SELECTED JUDGMENT NO. 37 OF 2017

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IN THE SUPREME COURT OF ZAMBIA **SCZ/8/262/2016**

HOLDEN AT NDOLA **APPEAL No.0005/2017**

(Civil Jurisdiction)

BETWEEN:

ZAMBIA NATIONAL COMMERCIAL BANK PLC **APPELLANT**

AND

GEOFFREY MUYAMWA AND 88 OTHERS **RESPONDENTS**

Corum : Hamaundu, Wood, Kaoma, Musonda and Mutuna, JJS.

On 6th June 2017 and 18th August 2017

For the Appellant : **Mr. G. Gondwe of Messrs Buta Gondwe & Associates, Mr. M. Sakala and Mr. N. Siamondo of Messrs Corpus Legal Practitioners, and Mrs. S. Wamulume, Legal Counsel ZANACO**

For the Respondents : **Mr. S. Mambwe and Mr. M.D. Lisimba of Messrs Mambwe, Siwila and Lisimba advocates**

J U D G M E N T

Mutuna JS, delivered the Judgment of the Court.

Cases referred to:

1) Kalaluka and Mwiinga v Zambia National Commercial Bank Plc-Comp. No.252/2003
2) Zambia Consumer Buying Corporation Limited (in Liquidation) and ZPA v Robbie Mumba and others - Appeal No.156 of 1997
3) ZIMCO Limited (in Liquidation) and ZPA v Michael Malisawa and 17 others - SCZ Judgment No.139 of 2002
4) Zambia Telecommunications Company Limited v Mulwanda and Ngandwe - Appeal No.63 of 2009
5) Minister of Home Affairs, The Attorney General v Lee Habasonde (Suing on his own behalf and on behalf of the Southern African Centre for Constructive Resolution of Disputes) - SCZ Judgment No.23 of 2007
6) Industrial Gases Limited v Waraf Transport Limited and Mussah Mogeehaid (1995/97) ZR 183
7) Paddy P. Kaunda and others v Zambia Railways Limited - Appeal No.13 of 2001
8) Zambia Consolidated Coppermines v Matale (1995/97) ZR 144
9) Mazoka and others v Mwanawasa (2005) ZR 138
10) Nkongolo Farms Limited v Zambia National Commercial Bank, Kent Choice and Charles Haruperi SCZ Judgment No.9 of 2007
11) Mususu Kalenga Building Limited and another v Richman Moneylenders Enterprises (1999) ZR 27
12) Dickson Zulu and others v Zambia State Insurance Corporation Limited - Appeal No. 203 of 2008
13) Zambia Telecommunications Company Limited v Felix Musonda and 29 others Appeal No. 51 of 2014
14) Mwamba v Nthenge - SCZ Judgment No. 5 of 2013
15) Printing and Numerical Registering Co. v Simpson (1875) LR 19 EQ. at 465
16) Kasengele and others v Zambia National Commercial Bank - Appeal No.11 of 2000
17) Richard Nsofu Mandona v Total Aviation and Export Limited, Zambia National Commercial Bank Plc, Zambia National Oil Company (In Liquidation) and Indeni Oil Refinery Company - Appeal No.82 of 2009
18) Masheke and others v Zambia Daily Mail (2002) ZR 99
19) Mhango v Ngulube and others (1983) ZR 61
20) Chiyengele and others v Scaw Limited, Appeal No.117 of 2013

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Other works referred to:

1) **Halsbury's Laws of England, by Lord Hailsham of St. Marylebone, 4th edition, volume 26, Butterworths, London.**
2) **Rules of the Supreme Court Practice, 1999, edition, Volume 1**

Legislation referred to:

1) **Constitution of Zambia (Amendment Act) No. 2 of 2016**
2) **Income Tax Act, Cap 323.**
3) **Industrial & Labour Relations Act, Cap 269**

The dispute in this matter arises out of a judgment on assessment by the Industrial and Labour Relations Division of the High Court (erstwhile, Industrial Relations Court) pursuant to which the Appellant was ordered to pay the Respondents their terminal benefits in accordance with the ZIMCO conditions of service. In the assessment, the court below directed that for purposes of computing the Respondents' terminal benefits, all their allowances as envisaged by the ZIMCO conditions of service should be added to the basic salaries. It also ordered payment of long service gratuity to certain categories of the Respondents.

However, this directive did not settle the dispute because, and as will be revealed by the background to this appeal, the dispute has been raging in the court below and in this court for sometime now and in the course of adjudicating upon the matter when it first came before us, we misdirected ourselves because we had misapprehended the pleadings, evidence and arguments by counsel in relation to the relief sought by the Respondents. We have, in the latter part of this judgment been compelled to correct the misdirection, because this Court has jurisdiction to vary, amend or set aside a judgment appealed against or to revisit its own decision and to vary or reverse its decision. This is by virtue of the powers vested in us by section 25 of the ***Supreme Court Act***. However, re-opening of a decision made by the full court will rarely be permitted.

The genesis of the dispute is that the Respondents were employees of the Appellant, having been so employed in various years. During the period of their employment but prior to December 1996, their terms and conditions of employment were governed by the ZIMCO conditions of service. By the said terms and conditions of employment, the computation of terminal benefits was based on the basic salaries including allowances. This was effective from 28th March 1995, following a directive to that effect by the Minister of Finance in a letter that is referred to as the *"Penza letter"* in this judgment. As a result of this, all the employees of the Appellant who were retired were paid their terminal benefits based on the basic salaries and applicable allowances.

In December 1996, the Appellant adopted its own conditions of service, (hereinafter referred to as *"the*

ZANACO conditions of service"), which it offered to the Respondents and they accepted the new conditions of service. Following from this, the Respondents' terms and conditions of employment migrated from ZIMCO conditions of service to the ZANACO conditions of service. These latter conditions did not provide for the inclusion of allowances to the basic salaries in computing the terminal benefits.

After the Respondents served under the ZANACO conditions of service for various years, their services were terminated on divers dates and for various reasons, which included voluntary/early retirement, retirement, termination of contract by effluxion of time and disciplinary measures. In effecting the said terminations, the Appellant paid the Respondents their terminal benefits based on the ZANACO conditions of service, that is to say, their terminal benefits were computed on the basis of the basic salaries

only. The Appellant refused to include the allowances in the computation on the basis that the ZANACO conditions did not provide for the inclusion of allowances in the computation of terminal benefits.

Prior to this, the Appellant paid one of its ex employees, Ricky Saeli Kalaluka his terminal benefits after declaring him redundant without including allowances. He and another ex-employee who had been declared redundant, took the matter to court and following a decision of the Industrial Relations Court (at the time), in the case of ***Kalaluka and Mwiinga v Zambia National Commercial Bank Plc***[1] Comp. No.252/2003, (hereinafter referred to as *"the Kalaluka and Mwiinga case"*), the Appellant paid the Complainants in that case their terminal benefits by including certain allowances to the basic salaries in accordance with the decision of the court.

The Respondents were aggrieved by the Appellant's refusal to similarly include allowances in computing their terminal benefits and commenced an action in the court below in which they sought an order for payment of their terminal benefits on the basis of the ZIMCO conditions of service; that is to say, to have the allowances added to the basic salaries in computing the terminal benefits.

In a judgment dated 23rd October, 2013 the court below upheld the Respondents' claim by ordering, among other things, that they were entitled to payment of their terminal benefits in accordance with the ZIMCO conditions of service on the basis of being similarly circumstanced as the Complainants in the ***Kalaluka and Mwiinga*** case. The court found further that there was evidence which pointed to the fact that an employee by the name of Mary Yoyo left the employment of the Appellant in May 2011 and was paid

her terminal benefits based on the ZIMCO conditions of service. The court, therefore, ordered the re-computation of the terminal benefits for the Respondents whose terminal benefits were computed in accordance with the ZANACO conditions of service by addition of allowances to basic salaries and payment of the balances due arising from the difference between the original amounts paid and the re-computed amounts.

The Appellant appealed against the lower court's judgment of 23rd October 2013, to this Court in Appeal No. 33 of 2014 and on 27th February 2015 we delivered our judgment (hereinafter referred to as *"the judgment of 27th February 2015"*) substantially dismissing the appeal. The basis upon which we dismissed the appeal was that we found that the court below was on firm ground in upholding the Respondents' claim for the addition of

allowances to the basic salaries in computing their terminal benefits in view of its decision in the ***Kalaluka and Mwiinga*** case. In effect, we took the position that the Respondents' terminal benefits should be calculated in the manner those of ***Kalaluka and Mwiinga*** were calculated because they were similarly circumstanced. We, therefore, passively and without much reflection, dismissed the argument by the Appellant that the ***Kalaluka and Mwiinga*** case departed from *stare decisis* in as far as it did not consider our decisions on the effect of an employee consenting to a change in his/her conditions of service.

After the dismissal of the Appellant's appeal, the Respondents applied to the court below for assessment of the amounts due to them pursuant to the judgment of 23rd October 2013. The evidence in support and opposition of the assessment was contained in affidavits and witness

testimonies. The Respondents on their part contended that their terminal benefits should be recomputed based on their basic salaries and all allowances. They also sought payment of long service gratuity.

The Appellant's evidence revealed that it conceded that the Respondents were entitled to a re-computation of their terminal benefits in accordance with the ZIMCO conditions of service. It, however, denied that all allowances should be included in the computation. The Appellant also took the view that long service gratuity was not payable because it was not specifically ordered in the judgment of 23rd October 2013.

The court below, in a lengthy and elaborate judgment, considered the evidence and arguments by the parties and held that in assessing the terminal benefits: it would have

to re-compute the terminal benefits of the Respondents in line with the ZIMCO conditions of service and the difference between the re-computed amounts and amounts already paid would be due and payable to the Respondents by the Appellant; and, when re-computing these terminal benefits it would only include those allowances which were considered in paying the other retirees of the Appellant on the principle of being similarly circumstanced (i.e. as in the ***Kalaluka and Mwiinga*** case). The court went on to explain the origins of payment of terminal benefits under the ZIMCO conditions of service and the formula to be used. In doing so, it explained that the ZIMCO conditions of service were governed by the ZIMCO corporate terms of service and the *"Penza letter"*, by virtue of which, the allowances were to be incorporated into the basic salaries for purposes of computing the terminal benefits. The court

stated further that clause 30 of the ZIMCO conditions of service prescribed the formula for eligibility to long service gratuity and provided for gratuity to be computed based on the last salary paid to the eligible employees.

Having given the foregoing explanation, the court proceeded to explain the meaning of its findings in the judgment of 23rd October 2013 that *" ... terminal benefits be recomputed in line with the ZIMCO conditions of service"* as follows: since long service gratuity is a terminal benefit payable under the ZIMCO conditions of service it is payable to the category of Respondents who went on normal retirement, those who died while in service, those who retired on medical ground and those who were separated on the basis of voluntary/earlier retirement; in computing the entitlements for long service gratuity aforestated, the allowances which the eligible Respondents earned were to

be added to the basic salaries in conformity with the *"Penza letter"*; and, in computing the long service gratuity, regard had to be had to clause 30.4 of the ZIMCO conditions of service which provided for a sliding scale based on the number of years served by the eligible Respondents.

The court concluded the issue of long service gratuity by ordering that this should be paid to all the Respondents except: those who served under the unionized conditions of service; those whose services were terminated as a consequence of disciplinary measures; and, those whose claims were unquantified and thus, abandoned.

In regard to addition of allowances to the basic salaries in computing terminal benefits, the court took the view that only those allowances that were taken into consideration in computing the terminal benefits of the

other retirees of the Appellant should be considered. Consequently, it ordered that in line with the ***Kalaluka and Mwiinga*** case, the only allowances that were payable were those in respect of housing, servants, furniture, maintenance, entertainment, water and electricity, education, medical, fuel, social tour, telephone, holiday and travel, householder insurance and security guard, value for two daily newspapers, and membership to two social clubs, and one professional body. The court rationalized the foregoing by stating that it was in conformity with its judgment of 23rd October 2013, that all former employees of the Appellant who were similarly circumstanced should be treated in the same manner as per its decision in the ***Kalaluka and Mwiinga*** case. The court below found further that despite the fact that some of the foregoing allowances were not indicated on the

Respondents' payslips, they were still to be considered in computing terminal benefits because a monetary value can be placed on them. It relied on our decisions in the cases of ***Zambia Consumer Buying Corporation Limited (in liquidation) and ZPA v Robbie Mumba and others***[2] and ***ZIMCO Limited (in Liquidation) and ZPA v Michael Malisawa and 17 others***[3]. The court, however, declined to grant the Respondents' request for inclusion of the benefit derived from the entertainment expense attached to cards issued to senior members of staff by the Appellant for entertaining its customers, to the salaries, for purposes of computing terminal benefits. The reason for this was two-fold: firstly, the court found that the benefit under the said scheme did not accrue to the affected Respondents directly because it was designed as a tool for use by them to entice

future customers of the Appellant. Secondly, it was, in any event, not claimed in the ***Kalaluka and Mwiinga*** case.

In concluding, the court ordered the re-computation of the terminal benefits based on the basic salaries incorporating the allowances, aforestated. It also ordered that payment of gratuity to those Respondents who were on fixed term contract should be computed in accordance with the ZIMCO conditions of service. This was notwithstanding the fact that these Respondents were serving under the ZANACO conditions of service which specifically provided for gratuity to be paid at twenty-five percent of the basic pay, excluding allowances. The court rationalized this by stating that it was in conformity with its decision of 23rd October 2013 which was not ambiguous and also the principle of similarly circumstanced in view of the award

given to the complainants in the ***Kalaluka and Mwiinga*** case.

In regard to the claim for redundancy, the court held that it could not award the relief because, not only was it not pleaded, but it was not one of the benefits the court found to be due under the ZIMCO conditions of service in its judgment of 23rd October 2013. Hence, it, could not be awarded at this late stage.

The court proceeded to make what it termed an award and in so doing, set out the mode of computing the terminal benefits for each category of the Respondents. It directed that the Respondents' terminal benefits should be recomputed to include allowances and long service gratuity except: category B comprising the Respondents who retired prior to the *"Penza letter"*; category H comprising

Respondents who served under the unionized conditions of service; and, category I, where there was one employee who withdrew his case. The court further ordered that the terminal benefits should not be subject to tax because they were exempt from tax in accordance with Articles 187(3)(b), 188(2) and 266 of the ***Constitution of Zambia (Amendment) Act*** which, in the court's view, altered the ***Income Tax Act.***

Finally, the court ordered that the assessed awards should attract interest in accordance with the decision of this court in the judgment of 27th February 2015 at the short term bank rate from date of Complaint to the date of judgment, thereafter, at the Bank of Zambia lending rate up to date of full payment. It also awarded the Respondents costs.

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Following the delivery of the judgment, the parties attempted to settle but only managed to execute a consent order which revealed, among other things, the Respondents' own computation of their entitlement. It also compelled the Appellant to immediately pay to the Respondents an undisputed sum of K40,396,396,648.00.

The Appellant is unhappy with the decision of the court below and has launched this appeal on five grounds as follows:

1) **The Honourable court below erred in law when it neglected and or failed to award a judgment sum after conducting the assessment.**
2) **The Honourable court below erred in law and fact by awarding long service gratuity when the trial court and this Honourable court only ordered that only allowances should be incorporated into basic pay when re-computing the Respondents' terminal benefits**
3) **The Honourable court below erred in law when it re-computed the complainants' terminal benefits by incorporating allowances beyond the ZIMCO conditions of service when the Minister of finance's letter directing the payment of terminal benefits with allowances (the Penza letter) ceased to apply after the liquidation of ZIMCO.**

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4) **The Honourable court below erred in law when it ordered the addition of allowances to the contractual gratuity when the fixed term contracts were self regulating and, except where expressly provided for, did not provide for inclusion of allowances when calculating contractual gratuity.**
5) **The Honourable court below erred in law when it exceeded its jurisdiction by purporting to interpret the provisions of the Constitution of Zambia (Amendment) Act No.2 of 2016 on taxation of terminal benefits when this is a preserve of the Constitutional Court.**

The Respondents were equally dissatisfied with the judgment of the court below and launched a cross appeal on four grounds as follows:

1) **The trial court erred in law and fact when it refused to award the Complainants redundancy package when they were similarly circumstanced to Kalaluka and Mwiinga who were awarded the same and against the weight of available evidence**
2) **The trial court erred in law and in fact when it denied the Complainants' entitlement to entertainment allowances**
3) **The court below erred in law and in fact when it held that unionized employees could not benefit in similar circumstances**
4) **That the court erred in law and in fact when it dismissed the un-quantified claims without hearing their evidence.**

Prior to the hearing of the appeal and cross appeal, the parties filed two sets of heads of argument each, which they relied upon at the hearing of the appeal and cross appeal and supplemented with *viva voce* arguments. We have considered these arguments, along with the record of appeal and judgment appealed against in determining this appeal. Further, our consideration is by way of dealing with the appeal first and thereafter the cross appeal and in doing so we have considered the individual grounds of appeal and cross appeal in the order they have been presented.

In ground 1, the Appellant is aggrieved by the fact that the court below did not give a judgment sum after the assessment. The arguments by counsel for the Appellant are threefold and are as follows: the judgment of the court below does not meet the requirements of what constitutes a

judgment because there is no specific or quantified judgment sum; the court below only made awards in respect of certain Respondents and directed that the said awards should be applied *mutatis mutandis* to the other Respondents; and, as a consequence of this, the parties had to engage in discussions in pursuit of reaching settlement resulting in a consent order, which, among other things, stayed execution and, directed the Appellant to pay an interim sum of ZMW40,396,648.00 to the Respondents, pending final determination of this appeal.

In a nutshell, the Appellant argued that the judgment is not final and conclusive on all matters in dispute to enable the parties know their rights and obligations. The Appellant sought solace in our decisions in the cases of ***Zambia Telecommunications Company Limited v Mulwanda and Ngandwe and Minister of Home***

Affairs[4], and ***The Attorney General v Lee Habasonda (Suing on his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes)[5]*** in which we gave guidance on how judgments must be crafted.

In response, counsel for the Respondents argued as follows in relation to the want of a judgment sum: the court below was on firm ground because it gave guidance as to the formula to be applied in calculating the terminal benefits due in accordance with the judgment of 23rd October 2013; the figures to be applied to the different categories of allowances and other benefits are common cause to the parties; as a consequence of the foregoing, the parties executed a consent order indicating that the amount due to the Respondents is K111,333,666.94, pursuant to which the Appellant only paid the sum of

K40,396,648.00; and, the court below proceeded in the manner it did because of the agreement by the parties to that effect.

Counsel argued further that in any event, we can only upset a judgment on assessment where the assessment is inaccurate or too high. This, they argued is in line with our decision in the case of ***Industrial Gases Limited v Waraf Transport Limited and Mussah Mogeehaid***[6] and that the Appellant has not advanced any arguments in that direction.

It was also counsel's argument that we have already given guidance in the case of ***Paddy P. Kaunda and others v Zambia Railways Limited***[7] that where there is a known formula for calculating dues, that formula must be used. Here, counsel was suggesting that since the court

had set out the formula for calculating dues that was the end of the matter and it was up to the parties to apply the formula and work out the terminal benefits due to the Respondents.

Arguing in the alternative, Mr. S. Mambwe emphasized the fact that each of the Respondents had submitted a computation of their entitlement as terminal benefits in the affidavit in support of the application for assessment. That the said computation included long service gratuity, redundancy and a merger of salaries to allowances. As such, it is possible to ascertain the amounts due to each of the Respondents as terminal benefits. He argued further that in any event, the court proceeded in the manner it did upon the request of the parties, consequently, the Appellant cannot now question the court's approach.

In regard to the form and content of a judgment, it was counsel's argument that the judgment of the court below meets the standard we set in the case of ***Zambia Telecommunications Company Limited v Mulwanda & Ngandwe***[4]. They contended, in this regard, that the judgment has an introductory section, it sets out the facts, the law and the issues, and applies the law to the facts. Further, the judgment grants the relief sought because a formula for calculating the terminal benefits is prescribed.

In reply, counsel for the Appellant contended that it is obvious that the court below failed to resolve all the issues in dispute between the parties in accordance with our directive in a plethora of authorities that a court should adjudicate upon all facts and matters in dispute and it is a failure on its part to leave certain matters hanging or undecided. Counsel argued further, that the Respondents

were misinterpreting the judgment of 23rd October 2013 and ours of 27th February 2015 which judgments are restricted to the addition of allowances to the basic salaries.

In assessing the terminal benefits due, the court below did not, as contended by the Appellant, make individual awards for each of the Respondents. The reason for this was an agreement by the parties that in assessing what was due to the Respondents the terminal benefits of only one Respondent from each of the categories identified by the court should be computed. The other Respondents' terminal benefits would thereafter be computed and agreed by the parties based on the formulae used for those Respondents whose terminal benefits would have been computed. The parties agreed to proceed in this manner because in their opinion and that of the court, the number

of Respondents was too big. This position can be discerned from the judgment of the court below which is the subject of this appeal. In effect, the court below assigned the function of apportioning the amounts due to the other Respondents to the parties.

We agree with the Appellant's contention that the court below erred when it failed to award judgment sums to each and every one of the Respondents. The reason why we have taken this position is that the decision of the court below did not resolve the dispute before it which was determining the amounts due, if any, to the Respondents and did not, therefore, resolve all the issues in dispute with finality as presented before it. This is evident from the fact that following the judgment on assessment, the parties still had to compute what was due to the majority of the Respondents and there is still disagreement on this issue.

The parties were thus prompted to execute the consent order dated 9th August 2016 which only partially settled the issues in dispute. The consent order did not, as counsel for the Respondents argued, reflect an agreement of the amount to be paid as being K111,333,666.94 because the reference to that figure in paragraph 1 of the consent order is merely a confirmation of the amount computed by the Respondents as due following the judgment. It does not say that the parties have agreed that the said sum would represent the judgment sum. The consent order does, infact, acknowledge that the dispute is still looming between the parties in latter paragraphs where it permits the Appellant to contest the decision of the court below by way of an appeal to this court. Consequently, we agree with the argument advanced by the Appellant that the judgment of the court below did not meet the

requirements of a judgment as explained in the two decisions referred to us by the Appellant of ***Zambia Telecommunications Company Limited v Mulwanda***[4] and ***Ministry of Home Affairs, The Attorney General v Lee Habasonda (Suing on his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes***[5]***)***. In the former case we held, *inter alia*, that a trial court should completely and with finality determine all matters in controversy properly brought before it, to avoid multiplicity of proceedings. Our holding, aforestated, was premised on the duty placed upon a High Court Judge to that effect by section 13 of the ***High Court Act***. The court below clearly reneged on this duty, as is evident by the actions, including this appeal, that have followed its judgment. As a result of the foregoing, we find merit in ground 1 and allow it.

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We now turn to consider ground 2 pursuant to which the appellant questions the awarding of long service gratuity by the court below in the light of the fact that in an earlier decision and the decision of this Court, the order restricted itself to the addition of allowances to the basic salaries when re-computing the Respondents' terminal benefits. The thrust of the arguments by counsel for the Appellant were that: the decision of the court below in the judgment of 23rd October 2013 only addressed the issue of addition of allowances to the basic salaries when computing the Respondents' terminal benefits; that the claims made by the Respondents in the court below as revealed by the pleadings were only restricted to the need for the addition of allowances to the basic salary in computing the terminal benefits; and that, the order of the court below, as a result, goes against the pleadings.

Counsel submitted further that one of the Respondents' witnesses did, in fact, concede that the judgment of 23rd October 2013 restricted itself to the issue of addition of allowances to the basic salaries and did not extend to an award of long service gratuity. He reproduced portions of both the affidavit and *viva voce* evidence of the Respondents' witness which reveals that the Respondents' grievance in the court below was centered on the Appellant's computation of their terminal benefits based on the basic salaries only.

Counsel went on to attack the court's interpretation of the judgment of 23rd October 2013 as being contrary to the pleadings, the evidence on record and indeed its earlier order. According to counsel, when interpreting a judgment, the law on interpretation requires that pre-eminence must be given to its literal meaning. This, they argued, is in line

with a passage from ***Halsbury's Laws of England***, 4th edition volume 26, paragraph 530 at page 273 where the learned authors had the following to say:

> **"When a judgment is clear as to its terms, not even the pleadings nor the history of the action may be utilized to construe the judgment contrary to its clear meaning".**

Applying the foregoing test to the judgment of 23rd October 2013, counsel argued that the court below ought to have given it the following interpretation:

1) **Firstly, that it ordered the re-computation of the Respondents' terminal benefits. The term re-compute to be interpreted to mean that whatever was previously computed must be computed again taking into account certain factors as guided by the court;**
2) **Secondly, that it ordered that only those Respondents whose terminal benefits were paid in line with the ZANACO conditions, that is, based purely on basic salary without allowances should have their terminal benefits re-computed;**
3) **Thirdly that it ordered that when re-computing the terminal benefits the Appellant should incorporate the allowances which were paid to the other retirees in keeping with the principle that similarly circumstanced employees must be treated similarly; and**

4) After orders 1 to 3 had been complied with, the Appellant ought to have paid to the Respondents the difference between the amounts it would have arrived at after the re-computation and the amounts they were paid on termination of employment.

Arguing in the alternative, counsel took the view that if we do not accept the literal interpretation of the judgment of 23rd October 2013, we should interpret it with reference to the issues, pleadings, evidence and submissions presented before the court below. They concluded by referring to a plethora of authorities, where we have held that a court cannot grant a relief that has not been specifically pleaded, especially where no evidence in respect of such a relief has been led.

In response, counsel for the Respondents traced the history of this matter and the ***Kalaluka and Mwiinga*** case. In doing so, they argued strongly that both the court below and ourselves have always held the view that the

Respondents in this case are similarly circumstanced to the complainants in the ***Kalaluka and Mwiinga*** case and, as such, should be treated similarly. Counsel argued further that the decision of the court below is that the Respondents' terminal benefits should be recomputed in line with the ZIMCO conditions of service which, according to counsel, means that the Respondents' should be paid all the benefits appurtenant to the said conditions. These benefits, it was argued, include, among other things, long service benefits and gratuity, which benefits were paid to the complainants in the ***Kalaluka and Mwiinga*** case as revealed by the evidence of the Appellant's key witness, one Mobbry Mwewa.

As regards the contention by the Appellant that long service gratuity was not specifically pleaded and as such not payable, counsel responded that the court below is a

court of substantial justice and is at large to award a relief not specifically claimed as long as it deems it reasonably due to a complainant. Our attention in this regard was drawn to our decision in the case of ***Zambia Consolidated Copper Mines v Matale***[8].

It was also counsel's argument that by virtue of the fact that the Respondents commenced their complaint in the court below pursuant to section 85(6) of the ***Industrial and Labour Relations Act***, it was not necessary for them to specifically claim for long service gratuity in order for the court to award it. Mr. Lisimba and Mr. Mambwe, stressed here, that in any event, on a proper interpretation of the notice of complaint and affidavit in support, pursuant to which the complaint in the court below was commenced, long service gratuity was pleaded by the mere reference to section 85(6) of the ***Industrial and Labour Relations Act***.

Arguing in the alternative, counsel took the view that since the evidence of Mobbry Mwewa on long service gratuity and redundancy was unchallenged, the court below was on firm ground in considering it notwithstanding the fact that the claims it related to were not specifically pleaded. This they argued, is in line with our decision in the case of ***Mazoka and others v Mwanawasa***[9] where we held that in a case where any matter not pleaded is let in evidence, and not objected to by the other side, the court is not and should not be precluded from considering it. Further that, the resolution of the issue will depend on the weight the court will attach to the evidence of unpleaded issues.

Counsel also argued that in any event, the finding by the court below that long service gratuity is payable is a finding of fact which we, as an appellate court cannot

reverse because it does not meet the threshold for reversal as we held in the case of ***Nkongolo Farms Limited v Zambia National Commercial Bank, Kent Choice and Charles Haruperi***[10].

In reply, counsel for the Appellant argued that the issue of long service gratuity and redundancy were not raised in the court below and cannot, therefore, be raised on appeal in line with our decision in the case of ***Mususu Kalenga Building Limited & another v Richman Money Lenders Enterprises***[11]**.** Mr. N. Siamondo argued further that the record of the proceedings in the court below reveals that he raised a number of objections each time the Respondents' witness led evidence on long service gratuity because it was not specifically pleaded. He argued, that the complaint by the Respondents was premised on the decision of the court below handed down by C.B. Phiri J, in

the ***Kalaluka and Mwiinga*** case which only restricted the award to the complainants to merger of allowances to the basic salaries in computing terminal benefits. That the said judgment makes no reference whatsoever to long service gratuity.

In awarding long service gratuity the court below began by summarizing the Respondents' claims as endorsed in the complaint. We are compelled to reproduce the summary by the court below because it has a bearing on the decision we have reached in the latter part of this judgment. It is at page J31 of the judgment and it is as follows:

> **"(a) All the complainants were retired from the Respondent and placed on fixed term contracts between 1998 and 2002 with inadequate terminal benefits.**
>
> **(b) The terminal benefits which were paid by the Respondent to the complainants were wrongly computed and were not paid in**

compliance with a directive from the Hon. Minister of Finance to the Director General of ZIMCO dated 28th March 1995".

The court below also summarized the relief sought as follows:

(a) Terminal benefits inclusive of interest at current rates

(b) Further or other relief

(c) Costs".

Then the court proceeded to analyze a portion of the judgment of 23rd October 2013 and concluded, *inter alia*, that the judgment directed the re-computation of the Respondents' terminal benefits in line with the ZIMCO conditions of service. These conditions, the court opined, provided for terminal benefits to be computed based on basic salaries plus allowances and payment of long service gratuity. According to the court, the long service gratuity is a terminal benefit under the ZIMCO conditions of service and is thus payable in view of the portion of the judgment

of 23rd October 2013 which reads in part that *"... terminal benefits be re-computed in line with the ZIMCO conditions of service ..."*

As regards eligibility for the long service gratuity, the court below found that it was payable to the Respondents who had gone on normal retirement, died while in service, retired on medical grounds; or proceeded on early retirement.

We have difficulty accepting the interpretation given to the judgment of 23rd October 2013 by the court below. The court granted the long service gratuity purely on its interpretation of the sentence in the judgment that the terminal benefits should be computed in line with the ZIMCO conditions of service. The view we take is that the reference to ZIMCO conditions of service in the judgment of

23rd October 2013 is restricted to addition of allowances to basic salaries. It was by no means saying that all other benefits linked to ZIMCO conditions of service should be paid. This is the position we have taken because it is quite evident from the pleadings, evidence and arguments presented to the court below by the parties that at the heart of the Respondents' grievance against the Appellant was the computation of their terminal benefits based on the basic salaries only. The grievance did not extend to the non-payment of long service gratuity as rightly argued by counsel for the Appellant. The evidence of the Respondents in the court below does not reveal a claim for long service gratuity but reveals a concession by one of the Respondents testifying as CW1 that long service gratuity was not part of the award in the judgment of 23rd October 2013.

We do not also accept the argument by counsel for the Respondents that by virtue of the fact, in itself, that the complaint was presented under section 85(6) of the ***Industrial and Labour Relations Act***, the principle of similarly circumstanced came into play and as such, long service gratuity became payable as was the case in ***Kalaluka and Mwiinga***. The said section states as follows:

> **"An award, declaration, decision, or judgment of the court on any matter referred to it for its decision or 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".**

The view we take is that the principle under this section cannot be applied in this matter because its application conflicts with the established principle of deference to decisions of higher courts and *stare decisis* as we have demonstrated in our consideration of ground 3.

Further, the Respondents did not demonstrate that they were similarly circumstanced as Kalaluka and Mwiinga in the mode of exiting the Appellant. We have also taken the view that the Respondents were required to specifically state in the notice of complaint that they sought payment of long service gratuity as well, since the same was allegedly ordered in the ***Kalaluka and Mwiinga*** case. We have deliberately used the phrase *"allegedly ordered"* because and as Mr. N. Siamondo argued, there is, in any event, no order in the ***Kalaluka and Mwiinga*** judgment for payment of long service gratuity. The Respondents have, therefore, laboured on a misapprehension of that judgment.

The decision we have made in the preceding paragraph follows our consideration and dismissal of the argument by counsel for the Respondents that the court below was on

firm ground when it ordered payment of long service gratuity though it was not specifically pleaded because the court below enjoys jurisdiction to award any remedy it deems reasonable as per the ***Matale***[5] case and due to the fact that it is a court of substantial justice. We have dismissed this argument because, though it is true that the court below is at large to award any remedy it deems suitable in doing substantial justice, it must not be one sided but must hear the other side on the remedy it intends to award. Substantial justice is neither intended to be one-sided nor is it akin to trial by ambush and must, therefore, not override the basic tenets of justice by which a party is afforded a right to be heard on a remedy sought by the opponent. Consequently, the Respondents in this matter can only invoke the principle of substantial justice in their quest for an award of long service gratuity if they

can show that the Appellant's right to be heard on the claim has not been breached. This, they should have done, by showing that they pleaded long service gratuity and led evidence on it. In this case, the record clearly shows that long service gratuity was not an issue and as such not addressed by the Appellant. The court below was, therefore, not at large to award it.

We have also had the opportunity to consider the argument by counsel for the Respondents to the effect that the court below can award any remedy. Our consideration is in the light of our decision in the ***Matale***[5] case in which we held as follows:

> **"We hold the view that the Industrial Relations Court has a general jurisdiction - as we will demonstrate and should be able to award compensation or damages, which are the universal remedy, and any other suitable awards. Of course, they will not be able routinely to award reinstatement if the case is not caught by the**

discrimination provisions under which, in any case, reinstatement is not to be automatic either.

The general jurisdiction of the Industrial Relations Court and the expansive extent of it is manifest in section 85 under various subsections cumulatively confer a sufficient jurisdiction unrestrained by technicalities under which real justice can be dispensed".

By the foregoing passage we were explaining the general jurisdiction of the court below which it had misconstrued to be restricted to matters where there is an allegation of discrimination based on social status in the termination of employment. We did not, in doing so, state that the court below can award any remedy as alleged by counsel for the Respondent even though such remedy is not pleaded by a party.

We have also considered and dismissed the argument that long service gratuity is payable because it was raised in evidence and not objected to in accordance with our

decision in the ***Mazoka***[9] case. Whilst it is true that there is evidence in the record of appeal which attests to the fact that long service gratuity was mentioned, the court below did not consider the said evidence and, as a result, it was not, as we have demonstrated earlier, the basis upon which it awarded long service gratuity. The court ignored the evidence on record on long service gratuity in considering this issue and relied entirely on its interpretation of the order that the terminal benefits should be paid in line with the ZIMCO conditions of service. Consequently, the principle in the ***Mazoka***[9] case is not applicable in this matter.

We accordingly find merit in ground 2 and allow it.

Regarding ground 3, the Appellant questions the applicability of the *"Penza letter"* alleging that it ceased to

have effect after the liquidation of ZIMCO. In effect, the Appellant is contending that the terms and conditions introduced by the *"Penza letter"* of adding allowances to the basic salaries in computing the terminal benefits were only applicable during the period that the ZIMCO conditions of service were applicable to the Appellant. This, counsel argued, was prior to the liquidation of ZIMCO and the introduction of the ZANACO conditions of service by the Appellant. Counsel relied on our decision in the case of ***Dickson Zulu and three others v Zambia State Insurance Corporation Limited[12].***

In the *viva voce* arguments, Mrs. S. Wamulume re inforced the argument by stating that at the time of migrating from the ZIMCO to the ZANACO conditions of service, there was no terminating event because the affected Respondents continued in employment. In so

doing, the said Respondents consented to the change in the conditions of service which were indicated as superceding the ZIMCO conditions of service in the letters of migration. She referred us to a letter addressed to one of the Respondents which confirmed this fact.

In response, counsel for the Respondents argued that the issue as crafted under ground 3 was not raised during assessment and as such, it could not be raised on appeal. We were referred to our decision in the case of ***Mususu Kalenga Building Limited v Richman Money Lenders Enterprises***[11] where we restated the principle that an issue that is not raised in the court below cannot be raised on appeal. Counsel argued further that in any event, the issue of addition of allowances to the basic salaries in computing terminal benefits had already been adjudicated upon by the court below prior to the hearing of the

assessment. The court below could not, therefore, reopen the issue on assessment.

In reply, counsel for the Appellant referred us to the evidence led by the Respondents in the court below. It was argued that the Respondents had contended in the court below that the re-computation of terminal benefits using the formula in the *"Penza letter"* was limited to the period up to the migration to ZANACO conditions of service and not up to the point of the Respondents exiting from the Appellant.

Before we consider the arguments advanced under ground 3, we feel compelled to comment on the rationale for the *"Penza letter"*. The position we have taken is that when considering the *"Penza letter"* one must not lose sight of the fact that it was issued at a time when a number of

employees in Zambia were being laid off as a consequence of the privatization exercise. In this regard, it was intended as a tool to cushion the impact of the lay offs and retrenchments on the employees and not as a tool to be used later by those employees who had consensually remained in employment under new conditions of service, to bargain for better separation packages. To the extent that we did not consider the *"Penza letter"* in this light in our judgment of 27th February 2015, when we held that the benefit under the *"Penza letter"* accrues to the Respondents based on the principle of being similarly circumstanced, we misdirected ourselves. The fact that the Respondents had consented to the migration from ZIMCO to the ZANACO conditions of service is not in dispute. They infact conceded that the ZIMCO conditions were no longer applicable to them because the ZANACO conditions had

been introduced. This can be discerned from the record of the proceedings in the court below. As such we were bound by our earlier decisions, during the hearing from which the judgment of 27th February 2015 arose and now, of ***Dickson Zulu and others v Zambia State Insurance Corporation Limited***[12] and ***Zyter and Zambia Telecommunications Company Limited v Felix Musonda and 29 others***[13]. In the former case we held as follows:

> **"We have seriously considered the above arguments and the finding by the court below. Perusal of the pleadings and the evidence on record has shown that the Appellants were employed under ZIMCO conditions of service when the Respondent was a subsidiary of ZIMCO. When ZIMCO went into liquidation in 1995, the**
>
> **Respondent put in place its own conditions of service the ZSIC Corporate Terms and conditions of service.**
>
> **The Appellants continued working under the ZSIC corporate conditions of service until their early retirement. There is no evidence on record showing that the Appellants protested or raised issues concerning the application of those conditions. Therefore,**

their claim that their severance packages under the ZIMCO conditions which could have entitled them to benefit from the directive of the Penza letter ..., as has been argued, has no basis. They are, therefore, estopped from claiming that they retired under the ZIMCO conditions of service".

Similarly in the latter case we held as follows:

"The trial judge rightly found that the Zamtel conditions of service are what applied to the Respondents. Further, the Appellant company was detached from ZIMCO in 1994. The directive was made in 1995. If indeed the directive by the Minister of Finance was meant to apply to the Respondents who served under the Zamtel conditions of service, it is our view that the directive would have been implemented and the conditions of service would have been drafted in such a way as to reflect the directive. This was not done. What was done was that the conditions of service stated the exact manner the terminal benefits ought to have been calculated and this was acceptable to the Respondents".

The effect of these two decisions in the light of the Respondents' plight is that upon migration to the ZANACO conditions of service, which they did so freely and willingly, they lost the right to the benefit of the *"Penza letter"* on termination. Their terminal benefits are to be computed in

accordance with their conditions of service at the point of exiting which are the ZANACO conditions of service which did not provide for inclusion of allowances in computing terminal benefits. The Appellant did advance this argument under ground 1 in the appeal from which we delivered our judgment of 27th February 2015. In dismissing ground 1 in that appeal we glossed over the said argument and relied entirely on the principle of similarly circumstanced. This was a misdirection on our part because it was omission on our part to consider the mode of termination of employment in the ***Kalaluka and Mwiinga*** case and it amounted to our ignoring our earlier decisions aforementioned which are to the contrary. Further, to the extent that the application of section 85(6) of the ***Industrial and Labour Relations Act*** conflicted with these decisions, we cannot invoke it especially that the

decisions of the court to which the Act relates are not final and binding as are ours. We have in the past held that the wording of sections 3 and 85(6) of the ***Industrial and Labour Relations Act***, reveals that orders made by the then Industrial Relations Court can have binding effect on the parties to the action and any other person who is affected by that order. However, this is the case only in cases where the affected persons' services were terminated at the same time and in the same manner. This is what amount to *"similarly circumstanced"* which is not applicable in this case because whilst the mode of payment for the Complainants in the ***Kalaluka and Mwiinga*** case was similar to what the Respondents in this appeal sought to be paid, the mode of separation was different because they were declared redundant and at a different time. For this reason the principle of similarly circumstanced was

wrongly applied by the court below and this court in our judgment of 27th February 2015. Likewise, the court below misdirected itself in applying the principle by reference to the payment made to Mary Moyo who it acknowledged exited at a time when the Appellant had varied the ZANACO conditions of service to bring them in line with the ZIMCO conditions of service. Her mode of exit was, therefore, not similar to that of the Respondents. Hence, in applying section 85(6) the court must have regard to the particular circumstances of each case and not in the manner that the decision in the ***Kalaluka and Mwiinga*** case was applied to this case. To this end we are compelled to follow our decisions in the earlier two cases and this effectively reverses our decision in the judgment of 27th February 2015 that the Respondents terminal benefits are to be computed by addition of the basic salaries to allowances.

Consequently, ground 3 succeeds and we allow it.

Moving on to ground 4 in which the Appellant has questioned the application of the order on merging of salaries and allowances in the computation of terminal benefits to those Respondents who served under fixed term contracts. Counsel for the Appellant argued that the fixed term contracts were self regulating and as such, the merger of basic salaries and allowances was to be implemented only where a particular contract specifically provided for such merger. Further that, the court below acknowledged in the judgment that the fixed term contracts had a clause which stipulated how gratuity was to be paid and that it did not provide for merger of allowances to the basic salaries. In articulating the argument, counsel for the Appellant reminded us of our decision in the case of ***Mwamba v Nthenge***[14] in which we stated that the law of

contract honours contracts entered into voluntarily by legal persons since time immemorial. We were also referred to the decision in the case of ***Printing and Numerical Registered Company v Simpson***[15] where Lord Jessel held that if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.

In conclusion, counsel for the Appellant argued that in any event, the affected Respondents only requested for the addition of the basic salaries to the allowances in regard to the period when they served under the ZIMCO conditions of service. It was counsel's argument that the court below acknowledged that the Respondents who migrated from

permanent and pensionable terms and conditions under ZIMCO to fixed term contracts started serving under the ZANACO conditions of service when they signed the fixed term contracts. That, in accordance with our decision in the ***Dickson Zulu***[12] case, the conditions of service to be applied in computing terminal benefits are those that were in force at the point when the Respondents were leaving employment.

In response, counsel for the Respondents' arguments were two fold. Firstly, it was argued that the basis of the assessment by the court below was what the court had ordered on 23rd October 2013 that the allowances should be added to the basic salaries in re-computing terminal benefits in line with the principle of similarly circumstanced. That, as a result of this, the terms and

conditions in the fixed term contracts were inconsequential.

Mr. Lisimba argued that the question of merger of basic salaries and allowances has already been settled. Secondly, and in the spirit of our decision in the case of ***Kasengele & others v Zambia National Commercial Bank***[16] the Government's directive as major shareholder in ZIMCO of merging allowances with basic salaries in computing terminal benefits overrides the terms and conditions in the fixed term contracts.

In reply, counsel for the Appellant argued that the payment made by the Appellant to the Respondents thus far of K40,390,648.00 discharges the Appellant's liability.

We are of the considered view that this ground must succeed in view of what we have stated in relation to

ground 3. We also wish to state that the Respondents' situation cannot be likened to that of the Appellants in the ***Kasengele***[16] case. The distinguishing factor is similar to the one we found in the ***Dickson Zulu***[12] case which was that, unlike in the ***Kasengele*** case where the Appellants retired under the ZIMCO conditions of service, in this case the Respondents continued to work under new conditions of service. This distinction underscores the rationale we have given for the *"Penza letter"*.

We accordingly allow ground 4.

We now turn our attention to consideration of ground 5. The Appellant is contending that the court below exceeded its jurisdiction when it made a determination in regard to the applicability or otherwise of tax to the Respondents' terminal benefits based on the ***Constitution***

of Zambia (Amendment) Act. According to counsel for the Appellant, the determination by the court below of this issue amounted to interpreting the ***Constitution*** which is in the sole preserve of the Constitutional Court.

In response, the Respondents' counsel advanced arguments from two fronts. Firstly, that the court below did not venture to interpret the ***Constitution*** in the strict sense. They referred us to our decision in the case of ***Richard Nsofu Mandona v Total Aviation and Export Limited, Zambia National Commercial Bank Plc, Zambia National Oil Company Limited (In liquidation), and Indeni Oil Refinery Company***[17] where we held as follows:

> **"Making observations on obvious Constitutional provisions as we determine disputes of a non Constitutional nature, is not, in our view, necessarily averse to the letter and spirit of the Constitution nor would it encroach or usurp the jurisdiction of the Constitutional**

Court. This court, as any superior court for that matter, is made up of judges of note, capable in their own way of understanding and interpreting the Constitution ... more significantly perhaps, we see that the issues raised in the motion are ones that hinge purely on the rules of procedure. Their interpretation, therefore, is hardly one that should take us into the realms of Constitutional interpretation".

Counsel argued further that courts are empowered to make pronouncements on issues brought before them in *limine* in accordance with order 14A of the ***Rules of the Supreme Court***, 1999 edition.

The second limb of counsel's argument was that in making the determination on the issue of whether the terminal benefits were subject to tax, the court below was invited to do so by the parties. As such, the Appellant cannot now blame the court for making the determination. Further that the Appellant, in any event, had opportunity

to raise objection in the court below but failed to do so. Having so failed, the issue cannot be raised now on appeal.

In reply, counsel for the Appellant argued that the irregular exercise of statutory powers cannot be cured by the consent of the parties and that the courts have no jurisdiction to override Parliament and no jurisdiction to determine that which is in the preserve of another person or body. We were referred to a number of authorities in this regard.

As counsel for the Appellant have rightly argued, Article 128 of the ***Constitution of Zambia (Amendment) Act*** vests jurisdiction in the Constitutional Court to hear matters, *inter alia*, relating to the interpretation of the ***Constitution***. The Constitutional Court is, in this regard, possessed with original and final jurisdiction.

P.1343

In the light of our explanation of the jurisdiction of the Constitutional Court, and before we determine this ground, it is important that we restate the extent to which the court below referred to the ***Constitution***.

On assessment, the court below was called upon to determine the amounts due to each Respondent as terminal benefits. This was the main issue before the court below and it was not a constitutional issue but rather a labour relations issue. Flowing from this issue arose a very minor issue of whether or not the terminal benefits to be paid to the Respondents were to be subject to income tax. It is at this point, in determining this very minor issue, that the court below made reference to articles of the ***Constitution***.

We are of the considered view that, to the extent that the reference to or interpretation of the ***Constitution*** by the court below did not relate to the main issue or subject matter of the dispute, it did not exceed its jurisdiction. Our finding is in accordance with our decision in the ***Mandona***[17] case referred to us by counsel for the Respondents. Further, this and other courts have in the recent past been frequently challenged in regard to the exercise of their jurisdiction by way of preliminary objections or interlocutory applications arising out of a dispute totally unrelated to the jurisdictional issue raised. It is our view that in dealing with such challenges, this, and indeed other courts, are not constrained from referring to the ***Constitution*** because that is where the jurisdiction of the courts is derived. Moreover, and from a common sense position, to argue that such applications should be

dealt with by the Constitutional Court would not only unnecessarily congest that court but would paralyze the other courts that would be forced to halt all proceedings until their jurisdiction is determined by the Constitutional Court. In our considered view, this would result in catastrophic consequences in the administration of justice completely unimagined by the framers of the ***Constitution***.

