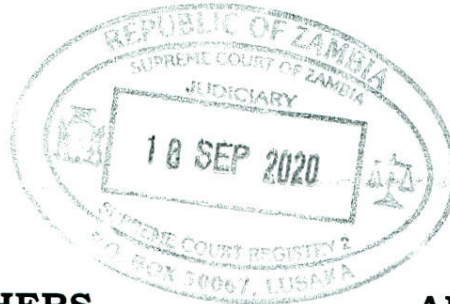


Appeal No. 140/2012

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



BETWEEN:

EMMANUEL TUMBA & 6 OTHERS

APPELLANTS

AND

ZAMBIA BATA SHOE COMPANY PLC

RESPONDENT

Coram : Phiri, Chibomba and Wood, JJS

On 15th July, 2015 and 18th September, 2020

For the Appellants: Mr. Desmond Banda – In Person

**For the Respondent: Mr. Kambwita Kanswata of Messrs
Kaswata & Company**

JUDGMENT

PHIRI, JS, delivered the Judgment of the Court.

CASES REFERRED TO:

- 1. Paddy Philemon Kaunda & 144 Others vs Zambia Railways Appeal
No. 37/2005**
- 2. Aristogerasimos Vangelatos & Another vs Metro Investments
Limited & 3 others Selected Judgment No. 35/2016**

LEGISLATION REFERRED TO:

1. **The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia**

OTHER WORKS REFERRED TO:

1. **Halsbury's Laws of England, 4th Edition, Volume 10 by Lord Hailsham of St. Marylebone (1973), Butterworths: London**

The delay in rendering this judgment is deeply regretted. When we sat to hear this appeal, madam Justice H. Chibomba was with us. She has since moved to the Constitutional Court. This is, therefore, the majority decision.

This is an appeal against a decision of the full court of the Industrial Relations Court (IRC) sitting in its appellate jurisdiction. The background of the case is as follows: the appellants herein, were the complainants in the IRC. They commenced an action against the respondents herein claiming, inter alia, damages for unlawful and unfair dismissal. Their case was successful, and in the judgment dated 6th February, 2008 (the "**Judgment**"), the IRC ordered that the following benefits were due to the complainants:

- a) **6 months' salary allowances and other perks that they were entitled to at the time of termination of employment;**
- b) **That the sums due will attract interest at Bank short term fixed deposit rate from the date of filing the Notice of Complaint to the date of Judgment;**

- c) That after Judgment the interest will accrue at the current Bank lending rate to the date of payment;
- d) That costs are awarded to the complainants;
- e) That in default of agreement, the same to be taxed by the Registrar of the Industrial Relations Court.

The parties had disagreements on how much the Complainants were entitled to according to the Judgment. On the one hand, the Complainants claimed that the Judgment meant that they were entitled to service benefits for the various years they served, and on the other hand, the respondents claimed that the Judgment only ordered them to pay 6 months salary as compensation for loss of employment, and not service benefits. The Complainants in their calculations relied on clause 27 of the Collective Agreement, which relates to retirement. Since there was no agreement between the parties, the Complainants made an application to the Deputy Director of the IRC ("**Deputy Director**") for assessment. In the Ruling of the Deputy Director, dated 5th February, 2010 ("Ruling on Assessment"), the Deputy Director did not agree that the complaints could base their calculations on retirement, and held as follows:

"This is the Assessment:

From the evidence on record I have to state that the above orders are very clear, that the Complainants are only entitled to 6 months not retirement as alluded to by the Complainants. As for the 'Perks' the Complainants are entitled to all the 'perks' as signed to on their collective agreement and should be calculated in accordance with the order (a) of the Judgment. Further, the interest applicable is as stated with orders (b) and (c) of the Judgment."

Subsequently, an application was made by the Complainants, for re-assessment of their terminal benefits. This application was heard by a different Deputy Director from the one who made the Ruling on Assessment. The question before the Deputy Director was the meaning of the term "Perks" in the Judgment, and whether the perks included the Complainants' service benefits for the various years of service they each worked. In the Judgment ("**Judgment on Re-assessment**"), the Deputy Director found that the Complainants were entitled to whatever perks an employee who was not dismissed would get. The Deputy Director therefore, concluded that the Complainants were entitled to the following benefits:

- i) **Compensation: 6 months' salary arrears with allowances being: basic pay; housing allowance; bonus (production) allowance; soap allowances; hardship allowances; and protective clothing allowances;**

- ii) **Termination (other than by dismissal) entitlements: 3 months of every year served; repatriation and leave days.**

Following this decision, the respondent appealed against the decision of the Deputy Director to the full bench of the IRC. The gist of the appeal was that the Deputy Director erred in his Judgment on Re-assessment because he effectively awarded the Complainants additional compensation which was not provided for in the Judgment, under the head "*termination entitlements*" when determining the meaning of the term "perks". Consequently, the Deputy Director went outside the scope of his authority as provided for in **Order 37 Rule 1 of the Supreme Court Practice Rules, 1999 Edition ("White Book")**.

In its Judgment on Appeal, the IRC found that the Deputy Director awarded the Complainants termination entitlements, which were not provided for in the initial Judgment of the IRC dated 6th February, 2008. Consequently, the Deputy Director went beyond his mandate under Order 37 Rule 1 of the White Book. The IRC further found that the term "*perks*" does not include service benefits. In sum, therefore, it was found that the Complainants were only entitled to 6 months' salary, allowances and perks as provided for in the

Ruling on Assessment. further, the court ordered that the Complainants were entitled to repatriation allowance if they qualify under the Collective Agreement, which they were party to.

It is against the Judgment on Appeal to the IRC, that the appellants herein have appealed to this court, advancing a single ground of appeal couched as follows:

- 1. The Court below erred both in law and fact in holding that the term “perks” does not include service benefits, effectively depriving the appellants hard earned gratuity of three month pay for each year worked, leave pay in lieu of accrued leave days and salaries and allowances the respondent withheld while the appellants were on suspension, when in fact the term “perks”, as is appearing in order (a) of the trial court’s judgment, as defined by various dictionaries and as used and applied by the Supreme Court simply, is payment of any kind.**

Both parties filed written heads of arguments in support, and in opposition to the appeal, respectively. At the hearing of the appeal, Mr. Desmond Banda, who appeared on behalf of himself and the other appellants, and Mr. Kanswata, learned Counsel for the respondent, relied entirely on their filed heads of arguments.

In support of their appeal, the appellants argued that in accordance with the Judgment, they were entitled to 6 months’ salary

allowances and other perks they were entitled to at the time of termination of their employment. According to the appellants, the other perks were: all the entitlements stated in the Collective Agreement; three months' salary for each year served (being the benefits due to an employee who has been terminated from employment); repatriation benefits; leave days up to the date of termination; and their salaries which were withheld while the appellants were suspended from employment. It was the appellants' further argument that the Deputy Director in the Judgment on assessment acted well within his jurisdiction as provided by **Order 37 Rule 1 of the White Book**, when he made the orders for compensation and termination (other than dismissal) entitlements.

Additionally, it was the appellants' further argument that the IRC relied on the definition of the term "*perks*" from the concise Oxford Dictionary which defined the term as follows: "*an extra profit or allowance additional to a main income*". However, the IRC fell into error when it failed to acknowledge that service benefits fell within the aforesaid definition of the term perks. It was the appellants' further argument that the term perks includes service benefits, and

consequently the IRC erred when it held that the appellants were not entitled to service benefits.

We were urged to allow this appeal.

In response, the respondent's argued that the Judgment of the lower court is unambiguous with respect to what was awarded to the appellants. Consequently, it was Mr. Kaswata's contention, that the said Judgment of 8th February, 2008 was clear in that it only awarded the appellants herein 6 months' salary, plus perks and allowances they were entitled to at the time of their dismissal from employment. It was the respondent's further argument that the Judgment clearly showed that at no point did the court find that the appellants were considered as retired. Therefore, the appellants are not in any way entitled to retirement benefits.

it was further argued that **Order 37 Rule 1 of the White Book** clearly states that the duty of the Registrar is to assess damages subject to the provisions of the Order, and only to make an assessment where no provision has been made in the Judgment on how they are to be assessed. the Deputy Director therefore exceeded his jurisdiction because the Judgment showed the manner in which

the assessment was to be conducted. We were urged to dismiss the appeal with costs.

We have considered the record of appeal, the Judgment appealed against and the arguments exchanged by the parties. From the record of appeal, it is clear that after the IRC delivered its Judgment, the appellants herein made an application before the Deputy Director for assessment of damages. Evidently, the appellants were not satisfied with the decision of the Deputy Director, and hence they made an application for re-assessment. We have combed the **Industrial Relations & Labour Relations Act** and have not found a provision that allows for re-assessment, or in any case the procedure adopted by the appellants herein. Instead of making an application for re-assessment, the appellants should have appealed against the decision of the Deputy Director to the full court of the IRC as we held in **Paddy Philemon Kaunda & 144 others Vs Zambia Railways**¹ wherein, we stated as follows:

“The sum total of our holding is that an appeal from an assessment by the Registrar of the Industrial Relations Court lies to the full court of the Industrial Relations Court and not the Supreme Court.”

The Deputy Director, therefore, did not have jurisdiction to hear the re assessment. With respect to an inferior court exercising jurisdiction it did not originally have, the learned authors of **Halsbury's Laws of England, 4th edition, Volume 10 at paragraph 715** states as follows:

“Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgment is given.”

In light of the above provision, we held in **Aristogerasimos Vangelatos & Another vs Metro Investments Limited & 3 others²** That:

“It can be discerned from the foregoing position of the law, that the absence of jurisdiction nullifies whatever decision follows from such proceedings. This is the position because the power of this court (like that of any other court created by the Constitution) to adjudicate upon matter in terms of Articles 118 and 119 of the Constitution of Zambia Act is vested in it by the people of Zambia to be exercised justly in accordance with the Constitution and any other laws. The exercise of such power, in the absence of jurisdiction, amounts to an abrogation of the confidence reposed in the courts by the people and a contravention of the Constitution and other laws. There is, therefore, need to cure such a defect at any adjudicative level and on appeal, whether or not it was an issue in the court below.”

In the above stated case, the issue of jurisdiction was raised on appeal even though it was not an issue in the court below. In the instant case, there was no question on jurisdiction in the court below, and there is no question of jurisdiction before us. However, it is prudent for us to address it in order to cure the defects from the lower court.

Since the Deputy Director did not have jurisdiction to hear the application on re-assessment all actions on the case that followed thereafter are nullified, as we held in the **Aristogerasimos Vangelatos²** case. Consequently, the subsequent appeal to the full court of the IRC is nullified and similarly, the appeal before us is nullified as well, and is therefore incompetently before us. In coming to this decision, we are alive to the provisions of **Rule 55 of the Industrial & Labour Relations Rules, of the Industrial & Labour Relations Act, Chapter 269 of the Laws of Zambia** which states that:

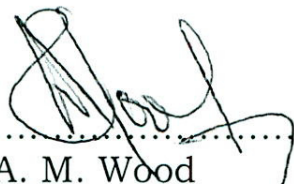
“Nothing in these Rules shall be deemed to limit or otherwise affect the power of the Court to make such order as may be necessary for the ends of justice or to prevent the abuse of the process of the Court.”

Despite the above provision, the IRC is still bound by the principles of law, which include issues of jurisdiction. The net effect is that the Judgment on Re-assessment and the Judgment on appeal are set aside for the respective courts' want of jurisdiction. In addition, the appeal is dismissed with costs to the respondents. We should mention that the Ruling on assessment still stands, and the appellants herein are entitled to the benefits as stipulated therein.



.....
G. S. Phiri

SUPREME COURT JUDGE



.....
A. M. Wood

SUPREME COURT JUDGE