

SELECTED JUDGMENT NO.55/2018

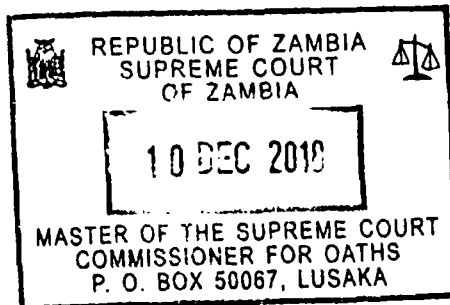
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IN THE SUPREME COURT FOR ZAMBIA

APPEAL No. 55/2016

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

NATIONAL MILLING CORPORATION LIMITED

APPELLANT

AND

JOSEPH NKAHA

RESPONDENT

CORAM: Mambilima CJ, Musonda and Kabuka, JJS,
on 4th December, 2018 and 10th December, 2018.

FOR THE APPELLANT: Mr. N. Nchito, Messrs. Nchito & Nchito.

FOR THE RESPONDENT: In Person

JUDGMENT

KABUKA, JS, delivered the judgment of the court.

Case referred to:

1. Times News Papers Zambia Limited v Kapwepwe (1973) ZR 292.

Legislation referred to:

1. The Constitution of Zambia (Amendment) Act No. 2 of 2016 article 113.

The appellant appeals against a judgment on re-assessment dated 27th April, 2014 which was delivered in favour of the respondent, by the Deputy Registrar of the Industrial Relations Court (IRC).

The history of the matter is that on 20th April, 2011 the respondent issued a Notice of Complaint against the appellant before the IRC. The respondent was seeking to recover the difference in the salary paid to him and what he claimed he was actually entitled to as a Warehouse Supervisor, for a period spanning six years from 18th July, 2001 to 30th May, 2007. After hearing the matter, the IRC in its judgment delivered on 17th November, 2011 found that the respondent was entitled to the differences in salary as well as allowances for the period claimed and directed that the actual amounts due be assessed by the Deputy Registrar.

The hearing on assessment proceeded as directed, at the end of which the Deputy Registrar found that the respondent had failed to produce evidence to establish his claims of underpayment.

Aggrieved with that outcome, the respondent went back, on appeal, to the trial Coram of the IRC that had ordered the assessment. After hearing the respondent's appeal, the trial court rendered a second judgment dated 28th February, 2013, by which the assessment was set aside and a '*re- assessment*,' ordered. The court reasoned that, in its earlier judgment of 17th November, 2011 it had made a finding of fact, that before the appellant harmonised the salaries of its employees on 29th May, 2007, the respondent had indeed suffered some underpayment. Granted that position and to avoid their decision being rendered ineffectual or to use the trial court's own words '*brutum fulmen*', detailed guidance was given to the Deputy Registrar, on how to go about determining the actual amounts due to the respondent.

The re-assessment was heard by a different Deputy Registrar of the IRC whose judgment, delivered on 27th April, 2015, in favour of the respondent, is now subject of the present appeal by the appellant.

The appeal is premised on the following grounds:

- 1. that the learned Deputy Registrar erred in law and in fact when he varied the order of the trial Court in its Judgment dated 24th November 2011;**
- 2. the learned Deputy Registrar erred in law and fact when he found that the appellant's evidence of salaries earned by other Warehouse Supervisors in grade NMC8 was proof of other underpaid employees when what it showed is that the respondent was not being underpaid at all;**
- 3. the learned Deputy Registrar erred in law and in fact when he failed to take into account evidence on the record showing that the complainant (respondent) was a unionised employee and allowances were governed by the collective agreement.**

In support of the grounds of appeal, counsel for the appellant filed written heads of argument on which at the hearing of the appeal, he informed the Court he would entirely rely, subject to brief oral augmentation of ground one. The gist of the arguments and submissions was to urge this Court to set aside the *re-assessment*,

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for misdirection on the part of the learned Deputy Registrar, when he found that the respondent was underpaid.

According to counsel, such finding was made in the face of abundant evidence from the appellant, in form of payslips of other employees holding the same position as the respondent, which revealed that they were also getting more or less the same salary as the respondent. It was counsel's argument that, this evidence only went to confirm that there was no underpayment to the respondent. It was not evidence of general underpayment of that category of employees, by the appellant, as erroneously found by the learned Deputy Registrar. For the said reason, counsel implored us to uphold the appeal, set aside the re-assessment and restore the first assessment.

The respondent similarly filed written heads of argument and when the appeal came up for hearing he indicated that he would wholly rely on the same. The respondent urged us to uphold the judgment on re-assessment.

We have considered the arguments and submissions made by counsel for the appellant and those of the respondent, in person. On the view of the appeal that we take, we find it unnecessary to refer to them in this judgment.

In our view, this entire appeal rests on the outcome of the determination of the question whether, granted the history of the case as given earlier in the judgment, the matter is properly before this Court as an appeal. In posing that question, we acknowledge the peculiar practice that obtained in the IRC prior to **the Constitutional amendments introduced in 2016** which constituted that court, as the Industrial and Labour Division of the High Court.

The practice referred to was that, unlike in the High Court where appeals on assessment of damages from Deputy Registrars came directly to this Court, on the basis that, a judgment on assessment once made, is in essence a complete judgment of a trial court, as the direction on the assessment proceeds from it: **Times**

News Papers Zambia Limited v Kapwepwe¹. Appeals from an assessment of a Deputy Registrar of the IRC went back to the Coram that heard the matter, which was then obliged to deal with the assessment itself. It was that decision on assessment which was then, appealable to this Court.

In view of that position as it was then obtaining, when a decision of the Deputy Registrar on assessment was contested, there was no provision for the IRC to order a '*re-assessment*'. The remedy lay in the Coram that directed the assessment to undertake the task of assessing, itself. It was not to send the matter back to the Deputy Registrar for a supposed '*re-assessment*' as happened in this case.

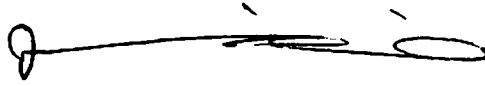
Since the establishment of new courts pursuant to **Article 133 of the Constitution as amended in 2016**, however, the IRC is now a Division of the High Court, constituted by a single judge. This is unlike at the material time of hearing the matter subject of this appeal, when the Coram of the IRC was formed by a 'judge' and two members. In the new set up, appeals on assessments from Registrars

or Deputy Registrars of the Labour Division of the High Court, now lie to the Court of Appeal.

This brings us back to the question, whether the matter which emanated from a re-assessment made by a Deputy Registrar of the IRC is properly before this Court as an appeal? On the basis of the facts of this case, as earlier given, and the procedure of the IRC at the material time, we find the second judgment of the trial court ordering *re-assessment* and the *re-assessment* that followed, were both made on the basis of misdirections and we hereby set them aside. The net result is that, the matter reverts to the stage where it had gone back to the trial Coram, to deal with the assessment, itself. We accordingly, direct that the required assessment should now proceed, before another judge of the Industrial and Labour Division of the High Court.

As the appeal has succeeded for reasons which are not related to the grounds of appeal advanced by the appellant, we find an appropriate order on costs of the appeal in the circumstances, is for each party to bear its own costs.

Appeal allowed.



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I. C. MAMBILIMA
CHIEF JUSTICE



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M. MUSONDA
SUPREME COURT JUDGE



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J. K. KABUKA
SUPREME COURT JUDGE