IN THE SUPREME COURT OF ZAMBIA Appeal No. 193/2016

HOLDENAT LUSAKA SCZ/8/180/2016

(Civil Jurisdiction)

BETWEEN:

STANDARD CHARTERED BANK (Z) PLC - APPELLANT

AND

WILLARD SOLOMON NTHANGA & OTHERS – RESPONDENTS

Coram: Musonda, DCJ, Malila and Kaoma, JJS
On 15th July, 2020 and 5th, October 2020

For the Appellant: Mr. E.S. Silwamba, SC, Mr. J.A. Jalasi, Eric Silwamba, Jalasi and Linyama Legal Practitioners

For the Respondents: Mr. M.L. Mukande, SC, M.L. Mukande and Company; Mr. M. Okware, Okware and Associates.

J U D G M E N T

Kaoma, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Standard Chartered Bank (Z) PLC v Willard Solomon Nthanga and others - Appeal No. 152 of 2006**
2. **Development Bank of Zambia v Dominic Maambo (1995-1997) Z.R. 89**
3. **Khalid Mohamed v The Attorney General (1982) Z.R. 49**
4. **Wilson Masauso Zulu v Avondale Housing Project (1982) Z.R. 172**
5. **Lennox Nyangu v Barclays Bank Zambia Plc - Selected Judgment No. 4 of 2016**
6. **Bank of Zambia v Caroline Anderson and another (1993-1994) Z.R. 47**
7. **B.P. Exploration Co (Libya) Limited v Hunt (No. 2) (1979) 1 WLR 783**
8. **Costa Tembo v Hybrid Farm Zambia Ltd - Selected judgment No. 13 of 2002**
9. **Jonas Banda v Dickson Tembo - Selected Judgment No. 18 of 2008**
10. **Zambia Daily Mail v Charles Banda (1999) Z.R. 203**
11. **James Mankwe Zulu and others v Chilanga Cement Plc - Appeal No. 12 of 2004**

12. Bellamano v Ligure Lombarda Limited (1976) Z.R. 276
13. Mutale v Zambia Consolidated Copper Mines Limited - Selected Judgment No. 12 of 1994
14. United Bus Company of Zambia v Jabisa Shanzi (1977) Z.R. 397
15. Collet v Van Zyl Brothers Limited (1966) Z.R. 66
16. Zambia National Commercial Bank Plc v Geofrey Muyamwa and 88 others - Selected Judgment No.37 of 2017
17. Atlantic Bakery Limited v Zesco Limited - Selected judgment No. 61 of 2018
18. Jacqueline Chipasha Mutale v Stanbic Bank Zambia Limited - Appeal No. 189 of 2016
19. Richard H. Chama and 213 others v National Pension Scheme Authority and 9 others - Appeal No. 1 of 2018
20. BUK Truck Parts Limited v Stanley Sinyenga – Appeal No. 59 of 2016
21. Zambia Telecommunications Company Limited v Aaron Mweenge Mulwanda and Paul Ngandwe - Appeal No. 63 of 2009
22. Judith Mukaya Chinyanta Tembo v Zambia Information and Communications Technology Authority - Appeal No. 226 of 2013
23. Standard Chartered Bank Zambia Limited v Peter Zulu and 118 others - Appeal No. 59 of 1996
24. Chick Masters Limited and another v Investrust Bank Plc - Appeal No. 198 of 2014

Legislation and other works referred to:

1. High Court Rules, Cap. 27, Orders 36(8) and 39(1)
2. Judgment Act, Cap. 89, s. 2
3. Law Reform (Miscellaneous Provision) Act, Cap. 74, s.4
4. Rules of the Supreme Court, 1999, Orders 2/2, 15/1/2, and 15/8(4)(a)
5. Pension Scheme Regulations Act No. 28 of 1996, s. 18(1)(f) and18(3)(b)
6. Industrial and Labour Relations Act, Cap 269, s. 85(5)
7. Black's Law Dictionary, Tenth Edition, Bryan A. Garner, Editor in Chief, Thomson Reuters, at page 694 and 1504

1 Introduction and background facts

1.1 This appeal is against a judgment of the learned Deputy Registrar, Charles Kafunda, on assessment of the respondents' separation packages, dated 17th June, 2016.We gave the full background to this matter in **Standard Chartered Bank Zambia PLC v Willard Solomon Nthanga and 402 others**[1], the first appeal to come before us in this series of appeals. For purposes of this appeal, we shall give only a brief summary of the facts.

1.2 On 28th November, 2000, fifty three (53) of the respondents to this appeal, as plaintiffs, commenced an action by writ against the appellant, as defendant, in the High Court. The writ was later on amended, and by the amended writ, the respondents claimed the following reliefs:

1.2.1 **Payment of their retirement benefits and/or packages inclusive of all allowances from the various dates of retirement up to the date of full settlement less what was paid to them;**
1.2.2 **Payment of the difference between the last drawn basic salary and the average basic salary wrongfully used for calculation of terminal benefits;**
1.2.3 **Payment of arrears of housing allowance effective 1st October, 1993 at 100% of basic salary less what was paid up to dates of retirement;**
1.2.4 **Payment of Deferred Pension and arrears thereof in line with the June, 1996 Anglo American Corporation Actuarial valuation;**
1.2.5 **Payment of salary arrears arising from salary increment signed in June, 1995 but backdated to January, 1995 when the plaintiffs were still in employment;**
1.2.6 **Interest thereon at current bank rates on Nos. 1, 2, 3 and 4 above from various dates of retirement to the date of full payment;**
1.2.7 **Any other relief the court may deem fit; and**
1.2.8 **Costs**

1.3 In its defence, the appellant denied the respondents' claims. In April 2001 the Deputy Registrar, E.M. Hamaundu (as his Lordship then was), allowed the respondents to amend the writ of summons to add 201 more persons to the action, thereby raising the number to 254. On 8th September, 2003 Justice Phillip Musonda also allowed the respondents to amend the writ to add 81 more plaintiffs, thus, raising the number to 335.

1.4 In September 2004, before trial, the parties settled the second claim in paragraph 1.2.2 by a consent order, regarding employees who retired under the 1998 Voluntary Separation Scheme (VSS).

1.5 On10th February, 2005 the respondents filed another application to further amend the writ to add 68 more plaintiffs. However, the court did not hear the application. The matter proceeded to trial and the 68 persons participated in the trial as if the court had formally joined them to the action. The number of plaintiffs was treated as 403.

2 Decision by the High Court

2.1 The learned trial judge Musonda, P. (retired) heard evidence from the parties and received their submissions. In his judgment, delivered on 4th April, 2006 he made several findings of fact and held, inter alia, that:

> **"I therefore, order that the 70 per cent of the pension Actuarial Reserves in respect of those who remained in the Defined Benefit Scheme be paid to them. The allowances not paid and those underpaid, i.e., housing allowance ought to have been 100 per cent of the basic salary of those entitled, be paid to the plaintiffs. The two categories ought to have had their Voluntary Severance Scheme packages calculated by using the basic salary plus allowances (emoluments earned on the last day of termination). The matter is remitted to the Deputy Registrar for assessment."**

2.2 Aggrieved by the decision, the appellant lodged Appeal No. 152 of 2006, and argued two grounds, attacking the trial judge's decision that 70% of the actuarial reserves in respect of those

who remained in the Defined Benefit Scheme (DBS) be paid to them; and that allowances be paid along with the basic salary in computing the VSS packages.The respondents filed a cross-appeal on the claim for salary arrears.

2.3 In our judgment dated 18th March, 2008 we upheld the decision by the trial judge that the appellant failed to account for 70% of the respondents' portable benefits and that all allowances formed part of their emoluments and could not be separated from their salaries for purposes of computing their separation packages.

2.4 Because the appeal involved many plaintiffs, we directed the Deputy Registrar to pay special attention to each plaintiff's entitlement at assessment to avoid ordering double payments and we referred the claim for salary arrears to the trial judge to make a pronouncement on it since he had omitted to do so.

2.5 On11th June, 2008 a total of 531 plaintiffs (now respondents) applied for assessment of their benefits. Later, on19th January, 2009 before the assessment, the appellant applied to strike out some parties it felt were wrongly joined to the action. However, the Deputy Registrar, E. Mwansa (as he then was) refused the application and held that the issue of proper parties would be dealt with during the assessment hearing.

2.6 The appellant appealed to the judge in chambers and on 9th July 2009 applied to the trial judge for orders for directions, wanting that the claim for salary arrears be determined by way of trial instead of submissions as earlier agreed by the parties.

2.7 On 5th August, 2009 the learned judge delivered his ruling, refusing to issue orders for directions. Simultaneously, he resolved the claim for salary arrears. In short he stated that:

> **"If one terminated employment two months after the new salaries came into force, he will be entitled to two months arrears. If he was terminated before the new salaries came into force, he will be entitled to nothing.**

2.8 Following that, on 26th August the respondents applied for assessment of the 25% salary arrears. Next, on 27th October, 2009 the appellant applied for leave to appeal out of time against the refusal by the learned judge to issue orders for directions. However, the learned judge declined leave, stating that he had, in his ruling, clarified the position the Deputy Registrar should take.

