IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 105 OF 2022

HOLDEN AT NDOLA

(Civil Jurisdiction)

B E T W E E N:

PHILIP SINCLAIR MAINZA **APPELLANT**

AND

ZESCO LIMITED **RESPONDENT**

CORAM: Chashi, Makungu and Sichinga, JJA

ON: 21st and 28th February 2024

For the Appellant: *C. Sianondo, Messrs Malambo and Company*

For the Respondent: *A.M Kambole Ngulube (Mrs), In House Counsel*

MAJORITY JUDGMENT

CHASHI JA, delivered the Majority Judgment of the Court.

Cases referred to:

1. ***Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR, 172***
2. ***Barclays Bank Zambia Plc v Patricia Leah Chatta Chipeta - SCZ Selected Judgment No. 16 of 2017***
3. ***Collet v Van Zyl Brothers Limited (1966) ZR, 147***
4. ***Star Drilling and Exploration Limited v National Institute for Scientific and Industrial Research and National Technologies Limited -SCZ Appeal No. 190 of 2013***

5. ***Kariba North Bank Company Limited v Joseph Zulu and Others – SCZ Appeal No. 185 of 2003***

6. ***Unyibi Musuiluko & 4 Others v Kariba North Bank Company Limited- SCZ Appeal No. 58 of 2999***

7. ***Paul Mumba v Zambia Revenue Authority - SCZ Judgment No. 10 of 2016***

8. ***Khalid Mohammed v Attorney General (1982) ZR, 1***

Legislation referred to:

1. ***The Judgment Act, Chapter 81 of the Laws of Zambia***

2. ***The Limitation Act, 1939***

Rules referred to:

1. ***The High Court Rules, Chapter 27 of the Laws of Zambia***

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of Honourable Lady Justice F.M Chisanga, High Court Judge, as she then was, delivered on 14th April 2020.

1.2 In the said Judgment, the learned Judge made the following determinations:

(i) I agree that the Respondent having admitted that there was an anomaly in the

grading by letter dated 20th June 2003, time begun to run at that time, rendering the claim to be within the time within which he could take out an action relating to an upgrade;

(ii) The underpayment of salary and attendant allowances will be assessed by the Deputy Registrar, based on grade M7 from October 2003 to 10th May 2004;

(iii) Leave accumulation to be assessed;

(iv) Terminal benefits computation to be assessed on grade M7 and the underpayment paid to the plaintiff;

(v) The pension dues if affected by failure to remit an enhanced contribution from October 2003 to May 2004, will be assessed and the underpayment made good by the defendant. The shortfall of the pension dues arising from the underfunding of the pension by the defendant, will be assessed and be paid if the plaintiff was paid less than

100% of his pension as a result of the pension scheme being under-funded;

(vi) The sums found due to the plaintiff to bear short term deposit interest at 5% from date of writ to date of Judgment and at current bank rate till payment in full; and

(vii) The economic rentals the plaintiff should have paid will be assessed from December 2004 up to the date the plaintiff vacated the company house. The said rent will bear interest at 5% from the date the defence was settled, to date of Judgment and thereafter at current bank rate.

2.0 BACKGROUND

2.1 The Appellant was appointed as Assistant Personnel Officer by Kariba North Bank Company Limited (KNBC) on 8th June 1984, which company was later on merged with the Respondent.

2.2 Whilst in employment with KNBC, in 1990, he obtained two diplomas, which earned him a promotion and was upgraded to salary scale K6.

2.3 In 1993, he was summarily dismissed and was only reinstated after a year on humanitarian grounds. On his reinstatement his salary scale was downgraded.

2.4 Of relevance to this appeal is that, during his employment and before his retirement on 10th May 2004, the Appellant was aggrieved that his elevation and salary scale were below what he deserved. During his employment, he relentlessly pursued the issue of promotion, in accordance with the ZESCO Limited non represented staff progression chart (the Chart).

2.5 The Appellant was of the view that, with his qualifications and the number of years he had worked for the Respondent, he should have been at scale M8 and not M6 at which scale he was retired.

2.6 In view of the aforestated, the Appellant took issue with the Respondent over the salary scale at which he was retired, as he was of the view that he was underpaid and as such his terminal and pension benefits were affected. This is what prompted him to take action in the court below.

