

JENNIFER NAWA

v

STANDARD CHARTERED BANK ZAMBIA PLC

SUPREME COURT

MAMBILIMA, D.C.J., CHIBESAKUNDA AND CHIBOMBA, JJS.,

22nd SEPTEMBER, 2009 and 14th JANUARY, 2011

(S.C.Z. Judgement No 1 of 2011)

[1] Employment law - Minimum Wages and Conditions of Employment Whether the retirement benefits are to be paid in accordance with a Pension Scheme approved by a Minister.

This is an appeal from the decision of the Industrial Relations Court (IRC) sitting at Lusaka in which the appellant's action against the respondent was dismissed. The parties were not agreed as to the mode of the appellant's separation from the Bank. The appellant's contended that she applied for, and was granted early retirement. The appellant sought to be paid terminal benefits in accordance with statutory instrument Number 2 of 2002, made under the Minimum Wages and Conditions of Employment Act.

The respondent's position was that the parties agreed to mutually separate because the appellant did not qualify for early retirement under the conditions of service. Consequently, her benefits were computed in accordance with the Bank's conditions of service. To resolve the impasse, the appellant moved the Court below seeking the following reliefs:

- (a) A declaration that the pension entitlements under the existing Standard Chartered Bank Pension Trust Fund Defined Contributions Scheme are contrary to the provisions of the Minimum Wages and Conditions of Employment Act, and hence inferior and therefore null and void;
- (b) The complainant be paid retirement benefits in accordance with the Minimum Wages and Conditions of Employment Act;
- (c) Interest on (a) and (b) above and costs;
- (d) A declaration that the existing Standard Chartered Pension Trust Fund Defined Contribution Scheme could not have been approved by the Minister. As such approval, if at all, would have been in contravention of the Minimum Wages and Conditions of Employment Act; and
- (e) An order that if the Minister had approved the existing Standard Chartered Pension Trust Fund Defined Contribution, such approval would have been contrary to the provisions of the Minimum Wages and Conditions of Employment Act, and hence null and void.

The High Court on the evidence before it, held as follows:

- (a) that the respondent had an approved Pension Scheme, and the appellant joined the Scheme;
- (b) that statutory instrument number 2 of 2002, did not apply to the appellant because it excluded employers who had established a Pension Scheme approved by the Minister;
- (c) that the Minister's approval did not contravene statutory instrument number 2 of 2002; and
- (d) that the Pension Trust Fund Scheme supplied sufficient information as to how payments to beneficiaries were to be effected.

Ultimately, the High Court dismissed all the appellants claims on the grounds that they lacked merit. Dissatisfied with the decision of the High Court, the appellant appealed against the decision.

Held:

- (1) There was no meeting of minds to grant the appellant her wish to go on early retirement.
- (2) Notwithstanding, what was contained in an agreement, parties can validly agree on an early retirement package.
- (3) The respondents Pension Scheme was registered on 22nd May,, 2000. At that date, the Minimum Wages and Conditions of Employment (General) Order as contained in statutory instrument number 2 of 2002, had not been passed.
- (4) It is trite law that unless expressly stated, a law does not operate retrospectively.
- (5) Under section 3(1) of the Minimum Wages and Conditions of Employment Act, the Minister is authorized to prescribe by statutory order minimum wages or minimum conditions of employment for any group of workers, if he is of the opinion that no adequate provision exists for their effective regulation.
- (6) The group of workers envisaged under the Act are those for whom there is no adequate provision regulating their wages, and conditions of employment.
- (7) The respondent established a Pension Scheme to which the appellant contributed and was therefore a member.
- (8) Where there is a Pension Scheme approved by the Minister, the retirement benefits are paid in accordance with that Scheme.
- (9) Statutory instrument number 2 of 2002, was passed after the Pension Scheme had already been established. This Pension Scheme derives its validity from the date it was registered.
- (10) No person can establish, or manage a Pension Scheme, unless in accordance with the provisions of the Pension Scheme Regulation Act. A valid Pension Scheme must therefore have a certificate of registration issued by the Registrar in accordance with the Act.

Cases referred to:

- 1. Tito and Others v Waddel and Others [1977] 3 ALL E.R. 129.

2. Re. Golden Chemicals Products Limited [1976] 2 ALL E.R. 543
3. Butler Machine Tools Limited v Ex Cell-o Corporation Limited [1979] 1 ALL E.R.965
4. Barclays Bank of Zambia v Mubanga (1995-1997) Z.R. 212
5. Kitwe City Council v Nguni (2005) Z.R. 57
6. Phiri and Others v Lusaka Engineering Company (No Citation).

Legislation referred to:

1. Minimum Wages and Conditions of Employment Act, cap 276 ss 2(1); 3(1) and (2) and 8.
2. Pension Scheme Regulation Act, cap 255, ss 4 and 18.
3. Industrial and Labour Relations Act, cap 269, s 85 (4).
4. High Court Act, cap 27, s 10.
5. Supreme Court Act, cap. 25, s 8 (ii).
6. statutory instrument No. 2 of 2002. Regulations 8(1) and (2) and (9)

Work referred to:

1. Rules of the Supreme Court (White Book) Order 18, Rule 13(1) (2) and (3).

W. Mubanga of Messrs Permanent Chambers for the appellant.

D. Tambulukani of Messrs Sharpe and Howard, for the respondent

MAMBILIMA, D.C.J.: delivered the judgment of the Court. This appeal, is from the decision of the Industrial Relations Court (IRC) sitting at Lusaka, in which the appellant's action against the respondent was dismissed.

It is common cause that the appellant was in the employment of the respondent, Standard Chartered Bank Zambia Plc (hereinafter referred to as the 'Bank') from 1993, up to September, 2004. There was evidence that prior to her engagement in 1993, she had worked for the respondent on temporary basis. She rose through the ranks up to the post of Head, Corporate Affairs, a position which she held up to the time of separation from the Bank.

The parties are not agreed as to the mode of the appellant's separation from the Bank. The appellant contended that she applied, and was granted early retirement. She sought to be paid terminal benefits in accordance with statutory instrument No. 2 of 2002; made under the Minimum Wages and Conditions of Employment Act. The respondent's position was that the parties agreed to mutually separate because the appellant did not qualify for early retirement under her conditions of service. Consequently, her benefits were computed in accordance with Bank's conditions of service.

To resolve this impasse, the appellant moved the Court below through an Amended Notice of Complaint, seeking the following reliefs:

“(a)A declaration that the pension entitlements under the existing Standard Chartered Bank Pension Trust Fund Defined Contributions Scheme are contrary to the provisions of the Minimum Wages and Conditions of Employment Act, and hence inferior and therefore null and void;

(b) The complainant be paid retirement benefits in accordance with the Minimum Wages and Conditions of Employment Act which is K923,650,000.00

(c) Interest on (a) and (b) above and costs;

(d) A declaration that the existing Standard Chartered Pension Trust Fund Defined Contribution Scheme could not have been approved by the Minister as such approval if at all would have been in contravention of the Minimum Wages and Conditions of Employment Act cap 276 of the laws of Zambia.

(e) An order that if the Minister had approved the existing Standard Chartered Pension Trust Fund Defined Contribution Scheme such approval would have been contrary to the provisions of the Minimum Wages and Conditions of Employment Act cap 276 of the Laws of Zambia, and hence null and void.”

The genesis of the appellant's complaint is a letter dated 7th April 2004, that she wrote to the respondent applying for early retirement. It was addressed to a Ms Jessica Pwiti, Area Head of Human Resources for Southern Africa. It reads in part:

“Following our meeting of the said date at which I requested to separate from the Bank through early retirement effective 1st April, 2004, I formally write to confirm the same...”

In a letter of response, dated 4th August,, 2004, the respondent's Head, Human Resources, a Mr. Alex Chule stated, inter alia:

“Nevertheless, the Bank has considered your application for early retirement, with a view to providing you with the most beneficial and tax efficient method of obtaining all your entitlements at law, and under the Group Pension Scheme to which you have been contributing during your employment with Standard Chartered Bank Plc....”

Mr. Chule then explained the options available to the appellant, and ended by stating:

“We trust you find this information useful, and that you will now be able to make an informed choice and advise us of your decision in this regard...”

It would appear that after this letter, the parties engaged in some form of discussions. On 28th September, 2004, the Bank, through Mr. Chule wrote:

“We wish to advise that your request to separate from the Bank has been accepted. The effective date of separation shall be 30th September, 2004.

Your terminal dues are as follows:

1. The 23 accrued leave days (not taken) amounting to K10,233.424.66 as at 30th September, 2004.

2. Pension benefits as per rules of the Pension Scheme accrued up to 30th September, 2004. Please contact our Principal Officer for details.”

Not long after this letter, the Bank sent another communication to the appellant on 15th October, 2004, stating, inter alia:-

“We wish to clarify that your request to separate from the Bank under early retirement cannot be granted. As we explained during our meeting, this is due to the fact that the rules of the retirement plan in the Standard Chartered Bank Zambia Pension Trust Fund Deed and Rules, stipulate the minimum age of 50 years for early retirement. Hence your separation from the Bank could either be by way of resignation, or by mutual separation. Given these options, the Bank will accept a mutual termination of contract of employment with effect from 30th September, 2004.”

It is apparent from the record that the decision by the appellant to apply for early retirement, was triggered by investigations that were conducted on her by the police. This is because on the same date of 7th April, 2004, when the appellant applied for early retirement, the office of the Inspector General of police wrote to the Bank, informing them that the appellant had been charged with the offence of Forgery and Uttering a false document and would consequently be arrested. It would appear that the appellant's academic qualifications were questioned. She was suspected of holding a forged school certificate and curriculum vitae. Arising by the letter from the Inspector General, the Bank suspended her from service indefinitely, in accordance with the Bank's disciplinary Code.

During trial in the Court below, the appellant was cross examined at length on her academic qualifications. What came out was that she did not write her Form V examinations because she was expelled from school. The only certificate she had was for Form III. She however admitted to have presented herself as a Form V school leaver. Although a Form V school certificate was on her file, she denied to have produced the same.

On 26th October, 2004, the appellant wrote to the Bank demanding to be paid an amount of K923,650,000.00 as terminal benefits. The said benefits had been computed in accordance with statutory instrument No. 2 of 2002. She testified that she claimed terminal benefits under this statutory instrument because the Bank's Pension Scheme was inferior. She however admitted, in cross examination, to have willingly joined the Bank Pension Scheme. She also admitted that at the time that she wrote to request for early retirement, she was aged 48, and that separation was given to her as an amicable exit.

Felix Chikwamu (RW1) Manager, Human Resource was the respondent's only witness. He confirmed that the appellant was investigated by police in connection with her academic qualifications; that though a General Certificate of Education was on her file, it was suspected not to have been genuine; that upon completion of investigations, the Inspector General of Police wrote to the Bank that they were left “with no option but to effect an arrest” on the appellant on a charge of forgery and uttering a false document. The respondent consequently suspended the appellant.

It was RW 1's further testimony that in an effort to resolve the matter amicably, Management advised the appellant to resign from the Bank, failure to which disciplinary action would be taken against her. This was followed by discussions between her and various senior officers of the Bank after

which she opted for separation from the Bank so that she could be paid benefits in accordance with the Bank's pension rules. RW 1 further told the Court that the appellant's request for early retirement was not accepted because she did not qualify for the same. She was paid her dues and benefits in accordance with the Bank pension rules.

RW 1 stated further that the respondent was exempt from the statutory instrument no. 2 of 2002, because it had in place, an approved Pension Scheme. A certificate from the Registrar of Pensions and Insurance, a copy of which appears on page 48 of the record of appeal, was relied on. According to this certificate, Standard Chartered Bank Zambia Plc was registered on 23rd May, 2000, as a Pension Scheme/Fund.

In its judgment, the Court below considered the rules of the Standard Chartered Bank of Zambia Limited Pension Trust Fund, and the provisions of the law as contained in Paragraphs 8 and 9 of statutory instrument No. 2 of 2002. Under Paragraphs 8(1) and 9, the statutory instrument prescribes a formula of three months basic pay for each completed year of service, as benefits accruing to an employee who has served for not less than ten years; has attained the age of fifty-five; and, retires in agreement with the employer before attaining the age of fifty-five. However, Paragraph 8(2) of the instrument stipulates that:-

“Where an employer has established a Pension Scheme approved by the Minister, the retirement benefits shall be in accordance with such Pension Scheme, and sub paragraph (1) shall not apply.”

The Court below found, on the evidence before it, that the respondent had a Pension Scheme which was approved on 22nd May, 2000. That the appellant signed to join the said scheme. A copy of the Pension Scheme and a letter from the Minister, approving the Scheme, were not produced. The appellant contended that the non-production of these documents was a serious breach of the Act. The Court did not agree with this contention. It took the view that the certificate produced before it was the end result of an application to the Minister to approve the Scheme.

The Court also rejected the argument by the appellant, that the Bank's Pension Scheme did not comply with the statutory instrument because it was never revised to be in line with the changes that the instrument had introduced. The Court was of the view that it was up to the members of the Pension Fund to enter into negotiations with their employer “and not task the Court to impose something that is a subject of an agreement between the parties.” In the face of the provisions of section 8(2) of the statutory instrument, the Court found that the said statutory instrument did not apply to the appellant because it excluded employers who had established a Pension Scheme approved by the Minister. Consequently, the Court refused to grant the appellant the reliefs she sought in paragraphs (a) (b) and (c) of her complaint.

The Court also refused to grant the appellant the reliefs that she sought in paragraphs (d) and (e) of her claim. In the said paragraphs, she had contended that the respondent's Pension Scheme could not have been approved by the Minister because such approval could have contravened the statutory

instrument and therefore null and void. The Court found that the Minister's approval was not contrary to the statutory instrument; and that the certificate issued was proof that the Minister exercised his powers as required by law.

On the formula used to compute the appellant's benefits, the Court found that the Pension Trust Fund Scheme supplied sufficient information as to how payments to beneficiaries were to be effected. The Court dismissed all the appellant's claims on the ground that they lacked merit.

Dissatisfied with the decision of the Court, the appellant has now appealed to this Court citing five grounds of appeal, that:

“1. The Court below erred in both law and fact by holding that the appellant did not go on early retirement and that there was no evidence given in Court to suggest that the respondent had granted the appellant her request to go on early retirement when in the actual fact there was overwhelming evidence on record to that effect.

2. The Court below erred in both law and fact by failing to declare that the respondent's Pension Scheme Fund under the existing Standard Chartered Bank Pension Trust Fund Defined Contributions Scheme on which the appellant's early retirement benefits were based was in contravention of the Minimum Wages and Conditions of Employment Act, cap 276 as read together with statutory instrument No. 2 of 2002, of the laws of Zambia in that it was inferior and therefore did not meet the minimum conditions under the said Act.

3. The Court below misdirected itself both in fact and law when it held that the respondent was exempted from statutory instrument No. 2 of 2002, and that in that regard it did not apply to the respondent contrary to the evidence on record.

4. The Court below misdirected itself in law and fact by finding that the certificate of registration of the respondent's Pension Scheme Fund issued by the Registrar of Pensions was an end result of an application to the Minister to approve the 12 respondent's Pension Scheme, and that the said certificate was proof of the Minister's approval of the said Pension Scheme when in the actual fact there was no such evidence on record; and

The Court below erred in both law and fact when it held that the appellant had failed to prove her case on a balance of probability and that the complaint lacked merit hence dismissed it when in the actual fact the appellant proved her case on a balance of probability and her complaint was on merit.”

In support of the appeal, Mr. Mubanga, the learned counsel for the appellant, filed written heads of arguments, which he augmented with oral submissions.

On the first ground of appeal, it is his argument that there is overwhelming evidence on record to show that the appellant had applied for, and was granted her application to go on early retirement. To this effect, he referred us to the appellant's letter of 7th April, 2004, addressed to Ms. Jessica Pwiti,

Area Head of Human Resources for Southern Africa (referred to above). Counsel also referred us to the respondent's letter in response, written by Mr. Alex Chule, the respondent's Head of Human Resources (also referred to above) in which options were floated to the appellant as to how she could separate from the Bank. According to Mr. Mubanga, the respondent in this letter did not decline the appellant's request to go on early retirement, but only referred to options available. Counsel further referred us to the respondent's letter on 28th September, 2004(supra), in which according to him, the Bank advised that the appellant's request to separate from the Bank had been accepted, and the effective date of the separation was going to be 30th September, 2004. He submitted that this letter was a clear response to the appellant's application to go on early retirement and an acceptance of her request in that regard. He argued that nowhere in this letter did the respondent either expressly, or by implication, indicate to the appellant that her request to go on early retirement had been declined. He contended that the appellant's letter of 7th April, 2004, together with the respondent's reply of 28 September, 2004, amounted to an express offer on the part of the appellant to go on early retirement which was accepted by the respondent. According to him, it was not open to the respondent to now change its mind because it was bound by the agreement.

In his continued submissions, Mr. Mubanga referred us to paragraphs 8 and 9 of statutory instrument No. 2 of 2000. Paragraph 9 is on early retirement. It provides that:

“An employee who retires in agreement with the employer before attaining the age of 55 shall be paid retirement benefits in accordance with paragraph 8.”

It is his submission that the appellant is covered by this paragraph because she agreed with her employer to retire before attaining the age of 55, after serving from 1982 to 2004, a period of more than 10 years, and therefore qualified to be paid benefits in accordance with the statutory instrument.

In the alternative, counsel submitted that even if the appellant did not qualify to go on early retirement, according to the appellant's conditions of service, that did not preclude the parties from arriving at a valid agreement for the appellant to go on early retirement. For this submission, counsel found solace in the case of *Phiri & Others v Lusaka Engineering Company Limited* (6). He cited a portion of the judgment which states:

“Even where the employees do not qualify to go on early retirement, the parties, employer, and employee can validly agree on an early 15 retirement package, and in this case, the early retirement package would be supported by valuable and sufficient consideration to make it a valid accord.”

Mr. Mubanga submitted that the case of *Phiri* corroborates the provisions of Paragraph 9 of the statutory instrument. He argued that the appellant having worked for the Bank for 22 years; thus having served for not less than 10 years; and having applied to go on early retirement, and her application having been accepted; she furnished sufficient consideration which made the respondent's response to her request to go on early retirement binding. According to counsel, it was no longer up to the respondent to reverse its decision capriciously. Any such reversal, if at all, was null and void and amounted to a breach of contract that already existed between the parties. It was his view that the court below took a narrow analysis of the evidence that was before it, and erred both in law and fact,

when it held that there was no evidence that the appellant had been granted early retirement in the face of overwhelming evidence.

In response to the appellant's arguments in support of the first ground of appeal, Mr. Tambulukani, on behalf of the respondent, submitted that it was abundantly clear from the appellant's letter of 7th April, 2004, that there was an earlier discussion that had taken place between her and the Head of Human Resources, Southern Region to discuss a suitable strategy or the mode of separation between her and the Bank. He stated that for the appellant to now insinuate that the said letter formed the basis of an acceptance to retire early, is misleading to this Court. That the appellant's decision to write this letter was prompted by her arrest by Zambia Police on an allegation that she forged a Form V certificate. That in compliance with its disciplinary procedures, the respondent did not hesitate to suspend the appellant from employment, pending the outcome of the allegations that were leveled against her. That the respondent, on its part, responded by listing several other alternatives upon which a mutual separation between parties could be effected.

He contended that the letter of response from the respondent did not expressly, or impliedly constitute an acceptance of the appellant's request to go on early retirement. It was clearly stated to her that she should revert to the respondent when she had made her decision, because she had not yet attained the prescribed age to qualify for early retirement under the Bank's conditions of service. According to counsel, it was within the respondent's contractual right, or discretion, to either decline or accept the request for early retirement. He stated that the respondent went out of its way to accord the appellant, who was on suspension, a dignified exit by mutual separation. This is because had she been forced to resign in the face of disciplinary charges, she would not have been entitled to any benefits. To buttress his argument, counsel referred to the case of *Kitwe City Council v Nguni (5)*, in which the Court stated:

"We agree that he decided to resign in the face of dismissable disciplinary charges against him in order to get some terminal benefits, which he would not have been entitled to had he been dismissed."

Mr. Tambulukani further submitted that the discussions that took place between the parties were aimed at identifying an option to effect a mutual and non confrontational separation between the parties and no final decision was made to grant her permission to retire early. He stated that from the evidence of witnesses on record, the only definitive letters emanating from the Bank on the appellant's separation are those dated 28th September, 2004, appearing on page 54 of the record of appeal, and 15th October, 2004, appearing on page 55. The letter of 28th September, 2004 is headed "Acceptance of separation from the Bank" and refers to the appellant's letter of 7th April, 2004, addressed to Ms. Pwiti, and the respondent's reply of August, 2004. It also refers to a subsequent meeting that the appellant had with Mr. Chule. It then states:

"We wish to advise that your request to separate from the Bank has been accepted. The effective date of separation shall be 30th September, 2004."

Counsel submitted that the letter of 15th October, 2004, clarified the position that the appellant's request to separate from the Bank under early retirement could not be granted because the

rules of early retirement in the Bank stipulated that such retirement must be within five years of normal retirement.

In the view of counsel, it is both irrational, and misguided for the appellant, to read into the contents of the letter of 28th September, 2004, that the respondent agreed to an early retirement when there is no evidence to show that. According to him, there is no substance in the assertion by the appellant that there was an express, or implied consent by the respondent to retire her early. That instead, there is a categorical refusal by the respondent to early retirement in the letter of 15th October, 2004, and this put to rest any misunderstanding, or confusion because the precise conditions by which the respondent wished to separate from the appellant were stated in no uncertain terms. He stated that this letter ended by stating:

“If you accept the separation under mutual agreement to terminate contract of employment, please signify at the bottom of this letter and by signing against the schedule of the terminals due.”

Mr. Tambulukani further submitted that the appellant received more than K182 million as terminal benefits under the mutual separation and she did not raise any objections to receiving the said money. That the conditions on her benefits were clear and she cannot now turn around and sustain a successful appeal against the respondent by repudiating the conditions under which she accepted to be paid pension benefits. In support of this position, he referred us to the case of *Tito and Others v Waddell and Others (1)*, in which it was stated that:

“He who accepts the benefit is taken to have accepted the burden, or it may be a rule of law so that he who accepts the benefit is bound by the burden...if you accept the benefit you cannot escape the consequences that you have accepted what forms part of the benefit, or is annexed to it.”

In his continued submissions, Mr. Tambulukani referred us to the evidence of the appellant, on page 205 of the record of appeal, in which she admitted in cross examination, that nowhere in the letter of 4th August, did it show that the respondent accepted her request to retire early. He also pointed out that in her examination in chief, the appellant stated that her last working day was 30th September, 2004. According to Mr. Tambulukani, this date is significant for two reasons; firstly, it is the date which is contained in the letter of 28th September, 2004, from the respondent to the appellant; and, secondly, that it was a material variation of the appellant's application to separate from the Bank with effect from 1st April, 2004. He argued that the letter shows that the application for separation had been accepted with a variation as to the date and basis of separation. That contrary to the appellant's assertion, that she separated from the respondent through early retirement, the Bank offered her separation by either resignation or mutual separation and the appellant accepted mutual separation as evidenced by the letter of 15th October, 2004. Counsel also cited various authorities which suggest that conditions of service cannot be varied without the consent of workers.

The learned counsel for the respondent further submitted that statutory instrument No. 2 of 2002, does not apply to the respondent. He stated that the plain language of Paragraph 8(2) exempts the respondent from the application of this statutory instrument in that the respondent established a Pension Scheme to which the appellant was a member, and this Scheme takes precedence over the

provisions of the statutory instrument.

In the alternative, counsel argued that even if the statutory instrument was to apply to the appellant, she would not be found to be eligible to qualify for benefits because she would not satisfy the condition that her employer should agree for her to take early retirement.

This is because the respondent did not agree for her to go on early retirement. This would leave her with the Bank Pension Scheme which entitles her to retire early only if her employer agreed, and she was within five years of normal retirement. counsel stated that at the time of her application for early retirement, the appellant had not even attained the age of 50. She was therefore ineligible to go for early retirement.

We have considered the arguments that have been made in support and in opposition to the first ground of appeal. At the core of the arguments in support of this ground of appeal is that there was an offer by the appellant, through her letter of 7th April, 2004, to go on early retirement which was accepted by the respondent in its letter of 28th September, 2004; thereby creating a valid accord capable of enforcement. This is denied by the respondent.

In resolving such a dispute, the words of Lord Denning, in the case of *Butler Machine Tools Limited v Ex-cell-o Corporation (England) Limited* (3) provide wise counsel:

“The better way is to look at all the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points...”

In our view, the pertinent documents to the matter in issue are:-

The appellant's letter of 7th April, 2004;
The respondent's letter of 4th August, 2004;
The respondent's letter of 28th September, 2004; and
The respondent's letter of 15th October, 2004.

It is clear from the letter of 7th April, 2004, that there was a prior meeting between the parties at which the appellant requested “...to separate from the Bank through early retirement effective 1st April, 2004.” The respondent's response through its letter of 4th August, 2004, was to float two options to the appellant;

- (i) Immediate early retirement with employer's contribution, or
- (ii) Early retirement with deferred employer's contribution.

According to the letter, the reason for availing the appellant the two options was to provide her “...with the most beneficial and tax efficient method of obtaining...” her entitlements at law and under the Group Pensions Scheme to which she had been contributing. We can deduce from this letter that at

that stage, the respondent was looking at benefits under its Group Pensions Scheme, and not statutory instrument No. 2 of 2002. The letter ended by stating:

“We trust you find this information useful and that you will now be able to make an informed choice, and advise us of your decision in this regard.”

There is no document on record to show that the appellant did indicate in writing, her decision on the options that were floated to her. What is apparent, from the respondent's next letter of 28th September, 2004, is that after the letter of 4th August, 2004, the appellant met with Mr. Chule, the Head, Human Resources. This is because he referred to “...a subsequent meeting you had with me.” In this letter the respondent accepted the appellant's request “to separate from the Bank” with effect from 30th September, 2004. The terminal benefits that were due to her under the said separation were clearly stated; payment in respect of 23 accrued leave days, and; pension benefits as per rules of the Pension Scheme up to 30th September, 2004.

We note that while the appellant, in her letter of 7th April, 2004, applied to separate from the Bank through early retirement with effect from 1st April, 2004, the respondent's response was to accept separation from the Bank with effect from 30th September, 2004, with benefits to be computed under its Pension Scheme. One can thus deduce that the respondent did not accept the terms as contained in the appellant's letter of 7th April, 2004. There was a counter proposal for the appellant to separate from the Bank, and be paid under the Pension Scheme to which she was a member.

The letter of 15th October, 2004, appears to be a mere explanation of the respondent's position as per letter of 28th September, 2004. The letter alluded to a meeting at which it was allegedly explained to the appellant that she could not be granted early retirement in view of the provisions of the Pension Trust Fund Deed and Rules which stipulated a minimum early retirement age of 50 years.

From the documents that we have referred to above, we hold and find that there was no meeting of minds to grant the appellant her wish to go on early retirement. She was met with a counter offer. Later correspondence from her shows that she rejected this counter offer. In her letter to the Managing Director of the Bank dated 20th October, 2004, she wrote:-

“I am surprised that exactly fifteen days into my retirement, your Human Resource Head Mr. Chule should find it prudent to waive the Bank's earlier reply to me about the same subject of early retirement dated 4th August, 2004.

Just for the record, I would like to inform you that I shall stand by the said reply of 4th August, 2004, accepting my request to go on early retirement without conditionalities.

On 26th October, 2004, the appellant wrote to the Bank claiming benefits under statutory instrument No. 2 of 2002.

Clearly, the parties had divergent positions. We, therefore, do not agree with the contention in the first ground of appeal that there was overwhelming evidence on record to show that the appellant was granted early retirement.

We did state in the case of *Phiri & Others v Lenco (6)*, that notwithstanding what May, be contained in an agreement, parties can validly agree on an early retirement package. It would appear to us, from the evidence and documents on record, that the respondent proceeded on the premise of mutual separation. We therefore find no merit in the first ground.

The 2nd ground of appeal, in the main, espouses the position that the Standard Chartered Bank Pension Trust Fund Defined Condition Scheme contravened the provisions of the Minimum Wages and Conditions of Employment Act, as read with statutory instrument number 2 of 2002, in that it was inferior and did not meet the minimum conditions under the Act. Mr. Mubanga argued spiritedly that the Court below was in grave error, when it failed to appreciate, and declare that the respondent's Pension Scheme did not meet the minimum standard under the law and was therefore null and void.

The argument by Mr. Mubanga, in the main, is that the law provides for minimum wage levels that every employer must accord to its employees. In buttressing this point, he referred to the objectives of the Minimum Wages and Conditions of Employment Act particularly, the wording of section 3(1)(h). It reads:

“If the Minister is of the opinion that no adequate provision exists for the effective regulation of minimum conditions of employment for any group of workers he May,, by statutory order prescribe;

(h) any other matter which in the opinion of the Minister is necessary or expedient to prescribe; provided that if the group of workers in respect of which a statutory order is to be made is represented by a Trade Union, no such order shall be made before consulting such Trade Union.”

He submitted that there was no evidence in the Court below, that the respondent, upon introduction of statutory instrument No. 2 of 2002, exercised its rights by applying to the Minister, for a review of the order.

He stated that if the provisions of section 3(2) of Act had been invoked, and the Minister granted such an application to the respondent, the respondent would have shown such documentation as to how the Minister had responded. He argued that while various employers and their respective employees can come up with different conditions of service and Pension Schemes, there is a mandatory requirement that these conditions of service should be in conformity with the Act. According to him, a Scheme which flagrantly violates the provision of the Act cannot be rendered valid just because the parties signed it. He submitted that consequently, the respondent's Pension Scheme is an illegal document, on account of the fact that it is inferior and offensive to the Act.

Mr. Mubanga submitted further that the respondent's Pension Scheme limits the scope of early retirement to within five years of the normal retirement age; when Paragraph 9 of the statutory instrument does not do so. It only prescribes that such retirement should be in agreement with the employer. That under Paragraph 8, all that an employee needs to show is that he or she worked for a minimum of 10 years and agreed with the employer to go on early retirement. Following from this argument, counsel submitted that the provisions in the respondent's conditions of service, in this

respect, is contrary to the minimum requirement of the law on early retirement.

It is also the argument of counsel that the respondent's Scheme contravenes the principles laid down in the case of *Phiri and Others v Lusaka Engineering Company Limited* (6), to the effect that even where the employee does not qualify to go on early retirement, the employer and employee can validly agree on an early retirement package, as long as such agreement is supported by valuable and sufficient consideration to make it a valid accord. To support his argument, counsel referred us to Section 8 of the minimum wages and conditions of employment act which provides that "any agreement which contravenes any of the provisions of this Act or any statutory order, or regulation made hereunder shall be void to the extent of such contravention."

He submitted that the appellant is entitled to three months pay for each completed year of service. That the limiting of early retirement to within five years of normal retirement was intended to frustrate the intention of the legislature and is a violation of section 8 of the Act.

On the provisions of paragraph 8(2) of the statutory instrument, which ousts the application of the law when an employer has a Pension Scheme, it is the submission of counsel that the intention of the legislature could not have been to create a loophole through which some employers would offer lower salaries, or other perks to employees. He argued that if the respondent's Pension Scheme was aimed at securing the interests of employees, the most reasonable thing the respondent would have done, would have been to revise it so that it conforms to the provisions of the law or provide an even better package. According to counsel, any employer, whose Pension Scheme purports to be exempted from the statutory instrument pursuant to Paragraph 8(2), with the sole purpose of offering an inferior package, as the case was herein, is perpetuating a mischief which should be frowned upon by the Court. He maintained that the idea to establish Pension Schemes that are not premised on the Act, can only be valid to the extent that the Pension Scheme so made, is equal to, or superior to the provision of the Act. He contended that the word "Minimum" as used in the Act means minimum terms and conditions of employment and minimum wages that can be paid to an employee. That this in fact was the intention of the legislature, when it enacted this law. He invited this Court to frown upon Schemes, which go against the minimum threshold provided in the law.

In response to the argument by Mr. Mubanga, counsel for the respondent submitted that the respondent's Pension Scheme was established and recognized under the laws of Zambia. He argued that the question as to whether the Scheme was inferior to the law, was answered in the judgment in the lower Court when it stated that:-

"As to the argument that the Pension Fund was inferior to the provision of statutory instrument No. 2 of 2002, it was for those who were members of the Pension Fund to enter into negotiation with their employers, and not the task of the Court to impose something that is subject of an agreement between the parties."

In this regard, Mr. Tambulukani referred us to section 3(2) of Act which states:

"Any person affected by a statutory order made under this section May, apply to the Minister for a review of such order."

According to Mr. Tambulukani, the appellant is misdirected in her understanding of this provision of the law. Nowhere does it prescribe, or stipulate that an employer or any other person is obliged to apply to the Minister to review a particular order. That language is clear, concise, and precise; only an affected person may, apply to the Minister for review. He stated that the word 'May,' is used and not 'shall', meaning that it is not mandatory to apply. Counsel contended that since it is the appellant who is disputing the compliance of the Pension Scheme with the order, she should have applied to the Minister to clarify any misconceptions in the application of the order.

Mr. Tambulukani further submitted that the regulations in the statutory instrument were intended to set the minimum conditions that would apply to a specified category of employees. He contended that this order was not designed as a second bite at the cherry, in the event that an aggrieved employee, after receiving benefits under a Pension Scheme, would then opt for the minimum conditions in the order, simply because they were more favourable to those contained in a Pension Scheme. He stated that ultimately, Pension Schemes, or agreements provide options for one to accept or decline the conditions offered, and once there is acceptance, there is a binding contract which the Court is called upon to enforce, and not to vary. He stated that the appellant, in the course of her employment with the Bank, served under conditions way above those contained in the Minimum Wages and Conditions (General) Order.

On the issue of early retirement, counsel submitted, also relying on the case of Phiri and Others v Lusaka Engineering Company (6), that there must be agreement between the parties for one to go on early retirement. He repeated his argument that at no time was there agreement for the appellant to take early retirement.

Counsel further submitted that there is currently the Minimum Wages and Conditions of Employment (General Order) Order 2006, which in its section 2(1) provides that,

“This order shall apply to protected employees as specified in the schedule to this order but shall not apply to employees in management positions as defined below in paragraph 3.”

It is his argument that since the appellant was in the management category, she would not be entitled to rely on this order. He submitted the statutory instrument No. 2 of 2002 should not be used as a mechanism by which an aggrieved party utilized it as a stepping stone in order to acquire what they were not entitled to, especially where there exists recognized Pension Scheme provisions or other similar regulated instruments that bind the parties under a contract.

Mr. Tambulukani submitted that the establishment of Pension Schemes is recognized by the Pensions Scheme Regulation Act. Under section 7 of the said Act, the Registrar has the power to register and deregister Schemes in accordance with the Act. He argued that in this case the respondent's Pension Scheme was in conformity with the laws, and was properly registered and is therefore recognized under the law. That the Scheme could not therefore have contravened the Minimum Wages and Conditions of Service Act.

We have considered the submissions of counsel on the second ground of appeal. Page 48 of the record of appeal shows a copy of a certificate of registration. According to this certificate, the respondent's Pension Scheme was registered on 22nd May, 2000. As at that date, the Minimum Wages and Conditions of Employment (General) Order, as contained in statutory instrument No. 2 of 2002 had not been passed.

If at all it was to be assumed and accepted that the statutory instrument in question applied to the respondent's Pension Scheme by implication, the kernel of the argument by the appellant seems to be that until the passing of the statutory instrument in 2002, the respondent's Pension Scheme was within the confines of the prescribed minimum wages and conditions of service. It picked up illegality along the way and became offensive sometime in 2002 when the statutory instrument was passed. In our view, such an argument is flawed. It is trite law that unless expressly stated, a law does not operate retrospectively. It could not therefore have been the intention of the framers of this law to invalidate agreements that were perfectly legal at the time that they were executed.

We have noted that in its section 3(2), cap 276 has provided for a review of an order made under the Act on an application by any affected person. The clear words used in this section authorize the review of the order or statutory instrument made pursuant to section 3(1) of the Act and not a Pension Scheme. Any argument to the effect that either of the parties could have applied to review the contents of the respondent's Pension Scheme to bring them in line with the 2002 statutory instrument would therefore be misconceived because the subject of review would not be a Scheme but an order.

Under section 3(1) of cap 226, the Minister is authorized to prescribe, by statutory order minimum wages or minimum conditions of employment for "any group of workers." if he is of the opinion that "no adequate provision exists" for their effective regulation. Read in its proper context, the group of workers envisaged under the Act are those for whom there is no adequate provision regulating their wages and conditions of employment. These are the 'protected workers' referred to in section 2 of cap 276, and they are the ones 'to whom a statutory order made under this Act applies.' This law was meant to protect such workers because they are prone to be exploited by their employers. For those who are represented by a trade union, the section 3(1) has categorically provided that "...no such order can be made before consulting such trade union."

The appellant had a clearly defined salary and conditions of service. She could not therefore be a 'protected worker' within the meaning of the Act, and she could not be said to have belonged to a 'group of workers' to whom orders passed under section 3(2) of cap 276, would apply. The Act dealt with a different category of workers. It did not lay down general conditions of service for all workers in the country. We find no merit in the second ground of appeal.

The 3rd ground of appeal contends with the finding of the Court below, that the respondent was exempted from the provisions of statutory instrument No. 2 of 2002. Mr. Mubanga submitted, in support of this ground of appeal, that although the intention of paragraph 8(2) of the statutory instrument was to provide an exemption to employers with established Pension Schemes; the underlying idea was not to provide a loop hole to enable some employers to devise Schemes that would

pay less money to their employees than that provided by the Act, by way of minimum payment. He maintained that the respondent's Pension Scheme is null and void and could therefore not have been approved, so as to exempt the respondent from meeting the minimum requirements under the law. It is counsel's view that before finding that the respondent's Pension Scheme was exempted from the statutory instrument and the Act, the Court below should have examined the Pensions Scheme itself and ascertained whether its provisions and packages were enough to meet minimum levels under the Act. according to counsel, the minimum level was the formula of three months salary for each complete year of service.

Counsel submitted further that the respondent's Scheme is not exempt from the statutory instrument No. 2 of 2002, on two accounts; firstly, it is an inferior document which had not even been revised to meet the changed economic scenario which the Minister was alive to when she introduced the statutory instrument in 2002. He contended that the Scheme could only be exempt from the Act if it was equal to, or better than that provided under the Act. Secondly, the exemption would only have arisen, after the respondent had applied to the Minister for a review of the order under section 3(2) of the Act, and the Minister had granted such review.

Counsel also referred to the computation of the appellant's benefits for the 22 years that she worked for the respondent. He stated that the computation did not meet the formula contained in the statutory instrument. According to counsel, had the formula in the statutory instrument been used, the appellant would have been entitled to K923,650,000.00, as compared to about K105,810,033.00, which, when added to the appellant's own contributions, came to K182,893,795.51. According to counsel, the respondent's computation fell far short of the formula provided in the law of three months pay for each completed year served.

Counsel further contended that in order to qualify for exemption under paragraph 8(2) of the statutory instrument, the respondent ought to have shown that the Pension Scheme was approved by the Minister. He argued that there was no evidence in the Court below to show that the Scheme, which was last revised by the respondent in the year 2000, was approved by the Minister after statutory instrument of 2002, came into force. He argued that even if the Minister had approved the Pension Scheme, which he did not do, he would have been in breach of or ultra vires cap 276, as read with statutory instrument No. 2 of 2002. It is his argument that in the circumstances, the Minister could not have validly exempted a null and void document.

Counsel further submitted, that the respondent did not bring the approval letter or any document to show the Minister's approval. In his view, the respondent was at liberty to call for such documentation through the Labour Commissioner, under the provisions of section 5(1) of cap 276. He argued that the Labour Commissioner has power under this section to order the production for examination of any record required to be compiled and maintained under section 4.

The 4th ground of appeal raises issue with the certificate of registration of the respondent's Pension Scheme, that was issued by the Registrar of Pensions. The appellant contends with the holding

by the Court below, that this certificate was the end result of an application to the Minister to approve the Scheme, and that it was proof of the Minister's approval.

In arguing this ground, the appellant has referred us to section 18 of the Pensions Scheme Regulation Act, No. 28 of 1996, which makes it mandatory for any Pension Scheme to protect the interest of its members. It is the argument of the learned counsel for the appellant, that the Pensions Scheme in this case did not protect the interest of its members because the pension benefits accruing to the members who contributed to it were less than those under the Act.

Counsel submitted that in its various provisions, Act No. 28 of 1996 places emphasis on the protection of rights and interests of members. He contended that the registration of a Scheme which contravened the rights of its members, by giving extremely meager benefits could not have been validly approved by the Minister. He argued that even if the Minister could have approved such a Scheme, that approval would be ultra vires the Act. He pointed out that the certificate of registration in this case shows that it was issued on 13th June, 2000; two years before the statutory instrument was issued in 2002, meaning that it had yet to conform to the law by ensuring that it complied with provisions of the statutory instrument. Counsel submitted further that under section 14 of Act No. 28 of 1996, a certificate of registration expires after three years. He stated that in this case, the appellant retired in 2004, after the certificate had already expired. He contended that the expired certificate, could not have amounted to approval of the Pension Scheme.

Mr. Tambulukani replied to the third and fourth grounds of appeal together. In respect of the third ground of appeal, he contended that the Court did not misdirect itself in law and fact, when it held that the respondent was exempted from statutory instrument No. 2 of 2002. That neither did the Court misdirect itself in law and fact, by finding that the certificate of registration of the respondent's Pension Scheme Fund issued by the Registrar was the end result of an application to the Minister to approve the Pension Scheme.

Counsel submitted that the Registrar's authority under the Act, is derived directly from the Minister and his decisions are treated as though they were made by the Minister himself. In this respect he referred us to section 4 of the Pension Scheme Regulation Act, which states that the Registrar acts as a de facto officer in the Minister's place to register Pension Schemes in accordance with the provisions of the Act. He submitted that the certificate issued by the Registrar to the respondent was in recognition that the Scheme had been registered. It was as the end result of an application to the Minister. Counsel further submitted that the respondent fully complied with the statutory requirements pertaining to the registration of Pension Schemes, and a certificate was duly issued. According to Mr. Tambulukani, the appellant was now clutching at straws, by reading beyond the requirements of approval, and issuance of a certificate, as a last resort to support this ground of appeal.

Mr. Tambulukani further submitted that the enabling Act is very clear, as to which officers are delegated with the function of registering pensions. The Court below found that the Minister's approval was not contrary to the provisions of statutory instrument No. 2 of 2002. On the argument that it was

the Registrar and not the Minister who issued the certificate, counsel referred us to the case of Re Golden Chemical Products Limited (2), in which it was stated that:

“In the administration of government in this country the functions which are given to Ministers are functions so multifarious that no Minister could even personally attend to them...the duties imposed upon Ministers, and the powers given to Ministers are normally exercised under the authority of the Ministers by responsible officials of the department.”

Counsel maintained that since the certificate was properly issued, and there was no evidence on record to suggest the contrary, the certificate was proof of the Minister's approval.

We will also deal with the third and fourth grounds of appeal together. The questions which call for determinations under these two grounds of appeal are:

Whether statutory instrument No. 2 of 2002, applies to the respondent.

Whether the Minister validly approved the respondent's Pension Scheme; and lastly

Whether the certificate of registration issued by the Registrar of Pensions and Insurance on 13th June, 2000, is valid.

Coming to the first question, Paragraph 8(2) of the statutory instrument No. 2 of 2002 states:-

“Where an employer has established a Pension Scheme approved by the Minister, the retirement benefits shall be paid in accordance with such Pension Scheme and sub paragraph (10) shall not apply.”

Sub paragraph 8(1) provides the formula for computation of terminal benefits payable to an employee who has served for not less than ten years and has attained the age of fifty-five years. This is three months pay for each completed year of service.

We have stated above, when dealing with the second ground of appeal, that cap 276, only applied to protected workers, or a group of workers for which no adequate provision had been made for their wages and conditions of service. We have found that the appellant is not a protected worker within the meaning of the Act. Be that as it may, it is common cause that the respondent did establish a Pension Scheme to which the appellant contributed, and was therefore a member.

The argument by the appellant is that the respondent is not exempt from the statutory instrument because the said Scheme is inferior and has not been raised to meet the changed economic climate. According to the appellant, the Scheme could only be exempt if it was equal to/or better than that provided by the law. The other argument advanced is that any exemption would only arise after the respondent had applied for review under the provisions of section 3 (c) of cap 276, and such review was granted.

In our view, the provisions of the law in this respect are very clear. Even if it was to be assumed that cap 276 applied to the appellant, where there is a Pension Scheme approved by the Minister, the

retirement benefits are paid in accordance with that Scheme. As we have observed above, statutory instrument No. 2 of 2002, was passed after the Pension Scheme in this case had already been established. The Pension Scheme would derive its validity as at the date that it was registered. Its validity did not hang in a pendulum pending the passing of statutory instrument No. 2 of 2002. It is a misconception to suggest that the exemption afforded in Paragraph 8(1) will sway, depending on statutory orders that will be issued by the Minister. As the Court below properly observed, it was up to those affected members of a Pension Scheme to enter into negotiations with their employer if they wanted to change the rules of such Schemes.

On the second and third questions that we have posed above, the argument advanced on behalf of the appellant is that the Minister could not have validly approved the Scheme as he would have been in breach of cap 276, as read with statutory instrument No. 2 of 2002. We have already found that a Pension Scheme is valid as at the date of registration. A statutory instrument cannot be used to retrospectively invalidate the exemption that a Pension Scheme enjoyed when it was registered unless expressly stated.

On the submission that the Scheme did not protect the interest of its members by giving what has been described as meager benefits, we can only repeat what we have stated above, that, the review of such Schemes is a matter of negotiations between the parties.

The appellant has also advanced an argument that the certificate of registration May, have expired after three years. From the evidence and documents on record, this appears not to have been an issue in the Court below. It is open to speculation as to whether had it been raised, the respondent would have called the relevant evidence. We cannot therefore speculate as to the factual situation on the ground.

The copy of the certificate of registration that has been exhibited shows that it was issued under section 10 of the Pension Scheme Regulation Act of 1996. The Act provides for among others, the regulation and supervision of Pension Schemes. It provides in its section 8(1) that

“A person shall not establish or manage a Pension Scheme except in accordance with this Act, and under the authority of a certificate of registration of a Pension Scheme issued under this Act.”

The Registrar is the public officer empowered to issue a certificate of registration authorizing the establishment of a Pension Scheme if he, or she is satisfied on the criteria stipulated in the Act. Under section 4 of the Act, the Registrar is appointed by the Minister, in consultation with the Minister responsible for labour and social security. The functions of the Registrar as outlined in section 7 include registration and de-registration of Pension Schemes. An application for a certificate to register, or manage a Pension Scheme is made to the Registrar “...in such form as May, be prescribed by the Minister by statutory instrument...”

The provisions of the Pension Scheme Regulation Act, make it clear that no person can establish or manage a Pension Scheme unless in accordance with the provisions of the Act. It follows that any

valid Pension Scheme must have a certificate of registration issued by the Registrar, in accordance with the Act. The Registrar being a public officer, must engage in a process of consultation before he/she can issue a certificate of registration. In public governance, Ministers operate through public functionaries, and unless it can be shown that a decision was not validly made, the presumption is that the law was complied with.

In terms of the law, the respondent could only register its Pension Scheme under the provisions of the Pension Scheme Regulation Act. There was no evidence to suggest that such registration was not properly done. Once a certificate of registration has been issued by the Registrar, there is no requirement that the express instructions of the Minister approving the Pension Scheme be produced. Having been issued under the law, such a Scheme is valid for purposes of Paragraph 8(2) of statutory instrument no. 2 of 2002. We agree with the Court below that no evidence was adduced to suggest that the certificate of registration that was produced was not the end result of an application to the Minister to approve the Scheme. We therefore find no merit in the third and fourth grounds of appeal.

On the last ground of appeal, that the Court erred when it held that the appellant failed to prove her case on a balance of probability, and that her complaint lacked merit, Mr. Mubanga submitted that the appellant adduced enough evidence to secure a judgment in her favour. He stated that the appellant amended her Notice of Complaint as well as her affidavit, to which there was neither an amended response, nor an amended affidavit filed by the respondent. Relying on Order 18, Rule 13(1), (2) and (3) of the Rules of the Supreme Court, he submitted that any allegation of fact made by a party in his pleadings is deemed to be admitted by the opposite side unless it is traversed by the other party, or a joinder of issue. He argued that in this case, the failure by the respondent to traverse pleadings contained in the amended complaint ought to be deemed to have been admitted by the respondent. To this effect, counsel referred to the specific pleadings referred to in paragraphs 5(a), (b), (c), (d) and (e) on page 95 of the record of appeal as well as paragraphs 3 to 9 of the amended affidavit.

In response to the submissions of counsel on this ground of appeal,

Mr. Tambulukani submitted that the Rules of the Supreme Court (White Book) 1999 Edition do not apply to this case. He cited section 96 of the Industrial and Labour Relations Act, cap 269, which provides that the rules regulating the procedure in the Industrial Relations Court are made by the Chairman. He submitted that the White Book applies to the High Court and the Supreme Court of Zambia by virtue of section 10 of the High Court Act, cap 27 of the Laws of Zambia, and section 8(ii) of the Supreme Court Act, cap 25 of the Laws of Zambia.

Mr. Tambulukani also referred to section 85(4) of the Industrial and Labour Relations Act which exempts the Industrial Relations Court from being bound by rules of evidence in civil and criminal proceedings. He also cited the case of *Barclays Bank v Mubanga* (4), in which this Court expressed the view that the Industrial Relations Court should not be regarded as a Court of technicalities and pleadings. Counsel consequently urged us to disregard the appellant's argument on pleadings based on the White Book because they are of no legal consequence. He stated that the respondent produced an

answer, gave evidence and furnished documents on which the Court relied to come to the conclusion that the appellant had failed to prove her case. He relied on the principle that he who alleges bears the burden of proof.

We note, from the arguments of the appellant in support of the fifth ground of appeal that it is anchored on the provisions of Order 18, Rule 13 (1), (2) and (3) of the White Book, which requires a person defending a claim to traverse allegations of fact made by the claimant. The answer to this is as espoused by Mr. Tambulukani. The Industrial Relations Court is in a class of its own. Section 85 (4) of the Industrial and Labour Relations Act states that

“The Court shall not be bound by rules of evidence in civil or criminal proceedings, but the main object of the Court shall be to do substantial justice between the parties before it.”

The Court heard the testimony of the appellant, and the respondent's witness. It also had before it various documents that were produced by the parties. At the end of the day, it rendered its decision that the appellant had failed to prove her case on a balance of probabilities. We have also looked at the evidence and the documents produced in the Court below. We agree that the appellant failed to prove her case on a preponderance of probabilities. We do not find that the Court below misdirected itself in this regard. The last ground of appeal therefore fails.

From the foregoing, we find that this whole appeal has no merit. We dismiss it with costs to be taxed in default of agreement.