IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL NO.156 OF 2006

HOLDEN AT KABWE AND LUSAKA

(CRIMINAL JURISDICTION)

BETWEEN:

FRANCIS KUVEYA(suing as General Secretary of NUPAW on behalf of Employess of the Respondent) APPELLANT

AND

ZAMBIA SUGAR PLC RESPONDENT

CORAM : Chibesakunda, Mushabati, JJS and Kabalata, Ag.JS

On 7th November, 2007 and 29th May, 2008

For the Appellant : Mr M. Ndhlovu of MRN Legal Practitioners

For the Respondent: Mr I.C. Ngonga and Mr H.H. Chizu of I.C. Ngonga and Company

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JUDGMENT

Mushabati, JS., delivered the judgment of the Court.

Cases referred to:

1. *Zulu Vs Avondale Housing Project Ltd [1982] Z.R. 172*
2. *ZCCM Ltd Vs Matale [1995 – 1997] Z.R. 144*
3. *Zambia Sugar Plc Vs Wincho Gumbo Appeal No.69 0f 1999(unreported)*
4. *New Plast Industries Vs Commission of Lands and another[2001] Z.R. 51*

Legislation referred to:

Industrial and Labour Relations Act,Cap. 269 – SS. 75,76 and 85

Industrial and Labour Relations Rules, Cap. 269 – R.55

This is an appeal against the judgment of the Industrial Relations Court delivered on the 15th day of October, 2004 dismissing the appellant's action against the respondent.

The appellant filed the complaint on behalf of the respondent company's employees in his representative capacity as Secretary – General of National Union of Plantation and Agricultural Workers (NUPAW).

The evidence in support of the complaint in the court below was that at the time of the commencement of this action there was in place a Recognition Agreement between the NUPAW and the respondent company which could only terminate if either of the parties ceased to be a Legal entity or went into liquidation or dissolved. As from 1st April, 2003 there existed a Collective Agreement, which was to expire on 31st March, 2005. This Collective Agreement contained a clause on long service gratuity for the unionized employees. It was later agreed between the respondent company and the appellant union to replace the long service gratuity scheme with pension scheme. When the new agreement, which introduced the pension scheme, came into effect the question of accrued gratuity as at 31st March, 2003 was still a subject to some discussions. The parties failed to reach an agreement over the same. The new Collective Agreement had not provided for the transfer of the accrued gratuity to the newly introduced Zambia Sugar defined Pension Contribution Scheme. When the parties failed to reach an agreement, the Ministry of Labour and Social Security was approached and a meeting was convened in June, 2003. The Permanent Secretary in the Ministry of Labour and Soccial Security later gave her opinion regarding the long service gratuity scheme through her letter to the Managing Director of the Respondent Company. (The letter is at pages 45-47 of the record and we shcll refer to it later). The Collective Agreement contained a provision for gratuity to be paid only when an employee left

employment and as a result at the meeting held in January, 2003 the parties agreed that the accrued gratuity could not be paid out to the employees whilst still in employment. Later rules of the Pension Scheme were given to the union to study and make necessary adjustments either by way of addition or subtraction. The union raised its concerns in a letter dated 13th February, 2003 to the management.

The parties never agreed on the newly introduced Defined Pension Scheme. Neither did they agree on the accrued gratuity i.e whether to have it transferred into the Defined Pension Scheme or to have it paid to the employee. A dispute was declared between the parties hence this action now before us.

The defence called one witness namely D.W.1, Doreen Mutinta Kabunda, The Human Resource Manager for the Respondent Company. D.W.1 confirmed that there existed a Collective Agreement for the period 1st April, 2001 to 31st March, 2003 which contained a provision for the introduction of a new Pension Scheme. The Scheme was to be agreed upon by the parties and it was agreed upon in the Collective Agreement for the period 1st April, 2003 to 31st March, 2005 but the question of accrued long service gratuity was yet to be agreed upon i.e either have it transferred into the new Scheme in the mean time or not. The old long service gratuity scheme continued to operate. Rules for the Pension Scheme were prepared and explained to the eligible unionized employees.

The issue of the accrued gratuity took central stage at all the meetings. It was resolved at these meetings that the accrued gratuity could only be paid to the employees on separation. D.W.1 stated that it was not true or correct to say the accrued gratuity was unilaterally or without consent of the employees transferred to the new Pension Scheme. The Collective Agreement introducing the Pension Scheme was approved by the Minister of Labour after it was

submitted to him. The Union however, later changed its mind over the transfer of the accrued gratuity into the Pension Fund and demanded that it be paid to the employees. A Legal opinion was sought for from the Ministry of Labour and the parties agreed that the opinion that was to be given was to bind the parties. After the advice was rendered the respondent company secured K20.4 billion which was transferred to the Zambia Sugar Defined Contribution Pension Fund for the benefit of the employees but the union did not accept that arrangement. They stated that they wanted the Zambia State Insurance Corporation to manage the Pension Scheme. The management of the respondent company instead came up with three names of Pension Scheme from which the union could choose the one to administer or manage employees, the Pension Scheme. The companies so named were Madison Insurance, Zambia State Insurance Corporation and African Life Financial Services. The number was later reduced to two namely African Life Financial Services and Madison Insurance. The union did not make any choice. The funds were in the mean time held in the Company account where it accrued no interest. This forced the Management to appoint African Life Financial Services as the Pension Fund Managers.

The court below considered the stories above and later dismissed the action on legal technicality that it was commenced under a wrong section of the law.

The appellant filed three grounds of appeal. These are:

1. ***The Industrial Relations Court misdirected itself in law when it held that by virtue of Section 85(4) of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia it lacked jurisdiction to entertain the Appellant's complaint.***
2. ***The Industrial Relations Court misdirected itself when it held that the collective dispute between the parties ought to have been subjected to***

conciliation notwithstanding that the Respondent refused to subject itself to conciliation and challenged the Appellants to refer the dispute to a court of law.

3. ***Having heard the Complaint and made findings of fact the Industrial Relations Court misdirected itself when it failed to adjudicate on all matters in controversy between the parties.***

These grounds were supported by written and oral submissions by both learned counsel.

On the first ground counsel for the appellant argued that ***Section 85(1) of the Industrial and Labour Relations Court Act, Cap. 269*** gave umbrella jurisdiction to the court to hear or determine any industrial matters.

This sub-section reads: ***The court shall have original and exclusive jurisdiction to hear and determine any industrial relations matter and any proceedings under this Act.***

The counsel went on to argue that ***sub-section 4 of Section 85*** under which this action was commenced gave jurisdiction to the court to hear the matter because the court below recognized the wide nature of the court's jurisdiction under ***Section 85(4).***

This sub-section reads; ***The court shall have the jurisdiction to hear and determine any dispute between any employer and an employee notwithstanding that such dispute is not connected with a Collective Agreement or other trade union matter.***

The Counsel for appellant further submitted that the Industrial Relations Court had powers under the foregoing provisions of the law to hear all disputes, like the one now under review in which the respondent deposited/transferred the appellant's monies into an illegal Pension Fund. The dispute was not a Collective dispute under ***Section 75.***

On the second ground it was argued that the court below misdirected itself when it held that the dispute between the parties ought to have been subjected to reconciliation proceedings. It was further submitted that the issue before the court was not over a dispute that was declared by the appellant in the letter of 9th September, 2003 but over the money that was paid into an illegal Pension Fund. The issue raised in the above mentioned letter did not fall under the **"Collective Dispute"** as stated in ***Sections 75 and 76.*** In the absence of a Collective Dispute under ***Section 75*** a conciliator could than be appointed under ***Section 76.***

In the alternative, he argued that should the court find that the action ought to have been commenced under ***Part 9 of the Industrial and Labour Relations Act, Cap. 269*** then it must invoke ***Rule 55 of Industrial Relations Court Rules*** which reads: ***Nothing in these rules shall be deemed to limit or otherwise affect the powers of the court to make such order as they be necessary for the ends of justice or to prevent the abuse of the process of the court.***

The court, having failed to determine the issues raised, failed in its duty to dispense justice.

Finally on the third ground it was submitted that the court misdirected itself when it failed to decide on the matter before after it had heard the complaint and made some findings of fact thereof. This court was urged to accept the

argument that the court below had jurisdiction adjudicate and make findings of fact in this case. The question of the accrued gratuity, as at 31st March, 2003 was still subject to discussion. No agreement was made on what was to be done with it. Though the Pension Scheme had been approved by Zambia Revenue Authority and the Pension and Insurance Authority no such approval was made by the Ministry of Labour. The court below ought to have adjudicated and make a decision on all the issues in dispute between the parties as per case of ***Zulu Vs Avondale Housing Project Ltd***[1]. This Court was urged to find for the appellant and order that the members of the appellant union be paid back their money which was transferred to the new Pension Scheme Fund.

In his oral submission the counsel for the appellant still repeated what he said in his written heads of argument that the court below had wide powers to hear any dispute between the employees and the employer as per authority of ***ZCCM Limited Vs Matale***[2]. The court's jurisdiction is not fettered by technicalities. As there was no declared dispute under ***Section 75*** the complaint was properly before the court in terms of ***Section 84(4).***

In reply to the grounds of appeal the learned advocates for the respondent submitted that the court below did not misdirect itself in law when it held that it had no jurisdiction to entertain the appellant's complaint because it was brought under wrong provision of the law. The cited ***Section 85*** related to issues of unfair dismissals, wrongful or unlawful dismissals as clearly stated in the case of ***ZCCM Vs Matale***(supra) and not to disputes under collective agreement. Where an Act provides for a procedure to be followed in a particular matter then failure to do so ousts the jurisdiction of the court. The issue before the court was recognized by the appellants that it was a **"Collective dispute".** The court below properly directed itself when it invoked the provisions of ***Order 14A rule 1 of the Supreme Court Rules 199 Edition.***

On the second ground they submitted that the court below did not err when it held that the issue at hand, which was a Collective Dispute between the parties, ought to have been subjected to a board of conciliation under ***Section 76***. The law therefore ousted court's jurisdiction to entertain this action before the conciliation procedures where exhausted. The respondent were justified to raise the point of law though not pleadec.

On the third ground of appeal the crust of the argument was that ***Sections 75 and 76*** contained mandatory provisions which ought to have been followed in this case. It was further submitted that since the Collective Agreement under which the dispute under consideration arose has ceased to exist, the whole appeal has been rendered academic.

In their supplementary heads of argument they said the parties having included in their Recognition Agreement, an arbitration clause they ought to have referred this dispute for arbitration in terms of ***Sections 9 and 10 of Arbitration Act*** **No. 19 of 2000.**

In support of this argument they cited the case of ***Zambia Sugar Plc Vs Wincho Gumbo***[3].

In his brief reply to the arguments by the respondent's advocates Mr Ndhlovu merely reiterated the argument tha- the dispute was on the unilateral transfer of the accrued gratuity to a Pension Fund and not on the Collective Agreement.

We have carefully considered the arguments both for and against this appeal and also the evidence and judgment appealed against. In our well considered view we find that the main issue on which this appeal rests is whether the

dismissal of the matter as having been commenced under a wrong provision of law was unjustified.

In light of the view we take in this case we wish to concentrate on reviewing the question of whether the case was improperly before the lower court. The argument by the appellant is that ***Section 85 of the Industrial and Labour Relations Act, Cap. 269*** gave wide powers to the court below to entertain any dispute. The learned counsel specifically relied on the construction of ***Sub-Sections 85(1)*** and (4) of the Act. For ease of reference we reproduce them here:

1. ***The Court shall have original and exclusive jurisdiction to hear and determine any industrial relation matters and any proceedings under this Act.***
4. ***The Court shall have the jurisdiction to hear and determine any dispute between any employer and an employee notwithstanding that such dispute is not connected with a collective agreement or other trade union matter.***

The Learned Counsel for the respondent, on the other hand, argued that this action was wrongfully commenced. It ought to have been commenced under ***Part 9 of the Industrial and Labour Relations Act, Cap. 269*** specifically under ***Section 75 and 76.***

Section 75 provides for commencement of actions arising out of a dispute from a Collective Agreement. ***Section 76*** provides for referral of disputes to conciliators before resorting to court process.

The dispute between the parties was over the transfer of the employees' accrued gratuity to a newly introduced Pension Scheme Fund without

agreement. The creation of the Pension Scheme Fund was agreed upon by parties under the **2003 to 2005 Collective Agreement Section 85** gives jurisdiction to the **Industrial Relations Court to adjudicate upon any industrial matters.**

Admittedly disputes arising out of a collective agreement between employees and employers are industrial matters. However in this particular case matters of collective dispute are to be handled in accordance with the provisions of the law under ***Part 9 of the Industrial and Labour Relations Act.***

Looking at the issue at hand in th's case, we have no doubt that it was a dispute emanating from a collective agreement on what was to be done to the accrued gratuity. Further more the action itself was commenced by the General Secretary of the National Union of Plantations and Agricultural Workers (NUPAW).

It is under this Section that the commencement of this action ought to have been brought. We have said before that where a particular statute provides for a procedure to be followed in commencing an action that procedure ought to be followed we wish to repeat here what we said in **New Plast Industries Vs The Commissioner of Lands and another**[4]. This is what we said:
It is not entirely correct that the mode of commencing of any action largely depend on the reliefs sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute.

This is the exact position existing here. It is not correct for the appellants to argue that Section 85 provides for umbrella jurisdiction to the court below to determine issues even if they are commenced under wrong provisions of the law.

The counsel for the appellant argued that should the court be inclined to accept that the commencement of the action was brought under a wrong

provision of the law then the provisions of ***Rule 55 of the Industrial and Labour Relations Act Cap.269*** should be invoked.

The argument sounds plausible but it is not tenable in that the procedure is provided for under the main or principal Act, Rule 55 is a subsidiary legislation. Where the principal Act is in conflict with subsidiary legislation then the principal Act takes precedence over the subsidiary legislation.

We entirely agree with the submissions by the Advocates for the respondent that the court below was justified in dismissing the action because it was wrongly before it. Courts can only be called to adjudicate on matters that are properly before them. The Zulu Vs Avondale Housing Project Limited case did not apply here.

On this ground alone we find that the appeal before us had no merit. We find it unnecessary for us to consider the remaining ground which in fact were in one way or the other related to the first ground which we have just disposed of.

The entire appeal has no merit and it is dismissed. Each party to beat its own costs.

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P.L. Chibesakunda
SUPREME COURT JUDGE

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C.S. Mushabati
SUPREME COURT JUDGE

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T.A. Kabalata
ACTING SUPREME COURT JUDGE