

IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA
(Civil Jurisdiction)

COMP.NO/IRCLK/442/2022

BETWEEN:

LOUIS KABULA

AND

ACCESS BANK ZAMBIA LIMITED

Before the Hon Mrs. Justice T.S Musonda



COMPLAINANT

RESPONDENT

For the Complainant:

*Mr. M. Mweene of Messrs M. Mweene and Partners
Ms. Siababundi and Mr. W. Mukule of Messrs S M Practitioners
Ms. A Nguluwe of Messrs GM Legal Practitioners*

For the Respondent:

*Mr. I. Siame and Mrs. A.M Mapiro of Linda Mataka and Partners
Ms. T Banda and Mrs. M.I Kapende- In-house Counsel.*

JUDGMENT

Legislation referred to:

- (1) The Employment Code Act No.3 of 2019
- (2) The Employment Act, Chapter 268 of the Laws of Zambia
- (3) The Limitation Act, 1939
- (4) Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia
- (5) The Constitution of Zambia (Amendment) 2016, Act. No. 2 of 2016

Cases referred to:

- (1) Geoffrey Kalomo Mudenda v. Robson Essau Muntanga & Rem Concession and Company Ltd, SCZ Appeal No. 229 of 2013
- (2) Kunda v. Konkola Copper Mines Plc, (2007) ZMSC 156

- (3) **African Banking Corporation (Zambia) Ltd v. Lazarous Muntente, CAZ Appeal No. 51 of 2021**
- (4) **Raila Odinga and Others v. Independent Electoral and Boundaries Commission and Others, [2017] eKLR**
- (5) **Associated Chemicals Limited v. Hill and Delamain Zambia Limited and Ellis and Company (as a Law Firm), (1998) S.J. 7 (S.C.)**
- (6) **Ebbw Vale Urban District Council v. South Water Traffic Licencing Authority, [1951] 2 KB 366**
- (7) **Salomon v. A Salomon & Co Ltd, [1896] UKHL 1, [1897] AC 22**
- (8) **Dimpleby & Sons v. National Union of Journalists, (1984) 1 WLR 427**
- (9) **Adams v. Cape Industries, (1991) 1 ALL ER 929**
- (10) **Daniel Mwale v. Njolomole Mtonga (Sued as Administrator of Estate of the late Gabriel Siwona Muteenye Kapuma Mtonga) and the Attorney General, SCZ Appeal No. 6 of 2012**
- (11) **Jonathan Lwimba Mwila v. World Vision Zambia, SCZ Appeal. Number 193 of 2005**
- (12) **Zambia National Commercial Bank PLC v. Nyathando & Others, SCZ Appeal No. 62 of 2016)**
- (13) **Indo Zambia Bank Limited v. Mushaukwa Mubanga, (2009) Z.R. 266**
- (14) **Anderson Mwale and Others v. Zambia Open University, 2021/CCZ/001**
- (15) **Levy Mwale v. Zambia National Broadcasting Corporation, 2020/CCZ/0012**
- (16) **Wilson Masauso Zulu v. Avondale Housing Project Ltd, (1982) ZR 172**
- (17) **Zambia National Commercial Bank v. Evans Hampopwe, SCZ Appeal. No. 188/ 2008**
- (18) **Lubunda Ngala & Jason Chulu v. Anti-Corruption Commission, CCZ Selected Judgment No. 4 of 2018**
- (19) **Dangote Cement Zambia Limited v. Michael Mwaba, CAZ Appeal No. 35 of 2022**

- (20) **Marshal Chileshe v Zambia National Building Society, (Appeal No. 258/2022**
- (21) **Phinate Chona v ZESCO Limited, CAZ Appeal No. 66 of 2019**
- (22) **Investors Compensation Scheme Ltd v West Bromwich Building Society, (1998)1 WLR 896**
- (23) **Holmes Limited v Buildwell Construction Company Limited, (1973) Z.R. 97 (H.C.)**
- (24) **National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo, SCZ Appeal No. 79 of 2001**

Other works referred:

- (1) **Blacks Law Dictionary, (10th delux ed. 2014) (Bryan A. Garner ed.)**
- (2) **Hanrahan, P.F., Ramsay, I.M. & Stapledon, G.P., *Commercial Applications of Company Law* (9th ed, Oxford University Press, 2008)**
- (3) **Chungu, C. & Beele, E. *Labour Law in Zambia, An Introduction* (2nd Edition) (2020), Juta & company (Pty) Ltd**

1. INTRODUCTION

1.1 This matter was commenced by way of a Notice of Complaint dated 9th June 2022, which was subsequently amended on 7th May 2024. The amended complaint was supported by an Amended Affidavit sworn by the Complainant, **Louis Kabula (“Mr. Kabula”)**, on 7th May 2024. In the said complaint, Mr. Kabula sought relief in respect of the following:

- (i) Payment of salaries for services rendered as Chief Financial Officer at Cavmont Capital Holdings PLC for a period of nine (9) years at a monthly rate of K60,000, amounting to K6,480,000;
- (ii) Payment of salaries for Company Secretarial duties for a period of three (3) years at a monthly rate of K80,000, amounting to K2,880,000;

- (iii) Payment of underpaid wages amounting to K483,862.38 for the period 1st April 2012 to 1st September 2015;
- (iv) Payment of a pension fund calculated at 10% of his annual salary over a nine (9)-year period;
- (v) Payment of gratuity for eight (8) years of service;
- (vi) Payment for 270 accrued leave days;
- (vii) Payment of monthly salaries from date of termination of employment, being 28th February 2018 to date;
- (viii) Interest on all sums; and
- (ix) Any other relief the Court may deem fit.

1.2 In response, the Respondent, **Access Bank Zambia Limited**, filed an Answer and a supporting Affidavit, both dated 24th May 2024, in which it denied all claims advanced in Mr. Kabula's Notice of Complaint.

1.3 Subsequently, Mr. Kabula filed an Affidavit in Reply dated 10th June 2024.

1.4 At trial, Mr. Kabula testified in his own behalf and did not call any other witness.

1.5 The Respondent, called one witness, **Ms. Beverly Nachula ("Ms. Nachula")**, its Head of Human Capital.

1.6 A summary of evidence led by both parties is set out below.

2. SUMMARY OF AFFIDAVIT EVIDENCE

Mr. Kabula's evidence in support of Notice of Complaint

2.1 Drawing from the founding affidavit evidence, Mr. Kabula was employed by Cavmont Bank Zambia Limited, now Access Bank Limited ("the Respondent") on 27th August 2009 as Chief Financial Officer, pursuant to an offer letter marked "**LK1**". His terms of employment included an annual salary of K705,353.95, a 10% pension contribution by the Respondent, an annual gratuity of K60,000.00, and leave accruing at three days per calendar month.

2.2 He averred that from 2009 to 2018, he served as Chief Financial Officer of both the Respondent and Cavmont Capital Holdings

PLC (“the Holding Company”). The latter was the Holding Company of Cavmont Bank Zambia Limited at the time. He contended that the Board of Directors of the Respondent appointed him to serve as Chief Financial Officer of the Holding Company.

- 2.3 From 2010 to 2012, the Board of Directors of the Respondent appointed him to serve as Company Secretary of the Respondent.
- 2.4 The aforementioned roles were served concurrently.
- 2.5 He asserted that he was never remunerated for the latter two appointments of Chief Financial Officer of the Holding Company and Company Secretary of the Respondent.
- 2.6 Mr. Kabula contended that a performance-based salary increment approved by the Respondent as per exhibit “**LK2**” with effect from 1st April 2012 was never implemented, resulting in an underpayment of K138,246.39 per annum over 3 and a half years, totaling K483,862.38.
- 2.7 He further alleged that the pension scheme referenced in exhibit “**LK1**” was never established, and that the Respondent made no contributions to his pension. While gratuity was paid in his first year, subsequent payments remained outstanding.
- 2.8 Upon resignation in February 2018, the Respondent accepted his departure by letter dated 28th February 2018 and claimed an outstanding loan of ZMW 1,616,194.77, purportedly recoverable from his terminal benefits, as per exhibit “**LK3**”. He asserted that no computation of such benefits was provided and that no payment was effected, as shown in the demand letter, exhibit “**LM4**”.
- 2.9 Mr. Kabula further stated that he accrued 270 leave days over nine years due to the workload arising from multiple roles.
- 2.10 He asserted that he ought to have remained on the payroll until settlement of his pension.