2.9 On 5th January, 2010 the learned judge delivered his ruling on the appeal against the refusal by the Deputy Registrar to remove from the list some of the respondents it considered were wrongly joined to the action. In refusing the application, the learned judge also pronounced that:

"If a person was not in employment in January, 1995 when the pay rise was effected, he does not get the arrears".

2.10 On 22nd January, 2010 the respondents applied for assessment of their benefits pursuant to the judgment of 5th August, 2009 and on 25th March, 2010 they applied for joinder of 141 more plaintiffs on the ground that they were former employees who were similarly circumstanced and for substitution of 26 deceased plaintiffs with the administrators of their respective estates. In opposition, the appellant argued that all the applicants left employment more than six years earlier, and so their claims were statute barred.

2.11 On16th July, 2010 the appellant filed an affidavit opposing the assessment of the 25% salary arrears stating that most of the 84 claimants were not entitled as they separated before the new salaries came into force as per the ruling of 5th August, 2009.

2.12 On 15th September, 2010 the Deputy Registrar dismissed the application for joinder, on the ground that the claims were statute barred and later, on 18th October, 2011 Hamaundu, J (as he then was) dismissed an appeal against the refusal to join the 141 applicants. However, his Lordship allowed substitution of the 26 deceased plaintiffs with the administrators of their respective estates.

3 Preliminary issue by the appellant

3.1 On18th May, 2011, before the assessment hearing listed for 23rd and 24th May, 2011, State Counsel Silwamba filed a notice to raise a preliminary issue, arguing that there were 68 plaintiffs claiming, *inter alia*, salary arrears, pension and VSS when they were not formally joined to the action. He asked the court to remove the names of the 68 individuals from the record, as plaintiffs. The Deputy Registrar, now Charles Kafunda, dismissed the preliminary issue.

3.2 On appeal to a judge in chambers, Siavwapa, J (as his Lordship then was) allowed the joinder of the 68 individuals but on further appeal to this Court, in Appeal No. 51 of 2016 we struck out the 68 individuals, leaving 335 individuals as plaintiffs.

3.3 We have been compelled to give an account of the applications relating to the joinder of various individuals to this case because, as we said in paragraph 2.5, a total of 531 plaintiffs applied for assessment of their benefits and from his judgment, it seems that the Deputy Registrar was dealing with 503 plaintiffs. State Counsel Silwamba confirmed at the hearing of this appeal that

there were 403 respondents to Appeal No. 51 of 2016 and that the 68 persons we struck out were not part of the assessment.

3.4 Counsel for the appellant also said in their heads of argument that at the assessment, PW1 testified in relation to about 300 plaintiffs who were represented by Mukande & Co while 3 plaintiffs were represented by Mr. Okware. Our perusal of the large record of appeal does not reveal that there were any more orders for joinder of plaintiffs after we struck out the 68 individuals. Therefore, the correct number of claimants must be 335.

4 Assessment proceedings before the Deputy Registrar

4.1 As stated by the Deputy Registrar in his judgment, given the number of persons involved in the assessment, the first group of respondents availed Ingombe Lubinda (PW1) as their only witness while Everson Chilobe (PW2) testified on behalf of the other three.

4.2 The respondents also divided their claims into seven categories. Out of each category, PW1 selected two sample witnesses, who testified on the claims in that category and counsel for the appellant cross-examined them on the same. The respondents also relied on affidavit evidence and spread sheets dealing with four main components.

4.3 On its part, the appellant called two witnesses, DW1 an expert on pensions from the Insurance and Pension Scheme Regulation Authority and DW2 an International Pensions Expert for the appellant Bank. The appellant also relied on affidavits evidence and pieces of evidence from the High Court and Supreme Court cases. Both sides also filed detailed submissions.

5 Decision by the Deputy Registrar

5.1 The Deputy Registrar decided to deal with the matter in three broad categories, namely, salary arrears, VSS/housing allowance and pension. On the claim for 25% salary arrears, he considered our decision in **Development Bank of Zambia v Dominic Maambo**[2], and analysed the two rulings by the trial judge of 5th August, 2009 and 5th January, 2010. He decided to adopt the statement in the later ruling, which we quoted at paragraph 2.9.

5.2 He concluded that the respondents not entitled to salary arrears were those who left employment before January 1995, which was the effective date of the increment and that the **Development Bank of Zambia v Dominic Maambo**[2] case was not applicable.

5.3 On the VSS, he noted the main complaint by the respondents as being that in calculating the dues under the various VSS, the appellant used basic salary, excluding allowances. Based on the

decision of the trial court and our decision, he held that all allowances, including housing allowance, should have been taken into account in calculating VSS.

5.4 However, he disallowed housing allowance for all employees in bank accommodation as that would have amounted to double payment. He applied the same reasoning to the claim for car allowance.

5.5 As to the rate of housing allowance, the Deputy Registrar considered the finding by the trial judge that the appellant acted unilaterally to reduce housing allowance to rates ranging between 50%-60% for certain categories of managers. He found it irrelevant that PW1 agreed during the assessment that some categories of staff enjoyed housing allowance in that range.

5.6 Anchored on the trial judge's decision that the allowances not paid and those underpaid namely, housing allowance, ought to have been 100% of the basic salary of those entitled, he held that the applicable rate was 100% across the board and that housing allowance arrears were payable to those who were underpaid as there was a distinct claim for arrears.

5.7 In relation to utility allowance, he considered the argument that it was not payable to employees who left under the 1995 VSS

since it was only effected for some categories of managers from July 1996. He found that the respondents had demonstrated from their pay slips, that two of the fourteen claimants, drew the allowance despite leaving employment before July 1996.

5.8 He then held that given the inconsistency relating to the objection to utility allowance on the part of the appellant, he accepted the respondents' evidence on a balance of probabilities that utility allowance was payable even to those who left employment before July, 1996.

5.9 On the claim of the eighty-two (82) respondents transferred to Finance Bank, the Deputy Registrar accepted that they litigated the matter in the IRC, which ordered that they be paid statutory redundancy dues and that the appellant opted to pay them under the 1995 VSS, which it believed to have been more rewarding. He also considered the argument that this group could not lay claim to VSS underpayments, as they did not leave under the VSS.

5.10 He found that this group joined the action claiming underpayment of the very VSS package they were offered and, like all the other claimants, they succeeded and nowhere in the judgments did the courts make a distinction based on the fact of whether one was transferred or left the Bank by VSS.

5.11 However, he said he was not sure if the evidence pertaining to this group was before the trial court, as the court offered no comment about them. He opined that he could not undo that which the court had awarded irrespective of the background of the respondents; and that his duty was to effect what the court had awarded, namely, for packages on VSS to be computed using basic salary, inclusive of all allowances enjoyed.

5.12 In respect of the pension, the Deputy Registrar reviewed the findings and decision of the trial judge and of this Court that affected employees were paid only 30% of their actuarial reserves as at 30th June, 1996 and that the Bank failed to account for 70% of their portable benefits, which must be paid to them. Healso considered the claim for assessment of the 70% of the actuarial value of the pension; and computation of the entire pension using basic pay inclusive of applicable allowances.

5.13 He was also alive to the argument that what the respondents reflected as 30% actuarial reserve value of pension paid was actually 100% of the actuarial reserve value paid to respondents under the DBS; and that notional accounts in the ratio 30%:70% only applied to the Defined Contribution Scheme (DCS).

5.14 He further considered the contention that the figures the respondents asserted to be 30% of the actuarial reserve value omitted sums they received as ex-gratia payments; and that allowances should not be included in the pensionable salary when calculating pension. Further, that the formulae used to determine pension benefits were set out in the DBS Trust Deed and Rules, where pensionable salary is defined as basic annual salary or wage excluding allowances or any other emoluments.

5.15 Lastly, the Deputy Registrar considered the argument that the signing of waiver certificates barred the respondents from claiming further pension. He rejected the argument as being inconsistent with the verdict on pension. He held that the issues raised were meant to absorb the appellant from liability and should have been raised at trial or appeal as they went to the root of liability already decided by the courts.

5.16 He further held that the employment of basic salary, minus allowances, to calculate pension was erroneous and dismissed the suggestion that what was paid to the respondents represented 100% of the actuarial value. He drew a distinction between paying special attention to each claimant to avoid double

payment as directed by this Court and entitlement to pension, which had been resolved in the respondents' favour.

5.17 He concluded that if he were to agree with the appellant, he would essentially be reversing the order of the courts on liability since the appellant was held liable for underpaying pension by 70% and using an erroneous salary factor in working out pension; his mandate did not extend to pronouncing on liability.

5.18 The Deputy Registrar also refused to interrogate whether notional accounts existed in the DBS. He said such argument sought to have been made at the trial and that the courts had found that an actuarial valuation was undertaken for deferred pensioners, which split the existing pension reserve into 30% - 70% but what was paid out as evidenced by PW3's statement was only 30%.

5.19 He also opined that whether the split was meant for use in the DCS did not obliterate the fact that there was such valuation and split. He was bound by the finding that all pensioners in PW3's position were underpaid by 70%.

5.20 Therefore, he decided to take into account applicable allowances in calculating the pension that should have represented the correct 30% paid to the respondents and to determine the pension, which should have been paid as 100% of the actuarial

reserve value by deriving the 70% underpayment from 30% worked out using the necessary allowances as part of basic salary. Thereafter, he would award an amount less what was paid.

