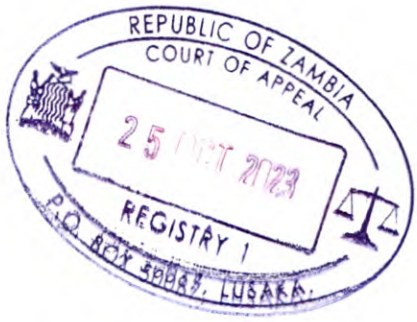
IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 226/2021**

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

BANK OF ZAMBIA **APPELLANT**

AND

SETRIDA BANDA *(Suing as Administratrix of the Estate of the late Joseph Damian Mutale)* **RESPONDENT**

CORAM: ***CHISHIMBA, SICHINGA, AND NGULUBE, JJA.***
On 21st September, 2023 and 25th October, 2023.

For the Appellant **:** *S. Kaingu - In house Counsel*

For the Respondent **:** *C. Chilufya - Messrs. DMK Legal Practitioners*

J U D G M E N T

NGULUBE JA, delivered the Judgment of the Court.

Cases referred to:

1. *Minister of Home Affairs vs Lee Habasonda (2007) Z.R. 207*
2. *Isaac Mwanza & Jeff Geoffrey Banda vs The People – Appeal No. 147,148 of 2018*
3. *Stripes Zambia Limited vs Ireen Siame & Others – Appeal No. 63 of 2018*
4. *Phillip Mhango vs Dorothy Ngulube & Others (1983) Z.R. 61 (S.C)*
5. *Zambia Telecommunications Company Limited v Sakala – Appeal No. 152 of 2010 (S.C.)*

1.0 INTRODUCTION

1.1 The appellant appeals against the assessment of the judgment sum made by Honourable Simusamba, the Registrar of the Industrial Relations Division of the High Court (IRD) at Ndola, which was delivered on 28th June, 2019. The learned Registrar awarded the respondent the difference between the sums of K362,168.59 and K202.273.37 with interest.

1.2 The Court concluded that the respondent ought to be treated as a person who was moved into the position of BOZ4 by reason of the restructuring exercise of 2005 and not by promotion.

2.0 BACKGROUND AND CLAIM

2.1 In the introductory part of this judgment, we shall refer to the parties by their designations in the lower Court. The appellant is the Bank of Zambia and was the respondent in the Court below. The respondent, is Setrida Banda and is the Administratrix of the estate of the late Joseph Damian Mutale, the complainant in the Court below.

2.2 The complainant commenced an action in the lower court claiming-

i. An order and declaration that the failure and or denial by the respondent to place the complainant in salary scale BOZ4 level was wrongful and unlawful, therefore, that the

complainant must be placed in salary scale BOZ4 with effect from January 2005;

ii. An order that the respondent pays the complainant all monies lost in salary and allowances, increments otherwise the same being the difference between salary scale BOZ3 and BOZ4 level;

iii. An order that the monies found to be due and payable to the complainant be paid with interest by the respondent from January 2005 to date of payment; and

iv. Costs.

2.3 The lower court found that the complainant was entitled to be paid all salaries and allowances for the period he was in BOZ4 as if he had been in the substantive position.

2.4 The complainant made an application for assessment of the judgment sum before the Honourable Registrar of the High Court, Industrial Relations Division. In his affidavit in support of the application, it was deposed that after the judgment delivered in the complainant's favour, he computed his entitlements which he forwarded to the respondent. That his computation amounted to the sum of K362,168.52 but the respondent's computation was K77,554.13. He deposed that after discussions between the parties, the respondent recomputed the judgment sum to

K195,724.15 which he still disputed because wrong principles were allegedly applied in calculating his dues.

2.5 It was deposed that the point of departure between the parties' respective computations was because the respondent treated him as having been promoted to a position in BOZ4 when he should have been treated as having moved into that position by way of the respondent's restructuring exercise of 2005. It was deposed further that in calculating his overtime pay, the respondent used the oracle system instead of using the old formula until the oracle system was introduced.

2.6 In his affidavit in opposition, the respondent's Assistant Director, Financial Accounting deposed that the lower court held in its judgment that the complainant should be paid his salary and allowances between BOZ3 and BOZ4 which he was entitled to with effect from 1st January, 2005. That the Court also ordered that the complainant benefits from all increments during the period when he was performing duties in BOZ4 salary grade as if he had been in that substantive position, taking into account the allowances already paid to him.

2.7 He deposed that at the meeting held on 22nd May, 2015 between the parties, the respondent revised its computation plus interest accrued up April 2015 in the sum of K195,724.15. There was further computation by the respondent which amounted to

K202,273.37 with interest up to July 2015. The respondent paid the sum of K202,273.37 with interest into Court as the complainant's dues.

2.8 It was deposed that the respondent's computation was based on the clear direction of the judgment of the trial Court and the Collective Agreement and conditions of service applicable to BOZ4 employees from 2005 to 2013.

3.0 HEARING IN THE COURT BELOW

3.1 At the hearing on assessment, the complainant testified in line with his affidavit evidence and did not call any witness. He testified that the contention between the parties relates to the formula used in calculating his salary and overtime pay.

3.2 With regard to the calculation of his salary, he testified that his understanding of the judgment of the trial Court in the main matter was that he should be paid at the BOZ4 salary scale from 2005 with increments applicable over the years. That the dispute between the parties is because the respondent calculated his dues as a person who was promoted into the position of Transport and Maintenance Officer as opposed to being taken in that position as a consequence of the respondent's restructuring. In calculating his dues, the respondent used the promotion clause in the Collective Agreement. He testified further that calculating his dues using the promotion clause disadvantaged him because his dues

are less than what he was actually getting during his employment. The promotional clause would not take into account other acting allowances that were given to him between 2005 and 2013. The promotional clause only has three notches which was only applied to him once in 2005.

3.3 With regard to overtime pay, he testified that he calculated it using the single rate of 1.5 when it was overtime done during weekdays and Saturdays. That he applied the double rate to overtime incurred on Sundays and holidays. The respondent used the same rate but with a different formula.

3.4 He stated that going by the minimum wage, the formula to be applied which was usually used by the regional office where he was stationed, should have been his basic salary multiplied by 12 multiplied by the rate multiplied by hours worked and then divided by 160. The formula which the respondent used and was used by the head office is overtime equals monthly basic pay multiplied by 12 divided by 365 and divided by 8 multiplied by hours worked multiplied by rate.

3.5 He testified further that respondent's formula was incorrect because wrong factors were used in arriving at his overtime pay.

3.6 In cross examination, he admitted to the following facts: that his conditions of service were governed by a Collective Agreement; prior to 2005 he was in BOZ3 salary scale and it was not a

demotion when he was moved to the new position; that he received the acting allowances which were five notches as the Collective Agreement provided: that the Collective Agreement which was applicable to him at the time he was moved to the new salary scale was valid from 2004 to 2006; that the judgment of the trial Court directed that the acting allowances already paid should be deducted; that the Collective Agreement at page 54 of the respondent's bundle of documents did not have the formula for calculating overtime; and that he was aware that the minimum wages does not apply where there is a Collective Agreement in place.

3.7 The respondent called two witnesses. RW1 testified that his understanding of the lower Court's judgment was that the complainant should have been appointed to the new position in the salary scale BOZ4 as opposed to him acting in the position. He stated that this was an elevation from one position to another. The Collective Agreement provided for how an employee would be treated when elevated from one position to a higher position. This is provided for in the promotion clause 5.0 of the Collective Agreement for period between 2004 and 2006.

