IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 124/2020
HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

MTUMBI GOMA **APPELLANT**

AND

ROY MWABA *(Sued as Secretary General of the Zambia Congress of Trade Unions)* **RESPONDENT**

Coram : Kondolo, Majula and Ngulube JJA
On 19th January 2022 and 22nd June 2023

For the Appellant : Mr. P. G. Katupisha of Messrs. Milner & Paul Legal Practitioners.

For the Respondent : Mr. V.M. Chilao.of Paul Mulenga Advocates.

J U D G M E N T

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Maamba Collieries Limited vs Douglas Siakalanga and others SCZ Appeal No. 12 of 2004.*

2. *James Mankwa Zulu and others vs Chilanga Cement PLC (SCZ Appeal No. 12 of 2004).*

3. *Attorney General vs Marcus Achiume (1983) Z.R. 1.*

4. *Boniface K. Mwale vs Zambia Airways Corporation Limited (In Liquidation) (1998) ZR 71*

5. *Mwangelwa Mwangelwa and Ruth Mwangelwa vs Sibeso Likando (SCZ Appeal No. 230/2016).*

6. *Chilufya Kusensela vs Astridah Mvula (SCZ No. 3 of 2014).*

7. *Afrope Zambia Limited vs Anthony Chate & Others (SCZ Appeal No. 160/2016).*

8. *Road Development Agency vs Agro Fuel Investment Limited (CAZ Appeal No. 114/2019).*

9. *Mary Musonda vs Attorney-General (1993-1994) ZR9*

10 *Midland Breweries (PVT) Limited vs David Mungenyembe (SCZ Judgment No.3 of 2017).*

11 *Owen Mayapi and others vs Attorney General (2019/CCZ/003).*

12 *General Nursing Council of Zambia vs Bangweta (2008) Vol. 2 ZR 105.*

13 *Alex Lwando & Another vs Mathews Mwansa Mulenga CAZ Appeal No. 151/2002.*

14 *John Nsululu (sued in his capacity as Secretary of The Zambia Union of Government and Allied Workers) vs Cosmas Mukuka (suing in his capacity as Secretary General of the Zambia Congress of Trade Unions (SCZ Appeal No 118/2019).*

15 *Engen Petroleum Ltd vs Willis Muhanga And Another (SCZ Appeal No. 117/2016).*

16 *Zambia National Commercial Bank Plc vs. Joseph Kangwa (SCZ Appeal No.54/2008).*

1.0 Introduction

1.1 This is an appeal against the decision of the learned Registrar of the High Court on its decision after an assessment of damages.

2.0 Background

2.1 The background facts are that the appellant commenced an action in the Industrial Relations Division of the High Court by way of complaint made pursuant to section 85(4) of the Industrial and Labour Relations Act. His was that he was an elected member of the Zambia Congress of Trade Unions (ZCTU) serving as Deputy Secretary General in charge of Finance and Business Administration. His primary role was to ensure financial integrity of the establishment and maintain financial systems. He was also mandated to report all financial matters to the various organs of ZCTU and to monitor, control and implement accounting systems.

2.2 During the course of his appointment, it came to his attention that there were numerous irregular decisions made by the respondent in his capacity as Secretary General that were not in accordance with the ZCTU Constitution or the conditions of service. To remedy the situation, he wrote an internal memorandum to the respondent on 20th July 2011, wherein he highlighted the alleged irregularities.

2.3 In relation to the memorandum, the respondent wrote a letter on the same day stating that the appellant's conduct was inimical to the smooth running of ZCTU. He was consequently charged for insubordination in line with Article 18(5) of the

ZCTU Constitution. The respondent further directed the appellant to stay away from office through a circular dated 21st July 2011, under the caption "Relief of Office of Deputy Secretary General (Finance and Business Administration)." The appellant was initially suspended for 90 days and eventually put on indefinite suspension on 13th January, 2012.

2.4 Aggrieved by the way his case was handled, he commenced an action in the lower court claiming, *inter alia,* that the suspension was null and void and that he be paid all his salaries and allowances that were withheld during the period of suspension. He also sought damages for inconvenience and emotional stress caused during the wrongful suspension.

2.5 The case for the respondent was that the appellant was properly charged for insubordination which was as a result of his refusal to obey instructions from the Secretary General's office. The charges were in accordance with the Constitution and the Conditions of Service. The appellant was subsequently placed on administrative leave and locked out of the office. He was eventually placed on indefinite suspension by the General Council.

2.6 After a protracted trial, the lower court found in favour of the appellant on certain claims, some of which were subsequently upheld by the Supreme Court after an appeal. The matter thereafter proceeded to the Registrar for assessment of damages.

3.0 Findings and decision of the registrar

3.1 In its assessment, the learned Registrar indicated that the basis of the assessment was from the portion of the High Court judgment which guided as follows at pages J25 to J26:

> *"In the circumstance, we order that the complainant be deemed to have served his full complete period of secondment to ZCTU and be separated therefrom with full benefits as would have been the case if he were to remain and continue with the remaining period of secondment until expiry by effluxion of time."*

3.2 The learned Registrar was of the view that the appellant was awarded benefits he was supposed to enjoy if he had not been placed on an indefinite suspension. In assessing the appropriate damages awarded, the learned Registrar adjudged that it would use the 2010 Conditions of Service as these were the ones that were applicable at the time he was placed on indefinite suspension in 2011.

3.3 In arriving at the basic salary that would be used in computing the appellant's benefits, the Registrar held that he would use K20,000.00 as provided in the 2010 Conditions of Service under salary scale ZC/2 of clause 4.11 and that he would also take into account monthly allowances totaling K16,458.33. The court was therefore of the view that the appellant ideally would have been receiving a total of K36,558.88 per month if he had continued to work.

3.4 By way of summary the appellant was awarded the following at page JA.12:

Summary

Funeral grant	-	K22,000.00
Gratuity	-	K100,000.00
Committed Car Allowance	-	K143,500.00
Furniture Allowance	-	K20,500.00
Club Membership fee	-	K36,000.00
Professional body Membership	-	K15,400.00
Holiday Allowance	-	K145,833.00
Travel on leave Allowance	-	K20,000.00
Christmas Bonus Allowance	-	K72,916.00
Unpaid leave, 192 days	-	K36,923.04
Paternity leave Allowance	-	K20,000.00
Compassionate leave allowance	-	K23,202.00
Local leave Allowance	-	K21,538.00
Repatriation Allowance	-	K20,000.00
Education Allowance	-	K12,000.00

Total	-	**K709,812.00**

3.5 The Registrar further found that a total of K462,000 was paid to the appellant on 26th April, 2014 comprising K285,000 which was meant for security for costs and a further sum of K177,000 paid directly from the respondent. The amount due was thus reduced by what had already been paid, leaving a balance of K352,437.48 with interest at 10% per cent. The appellant was ultimately awarded K634,337.46.

4.0 Grounds of appeal

4.1 Disenchanted with the outcome of the assessment, the appellant launched an appeal to this court asserting that:

> *"1. The learned Registrar erred in both law and fact in the computation of the appellant's benefits as in one breath he used K20,000.00 and in the other breath he used K36,558.88 per month as basic salary thereby arriving at wrong cumulative amounts.*
>
> *2. The learned Registrar erred in law and fact in assessing funeral grant by using the 2009 conditions of service relied upon by the Respondent which did not apply to the Appellant contrary to his holding at pages JA3 lines 20 and*

23 at JA4 lines 1 to 3 that he would use the 2010 conditions of service which applied to the appellant.

3. *The learned Registrar erred in law and fact in computing gratuity by employing a wrong formula of 20,000.00 x 10 months = 200,000.00 x 50% = 100,000.00 contrary to the formula in the conditions of service "MG4."*

4. *The learned Registrar erred in law and fact in computing club membership fee by using a wrong figure contrary to the figure in the conditions of service "MG4".*

5. *The learned Registrar erred in law and fact in holding that the "allowance was for the use in "Office Management" and since the complainant was not in office, he cannot be given this allowance" when the allowance had nothing to do with Office Management but a funded holiday trip as per conditions of service "MG4"*

6. *The learned Registrar erred in law and fact by using a wrong factor in computing leave days and a total number of leave days when the accrued leave days were 192 days.*

7. *The learned Registrar erred in law and fact when computing paternity leave and local leave pay by using wrong factors contrary to those contained in the conditions of service "MG4."*

8. *The learned Registrar erred in law and fact when he held that "upon being suspended, he went back to UNZA..." in the absence of evidence to that effect.*

9. *The learned Registrar erred in law and in fact when he awarded Children Education Allowance less the period of his term of four years contrary to the judgment a subject of the assessment.*

10. *The learned Registrar erred in fact and in law when he held that the appellant was paid a total of K814,437.48 by way of allowances for the period he was suspended as itemized at page JA13.*

11. *The learned Registrar erred in law and fact when he held that the K285,000.00 ordered as security for costs formed part of the principal sum of his benefits when security for costs were not meant to be part of the appellant's benefits.*

12. *The learned Registrar erred in law and fact when computing interest by deducting the amount of K462,000.00 from K814,437.48 without considering that the amount of K177,000.00 paid to the Appellant was made after judgment which fact affected the outcome as from date of filing the complaint to date of Judgment.*

13. The learned Registrar erred in law and fact when he failed to consider the awards of Judgment of:

13.1 50% of the full basic salary withheld from May, 2013 to October, 2013.

13.2 Full salary awarded in the Judgment from November, 2013 to December, 2014 of full term.

13.3 Payment of salary from the end of his term to the date of full payment as contained in the conditions of service "MG4."

13.4 Payment of the court awarded damages of two months basic salary for the 1st suspension.

14. The learned Registrar erred in law when he failed to consider the award of costs on assessment."

5.0 Cross- appeal

5.1 The respondent was equally disconsolate with the judgment of the Registrar after assessment and cross appealed on the following grounds:-

"1. That the learned Registrar erred in law and fact when he concluded that the Conditions of Service applicable to the matter at hand were the 2010 Conditions of Service and not the 2009 Conditions of Service.

2. That the learned Registrar erred in law and in fact when he interpreted the basic salary to include allowances.

3. *That the learned Registrar fell into error in law and in fact when he ordered that damages be paid for the period the appellant was on suspension which suspensions were held to be legal by the Supreme Court.*

4. *That the learned Registrar erred in law and in fact when he held that the appellant was entitled to the payment of Club Membership and Professional Membership fees in the absence of clear evidence that the appellant had joined any club or professional body.*

5. *That the learned Registrar misdirected himself in law and fact when he awarded the appellant the sum of K143,500 as commuted car allowance contrary to clause 5.6 of the Conditions of Service.*

6. *That the learned Registrar erred both in law and in fact when he held that the appellant was entitled to the following allowances in the circumstances of this case:*
   - *i) Holiday allowance;*
   - *ii) Christmas Bonus; and*
   - *iii) Repatriation Allowance.*

7. *That the learned Registrar erred in law and fact when he interpreted paternity leave, compassionate leave and local leave as commutable conditions of service.*

8. *That the learned Registrar erred in law and fact when he*

awarded the appellant the sum of K20,000 as travel on leave allowance in the absence of evidence that the respondent had travelled.

9. That the learned Registrar misdirected himself both in law and in fact when held that unpaid allowances whilst the appellant was on suspension were to be paid at the rate of 100% and not 50% as provided for in the conditions of service."

6.0 Appellant's arguments

6.1 In support of ground one, Counsel for the appellant submitted that the learned Registrar erred when he used two different figures in computing the appellant's benefits. It was argued that the correct conditions of service that were applicable at the time of separation were the 2010 conditions which the Registrar should have used. To support the assertion, reliance was placed on the case of ***Maamba Collieries Limited vs Douglas Siakalanga and Others.***[1]

6.2 Counsel went on to point out that the appellant was entitled to salary scale of ZC/2 K20,000.00 in accordance with clause 4.1.1 of the 2010 conditions of service together with allowances totaling K36,558.00 per month. We were referred to the definition of basic salary as set out in the 2010 conditions of service where it provides:

***"basic salary"** shall mean the monthly salary of an officer inclusive of allowances attached to the salary."*

6.3 In light of the foregoing it was contended that the Registrar misdirected himself when calculating the appellant's benefits based on his salary excluding the allowances which were attached to his salary. To buttress the argument, the case of ***James Mankwa Zulu and others vs Chilanga Cement PLC***[2] was called in aid where it was held that:

> *"There is no longer any debate as to the meaning of salary as the word salary includes allowances that are paid together with the salary on periodical basis by an employer to his employee."*

6.4 Pertaining to ground two, the main point taken by Mr. Katupisha was that the Registrar erred by using the 2009 conditions of service in assessing funeral grant. That the applicable conditions were the 2010 conditions of service which the Registrar should have used.

6.5 Moving on to ground three, learned Counsel criticized the Registrar for the formula used to calculate the appellant's gratuity based on the salary of K20,000.00 instead of a salary which includes allowances. It was submitted that the correct formula is the one provided in clause 6 of the 2010 conditions of service which states as follows:

"A full time officer shall be entitled to gratuity benefits at expiry of the term of office or separation from the Congress Service at the rate of 50% of annual basic salary for each completed year of qualifying service."

6.6 In relation to ground four, the grievance was with the calculation of club membership fee by the Registrar at the rate of K9,000.00 per year. Counsel observed that the appellant presented a club membership fee of K9,600.00 per annum for Raddison Blu Health Club. We were therefore urged to set aside the award so that the correct figure can be assessed.

6.7 With regard to ground five, Mr. Katupisha forcefully argued that the learned Registrar erred when he held that social tour allowance was for those in office and that since the appellant was not in office, he was not entitled to this allowance. It was noted that this was contrary to the guidance from the judgment of the court which directed that the appellant be deemed to have served the full term.

6.8 In respect of grounds six, seven and nine which were argued together, counsel for the appellant submitted that the learned Registrar erred when he used a wrong factor in computing the appellant's leave and paternity leave days. That this was so when he arrived at 48 leave days instead of 192 days as provided for in the 2010 conditions of service (clauses 11.1 and 11.2)

6.9 It was further submitted that the court misdirected itself when it awarded education allowance at K12,000 for 1 year as opposed to a period for 4 years.

6.10 In respect of ground eight, counsel criticized the learned Registrar for holding that the appellant went back to UNZA after being suspended. That this holding was arrived at in the absence of evidence to support it.

6.11 Turning to grounds nine and ten, it was vehemently asserted that the finding of fact to the effect that the appellant was paid a total of K814,437.48 for allowances was perverse and based on a misapprehension of facts. We were urged to set it aside on the authority of the case of ***Attorney General vs Marcus Achiume.***[3]

6.12 The thrust of the argument in ground eleven was that the learned Registrar erred when he held that K285,000.00 which was security for costs formed part of the principal sum of his benefits when security for costs were not meant to be part of the appellant's benefits. Counsel submitted that security for costs are costs incurred by the defendant or respondent in defending the claim and are not paid for the actual claim. As authority for this proposition, reliance was placed on the cases of ***Boniface K. Mwale vs Zambia Airways Corporation Limited (In Liquidation)***[4] and ***Mwangelwa Mwangelwa and Ruth Mwangelwa vs Sibeso Likando.***[5]

6.13 As regards ground twelve, the gist of the submission was that the learned Registrar erred when he computed interest by deducting the sum of K462,000.00 from K814,437.00 in total disregard of the fact that the K177,000.00 was paid to the appellant after judgment which affected the outcome as from the date of filing the complaint. The case of ***Chilufya Kusensela vs Astridah Mvula***[6] was adverted to as authority for principles on calculation of interest. In the aforecited case it was held that:

> *"It is our considered view that there is merit in ground 3 of this appeal in that the interest rate of 12 per cent per annum awarded should have been effective from the date of writ up to judgment date and thereafter at Bank of Zambia recommended lending rate to the date of full and final payment".*

6.14 The complaint in the thirteenth ground of appeal was that the learned Registrar omitted certain awards that were granted to the appellant in the assessment which included 50% of the basic salary withheld from March 2013 to October 2013 and the full salary from November 2013 to December 2014.

6.15 It was further contended that the appellant was entitled to remain on the payroll from the end of his term until payment of all accrued benefits. Reliance for this proposition was placed on clause 10 of the 2010 conditions of service.

6.16 Counsel further averred that the learned Registrar failed to award the appellant 2 months of his basic salary when he was serving the 1st suspension despite the guidance of the Supreme Court in its Judgment at page J33 where it held:

> *"However, the respondent is entitled to damages for wrongful suspension during the period he was told by the appellant (respondent herein) to stay away from work. In this regard, we uphold the award of 2 months basic pay which was made by the lower court".*

6.17 In the fourteenth ground of appeal, it was argued that the learned Registrar did not exercise his discretion judiciously when he failed to award the appellant costs despite being a successful party. He pointed out that the basic rule is that costs follow the event. We were referred to the cases of ***Afrope Zambia Limited vs Anthony Chate & Others***[7] and ***Road Development Agency vs Agro Fuel Investment Limited***[8] to support the assertion. Counsel contended that there was no evidence of misconduct on the part of the appellant which could have induced the learned Registrar not to award him costs.

6.18 With these submissions, we were called upon to allow the appeal, set aside the judgment on assessment and order that a fresh assessment be done before another Registrar of the High Court.

7.0 Respondent's arguments

7.1 In opposing ground one, learned Counsel for the respondent submitted that the definition of salary to include allowances that are paid together with the salary cannot be taken to be of general application. That in the present case there is no evidence to show that allowances were paid to the appellant monthly or on a regular basis.

7.2 The kernel of the respondent's Counsel's submission in respect of ground two was that the learned Registrar was on firm ground when he used the 2009 conditions of service in computing funeral grant as it was the one applicable at the time the appellant had a funeral. It was pointed out that the 2010 conditions only became applicable in March, 2014. We were referred to the evidence of (RW2) Musonda Evans Chongo, at page 1134 where he stated as follows:

> *"Regarding funeral assistance allowance, the applicant did not submit any documents, but the respondent has no objection to pay the complainant the prevailing rate at our office. In the present case the complainant was paid under "CM6" (13th October, 2017 affidavit). We paid allowances that were not in dispute and a total amount of K22,000 for the funeral."*

7.3 Pertaining to ground three, learned counsel for the respondent argued that the appellant was paid gratuity in accordance with

the applicable conditions of service. Alternatively, whatever amount may be outstanding must be reduced by half (50%) in line with the Supreme Court directive that an employee on leave is only entitled to half the monthly salary.

7.4 Moving on to ground four it was spiritedly argued that the appellant was not entitled to club membership fee as there was no evidence that he belonged to any club or a professional body.

7.5 Regarding ground five, the argument was that the grant of social tour allowance was discretional and therefore it would be speculative and pure conjecture to assume that the Secretary General would have used his discretion in favour of the appellant to proceed on a social tour.

7.6 On ground six, counsel submitted that the learned Registrar's finding on leave days' pay was correct in view of the fact that the appellant was not working as he was on a legal suspension and therefore not earning any leave days.

7.7 In respect of ground seven, the thrust of the assertion was that the appellant was not entitled to any monetary compensation under compassionate and paternity leave as these were non-commutable leave days. Counsel stated that during the time of the death of the appellant's mother and the birth of his son, the appellant was resting at home as he was officially on suspension.

7.8 Turning to ground eight, Counsel submitted that there is clear evidence to support the learned Registrar's finding that after being suspended and separated from the respondent, the appellant went back to UNZA, his employer. We were referred to the evidence of RW2, Musonda Evans Chongo at page 1136 where he testified as follows:

> *"In January, 2011, the Complainant was seconded to ZCTU by the University of Zambia after he won an election in December, 2010. The same members that elected him suspended him for 90 days and later suspended him indefinitely and the secondment was revoked and he went back to UNZA who were his employers."*

7.9 Moving on to ground nine, Counsel pointed out that the appellant was claiming for six (6) instalments of children's education allowance, out of which three instalments had already been paid before going for assessment. It was contended that what is due to the appellant are instalments for 2012 and 2013 which must be halved as the appellant was officially on suspension.

7.10 In relation to ground ten, the respondent submitted that the learned Registrar was on firm ground when he found that a total of K814,437.48 had been paid to the appellant prior to assessment. That this was supported by reliable and irrefutable evidence that is on record.

7.11 The main point taken in ground eleven was that the amount of K285,000.00 ordered to be part of the principal sum was properly done in view of the abandoned appeal.

7.12 The gist of the respondent's submission in ground twelve was that the appellant was paid in full the correct and applicable gratuity upon termination, hence his claims under this ground have no merit.

7.13 In relation to ground fourteen, the thrust of the respondent's argument was that while costs are in the discretion of the court, the Industrial Relations Court stands in a unique position when it comes to the award of costs. A party can only be condemned in costs if they have breached any of the elements set out in Rule 44 (i) of the Industrial Relations Rules. Thus, the respondent must have been guilty of unreasonable delay, improper or vexatious or unreasonable conduct during the proceedings. Counsel submitted that the claim for costs cannot therefore be sustained.

7.14 In light of these submissions we were urged to dismiss the appeal.

8.0 Arguments on cross appeal

8.1 The gist of the respondent's submission in support of ground one of the cross appeal was that there was no evidence which supports the finding that the 2010 conditions of service were the ones applicable to the appellant as opposed to the 2009

conditions of service. That the finding was in conflict with the evidence of RW1 who stated that the 2009 annexure or appendix to the 2010 conditions of service were not revoked by the 2010 conditions of service but were meant to clarify and amplify the 2010. It was therefore contended that the appellant cannot selectively and arbitrarily choose which conditions should be applicable when the institution applied both documents to all its elected officials.

8.2 In respect of ground two of the cross appeal it was averred that the learned Registrar erred when he interpreted the basic salary to include allowances. Counsel noted that the monthly salary and the payslip (CM3 and CM4) do not show any allowances attached to the basic salary of K20,000.00. It was observed that there is no evidence that the appellant was being paid K36,533.88 per month.

8.3 Furthermore, counsel referred us to the learned author of Black's Law Dictionary (6th ed.) at page 151 where salary is defined as:

> *"wages, exclusive of overtime, bonuses etc."*

8.4 Moving on to ground three, the point taken was that the learned Registrar misdirected himself when he ordered that damages be paid for the period the appellant was on suspension when the Supreme Court held that the suspensions were legal. For ease

of reference the holding of the Supreme Court was couched as follows:

> *"As we have held already elsewhere in the judgment, the suspension of the appellant for ninety (90) days and the indefinite suspension were lawfully done. The respondent is therefore not entitled to any damages in relation to the said suspension".*

8.5 In winding up the submission in this ground of appeal it was argued that the appellant was only entitled to half of any emoluments.

8.6 In respect of ground four, the kernel of the respondent's submission is that it was erroneous for the Registrar to award sums for club and professional membership in the absence of evidence to support the claim that he belonged to any club or professional body. Counsel stoutly argued that the lack of access to the office is not a sufficient reason for the appellant to escape his responsibility to provide evidence that he belonged to a club. The cases of ***Mary Musonda vs Attorney- General***[9] and ***Midland Breweries (PVT) Limited vs David Mungenyembe***[10] were relied on as authority. The thrust of the respondent's argument in ground 5 is that the Registrar misdirected himself when he awarded the sum of K143,500 to the appellant as commuted car allowance when he was under a legal suspension and was not reporting for work

9.0 Consideration and decision of this court

9.1 We have meticulously examined the record of appeal and the arguments by the rival parties. We shall deal with each of the grounds seriatim.

9.2 **Ground one - Computation of benefits**

9.3 In the 1st ground of appeal, the appellant is contending that the learned Registrar used two different figures in the computation of the appellant's benefits thereby arriving at the wrong cumulative amount. It has been strenuously argued that the learned Registrar ought to have used the 2010 conditions of service which applied to the appellant. The respondent on the other hand strongly disagrees with this contention and has submitted that the basic salary as per the conditions of service of the appellant as confirmed by the payroll and the payslip clearly indicates that it does not include allowances. The case of ***Owen Mayapi and others vs Attorney General***[11] has been called in aid where the Constitutional Court guided on the interpretation of conditions of service which may or may not include allowances. It was observed in the aforecited case that: *"Therefore, what constitutes salary under Article 189 is a question of fact that has to be proved or as provided for in the respective conditions of service."*

9.4 It has been spiritedly argued that although the court was tasked to give a meaning to 'salary' as used in Article 189 of the

Constitution, the principle enunciated is of general application to the extent that one single definition of the term 'salary' or 'basic salary' cannot be applied in all circumstances and for different types of employees. The respondent placed great store on the case of ***James Mankwa Zulu and Others vs Chilanga Cement***[2] for the proposition that it cannot be taken to be of general application to every case and circumstance. The argument being that, in *casu*, there is no evidence that allowances were paid on a regular basis to the appellant.

9.5 Having scrutinized the record, in particular the conditions of service that were prevailing at the time the appellant was seconded to ZCTU which were the 2010 conditions of service, we take the view that these were the ones that were applicable to the appellant. We are fortified in so holding by the case of ***Maamba Collieries Limited vs Douglas Siakalinda & Others***[1] where the Supreme Court opined:

> *"This court's reasoning in the case of* ***Professor Ram Copal (Dr) vs Mopani Copper Mines Plc*** *was that when computing terminal benefits of any employee, the existing conditions of service at the time of separating have to be used for computing such benefits. In line with that thought, in the case before us, the existing conditions of service at the time of respondent's separation from Maamba Collieries Limited have to be used in computing their terminal benefits."*

9.7 In light of the foregoing, the learned Registrar was therefore on firm ground to state that the applicable conditions of service were the 2010 conditions of service. Having established that the applicable conditions were the 2010 conditions, it only stands to reason that we ought to scrutinize the same in order to establish what was due and payable to the appellant.

9.8 As regards the definition of salary, part 1 of the Zambia Congress of Trade Unions Conditions of Service for elected officers 2010 (page 45 of the record of appeal) states as follows:

> *"Basic Salary' shall mean the monthly salary of an officer inclusive of allowances attached to the salary."*

9.9 It is clear from the above definition that the 2010 conditions of service included allowances in the computation of basic salary. As rightly pointed out by the respondent in the cases they had brought to the attention of the court, we ought to look at every case and make a decision based on all the circumstances. Where the definition of basic salary has been provided for, as a court we are compelled to interpret it accordingly. In this instance, the definition attaches allowances to the salary for purposes of computation.

9.10 We have looked at the payslip as well as the payroll which the respondent has sought to rely on as a basis for the computation of the appellant's monthly salary to exclude allowances. This alone does not absolve the respondent from the liability as the

2010 conditions of service are very explicit. Therefore, we are inclined to agree with the appellant's argument that the learned Registrar misdirected himself by using the basic pay and excluding the allowances in calculating the amounts due. Ground one has been found to be meritorious and we accordingly uphold it.

9.11 **Ground two - Funeral grant**

The appellant in the 2nd ground of appeal is greatly displeased with the learned Registrar for having used the 2009 conditions of service in assessing the funeral grant when he ought to have used the 2010 conditions of service. On the other hand, the respondent holds a contrary view which is that it was the 2009 conditions which were applicable at the time and to date and that the payment was in accordance with what is provided for in the appendix/annexure, reference, terms and conditions of service exhibit CM5 at page 898. That the rate applicable of K22,000 for funeral assistance was paid to the appellant and there was therefore no basis for the Registrar to award what had already been paid.

