IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 8/2014**
HOLDEN AT LUSAKA **SCZ/8/211/2013**

(Civil Jurisdiction)

BETWEEN:

MARTHA MAKASA **APPELLANT**

AND

MPIKA DISTRICT COUNCIL **RESPONDENT**

Before: Mambilima CJ., Kabuka and Chinyama, JJS., on 12th July 2016 and 24th August, 2016.

For the Applicant : Absent
For the Respondent : Mr. S Mambwe, Messrs Mambwe Siwila and Lisimba Advocates

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JUDGMENT

Chinyama, JS, delivered the Judgment of the court

Legislation referred to:

1. *Supreme Court of Zambia Act, Chapter 25, Laws of Zambia.*
2. *Local Authorities Superannuation Fund Act, Chapter 284, Laws of Zambia.*
3. *High Court Act, Chapter 27, Laws of Zambia.*
4. *Judgments Act, Chapter 81, Laws of Zambia.*

Cases referred to:

1. *Wilson Masauso Zulu V. Avondale Housing Project Limited (1982) ZR 17.*
2. *Khalid Mohammed V. Attorney General (1982) ZR 49.*

Works referred to:

1. *Rules of the Supreme Court (White Book), 1999 Edition.*

This is an appeal against the judgment on assessment by the acting Registrar of the High Court, which determined that the sum of K224,346.80 (K224.35 rebased) was the total sum of the appellant's contributions that had not been remitted to the Local Authorities Superannuation Fund (LASF) by the respondent in the period May, 1995 to December, 2000.

In the court below, the appellant was the plaintiff while the respondent was the defendant. By writ of summons issued out of the court's principal registry at Lusaka, the appellant sued the respondent for, among other claims, an order that the respondent remits her monthly contributions to the LASF for the aforestated period to enable the said LASF pay her dues.

The respondent did not enter an appearance or file a defence to the claim. The appellant proceeded to apply for and obtained a default judgment awarding her the relief sought with a further order that there be assessment of the amount due to be remitted to LASF if the parties fail to agree on the figures.

The appellant then applied to the learned acting Registrar of the High Court for assessment of the sum due in respect of the unremitted LASF contributions. The respondent did not oppose the application or attend the hearing, even though, according to the learned acting Registrar, the advocates for the respondent were served with the application.

In the affidavit in support of the application for assessment, the appellant did not state the amount due but said in paragraph 9 thereof that she was claiming the money owed to her to be paid to her with interest. It is notable, however, that in the statement of claim accompanying the writ of summons, the appellant had put the total sum of the unremitted monthly contributions at K35 million (non-rebased). There is no explanation how she arrived at the figure and she did not mention this figure in the affidavit in support of the summons for assessment.

In the affidavit in opposition to the application for entry of judgment, the respondent had deposed that according to its records the total sum that was not remitted in the period 1995 to 2000 was only K224,346 (non-rebased). The respondent relied on the copy

records of the appellant's LASF contributions for the period which were exhibited as "TZ1" in the affidavit.

In her judgment, the learned acting Registrar noted that the appellant had not helped the court to arrive at the amount due as she had not stated how much the monthly deductions were. The learned acting Registrar stated that the sum claimed of K35 million was without supporting documents. She also referred to the exhibit "TZ1" and concluded that, bearing in mind the appellant's salary and the monthly contributions which were being deducted, the sum of K224,345.80 represented the total contributions made during the period at issue. She accordingly awarded the appellant that sum with interest at the short term deposit rate from the date of the writ to the date of judgment and thereafter at the Bank of Zambia lending rate until full payment.

Dissatisfied with the acting Registrar's judgment, the appellant appealed to this court setting down essentially three grounds of appeal as follows:

1. **That the learned acting Registrar erred in law and in fact when she held that the appellant's total contribution of K224,345.80 now Kr224.34 being the amount due without considering Local Authorities Superannuation Fund (LASF) calculations had the amount been remitted to the Institution (LASF). The court neglected to call evidence from LASF even after the appellant made**

an application viva voce for LASF to come and testify in the proceedings as to the amount due as to her present situation and as such it was not possible to consider her situation then with the rightful quantum of damages.

2. **The learned acting Registrar erred in law and in fact when she failed to notice that the appellant was not served with affidavit in opposition by the respondent which she could have responded to had she been served with same. The same affidavit in opposition was basis upon which the decision of the court was premised.**
3. **The learned acting Registrar erred in law and in fact in evaluating the evidence before her thereby making biased findings unsupported with credible evidence in favour of the Respondent.** (sic).

