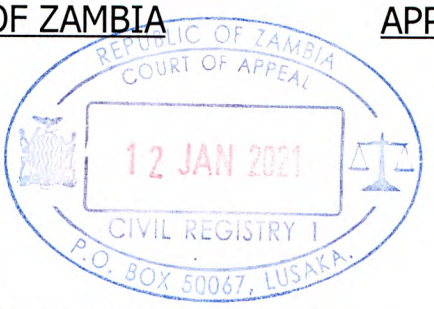
IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL № 166/2019



BETWEEN:

ZAMBIA NATIONAL COMMERCIAL BANK PLC APPELLANT

AND

ERNESTINA SAKALA & 62 ORS RESPONDENTS

CORAM: **Chashi, Sichinga** and **Lengalenga, JJA**
On 24th September, 2020 and 12th January, 2021.

For the Appellant: No appearance

For the Respondents: Mr. M. Lisimba – Messrs Mambwe, Siwila & Lisimba Advocates

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J U D G M E N T

LENGALENGA, JA delivered the Judgment of the Court.

Cases referred to:

1. **ATTORNEY GENERAL v NACHIZI PHIRI & 10 ORS (2014) 1 ZR 302**

2. **NATIONAL MILLING COMPANY LTD v GRACE SIMATAA & ORS (2000) ZR 91**
3. **ZAMBIA OXYGEN LTD & ANOR v PAUL CHISAKULA & ORS – SCZ JUDGMENT Nº 4 OF 2000**
4. **ZAMBIA CONSOLIDATED COPPER MINES LTD & ANOR v EMMANUEL SIKANYIKA & ORS – SCZ JUDGMENT Nº 24 OF 2000**
5. **INDO-ZAMBIA BANK LTD v MUSHAUKWA MUHANGA (2009) ZR 266**
6. **MASAUSO ZULU v AVONDALE HOUSING PROJECT (1982) ZR 172**
7. **ZAMBIA DAILY MAIL LTD v GREVESIOUS MAYENGA & ORS – SCZ APPEAL Nº 31 OF 2010 (unreported)**
8. **ENGEN PETROLEUM ZAMBIA LTD v WILLIS MUHANGA & ANOR – SCZ APPEAL Nº 117 OF 2016**
9. **JAMES MANKWA ZULU & ORS v CHILANGA CEMENT PLC – SCZ APPEAL Nº 12 OF 2004**
10. **BANK OF ZAMBIA v JONAS TEMBO (2002) ZR 103**
11. **JONES v ASSOCIATED TUNNELLING CO LTD (1981) 1RLR 477 EAT**
12. **ZAMBIA TELECOMMUNICATIONS CO. LTD v FELIX MUSONDA & ORS – SCZ APPEAL Nº 51 OF 2014**

Legislation referred to:

1. **THE PUBLIC SERVICE (RETIREMENT AGE) REGULATIONS – STATUTORY INSTRUMENT Nº 63 OF 2014**
2. **THE PUBLIC SERVICE (RETIREMENT AGE)(AMENDMENT) REGULATIONS – STATUTORY INSTRUMENT Nº 24 OF 2015**
3. **THE NATIONAL PENSION SCHEME (AMENDMENT) ACT Nº 7 OF 2015**
4. **THE INDUSTRIAL RELATIONS COURT RULES, CHAPTER 269 OF THE LAWS OF ZAMBA**

1.0 INTRODUCTION

1.1 This appeal emanates from a judgment of the Industrial Relations

(a) 1 – 10 years = 2½ months pay for each completed year of service;

(b) 11 – 20 years = 3½ months pay for each completed year of service;

(c) 21 – 30 years = 4½ months pay for each completed year of service.

2.4 It is not disputed that the Respondents' conditions of service were adjusted on several occasions and that the first one was by a circular dated 5th August, 1999 in which the salary was adjusted adding thirty-six percent (36%) of the allowances (medical and educational). The said circular also adjusted the Voluntary Severance Scheme (VSS) under Appendix H by revising the factors in (a) (b) and (c) to 1.5 and 2.5 respectively. In addition, the revised factors were to be multiplied by the **"monthly basic salary"** and not the **"month's pay."**

2.5 By a further circular dated 3rd September, 2003, the Appellant management approved *ex-gratia* payments to staff who were proceeding on normal and medical retirement at the rate of one month's basic salary for each completed year of service in addition to the benefits accrued from the Appellant's Pension Scheme. However,

Division of the High Court delivered by Hon. Mr. Justice Egispo Mwansa.

2.0 BACKGROUND TO THE APPEAL

2.1 The background to this appeal is that the Respondents as former employees of the Appellant, entered into separate contracts of employment with the Appellant on diverse dates on permanent and pensionable service.

