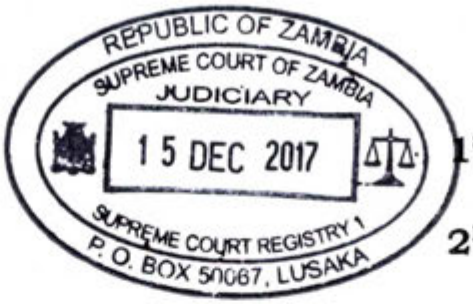
THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

Appeal No.179/2017



BETWEEN:

RAPHAEL MWALE **1ST APPELLANT**

RUTH PHIRI **2ND APPELLANT**

AND

BP ZAMBIA PLC **RESPONDENT**

CORAM: Mambilima, CJ, Kaoma and Kajimanga JJS
On 5th September and 12th December 2017

For the Appellants: In person by Raphael Mwale

For the Respondent: Mr. N. Ng'andu, Messrs Shamwana and Company

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J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. **Expendito Chipalo and Others v BP Zambia Plc 2002/HP/688**
2. **Unyimbi Musuluko and 4 Others v. Kariba North Bank, Appeal No.58 of 1999**

3. **BP Zambia Plc v Yuyi Lishomwa, Gondwe Hastings O'brien and Singumbe Keith Mutupo, Appeal No. 72/2007**
4. **Re Athlumney [1898] 2 QB 547**
5. **Celtel Zambia Limited (T/A Zain Zambia) v Zambia Revenue Authority (2011) Z. R. Vol. 2 11**
6. **Abel Banda v The People (1986) Z. R. 105**
7. **Nkhata and Others v Attorney General (1966) Z. R. 124**

Legislation referred to:

1. **Pension Scheme Regulations Act, No. 28 of 1996**
2. **Pension Scheme Regulations Act (Commencement) Order, 1997, Statutory Instrument No. 27 of 1997**

Other Work referred to:

Halsbury's Laws of England, 4th Edition Volume 44 paragraph 922, page 570.

This is an appeal against the decision of the learned Deputy Registrar of the High Court on an application for assessment.

For a better understanding of this appeal, it is necessary that we should trace its history. The events leading to this appeal are that sometime in 1993, the appellants issued a writ of summons against the respondent claiming, among other things, a refund of their pension contributions following the termination of their services by the respondent. On 25th November 1997, the High Court delivered a

judgment in favour of the respondent and the appellants appealed to this Court under Appeal No. 16 of 1999. By its judgment dated 30th September 1999, this Court allowed the appeal and ordered that the appellants were entitled to a refund of their pension contributions with interest. The pension contributions due to the appellants were then assessed before the Deputy Registrar who, in a ruling dated 15th May 2002, awarded the appellants the total sum of K1,309,687.30 (K1,309.68) of which the 1st appellant was entitled to K475,463.71 (K475.46) and the 2nd appellant was entitled to K834,225.90 (K834.22). The learned Deputy Registrar found that out of this amount, the respondent had paid the sum of K1,046,955 (K1,046.95) into court, leaving a balance of K262,734.30 (K262.73).

Dissatisfied with this ruling, the appellants appealed to this Court under Appeal No.109A of 2002. In its judgment delivered on 17th November 2004, this Court upheld the learned Deputy Registrar's awards by stating that the appellants' pension contributions were correctly found by the Deputy Registrar on the evidence before him and that the formula on which the appellants based their claim was for one who had reached normal pension date which was contrary to the pension rules. The appellants then issued

a Notice of Motion pursuant to Rule 78 of the Supreme Court Rules Chapter 25 of the Laws of Zambia, generally referred to as the slip rule, in which they requested this Court to correct some mistakes and accidental omissions in the judgment of 17th November 2004. In a ruling delivered on 11th May 2012, this Court re-affirmed its decision in the judgment rendered on 17th November 2004, but added that under the pension rules the employer's contributions become part of a member's contributions and, therefore, the employer's contributions should be paid to the appellants.

Following this ruling, the appellants took out a summons for assessment. The appellants' affidavit evidence in support of the application disclosed that the respondent had failed to pay the appellants their pension contributions as awarded to them in the Supreme Court judgment of 30th September 1999 and that as at 30th January 2015, the respondent's liability towards the appellants stood at a total sum of K6,735,281.00 (K6,735.28) consisting of K3,558,809.00 (K3,558.80) for the 1st appellant and K3,176,472.00 (K3,176.47) for the 2nd appellant. A computation showing how these figures were arrived at was exhibited in the affidavit and appears at pages 21 - 23 and 26 of the record of appeal.

In response, the respondent filed an affidavit in opposition in which it was asserted that on 14th August 2003, it made a further payment into court in the sum of K2,305,629.51 (K2,305.62) and K3,011,390.80 (K3,011.39) for the 1st and 2nd appellants respectively in the case of **Expendito Chipalo and Others v. BP (Zambia) Plc[1].** In support thereof, the respondent exhibited a letter and payment summaries appearing at pages 53 and 54 of the record of appeal. The affidavit in opposition further disclosed that the respondent's calculations, appearing at pages 55 - 71 of the record of appeal under exhibits "MMM3" and "MMM4", revealed that as at 30th June 2015, the 1st appellant was being owed the sum of K3,190.81 and the 2nd appellant the sum of K4,666.20.

At the hearing of the application for assessment, the 1st appellant testified that the formula applied in the computation of the sums being claimed by the appellants was provided by the fund manager, Zambia State Insurance Corporation. He admitted, however, that this formula was based on rule 11 (ii) of the respondent's pension rules despite the appellants not having reached pensionable age. According to the 1st appellant, the respondent had

not paid him his pension contributions at the time he separated with the respondent and as such, the pension continued to accrue and the respondent was supposed to continue paying the appellants' contributions. He stated that under rule 11 (ii) of the pension rules, where one is not paid upon separation, they wait until they are pensionable at which time the formula provided by the fund manager is applied.

Mulenga Mpundu Malata, the respondent's human resource manager testified on behalf of the respondent company. Her evidence was that the appellants were paid their pension contributions after their retrenchment from the respondent company but they did not receive the employer's contribution.

The respondent's other witness was Collina Beene Halwampa, a pension administrator and consultant of Benefits Consulting Services, who was the administrator of the pension scheme under which the matter was being considered. It was her testimony that the calculations appearing on pages 55 - 62 of the record of appeal were made by her on the basis of the record cards maintained by the previous pension administrator, Zambia State Insurance Corporation

and the Supreme Court ruling dated 11th May 2012 which stated that the appellants as members of the pension fund were entitled to a refund of both employee and employer contributions. She stated that the Supreme Court ruling was in line with rule 11 (i) of the pension rules and that under this rule, no formula is applied to the refund of contributions.

Upon considering the evidence of the parties, the learned Deputy Registrar found that in the application for assessment, the appellants ought to have confined themselves to the refund of the employer's pension contributions as the determination of the employees' contribution was *res judicata*, following the Supreme Court judgment delivered on 17th November 2004 which upheld the then Deputy Registrar's ruling adjudging the 1st and 2nd appellants' contributions to be in the sums of K475.46 and K834.23 respectively, bringing the total amount to K1,309.69.

He also found that the appellants had not adduced evidence to show the employer's pension contributions and instead proceeded to calculate the refund of pension contributions as if they had attained pensionable age under rule 11 (ii) of the pension rules when in fact

the Supreme Court had rejected this approach and in their pleading in the court below, the appellants restricted their claim to a refund of pension contributions as guided by rule 11 (i). The learned Deputy Registrar, therefore, concluded that the claim in the sum of K1,905.88 for the 1st appellant and K2,135.28 for the 2nd appellant arrived at by using the normal pension date formula of final salary × pension service divided by pension factor, was untenable as the same was only applicable to those that had attained the pensionable age of 55 years at the time of termination of employment.

He further found that the approach taken by the respondent in calculating the figures for the refund of the employer's pension contributions due to the appellants provided the true and correct position of the appellants' entitlement. Further, that exhibit "MMM3" in the respondent's affidavit in opposition clearly showed that at the time of separation, the 1st appellant's contributions in terms of pension was K159,029.76 (K159.03) and the employer's contribution was K318,059.53 (K318.06), making a total of K477,089.29 (K477.09) to which interest at 4% per annum was added in line with rule 11 (i) of the pension rules, bringing the employee's and employer's total contributions to K1,754,268.72 (K1,754.27). And

that in the case of the 2nd appellant, exhibit "MMM4" showed that her pension contribution was K209,088.59 (K209.09) and the employer's contribution was K418,177.18 (K418.18), making a total of K627,265.77 (K627.27). Adding interest at 4%, the grand total came to K2,605,948.25 (K2,605.95).

The learned Deputy Registrar found that in view of the assessment being limited to the employer's pension contributions, the employer's contribution in respect of the 1st appellant at the time of separation of employment on 31st September 1993 was K318,059.53 (K318.06) plus 4% interest per annum for a period of nine years, the total was K432,560.96 (K432.56). In respect of the 2nd appellant, he found that the employer's pension contribution at the time of separation on 31st March 1993 was K418,177.18 (K418.17) plus interest of 4% per annum for a period of twenty years, the total came to K752,670.92 (K752.67).

Regarding the respondent's purported payment into court under the case of **Expendito Chipalo and Others v. BP Zambia Plc**[1], the learned Deputy Registrar found that there was no evidence on record to show any such payment by the respondent covering the

employer's pension contributions. That therefore, the same remained unsettled and the adjudged interest rates were applicable. He accordingly awarded the 1st appellant the sum of K432.56 and the 2nd appellant the sum of K752.67 respectively, being the refund of the employer's pension contributions. He ordered that these amounts would accrue interest at 40% per annum from the date of separation to the date of the said ruling and thereafter, at 25% per annum until final payment.

Dissatisfied with this decision, the appellants have now appealed to this court on the following three grounds:

1. **That the Deputy Registrar erred in fact and law by veering off the law as set [out] in the Supreme Court Judgment [in cause] No.109A of 2002 delivered on 30th April 2012.**

2. **That the Deputy Registrar erred in fact and law by ignoring the Pension Scheme Regulations, Act No. 28 of 1996.**

3. **That the Deputy Registrar erred in fact and law by relying on false evidence and witnesses of questionable demeanour.**

Both parties filed written heads of argument. In support of ground one, the appellants referred us to the Supreme Court

ruling dated 14th May 2012, particularly at page 14 lines 1 - 6 of the record of appeal, where it was stated as follows:

> **"But perhaps we may agree that under the Pension Rules, each member has his own account to which his and employers contributions are credited and these sums become his, and at normal pension date these amounts are his and make him qualify to the pension on the formula provided by the Pension Manager."**

The appellants also referred us to the pension rules on pages 35 - 46 of the record of appeal and the calculations made by the 1st appellant appearing on pages 22 - 23 which were based on the formula provided by the fund managers. It was submitted that the learned Deputy Registrar disregarded these calculations despite that they were based on the ruling of the Supreme Court.

The appellants contended that the learned Deputy Registrar's assessment was restricted to the Supreme Court ruling aforesaid and that he ought not to have referred to the High Court ruling dated 15th May 2002 and the Supreme Court judgment of 17th November 2004 as the decisions thereunder were incorrect. To support this argument, they cited the case of **Unyimbi Musuluko and Others v.**

Kariba North Bank[2], where it was stated that:

> **"In sum we hold and advise that the ruling of the court below was erroneous in holding that the first respondent could and did lawfully terminate employment upon notice under the clause cited when the employers could only give six months notice to any employee due to retirement, that is to say ripe for retirement."**

In support of ground two, the appellants submitted that while the assessment proceedings in the present case were before the court below, an assessment was also being conducted by another Deputy Registrar in the **Expendito Chipala and Others v BP Zambia Plc**[1] case involving the same respondent. We were referred to two pages of the ruling in that case (J20 – J21) appearing on pages 100 - 101 of the record of appeal. The appellants submitted that unlike the present case, the decision by the Deputy Registrar in that matter was proper and since that ruling was delivered earlier, the principle of *stare decisis* must be applied.

In support of ground three, the appellants argued that the figures which the respondent relied on in the evidence adduced by them at assessment were concocted. The appellants referred us to the payslip on page 8 of the record of appeal showing a pension

deduction of K14,693.50 (K14.69) at line 12. According to the appellants, when this monthly deduction is multiplied by 12 months you arrive at the figure of K176,332.00 (K176.32). It was submitted that the respondent was contributing 20% of the salary and in one year it contributed K176,322.00 (K176.32) × 120% amounting to K211,586.40 (K211.58). That therefore, the court's assessment of the employer's contribution for the 1st appellant after 9 years of service being K435.00 [K432.56] was totally fabricated.

In response to ground one, the learned counsel for the respondent submitted that the dispute between the parties was for a refund of pension contributions. He referred us to pages R4 – R5 of the 2012 Supreme Court Ruling (pages 12 - 13 of the record of appeal), where a history of the case was traced as follows:

> **"This matter can be easily understood if we go to the origins of the case and this we do bearing in mind what has been submitted to us in this motion. The original case for the Appellants was for the refund of their pension contribution after their services were terminated by the respondent on some terms. The trial Judge held that the Appellants were entitled to their pension contributions. On appeal to the Supreme Court, by its Judgment of 30th September, 1999, the Supreme Court ruled that the Appellants gave evidence of what they contributed to the pension and there was also evidence**

from the Respondent. The Deputy Registrar awarded the sums which the Appellants disputed in their appeal to this Court.

In our Judgment, which is the subject of this motion, we upheld the Deputy Registrar's awards, commenting that their pension contribution was correctly found by the Deputy Registrar on the evidence before him and we particularly referred to Rule 11 of the Pension Rules and that the formula used by the Appellants was one for someone who had reached normal pension date."

We were further referred to pages R5 - R6 of the 2012 Supreme Court Ruling (pages 13 - 14 of the record of the appeal), where it was stated that:

"We have seriously considered the motion and the submissions. We still do not fault the calculations by the Deputy Registrar. The Appellants did not give any evidence to show that they contributed more than what the evidence showed. But perhaps, we may agree that under the Pension Rules, each member has his own account to which his and the employer's contributions are credited and these sums become his, and at normal pension date these amounts are his and make him qualify to the pension on the formula provided by the Pension Managers.

We are fortified in this argument because under Rule 19 no contributions or premium revert or become the employer's property. So the employer's contributions become a member's contribution and these should be paid to the Appellants as their contributions. To this extent only that the employer's contributions on leaving the

fund become member's contributions as they are in his account, our judgment is clarified. The rest of our Judgment stands."

The learned counsel submitted that the import of the 2012 Supreme Court Ruling is that pension contributions are not limited solely to member contributions but also include employer contributions, which the appellants were entitled to as the first assessment was restricted to member contributions only. He argued that this was the position taken by this Court in its Ruling delivered on 23rd October 2012 in the case of **BP Zambia Plc v Yuyi Lishomwa, Gondwe Hastings O'brien and Singumbe Keith Mutupo**[3] where, in referring to the 2012 Supreme Court Ruling, it was stated as follows:

"We are alive to our decision in the Raphael Mwale and Ruth Phiri case which has been heavily relied on by the respondents. Basically, we are being invited to determine this case in the same manner as we did in the Raphael Mwale and Ruth Phiri case where we held that the appellants in that case were entitled to their contributions which included the employer's contribution."

Counsel referred us to the Ruling of the Deputy Registrar in the court below, the subject of this appeal, where he stated at page 95 line 1 of the record of appeal as follows:

"Having carefully considered the evidence adduced, and the written

submissions made thereof, I now state my determination of the dispute. The judgment of the Supreme Court delivered on 17th November 2004, and the ruling of the Supreme Court herein delivered on 30th April 2012, incisively define the purview of the plaintiffs' entitlement in terms of refund of pension contributions as pleaded and accordingly adjudged. Therefore, the assessment of refund of pension contributions should be confined to the provisions of Rule 11 (i) of the Pension Rules. What emerges from the decisions of the Supreme Court is that the refund of pension contributions comprises two sources of funds; (i) the employee's contributions and (ii) the employer's contributions. The plaintiffs' entitlement as regards the employee's contribution is now res judicata, the ruling of the then learned Deputy Registrar was upheld by the Supreme Court in the judgment under Appeal No. 109A [of 2002] delivered on 17th November 2004. The contributions of Mr. Mwale were adjudged to be in the sum of K475,463.71 and for Ms. R. Phiri in the sum of K834,225.90 bringing the total to K1,309,687.30, determination of the employee's contribution is a settled issue, it cannot, therefore be re-opened in this assessment, neither can the plaintiffs be allowed to re-litigate this issue, by claiming that at the time judgment of the Supreme Court was delivered they were of pensionable age. The material date and age for purposes of computation is the age at the time of separation, and not at the time of judgment.

Strictly speaking the present assessment should be confined to determine refund of pension contributions as remitted by the employer."

The learned counsel, accordingly, submitted that the learned Deputy Registrar cannot be said to have wrongly applied the 2012

Supreme Court Ruling in his ruling on assessment. He contended that the appellants' claims before court were always that of refund of pension contributions and that the 2012 Supreme Court ruling reconfirmed that the appellants were entitled to refund of pension contributions, inclusive of employer contributions. That since the issue of member contributions was assessed prior to the 2016 ruling, the learned Deputy Registrar cannot be faulted in restricting himself to the employer's contribution at assessment.

On the question of the formula to be applied in determining the pension contributions due to the appellants, the learned counsel referred us to the ruling of the Deputy Registrar at page 95 line 22 of the record of appeal, where it was stated as follows:

> **"Strictly speaking the present assessment should be confined to determine refund of pension contributions as remitted by the employer. Unfortunately, the plaintiffs did not confine themselves to the limit adjudged by the Supreme Court in its ruling. In fact, the plaintiffs have not adduced evidence to show the employer's pension contributions, what the plaintiff purported to do is totally untenable, even in this assessment the plaintiffs still proceeded to calculate refund of pension contributions as if they had attained pensionable age, under Rule 11 (ii). This approach was clearly disapproved by the Supreme Court. Nothing has changed to make the disapproved approach/formula applicable in this assessment. Therefore, the plaintiffs' claim of principal sums in the following amounts;**

K1,905,883 rebased for Mr. Mwale and K2,135,284 for Ms. Phiri based on the NDP (Normal Pension Date) formula i.e., final salary × pension service divided by pension factor is untenable, this formula in my considered understanding of the Supreme Court decisions was only a preserve of those that attained the age of 55 years at the time of termination of employment. Given the plaintiffs' pleading, the pleading clearly shows that they had in contemplation of the only available option and the limits of that option; accordingly the plaintiffs properly restricted their claim to refund of pension contributions as guided by Rule 11 (i). However, the plaintiff being mindful that the severance of their employment was before they attained the age of 55 years, now they attempted to apply Rule 11 (ii) on pro rata basis, that approach is still unfounded because the Supreme Court never approved it."

Our attention was also drawn to the 2004 Supreme Court Judgment where it was stated thus at page J5 (page 26 of the supplementary record of appeal):

"It is common cause that both appellants had not reached the normal pension date at the age of 55 years. This being the case Rule 11 of the BP Zambia Ltd Rules of Staff Contributory Pension Scheme applies. They were not due for pension."

The learned counsel also referred us to Rule 11 of the BP Zambia Limited Staff Contributory Pension Scheme Rules appearing at page 44 of the record of appeal as follows:

"11. LEAVING THE EMPLOYER'S SERVICE

Should a member leave the service of the Employer for any reason before the Normal Pension Date other than early retirement in accordance with Rule 7 he shall have the following options: -

(i) To receive a refund of his contributions paid up to the date of his withdrawal from the fund with interest at four percent per annum;

(ii) A member shall be entitled to an accrued pension commencing on the Normal Pension date secured by both the employer's and employee's contributions provided that: -

a) He has been a member of the fund for at least five years or at the discretion of the employer, this period may be waived;

b) He is not dismissed for the misappropriation of the employer's monies or other serious misconduct. In interpreting the expression "other serious misconduct" for the purpose of this Rule the decision of the employer shall be conclusive.

A pension payable in terms of this Rule shall be subject to the provisions of Rule 12..."

The learned counsel, therefore, submitted that under the applicable pension rules, members of the pension scheme, inclusive of the appellants, had two options under Rule 11 on leaving the employment of the appellant. Firstly, the appellants had an option under Rule 11 (i) for a refund of contributions up to the date of withdrawal from the pension fund. Secondly, under Rule 11 (ii) the appellants would be entitled to be paid an accrued pension. He contended that a close reading of Rule 11 (ii) revealed that payment

of an accrued pension is, however, not automatic or unqualified and that a member would only be paid on normal pension date, that is, upon attaining 55 years. That it, therefore, followed that in consideration of the appellants' original claim for refund of pension contributions, the appellants never had in mind an accrued benefit in terms of Rule 11 (ii) but only a refund of contributions as per Rule 11 (i).

We were then referred to pages J5 - J6 of the 2004 Supreme Court Judgment at pages 26 – 27 of the supplementary record of appeal, where it was stated as follows:

> **"The formula on which the appellants based their claim is that used when one reached normal pension date, which is contrary to Rule 11. Rule 11 is very clear and it reads as follows:**
>
> **LEAVING THE EMPLOYER'S SERVICE**
> **Should a member leave the service of the Employer for any reason before the Normal Pension Date other than early retirement in accordance with Rule 7 he shall have the following options: -**
> **(i) To receive a refund of his contributions paid up to the date of his withdrawal from the fund with interest at four percent per annum;**
> **(ii) ..."**
>
> **This is the formula that the learned Deputy Registrar used in arriving at the principal sum due to the appellants and we cannot fault him. What the appellants used is the formula when one reaches the normal**

pension date and this is clearly shown at page 26, line 10 where the formula is given as

"Pension payable at NPD – Final Salary × Pension Service divided by pension factor"

To us "NPD" there stands for Normal Pension Date and according to the rule governing the pension scheme this normal pension date is first day after attaining the age of 55 years. Finding of the total contribution by each appellant as reflected in the Individual Card kept by the Insurance Company is the correct finding and we therefore find no merit in as far as it attacks the principal sums."

The learned counsel submitted that if indeed it was the desire of the appellants to pursue the respondent for payment of accrued pension benefits, which would be calculated based on the applicable formula being Rule 11 (ii), the appellants would have only taken out a suit against the respondent upon reaching the age of 55 years, which was not so, as the claim against the respondent was brought by the appellants before they attained the age of 55 years and clearly for a refund of pension contributions. He argued that, in any case, the 2012 Supreme Court ruling did not award the appellants an accrued pension benefit but only a refund of the employer contribution not subject of the earlier assessment based on the 2004 Supreme Court judgment. That the Deputy Registrar, therefore, correctly applied the 2012 Supreme Court ruling.

In response to ground two, the learned counsel for the respondent submitted that the principal statute governing pension schemes in Zambia is the Pension Scheme Regulations Act No. 28 of 1996. The learned counsel, however, argued that the Pension Scheme Regulations Act only came into operation following the publication of the Pension Scheme Regulations Act (Commencement) Order 1997, Statutory Instrument No. 27 of 1997 on 21st February 1997. It was his contention that since the appellants left the employment of the respondent on 31st March 1993, prior to the coming into force of the Pension Scheme Regulation Act on 21st February 1997, the question that arises is whether the provisions of the Act can apply retrospectively to the appellants. He submitted that unless expressly stated, a law does not operate retrospectively and referred us to the learned authors of **Halsbury's Laws of England, 4th Edition, Volume 44** who state at paragraph 922 on page 570 that:

> **"The general rule is that all statutes, other than those which are merely declaratory, or which relate only to matters of procedure or of evidence, are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. Similarly, the**

courts will construe a provision as conferring power to act retrospectively only when clear words are used."

Our attention was also drawn to the following dictum by Judge Wright in **Re Athlumney**[4], which the learned counsel submitted, perfectly reflected the law against retrospective operation of law:

"Perhaps no rule of construction is more firmly established than this: a retrospective effect should not be given to a statute so as to impair an existing right or obligation, except on procedural matters, unless the outcome cannot be avoided without doing violence to the text. If the writing of the text may give rise to several interpretations, we must interpret it as having to take prospective effect only."

It was, therefore, submitted that an Act of Parliament should always be regarded as prospective in nature unless the legislature has clearly intended the provisions of the said Act to be made applicable with retrospective effect. Further, that it is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by implication made to have a retrospective operation. The case of **Celtel Zambia Limited (T/A Zain Zambia) v. Zambia Revenue Authority**[5] was cited in support of this argument.

The learned counsel submitted that upon close examination of

the Act, there is no provision expressly providing for its retrospective operation and therefore, the appellants cannot rely on its provisions.

On the argument that the lower court ought to have applied the principle of *stare decisis* by following the decision on assessment in the case of **Expendito Chipalo and Others v BP Zambia Plc**[1], the learned counsel referred us to the case of **Abel Banda v. The People**[6] where we stated as follows:

> **"... The principle of stare decisis requires that a court should abide by its ratio decidendi in past cases.**
>
> **Put simplistically, in order to have certainty in the law, decisions of courts should be consistent and should not be so readily changeable as to make it at any given time what the law is on a given issue. In order to uphold this principle therefore, past decisions should not be exploded for the sole reason that they are wrong. Courts should stand by their decisions even if they are erroneous unless there be a sufficiently strong reason requiring that such decisions should be overruled. As this Court held in Kasote v. The People[7]:**
>
> > **'The Supreme Court being the final court in Zambia adopts the practice of the House of Lords in England concerning previous decisions of its own and will decide first whether in its view the previous case was wrongly decided and secondly if so whether there is a sufficiently good reason to decline to follow it'..."**

It was submitted by the learned counsel that since this Court is

superior to the High Court, it is not bound by the High Court decision upon which the appellants place reliance. He contended that the learned Deputy Registrar cannot, in any event, be faulted for relying on the decisions of this court in so far as the respective parties are concerned, as by doing so, he was applying the principle of *stare decisis*, the very principle upon which the appellants seek this court to uphold. That this is evident on page 95 line 3 of the record of appeal, where the learned Deputy Registrar in his ruling stated that:

> **"The judgment of the Supreme Court delivered on the 17th November 2004, and the ruling of the Supreme Court herein delivered on 30th April 2012, incisively define the purview of the plaintiffs' entitlement in terms of refund of pension contributions as pleaded and accordingly adjudged."**

In response to ground three, the learned counsel for the respondent pointed out that the appellants, in their heads of argument, expressed their misgivings of an earlier assessment on member contributions which was upheld by this court in the 2004 Supreme court judgment as confirmed by the 2012 Supreme Court Ruling. We were referred to the Supreme Court Ruling where it was

stated as follows at pages R5 – R6 (pages 13 – 14 of the record of appeal):

> **"We have seriously considered the motion and the submissions. We still do not fault the calculations by the Deputy Registrar. The Appellants did not give any evidence to show that they contributed more than what the evidence showed."**

It was submitted that since the member contributions have been adjudged on the merits, there are no further avenues open to the appellants to relitigate this issue and that they cannot seek an alteration or amendment of the judgment on assessment with respect to the member contribution refunds as the matter was moot. According to the learned counsel, the appellants in their heads of argument go further and challenge the finding made by the learned Deputy Registrar with respect to the employer contributions in the 2016 High Court ruling. That however, it was observed by the learned Deputy Registrar in the said ruling at page 95 line 25 of the record of appeal that:

> **"In fact the plaintiffs have not adduced evidence to show the employer's pension contributions..."**

It was learned counsel's contention that there is a plethora of authorities confirming the long-held position that an appellate court will always be loath to disturb or interfere with findings of fact of the lower court. To support his argument, he cited the case of **Nkhata and Others v. Attorney General**[7], where it was held that:

> **"A trial judge sitting alone without a jury can only be reversed on questions of fact if (i) the judge erred in accepting evidence, or (ii) the judge erred in assessing and evaluating the evidence taking into account some matter which he should have ignored or failing to take into account something which he should have considered, or (iii) the judge did not take proper advantage of having seen and heard the witnesses, (iv) external evidence demonstrated that the judge erred in assessing the manner and demeanour of witnesses."**

The learned counsel submitted that the appellants having led no evidence during the assessment with respect to the employer contributions, the learned Deputy Registrar cannot be faulted in making a finding of the employer contributions based on the evidence available to him. He referred us to page 96 line 15 of the record of appeal, where in assessing the employer contributions, the learned Deputy Registrar stated as follows:

> **"The defendant was gracious enough to provide the quantum of the plaintiffs' ... dues in terms of refund of pension contributions proper.**

The formula and approach taken by the defendant on the balance of probabilities provide the true and correct entitlement in terms of figures for refund of employer's pension contributions, the affidavit of Ms. Malata and the testimony of Ms. Halwampa is [are] of great assistance, in particular exhibits marked MMM3 and MMM4."

Further, we were referred to the testimony of Ms. Halwampa on page 120 line 10 of the record of appeal, where she stated that:

"I first referred to the judgment, which stated that members were entitled to [a] refund of both employee and employer contributions, the first thing I did was to find these contributions, and these were found in the record cards that were maintained by their then administrator Zambia State Insurance Corporation. To their contributions I applied 4% for the period they found the pension scheme and the time they left. This was ... to determine, the value of their amount on exit date, the interest rate was obtained from the scheme which is stated as 4% per annum..."

According to the learned counsel, after explaining the procedure used to calculate the employer contribution, Ms. Halwampa went further to confirm the documents used in her calculations being the 2012 Supreme Court ruling, the member cards, pension rules which documents were all before the lower court as seen from pages 121 line 15 - 122 line 8 of the record of appeal. He therefore, argued that in the absence of any evidence whatsoever from the appellant in

relation to the employer contribution, the learned Deputy Registrar cannot be faulted in finding the sum of K432,560.96 (K432.56) and K752,670.92 (K752.67) in favour of the 1st appellant and 2nd appellant respectively.

The learned counsel for the respondent accordingly prayed that the appeal should be dismissed with costs.

We have considered the record of appeal, the judgment appealed against, the heads of argument filed by the parties and their oral submissions.

The appellants' grievance in ground one is that the Deputy Registrar's assessment departed from the Supreme Court ruling in cause number 109 of 2002 which was delivered on 30th April 2012 (bearing a dated stamp of 14th May 2012). Specifically, the 1st appellant has argued that the Deputy Registrar was wrong to refer to the High Court ruling dated 15th May 2002 and the Supreme Court judgment of 17th November 2004, whose decisions he alleges were per in curiam, when he ought to have restricted himself to the said ruling of 30th April 2012. Further, that the Deputy Registrar ignored

the pension rules at pages 25 – 46 and the 1st appellant's calculations at pages 22 – 23 of the record of appeal which, according to the 1st appellant, were based on the Supreme Court Ruling.

In sum, the contention by the respondent on the other hand, is that the Deputy Registrar was on firm ground in restricting himself to the assessment of the employer's contribution and that this was in accordance with the 2012 Supreme Court Ruling.

We have considered the arguments of the parties in respect of ground one. It is quite clear from the ruling appealed against that contrary to the 1st appellant's assertion, the Deputy Registrar did not depart from the Supreme Court ruling of 30th April 2012. We note from the Deputy Registrar's ruling appealed against, which is on page 91 of the record of appeal, that the Deputy Registrar prefaced his ruling with a reference to the High Court ruling of 15th May 2002 and the Supreme Court judgment of 17th November 2004 solely for the purpose of giving a history of the case. This is revealed by the first sentence in paragraph one which reads:

"Before I proceed to give a summary of evidence adduced in support

and against the application, I will briefly give a historical genesis of case in order to put into context the present application."

In the same paragraph, the Deputy Registrar went on the say this:

"Mention must be made that information relating to the genesis of this case is obtainable from the judgment of the High Court dated 25th November 1997, judgment of the Supreme Court under Appeal Number 16 of 1999, Appeal No. 109A of 2002, and the ruling of the Supreme Court under Appeal No. 109A of 2002, including the ruling of the Deputy Registrar dated 15th May 2002."

And at page R3 of the ruling (page 92 of the record of appeal), the Deputy Registrar further stated in paragraph one that:

"Assessment of refund of employees pension contribution was duly done by the then learned Deputy Registrar, the Court in its ruling dated 15th May 2002 held..."

Further in paragraph three, the Deputy Registrar stated that:

"Again being dissatisfied with the said ruling the plaintiffs appealed to the Supreme Court, in Appeal No. 109A of 2002, in its judgment delivered on 17th November 2004, the Supreme Court held..."

A further perusal of the Deputy Registrar's ruling subject of this appeal reveals that other than being referred to in the context we

have discussed above, the High Court ruling of 15th May 2002 and the Supreme Court judgment of 17th November 2004 were never taken into consideration by the Deputy Registrar in the assessment.

Our finding is fortified by the following passage in the ruling on page R6 (page 95 of the record of appeal):

> **"The judgment of the Supreme Court delivered on 17th November 2004 and the ruling of the Supreme Court... delivered on 30th April 2012, incisively define the purview of the plaintiffs' entitlement in terms of refund of pension contributions as pleaded and accordingly adjudged. Therefore, the assessment of refund of pension contributions should be confined to the provision of rule 11 (1) of the Pension Rules. What emerges from the decisions of the Supreme Court is that refund of pension contributions comprises two sources of funds; (i) the employee's contributions and (ii) the employer's contributions. The plaintiff's entitlement as regards the employee's contributions is now res judicata, the ruling of the then learned Deputy Registrar was upheld by the Supreme Court in its judgment under Appeal No. 109A delivered on 17th November, 2004. The contributions of Mr. Mwale were adjudged to be in the sum of K415,463.71 and for Ms R. Phiri in the sum of K834,225.90 bringing the total to K1,309,687.30, determination of the employee's contribution is a settled issue it cannot therefore, be re-opened in this assessment, neither can the plaintiffs be allowed to relitigate the issue, by claiming that at the time the judgment of the Supreme Court was delivered they were of pensionable age. The material date and age for purposes of computation is the age at the time of separation, and not at the time of judgment. Strictly speaking the**

present assessment should be confined to determine refund of contributions as remitted by the employer" (emphasis added).

In the premises, we do not accept the appellants' argument that it was wrong for the Deputy Registrar to refer to the said decisions in his ruling as they had no relevance to the assessment. What was relevant to the assessment was the Supreme Court Ruling of 30th April 2012. What guided the Deputy Registrar in his assessment were the first and second paragraphs at R6 of the said judgment (page 14 of the record of appeal), in which Chirwa, JS stated as follows:

> **"But perhaps we may agree that under the Pensions rules, each member has his own account to which his and the employers contributions are credited and these sums become his, and at the normal pension date these amounts are his and make him qualify to the pension on the formula provided by the Pension Managers.**
> **We are fortified in this argument because under Rule 19 no contributions or premium revert or become the employer's property. So the employers contributions become a member's contribution and these should be paid to the appellants as their contributions. To this extent only that the employer's contributions on leaving the fund become member's contributions as they are in his account, our judgment is clarified."**

The appellants relied on **Unyimbi Musuluko and Others v**

Kariba North Bank[2] in support of their argument that the learned Deputy Registrar ought not to have referred to the High Court Ruling dated 15th May 2002 and the Supreme Court judgment of 17th November 2004 as, according to them, those decisions were incorrect. In the context we have discussed the two cases above and on the facts and circumstances of this case, we are at pains to appreciate the **Unyimbi Musuluko and Others**[2] case and in particular, the passage relied on by the appellants. What we are saying, in other words, is that, that case cannot add value to the appellants' appeal because it is irrelevant to the facts of this case.

For the above reasons, we do not accept the appellants' argument that in his assessment, the learned Deputy Registrar did not follow the ruling of the Supreme Court in Appeal No. 109A of 2000 delivered on 30th April 2012. The view we take is that the learned Deputy Registrar was on firm ground in limiting the assessment to the employer's pension contribution, leading to his finding that the amount due to the 1st appellant at the time of separation was K318.00 plus 4% interest per annum for a period of nine years, totalling K432.56; and that in respect of the 2nd appellant,

the amount due at the time of separation was K418.17 plus interest of 4% per annum for a period of twenty years, totalling K752.67.

The appellants also contended that the Deputy Registrar disregarded the pension rules on pages 35 – 46 and the 1st appellant's calculations on pages 22 – 23 of the record of appeal, notwithstanding that they were based on the Supreme Court ruling of 30th April 2012. We do not agree. First, the appellants have not, in their heads of argument, mentioned specific rules of the pension rule, which has been violated by the Deputy Registrar in his assessment. Second, the 1st appellant's calculations are based on the assumption that the appellants had reached the retirement age of 55 at the date of separation. However, the evidence deployed before the Deputy Registrar clearly shows that the appellants left employment before they reached their retirement age.

In sum, the Deputy Registrar properly addressed his mind to the Supreme Court ruling of 30th April 2012. In that ruling, the court merely clarified that in addition to the employee's pension contributions, the appellants were entitled to payment of the employer's contributions by reason that under rule 19 of the pension

rules, no contributions were to revert to the employer. As aptly pointed out by the appellants in their heads of argument, the assessment by the Deputy Registrar was restricted to the said ruling of the Supreme Court. Without doubt, the appellants have failed to prove that the Deputy Registrar veered away from the said Supreme Court Ruling.

For the reasons stated above, we conclude that ground one is bereft of merit and it must, therefore, fail.

In ground two, the appellants complain that the Deputy Registrar ignored the Pension Scheme Regulations Act No. 28 of 1996. The gist of their arguments is that unlike in the present case, the 'ruling' of another Deputy Registrar in the **Expendito Chipala and Others**[1] case at pages 100 – 101 of the record of appeal must apply to this case because it was a proper decision. Further, that because it was delivered earlier, it must be followed on the principle of *stare decisis*.

The respondent's arguments under ground two are that the Pension Scheme Regulations Act No. 28 of 1996 cannot apply to the appellants retrospectively as they left employment in 1993 prior to

its coming into force. Regarding the principle of *stare decisis* the respondent's argument is that being a High Court decision, the **Expedito Chipalo and Others**[1] case cannot bind this court which is superior to the High Court.

From the appellants' submissions, we note that the regulations of the Pension Schemes Regulations, Act No. 28 of 1996 alleged to have been ignored by the Deputy Registrar have not been specified. The appellants have also not directed our attention to any specific portion or page of the Deputy Registrar's ruling that confirms how the Deputy Registrar ignored the said regulations.

Worst of all, the so-called 'ruling' of another Deputy Registrar purported to be at pages 100 – 101 of the record of appeal relates to two pages numbered J20 and J21 plucked from an unknown document whose full text is not in the record of appeal.

Moreover, even assuming that the appellants had specified the regulations that the Deputy Registrar could have ignored, this ground would still not have gained purity. Authorities abound, including those cited by the learned counsel for the respondent which we need not repeat here, on the cardinal principle of statutory

construction that an Act of Parliament must be construed as having prospective effect unless its provisions expressly and clearly state that it is to be applied retrospectively. As aptly submitted by the learned counsel for the respondent, a perusal of the provisions of the Act does not indicate that it has retrospective application. The view we take is that the appellants having left employment in 1993, the said Act which came into force in 1997 cannot retrospectively apply to them.

It has also been canvassed by the appellants that we should follow the decision in the **Expendito Chipalo and Others**[1] case which was decided earlier, on the basis of the principle of *stare decisis*. This principle has been well articulated in the authorities earlier cited by the respondent's learned counsel. On the facts of this case, we cannot agree more with counsel that, that case being a High Court decision, it cannot bind this Court which is superior. This Court is only bound by its own decisions.

In our view, ground two also lacks merit and we, therefore, have no hesitation in dismissing it.

In ground three, the appellants have alleged that the Deputy Registrar relied on false evidence and witnesses of questionable demeanour. In their heads of argument, the appellants contended that the figures relied on by the respondents at assessment were concocted, resulting in the Deputy Registrar's assessment of employer's contributions being fabricated.

The respondent's argument under ground three is that the appellants did not lead any evidence during the assessment relating to the employer's contributions and that the Deputy Registrar could therefore not be faulted for the findings he made which were based on the evidence deployed before him by the respondent's witnesses.

At pages R6 – R7 of the ruling (pages 95 – 96 of the record of appeal), the Deputy Registrar stated as follows:

> **"... the plaintiffs have not adduced evidence to show the employer's pension contributions, what the plaintiffs purported to do is totally untenable, even in the assessment the plaintiffs still proceeded to calculate refund of pension contributions as if they had attained pensionable age under rule 11(ii). This approach was clearly disapproved by the Supreme Court. Nothing has changed to make the disapproved approach/formula applicable in this assessment. Therefore, the plaintiffs' claim of principal sums in the following**

amounts; K1,905,883.00 rebased for Mr. Mwale and K2,135,284.00 rebased for Ms Phiri based on the NPD (Normal Pension Date) formula, i. e., final salary x pension service divided by pension factor is untenable, this formula in my considered understanding of the Supreme Court decisions was only a preserve of those that had attained pensionable age of 55 years at the time of termination of employment the plaintiffs' pleading clearly shows that they had in contemplation of the only available option and the limits of that option; accordingly the plaintiffs... properly restricted their claim to refund of pension contributions as guided by rule 11(1), the plaintiffs being mindful that the severance of their employment was before they attained the age of 55 years, now they attempted to apply rule 11(ii) on a pro rata basis, that approach is still unfounded because the Supreme Court never applied it."

And at pages R7 – R8 of the ruling (pages 96 – 97 of the record of appeal), the Deputy Registrar had this to say:

"The defendant was gracious enough to provide the quantum of the plaintiffs' probable dues in terms of refund of pension contributions proper. The formula and approach taken by the defendant on the balance of probabilities provide the true and correct entitlement in terms of figures for refund of employer's pension contributions, the affidavit of Ms Malata and the testimony of Ms Halwampa is of great assistance, in particular exhibits marked MMM3 and MMM4.

Exhibit MMM3 clearly shows that at the time of separation, Mr. Mwale's contributions in terms of pension was K159,029.76 and the employer's contribution was K318,059.53, making a total of K477,089.29 to which interest at 4% per annum was added in line with rule 11(ii) [(i)] of the pension rules, bringing the employee's and

the employer's total contributions to K1,754,286.72 (K1,752.29 rebased).

And for Ms Ruth Phiri, exhibit marked MMM4 clearly shows her entitlement, ... her pension contribution was K209,088.59, the employer's contribution was K418,177.18, the total being K627,265.77, add 4% interest the grand total in terms of principal sum is K2,605,948.25 (K2,605.95 rebased). These tabulations are ... in conformity with the ruling of the then learned Deputy Registrar who assessed the employee's pension contributions."

On the basis of the evidence that was deployed before him, the Deputy Registrar assessed the employer's contributions in respect of the 1st appellant at the time of separation on 31st September 1993 to be K432.56, being K318.06 plus 4% interest per annum for a period of nine years.

In respect of the 2nd respondent, the assessed amount of the employer's pension contributions at the time of separation on 31st March 1993 was K752.67, being K418.17 plus interest of 4% per annum for a period of twenty years.

The appellants have assailed the Deputy Registrar's assessment on the basis that he relied on false or concocted evidence and witnesses of questionable demeanour. We have not found any iota

of falsehood or concoction in exhibits "MMM3" and "MMM4" as well as the oral testimony of the respondent's witnesses deployed before the Deputy Registrar. Further, our reading of the proceedings before the Deputy Registrar does not indicate anywhere, that the respondent's witnesses were of questionable demeanour. In our view, the Deputy Registrar properly rejected the computations of the employer's contribution made by the 1st appellant as they were based on a wrong premise, that is, the appellants having attained the retirement age at the time of separation when this was not the case. In other words, there is no justification for us to interfere with the Deputy Registrar's assessment which we accordingly uphold. Ground three also suffers the same fate as other grounds for lack of merit.

All the three grounds of appeal having failed, we uphold the ruling of the Deputy Registrar and dismiss this appeal. We award costs to the respondent, to be taxed in default of agreement.

I. C. MAMBILIMA
CHIEF JUSTICE

R. M. C. KAOMA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE