosed the revised conditions. This memorandum shows it is only addressed to Chief Managers and Branch Managers, while the appellant was an Assistant Manager. His submission was that, the document did not amount to evidence confirming the purported revised conditions of service were ever communicated to the appellant. The appellant also referred to evidence of the respondent's own witness in cross-examination, where he confirmed that other than

the identified addressees to the memorandum, the purported revised conditions of service were not communicated to other employees.

6.3 That argument was stretched to ground two and the submission here, was that, failure to directly communicate the purported revised conditions of service to the appellant and other employees constituted a unilateral variation of the appellant's basic condition of employment to which he did not consent. The case of **Musonda Kabwe v BP (Z) Limited[2],** was cited in support of the submission. The holding of this Court in **National Milling Company Limited v Grace Simataa and 3 Others[3]**, was further relied upon to underscore the point that, conditions of service dealing with gratuity, are some of the most important terms of employment, which should not be subject of variation without the consent of the employee.

6.4 In ground three, the appellant's submission was to the effect that, the **Mushaukwa Muhanga[1]** case, contrary to the trial court's finding, is on all fours with the appeal in

casu as the same respondent was there, ordered to pay gratuity to a permanent and pensionable employee based on the same clause 7.0 of the 1997 terms and conditions of service referred to in this appeal. The appellant contended that, it was infact the said decision that prompted the respondent to revise the conditions in July, 2006.

6.5 In addressing ground four, counsel for the appellant simply submitted that, the trial court neglected to make a determination on the appellant's claim for payment of repatriation allowance which was provided for in his conditions of service.

6.6 In their written response to those arguments and submissions, learned counsel for the respondent argued all the grounds of appeal together, contending that the central question raised as properly stated by the trial court, is: which conditions of service applied to the appellant at the time of his exiting employment?

6.7 The respondent argued that, the appellant had enjoyed several conditions such as enhanced education allowance for his children, car allowance and a housing loan, as provided for under the 2006 conditions of service. The submission was that, having enjoyed those conditions they are the ones that applied to him and he was precluded from making any claims under the 1997 conditions of service.

6.8 The respondent also referred to our decisions in **Moses Choonga v ZESCO Recreation Club, Itezhi-tezhi**[4] and **Hellen Besa Tembo and Others v Cavmont Bank Limited**[5]. We, in those cases, held that the appellants had impliedly, acquiesced to the changes in their status of employment from permanent to fixed term, by continuing to work under the new conditions. The respondent further cited the case of **Maamba Collieries v Douglas Sikalonga and Others**[6] in which we guided that, the existing conditions at the time of separation from employment are to be used for computing terminal benefits.

6.9 From the authorities cited, the submissions were that, conditions of service applicable to the appellant at the time of retirement were the 2006 conditions. That the appellant who was aware of them and opted to continue working until his retirement in 2010, cannot now, be heard to recant those conditions from which he had benefitted. Counsel distinguished the case in *casu* from that of **Mushaukwa Muhanga**[1] on the basis that, it is the pre-2006 terms and conditions of service that applied to that case.

6.10 Finally, the submission in response to ground four, on non-payment of repatriation allowance, was that, the appellant was requested to provide quotations and to indicate his place of retirement which he failed to do. Our decision in **Khalid Mohamed v Attorney General**[7] was called in aid of the submission that, for a claimant to be entitled to judgment, he must prove the allegation made.

6.11 At the hearing of the appeal, learned counsel for the appellant briefly augmented his written submissions,

orally. He underscored the point that, the appellant had an accrued right to payment of gratuity, under the 1997 conditions of service that was taken away by the 2006 conditions, to which he had not agreed or acquiesced. The cases of **Zambia Daily Mail Limited v Grevesious Mayenga & 2 Others**[8] and **Indo Zambia Bank v Boaz Kadochi Chinkamba**[9] were relied upon as authority for the submission. In those cases, this Court respectively, held that acquiescence should be approached with caution; and, that an employee is not precluded from claiming for an accrued right.

6.12 In his oral response and to demonstrate that the appellant was aware of the 2006 revised conditions of service, learned counsel for the respondent again, referred to evidence confirming that the appellant had benefitted from the increased education allowance introduced by the said conditions of service. He reiterated his argument that, conditions that exist at the time of exiting employment are the basis for calculating an employee's entitlements. The

cases of **Moses Choonga**[4] and **Hellen Besa Tembo**[5] were relied upon to support the submission that, an employee who becomes aware of a variation to his conditions of service and continues to work despite being so aware, will be bound by such variation.

7.0 Consideration of the matter by this Court and decision

7.1 We have read the record of appeal, considered the heads of argument, submissions by learned counsel and the authorities to which we were referred. We propose to deal with the grounds of appeal in the order they were presented.

7.2 Starting with ground one, faulting the trial court for not having found that there was a unilateral variation of the conditions without the consent of the appellant. The evidence on record is clear and shows it is not disputed that the appellant was initially, in 1990, employed on permanent and pensionable basis, under the ZIMCO conditions of service. Those conditions were replaced by the respondent's own 1997 conditions. Payment of

gratuity was however, retained in clause 7.0, at a rate of 25% of total gross basic pay earned over the entire period of employment, calculated on the employee's last drawn monthly basic pay. The 1997 conditions were formally notified to the appellant.

7.3 In July, 2006 the respondent, without any formal notification to the appellant, introduced revised conditions of service for management staff in grades MS6-MS11 who were employed on permanent and pensionable terms. There was no provision for entitlement to gratuity in those conditions of service. What the said omission confirms, in our view, is that the respondent certainly unilaterally varied the 1997 conditions by removing the clause providing for payment of gratuity.

7.4 This Court has previously pronounced itself on such unilateral variation of contracts by employers. In the cases of **Kabwe v BP Zambia Limited[10]; Peter Ng'andwe and Others v Zambia Oxygen Limited and Another[11];** and **Zambia Oxygen Limited & Zambia Privatisation**

Agency v Paul Chisakula and Others[12]**;** amongst many others, we re-iterated the position that, conditions of service already being enjoyed by an employee cannot be unilaterally altered to their detriment without their consent.

7.5 In the case of **Grace Simataa**[3]**,** relied upon by the appellant, we further held that, where unilateral changes are made to basic conditions of employment which are adverse and unacceptable to the employee, such employee becomes entitled to treat the variation as a breach by the employer which terminates the contract from the date of variation. That the payment of redundancy or other terminal benefits in those circumstances would be appropriate recompense.

7.6 We however hastened to clarify that, different considerations would apply, if the evidence revealed that clear notice by the employer had been given of the variations and that the employee, with full knowledge of the said variations, had opted to continue in employment,

notwithstanding that their terminal benefits would be on a reduced package in the event of exiting employment, such as by way of redundancy or retirement.

7.7 Premised on the evidence on record, in the present appeal, counsel for the respondent argued that, the appellant was aware of the July, 2006 changes made to his conditions of service by virtue of his work, carried out with a colleague, Mr. P.M. Imakando, in the months of November and December, 2008. That the duo undertook inspections following which they delivered a joint report headed: *'Report on Audit of Head Office Personnel Department'*.

7.8 Counsel went on to argue that, in the said report at paragraph 4.0 with the heading *'Conditions of Service'* three categories of terms and conditions of service were identified: for senior management, junior and middle management; and, unionised employees. The report acknowledged that terms and conditions for management staff in MS6 – MS11 were on permanent and pensionable

basis, and that management staff in MS1 – MS5, were on fixed term contract.

7.9 Having perused the report, we have noted that, there was infact a further observation made by the appellant and his colleague that was not considered by the trial court. This was that, the conditions of service for both categories of management staff, in MS1-MS5 and MS6 –MS11, '*had not been thoroughly revised since 1997 when the respondent had come up with its own conditions of service to replace the erstwhile ZIMCO conditions*'. Accordingly, the appellant and his colleague made a recommendation in the report, to address that apparent lapse. This was that, copies of the said documents held at the branches and head office departments, be made freely accessible and availed to concerned members of staff.

7.10 In his evidence at the hearing, the appellant in answer to the respondent's contention that he benefited from provisions of the 2006 conditions, did admit claiming educational allowance that had been increased from

K750.00 to K1,250.00 (rebased) per child. The appellant, however, explained that he learned of the said increment through a memorandum. This memorandum is dated 10th August, 2009. It appears at page 61 of the record of appeal and makes no reference to the 2006 revised conditions of service, whatsoever. Although he also admitted that the inspections he undertook did refer to conditions of service after 2006, and that in 2008, the Chief Manager gave him what were said to be revised conditions of service, the appellant adamantly, asserted that, he was unaware of the revised conditions until his retirement.

7.11 In response to the position taken by the appellant, the respondent's only witness stated that, the recommendations made in the appellant's report were infact the basis on which the Chief Manager- Personnel, subsequently issued a circular dated 20th February 2009, addressed to all Chief Managers and Branch Managers for their perusal and retention. He also claimed that

dissemination of the revised conditions was made to all management staff who were affected by the changes.

7.12 While we acknowledge the fact that there is indeed a report on record authored by the appellant and a colleague, that makes reference to the July, 2006 revised conditions of service for management staff in category MS6-MS11, in which as grade MS7, the appellant fell. It also appears clear to us from the said report, that the appellant was uncertain on the terms or conditions that had been revised from the 1997 conditions subsisting at the material time and those that had been retained. This dilemma as quoted in paragraph 7.10, appears in the Report, line 5 at page 140 of the supplementary record of appeal. It arose from the preamble of the 2006 conditions appearing at page 56 which states as follows:

> *INTRODUCTION*
>
> *"The following terms and conditions of service for management staff replace the erstwhile ZIMCO service conditions, and are effective from January 1, 1997."*

7.13 In light of the evidence that the preamble to the 2006 conditions of service specifically refers to have revised the

ZIMCO conditions of service without addressing the status of the 1997 conditions in force at the time. The observations made by the appellant as quoted in paragraph 7.10 shows that, although the appellant was aware of the existence of the 2006 revised conditions, as correctly found by the learned trial judge; the appellant further expressed uncertainty on the extent to which they had affected the 1997 conditions that were then, subsisting and were never stated to have been replaced by the 2006 conditions. This aspect of the appellants position was not addressed by the trial court.

7.14 In the absence of evidence that the July, 2006 revised conditions of service, also revised the 1997 conditions for grades MS 1-MS 11 and to what extent; and, in view of the respondent's failure to address the concerns raised in the *'Report on Audit of Head Office Personnel Department'* of the appellant and his colleague; the appellant's argument that he was entitled to claim gratuity, as an accrued right, under clause 7.1 of the1997 conditions for grades MS 1-

MS 11 cannot be said to be farfetched. Particularly so, we may add, that there was no clarity as to what was revised and what was to be maintained, varied or superseded. Hence, no clear meeting of the minds occurred between the parties, on the decision to vary the 1997 conditions that were existing at the time. As we held in the case of **Engen Petroleum (Zambia) Limited v Willis Muhanga & Another**[13], the fact that the employer did not bother to address the 1st respondent's concerns, shows that the latter, did not acquiesce or consent to the revised conditions.

7.15 There was thus, a clear drafting oversight on the part of the respondent for totally failing to address the status of the 1997 conditions of service subsisting at the material time. In addressing a similar lapse in the **Mushaukwa Muhanga**[1] case, we applied the contra proferentem rule and found that the document must be construed against the respondent in favour of the appellant. We find no reason to depart from that approach in the appeal in *casu*.

7.16 Accordingly, granted those circumstances, we are inclined to agree with the appellant that there was no actual revision or replacement of the 1997 *Indo-Zambia terms and conditions for management staff in grades MS 1-MS 11.* What appears to have transpired, is that the July, 2006 conditions did not affect the validity of the 1997 conditions which continued to apply; and, which in clause 7.0 provided for payment of gratuity. The argument canvassed by the respondent, that the July, 2006 revised conditions actually replaced the 1997 conditions is not supported by the evidence that is on record.

7.17 In our view, accepting the respondent's argument that the 2006 conditions replaced the 1997 conditions in the circumstances, would only go to fortify the appellant's contention, that he did not consent to such an unclear variation; and, that the same should not be used to deprive him of his right to payment of gratuity which accrued to him upon his retirement. The preamble to the 2006 conditions, only assists in advancing the argument that the 1997 conditions of service, continued to subsist. It is

for the reasons given that we find ground one of the appeal has merit.

