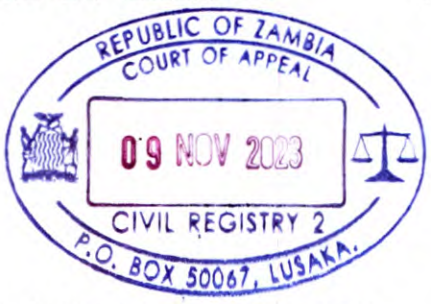
IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 254/2021
HOLDEN AT KABWE



(Civil Jurisdiction)

B E T W E E N:

FIRST QUANTUM MINING AND OPERATIONS LIMITED **APPELLANT**

AND

REGGAI MUSONDA **RESPONDENT**

Coram: Kondolo, Majula, Chembe, JJA
On 13th October, 2023 and 9th November, 2023

For the Appellant : *Mr. P. Kachimba, Principal State Advocate appearing as agent for Messrs Mando & Pasi Advocates.*

For the Respondent : *Mr. F. Tembo of GM Legal Practitioners.*

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Sydney Mwape vs First Quantum Mining and Operations Limited Comp. No. IRD/SC/11/2021.*
2. *University of Zambia vs University of Zambia and Allied Workers Union - SCZ Judgment No.4 of 2003.*
3. *Dennis Chansa vs Barclays Bank of Zambia Plc - SCZ Appeal No. 111 of 2011.*
4. *Byrne vs Kanweka (1967) ZR 82 (C.A.).*

5. *A.S. and C. Enterprises Limited, Yula Enterprises Limited Muchabani Astra T/A Karma General Dealers vs Stanbic Bank Zambia Limited (2012) 1 ZR 534.*

6. *Anderson Kambela Mazoka and Others vs Patrick Mwanawasa and the Attorney-General (2005) ZR. 138 (SC).*

7. *Savenda Management Services vs Stanbic Bank Zambia Limited - SCZ Selected Judgment No.10 of 2018.*

8. *The Attorney General vs Clarke (2008) 1 ZR 38*

9. *Undi Phiri vs Bank of Zambia —SCZ Judgment No. 21/2007)*

10. *Lazarus Mumba vs Zambia Publishing Company (1980) ZR.144.*

11. *Jere and Others vs Zambia Railways Limited - SCZ Appeal 125/2015.*

12. *ZCCM vs Matale (1995-1997) Z.R. 144*

Legislation Referred to:

1. *Employment Code Act, No. 3 of 2019*
2. *Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia*
3. *Constitution, Chapter 1 of the Laws of Zambia*

1.0 Introduction

1.1 The appeal is against the judgment of Mulenga J. of the High Court which was rendered on 30th July, 2021 at Solwezi. The learned Judge found in favour of the respondent in a complaint for wrongful, unfair and unlawful dismissal from employment.

1.2 The burning issue that the appeal addresses is whether a court can of its own motion (*suo motu)* formulate, determine and make awards on issues that have not been pleaded by the parties.

2.0 Background

2.1 The respondent was employed by the appellant on a permanent basis as a truck serviceman on 3rd April, 2013. He was promoted to the position of mechanic on 20th July, 2013.

2.2 During the course of his employment, the respondent was absent from work from 26th to 28th March and on 2nd April, 2021. When quizzed about his whereabouts on the dates in question, the respondent produced two sick notes obtained from Solwezi General Hospital but they were rejected on the premise that they were obtained from an unauthorized hospital. The appellant contended that the only authorized hospital according to the Collective Agreement was Mary Begg Hospital.

2.3 On 25th April, 2021 the respondent was charged with the offence of being absent from work without leave as per clause 1.4 of the appellant's schedule of offences in the Disciplinary Code. On 11 May, 2021, the respondent wrote an exculpatory statement. He subsequently attended a disciplinary hearing on 14th May, 2021. He was later found wanting and summarily dismissed from employment. His appeal within the appellant's appeal structure was thrown out for lack of merit. It is against this

backdrop that he instituted proceedings against the appellant in the Industrial Relations Division of the High Court.

3.0 Decision of the High Court

3.1 The lower court reviewed the evidence before it and found that the Collective Agreement that was applicable to the case was the one dated 1st January, 2021 to 31st December, 2022. That the Collective Agreement that ran from 2015 to 2016 had expired hence the clause that bound the respondent to produce sick notes from the Mary Begg Hospital was not applicable.

