

BETWEEN:

CHARITY TEMBO

PLAINTIFF

AND

CHIBULUMA MINES PLC

DEFENDANT

Before the Honourable Mrs. Justice R.M.C. Kaoma in Open Court at Kitwe this 26th day of October, 2011

For the Plaintiff: Mr. D. Mazumba – Douglas & Partners

For the Defendant: Mr. E.C. Banda, SC – MNB Legal Practitioners

J U D G M E N T

Cases referred to:

1. *Masauso Ndhlovu v Avondale Housing Project Limited (1982) ZR 175*
2. *Anthony Khetani Phiri v Workers Compensation Fund Control Board (2003) ZR 9 at page 14*

Other works referred to:

1. *Charlesworth's Business Law (16th Edition) at page 526*
2. *Commercial Law in Zambia by Mumba Malila at page 396*
3. *Termination of Employment-Understanding the Process, Maimunah Aminuddin 2010, The Malaysian Current Law Journal at pages 52, 56 and 106*

By writ of summons issued on 17th July 2007, the plaintiff, Charity Tembo claims against the defendant, Chibuluma Mines Plc, the following reliefs:

- (i) Payment of terminal benefits for the period 1998 to 2006, the period in which the plaintiff was an employee of the defendant company
- (ii) Payment of terminal benefits from Zambia Consolidated Copper Mines which benefits have been wrongly withheld by the defendants
- (iii) Interest on the amount due at current bank lending rate and costs.

The details of the plaintiff's claims are contained in the statement of claim at pages 3 to 5 of the plaintiff's Bundle of Pleadings.

In the amended defence at pages 9 to 11 of the same Bundle and particularly at paras 10 to 12, the defendant avers in respect of para 9(i) of the statement of claim that as the plaintiff resigned from the defendant's employment no terminal benefits are due or payable to her; in respect of 9(ii) that the service benefits in relation to Zambia Consolidated Copper Mines were settled prior to the action or receipt of process; and denies that there is any interest due to the plaintiff.

The plaintiff has testified on her own behalf. In brief her evidence is that she worked for Zambia Consolidated Copper Mines Limited (ZCCM) for seventeen (17) years after which Chibuluma Mines Plc took over. She said that houses were sold to them and that when the defendant took over there were benefits accrued from ZCCM which they were told the defendant would keep in dollars and that she signed at page 13, the letter of transfer at pages 11 to 12 of the defendant's Bundle of Documents.

She testified that on 9th November 2005, the defendant's General Manager went to see them and told them that there were many things he had gone for, but the most important was that he wanted to reduce on the number of nurses and had formed a committee of five members who would see that some nurses were retrenched; that the people who were willing to go should go and would be paid immediately and letters written to them; and that he asked those who wanted to go to show their hands, and she did so. She said that the minutes of the meeting at pages 6 and 7 of the same Bundle were recorded by Mrs. Moyo, the secretary for the Chief Medical Officer at the hospital. She said following that, she started applying to other places and applied to the Chief Medical Officer, by the letter at page 1 of her Bundle of Documents, for voluntary retrenchment.

She testified that she was instructed to take the letter to Mr. Mumphansha, the Human Resources Manager who told her that the General Manager made a mistake because people were waiting for ZCCM money and asked her to go back the following week, but when she went back, he told her that the General Manager was just joking and that he would send them to Dr. Kawesha, the Chief Medical Officer. She said that she was told to sign forms and she received a response from Dr. Kawesha.

She testified that the Human Resources Manager wrote to the Chief Medical Officer that he should have a replacement before she leaves, but the defendant wrote to her that they were not going to allow her to go on voluntary retrenchment. She said that she went back to the Human Resources Manager in the presence of union members and was told that there was confusion between the Human Resources Manager and the Chief Medical Officer. She said that she was working whilst she was pursuing a place to go and eventually got a place at Chambishi Metals and then went to see the General Manager again. She said that he called a meeting with Mr. Mumpansha and union members and told her that she could not get benefits because she was joining Chambishi Metals, but one of the union Vice-Presidents told him that she should be paid and that if they had stopped releasing people, they should write another letter.

She testified that she was not paid her benefits at the time she was commencing the action and that she was told that they would pay her after one year. She said that they sent her a cheque after her husband died which she refused because they had taken long and that her friends who stopped work were paid the same year. She reiterated her claims as per writ and statement of claim.

In cross-examination by Mr. Banda, SC, she said that her first claim is for payment of terminal benefits for the period 1998 to 2007 the period she worked for the defendant and that the year 2006 which she gave was a mistake; and that the second claim is for payment of terminal benefits from ZCCM which have been wrongly withheld by the defendant. She said that at the time she commenced the proceedings on 17th July 2007 she had not been paid benefits from ZCCM; that her friends were paid on 2nd March 2006 when she was only paid in September 2007. When shown a copy of a cheque at page 36 of the defendant's Bundle of Documents, she said that she knew about the cheque from her lawyers, Douglas and Partners and that the date of the cheque 02.03.2007 was earlier than the date of issuance of the writ of summons. She said that she did not bank the cheque. When referred to the letter from her lawyers to the defendant's lawyers at page 35 of the same Bundle, she said she understands that when her lawyers got the cheque the dates had already passed.

She said that the cheque was never replaced, but she admitted that the letter at page 38 of the same Bundle dated 22nd October 2007 is addressed to Douglas and Partners by MNB and is about a replacement cheque. She denied knowledge of the second cheque. She said that she has not received the money for ZCCM dues and that she is surprised because she rejected the cheque as it was late and it had no interest. She said that the defendant kept the cheque for one year six months.

Further in cross-examination she said that she worked with the defendant from 1997 to 2006; that she put in a letter based on the General Manager's words; and that her mode of exit was retrenchment. She admitted that there is no letter of redundancy by the defendant and that the letter at page 9 of the defendant's Bundle dated 8th March 2006 is her letter of resignation. She said that her mode of exit from Chibuluma Mines was forced resignation which followed her unsuccessful application for voluntary retrenchment. When shown clause 3.27 at page 31 of the same Bundle of Documents, she agreed that the clause is on voluntary displacement and that management had discretion to determine whether or not an employee should be displaced.

When shown her declaration for voluntary redundancy at page 4 of the same Bundle of Documents, she said that both the Section Head and Head of Department wrote under section C that she may be released with replacement and that there are comments by the Manager Human Resources under section D. She said that following the failure of voluntary redundancy she was forced to resign and that at that time she had not started working at Chambishi Metals. She said that she had only applied and attended interviews. At the same time she admitted that she had already sought employment.

When shown the minutes at page 10 of the defendant's Bundle of Documents, she admitted attending a meeting on 9th March 2006 and that her name appears at number 3 under Nursing Staff and that the topic was applications for redundancies. When referred to para 2.0 under Manager HR's Message, she admitted that she was one of the four nurses who had been given leave and one of the four nurses referred to by Mr. Kasonde. She said that she could still seriously claim that she was forced to resign.

She further stated that the General Manager had said he would not pay her benefits because she had gone to a rival company. She admitted that the meeting was minuted. When shown the minutes at page 15 of the defendant's Bundle, she said that the meeting was held after she had resigned and that the minutes were written by the Human Resources Manager and could be tailored. She said that the minutes she referred to were written by Mrs. Moyo. She admitted that her name appears on the list of nursing staff, but insisted that she never read the minutes and that the person who wrote the minutes may have removed or not written what the General Manager said. She admitted that the General Manager made the remarks in the first three paras at page 16 and the remarks in the first para at page 18. She admitted also that effort was made by the General Manager to withdraw her resignation and that she continued in her employment with Chambishi Metals.

She admitted that she was paid the ZCCM money because her lawyer kept the cheque. She said that she walked away from Chibuluma without being paid anything, but admitted that the document at page 22 of the defendant's Bundle is her pay statement for March 2006 and that she received her salary including her accrued leave days and that her net pay was K4,354,500.00. She admitted that the document at page 21 of the same Bundle shows that she forfeited one month's pay for leaving without notice and that she was paid as indicated in the two documents. She admitted that the cheque requisition for revised terminal benefits, pay last shift 8th March 2006, at page 33 and document 34 on the same Bundle show that she was paid. She said that she expected to be paid for the 9 years she worked for Chibuluma and interest. She said that the 9 years is not in the conditions of service, but she worked for it. She agreed that the money accrued under ZCCM was kept in dollars and converted on the date of payment.

In re-examination she said that the Matron advised her to fill in the form for voluntary separation immediately and that all was done pursuant to the General Manager's words. She said that her last shift was in January 2006; that the first cheque was issued on 2nd March 2007; and that she had gone to the defendant to check for the cheque, but Mr. Mumpansha refused to release it on the ground that the matter was in court.