3.8 He stated that the complainant's calculation of adding the acting allowance to come up with the final salary is not applicable to the respondent in practice. The conditions of service applicable to the

complainant were strictly governed by the Collective Agreement in place. The Court directed that the acting allowances should be deducted from the correct remuneration. That the overtime pay was calculated as per the Collective Agreement.

3.9 He testified that as of 2005, notches in the salary scales ranged from 0 to 14 but were later increased to 20 notches. That for employees who have served a full period, apart from the salary increase, they were also awarded a notch.

3.10 He admitted to the following facts during cross examination: that the movement of the complainant to the new position arose from the restructuring which took place and moved the complainant into salary scale BOZ4; that the complainant's remuneration reduced when the promotion clause was used; and that the complainant was paid his acting allowance.

3.11 RW2 testified that he was a former employee of the respondent and had worked for 26 years before retiring in 2015. He was involved in approving and calculating the complainant's remuneration. He stated that the calculations were done based on the judgment of the trial Court. Since the complainant was promoted, the respondent was guided by clause 5.0 of the Collective Agreement for the period between 2004 and 2006 on page 50 of the respondent's bundle of documents (page 124 of the record of appeal). The judgment of the trial Court guided that the

complainant should be paid less what was already paid to him for the period 1st January 2005 to May 2013 which the period in question.

3.12 He testified further that the period in question was divided into two as it consisted of firstly the complainant's salary governed by the Collective Agreement for new salary grade he moved into and secondly, what he was actually paid. The interest accrued to the complainant as at 1st July, 2015 the date of the payment into Court was K143,296.39 but the sum of K202,237.37 was paid into Court.

3.13 With regard to overtime pay, he testified that overtime incurred during the week is paid at a single rate while overtime incurred on Sundays and holidays is paid at a double rate. The single rate is calculated by multiplying the single rate per hour multiplied by the number of hours multiplied by 1.5 (factor). The double rate is calculated by multiplying the rate per hour multiplied by the number of hours multiplied by 2 (factor). The rate per hour is annual basic salary divided by 365 divided by 8 hours. He stated that the parties' calculations were different because the complainant's calculations were not done in accordance with the Collective Agreement.

3.14 It was his testimony that the payroll system the complainant allegedly used in calculating his dues was micro pay which was

used by the regional office. That this system was changed to the oracle system and it was observed that the regional office was using a formula of 160 instead of 365 which was used by the head office. This means that the respondent employees at the regional office got a higher overtime pay than the employees at head office. That during the transition to the Oracle system, it was agreed that the formula should be corrected to 365 days but the respondent waived recovery of the overpayments made to employees.

4.0 DECISION OF THE LOWER COURT

4.1 After considering the evidence on record, the learned Registrar found that the complainant ought to be treated as a person who was moved into the position of BOZ4 by reason of the restructuring of 2005 and not as a person who was promoted. The learned Registrar ordered that since the Complainant's computation was K362,168.59 while what was computed and paid by the respondent was K202,273.37, the complainant should be paid the difference with interest.

5.0 THE APPEAL

5.1 The respondent in the Court below was disenchanted with the decision of the learned Registrar and appealed to this court. We shall hereinafter refer to the respondent as the appellant. The appellant advanced four grounds of appeal couched as follows-

1. ***The Court below erred both in law and fact when it decided that the respondent is entitled to the difference between ZMW362,168.59 and ZMW202,273.37 based on the restructuring without due regard to the Collective Agreement and provisions relating to promotions;***
2. ***The Court below erred both in law and fact when it did not take into account the acting allowance already paid to the complainant by the respondent as ordered by the trial Court; and***
3. ***The Court below erred in law and fact when it did not accept the computations of the respondent without due regard to the rationale and basis of the said computations.***

6.0 APPELLANT'S CONTENTIONS

6.1 The appellant relied on its heads of argument filed on 21st September, 2021. The Court's attention was dawn to a portion of the judgment on assessment which stated that-