2.2 According to the evidence on record, at the time of separation from the Appellant, all the Respondents were in management and, therefore, the applicable conditions of service were the **"Conditions *of Service/Grievances and Disciplinary Procedures Code DHR/12/96 For Non-Represented Staff*** **(hereinafter referred to as "the conditions").**

2.3 Clause 13.1 provided for normal retirement at the pensionable age of 55 years or upon attainment of 25 years continuous service with the Appellant and payment of benefits to be paid in accordance with the Appellant's Pension Scheme while Clause 13.3 provided for a Voluntary Severance Scheme (VSS) whose compensation was in Appendix H as follows:

the said *ex-gratia* payment was later revised by a circular dated 28th June, 2013 to exclude staff that would join the Appellant after 1st July, 2013 whilst, the staff who were already on permanent and pensionable contracts and those who would be promoted, would be eligible for the said benefit. By a further circular dated 10th March, 2014, the same benefit was extended to both non-represented and represented staff employed prior to 1st July, 2013. The said circular further revised the factor to be a fraction of basic salary plus all the guaranteed monthly allowances.

2.6 Earlier in 2011, by circular number HRTD/03/2011, the Appellant management had revised Appendix H of the 1999 Conditions of Service by reducing the multipliers in (a)(b) and (c) to 0.83, 1.11 and 1.40 respectively and redefining **"monthly basic salary"** to **"monthly gross pay."**

2.7 By a further circular dated 29th August, 2014, management made further amendments to *ex-gratia* payments for both non-represented employees and represented employees. For non-represented employees, the new rate was one month's gross salary multiplied by

the total number of years served, multiplied by a factor of 0.58, while for the represented employees, the factor was 0.87.

2.8 There was evidence that the affected employees expressed their misgivings and subsequently petitioned the Appellant's management with regard to the various amendments to their conditions of service. One such petition was made on 10th April, 2015 to the Appellant's Managing Director following a presentation by the Head Human Resource, Operations and Industrial Relations on 2nd October, 2014. The petition exhibited at pages 257 to 266 of the record of appeal indicates that the members of staff who include the Respondents, were concerned about the adverse impact that would arise among others, from the reduction of the *ex-gratia* factor from 1 to 0.58.

2.9 According to the evidence on record, the 1st, 3rd, 4th and 9th Respondents on various dates between 2015 and 2016, gave notice of their intentions to retire at the age of 55 years. In separate letters, the Appellant subsequently retired them on early retirement except for the 4th Respondent whose letter indicated **"normal retirement."** Their retirement letters indicated that they would be paid normal retirement benefits in accordance with Clause 5(a) of the

Appellant's Pension Scheme Rules and an *ex-gratia* payment at the factor of 0.58 of the monthly gross salary for each completed year of service which payment is at management's discretion.

2.10 The four Respondents contended that they applied for early retirement at 55 years and were paid packages for normal or medical retirement as opposed to those under the Voluntary Severance Scheme (VSS). They contended that as the Appellant's conditions of service did not provide for early retirement, they ought to have been paid under Appendix H at the rate of 4½ months for each completed year of service.

2.11 The evidence on record indicates that the rest of the Respondents applied for the Voluntary Severance Scheme (VSS) and the same was granted in accordance with their respective letters dated 5th October, 2016 which indicated that they would be paid terminal benefits in accordance with the VSS formula at a rate between 1.4 and 0.83 multiplied by the monthly gross salary for each completed year of service.

2.12 It is in this regard that the Respondents commenced proceedings in the Industrial Relations Division, seeking *inter alia* the following reliefs:

(1) Terminal benefits including all allowances.

(2) An order that the multiplying factor to be used must be the one under which the Complainants (Respondents) enjoyed their tenure of employment.

(3) Interest on all amounts found to be due to the Complainants (Respondents).

2.13 During the trial, the Respondents contended that the variations to their conditions of service by management were made without their consent and that although in some cases, they signed letters consenting to the changes, they did so reluctantly as they were unable to oppose as they were part of management.

2.14 It was contended on behalf of the Appellants that four of the Respondents gave written notice to retire at the age of 55 years in accordance with their contracts and conditions of service. They were paid their lump sum pension, *ex-gratia* and monthly pension for life. The two unionised staff members and rest of the fifty-seven (57)

management staff who applied for Voluntary Severance Scheme (VSS) were separated in accordance with the revised conditions of service. It was further contended that the Respondents consented to the revisions as they signed for them except for the 2011 circular.

3.0 DECISION BY THE COURT BELOW

3.1 Hon. Judge Egispo Mwansa considered the evidence before him and found that the Respondents could be placed in three categories, based on their peculiar circumstances. With respect to the 1st, 3rd, 4th and 9th Respondents who he placed in category 1, he considered whether they proceeded on early or normal retirement. To that effect, he considered the Public Service (Retirement Age) Regulations Statutory Instrument Nº 63 of 2014; the Public Service (Retirement Age)(Amendment) Regulations, Statutory Instrument Nº 24 of 2015 and the National Pension Scheme (Amendment) Act, Nº7 of 2015 which revised the retirement age upwards and created three categories of retirement. The same being 55 years for early retirement; 60 years for normal retirement and 65 years for late retirement.

3.2 Guided by the Supreme Court decision in the case of **ATTORNEY GENERAL v NACHIZI PHIRI & 10 ORS[1],** the learned trial Judge reasoned that the contracts of employment that the Respondents entered into with the Appellant were relevant. Therefore, based on the said contracts of employment, he found that the agreed normal retirement age with respect to category 1 was 55 years. That the Statutory Instruments of 2014 and 2015 together with the National Pension Scheme (Amendment) Act, Nº 7 of 2015 were not applicable. He, therefore, found that the 1st, 3rd, 4th and 9th Respondents retired normally at the age of 55 years.

3.3 On the issue of consent by the Respondents to the variation of the conditions of service by the Appellant, he relied on the case of **NATIONAL MILLING COMPANY v GRACE SIMATAA & ORS[2]** and held that the reduction in the multiplying factor from 1 to 0.58 was without the Respondents' consent in Category 1. He, therefore, was of the view that there was need for re-calculation of the *ex-gratia* payment for the Category 1 Respondents. He further stated that the same was applicable to the 13th, 36th, 40th, 47th and 52nd Respondents who he found belonged to Category 2 and had

separated based on the Voluntary Severance Scheme (VSS) and whose multipliers were reduced from 2.5 to 1.4 without their express consent.

3.4 The learned trial Judge put the remaining 54 Respondents in Category 3 and found that they left the Appellant through the Voluntary Severance Scheme (VSS) and that although there was some form of consent to the variation from 2.5 to 1.4, the said consent was vitiated by the fact that it was obtained after the Appellant had granted the applications for them to proceed on the Voluntary Severance Scheme. In dismissing the purported consent, the Hon. trial Judge relied on the case of **ATTORNEY GENERAL v NACHIZI PHIRI & 10 ORS** where the Supreme Court held that:

> **"..... In a situation where fair and reasonably paying jobs are scarce, it is not right to expect an employee who disagrees with the unilateral downgrading of the conditions of service to simply opt out of employment and wait for the payment of separation package or the payment of damages for breach of contract ...."**

3.5 Consequently, the learned trial Judge found for all the three categories of Respondents and ordered a re-calculation of the terminal benefits in respect of all of them so that the multiplier factor

can be 1 for the *ex-gratia* payment, and 2.5 on gross salary for those in Categories 2 and 3 less what they were each paid, if any. The amounts due would attract interest at the current Bank of Zambia short term lending rate from date of Notice of Complaint to date of judgment, and thereafter at 6% to the date of final settlement. Costs were awarded to the Respondents.

4.0 GROUNDS OF APPEAL

4.1 Dissatisfied with Hon. Judge Egispo Mwansa's judgment of 5th June, 2019, the Appellant appealed to this Court and advanced the following five grounds of appeal:

1. **That the learned trial Judge erred in law and in fact when he found in favour of all the 63 Respondents and ordered a recalculation of their terminal benefits when it was conceded at trial that two (2) Respondents who served as unionised employees were paid in accordance with the Collective Agreement and that they had no further claim against the Appellant;**

2. **That the learned trial Judge erred in law and in fact when he held that the Appellant unilaterally varied four (4) of the Respondents' contracts of service without their consent to their detriment, when it reduced the multiplier factor of *ex-gratia* from 1 x month basic pay to 0.58 x month gross pay for employees that separated by way of**

retirement when in fact the variation was to their benefit;

3. **That the Court below erred in law and in fact when it held that the Appellant unilaterally varied 54 of the Respondents' contracts of service to their detriment without their consent when it reduced the multiplier factor from 2.5 x month basic pay to 1.4 x month gross pay for employees that separated through the Voluntary Severance Scheme when in fact the variation was to their benefit;**

4. **That the learned trial Judge misdirected himself when he found at page J7 that RW1's testimony was the same with the Complainants' (Respondents) witnesses in material particular and subsequently held at page J11 that the Appellant only obtained consent from 54 of the Respondents after it had accepted their Voluntary Severance Scheme applications when no consent was required as the variation was to their benefit; and**

5. **That the learned trial Judge erred in fact when he misapplied the contents of the documentary and oral evidence before it, particularly, as the same related to the consent signed by and obtained from the Respondents as well as the effect of Clause 1.2 of the Appellant's general conditions of service that made administrative circulars issued by the Chief Executive Officer integral parts of the Respondents' conditions of service and thereby**

ignoring the fact that all the variations were in accordance with the terms and conditions under which the Respondents served.

5.0 THE APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 The Appellant's heads of argument were filed into Court on 12th September, 2019.

5.2 Appellant's Counsel relied on them and augmented the arguments.

5.3 With regard to ground one, it was submitted that the evidence on record indicates that the Respondents' Counsel and CW3, Samuel Chabuka conceded that the 25th and 57th Respondents who were unionised employees, were paid in accordance with the Collective Agreement and that, therefore, they had no further claim against the Appellant. It was further submitted that the said Respondents had served for 27 years and that under Clause 29 of the Collective Agreement, the applicable factor was that of employees who had served for a period of 20 years and above, the same being 2.4 x monthly gross pay for each completed year of service. It was submitted that in this case the duo were paid accordingly.

5.4 It was, therefore, argued that the 25th and 57th Respondents abandoned their claims and that no liability lies against the Appellant.

It was further submitted that no evidence was adduced for this category of Respondents and that it was unjustifiable for them to be awarded anything. Appellant's Counsel, therefore, prayed that the 25th and 57th Respondents' claims be dismissed in their entirety.

5.5 Grounds two and three were argued together as they both deal with the unilateral variation of an employee's contract of service and its effect. It was submitted that in formulating the second question for determination, same being, **"whether the Appellant's unilaterally varied the contracts of the 57 Respondents,"** the Court below gravely misdirected itself. Appellant's Counsel argued that from the authorities cited on the subject, it is clear that the main consideration in determining variation of an employee's contract of service, is whether the effect of such a variation is to the detriment or advantage of the employee. To support this argument, he relied on the case of **NATIONAL MILLING COMPANY LTD v GRACE SIMATAA & ORS** in which the Supreme Court gave guidance that:

> **".....We affirm also that just as in the case of any other contract, a contract of employment can be varied for better or for worse with a variety of consequences, depending on whether or not the variation is consensual or accepted or rejected. In the cases to**

which the principles in the KABWE case and the MARRIOT case apply, the unilateral changes were adverse and unacceptable to the employee who became entitled to treat the breach by the employer as terminating the contract and warranting the payment of redundancy or other terminal benefits, as appropriate ....."

5.6 The Court further stated that:

".....The alteration of a basic condition if consensual and probably beneficial would result in bringing about a replacement contract, different from the former. It is thus necessary to look at the nature of the condition breached and the consequences of such a breach in order to determine whether a condition is basic or one that is relatively minor and not crucial to the contract."

5.7 *In casu,* it was thus contended that the Court below erred when it failed to consider the evidence on record that showed that the variations affected the *ex-gratia* and separation packages of both categories of employees who proceeded by way of retirement and Voluntary Severance Scheme (VSS) in 2011 and 2014 were to the benefit of the Respondents and not to their detriment.

5.8 It was argued that the Court below failed to consider that although there was a reduction in the factor from 1 to 0.58, the new factor

was based on gross pay as opposed to basic pay with the net effect that all four Respondents in category 1 received more under the revised 29th August, 2014 circular conditions of service than they would have received under the 3rd September, 2003 circular that introduced *ex-gratia* payments.

5.9 It was further argued that since the revision of the multiplier factor was to the advantage of the Respondents in category 1, their consent was not required before the variation was made. To amplify the point, Appellant's Counsel included a table of computations showing what the Respondents who retired would have received in both factors 0.58 and 1. It was submitted that for example, under this computation the 1st Respondent, Ernestina Sakala at factor 0.58, would have received K529 042.44 as opposed to K508 738.85 at factor of 1. It was submitted that, therefore, the variation was not to the Respondents' detriment.

5.10 The Appellant's argument with regard to the 57 Respondents who separated from the Appellant under the Voluntary Severance Scheme, was similar. It was submitted that CW2, Jordan Maliti conceded that the 2011 conditions of service provided a superior

package than that of 1999, and that as such, the Appellant did not require the Respondents' consent before effecting the said variations which reduced the multiplier factor while improving the salary from basic pay to gross pay. Appellant's Counsel referred to the cases of **ZAMBIA OXYGEN LTD & ANOR v PAUL CHISAKULA & ORS[3]** and **ZAMBIA CONSOLIDATED COPPER MINES LTD & ANOR v EMMANUEL SIKANYIKA & ORS[4]** where the principle that no employees' conditions of service should be altered to their detriment or disadvantage without consent.

5.11 It was further submitted that based on the cited authorities, for an employment contract to be breached, three elements must be satisfied that:

(a) The variation ought to have been unilaterally effected by the employer;

(b) The variation should be non-consensual or without the consent of the employee; and

(c) The variation must be adverse or to the disadvantage of the employee.

5.12 It was thus contended that the key consideration being the third element of variation being disadvantageous to the Respondents,

brought about a replacement contract as was held by the Supreme Court in the case of **NATIONAL MILLING COMPANY LTD v GRACE SIMATAA & ORS.**

5.13 Appellant's Counsel also argued grounds four and five together. With respect to the finding by the Court below that the Appellant only obtained consent from 54 Respondents after it had accepted their Voluntary Severance Scheme applications, it was argued that firstly, no consent was required before effecting the changes in the circular, as the variation was to the Respondents' advantage and secondly that the Respondents' letters were not an attempt by the Appellant to obtain consent but confirmation that they understood the terms of the separation and accepted the formula used in calculating their terminal benefits. It was submitted that therefore, the case was distinguishable from the **GRACE SIMATAA** case where the affected employees only became aware of the terms of separation at the point of exit whilst *in casu,* the employees were aware of the variations several years before their separation.

