

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



2022/HP/1672

BETWEEN:

**SUBULWA LEONARD MASWENYEHO AND 29 OTHERS****PLAINTIFFS**

AND

**INDO ZAMBIA BANK LIMITED****DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 31<sup>st</sup> DAY OF JANUARY,  
2025**

*For the Plaintiffs* : Mr. M.L Mukande SC and Mr. M. Mukande, Messrs M.L  
Mukande & Company

*For the Defendant* : Mr. M.A Mukupa & Ms. R. Kasuba, Messrs Isaac & Partners  
and Mr. C. Hamwela & Ms. N. Chibuye, Messrs Nchito &  
Nchito Advocates

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

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CASES REFERRED TO:

1. *Pinnel 1602 5 CO REP 117A*
2. *Printing and Numerical Registering Company v Sampson 1875 LR 19 EQ 462*
3. *Khalid Mohamed v the Attorney General 1982 ZR 49*
4. *Wilson Masauso Zulu v Avondale Housing Project Limited 1982 ZR 172*
5. *Godfrey Miyanda v the Attorney General 1985 ZR 85*
6. *Mike Musonda Kabwe v BP Zambia Limited 1995-1997 ZR 218*
7. *Farrant v The Woodroffe School 1998 1 WLR 176 EAT*
8. *Peter Ngandwe and others v Zambia Oxygen Limited and another 1999 ZR 90*
9. *ZCCM & Ndola Lime Company v Emmanuel Sikanyika & others SCZ No 24 of 2000*
10. *Zambia Oxygen Limited & Zambia Privatisation Agency v Paul Chisakula and others 2000 ZR 27*
11. *National Milling Company Limited v Grace Simataa & three others 2000 ZR 91*
12. *Rosemary Ngorima & 10 others v Zambia Consolidated Copper Mines Appeal No 97 of 2000*

13. *Bank of Zambia v Jonas Tembo and others* 2002 ZR 103
14. *ZESCO Limited v Ignatious Muleba Sule & others Appeal No 170/2002*
15. *Galunia Farms Limited v National Milling Corporation Limited* 2004 ZR 1
16. *James Munkwa Zulu and others v Chilanga Cement Appeal No 12/2004*
17. *Toll (FGCT) Pty Limited v Alhapaharm Pty Limited* 2004 219 Commonwealth Law Reports-CLR-165
18. *Colgate Palmolive Zambia Inc v Able Shemu Chuka and 10 others* SCZ No 181 of 2005
19. *Cosmas Phiri and others v Lusaka Engineering Company Limited* SCZ No 1 of 2007
20. *Standard Chartered Bank Plc v Willard Solomon Nthanga and 402 others* SCZ No 13 of 2008
21. *Indo Zambia Bank Limited v Mushaukwa Muhanga* 2009 ZR 266
22. *ZAMTEL v Bernard Aaron Sakala Appeal No 152/2010*
23. *Mwamba v Nthenge and two others* SCZ No 5 of 2013
24. *Attorney General v Nachizi Phiri & 10 others* 2014 Vol 1 ZR 302
25. *Kenny Sililo v Mend A Bath Zambia Limited and Spenco Zambia Limited Appeal No 168/2014*
26. *Finance Bank Zambia Limited and Rajan Mahtani v Simataa Simataa Selected Judgment No 21 of 2017*
27. *Zambia Daily Mail v Grevesious Mayenga & two others* SCZ Appeal No 31 OF 2016
28. *Richard Musenyesa v Indo Zambia Bank Limited Appeal No 214/2016*
29. *Engen Petroleum (Zambia) Limited v Willis Muhanga & another* Appeal No 2 of 2020
30. *ZANACO v Ernestina Sakala & 62 others Appeal No 13/2021*
31. *Nyambe Martin Nyambe and others v Konkola Copper Mines Appeal No 2/2022*

OTHER WORKS REFERRED TO:

1. *A Comprehensive Guide to Employment Law in Zambia, by Winnie Sithole Mwenda and Chanda Chungu Lusaka, University of Zambia Press, 2021*
2. *Black's Law Dictionary, 7<sup>th</sup> Edition*

## 1. INTRODUCTION

- 1.1 Subulwa Leonard Maswenyeho and the other Twenty-Eight (28) Plaintiffs, initially commenced this action on 25<sup>th</sup>

October, 2022. By an amended Writ of Summons which was filed on 4<sup>th</sup> August, 2023, and was accompanied by a statement of claim and the other documents, Subulwa Leonard Maswenyeho and the others claim:

- i. *A declaration that the unilateral migration by Indo Zambia Bank Limited from the January, 2020 conditions of service to the December, 2020 conditions of service was illegal, null and void.*
- ii. *A declaration that the decision by Indo Zambia Bank Limited to calculate Subulwa Leonard Maswenyeho and the others' accrued benefits at a rate of Three (3) months' basic pay was wrongful and a violation of their conditions of service.*
- iii. *An Order for the recalculation of their accrued benefits at a rate of Three (3) months' pay for each year of service as contained in the January, 2020 conditions of service.*
- iv. *An Order for the payment of the difference between what was paid to Subulwa Leonard Maswenyeho and the others, at the rate of Three (3) months' basic pay and what accrued to them at the rate of Three (3) months' pay.*
- v. *Interests on the sums found due.*
- vi. *Costs.*
- vii. *Any other relief that the Court may deem fit.*

## **2. STATEMENT OF CLAIM**

2.1 In the amended statement of claim, Subulwa Leonard Maswenyeho and the others, stated that they were employed

by Indo Zambia Bank Limited on various dates, and that they occupied managerial positions.

- 2.2 It was stated that Indo Zambia Bank Limited is a financial institution which is in the business of banking, and operates under the ***Banking and Financial Services Act No 7 of 2017***. Further averment was made, that Indo Zambia Bank Limited has its' headquarters in Lusaka.
  - 2.3 The assertion was that the January, 2020 Conditions of Service, under paragraph 8.3.1 (a) provided that an employee was entitled to retirement benefits, which were calculated at the rate of Three (3) months. Then under paragraph 8.3.1 (a), provision was made that an employee was entitled to retirement benefits which were calculated at a rate, which was inclusive of all allowances for each completed year of continuous service.
  - 2.4 The contention was that the said provisions were used to pay other employees who retired from Indo Zambia Bank Limited.
  - 2.5 However, in December, 2020, Indo Zambia Bank Limited unilaterally varied the conditions of service by the December 2020 Conditions of Service, without the consent of Subulwa Leonard Maswenyeho and the others. It was stated in that regard, that paragraph 8.3.1(a) was amended to now provide that an employee was entitled to retirement benefits which were calculated at the rate of Three (3) months basic pay.
  - 2.6 The assertion was that the formula now excluded allowances in the computation, and some employees were paid on the
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said condition when they retired from Indo Zambia Bank Limited.

- 2.7 The allegation was further that on 26<sup>th</sup> October, 2021, Indo Zambia Limited wrote to its' employees, seeking their consent to vary their conditions of service for various Management staff in relation to the calculation of their severance packages.
- 2.8 Subulwa Leonard Maswenyeho and the others, contended that Indo Zambia Bank Limited proposed to pay off an amount, which was equal to the accrued benefits of the various Management employees, as at 31<sup>st</sup> October, 2021, which amounts would have been available at the time of their retirement, in line with the Conditions of Service, which were applicable at the time.
- 2.9 Further averment was made, that Indo Zambia Bank Limited proposed to pay the accrued benefits at the rate of Three (3) months basic pay for each year served, which did not include allowances in the computation. This Subulwa Leonard Maswenyeho and the others contended, was a grave departure from their conditions of service.
- 2.10 Still in laying down the basis for their claims, Subulwa Leonard Maswenyeho and the others, stated that it was indicated that should they fail to provide written consent to Indo Zambia Bank Limited, on or before 29<sup>th</sup> October, 2021, they would be deemed to have consented to the amendment to their conditions of service, and Indo Zambia Bank Limited would be at liberty to exercise any of the options that were

available to Subulwa Leonard Maswenyeho and the others, for and on their behalf.

- 2.11 The allegation was that due to Subulwa Leonard Maswenyeho and the others pressure and fear of losing their employment, some of them consented to the variation to their Conditions of Service, and they continued working on a reduced severance package, while others did not.
- 2.12 It was Subulwa Leonard Maswenyeho and the others assertion, that the variation to their Conditions of Service was fundamental and necessitated their declaration as being redundant, if they did not consent to the said variation.
- 2.13 Thus, upon realizing that they were underpaid their severance packages, as they were paid their accrued benefits, which were computed at a rate of Three (3) months basic pay, exclusive of allowances, based on the December 2020 Conditions of Service, and not Three (3) months pay, inclusive of allowances in accordance with the January, 2020 Conditions of Service, they made various written appeals against the said underpayment to Indo Zambia Bank Limited.
- 2.14 In that regard, it was stated that they individually sought recalculation of their accrued benefits, based on the January 2020 Conditions of Service, and payment of the differences that would be found due. However, the common thread in Indo Zambia Bank Zambia's response, was that the accrued benefits were paid to Subulwa Leonard Maswenyeho on the basis that they consented to the variation to their Conditions of Service.
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- 2.15 The claim was that Subulwa Leonard Maswenyeho and the others had suffered loss, as they were underpaid their accrued benefits after many years of service.

### **3. DEFENCE AND COUNTERCLAIM**

#### **DEFENCE**

- 3.1 In the amended defence and counterclaim, which was filed on 14<sup>th</sup> August, 2023, Indo Zambia Bank Limited stated that Subulwa Leonard Maswenyeho and the others were still its' employees. It was agreed that Indo Zambia Bank Limited operates under the ***Banking and Financial Services Act No 7 of 2017***.
- 3.2 The assertions relating to the provisions that were contained in paragraph 8.3.1 (a) of the January, 2020 Conditions of Service, and those that were introduced in paragraph 8.3.1 (a) of the December, 2020 Conditions of Service were denied. The defence was that the so-called December, 2020 Conditions of Service were consented to by the majority of the Plaintiffs in writing.
- 3.3 It was contended that for those who did not consent to the same in writing, they accepted the conditions, and started receiving the benefits which included a salary increment. The further assertion was that the December 2020 conditions were adjusted after consultation with all the affected employees and management.
- 3.4 Admission was made, that the December 2020 Conditions of Service adjusted the word *pay* to *basic pay* for purposes of calculating any terminal benefits for employees who were in management pay Grades MS 6-11. It was stated that it was
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for that reason, that Subulwa Leonard Maswenyeho and the others were requested to confirm in writing, that the calculation of their accrued benefits was accurate, which they did.

- 3.5 Denial was made to the allegation, that severance packages were offered to Subulwa Leonard Maswenyeho and the others, with the defence being that the letters dated 26<sup>th</sup> October, 2021, and the consents which were attached thereto, were connected with the migration of employees from the prevailing conditions of employment, which provided for qualified employees to be paid their retirement benefits at the rate of Three (3) months basic pay for each year served, to a defined contributory scheme.
  - 3.6 Indo Zambia Bank Limited stated that Subulwa Leonard Maswenyeho and the others, consented to the migration and confirmed in writing, that the calculation of the benefits which were to be paid to them were accurate. It was also contended, that at the time of the migration, most of the Plaintiffs had not qualified to be entitled to retirement benefits, and the payments were made for purposes of migrating the said employees to a defined contribution scheme.
  - 3.7 Reiteration was made, that Subulwa Leonard Maswenyeho and the others, were paid in accordance with the calculations which they themselves, confirmed were correct, and which were also in line with the December 2020 Conditions of Service.
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- 3.8 The assertion was that Subulwa Leonard Maswenyeho and the others were required to have indicated their consent to the variation to their Conditions of Service in writing, by 29<sup>th</sup> October, 2021, and that those who did not do so, would be deemed to have consented to the variation, and that Indo Zambia Bank Limited would be at liberty to exercise any of the options that were available to Subulwa Leonard Maswenyeho and the others, for and on their behalf, was denied.
- 3.9 The defence was that Subulwa Leonard Maswenyeho and the others would be put to strict proof of the allegation.
- 3.10 It was also Indo Zambia Bank Limited's defence, that Subulwa Leonard Maswenyeho and the others freely and willingly consented to the variation to their conditions of employment, after various townhall meetings, and Indo Zambia Bank Limited did not exert any undue influence or pressure on any of them, in the acceptance of the variation to the conditions of their employment.
- 3.11 Also alleged, was that Subulwa Leonard Maswenyeho and the others, either consented or acquiesced to the variation of the conditions of their employment, thereby negating the need to have them declared redundant.
- 3.12 On the payments that were made to Subulwa Leonard Maswenyeho and the others, Indo Zambia Bank Limited's defence was that Subulwa Leonard Maswenyeho and the others were always aware of the basis of the payment, and they consented to it, and its' attendant calculation.
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- 3.13 It was further contended that the payments were made on migration, in accordance with the prevailing conditions of service, and Subulwa Leonard Maswenyeho and the others were estopped from resiling on the payments, after they received consideration for the same.
- 3.14 Thus, as Subulwa Leonard Maswenyeho and the others, accepted the calculation of their terminal benefits, and they were paid on the basis of the acceptance, there was no requirement for recalculation of the said benefits. It was also contended that Subulwa Leonard Maswenyeho and the others, accepted immediate payment of what ordinarily was to be a future payment, and therefore any underpayment, which was denied, would not be actionable on the basis of accord and satisfaction.
- 3.15 It was therefore the defence, that the claims as made by Subulwa Leonard Maswenyeho and the others, were denied.

**COUNTERCLAIM**

- 3.16 As for the counterclaim, Indo Zambia Bank Limited, stated that Subulwa Leonard Maswenyeho and the others are seeking reliefs which were aimed at having the 26<sup>th</sup> October, 2021 agreements, which formed the basis upon which they were paid their accrued retirement benefits, to be invalidated or rendered null and void.
- 3.17 Thus, should Subulwa Leonard Maswenyeho and the others succeed, this would entail that the basis of the payment of the accrued retirement benefits, being the 26<sup>th</sup> October, 2021, would be invalidated, should the Court so find, as they

would be wrongful, and ought not to have been accepted by Subulwa Leonard Maswenyeho and the others.

3.18 The contention was that accordingly, Subulwa Leonard Maswenyeho and the others, would be obliged to repay the monies that they received from Indo Zambia Bank Limited, as that money would have arisen from the 26<sup>th</sup> October, 2021 agreement, which the Court would have declared null and void.

3.19 The counterclaim was for:

- i. The repayment of all the money that was paid to each of Subulwa Leonard Maswenyeho and the others as accrued benefits;*
- ii. Costs; and*
- iii. Any other relief that the Court may deem fit.*

#### **4. EVIDENCE AT TRIAL**

4.1 At trial, Subulwa Leonard Maswenyeho testified on behalf of the other Plaintiffs, and Indo Zambia Bank Limited called One (1) witness.

##### **PW1- SUBULWA LEONARD MASWENYEHO**

4.2 Subulwa Leonard Maswenyeho produced his witness statement as his evidence. In that witness statement, his testimony was that from inception, Middle Management and Senior Management Staff, were enjoying ZIMCO conditions of service. Then over the years, the conditions of service for that category of employees was unilaterally downgraded by top management, without the consent of the staff.

4.3 He testified that on 10<sup>th</sup> February, 2021, Indo Zambia Bank Limited management circulated a letter whose subject was

**SALARY AND CONDITIONS OF SERVICE REVIEW.** It was Subulwa Leonard Maswenyeho's evidence, that the thrust of that letter, was the announcement of various employee salaries, with page 271 of Subulwa Leonard Maswenyeho and the others bundle of documents, being referred to as the said letter.

- 4.4 Still in his testimony, Subulwa Leonard Maswenyeho stated that Indo Zambia Bank Limited awarded various percentage increases to various employees' salaries, which according to the letter, was done on the basic salary as defined in the Conditions of Service which had been revised, effective 10<sup>th</sup> February, 2021, which was the same date of the letter. Pages 271 and 326 of Subulwa Leonard Maswenyeho and others bundle of documents was referred to in that regard.
  - 4.5 With reference to the Conditions of Service which were at pages 373-381 of Subulwa Leonard Maswenyeho and the others' bundle of documents, the testimony that was given, was that Indo Zambia Bank Limited enclosed the December, 2020 Conditions of Service, which bore the signature for the Company Secretary, and a stamp which stated that the Conditions of Service had been revised, sanctioned, approved and ratified by the Board on December, 2020.
  - 4.6 His evidence was that the purported revision was done way before Subulwa Leonard Maswenyeho and the others were given the opportunity to consent and agree to the revision to their Conditions of Service.
  - 4.7 Averment was made, that in the same letter, which was dated 10<sup>th</sup> February, 2021, Indo Zambia Bank Limited asked
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Subulwa Leonard Maswenyeho and the others, to acknowledge acceptance of the said revised Conditions of Service, by signing the said letter on or before 19<sup>th</sup> February, 2021, as seen at pages 271 and 326 of Subulwa Leonard Maswenyeho and the others bundle of documents.

- 4.8 Further in his testimony, Subulwa Leonard Maswenyeho testified that the said letter referred to basic salary as defined, to give clarity on the computation of the emoluments. He stated that the clarity in the computation of the emoluments came by way of amending paragraph 8.3.1 (a) of the then existing and subsisting January, 2020 Conditions of Service.
- 4.9 He referred to pages 350 to 366 of Subulwa Leonard Maswenyeho and the others bundle of documents, as evidence of the salary and conditions of service review.
- 4.10 It was stated that according to paragraph 8.3.1 (a) of the revised December, 2020 Conditions of Service for Management staff, which was at page 379 of Subulwa Leonard Maswenyeho and the others bundle of documents, the calculation of the terminal benefits was changed from Three (3) months pay for each year served, to Three (3) months basic pay for each year served.
- 4.11 His testimony was further that basic pay, was defined in paragraph 2 (d), as the standard rate pay before additional payments, such as allowances and bonuses for a period not exceeding One (1) month, as seen at page 374 of the said bundle of documents.

- 4.12 Assertion was made, that this was a departure from the position that was contained in the January, 2020 Conditions of Service, which were at page 363 of the said bundle of documents, and provided in paragraph 8.3.1 (a), that the calculation of terminal benefits was to be done at a rate of Three (3) months pay for each year served.
- 4.13 Still in his testimony, Subulwa Leonard Maswenyeho, stated that on 18<sup>th</sup> February 2021, Senior Management, through the Chief Manager-Human Resources called for a virtual meeting with all middle management staff, to discuss the revised Conditions of Service. His evidence was that over Thirty (30) concerns were raised on which clarity was sought, which included:
- (a) Whether the introduction of the term basic pay under Clause 8.3.1 (a) would reduce the calculation of terminal benefits by excluding allowances;
  - (b) What would happen to those who would not consent to the 2021 terms and Conditions of Service for Management staff.
- 4.14 It was stated that page 275 of Subulwa Leonard Maswenyeho and the others bundle of documents, was an e-mail, which was sent to Mr Wakunguma regarding the review of the Conditions of Service. The assertion was that no response was received from the Chief Manager-Human Resources over the concerns that had been raised, and he instead promised to revert once he had consulted his superiors over the same. However, no such feedback was given.
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- 4.15 With reference to pages 150-178 of Volume 1 of Subulwa Leonard Maswenyeho and the others bundle of documents, testimony was given that some of the Plaintiffs consented to the revised December, 2020 Conditions of Service, while others withheld their consent, stating that they were waiting for clarity to be given on the proposed amendments.
- 4.16 It was stated that on 21<sup>st</sup> October, 2021, a road show meeting was held for Middle Management by Senior Management, in which it was indicated that Indo Zambia Bank Limited would pay terminal benefits based on the December, 2020 Conditions of Service, during the course of the intended migration to a contributory pension scheme.
- 4.17 Subulwa Leonard Maswenyeho testified that the following questions were asked to the Chief Manager- Human Resources:
- (a) Whether payment of terminal benefits would be done based on the December, 2020 Conditions of Service or the January, 2020 Conditions of Service, given that the issue was still pending his feedback from Management; and;
  - (b) Whether it was correct to apply retrospectively, the change in the formula which was applicable in calculating the terminal benefits.
- 4.18 The evidence that was given, was that the Chief Manager- Human Resources declined to answer, stating that he would revert at an appropriate time.
- 4.19 Then on 26<sup>th</sup> October, 2021, the Chief Manager- Human Resources, circulated a letter to Management Staff, which
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proposed an amendment to the December 2020 Conditions of Service, as seen at pages 340-341 of Subulwa Leonard Maswenyeho and the others bundle of documents, on the migration of Indo Zambia Bank Limited to a contributory benefit scheme, which would be managed by a Registered Fund Manager.

4.20 It was testified that the following Two (2) options were given to the employees:

1. To pay off the accrued benefits as at 31<sup>st</sup> October, 2021 at a rate of Three (3) months basic pay for each year served; or
2. Calculation of the accrued benefits as at 31<sup>st</sup> October, 2021, at the rate of Three (3) months' basic pay for each year served, and transferring the calculated amount to the Private Pension Fund as initial contribution.

4.21 Also, in his testimony, Subulwa Leonard Maswenyeho stated that the letter indicated that consent was to be communicated by the close of business on or before 29<sup>th</sup> October, 2021, and that objections to the proposed variation should also be received by the said date. It was further testified, that the letter stated that express rejection would trigger the redundancy process under the **Employment Code Act**.

4.22 Subulwa Leonard Maswenyeho's evidence, was also that Indo Zambia Bank Limited indicated that it would consider that the employee would have consented, if they did not forward any written objections as at 29<sup>th</sup> October, 2021, and it would exercise any of the options that were available to the

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employees which had been stated above. Thus, out of duress, everyone was compelled to sign the Consent Forms.

- 4.23 Still in his testimony, Subulwa Leonard Maswenyeho testified that Indo Zambia Bank Limited paid out the terminal benefits at the rate of Three (3) months' basic pay for each year served, notwithstanding that the issue regarding the amendment of paragraph 8.3.1 (a) concerning the calculation of the terminal benefits, had remained unresolved.
- 4.24 His evidence was that soon after the payment was made, some employees decided to write to the Chief Manager-Human Resource to protest against the payment of their terminal benefits at a rate of Three (3) months basic pay for each year served, as opposed to Three (3) months pay. It was stated that the response was unequivocally negative.
- 4.25 Then as seen from the letters which were at pages 37-39 of Subulwa Leonard Maswenyeho and the others bundle of documents, Indo Zambia Bank Limited responded negatively to the appeal letters which were sent. Thus, Subulwa Leonard Maswenyeho and the others sought legal redress.
- 4.26 His testimony was that the variation to the Conditions of Service, was done in bad faith, and in anticipation of migration to a Private Pension Fund. Further, that the paying off, of the Terminal Benefits at the rate of the basic pay, disadvantaged Management staff, as junior staff (unionized) were paid higher accrued benefits than their superiors, who were Management Staff, who took on more risk, and more responsibility in Indo Zambia Bank Limited.
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4.27 Therefore, a letter of demand, which was dated 26<sup>th</sup> September, 2022, was sent to Indo Zambia Bank Limited by Subulwa Leonard Maswenyeho and the others' advocates, seeking recalculation of their accrued terminal benefits. Then as seen from the response, which was in the letter dated 11<sup>th</sup> October, 2022, and was at page 553 of Subulwa Leonard Maswenyeho and the others bundle of documents, it was stated that the claims were untenable. Accordingly, on 8<sup>th</sup> November, 2022, this action was commenced.

**CROSS EXAMINATION OF SUBULWA LEONARD MASWENYEHO**

4.28 In cross examination, Subulwa Leonard Maswenyeho testified that he recently moved station from where he was an officer to where he was currently serving as Branch Manager, as he was promoted. He stated that he was happy with his promotion. Subulwa Leonard Maswenyeho agreed that around October, 2021, Indo Zambia Bank Limited paid him a colossal sum of money, in the amount of K1, 200, 000.00.

4.29 His testimony was that he had served Indo Zambia Bank Limited for Sixteen (16) years, and that he had continued in employment. Further agreement was made, that the payment of K1, 200, 000.00 came earlier, as it was supposed to come on his retirement.

4.30 On being referred to the Form of Consent, which was at page 393 of Indo Zambia Limited's bundle of documents, Subulwa Leonard Maswenyeho agreed that it had his name, and his station as Choma. Further admission was made, that

Subulwa Leonard Maswenyeho signed the document on 2<sup>nd</sup> November, 2021, to unlock the payment which was made to him.

- 4.31 He testified that page 394 was the amendment to the conditions of service, which he signed for at page 395, and that the said Conditions of Service were effective 1<sup>st</sup> January, 2021.
- 4.32 Then at page 144, was the formula for calculation of his retirement benefits, at Three (3) months basic pay for each year served. It was also agreed that Subulwa Leonard Maswenyeho, agreed to be bound by the varied conditions of service, and that in doing so, he stated that he had given consent freely and voluntarily, without coercion.
- 4.33 Admission was also made, that Subulwa Leonard Maswenyeho had said that he was adequately informed and educated about the migration to the Private Pension Scheme, and that Kelvin Tembo, his workmate, signed as his witness.
- 4.34 It was his evidence, that the current return on Government Bonds was at about Twenty-Five (25) percent. Subulwa Leonard Maswenyeho, testified that at the time of his testimony, he was aged Forty-Four (44) years, and that when he signed to be paid his retirement benefits, he was about Forty (40) years old. He stated that he had the option to work up to Sixty (60) years.
- 4.35 Subulwa Leonard Maswenyeho also told the Court that Twenty-Five (25) percent of K1, 200, 000.00 was K300, 000.00 which was payable yearly, and that in Nineteen (19) years, he would be paid K5, 700, 000.00, and he would also
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get the principal sum of K1, 200, 000.00, which would give him K6, 900, 000.00.

- 4.36 As for the sum that he claimed, Subulwa Leonard Maswenyeho testified that it was about K2, 000, 000.00. On being referred to the Account Statement which was at page 205 of Vol 1 of his and the others bundle of documents, his evidence was that he claimed K774, 891.06.
- 4.37 Further in cross examination, Subulwa Leonard Maswenyeho stated that Government Bonds are low risk investment. Therefore, he would get roughly K5, 700.00, which was almost Eight (8) times what he claimed. His position was that he was not willing to pay back the money so that he could be paid post retirement. It was agreed, that if Indo Zambia Bank Limited kept the money, it would have made a return on the same, which would have been higher than K5, 700, 000.00.
- 4.38 Still in cross examination, Subulwa Leonard Maswenyeho stated that the lending rate by Indo Zambia Bank Limited was around Twenty-Nine (29) percent, and that if it lent out that money, it would have made more than K5, 700, 000.00, which was more than Ten (10) times the amount of his claim. Subulwa Leonard Maswenyeho added that the same went for all the other Plaintiffs.
- 4.39 His testimony, was however that he did not agree that his being paid before he retired, meant that Indo Zambia Bank Limited had lost out on K7, 000, 000.00, and the opportunity to make use of that money.

- 4.40 When referred to the letter dated 29<sup>th</sup> October, 2021, which was at page 461 of Indo Zambia Bank Limited's bundle of documents, and which was written to Indo Zambia Bank Limited by the Labour Commissioner, Subulwa Leonard Maswenyeho agreed that he was familiar with the said letter. He told the Court that the letter was written as a result of the process that his colleagues started at the Ministry of Labour.
- 4.41 Further agreement was made, that the letter which was at page 456 of the said bundle of documents, was addressed to his colleague Collins Chiwatu, who is a Plaintiff in this matter. It was also Subulwa Leonard Maswenyeho's testimony, that in the letter which was at pages 463-464 of the said bundle of documents, the Labour Commissioner guided that they were not entitled to the claims.
- 4.42 He told the Court that he bought bonds worth K300, 000.00, and that he built a house, bought a farm, and paid off all his outstanding claims. Subulwa Leonard Maswenyeho's evidence was that he had moved into the house, and he was rearing goats, chickens and turkeys, on a Four (4) hectare farm. He, however denied that Indo Zambia Bank Limited had put him in a comfortable position, but agreed that he was able to do some things at a young age.
- 4.43 It was Subulwa Leonard Maswenyeho's testimony, when he was referred to the letter that Indo Zambia Bank Limited wrote to Kaponde Simipundu, which was at page 454 of Indo Zambia Bank Limited's bundle of documents, that Indo

Zambia Bank Limited gave the same position as the Labour Commissioner.

- 4.44 He agreed that the Labour Commissioner, in the letter which was at page 463, in paragraph 13, stated that notice of variation of the conditions of service was given. Subulwa Leonard Maswenyeho testified that he knew Nephas Madalitso Musangu, and Liza Maxwell Moyo stating that they were recently promoted.
- 4.45 Whilst agreeing that he knew Pretoria Chikwamba, Subulwa Leonard Maswenyeho denied that he was recently promoted, stating that he was Manager North End Branch, and that he was moved to Chilanga.
- 4.46 The evidence that Subulwa Leonard Maswenyeho further gave, was that Maimbolwa Maibulwa, Wendy Mwanza, and Getrude Ngoza were recently promoted, but he denied that Patricia Ndoti was recently promoted, although she was moved from Chilanga to head office. Further denial was made, that Indo Zambia Limited was a bad employer.
- 4.47 Subulwa Leonard Maswenyeho agreed that his colleagues signed the documents from Indo Zambia Bank Limited. His position was that even after they were paid the money, they wanted to access different conditions of service from 2021. He stated that they wanted the calculations to be done based on the basic pay with allowances, even if they signed the Conditions of Service which were effective January, 2021, which were applicable.
- 4.48 Subulwa Leonard Maswenyeho in his continued testimony, when referred to the terms and conditions for Management

Staff, Revised January, 2020, which were at page 1 of Indo Zambia Bank Limited's bundle of documents, testified that they were the conditions, pursuant to which they wanted to be paid. In that regard, particular reference was made to Clause 8.3.1 at page 14, which defined months' pay as basic pay and allowances.

- 4.49 He stated that Clause 2 (c) at page 3 of the said bundle of documents, defined gross earnings as salary and other allowances which were paid through the payroll.
- 4.50 It was agreed that page 14, did not state gross earnings, and Subulwa Leonard Maswenyeho, testified that his net pay was about K17, 000.00, whilst his gross earnings were about K35, 000.00, the highest that he had ever earned whilst working for Indo Zambia Bank Limited. The evidence that was given, was also that Subulwa Leonard Maswenyeho only knew of Two (2) people that he would be supervising, stating that it was a new branch.
- 4.51 Further in cross examination, it was testified that Subulwa Leonard Maswenyeho had worked for Sixteen (16) years as at 2021, and that he had not qualified to retire, as he had not served for Twenty (20) years or reached the retirement age of Fifty-Five (55) or Sixty (60) years. His evidence was that the payment was done outside the Conditions of Service, and that the parties agreed to it.
- 4.52 Subulwa Leonard Maswenyeho agreed that page 393 of Indo Zambia Bank Limited's bundle of documents, was the consent that he signed. Further agreement was made, that in the said consent, there was provision to object to the
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proposal. He contended that it was not true, that there was no force that was exerted on him to sign the consent, stating that he had no choice.

4.53 When cross examined further, Subulwa Leonard Maswenyeho, testified that at the bottom of the document, there was an option to sign the objection, and that at page 394, it stated that he was not forced to sign the variation. He added that he signed it freely and voluntarily, but he thereafter stated that he signed the consent as the options which were there, were not better than what he signed for.

**RE-EXAMINATION OF SUBULWA LEONARD MASWENYEHO**

4.54 Subulwa Leonard Maswenyeho, clarified in re-examination, that when he was paid K1, 200, 000.00 as accrued retirement benefits, Indo Zambia Bank Limited did not put him a better position, even though he had not qualified to retire. He stated that if he did not sign the consent, he would have been declared redundant, and he would have been paid less, under the *Employment Code Act No 3 of 2019*.

4.55 That marked the close of the case for Subulwa Leonard Maswenyeho and the others.

**DW1-CHRISTOPHER WAKUNGUMA**

4.56 The sole witness for Indo Zambia Bank Limited was Christopher Wakunguma, the Head Human Resources at the said Indo Zambia Bank Limited. He produced his witness statement as his testimony, after he identified it.

4.57 It was his testimony, in that witness statement, that Subulwa Leonard Maswenyeho and the others were

employed by Indo Zambia Bank Limited in various positions and that they served under the Terms and Conditions for Management Staff in MS-6 to MS-11 (the January 2020 Conditions of service) which were communicated and agreed to, by most of Subulwa Leonard Maswenyeho and the others in writing, as seen at pages 1-53 of Indo Zambia Bank Limited's bundle of documents, and page 1 of its' supplementary bundle of documents.

- 4.58 His evidence was further that Indo Zambia Bank Limited introduced the Conditions of Service which were at pages 54-149 of its' bundle of documents, which were communicated in writing. Christopher Wakunguma also testified, that the said Conditions of Service were explained to Subulwa Leonard Maswenyeho and the others in a Town Hall meeting, which was attended by Subulwa Leonard Maswenyeho and the others on 17<sup>th</sup> February, 2021.
- 4.59 Still in his evidence, he stated that most of Subulwa Leonard Maswenyeho and the others, accepted the Conditions of Service, with pages 150-178 of Indo Zambia Bank Limited's bundle of documents being referred to. Christopher Wakunguma testified that those Plaintiffs who did not consent, received benefits under on account of the change, and as a well as the salary increment.
- 4.60 He continued testifying, stating that in the letters dated 26<sup>th</sup> October, 2021, and the consents which were attached thereto, Subulwa Leonard Maswenyeho and the others consented to migrate from the prevailing Conditions of Service of employment, which provided for qualified
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get the principal sum of K1, 200, 000.00, which would give him K6, 900, 000.00.

- 4.36 As for the sum that he claimed, Subulwa Leonard Maswenyeho testified that it was about K2, 000, 000.00. On being referred to the Account Statement which was at page 205 of Vol 1 of his and the others bundle of documents, his evidence was that he claimed K774, 891.06.
- 4.37 Further in cross examination, Subulwa Leonard Maswenyeho stated that Government Bonds are low risk investment. Therefore, he would get roughly K5, 700.00, which was almost Eight (8) times what he claimed. His position was that he was not willing to pay back the money so that he could be paid post retirement. It was agreed, that if Indo Zambia Bank Limited kept the money, it would have made a return on the same, which would have been higher than K5, 700, 000.00.
- 4.38 Still in cross examination, Subulwa Leonard Maswenyeho stated that the lending rate by Indo Zambia Bank Limited was around Twenty-Nine (29) percent, and that if it lent out that money, it would have made more than K5, 700, 000.00, which was more than Ten (10) times the amount of his claim. Subulwa Leonard Maswenyeho added that the same went for all the other Plaintiffs.
- 4.39 His testimony, was however that he did not agree that his being paid before he retired, meant that Indo Zambia Bank Limited had lost out on K7, 000, 000.00, and the opportunity to make use of that money.

- 4.40 When referred to the letter dated 29<sup>th</sup> October, 2021, which was at page 461 of Indo Zambia Bank Limited's bundle of documents, and which was written to Indo Zambia Bank Limited by the Labour Commissioner, Subulwa Leonard Maswenyeho agreed that he was familiar with the said letter. He told the Court that the letter was written as a result of the process that his colleagues started at the Ministry of Labour.
- 4.41 Further agreement was made, that the letter which was at page 456 of the said bundle of documents, was addressed to his colleague Collins Chiwatu, who is a Plaintiff in this matter. It was also Subulwa Leonard Maswenyeho's testimony, that in the letter which was at pages 463-464 of the said bundle of documents, the Labour Commissioner guided that they were not entitled to the claims.
- 4.42 He told the Court that he bought bonds worth K300, 000.00, and that he built a house, bought a farm, and paid off all his outstanding claims. Subulwa Leonard Maswenyeho's evidence was that he had moved into the house, and he was rearing goats, chickens and turkeys, on a Four (4) hectare farm. He, however denied that Indo Zambia Bank Limited had put him in a comfortable position, but agreed that he was able to do some things at a young age.
- 4.43 It was Subulwa Leonard Masenyeho's testimony, when he was referred to the letter that Indo Zambia Bank Limited wrote to Kaponde Simipundu, which was at page 454 of Indo Zambia Bank Limited's bundle of documents, that Indo

Zambia Bank Limited gave the same position as the Labour Commissioner.

- 4.44 He agreed that the Labour Commissioner, in the letter which was at page 463, in paragraph 13, stated that notice of variation of the conditions of service was given. Subulwa Leonard Maswenyeho testified that he knew Nephas Madalitso Musangu, and Liza Maxwell Moyo stating that they were recently promoted.
- 4.45 Whilst agreeing that he knew Pretoria Chikwamba, Subulwa Leonard Maswenyeho denied that he was recently promoted, stating that he was Manager North End Branch, and that he was moved to Chilanga.
- 4.46 The evidence that Subulwa Leonard Maswenyeho further gave, was that Maimbolwa Maibulwa, Wendy Mwanza, and Getrude Ngoza were recently promoted, but he denied that Patricia Ndoti was recently promoted, although she was moved from Chilanga to head office. Further denial was made, that Indo Zambia Limited was a bad employer.
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- 4.58 His evidence was further that Indo Zambia Bank Limited introduced the Conditions of Service which were at pages 54-149 of its' bundle of documents, which were communicated in writing. Christopher Wakunguma also testified, that the said Conditions of Service were explained to Subulwa Leonard Maswenyeho and the others in a Town Hall meeting, which was attended by Subulwa Leonard Maswenyeho and the others on 17<sup>th</sup> February, 2021.
- 4.59 Still in his evidence, he stated that most of Subulwa Leonard Maswenyeho and the others, accepted the Conditions of Service, with pages 150-178 of Indo Zambia Bank Limited's bundle of documents being referred to. Christopher Wakunguma testified that those Plaintiffs who did not consent, received benefits under on account of the change, and as a well as the salary increment.
- 4.60 He continued testifying, stating that in the letters dated 26<sup>th</sup> October, 2021, and the consents which were attached thereto, Subulwa Leonard Maswenyeho and the others consented to migrate from the prevailing Conditions of Service of employment, which provided for qualified

employees to be paid retirement benefits, at the rate of Three (3) months basic pay for each year served to a defined contributory scheme.

- 4.61 He denied that a severance package was offered to Subulwa Leonard Maswenyeho and the others, adding that at the time of the migration, most of Subulwa Leonard Maswenyeho and the others had not qualified to be entitled to retirement benefits, and that the payments were made for purposes of migrating the said employees to a defined pension scheme.
- 4.62 Pages 282-425, and pages 181-281 of Indo Zambia Bank Limited's bundle of documents, as well as pages 3-7 of its' supplementary bundle of documents, was stated as being the migration and terms of payment, including how much would be paid to each of them, adding that they were individually agreed by each one of them.
- 4.63 Further testimony was given, that each of Subulwa Leonard Maswenyeho and the others, consented to the migration and they confirmed in writing, that the calculation of the benefits that were to be paid to them were accurate. Addition was made, that in some instances, the calculations were amended and were confirmed by the respective Plaintiffs.
- 4.64 The assertion was that each of Subulwa Leonard Maswenyeho and the others, willingly and freely consented to the variation to the conditions of employment, after various meetings, and that no undue influence or pressure was exerted. It was further stated, that they consented to the changes, which was confirmed in writing.

4.65 Christopher Wakunguma's testimony was that on that account, Subulwa Leonard Maswenyeho and the others could not deny the computations after they had already been paid, as they accepted them, and there was immediate payment of what was supposed to be a future payment.

4.66 Pages 426-457 of Indo Zambia Bank Limited's bundle of documents was referred to in that regard. In concluding his testimony, Christopher Wakunguma stated that Indo Zambia Bank Limited consulted the Ministry of Labour and Social Security, as seen in the letter which was at pages 458-480 of Indo Zambia Bank Limited's bundle of documents. He denied that Subulwa Leonard Maswenyeho and the others were entitled to the reliefs sought.

**CROSS EXAMINATION OF CHRISTOPHER WAKUNGUMA**

4.67 When cross examined, Christopher Wakunguma's evidence was that he had been in charge of human resources for Twelve (12) years, and that he had seen the list of Plaintiffs. His position was that at the time of migration, Subulwa Leonard Maswenyeho and the others all signed.

4.68 He told the Court that the idea of varying the conditions of service was introduced in two different phases, that is firstly through a virtual Town Hall, and in secondly by writing, around December, 2020, if he was correct.

4.69 When referred to the memorandum titled Review of Current Terminal Benefits Provisions to all Staff, which was dated 6<sup>th</sup> October, 2020, and was at page 313 of Volume 2, of Subulwa Leonard Maswenyeho and the others bundle of documents, and the letter to Mr. Moyo on amendments to the terms and

conditions of service for Management Staff in Grade MS10, which was at pages 282-283 of Indo Zambia Bank Limited's bundle of documents, he testified that page 313 of Subulwa Leonard Maswenyeho's bundle of documents which was from the Managing Director, could have been the first one on terminal benefits.

- 4.70 Christopher Wakunguma testified that nothing could be implemented until the Board approved. He stated that during the survey in October, 2021, the conditions which were at pages 373 -374 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents applied. He added that the Conditions of Service which were being surveyed, had not yet been approved.
- 4.71 Still in cross examination, Christopher Wakunguma's evidence was that the Circular which was referred to, at page 313, was dated October, 2021, and that it referred to collecting information relating to a pension scheme. He took the position that the Conditions of Service which were prevailing at the time of the survey, were those which were at page 373.
- 4.72 Christopher Wakunguma added that the said Conditions of Service were effective 1<sup>st</sup> January, 2021, and that they were revised in 2020. It was his testimony, that prior to those Conditions of Service, there were other Conditions of Service which were applicable.
- 4.73 On being referred to the Terms and Conditions of Service for Management Staff in MS6-MS11 Revised July 2020, which were at page 310 a of Volume 2 of Subulwa Maswenyeho and

the others bundle of documents, and the letter which was addressed to Mr. Moyo, which was at pages 282-283 of Indo Zambia Limited's Bundle of documents, his evidence was that it was an amendment to the Conditions of Service for Management Staff in MS10, with regard to the pension scheme.

- 4.74 Christopher Wakunguma further testified that (1) was on payment of terminal benefits at Three (3) months basic pay, adding that it was in the Conditions of Service. He clarified that before the amendment in January, 2021, Three (3) months pay for each year served was applicable.
- 4.75 His continued testimony in cross examination, was that on being employed, the employees were agreeable in the majority, and questions for clarity were raised, which were responded to.
- 4.76 Christopher Wakunguma's response, when he was referred to the email, which was at page 276 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, was that it was addressed to him, in which the employees were apprehensive. He told the Court that the employees were met, and their apprehensions were addressed, and they signed the consent.
- 4.77 He agreed that at page 277 of the said bundle of documents, was a letter by an employee Kaunda Musebe, which stated that he had not received a response. It was testified that at the time, that was the position. Page 275 of the said bundle of documents, was said to be an email, which was also

addressed to Christopher Wakunguma, and that it also expressed apprehension.

- 4.78 He testified that in the email which was at page 273, the employee asked for more time to understand. The evidence that Christopher Wakunguma further gave, was that the employees were given Two (2) days to understand, but that his office was open for consultation. It was his testimony, that by October, 2021, everyone who had been paid had consented.
- 4.79 Further in cross examination, Christopher Wakunguma stated that as seen at page 278 of the said bundle of documents, he had responded to some of the queries which had been raised, stating that the new conditions were in force, as well as the options that were available.
- 4.80 His position was that according to the letter, the new conditions would apply if one signed or they did not. It was his contention that a choice was there, as if an employee did not sign, they would be declared redundant. Christopher Wakunguma denied that employees who would be declared redundant would land themselves unfavourable Conditions of Service, as well as those who resigned.
- 4.81 Agreement was made, that the matter ended up with the Labour Commissioner, by way of a complaint letter by the employees. Christopher Wakunguma further agreed with the contents of paragraphs 5 and 6 of the letter that the Labour Commissioner wrote to the Managing Director of Indo Zambia Bank Limited, on 17<sup>th</sup> February, 2021, which was at

pages 466-467 of Indo Zambia Bank Limited's bundle of documents.

- 4.82 He also agreed that according to the letter, Indo Zambia Bank Limited was varying superior conditions of service, and he added that the variation was for everyone who was exiting the Bank.
- 4.83 Christopher Wakunguma reiterated that the consent was obtained freely and voluntarily, and that the new conditions came into force on 1<sup>st</sup> January, 2021. He however could not recall the date when the variation was approved by the Board, but stated that it was in 2021. Christopher Wakunguma insisted that when the migration was done, the consent of the Board had been obtained.
- 4.84 He also testified that the Conditions of Service came into effect on 1<sup>st</sup> January, 2021, but that the October/November 2021 variation, introduced the contributory pension scheme.
- 4.85 It was Christopher Wakunguma's testimony, when he was referred to the letter that Indo Zambia Bank Limited wrote to Kaunda Musebe on 10<sup>th</sup> February, 2021, on the Salary and Conditions of Service Review, which was at page 271 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, that the Conditions of Service were effective 1<sup>st</sup> January, 2021.
- 4.86 He added that however, on 10<sup>th</sup> February, 2021, Indo Zambia Bank Limited, was seeking confirmation of the Conditions of Service. Christopher Wakunguma, nevertheless maintained that approval of the Board had been

obtained by that date, and that the said approval was done before the staff were communicated to.

- 4.87 With reference to page 327 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, which were emails that were forwarded from James Muyoba in which acknowledgment of the salary increment was made, and he stated that he was asking for a bit more time on the Conditions of Service, Christopher Wakunguma testified that he was aware of the counterclaim by Indo Zambia Bank Limited.
- 4.88 He told the Court that Subulwa Leonard Maswenyeho and the others were paid at Three (3) months basic pay for each year served in 2021, based on the annual increment of 2020, being the last drawn salary.
- 4.89 On the increment, Christopher Wakunguma testified that it was based on inflation, Indo Zambia Bank Limited's capacity, and the cost of living, but not on performance of an employee. When he was however referred to the letter which was addressed to Kaunda Musebe, which was at page 271 of Volume 2 of Subulwa Leonard Maswenyeho's bundle of documents, Christopher Wakunguma stated that the employee's salary increment was based on performance, and it was part of the payment of his benefits, as it was the last drawn salary.
- 4.90 He nevertheless took the position, that performance was not part of the benefits computation, as it was gratuitous payment, based on agreement by the parties, regardless of the salary having been increased, based on performance. In

concluding the cross examination, it was Christopher Wakunguma's testimony that Subulwa Leonard Maswenyeho and the others were paid based on agreement as a compromise outside the Conditions of Service.

**RE-EXAMINATION OF CHRISTOPHER WAKUNGUMA**

- 4.91 In re-examination, Christopher Wakunguma testified that in the letter, which was at page 271 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, the Bank's performance, and not the individual's notch was referred to. He clarified that no employee complained about the salary increment, and that the letter which was written to Indo Zambia Bank Limited, by the Labour Commissioner which was at page 466 of its' bundle of documents, was dated 17<sup>th</sup> February, 2021.
- 4.92 He further clarified that the letter that the Labour Commissioner wrote to Indo Zambia Bank Limited, which was at page 461 of the said bundle of documents, was dated 29<sup>th</sup> October, 2021, and it referred to the Conditions of Service, which were altered in January 2021, with the concurrence of the parties, long before the proposed establishment of the pension scheme. He added that it was the final position from the Ministry.
- 4.93 With reference to the letter which was written to Kaunda Musebe, and was at page 271 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, Christopher Wakunguma's clarification, was that the salary increment came as part of the variation of the Conditions of Service. He stated that rejection of one, was rejection of the

others, and that the employees were in a better position, emoluments wise, as they accepted the variation.

4.94 That marked the close of the case for Indo Zambia Bank Limited.

## **5. DECISION OF THIS COURT**

5.1 I have considered the evidence and the submissions.

### **FACTS NOT IN DISPUTE**

5.2 It is common cause that Subulwa Leonard Maswenyeho and the others are management employees of Indo Zambia Bank Limited. It is also not in dispute, that at the material time, the terms and conditions for Management Staff at Indo Zambia Bank Limited were allegedly governed by the December, 2020 Conditions of Service, after amendment was made to the January, 2020 Conditions of Service, and the employees were duly notified of the same, by a Circular letter which was dated 10<sup>th</sup> February, 2021.

5.3 There is no contention that on 21<sup>st</sup> October, 2021, Indo Zambia Bank Limited wrote to its' Management employees, seeking to vary their Conditions of Service, in relation to calculation of retirement benefits for purposes of migration to a contributory pension scheme, which would be managed by a Fund Manager from outside Indo Zambia Bank Limited.

5.4 It is not in dispute, that on 26<sup>th</sup> October, 2021, Indo Zambia Limited circulated a letter to Management Staff proposing to vary the December, 2020 Conditions of Service which were dated 1<sup>st</sup> January, 2021, to migrate to a contributory pension scheme, in which it was proposed to pay the said Management Staff their accrued retirement benefits at Three

(3) months' basic pay or to have the said calculated accrued retirement benefits transferred to the contributory pension fund as initial contribution.

5.5 Further not in contention, is that in the letter dated 26<sup>th</sup> October, 2021, Indo Zambia bank Limited requested the Management Staff to consent or object to the said migration to a contributory pension scheme by 29<sup>th</sup> October, 2021.

5.6 The facts which are also common cause, are that Indo Zambia Bank Limited paid Subulwa Leonard Maswenyeho and the others, their accrued retirement benefits, as it was migrating to a contributory pension scheme.

**ISSUES IN DISPUTE**

5.7 It is in contention whether Indo Zambia Bank Limited unilaterally varied the Conditions of Service for Management Staff in December, 2020. Also, in dispute, is whether Subulwa Leonard Maswenyeho and the others are entitled to a recalculation of their accrued retirement benefits with interest thereon, based on the January, 2020 Conditions of Service.

5.8 Further in contention, is whether, Subulwa Leonard Maswenyeho and the others should pay back the amounts of money to Indo Zambia Bank Limited that were paid to them as accrued retirement benefits on migrating to a contributory pension scheme.

**ANALYSIS**

5.9 The testimony as given by Subulwa Leonard Maswenyeho on behalf of the other Plaintiffs, was that as Management Staff, they were serving under the January, 2020 Conditions of

Service, which in Clause 8.3.1 (a) provided that they were entitled to Three (3) months' pay for each completed year of service as retirement benefits, and that the said pay was inclusive of all the allowances.

5.10 Subulwa Leonard Maswenyeho contended that Indo Zambia Bank Limited in December 2020, unilaterally varied the Conditions of Service without their consent, which saw an amendment to Clause 8.3.1 (a) to provide that upon retirement, they would be entitled to retirement benefits, which were calculated at Three (3) months basic pay, and which excluded allowances.

5.11 It was Subulwa Leonard Maswenyeho's testimony, that Indo Zambia Bank Limited on 10<sup>th</sup> February, 2021, announced various degrees of salary increments to the basic salaries of its' employees, effective the said 10<sup>th</sup> February, 2021. His evidence was also that Indo Zambia Bank Limited introduced new and revised conditions which had a sanctioned, approved and ratified stamp for the Board, which was dated 8<sup>th</sup> December, 2020, and that the said Conditions of Service were effective 1<sup>st</sup> January, 2021.

5.12 His contention was that these Conditions of Service were done way before himself and the other Plaintiffs were given opportunity to consent or agree to the revision of their Conditions of Service. Subulwa Leonard Maswenyeho also testified that in the said letter dated 10<sup>th</sup> February, 2021, they were asked to acknowledge acceptance of the revised Conditions of Service by signing the letter before 19<sup>th</sup> February, 2021.

5.13 His assertion was that the revised conditions, amended Clause 8.3.1 (a) of the January 2020 Conditions of Service, for retirement benefits to be calculated at Three (3) months basic pay for each year served. He added that *basic salary* was defined in Clause 2 (d) as standard rate pay before additional payments, such as allowances and bonuses for a period not exceeding One (1) month.

5.14 The testimony was that also given, was that on 18<sup>th</sup> February, 2021, a virtual meeting was held with the Chief Manager-Human Resources to discuss the revised Conditions of Service, at which clarity was sought on a number of issues, which included:

(a) Whether the introduction of the term basic pay under Clause 8.3.1 (a) would reduce the calculation of terminal benefits by excluding allowances;

(b) What would happen to those who did not consent to the 2021 Terms and Conditions of Service for Management Staff.

5.15 The assertion was that the Chief Manager-Human Resources did not respond to the questions that had been raised, and he informed the meeting that he would revert once he had discussed with his superiors.

5.16 Subulwa Leonard Maswenyeho stated that this notwithstanding, some of the Plaintiffs consented to the revised conditions, while others held off, waiting for clarity on the questions that had been raised.

5.17 His evidence was also that, on 21<sup>st</sup> October, 2021 a Road Show meeting was called at which Middle Management was

informed that Indo Zambia Bank Limited would pay terminal benefits, based on the December, 2020 Conditions of Service as Indo Zambia Bank Limited intended to migrate to a contributory pension scheme.

5.18 He stated that the questions which were raised in that meeting were;

(a) Whether payment of terminal benefits would be done based on the December 2020 Conditions of Service or the January, 2020 Conditions of Service, given that the issue was still pending his feedback from Management; and;

(b) Whether it was correct to apply retrospectively the change in the formula in calculating the terminal benefits.

5.19 The allegation was that the Chief Manager-Human Resources declined to respond, stating that he would revert later. Then on 26<sup>th</sup> October, 2021, the Chief Manager-Human Resources circulated a letter to Management Staff proposing amendment to the December, 2020 Conditions of Service to provide for a contributory pension scheme and gave the following two options:

(a) To pay off accrued benefits as at 31<sup>st</sup> October, 2021 at the rate of Three (3) months basic pay for each year served; or

(b) Calculation of the accrued benefits as at 31<sup>st</sup> October, 2021, at the rate of Three (3) months basic pay for each year served and transferring the calculated amount to the Private Pension Fund as initial contribution.

- 5.20 Subulwa Leonard Maswenyeho stated that the accrued pension benefits were calculated on 31<sup>st</sup> October, 2021 at Three (3) basic pay for each year served. Further, Management Staff were required to communicate their consent or objection at the close of business on 29<sup>th</sup> October, 2021. His evidence was that the letter also stated that any express objection, would trigger redundancy under the ***Employment Code Act***.
- 5.21 It was also testified that the letter indicated that where no objection was raised, it would be considered that the employee had consented, and Indo Zambia Bank Limited would be at liberty to exercise any of the options that were available on their behalf. Thus, out of apparent duress, everyone was compelled to sign the Consent forms.
- 5.22 Then thereafter, Indo Zambia Bank Limited proceeded to pay out the accrued retirement benefits, and Management Staff subsequently wrote a letter of protest against the underpayment, which yielded no positive results. That was how they sued.
- 5.23 On the part of Indo Zambia Bank Limited, Christopher Wakunguma testified that the January 2020 (Conditions of Service) were communicated and agreed to, by most of Subulwa Leonard Maswenyeho and the others in writing, as seen at pages 1-53 of Indo Zambia Bank Limited's bundle of documents, and page 1 of its' supplementary bundle of documents.
- 5.24 His evidence was further that Indo Zambia Bank Limited introduced the Conditions of Service which were at pages 54-

149 of its' bundle of documents, and were communicated in writing. Christopher Wakunguma further testified, that the said Conditions of Service were explained to Subulwa Leonard Maswenyeho and the others, in a Town Hall meeting which was attended by Subulwa Leonard Maswenyeho and the others on 17<sup>th</sup> February, 2021.

- 5.25 The testimony that Christopher Wakunguma further gave, was that most of Subulwa Leonard Maswenyeho and the others, accepted the Conditions of Service, as seen at pages 150-178 of Indo Zambia Bank Limited's bundle of documents. His evidence was that those Plaintiffs who did not consent, received benefits under on account of the change, and as well as the salary increment.
- 5.26 Further evidence that was given by Christopher Wakunguma, was that in the letters dated 26<sup>th</sup> October, 2021, and the consent which was attached thereto, Subulwa Leonard Maswenyeho and the others consented to migrate from the prevailing Conditions of Service, which provided for qualified employees to be paid retirement benefits, at the rate of Three (3) months basic pay for each year served to a defined contributory scheme.
- 5.27 He denied that a severance package was offered to Subulwa Leonard Maswenyeho and the others, adding that at the time of the migration, most of Subulwa Leonard Maswenyeho and the others had not qualified to be entitled to retirement benefits, and that the payments were made for purposes of migrating the said employees to a defined pension scheme.
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- 5.28 Christopher Wakunguma testified that pages 282-425, and pages 181-281 of Indo Zambia Bank Limited's bundle of documents, as well as pages 3-7 of its' supplementary bundle of documents, were the documents relating to the migration, and the terms of payment, including how much would be paid to each of them. He stated that the said documents were individually agreed by each one of them.
- 5.29 Also, in his testimony, Christopher Wakunguma stated that each of Subulwa Leonard Maswenyeho and the others, consented to the migration, and they confirmed in writing that the calculation of the benefits that were to be paid to them were accurate. He added that in some instances, the calculations were amended, and were confirmed by the respective Plaintiffs.
- 5.30 It was Christopher Wakunguma's assertion that each of Subulwa Leonard Maswenyeho and the others, willingly and freely consented to the variation to the conditions of employment, after various meetings, and that no undue influence or pressure was exerted. He further testified, that they consented to the changes, which was confirmed in writing.
- 5.31 The evidence that Christopher Wakunguma further gave, was that on that account, Subulwa Leonard Maswenyeho and the others, could not deny the computations after they had already been paid, as they accepted them, and there was immediate payment of what was supposed to be a future payment.
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- 5.32 He stated that Indo Zambia Bank Limited consulted the Ministry of Labour and Social Security.
- 5.33 The record shows that Subulwa Leonard Maswenyeho and the others, as middle management, were employed under the Conditions of Service, dated January, 2020 before the January, 2021 Conditions of Service which are in contention allegedly came into effect.
- 5.34 In the submissions, and with reference to the letter that was written to Kaunda Musebe, on 10<sup>th</sup> February, 2021, which is at page 271 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, a salary increase was given to middle management.
- 5.35 The submission was that according to that letter, the salary increase was now a percentage of the salary, unlike previously, as seen at page 270 of the said bundle of documents, when the base was the salary. Submission was further made, that in the letter at page 271, it was stated that the Conditions of Service for Grade MS11 had been revised effective 10<sup>th</sup> February, 2021, and that under item 2 use of the word *salary* was defined to give clarity to the calculation of emoluments.
- 5.36 It was submitted that the employees were called upon to give their consent to the Conditions of Service, not later than 19<sup>th</sup> February, 2021. The submission was also that some employees gave their consent, while others did not. Then thereafter, meetings were held, after which some employees gave their consent while others did not.
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- 5.37 Then in the email, which Christopher Wakunguma wrote on 28<sup>th</sup> April, 2021, which was at page 278 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, he had informed the employees that the new Conditions of Service applied, and they could either retire if they had reached the retirement age, as per the conditions of service, or they could resign if they had not reached the retirement age.
- 5.38 The contention was that going by that response, those who did not consent stood to lose their jobs or get an inferior package.
- 5.39 The Plaintiffs, Mbiko Moyo, Kaponde Simpundu, Clifford Shanobe, Madrine Lungu, Moses Zulu, Patricia Ndoti, Monica Chintu, Liza Maxwell, Kenneth Mwanza, Wendy Mwanza, Pretoria Chikwamba, Subulwa Leonard Maswenyeho, Kaunda Musebe, Willie Lembalemba, James Muyoba, Mabunde Maimbolwa and Jessie Mwiinga were stated as those, who did not sign the consent, with pages 150-170 of Indo Zambia Bank Limited's bundle of documents being referred to, in that regard.
- 5.40 It was submitted that the documents on record showed that the employees consented to migrate to a contributory pension scheme. However, their contention was the variation in the computation formula of the benefits from the use of *salary* to *basic salary*.
- 5.41 The letter that Kaunda Musebe Chonde wrote to Christopher Wakunguma, which was at page 284 of Volume 2 of Subulwa

Leonard Maswenyeho and the others bundle of documents was referred to in support of that position.

- 5.42 Therefore, the contention was that the Managing Director's letter to the Labour Commissioner, which was at pages 469-472 of Indo Zambia Bank Limited's bundle of documents, and was dated 6<sup>th</sup> October, 2022, in which assertion was made, that the employees consented freely and voluntarily was not true.
- 5.43 The position that was taken by Subulwa Leonard Maswenyeho and the others, was that some employees were fearful, given the response that Christopher Wakunguma gave, in the email which was at page 278 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, stating that the new conditions applied.
- 5.44 It was further submitted that the issue of consenting to the varied Conditions of Service, raged on until October, 2021, as evidenced by the letter dated 26<sup>th</sup> October, 2021, which was at pages 340-341 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, in which Indo Zambia Bank Limited, stated that should it not receive the express objections to the proposed amendments to the conditions of service by 29<sup>th</sup> October, 2021, it would consider that the said proposed amendments had been consented to, and it would be entitled to exercise the options which were available to those who had consented on their behalf.
- 5.45 Therefore, the fate of those who were not satisfied with management's explanation, or who wished to remain silent to avoid consenting under the circumstances, was sealed.
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The submission was also that, while all this was going on, management had concealed the fact that the Board had already approved the proposed amendments on 8<sup>th</sup> December, 2020, as evidenced at pages 54 to 149 of Indo Zambia Limited's bundle of documents, which saw amendment to Clause 8.3.1 (a) by substituting *pay* with *basic pay*.

- 5.46 Consequently, as the Board had already approved, it was incumbent upon management to have the amendments implemented at all costs.
- 5.47 In response to Indo Zambia Bank Limited's defence that Subulwa Leonard Maswenyeho and the others consented to the variation to the Conditions of Service in writing, Subulwa Leonard Maswenyeho and the others, submitted that the proposal to vary the said Conditions of Service was floated on 10<sup>th</sup> February, 2021, in a Circular.
- 5.48 The contention was that the said Circular in fact stated that the Conditions of Service had been varied by that letter, and there was no consultation or consent before that date. Rather, the employees were given a few days within which to consent, and some of them asked for more time, as seen at page 273 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents.
- 5.49 Then as evidenced by pages 275-277 of same bundle of documents, Management promised to give more information to the employees.
- 5.50 Subulwa Leonard Maswenyeho and the others further contended that the intended variation affected a

fundamental condition, which related to the formula for the computation of the accrued benefits under Clause 8.3.1 (a), by replacing it with *basic pay* from *pay*, and which would reduce the benefits payable, which were applicable to the affected employees.

- 5.51 Thus, Subulwa Leonard Maswenyeho and the others, claimed underpayment, as seen at pages 426- 440 of Indo Zambia Bank Limited's bundle of documents.
- 5.52 Submission was made, that in the letter dated 29<sup>th</sup> October, 2021, which the Labour Commissioner wrote to Indo Zambia Bank Limited, which was at pages 461-465 of its' bundle of documents, he guided that in the case of ***Kenny Sililo v Mend A Bath Zambia Limited and Spencon Zambia Limited*** <sup>(25)</sup>, the Supreme Court stated that alteration to an employees' conditions of employment, to the employee's detriment, cannot be done without the agreement or concurrence of the employee.
- 5.53 It was submitted that the Labour Commissioner noted that conditions of service are an accrued benefit, and therefore, they cannot be unilaterally changed by management to the detriment of employees.
- 5.54 The submission was also that, guidance was given by the Labour Commissioner, that the old conditions having been superior, and the new conditions being an adverse alteration to the conditions of service which required the consent of the employees, they fell within ***Section 55 (1) of the Employment Code Act No 3 of 2019***, and would trigger redundancy.

- 5.55 It was stated that Indo Zambia Bank Limited ignored that provision. The case of ***Richard Musenyesa v Indo Zambia Bank Limited*** <sup>(28)</sup> was referred to, stating that the Supreme Court in that matter, held that failure to respond to employees' queries may render the consent invalid, and that an employer who did not seek unequivocal consent of an employee before variation, did so at their own peril.
- 5.56 Further submission was made, that the Supreme Court in that matter, also held that it was no longer the position that if an employee continued to work after being given notice to vary the conditions of service, they would be deemed to have impliedly given consent, but rather, the burden shifted to the employer on variation, and the principle of estoppel no longer applied.
- 5.57 As evidence that Subulwa Leonard Masenyeho and the others were threatened with redundancy, retirement or were coerced into consenting to the variation to their Conditions of Service, reliance was placed on the letters which were written to Kaunda Musebe by Christopher Wakunguma and were at pages 276-278 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundles of documents.
- 5.58 It was also submitted that for those who consented to the variation, the said consent was obtained through coercion and threats of retirement, and they were denied the necessary information so that they could make informed decisions. Rather, they were exposed to misinformation through physical and virtual meetings that Indo Zambia Bank Limited held with them.

- 5.59 The options that were given, as seen at page 278 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents were repeated. The assertion was that those Two (2) options that were given, were not attractive to those who wished to continue in employment. Therefore, the submission was that Indo Zambia Bank Limited wanted to discourage the employees from taking any of the Two (2) options.
- 5.60 On the failure to adequately address the concerns that were raised by the employees, as evidenced by the letters which were at pages 274 and 276 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, the letter at page 284 of the said bundle of documents, was stated as where it was asked whether the variation to the conditions of service were prospective or retrospective. However, that query was not answered.
- 5.61 Referring to the case of ***Richard Musenyesa v Indo Zambia Bank Limited*** <sup>(28)</sup>, it was submitted, that in that case, it was held that the fact that the employer did not bother to address the employee's concerns, showed that the employee did not acquiesce or consent to the revised conditions.
- 5.62 Page 283 of Volume 2 of Subulwa Leonard Maswenyeho and the others' bundle of documents, was given as an example of where Indo Zambia Bank Limited refused to accept one employee's preferred version of the variation, and that in that case, the employee had accepted the migration, but had refused to accept the formula which was employed in calculating the pay out on migration.

- 5.63 It was contended that at the said page 283, Indo Zambia Bank Limited found that the employee's response was not unequivocal, and it gave him a few hours to clearly state his position, and that if he did not do so, his correspondence would be treated as a rejection to the proposed amended Conditions of Service.
- 5.64 This was argued, as being evidence of coercion, as if the employee did not oblige, he risked being declared redundant or his consent being assumed. Therefore, Subulwa Leonard Maswenyeho and the others, had no choice, but to accept the offer that Indo Zambia Bank Limited had made, in Order that they could remain in employment, and avoid exiting with inferior benefits.
- 5.65 The letter at page 467 of Indo Zambia Bank Limited's bundle of documents, which the Assistant Labour Commissioner wrote to Indo Zambia Bank Limited, was stated as having referred to the complaint letter that the employees wrote to the Labour Office, to the effect that employees were required to give their consent to the variation to their conditions of service by 19<sup>th</sup> February, 2021.
- 5.66 Note was made, that in the said letter, the Assistant Labour Commissioner requested that the environment at the workplace be free of intimidation and harassment, and that the consent to the variation should be given freely.
- 5.67 The allegation was that the consultation which was done was not genuine, as in the letters which were at pages 275-278 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, they highlighted the frustration by one

of the Plaintiffs over the said consultation, as he indicated at page 276, that he was willing to further negotiate, and for Indo Zambia Bank Limited to counter propose.

- 5.68 It was further stated, that the employee indicated that he was willing to continue working for Indo Zambia Bank Limited, and that he expected Human Resources to be the defender of his rights, and to promote his interests. However, he had been put in a precarious position, hence the need to have everything formally put on record.
- 5.69 However, as seen at page 283 of the said bundle of documents, the response was said to be unequivocal, as it was not what Indo Zambia Bank Limited wanted.
- 5.70 Further reference was made to the letter that the Assistant Labour Commissioner wrote to Indo Zambia Bank Limited which was at page 467 of Indo Zambia Bank Limited's bundle of documents, stating that Indo Zambia Bank Limited should immediately correct the approval of the unilateral variation to the conditions of service through the Board. However, that letter went ignored.
- 5.71 It was submitted that Christopher Wakunguma in his defence, testified that it was not in Order for Subulwa Leonard Maswenyeho and the others to consent only to the migration to a contributory pension scheme, but to refuse the computation using the varied formula, as the two were like Siamese twins.
- 5.72 Therefore, the contention that Subulwa Leonard Maswenyeho and the others did consent flew in the teeth of the submission.

**ACKNOWLEDGEMENT OF PAYMENT AFTER VARIATION  
TO THE CONDITIONS OF SERVICE FROM PAY TO BASIC  
PAY**

- 5.73 With reference to the Circular dated 10<sup>th</sup> February, 2021, it was acknowledged that Subulwa Leonard Maswenyeho and the others welcomed the idea of migrating to a contributory pension scheme which would be managed by a Fund Manager from outside Indo Zambia Bank Limited. However, the same was tied to them being paid accrued benefits under the old scheme using a formula based on the basic pay, which was not accepted.
- 5.74 Contention was made, that the offer was made in such a way that it gave no option of choosing one over the other. Thus, rejecting the payout meant that the employees would be declared redundant, or that Indo Zambia Bank Limited could assume that consent had been given to variation with a lesser package.
- 5.75 Consequently, there was no free choice, and the employees opted to adopt the choice that would guarantee their continued employment with an inferior package than retirement or resignation or worse still, redundancy under the ***Employment Code Act***.
- 5.76 The submission was therefore, that the employees accepted the pay, as evidenced at pages 392-423 of Indo Zambia Bank Limited's bundle of documents. Allegation was made, that the consent did not contain details of the formula for computation of the accrued benefits, which was tactfully

intended to avoid controversy with Subulwa Leonard Maswenyeho and the others.

- 5.77 The case of **ZESCO Limited v Ignatious Muleba Sule and others** <sup>(14)</sup> was relied on, as where the Supreme Court held that there is no freedom of choice, where those in authority make one choice more perilous than the other. It was submitted that in this case, the message to Subulwa Leonard Maswenyeho and the others, was that you agree to the offer as given and remain in employment, or you reject the offer, and you will be declared redundant with an inferior package.

#### **RETIREMENT AGE**

- 5.78 With regard to the retirement age, it was submitted that the Circular of 26<sup>th</sup> October, 2021, which was addressed to all employees in Grade MS11, which was at page 280 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, was circulated to propose migration to a pension scheme that would be managed by a Fund Manager outside Indo Zambia Bank Limited.
- 5.79 It was stated that this entailed that the accrued benefits under the old scheme would be transferred to the new scheme, and thereafter, the contributions would be on a contributory basis. Further, the accrued benefits under the old scheme would be computed, and paid out on the basis of Three (3) months basic pay for each year served.
- 5.80 The submission was that the pay out was necessary, as the employees had not reached retirement age, and they had to cross over to the new pension scheme, which had different conditions. Thus, the employees were called upon to consent

or to object to the proposals which were to be approved by the Board thereafter.

- 5.81 It was stated that at page 282 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, one of the Plaintiffs' consented to the migration to the contributory pension scheme, but refused to have the accrued benefits computed on Three (3) months basic pay, and at page 283 of the said bundle of documents, Indo Zambia Bank Limited treated the same as an objection.
- 5.82 Then at page 284, the employee, Kaunda Musebe Chonde, asked Indo Zambia Bank Limited whether the 2021 conditions of service were prospective or retrospective. It was stated that in the response, which was at page 286 of the said bundle of documents, Indo Zambia Bank Limited stated that the consent was unequivocal, and Kaunda Musebe Chonde was given up to Tuesday 2<sup>nd</sup> November, 2021, to provide an unequivocal response or objection, failure to which, the correspondence would be treated as a rejection of the proposed Conditions of Service.
- 5.83 This was contended, as being undue influence on the employee, to yield to management's wish, to accept an inferior package in order to avoid redundancy. The addition was that this was after the employees were informed earlier in April of that year, that irrespective of their response, the new Conditions of Service would be implemented.
- 5.84 It was further submitted that as the Board had already approved the proposed new Conditions of Service, the

employees stood to lose out, and they had no choice but accept the payment in order to avoid redundancy.

#### **CONTINUATION IN EMPLOYMENT**

- 5.85 Submission was made, that Indo Zambia Bank Limited had contended that redundancy did not arise, as Subulwa Leonard Maswenyeho and the others freely consented to the variation to their Conditions of Service, and they continued in employment. However, the position that was taken, was that no consent was given, as the consent forms were signed because there was no choice, on account of the duress and coercion which had been demonstrated above.
- 5.86 The observation that the Assistant Labour Commissioner gave in the letter, which was at pages 466-467 of Indo Zambia Bank Limited's bundle of documents was referred to, stating in that letter, reference was made to the case of **ZCCM & Ndola Lime Company v Emmanuel Sikanyika & others** <sup>(9)</sup>, where it was held that:

***“While a contract of employment – just like any other contract – can be varied, any unilateral variation to an important term which is non-consensual and which is unacceptable to the workers, would justify the aggrieved workers treating the same as repudiation and breach of the contract by the employer which terminates the employment and which warrants the payment of repudiation or other terminal benefits, as appropriate.”***

**PAY OUT AT THE PREVAILING TERMS AND CONDITIONS OF SERVICE**

- 5.87 It was submitted that pay out of the accrued benefits using the varied formula, was not only in contention, but it was also contrary to the terms and conditions which were applicable to Subulwa Leonard Maswenyeho and the others.
- 5.88 Relying on the letter that the Labour Commissioner wrote to Indo Zambia Bank Limited, which was at page 463 of Indo Zambia Bank Limited's bundle of documents, it was submitted that the said letter referred to the case of ***Rosemary Ngorima & 10 others v Zambia Consolidated Copper Mines*** <sup>(12)</sup> where it was held, that parties to an employment relationship are bound by the terms and conditions that they set for themselves.
- 5.89 The submission was that this position was reiterated in the cases of ***ZAMTEL v Bernard Aaron Sakala*** <sup>(22)</sup> and ***Nyambe Martin Nyambe and others v Konkola Copper Mines*** <sup>(31)</sup>.
- 5.90 It was contended that for there to be variation of the terms and conditions of service, there had to be evidence of unequivocal consent by the party that was affected, more so if the variation was prejudicial to their vested rights, which was missed by the Labour Commissioner.
- 5.91 Further submission was made, that the payment of terminal benefits was entrenched in the January, 2020 conditions of service, which was at Three (3) months pay for each year served. Therefore, the payment could not be the subject of an optional offer, because it related to accrued benefits which were agreed at inception, and could not be varied

without the unequivocal consent of the employees, which was obtained free of fear, coercion and duress, as the variation was prejudicial to the affected employees.

- 5.92 The threats of redundancy or the employee having to resign or to retire with inferior terminal benefits, was submitted as having been used by Management, to cause apprehension in the minds of those who were not eager to sign, by making the future uncertain, if they did not sign.
- 5.93 It was stated that the record showed that those who did not sign were not declared redundant, and neither were they forced to resign or retire, despite Indo Zambia Bank Limited having agreed that not all the affected employees signed the consent.
- 5.94 In further justifying why the consent for the payment of the accrued retirement benefits was obtained through duress or coercion, Subulwa Leonard Maswenyeho and the others submitted that this was because:
- (a) The form of consent was drafted in such a way that the formula for computation was not stated. That this fact was concealed in Order to mislead the employees.
  - (b) The employees were given Two (2) days to consider and consent to such major and fundamental changes to the terms and conditions of service.
  - (c) All the queries that were raised went unanswered until the last minute when the dark side of not signing became apparent, being that they were at risk of lower benefits, uncertainty for not signing and inadequate information being given.

- (d) Indo Zambia Bank Limited reserved the right to themselves, to deal in the manner that it saw fit for those who did not consent, including the employees being declared redundant;
- (e) Indo Zambia Bank Limited failed to create an atmosphere of tranquility for the employees to freely express themselves, and to avail them the necessary information, such as, that the Board had already approved and used unclear terms to explain why the basic salary was used in the formula as opposed to the salary;
- (f) The effective date of migration was not clear, as in the letter dated 10<sup>th</sup> February, 2021, it was said that the said date was the effective date. However, in the letter dated 13<sup>th</sup> December 2021, which was at page 1 of Volume 1 of Subulwa Leonard Maswenyeho and the others bundle of documents, it was stated as being 1<sup>st</sup> January, 2021.

5.95 The submission was that in the letter dated 13<sup>th</sup> December, 2021, note was made, that there was erroneous reference to the revised terms and conditions of employment as having been effective 1<sup>st</sup> January, 2021. The letter further stated that the revision was duly communicated to the employees on 10<sup>th</sup> February, 2021.

5.96 Therefore, the letter confirmed that the effective date of variation of the terms and Conditions of Service was 10<sup>th</sup> February, 2021, and consequently, attempts to get consent

thereafter was a smoke screen, as the approval of the Board was obtained on 8<sup>th</sup> December, 2020.

5.97 It was also submitted, that the reliance by Indo Zambia Bank Limited, on the letter from the Labour Commissioner was not conclusive, as the said letter could not override the provisions of the law. In that regard, it was submitted that the letter by the Labour Commissioner did not address the following:

- (a) that the variation was approved by the Board before the employees were accorded opportunity to voice out their concerns on variation of a fundamental term of the employment;
- (b) The Labour Commissioner did not take into consideration that a number of the queries which had been raised by the employees were not responded to;
- (c) The Labour Commissioner misinterpreted the law as there is no law which says silence is consent;
- (d) There is no law which says that if one continues to work in the face of a dispute, it means that they have consented to variation-***Engen Petroleum Zambia v Willis Muhanga and another*** (29).
- (e) Failed to appreciate that alteration of a fundamental term, terminates a contract of employment;
- (f) Accrued benefits cannot amount to a gratuitous payment;
- (g) Variation of terms cannot be done retrospectively;

(h) There was no evidence in the letter that the employee's circumstances were considered by the Labour Commissioner.

- 5.98 The decisions in the case of ***Kenny Sililo v Mend-A-Bath and Spencon Zambia Limited*** <sup>(25)</sup> as well as ***ZESCO Limited v Ignatious Muleba Sule and others*** <sup>(14)</sup> were reiterated.
- 5.99 Also relied on, was the case of ***Standard Chartered Bank Plc v Willard Solomon Nthanga and 402 others*** <sup>(20)</sup>, stating that in that case, it was held that an accrued benefit could not be the subject of an optional offer.
- 5.100 It was also stated that the Labour Commissioner referred to the case of ***ZAMTEL v Bernard Aaron Sakala*** <sup>(22)</sup>, in which the Supreme Court held that what determines an employee's entitlement, are the conditions of service under which they are employed.
- 5.101 The submission was however, that the Labour Commissioner did not look at the terms and conditions of employment on being employed, but the status of the employees at the time. It was stated that the Assistant Labour Commissioner in her letter, which was at pages 466-467 of Indo Zambia Bank Limited's bundle of documents gave the correct interpretation on accrued benefits.
- 5.102 Still in submission, it was contended that it was difficult to establish what Indo Zambia Bank Limited was trying to convey regarding the definition of basic salary, short of introducing a new term of emoluments, and did not clarify

anything, but just confirmed that the computation or terminal benefits must include emoluments.

5.103 Relying on the case of ***Indo Zambia Bank Limited v Mushaukwa Muhanga*** <sup>(21)</sup>, the submission was that if at all there was confusion that was created between the basic pay and salary, that ought to be resolved against Indo Zambia Bank Limited, as it failed to justify the variation, especially the formula that was used to compute the benefits.

5.104 Further submission was made, that what was clear in that case, was that the Court found that the pay out on migration, was Three (3) months emoluments for each year served.

5.105 The definition of *emoluments* by ***Black's Law Dictionary, 7<sup>th</sup> Edition*** was relied on, which is:

***“Any advantage, profit or gain received as a result of one’s employment or one holding office.”***

5.106 Consequently, the submission was that employment of the basic salary in the computation of the emoluments was erroneous, more so that Subulwa Leonard Maswenyeho and the others did not consent to the variation.

5.107 Quoting from the guidance that the Assistant Labour Commissioner gave, which was at page 466 of Indo Zambia Bank Limited’s bundle of documents, referring to the cases of ***James Munkwa Zulu and others v Chilanga Cement*** <sup>(16)</sup> and ***Bank of Zambia v Jonas Tembo and others*** <sup>(13)</sup> it was submitted that those cases held where the word salary is used, it meant the basic pay and all allowances.

- 5.108 The submission was that despite Indo Zambia Bank Limited having been guided in paragraphs 8 and 9 of the letter that the Assistant Labour Commissioner wrote, they ignored the same.
- 5.109 It was stated that the Labour Commissioner in paragraph 13 of the letter, which was at page 463, found that based on the substratum of facts, clear notice was given by Indo Zambia Bank Limited of the variation, and the employees had full knowledge of the variation, and they opted to continue working, notwithstanding that their benefits would be reduced at the time that they reached retirement age, or after having worked for Twenty (20) years.
- 5.110 Reliance was placed on the decision in the case of **Richard Musenyesa v Indo Zambia Bank Limited** <sup>(28)</sup> where the Supreme Court noted as follows:

***“However, in our latest decisions which include the case of Grevesious Muyenga, Nachizi Phiri & 10 others and Willis Muhanga & another, the burden was shifted to the employer who seeks to rely on acquiescence by conduct to give notice of the variation, and obtain clear and express consent from the employee before any changes to conditions of service to the employee’s disadvantage are effected. This was intended to ensure the protection and sanctity of employment contracts.***

***We further cautioned against implied consent or acquiescence too readily, in situations where an***

***employee does not protest the changes, particularly where there is an accrued right, such as pension, gratuity or pension benefits that are of long-term benefit.”***

5.111 The submission was that ignorance of the law is no defence, and that in this matter, some of Subulwa Leonard Maswenyeho and the others continued to work, because Christopher Wakunguma informed them that he would get back to them, to answer the queries that they had raised, as seen at pages 275 and 277 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents.

5.112 Therefore, the consent was not clear and express.

**BASIC SALARY AS MEANING BASIC WAGE**

5.113 As regards the basic salary, the submission that was made, was that the January, 2020 Terms and Conditions of Service were clear, as to who among Subulwa Leonard Maswenyeho and the others, should be paid using the basic salary and those who were to be paid using the salary.

5.114 In that regard, reference was made to the said Conditions of Service at page 362 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, stating that with regard to death benefits, it was provided that they were payable at Three (3) months basic salary for each year served, while at page 363, the normal retirement benefits were inter alia payable, at Three (3) months pay, for each year of completed years of continuous service.

5.115 Note was made, that the term salary was not defined in the Terms and Conditions of Service, but the earlier submissions

relating to the guidance that was given by the Courts on the same was reiterated.

5.116 It was submitted that Indo Zambia Bank Limited in the amended defence and counterclaim had not disputed the fact that the term salary, as used in the January, 2020 conditions of service, comprised salary plus allowances.

**COUNTERCLAIM**

5.117 On the counterclaim which was filed by Indo Zambia Bank Zambia Limited, Subulwa Leonard Maswenyeho and the others' submission, was that in the event that this Court found in their favour, then Indo Zambia Bank Limited wanted the payout that was made under the 2021 agreements, declared null and void and accordingly, Subulwa Leonard Maswenyeho and the others should repay the monies which were paid to them.

5.118 It was submitted that the documents that were on the Court record, showed that Subulwa Leonard Maswenyeho and the others agreed to the proposal to migrate to the contributory pension scheme which was to be managed by a Fund Manager from outside Indo Zambia Bank Limited, from an internal one. They stated that the payout arose from that agreement.

5.119 The letter which was addressed to Kaunda Musebe Chonde, which was at page 399 of Indo Zambia Bank Limited's bundle of documents, on the Review of the Conditions of Service, and was dated 21<sup>st</sup> November, 2021, was submitted as stating in paragraph 2, that management had received his form of consent, accepting the variation to the conditions of

service, but which disputed the basis of the calculations for the payout, which was offered by management.

5.120 The submission was that, as seen from the letters of appeal which were at pages 426-453 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, it was made clear that their discomfort related to the computation formula, which employed the basic salary as opposed to the salary, in line with the terms and conditions of service.

5.121 The letter that one of the Plaintiffs, Chiwati Collins wrote to Indo Zambia Bank Limited on 13th December, 2021, was referred to, stating that he had written that he referred to the letter dated 10<sup>th</sup> February, 2021 on the Salary and Conditions of Service review, and that he signed that letter on the understanding that the law did not apply retrospectively. As such, whatever he had accrued up to that point remained intact, but going forward, the conditions of service would change.

5.122 Further submission was made, that Chiwati Collins in that letter, had indicated that in the email that he wrote on 29<sup>th</sup> October, 2021, he had sought clarification over the same, but he was not given a response.

5.123 Thus, the issue in dispute was not the migration, but the payment, which position was clarified in the case of ***Nyambe Martin Nyambe***.

5.124 The submission was also, that if this Court were to declare the payout arising from the 26<sup>th</sup> October, 2021, null and

void, it would mean that the migration to the new pension scheme would fall away.

- 5.125 It was contended that this submission was on the basis that the Circular letter dated 2<sup>nd</sup> November, 2021, which was at pages 392-399 of Indo Zambia Bank Limited's bundle of documents, indicated that the form of consent had been received accepting the variation to the Conditions of Service, but disputed the basis of calculation for the payout, which had been offered by management.
- 5.126 Thus, unequivocal consent to the variation had not been given, as the early payout was a fundamental part of the proposal, that had been made.
- 5.127 Subulwa Leonard Maswenyeho and the others submitted that if the relief sought in the counterclaim was granted, then the Court would make an Order that would not be enforceable, as the proceeds of the payout had already been deployed in various investments, and the economic scenario had changed.
- 5.128 Further submission was made, that Indo Zambia Bank Limited could not seek an Order whose benefit was to redeem itself from a self-imposed dilemma, brought about by ignorance of the law. It was stated that Indo Zambia Bank Limited had come to Court with dirty hands, and with self-created peril. Therefore, the counterclaim, had no legs to stand on.
- 5.129 Rather, Subulwa Leonard Maswenyeho and others sought recalculation of the payout using the correct formula, as
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contained in the Terms and Conditions of Service with interest thereon, less the amounts already paid.

5.130 It was stated that Indo Zambia Bank Limited had attempted to portray that Subulwa Leonard Maswenyeho and the others, had obtained better packages, at the expense of it investing the money in some financial instruments of some sort. However, the contention was that Conditions of Service are agreed, and bind the parties thereto. Further, they cannot be altered without consent, which is obtained freely and without undue influence and coercion.

**SUBMISSIONS BY INDO ZAMBIA BANK LIMITED**

5.131 In Indo Zambia Bank Limited's submissions, it was agreed that Subulwa Leonard Maswenyeho and the others initially served on the January 2020 Conditions of Service. Then thereafter, the December, 2020 Conditions of Service were introduced.

5.132 The contention was that in October, 2021, Subulwa Leonard Maswenyeho and the others were written letters, which attached consents for migration to the Conditions of Service, which qualified them to be paid retirement benefits at Three (3) months basic pay for each year served, to a contributory pension scheme.

5.133 It was submitted that at the time, none of Subulwa Leonard Maswenyeho and others, qualified to be paid their retirement benefits, and the payout was to facilitate migration to the defined contributory pension scheme. Indo Zambia Bank Limited also submitted, that Subulwa Leonard Maswenyeho and the others signed the migration documents which were

at pages 282-425 of its' bundle of documents, and pages 3-7 of its' supplementary bundle of documents.

- 5.134 Further submission was made, that after freely attesting to the migration, and that the calculation of the benefits to be paid was accurate, Subulwa Leonard Maswenyeho and the others were paid, what ordinarily would have been a future payment.
- 5.135 It was contended that during the process, Indo Zambia Bank Limited sought guidance from the Ministry of Labour and Social Security, which Ministry confirmed that the payments were in Order, as seen at pages 458-480 of Indo Zambia Bank Limited's bundle of documents.
- 5.136 The submission was also that Subulwa Leonard Maswenyeho and the others main claim, was that they were underpaid the accrued future benefits. Therefore, the same should be re-calculated, and that they should be paid the difference.
- 5.137 However, Indo Zambia Bank Limited's defence was that since Subulwa Leonard Maswenyeho and the others were paid agreed benefits, which ordinarily should have been a future payment, which they accepted, they were not entitled to the reliefs sought.
- 5.138 It was further submitted that the counterclaim by Indo Zambia Bank Limited, was that should the Court find that the payments should be re-calculated, then Subulwa Leonard Maswenyeho and the others should pay back what they were paid, as it ought to have been paid at their retirement.

5.139 Citing the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited*** <sup>(4)</sup> the submission was that, he who alleges must prove. It was also stated that the Supreme Court in the case of ***Khalid Mohamed v the Attorney General*** <sup>(3)</sup> held that:

***“A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to Judgment. I would not accept the proposition that even if a Plaintiff's case has collapsed of its inanition or for some reason or other, Judgment should nevertheless be given to him on the ground that the defence set up by the opponent has also collapsed. Quite clearly a Defendant in such circumstances would not even need defence.”***

5.140 The submission was that the principles stated in the above case, were adopted in the case of ***Galunia Farms Limited v National Milling Corporation Limited*** <sup>(15)</sup>, when the Court held that the failure of one party's case, does not automatically entitle the other party to Judgment.

5.141 The position taken, was that Subulwa Leonard Maswenyeho and the others' claim that they were underpaid should fail, as the evidence on record showed that each one of them consented in writing, and confirmed the calculation of the benefits payable, with the consent form that Subulwa Leonard Maswenyeho signed, being given as an example.

5.142 It was also submitted, that the said consent read that it confirmed that the 1<sup>st</sup> January, 2021 conditions applied.

- 5.143 That in any case, none of them had retired, and the payment was made in Order for Subulwa Leonard Maswenyeho and the others to transition to the defined contributory scheme. Addition was made, that Subulwa Leonard Maswenyeho and the others were only entitled to the payment at retirement, but they were paid in advance, after they agreed to the payment and the attendant calculation.
- 5.144 The submission was also that the Labour Commissioner in the letter dated 29<sup>th</sup> October, 2021, which was at pages 463-464 of Indo Zambia Bank Limited's bundle of documents referred to the case of **Godfrey Miyanda v the Attorney General** <sup>(5)</sup> and concluded that an accrued right is an inchoate or complete right, that is contingent on, and would only vest on the happening of a future event, being the attainment of the age of Fifty-Five (55) or Sixty (60) years or after working for Twenty (20) continuous years in service, whichever was the earlier.
- 5.145 Note was made, that Labour Commissioner found with regard to Subulwa Leonard Maswenyeho and the others, that the accrued right had not been triggered, as they had not attained the requisite retirement age or served continuously, for a period of Twenty (20) years. Therefore, the payment of the package before migration to the pension scheme, did not fall within the meaning of retirement benefits as contemplated by the terms and conditions of service.

- 5.146 It was further stated that the Labour Commissioner stated that as Subulwa Leonard Maswenyeho and the others had not reached retirement age, Indo Zambia Bank Limited merely extended a gratuitous payment to them, which was not available before they reached the retirement age, and it was open for the parties to rely on the January, 2021 clause, to compute the package purely as a precedent of give and take, and not as a contractual obligation.
- 5.147 On that basis, the Labour Commissioner found that the complaint of variation of the Conditions of Service did not stand, as the Terms and Conditions of Service were altered long before the proposed establishment of the pension scheme.
- 5.148 Citing the case of **Toll (FGCT) Pty Limited v Alhapaharm Pty Limited** <sup>(17)</sup> it was submitted that a signature is a declaration that you agree to the terms of a document. Therefore, Subulwa Leonard Masenyeho and the others, having consented to the payments, they were bound by the documents, which they freely and voluntarily signed.
- 5.149 In that regard, the holding in the case of **Printing and Numerical Registering Company v Sampson** <sup>(2)</sup> was relied on, and it was also submitted that the cases of **Mwamba v Nthenge and two others** <sup>(23)</sup> and **Colgate Palmolive Zambia Inc v Able Shemu Chuka and 10 others** <sup>(18)</sup>, held that it is the duty of the Courts to enforce contracts, and not to alter them or cherry pick certain conditions, to create new sets of conditions, which were not contemplated by the parties, especially in the absence of undue influence/duress.
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- 5.150 Submission was further made, that Subulwa Leonard Maswenyeho and the others, still work for Indo Zambia Bank Limited, and some of them had even been promoted.
- 5.151 The case of ***Richard Musenyesa v Indo Zambia Bank Limited*** <sup>(28)</sup> which had been relied on by Subulwa Leonard Maswenyeho and the others was cited, stating that in that case, the Supreme Court stated that where clear notice is given by the employer of the variation, and the employee with the full knowledge of the said variations, opted to remain in employment, notwithstanding that their terminal benefits would be on a reduced package in the event of exiting employment, such as by way of redundancy or retirement, they would have acquiesced to the variation to their conditions of service.
- 5.152 Also relied on, was the case of ***ZANACO v Ernestina Sakala & 62 others*** <sup>(30)</sup> stating that the Supreme Court in that matter, held that once a party acquiesces to an employment position, they are estopped from alleging that they did not acquiesce.
- 5.153 It was submitted that in this matter, both Subulwa Leonard Maswenyeho and Christopher Wakunguma agreed that Subulwa Leonard Maswenyeho and the others signed the form of consent, and they were paid according to the prevailing conditions, which included a salary increment. Therefore, it was counter-intuitive for Subulwa Leonard Maswenyeho and the others, to seek a declaration that the conditions upon which they were paid, were unilaterally varied, and were thus null and void.

- 5.154 This, it was stated, was being because the January, 2021 Conditions of Service, which contained the salary increments, was used as a basis for paying them. That in any event, the Labour Commissioner, in paragraph 13 of the letter dated 29<sup>th</sup> October, 2021, found that clear notice was given to the employees of the variation to the Conditions of Service, notwithstanding that the benefits would be calculated at a reduced package at the time that they reached retirement age, or they had worked for Twenty (20) years.
- 5.155 Relying on the case of **Godfrey Miyanda**, it was submitted that a declaration is a discretionary remedy, and that it will only be made on proper principles and considerations. Further, that it will not be made, where it would not serve any useful purpose.
- 5.156 It was contended that Subulwa Leonard Maswenyeho and the others, having accepted the payout in October, 2021, which was offered on account of an agreed formula, Subulwa Leonard Maswenyeho and the others and Indo Zambia Bank Limited entered into a settlement agreement, which was binding on the parties.
- 5.157 This was submitted as being more so, as Subulwa Leonard Maswenyeho and the others, had not reached retirement age.
- 5.158 The submission was also that accepting a lesser amount before a higher amount became due, had been held at law to be an acceptable way of legally concluding a matter, with
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reliance being placed on the English case of **Pinnel** <sup>(1)</sup> stating that it was held as follows in that matter:

**“Payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of the circumstance of time....”**

5.159 Further relied on as authority, was the case of **Finance Bank Zambia Limited and Rajan Mahtani v Simataa Simataa** <sup>(26)</sup> where it was held that:

**“A settlement agreement, like any other agreement, is amenable to the core principle of English law applicable in this country, namely the need to preserve the value and sanctity of contract.**

**We have already stated that the voluntary settlement of civil disputes finds high Judicial favour. This Court, as should like all other Courts faced with civil litigation of a purely private nature, strive assiduously to promote amicable settlement of disputes for the most wholesome of reasons, and in the process to preserve the sanctity of contracts which, as we have stated already, is a cardinal principle of English law.”**

5.160 On the counterclaim, the submission was that this was in the alternative, should the Court find in favour of Subulwa Leonard Maswenyeho and the others, then all the payments based on 1<sup>st</sup> January, 2021 Conditions of Service should be

repaid to Indo Zambia Bank Limited, as the said conditions would be inapplicable.

5.161 The submission was that Subulwa Leonard Maswenyeho and the others, could not benefit from the payments and refuse to be bound by the conditions on which the payments were made.

**DECISION**

5.162 What the evidence on record shows, is that on 10<sup>th</sup> February, 2021, Indo Zambia Bank Limited by the Circular letter, one of which is at page 271 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents informed the affected employees, and in particular Kaunda Musebe as follows:

**10<sup>th</sup> February, 2021**

**Mr. Kaunda Musebe  
Indo Zambia Bank  
HEAD OFFICE-11  
LUSAKA**

**Dear MR MUSEBE**

**RE: SALARY AND CONDITIONS OF SERVICE  
REVIEW**

***As part of the annual salary revision for the year 2021, the Board of Directors has decided to award you a 9.5% salary increment with effect from 1<sup>st</sup> January, 2021.***

***In recognition of your invaluable contribution to the Bank's performance in the year 2020, the Board of Directors (the Board) has decided to***

*award you a salary increment of 9.5% on your basic salary as defined in the conditions of service for Grade MS11 (Conditions of Service) which have been revised with effect from the date of the letter. Accordingly, your salary has been adjusted from K27, 797 to K30, 437 per month.*

*The salary increment is effective 1<sup>st</sup> January, 2021.*

*Enclosed are the Conditions of Service which have been revised as follows:*

- 1. The Conditions of Service have been separated so that your Grade MS11 has its' own booklet;*
- 2. The term basic Salary has been defined to give clarity to calculation of your emoluments.*

*Kindly signify your acknowledgement and acceptance of the Conditions of Service by appending your signature in the spaces below no later than 19<sup>th</sup> February, 2021.*

*Yours Faithfully*

**CHRISTOPHER WAKUNGUMA  
CHIEF MANAGER-HUMAN RESOURCES**

5.163 The Conditions of Service which were referred to in the letter, are at pages 373-381 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents. In Clause

1 of the said Conditions of Service, at page 374, it was stated that they were effective 1<sup>st</sup> January, 2021. Thus, this was the effective date of the said Conditions of Service, and this addresses the submission that the effective date of the said Conditions of Service was not clear.

5.164 Subulwa Leonard Maswenyeho, in his testimony, told the Court that the definition of *basic pay*, as stated in the said letter, was a departure from that which was contained in the January, 2020 Conditions of Service, as *basic pay* was now defined under Clause 2 (d) was defined as:

***“The Standard Rate Pay before additional payments such as allowances and bonuses for a period not exceeding One month.”***

5.165 He further stated that this was a departure from the provisions of Clause 8.3.1 (a) of the January, 2020 Conditions of Service, which provided that calculation of terminal benefits was to be done at the rate of Three (3) months’ pay for each year served, as it now provided that this would be at Three (3) months *basic pay* for each year served.

5.166 It is trite that the terms and conditions of a contract of employment, govern the employment relationship between an employer and an employee. They are bound by the terms of such contracts. Further, legislation is by default incorporated into the terms and conditions of service of the employment relationship.

5.167 The law requires that before there is variation to the terms and conditions of service for employees, there must be

consent that is given by the employees. Various authorities have been cited in that regard, including the case of ***Richard Musenyesa v Indo Zambia Bank Limited*** <sup>(23)</sup> which gave guidance on how variation to the terms and conditions of employment can be done.

- 5.168 Subulwa Leonard Maswenyeho and the others, in relying on the said case, stated that it held that the consent of the employee must be obtained before the terms and conditions of service are varied, and that where this is not done, employers do so at their own peril.
- 5.169 Subulwa Leonard Maswenyeho in his testimony, told the Court that some of the Plaintiffs consented to the variation to their Conditions of Service dated January, 2021, while others did not.
- 5.170 In the submissions, Seventeen (17) Plaintiffs were named as those who did not consent to the January, 2021 Conditions of Service, being; Mbiko Moyo, Kaponde Simpundu, Clifford Shanobe, Madrine Lungu, Moses Zulu, Patricia Ndoti, Monica Chintu, Liza Maxwell, Kenneth Mwanza, Wendy Mwanza, Pretoria Chikwamba, Subulwa Leonard Maswenyeho, Kaunda Musebe, Willie Lembalemba, James Muyoba, Mabunde Maimbolwa and Jessie Mwiinga.
- 5.171 In terms of process that Indo Zambia Bank Limited adopted to obtain the consent of the employees, to vary the January, 2020 Conditions of Service, Subulwa Leonard Maswenyeho and the others alleged that at the time that the Circular letter dated 10<sup>th</sup> February, 2021 was written, Indo Zambia Bank Limited had not engaged them to obtain their consent, but

had instead obtained the approval of its' Board on 8<sup>th</sup> December, 2020, to vary the Conditions of Service, as evidenced by the said Conditions of Service, which were at pages 373-381 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents.

5.172 Then on 18<sup>th</sup> February, 2021, the Chief Manager-Human Resources called for a meeting with middle management to discuss the revised Conditions of Service, at which clarity was sought on the introduction of the term *basic pay*, which excluded allowances in the calculation of terminal benefits, and what would happen to those who did not consent to the variation.

5.173 However, the Chief Manager-Human Resources did not respond to the issues which were raised.

5.174 Subulwa Leonard Maswenyeho and the others also contended that on 21<sup>st</sup> October, 2021, Indo Zambia Bank Limited held a Road Show meeting for middle management, at which the said employees were informed, that Indo Zambia Bank Limited would pay terminal benefits based on the December, 2020 Conditions of Service, as it intended to migrate to a contributory Pension Scheme.

5.175 The allegation was that, at that meeting, a number of concerns were again raised, which included whether the payment would be based on the December 2020 or the January 2020 Conditions of Service, given that the said issue was still pending feedback from Management, and whether it was correct to retrospectively calculate the formula for computation of the benefits.

5.176 However, the Chief Manager-Human Resources, Christopher Wakunguma informed the affected employees that he would revert at an appropriate time. Then shortly thereafter, on 26<sup>th</sup> October, 2021, Christopher Wakunguma circulated a letter to them, in which proposal was made to amend the December, 2020 Conditions of Service, which were dated 1<sup>st</sup> January, 2021, to migrate to the contributory pension scheme, with two options being given.

5.177 These options were stated as, paying off the accrued benefits as at 31<sup>st</sup> October, 2021, at a rate of Three (3) months' *basic pay* for each year served, or the said accrued benefits as calculated at that rate, being transferred to the contributory pension scheme, as initial contribution.

5.178 The letter which is at page 340 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents which was addressed to one of the affected employees, read as follows:

**26<sup>th</sup> October, 2021**

**MR MAIMBOLWA MABUNDE  
INDO ZAMBIA BANK  
HEAD OFFICE-FINANCE-BACK OFFICE**

**Dear Mr. MAIMBOLWA**

**RE: AMENDMENTS TO THE TERMS AND  
CONDITIONS OF SERVICE FOR MANAGEMENT  
STAFF IN GRADE MS11**

***The above matter refers.***

***Management proposes to amend and replace the  
Terms and Conditions of Service for Management***

**Staff in Grade MS11 dated 1<sup>st</sup> January, 2021 (Conditions of Service). In addition to providing clarity in already existing terms and conditions, the main amendment will lead to a transition from the existing terminal benefits system applicable in the Conditions of Service to a contributory benefits system which shall be privately managed by a registered Fund Manager.**

**Once implemented, the following changes will be expected:**

- 1. Contributions towards the Pension Fund will be made by both the employees and the Bank in a ratio of 5% by the employees and 10% by the Bank. This ratio may be reviewed by Management as it reviews Conditions of Service in future.**
- 2. You shall be able to access the Pension Fund under the privately managed Pension Fund in the event of your separation from the Bank, however arising:**

**Subject to Board approval, and in consideration for electing to migrate to the Pension Fund, the Bank proposes to pay you an amount equal to the accrued benefits as at 31<sup>st</sup> October, 2021 which would otherwise have been available to you only upon your normal retirement from the Bank in line with the Conditions of Service that would be applicable at the time of such retirement. Please**

*note that by making this payment, the Bank is not in any way retiring you from its' establishment. To access the payment referred to above, the following options are available to you:*

*1.Payment of accrued benefits up to 31<sup>st</sup> October, 2021 as per current Conditions of Service at the rate of Three (3) months basic pay for each year served and being registered as a member of the selected fund going forward; or*

*2.Computation of your accrued benefits up to 31<sup>st</sup> October, 2021 as per current conditions of employment at the rate of Three (3) months basic pay for each year served and transferring the same to the Pension Fund selected by the Bank as your initial investment into the Pension Fund.*

*In view of the foregoing, the purpose of this letter is therefore to solicit your consent to the variation of your Conditions of Service which would trigger your exercise of one of the above options.*

*In the event that you freely and voluntarily agree to this transition, kindly indicate your consent to the above changes and confirm the amount to be transferred out to you or transferred to the Pension Fund by signing and returning a copy of this letter before 31<sup>st</sup> October, 2021. The computation of your accrued benefits is*

**ZMW26230 X 3 years X 8.87397260273972668  
years= ZMW 698292.90410958906.**

**Please note that these proposed changes to the Conditions of Service are subject to Board approval. The Bank shall therefore not assume any liability with respect to the proposal herein if the Board decides not to proceed as proposed.**

**Upon receipt of a duly signed copy of the letter, and final approval by the Board, you shall be required to execute the Addendum to the Conditions of Service attached hereto before any payment or transfer is made depending on your preferred option. Thereafter, your Conditions of Service shall be amended and the amounts due to you shall either be paid directly to you or reserved for transfer to the Pension Fund in accordance with your instructions. The proposed Conditions of Service are equally attached.**

**Your signed Consent shall be forwarded to the undersigned by close of business on 29<sup>th</sup> October, 2021. All objections to the variation should be received in writing by the same date. Please note that any express objections may trigger a redundancy process as contained in the Employment Code Act (ECA) No 3 of 2019. You will be fully informed on this process as required under the ECA.**

***Please note that should the Bank not receive your express objection to the proposed amendments to the Conditions of Service by 29<sup>th</sup> October, 2021, it shall consider you as having consented to the amended Conditions of Service and shall be entitled to exercise any of the options available to those who consent on your behalf.***

***We trust that you will find this to be in Order and await your timely response.***

***Yours Faithfully***

**INDO ZAMBIA BANK LIMITED  
CHIEF MANAGER-HUMAN RESOURCES**

5.179 The form of consent and objection, which is at page 342 of the said bundle of documents read as follows:

**FORM OF CONSENT**

***I \_\_\_\_\_ Employee number \_\_\_\_\_ stationed at \_\_\_\_\_ branch do hereby consent to the variation of my Conditions of Service in relation to the payment of retirement benefits from the current provisions which is managed in-house at the Bank to a defined contributory scheme which is managed by an external registered Fund Manager and to the subsequent amendment of my Conditions of Service to include a Private Pension Plan and agree that the computation of accrued benefits offered***

*to me is accurate to the best of my knowledge and belief.*

*Further, I hereby direct the Bank to pay my accrued benefits to me/transferred to the pension fund to be appointed.*

*Signed at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 2021*

**NAME**

**DATE**

**SIGNATURE**

**FORM OF OBJECTION**

*I \_\_\_\_\_, Employee number \_\_\_\_\_ stationed at \_\_\_\_\_ branch do hereby object to the variation of my Conditions of Service in relation to the payment of retirement benefits from the current provisions which is managed in-house at the Bank to a defined contributory scheme to be managed by an external registered Fund Manager and to the subsequent amendments of my Conditions of Service to include a Private Pension Plan.*

*Signed at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 2021*

**NAME**

**DATE**

**SIGNATURE**

5.180 Subulwa Leonard Maswenyeho testified that soon after the payout, some employees wrote to the Chief Manager-Human

Resources to protest the underpayment of their terminal benefits, at a rate of Three (3) months basic pay for each year served. However, the response that was given, was negative. They thereafter sought legal redress.

5.181 I have earlier stated that variation to an employees' Conditions of Service may only be done with the consent of the said employee.

5.182 The learned authors, **Winnie Sithole Mwenda and Chanda Chungu** in the book, ***A Comprehensive Guide to Employment Law in Zambia, Lusaka, University of Zambia Press, 2021 at page 141*** state that:

***“Thus, under Zambian law, all that is required is that changes to the terms and conditions of service in the employment contract must be lawful and consented to by the employer and employee. A contract of employment, like any ordinary contract, is the outcome of consent of both parties and cannot be varied without the consent of each party.”***

5.183 I have earlier stated that legislation is by default incorporated in the terms and conditions of employment. **Section 23 (2) of the Employment Code Act No 3 of 2019** states that:

***“(2) Where the terms of a written contract of employment change, the employer shall, with the consent of the employee, revise the contract to reflect the change and provide the employee with a copy of the revised contract of employment.”***

5.184 The case of ***Farrant v The Woodroffe School 1998 1 WLR 176 EAT (7)***, laid down the following guidelines for obtaining the consent of employees before varying their conditions of employment:

- (a) Consult fully with the employee;
- (b) Give reasonable and due consideration to any objections; and
- (c) Obtain the consent of the employee.

5.185 It will be noted that Subulwa Leonard Maswenyeho have contended that when the Circular letter of 10<sup>th</sup> February, 2021 was issued, they were asked to acknowledge acceptance of the same by 19<sup>th</sup> February, 2021. They further stated that this was after the Board had already approved the same 8<sup>th</sup> December, 2020, as seen at page 373-381 of Subulwa Leonard Maswenyeho and the others bundle of documents.

5.186 Then thereafter, on 18<sup>th</sup> February, 2021, a virtual meeting was held to discuss the revised Conditions of Service at which various concerns were raised, including what would happen if the employees did not consent to the variation, and whether the variation, which had introduced the term *basic pay* under Clause 8.3.1 (a), would reduce the calculation of terminal benefits by excluding allowances.

5.187 The emails reflecting the same, are at pages 258 and 275 of Subulwa Leonard Maswenyeho and the others bundle of documents.

5.188 The allegation was that Christopher Wakunguma did not respond to the queries which were raised, and he instead

informed the employees that he would revert to them on consulting his superiors.

- 5.189 Indo Zambia Bank Limited contended in response, that the consent to the variation to the Conditions of Service was given freely and voluntarily.
- 5.190 The record shows at page 156 of Indo Zambia Bank Limited's bundle of documents, that Tamara Nyirenda acknowledged that the January, 2021 Conditions of Service would replace the previous ones on 19<sup>th</sup> February, 2021, while Nephias Madalitso Msango did so on 16<sup>th</sup> February, 2021, as seen at page 158 of the said bundle of documents.
- 5.191 At page 159, Jessie Mwiinga acknowledged the same on 18<sup>th</sup> February, 2021, and Lloyd Chisapi did so, on 16<sup>th</sup> February, 2021 as seen at page 161.
- 5.192 Others who did so, are Chirumba Chilekwa on 25<sup>th</sup> February, 2021, as evidenced at page 162, Gertrude Ngoza on 19<sup>th</sup> February, 2021, as evidenced at page 167, Daniel Nawa on the same 19<sup>th</sup> February, 2021, as seen at page 168, Martin Lunda on 18<sup>th</sup> February, 2021, as reflected at page 170, Tresford Tandeo on 19<sup>th</sup> February, 2021, as shown at page 171, George Mungolo on 26<sup>th</sup> February, 2021 as evidenced at page 175, and Ocean Samu on 18<sup>th</sup> February, 2021, as reflected at page 176.
- 5.193 In light of the provisions of **Section 23 (2) of the Employment Code Act**, which requires that any change to the terms and conditions of employment shall be made with the consent of the employee, and the guidance that was given in the case of **Farrant v The Woodroffe School 1998 1**

**WLR 176 EAT** on the procedure to obtain the consent of the employee, in Order for an employer to vary the conditions of service, it can be said that the procedure was not followed strictly, with regard to the variation of the January, 2020 Conditions of Service, which saw the coming into force of the January, 2021 Conditions of Service.

- 5.194 This was because firstly, the Circular letter which was dated 10<sup>th</sup> February, 2021, required Subulwa Leonard Maswenyeho and the others to acknowledge the new Conditions of Service by 19<sup>th</sup> February, 2021, when the Board had already approved those Conditions of Service on 8<sup>th</sup> December, 2020, as seen from the stamp of the Board on the said Conditions of Service, which are at pages 373-381 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents.
- 5.195 Secondly, management only engaged Subulwa Leonard Maswenyeho and the others on the said Conditions of Service through a virtual meeting, on 17<sup>th</sup> February, 2021, about two days before the acknowledgment was due to be received from them.
- 5.196 I say because, while it is on record that Subulwa Leonard Maswenyeho and the others allege that Indo Zambia Bank Limited held a virtual meeting with them on 18<sup>th</sup> February, 2021 to discuss the variation, Christopher Wakunguma in his testimony, contended that the said meeting was held on 17<sup>th</sup> February, 2021.

- 5.197 No clarification was given when Subulwa Leonard Masenyeho and Christopher Wakunguma testified, to establish when exactly the said meeting was held.
- 5.198 In the absence of such evidence, and the burden being on Indo Zambia Bank Limited to prove that it consulted with the employees before obtaining their consent to vary the Conditions of Service, Christopher Wakunguma's testimony that the meeting was held on 17<sup>th</sup> February, 2021 was not rebutted. Thus, that is the date when the meeting at which the consultation was done took place.
- 5.199 The letter which is at page 271 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents which gave notice of the variation to the Conditions of Service did not inform the affected employees on what the implications of not consenting to the said Conditions of Service were or what the significance of the variation was.
- 5.200 It has however been seen, that various concerns were raised in the meeting of 17<sup>th</sup> February, 2021, including the import of the term *basic pay*, which would now be used to compute retirement benefits, as opposed to the term *pay*, as contained in the January 2020 Conditions of Service, and what would happen to those who did not consent to the variation.
- 5.201 Amongst Subulwa Leonard Maswenyeho and the others, some of them did not give their consent to the variation while others did.
- 5.202 The Assistant Labour Officer cautioned against the variation without consulting the employees, and asked Indo
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Zambia Bank Limited to rectify the mistake, which letter dated 17<sup>th</sup> February, 2021, is at pages 473-474 of Indo Zambia Bank Limited's bundle of documents following a complaint that was made by the employees.

- 5.203 Some employees, like Nephias Msango, the 9<sup>th</sup> Plaintiff and Lloyd Chisapi the 12<sup>th</sup> Plaintiff, signed the letter acknowledging the January, 2021 Conditions of Service on 16<sup>th</sup> February, 2021, even before they were engaged by Indo Zambia Bank Limited's management on the said variation and its' impact to their Conditions of Service and they fully understood the variation to the Conditions of Service.
- 5.204 The case of ***Richard Musenyesa v Indo Zambia Bank Limited*** <sup>(23)</sup> was clear, that where an employer does not engage an employee before variation of their Conditions of Service, the consent will not be unequivocal. This is because the employee would not have fully understood the variation and its' impact on their Conditions of Service.
- 5.205 Thus, Nephias Msango and Lloyd Chisapi cannot be said to have given unequivocal consent, as at the point they had not fully understood the implications of the variation, as Indo Zambia Bank Limited had not engaged them.
- 5.206 The Plaintiffs, Tamara Nyirenda, Nephias Madalitso Msango, Jessie Mwiinga, Lloyd Chisapi, Chirumba Chilekwa, Gertrude Ngoza, Daniel Nawa, Martin Lunda, Tresford Tandeo, George Mungolo and Ocean Samu gave their consent to the January, 2021 Conditions of Service after Indo Zambia Bank Limited had on 17<sup>th</sup> February, 2021 consulted them over the variation.
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- 5.207 As such, the above-named Plaintiffs were engaged before they gave their consent to vary the Conditions of Service. These Plaintiffs alleged that Indo Zambia Bank Limited unilaterally varied their Conditions of Service relating to the payment of retirement benefits in the statement of claim on the basis that they did not consent.
- 5.208 However, it has been shown that they consented to the variation after Indo Zambia Bank Limited engaged them on the said variation of the January, 2020 Conditions of Service by the introduction of the January, 2021 Conditions of Service, and in relation to the said Conditions of Service, they did not allege that their consent was not obtained freely and voluntarily.
- 5.209 That being the position, as they consented to the variation, they were bound by the January, 2021 Conditions of Service.
- 5.210 As for the Plaintiffs who did not give their consent to the January, 2021 Conditions of Service, their contention was that they had raised questions which Christopher Wakunguma did not respond to, and they were still waiting feedback on the questions that they had raised.
- 5.211 Indo Zambia Bank Limited contended that in fact, Subulwa Leonard Maswenyeho and the others who did not consent to the variation, continued in employment after they were given notice of the change to their Conditions of Service by virtue of the January, 2021 Conditions of Service and after they were consulted on 17<sup>th</sup> February, 2021. Therefore, they acquiesced to the variation, as they continued in employment.
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- 5.212 Subulwa Leonard Maswenyeho and the others in contending that management did not respond to their queries, stated that Christopher Wakunguma by the letter dated 28<sup>th</sup> April, 2021, which is at page 278 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, informed them that the January, 2021 Conditions of Service applied.
- 5.213 A perusal of that letter also shows that Christopher Wakunguma indicated that the date that was fixed for communicating the employees' response to the variation, was 19<sup>th</sup> February, 2021, and that had Indo Zambia Bank Limited received such refusal on or before 19<sup>th</sup> February, 2021, it would have triggered the redundancy process under **Section 55 of the Employment Code Act.**
- 5.214 Therefore, as that date had passed, the new conditions were in force, and the employees could retire if they had reached the requisite retirement age, or resign if they had not reached the retirement age, on the January 2021 Conditions of Service.
- 5.215 As regards acquiescence, the Supreme Court in the case of **Richard Musenyesa v Indo Zambia Bank Limited** <sup>(23)</sup> states as follows:

***“Where acquiescence is intended to be assumed from conduct, credible evidence will have to be led, showing that the employee was by clear notice given by the employer indeed aware of the variation, understood the implications and its’ full***

**extent, before it can be said that they acquiesced or consented by conduct.**

**As we stated in the Grace Simataa case, an employee has no cause for complaint, if the evidence reveals that clear notice by the employer has been given, covering the alteration and that the employee has opted to continue in employment with full knowledge that the terminal benefits would be on a reduced package, if the separation came by way of redundancy.”**

5.216 Subulwa Leonard Maswenyeho and the others submitted that what came out from the above case, was that where an employee after becoming aware of the variation or change in the contractual terms continued to work without protest or complaining about the changes to their conditions of service, they would be said to have acquiesced.

5.217 However, in the cases of **Zambia Daily Mail v Grevesious Mayenga & two others SCZ** <sup>(27)</sup>, **Attorney General v Nachizi Phiri & 10 others** <sup>(24)</sup> and **Engen Petroleum (Zambia) Limited v Willis Muhanga & another** <sup>(29)</sup>, the burden was shifted to the employer who seeks to rely on acquiescence by conduct, to give notice of the variation and to obtain clear and express consent from the employee before any changes to the conditions of service to the employee's disadvantage are effected. That this was intended to ensure the protection and sanctity of employment contracts.

5.218 In this matter, the evidence shows that after the January, 2021 Conditions of Service were varied by the letter dated

10<sup>th</sup> February, 2021, and after the Board had approved the same on 8<sup>th</sup> December, 2020, Indo Zambia Bank Limited sought to obtain the consent of the affected employees thereafter. Subulwa Leonard Maswenyeho and the others, contend that the queries that they raised with respect to the said variation were not responded to.

5.219 The case of ***Richard Musenyesa v Indo Zambia Bank Limited*** <sup>(28)</sup> held that there is no clear consent, if the employer fails to respond to clarifications.

5.220 In that case, the Supreme Court noted that Indo Zambia Bank, in July, 2006, without any formal notification to Richard Musenyesa, introduced revised Conditions of Service for Management Staff in Grades MS6-MS11 who were employed on permanent and pensionable terms, which had no provision for the payment of gratuity.

5.221 It was the Supreme Court's finding, that the omission confirmed that Indo Zambia Bank Limited unilaterally varied the 1997 Conditions of Service, by removing the clause that provided for the payment of gratuity.

5.222 The cases of ***Mike Musonda Kabwe v BP Zambia Limited*** <sup>(6)</sup>, ***Peter Ngandwe and others v Zambia Oxygen Limited and another*** <sup>(8)</sup> as well as the case of ***Zambia Oxygen Limited & Zambia Privatisation Agency v Paul Chisakula and others*** <sup>(10)</sup> were stated as being among the number of cases, where the Supreme Court had reiterated that conditions of service which are enjoyed by an employee, cannot be unilaterally altered to their detriment without their authority.

- 5.223 The Supreme Court noted that they had, in the case of ***National Milling Company Limited v Grace Simaata & three others*** <sup>(11)</sup> held that where unilateral changes are made to the basic conditions of employment which are adverse and unacceptable to the employee, such an employee becomes entitled to treat the variation as a breach by the employer, which terminates the contract of employment from the date of variation, and that the payment of redundancy or other terminal benefits would be appropriate recompense.
- 5.224 The Supreme Court went on to further note, in that matter, that different considerations apply, if the evidence reveals that clear notice was given by the employer of the variations and that the employee with full knowledge of the said variations opted to continue in employment, notwithstanding that their terminal benefits would be on a reduced package in the event of exiting employment such as by way of redundancy or retirement.
- 5.225 Observation was also made in that case, that the Supreme Court in the case of ***Engen Petroleum (Zambia) Limited v Willis Muhanga and another*** <sup>(29)</sup> held that the fact that the employer did not bother to address the 1<sup>st</sup> Respondent's concerns showed that the 1<sup>st</sup> Respondent did not acquiesce or consent to the revised conditions.
- 5.226 They further stated that the rationale that is expounded, is that an employee should not be subjected to conditions of service which did not exist during their tenure of service, and
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that no conditions of service should be altered to the detriment of the employee without their consent.

5.227 The Supreme Court further stated that conditions of service of employment can be amended, but that they gave caution, that this must be done with the clear and express consent of the employee, and that express consent of the employee is the pillar in employment, for purposes of safeguarding of the employee's contract of employment, which is already being enjoyed, and that there should be predictability of the employee's retirement or separation package, founded on the principle of good conduct.

5.228 It was stated that an employer who does not seek the express consent of an employee to the variation of their terms and conditions of service, does so at their own peril. Note was made, that this was in line with the *ILO (R198) Employment Relationship Recommendation No 198 of 2006* which guides that labour seeks amongst others, to address what can be an equal bargaining process between parties to an employment relationship.

5.229 They found that the Respondent did not engage the affected employees on the variation of the condition which entitled them to gratuity, and there was no formal communication of the revised condition, as previously done when the 1997 conditions came into effect.

5.230 It was also the Supreme Court's finding that to compound it all, there was no response by the Respondent to the clarification that the Appellant and his colleague sought, on

the applicable conditions of service, and to what extent they applied. Thus, there was no consensus on the variation.

5.231 Distinction was made of the facts of that case, to those in the cases of ***Cosmas Phiri and others v Lusaka Engineering Company Limited*** <sup>(19)</sup> and ***National Milling Company Limited v Grace Simataa & three others*** <sup>(11)</sup> where they had held that where employees were aware of the changes to the terms and conditions of their employment, and there was no protest from them, it would be taken that the employees had consented to the variation.

5.232 A perusal of the evidence, shows that Christopher Wakunguma wrote the letter which is at page 278 of Volume 2 of Subulwa Leonard Masenyeho and the others bundle of documents in response to Kaunda Musebe's letter, in which Kaunda Musebe was still inquiring about the revised Conditions of Service. Christopher Wakunguma in the letter, noted that all the questions that had been raised were exhausted in the meeting of 10<sup>th</sup> March, 2021, at which clarification was given, that failure to consent would trigger redundancy in line with ***Section 55 of the Employment Code Act***.

5.233 In the email, which is at page 276 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, Kaunda Musebe had written to Christopher Wakunguma on 26<sup>th</sup> March, 2021, advising that he was still willing negotiate his terms and conditions of employment with Indo Zambia Bank, following the meeting that they had the previous day.

5.234 What this evidence reveals, is that while Indo Zambia Bank Limited did not obtain the consent of Subulwa Leonard Maswenyeho and the others prior to the Board approving those Conditions of Service on 8<sup>th</sup> December, 2020, and it informed Subulwa Leonard Maswenyeho and the others on 10<sup>th</sup> February, 2021, that there were new Conditions of Service, which I have said, were effective 1<sup>st</sup> January, 2021, it did request the employees in the Notice to acknowledge the Conditions of Service by 19<sup>th</sup> February, 2021.

5.235 Further, a meeting was held on 17<sup>th</sup> February, 2021, during which Management engaged the affected employees on the new Conditions of Service. Therefore, belatedly, Indo Zambia Bank Limited sought to obtain the consent of Subulwa Leonard Maswenyeho and the others, to vary their Conditions of Service.

5.236 Where an employee does not consent to the variation of basic conditions of service, then the employer is said to be in breach of the contract and they are entitled to treat the contract of employment as repudiated, and it will trigger redundancy.

5.237 **Section 55 of the Employment Code Act** in that regard, provides as follows:

**“55. (1) An employer is considered to have terminated a contract of employment of an employee by reason of redundancy if the termination is wholly or in part due to —**

.....

**(c) an adverse alteration of the employee's conditions of service which the employee has not consented to."**

5.238 The record shows that Subulwa Leonard Maswenyeho and the others, who did not give their consent to the variation, did not terminate their contracts of employment, and sued claiming redundancy. They have instead continued to work at Indo Zambia Bank Limited.

5.239 Thus, the question is whether they can be said to have acquiesced to the variation to their conditions of service?

5.240 The Supreme Court in the case of **Richard Musenyesa v Indo Zambia Bank Limited** <sup>(23)</sup> stated that:

**"Where acquiescence is intended to be assumed from conduct, credible evidence will have to be led, showing that the employee was by clear notice given by the employer indeed aware of the variation, understood the implications and its' full extent, before it can be said that they acquiesced or consented by conduct."**

5.241 Christopher Wakunguma in the letter which is at page 278 of Volume 2 of Subulwa Leonard Maswenyeho and the others bundle of documents, clearly told Kaunda Musebe that the January, 2021 Conditions of Service applied, and that as his consent had not been received by 19<sup>th</sup> February, 2021, the redundancy process could not be triggered, and he could either retire, if he qualified, or resign if he had not met the specified retirement age, and he would do so on the new conditions of service.

- 5.242 Therefore, by that date, Kaunda Musebe was informed of the implication of failure to consent to the variation to the Conditions of Service, with the option being given, to either retire if he had reached retirement age or to resign if he had not reached the same.
- 5.243 The said letter, also referred to meetings which were earlier had, with the latest being on 25<sup>th</sup> March, 2021, at which all the questions that were raised were exhaustively discussed, and that the provisions of **Section 55 of the Employment Code Act No 3 of 2019** which provides for redundancy, was explained, as a way of clarifying the implications of not consenting to the variation.
- 5.244 From what is on record, it can therefore be concluded that Indo Zambia Bank Limited gave notice of the variation to the January, 2020 Conditions of Service by introducing the January, 2021 Conditions of Service, which amended Clause 8.3.1 (a) to state that on retirement, the affected employees would receive retirement benefits at Three (3) months' basic pay, for each year served, as opposed to Three months' pay for each served, as contained in the January, 2020 Conditions of Service.
- 5.245 It has also been seen that Indo Zambia Bank Limited engaged the affected employees, who included Subulwa Leonard Maswenyeho and the others, after the Board had already approved those Conditions of Service on 8<sup>th</sup> December, 2020. However, on engaging the employees, the employees were required to consent before the Conditions of Service took effect.

5.246 It has been seen that Two (2) employees signed giving their consent before they were engaged, while others on being engaged consented, and others did not.

5.247 However, all the employees continued working for Indo Zambia Bank. I will return to the issue of consent by acquiescence, when I deal with the payment for purposes of migrating to the contributory pension scheme.

**WHETHER SUBULWA LEONARD MASWENYEHO AND THE OTHERS CONSENTED TO MIGRATE TO THE CONTRIBUTORY PENSION SCHEME AND TO BE PAID ACCRUED PENSION BENEFITS AT THREE MONTHS BASIC PAY FOR EACH YEAR SERVED?**

5.248 The next issue that arises, is whether Subulwa Leonard Maswenyeho and the others, consented to the migration to the contributory pension scheme, and to be paid their accrued retirement benefits at Three (3) months' basic pay for each year served?

5.249 The submission by Subulwa Leonard Maswenyeho and the others, was that on 21<sup>st</sup> October, 2021, a Road Show meeting was called, at which management indicated that it would pay terminal benefits based on the December, 2020 Conditions of Service.

5.250 It was stated that on 26<sup>th</sup> October, 2021, Management circulated a letter, in which it proposed to amend the December 2020 Conditions of Service, which were dated January, 2021, so that it could migrate to a contributory pension scheme, which would be managed by a private Fund Manager.

- 5.251 The submission was further that, the letter stated that the accrued pension benefits would be calculated, and the employees had the option of either being paid the amount that would be calculated, or having the amount that would have been calculated paid into the private Pension Fund as initial contribution.
- 5.252 It was also submitted that at the end of that letter, was a Consent Form to vary the Conditions of Service, and an Objection Form, which the employees were required to complete, stating whether they consented or objected to the variation, by the close of business on 29<sup>th</sup> October, 2021.
- 5.253 Subulwa Leonard Maswenyeho and the others argued that Indo Zambia Bank Limited in that letter, indicated that if an employee did not object to the variation, they would be considered as having consented, and it would be at liberty to exercise any of the options contained in the letter on behalf of the employee.
- 5.254 Thus, out of fear of being disadvantaged, looking at the options that were given, Subulwa Leonard Maswenyeho and the others consented to the variation of the Conditions of Service to migrate to a contributory pension scheme, and they were paid.
- 5.255 Subulwa Leonard Maswenyeho and others other than relying on the case of ***Richard Musenyesa v Indo Zambia Bank Limited*** <sup>(23)</sup> which has been seen above, also relied on the case of ***ZESCO Limited v Ignatious Muleba Sule & others*** <sup>(14)</sup>, as where it was stated that where the employee
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is given one choice which is more perilous than the other by the employer, the employee has no freedom of choice.

5.256 It was stated as follows in the case of **ZESCO Limited v Ignatious Muleba Sule & others** <sup>(14)</sup>:

***“We therefore agree with the Court below that there is no freedom of choice where those in authority make one choice more perilous than the other.”***

5.257 The evidence shows that Subulwa Leonard Maswenyeho and the others agreed to the variation to migrate to the pension scheme. Their contention is that they protested the computation of the accrued pension benefits, and that when that did not yield fruit, they sued.

5.258 The Circular letter of 26<sup>th</sup> October, 2021, merely informed Subulwa Leonard Maswenyeho and the others of the migration to the contributory pension scheme, and asked them to indicate their consent or otherwise by 29<sup>th</sup> October, 2021.

5.259 The letters that were addressed to each one of them are at pages 282-425 of Indo Zambia Bank Limited’s bundle of documents. In those letters, which are also dated 26<sup>th</sup> October, 2021, Subulwa Leonard Maswenyeho and the others were informed of the changes to their Conditions of Service, which were intended to enable them to migrate to a contributory pension scheme, and computed their accrued pension benefits, as at 31<sup>st</sup> October, 2021.

5.260 While that was the position, Subulwa Leonard Maswenyeho and others contended that there was no response to the

questions which were raised during the meeting of 21<sup>st</sup> October, 2021, on whether the accrued pension benefits would be paid at Three (3) months' pay, as provided in the January, 2020, Conditions of Service, given that the issue was still pending and whether it was correct to retrospectively apply the formula in calculating the accrued retirement benefits.

5.261 Indo Zambia Bank Limited in the letters that it sent to Subulwa Leonard Maswenyeho and the others on 26<sup>th</sup> October, 2021, asked them to indicate their consent or otherwise by 29<sup>th</sup> October, 2021, and that any objections would trigger redundancy, and any failure to object would be deemed as consent, and Indo Zambia Bank Limited would be at liberty to exercise any of the options that had been given on their behalf.

5.262 At page 282 of Volume 2 of Subulwa Maswenyeho and the others bundle of documents, is a Consent Form for Kaunda Musebe Chonde on which he consented to the migration, but he disputed the computation of the accrued retirement benefits.

5.263 The consequences that were available for failing to consent such as redundancy being triggered, enlightened Subulwa Leonard Maswenyeho and the others on the implication of the failure to consent. This was after Indo Zambia Bank Limited had given notice on 21<sup>st</sup> October, 2021, that it intended to vary the Conditions of Service to migrate to a contributory pension scheme, and it engaged them on the said variation.

5.264 Thus, Subulwa Leonard Maswenyeho and the others fully understood what would happen if they chose not to migrate to the contributory pension scheme.

5.265 The accrued retirement benefits were calculated at Three (3) months basic pay for each year served, in accordance with Clause 8.3.1 (a) of the Terms and Conditions of Service dated January, 2021.

5.266 For the Plaintiffs Tamara Nyirenda, Nephas Madalitso Msango, Jessie Mwiinga, Lloyd Chisapi, Chirumba Chilekwa, Gertrude Ngoza, Daniel Nawa, Martin Lunda, Tresford Tandeo, George Mungolo and Ocean Samu who consented to the January, 2021, Conditions of Service which provided that retirement benefits were payable at Three (3) months' basic pay, their consent was unequivocal, as there is nothing on the record to show that they did not fully understand the effect of the variation to their Conditions of Service with regard to retirement after they were engaged in the meeting of 17<sup>th</sup> February, 2021, after which they gave their consent.

5.267 That being the position, and the issue of them consenting to the migration to the contributory pension scheme not being in dispute, I find that their accrued pension benefits as calculated and paid to them, based on the January, 2021 Conditions of Service, was done in line with their Conditions of Service, and their claims cannot stand.

5.268 For the Two (2) Plaintiffs, Nephas Msango and Lloyd Chisapi who gave their consent to the variation on 16<sup>th</sup> January, 2021, prior to being engaged by Indo Zambia Bank Limited, I have said that they cannot be said to have given

unequivocal consent, as they had not been informed about the variation and the consequences of their failure to consent to the same, and they fully appreciated the same.

5.269 Indo Zambia Bank Limited made no efforts to obtain their consent post the meeting of 17<sup>th</sup> February, 2021. As such, I have held that Nephias Msango and Lloyd Chisapi did not give unequivocal consent to the variation, and the failure to consult them before consent to the variation was given, was at Indo Zambia Bank Limited's peril.

5.270 It therefore follows, that Nephias Msango and Lloyd Chisapi did not consent to the January, 2021 Conditions of Service, and payment of their accrued pension benefits could not have been made under Clause 8.3.1 (a) of the January, 2021 Conditions of Service, but under Clause 8.3.1 (a) of the January, 2020 Conditions of Service.

5.271 Those Conditions of Service in Clause 8.3.1 (a) provided for the payment of pension at Three (3) months' pay for each year served. Pay was not defined in the said Conditions of Service, but as seen from the case of **James Mankwa Zulu and others v Chilanga Cement Plc** <sup>(12)</sup>, it was held that where the term salary is used, it connotes salary plus allowances.

5.272 Consequently, the computation of Nephias Msango and Lloyd Chisapi accrued retirement benefits at Three (3) months basic pay resulted in them being underpaid.

5.273 Then for the Plaintiffs, Mbiko Moyo, Kaponde Simpundu, Clifford Shanobe, Madrine Lungu, Moses Zulu, Patricia Ndoti, Monica Chintu, Liza Maxwell, Kenneth Mwanza,

Wendy Mwanza, Pretoria Chikwamba, Subulwa Leonard Maswenyeho, Kaunda Musebe, Willie Lembalemba, James Muyoba, Mabunde Maimbolwa and Jessie Mwiinga they did not consent to the January, 2021, Conditions of Service.

5.274 They did however consent to the migration to the contributory pension scheme. What they have taken issue with, is the computation of their accrued retirement benefits as they were calculated at Three (3) months' basic pay for each year served in line with the January, 2021, Conditions of Service which they did not consent to.

5.275 Indo Zambia Bank Limited argued that Subulwa Leonard Maswenyeho and the others agreed to be paid their accrued retirement benefits early, as they had not reached the requisite retirement age. Therefore, they entered into a settlement agreement, which going by the decision in the case of ***Finance Bank Zambia Limited & Rajan Mahtani v Simataa Simataa*** <sup>(26)</sup> should be enforced.

5.276 While it is trite that Courts should give effect to settlement agreements where they are freely and voluntarily executed, as held in the case of ***Finance Bank Limited & Rajan Mahtani v Simataa Simataa*** <sup>(21)</sup> the facts of this case show that the accrued retirement benefits were agreed to be paid, as Indo Zambia Bank Limited sought to migrate the employees to a contributory pension scheme, as a variation to the Conditions of Service.

5.277 It is also common cause, that at the time, Subulwa Leonard Maswenyeho and the others had not reached retirement age. However, for purposes of migrating to the contributory

scheme, they were paid accrued retirement benefits at a rate which was lower than what they would have been paid on retirement had the variation to their Conditions of Service not been done.

5.278 Subulwa Leonard Maswenyeho and the others, prior to the variation, had accrued a right to be paid their retirement benefits at Three (3) months' pay for each year served. From the authorities that are on record, they show that such right could be varied, but with the express and clear consent by Subulwa Leonard Maswenyeho and the others, as the right to retirement benefits is a fundamental term of any employees' contract of employment, which should be certain.

5.279 It has an implication on one's life post-employment, and it is a right that should be guarded. It matters not that Subulwa Leonard Maswenyeho and the others were paid before they retired, and it could be said that they acquired the benefit earlier than when it was to be paid, as Indo Zambia Bank Limited migrated to a contributory pension scheme, and it needed Subulwa Leonard Maswenyeho and the others consent to do so.

5.280 Indo Zambia Bank Limited chose to vary the earlier agreed upon terms of the employment contracts, that it had with Subulwa Leonard Maswenyeho and the others, and in doing so, it resulted in Subulwa Leonard Maswenyeho and the others being paid their accrued retirement benefits early.

5.281 I have however said that for the Plaintiffs, Subulwa Leonard Maswenyeho and the others, who did not consent to the January, 2021 Conditions of Service, they continued in

employment after Christopher Wakunguma made it clear on 24<sup>th</sup> April, 2021, that the January, 2021, Conditions of Service were in force, as they had not given their objection by 19<sup>th</sup> February, 2021, which would have enabled Indo Zambia Bank Limited to trigger the redundancy process, and he informed them that they had the option either to retire if they had reached the retirement age, or to resign if they had not reached the retirement age.

5.282 In the case of ***Richard Musenyesa v Indo Zambia Bank Limited*** <sup>(23)</sup>, the Supreme Court had referred to *ILO (R198) Employment Relationship Recommendation No 198 of 2006* which guides that labour seeks amongst others, to address what can be an equal bargaining process between parties to an employment relationship.

5.283 This equal bargaining power of the parties to the employment relationship, can be said to obviously not have been balanced in this case, looking at the options that are available where an employee does not give consent to the variation of their Conditions of Service.

5.284 The options that were given to Subulwa Leonard Maswenyeho and the others to either resign or retire as they had not given consent to the variation to their Conditions of Service, on the basis that Indo Zambia Bank Limited could not trigger the redundancy process, as they did not by 19<sup>th</sup> February, 2021, submit their objection to the variation, is the position of the law currently, when an employee does not consent to the variation of their Conditions of Service which is adverse.

- 5.285 It cannot amount to intimidation, coercion or even duress, as has been alleged by Subulwa Leonard Maswenyeho and the others in this matter. This is because, a unilateral variation of an employees' Conditions of Service, amounts to breach of the employment contract, and the employee as the innocent party, has a right to repudiate the contract of employment, and claim that they have been declared redundant.
- 5.286 Christopher Wakunguma merely explained what the failure to consent to the variation to the Conditions of Service connoted, and the options that were there, when there was such failure to consent.
- 5.287 In the case of **ZESCO Limited v Ignatious Muleba Sule and others** which Subulwa Leonard Maswenyeho and the others relied on, to state that it held that where employees are given a choice which is more perilous than the other, such cannot stand, the Supreme Court in that matter noted that the letters in which the Respondents were offered early retirement clearly referred to "a major reorganization which had seen some jobs upgraded, other jobs downgraded and others recommended for abolition".
- 5.288 They stated that it appeared that the affected Respondents were separated due to the said reorganization. Note was made that in fact, in later correspondence which the Appellant authored to give a Notice of Redundancy, it was stated that the Corporation was "... currently undergoing structural as well as personnel reorganization..."
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It was observed that re-organisation of an entity, is usually a prelude to redundancies.

5.289 They found that the choice of words used denoted that some employees would be redundant to the new structure. The Supreme Court also stated that the affected employees had to be separated to create the framework for the new reorganized structure.

5.290 Therefore, in their view, the notice of early retirement was in fact a notice of redundancy. That had that not been so, the Appellant would not have rushed to separate employees who had a few months to go before qualifying for normal retirement. They also found that the options which were given to Respondents, whether to remain in employment or leave was completely negated by the threats contained in the offers of retirement.

5.291 The view taken was that those Respondents were forced out. The Supreme Court therefore agreed with the Court below, that there is no freedom of choice where those in authority make one choice more perilous than the other. It was stated that for all intents and purposes, the Respondents who had not yet qualified for retirement were casualties of the Appellants reorganization exercise and therefore redundant.

5.292 The Supreme Court found that the Appellants ought to have been separated under Section 28 of the LASF Act and paid redundancy benefits. Thus, having been rendered redundant and being governed by the ZIMCO Conditions of Service, the Supreme Court's view was that Circular HRA/07/01 of 26th

July 1993 which was a compensation package for surplus labour, applied to them.

5.293 It was also stated that the benefits to which they were entitled under the Circular, were clearly more advantageous than the unionized formula which the Appellant used.

5.294 It can therefore be seen that the reference to employees being given perilous choices did not amount to choices in that matter, referred to what was the appropriate way of dealing with the Respondents, following the re-organisation of the Appellant. The said words were not stated in reference to failure by an employee to give consent to the variation to their Conditions of Service. The case is therefore distinguishable from this case on that basis.

5.295 That notwithstanding, the authorities that have been cited in this matter, show that where an employee has been given clear notice of the variation to their Conditions of Service by the employer, and they have been engaged or consulted on the said variation, and they fully understand the implication of not giving their consent to the variation, and they continue in employment with the full knowledge and understanding that they will receive retirement or redundancy packages at a reduced amount due to the variation, they are deemed to have acquiesced to the variation.

5.296 That is the position in this matter, for those Plaintiffs who did not consent to the January, 2021 Conditions of Service as with the full knowledge and understanding of the variation as communicated by Christopher Wakunguma on

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24<sup>th</sup> April, 2021, and they did not give their consent, they continued in employment.

5.297 They only disputed the computation of their accrued retirement benefits in October, 2021. By continuing in employment with the full knowledge of the consequence of their failure to consent, on being given notice of the variation, they acquiesced to the variation, as they did not repudiate the contract of employment for breach by the employer.

## **6. CONCLUSION**

- 6.1 Only the Plaintiffs, Nephias Msango and Lloyd Chisapi succeed on their claim for a declaration that there was unilateral variation of their Conditions of Service by Indo Zambia Bank Limited by the January, 2021 Conditions of Service, as they were not consulted before they gave their consent.
  - 6.2 Nephias Msango and Lloyd Chisapi further succeed on their claim that the decision by Indo Zambia Bank Limited to calculate their accrued retirement benefits based on the basic pay, as opposed to pay was wrongful, and a violation of their Conditions of Service.
  - 6.3 Nephias Msango and Lloyd Chisapi also succeed on their claim for an Order that their accrued retirement benefits be re-calculated at Three (3) months' pay for each year served and that they be paid the difference between the re-calculated amounts and what was paid to them.
  - 6.4 Nephias Msango and Lloyd Chisapi having succeeded on their claim for re-calculation of their accrued retirement
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benefits, the counterclaim for repayment of the monies paid to them fails, and it is dismissed.

- 6.5 The differences due to be paid to Nephias Msango and Lloyd Chisapi shall carry interest at the average short-term deposit rate from the date of issue of the Writ of Summons until Judgment, and thereafter, at the Bank of Zambia lending rate until payment.
- 6.6 For the rest of the Plaintiffs, their claims fail, and they are dismissed. The counterclaim against them fails as there is no Order for re-commutation of the accrued retirement benefits which were paid to them.
- 6.7 This being an employment matter, I Order that the said Plaintiffs shall bear their own costs of the proceedings.
- 6.8 Nephias Msango and Lloyd Chisapi, having succeeded on their claims, they are awarded costs, which shall be taxed in default of agreement. Leave to appeal is granted.

**DATED AT LUSAKA THE 31<sup>st</sup> DAY OF JANUARY, 2025**

*S. Kaunda Nawa*  
**S. KAUNDA NEWA  
HIGH COURT JUDGE**

