

**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**2011/HPC/0313**



**BETWEEN:**

**FINANCE BANK ZAMBIA LIMITED**

COMMERCIAL REGISTRY  
05

**PLAINTIFF**

**AND**

**DAVID DICK MICHAEL KING**

**DEFENDANT**

**BANK OF ZAMBIA**

**THIRD PARTY**

***Before the Hon. Mr. Justice Justin Chashi in Open Court on the 1<sup>st</sup> Day of September, 2016.***

*For the Plaintiff:*

*JP Sangwa SC, Messrs Simeza Sangwa & Associates*

*For the Defendant:*

*EK Mwitwa, Messrs Mwenye & Mwitwa Advocates*

*For the Third Party:*

*Dr LN Kalinde, C. Mweemba and J Kamanga (Mrs)*

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**JUDGMENT**

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**Cases referred to:**

1. *James Davis Mtine v Zesco Limited – SCZ Judgment No. 31 of 2006*
2. *Chilanga Cement Plc v Kasote Singongo (2009) ZR, 122*
3. *Kafue District Council v James Chipulu – SCZ Judgment No. 5 of 1987*
4. *Chitomfwe v Ndola Lime Limited (1999) ZR 172*

**Legislation referred to:**

5. *The Banking and financial Services Act Chapter 381 of the Laws of Zambia*
6. *The Employment Act, Chapter 268 of the Laws of Zambia*

The Plaintiff **Finance Bank Zambia Limited** commenced proceedings herein against the Defendant **David Dick Michael King** on 14<sup>th</sup> June 2011 by way of a Writ of Summons.

After the Defendant settled its lengthy Defence and Counter Claim, both parties made several applications to amend their respective pleadings.

According to their amended Writ of Summons filed on 23<sup>rd</sup> June 2014, the Plaintiff is claiming the following reliefs:

- 1. The sum of US\$ 163,596.76 due from the Defendant to the Plaintiff as at 2<sup>nd</sup> March 2011.**
- 2. Interest (at the agreed contractual rate) from 2<sup>nd</sup> March 2011 until full settlement.**
- 3. Damages for breach of contract and**
- 4. Costs**

In the accompanying Statement of Claim, the Plaintiff averred that it is a financial service provider registered under **The Banking and Financial Services Act<sup>5</sup>**, whilst the Defendant was at all material times a customer of the Plaintiff and at the same time an employee of the Plaintiff as Managing Director until 10<sup>th</sup> December 2010.

It was further averred that by an agreement contained partly in a letter dated 29<sup>th</sup> August 2008 (the facility letter) from the Plaintiff to the Defendant, the Plaintiff agreed to provide a Credit facility to the Defendant for a sum not exceeding US\$ 275,000.00 to be disbursed in tranches as and when required by the Defendant.

That the agreement was to be further inferred from the following documents:

1. Promissory note dated 1<sup>st</sup> September 2008 from the Defendant to the Plaintiff.
2. Letter of continuity dated 1<sup>st</sup> September 2008 from the Defendant to the Plaintiff.
3. Letter of set off dated 1<sup>st</sup> September 2008 from the Defendant to the Plaintiff.
4. Letter of instalments for loan from the Defendant to the Plaintiff.
5. Undertaking to create legal mortgage dated 1<sup>st</sup> September 2008 from the Defendant to the Plaintiff.

According to the Plaintiff, it was an express term of the agreement (in Clause 6 of the facility Letter) that the Defendant would repay



the loan through monthly instalments over a period of 10 years with a grace period of six months on the principle debt while interest was to be serviced from commencement of the credit facility.

The Plaintiff further averred that it was an express term of the agreement (in Clause 15 of the facility letter) that in the event of default by the Defendant, the Plaintiff's obligation to make further advances would cease and the Defendant would pay on first written demand all amounts outstanding under the credit facility.

It was the Plaintiff's further averment that pursuant to the said agreement and at the Defendant's request, the Plaintiff disbursed the total sum of US\$ 173,750.00 to the Defendant under the credit facility. That in breach of the agreement, the Defendant has refused, failed and neglected to remit any monthly repayments since 2<sup>nd</sup> March 2011 as at which date the sum of US\$ 163,596.76 was due and payable to the Plaintiff. That as a result, the Plaintiff has suffered loss and damage.

In its tediously lengthy Amended Defence and Counter Claim settled on 12<sup>th</sup> June 2014, the Defendant in its Defence admitted most of the averments in the Statement of Claim save for the



averments that the matters pleaded in paragraph 4 of the Statement of Claim were preceded by specific discussions between the Defendant and the Plaintiff's Board Chairman, Dr Rajan Mahtani (the Chairman) in which the Chairman committed to advance a performance bonus to the Defendant for certain work the Defendant carried out on behalf of the Plaintiff.

The Defendant averred that in 2007, he was instructed by the Plaintiff to lead and broker a sale of shares (the trade sale) by the Plaintiff's shareholders to an appropriate and acceptable buyer. That consequently, the Defendant took on the responsibility of overseeing and participating in lobbying, negotiating, arranging and participating in meetings with potential buyers. That the Defendant's added responsibility also included the role of overseeing the due diligence process and creating a virtual data room of specifically complied performance, risk and operational information.

According to the Defendant, during the process, offers were solicited from interested parties and the Defendant's efforts in the trade sale enabled the Plaintiff's shareholder to adjudicate the offer for purchase of equity from more than one interested party, which

parties on a number of occasions in 2007 met with the Defendant and the Chairman.

The Defendant also averred that he was further called upon to present among other things, the Plaintiff's credentials, a summary of the sales prospectus and to perform all other executive tasks associated with a transaction of this nature, which resulted in attractive offers from First National Bank, Barclays Bank and Credit Suisse. That as a result of the Defendant's efforts, Barclays Bank and First National Bank of South Africa conducted a rigorous due diligence on the Plaintiff.

The Defendant further averred that as a result of his input, there was a successful trade sale process and by late 2007 and early 2008, the Plaintiff's shareholders had received three offers to purchase equity in the Plaintiff.

That the Plaintiff's shareholders finally elected to sell shares representing 40 per centum of the equity in the Plaintiff to Credit Suisse.

According to the Defendant, the work he did in respect of the trade sale would usually be performed by a dedicated specialist at a fee of

between 1.75 to 2.5 per centum of the final sale price achieved. That the trade sale was done at a purchase price of US\$ 80,000,000.00 for the 40 per centum shares, resulting in the total valuation of the Plaintiff being at US\$ 200,000,000.00 and that therefore the fee for transaction brokerage would have been between US\$1,400,000.00 and US\$ 2,000,000.00 if it had been done through a dedicated external commercial agent.

It was the Defendant's averment that the task he performed in the trade sale was over and above his duties as Managing Director and that therefore as recognition and due compensation for his efforts, in the trade sale, the Defendant was entitled to a performance related award, which the Plaintiff through the Chairman offered to pay the Defendant a performance bonus.

The Defendant further averred that sometime in 2007, during the Defendant's employment with the Plaintiff, the Defendant informed the Chairman that he was interested in investing in one of the houses that were being constructed by the developer on the Livingstone Royal Golf Course. That the Chairman suggested that the developer constructs three executive houses, one for the Chairman, one for the then Plaintiff's Deputy Managing Director,



Barkat Ali and one for the Defendant, the purchase price for each house being US\$ 275,000.00.

According to the Defendant, the Chairman made the offer to pay for the construction of the Defendant's house as performance bonus and/or recognition at various meetings held in the Chairman's office between 2008 and 2009 in the presence of Barkat Ali. That on the strength of the verbal understanding made by the Chairman, the Defendant and Barkat Ali accordingly contracted to purchase the houses.

It was the Defendant's averment that both himself and Barkat Ali were advanced loans for the purchase and construction of houses and it was agreed that the loans would then be settled by the Plaintiff as performance bonus and in recognition of the Defendant's efforts in facilitating the trade sale and for Barkat Ali's long service. That the house loan was properly secured by the valuation of the project and cession of title as with any other loan.

The Defendant in denying paragraph 8 of the Statement of Claim averred that the loan was advanced to him on the understanding that the loan would eventually be settled in accordance with the

undertaking by the Chairman aforestated. That he duly paid the loan interest on a monthly basis for more than two years and that the loan was a performing loan and would have continued doing so had the Defendant's employment not been wrongly terminated by the Third Party.

In its Counter Claim, the Defendant averred that in or about February 2007 he was employed by the Plaintiff as Managing Director under a one year contract which was twice renewed for two year periods with the last renewal being on 1<sup>st</sup> April 2010. That the last renewal was done pursuant to a Service Agreement (the Contract of Employment) dated 1<sup>st</sup> April 2010. That on 1<sup>st</sup> October 2010, the Plaintiff and the Defendant executed an addendum to the Contract of Employment by which the Defendant's conditions of service were enhanced.

According to the Defendant, the Contract of Employment entitled the Defendant to the following conditions of service:

1. A gross salary of K222,000.00 and a net annual inducement allowance of US\$ 250,000.00 which was paid in 12 equal monthly instalments on the first day of each calendar month

pursuant to Clause 5.0 of the Contract of Employment as read with the schedule to the contract.

2. Gratuity equivalent to 25 per centum of the accumulative inducement allowance earned during the period of service pursuant to Clause 6.1 of the Contract of Employment.
3. Repatriation to Johannesburg, South Africa by the provision of a business class air ticket for the Defendant's spouse and air freight of the Defendant and his immediate family's household goods up to 450 kilograms pursuant to Clause 7 and 8 of the contract of employment.
4. Leave at the rate of 2.5 days per month pursuant to Clause 11.1 of the contract of employment and
5. Entitlement to purchase the personal to holder motor vehicle at book value after four years.

The Defendant further averred that on 10<sup>th</sup> December 2010, Bank of Zambia took possession of the Plaintiff and purported to terminate the Defendant's Contract of Employment with immediate effect. That the termination was in breach of the Contract of Employment.



According to the Defendant, at the time of termination the Defendant had accrued 44 leave days and was also entitled to other severance benefits.

That in addition to the foregoing the Defendant was also entitled to the following which were to be net of taxes:

1. Three months pay in lieu of notice – K66,000.00
2. Inducement allowance at US\$ 20,833.00 per month – US\$ 62,500.00.
3. Gratuity at 25 per centum US\$ 62,500.00
4. Air tickets – US\$ 1,100.00
5. Baggage allowance – US\$ 2,000.00
6. Annual travel allowance – US\$ 10,000.00
7. Medical costs – US\$ 2,746.00
8. Leave days (29) K13,377.42 and US\$ 24,616.08

bringing the cumulative totals to K79,377.42 and US\$ 165,462.08 as well as the performance bonus of US\$ 275,000.00 as earlier averred.

It was the Defendant's further averment that he was in addition and is still entitled to purchase his personal to holder Mitsubishi Pajero

Motor Vehicle registration number FBZ 22 at zero book value and two other personal to holder motor vehicles namely Mercedes Benz E500 registration number FBZ 3 and Mercedes Benz ML500 registration number ABX 4153 at the current book value.

That in accordance with the Plaintiff's practice of offering its Executive level employees with furniture that they had been using for four years and above at book value of zero and as the furniture the Defendant was using at 6 Chila Road Kabulonga, Lusaka was purchased in the months of February and March 2006, that he was entitled to acquire all the furniture at the said residence at the current book value of zero.

The Defendant further averred that by a letter dated 28<sup>th</sup> February 2011, the Plaintiff contrary to the terms of the Contract of Employment advised the Defendant that it was only willing to pay his salary and inducement allowance for the 10 days he worked in December 2010, 15 days leave and servant allowance.

That although by a letter dated 9<sup>th</sup> March 2011, the Defendant's Advocates wrote to the Plaintiff demanding settlement of the aforestated amounts, the Plaintiff has to date neglected and/or

failed to respond to the demands and has refused to respect the Defendant's contractual rights.

It was the Defendant's averment that the Plaintiff's refusal and/or failure to accommodate the Defendant's demands was in further disregard to a letter from Bank of Zambia to the Plaintiff's Advocates dated 27<sup>th</sup> September 2013 in which Bank of Zambia informed the Plaintiff that all litigation arising from the termination of Contracts of employment involving the Plaintiff's Senior Management employees were to be resolved amicably on the following terms and conditions:

1. That all accrued benefits for the former employees were to be borne by the Plaintiffs.
2. That any damages awarded to the former employees including costs awarded to them were to be borne by Bank of Zambia.

It was the Defendant's further averment that as a consequence of the aforestated the Defendant had suffered loss and/or damage which was particularized as follows:

1. The Defendant suffered humiliation, embarrassment and severe personal trauma and had been diagnosed with



PTSS/PTSD (Post Traumatic Stress Syndrome) and is still under regular counseling for which he has had to incur costs which he has had now in excess of ZAR 7,200.00.

2. The Defendant was unable to secure alternative employment for six months.
3. The Defendant experienced severe financial hardship which required him to sell his retirement assets as a direct consequence of the Plaintiff's conduct and the wrongful manner in which his employment was terminated by Bank of Zambia.
4. The Defendant lost out on the opportunity to derive any profit from his investment on the Livingstone Royal Golf Course.

In view of the aforestated the Defendant is Counter Claiming the following reliefs:

1. Damages for breach of contract.
2. Damages for wrongful dismissal, mental distress and anguish.
3. Special damages as particularized.

4. An order for payment of K79,377.42 and US\$ 165,462.08 as severance and or terminal benefits.
5. An order for the payment of USD 275,000.00 being performance bonus agreed with the Chairman.
6. A declaration that the Defendant is entitled to purchase Mitsubishi Pajero motor vehicle registration number FBZ 22 at zero book value and Mercedes Benz E500 registration number FBZ 3 and Mercedes Benz ML500 registration number ABX 4153 at the current book value.
7. A declaration that the Defendant is entitled to purchase the furniture he was using aforestated.
8. Payment of the cash equivalent of the items found to be due to the Defendant under (6) and (7)
9. Costs
10. Any other relief the Court may deem fit

In its Amended Reply and Defence to the Counter Claim settled on 12<sup>th</sup> November 2014, the Plaintiff joined issue with the Defendant on its Defence and went on to aver in defence to the Counter Claim that gratuity was only payable upon successful completion of the term of Service Agreement or upon separation of the parties with

notice in line with the provisions of Clause 3.2 of the agreement. That in line with the provisions of Clause 7.4 of the agreement, the Defendant and his spouse were not entitled to repatriation to Johannesburg, South Africa. That the Defendant was only entitled to reimbursement of the actual cost of transporting his personal effects, his spouses and those of his dependent children to the combined maximum of 450 kilograms and in line with the provisions of Clause 8.1 of the agreement and reimbursement of the actual costs aforesated was payable only upon successful completion of the term of the Contract of employment.

The Plaintiff further averred that Bank of Zambia did not just purport to terminate the Defendant's contract of employment but did in fact terminate the contract.

As regards the allegation of breach of contract, it was the Plaintiff's averment that if there was any breach the same was occasioned by Bank of Zambia.

According to the Plaintiff, it has paid in full the amount of money due to the Defendant under the Contract of Employment and that if there is any amount due above what has already been paid to the



Defendant for the alleged breach of the contract, then the same is payable by Bank of Zambia.

The Plaintiff further averred that the Defendant is not entitled to the sum of US\$ 275,000.00 or any other amount.

Further that the Defendant is not entitled to buy any of the motor vehicles listed in the Counter Claim at book value or at all in that only the Plaintiff in its sole discretion had the right to decide to sell or not and in the circumstances of this case, no such decision was ever made by the Plaintiff.

It was the Plaintiff's further averment that the Defendant is not entitled to buy any of the furniture and that in line with the terms of conditions of the Contract of Employment only the sum of K59,258.71 was due and payable to the Defendant and the same has since been paid and if there is any amount payable to the Defendant above the said amount the same is payable by Bank of Zambia as the Plaintiff has discharged all its obligations under the Contract of Employment and that if there are any outstanding obligations, the same ought to be met by Bank of Zambia.

According to the Plaintiff, the Defendant is not entitled to any of the reliefs being claimed in the Counter Claim and it was its averment that if there was any relief due to the Defendant, the same ought to be met by Bank of Zambia.

**Bank of Zambia** were joined to the proceedings as **Third Party** by way of an ex parte Order on 1<sup>st</sup> October 2012 at the instance of the Plaintiff by way of a Third Party Notice.

According to the Re-Amended Third Party Notice filed by the Plaintiff on 17<sup>th</sup> December 2015, the Plaintiff claims against the Third Party indemnification against the Defendant's Counter Claim and for costs of the action on the following grounds:

1. That the Defendant was until 10<sup>th</sup> December 2010 in the employ of the Plaintiff as Managing Director serving under a two (2) year Contract of Employment effective 1<sup>st</sup> April 2010 to 31<sup>st</sup> March 2012.
2. On 10<sup>th</sup> December 2010, the Third Party took possession of the Plaintiff as a financial service provider, in line with the provisions of Section 81 (2)(a) of **The Banking and Financial Services Act<sup>5</sup> (Act)**.

3. That by taking possession of the Plaintiff, the Third Party in line with the provisions of Section 84A of the Act assumed full and exclusive powers of management and control of the Plaintiff.
4. That on 10<sup>th</sup> December 2010 in breach of Clause 3 of the Contract of Employment between the Plaintiff and the Defendant, the Third Party dismissed the Defendant from the Plaintiff's employment.
5. That further or in the alternative, the Plaintiff will aver that:
  - (a) By an agreement made between the Plaintiff and the Third Party, the Plaintiff and the Third Party agreed that all litigation commenced as a result of the supervisory action taken against the Plaintiff be resolved between the Parties outside Court.
  - (b) It was further agreed that all litigation arising from the termination of contracts of employment involving senior management employees of the Plaintiff be resolved on the following terms and conditions:
    - (i) All accrued benefits for the former employees were to be borne by the Plaintiff and



- (ii) Any damages awarded to the former employees including costs awarded to them were to be borne by the Third Party.
- (c) The agreement between the parties was made partly orally, partly in writing and partly by conduct of the parties and the Third Party in the circumstances set out in the two paragraphs (d) and (e) below following.
- (d) In so far as it was made orally, the agreement was made after several meetings between the Plaintiff and the Third Party between January to September 2013.
- (e) In so far as it was made in writing, the agreement is contained or to be inferred from:
  - (i) The letter dated 27<sup>th</sup> September 2013 from the Third Party to the Plaintiff's Advocate.
  - (ii) The Consent Order for Discontinuance of the matter under Cause No. 2010/HP/1332/1339 dated 10<sup>th</sup> December 2013.
  - (iii) The Consent Order of Discontinuance of the matter under Cause No. 2010/HP/420 dated 3<sup>rd</sup> July 2014.

- (iv) The Consent Order for Discontinuance of the matter under Cause No. 2010/HP/1018 dated 28<sup>th</sup> August 2013.
  - (v) The Consent Order for Discontinuous of the matter under Cause No. 2011/HP/850 dated 10<sup>th</sup> December 2013
  - (vi) Consent Order for Discontinuous, Discharge from liability and withdrawal of Appeal dated 21<sup>st</sup> October 2013 under Appeal No 108 of 2012.
- (f) That in so far as it was by conduct, the conduct consisted of or is to be inferred from the following:
- (i) On 14<sup>th</sup> December 2010, Mr. Miles Sampa – Executive Director Treasury and International Banking lodged Complaint No. 253 of 2010 in the Industrial Relations Court against the Plaintiff and the Third Party seeking among other remedies, damages for unlawful termination of employment amounting to 24 months salary.
  - (ii) On 22<sup>nd</sup> November 2011, Mr. Noel Nkhoma, Executive Director – Corporate Banking lodged

Complaint No. 73 of 2011, in the Industrial Relations Court against the Plaintiff and the Third Party seeking among other remedies damages for unlawful termination of employment amounting to 24 months salary, allowance and benefits on the basis of the applicable precedent and case law.

- (iii) Under complaint No. 258 of 2010, on 6<sup>th</sup> October 2011, the Court in its Judgment found in favour of Mr. Miles Sampa and Ordered the Third Party to pay damages, prompting the Third Party to appeal to the Supreme Court.
- (iv) Under complaint No. 73 of 2012, on 9<sup>th</sup> March 2012, the Court in its Judgment found in favour of Mr. Noel Nkhoma and directed that damages be paid by the Plaintiff prompting the Plaintiff to appeal to the Supreme Court.
- (v) After discussions which involved the Complainants, the Plaintiff and the Third Party, an agreement was reached with the consequence that the two appeals were consolidated and settled with the consent of all



the parties on the understanding that the Plaintiff would pay Messrs Miles Sampa and Noel Nkhoma all the benefits which had accrued to them at the time of termination of their employment by the Third Party on 10<sup>th</sup> December 2010, which benefits the Plaintiff has since paid.

- (vi) It was further agreed among the parties that the Third Party would pay Messrs Miles Sampa and Noel Nkhoma all damages awarded to them including costs, which the Third Party has since paid in full.

In its Reply to the Plaintiff's Amended Defence to the Counter Claim, settled on 31<sup>st</sup> August 2015, the Defendant averred that the Plaintiff is liable for the actions of the Third Party as the Defendant was at all material times an employee of the Plaintiff and the Plaintiff was under the supervision of the Third Party at the time of the wrongful and/or unlawful termination of the Defendants contract.

According to the Defendant, his claim to the vehicles is based on the provisions of the Contract of Employment with the Plaintiff and the prevailing policy and common practice at the material time of

offering for sale (at book value) the vehicles that were personal to holder, sometimes even before the expiration of the four years vesting period upon termination of an employee's contract of employment. That the said policy was implemented by the Plaintiff regularly and beneficiaries of the said policy and practice include Mr. Simataa Simataa, who was given his second personal to holder vehicle after only three years of service. Mr. Barkat Ali, Mr. Noel Nkhoma and all other Senior Staff/Directors, were given their personal to holder vehicles after completing each four year cycle (vesting period); Mr. Barkat Ali was given a Mercedes Benz E350 on 31<sup>st</sup> March 2010 as a four year cycle had elapsed, as well as Mrs. Uma Pathak.

The Third Party maintained its amended Third Party Defence which was settled on 26<sup>th</sup> February 2015. The Third Party did not take issue with some of the Counter Claims, but denied the Counter Claim in so far as it alleged that the Third Party purported to terminate the Defendant's contract of employment with the Plaintiff, in breach of the contract and averred that the Third Party as the regulator of banks took supervisory action against the Plaintiff pursuant to Section 81 (2)(a) of the Act.

The third Party further averred that the Defendant's Contract of Employment terminated by operation of law through the legitimate exercise by the Third Party of powers lawfully vested in it by Section 84A (f) of the Act. That in exercising its statutory functions during the period of possession, the Third Party notified the Defendant that payment of accrued terminal benefits were suspended pending investigations of the circumstances leading up to possession of the Plaintiff, a power conferred upon the Third Party under Section 84A (c) of the Act.

According to the Third Party, the terminal benefits, if any, accruing from a contract of service as between the Plaintiff and the Defendant accrued in the books of the Plaintiff and at no time accrued in the books of the Third Party and are only claimable against the Plaintiff without a basis for indemnity from the Third Party.

Further that, no adverse findings as to damages have been made against the Third Party who shall contend that it would be contrary to public policy that liability should be ascribed to a public authority acting in good faith, where a Statute has conferred upon such a public authority a clear power to terminate the contracts of



service of management employees who may be demonstrably culpable for any identified breaches of regulatory requirements.

The Third Party further averred that its intervention by way of taking possession of the Plaintiff in respect of which it had adverse finding of breaches against the Act was a proper, lawful and necessary exercise of statutory power for which there can be no liability in public or private law.

It was the Third Party's averment in the alternative, that the Pleadings disclose no cause of action against the Third Party on account that:

1. The Third Party Notice seeks indemnification in favour of the Plaintiff for termination of the Defendant's Contract of Employment which termination occurred by operation of the law and clearly cannot be said to be unlawful so as to bring it within a recognised head of liability such as wrongful dismissal or wrongful termination.
2. The Counter Claim alleges without alleging existence of any contract as between the Plaintiff and Third Party damages for breach of contract.

At the trial, which only commenced on 6<sup>th</sup> April 2016, the Plaintiff in pursuit of its case called three witnesses.

**Mutale Chilangwa Chisela, PW1** currently employed by the Plaintiff as Executive Director –Human Resources and Operations proffered her evidence as per her Witness Statement.

On the issue of the performance bonus, it was her testimony that in the year 2007, the Plaintiff decided to source an equity investor for various reasons which included recapitalization of its operations. That the Defendant as Managing Director was expected to play a key role in the affairs of the Plaintiff and his involvement in the process of sourcing an equity investor was no exception. That as a result of the collective efforts of the Plaintiff's Board of Directors and Officers at various levels, Credit Suisse was successfully identified and contracted as an equity investor.

According to PW1, there were no separate contracts of service nor contracts for services entered into between the Plaintiff and the Defendant nor between the Plaintiff and any of its other officers involved in respect of the sourcing of an equity investor and any

involvement thereof was within the scope of duty under already subsisting employment.

PW1 further testified that there was no special remuneration package or bonus for the Defendant for his role towards the sourcing of Credit Suisse.

Further that the credit for securing the investment cannot be attributed to any one individual officer or the Defendant, but to a combination of collective effort as aforestated.

That the only form of bonus provision in the Defendant's employment with the Plaintiff was in the Appendix to the Contract of Employment of 1<sup>st</sup> April 2010 which was capped at a month's salary and payable only if the Plaintiff made a blanket award of the bonus to all members of staff.

That the threshold for all staff bonus was if the Plaintiff achieved 80 per centum or more of its annual performance targets and profitability budget as per the document on page 17 of the Defendant's Bundle of Documents.

It was PW1's testimony that all the Defendant's Contracts of Employment with the Plaintiff contained a standard Clause of



constituting the entire agreement between the Plaintiff and the Defendant and superseding all prior agreements or understandings whether written or oral. That by way of an example, the Defendant's Contract of Employment dated 1<sup>st</sup> May 2007 read under Clause 21.1 as follows:

*"This agreement including the schedule hereto contains the entire agreement of the parties with respect to the matters referred to here and supercedes all prior agreements or understanding written or oral which may have related to the subject matter hereof".*

as appears at page 34 of the Plaintiff's Bundle of Documents. That the Defendant's Contract of Employment of 1<sup>st</sup> April 2010 was identically worded. That the relevant part of the addendum dated 1<sup>st</sup> October 2010 to the Defendant's last Contract of Employment as appears at page 20 of the Defendant's Bundle of Documents was worded as follows:

*"This addendum and the original contract including the schedule hereto contains the entire agreement with respect to the matters referred to here and supersedes all prior*

*agreements or understanding written or oral which may have related to the subject matter hereof”.*

PW1, then went on to address the issue of the Defendant's contractual benefits and testified that Clause 6.1 of the Contract of Employment of 1<sup>st</sup> April 2010 provided for a gratuity to be paid to the Defendant in the event of a premature end of his employment provided that the termination was done with notice by either the Plaintiff or the Defendant in accordance with Clause 3.2 of the agreement.

That however, the Defendant's employment was not terminated in accordance with Clause 3.2 but instead summarily dismissed by the Third Party as per the letter appearing on page 20 of the Defendant's Bundle of Documents.

It was PW1's testimony that the Defendant, his spouse and children under 18 years were entitled to be repatriated by air from Zambia to the place of recruitment. That the tickets were to be business class at a cost to be borne by the Plaintiff. That this was according to Clause 7.2 of the agreement, which however imposed a precondition that the benefit only arose upon successful completion of

the contract term, which according to Clause 3.1 was two years from 1<sup>st</sup> April 2010.

Furthermore, that Clause 7.4 expressly excluded any form of repatriation benefits if the Defendant did not complete a minimum of one year's service from the date of the Contract, that the Defendant's employment was however terminated by the Third Party barely eight months after execution of the Contract.

PW1 further testified that Clause 8.1 of the agreement entitled the Defendant to a reimbursement of expenses to be incurred in transporting the Defendant's personal effects and those of his spouse and children from Zambia to his place of initial recruitment. That however the benefit was only available after successful completion of the term of the contract. Furthermore, that Clause 8.2 expressly excluded any form of baggage benefit if the Defendant did not complete a minimum one year service from the date of the Contract.

According to PW1, after execution of the addendum on 1<sup>st</sup> October 2010, the Defendant became entitled to a one off travel allowance of US\$ 10,000.00 every twelve months. That under Clause 15.0 of the



addendum, the Defendant was entitled to reimbursement for all reasonable and normal medical costs incurred in Zambia or South Africa by the Defendant, his spouse and children under 18 years. That however, the entitlement did not cover the Defendant's post employment medical expenses.

PW1 further testified that the agreement of 1<sup>st</sup> May 2007 entitled the Defendant to the use of a personal to holder vehicle to a maximum value of US\$ 120,000.00. That under the Contract the Plaintiff had the discretion to sell the vehicle to the Defendant upon his cessation of employment at book value if the sale took place at the lapse of four years since the vehicle was first purchased. That the aforesaid was replicated in the Contract of 1<sup>st</sup> April 2010.

That the addendum amended the Clause to remove the cap on the value of the vehicle and also introduced a second service vehicle for the Defendant's use. The addendum maintained the Plaintiff's discretion to sell the vehicle to the Defendant and extended the discretion to the second service vehicle at book value if the sale took place after four years had elapsed since the vehicle was first purchased.

According to PW1, the Plaintiff has never exercised its discretion to offer any of its vehicles for sale to the Defendant since he ceased to be an employee. That during his employment the Defendant was by virtue of Clause 9 of the Contract of 1<sup>st</sup> April 2010 enjoying furnished accommodation. That there was however no provision for the Defendant to purchase the furniture at the end of his employment and the Plaintiff has never offered any of the furniture to the Defendant.

As regards the termination of the Defendant's employment, it was PW1's evidence that on 10<sup>th</sup> December 2010, the Third Party took possession of the Plaintiff and assumed full control of its activities through its appointed agents. That she was aware from various documents generated and available that during the period of possession, the Third Party terminated the services of the Defendant on 10<sup>th</sup> December 2010 and through its agent eventually computed the Defendant's separation dues and arrived at a net total of K59,258,717.00. That she similarly came to learn that on 2<sup>nd</sup> March 2011, the Third Party agents debited the outstanding loan balance of US\$ 170,832.22 on the Defendant's loan account thereby creating an overdraft. That on the same day the agents

credited the separation dues to the current account thereby reducing the Defendant's indebtedness to US\$ 162,457.57 as at 2<sup>nd</sup> March 2011.

In cross examination by Counsel for the Defendant, PW1 asserted that it is not the ordinary duty of the Managing Director to be sourcing for buyers of shares in the company in which he is employed. She further went on to state that when this happened, she was not yet in the Plaintiff's employ. That however from the available documents, she was aware that the position of Deputy Managing Director was held by Mr. Barkat Ali.

When referred to the Contract of Employment of 1<sup>st</sup> April 2010, PW1 agreed that the same does not state that the Defendant would be responsible for the aspect of ensuring the sale of shares in the Plaintiff to interested parties.

As regards the number of leave days the Defendant had accrued PW1 asserted that she was not in a position to confirm that as she had not verified the same as she did not have access to the individual files.



Further, that the only contract she had seen in respect to the Defendant was that for 2010. She further asserted that she had not verified whether some senior members of staff were sold household furniture after termination of their contracts and personal to holder vehicles before clocking four years.

When referred to the contract, it was PW1's evidence that she had not seen any documentation to show that the Defendant was given notice to terminate his contract of employment and neither that he was paid three months salary in lieu of notice.

PW1 conceded that the Defendant's contract was wrongfully terminated.

According to PW1, the Plaintiff was given back the rights to manage and control its affairs by the Third Party in October 2011. That to the best of her knowledge she has not seen anything to suggest that the Defendant was invited back by the Plaintiff to continue as Managing Director.

In cross examination by Counsel for the Third Party, PW1 asserted that she had not been able to verify any matters relating to the Defendant as the Third Party at the time of taking possession of the

Plaintiff, took all the records for senior management that were relieved of their duties.

In re examination by Counsel for the Plaintiff, PW1, reiterated that after 10<sup>th</sup> December 2010, the Third Party and its agents were running the affairs of the Plaintiff and that they were the ones who terminated the Defendant's employment.

On the issue of leave days, PW1 testified that only 15 days were included in the computation of the benefits. On the right to purchase Motor Vehicles she reiterated that it only accrued four years from the date of purchase of the vehicle.

**PW2, Charity Nsunge Shitumbanuma**, the Executive Director – Credit in the employ of the Plaintiff gave her evidence as per her Witness Statement. It was her evidence that in 2008, the Defendant applied for a credit facility from the Plaintiff in the sum of US\$ 275,000.00 to be utilized in the construction of a villa at the Royal Livingstone Golf Club in Livingstone. That at the time the Defendant was the Managing Director in the employ of the Plaintiff.

According to PW2, she issued the facility letter on 29<sup>th</sup> August 2008 on behalf of the Plaintiff. That the salient terms of the facility letter included the following:

1. Clause 4, that the loan would be disbursed in tranches as and when required by the Defendant.
2. Clause 7, that the facility would expire on 31<sup>st</sup> December 2018.
3. Clause 6, that the loan and interest would be repaid in equal monthly installments over a period of ten years with a grace period of six months before repayments of the principal amount could commence.
4. Clause 8, that the outstanding balance on the loan would attract interest at the rate of 4.22 per centum per annum.
5. Clause 10, that part of the security would be a mortgage over the leasehold property which the Defendant wanted to develop with the funds from the credit facility.
6. Clause 15, that in the event of default by the Defendant, the Plaintiff's obligation to make further advances would cease and the Defendant would when demanded, pay the Plaintiff for all sums outstanding.



PW2 further testified that the facility letter was accepted by the Defendant on 1<sup>st</sup> September 2008 who countersigned the same. That the Defendant executed additional documents as collateral security as follows:

1. Letter of continuity
2. Promissory note
3. Letter of set off
4. Letter of installments and
5. Undertaking to create a legal mortgage.

That the aforestated documents appear at page 5-9 of the Plaintiff's Bundle of Documents.

According to PW2, the Defendant did not however create a legal mortgage in favour of the Plaintiff over the leasehold. That notwithstanding and at the Defendant's request, the Plaintiff disbursed the total sum of US\$ 173,750.00. A statement of the Defendant's loan account appears at pages 11-12 of the Plaintiff's Bundle of Documents.

PW2 further testified that when the Third Party took possession of the Plaintiff, they terminated the Defendant's services and debited

the outstanding loan to the Defendant's current account. That the statement of the current account appears at pages 13-20 of the Plaintiff's Bundle of Documents. Further that in 2011, the Third Party agents instructed their Advocates to demand for the outstanding balance due on the account as per the demand letter on page 10 of the Plaintiff's Bundle of Documents.

PW2 concluded by testifying that despite the demand, the Defendant has not made any payments to liquidate his indebtedness to the Plaintiff.

In cross examination by Counsel for the Defendant, PW2 asserted that she knew Mr. Barkat Ali who served as Deputy Managing Director in the employ of the Plaintiff. That Dr. Rajan Mahtani was the Chairman then.

According to PW2, she was not preview to the discussion and interactions that the Chairman had with the Defendant in relation to the loan.

PW2 further asserted that the loan in issue was to be secured by the property that was to be constructed using the loan which property was supposed to be owned by the Defendant, on the land

belonging to Royal Livingstone Golf Trustees which was subleased to Little Park who in turn were to sublet to the Defendant.

PW2 confirmed that according to the facility letter the Certificate of Title was supposed to be surrendered to the Plaintiff, but that was never done.

According to PW2, she was not aware of the state of development of the property to date and that at this stage the Plaintiff cannot be able to enforce the security, as they have no title deeds to the property.

As regards the performance bonus, PW2 asserted that she had no knowledge of the same. Further that she was not preview to the practice on furniture and motor vehicles as such she was not able to comment on the same.

In cross examination by Counsel for the Third Party, PW2 asserted that the monies which would have been recovered from the Defendant on the loan was going to benefit the Plaintiff.

**PW3, Sokwani Peter Chilembo**, the Assistant Director – Legal in the employ of the Plaintiff proffered his evidence as per his Witness Statement.



It was his evidence that the Third Party took possession of the Plaintiff on 10<sup>th</sup> December 2010 as a financial service provider pursuant to the provisions of Section 81 (2) (a) of the **Act** and thereupon, Section 84A of the Act vested the full and exclusive powers of management and control of the business of the Plaintiff in the Third Party. That upon taking possession, the Third Party terminated the Contract of Employment of the Defendant without notice nor payment in lieu of notice as stipulated in his contract. That the Third Party also terminated the contracts of employment of Noel Nkhoma, Miles Sampa, Rex Ellis and Peter Lunn, who contested the terminations in a number of cases in which the Plaintiff and the Third Party were either Respondents or Defendants.

It was PW3's testimony that the Third Party ended possession of the Plaintiff in September 2011.

According to PW3, thereafter, several meetings were held between the Plaintiff and the Third Party which culminated into an agreement between them on how the legal cases pending before the Courts were to be settled. That there was consensus between the Parties that the manner in which the contracts were terminated was

wrong and some form of compensation ought to be paid to the affected employees. That the only question which was left to be resolved was who was to be responsible for paying the dues.

PW3 testified that it was agreed that the Plaintiff would pay all benefits that had accrued up to the date of termination and the Third Party would pay all the damages which the Courts would order and the costs.

In cross examination by Counsel for the Defendant, PW3 re affirmed his position that the termination of the Defendant's contract of employment was wrongful.

PW3 further asserted that the Plaintiff is attempting to enforce the agreement that resulted from the discussion between the Plaintiff and the Third Party.

According to PW3, if there are any accrued benefits due to the Defendant the Plaintiff is willing to pay.

As regards the issues of furniture and motor vehicles, it was PW3's position that he was not able to competently speak on the same.

On its part, the Defendant only called one witness, the Defendant himself who for convenience I shall refer to as **DW** who gave his testimony as per his Witness Statement. The Witness Statement of DW was to a large extent a rehash of his Defence and Counter Claim and I see no need to repeat the same except to add of relevance that it was also his evidence that the Plaintiff is not entitled to any of the reliefs being claimed in view of what he is entitled to under the Counter Claim.

DW further testified that on the day the Third Party took possession of the Plaintiff he was subjected to armed men carrying AK 47 fire arms and was forced to vacate his office in the presence of his members of staff.

DW's further testimony was that he suffered humiliation, shock and severe trauma for which he has required ongoing counseling as shown on pages 50-55 of the Defendant's Supplementary Bundle of Documents.

Further, that following termination of his employment he was not able to find another job for six months. That he experienced severe



financial hardships and embarrassment which required him to sell assets.

In cross examination by Counsel for the Plaintiff, DW asserted that the instruction by the Plaintiff to lead and broker the sale of shares were verbal and that he was offered a bonus by the Chairman, although he did not mention a figure. That the figure of US\$ 275,000.00 only crystallized during the course of 2007 when he became aware of the developments which were being done at Royal Livingstone Golf Club and he informed the Chairman about purchase of a house and arranging of a loan.

According to DW, he applied for a loan for USD 275,000.00 from the Plaintiff.

That the presentation to Credit Suisse was done by the Chairman and that he was not involved in the discussions with them.

It was DW's further assertion that the issue of the bonus was never tabled, discussed or approved by the Board of Directors nor the shareholders and also that there was no record of the issue.

DW conceded that the bonus he was claiming was not part of his Contract of Employment and that the work he did was done during his normal working hours.

On the issue of leave days, DW asserted that the Contract of Employment provided that he could only claim 15 days. that however in practice he could claim more and that is the reason he was claiming 44 days.

As regards the loan, it was the evidence of DW that the security was never perfected, although the Plaintiff still has interest in the property.

In cross examination by Counsel for the Third Party, DW recalled that at the end of December 2009, the Third Party did raise a complaint about issues to do with insider borrowing and large loan exposure exceeding the prescribed limits and that the Plaintiff's management responded to the same.

DW asserted that he underwent counseling as a result of trauma after a specialist diagnosed him with post trauma stress as shown at pages 51-52 of the Defendant's Supplementary Bundle of Documents.

The Third Party equally only called one Witness, **Rapheal Kasonde**, the Assistant Director – Examination and Surveillance in the employ of the Third Party whom I shall refer to as **TPW**, who proffered his evidence in chief as per his Witness Statement.

It was TPW's evidence that the Third Party in its capacity as the regulator of banks took supervisory action against the Plaintiff in 2010 pursuant to section 81 (2) of the Act following revelation of irregularities identified during an inspection. That under Section 84A, the Third Party is vested with full and exclusive powers of management and control of the financial service provider under possession and was empowered to terminate the services of any director or employee.

TPW testified that the Defendant's contract was terminated pursuant to the Third Party's statutory powers to terminate by operation of law. That the termination was effected simultaneously with those of all other contracts of senior management classified as Executive Directors without exception.

According to TPW, the terminal benefits owing to the Defendant continued to accrue to the books of the Plaintiff.



That however, payment thereof at the point of termination was stopped or suspended in accordance with Section 84A (c) of the Act pending individual culpability for the operational irregularities of the Plaintiff.

TPW further testified that on 3<sup>rd</sup> October 2011, prior to the conclusion of the possession, the Third Party received a policy directive from Government to hand over the Plaintiff to the original shareholders with immediate effect and the Third Party immediately complied with the directive in accordance with Section 5 of the Act which obliges the Third Party to implement policy directives.

In cross examination by Counsel for the Plaintiff, TPW asserted that once the Third Party takes possession of a financial service provider, it is vested with full and exclusive powers in both management and control. According to TPW that entails making any executive management decision. That as such the Board of Directors have no say.

That the powers extended to termination of services of any employee or officer and the Third Party in that respect terminated the contracts of all executive management including the Defendant.

According to TPW, the Defendant's payment in lieu of notice were being withheld because he was still being investigated, although that was never communicated to him until 7<sup>th</sup> July 2011, by way of a letter which was not before the Court.

Further according to TPW, this case was initially supposed to have been settled outside Court. When shown the document at page 1 of the Plaintiff's Supplementary Bundle of Documents relating to the Third Party, TPW confirmed that as the agreement between the Plaintiff and the Third Party.

In cross examination by Counsel for the Defendant, TPW denied being accompanied by armed officers when they went to take possession of the Plaintiff although there could have been security officers from the Third Party for protection of its officers.

At the time of concluding trial, all the parties indicated that they would file written submissions. However, at the time of writing this Judgment, the Plaintiff and the Defendant had not done so. Only the Third Party filed its submissions on 29<sup>th</sup> August 2016. Despite that, I have taken into consideration the Plaintiff's and Defendant's

respective skeleton arguments and list of authorities in support of their cases.

In its skeleton arguments which were filed on 24<sup>th</sup> April 2013, the Plaintiff submitted that as regards the loan advanced to the Defendant, there was a binding contract between the Plaintiff and the Defendant and that therefore the Plaintiff is entitled to recovery of the same as the Defendant had defaulted on repayments.

It was the Plaintiff's further submission that the collateral documents constituted contracts made by the Defendant with obligations to be performed in favour of the Plaintiff.

On its part, it's the Defendant's submission from its skeleton arguments which were filed on 16<sup>th</sup> September 2015 that a contract of employment can only be terminated in accordance with the contract or the provisions of the law and that in the event that it is terminated contrary, the employee has the right to challenge the termination.

As regards the loan vis a vis the performance bonus, it was submitted that where the parties have reduced their agreement in writing or in the case where there is an oral agreement, the parties



are bound by the terms of the agreement and the Courts are called upon to enforce that which the parties expressly agreed upon.

It was submitted that the Chairman had the powers to bind and did in fact bind the Plaintiff in the agreement that the Plaintiff would pay for the loan of US\$ 275,000.00 which was advanced to the Defendant as a construction loan for a house by way of a performance bonus in appreciation of the work which the Defendant had done in securing the sale of shares in the Plaintiff.

According to the Defendant, he did not breach any agreement and is therefore not indebted to the Plaintiff, but that he is in fact owed US\$ 275,000.00 as performance bonus and other accrued benefits following the wrongful termination of his employment.

On the termination of the Contract of Employment, the Courts attention was drawn to Section 36 (1)(a) and (c) of **The Employment Act<sup>6</sup>** which recognises that a Contract of Employment may be terminated in any other lawful manner as agreed to by the parties under the contract. In the event that a contract is terminated contrary to the agreed provisions, then it is wrongful.

That according to Clause 3.2 of the contract of employment between the Plaintiff and the Defendant either party could terminate the employment at any time upon giving not less than three months prior written notice to the other. Further that Clause 3.4 provided for the Plaintiff to terminate the employment at any time by a shorter notice or without notice by paying to the employee such sum in lieu of notice as he would have received by way of salary if the employment was terminated after notice given under Clause 3.2.

It was the Defendant's further submission that although the Third Party had the powers to take possession of the Plaintiff and exercise full powers of management and control, that there is no power for the Third Party to act in violation of existing contracts validly entered into between the Plaintiff and its employees or Third Parties. Reliance to that effect was placed on the cases of Noel Nkhoma and Miles Sampa, earlier alluded to and submitted that by the Third Party terminating the contract without notice, the contract was terminated without due consideration to the agreed procedure for termination. That as such, the Defendant's employment was wrongfully terminated and is therefore entitled to

damages for wrongful dismissal, accrued leave days and other accrued benefits.

According to the Defendant, he is entitled to accrued benefits as claimed in the counter Claim following the holding in the case of **James Davis Mtine v Zesco**<sup>1</sup> where it was held that:

*“We have held in a plethora of authorities that accrued rights are vested rights incapable of being vitiated”.*

It was further submitted that in addition the Defendant is entitled to damages for breach of contract.

On the quantum of damages, it was submitted that although the Supreme Court considered the issue in the case of **Chilanga Cement Plc v Kasote Singongo**<sup>2</sup> and held that in awarding damages for loss of employment, they are always mindful of the common law remedy for wrongful termination of the employment being the notice period, they went on to state that in the deserving cases, depending on the circumstances of each particular case, they have awarded more than the common law damages as compensation.



That the Court went on to award Singongo 24 months salary as compensation for the abrupt loss of employment.

The Defendant further submitted that in addition to the general damages aforestated, the employee may claim damages for mental anguish as was the case in the said **Singongo case** and also in the case of ***Kafue District Council v James Chipulu***<sup>3</sup>.

According to the Defendant, the manner in which the contract was terminated, made the Defendant suffer pain, mental distress and anguish for which he had to seek medical treatment and counseling, to justify an award for damages as the Defendant's case was an exceptional one entitling him to damages for mental distress and anguish.

In its aforestated submissions, the Third Party after a recap of Pleadings and evidence and stating its role under the Act as regards the supervision and regulation of financial service providers, submitted that, the Third Party had a statutory power to terminate the Defendant's Contract of Employment and that no liability can arise from the exercise of the statutory power unless it can be

demonstrated that it was not exercised in good faith, which had not been pleaded nor proved in this case.

According to the Third Party, there was no breach of the Contract of Employment as it was legally terminated and that as such the Defendant is not entitled to any damages. That in any case the Defendant has failed to establish any claim for damages or any loss suffered under the Contract to warrant an award of damages.

On the claim for mental distress, it was the Third Party's submission that the Defendant's circumstances have not met the yardstick necessary for an award of damages for mental distress and anguish as he has failed to prove that he suffered the same and the claim must therefore be dismissed.

In determining this matter, I have carefully taken into consideration the parties respective evidence, pleadings, Bundle of Documents, skeleton arguments and the Third Party's written submissions.

So much for the voluminous evidence, the issues for determination before this Court are very clear and straight forward.

On the part of the Plaintiff, the only issue which arises is whether the Plaintiff is entitled to the claim of the sum of US\$ 163,596.76 as

at 2<sup>nd</sup> March 2011 arising from the loan which was advanced to the Defendant.

It is common cause between the Plaintiff and the Defendant from the evidence on record that the Defendant did apply for a loan from the Plaintiff in the sum of US\$ 275,000.00 out of which the sum of K173,750.00 was disbursed in tranches. It is further not in dispute that when the Third Party terminated the Defendant's contract of employment through its agents, it computed the separation dues at K59,258,717.00 which it credited to the Defendant's current account to which the outstanding loan balance had been credited, thereby leaving the outstanding amount due to the Plaintiff at US\$ 162,457.57 as at 2<sup>nd</sup> March 2014 as shown at page 19 of the Plaintiff's Bundle of Documents.

In my view, a perusal of the Defence does not seem to show that the Defendant has a defence to the claim. If anything the Defendant admits the claim apart from advancing the argument that the loan was secured and if the Plaintiff succeeds in his claim it would be undue enrichment, whilst in the same breath stating that he is in fact owed more in his Counter Claim and the Plaintiff's claims should be offset against what is due to him in the Counter Claim.



I have noted that even though there was an undertaking on the part of the Defendant to create a legal mortgage, no such legal mortgage was ever created hence the loan to date remains unsecured, and as such there is no security to enforce on the part of the Plaintiff. The issue of unjust enrichment does not therefore arise as the security was not perfected.

In view of the aforesaid, the Plaintiff is entitled to its claim and I accordingly award the Plaintiff the sum of US\$ 162,457.57 being the sum outstanding as at 2<sup>nd</sup> March 2011 together with interest from the said date at the agreed contractual rate up to the date of full settlement, subject to the issue of the offset which I have earlier alluded to and will touch on again in due course.

As regards, the issue of damages for breach of contract, though this was pleaded, no evidence was canvassed at the trial by the Plaintiff to prove the same.

However, even if that was done, the awarding of interest would have taken care of the same.

On the part of the Defendant as regards its Counter Claim, the following issues arise for determination:

1. Whether the Defendant was entitled to a performance bonus as is being alleged and claimed.
2. Whether the termination of the Defendant's contract of employment was unlawful and/or wrongful in the manner it was done.
3. That if the answer to (2) above be in the affirmative, whether the Defendant is entitled to damages for wrongful termination of employment, accrued benefits and damages for mental distress and anguish.

I shall address the aforestated issues seriatim.

Although the Defendant in his evidence spent enormous time on the issue of the performance bonus, it was purely a situation of his word against the Chairman's "unsaid" word. There is no evidence of the Chairman's promise either in writing or by way of corroboration to pay a performance bonus in the sum of US\$ 275,000.00 towards liquidation of the Defendant's loan.

On the same premise it would therefore be immaterial for me to delve into the argument as to whether the Defendant was entitled to the same or not.

If indeed that was the agreement, in view of the colossal amount involved, the Defendant should have endeavoured to have had the same reduced into writing or at the least should have called Barkat Ali as his witness to collaborate the story whom he claimed was present when this was being agreed.

Although the issue of the performance bonus according to the Defendant emanated from 2007/2008 he only seem to have penned something to that effect in 2010 in his letter dated 24<sup>th</sup> September 2010 addressed to Dr. Jacob Mwanza, then Chairman of the Plaintiff, which letter appears on pages 16 of the Defendant's Bundle of Documents. Even then, the Defendant in his own words had no conviction that the claim could succeed. This is what he stated at page 17, paragraph 2.4:

*"I realise that it will be complicated (without documentary proof) to claim a bonus of US\$ 275,000 (being the agreed contract price of the said property in Livingstone) however as a consequence of this experience, I now wish to establish a formal bonus agreement with the Board of FBZ going forward – see item 3 below (the same promise was*



*made to the Deputy MD Mr. Barkat Ali who will likely make a similar claim for removal debt against his name).*

Again it would seem nothing seemed to have come out of the aforestated letter, thereby making it more difficult for the Defendant to prove his claim.

In my view, there is no evidence to support the Defendant's claim for a performance bonus and as conceded by the Defendant himself there is no record of that issue and I accordingly dismiss the same.

As regards the issue of whether the termination of the Defendant's Contract of Employment was unlawful and/or wrongful, it is common cause that the same was done by the Third Party contrary to Clause 3.2 and 3.4 of the contract as no notice was given nor payment in lieu of notice effected. I need not belabour this issue as both PW1 and PW3 conceded that the Defendant's Contract of Employment was wrongfully terminated although they seemed to be at cross purpose with Mr. Sangwa, the Advocate representing the Plaintiff in the matter. However PW3, being in house Counsel was candid on the issue and his testimony that there was consensus between the Plaintiff and the Third Party that the manner in which

the Contracts of employment were terminated by the Third Party was wrong and some form of compensation ought to be paid to the affected employees remained uncontroverted. In fact in the words of TPW, this case was initially supposed to be settled outside Court in accordance with the agreement between the Plaintiff and the Third Party.

There is also documentary evidence that when the Plaintiff and the Third Party were dealing with the issue of the termination of the contracts of senior management that they came to the agreement that the termination of all the staff were wrongful and that included the Defendant. It is in fact arising from that, that the Plaintiff and the Third Party agreed and consented that all litigation arising from the termination of the said contracts were to be resolved amicably on the following terms and conditions:

1. That all accrued benefits were to be borne by the Plaintiff and
2. Any damages awarded including costs were to be borne by the  
Third Party.

Reference to that effect is made to the documents on pages 1-2, 11-15, 16 and 17 of the Plaintiff's Supplementary Bundle of Documents relating to Third Party proceedings.

In view of the aforestated, it is my finding that the termination of the Defendant's employment by the Third Party was wrongful and I accordingly find in favour of the Defendant.

Having affirmed that the termination was wrongful, that now takes me to the issue of damages as pleaded in the Counter Claim.

Having found that the termination was wrongful, the Defendant is therefore entitled to damages for breach of contract and wrongful termination of the Contract of Employment which I shall deal with as one item, for that is what they are.

The issue which then arises is as to the quantum of damages. In quantifying the damages I am mindful and guided by the principles which were pronounced by the Supreme Court in the **Singongo case** aforestated as to what amounts to adequate damages under the common law remedy for wrongful termination of contract of employment as being the notice period and as to when that can be



exceeded as was the case in **Chitomfwa v Ndola Lime Limited**<sup>4</sup> where a salary of two years was awarded in damages.

I am persuaded due to the circumstances in this case, to treat it as an exceptional case and depart from the notice period, not only on the basis of the termination having been abrupt but also on the fact that it was the parties resolve, in particular the Plaintiff and the Third Party to have all the matters relating to the affected employees including the Defendant resolved amicably although their respective lawyers in particular the Plaintiff's and the Third Party's did not seem to accord the agreement entered into the due attention and respect.

Furthermore, on consolidating and discontinuing the Supreme Court Appeals relating to Noel Nkhoma and Miles Sampa under Appeals No. 108 and 118 of 2012 through Consent Orders which Consent Orders also dealt with discharge from liability (refer page 11 of the Plaintiff's Supplementary Bundle of Documents relating to Third Party Proceedings) the Third Party, the Plaintiff and Noel Nkhoma and Miles Sampa under paragraph (c) consented that:

*“That the Bank of Zambia shall pay to Noel Nkhoma and Miles Sampa the damages awarded in the respective Judgments of the Industrial Relations Court in Complaint No. 73 of 2011 and Complaint No. 253 of 2010 and interest thereon”.*

Although both the Plaintiff and the Third Party did not address me on the issue of quantum of damages, I am of the view that in settling these issues, it was the intention of the parties that the former Senior Management employees were to be treated equally. It would therefore in my view be un equitable, unfair and despicable to treat the Defendant herein differently and award him damages far below what was awarded by the Industrial Relations Court to Noel Nkhoma and Miles Sampa and subsequently consented to by the Plaintiff and the Third Party.

There is evidence on record before the Court that the aforestated employees were awarded 24 months salary in damages. I will in the view that I have taken equally award the Defendant 24 months salary in damages. The damages in line with the agreement between the Plaintiff and the Third Party aforestated shall be borne

by the Third Party. The enhanced damages awarded herein are inclusive of the three months payment in lieu of notice. The amount de herein shall attract interest at the Commercial lending rate from the date of this Judgment till full satisfaction of the same.

On the issue of accrued benefits, I am satisfied that the issue of leave days was adequately dealt with and this was conceded to by the Defendant. Under Clause 11.1 of the Contract of Employment, the Defendant was entitled to two and half working days per month for each month of service. Clause 11.7 limited the accrued leave days to be paid for on termination of employment to 15 days. therefore the calculation as it appears on page 23 of the Defendant's Bundle of Documents is in conformity with the Contract of Employment.

As regards gratuity, that was not included in the computation for final separation dues. As conceded by PW1 it was not paid and it ought to be paid. According to Clause 6.0, in the event of earlier separation in terms of Clause 3.2, the contract provided that the Bank shall immediately thereupon pay the employee a gratuity being 25 per centum of the cumulative monthly inducement allowance earned during the actual period of service, net of tax.



The Defendant in light of Clause 6.0 of the contract is therefore entitled to gratuity as an accrued benefit and I accordingly order that the same be paid to the Defendant by the Plaintiff in accordance with the agreement aforesated. The amount due here, shall attract interest at the short term bank deposit rate from 21<sup>st</sup> July 2011 being the date of the Counter Claim to the date of this Judgment and thereafter at the Commercial Bank lending rate till full satisfaction of the same.

Let me now turn to the issue of motor vehicles and the household furniture. As regards the motor vehicles, the Addendum to the contract of employment which amended Clause 16 of the main contract provided as follows:

*“The Bank shall provide a personal to holder vehicle appropriate to the role of Managing Director and CEO plus a second service vehicle in accordance with the terms of the Bank’s staff car policy.*

*.....in the event of the employee leaving the Bank’s service both said vehicles may be sold by the Bank. The employee will be entitled to purchase the said*

*two vehicles at book value after four years from the date of purchase”.*

It is indisputable that the Defendant was not as of right entitled to the purchase of the vehicles as they had not cloaked four years from the date of the purchase.

However, the same Clause gave the Plaintiff discretion to sell the vehicles to the employee upon leaving employment. Although there is an allegation that vehicles were sold to Noel Nkhoma and Miles Sampa, no proof or evidence was brought before the Court and I therefore find myself in an awkward situation where I am not able to make a pronouncement on the same but leave it to the Plaintiff's discretion if indeed the named members of staff were accorded that discretion, that it may only be equitable to do the same to the Defendant.

As for the issue of furniture, the contract does not provide for purchase of the same and the claim is therefore accordingly dismissed.

The claim for contract passage is dismissed as the Defendant had not completed a minimum year service from the commencement

of the contract in accordance with Clause 7.4 of the Contract of Employment.

Equally baggage allowance as provided for under Clause 8.0 could only be claimed upon successful completion of the contract.

Furthermore, there was no documentation provided before the Court for reimbursement as provided for under the said Contract of Employment.

Lastly, there is the Defendant's claim for damages for mental distress and anguish. There is indeed proof before the Court that the Defendant experienced anguish and mental distress and is to date receiving ongoing counseling and specialist treatment for post traumatic stress syndrome.

Indeed as much as the Defendant is entitled to damages under this item, I am persuaded by the reasoning in the **Singongo case** that having granted more than the normal measure of common law damages, the same will encompass the anguish and distress suffered by the Defendant as a result of the loss of the job especially taking into consideration that he was able to find a job within six months.

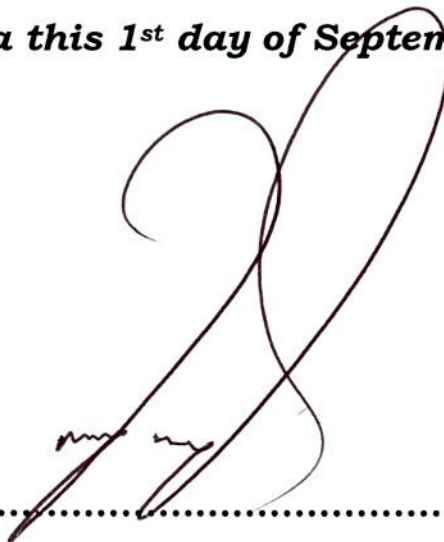


In concluding, let me state that if there is any issue which needs to be referred to the learned Deputy Registrar for assessment, the parties will be at liberty to apply, although I do not envisage any, as the parties should not find it difficult to agree on the amounts due.

As earlier alluded to, the amounts which will be found in favour of the Plaintiff will be offset against those found in favour of the Defendant.

The costs of these proceedings shall be to the Defendant and in accordance with the agreement between the Plaintiff and the Third Party, they shall be borne by the Third Party. Same are to be taxed in default of agreement.

***Delivered at Lusaka this 1<sup>st</sup> day of September 2016.***

A handwritten signature in dark ink, consisting of a large, stylized loop and a smaller flourish below it, positioned above a horizontal dotted line.

**Justin Chashi**  
**HIGH COURT JUDGE**