3.2 The learned Judge consequently held that the respondent was wrongfully dismissed from employment since the appellant did not have the power to charge him under an expired Collective Agreement. The court thereafter awarded the respondent 24 months' salary as damages for wrongful and unfair dismissal.

3.3 Relying on the judgment of ***Sydney Mwape vs First Quantum Mining and Operations Limited***[1] the lower court held that the respondent should additionally be paid his accrued pension benefits in accordance with the Collective Agreement despite this issue not being pleaded.

4.0 Grounds of Appeal

4.1 The appellant was dissatisfied with the outcome, hence the appeal anchored on the following grounds:

"1. The court below erred in law by erring in the interpretation of the Respondent's disciplinary rules and policies to hold that the respondent was unfairly and wrongfully dismissed.

(We note the err by counsel in referring to the respondent's disciplinary rules and policies when in actual fact it was the appellants)

2. The court below erred in law when it adjudicated on the issue of accrued pension benefits which was not pleaded and on which the respondent did not have an opportunity to be heard and when it awarded the respondent reliefs he did not seek.

3. The court below erred in law when it erred in its interpretation of the Collective Agreement between the appellant and the unions and the respondent's conditions of employment to hold that the complainant was entitled to accrued pension benefits when he was being summarily dismissed.

4. The court below erred in law by awarding the respondent accrued pension benefits in addition to damages for unfair and wrong dismissal which amounted to double compensation for loss of employment."

5.0 Appellant's Arguments

5.1 In support of ground one, the appellant asserted that the policy that was communicated via a joint memorandum by the appellant and the unions could only be revoked in a like manner and not by implication. Further, that a policy introduced via an addendum to a Collective Agreement cannot be automatically

revoked by the coming into force of another Collective Agreement.

5.2 Counsel contended that in the 2021 Collective Agreement, Mary Begg continued to be the sole medical services provider as stipulated in clause 19.4. He argued that the respondent admitted and was aware of this policy and it was also the understanding of the Tribunal Chairperson and the human resources representative that the policy was in force. That it was a misdirection on the part of the court below to substitute the tribunal's findings of fact with its own as this was tantamount to the court sitting as an appellate court to review what the tribunal had done.

5.3 Counsel observed that the appellant only accepted sick notes from Mary Begg or from elsewhere but verified by Mary Begg. We were further referred to **section 71(3) of the Industrial and Labour Relations Act** on when a Collective Agreement comes into force.

5.4 Counsel stoutly argued that the respondent produced a letter from the Labour Commissioner at page 95 of the record of appeal notifying the respondent and the unions of the approval and regulation of the 2021 to 2022 Collective Agreement and is dated 21st April, 2021. That at the time the respondent committed the offence of absenteeism on 26th March, 2021, 27

March, 2021 and 2nd April, 2021, the 2021/2022 Collective Agreement had not yet come into force.

5.5 To buttress this argument Counsel called in aid the case of ***University of Zambia vs University of Zambia and Allied Workers Union***[2] where it was held that:

> *"The Collective Agreement as agreed upon by the parties was not registered and the Industrial Relations Court never ordered that it be registered. Therefore, it has no legal force."*

5.6 With respect to the second ground of appeal, the appellant faulted the trial Judge for adjudicating on the issue of accrued pension benefits when it was not pleaded and the appellant did not have an opportunity to be heard on the matter. Counsel submitted that the court below misinterpreted **section 85 (6)** of the **Industrial and Labour Relations Act** to mean that the court has powers to adjudicate on matters not pleaded. According to the appellant, the aforecited section was intended to avoid a multiplicity or proliferation of litigation by different parties on a matter that had already been settled by the Court.

5.7 Pertaining to ground three, the kernel of the appellant's argument was that the retirement benefits contemplated in clause 18 of the Collective Agreement were meant to provide for the respondent and other employees who were in employment

on permanent and pensionable terms by 31st December, 2020. The option was to choose either to remain with the status quo or sign on with a private pension scheme after it has been set up. For those who had left employment by retirement prior to the pension scheme being set up, they were only entitled to be paid one month gross salary per each year served plus an additional one-month gross salary.

