

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil jurisdiction)

2016/HPC/0243

BETWEEN

MWAKA CHILWA NAKAZWE MUNTHALI

AND

STANDARD CHARTERED BANK ZAMBIA PLC



PLAINTIFF

DEFENDANT

Coram: *The Hon. Lady Justice Dr. Winnie S. Mwenda in Chambers this 20th day of February, 2018.*

For the Plaintiff: Mr. C. M. Sianondo of Messrs Malambo & Company.

For the Defendant: Mr. K. Wishimanga of Messrs A.M. Wood & Company.

JUDGMENT

Cases referred to:

1. *Shanklin Pier v. Detel Products* (1951) 2 K B 854.
2. *Cook v. Financial Insurance Company Limited* (1998) 1 W.L.R. 1765.
3. *Chilanga Cement Plc v. Kasote Singogo* (2009) Z.R. 122.
4. *Barclays Bank Zambia Plc v. Zambia Union of Financial Institutions and Allied Workers*, SCZ Judgment No, 12 of 2007.
5. *Miyanda v. Raymond Handahu* (1993 – 1994) Z.R. 187.
6. *Edith Tshabalala v The Attorney General* (1994) S.J.Z. 39.
7. *Lubunda Ngala and Jason Chulu v. Anti-Corruption Commission*, S.J.Z. No. 4 of 2018, 2017/CC/R002.

Legislation referred to:

1. Article 189 (1) and (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.
2. Article 188 (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.
3. Article 266 of the Constitution of Zambia.

4. *Order 30, rule 13 of the High Court Rules, Chapter 27 of the Laws of Zambia.*
5. *Section 26B of the Employment Act, Chapter 268 of the Laws of Zambia.*

Publication referred to:

Falcon, Chambers and Sir Paul Morgan, *Fisher and Lightwood's Law of Mortgage*, 13th Edition (Butterworths, 2010) at p.580.

By Writ of Summons dated 19th May, 2016, the Plaintiff herein brought an action against the Defendant Claiming the following relief: -

- (a) An order for the Defendant to furnish the statement of mortgage account;
- (b) An account of all monies received by the Defendant from the Plaintiff as at 31st January, 2016 when the Plaintiff was retrenched and thereafter;
- (c) An order and declaration that the Defendant is liable to make good of 50% of the outstanding amount on the mortgage as at 31st January, 2016, as per Master Policy of Credit Life Insurance between the Defendant and African Life Assurance Company Zambia Limited and any default by the Defendant the same should not lie on the Plaintiff;
- (d) An order that the Defendant do pay the Plaintiff such sums as may have been found to have been overpaid by the Plaintiff over and above 50% of the outstanding amount as at 31st January, 2016;
- (e) An order that the Defendant should release to the Plaintiff a Certificate of Title for the mortgaged property upon the Plaintiff having paid 50% of the outstanding debt as at 31st January, 2016;
- (f) An order for payment of salaries of K28,466.00 per month until the date of payment of severance package inclusive of pension;
- (g) Interest;
- (h) Any relief the court may deem fit; and
- (i) Costs.

As stipulated in the Rules, the Plaintiff filed the Writ of Summons accompanied by a Statement of Claim wherein she avers that she was an employee of the Defendant, but that her position was declared redundant and she was consequently retrenched. It was the Plaintiff's evidence that this was done

through a letter dated 23rd December, 2015 and her last working day was 31st January, 2016.

The Statement of Claim further discloses that during the course of the Plaintiff's employment, the Defendant availed her a house loan banking facility without independent legal advice being extended to her. As per terms of the banking loan facility, the Certificate of Title to The Remaining Extent of Subdivision A of Lot No. 8321/M Lusaka was deposited by the Plaintiff with the Defendant as collateral.

Consequently, and/or attendant to the mortgage which the Plaintiff obtained from the Defendant, the Defendant took out insurance cover with African Life Insurance Company Zambia Limited under the Standard Chartered Bank Policy. The responsibility for payment of the cover resided with the Plaintiff who has been paying and continues to pay the premium for the said cover to African Life Insurance Company Zambia Limited.

According to the Plaintiff, it was a term and condition of the Master Policy of Credit Life Insurance that upon the retrenchment of an employee in the position of the Plaintiff with a loan facility, 50% of the outstanding loan amount would be covered and the Defendant would claim it from the Insurance Company in reduction of the outstanding amount. The Plaintiff was retrenched and thus, triggered the operation of the Policy and the Defendant's obligation to recover the 50% outstanding amount on the loans from African Life Insurance Company Zambia Limited.

The Statement of Claim discloses, in addition, that the outstanding amount on the mortgage as at 22nd March, 2016 was K829,625.46. As such, the Defendant was supposed to cover or meet the sum of K414,812.73 to clear the mortgage. According to the Plaintiff, the figure of the outstanding amount, namely K829,625.46 was given by the Defendant to the Plaintiff without a Statement of

Account showing how much had been recovered by the Defendant from the Plaintiff and how much is outstanding, despite several repeated requests by the Plaintiff.

Further, that the Defendant did not pay the Plaintiff the full redundancy package and unlawfully withheld the same until 30th March, 2016 wherein, through its letter of 14th April, 2016, the Defendant alleged that the last amount was paid to the Plaintiff's account. Additionally, the Plaintiff has not been paid the full pension to date and since the pension was not paid on the Plaintiff's last working day, being 31st January, 2016, the Plaintiff is entitled to her salary based on the last salary received, being ZMW28,466.00 per month until the pension is paid in full.

That by reason of the aforesaid, the Plaintiff has suffered loss and damage and claims as per endorsement on the Writ of Summons.

The Defendant entered appearance on 14th June, 2016 and filed a Defence and Counterclaim. In the Defence, the Defendant admitted that the Plaintiff was declared redundant and that she was availed a house loan facility, but that the house loan facility was availed to the Plaintiff and one John Munthali who was not an employee of the Defendant. The Defendant further averred that the Plaintiff was always at liberty to seek independent legal advice. Further, that the Plaintiff and John Munthali executed a Legal Mortgage over a property known as The Remaining Extent of Subdivision A of Lot No. 8321/M, Lusaka.

It was the Defendant's further averment that the Plaintiff's situation of retrenchment was not covered by the Credit Life Insurance ("the Insurance Policy") as alleged. Further, that for secured loans such as the Plaintiff's loan, the rider benefit in the Insurance Policy would only be triggered after all collection efforts, including foreclosure and sale had been exhausted and failed. The Defendant asserted further, that in any event, the policy at issue inures to the

Defendant and not the Plaintiff and that the Plaintiff is not privy to the Policy and therefore, cannot claim as of right, any benefit thereunder.

The Defendant contended in addition that it has never refused to furnish the Plaintiff with the details of her outstanding loan amount. It also denied not paying the Plaintiff her full redundancy package or pension and stated that she was paid all her dues in full. The Defendant denied that the Plaintiff has suffered loss and damage as alleged or at all.

By way of counterclaim, the Defendant stated that by an offer of employment dated 30th June, 2008, the Plaintiff was employed by the Defendant as Business Planning Manager under Band 7. The employment was subject to the conditions of service of employment as contained in the Human Resources Policy Manual. By a Mortgage Banking Facility entered into between the Plaintiff and the Defendant on 10th October, 2014 the Defendant agreed to advance to the Plaintiff the sum of K867,358.00.

The advance was secured by a Mortgage dated 18th November, 2014 over a property known as The Remaining Extent of Subdivision A of Lot No. 8321/M, Lusaka. The Mortgage was executed by the Plaintiff and one John Munthali in favour of the Defendant. By a Notice of Redundancy dated 23rd December, 2015 the Plaintiff was notified that her employment had been terminated by reason of redundancy and that she would be paid her salary up to 31st December, 2015.

That as at 13th June, 2016, the Plaintiff had an outstanding loan balance of K524,415.98 which is now due and payable by the Plaintiff to the Defendant. Further, that commercial terms became applicable to the Mortgage upon termination of the Plaintiff's employment aforesaid. Thus, the Defendant counter claims the following: -

- (i) Payment of the sum of K524,415.98 being the amount due from the

Plaintiff to the Defendant as an outstanding loan balance by virtue of a Legal Mortgage executed between the Plaintiff, John Munthali and the Defendant;

- (ii) An order that the Mortgage may be enforced by foreclosure and sale;
- (iii) Delivery by the Plaintiff to the Defendant of possession of the mortgaged property;
- (iv) Costs of execution;
- (v) Alternatively, an order that the Plaintiff continues to pay her mortgage instalments, at the commercial bank lending rates;
- (vi) All legal costs and those pursuant to Order 88/5/17 of the Rules of the Supreme Court 1999 Edition; and
- (vii) Any other relief as the Court shall deem fit.

In her Reply and Defence to Counterclaim, the Plaintiff stated that the House Loan Facility was only given to her in her individual capacity and was never given to John Munthali. Further, that the Mortgage was executed by John Munthali by virtue of being joint owner of the property and not that the facility was extended to him as well.

The Plaintiff stated further, that the insurance cover with African Life Insurance Company Zambia Limited applies to her and the Defendant had the responsibility to advise the Plaintiff, who was its employee, of the legal options available to her. Additionally, that the insurance policy does not state that the same would only be triggered after all collection efforts have been exhausted.

The Plaintiff contended further that she took the responsibility of paying and continues to pay the premium for the said cover to the insurance company, namely; African Life Insurance Company Zambia Limited and as such, is entitled to claim under the policy. That this notwithstanding, there is a collateral agreement between the Plaintiff and the Defendant constituted by an offer for

the benefit of the policy which was accepted when the Plaintiff paid and continues to pay the premium for the policy.

The Plaintiff also contended that the Defendant has only been giving figures without a statement of account reflecting how much has been paid to the Defendant by the Plaintiff and how much is outstanding and which statement of account the Plaintiff is entitled to. In her defence to counterclaim, with regard to paragraph 19 of the Defendant's counterclaim, the Plaintiff averred that she was paid her salary until 31st January 2016. She denied the contents of paragraphs 20 and 21 of the Counterclaim and claimed that the statement of account had never been given to her to see what she had paid to the Defendant. She stated that it is a term and condition of the Insurance Policy that upon the retrenchment of an employee, in the position of the Plaintiff with a loan facility, 50% of the outstanding loan amount is covered by the Defendant claiming under the Policy.

Therefore, by virtue of the said recovery by the Defendant, the amount would cover the outstanding amount to the extraction of the debt, if not overpaying the same. The Plaintiff did not contest the Defendant's counterclaim which speaks about commercial terms becoming applicable to the mortgage upon termination of the Plaintiff's employment. She however, denied that the Defendant is entitled to the relief sought in the counterclaim or any at all.

The Defendant filed a Reply to Defence to Counterclaim which basically restated its counterclaim.

Trial commenced on 18th April, 2017 and the Plaintiff tendered, in evidence, her two witness statements dated 4th August, 2016 and 18th April, 2017, respectively. The Plaintiff also tendered, in evidence, her two sets of Bundles of Documents dated 21st July, 2016 and 6th October, 2016, respectively. All the documents were duly admitted as the Plaintiff's evidence.

In cross examination, the Plaintiff (hereinafter called "PW") confirmed that she had a banking facility with Standard Chartered Bank, which she signed, thereby accepting the banking arrangements stated in the agreement upon the terms and conditions and subject to the covenants set out in the Banking Facility Letter. PW also admitted that the facility was made available to her in accordance with the Bank's terms and conditions for loans which she read and understood. She confirmed that she now had legal representation.

In further cross-examination, PW confirmed that she took out a mortgage loan which was a secured lending. She also confirmed that she did execute a mortgage which appears at pages 21-27 of the Plaintiff's Bundle of Documents. She said that she also took out insurance as per terms of her facility letter. When showed the Insurance Policy appearing on pages 1 to 12 of the Plaintiff's Bundle of Documents, PW identified it as the Policy she took out and said that it is between Standard Chartered Bank Zambia Plc (the Defendant herein) and African Life Assurance Company Zambia Limited. PW admitted that she appears as the Life Assured on page 2 of the Policy, which means, she is a person who effected the Loan Agreement with the Creditor (the Defendant).

In further cross-examination, PW admitted that according to clause 2.3 at page 3 of the Policy, it is only the Defendant who is the Creditor who can claim with the Insurance Company. She admitted that she filled in the Insurance Application form on pages 73-74 of the Defendant's Bundle of Documents and that she was not coerced into purchasing the insurance. When referred to clause 3 on page 74, PW agreed that the Policy covered death, permanent total disablement and temporary total disablement.

PW said that according to clause 10 of the Policy, in the event of a claim, the life assured was to advise the bank who in turn would submit the claim together with relevant documentation to the insurer within 30 days of the claim event. She

identified the letter exhibited on page 37 of the Plaintiff's Bundle of Documents as the letter she wrote on 22nd March, 2016, demanding that the bank makes a claim after the event of retrenchment happened on 31st January, 2016.

In further cross-examination, PW stated that she was employed in July, 2008 and that the offer letter was dated 30th June, 2008. She said she served diligently and was promoted.

In further cross-examination, PW confirmed that on 23rd December, 2015 she was given a notice of redundancy. She admitted that Standard Chartered Bank is a digital bank and that information is transmitted via electronic mail (email). She further agreed that you could not ignore an email when it came. She admitted that redundancy is mentioned on pages 63 and 67 of the Defendant's Bundle of Documents.

PW stated in continued cross-examination that at page 2 of the Plaintiff's Bundle of Documents, which is the second page of the Insurance Policy document, under 'sum Assured' - it only provides for death and total permanent disability and that under the definition of 'Free Cover Limit', redundancy is not provided for. When referred to page 17 of the Plaintiff's Bundle of Documents which exhibits the Mortgage Banking Facility letter, item 1.3 (on insurance), PW admitted that the section only talks about death and permanent disability, not redundancy. PW was then taken to item 4.4 of the Insurance Policy document which states that retrenchment is only offered as a Rider Benefit. She read clause (a) which provides as follows: -

"No benefits are payable in respect of retrenchment arising from any of the following events:

1 ...

2 ...

3. *In respect of unemployment occurring due to resignation or the acceptance of voluntary retrenchment, the expiry of a non-renewable fixed term contract or a contract of temporary or casual nature; any form of retrenchment or dismissal in terms of the contract of employment."*

In further cross-examination PW agreed that she was retrenched and that she has a mortgage which is insured with African Life Assurance Company Zambia Limited. She admitted that she is bound by the terms of the mortgage and that if the insurance company refused to pay, the bank would go to the person who took out the loan, which in this case is herself.

PW admitted that in paragraph 3 at page 79 of the Defendant's Bundle of Documents the insurer was saying retrenchment claims are not covered. She also admitted that according to the letter exhibited on pages 40-41 of the Plaintiff's Bundle of Document she was paid her pension by 18th February, 2016. She confirmed that her full redundancy package was paid to her by 18th February, 2016 as indicated in the letter.

PW confirmed in further cross- examination that she used to contribute to a private pension fund called Aon Zambia Pension Fund Administrators Limited, which was the Fund Manager. She confirmed that on the Writ of Summons for cause No. 2016/HP/0992 exhibited at page 54 of her Bundle of Documents, the Defendant is Standard Chartered Bank Zambia Plc Pension Trust Fund. She admitted that the document exhibited on page 75 of the Defendant's Bundle of Documents is a statement of her Loan Account.

In re-examination PW stated that she is claiming under the Insurance Policy because she applied for the insurance as part of the mortgage, based on her Mortgage Banking Facility letter exhibited on page 13 of the Plaintiff's Bundle of Documents. PW read clause 3 at page 14 which reads as follows: -

"3. Credit Life Insurance Cover will be taken from an insurance company selected under the Bank's insurance policy at your cost; the policy must be formally assigned and lodged with the Bank. All costs associated with this exercise will be for the account of the Borrower and may be debited to the Borrower's account or capitalised and recovered over a period determined by the Bank by adjusting the monthly instalment without need for the Borrower's consent."

PW stated that with the Policy and her application, she was covered by the insurance and it was her expectation that her retrenchment did not fall under any of the exclusions that were referred to by the Defendant.

PW stated in further re-examination that she was added to the Credit Life Assurance and that the Policy covers retrenchment and abscondment as a rider benefit as provided on page 2 of the Policy. PW stated that she had not seen any Human Resources Policy Manual for 2009; that the letter of redundancy exhibited on page 39 of the Defendant's Bundle of Documents does not refer to any manual in terms of redundancy. When referred to Section 17 of the Standard Chartered Bank (Zambia) Limited Human Resources Manual 2014 Edition, on page 63 of the Defendant's Bundle of Documents, PW stated that there was nothing there in terms of redundancy. PW also said, in further re-examination, that she did not recall receiving an email bringing to her attention the 2014 edition of the Human Resources Manual. She added that in any event, there was no email before Court showing that it was sent to her.

When referred to clause 4.4 (a) 3 of the Insurance Policy, which provides that no benefits are payable in respect of any form of retrenchment, PW stated that she did not have anything in her employment contract on redundancy and her redundancy was done pursuant to the Employment Act and not her terms of contract.

PW stated in further re-examination that when she read through the Insurance Policy, she did not see any exclusions relating to retrenchments and disappearance. She stated, in addition, that the last redundancy payment was credited to her account on 11th April, 2016.

With regards to the exhibit on page 61 of the Plaintiff's Bundle of Documents, namely, a GRZ Receipt for payment into Court of judgment sum plus interest, in case No. 2016/HP/0992, PW said that according to this document, her pension benefits were paid on 28th June, 2016. PW concluded by saying that she is claiming payment of salary because, according to the Constitution her retrenchment benefits were supposed to be paid to her at the time of leaving, but since they were not, the Defendant should have continued paying her salary until all outstanding payments were made.

This marked the close of the Plaintiff's case.

Three witnesses testified on behalf of the Defendant. These were Moses Kayamba, Perpetua Siloya-Mulikita and Charles Banda (hereinafter referred to as "DW1", "DW2" and "DW3," respectively).

DW1's Witness Statement was admitted in evidence as part of the Defendant's evidence after the last sentence in paragraph 2 which made reference to the Human Resources Manual appearing at pages 16-46 of the Defendant's Supplementary Bundle of Documents was expunged from the record. Also expunged from the Witness Statements were paragraphs 5,6,8,9 and 10. These paragraphs were expunged from the Witness Statement on application by the Plaintiff's advocates for the reason that they introduced new evidence which was not adduced in the Witness Statement of Moffat Nyirenda which was originally filed by the Defendant, but was later replaced with leave of Court, by Moses Kayamba's Witness Statement filed on 19th April, 2017. Moses Kayamba's Witness Statement was filed after the Plaintiff had closed her case and therefore,

she would not have been in a position to rebut the new evidence introduced in the Witness Statement.

The Defendant's Bundle of Documents and Supplementary Bundle of Documents (with the exception of the expunged portion therein) were also tendered in evidence and admitted by the Court as part of the Defendant's evidence.

In cross-examination, DW1 said that he joined the Bank on 3rd December, 2012 and was given a contract which regulated his relationship with the Bank. He said that his contract referred to the Human Resources Manual as part of his conditions.

He admitted that he would have had difficulties accepting the Human Resources Manual as part of his conditions if it was not incorporated in his conditions of service. When referred to the Plaintiff's letter of offer of employment with the Defendant dated 30th June, 2008 DW1 said that he had seen the document before. He agreed that the document constituted the contract between the Bank and the Plaintiff. He agreed further that the Plaintiff could claim more than what the contract was giving her if that was communicated to her.

In further cross-examination, DW1 stated that there is no evidence before Court that the Human Resources Manual was communicated to the Plaintiff or that she accepted it. He admitted that there were two 2014 Human Resources Manuals before Court, but said he did not generate them. He also said that he was part of the review team and was aware that there were two 2014 manuals which were different from each other.

DW1 was referred to the Human Resources Manual exhibited in the Defendant's Bundle of Documents, particularly Section 17 at page 63 which deals with redundancy, where it is provided as follows "*Dispensation on redundancy will be incorporated when put in Risk Pod.*" He admitted that it was his team that put in

the redundancy in the other 2014 Human Resources Manual and that by then the Plaintiff had already left the Bank. DW1 also admitted under further cross-examination that the Plaintiff's contract does not provide for redundancy.

With regards to the Notice of Redundancy on page 39 of the Defendant's Bundle of Documents, DW1 stated that this was a decision which the bank was communicating to the Plaintiff and that it did not cite the Plaintiff's contract. He identified the document on page 73 of the Defendant's Bundle of Documents as a Credit Life Assurance Application Form. He confirmed that the account type on the form is 'Mortgage' and the Life Assured is Mwaka Chilwa Nakazwe Munthali, the Plaintiff herein. He confirmed that under paragraphs 3 and 4 of his Witness Statement, he was discussing mortgages. He agreed that there is no other application for insurance apart from the one appearing on page 73 of the Defendant's Bundle of Documents. DW1 could not, however, confirm that the Plaintiff was paying premiums for the insurance.

When referred to the Banking Facility Letter exhibited on pages 1-8 of the Defendant's Bundle of Documents, DW1 admitted that he had seen a fee for Credit Life Assurance Premium of ZMW9,828.00. He admitted that this is the same amount found on page 73 of the Defendant's Bundle of Documents under 'single premium'. He said he did not know if the Plaintiff is still paying for the mortgage, but the mortgage is still there.

DW1 was referred to the Master Policy of Mortgage Life Insurance exhibited on pages 1 - 6 of the Defendant's Supplementary Bundle of Documents and said that going by the dates (cover period 1st January, 2014 to 31st December, 2014), it was an expired document. He could not confirm that the names listed on pages 8 – 10 of the bundle where the names of beneficiaries under the Master Policy of Mortgage Life Insurance.

In further cross-examination, DW1 admitted that from a human resource perspective the Plaintiff's contract of employment did not have a redundancy clause and that it did not refer to a Human Resources Manual. He also admitted that there is no indication on record that the Plaintiff accepted the Human Resources Manual.

In re-examination, DW1 stated that the Human Resources Manual was shared with everyone at the time the Plaintiff was within the Bank and that it was shared with her. He stated further that during the course of a relationship between the employee and the Bank, if a person is being appointed into another role, reference to the Human Resources Manual is made. In the case of the Plaintiff, her letter of promotion made reference to the Human Resources Manual. He further stated that the Human Resources Manual is reviewed after every two years and is sent to all employees.

DW1 stated in further re-examination that the Plaintiff worked for the Bank from 30th June, 2008 to 31st January, 2016. He further stated that the document exhibited on pages 46-73 of the Defendant's Bundle of Documents (Human Resources Manual, 2014 Edition) is a draft document.

DW2's Witness Statement was tendered in evidence and duly admitted. In cross-examination she said she did not know if the Human Resources Manual is renewed every two years. She told the Court that she is aware of the conditions affecting her employment. She said that she joined the Bank in 2013 and the Human Resources Manual has since been revised. She said under further cross-examination that she wasn't sure, but it was possible that the Manual was revised in 2016.

When referred to page 73 of the Defendant's Bundle of Documents, DW2 indicated that she was familiar with the document (Credit Life Assurance Application Form) and that it covers mortgages. She stated that the parties to

the application were Standard Chartered Bank and Mwaka Chilwa Nakazwe Munthali. She admitted that according to page 74 of the document, the Assured, Mwaka Munthali, was added to the Master Policy. She also agreed that Mwaka Munthali was designated as the Policy Holder.

When referred to the Insurance Policy between Standard Chartered Bank Zambia Plc and African Life Assurance Company Zambia Limited, exhibited on pages 16-27 of the Defendant's Bundle of Documents, DW2 said that this was not necessarily the document referred to in the application form. However, under further cross-examination, she conceded that in her Witness Statement of 10th October, 2016 she made reference to the same document. She further confirmed that there is no reference to the Supplementary Bundle of Documents in her Witness Statement.

In further cross-examination DW2 was referred to the document exhibited on page 35 of the Plaintiff's Bundle of Documents entitled 'Meeting on Redundancy' and agreed that according to the letter, the 50% loan write off only comes in when the severance payment does not fully cover the loan. She was not sure if Ann-Louise Chintu was in the same category with the Plaintiff as one of those declared redundant by the Bank. She agreed that according to page 23 of the Defendant's Bundle of Documents, retrenchment is offered only as a 'rider benefit' which she defined as an additional benefit. She admitted that retrenchment and disappearance/abscondment are additional benefits. DW2 did not know if the Plaintiff was still paying premiums or not and if the bank had paid off the amount. She stated that she contributes to a pension and will be paid her pension by the Board of Trustees of the Fund once she leaves employment.

In further cross-examination, DW2 said that the receipt on page 61 of the Plaintiff's Bundle of Documents shows that the Plaintiff was paid her benefits on 28th June,

2016. She did not know if the Plaintiff was paid her salary from 31st January 2016 to the date of payment into Court, namely 28th June, 2016.

DW2 conceded in further cross-examination that the Plaintiff's offer of employment letter dated 30th June, 2008 does not make any reference to redundancy or the Human Resources Manual. She also agreed that the Notice of Redundancy dated 23rd December, 2015 does not refer to any contract or conditions of service.

In further cross-examination DW2 said she was not in a position to know if the Plaintiff had defaulted on the mortgage or not or if she had breached the terms of the mortgage. DW2 was referred to paragraph 23 of her Witness Statement where she stated as follows: -

"Further to the above, the Insurance Policy did not apply to secured loans such as the Plaintiff's loan as recourse to the Insurance Policy would only arise after all collection efforts including foreclosure and sale had been exhausted and failed."

DW2 conceded in further cross-examination that the Insurance Policy did not provide for what she stated in paragraph 23 of the Witness Statement quoted above.

In re-examination DW2 stated that she would know through a broadcast if the Human Resources Policy Manual had been revised. She described a broadcast as an electronic way through which information is communicated to employees. DW2 said by electronic way she meant that they receive information via email. She also stated that rider benefits are subject to exceptions appearing in the Insurance Policy on page 23 of the Defendant's Bundle of Documents, in other words, they are conditional.

DW2 stated in further re-examination that in paragraph 2 of the Witness Statement she had stated that the Plaintiff's employment was subject to the conditions of service of employment as contained in the Human Resources Manual which appears on pages 46-72 of the Defendant's Bundle of Documents. With regards to Cause No. 2016/HP/0992 brought by Mwaka Chilwa Nakazwe Munthali, DW2 said the Defendant in that cause was Standard Chartered Bank Plc Pension Trust Fund.

DW3, is a Manager – Corporate Business in the Defendant Bank. His Witness Statement of 18th April, 2017 was tendered in evidence and duly admitted as part of the Defendant's evidence. In cross-examination he stated that he was familiar with the Credit Life Assurance Application Form found on page 73 of the Defendant's Bundle of Documents. He said the type of account on the form is a mortgage account. DW3 admitted that according to page 74, the Bank (the Defendant) is only a distributor of the product.

DW3 was referred to item 1 of the Terms and Conditions of the Policy which states as follows: -

"The Personal Instalment Loan Credit Life Assurance assures the client in the event of Death, Permanent Disability and Total Temporary Disability. This contract is issued as confirmation that the person named herein has/have been added as an insured to the Master Policy issued by the African Life Assurance Company Limited to the Policy holder specified herein and is available for inspection at the Policy Holder's Head Office."

DW3 agreed that under clause 2.1, the Policy Holder is Mwaka Munthali, the Plaintiff. He stated in further cross-examination that according to the application form on page 73, the amount of single premium is K9,828.00 and the Term of Loan in months is 161. He identified the document on page 1 of the Defendant's Bundle of Documents as the Mortgage Banking Facility. He observed that the facility also had a Credit Life Assurance Premium of K9,828.00 which he agreed is

the same figure as that appearing on page 74 of the same Bundle of Documents (the Credit Life Assurance Application Form).

It was DW3's further evidence that the tenure on the Facility is 161 months which is the same as that found on page 73 of the Defendant's Bundle of Documents. He said that he was aware that the insurance company was receiving premium until 2015 which was being deducted from Mwaka Munthali's salary. When referred to page 16 of the Defendant's Bundle of Documents, DW3 identified the document thereon as the Insurance Policy and agreed that under Scope of Cover on page 17, retrenchment is covered as a rider benefit. He further agreed that a rider benefit is an additional benefit.

With reference to paragraph 4.4 (b) 1, DW3 agreed that under that provision, a person who is retrenched is entitled to retrenchment cover of 50% of the outstanding loan amount.

In further cross-examination, DW3 was referred to paragraph 1 of his Witness Statement where he stated that Standard Chartered Bank Zambia Plc took out Credit Life Insurance with African Life Assurance Company to protect itself against losses incurred by death and permanent disability of employees on the personal loan portfolio. DW3 conceded that on the Credit Life Assurance Application Form at Page 73 of the Defendant's Bundle of Documents what was ticked was mortgage and not personal loan.

DW3 conceded in further cross-examination that employees in the Bank sign contracts of employment which regulate the relationship between employer and employee. He admitted further that all documents which affected his relationship with his employer were brought to his attention. When referred to the Plaintiff's letter of employment, DW3 stated that he did not have sight of the document before coming to Court.

DW3 was also referred to paragraph 5 of his Witness Statement where he said that the Plaintiff's employment was terminated by reason of redundancy in accordance with the offer of employment and the Human Resources Policy Manual. He admitted that he did not see any Human Resources Policy Manual referred to anywhere in the letter of offer of employment. He conceded that there is no reference to a Human Resources Policy Manual in the Notice of Redundancy. He also conceded that redundancy is not provided for in the contract of employment found at pages 31-37 of the Defendant's Bundle of Documents, and therefore, it was not in accordance with the letter of employment.

In further cross-examination, DW3 stated that in the document exhibited on page 40 of the Plaintiff's Bundle of Documents entitled "Ref: Outstanding Loan Balance", the Bank is in effect saying that Mwaka Munthali can be paid 50% provided all collection efforts are exhausted. He said further that the Master Policy does not provide for such conditions as the Bank put it.

When referred to the document exhibited on page 79 of the Defendant's Bundle of Documents referenced "Request for Information on Credit Life Master Policy", DW3 said that the Bank had sent him an email to which he was responding. He stated that he had not seen the email among the documents before Court. He denied that the Bank had made him aware that the case was already in Court when he wrote the letter on 27th August, 2016. He admitted in further cross-examination that contrary to what he had stated in the letter that retrenchment cover for mortgage loans was not included in the agreement as this applied to personal loans only, the Credit Life Assurance Application Form on page 73 shows that a Mortgage was the account type covered.

DW3 identified the document exhibited at page 1 of the Defendant's Supplementary Bundle of Documents as the Master Policy of Mortgage Life Insurance. He agreed that there are signatures on page 7 of the document and

that the names on pages 8-10 of the document are for beneficiaries under the policy, arranged by year of birth. He said he had not seen Mwaka Munthali's name on the list of beneficiaries. He admitted that there is no other form apart from the one on page 73 which Mwaka Munthali filled in. When referred to page 6 of the Defendant's Supplementary Bundle of Documents where part of the Master Policy of Mortgage Life Insurance is exhibited, DW3 said that the document had a cover period of 1st January, 2014 to 31st December, 2014 and therefore, expired at the end of December, 2014. DW3 said that he had not seen any document before Court to show that this document had been renewed.

In further cross-examination, DW3 said that he was not aware of all the claims before Court. He admitted that he had gone through his Witness Statement. He further said that he did not remember seeing any other document apart from the document on page 74 of the Defendant's Bundle of Documents where Mwaka Munthali is described as a Policy Holder.

In re-examination, DW3 said that the Policy is an agreement between the Insurance Company and the Defendant. He also said that a rider benefit has conditions.

This marked the close of the case for the Defendant.

Both parties filed comprehensive written submissions citing a plethora of authorities. I commend Counsel on both sides for putting up spirited arguments on behalf of their clients.

The undisputed facts of this case are that the Plaintiff was employed by the Defendant as Business Planning Manager on 30th June, 2008. The offer of employment was contained in letter of offer of employment dated 30th June, 2008. On 23rd March, 2009, the Plaintiff was promoted to Band 6 from Band 7 of first appointment.

By a Mortgage Banking Facility entered into between the Plaintiff and the Defendant on 10th October, 2014 ("the Banking Facility"), the Defendant agreed to advance to the Plaintiff the sum of ZMW867,358.00. The advance was secured by a Mortgage dated 18th November, 2014 ("the Mortgage") over a property known as The Remaining Extent of Subdivision A of Lot No. 8321/M Lusaka ("the Property"). The Mortgage was executed by the Plaintiff and John Munthali in favour of the Defendant.

By a Notice of Redundancy dated 23rd December, 2015, the Plaintiff was notified that her employment with the Defendant had been terminated by reason of redundancy and that she would be paid her salary up to 31st December, 2015 and her last working day was 31st January, 2016. Upon being declared redundant, the Plaintiff made a claim to the Defendant for the latter to write off 50% off her outstanding amount on the basis of the provisions of the Master Policy of Credit Life Insurance ("the Insurance Policy"). She also asked to be paid her salary until her pension was paid in full. The Defendant refused to honour the Plaintiff's claims resulting in her instituting the current proceedings.

Given the above scenario, it is cardinal, at this juncture, to identify what I opine to be the issues this Court is called upon to determine. Essentially, the issues are as follows: -

1. Whether the Plaintiff is entitled to a retrenchment cover of 50% of her outstanding loan;
2. Whether the Plaintiff is entitled to payment of salary from 31st January, 2016, which is the effective date of her retrenchment, to 28th June, 2016, when a payment was made into Court under cause No. 2016/HP/0992; and
3. Whether the Defendant is entitled to the relief claimed in the counterclaim.

In order to address the first issue, it is crucial to determine whether the Insurance Policy covered the Plaintiff and whether under the said Policy the Plaintiff was entitled to a retrenchment cover of 50% of the outstanding loan.

It is the Defendant's argument that the Plaintiff was not privy to the insurance contract entered into between the Defendant and African Life Assurance Company Zambia Limited and therefore, she cannot claim, as of right, any benefit under the policy. It is my considered view that this argument is unsustainable for the reasons given below. It is on record that the Insurance Policy was executed between the Defendant and African Life Assurance Company Zambia Limited, on behalf of the Plaintiff. The said insurance agreement was one of the requirements for the Plaintiff to obtain the loan from the Defendant. The Insurance Policy has a provision that retrenchment cover is 50% of the outstanding loan amount, and the Plaintiff's claim against the Defendant is premised on the said provision.

The House Loan between the Plaintiff and the Defendant was created by the Mortgage Banking Facility Letter (the "MBFL") dated 10th October, 2014. On the provision for security, the following are the requirements that ought to have been satisfied by the Plaintiff in order to obtain the loan, namely; creation of a mortgage over Subdivision A of Lot No. 8321/M, Lusaka West, Lusaka; production of a Valuation Report by a Defendant-approved Valuer, addressed to the Bank; taking out of a Mortgage Protection Policy; and taking out of a Credit Life Insurance Policy. The MBFL further stated that the loan facility was made available to the Plaintiff subject to the Defendant's terms and conditions for loans.

In addition to the said terms and conditions, the MBFL listed eight other conditions that were to apply in a similar manner. As part of these additional conditions, it was a requirement that a mortgage protection insurance cover for fire and other perils be taken from an insurance company selected under the Defendant's insurance policy at a cost to the Plaintiff. It was also mandatory for credit

insurance cover to be taken from an insurance company, also selected under the Defendant's insurance policy, and also at a cost to the Plaintiff. It was a requirement that the requisite policies be formally assigned and lodged with the Defendant. Under clause 13 of the MBFL, the Plaintiff agreed to give her consent to the Defendant to insure the loan on her behalf and add the insurance premium to the loan principal.

In my view, the effect of this clause is that, while it should generally have been the responsibility of the Plaintiff to insure the loan, the said responsibility was shifted to the Defendant and any executions done became as those which the Plaintiff would have personally and reasonably executed. The conditions relating to insurance, in my view, are inescapable as they are mandatory and fundamental to the very loan facility advanced to the Plaintiff.

Since the conditions ought to have been fulfilled by the Plaintiff, which exercise the Defendant assumed on her behalf, the Defendant cannot turn around and claim that the Plaintiff is not privy to the Insurance Policy executed between them and Africa Life Assurance Company Zambia Limited. The subject matter of the Insurance Policy, although executed by the Defendant, is a loan taken out by the Plaintiff, who is the party responsible for paying the premiums on the Insurance Policy.

It is my considered view that from the above review of the conditions surrounding the grant of the loan facility to the Plaintiff, it is manifest that the relationship between the Defendant and the Plaintiff was that of principal and agent, the Defendant in this case being the agent of the Plaintiff vis-a-vis the Insurance Policy with African Life Assurance Company Zambia Limited.

Recourse to the law of contract reveals that the concept of agency is one of the exceptions to the doctrine of privity of contract. Thus, an agent may contract, on behalf of his principal, with a third party and form a binding contract between

the principal and the third party, which I believe was the case in the matter before this Court. Alternatively, and to this end, I concur with the submission by Counsel for the Plaintiff, the contract between the Defendant and African Life Assurance Company Zambia Limited was accompanied by a collateral contract between the Defendant and the Plaintiff relating to the Insurance Policy. This contract was constituted by an offer by the Defendant to the Plaintiff for the benefit of the policy, which offer was accepted by the Plaintiff through payment of premiums.

The case of *Shanklin Pier v. Detel Products*¹, is helpful in this regard. The *brief* facts of that case are that the plaintiffs had employed contractors to paint a pier. They told them to buy paint made by the defendants. The defendants had told them that the paint would last for seven years. It only lasted for three months. The court decided that the plaintiffs could sue the defendants on a collateral contract. They had provided consideration for the defendants' promise by entering into an agreement with the contractors, which entailed the purchase of the defendants' paint.

However, before a collateral agreement can be formed, there must be an intention to create the agreement. In the present case, the intention to create the collateral agreement can be seen from the fact that the Defendant insured the Plaintiff's loan on her behalf. In consideration for the offer of benefits under the Policy, the Plaintiff accepted to pay premiums, thus creating a binding contract between the two parties.

I have no doubt in my mind that the Credit Life Insurance cover referred to in clause 3 of the MBFL is the same one exhibited on pages 13 – 20 of the Plaintiff's Bundle of Documents and 16 – 27 of the Defendant's Bundle of Documents. This is so because in the MBFL which is exhibited on page 13 of the Plaintiff's Bundle of Documents under "Fees", there is provision for Credit Life Assurance Premium of ZMW9,828.00 per month. This is the same amount that appears as "single

premium", on the Credit Life Assurance Application Form filled in by Mwaka Chilwa Nakazwe which is exhibited at page 73 of the Defendant's Bundle of Documents. The MBFL also reflects the tenure of the facility as 161 months, which is the same figure reflected under "Term of Loan in months", on the Credit Life Assurance Application Form.

Contrary to the Defendant's contention that the policy which applied to the Plaintiff is the one exhibited on pages 1 – 7 of the Defendant's Supplementary Bundle of Documents entitled 'Master Policy of Mortgage Life Insurance', it is apparent that this policy never applied to the Plaintiff whose name does not appear on the list of beneficiaries under the said policy, on pages 8-10 of the Supplementary Bundle. The Defendant's own witness, DW3, testified to the effect that the names that appear on pages 8 – 10 of the Defendant's Supplementary Bundle of Documents are for beneficiaries under the said policy and conceded in cross-examination that the Plaintiff's name does not appear on the list. In any event, going by the period of cover, the said policy expired on 31st December, 2014. There is no evidence of renewal of the said policy.

The Defendant submitted that since the Plaintiff had a mortgage facility and not a personal loan, she was not covered by the Insurance policy but rather, by the Master Policy of Mortgage Life Assurance. However, the evidence on record clearly demonstrates that even though the Plaintiff had a mortgage facility, she was covered by the Insurance Policy. The Credit Life Assurance Application Form filled in by the Plaintiff clearly bespeaks to the fact that 'mortgage' was the account type covered.

Counsel for the Plaintiff submitted that the policy must always be read with the application form. I agree with him, and I am persuaded by the decision in the case of *Cook v. Financial Insurance Company Limited*², which he cited, where Lord Lloyd of Berwick aptly said the following at page 1768: -

"...since the application form is, by the terms of certificate, incorporated in and forms part of the contract of insurance, the two must be read together so as to make sense of the whole."

Having concluded that the Insurance Policy covered the Plaintiff, who is described as a Policy Holder on the application form, it is opportune to scrutinise the said Policy to see what it provides on retrenchment benefits. The relevant provisions of clause 4.4 of the Policy reads as follows: -

"4.4. Retrenchment (Offered as a Rider Benefit)

The retrenchment benefit will become payable on loss of employment as a result of retrenchment subject to the conditions and exclusions specified below: -

a) No benefits are payable in respect of retrenchment arising from any of the following events:

1. ...

2. ...

3. in respect of unemployment occurring due to resignation or the acceptance of voluntary retrenchment, the expiry of a non-renewable fixed term contract or a contract of temporary or casual nature; any form of retrenchment or fair dismissal in terms of the contract of employment;

4. ...

5. ...

6. ...

7. ...

b) Retrenchment benefits will be paid on the basis of the following: -

1. Retrenchment cover is 50% of the outstanding loan amount. The outstanding loan will be adjusted for any arrear repayments." (highlighting the Court's for emphasis only).

The Defendant's advocates submitted that even if the Insurance Policy applied to the Plaintiff, which the Defendant denies, the Plaintiff still falls within the exceptions of the said policy. However, the Court is cognisant of the fact that in a letter dated 14th April, 2016 exhibited on pages 42-43 of the Defendant's Bundle of Documents, the Defendant does not deny *per se* that the Plaintiff is entitled to a 50% loan write off on the outstanding loan, but states that it only applies after all options to collect outstanding balance have been exhausted. The letter goes on to state that for secured loans, the circumstance which the Plaintiff was in, all collection efforts, including foreclosure, need to be exhausted before the Bank can make an insurance claim.

After perusing the Insurance Policy, I can only, but concur with the submission by Counsel for the Plaintiff that the position taken by the Defendant is not anchored on any provision in the Insurance Policy. Additionally, there is no evidence that the same was communicated to the Plaintiff. In my view, the Defendant's stance could explain their failure or neglect to lodge the claim with the insurer within thirty days of declaring the Plaintiff redundant (that is, the claim event), as required by the Insurance Policy.

Notably, contrary to the Defendant's argument that the insurer refused to participate to the benefit of the Plaintiff, there is no such evidence before this Court. As the Plaintiff's advocate rightly submitted the insurer could not have refused to participate when no claim was lodged. From a perusal of the contents of the letter from the insurance company exhibited on page 79 of the Defendant's Bundle of Documents, the same cannot be said to amount to a refusal by the company to participate, the said letter having been written on 27 August, 2016 by DW3 in response to an email sent to him by the Defendant requesting for information on the Insurance Policy. The Defendant's email has not been adduced in evidence. DW3's letter was written long after this matter was commenced on 19th May, 2015. The letter was seemingly generated for use

as evidence in this matter. This is unacceptable and indeed the Court takes a dim view of such conduct by the Defendant.

While Counsel for the Defendant has submitted that the Plaintiff was caught by the exceptions in the Insurance Policy, I am of the considered view that this was not the case for the reason that the Plaintiff's redundancy was not carried out in terms of her contract of employment since the said contract had no such provision. Further, in the Notice of Redundancy dated 23rd December, 2015 exhibited on page 28 of the Plaintiff's Bundle of Documents, the Defendant notifies the Plaintiff that her employment will be terminated "by reason of redundancy on 31st January, 2016 pursuant to the Employment Act, Cap 268 of the Laws of Zambia." A perusal of the Employment Act reveals that redundancy is covered in section 26B of the Act. In the case of *Chilanga Cement Plc v Kasote Singogo*³ the Supreme Court stated as follows regarding section 26B: -

"Section 26B of the Employment Act, dealing with termination of employment by way of the redundancy does not apply to written contracts. In enacting this provision, Parliament intended to safeguard the interests of employees who are employed on oral contracts of service, which by nature would not have any provision for termination by way of redundancy."

A similar holding had been made by the Supreme Court two years earlier in 2007 in the case of *Barclays Bank Zambia Plc v. Zambia Union of Financial Institutions and Allied Workers*⁴.

Thus, as rightly submitted by Counsel for the Plaintiff, the Employment Act, as it stands at the moment, does not provide for redundancy for employees under written contracts of employment. For such contracts, the redundancy provision must be specifically provided for in the contract of employment. However, the contract of employment for the Plaintiff herein is silent on the issue of redundancy. That being the case, I opine that the said redundancy was not in terms of the

contract of employment and for this reason the Plaintiff is not caught by the exclusion in clause 4.4 of the Insurance Policy.

The Defendant's Counsel submitted that the Human Resources Manual formed an integral part of the Plaintiff's contract of employment and provided for retrenchment/redundancy. There is no conclusive evidence to that effect before Court. The evidence on record appears to suggest that the dispensation on redundancy was only incorporated in the Human Resources Manual when it was put in risk pod, as provided in section 17 of the Manual exhibited in the Defendant's Bundle of Documents, at page 63, only after the Plaintiff had left the Defendant's employment.

What is before Court is the Plaintiff's contract of employment which does not provide for redundancy as a mode of exit for the Plaintiff. In fact, the Defendant's witness, DW1 admitted under cross-examination that it was his team that put in the redundancy clause in the Human Resources Manual and by that time the Plaintiff had already left the Bank.

Having found as I did earlier that the Plaintiff was not caught by the exclusion clauses in the Insurance Policy, the retrenchment benefit became payable upon the Plaintiff's loss of employment, and in accordance with clause 4.4 (b) of the Policy, the retrenchment cover is 50% of the outstanding loan amount which should be adjusted for any arrear repayments. Therefore, with regards to the question whether the Plaintiff is entitled to a retrenchment benefit of 50% of her outstanding loan amount, the answer is in the affirmative, by virtue of the provision in the Insurance Policy.

The second issue for determination as indicated earlier, is whether the Plaintiff is entitled to payment of her salary from 31st January, 2016, being the effective date of the redundancy, to the date that she was finally paid her pension benefits. In order to address this issue, it must first be established whether the Plaintiff was or

was not paid her pension benefit in accordance with Article 189 of the Constitution of Zambia (Amendment) Act No. 2 of the 2016. The said provision prescribes that: -

"(1) A pension benefit shall be paid promptly and regularly.

(2) Where a pension benefit is not paid on a person's last working day, that person shall stop work, but the 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."

Article 266 of the Constitution stipulates the following with regards to pension benefit: -

"Pension benefit includes a pension, compensation, gratuity or similar allowance in respect of a person's service".

It is the Defendant's submission that the Plaintiff was paid part of her pension and that only the tax component was deducted and remitted to the Zambia Revenue Authority following confusion perpetuated by the fact that the Constitution had only been assented to a few days prior to the Plaintiff's retrenchment and guidelines were yet to be issued. The Defendant further argues that the Plaintiff was in fact advised that the tax component of her pension had been deducted and remitted to the Zambia Revenue Authority and that she could claim a refund therefrom. That there was a genuine mistake in this case premised on the fact that the 2016 Zambia Revenue Authority Practice Note did not make mention of the exclusion of taxes to pension benefits.

According to the letter of 14th April, 2016 from the Defendant to the Plaintiff exhibited on pages 40 – 41 of the Plaintiff's Bundle of Documents, after getting the final position from the Zambia Revenue Authority the Defendant paid the tax amount which was debited from the Plaintiff's severance pay. This ZMW36,353.33 was paid into the Plaintiff's account on 11th April, 2016.

The Defendant went on to state that the Plaintiff was paid her pension benefits on 18th February, 2017 after she fully completed her exit formalities. Earlier, on 22nd March, 2016 the Plaintiff had written to the private pension fund called Aon Zambia Pension Fund Administrators Limited wherein she referred to her pension benefits paid out on 17th February, 2016 and alluded to the fact that her benefits were paid less taxes amounting to K85,722.77. The said letter, exhibited on page 45 of the Plaintiff's Bundle of Documents was copied to the Defendant, amongst others.

The above notwithstanding, the receipt exhibited at page 61 of the Plaintiff's Bundle of Documents shows that a judgment sum of K92,964.00 inclusive of interest was paid to the Plaintiff on 28th June, 2016 following a suit which she brought against standard Chartered Bank Pension Trust Fund – 2016/HP/0992.

From the preceding narration, it is evident that the Plaintiff was only paid part of her pension benefit by 18th February, 2016; a tax refund on 11th April, 2016 and further payment in respect of her pension on 28th June, 2016.

While this Court is in agreement with the holding in the cases of *Miyanda v. Raymond Handahu*⁵ and *Edith Tshabalala v. The Attorney General*⁶ cited by the Defendant, to the effect that a statute should be construed according to the intent expressed by Parliament, Article 189 of the Constitution, however, clearly shows that the intention of Parliament in passing that article was to ensure that where a person is not paid a pension benefit on the person's last working day, the person is retained on the payroll until he/she is paid the pension benefit. There is no ambiguity in this article which has been made mandatory by the use of the imperative "shall be retained on the payroll until payment of the pension benefit." Nowhere in the article does it state that the salary is not payable if the employee has been partly paid his or her benefits.

In a recent Constitutional Court judgment of *Lubunda Ngala and Jason Chulu v. Anti-Corruption Commission*⁷, the Court held that the mischief behind the

enactment of Article 189 is plain and the intention is clear, namely, to cushion pensioners and retrenchees from the hardships they were experiencing as a result of delayed payment of their pension money or gratuity.

It is evident from the above that the Plaintiff's pension benefits were not fully and promptly paid upon being declared redundant as required by Article 189 of the Constitution and therefore, she should have been retained on the Defendant's payroll until full payment of the pension. The Defendant argued that it was not responsible for paying the pension because that responsibility lay with the Standard Chartered Bank Zambia Plc Pension Trust Fund; that it would be inequitable to condemn the Defendant to pay the Plaintiff's salary when it is not the body charged with payment of the Plaintiff's pension.

This argument does not, in my view, hold water because the Defendant was the Plaintiff's employer and she was on its payroll, which is where the Constitution categorically states she should have been retained. If the Defendant is of the view that it was not responsible for payment of the Plaintiff's pension, then it can seek to be indemnified by Standard Chartered Bank Plc Pension Trust Fund for the salary which is due to the Plaintiff.

Therefore, for the reasons enumerated above, with regard to the question whether or not the Plaintiff is entitled to payment of salary from 31st January, 2016, which is the effective date of her retrenchment to 28th June, 2016 when her pension benefits were paid into court, the answer is also in the affirmative.

Issue number three for determination is with regard to the counterclaim by the Defendant.

Before I proceed to addressing this issue, I wish to point out that I have noticed that the Defendant's claim in paragraph (i) of the relief sought under the counterclaim, makes reference to 'an outstanding loan balance by virtue of a Legal Mortgage executed between the Plaintiff, John Munthali and the Defendant.' While the construction of the said paragraph appears to suggest that the loan in question was created by the mortgage referred therein, it has

already been established, in this Judgment, that the loan in question was created by the MBFL dated 10th October, 2014. It was, however, secured by a mortgage over the Plaintiff's property, namely, The Remaining Extent of Subdivision A of Lot No. 8321/M, Lusaka. I shall, therefore, address this third issue within this context.

The Defendant is claiming for payment of the sum of K524,415.98 being the amount due from the Plaintiff to the Defendant as outstanding loan; that the mortgage may be enforced by foreclosure and sale; delivery by the Plaintiff to the Defendant of possession of the mortgaged property; costs of execution; alternatively, an order that the Plaintiff continues to pay her mortgage instalments at the commercial bank lending rates and legal costs.

It is the Plaintiff's argument that the mortgage of a property is not a sale, but security which in default of payment, the mortgagee would rely on and sale the property. Counsel for the Plaintiff referred the Court to the MBFL, particularly clause 10 thereof, which stipulates the consequences of default by the borrower, namely that the outstanding principal and accrued interest shall become immediately due and payable. Counsel argued that there is no default by the Plaintiff.

To counter this argument, learned counsel for the Defendant submitted that clause 26 of the MBFL shows that the bank reserves the right, at its sole discretion, to call in the loan in part or in full, where there has been a material change in the Applicant's circumstances including change in employment, retrenchment, etc. That in any event, the mortgagee is entitled to possession of the mortgaged property from the date of execution of the mortgage and as authority for this proposition, quoted Fisher and Lightwood's Law of Mortgage, 13th Edition at page 580 which provides as follows:

"The general rule is that subject to contractual or statutory limitations, a mortgagee under a legal mortgage is entitled to seek possession of the mortgaged property at any time after the mortgage is executed, by virtue of the estate vested in him. As it is sometimes put, a mortgagee 'may go into possession before the ink is dry on the mortgage.' A mortgagee's right

to possession derives from his estate or interest in the land, and is not dependent on fault."

According to Counsel, the Defendant's position is that under the banking facility the Defendant was allowed to call in the mortgage at any stage and this, the Defendant has done.

It is my considered view, that notwithstanding the fact that the Plaintiff has not defaulted in paying her instalments, the facility letter does give the Defendant the sole discretion to call in the loan in part or in full where there has been a material change in the Plaintiff's circumstances. It is not in dispute that the Plaintiff left the Defendant's employment after being served with a notice of redundancy and I have no doubt in my mind that that is a material change in circumstances as envisioned by clause 26. Further, as learned Counsel for the Defendant rightly submitted, the MBFL allowed the Defendant to call in the mortgage at any stage.

For the above reasons, the Defendant's counter-claim succeeds. The Defendant is seeking the usual remedies outlined in Order 30, rule 14 of the High Court Rules, but is also seeking, in the alternative, an order that the Plaintiff continues to pay her mortgage at commercial bank lending rates and since there is no evidence before this Court of default by the Plaintiff in her mortgage repayments, I am inclined to grant the alternative order.

In summation, I enter judgment for the Plaintiff, being 50% write-off of the outstanding loan, as retrenchment cover. The Defendant shall furnish the Plaintiff with a current statement of the Plaintiff's mortgage account. In the event of an over payment by the Plaintiff, following the 50% write-off and account reconciliation, the Defendant shall reimburse the Plaintiff the amount over and above what is due to the Defendant.

Judgment is also entered for the Plaintiff for payment of salary at the rate of K28,466.00 per month from 1st February, 2016 to 28th June, 2016 plus interest at fixed deposit rate from date of issue of the Writ of Summons to date of judgment, and thereafter at current lending rate as determined by the Bank of Zambia, until full payment.

I enter judgment for the Defendant on the Counter-claim for the sum of K524,415.98 plus interest at contractual rate from the date of Writ of Summons to the date of judgment and thereafter, at current lending rate as determined by the Bank of Zambia from the date of judgment until full payment.

The Plaintiff shall settle the outstanding mortgage instalments, if any, at commercial bank lending rates.

As both parties have succeeded in their respective claims, I order that each party shall pay its own costs.

Leave to appeal is granted.

Delivered at Lusaka the 20th day of February, 2018.



W. S. Mwenda (Dr.)
HIGH COURT JUDGE