

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 153/2015

BETWEEN:

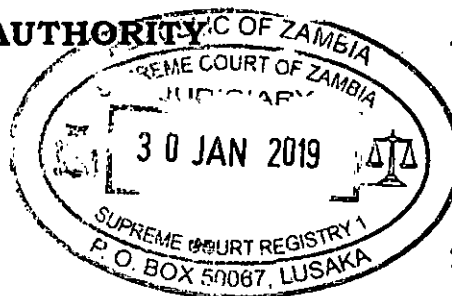
ZAMBEZI RIVER AUTHORITY

APPELLANT

AND

GILBERT ZULU

JOHN BONZO



1ST RESPONDENT

2ND RESPONDENT

Coram: Mwanamwambwa, DCJ, Kajimanga and Musonda, JJS
on 8th May, 2018 and 30th January, 2019

For the Appellant: Mr. W. Mubanga, SC of Messrs Chilupe &
Permanent Chambers

For the Respondent: Mr. M. Katolo of Messrs Milner & Paul Legal
Practitioners

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Legislation referred to:

- 1. Industrial and Labour Relations Act, Cap. 269 of the Laws of Zambia, Sections 85 (4) and 108**
- 2. Statutory Instrument No. 2 of 1995 (Zambia)**
- 3. Statutory Instrument No. 119 of 1995 (Zimbabwe)**

Sometime in January 1993, Mr. John Bonzo, the respondent to this appeal, had the good fortune of receiving an employment offer from Zambezi River Authority, the appellant herein. The employment offer involved was that of being engaged as a Telemetry Technician. This offer was conveyed to the respondent in the appellant's offer letter which was dated 19th January, 1993.

The employment offer in question undoubtedly represented a stroke of good fortune for the respondent not least because the appellant, as a statutory body which is jointly owned by the Governments of Zambia and Zimbabwe was one of the best-paying employers at the time. Aside from a comparatively generous salary, the appellant also offered its employees a variety of incentivising perquisites which made it far more attractive as an employer.

One of the perquisites which the appellant was offering to certain categories of its employees at the time was an allowance which was known as a Critical Area Allowance ("the allowance"). This allowance became the subject of sustained wrangling between the appellant of the one part and Gilbert Zulu, Francis Sungwe and the respondent, of the other. That wrangling culminated in the

filing, by the trio, of the complaint in the court from which this appeal arose.

The genesis of the wrangling we have alluded to above was the appellant's stubborn and persistent refusal to extend the allowance to the three gentlemen mentioned above. While the three disaffected employees articulated what they considered to have constituted the basis for seeking to secure the benefit of the allowance, the appellant outrightly dismissed the employees' quest.

Given that this appeal is limited in its scope to the respondent, we propose to segregate and isolate issues and evidence that pertained to the respondent and restrict the continuing discourse to him.

The respondent's determination to secure the extension of the allowance to him was founded and anchored upon what was expressed and conveyed in one paragraph of the appellant's employment offer letter to him. That paragraph was couched in the following terms:

"1. You will be paid a salary of Z\$3,590.00 per month...

You will also be paid a Critical Area Allowance of 15% of basic salary per month upon production of a membership certificate from a recognised professional institution."

There is, however, nothing on the record which suggests that, following his appointment, the respondent took any steps to secure the payment of the allowance to him by his employer. We make this observation because, as shall become clear later in this judgment, entitlement to this allowance was not automatic but subject to an employee meeting some set criteria.

On 27th July, 1994, the appellant's Chief Executive Officer issued a memorandum in which he advised the appellant's senior staff that the allowance was only available to holders of posts in the organisation which the Chief Executive Officer listed and which were considered critical to the operations of the appellant at that time. For completeness, entitlement to the allowance was subject to some specified conditions. As it turned out, the respondent's post was not one of those that the Chief Executive Officer had listed in his memorandum for the purpose which we momentarily referred above.

Sometime in 1995, two identical Statutory Instruments namely, numbers 2 and 119 of that year were separately

promulgated in the Republics of Zambia and Zimbabwe, respectively, in relation to the appellant's Terms and Conditions of Employment. Each of the two Instruments was titled '*Zambezi River Authority (Terms and Conditions of Service) By-Laws, 1995*'.

In terms of By-Law or Section 18 of the two Statutory Instruments (which, for convenience, we shall continue referring to in this judgment as 'the Statutory Instrument'):

"The [Appellant was to] pay a critical area allowance, as determined by the [Appellant] to professionally and technically qualified employees as designated by the [Appellant]."

On 20th May, 2005, the respondent authored an internal memorandum which was addressed to the appellant's Assistant Secretary – Administration, whose subject matter was the allowance and which was expressed in the following terms:

"With reference to the above captioned subject, please find attached herewith documents required for me in order to be paid critical area allowance.

The [Appellant] recognises my professional institution and pays membership subscription. Therefore, I would be grateful if I am guided/advised as to why I am not paid the Critical Area Allowance."

On 21st June, 2005, the appellant's Corporate Secretary and Finance Director responded to the respondent's memorandum of 20th May, 2005 in the following terms:

"Kindly refer to your memo on the above subject matter dated May 20th, 2005 addressed to the Assistant Secretary – Administration.

Management is surprised that it has taken you so many years to quote your letter of employment which is dated 11th January, 1993.

It has also been noted that currently your position is not listed for Critical Area Allowance. Furthermore, your class of membership does not allow you to receive Critical Area Allowance."

Following the receipt, by the respondent, of the above negative memorandum, he decided to appeal to the Chief Executive Officer of the appellant. The gist of the respondent's appeal to the appellant's Chief Executive Officer was expressed in the following terms:

"In my appointment letter dated 11th January, 1993 the [Appellant] committed itself that it shall pay me Critical Area Allowance on monthly basis upon production of a membership certificate from a recognised professional institution which has been done."

After some further written exchanges between the respondent and the appellant, it became clear to the respondent that the appellant was not going to yield to his demands. Consequently,

the respondent and his colleagues turned to the then Industrial Relations Court, to secure the intervention of that coercive medium of dispute resolution through the presentation of a complaint to secure the following relief pursuant to Section 85(4) of the Industrial and Labour Relations Act, Cap. 269 of the Laws of Zambia:

- “(i) A declaration that they are entitled to Critical Area Allowance from the date the complainants made the demand;**
- (ii) A declaration that the decision of management to only award Critical Area Allowance to top management officers and also handpick employees who are not sufficiently qualified is discriminatory and illegal;**
- (iii) A declaration that the handpicking and awarding of Critical Area Allowance to some employees on a ‘personal-to-holder’ basis is illegal, unlawful and discriminatory;**
- (iv) Any other order or award, as the court may consider fair in the circumstances of the case;**
- (v) Interest and costs.”**

One of the complainants in the court below, Gilbert Zulu, swore the relevant affidavit to support the complaint.

The gist of the depositions in Zulu’s affidavit - so far as the same were relevant to the respondent - was that the appellant used

to pay the allowance to its employees until in 1994, when the organisation's Managing Director issued a circular in which he handpicked and designated senior management officials as the only employees who were entitled to it.

Zulu further deposed in his affidavit that the practice of using the position which an employee held in the appellant, as the basis for paying the allowance, was neither consistent with Statutory Instrument No. 119 of 1995, which was issued in relation to the appellant nor the provisions of the appellant's *Administration Manual*.

Zulu further complained in his affidavit that apart from initially selecting top management officials as the only beneficiaries of the allowance, the appellant subsequently picked employees whose qualifications were far inferior to those which were possessed by the complainants, for the purpose of benefitting from the allowance. Zulu also deposed in his affidavit that the allowance was intended to motivate employees who were working in critical areas of the appellant's operations and to attract the best qualified people to work in those areas.

Zulu concluded his affidavit by stating that the criteria which was used to select employees of the appellant who were to benefit from the allowance, was discriminatory while the decision of the appellant's Chief Executive Officer which had served to exclude the complainants from benefitting from the allowance, was illegal and irrational.

In its reaction to the complaint, the appellant filed an Answer (which it subsequently amended) together with its supporting affidavit. In that Answer, the appellant averred that it had the sole discretion to determine the areas of its operations, which were critical for the purpose of attracting and retaining experienced and qualified staff, in accordance with Section 18 of the Statutory Instrument.

The appellant further averred that, in designating the employees who were entitled to receive the allowance upon production of a membership certificate from a recognised professional institution, in accordance with a resolution of its Board, the appellant acted lawfully and consistently with its discretionary mandate in that regard. The appellant further averred that the respondent was only entitled to receive the

allowance prior to 1995 but could not do so at the time because he did not have the necessary qualifications adding that, following the subsequent declassification of the respondent's position, the allowance was no longer available to the position which he held. The appellant accordingly dismissed the respondent's allegations founded on discrimination on the ground of social status and maintained that payment of the allowance was neither automatic nor a matter of right but was dependent on the factors which had been prescribed in the Statutory Instrument earlier mentioned, as read with the appellant's *Administration Manual*.

As earlier noted, the appellant's Answer to the complaint was supported by an affidavit which was sworn by Peter Kapinga, the appellant's Legal Counsel.

In his affidavit, Kapinga confirmed that the respondent (Bonzo) was entitled to be paid the allowance upon production of proof that he was professionally and technically qualified from some recognized institution or institutions in Zambia or Zimbabwe and held professional and technical membership certificates in Zambia or Zimbabwe as designated by the appellant.

According to Kapinga, the position of technician was one of the posts which had been approved and designated for the purpose of receiving the allowance from as far back as January, 1991. However, the position of technician ceased to be eligible for the purpose of entitlement to the allowance on 24th July, 1994, when the appellant's senior management decided to re-designate the posts which were eligible for the same, in accordance with the powers which had been delegated to the appellant's chief executive officer at the 33rd Board meeting of the appellant.

Kapinga also dismissed the respondent's suggestion that the appellant's chief executive officer had hand-picked the posts which were to be eligible for the allowance. He also confirmed that, prior to 30th June, 1994, there were a number of the appellant's staff who had been receiving the allowance but ceased to do so after that date on account of the fact that they had not been in possession of the requisite professional/technical or membership qualifications.

Kapinga further deposed in his affidavit that, according to the Statutory Instrument earlier referred to, the right and power to designate staff of the appellant who were eligible to be paid the allowance resided in the appellant.

Kapinga also maintained that, both at the time when he was offered employment as well as the time of re-designation as earlier observed, the respondent was not eligible to receive the allowance.

When the complaint was tried before the court below, the lower court identified the issues which it considered as having fallen for its determination as whether or not the complainants (at the time) qualified to be paid the allowance and, consequentially, whether the non-payment of the same to the trio (at the time) was discriminatory.

In seeking to resolve the issues identified above, the trial court reviewed the evidence and submissions which had been laid before it before coming to the conclusion that, although payment of the allowance was not automatic, the 2nd respondent (Bonzo) became entitled to be paid the same when he submitted his certificate of membership relating to the Institution of Engineering and Technology.

In reaching this conclusion, the lower court took the view that Bonzo was similarly circumstanced with Sungwe who had been receiving the allowance on a personal-to-holder basis.

The appellant was not satisfied with the lower court's judgment and has escalated its displeasure to this court on the basis of four (04) grounds which were expressed in the memorandum of appeal in the following terms:

- "1. The Trial Court erred in fact and in law when it adjudged that the 2nd Respondent was entitled to Critical Area Allowance notwithstanding that his Letter of Appointment had stated that his entitlement to that allowance was conditional upon submitting a membership certificate to a recognized professional body accepted by the Appellant which was not.*
- 2. The Trial Court misdirected itself in fact and in law by awarding the 2nd Respondent Critical Area Allowance despite failure by him not only to submit a certificate but also failure to provide evidence that such a certificate, if any, had been accepted by the Appellant.*
- 3. The Learned Trial Court misdirected itself in law and in fact by adjudging that the 2nd Respondent was entitled to Critical Area Allowance when he had not provided proof that his job was designated as one of the jobs eligible for receiving such allowance nor provided proof that he (the 2nd Respondent) was qualified to receive such an allowance on personal-to-holder basis.*
- 4. The Learned Trial Court misdirected itself in both fact and law by failing to recognise and appreciate that the payment of Critical Area Allowance was neither automatic nor a right but*

was dependent on the sole discretion of the Appellant as defined in Statutory Instrument No. 2 of 1995 as read together with Clause 2.3.8.1 of the Appellant's Administration Manual and which discretion on the basis of the evidence on record was never exercised in favour of the 2nd Respondent by the Appellant.

5. Such other grounds as may be filed upon perusal of the case record."

At the hearing of the appeal, counsel for the parties confirmed having filed their respective Heads of Argument to support the positions which they had respectively taken in the appeal.

In opening the appellant's arguments, Mr. W. Mubanga, S.C learned counsel for the appellant, set the theme for the appellant's position by arguing, in respect of grounds one and two (which were argued as one ground) that, although the respondent's letter of appointment had indicated that he was entitled to be paid a critical area allowance, this entitlement was not automatic but was subject to the fulfilment of some conditions. In this regard, learned State Counsel submitted that payment of the critical area allowance to the respondent was subject to the latter submitting a certificate confirming his membership with a recognized professional body. To reinforce this point, learned State Counsel

referred to Clause 2.3.8.1 of the appellant's *Administration Manual* which provided as follows:

"The acceptance of a certificate resulting in an employee qualifying for [the critical area] allowance is at the sole discretion of management..."

According to Mr. Mubanga, S.C, the respondent fully acknowledged the meaning and effect of the above Clause in his own testimony which counsel drew our attention to. For the removal of any doubt, State Counsel observed that the respondent did unequivocally acknowledge that it was the appellant's management's prerogative to accept or reject a membership certificate which any employee submitted to it for the purpose of becoming eligible to receive the allowance.

Counsel further argued that the respondent did not, in fact, submit a proper or acceptable membership certificate from a recognized professional body but only availed an associate membership certificate which the appellant outrightly rejected.

Turning to the third ground of appeal, Mr. Mubanga opened his arguments around this ground by citing By-Law or Section 18 of the Statutory Instrument which provided that:

"The [appellant] shall pay a Critical Area Allowance determined by [itself – the appellant] to professionally and technically qualified employees as designated by [itself – the appellant]."

State Counsel then went on to cite Clause 2.3.8.1 of the appellant's *Administration Manual* which provided, in part, as follows:

"A critical Area Allowance of 20% of basic salary per month is paid to professionally and technically qualified employees in fields relevant to the jobs that they are performing. The acceptance of a certificate resulting in an employee qualifying for this allowance is at the sole discretion of management but will primarily reflect the need to pay a market supplement to people with skills that are critical to the [appellant]..."

Turning to the respondent's specific circumstances, Mr. Mubanga, S.C, argued that, according to the evidence on record, the post of Telemetry Technician which the respondent held was not considered 'critical' to the appellant's operations. Under those circumstances, it was State Counsel's contention that the respondent could not have been eligible for the allowance.

As to whether the respondent was entitled to the allowance on a personal-to-holder basis as was the case with Francis Sungwe, learned State Counsel submitted that the latter's circumstances

were clearly distinguishable from those of the respondent in the sense that, unlike the respondent, Sungwe had been receiving the allowance as part of his conditions of service because the same had been provided for in his letter of appointment. Counsel also explained that, although Sungwe's job was subsequently deemed not to have been critical to the needs of the appellant, the appellant's management exercised its discretion in favour of allowing him (Sungwe) to continue receiving the allowance on a personal-to-holder basis. According to learned State Counsel, the meaning of Sungwe's arrangement was that his successor was not going to benefit from the allowance on the basis that the job involved was not eligible to benefit from that allowance. Mr. Mubanga also submitted that, unlike the respondent, Sungwe had submitted a certificate of membership with a recognized professional body which the appellant had accepted.

Turning to the fourth and final ground of appeal, counsel for the appellant's arguments around this ground were a mere repetition of his earlier arguments suffice it to mention that counsel sought to emphasise the fact that the availability of the allowance

was not automatic but was subject to certain conditions being fulfilled to the satisfaction of the appellant.

Accordingly, we were urged to allow the appellant's appeal.

In his response to counsel for the appellant's arguments, Mr. Katolo, learned counsel for the respondent opened his arguments around grounds One, Two and Four (which he argued together) by criticizing, as discriminatory, the linking of a critical area allowance to the position which an employee held in the appellant organisation as opposed to the technical and professional qualifications which an employee held.

According to Mr. Katolo, the appellant's decision to pay the allowance on the basis of one's position in the appellant as opposed to one's professional qualifications was the appellant's own creation which was not even provided for in its *Administration Manual*. In this regard, Mr. Katolo drew our attention to Clause 2.3.8.1 of the said *Manual*, which we referred to early on in this judgment.

Mr. Katolo further argued that the conditions which an employee of the appellant had to fulfill before he could be

considered for the allowance were that the employee had to be professionally and technically qualified and must have held membership certificates with professional and technical institutions established by statutes either in Zimbabwe or Zambia or any other similarly established or recognized professional or technical institutions. In the case of the respondent, counsel argued that he was a member of the Institute of Electronics and Electrical Engineers, the City and Guilds Institute of London and the Institute of Engineers and Technology, for which the relevant subscription fees were being paid by the appellant.

As to whether or not the respondent had submitted his certificates to the appellant for the purpose of facilitating the payment of the allowance to him, counsel submitted that there was, indeed, evidence on record which confirmed that the certificates had been presented to the appellant.

On the critical issue regarding acceptance of the certificates by the appellant, counsel posited that the record did not contain any evidence suggesting that the appellant had rejected the certificates. Mr. Katolo further surmised that the only reason why the certificates had not been considered for the purpose of the

allowance was because the respondent held a junior position which had not been designated as critical to the appellant's operations. To support this assertion, counsel drew our attention to a memorandum which had been authored by the appellant's Assistant Secretary for Administration and in which Gilbert Zulu, one of the complainants in the court below was advised that:

"Critical area allowance is only paid to members of staff in senior grades one to four only."

Arising from the preceding arguments, counsel for the respondent submitted that the respondent had suffered discrimination on account of his social status as a junior employee and that he was entitled to be paid the allowance even though the same had not been the subject matter of his letter of appointment.

Turning to the third ground of appeal, the respondent's counsel opened his arguments around this ground by criticising the lower court for having interpreted by-law 18 of Statutory Instrument No. 2 of 1995 and Clause 2.3.8.1 of the appellant's *Administration Manual* (each of which was recited early on in this judgment) "very narrowly".

According to learned counsel, "...the lower court took a flawed and narrow view..." as regards the appellant's "...discretion to determine" an employee's eligibility to receive the allowance in question. In counsel's view, the trial court should have looked at the guidelines in the Statutory Instrument and *Manual* before proceeding to interpret 'the discretion' which had been invested in the appellant in the manner that the lower court did.

According to Mr. Katolo, the respondent was qualified and had satisfied the appropriate threshold for the purpose of receiving the allowance adding that the qualifications which the respondent possessed were relevant to the position he held in the appellant organization.

Mr. Katolo also argued that the circular which the Chief Executive Officer of the appellant had issued (on behalf of the appellant's senior management) had been superseded by the Statutory Instrument of 1995 and the *Manual* which came into force later.

Mr. Katolo also highlighted the payment of the allowance to Sungwe and Fisher on a personal-to-holder basis notwithstanding

that the duo held positions which were not considered critical to the appellant's operations. He maintained that the respondent had been discriminated against on the basis of his social status contrary to Section 108 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, which prohibits the imposition of any form of disadvantage on an employee on the ground of their social status.

In conclusion, counsel urged us to examine the manner in which the appellant had exercised its discretion in relation to the core issue at play in this appeal. In particular, we were invited to consider whether or not the appellant had exercised its discretion “... *in an unreasonable manner or absolutely in defiance of logic and morality*” and whether “... *the discretion [had] been outrageously used, so much that it [had] paved the way for arbitrariness....*” and liable to be nullified.

At the hearing of the appeal, the two learned Counsel augmented their written arguments with oral submissions which we have refrained from setting out here as they did not bear any material differences from the written arguments.

We are truly grateful to counsel involved for their invaluable perspectives.

As the lower court noted, this appeal essentially raises one core issue, namely, whether or not the respondent, who was the second complainant in the court below, was entitled to be paid an allowance which was dubbed as the 'critical area allowance' as one of the perquisites of his employment by the appellant. Having regard to the foregoing, coupled with the interrelated nature of the four grounds which were argued in this appeal, we propose to deal with the entire appeal holistically, particularly in the light of the fact that its fate will inevitably turn on how we shall resolve the core issue we have identified above.

In resolving the complaint which had been laid before it in favour of the respondent, the trial court construed - on face value- the paragraph in the respondent's appointment letter which was expressed in the following terms:

- "1. You will be paid a salary of ZS3,590.00 per month... You will also be paid a critical area allowance of 15% of basic salary per month upon production of a membership certificate from a recognized professional institution."*

Having regard to the approach which the trial court had adopted in its interpretation of the Clause in the respondent's letter of appointment which we alluded to a moment ago, it was inevitable for that court to reach the conclusion that the allowance which birthed the grievances which were escalated to this court was automatically payable to the respondent upon production of his certificate of membership to a professional body.

This conclusion by the lower court was premised on its finding and consequential reasoning that, as the respondent's employment contract provided for payment of the allowance upon production of a certificate of membership from a recognized professional body which, in the context of this matter, the court found to have occurred in the way of the respondent having submitted a certificate of membership of the Institute of Engineering and Technology, he was entitled to be paid the allowance in accordance with his letter of appointment.

In effect, the approach of the court below was consistent with the respondent's position and contention.

The position which the appellant articulated in faulting the court below was multi-pronged. In this regard, it was contended on the appellant's behalf as follows:

Firstly, that, mere production, by an employee, of a professional membership certificate was not sufficient for the purpose of having the appellant determine whether or not an employee was eligible to be paid the allowance. In this regard, the contention and position of the appellant was that it was its prerogative both to recognise the professional body granting the professional membership involved and to determine the appropriateness or otherwise of the class of membership with which it was furnished. In the context of this matter, the appellant declined to treat, as acceptable for the purpose of eligibility for the allowance, the respondent's *associate* membership certificate which he had availed to the appellant.

Secondly, the Statutory Instrument titled '*Zambezi River Authority (Terms and Conditions of Service By-Laws, 1995)*' which was identically promulgated as numbers 2 and 119 of 1995 in the Republics of Zambia and Zimbabwe respectively and the appellant's *Administration Manual* which followed it had invested the appellant with the sole discretion to determine whether or not

to accept any particular certificate of professional membership to a professional body for the purpose of determining an employee's eligibility or otherwise to be paid the allowance. As noted early on in this judgment, following the coming into effect of the Statutory Instrument and the *Manual* earlier mentioned, the respondent's position was not designated for the purpose of benefitting from the allowance.

In his arguments, Mr. Katolo, learned counsel for the respondent fervently criticized the appellant's management for having designated 'positions' which were to benefit from the allowance as opposed to 'qualifications'. It was counsel's contention that the Statutory Instrument of 1995 did not refer to 'positions' but to 'qualifications.'

Perhaps we should take a moment or so to reflect on what the Statutory Instrument in question provided. It read:

"CRITICAL AREA ALLOWANCE

18. The Authority [i.e. the appellant] shall pay a critical area allowance to professionally and technically qualified employees as designated by the Authority."

If we understood Mr. Katolo's criticism correctly, in seeking to enforce the above By-Law, the appellant ought to have confined itself to the professional and technical qualifications which the employees held as opposed to such employees' positions in the organization.

With the greatest respect to learned counsel and without having to engage in a needless discussion around the rules of statutory construction, we do consider that, the interpretation which counsel placed on this by-law sprung from a rather narrow premise which, wittingly or unwittingly, avoided the by-law's broader import.

Speaking for ourselves, we cannot see how, in the light of the manner in which the by-law is worded, the technical or professional qualifications of the target employees could have been viewed in abstract – that is, completely divorced or isolated from the positions or 'areas' involved.

Indeed, as we read and understood the by-law in question, the appellant was assigned the role of designating professionally and technically qualified employees for the purpose of entitlement to

the allowance. In this way, the technical and professional qualifications had to be contextualized. The context in which the technical and professional qualifications had to be located was the appellant as an organization which had positions or roles which had been filled by employees some of whom had to be targeted for the incentivising allowance in question.

Returning to the narrow issue with which we are concerned, we are satisfied, from the evidence on record, that the respondent did not furnish the appellant with any membership certificate from any recognized professional institution at the time of his appointment in January/February, 1993. In fact, the uncontroverted evidence which was laid before the trial court made it abundantly clear that the respondent only submitted his certificates of professional membership to professional bodies to the appellant in May, 2005, that is, some 12 years after he was employed. At this time, the Statutory Instrument and the *Administration Manual* earlier mentioned had taken effect. We pause here and call to mind that, upon receiving the respondent's memorandum of 20th May, 2005 (by which the respondent had sought to be paid the allowance), the appellant's Corporation

Secretary and Director of Finance (acting on behalf of the appellant's management) expressed 'surprise' over the very long period that it had taken the respondent to seek to be paid the allowance. Aside from expressing 'surprise' in his response of 21st June, 2005, the Corporation Secretary and Director of Finance advised the respondent that:

*"...**Currently**, your position is not listed for critical area allowance. Furthermore, your class of membership does not [entitle] you to receive [the] allowance" (emphasis ours).*

It is quite implicit from the above paragraph of the response which was sent to the respondent on the appellant's behalf that the appellant had acknowledged the fact that the respondent's position might have been listed or might have been eligible for the allowance until the changes of 1995 arose as discussed early on in this judgment.

For the removal of any doubt, it was the Statutory Instrument and the appellant's *Manual* which had introduced discretionary powers in favour of the appellant which made it possible for it (the appellant) to determine the eligibility criteria for the allowance. As we earlier noted, the coming into force of the Statutory Instrument

and the appellant's *Manual* had the effect of disqualifying the respondent's position for the purpose of eligibility for the allowance. Lest there be any doubt, and for the reasons earlier canvassed, no right to benefit from the allowance had accrued to or arisen in favour of the respondent prior to the coming into force of the Statutory Instruments and the *Manual* in the manner that the same had arisen or accrued in relation to Sungwe. Consequently, the respondent could not also have enjoyed the allowance on a personal-to-holder basis as the lower court erroneously held.


The net effect of the preceding discourse is that this appeal has merit and succeeds. Notwithstanding this outcome and, consistent with the general disposition of the forum from which this appeal arose, we make no order as to costs.



.....
M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE



.....
C. KAJIMANGA
SUPREME COURT JUDGE



.....
M. MUSONDA, SC
SUPREME COURT JUDGE