5.8 Counsel further stressed that the retirement benefits as contemplated under the Collective Agreement are meant to cater for entitlements of an employee who leaves employment specifically by way of retirement and not any other means from a severance pay to a pension benfit payable under the pension scheme to be created. The long and short of counsel's submission was that the eligibility to the retirement benefits was predicated on the mode of exit of employment being retirement. This entails that if an employee leaves by any other mode of exit other than retirement, they are not eligible and should be paid in accordance with the prevailing conditions.

5.9 On the fourth ground of appeal, the appellant spiritedly argued that the court's award of accrued pension benefits in addition to an award of damages for wrongful and unfair dismissal was a misdirection as it amounted to double compensation for loss of employment. That the court did not deem the respondent to have retired to entitle him to pension benefits and that having found that the respondent was wrongfully and unfairly

dismissed, damages were the only relief available to the respondent.

6.0 Respondent's Arguments

6.1 The respondent's heads of argument were filed on 2nd September, 2022. In reaction to ground one, the respondent contended that the trial Judge was on firm ground when he held that the respondent was wrongfully and unfairly dismissed. That this was so in that the appellant dismissed the respondent on the basis of a policy contained in a Collective Agreement that expired.

6.2 Counsel argued that the 2021/2022 Collective Agreement did not have a policy that restrictd the respondent to obtaining sick notes from Mary Begg Clinic. **Section 71(3)** of the **Industrial and Labour Relations Act** was cited as authority for the proposition that a collective agreement comes into force on the date on which it is approved by the Minister and remains in force for a period specified in the Collective Agreement.

6.3 Counsel further submitted that while it is not in dispute that the respondent did not report for work on 26th, 27th, 28th, March 2021 and 2nd April, 2021, he did however produce two sick notes from Solwezi General Hospital.

6.4 Pertaining to ground two, Counsel for the respondent argued that by virtue of clause 18 of the 2021 Collective Agreement, the

respondent ought to be paid his accrued pension benefits at the rate of one month's gross pay per year served until 31st December, 2020 and 5% of his basic salary as employers' contribution to the private pension fund for the period between 1st January, 2021 to May, 2021. We were referred to **Article 187 (2) of the Constitution of Zambia** which states as follows:

> *" (1) An employee has the right to pension benefit.*
> *(2) A pension benefit shall not be withheld or altered to that employee's disadvantage."*

6.5 Further reliance was placed on **section 85(5)** of the **Industrial and Labour Relations Act** which enacts that:

> *"The court shall not be bound by the rules of the evidence in civil and criminal proceedings, but the main object of the court shall be to do substantial justice between the parties before it."*

6.5 Based on the foregoing, Mr Tembo submitted that the learned trial Judge in the court below was justified in granting the respondent his pension benefits despite the fact that they had not been expressly pleaded by the respondent.

6.6 In relation to ground three, Counsel observed that the appellant wrongly dismissed the respondent on the basis that absenteeism without leave did not prove grounds amounting to wrongful dismissal. Counsel went on to submit that the

respondent provided verifiable sick notes to the appellant that amounts to a reasonable excuse.

6.7 Moving to ground four, it was forcefully argued that the learned trial Judge was on firm ground in granting damages for unfair and wrongful dismissal as well as accrued pension benefits. Counsel pointed out that the respondent was unfairly and wrongfully dismissed on unproved grounds. He was therefore entitled to damages in line with the case of ***Dennis Chansa vs Barclays Bank of Zambia Plc.***[3]

6.8 We were implored to dismiss the appeal.

7.0 **Hearing of the Appeal**

7.1 At the hearing of the appeal Mr. Kachimba relied entirely on the heads of argument that were filed on behalf of the appellant.

7.2 In response Mr. Tembo informed the court that he would substantially rely on the respondent's heads of argument that were filed on 2nd September, 2022, but that he would also make brief oral submissions to augment.

7.3 On the issue of accrued benefits not being pleaded, Mr. Tembo submitted that **section 51(1)** of the **Employment Code Act** confers a right on an employee who has been summarily dismissed to be paid accrued wages and benefits by an employer. He spiritedly argued that the said section is couched

in mandatory terms and that the right subsists even where a dismissal has been held to be lawful.

7.4 Mr Tembo further cited **section 85(5)** of the **Industrial and Labour Relations Act** for the submission that the High Court is enjoined to carry out substantial justice and it was on that basis that the trial Judge was on *terra firma* when it awarded wages on accrued benefits.

7.5 In sum, learned counsel called upon this Court to dismiss the appeal for being devoid of merit.

8.0 Decision of the Court

8.1 We have pondered over the evidence and the submissions by counsel for the appellant for which we are grateful.

9.0 Ground one - Applicable Policy

9.1 In the first ground of appeal before us, the appellant is attacking the learned trial Judge's interpretation of the appellant's disciplinary rules and policies in holding that the respondent was unfairly dismissed. The contention by the appellant is that it was company policy that only sick notes from Mary Begg clinic were to be recognized and accepted for purposes of sick leave.

9.2 In the submissions, the appellant was aggrieved with the lower court's finding that the collective agreement that was in force at the time the appellant presented a sick note from Solwezi

General Hospital was the 2021 to 2022 Collective Agreement which does not have the aforecited provision. It has been forcefully argued that the policy was still in existence after its introduction and was communicated to the employees by management and the unions. There was no revocation of this policy. In addition, that a policy introduced via an addendum is not automatically invalidated by the coming into force of another Collective Agreement. Great store has been placed on clause 14 of the Collective Agreement which is that the medical scheme that was earlier introduced was maintained and that Mary Begg was to continue to be the sole medical services provider.

9.3 The thrust of the respondent's argument is that the 2021/2022 Collective Agreement did not have the policy and further that the respondent did produce two sick notes from Solwezi General Hospital. On this score, the finding by the court below that the respondent had been wrongfully and unfairly dismissed could not be faulted.

9.4 Having reflected on the rival positions, we are inclined to agree with the arguments advanced by Counsel for the appellant. A scrutiny of the evidence reveals that the respondent did admit during the course of the disciplinary hearing that he was aware of the policy. So did the Union Leader who was present during the disciplinary hearing (see minutes of the disciplinary hearing exhibit 'CN9' on page 135 of the record of appeal.)

9.5 The fact that it was not added as an addendum to the 2021/2022 Collective Agreement does not mean that it had been automatically revoked or invalidated. One cannot ignore the fact that there was an admission on the part of the respondent and the Union Leader that there was this policy in existence. Notwithstanding that the Collective Agreement for 2021 to 2022 did not have an addendum, there was no evidence of revocation of the said policy. This evidence must be looked at holistically.

9.6 Clause 14 of the 2021/2022 Collective Agreement speaks to entitlement to the medical scheme and should be read in conjunction with clause 19.4 which makes provision for medical allowance which is for membership at Mary Begg clinic. At the expense of being repetative, we hold the view that the aspect of Mary Begg clinic being the provider for medical services was not disputed and was never revoked. The understanding by the parties from the evidence on record is that sick notes needed to be obtained from Mary Begg clinic. There is consensus on the part of the respondent save to say that in his defence he was of the view that the ones obtained from Solwezi General Hospital could be verified.

9.7 In light of the foregoing, we opine that the policy that was in force and applicable to the respondent was that of Mary Begg medical scheme and the Judge fell in error by holding otherwise.

9.8 The holding that the appellant was wrongfully dismissed is wrong on account of the misapprehension of the appellant's policies. Therefore we find that there is merit in this ground of appeal.

10.0 Ground two - Unpleaded matters

10.1 The aggravation in the second ground of appeal emanates from the decision by the trial Judge to award pension benefits which, according to the appellant, were never pleaded. The Honourable Judge in the court below justified the award by invoking the provisions of **section 85(6)** of the **Industrial and Labour Relations Act** which provides that:

> *"(6) An award, declaration, decision or judgment of the Court on any matter referred to it for its decision or on any matter falling within its exclusive jurisdiction shall, subject to section ninety-seven, be binding on the parties to the matter and on any parties affected."*

10.2 On the basis of the above provision, the learned trial Judge held that the respondent herein was entitled to benefit on the basis of the judgment of ***Sydney Mwape vs First Quantum Mining Operations Limited***[1] which in effect entitled the parties to be paid accrued pension benefits. In a nutshell, the appellant's criticisim of the Judge is that **section 85(6)** of the **Industrial and Labour Relations Act** was misinterpreted and did not give the court powers to adjudicate on matters not pleaded and to grant reliefs not sought. The argument is that a party must

specifically plead an issue where they seek to rely on an award, declaration, decision or judgment of the court in order that the other party is afforded an opportunity to be heard on the issue.

10.3 The respondent's submission is simply that the award of pension beneifts although not expressly pleaded by the respondent, was justified. Reliance has been placed on the priovisions of **Article 187** of the **Constitution** as well as **section 85(5)** of the **Industrial and Labour Relations Act**.

10.4 We turn to examine the law on pleadings which is well settled. It is clear that parties are bound by their pleadings and evidence outside the pleadings is inadmissible. The case of ***Byrne vs Kanweka*** [4] is a case in point where the Supreme Court speaks to this principle. The principle was reaffirmed in yet another illuminating case of ***A.S. and C. Enterprises Limited, Yula Enterprises Limited Muchabani Astra T/A Karma General Dealers vs Stanbic Bank Zambia Limited.***[5]

10.5 One of the cardinal principles of pleadings is that a party must specifically plead any matter which they wish to raise. In other words, they must clearly and distinctly notify their opponent what issue they intend to prove at court and avoid the element of taking the opponent by surprise. The learned author Dr. Patrick Matibini stated the following in his book titled **Zambian Civil Procedure: Commentary and Cases** volume at page 565:

> *"Pleadings constitute the spine and sprinkle of a suit on which the fate of the case of a plaintiff or Defendant depends. Thus,*

the case of a party is articulated in a pleading and no relief based on any ground not set out in the pleadings can be granted by the Court. Parties to a suit are bound by the pleadings."

10.6 The Supreme Court yet again explained the functions of pleadings in the celebrated case of ***Anderson Kambela Mazoka and Others vs Patrick Mwanawasa and the Attorney-General***[6] when it held that:

"The functions of pleadings are to give notice of the case which has to be met and define the issues on which the Court will have to adjudicate in order to determine the matter in dispute between the parties. Once the pleadings have been closed, the parties the bound by their pleading and the court has to take them as such."

10.7 It is clear from the foregoing that parties are bound by their pleadings. The court cannot, on its own motion (*suo motu*), seek out new reliefs. Fair play demands that the opponent must have an opportunity to be heard on the issue. We stand guided by the case of ***Savenda Management Services vs Stanbic Bank Zambia Limited***[7] where the Supreme Court had this to say regarding the introduction of extra remedies in favour of a party:

"We have difficulty with the pronouncement made by the Court of Appeal in the preceding paragraph because it arises from a finding made by the learned High Court Judge after he referred to section 50 of the Banking and Financial Services Act of his own motion after creating a new set of

facts and circumstances resulting in the introduction of an extra remedy in favour of the Appellant namely, breach of the duty of confidentiality. The court of Appeal justified this departure by the learned High Court Judge by holding that the is empowered by virtue of section 13 of the High Court Act to grant all such reliefs to which any party may appear to be entitled in respect of any and every equitable claim of defence properly brought by them, or which shall appear in the cause or matter."

10.8 It is our firm view that the function of pleadings has been adequately addressed in our jurisdiction and courts have a duty to confine their adjudication within the case that has been pleaded. Failure to do so means the court has enlarged the case before it and disadvantaged the other party who had no opportunity to be heard on the issue. The only exception to the general rule on pleadings is where evidence an unpleaded matter has been let into evidence and not objected to by the opposing party. In such a situation, a court is at liberty to consider the evidence (see ***The Attorney General vs Clarke***[8]***; Mazoka and Others vs Levy Patrick Mwanawasa and Others***[6] and ***Undi Phiri vs Bank of Zambia***[9]***)***

10.9 Further, it was stated in the case of ***Lazarus Mumba vs Zambia Publishing Company***[10] that:

"Although the trial Court has a duty to admit and decide a case on a variation, modification or development of what

has been averred, a radical departure from the case pleaded amounting to separate and distinct new case cannot entitle a party to succeed."

10.10 Turning to the case at hand, it is abundantly clear that the trial court misdirected itself when it decided on the aspect of pension benefits which were not pleaded and the appellant was not given an opportunity to be heard. The invocation of **section 85(6)** without affording the parties an opportunity to address him was in violation of the principle on pleadings and cannot be entertained. The adjudication on accrued pension benefits which was not pleaded was therefore a departure from the case that had been put forward by the respondent and must be rejected. The reliance on the provisions of **section 85(6)** of the **Industrial and Labour Relations Act** is misconceived in this instance for the simple reason that even if one intended to invoke that, they ought to have pleaded the issue. The aforecited section was explained in the case of ***Jere and Others vs Zambia Railways Limited***[11] where it was held that:

"The section was intended for the parties who had not yet litigated their claims but were similarly circumstanced with parties to an action. That section cannot be relied upon by a party who has prosecuted his/her claim independently and lost. The section is not intended to provide a mechanism where parties can undertake separate litigation and later choose which judgment to benefit from."

10.11 At this point, we wish to address the argument by counsel for the respondent that the Industrial Relations Division of the High Court is a court of substantial justice and that it was in the interest of justice that the respondent be awarded accrued pension benefits. Refuge has been sought in the provisions of **section 85(5)** of the **Industrial and Labour Relations Court Act** which states that:

> *"The Court shall not be bound by Rules of civil and criminal procedure but the main purpose shall be to do substantial justice to the parties before it."*

10.12 Further the case of ***ZCCM vs Matale*** [12] that has been called in aid in relation to the object of the above cited section. On the basis **section 85(5)** as well as the ***Matale*** case it has been vehemently that the grant of pension benefits notwithstanding that they were no expressly pleaded was justified.

10.13 We take the view that **section 85(5)** does not give parties a blanket relief for not abiding by the rules of court. This section does not take away the requirement for a party to articulate their pleadings. The authorities we have referred to on the functions of pleadings do not exempt parties appearing before the Industrial and Labour Division of the High Court from complying with the law in relation to having issues expressly pleaded.

10.14 Mr Tembo in his oral submissions argued further that the respondent was entitled to accrued pension benefits even if they were not pleaded this was on account on the provisions of **section 51(1)** of the **Employment Code Act**. For ease of reference we shall reproduce it hereunder:

> *"51. (1) An employer who summarily dismisses an employee under section 50 shall pay the employee, on dismissal, the wages and other accrued benefits due to the employee up to the date of the dismissal."*

10.15 We have stewed over this argument and hold the view that indeed an employee ought to be paid their accrued wages and benefits by their employer. In terms of accrued benefits due to an employee this generally refers to wages, leave and other beneftis that the employee has earned and not yet received.

10.16 Whether pension benefits are included can depend on the specific terms of the employment contract, the pension scheme and applicable laws. In many cases, pension beneftis are separate from wages and are typically governed by pension regulations and agreements.

10.17 It is essential to review the employment contract and any relevant pension documents to determine the specific entitlements related to pension benefits upon summary dismissal.

10.18 That is the reason why it is cardinal when it comes to the aspect of accrued pension benefits that they are specifically pleaded and there must be evidence led that the employee belonged to a pension scheme and made contributions towards the same. We are none the wiser as to what scheme was in place at the time and whether the appellant and the respondent were contributing to the same. There is conflicting evidence regarding the pension scheme.

10.19 We therefore find that the arguments advanced by the Respondent have no legal basis to stand on and are dismissed.

10.20 In light of the foregoing, we find merit in the second ground of appeal and consequently the award of pension benefits is hereby set aside.

11.0 Grounds three and four - Accrued pension benefits

11.1 The third and four grounds are entwined in that the criticism of the Judge is on the award of accrued pension benefits and also award of damages. In the third ground it has been submitted that the court below erred in its interpretation of the collective agreement between the parties when it held that the respondent was entitled to accrued pension benefits when he was summarily dismissed. In the fourth ground, they are challenging the award of accrued pension benefits and damages

for wrongful dismissal on the basis that this amounts to double compensation.

11.2 In the view that we have taken in relation to the second ground of appeal which is that the Judge misdirected himself when he awarded accrued pension benefits which were not pleaded, the third and fourth grounds of appeal become an academic exercise in futility. They accordingly fall away.

12.0 Conclusion

12.1 In sum, the appeal has succeeded and is upheld.

12.2 This matter having emanated from the Industrial Relations Division of the High Court, each party shall bear their own costs.

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M.M. Kondolo, SC

COURT OF APPEAL JUDGE

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B.M. Majula

COURT OF APPEAL JUDGE

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Y. Chembe

COURT OF APPEAL JUDGE