IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 194/2020**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

JOHN MUMBA & 150 OTHERS **APPELLANTS**

AND

THE COUNCIL OF THE UNIVERSITY OF ZAMBIA **RESPONDENT**

CORAM: ***KONDOLO SC, CHISHIMBA AND NGULUBE, JJA.***
On 25th August, 2021 and 8th November, 2021.

For the Appellants: *Mr. F.S. Kachamba, of Messrs. EBM Chambers.*

For the Respondent: *Ms. M. Ngoma, In House Counsel - University of Zambia*

J U D G M E N T

NGULUBE, JA delivered the judgment of the Court.

Cases referred to:

1. *Iness Zeko & 114 Others vs The Council of the University of Zambia, 2014/HP/945.*
2. *Davies Jokie Kasote vs The People (1977) ZR 75.*
3. *Zambia Consolidated Copper Mines Limited vs Mulemwa, SCZ Judgment No. 15 of 1995.*
4. *Mundia Sikatana vs The Attorney General (1982) ZR 109.*
5. *C. K. Scientific Group Zambia Limited vs Zambia Wildlife Authority, SCZ Judgment No. 5 of 2014.*
6. *Zega Ltd vs Zambezi Airlines Ltd, Appeal No. 39 of 2014.*
7. *Indeni Petroleum Refinery Company Ltd vs G. Ltd (2007) ZR 197.*
8. *Harbutt's Plasticine Limited v Wayne Tank and Pump Co. Limited (1970) 1 ALL ER 225.*

9. *Chola Chama vs. Zambia Electricity Supply Corporation Limited (2008) 1 ZR 222.*
10. *Kitwe City Council vs. William Ng'uni (2005) ZR 57.*
11. *Wilson Masauso Zulu vs Avondale Housing Project Ltd (1982) ZR 172.*

Legislation referred to:

1. *The Constitution of Zambia (Amendment) Act No. 2 of 2016.*
2. *The High Court Act, Chapter 27 of the Laws of Zambia.*
3. *The Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia.*

Other works referred to:

1. *The Rules of the Supreme Court, 1965 (White Book) RSC, Volume 1, 1999 Edition.*

INTRODUCTION

1. This is an appeal against a Ruling of the High Court delivered by the Honourable Mr. Justice C. Chanda on 16th May, 2019, which dismissed the appellants' claim against the respondent, for payment of interest on their retirement benefits.

BACKGROUND

2. The brief history of this appeal is that the appellants retired from their employment at the University of Zambia on different dates between 2000 and 2007. The relationship between the appellants and the respondent was governed by a Collective Agreement which provided that a retired employees who have been retired must be paid their retirement gratuity in full within three months. The Collective Agreement further provided that a retired

employee whose retirement gratuity had not been paid in full, would continue to receive a monthly salary until the retirement gratuity was paid in full.

3. The appellants were not given their full retirement gratuity within three months and the respondents retained them on the payroll and they continued to receive monthly salaries in accordance with the Collective Agreement. They subsequently commenced legal proceedings seeking payment of their terminal benefits with interest. They later obtained a judgment in default and the respondent eventually paid them terminal benefits but without interest. The respondent subsequently made an application to set aside the default judgment, which was granted on 19th December, 2018.

4. On 14th February, 2019, the appellants made an application for leave to enter judgment in default of defence. After hearing the parties, the lower court refused to do so because the principal debt had been paid. The only dispute was whether the appellants were entitled to interest on their terminal benefits. The court below held that the issue of interest was a point of law to be determined under ***Order 14A of the Rules of the Supreme Court***. It accordingly directed the parties to file affidavits and

submissions. The matter came up for hearing on 15th April, 2019, at which the appellants' counsel sought leave to file a written reply to the respondent's submissions. The lower court gave the appellants up to 18th April, 2019, to file a written reply.

5. The basis on which the appellants claimed interest was that the respondent had a contractual obligation to pay their terminal benefits within three months of their retirement but delayed to do so and as a result, their benefits had lost value. The appellants relied on correspondence which according to them, showed that the respondent acknowledged that it would pay interest on the terminal benefits. They further claimed that they were similarly circumstanced with other retirees of the respondent who were paid interest.

