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IN THE COURT OF APPEAL **APPEAL NO. 12/2017**
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

BUTLER ASIMBUYU SITALI **APPELLANT**

AND

ENERGY REGULATION BOARD **RESPONDENT**

CORAM: MAKUNGU, CHISHIMBA, KONDOLO SC, JJA
On 11th April, 2017 and 13th September, 2017

For the Appellants :*Mr. M.L. Mukande SC, of Messrs ML Mukande & Company*
For the Respondents :*Mr. W. Chitungu, Legal Counsel and Mr. M. Chewe In-House Counsel*

J U D G M E N T

KONDOLO SC, JA delivered the Judgment of the Court

CASES REFERRED TO:

1. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172**
2. **Communications Authority v Vodacom Zambia SCZ Judgment No. 21 of 2009**
3. **Zambia Consolidated Copper Mines v Matale (1995-1997) Z.R. 144**

4. **ZESCO Limited v Alexis Mabuku Matale Appeal No. 227 of 2013**
5. **James Zulu and Others v Chilanga Cement Appeal No. 12 of 2004**
6. **Swarp Spinning Mills V Sebastian Chileshe and 30 Others (2002) Z.R. 23**
7. **Sydney Mungala and Collins Chali v Post Newspaper Limited SCZ/8/133/2013**
8. **Chilanga Cement v Kasote Singogo SCZ Judgment No. 13 of 2009**
9. **ZESCO Limited v Ignatious Muleba Sule SCZ 170 of 2002**
10. **Giles Yambayamba v Attorney General and National Assembly SCZ/26/2015**
11. **Charles Osenton and Company v Johnson [1941] 2 ALL E.R. 245.**
12. **Belenden (formerly Satterthwiate) v Satterthwaite [1948] 1 ALL ER 343**
13. **Zambia Oxygen Limited and Zambia Privatisation Agency v Paul Chisakula and 4 Others SCZ Judgment No. 4 of 2000**
14. **Attorney General v Mpundu (1984) ZR, 6**

LEGISLATION REFERRED TO:

1. **The Industrial and Labour Relations Act, Chapter 269, Laws of Zambia**

This appeal is against the Judgment of the lower Court in which the Appellant sought the following reliefs:

1. **Damages for wrong/unfair termination of his contract of employment equivalent to 36 months' salary inclusive of all allowances.**

2. **A declaration or order that he was entitled to purchase his personal-to-holder vehicle on the same terms as the previous C.E.O.**
3. **An order for payment of landline telephone allowance arrears in the sum of K66,000.00**
4. **An order for payments in lieu of use of personal-to-holder vehicle at the rate of K1000 per day 30 days.**

The Lower Court denied the reliefs sought and hence the appeal.

The background to this case is that the Appellant was employed by the Energy Regulation Board (**ERB**), the Respondent herein, on a contract as the Executive Director and Chief Executive Officer (**CEO**) on 6th September, 2010. According to the Appellant's testimony, the Board was dissolved in November, 2010 and in November 2012, the next Board was constituted with the appointment of 7 Directors who were introduced to management. The then Minister of Energy, appointed 4 additional Directors and the Appellant brought it to the attention of the Chairperson of the Board that this was contrary to the enabling Act which only provided for 7 Directors.

The irregular appointment of the additional Directors was raised by a member of Parliament, Honorable Mr. Jack Mwiimbu, as a point of order during debates in Parliament on 21st February, 2013 and on 26th February,

2013, the Permanent Secretary (**PS**) at the Ministry of Energy, requested the Appellant to work with the Ministry of Justice in preparing a response to the point of order, which he did. The following day the Minister of Justice delivered a Ministerial Statement in which he stated that *"A crackdown would be launched at the ERB and the responsible staff punished."* After delivering his statement and whilst still at parliament, the Minister of Justice briefed the press and stated that that there was a leakage at the ERB and he would flush out the culprits.

The Appellant further told the trial Court that on 27th March, 2013 at a board meeting, one of the Board Members insinuated that the Appellant was behind the leakage and at the same meeting his employment was terminated. He alleged that his terminal benefits were underpaid, and that he was not allowed to purchase a personal-to-holder vehicle. The Appellant conceded that the conditions of service stated that he was only entitled to buy the personal to holder car after he had used it for at least four years. He however stated that previous CEOs had been offered to purchase their personal to holder cars after they had used their vehicles for less than four years. The Appellant further claimed that he should have benefitted from a salary increment which was effected in July, 2013 because the effective date of the increment should have been in January, 2013 whilst he was still in employment. He expressed the firm view that the reasons for his dismissal were political.

In response, the Respondent called RW1, Juliet Mushili Bungoni, who was the Senior Manager Human Resources and Administration. She testified that the Appellant was paid 3 months' salary in lieu of notice and that, pursuant to the transport policy, he did not qualify to purchase the vehicle. RW2, Sydney Zulu, who was the Accountant, reiterated what RW1 stated and added that the telephone allowance was only payable on presentation of bills and that any salary increment was to be sanctioned by the Board and in this case the Appellant's contract had been terminated before the salary increment was implemented.

The Trial Court found that the Appellant was properly and lawfully dismissed and it did not agree with the Appellant that the reasons behind his termination were connected to the point of Order raised on the floor in Parliament because no evidence was adduced to substantiate such an allegation. The Court further found that the Appellant was neither entitled to purchase his personal to holder vehicle nor to the cost of hiring an equivalent vehicle because upon termination of contract the parties were exonerated from their respective obligations. The Appellant's claim for landline telephone arrears was refused on the basis that he did not claim these during employment which made his claim an afterthought. The Court further denied the Appellant's claim for an enhanced salary as well as payment of 36 months gratuity and held that he was duly paid his benefits in full less tax.

The Appellant has advanced eight (8) grounds of appeal, namely:

1. **The learned Judge and Honourable Members in the Court below erred in fact and in law when they ignored evidence showing that, following the statements and threats issued by the Minister of justice, the Respondent called a Board Meeting to discuss the issues which had been referred to by the Minister of Justice, and that it was at this meeting that the Appellant's contract was terminated and that therefore the decision to terminate the Appellant's contract of employment was linked to, influenced or was as a result of the threats and allegations leveled against the Respondent by the Minister of Justice.**

2. **The learned Judge and Honourable Members in the Court below erred in law and in fact and failed to do substantial justice when they declined to delve behind the purported Notice of Termination of the Appellant's contract of employment and critically examine all the circumstances surrounding the said termination.**

3. **The learned Judge and Honourable Members in the Court below erred in law and in fact when they dismissed the Appellant's claim for a re-calculation of his benefits in spite**

of unchallenged evidence which showed that salaries ought to have been revised with effect from 1st January, 2013.

4. The learned Judge and Honourable Members in the Court below erred in law and in fact when they ignored the provision in the Appellant's contract of employment entitling him to payment of gratuity based on 36 months in the event his contract was terminated for reasons other than performance or discipline, and thus erroneously held that any such payments would amount to unlawful enrichment.

5. The learned Judge and Honourable Members in the Court below erred in law and in fact when they held that the Appellant was not similarly circumstanced with Mr. Sylvester Hibajene, the former Executive Director of the Respondent who, following the termination of his contract of employment had been sold his personal-to-holder motor vehicle despite the said motor vehicle not having clocked 4years.

6. The learned Judge and Honourable Members in the Court below erred in law and in fact when they dismissed the

Appellant's claim to be compensated for the withdrawn personal-to-holder motor vehicle when evidence showed that the motor vehicle had been withdrawn before 3 months' notice period had elapsed.

7. **The learned Judge and Honourable Members in the Court below erred in law and in fact when they dismissed the Appellant's claim to be paid for a residential landline, when this was an entitlement in the appellant's contract of employment.**

8. **The learned Judge and Honourable Members in the Court below erred in law and in fact when they ignored the traumatic and harsh manner in which the Appellant's contract of employment was terminated.**

In arguing Ground one, Mr. Mukande SC, on behalf of the Appellant, rehashed the evidence given in the lower Court, and he directed this Court's attention to the differences between the Statement prepared by the supervising Ministry and the one delivered by Honourable Wynter Kabimba to Parliament. He argued that the Minister threatened people, whom he believed leaked the information to Honorable Jack Mwimbu, with loss of employment. He argued this point at great length and submitted that the Minister's allegations and

threats were rightly or wrongly, taken as directives and instructions to be acted upon by the Respondent's board.

State Counsel advanced an argument that following this Ministerial Statement the Board convened an emergency Board Meeting on 7th March, 2013 whose sole purpose and agenda was to receive a Management Brief on the issues which had been raised in Parliament concerning the excessive number of ERB Board members. He further submitted that the strong threats issued by the Minister of Justice clearly showed that Government wanted the Respondent's Board to take action against the ERB employees of whom the Appellant was CEO. It was argued that in the face of all this evidence the Court's finding to the effect that the Appellant did not adduce any proof was a perverse finding which could not have been made by a Court acting correctly. Mr. Mukande implored this Court to interfere with the findings of fact of the Lower Court and in aid of this argument he relied on the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[1] and **Communications Authority v Vodacom Zambia.**[2]

In-House counsel Mr. Chitungu submitted on behalf of the Respondents. With respect to Ground One, he argued that the finding of the lower Court was not perverse so as to warrant any interference by this Court because the Appellant had not established a clear link between the Board's decision to terminate the Appellants employment and the Minister of Justices

pronouncement in parliament and radio interview. He opined that the trial court had addressed its mind to the facts before it and in support of this he directed us to page 23 of the record of appeal where the Trial Court said as follows;

> ***"We have anxiously considered the arguments of both parties on this issue and fail to connect how the Honourable Ministers point of order on the floor of the House would have triggered the termination of the Complainants contract of employment. We have not seen evidence adduced at trial to suggest that the Board was coerced to dismiss the Complainant to please the Minister of Justice."***

Mr. Chitungu added that the accusation by one of the Board members that the Appellant was the one who leaked the information to the opposition Members of Parliament (MP's) and that he was working with the opposition political party even when considered with the Minister of Justices address to parliament, did not show any link to the Appellant's dismissal and was merely speculative and that the Appellant did not prove that the Board member said that he would be sternly dealt with. He relied on the case of **Wilson Masauso v Avondale Housing Project**[1] which basically states that he who alleges wrongful or unfair dismissal must prove the allegation. Learned Counsel's position on this ground was that there was no evidence to show that the Respondent was coerced into dismissing the Appellant.

Ground two is closely related to Ground One in that it relates to the power of the Court to "pierce the veil" and go behind the termination letter to examine the "real" reasons for termination, if any. In Ground two, Mr. Mukande SC advanced the argument that the trial Court declined to consider whether the notice clause in the Respondents contract had been invoked genuinely because it had clearly misapprehended the facts as it had focused on the point of order raised on the floor when it should have focused on the threats and allegations in the Ministerial Statement. According to him, the Minister accused employees at the Energy Regulation Board of having leaked information to Hon. Mwiimbu and of having failed to advise and guide the Minister of Energy. He stated that the Minister threatened to *"flush out"* these people and *"catch up with disloyal civil servants"* and that *"such a person is not fit to serve our people"* and that *"such people would do the nation a favour by resigning"*.

Mr. Mukande cited **Section 85(5) of the Industrial and Labour Relations Act**[1] which obliges the Industrial Relations Court to do substantial justice. He submitted that case law had established that in doing substantial justice the court was empowered to "delve behind or into the reasons given for termination in order to redress any real injustice discovered." In that regard he cited **Zambia Consolidated Copper Mines v Matale** [3].

Mr. Mukande submitted that the Court omitted to consider the fact that the Respondent is a statutory body subject to government control and

direction, which could have been influenced by the Honorable Minister's statement. He opined that the Court failed to critically examine all the circumstances surrounding the termination of the Appellant's contract of employment.

In response to this ground, Mr. Chitungu pointed out that the trial Court had in fact referred to the Ministerial statement when it declined to delve behind the notice of termination when it said as follows; *"It is not in dispute that in answer to a Point of Order on the floor of the House, the Minister alluded to the fact that anyone who attempted to undermine the development process should be regarded as an enemy of the people and that such a person had no right to continue to serve the people."*

He submitted that the trial Court was on firm ground because it considered all the evidence and the arguments by both parties and clearly stated as follows, *"We have not seen evidence adduced at trial to suggest that the board was coerced to dismiss the Complainant to please the Minister of Justice"* and that in terms of the case **Sydney Mungala and Collins Chali v Post Newspaper Limited** [7] the Appellant failed to lay, "sufficient evidence before the Court to enable it form the decision whether or not to pierce the veil". He submitted that the termination of the Appellant's contract of employment by payment in lieu of notice was lawful. He cited the case of **Chilanga Cement PLC v Kasote Singogo** [8] in that regard.

We have considered the Record of Appeal, the Lower Court's Judgment and indeed the spirited arguments by both State Counsel and Counsel for the Respondent.

Grounds One and Two are intertwined and we shall therefore address them concurrently. In the **Sydney Mungala Case** (supra) the court stated that the reasons for delving behind the termination clause were based on fact. We would say that is true for most cases where the Court finds a need to embark on that particular expedition and is most definitely the same in casu. That being the position, we would have to examine in depth some of the events that occurred prior to termination of the Appellant's contract of employment. Despite already having alluded to some of the facts of this case, this is unfortunately, one of those cases where repetition seems inevitable. We must also, at this juncture, take judicial notice that the Energy Regulation Board is a Statutory Body which executes government policy.

The unchallenged evidence of the Appellant[1] is that upon request, he furnished the Minister of Energy, through his Permanent Secretary, information which included an Aide Memoir regarding the appointment of Directors to the Respondent's Board[2]. The Memoir advised that according to **Section 2 of the Energy Regulation Act**, the Board was composed of seven (7) part time members who were appointed by the Minister and that the

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[1] *Record of Appeal, pages 226, 230 & 411*
[2] *Record of Appeal, pages 266 & 267*

qualifications of the members was prescribed[3]. The Permanent Secretary accordingly appointed 7 board members but later, on 7th December, 2012 the new Minister of Energy appointed 4 additional Board Members.

The further unchallenged evidence is that the Appellant brought the anomaly to the attention of the ERB Board Chairman and the Permanent Secretary. The additional directors started attending Board Meetings and their names went up on the website. He repeatedly reminded the Permanent Secretary and all he was told was that it was receiving attention.

On 21st February, the issue was raised as a point of order in Parliament and the Speaker directed the Minister of Justice to respond. The Minister delivered his Statement on 26 February, 2013[4] in which he accused ERB employees of having leaked the information to Hon. Jack Mwimbu instead of advising the Minister to correct the anomaly[5]. The Minister told the house that the culprits wanted to, *"undermine the image of the Government and show that it is comprised of men and women who act with impunity in matters of law"*[6]. He added that such employees *"should be regarded as an enemy of the people ..... Such a person has no right to continue to serve our people".*

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[3] *Record of Appeal, p.267*
[4] *Record of Appeal, p.275*
[5] *Record of Appeal, p.276*
[6] *Record of Appeal, p.277*

Paragraph 29 of the Appellant's Affidavit in support of Complaint[7] attests that on or about 26th February, 2013, ZNBC Radio and Television aired an interview granted to them by the Minister of Justice in which he said that the Government was going to take action and flush out staff at the Energy Regulation Board.

On the 28th February, 2013 the Appellant wrote to the Permanent Secretary at the Ministry of Energy[8] expressing concern with the Ministerial Statement. He drew his attention to the fact that the excess number of Board members was in the public domain as the List of Directors had even been published on the ERB website and that the New Board had attended public hearings on ZESCO's application to increase electricity tariffs. He also reminded the Permanent Secretary that he had drawn the anomaly to the attention of the Ministry and he was informed that they were attending to the situation.

Paragraph 32 of the Appellant's Affidavit in support of Complaint states that the Chairman of the ERB called for a Board Meeting which was held on the 7th March, 2013 for the purpose of a briefing by the ERB Management on the issues surrounding the statements made in Parliament. After the Appellant briefed the Board, one of the Board Members accused him of lying and said that the letter of 28th February, 2013 was just a smoke screen as it was the Appellant, together with his Management Team, who had leaked the

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[7] *Record of Appeal, p.50*
[8] *Record of Appeal, p.294-295*

information to the opposition and that he was working for the opposition therefore the board was going to take stern action.

The Appellant testified that he was asked to leave the meeting and when he was called back, the Chairman of the Board informed him that the Board had decided to terminate his contract and he was handed his letter of termination.