The Respondent’s case in opposition to Notice of Complaint

- 2.11 According to the Affidavit in Support of Answer, sworn by Ms. Nachula, Mr. Kabula was employed on 27th August 2009 as Chief Financial Officer of Cavmont Bank, effective 1st October 2009, and served until his voluntary resignation in February 2018. The Respondent denies knowledge of his purported appointment as Chief Financial Officer of the Holding company or any appointment by the Board of Directors or the Respondent as Company Secretary.
- 2.12 The Holding company was a separate and distinct legal entity from Cavmont Bank and the Respondent, and was struck off the register of companies on 20th December 2021. A copy of the Certificate of Publication was exhibited and marked “**BN3**”.
- 2.13 It is therefore the Respondent’s position that Mr. Kabula did not serve in three concurrent roles within Cavmont Bank or the Respondent as alleged.
- 2.14 The Respondent further contends that Mr. Kabula is not entitled to any remuneration in respect of the additional roles he claims to have performed, as there is no documentation supporting such allegations. The Respondent characterizes the claims as misguided.
- 2.15 It is the Respondent’s contention that the allegations concerning the additional roles are an afterthought, noting that they were not raised during Mr. Kabula’s tenure with Cavmont Bank, nor immediately following his resignation, but only emerged four years later and two years after the Respondent’s acquisition of Cavmont Bank.
- 2.16 Regarding pension, the Respondent asserts that Cavmont Bank had established a scheme for the benefit of its employees, including Mr. Kabula, in accordance with his contract of employment. It maintains that it is incumbent upon Mr. Kabula to pursue any benefits directly with the pension scheme administrators.

- 2.17 The Respondent further asserts that all payments relating to gratuity and terminal benefits were made in accordance with contractual obligations and that no outstanding dues remain. Instead, the Respondent maintains that Mr. Kabula is indebted to Cavmont Bank in the sum of ZMW 1,616,194.77, as shown on the Statement of Account exhibited and marked “BN4”.
- 2.18 The Respondent states that Cavmont Bank duly computed Mr. Kabula’s terminal benefits and remitted the same accordingly, and that no further sums are outstanding or payable in relation to his employment.
- 2.19 The Respondent denies the claim that Mr. Kabula forfeited leave over a nine-year period, affirming that he had, in fact, proceeded on leave during his engagement with Cavmont Bank.
- 2.20 In conclusion, the Respondent submits that all employment-related obligations were fulfilled upon separation and that there was no legal basis for retaining Mr. Kabula on the payroll following his resignation.

Mr. Kabula’s case in reply

- 2.21 In response, as drawn from the affidavit in reply, Mr. Kabula reiterated that the additional appointments attributed to him were made by the Respondent’s Board of Directors through a formal resolution, which he contends is held in the Respondent’s custody. He maintained that the Board of Directors of the Respondent, and not the Holding company, was the instructing entity. Therefore, the Respondent bears the obligation to remunerate him. He also maintained that the three roles run concurrently.
- 2.22 He denied the Respondent’s assertion that his claims were an afterthought, explaining that he had engaged the Respondent immediately following his resignation. He stated that he could not commence formal proceedings earlier as he was awaiting

clearance from the Bank of Zambia regarding his subsequent appointment as Chief Executive Officer at another institution.

- 2.23 Mr. Kabula denied the existence of a functioning pension scheme during his tenure and maintained that no contributions were made on his behalf. He further refuted the Respondent's claim that gratuity and terminal benefits were paid to him, asserting that no computation had ever been provided and no payment had been received.
- 2.24 He argued that if terminal benefits had in fact been paid, the Respondent would have deducted his outstanding loan balance prior to making any settlement. He asserted that he personally settled the loan independently, and in support thereof relied on the bank statement, exhibit "**LK1**".
- 2.25 Mr. Kabula maintained that he did not proceed on leave due to the intensity of his workload throughout the period of engagement. He referenced positive annual performance reviews as evidence of his continued and uninterrupted service.
- 2.26 He concluded by restating his position that he ought to have remained on the payroll until such time as all outstanding dues were discharged by the Respondent.

3. SUMMARY OF EVIDENCE AT TRIAL

Mr. Kabula's evidence

- 3.1 At trial, Mr. Kabula confirmed his appointment and original terms of service as set out in exhibit "**LK1**". He reiterated that, in addition to his appointment as Chief Financial Officer of the Respondent, the roles of Chief Financial Officer of the Holdings Company and Company Secretary of the Respondent were conferred by the Board of Directors, without separate remuneration or formal contract. He identified Exhibit "**LK1**" as proof that he personally discharged the loan obligation, and testified that his Statement of Claim included market-value estimates for the Company Secretary role (K60,000.00) and

salary adjustments corresponding to his expanded Chief Financial Officer responsibilities.

- 3.2 He described the duties as mentally and physically demanding, and attributed his inability to take leave to the cumulative workload.
- 3.3 He testified that despite positive annual performance reviews, the Respondent failed to honor pension, gratuity, and terminal benefit obligations.
- 3.4 He stated that he made several follow-ups with both the Respondent and pension institution, but that those efforts were unsuccessful. As a finance executive subject to regulatory obligations under the Bank of Zambia, he discharged all debt obligations independently to remain in good standing.

Ms. Nachula's evidence

- 3.5 At trial, the Respondent's witness, Ms. Nachula, stated that she would rely on the affidavit sworn on its behalf in support of the Respondents' case.

4. SUBMISSIONS

- 4.1 I am grateful to both parties for their respective submissions. While I shall not reproduce them in full, I will refer to them where necessary in the course of my analysis.

5. FINDINGS NOT IN DISPUTE

- 5.1 Having considered the rival evidence and submissions, I find that it is not in dispute that:
 - (i) Mr. Kabula was employed by Cavmont Bank Zambia Limited as Chief Financial Officer on 27th August 2009, effective 1st October 2009 and resigned from employment on 28th February 2018;
 - (ii) Cavmont Bank accepted Mr. Kabula's resignation by letter dated 28th February 2018;
 - (iii) The Respondent acquired Cavmont Bank and not Cavmont Capital Holdings Zambia; and

(iv) That Cavmont Capital Holdings Zambia PLC was struck off the Register of Companies on 20th December 2021.

5.2 The issues in dispute and accordingly framed for determination are as follows:

- (i) Whether Mr. Kabula is entitled to payment of salaries for services rendered as Chief Financial Officer at Cavmont Capital Holdings PLC for a period of nine (9) years at a monthly rate of K60,000, amounting to K6,480,000;
- (ii) Whether Mr. Kabula is entitled to payment of salaries for Company Secretarial duties for a period of three (3) years at a monthly rate of K80,000, amounting to K2,880,000;
- (iii) Whether Mr. Kabula is entitled to payment of underpaid wages amounting to K483,862.38 for the period 1st April 2012 to 1st September 2015;
- (iv) Whether Mr. Kabula is entitled to payment of a pension fund calculated at 10% of his annual salary over a nine (9)-year period;
- (v) Whether Mr. Kabula is entitled to payment of gratuity for eight (8) years of service;
- (vi) Whether Mr. Kabula is entitled to payment for 270 accrued leave days;
- (vii) Whether Mr. Kabula is entitled to payment of monthly salaries from date of termination of employment, being 28th February 2018 to date; and
- (viii) Whether Mr. Kabula is entitled to any other relief the Court may deem fit.

6. ANALYSIS AND DETERMINATION

6.1 Before proceeding further in this analysis, I find it necessary to determine the legal framework under which the Complainants' claims are to be assessed. The evidence shows that the Respondent resigned on 28th February 2018. At the material time,

the **Employment Code Act, No. 3 of 2019**, had not yet come into force.

6.2 I therefore hold that this matter is governed by the repealed **Employment Act, Chapter 268 of the Laws of Zambia**, which was in force at the time.

6.3 Given their interrelated nature, the first and second issues shall be determined together. The subsequent issues will be addressed *ad seriatim*, in the order in which they arise.

Issue 1: Whether Mr. Kabula is entitled to payment of salaries for services rendered as Chief Financial Officer at Cavmont Capital Holdings PLC for a period of nine (9) years at a monthly rate of K60,000, amounting to K6,480,000; and

Issue 2: Whether Mr. Kabula is entitled to payment of salaries for Company Secretarial duties for a period of three (3) years at a monthly rate of K80,000, amounting to K2,880,000

6.4 Mr. Kabula contends that he was appointed to serve in the additional roles of Chief Financial Officer of the Holding Company and Company Secretary of the Respondent through a resolution of the Board of Directors of the Respondent. He states that verbal instructions were issued by directors requiring him to discharge additional duties for the Holding and Respondent company, and that such instructions formed the basis of an agreement. According to the submissions, a copy of the Board resolution- showing proof of the appointment- was to be produced by the Respondent, as fortified by **Section 24(5) of the Employment Act**. That provision states that:

Where any dispute arises as to the terms and conditions of an oral contract other than a contract for the employment of a casual employee, and the employer fails to produce a record of such contract

made in accordance with the provisions of this section, the statement of the employee as to the nature of the terms and conditions shall be receivable as evidence of such terms and conditions unless the employer satisfies the court to the contrary.

- 6.5 **Section 24(5) of the Employment Act** was relied on to demonstrate that employees are afforded statutory protection in circumstances where appointments or engagements are conveyed verbally, and no formal written contract is issued. It was thus submitted that the Respondent's failure to produce employment records relating to the additional roles ought to be construed in Mr. Kabula's favour, as the statutory duty to maintain such records rested with the employer.
- 6.6 To reinforce this position, the case of **Geoffrey Kalomo Mudenda v. Robson Essau Muntanga & Rem Concession and Company Ltd (1)**, was cited, in which the Court affirmed that the burden lies on the employer to maintain adequate records of employment terms and conditions. The Court held that where such records are absent, and the employee provides a plausible account of engagement and duties performed, the evidentiary balance may shift in the employee's favour.
- 6.7 The Respondent, in reply, contends that Mr. Kabula has failed to establish any legal foundation upon which liability may be imputed to it for obligations arising under the Holdings company.
- 6.8 It argues that no documentary evidence has been adduced to confirm Mr. Kabula's appointment to the roles of Chief Financial Officer and Company Secretary.
- 6.9 The Respondent further submits that it cannot be held accountable solely on the basis of alleged verbal instructions issued by Directors of Cavmont Bank. In support of this position, it cites the case of **Kunda v. Konkola Copper Mines Plc (2)**, in which the Supreme Court reaffirmed the principle that the

burden of proof lies on the party asserting a fact. The Court held that where a party alleges the existence of a right or entitlement, it must discharge the evidentiary burden by producing sufficient proof to support that claim.

- 6.10 At this point, it is essential to consider the distinction between the legal burden of proof and the evidential burden. In doing so, I borrow the wisdom of the Court in the case of ***African Banking Corporation (Zambia) Ltd v. Lazarous Muntente (3)***. In that case, the court held that while the legal burden in civil cases always lies with the claimant, the evidential burden, which is the duty to adduce evidence, can shift during the course of proceedings once a prima facie case is established. As defined in ***Black's Law Dictionary (10th deluxe ed. 2014, Bryan A. Garner, ed.)*** at page 1589, shifting the burden of proof is:

In litigation, the transference of the duty to prove a fact from one party to the other; the passing of the duty to produce evidence in a case from one side to another as the case progresses, when one side has made a prima facie case showing on a point of evidence, requiring the other side to rebut it by contradictory evidence.

- 6.11 Furthermore, the Supreme Court in the case of ***Raila Odinga and Others v. Independent Electoral and Boundaries Commission and Others (4)***, persuasively emphasized that while the legal burden of proof remains with the claimant throughout, the evidential burden may shift depending on how effectively that burden is discharged at various stages of the case. The Court stated:

The legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting... It falls to the court to determine whether a firm and unanswered case has been made.

- 6.12 This reasoning, while arising in an electoral context, affirms a well-established evidential doctrine equally applicable in employment law: once a prima facie case has been laid.
- 6.13 Pertinently, and drawing from the principle set out in ***African Banking Corporation*** (supra), where an evidential burden is imposed by statute, the party seeking to rely on a particular fact bears the burden of proving it.
- 6.14 In applying these principles to the present matter, I am of the considered view that Mr. Kabula bore the legal burden of establishing an employment agreement with either the Holding Company or the Respondent in relation to the additional roles. Only upon satisfying that threshold would the evidential burden shift to the Respondent to produce further particulars of the engagement.
- 6.15 The wording of ***Section 24(5) of the Employment Act*** clearly operates within the framework of an established oral contract. It addresses evidentiary presumptions concerning disputed terms, not the existence, of employment.
- 6.16 In this regard, the Respondent did not admit or assert the existence of any board resolution appointing Mr. Kabula to the roles of Chief Financial Officer and Company Secretary. It expressly disclaimed liability for any alleged verbal directives said to have been issued by the Board of Directors of the Respondent. The burden of proving the existence of the alleged engagement therefore remained squarely on Mr. Kabula.
- 6.17 With respect to the first issue, the Respondent contends that it only acquired Cavmont Bank and not the Holding Company, which was a separate legal entity, and as such, it cannot be held liable for obligations or duties performed under a different company. The Respondent relied on the well-established principle of separate legal personality codified under ***Section 16 of the Companies Act No. 10 of 2017***, which provides that:

A company registered in accordance with this Act, acquires a separate legal status, with the name by which it is registered, and shall continue to exist as a corporate until it is removed from the register of companies.

6.18 The Respondent also relied on the Supreme Court case of *Associated Chemicals Limited v. Hill and Delamain Zambia Limited and Ellis and Company (as a Law Firm)* (5), in which it was held that:

We agree with the learned trial Judge. In seeking to distinguish between old and new shareholders and between new and old management, indeed in seeking to treat the business transaction giving rise to the respondent's claim as one essentially between individuals, Mr Mbushi fell into grave error. A principle of the law which is now too entrenched to require elaboration is corporate existence of a company as a distinct legal person: see *Salomon v. Salomon and company* (1897) AC 22 and also the Companies Act, cap 388 of the 1995 edition of the laws of Zambia.

Upon the issue of the certificate of incorporation, the Company becomes a body corporate. As the learned authors of palmer's company law (22nd Ed) suggest in Chapter 18 a company is not, like a partnership or a family. A mere collection or aggregation of individuals. In the eve of the law, it is a person distinct from its members or shareholders, a metaphysical entity or a fictional of the law, with legal but no physical existence" the argument based on old and new

shareholders and managers or on the share purchase agreement must fall of its own inanition.

6.19 The Respondent argued that it is trite that once a company is registered, it acquires a separate legal status and becomes a person at law as well as the shareholders of the company. Thus, an action should not be brought against a person that is not a party to the contract. The Respondent also relied on the English case of *Ebbw Vale Urban District Council v. South Water Traffic Licencing Authority* (6), in which it was observed that:

Under the ordinary rules of law, a parent company and a subsidiary company, even a hundred percent subsidiary company, are distinct legal entities and in the absence if a contract of agency between the two companies one cannot be said to be the agent of the other.

6.20 In response, Mr. Kabula submitted that he was expected to perform whatever tasks assigned to him by the Board of Directors of the Respondent and that this was in line with the powers of the board of directors under **Section 86(b)** and **Section 88 of the Companies Act No. 10 of 2017**, and that he would have been in breach of his fiduciary duties had he declined to act.

6.21 In my view, this part of the issue is anchored in the principle of separate legal entity, as the Respondent contends that it cannot bear liabilities relating to the Holding Company, having only acquired Cavmont Bank.

6.22 As correctly stated by the Respondent, the general rule is that a company is a separate legal entity, a principle espoused in **Associated Chemicals Limited** (supra).

6.23 The position of a company being a separate entity is codified in **Section 16** of the **Companies Act No. 10 of 2017**, as stated above.

6.24 Further, **Section 22(1)(a)** of the same Act provides that:

A company shall have:- (a) perpetual succession and a common seal, capable of suing and being sued in its corporate name and shall, subject to this Act, have power to do all such acts and things as a corporate may by law, do or perform.

6.25 The principles of separate legal personality are elementary and entail that a company duly incorporated under the Companies Act acquires a separate legal status such that it ought to be sued in its own right and vice versa.

6.26 In the landmark case of **Salomon v. A Salomon & Co Ltd (7)**, the House of Lords affirmed this position, holding:

As the company was duly incorporated, it is an independent person with its rights and liabilities appropriate to itself, and that “the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

6.27 In this matter, Mr. Kabula does not dispute that the Respondent acquired Cavomt Bank only. His contention is that the Directors of the Respondent instructed him to serve in the additional role for the Holding Company, thereby asserting that the Respondent was the instructing entity and should therefore bear liability.

6.28 The law is settled: a company cannot be held liable simply because it is linked to another, or even if the company shares the

same shareholders or directors. To impose liability in such cases, one must first pierce the corporate veil.

6.29 On this point, I stand guided by *Dimpleby & Sons v. National Union of Journalists* (8) where, the House of Lords, stated inter-alia at page 435 that:

The reason why English statutory law, and that of all other trading countries, has long permitted the creation of corporations as artificial persons distinct from their individual shareholders and from that of any other corporation even though the shareholders of both corporations are identical is to enable business to be undertaken with limited financial liability in the event of the business proving to be a failure...

6.30 Similarly, in *Adams v. Cape Industries* (9), the Court held:

... the court is not free to disregard the principle of *Salomon v. A Salomon & Co. Ltd* 111 merely because it considers that justice so requires our law, for better or worse, recognises the creation of subsidiary companies which though in one sense the creature of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities. There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary the fundamental principle is that each company in a group of companies is a separate legal entity possessed of separate legal rights and liabilities.

6.31 Here, Mr. Kabula asserts that he was instructed by the Respondent's Directors to perform functions for the Holding

Company. Whether such instructions confer liability turns on whether the Respondent can be deemed controller of the Holding Company.

- 6.32 On this point, I draw from Hanrahan, Ramsay & Stapledon in ***Commercial Applications of Company Law (9th ed, 2008)***, where, at page 24, the authors state:

If a company were treated as the agent of a person who controlled it, any rights or obligations of the company arising under the scope of the agency would be treated as rights or obligations of the controller. This would have the effect of piercing the corporate veil.... In some very limited circumstances, English Courts have been prepared to treat the company as the agent or partner of its controllers, where the Company was clearly under-resourced to carry on the activities for which it was formed and did not operate independently in any way from its controllers.

- 6.33 I am, however, hesitant to adopt the view that an agency relationship existed between the Holding Company and the Respondent, in the present matter. This is because no evidence was presented that the Holding Company operated as an agent of the Respondent; or that it lacked the capacity to operate independently. I am therefore not persuaded that any agency or controlling relationship existed that would warrant lifting the corporate veil.

- 6.34 If it were true that Mr. Kabula held contractual obligations with the Holding Company, the Respondent cannot be deemed privy to that arrangement. The principle of privity of contract dictates that legal obligations bind only those who are party to the agreement. The Supreme Court in ***Daniel Petyala v. Zambia Consolidated Copper Mines (10)***, reaffirmed that only parties to

a contract may enforce its rights or be burdened by its obligations, when it stated:

The principle of privity of contract provided that a contract could not confer rights or impose obligations arising therefrom on to other persons except the parties...only the parties to a contract can sue, enforce rights or claim damages in a contractual situation.

6.35 Against the backdrop of my findings on agency, corporate separateness, and the absence of evidence of any legal or contractual basis obligating Mr. Kabula to accept the additional roles, I do not find it necessary to explore the fiduciary duty argument in depth. Any suggestion that declining such roles would constitute a breach of fiduciary duty is rendered moot, as no foundational relationship-whether contractual, legal, or fiduciary-was established to support that claim. In short, the argument does not alter the legal position.

6.36 In light of the foregoing, I find that Mr. Kabula has not established his claim under the first issue, namely his entitlement to remuneration for services allegedly rendered as Chief Financial Officer for the Holding Company. The Holding Company remained a separate legal entity from the Respondent, and the proper entity against whom such a claim may have been pursued was the Holding Company itself. Its subsequent deregistration, while regrettable, does not transfer liability to the Respondent.

6.37 Similarly, I find that Mr. Kabula has failed to establish his claim under the second issue, namely remuneration for the role of Company Secretary of the Respondent, in the absence of any evidentiary basis of the employment relationship regarding the appointment.

Issue 3: Whether Mr. Kabula is entitled to payment of underpaid wages amounting to K483,862.38 for the period 1st April 2012 to 1st September 2015

- 6.38 On this issue, Mr. Kabula submitted that, following a favourable performance review in 2012, exhibited as "**LK2**" in the Amended Affidavit in Support of Notice of Complaint, his annual salary was approved for adjustment from K637,889.82 to K843,600.35. This translated to a revised monthly salary of K70,300.03. However, he argued that this adjustment was never implemented. In support, he relied on payslips on record, including one dated November 2014, which continued to reflect the earlier monthly salary of K60,465.35. He contended that the discrepancy resulted in a monthly shortfall of K9,835.00, and that the underpayment persisted from 1st April 2012 to 1st September 2015, a period of three years and six months, culminating in a total claim of K483,862.00.
- 6.39 It was further submitted that the Respondent failed to produce any documentary evidence, such as payslips or bank transfer records, covering salary payments during the relevant period. Mr. Kabula argued that this omission contravenes the Respondent's statutory duty under **Section 24(5) of the Employment Act**, which requires every employer to keep accurate records of wages paid.
- 6.40 In response, the Respondent contended that Mr. Kabula is not entitled to the alleged underpayment of K483,862.00 covering the period from 1st April 2012 to 1st September 2015. It was submitted that the claim is statute-barred under the **Limitation of Actions Act, 1939**, which prescribes a six-year limitation period for actions founded on a simple contract. According to the Respondent, this period has elapsed and bars the claim.
- 6.41 Additionally, the Respondent argued that Mr. Kabula had not provided sufficient evidence to support the claim. Reference was made to payslip records said to reflect accurate salary payments. In the absence of credible and verifiable documentation, it was submitted that Mr. Kabula's assertions remained unsubstantiated. The Respondent therefore contended that the

claim fails, both for want of evidence and by reason of being statute-barred.

- 6.42 In reply, Mr. Kabula maintained that the claims are not statute-barred. He contended that the cause of action did not arise during the course of his employment, but only upon his separation from the Respondent in February 2018. According to him, the Respondent's failure to pay the outstanding salary adjustment at that juncture constituted the first actionable breach. He argued that payment had previously been deferred by mutual agreement, and that throughout this period he had reasonably relied on assurances from the Respondent that the adjusted amounts would be settled.
- 6.43 To reinforce this interpretation, the case of ***Daniel Mwale v. Njolomole Mtonga (Sued as Administrator of Estate of the late Gabriel Siwona Muteenye Kapuma Mtonga) and the Attorney General (10)***, was cited, where the Supreme Court affirmed that limitation begins to run only when there exists (i) a party capable of suing, (ii) a party capable of being sued, and (iii) a full set of material facts necessary to prove the claim.
- 6.44 Additionally, it was pointed out that the Court had granted Mr. Kabula leave to file the complaint out of time on 31st May 2022. He emphasized that the Respondent did not take steps to challenge or set aside that ruling.
- 6.45 In support of his position, Mr. Kabula tendered into evidence a letter dated 12th April 2012, addressed to him by the then Managing Director, Mr. Johan Minnaar, and marked "Private & Confidential." It is reproduced verbatim below:

12th April 2012

Private & Confidential

**Mr. Louis Kabula
c/o Cavmont Bank Limited
Finance Department**

Dear Mr. Kabula

2012 PERFORMANCE REVIEW

We have great pleasure in advising that you have been awarded a package increase of K62,488,922.00 per annum, with effect from 1st April, 2012, in accordance with your contribution towards realising our business objectives during 2011/2012.

The magnitude of your individual increase is based on your annual remuneration package as at 31st March 2012.

Your new remuneration package will be as follows with effect from 1st April 2012:

New Annual Remuneration Package K843,600,348.00

(Payable on April Salary payday)

New Monthly Remuneration Package K70,300,029.00

We thank you for your personal commitment to achieving the objectives of the Bank during 2011/2012 and no doubt we can rely on you to deliver similar outcomes in 2011/12. Good luck with these challenges.

May I use this opportunity to thank you for your contribution to the success of our Bank during the past year.

Yours sincerely

*Johan Minnaar
Managing Director*

6.46 The letter clearly confirmed that, following a favourable performance review, Mr. Kabula had been awarded a salary increment of K62,488,922.00 per annum, effective 1st April 2012. The communication further stated that the Complainant's new annual salary would be K843,600,348.00, translating into a revised monthly salary of K70,300,029.00, to be paid from the April 2012 payroll onward.

6.47 Despite this clear communication, the pay slips submitted by the Respondent in response to the Notice to Produce dated 2nd August 2024, specifically for November 2014, May 2015, June 2015, July 2015, and October 2015, reflect no adjustment from the earlier salary. Notably, the November 2014 pay slip still shows a monthly salary of K60,465.36. This figure supports Mr. Kabula's position that the approved increment was never put into effect. The Respondent provided no alternative payroll records or internal documentation to show that the increment was ever implemented. Instead, it leaned primarily on the argument that

the claim should be dismissed for being time-barred under the ***Limitation Act, 1939***.

6.48 That argument does not stand. The record shows that Mr. Kabula applied for leave to file the complaint out of time on 12th May 2022. Leave was granted on 6th June 2022 by the Registrar, who considered the reasons given for the delay. It is important to note that such leave is not automatic, it is granted only when the Court is satisfied that there is a valid explanation. I refer to the case of ***Jonathan Lwimba Mwila v. World Vision Zambia (11)***, where the Court emphasised:

That leave to file a complaint out of time is not granted as a matter of course as though the pursuer is merely pushing an open door. The granting of leave to file delayed complaints requires that discretion is exercised judiciously, there have to be sufficient reasons for the delay to seek redress in court after the incident complained of.

6.49 In this matter, the reasons for delay were adequately explained, and the Respondent did not challenge the grant of leave nor seek to have the order set aside. Having let that opportunity pass, it cannot now seek to rely on limitation as a defence.

6.50 This leads to a further issue: does the grant of leave to file a late complaint render the ***Limitation Act, 1939*** inapplicable? On this point, the Supreme Court in ***Zambia National Commercial Bank PLC v. Nyathando & Others (12)*** made it clear that:

In the application to file the complaint out of time, several arguments were put forward regarding the effect of the Limitation Act, 1939 and the limitation placed by section 85(3) of the Industrial and Labour Relations Act. Arguments were also advanced on the question whether or

not, in our judgment allowing the Muyamwa group to file their complaint, we had ousted the provisions of the Limitation Act, 1939. In the end, the Industrial Relations Court held that the effect of our decision in the Muyamwa case, and others on the same subject, was that both section 85(3) of the Industrial and Labour Relations Act and the Limitation Act, 1939, did not apply to a complaint that was brought under section 85(6) of the Industrial and Labour Relations Act. We must state here that we do not understand why the parties and the court below brought into play the Limitation Act, 1939, because section 32 of that Act says that it does not apply to an action where the limitation period is prescribed by another statute. So, in this case, the only limitation that the parties and the court ought to have been considering is that which is placed by section 85(3) of the Industrial and Labour Relations Act.

- 6.51 In this case, the decision in *Nyathando & Others* supports the position that the Respondent's reliance on the *Limitation Act, 1939* is unattainable. That statute does not apply where another law already prescribes a specific time limit, and here, the applicable law is the *Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia*. Under that framework, Mr. Kabula was granted leave to file the complaint out of time. That leave was neither challenged nor appealed, and its effect is clear: the claim is properly before this Court.
- 6.52 The next question is whether Mr. Kabula has proved that a salary increment was approved but not implemented. I find that he has. The salary adjustment letter and pay slips show the old rate remained in place despite formal approval of an increase. The Respondent, in the best position to produce updated pay slips or

other records, failed to do so. In the absence of any credible rebuttal, Mr. Kabula's version stands unrebutted.

- 6.53 Accordingly, I find in favour of Mr. Kabula. The Respondent is hereby held liable to pay the amount claimed in respect of the salary increment that was not effected during the relevant period. The precise sum due shall be computed by the Registrar.

Issue 4: Whether Mr. Kabula is entitled to payment of a pension fund calculated at 10% of his annual salary over a nine (9)-year period

- 6.54 As regards the claim for the pension benefit, Mr. Kabula asserted that he was never paid any pension entitlement throughout his nine years of service with the Respondent.
- 6.55 He submitted that although pay slips for May, June, and October 2015 featured a line item labelled "Pension Fund," no payments were ever made directly to him, nor was he informed of the specific pension house or scheme to which any contributions were allegedly remitted.
- 6.56 He argued that the entries were misleading, particularly as the November 2014 pay slip, submitted for comparative purposes, contained no such line, thereby casting doubt on the consistency and accuracy of the Respondent's payroll documentation.
- 6.57 In support of this position, Mr. Kabula relied on the principle of *contra proferentem*, as restated in ***Indo Zambia Bank Limited v. Mushaukwa Mubanga (13)***, arguing that any ambiguity in the pay slip descriptions must be interpreted against the Respondent, as the drafter of those documents.
- 6.58 Mr. Kabula maintained that the 10% pension contribution was the sole responsibility of the employer and ought to have been remitted directly to an established pension scheme, rather than appearing as a deduction or allowance on the pay slip. He further submitted that the Respondent had provided no evidence to confirm that any pension facility was ever created or administered on his behalf.

- 6.59 During cross-examination, the Respondent's witness, Ms. Nachula, conceded that pension contributions were made through a broker, but was unable to identify the pension house used or confirm whether any account had been opened in Mr. Kabula's name. Ms. Nachula also acknowledged that no records of remittance or account statements had been produced before the Court. Mr. Kabula referred to a demand letter marked as exhibit "**LK4**", evidencing that follow-ups had been made, but the Respondent failed to reply or furnish the requested details.
- 6.60 Mr. Kabula therefore submitted that the Respondent's failure to identify the pension house or present supporting documentation spanning the full nine-year employment period was indicative of the fact that no pension scheme had been established. He contended that reliance on three isolated pay slips from 2015 was insufficient to account for the entire period of service. In the absence of proof to the contrary, he is entitled to recover the full value of the employer's 10% pension contribution over the duration of his employment.
- 6.61 In response, the Respondent submitted that Mr. Kabula is not entitled to any further payment in respect of pension or gratuity, arguing that the employment offer, tendered as exhibit "**BN2**", expressly stated that the pension scheme was a benefit wholly funded by the employer. It was further contended that upon resignation, Mr. Kabula received all vested benefits due to him under the terms of the pension arrangement.
- 6.62 When asked whether actual contributions had been made, Ms. Nachula affirmed that pension contributions were processed for employees generally. However, Ms. Nachula stated that certain employees opted to receive these contributions as part of their salary rather than having them remitted to a pension scheme. In the present matter, the Respondent relied on the pay slip produced pursuant to the notice to produce to suggest that Mr. Kabula fell into this category.

6.63 Specifically, the Respondent produced pay slips in its Notice to Produce for the months of May, June, July, and October 2015, each showing a pension fund allocation of K3,846.49, in support of its position that Mr. Kabula's pension was paid directly to him. This position was maintained by Ms. Nachula under cross-examination, as can be gleaned from the following extract of questions and responses:

Q. I am referring you to your own paragraph 14 (reads), based on that, where was the Complainant receiving his pension, what is your position?

A. He was being paid directly.

Q. Are you now changing your earlier position that the money was being paid to a pension scheme?

A. The Complainant was being paid directly to his account by the employer. To qualify this statement, if the Complainant claims his pension entitlement was never remitted, what I am clarifying is that he was paid directly as per his pay slip.

Q. Have you brought evidence to show how much pension fees the Complainant has received, from the time he was employed to the date he resigned? The first pay slip under notice to produce, you agree with me according to this slip, it does not show whether or not the Complainant received the pension fund. Therefore, it would have been more helpful for employers to produce the total amount of pension paid so far to the Complainant.

A. Yes.

Q. You equally agree you have not brought any evidence of bank transfers showing evidence to establish whether or not there was a bank transfer?

A. It is on his pay slips.

Q. You have not brought any other evidence to show totality of pension received?

A. No.

Q. Especially that pay slip exhibits, there was one which does not show any pension—you agree it would have been helpful?

A. No, because pay slips are there.

- 6.64 While the Respondent maintained, through pay slips and witness testimony, that pension payments were made directly to Mr. Kabula, the absence of any supporting records, bank statements, or third-party confirmations casts doubt on the reliability and completeness of this assertion.
- 6.65 To provide context, paragraph 14 of the Respondent's affidavit in support of answer sets out the position that it contributed to a pension fund on behalf of Mr. Kabula and other employees. According to the Respondent, this was in line with Mr. Kabula's contract of employment, and it asserted that the burden to pursue pension benefits through the scheme rested with Mr. Kabula. The Respondent maintained that the pension scheme was separate and distinct from Cavmont Bank and from the Respondent itself.
- 6.66 Upon analyzing the evidence presented, it is apparent that Mr. Kabula's offer of employment clearly stipulated that the pension fund was to be entirely employer-contributory at a rate of 10%. Thus, the Respondent's assertion that some employees opted to receive pension contributions as part of their salary lacks merit,

as no evidence was adduced to demonstrate any formal variation or amendment to the original contractual terms between the parties.

6.67 Although Mr. Kabula did not tender his own pay slips for comparison, the contractual obligation to contribute lay with the Respondent. It follows that the burden to produce evidence of compliance, whether by way of remittance records, confirmations from the broker, or scheme statements, rested squarely with the Respondent. The explanation that contributions were incorporated into Mr. Kabula's salary stands at odds with the Respondent's pleaded position that pension payments were remitted to a separate scheme. This inconsistency undermines the credibility of its defence. Moreover, the Respondent only submitted pay slips for four months (May 2015, June 2015, July 2015 and October 2015) within a nine-year period, leaving a substantial evidentiary gap that has not been accounted for.

6.68 In light of the Respondent's own assertion that pension contributions were made through a broker, and in the absence of any documentation or records evidencing actual remittance to a pension house, it is my considered view that Mr. Kabula remains entitled to the claimed payment. The Respondent's failure to provide proof of such remittances leads to the conclusion that the pension fund remains outstanding and should be paid to Mr. Kabula as a lump sum. The exact amount payable shall be computed by the Registrar.

Issue 5: Whether Mr. Kabula is entitled to payment of gratuity for eight (8) years of service

6.69 With respect to the claim for gratuity, Mr. Kabula submitted that his offer of employment expressly provided for a gratuity payment of K60,000.00 initially payable in February 2010, subject to his continued service until 31st December 2010. He contended that this gratuity formed part of his annual remuneration package, as reflected in the stated total annual cost to employer of

K705,353.95. It was his position that the gratuity was not a once-off payment but rather an annual entitlement, and that the date cited merely marked the commencement of such payments, not their limitation.

- 6.70 In support, he relied on the decision of the Court of Appeal in ***Marshal Chileshe v Zambia National Building Society (20)***, which invoked the *contra proferentem* rule. He submitted that any ambiguity surrounding the gratuity clause should similarly be construed in his favour, particularly since the contract was authored by the Respondent.
- 6.71 On that basis, Mr. Kabula contended that he is entitled to gratuity payments for the remaining eight years of service, as only the initial year's gratuity was paid. He maintained that the Respondent's failure to make further payments constituted a breach of the employment terms, and that the outstanding gratuity remains due and payable.
- 6.72 In response, the Respondent asserted that Mr. Kabula's entitlement was expressly limited to a single payment, made in February 2010, and conditional upon service until 31st December 2010. It was their position that the payment was duly made in accordance with the contract and that no further gratuity was contemplated.
- 6.73 The Respondent further argued that **Section 73 of the Employment Code Act** was inapplicable, as the Complainant held a permanent contract. Citing the Act's definition of gratuity as a payment in respect of earnings accrued during the term of service, typically associated with fixed-term or long-term contracts, the Respondent maintained that Mr. Kabula's permanent employment status excluded him from such statutory entitlement. The Respondent added that neither the employment contract nor the repealed **Employment Act** created any continuing right to gratuity beyond what was initially paid.

6.74 Before turning to the rival submissions, it is helpful to briefly situate gratuity entitlements within their historical context. As noted by the learned authors of *Labour Law in Zambia: An Introduction* (2nd edition, page 84):

Under the previous regime, payment of a gratuity was either at the employer's discretion or a benefit for certain protected groups of employees under the statutory instruments made pursuant to the Minimum Wages and Conditions of Employment Act.

6.75 In assessing Mr. Kabula's offer of employment, particularly regarding the clause on gratuity, it is important to apply established principles of contract interpretation. It is a well-settled rule that where the language used in a contract is clear and unambiguous, it must be given its plain, natural, and ordinary meaning. Courts are not permitted to insert meanings or intentions not reflected in the text, nor to redraft contracts under the guise of interpretation. The task is to give effect to what the parties have actually agreed, not what one party later claims they intended.

6.76 This approach was reaffirmed in *Phinate Chona v ZESCO Limited* (21), where the Court of Appeal endorsed the principle from *Investors Compensation Scheme Ltd v West Bromwich Building Society* (22) which held that:

..interpretation of a contract entails ascertaining the meaning to be ascribed to the document by a reasonable person having all the background knowledge available to the parties to the contract at the time of agreement." While context may aid understanding, it does not override clear language unless there is compelling evidence that the wording fails to reflect the parties' true intentions.

5.73 Similarly, in *Holmes Limited v Buildwell Construction Company Limited* (23), Bruce-Lyle J, persuasively emphasized that:

...when the parties have reduced their agreement into writing, extrinsic evidence is inadmissible to add to, vary, or contradict its terms.

5.74 And in *National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo* (24), the court held that:

parties who freely and voluntarily enter into contracts are bound by their terms, and the role of the court is to uphold and enforce those terms so as to give efficacy to the agreement.

5.75 In the present matter, Mr. Kabula's offer of employment forms the only documented agreement governing the employment relationship. It contains the following paragraph:

Your detailed contract of employment as well as your performance contract will be discussed with you and finalized before the effective date of your employment. But we set out the more important conditions of your employment below.

5.76 Despite this reference to a future agreement, no further document was produced by either party. In the absence of any supplementary agreement, this offer letter must be treated as the definitive record of the terms of employment presented before Court and binding on the parties.

5.77 Mr. Kabula contended that the gratuity referred to in the offer letter was an annual entitlement, forming part of the overall remuneration package, and should have been paid for each year of service. He further relies on the principle of *contra proferentem*,

arguing that any ambiguity in the clause should be resolved in his favour, since the Respondent drafted the document. Conversely, the Respondent maintained that the gratuity was a once-off payment of K60,000.00 payable in February 2010, subject to Mr. Kabula remaining in service until 31st December 2010, with no contractual or statutory basis for any further gratuity.

- 5.78 Upon review, the clause in question is specific and clearly worded. It provides for payment of a fixed amount of K60,000.00 on a specified date, February 2010, contingent upon continued employment until the end of that calendar year. There is no wording suggesting that the gratuity was to be repeated annually or that it formed part of a continuing benefit. Mr. Kabula has also not submitted any evidence to show a consistent past practice of gratuity being paid after 2010 or a revised agreement altering the original term.
- 5.79 While Mr. Kabula draws a connection between the gratuity and the stated total annual cost to the employer (K705,353.95), this figure alone cannot be taken as evidence of an ongoing entitlement. The clause must be interpreted in context, but without importing meaning not clearly intended.
- 5.80 Moreover, the *contra proferentem* rule only applies where there is genuine ambiguity. In this case, the clause is precise in its reference to amount, timing, and condition. I do not find the language ambiguous or open to multiple plausible interpretations. The fact that Mr. Kabula was paid the gratuity in 2010 and not in subsequent years further reinforces the interpretation that it was intended as a once-off benefit.
- 5.81 Regarding statutory entitlements, as previously observed, the repealed **Employment Act** did not impose a gratuity obligation on employers with respect to permanent employees unless expressly stipulated by contract. **Section 73** of the current **Employment Code Act** was not in force during the relevant

period and should not arise in the determination of the present claim.

5.82 Thus, the clause in the offer of employment is clear, specific, and unambiguous. It provided for a single gratuity payment in 2010, conditional upon continued service. There is no contractual or statutory foundation upon which to extend this entitlement beyond the stipulated period.

5.83 In the absence of additional documentation or evidence of an established pattern of annual payments, I am unable to accept Mr. Kabula's claim for gratuity covering the entire period of employment. Therefore, the claim for gratuity covering the remaining eight years of service cannot succeed and is hereby dismissed.

Issue 6: Whether Mr. Kabula is entitled to payment for 270 accrued leave days

5.84 On this issue, Mr. Kabula submitted that he was never paid for his accrued leave days during the course of his employment with the Respondent. He relied on his own testimony and the record, asserting that there was no evidence supporting the Respondent's claim that such payments had been made. During cross-examination, Mr. Kabula was referred to exhibit "BN4" in the Respondent's affidavit in support of answer, which contained multiple entries labeled "leave days" and "leave commutation," reflecting various amounts such as K16,517.00 and K14,256.00. However, Mr. Kabula disputed having received these payments.

5.85 He further submitted that although the Respondent's witness acknowledged that the total value of these entries amounted to K146,652.79, this figure did not correspond with the 270 leave days he had accrued between 2009 and 2018, an accrual which, according to Mr. Kabula, was not contested during trial. It was contended that, prior to the enactment of the **Employment Code Act No. 3 of 2019**, the applicable formula for calculating payment in lieu of leave was basic pay divided by 26, multiplied

by the number of accrued leave days. Accordingly, he submitted that any accurate computation should have been based on his last pay slip, reflecting his most recent salary.

5.86 Mr. Kabula also argued that the Respondent, as employer, bore the responsibility of maintaining and producing accurate leave records. He noted that no signed leave forms, commutation approvals, or supporting documentation were presented to Court to show that he had either taken leave or been paid for it. He asserted that the Respondent's reliance on isolated bank entries, without contextual explanation or corroboration, was insufficient.

5.87 Even accepting that the Respondent paid a total of K146,652.79 as alleged, Mr. Kabula contended that there was no clarity as to the basis for this figure—particularly what basic salary was used in its computation. In the absence of such evidence, and given the extent of his accrued leave, he maintained that the amount purportedly paid was insufficient. He therefore urged the Court to uphold his claim and order payment for the outstanding leave days.

5.88 In response, the Respondent submitted that Mr. Kabula was not entitled to any further payment for leave days, as their records demonstrated that he had already commuted his accrued leave to monetary compensation. They relied on exhibit **"BN4"** in the affidavit in support of answer, which included several bank entries labeled "leave days" and "leave commutation." These entries, found across various pages of the exhibit, were said to reflect payments made to Mr. Kabula for unused leave.

5.89 The Respondent further argued that Mr. Kabula had neither disputed these entries with cogent evidence nor produced any documentation substantiating his claim of 270 accrued leave days. They contended that the absence of contrary evidence and the clarity of their financial records supported the conclusion that the leave days had been exhausted.

5.90 Finally, the Respondent invoked the legal principle that a party cannot claim benefits already received, asserting that Mr. Kabula's attempt to seek additional payment amounted to an abuse of process. On that basis, they urged the Court to dismiss the claim as unmeritorious and unsupported by evidence.

5.91 In analyzing Mr. Kabula's claim for accrued leave days, I considered the financial entries appearing in the bank statement marked as "**BN4**" in the Respondent's affidavit in support of answer. The following entries are labelled either "leave days" or "leave commutation" and appear to relate to payments made in respect of Mr. Kabula's unused leave days:

- (i) 13/08/2014 – K16,151.71
- (ii) 13/10/2014 – K16,151.71
- (iii) 08/01/2015 – K17,766.88
- (iv) 20/03/2015 – K12,921.36
- (v) 20/08/2015 – K16,151.71
- (vi) 04/09/2015 – K16,151.71
- (vii) 08/07/2016 – K16,151.71
- (viii) 07/09/2017 – K14,383.56
- (ix) 27/11/2017 – K20,547.95
- (x) 19/02/2018 – K16,438.36

5.92 These entries total **K162,816.66**.

5.93 The Respondent submitted that the said payments were made in commutation of Mr. Kabula's accrued leave days. The entries in exhibit "**BN4**" reflect bank credits with consistent and descriptive narrations, namely "Leave Days" and "Leave Commutation", that correspond to the period in question.

5.94 **Section 15(5) of the Employment Act**, provides that:

Notwithstanding the provisions of subsection (1), an employer may, with the agreement of the employee,

pay wages to such employee in lieu of any holiday due to the employee under that subsection and if any leave has been accumulated by an employee whose contract has terminated, the employer shall pay wages to the employee for the period of such accumulated leave.

- 5.95 It is clear that under the repealed **Employment Act**, there was no prescribed formula for calculating payment in lieu of leave. **Section 15** permitted leave commutation but did not set out any numerical method of computation.
- 5.96 The bone of contention is whether Mr. Kabula is entitled to payment for 270 accrued leave days.
- 5.97 Under cross-examination, Ms. Nachula conceded that the only payments made in respect of leave commutation were those reflected in exhibit **"BN4"**. No further documentation or evidence was placed before Court concerning additional payments or computation methods.
- 5.98 It was suggested to the witness that applying the formula - dividing the basic pay of K60,465.36 (as per the November 2014 pay slip) by 26 and multiplying the quotient by 270 accrued leave days - yields a total of K627,775.24. Ms. Nachula agreed that this figure was arithmetically correct using that formula. However, she clarified that she did not accept the validity of the formula itself, as it was based on the inapplicable current **Employment Code Act** and was premised on the assumption that Mr. Kabula had taken no leave.
- 5.99 When asked to specify which formula was applicable in the circumstances, Ms. Nachula stated that she would need to recheck the formula previously used, admitting that she was not presently aware of the method of computation. She categorically denied that Mr. Kabula was entitled to K627,775.24 and acknowledged that the amount paid by the Respondent did not approach that figure.

- 5.100 In my view, the evidence indicates that the Respondent made certain payments in respect of leave pay and commutation and acknowledged, through its witness, that Mr. Kabula was entitled to 30 annual leave days per annum from 2009 to 2018.
- 5.101 However, Ms. Nchula was unable to state definitively the number of leave days taken by Mr. Kabula during his tenure. No leave application forms were produced, nor were any leave commutation forms presented to show that Mr. Kabula had applied to commute his leave.
- 5.102 Notably, there is a conspicuous absence of supporting documentation explaining how the payments made towards leave pay were calculated. The Respondent failed to produce leave records, commutation schedules, or any evidentiary material showing whether, and how, Mr. Kabula's leave days were utilized or paid out.
- 5.103 Mr. Kabula, on the other hand, stated that the demands of his role left him unable to take leave. He claims entitlement to full 270 leave days, notwithstanding payments made to him.
- 5.104 Based on the calculations made on Mr. Kabula's behalf, anchored on the Respondent's bank statement, the total amount received as commuted leave pay was K146,652.79. However, upon a closer analysis of exhibit "BN4", I find that the accurate cumulative figure is K162,816.66.
- 5.105 To seek guidance on how to resolve the issue, I refer to the case of *MP Infrastructure Zambia Limited v. Matt Smith and Kenneth Barnes (25)*, where the Court of Appeal stated:

The law is settled that the burden of proof lies on the person who alleges. Since the contracts of employment were on record, and they showed the leave days that each respondent was entitled to, the lower court was duty-bound to consider that evidence and whether there was any evidence that the respondents had taken

leave or that the leave days were even commuted. In the absence of such evidence, the court should have ordered that their leave days amounts due be assessed.

5.106 As guided in *Matt Smith and Kenneth Barnes*, where there is no evidence showing whether an employee took leave or commuted the same, the Court should order an assessment.

5.107 In this case, the Respondent admitted Mr. Kabula's entitlement to 270 leave days during his tenure and produced evidence of partial payments. However, no documentation was presented to establish whether leave was taken or how many days were commuted.

5.108 I therefore find that I am unable to ascertain, with certainty, whether Mr. Kabula took leave or remains entitled to payment for unutilized leave days.

5.109 Accordingly, I refer the matter to the Registrar for assessment of whether Mr. Kabula took any leave during the period 2009 to 2018, and if not, to determine the number of accrued but unutilized leave days and any outstanding sums payable, if any.

5.110 Any amount found to be payable shall be subject to deduction of the sum of K162,816.66 already paid.

Issue 7: Whether Mr. Kabula is entitled to payment of monthly salaries from date of termination of employment, being 28th February 2018 to date

5.111 Regarding this claim, it was Mr. Kabula's submission that he is entitled to receive salaries from the date of his termination of employment until the date his pension benefits are fully paid. He relied on *Articles 187(1) and 189(1) of the Constitution of Zambia (Amendment) 2016, Act. No. 2 of 2016*, arguing that these provisions extend to all employees, including those in the private sector. He contended that where a pension benefit is not paid on an employee's last working day, that employee ceases to

report for work, but their name must remain on the payroll until the pension is paid, based on the last salary earned.

5.112 He further argued that the constitutional protection of pension benefits was not limited to retirees, but applied at the conclusion of any employment relationship where pension benefits are due.

5.113 On this basis, Mr. Kabula asserted that it was his contractual and constitutional right to be retained on the payroll and paid salaries from the date of separation until the Respondent discharged its obligation to pay the pension.

5.114 In response, the Respondent submitted that Mr. Kabula's claim for continued salary payments post-separation was without merit. It was contended that the constitutional provision relied upon, which is **Article 189**, only applied where the pension benefit in question was granted under a statute or pension law.

5.115 The Respondent referred to the case of **Anderson Mwale and Others v Zambia Open University (14)**, where the Constitutional Court held that the retention of an employee on the payroll under **Article 189(2)** is only applicable where the unpaid pension is one recognized under a statutory pension scheme. The Respondent argued that Mr. Kabula's pension benefit was purely contractual in nature, arising from his offer of employment, which expressly stated that the pension scheme was employer-funded and not governed by any statutory pension law. As such, it maintained that **Article 189** had no application in the present case.

5.116 The Respondent further relied on the decision in **Levy Mwale v Zambia National Broadcasting Corporation (15)**, where the Constitutional Court reiterated the purpose of **Article 189** as being to cushion pensioners and retrenchees against the hardship caused by delayed pension payments under statutory schemes. It was argued that, since Mr. Kabula's benefit was not statutory, the constitutional obligation to retain him on the payroll did not arise.

5.117 Additionally, the Respondent submitted that Mr. Kabula had failed to discharge the burden of proof in respect of this claim. The Respondent cited the authority of ***Wilson Masauso Zulu v Avondale Housing Project Ltd (16)***, where the Supreme Court held that the party making an allegation bears the burden of proving it. The Respondent also referred to ***Zambia National Commercial Bank v Evans Hampopwe (17)***, in which the Court emphasized that a claim for unpaid salary or allowances must be specifically pleaded and supported by evidence.

5.118 The Respondent contended that Mr. Kabula neither pleaded nor proved any contractual provision entitling him to continued salary post-separation, and therefore urged the Court to find that the claim lacked merit and ought to be dismissed.

5.119 Having carefully considered the rival submissions, I am persuaded that the proper starting point for resolving Mr. Kabula's claim to be retained on the payroll until payment of his pension benefit lies in the Constitution itself. ***Article 189 of the Constitution*** provides:

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

5.120 The rationale for ***Article 189(2)***, as articulated by the Constitutional Court in ***Levy Mwale*** (supra) and ***Lubunda Ngala & Jason Chulu v. Anti-Corruption Commission (18)***, is to cushion pensioners and retrenched from economic hardship caused by the delay in receiving their terminal benefits.

5.121 In ***Anderson Mwale & Others*** (supra), the Constitutional Court clarified that the phrase "pension benefit" under ***Articles 187, 189*** and ***266*** encompasses entitlements granted under pension

legislation or any other law regulating an employee's conditions of service.

5.122I also found the Court of Appeal's recent decision in ***Dangote Cement Zambia Limited v. Michael Mwaba (19)***, insightful.

The Court stated:

It is clear from the above provisions that the Constitution of Zambia makes provision for an employee to be retained on the payroll up until his or her pension benefits are fully paid up. What is termed as a pension benefit also includes gratuity. The Constitutional Court microscopically examined the provisions of the Constitution in relation to pension benefits and retention on the payroll in the case of Anderson Mwale & Another vs Zambian Open University wherein they held that: "Given that the pension benefits referred to in Article 187,188 and 189 of the Constitution, is a pension benefit granted by or under a relevant pension law or other laws, it follows that for an employee to be retained on the employer's payroll under Article 189(2) of the Constitution, the pension benefit which is not paid to an employee on the last day of work should be a pension benefit granted by or under the relevant pension law or other law applicable to that employee's service." The critical point here is that a pension benefit is tied to a pension law or other law in order for someone to be entitled to be retained on the payroll. What we have also been able to glean from the Anderson Mwale case is that in order for a party to succeed for retention on the payroll that party must adduce evidence that at the end of the contract, there was a pension benefit due to be paid to them granted in accordance with a pension law or other law.

The onus therefore lies on the person claiming the pension benefit to adduce cogent evidence. The burden of proof lies with the party who asserts the affirmative of the issues. In leaving no stone unturned, we have examined the rationale behind enacting Article 189(2) contained in the Report of the Technical Committee on drafting the **Zambian Constitution**. They expressed themselves in the following terms: "The rationale for the article is that, benefits need to be made promptly for a pension, gratuity and retrenchment package to serve its purpose. The committee observes that public servants suffer hardships due to delays in payment of terminal benefits and need to be cushioned from these hardships by continuing to receive salaries until the Government pays them terminal benefits, and that for the avoidance of doubt this payment shall not be deducted from the terminal benefits. The committee, therefore, resolves to make provision in the Constitution for prompt payment of pension and retrenchment benefits." This is what birthed Article 189. The rationale being after retirement the status quo should be maintained and whilst awaiting payment of their benefits, the retirees ought not to suffer hardships. We are thus bewildered when the retention on payroll argument is stretched to cover instances where an employee has on his own volition resigned from employment. We do not believe that the drafters envisaged this scenario and extended the provisions of Article 189 to resignation.

5.123 It is settled law that the right to be retained on the payroll under **Article 189(2)** is not triggered merely by the non-payment of any pension-like benefit. Rather, the benefit in question must be one

conferred pursuant to a recognized pension statute or other applicable law. This interpretation ensures that constitutional protection is afforded specifically to employees awaiting statutory benefits, such as those administered under public pension schemes, rather than private contractual arrangements.

5.124 In the present case, Mr. Kabula's entitlement to pension arose from a term in his offer of employment and, as already found above, was to be funded by the employer. However, the record discloses no indication that the pension scheme was governed by any pension legislation or regulatory framework. Accordingly, it falls outside the scope of benefits contemplated by **Article 189(2)**.

5.125 As held in **Dangote Cement**, the rationale behind **Article 189(2)** was thoroughly canvassed in the Report of the Technical Committee on Drafting the Zambian Constitution. The Committee observed that the provision sought to insulate public servants from hardship arising from delays in disbursement of terminal benefits, by ensuring continuity of income through salary payments. Crucially, it was noted that interim salaries were not to be deducted from eventual benefits.

5.126 That rationale does not logically extend to employees who exit employment voluntarily. As the Court of Appeal held in **Dangote Cement**, to apply **Article 189(2)** to cases of resignation would stretch the intent of the framers beyond its permissible limits.

5.127 In this case, Mr. Kabula separated from the Respondent by way of resignation. There is no evidence to suggest that his departure was involuntary or related to retrenchment or retirement governed by statute. As such, the constitutional protection conferred under **Article 189(2)** does not apply.

5.128 Moreover, the burden of proof lies with the party asserting a right to remain on the payroll. As clarified in **Anderson Mwale**, a claimant must adduce cogent evidence that the benefit due arose

under a pension statute or comparable legal instrument. That burden has not been discharged.

5.129 Based on the foregoing, I therefore find that Mr. Kabula has failed to establish a legal basis for continued inclusion on the payroll following his resignation.

5.130 The claim is accordingly dismissed.

Issue 9: Whether Mr. Kabula is entitled to any other relief the Court may deem fit

5.131 Save for the reliefs already awarded to Mr. Kabula, I find that he is not entitled to any further relief.

7. CONCLUSION

7.1 In conclusion, and in light of the foregoing findings, I hereby issue the following orders in respect of the reliefs claimed by Mr. Kabula:

(i) Claim for payment of salaries for services rendered as Chief Financial Officer at Cavmont Capital Holdings PLC for a period of nine (9) years at a monthly rate of K60,000, amounting to K6,480,000.

This claim is dismissed.

(ii) Claim for payment of salaries for Company Secretarial duties for a period of three (3) years at a monthly rate of K80,000, amounting to K2,880,000

This claim is dismissed.

(iii) Claim for payment of underpaid wages amounting to K483,862.38 for the period 1st April 2012 to 1st September 2015

This claim for underpayment is accepted, however, the precise sum due shall be computed by the Registrar based

on the applicable salary rates and supporting documentation.

(iv) Claim for payment of a pension fund calculated at 10% of annual salary over a nine (9)-year period

This claim is upheld. The exact amount payable shall be computed by the Registrar.

(v) Claim for payment of gratuity for eight (8) years of service

This claim is dismissed.

(vi) Claim for payment for 270 accrued leave days

This claim shall be subject to assessment by the Registrar, who shall determine whether Mr. Kabula took any leave during the period 2009 to 2018. If no leave was taken, the Registrar shall compute the number of accrued but unutilized leave days and any outstanding sums payable, if any. Any amount found to be payable shall be subject to deduction of the sum of K162,816.66 already paid.

(vii) Claim for payment of monthly salaries from the date of termination of employment, being 28th February 2018 to date

This claim is dismissed.

(viii) Claim for any other relief the Court may deem fit

Mr. Kabula is not entitled to any other relief save for those granted herein.

(ix) Claim for interest on all sums found due

All amounts payable to Mr. Kabula shall attract interest at the short-term bank deposit rate from the date of the Notice of Complaint to the date of Judgment, and thereafter at the current bank lending rate as determined by the Bank of Zambia.

7.2 Each party shall bear its own costs.

DATED THIS 15TH DAY OF AUGUST 2025



T.S. MUSONDA
JUDGE