6. On the other hand, the respondent argued that the retention of retirees on the payroll pending payment of terminal benefits was intended to cushion against financial hardships and, the salaries which the appellants had been receiving covered the devaluation of the currency. The respondent submitted that it had not paid interest to any retirees who had been retained on the payroll. Further, that paying the appellants interest on the terminal benefits would amount to unjust enrichment.

DECISION OF THE HIGH COURT

7. After hearing the parties, the learned judge held that the basis for an award of interest is that the defendant has kept the plaintiff out of his money and the defendant has had the use of it himself so he ought to compensate the plaintiff accordingly. It was his opinion that the retention of the appellants on the payroll was intended and did cushion the appellants against financial hardships arising from the non-payment of terminal benefits on time. According to him, the payment of monthly salaries to the appellants while they waited for their retirement gratuity operated as compensation akin to interest payable as compensation for being kept out of their money.

8. The lower court was of the view that paying the appellants interest would be tantamount to paying them twice and would amount to unjust enrichment. He adopted the approach that was taken by his brother the Honourable Mr. Justice C. Zulu in the case of ***Iness Zeko & 114 Others vs The Council of the University of Zambia***[1], which the lower court found to be on all fours with this case. The court in that case held that the claim for interest to run parallel with the payment of salaries pending final payment

of terminal benefits in the absence of an agreement to that effect, would amount to duplicity of payments to the plaintiffs.

9. The court below held that there was no letter where the respondent unequivocally agreed to pay interest as alleged by the appellants. It found that the letter by the respondent's Vice Chancellor, Professor Andrew Siwela, which the appellants relied on, related to employees who retired long before the appellants retired. The court found that there was no admission made by the respondent to pay interest. There was also no agreement between the parties that interest was payable due to the delay in the payment of terminal benefits.

10. The lower court was of the further opinion that the appellants failed to prove that they were similarly circumstanced with other retirees who were paid interest. The court accepted the respondent's contention that the retirees who were paid interest had not been retained on the payroll and the government paid them interest on humanitarian grounds. It found that the appellants were all retained on the payroll and as such, the appellants could not claim to be similarly circumstanced with those who were not retained on the payroll. The court dismissed the claim for interest on grounds that payment of interest to the

appellants would amount to double payment and unjust enrichment.

THE APPEAL TO THIS COURT

11. Dissatisfied by the ruling of the learned trial judge, the appellants have now appealed to this Court advancing eight grounds of appeal as follows: –

1. ***That the lower court misdirected itself in law and fact by discounting altogether the fact that the appellants were in a contractual relationship with the Respondent and that the terms of the contract between the parties with respect to their payment was that the appellants' terminal dues needed to be paid by the respondent within three months from the time of their retirement which was not done and therefore amounting to breach of its contract with the Appellants;***
2. ***That the lower court misdirected itself in law and fact by failing to recognize the legitimacy of the appellants action in taking the respondent to court to demand interest payment for its terminal dues;***
3. ***That the lower court misdirected itself in law and fact by failing to recognize in this case that the Respondent neglected or omitted to file in its defense to the appellants' claims which led the court in the year 2009 to give the appellants a default judgment and;***
    a. ***Instead of setting this default judgment aside the respondent sat on its rights and;***
    b. ***Engaged the appellants in protracted negotiations over an unreasonable length of time on over a***

period covering about ten years over as shown by the correspondence between the parties;

c. *Which activities misled the applicants as to the respondent's position in this matter;*

4. *That the lower court misdirected itself in law and fact by not assessing;*

a. *The impact the breach of contract had on the appellants and;*

b. *The impact of the delay to apply to set aside the default judgment by the respondent;*

Which actions negatively affected the appellants through no fault of their own;

