IN THE SUPREME COURT OF ZAMBIA **APPEAL No. 103/2014**
HOLDEN AT NDOLA
(*Civil Jurisdiction*)

BETWEEN:

RICHARD MUNYATI MULEYA **APPELLANT**

AND

TANZANIA ZAMBIA RAILWAY AUTHORITY **RESPONDENT**

Coram: **Mambilima CJ, Kaoma and Musonda, JJS**
On the 6th December, 2016 and 9th December, 2016.

For the Appellant: N/A

For the Respondent: Mr. M. Mando, of Messrs M.L. Mukande & Company.

J U D G M E N T

Musonda, JS, delivered the Judgment of the Court.

Cases referred to:-

1. **Samuel Miyanda vs. Raymond Handahu (1993-94) Z.R. 187.**
2. **Violet Kansenge Bwalya and Others vs. ZAMTEL Comp No. 70 and 75/2010.**
3. **Indo Zambia Bank Limited vs. Mushaukwa Muhanga SCZ/29/2009.**
4. **The Attorney General vs. Marcus Kampumba Achiume (1983) Z.R. 1.**

Legislation referred to:-

1. **Employment Act, Chapter 268 of the Laws of Zambia.**
2. **Income Tax Act, Chapter 323 of the Laws of Zambia.**
3. **Minimum Wages and Conditions of Employment (General) Order, S.I No. 2 of 2002 of the Laws of Zambia.**

Works referred to:-

1. ***Chitty on Contracts* Volume 1 28th edition paragraph 12.**

This appeal raises one of those all-too-familiar disputes between an employer and their ex-employee which have been arising following the termination of the employment relationship, be it consensual or non-consensual and which have usually revolved around the amount of terminal benefits payable to the employee consequent upon such determination of the employment relationship. Typically, the dispute would be of the nature of the ex-employee confronting their ex-employer with the accusation that they had been underpaid or that, in computing their benefits, the ex-employer had employed a wrong formula or had invoked a wrong or inapplicable benefits' clause.

The High Court Judge from which this appeal arises faced a scenario quite similar to the scenario we have presented above.

The Appellant (whom we shall, for convenience, continue to refer to in this Judgment as "**the Plaintiff**" as this was the designation that he held in the Court below) was employed by the Respondent (which, for the same reason given above, we shall continue to refer to in this Judgment as "**the Defendant**") as an Artisan on 1st September, 1997. The Plaintiff's employment subsisted until 1st September, 2003 when he was prematurely retired

on medical grounds. Over the period of its subsistence, the Plaintiff's employment was both permanent and pensionable. The Plaintiff was also both a member of the union to which other eligible TAZARA employees belonged, the TAZARA Pension and Life Assurance Scheme.

Following the Plaintiff's afore-mentioned retirement, he received a letter from the Defendant's Head of Human Resources which, among other things, set out his leave days' cash benefits as well as his pension benefits. The pension benefits were indicated in the letter as amounting to K55,604,025.00.

Disagreements subsequently ensued between the Plaintiff and the Defendant as regards the scope and quantum of the pension benefits which were payable to him consequent upon his said retirement. These disagreements culminated in the institution, by the Plaintiff, of the action which has now been escalated to this Court at the behest of the Plaintiff who was not happy with the outcome in the Court below.

The gist of the Plaintiff's case as it was pleaded in the Court below was that the pension benefits which he received following his

early retirement on medical grounds did not represent the full scope of his entitlement. The Plaintiff complained that his benefits were not paid to him to the full extent that the Rules of the Tanzania Zambia Railway Authority (TAZARA) Pension Scheme to which he belonged prescribed. The Plaintiff was doubly displeased that his former employer could not extend the benefits which he believed accrued to him by virtue of the provisions of the TAZARA Collective Agreement which applied to him as a former unionized employee of the Defendant. The Plaintiff's claims as they were packaged in his Statement of Claim were for the following reliefs:

1. ***A lump sum under the various heads as particularized below.***
2. ***Damages occasioned to the Plaintiff by reason of breach of contract, inclusive of special damages.***
3. ***Interest in the sums the court will find to be due to the Plaintiff.***
4. ***Further or other relief.***
5. ***Costs.***

According to the Plaintiff, the lump sum which he was claiming as indicated above was made up of the following:

a. **A sum of K4,485,354.67 representing an underpayment on the pension benefit which had been availed to him and which underpayment he attributed to some miscalculation;**

b. **a Lump sum payment amounting to K19,948,032.00 which ought to have been paid to him in accordance with the TAZARA Pension**

Scheme Rules which applied to him consequent upon his retirement;

c. **A sum of K7,831,500.64 by way of a further pension which had been secured through additional contributions;**

d. **A *Golden Handshake* comprising 35 pieces gauge 30 x 3 meters corrugated iron sheets or a sum of K2,500,000.00 in lieu thereof pursuant to the terms of the Collective Agreement which had applied to him; and**

e. **Two free TAZARA train passes per annum to which he claimed to have been entitled pursuant to the terms of the Collective Agreement which had applied to him. The free passes were to cover a period of five years.**

For its part, the Defendant reacted to the plaintiff's Amended Statement of Claim by filing an Amended Defence and also mounted its own counter-claim against him.

The Defendant opened its Amended Defence and Counter Claim by admitting that the Plaintiff had, indeed, been its employee between the dates earlier highlighted and that, following his retirement on medical grounds, the Plaintiff was paid his pension benefits in accordance with the terms and conditions under which he had been retired. The Defendant, however, denied that the Plaintiff was underpaid and averred that, in point of fact, he was overpaid. The Defendant went on to admit that the formula which it had employed

in calculating the Plaintiff's pension was flawed in so far as it resulted in the Plaintiff being overpaid.

In denying the Plaintiff's lump sum payment and the other claims which were particularized in the manner we have highlighted above, the Defendant contended, firstly, that the formula which it had used in calculating the Plaintiff's pension benefits was incorrect to the extent that the reducing factor which was prescribed in the applicable Pension Rule was not taken into account during the computation exercise.

Secondly, it was the Defendant's contention that as the Plaintiff had been retired on Medical grounds under Rule 6(a) of the TAZARA Pension Fund Rules, the latter did not qualify for the 24 months lump sum payment as this was reserved for employees who retired in the normal way at the retirement age of 55 years.

The Defendant further averred that the Plaintiff was paid his full pension in accordance with his entitlement and that his claims for a Golden Handshake and two free passes represented complete misapprehensions in that these latter entitlements were only

available to employees who had retired in the ordinary way as opposed to those who retired in the manner the Plaintiff had done.

With regard to his Amended Counter-Claim, the Defendant reiterated that the formula which it had employed in computing the Plaintiff's terminal benefits was wrong and that its error resulted in having the Plaintiff overpaid to the extent of K15,553,665.97.

The Defendant further averred that the Plaintiff having been retired early on medical grounds, the only legitimate pension benefit to which he was entitled was a 100% cash benefit of K40,130,359.03 as had been computed by Zambia State Insurance Corporation (ZSIC) and based on the formula which captured the actual age that the Plaintiff had retired on, namely, 50 years. The Defendant accordingly concluded that the Plaintiff was wrongly paid the sum of K55,684,025.00 in October, 2003 which figure had been computed on the basis of the normal retirement age of 55 years.

The Defendant accordingly Counter-Claimed the following:-

"i) K15,553,665.97.
ii) Interest.
iii) Costs.
iv) Any other relief the court may deem just."

At the hearing of the case, the parties adduced oral evidence which the trial Judge considered and analysed. The parties also filed their respective written submissions for the court's consideration.

In his Judgment dated 25th April, 2014, the learned Judge in the Court below interpreted the relevant provisions of the Rules of the TAZARA Pension Fund or Scheme and the TAZARA Collective Agreement for the Period 1st July, 2003 to 30th June, 2005 and found that the Plaintiff's claims as pleaded and deployed before that court were wholly unmeritorious and proceeded to dismiss them in their entirety. In reaching its conclusion, the trial court reasoned that the pension claim which the Plaintiff founded on the Pension Scheme and its applicable Rules were paid to him but that his search for relief founded on the Collective Agreement earlier referred to had been misconceived as the same was only available to ex-employees of the Defendant who had retired normally.

With regard to the Defendant's Counter-Claim, the learned Judge considered and analysed the computation of the Plaintiff's pension benefits which had been done and communicated by the Defendant to the Plaintiff in the former's letter of 22nd October, 2003.

According to the trial Judge, the computation which the Defendant did revealed that it was premised on the denominator of 55 (being the normal retirement age) and that this approach yielded the sum of K55,684,025.00 which was subsequently paid to the Plaintiff. The Judge reasoned that the computation by the Defendant failed to take into account the actuarial reduction which was prescribed in Rule 6(a) pursuant to which the Plaintiff was retired on medical grounds at the age of 50.

The Court below also considered the plaintiff's pension benefit computation which was done by Zambia State Insurance Corporation (ZSIC), the Managers of the TAZARA Pension Scheme Fund and came to the conclusion that the ZSIC pension calculations were the ones which had been done in accordance with the clause (6(a)) of the TAZARA Pension Scheme Rules pursuant to which the Plaintiff had been retired. The Court noted that the ZSIC computation had correctly yielded the Plaintiff's correct pension benefit of K40,130,359.03 by using the early retirement factor of 0.658 at the Plaintiff's retirement age of 50.

The learned Judge accordingly expressed his agreement with the Defendant's assertion that the Plaintiff had been overpaid by

K15,553,665.97 and that, consequently, the Defendant had proved its Counter-Claim to the requisite standard and was entitled to a refund in the said sum together with interest.

The Judgment of the learned Judge, in the terms described above, so displeased the Plaintiff that he decided to mount the present appeal which is anchored on the following grounds:

"GROUND 1

The court below erred in fact and in law when it interpreted the Trust Deed to mean that early retirement on medical grounds did not entitle a person to be subjected to the retirement rules for normal retirement, when that is what the Trust Deed and other employment laws of Zambia stipulate.

GROUND 2

The court below erred in law and in fact when it held that Rule 5(c) [of the Pension Fund Rules] did not apply to the [Plaintiff] therefore he was not entitled to the full retirement benefits therein, in particular the lump sum, golden handshake and the free passes.

GROUND 3

The Judge below erred in fact and in law when it judged that the Minimum Wages and Conditions of Employment Act was irrelevant in the [Plaintiff's] case as he was under a contract by virtue of his letter of appointment, the Collective Agreement and the Pension Trust Deed.

GROUND 4

The court below erred in law and fact when it relied on unofficial, undated and unsigned calculation sheet and calculations, and held that, based on its interpretation, the [Plaintiff] was overpaid and must refund K15,000.00 with interest as claimed in the counter-claim, which is from the year 2005, to the date of Judgment, 25th April, 2014.

A question should also be asked, why did it take so many years, 14 years to be precise, to interpret this Trust Deed for which the [Plaintiff] must pay or refund the [Defendant] much in excess of all the money he ever earned in the 30 years he worked for the [Defendant]?"

At the hearing of the Appeal, we were informed by Mr. Mando, the learned counsel for the Defendant, that he had been advised by Mrs. Mushota, the learned Counsel for the Plaintiff, that she was indisposed and, consequently, had sought the indulgency of the court to consider adjourning the hearing of the appeal. We, however, declined to accede to Mrs. Mushota's informal and abrupt request which did not even conform to the Rules of this Court which govern adjournments and indicated to the Defendant's counsel that as Mrs. Mushota had already filed her detailed Heads of Argument to buttress the Plaintiff's appeal, we would proceed with the hearing.

In arguing ground one, Mrs. Mushota's written arguments opened by drawing the following provision of the TAZARA Pension Fund Rules which dealt with Early Retirement on account of an employee's failing health:-

"6. EARLY RETIREMENT

a) ON GROUNDS OF HEALTH

A member may retire from the Employer's permanent service at any time before his fifty-fifth birthday if such retirement is on account of any infirmity of body or mind certified as such by a medical doctor approved by the employer, then he shall be entitled to an immediate pension determined on the basis worked out in Rule 5(a) and actuarially reduced according to the number of years before the Normal Retirement Date. The pension shall be payable in accordance with Rule 5(c) substituting the early retirement date for the Normal Retirement Date. The amount of actuarial reduction will be determined by the actuary to the Insurance Corporation and agreed upon with the Employer."

Counsel for the Plaintiff argued that, on the basis of the above Rule, a retirement on medical grounds was, for the purpose of the Pension benefit available to an employee under the TAZARA Pension Fund Rules, treated as normal retirement and that the only difference between the two lay in the fact that when calculating the benefit for an employee who proceeded on early retirement on account of ill health, the formula changed in the sense that reference to normal retirement age in Rule 5(c) of the Pension Fund Rules was replaced with the actual age of the affected ex-employee at which he or she is certified medically unfit, whatever age that might be before the normal retirement age of 55.

Counsel further submitted that the early retirement pension provision in question ended by stating that the actual amount which would be reduced from the Pension benefit of an employee who is retired early on account of poor health would be determined by the actuary to either of the two insurance companies which were designated as the Managers of the TAZARA Pension scheme under the Pension Fund Rules subject to securing the agreement of the employer on the matter.

Counsel for the Plaintiff also criticised the trial Court's refusal to take into account the provisions of the Minimum Wages and Conditions of Employment (General) Order being Statutory Instrument No. 2 of 2002 promulgated pursuant to the Minimum Wages and Conditions of Employment Act, Chapter 276 of the Laws of Zambia and contended that the Statutory Instrument in question had been specifically referred to in the Trust Deed relating to the Pension Fund in question thereby making this law relevant and applicable to any employee who was retired on medical grounds. Counsel accordingly urged us to determine in the Plaintiff's favour on this score and uphold the first ground of appeal.

In support of ground two, Counsel argued, in effect, that the court below erred in law and in fact when it held that Rule 5(c) of the TAZARA Pension Fund Rules did not apply to the Plaintiff and that, consequently, the Plaintiff was not entitled to full benefits, that is, a lump sum, golden handshake and two TAZARA train free passes per annum. Counsel argued that this conclusion by the learned trial Judge constituted a misinterpretation of Rule 5(a) of the same Rules which read as follows:-

> **"A member on his retirement from permanent service of the employer on the normal retirement date shall be entitled to a yearly pension equal to one fifty fifth (1/55th) of the member's final pensionable salary multiplied by his pensionable service or period of membership as the case may be. In addition, the member shall also be entitled to a further pension of such amount as is secured by his and the employer's additional contributions applied towards the purchase of such pension benefits in respect of each such member."**

Learned counsel for the Plaintiff argued, *firstly*, that the Rule which has been reproduced above applied as much to a medical early retiree as it deed to a normal retiree; that the pension formula given in the Rule was 1/55 of a member's final pensionable salary multiplied by the period of membership, and, in the case of a medical retiree, the pension had to be actuarially reduced in accordance with the number of years before the normal retirement date in accordance

with Rule 6(a) of the Rules in question and; that, in the case of the Plaintiff, the relevant number of years was 50.9 years.

Learned counsel accordingly concluded her first argument around the second ground of appeal by submitting that the trial court did not appreciate the approach which we have recounted in the preceding paragraph and that, consequently, fell in error.

In advancing his second argument around Ground Two, Counsel cited Rule 5(c) of the Rules in question which read as follows:-

> **"The pension due to a member shall be paid to him monthly in advance, each monthly payment being equal to one twelfth (1/12th) of the pension and the first payment being made immediately after his normal retirement date. Payment shall be made until and including the monthly payment due immediately prior to the death of a pensioner. Provided, however, that should the pensioner die soon after retirement pension payment shall continue until 120 monthly instalments have been made. Any of such 120 monthly payments falling due after the death of the pensioner shall be paid to his dependants."**

Counsel argued that the Plaintiff was not paid according to the above Rule 5 (c).

Counsel further submitted that, during the trial in the court below, DW2, one of the Defendant's witnesses, had testified in cross examination that he did not know whether the plaintiff had been paid

and also conceded in re-examination by his own Counsel that the Plaintiff was disadvantaged by the Defendant in that it had not been remitting both its own share of the pension contributions as well as that of the Plaintiff as employee to ZSIC as the Fund Manager since 1995. As a result of this default on the part of the Defendant, ZSIC refused to honour the Plaintiff's Pension in accordance with the Pension Rules in question and directed the Plaintiff back to the Defendant.

Counsel concluded her arguments around Ground two by submitting that the trial court seriously erred when it failed to correctly interpret the meaning and effect of the provisions of the Trust Deed as well as the Pension Fund Rules in question and urged us to uphold ground two.

In arguing ground three, counsel submitted that the Trust Deed which had established the Pension Fund and the Pension Scheme in question provided for compliance with the **Income Tax Act, Chapter 323 of the Laws of Zambia** and the **Employment Act** and that laws such as these are necessary for the approval or continued approval of the Deed in question. It was Counsel's contention that the

interpretation which the court below had placed on the Pension Rules which were at play in that court was a strange one, adding that all private employers are required to comply with the employment and tax laws of the country even if they have their own terms and conditions of employment. Counsel proceeded to make specific reference to Rule 1 of the Trust Deed relating to the Pension Fund in question which, in Rule 1, defined **'Income Tax Act' as the income tax legislation for the time being in force in Tanzania and Zambia (as the case may be) or any statutory modification or re-enactment thereof for the time being in force."**

Learned Counsel further argued that, for its part, Statutory Instrument No. 2 of 2002 promulgated pursuant to the Minimum Wages and Conditions of Employment Act, Chapter 276 of the Laws of Zambia specifies, in its application clause, persons to whom it must apply, but that there was no bar which prevents parties to extend its application to parties to any contract. Counsel further contended that the TAZARA Pension Trust Deed in question, so far as it applies to Zambia, "...*extended compliance with the employment and labour laws of Zambia*". Counsel argued that this represented

simple contract law, adding that it was what the Rules in question provided.

Accordingly, it was Mrs. Mushota's argument that the learned trial Judge totally misinterpreted the Trust Deed Rules in question and, in consequence, deprived the Plaintiff of his rightful entitlement to a lump sum, free passes on TAZARA trains and a golden handshake under the Trust Deed and the Collective Agreement which had applied to his employment contract. Counsel invited us to uphold this ground.

With respect to the fourth and final ground of appeal, Mrs. Mushota contended that the court below erred in law and in fact when it held, on the basis of what she described as unofficial, unauthenticated and undated documents and drafts which had been availed by the Defendant and which were full of errors and cancellations and on its own interpretation, that the Plaintiff was overpaid by K15,553,665.97 and must refund this amount together with interest at the average bank deposit rate as determined by the Bank of Zambia with effect from 14th September, 2005. According to counsel for the Plaintiff, it was, in fact, the Plaintiff who had been

underpaid by K4,485.35 as had been claimed in the Amended Writ of Summons and Statement of Claim.

Counsel drew our attention to one of the draft documents which had been challenged by the Plaintiff in the Record of Appeal which showed the formula used as being:-

" **RICHARD M. MULEYA**

REDUCED PENSION

Annual salary x 12 x years contributed to the Scheme x factor

Age at the time of separation

Therefore:- K831.168 x 12 x 2 years 83 x 11.807 x Reducing factors

50.17

: **K58,481,208.55 x 0.658**
= K38,480,635.22

55,684,025.00
- 38,480,635.22

17,203,389.78 "

It was the Plaintiff's Counsel's submission that the documents which had been produced by the Defendant such as the one which has been described above should not have been relied upon by the learned trial Judge given that even the formula which was used was unexplained and had unexplained figures.

Counsel further submitted that both witnesses of the Defendant had not only contradicted each other as between themselves but in relation to the documents on Record, and that, consequently, they should not have been believed by the trial court.

Learned Counsel for the Plaintiff closed her arguments by posing the question as to why it took 14 years to have the Trust Deed in question interpreted if the Defendant knew that the Plaintiff was liable to refund the Defendant so much money by way of the excess over what the Plaintiff received as his pension which he had earned in the 30 years that he worked for the Defendant.

Counsel for the Plaintiff accordingly prayed that we allow this appeal with costs both below and in this Court.

For his part, Mr. Mando, the learned Counsel for the Defendant sought and was granted leave to file the Defendant's Heads of Argument into Court out of time on the same day, that is, 6th December, 2016, that the appeal came up for hearing. Following the successful filing of the Defendant's Heads of Argument, Mr. Mando confirmed that he was entirely relying on the same to buttress the position which the Defendant had adopted in the appeal.

Mr. Mando opened his Heads of argument by drawing our attention to a passage in ***Chitty on Contracts*, Volume 1 28th edition paragraph 12** which states that the starting point in construing a contract is that words are to be given their ordinary and natural meaning. That this meaning is not necessarily the dictionary meaning of the word, but that in which it is generally understood. According to the editors of that practitioners' text, courts assume that the parties have used language in the way that reasonable persons ordinarily do. So terms are:

> **"...to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense."**

Counsel went on to cite our judgment in the case of **Samuel Miyanda vs. Raymond Handahu**[1] in which we held that when the language employed is plain and there is nothing to suggest that any words are used in a technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into a document terms or anything else on the

grounds of policy, expediency, justice or political exigency, motive of the framers and the like.

Counsel further called our attention to a passage in the judgment of the then Industrial Relations Court in the case of **Violet Kansenge Bwalya and Others vs. ZAMTEL**[2] in which that Court adopted a passage from *Chitty on Contracts*, vol.1, 24th edition which was to the effect that if the provisions in a document are clearly expressed and there is nothing to warrant the court to put on them a construction different from that which the words import, the actual words used must prevail. Counsel went on to cite another passage from our judgment in the case of **Indo Zambia Bank Limited vs. Mushaukwa Muhanga**[3] which dealt with interpretation of conditions of service.

On the basis of the inspiration which counsel for the Defendant had drawn from the sources which he made reference to as we have recounted them above, he made the general submission that the provisions of the Collective Agreement and the Pension Trust Deed which were at play in the trial court are conclusive on the issues before this Court.

Counsel then went on to make his second general submission which was to the effect that the case the judgment of which is now being assailed in this court was decided on the basis of the documentary evidence before the lower court. According to counsel, a perusal of the Grounds of Appeal which had been advanced in this appeal revealed that, save for Ground three, the whole appeal was attacking findings of fact. Counsel accordingly invited us to dismiss grounds "one to three" on that basis alone.

In opposing ground one, Counsel argued that the relevant clause under which the Plaintiff had proceeded on retirement was clause 6(a) and that a critical perusal of the said clause showed that it provided for two things that related to the computation of pension benefit due namely, that the package was to be determined on the basis worked out in Rule 5(a) and (b) (sic.) and that the package should be paid in accordance with Rule 5(c). According to counsel, clause 5(a) provided the formula to be used while clause 5(c) provided for the mode of payment. Counsel further submitted that it was wrong for counsel for the Plaintiff to suggest that the Plaintiff was supposed to be treated as if he had proceeded on normal retirement.

Counsel accordingly concluded that the lower court was on firm ground.

In opposing ground two, Counsel for the Defendant drew our attention to page 25, lines 8 to 24 of the Record of Appeal which reads as follows:-

> **"The TAZARA Collective Agreement earlier alluded to appears on page 39 of the Plaintiff's Bundle of Documents and runs up to page 87.**
>
> **I note that under the Definitions, the interpretation and understanding of retirement is not provided for. However, under clause 22.1 of the agreement, this is what it states:-**
>
> **22.1 <u>RETIREMENT AGE</u>**
> **Retirement age for all permanent employees shall be as provided under the Rules of the Pension Scheme of the Authority, which is fifty-five (55) years of age provided further that either party shall give six (6) months' notice of intention to retire.**
>
> **The import of that clause is that only normal retirement at the age of 55 years is catered for under the agreement and not any other retirement such as early retirement, regardless of how unfair or discriminatory that sounds. In that respect, I agree with the evidence of DW1 that clause 15.4 and 23.5 relating to a golden handshake and free passes does not apply to employees who retire on early retirement such as the Plaintiff.**
>
> **Therefore, the practice attaining of not giving entitlement to a golden handshake and free passes for those who leave employment on early retirement is in order."**

Counsel contended that, it was clear from the foregoing that terminal employment benefits of the nature of a golden handshake and free passes on TAZARA trains were covered in clause 22.1 of the TAZARA Collective Agreement and not as had been alleged under this

ground of appeal. Counsel also reiterated the Defendant's position in relation to Ground One above and contended that there was nowhere in the Plaintiff's conditions of service where it was provided that he was to be treated as if he had proceeded on normal retirement. Counsel concluded his arguments around Ground Two by submitting that it completely lacked merit.

In opposing Ground Three Counsel submitted that the **Minimum Wages and Conditions of Employment Act** cited by the Appellant under Section 2 provides that:-

> **"2. This order shall apply to all employees except employees-**
>
> **(a) of the Government of the Republic of Zambia;**
> **(b) engaged in domestic service;**
> **(c) of district councils; and**
> **(d) in occupations where wages and conditions of employment are regulated through the process of collective bargaining under the Industrial and Labour Relations Act."**

On the basis of the above provision, Counsel for the Defendant contended that the **Minimum Wages and Conditions of Employment Act** was not only irrelevant but inapplicable to the Plaintiff's circumstances.

In opposing Ground Four, Counsel for the Defendant relied on the testimony of DW2, the Defendant's second witness, who, in his

testimony during trial, (p.203, lines 1 to 20 of the Record) had demonstrated that the Plaintiff was only entitled to ZMW40,130,359.03 as his total pension and had explained thus:-

> **"Putting those factors together the annual salary + Pension factor on accrual factor we get what is known as pension payable at the normal retirement date (NRD) which is at age 55.**
>
> **Now Mr. Munyati did not attain 55 at the time of discharge. Therefore the pension payable at 55 has to be reduced to the age at which he was medically discharged showing the actuarial factors that had been agreed with the consulting actuarial under the scheme, the employer and the fund manager which at age 50 is 0.658.**
>
> **So the accrued pension at 55 was reduced to K3,102,463.01 the actuarial factor 0.658 which gives the reduced pension at age 50 and based on this reduced pension 100% cash lump sum was arrived at amounting to K40,130,351.03.**
>
> **Based on these computations we advised the employer the 100% cash value of the Plaintiff's pension entitlement."**

Counsel also referred us to the testimony of DW1, the Defendant's first witness, who had testified as follows (p.193, lines 14-17):-

> **"There was no underpayment made to Mr. Muleya because in the formula that we used to pay him there is no actual reducing factor and the factor we used is 55. In fact, we later on discovered that we had overpaid by ZMW15,500,000.00.**

Counsel further submitted that the initial computation of the Plaintiff's pension by the Defendant had not taken into account the actuarial reduction which Rule 6(a) of the Pension Rules prescribed thereby resulting in having the Plaintiff paid the sum of

K55,684,025.00. Counsel further argued that when the Plaintiff's Pension claim was subsequently forwarded to ZSIC, the Fund Managers, who, in computing the Plaintiff's pension entitlement factored in the actuarial reduction, and reached the conclusion that only K40,130,351.03 was due to the Plaintiff. Counsel accordingly submitted that the net effect of the computation exercises by the Defendant and the Fund Manager was that the Plaintiff was overpaid by ZMW15,553,665.97 which the lower court ordered to be refunded to the Defendant together with interest.

The Defendant's counsel accordingly concluded that this appeal lacks merit and prayed that we dismiss it with costs.

We are indebted to both counsel for the parties to this appeal for their able and sustained arguments and can confirm that we have given anxious consideration to their arguments as well as the authorities which they relied upon and have taken them into account in this judgment.

Before we proceed to consider, *seriatim*, the grounds of appeal around which the contest between the Plaintiff and the Defendant was waged before us, we wish to observe, upfront, that the dispute

which has now been escalated to this court revolved around the construction of two Rules of the TAZARA Pension Trust Fund.

Consistent with the observation we have just made above and, in the context of the first ground of appeal, we propose to begin by quoting, yet again (for reasons of emphasis) the first rule which was the subject of intense interrogation in the court below, namely, Rule 6(a) of the Tanzania Zambia Railway Authority (TAZARA) Pension Fund Rules which governed early retirement of a member of the TAZARA Pension and Life Assurance Scheme on medical grounds and which Rule was couched in the following words:

> **"6. EARLY RETIREMENT**
>
> **a) ON GROUNDS OF HEALTH**
>
> **A member may retire from the Employer's permanent service at any time before his fifty-fifth birthday if such retirement is on account of any infirmity of body or mind certified as such by a medical doctor approved by the employer, then he shall be entitled to an immediate pension determined on the basis worked out in Rule 5(a) and actuarially reduced according to the number of years before the Normal Retirement Date. The pension shall be payable in accordance with Rule 5(c) substituting the early retirement date for the Normal Retirement Date. The amount of actuarial reduction will be determined by the actuary to the Insurance Corporation and agreed upon with the Employer."**

In our estimation and, based on the authorities relating to the rules and principles which govern the construction of documents which were cited to us by counsel for the Defendant, the meaning of the above Rule is as perspicuous as it can possibly be. The Rule meant that the pension benefit of an employee who was retired early on medical grounds had to be determined on the basis worked out in Rule 5 (a) which provided that:

> **"A member on his retirement from permanent service of the employer on the normal retirement date shall be entitled to a yearly pension equal to one fifty fifth (1/55th) of the member's final pensionable salary multiplied by his pensionable service or period of membership as the case may be. In addition, the member shall also be entitled to a further pension of such amount as is secured by his and the employer's additional contributions applied towards the purchase of such pension benefits in respect of each such member."**

It is evident from the wording of the early retirement formula on account of poor health which is defined in Rule 6(a) that it links Rule 5(a) to Rule 5(c) which is couched in the following terms:

> **"The pension due to a member shall be paid to him monthly in advance, each monthly payment being equal to one twelfth (1/12th) of the pension and the first payment being made immediately after his Normal Retirement Date. Payment shall be made until and including the monthly payment due immediately prior to the death of a pensioner. Provided however that should the pensioner die soon after retirement pension payments shall continue until 120 monthly instalments have been made. Any of such 120 monthly payments falling due after the death of the pensioner shall be paid to his dependants."**

According to the early retirement formula which applied to the plaintiff, the wording of Rule 5(c), so far as its application was extended to early retirement on medical grounds, had to be modified by the substitution of the words 'Normal Retirement Date' which occur therein with the words 'Early Retirement Date.'

In our considered view, the effect of linking both the manner of working out as well as the mode of disbursing the pension benefits for those of the Pension Scheme members who proceeded on early retirement on account of infirmity of body or mind to those who proceeded on normal retirement was that a shared approach emerged which was enjoyed by the two categories of the pension scheme members, that is to say, those who retired normally and those who had to be retired early on account of ill health.

In our view, the only areas of difference between our suggested shared approach was that the normal retirement factor which was employed in relation to the normal retirement pension computation pursuant to Rule 5(a) had to be reduced so as to reflect the member's actual age, the same not being the normal retirement age of 55.

Although we have taken time to discuss our understanding of the 'pension benefit' relationship between normal retirement and early retirement so far as these were affected by Rule 5 of the TAZARA Pension Fund Rules, the kernel of the Plaintiff's complaint, so far as it is embedded within Ground One is the trial Court's refusal to have the plaintiff benefit from Rule 5(d) of the Rules in question. This Rule deals with a lump sum pension benefit payment and falls under normal retirement as generally used under the Rules. The Rule states that:

> **"*In addition* *to* the pension payable under Rule 5(c) the member shall on retirement be paid a lump sum equivalent to twice the annual salary drawn by him at the time of retirement** (emphasis added)."

Although the plaintiff's Counsel's written Heads of Argument around Ground One were quite lackadaisical or, perhaps, lukewarm, the trial Court was quite categorical when it discounted the plaintiff's entitlement to enjoy the pension benefit which Rule 5(d) created.

In the view that we have taken and, having regard to our earlier exertions around Rule 6(a) and the connection or relationship which we see this Rule (that is,6(a)) as creating between itself and sub-rules 'a' and 'b' of Rule 5, we cannot possibly buy the argument, or

suggestion, that the ***additional*** benefit which Rule 5(d) created should not be read or understood *ejusdem generis* with those in Rule 5(a) and (b). A question may indeed be asked: if the pension benefit conferred by Rule 5(a) was, by the very words used in this sub-rule, expressed to be ***additional*** *"to the pension payable under Rule 5(c)"*, why should someone who was a beneficiary under the Rule 5(a) (b) pension such as one who retires early on medical grounds pursuant to Rule 6(a) not benefit from the additional pension benefit created and automatically conferred by Rule 5(d)?

In truth, we are inclined to accept that the pension benefit which Rule 5 (d) created or conferred was as available to a normal retiree pursuant to Rule 5 as it was to an early retiree under Rule 6. Consequently, and to the extent that Ground One encompassed the lump sum pension claim conferred by Rule 5(d) of the TAZARA Pension Fund Rules, we uphold the same. Accordingly, to the extent that the lower Court reasoned otherwise, it erred.

Another argument which Mrs. Mushota, the learned Counsel for the plaintiff advanced, perhaps faintly and, rather unconvincingly, was that the Court below erred when it rejected her contention that

"...other employment laws of Zambia...." such as the Statutory Instrument on Minimum Wages Act 2002 (*Presumably Counsel here had in mind the Minimum Wages and Conditions of Employment (General) Order of 2002 which the Minister responsible for Labour had promulgated pursuant to Section 3 of the Minimum Wages and Conditions of Employment Act, CAP. 276 of the Laws of Zambia)* could be used in computing terminal benefits for a retiree who proceeds on early retirement on account of ill health similar to one who retires normally.

As we have hinted above, Mrs. Mushota could not have hoped to persuade us with an argument which she herself failed to sustain. Accordingly, we are unable to disturb the sound view which was expressed by the Court below to the effect that Counsel's sweeping reference to and reliance upon the employment laws of Zambia was totally misapprehended given the specific terms and conditions under which the plaintiff had been employed and subsequently retired. For the removal of any doubt, Mr. Mando, learned counsel for the Defendant was spot-on when he submitted that Rule 2 of the Statutory Instrument which Mrs. Mushota was trying to rely on

totally discounted Mrs. Mushota's proposition. For completeness, Rule 2 provided as follows:

> **"2. This order shall apply to all employees except employees-**
>
> **(a) of the Government of the Republic of Zambia;**
> **(b) engaged in domestic service;**
> **(c) of district councils; and**
> **(d) in occupations where wages and conditions of employment are regulated through the process of collective bargaining under the Industrial and Labour Relations Act."**

Needless to say, the Plaintiff was a unionised employee and the cited Rule expressly excluded him from benefitting from that law.

With regard to Ground Two, we consider that this is inextricably linked to the 1st ground of appeal to the extent that it purports to revolve around Rule 5(c) of the TAZARA Pension Fund Rules and its applicability to the plaintiff. Accordingly, we repeat our reflections in Ground One to the extent that they touch upon this Ground.

However, to the extent that this Ground makes reference to the plaintiff's entitlement to benefit from a golden Handshake and two free passes on the TAZARA train per annum, we have no difficulty in expressing our total agreement with the conclusion of the Court below that, in terms of clause 22.1 of the TAZARA Collective

Agreement which was in force at the time of the plaintiff's early retirement, only employees who had retired normally could benefit from those benefits.

Indeed, unlike the respite which was available to the plaintiff pursuant to the Pension Fund Rules even as he had not retired normally, the TAZARA Collective Agreement left no room for those who did not attain the prescribed retirement age for the purpose of benefitting from the benefits which we have earlier referred to.

Accordingly, Ground Two fails.

As to Ground Three, we find this Ground to be linked to the first two grounds which we have considered above. For the reasons which we have given in the context of those earlier grounds, we would dismiss this ground as well.

Before we leave Ground Three and proceed to the fourth and final ground, we wish to observe that, in arguing Ground Three, Counsel for the plaintiff suggested that although The Minimum Wages and Conditions of Employment (Act) Statutory Instrument No. 2 of 2002 being the General Order which had been promulgated by

the Minister in Charge of Labour specified the categories of employees to whom it applied, *"...there is no bar which, by contract, prevents parties to extend its application to the parties to the contract..."*

Our short reaction to Mrs. Mushota's argument is that if a statute or a Statutory Instrument promulgated pursuant to a statute specifies the persons or category of persons to whom it can apply and such statute or Statutory Instrument leaves no doubt as to the specific persons or category of persons that it applies to, it would be plainly disingenuous and, crucially, unlawful for any busy body to seek to secure or purport to secure its application to them even under the guise of a contractual term.

As to the 4th and last ground of appeal, we consider, yet again, that the issues which are raised in this Ground have been the subject of our earlier reflections in this Judgment. Perhaps we should take this opportunity to clarify one issue around the relationship between the mode of retirement which had applied to the plaintiff, that is, early retirement on medical grounds and the extension, via Rule 6(a), of 'normal retirement' benefits to him.

Let there be no confusion or doubt that although Rule 6(a) had extended the Rule 5 pension benefits which were otherwise or ordinarily available only to normal retirees, to the plaintiff as an early medical retiree, the fact that the plaintiff had not attained 55 years meant that, in terms of the same Rule (i.e,6(a)) his (that is, the Plaintiff's) actual pension had to be reduced by taking into account the age (being 50) at which the plaintiff was medically discharged.

And, quite contrary to the conclusion which Counsel for the plaintiff reached, the evidence of DW1 and DW2 touching upon the over-payment to the plaintiff by the Defendant was not assailed so as to discount the Defendant's counter-claim as pronounced upon in the Court below.

In all seriousness, we have no reason to disturb the solid and sound conclusion which the trial Judge reached with regard to the Defendant's entitlement to the over-payment which the plaintiff received. The fourth ground fails. This means that the Respondent's counter-claim remains unimpeached.

The net effect is that the appeal has substantially failed as only ground one has partially succeeded.

Having regard to the overall outcome of this appeal, we order that each party should bear their own costs.

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I.C. MAMBILIMA
CHIEF JUSTICE

.....

R.M.C. KAOMA
SUPREME COURT JUDGE

.....

M. MUSONDA, SC
SUPREME COURT JUDGE