Arising from what we have stated in the preceding paragraphs, we find no merit in ground five and accordingly dismiss it.

Moving on to the cross appeal, ground 1 questions the refusal by the court below to award a redundancy package. The contention is that the same is payable because it was payable in the case of ***Kalaluka and Mwiinga***, therefore, the principle of similarly circumstanced is applicable. In

advancing arguments under this ground, counsel for the Respondents relied upon the arguments advanced under ground 3 of the appeal.

In response counsel for the Appellant restated the arguments advanced under grounds 1 and 2 of the appeal.

The fate of this ground is similar to the fate suffered by ground 2 of the appeal on long service gratuity. It is abundantly clear from the facts and pleadings that when the Respondents set upon the long journey of seeking redress from the Appellant, their primary objective was to have their terminal benefits computed on the basis of the basic salaries merged with allowances. The court below in its judgment of 23rd October 2013 accordingly determined the dispute on this issue only. There is, therefore, no merit in this ground and we accordingly dismiss it.

P.1347

Under ground 2, the Respondents are aggrieved at the refusal by the court below to include entertainment allowances in the computation of terminal benefits notwithstanding that the Complainants in the ***Kalaluka and Mwiinga*** case had the entertainment allowance included in their computations. Counsel for the Respondents argued that the entertainment allowance should be included in re-computing terminal benefits because it is a fringe benefit to which one can attach value. This, he argued, is in line with our decision in the cases of ***ZIMCO Limited (in Liquidation) and ZPA v Michael Malisawa and 17 others***[3] and ***Robbie Mumba and others***[2]. He concluded by arguing that the Appellant's witness, one Mobbry Mwewa, confirmed in cross examination in the court below that all the fringe benefits had a value attached to them.

In response, counsel for the Appellant argued that the Respondents did not prove their entitlement to the claim and as such, the court below was on firm ground in dismissing it. He argued that the foregoing is in line with our holding in the case of ***Mhango v Ngulube and others***[19], namely that, it is for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the court to determine the value of that loss with a fair amount of certainty. That, as a general rule, any shortcomings in the proof of a special loss should react against a claimant. It was argued further that the ***Kalaluka and Mwiinga*** judgment ordered payment of all monetary allowances only.

In view of our findings under ground 3 of the appeal, this ground of cross-appeal is doomed to fail. We accordingly find no merit in it and dismiss it.

P.1349

Ground 3 attacks the refusal by the court below to extend the benefit arising from the principle of *"similarly circumstanced"* to the Respondents who had served under the unionized conditions of service. Counsel for the Respondents argued that the issue of whether or not allowances were to be merged with basic salaries had already been determined in the judgment of 23rd October 2013. The court below at assessment was only called upon to assess the amounts due and, therefore, erred when it determined that the unionized employees were not entitled to the benefit under the *"the ZIMCO conditions of service"*. We were referred to our decision in the case of ***Masheke and others v Zambia Daily Mail***[18].

In response, counsel for the Appellant argued that the Respondents' witness had conceded that the Respondents who served under the unionized conditions of service were

not entitled to the benefits under the ZIMCO conditions of service.

We agree with the arguments advanced by counsel for the Respondents to the effect that the jurisdiction of the court below was limited to assessment of the amounts due and not the determination of whether or not any category of the Respondents was entitled to their terminal benefits computed in line with the "*Penza letter*". However, we are of the firm view that the principles we have articulated under ground 3 of the appeal on what amounts to similarly circumstanced and its effect and the binding nature of the conditions of service under which one serves are applicable here. The effect of the latter point is that those Respondents who served under the unionized conditions of service are bound by those conditions and their terminal benefits are to be computed in accordance thereto. As a

> **"Nominal damages' is a technical phrase which means that you have negative anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed".**

In response, counsel for the Appellants argued that the concerned Respondents were obliged to prove their case, failing which, they are not entitled to any payment. Further that, the evidence on record reveals that they abandoned their claims.

The finding by the court below in respect of the Respondents affected by this ground was that they abandoned their claims because no evidence was adduced to support the same. The view we take is that a claimant has the responsibility of laying his claim before a court when called upon to do so otherwise the claim cannot be considered. The court below cannot, as a result of this, be

faulted, in a case such as this one, when certain Respondents failed to present their case, in finding that the claims were abandoned. This situation is to be distinguished from the situation in the ***Chiyengele***[20] case because, whilst in the case of the concerned Respondents in this case, there was a total failure to prosecute their claims, in the latter the failure by the Appellants was only partial, being that the material laid before the court for purposes of determining the damages was insufficient.

Consequently, ground 4 fails and we dismiss it.

The net result of our findings is that grounds 1, 2, 3 and 4 of the appeal having succeeded, we allow the appeal to that extent. In doing so we remit the record back to the court below for purposes of re-computing the terminal benefits for each and every Respondent entitled to the terminal benefits in line with the conditions of service they were serving under at the time of exiting from the Appellant. To this extent, we reverse our order in the judgment of 27th February 2015 upholding the decision of the court below in the judgment of 23rd October 2013 that

faulted, in a case such as this one, when certain Respondents failed to present their case, in finding that the claims were abandoned. This situation is to be distinguished from the situation in the ***Chiyengele***[20] case because, whilst in the case of the concerned Respondents in this case, there was a total failure to prosecute their claims, in the latter the failure by the Appellants was only partial, being that the material laid before the court for purposes of determining the damages was insufficient.

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all the Respondents' terminal benefits must be calculated in line with the ZIMCO conditions of service by merger of the basic salaries with the allowances. The re-computation must take the form of specifically stating the amounts that each Respondent is entitled to as terminal benefits. Upon re-computation of the said terminal benefits the Appellant should pay the balances due (if any) to the Respondents immediately thereafter, plus interest in accordance with our judgment of 27th February 2015. We also direct that the re-computation should exclude long service gratuity.

If, however, the re-computation reveals that some of the Respondents have been paid more than what they are entitled to, we order that these Respondents should refund the excess amounts paid by the Appellant. We have decided to make the foregoing order because we are alive to the fact that the Appellant consented to paying the admitted sum which included allowances because of our decision in the judgment of 27th February 2015 that the Respondents' terminal benefits should be paid by addition of allowances to salaries, which we have since reversed.

P.1355

The cross appeal having failed, we dismiss it in its entirety.

As regards costs, we order that the parties will bear their respective costs.

.....
E.M. HAMAUNDU
SUPREME COURT JUDGE

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A.M. WOOD
SUPREME COURT JUDGE

.....
R.M.C. KAOMA
SUPREME COURT JUDGE

.....
M.C. MUSONDA, SC
SUPREME COURT JUDGE

.....
N.K. MUTUNA
SUPREME COURT JUDGE