3.0 MATTER IN THE COURT BELOW

3.1 The Appellant commenced an action in 2006 by way of writ of summons which was amended in September 2014 with leave of the court. The Appellant fronted fifteen claims. Of relevance to this appeal are the following reliefs:

(i) A declaration that the Appellant was entitled to be upgraded to salary scale M8 with effect from the date when Kariba North Bank adopted the Zesco Salary progress chart;

(ii) The sum of K132, 472, 572.61 (unrebased) being the amount by which the Respondent underpaid on terminal benefits;

(iii) The sum of K467,500,984.17 (unrebased) being pension benefits due to the Appellant from the Respondent;

(iv) The sum of K57,758,104.95 (unrebased) same being the amount by which the plaintiff was underpaid on salaries by the

Respondent between 1st April 1999 and 10th May 2004, and

(v) An injunction restraining the Respondent from evicting the Appellant from House No. 9 High Cost, Kariba Bank Housing Estates, Siavonga.

4.2 The other claims mainly were about underpayment on allowances such as service, hardship, overtime and subsistence.

4.3 According to the Appellant, on 16th March 1999, whilst he was in the employ of KNBC, KNBC adopted the Respondent's salary Progression Chart, consequent to which some technical staff were promoted to various scales depending on their seniority.

4.4 It was the Appellants averment that contrary to the Chart, KNBC upgraded him to salary scale M6 as opposed to salary scale M8, as he had served for 15 years, with academic qualifications at the time KNBC harmonized its salary structure in accordance with the Chart.

4.5 According to the Appellant, on divers occasions, he made written representations, requesting KNBC and subsequently the Respondent, to rescind the decision, but they refused. The Appellant averred that the officers who were heading Sections at the time KNBC adopted the Chart, were upgraded to scale M8 with the exception of himself who at the material time was heading the Industrial Relations.

4.6 It was further averred that, the Respondent has since paid the Appellant terminal benefits using scale M6 and has refused to pay the Appellant the difference. According to the Appellant, as a consequence, his final annual salary upon retirement was underpaid, resulting in him receiving an inferior retirement package.

4.7 Further, it was the Appellant's averment that at the time of his retirement, his pension benefits were calculated using scale M6 as opposed to M8.

4.8 In respect to the pension, the Appellant claimed that in terms of the KNBC Pension and Life Assurance Fund Rules, he was supposed to retire upon attaining the

normal pension age of sixty (60) years. That contrary to the Rules, he was prematurely retired at fifty five (55) years, and as such, losing out on a yearly pension equal to one sixtieth of his final pensionable salary multiplied by his pensionable service.

4.9 It was averred that, as a consequence of the premature retirement, the Appellant was disqualified from being a pensioner, thereby depriving him of drawing monthly pension payments from the Pension Fund. Further it was averred that the Respondent neglected to fund the Pension Scheme 100% as a result of which the Pension Manager only paid the Appellant a portion of retirement benefits as opposed to paying him full normal pension retirement benefits.

4.10 The Respondent settled its defence to the amended statement of claim on 29th September 2014, and averred that the Appellant was on 8th July 1999, upgraded from scale M5 to M6, but holding the same position of Human Resource Officer- Industrial Relations; with effect from 1st April 1999.

4.11 The Respondent denied that the Appellant was placed in the wrong scale and claimed that he was paid his terminal benefits in full using scale M6.

4.12 The Respondent averred that the Appellant was normally retired in accordance with his conditions of service and was therefore not prematurely retired. Further that, the obligation to pay pension benefits was on the part of Zambia State Insurance Corporation (ZSIC), the Pension Fund Managers.

4.13 According to the Respondent, the Appellant was never disqualified as a pensioner, as the pension benefits were paid by ZSIC. It was averred that at the material time, the Appellant was contributing at scale M6 and not M8 and was therefore correctly paid on that scale.

4.14 It was further averred that, the Respondent has no obligation to pay the Appellant pension benefits, as the same should be claimed from ZSIC. According to the Respondent, the Appellant had since vacated the house in issue and was not entitled to any reliefs being sought.

4.15 The Respondent then counterclaimed for rentals from March 2006 per month, up to the time he vacated the

house. Further, rentals per month from December 2004 to February 2006.

5.0 DECISION OF THE COURT BELOW

5.1 After considering the evidence and the submissions by the parties, the learned Judge noted from the correspondence exchanged between the parties, that the Appellant relentlessly pursued the issue of his promotion and upgrading.

5.2 The learned Judge noted that, if an employee performed according to expectation, he would progress in accordance with the Chart. Unsatisfactory performance would entail engagement with the concerned employee. The employee would then know that, issue had been taken in respect to performance. According to the learned Judge, she had not seen any indication of poor performance on the part of the Appellant after the summary dismissal in 1993.

