

**IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT NDOLA**

COMP/56/2014

BETWEEN:

FRANCIS KAMANGA

AND

ATTORNEY GENERAL



COMPLAINANT

RESPONDENT

CORAM: J. CHINYAMA, CHAIRMAN

K. KALALUKA, HON. MEMBER

N.Z MBEWE, HON. MEMBER

Appearances

*For the Complainant : Mr. P. Muyatwa,
Messrs Muyatwa Legal Practitioners*

*For the Respondent : Mr. Francis K. Mwale
Acting Senior State Advocate, Attorney
General's Chambers.*

JUDGMENT

Legislation referred to:

- 1. Industrial and Labour Relations Act, Chapter 269, Laws of Zambia.**
- 2. Employment Act, Chapter 268, Laws of Zambia.**

Cases referred to:

- 1. Morris Mbalakao V. Zambia National Provident Fund, SCZ Appeal No. 120 of 2000.**

2. **Attorney General V. Mpundu (1984) ZR 6.**
3. **Chilanga Cement Plc V. Kasote Singogo, SCZ Judgment No. 13 of 2009.**
4. **Zambia State Insurance Corporation Limited and Attorney General V. Alisand Singogo, SCZ Appeal No. 2 of 2007 (unreported).**
5. **Zambia Consolidated Copper Mines Limited V. Matale (1995-1997) ZR 144.**
6. **Redrilza Limited V. Abuid Nkazi and Others, SCZ Judgment No. 7 of 2011.**
7. **Zulu and Another V. Barclays Bank Zambia Limited (2003) ZR 127.**
8. **Abel Mulenga and Others V. Mabvuto Adanavuta Chikumbi and Others and Attorney General (2006) ZR 33.**
9. **Agholor V. Chesebrough Ponds (Zambia) Limited (1976) ZR 1.**
10. **Contract Haulage Limited V. Mumbuwa Kamayoyo (1982) ZR 13.**
11. **National Breweries Limited V. Philip Mwenya (2002) ZR 118.**
12. **Zambia National Provident Fund V. Yekweniya Mbiniwa Chirwa (1986) ZR 70.**
13. **Kangombe V. Attorney General (1972) ZR 177.**
14. **Kitwe City Council V. Nguni (2005) ZR 57.**
15. **Khalid Mohammed V. Attorney General (1982) ZR 49.**
16. **Wilson Masauso Zulu V. Avondale Housing Project (1982) ZR 172.**

The Complainant's three years contract of employment as Permanent Secretary in the Ministry of Transport, Works, Supply and Communications was terminated by way of a purported retirement in the public interest by the President of the Republic of

Zambia in a letter dated 1st October, 2012. The Complainant was of the view that the terms and conditions of service applicable to him under the contract of employment did not provide for that manner of separation.

On 8th April, 2014 the Complainant filed a Notice of Complaint under **Section 85 (1)** and **(9) (c)** as read with **Section 108** of the **Industrial and Labour Relations Act**¹ claiming relief for what he termed the unlawful wrongful termination of his employment and other resultant relief in the following manner *ipsissima verba*:

“(a) A declaration that termination of the Complainant’s employment was unlawful and done in bad faith thus wrongfully dismissed thereby rendering the dismissal unlawful illegal and null due to the fact that the Respondent wrongfully retired the Complainant in the Public Interest, notice was ever given and/or no right to be heard was availed when they ought to have relied on the Terms and Conditions of Service as hereinbefore outlined.

(b) An Order of the court for damages to compensate the Complainant for the unlawful termination of employment.

OR IN THE ALTERNATIVE

An Order compelling and directing the Respondent to pay moneys payable under the contract of employment and all sums outstanding for the remainder of the contract as follows:

- 1. ZMW642,857.14 being outstanding salary for the remainder of the contract period unlawfully cut short;*
- 2. ZMW128,572.80 the equivalent of 3 months' salary in lieu of notice (subject to what constitutes the term "salary");*
- 3. ZMW385,714.28 motor vehicle allowance for the remainder of the contract period payable through the payroll at the rate of 60 percent of the monthly basic salary;*
- 4. ZMW8,035.72 refund of the 10 percent of basic salary made towards the purchase of the personal to holder vehicle pursuant to clause (c) for the revised terms. Payment was made for 3 months running prior to alleged dismissal. Vehicle was however paid for in full upon separation;*
- 5. ZMW128,571.42 Recruitment and Retention Allowance at 20 percent of the basic salary for the remainder of the contract period;*
- 6. ZMW36,000.00 Responsibility Allowance for the 2 years remaining on the contract life span;*
- 7. ZMW48,000.00 payment towards 2 domestic servants at ZMW1,000.00 per servant for the remaining 24 months of the contract;*
- 8. ZMW6,000.00 for Water Allowance;*
- 9. ZMW12,000.00 for Electricity phone;*
- 10. ZMW6,000.00 for Landline Phone;*

11.ZMW12, 000.00 for mobile phone;

12. ZMW75,001.08 cumulative leave pay for the remainder
of the tenure;

13.ZMW168,000.00 Fuel Allowance;

14.ZMW8,000.00 Repatriation Allowance;

15.ZMW49,197.13 Wrongfully withheld as car loan;

16.ZMW1,713,949.57 Gratuity computed at the rate of 100
percent of the total remuneration tax free for the remainder
of the contract; and

17.The purchase of property known as Plot No. 35C Leopards
Lane, Kabulonga Lusaka.

(a)An Order of court directing the Respondent to pay damages for
the manner in which the employment was terminated,
embarrassment he endured and the physical and mental
distress he suffered.

(b)Any other relief the Court might deem fit.

(c) Interest.

(d)Costs."

An affidavit deposed to by the Complainant was filed in
support of the Notice of Complaint.

The Respondent filed an Answer to the Notice of Complaint on
16th July, 2014. In the answer the following response was made:

(a)that **clause (w)** in the letter of 18th November, 2011 containing
the Terms and Conditions of Employment entitled either party to

the contract to terminate the appointment at any time by giving three (3) months' notice or paying to the other three months' salary in lieu of notice;

- (b) that the Complainant is not entitled to the sums of ZMW 642,857.14 and ZMW385,714.28 being outstanding salaries for the remainder of the contract and motor vehicle allowance also for the remainder of the contract respectively;
- (c) that the Complainant is entitled to a refund of ZMW 8,035.72 being 10% of basic salary made towards the purchase of the personal to holder vehicle on proof that the vehicle was paid for in full;
- (d) that the Complainant is not entitled to the alternative claims numbered 5 to 13 as he ceased to be a government employee after 1st October, 2012;
- (e) that the Complainant is entitled to ZMW8,000.00 repatriation allowance upon proof that he was not paid;
- (f) that the Complainant may be entitled to ZMW 49,197.57 withheld as car loan only upon verification;
- (g) that the Complainant is not entitled to payment of gratuity for a period that he did not serve.

An affidavit verifying the Answer deposed to by one Milambo Michelo, an Assistant Director-Technical Services at the Public Service Management Division (PMSD) at Cabinet Office was also filed.

At the hearing of the matter, the Complainant gave oral evidence in his own behalf while Mr. Michelo also gave evidence on behalf of the Respondent.

At the close of the evidence in the whole of the case Counsel on either side undertook to file written submissions which they did and for which we are grateful.

We would like to state at this juncture that there are matters which are clearly of common occurrence between the parties or in respect of which there is no dispute. We will proceed to state them and find them established as facts. There after we shall endeavor to resolve the issues that are in dispute.

It is not in dispute that the Complainant was appointed Permanent Secretary in the Ministry of Transport, Works, Supply and Communications with effect from 15th November, 2011 by then President of Zambia, Mr. Michael Chilufya Sata. Following his appointment he was given terms and conditions of service in a letter dated 18th November, 2011 under the hand of the Secretary to the Cabinet. Amongst the terms and conditions of service were the following items: gratuity at the end of the contract at the rate of 100% of the total remuneration received during the contract tax free (clause (d)) and on a pro rata basis where the contract was not completed together with terminal leave benefits (clause (x)); suitable Government housing or a monthly housing allowance (clause (f)); water and electricity allowances (clause (j)); telephone allowance (clause (k)); two (2) domestic servants (clause (m)); recruitment and

retention allowance at 20% of basic pay (clause (p)); **termination of appointment by either party giving three (3) months' notice in writing or paying to the other three (3) months' salary in lieu of notice (clause (w))**; repatriation allowance of K8,000,000.00 (unrebased) on termination of contract (clause (y)); and other conditions not specified to apply as applicable to Division 1 officers in the Civil Service. The Complainant was given a house at no. 35C Leopards Lane, Kabulonga, Lusaka to occupy during his tenure as Permanent Secretary.

In a letter dated 3rd September, 2012 the Complainant was informed of the revision of conditions of service as they affected him as follows: introduction of a Motor Vehicle Allowance at the rate of 60 percent of monthly basic salary (clause (b)); entitlement to purchase the Personal-To-Holder Motor Vehicle payment of which was required to be made by way of monthly deductions of 10% of basic salary until full payment (**clause (c)**). The Complainant did pay for the motor vehicle in full upon separation. The following allowances were also consolidated into the basic salary: recruitment and retention; responsibility; domestic servants; water; electricity; telephone and cell phone. It was further stated that other Conditions of Service that were not covered in the letter were to continue to apply until the process of harmonization and rationalization was completed. The letter was signed by the Secretary to the Cabinet.

It is common cause that on 1st October, 2012 the Complainant's contract of employment was terminated by the President in the following terms:

"1st October, 2012

Mr. Francis K.K. Kamanga

Permanent Secretary,

Ministry of Transport, Works, Supply and Communications

Lusaka

Dear Mr. Kamanga

RE: RETIREMENT IN PUBLIC INTEREST - YOURSELF

This is to confirm that, with immediate effect, I have decided to retire you in the public interest as Permanent Secretary.

I wish to thank you most sincerely for the services you rendered to the government during your tenure of office.

I wish you well in your future endeavors.

Yours sincerely

(Signed)

M.C. Sata

PRESIDENT

REPUBLIC OF ZAMBIA"

The Complainant had only served ten (10) months and fifteen (15) days of the three (3) years contract.

In March 2014, the Complainant was paid the net sum of K168,040.22 being in respect of his gratuity for the period of employment from 15th November, 2011 to 1st October, 2012.

It is also not contended that up to the termination of his employment the Complainant had been living in the Government house at Plot No. 35C Leopards Lane, Kabulonga, Lusaka. On 1st November, 2012 the Complainant wrote to the Secretary to the Cabinet requesting to purchase the house. No response of a positive nature or at all has been forthcoming. He has continued living in the same house. The foregoing are the facts which are common or not in dispute between the parties. We find them established.

The Complainant's grievance is that the termination of his employment was without notice, that no (disciplinary) charge was preferred against him (to justify a retirement in the public interest) and that he should be sold the Government house in which he is living. Further, that he must be paid all the monies due to him.

In his affidavit and oral evidence, the Complainant testified to the effect that he only served 12 months of the 36 months' contract (it was actually 10 months 15 days as we have already found above); that the mode of terminating his contract was not provided in the contract and is, therefore, unlawful. In apparent conformity with the letter communicating the terms and Conditions of Service

which extended the terms and Conditions of Service applicable to Division 1 officers in the Civil Service, the Complainant referred us to an extract from the Terms and Conditions of Service applicable to Division I officers in the Public Service, which had Section 38 (f) (exhibit "FK19" in the Affidavit in support of complaint) which provided for retirement in the public interest as follows:

"38...

(f) A Service Commission may require an Established Officer to retire in the public interest on the following grounds:

- (i) failure to perform his or her duties;*
- (ii) incompetent performance of his or her duties;*
and
- (iii) an offence under the disciplinary code."*

The Complainant pointed out that retirement in the public interest presupposes misconduct of some sort requiring one to be tried; that he never went through any disciplinary process. He complained that prospective employers do not want to have anything to do with him once they hear that he was retired in the public interest. He said he is a civil engineer by profession and cannot now get employment especially that most jobs (works) that he can do are with Government.

He stated that after receiving the letter from the President he expected communication from PSMD with whom he had signed the contract of employment.

On the claims for payment of the various sums of money covering the remainder of the contract period which he was not able to work because of the termination, the Complainant stated that the terminal dues paid to him were not enough. As we understood him he expected to be paid for the remainder of the contract period.

The Complainant did not adduce evidence at all on the claims for the refund of the sums of: ZMW8,035.72 being 10% of the salary allegedly paid towards the purchase of the personal-to-holder motor vehicle (before the lump sum payment of the price assessed by Government); ZMW8,000.00 being the repatriation allowance under the contract; and ZMW49,187.13 being a withheld car loan. Although these claims are part of the alternative pleas for relief in the Notice of Complaint, we have no difficulty in holding that they are stand alone claims and require proof, of course on a balance of probabilities.

Regarding the request to sell him the house, the Complainant's evidence was that he had not benefitted from the sale of government houses despite having worked for government for over 21 years. He had worked in the Zambia Army which he joined as an officer cadet and rose to the rank of Major. He also worked at Medical Stores and as hospital maintenance engineer for the University Teaching Hospital and Chainama Hills Hospital before he became Permanent Secretary. He pointed out that Government houses had been sold to Senior Government officials. He felt discriminated because people in his position and others have been awarded opportunities to buy houses similar to the one he resides in.

In cross-examination the Complainant replied that he moved into the house he wants to be sold in either January or February 2012 in his capacity as Permanent Secretary. He does not regard the letter from the President which retired him in the public interest as finally terminating his employment. He stated that he has been told verbally that he cannot be employed because he was retired in the public interest.

He responded, when shown a document which he identified as the Disciplinary Code and Procedures for Handling Offences in the Public Service dated June 2003, that Regulation 34, according to the document, dealt with retirement in the public interest. He stated that the procedure required that the employee is given a hearing which did not happen in this case. He, however, also read regulation 3 from the document which stated that the code does not apply to Permanent Secretaries among others.

The Complainant confirmed that the appointing authority for Permanent Secretaries was the President and conceded that one who has power to appoint also has power to disappoint.

The Complainant clarified that when the President makes an appointment, one does not become a civil servant immediately. The appointment is formalized by Cabinet Office (PSMD as we understand) which prepares a contract. Until the contract is signed one cannot be put on the payroll or be considered as a civil servant. He stated that when the employment is terminated PSMD must advise the individual of the termination of his contract. The officer

remains on the payroll until leave pay and repatriation allowance are paid.

The Complainant replied that immediately he received the letter from the President he stopped reporting for work.

In re-examination the Complainant explained that his retirement (in public interest) was not done in good faith, that it was the procedure in Government that an officer continues on the payroll until leave pay and repatriation are effected.

The Affidavit and oral evidence for the Respondent as told by Mr. Michelo (RW1) was that the terms and conditions of service of the Complainant were drafted in the Department of Technical Services at Cabinet Office (PSMD) where he works. He stated that the Complainant's contract of employment was terminated with immediate effect, that is to say without notice, therefore, that the Complainant became entitled to three months' pay in lieu of notice together with gratuity on pro rata basis, repatriation allowance and terminal leave pay.

The witness stated that in his experience Permanent Secretaries are appointed by the President on contract. They serve

the contract unless terminated by themselves or the President. He was not aware of any practice that required a hearing before the termination of employment. He had not seen any (disciplinary) charges against the Complainant.

RW1 testified that the Complainant was paid his dues after the termination of the contract.

On the issue of buying the house, the witness stated that he was not competent to comment on the eligibility of the Complainant to purchase the house but that the contract had no provision allowing the Complainant to purchase the house.

The witness did not see any disadvantage in the Complainant being retired in the public interest especially that the contract provided that either party could terminate it.

When cross-examined, RW1 replied that the letter from the President complied with **clause (w)** in the terms and conditions of employment because the bottom line was that the employment was terminated. He conceded though that retirement in the public interest meant that a person had issues to do with incompetence, failure to perform or (other) disciplinary issues. He stated that

disciplinary procedures should have been followed even though, according to him, Permanent Secretaries and other constitutional office holders are dealt with by authorities above his (witness's) level.

On the effect of the President's letter retiring the Complainant in the public interest, the witness replied that it was sufficient (for Cabinet Office to act upon). He stated that a period of one year six months elapsed from the time when the Complainant was removed from the payroll to the time when he was paid his package and that the Complainant was entitled to payment of his emoluments (only) up to the date of termination.

In re-examination, RW1 explained that there is no restriction as to when **clause (w)** can be applied.

This summed up the parties' and the whole of the salient evidence in this matter.

It was submitted on behalf of the Complainant that he was wrongly dismissed from his employment because **clause (w)** in the terms and conditions of employment was not adhered to. It was argued that the appointment under the clause could only be

terminated by notice or payment in lieu of notice; that it did not state that the appointment could be terminated in the public interest. It was submitted, therefore, that the mode of termination was ultra vires **clause (w)**.

The further submission was made to the effect that the Complainant having been retired in the public interest which denotes disciplinary misconduct, he should have been given a hearing as provided in **Section 26A** of the **Employment Act**². This was buttressed by the argument that employer/employee relationships connote the existence of a right to observe rules of natural justice and a right not to be thrown out of a job except on some rational ground as held in **Morris Mbalakao V. Zambia National Provident Fund**¹.

It was, accordingly, submitted to the effect that the circumstances of the dismissal and the delay of 18 months before the Complainant was paid his dues amounted to an injustice and he suffered embarrassment, physical and mental distress. This entitles the Complainant to damages/compensation for loss of employment, embarrassment, physical and mental distress. The

cases of **Attorney General V. Mpundu²** and **Chilanga Cement Plc V. Kasote Singogo³** were cited to support the arguments.

The submission concluded with a passage from the case of **Zambia State Insurance Corporation Limited and Attorney General V. Alisand Singogo⁴** which we have taken the liberty to paraphrase, to the effect that this court will interpret a contract favourably to protect the employee's reasonable expectation to remain in employment in the face of an employer's pernicious liberty to terminate the employment at will.

For the Respondent's part the submission was that the President rightly terminated the Complainant's employment with immediate effect and as such the Complainant was entitled to 3 months' salary in lieu of notice. The case of **Zambia Consolidated Copper Mines V. Matale⁵** was cited to support the submission. It was submitted that the Complainant's employment was terminated; that he was not dismissed as distinguished in the case of **Redrilza Limited V. Abuid Nkazi and Others⁶**; that the Respondent exercised the right to terminate the contract of employment immediately and to pay the complainant three months' salary in lieu of notice, an option available to the Respondent following the

decision in the case of **Zulu and Another V. Barclays Bank Zambia Limited**⁷.

With regard to the alternative prayer it was submitted that should we find that the Complainant was wrongly dismissed, he would only be entitled to damages but the contract should not be treated as though it was performed to its end. Further that it should be noted that the revised conditions of service consolidated all allowances into the basic salary.

On the claim for damages for embarrassment, physical and mental suffering, it was submitted that the Complainant did not demonstrate the existence of special circumstances as required in the case of **Chilanga Cement V. Kasote Singogo**³ ante. Further, that the Complainant has not shown evidence that his applications for jobs have been turned down because he was retired in the public interest.

On the claim that he should be allowed to purchase the Government house which he is currently occupying, it was submitted that this court has no jurisdiction to entertain the claim

and cited the case of **Abel Mulenga and Others V. Mabvuto Adanavuta Chikumbi and Others and Attorney General**⁸.

It was submitted in conclusion that the Complainant failed to establish his claims and that we dismiss the complaint with costs.

We would like to observe at this stage that the claim is unnecessarily long winded in the manner it is framed. From the much that has been stated what we make out is that the Complainant seeks an order that the termination of his employment in the public interest was wrongful and a breach of contract; that he is as such entitled to damages assessed on the basis of the emoluments he would have earned had his three years contract run its full course including the payment of three months' salaries in lieu of notice; and that he is entitled to the following other relief: a refund of the sum of ZMW8,035.72 being 10% of the basic salary paid for three months towards the purchase of the personal-to-holder motor vehicle pursuant to **clause (c)** of the revised terms which motor vehicle was, however, paid for in full upon separation; payment of the sum of ZMW8,000.00 repatriation allowance pursuant to **clause (y)** of the initial terms and conditions of

employment; disbursement of ZMW49,197.13 wrongfully withheld as a car loan; and an order for interest and costs. We shall deal with the matter as though it was couched in the foregoing terms.

We have considered the parties' evidence and the submissions. We also take into account the matters that we already found to be established as facts in this case. Arising from all these, the issues that must be determined are whether the Complainant's contract of employment was terminated at all by the President's letter which purported to retire him in the public interest; if so whether the Complainant is entitled to the reliefs sought, including the claims for refund of the ZMW8,032.72 allegedly paid towards the purchase of the personal-to-holder motor vehicle, ZMW8,000.00 repatriation allowance and the ZMW49,197.13 withheld loan. Also whether the Complainant is entitled to be sold the Government house allocated to him by virtue of his employment as Permanent Secretary.

Regarding the President's letter purporting to retire the Complainant in the public interest, it is clear from the evidence that the terms and conditions of service communicated to the Complainant at the commencement of and during his employment

did not contain any clause stating that his employment could be terminated in the public interest by the President. The nearest reference to such a term is the authority reposed in a service commission (in this case the Public Service Commission no doubt) *“to require an Established Officer to retire in the public interest”* for *“failure to perform his or her duties”*, *“incompetent performance of his or her duties”*, and for committing *“an offence under the disciplinary code”*. This was as per section 38 of the Terms and Conditions of Service applicable to Division I officers shown to us by the Complainant. There is, of course, no dispute that this is similar to the provision contained in the document shown to the Complainant during his cross-examination. In the manner in which the provision is couched, the action must be taken by a Service Commission and not the President and certainly, as conceded by RW1, the employee must have been subjected to a disciplinary hearing because retirement in the public interest connotes that the employee is guilty of some disciplinary mischief or misconduct as stated in the section. In these circumstances we are left with no doubt that when the President purported to retire the Complainant in the public

interest he acted outside the contractual stipulations contained in the terms and conditions of service given to the Complainant.

It is common cause, however, that the Complainant stopped reporting for work when he received the letter. We are surprised with the argument, therefore, that the Complainant did not regard the letter as effectively terminating his employment, that his employment could only end after PSMD wrote to him. The view that we take is that the Complainant stopped reporting for work because he regarded the letter as bringing his employment to an end. We find accordingly that the Complainant's employment came to an end by virtue of the letter from the President. The only issue that was left to be determined was whether there was a breach of the conditions and terms of employment in the manner that the employment was terminated.

We have already found that the President's action was contrary to the terms and conditions of the Complainant's employment.

The only mode of separation provided in the contract of employment was under **clause (w)** of the letter of appointment which allowed either party to terminate the appointment by giving

to the other three months' notice in writing or paying to the other three months' salary in lieu of notice. The Respondent labored to establish that effectively the termination of the Complainant's employment in the public interest ought to be viewed as a termination in a manner consistent with **clause (w)**. We do not agree. The clause is clear on the action to be taken by either party. It is either to give three months' notice or to pay to the other three months salaries in lieu of notice. The President and the State which ultimately was the Complainant's employer did neither of these. In other words in bringing the contract of employment to an end, the contractual stipulation for doing so was not complied with. This amounted to a breach of contract.

The cases of **Agholor v. Chesebrough Ponds (Zambia) Limited**⁹ and **Contract Haulage Limited v. Mumbuwa Kamayoyo**¹⁰ establish that a master can terminate a contract of employment at any time, even with immediate effect, for any reason or for none and that if he terminates outside the provisions of the contract, then he is in breach of contract and is liable in damages thereof. The cases also establish that where a master dismisses a

servant he terminates the contract summarily without notice on the grounds of misconduct, negligence or incompetence, that if such grounds are justified, the servant forfeits the right to notice as well as a number of other benefits.

Cases such as **National Breweries Limited v. Philip Mwenya**¹¹ and **Zambia National Provident Fund v. Yekeweniya Mbiniwa Chirwa**¹² also establish that where it is not in dispute that an employee has committed an offence for which the appropriate offence is dismissal and he is so dismissed, no injustice arises from a failure to comply with the procedure laid down in the contract and the employee will have no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity.

It is also the law that where the procedural requirements before disciplinary action are not statutory but merely form part of the conditions of service in the contract between the parties, a failure to follow such procedure would be a breach of contract and could possibly give rise to a claim for damages for wrongful dismissal but would not make such dismissal null and void. It was held in the case of **Zambia National Provident Fund v. Chirwa**¹²

that although the appellant was a parastatal organization its conditions of service were not statutory and in the circumstances no declaration could be made that the dismissal was null and void for failure to comply with the appropriate procedure.

We have already found in this case that the President acted outside the terms and conditions of employment applicable to the Complainant. We now wish to state that on the basis of the authorities there was no evidence that the conditions of service were statutory. In the event we find that the failure to comply with **clause (w)** relating to the mode of separation could only amount to a breach of contract which entitles the Complainant to damages for wrongful dismissal.

In coming to the conclusion above we have also taken into account Article 44(2)(g) and (5) of the 1996 **Constitution of Zambia** which applied at the time in issue in this case and which, together, gave the President power to appoint and remove persons he appointed from office. Our position, though, is that these provisions prescribed the general power that the President could exercise. Suffice that where terms and conditions of employment are

prescribed for a person appointed by the President, as in this case, they bound the State including the President, barring the occurrence of some frustrating *force majeure*. In the case of **Kangombe V. Attorney General**¹³, the High Court refused to sanction the direct exercise by the President, of a power reposed in the Teaching Service Commission on behalf of the President. Silungwe J, as he then was, held among other things, that:

“(i) The power to appoint, confirm or exercise disciplinary control over persons in the Teaching Service or to remove such persons from office is vested in the President. But the President’s power in this connection shall be exercised by the Teaching Service Commission in the name of and on behalf of the President. The President can himself exercise his power only if he requires expressly or by implication the Teaching Service Commission to refer to him any matter which is actually under consideration by the Commission”.

We are aware that the holding came out of the interpretation of Constitutional provisions at the time that enabled the President exercise of disciplinary power in the alternative. We would, however, draw a corollary to the holding in the **Kan'gombe**¹³ case on the basis that section 38 of the Terms and Conditions of Service for

Division I Officers produced by the Complainant refers to the exercise of disciplinary power by a Service Commission. It is trite that the Commission is appointed by and acts on behalf of the President. Unlike in the **Kangombe**¹³ case, however, there is no provision in the conditions of service brought to our attention which empowers the President to exercise directly the power that would have been exercised by the Service Commission.

If the President were to decide to invoke the power to remove the Complainant as provided under Article 44(5) of the Constitution, he could only do so in the manner provided in the contract, that is to say, to terminate by giving three months' notice or directing that the Complainant be paid three months salaries in lieu of notice. He did not do that but proceeded to dismiss the Complainant in the public interest contrary to the stipulations of the contract. The dismissal was wrongful and we reiterate that the Complainant is entitled to damages. We should be quick to acknowledge that there was nothing to stop the President or the State from summarily terminating the contract of employment on grounds, say of proven misconduct because the misconduct would

have amounted to a repudiation of the contract. What we do not approve of is the decision to dismiss outside the terms of the contract.

The next issue to consider is the Complainant's claim for damages for mental stress and embarrassment. In this regard, we find the position to be akin to the doctrine of *res ipsa loquitur* (the facts speak for themselves) which presumes the existence of negligence once certain basic facts are established. The Complainant was dismissed for disciplinary cause as we have found. He was not charged with any offence prior to his dismissal and he was never given any hearing. We take note that the action was by no other than the Head of State and that the Complainant would have to carry the stigma of having been dismissed for undisclosed disciplinary reasons at that very high level. It is not difficult to conclude in these circumstances the negative impact on the Complainant's future prospects. To say that a person treated in this manner would not be stressed or embarrassed would be an understatement. The Supreme Court has held in the case of **Attorney General V. Mpundu**² that damages for mental distress

and inconvenience may be recoverable in an action for founded on a breach of contract. In that case the Respondent was unlawfully suspended from work. The breach of contract did not amount to termination of contract. In the case before us the Complainant lost his employment altogether. We bear in mind, of course, that in spite of being dismissed the Complainant was paid his gratuity on pro rata basis in compliance with **clause (x)** in the letter communicating the terms and conditions of employment. It is also common cause that the terminal benefits were not paid until some one year and five months from the date of dismissal.

We have applied our minds to the claims. The starting point in assessing awards for damages for breach of contract is the notice period, otherwise known as the common law damages as held in **Chilanga Cement Plc v. Kasote Singogo**³. We cannot equate the damages to the remaining period of the contract simply because the Complainant cannot be paid for a period that he did not work in accordance with the decision in the case of **Kitwe City Council V. Nguni**¹⁴. In deserving cases and depending on the circumstances of each particular case more has been awarded as compensation for

loss of employment. Bearing in mind the peculiar circumstances of this case and the conduct of the Respondent in dismissing the Complainant and bearing in mind particularly the more than one year delay from the date of dismissal before paying the terminal benefits we are of the view that a global award incorporating both damages for loss of employment and also for the embarrassment and mental distress would suffice. We, therefore, award the sum of twelve months' salary incorporating all the emoluments that made up the monthly basic salary as shown in the conditions of service above as global damages encompassing loss of employment and the injury to the sensibilities (i.e. embarrassment and mental distress).

Regarding the claims for the refund of the sum of ZMW8,035.72 and the payment of the sums of ZMW8,000.00 and ZMW49,197.13, we reiterate that no direct evidence of the viability of the claims was adduced.

We recall, however, that it was a term of the contract that deductions of 10% of the basic salary was required to commence as soon as the Complainant had indicated willingness to purchase the

vehicle under the terms of the contract. On 4th October, 2012 after his dismissal in the public interest, the Complainant wrote to the Secretary to the Cabinet affirming his desire to purchase the vehicle. He also requested to be availed the balance on the vehicle so that payment of it could be made. The letter we have referred to is not signed. However, the Respondent did not deny it. The Complainant produced it to show that the communication was made. Going by its contents, we are satisfied that deductions of 10% from the Complainant's basic salary had been made prior to his dismissal, hence the claim. We find, therefore that the Complainant is entitled to the refund and we award him the relief.

It was also a term of the contract that a repatriation allowance of ZMW8,000.00 was to be paid upon termination of employment. The gratuity computation produced by the Complainant does not show that he was paid. We have also in mind that the Complainant is still in the Government house confirming the likelihood that he was not paid. We find that the Complainant is entitled to payment of repatriation allowance and we award him accordingly.

As regards the alleged withheld loan, the gratuity computation shows that a similar amount was deducted in respect of a car loan. There is, however, no explanation whatsoever what would justify its repayment to the Complainant and his silence did not assist the matter. It is trite law that it is always for the party alleging to prove the allegation, never mind the defence or the lack of it as determined in the Supreme Court cases of **Khalid Mohammed V. Attorney General**¹⁵ and **Wilson Masauso Zulu V. Avondale Housing Project**¹⁶. In this case there is clearly no evidence supporting the claim. As such we find no merit in it and we dismiss it.

We award interest on the damages and the amounts of ZMW8,035.72 and ZMW8,000.00 awarded to the Complainant at the average of the commercial bank short – term deposit rate per annum prevailing from the date of the dismissal to the date of Judgment and thereafter at 6% per annum until full settlement.

The last, though not least issue is the claim that the Complainant is entitled to be sold the Government house he is living in. Without belabouring the matter the law is as contended by counsel for the respondent. This court has no jurisdiction to

entertain claims involving land as determined in the Supreme Court case of **Abel Mulenga and Others V Mabvuto Adanavuta Chikumbi and Others**⁸, notwithstanding that the claim may be connected to an employee's conditions of service. The claim is not sustainable and we dismiss it. The Complainant may have to seek relief for this claim elsewhere.

Having succeeded in the claim as awarded the Complainant will have his costs in this action.

IRA to the Court of Appeal within 30 days from date of this Judgment.

Delivered at Lusaka this.....^{27th} day^{December} of.....2016.


J. CHINYAMA
CHAIRMAN




K. KALALUKA
HON. MEMBER


N. Z. MBEWE
HON. MEMBER