SELECTED JUDGMENT NO. 31 OF 2019

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IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 217/2016**

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

FINANCE BANK ZAMBIA LIMITED **APPELLANT**

AND

WELUZANI BANDA AND 162 OTHERS **RESPONDENTS**

Coram : **Malila, Kajimanga and Mutuna JJS**

On 5th November 2019 and 27th November 2019

For the Appellant : **Mr. J.P. Sangwa SC of Messrs Simeza Sangwa and Associates**

For the Respondent : **Mr. M.D. Lisimba of Messrs Mambwe Siwila and Lisimba**

J U D G M E N T

MUTUNA JS, delivered the judgment of the Court.

Cases referred to:

1) **Michael Kahula v Finance Bank Zambia Limited, Appeal No. 28 of 1996**
2) **Mazoka and others v Mwanawasa and others (2005) ZR 138**
3) **Mohammed v The Attorney General (1982) ZR 49**

4) **Zambia National Commercial Bank Plc v Geoffrey Muyamwa and 88 others, SCZ judgment number 37 of 2017**
5) **The Secretary General of the United National Independence Party v Elias Marko Chisha Chipimo (1983) ZR 125**
6) **National Milling Company Limited v Vashee (Suing as Chairman of Zambia National Farmers Union (2000) ZR 98**
7) **Wilson Masauso Zulu v Avondale Housing Project Limited, (1982) ZR 172**
8) **John Mugala and Kenneth Kabenga v Attorney General (1988-89) ZR 171**

Works referred to:

1) **Blacks Law Dictionary, by Bryan A. Garner, 7th edition, West Group, USA**
2) **Halsbury's Laws of England, 4th edition (reissue) volume 36(1) by Lord Hailsham of St. Marylebone, Butterworths, London**
3) **Atkins Court Forms, Second Edition, volume 32, by Lord Evershed, Butterworths, London**

Legislation referred to:

1) **Minimum Wages and Conditions of Employment (General Order) 2011**
2) **Industrial and Labour Relations Act, Cap 269**
3) **High Court Act, Cap 27**
4) **Pension Scheme Regulation Act, Cap 255**
5) **Income Tax Act, Cap 323**
6) **Interpretation and General Provisions Act, Cap 2**

Introduction

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1) This appeal is against the decision of the Learned High Court Judge (Banda - Bobo J) which found as a fact that the Appellant had set up a voluntary non contributory pension and terminal benefits scheme (the scheme) for the benefit of the Respondents.

2) The Learned High Court Judge also found as a fact that the 162 Respondents joined to the proceedings were former employees of the Appellant and declared that they and the First Respondent were entitled to payment of the benefit arising from the scheme. That such benefit should be computed on the basis of three months pay for every year served.

3) Consequently, the appeal questions findings of fact by the Learned High Court Judge and addresses the purpose of pleadings and when it is necessary to amend pleadings.

Background

4) The dispute in this matter revolves around the issue whether or not the Appellant had set up the scheme in 1993. The contention by the Respondents was that the Appellant set up the scheme in 1993 to which it made various contributions which totaled the sum of K1,201,479.61 in 1998.

5) The Respondents sought to prove the establishment of the scheme by reference to various documents including the Appellant's director's report. They contended further that in 1999 the Appellant introduced a staff contributory scheme.

6) As a consequence of the matters in the two preceding paragraphs, the Respondents contended that since they had worked for the Appellant for the period 1993 to 1999, they were entitled to benefit from the scheme.

7) On the other hand, the Appellant's contention was that there was no such scheme established.

The Respondents' claim and Appellant's defence in the High Court and evidence

8) The First Respondent issued a writ of summons against the Appellant and claimed the following reliefs:

8.1 A declaratory order that the scheme existed from 1993.

8.2 A declaratory order that he is entitled to benefit from the scheme.

8.3 Costs.

8.4 Interest.

9) In support of the claim, the First Respondent contended that: the Appellant set up the scheme in 1993; an initial amount of K73,000.00 was provided to the scheme by the Appellant which was later transferred to Leasing Finance Company Limited (LFCL) in 1994; in 1998 the balance on the scheme was K1,201,479.00; later the Appellant cancelled the scheme and denied its existence and refused to pay the Respondents the benefit thereof; and, this followed the chairman of the Appellant pledging the

scheme as collateral for loans obtained from two companies.

10) In its defence, the Appellant denied the existence of the scheme. It contended that it had set aside some funds which it invested with LFCL with the intent of setting up a pension scheme, group life insurance, and provision for redundancy benefits and benevolent payment for its employees.

11) That the said funds were later used to settle the Appellant's obligations to LFCL, subsequent to which it set up a staff contributory pension scheme in 1999.

12) After the First Respondent commenced the action the other Respondents who were one hundred and sixty two in total applied to join the proceedings as co-plaintiffs. The Appellant did not object to the application and the Learned High Court Judge granted the order of joinder.

13) The Respondents did not amend the pleadings after the joinder and the documentation on the record remained as if there was only one plaintiff, the First Respondent.

14) At the trial the Respondents called three witnesses. Their evidence was that in 1993 a meeting was called by the Appellant to inform the workers that it was considering setting up the scheme for their benefit. In pursuance of this, the Board approved its establishment and certain sums of money were set aside for its establishment.

15) The witnesses referred to two letters and the Appellant's annual report for 1994 and board report of 1996, which they contended proved the setting up of the scheme. The evidence also revealed that later when some of the employees were leaving employment, they were informed by officers of the Appellant that the scheme had never been set up. They could, therefore, not benefit from it.

16) In response, the Appellant called one witness who testified that there was no scheme set up as alleged by the Respondents but that there was in place a contributory pension scheme. The witness however conceded that the documents referred to her in cross

examination seemed to suggest that the scheme was set up.

Consideration by the Learned High Court Judge and decision

17) The Judge considered the pleadings, evidence and arguments by counsel and identified the issue for determination as being whether or not the Appellant had set up the scheme. Prior to determining this issue she dealt with a peripheral issue on whether subsequent to the order of joinder of the one hundred and sixty two Respondents they ought to have amended the originating pleadings to include themselves as co-plaintiffs and that each of them should have given individual testimonies.

18) The Judge found that the pleadings ought to have been amended as contended by the Appellant. However, she found that the omission was merely a technical error which was not so profound as to be fatal. The position she took was that upon the order of joinder being

granted, the action became a representative action. She accordingly took judicial notice to this effect.

19) Further, she found that it was not necessary for each and every one of the Respondents to testify at the trial because their evidence would have been a repetition of the first witness. In addition, the Judge found as a fact that the one hundred and sixty two Respondents were ex employees of the Appellant, especially that no objection was raised by the Appellant during the hearing of the joinder application.

20) As for the issue of whether or not the Appellant had set up the scheme, the Judge concluded that the Appellant had indeed set up the scheme as alleged by the Respondents. She relied heavily on the evidence of PW3 who had been in the Appellant's Human Resources department and the Appellant's annual report and board report which both made mention of the scheme.

21) The Learned High Court Judge also took cognizance of the fact that the Appellant's witness did not flatly deny

the existence of the scheme but merely stated that she did not recall that the scheme was in existence. She also noted the fact that the Appellant's witness agreed that the annual and board reports suggested that the scheme had been set up and certain moneys remitted to LFCL to cover the scheme. Lastly, that the witness acknowledged that at the end of December 1991 when the scheme was discontinued there was a balance of K1,201,479.61 in the scheme.

22) The Judge accordingly granted the declaratory reliefs sought. In so doing she found that the Appellant had set up the scheme and that the Respondents were entitled to benefit from it by way of three months pay for every year served in accordance with our decision in the case of ***Michael Kahula v Finance Bank Zambia Limited***[1]. She had great difficulty in arriving at the latter decision because she acknowledged that there were no terms and conditions put in place to govern the scheme and that the ***Minimum Wages and Conditions of Employment***

(General Order) 2011 was not applicable. The absence of the terms and conditions of service is what prompted the Learned High court Judge to rely on our decision in the ***Kahula***[1] case. In doing so she quoted a passage from that judgment at page J 27 as follows:

> **"... we hold the strong view that the appellant cannot be denied his benefits on the basis of the respondent's failure to come up with a way of computing his entitlements. In the absence of the said criteria we are of the considered view that the most equitable way of computing the appellants benefits for the period 1988 to 1999, was by using the formula that was applicable prior to the introduction of the pension scheme."**

She justified her reasoning by holding that the foregoing passage is a general principle applicable to all cases where an employee omits to put in place a formula for computing an employee's terminal benefits and not limited to the ***Kahula***[1] case. She also examined the mode of departure and payment of other employees of the Appellant and found that the same formula was used in computing their benefits. She ended by referring the

matter to the Deputy Registrar for purposes of computing each Respondent's entitlement.

Grounds of appeal to this Court and arguments by counsel

23) The Appellant is unhappy with the decision of the Learned High Court Judge and has appealed to this Court advancing four grounds of appeal as follows:

23.1 At pages 35 and 36 of the judgment, the Court below misdirected itself on points of law by holding that after the grant of the order of joinder of 15th February 2010, the cause before Court became a representative action;

23.2 At page 36 of the judgment, the Court below misdirected itself on the facts by holding that the (Respondents), without exception were at one point or another in the employ of the Appellant;

23.3 The Court below misdirected itself on points of law and facts by holding that the Appellant had indeed created a non-contributory pension scheme;

23.4 The Court below misdirected itself on points of both law and facts by relying on the decision of this Court of ***Michael Kahula v Finance Bank Zambia Limited***[1] and holding that *"the most equitable way*

of computing the (Respondents') benefits, for the period 1993 to 1995, is by using the formula that was applicable in computing pension/retirement benefits prior to the introduction of the voluntary pension scheme."

24) The parties filed heads of argument in support and opposing the appeal which they relied upon. When counsel for the parties appeared before us they also made *viva voce* arguments.

25) In respect of ground 1 of the appeal, counsel for the Appellant, Mr. J.P. Sangwa SC, argued that the issue of whether or not the action was a representative action was crucial because the fate of the Respondents' claim rested on it. He argued that what determines this issue is the pleadings which must specifically state an action to be as such. It is not determined by joinder of a party to the proceedings pursuant to Order 14, rule 1 of the ***High Court Act***.

26) State counsel argued further that the Respondents were obliged to comply with Order 14, rule 3 of the ***High***

Court Act, if they wished their action to be a representative one. This Order states as follows:

"**Order 14, rule 3**

Where more persons than one have the same interest in one suit, one or more of such persons may be authorized to sue or to defend in such suit for the benefit of or on behalf of all parties interested."

27) According to state counsel, the First Respondent continued to appear on the process after the order for joinder as the sole Plaintiff and he was never authorized to represent the other Respondents contrary to Order 14, rule 1 of the ***High Court Act***. This order states that *"If any Plaintiff sues, or any Defendant is sued, in any representative capacity, it shall be expressed on the writ. The Court or a judge may order any of the persons represented to be made parties either in lieu or, in addition to, the previously existing parties."* State counsel then set out the function of pleadings with reference to our decision in the case of ***Mazoka and others v Mwanawasa and others***[2]. To this end he argued that since the originating process was not amended to, among

other things, show the other Respondents as Plaintiffs, the parties were bound by what was contained in it.

28) Lastly, state counsel argued that the Learned High Court Judge ignored the need for the First Respondent to prove his case on a balance of probabilities if judgment was to be entered in his favour in line with our decision in the case of ***Mohammed v The Attorney General***[3]. The basis of state counsel's argument was that the First Respondent's case should have failed because he did not attend Court to present it by way of leading evidence to prove his contentions and averments in the pleadings.

29) Regarding ground 2 of the appeal, state counsel argued that it was a misdirection on the part of the Judge to find that all the Respondents were previously in the employ of the Appellant in the absence of pleadings to that effect. He argued that the statement of claim shows that it is only the First Respondent who pleaded that he had been in the employ of the Appellant and the latter admitted this fact only in relation to him.

30) State counsel argued that it was incumbent upon the Judge to make a finding of fact based on the evidence presented before her that indeed the concerned Respondents were previously in the employ of the Appellant and not arrive at the finding solely because the Appellant neglected to oppose the application for joinder. He argued that the burden of proving this fact rested on the Respondents as Plaintiff who were duty bound to prove the fact.

31) Under ground 3 of the appeal, state counsel for the Appellant attacked the finding of fact by the Learned High Court Judge that indeed the scheme had been set up. He argued that it was a misdirection both at law and in fact as follows:

31.1 The finding ignored the fact that creation of pension funds is regulated by and must comply with the ***Pension Scheme Regulation Act*** and the ***Income Tax Act*** whose provisions, counsel quoted;

31.2 The evidence on record shows that the Appellant entertained the idea of creating the scheme but

never implemented it. The Court acknowledged this fact when it found that details of the scheme were to be communicated but were not communicated. That these details would have contained the modality of determining the benefit due to each employee and that such modalities do not exist;

31.3 The crucial evidence relied upon by the Learned High Court Judge in arriving at her finding were the annual report and directors' report. These reports in no way show that the scheme was actually set up but merely acknowledge the importance the Appellant attached to staff welfare and funds it had set aside for their benefit;

31.4 In regard to the letter of 24th March, 1998 from A.S. Pillai to A. Ramesh of LFCL, state counsel argued that it does not attest to the establishment of the scheme but rather that the Appellant was setting aside funds not only to cater for its employees' pension but also its other obligation to them. He argued that the memorandum from the Appellant's managing director referred to by the Court confirmed this fact and the fact that creation of the scheme was merely an intention by the Appellant.

32) In the last ground of appeal, counsel attacked the reliance by the Judge on our decision in the case of

Michael Kahula v Finance Bank Zambia Limited[1] as the basis for computing the benefits due to the Respondents. He began by saying that the Judge's failure to ascertain the Respondents' entitlement from the documents before her attested to the fact that her judgment is flawed. That, if indeed there was a scheme in place it ought to have provided the formula for computing each of the Respondents' entitlement. The absence of such formula attested to the fact that there was no scheme put in place.

33) Taking the issue further, state counsel argued that the Respondents and Kahula were not similarly circumstanced. The differences in their situations were that: the Respondents' action was commenced in the High Court General List, while Kahula commenced his in the then Industrial Relations Court; the Respondents in any event did not contend that they were in the same position as Kahula, thereby inviting the Judge to hold as she did; the Respondents unlike Kahula did not plead the

circumstances under which they left employment with the Appellant and, but for the First Respondent, none of them pleaded when they joined or left the employ of the Appellant; and, except for the first two witnesses in the High Court, none of the remaining Respondents established their relationship with the Appellant to prompt the Judge to consider whether the principle in the ***Kahula***[1] case was applicable to them.

34) State counsel concluded that the reliefs sought by Kahula and the Respondents were different. Kahula was claiming for payment of his separation dues and damages for constructive dismissal. The Respondents, on the other hand, were claiming for a declaration that the scheme had been set up and that they were entitled to benefit from it.

35) In his *viva voce* arguments and in response to questions posed by the Court, Mr. J.P. Sangwa SC, clarified and argued as follows:

35.1 The Appellant intimated its intention to set up the scheme by way of an announcement to its members of staff. There were no further steps taken by it to establish the scheme nor was there a corresponding change in the Respondents conditions of service incorporating the scheme.

35.2 The announcement of the intention to set up the scheme which was verbal could not alter the Respondents' written contracts because it would offend the parole evidence rule.

35.3 The establishment of the scheme was both a matter of law and fact.

35.4 The ***Kahula***[1] case is bad law in view of our decision in the case of ***Zambia National Commercial Bank Plc v Geoffrey Muyamwa and 88 others***[4]. Even if the case was still good law, the principle of 'similarly circumstanced' cannot be applied by a High Court Judge general list because it is unique to a Judge of the Industrial Relations Court Division as per Section 18 of the ***Industrial and Labour Relations Act***. Further, the principle can only be applied where the persons claiming to be similarly circumstanced exited from employment at the same

time and under the same circumstances as those they are likening themselves to.

35.5 After the one hundred and sixty two Respondents were joined to the action, it was necessary for them to amend the pleadings to show that they were parties to the action and for them to particularly plead their case and testify. Having failed to do so, it is only the First Respondent's case which was pleaded. It was, therefore, a misdirection on the part of the Judge to render a judgment in their favour. Joinder, in and of itself, does not establish a party's claim even if a defendant does not object to the joinder.

35.6 It was a further misdirection on her part to find in favour of the First Respondent in view of the fact that he did not testify and as such did not present his case.

35.7 It was a misdirection on the part of the Judge to find that the action was a representative action in the absence of one of the Respondents being authorized to represent the others. It is clear from the First Respondent's affidavit evidence at page 66 of the record of appeal that he was not representing the other Respondents but merely stating that they may have a claim against the Appellant.

36) We were urged to allow the appeal.

37) In his response to ground 1 of the appeal, counsel for the Respondents, Mr. M. D. Lisimba, argued that Order 14, rule 5(1) of the ***High Court Act*** provides for an Order for joinder of a party which has the effect of binding the person joined to the proceedings. That is to say, as long as a person is joined to proceedings he is thereafter bound by the outcome of the proceedings, notwithstanding that pleadings were not amended subsequent to the joinder.

38) As regards the need for claimants in a representative action to authorize one of their number to represent them, counsel argued that such authority need not be in writing. The claimants need only show that there was a community of interest between them. He drew our attention to our decision in the case of ***Secretary General of the United National Independence Party v Elias Marko Chisha Chipimo***[5] and quoted selectively from the judgment as follows:

"He can only be sued in a representative capacity ... providing that it is shown that there was community of interest between himself and other members."

39) Mr. Lisimba argued further that the omission by the Respondents to amend the pleadings after the joinder to, among other things, show that it was a representative action, was not fatal. He said that an action may be began and continued by or against the representative of the other parties. Our attention was drawn to our decision in the case of ***National Milling Company Limited v Vashee (Suing as Chairman of Zambia National Farmers Union***[6]. In that case we held that where there are numerous persons having the same interest in any proceedings, the proceedings may begin and unless the Court otherwise orders, be continued by or against any one or more of them as representing all or as representing all except one or more of them. Counsel argued that the facts deposed in the affidavit in support of the application for joinder reveal that there was

sufficient community of interest to justify the Judge's finding that it was a representative action.

40) Taking his argument further, Mr. Lisimba submitted that the Judge was on firm ground when she took judicial notice of what she termed the obvious, that at the point of joinder of the one hundred and sixty two Respondents the action became a representative action. He defined judicial notice as per ***Blacks Law Dictionary*** and concluded that the Judge's finding was a finding of fact which cannot be set aside by an appellate court in line with our decision in the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited***[7].

41) The last point counsel advanced under ground 1 of the appeal negated Mr. Sangwa SC's submission that the First Respondent's case should have failed because he did not tender evidence at the trial. He contended that the submission was incredible in view of our decision in the case of ***John Mugala and Kenneth Kabenga v Attorney General***[8] that an action should not be

summarily defeated by reason of non joinder or misjoinder of parties merely because a Judge had correctly ruled that the wrong party had been made a defendant. It is important that we state here that quite frankly, we did not understand the line of argument taken by counsel and have not considered it because it has no bearing on the decision we have reached.

42) Under ground 2 of the appeal Mr. Lisimba argued that the finding by the Judge that the one hundren and sixty two Respondents were employees of the Appellant was subject to the principle of *res judicata*. He argued that the Appellant had opportunity to object to the application for joinder but it did not do so. In addition, it has not appealed against the decision to join the one hundred and sixty two Respondents. The decision is, therefore, binding on the Appellant as it has not been challenged. That it was too late in the day for the Appellant to object to the joinder now.

43) In conclusion, Mr. Lisimba argued that the finding by the Learned High Court Judge could not be assailed in accordance with our decision in the ***Avondale Housing Project***[9] case.

44) Mr. Lisimba dealt with ground 3 of the appeal from two fronts. The first was that the Appellant cannot seek to assail the finding of fact that the scheme was set up on the basis that the provisions of the ***Pension Scheme Regulations Act*** were not followed because that Act was not in existence at the material time. Further, in terms of Section 19(1)(a) of the ***Interpretation and General Provisions Act*** and our decision in the case of ***Zambia National Holdings Limited and UNIP v Attorney General***[5], Acts of Parliament, do not have retrospective effect.

45) Secondly, Mr. Lisimba set out the relevant passages from the judgment of the Learned High Court Judge to justify his argument that the finding on the establishment of the

scheme was indeed a finding of fact and could not be assailed for the reasons given earlier.

46) The arguments under ground 4 of the appeal were very brief. They were that the Judge was on firm ground when she prescribed the formula to be applied in computing the Respondents' benefits under the scheme in view of the fact that the Appellant concealed the formula. This, he said, was the same principle we applied in the ***Kahula***[1] case.

47) In the *viva voce* arguments and in response to questions posed by the Court, Mr. Lisimba clarified and argued as follows:

47.1 The claim by the Respondent was for a declaration that the scheme existed. It was, therefore, not necessary for all of the Respondents to give evidence to prove this claim.

47.2 The one hundred and sixty two Respondents would only be required to testify and present their case at assessment of damages. That it was at this point that they would have had to lay before the Court

their employment history and conditions of employment.

47.3 The finding by the Judge that the scheme existed is supported by the documents at pages 118, 143 and 160 of the record of appeal. Further, the Appellant's witness conceded in cross-examination that the scheme existed. The finding of fact was, thus not perverse.

47.4 The directors' report did alter conditions of service of the Respondents to include the scheme.

47.5 The fact that the scheme may not have complied with the law merely rendered it voidable and not void.

48) We were urged to dismiss the appeal.

49) In his reply Mr. J.P. Sangwa SC by and large repeated his earlier arguments. The only departure was the emphasis that the finding by the Learned High Court Judge that the scheme had to be established was perverse. Further that, a Court on assessment of damages does not determine liability but quantum only. As such, it was incumbent upon the one hundred and sixty two Respondents to plead their employment history with the

Appellant and testify to prove their claim. Lastly, the ***Minimum Wages and Conditions of Employment (General Order) 2011*** is only applicable where no conditions of service are in place.

Considerations by this Court and decision

50) In our determination of this appeal we have considered the record of appeal and arguments advanced by counsel. We are indeed indebted to counsel for the industry deployed in preparing and presenting their clients' cases as evidenced by their arguments.

51) The four grounds of appeal raise three issues as follows:

51.1 Whether or not the Respondents were obliged to amend the pleadings after the joinder;

51.2 Whether or not it was a misdirection on the part of the Learned High Court Judge when she found that the action was a representative action; and

51.3 Whether or not the finding by the Learned High Court Judge that the scheme was established was perverse.

52) Regarding the first issue, the argument by Mr. J.P. Sangwa SC is that the Respondents ought to have amended the statement of claim after the joinder of the one hundred and sixty two Respondents to reflect all the Respondents. Further, the averments by all the Respondents should have been set out in the amended statement of claim showing their cause of action and why they felt they were entitled to the relief sought. Lastly, they should all have testified to prove their claims.

53) Mr. Lisimba took the view that at the stage of trial all the Respondents had to do was prove the existence of the scheme and that only after a declaration to that effect was made, would the one hundred and sixty two Respondents be called upon to testify and prove their claim at assessment of damages. There was, therefore, no need to amend the pleadings.

54) In order to answer the question posed by the issue we have looked at the purpose of pleadings in line with our decision in the ***Mazoka***[2] case to see if indeed the

pleadings before the Court below met the criteria. In that case we said the following:

> **"The function of pleadings was aptly stated by Chirwa J. (as he then was) in the case of Mundia v Sentor Motors Ltd, a case cited by the Respondents, when at page 69, he said:**
> **The function of pleadings is very well known, it is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. Once pleadings have been closed, the parties thereto are bound by their pleadings and the Court has to take them as such."**

55) Put simply, pleadings are what define the dispute between the parties and are, thus the parameters of the Court's adjudicative functions. The Court can only determine that which is contained in the pleadings because this is what has been notified to the other side as the dispute by the contending party against the other.

56) Arising from what we have said in the preceding paragraph, the question that begs an answer is: was the one hundred and sixty two Respondents' dispute with the

Appellant defined in the statement of claim? Put another way, was the Appellant warned of the one hundred and sixty two Respondents' case against it to enable it mount a defence? We think the answer to both questions is no because, and as Mr. J. P. Sangwa SC quite rightly argued, the averments contained in the statement of claim in the record of appeal only relate to the First Respondent. That is to say, the contentions of having been employed by the Appellant, period of such employment and tenure only relate to the First Respondent. As a result, it was incumbent upon the one hundred and sixty two Respondents to amend the statement of claim to reflect the fact that they were additional plaintiffs and plead their averments or contentions.

57) The decision we have made in the preceding paragraph is reinforced by two passages from ***Halsburys laws of England 4th edition, reissue,*** volume 36(1) at paragraphs 50 and 49 as follows:

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"Statement of material facts. A statement of claim must contain in a summary form a statement of material facts on which the Plaintiff relies as showing that he has a cause of action against the defendant and that he is entitled to relief at the hands of the Court."

And

"Statement of claim where there are several plaintiffs or defendants. Where there are several plaintiffs the statement of claim must show either (1) that they have a joint cause of action; or (2) that all rights to relief which they claim in the action whether they are joint, several or in the alternative, are in respect of or arise out of the same transaction or series of transactions, and are such that if the plaintiffs had each brought separate actions some common questions of law or fact would have arisen in all those actions."

58) The relevance of the first passage is that it emphasizes the need for all the Respondents as plaintiffs in the Court below to show the basis of their cause of action by adducing relevant facts in the statement of claim. They were all individually required to do so by way of amending the statement of claim and could not ride on the back of the First Respondent because it is each

individual plaintiff who is required to prove his cause of action.

59) This requirement was at the point of exchanging pleadings and prior to the trial and not at the stage of assessment of damages as argued by Mr. Lisimba. The reason for this is that, at assessment of damages liability will have already been established and pronounced in the judgment based on the pleadings and evidence presented by a party. The assessment of damages is merely to determine the quantum of damages and does not at all discuss liability.

60) Our decision is reinforced by the second passage we have quoted at paragraph 57 of this judgment which requires all of the several plaintiffs to demonstrate and plead cause of action which arises from the same set of facts or raises a common legal issue for determination. That as a consequence, it is expedient for the Court to hear them all in one matter. The one hundred and sixty two Respondents were, thus required to amend the statement

of claim to incorporate these averments. The Court cannot, as did the Learned High Court Judge, cure this omission by finding that joinder was sufficient to establish their cause of action because the commonality or community of the claim and cause of action must specifically be pleaded and established. The foregoing complies with the purpose of amendment of pleading as set out by ***Atkins Court Forms 2nd edition volume 32*** at page 53 as follows:

> **"The object of the Court is to try the merits of the cases that came before it, and for the purpose of determining the real question in controversy between the parties or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings, either of its own motion or on the application of any party, order any document in the proceeding to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."**

Amendment of pleadings aids the Court in, not only determining a case on the merits, but all disputes between the parties. As such a party must avail himself

of the opportunity to apply to amend process if the Court is to discharge its function properly.

61) The answer we have arrived at in relation to issue 1 is that the one hundred and sixty two Respondents were not only required to amend the statement of claim and particularly plead their respective cases but also lead evidence to that effect. What then is the consequence of their failure to do so? Their case was not presented before the Learned High Court Judge, consequently, all her findings in relation to them that: they were all former employees of the Appellant; entitled to the benefit of the scheme, etc, are perverse and made in the absence of evidence to that effect. The fact that the Appellant did not oppose the application for joinder does not of itself warrant a finding by the Learned High Court Judge that the one hundred and sixty two Respondents were ex employees. When a party does not object to any application an applicant still has to prove his or her case and a Court has to determine, based on the material

presented before it, if the application has been proven. The Judge ought, in this case, to have interrogated the one hundred and sixty two Respondents' contention further by compelling them to produce evidence of their service record such as pay slips.

62) In arriving at the decision we have reached in the preceding paragraph we have considered Mr. Lisimba's argument that the decision that the one hundred and sixty two Respondents were ex employees is *res judicata* because the Appellant has not challenged the joinder application by way of appeal and dismissed it. The reason for this is quite obvious. At the point of application for joinder, the one hundred and sixty two Respondents were merely asserting that they may have an interest in the matter. The finding that they were ex employees was made by the Judge in the judgment after trial and not in the application for joinder. As such, it is the subject of this appeal which seeks to assail the judgment.

63) The second issue relates to the finding of fact by the Learned High Court Judge that the action was a representative action. In determining this issue, it is important that we set out the finding by the Learned High Court Judge which is at pages 42 and 43 of the record of appeal which are pages J35 and J36 of the judgment. The Judge said the following:

> **"Regarding the first issue, it is true that following the order of joinder dated 15th February 2010 granting the 162 persons as co-plaintiffs, the pleadings should thereafter have been amended as this effectively became a representative action ... The Court takes judicial notice of the obvious fact which is that at the point the aforementioned order of joinder was granted, this became a representative action."**

Mr. Lisimba has fervently embraced the taking of judicial notice by the Judge. We would pause here and remind Mr. Lisimba that a Court takes judicial notice of notorious facts such as the sun rising in the east and setting in the west. It does not take judicial notice of matters requiring a determination based on law such as

the one with which she was confronted of whether or not a matter is a representative action. This requires a Court to make a reasoned determination and not take judicial notice.

64) Defining the phrase representative action, ***Blacks Law Dictionary*** refers the reader to *"class action"* at page 243 which is defined as *"a law suit in which a single person or small group of people represents the interests of a larger group."* The definition goes further to set out the procedural requirements for class actions as follows: *"(1) the class must be so large that individual suits would be impracticable (2) there must be legal or factual questions common to the class (3) the claims or defences of the representative parties must be typical of those of that class, and (4) the representative parties must adequately protect interests of the class."*

65) These requirements are similar to the requirements we have set out under paragraph 57 of this judgment for

endorsement of a statement of claim with a number of plaintiffs.

66) Although the order for joinder made the one hundred and sixty two Respondents parties to the action, it was not effected by way of including them in the Court process. This is clear from the statement of claim at page 60 of the record of appeal which only has the First Respondent as the sole Plaintiff. He is not named as representing himself and the interests of the other Respondents. Therefore, when the action went through the process of pleadings and trial it was not a representative action and did not infact meet the definition we have ascribed to such actions with reference to ***Blacks Law Dictionary***.

67) The Respondents' predicament is compounded, as argued by Mr. J.P. Sangwa SC, by their failure to comply with Order 14(1) of the ***High Court Act*** which states in part as follows:

> ***"If any plaintiff sues, or any defendant is sued, in any representative capacity, it shall be expressed on the writ."***

The rationale for this requirement is tied to execution of a Court order. To give an example, where a secretary or trustee of a club sues any person on behalf of the members of the club, this capacity must be revealed in the pleadings, otherwise the law presumes the action to be a personal suit and in the event of loss and costs are awarded, execution is levied against the individual.

68) In our case, the Respondents having failed to comply with Order 14(1), the presumption is that it is an action by the First Respondent alone. Had the matter been lost in the Court below and cost awarded in favour of the Appellant, the costs would have been recoverable only from the First Respondent.

69) Our decisions in the preceding paragraphs have the support of the ***Vashee***[6] case referred to us by Mr. Lisimba. In that case Vashee is described as *"suing as chairman of Zambia National Farmers Union"*. Consequently, he was representing the members of that union.

70) Coming to the last issue which involves the finding of fact by the Learned High Court Judge that the Appellant had set up the scheme. We have no difficulty in holding that the finding was perverse and made in the absence of supporting evidence. Counsel for the parties were in agreement at the hearing that the Respondents' employment was governed by terms and conditions of service which were not at any point varied to incorporate the scheme. Further, the terms and conditions of employment were in writing and could not, despite the argument by Mr. M.D. Lisimba to the contrary, be varied verbally by the announcement by one of the Appellant's employees of its intention to set up the scheme.

71) In addition, the documents which the Court relied upon in proving the existence of the scheme do not of themselves sufficiently prove that it was set up. The first of these documents are the Appellant's director's reports specifically at pages 118 and 143 of the record of appeal. The relevant portions of the former state as follows:

> **"The welfare of the employees continues to be of importance and the Bank made contributions of K35 million to the non-contributory pension fund."**

While the latter states:

> **"The Bank employed 500 employees on average for each month during the year. The total remuneration paid to them was K2.7 billion. The welfare of the employees continues to be of importance and the Bank made contributions of K75 million to the various staff welfare funds."**

72) The position we have taken is that apart from confirming the Appellant's interest in catering for the welfare of its staff, the passages do not convincingly prove that the scheme was set up. This is notwithstanding the mention of the scheme in the first passage because its existence was not only a matter of fact but also law as argued by Mr. J.P. Sangwa SC. At the material time the governing law was regulation 2 in schedule 4 to the ***Income Tax Act*** which states as follows:

> **"Where any fund or scheme is established by or on behalf of an employee under the rules relating thereto, of**

pensions and other benefits to his employees in respect of service with him on the retirement of his employees from such service or to dependants of his employees on the death of his employees then application under paragraph 2 may be made for such fund or scheme to be approved by the commissioner - General; and, where any fund or scheme is so approved, it shall be known as an approved pension fund."....

The Commissioner General referred to here is the head of Zambia Revenue Authority. There was need for the Respondents to lead evidence to show that the Appellant in fact complied with this regulation and the scheme was indeed an approved scheme in terms of the regulation.

73) Further, the board reports are merely reports tendered at a board meeting by the company secretaries of the company. They were not decisions made by the Appellant management setting up the scheme. There is no evidence, and indeed, Mr. M.D. Lisimba conceded, to show that a board resolution was passed by the Appellant's board or management confirming its intention or implementation of the intention to set up the

scheme. Such a board resolution would have been a first step in amending the terms and conditions of service of the Respondents.

74) Our position is the same in regard the other documents at pages 192 and 77 of the record of appeal. The former is a passage from the report by Price Water House Coppers while the latter is a letter by A.S. Pillai to Ramesh. The two documents merely reveal the Appellant's intention of setting aside funds for the welfare of its staff to cater for their retirement.

75) In conclusion, we must state that the lack of the terms and conditions of the scheme, which the Judge acknowledged, further negates her finding of fact to the contrary. She expressed this in her judgment at page 44 of the record of appeal as follows:

> **"Details of the scheme, which I can only conclude were the terms and conditions of the said scheme, were going to be communicated to the employees. As I shall show later, these terms and conditions of the non-contributory pension were never communicated through**

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the employee's union representatives as promised or to the workers as promised."

And at page 55 as follows:

"The only trouble in the present case is that the defendant conveniently and expeditiously chose not to create the terms and conditions (including the formula) necessary for this Court to make such a determination."

These findings should have logically led the Judge to conclude that no scheme existed as no terms and conditions governing it existed.

76) For this reason we cannot also support the formula adopted by the Learned High Court Judge in determining the Respondents' benefits in the scheme. Her reasoning as we have shown in paragraph 22 of this judgment was that in determining the formula for payment of Kahula's benefits we held that it is a general principle applicable to all cases where no formula has been put in place for computing terminal benefits as in this case. The Judge's words at page 56 of the record of appeal were as follows:

"I am of the considered view that this was a general principle applicable to all manner of cases, and cannot as Mr. J.P. Sangwa SC had suggested, be limited to the ***Kahula*** *case."* This was a clear misdirection on the part of the Learned High Court Judge.

77) When one revisits our decision in the ***Kahula***[1] case, it becomes apparent that we were swayed by the arguments by counsel for Kahula that he was entitled to payment of three months pay for each year served because he was similarly placed as Mundia and Njolomba who had earlier been paid using the same formula. The basis of counsel's argument was the principle of similarly circumstanced. This is apparent from the observation we made in that case at page J25 as follows:

> **"The contention by counsel for the Appellant, as we understand it, is that since the Appellant was similarly placed with Ms Mundia and Mr. Njolomba, the Court below properly directed itself when it held that he should be paid in a manner similar to that in which the duo was paid."**

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78) Our decision in ***Kahula***[1] case was also based on the evidence led in the Court below which revealed a practice adopted by the Respondent in computing terminal benefits for its ex employees prior to the establishment of a pension scheme. We, in this regard, said the following at page J26:

> **"However, in our view, RW2's evidence establishes that the duo was paid in that manner because prior to the establishment of the Pension Scheme, the respondent used to pay its separated employees three months' basic salary for each year served. When referred to an email authored by a Mr. Jacque J. de Jager, RW2 told the trial Court that the Respondent had been paying its separated employees in the manner indicated in the email ... The relevant part of the said email reads as follows: *"For the period during which she (Ms Inutu Mundia) was not a member of the pension fund, i.e. between date of joining and sometime in 1999, she is entitled to dues calculated at 3 months pay for every completed year of service."***

From what we have said in the two preceding paragraphs it is clear that we did not, as the Judge below found, state that where there are no conditions set out for paying one's

benefits the applicable formula is that applied in the ***Kahula***[1] case.

79) In addition, it is important to note that the circumstances in the ***Kahula***[1] case and indeed Mundia and Njolomba were that the Court was determining the dues that the three were entitled to for the period 1988 to 1999 when there was no pension scheme. In this matter, the converse is the case. The First Respondent alleged that there was a scheme in place and he and the other Respondents joined to the action are entitled to benefit from it. This situation of itself suggests that the formula is to be derived from the scheme which ought to have been incorporated in the conditions of service unlike in Kahula where the period 1988 to 1999 was a vacuum.

80) Lastly, the Respondents, as Mr. J.P. Sangwa SC quite rightly argued launched their action in the then High Court, General List as opposed to the then Industrial Relations Court. The High Court General List does not espouse the principle of similarly circumstanced and, as

such, it could not be applied by the Judge. This is quite apart from the fact that it was not specifically pleaded and facts were not presented to show if the criteria was met for invoking the principle.

Conclusion

81) Our reasoning in the preceding paragraphs leads to the conclusion that all four grounds of appeal have merit. The appeal must, consequently, succeed and we uphold it. We accordingly set aside the judgment of the lower Court in its entirety. As to costs, the nature of this case is such that the appropriate order to make is the parties bear their respective costs, and we so do order.

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M. MALILA
SUPREME COURT JUDGE

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C. KAJIMANGA
SUPREME COURT JUDGE

.....
N. K. MUTUNA
SUPREME COURT JUDGE