IN THE HIGH COURT FOR ZAMBIA **2014/HP/1134**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

PETER NG'ANDU **PLAINTIFF**

AND

ZESCO LIMITED **DEFENDANT**

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 30TH OCTOBER, 2017 – IN CHAMBERS

For the Plaintiff : *Mr. Katuta- Luboko Chambers*

For the Defendant : *Mrs. D. Machona – Legal Counsel Zesco*

JUDGMENT

CASES REFERRED TO:

1. ***Development Bank of Zambia vs Dominic Mambo (1995-1997) ZR 89***
2. ***National Milling Company Limited vs Simataa and Others (2000) ZR 91***
3. ***North-Western Energy Company Limited vs The Energy Regulation Board (2011) 2ZR 562***
4. ***Council of Civil Service Union v Minister for the Civil Service[1985] A.C. 374***
5. ***Hotel and Tourism Training Institute Trust vs Happy Chibesa SCZ Appeal No. 58/2001 (unreported)***
6. ***Kasenge vs Zanaco (2000) ZR 72; Nguleka vs Furniture Holdings Limited (2006) ZR21;*** and ***James Mankwa Zulu and Others v Chilanga Cement Plc, SCZ Judgment No. 12 of 2004***
7. ***Rosemary Ngorima and 10 Others v Zambia Consolidated Coppermines Appeal No. 97 of 2000***
8. ***Zambia Oxygen Limited v ZPA, Paul Chisakula and Ors (2000) ZR 27***
9. ***Zambia Telecommunications Company Limited v Felix Musonda and 29 others, SCZ/8/26/2014 (Appeal no. 51 of 2014)***
10. ***Zambia National Commercial Bank Plc v Geoffrey Muyamwa and 88 Others, SCZ/8/262/2016 (Selected Judgment No. 37 of 2017)***

In this case the Plaintiff claims the following reliefs against the Defendant:

1. *K397,636.28 being an underpayment on his retirement benefits following his retirement from the Defendant's employment on 11th March, 2011 particular whereof exceed three folios and have been furnished to the Defendant;*
2. *Interest; and*
3. *Costs*

The basis of his claim as stated in his statement of claim is that when calculating the long service gratuity the Defendant used a fictitious figure of K5,339.25 representing his service allowance instead of K6,776.74 as contained on his pay slip and as receivable by him on a monthly basis. As a result of this he was underpaid by an amount of K133,379.00. Secondly, the Plaintiff claims to have suffered a further underpayment of K264, 157.28 by reason of the Defendant's omission to incorporate the Plaintiff's housing allowance of K2,847.60 (receivable by him on a monthly basis) into his basic salary when it calculated the Plaintiff's retirement benefits as by law established.

In its defence, the Defendant denied underpaying the Plaintiff and stated that no fictitious figures were used in computing the Plaintiff's long service gratuity but the applicable formula at the time was applied. It was further stated that for the purpose of

enabling the Plaintiff take a substantial portion of the service allowance on a monthly pay slip, the sum due as tax is added to the monthly service allowance, with the effect that the service allowance on the monthly pay slip was almost 95% of the basic pay which is more than the 75% the employee actually is entitled to as it included the tax component borne by the Defendant.

Furthermore, the Defendant stated that the service allowance that is used for computing terminal benefits is grossed up at the tax applicable for long service gratuity which is 10%. The whole gross is grossed at 10% as opposed to the calculation on the pay slip where only half of the services allowance is grossed up at 35%. The service allowance is treated differently when computing the long service gratuity.

At trial, the Plaintiff testified and did not call any witnesses, the Defendant called two witnesses.

It was the Plaintiff's ***(PW1)*** testimony that he joined the Defendant Company in June, 1980, as a Technician Draftsman. The conditions of service that were applicable to him were those for non-represented members of staff. He was later promoted to a position of Principal Technologist, Civil, and the non-represented members of staff conditions still applied to him. His remuneration included a basic pay, service allowance and housing allowance. The allowances were reviewed from time to time. ***PW1***'s allowance

as at December, 2010 was K6,776.74 while his housing allowance was K2,847.60. It was his testimony that these figures reflected on his pay slip. He identified the pay slip dated February, 2011, on page 47 of the agreed bundle of documents. On that pay slip the basic pay is stated as K7,119.00 and the service allowance as K6,776.74, while the housing allowance is stated as K2,847.60.

PW1 received a notice of retirement on 23rd August, 2010. The notice was for six months with effect from 12th September, 2010. The notice was due to expire on 11th March, 2011. After expiration of the notice, he was given two pay slips, which showed computations for terminal benefits, and the other was long service gratuity.

PW1 discovered from the computations for the long service gratuity that the Defendant had used a wrong rate of K5,339.25, instead of K6,776.74 for computing long service gratuity. By his own calculations, ***PW1*** discovered that he was underpaid by K133,399.00. ***PW1*** further testified that the Defendant used 75% when calculating the service allowance. It was his view that the service allowance is supposed to be a hard figure as appears on the pay slip and in this case K6,776.74, and not 75%. Practically, ***PW1*** was getting 95% of his basic pay. The 95% is what is applicable to all Defendant's staff. The 75% does not appear anywhere in the conditions of service.

PW1 referred the court to the case of Mr. Kalumba who retired from the Defendant in January, 2010 and the Defendant paid him the service allowance calculated using the figure appearing on the pay slip. The said pay slip appears on pages 51 to 53 of the agreed bundle of documents. He explained that the terminal benefits were calculated using the figure K6,454,038.46 which was appearing on his pay slip as service allowance. His conversion of this figure amounts to 95% of the basic pay.

PW1's other claim was that his housing allowance of K2,847.60 was not included in calculating his terminal benefits. According to his own calculations the amount comes to K264,257.28 which should have been part of his terminal benefits. This brought his total claim to K397,656.28.

In cross examination ***PW1*** agreed that the conditions of service appearing pages 1 to 42 were applicable to him. He was referred to page 54 of the agreed bundle of documents and admitted that according to his letter of confirmation dated 29th March, 2010 his service allowance was 75% of the basic pay. He also admitted that 75% of his basic salary of K7,119.00 was K5,339.25 which was the figure which was used in calculating his terminal benefits. On the figure of K6,776.74, when asked whether he was aware that it was grossed for tax purposes, ***PW1*** responded in the negative.

PW1 was further referred to an internal memorandum supplementing the 2003 conditions of service for non-represented staff which he said were applicable to him and confirmed that services allowance was stated as 75% of monthly basic salary grossed up for tax. He also confirmed that the definition of pay when it comes to payment of gratuity upon normal retirement was "basic salary plus services allowance".

In re-examination he ***PW1*** confirmed that what was included in his terminal benefits was his basic pay and services allowance. He further stated that housing allowance and commuted car allowance were applicable.

DW1 was ***Theodata Chombwe Shapi Chisembele,*** a Senior Manager, Human Resources, Business Operations department. Her job entails looking after employees' welfare pertaining to the conditions of service, from the time of their employment to the time of separation.

DW1 testified that the Plaintiff was employed as Civil Technologist in the Civil Department until his retirement in 2011. The conditions of service that were applicable to the Plaintiff were non-represented members of staff conditions effective 2003.

She testified that the Plaintiff was paid his terminal benefits as per his conditions under which he served. ***DW1*** further testified that

the housing allowance was not part of the terminal benefits at the time of his retirement. She referred the court to pages 25 and 26 of the agreed bundle of documents. ***DW1*** also referred the court to page 1 of the Defendant's bundle of documents at page 1 and told the court that the document contained revised and amended conditions of service for non-represented employees effective 1st April, 2013. ***DW1*** testified that the Plaintiff was paid his terminal benefits in accordance with the conditions of service under which he served. She appealed to the court not to allow the Plaintiff's claims.

In cross-examination the witness was referred to the notice to produce on the last page of the document, particularly item number 4 which says the service allowance shall be calculated at 75%. When asked whether it would have been stated as such in the memo if it was not meant to be calculated like that, ***DW1*** answered that she could not answer because she was not competent to respond to that.

She reiterated that the Plaintiff was not entitled to have the housing allowance included in the calculation of his benefits. She was not aware that there is case law which obliges the inclusion of all allowances when calculating terminal benefits.

In re-examination, ***DW1*** informed the court that as at 1st April, 2013 the computation included basic pay, services allowance, housing allowance and commuted car allowance.

DW2 was ***Prince Hamwenzu,*** a Taxation Manager at the Defendant Company. His duties include computation of taxes such as PAYE, VAT and company tax.

He testified that the Plaintiff was employed as a Chief Technician Civil and was retired under the normal retirement in March, 2011.

DW2 testified that the computation of service allowance is calculated at 75% both during and after employment. He referred to page 46 of the agreed bundle and stated that this is a copy of the Plaintiff's pay slip. He pointed out that the basic ay is K7,119.00 and the service allowance is K6,776.74. If the service allowance figure is divided into the K7,119.00, basic pay, it amounts to 95% of the basic pay. As per conditions of service 50% or half of the service allowance is grossed up at 35%. ***DW2*** stated that this is the reason why it is reflecting on the pay slip as 95% on the pay slip.

DW2 referred to the memo on page 1 of notice to produce and told the court that it was a memo from the Director of Human Resource. The memo stated that the service allowance remained at 75% of the monthly basic salary grossed up for tax.

He explained that grossing up means adding a certain percentage to the original services allowance in order to mitigate the tax burden. The 35% is what is paid as tax through PAYE. You gross up at the last band because basic pay remains at 35% once taxes have been deducted; 75% of basic pay, which is the services allowance is K5,339.25. Grossing up is 50% of K5,339.25 multiplied by 100 over 65, the figure you get is K4,107.12, this is the 50% grossed up at 35%. When you add the remaining 50% (K2, 669.62) to K4, 107.12, you come up with K6, 776.74 as services allowance.

When referred to pages 48 and 49 of the agreed bundle, ***DW2*** pointed out that was a manual pay slip for calculations of terminal benefits for the Plaintiff, it agrees with his explanation. The first portion of it is the basic pay, the number of days that the Plaintiff worked during the last month of his retirement together with the other allowances, such as services allowance and housing allowance. The services allowance was still at 95% because the Plaintiff still worked under normal employment during the 11 days on the manual pay slip. The pay slip indicates that he worked 11 days out of 31 days in the month of March.

DW2 explained the computation for long service allowance is at 75% of the basic salary because on retirement the taxation differs between one who is in employment and the calculation of terminal benefits. Terminal benefits are taxed at 10%.

DW2 explained that the grossing up of tax during employment is a gratuitous act on the part of the employer in order to reduce or transfer the tax burden from the employee to the company.

Concerning the pay slip for Albert Kalumba appearing on page 53 of the agreed bundle, where the services allowance was calculated at 95%, ***DW2*** told the court that it was an error.

In cross-examination ***DW2*** was asking whether paying the retirement benefits at 75% was altering the 95% which the employing was used to receiving to which ***DW2*** answered that it was indeed altering but was not an oversight in the case of the Plaintiff. ***DW2*** testified that the oversight was on the calculation of Mr. Kalumba's benefit.

Asked whether this was a confirmation of the absence of a rule which is supposed to promote uniformity with regards to the payment of the service allowance that the rule is that it should be paid at 95%, ***DW2*** denied that it is paid at 95%.

In re-examination, ***DW2*** informed the court in clarifying which policies or rules guide services allowance that it was Zesco's right to indicate to employees through the conditions of service which allowances will be paid. He reiterated that the services allowance was paid at 95% while the Plaintiff was still in employment. He

added that the guidelines were the Income Tax Act. He further told the court that the percentage applicable is 10%.

Both parties filed submissions which I have taken into great consideration and will make reference to though I will not reproduce them in full in this judgment.

Counsel for the Plaintiff, Mr. Katuta, submitted that it is trite law that upon termination of employment the only rate payable is that existing and known to the parties at that given time. I was referred to the case of ***Development Bank of Zambia vs Dominic Mambo (1995-1997) ZR 89***[1] where it was stated:

> ***"....as at that date the only way of calculating what... was to apply the only rate that was known to the parties, that is, the old rate."***

I was also referred this court to the case of ***National Milling Company Limited vs Simataa and Others (2000) ZR 91***[2] in which *Ngulube CJ*, as he then was said the following:

> ***"In this regard, we accept that to a person leaving employment the arrangements for terminal benefits – such as pension, gratuity, redundancy pay and the like – are most important and any unfavorable unilateral alteration to the disadvantage of the affected worker and which was not previously agreed is justifiable and in this connection it is unnecessary to place a label of basic or non-basic on it."***

It was submitted that the Defendant has not produced any rule or guideline, or tax law which stipulated that on retirement the

services allowance shall be paid at the rate of 75% and not the monthly rate of 95%.

It was Counsel's contention that a mere statement that the application of the 75% was done pursuant to the Income Tax Act unsupported by substratum of evidence is not enough. The Defendant ought to have pointed the court to specific guidelines which the court could have perused and made its interpretation.

Mr. Katuta further contended that the Plaintiff had a legitimate expectation that the rate of K6,776.74 was applicable when calculating his terminal benefits.

He submitted that legitimate expectations arise where an employer has led any employee to believe that such employee will receive or retain a benefit or advantage. I was referred to the case of ***North-Western Energy Company Limited vs The Energy Regulation Board (2011) 2ZR 562[3],*** in which my brother Dr. Matibini (SC) J, as he then was, highlighted the issue of legitimate expectation citing the learned authors of *De Smiths Judicial Review*, where it was observed in paragraph 12-001, at page 609, that:

> ***"Since the early 1970's one of the principles justifying the imposition of both procedural and substantive protection has been "legitimate expectation". Such an expectation arises where a decision-maker has led someone affected by the decision to believe that he will receive, or retain a benefit, or advantage___ including that a hearing will be held before a decision is taken. It is a basic principle of fairness that legitimate expectations ought not to be thwarted.***

The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty ...."

He went on to quote *Lord Diplock* in the House of Lords in ***Council of Civil Service Union v Minister for the Civil Service[1985] A.C. 374***[4] where he stated the following:

"***For a legitimate expectation to arise, the decision:***

> ***Must affect [the] other person... by depriving him of some benefit, or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy, and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received an assurance from the decision-maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.***"

It was Counsel's further contention that the Plaintiff was in similar circumstances as Mr. Albert Kalumba and should have been treated equally. I was referred to the Supreme Court case of ***Hotel and Tourism Training Institute Trust vs Happy Chibesa SCZ Appeal No. 58/2001 (unreported)***[5] where *Chibesakunda JS*, as she then was, said:

> ***"At law if an employer raised legitimate expectation to any employee by the employer's conduct that employer is estopped from refusing to extend the same treatment to that employee in the similar circumstances."***

Counsel's submission on the Defendant's failure to include the K264,257.28, housing allowance into the basic pay, contended

that the claim was anchored on the Supreme Court's decision in a plethora of authorities. Counsel submitted that it is trite law that in calculating terminal benefits a salary or pay ought to include all allowances in addition to basic salary that an employee was entitled to at the time of termination.

I was referred to the following cases: ***Kasenge vs Zanaco (2000) ZR 72; Nguleka vs Furniture Holdings Limited (2006) ZR21;*** and ***James Mankwa Zulu and Others v Chilanga Cement Plc, SCZ Judgment No. 12 of 2004[6],*** where it was stated that:

> ***"....we allow the appeal and enter judgment for the appellants for terminal benefits based on merged salaries and allowances...."***;
>
> ***"We have not awarded or endorsed compensations or damages based on basic pay..., such awards have always included allowances and any other perks that the aggrieved party was entitled to at the time of termination." ; and***
>
> ***"When the word salary is used there is no debate any more that the word salary includes allowances that are paid together with the salary on periodical basis by an employer to his employees",*** respectively.

It was submitted that the Defendant by formulating the proviso to clause 12.1 (e)of the conditions of service for non-represented employees was wittingly or unwittingly incorporating the definition of a salary, as by case law established, into its own conditions of service. The Plaintiff is therefore entitled to be paid the sum of K264,257.28.

Mrs. Machona in the submissions in reply contended that the Plaintiff has failed to bring cogent evidence before this court to prove that the figure used in computing his long service gratuity was fictitious. She relied on the case of ***Anderson Kambela Mazoka, Lt General Christon Tembo, Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, Electoral Commission of Zambia, & the Attorney General (2005) ZR 138 (S.C).***

It was Counsel's contention that the case of ***Development Bank of Zambia vs Dominic Mambo (1995-1997) ZR 89***was distinguishable from the claim in casu, as it relates to claim of underpayment of a salary following a salary adjustment, which had a retrospect effect thereby making the Plaintiff to accrue a right as the effective date of the said adjustment was within the period of service of the Plaintiff. She argued that in the current case the Plaintiff is putting a claim that operated outside his conditions of service applicable at the time, which conditions of were confirmed by the Plaintiff as testified in court by ***DW1.***

Counsel in reference to the case of ***Sam Amos Mumba v Zambia Fisheries and Fish Marketing Corporation Limited (1980) ZR 135***submitted that the facts of the aforementioned case indicate that the extrinsic evidence that was relied on in varying the contract was a government directive that was by way of delegated legislative action. It was further submitted that in the current case, no such directive which could be considered as an exception existed so as to entitle the Plaintiff to any claim outside his conditions of service

applicable at all materials times. Counsel employed the court not to be drawn into extrinsic evidence other than the embodied terms, being Zesco 2003 Conditions of Service for Non-Represented Employees.

Counsel further referred me to the case of ***Rosemary Ngorima and 10 Others v Zambia Consolidated Coppermines Appeal No. 97 of 2000***[7], where the Court aptly noted that *"it is trite law that in any employer/employee relationship the parties are bound by whatever terms and conditions they set for themselves."*

It was submitted that in effect it follows that parties are at liberty to agree on the terms and condition of their relationship and bound by the said terms once agreed. It was further submitted that that at no time did the Plaintiff object to the Conditions of Service which provided that service allowance was to be computed at the rate of 75% and not 95% of his basic pay being K7,119.00 as at the date of retirement.

It was Counsel's submission that at retirement the service allowance that is used for computing terminal benefits is grossed up at the tax applicable for long service gratuity which is 10%. Further that should the Plaintiff be allowed by the Court to have his retirement benefits recomputed by using the formula and figures as on the pay slip that are grosses up at 35% and not 10% the Plaintiff would unjustly gain. Counsel referred the court to the case of ***Chola Chama v Zesco Limited, SCZ Judgment No. 20 of 2008, Appeal No. 2015/2006.***

Counsel submitted that the Plaintiff's claim as mirrored in the Writ of Summons and Statement of Claim has excluded the tax component which is supposed to show that tax to be paid on benefits, either on salaries or retirement benefits.

Mrs. Machona further submitted that whereas the Plaintiff has made a claim of underpayment, he has not gone further to prove how the said underpayment actualized other than just comparing figures from the pay slip and the computation of his retirement benefits which figures are affected with the tax component.

I was further to the case of ***Robbie Mumba and Others v ZPA and ZCBC, Appeal No. 149 of 2001,*** where the Court held that in computing that employee's terminal benefits enjoyed by an employee during his period of service must be integrated in the basic salary before computing that employee's terminal benefits except where the conditions say so.

It is the Defendant's submission that the Plaintiff was correctly paid as prescribed by the tax law that governs the matter relating to tax of benefits. It follows that the Plaintiff's claim is unjustifiable and lucks merit.

Counsel contended that the Plaintiff relied on the calculations of Mr. Albert Kalumba where the 95% was applied and not the 75%.

Counsel submitted that this was an error and efforts have been put in place to recover the money that was overpaid.
In summary, Counsel submitted as follows:

(i) *The Plaintiff was correctly paid as per conditions of service*
(ii) *That the benefits were computed as provided for under tax law at both instances of employment and retirement.*
(iii) *That the principal of similar circumstanced employees did not apply to the Plaintiff.*

It is not in dispute that the Plaintiff's terminal benefits were calculated without an inclusion of housing allowance and the service allowance was calculated at the rate of 75% and not 95% of the Plaintiff's basic pay of K7,119.00. It is clear that 75% of K7,119.00 amounts to K5,339.25.

What is in dispute is whether the Plaintiff is entitled to these claims. The claim by the Plaintiff is based on the fact that concerning the service allowance, he had an accrued right to be paid at the rate of K6,776.74, representing 95% of his basic salary as I have come to learn, and not K5,339.25 which was 75% of his basic salary. It was argued on behalf of the Plaintiff that this was a condition of service already being enjoyed by the Plaintiff. Counsel for the Plaintiff submitted that it is a notorious principle of law in our jurisprudence that conditions of service already being enjoyed by employees cannot be altered to their detriment without

their consent. I was directed to the case of ***Zambia Oxygen Limited v ZPA, Paul Chisakula and Ors (2000) ZR 27[8],*** where Ngulube, CJ, as he then was, stated the following:

> ***"...conditions of service already being enjoyed by the employees cannot be altered to their disadvantage without their consent nor can this principle depend on whether the employees are continuing in employment or they have been separated."***

Evidence which was not in dispute during trial was that the Plaintiff used to get a monthly service allowance, which reflects on his pay slip as a sum of K6,776.74. The Defendant through DW2 explained firstly that this amount amounted to 95% of the Plaintiff's basic salary and secondly that the conditions of service which the Plaintiff was aware of clearly stated that the Plaintiff was entitled to 75% of his basic salary as his service allowance. In addition, it is not in dispute that the Plaintiff retired on 12th March, 2011.

The Defendant produced a memorandum that was written to all Human Resources Managers and all Chief Accountants from the Director Human Resources dated 2nd October, 2003. In that memorandum it was clearly stated that services allowance was 75% of the monthly basic salary grossed up for tax. In cross examination, the Plaintiff was referred to a document on page 54 of the agreed bundle of documents, a letter confirming the Plaintiff as Chief Technologist-Civil. In that letter dated 29th March, 2010, it was confirmed that the Plaintiff's services allowance was 75%.

On the issue of services the Defendant brought a witness who was said to be an expert in tax, ***DW2.*** In his testimony he explained why the service allowance was coming to 95% on the payslip and yet the entitlement for the Plaintiff was 75%. He explained that as per their conditions of service 50% or half the service allowance is grossed up at 35%. This is the reason why it is reflecting at 95% on the pay slip. He further explained that grossing up meant adding a certain percentage to the original services allowance in order to mitigate the tax burden.

Counsel for the Plaintiff argued that it was trite law that upon termination of employment the only rate payable is that existing and known to the parties at that given time. This is indeed the position of the law. It was argued that the condition being enjoyed by the Plaintiff was services allowance of K6,776.74 (95% of basic salary) and not K5,339.25 (75% of basic salary).

The position of the law is that terminal benefits should be calculated in accordance with what was agreed by the parties where such an agreement exists. The case of ***Zambia Telecommunications Company Limited v Felix Musonda and 29 others, SCZ/8/26/2014 (Appeal no. 51 of 2014)***[9] where the court stated as follows:

> "...***What was done was that the conditions of service stated the exact manner the terminal benefits ought to have been calculated and this was acceptable to the Respondents.***"

The memorandum dated 2nd October, 2003, I referred to above is a clear sign that both the Plaintiff and the Defendant's knew that the service allowance was 75% of monthly basic salary grossed up for tax. I should add that there was no objection to the production of this document in court by the Plaintiff. I take it the Plaintiff was aware of this memorandum during the time of his employment.

It would appear to me that the grossing up for tax was part of the condition which cannot be taken away at the time of termination. This is especially so because it had the effect of increasing the services allowance to K6, 776.74. I do not think that the Defendant can now argue in terms of percentages. I find that the Plaintiff had a legitimate expectation that the services allowance would be calculated at K6,776.74 an amount which he used to get as part of his monthly salary and appeared as such on the payslips exhibited. It is my considered view that the Plaintiff is entitled to have his terminal benefits calculated with the services allowance of K6,776.74 and not K5,339.25. The Plaintiff also raised the issue of being similarly circumstanced with one Albert Kalumba. According to the letter exhibited on page 61 of the agreed bundle of documents, Mr. Kalumba retired on 22nd January, 2010. The payslips exhibited on pages 52 to 53 of the same agreed bundles which show that the services allowance in his terminal benefits was calculated at 95% (I believe grossed up for tax). The said payslips bear stamps of Senior Auditor, implying

that they were verified. Counsel for the Defendant argued that this was a mistake. There is however no evidence that there was even an attempt on the part of the Defendant to correct this 'mistake'. There is, in fact, an exchange of correspondence between the said Mr. Albert Kalumba and the Defendant at pages 61 and 62 of the agreed bundle of documents dated 31st January, 2014 and 9th April, 2014, respectively, where Mr. Kalumba was inquiring about the non-inclusion of the housing allowance in calculating his terminal benefits. This would have alerted the Defendant on the fact that they had actually over paid Mr. Kalumba by calculating the services allowance in the manner they did but instead the Defendant confirmed that Mr. Kalumba's benefits were properly calculated (paragraph 3 of the letter on page 62).

In the case of in the case of ***Zambia National Commercial Bank Plc v Geoffrey Muyamwa and 88 Others, SCZ/8/262/2016 (Selected Judgment No. 37 of 2017)***[10] the Supreme Court stated the following:

> "***In effect, we took the position that the Respondent's terminal benefits should be calculated in the manner those of Kalaluka and Mwiinga were calculated because they were similarly circumstanced. We, therefore, passively and without much reflection, dismissed the argument by the Appellant that the Kalaluka and Mwiinga case departed from stare decisis in as far as it did not consider our decisions on the effect of an employee consenting to a change in his/her conditions of service."***

The case is only distinguishable from the current case to the extent that the Complainants in the Kalaluka case were not

similarly circumstanced as the ones in that case as the two groups served under different conditions of service. This can be confirmed by what the court stated at page J17 when it stated the following:

> ***"This was notwithstanding the fact that these Respondents were serving under the ZANACO conditions of service which specifically provided for gratuity to be paid at twenty-five percent of the basic pay, excluding allowances."***

All in all, the Supreme Court upheld the doctrine of similarly circumstanced, save that it was not applicable in that matter. The Court stated on page J57 of the judgment as follows:

> ***"We have in the past held that the wording of sections 3 and 85(6) of the Industrial and Labour Relations Act, reveals that orders made by the then Industrial Relations Act, reveals that orders made by the then Industrial Relations Court can have binding effect on the parties to the action and any other person who is affected by that order. However, this is the case only in cases where the affected person's services were terminated at the same time and in the same manner. This is what amount to 'similarly circumstanced" which is not applicable in this case because whilst the mode of payment for the Complainants in the Kalaluka and Mwiinga case was similar to what the Respondents in this appeal sought to be paid, the mode of separation was different because they declared redundant and at a different time. For this reason the principle of similarly circumstanced was wrongly applied by the court below...."***

It is my view that the doctrine applies in the matter before me as the Plaintiff and Mr. Kalumba served under the same conditions and retired almost at the same time.

I reiterate that the service allowance should have been calculated based on the amount that used to appear on the monthly pay slip as was the case in the Kalumba case.

Coming to the issue of housing allowance being included in the calculation of terminal benefits, the same memorandum of 2nd October, 2003 stipulated the formula for payment of gratuity as basic salary plus services allowance. The Plaintiff sought to rely on the conditions of service for non-represented employees effective 1stApril, 2013. These conditions include housing allowance in the calculation of terminal benefits. I agree with the submissions of Counsel for the Defendant that these conditions did not apply to the Plaintiff because they came into effect after the Plaintiff had already retired. Therefore, what was applicable to him was what was stated in the memorandum of 2nd October, 2003. There was no other evidence produced to show that the conditions had been revised during the time of his employment at the Defendant's company.

The proposition by the Counsel for the Plaintiff that when it comes to the calculation of terminal benefits it is trite law that all the allowances in addition to basic salary that an employee was entitled to at the time of termination is not good law. The Supreme Court in the case of ***Zambia National Commercial Bank Plc v Geoffrey Muyamwa and 88 Others, SCZ/8/262/2016 (Selected Judgment No. 37 of 2017),*** cited above had an occasion to revisit this issue and came to a conclusion that terminal benefits should be calculated in

accordance with the conditions under which the employees served. Therefore, the Plaintiff was only entitled to the service allowance and the basic salary to be included in the calculation of his terminal benefits as per his conditions of service.

The net result is that the Plaintiff action concerning the service allowance being calculated at K6,776.74 succeeds. However, the claim of the housing allowance being incorporated in the calculation of terminal benefits does not succeed for the reasons stated herein.

I ward interest on the amount due to the Plaintiff on his successful claim.

I make no order as to costs.

Leave to appeal is hereby granted.

DELIVERED AT LUSAKA THIS 30TH DAY OF OCTOBER, 2017.

G.C. CHAWATAMA
JUDGE