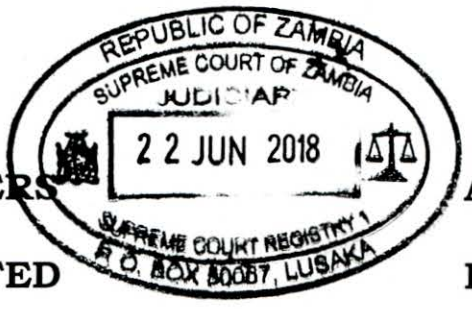
IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 125/2015
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)



B E T W E E N:

ERIC JERE AND 15 OTHERS **APPELLANTS**
AND
ZAMBIA RAILWAYS LIMITED **RESPONDENT**

CORAM: MAMBILIMA, CJ; MALILA AND KAOMA, JJS
On 15th May, 2018 and 22nd June, 2018

For the Appellants: **In Person**
For the Respondent: **Mr. V.K. Mwewa of V.K. Mwewa and Company**

JUDGMENT

MAMBILIMA, CJ, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **PADDY KAUNDA AND OTHERS V. ZAMBIA RAILWAYS LIMITED, COMP/79/1992;**
2. **INAMBWAE LIKANDO AND OTHERS V. ZAMBIA RAILWAYS LIMITED, APPEAL NO. 169/2003;**
3. **VINCENT KASONGO AND OTHERS V. ZAMBIA RAILWAYS LIMITED, APPEAL NO. 1115/06; AND**
4. **L. A. MUWOWO AND 96 OTHERS V. ZAMBIA RAILWAYS LIMITED, 2007/HP/1201.**

This is an appeal from the judgment of the Industrial Relations Court (IRC), delivered on 15th February, 2012. The Judgment of the

Court followed an appeal from a decision of a single Judge of that Court.

The background to this matter, in so far as it is relevant to this appeal, is that the Appellants applied for leave to file a notice of motion pursuant to Section 85(6) of the **INDUSTRIAL AND LABOUR RELATIONS ACT, CHAPTER 269 OF THE LAWS OF ZAMBIA** (hereinafter referred to as **"the Act"**). That Section provides that a decision of the IRC on any matter shall be binding on the parties to the matter and on any parties affected. Thus, through the aforesaid notice of motion, the Appellants sought to move the Court for an order that they were entitled to benefit from the judgment of the IRC on appeal to this Court, in the case of **PADDY KAUNDA AND OTHERS V. ZAMBIA RAILWAYS LIMITED[1].** In that case, we upheld the findings of fact by the IRC, that the Appellants therein, who had been served with retrenchment letters on 29th September, 1992, had remained in employment until 25th November, 1992 because of the 90 days notice period and were, therefore, entitled to benefit from the salary increments effected during that period.

This case has seen its days in Court. The application by the Appellants to benefit from the case of **PADDY KAUNDA**[1], was first made to the Deputy Registrar in February, 2006 through summons for leave to file a Notice of Motion under Section 85(6) of the Act. It was granted. The Respondent appealed to a single Judge in Chambers who allowed the appeal and overturned the ruling by the Deputy Registrar. The Appellants then escalated the matter to the full bench of the Court. The full bench granted the application for leave to file the notice of motion. The Respondent was aggrieved with the decision of the full bench to grant leave and accordingly appealed to this Court. However, before we could hear the appeal, the Respondent abandoned it.

Following the withdrawal of the appeal, the matter went back to the lower Court where the Appellant proceeded to file an Originating Notice of Motion on 10th December 2009. A single Judge of the Court heard the motion and dismissed it. The Appellants challenged the decision of the single Judge through an appeal to the full bench. The full bench, after considering the appeal by the Appellants, the Judgment of the single Judge and the

submissions of Counsel, came to the conclusion that the appeal did not have merit. The reasons the Court gave for dismissing the appeal were that, firstly, while the Appellants relied on the case of **PADDY KAUNDA**[1], the Supreme Court Judgment in that case did not award the reliefs that the Appellants were seeking in this case. Secondly, the Court below noticed that 83 of the litigants in the case before it were also parties to the case of **INAMBWAE LIKANDO AND OTHERS V. ZAMBIA RAILWAYS**[2]**.** The Court decided that since the case of **INAMBWAE LIKANDO**[2] was decided by the Supreme Court, the Appellants could not re-litigate the matter in the lower Court. Thirdly, the lower Court was of the view that although the doctrine of *res judicata* may not apply to Section 85(6) of the Act, a party cannot, after losing a case, go back to Court and seek to rely on that Section to benefit from a decision in another case. In its own words, the Court put it this way:-

> **"S.85(6) of Cap 269 does not apply to complainants who have prosecuted their legal battle independent of the case for others from which they now wish to benefit. Having lost their legal battle in the case of INAMBWAE L. LIKANDO AND OTHERS V ZAMBIA RAILWAYS SCZ APPEAL No. 169/2003, these Appellants can now not turn to S.85(6) of Cap 269 because they are already wearing a tag of defeat in the Likando case."**

Dissatisfied with the judgment of the full bench of the IRC, the Appellants have now appealed to this Court advancing two grounds of appeal that:-

1. **The Court erred in law and in fact when it concluded that the Appellants benefitted from the Judgments of INAMBWAE L. LIKANDO & OTHERS (APPEAL NO. 168/2000) and L. A. MUWOWO & OTHERS (NO. 2007/HP/20) in the absence of any tangible evidence proving the same; and**
2. **The Honourable Court below erred in law in its interpretation of Section 85(6) of the Industrial and Labour Relations Act Cap 269 of the Laws of Zambia which entitles the Appellants to enjoy the fruits of the Superior Judgment of PADDY KAUNDA & OTHERS SCZ NO. 88/2000 albeit they were not parties thereto.**

In support of the appeal, the Appellants filed written heads of argument. These were augmented by brief oral submissions. Submitting in support of the appeal, the first Appellant, Eric Jere stated that they were relying on their filed heads of argument as well as Articles 187(1)(2)(3); 188(1) and (2) and 189(1) and (2) of the amended Constitution, Act No. 2 of 2016.

The kernel of the Appellants' arguments, in support of the first ground of appeal, was that the Appellants should be allowed to enjoy the fruits of the judgment in the case of **PADDY PHILLIMON KAUNDA**[1]. They submitted that the Respondent grossly underpaid them their benefits. That the claim by the Respondent that it paid their benefits pursuant to the Judgments in the case of **INAMBWAE**

LIKANDO[2] and **L. A. MUWOWO AND 96 OTHERS V. ZAMBIA RAILWAYS LIMITED**[4], was misleading. They, therefore, contended that they should be paid their benefits on the basis of the formula used to arrive at the new salaries for those paid under the **PADDY PHILLIMON KAUNDA**[1] case. Further, that the Appellants herein and the Appellants in the **PADDY PHILLIMON KAUNDA**[1] case were similarly circumstanced because they were retrenched together in 1992. That the Appellants, in the case of **PADDY KAUNDA** were given enhanced exit packages while theirs remained static. They contended that because they were similarly circumstanced, their benefits should be similar.

The Appellants submitted further that the Court, in the case of **PADDY PHILLIMON KAUNDA**[1] ruled in favour of the Appellants that they should be paid pension because they did not leave on their own. They contended that likewise, they also did not leave on their own and they should also be paid their pension.

With regard to the second ground of appeal, the gist of the submissions by the Appellants is that Section 85(6) of the Act entitles them to enjoy the fruits of the superior judgment in the

PADDY PHILLIMON KAUNDA[1] case, although they were not parties to it. That the case of **PADDY PHILLIMON KAUNDA**[1], was a superior decision because it ordered the Respondent to pay the Appellants in the case, the underpayments in the packages that had been paid to them. They contended that Section 85(6) should be read together with Section 85(5) of the Act which states that:-

> **"(5) The Court shall not be bound by the rules of evidence in civil or criminal proceedings, but the main object of the Court shall be to do substantial justice between the parties before it."**

In the Appellants' view, in light of Section 85(5) of the Act, the doctrine of *res judicata* is not applicable to this case.

Accordingly, the Appellants prayed that this Court grants them an award in accordance with the **PADDY PHILLIMON KAUNDA**[1] case.

In his oral submissions, Mr. Jere referred us to Articles 187, 188 and 189 of the Constitution of Zambia as amended by Act No. 2 of 2016. These Articles are in Part XIV of the Constitution which deals with pension benefits.

The learned Counsel for the Respondent filed written heads of argument on which he entirely relied. On the first ground of appeal, Counsel pointed out that there is no particular holding by

the lower Court that the Appellants benefitted from judgments in the cases of **INAMBWAE L. LIKANDO AND OTHERS**[2] and **L.A. MUWOWO AND OTHERS**[4]. That while agreeing with the Ruling of the single Judge, the lower Court acknowledged and noticed that 83 of the current Appellants were litigants in multiple actions which benefited them in one way or the other. That the Court made findings of fact to this effect, and such findings cannot be assailed because they were not perverse, misapprehended or made in the absence of relevant evidence.

With regard to the second ground of appeal, Counsel submitted that he agreed entirely with the interpretation of Section 85(6) of the Act by the Court when it said that this Section was intended to avoid a multiplicity or proliferation of litigation by different parties and that its import and essence was to prevent individuals who had prosecuted their claims independently and lost, from having the benefit of the Section. He agreed with the Court that Section 85(6) was intended for the parties who had not yet litigated their claims but were similarly circumstanced with parties to an action.

We have carefully considered the evidence on record, the judgment appealed against and the submissions of the parties. In the first ground of appeal, the Appellants are contending that the Court below erred when it concluded that the Appellants benefited from the judgment of **"INAMBWAE L. LIKANDO[2] AND L.A. MUWOWO AND OTHERS[4].**

We have carefully perused the judgment of the Court below. The Court, on pages 13 and 14 of the record of appeal, gave four reasons as to why the appeal from the single Judge could not succeed. One of the reasons was that **"83 of the current litigants were a party in the case of INAMBWAE LIKANDO AND OTHERS V ZAMBIA RAILWAYS."** The case of **MUWOWO AND OTHERS** is mentioned on page 10 of the record of appeal and only in relation to the Appellants' second ground of appeal from the decision of the single Judge. The ground is formulated as follows:-

> **"The Hon Judge errored (sic) in law and in fact when he held that each and every Appellant had been paid in the case of IMBWAE LIKANDO AND OTHERS and the case of MUWOWO AND OTHERS...."**

We, therefore, agree with the learned Counsel for the Respondent that there is no particular holding by the lower Court stating that the Appellants benefited from the **INAMBWAE L.**

LIKANDO OR MUWOWO cases. Rather the Court only found that 83 of the current litigants were parties in the **INAMBWAE L. LIKANDO** case. It would appear, therefore, that the first ground of appeal was not properly formulated. The finding by the Court that the Appellants were parties to other litigation was not challenged. The first ground of appeal cannot therefore succeed.

The second ground of appeal raises the issue as to ***"whether the Appellants can rely on Section 85(6) of the INDUSTRIAL AND LABOUR RELATIONS ACT to benefit from the decision in the case of PADDY PHILLIMON KAUNDA".***

The Appellants have essentially contended that they should be allowed to enjoy the benefits awarded to their colleagues in the **PADDY PHILLIMON KAUNDA**[1] case because they are similarly circumstanced, basing their contention on Sub-sections (5) and (6) of Section 85 of the Act.

We have carefully studied Section 85(6) and (5) of the Act which the Appellants claim entitles them to benefit from the decision in the **PADDY PHILLIMON KAUNDA**[1] case. Section 85(6) states as follows:-

> **"85(6) An award, declaration, decision or judgment of the Court on any matter referred to it for its decision or on any matter falling within its exclusive jurisdiction shall, subject to section ninety-seven, be binding on the parties to the matter and on any parties affected."**

A scrutiny of the record of appeal and the Appellants' heads of argument establishes that the Appellants were paid benefits when they were retrenched from the Respondent. The Appellants, however, claim that the said benefits were inferior to those awarded to their colleagues in the case of **PADDY PHILLIMON KAUNDA**[1].

We are of the firm view that, in the circumstances of this case, the Appellants cannot invoke Section 85(6) of the Act to benefit from the decision in the case of **PADDY PHILLIMON KAUNDA**[1]. We agree with the Court below that, that Section cannot be relied upon by a party who has prosecuted his/her claim independently and lost. In our view, the Section is not intended to provide a mechanism where parties can undertake separate litigation and later choose which judgment to benefit from. We, therefore, hold that a party cannot invoke that Section simply because they have been awarded benefits which they feel are inferior to those awarded by another Court in a different case but with similar facts.

In this case, both the lower Court and the Single Judge found that the Appellants were parties to either the case of **INAMBWAE LIKANDO**[2] or the case of **MUWOWO**[4]. It is not in dispute that the facts leading to the litigation in the **INAMBWAE LIKANDO** case and the **MUWOWO** case were the same as those that gave rise to the case of **PADDY PHILLIMON KAUNDA**[1]. All the three cases involved litigation by former employees of the Respondent who were separated from the Respondent in similar circumstances. They pursued their claims under the said different cases and the cases were all determined by the Court. To emphasise, therefore, we do not agree with the Appellant's assertion that if the Court in their case awarded them what they consider to be inferior benefits, they can rely on Section 85(6) of the Act to benefit from the supposedly superior awards given to their colleagues in the case of **PADDY PHILLIMON KAUNDA**[1]**.** The second ground of appeal also fails.

With regard to the Appellants' reliance on Articles 187, 188 and 189 of the Constitution, it is our considered view that these Articles do not help their case. In the first place, this aspect of the case was not pleaded and was not an issue in the lower Court.

Even if it had been pleaded, success would still have elluded the Appellants because Article 187(3)(a) is very clear. It states that the law applicable to pension before the commencement of the Constitution in 2016:-

> **"...shall be the law that was in force immediately before the date on which the pension benefit was granted or the law in force at a later date that is not less favourable to that employee."**

The Appellants were separated in 1992, long before 2016 when the amendments to the Constitution were made. Their pension was governed by the law which was in force at the time of their separation. It follows, therefore, that the provisions of the Constitution which the Appellants have now invoked have not altered the pension law which was in force at the time that they were separated.

From the foregoing, we find that this entire appeal has no merit and it is dismissed. We make no order on costs.

I.C. Mamabilima
CHIEF JUSTICE

M. Malila
SUPREME COURT JUDGE

R.M.C. Kaoma
SUPREME COURT JUDGE