> ***"The complainant is accordingly entitled to the difference in salary and allowances between the BOZ3 grade which he was unlawfully made to be drawing and the BOZ4 grade to which he became entitled with effect from 1st January, 2005."***

6.2 In arguing ground one, Counsel for the appellant submitted that there is no dispute that the respondent was performing duties of a Maintenance and Transport Officer, a position in BOZ4 salary scale while the respondent was paying him BOZ3 salary and

receiving an acting allowance. It was submitted that the learned Registrar fell into grave error when he drew the conclusion that the respondent must be treated as a person who moved into the new position by restructuring without due regard to the applicable Collective Agreement. It was argued that the trial Court simply ordered that the respondent ought to have been treated as though he was in the substantive position in grade BOZ4. The Court did not order that the respondent be treated as though he went into that position by restructuring. According to the respondent, this means that the respondent moved upward by way of promotion into the BOZ4 salary grade and if it was indeed a restructuring, there would have been no need to take into account the acting allowances already paid as per the order of the trial court.

6.3 Our attention was drawn to clause 5.1 of the appellant's Collective Agreement on page 127 of the record of appeal which provides as follows:

> ***"It is hereby agreed between the Bank and the Union that on promotion an eligible employee shall be awarded a minimum of two notches in the salary scale of the new post."***

6.4 It was contended that the learned Registrar was bound by the above provision of the Collective Agreement signed between the parties and should have given reasons for concluding otherwise. It was contended further that the learned Registrar did not analyze

the evidence or articulate his reasoning to the standard required in judgments. To buttress this argument, we were referred to the cases of ***Minister of Home Affairs vs Lee Habasonda***[1] and ***Isaac Mwanza & Jeff Geoffrey Banda vs The People.***[2]

6.5 Ground two attacks the lower court's failure to take into account the acting allowances already paid to the respondent. That he was bound by the direction of the lower Court to take into account the already paid allowances in finding what was due to the respondent.

6.6 In support of ground three, it was contended that the learned Registrar erred when he accepted the respondent's computations without a basis for doing so. That there was no basis upon which the Court accepted the respondent's calculations. Counsel submitted that the lower Court ought to have proceeded as though the respondent was promoted into the new position. We were referred to the case of ***Stripes Zambia Limited vs Ireen Siame & Others***[3] where we guided that an assessment is an evaluation and as such a judgment ought to show a review of the evidence.

6.7 Our attention was drawn to page 163 of the record of appeal where the complainant stated that-

> ***"In arriving at my calculations, I took the acting allowance on the salary at BOZ3 added them up as indicative of the salary that I should have enjoyed at***

the Bank of Zambia in accordance with the Collective Agreement."

6.8 It was argued that the respondent's calculations were contrary to the Collective Agreement which provides for promotion at two notches in the salary scale of the new position. Further that the Minimum Wages and Conditions of Employment Statutory Instrument was not applicable to the respondent in calculating his overtime pay.

6.9 In arguing that the evidence adduced by the respondent at the hearing on assessment was unsatisfactory, we were referred to the case of ***Phillip Mhango v Dorothy Ngulube & Others***[4] where the Supreme Court of Zambia held that-

> ***"... the evidence presented to the Court was unsatisfactory, and, in our opinion the learned trial judge would have been entitled to either refuse to make any award or to award a much smaller sum if not a token amount, in order to remind litigants that it is part of the judge's duty to establish for them what their loss is."***

6.10 Counsel argued that in view of the inconsistencies and inadequacies in the evidence, the lower Court was bound to provide the rationale for accepting the respondent's calculations and concluding that he moved into his new position by the appellant's restructuring. We were referred to the case of ***Zambia Telecommunications Company Limited v Sakala***[5] to buttress

the argument that the assessment was incomplete and should be sent before a different Registrar for assessment.

6.11 It was argued further that there was no basis for the collapsing of the acting allowance into BOZ3 salary to provide for the new BOZ4 salary.

7.0 RESPONDENT'S CONTENTIONS

7.1 The respondent filed its heads of argument on 6th January, 2022. Counsel for the respondent argued all the ground of appeal collectively. He submitted that the question as to whether the respondent should be treated as having moved into the new position by restructuring was resolved by the trial Judge and the learned Registrar merely followed the direction. That therefore, the Registrar did not need to give reasons.

7.2 It was submitted that at the assessment hearing, the appellant's witness (RW1) admitted that the respondent's new position moved to BOZ4 after the restructuring. It was submitted that the trial Court's directive that the respondent's acting allowances should be taken into account was so as not to place the respondent in a position of unjust enrichment and not that he was promoted. The difference in the respective calculations by the parties was not because of disregarding the Collective Agreement but because of the manner in which the overtime pay was calculated.

7.3 Our attention was further drawn to the part of RW1's evidence at the assessment hearing where he stated that it was discovered that during the change of the payroll system from micro pay to the oracle system, employees at the regional office were getting higher overtime pay compared to those at the head office because the factor of 160 was used instead of 365. The gist of Counsel's argument was that the calculation of the respondent's overtime pay should have been calculated using 160 as a factor.

7.4 It was argued further that the appellant cannot seek to impugn the respondent's calculations for failure to follow the provisions of the Collective Agreement when this issue was not raised in the Court below. That since the salary scale BOZ3 had been abolished, the respondent's salary could only be calculated by adding the acting allowance to the unlawful salary the respondent was paid.

7.5 Lastly, it was submitted that should the court be of the view that the judgment on assessment ought to be set aside for failing to show an evaluation of the evidence and the reasoning, and should this court order that trial should be before a different registrar, matter should be determined based on the evidence on record given at the assessment.

8.0 THE COURT'S CONSIDERATION AND DECISION

8.1 We have carefully considered the record of appeal, the grounds of appeal, the arguments by the parties and the judgment appealed against. This appeal raises the following three issues:

i. ***Whether in calculating the respondent's remuneration, he should be considered as having moved into the new position by restructuring or promotion;***

ii. ***Whether the learned Registrar erred by not taking into account the acting allowances already paid to the respondent; and***

iii. ***Whether or not the learned Registrar accepted the respondent's computation of his dues without due regard the rationale and/or basis of his calculations.***

8.2 Regarding the first issue as to how the respondent ought to have been treated, the appellant has also raised the question whether the manner in which the respondent's overtime pay was calculated was proper. The starting point in addressing this ground of appeal is the judgment of the learned trial judge which stated as follows at pages J16 to J17 -

> ***"The result of the foregoing position is that the complainant is entitled to be paid all salaries and allowances and to benefit from any increments during the period at BOZ4 salary grade as if he had been in that substantive position firstly in the position of Maintenance and Transport Officer and lately as Office Services Officer. These salaries and allowances are***

with effect from 1st January, 2005 to his current position of Office Services Officer. The said payment shall, of course, take into account the acting allowances paid."

8.3 The outcome of this ground of appeal is anchored on the interpretation of the trial Court's judgment. We must hasten to mention that there is nowhere in the judgment of the trial judge where it is expressly stated that the respondent should be treated as having moved in the position of Maintenance and Transport Officer by the restructuring that occurred or that he should be treated as if it was a promotion. The judgment of the trial judge simply directed that the respondent was entitled to be paid all salaries and allowances for the period he was performing duties of the BOZ4 salary grade as if he had been in that substantive position.

8.4 The parties have fronted conflicting positions on this issue. While the respondent contends that he moved in the position in question by a restructuring, the appellant alleges that it was a promotion.

8.5 What is clear from the evidence adduced before the trial Court and before the learned Registrar was that the position of Maintenance and Transport Officer was a restructured position (Page J13 of the trial Court's judgment and page 181 of the record of appeal). In as much as it can be argued that because the respondent was moved into a higher position making it a promotion, we are of the

considered view that the restructuring occurred before the respondent was moved in the new higher position. We therefore do not find fault with the learned Registrar's conclusion that the respondent should be treated as if he moved into the position in question by restructuring.

8.6 With regard to the overtime pay, the parties' point of departure is the way they respectively calculated the overtime pay due to the respondent. It is clear from the evidence adduced at the hearing of the assessment that the parties departed on whether the factor 160 or 365 should be used in calculating the overtime pay. The evidence adduced showed that the employees at the regional office, where the respondent was based received higher overtime pay because the appellant at the regional office erroneously used the factor 160 in the calculations when they ought to have changed to using the factor 365. It is not in dispute that the respondent's overtime pay was calculated using the 365.

8.7 We concur with the submission by Counsel for the respondent that the appellant should have used the formula which incorporated the 160 as a factor as there was a legitimate expectation on the part of the respondent. Ground one therefore fails.

8.8 Ground two of the appeal finds fault with the learned Registrar's failure to take into account the acting allowances already paid to the respondent.

8.9 The guidance given by the trial judge on J17 of the judgment was that the payments made to the respondent shall take into account the acting allowances paid to the respondent. A perusal of the judgment on assessment shows that the learned Registrar did not take into account the direction of the trial judge. This ground of appeal therefore succeeds.

8.10 In ground three, it was contended that the learned Registrar simply accepted the Respondents calculation of his dues without a basis for doing so. We have carefully perused the judgment of the learned Registrar and the relevant portion states as follows:

> ***"I have applied my mind to the Judgment of the court and the positions taken by the two parties. My conclusion is that the Complainant must be treated as a person who was moved into the position of BOZ4 by reason of the restructuring of 2005 and not as a person who ought to have been promoted into there.***
>
> ***Taking the foregoing position, the Complainant computed K362,168.59 as his dues. The Respondent on the other hand taking their position computed and paid out to him a sum of K202,273.37."***
>
> ***I therefore order that the Complainant is entitled to the difference."***

8.11 As rightly submitted by the appellant, there was no basis upon which the learned Registrar accepted the respondent's calculations and ordered the appellant to pay the difference. The judgment does not show that the learned Registrar reasoned on the evidence that was presented before him in order to reach at the conclusion that he did.

8.12 Contrary to the guidance given in the case of ***Minister of Home Affairs v Lee Habasonda***[5] (cited above), the learned Registrar's judgment did not reveal a review of the evidence, make findings of fact, reveal or disclose the reasoning of the Court on the facts and application of the law to the facts. The judgment only contained three pages and very important points of fact were not addressed by the learned Registrar. We therefore form the view that there was no assessment in this matter as the learned Registrar merely stated his conclusion.

8.13 The appellant further contended that the evidence presented for the assessment was unsatisfactory. We concur with the appellant. A perusal of the evidence presented before the assessment hearing mainly shows the respective parties calculations of what they thought was due to the respondent. In our considered view, the evidence should have been presented in such a way that the lower Court should have shown how he arrived at the amount awarded to the respondent. The manner in which the evidence was

presented before the learned Registrar did not assist the Court. It is because of this that the suggestion by Counsel for the respondent that should the Court refer the matter back for reassessment, the matter should be determined based on the documents before Court, cannot be accepted. The parties shall present the evidence for assessment before the Registrar who shall determine whether he can assess the matter on the basis of the documents that the parties will file. This ground of appeal therefore also succeeds.

9.0 CONCLUSION

9.1 In view of the foregoing, the appeal partially succeeds. We order that the matter shall be reassessed before a different Registrar who shall take into account the acting allowances paid to the respondent as directed by the trial judge.

9.2 Each party shall bear its own Costs.

F. M. CHISHIMBA
COURT OF APPEAL JUDGE

D. L. Y. SICHINGA, SC
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE