SC Library

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

Appeal No. 06/2020
SCZ/8/02/2020

(CIVIL JURISDICTION)

BETWEEN:

TIGER CHICKS (T/A PROGRESSIVE POULTRY LIMITED) **APPELLANT**

AND

TEMBO CHRISFORD **1ST RESPONDENT**
GWEN MUSONDA **2ND RESPONDENT**
MEMORY MUSONDA **3RD RESPONDENT**
OBBY SOTWA **4TH RESPONDENT**
CHILUFYA CHIBENDE **5TH RESPONDENT**

Coram: **Mambilima, CJ, Malila and Kajimanga, JJS**
On 1st September, 2020 and 23rd December, 2020

For the Appellant: Mr. E. K. Mwitwa of Messrs Mwenye & Mwitwa Advocates

For the Respondents: In person

JUDGMENT

Malila, JS, delivered the Judgment of the Court.

Cases referred to:

1. *Jennipher Nawa v. Standard Chartered Bank (SCZ Judgment No. 1 of 2011).*
2. *Kenny Sililo v. Mend-A-Bath Zambia & Another (Appeal No. 168/2014.*
3. *Kasembo Transport Limited v. Kinnear (Appeal No. 89/2010).*
4. *Lyons Brook Bond Ltd v. Zambia Tanzania Road Services (1977) ZR 317.*
5. *Barclays Bank v. ERZ Holdings Ltd. & Others (SCZ Appeal No. 71 of 2007).*
6. *William Carlisle Wise v. E. F. Harvey Ltd. (1985) ZR 129.*

7. *Clement H. Mweempe v. Attorney-General, Interpol and Another (SCZ Appeal No. 15/2006).*
8. *Richard Zyambo v. Abraham Sichalwe Neharzy (SCZ Appeal No. 154/2011).*
9. *Mazoka & Others v. Mwanawasa and Others (2005) ZR 135.*
10. *Folayinka Fibisaiye Oladipo Easa v. Attorney General (2016) ZR Vol. 3 at 351.*
11. *Savenda Management Services v. Stanbic Bank (Selected Judgment No. 10 of 2018).*
12. *Lawrence Muyunda Mwalye v. Bank of Zambia (2010) ZR Vol. 2, 387.*
13. *Atlantic Bakery v. ZESCO (Selected Judgment No. 61 of 2018).*

Legislation referred to:

1. *Minimum Wages and Conditions of Employment (General) Order 2011, Statutory Instrument No. 2 of 2011*
2. *Minimum Wages and Conditions of Employment (General)(Amendment) Order 2012.*
3. *Industrial and Labour Relations Act.*

Other works referred to:

1. *Halsbury's Laws of England Vol. 44(1), 4th ed. at para. 1347.*
2. *P. Matibini, Zambia Civil Procedure: Commentary and Cases (Vol. 2 p. 1130 and 1131).*

1.0 INTRODUCTION

1.1 The question whether the Minimum Wages and Conditions of Employment Act, chapter 276 of the Laws of Zambia (the Act), and the Ministerial Orders promulgated under it (the orders), apply to employees who had job designations not covered in the Act or the Orders and who have specific contracts of employment attested to by a Labour Officer, and are for that matter unionised, fell to be determined by the High Court in the action that birthed this appeal.

1.2 Kaunda-Newa J answered the question in the affirmative on the basis that the aggregate conditions of employment of the employees concerned were below the minimum conditions prescribed in the Act and the Orders. The Court of Appeal (Chashi, Lengalenga and Siavwapa JJA) upheld that decision.

1.3 It was the endorsement of that High Court judgment by the Court of Appeal that has prompted the appellant to escalate its grievance by way of appeal to us.

2.0 BACKGROUND FACTS

2.1 Once upon a time, the respondents served in the employ of the appellant as either hatchery attendant, poultryman and woman or vaccinator, for varying fixed term contracts. They were summarily dismissed on 10th November, 2016 for their alleged participation in illegal industrial action.

2.2 At the termination of their contracts, the respondents were unhappy with what they regarded as non-payment of some of their entitlements in the nature of allowances.

2.3 Their grievance was simply that in the whole time that they had worked for the appellant, they were not paid housing, lunch and transport allowances, which they believed they were legally entitled to.

2.4 Commenced by Writ of Summons and Statement of Claim, their action in the High Court was for:

1. **Payment of K80,587.60 for housing, lunch and transport allowances;**
2. **Interest thereon;**
3. **Costs;**
4. **Any other relief that the court deemed fit.**

2.5 The appellant impugned the respondents' claim in the High Court, stating that the erstwhile employees were not owed any money as the allowances they were claiming had been grossed or incorporated into their monthly salaries as provided for in their contracts of employment and were already duly paid to them.

3.0 THE HIGH COURT DETERMINES THE CLAIM

3.1 Kaunda-Newa J, heard the matter. In her understanding, there was a factual question to be determined, namely, whether the allowances the former employees were claiming, had in fact been incorporated into the basic pay in accordance with the

individual contracts of those workers. She also identified a legal issue, namely, whether grossing allowances into basic pay was in consonance with the law and brought the respondents' conditions within the parametres allowed under the Act and the Ministerial Orders made under it.

3.2 The learned High Court judge found and held that:

3.2.1 The former employees' allowances, which they were claiming, had in fact been incorporated into their basic pay.

3.2.2 The Minimum Wages and Conditions of Employment (General) Order 2011, made pursuant to the Act (Statutory Instrument No. 2 of 2011), (General Order) which provided for payment of transport and lunch allowances, was not applicable to the respondents as they had signed contracts of employment that had been attested to by a Labour Officer and that for the said contracts to be enforceable they had to be not less favourable than the terms prescribed in the General Order.

3.2.3 The respondents' contracts with the appellant were not, in the learned judge's view, enforceable as they provided for an all-inclusive basic pay that was below the minimum wage and conditions of employment provided by the law. Consequently, she upheld the respondents' claim.

4.0 APPEAL TO THE COURT OF APPEAL AND THE DECISION OF THAT COURT

4.1 Aggrieved by the decision of the High Court, the appellant appealed to the Court of Appeal, fronting four grounds in which it alleged error and misdirection on the part of the trial court.

4.2 The Court of Appeal considered the arguments deployed before it and reviewed the documentary and oral evidence given in the lower court. It held that although it was uncontroverted that the respondents were employed under approved individual contracts of employment and held different positions not specifically falling in the categories identified in the General Order and were, above all, unionized employees, their conditions were less favourable than those provided for in the Minimum Wages and Conditions of

Employment (General)(Amendment) Order 2012 (the General Amendment Order).

4.3 That being the case, the Court agreed with the reasoning of the trial court that it became irrelevant whether or not the respondents were included in the category of protected workers named in the Schedule to the General Order.

4.4 Based on the decision in **Jennipher Nawa v. Standard Chartered Bank**[1], as the Court understood it, the Court of Appeal upheld the trial court in its order that the grossing up of the respondents' wages still left the respondents' emoluments below the minimum wage and conditions of employment requirements provided by the law.

4.5 The Court of Appeal also dismissed, as baseless, the appellant's claim that the respondents had been paid all the applicable allowances, including transport allowances, noting that there was a clear contradiction in the positions adopted by the appellant in this regard. While in one breath the appellant had argued that transport allowances were paid, in another, it argued that the respondents had not adduced evidence to show that they lived beyond a three-kilometre

radius from their duty station to justify their claim to entitlement to the transport allowance

4.6 The upshot of the Court of Appeal's holding was that the whole appeal was unmeritorious. It dismissed the appeal accordingly.

5.0 THE APPELLANT APPEALS TO THE SUPREME COURT

5.1 Befuddled by the judgment of the Court of Appeal, the appellant has now appealed to this court.

5.2 The memorandum of appeal sets out five grounds of appeal structured as follows:

1. **The court below misdirected itself in law and in fact when it upheld the High Court's holding, at page J24 of the judgment, that the Minimum Wages and Conditions of Employment (General)(Amendment) Order 2012 was not applicable to the respondents, but went on to apply the provisions of the same Minimum Wages and Conditions of Employment (General)(Amendment) Order 2012 to the respondents.**

2. **The court below erred in law and in fact when it upheld the High Court's holding, at pages J24 to J25 of the judgment, that the respondents could be categorized under the Minimum Wages and Conditions of Employment (General)(Amendment) Order 2012 without giving reasons for that conclusion, when the respondents had specific job titles, which were not categorized under the Minimum Wages and Conditions of Employment (General) Order 2011**

or the Minimum Wages and Conditions of Employment (General)(Amendment) Order 2012.

3. **The court below erred in law and in fact when it held at pages J23 and J24 of the judgment that what was material in the matter was that the respondents' conditions were found to be less favourable than those provided in the Order and that it was irrelevant whether or not the respondents were included in the category of protected workers named in the schedule and further that it was sufficient that the High Court found that the respondents were not adequately provided for in their employment contracts, despite the court below accepting that the respondents were unionised employees and had their conditions of service negotiated by the union.**

4. **The court below erred in law and in fact when it held at pages J24 and J25 of the judgment that the High Court was on firm ground when it delved into the Minimum Wages and Conditions of Employment (General)(Amendment) Order 2012 when the issue was not specifically pleaded.**

5. **In the alternative, the court below erred in law and fact when it upheld the decision of the High Court, at page J26 of the judgment to award the respondents transport allowances when there was no evidence on the record to show that the respondents' duty station or workplace was beyond a 3 kilometre radius from their residences to justify the payment of the said allowance, notwithstanding the supposed contradictions noted by the court below in the appellant's ground of appeal and its arguments on the issue.**

6.0 THE APPELLANT'S CASE ON APPEAL

6.1 On behalf of the appellant, detailed heads of argument, complete with authorities, were filed. At the hearing of the appeal, Mr. Mwitwa, learned counsel for the appellant, placed reliance on those heads of argument which he briefly supplemented orally.

6.2 Grounds one, two and three of the appeal were argued globally while grounds four and five were argued distinctly.

6.3 The general theme of the appellant's argument under grounds one, two and three was the applicability or otherwise of the General Order and the General Amendment Order to the respondents.

6.4 Counsel drew our attention to a passage in the judgment of the Court of Appeal where the Court stated that the two Orders referred to in the preceding paragraph did not apply to employees such as the respondents and yet, the Court went ahead to apply the provisions of the General Amendment Order on the ground that the former employees' salaries were below the prescribed minimum wages and conditions of employment.

6.5 The learned counsel pointed out that section 3(1) of the Act has since been repealed by section 138(1) of the Employment Code Act No. 3 of 2019. Bearing in mind that the repealed Act was in force at all material times, he quoted from it in addition to reproducing a passage from our judgment in the case of **Jennipher Nawa v. Standard Chartered Bank Plc[1],** before submitting that the power of the Minister under the repealed Act as well as the Orders promulgated under it, were intended to protect specific groups of workers identified in the General Order and not, as we stated in the **Jennipher Nawa case[1]**, to lay down general conditions of service for all workers in the country.

6.6 Counsel distinguished from the present case, our decision in **Kenny Sililo v. Mend-A-Bath Zambia & Another[2]** where we held that the General Amendment Order was applicable to the appellant in that case who had held the position of Accountant. The distinction, according to counsel, is that in that case the employer accepted, upon advice from the Labour Officer, to have the employee categorized and paid a separation package as a 'qualified clerk' within the meaning of the General Amendment Order given that there was no prescribed position

of Accountant in the Order. In the present case, on the other hand, there was no evidence that the appellant consented to the respondents being treated as if they had been categorized under the General Amendment Order.

6.7 A passage from the judgment of the Court of Appeal, in which the court expressed clarity as to the status of the respondents *vis `a vis* the General Amendment Order, was reproduced. It reads as follows:

> **From the evidence on record, it is not disputed that the respondents were employed under approved individual contracts of employment and held different positions, namely hatchery attendant and poultryman. It is also common cause that they were bona fide members of the National Union of Plantation and Allied Workers (NUPAW), which negotiated for their conditions of service.**

6.8 Counsel pointed to parts of the record of appeal containing evidence deployed in the lower court, confirming the fact that the fifth respondent was employed as a vaccinator. He then quoted paragraph 2(1) of the General Order, as amended by the General Amendment Order, before submitting that the provisions of the General Amendment Order, when read together with the definition in the General Order of an employee as a protected worker specified in the Schedule,

completely puts it beyond question that a hatcheryman, a poultryman and a vaccinator are not covered in the categories of protected employees.

6.9 The case of **Kasembo Transport Limited v. Kinnear**[3] was also cited by counsel. There, we held that an employee, whose conditions of employment the employer claimed had brought him in the management bracket within the definition of section 4 of the Industrial and Labour Relations Act, was not after all in management and was categorized as a qualified clerk under the General Order, thus extending the applicability of that Order to him. In the present case, however, counsel submitted that none of the employees fell under any of the categories listed in the Schedule to the Order.

6.10 Counsel also submitted that the explanation given by the Court of Appeal for endorsing the High Court judgment that the General Amendment Order applied to the respondents, was at variance with the court's own conclusion that the respondents were employed under approved individual contract of employment and were bona fide members of the union, NUPAW, which negotiated their conditions of service.

6.11 The general thrust of the appellant's argument was that paragraph 2 of the General Order makes the General Order inapplicable to employees with approved employment contracts and employees that are unionized and have their wages and conditions of service negotiated by their Union. If the High Court or indeed the Court of Appeal, had desired to apply the Orders to the respondents, given their circumstances, it should have first of all established the appropriateness of a recategorisation and should have articulated why the Orders were to be applicable to them. Further, it should have identified a specific category within the Orders in which the employees fell. According to the learned counsel, holding that the General Amendment Order was not applicable to the respondents and then applying its provisions to them is a contradiction in terms and in logic, and, in the circumstances, a misdirection.

6.12 Counsel then moved to a slightly different issue of statutory interpretation. He submitted that courts have a duty to interpret and implement legislation, but in doing so such interpretation should not defeat the intention of the Act. The

following passage from **Halsbury's Laws of England (Vol. 44(1), 4th ed. para. 134)** was quoted:

> **The courts' duty to implement legislation means that they must aid its operation and enforcement in their judgments. This requires that if it is possible, the words of an Act must be reconciled, and it must, if possible, be construed in the sense which makes it operative and does not defeat the manifest intention of the legislature.**

6.13 The manifest intention of the Act and the General Order was, according to counsel, to provide protection to specific workers clearly identified in the Schedule to the General Order. The judgment in the lower court goes against that manifest intention. Even when the General Order was amended by the General Amendment Order in 2012, the list or categories of employees was not extended. Above all, there is no general provision in the General Order or the General Amendment Order stipulating that all employees considered by the courts to perform similar tasks as those listed in the Schedule to the Order or the General Amendment Order should be deemed to be protected workers.

6.14 The learned counsel stressed that a trade union fulfils a protection role for its members and that explains why unionized employees do not need to be protected by Orders made under the Act. To this end, we were referred to the learned author, W. S. Mwenda who, in her **Employment Law in Zambia: Cases and Materials** (UNZA Press, 201 at page 190) defines a trade union as:

> **Any group or organization of employees registered under the Act whose principal objectives are the representation and protection of the interest of employees and regulation of relations between employees and employers and include a federation of trade union.**

6.15 The learned counsel once again adverted to our decision in the **Jennipher Nawa case**[1] and quoted the following passage from it:

> **Read in its proper context, the group of workers envisaged under the Act are those for whom there is not adequate provision relating to their wages and conditions of employment. These are the 'protected workers' referred to in section 2 of Cap 276, and they are the ones 'to whom a statutory order made under this Act applies'. This law was meant to protect such workers because they are prone to be exploited by their employers. For those who are represented by a trade union, the section 3(1) has categorically provided that:**

"..... no such order can be made before consulting such trade union."

6.16 On the basis of the argument he made so passionately in respect of the first three grounds of appeal, the learned counsel implored us to uphold these grounds of appeal.

6.17 Turning to ground four, it was counsel's contention that the High Court was wrong to have delved into the General Amendment Order as the respondent never raised any issue regarding that Order in their pleadings. By endorsing the holding of the High Court, the Court of Appeal equally fell into error.

6.18 The learned counsel's argument had two limbs. First, that the issue respecting the General Order or General Amendment Order not having been pleaded, the court had no business dealing with it. Second, that a court cannot grant a relief which has not been claimed, in this case could not grant relief under the General Amendment Order not claimed by the respondents.

6.19 In support of the submission that pleadings serve the function of defining the parties' cases and giving notice to the other party, counsel cited a number of case authorities including **Lyons Brook Bond Ltd. v. Zambia Tanzania Road Services[4]; Barclays Bank v. ERZ Holdings Ltd. & Others[5]; William Carlisle Wise v. E. F. Harvey Ltd[6]; Clement H. Mweempe v. Attorney-General, Interpol and Another[7]; Richard Zyambo v. Abraham Sichalwe Neharzy[8]**; and **Mazoka & Others v. Mwanawasa and Others[9].**

6.20 With respect specifically to the argument that a court cannot grant relief which is not sought by a party to the action, the learned counsel referred to the case of **Folayinka Fibisaiye Oladipo Easa v. Attorney General[10]** where we stated that:

> **We agree with the respondent that a case is defined by its pleadings. In judicial review proceedings, the court has powers to grant orders of mandamus, prohibition, certiorari, declarations, injunctions and even damages if these have been pleaded. The pleadings in this case show that the appellant only sought the prerogative writ of certiorari relying on procedural impropriety and irrationality. He did not plead for the other reliefs. The learned trial judge cannot therefore be faulted for having confined himself to the reliefs that were pleaded.**

6.21 The learned counsel also quoted from our judgment in **Savenda Management Services v. Stanbic Bank**[11] where we stated, among other things, that:

> **Ours is an adversarial court system which shackles the judge to the pleadings and evidence presented before him. He is not at large and by virtue of section 13 [of the High Court Act] to grant any relief and remedies coming out of such pleadings and evidence, whether they are specifically asked for or not, but he is not permitted to introduce a remedy or relief from facts and circumstances of his own creation and outside the pleadings and evidence.**
>
> **For the avoidance of doubt, the applicant did not plead breach of duty of confidentiality, and neither did he deploy any evidence to that effect in the High Court.**

6.22 In the present case, counsel observed that the trial court judge, on her own volition delved into issues relating to the General Order and the General Amendment Oder and provided a remedy to the respondents which was not pleaded. This was, according to counsel, an error at law which was perpetuated by the Court of Appeal when it upheld the High Court.

6.23 The learned counsel invited us to examine the Writ of Summons, the Statement of Claim, the Defence, the Reply as well as the evidence deployed in the trial court to confirm that

none of these raised any issue in relation to the General Order or the General Amendment Order. He reproduced the respondent's claim as endorsed on the Writ as we have reproduced it at paragraph 2.4, in order to demonstrate the limited relief that the respondents sought in the High Court.

6.24 Counsel contended that although the holding in the **Savenda case**[11] shows that there are instances when issues which are not pleaded may be delved into by a court, the court is not permitted to introduce a remedy or relief from facts and circumstances of its own creation and outside the pleadings and the evidence on record.

6.25 The learned counsel complained that the trial court, while offering no justification or reason for doing so, proceeded to treat each of the respondents as a general worker and applied the General Amendment Order to them and thereby provided a new claim and remedy to the respondents which were not pleaded.

6.26 Counsel also criticized the Court of Appeal judgment as wanting in essential respects for an appellate court judgment. According to the learned counsel, it did not meet the threshold

necessary for such judgments, namely, having a summary of the facts, a summary of the heads of argument and submissions, an analysis and a conclusion. He relied in this regard on P. Matibini's **Zambia Civil Procedure: Commentary and Cases.**

6.27 The lower court, according to the learned counsel, failed to articulate the law, if any, which offered support for the position that it took to depart from the pleadings. We were thus urged to uphold ground four of the appeal.

6.28 In support of ground five of the appeal, counsel indicated that the ground was argued as an alternative in the event that the first four grounds did not succeed. The gist of the argument under this ground, as we understand it, is that the Court of Appeal erred when it upheld the trial court's decision awarding the respondents transport allowances when there was no evidence on record to indicate that their duty stations were actually beyond a three kilometre radius from their areas of residence so as to justify the payment of the said allowance as directed in the General Amendment Order.

7.0 THE RESPONDENTS' CASE ON APPEAL

7.1 The respondents, who were not legally represented, addressed us through Mr. Chrisford Tembo, one of their number. He indicated that he was relying entirely on the home-grown heads of argument which had been filed in court, signed by him.

7.2 In these heads of argument, the respondents globally argued against all the grounds of appeal, contending that although the terms and conditions of employment are often contained in written contracts of service between employer and employee, or in a collective agreement for unionised employees, or could be fixed by law, no terms and conditions of employment can be valid if they are outside the provisions of the law.

7.3 It was also submitted that the respondents were not unionized employees even if there was a union at the time at the appellant company. The terms and conditions that applied to the respondents were those set out in the specific fixed contracts of service for each employee. Those terms, according to the respondents, could not override the prescriptions of the law, namely the Employment Act, chapter 268 of the Laws of

Zambia, and the Minimum Wages and Conditions of Employment Act, chapter 276 of the Laws of Zambia.

7.4 Section 8 of the Minimum Wages and Conditions of Employment Act was quoted. It states as follows:

> **Any agreement which contravenes any of the provisions of this Act, or any other statutory order or regulation made thereunder, shall be void to the extent of such contravention.**

7.5 Arising from the foregoing provisions, it was submitted that terms and conditions of employment fixed by the parties ought always to be within, or in conformity with, the law and shall be void to the extent that they contravene any law.

7.6 It was further contended that employees whose terms and conditions of employment are not defined by specific written contract of service or a collective agreement, enjoy their terms and conditions of employment as recognised under the law – one of which is the Minimum Wages and Conditions of Employment Act and the Statutory Instruments or Orders made thereunder.

7.7 The respondents also submitted that where their contracts of employment did not expressly provide for any conditions recognized under the law, the respondents were nonetheless entitled to those conditions. In the present situation, the respondents had not been paid their housing, lunch and transport allowances the whole time that they worked for the appellant and are thus entitled to them. The lower court could not, in the respondents' view, be faulted for holding that the respondents were properly entitled to payment of those monies at exiting employment.

7.8 The thrust of the respondent's argument was that the Act provided for the minimum standard conditions applicable to an employee. Where there is a contract specifying conditions of employment, the conditions in it should not be less favourable than those prescribed in the Act. They further contended that even if the Employment Code Act No. 3 of 2019 repealed the existing law at the time the respondents worked for the appellant, that did not take away the respondents' entitlements under the law as it existed.

7.9 We were thus urged to dismiss the appeal for lacking merit.

8.0 REJOINDER BY THE APPELLANT

8.1 In his brief riposte, Mr. Mwitwa drew our attention to paragraphs 8.9 of the judgment of the Court of Appeal where the Court recorded its findings thus:

> **We are of the considered view that whilst we accept that the respondents were on specific employment contracts and that they were unionized and had their wages and conditions of service negotiated by the union, what is material is that their conditions were found to be less favourable than those provided by this order.**

8.2 This, according to Mr. Mwitwa, sufficiently confirms that the respondents were, by the court's own findings, unionized employees to whom the Orders made under the Act did not apply.

8.3 He implored us to uphold the appeal

9.0 ISSUES FOR DETERMINATION

9.1 We have considered the rival positions of the parties to this appeal in light of the judgment of the lower court. We have also paid particular attention to the five grounds forming the appellant's criticism of the judgment of the Court of Appeal.

9.2 To us the real issue for determination is whether, all circumstances considered, the Act and the Orders made under it applied to the respondents. This is particularly in view of three factual findings of the court namely, that: (i) the respondents were on fixed employment contracts attested to by a Labour Officer; (ii) they were unionised and (iii) their conditions of service fell below those prescribed under the Order made pursuant to the Act. Above all this, there is the uncontroverted fact that none of the positions held by any of the respondents falls within the categories of protected workers specified in the Orders.

9.3 The appellant has equally raised a fairly significant issue, namely that the judgment of the High Court, which the Court of Appeal upheld, was not borne out of the respondents' own pleadings and the relief sought in that case. This, then introduces a weighty issue for determination namely, whether a trial court is at liberty to grant relief not specifically requested for.

10.0 OUR ANALYSIS AND DECISION

10.1 Although we view the appellant's complaint regarding the alleged failure by the trial court to confine its judgment to the issues as defined in the pleadings of the parties, to be paramount as it does in a broad way impeach the trial court's jurisdiction *ratione materiae* (the subject matter jurisdiction) and would thus ordinarily have to be dealt with first, we nonetheless, for good order, will deal with the grounds as they have been raised by the appellant.

10.2 We have elsewhere in this judgment intimated that the first three grounds of appeal were argued compositely. The common theme in these grounds concerns the applicability to the respondents of the Act and the Orders made pursuant to it. This is the fulcrum of the appeal and we apprehend it to be interpretational in substance.

10.3 Of particular significance is the meaning to be attached to section 3(1) of the Act which enacts as follows:

> **If the Minister is of the opinion that no adequate provision exists for the effective regulation of the minimum conditions of employment for any group of workers he may, by statutory order, prescribed: ...**

Provided that if the group of workers in respect of which a statutory order is to be made is represented by a trade union, no such order shall be made before consulting such trade union.

10.4 The real questions are; first, what this provision is intended to achieve and second, who are the targeted employees. Fortunately, these are not questions arising in this court for the first time. We have previously pronounced ourselves unequivocally as to both the purpose of the legislation and the category of employees sought to be protected by it and the Orders made thereunder.

10.5 Before considering what we have previously stated about the Act, however, it is instructive to also quote from paragraph 2(1) of the General Order as amended by the General Amendment Order. It reads as follows:

2(1) This Order shall apply to employees as specified in the Schedule but shall not apply to employees:

(a) of the Government of the Republic of Zambia;
(b) of a local authority;
(c) engaged in domestic services
(d) in any occupation where -

(i) wages and conditions of employment are regulated through the process of collective bargaining conducted under the Industrial and Labour Relations Act; or

(ii) employee-employer relationship are governed by specific employment contracts attested by a proper officer;

and such conditions shall not be less favourable than the provisions of this Order ...

10.6 We believe that it is the interpretation to be placed on the provision of section 3(1) of the Act and paragraph 2(1) of the Order that holds the key to resolving the issues before us.

10.7 We entertain no doubt whatsoever as to the purpose of the Act and the Orders made under it by the Minister. We articulated that purpose quite clearly in many authorities including the **Jennipher Nawa case**[1] to which reference has been made by the learned counsel for the appellant. That position has not changed. The purpose of the Act is to protect certain categories of employees from vulnerability and exposure to undue exploitation by employers. The protected employees are those we identified in the **Kasembo Transport case**[3] as we restate them in paragraph 10.10 of this judgment.

10.8 In the case of **Jennipher Nawa v. Standard Chartered Bank Zambia Plc.**[1] upon which counsel for the appellant relied, we stated as follows in relation to section 3(1) of the Act:

> **Under section 3(1) of Cap 276, the Minister is authorized to prescribe, by statutory order minimum wages or minimum conditions of employment for "any group of workers" if he is of the opinion that "no adequate provision exists" for their effective regulation. Read in its proper context, the group of workers envisaged under the Act are those for whom there is no adequate provision regulating their wages and conditions of employment. These are the 'protected workers' referred to in section 2 of Cap. 276, and they are the ones 'to whom a statutory order made under this Act applies.' This law was meant to protect such workers because they are prone to be exploited by their employers. For those who are represented by a trade union, section 3(1) categorically provides that "... no such order can be made before consulting such trade union."**

10.9 Having made the observations quoted above, we went on to hold in that case that:

> **The appellant had a clearly defined salary and conditions of service. She could not, therefore, be a 'protected worker' within the meaning of the Act, and she could not be said to have belonged to 'a group of workers' to whom orders passed under section 3(2) of Cap. 276, would apply. The Act dealt with a different category of workers. It did not lay down general conditions of service for all workers in the country.**

10.10 In the case of **Kasembo Transport Ltd v. Kinnear**[3] we reiterated the position that the Act prescribed minimum conditions of employment for protected workers – the ones to whom the statutory orders made under the Act apply. We went further in that case to specifically mention the protected employees as identified in the Schedule to the General Order being, under Category I, (a) general workers, not elsewhere specified, (b) cleaners; (c) handymen; (d) office orderlies; and (c) watchmen and guards. Under Category II are drivers, while Category III has typists and receptionists or telephonists. Category IV protects clerks.

10.11 The learned counsel for the appellant had, in his submissions, also referred us to our holding in the case of **Lawrence Muyunda Mwalye v. Bank of Zambia**[12] where we observed that:

> **The Minimum Wages and Conditions of Employment Orders which are amended from time to time, are meant to apply to non-unionised workers whose organisations do not have clear guidelines on certain aspects of employment.**

10.12 It is in light of these authorities that Mr. Mwitwa understands the provisions of the Act as well as the Orders made under it to mean that employees whose job titles are not listed in the

General Order and the General Amendment Order are not categorized or protected employees and, therefore, that the provisions of the Act as well as the Orders do not apply. This, he submitted was the position of the respondents, none of whose job titles answered to any of the identified categories and who had, in any case, specific attested contracts of employment. Not only that, the respondents belonged to a trade union which represented and promoted their interests.

10.13 On the other hand, the thrust of the respondents' argument, which supports the position taken by both the High Court and the Court of Appeal, is simply that the Act and the Orders made thereunder will apply to employees who may not fall under any of the categories identified in the Schedule to the Act provided the aggregate conditions of employment of such employee are less favourable than those prescribed in the Act.

10.14 Adopting a literal rule of statutory interpretation of the words used in section 3(1) of the Act gives us the meaning that the Minister has discretion, where he forms the opinion that there is no effective rule or directive on the minimum conditions of employment in respect of a category of workers, to make a statutory order prescribing minimum terms and conditions of

employment. This means, therefore, that where there is already effective regulation of the minimum conditions of employment, the Minister would not be expected to make prescription by such statutory order.

10.15 It also means that the prescribed minimum conditions of employment would be for groups or categories of employees and not individuals. However, where a group of employees is represented by a trade union, the Minster would be obliged to consult such trade union before making the order. Section 3(1) of the Act also means, in our view, that the prescription under it would only be for the minimum condition of employment, or the bottom acceptable level of conditions of employment.

10.16 It is beyond debate that hatchery men, poultrymen and vaccinators are not mentioned in any of the four categories of the Schedule to the General Order. This much is factual and it is uncontroverted. For the Act to apply to them, there ought to be a basis for bringing them into one or another of the job categories mentioned in the Act. In other words, notwithstanding their work designations, which do not answer to any of the categorised positions, it is possible for good cause,

as happened in **Kenny Sililo v. Mend A Bath**[2], and in **Kasembo Transport v. Kinnear**[3] for non-categorised employees to be recategorised into one or another of the identified categories.

10.17 In **Kenny Sililo case**[2], the employee was by designation an accountant. In the peculiar circumstances of that case, the employer, for good reason and working in concert with the Labour Officer, redesignated the employee as a qualified clerk which brought him within the group of categorized employees before he was eligible to be paid a package prescribed under the Order for a qualified clerk.

10.18 In **Kasembo Transport**[3], the employee was employed as a bookkeeper but enjoyed conditions that were comparably superior to those enjoyed by many employees that carried a similar job title or description. There was a problem at his retirement as to whether he was in middle management or in one of the protected categories. Upon examining the peculiar circumstances of the case, and having dispelled the notion that the employee was in management, we came to the conclusion that as a bookkeeper, the employee fitted in the category of qualified clerks. Having so categorized him, we held that he

was entitled to the protection afforded to that category of employees by the applicable Order.

10.19 The position before us is markedly different as Mr. Mwitwa has correctly argued. The lower court did not seek to bring the respondents into any of the categories of protected workers on the basis that the work they did fitted within such category, nor indeed was there any other justifiable reason to do so. The only reason the court assigned for so doing was that the respondents' conditions were less favourable than those prescribed in the Act.

10.20 At paragraphs 10.8 and 10.9 of this judgment we have reproduced part of what we stated in the **Jennipher Nawa**[1] case, namely that the Act did not lay down general condition of service for all workers in the country. To this we can add that the Act does not provide a default position for all employees. Had the Act been intended to provide a fall back position in respect of all workers in Zambia, it would have stated so.

10.21 We revert now to the meaning to be ascribed to the General Order as amended by the General Amendment Order. We have reproduced that Order at paragraph 10.5. The question is to whom is the Order targeted?

10.22 It is clear that the Order applies to employees specified in the Schedule. Who are those employees? They are the ones we have identified in paragraph 10.10 of this judgment. We have also already stated at paragraph 10.16 that none of the respondents fell into the categories of protected employees as set out in the Order.

10.23 Yet, paragraph 2(1) of the General Order as amended specifies employees to whom it does not apply. These are government employees, council workers, domestic servants and those in occupations where their conditions of employment are regulated through collective bargaining – in other words unionized employees, and employees whose contracts are governed by specific contracts attested by a proper officer and such conditions are not less favourable than the provisions of the Order.

10.24 We believe that what is key to a proper appreciation of paragraph 2(1) of the General Order are the use in paragraph 2(1)(d)(i) of the function words 'or' to indicate an alternative; denoting the provision applies to either of the two. Thus, in terms of paragraph 2(1)(d), the Order is inapplicable in any occupation where-

> **(i) wages and conditions of employment are regulated through the process of collective bargains conducted under the Industrial and Labour Relations Act; or**
>
> (j) **employee-employer relationship are governed by specific employment contracts attested by a proper officer.**

10.25 A plain reading of paragraph 2(1)(d)(i) and (ii) thus means that the Order is inapplicable where either employees are unionized or where their employment relationship is covered by specific contract of employment which is attested by a proper officer. Either of these conditions makes the Order inapplicable. Yet paragraph 2(1)(d) takes the position further by the use of the conjunction 'and' when it provides that and 'such conditions shall not be less favourable than the provisions of this Order...'

10.26 Our understanding of the latter provision, beginning with 'and' is that in either of the instances contemplated in paragraph 2(1)(d)(i) and (ii) of the Order, there is the additional requirement that the conditions shall not be less favourable than those prescribed in the Order. Paragraph 2(1)(d) is operational where either (i) or (ii) is the case but in either case, such conditions shall not be less favourable than the provisions of the Order.

10.27 Does it mean that if the conditions are in fact less favourable than those provided for in the Order then the Order becomes applicable? The lower courts seemed to have taken this to be the position and determined the issue before them on that basis. We think that the misdirection lay in that approach. An interpretation of paragraph 2(1)(d)(i) and (ii) which implies that any conditions less favourable than those prescribed in the Order makes the positions of the Order applicable, is legally unattainable. With such an interpretation, the Order would extend to all employees including those specified in paragraph 2(1)(a)(b) and (c) if it can be shown that their conditions are less favourable in some respects than the provisions of the

Order. We do not believe that the Order was intended to have this claw – back effect.

10.28 The point is that the Act and the Order did not apply to the respondents on the basis of paragraph 2(1)(d)(i) and (ii) only. The chief reason that the Act and the Order were not applicable to the respondents was, as counsel for the appellant had argued, because they were not protected employees within the intendment of the Act.

10.29 Our view is that parties to employment contracts are still generally entitled to exercise their freedom to determine their own terms and conditions of employment. Where, however, an employee falls within the protected categories, then that freedom to contract is circumscribed to the extent that the conditions to be agreed upon should not be less favourable than the minimum prescribed in the Orders made pursuant to the Act.

10.30 The logic of what we are saying is that if an employee is not in the protected category he/she cannot use the Act or the Order to introduce additional conditions of service not agreed upon. For example, employees engaged in domestic services,

to whom the Order does not apply by virtue of paragraph 2(2)(c) of the Order cannot use unfavourable terms of employment to bring themselves under the protection of the Act and the Order. This would be a perfect recipe for chaos and industrial disharmony in a labour market where not all the prescribed minimum conditions under the Act are enjoyed by all employees.

10.31 We agree with counsel for the appellant that unionized employees are already represented by their unions in as far as their conditions of employment are concerned. They thus do not require the additional protection offered under the Act. In this regard, we reiterate what we stated in **Lawrence Muyunda Mwalye v. Bank of Zambia**[12] as we have quoted it at paragraph 10.11. If indeed the only reason for the exclusion of the applicability of the Order was their union membership, the holding by the trial court and the Court of Appeal would not be faulted given that their conditions of service were less favourable than those prescribed in the Order.

10.32 For all the reasons we have given, we find merit in grounds one, two and three of the appeal. The respondents were not employees to whom the Act and the Orders applied. Though the applicability of those Orders could possibly be extended to them, there had to be a proper basis for recategorising them from their contract job description. It was thus wrong for the courts below to have held that the Act applied.

10.33 Turning to ground four regarding the failure by the respondents to plead specifically the issue of the Act and the Orders, there is no doubt whatsoever that as captured at paragraph 2.4 of this judgment, the respondents' claim in the lower court was purely monetary. They asked for payment of housing, lunch and transport allowance. They did not allege that these were payable under the Act, nor did they indeed claim redesignation of their job titles to categorized or protected employees under the Act.

10.34 We agree entirely with the learned counsel for the appellant that pleadings serve a very important role in defining the plaintiff's case and putting the defendant on notice as to the case that he/she is to meet.

10.35 The authorities identified and alluded to by the learned counsel for the appellant as regards the need to plead, and for the court to grant relief prayed for, are to us on point. To those authorities we can only add, by way of emphasis, what we stated in **Atlantic Bakery v. ZESCO**[13] that:

> **...the learned judge made an order which violated a fundamental rule of civil procedure, namely that evidence can only be considered where a plea which that evidence supports has been put forward in the pleadings. A court is not to decide on an issue which has not been pleaded. Put differently, a court should confine its decision to the questions raised in the pleadings. It can thus not grant relief which is not claimed. Litigation is for the parties; not the court. The court has no business extending or expanding the scope defined by the parties in their pleadings. In other words, a court has no jurisdiction to set up a different or new case for the parties.**

10.36 As it turned out, without being afforded an opportunity to make its own representations and position on the Act and the Orders and their applicability to the respondents, the appellant suffered an adverse finding by the trial court. That was, in our view, wrong from the due process point of view. It was wrong still for the Court of Appeal to have upheld that position. It was thus a misdirection. Ground four has merit.

10.37 The appellant's grouse under ground five is that even assuming that the respondents could properly be recategorised so that they fell within the protected workers under the Act and the Orders, the trial court and the Court of Appeal were wrong to have found the erstwhile workers to be entitled to transport allowances in the absence of evidence that the respondents' duty station was actually beyond a three kilometre radius from their areas of residence.

10.38 The General Order provides in paragraph 14 that:

> **An employee whose duty station is beyond a three kilometre radius from the area of residence shall be paid a monthly allowance ...**

10.39 We have stated already that for some cryptic reason, the respondents were redesignated as general workers for purposes of granting them access to the protection offered by the Act and the Orders. Having done so, the court proceeded to hold that they were entitled to transport allowance, under paragraph 14 of the General Order as we have quoted it above.

10.40 The High Court's holding on this issue confirms our earlier observation that when a court makes decisions outside the parametres defined by the pleadings, there is a real risk of

reaching conclusions outside the remit if the pleadings. If in this case the respondents had pleaded that they were general workers entitled to the protection of the General Order as regards entitlement to transport allowances, they would have proceeded to avail evidence entitling them to the transport allowances; that is to say, three kilometres from their work station.

10.41 The onus of proof lay on the respondents as plaintiffs in the High Court to demonstrate that as general workers (redesignated) they should have been paid transport allowances. It was not upon the appellant as defendant then, to prove that they were not entitled to it. Whether or not the appellant had contradicted itself in its evidence on this point is neither here nor there when all this is viewed within the context of who bears the burden of proof.

10.42 Our view, therefore, is that for what it is worth, ground five has merit.

11.0 CONCLUSION

11.1 The upshot of our judgment is that this appeal has merit and is upheld on all grounds

11.2 We make no order as to costs.

I.C MAMBILIMA
CHIEF JUSTICE

M. MALILA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE