

**IN THE COURT OF APPEAL OF ZAMBIA**  
**HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**APPEAL No. 245 OF 2020**  
**CAZ/08/372/2020**

**BETWEEN:**

**PAUL CHUKEH KAPOTWE**

**AND**

**WATER RESOURCES MANAGEMENT AUTHORITY**



**APPELLANT**

**RESPONDENT**

***Coram: Kondolo, Sichinga, and Sharpe-Phiri, JJA***  
***on 12<sup>th</sup> October, 2022 and 16<sup>th</sup> December, 2022***

*For the Appellant: Ms. C. Mwambazi and Mr. L. Yeta of Messrs Central Chambers*

*For the Respondent: Mr. C. Ngaba, In-house counsel*

---

## **JUDGMENT**

---

**Sichinga, JA** delivered the Judgment of the Court.

**Cases referred to:**

1. *Moses Choonga v Zesco Recreation Club, Itezhi Tezhi SCZ Appeal No. 168 of 2013*
2. *Base Chemicals Zambia Limited, Mazzonites Limited v Zambia Air Force and the Attorney-General SCZ Judgment No. 9 of 2011*
3. *Attorney-General v Marcus Kampumba Achiume (1983) ZR 1*
4. *National Airports Corporation Limited v Reggie Ephraim Zimba and Saviour Konie (2000) ZR 154*
5. *Penelope Chishimba Chipasha Mambwe v Millington Collins Mambwe SCZ Appeal No. 222 of 2015*

6. *Wilson Masauso Zulu v Avondale Housing Project Limited* (1982) Z.R. 172
7. *The Minister of Information and Broadcasting Services and The Attorney-General v Fanwell Chembo, Amos Chanda and Others* SCZ Appeal No.76 of 2005
8. *Rating Valuation Consortium & D.W. Zyambo & Associates (suing as a firm) v The Lusaka City Council and the Zambia National Tender Board* (2004) ZR 109
9. *Kansanshi Mining Plc v Zambia Revenue Authority* SCZ Appeal No. 143 of 2014
10. *The Attorney-General v E.B. Jones Machinists Limited* (2000) ZR 326
11. *Lubinda Ngala and Jason Chulu v Anti-Corruption Commission* Selected Judgment No. 4 of 2018
12. *Owen Mayapi and 4 others v The Attorney-General* 2019/CCZ/003
13. *Nayanda and others v Plessey Zambia Limited Comp.* No.152 of 2016
14. *Holmes Limited v Buildwell Construction Company Limited* (1973) ZR 97
15. *Freeman v Cooke* [1948] 2 Exch. 654
16. *Jacques Chisha Mwewa v Attorney-General* IRC Comp. No. 95/08/2011
17. *Zambia Union of Financial Institutions and Allied Workers v Barclays Bank Zambia PLC* SCZ Appeal No. 209 of 2004
18. *Engen Petroleum Zambia Limited v Willis Muhanga and Jeromy Lumba* SCZ Appeal No. 117 of 2016
19. *Zambia Telecommunications Company Limited v Mirriam Shabwanga and 5 others* SCZ Appeal No. 78 of 2016
20. *Powell v Lee* (1908) 99L.T 284

**Legislation referred to:**

1. *Water Resources Management Act* No. 21 of 2011 of the Laws of Zambia
2. *Employment Act*, NO. 15 of 2015 of the Laws of Zambia
3. *The Industrial and Labour Relations Act* Chapter 187 of the laws of Zambia
4. *Statutory Functions Act*, Chapter 4 of the Laws of Zambia



## **1.0 Introduction**

- 1.1 This appeal is against the Judgment of Mwansa, J of the High Court Industrial Relations Division (IRD) at Lusaka of 9<sup>th</sup> September, 2020 in which he held in the main that the complainant's contract was terminated by effluxion of time and that there was no automatic renewal of his contract due to the non-existence of a Board of Directors. Therefore, he was not entitled to payment of his June, 2017 salaries and allowances; payment in lieu of notice; tax exemption for gratuity; payment of salaries for a renewed contract; refund for costs of service of personal to holder motor vehicle; and reimbursement of gratuity for renewed contract. The complainant seeks a reversal of this decision on appeal.

## **2.0 The Factual Background**

- 2.1 A summary of the facts is that the complainant, Paul Chukeh Kapotwe, who is the appellant on this appeal, was employed as Director General of the Water Resources Management Authority (WARMA) on a three (3) year contract of employment which was due to expire on 14<sup>th</sup> May, 2017, and subject to renewal. Per clause 24 of the contract of employment, he was required to apply to the Authority for renewal of the contract three (3) months prior to expiry thereof. In turn, WARMA was required to communicate to him regarding the status of his renewal one (1) month prior to its expiry.
- 2.2 Since there was no Board of Directors in place, on 13<sup>th</sup> February, 2017, the complainant wrote a letter to the Minister of Water Development

Sanitation and Environmental Protection, seeking a renewal of his contract pursuant to clause 24 of the contract.