5. *That the lower court misdirected itself in law and fact in the manner that it handled this case which it is common knowledge that it consists of groups of retirees fighting for the same cause but represented by different lawyers in that the court:*

a. *Ignored a fundamental principle that like cases should be treated alike by closing its eyes to the fact that the group which was represented by the late Mr. Mundia SC of C.L. Mundia and Company arising out of the same default judgment approached government which is the primary funder of the respondent, and government paid the claims made by Mr Mundia's clients; and*

6. *That the lower court misdirected itself in law and fact by not hearing the appellants and instead relied on a precedent case Iness Zeko and 114 Others and the Respondent, 2014/HP/1945 delivered on the 13th November 2018 which case declared to be on all fours*

with this case without first of all considering whether the said case was correctly decided;

7. ***That the lower court misdirected itself both in law and fact in following the case of Iness Zeko and 114 others and the respondent 2014/HP/1945 which case was based on Article 189 of the Constitution of Zambia (Amendment) 2016 which came into effect long after the appellants had brought their grievance against the appellant to court and therefore not forming the basis upon which the appellants were denied their rights; and***
8. ***That the lower court misdirected itself in law and fact by deciding this case without hearing the appellants' lawyer's written reply to the respondent's arguments.***

12. When this appeal came up for hearing, Counsel for the parties entirely relied on the heads of argument which they had filed on behalf of their respective clients.

THE APPELLANTS' CONTENTIONS

13. On ground one, the appellants' counsel, Mr Kachamba submitted that there was a contract between the appellants and the respondents which stated that the appellants were to be retained on the payroll and paid salaries. He stated that the law requires that contracts should be honoured.

14. Counsel argued that the respondents retained the appellants on the payroll for a long period of time and this resulted in their money losing value. He submitted that their counterparts who were still working had obtained salary increments to cushion their money against depreciation, but the appellants were not given such a cushion. He said the appellants were made to live on money borrowed against their terminal benefits. He argued that the long time it had taken the respondents to pay the appellants their terminal benefits made the salaries the appellants were receiving to cease to be salaries as envisaged by the contract between the parties. This according to him was a breach of contract.

15. In the second and fourth grounds of appeal, the appellants are challenging the approach adopted by the lower court in dealing with this matter. The appellants' counsel contends that this matter was commenced by writ of summons and as such it should have been heard in open court. It is argued that the court should not have dispensed with holding a trial in open court and ordered that the matter be determined using affidavit evidence. This allegedly deprived the appellants of their right to be heard and to cross examine the respondent. It is contended that the

lower court failed to recognize the legitimacy of the appellants' action against the respondent to seek payment of interest on their terminal benefits.

16. On ground six, counsel submitted that the lower court relied on the ***Iness Zeko case*** and ignored the letter by the Vice Chancellor, Professor Siwela. Mr. Kachamba further submitted that the Vice Chancellor's understanding was that retirees on the payroll should be given any salary increase given to their working colleagues, but this was going to increase the wage bill and therefore there was urgent need for the government to fund the respondent. He argued that paying salaries could have cushioned the appellants' money against depreciation and they would not have claimed for interest.

17. Counsel argued that the finding of the court below that the letter by the Vice Chancellor referred to another class of retirees was wrong, because the letter was not specific to any group of retirees. He further contended that the ***Iness Zeko case*** was not on all fours with this case because the appellants' money was kept longer than anticipated and was not cushioned against depreciation.

18. Under grounds seven and eight, Counsel submitted that the appellants were given leave to file a written reply to the respondent's submission by the 18th April 2019, which they complied with, but the court rendered its ruling without considering it. We were urged to take judicial notice that parties to a case have the right to have all their arguments heard. He submitted that the appellants in their reply made arguments on why the ***Iness Zeko case*** should not have been used as a precedent in this case. It was his argument that the appellants did not get a fair hearing and that the ruling should be set aside.

19. On ground four, counsel submitted that it took close to ten years before the respondent could finally pay the appellant their dues and their money depreciated which forced them to borrow in order to meet recurrent expenses. It was contended that if the lower court had made this assessment, it would have held that the appellants were entitled to compensation and that assessment could not be fully made based on affidavit evidence.

