IN THE COURT OF APPEAL **APPEAL No. 60/2020**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

CHRISPIN LIENDA **APPELLANT**

AND

ZAMBIA NATIONAL BUILDING SOCIETY **RESPONDENT**

On the 19th and 26th day of February, 2021.

Coram: ***M. Kondolo SC, C. Makungu and B. Majula JJA***

For the Appellants: Mr. M. Sinyangwe

on brief from Messrs Willa Mutofwe & Associates.

For the Respondent: Ms. E. Chimambo

of Messrs M.L. Mukande & Advocates.

JUDGMENT

KONDOLO SC, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. **Zambia Consolidated Copper Mines v. Matale (1995-97) ZR 144**
2. **National Milling Company Limited v. Grace Simataa and Others (SCZ Judgment No. 21 of 2002)**
3. **Mayo Transport v. United Dominions Corporations Limited (1962) R & N R 22**

4. **Savenda Management Services Limited v Stanbic Bank Zambia Limited Selected Judgment No. 10 of 2018.**
5. **Kalusha Bwalya v. Chadore Properties and Another Selected Judgment No. 20 of 2015**
6. **Juldan Motors Limited and Another v. Nasser Ibrahim and Another Appeal SCZ/201/2018**
7. **Nkongole Farms Ltd v. Zambia National Commercial Bank and Others (2007) ZR 19**
8. **Ragin and Morel and Others v. Tembo (2014) ZR 12**
9. **Mamba Collieries Limited v. Douglas Siakalongo and Others SCZ/51/2004**
10. **China Copper Mines Limited v. Tikumbe Limited Appeal No. 17 of 2017**
11. **Khalid Mohamed v. The Attorney General (1982) ZR 49**
12. **Jamas Milling Company Limited v. Amex International Pty limited (2002) ZR 79**
13. **Kabwe v. BP Limited (1997) ZR 25**
14. **Zambia Consolidated Copper Mines Limited v. Daka and Another (1998) ZR 12**
15. **Lewanika and Others v. Chiluba (1998) ZR 79**
16. **Zimba v. Tembo and 2 Others CAZ Appeal No. 26 of 2016**

This is an appeal against the ruling of the Industrial Relations Division of the High Court delivered by Chisunka J, dated 30th

January 2020 dismissing the Appellants application for special leave to review the judgement of Musaluke J, as he then was, dated 8th December, 2015 in which the Appellant had filed a complaint seeking that the Court orders his former employer, the Respondent, to compute his separation benefits on the basis of a restructured salary that had been awarded to other employees.

The background to this matter is that the Appellant was an employee of the Respondent from 20th March, 1988. The record shows, and it is not in dispute that the Respondent institution intended to discontinue the payment of Long Service Gratuity (LSG) and to restructure the salaries. The restructuring of the salaries involved the merging of basic salaries with other allowances except housing allowance.

The Respondents Board of Directors resolved to discontinue paying employees LSG as part of its employees' conditions of service effective 31st March, 2015. This discontinuance was cushioned by an upward re-alignment in the salary structure for the Respondent's employees which took effect on 1st April, 2015.

The Respondents sent letters to all affected employees including the Appellant advising them on the board decision. The letter was

accompanied by an agreement form on which employees were to append their signatures if they agreed to the new conditions of service. On 26th March, 2015, the Appellant disagreed with the variation of the conditions of service and declined to give his consent.

The Respondent reacted by declaring the Appellant redundant and proceeded to calculate his redundancy package based on his last drawn basic salary of K6, 017.68 as at 31st March, 2015 and not K12, 744.10 as restructured on 1st April, 2015.

His contention in the lower Court was that he was deemed redundant on 31st March, 2015 but was only separated from the Respondent on 22nd April, 2015. He averred that on 16th April, 2015 the Respondent wrote to him through the Human Resource Manager informing him that his pay had been revised, all monthly allowances except housing allowance had been merged and would make part of his gross salary. This letter however had an anomaly as it indicated the salary to be K9, 682.29 and not K12, 744.1. He was advised to surrender this letter to the Respondent and when he did, he never received a corrected copy.

His argument was essentially that when the salaries were re-aligned upwards, he was still an employee of the Respondent meaning that his separation package ought to have been calculated on the basis of the restructured salary and not his last drawn basic salary.

The Respondent however maintained that it correctly computed the Appellants benefits on his last drawn salary because when the Appellant declined to accept the variation of his conditions of service, the Respondents action amounted to a unilateral variation of the Appellants contract of employment. According to the Respondent, the Appellant was deemed redundant on 31st March, 2015 by the Respondent unilaterally varying the Appellants conditions of service.

From the evidence before it, the Court below found that LSG as a term of the conditions of employment came to an end on 31st March, 2015. As a result, all employees of the Respondent who had consented to this change had their salaries adjusted upwards as at 1st April, 2015 to mitigate the withdrawal of LSG. The Court held that the Appellant, having declined the discontinuance of LSG was thereby declared redundant and could not benefit from the

enhanced salary structures that were tied to the discontinued LSG which he rejected. The Court went on to state as follows;

> **"..... we fail to understand the reasoning by the Complainant that since he had worked for 22 days in April, 2015, then his redundancy pay should be calculated as at new salaries that were applicable to those that consented to the Long Service Gratuity being discontinued. The Complainant has in fact made an unsubstantiated claim that he had received a letter from the Human Resource Department increasing his salary as at 1st April, 2015. That letter is not on record and we shall treat that letter as an afterthought"**

On 24th November, 2017, the Appellant applied for special leave to review the Court's Judgment. The Application for review was based on the Appellant's claim that he had fresh evidence which he did not have access to at the time of judgement and which could prove that his salary had indeed been increased by the Respondent.

The Appellant deposed in an affidavit supporting the application that on 13th November, 2017, he received a letter from the Respondent dated 31st October, 2017 regarding payment of

profit sharing which amounted to K660.00 calculated on the basis of his basic salary. Attached to that letter was a declaration form which read in part as follows:

> ***"I ..... holder of NRC No. ..... do hereby confirm the correctness of my profit sharing amount of ZMW660.00 gross for the period 1st April, 2015 to 22nd April 2015 as the correct figure."***

The Appellant's profit sharing for the stated dates was calculated on the gross monthly income of K12, 746.04. According to the Appellant, the letter showed that his last drawn salary was for the month of April 2015 amounting to K12 746.04 and not the for the month of March at K6, 017. He further contended that his payment in lieu of notice was for the months of May, June and July meaning that he was still an employee in April, 2015. In this regard, his redundancy package should have been calculated on the basis of his gross pay of K12 746.04.

The Respondent opposed the application stating that the computation in the letter dated 31st October, 2017 based on the restructured salary was erroneous as it was based on the

restructured salary. The Respondent averred that it wrote a subsequent letter correcting the said error and recalculating the profit sharing.

The Respondent stated that it has hundreds of employees across the country and errors are common thus the requirement for employees to confirm on the declaration form that the gross amount payable was correct. The Respondent pointed out that despite the Appellant being aware that the Judgment of 8th December, 2015 held that he did not qualify for the salary increment, he dishonestly confirmed amounts that did not apply to him. It was deposed that the Appellant having rejected the new conditions of service could not claim a computation of his redundancy package based on them.

In reply, the Appellant attested that the allegations by the Respondent were untrue as no subsequent letter was delivered to him advising that the amounts in the letter on profit-sharing dated 31st October, 2017 were erroneous. That even if such letter was delivered, it was written on 29th November, 2017 after his application for review was instituted thus making the purported correction an afterthought and a ploy to suppress and conceal evidence.

Chisunka J, considered the application for special review and held that it was plain to him that the letter which the complainant was relying on for his application had been superseded by the subsequent letter from the Respondent that corrected the error.

