IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

SCZ/8/343/2012
APPEAL NO. 201/2012

(Civil Jurisdiction)

BETWEEN:

DAMALES MWANSA **APPELLANT**

AND

NDOLA LIME COMPANY LTD **RESPONDENT**

Coram: **Phiri, Malila and Kaoma, JJS.**

on 2nd June 2015 and 3rd July, 2015.

For the appellant: Mr. J. C. Kalokoni, Messrs. Kalokoni& Co.

For the respondent: Mrs. M.K. Mwape, Messrs. J.B.Sakala& Co.

JUDGMENT

Malila, JS delivered the Judgment of the Court.

Cases referred to:-

1. *Braganza v. BP Shipping Limited and Another (2015) 1 WLR 1661*
2. *Grave v. Mills 7 H& N 917*
3. *Nkata and Four Others v. Attorney General (1966) ZR 124*
4. *Zambia Revenue Authority v. Independence Service Station, SCZ Appeal No. 51 of 2004*
5. *Attorney General v. Marcus KapumbaAchume (1983) ZR 1.*
6. *Masauso Zulu v. Avondale Housing Project (1982) ZR. 172*
7. *Jere v. Shamayuwa and Another (1978) ZR 205*
8. *Mazoka and Others v. Mwanawasa and Others (2005) ZR 13*
9. *Roland Leon Norton v. Nicholas Lostrom (2010) ZR 1*
10. *Mtine v. Zambia Electricity Supply Corporation, Appeal No. 31 of 2006 (Unreported)*
11. *Admark v. Zambia Revenue Authority (2006) ZR 43*
12. *Kapembwa v. Maimbolwa and Another (1981) ZR 122*

13. *Lyons Brooke Bond v. Zambia –Tanzania Road Services Ltd (1977) ZR 317*
14. *Mundia v. Sentor Motors Ltd. (1982) ZR 66*
15. *NeversSekwilaMumba v. MuhabiLungu, Appeal No. 200 of 2014*
16. *Geo Wimpey and Co. Ltd (1969) WLR 1764*
17. *Attorney General v. Kakoma (1975) ZR21*

This appeal is sequel to the judgment of the High Court delivered on the 18th October, 2012, dismissing the appellant's claim for, among other things, payment of the appellant's terminal benefits under the voluntary displacement scheme, and damages for misrepresentation, mental torture and anguish.

The material facts were these. The appellant was employed by the respondent as Stores Clerk in August, 1998. She eventually rose to the position of Stores Controller, which position she held at the time of termination of her employment. The respondent company introduced what it called the voluntary displacement scheme. Under this scheme, the respondent was to consider applications from employees who voluntarily chose to separate with the respondent. The scheme applied to employees in management as well as those in the unionized category. The appellant, desiring to separate from

the respondent's employment, intimated to her immediate supervisor, her desire to leave employment through the voluntary displacement system. The said supervisor is reported to have been warm to the appellant's desire, but advised her to formally apply. The appellant did in fact, formally apply, by letter dated 29th March, 2006, to proceed on voluntary displacement scheme. The respondent did not respond to that application, prompting the appellant to report the matter to the Labour Office in Ndola. Following the intervention of the Labour Office, the respondent replied to the appellant's letter of 29th March, 2006, indicating that the appellant's request had not been accepted as the respondent still required the services of the appellant. By this time, the appellant had secured employment elsewhere.

The appellant's position is that the respondent had earlier on agreed to allow the appellant to go on voluntary displacement but only changed that stance after the appellant had relied on the respondent's intimation of acceptance. The respondent's position on the other hand, is that the appellant was told in the presence of her supervisor on the 10th April, 2006 that her services were still required by the respondent

and that a subsequent letter to the same effect was merely confirmatory of that position.

In the lower court, the appellant maintained that she separated with the respondent under the voluntary displacement scheme after an unbroken service of seventeen years with the respondent, and was, therefore, entitled to terminal benefits calculated according to the formula applicable to employees who left via the voluntary displacement scheme. The respondent denied this and added that the appellant secured another job without being released on voluntary displacement. The appellant's absence from the appellant's employ after she secured another job was treated as unauthorized absenteeism which, after ten days, entitled the respondent to dismiss the appellant, as it in fact did on the 11th May, 2006.

In a closely reasoned judgment which has occasioned grievance to the appellant, the learned High Court judge dismissed the appellant's claim in its entirety, holding that, on the evidence before him, the appellant had failed to prove that the respondent had made any unequivocal representation that the appellant could proceed to separate from the respondent

company under the voluntary displacement scheme. Accordingly, the appellant was not entitled to terminal benefits payable under the voluntary displacement scheme.

Disenchanted by the High Court judgment, the appellant appealed to this court, fronting four grounds of appeal.

Under ground one, the appellant contests the lower court's dismissal of her claim for damages for misrepresentation when the respondent ignored the only criterion on record for accepting applications under the voluntary displacement scheme.

Ground two impugns the decision of the lower court to reject the appellant's claim for benefits which the respondent held in trust for the appellant on the basis that the same were not pleaded.

In ground three, which in our view, is not dissimilar to ground two, the appellant takes issue with the lower court's holding that the point about benefits held in trust for the appellant cannot be considered, let alone succeed, as it was brought in at an advanced stage of the proceedings.

The final ground attacks the lower court for allegedly failing to conclusively adjudicate upon each and every issue raised before it and for failing to evaluate the evidence before the court in a balanced way.

Both parties filed in heads of argument in support of their respective positions. Additionally, Mr. Kalokoni, learned counsel for the appellant, also filed in a copious list of authorities. At the hearing of the appeal, both parties supplemented their written submission with oral arguments.

Under ground one, the learned counsel for the appellant complained that the trial court ignored the respondent company's only criterion on record for accepting application under the voluntary displacement scheme. This, in the view of the learned counsel, was a misdirection and gave rise to miscarriage of justice.

According to the learned counsel, the learned judge in the court below came to the conclusion that the appellant had failed to prove an unequivocal representation that the respondent had accepted the appellant's separation on voluntary displacement basis. For that reason, the trial judge

declined the appellant's claim. In Mr. Kalokoni's estimation, the conclusion by the learned trial judge was wrong in principle because it ignored clear evidence of unequivocal representation on record. We were referred to the extract of the minutes of a departmental meeting held at the respondent company, and more specifically, to an item in those minutes which showed that the labour head count in that department was sixteen against the actual of eleven. According to Mr. Kalokoni, the corrective measure, as per those minutes, was to reduce the head count to eleven. Those minutes according to the learned counsel, further stated clearly that "we will accept voluntary displacement and departmental transfers."

The learned counsel also referred us to the transcript of proceedings where in cross examination, DW1, Arnold Kapambwe, the Chief Accountant and Company Secretary of the respondent, is recorded as having confirmed, after being referred to the same minutes, that the department intended to reduce the work force from sixteen to eleven persons. Mr. Kalokoni also referred us to the evidence of DW1 to the effect that the respondent company denied the appellant's application for voluntary displacement on anon-existent criterion. It was

Mr. Kalokoni's submission that "therefore, the only criterion on record is that Ndola Lime undertook to accept applications for voluntary displacement from the employees."

With panache, Mr. Kalokoni stressed that employees, who desired to leave under the voluntary displacement scheme merely had to "apply and go."

Mr. Kalokoni also argued that there was no evidence on record to show that the company told the employees that it was within the company management's discretion to accept applications for voluntary displacement. He contended that even assuming that the company retained the discretion to accept applications, the court has a duty to ensure that such discretion is exercised by the party in whom it in hares, in good faith and not arbitrarily, capriciously or irrationally. He relied for this submission on the UK Supreme Court judgment in the case of **Braganza v. BP Shipping Limited and Another**[1].

In our view, the short point that Mr. Kalokoni sought to make under this ground, was simply that the respondent company had made a clear policy that applications for voluntary displacement would be accepted by the respondent

and that there were no preconditions for such acceptance. All that an eligible employee had to do was to apply and the respondent company would grant the application as a matter of course.

In countering the arguments advanced by the appellant's learned counsel on ground one, Mrs. Mwape, learned counsel for the respondent, maintained that there was no error or misdirection on the part of the lower court in holding that the appellant did not prove that the respondent made an unequivocal representation intimating acceptance of the appellant's application to separate from the respondent's employ via voluntary displacement. The learned counsel posited that it was erroneous to argue, as the appellant did, that there was only one criterion to consider when an application for voluntary displacement was made. We were in this connection, referred to the evidence of DW2, Mr. James Mwape, Human Relations Manager, where he stated that the Collective Agreement provides the voluntary displacement procedure at page 3. Under that procedure, according to DW2, the application was considered in the discretion of management. That provision of the Collective Agreement,

which is reproduced in the record of appeal at page 73 lines 10-15, reads as follows:

> **"(e) Rule 7:3:10 15 NEW – VOLUNTARY DISPLACEMENT**
>
> **Procedure**
>
> **Employees who had done five or more years wishing to volunteer for displacement will apply through their Head of Department. On receipt of such an application, Management shall, in its absolute discretion, determine whether or not such an employee should be displaced."**

According to the learned counsel for the respondent, the Collective Agreement clearly reposed in the respondent company, the discretion in considering applications in exercising discretion not to allow the appellant to proceed on the voluntary displacement scheme, the appellant, as the record shows, assigned the reason that the appellant's services were still required by the respondent. According to the learned counsel, contrary to the claims by the appellant that the learned trial judge ignored the evidence on record, the learned judge did in fact reproduce both the appellant's application for voluntary displacement as well as the respondent's response rejecting the application; that the discretion was properly exercised by the respondent; that the cross examination of the respondent in the lower court elicited the responses that the

appellant received the letter rejecting her application; that she failed to report for duty, and that she had commenced work at Lafarge Plc. then.

We have carefully considered the competing arguments of counsel addressed to us in respect of ground one. As formulated, ground one requires us to determine whether there was any misrepresentation as alleged by the respondent to the appellant; what the criterion for accepting applications under the voluntary displacement scheme was; and whether in the present case, such criterion was followed by the respondent.

We perceive the appellant's complaint under this ground as one comprising largely challenges to findings of fact. And we shall come back to this aspect anon.

Mr. Kalokoni argued that the only criterion for consideration of applications for voluntary displacement was that "Ndola Lime undertook to accept applications for voluntary displacement from employees."

Mrs. Mwape on the other hand fingered Rule 7:3:10 in the Collective Agreement, as elaborating the criteria to be used in considering whether an application for voluntary displacement

should be granted or not. Our reading of that provision of the Collective Agreement is that it sets out the criteria for consideration of applications for voluntary displacement. It also clearly does donate to the respondent's management, a discretion in their consideration of applications.

In his supplementary oral arguments, Mr. Kalokoni, pointed out that the provision relied upon as elaborating the criteria and granting discretion to the respondent's management, applied to unionized employees and did not apply to the appellant who was part of management.

The evidence before the trial court as given by DW1 and DW2 was that the appellant was at the material time a Stores Controller, which position was in the supervisory scale and not in the management scale. In fact, this point is also alluded to in the pleadings, particularly the respondent's defence in the lower court. It does not appear from the judgment that the learned judge in the court below made any specific finding of fact on the status of the appellant.

Our own view, based on available evidence which was assessed and accepted by the trial court, is that the provision

relating to the voluntary displacement scheme was, as is also stated in the defence, introduced as a result of the negotiations between the respondent's management and the union. This was not dispelled in rebuttal by the appellant during the trial. In fact, the cross-examination of DW1, Arnold Kapambwe, elicited the following answers in regard to the applicability of the voluntary displacement scheme:

> **"it is an arrangement which the company introduced in connection with the union representatives to facilitate exiting from the company employment based on initiative of employees but granted on the discretion of company...."**

To the question whether voluntary displacement as set out in the Collective Agreement applied to employees in management, DW1 answered "yes"

DW2, James Mwape, Human Resource Manager, confirmed in cross examination that the Collective Agreement did not apply to non-unionized employees such as the appellant, but the provisions relating to voluntary displacement as set out in the Collective Agreement were "imported into management because under management there is no voluntary displacement. The rules have been extended across the company."

Besides the foregoing evidence that was adduced in the lower court by the respondent, the appellant, in her own statement of claim stated in paragraph 7 that:

> **"The provisions for voluntary displacement applied both to management as well as unionized employees."**

The appellant did not produce in evidence in the lower court, any other provisions of a voluntary displacement scheme applicable solely to employees in her category. Furthermore, in her own evidence before the trial court, the appellant testified that she was entitled on voluntary displacement to terminal benefits calculated at the formula set out in the Collective Agreement.

The aggregate of all the foregoing circumstances leave us perfectly satisfied that the provision in the Collective Agreement relating to the considerations for voluntary displacement, applied to the appellant. Those provisions not only stated clearly that the respondent had the discretion whether or not to accede to an employee's request to be allowed to proceed on voluntary displacement, but also set out the criteria.

By arguing that the respondent had no discretion whether or not to accept an employee's application to proceed on voluntary displacement, and by also maintaining that there was no criteria for consideration of applications under the voluntary displacement scheme, the appellant is attempting to a probate and reprobate at once. We say this because the whole voluntary displacement scheme was founded on the Collective Agreement which the appellant wants us to believe does not apply to her. Mr. Kalokoni submitted in the lower court that *alleganscontraria non estaudiendus* (he is not to be heard who alleges things contradictory to each other). We think this very much describes the appellant's position here. And as was aptly quoted by the learned counsel, Lord Mansfield in **Grave v. Mills**[2], stated that:

> **"a man shall not be allowed to blow hot and cold – to affirm at one time and deny at another – making a claim on those whom he has deluded to his disadvantage, and founding that claim on the very matters of the delusion. Such a principle has its basis in common sense and common justice – and it is one which the courts of law have in modern times usefully adopted."**

We inevitably have to go to this length so as to establish the strength of the plinth upon which ground one is premised. What is still a relevant question to ask is whether, in the

present case, the trial court did ignore the company's criterion on record for accepting applications under the voluntary displacement scheme.

It is clear from what we have already stated that the criteria for accepting applications under the voluntary displacement scheme was that set out in the Collective Agreement. That criteria, in our understanding, comprised the following:

1. The employee ought to have done five years or more of service with the respondent company;

2. The eligible employee was desirous of proceeding on voluntary displacement;

3. Such employee was to apply through the head of department; and

4. Management, in its absolute discretion, was to determine whether or not such employee should be displaced.

The learned counsel or the appellant submitted that the only criterion for consideration of applications for voluntary displacement was acceptance of voluntary displacement

applications, and that the respondent company had no discretion in the matter. With the greatest respect to the learned counsel, we find fantastic to say the least, his submission that "unequivocal acceptance" of every application for voluntary displacement, was a criterion, let alone the only criterion for considering applications.

Having found that the learned counsel for the appellant thoroughly missed the point about the criteria for dealing with applications for voluntary displacement, and positively misapprehended the respondent company's discretion, we now turn, only for good measure, to the issue of damages for misrepresentation.

Naturally damages for misrepresentation would be predicated on the fact that there was misrepresentation in the first place. Where there is no misrepresentation, it is otiose to even discuss the issue of damages.

The learned judge in the court below, after needlessly reviewing a legion of case authorities on damages for misrepresentation and for mental distress and anguish, came to the conclusion at J37 that:

> **"I agree with DW1 that the plaintiff has failed to prove that the defendant made any unequivocal representation that the defendant had accepted that the plaintiff could separate with the defendant on the basis of voluntary displacement. Thus in the absence of such an unequivocal statement, the plaintiff can neither call in aid the doctrine of estoppel nor the tort of negligent misrepresentation. In view of the foregoing, I find and hold that although the plaintiff lodged an application to proceed on voluntary displacement, the defendant did not accede to the request."**

In our view, a finding whether there was or was no misrepresentation is rightly a finding of fact. Here, the learned judge found no misrepresentation. As we have repeatedly asserted, this court, as an appellate court, is loath to interfering with a lower court's findings of fact except in very exceptional circumstances (see **Nkata and Four Others v. Attorney General**[3], **Zambia Revenue Authority v. Independence Service Station**[4], and **Attorney General v. Marcus Kapumba Achume**[5]. We have no reason to interfer in the present case, with the lower court's finding of fact that there was no misrepresentation.

The court below having found as a fact that there was no misrepresentation, any consideration of the law on damages would serve no useful purpose other than fanciful academic peregrination. The net result is that ground one fails.

Grounds two and three were, not surprisingly, argued together. Here, the main point taken by the learned counsel for the appellant was that it was a misdirection on the part of the judge in the lower court to hold, as he did, that the appellant's benefits which were allegedly held in trust for the appellant by the respondent, were not awardable under this action as they were not pleaded.

The learned judge rejected the appellant's claim that she was entitled to accrued terminal benefits principally because these were not pleaded in the action before him. The appellant maintained in this appeal, that those benefits were pleaded. According to Mr. Kalokoni, the first of the appellant's claim in the lower court as is reflected in the writ of summons was for:

> **"Payment of the terminal benefits under the voluntary Displacement Scheme for the 17 years the plaintiff worked for the company."**

It was the learned counsel's contention that the learned trial judge should have asked himself the question what the benefits pleaded in (1) of the appellant's claim, as endorsed on the writ, were. It was counsel's argument that evidence was led in the lower court as to what these benefits were. We were

referred to the part of the appellant's evidence in the record of appeal to the effect that the respondent company wrote to her in 2004 advising that those who were in employment before 11 April, 2004 would have their benefits calculated and held in trust; that those benefits were not paid to her and that she was entitled to fifteen (15) months' pay plus two (2) months' pay for each completed year of service. The learned counsel for the appellant drew our attention to various parts of the record to show that the appellant did allude to the terminal benefits in her testimony in court. Inspite of all this, the trial judge held that:

> **"Whilst it is accepted that the submissions by Mr. Kalokoni represents a correct statement of the law, he has at this very advanced stage of the proceedings, time of submitting, departed from that which he pleaded in the writ of summons and statement of claim."**

This, according to Mr. Kalokoni, was a misdirection and went contrary to what we stated of the duty of the trial court in **Masauso Zulu v. Avondale Housing Project**[6], to adjudicate in finality all matters in dispute. The learned counsel went on to argue that even assuming that payment of benefits held in trust were not pleaded, there was sufficient evidence led in the court

below regarding this matter, which evidence was not objected to, but was instead cross examined upon by counsel for the respondent. In keeping with the decisions of this court in **Jere v. Shamayuwa and another**[7], **Mazoka and Others v. Mwanawasa and Others**[8] and **Roland Leon Norton v. Nicholas Lostrom**[9],this evidence, according to Mr. Kalokoni, should have been accepted by the lower court. It was counsel's contention that although the learned trial judge was alive to all these authorities, which he infact cited and quoted from, he failed to apply them to the facts of the present case.

Mr. Kalokoni further argued that as was held in the case of **Mtine v. Zambia Electricity Supply Corporation**[10], accrued rights cannot be taken away or vitiated by any changes in conditions of service which come into force subsequently and, therefore, that the appellants' benefits held in trust as accrued rights were payable. According to Mr. Kalokoni, although the court agreed with him on this argument, it nonetheless rejected the claim on the basis that the pleadings were deficient in this respect.

Mr. Kalokoni next argued about a point of law being raised at any stage of the proceedings even at submission stage. He

cited the case of **Admark v. Zambia Revenue Authority**[11] as authority for this proposition. In the present case, according to Mr. Kalokoni, the issue of accrued benefits was a point of law which could be raised at any stage. The rejection of the claim for accrued benefits by the lower court, therefore, constituted a misdirection.

In countering the appellant's arguments on grounds two and three, Mrs. Mwape maintained that the lower court's treatment of the issue of accrued benefits was correct. According to the learned counsel, the lower court held that the respondent did not accept the appellant's request to proceed on voluntary displacement, and accordingly that she was not entitled to terminal benefits under the voluntary displacement scheme. Mrs. Mwape argued that the learned trial judge did address the claim for benefits held in trust. According to the learned counsel, while agreeing that matters not pleaded but on which evidence is led and not objected to, could well be allowed, the judge, relying on the case of **Mazoka & Others v. Mwanawasa & Others**[8], indicated correctly that even when such unpleaded matters are considered, the question becomes one of the weight the court is to attach to the evidence led. In

the present case, argued counsel for the respondent, upon considering the evidence led on the unpleaded terminal benefits under the voluntary displacement scheme, the court came to the conclusion that the appellant was not entitled to such benefits under the voluntary displacement scheme.

In the view taken by Mrs. Mwape, the learned trial judge was right when he, applying the case of **Kapembwa v. Maimbolwa and Another**[12], held that in this case, the plaintiff's version of the facts was not just a variation of the pleadings, but something separate and distinct so that there was a radical departure from the pleaded case. In this case the plaintiff was disentitled to succeed.

We have critically examined the rival submissions of the parties on this ground in the backdrop of the findings of the lower court. The crisp issue for determination under this ground is whether the claim for accrued terminal benefits was indeed pleaded by the appellant in the lower court. The learned trial judge was of the view that the appellant did not plead the issue of accrued terminal benefits and was, therefore, not entitled to any order in respect thereof. The appellant views this as a misdirection. Our understanding of Mr. Kalokoni's

argument is that first, the appellant did plead the aspect about accrued terminal benefits. Second, that even if the said benefits were not pleaded, the matter could be raised at any stage since it was a point of law, and third, that the issue was raised in evidence, was not objected to, and therefore, should have been properly considered by the trial court.

There is now an elaborate *corpus juris* in this jurisdiction on the functions of pleadings and the necessity of parties to plead their cases elegantly. And in his judgment, the learned trial judge gave a sterling review of some of these authorities. The import of these authorities is that pleadings perform the significant purposes of defining the case which a party is to meet, and sketching the issues which the court will have to consider at trial. This has been restated by the courts in a number of cases. In **Lyons Brooke Bond v. Zambia –Tanzania Road Services Ltd**[13] the court was emphatic that as pleadings played the important role of defining the parameters of the action, they cannot be extended without the leave of the court. A similar perception was recorded by this court in **Mundia v. Sentor Motors Ltd.**[14] where it was pointed out that once pleadings have been closed and the parties' respective cases

known, the parties are bound by such pleadings. Similar sentiments were strongly expressed by Bruce-Lyle, JS, in **Jere v. Shamayuwa and Another**[7] and by Sakala, CJ, as he then was, in **Mazoka & Others v. Mwanawasa & Others**[8].

In **Jere v. Shamayuwa**[7], the court guided that where a party raises a matter that was not pleaded, the court may not be allowed to rely on it, or may grant leave to the party raising it to amend the pleadings. The overriding policy consideration, in our view, being to ensure that a party is not taken by surprise.

Were the accrued benefits pleaded by the appellant in this case? To answer this question, one has to examine the pleadings comprising the writ of summons, statement of claim, defence and reply. In the statement of claim filed in the lower court, the endorsement on the writ of summons was for:

> **"(i) Payment of the terminal benefits under the voluntary displacement scheme for the 17 years the plaintiff worked for the company.**
>
> **(ii) Damages for misrepresentation, mental torture and anguish.**
>
> **(iii) Further or other relief the court may deem fit.**
>
> **(iv)Interest and costs."**

This endorsement on the writ of summons was replicated, *ipssismaverba,* in the statement of claim. It is clear that accrued benefits held in trust where nowhere mentioned in these pleadings. A combined reading of these pleadings shows plainly that the appellant did not plead accrued benefits which were supposedly kept in trust by the respondent. The thrust of the appellant's case as disclosed in those pleadings was focused on benefits arising as a result of voluntary displacement.

Applying the general principle so rationally and coherently given in the case authorities we have alluded to, it is clear to us that the appellant could not claim terminal benefits as a matter of course, through this action whose primary focus was on benefits arising from voluntary displacement. Our understanding of claim number (i) on the endorsement on the writ of summons as well as in the statement of claim, is that it was for benefits under the voluntary displacement scheme, calculated with reference to the period of seventeen years that the appellant served in the respondent's employ. To this extent, the learned trial judge cannot be faulted for holding that accrued benefits held in trust were not pleaded.

We turn now to consider whether, as Mr. Kalokoni argued, the whole issue of accrued terminal benefits was a point of law which could be raised by the appellant at any stage of the proceedings and duly entertained. We reiterate the position that we so clearly articulated in **Admark Limited v. Zambia Revenue Authority**[11] that a point of law can be raised at any stage of the proceedings even though not pleaded. In **Nevers Sekwila Mumba v. Muhabi Lungu**[15], in support of the general position that a legal point can be raised at any stage of the proceeding, we observed that:

> **"It would indeed be calamitous were we to accept the argument implied in the appellant counsel's submission that any legal argument and authority not advanced before a lower court cannot be made before this court."**

Going through the submissions of the learned counsel for the appellant, it is unclear to us in what respects he argues that the issue of the appellant's accrued benefits is a matter of law that could be raised at any stage of the proceedings. It seems to us imperative to grasp and to keep constantly in mind the distinction between a question of law and one of fact. The former is one which must be answered by applying applicable, relevant legal principles or by interpretation of the law. The

latter can only be determined by reference to the facts and evidence, and all useful inferences arising there from.

In our considered view, a distinction here ought to be made between the principle of accrued rights, that is to say established rights which cannot be taken away by statute or other supervening occurrences, and a claim that on the evidence before the court that something in the form of benefits had accrued as a right to the appellant and qualifies as an accrued right. While the question whether one has an accrued right is a question of law, establishing that such a right has accrued to one, is clearly a question of fact. The latter cannot be disposed of without bringing forth evidence of articulable facts showing the genesis of the benefits in question, and that they became due and owing to the appellant before some event which forms a reference point.

In this regard, we agree with the learned High Court judge for his appreciation of the distinction between a point of law which may be raised at any stage even outside the pleadings, and one of fact which ought to be pleaded. He came to the conclusion that, while Mr. Kalokoni made legally correct submissions on the law as regards accrued rights, there were

no pleaded facts on the benefits subject of the accrued right upon which the legally sound submission of law, would anchor.

On the finial limb of this ground, we have to consider whether evidence was led on the accrued benefits which was not objected to. We accept Mr. Kalokoni's submission that the cases **Jere v. Shimayuwa**[7]and **Mazoka & Others v. Mwanawasa & Others**[8] are authority for the position that where evidence of issues not pleaded is led in evidence at trial and it is not objected to, a court is not prevented from considering such evidence. Similar sentiments were strongly carried in the case of **Roland Leon Norton v. Nicholas Lostrom**[9].

According to Mr. Kalokoni, the issue of payment of benefits held in trust arose in the lower court and was not objected to. In fact, the respondent's counsel, according to Mr. Kalokoni, proceeded to cross-examine the appellant on such evidence.

We have thoroughly examined the record of proceedings in the lower court, particularly the evidence of the appellant to ascertain whether evidence of the appellant's accrued benefits

was led and not objected to. At page 111 of the record of appeal, the following response of the appellant in her evidence in chief, is recorded:

> **"In 2004, the company wrote to me that those in employment before 11 April, 2004 would have their benefits calculated and be held in trust. I have the letter before the court, the letter is at page 3-6 of the plaintiff's bundle of documents. Refer to page 5 condition 18. The letter in question was addressed to me on the 11th April, 2004. I was in employment. I was not paid the benefits indicated in the letter of 9th September, 2004 (document 3-6). According to the conditions of service, I was entitled to the 15 months' pay plus 2 months' pay for each completed year of service. This condition of service is at page 7 of the bundle of documents, the letter at page 7 dated 10th December 2004, addressed to me and reflects the adjustment. The formula is at page 7 and it is 15 months' pay plus 2 months' pay for each completed year of service. This formula related to voluntary displacement among others..."**

Our perusal of the record of the cross examination does not reveal any reference to the appellant's accrued benefits, or the holding of those benefits in trust. What is, however, beyond doubt to us is that reference is made to the benefits in the letter of 9th September, 2004, which stated in paragraph 18 that:

> **"(b) Employees who were in service before 1st April, 2004 shall be paid their accrued benefits up to 31st March which shall be held in trust and 2 (two) months' pay for each completed year of service from 1st April, 2004 in addition to (a) above."**

From the record of appeal, we discern no objection from the respondent to the allusion by the appellant in her testimony to the said letter, and by necessary implication, to the terminal benefits.

While reference to the accrued benefits was made in evidence in the manner we have described it, the issue whether such passing reference, which was not objected to by the respondent, entitled the appellant to have the unpleaded matter considered by the court. As the learned counsel for the respondent submitted in supporting the position taken by the trial court, the plaintiff's version of the facts should not be a variation of the pleadings.

In holding that it was not open to the appellant to depart from the pleadings, the learned trial judge referred to our decision in the case of **Kapembwa Maimbolwa and Another**[12]. There, Gardner, DCJ, as he then was, referred to the holding of Lane, J, in the case of **Geo Wimpey and Co. Ltd**[16] that where a plaintiff's version of the facts was not just a variation of the pleadings, but was something new, separate, and distinct and not merely a technicality, there had been so radical a departure from the pleaded case, as to disentitle the plaintiff to succeed.

In that case, Lane J, stated the following as quoted by the learned trial judge:

> **"One must test the plaintiff's submissions in this way. If these allegations had been made upon the pleadings in the first place, namely allegations based upon the facts as they have emerged, would the defendant's preparation of the case and conduct of the trial have been different. The answer to that is undoubtedly yes. Evidence would have been sought as to the pathway alongside the caravan."**

Having taken the foregoing into consideration, the learned trial judge came to the conclusion that had the issue of accrued terminal benefits been pleaded, the appellant's preparation of the case, and conduct of the trial, would have been probably different.

We entirely agree with the reasoning employed by the learned trial judge in coming to this conclusion. We would add that had the issue of accrued terminal benefits been pleaded, the confusion that has characterized the treatment by the appellant of her benefits over a seventeen year period, and the benefits payable under the voluntary displacement scheme, would have been separated. Evidence on the accrued benefits held in trust would have been carefully and properly led. For example, the appellant would have had to show how those

benefits were to be computed. Likewise the respondent would have been entitled to raise any appropriate defence such as, for example, that any benefits due to the appellant were lost by a dismissal of the employee. As it turns out, to claim accrued benefits on a case constructed on a claim founded on a belief that the appellant had separated from the respondent through voluntary displacement, is in our view, inelegant.

The criticism against the learned trial judge on this ground was a wrong one. Grounds two and three are bereft of merit. They are dismissed.

The final ground criticizes the trial judge for allegedly failing to conclusively adjudicate upon each and every issue raised and for failing to evaluate the evidence adduced before him in a balanced way.

The learned counsel for the respondent accused the trial judge of failing to consider evidence on page 62 of the record of appeal, being an extract of the minutes of a departmental meeting. Other evidence not taken into account by the learned judge, according to Mr. Kalokoni, was the evidence adduced on benefits held in trust and the evidence on benefits that are

payable under the voluntary displacement scheme. Mr. Kalokoni criticized the judge using only evidence that was supportive of the respondent's case without commenting on the material evidence that weighed heavily against the respondent.

The learned counsel called in aid the case of **Masauso Zulu v. Avondale Housing Project**[6] on the duty of the trial court to adjudicate every issue in contention between the parties so as to attain finality. He also cited the case of **Attorney General v. Marcus Kaumba Achiume**[5] where the court held that an unbalanced evaluation of the evidence, where only the flaws of one side but not of the other are considered, is a misdirection on the part of a trial court.

For her part, Mrs. Mwape maintained that the decision of the trial court is unassailable on the basis of the arguments made in support of ground four. According to Mrs. Mwape, the judge below considered all the evidence on record and came to the conclusion that the appellant did not leave the respondent's employment by way of voluntary displacement. Accordingly, the claim for benefits under the voluntary displacement scheme fell away as did the claim for damages for misrepresentation, mental torture and anguish.

We have considered the opposing arguments of counsel on this ground. We must state immediately that Mr. Kalokoni alleges that the trial judge shirked in his judicial responsibility of doing justice between the parties by paying undue regard to one party's case to the detriment of the other. A balanced evaluation of the evidence is expected of every trial judge before passing a verdict, and failure to do so may result in misjudgment. And, this may justify this court's interference with the trial court's judgment even on matters which are *ex facie* factual. In **Nkata & Others v. Attorney General**[3], we stated that:

> **"A trial judge sitting alone without a jury can only be reversed on questions of fact if (i) the judge erred in accepting evidence, or (ii) the judge erred in assessing and evaluating the evidence taking into account some matters which he should have ignored or failing to take into account something which he should have considered, or (iii) the judge did not take proper advantage of having seen and heard the witnesses, (iv) external evidence demonstrated that the judge erred in assessing manner and demeanor of witnesses."**

Quite clearly the appellant here situates the learned trial judge's treatment of the evidence before him in two or more categories identified in the **Nkata**[3] case.

This ground of appeal, in our view, seeks to assail the findings of fact made by the learned trial judge. Having ourselves examined, the pieces of evidence which the learned trial judge is alleged not to have taken into account, or not to have balanced judiciously, we are of the view that contrary to Mr. Kalokoni's submissions, the learned judge took into account all the relevant items of evidence and testimonies in arriving at his judgment. In **Attorney General v. Kakoma**[17], we stated that:

> **"a court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it and having seen and heard witnesses giving that evidence."**

It is clear to us that it is in the province of the trial court to assess the evidence before it and make findings of fact. While ascription of probative value to evidence of witnesses is preeminently the business of the trial court, there is in our view, no obligation on the part of the trial judge to give vent to evidence that is plainly irrelevant to the issues for determination arising from the pleadings.

The learned counsel for the appellant has made general statements regarding the alleged failure by the trial court to

consider the evidence before him in a balanced way. This is not very useful. The nature of the responsibility that a trial court faces in its role of accepting evidence, assessing it and assigning evidentiary value to it, makes it inevitable that at least one party will perceive the badge of neutrality on the part of the judge to be absent. To us, this is not unusual, but should hardly be a ground of appeal. We would be shirking in our judicial responsibility as the last court of the land if we fail to discourage parties that come before us from foisting bad faith and subterfuge on lower courts merely because the court's assessment of evidence turned out to be unfavourable to such a party.

We are, for our part, perfectly satisfied that the learned trial judge in his bravura judgment, properly alluded to the relevant evidence relative to the issues arising from the pleadings, and made a proper assessment of that evidence. As we have earlier indicated, the trial judge went so far as to gratuitously review the law relating to damages relating to misrepresentation, all in an effort, we believe, to comprehensively deal with the issues raised by the appellant.

In our considered view, ground four has no merit and it is dismissed.

The net result is that the whole appeal is bereft of merit and it is dismissed accordingly. Costs shall follow the vent, to be taxed in default of agreement.

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G. S. PHIRI
SUPREME COURT JUDGE

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M. MALILA, SC
SUPREME COURT JUDGE

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R. M. C. KAOMA
SUPREME COURT JUDGE