5.21 With respect to the *ex gratia* payments, he held that it did not matter the source of the payment, whether from the Bank's account or the pension trust fund account because the principle remained that the payment was made out of sympathy of the meager pension being paid to the respondents. He concluded that the payment was not logically part of the pension and that the respondents were under no legal obligation to reflect the payments, in addition to the pension they received.

5.22 As to the waivers on pension, the Deputy Registrar held that it was immaterial that the respondents had signed waivers precluding them from laying further claim on pension, for they litigated on the issue, which was a subject of waivers and succeeded; his duty was to give effect to the judgment. He believed the evidence on waivers was before the trial court but the court ordered that the respondents were entitled to pension underpayments although they had signed the waivers.

6 Methodology adopted by the Deputy Registrar

6.1 In assessing the specific amounts for each respondent, the Deputy Registrar decided to generate his own spreadsheets partly drawing from the respondents' spreadsheet in terms of the undisputed figures. In working out the figures, he said reference would, in some cases, be made to the approach taken by the respondents in their spreadsheet, indicating why he agreed or disagreed on their methodology as expressed on their spreadsheet. He also decided to apply the same methodology to all of the respondents in assessing the various heads of claim.

6.2 He then purported to make assessments under four spreadsheets, namely (a) VSS, (b) pension, (c) housing allowance arrears, and (d) 25% salary arrears.

6.3 Starting with the VSS, he referred to column C of his spreadsheet, which he said contained the amounts paid to the respondents as VSS and that the salary should have included utility allowance, 100% housing allowance and 25% salary increment, respectively. That the new basic salary appeared in column F and that the net amount payable to each respondent was subject to interest and deduction of the amount already paid as VSS as appeared in column C of the respondents' spreadsheet.

6.4 On the pension, he referred to column C of his spreadsheet, which he said reflected the figures of pension paid to the respondents as appeared in column H of their spreadsheet. He said the approach taken in the VSS spreadsheet of factoring in the allowances and salary increment, applied pursuant to clause 10 of the DBS Pension Trust Fund. He also said the figure arrived at after factoring in the allowances and salary increment appeared in column F of his spreadsheet, which represented the correct sum that should have been paid as 30% of pension while column G reflected the 70% underpayment derived from the 30% figure reflected in column F of his pension spreadsheet.

6.5 The Deputy Registrar also accepted that the appellant withheld the pension, even when it had a statutory duty to pay out and that for the period, 1996 to 1998, interest should accrue on the withheld pension. He agreed that in arriving at the interest, the respondents used the criteria applied to the DCS and that the DBS Rules did not provide for interest on deferred pension.

6.6 However, he held that since the deferred pension was not supposed to have remained in the pension fund, an approach, in calculating interest according to the method applied under the DCS was the nearest possible approach available. He allowed

interest as reflected in column O of his spreadsheetand as computed by the respondents in column L of their spreadsheet. This was a standalone award, without further interest.

6.7 On housing allowance arrears, he said column C of his spreadsheet reflected the payable arrears and that the net figure payable after addition of interest appeared under column I. He agreed that at the time of preparation of his judgment, he had no information of the specific officers in bank accommodation; and that because of that difficulty, the spreadsheets computed 100% housing allowance entitlement for all respondents claiming the allowance. However, he said as he had found that respondents who enjoyed bank accommodation were not entitled to the allowance, any figures that might appear on the spreadsheet as 100% housing allowance for such respondents would not apply.

6.8 On the 25% salary arrears, he said column C of his spreadsheet reflected the arrears found due to unionized respondents for the months they were in employment during the time the salary increment was backdated and that the arrears appeared in column G of the respondents' spreadsheet.

6.9 Finally, in respect of VSS and pension, he said he had already explained how he had factored the 25% salary increment into computing the new VSS and pension.

7 Grounds of Appeal and Arguments by the Appellant

7.1 The appellant was again unhappy with the judgment and appealed to this Court on nine grounds arranged as follows:

7.1.1 The learned Deputy Registrar erred in fact and law when he held that the appellant was impugning liability in the Assessment of Damages Proceedings. The appellant endeavored to demonstrate throughout the assessment that the Plaintiffs had not adduced any evidence to prove their claims for monies due.

7.1.2 The learned Deputy Registrar erred in fact and law when he held that the learned trial Judge had conclusively adjudicated on the plaintiffs' claim for the payment of the 25% salary arrears. The learned trial Judge referred the exercise of adducing evidence and final determination of the plaintiffs' claim for the payment of 25% salary arrears to the learned Deputy Registrar

7.1.3 The learned Deputy Registrar erred in fact and law when he declined to evaluate the evidence adduced during the assessment of damages proceedings in the computation of payments for the Voluntary Severance Schemes, but instead held that the issues had been settled by both the High Court of judicature for Zambia and the Supreme Court of Zambia.

7.1.4 The learned Deputy Registrar erred in fact and law when he held that Housing allowance was payable at 100% despite the evidence adduced before him demonstrating otherwise (pages J18, J19 and J20).

7.1.5 The learned Deputy Registrar erred in law when he purported to shift the burden of proof to the appellant in the determination of the payable utility allowance (page J. 24).

7.1.6 The learned Deputy Registrar erred in fact and law when he held that the learned trial Judge had made a finding of fact that the plaintiffs who transferred to Finance Bank Zambia Limited be paid a separation package that includes all allowances (in addition to redundancy).

7.1.7 The learned Deputy Registrar erred in law and fact when he declined to adjudicate on the evidence adduced by the appellant on the issue of notional accounts for actuarial reserve values in the context of the offer to eligible staff to transfer from a Defined Benefit Scheme (DBS) to a Defined Contribution Scheme (DCS).

7.1.8 The learned Deputy Registrar erred in fact and law when he made an assumption that the evidence of waivers had been before the trial Court.

7.1.9 The learned Deputy Registrar erred in law when he awarded costs to the plaintiffs without taking into account his observation in favour of the appellant at pages J22, J23, and J24 of the Judgment on Assessment.

7.2 Learned counsel for the appellant filed heads of argument in support of the appeal on which they relied entirely. State Counsel Silwamba also filed a List of Authorities at the hearing of the appeal, to support the appellant's case and endeavoured to address questions put to him by the Court.

7.3 Counsel opened their written arguments by giving a synopsis of the holdings by the Deputy Registrar under seven heads, where they said he awarded damages, namely: 25% salary arrears, VSS, pension, *ex gratia* payments on pension, waivers on pension, employees transferred to Finance Bank, and credibility of assessment method used by the Deputy Registrar.

7.4 Learned counsel argued grounds 1, 2, 3 and 4 as one, largely attacking the holding by the Deputy Registrar that the appellant was impugning liability. They emphasized that the respondents failed to discharge their burden to prove their loss and that the Deputy Registrar failed to address this gross failure, thereby abrogating the principle on burden of proof, expounded in cases such as **Khalid Mohamed v The Attorney General**[3].

7.5 Counsel submitted that the examination-in-chief of PW1 comprised of reading from the respondents' spreadsheet, without first establishing the evidential basis for either a particular respondent having an entitlement to bring a particular category of claim or the underlying figures inserted in the spreadsheet, an approach that was fundamentally flawed.

7.6 Counsel argued that in contrast, the appellant's approach had been to provide evidence to assist the court in establishing if sums were due to each respondent under the various claims, and if so, how much, an approach the Deputy Registrar should have applied, as it was consistent with our directive in Appeal No.152 of 2006 to pay special attention to each claimant's entitlement during assessment to avoid double payment.

7.7 According to learned counsel, even if the Deputy Registrar did not accept their methodology and approach, he should not have adopted the respondents' figures, in the manner he did, because the figures were incorrect, as conceded by their witnesses. Counsel demonstrated areas of discontent with the respondents' figures, chiefly as they did before the learned Deputy Registrar.

7.8 As regards the claim for salary arrears, learned counsel insisted that this claim was untenable as the affected respondents left employment before the salary increment came into effect.

7.9 Concerning the VSS claims, counsel contended that the claims included divers errors, such as, inclusion of allowances and ignored this Court's warning to avoid double payments.

7.10 As regards the pension claims, counsel argued largely that the Deputy Registrar ignored payments the respondents received, agreed with their misstated actuarial reserve figures, and failed to consider the proposition that the respondents already received more than 70% of their actuarial reserve, which did not amount to disputing liability.

7.11 Learned counsel also took issue with the Deputy Registrar's reliance on the respondents' 'flawed spreadsheet', reiterating that they justified why it was unsafe for the court to adopt the respondents' claim figures, whether relating to the seventeen (17) respondents whose claims were presented to the court during the assessment or the broader group of respondents.

7.12 Counsel demonstrated areas of discontent with the respondents' spreadsheets, such as, admission by PW1 that there were errors in their figures, that committees representing the respondents,

none of whom was an actuary, prepared their spreadsheets; and that PW1 falsely represented by affidavit that the parties agreed on the figures in his recomputed spreadsheet during the verification exercise. Counsel also noted that PW2 agreed that PW1's methodology, approach and calculations were wrong and in some cases contained errors and false assumptions.

7.13 The appellant also faulted the Deputy Registrar for examining only the claims of 17 of the respondents, leaving out the claims of the other respondents, whose figures were also erroneous. Consequently, a separate exercise would have to be undertaken, to assess the claims of the broader respondent group.

