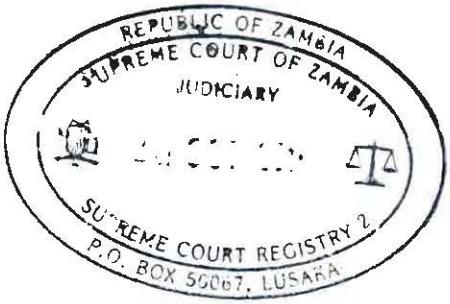
IN THE SUPREME COURT FOR ZAMBIA APPEAL NO.020/2016

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

BANK OF ZAMBIA **APPELLANT**

AND

IGNATIUS KASHOKA **RESPONDENT**

CORAM: Wood, Musonda and Kabuka, JJS

On 2nd October, 2018 and 25th October, 2018.

FOR THE APPELLANT: Dr. K. Kalinde, Mr. C. Sikazwe, Mr. C. Mweemba, Legal Counsel.

FOR THE RESPONDENT: Mr. Z. Muya, Messrs. Muya & Co.

JUDGMENT

KABUKA, JS, delivered the judgment of the court.

Cases referred to:

1. Undi Phiri v Bank of Zambia (2007) ZR 186.
2. Chola Chama v Zambia Electricity Supply Corporation Limited (2008) Vol. 1 ZR 222.

3. Bank of Zamba v Martin Simusamba, Appeal No. 50 of 2010.
4. Edward Mweshi Chileshe v Zambia Consolidated Copper Mines Limited (1996) S.J. (S.C.), SCZ Judgment No. 10 of 1996.
5. Collett v Van Zyl Brothers Limited (1966) ZR 65 (CA).
6. General Nursing Council of Zambia v Mbangweta (2008) ZR Vol. 2 105.
7. Match Corporation Limited and Development Bank of Zambia and the Attorney General, SCZ Judgment No.3 of 1999.
8. YB and F Transport Limited v Superstone Motors Limited (2000) ZR 22.
9. Matilda Mutale v Emmanuel Manaile SCZ Judgment No. 14 of 2007.
10. Central Newbury Car Auctions Limited v Unit Finance Limited (1957) 1QB 371.
11. Posts and Telecommunications Corporation v Salim Jack Phiri (1995) ZR (SC).
12. Samuel Mumba v Lusaka City Council Appeal No. 70/2017.
13. Attorney General v Roy Clarke (2008) ZR 38 Vol. 1 (SC).
14. Charles Mvula v Zambia Revenue Authority, SCZ Appeal No.134/2009.
15. Davies Kasonde v Zambia Revenue Authority SCZ Appeal No.84 of 2015.
16. Costa Tembo v Hybrid Poultry Farm (Z) Limited SCZ Judgement No. 13 of 2003.

By a judgment dated 22nd June, 2015 the High Court awarded the respondent terminal benefits under the appellant's Voluntary Early Separation Scheme ("VESS"). The appellant appeals against that judgment contending that, the respondent did not meet the criteria to qualify him for such a payment.

According to the record of appeal, the relevant facts of the matter are that the respondent was employed by the appellant as Director-Personnel on 6th January, 1995 and he later rose to the position of Director-Human Resources. On the 10th of January, 2003 after the respondent had worked for a period of eight years, the appellant gave him a six months' formal notice of his retirement, on 18th July, 2003 when he would have reached the age of 55.

Exactly 52 days to his retirement, on 28th May, 2003 however, the President appointed the respondent as Permanent Secretary, in the Ministry of Transport and Communications and the respondent left his job with the appellant to take up the said position.

Five days after he had left his employment, on the 2nd of June, 2003 the respondent applied for early separation from the appellant, under VESS. In his application Form, the respondent stated the reason for seeking early separation was due to his appointment to a government position. He also indicated on the same Form, that his indebtedness to the appellant was in the sum of K130,868,526.82. The respondent's application was considered by the VESS committee which rejected it, substantially on the ground that, the respondent

who was 54 years old at the time, was above the prescribed age limit of 50, required to qualify for consideration under VESS.

The respondent appealed that outcome alleging that the appellant had discriminated against him and cited eight cases relating to other former employees whom he felt were similarly circumstanced, but whose applications for VESS had been approved by the appellant without reference to the age limit. The respondent contended that some of those employees were also above 50 years when they made their applications.

After a protracted exchange of letters, all grievances the respondent had previously raised were addressed by the appellant's Director- Human Resources in a letter to him dated 6th April, 2005. The respondent was further informed that, his appeal had been referred to the Board for review and after giving its due and careful consideration to the matter, the Board upheld the decision of the VESS committee declining his application for early separation. The appellant maintained that it had fully discharged its contractual obligations to the respondent as it had paid him his entitlement on the basis of normal retirement benefits and reminded him to settle

his outstanding loans, which after his exit from the appellant, was accumulating interest at the commercial rate.

Unhappy with the stance taken by the appellant, on 21st July, 2005 the respondent went to the High Court from where he issued a writ of summons against the appellant, claiming terminal benefits under VESS, in the sum of K221,333,849.00, in accordance with clause 4.2.3 of the scheme. He also claimed salary arrears accrued between his date of separation from the appellant to the date of full payment, interest at the appellant's bank lending rates, less what he believed was owing to the appellant, together with costs of the action.

In his statement of claim, the respondent did not deny obtaining the loans in issue but disputed the interest rate of 5% applied by the appellant. He also did not deny that when he was appointed Permanent Secretary, he was 54 years old, and that, under VESS, employees above the age of 50 were disqualified from accessing the scheme.

In its defence to the claim, the appellant maintained its position that the respondent did not qualify to be paid a package under VESS. That, what he was entitled to was a pension in accordance with the

pension rules obtaining at the time. The appellant also counter-claimed from the respondent, payment of the outstanding amounts due on the monies he had obtained during the course of his employment, stated as, K65, 423,113. 51 on a mortgage loan; and K269, 713, 118.00 in respect of a personal to holder motor vehicle loan, inclusive of other advances and interest.

At the trial of the matter in the court below, the respondent gave a background of the employee categories that VESS was intended to cater for: (i) employees who wanted to go on early voluntary separation, provided they were under 50 years of age; (ii) employees who did not meet the age requirement but were appointed from the appellant Bank to a government institution; and (iii) employees who did not meet the requirements but were allowed, solely, in the discretion of management. In this regard, the respondent asserted that, but for the discrimination against him, he was otherwise entitled to be favourably considered for voluntary early separation under VESS, on the basis that, he had been appointed to take up a position in the government.

In its evidence in defence to those assertions the appellant maintained that, VESS was intended to allow for early separation of employees who went to work elsewhere, due to political appointments, secondments or other appointments which affected the appellant's operations. Regarding the respondent's claims of some former employees who were granted voluntary separation under VESS, the contention was that, from the eight names given by the respondent, only two were above 50 years. One was a Mr. Nenechi, aged 54 years 4 months at the time, who had diabetes and was allowed voluntary separation on medical grounds under the transitional provisions, of the scheme. The second applicant, a Mr Mfula who was 51 whose application was rejected by both the committee and the appellant's Board, on appeal on account of his age being over 50.

In the respondent's case, the appellant's position was that his retirement had already been kick started by a letter dated 10th January, 2003 giving him six months prior notice of his normal retirement on 18th July, 2003. This notice was given to him long before his appointment as Permanent Secretary, by the President.

Notwithstanding that he left his job only 52 days before his retirement date, the respondent's terminal benefits were still computed on the basis of a normal retirement. These came to the sum of K44,241,315.62 from which an outstanding loan of K124,778,313.18 was deducted, leaving the respondent with a negative balance of K83,536,988.56, with interest accruing at commercial rate.

On this evidence which was before the trial court, the appellant for its part contended that, it had established its counter-claim of monies owed by the respondent which it was seeking to recover. That the respondent on the other hand, had failed to prove his claim that he was entitled to access VESS.

Having considered all the evidence and the submissions by the parties, the learned trial judge found that, the question to be determined was whether the respondent qualified to be paid benefits under VESS, upon leaving his employment with the appellant; and whether also, he owed the amount claimed by the appellant in outstanding loans?

Upon examining the eligibility criteria for one to access the benefits under VESS, given in clauses 4.4 and 4.7.3 of the scheme, as 50 years, the learned judge found that, since the respondent was 54 and thus, above the age limit of 50 at the time of his application, he did not qualify to be paid a separation package under the scheme. The court further found, having worked for only 8 years with the appellant, the respondent did not also meet the minimum service period of 15 years required, as provided under clause 4.2. of VESS.

Those findings notwithstanding, the learned judge went further to observe that, there were a number of instances involving the appellant's former employees who were allowed to proceed on voluntary early separation despite not meeting all the requisite conditions under the scheme. That the appellant had in those instances, still used its *discretion* and allowed them to access the benefits under the scheme. To illustrate the point, the court used the case involving an employee who had separated from the appellant in 1997, some two years prior to the scheme coming into operation. The judge noted that, although the respondent had only worked for 8 years and was ineligible, he was nonetheless permitted to access

the scheme, in the discretion of the Bank Governor. Using that example, the learned judge cited the case of **Undi Phiri v Bank of Zambia**[1] in stressing the position that, similarly circumstanced employees must be given the same treatment by their employers.

Accordingly, the learned trial judge reached the conclusion that, although the respondent did not meet the requirements for VESS, relating to age and length of service, there was evidence that the appellant had granted VESS benefits to other employees in similar circumstances who also did not meet all the requisite eligibility requirements. In the event, that the appellant's refusal to allow the respondent's application for early separation under VESS, as it had done for other employees, amounted to discrimination against him.

On the respondent's claim for salary arrears, the learned judge found that, as the period for which the claim was being made was after his separation, when the respondent had not been working for the appellant, sustaining this claim would result in unjust enrichment of the respondent. The cases of **Chola Chama v Zambia Electricity Supply Corporation Limited**[2] and **Bank of Zamba v Martin Simusamba**[3] were cited as authority.

In relation to the counterclaim, the learned judge found, although it was not in dispute that the respondent owed the appellant certain amounts on loans, the appellant had not entirely proved its claim as there was a dispute over the quantum owed by the respondent. In the absence of evidence before the court showing how the amount owing was arrived at, the exact amount owed by the respondent in unpaid loans would be assessed by the Deputy Registrar.

In the final analysis, the learned judge found, the respondent had proved his claim on a balance of probabilities and awarded him terminal benefits under VESS, in the claimed sum of K221, 333.85 plus interest at short term bank deposit rate, from date of writ to date of judgment and thereafter, at the current bank lending rate, as determined by the appellant. The respondent was also awarded costs of the matter.

Dissatisfied with that outcome, the appellant now appeals to this Court against parts of the judgment as decided that:

(1) "there were a number of other employees of the appellant who did not qualify for the Voluntary Early Separation Scheme (VESS) but were paid under the VESS policy and that the respondent was

similarly circumstanced with them and suffered discrimination from the appellant;

(2) there was evidence on record that a number of former employees were allowed to go on VESS although they did not meet the requisite criteria for accessing VESS;

(3) the respondent proved his claim on a balance of probabilities and awarded him terminal benefits in the sum of K221, 333.85 in accordance with the VESS policy plus interest;

(4) the respondent be awarded costs despite the fact that the appellant was successful on the counter claim and the respondent failed on his other claim for salary arrears."

In heads of argument filed in support of the grounds of appeal, and augmented orally, by Dr. Kalinde at the hearing, grounds one, two and three were argued together. The contention in these grounds was that, all the individuals cited by the respondent who received VESS benefits, were below the age of 50 at the time they applied for VESS, except for a Mr. Nenechi, who was aged 54 years and was granted VESS as an exception, using the transitional provisions of the scheme. Mr. Nenechi's reasons for applying and on which discretion was exercised, were ill health and advanced age. It was accordingly, further argued that, the respondent's circumstances cannot be said to be similar to those of Mr. Nenechi, as his reasons

were medical, whilst the respondent's was that, he had been appointed to a government position.

The submission in this regard was that, the respondent misinterpreted the VESS policy by suggesting that appointment to a government position 'automatically' entitles one to VESS benefits. That the transitional provisions that had applied to Mr. Nenechi, in September, 1999 were only effective for one year after the scheme was operationalized as provided under clause 4.6.1 and as such, the said clause had no force after 23rd June, 2000. The said transitional clause 4.6.1, required employees over the age of 50 but below retirement age, to be allowed management discretion in benefitting from VESS, on condition that the application was made within one year. Counsel submitted that, the transitional provision having ceased to apply, the respondent could not benefit from the same discretion.

In aid of his arguments counsel for the appellant referred to a table of the various employees who benefitted under the scheme, which showed their ages to be below 50 at the time they applied and also reflected the length of years served. The submission here, was

that, the table demonstrated management consistently exercised its discretion in favour of those employees who were below 50 years and that, applications involving employees who were above 50 were rejected, as the age limit was an absolute bar from accessing VESS.

It was further argued that, by clause 4.0 which provides for the scheme to be management driven, management was empowered to exercise its discretion as it deemed fit. Counsel submitted that, management discretion was very wide under the VESS policy and it consistently exercised that discretion in favour of those employees who were below 50 years of age, and the learned trial judge in his judgment, glossed over this pertinent fact. The learned trial judge was also faulted for relying on the **Undi Phiri**[1] case, where the appellant, Undi Phiri, had alleged discrimination against him by the respondent, his employer, that other employees charged with similar offences were not discharged, like himself, but were only warned. Counsel distinguished the facts of that case, where this Court had found, the appellant was not similarly circumstanced with the other employees, as there was no evidence that the others, had bounced numerous cheques, like he did.

Counsel for the appellant argued that, in this appeal now before us, although employees applied for and were granted VESS, when on the face of it, they did not meet all the requirements, does not mean they were similarly circumstanced with the respondent. That a critical and detailed look which by taking a broad approach, the learned trial judge failed to do, revealed their situations infact differed. The case of **Edward Mweshi Chileshe v ZCCM[4]** was cited for the submission that, there was reasonable and just cause for rejecting the respondent's VESS application on the basis that, he did not meet the age and length of service requirements. That there was also no evidence on record of someone who could be said to have been similarly circumstanced with the respondent.

On ground four, relating to costs, Dr Kalinde, accepted that, the award of costs is indeed in the discretion of the court. Citing the cases of **Collett v Van Zyl Brothers Limited[5]** and **General Nursing Council of Zambia v Mbangweta[6],** his submission was however, that, it was the duty of the learned trial judge in this case to look at the litigation as a whole and consider the substantial result. In that regard, counsel pointed to the fact that in the court below, the

respondent on the one hand had succeeded on his claim for VESS benefits but failed on his claim for salary arrears, while the appellant on the other hand, had succeeded on its counterclaim for the unpaid loans. In the circumstances, the submission by learned counsel was that, the trial judge should have properly exercised his discretion and seen the substantial result which was that, both parties had succeeded in their claims and should not have condemned the appellant in costs. The cases of **Match Corporation Limited and Development Bank of Zambia and the Attorney General**[7] and **YB and F Transport Limited v Superstone Motors Limited**[8], were relied on as held that, in the case where the appeal and the cross-appeal are largely unsuccessful, there is no clear winner or loser, each party should bear the costs of their appeal. Counsel's submission was that, the trial judge in this case should have made such an order.

In his heads of argument in response, learned counsel for the respondent in grounds one, two and three, noted that, the appellant did not deny there were about 8 employees who had benefited under the VESS even though they did not meet the criteria for qualification.

That the word **'shall',** is used in clause 4.0 and the case of **Matilda Mutale v Emmanuel Munaile**[9] was relied on in advancing the argument that, use of the word **'shall'** denotes a mandatory requirement for an applicant to the scheme, to satisfy the eligibility criteria in clauses 4.1 to 4.4.

It was also argued that, managerial discretion as provided under clause 4.5 did not relate to the criteria stipulated in clauses 4.1 to 4.4, but to 'other compelling circumstances' and should be exercised where one has not satisfied all the ingredients under clause 4.1 to 4.4. From that premise, it was the respondent's argument that like other appellants, he met at least one of the eligibility requirements relating to 'personal circumstances,' under clause 4.3.2. That his situation of being appointed to a government position, was in that regard, a 'personal circumstance' no different from that of Mr. Nenechi, who applied for VESS when he was already aged 54 and management applied clause 4.3.1 which covers medical grounds, under 'personal circumstances'.

The respondent further argued that, the appellant's contention that the age of 50 was an absolute bar from accessing VESS is a

contradiction, as Mr. Nenechi who was 54 years was permitted to benefit under VESS with the result that, the appellant had decided not to follow its established practice at its own peril. Counsel further argued that, it is unheard of for an employer to retrospectively apply a benefit to an ex-employee, two years after the employee had left service and long after the employment relationship had ceased. That although the appellant's only justification for allowing the former employees to benefit was that they had met the threshold age at the time they made the applications, yet none, but one individual only, had fulfilled the mandatory 15 years of continuous service as required by clause 4.2 of VESS.

Counsel for the respondent submitted that, the appellant went against the provisions of its own scheme by extending the benefits of the scheme to non-eligible employees thereby creating a legitimate expectation for its serving employees, that they too, could benefit from VESS as long as they met one of the criteria requirements. The case of **Central Newbury Car Auctions Limited v Unit Finance Limited**[10] was cited in advancing the argument that, the respondent had been led to believe that as long as he met one criteria under VESS

he too would be eligible to benefit. The respondent further submitted that, for the appellant to now turn back on the representation as earlier made, amounts to discrimination against him, as correctly found by the trial judge. According to counsel, this is so, as the rules of fairness and justice require that the standard applied is the same across the board and not selective. The case of **Posts and Telecommunications Corporation v Salim Jack Phiri**[11] was cited as authority for the submission.

While conceding that the case in the present appeal, now before us, is distinguishable from the case of **Undi Phiri**[1], to the extent that none of the beneficiaries here, were similarly circumstanced on all fours. Counsel nonetheless argued that, the similar circumstances arose from the fact that the respondent, just like the other employees, did not meet the full eligibility criteria and the appellant applied its discretion to waive those unmet requirements.

In relation to ground four, on costs, counsel argued that, the respondent did not dispute owing the appellant and contended, that being the case, there was no need for the appellant to claim repayment of the loans which are deductible. That the only dispute

raised by the respondent was as to the amount owing which the trial court referred to the Deputy Registrar for assessment. Counsel submitted that, where a party's success in a matter was more apparent than real, it was trite that the court had discretion to decline to award a litigant costs of the matter as decided in the case of **Samuel Mumba v Lusaka City Council[12].**

Learned counsel concluded by urging that, as the respondent had succeeded in his claim for terminal benefits, which was the substantive matter, while the appellant's claim was nominal in nature, the overall success of his claim merited an award of costs.

We have considered the evidence on record, the findings of the learned trial judge and the submissions by counsel for the parties together with the cases to which we were referred.

Grounds, one two and three of the appeal are interrelated, they were argued together by counsel, and we will deal with them in like manner. These grounds fault the trial judge's finding, that the respondent suffered discrimination from the appellant, as he was similarly circumstanced with a number of other employees who did not qualify for VESS but were paid. Based on that finding, the trial

judge proceeded to award the respondent terminal benefits in the sum of K221, 333.85, in accordance with the VESS policy, plus interest.

According to the material facts which were common cause in the court below, the respondent was aged 54 at the time he applied for the voluntary early retirement under the appellant's VESS. The respondent had also worked for the appellant for 8 years and was only two months shy of reaching his retirement age, when he was appointed as Acting Permanent Secretary in the Ministry of Transport and Communications. Evidence on record also shows that, in order to qualify for VESS, an employee had to be no more than 50 years with a 15 years period of service. It was also a fact not in dispute between the parties, that granted his age of 54 and 8 year period of service, the appellant did not qualify for payment of benefits under the VESS scheme, as correctly found by the trial judge; and that, the administration of VESS was in the sole discretion of the appellant's management.

The real issue which is at the core of this appeal, as we see it, is whether the exercise of management's discretion in rejecting the

appellant's application for VESS was discriminatory, as found by the learned trial judge. A perusal of the VESS document in clauses 4.5 and 4.6 shows that the qualification under the scheme is on application and subject to management's discretion; and consideration for VESS of employees above 50 was restricted to the one year transitional period, in the following words:

> 4.5 **Managerial Discretion**
>
> Any other compelling circumstance not covered in 4.1 – 4.4 above, which in the opinion of management may warrant early separation.
>
> 4.6. **Transitional Provisions**
>
> 4.6.1 Employees over the age of 50 but below retirement age may be allowed under Management discretion provided that the application is made within one year of coming into force of this Scheme.

The respondent's main contention before the trial court which was accepted by the learned judge, was that, he was similarly circumstanced as other employees that had been granted benefits under VESS. Evidence led by the appellant as appears on record however, proved that all the successful applicants to VESS were under the age of 50 except for a Mr. Nenechi who was 54 years of age. Mr. Nenechi had applied for VESS on account of his advanced age

and diabetic medical condition. His application was made under the one year transitional period provided for by clause 4.6.1. Evidence on record also shows, it is the medical condition, that persuaded management to exercise its discretion, to waive the age requirement of 50 years. This is how Mr. Nenechi was enabled to access the VESS benefits.

In the case of **Attorney General v Roy Clarke**[13], we did state that, discrimination, in relation to people, means treating similarly circumstanced people, differently. The issue here, is whether the respondent was similarly circumstanced to the other applicants that had successfully applied for VESS. The evidence on record is clear that, of the eight former applicants who had benefited from the scheme, 6 had been below the age of 50 when they applied, but only one had 15 years unbroken service. This evidence goes to underscore the fact that, most of the applicants were granted benefits under VESS, on account of their age.

Evidence on record also shows, the only person who can be said to be remotely in similar circumstances as the respondent, was actually a Mr. Felix Mfula, who was appointed Deputy Governor-

Administration, of the appellant Bank. One of the requirements of Mr. Mfula's said appointment was that, he would cease to be on permanent and pensionable contract and was to be re-engaged on a fixed term contract which resulted in an impact on the structure of his pensionable benefits. At the time of his appointment, Mr. Mfula was aged 51 and thus, over the prescribed age of 50, to qualify him for VESS. His application was initially rejected by management. It was thereafter referred to the VESS Committee and later to the Board for determination. Following a protracted debate as to whether or not to grant him benefits under VESS, it was decided that he should not be so granted, as he was ineligible. It was also noted that his new position entitled him to gratuity at the rate of 50% of his total earned remuneration, meaning that his appointment had not disadvantaged him in any way.

The Board was however, more concerned with how it would deal with such situations in the future, in the absence of an approved scheme to compensate employees over the age of 50, who receive senior appointments within or outside the Bank. Ultimately, the deciding factor which was settled upon, was the consideration that,

awarding any compensation to Mr. Mfula would set a precedent that may not be in the long term interests of the Bank.

The foregoing makes it clear, the appellant's approach to the respondent's case was informed by the considerations made in the case of Mr, Mfula, that it would not be beneficial to the Bank to exercise its discretion in the respondent's favour. Mr. Mfula's case further confirms the fact that, the respondent was not the only one whose application for VESS was rejected when he took up another appointment. In the event, the contention that he was discriminated against, since *all* other similarly circumstanced employees were allowed to access VESS, is against this evidence concerning Mr. Mfula, which is on record.

In our view and of greater consideration, is the fact that, applying to exit employment under the appellant's VESS was not as a matter of right, requiring that the decision made must always be in favour of an applicant. Each case had to be considered on its own merits and circumstances. As we stated in the case of **Charles Mvula v Zambia Revenue Authority**[14], an employment provision such as that for early retirement, which is left to management's discretion

cannot be claimed by an employee as a matter of right, as the final decision always rests with the employer. We confirmed this position in a more recent judgment, **Davies Kasonde v Zambia Revenue Authority[15].**

In that regard, we have further noted that the evidence on record in the present appeal shows the respondent proceeded with his action against the appellant, under a misapprehension that when one was appointed to a government position, benefiting under VESS was an entitlement. We say so, as this is clear from his statement of claim, where the respondent set out calculations of terminal benefits under VESS and referred to them as 'entitlements'. It is also clear from his submission suggesting that, the 'personal circumstance' of appointment to a government position required such consideration.

According to the appellant, it is the age, medical condition and transitional provision, which qualified the said Mr. Nenechi to access VESS benefits. The respondent likened the medical 'personal circumstances' of Mr. Nenechi, over which the said person or indeed any other person for that matter has no choice; to his own decision

to take up a government position, over which he had an option to decline.

For our part, suffice to say that, evidence on record shows Mr. Nenechi was allowed to access VESS within one year of the scheme becoming operational, which was specifically provided for under the *transitional provision* in clause 4.1.6. In the event, we have no difficulty in coming to the conclusion that, the learned judge erred when he made a general finding to the effect that, the respondent was similarly circumstanced with other applicants before him, who included Mr. Nenechi. The refusal to allow the respondent proceed on early retirement under VESS, when he had already been given a valid notice for normal retirement; and was subsequently, paid normal retirement benefits, in our view, cannot be said to have amounted to discrimination against him. Grounds one, two and three of the appeal faulting the trial judge in that respect, succeed.

On the issue of costs which is subject of ground four of the appeal, Dr. Kalinde in his viva voce arguments at the hearing of the appeal contended that the counter-claim was substantial and has pointed us to the outstanding amount on the loan which the

respondent does not deny but merely questions the quantum. His counter-part, counsel for the respondent, in rebuttal, had also asserted that it was unnecessary to put up the counter-claim since the respondent was not disputing liability and the amounts were deductible from his successful claim. In answer to those counter positions, we can only point to the trite legal position, as held by this Court in the case of **Costa Tembo v Hybrid Poultry Farm (Z) Limited**[16] that, in general, costs follow the event. The fact remains that the appellant had a valid counter-claim, before the trial court on which it succeeded. The amount involved was substantial and the appellant was therefore, also entitled to an award of costs in its favour. An appropriate award on costs, in those circumstances, would have been for each party to bear their own costs. It is for those reasons that we set aside the order of costs made by the trial court against the appellant, with the result that ground four of the appeal, equally succeeds.

Finally, as the appeal has been wholly successful assessment of the disputed amounts owing by the respondent on outstanding loans

is to proceed before the Deputy Registrar of the High Court, as properly ordered by the learned trial judge.

The appellant having succeeded on all its four grounds of appeal, costs will follow the event and are to be taxed in default of agreement.

Appeal allowed.

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A. M. WOOD
SUPREME COURT JUDGE

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M. MUSONDA
SUPREME COURT JUDGE

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J. K. KABUKA
SUPREME COURT JUDGE