20. As regards grounds three and five, counsel submitted that following the late release of their terminal benefits, the appellants commenced an action to which the respondents did not mount a defense. He stated that the appellants obtained a

default judgment and the logical action the respondent should have taken was to either apply to set aside the default judgment or comply with it. The respondent however did not apply to set aside the default judgment but instead engaged the appellants and other groups who had obtained a default judgment against it, not on without prejudice basis, regarding the payment of interest.

21. He submitted that none of the letters by the respondent's counsel outrightly rejected the default judgment. It was his further contention that the respondent's letters, coupled with the fact that they took close to ten years to pay the appellants, can only be interpreted as compliance with the default judgment.

22. He submitted that the appellants lost a considerable amount of money, time and resources, directly attributable to the conduct of the respondent in delaying to pay their terminal dues; in not timely contradicting the appellants when they obtained a default judgment and; in engaging the appellants not on a without prejudice basis. Counsel further contended that the court below misapprehended the facts and the law as regards the interest which government paid to the retirees who were represented by Mr. Mundia SC and failed to come to a correct decision because

it did not hold a full trial. The gist of his argument was that the appellants were entitled to interest with costs.

23. On behalf of the respondent, Ms. Ngoma opposed ground one. She submitted that Clause 28.2 of the Collective Agreement provided that a retiree should continue to receive a monthly salary until the retirement gratuity is paid in full but did not prescribe the maximum period that a retiree should be retained on the payroll. She submitted that the appellants remained on the payroll and continued to draw salaries to cushion them from financial distress, as they were not paid their benefits within three months. Counsel contended that the respondent did not breach its contract with the appellants because it retained the appellants on its payroll as required by Clause 28.2 of the Collective Agreement.

24. Regarding the second ground of appeal, Counsel argued that the question faced by the court below was whether the appellants were entitled to interest, after it was established that all the appellants were paid their terminal benefits. She submitted that this was a question of law, and referred to ***Order 14A of the Rules of the Supreme Court***, which provides that the court may upon application of a party or on its own motion determine any

question of law arising in any cause or matter at any stage of the proceedings where it appears to the court that such question is suitable for determination without a full trial of the action.

25. The court was referred to the editorial introduction under ***Order 41 of the Rules of the Supreme Court***, which states that an affidavit is a written sworn statement signed by a person which is used as evidence of the matters deposed to. Counsel therefore supported the decision of the court below that the issue of interest was a question of law which could be determined on the affidavit evidence without a full trial.

26. On ground six, the respondent's counsel contended that the appellants' argument that they were not given an opportunity to be heard is misguided because the purpose of a hearing is to provide an opportunity for each side of the dispute to present their case which opportunity was granted to the parties in this case.

27. It was argued that the ***Iness Zeko case***, was on all fours with this case, in that the plaintiffs in both cases were former employees of the respondent who retired and had continued to draw salaries from their respective retirement dates until their retirement benefits were paid in full. She submitted that the

plaintiffs in both cases had been paid their terminal benefits and were seeking an order for interest. It was her argument that a case is considered to be on all fours with another where the claims are substantially similar and need not be exactly the same.

28. Ms. Ngoma further argued that the principle of stare decisis requires that a court should abide by its ratio decidendi in past cases. For this contention, she relied on the case of ***Davies Jokie Kasote vs The People***[2] and the case of ***Zambia Consolidated Copper Mines Limited vs Mulemwa***[3]. It was submitted that the ***Iness Zeko case*** is still good law as there has been no subsequent decision that has overruled it.

29. According to counsel, what the appellants were seeking to achieve is not tenable at law as all High Court judges have equal power, authority and jurisdiction. We were referred to ***Section 4 of the High Court Act*** and the case of ***Mundia Sikatana vs The Attorney General***[4] for this argument. It was her contention the court below could not have examined whether the ***Iness Zeko case*** was correctly decided as that would amount to reviewing a decision of a court with equal authority, power and jurisdiction.

30. She submitted that the letter by the Vice Chancellor was not written for the appellants' benefit, but was a communication between stakeholders. According to her, the communication was not the respondent's final position on the matter and was subject to change for various legal reasons. The thrust of her argument was that the appellants could not rely on the letter as it was not addressed to them or written for their benefit to claim interest.

31. As regards grounds seven and eight, Ms. Ngoma argued that the appellants' reply to the respondent's arguments was not part of the record at the time the lower court was writing its ruling. The ruling demonstrated that the lower court did not deliberately ignore the documents. She referred to the case of ***C. K. Scientific Group Zambia Limited vs Zambia Wildlife Authority***[5] and argued that that the court is only confined to rely on documents before it.

32. Counsel went on to argue that the court in the ***Iness Zeko case*** cited ***Article 189(1) (a) of the Constitution*** in its obiter dictum due to its similarities with Clause 28.2 of the Collective Agreement. Therefore, it was misleading for the appellants to contend that the said case was determined based on that provision.

33. Ms. Ngoma further opposed ground four. She submitted that the court below addressed its mind to the issue whether the appellants would be disadvantaged if not awarded interest. She repeated her arguments in ground one and contended that the lower court was on firm ground when it held that the appellants would be unjustly enriched if awarded interest in addition to the salaries.

34. On grounds three and five, Ms. Tembo argued that at no time did the respondents commit to paying interest on the appellants' terminal benefits. She submitted that the letters authored by the respondent's counsel expressly denied any intimation that interest was payable. She referred to the case of ***Zega Ltd vs Zambezi Airlines Ltd***[6], where the court held that an admission must not only be unconditional, but must also be unequivocal. Counsel further argued that no group of retirees who had been retained on the payroll had been paid interest as alleged by the appellants. According to her, the appellants failed to prove that the respondent paid interest to retirees who were similarly circumstanced. We were urged to dismiss this appeal and uphold the lower court's decision.

35. The appellants' counsel filed a reply to the respondents' contentions. On grounds one, Mr. Kachamba submitted that the respondent's contractual obligation to pay terminal benefits within a period of three months was breached and this brought into effect the requirement for the respondent to retain the appellants on the payroll and to pay them salaries. He maintained that the respondent breached the contract when the period of three months was prolonged into years without upward salary adjustments.

36. On ground three, counsel submitted that the breach of contract resulted in the appellants commencing an action and obtaining a default judgment. He argued that the respondent did not act promptly to offset the judgment debt, but it entered into protracted discussions over a period of about ten years leading the appellants to believe that the respondent would redress their grievances. He argued that the lower court did not attach weight to the negligence and misrepresentations of the respondent. According to him, the court ought to have considered awarding an equitable remedy.

37. On ground five, Mr. Kachamba submitted that flowing from the respondent's inertia or misconduct, the retirees who were

represented by Messrs. Mundia and Company commenced an administrative action against the government and were paid. He argued that the retirees in the ***Iness Zeko case*** sued the respondent but did not properly articulate their case and lost. Therefore, this case was mishandled by the lower court when it used the ***Iness Zeko case*** as a precedent.

38. On grounds two and four, counsel submitted that ***Order 14A of the Rules of the Supreme Court*** provides that the parties should have had an opportunity to be heard on the question or consented to an order or judgment on such determination. It was his contention that the appellants did not have an opportunity to be heard and did not consent to the judgment on a point of law which made the ruling of the lower court irregular.

39. In respect of ground six, Mr. Kachamba insisted that the ***Iness Zeko case*** was not applicable to this case because it did not deal with the issue of breach of contract. He submitted that the lower court on its own motion, decided to determine the matter on a point of law but should have allowed the appellants to present their case as they had commenced the action by writ of summons.

40. On grounds seven and eight, Mr. Kachamba argued that justice must not only be done, it must be seen to done. He submitted that the appellants were denied the right to be heard and further illustrated by the lower court's statement that it had not looked at the reply filed by the appellants.

CONSIDERATION OF THE MATTER BY THIS COURT AND VERDICT

41. We have considered the evidence on record, the heads of argument filed by Counsel for the parties and the authorities. The appellants have raised eight grounds of appeal, which, for purposes of clarity and coherence, we shall address in their sequential order. We shall nevertheless address grounds three and four at the same time for convenience's sake. We will also deal with grounds six and seven together, for the simple reason that are they revolve around the same issue and are interrelated.

42. The issue for determination in ground one is whether the appellants were entitled to interest on their terminal benefits. The contract which governed the relationship between the appellants and the respondent was a Collective Agreement, which in Clause 10(b) provided that an employee who has been retired must be paid their retirement benefits in full within three

months. The Collective Agreement in Clause 28.2 further provided that:

> ***"When an employee has been retired and the retirement gratuity has not been paid to him/her in full, he/she shall continue to receive the monthly salary until the retirement gratuity is paid in full. The monthly salary so paid shall not be recovered from the retirement gratuity when finally paid."***

43. The respondent did not pay the appellants their retirement benefits within three months but retained them on the payroll. They continued to receive salaries in accordance with Clause 28.2 of the Collective Agreement. The appellants contend that they are entitled to interest on their retirement benefits because the respondent delayed to pay them and this amounted to a breach of contract. They argue that the salaries they received while waiting to be paid their terminal benefits had lost value because they were never increased to cushion against currency depreciation.

44. Firstly, we wish to state that an award of interest is in the discretion of the court. The underlying principle for an award of interest is that the defendant has kept the plaintiff out of his money and the defendant has had the use of it himself so he

ought to compensate the plaintiff accordingly. This principle does not apply when the plaintiff has not been kept out of his money but has in fact been indemnified. The English case of ***Harbutt's Plasticine Limited v Wayne Tank and Pump Co. Limited***[8], is instructive, in which Lord Denning, M.R., stated as follows:

> ***"An award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly.***
> ***The reasoning does not apply when the plaintiff has not been kept out of his money but has in fact been indemnified by an insurance company. I do not think the plaintiff should recover interest for himself on the money when he has not been kept out of it."***

45. We take the view that Clause 28.2 of the Collective Agreement which provided that a retiree who has not been paid his retirement gratuity in full should continue to receive their monthly salary until the retirement gratuity is fully paid, was designed to compensate retirees in cases where there has been a delay in paying their retirement package. This has been made clear by the respondent and indeed there is no other justification for an employer to pay an employee a salary for a period not worked for. There is a plethora of authorities which say that

during the period an employee is on termination there is no consideration to justify paying the employee and doing so would amount to unjust enrichment.

46. This was the reasoning of the court in the case of ***Chola Chama vs. Zambia Electricity Supply Corporation Limited***[9], where the Supreme Court held that:

> ***"In the case of Siamutwa v Southern Province Cooperative Marketing Union Limited and Finance Bank (Z) Ltd (3), the case relied upon by the trial court, this court stated as follows:-***
> ***'The appellant never rendered any services to the 1st respondent from the time that his services were terminated on 20th May, 1999, up to the date of judgment in May, 1999, up to the date of judgment in May, 2002. There would therefore be no consideration for the money which could be paid to the appellant were such an order made. In our view, this would amount to unjust enrichment'.***
> ***Although Siamutwa was not based on reinstatement, it made the point that during the period an employee is on termination there is no consideration to justify paying the employee, it would be unjust enrichment."***

47. In the case of ***Kitwe City Council vs. William Ng'uni***[10], the Supreme Court held that it is unlawful to award a salary or pension benefits, for a period not worked for because such an award has not been earned and might be properly termed as

unjust enrichment. We therefore take the view that the salaries which the appellants received while waiting to be paid their terminal benefits were compensation for the respondent's delay in paying the terminal benefits. We, accordingly, hold that the appellants were not kept out of their money and therefore, there was no justification for the lower court to award interest to the appellants.

48. We do not find merit in the argument that the appellants are entitled to interest because the respondent delayed to pay their terminal benefits. First of all, though the appellants ought to have been paid within three months, they continued to receive their salaries precisely because the respondents delayed to pay them retirement benefits. This was in our view the rationale behind Clause 28.2 of the Collective Agreement. There is also no merit in the appellants' argument that the respondent breached its contract with the appellants. The Collective Agreement did not provide for salary increments in respect of the salaries the appellants received while waiting to be paid their terminal benefits. We hereby dismiss ground one for lack of merit.

49. The second ground of appeal is against the decision of the lower court to determine the matter on a point of law as provided in

Order 14A of the Rules of the Supreme Court. It is the appellants' contention that this matter was commenced by writ of summons and it should have gone to trial in open court, but the court failed to recognize the legitimacy of the appellant's action. We wish to state that a court has power, upon application of a party or of its own motion, to determine any question of law arising in a matter. This is provided in ***Order 14A of the Rules of the Supreme Court***, which states as follows:

> ***"1. The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –***
> ***(a) Such question is suitable for determination without a full trial of the action, and***
> ***(b) Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.***
> ...
> ***3. The Court shall not determine any question under this Order unless the parties have either***
> ***(a) Had an opportunity of being heard on the question, or Consented to an order or judgment on such determination."***

50. The lower court opined that whether the appellants were entitled to interest on their terminal benefits was a question of law

suitable for determination without a full trial of the action. This was within the power of the court below and we entirely agree with it that the issue of whether interest is payable in any circumstance, is always a question of law which would in appropriate circumstances be suitable for determination without a full trial of the action.

51. There is no merit in the appellants' contention that the appellants neither had an opportunity of being heard nor consented to an order or judgment on the determination of the issue. This is because the lower court directed the parties to file affidavits after making up its mind to determine the matter on a point of law. The appellants' counsel did not object and complied with the directive and the matter was argued on 15th April, 2019, where counsel even sought to file a written reply to the respondent's contentions.

52. This sequence of events clearly shows that the appellants were given an opportunity to be heard and tacitly consented to the ruling of the lower court on the determination of whether the appellants were entitled to interest on their terminal benefits. Therefore, there was nothing wrong with the decision of the lower court to determine the matter in accordance with ***Order 14A of***

the Rules of the Supreme Court. Grounds two of this appeal lacks merit.

53. We will now move to grounds three and four. On grounds three, the appellants are contending that the lower court failed to recognize that the respondent omitted to file a defence which had led to the entry of judgment in default and sat on its rights instead of setting aside the default judgment and engaged the appellants in protracted negotiations. It is their contention that these factors had misled the appellants as to the respondent's position. In ground four, the appellants argue that the lower court did not assess the impact of the respondent's breach of contract on the appellants as well as the impact of the respondent's delay to apply set aside the default judgment. The thrust of their argument is that these factors had negatively affected the appellants.

54. In our view, the issues raised in grounds three and four are not only misplaced but they are totally misconceived. The ruling appealed against was dealing with the issue of whether the appellants were entitled to interest on their terminal benefits. It had nothing to do with the impact of the respondent's delay in setting aside the default judgment or the protracted negotiations

which the parties may have engaged in after the default judgment was entered. The delay on the part of the respondent in applying to set aside judgment and the negotiations which may have taken place, have no bearing on this appeal. We say this because this appeal is not challenging the setting aside of the default judgment.

55. It is our considered view that grounds three and four are essentially a digression from the real issue in this appeal. The real issue was whether the appellants are entitled to interest. We also do not find merit in the appellants' argument that the lower court did not assess the impact that the respondent's breach of contract had on the appellants. We have already found that there was no breach of contract and therefore this argument cannot be sustained. We, accordingly, hold that grounds three and four are misconceived. We hereby dismiss them for lack of merit.

56. On the fifth ground of appeal, the appellants contend that this case consists of groups of retirees fighting for the same cause who were represented by different lawyers but the lower court ignored a fundamental principle that like cases should be treated alike. They argued that the lower court closed its eyes to the fact that retirees who were represented by the late Mr. Mundia SC

approached the government which funds the respondent and were paid interest.

57. We agree with Mr. Kachamba that in employment cases, similarly circumstanced employees must be treated alike. The question in this particular case is whether the appellants were similarly circumstanced with the retirees who were represented by the late State Counsel Mundia. The respondent's evidence in the lower court was that the retirees who were paid interest on their terminal benefits were not retained on the payroll and therefore, the payment made by the government was done on humanitarian grounds. The court below found that there was no affidavit evidence to disprove the appellants' argument. To this effect, the court held that the appellants failed to prove that they were similarly circumstanced with those who were paid interest. In the case of ***Wilson Masauso Zulu vs Avondale Housing Project Ltd***[11], the Supreme Court held that:

> *"**Before this court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make.**"*

58. We cannot interfere with the finding of the court below that the appellants failed to prove that they were similarly circumstanced with retirees who were paid interest. This is because there is no evidence on record to prove that the retirees who were represented by the late Mr. Mundia SC were paid interest and were also retained on the payroll just like the appellants. We cannot, therefore, hold that they were similarly circumstanced with the appellants. Accordingly, ground five automatically fails.

59. In respect of grounds six and seven, it is the appellants' contention that the court below was wrong to have held that the ***Iness Zeko case*** was on all fours with this case without first considering whether the case was correctly decided. The appellants contend that the case was decided based on ***Article 189 of the Constitution of Zambia***, which came into effect long after the appellants commenced the action against the respondent.

60. In our considered view, this argument is totally misconceived and wrong in principle. We say so because a Judge of the High Court has no jurisdiction to determine whether a decision of another High Court Judge was correctly decided. It was however within the power of the lower court to determine whether the

case was applicable to this case or distinguishable and chose whether to rely upon it. In any event, the case was merely of persuasive value and not binding on the court.

61. We have read the ***Iness Zeko case*** and we agree with the lower court that this case is on all fours with the case in casu. We also agree with Ms. Ngoma that the plaintiffs in both the ***Iness Zeko case*** and this case were retirees of the respondent who continued to receive monthly salaries after their retirement, in accordance with Clause 28.2 of the Collective Agreement. The plaintiffs in both cases were paid their terminal benefits but they wanted to be paid interest on their terminal benefits due to the delay in the payment of terminal benefits. We therefore disagree with Mr. Kachamba that the ***Iness Zeko case*** was decided based on ***Article 189 of the Constitution***, because the Article was cited in orbiter dictum due to its similarities with Clause 28.2 of the Collective Agreement.

62. There is also no merit in the appellants' argument that the lower court ignored the respondent's letter which was authored by the then Vice Chancellor, Professor Siwela. The lower court held that there was no letter where the respondent unequivocally agreed to pay interest as the appellants had alleged. The letter by the Vice

Chancellor was discounted by the lower court which found that it related to employees who retired as at 31st December, 1996 and January, 1997, long before the appellants were retired. We take the view that the letter was not applicable to the appellants and had nothing to do with payment of interest to the appellants.

63. We, accordingly, find no merit in grounds six and seven and we dismiss them.

64. Coming to ground eight, the appellants' grievance is that the lower court proceeded to render a ruling without their written reply to the respondent's arguments. Mr. Kachamba contends that the lower court did not consider the appellants' reply which was filed within the time that was given by the lower court. He submits that the parties had the right to have all their arguments considered, and as such the appellants were not given a fair hearing.

65. It must be noted that the ruling of the lower court was delivered on 16th May, 2019, which was close to a month after the court directed counsel for the appellants to file a reply. The lower court found that the reply had not been filed and if at all it had been filed, it was not been placed on the record or brought to the attention of the court.

66. Therefore, the court below cannot be faulted for not having considered a reply which was not on record and was not brought to its attention for close to a month after it was supposed be filed. In our view, the appellants were given the opportunity to be heard when the matter came up for hearing and they had filed their affidavit and main submissions which were sufficient for the court to render its ruling. In any event, matters are decided based on evidence and it is trite law that the court is not bound by submissions of counsel. Therefore, ground eight has no merit.

67. We hereby dismiss this appeal for lack of merit. We, accordingly, uphold the ruling of the lower court. We make no order as to costs.

M. M. KONDOLO SC
COURT OF APPEAL JUDGE

F. M. CHISHIMBA
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE