

**IN THE SUPREME COURT FOR ZAMBIA**  
**HOLDEN AT KABWE**

*(Civil Jurisdiction)*

**APPEAL NO. 68A/2007 AND**  
**APPEAL NO. 108/2013**

**BETWEEN:**

**NATIONAL AIRPORT CORPORATION LIMITED**  
**ATTORNEY GENERAL**

**1<sup>ST</sup> APPELLANT**  
**2<sup>ND</sup> APPELLANT**

**AND**

**EDWARD MULUBE**

**RESPONDENT**

**CORAM: Mwanamwambwa DCJ, Musonda and Chinyama, JJS,**  
**On 5<sup>th</sup> April, 2016 and 21<sup>st</sup> October 2016**

*For the 1<sup>st</sup> Appellant: Mr. S. Chisulo SC, of Messrs. Sam Chisulo & Company*

*For the 2<sup>nd</sup> Appellant: Mr. F. Imasiku, Senior State Advocate, from the Attorney General's Chambers*

*For the Respondent: In person*

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**JUDGMENT**

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**Mwanamwambwa D.C.J., delivered the Judgment of the Court.**

***Legislation Referred to:***

- (1) The Aviation (Amendment) Act No. 16 of 1989 (Repealed and Replaced)**
- (2) The Civil Service (Local Conditions) Pensions Act, Chapter 410 of the Laws of Zambia (Repealed and Replaced)**
- (3) Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia**
- (4) Section 26B (3) of the Employment Act, Chapter 268 of the Laws of Zambia**
- (5) Order XXXI Rule 14 of the High Court (Amendment) Rules, Statutory Instrument No. 71 of 1997**

***Cases Referred to:***

1. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172
2. William Harrington v Dora Siliya and Attorney General (2011) 2 ZR 253

In this matter, two appeals were consolidated: Appeal No. 68A/2007 and Appeal No. 108/2013. These appeals are against two judgments by two different High Court Judges. Both appeals relate to the same subject matter and the parties are the same.

Brief facts are that the respondent worked for the Department of Civil Aviation from 1971 to 1989. He served as Senior Air Traffic Control Officer at the Lusaka International Airport. In 1989, the Department of Civil Aviation was restructured and this led to the formation of the 1<sup>st</sup> appellant. Its employees were given an option to choose either to remain in the Department of Civil Aviation or to transfer to the 1<sup>st</sup> appellant. Section 31 of the Aviation (Amendment) Act No. 16 of 1989, provided that employees who voluntarily transferred or those that were deemed to have voluntarily transferred to the 1<sup>st</sup> appellant were entitled to have their previous years of service in government, treated as service at the 1<sup>st</sup> appellant for purposes of determining their pension and other benefits.

On 21<sup>st</sup> February 1990, the respondent requested the Department of Civil Aviation to place him on early retirement in national interest. He was retired on 27<sup>th</sup> September 1991, to enable him take up a new appointment at the 1<sup>st</sup> appellant. The

Department of Civil Aviation paid him pension benefits in accordance with section 18 of the repealed Civil Service (Local Conditions) Pensions Act, Cap 410 of the Laws of Zambia.

He then joined the 1<sup>st</sup> appellant. On 30<sup>th</sup> April 1999, he was retrenched. The 1<sup>st</sup> appellant paid him a retrenchment package which was computed based on the number of years that he had served at the 1<sup>st</sup> appellant. He was not satisfied. He wanted the 1<sup>st</sup> appellant to include, in calculating his retrenchment package, the number of years he had served in the Department of Civil Aviation. He took the view that his retrenchment package was not correctly calculated and he was underpaid. He, therefore, sued the 1<sup>st</sup> appellant, seeking the following reliefs:-

- (a) Payment of the balance of his terminal benefits and package from the 1<sup>st</sup> appellant based on the calculation in accordance with the ZIMCO conditions of service, and section 31 of the Aviation Act No.16 of 1989;**
- (b) An order that he is entitled to be paid his wages from the date of retrenchment until his retrenchment benefits are paid in full;**
- (c) Damages for discrimination by the 1<sup>st</sup> appellant against him, in denying him the right to a salary increment during the extension of his employment;**
- (d) Interest on the said balance; and**
- (e) Costs.**

The matter was taken for mediation where the parties executed a Mediation Settlement Order. In the Order, the parties settled all the respondent's claims except one issue which they referred to the High Court for determination. This was the respondent's claim to have the period he served in government included in the calculation of his retrenchment package.

In the High Court, the trial Judge held that the period of 18 years which the respondent served in the Civil Service should be included in calculating his terminal benefits, in accordance with section 31(1) of the Aviation (Amendment) Act. He further ordered that the amount due should carry interest at the rate of 10%, from the date of the writ to the date of judgment and thereafter at the rate of 6% until the date of payment.

In arriving at his decision, the trial Judge agreed with the respondent that his retirement in national interest did not break his period of service. He took the view that the respondent did not voluntarily transfer to the 1<sup>st</sup> appellant, but that the 1<sup>st</sup> appellant offered him employment which he accepted. He explained that even if the respondent did not voluntarily transfer to the 1<sup>st</sup> appellant, eligibility to transfer to the 1<sup>st</sup> appellant was not solely based on a voluntary decision alone; it extended to government employees who did not, within three months from the 11<sup>th</sup> September 1989, indicate to the government in writing, that they did not intend to transfer to the 1<sup>st</sup> appellant. He pointed out that there was no evidence to show that the respondent wrote to the government to indicate that he did not intend to transfer to the 1<sup>st</sup> appellant. He came to the conclusion that the respondent could rightly be deemed to have voluntarily transferred to the 1<sup>st</sup> appellant and that section 31 as read with section 26 of the Aviation (Amendment) Act, applied to him. The trial Judge held that the respondent fell within the category of employees who were entitled to transfer to the 1<sup>st</sup> appellant.

Dissatisfied with the Judgment of the High Court, the 1<sup>st</sup> appellant appealed to this Court and the respondent cross-appealed. The 1<sup>st</sup> appellant advanced four grounds of appeal. These read as follows:-

1. That the trial Judge having admitted the evidence adduced by the respondent himself and the defence witnesses that the respondent was offered employment by the 1<sup>st</sup> appellant, while he was engaged by the government at the Department of Civil Aviation Headquarters in Lusaka, the trial Judge erred both in law and fact when he found as a fact that the respondent can rightly be deemed to have voluntarily transferred to the 1<sup>st</sup> appellant;
2. That the trial Judge's definition of 'eligibility' to transfer to the 1<sup>st</sup> appellant at page 7 of the judgment is perverse; and the finding that eligibility to so transfer was not solely based on the voluntary decision alone, is one on which a proper interpretation of section 31 subsections (1) and (2), no trial Court correctly could reasonably make;
3. That the trial Judge misdirected himself in principle when at page 9 of the Judgment, he accepted two conflicting submissions from the respondent i.e. firstly, that he did not receive full pension and that there was no break of service as a result of being retired in national interest; and secondly, that the government had promised its employees who were to transfer to the 1<sup>st</sup> appellant a number of attractive incentives, among them retirement in national interest to facilitate the payment of pension from the Public Service Pension Fund;
4. That the learned trial Judge misdirected himself in principle when he failed to consider and properly analyse the evidence favourable to the defence, such as the consensus reached between the government and the Civil Servants Union that the civil servants opting to transfer to the 1<sup>st</sup> appellant be retired in the national interest and be paid their terminal benefits. Also, that upon the respondent's own request he was retired from the Civil Service.

On the other hand, the respondent advanced two grounds of appeal in his cross-appeal. These read as follows:-

- 1) That the learned Judge in the court below, erred both in fact and law by not awarding the respondent payment of his salary from the date of retrenchment until the date of full payment of retrenchment benefits, pursuant to section 26 (B) (3) of the Employment Amendment Act No. 15 of 1997 of the Laws of Zambia which provides for the payment of full salary until such benefits are paid;
- 2) That the learned Judge in the court below, erred both in fact and law by awarding lower interest of 10% and 6% when the parties agreed at mediation settlement that the balance of terminal benefits will be paid with interest at the rate of 40% per annum from 1<sup>st</sup> May 1999.

Before the appeal and cross-appeal could be heard, the parties agreed to remit this matter back to the High Court before another Judge. This time, the parties wanted the High Court to determine whether or not the respondent was paid full pension in accordance with the provisions of the repealed Civil Service (Local Conditions) Pensions Act Cap 410, when he was retired from the Civil Service in national interest.

In her Judgment, the second Judge of the High Court held that the respondent was correctly paid his full pension in accordance with section 18 of the Civil Service (Local Conditions) Pensions Act. She formed the opinion that since the respondent was retired following the transfer of all the positions under the Department of Civil Aviation, he fell under section 18 of the Civil Service (Local Conditions) Pensions Act, which was applicable in cases where an officer was retired on abolition of a position or to effect greater efficiency. She held that the respondent failed to prove that his retirement was based on any other ground.

The respondent was not happy with the decision of the second trial Judge. He appealed to this Court, advancing four grounds of appeal. These read as follows:-

- (1) That the court below erred both in law and fact by holding that, the respondent was paid full pension under section 18 of Cap 410 and by defining a full pension to mean "the correct or rightful pension due to the respondent in accordance with the manner of his retirement";**
- (2) That the learned Judge in the court below erred both in law and fact by accepting the evidence from the 2<sup>nd</sup> respondent that the formula in section 18 included some compensation in the pension benefits, when it is not so;**
- (3) The lower court misdirected itself both in law and fact by holding that, "the respondent had not proved that his retirement was on any other ground, other than section 18 to entitle him to benefits under section 20", when the 1<sup>st</sup> respondent's circular No. NACL/CPS/MM/mm dated 9<sup>th</sup> October 1989, states that such officers to be retired from the civil service in the national interest may be paid the retirement benefits prescribed under section 20 or 29 of the Civil Service (Local Conditions) Pensions Act, Cap 410, which position was canvassed in the respondent's submissions at page 167 of the record of appeal;**
- (4) That the learned Judge in the court below, erred both in fact and law by holding that the passing of the Aviation (Amendment) Act No. 16 of 1989 led to the abolition of the Department of Civil Aviation and moving all the relevant staff to the 1<sup>st</sup> appellant when in fact the Department of Civil Aviation was not abolished.**

On 2<sup>nd</sup> February 2016, the parties agreed to deem the respondent's appeal against the Judgment of the second trial Judge, as an additional cross-appeal to his earlier cross-appeal. Therefore, the parties agreed to treat grounds one to four of the respondent's appeal as grounds three to six of the cross-appeal.

Based on the grounds of appeal, the parties filed written heads of argument. However, the appellants did not file heads of argument in response to the additional cross-appeal. But we considered the evidence in relation to the issues raised.

On behalf of the 1<sup>st</sup> appellant, Mr. Chisulo SC, argued grounds one and two together. He submitted that the first trial Judge erred in analyzing the evidence and making findings of fact on the eligibility of the respondent to transfer to the 1<sup>st</sup> appellant. He contended that the first trial Judge's definition of 'eligibility' was perverse because it did not confine itself to the purview of section 31 (1) of the Aviation (Amendment) Act. He submitted that an officer who was not eligible to transfer to the 1<sup>st</sup> appellant could not be deemed to have voluntarily transferred to the 1<sup>st</sup> appellant by default, as suggested by the first trial Judge.

State Counsel Chisulo argued that eligibility by default in section 31(2) was intended to be a conscious and voluntary decision by an employee to whom subsection (1) applied and the only requirement for such an employee to be eligible, was to remain silent on the matter. He therefore contended that the first trial Judge's finding that the respondent fell into the category of the employees entitled to transfer to the 1<sup>st</sup> respondent should be set aside. He relied on the case of **Wilson Masauso Zulu v Avondale Housing Project**<sup>(1)</sup> for this argument.



On behalf of the 2<sup>nd</sup> appellant, Mr. Imasiku supported grounds one and two. He cited section 31 (1) (2) and section 26 of the Aviation (Amendment) Act and submitted that the respondent could not be rightly deemed to have voluntarily transferred to the 1<sup>st</sup> appellant. He stated that the respondent's letter of retirement took him out of the bracket of voluntary transfer. He pointed out that there was a break in the respondent's service when he was retired in national interest and as such, he was not within the contemplation of section 31 of the Aviation (Amendment) Act. Counsel contended that the respondent took himself out of the protection of section 31 (1) of the Aviation (Amendment) Act when he opted to be retired in the national interest. He submitted that the first trial Judge erred when he found that the respondent could be rightly deemed to have transferred to the 1<sup>st</sup> appellant.

The respondent opposed grounds one and two. He supported the first trial Judge's finding that the respondent was deemed to have voluntarily transferred to the 1<sup>st</sup> appellant. He submitted that the first trial Judge's finding was based on the respondent's appointment letter from the 1<sup>st</sup> appellant; his letter accepting the 1<sup>st</sup> appellant's offer of employment and; the provisions of section 31 of the Aviation (Amendment) Act. He submitted that the respondent met the conditions for eligibility to transfer to the 1<sup>st</sup> appellant, as was set out in section 31 of the Aviation (Amendment) Act. He argued that the lower court correctly interpreted eligibility to transfer to the 1<sup>st</sup> appellant in

accordance with that provision. He stated that there was no basis on which the lower court's findings could be reversed. He further contended that the case of **Wilson Masauso Zulu v Avondale Housing Project**<sup>(1)</sup> which the 1<sup>st</sup> appellant cited, was irrelevant to this case because the trial court considered all the evidence from the parties and found for him.

In support of the third and fourth grounds of appeal, State Counsel Chisulo contended that the first trial Judge glossed over the fact that the 1<sup>st</sup> appellant pleaded and canvassed at trial that since the respondent was retired and paid his pension, section 31 of the Aviation (Amendment) Act did not apply to him because there was a break of service. He submitted that the first trial Judge did not consider the appellant's evidence that all employees who were being employed started afresh with the 1<sup>st</sup> appellant.

He stated that the first trial Judge rushed to interpret section 31 of the Aviation (Amendment) Act without considering the following facts: that firstly, the respondent conceded under cross-examination that he was paid his pension benefits; that secondly, there was evidence from the defence that the Trade Union agreed with the 1<sup>st</sup> appellant and the government that employees joining the 1<sup>st</sup> appellant would, despite the provisions of section 31 of the Aviation (Amendment) Act, be retired in national interest to facilitate the payment of their pension benefits which accrued when they worked for the Civil Service. He

pointed out that the problem was that the first trial judge failed to consider the evidence which was favorable to the defence. It was his submission that the first trial Judge misdirected himself when he solely premised the determination of the respondent's case on the interpretation of section 31 of the Aviation (Amendment) Act.

On behalf of the 2<sup>nd</sup> appellant, Mr. Imasiku stated that the respondent received his pension after he was retired. He said there was a break of service after the respondent was retired following his request. He submitted that there is correspondence on record which confirms that consensus was reached between the 1<sup>st</sup> appellant and the government on one hand, and the Civil Servants Union of Zambia Union on the other hand, regarding the payment of pension to employees. He stated that the 1<sup>st</sup> appellant's offer of employment to the respondent shows that the respondent did not voluntarily transfer to the 1<sup>st</sup> appellant and was therefore not covered by section 31 of the Aviation (Amendment) Act. He submitted that the first trial Judge's findings were perverse because he did not give due consideration to all the evidence. He relied on the case of **Wilson Masauso Zulu v Avondale Housing Project**<sup>(1)</sup> and urged us to reverse the findings by the first trial Judge.

The respondent countered both grounds three and four. He submitted that the first trial Judge based his judgment on the provisions of section 31 of the Aviation (Amendment) Act. He pointed out that the first trial Judge considered the fact that the

respondent worked for the government for 18 years before he transferred to the 1<sup>st</sup> appellant. He stated that the first trial Judge also considered that the pension he received from the government was a mere refund of his contributions and not full pension because he had not yet reached the retirement age of 55 years at the time. He further submitted that the first trial Judge also considered that there was no break in service in that the respondent transferred to the 1<sup>st</sup> appellant. He defended the decision of the first trial Judge and urged us to dismiss the main appeal.

