

**IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

APPEAL NO.115/2017

BETWEEN:

FINANCE BANK ZAMBIA LIMITED

Appellant

AND

MIRRIAM MUZEYA

1st Respondent

JANET MWANDUNGA

2nd Respondent

DOROTHY MUSONDA

3rd Respondent

SIYENGENDE MAXWELL

4th Respondent

NKUZI CHIBONI

5th Respondent



Coram: Mchenga DJP, Mulongoti and Siavwapa JJA

On 20th March 2018 and 25th July, 2018

For the Appellant:

Mr.J. Sangwa SC of Simeza, Sangwa and Associates

For the Respondents:

Mr.M. Lisimba of Mambwe, Siwila and Lisimba Advocates

J U D G M E N T

MULONGOTI, JA, delivered the Judgment of the Court

Cases referred to:

1. Standard Chartered Bank v Peter Zulu and others SCZ Appeal No.59/1996
2. Finance Bank v Timothy Kangamungazi SCZ Appeal No.12/2009
3. Zambia National Commercial Bank Plc v Geoffrey Muyamwa and 88 others SCZ Selected Judgment No.37/2017
4. Davies Jokie Kasote v The People (1977) ZR 75
5. Robert Mboneni Simeza and another v Ital Terrazo Limited SCZ Appeal No.194/2009
6. Michael Kahula v Finance Bank Zambia Limited SCZ Appeal No.96/2012
7. Kutalika v Kalunga SCZ Appeal No.70/2013
8. Krishna Priya Ganguly v University of Lucknow(1984) AIR 309
9. Sheikh Abdul Kayum & others v Alibhai and others (1963) AIR 309

Legislation referred to:

1. The High Court Rules Chapter 27 of the Laws of Zambia

This is an appeal by Finance Bank Zambia Limited, (the appellant) from a decision of the High Court which found that the respondents were similarly circumstanced as their former workmate one Timothy Kangamungazi. Consequently, that they were entitled to payment of terminal benefits calculated at the rate of three months basic pay for each completed year served, from the time of joining Standard Chartered Bank up to 1999, when the appellant introduced a contributory pension scheme.

At this stage, it is necessary to say a little about the background of the matter. The respondents were initially employed by Standard Chartered Bank on diverse dates between 1971 and 1981. In 1995, the appellant acquired some branches of Standard Chartered Bank in Kabwe, Mpulungu, Livingstone, Isoka, Chinsali and Mpika.

According to a memorandum issued by the appellant, dated 4th December, 1995, the contract of service between Standard Chartered Bank and the individual employees, had been transferred to the appellant and that there was no need for individual employees to enter into new contracts. Further, that the terms and conditions of service, grade and salaries for unionised staff, remained unchanged.

Later the respondents were retired by the appellant after attaining retirement age of 55. Their retirement took effect on diverse dates between 2005 and 2010. They were paid in accordance with the pension scheme which was introduced by the appellant effective 1st April, 1999.

Dissatisfied with the retirement packages, the respondents commenced legal action for payment of dues from the time they joined Standard Chartered Bank up to 1999, the period not covered by the appellant's pension scheme.

They demanded that they be paid three months' pay for each year served. They contended that some of their former workmates like a Ms. Inutu Mundia and Mr. David Njolomba, were paid the three months pay per year served and since they were similarly circumstanced, they should also be paid in like manner.

At trial, they also alleged that a Mr. Timothy Kangamungazi had also been paid the three months pay per year served for his service with Standard Chartered Bank.

Mirriam Muzeya, who testified as PW1, clarified in cross-examination, that the period for which they should be paid, was from 1995 when they joined the appellant and not from the time they joined Standard Chartered Bank to retirement. She said it was

an oversight that the amended statement of claim stated that it was from the period they joined Standard Chartered Bank.

PW1 also testified that she did not have the full details of Mr. Kangamungazi's contract. She conceded that she did not have personal knowledge of the circumstances under which Ms. Mundia, Mr. Njolomba and Mr. Kangamunguzi left employment.

PW2's (Janet Mwandunga) testimony was that the plaintiffs were claiming payment of three months per year served from 1995 to retirement.