7.18 Having determined that evidence on record confirms the 1997 conditions of service were still applicable, we, on that premise, uphold the appellant's contention in ground two, that he had an accrued right to be paid gratuity under the 1997 terms and conditions of service. In the case of **Attorney-General v Thixton**[14], we did state that:

> "**In deciding whether a right accrues or is acquired one must have regard not only to the process of accrual and acquisition but also to the nature of the right in question. Some rights, in order to become accrued and acquired, undoubtedly require some incident, that is some action to be taken - not necessarily by the claimant - or some event to occur.**" (underlining for emphasis only)

7.19 In the case of **Godfrey Miyanda v Attorney General**[15], our holding was that, an accrued right was an inchoate or incomplete right that is contingent on, and would only vest on the happening of a future event. In that case, the event was the appellant becoming a commissioned officer. In the case in *casu* it was the coming to an end of the

respondent's permanent and pensionable employment, that would trigger payment of his gratuity as provided by clause 7.0 of the 1997 conditions of service. The clause reads as follows:

> **"7.0 GRATUITY**
>
> 7.1 **Permanent and Pensionable Staff**
>
> 7.1.1 gratuity will be paid at the end of the contract."
>
> 7.1.2 the quantum of gratuity will be 25% of the:
>
> (a) Total basic pay for the duration of the contract calculated on the basis of the last drawn basic pay.
>
> (b) Commutation of leave days availed during the contract, calculated of the last drawn monthly basic pay."

7.20 Further, in one of our landmark decisions on payment of gratuity, **Attorney-General v Nachizi Phiri and 10 Others**[16], the appellant had appealed a finding of the High Court that the respondents be paid *ex-gratia* payments under clause 9.5 of the National Assembly Conditions of Service and Disciplinary Code of 1996; which had been repealed by National Assembly Circular No. 5 of 2000.

7.21 In considering what the rights of the parties were, we found that, the respondents should not have been disadvantaged by subjecting them to terms and conditions which did not exist in 1996 but were created in 2000 after they had rendered more than 10 years of service, and that having worked so long, the respondents were entitled to have a legitimate expectation of their terminal benefits and ex-gratia payment, that had become an accrued right.

7.22 The rationale expounded was that, employees should not be subjected to conditions of service which did not exist during their tenure of service; and that no employee's conditions of service should be altered to their detriment without their consent, a position underscored in numerous other past decisions of this Court, such as the case of **Paul Chisakula.**[12]

7.23 We, in the said case, held that, conditions of service of any kind of employment can be amended and cautioned on how that can be properly effected when we said:

> **"but 'this must only be <u>with the clear and express consent of the employee</u>. That express consent of an**

> **employee must always be a major pillar in employment law for purposes of safeguarding of the terms of an employee's contract of employment already being enjoyed; and, that there should be predictability of the employee's retirement or separation package, founded on the principle of good conduct.'** (Underlining for emphasis only)

7.24 We further held that, an employer who does not seek the express consent of an employee to the variation of their terms and conditions of service does so at their own peril. This is in line with the ILO *(R198) Employment Relationship Recommendation, No. 198 of 2006* which guides that labour seeks amongst other things to address what can be an unequal bargaining position between parties to an employment relationship.

7.25 The evidence on record in the appeal now before us, shows there was no engagement by the respondent with the affected employees, such as the appellant on the variation of the condition entitling them to gratuity. There was also no direct formal communication of the revised conditions, as previously done when the 1997 conditions came into

effect. To compound it all, there was no response by the respondent to the clarification sought by the appellant and his colleague on the applicable conditions of service and to what extent, they applied. Hence, no clear consensus on the variation.

7.26 In our view, those facts distinguish this case from the cases of **Cosmas Phiri and Others v Lusaka Engineering Company Limited[17],** and **Grace Simataa[3]** in which we held that, where employees are aware of a change to their terms and conditions of service, and there is no protest from them, it will be taken that the employees have consented to the variation.

7.27 Where acquiescence is intended to be assumed from conduct, credible evidence will have to be led, showing that the employee was by clear notice given by the employer indeed aware of the variation, understood the implications and its full extent, before it can be said that they acquiesced or consented by conduct. As we said in the case of **Grace Simataa[3],** an employee has no cause for

complaint, if the evidence reveals that clear notice by the employer has been given, covering the alterations; and, that the employee had opted to continue in employment with full knowledge, that his terminal benefits would be on a reduced package, if the separation came by way of redundancy.

