IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 05/2016**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

MALCOM MORGAN WALUBITA & 67 OTHERS **APPELLANT**

AND

PERMANENT SECRETARY, MINISTRY OF FINANCE AND NATIONAL PLANNING **1ST RESPONDENT**

THE ATTORNEY GENERAL **2ND RESPONDENT**

CORAM: Hamaundu, Kaoma and Kabuka, JJS.
On 4th September, 2018 and 7th September, 2018.

FOR THE APPELLANTS : Mr K. Wishimanga, A.M. Wood & Co.

FOR THE RESPONDENTS : N/A

JUDGMENT

KABUKA, JS, delivered the Judgment of the Court.

Cases referred to:

1. Khalid Mohamed v The Attorney-General (1982) Z.R. 49 (SC).
2. Brown v Dunn, 6 R. 67 (H.L).
3. Galaunia Farms Limited vs National Milling Company Limited and National Milling Corporation Limited (2004) ZR 1 (SC).
4. ZCCM Investments Holdings v Sichimwi, Appeal No. 172/2014 [2017].
5. Kitwe City Council vs William Ng'uni (2005) ZR 57 (SC).

Legislation and other works referred to:

1. The Constitution of Zambia, Cap. 1, Article 124.
2. The Public Service Pensions Act, Section 39.
3. Public Service Commission Regulation S.I. No. 319 of 1965, regulation 43A
4. General Order 44 and 45
5. Phipson on Evidence, 14th Edition, Common Law Library

The High Court delivered a judgment dated 19th October, 2015, in which the learned High Court Judge found that there was a re-organisation in the Ministry of Finance from 1994 up to 1999. That as a result of that re-organisation, the appellants were retired in the national interest, pursuant to **General Order 44 (b)** and paid their retirement benefits for their various periods of service. Accordingly, the trial court further found that their claim for payment of the

difference between what they received and the pension benefits which could have been due to them upon reaching the retirement age of 55 could not be sustained and dismissed it. The appellants have now come to this Court on appeal against that dismissal.

The facts of the case are that, the appellants were on diverse dates employed as civil servants in the Ministry of Finance under the Income Tax and the Customs and Excise Departments. In 1994, the said departments were abolished and the Zambia Revenue Authority (ZRA) established in their place. Following this development, the appellants who were not taken on by ZRA were referred back to the Ministry of Finance for redeployment within the civil service. As it turned out, the Ministry of Finance did not redeploy the appellants and, whilst waiting to know their fate, they continued to receive their salaries for a period of five years from 1994 until January, 1999.

On 14th January, 1999 the appellants were, through a letter authored by the Acting Permanent Secretary, Public Service Management Division finally informed, that after consultations and following approval by the Public Service Commission, they were

retired from the Civil Service with effect from 31st December, 1998. This was done pursuant to the provisions of **General Order No 44 (b)** as read with **Public Service Commission Regulation No. 43A** for the reorganisation of the Ministry of Finance, and the appellants were to receive their retirement benefits as prescribed under **section 39 of the Public Service Pensions Act**.

The appellants' contention on this decision was that, since they had already been referred to the Ministry of Finance for redeployment, they could not be retrospectively retired in 1999, based on a reorganisation that had taken place five years earlier in 1994. The appellants contended that, the respondents' said action was wrongful, unlawful and in breach of their contracts of employment, as they were arbitrarily retired from the civil service before they attained the retirement age of 55. In the premises, the appellants claimed that the retirement benefits paid to them under **section 39 of the Public Service Pensions Act** only amounted to a partial payment and they were entitled to be paid the full retirement

benefits they would have received upon attaining the retirement age of 55 years.

The appellants and other similarly circumstanced employees had initially separately commenced their said actions in cause numbers 2003/HP/1017 and 2004/HP/1048, which in substance, were premised on the same facts and raised the same issues. Following a consolidation of the actions in 2008, an amended statement of claim was filed by the appellants, seeking several reliefs namely; a declaration that the appellants be deemed to have continued in employment until attaining the mandatory retirement age of 55 years; an order that the appellants be paid all terminal benefits which would have been due to them had they continued in employment until their mandatory retirement age of 55 years; pension and other entitlements; terminal benefits in the sum of K19 597. 23 rebased; accrued leave pay; housing allowances as per the existing conditions of service; other entitlements; damages for breach of contract; and interest on the sums found due at the average short

term deposit rate per annum, from the date of writ to the date of judgment.

In defence of those claims, the respondents' contention was that, the appellants' retirement in the national interest was not retrospective as alleged, as the reorganisation of the public service had already commenced and that the provisions of **General Order No. 44 (b)** did apply to their situation. The respondents asked the trial judge to take judicial notice of the Structural Adjustment Program (SAP) that influenced the reorganisation that took place in the Ministry of Finance and, that this was done in the national interest. The appellants' retirement was said to be in accordance with the provisions of the law as contained in **General Order No. 44**, their employment contracts and the Civil Service guidelines. It was further contended that, the appellants acknowledged that they were paid what was due to them at the time of retirement and they were still receiving pension payments at the time of their claim.

After considering the evidence presented and the arguments by

counsel on both sides, the learned judge noted that, it was common cause that the departments in which the appellants were employed were abolished in 1994, when the Zambia Revenue Authority was created. As a result, some employees such as the appellants, were referred back to the Ministry of Finance for redeployment into new roles, but this did not happen. The learned judge also made a finding of fact that, when this was not possible, all the appellants received letters retiring them in the national interest. The trial judge identified the issue to be determined as, whether the appellants could be retired for reasons of national interest, in light of the prevailing conditions of restructuring that existed in 1998 and 1999.

On the evidence before him, the learned judge found that, although the appellants were referred back to the Ministry of Finance, they were never redeployed as they were never assigned any work. The learned judge observed that, there was no direct evidence on how long the reorganisation of the Ministry took, but that it was still on-going when the appellants were retired. That had the reorganisation been concluded, all the appellants would have been

placed in some department in the Ministry of Finance or elsewhere within the civil service. The court further found that, in light of uncontroverted evidence that reorganisation had continued until 1999, the respondents' decision to invoke the provisions of **General Orders No. 44 and 45,** retiring the appellants in the national interest, cannot be faulted as having been illegal.

The learned judge rejected the appellants' contention that the respondent had employed other people in their positions and cited the case of **Khalid Mohamed v The Attorney General**[1] in finding that, the appellants had failed to bring any evidence to prove this allegation. The learned judge accordingly found, there was indeed a reorganisation that was taking place within the Ministry of Finance at the time the appellants were retired, and that the appellants were not entitled to have their dues calculated as though they had reached retirement age. Premised on his finding that the retirement was legal, all the appellants claims failed and their matter was dismissed.

Dissatisfied with the findings made by the learned judge, the appellants filed an appeal to this Court, on the following grounds:

1. **that the learned judge misdirected himself in law and fact when he dismissed all the appellants claims after finding that there was a reorganisation of the Ministry of Finance between 1998 and 1999 contrary to the evidence on record;**
2. **that the learned trial judge misdirected himself in law and in fact by failing to differentiate between the appellants and the plaintiffs under cause no. 2004/ HP/1048;**
3. **that the learned trial judge misdirected himself in law and fact when he found that there was no evidence that the Ministry of Finance was still employing people in the same capacities as the appellants, contrary to the evidence on record;**
4. **that the learned trial judge misdirected himself in law and fact when he failed to find that the appellants were not paid according to the provisions of section 39 of the Public Service Pensions Act.**

Heads of argument were filed by the appellants in support of their grounds of appeal. In ground one, the appellants contended that the learned judge misdirected himself by finding that there was a reorganisation of the Ministry of Finance between 1998 and 1999. It was argued that, the learned judge should not have relied on the failure by the respondents to give them work, during the period they

were redeployed, as the basis for finding that there was a restructuring exercise still underway. The appellants maintained that the restructuring only took place in 1994, when they were redeployed. The appellants relied on **General Order No.44 (b)** in advancing the argument that, an officer would only be required to retire for purposes of facilitating reorganisation of a Ministry to which the officer belonged. For the said reason, the respondents were precluded from relying on a reorganisation that had already taken place in 1994, to retire the appellants in 1999.

In ground two, the appellants faulted the learned judge for not differentiating between the appellants in the present appeal and the plaintiffs under cause number 2004/HP/1048. That the letters on the record of appeal were addressed to the plaintiffs and their witnesses had testified that some of the appellants had not received such letters. According to the appellants, this was an indication that there was no reorganisation of the Ministry of Finance.

In ground three, it was contended that the respondent had continued to employ people in the same positions held by the appellants. That being the case, it could not be said that there was any on-going reorganisation of the Ministry of Finance. The submission was that, the appellants' said evidence had remained unchallenged and as a rule, the court ought to take such evidence as undisputed. **Phipson on Evidence, 14th Edition, Common Law Library** and **Brown v Dunn**[2] were cited in support of the submission.

Lastly, on ground four, the appellants maintained that the learned judge misdirected himself in failing to find that the appellants had been underpaid, contrary to the provisions of **Article 124 of the Constitution of Zambia** and **Section 39 of the Public Service Pensions Act.** It was argued that, according to the Constitution, pension benefits paid to a person must not be any less favourable than what they are entitled to, as provided by the law applicable at the date that the benefits are granted. The appellants referred to **section 39 (2) of the Public Service Pensions Act No. 35 of 1996** and argued that, the learned judge failed to consider the evidence

showing the computation of benefits to which, the appellants are entitled. Under that section, according to the appellants, an officer was entitled to all benefits he would have received had he continued to hold the position at the date of retirement. In that regard, the appellants contended that, the learned trial judge did not consider that they were underpaid their retirement benefits in contravention of **section 39 of the Act.**

In their submissions in response, the respondents on ground one referred to **General Order 44,** which formed part of the conditions of service of the appellants, in the Public Service, and the relevant part of which reads as follows:

> **"an appropriate commission may require an officer serving on permanent and pensionable terms of service to retire;**
>
> **(a) .....**
>
> **(b) For the purposes of facilitating re-organisation of a ministry or province to which he belongs by which greater efficiency or economy may be affected."**

Counsel for the respondents argued that, the above provision comes into play when there is need for re-organisation in a ministry

or province, so as to achieve greater efficiency or economy, and was properly relied upon by the trial judge, as it is abundantly clear that there was ongoing re-organisation in the Ministry of Finance.

In support of that proposition, and as evidence of the re-organisation, counsel for the respondent pointed to the fact that, upon being referred back to the Ministry of Finance the appellants continued to receive their salaries until 1998 – 1999, although they were not actually working. That the reason was that, there was nowhere for the appellants to be re-deployed in the public service to continue their employment.

On the appellants' contention based on letters appearing at pages 167 – 328 of the record of appeal, which were issued to the plaintiffs under Cause No. 2004/HP/1048; that, the re-organisation of the Ministry of Finance only occurred in 1994; and the proper retirements were done or ought to have been done in 1994, the respondents submitted that, those letters in fact confirm that there was indeed a re-organisation per **General Order 44 (b).** The said

letters were written to the plaintiffs in Cause No. 2004/HP/1048 from 1995 to 1997 and were not issued in 1994 or at the same time. These letters according to the respondents, were continually issued to the said plaintiffs on varying dates but were all based on the fact of the abolishment of their respective departments. So that, while the appellants only received their letters of retirement in 1999, they were still affected by the same plight of the non-existent departments.

The submission in this respect was that, notwithstanding that the appellants received their letters slightly later than the plaintiffs in Cause No. 2004/HP/1048, the fact remained that re-organisation of the Ministry still continued.

On ground two, the respondents submitted that the circumstances of the appellants and plaintiffs under Cause No. 2004/HP/1048 were similar, as both parties were affected for the same reason, which is the re-organisation of the Ministry of Finance. That the letter produced by the appellants at page 51 of the record of appeal, clearly shows that the appellants were no longer required

because the Ministry was undergoing re-organisation, which was the same reason given to the plaintiffs under Cause No. 2004/HP/1048, save for the fact that, their letters came earlier than those of the appellants. Further, that the amended Statement of Claim dated 2nd September, 2013 at pages 37 – 41 of the record of appeal, shows that the appellants and the plaintiffs were similarly circumstanced, hence, the consolidation of their claims before the trial judge. Counsel alluded to the fact that, it is unclear as to why the appellants would now on appeal want to detach themselves from the plaintiffs under Cause No. 2004/HP/1048. The submission was that, the trial judge was on firm ground when he considered them to be similarly circumstanced.

On ground three, learned counsel for the respondents referred to the evidence of the appellants' first witness, PW1, that, *"there was no re-organisation because the Ministry of Finance still employs support staff,"* and also that of PW2 at page 452 of the record of appeal (line 13 – 16) were he said, *"...the post of assistant clerical officer. The department I used to work for is not there in the Ministry."*

The submission was that, the witness PW1 merely suggested that the Ministry of Finance was still employing support staff without stating in which departments the support staff were being employed, nor their specific positions; while that of PW2 only shows that the department in which she was employed no longer exists in the Ministry, thereby making it impossible for anyone to be employed. The submission on that evidence was to the effect that, a re-organisation does not stop the Ministry from filling newly created vacancies which could be for people with different skill sets from those of the appellants. In any event, that the appellants did not lead evidence to prove the allegation that other people were being hired by the Ministry in their positions, under the same departments.

The submission on that point was that the perceived failure by the respondents to cross-examine or impeach the appellants' testimony does not in itself entitle the appellants to judgment. That the appellants had a duty to set up a good case supported by unimpeachable evidence to succeed. The case of **Galaunia Farms Limited v National Milling**[3]**,** was relied on as held that, a plaintiff

must actually prove his case and failure to do so, does not entitle him to judgment on account of mere failure by the opponent to raise a defence.

Finally, on ground four, attacking the trial judge for having failed to find that the appellants were not paid according to the provisions of **section 39 of the Public Service Pensions Act,** counsel argued that, the appellants acknowledged they had been paid their dues at the time they were retired in accordance with their conditions of service. The appellants also acknowledged they were paid part of their pension up to the date of retirement and now receive their monthly pension payments. The appellants further accepted, that they received payment in lieu of notice. At page 437 of the record of appeal (starting from line 6), however, PW1 testified that their benefits were partially paid. The appellants' main contention was that, they should have been paid as though they had worked up to the age of 55 years, as their proper age of retirement.

In essence, counsel for the respondents argued that, the appellants are seeking the court to order that they be paid even for

years that they had not worked for in the public service. In this regard, it was argued that, a pension being a contributory benefit from both the employee and employer, there can be no valid claim for entitlement to payment if the appellants have not made any contributions for the years they have not actually worked and earned a wage.

The submission in conclusion was that, since the appellants were properly retired in line with their conditions of service and paid their terminal benefits for the period served, inclusive of three months' pay in lieu of notice, they would not be entitled to any other payments. The case of **ZCCM Investments Holdings v Sichimwi**[4] was relied upon for the submission.

When the appeal came up for hearing there was no appearance for the respondents. Counsel for the appellants who was present intimated, that the state advocate handling the matter had logistical problems travelling from Lusaka. Having considered that the respondents had nonetheless filed written heads of argument on record, we proceeded to hear the appeal. Counsel for the appellants

relied on his heads of argument which he briefly recounted orally, highlighting the main areas of contention.

The thrust of his arguments was that the retirement of the appellants in the national interest was not only wrongful, but also unlawful as they were on permanent and pensionable terms of employment and their employment was terminated without notice. That the appellants ought to have been paid as if they had attained the retirement age. He maintained his assertion that a retirement in the national interest entailed payment with full benefits as if the person had continued to work until retirement age, and he placed reliance on **section 39 (2) of the Public Service Pensions Act.** Counsel further contended that the retirement was unlawful as the appellants were retired in 1999 which was long after the re-organisation had taken place in 1994, and he urged us to so find.

We have considered the heads of argument and submissions by counsel for the appellant, those of the respondents, the legislation to which we were referred and case law cited, against the evidence on record. Having considered the grounds of appeal, we propose to deal

with grounds one and two together and then proceed to consider grounds three and four separately.

The thrust of this appeal appears to be, (i) whether the employment of all the appellants was terminated for purposes of facilitating reorganisation within the Ministry of Finance; (ii) whether arising from such termination, the appellants were entitled to retirement benefits they could have received on attaining the mandatory retirement age of 55 years; and if so, (iii) whether payment of their retirement benefits was done in accordance with their respective conditions of service and the applicable law.

A perusal of the record of appeal shows that the appellant's respective contracts were all terminated on diverse dates. Some had their contracts terminated by three months' salary in lieu of notice, as evidenced by termination letters appearing at pages 234 to 328 of the record. In the case of the appellants, they were redeployed to the Ministry of Finance, awaiting new postings which did not happen, following which they were formally retired pursuant to **General Order**

44 (b). This Order provides for an officer serving on permanent and pensionable terms of service to retire for purposes of facilitating reorganisation of a Ministry or Province, to which he belongs, by which greater efficiency or economy may be effected.

As it happened, some of the affected employees had already been retired before the deployment of the appellants and received their retirement letters in 1994, itself. This is evidenced by letters appearing from pages 159 to 328 of various dates, but between 1994 and 1999. The effective dates for the backdated retirement also differed. For instance, those employees who received their letters in March, 1995 were deemed to have been retired by 31st January, 1995. The appellants cannot therefore be heard to argue that, the retirement was wholly conducted in 1994 itself. The record at page 163 also shows that, some employees who were referred back to the Ministry of Finance for re-deployment such as one, Eustace Musoka, were only retired in 1999. It is also not correct to claim that some of the appellants did not receive letters as argued by counsel for the appellants. Pages 446-447 of the record which were relied upon, for

this argument in fact disclose that, there was an admission by one of the appellants that, other than individual letters that they received, there was also a block letter addressed to some of them dated 14th January, 1999.

From that evidence, it is clear to us, that for those appellants who were retired for purposes of reorganisation, the respondents had carried out the reorganisations within the confines of the law. In any event, it does not assist the appellants to argue that the learned judge should have differentiated the appellants under cause no. 2003/HP/1017 from those under 2004/HP/1048 when the very reason that the two causes were consolidated is that the two groups were *'similarly circumstanced'* and *'affected'*, by the early termination of employment. The only differences that should have been made is between those of the appellants whose employment was terminated by payment in lieu of notice in accordance with **General Order 45;** and those like the appellants whose employment was terminated for purposes of re-organisation in the ministry under **General Order 44 (b)** as read with **section 39 of the Public Service Pensions Act No.**

of 1996. Accordingly, the appellants did not substantiate their argument that there was no reorganisation taking place from 1994 to 1999, as the evidence on record shows the contrary. We agree with counsel for the respondents' that proof, that the reorganisation was still ongoing is confirmed by the evidence of PW2, who testified that she received her letter of retirement dated 10th June, 1999 in which she was deemed to have been retired on 31st December, 1998.

It is for the reasons given, that we find grounds one and two of the appeal faulting the trial court's finding that the re-organisation continued beyond 1994, and that it affected all the appellants, to have no merit.

Coming to ground three, the allegation made by the appellants that the respondents had continued to employ people in the same capacities held by themselves is one that needed actual evidence establishing which people had been employed. The record shows, no such evidence was led by the appellants. The mere fact that a post continues to exist, by itself, is not proof that others have been

employed to replace those that were retired. We find ground three is equally devoid of merit.

This appeal is largely hinged on ground four, that is to say, whether the appellants to whom the provisions of the **Public Service Pensions Act No. 35 of 1996** applies, were paid in accordance with the formula found in **section 39**. A reading of **section 39 (1)** shows that the pensionable emoluments are calculated on the completed months of pensionable service, the age at which the officer retires and the number of completed periods of three years, in pensionable service up to '*a maximum of ten*'. **Section 39 (1)** reads as follows:

> **Subject to the provisions of Part XI and of subsection (2), an officer who retires on the abolition of his post or to facilitate an improvement by which greater efficiency or economy could be effected in the organisation of the part of the service to which the officer belongs shall be entitled with effect from the date of the officer's retirement to receive a pension calculated as follows:**
>
> $$\frac{KA \times B}{C} + \frac{KA \times D}{60}$$
>
> **Where KA = his pensionable emoluments;**
>
> **B = the number of completed months of his pensionable service;**
>
> **C = the age at which he retires, expressed in complete months;**

D = the number of completed periods of three years in his pensionable service, to a maximum of ten.

Section 39 (2) states that:

A pension payable under subsection (1) shall not exceed-

(a) the pension calculated with reference to the salary scale on which the officer was serving at the time of retirement, to which the officer would have been entitled if the officer had continued to hold the post the officer held at the date of retirement until the date on which the officer would otherwise have retired under the provisions of this Act having received all scale increments for which the officer would have been eligible by that date; (underlining for emphasis supplied).

From a reading of the above provisions, the formula used to calculate the pensionable emoluments under **section 39 (1)** is the *'completed months of pensionable service and the age at which the person retires'* expressed in completed months. A correct interpretation of **section 39 (2)** in our view, would be that, the pension payable under **subsection (1)**, cannot exceed the pension that the officer would have received had he continued to hold his post up to the retirement age of 55. It does not mean that they must be

paid what they could have been entitled to on normal retirement at age 55.

In the event, the appellants were entitled to pension benefits calculated at the date they were retired. Effectively, this cannot include periods not worked which is what we guided against in the case of **Kitwe City Council v William Ng'uni**[5], when we said that:

> **"We are, therefore, dismayed by the order to award 'terminal benefits equivalent to retirement benefits' the plaintiff would have earned if he had reached retirement age had he not been constructively dismissed. Apart from the issue of constructive dismissal, which we have already dealt with, we have said in several of our decisions that you cannot award a salary or pension benefits, for that matter, for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment."** (underlining for emphasis only)

We find no reason to depart from that holding. The appellants are thus only entitled to pensionable emoluments for periods actually worked for, up to the dates of their respective retirements as indicated in their retirement letters and no more.

All the grounds of appeal having failed, the appeal is dismissed with each party to bear their own costs.

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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R. M. C. KAOMA
SUPREME COURT JUDGE

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J. K. KABUKA
SUPREME COURT JUDGE