She said that she went to pick the cheque in September 2007, but refused it because the defendant kept it for 1 year 6 months when there was no requirement to be paid after one year and that her lawyers returned the cheque because it was stale. She said according to Mr. Shamutete, no matter the mode of exit, one had to be paid immediately and that the letter at page 38 enclosing the second cheque is dated 22nd October 2007. She reiterated that with regard to terminal benefits for Chibuluma Mines, the General Manager had promised that whoever wanted to go would be paid without difficulty.

The defendant has called one witness Mr. Michael Munyeke Mumpansha, the Human Resources Manager, a position he has held for seven (7) years. He testified that his duties involve planning, organising and controlling human resources including man power planning or recruitment and maintaining strength of employees to the required levels as per budget and also includes industrial or employee relations, interpretation of conditions of service, maintenance of discipline and employee welfare. He testified that the plaintiff was employed as a nurse in the main hospital and must have been attached to a ward. He said that Chibuluma Mine was the first or second former ZCCM unit to be privatised because ZCCM was not performing well financially and that the investor that bought the unit undertook to continue to employ workers it was inheriting under the existing conditions. He confirmed also that ZCCM was selling its housing units to its employees; that the employees were offered letters of sale; and that the value of the houses would be deducted from the calculated value of the redundancy benefits.

He said that the balance should have been paid to the employees, but in the case of the defendant, it was agreed that it would pay terminal benefits not immediately, but at the time of termination of employment regardless of the mode of exit. He said that money was not given to Chibuluma by ZCCM to hold for employees, but Chibuluma would have to generate the money from its business and then pay off the balances. He said that even when employment was terminated money would not be paid immediately, but 12 months later so as to protect the investor from terminations and employees calling for their money which would have led to the collapse of the company through paying huge terminal benefits that it had taken over from ZCCM which had failed to pay the benefits.

He testified that when the plaintiff resigned, she was paid the money that the defendant inherited from ZCCM and held in trust, twelve (12) months later through her lawyers Douglas and Partners by the cheque in the sum of K24,459,028.67 at page 36 of the defendant's Bundle of Documents. He said that the plaintiff did not want to collect the cheque initially and that due to time lapse the cheque was cancelled and that with advice from their lawyers they raised another cheque payable to the plaintiff through her lawyers for the same amount of money as shown by the cheque requisition at page 37 of the same Bundle. He said that the cheque was enclosed in the letter at page 38 and that the benefits for ZCCM service were paid through the plaintiff's lawyers.

He testified further that on the claim for terminal benefits for the period 1998 to 2006, the plaintiff's mode of exit was resignation and that when an employee terminates employment, there are no benefits payable other than the accrued wages such as leave days, number of days or shifts worked in that month and premiums such as overtime and Christmas bonus. He said that if an employee has served for 10 years, by collective agreement, they are entitled to a repatriation allowance and that this is what was paid to the plaintiff and that other payments over and above this should be claimed from the pension scheme which is voluntary and managed independently by African Life Services. He said that the pay statement for March 2006 at page 22 of the defendant's Bundle of Documents constitutes the payments made to the plaintiff including housing allowance, African Life Assurance, personal levy and NAPSA and that at page 26 of the same Bundle is a cheque requisition in respect of repatriation which was also paid.

He said that the plaintiff was seeking to be paid redundancy benefits, so the letter at page 25 of the same Bundle dated 19th June 2006, was a response to her letter and that they thought it prudent to put it on record that what she was entitled to was what she had been paid; that she was not entitled to redundancy payments; and that this was a summation of meetings held to try and persuade her not to resign as she would forfeit some benefits. He said that he, union officials and other management officials and supervisors were involved and that the General Manager had the last meeting with her and that her resignation was in writing as seen at page 9 of the same Bundle.

He testified further that at page 15 of the same Bundle of Documents are minutes of the meeting the General Manager held on 10th March 2006 with four nurses that were resigning from the company, two days after the resignation letters were received. He said that management did not want to lose the nurses because their services were still required and they did not want them to leave the company in that manner which would result in them not accruing any benefits at all. He said that the position was clarified in the letter at page 19 of the same Bundle dated 16th March 2006.

In cross-examination, he said that the terminal benefits under ZCCM were 28 months pay plus one month's pay for each year of service. He said that the letter at pages 11 and 12 of the plaintiff's Bundle of Documents was signed by CDS Needham, Director of Metorex (Pty) Limited at the time of transfer of the plaintiff to the defendant and was also signed by the plaintiff and that by para 2 of the said letter, terms and conditions of service were to be no less favourable than those on which the plaintiff was employed by ZCCM. He admitted that in para 4 the said letter indicated that benefits would become payable when the plaintiff left employment with Chibuluma Mines and not after 12 months. He stated that there were other agreements to that effect.

He admitted that from the letter from their lawyers to the plaintiff's lawyers at page 18 of the same Bundle of Documents, they received the letter of demand at page 10 of that Bundle, but he does not recall the plaintiff going to his office to pick the cheque or refusing to release the cheque on the ground that the matter was in court. He said he may have told her that the cheque would be paid through the lawyers. He said that the cheque for K24,459,028.67 at page 36 of the defendant's Bundle was prepared on 2nd March 2007 on the cheque requisition at page 33 and was sent to the plaintiff's lawyers by the letter dated 18th July 2007 at page 1 of the plaintiff's Supplementary Bundle of Documents. He does not recall when it was given to their lawyers to be forwarded to the plaintiff's lawyers, but agreed that the letter at page 2 of the same Bundle is dated 29th May 2007 and that two cheques were issued in respect of the same amount on 2nd March and 3rd October 2007; the first cheque was tendered on 18th July and received by Douglas and Partners on 19th July 2007 while the writ was issued on 17th July 2007.

He admitted that the plaintiff's resignation letter at page 9 of the defendant's Bundle is dated 8th March 2006; that they paid the cheque on 19th July 2007; and that the conditions of transfer of employment stipulated that the payment would be made immediately upon leaving employment. He said that he does not recollect that they gave a document to their lawyers to show that benefits would be paid after 12 months and that the document though not in their Bundle could be produced. He denied that there was a circular that those who wanted to go on voluntary displacement could apply or that there was a meeting called to address the issue of voluntary redundancy.

He said that there was a meeting by the General Manager and other management staff with nursing staff to review recommendations that were put forward by a committee of nurses and accountant on how the hospital could reduce costs on overtime which included reconfiguring the shift arrangement to 8 hours and curtail the excess hours and that there was no proposal on reduction of labour force. He stated that the minutes at page 6 of the plaintiff's Bundle of Documents were not taken by an appointed secretary, but admitted that a meeting took place. When shown the declaration for voluntary redundancy at page 4 of the defendant's Bundle of Documents, he said that Dr. Kawesha signed under section C and accepted the plaintiff's application with replacement. He said that in redundancy, the position goes with the employee.

In re-examination, he reiterated that the plaintiff's mode of exit was resignation and that her application for voluntary displacement did not change the mode of exit. He said that the document at page 4 was written by the plaintiff on 21st February 2006 while the letter of resignation is dated 8th March 2006 and that the acceptance by the Head of Department was not unequivocal. He said that in his comments under section D, he explained when redundancy was applicable and that the plaintiff was not the only one, that it included others, including Mrs. Moyo the author of the controversial minutes. He stated that the rationale for paying ZCCM benefits after 12 months was based on an agreement between management and the union; that the balance of ZCCM benefits were held in trust in dollar; and that when the employee leaves employment, the dollar rate applicable is the current rate which was meant to protect the employee.

He said that the letter of transfer of employment at page 11 of the plaintiff's Bundle does not suggest that the employee would leave with the cheque on the date of exit and that it was a commitment by the investor that it would pay the benefits which were pegged to the dollar, which made the workers happy. He said that the resignation was either 7th or 8th March 2006 while the cheque was issued on 2nd March 2007 which was almost one year and in conformity with their practice. This in brief is the evidence by the parties.

I have received written submissions from counsel for both parties. Mr. Mazumba has submitted with regard to the plaintiff's first claim that a meeting was held, to the effect that those who wanted to be on voluntary displacement could do so, and inform management, as captured in the minutes for the meeting at page 6 of the plaintiff's Bundle of Documents. He has submitted that the plaintiff completed the form at page 4 of the defendant's Bundle; that her action was in accordance with what the defendant had assured her and many other employees; and that she should be entitled to the terminal benefits for the period she worked for the defendant. With regard to the second claim for the terminal benefits for ZCCM, Mr. Mazumba's contention in short is that at the time of commencement of this action the defendant had not paid the sum of K24,459,028.62 and that interest and costs be ordered on the said amount until the date when the defendant paid the said amount on 23rd October 2007.

On the other hand, Mr. Banda, SC has submitted that there are only two issues for determination, first whether the plaintiff has not been paid her service dues arising from her employment with ZCCM Limited as claimed; and second whether the plaintiff is due any benefits in respect of her service for the period 1998 to 2006. State Counsel submits and rightly so, that the onus is on the plaintiff to prove her entitlement to both these items of claim. He has referred me to *Masauso Ndhlovu v Avondale Housing Project Limited (1)* where the Supreme Court stated as follows:

“...where a plaintiff alleges that he has been wrongfully or unfairly terminated as indeed in any other cases where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent's case.”

As regards the claim for ZCCM benefits, State Counsel submits that the uncontroverted evidence on record is that these have been paid in the sum of K24,000,000.00. He says that a cheque was written in favour of the plaintiff on 2nd March 2007 in settlement of the plaintiff's dues as evidenced by documents 33 and 34 on the defendant's Bundle; that this cheque had to be replaced as it had gone stale while in the custody of the plaintiff's advocates; and that the cheque dated 4th October was issued and served on the plaintiff's advocates as appears in documents 37 and 38 of the same Bundle.

State Counsel further submits that the cheque was payable to Douglas and Partners as advocates for the plaintiff, but the plaintiff is unaware of this cheque and that if the cheque was not paid over by the plaintiff's advocates the same should be held or construed against the plaintiff and her advocates and not the defendant. He relies on Charlesworth's Business Law (16th Edition) at page 526 where the learned authors state as follows:

"The holder of a cheque must present it for payment within a reasonable time of its issue, and failure to do this will discharge the drawer to the extent of any damage he may suffer from the delay."

He also relies on Commercial Law in Zambia by Mumba Malila at page 396 where the author states as follows:

"A bill must be duly presented for payment by the holder failure of which discharges the drawer and endorsers."

On the claim for benefits for the period 1998 to 2006, he says this must also be dismissed as it has not been proved. He says it is trite that the conditions of service are the basis of the contract of employment and determines what is payable as an exit package and that the plaintiff has failed to demonstrate her entitlement to the benefits claimed. He says that DW1 stated with utmost certainty that given that the mode of exit was resignation, the plaintiff was not due any benefits other than accrued leave days and salary etc; that her resignation meant that she forfeited one month's salary; and that document 22 the final pay statement clearly shows that all her entitlements were paid.

State Counsel submits further that there is documentary evidence in both the plaintiff's and defendant's Bundles of Documents lending to show that the consequences of resigning were brought to the plaintiff's attention and that these included loss of benefits and that among these are the minutes appearing at page 15 of the defendant's Bundle and documents 19 and 25 which show the extent to which the defendant's officials went to dissuade the plaintiff from resigning so as to avoid losing benefits.

He further relies on the decision and the effect of the judgment in *Anthony Khetani Phiri v Workers Compensation Fund Control Board (2)* where he says the Supreme Court upheld the arguments by Mrs. J. Kabuka to the effect that:

"The appellant initiated the termination of his contract of service on his own accord by way of resignation when he communicated his intention to cease to be in employment on the 15th February 2001. According to Mrs. Kabuka the learned trial Judge therefore properly found that only the accrued rights due to the appellant were those payable on termination of employment by way of resignation."

He says that in dismissing the appellant's demand for a redundancy package the Supreme Court held that:

"Having indicated that he would cease to be in employment on the 15th February 2001, we cannot fault the trial Judge for having found that the appellant terminated his employment by resignation and that he was entitled to benefits on resignation up to the time that he stopped work."

State Counsel says that the appeal in that case was dismissed and that likewise, the plaintiff's claim must fail and be dismissed with costs.

I have analysed the evidence and submissions. It is common ground that the plaintiff, a nurse by profession was employed by Zambia Consolidated Copper Mines Limited for 17 years and that after the privatisation of ZCCM, she was taken on by Chibuluma Mines Plc, the defendant company in the same job and same terms and conditions of service. The conditions of transfer of employment from ZCCM to the defendant company were clearly spelt out in the letter dated 1st September 1997 addressed to the plaintiff which letter appears at pages 11 to 12 of the plaintiff's Bundle of Documents.

It is clear from the said letter that the benefits accrued to the plaintiff in respect of her service with ZCCM (including service with its predecessor companies, where applicable) would be transferred and held on her behalf by Chibuluma Mines Plc, upon her acceptance of the offer. The said benefits would become payable to the plaintiff when she leaves employment with Chibuluma Mines Plc, or to her beneficiaries in the case of death. It is also clear that the plaintiff accepted the transfer of employment by signing the acceptance form at page 13 of the same Bundle on 16th September 2007. She also opted to remain a member of Mukuba Pension Scheme.

The plaintiff was also advised of the transfer of employment from ZCCM to Chibuluma Mines by E.K. Shamutete Chief Executive of ZCCM Limited in a letter dated 2nd September 1997 which appears at pages 16 and 17 of her Bundle of Documents. In the said letter Mr. Shamutete made it very clear that the value of her kwacha benefits would be expressed in US Dollar terms to guard against inflation and that these benefits would be paid out to her in kwacha when she leaves employment with Chibuluma Mines or to her beneficiaries in case of death.

It is common ground that the plaintiff worked for the defendant from the date of transfer of her employment to 8th March 2006 when she resigned from employment as seen by the letter at page 9 of the defendant's Bundle of Documents. On the evidence it is quite clear that the plaintiff was not paid her ZCCM benefits immediately she resigned from Chibuluma Mines. It is not disputed that she was finally paid on 22nd October 2007 by cheque issued on 4th October 2007 as seen from the cheque requisition at page 37 and the letter to Douglas and Partners at page 38 of the defendant's Bundle of Documents. It is not disputed either that the plaintiff has not been paid any terminal benefits for the period of 9 years that she worked for the defendant.

In my view, this case raises two questions. The first question is whether the plaintiff is entitled to interest on the terminal benefits from ZCCM amounting to K24,459,028.62. The second is whether she is entitled to terminal benefits in respect of her service with the defendant. I propose to deal with the two matters in turn.

On the first question raised, I do not understand it to be disputed that the plaintiff has been paid her service dues arising from her employment with Zambia Consolidated Copper Mines Limited. In my judgment she was fully paid by cheque dated 4th October 2007. The plaintiff's advocates were informed in the cover letter of 22nd October 2007 of the payment of K24,459,028.67 in settlement of the ZCCM service. From document 38 on the defendant's Bundle of Documents, Douglas and Partners received the letter and the cheque which was enclosed on 23rd October, 2007, but they did not inform the plaintiff of the payment. As properly submitted by Mr. Banda, SC, at the trial on 7th December 2009, the plaintiff told this Court that she had no knowledge of the cheque. There is no explanation by her lawyers as to why they did not notify her of the receipt of the second cheque. The explanation may be put forward by the lawyers to their client.

But for me the question is whether the delay in paying the ZCCM benefits should result in a judgment for interest. Mr. Mazumba submits that at the time of commencement of the action on 17th July 2007, the defendant had not paid the sum of K24,459,028.67. On the evidence the first cheque was issued on 2nd March 2007 as seen from the documents at pages 33, 34 and 36 of the defendant's Bundle of Documents. This was well before the commencement of the proceedings. However, I feel bound to say from the letter at page 1 of the plaintiff's Supplementary Bundle of Documents that the cheque was only sent to the plaintiff's lawyers on 18th July and was received by Douglas and Partners on 19th July 2007, two days after the commencement of the action.

It is not disputed that prior to that, on 29th May 2007, Douglas and Partners had written to MNB Legal Practitioners the letter at page 2 of the plaintiff's Supplementary Bundle advising that the defendant was withholding the cheque from ZCCM Limited on the pretext that the matter was in court and that their client needed the said money as that money was not in dispute as it was money kept by ZCCM. I do not know if the defendant's advocates responded to that letter. But one thing is clear, there was no matter in court at the time and the fact that the cheque was only sent by the defendant's advocates to the plaintiff's advocates on 18th July 2007, shows that the defendant was reluctant for reasons best known to them to release the cheque to the plaintiff.

Be that as it may, when the cheque was finally sent to Douglas and Partners, the plaintiff rejected it because it was paid after one year six months and it had no interest included. From the letter at page 35 of the defendant's Bundle of Documents, the cheque was only returned to the defendant's advocates on 12th September 2007. In the said letter Douglas and Partners indicated that the cheque had already gone stale at the time they were presenting it to their client, but it is silent on when the cheque was actually presented to the client. Suffice to add that almost two months had passed from the time Douglas and Partners received the cheque on 19th July 2007 to the time it was returned on 12th September 2007.

I am inclined to say that the cheque went stale in the hands of the plaintiff's advocates, which prompted the defendant's advocates in the letter enclosing the second cheque at page 39 of the defendant's Bundle to advise Douglas and Partners to transact the cheque as opposed to keeping it until it goes stale. I quite agree with the learned authors of Charlesworth's Business Law and Mumba Malila's Commercial Law in Zambia, that the holder of a cheque must present it for payment within a reasonable time of its issue and that failure to do this would discharge the drawer to the extent of any damage he may suffer from the delay. Moreover the first cheque was received by Douglas and Partners on 19th July 2007, two days after the commencement of the proceedings. I think that it makes no difference in the value of the terminal benefits.

It still remains for me to consider whether the plaintiff is entitled to interest for payment of the benefits in October 2007 when she resigned in March 2006. It is common ground that the value of the plaintiff's kwacha benefits was expressed in US dollar to guard against inflation. There is no evidence before me to suggest that had the plaintiff been paid on 8th March 2006, when she resigned from the defendant company, she would have realised more than the K24,459,028.67 which she was paid through her advocates in October 2007. There is simply no evidence of loss as a result of late payment of the benefits. For these reasons I am not satisfied that the plaintiff is entitled to interest on the ZCCM terminal benefits. This aspect of the claim fails and is dismissed.

I turn now to the second claim for terminal benefits for the service under Chambishi Mines. It is agreed that the plaintiff resigned on 8th March 2006 and that she has not been paid any benefits for her service with the defendant. I am bound to accept that before the plaintiff's resignation; about December 2005 a meeting was held at Chibuluma hospital which was attended, among others, by the General Manager, the Human Resources Manager, and the plaintiff and union officials. Although DW1 refused that the minutes at pages 6 to 7 of the plaintiff's Bundle of Documents are official, as the person who took the minutes was not the appointed secretary, or that there was a meeting called to address the issue of voluntary redundancy, but to review recommendations that were put forward by a committee of nurses and accountant on how the hospital could reduce costs on overtime, he agreed that a meeting was held.

I accept the plaintiff's evidence that the General Manager said at the meeting that management was looking for a long term solution to down size the hospital staff by reducing the labour force and that those who wanted to leave were free to do so and should channel their applications through Dr. Kawesha and assured the audience that these would be ratified immediately. Quite clearly employers are expected to take all possible measures to avoid retrenching workers though this is a social obligation rather than a legal one. But as soon as an employer becomes aware that the organisation is facing problems and that some of the workers are surplus to the company's needs, management needs to hold a meeting and devise a strategy to solve the problem.

As Maimunah Aminuddin states in his book titled Termination of Employment-Understanding the Process, 2010, The Malaysian Current Law Journal at page 106, workers can be encouraged to leave employment voluntarily, by offering them sufficient inducement, thus reducing the head count and the associated payroll costs. I agree that a voluntary separation scheme is an excellent method for avoiding retrenchment. But in this case it is clear from the oral evidence and the document at page 31 of the defendant's Bundle of Documents, that under clause 3.27 of the said document, on voluntary displacement, management has the absolute discretion to determine whether or not an employee should go on voluntary displacement, or separation or redundancy.

It is common cause that on 17th February 2006 the plaintiff requested for retrenchment by the letter at page 1 of her Bundle of Documents and on 21st February 2006, the plaintiff filled in the declaration for voluntary redundancy which is at page 4 of the defendant's Bundle of Documents. It is common cause that the Section Head and the Head of Department both stated on the said document, that the plaintiff may be released with replacement. In my view this prompted DW1 to comment under section D that "redundancy is applicable only when a Head of Department agrees to reduce his establishment and does not need replacement and that in this case the Head of Department is asking for a replacement meaning that the positions are still required, therefore there is no redundancy. He should advise the nurses appropriately."

The plaintiff was notified by DW1 on 3rd March 2006 by the letter at page 2 of her Bundle of Documents that she could not go on voluntary displacement because her services were still required by the company and that consequently her application had not been successful. Despite that explanation, the plaintiff tendered a "Forced Resignation" on 8th March 2006. I accept that the General Manager clarified, in the meeting held at Kalulushi Mine hospital on 10th March 2006, attended by the plaintiff among others, that what he had said at the 2005 meeting was that those who wanted to leave the company could make their applications through the Chief Medical Officer for consideration. This appears in the minutes at page 15 of the defendant's Bundle and particularly at page 16 para 3.2. The General Manager had re-emphasised at para 3.5 that for redundancy to be effected, both the person and the job goes and that in this case since their positions were still required they could not be released on redundancy.

I ought to add that a forced resignation is considered in law a dismissal by an employer. But when an employee claims that he was forced to resign, the onus of proof is on him. He will have to bring evidence to the Court to show that his resignation was not voluntary. The Court will have to examine this and the context in which the employee resigned and may also take into account the phrasing of any letter of resignation (See Termination of Employment-Understanding the Process, at page 56).

In this particular case, it is very clear that the defendant refused the plaintiff to go on voluntary displacement on the ground that her position was still required. The defendant exercised its discretion not to let the plaintiff and the other three nurses to go. I accept Mr. Banda's submission that following the plaintiff's resignation, management, including the General Manager, tried without success to dissuade the plaintiff from resigning as that would result in the loss of terminal benefits, but the plaintiff was adamant. This is clear from the letter at pages 19 and 20 of the defendant's Bundle of Documents.

In addition it is not disputed that in fact the plaintiff and three other nurses took leave and sought employment with Chambishi Metals whilst on leave. This concern was raised by the General Manager in the meeting of 10th March 2006 as seen at page 16 of the defendant's Bundle of Documents. It is also clear from page 18 of the same document that the General Manager offered the nurses their positions without any loss if they could resign from Chambishi Metals and that they would be re-engaged without losing any benefits. But still the plaintiff was not persuaded to withdraw her resignation. Instead on 17th May 2006 she wrote to the General Manager the letter at pages 23 and 24 of the defendant's Bundle in which she reiterated that the actual date when she initially notified management of her intentions to leave employment of the company on retrenchment was 17th February 2006.

I should add that resignation are a voluntary act on the part of the employee and that employees have the right to terminate their contracts of employment at any time, for any reason or for no particular reason. If they have a reason they certainly do not have to justify their resignation to their employer and an employer has no mechanism by which he can stop an employee from resigning (See Termination of Employment-Understanding the Process, at page 52). As the plaintiff rightly wrote to the General Manager in the letter at pages 23 and 24 of the defendant's bundle of Documents, every person has a right to opt for employment where they are offering better conditions. Suffice to add that different rules and regulations may apply when it comes to entitlement to terminal benefits. In this case, it is very clear that the company rule was that the plaintiff was not entitled to terminal benefits having resigned on her own.

On the whole of the matter the plaintiff was determined to leave her employment even without notice for which she paid an indemnity to the defendant of one month's salary. In the circumstances I am not persuaded that the plaintiff was forced to resign because the General Manager had gone back on his word to let anybody that wanted to leave to do so. I do not think that the General Manager wrongly exercised his discretion.

In my judgment, the plaintiff was advised of the consequences of resigning, but she still opted to go. She resigned on her own free will well knowing the consequences of doing so; the loss of terminal benefits for the nine (9) years she had worked for the defendant. Indeed in *Antony Khetani Phiri v Workers' Compensation Fund Control Board (2)* the Supreme Court found that the appellant was not entitled to any other benefits as he terminated his employment by resignation.

In the same way, the plaintiff terminated her employment with the defendant by resignation well knowing that she would lose her terminal benefits. Moreover, she was already in employment with Chambishi Metals, which in her words to the General Manager, in the same letter at pages 23 and 24 of the defendant's bundle of Documents, had offered her far much better conditions than the ones they were working under at Chibuluma. Therefore, I am not convinced that the plaintiff is entitled to any more benefits than the exit pay she received under the pay statement for March 2006 at page 22 of the defendant's Bundle of Documents. In conclusion I find and hold that the plaintiff has not proved on a balance of probabilities that she is entitled to terminal benefits from the defendant following her resignation from the company. Consequently the second claim fails and is dismissed. The costs of the proceedings are for the defendant to be taxed if not agreed.

Delivered in Open Court at Kitwe this 26th day of October 2011

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R.M.C. Kaoma
JUDGE