In support of the first ground of the cross-appeal, the respondent submitted that the first trial Judge erred when he refused to entertain his other claims on the basis that they were not referred to the High Court by the mediator. He drew our attention to Section 13 of the High Court Act and contended that the lower court should have determined all the issues in controversy between the parties to avoid a multiplicity of actions on the same facts. It was his submission that the lower court should not have refused to award him his claim for the payment of his salary from the date of retrenchment until date of full payment. He argued that Section 26 (B) (3) of the Employment Act provides for the payment of a salary to a retrenched employee until his full benefits are paid.

On behalf of the 1<sup>st</sup> appellant, State Counsel Chisulo opposed ground one of the cross-appeal. He submitted that the

trial Judge was on firm ground when he declined to entertain the respondent's other claims because they were not the subject of reference to the High Court by the Mediation Settlement Order. He referred us to the terms of the Mediation Settlement Order. He contended that the court below had no jurisdiction to determine a claim which had been resolved by the Mediation Settlement Order. He further submitted that the first trial Judge could not have entertained the issue raised in ground one of the cross-appeal, because Order XXXI Rule 14 of the High Court (Amendment) Rules, Statutory Instrument No. 71 of 1997 provides that no appeal shall lie against a registered mediation settlement.

In support of the second ground of the cross-appeal, the respondent submitted that the parties agreed at mediation that 40% interest shall apply to the remaining balance of terminal benefits, but the lower court altered it to 10% and 6%. He stated that the court below should not have altered the interest rate which was agreed by the parties. He requested us to vary the Judgment of the lower court to bring it in line with what was agreed by the parties.

In response to ground two of the cross-appeal, Mr. Chisulo SC contended that the respondent's arguments on this ground are a misconception of the law. He argued that the terms of the Mediation Settlement Order could not be stretched to include other payments which were not determined at the time the

Mediation Settlement Order was being signed by the parties. He submitted that trial courts have discretion to decide the rate of interest on any money they awarded. State Counsel relied on the case of **Zambia Revenue Authority v Jayesh Shah** <sup>(1)</sup> for this proposition. He said the cross-appeal on wages and interest at forty per centum (40%) should be dismissed.

In support of the third ground of the additional cross-appeal, the respondent made global submissions. The gist of his submissions was that the definition of full pension by the second trial Judge was a mere expression of her opinion which was not supported by any evidence. He stated that the correct and rightful pension benefits to a transferred officer were payable under section 29 of the Civil Service (Local Conditions) Pensions Act, as opposed to section 18. It was his submission that his pension benefits as a transferred employee were payable under section 29 of the Civil Service (Local Conditions) Pensions Act and this was supported by Circulars from the 1<sup>st</sup> and 2<sup>nd</sup> appellants.

In support of the fourth ground of the additional cross-appeal, the respondent submitted that there was no compensation in the pension payable under section 18 of the Civil Service (Local Conditions) Pensions Act, contrary to the second trial Judge's finding. He stated that the explanatory notes under section 18 of the Civil Service (Local Conditions) Pensions Act do not show the alleged compensatory factor. He contended that the error which was made in paying his pension should be

corrected so that he is paid the correct pension under section 29 of the Civil Service (Local Conditions) Pensions Act.

In submitting on the fifth ground of the additional cross-appeal, the respondent argued that the second trial Judge overlooked the evidence which was favourable to the respondent and that she misdirected herself. He stated that there was evidence to show that his pension was supposed to be paid in accordance with section 29 of the repealed Civil Service (Local Conditions) Pensions Act. The respondent complained that he had been underpaid his benefits.

In support of the sixth ground of the additional cross-appeal, the respondent argued that the enactment of the Aviation (Amendment) Act, did not lead to the abolition of the Department of Civil Aviation. He submitted that the Department was merely re-organized. He pointed out that the Department of Civil Aviation is still in existence and it is situated next to Cabinet Office. He submitted that the judgment of second trial Judge lacks insight and proper analysis.