5.14 It was further argued that the Respondents' signing of the letters of separation was not an attempt by the Appellant to obtain consent for

the changes in the 2011 circular, as all the conditions of service were already in place at the time of separation, whether by retirement or Voluntary Severance Scheme. It was submitted that the circulars were sent out between two and five years prior to the separation of the Respondents who remained in employment without disputing the variations until after their separation.

5.15 It was further argued that therefore, the Respondents had full knowledge of the variations and opted to remain in employment and later applied to be separated from the Appellant based on the terms known to them. It is contended that consequently, the signing of the letters by all the Respondents was not an attempt by the Appellant to obtain consent after accepting the Respondents' applications.

5.16 It was argued that since there was no misrepresentation, fraud, breach of trust, willful default or undue influence by the Appellant, the letters of separation and their accompanying terms and conditions should be interpreted based on their natural meaning as held in the case of **INDO-ZAMBIA BANK LTD v MUSHAUKWA MUHANGA[5].** It was contended by the Appellant that the natural and ordinary meaning of the words used and acknowledged by the

Respondents at the point of separation clearly indicate that they acknowledged and consented to the terms on which they were separated from the Appellant.

5.17 Appellant's Counsel prayed that this Court interferes with the findings by the Court below and allows grounds four and five.

6.0 RESPONDENTS' ARGUMENTS IN OPPOSING THE APPEAL

6.1 The Respondents' heads of argument in opposition to the appeal were filed into Court on 26th September, 2019. Respondents' Counsel relied on the same with augmentations.

6.2 With regard to ground one, Respondent's Counsel submitted that it is a non-issue as the evidence on record shows that it was conceded at trial that the 25th and 57th Respondents who served as unionised employees were paid in accordance with the Collective Agreement and that they had no further claim against the Appellant. It was submitted that therefore the Respondents have no objection to ground one as it does not affect the rest of them as each Respondent has a claim *in personam* jurisdiction.

6.3 Grounds two and three were argued together as they both deal with unilateral variations of the contract of service through the reduction

of the multiplier factor for those who separated by way of retirement and Voluntary Severance Scheme to their benefit. It was submitted that the Court below was on firm ground when it held that the Appellant had unilaterally altered the Respondents' conditions to their detriment.

6.4 It was firstly submitted that the said finding being a finding of fact, on the authority of **MASAUSO ZULU v AVONDALE HOUSING PROJECT[6],** cannot be reversed unless it is perverse and that the Appellant has not advanced any arguments or evidence of pervasiveness of the findings.

6.5 It was secondly submitted that it is baffling for the Appellant to argue that a reduction of a factor from 1 to 0.58 is not detrimental in light of the Supreme Court's guidance in the case of **ZAMBIA DAILY MAIL LTD v GREVESIOUS MAYENGA & ORS[7]** that for any condition affecting terminal benefits that is being down graded there must be express consent from the employee. Further reliance was placed on the case of **ENGEN PETROLEUM ZAMBIA LTD v WILLIS MUHANGA & ANOR[8]** where the Supreme Court cited with approval the case of **ZAMBIA DAILY MAIL v GREVESIOUS**

MAYENGA & ORS where it guided that acquiescence should be adopted with caution.

6.6 Respondents' Counsel argued that had the larger factor been used as the basis for calculation under the 2011 formula, the amount would certainly have been larger. To support this argument, by way of example, computations for, among four Respondents, Ernestina Sakala, was shown that she would have received K529 042.44 under the reduced factor of 0.58, while under the original factor of 1.0, she would have received K912 142.00 thereby indicating an underpayment of K383 098.56. Computations for the other three Respondents in that category showed that they would have all suffered underpayments under the reduced factor.

6.7 It was submitted that by using gross salary under the 0.58 factor and the basic salary under the factor of 1, the Appellant was using a wrong way of comparison and, therefore, misleading the Court. It was further submitted that the correct formula should have been the factor 1 under gross salary in accordance with the 1996 conditions of service, and that the same ought not have been varied without their consent. Respondents' Counsel submitted that the Supreme Court

has guided that allowances should be included whenever terminal benefits are calculated as this is a principle established in all labour matters and practice. Reliance was placed on the case of **JAMES MANKWA ZULU & ORS v CHILANGA CEMENT**[9] where the Appellants were declared redundant and paid terminal benefits calculated on their basic salaries without allowances. It was further submitted that in the **JAMES MANKWA ZULU & ORS** case, the Supreme Court cited with approval the case of **BANK OF ZAMBIA v JONAS TEMBO**[10] where it discussed the meaning of the term **"salary,"** indicating that it included all allowances earned. It was submitted that the decision in the **JAMES MANKWA** case was made in December 2008 long before the 2011 conditions in issue *in casu* were altered and that the 2011 circular did not introduce new conditions in relation to the amalgamation of allowances for purposes of terminal benefits calculations, as the Respondents were already by operation of law entitled to them. It was further submitted that the only new introduction in the 2011 formula was the reduction of the multiplier factor from 1 to 0.58 which was to the Respondents' disadvantage.

6.8 It was submitted that the same arguments were applicable to the remaining 57 Respondents who suffered an underpayment when their computations were reduced from 2.5 to 1.4 without their consent. The case of **NATIONAL MILLING COMPANY LTD v GRACE SIMATAA & ORS** was relied on for consequences of unilateral variation of basic conditions of service.

6.9 Respondents' Counsel also argued grounds four and five together. It was submitted that Clause 1.2 of the 1999 ZANACO Conditions of Service which stipulates that administrative circulars issued by the Chief Executive Officer (CEO) or any officer acting on his or her behalf affecting the conditions shall form an integral part of the conditions, only permits the Chief Executive Officer or his agent to introduce new and/or improve (review) existing conditions, whereas revisions to the detriment of employees requires their individual written consent, that is, personalised letters. It was further submitted that there are a plethora of authorities that abound on this principle of law. It was further submitted that the Supreme Court has guided on matters of variation of conditions whose effect, as in the present case, has no immediate practical effect, there is need for

actual consent by the employee. Reliance was placed on the earlier cited **GREVESIOUS MAYENGA** case in which the Supreme Court gave guidance by adopting the words, albeit, obiter, of Browne Wilkinson J, in **JONES v ASSOCIATED TUNNELLING COMPANY LTD**[11] in which he stated *inter alia* that:

> **"In our view, to imply an agreement to vary or to raise an estoppel against the employee on the grounds that he has not objected to a false record by the employers of the terms actually agreed is a course which should be adopted with caution. If the variation related to a matter which has immediate practical application (e.g. the rate of pay) and the employee continues to work without objection after effect has been given to the variation (e.g. his pay packet is reduced) then obviously he may well be taken to have impliedly agreed.**
> **But where as the present case, variation has no immediate practical effect, the position is not the same."**

6.10 The Supreme Court further stated that:

> **"Similarly, our view is that, where the variation of the conditions of service has no immediate practical effect, as in the present case, there can be no implied consent, for mere failure to object. Further, we are fortified in this position by our decision in the ATTORNEY GENERAL v NACHIZI PHIRI & ORS where we stated:**
>
> > **'Although consent, or the absence of it, ought to be considered as a matter of fact, failure to protest**

downgrade of conditions of service, should not amount to consent.' "

6.11 Based on the foregoing, Respondent's Counsel submitted that the finding of fact by the Court below that the Appellant's attempt to obtain consent after it had accepted the 54 Respondents' application to proceed on Voluntary Severance Scheme was invalid, cannot be appealed against. It was further submitted that the Appellant's argument that the letters given to the Respondents at time of exit were merely confirmations of their acceptance of the formula used in calculating their benefits is unacceptable. It was submitted that the present case can be likened to the **GRACE SIMATAA** case where the affected employees were only made aware of the terms of their separation at the point of exit.

6.12 With regard to the Appellant's argument that the Respondents herein remained in employment from the time the conditions were varied and did not dispute the variations until after they had been separated from the Appellant's employ, Respondents' Counsel submitted that the case of **ATTORNEY GENERAL v NACHIZI PHIRI & ORS** in which the Supreme Court guided on the practicality of employees

staying on and disputing any adverse alteration of their conditions of employment, is instructive.

6.13 Respondents' Counsel concluded by submitting that the Court below was on firm ground in finding that the reduction in the multiplier factor constituted a variation of the Respondents' contract to their detriment and subsequently ordering recalculation. This Court was urged not to interfere with the said findings and to dismiss the appeal with costs to the Respondents.

7.0 ORAL SUBMISSIONS BY COUNSEL

7.1 In his augment, Mr. Kawanda, Appellant's Counsel, submitted with respect to grounds two and three that there is no law that supports the proposition that allowances have to be added or included each time terminal benefits are calculated. He argued that the **JAMES MANKWA ZULU** and **JONAS TEMBO** cases merely defined the term **'salary'** and that where the terms of employment are clear that calculations must be based on the basic salary, then it is that agreement that must prevail as it was in the case of **ZAMBIA TELECOMMUNICATIONS COMPANY LTD v FELIX MUSONDA & ORS[12].** He submitted that, therefore, the Court below erred by

finding that the Respondents' conditions of service were altered or varied.

7.2 Mr. Sakala, Appellant's co-Counsel in augmenting with respect to grounds four and five submitted that the Voluntary Severance Scheme amounted to an independent contract between the Appellant and Respondents. He argued that, therefore, the Respondents were aware of the conditions at the time of applying for it and that a contract was thus concluded and the Respondents are estopped from claiming that they did not consent. He further argued that the Respondents voluntarily applied to go on the Voluntary Severance Scheme, thereby binding themselves.

7.3 In reply Mr. Lisimba, Respondents' Counsel submitted that the law is very clear that any variations to conditions of service must be specifically consented to as guided by the Supreme Court in the **GREVESIOUS MAYENGA** case. He further submitted that the source document for the conditions of service are Conditions of Service for 1996, which in **"Appendix H"** refer to a month's pay. He argued that if a calculation provides for payment of a month's pay, then allowances are included as held in the **JONAS TEMBO** case.

He submitted that there is nowhere where the Respondents consented for their allowances to be stripped off and that the reduction of the multiplier effect was not consented to and must be frowned upon. He argued that if the calculations were done by including the gross salary, the benefits would have been higher as earlier argued.

7.4 Mr. Lisimba submitted that the principle in the **JAMES MANKWA ZULU** case is still good law, that company policy cannot override the law as the law is supreme. He concluded by submitting that, therefore, allowances must be included in calculating the terminal benefits as decided by the Court below and he prayed that the appeal be dismissed.

7.5 In reply, Mr. Kawanda argued that the issue is not with the 1996 Conditions of Service but on the variation of the conditions of service in the calculation of the severance pay which removed allowances. He further argued that the **JAMES MANKWA ZULU** case does not address terminal benefits in defining the term **"salary."** He reiterated that the Appellant's position that the 2011 variation

translated into a benefit to the Respondents because it introduced gross pay as opposed to the 1996 Conditions of Service.

7.6 He prayed that the decision by the Court below be reserved.

8.0 THIS COURT'S CONSIDERATION OF THE APPEAL AND ITS DECISION

8.1 We have considered the grounds of appeal, respective arguments advanced by Counsel, authorities cited, evidence on record and judgment appealed against.

8.2 Ground one faults the Court below for finding in all the Respondents' favour and ordering a recalculation of their terminal benefits inspite of the evidence that emerged at trial that two Respondents who were formerly unionised employees were paid in accordance with the Collective Agreement.

8.3 It is the Appellant's contention therefore, that the said former unionised employees, being the 25th and 57th Respondents, Daison Makeche and Dalitso Mbewe respectively, abandoned their claims and therefore should not have been included in the award made to all the Respondents. We noted from the Respondents' arguments that they conceded that in view of the evidence before the Court

below, they have no objection to ground one and that they consider it as a non-issue.

8.4 In the circumstances, we find merit in ground one and it, therefore, succeeds.

8.5 We turn to grounds two and three that were dealt with and argued together as they contend that the Respondents' conditions of service were not altered to their detriment. From the Appellant's arguments in support of these two grounds, we noted that it maintained that even though it unilaterally varied the multiplier factor from 1 to 0.58 for the four Respondents who retired, and from 2.5 to 1.4 for those Respondents who separated from it through the Voluntary Severance Scheme, the said variation was beneficial to them. This view was based on the fact that in both cases, the reduced multiplier factor was to be multiplied by the **'monthly gross pay'** as opposed to the **'monthly basic pay.'**

8.9 We had occasion to peruse the two tables of computations at pages 7, and 9 to 11 of the Appellant's heads of argument, in respect of the four Respondents who retired, and those who exited by way of the Voluntary Severance Scheme. We observed that in both instances

the computations show the variance in the total benefits due based on the 1999 and 2014 conditions of service. The two tables show that under the 2014 conditions of service based on the reduced factors of 0.58 and 1.4 in either case, and multiplied by the monthly gross pay, the Respondents were paid more than they would have received under the factors of 1 and 1.4 multiplied by monthly basic pay. It is, therefore, evident that the Appellant's contention that the learned trial judge failed to consider that the unilateral downward revision of the multiplier factors was to the Respondents' advantage, and as such required no consent from them, was based on the said computations.

8.10 Upon perusal of the record of appeal and particularly the affidavit in reply sworn by one Samuel Chabuka, we noted that the Respondents tried to demonstrate to the trial court what they were claiming through computations for each Respondent exhibited as **"SC4"** at pages 267 to 268 accompanied by individual calculations from pages 269 to 331 that were based on the original multiplier factor under the 4th December, 1998 circular exhibited at page 32 of the record of appeal.

8.11 We, however, observed that besides exhibiting all the circulars in which the amendments to the conditions were made and the Respondents' consent, the Appellant in its affidavit in support of answer and further affidavit in support of answer, failed to demonstrate through computations how the unilateral variations were beneficial to the Respondents. We opine that, that would have assisted the Court below to make reasoned comparisons with what it sought to establish.

8.12 We, however, noted that during CW2, Jordan Maliti's cross-examination he conceded that under the 1999 conditions of service, applying the factor 4.5 at monthly basic pay, he would have received K1 183 273.65 whereas under the 2011 multiplier factor of 1.4 against the monthly gross pay, he would have received K1 424 597.72. While RW1's testimony was that the effect of the reduced multiplier factors on the gross monthly pay, was a higher package than one on a monthly basic pay.

8.13 Based on this evidence, we are of the considered view that it is apparent that through the Appellant's various circulars, it reduced the multiplier factor while revising the monthly pay to gross pay to

achieve an enhanced separation package. We opine that Respondents seem to have accepted the revision of the monthly basic pay to monthly gross pay as it was in line with prevailing labour practices. They, however, rejected the reduction of the multiplier factor and contend that it ought to have remained at the original factors under the 1998 circular.

8.14 The Respondents' argument is that constant downward revision of the multiplier factor would entail a reduction in whatever retirement or severance package was due to them, which means that a basic condition of service would adversely affect a fundamental or essential term of the contract of service or employment.

8.15 Therefore, based on evidence and arguments advanced, we opine that the learned trial judge cannot be faulted for finding as he did. We find that grounds two and three are devoid of merit and we dismiss them.

8.16 We turn to ground four in which the Appellant faults the finding by the learned trial Judge that RW1's evidence was the same as that of CW1, CW2 and CW3 in a material particular resulting in a finding that the Appellant only obtained consent from the 54 Respondents after it

had accepted their Voluntary Severance Scheme applications. It is the Appellant's contention that no consent was required as the variation was to their benefit.

8.17 In support of this ground, it was argued on behalf of the Appellant that it did not attempt to obtain the Respondents' consent through the letters they signed which contained a clause that they understood and accepted the terms and conditions of separation regarding the formula and principle applied towards computation of their final terminal benefits, as the conditions of service were already in place at the time of separation.

8.18 We noted from the evidence on record and particularly exhibit **"SC3"** to the affidavit in reply and the response to management's letter which indicates that the Respondents were unhappy and had expressed their grievances prior to their respective separations. That the Respondents being the weaker parties as the Appellant's employees, could not contest or reject the revised conditions both at the time of their revision and point of exit as that would have been unwise as they were clearly at a disadvantage. To fortify this

position, we relied on the case of **ATTORNEY GENERAL v NACHIZI PHIRI & ORS** where the Supreme Court observed that:

> **".....It must be recognised that the employer is always in a stronger position than the employee and therefore, the safeguarding of the employee's rights must be based on favourable interpretation of the principles of employment law. In any event, from the numerous cases that we have dealt with, it is apparent to us that the employer often chooses to downgrade the employees' conditions of service without really giving that employee much choice about it. It is for this reason, among others, that we hold, in this case, that it was desirable that each of the Respondents should have given their express consent to the downgraded conditions of service; and the purpose of such a measure and its effects should have been made plain and clear to the Respondents...."**

8.19 Therefore, based on the Supreme Court's observation in the cited case, we opine that the Respondents' consent obtained by the Appellant at separation, cannot be deemed to be consent as it was challenged by them in 2015, prior to their separation. In the circumstances, we find that ground four lacks merit and we disallow it.

8.20 We finally turn to ground five in which the Appellant alleges that the learned trial judge misapplied the contents of the documentary and oral evidence before it, particularly, as the same related to the

consent signed by and obtained from the Respondents as well as the effect of Clause 1.2 of the Appellant's general conditions of service. It was submitted on behalf of the Appellant that any circular issued pursuant to Clause 1.2 is legally binding and forms an integral part of the conditions of service provided that it does not adversely affect an employee's conditions of service. However, we opine that this must be further qualified that the employee's consent must be obtained. As we earlier observed, in the Respondents' case, no consent was obtained from them as the Appellant's effort to obtain it at point of separation was no consent at all.

8.21 Consequently, we find that the learned trial judge did not misapprehend the oral and documentary evidence before him as alleged by the Appellant. We further find that he properly directed himself in rejecting the reductions to the multiplier factors issued the various circulars as they adversely affected the Respondents who had earlier expressed their dissatisfaction with the same. Therefore, ground five is also devoid of merit.

9.0 CONCLUSION

9.1 In conclusion, ground one being the only successful one out of the five grounds of appeal, the net effect is that the appeal fails and it is, accordingly, dismissed.

9.2 On the issue of costs, we noted that both parties to the appeal prayed for costs without stating the basis for the prayer for costs. We wish to point out that in Industrial Relations Division matters, Rule 44(1) of the Industrial Relations Court Rules, Chapter 269 of the Laws of Zambia is instructive on the issue of costs. It provides that:

> **"44(1) 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."**

9.3 In the case of **ENGEN PETROLEUM (Z) LTD v WILLIS MUHANGA & ANOR,** the Supreme Court gave guidance on the award of costs under Rule 44(1) of the Industrial Relations Court Rules.

9.4 In the present case, none of the parties presented any evidence of unreasonable delay or unreasonable conduct against the other so as

to prompt us to order costs or expenses. In the circumstances, we make no order as to costs and each party to bear own costs in this Court and the Court below.

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J. Chashi

COURT OF APPEAL JUDGE

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D. L. Y. Sichinga

COURT OF APPEAL JUDGE

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F. M. Lengalenga

COURT OF APPEAL JUDGE