DW1, the appellant's Executive Director Human Resource and Operations, testified that the respondents' accrued benefits were not transferred to the appellant.

The Court heard that the respondents, together with other former employees of Standard Chartered Bank, had sued the Bank in 1995. This was the case of **Peter Zulu and others v Standard Chartered Bank**. The action was commenced in the Industrial

Relations Court (IRC) (now a division of the High Court) which found in favour of the employees. The Court found that by its conduct the respondent (Standard Chartered Bank) had declared the complainants redundant.

DW1 testified that the respondent appealed the IRC decision in the Supreme Court (**Standard Chartered Bank v Peter Zulu and 118 others¹**). By its Judgment dated 13th November 1997, the Supreme Court dismissed the appeal.

It was her testimony that Standard Chartered Bank paid the employees redundancy packages, deferred pension, repatriation fees and leave benefits as ordered by the Courts, as shown by the payment schedule on pages 124 to 125 of the Record of Appeal. The respondents were therefore paid together with their colleagues for the period worked under Standard Chartered Bank.

After they joined the appellant in 1995, they were taken on under the appellant's conditions. In 1999, the appellant introduced a

pension fund. Upon retirement from the appellant, the respondents were paid pension benefits in accordance with the pension fund.

In cross-examination, DW1 conceded that the respondents' contracts of employment were transferred from Standard Chartered Bank to the appellant and that this constituted continuous service from Standard Chartered Bank to the appellant.

After analysing the facts and in arriving at the decision that the respondents were similarly circumstanced as Timothy Kangamungazi, the trial Judge noted that the Supreme Court in the case of **Finance Bank v Timothy Kangamungazi**² observed that:

"Consequent to the acquisition by Finance Bank of select Standard Chartered Bank (Z) Limited branches your contract of service has been transferred to Finance Bank on the following terms and conditions..." "There is no doubt from these correspondence that the services of the respondent with appellant, for the purpose of calculating terminal benefits starts from the time the respondent joined Standard Chartered Bank notwithstanding that he actually physically served the appellant for about seven years before retiring".

The trial Court concluded that the respondents were similarly circumstanced as Kangamungazi and ordered that they be paid three months basic pay from the time of joining Standard Chartered

Bank to 1999, when the appellant introduced a pension contributing scheme.

Disenchanted with the Judgment, the appellant filed five grounds of appeal before this Court as follows:

- 1. The Court below misdirected itself on points of law and facts by holding that the Respondents' contracts of employment with Standard Chartered Bank Plc were transferred from Standard Chartered Bank Plc to the Defendant.**
- 2. The Court below misdirected itself on points of law and facts by finding in favour of the First, Third and Fourth Respondents when none of them attended Court to prove their claims against the Appellant**
- 3. The Court below misdirected itself on points of law and facts by holding that the Respondents were similarly circumstanced as Mr. Timothy Kangamungazi in Cause: Finance Bank Zambia Limited V. Timothy Kangamungazi (SCZ appeal No. 112 of 2009).**
- 4. The Court below misdirected itself on points of law and facts by holding that the Respondents were entitled to the terminal benefits calculated at the rate of three months basic pay for each complete year served from the time of joining Standard Chartered Bank Plc up to 1999, when the Appellant introduced a contributory pension scheme.**
- 5. The Court below misdirected itself on points of law and facts for directing that if there are other dues including allowances that the Respondents had not mentioned, but which are truly due to the Respondents, the same be paid by the Appellants.**

In support of the grounds of appeal, Mr. Sangwa SC, who appeared for the appellant, also filed Heads of Argument.

In grounds one, three and four it is the appellant's contention, mainly, that in the **Peter Zulu Judgment of the IRC**, it was held that the employees were terminated by redundancy and that they be paid a redundancy package. On appeal, by Standard Chartered Bank, the Supreme Court dismissed the appeal and found that conditions of services for Standard Chartered Bank and Finance Bank were different. Thus, the employees would lose out. The Supreme Court also found that there was no transfer of the employees' contracts of service from Standard Chartered to the appellant. Accordingly, that all the employees including the respondents were paid for their service to Standard Chartered Bank. It was therefore, wrong for the trial judge to have found that their contracts were transferred to the appellant. State Counsel argued that this is illogical because, if indeed they were transferred, why were they paid by Standard Chartered Bank? According to State Counsel, the trial judge ignored the **Peter Zulu Judgment**, even evidence regarding that case from PW1.