The Court dismissed the Respondents assertion that the subsequent letter was an afterthought and its considered view was that the complainant had not provided sufficient ground or reason upon which it could grant special leave to review its judgment. There being no exceptional circumstances upon which to exercise its discretion for review, Chisunka J dismissed the application.

Aggrieved by the holding of the Court, the Appellant has raised the following five grounds of appeal;

1. **The lower Court erred both in law and fact when it refused to review the Judgment dated 8th December, 2015, despite being given fresh material evidence and sufficient reasons for review.**
2. **The lower Court erred both in law and in fact by failing to do substantial justice when he refused to review the judgment of 8th December, 2015 on the basis of a letter dated 29th November 2017, that was clearly sent**

to the Appellant as an afterthought and which letter was clearly sent for purposes of concealing or suppressing material evidence and was only written after an application for special leave to review the Judgment dated 8th December was filed on 24th November in the court below.

3. The lower court erred both in law and in fact when he refused to review the Judgment dated 8th December, 2015, on the basis of the letter dated 1st November, 2017, which was in fact not before the Court below nor on record.
4. The lower Court erred both in law and fact in failing to do substantial justice when it failed to appreciate the import of the profit-sharing payment calculations between the Appellant and the Respondent and the letter dated 31st October 2017, which ought to have directed the lower Court to review its Judgment dated 8th December, 2015.
5. The lower Court erred both in law and fact when he refused to review the Judgment dated 8th December,

2015, despite the Appellant substantiating his claim and providing the lower Court with consistent and overwhelming evidence to enable it to review its judgment dated 8th December, 2015.

Both parties filed heads of argument and both submitted *viva voce*. The arguments were similar to those advanced in the Court below before Chisunka J. The Appellant's opening remarks are that in the High Court, the application for Special Leave to review was erroneously made under **Order 39 of the High Court Rules Chapter 27 of the Laws of Zambia**. As the **Industrial Relations Division Rules**, particularly **Rule 55**, gives the Court inherent jurisdiction to make any Order in the interest of justice, the Appellant now places reliance on the said **Rule 55**.

It was submitted that whilst reliance on **Order 39** was erroneous, it is not fatal and does not preclude this court from considering the matter. Following the Supreme Court's guidance in the case of **Zambia Consolidated Copper Mine v. Matale**[1] that in carrying out substantial justice, the Industrial Relations Court should not be restrained by any technicalities, the Appellant has

submitted that the Industrial Relations Division of the High Court has a paramount duty to dispense substantial justice.

It was argued under ground one that the key issue for determination in this matter is the date of termination of the Appellant's contract of employment and the Appellant's basic salary on the last day of employment. The Appellant's contention is that the date of separation from employment was 22nd April, 2015 and not 31st March, 2015 as asserted by the Respondent. It is argued that LSG similarly accrued to the 22nd of April, 2015.

The Appellant submitted that this is evidenced by the fact that upon separation, the Respondent calculated his Long Service Gratuity up to 22nd April, 2015 and not 31st March 2015. In addition to this is the letter of 31st October, 2015 on profit-sharing which also alluded to 22nd April, 2015 as the last day of service.

The Appellant cited the case of **National Milling Company Limited v. Grace Simataa and Others**[2] in which the Supreme Court held that where an employer unilaterally effects an adverse variation to an employee's basic conditions of employment, the contract terminates and the employee is deemed redundant or early retired at the date of the variation and the benefits are to be

calculated on the applicable salary. Counsel submitted that the case before us was distinguishable from the cited case because *in casu*, the redundancy was only communicated to the Appellant by a letter dated 22nd April, 2014 by which time the salaries of all employees had been increased. According to the appellant, his separation package ought to have been calculated on the basic pay applicable at the time of separation, which was the increased salary of K12 746.04.

The Appellant pointed out that Clause 32.1 and 41.0 (iv) of the Appellant's conditions of service provided that LSG and redundancy pay respectively were to be computed on the basis of the last drawn monthly basic salary.

Counsel further argued that the Appellant had been consistent in claiming that his last drawn salary was the salary applicable on 22nd April 2015. It was submitted that the salaries of all employees had been increased on 1st April, 2015, including the Appellant's salary. That the Appellant informed the lower court that on 16th April, 2015, the Respondent wrote to him advising that his salary had been increased. He however, handed the letter back to the Respondent to correct an error but the Respondent did not give him

a corrected version of the letter as they had promised. It was on that basis that the lower court held that he had no proof to show that his salary had been increased and the lower court described his assertion as an afterthought.

On the issue of the discontinuation of the LSG, the court was referred to page 52 of the record which is a letter from the Respondent informing the Appellant that the Board had decided discontinue the payment of LSG and he pointed out that the letter stated that the payment due to the Respondent as LSG was the sum of K488,272. He further pointed out that, however, the letter of separation at page 57 of the record showed the payment of LSG in the sum of K500,610.80 as on 22nd April, 2015, meaning that the Appellant had considered the Appellant as still being in employment up to 22nd April, 2015. According to the Appellant this meant that the redundancy occurred on 22nd April, 2015 and that the Appellants salary had been increased on 1st April, 2015 when the salary adjustment for all employees was effected.

Counsel argued that the salary increment was not tied to the discontinuance of LSG and he referred the court to the Circular at page 50 of the record of appeal dated 28th November, 2014 by which

Middle Management employees were awarded a salary increment of K500 to their basic monthly salaries. Counsel pointed out that as shown by the board resolution at page 77 of the record of appeal, the salary increment occurred after the Respondents Board had already resolved to discontinue the payment of LSG. Counsel submitted that the actual variation of the Appellants conditions of service occurred on 22nd April, 2015 and his terminal package should have been calculated on the re-aligned salary that came into effect on 1st April, 2015.

The Appellant referred to the letter he received from the respondent dated 31st October, 2017 on profit sharing for the period 1st April, 2015 to 22nd April, 2015 saying that it clearly indicates that the Appellant's basic pay stood at K12, 746.04.

It was submitted that this was fresh material evidence, which was not available at the time of trial and Judgment and that was why the Appellant applied for special leave to review the Judgment of the 8th of December, 2015. It was further submitted that after service of this process upon it, the Respondent tried to evade liability by authoring a subsequent letter dated 29th November 2017, which letter was never delivered to the Appellant and was

first seen by the Appellant as an exhibit in the Respondents affidavit in opposition to the application for review.

The Appellant contended that the letter proved the Appellant's consistent claim that he was indeed separated from employment on 22nd April, 2015. That this position was reinforced by the Respondents behavior of crafting a subsequent letter purporting that the initial letter was sent in error.

It was submitted that the lower court erred when it refused to review its judgment because the letter of 31st October, 2017 was material new evidence which wasn't available at the time of hearing but upon which the lower court would have varied its decision. The case of **Mayo Transport v United Dominions Corporations Limited**[3] was cited.

Under ground two, it was argued that the Court failed to do substantial justice when it refused to review the Judgment in issue on the basis that the Respondent's letter dated 31st October, 2017 was superseded by the dated 29th November, which letter was clearly written for purposes of concealing or suppressing material evidence. It was submitted that the lower Court erred by not interrogating the said letter. Such an omission is frowned upon by

the Supreme Court as illustrated in the case of **Savenda Management Services Limited v Stanbic Bank Zambia Limited**[4] where the Court stated at pages J150-J151:

> **"What was clear from the Judgment of the Learned High Court Judge is that he did not analyse the documents he relied upon to justify the award of K192,500,000.00 and other damages but merely accepted them as a given. This is against the principles of Judgment Writing..."**

Our attention has also been drawn to the case of **Kalusha Bwalya v. Chadore Properties and Another.**[5] It is argued that there were no vitiating factors warranting the superseding of the letter dated 31st October, 2017 and the profit-sharing calculations but that the Respondent was simply attempting to conceal material fresh evidence which would have rightly guided the lower Court to review in this matter. On the premise of the case of **Juldan Motors limited and Another v. Nasser Ibrahim and another**[6], it was submitted that the lower Court ought to have dismissed the purported letter as it was a mere afterthought.

Under ground three, the Appellant contended that the lower Court relied on a letter dated 1st November, 2017 which letter was

not before Court nor on record. The Court therefore erred to refuse review on the basis of a none existent letter. Relying on the cases of **Nkongole Farms Ltd v. Zambia National Commercial Bank and Others**[7] and **Ragin and Morel and Others v. Tembo**[8], we were urged to reverse this finding of fact as it was not supported by evidence on record.

Under ground four, the Appellant has submitted that the lower Court failed to appreciate the import of the profit-sharing calculations and the letter dated 31st October, 2017. It was again pointed out that the letter very clearly showed that the profit-sharing period was from 1st April, 2015 to 22nd April, 2015 meaning that the Appellant's contract of employment was not terminated on 31st March, 2015 as claimed by the Respondent.

It was on this basis argued that as shown in the said letter the Appellant's applicable basic salary was K12 746.04 and that is the figure that should have been used when calculating his terminal benefits. We have been referred to the case of **Mamba Collieries Limited v. Douglas Siakalongo and Others**[9] in which it was held that the conditions of service existing at the time of separation must be used when computing terminal benefits. It was further

submitted that it was a condition of service that employee's salaries would be reviewed every 1st April, subject to the financial performance of the institution. It was finally submitted under ground four that the letter dated 31st October, 2017 was an admission on the part of the Respondent and the case of **China Copper Mines Limited v. Tikumbe Limited**[10] was referred to.

In ground five, it was contended that the uncontroverted and consistent evidence on record is that the Appellant's assertion that his effective date of redundancy was 22nd April, 2015 and his basic pay as at that date was K12 746.04 was supported by the fact that the Respondent paid the Appellant in lieu of notice for the months of May, June and July 2015 meaning that he was considered as being in employment in the month of April. Referring to the case of **Khalid Mohamed v. The Attorney General**[11], it was submitted that the Appellant has discharged his burden of proof in this matter on the required balance of probabilities and that the appeal be allowed.

The Respondent reacted by arguing grounds one, four and five together. Counsel for the Respondent submitted that it was clear from the Judgment dated 8th December, 2015, that the lower court

dismissed the Appellant's allegations regarding calculation of terminal benefits on the premise of settled law that an employee is deemed redundant on the date that his contract of employment is unilaterally varied by the employer. In this case, the date of variation was 31st March, 2015 and was as a result of the Appellant's refusal to accept the variation of his contract of service which resulted in the discontinuance of payment of LSG.

On the law regarding review of a Judgment, the Respondent referred to **Order 39 Rule 1 of the High Court Rules Cap 27 of the Laws of Zambia** as well as the cases of **Jamas Milling Company Limited v. Amex International Pty limited**[12] and **Kalusha Bwalya v. Chadore Properties and Others**[5], it was submitted that for a Court to review a Judgment on the basis that there is material fresh evidence, the Applicant must prove that:

1. There is fresh evidence;
2. The fresh evidence would have had material effect upon the Court's decision;
3. The evidence existed prior to the decision of the Court;
4. The fresh evidence was only discovered after the decision of the Court; and

5. The fresh evidence could not, with diligence have been discovered prior to the decision.

In response to the arguments relating to the letter dated 31st October, 2017, the Respondent contends that the said letter is immaterial as it does not affect the fact that on 31st March, 2015, the Appellant's conditions of service were unilaterally varied rendering him redundant as at that date in line with the cases of **Kabwe v. BP Limited**[13] and **National Milling Limited v. Grace Simataa.**[2] His dues were calculated on the applicable salary as at that date. Counsel added that even though the Appellant worked until the 22nd April, 2015, it does not change the date of variation of his terms of employment nor the salary at that date.

Counsel for the Appellant submitted that a pertinent question is whether the lower court would have come to a different conclusion had the new evidence i.e. the letter dated 31st October, 2015 on profit-sharing been available to it before it rendered its judgement of 8th December, 2020. It was opined that the answer was a definite no because the fact remained that the termination of the Appellants employment by way of redundancy was because he

declined to accept the variation of his conditions of service with regard to LSG. That the Board resolution appearing on page 77 of the record of appeal clearly states that the date for discontinuing payment of the LSG was 31st March 2014. She added that the Supreme Court authorities of **Kabwe v BP Limited (supra)** and **National Milling v Grace Simataa (supra)** were very clear that an employee becomes redundant at the point when his conditions of service are varied and the fact that the Appellant in casu worked for an extra 27 days is irrelevant because the date of variation remains the same.

The Respondent submitted that the profit-sharing letter was written in error, the error was acknowledged in the affidavit in opposition to the application for special leave to review, moreover, a corrected copy was authored on 29th November, 2017. It was further submitted that the fact that the Appellant was informed that the 22nd April, 2015 was his last working day, does not amount to fresh evidence as he is deemed to have been declared redundant at the date of variation.

That the Appellant failed to meet the threshold to review the Judgment of the lower Court and therefore grounds one, four and five must fail.

In response to ground two regarding the argument that the letter dated 29th November, 2017 was an afterthought on the part of the Respondent, it is the Respondent's submission that the profit-sharing award was wrongly calculated on an increased salary when it should have been calculated on the Appellant's basic salary of K6,017.68. The letter dated 29th November, 2017 was merely a correction and not an attempt to evade liability or conceal evidence and was therefore not an afterthought. Counsel further submitted that the Court below did in fact apply substantial justice by not giving consideration to the letter dated 31st October, 2017.

With regard to ground three, counsel conceded that there was no letter dated 1st November, 2017 either before Court nor on record. It was however opined that this was a clerical error as the Court clearly intended to refer to the letter dated 29th November, 2017.

In response to the Appellants argument that in line with the holding in the **Nkongolo Farms Limited case** the lower court's

finding based on the non-existent letter of the 1st November, 2017 ought to be reversed, the Respondent submitted that in the cited case, the Supreme Court dealt with the issue of interfering with the lower Court's findings on the basis of substantial irregularities and anomalies in the evidence adduced in the Court below. That the circumstances *in casu* were distinguishable as an incorrect reference to a date does not amount to a substantial irregularity or anomaly.

The Respondent summed up by stating that the lower Court was on firm ground when it held that the Appellant did not provide sufficient evidence to warrant the grant of leave to review its judgment. It is prayed that the appeal be dismissed.

We have considered the record of appeal together with the parties' arguments. It is our considered view that the grounds of appeal are interrelated and we shall therefore deal with the appeal as a whole.

We however wish first to deal with the procedural issue which was raised by counsel for the Appellant in his introductory remarks in ground one. Counsel for the Appellant stated in the arguments that the initial application for review was erroneously made

pursuant to **Order 39 Rule 2 of the High Court Rules** as read with **Article 133(2) of the Constitution** and **Section 85 of the Industrial and Labour Relations Act**. He wished to correct this error as he was alive to the fact that the Industrial Relations Division has its own Rules. Particularly, **Rule 55** gives the Court inherent jurisdiction to make any Order in the interest of justice. He went on to state that while reliance on **Order 39** was not in order, the same was not fatal and does not preclude us from hearing this matter.

It seems to us that Counsel is seeking to amend the law under which he made the application to review. No such application arose in the Court below and should not be in issue in this Court. We shall therefore proceed on the premise that the application in the Court below was made under **Order 39 of the High Court Rules**.

The application before the lower court was for special leave to review the judgment of the lower Court dated 8th December, 2015. Counsel for the Appellant argued that the said application should have been granted because substantial fresh evidence, which was not available at the time of judgment, had now been discovered.

Muzyamba JS, in the case of **Zambia Consolidated Copper Mines Limited v. Daka and Another**[14], interpreting **Order 39 of the High Court Rules**, stated that the rule confers upon a Judge powers to review his own decision and receive fresh evidence and to either vary or confirm his earlier judgment. In the case of **Lewanika and Others v. Chiluba**[15], the Court held that review enables a Court to put matters right. That the provision for review does not exist to afford a dissatisfied litigant the chance to argue for an alteration to bring about a result considered more acceptable.

Order 39(1) of the Rules of the Supreme Court states as follows;

> **Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision**

As can be seen from the use of the word 'may', this Order confers discretionary power upon a Court. When considering an appeal against the exercise of discretion, it is not the duty of an appellate

court to substitute its own discretion. In the case of **Zimba v. Tembo and 2 Others**[16], we held that the appellate court's function is primarily one of review, and a judge's decision should only be reversed in cases where the appellate court is satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to have taken into account.

In the case now before us, the reason review was sought in the court below was that the Appellant had in his possession fresh evidence. The application was made after the Respondent wrote to the Appellant informing him that his profit sharing for the period 1st April and 22nd April 2015 was pegged at K660 based on the basic salary of K12 744.06. On the premise of this letter, the Appellant argued that the Respondent could not escape the fact that the Appellant was its employee up to 22nd April, 2015 and was entitled to the upward adjustment of salaries effected on the 1st of April, 2015 and therefore a proper calculation of his redundancy benefits.

The Supreme Court considered a similar issue in the case of **Kabwe v. B.P. Zambia Limited**[13] where the respondent had reversed a general salary increase, which resulted in the appellant's

salary being reduced to the level prior to the increase. He applied for early retirement and the respondent offered him a retirement package which was based on his salary prior to the increase. In an appeal against the dismissal of the appellant's claim for a declaration that he was entitled to a package calculated on his increased salary, the Supreme Court stated the position of the law as follows;

> **".... if an employer varies a basic condition or basic conditions of employment without the consent of the employee then the contract of employment terminates and the employee is deemed to have been declared redundant on the date of such variation and must get a redundancy payment ... The appellant's contract of employment was therefore terminated on the date his salary was decreased and his benefits ought to have been calculated on the increased salary applicable to him then."**

In the cited case, the date of termination was held to be the date at which the employer reduced the employee's salary. On that date the contract was deemed to have terminated. In respect of

calculation of redundancy payments, the Court held that it was the employer's salary at the time of termination.

Similarly, *in casu*, the date of termination is the date the employer discontinued LSG. The unilateral variation of the Appellants condition of service resulting in discontinuance of payment of LSG was a variation of a basic condition of service warranting redundancy and payment of the terminal package on the basis of the basic salary enjoyed by the Appellant on that date. The Board resolution at page 77 of the record of appeal dated 24th February, 2015 clearly states that the LSG was to be discontinued on 31st March 2015. Secondly, the letter dated 16th March, 2015 addressed to the Respondent shown on page 52 of the record of appeal *inter alia* reads as follows;

> ***"..... we write to inform you that the Board of Directors approved to discontinue the Long Service Gratuity (LSG) as a condition of service effective 31st March, 2015. Long Service Gratuity will therefore cease to form part of terms and conditions of service enjoyed by Middle Management employees effective 1st April 2015 ....." (emphasis ours)***

After receiving the above letter, the Appellant on 26th March, 2015 promptly rejected the unilateral variation of his condition of service with regard to LSG, which in our view was a basic condition of service. It is therefore crystal clear that LSG was discontinued on 31st March, 2015 and it was brought to the Appellants attention on 16th March and he declined the variation on 26th March. The Appellants terminal benefits were thus to be calculated on the salary applicable to him on 31st March, 2015.

It is notable that in the **Kabwe Case,** the Appellant was paid on the increased salary because when the Respondent decided to reduce the salaries by reverting to the salaries applicable before the increment, the increased salary was already a condition of service being enjoyed by the Appellant.

The Appellant argued at length that the salary applicable to him was the new salary introduced on 1st April 2015 because he was only declared redundant when he received the letter dated 22nd April 2015 informing him that his last day of service was 22nd April 2015. He reinforced the argument by stating that his refusal to accept the discontinuance of payment of LSG should not affect him because the salary increment had nothing to do with payment of

LSG. Counsel referred to the Circular at page 50 of the record of appeal stating that a salary increment was awarded to the employees before the LSG was discontinued.

We have looked at the cited circular and it is necessary to reproduce parts of it;

Dated 28th November, 2014

DIRECTOR HUMAN RESOURCES & ADMINISTRATION'S

CIRCULAR No.6 OF 2014

This serves to inform all employees that in April this year all Unionised employees were awarded a salary increment of K500 to their monthly basic salaries after the 2014/15 Collective Bargaining Unit negotiations were concluded. Considering that the matter of Long Service Gratuity has taken longer than expected, Management has since awarded all Middle Management employees a salary increment of K500 to the monthly basic salaries with effect from April 2014 to cater for this financial year. This salary increment will attract arrears and salary arrears will be paid in full together with the December 2014

salaries on Friday 19th December, 2014 before close of business.

In this regard, implementation of the new salary/grading structure and salary re-alignment will be deferred until the matter of Long Service Gratuity is concluded.

Counsel for the Appellant was quite right that the salary increment awarded to all middle management employees had nothing to do with discontinuance of LSG as the circular makes it clear that it was a stop-gap measure aimed at cushioning the employees before a final decision was made with regard to the LSG. The last paragraph of the circular makes it clear that the "..... *implementation of the new salary/grading structure and salary re-alignment will be deferred until the matter of Long Service Gratuity is concluded."*

It is quite clear that the increment of salaries that came into effect on 1st April, 2015 was inextricably tied to the discontinuance of LSG. The Appellant declined to be a part of it and cannot now claim the benefit of the salary increment. This was in fact one of the findings in the lower Courts judgment of 8th December, 2015.

Chisunka J dismissed the application for review because he found no exceptional circumstances upon which the Judgment could be reviewed. He found that the fresh evidence the Appellant intended to rely upon i.e. the letter dated 31st October, 2017 on profit-sharing, had been superseded by the Appellants subsequent letter of the 27th November, 2017 (erroneously written as 1st November, 2017). This is the subsequent letter which the Appellant contended was a ploy to conceal and suppress evidence on the part of the Respondent as it was authored after the application for review had been made.

We do note however that in exercising his discretionary power, Chisunka J erred as he did not consider the so-called fresh evidence in light of the law. He instead gave weight to the subsequent letter and refused the application on the basis that it had superseded the letter of the 31st October, 2017.

The lower Court erred in principle because as earlier noted, the reasoning in the Judgment of the 8th of December, 2015 was that the Appellant had declined the variation to the LSG thereby being declared redundant and could thus not benefit from the salary increment which was awarded to employees as a result of

discontinuation of LSG. However, the reasoning adopted by the lower court has no effect on its decision to refuse the application for review for the reasons stated hereunder.

In the view we take of the circumstances of the case, we agree with the finding of the lower court on the applicable salary and the law as enunciated in the **Kabwe Case** (supra). The letter of 31st October, 2017 which the Appellant calls new evidence is quite irrelevant because it does not affect the fact that the date of redundancy was 31st March, 2015 and that the Appellant was not entitled to benefit from the salary increment of 1st April, 2015. The fact that the Appellant worked for an extra 22 days also has no impact on the date of redundancy and the applicable salary.

In the premises, we find no merit in this appeal and we dismiss it accordingly. Each party shall bear its own costs.

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M. KONDOLO, SC
COURT OF APPEAL JUDGE

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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B.M. MAJULA
COURT OF APPEAL JUDGE