We have considered the issues raised by the parties in the main appeal, cross appeal and the additional cross appeal. Although the parties have raised so many grounds of appeal in this matter, we hold the view that there are only two main issues to be determined. The two issues are the questions which the parties referred to the two High Court Judges for determination.

We take the view that the rest of the issues which the parties have raised are peripheral in nature and are therefore unnecessary. Accordingly, we shall not rule on them. This is line with our decision in William Harrington v Dora Siliya and Attorney General <sup>(2)</sup>, where he held that:

**“...a trial or appellant Court, is at liberty not to rule on an issue raised before it, if it is of the view ruling on such an issue is unnecessary or would go beyond what needs to be adjudicated upon. Of course, we still stand by our earlier decision that a court should adjudicate on all issues placed before it; so as to achieve finality. However, we wish to emphasize that such an issue must be necessary or relevant, and properly brought or raised before the Court...”**

This holding in the Dora Siliya case, applies to the present case with equal force. We shall in the circumstances go straight to the two main issues.

The first issue, which the parties referred to the first trial Judge for determination, was whether the respondent was entitled to have the period he served in government included in the calculation of his retrenchment package. In our view, the respondent was required to meet the conditions set out in Section 31 of the repealed Aviation (Amendment) Act, in order for him to have the period he served in government included in the calculation of his retrenchment package at the 1<sup>st</sup> appellant. Section 31 stipulated that:

**“31. (1) Where any person who was in the service of the government at designated airports or was performing functions referred to in section twenty six, immediately before the commencement of this Part,**



**voluntarily transfers from that service to the service of the Company, his terms and conditions of service with the company shall be no less favourable than those he enjoyed while in the service of the government and his previous service with the government shall be treated as service under the company for the purposes of determining his rights, to or eligibility for, pension, gratuity, leave or other benefits.**

**(2) A person to whom subsection (1) applies shall be deemed to have voluntarily transferred his services to the Company unless within three months from the commencement of this Part, gives notice in writing to the government with a copy to the Company stating his intention not to transfer from the service of the Government."**

In view of these provisions, the critical question is whether the respondent in fact met the stipulated conditions in Section 31 of the repealed Aviation (Amendment) Act. The evidence shows that on 13<sup>th</sup> September 1989, the respondent applied for employment with the 1<sup>st</sup> appellant, as Chief Air Traffic Control Officer. He made his application at the time the Department of Civil Aviation was being restructured. By a letter dated 12<sup>th</sup> September 1989, the 1<sup>st</sup> appellant offered him the job he had applied for. By a letter dated 18<sup>th</sup> September 1989, the respondent accepted the offer of employment.

On 21<sup>st</sup> February 1990, he formally wrote to the Director at the Department of Civil Aviation, requesting to be placed on early retirement in national interest. He was retired on 27<sup>th</sup> September 1991, and paid his pension in accordance with section 18 of the repealed Civil Service (Local Conditions) Pensions Act.

When these facts are carefully considered, it will be noted that Section 31 of the repealed Aviation (Amendment) Act did not provide for the retirement of employees and the payment of

pension as part of voluntary transfer to the 1<sup>st</sup> appellant. We are of the considered opinion that the respondent's retirement and the payment of pension took him out of the purview of Section 31 of the repealed Aviation (Amendment) Act. In fact, it is abundantly clear from the evidence that the original intention of the appellants, as managers of the process, was that employees who retired from government, in national interest and were paid their pension, would start afresh at the 1<sup>st</sup> appellant. There is a letter on record dated 31<sup>st</sup> August 1989, which outlines how the transfer of employees from the Department of Civil Aviation to the 1<sup>st</sup> appellant was intended to be done by the appellants. The letter reads as follows:

**"NATIONAL AIRPORTS CORPORATION LIMITED  
(Letter Head)**

**OUR REF: NACL/MD/GAL/whm/Conf.0001  
31<sup>st</sup> August, 1989**

**The Permanent Secretary  
Ministry of Power, Transport and Communications  
P. O. Box 50065  
LUSAKA**

**Dear Sir,**

**RE: TRANSFER OF GRZ EMPLOYEES TO NATIONAL AIRPORTS CORPORATION LIMITED**

**I refer you to the meeting this morning attended by persons on the attached list.**

**As per discussions, we put forward the following for final approval by the relevant authorities:-**

**1. TRANSFER**

**In conformity with section 31 of Part II of the Aviation (Amendment) Act 1989, the affected GRZ staff members will be given an option to either (a) remain with GRZ or (b) transfer to NACL**

- a) Those who opt to remain in GRZ will either be relocated or retired.
- b) Those transferring to NACL will be employed by NACL in whatever position NACL deems suitable. However, the conditions of service of those individuals who transfer to NACL will not be less favourable as a TOTAL PACKAGE than those conditions the transferee enjoyed with GRZ.

We emphasize "Total package" because there may be some areas in which ZIMCO conditions do fall short of GRZ conditions. In this regard, a good example is the GRZ pension scheme which is much better than that enjoyed by the parastatal sector.

## **2. PENSION AND OTHER BENEFITS**

For those employees transferring to NACL, they will be given the following options:-

- a.) That they will retire from GRZ services, and receive pensions and all other terminal benefits. They will then join NACL afresh.
- b.) They may transfer to NACL bringing with them only the duration of service but not the value of their pensions. That is, when they eventually retire from NACL, the years of service with GRZ will be counted as years of service with NACL but they will be paid on the NACL rates. In order to permit NACL to meet the backdated premiums, the GRZ Pension Scheme will transfer to NACL all accrued benefits.

We would like to emphasize that the possibility of transferring the monies mentioned in option b.) should be ascertained. Further, we would like to express the need for expeditious resolution of this issue as workers are anxious and have already requested for a meeting for them to be briefed.

Yours sincerely,

**SIGNED**  
**George A. Lewis**  
**MANAGING DIRECTOR."**

**Paragraph 2(a.)** of the letter we have reproduced shows that employees, such as the respondent, who chose to retire from government and received pension, were required to start afresh at

the 1<sup>st</sup> appellant. Therefore, we agree with both Counsel for the appellants that the retirement of the respondent broke his period of service. And as such, he is not entitled to have the period he served in government included in the calculation of his retrenchment package from the 1<sup>st</sup> appellant. We hold the view that the respondent took himself out of the purview of section 31 of the repealed Aviation (Amendment) Act when he opted to retire and to receive his pension.

In our view, the only employees who were entitled to have their previous years of service in government, treated as service at the 1<sup>st</sup> appellant for purposes of determining their pension in accordance with section 31 of the repealed Aviation (Amendment) Act, are those described in **Paragraph 2(b.)** of the letter above. The first trial Judge did not address his mind to all these issues. He misdirected himself, when he held that the respondent was entitled to have the period he served in government included in the calculation of his retrenchment package. We hereby set aside the whole of his judgment and allow the main appeal. As a consequence, grounds one and two of the cross-appeal are hereby dismissed.

We now come to the second issue. The second issue, which was referred to the second trial Judge for determination, was whether or not the respondent was paid full pension in accordance with the provisions of the repealed Civil Service (Local Conditions) Pensions Act, when he was retired from the Civil

Service. As we determine this issue, it must bone in mind that there is no dispute that the respondent was paid pension in accordance with section 18 of the repealed Civil Service (Local Conditions) Pensions Act, at the time he was retired from the Civil Service. There is a Payment Advice Form on record which shows that he was paid gratuity, pension and increased arrears for the period he served in government. Further evidence shows that he continued receiving monthly pension at the time this matter was being heard in the court below. The only dispute is the respondent's contention that what he received was not 'full pension', but a mere refund of his pension contributions.

We note that the repealed Civil Service (Local Conditions) Pensions Act, made provision for the payment of pension benefits to employees based on the circumstances in which they left employment. In the case of the respondent, his letter of retirement stated that his pension would be paid in accordance with section 18 of the repealed Civil Service (Local Conditions) Pensions Act. The letter was couched in the following terms:-

**CONFIDENTIAL**

**"REPUBLIC OF ZAMBIA**

**MPTC/8/17/26 CONF.**

**27<sup>th</sup> September 1991.**

**Mr. Edward L. Mulube,  
Senior Air Traffic Control Officer,  
C/O The Managing Director,  
National Airports Corporation,  
P. O. Box 30175,  
LUSAKA.**

Dear Mr. Mulube,

**RETIREMENT FOLLOWING REORGANISATION OF THE CIVIL  
AVIATION DEPARTMENT**

I wish to inform you that the Public Service Commission acting in the name and on behalf of His Excellency the President, has directed that:

- (a) you be deemed to have been seconded to the National Airports Corporation Ltd for the period 11<sup>th</sup> September, to 10<sup>th</sup> December, 1989;
- (b) you be retired from the Civil Service in the national interest with effect from 11<sup>th</sup> December, 1989, under the provisions of the Public Service Commission Regulations 43(c) so that you may receive the pension benefits prescribed under section 18 of the Civil Service (Local Conditions) Pensions Act, CAP 410; and
- (c) you may take up your new appointment with the National Airports Corporation.

I should be grateful if you could as soon as possible submit appropriate pension papers so that arrangements may be made for the calculations of your pension benefits.

Yours faithfully,

**SIGNED.**

**N. B. Nyoni**

**Permanent Secretary**

**MINISTRY OF POWER TRANSPORT AND COMMUNICATIONS**

Section 18 of the repealed Civil Service (Local Conditions) Pensions Act, stipulated the formula for the payment of pension to any employee who had retired following the abolition of his post, to facilitate an improvement by which greater efficiency or economy could be effected in the organization of the part of the government service to which such an employee belonged. We have no doubt in this matter that Section 18 of the repealed Civil Service (Local Conditions) Pensions Act applied to the respondent, considering the circumstances under which he was retired. The


Department of Civil Aviation was restructured and the functions which it exercised in relation to designated airports were transferred to the 1<sup>st</sup> appellant, by virtue of Section 25 of the Aviation (Amendment) Act. Since the respondent served as Senior Air Traffic Control Officer at Lusaka International Airport, we think that his position was effectively abolished. We, therefore, hold the view that the Department of Civil Aviation was right to have paid the respondent's pension in accordance with Section 18 of the repealed Civil Service (Local Conditions) Pensions Act.

We agree with the second trial Judge that the respondent failed to show that he was entitled to receive his pension pursuant to a different provision. There is no evidence on record to show that he was entitled to receive pension in accordance with either Section 20 or 29 of the repealed Civil Service (Local Conditions) Pensions Act. We do not think that the 1<sup>st</sup> appellant's Circular of 9<sup>th</sup> October 1989, which the respondent relied on, can assist his case. The Circular was superseded by the respondent's retirement letter of 27<sup>th</sup> September 1991, which expressly indicated that his pension benefits would be paid in accordance with section 18 of the repealed Civil Service (Local Conditions) Pensions Act.

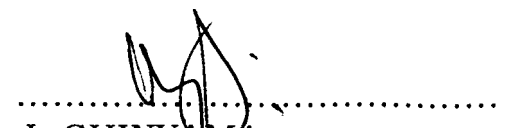
We further wish to make plain that there is nothing in the repealed Civil Service (Local Conditions) Pensions Act, to suggest that the pension payable under Section 18 was not full pension.

There is equally no evidence to support the respondent's contention that the pension he received was a mere refund of his pension contributions and not full pension. We are, therefore, convinced that the pension the respondent received, pursuant to Section 18 of the repealed Civil Service (Local Conditions) Pensions Act, was full pension. Accordingly, we hereby uphold the second trial Judge's decision to dismiss the respondent's claim that he was not paid full pension benefits. The additional cross-appeal which comprises of grounds three to six, has no merit and it is accordingly, dismissed.

All in all, we hereby allow the main appeal and dismiss the cross-appeal and the additional cross appeal, for lack of merit. We order that the parties bear their respective costs.

  
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**M.S. MWANAMWAMBWA**  
**DEPUTY CHIEF JUSTICE**

  
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**M.C. MUSONDA**  
**SUPREME COURT JUDGE**

  
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**J. CHINYAMA**  
**SUPREME COURT JUDGE**