- 2.3 On 8<sup>th</sup> May, 2017, within a month of the expiration of the contract, the Minister replied to the complainant's letter by renewing his contract for a further term of three (3) years.
- 2.4 Four (4) days later, on 12<sup>th</sup> May, 2017 the Permanent Secretary in the Ministry of Water Development, Sanitation and Environmental Protection wrote to the complainant informing him that his contract would expire on 14<sup>th</sup> May, 2017. He was advised not to report for work after the expiration of his contract. This letter, was followed by another letter from the Minister on 22<sup>nd</sup> May, 2017. In that letter, the Minister informed the complainant that he had revoked his earlier appointment as the legal mandate to employ a Director General vested in the Board of Directors.
- 2.5 The complainant subsequently vacated the office of Director General on 31<sup>st</sup> May, 2017.
- 2.6 On 14<sup>th</sup> March, 2018, the new Board Chairperson of WARMA wrote to the complainant referring to an earlier letter received by the complainant on 9<sup>th</sup> February, 2018 (which is not on record) and advised him of his outstanding dues. The said letter also contained an offer to the complainant to purchase his personal-to-holder motor vehicle at 20% of the net book value upon completion of formalities. The formal offer to purchase the vehicle was made on 20<sup>th</sup> June, 2018 and the complainant was availed thirty (30) days to purchase the vehicle.



- 2.7 On 5<sup>th</sup> September, 2018 WARMA wrote to the complainant advising him to return the vehicle to the authority for failure to comply with sale conditions within the stipulated timeframe.
- 2.8 Discontent with his exit from the authority, the complainant then took out a complaint in the Industrial Relations Division of the High Court at Lusaka.

### **3.0 Complainant's reliefs in the High Court**

3.1 The complainant sought the following reliefs:

- i. Payment of June 2017 salary and allowances in the sum of K58,196.00;
- ii. Payment of 3 months' salary and allowances in lieu of notice in the sum of K174,588.00 for the contract of employment ending 14<sup>th</sup> May, 2017;
- iii. Reimbursement of tax deducted on terminal benefits in the sum of K23,825.00;
- iv. Payment of salaries for the months starting July 2017 to September, 2018 in the sum of K931,136.00; Damages for breach of contract of employment;
- v. Refund of deducted days service from 15<sup>th</sup> to 31<sup>st</sup> May, 2017 in the sum of K5,906.25;
- vi. Refund of cost of vehicle service of personal-to-holder vehicle in the sum of K9,338.70;
- vii. Reimbursement of gratuity up to 23<sup>rd</sup> June, 2017 in the sum of K17,459;

- viii. Leave earned for period starting 15<sup>th</sup> May, 2017 to June, 2018 in the sum of K8,147.40
- ix. Interest
- x. Costs; and
- xi. Any other relief that the court may deem fit.

#### **4.0 The Appeal**

4.1 Aggrieved by the decision of the lower court, the complainant (hereinafter referred to as the *appellant*) launched this appeal advancing nine (9) grounds of appeal couched as follows:

1. *The trial Judge erred in both law and fact when he held that after 14<sup>th</sup> May, 2017, there was no contract of employment between the appellant and the respondent as the contract had expired by effluxion of time and there was no automatic renewal;*
2. *The learned trial Judge erred in law and fact when he held that the contract of employment between the parties ended due to effluxion of time yet he awarded the appellant the sum of K5,906.25 for days worked from 15<sup>th</sup> May, 2017 to 31<sup>st</sup> May, 2017;*
3. *The learned trial Judge erred in law and fact when he held that the termination of employment of the appellant was neither wrongful nor unlawful as there was no contract of employment between himself and the respondent;*
4. *The learned trial Judge erred in both law and fact by holding that the appellant is not entitled to gratuity as he had neither attained*



*the age of retirement nor had he opted for early retirement as his contract was terminated due to effluxion of time;*

5. *The learned trial Judge erred in both law and fact by holding that there was no justification for the appellant to have continued in office when he was aware that as of 14<sup>th</sup> May, 2017, his contract had expired;*
6. *The learned trial Judge misdirected himself in law and fact when he held that the appellant made the application for renewal to the wrong person and that the actions of the Minister were illegal and irregular and did not amount to renewal as per letter dated 22<sup>nd</sup> May, 2017;*
7. *The learned trial Judge erred in both law and fact when he held that the appellant was not entitled to reimbursement of the sum of K17,459.00 as gratuity earned for leave days, from 15<sup>th</sup> May, 2017 to 23<sup>rd</sup> June, 2017 and leave pay for the period of 15<sup>th</sup> May, 2017 to 23<sup>rd</sup> June, 2017 in the sum of K8,147.40 on the basis that there was no renewal of the contract of employment;*
8. *The learned trial Judge erred both in law and fact when he held that the appellant was not entitled to his refund claim of K9,338.70 for costs of service of the motor vehicle which at the material time was under the care and maintenance of the respondent on account that such motor service occurred outside the subsistence of his contract, and*
9. *The learned trial Judge misdirected himself in law when he failed to adjudicate all issues in controversy between the parties.*

## 5.0 Appellant's arguments

5.1 The appellant relied on his written heads of argument filed into court on 2<sup>nd</sup> December, 2020, heads of argument in reply filed into court on 16<sup>th</sup> February, 2021 and counsel's oral submissions. The appellant argued grounds one, two and seven together as they are interrelated. Ground three was argued separately. Grounds five and six were argued together. Ground eight was argued separately. There are no submissions relating to grounds four and nine. We take it that the same have since been abandoned.

5.2 With respect to grounds one, two and seven, it was submitted that in view of the facts of this case, and in light of **section 28(c) (1) and (2) of the Employment Act<sup>1</sup>** the appellant's employment be deemed to have been renewed as he continued to work after his contract of employment expired. The said provision states as follows:

*"(1) Subject to subsection (2), an employee's fixed term contract may be renewed for subsequent terms, except that the cumulative duration of the successive fixed terms contracts of employment with an employer shall be as prescribed.*

*(2) When an employee who is engaged on a fixed term contract of service continues in employment with the same employer after the expiration of the prescribed cumulative period, the contract of service shall be deemed to be a permanent contract."*

5.3 It was submitted that this was the intended effect of clause 24 of the contract of employment which is couched in mandatory terms. We were invited to consider the evidence on record and consider whether the appellant's employment contract was automatically renewed. Reliance was



placed on the case of **Moses Choonga v Zesco Recreation Club, Itezhi Tezhi**<sup>1</sup> where the Supreme Court held as follows:

*"Since the respondent allowed the appellant to continue his duties for one month after the contract expired due to effluxion of time on 31<sup>st</sup> July, 2012, it can be implied and properly so, that the contract of employment was extended for the same period and on the same conditions as those in the expired term of contract of employment."*

- 5.4 We were urged to follow this Supreme Court holding and hold that the respondent allowed the appellant to continue working after his contract of employment had expired. We were also urged to hold that the appellant is entitled to remuneration from 14<sup>th</sup> May, 2017 to 31<sup>st</sup> May, 2017 and that his contract was renewed for a further three years on the same terms and conditions as contained in the expired contract.
- 5.5 We were further referred to the portion of the judgment at page J17 where the learned Judge found that the appellant was entitled to be paid for the days he rendered service after his contract had expired. It was submitted that this was confirmation by the learned Judge that the appellant continued working beyond 14<sup>th</sup> May, 2017, and thus his contract of employment was renewed. Counsel contended that the learned Judge contradicted himself when he went on to find that the contract of employment ended by effluxion of time on 14<sup>th</sup> May, 2017. Reliance was placed on the case of **Base Chemicals Zambia Limited, Mazzonites Limited v Zambia Air Force and the Attorney-General**<sup>2</sup> where the Supreme Court guided that it is either one position or the other and not both.

- 5.6 It was submitted that the learned Judge erred when he declined to award the sum of K17,459.00 as gratuity earned and the sum of K8,147.40 as leave pay because his contract had been renewed as contended above.
- 5.7 We were urged to allow grounds one, two and seven.
- 5.8 With respect to ground three, counsel relied on the submissions made under ground one and the ***Moses Choonga*** case.
- 5.9 We were urged to intervene and reverse the findings made by the learned Judge that the contract had not been renewed as the same were not made on a proper and well balanced view of the evidence before the court. In support of this submission reliance was placed on the case of ***Attorney-General v Marcus Kampumba Achiume***<sup>3</sup>.
- 5.10 It was contended that had the learned trial Judge made a proper and balanced view of the whole of the evidence on record, he would have come to the inescapable conclusion that the appellant's contract of employment had been renewed and that it could only have been properly terminated in accordance with the said contract. We were urged to allow ground three of the appeal.
- 5.11 As stated earlier, grounds five and six were argued together. The gist of the appellant's submissions with respect to these grounds is that he complied with the provisions of clause 24 of the contract of employment by applying for renewal within the time stipulated in the contract. That he was the respondent's chief executive officer who could not abandon his position. It is submitted that he applied for renewal of his contract to the Minister because the respondent had no Board of Directors in place.



- 5.12 It was submitted that the appellant cannot be blamed for the Minister's want of authority because he was an outsider. Reliance for this submission was placed on the case of ***National Airports Corporation Limited v Reggie Ephraim Zimba and Saviour Konie***<sup>4</sup>. It was submitted that the appellant was an outsider for issues relating to his employment.
- 5.13 In the alternative, it was argued that any ambiguity brought about by the appellant's contract of employment ought to be interpreted in the appellant's favour, because he did not draft the contract. In support of this submission reliance was placed on the case of ***Penelope Chishimba Chipasha Mambwe v Millington Collins Mambwe***<sup>5</sup>.
- 5.14 In light of these submissions, we were urged to allow grounds five and six of the appeal.
- 5.15 On ground eight, the appellant relied on the arguments advanced in respect of grounds one, two, three and seven that his contract of employment was renewed for a further three (3) years and as such he was entitled to all the perquisites of his contract of employment upon renewal of the same.
- 5.16 We were urged to interfere with the findings of the trial court on the basis that the learned trial Judge misapprehended the facts of the case. Reliance for this submission was placed on the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited***<sup>6</sup>. It was contended that the learned trial Judge misapprehended the facts when he declined to award the appellant not only the refund of the sum of K9,388.70 for the costs of service and motor vehicle costs but also other awards that he was entitled to.

5.17 We were urged to allow the appeal in its entirety with costs to the appellant.

5.18 In their oral submissions, Ms Mwambazi and Mr Yeta, learned counsel for the appellant reiterated the arguments and authorities highlighted in their written submissions. They urged us to uphold the appeal.

## **6.0 Respondent's arguments**

6.1 Mr Ngaba, learned counsel for the respondent relied on their heads of argument filed on the 26<sup>th</sup> January, 2021. Grounds one, two, three, five, six and seven are argued as one on the basis that they all stem from the procedure of appointment/renewal of the appellant's contract of service with the respondent. Grounds four and eight were argued separately.

6.2 In response to grounds one, two, three, five, six and seven, it was submitted that the issues for determination are whether there was a renewal of the appellant's employment contract and whether he was entitled to the reliefs sought.

6.3 It was submitted that there was no justification for the appellant to have continued in office when he was aware that as of 14<sup>th</sup> May, 2017 his contract of employment had expired. That the appellant had conceded in his heads of argument that at the time that he was applying for renewal of his contract, the respondent did not have a Board of Directors in place. That the appellant had admitted in cross-examination, at page 152 of the record of appeal, that in the absence of a Board of Directors of the respondent, the Minister had no power to appoint the respondent's Director-General as per *section 15 of the Water Resources Management Act*<sup>1</sup>.



6.4 The respondent argued that the appellant's contract of employment could not have been automatically renewed as it was a mandatory requirement under the appellant's contract of service for an application for renewal of his contract of service to be made to the respondent's Board of Directors. That in the absence of the respondent's Board of Directors, the appellant had no discretion to make the application to any person other than the Board of Directors as this power of appointment had not been delegated as provided in the Act. In support of this submission reference was made to the case of ***The Minister of Information and Broadcasting Services and The Attorney-General v Fanwell Chembo, Amos Chanda and Others***<sup>7</sup> where the Supreme Court was called upon to deal with the fundamental rule of construction of Acts of Parliament and held that:

*"(1) The fundamental rule of interpretation of Acts of parliament is that they ought to be construed according to the words expressed in the Acts themselves. The word construe means, reading the statute in whole and not piecemeal.*

*(2) If words of a statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense."*

6.5 It was submitted that **section 15(1) of the Water Resources Management Act** stipulates the procedure for the appointment of the Director-General of the respondent. That as for a renewal of the contract of employment, Clause 24 of the appellant's contract of employment provides that he was required to apply to the respondent for renewal of the contract three (3) months prior to its expiry. And the respondent was required to

communicate to the employee regarding the status of his renewal of the contract one (1) month prior to the expiration of the contract.

- 6.6 It was submitted that the appellant did not make his application to the Board, but made the same to the Minister, who under **section 15 of the Water Resources Management Act** has no authority to appoint a Director-General. That the appellant's application and the Minister's reply were illegal, null and void as they did not conform to the law. In support of this submission reliance was placed on the case of **Rating Valuation Consortium & D.W. Zyambo & Associates (suing as a firm) v The Lusaka City Council and the Zambia National Tender Board**<sup>8</sup> where the Supreme Court considered **section 3 of the Rating Act**<sup>2</sup> which provides that:

*"The rating authority shall, subject to the approval of the Minister, appoint a Valuation Surveyor, who shall be responsible for the preparation of a main roll or supplementary valuation roll for the rating authority."*

- 6.7 That the Supreme Court held that on the true construction of **section 3 of the Rating Act**, it must be concluded that the approval of the Minister was required for the appointment of a surveyor. That the Supreme Court also held that the non-observance of this provision renders any of the purported contracts, which result from non-observance, illegal, null and void.
- 6.8 It was submitted that *in casu* the wording of the statute does not provide for the application to be made to any alternative body or person. Therefore, the purported appointment by the Minister was illegal, null and



void for non-observance of the statutory provisions once the appellant's contract had expired. Reliance for this submission was placed on the case of ***Kansanshi Mining Plc v Zambia Revenue Authority***<sup>9</sup>. It was submitted that whilst this case relates to the commencement of a matter, the salient findings of the Court are applicable *in casu*. That in the instant case, the wording of ***section 15(1) of the Water Resources Management Act*** does not provide any discretion where a person can make an application for renewal of a contract once the same has expired.

- 6.9 On the argument relating to the absence of a Board of Directors at the time of renewal, it was submitted that this did not justify the submission of the application to the Minister, because the record shows that the Board actually proceeded to consider the appellant's application once it was constituted in February 2018. It was therefore submitted that no legitimate contract was entered into between the Minister and the appellant owing to the fact that the statutory requirement was not met for the renewal of the appellant's contract of employment.
- 6.10 In response to the argument that the appellant could not be blamed for the Minister's want of authority, Counsel argued that in the event that the appellant was aggrieved or indeed suffered any damages by the Minister's 'want of authority,' then he ought to have sought relief against the Minister's action by taking out an action against the appropriate party and not the respondent which was not the decision maker. It was submitted that the instant case can be distinguished from that of ***National Airports Corporation Limited v Reggie Ephraim Zimba and Saviour Konie*** *supra* on

that fact. It was submitted that the learned trial Judge was therefore on firm ground when he found that the non-existence of a Board of Directors does not entitle the appellant to automatic renewal of his contract of service. That the said contract cannot be deemed to have been renewed per the provisions of **section 28 of the Employment Act<sup>2</sup>**.

- 6.11 The respondent submitted that the appellant cannot claim estoppel against a statute. In support of this submission reliance was placed on the case of ***The Attorney-General v E.B. Jones Machinists Limited<sup>10</sup>*** where the Supreme Court held as follows:

*"The doctrine of estoppel may not be invoked to render valid a transaction which the legislature has on grounds of general public policy enacted, is to be invalid, or to give the court a jurisdiction which is denied to it by statute or to oust the court's statutory jurisdiction under an enactment which precludes the parties from contracting out of its provisions.*

*Where a statute enacted for the benefit of a section of the public imposes a duty of a positive kind, the person charged with the performance of the duty cannot by estoppel be prevented from exercising his statutory powers."*

- 6.12 It was submitted that *in casu* the doctrine of estoppel cannot be invoked to render the renewal of the appellant's contract valid against the specific statutory provisions.
- 6.13 On the appellant's contention that there was wrongful or unlawful termination of his contract of employment, it was submitted that the appellant's contract of employment came to an end by effluxion of time.



- 6.14 It was submitted that the appellant's contract of employment was never renewed on account of a mandatory provision of the law having not been complied with. Therefore, the respondent prayed that we dismiss grounds one, two, three, five, six and seven as they lack merit.
- 6.15 In response to ground four, it was submitted that the ground is misconceived as the question for determination by the court below was whether or not the appellant was rightly removed from the respondent's payroll before his gratuity was paid. It was submitted that the lower court was on firm ground based on the case of ***Lubinda Ngala and Jason Chulu v Anti-Corruption Commission***<sup>11</sup> to the effect that gratuity in the case of the appellant did not amount to a pension benefit simply because the appellant did not exit by way of reaching the prescribed age of retirement or opting for early retirement.
- 6.16 To buttress this position, reliance was placed on the case of ***Owen Mayapi and 4 others v The Attorney-General***<sup>12</sup> where the Constitutional Court held as follows:

*"We briefly wish to reiterate our observations in the Lubinda Ngala and Jason Chulu v Anti-Corruption Commission case that pension benefits are triggered by retirement due to age or other circumstances. We did not venture into defining the other circumstances. It is apparent that the circumstances have to be akin to retirement."*

- 6.17 On the basis of these authorities, it was argued that the appellant could not be entitled to have been maintained on the payroll as his exit from the respondent was not by way of retirement or in any case akin to retirement.

- 6.18 We were therefore urged to dismiss ground four of the appeal for lack of merit.
- 6.19 As regards ground eight, it was submitted that the trial court was on firm ground when it held that the appellant was not entitled to the sum of K9,338.70 as a refund of costs of motor vehicle service. That all refund claims that the appellant was claiming were in respect of service works carried out on the motor vehicle after he had left the respondent's employ. As such, the respondent had no responsibility to meet the costs of the motor vehicle repair as the appellant was no longer serving it.
- 6.20 It was submitted that the lower court was on firm ground on this finding of fact and we were urged not to upset it and to dismiss this ground of appeal.
- 6.21 In conclusion, the respondent contended that the appellant was not entitled to any of the reliefs sought and prayed that we dismiss the appeal in its entirety, with costs.

## **7.0 Appellant's submissions in reply**

- 7.1 In response to the respondents' submissions, the appellant relied on his arguments in reply filed on 16<sup>th</sup> February, 2021.
- 7.2 Responding to grounds one, two, three, five, six and seven, it was submitted that the issue in this appeal was not about the Director-General's appointment, but rather renewal of the appellant's contract of employment. We were reminded about the High Court Industrial and



Labour Division's mandate to do substantial justice in accordance with ***section 85(5) of the Industrial and Labour Relations Act***<sup>3</sup>.

- 7.3 Counsel reiterated their earlier position and maintained that the appellant's contract of employment did not terminate due to effluxion of time on 14<sup>th</sup> May, 2017 but rather was automatically renewed as provided for in ***section 28 (c) (1) and (2) of the Employment Act***. In support of this submission, we were referred to the case of ***Nayanda and others v Plessey Zambia Limited***<sup>13</sup>, a lower court's decision to the effect that a person on a fixed term contract is presumed by law to be on a new contract if he continues working without a new contract.
- 7.4 It was submitted that effluxion of time could not come into play when there is embedded in a contract, mandatory terms, prepared by the respondent that expression for renewal shall be made in writing to the Board.
- 7.5 We were also referred to the case of ***Holmes Limited v Buildwell Construction Company Limited***<sup>14</sup> where the Supreme Court held:
- "Where parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally allowed to add, vary, subtract from or contradict the terms of a written contract."***
- 7.6 It was submitted that the appellant adhered to the provisions of clause 24 of the employment contract by applying for renewal of his contract of employment to the Minister responsible for superintending the respondent due to the fact that there was no Board in place at the time.
- 7.7 It was further reiterated that any default arising from the contract of employment between the appellant and the respondent could only be read against its drafter, that is, the respondent.

- 7.8 It was submitted that a Board was appointed after the matters giving rise to this appeal had passed. The new Board ordered that the appellant be paid his dues but the court below disregarded this evidence.
- 7.9 On the issue of wrongful and lawful termination, it was submitted that the appellant led and presented evidence on record that the Permanent Secretary in the Ministry of Water Development, Sanitation and Environmental Protection instructed him not to report for work following the expiry of his contract. It was submitted that the Permanent Secretary could not legally assume the responsibilities of the Board of Directors. We were referred to the case of **Freeman v Cooke**<sup>15</sup> where it was held that:
- “Where one by his word or conduct, with the intention that the belief which is induced should be acted upon, causes another to believe in the existence of a certain state of things and induces him to act on that belief, the former is precluded from averring against the latter a different state of things as existing at that time.”*
- 7.10 It was submitted that the appellant complied with clause 24 of his contract of employment by writing to the Minister in the absence of a Board. In support of this submission reliance was placed on the case of **Jacques Chisha Mwewa v Attorney-General**<sup>16</sup> in which the lower court held a respondent was barred by the doctrine of estoppel from disputing or denying extension of the appellant’s contract by conduct, as evidenced by payment of dues and continuing to carry on services.
- 7.11 It was submitted that in the instant case, the respondent in expressing to pay the appellant his June 2017 salary as well as the sum of K5,906.25 for services rendered from 15<sup>th</sup> to 31<sup>st</sup> May, 2017, an inference could be raised



by that action, that the appellant was still recognised as the respondent's employee.

- 7.12 On these submissions, we were urged to uphold grounds one, two, three, five, six, and seven of the appeal.
- 7.13 In response to ground four, the appellant relied on his earlier submissions. It was submitted that the appellant ought to have been retained on the payroll until gratuity was paid and until his renewed contract was established.
- 7.14 In response to ground eight, it was contended that the court below misapprehended the facts and failed to appreciate that the respondent's failure to ensure that a Board was in place to determine the contract of the appellant, led to his contract being impliedly renewed as per the principle in the ***Moses Choonga*** case.
- 7.15 It was submitted that the trial court accepted that the appellant rendered a service to the respondent, which entitled him to a renewed contract, as he would not serve devoid of terms and conditions. That the only conditions under which the appellant served were those embedded in the expired but renewed contract of employment.
- 7.16 It was contended that the court misapprehended the facts and this court ought to upset the lower court's findings in accordance with the principles enunciated in the ***Wilson Masauso Zulu*** case.
- 7.17 Ultimately, it was the appellant's contention that the respondent is not entitled to costs. In support of this position reliance was placed on ***Rule 44(1) of the Industrial and Labour Relations Act*** and the cases of ***Zambia Union of Financial Institutions and Allied Workers v Barclays Bank Zambia***

*PLC*<sup>17</sup> and *Engen Petroleum Zambia Limited v Willis Muhanga and Jeromy Lumba*<sup>18</sup>.

7.18 The case of *Zambia Telecommunications Company Limited v Mirriam Shabwanga and 5 others*<sup>19</sup> was cited where the Supreme Court guided that Rule 44(1) restricts the discretion of the IRC in the award of costs to instances specified in the rule. It was argued that the appellant cannot be said to be guilty of perpetrating any unreasonable delay. That he had not made any improper, vexatious or unnecessary steps in this matter.

7.19 In turn, the appellant submitted that having shown that the appeal has merit, he prayed for costs.

#### 8.0 The decision of the Court

8.1 We have carefully considered the arguments of the parties, the record of appeal including the impugned judgment. We are grateful for the detailed submissions made by counsel for the parties. As we see it from the onset, the main issue for determination in this appeal is whether the appellant's contract of employment had been renewed after it expired on 14<sup>th</sup> May, 2017. This issue is premised on both mixed points of law and facts which are intertwined. To this end, grounds one, two, three, five, six and seven shall be dealt with together as they are interrelated. Ground eight shall be dealt with separately. Grounds four and nine have not been argued by the appellant. The consequence of which, they are considered to have been abandoned.

8.2 It is not in dispute on the facts of this case that the appellant applied to renew his contract of employment to the Minister, and not the Water



Resources Management Authority. He did so at a time when the Authority did not have a Board of Directors. To consider whether the appellant's contract was renewed, we refer to **section 15 (1) of the Water Resources Management Act**. It provides as follows:

*"15. (1) The Board shall appoint, on such terms and conditions as the Board may determine, a Director-General who shall be the chief executive officer of the Authority."*

8.3 Further, the composition of the Board is spelt out in **section 11 of the Act**. It states as follows:

*"11. (1) There is hereby constituted a Board for the Authority which shall consist of —*

*(a) four persons with expertise in any of the following:*

*(i) environmental management;*

*(ii) hydropower;*

*(iii) engineering; and*

*(iv) commerce and industry;*

*(b) one person each from the following groups:*

*(i) farmers;*

*(ii) traditional authorities; and*

*(iii) consumers;*

*(c) a representative of the Attorney-General;*

*(d) one representative each of the Ministries responsible for water resources, local government, agriculture and the environment;*

*(e) the Commissioner of Lands; and*

*(f) one other person."*

8.4 From these provisions of the law, it is plain that the power to appoint a Director-General for the respondent is vested in its Board and not the Minister. Further, that the composition of the Board does not include the Minister.

8.5 It was argued, on behalf of the appellant, that in the absence of a Board of Directors, the appellant applied to the Minister to have his contract of service renewed. That he continued to work notwithstanding the Permanent Secretary's letter dated 12<sup>th</sup> May, 2017 directing him to stop work because the Permanent Secretary had no authority to so direct. In support of this argument, reliance was placed on **section 28C (1) and (2) of the Employment Act**. It provides as follows:

*"28C. (1) Subject to subsection (2), an employee's fixed-term contract may be renewed for subsequent terms, except that the cumulative duration of the successive fixed term contracts of employment with an employer shall be as prescribed.*

*(2) Where an employee who is engaged on a fixed term contract of service continues in employment with the same employer after the expiration of the prescribed cumulative period, the contract of service shall be deemed to be a permanent contract"*

8.6 The appellant went on to rely on the renewal clause contained in the contract of employment found at pages 36 to 44 of the record of appeal. The said clause 24 provides as follows:

***"RENEWAL OF CONTRACT***

*The Employee will be required to apply to the Authority for renewal of the contract three (3) months prior to the expiry of this Contract. While*



*the Employer shall be required to communicate to the Employee regarding the status of his renewal of the contract one (1) month prior to the expiration of this contract."*

- 8.7 Relying on these provisions, it was submitted that the renewal clause is couched in mandatory terms and the lower court ought to have given them their intended effect.
- 8.8 Having considered the evidence before him, the learned trial Judge relied on the English case of **Powell v Lee**<sup>20</sup>. In that case the plaintiff, Powell, applied for a job as headmaster and the school managers decided to appoint him. One of them, acting without authority, informed Powell that he had been appointed. The managers rescinded their decision to appoint him. The ruling of the court established that acceptance of an offer must be communicated to the offeror by the offeree himself or authorised agent.
- 8.9 In the present case, page J13 of the judgment (page 21 of the record of appeal), the learned Judge held as follows:

*"Similarly, in casu, despite the circumstances conspiring against him, I hold the firm view that the Complainant made the application for renewal to the wrong person. The actions of the Minister to renew the Complainant's employment contract were illegal and irregular. Thus, they did not amount to renewal as admitted in letter of 22<sup>nd</sup> May, 2017. I must also state that the non-existence of a Board of Directors does not also entitle the Complainant to automatic renewal of his employment contract. The Complainant's employment contract can therefore not be deemed to have been renewed."*

- 8.10 The learned Judge found that there was no compliance with the renewal clause by both parties. He accepted that this was occasioned by the respondent not having a Board of Directors at the material time.

8.11 Our view is that the learned Judge's findings were not farfetched after analysing the law and the evidence before him. It is not in dispute that the Water Resources Management Authority is a body corporate with perpetual succession, established by virtue of **section 7 of the Water Resources Management Act**. Whilst the Minister is responsible for appointing a Board of Directors by virtue of **section 11**, we note that the Act does not avail the Minister any delegated power to act in the absence of a Board of Directors. The application to renew the contract of employment was made by the appellant to the Minister. Page 75 of the record of appeal refers. In turn, the Minister unilaterally renewed the appellant's contract. (Page 47 of the record of appeal refers). This was contrary to the provisions of **section 15 of the Water Resources Management Act**, which explicitly provides that the Director-General of the authority shall be appointed by the Board of Directors on such terms and conditions as the Board may determine.

8.12 The Minister acted *ultra vires* the provisions of the law. When this was brought to his attention, he promptly revoked his letter of appointment. Page 49 of the record of appeal refers. Further, by virtue of **section 3(3)** of the **Statutory Functions Act**<sup>4</sup> the President is vested with statutory functions where the law does not state the person vested with statutory functions.

8.13 The said Act provides:

**“(3) The person for the time being vested with statutory functions shall be-**



*(c) If such provision does not confer or impose such functions on an identified person and the President has made no allocation or transfer, the President."*

8.14 It is clear from the evidence on record that the Minister did not possess the statutory power to act on behalf of the Board of Directors. That clause 24 of the Contract of Employment had not been complied with.

8.15 We accept the respondents' submissions that the appointment of a Director-General for the respondent and the renewal of his contract are guided by statutory provisions, and as such the appellant's contract of service could not be automatically renewed by virtue of **section 28 of the Employment Act** *supra*. Since both **section 15 of the Water Resources Management Act** and clause 24 of the appellant's contract of employment were not complied with, the contract came to an end by effluxion of time. We find no merit in grounds one, two, three, five, six and seven of the appeal. They are accordingly dismissed.

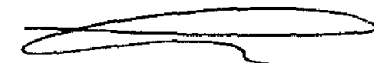
8.16 Turning to ground eight of the appeal on the claim for costs of service of the appellant's personal-to-holder motor vehicle, the receipts at pages 101 to 109 of the record of appeal show that the motor vehicle was serviced between 2<sup>nd</sup> August, 2017 and 7<sup>th</sup> November, 2017. This fact is not in dispute. A perusal of the record of appeal reveals at page 87, an offer made by the respondent to the appellant to purchase his personal-to-holder motor vehicle, Toyota Landcruiser GX V8, Registration Number ALZ 3126. The offer to purchase the vehicle was made on 20<sup>th</sup> June, 2018. This means that until the time that the motor vehicle was formally purchased by the

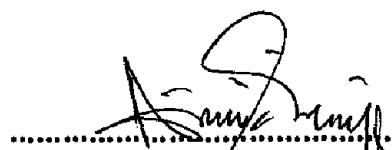
appellant, it remained the respondent's property for all intents and purposes because title had not passed to the appellant.

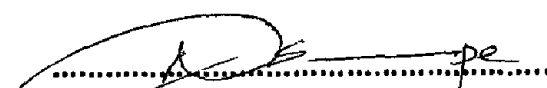
8.17 Had the learned trial Judge considered the evidence on record as to when the offer to purchase was made to the appellant, he would have come to a different decision. There is no evidence on record that the appellant was not authorized to repair his personal to holder motor vehicle. We accordingly reverse the finding that he is not entitled to a refund of the cost of service as the same was made without regard to the fact that title of the vehicle had not passed onto the appellant. Thus the appellant is entitled to the sum of K9,338 .70. We find merit in ground eight and allow it.

## 9.0 Conclusion

9.1 In conclusion, we find no merit in this appeal. However, we allow the claim for a refund of the cost of motor vehicle service amounting to K9,338.70 plus interest at six (6) per centum per annum from the date judgment in the lower court (9<sup>th</sup> September, 2020) to the date of settlement. Pursuant to rule 44 of the *Industrial Relations Rules*<sup>2</sup> we order each party to bear own costs.

  
.....  
M.M. Kondolo, SC  
COURT OF APPEAL JUDGE

  
.....  
D.L.Y. Sichinga, SC  
COURT OF APPEAL JUDGE

  
.....  
N.A. Sharpe-Phiri  
COURT OF APPEAL JUDGE