

**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

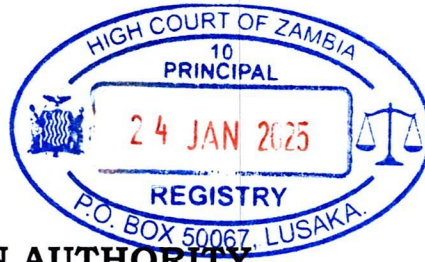
**2019/HP/0879**

**BETWEEN:**

**JEAN K. CHILIKWELA**

**AND**

**RADIATION PROTECTION AUTHORITY**



**PLAINTIFF**

**DEFENDANT**

**BEFORE THE HONOURABLE MR. JUSTICE S. V. SILOKA, ON THIS  
24<sup>TH</sup> DAY OF JANUARY, 2025.**

**For the Plaintiff:** *Mr. C. Siando of Messrs. Malambo & Co.*

**For the Defendant:** *Ms. A. Chisha of Messrs. D. Bating & Associates.*

**J U D G M E N T**

**CASES REFERRED TO:**

1. *Roland Leon Norton Vs Nicholas Lastrom (2010) ZR 358 Vol 1;*
2. *Rodgers Chali Ponde & Others Vs Zambia State Insurance Corporation Limited (2004) ZR 151;*
3. *Patrick Chiluba Vs Attorney General (Appeal No 14/2016);*
4. *Richard Musenge Vs Indo Zambia Bank (Appeal No. 214/2016);*
5. *Rookes vs Bernard and Others (1964) AC 1129;*
6. *Attorney General Vs D.G Mphundu (1984) ZR 6;*
7. *Mohamed Vs The Attorney General (1982) ZR 49;*
8. *McQueen Zenzo Zaza Vs ZESCO Limited (2018/CCZ/006);*
9. *Kasote Singogo Vs Chilanga Cement Plc (Appeal No. 33 of 2021);*
10. *Rakir Hussein Motala Vs Jabir Ali Bux (Appeal No. 158 of 2018);*
11. *Chazya Silwamba Vs Lamba Simpito (2010) 1 ZR 475;*

12. *Gerrick Refrigeration and Air Condition Vs Forest Direct Zambia Limited (Selected Judgment No. 34 of 2016);*
13. *Wilson Masauso Zulu Vs Avondale Housing Project (1982) ZR 172*
14. *Galaunia Farms Limited Vs National Milling Company and National Milling Corporation Limited (2004) ZR 1;*
15. *Holmes Vs Build well Construction Limited (1973) ZR 97;*
16. *Afrope Zambia Limited Vs Chate and Other (Appeal No. 160/2013 [2016 ZMSC 41]);*
17. *Zambia National Building Society Vs Ernest Mukwamataba Nayunda SCZ Judgement No 11 of (1993);*
18. *Chilanga Cement Vs Kasote Singogo (SCZ Judgement No 12/2009); and*
19. *Standard Chartered Bank Zambia Plc Vs Singogo (Appeal No 212 of 2016).*

**LEGISLATION REFERRED TO:**

1. *The Employment Code Act No 3 of 2019;*
2. *The Constitution Chapter 1 of the Laws of Zambia; and*
3. *The Employment Act Cap. 268 of the Laws of Zambia.*

**OTHER WORKS REFERRED TO:**

1. *Chanda Chungu and Ernest Beele: Labour Law in Zambia: An Introduction, second Edition 2020.*

**1.0 INTRODUCTION**

- 1.1 This is a Matter commenced by a Writ of Summons dated 11<sup>th</sup> May 2022, accompanied by a statement of claim seeking the following reliefs:

- i. Damages of 36 months' salary for unlawful withholding of terminal benefits;*
- ii. Punitive and exemplary damages for wrongful and unlawful payment of gratuity;*
- iii. An order directing the re-computation of the Plaintiff's terminal benefits;*
- iv. An order for payment of salaries until the payment of full payment of gratuity;*
- v. Damages for mental anguish and anxiety;*
- vi. Payment of leave allowance;*
- vii. Payment of repatriation allowance;*
- viii. Payment of balance outstanding on gratuity;*
- ix. An order directing the Defendant to pay all the contractual benefits which were not paid during the contractual period;*
- x. An order that the Plaintiff be paid cash equivalent of the current value of the vehicle she was to have as personal to holder on the open market as compensation for loss of use;*

- x. An order of compensation for the use of the personal motor vehicle as a result of the default by the Defendant in allocating the Defendant personal to holder vehicle;*
- xii. Damages for the loss of opportunity to purchase the vehicle;*
- xiii. Any other reliefs the court may consider fit;*
- xiv. Interest from the time the amount should have been paid; and*
- xv. Costs.*

## **2.0 THE PLEADINGS**

- 2.1 In the Statement of Claim, the Plaintiff averred that she was engaged by the Defendant as Human resource and Administration Manager. The said relationship was governed by a Contract of employment for a term of three years from the 14<sup>th</sup> of July, 2014 to the 13<sup>th</sup> of July, 2017.
- 2.2 The Plaintiff averred that against the Contract the Defendant sent her on leave on the 4<sup>th</sup> of June, 2017.
- 2.3 The Plaintiff averred that aside from the salary stipulated in the Contract of employment, she was entitled to Housing allowance which in addition to the salary constitutes twenty percent (20%) of basic pay as per clause 10.2 of the Contract and a personal to

holder Vehicle of suitable type with the option to purchase it at termination or expiry of the Contract.

- 2.4 The Plaintiff also averred that in addition to her salary, she was entitled to motor vehicle allowance of 30% of the basic salary. Further, on the strength of clause 10.5 of the Contract, the Plaintiff was entitled to 35% of the drawn salaries calculated at the rate of the last drawn salary, upon termination of the contract.
- 2.5 Further, the Plaintiff averred that the basic pay at expiry of the Contract was K34, 357.67, however, it was wrongly reduced to K26,428.99.
- 2.6 It was further the Plaintiff averment that the Defendant relied on the Conditions of service as obtained in the harmonized conditions for all boards under the Ministry of Health, Cabinet Circular and radiation Protection Authority Circulars. Further, by the said Conditions of service the Plaintiff was entitled to fuel allowance which when read with Cabinet Office Circular No. 7 of 2012 is 30% of the basic salary.
- 2.7 The Plaintiff further averred that when her Contract was not renewed, the Defendant did wrongly pay an instalment in the sum of K333,005.27 being the Plaintiffs gratuity. This was calculated without adding the allowances and the claim for the Vehicle.

2.8 The Plaintiff also averred that by letter dated 29<sup>th</sup> May, 2017, she wrote the Defendant for clarification on the Vehicle and in a letter dated 16<sup>th</sup> June, 2017, the Defendant responded stating that the Authority was finalizing the procurement of the Vehicles for Managers.

2.9 Further, to the above paragraphs the Plaintiff averred that two vehicles were procured from Southern Cross Motors, one intended for the Plaintiff with Registration Numbers BAF 5325 and BAF 5338. However, the Plaintiff was allocated an old pool vehicle Registration No. GRZ546.

2.10 Furthermore, the Plaintiff averred that for the period of three years she used her personal vehicle thereby suffered loss due to the Defendant's failure to avail the vehicle she was entitled to.

2.11 It was the Plaintiffs further averment that, the vehicle which was bought for her as personal to Holder was purchased at K325,000.00 and the same ought to be sold using the straight-line method of depreciation at 25% for 3 years which is 75% of K325,000.00 which brings the total to K243,750.00, leaving a net book value of K81,250.00. Therefore, the vehicle should be sold to the Plaintiff at K81,250.00 which when compared with the underpayment the Defendant still owes the Plaintiff.

2.12 Further, the Plaintiff averred that due to the delay in selling the vehicle to her, she has sustained loss of use of the vehicle. Further, because of the irregularity in paying terminal benefits, the Plaintiff was to be maintained on the pay roll until final payment was made.

2.13 Finally, the Plaintiff averred that the irregularities in the payment of the terminal benefits has caused her mental anguish and distress.

2.14 The Defendant entered appearance and filed its defence on the 3<sup>rd</sup> of March, 2020. The Defendant denied the contents of paragraph 6 of the Statement of claim to the extent that the parties ever relied on the Radiation Protection Authority Circulars.

2.15 With regard to paragraph 7 of the Statement of Claim, the Defendant averred that motor vehicle allowance was provided to the Plaintiff even in the absence of a personal to holder vehicle.

2.16 The Defendant admitted paragraph 8 and 11 of the Statement of Claim but denied paragraphs 9 and 10 and averred that the Plaintiff will at trial be put to strict proof.

2.17 With regard to the gratuity paid, the Defendant averred that he denies that the gratuity in the sum of K333,005.27 was an

instalment as the amount was paid on the basis that it was a full and final payment of the gratuity owed to the Plaintiff.

2.18 With regards to paragraph 13 of the Statement of Claim, the Defendant averred that the contents of the said paragraph are denied, and averred that the Plaintiff's gratuity was computed as provided for in the Contract.

2.19 The Defendant averred that with regard the two vehicles bought from Southern Cross Motors, none was allocated to the Plaintiff. Further that at the expiry of the Plaintiff's Contract, the Plaintiff did not have a personal to holder vehicle therefore the Defendant could not offer for sale a vehicle which was non-existent.

2.20 The Defendant averred that the offer to purchase pool vehicle Registration No. GRZ 546 was made in accordance with the Contract of employment.

2.21 With regard to the personal Vehicle the Plaintiff claimed to have used during the subsistence of her Contract, the Defendant averred that the Plaintiff continued to draw a motor vehicle allowance to her benefit during the course of her Contract.

2.22 With regard to paragraph 24 of the Statement of Claim, the Defendant denied that the said vehicle ought to be sold using the straight-line depreciation, as the said vehicle referred to was new

and had never been used by the Plaintiff or anyone as such the vehicle could not have depreciated retrospectively.

2.23 Further, with regard to the delay in selling the vehicle, the Defendant averred that there has been no delay in the selling of the vehicle allocated to the Plaintiff. The Defendant further averred that the Plaintiff refused to purchase the motor vehicle that was offered to her.

2.24 Further, the Defendant averred that it denies any irregularities in payments of terminal benefits, as the Defendant did accurately pay the Plaintiff's terminal benefits as provided for in the said Contract of employment.

2.25 Finally, the Defendant averred that they deny that the Plaintiff is entitled to any of the claims as pleaded in paragraphs 27 and 28 of the Statement of Claim.

2.26 The Plaintiff's reply was filed into Court on the 16<sup>th</sup> of March, 2020. In her reply the Plaintiff averred that the vehicle allowance was an independent entitlement and did not relate to the service of the vehicle contrary to the Defendant's suggestion.

2.27 The Plaintiff further averred that some of her entitlements were not met as a result of the Defendant's lack of funds and the that the first payment of the gratuity was an instalment.

2.28 The Plaintiff also averred that a decision was made by the Defendant to allow the Plaintiff purchase the personal to holder vehicle which decision was communicated to the Plaintiff by the Defendant.

2.29 The Plaintiff further averred that the purported allocation of the Vehicle GRZ 546 was done when the Plaintiff had already been sent on forced leave on the 4<sup>th</sup> of June, 2017 and the letter was written four days before the expiration of the Contract so as to prejudice the Plaintiff from the vehicle which was allocated to her.

2.30 Further, the Plaintiff averred that she was entitled to motor vehicle and motor vehicle allowance which are independent entitlements.

2.31 With regards the issue of selling the vehicle to the Plaintiff after applying the straight-line depreciation, the Plaintiff averred in reply that she should be paid the equivalent market value of the vehicle, as the lack of the vehicle was the Defendant's fault.

2.32 Finally in reply to paragraph 19 of the Defence, the Plaintiff averred that during the three-year duration of the Contract, no benefit of the motor vehicle was availed to the Plaintiff contrary to the Contract serve for the letter dated 10<sup>th</sup> July, 2017 which was 4 days before the end of the Contract. Further that the said vehicle

was involved in an accident more than once during the period the Plaintiff worked with the Defendant.

### **3.0 THE EVIDENCE**

#### **3.1 EVIDENCE FOR THE PLAINTIFF**

3.2 In support of her case, the Plaintiff called one witness, the Plaintiff herself, herein after called **PW1**.

3.3 **PW1** informed the Court that she was engaged by the Defendant as Human Resource and Administration Manager for a period of three (3) years.

3.4 **PW1** informed the Court that apart from the salary as stipulated in the Contract, she was entitled to housing allowance at twenty percent (20%) of the basic salary as per clause 10.2 of the Contract.

3.5 **PW1** also informed the Court that she was also entitled to a personal to Holder Vehicle of suitable type for official duties with the option to purchase it at termination or expiry of the Contract. And motor vehicle allowance of 30% of the basic salary pursuant to cluse 10.3 (ii) of the Contract.

3.6 **PW1** also informed the Court that the parties relied on the conditions of service as obtained in the harmonized conditions for all boards under the Ministry of Heath, Cabinet Circulars and Radiation Protection Authority Circulars.

- 3.7 **PW1** further informed the Court that going by the conditions of service, she was entitled to fuel allowance which when read with the Cabinet Office Circular No. 7 of 2012 is 30% of the basic salary. Further, that she was also entitled to telephone allowance, repatriation allowance and leave travel benefit.
- 3.8 Further, **PW1** informed the Court that on the strength of clause 10.5 of the Contract, at termination, she was entitled to gratuity computed at the rate of thirty five percent 35% of the last drawn salary. The basic pay at expiry of the Contract was K34,357.67 which was wrongly reduced to K26,428.99.
- 3.9 Further, **PW1** informed the Court that when her Contract was not renewed the Defendant wrongly paid an instalment of K333,005.27 as her gratuity. She informed the Court that when calculating her gratuity, the Defendant did not add all allowances, thus miscalculating the gratuity.
- 3.10 **PW1** also informed the Court that she wrote a letter to the Defendant following up on the vehicle, and that the Defendant responded that they were in the process of procuring vehicles for Managers which would be allocated to her. **PW1** further informed the Court that two vehicles were procured from Southern Cross Motors, one for the Finance Manager and one for the Plaintiff.

3.11 **PW1** further informed the Court that contrary to the agreement to allocate a personal to holder Vehicle to the Plaintiff which was being procured, the Defendant allocated an old poor vehicle Registration No. GRZ 546 to her, which she refused as it was against what had been agreed.

3.12 **PW1** also informed the Court that she wrote a letter to the Defendant expressing her concern over the vehicle that had been allocated to her. And when she did not receive any response, she wrote a demand letter demanding the purchase of the vehicle which was allocated to her among other demands.

3.13 **PW1** informed the Court that because the Defendant did not avail the personal to holder vehicle during the subsistence of her three-year contract, she used her personal vehicle causing her to suffer loss.

3.14 **PW1** also submitted that the motor vehicle bought for her should be sold at to her at net book value of K81,250.00 in line with the Cabinet Circular No. 6 of 2001 and using the straight - line depreciation method (i.e. 25% for three years which is 75% of K325,000,00. When K243,750.00 is subtracted from K325,000.00 we get K81,250.00 which is the net book value.

3.15 Further, **PW1** informed the Court that the none selling of the vehicle to her has caused her to suffer loss of use of the vehicle, and should therefore be compensated the current value of the then vehicle or at the then price reflecting the interest from the date when it should have been sold.

3.16 Further, **PW1** informed the Court that because of the irregularities in paying terminal benefits, she was to be maintained on the Defendant's pay role until she was paid.

3.17 **PW1** further informed the Court that according to the Contract of employment, gratuity was to be calculated at the rate of thirty five percent (35%) of the last drawn salary in addition to other benefits tenable under the general terms and conditions.

3.18 Further to the above paragraph, **PW1** informed the Court that according to her calculation based on the basic pay and allowances she is owed, K78,468.48 monthly. When the sum of K78,468.48 is multiplied by 36 months (being the three years of her contract) at 35%, the total gratuity owed to her is K988,702.85 and not the K333,00.85 which was paid.

3.19 Stretching the argument further, **PW1** informed the Court that her unpaid gratuity balance is K393,288.71. This is so because from

the balance of K655,695.58, the sum of K262,406.87 was paid into Court.

3.20 **PW1** further argued that there were other unpaid amounts which included a personal to holder Vehicle worth K216,000.00, Loss of purchase of vehicle K244,000.00 Repatriation allowance K16,491, fuel allowance K10,307.30 x 36 months, telephone allowance which is 300 x 36 months and leave pay in the sum of K7,000.00.

3.21 In cross-examination, **PW1** admitted that she was in charge of pay roll and also confirmed that her name was indeed on the payroll.

3.22 When asked if she ever received a motor vehicle allowance, **PW1** responded that she was receiving a motor vehicle allowance even without the personal to holder vehicle she was entitled to.

3.23 When Cross examined on the sum of K333,005.00 paid as her gratuity, **PW1** responded that according to the bundle of documents it is not appearing as an instalment.

3.24 When cross examined on the telephone allowance claimed, **PW1** responded that there is no mention of telephone allowance in her Contract of employment.

3.25 Further in cross examination **PW1** informed the Court that she was entitled to purchase the vehicle which was allocated to her namely GRZ 546 but that it was an old Vehicle procured in 2015.

- 3.26 Further in her cross examination **PW1** stated that her Contract does not state that she was entitled to purchase a brand-new motor vehicle.
- 3.27 When further cross examined if her Contract had a provision for repatriation, **PW1** responded that the Contract did not contain such a provision.
- 3.28 In Re-examination **PW1** informed the Court that the telephone and fuel allowances though not contained in the Contract, they are contained in the Harmonised conditions of service for the Ministry of Health and that is the reason Clause 12.0 of the Contract which provides for other conditions was referred to.
- 3.29 **PW1** also informed the Court that Statutory Boards were guided by Circulars from Cabinet office and fuel allowance was enshrined in the Circular, hence her claim.
- 3.30 With regard to repatriation, **PW1** stated that on page 25 of her bundle of documents, repatriation was to be paid upon exit.
- 3.31 Further in re-examination, **PW1** informed the Court that it is her position that the amount paid as gratuity is an instalment because the figure computed was not complete as the Defendant did not take allowances into account.

3.32 Finally, **PW1** stated that the gratuity owed to her was supposed to be thirty five percent (35%) of her last drawn salary, meaning allowances should have been taken into account.

### **3.33 II EVIDENCE FOR THE DEFENDANT**

3.34 In support of its case the Defendant called one witness Boster Dearson Siwala, hereinafter called **DW1**.

3.35 In his evidence-in-chief, **DW1** informed the Court that the Plaintiff was offered employment as Human Resources and Administration Manager and signed a Contract of employment.

3.36 **DW1** informed the Court that the Plaintiff was recruited from Lusaka and was resident in Lusaka during the subsistence of her contract which required her to be stationed at the head office in Lusaka. According to **DW1**, her contract of employment did not therefore cover repatriation allowance.

3.37 **DW1** informed the Court that in 2013 the Permanent Secretary of the Ministry of Health guided all Statutory bodies under the Ministry of Health to implement the Harmonization and Rationalization of Salaries and Conditions of service Report of 2012, this Report therefore formed part of the Plaintiff's contract.

3.38 **DW1** also informed the Court that one of the terms of the Plaintiff's Contract entitled her to a personal to holder vehicle. In the

absence of the vehicle, the Plaintiff was entitled to motor vehicle allowance at 30% of the basic pay, which allowance she received during her Contract as shown in document 1 to 12 of the Bundle of Documents.

3.39 **DW1** informed the Court that the Plaintiff was further entitled to fuel allowance when given an assignment outside Lusaka as shown by document 5 - 6 of the Defendant's Supplementary Bundle. According to **DW1**, the Plaintiff was also entitled to Housing allowance but was not entitled to telephone allowance. The Plaintiff was entitled to 3.5 leave days for every month.

3.40 **DW1** also informed the Court that according to the Plaintiff's Contract of employment, she was entitled to a basic salary of K159,996.00 per annum.

3.41 **DW1** also informed the Court that in 2017 the Defendant declined the Plaintiff request to renew her Contract and sent her on leave, the Plaintiff later wrote to the Defendant requesting on how the issue of the personal to holder motor vehicle would be resolved having had knowledge that the Authority was procuring motor vehicles for Managers.

3.42 Further, to the above paragraph, **DW1** informed the Court that at the time the Plaintiff's Contract was coming to an end the vehicles

procured through the Government Procurement Process at the Ministry of Health - Tender Committee were not yet delivered to the Defendant.

3.43 Further, to the above paragraph, **DW1** informed the Court that Cabinet Office Circular No. 6 of 2001 provided for purchase of personal to holder vehicle, only after 5 years of use. And to arrive at the sale price, the vehicle had to be depreciated at a rate of 20% per annum. **DW1** further informed the Court that the procured vehicles were brand new vehicles therefore depreciation did not apply and could not be offered to the Plaintiff for sale.

3.44 **DW1** further informed the Court that by the time the procured vehicles were delivered, the Plaintiff was no longer in the employ of the Defendant and was therefore not eligible to be assigned a personal to holder vehicle. However, on the 10<sup>th</sup> of July, 2017 the Defendant allocated an available suitable Spotero GRZ 546 to the Plaintiff, which she declined.

3.45 Finally in his evidence-in-chief **DW1** informed the Court that on the 31<sup>st</sup> of July, 2017 the Plaintiff was paid her gratuity in the sum of K 333,005.27. Further when the Defendant recalculated the gratuity, it made payment into Court of the underpaid gratuity inclusive of interest in the sum of K262,406.87.

3.46 In cross-examination **DW1** informed the Court that as Executive Director he was given a personal to holder vehicle and was receiving a motor vehicle allowance of K5,054.83. When asked if the Plaintiff was given a motor vehicle, she was entitled to, **DW1** stated that she was not given one.

3.47 **DW1** informed the Court that the Plaintiff was entitled a motor vehicle with the option to purchase it. Further **DW1** informed the Court that the Plaintiff is entitled to housing allowance, personal to holder motor vehicle and motor vehicle allowance. Further, **DW1** informed the Court that the Plaintiff was entitled to 35% gratuity calculated on the last drawn salary and other benefits.

3.48 **DW1** also informed the Court that the Defendant did not provide a motor vehicle to the Plaintiff during the subsistence of her contract. **DW1** also informed the Court that the Defendant also did not pay the Plaintiff repatriation allowance upon her exit, fuel allowance and telephone allowance. Further, the Plaintiff was not paid her K7,000.00 as travel benefits as stipulated in the conditions.

3.49 When cross-examined on what the agreement was between the Defendant and the Plaintiff over the motor vehicle, **DW1** informed the Court that it was agreed between the parties that the motor

vehicle was to be brand new, this is as per letter dated 16<sup>th</sup> June, 2017.

3.50 When Cross examined on what the Plaintiff's basic pay was, **DW1** informed the Court that her basic pay was K34,357.67 before she was sent on leave and it was reduced to K26,428.99 when she was sent on leave. **DW1** stated that the Plaintiff's gratuity was affected because of that reduction.

3.51 Further in his cross-examination, **DW1** informed the Court that the payment of K333,005.27 as gratuity, was an incorrect figure and that is why the Defendant paid money into Court on the 28<sup>th</sup> November after correct computation.

3.52 In re-examination, **DW1** informed the Court that according to Clause 10.3(ii) motor vehicle allowance was paid through the pay roll during the subsistence of the Plaintiff's Contract.

3.53 **DW1** under further re- examination informed the Court that at the time of the Plaintiffs Contract the Authority did not have its own terms and conditions and so it relied on the Report on Harmonization of Salaries, but did not adopt everything because the Authority had no funds to pay all allowances continued in Report.

- 3.54 **DW1** further informed the Court that for employees on Contracts the allowances appeared on the payslip. In the Report, fuel was described as remunerative allowance, which meant that it was paid under the pay roll. As regards Repatriation, Fuel and Telephone allowance, **DW1** informed the Court that the said allowances were not adopted in the Contracts for Managers.
- 3.55 Further, in his re-examination **DW1** informed the Court that while travel benefits were paid to certain officers while on leave, the Plaintiff was not paid because she was not entitled to it.
- 3.56 **DW1** further informed the Court that the Plaintiff was offered GRZ 546 because it was a Vehicle that was available at the time.

#### **4.0 SUBMISSIONS**

##### **4.1 PLAINTIFFS SUBMISSIONS**

- 4.2 In his submission, Counsel addressed different points, one after the other. The first point submitted on was the Contract and its binding nature, wherein Counsel submitted that a Contract of employment is like any other Contract and Parties are bound by it.
- 4.3 Counsel referred the Court to the Case of **Roland Leon Norton Vs Nicholas Lastrom**<sup>(1)</sup> where the Supreme Court held that:

***“It’s trite law that a Party to a contract is bound by it even though it may not have been in the interest of that party entering into that contract. Even a bad contract, if its valid, is binding”.***

4.4 It was Counsel’s submission that the Plaintiff and the Defendant entered into this Contract freely and as such its terms ought to be enforced by the Court.

4.5 Counsel further submitted that by the guidance of the case of **Rodgers Chali Ponde & Others Vs Zambia State Insurance Corporation Limited**<sup>(2)</sup>, parole evidence is inadmissible because it tends to add vary or contradict the terms of a written agreement validly conducted by the parties. Therefore, the Plaintiff and the Defendant are bound by the written contract they freely entered into.

4.6 The second point Counsel submitted on was pleadings, Counsel submitted that once the pleadings are closed, Parties are bound by their pleadings and the court has to take them as such.

4.7 Counsel submitted that there are matters the Defendant has admitted to in his pleadings and is therefore bound by them. That by admitting paragraph 1 to 5 of the statement of claim, the Defendant has admitted to sending the Plaintiff on leave on the 4<sup>th</sup>

June, 2017, Plaintiff being entitled to Housing allowance at 20% of the Basic pay and a personal to holder vehicle.

4.8 Further, it was submitted by Counsel for the Plaintiff that the Defendant in paragraph 2 of the defence admitted to the harmonized conditions for all boards and cabinet circulars being applicable to the Contract. In paragraph 3 of its defence, the Defendant admitted to the Plaintiff being entitled to a motor vehicle allowance. And in paragraph 4 of the defence the Defendant admits to the Plaintiff being entitled to other benefits tenable under the general terms and conditions.

4.9 It was Counsels submission that from the Defendant's admissions, the Plaintiff is entitled to Housing allowance, personal to holder vehicle, motor vehicle allowance, fuel allowance, repatriation allowance, telephone allowance and leave travel benefit.

4.10 Counsel referred the Court to the case of **Patrick Chiluba Vs Attorney General**<sup>(3)</sup> where it was stated that:

***“We note that the respondent has conceded to ground two. It is indeed settled law that terminal benefits or awards should be paid together with allowances and perks an employee was entitled to during the course of his employment.”***

4.11 It was Counsels submission that all allowances enjoyed during the course of her employment ought to have been included when calculating what is owed to her as she has shown in her witness statement.

4.12 The third point Counsel submitted on was on resolving which Contract applies between the one produced by the Plaintiff and the Defendant, as far as Clause 10.3(ii) is concerned.

4.13 It was Counsels submission that the applicable clause is the clause as produced by the Plaintiff. According to Counsel the Defendant has in its defence admitted that the Plaintiff was entitled to both motor vehicle allowance and a personal to holder vehicle.

4.14 Regarding the contention of the basic pay, Counsel submitted that the basic pay paid to the Plaintiff from January 2017 to May 2017 should be used to calculate the benefits. According to Counsel, the Plaintiff's basic pay was K34,357.67, but that when the Plaintiff was sent on leave on 4<sup>th</sup> June, 2017, the Defendant reduced the basic pay to K26,428.99 for the month of June and July 2017.

4.15 It was Counsels submission that the Plaintiffs basic pay of K34,357.67 is an accrued right which cannot be taken away

without an express agreement of the parties. Counsel referred the Court to the case of **Richard Musenge Vs Indo Zambia Bank**<sup>(4)</sup> where in the Supreme Court held that:

***“...conditions of service of any Kind of employment can be amended... But this only be with the clear and express consent of the employee. That express consent of an employee must always be a major pillar in employment law for purposes of safeguarding of the terms of an employee’s contract of employment already being enjoyed...”***

4.16 It was Counsels submission that there not being an express agreement to reduce the basic pay, the Plaintiff is entitled to the use of the sum of K34,357.67 as basic pay in calculating the allowance and ultimately the gratuity.

4.17 Counsel’s fifth point of submission was the Plaintiffs claim for damages for unlawful withholding of terminal benefits and the claim for punitive and exemplary damages.

4.18 Counsel submitted that it is not in doubt that the Defendant wrongly paid the Plaintiff her gratuity, as this can be seen by the payment into Court of a further amount. It was Counsels submission that, this therefore justified the Plaintiffs claim for 36

months salary as damages for unlawful withholding of terminal benefits.

4.19 In support of the claim for punitive and exemplary damages counsel referred the Court to the case of **Rookes Vs Bernard and Others** <sup>(5)</sup> where it was held:

***“Exemplary damages for tort may only be awarded in two classes, (of course apart from any case where it is authorised by statute), these are first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and secondly where the defendants conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff.”***

4.20 It was also Counsel’s submission that the payment of gratuity is now a constitutional issue where the gratuity is not paid regularly and promptly. Further that the conduct of the Defendant was not only oppressive and arbitrary but also unconstitutional as the Defendant underpaid the Plaintiff by not taking into account all the benefits under the Contract. Therefore, this is an appropriate case to grant the exemplary and punitive damages.

4.21 Closely related to gratuity, Counsel submitted on the payment of salaries until the date of full payment of gratuity. Counsel drew

the courts attention to **Article 189 (1) (2) of the Constitution Chapter 1** of the **Laws of Zambia** which provides that:

*(1) A pension benefit shall be paid promptly and regularly;*

*(2) Where a pension benefit is not paid on a person's last working day, that person shall stop work but the persons name shall be retained on the payroll until payment of the pension benefit based on the last salary received by that person while on pay roll".*

4.22 It was Counsel's submission that according to **Article 266** of the **Constitution**, pension benefit includes a pension, compensation, gratuity or similar allowance in respect of a person's service.

4.23 It was Counsel's submission that since the Plaintiff was not paid her gratuity on time, she ought to have remained on payroll until payment of her full gratuity.

4.24 Coming to the claim of mental anguish, Counsel submitted that the Plaintiff was and continues to be inconvenienced by the Defendant thereby causing her mental anguish.

4.25 Counsel drew the Court's attention to the case of **Attorney General Vs D. G. Mphundu**<sup>(6)</sup> wherein the Court held that:

***“It is now settled that the court can give damages for the mental upset and distress caused by the defendants conduct in breach of Contract”.***

- 4.26 Counsel submitted that gratuity ought to have been paid regularly and promptly, thus the Defendants failure to do so has caused the plaintiff mental anguish and anxiety.
- 4.27 Leaving the issue of gratuity, Counsel submitted that the Plaintiff should be paid cash equivalent of the current value of the vehicle she was to have as personal to holder vehicle as compensation for loss of use of the personal to holder vehicle.
- 4.28 It was Counsel submission that the Plaintiff experienced loss of use of the vehicle during her contract, and to attend to the loss suffered, she claims the value of the vehicle on the open market as compensation for the loss.
- 4.29 Similarly, Counsel submitted that the Plaintiff should be paid damages for the loss of opportunity to purchase the vehicle. According to Counsel, by a letter dated 16<sup>th</sup> June, 2017, the Defendant informed the Plaintiff that the Authority is finalizing the procurement of the personal to holder vehicles, of which one was to be allocated to the Plaintiff.

4.30 It was Counsel's position that the Defendant refused to honour the agreement and allocated a vehicle to the Plaintiff which was not agreed upon. It was Counsel's argument that the Plaintiff would have been entitled to a financial benefit of having to purchase a vehicle at depreciation value. However, the Defendant breached this agreement by not allocating the vehicle to the Plaintiff, which prejudiced the Plaintiff by causing loss of opportunity to purchase the Vehicle.

## **5.0 DEFENDANT'S SUBMISSIONS**

5.1 Counsel submitted that it is not in dispute that a Contract of employment existed between the Plaintiff and the Defendant. The said Contract was regulated by documents as provided in clause 12.0 of the Contract.

5.2 It was Counsel's submission that according to the above Contract, the Plaintiff was not entitled to fuel, telephone allowance and repatriation allowance as they did not form part of the Contract.

5.3 With regards parties being bound by their pleadings, Counsel submitted that while a party is precluded from abandoning a position earlier admitted, the court is alive to the fact that an admission can be made unintentionally based on an honest mistake and that does not entitle a Plaintiff to a Judgement.

- 5.4 It was Counsel's submission that the Court has to evaluate the evidence on record so that he who alleges proves his claim. To buttress this point counsel referred the Court to the case of **Mohamed Vs The Attorney General**<sup>(7)</sup>.
- 5.5 Clarifying on paragraph 6 of the statement of claim, Counsel submitted that it was a report only used to draft the Contracts and only applied to the Defendant where a circular specifically stated so.
- 5.6 It was Counsels further submission that according to the Contract entered between the parties, the Plaintiff was entitled to housing allowance at 20% of the basic pay, a personal to holder motor vehicle, and a motor vehicle allowance.
- 5.7 Counsel went further to submit that the document relied on by the Plaintiff is merely a report and not conditions of employment. According to Counsel, the said report is dated 2012 which was way before the parties herein entered into the Contract. The report's applicability is limited to guiding the Contract as opposed to forming part of the contract.
- 5.8 Further, counsel submitted that the Defendant denies the Plaintiff being entitled to repatriation allowance, telephone allowance and

leave travel benefit allowance as these are drawn from the report and do not form part of her contract of employment.

5.9 In respect to which Contract applies between the one produced by the Plaintiff and the Defendant, it was Counsel's submission that the issue of which Contract should be relied on is irrelevant.

5.10 According to Counsel, what is in contention was whether the Plaintiff herein was entitled to motor vehicle allowance and personal to holder Vehicle.

5.11 Counsel submitted that the Plaintiff was being paid a motor vehicle allowance during the course of her contract as shown on the Plaintiff's pay slips and was allocated a motor vehicle suitable for official duties, which she declined to purchase when offered to. It was Counsel's view that it is of no consequence as to which contract applies as the issues in contention have been resolved.

5.12 With regards the issue of which salary is to be used when computing gratuity, Counsel submitted that what has been revealed by the evidence at pages 1 to 6 of the Plaintiff's Supplementary bundle of documents is that the Plaintiff consolidated her basic pay with her motor vehicle allowance thereby coming up with a basic salary of K34,357.67.

5.13 It was Counsel's submission that the Plaintiff in cross-examination admitted that she consolidated motor vehicle allowance to her basic salary. According to Counsel, it was as a result of the consolidation that the Plaintiff's payslip did not show a separate line for motor vehicle allowance. According to Counsel the Plaintiffs basic salary at the end of the contract was K26,428.99.

5.14 Moving to the claim of damages for unlawful withholding of terminal benefits, Counsel submitted that the evidence on record shows that terminal benefits were promptly paid by the Defendant. According to Counsel, the Contract expired on the 13<sup>th</sup> of July, 2017 and the terminal benefits were paid on 26<sup>th</sup> July, 2017. Further, accrued leave days of 96.00 amounting to K121,784.64 was equally promptly paid.

5.15 The gratuity having promptly been paid, Counsel submitted that there are no reasons why the Court should use its discretion to condemn the Defendant in damages of 36 months' salary for unlawful withholding of terminal benefits.

5.16 With regards the claim for punitive and exemplary damages, Counsel submitted that the evidence on record demonstrates that the Defendant promptly paid the Plaintiff her gratuity and accrued

leave days. Further, Counsel submitted that when the Defendant discovered that it had used a wrong formula to compute the Plaintiff's gratuity, the Defendant promptly remedied the situation by paying the balance into Court.

5.17 Regarding the motor vehicle, Counsel submitted that the Defendant offered the Plaintiff the option to buy the personal to holder vehicle as agreed in the Contract, but that the Plaintiff declined the offer. According to Counsel, the Defendant having discharged its obligation to provide a personal to holder vehicle to the Plaintiff, the Plaintiff is therefore not entitled to punitive or exemplary damages because she declined the motor vehicle which was offered to her.

5.18 With regards the claim for payment of salary until the date of full payment of gratuity, Counsel submitted that the payment of K333,005.27 was intended to be full and final settlement and that this Court should take judicial notice of a payment that was made into court on the re-calculated gratuity together with interest. Counsel referred the Court to the case of **McQueen Zenzo Zaza Vs ZESCO Limited**<sup>(8)</sup> for the proposition that the payment of K333,005.27 was full and final payment of the Plaintiffs gratuity, as such the Plaintiff could not have remained on the payroll

5.19 Coming to the claim for damages for mental anguish, Counsel submitted that the Plaintiff's claim is hinged on the claim that the Defendant breached the Contract thereby causing the Plaintiff to suffer mental anguish.

5.20 It was Counsel's submission that this claim was not tenable, firstly because the Plaintiff knew that her contract was only valid for a term of three years and would expire thereafter. Therefore, there was no breach of Contract. Secondly her claim of her terminal benefits was paid promptly. According to Counsel, the Defendant having met the above two conditions proves that the claim for damages for mental anguish lacks merit and should be dismissed.

5.21 With regards payment for leave and repatriation allowance, Counsel submitted that the Plaintiff was paid all her accrued leave days amounting to K121,784.64. Counsel further submitted that the Plaintiff was not entitled to repatriation allowance as she was recruited from Lusaka.

5.22 With regards the Plaintiff's claim seeking an Order that she be paid cash equivalent of the current value of the vehicle she was to have as personal to holder on the open market as compensation for loss of use of the vehicle. It was Counsel's submission that as

per Clause 10.3 of the Contract, the employee only had an option to purchase the motor vehicle at the cost and conditions determined by the Authority as per the motor vehicle policy.

5.23 Counsel submitted that since the Authority has no motor vehicle policy, it applies the government policy which provides that a motor vehicle will only qualify for disposal at residue value after it has been used for a number of years.

5.24 It was further Counsel's position that, the Vehicle purchased would not qualify for disposal hence the reason the Plaintiff was offered another vehicle. Counsel further submitted that the Plaintiff cannot legitimately claim compensation for the use of the personal motor vehicle, when there is evidence that she was benefiting by getting motor vehicle allowance.

5.25 With regard to the Plaintiff's claim of damages for loss of opportunity to purchase the vehicle, Counsel submitted that the Plaintiff is not entitled to the same because the Defendant offered the Plaintiff an opportunity to purchase the motor vehicle but the Plaintiff declined as such the Plaintiff cannot claim loss of opportunity to purchase the vehicle.

5.26 With regards the Plaintiff's claim for an order directing the Defendant to pay all contractual benefits which were not paid,

Counsel submitted that the Plaintiff is claiming allowances which were not part of the Contract and do not form part of the conditions of service.

- 5.27 It was Counsel's submission that the Plaintiff was paid all her contractual benefits and is not entitled to those other allowances claimed like telephone allowance as they were not part of the Contract of employment.
- 5.28 With regards the claim for recomputing of the terminal benefits due, Counsel submitted that the same had been overtaken by events as the Plaintiff's gratuity was re-computed and the payment was made into court together with interest.
- 5.29 With regards the Plaintiff's claim of the payment due to her, Counsel submitted that the exercise of assessment of damages is outside the pleaded matters by the Plaintiff. Therefore, the Plaintiff's claim for assessment by the Judge must be dismissed as it is misplaced.
- 5.30 Counsel further submitted that the Defendant denies owing the Plaintiff anything as all dues were paid.
- 5.31 It was Counsel's submission that the K34,357.67 relied on as the Plaintiff's basic pay is incorrect because the Plaintiff added her motor vehicle allowance to her basic pay. It was Counsel's position

that the Plaintiff has not shown any evidence on how her basic pay increased to K34,357.67 because in cross examination she conceded that the increase was due to the motor vehicle allowance added.

5.32 Moving to the payment of interest, Counsel submitted that the Defendant has shown that the Plaintiff has not been kept out of her money as she was paid gratuity and the remainder paid into Court. According to Counsel, the Defendant should not be made to pay any further interest. The Defendant urged the Court to dismiss the Plaintiff's case.

## **6.0 THE PLAINTIFF'S SUBMISSIONS IN REPLY**

6.1 In reply, Counsel for the Plaintiff submitted that the Harmonization and Rationalisation of salaries and conditions of service report of 2012 formed part of the Contract, as such all the benefits under the Report accrued to the Plaintiff. As admitted by the Defendant in paragraphs 6 and 7 of their witness statement.

6.2 It was also Counsel's submission that the fringe benefits should be incorporated in calculating gratuity as guided in the Supreme Court decision of **Kasote Singogo Vs Chilanga Cement Plc**<sup>(9)</sup> for the proposition that fringe benefits should form part of the salary used to calculate terminal benefits.

- 6.3 In further reply regarding inadvertent admission in pleadings, Counsel submitted that one is bound by their pleadings and the only recourse open to them after an admission is amendment. According to Counsel, once an admission is made, it ceases to be an issue requiring proof. In support of this proposition regard was had to the cases of **Rakir Hussein Motala Vs Jabir Ali Bux**<sup>(10)</sup> and the case of **Chazya Silwamba Vs Lamba Simpito**<sup>(11)</sup> respectively.
- 6.4 In further reply, Counsel submitted that there are no preconditions for repatriation to be paid. Further, Counsel submitted that the parties agreed that the Plaintiff would be sold one of the new cars and not the old one. Therefore, the Defendant's failure to sale the Plaintiff a new vehicle amounted to a breach of Contract. In buttressing this argument Counsel relied on the letter dated 16<sup>th</sup> June 2017 appearing at page 41 of the Plaintiff's bundle.
- 6.5 In replying to the issue of the salary scale, Counsel submitted that it is K34,387.67, that the Defendant approved as a salary and this was without the motor vehicle allowance.
- 6.6 On the issue of gratuity, Counsel submitted that Plaintiff has not been paid her full gratuity and what was paid into Court is merely

a second instalment paid upon the Defendant being dragged to Court.

6.7 According to Counsel, the calculations made by the Defendant in the submissions are an attempt to sneak in evidence that was not proffered in the witness statements. It was Counsels submission that the calculations as made by the Plaintiff are correct and uncontested, which should be accepted as such, Counsel refereed the Court to the case of **Gerrick Refrigeration and Air Condition Vs Forest Direct Zambia Limited**<sup>(12)</sup>.

6.8 Lastly, the Plaintiff argued that to assert that for there to be assessment it should be pleaded is equivalent to asserting that for there to be a hearing it should be pleaded. According to the Plaintiff, assessment follows the Courts jurisdiction to try a matter. In the premises it was prayed that the assessment should be done.

## **7.0 FINDING OF FACTS**

7.1 I have found the following facts are established and not in contention:

- i) That the Plaintiff was employed by the Defendant as a Human Resource and Administration Manager***

*on a 3 years Contract of employment from 2014 to July, 2017.*

- ii) That the Contract of employment imported other documents as forming part of the contract as stipulated in clause 12 of the contract of employment.*
- iii) That the Contract between the parties herein was determined by effluxion of time and non-renewal of the Contract in 2017.*
- iv) Upon determination of the Contract, the Plaintiff was paid a sum of K333,005.27 as gratuity and a sum of K121,784.64 as a leave-days and was offered a motor vehicle registration No. GRZ 546 to purchase which Vehicle, she refused to purchase as it was old.*
- v) The initial gratuity was calculated using a wrong formula but that the Defendant when this suit was commenced, re-computed the gratuity and paid a sum of K262 406.87 into court as the Plaintiff's gratuity plus interest.*

## **8.0 ISSUES FOR DETERMINATION**

8.1 The following are the issues for determination;

- i) Whether or not the Harmonization and rationalization of salaries report formed part of the contract?*
- ii) What is the applicable basic salary and allowances to be used in the computation of the gratuity due to the Plaintiff?*
- iii) Whether the Plaintiff is entitled to repatriation allowance notwithstanding being recruited from Lusaka?*
- iv) Whether the Plaintiff is entitled to the cash equivalent of current value of the vehicle she was to have as personal to holder vehicle as compensation for loss of use of the Vehicle?*
- v) Whether the Plaintiff is entitled to damages for loss of opportunity to purchase the motor vehicle?*
- vi) Whether the Plaintiff is entitled to the reliefs sought in the statement of Claim?*

## **9.0 ANALYSIS AND DECISION OF THE COURT**

9.1 I am greatly indebted to Counsel for the submission filed before Court. I am mindful that he/she who alleges must prove his/her case on a balance of probability. This trite proposition of the law has been endorsed in several case inter alia **Wilson Masauso Zulu Vs Avondale Housing Project**<sup>(13)</sup> and indeed it is trite that this burden persists even if the Defendant's defence collapses as per **Galaunia Farms Limited Vs National Milling Company and National Milling Corporation Limited**<sup>(14)</sup> case. With this in mind I proceed to analyse the issues set out above.

***(i) Whether or not the Harmonization and rationalization of salaries report formed part of the contract?***

9.2 With regard to this issue the Plaintiff's Counsel submitted that the Defendant has admitted to the fact that the Harmonisation and rationalisation of salaries report of 2012 (herein after "the Report") formed part of the Contract of employment between the Plaintiff and the Defendant. In this vein, Counsel on the strength of the case of **Chazyia Silwamba Vs Lamba Simpito**<sup>(11)</sup> submits that the issue needs no proof. For clarity's sake the said case states as follows:

***“A party may admit the truth of the whole or any part of another’s case. When a fact is admitted, it is unnecessary for a party to advance evidence in relation to the admitted facts at trial.***

***When a fact is admitted it ceases to be an issue and neither party is required or permitted to advance evidence about it at trial. An admission can be made expressly in a defence or in a defence to a counterclaim...”***

9.3 In view of the above, the Court has been urged to find that the report was a part of the Plaintiff’s Contract of employment notwithstanding that the same is not listed in clause 12 of the Contract.

9.4 The Defendant’s Counsel on their part argue that one can inadvertently admit to something, however, the Court can review the evidence and come to a find. In so arguing, Counsel submits that the Contract in Clause 12, lists the specific documents that were imported into the contract. The said clause provides as follows:

***“Other terms and conditions applicable to the employee shall be as contained in the general conditions of service, administration manuals, job description, disciplinary and grievance procedure manual, which***

***will apply mutatis mutandis and shall form part of this agreement.”***

- 9.5 The gist of the Defence Counsel submission on this issue is that since the report is not listed in clause 12, the Report should not be held to be part of the parties Contract.
- 9.6 I have analysed both arguments by Counsel. Firstly, I note that the Defendant at paragraph 2 of its Defence admits to paragraph 6 of the statement of claim which states that the Report was part of the Contract. Secondly, the Defendant’s sole witness at paragraphs 6 and 7 of his witness statement admits to the Report forming part of the Contract. It is therefore beyond argument that there is an admission on the part of the Defendant.
- 9.7 The question that remain unanswered is what should the Court do in the face of this admission? Defence Counsel argues that this admission should be forgiven and the evidence considered. Looking at the evidence at trial, the Defendant’s own witness in chief states that the Report is part of the Contract.
- 9.8 Therefore, even this plea does not aid the Defence. In arriving at this position, I find wisdom in the case of **Chazyia Silwamba Vs Lamba Simpito** <sup>(11)</sup> and find that the issue having clearly been

admitted is a none issue. In other words, I find that indeed the report forms part of the Plaintiff's Contract.

9.9 In saying the above, I am alive to the fact that it is a settled principle of law that extrinsic evidence is generally inadmissible to vary the contents of a written contract as per the case **Holmes Vs Build Well Construction Limited**<sup>(15)</sup>. However, I am comforted by the said authority as it provides for exception to the general rule among them being a situation where the parties have agreed that the contract does not form the whole or entirety of their agreement. In this case, the Defendant has admitted both in its pleadings and evidence, that the Report formed part of the Plaintiff's Contract. To that end the facts in *casu* fall within the said exception.

***(ii) What is the applicable basic salary and allowances in the computation of the gratuity due to the Plaintiff?***

9.10 As regard the issue of the applicable basic pay, the Plaintiff through Counsel submitted that the applicable basic salary is K34,357.67. This argument is premised on the fact that this is the salary she received the whole of 2017 until June when she was sent on leave.

9.11 In countering this argument, Défense Counsel submits that the basic salary applicable is K26 428.99. According to Defence Counsel, the Plaintiff is insisting that her basic salary is K34 357.67 because she consolidated the basic salary and the motor vehicle allowance.

9.12 Looking at the competing submissions, I form the view that the answer lies in the examination of the documents produced and the evidence tendered by the parties at trial. A perusal of the payslips from 2015 exhibited in the Defendant's bundle of documents show that the Plaintiff was receiving a basic salary and a motor vehicle allowance. On the other hand, payslips for the year 2016 and early 2017 show that the motor vehicle allowance was scrapped off but the basic salary was increased.

9.13 Looking at the evidence before me, the conclusion I draw is that the correct basic salary is K26,428.99. I have arrived at this conclusion because the evidence on record shows that the payslip on which the Plaintiff predicts her case omits the motor vehicle allowance but has an unexplained increase in the basic salary.

9.14 Further the inference that I draw as regards the increase in the basic salary is that the motor vehicle allowance was in actual fact not scrapped but consolidated into the basic salary as agreed to

by the Plaintiff in Cross-examination. With that said, my finding is that the correct basic pay at the time the Contract was terminated was K26,428.99.

9.15 Coming to the applicable allowance, the Contract entered between the parties stipulates which allowances are payable to the Plaintiff. These allowances include Housing allowance payable at 20% of the basic salary as per Clause 10.2 and motor vehicle allowance payable at 30% of the basic salary. These two allowances were not contested by the parties.

9.16 The contest as demonstrated by the arguments of the parties were in relation to fuel allowance which was claimed to be payable at 30% of the basic salary, telephone allowance at K300.00 per month and leave travel allowance at K7,000.00.

9.17 In understanding the contest in paragraph 7.16 above, it is important to state that the parties disagreed as to whether the Harmonization report was part of the Contract. This was resolved in paragraph 7.8 above, the resolution was that the Report does form part of the Contract.

9.18 In line with the Harmonization Report, the Plaintiff claims for payment of fuel allowance, telephone allowance and leave travel

allowance. On the other hand, the Defendant disputes this claim by stating that the Plaintiff is not entitled.

9.19 In resolving this question, I will first start with fuel allowance. The Plaintiff's claim is anchored on table 6 appearing at page 24 of the Plaintiff's bundle of documents. In this table, under fuel, it states that fuel allowance is remunerative and it is consolidated in the basic salary. Further, in claiming for fuel allowance, the Plaintiff relied on the Circular appearing on page 30 of the Plaintiff's bundle of documents which placed it at 30% of the basic salary.

9.20 In my reading of the Report and Cabinet Office Circular No. 7 of 2012 is that the Report and the Circular are independent documents that are in no way meant to complement each other. In this vein, going by the report, the Plaintiff cannot seek a payment for fuel allowance as the same forms part of her basic salary. I am fortified in making this finding by Clause 3.5 of the said Report appearing at page 17 of the Plaintiff's bundle of documents which provides that remunerative allowances should form part of the basic salary.

9.21 Further, Clause 3.7 of the said Report provides that only two allowances should be kept as a percentage of the basic salary, these being Housing allowance and Transport Allowance.

9.22 In line with Cabinet Office Circular No. 7 at page 30 of the Plaintiff's bundle of documents, I agree with the Defendant because, the same refers to employees of GSS03. On the other hand, the Contract for the Plaintiff under clause 10.1 stipulates that her scale is RPA3. Therefore, the Plaintiff has not produced any evidence to show that GSS and RPA salary scale are equivalent or that they are even related. On that basis I find no basis upon which to find that she was entitled to the 30% fuel allowance. Accordingly, I dismiss the claim for 30% fuel allowance.

9.23 Coming to the telephone allowance at K300.00 per month, the basis for the Plaintiff's claim is table 6, appearing at page 24 of the Plaintiff's bundle of documents, as read with the Plaintiff's own letter appearing at page 45 and 46 of the said bundles of documents.

9.24 As earlier stated, the Report envisages that the allowance is included in the basic salary. Therefore, the Plaintiff's letter relied on at page 45 and 46 of her bundles of documents containing her own views of what she seems to be rightly due to her cannot be said to be binding on the Defendant. Consequently, I find that there is no basis for the claim for telephone allowance at K300.00 per month. The claim is dismissed.

9.25 The last allowance imported from the Report is leave travel allowance. The Plaintiff argues that she is entitled to the leave travel allowance. The Defendant refutes this claim and asserts that the said allowance was for employees who were in Division 1 to 3. I have perused the evidence on the record. However, I have not found any explanation or indeed any evidence as to why the Plaintiff believes that she is a division 1 employee, when her Contract of employment does not speak to divisions. Indeed, he who alleges must prove see **Wilson Masauso Zulu** case cited above.

9.26 In the premises, the Plaintiff has not shown proof that she is in the category of employees who fall in Division 1 to entitle her to a claim for the K7,000.00. Accordingly, I deny this claim for want of proof. The claim is dismissed.

***(iii) Whether the Plaintiff is entitled to repatriation allowance notwithstanding being recruited from Lusaka?***

9.27 With regard to this issue, the gist of the Plaintiff's claim is that she is entitled to repatriation allowance notwithstanding that she was stationed in Lusaka. The Defendant on the other hand submits

that the Plaintiff is not entitled to repatriation allowance because she was recruited from Lusaka.

9.28 To resolve this issue, guidance will be sought from **Section 13 (1)** of the **Employment Act Cap 268** of the **Laws of Zambia**. Cap 268 will be relied upon because at the time the Contract between the Plaintiff and the Defendant was entered into, the Employment code of 2019 was not yet enacted. This Section states thus:

*“Whenever an employee has been brought from a place within Zambia to a place of employment by the employer, or by an employment agency acting on behalf of the employer the employer shall pay the expenses of expatriating the employee to the place from which he was brought in the following circumstances:*

*a. On the expiry of the period of service as may be specified in the contract of service”.* (Emphasis mine)

9.29 From the above provision it is clear that repatriation applies to employees brought in by an employer from their original place of residence to a new place of employment by the employer or an agency instructed by an employer. As clearly stipulated by **Section 13 (1)** above, this allowance is not open to all employees. In *casu*, the Plaintiff cannot claim for this allowance because she was recruited from within Lusaka.

9.30 This indeed is in tandem with the guidance given by the Supreme Court in the case of **Afrope Zambia Limited Vs Chate and Other**<sup>(16)</sup> wherein the Supreme Court guided as follows:

***“With regard to the claim for repatriation, our view is that the learned trial judge erred when she awarded the respondents repatriation in the absence of evidence to substantiate the claim for repatriation. The respondents did not adduce evidence showing that they were employed from a place outside of Kitwe as required by section 13(1) of the employment Act...”***

9.31 In view of the above and indeed the binding authority of the Supreme Court. I am inclined to accept the Defendant’s argument that the plaintiff having been recruited from Lusaka and having served in Lusaka for the entirety of her Contract is not entitled to repatriation allowance.

9.32 Even as I state the above, I am aware that the Plaintiff has argued in reply that there was no precondition to repatriation. In my considered view that argument fails in the light of the guidance of the Supreme Court in the case of **Afrope** where it was guided that a party should prove that they had been moved to be entitled to repatriation. Accordingly, the claim for repatriation is without merit and is dismissed.

***(iv) Whether the Plaintiff is entitled to the cash equivalent of the current value of the vehicle she was to have as personal to holder vehicle as compensation for loss of use?***

9.33 On this issue the gist of Plaintiff's argument is that she was not given a Personal to holder motor vehicle. As such she lost use of the same. In this vein she argues that she should be paid the value of the Vehicle as compensation. Further, she argues that by so doing the Court will be attending to her claim for the use of her personal vehicle during the subsistence of her Contract. The Defendant has on its part gone to lengths to dispute this assertion and concludes by arguing that the Plaintiff having been paid motor vehicle allowance cannot claim loss of use.

9.34 I have analysed the competing positions. Firstly, the question that seeks to be resolved is, can the Plaintiff in the circumstances claim that she had lost use of the personal to holder vehicle? To lose use assumes that she had use and therefore was prevented or stopped from enjoying the same by the Defendant as such she ought to be compensated. On the facts at hand that is not remotely close to what happened. Therefore, I form the considered view that this claim is untenable.

9.35 It is untenable because, though the Plaintiff was entitled to a car which she was not given as a result of which she used her personal vehicle even for official work and can validly claim for compensation for using her personal vehicle, she has not shown to the requisite standard, that she suffered loss equivalent to the market value of a brand-new car.

9.36 I must say that, I have perused through the evidence on record but I have not seen any evidence showing how much loss the Plaintiff had suffered as a result of using her personal motor vehicle. As guided in **Khalid Mohamed** case earlier cited, where a party alleges, it is on them to prove. In casu there is no proof that the loss suffered if any, is equivalent to the cash equivalent of a relatively new Vehicle. What is beyond argument is that she indeed used her Vehicle during the tenure of her employment. Owing to the lack of evidence to show that the Plaintiff is entitled to the sum of money claimed I am inclined to deny the claim as prayed.

***(v) Is the Plaintiff entitled to damages for loss of opportunity to purchase the motor vehicle?***

9.37 The Plaintiff on this issue relies heavily on the letter dated 16<sup>th</sup> June, 2017 appearing at page 41 of the Plaintiff's bundle of

documents. Premised on that letter, Plaintiff's Counsel argues that there was a contract entered into for the Plaintiff to be allocated one of the Vehicles that were in the process of being procured but was yet to be procured or delivered to the Defendant.

9.38 The Plaintiff argues that it is this Vehicle that she should have been offered to purchase in line with Clause 10.3 of the Contract of employment. The Defendant's Counsel on their part argues that the Plaintiff had the opportunity to purchase a vehicle offered to her, which option she denied. Further, the vehicle she claims she ought to have been offered, was not delivered until after the effluxion of the contract between the parties herein. Therefore, there was never a possibility of her being allocated one of the vehicles yet to be procured. In any event, the Defence submits that the letter of 16<sup>th</sup> June, 2017 is not a binding agreement.

9.39 I have analysed the above competing arguments in light of the evidence on the record. Firstly, it is beyond argument that the Plaintiff was entitled to be offered a personal to holder vehicle to purchase on such terms as the Defendant determined. The issue however, is on the import of the letter of 16<sup>th</sup> June, 2017. The letter on the relevant parts reads as follows:

***“Dear Mrs. Chilikwela,***

**REF: SPECIAL LEAVE-YOURSELF**

**Reference is made to our letter dated 4<sup>th</sup> June 2017 in which the Authority put you on leave until further notice.**

**Further to your being on leave and subsequent meetings we have had, it was agreed between the institution and you that:**

- i. You will proceed being on leave until the end of your contract on the 14<sup>th</sup> of July, 2017 and that you will be on full conditions of service as per your contract.**
- ii. The authority is finalizing the procurement of the personal to holder vehicles for managers which will be allocated to you in line with your contract.**

**In view of this, kindly ensure that you fill in leave forms enclosed here in as per requirement.**

**Yours sincerely,**

**Radiation Protection Authority**

**Boster D. Siwila**

**Executive Director". (emphasis mine)**

9.40 It is from this letter that the Plaintiff argues that there is an enforceable contract to offer the Plaintiff one of the Vehicles that were in the process of procurement. And denying her the benefit to buy the said Vehicle was a breach of Contract therefore, she is entitled to damages for loss of opportunity to purchase it.

- 9.41 Having examined this letter, my considered view is that the import of clause ii. of the letter on which the Plaintiff infers a contract cannot be looked at in isolation from clause i. When the two clauses are looked at together, the inference I drew is that the parties were agreeing to ensure that the Plaintiff enjoys all the contractual benefits as agreed in the Contract of employment. Therefore, the meaning I discern from clause ii is that the Plaintiff was being assured that the one benefit she had not enjoyed would soon be fulfilled once the vehicles were procured.
- 9.42 My inference above is affirmed by the letter of 10<sup>th</sup> July, 2017 appearing at page 42 of the Plaintiff's documents where the Defendant proceeded to allocate the Plaintiff a motor vehicle GRZ 546 and assigned a driver to the said vehicle notwithstanding that the Plaintiff was on leave.
- 9.43 The Contract having come to an end, the Plaintiff was given a right of first refusal of the vehicle allocated to her. In this case the letter dated 10<sup>th</sup> July alluded to above, did in fact not just allocate a vehicle, it expressly offered the Plaintiff to buy the vehicle. This offer was rejected by the Plaintiff in her letter of 11<sup>th</sup> July, 2017.
- 9.44 Having analysed Clause 10.3 i. of the Contract of employment my understanding is that the personal to holder vehicle offered and

allocated to an officer was merely supposed to be one that is fit for official duties. Having arrived at this conclusion, I find no basis upon which the Plaintiff can validly reject the allocation of GRZ 546 as she has not demonstrated that it was not fit for official use. In fact, I take judicial notice and indeed infer from her letter of 11<sup>th</sup> July, 2017 that the vehicle has been used for official activities by the Defendant. In the premises I find that the opportunity to purchase the personal to holder vehicle allocated was given but rejected by the Plaintiff.

9.45 Further, the Plaintiff's claim fails by her own admission in her letter of 11<sup>th</sup> July, 2017 that the vehicle she sought to purchase was yet to be supplied or delivered. The vehicle in question was delivered after the Plaintiff's Contract of employment had come to an end.

9.46 The question that remains unanswered is; how could she be allocated a non-existent Vehicle let alone be offered to purchase the same? Further, how could the Plaintiff be offered to purchase the motor vehicle when the Contract between the parties had come to an end? To that end, the Defendant cannot be obliged to offer for sale a Vehicle whose purchase was concluded post the contract. I accordingly deny this claim as prayed.

**(vi) Whether the Plaintiff is entitled to the reliefs sought in the statement of Claim?**

9.47 The Plaintiff has claimed for 36 months salary for unlawful withholding of terminal benefits, damages for punitive and exemplary damages for wrongful payment of gratuity, an Order for payment of salaries until the date of full payment of gratuity, Damages for mental anguish, payment of leave allowance and an Order directing the re-computation of the Plaintiffs terminal benefits.

9.48 With regard to the claim for 36 months' salary for unlawful withholding of terminal benefits, the question that begs to be answered is whether the Defendant unlawfully withheld the Plaintiffs terminal benefits, to warrant the awarding of 36 months' salary as damages?

9.49 The Plaintiff through Counsel has submitted that the Defendant wrongly paid the Plaintiff her gratuity, as this is made clear by the Defendants further payment into Court of the gratuity. While the Defendant through Counsel has submitted that the Plaintiffs claim of 36 months' salary for unlawful withholding of terminal benefits is untenable, because the Plaintiff was paid her terminal benefits promptly.

9.50 Looking at the facts at hand, it has been made clear that the Plaintiff's Contract was terminated on the 13<sup>th</sup> of July, 2017 and her gratuity was computed on the 26<sup>th</sup> of July, 2017 as shown by page 37 of the Plaintiff's bundle of documents. And the accrued leave pay was paid in July as shown by the July 2017 payslip.

9.51 Further, upon the Defendant realising that the Plaintiffs gratuity had been wrongly computed, a re-computation was carried out and payment of gratuity with interest was made into Court.

9.52 In **Zambia National Building Society Vs Ernest Mukwamataba Nayunda**<sup>(17)</sup>, the Supreme Court held that:

***“The essence of damages has always been that the injured party should be put as far as monetary compensation can go in about the same position he would have been, had he not been injured.”***

9.53 In the case of **Chilanga Cement Vs Kasote Singogo**<sup>(18)</sup>, the Supreme Court though discussing dismissal had the following to say on the rationale behind awarding damages against an employee:

***“Enhanced damages are awarded to compensate for inconvenience and distress caused. Furthermore, these***

***damages are awarded to also condemn the malicious and improper manner an employer effects dismissal.”***

- 9.54 Looking at the facts in casu, though not a case of dismissal, the question to be answered is whether the employers conduct to the Plaintiff was malicious and improper to warrant the awarding of 36 months' salary as damages for unlawful withholding of terminal benefits? Or whether the Plaintiff has been injured by the plaintiff to warrant her being awarded 36 months' salary as damages.
- 9.55 It is my finding that the Defendant has not acted in a malicious or an improper way with regard the payment of the Plaintiffs terminal benefits. Rather, it has acted in good faith that even when it noticed the terminal benefits were computed with the wrong formula, a re-computation was carried out and promptly remedied.
- 9.56 It is my finding that the Defendant, has not acted in a way that would justify the awarding of 36 months' salary to the Plaintiff as damages. This is more so that the Defendant has not unlawfully withheld the Plaintiffs terminal benefits.
- 9.57 With regards the claim for damages for punitive and exemplary damages, the Plaintiff submits that payment of Gratuity regularly

and promptly is now a constitutional issue. Further that the act by the Defendant of allocating the Plaintiff a Vehicle which had been involved in an accident instead of the one procured for her, amounted to an abuse by the Defendant.

9.58 The Defendant on the other hand submitted through Counsel that the Plaintiff's gratuity was paid promptly, and with regards the motor vehicle, Counsel submitted that the Vehicle was only supplied and delivered after the Plaintiff had left employment of the Defendant.

9.59 The authors of **Labour Law in Zambia: An Introduction at page 138** have the following to say about exemplary and punitive damages:

***“Exemplary and punitive damages are awarded when the conduct of the employer deserves punishment because it acted in a manner that disregards the rights of the employee. These damages are awarded where the Court desires to make its disapproval of the employers conduct towards the employee by awarding the employee damages beyond the amount that would be adequate compensation for their actual injury”.***

9.60 A glance of the facts in casu does not reveal how the Defendant Conducted itself in a manner that disregarded the rights of the Plaintiff, because the Defendant promptly paid the Plaintiff her

gratuity in July 2017. And when it realised there was an error with the computation of her gratuity, a re-computation was carried out and payment of the gratuity into Court with interest was made. This to me, seems to be a conduct that should be applauded.

9.61 The Plaintiff has further claimed for an Order awarding her payment of salaries until the date of full payment of her gratuity.

9.62 **Article 189 (1) (2) of the Constitution of Zambia** provides that:

***“(1) A pension benefit shall be paid promptly and regularly;(2) where a pension benefit is not paid on a person last working day, that person shall stop work but the persons name shall be retained on the payroll until payment of the pension benefit based on the last salary received by that person while on the payroll.”***

9.63 Further in the case of **McQueen Zenzo Zaza Vs ZESCO Limited**<sup>(8)</sup>, the court stated that:

***“The mere fact that some amounts were found to have been underpaid following litigation did not transform the June 2016 payment into an instalment payment. The onus was on the Petitioner to prove that the June 2016 payment was indeed an instalment payment or partial payment envisaged under Article 189 (2) of the Constitution....”***

9.64 Looking at the facts at hand, as stated above, the Plaintiff was paid her gratuity promptly after the termination of her

employment. As guided by the McQueen case above, I find that the Defendants payment into Court did not constitute a second instalment as the first payment was made as a final payment and the payment made into Court was only made as a remedy upon the realisation that the payment that had been made was computed with a wrong formula.

9.65 The Plaintiff has also made a claim for mental anguish. It is the Plaintiff's position that the Defendants conduct of keeping her away from her gratuity deeply and continues to inconvenience her thereby causing her to suffer mental anguish.

9.66 It is trite law that the burden is always on the Plaintiff to prove his/her case on a balance of probabilities as per the case of Wilson Masauso Zulu Vs Avondale Housing Project<sup>(13)</sup>.

9.67 In the case of Standard Chartered Bank Zambia Plc v Singogo<sup>(19)</sup> the Supreme Court guided that damages for mental anguish should only be granted where they have been pleaded and proved.

9.68 Further in the case of the Attorney General Vs DG Mpundu<sup>(6)</sup> a case for unlawful suspension, the plaintiff was reinstated and recovered damages for mental distress and inconvenience. The evidence in that case clearly established that the respondent was

extremely inconvenienced and mentally tortured by the appellant council's inconsiderate treatment.

9.69 The position of the two cited cases above reveal that for one to be awarded damages for mental anguish, they ought to have pleaded the mental anguish and laid evidence to prove the same.

9.70 Looking at the facts in casu, the Plaintiff has indeed pleaded this claim, however she has not proved it. Further the Plaintiff's basis for the claim of mental anguish is untenable as it has already been found above that her gratuity was paid promptly therefore, she was not kept away from her gratuity.

9.71 With regards the plaintiffs claim for leave allowance, it is the Plaintiff's submission that She was entitled to leave allowance as such she must be paid. The Defendant on the other hand has demonstrated that the Plaintiffs accrued leave days were computed and paid as shown on the July 2017 payslip in the sum of K121,784.64.

9.72 A look at the documents before me as produced by the Plaintiff herself reveals that her Leave allowance was indeed paid in July as shown by the July 2017 payslip.

9.73 The Plaintiff further claimed for an Order directing the re-computation of the terminal benefits due to her, this is owing to


the fact that the Gratuity paid to the Plaintiff was incorrectly calculated. The Defendant through Counsel argues that this has been overtaken by events as the benefits were already recomputed.

9.74 I form the view that this claim has indeed been overtaken by events as the Defendants have already recomputed what was owed to the Plaintiff and paid it into Court with interest. Accordingly, I dismiss this claim.

### **10.0 CONCLUSION**

10.1 In view of my analysis above I find that all the Plaintiff's claims fail. I order that each party shall bear their own costs. Leave to appeal within 30 days is granted.

**DELIVERED AT LUSAKA THIS 24<sup>TH</sup> JANUARY, 2025.**

 .....

**S. V. SILOKA  
HIGH COURT JUDGE**