7.28 What comes out from the previous decisions of this Court is that, in the earlier cases decided between 1995 and 2010 such as **Kabwe v BP (Zambia) Limited[10], Ng'andwe & Others v ZAMOX & Another[11], Newtone Siulanda & Others v Foodcorp Products[18],** and **Peter Bimbe v AMI Zambia Limited[19]** to mention a few, our approach towards what would constitute acquiescence by conduct was simply that an employee who, after becoming aware of the variation or change in contractual terms, continued to work without protest or complaining about the changes to their conditions of service, would be said to have acquiesced.

7.29 However, in our later decisions which include the case of **Grevesious Mayenga**[8], **Nachizi Phiri & 10 Others**[16] **and Willis Muhanga & Another**[13], the burden was shifted to the employer who seeks to rely on acquiescence by conduct, to give notice of the variation and obtain clear and express consent from the employee before any changes to conditions of service to the employee's disadvantage are effected. This was intended to ensure the protection and sanctity of employment contracts. We further cautioned against finding implied consent or acquiescence too readily, even in situations where an employee does not protest the changes, particularly where there is an accrued right, such as gratuity or pension benefits that are of long term benefit.

7.30 On the evidence, the appellant in *casu* was, by a report compiled in 2008, still seeking clarity from management on which clauses in the 1997 conditions had been revised by the 2006 conditions and no formal response was given to him addressing the query raised. The respondent

cannot, therefore, claim to have placed the appellant on clear notice of the variation to his conditions of service regarding payment of gratuity. In the **Chinkamba**[9] case, Mr Chinkamba had also been employed by the same respondent in this appeal, as Branch Manager under grade MS6 in 1993, till he retired in July, 2006 at the age of 55. Five years later, following our decision in the **Mushaukwa Muhanga**[1] case, Mr. Chinkamba demanded payment of gratuity under the same clause 7.0 *Indo-Zambia Bank Limited terms and conditions for management staff in grades MS 1-MS 11 of 1997*, reproduced at paragraph 7.20 of this judgment. This is the same clause that is in contention in the present appeal.

7.31 We, in the **Chinkamba**[9] case upheld the findings of the learned trial judge that, the intention of the appellant was to pay gratuity to permanent and pensionable staff, and we also went further to state that, an employee is not precluded from pursuing and claiming *an accrued right,*

within the limitation period or upon realising he was entitled to it.

7.32 Following our holding in ground one, that the appellant is entitled to claim gratuity on the basis that the 1997 conditions of service still continued to subsist at the time of his exiting employment; we further hold that, the gratuity was an accrued right that could not be unilaterally varied by the respondent. We find merit in ground two.

7.33 Coming to ground three, the appellant faults the trial judge for not finding that the case in *casu* is on all fours with the case of **Mushaukwa Muhanga[1].** We agree with the learned trial judge that the factual circumstances between the case *in casu* and **Mushaukwa Muhanga[1]** differ and cannot be said to be on all fours. What was in issue there, was the interpretation of clause 7.1 on payment of gratuity. Hence, the said case is still applicable to the extent that the provision confirms there was intention to pay gratuity to permanent and pensionable

employees, as has already been established in grounds one and two. Ground three also succeeds.

7.34 Lastly, on ground four, we have perused the judgment of the trial court and found that the claim for repatriation allowance, although provided for in both the 1997 and 2006 conditions of service, was indeed not determined by the trial court. The record shows the respondent in that regard, had written the appellant a letter dated 16th February, 2010 in which he was informed that he had not indicated the place of settlement nor sent quotations from reputable transport companies to allow for processing of his repatriation payment.

7.35 In our view, that communication reveals the respondent was not disputing that the appellant was entitled to repatriation. It was therefore incumbent on the appellant to follow the respondent's internal procedure for claiming his payment for repatriation. Accordingly, we cannot fault the learned trial judge for not dealing with a non-issue. We find no merit in ground four.

7.36 The net effect is that, this appeal has substantially succeeded, with the result that, the appellant's terminal benefits are to be entirely re-calculated on the basis of the 1997 conditions of service which include payment of gratuity. He is to be paid his entitlements with interest at current average bank deposit rate as determined by the Bank of Zambia from the date of the Writ to date of judgment in the court below. Thereafter, interest will accrue at current bank lending rate until final payment, less amounts already received.

7.37 The appeal having succeeded on three of the four grounds, the appellant will have his costs of the appeal, to be taxed in default of agreement.

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M. MALILA
SUPREME COURT JUDGE

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C. KAJIMANGA
SUPREME COURT JUDGE

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J. K. KABUKA
SUPREME COURT JUDGE