During the trial, the Respondent only called two witnesses. RW1, Juliet Bungoni the Respondent's Senior Manager Human Resource, who testified that the Appellant's employment was terminated as provided by his contract of service and that he was duly paid in lieu of notice. She neither alluded to any of the allegations by the Appellant that he was dismissed on account of the Statement made by the Minister of Justice to Parliament nor the Appellant's claim that one of the Board Members accused him of having been responsible for leaking information to the opposition. Under cross examination she said she was not aware of the Board Meeting and had not seen the minutes. RW2 Sydney Zulu the Respondent's Management Accountant only testified with regard to the Appellant's dues after termination of employment.

The Respondent had however, in its Answer to the complaint, denied the assertion that the Appellant's dismissal was in any way connected to the Ministerial Statement and also denied that the Appellant was threatened in the Board Room on the day his contract of employment was terminated.

The Respondent's affidavit in Support of Answer, sworn by Pethel Chambwe Phiri, contained similar denials and he attested that most of the Appellant's claims were within his own knowledge and he would be put to strict proof. The deponent did not dispute that the Minister of Justice told ZNBC Radio and Television that Government was going to take action to flush out staff at the ERB[9]. With regard to the accusations by the Board Member at the Board Meeting, it was attested that those facts were within the Appellant's own knowledge and that he would be put to strict proof[10]. On this point, the Respondent's Answer to the Complaint stated that the minutes of the Board meeting would attest to the fact that the Complainant was not directly pointed at and accused of working with the Opposition.

In the case of **Giles Yambayamba v Attorney General and National Assembly**[11] the Supreme Court set out the following guidelines to determine when the Industrial Relations Court can go behind a termination clause in a contract of employment for the purpose of establishing the real reasons for termination;

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[9] *Record of Appeal page 135 (paragraph 12; affirms that the contents of the paragraphs 21-31 of the Appellants affidavit in support of complaint are correct of which parargraph 29 alludes to the ZNBC interview.*

[10] *Record of Appeal page 135 paragraph 13in reference to paragraph 33 of the Appellants affidavit in support of complaint*

[11] *Giles Yambayamba v Attorney General and National Assembly SCZ/26/2015*

1. *Sufficient ground should have been laid before the court to suggest that the termination of employment was motivated by factors quite apart from the employer's power and right to terminate as provided by the contract of employment. In so doing, the party seeking to have the veil pierced must lead evidence, at least on a prima facie case that the termination was motivated by malice.*
2. *This being a discretionary remedy, in assessing and evaluating the evidence, the Court must exercise the discretion judicially and judiciously.*

In casu the trial Court exercised its discretion and made a finding of fact that the Point of Order raised on the floor of Parliament and the resultant Ministerial Statement were not linked to the termination of the Appellant's employment. It is settled law that an appellate court should not interfere with findings of fact of a trial court unless the findings were perverse or made in the absence of relevant evidence or upon a misapprehension of the facts[12].

Added to this, is the principal that where a trial court exercises discretion, the appellate court should only reverse the order of the trial court where it reaches the clear conclusion that there has been a wrongful exercise of discretion in that, insufficient weight has been given to relevant considerations

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[12] *Wilson Masuso Zulu v Avondale Housing Project Limited (1982) Z.R. 172 (S.C.)*

and not simply because the appellate court would have exercised its discretion differently[13].

We have considered the facts laid down by the Appellant and it is clear to us that the termination of his employment was preceded by an unbroken chain of events. The chain began with Minister of Justice's Statement on 26th February, 2013 in which he clearly blamed employees of the ERB for leaking information to an opposition Member of Parliament Hon. Jack Mwiimbu and further accused them of seeking to undermine Government and that such people should be considered as enemies of the people. This was followed by an interview with ZNBC, the same day, in which he threatened to flush out staff at the ERB. On 28th February, the Appellant wrote to the Permanent Secretary of the Ministry of Energy expressing concern with the contents and substance of the Ministerial Statement. On 7th March, 2013, the Board Chairman called a meeting of the ERB Board of Directors at which one of the Directors of the Board accused the Appellant of working with the Opposition and warned him that severe measures would be taken. That same day the Appellant was given a letter of termination of employment notifying him that his employment had been terminated in accordance with the notice clause in his contract of employment. This chain of events occurred over a period of 11 days.

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[13] *Charles Osenton and Company v Johnson [1941] 2 ALL E.R. 245. at page 250*
Belenden (formerly Satterthwiate) v Satterthwaite [1948] 1 ALL ER 343 at page 345

It is crystal clear that the trial Court failed to consider the Appellant's evidence which laid a very clear path to the inevitable conclusion that the termination of employment was motivated by facts quite apart from the employer's power and right to terminate, as provided by the contract of employment, and that the ominous rumble of malice was loud and clear.

As earlier stated, we are loath to interfere with findings of fact and quite averse to reversing the exercise of discretion by a trial court. We do however, find that in this particular matter the trial Court demonstrated a wrongful exercise of discretion by attaching insufficient weight to the evidence presented to it. We further find that the trial court's finding of fact that there was nothing lurking behind the notice clause was, in the face of the facts presented to the court, perverse and based on a misapprehension of the facts. The trial Court should have pierced the veil and found that the real reason for the Appellant's termination of employment was that the Board of Directors of the ERB acted on the sentiments expressed by the Minister of Justice in his Statement to Parliament. The first and second grounds of appeal therefore succeed.

With regard to Ground Three, Mr. Mukande SC submitted that in 2011, the Respondent's Board of Directors issued a resolution revising its salary adjustment date from 1st April to 1st January so as to synchronize it with the National Budget cycle. The Appellant testified that he was in attendance at the Board Meeting at which the adjustment was ratified. State Counsel argued that

the Respondent had not challenged the Appellant's evidence on the issue and the trial Court should therefore have granted this claim. He further suggested that once the Board of Directors had resolved that the salary adjustment should be moved to January, it became a condition of service. He argued that varying the effective date of the salary adjustment to July was a unilateral alteration of the Appellant's conditions of service by the Respondent which offended the principle in **Zambia Oxygen Limited and Zambia Privatisation Agency v Paul Chisakula and 4 Others**[14] where the Supreme Court held that conditions of service already being enjoyed by an employee cannot be altered to his detriment or disadvantage without his consent.

Mr. Chitungu, on the other hand argued that the salary increment sought by the Appellant was never part of his salary and therefore not an accrued right. He pointed out that the salaries were increased after the Appellant had already left employment.

The evidence referred to by the Appellant is entitled 'Proposal to Change Effective Date of Salary Adjustment – Remuneration Policy' and is dated July, 2011. The Appellant did not specify the date of the meeting that ratified the proposal. He was always at liberty to subpoena the resolution but neglected to do so. This is clearly a process that started in 2011 and there is no proof that the salary increment effected in July, 2013 had anything to do with that

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[14] *Zambia Oxygen Limited and Zambia Privatisation Agency v Paul Chisakula and 4 Others*

particular proposal. Further, there is no proof that management communicated to the Appellant or any other employee that their conditions of service had been changed by moving the date for adjusting salaries from April to January. We see no unilateral alteration of the Appellant's conditions of service in this regard. The benefit of the salary increment awarded in July clearly does not accrue to the Appellant because it was awarded after he left employment. We therefore find no merit in this ground which consequently fails.

The Appellant's claim in Ground Four, is that his gratuity should have been paid on the basis of the enhanced salary which should have been effected in January, 2013. The Respondent's argument was that the gratuity was paid on the basis of the Respondents last drawn salary.

The success of Ground four is wholly dependent on our decision on Ground Three and having found that the Appellant was not entitled to benefit from the salary increment effected in July, 2013, Ground Four consequently fails.

Ground Five was hinged on the trial Court's finding that the Appellant was not entitled to purchase his personal-to-holder vehicle on the basis that the car was less than four years old. His argument was that the previous CEO of the Respondent, Mr. Sylvester Hibajene was allowed to buy his personal-to-holder car even though it was less than four years old. Mr. Mukande cited the cases of **James Zulu and Others v Chilanga Cement**[5] and **ZESCO Limited v**

Ignatious Muleba Sule (9) in which the Supreme Court held the view that similarly circumstanced employees ought to be similarly treated unless there is a valid reason justifying different treatment.

The Respondent's submitted that the trial Court was on firm ground when it distinguished this case from the case of **James Zulu and Others V Chilanga Cement Plc**[5] because, *in casu*, the Appellant's predecessor was given three months' notice to terminate whilst the Appellant was paid three months' salary in lieu of notice. According to the trial Court, unlike in the case of his predecessor, the Appellant's contract of employment was effectively and properly terminated thus exonerating the parties from their respective obligations. Learned Counsel for the Respondent stated that he further agreed with the trial Court when it held that the Respondent's discretion to sell the personal-to-holder vehicle to Mr. Hibajene cannot be questioned.

To begin with, it is essential that we clear the impression that might have been created by the trial Court's finding that parties are exonerated from their respective obligations when a contract of employment terminates. The correct position is that not all obligations are extinguished by termination. Certain obligations such as the payment of terminal benefits are in fact triggered by termination and the contract of employment may specify other rights and obligations which shall survive termination.

Coming to the issue at hand, we find it hard to understand how termination by notice and termination by giving three months' salary in lieu of notice can be distinguished vis-à-vis the right to purchase a personal-to-holder motor vehicle. In **ZESCO Limited v Alexis Mabuku Matale** [4] the Respondent claimed he wanted to be treated in the same manner as another former Director Mr. Akapelwa with whom he claimed to be similarly circumstanced. In that case the Supreme Court distinguished Mr. Matale's circumstance from Mr. Akapelwa's, whose separation was by way of redundancy and the terms and conditions of their contracts were different.

We are not satisfied that the Appellant's circumstances were distinguished from Mr. Hibajene who held the same job as him but was sold his personal-to-holder vehicle even though it was less than four years old. We further dismiss the notion that management of a public institution can without question exercise discretion in a manner which appears to favour certain employees over others. Management's discretion to sell personal-to-holder-vehicle's before they reach the prescribed age for sale might exist but that discretion is not unquestionable. The principles of fairness enunciated in the cases of **James Zulu and Others v Chilanga Cement**[5] and **ZESCO Limited v Ignatious Muleba Sule** [9] are, for the time being, cast in stone. We find that the trial Court did not adequately distinguish the Appellant's circumstances from those of his predecessor Mr. Hibajene so as to justify that they be treated differently. This ground of appeal therefore succeeds.

In Ground six, State Counsel submitted that the Appellant ought to have been paid K30, 000 to cover the 30 days when the personal-to-holder vehicle was withdrawn from him. We shall not repeat the submissions of either counsel save to state that the record shows that the Respondent admitted that the Appellant was entitled to use the vehicle during the notice period.

The Respondent created a problem because they withdrew the vehicle when there was still one month of the notice period left and the Appellant demanded payment of ZK1,000 per day as the cost of hiring a replacement vehicle. The Respondent declined to pay and told him to go and pick up the vehicle and use it for the remaining month but the Appellant refused.

As earlier indicated, the Respondent does not deny that the Appellant was entitled to use the car for the remaining one month. This ground of appeal also succeeds and should the parties fail to agree on the amount to be paid, the parties are at liberty to apply to the Deputy Registrar for assessment.

Ground Seven was the Appellant's claim that he is entitled to payment of his telephone allowance which was never paid to him throughout his employment except the sum of ZK6,000 which was paid with his terminal benefits, in lieu of notice at the rate of ZK2,000 per month. The Respondent's

response to this was that the payment was erroneous as landline telephone bills were only paid upon presentation of the land line bill[15].

The trial Court dismissed this claim because it accepted the Respondent's evidence that the Appellant did not own a landline telephone and the fact that he never complained about none payment of his landline telephone throughout his employment meant that this claim was a mere afterthought. We have looked at the relevant provision in the contract of employment, clause 3 (f), which reads as follows;

"3 (f) you will be entitled to a paid residential landline telephone of up to K2,000 per month"

The fact that it says, "up to" validates that this was a payment that could vary from month to month with a ceiling of K2,000. It follows that payment would be by proof of expenditure. We therefore find no merit in this claim and dismiss it accordingly.

Lastly, in Ground Eight, State Counsel submitted that the Appellant was entitled to damages beyond the common law measure on account of the harsh and traumatic fashion in which the termination was effected. The trial Court

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[15] *Record of Appeal, age 138, paragraph 27,*

dismissed this claim on the basis that it did not find that the Appellant had been wrongfully dismissed. We have considered the submissions of both counsel on this ground of appeal and the arguments are appreciated.

The record shows that after the point of order was raised in Parliament the Permanent Secretary of the Ministry of Energy instructed the Appellant to work with officers at the Ministry of Justice in drafting the Minister of Justice's Statement in response to the point of order[16]. The Minister however veered from the Statement which had been prepared for him and launched a scathing attack against employees of the ERB calling them enemies of the people who were trying to destabilize the Government. The Minister's sentiments were broadcast on radio, television and the print media. Even though the Appellant was not personally named, he was the CEO and ultimately responsible for his employees actions.

It is not hard to understand why two days later he wrote to the Permanent Secretary expressing concern about the things the Minister had said. It must have been all the more distressing because the Minister gave Parliament the impression that the ERB had never advised the Ministry on the correct number of Board Members when the record shows that they had in fact done so. That particular accusation was one that fell squarely on the laps of the CEO.

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[16] Record of Appeal, page 47, paragraph 17

In the case of **Swarp Spinning Mills v Sebatian Chileshe & 30 Others**[6] the Supreme Court held as follows;

> ***"In assessing the damages to be paid and which are appropriate in each case, the court does not forget the general rule which applies. This is that the normal measure of damages applies and will usually relate to the applicable contractual length of notice or the notional reasonable notice, where the contract is silent. However, the normal measure is departed from where the circumstances and the justice of the case so demand. For instance the termination may have been inflicted in a traumatic fashion which causes undue distress or mental suffering ..."***

The principle of awarding damages for mental distress and inconvenience was reaffirmed in the case of **Chilanga Cement Plc v Kasote Singogo**[8]**.** In that case, the trial Court awarded the Appellant 24 months' salary as damages beyond the notice period after it pierced the veil and considered the real reason for termination of employment. The Supreme Court approved the award but said as follows:

"We have considered the portion of the judgment of the Court below when it awarded 24 months' pay as damages to the Respondent. There is no indication in the judgment as to the consideration it took into account to arrive at the 24 months' pay save for a reference to 'abrupt loss of employment' ... We are alive to the fact that in the Chintomfwa case, the rationale for awarding two years' salary as damages was due to the appellants grim future of job prospects. We are of the view that when each case is considered on its own merit, future job prospects may not be the only consideration for enhanced damages in wrongful or unlawful dismissal."

In addition to 24 months' pay, the trial Court also awarded Mr. Singogo six months' pay as compensation for embarrassment, physical and mental torture. The Supreme Court overturned that particular award on the following consideration;

"....we are mindful that in a proper case, damages for loss of employment maybe awarded for embarrassment and mental torture ..... damages for mental distress, and inconvenience

would also be recovered in an action for breach of contract ..... however, such an award for torture or mental distress should be granted in exceptional circumstances."

In casu, the Appellant's ordeal started on the floor of Parliament and it is sufficient to suppose that he was for at least a brief period "the topic of the day" and depending on the observer's vantage point, he was either a hero or a villain. He was thrust into the public eye and we have no doubt that the entire chain of events, inclusive of the manner of dismissal were sufficient to cause embarrassment and mental torture and constitute exceptional circumstances that warrant compensation on that account. Ground Eight therefore succeeds.

In the premises under grounds One, Two and Eight, on account of the exceptional circumstances of this matter, we award the Appellant a global sum of 24 months' pay as compensation for damages beyond the notice period and for embarrassment and mental distress often referred to as "**Mpundu damages**[17]".

For clarity we would summarize our judgment on the remaining grounds as follows; Grounds Three and Four in relation to underpayment of salary and gratuity are dismissed; Ground Seven in relation to none payment of landline telephone bills is also dismissed; Grounds Five and Six in relation to purchase of the personal-to-holder-vehicle and loss of use of the said vehicle succeed.

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[17] *Attorney General v Mpundu (1984) ZR, 6*

The costs of this action both in the Court below and this court are awarded to the Appellant.

Dated this 13th day of September, 2017

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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F.M. CHISHIMBA
COURT OF APPEAL JUDGE

.....

M.M. KONDOLO SC
COURT OF APPEAL JUDGE