7.14 Learned counsel further narrated the appellant's key evidence at the assessment under the claims for salary arrears, VSS and pension, which we do not find necessary to restate at this stage.

7.15 In support of ground 5, learned counsel submitted that it was a gross misdirection for the Deputy Registrar, having correctly found that the respondents' evidence was inconsistent, to accept the evidence and award utility allowance, thus shifting the burden of proof to the appellant. In the course of argument, counsel repeated arguments and authorities on burden of proof.

7.16 In ground 6, counsel argued that as the Deputy Registrar agreed that the trial court made no finding of fact on the claim of the 82 respondents transferred to Finance Bank, he fell into error when he held that they were entitled to VSS by the mere fact of joining the suit. Counsel submitted that the Deputy Registrar was duty bound to interrogate whether this group had a tenable legal claim that would entitle them to benefit from the VSS package in addition to redundancy; and that it was an abdication of his judicial function to award them purely on assumption.

7.17 In addition, counsel argued that having found that both courts made no finding of liability, the Deputy Registrar was wanting in jurisdiction. He could not in one breath hold that he could not undo what the court had done regarding liability and in another proceed to make determinations on liability,which was a preserve of the trial judge. They went on to replicate arguments they advanced during the assessment.

7.18 In respect of ground 7, counsel for the appellant cited some authorities, such as **Wilson Masauso Zulu v Avondale Housing Project**[4] and again pointed out areas of dispute on which they said the Deputy Registrar failed to adjudicate. These relate to whether notional accounts in the ratio 30%-70% existed in the

DBS; the legal status of the *ex gratia* payments *qua* the pension amounts payable to the respondents; and our decision in the case of **Lennox Nyangu v Barclays Bank Zambia Plc**[5].

7.19 Counsel also restated arguments on the alleged failure by the Deputy Registrar to examine the claim figures for the broader respondent group, which counsel said amounted to a total failure to adjudicate on matters in controversy. Counsel also argued that the Deputy Registrar failed to adjudicate on the mode of computation of interest regarding the respondents who joined proceedings on diverse dates.

7.20 Counsel further demonstrated what they considered erroneous computations of interest on salary arrears, VSS and pension, in relation to the periods and rates of interest applied. Counsel cited the **Judgments Act**, **Order 36(8) of the High Court Rules, Section 4 of the Law Reform (Miscellaneous Provisions) Act, Order 15/1/2 of the White Book** and some authorities, including **Bank of Zambia v Caroline Anderson and another**[6] and **B.P. Exploration Co (Libya) Limited v Hunt (No. 2)**[7].

7.21 Counsel contended that whilst Mukande and Company provided a schedule of Bank of Zambia interest rates, it was not clear which rates or methodology they used to arrive at both the long-

term and short-term interest rates and that they used a long-term rate for 8.333 years, which included interest for periods before issuance of the writ.

7.22 As regards ground 8, learned counsel submitted that neither court considered the effect of waivers because the evidence was adduced for the first time, during the assessment proceedings. They quoted a passage from the respondents' termination letters, which confirmed that they accepted the waivers and submitted that the legal effect of the waiver certificates was to stop the respondents from bringing claims of this nature.

7.23 Lastly, in ground 9, counsel argued that there is an exception to the general rule that costs follow the event; where there is partial success, each party bears its own costs. As authority, they cited the cases of **Costa Tembo v Hybrid Farm Zambia Limited**[8] and **Jonas Banda v Dickson Tembo**[9] and argued that since the Deputy Registrar sustained the objection on non-cash benefits forming part of basic salary for purposes of computing VSS and pension, there was partial success. Hence, we must order each party to bear their own costs. We were urged to allow the appeal.

8 Arguments by the respondents

8.1 Learned counsel for the respondents filed joint heads of argument on which they too relied together with the submissions they filed at the assessment. They responded to grounds 1, 2 and 3 together and the rest of the grounds, sequentially.

8.2 In response to grounds 1, 2 and 3, learned counsel supported the Deputy Registrar's finding that the appellant was impugning liability in the assessment. Counsel argued that since there was no appeal against the ruling of 5th January, 2010, it remained the basis for computing salary arrears; the issue of liability and entitlement was finally settled. However, the appellant laboured on the ruling of 5th August, 2009 which was stale; thus, the Deputy Registrar had no mandate to reopen the issue of liability.

8.3 Counsel referred to DW2's replies in his evidence in cross-examination to show that he refused to accept the verdict of this Court on liability regarding inclusion of allowances and arrears in the calculation of VSS, although the appellant had not successfully impeached the evidence of PWs 1 and 2.

8.4 Counsel referred to the case of **Zambia Daily Mail v Charles Banda**[10] also cited by the appellant, as regards when an appellate court will interfere with an assessment of damages and

submitted that the Deputy Registrar did not misapprehend the facts or misapply the law to the facts because both courts gave directives on what he had to do and he religiously complied.

8.5 Learned counsel further submitted that because salaries were adjusted upwardly by 25%, allowances and pension ought to be adjusted as the claim for arrears on allowances and re-computation of VSS and pension became an entitlement in line with the judgment. For this reason, the computations by the Deputy Registrar could not be faulted, particularly that the appellant failed to show that they were wrong.

8.6 Counsel further argued that the assessment proceeded by way of a mutually agreed method, which was intended to avoid unnecessary repetition of evidence.Therefore, the attack on the Deputy Registrar that he failed to interrogate and adjudicate on the claims of all the respondents was unfortunate and in bad faith. If anything, the appellant could have raised issue with errors in the process during assessment but it did not.

8.7 Counsel also agreed with the decision by the Deputy Registrar on housing allowance and took issue with the appellant's production of a document, after the judgments of both courts, aimed at showing that what was paid to the respondents was 100% of

their pension benefits, when we had confirmed that it was only 30%. Counsel argued that computations based on that document were to be optional for retirees who wanted to encash their benefits instead of waiting for deferred pension and that it was irrelevant to those who opted to remain as deferred pensioners.

8.8 Counsel further argued that, in any case, that document was based on basic salary, which was contrary to our decision to incorporate allowances; and that the Deputy Registrar was on firm ground when he held that benefits under VSS must be computed on merged basic salaries and allowances.

8.9 On the pension claim, counsel submitted that both courts upheld the respondents' claim for payment of enhanced pension benefits emanating from the 1996 actuarial valuation. They referred to clause 13 of the Pension Trust Fund Regulations, relating to periodic actuarial investigation of a fund.They argued that the 1996 actuarial valuation shows that it was intended to determine the value of the fund and of each member's benefits before migrating to the new DCS.

8.10 Counsel impugned the argument that the concept of 30%:70% actuarial value split could not apply to the respondents because the idea was a notional one intended for opening of balances in

the DCS, arguing that if that was the position, the accounts could not have been credited with interest. They gave the example of PW4, at the trial, who had crossed over to the DCS and left through the 1998 VSS. They said his actuarial statement on 30th June, 1996 showed accrued reserve value of K30,652,463 apportioned into K9,195,738-90 (30%) and K21,456,724-10 (70%), which were the opening balances in the DCS and were credited to his account on retirement, with interest and bonus.

8.11 Counsel also quoted from a circular issued to all members of the pension fund, assuring them that the value of their accumulated interest in the fund as at the conversion date, would be credited to a separate account for them in the fund. This, counsel argued, was acknowledgment that amounts that accumulated in the fund up to conversion date belonged to the employees. Therefore, the issue of notional accounts was meant to discriminate against those who chose to remain in the DBS.

8.12 Counsel also referred to a letter the appellant wrote on 5th March, 2010 to one Gilbert M. Simwawa after constant complaints from members of the DBS about what was shown to them as actuarial value in 1996 and what was actually paid to them in 1999. Counsel argued that the letter confirmed that at the time of

conversion on 30th June, 1996, each member was given a transfer value certificate showing the amount the member had under the DBS, which clearly showed that what was reflected for each member on 30th June, 1996 was accrued value; there was nothing like notional accounts.

8.13 In response to arguments around *ex gratia* payments, counsel quoted a passage from a letter the appellant wrote to all DBS members on1st August, 2000, advising them that the Bank together with the trustees had, exceptionally to the Rules of the Fund, decided to make a further enhancement to the minimum payment. Further, that because of the review, in addition to the commuted lump sum, based on actuarial reserve value, an *ex gratia* amount of K120,000 for every completed year of service (on permanent employees), was arrived at.

8.14 Learned counsel submitted that an *ex gratia* payment is made without obligation; it is a discretionary payment, for which the person paying cannot be held accountable. Therefore, such payment cannot form part of one's pension and since pension is a right, the one holding it on behalf of another has a legal duty to account and if it is underpaid, a legal claim arises.

8.15 Counsel submitted that the *ex gratia* payments were made due to the inadequacy of the pension paid to the respondents, who were justified to receive the payments to mitigate their economic positions but not as part of pension. Further, that the *augmentation rule* mentioned by the appellant was merely authority given to the appellant and trustees to make a discretionary payment; it was temporary and did not revise the pension entitlement.

8.16 However, the appellant revised the minimum lump sum pension to K1,000,000 in a standard letter to the respondents in August, 1999 as was explained in another standard letter of 1st August, 2000. Therefore, the respondents were obliged to take into account the K1,000,000 minimum payment as it became part of their pension entitlement, since the pension rules had changed.

8.17 In response to the argument that pension benefits were calculated excluding allowances, counsel contended that the respondents remained in the DBS and changes made to the DCS rules in 1998 had nothing to do with them. They quoted the definition of 'pensionable salary' in clause 4 of the Pension Trust Fund Rules, and argued that this only excluded directors' fees.

8.18 Lastly, counsel submitted that this Court had already dealt with the meaning of 'basic salary' when we found that it had assumed a new meaning of salary plus allowances.

8.19 In response to ground four, counsel submitted that the Deputy Registrar could not be faulted for holding that housing allowance was payable at 100% because that was the order given by the trial court and upheld by this Court. Therefore, the argument that housing allowance was between 50% - 60% challenged liability already determined by this Court and the 1993 terms and conditions, which were imposed on the respondents and purported to vary the housing allowance from 100% to 50% - 60% of basic pay were invalid as they amounted to a unilateral variation of the conditions of service.

8.20 In answer to ground 5, counsel rejected the argument that the Deputy Registrar shifted the burden of proof, arguing that all the respondents did was to place pay slips before him to prove that the allowance was payable to those entitled even before July, 1996. Conversely, DW2 failed to explain why some of the claimants who left on 31st May, 1996 were getting the allowance.

8.21 According to counsel, the Deputy Registrar's position embraced the non-discriminatory principle enshrined in our decision in

James Mankwe Zulu and others v Chilanga Cement Plc[11] that similarly circumstanced employees ought to be similarly treated unless there were reasons justifying different treatment.

8.22 Counsel submitted that the respondents' spreadsheet showed that the amounts the respondents were paid earlier were not factored into the claims in order to avoid double payment and that the appellant in its spreadsheet accepted as correct figures appearing under column C of the respondents' spreadsheet.

8.23 Counsel further argued that the amounts paid to the respondents under column C constituted underpayment as allowances were omitted. They explained that the respondents added column D to include housing and utility allowances; column E for arrears; column F for basic salary plus housing and utility allowances and salary increment at 100%; and column G for housing allowance wrongly paid at 50% - 60%.

8.24 Counsel referred to the figures for respondent No. 55 and endorsed the Deputy Registrar's finding that his correct VSS on exit should have been K157,570,350.00 and not K56,910,175.00.

8.25 In response to ground 6, learned counsel agreed that both judgments did not specifically mention the names of the 82 respondents transferred to Finance Bank or when they joined the

action but they were part of the action from the start and if they were not supposed to be parties, the appellant would have objected before commencement of trial.

8.26 To support the argument that if a party allows an irregularity to remain on record and takes further steps, ignoring the same, such litigant has not only slept on their rights but has waived the same, counsel cited the case of **Bellamano v Ligure Lombarda Limited**[12] and **Order 2 Rule 2** of the **White Book**. Counsel argued, also, that as properly observed by the Deputy Registrar, this group litigated and succeeded in both courts; hence, he could not deny them what they were awarded or reverse the awards as liability was long settled.

8.27 Counsel referred to the appellant's appeal to the trial judge after the refusal by the Deputy Registrar to remove this group from the record and the position taken by the judge in dismissing the appeal. Counsel further contended that this group is entitled to the pension claim because of incorporation of allowances into basic salary that ultimately affected their pension amounts.

8.28 In reaction to ground 7, counsel stated that the appellant is lamenting on the methodology applied, when it was mutually agreed; that the Deputy Registrar correctly declined to be drawn

into issues of liability; and that, issues of notional accounts were irrelevant since both courts dealt with the issue and mandated the Deputy Registrar to determine the withheld 70% benefits.

8.29 Concerning the **Lennox Nyangu**[5] case, counsel argued that it was decided on its own facts and on a memorandum of understanding executed between the parties, which is completely different from this case and cannot be used after assessment to reopen issues of liability.

8.30 In reaction to alleged errors in the computations, counsel submitted that the spreadsheet submitted at assessment took into account corrections agreed between the parties and after assessment, further changes were made to the figures to take into account the effect of assessment. Therefore, this argument is untenable and an after thought meant to avoid liability.

8.31 As regards the interest, counsel argued that we did not disturb the order by the trial judge that the Deputy Registrar would award appropriate interest and there was no appeal. They explained how they arrived at the interest rates, based on rates obtained from the Bank of Zambia and refused the suggestion that they included interest for periods predating the writ. They argued that the appellant did not challenge the rates at

assessment and cannot do so now; therefore, the long-term deposit rate was to run from date of writ to the date of judgment.

8.32 In respect of the bonus claim, counsel retorted that the Deputy Registrar did not award any bonus claim.

8.33 Responding to ground 8, learned counsel referred us to DW2's evidence in cross-examination, agreeing that a waiver is not a bar to a future claim and to the consent order the parties executed in relation to respondents who left under the 1998 VSS. The gist of this contention is that if the waivers were final, the parties would not have executed the consent order.

8.34 Learned counsel further submitted that we resolved the argument that the respondents agreed to be paid smaller amounts of their benefits so that they could encash deferred pensions earlier than provided in the pension rules when we held that that was untenable at law. Therefore, the Deputy Registrar was on firm ground when he rejected that argument especially that the encashment omitted the merging of salaries with allowances implemented in 1993.

8.35 Finally, in answer to ground 9, counsel submitted that the respondents succeeded in all their claims at trial, on appeal, and at assessment; only a few, out of the 403 respondents lost out, so

their success was substantial and outweighed the appellant's partial success. Counsel cited some cases of **Mutale v Zambia Consolidated Copper Mines Limited**[13], **United Bus Company of Zambia v Jabisa Shanzi**[14] and **Collet v Van Zyl Brothers Limited**[15].

8.36 In conclusion, counsel contended that this appeal is a mere attempt by the appellant to have another trial on issues already settled by this Court and that we must dismissit with costs.

9 Consideration of the appeal andour decision

9.1 We have perused the voluminous record of appeal, the contested judgment,and thebroad and detailed arguments by learned counsel on both sides.We have also considered the authorities referred to us, for which we are indebted to counsel.

9.2 Thisappeal raises three critical issuesfor our consideration. These are whether: 1)the assessment was proper and complete;2) the appellant was impugning liability in the assessment proceedings;and 3)the Deputy Registrar properly dealt with the issues concerning the VSS, salary arrears and pension. In determining these questions, we shall deal with grounds 1 to 4, 7 and 8at the same time as some of the arguments are related.Weshall then deal with grounds 5, 6, and 9 respectively.

9.3 Starting with the first question of whether the assessment was proper and complete,theappellant's main argument is that the Deputy Registrar conducted the assessment in respect of only 17 respondents and accepted erroneous figures in the respondents' flawed spreadsheets. In contrast, the respondents argued that the parties mutually agreed upon the methodology applied during the assessment and that they corrected the figures that required correction,before and subsequent to the assessment.

9.4 We hasten to state that what happenedhereis comparableto what occurred in **Zambia National Commercial Bank Plc v GeofreyMuyamwa and 88 others**[16],cited by learned counsel for the appellant. Thecourt below did not make individual awards for each of the respondents as the parties had agreed that in assessing what was due to the respondents, the terminal benefits of only one respondent from each of the categories identified by the court should be computed. The terminal benefits of the other respondents were to be computed and agreed by the parties, thereafter, based on the formulae used for those respondents whose terminal benefits would have been computed. The parties agreed to proceed in that manner because, in their opinion and

that of the court, the number of respondents was too big. We put the matter, inter alia, at page J29 thus:

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

9.5 In the present case too, the parties agreed to the methodology applied in the assessment, of the first group of respondents availing only one witness who testified in relation to the claims of two sample witnesses from each of the seven categories identified owing to the number of claimants involved. The respondents also relied on their spreadsheets containing claim figures, which some committee had computed on their behalf.

9.6 On his part, the Deputy Registrar generated his own spreadsheets, partly drawing from the respondents' spreadsheet in terms of the undisputed figures. Unfortunately, while he said in working out the figures, he would refer in some cases, to the approach taken by the respondents in their spreadsheet, indicating why he agreed or disagreed on the methodology they applied in their claim as expressed on their spreadsheet, we have

not see any such indications in his judgment. He seems to have simply accepted and adopted the figures computed by the respondents by moving them to his own generated spreadsheets.

9.7 Regrettably again, the Deputy Registrar did not annex to his judgment, the spreadsheets on which he relied to arrive at the figures he purportedly awarded or prepare a schedule of calculations for each respondent indicating the amounts he had assessed and awarded. As a result, we do not know the figures that were contained in his spreadsheets or what actual figures he awarded to each one of the respondents.

9.8 Furthermore, as submitted by counsel for the appellant, PW1 conceded during the assessment that there were some errors in their figures and that no actuary was involved in the computation of their pension figures. PW2 also admitted that PW1's methodology, approach and calculations were wrong and that in some cases computations contained errors and false assumptions. Again, there is no indication in the judgment that the Deputy Registrar dealt with the errors in the respondents' figures. He left it to the respondents to correct the figures, a clear indication that the assessment was not proper or complete.

9.9 We appreciate that the parties agreed on the methodology applied, to avoid repetition of evidence due to the big number of persons involved and that assessment, involving many claimants can be onerous and a complex exercise, especially if it relates to calculation of pension entitlements. However, as we said in the **Geoffrey Muyamwa**[16] case, the Deputy Registrar was still required to conduct a complete and proper assessment, clearly setting out the individual amounts he had assessed and awarded to each respondent, whether as VSS, pension or salary arrears.

9.10 It was because we recognised that this matter involved many plaintiffs, that we directed the Deputy Registrar to pay special attention to each plaintiff's entitlement during assessment to avoid ordering double payments. Alas, it does not seem to us that the Deputy Registrar adhered to our directive or that of the trial judge who had said the assessment would be individual.

9.11 We agree entirely with State Counsel Silwamba, considering the number of claimants involved and looking at the time the matter had remained in court, that the Deputy Registrar should have invoked the provisions of section **23** of the **High Court Act, Cap 27,** which provides for Enquiries and Accounts, to appoint a referee to compute the entitlement of each respondent.

9.12 Accordingly, we answer the first question in the negative that the assessment was improperly done and incomplete.

9.13 We come now to the second and third questions raised above of whether the appellant was impugning liability in the assessment proceedings and whether the Deputy Registrar properly dealt with the issues touching on allowances and salary arrears on VSS and pension, *ex gratia* payments, notional accounts and waivers on pension.

9.14 In relation to ground 3, the appellant attacked the Deputy Registrar for allegedly declining to evaluate the evidence adduced during the assessment in the computation of payments for the VSS, as he believed both courts settled the issue. In the earlier Appeal we dealt with the appellant's grievance that the trial judge erred when he ordered that allowances be paid to the respondents, along with basic salary in computing VSS packages.

9.15 The appellant is raising this same issue after we agreed with the trial judge that **all** allowances formed part of the respondents' emoluments and could not be separated from their salaries for purposes of computing their separation packages. The appellant's argument is misconceived. We agree that it was simply trying to impugn liability.

9.16 In relation to ground 4, the Deputy Registrar is faulted for holding that housing allowance was payable at 100% in spite of the evidence adduced before him demonstrating otherwise. We have considered State Counsel Silwamba's oral submission that the appellant was not at all impugning liability and that they raised the issue of the rate of housing allowance because the trial judge said the "rate ought to be 100%" and not that it was 100% and that we affirmed that position.

9.17 The respondents' core argument has been that the circular letter of 17th December, 1993 emphasised that housing allowance would remain at 100% of the basic salary.

9.18 In resolving this issue, the Deputy Registrar, referred to the finding by the learned trial judge that "the allowances not paid and those underpaid, i.e., housing allowance ought to have been 100 per cent of the basic salary of those entitled, be paid to the plaintiffs". He understood this to mean that the rate of application of housing allowance was 100% across the board.

9.19 We confirmed the decision of the trial judge. Infact, the learned judge explained that those that opted for the new scheme represented by PW4, had their existing allowances suppressed,

i.e., the housing allowance was supposed to be 100%, but was suppressed, while the other allowances were not paid.

9.20 The appellant did not challenge this finding of fact by the trial judge in the earlier appeal. We have said repeatedly that this Court, as an appellate Court, is reluctant to disturb findings of fact made by a trial court which had the privilege of hearing and seeing the witnesses firsthand and making a credibility assessment (see **Atlantic Bakery Limited v ZESCO Limited**[17]).

9.21 We agree with the Deputy Registrar that the learned trial judge essentially, found that housing allowance was payable at 100% and that all allowances should be included in the computation of VSS. Therefore, the Deputy Registrar was on firm ground when he avoided tampering with an unchallenged finding of fact and it is clear again that the appellant was trying to impugn liability, which the trial judge had already settled.

9.22 The only issue on which we agree with the appellant is that the Deputy Registrar should have clearly identified the respondents who were entitled to housing allowance, instead of leaving it to the respondents to exclude from their spreadsheet respondents in bank accommodation to whom the figures calculated as 100% housing allowance would not apply.

9.23 In relation to ground 7, the appellant faulted the Deputy Registrar for refusing to adjudicate on the evidence adduced on notional accounts. We hasten to state yet again that we adequately dealt with this issue in the earlier appeal. We stated, with certainty, that the arguments and submissions on behalf of the appellant missed the point because the issue was not the availability of the option but what happened to the 70% as shown in the actuarial reserve statement of PW3 as at 30th June, 1996.

9.24 The appellant has now changed direction, alleging that what was paid to the respondents amounted to 100% of their actuarial reserve value. It is plain that the appellant is impugning liability because we already found that what was paid to the respondents who remained in the DBS represented 30% of their actuarial reserve value as at 30th June, 1996 and that the appellant failed to account for 70% of the respondents' portable benefits.

9.25 The Deputy Registrar was right that the appellant ought to have made that argument at trial, or at the most, at the hearing of the earlier appeal. The **Lennox Nyangu**[5] case is of no help to the appellant's case and has no significance to this appeal as the real dispute here was what happened to the 70% of the respondent's actuarial reserves as at 30th June, 1996.

9.26 In the earlier appeal, we had also considered the appellant's argument that payments of lesser amounts were made on optional basis to the deferred pensioners who did not at the time of retirement reach the retirement age. However, we rejected the argument because it did not explain what happened to the 70% of the respondents' actuarial reserves as at 30th June, 1996.

9.27 We accepted that this was an accrued benefit, which could not be subject of optional offer and above all, the respondents had refused to acknowledge that the payment of 30% of their accrued actuarial reserve was full and final. Therefore, it cannot be true as argued by learned counsel for the appellant that the issue was raised for the first time at the assessment. This, in fact, settles the issue the appellant has raised in ground 8 of the appeal that the Deputy Registrar made an assumption that the evidence of waivers had been before the trial court. The issue was before us.

9.28 In consequence, we do not fault the Deputy Registrar's analysis of the evidence. He was on firm ground when he refused to interrogate the issue of notional accounts and of waivers on pension because we adequately dealt with those issues.

9.29 We come now to the issue of the *'ex gratia'* payments,which the appellant argued the respondents left out in the computation of

their pension benefits. As the Deputy Registrar said *ex gratia*, payment is a sum of money paid to an employee in a situation where the employer has no contractual obligation and without admission of liability. In essence, it is a gesture of good will by the employer because they acknowledge that they have treated the employee badly or that the employee deserves some financial compensation. It may also be a way to avoid the employee trying to sue the employer. It may be a lump sum payment over and above the pension benefits of a retiring employee.

9.30 In this case, there are two limbs to this issue; the augmentation of K1,000,000.00, which the respondents acknowledged as part of pension; and the K120,000.00 for each completed year of service, which they refused to accept as part of pension. The appellant contended that both amounts must be considered as part of the settlement of the DBS Deferred Pension encashment offer because clause 9(i) of the Pension Fund Rules provided for the possibility of *ex gratia* payments being made as part of pension and the payments were made from the pension fund.

9.31 Conversely, the respondents argued that the *augmentation rule* the appellant referred to was merely an authority given to the appellant and trustees to make a discretionary payment; it was

temporary and did not revise the pension entitlement. They also submitted that they were obliged to take into account the K1,000,000 minimum payment because it became part of their pension entitlement, as the pension rules had changed.

9.32 The question we must decide is whether the two payments formed part of the pension received by the respondents. To start with, clause 9(i) of the Pension Trust Fund provided that:

> **"THE Trustees, in addition and without prejudice to all powers conferred upon trustees by law, shall have the following powers all to be exercised or not as they in their sole discretion may deem desirable namely**
>
> **(i) generally to execute and do all such acts and things as they may consider necessary or expedient for the maintenance and preservation of the Fund and of the rights of the members and others therein."**

9.33 Furthermore, the Augmentation Clause referred to by the appellant, which is clause 27 provided:

> **"THE Trustees at the request of the Employer and upon the payment by the Employer to the Fund of such additional contributions (if any) and on such terms as the Trustees may consider appropriate arrange for the provision of benefits additional or supplementary to those mentioned herein provided however that should any such additional or supplementary benefits be granted they shall be granted to all Members of the class to which such benefits are to be granted and provided that no such benefits shall be granted which would affect the continuing approval of the Fund under the Act."**

9.34 Based on the above clauses in the Pension Trust Fund, we are satisfied that the trustees had the power, in their sole discretion to enhance the minimum lump sum payable to the affected

respondents and to make *ex gratia* payments to mitigate the meager pension benefits payable to the respondents.

9.35 Now, in respect of the minimum lump sum payment of K1,000,000.00, the standard letters dated 1st August, 1999 and 1st August, 2000, which the respondents quoted in their heads of argument, and which we mentioned in paragraph 8.16, did not indicate, anywhere that the minimum payment of K1,000,000.00 for respondents whose pension benefits fell below that amount would be *ex gratia*. If it was meant to be *ex gratia* the standard letters would have said so in clear language.

9.36 As a result, we are not convinced that the enhanced payments were made as a favour or gesture of good will. We agree with the appellant, that the affected respondents received the K1,000,000.00 minimum lump sum payments as part of pension. Therefore, the payments formed part of the pension received and must be deducted from any amounts due to the respondents.

9.37 However, the difficulty we have with the commuted lump sum pension payments is that the amounts were far less than the respondents' accrued actuarial reserve values as at 30th June, 1996. Further, as we said in the earlier appeal, offering the respondents amounts lesser than their accrued benefits was

untenable as it was contrary to the law and it did not answer the question of what happened to their withheld 70%.

9.38 As regards the payment of K120,000 for every completed year of service, in addition to the commuted lump sum based on the accrued actuarial reserve value, the other letter of 1st August, 2000, which we referred to in paragraph 8.13 mentioned in very clear terms that this amount was an *ex gratia* payment.

9.39 As the Deputy Registrar said the respondents were not legally entitled to the increased pension. The payments were made *ex gratia* due to the meager pension benefits paid to the respondents that were so eroded by inflation that they were meaningless. Indeed, the respondents were justified to accept the payments to mitigate their economic positions but not as part of pension.

9.40 In **Jacqueline Chipasha Mutale v Stanbic Bank Zambia Limited**[18], we said since *ex gratia* payment is a sum of money paid when there is no obligation or liability to pay, we found no basis, to order that it be reimbursed. Similarly, the payments of K120,000 for each completed year of service were made *ex gratia*, and so, the respondents were under no legal obligation to reflect the payments in their computations, in addition to the pension they received; and the payments, were and are, not recoverable.

9.41 However, we have a problem with the Deputy Registrar's decision to incorporate utility and housing allowances and the 25% salary increment in the calculation of the pension that should have represented the correct 30%, paid to the respondents and in assessing what amounted to the withheld 70%, thus ignoring the rules of the DBS Trust Deed. In fact, neither the trial judge nor this Court directed the Deputy Registrar to re-compute either the 30% already paid or the withheld 70% portable benefits using the basic salary plus allowances. That was restricted to the VSS.

9.42 Of course, the trial judge had directed that the 70% of the actuarial reserves in respect of those who remained in the DBS be paid to them. He also held that the two categories, namely those that did not crossover to the new pension scheme and those that opted for the new scheme, ought to have had their **VSS packages** calculated by using the basic salary plus allowances. Clearly, this did not extend to the pension benefits.

9.43 The appellant admitted that the actuarial reserve value was calculated for the respondents except that for those who decided to remain in the DBS, the calculated actuarial reserve value as at 30th June, 1996, was no longer applicable. However, both the trial judge and this Court rejected that argument.

9.44 The Deputy Registrar also found as a fact, that the actuaries had already done the computations of the actuarial reserve value as at 30th June, 1996 and the split in the ratio 30%:70% for all active employees in the DBS, except that the appellant did not give statements to the respondents who remained in the DBS.

9.45 In the earlier appeal, we said, in interpreting **section 18(1)(f)** and **18(3)(b)** of the **Pension Scheme Regulations Act No. 28 of 1996**, that the appellant was compelled by law to give full statements to the respondents and pay out on separation and that deferred pension was abolished by the law. What this means in relation to this case is that at the time the Act came into effect, the deferred pensioners in the DBS became entitled to full portability of their pension benefits. For the active pensioners or active members, they were entitled to full portability of their benefits as and when they separated from employment.

9.46 The appellant argued that our decision that deferred pension was abolished by the law was made *per incurium.* We do not agree. In actual fact, we affirmed this decision very recently in the case of **Richard Chama & 213 others v National Pension Scheme Authority & others**[19], which learned State Counsel Silwamba cited, where we also held that the Pension Scheme Rules cannot

supercede the provisions of an Act of Parliament designed to deal with the same mischief that the Rules were perpetrating.

9.47 In our view, since the actuaries had already calculated the accrued actuarial reserve values at 30th June, 1996, all that the appellant was required to do at the assessment was to produce the statements from 1996, which contained the split of 30%:70% actuarial reserve values as at 30th June, 1996, which would have disclosed the withheld 70% actuarial reserve value.

9.48 With regard to interest on the withheld 70% pension benefits for the two years the benefits remained in the pension fund, we have said that the respondents were entitled to full portability of their accrued pension benefits upon the Act coming into effect or at the time of leaving employment, which ever was applicable.

9.49 We have explained in detail the meaning of portable benefits in relation to the DBS and DCS in the case of **Richard Chama & 213 others**[19]. We shall not repeat those explanations here but as we said in that case, the two pension schemes are in law distinguishable in fundamental respects, in the way the retirement account is built-up and what determines a member's ultimate benefit. The benefit payment from the two schemes should also be differently computed.

9.50 In this case, the Deputy Registrar acknowledged that in arriving at the interest, the respondents used the criteria of interest applied to the DCS and that under the DBS Rules no interest was provided for on deferred pension and the respondents admitted this fact in their heads of argument. Further, there was no judgment for interest on the withheld pension for that period.

9.51 Therefore, the Deputy Registrar erred when he awarded interest on the withheld pension for the two years it remained in the pension fund, in the absence of an order by the trial judge for interest; and when he applied interest rates applicable to the DCS to calculate interest in the DBS; and confirmed the respondents' figures that included bonus.

9.52 Although the Deputy Registrar did not award any bonus, we are not sure that after the judgment, the respondents removed the bonus figures from the interest figures.

9.53 The view we take is that interest should apply on the judgment sums since the order by the learned trial judge was that the Deputy Registrar would award the appropriate interests, i.e., long-term deposit rate from the issuance of the writ until judgment and short-term deposit rate from the date of the judgment until payment.

9.54 As regards the rate of interest, counsel for the respondents submitted that we did not reverse the rate and that there was no appeal. Counsel is right. Suffice to say that the rate of interest, which has now come to our attention, was wrong in principle. In **BUK Truck Parts Limited v Stanley Sinyenga**[20], we reversed the award of interest at current lending rate even though there was no appeal because there too, the rate was wrong in principle.

9.55 We do the same here. The appropriate rate should be the average of the short-term bank deposit rate per annum from date of writ to date of judgment and thereafter, at the current lending rate as determined by the Bank of Zambia until full payment. This shall apply to any amount to be found due to the respondents.

9.56 As to the period over which interest should apply, the order by the trial judge was that it would apply from issuance of the writ to judgment and thereafter until payment. Therefore, the respondents were not entitled to include any period prior to the issuance of the writ (if they did) but they deny doing so.

9.57 The appellant also submitted that the Deputy Registrar failed to adjudicate on the mode of computation of interest concerning respondents who joined the action on different dates. As we said in paragraph 1.2, the matter commenced in November 2000 with

only 53 plaintiffs; others joined the action later, in 2001 and 2003. In view of that, we agree with the appellant that interest should apply to individual respondents from the respective dates they joined the action; no one should benefit from an award of interest for periods prior to joining the action.

9.58 We turn now to the argument that the Deputy Registrar did not conclusively adjudicate on the claim for 25% salary arrears.The main argument by the appellant is that the trial judge referred the exercise of adducing evidence and final determination of the claim to the Deputy Registrar and that the affected respondents were not entitled to salary arrears as they all left employment prior to the date of the collective agreement.

9.59 In answer, the respondents argued that the trial judge settled issues of liability and entitlement by the ruling of 5th January, 2010.

9.60 As we said in paragraphs 2.9, the trial judge dealt with the claim for salary arrears in his ruling of 5th August, 2009, in which he also refused to issue orders for directions for the claim to go to trial. He put matter as follows:

> **"If one terminated employment two months after the new salaries came into force, he will be entitled to two months arrears. If he was terminated before the new salaries came into force, he will be entitled to nothing. On assessment, evidence will be called, and the defendant will have an opportunity to refute even by *viva***

> ***voce*. There is therefore, no prejudice, nor is there now any ambiguity in the judgment ..." (Underlining ours for emphasis)**

9.61 Later, when the appellant applied for leave to appeal out of time against the refusal to issue orders for directions, the learned judge refused to grant leave and said that he had clarified in his ruling the position the Deputy Registrar should take.

9.62 The ruling the judge delivered on 5th January, 2010, which the respondents and the Deputy Registrar heavily relied upon related to the appeal against the refusal by the Deputy Registrar to strike out some parties the appellant felt were wrongly joined to the action. The trial judge pronounced, inter alia:

> **"If a person was not in employment in January 1995 when the pay rise was effected, he does not get the arrears. The defendants have the data as former employers and this is evidence to lay before the Deputy Registrar ..." (underlining ours for emphasis)**

9.63 Although there was no appeal against this ruling, it is clear that the learned judge purported to overturn his ruling of 5th August, 2009 when there was no application before him for review or an appeal against that ruling. We can discern this from the respondents' argument that the appellant was relying on the earlier ruling, which was stale.

9.64 We frowned upon such conduct in the case of **Zambia Telecommunications Company Limited v Aaron Mweenge Mulwanda and another**[21]. We held in that case that the trial

judge erred in law when she reviewed her judgment in the absence of an application for review; and that what was before her was an application to interpret the judgment, which she dismissed and on which she heard the appellant; she did not give the appellant a chance to be heard on the review.

9.65 Applying that decision to the current case, we find and hold that the learned trial judge erred in law when he purported to review his ruling of 5th August, 2009, on his own motion, and without giving the appellant an opportunity to be heard on the review. As we have said above, the judge was dealing with an appeal against the refusal by the Deputy Registrar to strike out some parties the appellant believed were wrongly joined to the action and he heard the parties in that appeal.