9.12 We have examined the funeral conditions as provided for in the 2010 conditions of service. These provide as follows:

> *"The congress shall meet funeral expenses upon the death of the officer, spouse, child, biological parent(s) and*

registered dependent(s) living with the officer and or any such benefits as shall be determined from time to time.

The funeral expenses referred to herein shall be in respect of (a) cost of purchase of executive coffin/casket; (b) food stuff at funeral house such as mealie-meal and relish and other necessary consumables; (c) reasonable quantity of firewood; and (d) vehicles arranged for funeral purposes and cash consideration of 100% of one's basic salary on death of officer, and 50% of one's basic salary on death of spouse, child, biological parent(s) and registered dependant(s)."

9.13 It is important to note that the amount payable has been qualified by the condition when they provide that as shall be determined from time to time. In this particular instance, it is not in dispute that at the time of the appellant's bereavement, the respondent chose to use the provisions of the 2009 conditions of service. They are annexure/appendix 2009 for elected officers. A total amount of K22,000 was disbursed to the appellant which was broken down as follows:

- *Executive Casket/coffin* *K6,000*
- *Food stuffs at Funeral* *K3,000*
- *Fire wood* *K1,000*
- *Transport for mourners* *K2,000*

- *50% basic salary* *K10,000*

9.13 Given that the 2010 conditions of service are the ones that were applicable and basic salary included allowances, we think that there was misdirection on the part of the learned Registrar in calculating the funeral assistance allowances. We thus find merit in this ground of appeal and order that the amount be recalculated and the appellant be paid the difference.

9.14 **Ground Three - Gratuity**

In the 3rd ground of appeal, the appellant is dissatisfied with the computation of the gratuity, the contention is that the learned Registrar erred in law and fact by computing gratuity using a wrong formula contrary to the formula in the conditions of service.

9.15 The counter argument by the respondent is that the gratuity benefits were paid in line with the applicable conditions of service. We have scrutinized the two positions and looked at the 2010 conditions of service (page 808 - 809) on gratuity which provides as follows:

> *"Gratuity benefits*
>
> *A full-time officer shall be entitled to gratuity benefits at expiry of the term of office or separation from the Congress service at the rate of 50% of annual basic salary for each completed year of qualifying service."*

9.16 Reacting to the appellant's contention that he should be paid gratuity benefits under the 2010 conditions of service, the respondent has adverted to the 2009 under clause 2 (A) Conditions of service at page 836 of the record of appeal which states as follows:

> *"2. Gratuity*
>
> *i. Full time officers 50% of annual basic salary for each completed year of qualifying service based on last earned basic rate pay."*

9.17 It has been argued that the operative phrase is the last earned basic pay and therefore according to the appellant's last payslip the basic rate of pay was K20,000.00 and that he was paid accordingly.

9.18 In our perspective, having already found that the applicable conditions of service were the 2010 conditions, it only stands to reason that the gratuity should also be calculated based on the 2010 conditions. The 2010 conditions are crystal clear that the rate shall be 50% of annual basic salary for each completed year of qualifying service. We did indicate in the 1st ground of appeal that in arriving at the basic salary, it should be computed inclusive of allowances. Therefore, the formula for calculating the appellant's gratuity as per clause 6 of the conditions of service is to include the allowances. It should, therefore, be recalculated.

9.19 Ground three is meritorious and we uphold it. The total due will be less what has already been paid.

10.0 Ground Four - Club membership

The question of whether or not the learned Registrar ought to have awarded the appellant payment of club membership has been raised by both the appellant in the main appeal as well as the respondent in the cross appeal. We shall therefore deal with this issue compositely. The argument raised by the appellant in the fourth ground is that he was entitled to a total of K9,600 for club membership instead of K9,000 awarded to him by the learned Registrar. He is therefore seeking for the balance of K600 on the basis that the club membership fee at Raddison Blu Health Club was K9,600 per year.

10.2 In the fourth ground of the cross appeal, the respondent is aggrieved by the award of club membership fee as well as professional membership fees in the absence of clear evidence that the appellant had joined any club or professional body. It has been strongly submitted that these awards were erroneously given in the absence of evidence to support to them. That apart from his word of mouth the appellant did not provide any documentary proof that he actually belonged to Radisson Blu Health Club or two professional bodies namely Engineers Institute of Zambia and the Institute of Directors.

10.3 Having scrutinized the record it is plain that there was no evidence adduced to support the finding that the appellant did indeed belong to Radisson Blu Health Club or the two professional bodies i.e. Engineers Institute of Zambia and Institute of Directors. The law is clear that in civil matters a party needs to prove his case on a balance of probabilities. In so doing a party needs to adduce evidence in support of any of his or her claims. It stands to reason that in the absence of any evidence to support the claims they cannot be upheld. We are fortified in so stating by the cases called in aid by the respondent of ***Mary Musonda vs The Attorney-General***[9] and ***Midlands Breweries (PVT Limited vs David Munyenyembe***[10] where the Supreme Court made it abundantly clear that the onus is the on a claimant to present documentary proof to support their claims and in the absence of any such proof or evidence, a litigant's claim should react against that litigant.

10.4 We are thus inclined to interfere with the findings of the Registrar as they were made in the absence of relevant evidence and we are fortified in this regard by the case of ***The Attorney-General vs Marcus Kapumba Achiume***[3].

10.5 For the foregoing reasons and in line with the case of ***Marcus Kapumba Achiume***[3] case we are inclined to set aside the findings of the trial Court in relation to the award of club membership. We find no merit in the appellant's fourth ground

and dismiss it. We, however, find the respondent's fourth ground of the cross appeal to be meritorious and we uphold it.

10.6 **Office Management/Holiday Trip**

The other aspect to the 4th ground of appeal, is the appellant's claim to be paid an allowance for local tour by virtue of clause 19 of the Conditions of Service. The respondent on the other hand has contended that the claim was discretional and therefore see no basis for the same. Clause 19 of the conditions of service provides as follows:

> *"The Secretary General may by discretion provide for a social tour of full time elected officers once in a year for a duration not exceeding 7 days."*

10.7 What emerges from the above is that payment for a social tour is at the discretion of the Secretary General. The use of the word 'may' denotes that it is simply expressing a possibility. It is therefore not mandatory. This is as opposed to the word 'shall' which would have made it a mandatory requirement. In our eyes, the appellant cannot seek to derive a benefit from the provisions of clause 19 above as this was a discretionary benefit. As rightly pointed out by the respondent, it would be speculative and pure conjecture to assume that the Secretary General would have used his discretion in favour of the appellant to proceed on a social tour holiday.

10.8 The learned Deputy Registrar cannot be faulted for dismissing this claim although the reasons advanced for the dismissal are different as he held that the allowance was for use in office management and that since the appellant was not in office he could not be given the same. The reason is simply that the social tour was based on the Secretary General's discretion and there was no evidence that he had exercised his discretion in favour of the appellant.

10.9 In light of the foregoing we find this ground of appeal to be destitute of merit and dismiss it accordingly.

11.0 Grounds Six, Seven and Nine - Leave days/Paternity and Local Leave

In the sixth, seventh and ninth grounds of appeal which have been argued together, the appellant is disgruntled that the learned Registrar used a wrong factor in computing leave days which he claims were 192 in total, as well as paternity leave and local leave. He has also taken issue with the award of the children education allowance.

11.2 The respondent has opposed these grounds of appeal and holds the view that the learned Registrar's finding on leave was on firm ground. And also as regards the paternity leave and local leave that the appellant was not entitled to any of the two as these are not commutable leave days. Further, that during the time of death of the appellant's mother and the birth of his son,

the appellant was on suspension and therefore not reporting for duty.

11.3 **Leave Days**

Regarding the 192 claimed leave days, we do note that the appellant had been on suspension and we are of the considered view that the learned Registrar cannot be faulted for having found that on account of the fact that the appellant had not worked, he did not qualify to being paid leave benefits. He awarded him 48 days that he earned before he was suspended. We are alive to what was stipulated in the judgment which was subject of assessment wherein, the learned trial Judge stated as follows:

> *"In the circumstances, we order that the complainant be deemed to have served his full complete period of secondment to ZCTU and be separated therefrom with full benefits as would have been the case if he were to remain and continue with the remaining period of secondment until expiry by effluxion of time."*

11.4 Notwithstanding the fact that the appellant was to enjoy full benefits as though he had served his full four year terms, he does not qualify for the 192 leave days as claimed for the mere reason that he had not worked and therefore he had not earned those particular leave days. The assessment by the learned

Deputy Registrar cannot be assailed for this reason. The claim for 192 leave days is dismissed.

11.5 **Paternity leave**

Turning to the claim for paternity leave, we equally find that this claim has no legal leg to stand on. At the time the event occurred, i.e. the birth of his son, the appellant was on suspension. Having perused the conditions of service, we hold that the paternity leave days are not commutable. This ground is equally destitute of merit and we dismiss it.

11.6 **Back to UNZA**

In the eighth ground of appeal, the grievance by the appellant is that the learned Registrar erred in law and fact when he held that "upon being suspended he went back to UNZA" in the absence of evidence to that effect. He is contending that no evidence was led by the respondent that he went back to UNZA who in turn started paying his housing allowance, therefore there was a misdirection by the Deputy Registrar in arriving his conclusion.

12.6 The respondent has highlighted what it considers evidence to support the finding by the learned Deputy Registrar that after being suspended and being separated with the respondent, he went back to UNZA, his employer. A thorough examination of the evidence on record which is evidence from Cosmas Mukuka who was RW1 in the court below as well as Evans Musonda

(RW2), there is evidence in support of the learned Registrar's finding. The finding being supported by the evidence on record, ground eight lacks merit and is accordingly dismissed.

12.7 **Payment of Allowances**

In relation to ground ten, the appellant is unhappy with the finding that the appellant was paid K814,437.48 by way of allowances for the period he was suspended. We have been called upon to interfere with the trial court finding of fact and the case of ***Attorney General vs Marcus Achiume***[3] has been called in aid which gives us authority to do so if the finding was perverse or there was a misapprehension of facts or made in the absence of relevant evidence. According to the appellant, the total of unpaid allowance amounted K104, 625.00 and not K814,437.48.

12.8 The respondent's contention is that the Registrar was on firm ground when he held that a total K814,437.48 had been paid to the appellant prior to assessment. There is evidence on record in particular exhibit "CM6" (pages 22 and 23 of the record of appeal volume 1) that allowances were paid for a period he was suspended. The learned Registrar was therefore on *terra firma* in making a finding based on the evidence that was before him.

12.9 This ground of appeal therefore lacks merit and is dismissed.

12.10 **Security for Costs**

12.11 In the eleventh ground of appeal, the appellant is greatly displeased with the learned Registrar when he held that K285,000.00 ordered as security for costs formed part of his benefits when it was not supposed to be the case. It is his contention that the learned Registrar erred and misdirected himself.

12.12 He has drawn a distinction between security for costs which are costs incurred by the defendant/respondent in defending the claim and are not paid for the actual claim, and payment into court which refers to the actual or part of the sum in dispute. He has placed great store on the cases of ***Borniface K Mwale vs Zambia Airways Corporation (In Liquidation)***[4] and ***Mwangelwa Mwangelwa and Ruth Mwangelwa vs Sibeso Likando***[5] for this proposition.

12.13 In response, the respondent is contending that the sum of K285,000.00 should be regarded as part of the principal sum of benefits. They have gone to lengths to give a background as to what transpired in the Industrial Relations Court and they have argued that since the amount of K295,000.00 was not refunded after the lapse of the order of stay of execution and even after the abandonment of the appeal itself, the amount should be counted as part of the principle sum of benefits payable to the appellant. The respondent has urged it upon us to uphold the learned Registrar's decision to include this payment to the general benefits payment for the appellant.

12.14 From the onset, we wish to state that indeed there is a distinction between security for costs and payment into court. This was well expressed by the Supreme Court in the case of ***Mwangelwa Mwangelwa & Ruth Mwangelwa***[5] in the following terms:

> *"There is a fundamental difference between a payment into court and security for costs. Payment into court, as was correctly submitted by counsel for the appellants in the Court below, is a sum paid into court usually by a defendant or a plaintiff in the event of a counter claim pending litigation or as a settlement or indeed as a condition precedent before filing an appeal. Payment into court can be made with an admission or denial of liability. Payment into court refers to the actual or part of the sum in dispute whereas security for costs does not. A more detailed reading on payment into court and tender can be found in Order 29 of the High Court Rules Cap 27 of the laws of Zambia. Security for costs on the other hand must at the very least comply with Order 40 rule 7 of the High Court Rules as read with Order 23 rule 1 of the Rules of the Supreme Court, before a Judge can exercise his discretion to grant the orders."*

12.15 The circumstances of this case are rather peculiar in that there was an appeal on an interlocutory ruling and then this was later abandoned. It is this appeal which necessitated an

order for stay and the Industrial Relations Court then ordered payment for security for costs. The appeal itself was abandoned and there was a lapse of the order for stay of execution. The question that falls to be determined is, where should the security for costs go against the backdrop of the abandonment of the appeal? Should it be applied to the principle sum of benefits?

12.16 The law as has been set out in a plethora of authorities is clear that security for costs are costs incurred by the defendant in defending the claim and are not paid for the actual claim. The Supreme Court expressed themselves eloquently in the case of ***Boniface K Mwale vs Zambia Airports Corporation Limited***[4] referred to us by the appellant. We stand guided by this decision that there is a distinction between security for costs and costs incurred by the defendant.

12.17 In this instance as already stated, the appeal against an interlocutory ruling was abandoned. In the meantime the court had ordered the payment for costs. Our view is that having abandoned the appeal, it was not up to the Registrar to order that the amount should be counted as part of the principal sum of benefits payable. The learned Registrar did fall into err by holding that the K285,000 formed part of the principal sum of benefits and we accordingly find merit in ground eleven and uphold it.

13.0 Ground 12 - Computation of Interest

13.1 In the twelfth ground of appeal the resentment is on the computation of interest when he deducted the amount of K462,000.00 from K814,437.48 in total disregard of the fact that K177,000.00 which formed part of K462,000.00 paid to the appellant was made after judgment. The argument being that since the amount of K177,000.00 was paid after judgment, the interest should have been imposed on the total amount paid to the appellant from the date of complaint to the date of judgment.

13.2 Taking into consideration the case of ***Chilufya Kusensela vs Astrida Mvula***[6] wherein the Supreme Court observed that interest should be awarded effective from date of writ up to date of judgment and thereafter at Bank of Zambia recommended lending rate to the date of full and final payment, that is the position of the law. We find this an appropriate case to set aside the finding by the learned Registrar on the computation of interest because this would be contrary to the position as set out by the Supreme Court. There is therefore merit in the twelfth ground of appeal and we uphold it.

14.0 Ground 13 – Consideration of awards

14.1 The contention in ground thirteen is that the learned Registrar fell in err when he did not consider awards that were granted by the High Court and the Supreme Court. More pointed by the

appellant referring us to the holding of the High at page 683 vol. 1 of the record of appeal where it states:

> *"We order that all the basic salaries that were withheld be paid back to the complainant of not already paid and received by the complainant. This has no reference to what has been paid into court as security for costs."*

14.2 The view we take is that the learned Registrar operated outside his mandate when he refused to award what was granted by the trial Court and also upheld by the Supreme Court. In light of the foregoing this ground of appeal is found to be meritorious and we accordingly allow it.

15.0 Ground 14 - Costs

15.1 The appellant is grappling with the refusal by the Registrar to award costs on assessment. The appellant has begun by outlining the law on the award of costs and has conceded that the award of costs is in the discretion of the court and that such discretion should be exercised judiciously. Our attention has been drawn to the case of ***General Nursing Council of Zambia vs Bangweta***[13] for this proposition. In addition, the case of ***Afrope Zambia Limited vs Anthony Chate & Others***[7] has been called in aid.

15.2 He has, however, contended that the learned Registrar did not exercise his discretion judiciously by his failure to award him costs, and that this discretion was not exercised in accordance

with reason and justice. He has drawn inspiration from the principle that costs follow the event and has relied on the case of ***Road Development Agency vs Agro Fuel Investment Limited***[8] where we held as follows:

> *"To depart from the principle of costs follow the event, there must be good reason, such as matters in the domain of the public interest, these will be exempted from costs. A successful party may be denied costs if it is proved that but for his conduct the action would not have been brought. Further where there is misconduct in the proceedings, the court may decline to award costs to a successful party".*

15.3 On the basis of the foregoing authority, it has been strenuously argued that the appellant has not properly conducted himself during the course of proceeding to be awarded costs. Another case of ***Alex Lwando & Another vs Mathews Mwansa Mulenga***[14] which articulate the same principle as ***Road Development Agency***[8] case that a successful party should not be deprived of costs was also cited.

15.4 The respondent strongly disagrees with the position taken and holds the view that the Supreme Court has already guided on the aspect of costs in the Industrial relations Court which stands in a unique position in relation to the same. To cement this position, they have drawn our attention to the cases of ***John Nsululu (sued in his capacity as Secretary of the Zambia Union of Government and Allied Workers) vs***

Cosmas Mukuka (suing in his capacity as Secretary General of the Zambia Congress of Trade Unions)[15] and ***Engen Petroleum Ltd vs Willis Muhanga And Another.***[16]

15.5 In addressing this ground of appeal we shall begin by setting out the law on costs as discussed in the case of ***Engen Petroleum Zambia Limited & Another vs Willis Muhanga & Another***[16] where the Supreme Court stated that in Industrial and Labour Relations matters each party is to bear its own costs *"unless one is guilty of unreasonable delay or taking improper vexatious or necessary steps in any proceedings or the other unreasonable conduct"*

15.6 Similarly in ***Zambia National Commercial Bank Plc vs. Joseph Kangwa,***[18] it was held *inter alia* that:

> *"With regard to costs, Rule 44 of the Industrial Relations Court Rules, contained in the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia provides that a party should only be condemned in Costs it they have been guilty of misconduct in the prosecution or defence of the proceedings. We wish to adopt the principle in that rule since this is a matter coming from the Industrial Relations Court. We do not find any misconduct in the respondent's defence of this appeal. Therefore, either party will bear their own costs, both here and in the court below."*

15.7 From the cited cases it is clear that for one to be awarded costs it must be shown that they have fallen into the criteria set out in the aforecited ***Engen Petroleum***[16] and ***ZANACO***[17] cases. Having combed the record, we have not found any misconduct on the part of the respondent to warrant a condemnation in costs. We therefore find no merit in this ground and dismiss it.

16.0 Cross appeal

16.1 The respondent has raised nine grounds in the cross appeal. We have noted that a number of the grounds that have been raised have also been raised by the appellant and have been dealt with in the earlier part of this judgment. We shall however proceed to tackle each ground as has been set out by the respondent.

17.0 Ground one - Applicable conditions of service

17.1 In the first ground, the respondent is contending that the learned Registrar erred in law and fact when he concluded that the conditions of service applicable to the matter at hand were the 2010 conditions of service and not the 2009 conditions of service. As regards whether which conditions of service were applicable we have sufficiently addressed this issue in the first ground of appeal by the appellant and determined that it was the 2010 conditions of service that were applicable. By so holding, the respondent's first ground of appeal lacks merit and is dismissed for reasons that have been advanced earlier in this judgment.

18.0 Ground two – Interpretation of the basic salary

18.1 In the second ground, the learned Registrar was attacked for his interpretation of the basic salary to include allowances. The argument is that the appellant's monthly salary or pay as shown by "CM3" and "CM4" being the payslip and payroll, do not show any allowances attached to the basic salary. It has been forcefully submitted that the basic salary for the appellant was exclusive of allowances. The argument as to whether the appellant's basic salary was to be calculated inclusive or exclusive of allowances has equally been dealt with in ground one of the appellant's grounds of appeal.

18.2 We have considered the applicable conditions of service and concluded that the learned Registrar was on *terra firma* when he held that at the time of exit the applicable conditions of service of the appellant were the 2010 conditions of service. Significant to note is that in the computation of the 2010 conditions of service the basic salary was inclusive of allowances. We therefore find ground two to be devoid of merit and accordingly dismiss it.

19.0 Ground three

19.1 In the third ground of appeal the respondent is greatly displeased with the learned Registrar for ordering the payment of damages for the period that the appellant was on suspension. It has been averred that the learned Registrar fell into grave err in law and in fact when he did so against the backdrop that the

suspensions were held to be legal by the Supreme Court. In support of this ground of appeal, the respondent has drawn our attention to the Supreme Court Judgment where it was held as follows:

> *"As we have held already elsewhere, in the judgment, the suspension of the appellant for ninety (90) days and the indefinite suspension were lawfully done. The Respondent is therefore not entitled to any damages in relation to the said suspension."*

19.2 We have examined the judgment as well as the constitution of the Zambia Congress of Trade Unions and we are satisfied that the respondent is sure-footed to state that the appellant was not entitled to damages. The order of payment of damages by the learned Registrar flew in the teeth of the Supreme Court's Judgment and is therefore perverse and must be set aside. In light of the foregoing we find merit in the third ground and uphold it.

20.0 Ground four - Club Membership

20.1 This has been dealt with in the earlier part of this judgment.

21.0 Ground five – Car allowance

21.1 Pertaining to the fifth ground the respondent's displeasure emanates from the award of commuted car allowance that was awarded to the appellant. It has been argued that the learned Registrar misdirected himself in law and fact when he awarded

the appellant the sum of K143,500.00 as commuted car allowance contrary to clause 5.6 of the prevailing conditions of service. We have pondered over the arguments and have looked at clause 5.6 which states that:

> *"Commuted Car Allowance: Three million five hundred thousand Kwacha K3,500,000) per month shall be paid to the officer who use their own private vehicle and has not been provided with personal to holder motor vehicle for at least 14 days in a month."*

21.2 In addition, we have addressed our mind to the Supreme Court judgment which held that the 90 day suspension that was inflicted on the appellant was legal. Furthermore, we have noted that the appellant was not reporting for work on account of being on suspension and thus was not using his car for active duty. It is our perspective that in view of the foregoing the appellant was not entitled to commuted car allowance during the period he was on suspension. There is, therefore, merit in the assertion that the learned Registrar misdirected himself in law and in fact when he awarded commuted car allowance contrary to prevailing conditions of service. We consequently set aside this award and uphold this ground of appeal.

22.0 Ground six - Holiday allowance, repatriation, Christmas bonus

22.1 The grievance in ground six is in relation to the award of holiday allowance, Christmas bonus and repatriation allowances that

he erred by the award of these allowances in the circumstances of this case. We will deal with each one of these by scrutinizing the conditions of service that were obtaining.

22.2 **Holiday allowance**

The conditions of service for elected officers (2010) as read together with the 2009 Annexure on conditions of service elected officers provide as follows under clauses 15 and 18 respectively:

> *"An officer proceeding on holiday and/or leave shall be entitled to holiday allowance equivalent to one month basic salary or as shall be determined from time to time."* (page 55, volume 1 Record of Appeal).
>
> > *An elected officer who has served for two or more than a year may apply to the office of the Secretary General at the approval the officer will entitled to not exceeding one month's basic salary in respect thereof."* (page 904 Volume 3, Record of Appeal)

22.3 As far as we are concerned the evidence reveals that the appellant was under a 90 days legal suspension and a subsequent legal but indefinite suspension and therefore the entitlement for holiday allowance cannot be sustained. The entitlement of holiday allowance shall be upon application to the Secretary General and it is upon such approval that it is granted. There is no evidence indicating that any such

application was made but above all the appellant was on legal suspension and therefore cannot be availed the holiday allowance. Turning to the Christmas bonus, we are of the view that likewise the appellant was not entitled for reasons articulated above.

22.4 **Repatriation allowance**

We now turn to consider the repatriation allowance that was awarded. It is crystal clear that the appellant was working for the University of Zambia and he was seconded to ZCTU. He was recruited in Lusaka and continued to reside in the same house during his secondment to ZCTU. We are quite surprised that the learned Registrar held the view that the appellant was entitled to this particular allowance. Repatriation allowance simply means a person who has been recruited from one place and is moved to another place outside the place of recruitment and is then given an allowance to facilitate that movement. We are, therefore, quite baffled that the appellant who had never changed his place of residence should seek to be paid repatriation allowance. All in all we have found merit in this ground of appeal and consequently set aside the award of holiday allowance, Christmas bonus and repatriation allowance.

22.5 **Paternity, compassionate and Local Leave**

In the seventh ground of appeal the respondent is frustrated with the award of paternity, compassionate and local leave. However, this ground has already been addressed comprehensively in grounds two, six, seven and nine of the main appeal. Suffice to state for the avoidance of doubt that the paternity and compassionate or local leave do not have a legal leg to stand on for reasons advanced earlier in the judgment.

23.0 Travel on leave allowance

23.1 In the eighth ground the respondent has contended that the learned Registrar erred in law and in fact when he awarded the appellant the sum of K20,000 as travel on leave allowance in the absence of evidence that the appellant had travelled.

23.2 According to the respondent, the appellant was suspended legally at the time and he was therefore not entitled to any travel on leave allowance. They have gone on to submit that it is not proper to penalize or punish the respondent for placing the appellant on a legal and valid suspension as observed by the Supreme Court. For that reason, we have been called upon to set aside the award.

24.3 We are in agreement with the arguments advanced on the basis that the appellant was on a legal suspension and is therefore not entitled to the travel on leave allowance.

24.0 Unpaid allowances

24.1 The outrage in the last ground of appeal arises from the holding by the learned Registrar that unpaid allowances whilst the appellant was on suspension where to be paid at the rate of 100% and not 50% as provided for by the conditions. In the view that we have taken that the following allowances were not payable namely:

- Commuted Car Allowance
- Club Membership fee
- Professional body membership fees
- Holiday Allowance
- Travel on Leave Allowance
- Christmas Bonus
- Local Leave Allowance

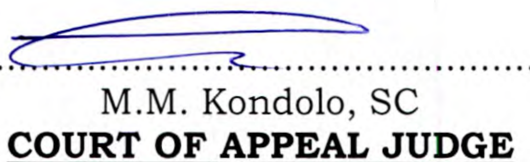
24.2 The argument therefore becomes otiose.

25.0 Conclusion

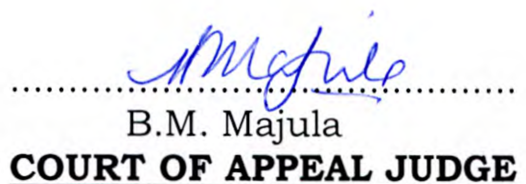
25.1 The critical issue that was raised in this appeal related to what conditions of service were prevailing at the time of exit of the appellant. We have concluded that it was the 2010 conditions of service. We have found merit in grounds one, two, three, eleven, twelve and thirteen of the main appeal. Pertaining to the cross appeal we find merit in grounds three, four, five, six, seven eight and nine.

36.2 Turning to the aspect of costs each party to bear their own costs in the court below and in this court.

37.3 In the final analysis we order that this matter goes back to the High Court before another Registrar for assessment.



M.M. Kondolo, SC
COURT OF APPEAL JUDGE



B.M. Majula
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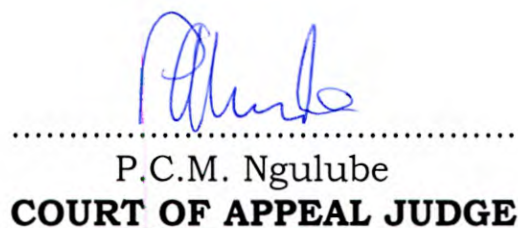

P.C.M. Ngulube
COURT OF APPEAL JUDGE