In support of the grounds of appeal, the appellant filed Heads of Argument. The Heads of Argument did not address each ground of appeal in the manner in which they are supposed to do. It is doubtful that the appellant who appeared in person understood the reason for filing Heads of Argument. We digress briefly to explain for the benefit of litigants appearing in person that Heads of Argument are a requirement under **Rule 70 (1) of the Supreme Court Rules[1].** The rule states:

> **"70. (1) An appellant or respondent who will be represented by a practitioner at the hearing of the appeal shall prepare a document setting out the main heads of his argument together with the authorities to be cited in support of each head."**

As can be seen, from the rule, Heads of Argument apply in a case in which the appellant or the respondent will be represented at the hearing of the appeal by a practitioner. The rule does not require an unrepresented litigant to file them. As to how to treat the

matter in the absence of specific provision in the **Supreme Court Act**[1], the **Rules of the Supreme Court**[1] shade some light when dealing with the requirement to file skeleton arguments by litigants acting in person. The following appears under paragraph **55** of **Order 59/9**:

> **"55. In the interests of avoiding placing undue burdens on them litigants in person are not required to lodge skeleton arguments in support of their appeals and applications, but may do so if they wish..."**

It appears to be the practice in this court that our Registry routinely insists on litigants acting in person to also file Heads of Argument to support the grounds of appeal. We would not say that this is not good practice as there equally appears to be no caveat prohibiting the court from considering such arguments once filed by a litigant acting in person. Litigants who are acting in person should be free to file Heads of Arguments. However, where a litigant who is acting in person decides to file Heads of Argument, the arguments must specifically address the grounds of appeal so as to quickly bring into focus the contended issue(s) in each ground. This is because the arguments are supposed to speak to each ground of appeal so that it is clear what the issue in each ground is. We are

not able to say that in this case the appellant's Heads of Argument, so-called, satisfy the requirement as regards each ground of appeal.

We have, however, noted the thrust of the argument. It is that the learned acting Registrar erroneously arrived at the sum awarded of K224,385.80 (the correct figure as recorded in the judgment is K224,345.80) because she did not take into account the fact that the appellant had been a contributing member to the LASF for seven years before she resigned. It is thus her position that the sum awarded did not take into account the other years served before the Respondent stopped remitting the contributions. This argument is clearly directed to ground one in the grounds of appeal.

The appellant was not in attendance at the hearing and did not, therefore, speak to her other grounds of appeal. Suffice, however, that we shall consider all the grounds of appeal in this judgment.

At the hearing of the appeal we directed Mr. Mambwe, counsel for the respondent, to file a response to the appellant's Heads of Argument after he informed us that he had not done so because the

appellant had not served the documents pertaining to the appeal. On 22nd July 2016, the Respondent's Heads of Argument were filed.

In response to ground one of the appeal, counsel argued that the court below had made a finding of fact that only K224.34 (rebased) was due in respect of the unremitted contributions for the period at issue; that the appellant's claim for the sum of K35 million was not supported by any evidence. It was submitted that we can only set aside or reverse a finding of fact of a lower court where the finding is either perverse or made in the absence of relevant evidence. The case of **Wilson Masauso Zulu V. Avondale Housing Project Limited**[1] was cited for the submission. It was further argued that the only evidence available to the learned acting Registrar showed that K3.15 (Registrar's judgment shows it was K3,159 non rebased) was the contribution being deducted per month; that the Registrar multiplied this amount by the period that the contributions were not being remitted to LASF. Counsel submitted that this approach was neither perverse nor a misapprehension of the facts by the learned acting Registrar.

On the argument that the court below failed to call evidence from LASF, the submission was that the onus of proof lies on the

person alleging and not the court. The case of **Khalid Mohammed V. Attorney General**[2] was relied upon.

We were urged to dismiss ground one of the appeal.

In relation to the second ground of the appeal, it was argued that the appellant was served with the affidavit in opposition (to the appellant's summons to enter Judgment in default of defence) as shown in the transcript of proceedings in the Record of Appeal. Counsel pointed out alternatively, that since the court went on to grant the application to enter judgment in default, the affidavit could not have prejudiced the appellant even if it were not served. We were also urged to dismiss this ground.

Turning to the third and final ground of appeal, it was submitted that the appellant has not demonstrated how the court below erred in evaluating the evidence. Counsel reiterated his arguments in relation to ground one and urged that this ground be dismissed as well.

We have duly considered the grounds of appeal and the arguments advanced by the parties. We are of the view that the three grounds and the arguments may be dealt with together because of the interrelatedness of the issues in contention. We

agree with the respondent's submission, in the first place, that it is not the duty of the court to call or even, we must add, to decide for a party which witness(es) to call. We reiterate what we said in the case of **Wilson Masauso Zulu V. Avondale Housing Project Limited**[1] that it is generally for the person making allegations to prove those allegations. We are, nevertheless, of the view that the appellant missed the point of the acting Registrar's judgment on assessment. The judgment determined that the monies that were not remitted in the period at issue amounted to K224.34 (rebased) based on the respondent's records of what were supposed to be the monthly remittances.

We are alive to the contention in ground two of the appeal that the affidavit in opposition to the summons to enter judgment in default of appearance and defence was not served on the appellant. However, a perusal of the Record of Proceedings at page 42 taken on 18th September, 2013 recorded the following exchange:

> **"...I want Mpika District to pay me K70million. K40million is the damages which they have caused me in my life and K30million is for the contributions which they were not remitting to LASF.**
> **Mr. Chileshe: We are opposing the application by the plaintiff. We rely on the affidavit that we filed.**
> **Plaintiff: It has been too long for the excuses. I pray that the case proceeds as it has taken too long.**
> **Court: Adjourn for ruling.**"(sic)

It is clear from the above notes of the proceedings that the respondent had filed an affidavit in opposition. The appellant did not, at the time raise any objection that the affidavit was not served on him or that he was unaware of it. The evidence shows that the affidavit was served on the appellant. The learned acting Registrar was, therefore, entitled to make the finding of fact that the unremitted contributions amounted to the sum of K224.34 rebased based on the respondent's records exhibited in the affidavit which the appellant did not challenge. We see no justification for interfering with this finding of fact as it is supported by the evidence which was before the learned acting Registrar and cannot be said to be perverse. The court having so determined, the respondent was then to remit this amount to LASF.

As regards the true value of the contributions which is at the heart of this appeal, the concern is resolved in **section 33** of the **Local Authorities Superannuation Fund Act**[2]. The section prescribes that:

> **"33. Subject to the provisions of any rules made under paragraph (j) of subsection (1) of section forty-one, if a member, upon leaving the service of his employer, is not eligible to receive any benefit under the foregoing Provisions of this Part, he shall, provided the provisions of section thirty-two do not apply to him, be granted a lump sum calculated as follows:**

(a) ...
(b) if such member has had seven years' or more continuous service, a payment equal to twice the amount of the contributions paid by him together with interest thereon at the rate of four per centum per annum compounded annually."

The effect of the foregoing provision is that where an employee, who has had seven years or more of employment and is a member under the **Act**[2], does not leave by way of retirement, dismissal or death but resigns, the employee is entitled to payment of a lump sum in the manner provided. It is not in issue, in this case, that the appellant was a member of LASF, that she had been in employment with the respondent for just over seven years when she resigned and that the provision applies to her. Further, subsection (3) of section twenty of the **Act**[2] stipulates a discretionary penalty against an employer who fails to remit the contribution on the due date as follows:

"20. (1) ...
(2) Every associated authority shall, before the seventh day of every month
(a) certify to the committee in writing the amount of the contributions and interest deducted from members in the employ of the authority during the preceding month and shall pay such amount into the Fund; and
(b) ...
(3) Where any amount payable under subsection (2) remains unpaid by the seventh day in any month, the committee may, in its discretion, charge the associated authority concerned interest on the amount unpaid at the rate of four per centum per annum."

In this case the respondent was not remitting the monthly contribution from May, 1995 to December, 2000 when the respondent resigned. The issue of the true value of the contributions and ultimately the lump sum payment was not a matter for the learned acting Registrar to determine. It is a matter to be resolved by the LASF especially if it exercises its discretion to award interest on the delayed contributions.

To clarify the matter, we uphold the learned acting Registrar's finding that the amount of contributions not remitted to the LASF in the period May, 1995 to December, 2000 is K224.35. This amount must be remitted forthwith. In terms of the final amount of the lump sum payment to be paid to the appellant by the LASF, however, this will depend on whether LASF will impose interest on the delayed remittances. In this vein we are of the view that the learned Registrar ought not to have awarded interest on the amount ordered to be remitted to LASF as the award was not, strictly speaking, a money judgment in terms of **Order 38 Rule 8** of the **High Court Rules**[3] and **section 2** of the **Judgments Act**[4]. We, accordingly, set aside this part of the judgment.

The appellant will have to make her claim to LASF which after receiving the amount determined by the court from the respondent, would then pay the appellant in accordance with the law as provided, bearing in mind that the contributions were not remitted in the time allowed. In our considered judgment all three grounds of appeal and, therefore, the entire appeal has no merit. In view of the respondent's own misconduct in failing to make timely remittances of the appellant's contributions to LASF, however, we will order either party to meet their own costs of this appeal.

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I.C. MAMBILIMA
CHIEF JUSTICE

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J.K. KABUKA
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE