

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(CIVIL JURISDICTION)

APPEAL NO. 70/2011
SCZ/8/44/2011

BETWEEN:

THE ATTORNEY-GENERAL

APPELLANT

AND

DELSON CHIBAYA
DICKSON PHIRI
ALISON CHIRWA
BLACKSON ZULU
MILTON NGWIRA

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT

Coram: Chibomba, JS, Kaoma and Hamaundu, Ag. JJS.

On 9th July, 2013 and on 10th June, 2015.

For the Appellants: Mrs. C. Mulenga, Assistant Senior State Advocate,
Attorney-General's Chambers.

For the Respondents: Mr. N. Okware of Messrs. Okware & Associates
appearing together with Mr. P.G. Katupisha of
Messrs Milner Katolo & Associates.

J U D G M E N T

Chibomba, JS, delivered the Judgment of the Court.

Cases referred to:

1. Bank of Zambia vs. Caroline Anderson and Andrew Anderson (1993 – 1994) ZR 47
2. Mary Musambo Kunda vs. the Attorney-General (1993 - 1994)ZR 1
3. George Chishimba vs. Zambia Consolidated Copper Mines Limited (1999) ZR 198
4. Attorney General vs. Achiume (1983) ZR 1

Legislation referred to:

1. The High Court Act, Chapter 27 of the Laws of Zambia
2. The Judgments Act, Chapter 81 of the Laws of Zambia
3. Public Service Pensions Act, Chapter 35 of the Laws of Zambia, Section 2 and 4.1.
4. Employment Act, Chapter 268 of the Laws of Zambia, Section 26 B(3).

The Appellant appeals against the Ruling of the Deputy Registrar at assessment, wherein the learned Deputy Registrar awarded a cumulative total sum of K2,501,381,500.98 which he apportioned to each of the Respondents as follows:-

- “1. K314,270,113.10 for Mr. Dickson Phiri
2. K433,248,073.29 for Mr. Milton Ngwira
3. K397,437,477.93 x 3 for the three CDEs
4. K561,550,880.80 for Mr. Alison Chirwa”

The learned Deputy Registrar also awarded interest at 8% per annum, from date of assessment until payment and costs.

The brief facts of this case are that the Respondents were employees of the now defunct Department of National Parks and Wildlife Services, which became the Zambia Wildlife Authority (the first Defendant) in the Court below. The said Department of National Parks and Wildlife Services was a Government Department under the Ministry of Tourism. The Respondents were declared redundant when the

Department of National Parks and Wildlife Services became defunct. They were later engaged by the Zambia Wildlife Authority, the Appellant in this appeal. Following their retrenchment, on 12th December, 2007, the Respondents, by Writ of Summons, commenced an action in which they sought the following reliefs:-

- “(a) K835,049,900.00 being long service bonus, leave pay, notice pay, repatriation allowance, loss of salary and house rental refund due to them following their retrenchment from Government service.**
- (b) Interest**
- (c) Costs”**

On 17th April, 2009, the parties entered into a Consent Judgment on the following terms:-

“THE PARTIES having agreed terms of settlement and Consenting that Judgment be entered in favour of the Plaintiffs and in such terms as provided hereunder.

BY CONSENT:

IT IS ADJUDGED that the Defendants do pay the Plaintiffs a sum of money as will be agreed to by the parties in default whereof such sums as will be assessed by the Deputy Registrar together with interest thereon and costs to be taxed, in full and final settlement of the Plaintiffs’ claim against the Defendant...”

Following the failure to agree on the sum to be paid, the Respondents applied to the Deputy Registrar for assessment of the sum(s) pursuant to the Consent Judgment. The learned Deputy Registrar heard evidence from the parties which he analyzed. He awarded the sums reflected above to each of the Respondents.

Dissatisfied with the awards by the Deputy Registrar, the Appellant has appealed to the Supreme Court advancing two grounds of appeal in the Memorandum of Appeal, as follows:

- “1. That the learned Deputy Registrar in the Court below erred in both law and fact when he awarded the Respondents a total sum of K2,501,381,500.98 without taking into consideration that the Respondents did not produce their pay slips or any other documentary proof indicating how much they had been earning as a basis of calculating how much was due to them.
2. That the learned Deputy Registrar in the Court below erred in both law and fact when he held that Alison Chirwa, the 3rd Respondent herein was a Classified Daily Employee and entitled to Retirement Terminal benefits for the period 1st November, 1971 to 31st December, 1996.”

The learned Assistant Senior State Advocate, Mrs. Mulenga, relied entirely on the Appellant's Heads of Argument. In support of ground one, it was submitted that the learned Deputy Registrar erred both in law and fact when he awarded the total sum of K2,501,381,500.98 on ground that the sum awarded did not take into account that the Respondents did not produce payslips or any other documentary proof indicating how much each had been earning, so as to form a basis for calculating how much was due to them. Mrs. Mulenga submitted that although the Deputy Registrar has power to assess damages under the **High Court Act**, such assessment, must be based on tangible evidence so as to enable the court to make a just and equitable award.

In support of the above contention, Mrs. Mulenga cited the case of **Bank of Zambia vs. Caroline Anderson and Andrew Anderson**¹, and stated that since the Respondents did not produce any documentary evidence to show the basis of their claim upon which the Deputy Registrar could have based his decision in assessing what was due to them, there was no proof of what they were earning. It was argued that in the absence of proof of actual earnings, the Deputy Registrar in this matter should not have awarded such a large sum to the Respondents.

Counsel also cited the case of **Mary Musambo Kunda vs. The Attorney-General**,² in which we stated, inter alia, that a plaintiff must adduce evidence to quantify net loss in the claims for pecuniary damages. She pointed out that in **George Chishimba vs. Zambia Consolidated Copper Mines Limited**³, we stated that loss of future earnings could have been proved by a payslip, and since this had not been done, the Deputy Registrar was right in disallowing that claim.

In support of ground two, Mrs. Mulenga submitted that the learned Deputy Registrar erred in law and in fact when he ruled that the 3rd Respondent was a Classified Daily Employee (CDE) and that he was entitled to retirement terminal benefits for the period 1st November, 1971 to 31st December, 1996 when in fact, the 3rd Respondent was not a CDE but an established officer. Counsel submitted that the letters at pages 62

and 64 of the Record of Appeal show that the 3rd Respondent was a civil servant. And that the **Public Service Commission** in that letter directed as follows:-

- “(a) Mr. Alison Chirwa be deemed to have been declared an established officer for the purposes of the Public Service Pensions Act No. 35 of 1996;
- (b) he be deemed to have been retired from the Civil Service with effect from 31st December, 1996 so that he may receive the retirement benefits prescribed under Section 41 of the Public Service Pensions Act No. 35 of 1996;
- (c) he be deemed to have been re-appointed to the Civil Service on agreement for temporary service with effect from 1st January, 1997 and
- (d) he be given three (3) months notice of termination of his temporary service and his last day of duty be 31st May, 2000.”

The above was communicated to the 3rd Respondent by letter at page 62 of the Record of Appeal which is dated 10th April, 2002 while the letter at page 64 is dated 6th June, 2000.

It was Mrs. Mulenga's further submission that it is clear that the 3rd Respondent was a civil servant as his employment was regularized by the letters referred to above. And that Section 2 of the **Public Service Pensions Act, No. 35 of 1996** defines an 'officer' as:-

“...a person serving on pensionable terms in the Public Service who has been confirmed in his appointment...”

Therefore, that the 3rd Respondent, as an established officer, was entitled to receive full retirement benefits prescribed under **the Public Service Pensions Act**, having been retired in national interest on 31st December, 1996. And therefore since he was not declared redundant, he was not entitled to any redundancy benefit. Counsel argued that, where an employee is declared redundant, such employee would be entitled to a redundancy package and not to full retirement benefits as was held by the learned Deputy Registrar.

It was Mrs. Mulenga's further submission that **Section 26B (3) of the Employment Act**, did not apply to the 3rd Respondent, as he was retired under **Section 39 of the Public Service Pensions Act** and not declared redundant. And, that **Section 26B (3) of the Employment Act** only applies to oral contracts. Hence, it did not apply to the 3rd Respondent. And, that since the 3rd Respondent was retired in national interest, he was not entitled to remain on the payroll as there is no law which requires an employer to pay salaries/wages to a retired employee until he/she gets his/her pension.

Mrs. Mulenga argued further that the termination of the 3rd Respondent's temporary service did not amount to redundancy, as that was a mere act of separation between the employer and the employee

and that he was paid three months salary in lieu of notice in accordance with **General Order No. 45** as evidenced by the letter at page 62 of the Record of Appeal. Therefore, that the learned Deputy Registrar misdirected himself in law and fact when he awarded the Respondents a total sum of K2,501,381,500.98 without their payslips or any other documentary proof to show how much each was earning and for also holding that the 3rd Respondent was a CDE and hence, this Appeal should be upheld with costs to the Appellant.

In opposing this Appeal, the learned Counsel for the Respondents, Mr. Okware, also relied on the Respondents' Heads of Argument. In response to ground one, it was Mr. Okware's submission that the record will show that the learned Deputy Registrar based his decision on the evidence presented to him by the Respondents. In response to the argument that the Respondents did not submit any documentary evidence to indicate how much each was earning so as to form a basis for calculating how much was due to them, Counsel referred us to pages 16 to 99 of the Supplementary Record of Appeal which Counsel contended, contain the applicable conditions of service. Counsel submitted that these conditions were also contained in various Circulars from Cabinet Office. Counsel urged us to take judicial notice of the fact that a pay slip is merely a product of conditions of service and thus, the

Respondents relied on the Circulars which contained their conditions of service which were produced in the court below. As an example, Counsel referred to **the Wildlife Conservation Revolving Fund Conditions of Service** at pages 16-35 of the Supplementary Record of Appeal.

Counsel also referred us to Circulars B5 of 1994, B3 of 1999 and B4 of 2003 and to the Circulars in the Supplementary Record of Appeal. Counsel argued that the Respondents, therefore, produced documentary proof to substantiate their claims for the various underpayments.

Mr. Okware then went on to invite us to take into account the Appellant's conduct during trial. He pointed out that the Appellant did not state that the Circulars were not genuine or that the Respondents were not entitled to any of the conditions contained in those Circulars. Further, that the pay slip for Louis Maimbo was merely persuasive to show the court below how persons in similar circumstances as the Respondents were treated by the Appellant. Counsel, therefore, urged us to take judicial notice that the civil service salaries are determined by the category that one serves in regardless of which Ministry one serves under. Counsel's position was therefore, that the learned Deputy Registrar was in order as he relied on Circulars together with the

evidence of PW1. And that the Appellant's own witness, DW1, admitted that **Circular B18 of 2000** produced by the Respondents in the Court below to support their case, contained the salaries for the 4th and 5th Respondents as he also ably explained how he arrived at the calculations contained in the bundle of documents.

Counsel argued further that the Respondents' witness explained that the Respondents' pay slips were taken by ZAWA officers which evidence the Appellant did not challenge under cross examination. That on the other hand, the Appellant's witness lamentably failed to justify their calculations as both DW1 and DW2 failed to show the basis of their calculations and gave contradictory evidence on the 2nd Respondent's salary as DW1 said his salary was K75,000 while DW2 put it at K50,000 per month. And that both witnesses admitted under cross-examination, that they did not have documents or pay slips to support their figures on the Respondents' salaries.

In response to ground two, Mr. Okware supported the learned Deputy Registrar's finding that Alison Chirwa was a CDE and therefore, entitled to redundancy benefits for the period 1st November, 1971 to 31st December, 1996 as he was declared redundant in 1996. And that he was retrospectively re-appointed to the civil service on 6th June, 2000. It

was Mr. Okware's submission that clause (b) of the letter at page 64 shows that Mr. Chirwa was retired from the civil service and that this was notwithstanding the fact that he was a CDE. Counsel argued that the question that begs an answer is, "**why was he re-appointed retrospectively**" with effect from 1st January, 1997?

Counsel submitted that it is clear that the Appellant was trying to cover up a mischief as Mr. Chirwa was declared redundant in 1996 and had not been paid his redundancy package and that the pay slip produced by the Appellant on page 106 of the Record of Appeal was related to the period after he was re-engaged to the civil service on temporal service. It was argued that the Record also shows that the learned Deputy Registrar took into account the various positions that Mr. Chirwa served under, in awarding him his dues.

Counsel submitted that the Respondents therefore, discharged their burden of proof to the required standard of balance of probabilities and that as such, the Court below correctly found in their favour. In conclusion, Counsel reiterated the Respondents' submissions in the Court below, which we shall take into account in arriving at our decision on the issues raised in this Appeal. Counsel, accordingly, urged us to dismiss the Appeal with costs.

We have seriously considered this Appeal together with the Heads of Argument filed and the authorities cited. We have also considered the Judgment by the learned Deputy Registrar at Assessment. It is our considered view that this Appeal raises two major questions for our determination. The first is whether the total sum of K2,501,381,500.98 awarded by the learned Deputy Registrar to the Respondents, as their terminal benefits, was supported by the evidence on Record. The second is whether the learned Deputy Registrar was on firm ground when he held that the 3rd Respondent was a CDE and an established civil servant and therefore entitled to both redundancy package and pension.

As regards ground one which raises the first question posed above, it is not in dispute that the Respondents were entitled to terminal benefits. However, the Appellant's major argument is that the award by the Deputy Registrar was not supported by documentary evidence, such as payslips, to show how much each one of the Respondents was earning. The Respondents' response was that documentary evidence was produced in the form of payslips and Circulars from Cabinet Office. The oral evidence of PW1 and DW1 was also cited as reflecting what each one of the Respondents was entitled to. Hence, the position that

the award by the learned Deputy Registrar of the sum of K2,501,381,500.98 was sound.

We have perused the Circulars produced. These reflect the different scales and amounts for each scale. These are what the Respondent relied on as proof of what each one of the Respondents was earning. However, our firm view is that although these Circulars show the salary scales and the amounts for each salary scale, they do not show the actual amount each individual employee in that particular scale was earning. For example, the conversion table in the Circular at page 51 of the Record of Appeal, which is for **non-civil service employees' wages scale**, has four different scales for "**Special Grade CE Classes i, ii, and iii**". Each grade has at least six notches with the lowest figure at the bottom of the scale and the highest on top of the scale. This means that a new entrant in that scale would be earning the lowest in that scale and has a ceiling for the highest paid employee in that scale. As a result, the Circulars on their own cannot be evidence of what each employee is/was actually earning, because that depends on the notch the employee was at in that scale at the time of termination/retirement/retrenchment.

Although Mr. Okware, on behalf of the Respondents, did argue at length that the award was also supported by payslips, perusal of the Record has, however, shown that the two payslips produced and relied

upon were not for any of the Respondents in this matter, but for persons who were not parties to this action. So, as much as we agree that a payslip can be used to show what each employee is/was earning during the period in question, the Respondents cannot rely on other employees' payslips as proof of what each one of them was earning. Therefore, in the absence of the Respondents' own payslips, it is difficult for us to accept the learned Deputy Registrar's assessment of what each one of the Respondents was earning during the period in question. To compound this matter further, in the judgment appealed against, the learned Deputy Registrar did not indicate or disclose where the sums that he based his calculations of the Respondents' "last salary", "last basic salary" and so on, came from. This could have enabled us ascertain whether or not the learned Deputy Registrar properly directed himself in calculating the sum(s) due to each one of the Respondents.

As regards ground two which raises the second question posed above concerning the status and the awards made to the 3rd Respondent by the learned Deputy Registrar, for convenience we recast hereunder the Deputy Registrar's observations, findings and the awards which he made. This is as follows:-

"The next consideration – is to establish the Plaintiffs' categories and their entitlements. Starting with Mr. Alison Chirwa; the question is; was he a CDE or a Civil Servant – under which category was he to be considered? The only evidence on this issue was in the two letters marked "ESB 1"; authored by two

Permanent Secretaries; informing Mr. Chirwa regards his employment status. The two letters were dated 6th June, 2000 and 16th April, 2002. The first letter stated that:-

- a. Mr. Alison Chirwa Wildlife Scout be deemed to have been declared an established officer for the purpose of Public Service Pension Act...
- b. He be deemed to have retired from Civil Service with effect from 31st December, 1996...
- c. He be deemed to have been re-appointed to the Civil Service on agreement for temporary service with effect from 1st January, 1997; and
- d. He be given (3) months notice of termination of his temporary service and his last day of duty be 31st May, 2000.

The second letter dated 16th April, 2002 stated that:-

- b. Mr. Chirwa was deemed to be declared an established officer and retired from Civil Service in national Interest with effect from 31st December, 1999.

The Defendants' interpretation of the letters was that Mr. Chirwa was retired normally as a Civil Servant and was supposed to receive his retirement benefits from Pensions Board. The contrary interpretation from the Plaintiffs was that Mr. Chirwa retired as a CDE; for the reason that the purported appointment into civil service was never formalized. In this view, however, both interpretations are incorrect, in that the letters established; first; that Mr. Chirwa was retired as CDE in June 1996 and then was re-appointed (Civil servant) on temporary service which appointment was to end on 31st May, 2000. The second letter merely pronounced that the temporary service as civil servant was untimely terminated in national Interest on 31st December, 1999. This means from the day Mr. Chirwa joined service (1st November, 1971) he was CDE – and he effectively retired as a CDE on 31st December, 1996; thus he was entitled to full retirement package as CDE. When (in the second letter) the appointment to temporary service was terminated in national interest on 31st December 1999; per Section 39 of Act No. 35 of 1996 that was redundancy as the duly agreed term of appointment had been cut short.

This court's interpretation in simple terms mean Mr. Chirwa was entitled to claim under both categories: retirement as CDE and redundancy as Temporary Civil Servant. It is also, my considered view, that since the two letters on Mr. Chirwa's appointments were authored by Permanent Secretaries; renders support to the fact that Mr. Chirwa's appointment as civil servant was officially formalized and was therefore rightfully effected.

Mr. Chirwa's working career was therefore broken up as follows:-

- i. a CDE from 1st November 1971 to 31st December 1996
- ii. a Civil Servant from 1st January 1997 to 31st December 1999.

Since Mr. Chirwa was not paid anything, the Defendant must pay Mr. Chirwa's full retirement benefits in (i) and Redundancy benefits in (ii) while it is true that other benefits as civil servant would be paid from Public Service Pensions Board, in the meantime however, as a redundant employee Mr. Chirwa was entitled to the provisions of Sections 26B (3) of the Employment Act Chapter 268 and Circular B.2 of 2004; namely to remain on the payroll."

The major argument by the Appellant is that the Deputy Registrar ought not to have awarded Mr. Alison Chirwa redundancy benefits as he was an established civil servant and not a CDE. Mr. Okware's response was that the Deputy Registrar was on firm ground as the same was based on the evidence before him.

We have considered the above submissions and the Deputy Registrar's findings and conclusions.

As regards the findings by the Deputy Registrar that Alison Chirwa, was a CDE from 11th November, 1971 to 31st December, 1996 when he retired and that he was re-appointed as an established civil servant from 1st January, 1997 to 31st December, 1999; it is evident that the learned Deputy Registrar relied on the evidence of PW1, a Labour Consultant, whom the Respondents had engaged to process terminal benefits on their behalf. The record shows that the issue of Mr. Alison Chirwa retiring as a CDE only arose in the evidence of PW1. At pages 164 and 165 of the Record of Appeal, PW1's evidence in the court below with regard to the 3rd Respondent's status was as follows:-

“Alison Chirwa was not retired as a Civil Servant the allegation that he was Civil Servant is not correct because he retired as a CDE.

There was no application by form 1 and then there must be acceptance letter and letter CSB form 1 which is medical examination. There is also supposed to be arrival form 1 which engages a person into civil service without those then the appointment is null and void.

The letter of 16.04.2002 stating that retirement from civil service for Mr. Chirwa this letter was written after Chirwa was retired 31.12.1999

The other of 6.06.2000 it talks of appointment/termination. The general order are clear that temporal service is given to retirees who have reached 5 years but continued to work up to the time they received retirement letters. This is because PS Act does not accommodate any excess years after retirement age.

Under the terms of General Orders the temporal service has to be agreed by the two parties. The assertion for Chirwa to go to pension's board should be dismissed as Chirwa never contributed to the board. Public Service Pension Act is only mandated to pay members out of their contribution. It's the employer who submits the file to the Pension Board – Its not the individual retiree to submit the file.”

The record shows that PW1 was not cross-examined on the issue of Alison Chirwa retiring as a CDE and being re-engaged as an established civil servant on contract.

There is however, evidence on record from the Appellant's witnesses, DW1 and DW2, on the status of Mr. Chirwa. At page 172 of the Record of Appeal, DW1 told the Court below that Mr. Chirwa was a civil servant. DW1 was not cross-examined on this issue. Under re-examination, DW1 told the Court below at page 176 that:-

“Alison Chirwa was a Civil Servant, was retired normally therefore he was not supposed on payroll. Alison was not made redundant. Alison who was retired was not entitled to loss of salary....”

DW2's evidence (at page 184) was as follows:

"I had a look at Mr. Chirwa's file, Mr. Chirwa was a Civil Servant, his payslip Man Number, he worked for 20 years. He was appointed 1.11.1971 and terminated 31.12.1999. He was retrenched on national interest: that means the government had taken a restructuring process for civil servants in most ministries."

At page 185, DW2 told the Court below that:

"Mr. Chirwa was supposed to get his pension from GRZ. He was deprived of his pension which also must be paid by the pension board."

Under cross-examination, DW2 maintained his position that Alison Chirwa was retired in national interest and that only the other 3 Respondents were declared redundant and hence, entitled to redundancy payments.

Now, whilst the Deputy Registrar rejected the evidence of the Appellant's witnesses that Mr. Chirwa was retired in national interest as a civil servant and that he was supposed to receive his retirement benefits from Pensions Board, he however, accepted and relied on the same letters that deemed Mr. Chirwa an established civil servant from 1971 to 1996 (see pages 62 and 64), to find that Mr. Chirwa retired as a CDE and that he was re-appointed as an established civil servant from 1st January, 1997 to 31st December, 1999 when his temporal employment was terminated. His interpretation, was therefore, that Mr. Alison Chirwa was entitled to claim "under both categories: retirement as a CDE and

redundancy as a temporary civil servant” on ground that the two letters from the Permanent Secretaries supported the official formalization of Mr. Chirwa’s appointment as a civil servant and that this was rightfully effected. And hence, his conclusion that Alison Chirwa was entitled to full retirement benefits as a CDE for the period 1st November, 1971 to 31st December, 1996 and to redundancy benefits as a civil servant from 1st January, 1997 to 31st December, 1999 pursuant to Section 26B (3) of the Employment Act, Chapter 268 and Circular B. 2 of 2004 of him remaining on the payroll.

It is, however, our firm view that the above findings are a misapprehension of the evidence and the law by the learned Deputy Registrar. Having found and accepted that Alison Chirwa’s appointment as a civil servant was formalized, as evidenced by the two letters referred to above, he ought to have accepted the deeming of Mr. Chirwa as an established civil servant, for purposes of the Public Service Pensions Act No. 35 of 1996, as that is what the two letters were stating. So had the learned Deputy Registrar properly apprehended the facts and the law, he could certainly not have come to the erroneous conclusion that Alison Chirwa retired as a CDE and that he was entitled to redundancy benefits of remaining on the payroll after termination of his temporal Contract of Service.

We are also of the firm view that the learned Deputy Registrar misapprehended the law and the facts when he came to the conclusion that following the termination of his re-appointment as a civil servant for the period 1st January, 1997 to 31st December, 1999, Alison Chirwa was entitled to redundancy benefits under Section 26B (3) of the Employment Act as that Section could not and did not apply to him as Mr. Chirwa's position on re-appointment on contract, was that of a civil servant as clearly spelt out in the two letters in question. Further, it is settled that an employee on a fixed term contract is not entitled to pension benefits or redundancy pay as such employee can only be entitled to gratuity at the end of his contract. If the contract is wrongfully terminated before it ends by effluxion of time, all the employee may be entitled to are damages for breach of contract.

In this case and based on the first letter from the Permanent Secretary, whose terms we have recast above, Mr. Chirwa was given three months notice of termination of his temporary contract of service and his last day was 31st May, 2000. There is, however, no evidence to suggest that this termination notice was wrongful or that the same was in breach of Mr. Chirwa's contract of service so as to entitle him to any damages.

In view of these clear misdirections by the Deputy Registrar and on the basis of the principles in Attorney General vs. Achiume⁴, we reverse the findings by the Deputy Registrar as regards the status of Alison Chirwa and his entitlements upon retirement and on termination of his temporary re-engagement to the public service as a civil servant. We instead order that Mr. Alison Chirwa is and/or was entitled to receive his pension under the Pensions Act upon retirement from the civil service as an established civil servant for the period 1st November, 1971 to 31st December, 1996 as deemed by the two letters recast above and as evidenced by the evidence of the Appellant's witnesses, DW1 and DW2. We further order that since Alison Chirwa was given three months notice of termination, he was not entitled to pay in lieu of notice.

As regards the award of interest by the Deputy Registrar, it is clear that he awarded interest from date of termination on ground that the Appellant did the same in calculating the Respondents' entitlement and because the Appellant had done the same in other cases. However, this reasoning is flawed as this is contrary to statutory provisions which regulate how interest should be awarded, namely, the High Court Rules and the Judgment Act. So the parties cannot contract themselves out of a statutory provision. Our conclusion is therefore, that the award of interest effective from the date of termination was a misdirection.

Interest should be effective from the date of Writ up to the date of Judgment and thereafter, at short term deposit rate not exceeding the Bank of Zambia current lending rate until full payment. We accordingly set aside that order.

In summing up, we wish to point out that in the cases cited by Mrs. Mulenga which we have recast above and indeed, many other cases, this Court has laid down useful guidance on how an assessment must be done. We also wish to observe that the Respondents' evidence was given by PW1, the so called "Debt Collector", who had no personal knowledge of the Respondents' actual salaries and conditions. He presented his own calculations which were based on unsubstantiated information. The Deputy Registrar ought not to have accepted this evidence over the evidence of the Appellant's witnesses who were in the system and had first hand information of the salaries and conditions of service that pertained in the system.


We have also noted that in accordance with the evidence of PW1, at page 168, Disckson Phiri and Milton Ngwira, the 2nd and 5th Respondents respectively, are dead. They, however, continue to be reflected as parties in this Appeal. We expect that this will be cured as the administrators of their respective estates should be joined by making an appropriate application in the court below.

In view of the fundamental misdirection by the learned Deputy Registrar as illustrated above, we order that the Judgment by the Deputy Registrar be and is wholly set aside. We order that the Record be sent back to the Court below for re-assessment by a different Deputy Registrar, as the issue of liability still stands.

We order that costs of this appeal shall abide the outcome of the reassessment in the Court below.



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H. Chibomba
SUPREME COURT JUDGE



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R. M. C. Kaoma
ACTING SUPREME COURT JUDGE



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E. M. Hamaundu
ACTING SUPREME COURT JUDGE