IN THE SUPREME COURT OF ZAMBIA **Appeal No.196/2015**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MULONDA KUMAYANDO	**1ST APPELLANT**
NICHOLAS SIAMASANDU	**2ND APPELLANT**
LAWRENCE N. MWANGALA	**3RD APPELLANT**
BRUCE MUMBATI	**4TH APPELLANT**
JAILOS SHABA	**5TH APPELLANT**

AND

NITROGEN CHEMICALS OF ZAMBIA LIMITED **RESPONDENT**

CORAM: **Malila, Kajimanga and Kabuka JJS**
On 10th July 2018 and 8th February 2019

FOR THE APPELLANTS : Mr. M. Chitambala of Messrs Lukona Chambers

FOR THE RESPONDENT : Mrs. I. Kunda of George Kunda & Co.

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. **Khalid Mohamed v Attorney General (1982) Z.R. 49**
2. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172**

3. **Zambia Electricity Supply Company Limited v Sule and Others - Appeal No.170 of 2002**
4. **National Milling Company Limited v Grace Simataa and Others (2000) Z.R. 91**
5. **Zambia Consolidated Copper Mines Limited v Emmanuel Sikanyika (2000) Z.R. 105**
6. **Zambia Oxygen Limited and Another v Chisakula and Others (2000) Z.R. 27**
7. **Jacob Nyoni v Attorney General (2001) Z.R. 65**
8. **Miyanda v Attorney General (1985) Z.R. 185**
9. **Association of Copper Mining Employees and Attorney General v Mine Works Union of Zambia - Appeal No. 129 of 1998**
10. **Banda v Chief Immigration Officer and Attorney General (1993/94) Z.R. 80**
11. **Simwanza Namposha v Zambia State Insurance Corporation Limited (2010) Z.R. Vol 2. 339**
12. **Agholor v Cheeseborough Ponds (Zambia) Limited (1976) Z.R. 1**
13. **Contract Haulage Limited v Mumbuwa Kamayoyo (1983) Z.R. 13**
14. **Albert Mwanaumo and Others v NFC Africa Mining Plc and Another (2011) Vol 1. Z.R. 130**
15. **John Paul Mwila Kasengele and Others v Zambia National Commercial Bank Limited (2000) Z.R. 72**
16. **Zambia Revenue Authority v Hitech Limited, SCZ Judgment No. 40 of 2000**

Legislation referred to:

Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, S.71(3)(c)

Other work referred to:

Chitty on Contract Volume 2, 27th Edition; paragraph 37-063

Introduction

1. This is an appeal against the decision of the High Court

delivered on 29th September 2015, dismissing the appellants' claim for damages against the respondent. In the main, the appellants were claiming damages against the respondent for its failure to pay their terminal benefits on the last day of service.

Background to the dispute in this appeal

2. The appellants were employees of the respondent, engaged and retired on diverse dates after attaining the age of 55 years. It was a term of their conditions of service that their terminal benefits were to be paid on the last day of service. The respondent did not, however, settle their terminal benefits in full on the date of their exit from employment. Their terminal benefits were instead paid in dribs and drabs and only cleared after a period of two years. On account of this alleged breach of their conditions of service, they brought an action against the respondent in the High Court.

The Pleadings of the parties before the High Court

3. The appellants issued a writ of summons against the respondent claiming damages for breach of contract,

particularly clause 4.3 of the collective agreement entered into between the National Union of Commercial and Industrial Workers (the Union) and the respondent which expressly provided for payment of terminal benefits on the last day of employment. The appellants also claimed interest on the sums found due and costs.

4. The appellants contended that on 31st July 2008, the Union, to which all the appellants were members, entered into a collective agreement with the respondent which, among other things, specified the time of payment of terminal benefits in case of termination of the contract of employment. According to the appellants, clause 4.3 of the collective agreement provided that:

> **"The normal retirement age shall be 55 years for both men and women. An employee due for retirement will be notified to that effect at least six months in advance. Terminal benefits shall be paid in full on the last day of service."**

5. Contrary to this provision of the collective agreement, the appellants were not paid their terminal benefits in full upon termination of their employment. It was contended that the failure or neglect by the respondent to pay them their terminal

benefits in full on the date of exit constituted a breach of contract, as a result of which damage was suffered by the appellants.

6. The respondent disputed the appellants' claim and contended that it would rely on clause 7 of the collective agreement which was to be read together with clause 4.3. The respondent averred that in view of its compliance with clause 7 of the collective agreement, there was no damage suffered by the appellants.

Evidence of the parties in the High Court

7. On behalf of the appellants, the 1st appellant testified that during their employment, he and the other appellants served under Unionized terms and conditions. Upon their retirement, they were not paid terminal benefits on the last day of service in accordance with clause 4.3 of the said conditions. They, however, received advances against their terminal benefits before the balance was paid in full in August 2011. At the same time, they were paid upkeep allowances in arrears which were meant to cushion them as they waited for full payment of their

terminal benefits. During this time, the respondent was also paying their rentals.

8. His evidence also revealed that the appellants stayed for about two and half years before receiving their terminal benefits. He stated, however, that the respondent company was for some time not operating due to lack of finances. He also admitted that as of the date the matter was commenced, the respondent had paid the respondent all their terminal benefits in full together with repatriation. Further, that the respondent paid the appellants their upkeep allowances at 25% of their monthly salary up to the date of retirement.

9. Henry Chisenga Chewe testified on behalf of the respondent. His evidence was that the financial position of the respondent at the time the appellants retired was bad due to various liquidity problems. As such, the appellants were not paid on the last working day. However, they were initially paid advances against terminal benefits and two years later they were paid their terminal benefits in full together with repatriation. According to this witness, advances were being paid upon requests made by

individual retirees. The appellants were also being paid upkeep allowances as required by clause 7 of the collective agreement. This was done to help sustain the retirees' lives as they awaited full payment of terminal benefits.

10. He testified that the appellants were not the only ones who were affected by the delayed payment of terminal benefits. There were other retirees who were affected as a result of liquidity problems affecting the respondent at the time. He, however, conceded that according to the collective agreement, each retiree was supposed to be paid terminal benefits on the last working day and that this was also indicated in the notice of retirement. He confirmed that none of the appellants was paid terminal benefits on the last working day. Further, that prior to retirement there was no agreement between the respondent and the appellants to stagger the payment of terminal benefits in phases.

11. He also confirmed that the upkeep allowance was being paid to retirees who had not yet received their terminal benefits and that some of it was paid to the appellants in arrears. He further

stated that the financial difficulties faced by the respondent was communicated to the appellants among other retirees.

Consideration of the matter by the Learned High Court Judge and decision

12. The learned trial judge found that the question for determination before her was whether the failure by the respondent to pay the appellants on their last working day constituted a breach of contract and whether the appellants were, therefore, entitled to damages.

13. She found that the appellants were not paid their terminal benefits on the date of exit in accordance with clause 4.3 of the collective agreement but they were paid an upkeep allowance of 25% of their last drawn basic salary in accordance with clause 7 of the collective agreement until they received all their benefits. Further, that this payment ceased immediately the benefits were paid and therefore, clauses 4.3 and 7 of the collective agreement should be read together.

14. She also found that the respondent did not breach the collective agreement and its failure to pay the appellants on the last

working day meant that it was obliged to pay them the upkeep allowance pending full settlement of the benefits which it did and as such, it mitigated any loss the appellants would suffer as a consequence of the delay in paying their terminal benefits. She reasoned that had the respondent not paid the upkeep allowance, it would have been deemed to be in breach of the collective agreement at that point and liable to pay damages.

15. Guided by the cases of **Khalid Mohamed v Attorney General**[1] and **Wilson Masauso Zulu v Avondale Housing Project Limited**[2], the learned trial judge concluded that the appellants had failed to prove their claim. She accordingly dismissed the action with costs.

The grounds of appeal to this Court

16. The appellants have now appealed to this Court advancing four grounds as follows:

> **1. The learned trial judge erred in law and fact when she held that clause 4.3 of the collective agreement of 2008 had to be read together with clause 7 thereof in order to determine whether or not there was breach of contract on the part of the respondent.**

2. **The learned trial judge erred in law and fact when she completely ignored the position that as on the last day of employment the appellants' right to be paid their terminal benefits in full had accrued.**
3. **The learned trial judge fell into grave error when she held to the effect that the respondent discharged its obligations to the appellants by payment of their terminal benefits in the face of evidence that such payment was in breach of the collective agreement.**
4. **The learned trial judge erred in law and fact when she ignored the fact that the respondent had raised the defence of inability to pay the appellants their terminal benefits in full on the last day of service as the basis for delayed payment of the same.**

The arguments presented by the parties

17. Both parties filed written heads of argument which they augmented at the hearing. In support of ground one, the learned counsel for the appellant submitted that payment of both terminal benefits and repatriation benefits to the appellant was governed by the collective agreement entered into between the respondent and the Union dated [29th July] 2008 whose terms were binding on the respondent.

18. He referred us to the learned authors of **Chitty on Contract;**

Volume 2, 27th Edition who state at paragraphs 37-063 that:

> **"The duty of the employer to remunerate his employee for his services will normally be found by construing the terms of the contract of employment in the light of particular circumstances. The remuneration will frequently be specified in a collective agreement, whose terms are incorporated into individual contract of employment."**

19. Counsel also referred us to clause 4.3 of the collective agreement which provided for payment of terminal benefits. He contended that the learned trial judge elected to confuse terminal benefits payable at retirement with repatriation benefits. Our attention was then drawn to clause 4.3.3 of the collective agreement which provided as follows:

> **"<u>Benefits on Retirement</u>**
> **An employee who retires as stipulated in clause 4.3, 4.3.1 and 4.3.2 shall receive three months' basic salary for every completed year of service unless what the law provides is higher, in which case the higher package shall apply."**

20. He argued that the terminal benefits prescribed under clause 4.3.3 of the collective agreement are the ones required to be paid on the last day of service in accordance with clause 4.3. That the learned trial judge heavily relied on clause 7, which provided

for payment of repatriation benefits, to deny the appellants' relief. However, counsel contended, the provisions of the collective agreement governing the payment of terminal benefits and those providing for the payment of repatriation benefits are different.

21. According to counsel, clause 7 of the collective agreement provided for payment of upkeep allowance for as long as the recipient had not requested payment of repatriation benefits. That this position was confirmed by DW1 who stated under cross-examination as follows:

> **"Referred to page 57 of the defendant's bundle. I confirm this is the payment schedule for upkeep allowance. This was the upkeep allowance paid to the Plaintiffs before they were paid their terminal benefits. It is true this upkeep was paid to retirees who had not received their repatriation benefits."**

22. He argued that this witness also stated that:

> **"If a retiree has been paid repatriation in full then they are not entitled to upkeep allowance."**

23. The payment of terminal benefits provided under clause 4.3

which are prescribed under clause 4.3.3 of the collective agreement, counsel contended, is not subject to payment of upkeep allowance. We were referred to the evidence of PW1 who testified on the separate nature of the terminal benefits required to be paid on the last day of service when he stated that:

> **"In my case I was owed K106,970 (rebased). The money was supposed to be paid on the last working day of my retirement. The money was not paid to me on the last working day. I stayed close to two and half years without getting my terminal benefits. I was paid the advances from 2009 to 2011 August. In August 2011, I and my colleagues were paid terminal benefits. I got a net of K57,000.00 (rebased). We were paid balances outstanding on terminal benefits.**
>
> **In 2011 we were paid in arrears upkeep allowances between May and June. Upkeep allowance was to cushion us. According to the conditions of service we were supposed to be paid upkeep allowance."**

24. According to counsel, PW1 established in his evidence that the upkeep allowance paid to each of the appellants in arrears was related to repatriation benefits when he stated that:

> **"The purpose of upkeep allowance was to cushion us as we wait for terminal benefits. When we were still serving as employees**

upkeep allowance was called housing allowance of 25% of one's basic salary that is if one is not occupying an NCZ house."

25. He submitted that even under cross-examination, PW1 insisted that upkeep allowance was paid in place of housing allowance which was paid to the appellants while they were in employment. We were referred to the evidence in the record of appeal where the witness stated that:

> **"I remember very well saying the upkeep allowance was being paid to cushion us while waiting for terminal benefits. The upkeep allowance was [the] same thing and just changed ... from housing allowance. Housing allowance and upkeep allowance were one and the same."**

26. It was, therefore, counsel's contention that the payment of terminal benefits on the last day of service was a fundamental term of the appellants' contracts of employment and that the decision by the respondent to pay the appellants terminal benefits in piecemeal was a unilateral variation of a fundamental term of the appellants' contracts of employment which constitutes a breach of contract.

27. According to Mr. Chitambala, the unchallenged evidence of

PW1, to the effect that the appellants were required to write letters requesting for advances against their terminal benefits is blatant evidence of how the respondent left the appellants with only precarious choices, the first was to wait for terminal benefits for two and half years after retirement and the other was to accept unstructured instalment payments of the same.

28. To buttress this argument, counsel relied on the case of **Zambia Electricity Supply Company Limited v Sule and Others**[3], where this Court held that:

> **"There is no freedom of choice when those with moral superiority make one choice more perilous than the other, they left the employee with one choice which is less perilous than the other."**

29. He also cited the case of **National Milling Company Limited v Grace Simata and Others**[4], where this court held as follows:

> **"The alteration of a basic condition if consensual and probably beneficial would result in bringing about a replacement contract different from the former."**

30. Mr. Chitambala contended that the decision by the respondent to pay the appellant their terminal benefits in instalments over

a period of more than 2 years was not only unilateral; it was in flagrant breach of the collective agreement and the appellants' contracts of employment. He relied further on the **National Milling Company**[4] case referred to in paragraph 29, where we also held that:

> **"In this regard, we accept that to a person leaving employment the arrangements for terminal benefits such as pension, gratuity, redundancy pay and the like are most important and any ... unilateral alteration to the disadvantage of the affected worker and which was not previously agreed is justiciable and in this case there is no need to place a label of basic or non-basic on it."**

31. It was his contention that no consent of the appellants was either sought or obtained to justify the punitive variation of a fundamental term of their contracts of employment. To buttress his argument, he called in aid the case of **Zambia Consolidated Copper Mines Limited v Emmanuel Sikanyika**[5], where this court held that:

> **"While a contract of employment just like any other contract can be varied, any unilateral variation of an important term which is non-consensual and which is unacceptable to the workers, would justify the aggrieved workers treating the same as repudiation and breach of the contract by the employer."**

32. Counsel argued that at the time the respondent was unilaterally varying the term relating to the payment of terminal benefits the appellants had already retired and there was, therefore, no contract capable of any variation. Reliance was placed on **Zambia Oxygen Limited and Another v Chisakula and Others**[6], where it was held that:

> **"Conditions of service already being enjoyed by employees cannot be altered to their disadvantage without their consent."**

33. Counsel submitted, therefore, that the learned trial judge erred when she held that clause 4.3 of the collective agreement had to be read together with clause 7 and that to the contrary, clause 4.3 should have been read together with clause 4.3.3 of the collective agreement.

34. In support of ground two, Mr. Chitambala submitted that the execution of the collective agreement made the payment of terminal benefits a right which accrued on the last day of work. The obligation of the respondent to pay each of the appellants

benefits under clause 4.3.3 on the last day of service became binding and the terminal benefits became payable on that day.

35. He argued that the position that the appellants' right to be paid their terminal benefits on the last day was confirmed by DW1 when he testified that:

> **"According to the collective agreement each of the Plaintiffs was supposed to be paid their terminal benefits on the last working day as indicated in the notice of retirement. I confirm none of the Plaintiffs were paid their terminal benefits on the last day.**

36. Mr. Chitambala contended that DW1 reiterated this position when he stated that:

> **"I was aware that NCZ was obliged to pay them their terminal benefits on the last day of working."**

37. According to counsel, the appellants' right to be paid their terminal benefits on the last day of service was an accrued right which could not be either varied or taken away by clause 7 in that clause 4.3 is not subject to any other provision of the collective agreement. Counsel referred us to the case of **Jacob Nyoni v Attorney General**[7], where it was held that:

> **"The law on accrued rights was exhaustively reviewed and**

confirmed by this Court in the case of Miyanda vs. The Attorney General[8], where we considered decisions of this Court and English Courts. The acquired or accrued right in our present case was part of the appellant's condition of service which cannot be altered to his disadvantage."

38. We were also referred to the case of **Association of Copper Mining Employees and Attorney General v Mine Workers Union of Zambia**[9] which held that:

> **"There can be no doubt, therefore, that those benefits became an accrued right and it is trite law that an accrued right cannot be taken away."**

39. In arguing ground three, counsel began by referring us to page J12 of the trial court's judgment where it was stated that:

> **"I have considered the evidence and arguments before me, I find it is not in dispute that the Plaintiffs were not paid their full terminal benefits on the date of exit in accordance with clause 4.3 of the Collective Agreement."**

40. The learned trial judge having correctly found that the appellants were not paid their terminal benefits in accordance with clause 4.3 of the collective agreement, counsel argued, proceeded in error when she suggested that the said breach was

remedied by payment of an upkeep allowance. Our attention was also drawn to the following finding by the trial court at page J12:

> **"I find also that it is not in dispute that the Plaintiffs were paid 25% of upkeep allowance of their last drawn basic salary up until their benefits were paid in accordance with Clause 7 of the Collective Agreement."**

41. According to counsel, the learned trial judge proceeded with her erroneous interpretation of the collective agreement when she concluded as follows at page J13 of the judgment:

> **"In so doing I find that the Defendant did not breach the Collective Agreement. The failure by the Defendant to pay the Plaintiffs on the last working day meant that they were obliged to pay the 25% of the upkeep allowance pending full settlement of the benefits which they did and as such they mitigated any loss the Plaintiffs would suffer as a consequence of the delay in payment of the terminal benefits."**

42. It was contended that the record of appeal is replete with evidence of clear breach of the collective agreement and contracts of employment by the respondent. We were, among others, referred to the testimony of PW1 in the record of appeal

to the following effect:

> **"I and my colleagues suffered damages. Upon our retirement we were not given any thing. Each time we went to management to ask for terminal benefits we were told there was no money hence living became difficult for us. We were told if we were to be assisted in any way we should write letters asking for advances.**
>
> **I and some colleagues wrote letters asking for advances since we had school going children. We needed a living to pay electricity bills as well as water. We were being assisted, sometimes we would write and they would not assist us. I and my friends were turned into beggars for our own terminal benefits.**
>
> **The Defendants would assist with the amount requested or deduct from the amount requested. NCZ called the payment made to us an advance against terminal benefits. What transpired after writing ... letters, management of NCZ decided on their own [to pay] us an advance of K1.5 million (not rebased). They did so without consulting us."**

43. Mr. Chitambala submitted that the provisional terminal benefits statements as at 30th September 2011 issued in respect of the appellants prior to the payment of the balances on terminal benefits in 2011 show evidence of these instalment payments of K1.5 million (unrebased).

44. According to counsel, the variation of the term of the appellants' contracts in relation to payment of terminal benefits was not consensual as it was not agreed to prior to effecting the same. In this regard, counsel referred us to the following testimony of DW1:

> **"I confirm that before each of the Plaintiffs left employment there was no agreement to stagger payment of terminal benefits."**

45. Counsel argued that other than making the above stated confirmation, DW1 also confirmed that the appellants were paid their terminal benefits in piecemeal when the respondent was obliged to pay the same on the last day of work.

46. Mr. Chitambala submitted that in light of the above factors which are supported by evidence on record, it was gravely erroneous for the learned trial judge to have made the finding that the respondent did not breach the collective agreement and consequently, the contract. Counsel relied on the case of **Banda v Chief Immigration Officer and Attorney General**[10], where

this court held that:

> **"The appeal court will not interfere with the finding of fact of the lower court unless it is apparent that the trial court fell into error."**

47. He also cited the case of **Simwanza Namposha v Zambia State Insurance Corporation Limited**[11] on the same principle. Counsel submitted that the finding by the learned trial judge that the respondent was not in breach of the collective agreement was perverse and flew in the teeth of overwhelming evidence to the contrary.

48. Mr. Chitambala also submitted that this court has on numerous occasions pronounced itself on the consequences of terminating a contract of employment in a manner that contravenes the terms and conditions of such contract. To support this contention, counsel called in aid the case of **Agholor v Cheeseborough Ponds (Zambia) Limited**[12], where it was held that:

> **"A master can terminate a contract of employment at any time even with immediate effect and for any reason and if he**

terminates outside the provision of the contract, then he is in breach thereof and is liable in damages for breach of contract."

49. Although the present matter is not concerned with the mode of termination of the contract of employment, counsel argued, the principle in that case is applicable to this matter. Counsel also relied on the case of **Contract Haulage Limited v Mumbuwa Kamayoyo**[13], and **Albert Mwanaumo and Others v NFC Africa Mining Plc and Another**[14] on the same principle.

50. Mr. Chitambala contended that while the respondent was entitled to retire the appellants, it was in so doing obliged to pay them their terminal benefits prescribed under clause 4.3.3 of the collective agreement on the last day of service as required by clause 4.3. Failure on the part of the respondent to comply with clause 4.3 of the collective agreement amounts to breach of contract.

51. Counsel, therefore, submitted that the respondent having acted in breach of the contract between itself and the appellants, it is liable in damages for the breach.

52. In arguing ground four, counsel contended that the record of

appeal was replete with testimony of the respondent's witness that the failure by the respondent to pay the terminal benefits due and payable to the appellants on the last day of service was due to the respondent's inability. In this regard, he referred us to the following testimony of DW1:

> **"The financial position at that time was bad, we had problems. These employees were not paid on the last working day because we were unable to raise employees' funds as a company due to liquidity problems."**

53. We were again referred to the following evidence of DW1:

> **"I confirm there were no financial resources and inability to pay was communicated to the Plaintiffs among other retirees. I was aware that NCZ was obliged to pay them their terminal benefits on the last day of working."**

54. According to counsel, in the face of clear evidence that the respondent did not honour its obligation under clause 4.3 of the collective agreement due to its inability to pay, the learned trial judge made the following finding on page J21 of her judgment:

> **"I am in total agreement with the position of the law that inability to pay a debt is not a defence to the claim. In point of fact the Defendant is not using it as a defence. They admit**

having had liquidity problems however, they have since discharged their obligations by settling the claims by the Plaintiffs regarding payment of their terminal benefits."

55. Mr. Chitambala submitted that in order to justify her position that the respondent did not raise the factor of inability to pay as the defence to its failure to settle the appellants' terminal benefits on the last day of work, the learned trial judge misapprehended the appellants' claim by stating that the respondent discharged its obligations by paying them their terminal benefits. In doing so, she failed to consider the fact that the manner of payment of the terminal benefits by the respondent was in breach of the collective agreement.

56. Counsel submitted that contrary to the misapprehension by the learned trial judge, the appellants' claim before the trial court and now before this court, is whether the respondent paid their terminal benefits in accordance with the provisions of clause 4.3 of the collective agreement. This particular finding by the learned trial judge is perverse as it was unsupported by the relevant evidence on record.

57. He reiterated his reliance on the cases of **Banda**[10] and **Simwanza Namposha**[11] for the proposition that the appellate court will only interfere with a finding of fact if it is perverse and unsupported by evidence on record.

58. It is clear, counsel argued, that the respondent during trial sought to rely on its liquidity challenges to justify its failure to comply with clause 4.3 of the collective agreement through the evidence of DW1. This, counsel submitted, could not be relied on as a defence against a claim for breach of contract. He cited the case of **John Paul Mwila Kasengele and Others v Zambia National Commercial Bank Limited**[15], where it was held that:

> **"Inability to pay has never been and is not a defence to a claim. It is not a bar to entering judgment in favour of a successful litigant."**

59. We were accordingly urged to allow the appeal.

60. In the respondent's heads of argument, Mrs. Kunda submitted in response to ground one that repatriation benefits are part of terminal benefits and to suggest that they are different is

untenable. She referred us to the testimony of DW1 who stated that:

> **"These employees were entitled to retirement payment. Repatriation payment was part of the terminal benefits. The retirees were asking for terminal benefits."**

61. According to counsel, PW1 did not state anywhere that he or the other appellants requested for repatriation payment but that the advances the appellants were being given were towards their respective terminal benefits. Further, that the appellants' respective terminal benefits advice forms on record clearly established that repatriation benefits were part of the appellant's terminal benefits. That, therefore, there was no doubt that the lower court correctly and properly directed itself when it held that the respondent did not breach the collective agreement when it paid the appellants their respective upkeep allowances whilst they waited for their terminal benefits which also included repatriation benefits.

62. As to whether the failure to pay the appellants on the last working day constituted a breach of contract, Mrs. Kunda submitted that a comprehensive construction of clauses 4.3

and 7 of the collective agreement provided for a situation where retirees who were not paid their terminal benefits in full on the last working day could be cushioned via the receipt of upkeep allowances until payment of their full terminal benefits.

63. According to counsel, none of the appellants in the present case requested for repatriation benefits prior to payment of their terminal benefits. This, it was contended, meant that the appellants' argument that payment of upkeep allowance was dependent on the receipt of repatriation benefits when the latter was requested for cannot be sustained as that is not what took place.

64. Mrs. Kunda submitted that the interpretation of a clause or contract must be made with the circumstances of each particular case being the guiding principle. The appellants received their upkeep allowance whilst they waited for their full terminal benefits that included repatriation benefits which the appellant had an option to request for earlier but did not exercise such option. Further, the appellants received their respective terminal benefits in full, therefore, it would be

67. Counsel referred us to the case of **Zambia Revenue Authority v Hitech Limited**[16], where this Court guided that:

> **"Arguments and submissions at the bar spirited as they may be cannot be a substitute for sworn evidence.**

68. Reference was made to the evidence of PW1 and DW1 who both stated that upkeep allowance was paid to cushion the employees while they waited for terminal benefits. That as they, however, did not state that there was an alteration of the conditions, any argument on that ground ought to be rejected. According to counsel, the evidence of PW1 clearly shows that he and the other appellants were actually paid upkeep allowances throughout the period they awaited full payment of their respective terminal benefits and that they would be given advances towards their terminal benefits during this period.

69. The argument was that since the appellants were paid in accordance with clauses 4.3 and 7 of the collective agreement which was never altered at any point in time, there was no breach by the respondent as held by the court below. That being

the case, it was submitted, the appellants are not entitled to any damages and as such this ground of appeal must fail.

70. In response to ground two, Mrs. Kunda submitted that although the **Jacob Nyoni**[7] case is good law, the circumstances of that case are different and to rely on it as a basis for appealing is untenable at law. The difference, counsel argued, is that unlike in that case, there was no alteration in this case, of the accrued rights of the appellants as regards payment of their terminal benefits as provided for under the collective agreement. Further, that there was no disadvantage to the appellants based on the respondent's inability to pay them their full terminal benefits on their respective last working days as they were paid upkeep allowances throughout the period of waiting for their full terminal benefits in accordance with the collective agreement.

71. It was argued that this position was substantiated by the fact that clause 7 of the collective agreement envisaged a situation whereby upkeep allowance would be payable to all employees who were yet to receive full payment of their of terminal benefits.

This, it was contended, meant that there was no alteration as alleged but that clause 7 came into effect as this clause could only be triggered after non-compliance with clause 4.3. Secondly, there was no disadvantage on the appellants as the upkeep allowance cushioned the appellants as they awaited their full terminal benefits. As such, counsel contended, there was no alteration of the accrued right by the respondent and, therefore, this ground of appeal must fail.

72. In response to ground three, Mrs. Kunda submitted that the learned trial judge was on *terra firma* when she held that the respondent had discharged its obligation to the appellants by the payment of their terminal benefits together with all the upkeep allowances accrued whilst awaiting their full terminal benefits. It was not in dispute that the appellants were paid upkeep allowances for the period they awaited their full terminal benefits and that the appellants' argument under this ground seems to suggest that the respondent erred when it complied with clause 7 of the collective agreement by paying upkeep allowances to the appellants.

73. It was argued that the appellants would have had a proper case if the respondent had not complied with clause 7 which for purposes of discerning the intention of the parties, must be read together with clause 4.3. That it is the combined reading that shows whether or not the respondent discharged its obligations to the appellants.

74. It was ironic, counsel submitted, that the appellants were contending on one hand that the respondent breached their contract of employment by not paying them their terminal benefits in full on their respective last working days whereas on the other hand, they have acknowledged that the respondent paid them an upkeep allowance during the entire period they awaited full payment. This, it was contended, was because the respondent's non-compliance with clause 4.3 brought into effect clause 7 which the respondent complied with, thereby negating any breach by the respondent.

75. In response to ground four, Mrs. Kunda submitted that inability to pay was never pleaded or raised as a defence and to raise a ground premised on this aspect is an error at law. We were

referred to the respondent's submissions in the court below where it was stated that:

> **"The Defendant however, agrees with the contention of the plaintiffs that inability to pay is not a defence as per the Kasengele[15] case cited and indeed the Defendant did not plead inability as its defence."**

76. Counsel argued that the explanation by DW1, which is the premise upon which the appellants are suggesting that inability to pay was a defence raised by the respondent, must not be taken out of context as the record will show that the respondent did not plead such a defence. According to counsel, the explanation by DW1 showed how the respondent, despite not complying with clause 4.3, which was attributed to liquidity problems, complied with clause 7 which came into effect after clause 4.3 was not adhered to. That the two clauses ought to be read together as clause 7 envisaged a situation where employees who had not received their terminal benefits in full on their last working day would be paid an upkeep allowance whilst awaiting full payment of terminal benefits. In view of the foregoing, we were urged to dismiss the appeal with costs.

Decision of the Court

77. We have considered the record of appeal, the judgment appealed against and the written as well as oral submissions of the parties. The four grounds of appeal are intertwined and we will, therefore, consider them together.

78. The gist of these grounds is that the learned trial judge erred when she held that clauses 4.3 and 7 of the collective agreement had to be read together in order to determine whether or not there was breach of contract on the part of the respondent, ignoring that the appellants' right to be paid their terminal benefits in full had accrued on their last day of employment.

79. The appellants also assert that the learned trial judge erred when she ignored the fact that the respondent had raised the defence of inability to pay as the basis for delayed payment of the terminal benefits and further, when she held that the respondent discharged its obligation to the appellants by the payment of their terminal benefits.

80. We shall first determine whether on the facts of this case,

clauses 4.3 and 7 of the collective agreement had to be read together for the purpose of determining whether or not there was breach of contract on the part of the respondent. We reproduce clause 4.3 which stated as follows:

> **"4.3 Retirement**
>
> **The normal retirement age shall be 55 years for both men and women. An employee due for retirement will be notified to that effect at least six months in advance. Terminal benefits shall be paid in full on the last day of service."** [Emphasis added]

81. Benefits on retirement were set out in clause 4.3.3 which is quoted at paragraph 19 above. And finally, clause 7 which dealt with repatriation benefits was couched in the following terms:

> **"7. REPATRIATION BENEFITS**
>
> **Only employees (with their immediate families and registered dependants) who are retiring or being declared redundant or being medically discharged or families of the deceased employees shall be entitled to repatriation payment of K3,000,000.00 which constitutes full payment. Such employees or widow/widower shall be paid upkeep allowance of 25% of the last drawn salary ... until benefits have been paid, but if the beneficiary requests for repatriation, then payment of**

upkeep allowance shall cease immediately the repatriation is paid." [Emphasis added]

82. In our view, the provisions of clauses 4.3 and 7 are quite clear and unambiguous. Clause 4.3 provided for payment of "retirement benefits" on the last day of service. Clause 7, on the other hand, provided for payment of "repatriation benefits" to employees who had retired, were declared redundant or had been medically discharged. The clause goes on to state that such employees were to be paid an upkeep allowance until retirement benefits were paid in full and further, that should one request for settlement of the repatriation benefits, then the payment of upkeep allowance ceases.

83. As we see it, on an ordinary reading of the provisions concerned, the use of the term "benefits" under clause 7 refers to "repatriation benefits" and not "terminal benefits" as provided for under clause 4.3 of the collective agreement. This is because clause 7 is titled "REPATRIATION BENEFITS". It is for this reason that the payment of the upkeep allowance would cease once the repatriation payment of K3,000,000.00 (unrebased) was made.

84. We, therefore, agree with counsel for the appellant that the payment of terminal benefits provided under clause 4.3 was not subject to payment of upkeep allowance under clause 7 and as such, the two clauses should not have been read together in determining whether the respondent was in breach of contract. It is quite clear from clause 7 that one had to be paid either a repatriation of K3,000,000.00 (unrebased) or an upkeep allowance but no similar relationship existed between terminal benefits and upkeep allowances. Consequently, the lower court's reasoning that clauses 4.3 and 7 should be read together in order to determine whether or not there was a breach of contract on the part of the respondent, was a serious misdirection.

85. As regards the accrued right to be paid terminal benefits on time, it was argued that the execution of the collective agreement ensured that the obligation of the respondent to pay the appellants their terminal benefits on the last day of service became binding and that the terminal benefits became payable on such last day of service.

86. Having addressed our minds to the provisions of clause 4.3 and the evidence on record, it is not in dispute that there was an obligation on the part of the respondent to pay the appellants their terminal benefits upon exiting employment and that the appellants accrued the right to be paid such benefits on the date of exit. It is also incontrovertible from the evidence deployed before the trial judge, and as properly conceded by counsel for the respondent at the hearing, that the appellants did not receive their retirement benefits on the last day of service.

87. To this extent, the respondent could be said to have been in breach of the collective agreement considering that the respondent's obligation to pay retirement benefits on the last day of service under clause 4.3 was couched in mandatory terms. This could have been the position if that is all there was to this case. However, this is not the end of the matter. As it will shortly become apparent, the above narrative does not, *ipso facto*, entitle the appellants to an award of damages.

88. It was spiritedly canvassed by the appellants that the respondent's payment of their terminal benefits in instalments

over a period in extent of two years was unilateral and a fragrant breach of the collective agreement and consequently, their contracts of employment. In the view that we take, this argument fails to recognize two salient issues. First, no evidence was deployed by the appellants in the court below that they objected to the settlement of their retirement benefits in instalments. The second point is that, even assuming that the appellants were disenchanted with this mode of payment, it is plain from the record that they took no steps to seek legal redress and enforce their rights. Instead, they continued accepting payment of their terminal benefits in instalments until the full amounts were paid by the respondent. We do not believe that the **Zambia Electricity Supply Company**[3] case can aid the appellants in any way as the question of superiority on the part of the respondent could not be an issue in this case, the appellants having ceased to be the respondent's employees by reason of retirement.

89. It is trite that not in all cases would damages be awarded whenever there is an infraction by one of the parties to a contract. This is particularly so, as in the present case for

instance, where no real or actual loss was suffered by the appellants who were receiving their terminal benefits in instalments as well as an upkeep allowance of 25% of their last drawn salaries pending the full payment of their terminal benefits which were eventually fully paid, albeit after two years. In the view that we take, any loss the appellants could have suffered for not receiving their terminal benefits on the last day of service was adequately mitigated by the said payments.

90. On the facts of this case, we can only come to one inescapable conclusion, that notwithstanding the provisions of clause 4.3 of the collective agreement, the appellants acquiesced in receiving their retirement benefits in dribs and drabs. On the basis of the doctrine of estoppel, the appellants cannot now be heard to allege that the respondent was in breach for not paying them their retirement benefits on the last day of service.

91. Without doubt, the appellants waived their right to challenge the payment of their retirement benefits by instalments. In the circumstances, we find that there was no impropriety on the

part of the trial judge in refusing to award damages to the appellants.

92. Counsel for the appellants contended that there was an attempt by the respondent to rely on the financial difficulties it was experiencing to justify the delay in the payment of the appellants' terminal benefits. At pages J13 – J14 of the judgment in the court below, the trial judge stated as follows:

> **"I am in total agreement with the position of the law that inability to pay a debt is not a defence to the claim. In point of fact the defendant is not using it as a defence. They admit having had liquidity problems, however, they have since discharged their obligations by settling the claims by the plaintiffs regarding payment of their terminal benefits."**

93. While we agree that the respondent mentioned its liquidity challenges in its evidence before the court below, it is our view that this issue did not influence the decision of the trial court in any way.

94. It is clear to us that the findings of the court below were based on the fact that the appellants received upkeep allowances until their benefits were paid in full and secondly, that the

respondent had since settled the appellants' terminal benefits in full. This is evident from page J12 of the judgment where the learned trial judge stated that:

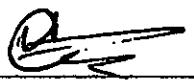
> **"I am being urged to read clause 4.3 and clause 7 in order to arrive at a determination that in lieu of the payment of benefits in full on the last working day the Defendant adequately compensated the Plaintiffs by payment of upkeep allowances. That having received the upkeep allowances the Plaintiffs are precluded from making claims regarding their terminal benefits. That the Defendant has since paid the terminal benefits in full thereby rendering the Plaintiffs contract of employment discharged."**

95. It is, therefore, our view that the **Kasengele**[15] case relied upon by the appellants on the principle that impecuniosity is not a defence to a claim is not relevant to the facts of this case.

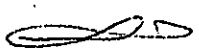
Conclusion

96. In the final analysis, we conclude that this appeal lacks merit and it is accordingly dismissed. Given the circumstances of this case, however, we order that parties shall bear their own costs.

M. Malila
SUPREME COURT JUDGE



C. Kajimanga
SUPREME COURT JUDGE



J. K. Kabuka
SUPREME COURT JUDGE