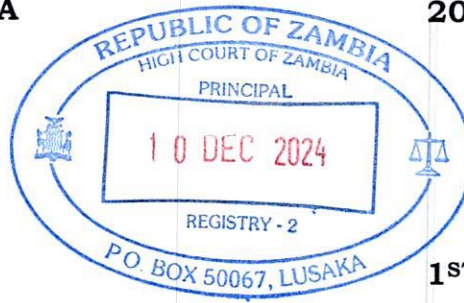


**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

2022/HP/0706

**BETWEEN:****MUKUPA KAPASA MUSONDA****1<sup>ST</sup> PLAINTIFF****WILLIAM KAPYA MULUSA****2<sup>ND</sup> PLAINTIFF****AND****ROAD DEVELOPMENT AGENCY****DEFENDANT**

**BEFORE THE HONOURABLE MR. JUSTICE S. V. SILOKA, ON THIS 10<sup>TH</sup>  
DAY OF DECEMBER, 2024.**

**For the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff:** Mr. K. M Sikazwe - Messrs. Jacque &

*Partners;*

**For the Defendant:** Ms M. Mukobe & V. Chizawo - Messrs. Shapande &

*Partners.*

## **JUDGMENT**

### **CASES REFERRED TO:**

1. *Victoria Chileshe Sakala Vs Spectra Oil Corporation Limited (SCZ Appeal No. 02/2016);*
2. *Moses Choonga Vs ZESCO Recreation Club, Ithezi Tezhi (SCZ Appeal No. 168/2013);*
3. *Konkola Copper Mines Ltd Vs Hendrix Mulenga Chileshe (SCZ Appeal No. 94/2015);*
4. *James Mankwa Zulu & 3 others Vs Chilanga Cement Pic (SCZ Appeal No. 12/2004);*
5. *Lovell & Christmas Ltd Vs Wall (C A 1911);*

6. *National Drug Company Limited and Zambia Privatization Agency Vs Mary Katongo (Appeal No. 79/2001);*
7. *Mhango Vs Ngulube (1983) Z.R 61;*
8. *Wilson Masauso Zulu Vs Avondale Housing Project (1982) ZR 172;*
9. *Galaunia Farms Limited Vs National Milling Company and National Milling Corporation Limited (2004) ZR 1;*
10. *Eston Banda and Another Vs Attorney General (Appeal 42 of 2016) 2019 ZMSC 7 (22<sup>nd</sup> February, 2019);*
11. *Swap Spinning Mills Plc Vs Sebastian Chileshe and Others (2002 ZR 23 SC); and*
12. *Zambia Consolidated Copper Mines Limited Vs Mulemwa (SCZ Judgement No. 15 of 1995.*

**LEGISLATION REFERRED TO:**

1. *The Employment Code Act No 3 of 2019; and*
2. *The Constitution of Zambia Act NO 2 of 2016.*

**OTHER WORKS REFERRED TO:**

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

**1.0 INTRODUCTION**

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

- i. Thirty-Six months pay, being Damages for unlawful termination of contract;*
- ii. ZMW K4,000,000.00, Damages for loss of prospects of finding suitable employment as a lawyer, at Director level due to bad publicity;*
- iii. Damages for unfair treatment/discrimination;*
- iv. Payment for the sum of ZMW1,385,700.00 on the premise that the 1<sup>st</sup> Plaintiff will be assumed to have hired the private vehicle and the amount being the cost of hiring motor vehicle Toyota Land cruiser GX for 447 days at K3,100 per day;*
- v. Any other order the Court may deem fit;*
- vi. Interest;*
- vii. Costs.*

## **2.0 THE PLEADINGS**

2.1 In the Statement of Claim, the Plaintiffs averred that 1<sup>st</sup> Plaintiff was employed by the Defendant on 8<sup>th</sup> October, 2007, as legal Officer, and later promoted as Director legal Services on a three-year contract.

- 2.2 The Plaintiff averred that the first contact as Director legal services, was from 22<sup>nd</sup> August, 2017 to 21<sup>st</sup> August, 2020. On expiry of the Contract, the Defendant offered the 1<sup>st</sup> Plaintiff a second Contract on 12<sup>th</sup> August, 2020, which was executed on the 13<sup>th</sup> of August, 2020.
- 2.3 The 2<sup>nd</sup> Plaintiff averred that he was employed by the Defendant on the 4<sup>th</sup> July, 2012, as Chief Engineer Planning and held Several Positions of Senior Manager for over nine year and his last position was Director of Construction and Rehabilitation which was effective from the 1<sup>st</sup> of August, 2020 to the 31<sup>st</sup> of July, 2023.
- 2.4 The Plaintiffs averred that by the letters dated 15<sup>th</sup> November, 2021 and 24<sup>th</sup> November, 2021, the Defendant terminated the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs contracts of employment without furnishing them with any reasons for the termination.
- 2.5 The Plaintiffs averred that the said termination was published in the public media bringing their names in disrepute and causing them to suffer mental anguish.
- 2.6 The Plaintiffs also averred that by Clause 7 (a) of their respective Contracts of Employment, they were each entitled to

GX Land cruiser which the Defendant did not provide. Further it was averred that by Clause 7 (c) of the contracts of employment the Plaintiffs were entitled to purchase the said vehicles on termination of their contract at 15% of the original cost or 25% of the market value whichever is greater.

- 2.7 The Plaintiffs further averred that because of the breach of Clause 7 (a) and 7 (c) they individually claim ZMW453,000.00 being 15% of the original cost of the GX land cruiser whose value is ZMW3,026,000.00.
- 2.8 The 1<sup>st</sup> Plaintiff averred that because of the Defendant's failure to provide a personal to holder motor vehicle during the subsistence of her contract, she used her private GX Land cruiser thereby incurring personal costs associated with repairs and maintenance.
- 2.9 The 1<sup>st</sup> Plaintiff averred that she used her private vehicle for the period 22<sup>nd</sup> August, 2020, to 15<sup>th</sup> November, 2021 and thus she seeks compensation for utilizing her vehicle for the Defendants work.
- 2.10 It was further averred that as per Clause 20 of their Contacts, the Plaintiffs were entitled to gratuity.

- 2.11 The Defendant entered appearance and filed its defence on the 24<sup>th</sup> of May, 2022. The Defendant averred that it acted within the parameters of the contract when terminating the contracts, save to mention that the Defendant was not contractually duty bound to provide reasons to the Plaintiffs provided it pays terminal benefits for the remaining contract duration which would effectively restored the Plaintiffs to their positions.
- 2.12 With regards the personal to holder vehicles, the Defendant averred that it was a term of the Plaintiffs' Contracts that the selling price of the vehicles was 15% of the original cost or 25% of the market value whichever is greater.
- 2.13 The Defendant averred that at the time of the termination of employment the Defendant had not purchased the Motor vehicles in light of financial constraints faced by the Defendant which the Plaintiffs were fully aware of.
- 2.14 The Defendant also averred that with regards the Plaintiffs' Claim that they suffered mental anguish, the plaintiffs are of age and if indeed they had suffered mistreatment or

discrimination they could have resigned or commenced grievance actions.

- 2.15 The Defendant averred that the Plaintiff's claims are baseless as the Defendant perfected the provisions of the contract of employment as it relates to payment of gratuity in March 2022.
- 2.16 The Defendant further averred that the Contract clearly provided for payment of gratuity excluding monthly salaries allowances as if the Contract had been duly served in an event of termination of the contract. Maintaining the Plaintiffs on the payroll would have amounted to them being paid twice.
- 2.17 Further, the Defendant averred that the Plaintiffs are not entitled to any reliefs sought and prayed that the Plaintiffs case be dismissed with Costs.
- 2.18 The Plaintiff's reply was filed into Court on the 16<sup>th</sup> of August, 2022. The Plaintiff averred that the Defendant was mandated to provide grounds for termination of the employment both by contract and by law.
- 2.19 The Plaintiffs averred that the contents of Paragraph 5 of the Defence amounts to an express admission of a breach of

contract on the part of the Defendant and the Plaintiffs averred that the Defendant's financial constraint do not in any way insulate it from honouring its contractual obligations.

2.20 The Plaintiff further averred that the payment of gratuity and payment in lieu of notice was effected on 9<sup>th</sup> March, 2022, the Defendant only paid the said gratuity in March 2022.

### **3.0 THE EVIDENCE**

#### **i. EVIDENCE FOR THE PLAINTIFF**

3.1 In support of their case, the Plaintiffs called two witnesses. The first witness was the 1<sup>st</sup> Plaintiff herself, herein after called **PW1**.

3.2 **PW1** informed the Court that she filed a witness statement on the 29<sup>th</sup> of September, 2022, and she would rely on the same as her evidence in chief.

3.3 In her Evidence in Chief, **PW1** informed the Court that she was employed by the Defendant on the 8<sup>th</sup> of October, 2007, as legal Officer and rose through the ranks until 17<sup>th</sup> August, 2017, when she was appointed as Director of Legal Services, on a three-year Contract.

- 3.4 **PW1** informed the Court that when her first Contract expired, the Defendant offered her a second Contract of employment, which was executed on the 13<sup>th</sup> August, 2020.
- 3.5 **PW1** informed the Court that on the 15<sup>th</sup> of November, 2021 she received a letter from the Defendant terminating her contract of employment, without furnishing any reasons for the said termination.
- 3.6 **PW1** informed the Court that the termination was published in public media bringing her name into disrepute and causing her to suffer mental anguish and distress, which was intended to ruin her reputation.
- 3.7 It was **PW1**'s further testimony that Clause 7 (a) of the Contract of Employment stipulated that she was entitled to a personal to holder Motor Vehicle, GX Land cruiser, and in breach of the said clause the Defendant did not provide the said Vehicle during the subsistence of her Contract. Despite several reminders to the Defendant to avail an alternative vehicle, no result yielded.

- 3.8 **PW1** also stated that had the Defendant availed the vehicle, she was entitled to purchase the GX Land cruiser at 15% of the original cost or 25% of the market value, whichever is greater.
- 3.9 **PW1** further stated that as a result of the Defendant's failure to provide a Motor Vehicle, she used her private GX Land cruiser for all business strips, which were a cost to her. She stated that her vehicle suffered wear and tear and costs associated with repairs and maintenance which were borne by her.
- 3.10 It was the further testimony of **PW1** that she used her private Vehicle for the Defendants work for the period 22<sup>nd</sup> August, 2022 to 15<sup>th</sup> November, 2021 being 447 days at rate of ZMW3,100.00 per day.
- 3.11 **PW1** further testified that she was unfairly treated or discriminated against, as the Defendant did not extend the option available within the Defendant's institution, despite pointing out this anomaly and complaining about the costs she was incurring.
- 3.12 She stated that Clause 20 of her contract of employment stipulated that she was entitled to gratuity to be calculated at

the rate of 35% and the last drawn salary shall be used for calculating the gratuity payment.

3.13 It was **PW1**'s further testimony that in January 2022, the Defendant removed her from the payroll, before paying gratuity, and she was only paid gratuity in March 2022, thereby depriving her of income for the months of January and February 2022.

3.14 In cross-examination, **PW1** informed the Court that she was paid her gratuity in full as per Clause 19.2.

3.15 Still under cross-examination **PW1** responded in the affirmative that her termination was published in the Newspapers, and that the articles are at pages 30, 31 & 32 of the bundles of documents.

3.16 **PW1** further under cross-examination informed the Court that she was entitled to a personal to Holder Motor Vehicle as per clause 7 of the Contract, and stated that there was no specific mention of a GX Land cruiser.

3.17 **PW1** further under Cross-examination informed the Court that she was paid k386, 236.42, for the personal to holder Motor

Vehicle, and stated that the payment was not more than what she was entitled to.

3.18 **PW1** also informed the court that she was not offered an alternative vehicle. And when asked if she hired the vehicle she was using, she informed the court that she did not hire the vehicle.

3.19 When asked if she had any evidence to support the claim for discrimination, **PW1** informed the Court that she was discriminated against but she had no proof of it.

3.20 In re-examination **PW1** stated that the letter of offer on page 27 pertains to the Contract that ran from 2017 to 2020 and that was the value of that particular Motor Vehicle. The Contract that was terminated was one that run from 2020 to 2023.

3.21 In further re-examination, **PW1** told the Court that she didn't purchase a Motor Vehicle, and that the amount of ZMW386, 236.42 she was asked about was based on the valuation of the Motor vehicle they were to buy. She also stated that the calculation was based on the similar motor vehicle offered to other Directors, therefore she was not overpaid.

3.22 The second Plaintiffs' witness was the 2<sup>nd</sup> Plaintiff, herein called **PW2**. **PW2** filed his witness statement into Court on the 29<sup>th</sup> September, 2022, however at trial and by Consent Judgement dated 27<sup>th</sup> April, 2023 he intimated that he was withdrawing his claim as such his witness statement was not admitted into evidence and therefore, I will not consider it.

**ii. EVIDENCE FOR THE DEFENDANT**

3.23 In support of its case the Defendant called one witness, Mr Nyama Bueendo, hereinafter called **DW1**.

3.24 **DW1** informed the Court that he did file a witness statement on the 8<sup>th</sup> of September, 2023, and he would rely on the same as his evidence in chief.

3.25 In his evidence in chief **DW1** informed the Court that the Plaintiff was employed as Legal officer on 8<sup>th</sup> of October, 2007 and was later appointed as Director Legal services on 12<sup>th</sup> August, 2017 on a three-year contract, which was later extended to another three years from August 2020 to October 2023.

3.26 **DW1** also informed the Court that on 15<sup>th</sup> of November, 2021, the Defendant terminated the employment of the 1st Plaintiff

in line with Clause 19.1.2 of the Plaintiff's employment contract.

3.27 Further, by letter dated 15<sup>th</sup> November, 2021 the 1<sup>st</sup> Plaintiff was duly informed that her employment Contract had been terminated with immediate effect.

3.28 Further, **DW1** testified that on 24<sup>th</sup> of November, 2021, the Defendant terminated the employment of the 2<sup>nd</sup> Plaintiff in line with Clause 19.1.2 of the 2<sup>nd</sup> Plaintiff's employment Contract and dully informed him.

3.29 It was **DW1**'s further testimony that the 1<sup>st</sup> Plaintiff was entitled to a personal to holder Vehicle as stipulated in Clause 7 (a) of her employment Contract, however, the Defendant informed the 1<sup>st</sup> Plaintiff that financial constraints faced by the Defendant resulted in the delayed procurement of the Vehicle.

3.30 Further to the above paragraphs, in the interim, the Defendant offered the 1<sup>st</sup> Plaintiff an alternative Vehicle for use while awaiting the procurement of her personal to holder vehicle. However, the 1<sup>st</sup> Plaintiff declined the Defendant's offer for an alternative Vehicle. On the other hand, the 2<sup>nd</sup> Plaintiff

accepted to use the alternative vehicle until his contract was terminated.

3.31 **DW1** also testified that the Defendant offered to pay the 1st Plaintiff an amount equivalent to the value of the motor vehicle which the 1st Plaintiff was entitled to. The 1st Plaintiff agreed and the value of the Motor vehicle has since been paid to her and the 2nd Plaintiff.

3.32 He testified that as shown by document on page 38 in the Defendant's bundle of documents, the 1st Plaintiff's terminal benefits were computed, which included one month's salary in lieu of notice and gratuity. This was accepted by the 1st Plaintiff.

3.33 He finally testified that as far as it is known to him the Plaintiffs have been duly paid their Contractually agreed terminal benefits in full and the Defendant is no longer indebted to them.

3.34 In cross-examination, when asked about Clause 19.1 of the Plaintiff's Contract of employment, **DW1** informed the Court that the said clause talks of grounds for termination of the contract.

- 3.35 **DW1** also under Cross-examination informed the court that he would not say the termination was unlawful even if it was done without any ground.
- 3.36 When asked about Clause 7 (1) of the Contract, he informed the Court that the clause allows employees to buy the Motor Vehicle at the end of the Contract.
- 3.37 He further informed the Court that he was not aware that the Plaintiff was not provided with a Motor Vehicle, as there is no proof. He also testified that he knew the policy as regards Motor Vehicles to the Directors, that the Agency provided Vehicles to the Directors at the start or during the Contracts depending on the availability of money.
- 3.38 **DW1** also informed the Court that an alternative Motor Vehicle may be provided where a Vehicle has not been procured.
- 3.39 **DW1** informed the Court that it is true that no Motor Vehicle was given to the Plaintiff at the start, during or at the end of her 2<sup>nd</sup> Contract while other Directors were provided with motor vehicles. He informed the Court that this was due to the Defendants financial constraints, however **DW1** admitted that he had no proof of this financial constraint.

3.40 Further, **DW1** informed the Court that he could not confirm if the information about the Plaintiff's termination was leaked by the Defendant. Neither could he confirm if the Plaintiff suffered personal injury as a result of the publication of her termination.

3.41 In re-examination, informed the Court that the Vehicle that was proposed to the Plaintiff was declined by her.

3.42 Finally **DW1** informed the Court that those who were not given vehicles were duly compensated in monetary forms at the time of termination.

#### **4.0 SUBMISSIONS**

4.1 In his submission, Counsel for the Plaintiff drew the attention of the Honourable Court to **Section 52 (2)** of the **Employment Code Act No. 3 of 2019** (hereinafter referred to as the Code): which provides that:

***“(2) An employer shall not terminate a contract of employment of an employee without a valid reason for the termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.”***

4.2 Counsel submitted that the Supreme Court in the case of **Victoria Chileshe Sakala Vs Spectra Oil Corporation Limited**<sup>(1)</sup> confirmed that an employer who terminates employment must give valid reasons. Kabuka JS, on behalf of the Supreme Court, in interpreting section 36, which is the predecessor to section 52(2) of the current Employment Code Act, held that:

***“We are alive to the fact that since the coming into effect of the Employment (Amendment) Act No. 15, which amends section 36 of the Employment Act, Cap 268, an employer is now required to give a valid reason for termination of an employment contract”.***

4.3 It was Counsel’s submission, that the above authorities place an unequivocal obligation on employers such as the Defendant to ensure that they give not only a reason but one that is also valid upon termination of employment.

4.4 Counsel drew the courts attention to the case of **Moses Choonga v. Zesco Recreation Club, Ithezi Tezhi**<sup>(2)</sup>, wherein the Court held that:

***“Unfair dismissal occurs when an employee's contract is terminated in breach of any***

***statutory provisions linked to the protection of the right of employment and the promotion of fair labour practices that require employers to terminate contracts of employment only on valid, specified, and reasonable grounds”.***

4.5 It was also Counsel’s submission that the Defendant was required to provide a reason for the termination of the Plaintiff’s employment in accordance with the Code, which they failed to do. Counsel further submitted that in the case of **Konkola Copper Mines Limited Vs Hendrix Mulenga Chileshe**<sup>(3)</sup>, the Supreme Court stated that:

***“The concept of wrongful dismissal has been widely accepted to mean that in considering whether dismissal is wrongful or not it is the form to be considered rather than the substance”.***

4.6 Further, Counsel submitted that a glance at Clause 19.1.2 of the Contract shows that the clause did not at any point exempt or obviate the Defendant from advancing a reason for the termination of the employment. And when further cross examined, **DW1** admitted to not giving reasons for termination of the employment contract.

4.7 With regard to the failure to provide a motor vehicle or an alternative motor vehicle to the Plaintiff while other Directors were availed with Motor Vehicles, Counsel referred the Court to the case of **James Mankwa Zulu & 3 Others Vs Chilanga Cement Plc**<sup>(4)</sup>, wherein the Supreme Court held that it was unfair discrimination to grant the entitlement to purchase a company house to an employee only if he withdrew his court case against the employer. The Supreme Court stated as follows:

***“Other than withdrawal of the court case, no other evidence was available to differentiate special Bwalya's entitlement from that of the appellants as far as the purchase of houses was concerned. And the denial of the offer of the houses to the appellants was meant to punish them for taking court actions. This conduct by the Respondent should be frowned upon”.***

4.8 It was Counsel's submission that as admitted by **DW1** in cross-examination and re-examination, she had no evidence to support her assertion that the Plaintiff declined the alternative vehicle that was offered.

- 4.9 It was also Counsels submission that, **DW1** further attempted to convince the court that financial constraints were the reason for the failure to avail the Plaintiff with a Motor Vehicle or alternative Motor Vehicle. However, in cross-examination **DW1** testified that the Plaintiff was not informed of the Agency's financial constraints.
- 4.10 Further, Counsel submitted that **DW1**'s admission that it gave other Directors alternative vehicles or compensated them for the failure to provide them with Motor Vehicles dispels the Defendant's defence of financial constraint.
- 4.11 **DW1** further submitted that the Defendant only offered the Plaintiff compensation for the failure to purchase the said motor vehicle in the course of these proceedings by way of consent judgment.
- 4.12 It was further submitted that the Defendant's failure to purchase or provide the Plaintiff with an alternative Motor Vehicle during the course of employment, while other Directors were afforded this entitlement, constitutes clear discrimination and unfair treatment. This disparate treatment

breaches the principles of equality and fairness enshrined in employment law.

4.13 It was Counsel's further submission that the Defendant's failure to purchase a motor vehicle for her or to provide an alternative Motor Vehicle led to significant wear and tear to her personal vehicle, which she was compelled to use for work-related purposes.

4.14 Consequently, the Plaintiff's vehicle sustained considerable depreciation and damage, for which the Defendant should be held accountable for.

4.15 With regards publicity of the termination, Counsel submitted that the Defendant caused significant bad publicity to the Plaintiff by allowing the publication of her termination of employment to the media, resulting in considerable reputational damage as evidenced on pages 31 to 35 of the plaintiffs Bundle of documents.

4.16 Further to the paragraphs above, Counsel submitted that while the termination letter was presented as a confidential document, the Plaintiff's termination was subsequently leaked

to the media, resulting in significant adverse effects on the Plaintiff.

4.17 It was Counsel's submission that the Defendant herein had not implemented any measures to ensure that confidential information is not leaked to the media. This lack of adequate safeguards and protocols to protect the Plaintiff's confidentiality exacerbated the harm caused by the termination, highlighting the Defendant's negligence and failure to uphold their duty of care.

## **5.0 DEFENDANT'S SUBMISSIONS**

5.1 The Defendant filed its final submissions on the 10<sup>th</sup> of October, 2023.

5.2 Counsel submitted that as the record will show, by the Consent dated the 27<sup>th</sup> of April, 2023, the parties agreed that the Plaintiff's Claims under items v, vi, vii and viii should fall off from the Plaintiff's Claim and that only the claims under items i, ii, iii, iv, ix, x and xi should be determined.

5.3 It was Counsel's submission that the 2<sup>nd</sup> Plaintiff made an Application to discontinue his claim. The Application was granted by Consent of the Parties.

- 5.4 With regard to the 1<sup>st</sup> Plaintiff's Claim for thirty-six months' pay, being damages for unlawful termination of Contract, Counsel submitted that a perusal of the letter of termination shows that indeed no reason was given for the termination of the 1<sup>st</sup> Plaintiff's employment.
- 5.5 However, it was Counsel's submission that the letter of termination duly informed the 1<sup>st</sup> Plaintiff that her employment was terminated in accordance with Clause 19.1.2 of her contract.
- 5.6 It was Counsel's submission that the said termination entitled the 1<sup>st</sup> Plaintiff to a full gratuity, excluding monthly salaries and allowances, as if the contract had been duly served.
- 5.7 It was further submitted that at Paragraph 12 of the Defendant's sole Witness Statement, it was averred that the 1<sup>st</sup> Plaintiff was paid off her terminal benefits which included one month's salary in lieu of notice as well as gratuity for the entire contract as evidenced by page 38 of the Defendant's Bundle of Documents.
- 5.8 It was also Counsel's submission that the 1<sup>st</sup> Plaintiff freely and voluntarily entered into a contract of employment with the

Defendant and thus bound herself to adhere to the terms and conditions therein.

5.9 Further it was submitted that the wording of Clause 19.1.2 provides that regardless of what the reason for termination of contract is, as long as the said reason did not relate to her conduct and/or performance, the 1<sup>st</sup> Plaintiff would be entitled to terminal benefits comprising of a full gratuity (as though the entire contract had been served), but not to monthly salaries and allowances.

5.10 It was also Counsel's submission that the 1<sup>st</sup> Plaintiff seeks the very relief which is expressly excluded by her contract of employment. Counsel referred the Court to the case of **Lovell & Christmas Limited Vs Wall**<sup>(5)</sup> wherein the Court stated that:

***"It is the duty of the Court... to construe the document according to the ordinary grammatical meaning of the words used therein".***

5.11 Further, in the case of **National Drug Company Limited and Zambia Privatization Agency Vs Mary Katongo**<sup>(6)</sup>, the Court held that it is trite law that once the Parties have freely and

voluntarily entered into a contract, they become bound to abide by the terms of the Contract and the Court's role is to give efficacy to the Contract when one Party has breached it by respecting, upholding and enforcing the Contract.

5.12 With regards the claim for, ZMW4,000,000.00 Damages for loss of prospects of finding suitable employment as a lawyer, at Director level due to bad publicity.

5.13 It was submitted that During cross-examination, the 1<sup>st</sup> Plaintiff reiterated that she was unable to find suitable employment because of the bad publicity as exhibited in her bundle of documents. Surprisingly, when asked if the newspaper articles in question contained any false or injurious information, the 1<sup>st</sup> Plaintiff stated that none of the information contained in the news articles was false, neither was it injurious. Further, when asked if the Defendant had any involvement in the publication, editing or authoring of the articles in question, the 1<sup>st</sup> Plaintiff said that she did not know.

5.14 It was Counsel's submission that it is a basic tenet of law that he who alleges must also prove. In making her claim, the 1<sup>st</sup>

Plaintiff was bound to adduce evidence to substantiate her claim for damages in the sum of ZMW4,000,000.00 by *inter alia* showing that the 'bad publicity' resulted in her losing prospects of finding suitable employment, which she did not.

5.15 It was Counsel's submission that without proof, there can be no Order for damages. In the case of **Mhango Vs Ngulube**<sup>(7)</sup> the Court stressed the need for evidence to make it possible to determine the value of the loss with a fair amount of certainty.

5.16 Counsel submitted that the 1<sup>st</sup> Plaintiff has not adduced any evidence to substantiate her claim for ZMW4,000,000.00 and as such this claim must fail.

5.17 With regard to Damages for unfair treatment/discrimination, Counsel submitted that the failure to provide the 1<sup>st</sup> Plaintiff with a personal to holder vehicle was on account of the Defendant's financial position at the time which did not allow for the timely procurement of personal to holder Motor Vehicles for all the Directors.

5.18 It was further averred at trial that contrary to the 1<sup>st</sup> Plaintiff's averments, she was not the only director who was not provided with a personal to holder Vehicle.

5.19 It was also submitted that in the interim, the 1<sup>st</sup> Plaintiff like others, was offered an alternative vehicle to use whilst funds to purchase her personal to holder Vehicle were being sourced. However, the Plaintiff rejected the offer for an alternative vehicle whilst the other Directors accepted.

5.20 Counsel referred the Court to **Article 266** of the **Constitution of Zambia Act NO. 2 of 2016** which defines “Discrimination” as:

***“Discrimination means directly or indirectly treating a person differently on the basis of that person's birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health or marital ethnic, social or economic status”.***

5.21 Further, Counsel submitted that **Article 23 (3)** of the **Bill of Rights** which protects individuals and preserves their freedom against discrimination attempts to describe a discriminatory act as follows:

***“(3).....the expression "discriminatory" means affording different treatment to different persons, wholly or mainly attributable to their respective descriptions by race, tribe, sex, place of birth or***

***origin, marital status, political opinions, color or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”.***

5.22 It was Counsel’s submission that the provisions above clearly provide that discrimination cannot be proven by merely showing facts of unfair treatment. The two provisions deliberately use the words “...affording different treatment to different people attributable to their respective descriptions” and “...treating a person differently on the basis of that person's birth, sex, race...”.

5.23 Counsel submitted that the words “attributed” and “on the basis” in the above cited provisions seem to suggest that there should be a material factor or basis leading to the ultimate discriminatory act. The Plaintiff merely stated that the Defendant did not provide a personal to holder motor vehicle and that other directors of her level were provided with the same.

5.24 Discrimination, in the premises and according to the above provisions, ought to be attributed to something and particularly there should be evidence of unjustifiable unfairness.

5.25 Counsel submitted that when one makes a claim for discrimination and/or unfair treatment, they need to show the court evidence that they have been treated deliberately unfairly and that the reason for that treatment is because of a protected characteristic or material factor which may include age, gender, disability, pregnancy/maternity, race or any of the characteristics in the provisions cited above.

5.26 It was Counsel's submission that the 1<sup>st</sup> Plaintiff has failed to disclose the nature of the purported discrimination matted against her and how it entitles her to damages in the sum of ZMW4,000,000.00. As such, her claim for damages for discrimination must fail.

5.27 With regard to the Plaintiff's private Vehicle and the cost of wear and tear of the Motor Vehicle Toyota Land Cruiser for 447 days at ZMW3,100.00 per day, being a total of ZMW1,385,700.00 which she informed the Court was the charge she

would have incurred had she hired a private Motor Vehicle for the 447 days she had been employed before a personal to holder vehicle was purchased for her.

5.28 Counsel submitted that the 1<sup>st</sup> Plaintiff did not provide any evidence of the purported Motor Vehicle. Further no evidence was adduced to confirm that she spent the sum of ZMW1,385.00 per day for 447 days.

5.29 Further, it was Counsel's submission that the 447 days claimed by the Plaintiff includes weekends and public holidays during which the Plaintiff cannot be deemed to have been using a motor vehicle for official duties.

5.30 Further, to the above paragraph, Counsel submitted that a partial Consent Judgment was executed wherein the 1<sup>st</sup> Plaintiff was duly paid the value of the personal to hold vehicle which she was entitled to. That being the case, the Plaintiff ought not to be further compensated for the alleged depreciation to the vehicle which she had used.

5.31 It was Counsel's prayer that the Plaintiff's Claim for ZMW385,700.00 should therefore fail.

## **6.0 FINDING OF FACTS**

6.1 I have found the following facts established:

- i. That the Plaintiff was employed by the Defendant in different roles for fourteen years, the last position she held was Director of Legal Services from 22<sup>nd</sup> August 2020 to 21<sup>st</sup> August 2023;*
- ii. That by letter dated 15<sup>th</sup> November 2021 the Defendant terminated the 1<sup>st</sup> Plaintiff's Contract of employment;*
- iii. That at termination, the Defendant did not furnish the Plaintiff with any reasons for the termination;*
- iv. That the Plaintiff was paid her dues which included, accrued leave pay, Gratuity and payment in lieu of notice;*
- v. That the Plaintiff was not given a personal to holder Motor Vehicle during the subsistence of her contract last Contract which was to run from the 22<sup>nd</sup> August 2020 to the 21<sup>st</sup> of August 2023;*
- vi. That the Plaintiff was paid a sum of ZMW K386 236:42 being a sum equivalent to the motor vehicle which was due to her; and*

vii. *That the termination of the Plaintiff's Contract of employment was published in News Papers.*

## **7.0 ISSUES FOR DETERMINATION**

7.1 The following issues have been framed for determination:

- i. Whether or not the 1<sup>st</sup> Plaintiff is entitled to thirty-six months' pay as damages for unlawful termination?*
- ii. Whether the 1<sup>st</sup> Plaintiff is entitled to ZMW 4 000 000.00 damages for loss of prospects of finding suitable employment due to bad publicity?*
- iii. Whether or not the 1<sup>st</sup> Plaintiff was unfairly treated or discriminated against by the Defendant by not offering her a motor vehicle or an alternative one?*
- iv. Whether or not the 1<sup>st</sup> Plaintiff is entitled to the sum of ZMW 1, 385 700.00 for the costs incurred by the use of a Personal private vehicle during the course of her employment?*

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

8.1 I am greatly indebted to Counsel for the submission filed before Court. I should point out from the onset, that the

burden of proof is always on the Plaintiff to prove hers or his case to the required standard of proof as per the guidance laid down in the Case of **Wilson Masauso Zulu Vs Avondale Housing Project**<sup>(8)</sup>.

8.2 Further, that even if the Defence mounted by the Defendant fails it does not automatically guarantee success for the Plaintiff as guided by the Supreme Court in the case of **Galaunia Farms Limited Vs National Milling Company and National Milling Corporation Limited**<sup>(9)</sup>, with the foregoing in mind I will now proceed to consider the issues raised.

i) *Whether or not the 1<sup>st</sup> Plaintiff is entitled to thirty-six months' pay as damages for unlawful termination?*

8.3 The starting point for me is to understand what “unlawful” termination of employment relates to or entails. In this regard the Supreme Court in the case of **Eston Banda and Another Vs Attorney General**<sup>(10)</sup> guided as follows:

***“According to Michael Jefferson, author of Principles of Employment Law, (2000) 4th Edition, Cavendish Publishing Limited, Sydney, Australia, 'wrongful'***

*dismissal looks to the form of the dismissal. It refers to a situation where an employer dismisses an employee without notice or with insufficient notice. This is contrasted with 'unfair' dismissal which is said to concentrate both on procedure and substance.*

*Halsbury's, Laws of England, Volume 41, 5th Edition, at paragraph 722, also provides that " ... dismissal may at common law either be lawful or wrongful; and a dismissal, whether lawful or wrongful, may be challenged as being unfair by statute." The above excerpts only go to underscore the fact that, there are only two broad categories for dismissal by an employer of an employee, it is either wrongful or unfair. 'Wrongful' refers to a dismissal in breach of a relevant term embodied in a contract of employment, which relates to the expiration of the term for which the employee is engaged; whilst 'unfair', as stated at paragraph 757 of Halsbury's Laws of England, refers to a dismissal in breach of a*

***statutory provision, where an employee has a statutory right not to be dismissed”.***

8.4 From the above stated authority, I can safely state that there are only two categories of termination, these being wrongful and unfair termination. The former refers to termination in breach of some contractual term such as failure to give notice or pay in lieu of notice. The later refers to termination that contravenes some statutory provision.

8.5 In this vein I come to the conclusion that by the guidance of the Supreme Court, which I am bound by, what the Plaintiff terms as unlawful termination is in fact unfair termination. In the premises I will now proceed to address my mind as to whether the Plaintiff was unfairly dismissed.

8.6 For the Plaintiff to succeed with her claim for unfair dismissal, she needs to prove on a balance of probabilities that her termination was done in contravention of a statute. The Plaintiff has argued that the termination was unfair because the Defendant failed to abide by the provisions of **Sections 52 (2)** of the **Employment Code, Act No. 3 of 2019** when it failed to provide the reason for the termination of the contract.

The Defendant on the other end has fervently argued that the contractual provision relied on to terminate being Clause 19.1.2 did not require a reason to be given as such there was nothing unfair as all the other requirements under the said clause had been satisfied.

8.7 I have looked at the competing submissions and the premise thereof. **Section 52 (1) and (2)** of the **Employment Act No. 3** of **2019** relied on by the Plaintiff provides as follows:

***“(1) A contract of employment terminates in the manner stated in the contract of employment or in any other manner in which a contract of employment is deemed to terminate under this Act or any other law, except that where an employer terminates the contract, the employer shall give reasons to the employee for the termination of the employee’s contract of employment; and (2) An employer shall not terminate a contract of employment of an employee without a valid reason for the termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.”*** (Emphasis mine)

8.8 From this provision it is clear that whereas the statute in the first part is allowing for termination to be in accordance with

contractual provisions and any other means permitted by the Code, it clearly and unequivocally provides that an employer cannot terminate employment without providing a reason and **Subsection 2 of Section 52** adds that the reason should be valid.

8.9 The Supreme Court in the case of **Moses Choongo Vs ZESCO Recreation Club Itezhi Tezhi**,<sup>(2)</sup> the Court held that:

***“Unfair dismissal occurs when an employee’s contract is terminated in breach of any statutory provision linked to the protection of the right of employment and promotion of fair labour practices that require employers to terminate contracts of employment only on valid, specified and reasonable grounds.”***

8.10 In view of the interpretation of the above stated authorities it follows that the Defendant’s argument that clause 19.1.2 did not require them to provide reasons for the dismissal is not tenable, as it is a requirement by Statute to give a valid reason before termination of employment.

8.11 In fact a close reading of the said clause reveals that it does not seem to carry the import ascribed to it by the Defendant's advocates in their submissions. The said clause provides thus:

***"Where however, the Agency terminates the contract on other grounds other than those stated in clause 19.1.1 the agency shall pay the employee full gratuity excluding monthly salaries and allowances as if the contract had been duly served"*** (Emphasis mine)

8.12 From the above except of the contract it is clear that even the termination clause relied on does envision some grounds upon which the employee is being dismissed. The only difference is that those grounds were not expressly stated in the contract. Therefore, I have no difficulty in finding that the dismissal was unfair.

8.13 However, the question that remains to be answered is how much is the Plaintiff entitled to as damages for the unfair dismissal?

8.14 The Plaintiff has claimed thirty-six months' pay damages for unlawful termination of contract. The Courts have on multiple occasions held that that the normal measure of damages is

based on the notice period required under the contract of employment. Which entails that the damages will therefore equal wages for the notice period.

8.15 However, looking at the Plaintiffs claim, it is clear that what the Plaintiff claims for are not normal damages. The authors of **Labour Law in Zambia: An Introduction at page 137** have stated that:

***“In deserving and special cases, the Zambian Courts have held that the normal measure of damages for wrongful or unfair dismissal will be departed from where the termination involved aggravating factors such as being inflicted in a traumatic fashion that caused the employee undue distress or suffering.”***

8.16 Similarly in the case of **Swap Spinning Mills Plc Vs Sebastian Chileshe and Others**<sup>(11)</sup> the Supreme Court guided thus:

***“The normal measure of damages applies and will usually relate to the applicable contractual length of notice or the national reasonable notice where the contract is silent. The normal measure is departed from where the termination may have been inflicted in a traumatic fashion which causes undue distress or mental suffering and while there should be***

***compensation over an above the contractual termination benefits already paid, it is beyond the normal measure to equate such damages to the salary and perquisites over a two-year period.”***

8.17 The question that begs to be answered at this point is whether the Plaintiff's termination is one that can be said to have involved aggravating factors to warrant the enhanced compensatory damages of thirty-six months' pay?

8.18 As shown by the analysis above, the only fault on the Defendant's part is the failure to give a reason for the dismissal. Otherwise, the Plaintiff has been paid all the terminal benefits. The Plaintiff has not shown any aggravating factors to entitle her to 36 months' pay. The only attempt at this is the claim that the publication of the dismissal caused injury to her. This with all respect cannot hold, as it will be made more apparent under the second issue.

8.19 In the premises I find that there are no aggravating circumstances in *casu* and accordingly grant the Plaintiff damages equal to her notice period being three months' pay.

ii. *Whether the 1<sup>st</sup> Plaintiff is entitled to ZMW 4 000 000.00 damages for loss of prospects of finding suitable employment as a Lawyer, at Director level due to bad publicity?*

8.20 The other claim by the Plaintiff is that she be paid ZMW4,000 000.00 as loss of prospects of finding a job due to bad publicity. In trying to convince the Court on this ground the Plaintiff relies entirely on the newspaper articles appearing in her bundle of documents at pages 30, 31 and 32.

8.21 I have taken time to examine the said news articles, it is clear to me that the Defendant had no hand in their publication. What is in fact clear is that the other Directors who had suffered the same fate as the Plaintiff had gone to the media to bemoan their fate. In the process they publicised what were otherwise confidential dismissals.

8.22 Further, the Plaintiff admitted in cross examination that the articles were truthful and not injurious. Clearly, the Plaintiff has failed to show how that the publications caused any loss of prospect to get a job. As stated in my opening of my analysis, the burden is always on the Plaintiff to prove her

case on a balance of probabilities as per the case of **Wilson Masauso Zulu Vs Avondale Housing Project**<sup>(2)</sup>.

8.23 I am further fortified, in finding that the Plaintiff has failed to prove this issue by the fact that there is no proof or evidence laying the basis of how the Plaintiff arrived at ZMW4,000 000.00 as compensation. In this regard, I agree with Counsel for the Defendant that in the absence of evidence I cannot grant the Plaintiff the order sought. This claim therefore fails.

*iii. Whether or not the 1<sup>st</sup> Plaintiff was unfairly treated or discriminated against by the Defendant by not offering her a motor vehicle or an alternative one?*

8.24 **Article 266** of the **Constitution of Zambia Act No. 2 2016**, defines discrimination as:

***“Discrimination means directly or indirectly treating a person differently on the basis of that person’s birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health or marital ethnic, social or economic status.”***

8.25 **The Employment Code, Act No. 3 2019** in **Section 5** does proscribe employers from treating employees in a

discriminatory manner in the conditions of service. **Section 5**

**(2) (a) (b)** of the very **Act** provides that:

***“An employer shall not, in any employment policy or practice discriminate, directly or indirectly, against an employee or a prospective employee-...***

***(a) on grounds of colour, nationality, tribe or place of origin, language, race, social origin, religion, belief, conscience political or other opinion, sex, gender, pregnancy, marital status, ethnicity, family responsibility, disability, status, health, culture or economic grounds; and***

***(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment”***

(Emphasis mine)

8.26 From the above provision it is clear that the employer is not allowed to have policies or practices that discriminate in terms of the terms and conditions or any other matters arising from the employment. The question I need to resolve therefore is whether the Defendant offended the provisions of **Section 5 (2) (a) and or (b)** in *casu*.

8.27 The Plaintiff alleges that she was discriminated against when she was not given a personal to holder vehicle or an alternative. The Defendant counters and contends that other employees who were in her position received the same treatment, in fact the evidence shows that she was offered an alternative which she refused.

8.28 The Supreme Court in the case of Zambia Consolidated Copper Mines Limited Vs Mulemwa<sup>(12)</sup> ruled that:

***“The fact that some members of a company were treated differently from others was evidence of discrimination but was not in itself discrimination on the grounds of social status. An employee bears the burden of showing that he has been discriminated against because of his social status”.***

8.29 On the above facts the Plaintiff has not shown how the conditions of service were discriminatory or how the Defendant’s practice or behaviour in this regard was discriminatory on the ground of her status.

8.30 By the guidance of the law as stated above for one to prove discrimination they must show the ground upon which, he or

she was discriminated against. The Plaintiff has failed to show the basis upon which she claims discrimination.

8.31 It is on this premise that I find that the Plaintiff has failed to prove on a balance of probability how she was discriminated against by the Defendant. I am fortified in my finding by the fact that the Defendant acknowledged that she was entitled to the vehicle and accordingly paid her for it. In the premises this claim equally fails.

*iv. Whether or not the 1<sup>st</sup> Plaintiff is entitled to the sum of ZMW 1, 385 700.00 for the costs incurred by the use of a Personal private vehicle during the course of her employment?*

8.32 The Plaintiff further claims that she should be compensated for using her personal car which has incurred wear and tear over the period of usage. In this regard she asks for ZMW1, 385,700.00. Counsel for the Plaintiff in his submission has sought to demonstrate that because the Plaintiff was not given a personal to holder vehicle during the subsistence of her contract, she suffered great loss by using her personal car.

8.33 The Defendant on its part argues that the Plaintiff has not demonstrated how she suffered loss and what loss was actually suffered. Counsel for the Defendant argues that the Plaintiff claims loss but does not provide any proof thereof of how she incurred it.

8.34 A look at the evidence and the record shows that the Plaintiff was paid for the Motor Vehicle. Further, to that payment, there is no proof of how much the car was worth or evidence of the car itself. Neither is there evidence of the costs of repair and service if any which was undertaken in the said period.

8.35 In view of the above, it can only be concluded that whereas the Plaintiff speaks of damage having been suffered she has not proved the said damage. There is no basis in the evidence or in the documentary evidence on the record that can justify the award of the money claimed.

8.36 In any event, there seems to be no serious prejudice to be suffered by the Plaintiff by the deny of this relief as she was compensated for non-award of a personal to holder vehicle. In the premises this claim equally fails.

## 9.0 CONCLUSION

9.1 In conclusion, the Plaintiff succeeds on the first claim and the remainder of the claims fail. Seeing as the Plaintiff has succeeded partially, I order that each Party shall bear their own costs. Leave to Appeal is hereby granted.

**DELIVERED AT LUSAKA THIS 10<sup>TH</sup> DECEMBER, 2024.**

