

**IN THE COURT OF APPEAL OF ZAMBIA      APPEAL No. 43/2020  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)**

BETWEEN:

**PAUL MWENYA SIAME**

**AND**

**INDUSTRIAL DEVELOPMENT CORP.**

**1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL**

**2<sup>ND</sup> RESPONDENT**

**CORAM      : Mchenga DJP, Chishimba and Sichinga JJA**

**On the 17<sup>th</sup> February, 2021 and 25<sup>th</sup> February, 2021**

For the Appellant                    : Mr. M. Bwalya and Ms Z. Maipampe of Messrs  
Mwenye & Mwitwa Advocates.

For the 1<sup>st</sup> Respondent            : Messrs Eric Silwamba, Jalasi & Lunyama Legal  
Practitioners.

For the 2<sup>nd</sup> Respondent           : Ms L. S. Chibowa Principal Sate Advocate.

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**J U D G M E N T**

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**CHISHIMBA, JA, delivered the Judgment of the Court.**

**Cases referred to:**

1. Kenny Sililo v. Local Authority Superannuation Fund and Chongwe District Council SCZ Judgment No. 161/2013.



2. Zambia Consolidated Copper Mines v. Jackson Munyika Siame and Others (2004) Z.R. 193.
3. Zambia Consolidated Copper Mines PLC v. Martin Musonda and Others Selected Judgement No. 24/2018.
4. Times Newspapers Zambia Limited v. Kapwepwe (1973) ZR 291.
5. Phillip M'hango v. Dorothy Ngulube 1983 ZR 61.
6. Phillips v. Copping (1935) 1 KB 15.
7. Savenda Management Services Limited v. Stanbic Bank (Z) Limited Appeal No. 10 of 2018.
8. Henry Kapoko v. The People SCZ No 23 of 2016.
9. Edgar Hamuwele (Joint Liquidator of Lime Bank Limited (In Liquidation), Christopher Mulenga (Joint Liquidator of Lima Bank Limited (In Liquidation) v. Ngenda Sipalo Brenda Sipalo SCZ No. 4 of 2010.
10. Zambia Consolidated Copper Mines Limited v. Patrick Mulemwa SCZ Judgment No. 1t5 of 1995
11. Motor Holding (z) Limited v. Raj Raman SCZ No. 17 of 2001.
12. Match Corporation Limited and Development Bank of Zambia and the Attorney General SCZ No. 3 of 1999.
13. Access Bank Limited v. Group Five/ZCON Business Park Venture SCZ/8/852/2014.
14. Richard Nsofu Mandona v. Total Aviation and Export Limited, Zambia National Commercial Bank PLC, Zambia National Oil Company Limited (in liquidation, Indendeni Petroleum Refinery Company Appeal No. 82 of 2009 (delivered on 16/02/2017).
15. Logistics Zambia Limited v. Joseph Kanyanta and 13 Others SCZ Judgment No. 17 of 2017.
16. Duncan Mbembeta v. Charles Lundofu CAZ Appeal No. 195/2020.
17. Nevers Sekwila Mumba v. Muhabi Lungu SCZ Appeal No. 200/2014 (Selected Judgment No. 55/2014)

**Legislation referred to:**

1. The Constitution of Zambia (Amendment) Act No. 2 of 2016.
2. The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia.

**1.0 INTRODUCTION**

1.1 This appeal arises from an interlocutory ruling during an assessment hearing before the learned Deputy Registrar of the Industrial Relations Division of the High Court in which he upheld the 1<sup>st</sup> respondent's preliminary objection.

1.2 The appeal explores the novel issue of whether a complainant who has been unlawfully dismissed and was paid his gratuity, albeit on wrong salary computations, should be maintained on a payroll pending settlement of his gratuity in terms of Article 189(2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

**2.0 BACKGROUND**

2.1 The brief facts of the matter are that the appellant, as complainant in the court below, had inter alia, sought the following reliefs against the respondents:

- 1) A declaration that the complainant's contract of employment was unlawfully terminated;**
- 2) In the alternative, a declaration that the complainant was unlawfully and/or wrongfully dismissed;**
- 3) Damages for unlawful termination of the contract;**
- 4) Damages for unlawful and/or wrongful dismissal;**
- 5) Damages for mental distress and inconvenience;**
- 6) Payment of the all accrued benefits and contractual entitlements (sic); and**
- 7) Interest on all sums found to be due.**

2.2 The learned Judge of the Industrial Relations Division found in favour of the appellant and held that the termination of employment was unfair and unlawful. He then awarded the appellant a block award of three months' salary. The learned Judge noted that the appellant's main complainant with regard to the claim for payment of all accrued benefits and contractual entitlements, was that when he was paid his terminal benefits, the computations were wrongly done. Therefore, the learned Judge referred this claim to the Registrar for assessment of what was due as terminal benefits, which was to include all the contractual entitlements due to the appellant such as fuel allowance, talk-time allowance and the like.

2.3 The court below further ordered that the successful claims shall attract interest at the Bank of Zambia short term rate from the date the complaint was filed into court up to date of judgment, and thereafter, at the current Bank of Zambia lending rate. Costs were ordered in favour of the appellant. As there was no appeal, the matter subsequently proceeded for assessment before the learned Deputy Registrar with the parties filing affidavits.

### 3.0 **PROCEEDINGS BEFORE THE DEPUTY REGISTRAR**

3.1 During the hearing, the appellant relied on his affidavit in support of assessment of damages dated 11<sup>th</sup> March, 2019. In particular, at paragraph 12 of the said affidavit, the appellant stated:

***“That I am reliably advised and verily believe that since the 1<sup>st</sup> Respondent underpaid my gratuity and did not therefore pay my gratuity in full on the last working day, I am entitled to my monthly salary from 12<sup>th</sup> of November 2015 until my gratuity is paid in full.”***

In this regard, he told the learned Deputy Registrar that he was claiming outstanding benefits, among them, salaries for the period November 2016 to July 2019 in the sum of K4, 307,

214.55. The basis for the claim was that the **Constitution of Zambia Act, 2016** provides that until payment of gratuity is made, the appellant should continue receiving his salary.

3.2 At that point, learned counsel for the 1<sup>st</sup> respondent, Mr. Linyama objected to the claim and sought an adjournment to obtain instructions. After obtaining instructions, Mr. Linyama contended that while a perusal of the originating process reveals that the claim under the Constitution was specifically pleaded by the appellant, a claim inviting the Deputy Registrar to give a new form of liability, at this stage, was untenable being a legal right emanating from the Constitution. Counsel took the view that such a claim emanating from statute must be pleaded, and cannot be raised at assessment. He contended that the trial court was neither invited to consider the particular claim nor does the judgment reveal that the court below addressed its mind on any claim arising from the Constitution.

3.3 Mr. Linyama further submitted that the jurisdiction of the Deputy Registrar at assessment was limited to the awards given at trial. For this, counsel placed reliance on the case of **Kenny**

***Sililo v. Local Authority Superannuation Fund and Chongwe District Council***<sup>(1)</sup>.

3.4 In response, learned counsel for the appellant, Mr. Mwenye, State Counsel, distinguished the ***Kenny Sililo case*** from the present by arguing that the facts of that case are different as it was passed in 2013 when the Industrial Relations Court was a stand-alone court, and not a division of the High Court. He stated that the provisions of section 85(5) of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia applied to the then Industrial Relations Court. Today, the court is required by law to have regard only to substantial justice to the extent that even the rules of evidence do not apply in this division. He further contended that the ***Kenny Sililo case*** was commenced in the High Court, and not the Industrial Relations Court (IRC), and therefore, the process of substantial justice did not apply at the time. Hence the need to specifically plead each claim was necessary but is not required in the present case.

3.5 Mr. Mwenye submitted that prior to the establishment of the Industrial Relations Division, people had a choice to either commence a complaint in the High Court or the IRC. Today,

they have a choice to either commence an action in the General List or in the Industrial Relations Division where the provisions of section 85(5) of the Industrial and Labor Relations Act apply.

3.6 State Counsel further submitted that even if the decision in the **Kenny Sililo case** applied in this matter, the claim for unpaid gratuity and terminal benefits in the form of salaries, as required by law, would still be rightfully claimed by the appellant, and the Deputy Registrar would be entitled to consider it because it was pleaded under paragraph 5(vi) of the notice of complaint filed on 8<sup>th</sup> February, 2017. The said paragraph 5(vi) states as follows:

*“5(vi) Payment of the all accrued benefits and contractual entitlements.” (sic)*

He added that the 1<sup>st</sup> respondents’ heads of arguments filed on 10<sup>th</sup> October, 2018 at pages 9 and 10, did canvass the issue of terminal benefits and gratuity at trial, and that at page J19 of the judgment, the learned Judge did note that the computations were wrongly effected.



3.7 State Counsel Mwenye concluded by submitting that salary and entitlements that are due to an employee upon the termination of the contract are terminal benefits, and that this is so whether they arise as a matter of contract law or constitutional law.

3.8 In reply, Mr. Linyama maintained that a right that arises by way of statutory provision must be pleaded. In this case, both the claims and the term relating to the constitution were not pleaded. The right being a substantive right cannot be determined at assessment. He further contended that the principle of substantive justice does not take away the need for a litigant to plead matters at court as the procedures that help a court to do so make it mandatory that relief emanating from other statutory provisions must be specifically pleaded.

3.9 Mr. Linyama concluded by submitting that the mere creation of the Industrial Relations Division did not in any way give a party or a litigant the right to seek a substantive claim at assessment.

4.0 **DECISION OF THE DEPUTY REGISTRAR**

4.1 In his ruling, the learned Deputy Registrar considered the arguments on record, and was of the view that the question to

be determined was whether a relief arising from a constitutional requirement should be pleaded before a matter proceeds at trial.

4.2 The learned Deputy Registrar reasoned that the essence of the **Kenny Sililo case** is that a party relying on a statutory provision must make a pleading. The maintenance of an employee on the payroll after retirement before his terminal benefits are paid, being a constitutional provision, should have been pleaded in the pleadings so that the trial court and the parties thereto could have applied their minds to it.

4.3 Consequently, the learned Deputy Registrar ruled that the claim for maintaining the appellant on the payroll until the whole judgment debt is paid should not have come during assessment, and for that reason, he would not consider the claim.

#### 5.0 **GROUND OF APPEAL**

5.1 Being dissatisfied with the interlocutory ruling of the Deputy Registrar, the appellant has raised three grounds of appeal as follows:

- 1) ***The court below erred in law and in fact when it held that the appellant's claim to be maintained on the payroll after***

*retirement before his terminal benefits are paid should have been pleaded in the pleadings and not raised during assessment when the law applicable to the Industrial Relations Division of the High Court requires that the court administer substantial justice unfettered by procedural technicalities;*

- 2) *The court below erred in law and in fact when it decided that the appellant did not plead payment of his salary pending payment of his terminal benefits when he in fact specifically claimed payment of his terminal benefits in full and, the payment of his salary pending settlement of gratuity in full, is an accrued right necessarily incidental to his right to be paid any unpaid gratuity that should not be lightly tampered with; and*
- 3) *The Honourable Registrar erred in law and in fact when he ruled that the appellant would not be allowed to claim unpaid salaries pending the full settlement of his terminal benefits when in fact the High Court, at trial, directed the Registrar to determine all unpaid amounts constituting the appellant's terminal benefits of which salaries pending the full settlement of the appellant's terminal benefits, is one such accrued component of the terminal benefits.*

## 6.0 **APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL**

6.1 In ground one of the appeal, the appellant began by referring to section 85(5) of the Industrial and Labour Relations Act which provides as follows:

**(5) The Court shall not be bound by the rules of evidence in civil or criminal proceedings, but the main object of the Court shall be to do substantial justice between the parties before it.**

It was submitted that the provision deals with the exclusive jurisdiction of the Industrial Relations Division (IRD) of the High Court and that therefore, serving substantial justice among parties is, in principle, the prime consideration of the court. It follows that rules of evidence and procedure should not impede the court from serving justice by unduly binding itself to the rules of procedure or evidence.

6.2 The submission was fortified by the decision of the Supreme Court in **Zambia Consolidated Copper Mines v Jackson Munyika Siame And Others**<sup>(2)</sup> where it was held that:

***“The Industrial Relations Court has a mandate to administer substantial justice unencumbered by rules of procedure. ...”***

The case of **Zambia Consolidated Copper Mines PLC v Martin Musonda and Others**<sup>(3)</sup>, a Constitutional Court decision was also cited to anchor the submission.

6.3 It was further submitted that the case of **Kenny Sililo**<sup>1</sup>, which was wholly relied upon by the learned Deputy Registrar, was

decided on consideration of **the High Court Rules Chapter 27 of the Laws of Zambia** as opposed to the **Industrial Relations and Labour Court Rules of 1974**. Therefore, on the premise that the IRD is guided by the Industrial Relations and Labour Court Rules, the learned Deputy Registrar erred when he applied the procedural rules of the High Court to the IRD which is not bound by the procedural necessities required in the High Court.

6.4 It was submitted that evidence was laid at trial that pension benefits in terms of gratuity had not been paid by the Respondent, and therefore, that the appellant ought to have been maintained on the payroll by virtue of Article 189(1) and (2) of the Constitution of Zambia Act, 2016. Therefore, as the said salaries remained unpaid, they fell squarely within the order of the Judge in his judgment at page 36 of the record of appeal directing that all terminal benefits payable to the appellant be computed, when he ordered as follows:

***“The Complainant’s main complaint is that when he was paid his terminal benefits, the computations were wrongly done. I shall refer this item to the Registrar for assessment of what is due to the Complainant as terminal benefits.”***

- 6.5 The appellant went on to cite the case of ***Times Newspapers Zambia Limited v. Kapwepwe*** <sup>(4)</sup> where a judgment on assessment was stated to be the judgment of the trial court. That the Registrar altered the scope of his mandate by limiting the terminal benefits due to the Complainant by excluding unpaid salaries from the date of his termination to the date when his pension benefits in form of gratuity is paid. That the Registrar ought to have made an intelligent guess that the umbrella term of terminal benefits encompasses unpaid salaries due to the appellant. The case of ***Phillip M'hango v. Dorothy Ngulube*** <sup>(5)</sup> was cited as authority.
- 6.6 The appellant proceeded to draw our attention to Article 118 (1) and 2(e) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 on the administering of justice without undue regard to technicalities. Therefore the learned Registrar erred when he unduly considered technicalities which do not apply to the Industrial Relations Divisions.
- 6.7 The last argument made was in relation to the issue of pleadings. Here, it was submitted that on the premise of the

case of ***Phillips v. Copping*** <sup>(6)</sup> cited in ***Savenda Management Services Limited v. Stanbic Bank (Z) Limited*** <sup>(7)</sup>, an illegality by the respondent in violating Article 189 of the Constitution of Zambia Act, 2016, overrides all questions of pleadings. In the ***Phillips v Copping case***, the court stated that:

***“It is the duty of the court when asked to give a judgment which is contrary to statute to take the point, although the litigants may not take it. Illegality once brought to the attention of the court overrides all questions of pleadings including any admission made therein.”***

- 6.8 Reference was also made to the case of ***Henry Kapoko v. The People*** <sup>(8)</sup> which dealt with Article 118 (2)(e) whose intension is to avoid a situation where a manifest injustice would be done by paying unjustifiable regards to technicality.
- 6.9 The second and third grounds of appeal were argued together. It was submitted that a perusal of the Notice of Complaint in the record of appeal, shows that under relief No. 5(Vi), the appellant, as Complainant, did seek payment of all accrued benefits and contractual entitlements from the respondent who had not paid the appellant, the terminal benefits in full as was alleged at paragraph 29 of the Affidavit in Reply. Therefore, an

award was made in favour of the appellant by the trial court in its judgment as a result of the said claim and the evidence placed before the court to the effect that the respondent had not paid the appellant all of his accrued benefits. The said unpaid salaries are accrued terminal benefits properly accruing to the appellant to be determined by the Registrar.

6.10 The submission was fortified by reference to Articles 189 and 266 of the Constitution of Zambia Act, 2016. Article 189 provides as follows:

**(1) A pension benefit shall be paid promptly and regularly.**

**(2) Where a pension benefit is not paid on a person's last working day, that person shall stop work but the person's name shall be retained on the payroll, until payment of the pension benefit based on the last salary received by that person while on the payroll.**

**Article 266 provides that "pension benefit" includes a pension, compensation, gratuity or similar allowance in respect of a person's service;**

6.11 In this regard, it was argued that the appellant's entitlement to terminal benefits can be properly defined as a pension benefit, being funds due from the employer following termination of employment which include gratuity. The trial court having



found in favour of the appellant that the terminal benefits were not paid in full by the respondent, it was submitted that Article 189(2) bestows upon the appellant the constitutional right to be maintained on the payroll on the last salary received by such an employee, *in casu*, the appellant's last salary being K132,160.00.

6.12 In conclusion, it was submitted that the payment of the appellant's salary pending settlement of his gratuity in full, is an accrued right which is necessarily incidental to his right to be paid any outstanding gratuity which need not be specifically pleaded. Therefore, the ruling of the court below be set aside.

7.0 **1<sup>st</sup> RESPONDENT'S HEADS OF ARGUMENT:**

7.1 The 1<sup>st</sup> respondent relied on the heads of arguments filed on record also sought to rely on the submissions made in the proceedings before the Registrar which we have taken note. It is submitted and that the court below was on firm ground in holding that the claim for maintaining the appellant on payroll until the whole Judgment debt was paid had come late and should have been pleaded in the court below.

- 7.2 In response to ground one, the respondent submits in the first instance that the claim to be maintained on payroll after retirement before his benefits are paid should have been pleaded in the pleadings and not raised at assessment. The court below had stated what was subject to assessment which did not include being maintained on payroll. The complaint and supporting affidavit contains no specific claim to remain on the payroll until the terminal benefits are paid.
- 7.3 The appellant is attempting to place upon the 1<sup>st</sup> respondent a new liability not pleaded in the court below. Legal rights emanating from statute must be pleaded and determined at trial, not to be raised at assessment. The court below did not determine or address its mind to this claim arising from the Constitution of Zambia.
- 7.4 In response to the authority cited by the appellant of the case of ***Phillip Mhango v Dorothy Ngulube*** <sup>(5)</sup>, the 1<sup>st</sup> respondent contends that the holding does not give the courts the liberty to make intelligent guesses *quo motto* but to infer evidence where there has been meagre evidence. In any event *in casu*, the claim in issue did not arise at all.

7.5 As regards the **Kenny Sililo** case, the respondent contends that it is on all fours with the case *in casu*. The registrar is shackled as his jurisdiction is only limited to the assertions given by the Judgment in the court below and cannot at the stage of assessment consider a claim that was not pleaded at inception. The appellant submits that the **Kenny Sililo** case being a Supreme decision, the Registrar is bound by the doctrine of *stare decisis*. We were referred to a plethora of judicial precedents on *stare decisis* issued by the Apex Court in the following cases;

**Edgar Hamuwele Christopher Mulenga v. Ngenda Sipalo Brenda Sipalo;** <sup>(9)</sup> **Zambia Consolidated Copper Mines Limited v. Patrick Mulemwa** <sup>(10)</sup>, **Motor Holding (z) Limited v Raj Raman** <sup>(11)</sup> **Match Corporation Limited and Development Bank of Zambia and the Attorney General** <sup>(12)</sup>.

7.6 As regards the heavy reliance by the appellant on Article 118 (2)(e) of the Constitution of Zambia, the appellant made reference to the case of **Access Bank Limited v. Group Five/ZCON Business Park Venture** <sup>(13)</sup> in which the Supreme Court guided on the application of Article 118 (2) (e) by stating

that “***all we can say is that the Constitution never meant to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the Courts***”. This was reiterated in the latter case of ***Richard Nsofu Mandona v. Total Aviation and Export Limited, Zambia National Commercial Bank PLC, Zambia National Oil Company Limited, Indendeni Petroleum Refinery Company Appeal*** <sup>(14)</sup> (delivered on 16/02/2017). In a nutshell the argument being that a litigant cannot use the Constitution to oust his/her obligation to comply with procedure including the duty to raise matters at trial so that the trial Court makes proper directions.

- 7.7 In respect of the Industrial Relations Court being a court of substantial justice, it does not mean that it must give complainants claims that are not pleaded or designed to change the way courts determine matters. That substantial justice is for both litigants and not just the complainant as held in the case of ***Logistics Zambia Limited v. Joseph Kanyanta and 13 Others*** <sup>(15)</sup>.

7.8 Further that substantial justice cannot cloth the Registrar with jurisdiction he does not have by granting a relief not pleaded. Doing so amounts to ambushing the other party.

7.9 Grounds two and three were responded to as one. It is submitted that a right that arises by way of statutory provision must be pleaded. The substantive claim for terminal benefits was never pleaded.

7.10 The appellant referred to the judgment of the court below appearing at pages 35 to 37 of the record of appeal and the reliefs granted. It is contended that ground two and three assailing the holding by the court below that the claim for payment of salary pending terminal benefits was not pleaded and refusing the said claim should have been grounds of appeal against the judgment of the High Court for Zambia and not against the Ruling of the Registrar.

7.11 In regard to the reference to Articles 189 and 266 of the Constitution of Zambia, it was submitted that the Registrar has no jurisdiction to decide on constitutional issues and is not clothed with jurisdiction at the stage of assessment to

determine the said entitlement of a claim not properly pleaded and determined at trial.

7.12 The respondent submits that at the point of termination of his employment the appellant was paid what was owed to him. The main issue was that the payment of terminal benefits was done wrongly, hence the reference to the Registrar to determine what was due to him as terminal benefits after what was already paid. Namely to determine whether there was a shortfall or not.

7.13 The appellant reiterated that section 85 (5) of the Industrial and Relations Court Act, does not in any way take away the obligation of a party to specifically invite the court's attention to the law that the party seeks relief from or give a litigant the right to seek a substantive claim at assessment. The duty of a Registrar is to compute the reliefs outline by the High Court judgment subject of assessment and not to impose liability on the 1<sup>st</sup> respondent not pleaded or awarded. We were urged to dismiss the appeal with costs to the 1<sup>st</sup> respondent.

7.14 The 2<sup>nd</sup> respondent did not file any arguments and stated at the hearing that the decision subject of appeal does not affect it.

## 8.0 **DECISION OF THE COURT**

8.1 We have considered the appeal, the heads of argument, the authorities cited and the submissions advanced by the learned Counsel.

8.2 It is not in dispute that the learned trial judge in the Industrial Relations Division found in the favour of the appellant in a claim for unfair and unlawful termination of employment. Damages were awarded at three months' salary. In respect of the claim for payment of all accrued benefits and contractual benefits, which were alleged to have been wrongly computed, the learned judge referred the claims to the Registrar for assessment of what was due as terminal benefits.

8.3 The issue in contention arose at assessment when the appellant sought to claim as benefits, payment of salary from 12<sup>th</sup> November (date of dismissal) until the gratuity is paid in full. The basis being Article 189 of the Constitution of Zambia (Amendment) Act 2016.

8.4 This claim was objected to vehemently by the 1<sup>st</sup> respondent on the basis that it was not pleaded in the court below. I will not repeat the arguments by the parties earlier recited.

8.5 The issue for determination in our view from the three grounds of appeal raised are as follows;

- (i) Whether the claim to be maintained on payroll pursuant to Article 189 (2)(e) of the Constitution of Zambia Act and payment of the appellant's salary pending settlement of gratuity in full was pleaded.**
- (ii) Whether the learned trial judge's direction to the Registrar for assessment of accrued benefits and contractual benefits included the claim to be maintained on payroll until full payment of benefits.**
- (iii) Whether the Industrial Relations Court as a court of substantial justice unfettered by procedural technicalities entails that litigants can claim reliefs not pleaded.**

8.6 The appellant was emphatic that under relief ((vi), the claim was made for payment of all accrued benefits and contractual entitlements which were not paid in full. The unpaid salaries are accrued terminal benefits.

8.7 It is not in issue that under Article 189 (2)(e), where a pension is not paid on a person's last working day, the person's name shall be retained on payroll on the last salaries received. Further the definition of pension benefits include gratuity or similar allowances in respect of a person's service.



- 8.8 We have perused the Notice of Complainant and Supporting Affidavit. Under claim (vi) the appellant sought payment of all accrued benefits and contractual entitlements. In paragraph 15 of the affidavit in support of Complaint, the appellant deposed that his last basic salary was K132,160, but all his accrued benefits were inexplicably calculated on the basis of a basic salary of K132,000. The paid benefits were paid at K132,000 instead of K132,160.
- 8.9 The trial judge noted that the main complaint by the Complainant is that *“when he was paid his terminal benefits the computations were wrongly done.”* The trial judge referred this item to the Registrar for assessment of what is due to the Complainant as terminal benefits. If it was to be found that the Complainant was paid less than what was due to him, then he would be paid the difference.
- 8.10 Can it be said that the appellant did plead the claim for maintenance on the payroll or payment of salaries until he is fully paid his benefits?
- 8.11 It is trite that the function of pleadings i.e statement of claim, defence, reply or Notice of Complaint is to identify issues, the

resolution of which will determine the outcome of proceedings; to apprise the opposite party of the case to be met and to enable then identify the case that the pleading requires him or her to meet. There are a plethora of decided cases on pleadings some of which have been cited by the parties.

8.12 We are of the view from perusal of the record particularly the Notice of Complaint and supporting affidavit, that the appellant did not plead the claim to be maintained on payroll pursuant to Article 189 (2)(e) of the Constitution of Zambia (Amendment) Act 2016 and payment of his salary benefits from date of dismissal until fully paid.

8.13 The pleading or grievance the appellant sought to have resolved by the trial court was that he was underpaid by the respondent company which calculated his salary at the rate of K132,000 instead of K132,160. Nothing shows that aside from the issue of the rate used to calculate his benefits/gratuity, the appellant sought to remain on the payroll until the shortfall in calculation was fully paid. The claim under section 189 (2)(e) of the Constitution only arose at assessment when the appellant sought to include it as part of the benefits to be assessed.

8.14 Even assuming for argument's sake that the claim raised on assessment is a point of law which can be raised at any point, the same ought to have been raised before the trial judge who would then had made a decision allowing or disallowing the relief. We therefore find that the court below was on firm ground when it held that the appellant's claim to be maintained on the payroll after retirement before his terminal benefits are paid should have been pleaded and not raised during assessment. The issue the appellant misapprehends is that whilst Article 189 (2)(e) of the Constitution provides for the retaining of a person on payroll until payment of the person's benefits, the claim ought to have been pleaded in the Notice of Complaint and supporting affidavit. The appellant was paid his benefits, save for the computations wrongly done. The said claim could not just be sneaked in at assessment.

8.15 As regards the issue whether the order of the trial Judge can be deemed to have included the claim under Article 189 (2)(e) of the Constitution, we are of the view that the Judge stated clearly what was subject of assessment, he referred the item (computations of terminal benefits wrongly done) to the

Registrar for assessment of what was due to the complainant as terminal benefits. The same did not include the claim envisioned under Article 189 (2)(e) of the Constitution of Zambia (Amendment) Act 2016.

8.16 As regards the arguments advanced that because the Industrial Relations Court administers substantial justice unfettered by procedural technicalities, there was no need to plead the claim arising from statute, Article 118 (1) and (2)(e) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 provides for the exercise of Judicial Authority in a just manner and in exercising that authority, the court are guided by principles. One of which is that justice shall be administered without undue regard to procedural technicalities. This clause has been argued by one school of thought to mean that the court has power to act without undue regard to technicalities and procedural rules as the Industrial Relations Court is a court of welfare. That the court should not be strictly bound by rules of procedure or evidence. In a nutshell that the court below should have dealt or directed itself without undue consideration of any laws, rules

or procedures such as those regulating pleadings that are technical or procedural in nature.

8.17 The issue can be framed as follows; whether the normal procedural rules/laws as to pleadings amounts to procedural rules/technicality or otherwise. We are of the view that the procedural rules of pleadings of reliefs sought to be claimed are not technicalities but appropriate rules of procedure which must be observed by litigants.

8.18 The Supreme Court in the case of **Access Bank Zambia Limited** <sup>(13)</sup> deliberated on the issue regarding Article 118 (2)(e) of the Constitution of Zambia and stated that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the court.

8.19 We are of the further view that the appellant cannot invoke the provisions of Article 189 (2)(e) of the Constitution of Zambia to oust his obligation regarding the necessity to plead matters at trial, to enable the opponent know the case it will meet and allow the court to determine the raised issue.

8.20 Therefore, the issue of the claim under Article 189 (2)(e) sought as benefits not having been part of the Judgment of the High

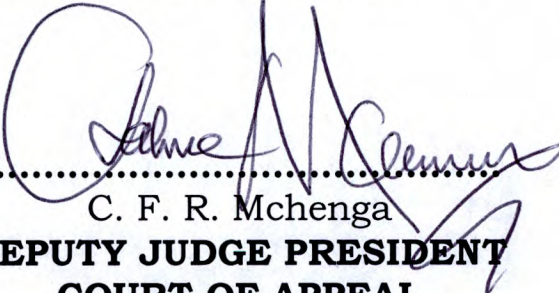
Court subject of assessment proceedings could not be entertained by the Registrar. This claim crept in at the assessment proceedings. We agree that the holding in **Kenny Sililo** case, is applicable in the circumstances of this case. In the said case, the Supreme Court held that the issue of damages that was not part of the consent order, crept into the proceedings at assessment stage and was rightly declined by the Deputy Registrar. The Registrar was therefore on firm ground to decline and reject the objected to claim under Article 189 (2)(e) of the Constitution, which was not pleaded from *'inception.'*

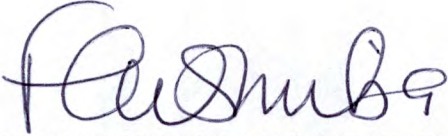
8.21 We reject the argument that the court below ought to have on account of illegality in the alleged violation of Article 189 (2)(e) of the Constitution, overridden all questions of pleadings. The directions by the learned trial judge was clear to the Registrar on what was subject to assessment. His jurisdiction was limited to the reliefs awarded by the trial court. The Registrar had no jurisdiction on assessment to determine and grant substantive reliefs not pleaded or awarded by the trial judge.

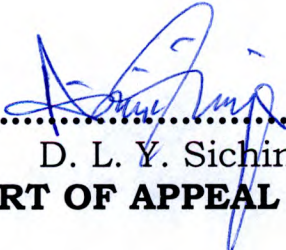
8.22 For the forgoing reasons, we cannot fault the decision of the Registrar in refusing to allow the claim on assessment by the appellant to be maintained on payroll until terminal benefits are fully paid by the 1<sup>st</sup> respondent.

9.0 **CONCLUSION**

9.1 All the three grounds having no merit, the appeal is dismissed. The decision of the Deputy Registrar is accordingly upheld. The parties shall each bear their own costs.

  
.....  
C. F. R. Mchenga  
**DEPUTY JUDGE PRESIDENT**  
**COURT OF APPEAL**

  
.....  
F.M. Chishimba  
**COURT OF APPEAL JUDGE**

  
.....  
D. L. Y. Sichinga  
**COURT OF APPEAL JUDGE**