Thus, it would be unjust enrichment to let the appellant pay the respondents again from the time they joined Standard Chartered

Bank to 1999 when the appellant introduced its scheme. It is contended that the **case of Timothy Kangamungazi**, was decided on agreed facts and the parties settled issues which were disputed and which they wanted the court to decide. That the respondents had previously worked for Standard Chartered Bank was one of the issues agreed upon, therefore, the manner of their transfer from Standard Chartered Bank to the appellant was not a subject of determination by the court below in *casu*.

It is the further submission of Counsel that when the Supreme Court considered **Timothy Kangamungazi case**, the **case of Peter Zulu** was never brought to its attention. Mr. Sangwa, amplified, that the issues canvassed by the trial judge were already considered and determined by the Supreme Court in **Peter Zulu case**, therefore binding on the lower court.

The trial judge therefore, misdirected herself when she relied on the **Timothy Kangamungazi case** to find in favour of the respondents. Mr Sangwa was also of the considered view that just because **Timothy Kangamungazi case** was decided later, it does not follow

that our hands as a Court are tied, because we are now exercising the jurisdiction that was being exercised by the Supreme Court. Both this Court and the Supreme Court then review decisions of the High Court. To stretch the argument further, it is State Counsel's contention that the Supreme Court decision in **Timothy Kangamungazi case** is effectively our decision and we are perfectly at liberty to depart from it, especially in light of the earlier decision in **Peter Zulu**.

At the hearing, the learned State Counsel, orally, submitted that in the recent case of **Zambia National Commercial Bank Plc v Geoffrey Muyamwa and 88 others**³, the Supreme Court dealt with the concept of similarly circumstanced. The Court held that what amounts to similarly circumstanced, is that the affected persons' services were terminated at the same time and in the same manner. And that it applies to cases in the IRC only. In *casu*, there is no evidence that the contracts ended on the same day.

In response to grounds one, three and four, Mr. Lisimba who appeared for the respondents, argued that the law is very clear and

well settled where there are two conflicting judgments. He referred to the case of **Davies Jokie Kasote v The People**⁴ where it was held that where there are two apparently conflicting judgments of the Supreme Court, all lower courts are bound by the latest decision. It is counsel's view, that though the Supreme Court judgment in the **Peter Zulu case** was delivered on 10th November 1997 whilst that of **Timothy Kangamungazi**² was delivered later on 24th November 2009, the outcome could not be the same because the evidence in the latter case was that the contracts were not transferred. Thus, the Court in **Peter Zulu case** had no benefit of the documents in issue unlike the **Timothy Kangamungazi case** and the matter in *casu*. Accordingly, the trial Court was on firm ground when it found, as a fact, that all conditions and terms of service from Standard Chartered Bank were transferred to the appellant. That the **Timothy Kangamungazi** judgment being the latest, upset the decision in the **Peter Zulu case**. It is the further submission of counsel that the similar circumstance of this case and the **Timothy Kangamungazi case** are as observed by the trial judge at pages 32-33 of the Record of Appeal. Furthermore, the argument by the appellant's counsel that at the time it decided the

Timothy Kangamungazi case, the Judgment in the **Peter Zulu case** was never brought to the attention of the Supreme Court, flies in the teeth of the holding in **Davies Jockie Kasote**, supra.

Regarding the **Geoffrey Muyamwa case**, Mr. Lisimba contended that the Supreme Court never stated that similarly circumstanced, meant that the employees must leave at the same time or very minute and through the same door. Additionally, that the fact that the **Industrial and Labour Relations Act** provides for similarly circumstanced in **section 85 (6)** does not preclude a High Court Judge from finding that two employees are similarly circumstanced.

In conclusion learned counsel was of the view that we are bound by decisions of the Supreme Court, as that Court is superior.

The cardinal issue which arises from these grounds (one, three and four) is whether the respondents, who were parties to the **Peter Zulu case** are entitled to be paid three months per year served from the time of joining Standard Chartered Bank to 1999, when the

appellant introduced a pension scheme as held by the trial judge, for being similarly circumstanced as Timothy Kangamungazi.

To put matters in proper context, we refer to the internal memorandum dated 4th December, 1995 from the appellant's Director Operations to its Manager at Livingstone "B", at page 30 of the Record of Appeal. The memorandum was to the effect that the contract of service between Standard Chartered Bank and the individual employee had been transferred to the appellant.

Furthermore, that there was no need for individuals to enter into new contracts of service. On 6th December, 1995 the Director Operations issued a similar internal memorandum to the Managers at Livingstone "B", Monze, Kabwe, Isoka, Chinsali, Mpika and Mpulungu "B". After these memoranda, the employees were not pleased and took out an action against Standard Chartered Bank in the IRC (**the Peter Zulu case**). By its Judgment of 28th December, 1995 that Court found in favour of the employees and ordered that they be paid redundancy packages, deferred pension, repatriation

fees and leave benefits because by its conduct the employer (Standard Chartered Bank) had declared them redundant.

The employer appealed to the Supreme Court. The appellate court upheld the decision of the lower court. As argued by State Counsel, it observed that the contracts of service could not be transferred because employees would lose out as the conditions of service for Standard Chartered and the appellant were different. The respondents who were parties to the **Peter Zulu case** were paid in full for their services to Standard Chartered Bank. It follows therefore, that their contracts were not transferred to the appellant and the memoranda were then superseded by the judgment of the IRC which was confirmed by the Supreme Court. Having been fully paid for their services to that Bank, they cannot be paid by the appellant for the same period they served that Bank. It would be unjust enrichment for them to be paid three months per year served from the time of joining Standard Chartered Bank to 1999 when the appellant introduced the pension scheme.

We are also inclined to agree with Mr. Sangwa that the case of **Timothy Kangamungazi** is distinguishable from the present case. Kangamungazi was determined on agreed facts as appears on page 79 of the Record of Appeal. We note that the issue of the Peter Zulu litigation and its judgments were never raised. The agreed facts focussed on the peculiar circumstances of that case especially termination of the contracts he was engaged on after retirement. Of importance to this case, perhaps, is the fact that Mr. Kangamungazi like the respondents here, joined the appellant in 1995 after the appellant purchased seven branches of Standard Chartered Bank where they previously worked. Kangamungazi worked for the appellant for seven years and was retired in 2003 after he attained the age of 55. He was later re-engaged on a two year contract after his retirement which led to litigation in the **Finance Bank v Timothy Kangamungazi case**, over terminal benefits accrued on the contracts and whether the termination was illegal, unfair and wrongful.

Apart from agreed facts, the parties in Kangamungazi also agreed on points of dispute which fell to be determined by the court as follows:

- "1. ***Whether the plaintiff was in fact appointed as Acting Director of Audit and Inspections after the death of Mr. Mukadam and before the appointment of Mr. Assaddudin.***
2. ***Whether the plaintiff was entitled to anything more than the one month's salary for each year served that he was paid as retirement benefits.***
3. ***Whether for the purpose of Clause 4(viii) in the plaintiff's contract of service the plaintiff in the circumstances had, on the 4th March 2008 decided to litigate when his lawyers wrote a letter of demand to the defendant.***
4. ***Whether the provision of Clause 4(viii) is constitutional as regards the right of individuals to seek legal redress.***
5. ***Whether the termination of contract on the 7th March was illegal, unfair and wrongful."***

Of importance to this matter is the second question, to which the trial judge found that Kangamungazi had served Finance Bank (appellant) for more than ten years based on the afore mentioned memorandum of 4th December, 1995 to the effect that his contract of service was transferred from Standard Chartered Bank to Finance Bank. He was accordingly, awarded three months per year served from the time of joining Standard Chartered Bank. On

appeal, the Supreme Court upheld the High Court decision that based on the memorandum his contract had been transferred. Again, the **Peter Zulu case** was never raised nor brought to the attention of the Supreme Court.

We would therefore, agree with Mr. Sangwa,SC that the trial judge in the present case erred when she ignored the evidence, including the judgments of the **Peter Zulu case**, which were brought to her attention unlike in **Timothy Kangamungazi's case**. It is clear to us that initially, the contracts were transferred to the appellant. However, following litigation in the **Peter Zulu case**, the employees were declared to have been redundant and Standard Chartered was ordered to pay their redundancy packages. It is settled law that redundancy is a mode of termination of employment. This effectively means that the contracts of service with Standard Chartered were terminated and the employees were paid their benefits. The employees therefore, began to serve the appellant on new contracts and conditions in line with the Supreme Court judgment in the **Peter Zulu case**.

After the Judgment in the **Peter Zulu case**, the memoranda which stated that the contracts were transferred to the appellant were superseded and of no effect. It is clear that the **Timothy Kangamungazi case** was decided on the basis that the memoranda transferred the contracts of service from Standard Chartered to the appellant. However, the **Peter Zulu case**, which held that the respondents were declared redundant, in effect superseded the memoranda, was never brought to the attention of the Courts in **Timothy Kanagamungazi case**. Such that the fact that the respondents including Kangamungazi, were declared redundant and paid redundancy packages, deferred pension, repatriation fees and leave pay, was not an issue in that case.

The respondents were paid in full for their service to Standard Chartered Bank up to 1995 when they joined the appellant as shown on pages 124 to 125 of the Record of Appeal. The trial judge erred when she found in their favour based on the **Timothy Kangamungazi case**.

Regarding the argument that the respondents were similarly circumstanced as Kangamungazi, we are again inclined to agree with State Counsel. As aforestated, the **Timothy Kangamungazi case** was not dealt with in the same way as the present case. Additionally, in the **Geoffrey Muyamwa case**, supra, the Supreme Court elucidated that similarly circumstanced entailed that the affected employees were terminated at the same time and in the same manner. Though the respondents and Kangamungazi were declared redundant for their services to Standard Chartered Bank, they did not leave at the same time and circumstances are different. Whereas Kangamungazi retired in 2003 he was later re-engaged on contract, the respondents retired on divers dates between 2005 and 2010. Guided by the **Geoffrey Muyamwa case**, we find that they were not similarly circumstanced as Timothy Kangamungazi.

For the foregoing we allow grounds one, three and four. However, we hasten to add that the respondents are entitled to be paid from the date they were paid redundancy package in 1995 to the date in 1999 when the appellant introduced the pension contributory scheme.

In ground two, Mr. Sangwa, SC argued that only two of the five respondents gave evidence in support of their respective claims.

However, the trial Judge found in favour of all the five plaintiffs (respondents). It is counsel's view that this was wrong because the action was not a representative action. At the minimum, the plaintiffs, if they wanted the action to be a representative action, should have appointed one person to prosecute the case on his own and on behalf of the other four. Citing **Order 14 Rule 3 of the High Court Rules**, which provides that one person may be authorised to sue or defend on behalf of all interested parties, it is argued that there was no evidence either in writing or orally to suggest that PW1 and PW2 were authorised to sue on behalf of the others. Additionally, that **Order 14 Rule 1 of the High Court Rules** requires that if a plaintiff is suing in a representative capacity, the writ must expressly state so.

In this case, the writ shows that the plaintiffs sued in their own right. Thus, each and every one of them had the responsibility to prove their respective claims.

In response, Mr. Lisimba submitted that in our jurisdiction and the whole of the Commonwealth, there is no law that states that a party to a case must always personally adduce evidence. If that were the case, it would pose a great absurdity in matters where companies are sued or sue. He cited as authority the case of **Robert Mboneni Simeza and another v Ital Terrazo Limited**⁵, in which Mwanamwambwa JS (as he then was) stated:

"at law, anybody can be a witness for a company or indeed any litigant. He can be such a witness either as a deponent of an affidavit or in oral form. What matters mostly is that he should have personal knowledge of facts he is testifying on"

Thus, the trial judge properly heard and received evidence given on behalf of the affected respondents. The 1st respondent adduced evidence on her behalf and on behalf of the rest of the respondents. Then the 2nd respondent buttressed the evidence of the 1st respondent.

Furthermore, that it is not in dispute that the respondents in this matter were similarly circumstanced as Mr. Kangamungazi and are entitled to be paid as guided in that case. It was the further submission of counsel that DW1 confirmed that the respondents were not paid anything for the period before 1999 and as such, these were accrued rights which could not be taken away.

Reliance was placed on the case of **Michael Kahula v Finance Bank Zambia Limited**⁶, where the Supreme Court held as follows:

"However, in our view...the evidence establishes that the duo was paid in that manner because prior to the establishment of the Pension Scheme, the respondent used to pay its separated employees three months basic salary for each year served..."

"In any case, we cannot agree with counsel for the respondent's position that the appellant was not entitled to any benefits for the period before the introduction of the Pension Scheme. ...Evidence establishes that those that separated from the respondent prior to the introduction of the Pension Scheme were paid benefits albeit on the basis of the minimum wages and Conditions of Employment Order. We do not think it is tenable at law to argue that the introduction of the pension scheme wiped away all the benefits that had accrued to the appellant for the period he worked for the respondent from 1988 to 1999. Although RW2 testified, under cross-examination, that employees who worked for the respondent, prior to the introduction of the pension scheme but retired after the pension was introduced, were not paid anything because the respondent had not come up with the criteria for the making of such payments, we hold the strong view that the appellant cannot

be denied his benefits on the basis of the respondent's own failure to come up with a way of computing his entitlement. In the absence of the criteria, we are of the considered view that the most equitable way of computing the appellant's benefits, for the period 1988 to 1999, was by using the formula that was applicable prior to the introduction of the pension."

We note that some of the arguments by the respondents here apply to ground three as well which we have already dealt with. We have found that the respondents are entitled to be paid from the date in 1995 that they were paid redundancy packages to the date the pension was introduced in 1999. We order that they be paid at three months per year served for that period.

We must also state from the outset that the position of the law regarding representative actions is as stated by Mr. Sangwa. Our perusal of the record shows that the 1st and 2nd respondents who testified as PW1 and PW2 did not indicate that they were testifying on behalf of the other three. Neither was the writ issued as a representative action. In this regard, ground two succeeds. This therefore means that only the 1st and 2nd respondents are entitled to be paid from 1995 (from date redundancy package was paid) to 1999 (date pension was introduced).

We now turn to ground five. It is the appellant's contention here that the trial judge misdirected herself on points of law and facts, for directing that if there are other dues including allowances that the plaintiffs have not mentioned, but which are truly due to them, they be paid. It is submitted, that there is no legal basis for the court to make such a directive.

Relying on the Supreme Court decision in **Kutalika v Kalunga**⁷, to the effect that a Judge cannot grant a relief which a party has not sought or which is more than he sought, it is contended that the court erred in granting the respondents other allowances they had not mentioned.

State Counsel also cited the Supreme Court of India decisions in **Krishna Priya Ganguly v University of Lucknow**⁸ and **Sheikh Abdul Kayum & others v Alibhai and others**⁹, to illustrate this same position of the law.

In conclusion, it is submitted that although there is a generic claim for "**payment of all dues including allowances up to the time of**

severance," it was for the respondents to, firstly, identify what these dues are and prove that they are in fact due to them.

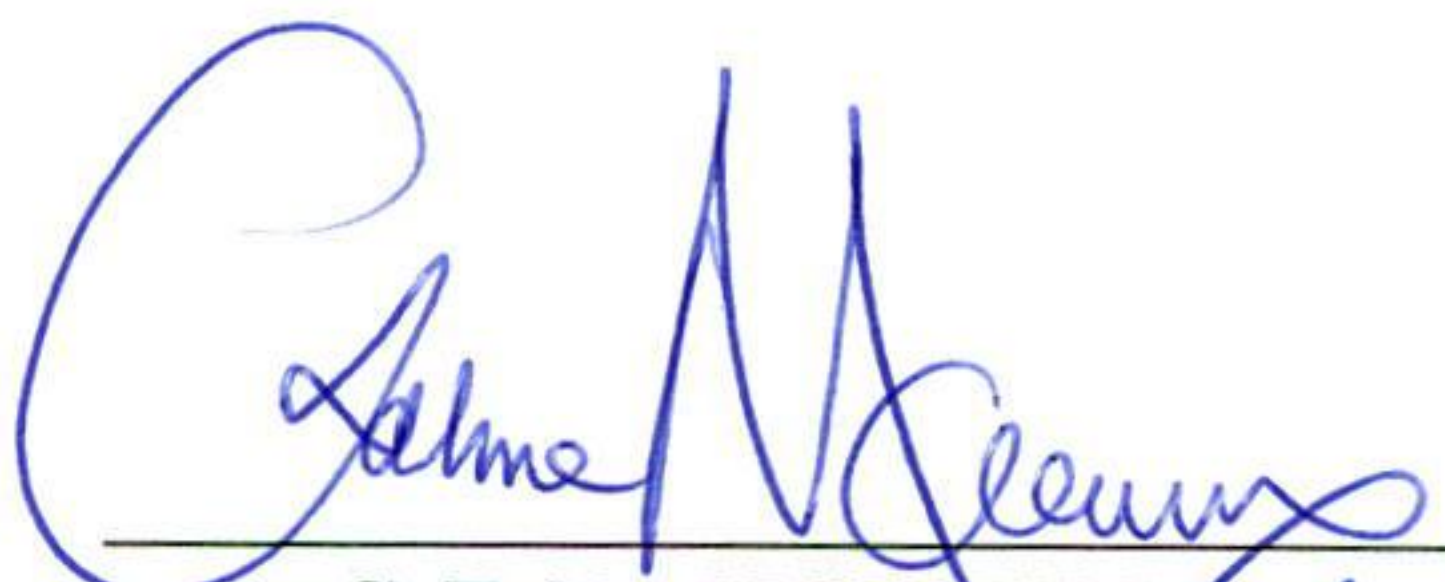
In the absence of such proof, it was arbitrary and abuse of its authority for the Court to have directed that the respondent be paid the other dues that they never mentioned.

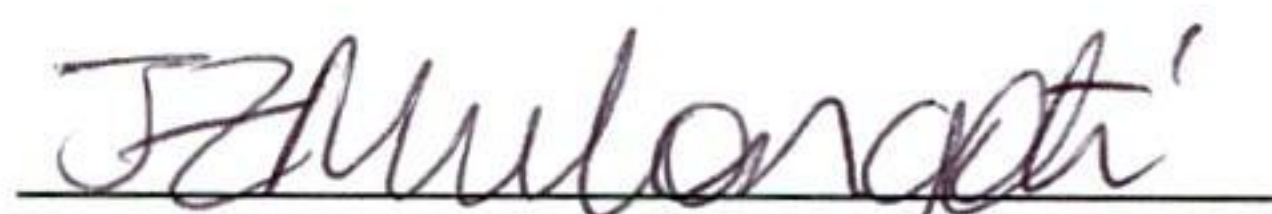
The respondents counsel is contending, in ground five, that in the amended statement of claim, the respondents prayed for payment of all dues including allowances up to severance. Therefore, the trial judge was on firm ground in deciding that the respondents must be paid all dues claimed including allowances not specifically mentioned but rightly due to them.


Having perused the record, we note that the respondents did not adduce any evidence as regards allowances due to them on severance. Their case at trial centred around payment of three months pay per year served. The claim for allowances was not substantiated. We therefore agree in *toto* with State Counsel and authorities cited, that the judge misdirected herself when she

directed that the respondents be paid other dues and allowances they have not mentioned but are truly due to them. As alluded to, and canvassed by the appellant's counsel, it was for the respondent to first identify what these dues are and prove that they are entitled to them. The respondents failed to do so. Ground five is also equally allowed.

In the net, the appeal substantially succeeds, except as ordered that the 1st and 2nd respondents be paid from 1995 (from date of payment of redundancy package) to 1999 (date of introduction of pension contributory scheme). We award costs in this Court to the appellant, to be taxed in default of agreement.


C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT


J.Z. MULONGOTI
COURT OF APPEAL JUDGE


M.J. SIAVWAPA
COURT OF APPEAL JUDGE