5.3 The learned Judge opined that, outstanding performance could be rewarded by moving an employee to a grade higher than the next one and in that regard the

prerogative of management does not seem to have been fettered.

5.4 The learned Judge noted that in 2003, the Appellant again complained about the grading, that all diploma holders who were section heads were all remunerated in scale M7 or M8, with the exception of the Appellant. The Appellant requested for an upgrade to scale M7. The response from the Respondent was that the anomaly the Appellant had highlighted was harmonized in a manpower audit and review of conditions of service and a restructuring exercise that had just been completed and was to be carried out in phases.

5.5 According to the learned Judge, going by the progression Chart and in the absence of any performance issues, the Appellant was entitled to progress from scale M6 as conceded by Mr C. Mwenda, R. Eng, and rightly so. That the upgrading should have been effected in 2003.

5.6 Based on the admission by the Respondent that there was an anomaly in the grading as stated in the letter of 20th June 2003, the learned Judge ordered that, he be paid all underpayments arising from the failure to

upgrade him. As to the effective date; the learned Judge considered a period of three (3) months as reasonable period within which the upgrade would have been effected. That therefore, he be paid from October 2003 on the first notch of M7 up to the date of retirement, 10th May 2004.

5.7 As regards the pension retirement benefits from ZSIC, the learned Judge noted that the pension fund was under funded as the Respondent was not remitting the contributions in full, despite deductions being made from the Appellant's salary. As a result, the Appellant was only paid K35,754,154.97 (unrebased) as retirement benefits by ZSIC.

5.8 The learned Judge further noted that, ZSIC notified KBNC that an actuarial valuation report of 31st December 2001, revealed that the scheme was only funded up to 72.3% and that as such, the fund was unable to meet 100% of the normal pension retirement benefits. It was in that view, that the learned Judge ordered that the Respondent must make good the shortfall. Additionally that, the difference to his pension benefits arising from

the failure to upgrade him to scale M7 with effect from 2003, falls to be paid by the Respondent.

5.7 The learned Judge then went on to make the determinations as shown in the introductory part of this Judgment (paragraph 1.2).

6.0 THE APPEAL

6.1 Dissatisfied with the Judgment, the Appellant has appealed to this Court, advancing eight (8) grounds of appeal as per the amended memorandum of appeal at page 6 (a) of the record of appeal as follows:

(i) That the lower court erred in fact and law when it held that the Appellant (plaintiff in the lower court) was entitled to be in grade M7 from October 2003, when the said elevation to grade M7 should have been from 1st April 2002, in accordance with the Respondent's progression chart;

(ii) That the court below erred in law and fact when it held that underpayments made to the Appellant should have been assessed from October 2003 to 10th May 2004, when

the appropriate period should have been from 1st April 2002 to 10th May 2004;

(iii) That the lower court erred in fact and law when it held that the Appellants pension contribution was based on emoluments applying to a lower grade from October 2003 to May 2004, when the appropriate period ought to have been from 1st April 2002 to 10th May 2004;

(iv) That the lower court erred in fact and law when it held that the Judgment sum was to bear the short-term deposit interest at 5%, when the appropriate interest rate ought to have been the average of the short-term deposit rate per annum prevailing from the date of the cause of action or issuance of writ depending on the court's discretion and current lending rate after Judgment;

(v) That the lower court erred in fact and law when it proceeded to vacate the consent

settlement order obtained at mediation in which consent order the Respondent agreed to pay the Appellant his repatriation allowance and to grant relief on the matter which was subject of mediation settlement;

(vi) The lower court erred in omitting to order that the payment of the salary be for the correct grade pursuant to the letter of 8th July 1999 which correct grade is grade M6 and not for M5;

(vii) The court below erred both in law and fact in ordering that each party will bear own costs as the success of the Respondent was based on an issue which had been resolved at mediation and the court did not have jurisdiction to determine; and

(viii) The court below erred in law and fact when it took a view that the Appellant (plaintiff in the court below) did not claim that he had lost out on pension benefits as

result of being retired early than 60 years of age, when the same was claimed and thereby denying the Appellant benefits which would have accrued to the Appellant.

7.0 ARGUMENTS IN SUPPORT OF THE APPEAL

7.1 The first, second and third grounds were argued together. According to the Appellant, the grounds raise the issue of reckoning the period when the Appellant was to be in scale M7, and consequently affected the period when the underpayment should be calculated.

7.2 Our attention was drawn to the Chart, which appears at pages 115 to 118, in particular at page 118 where there is a date 04/98. Additionally our attention was drawn to the letter at page 119 dated 8th July 1999 upgrading the Appellant from scale M5 to M6 with effect from 1st April 1999. In view of those dates, it was the Appellant's contention that the month of April, is the month of reckoning when decisions take effect.

7.3 It was the Appellant's submission that according to the Chart, the Appellant would only have entered scale M7

after working for 11 years. That considering that, as at 1999, the Appellant had worked for 8 years, it follows that he would have worked for 11 years in 2002 and thereby entering scale M7. According to the Appellant, there was no basis on which the court considered October 2003, when the Appellant qualified to enter into M7 on 1st April 2002.

7.4 Based on the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[1], we were urged to reverse the effective date as it was done in the absence of evidence and substitute it with 1st April 2002.

7.5 In arguing the fourth ground, reliance was placed on the case of **Barclays Bank Zambia Plc v Patricia Leah Chatta Chipeta**[2] where the Supreme Court stated as follows:

> ***"We have stated in a number of cases that interest shall be awarded at the short term bank deposit rate from date of the writ to date of Judgment, thereafter at the current lending rate as determined by Bank of Zambia from***

date of Judgment to date of payment unless the parties have agreed otherwise."

7.6 It was the Appellant's contention that the nomination and imposition of 5% which has no resemblance to any evidence on the record or any bank deposit rate was unjustifiable. We were urged to reverse the decision of the court below.

7.7 The Appellant argued grounds five and seven together as according to the Appellant, had the court below appropriately considered the effect of the mediation settlement on rentals, it would not have made the Order it made as regards costs.

7.8 According to the Appellant, the issue of the house and the injunction were subject of a mediation settlement, where it was resolved. That despite the issue having been resolved, the court revisited the matter and ordered that economic rentals be paid upon assessment.

7.9 It was submitted that the award of costs is discretionary as per the case of **Collet v Van Zyl Brothers Limited**[3]. The Appellant contended that, what influenced the court in ordering that each party bears its own costs, was the

success of the rental claims, which rental issue was subject of mediation and thereby robbing the court of its jurisdiction, the ultimate decision should have been to award the Appellant costs.

7.10 It was further argued, relying on the case of **Star Drilling and Exploration Limited v National Institute for Scientific and Industrial Research and National Technologies Limited**[4] that the Appellant succeeded substantially and the costs ought to have been granted to the Appellant.

7.11 With respect to the sixth ground, our attention was drawn to the Appellant's second claim under the statement of claim, which was for underpayment of salaries from 1st April 1999 to 10th May 2004. According to the Appellant, despite being on scale M6, he was put on salary scale M5, which led to the underpayments of his salaries.

7.12 According to the Appellant, his evidence in court as shown at pages 392, line 19 to 394, line 2 of the record, was not contradicted and it was on that basis, he

submitted that the underpayment of the salaries should be corrected by this Court.

7.13 In arguing the eighth ground, the Appellant submitted that, he did under the amended writ of summons and statement of claim, appearing at page 275 of the record and particularly relief (ix) make the claim for the sum of K467,500,984.17 (unrebased), being pension benefits due to him from the Respondent. That this error was acknowledged by the court in its ruling on review appearing at page 365 of the record, which error the court ruled could not be rectified by way of review.

7.14 It was submitted that the Respondent retired the Appellant at the age of 55, instead of the pension age as required at 60 years, which occasioned the Appellant loss. We were in that respect referred to the cases of **Kariba North Bank Company Limited v Joseph Zulu and Others**[5] and **Unyibi Musuiluko & 4 Others v Kariba North Bank Company Limited & Zambia State Insurance Corporation Limited**[6]; where the Supreme Court had the opportunity to deliberate issues relating to whether a Respondent had occasioned a loss of pension

by being retired prematurely, on conditions of service which were not harmonized with the pension scheme rules.

8.0 ARGUMENTS IN RESPONSE

8.1 In response to the first, second and third grounds, the Respondent submitted that, whilst it did not agree that the Appellant was entitled to scale M7 from 2003, it was in the alterative argued that the three grounds are bereft of merit. It was submitted that, in coming to the conclusion that the Appellant was entitled to be upgraded to scale M7, the learned Judge took into consideration the evidence before the court, in particular the letter of 20th June 2003, which she held to be a concession by the Respondent, that the Appellant ought to have been upgraded. The court gave the Respondent three months from June 2003 as a period within which the upgrade would have been effected, thereby landing on the month of October 2003.

8.2 It was submitted that, there was relevant evidence upon which the court gave the Respondent a grace period within which the upgrade would have been effected. That

the finding of the learned Judge was based on evidence deployed before her and the Appellant has not demonstrated perversity in the finding to warrant interference by this Court.

8.3 As regards the fourth ground, the Respondent did not contest, as they were guided by Order 36/8 of **The High Court Rules**[1] and Section 2 of **The Judgment Act**[1].

8.4 In response to the fifth ground, it was submitted that the mediation settlement Order only determined the issue of repatriation allowance, whereby the Respondent agreed to pay the Appellant repatriation and further that the Appellant was to vacate the house on 1st April 2010. That there was no agreement relating to the issue of rentals.

8.5 In response to the sixth ground, it was submitted that the Appellant at page 414 of the record agreed in cross examination that the document at page 117 (b) of the record were proposed salaries and there was no document to show that they were ratified. That he further agreed that it would have been better for him to produce the final proposed salary structure as that is the one which was used.

8.6 That in view of the aforestated, the Appellant cannot claim that his evidence was not contradicted. Further that, the learned Judge cannot be faulted as her findings of fact were based on the evidence before the court.

8.7 In response to the seventh ground, it was submitted that costs follow the event. That the Appellant had fifteen (15) claims, out of which only five (5) succeeded, while the Respondent succeeded in the counterclaim entirely. That under the circumstances it cannot be said that the Appellant succeeded substantially. According to the Respondent, by ordering each party to pay its own costs, the learned Judge exercised her discretion judiciously.

8.8 In response to the eighth ground, it was submitted that, while the Respondent agreed that the court below misdirected itself when it held that the Appellant did not claim that he had lost out of the pension benefits, as a result of being retired early, when the Appellant did make the claim, the Respondent still contended that the ground lacked merit. According to the Respondent, the learned Judge still addressed her mind to the Appellant's claim by stating that the correspondence from ZSIC

indicated that the Appellant was retired normally and there was no evidence to show that he was merely refunded his contributions.

8.9 That the learned Judge further went on to distinguish this matter from the **Unyibi** case as the evidence before her, did not show that the Appellant was merely refunded his contributions but instead reveals that he was only underpaid because the pension fund was underfunded.

9.0 CROSS APPEAL

9.1 On 13th July 2022, the Respondent filed into court, a notice of cross appeal together with heads of argument. In its cross appeal, the Respondent fronted the following four (4) grounds:

(i) The learned Judge erred in law and fact when she held that the letter dated 20th June 2003, was an admission that the Appellant should have been upgraded from M6 and that the Appellant's claim for upgrading was not statute barred;

(ii) The learned Judge erred in law and fact when she overlooked without justification, the

evidence of DW1 and the other criteria for promotion set out in the progression Chart and held that the Appellant was entitled to be at scale M7 from October 2003;

(iii) The learned Judge erred in law and fact when she ordered the pension dues to be assessed on scale M7 and the underpayment to be paid to the plaintiff;

(iv) The learned Judge erred in law and fact, when she ordered that the Appellant is entitled to 100% of the pension and not 72%, due to the Respondent's failure to fully fund it, if he was paid 72% only.

10.0 ARGUMENTS IN SUPPORT OF THE CROSS APPEAL

10.1 In arguing the first ground, it was submitted that nowhere in the letter by Mr C. Mwenda R. Eng appearing at page 132 of the record, did the Respondent state that the Appellant was wrongly graded at scale M6. According to the Respondent, the court misapprehended the contents of the letter, as the same cannot be inferred to be a concession by the Respondent that the Appellant was wrongly placed.

10.2 It was submitted that, had the court taken a balanced view of all the evidence, in particular that of DW1 and the letters on pages 141, 148 and 153 of the record, it would not have come to the conclusion that the letter of 20th June 2003, was a concession.

10.3 Our attention was drawn to the first determination by the court below captured under paragraph 1.0 (1) in our introductory remarks and it was submitted that, the Appellant alleges that he was underpaid from 1st April 1999 to 10th May 2004. That he only commenced the action in December 2008; which was nine (9) years later, after the cause of action arose. Our attention was drawn to Section 2 (1) (a) of **The Limitation Act[2],** which provides that, any action founded on contract must be brought within six years of the cause of action arising. The case of **Paul Mumba v Zambia Revenue Authority[7]** was in that respect cited.

10.4 It was contended that, having demonstrated that the letter referred to in the finding was not a concession, and that this action was not commenced within six (6) years,

after the cause of action accrued, the suit was statute barred.

10.5 In respect to the second ground, our attention was drawn to page 118 of the record, where at the bottom, it was under heading "Note" provided that:

> **"The boundaries between grades entail evaluation promotion recommendations and performance."**

10.6 It was submitted that DW1 explained what was taken into consideration when promoting an employee. According to the Respondent, the document was a remuneration structure for KNBC for non-represented staff with a view of being implemented, but was never implemented.

10.7 It was the Respondent's submission that the finding by the lower court was premised on unbalanced evaluation of evidence which resulted in misdirection and should be interfered with.

10.8 In arguing the third ground, it was submitted that this ground is related to the first and second ground and having demonstrated that, the learned Judge erred by holding that the Appellant was entitled to be in grade M7,

it was the Respondent's prayer that the finding that the pension dues be assessed at M7 and the underpayment be paid to him be reversed.

10.9 In arguing the fourth ground, the Respondent cited the case of **Khalid Mohammed v Attorney General**[8], where the court held that he who alleges must prove and that even where a defence has failed, a plaintiff must prove his case. According to the Respondent, the Appellant did not adduce evidence to show that the pension was under funded by the Respondent. That in the absence of evidence of how the fund was underfunded, the Appellant should not have been entitled to Judgment.

11.0 ARGUMENTS IN OPPOSITION TO THE CROSS APPEAL

11.1 In respect to the first ground, we were directed to the letter at page 131 of the record, dated 24th April 2003, from the Appellant to KNBC, in which the Appellant was highlighting anomalies. Further our attention was drawn to page 132 of the record where the letter dated 20th June 2003, from C. Mwenda R. Eng to the Appellant appears. According to the Appellant, this letter was responding to the Appellant's letter of 24th April 2003.

11.2 It was submitted that the letter from the Respondent accepted that there were anomalies, which were being normalized. The Appellant contended that the evidence was properly evaluated and the court below gave its reasons in the assessment of evidence.

11.3 On the issue of the matter being statute barred, the Appellant submitted that the issue was raised in the pleadings, but no evidence was laid to that effect. That however the letter of 20th June 2003, acknowledged that the anomaly had been attended to, which acknowledgment has the effect of extending time in accordance with section 23 (4) of **The Limitation Act[2]**. According to the Appellant, the date of acknowledgement gave a new date of birth. That having commenced that action in 2006, the action was therefore not statute barred.

11.4 In response to the second ground, it was submitted that the Respondent referred to the evidence of DW1 at page 430 of the record, to the effect that it was not automatic to upgrade, but it depended on the performance as well. It was submitted that the court analyzed all the evidence and found that there were no issues of performance

deficiencies on the part of the Appellant, which was part of the progression criteria. According to the Appellant the evidence was properly evaluated.

11.5 The Appellant responded to the third and fourth grounds together and submitted that, to arrive at its determination, the court made its analysis. That additionally, ZSIC, in its letter dated 12th December 2005, showed in addition to the actuarial valuation that, the fund was not fully funded.

12.0 OUR ANALYSIS AND DECISION

12.1 We have considered the Judgment being impugned and the arguments by the parties. We shall address the main appeal first.

12.2 Both parties have argued the first, second and third grounds together. The main contention on the part of the Appellant was that his entitlement to scale M7, should have been ordered to be from 1st April 2002 and not October 2003, as ordered by the court below. According to the Appellant, all underpayments should be paid from 1st April 2002.

12.3 The Appellant's argument is that, the Order for the grading to M7 to be with effect from October 2003, was perverse and not supported by evidence. According to the Appellant, if the Chart was followed, the Appellant qualified to enter into grade M7 in April 2002. According to the Appellant, the month of April is the month of reckoning when the decisions take effect.

12.4 The Respondent on its part argued that in coming to the conclusion that the Appellant was entitled to be upgraded to M7, the learned Judge took into consideration the evidence before the court, in particular the letter of 20th June 2003 appearing at page 132 of the record, which she held to be the concession by the Respondent, that the Appellant ought to have been upgraded in 2003. That the court gave the Respondent three months from the date of the letter, as a period within which the upgrade would have been effected, thereby landing on the month of October.

12.5 As earlier alluded to, the issue at hand is the effective date. Our view is that the approach taken by the learned Judge in arriving at the effective date was unprecedented.

As argued by the Appellant, the Chart at page 118, clearly shows that the revisions were to be effected in the month of April. There is in addition evidence on the record of the upgradings being done and being backdated to the month of April, such as the upgrading of the Appellant from scale M5 to M6 with effect from 1st April 1999.

12.6 The pivotal point being the letter of 20th June 2003, it would have been prudent for the learned Judge to backdate the effective date to April 2003 and not carry it forward. We however, are not in agreement with the Appellant that the effective date should be April 2002. We note in fact from the reliefs sought in the court below, that the claim by the Appellant was as follows:

> **"A declaration that the Appellant was entitled to be upgraded to salary scale M8 with effect from the date when Kariba North Bank adopted the Zesco Salary progress Chart."**

12.7 It is clear from the evidence on record that the adoption of the Chart was done in 1999. The argument that the effective date should be April 2002, is in our view an

afterthought by the Appellant, as that was not the effective date he was seeking. We therefore do not agree with the Appellant that the effective date should be April 2002, as that is not supported by evidence.

12.8 This in our view is a proper case for setting aside October 2003 as the effective date and substitute it with 1st April 2003, and we accordingly do so.

12.9 As regards the fourth ground, it succeeds as it has been conceded. We accordingly set aside the learned Judge's Order for interest at 5% and Order that the interest payable shall be as provided for under Section 2 of **The Judgments Act**[1] and Order 36/8 of **The High Court Rules**[1] and also in line with the ruling in **Patricia Leah Chatta Chipeta**[2] case.

12.10 Grounds five and seven were argued together and relate to the Order of the court below, that the Appellant pays the economic rentals. The contention by the Appellant is that the issue of rentals was settled under court annexed mediation and should therefore not have been revisited by the learned Judge. At the same time, the Appellant argues that had the learned Judge not found in favour of

the Appellant on this claim she would have ordered costs of the matter in favour of the Appellant.

12.11 On the other hand, the Respondent submitted that the Consent Settlement Order, appearing at page 269 of the record did not contain any Orders in respect of rentals.

12.12 We note that the learned Judge in dealing with this issue acknowledged the Consent Settlement Order and in doing so stated as follows:

> **"I note that by consent settlement Order at mediation, the defendants agreed to pay the plaintiff repatriation allowance and he agreed to vacate the company house by a named date."**

12.13 It is clear from the aforestated statement, that the issue of rentals was not part of the Consent Settlement Order. These two grounds having failed, it follows that the argument on costs has no leg to stand on and is accordingly dismissed for lack of merit.

12.14 With respect to the sixth ground, the Appellant is claiming that the court below erred in omitting to order that the payment of the salary be for the correct scale

pursuant to the letter of 8th July 1999, which correct grade is M6 and not M5.

12.15 This ground is challenging a finding of fact. We agree with the Respondent that the document which the Appellant relied on, appearing at page 117 (b) of the record, contains what were proposed salaries and there was no evidence or documents to show that they were ratified. This was admitted by DW1 in cross examination.

12.16 At the hearing, we asked Counsel for the Appellant to show us any evidence that the Appellant complained about this anomaly during the sustenance of his employment. Counsel was not able to do so. In our view this claim was an afterthought on the part of the Appellant. We find no basis on which to fault the learned Judge.

12.17 As regards the eighth ground, as conceded by the Respondent, the Appellant in the amended writ and statement of claim did plead for pension loss. Despite the learned Judge stating that it was not pleaded, it is however clear from the evidence on record that the learned Judge ably dealt with the issue of pension loss. It

is also clear from her determination that the Appellant was retired normally and not prematurely as there was no evidence to show that he was merely refunded his contributions. We agree with the Respondent that the Appellant has not demonstrated that the findings by the learned Judge were perverse.

12.18 Apart from the setting aside of the effective date and substituting it with 1st April 2003 and ground five on interest, the rest of the main appeal fails.

12.19 We now turn to the cross appeal. The first ground attacks, the holding by the learned Judge that the letter of 20th June 2003 was an admission that the Appellant should have been upgraded from grade M6 and that the claim for upgrading was not statute barred.

12.20 The letter in issue appears at page 132 of the record. We reproduce the letter hereunder for ease of understanding:

> **"UPGRADING OF STAFF**
>
> **We acknowledge receipt of your letter dated 24th April 2003, in which you are requesting management's consideration to upgrade you**

from salary scale M6 to M7, so as to harmonize your salary scale with other sectional heads.

Be advised that the anomaly you have highlighted was harmonized during the recently completed manpower audit and review of the conditions of service restructuring exercise. The implementation of the exercise has just begun and would be carried out in phases..."

12.21 The aforestated letter was a response to the Appellant's letter complaining that there was an anomaly. The letter of complaint was just one in a series of letters from the Appellant to the Respondent. It is clear in our view that the Respondent acknowledged the anomaly and went on to state that the anomaly has in fact been harmonized and would be implemented.

12.22 In our view, there was an admission that indeed, there was an anomaly, which had since been harmonized and was awaiting implementation. In the view that we have taken, we see no basis on which to fault the learned Judge on her interpretation and understanding of the

letter. Having agreed with the learned Judge, it is our view that in accordance with Section 23 (4) of **The Limitation Act**[2], the Appellant's claim was not statute barred.

12.23 The second ground attacks the learned Judge for overlooking the evidence of DW1 and other criteria for promotion as set out in the Chart. We are of the view that this is an unfair assessment of the Judgment by the Respondent. The Judgment shows from pages 33-48, that the learned Judge applied her mind fully to the matter and in arriving at her decision took into consideration not only the Appellant's but also the Respondents oral and documentary evidence properly and fairly evaluated the same. We see no basis on which to fault the learned Judge.

12.24 The third and fourth grounds are in respect to the pension dues. Having found that the effective date was 1st April 2003, the enhanced contribution on scale M7 will be limited for the period 1st April 2003 to 10th May

2004. Having maintained scale M7 in the main appeal, we see no basis on which to further this discussion.

12.25 In respect of the underfunding, it is startling to note that the Respondent is claiming that the Appellant should demonstrate that there was underfunding, in the face of the actuarial valuation from ZSIC, that the funding was only at 72.3% and not 100%. We find this argument superfluous.

3.0 CONCLUSION

13.1 The main appeal succeeds to the extent stated in paragraph 12.18 of this Judgment and the cross-appeal totally fails. We order that each party bears its own costs here and in the court below.

J. CHASHI
COURT OF APPEAL JUDGE

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

DISSENTING JUDGMENT

Makungu, JA delivered the dissenting Judgment.

Case referred to:

1. ***Nkhata and Four Others v. The Attorney-General of Zambia (1966) Z.R. 124 (C.A.)***

I have had the opportunity to read the majority judgment prepared by Chashi JA. I agree with it except on the analysis and determination of the first, second, third, and fourth grounds of the main appeal and part of the cross-appeal.

On page 32 paragraph 12.5 of the majority judgment, my learned brothers are of the view that the issue at hand is the effective date of the upgrade of the appellant's salary scale. I beg to differ. The crucial question as I see it, is whether the appellant is entitled to any payment on salary scale M7.

It is trite law that retirement benefits are calculated on the last drawn salary. I am of the view that since the appellant retired on 10th May 2004, under the salary scale M6, he was entitled to payment of his retirement benefits at that grade. Only employees in

service were entitled to be elevated from one remuneration scale to another.

The lower court found that "*the prerogative of management as far as promotions were concerned did not seem to have been fettered.*" I would hold that such prerogative was unconstrained. Even if the respondent in its letter dated 20th June, 2003 acknowledged the anomaly in the upgrading system following the appellant's complaints, the fact remains that he was not upgraded from M6 to M7 before his retirement. It would be unjust enrichment for the court to award the appellant retirement benefits based on a higher salary scale which he never received whilst in employment. In my considered view, promotion is not an acquired right.

I would under the circumstances hold that the appellant's claims in the court below, which are reproduced on page 6 paragraph 3.1 of the majority judgment, all lacked merit and ought to have been dismissed.

Consequently, I would dismiss the first, second, third, and fourth grounds of the main appeal.

CROSS-APPEAL

I would dismiss the first ground of the cross-appeal for lack of merit.

On the second and third grounds of appeal, I agree with the arguments by counsel for the respondent set out on page 28 of the main judgment. I would uphold the second and third grounds of appeal based on what I have stated above.

In sum, I would accordingly reverse the findings that the appellant was entitled to be paid his retirement benefits under M7 and the order that he be paid the balance. I am fortified by the case of **Nkhata and 4 others v. The Attorney General**[1] in that the said findings were not made on a proper assessment of the evidence. I would award costs to the respondent here and the Court below.

.....

C.K. MAKUNGU
COURT OF APPEAL JUDGE