

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

**Appeal No. 309/2021**

**BETWEEN:**

**CAVMONT BANK LIMITED**

**APPELLANT**

**AND**

**JOHN MWANSA KALINDE AND 40 OTHERS**

**RESPONDENTS**



**Coram: Kondolo, Makungu, and Sharpe - Phiri J.J.A**  
**On the 21st September, 2022 and on the 10<sup>th</sup> day February, 2023**

*For the Appellant: Mr. P. G Katupisha of Messrs Milner and Paul Legal  
Practitioners*

*For the Respondent: Mr. J.C Kalokoni of Kalokoni and Company*

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**JUDGMENT**

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

**Cases referred to:**

1. *P.C Cheelo and Others v. Zambia Consolidated Copper Mines Limited* SCZ No. 27 of 1999
2. *Cosmas Mukuka v. Jason Mwanza* SCZ Selected Judgment No. 13 of 2019
3. *Kunda v. Konkola Copper Mines PLC* SCZ Appeal No. 48 of 2005
4. *Zambia National Holdings Limited and United National Independence Party (UNIP) v. The Attorney General* (1994) S.J 22 (S.C)
5. *Godfrey Miyanda v. The High Court* (1984) ZR 75 (reprint)
6. *Zambia Consolidation Copper Mines Limited v. James Matale* (1995/ 1997) ZR 144
7. *Attorney General v. Marcus Kapumba Achiume* (1983) ZR 1
8. *Nkhata and 4 Others v. The Attorney General* (1966) ZR 124

9. *Zambia National Commercial Bank PLC v. Morton Musanda & 58 Others* (2017/CCZ/R004) Selected Judgment No. 24 of 2018
10. *Mubita Mwanauka v. Armaguard Security Limited* CAZ Appeal No. 201/ 2021
11. *GDC Logistics Zambia Limited v. Kanyata & Others* SCZ Selected Judgment No.17 of 2017

**Legislation Referred to:**

1. *The Constitution (Amendment ) Act, 2016*
2. *The Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia*
3. *Rules of the Supreme Court ( White Book) 1999 Edition*
4. *The High Court (Amendment Act) 2016*

**Other works Refereed to:**

1. *Hodge. M. Malek, Phipson on Evidence (2010) 17<sup>th</sup> edition London, Thomas Reuters (legal) Limited.*
2. *Garner, Bryan A and Henry Campbell Black. Black's Law Dictionary. (2004) 8<sup>th</sup> Edition. st. Paul MN, Thomson/ West.*
3. *Https://www.ioe – emp.org – accessed 2<sup>nd</sup> Feb. 2023*

## **1.0 INTRODUCTION**

- 1.1 This appeal emanates from the decision of R. Chibbabbuka J, of the High Court dated 21<sup>st</sup> April, 2021, dismissing the appellant's preliminary issue for lack of merit.

## **2.0 BACKGROUND**

- 2.1 The respondents were employed severally by the appellant on diverse dates between 1992 and 2018 in Senior Management

positions. Their employment contracts were governed by a number of policies, including the Recruitment and Termination Policy effective June, 2015 and the Employment Terms, Conditions and Benefits Policy of 6<sup>th</sup> June, 2017.

2.2 The said Termination Policy provided for redundancy while the Employment Conditions Policy provided for repatriation. Between August and September, 2019, the appellant decided to retrench the respondents due to the fact that for 8 years since 2011 the company had suffered financial difficulties. The parties went through laid down procedures for restructuring and retrenchment. The respondents were paid redundancy packages of two months' pay for each year served. They appealed to the Minister of Labour, who directed the appellant to pay them 3 month's pay for each year served, but the appellant cited financial constraints as the reason why the proposed package was not affordable.

3.3 On 22<sup>nd</sup> January, 2020 the respondents sued the appellant in the Constitutional Court, claiming *inter-alia* that, the appellant breached **Article 187 of the Constitution (Amendment Act) No. 2 of 2016<sup>1</sup>** by unilaterally varying the redundancy package.



The Constitutional Court dismissed the matter for lack of jurisdiction and directed the respondents to commence an action in the High Court.

3.4 Following that advice, the respondents commenced an action in the High Court under the General List by writ of summons and statement of claim. The following were their claims:

- (i) A declaration that the plaintiffs (now respondents) have accrued the right to be paid the redundancy package under clause N (i) of the applicable 2005 Local Management Conditions of Service which cannot be unilaterally taken away from them.*
- (ii) A further declaration that the bank's (appellant's) imposition upon the plaintiffs of a redundancy package of two months' pay for each year served under the New Employment Code amounts to a unilateral variation of clause N (i) of the applicable Management Conditions of service and therefore null and void.*
- (iii) A further declaration that the bank is bound by the Minister's directive under clause N (i) of the applicable Local Management Conditions of Service of 2005.*



- (iv) *An order for the payment of redundancy packages of three months' pay for each year served with merged allowances less what the plaintiffs were paid.*
- (v) *A declaratory order that the bank breached the trite legal principle that similarly circumstanced employees must be treated the same when it treated the plaintiffs differently from the unionized employees.*
- (vi) *An order for the payment of repatriation allowances.*
- (vii) *A further declaration that the plaintiffs must be given equal treatment on staff loans and medical schemes which were given to the unionized employees.*
- (viii) *Damages for breach of mutual trust and confidence.*
- (ix) *Damages for breach of contract.*

### **3.0 PRELIMINARY APPLICATION**

3.1 On 25<sup>th</sup> November, 2020 the appellant filed a notice to raise preliminary issues in the lower Court pursuant to **Order 14 A of the Rules of the Supreme Court,**<sup>3</sup> as read together with **section 85 of the Industrial and Labour Relations Act, Chapter 26 A of the Laws of Zambia.**<sup>2</sup> **Article 120 Clause 3 (b) of the**

**Constitution Amendment Act No. 2 of 2016.**<sup>1</sup> The issues raised were as follows:

- 1. Whether or not the general division of the High Court (civil jurisdiction) has original and exclusive jurisdiction to hear and determine industrial relations matters such as this?*
- 2. Whether or not the writ of summons and statement of claim are appropriate modes of commencement for industrial and labour related matters?*
- 3. Whether or not the action was properly on the general list of the High Court?*
- 4. Whether or not the High Court has jurisdiction to determine a matter that is statute barred as regards the enabling Act; The Industrial and Labour Relations Act?*

#### **4.0 AFFIDAVIT IN SUPPORT OF THE PRELIMINARY APPLICATION**

- 4.1 The preliminary application was supported by an affidavit sworn by one Milimo Silenge, Head of Human Resources in the appellant Company who gave the history of the matter as stated above. He went on to aver that the matter should have been commenced in the Industrial Relations Division of the High Court as that is what the appellant understood to be the import of the

advice given by the Constitutional Court. That the matter should have been commenced within 90 days from the alleged violation of the respondent's rights.

- 4.2 The deponent stated that the High Court had no jurisdiction in the matter as it was statute barred having been brought outside the 90 day period which is provided for under the Industrial and Labour Relations Act.

## **5.0 AFFIDAVIT IN OPPOSITION TO PRELIMINARY APPLICATION**

- 5.1 The respondents filed an affidavit in opposition deposed to by the 1<sup>st</sup> respondent on behalf of the others who also gave a similar background to the case as stated herein. The gist of the affidavit is that the respondents are claiming that the action does not qualify as an industrial relations matter.
- 5.2 Further, that the matter is properly before the lower court as it is a debt claim, which can be commenced within a period of 6 years.

## **6.0 AFFIDAVIT IN REPLY**

- 6.1 The essence of the affidavit in reply sworn by Esther Daka, a Banker in the Human Resource Department of the appellant Bank is that the appellant did not impose the redundancy



package on the respondents as the same was calculated in accordance with the group termination policy.

6.2 That accordingly, the respondents were each entitled to a week's pay for each year served but the appellant decided to pay them a higher package.

6.3 Further that, the appellant declined to pay the redundancy pay of 3 months basic pay for each year served which the respondents had requested for.

6.4 The affiant stated further that, the appellant advised the respondent that the repatriation policy contained in the Employment Conditions Policy gave the appellant only two options as follows: payment of the repatriation costs or providing transportation. The appellant opted for the latter. That the respondents were paid 2 months basic for each year served in accordance with the Employment Code No. 3 of 2019 and in addition paid the following:

1. Contributions made to the private pension scheme by the appellant at the rate of 10% and each plaintiff at the rate of 5%;
2. Repatriation benefits in the form of physical transport.

3. Staff interest rate for 3 months after the date of exit, after which the loan interest rate would be converted to a commercial rate;
4. Medical cover for each respondent, their spouses and registered dependents for 3 months after exit; and
5. Further, the respondents were not charged maintenance charges on their current accounts held with the appellant for a period of 12 months from the date of exit.

## **7.0 DECISION OF THE LOWER COURT**

- 7.1 After considering the affidavit evidence and the submissions made by the parties, the lower court tackled the first issue raised which was whether the general division of the High Court has jurisdiction to hear industrial relations matters?
- 7.2 The Judge considered **Article 133 Clause 2 of the Constitution of Zambia** which provides that:

*“There are established as divisions of the High Court the Industrial Relations Court, Commercial Court, Family Court and Children’s Court.”*

- 7.3 The Court also considered **Section 85 (1) of the Industrial and Labour Relations Act,**<sup>2</sup> which provides as follows:

***“The court shall have original and exclusive jurisdiction to hear and determine any industrial relations matter and any proceedings under this Act.”***

7.4 The Judge held that it is not all industrial relations matters that are exclusively reserved for hearing and determination by the Industrial Relations Division of the High Court, as conceded by both parties. The case of **P.C Cheelo and Others v. Zambia Consolidated Copper Mines Limited<sup>1</sup>** was cited, where the Supreme Court held *inter alia* as follows:

***“In the instant case the appellants are no longer employees of the respondent and their claim is for benefits due to them under The Redundancy Agreement. To give the expression “Industrial Relations Matters” a wide interpretation so as to encompass cases of breach of contract wrongful dismissal or claims of the nature before us which could be tried by a Local Court or Subordinate Court would lead to absurdity...”***



- 7.5 The lower Court noted that this position was reaffirmed in the case of **Cosmas Mukuka v. Jason Mwanza**<sup>2</sup> and went on to hold that the reliefs sought by the respondents arose from an alleged breach of conditions of employment contained in the various contracts of employment. That the parties evidently had master and servant relationships, which the appellant had admitted in the affidavit in support of the application to raise the preliminary issues. So the first preliminary question was answered in the negative.
- 7.6 The Court went on to consider the second and third questions raised by the appellant as to whether it was correct to commence an industrial and labour related matter by way of writ of summons and statement of claim. The Judge pointed out that the mode of commencement for the general list of the High Court is provided for under **Order 6 Rule 1 of the High Court (Amendment) Act**<sup>5</sup> which was complied with by the respondent. Clearly the second and third questions were both answered in the positive.
- 7.7 As regards the fourth and final question whether the lower Court has jurisdiction to determine a matter that is statute barred as regards the purported enabling Act; Industrial and Labour

Relations Act, the Court held that the Industrial Relations Act is not applicable to matters on the High Court General List, and therefore the Court finally ruled that, it has the requisite jurisdiction to handle the case and wholly dismissed the preliminary application for lack of merit, with costs.

## **8.0 THE APPEAL**

8.1 The appellant has raised 3 grounds of appeal framed as follows:

***1. The court below erred in law and fact when it held that it was persuaded that the reliefs reproduced arose from an alleged breach of the conditions of employment agreed in the plaintiffs' respective contracts with the defendant in the absence of evidence of the alleged breach.***

***2. The court below erred in law and fact when it held that; "premised on the proceedings, I find this court has jurisdiction to hear and determine this case when the gist of the claim by the plaintiffs is a matter that should be determined by Industrial and Labour Division of the High Court.***

***3. The court below erred in law when it dismissed the preliminary issues for lack of merit when the plaintiffs' action is purely labour related and therefore the preliminary issues were meritorious.***

## **9.0 APPELLANT'S HEADS OF ARGUMENT**

9.1 During the hearing of the appeal, the appellant's counsel relied on the filed heads of argument dated 17<sup>th</sup> December, 2021. On the first ground of appeal, the argument put forward is that the lower Court erred in finding that the reliefs sought by the respondents arose from the alleged breach of Conditions of Employment because there was insufficient evidence of breach of the Conditions of Employment. Reference was made to several authorities on the burden of proof by anyone who alleges in the affirmative including **Kunda v. Konkola Copper Mines PLC** <sup>3</sup> and **Phipson on Evidence**.<sup>1</sup>

9.2 In light of these authorities, the appellant contended that the respondents needed to prove the alleged breach of conditions of employment on the balance of probabilities in order for the Court to arrive at the finding that there was a breach of the conditions of employment which gave rise to the reliefs sought.



9.3 Further, that the respondents should have produced their conditions of employment in the affidavit in opposition to the preliminary application. That the claim by the respondents in their skeleton arguments that there is a debt collection case lacked proof. That the matter thus remains a labour dispute to be determined by the Industrial and Labour Division of the High Court.

9.4 The second and third grounds of appeal were argued together as follows:

In the case of **Zambia National Holdings Limited and United National Independence Party (UNIP) v. The Attorney General**<sup>4</sup> it was held that:

***“The jurisdiction of the High Court is unlimited but not limitless since the court must exercise it’s jurisdiction in accordance with the law.... The High Court is not exempt from adjudicating in accordance with the law including complying with procedural requirements as well as substantive limitations..”***

The court went on to hold that:

*“Although Article 94 of the constitution gives the High Court unlimited jurisdiction, that court is bound by all the laws which govern the exercise of such jurisdiction.”*

9.5 We were also referred to the case of **Godfrey Miyanda v. The High Court**<sup>5</sup> where the term jurisdiction was defined as follows:

*“The term “jurisdiction” should first be understood, in one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognizance of matters presented in a formal way for its decisions. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation. Such limits may relate to the kind and nature of the actions and matters of which the particular court has cognizance or to the area over which the jurisdiction extends, or both.”*

9.6 Counsel contended further that the lower Court misdirected

itself in finding that it has the necessary jurisdiction to preside over this matter as the reliefs sought clearly relate to industrial and labour relations which ought to be determined by the Industrial and Labour Division of the High Court. We were further referred to the case of **Zambia Consolidation Copper Mines Limited v. James Matale**<sup>6</sup> where the Supreme Court held *inter alia* as follows:

***“The general jurisdiction of the Industrial Relations Court and the expansive extent of it is manifest in section 85 under various subsections which cumulatively, confer a sufficient jurisdiction unrestrained by technicalities under which the real justice can be dispensed. Subsection 4 of section 85 for example, confers jurisdiction to hear any dispute between employers and employees even if not connected with group rights or grievances.”***

9.7 Counsel also referred us to **section 85 of the Industrial and Labour Relations Act and Articles 120 (3) (b), and 133 (2) of the Constitution of Zambia** on the formation of divisions of the



High Court and prescribed jurisdiction, power, sitting of the said divisions and other specialized courts.

9.8 We were also referred to the case of **Cosmas Mukuka v. Jason Mwanza**<sup>2</sup> where the Supreme Court held at J7 that:

***“The position now, therefore is that where a matter is purely an industrial relations one, proceedings should be filed in the registry of the Industrial Relations Court; and not in the Principal Registry of the High Court, which is reserved for matters that do not fall under these specialized courts.”****(Emphasis added)*

9.9 Counsel went on to submit that the law as regards jurisdiction of the industrial division of the High Court is settled and that this matter falls under the jurisdiction of that division, therefore, the lower Court has no jurisdiction to hear and determine the matter.

9.10 Counsel went on to refer to the respondent’s claim number 5 in the statement of claim which says:

*(v) A declaratory order that the bank breached the trite legal principle that similarly circumstanced employees must*

*be treated the same but it treated the plaintiffs differently from the unionized employees.”*

9.11 It was submitted that this claim can only be entertained by the Industrial and Labour Division of the High Court. That unionized Employees Conditions of Service were governed by a separate agreement which the IRD can look into.

9.12 Citing the cases of **Attorney General v. Marcus Kapumba Achiume**<sup>7</sup> and **Nkhata and 4 Others v. The Attorney General**<sup>8</sup> we were urged to reverse the lower court’s findings of fact as in the appellant’s view, the trial court did not direct her mind to the claims and examine them entirely when making the finding that it has the necessary jurisdiction.

## **10.0 RESPONDENTS’ HEADS OF ARGUMENT**

10.1 During the hearing of the appeal, the respondents relied on the heads of argument filed on 17<sup>th</sup> January, 2022. Counsel took the view that, the grounds of appeal were inter-related and deserved a joint response. He started by providing a brief contextual background of the case and then went on to submit that, the question for determination by this court is; whether the claim for the balance of the respondent’s redundancy package and their

insistence on the strict enforcement of clause N (i) of the applicable Management Conditions of Service is an Industrial Relations matter.

10.2 In answering the question, counsel made reference to a number of authorities including the cases of **P.C Cheelo and others v. Zambia Consolidated Copper Mines Limited**,<sup>1</sup> **Cosmas Mukuka v. Jason Mwanza**<sup>2</sup> and **Zambia National Commercial Bank Plc v. Martin Musonda and 58 others**.<sup>9</sup> All these cases relate to the relationship between the High Court and the Industrial Relations Division of the High Court.

10.3 Counsel submitted that on the basis of the above authorities, the preliminary issues raised in the lower court as well as this appeal is unmeritorious and ought to be dismissed with costs. Finally that, the argument that clause N (i) was not proved is a matter for trial.

#### **11.0 ORAL ARGUMENTS BY THE APPELLANT**

11.1 During the hearing of the appeal, Mr. P.T Katupisha orally augmented his written submissions: commenting on page 2 and 3 of the respondent's heads of argument: He stated that the brief contextual background was that, it was not after being



dissatisfied with the appellant's position that the respondents went to court. The respondents first went to the Constitutional Court and after the Constitutional Court dismissed the matter, they went to the High Court. That for these reasons, it was not true that the respondents went to the High Court to claim a mere debt because they seek to be paid like unionized workers as per directive of **the Minister of Labour**. That this puts the case out of the **P.C Cheelo** case and translates the matter to an industrial relations one. The contention being that only the Industrial Relations Court can inquire into whether the Minister did actually give the directive that they be paid like unionized employees. That the matter came for interpretation of the Collective Agreement.

#### **ORAL ARGUMENTS ON BEHALF OF THE RESPONDENTS**

- 11.2 In response, Mr. Kalokoni argued that this is merely a debt collection matter as the respondents are each claiming a balance of one month pay on their retirement packages as determined by the Minister. He contended that according to the **PC Cheelo** case, the High Court has jurisdiction to hear the matter.
- 11.3 As regards the contextual background of the case, he admitted that the matter first went to the Constitutional Court. He pointed

out that Pages 111 to 112 of the record of appeal shows the reasons given by the Constitutional Court as to why it declined to hear the appeal being that, it lacked jurisdiction.

## **12.0 OUR DECISION**

12.1 We have considered the record of appeal and the written and oral arguments by counsel for both sides.

12.2 We shall first deal with the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal as they raise the important question of jurisdiction. What we have to determine under these two grounds of appeal is; between the Industrial Relations Division of the High Court and the High Court general list which is not designated by the Constitution as a division of the High Court, has the requisite jurisdiction to hear and determine the main action.

12.3 According to **Black's Law Dictionary,<sup>3</sup> 8<sup>th</sup> Edition at page 791,**

***“The term industrial relations refers to all dealings and relationships between an employer and its employees including collective bargaining about issues such as safety and benefits.”***

12.4 Case law as to what qualifies as a matter to be determined by the Industrial Relations Division of the High Court or what matters fall under the jurisdiction of the High Court General List abound in this jurisdiction.

12.5 In *casu*, we observe that although the claims seem to be mixed, the respondents' main claim is for payment of amounts they feel are due as the balances on their redundancy packages. This case is similar to the case of **P.C Cheelo and Others v. Zambia Consolidated Copper Mines Limited.**<sup>1</sup>

12.6 The position in the P.C Cheelo case was re-affirmed in the **Cosmas Mukuka v. Jason Mwanza**<sup>2</sup> where the Supreme Court held that:

*“We are alive to the fact that in the case of PC Cheelo and others v. Zambia Consolidated Copper Mines Limited, we held that the term industrial relations matters did not have such wide interpretation so as to encompass cases of the breach of contract, wrongful dismissal or even monetary claims for unpaid salaries or redundancy benefits which could be tried by the Subordinate Court, provided the amount did not exceed that*



*court's jurisdiction. For that reason, we held also that the High Court has jurisdiction to try cases arising out of pure master and servant relationships. Indeed that should be so because in the case of wrongful dismissal, the issues to be determined fall purely under the law of contract even though the dispute may itself arise in an industrial relations setting."*

12.7 The import of the cases mentioned above is that the industrial relations division has exclusive jurisdiction in purely industrial relation matters.

12.8 The matter of jurisdiction of the High Court general list is settled as can be seen in the postea to the case of **Mubita Mwananuka v. Armaguard Security Limited**<sup>10</sup> in which we recently followed the Constitutional Court judgment in the case of **Zambia Commercial Bank PLC v. Morton Musanda & 58 Others**<sup>9</sup> where it was held as follows:

*"In its literal interpretation, Article 133 (2) of the constitution as amended merely makes the Industrial Relations Court a division of the High Court and has not affected wholesale, the*

*provisions of the Industrial and Labour Relations Act and its rules to the extent that they do not conflict with the provision of the constitution as amended. Until new legislation is enacted to provide for the processes and procedures and jurisdiction of the Industrial Relations Court Division pursuant to article 120 (3) (a) and (b) of the constitution as amended, the court continues to use the existing processes and procedures and enjoys the same jurisdiction.”*

*“That the effect of the said holding is that those employment related matters that were previously filed in the High Court before the divisions were created can be competently filed on the general list as was done by the appellant.”*

12.9 In the case of **GDC Logistics Zambia Limited v. Kanyata & Others**,<sup>11</sup> the Supreme Court stated that:

*“Even though the IRC is now a division of the High Court, it is still guided by its own court rules. The jurisdiction of the Industrial Relations Court is*

*limited to settling of labour disputes falling under the Act. It is an alternative forum to the High Court only in cases of labour disputes. N.B Mbazima and other Joint Liquidators of ZIMCO Limited (In Liquidation) v. Reuben Vera SCZ judgment No.6 of 2001 followed.”*

12.10 What is meant by the term industrial relations?

*“Industrial relations refers to all types of relations between employers and workers be they at national, regional or company level; and to all dealings with social and economic issues, such as wage setting, working time and working conditions.”<sup>(3)</sup>*

12.11 We are aware that the term ‘industrial relations’ has been variously defined. Nevertheless, we are well guided by the Supreme Court of Zambia in the case of **PC Cheelo and Others v. Zambia Consolidated Copper Mines Limited** *supra* that:

*“The term industrial relations matters does not have such wide interpretation as to encompass cases of breach of contract or monetary claims for unpaid salaries or redundancy benefits...”*



12.12 In light of the above authorities, we hold that, the fact that under paragraphs five (5) and seven (7) of the statement of claim, the respondents claim that they should have been treated in a similar way as unionized employees borders on industrial relations issues does not make the case purely an industrial relations one as the respondents' main claim is for the balance of their terminal benefits and this is tantamount to a claim for payment of a debt. This case cannot therefore reasonably be classified as purely a labour dispute.

12.13 Our firm view, is that this case can be competently dealt with under the general list of the High Court. Thus grounds 2 and 3 are bereft of merit.

12.14 On ground one, the appellant's contention is that there was no proof of the alleged breach of conditions of service to warrant the position taken by the lower court. Our view is that the position taken by the appellant is misplaced as the main matter will go to trial where the respondents will have to discharge their burden of proof. They need not prove their claims at interlocutory stage. For these reasons, we find no merit in ground one as well.

### **13.0 CONCLUSION**

13.1 All being said, we find no merit in this appeal as a whole and it is dismissed with costs to be taxed in default of agreement. This entails that the High Court may proceed to hear and determine the matter.

  
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**M.M. KONDOLO**  
**COURT OF APPEAL JUDGE**

  
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**C.K. MAKUNGU**  
**COURT OF APPEAL JUDGE**

  
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**N.A. SHARPE - PHIRI**  
**COURT OF APPEAL JUDGE**