IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.238/2013**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ZCCM INVESTMENTS HOLDINGS PLC **APPELLANT**

AND

MUYANGWA MUFALALI AND 141 OTHERS **RESPONDENTS**

CORAM: Mwanamwambwa DCJ, Hamaundu, Kabuka, JJS
On the 7th June, 2016 and 12th April, 2017.

FOR THE APPELLANT: Ms. G. Ndovi, Messrs. John Kaite & Company.

FOR THE RESPONDENTS: Mr. Z. Muya, Messrs. Z. Muya & Company.

JUDGMENT

Kabuka, JS, delivered the Judgment of the Court.

Cases referred to:

1. Zambia Consolidated Copper Mines Limited v. Jackson Munyika Siame and Others (2004) Z. R. 193.

2. J.Z. Car Hire Limited vs. Chaila and Scirocco Enterprises Limited SCZ No. 26/2002).
3. Phillip Mhango v Dorothy Ngulube (1983) Z.R. 61.
4. Khalid Mohamed v Attorney-General (1982) ZR 49.
5. JK Mpofu v Impregilo Rechi (Zambia) Limited and Goodwin Mingandi (1979) ZR 5 (HC).
6. Times Newspapers Zambia Limited v Kapwepwe (1973) Z.R. 292.
7. Grieve Z. Sibale v Attorney General (2012) Vol.3 ZR 308.
8. Barclays Bank Zambia Plc v Zambian Union of Financial Institution and Allied Workers (2007) ZR 106.
9. Godfrey Miyanda v The High Court (1984) Z.R. 62 (S.C.).
10. Water Wells Limited v Wilson Samuel Jackson (1984) Z.R. 98 (S.C.)
11. Zambia Revenue Authority v T & G Transport SCZ No. 2/2007.
12. Boart Longyear (Zambia) Limited v Austin Makanya SCZ No. 9/2016.

Legislation and Other Works referred to:

1. The Industrial and Labour Relations Act Cap. 269 S.85 (3); (5).
2. The Industrial and Labour Relations Amendment Act No. 8 of 2008.
3. Stroud's Judicial Dictionary, 5th Edition, Volume 1 at page 151.

This is the appellant's appeal against a judgment of the Industrial Relations Court dated 22nd August, 2013 which awarded each of the respondent's damages in the sum of K15, 000.00. The award was made in lieu of furniture the respondents claimed they were entitled to receive under their 1994-1995, G10 revised conditions of service, but which their employer, did not deliver to them.

In the court below, the respondents in this appeal were the complainants while the appellant was the respondent. For convenience, we will in this judgment, continue referring to the parties by their said designations.

The complainants were employees of the respondent and were all serving as Frontline Supervisors in grade, G1. By letters dated 8th July, 1994 the respondent advised the complainants that they had been integrated into a newly introduced senior staff grade, G10. The letter further stated that they would, accordingly be advised of their enhanced conditions of service on completion of an evaluation exercise which was being undertaken.

On 12th June, 1995, the newly introduced grade G10 position was abolished with no changes having been effected to any of the complainants' conditions of service.

Subsequently, the complainants came to learn that, some of their workmates who were in the same G1 grade in fact had their conditions improved, following the receipt of letters similar to those received by the complainants, dated 8th July, 1994. Armed with that information, the complainants on 18th November, 1998 filed a complaint before the Industrial Relations Court (IRC), against their employer, Zambia Consolidated Copper Mines Limited (ZCCM) as 1st respondent. Zambia Investments Holdings Plc, is the successor in title to the said ZCCM. The complainants also sued Zambia Privatisation Agency (ZPA), as the 2nd respondent.

The complaint was brought on the ground that between 8th July, 1994 and 12th June, 1995 the respondent had integrated the complainants' conditions of service, along with others, from the previous G1 grade into a new Senior Staff grade known as G10. Following this integration, the complainants' conditions of

service in relation to salaries, other emoluments and fringe benefits, also changed. Hence, the complainants' claims for payment of: ***(i) salary arrears in the quantified total sum of K247,104,000.00 with interest at current bank rate; (ii) undelivered basic furniture or its value, along with other attendant benefits; (iii) damages for inconvenience; (iv) any other relief the court would deem fit; and costs.***

The matter was initially heard by a Coram of the IRC (the *'trial Coram'*). In its judgment dated 28th March, 2003 the *trial Coram* found that the evidence led had, on a balance of probabilities, established that the complainants were between 8th July, 1994 and 12th June, 1995 incorporated into the newly introduced senior staff grade known as G10, from their previous positions of G1. It also found the complainants' conditions of service did provide for furniture and ordered that, those of the complainants who did not benefit from this condition, "be given the award in percentage terms, equal to that which was allowed by the conditions of service, in lieu of furniture." The *trial Coram* further directed that there be an assessment, "by the Learned Deputy Registrar in order to determine what these percentages

amounted to." The claim for damages for inconvenience was rejected; and the *trial Coram* found the case was not proved against the 2nd respondent, ZPA.

Dissatisfied with the judgment, the respondent filed an appeal, but this appeal was later dismissed for want of prosecution. The complainants were thereby left at liberty to proceed to apply for assessment of damages, as directed in the judgment of the *trial Coram* dated 28th March, 2003, which they did on 10th October, 2007.

After hearing the evidence on assessment, the Deputy Registrar, in his judgment delivered on 12th October, 2010 found that the increment relating to the enhanced G10 conditions of service was applied across the board at the rate of 17 % of each complainant's subsisting G1 salary. He accordingly ordered that, the amount due on salary arrears should be computed on a formula calculated at each individual complainant's G1 salary + 17% + leave days+ interest at 20% from the date of filing the complaint to the date of judgment. Thereafter, interest was to accrue at 6% per annum.

The learned Deputy Registrar also found that, the complainants' conditions of service did provide for entitlement to furniture and accepted the following list, which was produced by the complainants as constituting this entitlement:

1x 3 piece lounge suite
1x fridge
1x 4 plate cooker
1x 6 piece dining suite
2 x single beds and mattresses
1x dressing mirror
1x coffee table

The Deputy Registrar considered submissions from learned counsel for the respondent to the effect that, as the complainants were Frontline Supervisors, they had all received their furniture and should not be allowed to benefit twice from this entitlement. The Deputy Registrar bemoaned the fact that, both parties had failed to produce any document to support their respective cases which could have assisted him ascertain whether or not, the complainants had already benefited from the condition providing for entitlement to furniture.

The Deputy Registrar then resolved the issue on the basis that, the respondent did not strongly rebut the complainants' claim alleging the furniture was not issued to them, on their improved conditions of service. He accordingly proceeded to order that, 'in the event some of the complainants were not given furniture, the respondent should deliver the said furniture in the quantities indicated on the list provided to the Court'. In the alternative, the Deputy Registrar echoed the finding of the *trial Coram and* directed the respondent, *'to pay in percentage terms, those of the Complainants who did not benefit from the condition of service allowing for furniture, the value equivalent of this furniture.'*

Following the judgment on assessment, the parties engaged in discussion which culminated in settlement of the issue relating to salary arrears and on the basis of which the respondent paid the complainants the amounts which were found to be due to them.

The parties however failed to similarly resolve the issue of entitlement to furniture and on 11th July, 2012 the complainants,

filed an application for leave to appeal that portion of the judgment on assessment, out of time. This application which was contested by the respondent, was heard by another Deputy Registrar of the IRC, who, in a ruling delivered on 13th November, 2012 declined to grant the complainants the leave they were seeking on grounds that, the delay to bring the application of over two years was inordinate and inexcusable. The complainants appealed this ruling on 13th February, 2013.

The grounds of appeal, however, disclose that the complainants instead of addressing the ruling declining them leave to appeal, proceeded to pursue the matter as though leave to appeal had been granted to them. As a result of this approach, the complainants' grounds of appeal were actually against the judgment on assessment that had been delivered by the Deputy Registrar, two years earlier on 12th October, 2010, instead of the ruling of 13th November, 2012, which declined them leave to appeal. The grounds of appeal were stated as follows:

1. *The Learned Deputy Registrar erred in law and fact when he did not specify the amount to be paid to the Complainants in lieu of furniture.*

2. *The Learned Deputy Registrar erred in law and fact when he ordered that in the event some of the Complainants were not given furniture, the Respondent makes available the said furniture in the quantity stated by the Complainants or in the alternative that they be given the award in percentage terms equal in value to that which was allowed by the condition of service, in lieu of furniture.*

In view of this 'apparent' anomaly, the matter proceeded to be heard as an appeal against the judgment of the Deputy Registrar on assessment, dated 12th October, 2010; instead of an appeal declining them leave to appeal out of time, which it in fact was. Another Coram of the IRC heard this appeal (hereinafter referred to as the '*appeal Coram*').

In his submissions at the hearing of the appeal by the '*appeal Coram*' of the IRC, the thrust of the arguments by learned counsel for the complainants was that, the Deputy Registrar in his judgment on assessment, did not state a definite sum to be awarded to the complainants, in lieu of furniture. That the duty to calculate the exact amount was left to the respondent. In the premises, the complainants feared that the respondent was likely to come up with a figure favourable to itself, which in turn, might fall short of their expectations. Counsel's submissions were further that, the Deputy Registrar should have directed his mind

to the market value of the furniture which had considerably increased at the time he was delivering his judgment on 12th October, 2010; as compared to the price obtaining in 1994-1995 when, according to counsel, the complainants' entitlement to the furniture in issue accrued to them.

Counsel referred to rule 55 of the Industrial and Labour Relations Rules which states that, nothing in the rules should limit the power of the court to make such orders as may be necessary to meet the ends of justice. He also referred to the case of **ZCCM v Munyika Siame and Others**[1] in which we held that, the Industrial Relations Court has a mandate to administer substantial justice unencumbered by rules of procedure. Counsel then, proposed K15,000.00 which he referred to as a 'conservative' sum, to constitute the award 'in percentage terms' that was ordered by the *trial Coram* in its judgment dated 28th March, 2003 and which was echoed in that of the Deputy Registrar, on assessment.

The arguments of learned counsel for the respondent on the complainants' submissions were that, the real reason both the

trial Coram and Deputy Registrar failed to order specific amounts due to each of the complainants was in fact on account of the complainants' failure to prove their said claim. In the event, that the Deputy Registrar was correct in not stating the quantity of furniture in his judgment on assessment, as the matters were not ascertainable. The Deputy Registrar found there was no evidence led to tilt the balance of probability in the complainants' favour. Hence, ending his ruling with the observation that:

> *"However, in the event that some of the Complainants were not given furniture, I order that the Respondents makes available the said furniture in the quantity stated above by the Complainants or in the alternative be given the award in percentage terms equal in value to that which was allowed by the condition of service in lieu of furniture."*

The *appeal Coram* rendered its judgment on appeal dated 22nd August, 2013 in which it was observed that, the starting point in their view; was the effect of the order in the judgment of the *trial Coram* dated 28th March, 2003 which directed assessment to be done, in the following words:

> *"With regard to undelivered furniture we order that those who did not benefit from this condition be given the award in the percentage terms, equal to that which was allowed by the conditions of service in lieu of furniture."*

In the view taken by the *appeal Coram,* the order as quoted above directed that the awards be ascertained by the Deputy Registrar to determine what they amounted to. Reference was made to the evidence on which the *trial Coram* had considered in determining that the amounts claimed were due to the complainants, as appears at page J3 of the judgment of the *trial Coram* dated 28th March, 2003. The *'appeal Coram'* quoted the following testimony of the 1st complainant, Muyangwa Mufalali:

> *"When referred to the Respondent's letter of 8th July, 1992 an adjustment to conditions of employment and service,* ***Frontline Supervisor- Supervisor ANALAB-SG.1*** *and asked about furniture, he stated that in pursuance to that letter he had been issued furniture but that the furniture was subsequently sold to him when the condition providing basic furniture was abolished. He said that what he and his fellow Complainants were asking for is that they be given the conditions of service between the time they were given this letter moving them to G.10 and when it was abolished. Under re- examination he stated that nobody negotiated conditions for him and his colleagues. He said he fell in the same category with Mr. Kampilimba and that the date of the letter filed into Court on furniture was 8th July 1992 while the case they brought to Court was for the consideration of the period 8th July 1994 to 12th June, 1995."*

The *'appeal Coram'* went on to note that, the *trial Coram* had also considered the evidence of the 2nd complainant and;

"he stated that he was not sure of the year but furniture issue to senior staff had been abolished."

After looking at the evidence as quoted above, the '*appeal Coram*' was of the further view that, the furniture in issue related to the period between 8th July, 1994 to 12th June, 1995; when the complainants were integrated into the Senior Staff grade G10 from their previous G1. In this context, it was the understanding of the '*appeal Coram*' that, when the *trial Coram* stated in the first part of its finding that: *"those who did not benefit,"* it was referring to the complainants' group, as distinguished from any other employee of the respondent company. They also understood the rest of statement: *"in percentage terms, equal to that which was allowed by the conditions of service in lieu of furniture"* to mean that, the complainants could be paid a sum of money equal to the value of the furniture to which they claimed they were entitled.

Consequently, notwithstanding there was evidence that the condition of entitlement to furniture was in fact abolished prior to the period in issue (8th July, 1994 to 12th June, 1995); the '*appeal Coram*' found that the complainants were entitled to

delivery of further furniture, for this one year period. Their observation was that, considering the nature of employment relationships; it was unrealistic to expect an employee to produce documents to show he is entitled to certain conditions; as such documents, would ordinarily be expected to be in the custody of the employer.

The *'appeal Coram'* acknowledged that the complainants did not adduce evidence which would have enabled the Deputy Registrar make an informed assessment of the value of the furniture. Citing the case of **J.Z. Car Hire Limited vs. Chaila and Scirocco Enterprises Limited**[2], they affirmed the settled legal position that, it is for the party claiming damages to prove them; notwithstanding failure of any defence put up by the opponent. The *appeal Coram* however, proceeded to note that, in order to avoid passing a judgment which was of no effect, in circumstances where it is clear that a party is entitled to some damages; the courts are at liberty to make some intelligent/ inspired guesses and cited the case of **Phillip Mhango vs Dorothy Ngulube**[3].

Proceeding from that premise, the '*appeal Coram*' considered the market value of furniture, at the time of hearing the appeal against the figure of K15,000.00 damages proposed by counsel for the complainants. In the view of the *appeal Coram*, this amount was indeed '*conservative*' as submitted by counsel and each of the complainants was accordingly awarded the sum of K15,000.00 in lieu of undelivered furniture. The award was to carry interest at 6% per annum from the date of judgment until final payment. The complainants were also awarded costs of the appeal.

The respondent now appeals that judgment to this court, on two grounds:

1. **That the Court below erred in law and in fact when it awarded the sum of K15,000.00 in lieu of furniture which the Complainants claimed in the absence of evidence to justify the award.**
2. **The Court below erred in law and in fact when it heard the appeal on assessment from the Deputy Registrar of the Industrial Relations Court when appeals from judgments on assessment, lie to the Supreme Court.**

When the matter came before us for hearing of the appeal, counsel for the respondent relied on written heads of argument

which they had filed into court, on 23rd December, 2013; while counsel for the complainants relied on theirs which were filed with leave of the court, at the hearing of the appeal.

The gist of the respondent's submissions on ground 1 was that, the judgment of the *trial Coram* of the IRC had ordered assessment directing that, those of the complainants *"who had not benefited from the condition of service entitling them to be given furniture be given an award in percentage terms equal to that which was allowed by the conditions of service."* Counsel further argued that, in the absence of proof from the evidence led, either at trial or during assessment, to enable the learned Deputy Registrar make an informed decision on the value of the furniture; the Coram of the IRC that sat as an appeal court erred in law and on the facts; when it found the complainants were each entitled to the sum of K15,000.00; based purely on the assumption that it was clear the complainants were entitled to some damages.

Counsel also argued that, the case of *Phillip Mhango vs Dorothy Ngulube* on which the court based its judgment, applied

to a situation, where it was clear the party was entitled to some damages. That in the present appeal, it is not clear whether the complainants were indeed entitled to any damages or undelivered furniture; for the Deputy Registrar to have made any kind of a 'guess' on the quantity; type of furniture that was owed; and to whom it was actually owed. Counsel further argued that, the *'appeal Coram'* wrongly interpreted the judgment of the *trial Coram* dated 28th March, 2003.

His submission was that, the interpretation given in the judgment of the *'appeal Coram'*, dated 22nd August, 2013 regarding who amongst the complainants was in contemplation of the *trial Coram* owed furniture, is therefore incorrect. That the judgment was clear as the *trial Coram* was of the view that, some of the complainants had in fact received furniture, contrary to the interpretation that was given by the *'appeal Coram'*, that all of them did not receive the furniture.

It was also counsel's argument that, the entire Record of Appeal shows there was no evidence adduced at all, as to what constituted the G10 conditions of service. The only evidence

tendered at trial, disclosed the condition on entitlement to furniture was restricted to the G1 conditions of service.

Whilst acknowledging that the appeal of the respondent against the judgment of the *trial Coram* of 28th March, 2003 was not prosecuted and ended up being dismissed for want of prosecution, Counsel still argued that, in keeping with the same judgment, which directed that an assessment be undertaken of how much furniture was owed, and to whom it was owed facts were required and not guess work, as the *'appeal Coram'* in the court below attempted to do. In this regard, counsel went into great detail to distinguish the facts of the present case from that of *Phillip Mhango v Dorothy Ngulube* relied on by the *'appeal Coram'* to support the award of K15,000.00.

The arguments by Counsel were to the effect that, in the *Phillip Mhango* case, the facts were that, the appellant's motor vehicle had run into that of the respondent. The subject matter of assessment was the respondent's vehicle. Clear evidence was led in relation to the make of the respondent's vehicle, its cost, date of purchase and period of ownership. In the circumstances, it

was possible for the court to form 'an intelligent guess,' to place the damages due to the respondent at a little more than the initial cost of the vehicle, less the salvage value, after the accident.

Counsel further argued that, unlike the facts of that case, the issue in the present appeal was not insufficient evidence but one of no evidence, at all, having been adduced by the complainants before the Deputy Registrar. In the premises, that the Deputy Registrar was on firm ground in failing to make an award for damages or actual furniture as the complainants had failed to prove their case on assessment. Counsel' s submissions were that, the complainants who had failed to prove their entitlement to furniture in accordance with G10 conditions of service, were not entitled to such damages. He cited as authority for the submission, the case of **Khalid Mohamed vs Attorney-General[4].**

We were accordingly urged to reverse the finding of the *'appeal Coram'* as well as the order of costs made against the

respondent, both on assessment and on appeal before the *'appeal Coram'*.

The argument on ground 2 was that, by reason of the matter having already been conclusively dealt with by the *trial Coram,* through its judgment dated 28th March, 2003 followed by one on assessment of damages dated 12th October, 2010. The *'appeal Coram'* in the court below was *functus officio* to hear, determine, and render a judgment on appeal dated 22nd August, 2013 from the assessment of damages. That the two judgments rendered by the *trial Coram* and on assessment directed by it, were for all intents and purposes to be treated as one whole complete judgment. The High Court case of **JK Mpofu v Impregilo Rechi (Zambia) Limited**[5] and a decision of this court in **Times News Papers Zambia Limited vs Kapwepwe**[6], to that effect, were relied upon.

In conclusion, counsel's submissions were that, there is no law allowing one Coram of the Industrial Relations Court to interpret a judgment of another Coram of the same court, as was purportedly done in the judgment on appeal dated 22nd August,

2013, now subject of the present appeal before us. Counsel accordingly prayed that the judgment be set aside.

In his response to the submissions on ground 1, learned counsel for the complainants contended that, it was clear the complainants were entitled to furniture and the *'appeal Coram'* was on firm ground when it awarded each one of them K15, 000. 00 in damages. Counsel argued that, the issue which was to be resolved by the Deputy Registrar during assessment was not whether the complainants were entitled to furniture or not, but rather, the amount to which they were entitled. That the appellant intentionally withheld evidence which could have shown who amongst the complainants was entitled to furniture, in order to deprive the complainants of their entitlement to the said furniture.

It was counsel's further argument that, where there is a lacuna in the evidence, the court must find in favour of the party not responsible for it. He relied for the proposition, on the case of **Grieve Z Sibale v Attorney General**[7]. The submissions in this regard were that, whilst the complainants concede not all of them

were entitled to furniture, the lower court was still on firm ground in finding in their favour. That there was nothing precluding the court from making an intelligent and inspired guess as to the value of the furniture owed and the case of *Dorothy Ngulube v Phillip Mhango,* was again cited as authority.

The arguments on ground 2, were that, the appellant had waived its right to challenge the jurisdiction of the *'appeal Coram'*, to adjudicate upon the appeal on assessment. That it did so firstly, by not raising the issue of want of jurisdiction when the matter came up on appeal. Secondly, that as the appellant argued the appeal before the *'appeal Coram'*; it was deemed to have consented to the jurisdiction. Citing the case of **Barclays Bank Zambia Plc v Zambian Union of Financial Institution and Allied Workers[8],** Counsel accordingly submitted that, an issue not raised in the court below cannot be raised for the first time on appeal.

He went on to distinguish the present case from the case of *J.K Mpofu v Impregilo Recchi (Zambia) Limited and Another,* relied on by counsel for the respondent. He pointed out that, whereas

the said case involved the Deputy Registrar of the High Court, the present case involves a Deputy Registrar of the Industrial Relations Court. That unlike the High Court which is bound by rules of procedure, the Industrial Relations Court is not so bound. Counsel referred us to a decision of this court in the case of *Zambia Consolidated Copper Mines Limited v Jackson Munyika Siame and Others* and his submission was that, it was wrong at law, to extend rules of procedure which apply to the High Court to the Industrial Relations Court.

Counsel concluded by reiterating his submission that, the IRC had jurisdiction to hear the appeal from the Deputy Registrar. That it was on firm ground when it awarded each of the complainant's damages in the sum of K15, 000. 00 in lieu of furniture; and on that account, this appeal should be dismissed in its entirety.

We have considered the arguments and submissions, as well as the authorities referred to by counsel on both sides. In our view, this appeal rests on the determination of the *'jurisdiction'* issue raised in ground 2. For convenience, we

propose to first deal with this ground after which we will then proceed to consider ground 1 of the appeal.

Ground 2 questions the jurisdiction of the IRC to sit and hear an appeal emanating from an assessment by the Deputy Registrar which was directed in a judgment delivered by another Coram of the same court.

In arguing that the Industrial Relations Court had jurisdiction to hear the appeal, learned counsel for the complainants proceeded on the basis that there was submission by the respondent to the jurisdiction of the *appeal Coram* and the issue of jurisdiction was not raised, at the hearing.

In considering the meaning of the term jurisdiction, this court in the case of **Godfrey Miyanda v The High Court**[9] had this to say:

> **"The term "jurisdiction" should first be understood. In one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognisance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation. Such limits may relate to the kind and nature of the actions and matters of**

which the particular court has cognisance or to the area over which the jurisdiction extends, or both."

In deciding the question of whether there was jurisdiction by one Coram of the court below to hear an appeal from a judgment emanating for all intents and purposes from another Coram of the same court and of equal jurisdiction; we wish to observe that, this question arises in relation to an appeal. That in a hierarchical court system such as obtains in this country, it is a trite legal position, that an appeal serves the purpose of allowing a litigant to take his grievance to forum which is higher than the one that originally heard the matter and so on, as permitted by the relevant laws. According to **Stroud's Judicial Dictionary, 5th Edition, Volume 1 at page 151,** an appeal affords a party aggrieved with a decision of a court:

"the right of entering a superior court and invoking its aid and interposition to redress the error of the court below."

The decision that was appealed against in the case in *casu* is an assessment of damages by a Deputy Registrar which he was directed to hear, in a judgment delivered by a Coram of the Industrial Relations Court, that originally heard the matter.

The issue as to where appeals on assessment from Registrars generally lie, arose for consideration in the High Court case of *Times Newspapers Limited v Kapwepwe,* also referred to by learned counsel for the complainants when he argued that, the IRC was not bound by High Court Rules. In that case, a decision of the learned Deputy Registrar of the High Court on assessment of damages was appealed directly to this court instead of directing it to a High Court Judge in Chambers. The procedure adopted was in apparent violation of the provisions of the High Court Rules Order 30 rule 10 (1) the relevant part of the states in very general terms that:

> **"10.(1) Any person affected by any decision, order or direction of the Registrar may appeal therefrom to a Judge at Chambers."**

As a result of that direct appeal from the Deputy Registrar to a Judge, the need to deal with the issue of the procedure for appealing decisions on assessment arose. Practice Direction No. 1 of 1979 was accordingly put in place for the guidance of Practitioners. This Practice Direction (PD) is to the effect that, notwithstanding the provisions of Order 30 rule 10 which

provides for appeals from Registrars to lie to a Judge at Chambers; appeals from a Registrar/Deputy Registrar on assessment of damages, lie directly to the Supreme Court.

When the question next arose in the case of **Water Wells Limited v Wilson Samuel Jackson**[10], that position was further clarified in the following observation:

> **"(i) Order 30 r. 10 of the High Court Rules confers a right of appeal from a Registrar to a Judge at Chambers, but by Practice Direction No. 1 of 1979, appeals against the assessment of damages by a Registrar lie direct to the Supreme Court."**

In the more recent decision, **Zambia Revenue Authority v T & G Transport**[11] it was again held that:

> **".....since all appeals from the learned Deputy Registrar's orders on assessment of damages lie to this court (Supreme Court). If the learned Deputy Registrar had rejected the application for leave, then the appellant should have applied to this court for leave."**

The reason for this approach was explained in the case of *Times News Papers Zambia Limited vs Kapwepwe* earlier referred to and also relied on by learned counsel for the respondent. He

argued that, O.30 rule 10 and apparently, PD No.1 of 1979 do not apply to this appeal which originated from an assessment by a Deputy Registrar of the IRC. That as a court of substantial justice, the IRC is unrestrained by rules of procedure. In addressing the arguments by learned counsel, we can only echo the *ratio decidendi* of this Court as expressed in the case of *Times News Papers Zambia Limited vs Kapwepwe,* that a judgment on assessment is in essence, the judgment of the trial court, as the direction on assessment proceeds from it. It was accordingly to be understood as *'one whole complete judgment' of* ***'the court'***. This is the reason, that an appeal from the assessment of a Deputy Registrar which is generally considered as a complete judgment of the High Court, lies direct to the next Court of higher jurisdiction which at the time, was the Supreme Court.

Proceeding from that premise and in addressing the further arguments by learned counsel for the respondent, that O.30 rule 10 and apparently, PD No.1 of 1979 do not apply to this appeal which originated from an assessment by a Deputy Registrar of the Industrial Relations Court; which, as a court of substantial justice is unrestrained by rules of procedure. We note that this

assertion from learned counsel appears to be grounded in S.85 (5) of the Industrial and Labour Relations Act Cap. 269 of the Laws of Zambia which deals with the exclusive jurisdiction of the IRC to deal with industrial relations matters and provides that:

> **"85. (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".** (underlining for emphasis supplied)

A reading of the above provision on the jurisdiction of the Industrial relations Court, as emphasised by underlining is clear, that the rules that do not apply are rules of evidence. The origins of the court having been an industrial tribunal, the objective was not to make the conduct of proceedings difficult for the litigants who were mostly appearing in person and were unfamiliar with procedural rules of evidence. It was to enable such persons produce evidence, which they had on them at trial, whether from 'their pockets', 'briefcases' or 'handbags,' so to speak, as the case may be, so long as such evidence was relevant for the determination of the issues in dispute. There is nothing in section 85 (5) suggesting it equally applies to procedural defaults

in the conduct of litigation. Indeed, this can be further gleaned from S.85 (3) as amended by Act No. 8 of 2008 which states in mandatory terms that:

> **"85 (3) The Court shall not consider a complaint or an application unless the complainant or applicant presents the complaint or application to the Court-**
>
> **(a) within ninety days of exhausting the administrative channels available to the complainant or applicant; or**
>
> **(b) where there are no administrative channels available to the complainant or applicant, within ninety days of the occurrence of the event which gave rise to the complaint or application:**
>
> **Provided that-**
>
> **(i) upon application by the complainant or applicant, the Court may extend the period in which the complaint or application may be presented before it;"**

In the premises, we can only echo our previous decisions on the point as restated in one of the most recent cases, **Boart Longyear (Zambia) Limited v Austin Makanya**[12] in which we stressed that, S. 85 (5) relates to the non-application of rules of evidence when hearing the matter for purposes of ensuring dispensation of substantial justice. In the event, it cannot be relied upon to excuse a default relating to lack of jurisdiction on the part of the court to hear the matter, which is a substantive issue.

We accordingly have no hesitation in finding, the *ratio* in the case of *Times News Papers Zambia Limited v Kapwepwe applied* to the circumstances of this case, notwithstanding that it was one that emanated from the Industrial Relations Court. This is that, the order for assessment of damages having been directed by a Coram of the court which tried the case, the ensuing judgment on assessment constituted part of the whole complete judgment of the Industrial Relations Court. In the event, it was indeed a misdirection for counsel to appeal the assessment by the learned Deputy Registrar to *another* Coram, of the same court.

The first limb of ground 2, contending that the there was no jurisdiction by the Coram of the IRC that sat as an Appeal Court to hear the matter, accordingly succeeds, as the appeal at the material time, properly lay to the Supreme Court.

We nonetheless hasten to mention that, the said position notwithstanding, in view of **Article 133 of the Constitution of Zambia (Amendment) Act No. 2 of 5th January, 2016,** which has seen the establishment of new courts, including the Court of

Appeal, appeals on assessment of damages from the Registrars and Deputy Registrars of the High Court, including those from the Industrial Relations Court, which is now one of the Divisions of the High Court, lie direct to the Court of Appeal.

Having found that the issue of jurisdiction is a substantive issue, ground 2 attacking the appellant for raising it for the very first time in this court cannot be sustained. The legal position that an issue not raised before a trial court cannot be raised for the first time on appeal does not apply where the issue is one questioning the very authority or jurisdiction of the court to have heard the matter, in the first place. For in the absence of jurisdiction to hear a matter, the ensuing decision is a complete nullity and no appeal can lie against it on the merits.

The second limb of ground 2 of the appeal also succeeds.

Finally, on the issue raised in ground 1 of the appeal faulting the award of K15,000.00 as damages, to each of the complainants, in the absence of evidence to prove the same. This ground was anchored on the success of ground 2 of the appeal. As our finding in that ground is that, the judgment by the *'appeal*

Coram' to hear the matter is a nullity for want of jurisdiction, the award of damages premised on such a judgment cannot be sustained. Ground 1 of the appeal equally succeeds.

In conclusion, this appeal having succeeded in its entirety the matter is accordingly sent back to the court below for the complainants to proceed, should they be so inclined, with their appeal which was never heard, against the ruling of the Deputy Registrar dated 13th November, 2012, declining them leave to file an appeal out of time, against the judgment on assessment.

Considering all the circumstances of this case, we make no order as to costs.

M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

E.M. HAMAUNDU
SUPREME COURT JUDGE

J. K. KABUKA
SUPREME COURT JUDGE