9.66 The verdict by the learned judge, which we have highlighted in paragraph 9.62 was a misdirection and we quash it. Moreover, the respondents applied for assessment of their benefits pursuant to the ruling of 5th August, 2009. Therefore, the Deputy Registrar should not have disregarded that ruling and adopted the decision of 5th January, 2010.

9.67 In any case, the pertinent question the Deputy Registrar should have asked was whether the respondents who left employment

before the collective agreement was executed on 28th June, 1995 were entitled to the salary increment and to salary arrears.

9.68 We dealt with a similar problem in **Development Bank of Zambia v Maambo**[2], which the Deputy Registrar said did not apply. We held that:

> **"When the respondent received his notice on 6th November, the only way of calculating his entitlement was to use his then existing salary scale: whatever happened to other employees who continued in employment could not affect the completed obligations between the parties. There was no consideration and no continuing contract between the parties. Accordingly, the respondent's notice pay had to be calculated on the old salary scale."**

9.69 We applied the same reasoning in **Judith Mukaya Chinyanta Tembo v Zambia Information and Communications Technology Authority**[22], where the appellant also argued that she was entitled to a salary increment, which though effected after she had left, was backdated. We held that the salary scale, which became effective in December, 2010 could not be used to compute her gratuity benefits because by then she had left employment.

9.70 We agree with the appellant that the 25% salary increment only had retrospective effect for employees who remained in employment after 28th June, 1995 and that the fifty-nine respondents whose employment was terminated before that date

were not entitled to the salary increment or salary arrears. Therefore, we reverse the decision by the Deputy Registrar to use an enhanced salary in computing VSS and pension and to include salary arrears for the fifty-nine respondents.

9.71 Consequently, we find merit in grounds 1, 2, 4, and 7 to the extent we have indicated, while grounds 3 and 8 have failed.

9.72 We come now to ground five where the appellant has accused the Deputy Registrar of shifting the burden of proof on the payable utility allowance. The Deputy Registrar had concluded that given the inconsistency relating to the objection to utility allowance on the part of the appellant, on the balance of probabilities, he accepted the evidence of the respondents that utility allowance was payable even to respondents who left before July, 1996.

9.73 We agree with the appellant that, in essence, the Deputy Registrar shifted the burden of proof to it when he found that all the fourteen respondents claiming utility allowance were entitled to the allowance because the appellant had advanced no valid reason as to why they should not be paid. The respondents were required to prove their entitlements to the allowance by producing individual payslips. The appellant had no obligation to

aid them to prove their claims. This is the principle expounded in **Khalid Mohamed v The Attorney General**[3].

9.74 The argument that the Deputy Registrar embraced the non-discriminatory principle enshrined in the **James Mankwe Zulu**[11]case is flawed because that case came from the Industrial Relations Court (now a Division of the High Court) and was based on **section 85(5)** of the **Industrial and Labour Relations Act, Cap 269**. In contrast, this case emanated from the High Court where the Industrial and Labour Relations Act had no application. This ground succeeds and we reverse the Deputy Registrar's decision as far as it applied to all the 14 respondents.

9.75 In ground six, the appellant assailed the Deputy Registrar's finding that the respondents who transferred to Finance Bank were to get a separation package that included all allowances. The respondents accepted that the judgments of both courts did not specifically mention the names of the 82 respondents or when they joined the action but argued that the group litigated from inception up to final judgment; and that the appellant sat on its rights by not objecting before commencement of the trial.

9.76 The respondents referred to the evidence of PW1, confirming that the 82 joined proceedings from the start and were part of the

computations under the spreadsheets; that they were paid redundancy under VSS excluding housing allowance; and that their claim in this case related only to housing allowance.

9.77 As rightly argued by counsel for the appellant, the Deputy Registrar was not sure if the evidence pertaining to this category of respondents was before the trial court because the court offered no comment on this group. However, he went on to hold that he could not undo that which the court had awarded irrespective of the background of the respondents.

9.78 We accept that since the trial judge offered no comment on this category of respondents, there was nothing the Deputy Registrar could undo and for this reason, he could not properly hold that the group had successfully litigated the matter because they questioned the underpayment of the very VSS they were offered.

9.79 Further, as conceded by the respondents, before assessment, the appellant applied to have this group together with others, struck out from the record. In relation to the 82 respondents the appellant argued that they did not leave under VSS and their service to the Bank was less than ten years. However, the Deputy Registrar held that the issue of the proper parties would be dealt with in the assessment.

9.80 On appeal, the learned judge directed that parties to the assessment should be the plaintiffs in that court and that the Deputy Registrar would deal with the issues of those included by error and those whose names were repeated, as the assessment would be individual. Therefore, we reject the argument that the appellant slept on its rights or waived its rights by allowing an irregularity to remain on the record.

9.81 The Deputy Registrar had a duty to interrogate the entitlement of the 82 respondents given the above directive by the trial judge and our directive that he pays special attention to each respondent's entitlement during assessment to avoid ordering double payments. Besides, it does not seem to us that the Deputy Registrar dealt with the issue of the proper parties or those whose names might have been included by error or repeated.

9.82 The appellant also submitted that this matter is *res judicata* and we agree. We dealt with the issue of whether the appellant was justified in transferring the respondents to Finance Bank following a restructuring exercise, in **Standard Chartered Bank Zambia Limited v Peter Zulu and 118 others**[23]. We agreed with the IRC that the appellant had not complied with the provisions of the Constitution as it ignored to obtain consents from the employees

when it transferred some branches to Finance Bank and we upheld the order by the IRC directing the appellant to pay the affected employees statutory redundancy packages, pension, repatriation fees and leave benefits. The appellant complied and paid the respondents redundancy packages using the 1995 VSS formula that was higher than the statutory redundancy formula.

9.83 We have also dealt with the subject of *res judicata* invarious cases such as **Chick Masters Limited and another v Investrust Bank Plc**[24], where we considered the meaning of the term in **Black's Law Dictionary, 8th ed. at page 1336**, where it is defined as:

> **"1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been - but was not - raised in the first suit."**

9.84 We held, inter alia, that a matter that could but was not raised in the first suit is *res judicata* in terms of our understanding of *res judicata* within Black's Law Dictionary and that if such matter could not be raised and was for that reason not in fact raised, then it is not *res judicata.*

9.85 In this case, the 82 respondents did not explain why they did not ask for inclusion of all allowances in the calculation of their redundancy packages or benefits payable to them in that action. If they had any grievance with their redundancy packages or

pension, they could and should have raised the issue in the matter where they had successfully litigated their claims in the IRC; since they did not, the matter was *res judicata*.

9.86 Further, while PW1 testified at assessment that the claim of the 82 respondents related only to housing allowance, they are now also claiming an enhanced pension as seen from counsel's submission in paragraph 8.27. We must point out that there is normally no legal obligation for an employer to pay enhanced redundancy payments. Such payments would normally be made as a gesture of goodwill, to avoid legal action or to ensure that the employment relationship is terminated as quickly as possible.

9.87 The respondents could not have it both ways especially that they already obtained a more superior package than they would have obtained under statutory redundancy and there was no loss of employment. We conclude that this group was not entitled to make any claims in this matter and we strike down their names. This ground of appeal wholly succeeds and this means that the number of respondents should further reduce by that number.

9.88 We come lastly to the question of costs. It is trite, that costs are always in the discretion of the court and usually follow the event. The authorities cited by counsel on both sides are on point. In our

view, the purported success by the appellant, in relation to the objection on non-cash benefits forming part of basic salary for purposes of computing VSS and pension was minimal and had little impact on the outcome of the assessment proceedings.

9.89 However, considering the many flaws in the assessment, which we have highlighted in this judgment, the appellant should not have been condemned in costs. Hence, we set aside the costs order.

10 **Conclusion and Orders**

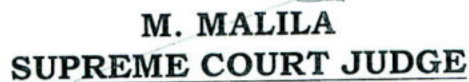
10.1 In all, this appeal substantially succeeds and we allow it. We set aside the judgment on assessment and remit the record back to the learned Deputy Registrar to re-compute the separation packages for each respondent in line with our judgment.

10.2 The Deputy Registrar shall invoke the provisions of **section 23** of the **High Court Act, Cap 27** and appoint a referee, preferably a qualified chartered accountant, to compute the amounts, to which each respondent is entitled in terms of the VSS packages. Upon re-computation of the amounts, the appellant must pay the balances due to the respondents, together with interest as we have stated in paragraph 9.55, less the amounts already paid as VSS.

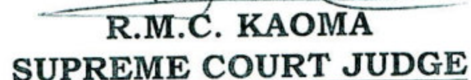
10.3 If the 70% actuarial reserve values as at 30th June, 1996 have to be re-computed, the court should involve the Bank's actuary and apply the rules of the DBS Pension Trust Fund and section 18(1)(f) and 18(3)(b) of the Pension Scheme Regulation Act. The respondents must, without delay, be given any outstanding portable benefits less the minimum lump sum payment of K1,000,000.00. Interest shall also apply on any outstanding amounts as stated in paragraph 9.55.

10.4 Because the appellant agreed to the methodology applied at assessment, we order the parties to bear their respective costs here and below.

M. MUSONDA
DEPUTY CHIEF JUSTICE



M. MALILA
SUPREME COURT JUDGE



R.M.C. KAOMA
SUPREME COURT JUDGE