

IN THE HIGH COURT FOR ZAMBIA

2007/HP/444

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

WYNTER ARCHIM KABWIKU

Plaintiff

and

ATTORNEY GENERAL

Defendant

Before the Hon. Madam Justice F. M. Lengalenga this 30th day of April, 2012 in open court at Lusaka.

For the plaintiff : Mr. N. K. Mubonda – Messrs D. H. Kemp & Company

For the defendant : Mrs. M. N. Siansima – Assistant Senior State Advocate

JUDGMENT

This action by Wynter Archim Kabwiku, the plaintiff herein is directed at the Attorney-General, the defendant herein for the reliefs outlined in the plaintiff's claim as endorsed on the

amended Writ of Summons filed into court on 22nd September, 2007 and these are reproduced hereunder as follows:

“The plaintiff’s claims are for:

- (1) payment of terminal benefits namely,
payment of 40% of former Commissioner of Police’s salary per month with effect from 21st August, 2003**
- (2) payment of terminal benefits namely, the sum of K250 000-00 per month with effect from 1st August 2003 in respect of telephone bills for land phone,**
- (3) provision of domestic servant**
- (4) provision of security cover**
- (5) a declaration that the plaintiff is entitled to change of ownership into his name of motor vehicle, Toyota Land Cruiser VX registration No. ZP 153 B**
- (6) a declaration that the plaintiff is entitled to purchase motor vehicle,**

**Toyota Land Cruiser Pick-up
registration No. ZP 1431 B**

**(7) a declaration that the plaintiff is
entitled to purchase motor vehicle,
Toyota Corona Saloon registration
No. ZP 414 B**

**(8) damages for mental distress and
inconvenience**

**(9) interest on (1) (2) and (8) above at
such rate and for such period as
may seem to the court just and
proper, and**

(10) Costs.”

According to the plaintiff's amended Statement of Claim filed on 22nd September, 2008, the plaintiff was appointed by the President of the Republic of Zambia as Commissioner of Police on the 19th June 2002, but on 21st August 2003, the plaintiff's said appointment as Commissioner of Police was terminated by the President of the Republic of Zambia and on the same date, the plaintiff handed over office and on 14th November 2003, the Acting Secretary to the Cabinet on behalf of the President of the Republic of Zambia formally wrote to the plaintiff notifying him of the termination of his appointment with effect from 21st August 2003. In paragraph 4 of the said amended Statement of Claim, the plaintiff stated that as Commissioner of Police the plaintiff's

terms and conditions of service were set out in the Cabinet Appointment Memorandum dated 5th September 2002 as read with Review of Retirement Package letter dated 3rd January 2002. He stated further that clause (v) of the said Cabinet Appointment dated 5th September 2002 provides as follows:

"Other conditions of service

Other conditions of service are specified above will be as those applicable to Super Scale Officers in the Civil Service and current conditions applicable to Service Chiefs."

He stated that in terms of the aforesaid terms and conditions of service, he is entitled to the reliefs claimed as endorsed on the amended Writ of Summons. In paragraph 7 of the amended Statement of Claim the plaintiff further stated that the motor vehicles claimed are in his custody and possession. He explained that motor vehicle Toyota Land Cruiser Pick-up registration № ZP 1431 B was immobile on account of mechanical breakdown but has now been repaired by the plaintiff using his own funds and that the motor vehicle, Toyota Corona Saloon, registration No. ZP 414 B is now serviceable after being repaired by the plaintiff using his own funds. In paragraph the plaintiff stated that he had made several requests to the defendant to pay him the claimed salary of 50% of former Commissioner of police's salary per month effective from 21st August, 2003, money for telephone bills,

provision of domestic servants as well as security cover and to formalize the said change of ownership as well as purchase of the said vehicles but the defendant has refused and/or neglected to do so resulting into a delay of over three (3) years.

The defendant on 5th March, 2009 filed an amended Defence in which the defendant admitted the contents of paragraphs 1 to 5 of the plaintiff's amended Statement of Claim. However, in relation to paragraph 6 of the plaintiff's amended Statement of Claim, the defendant denied the contents of paragraphs 6 (1) and (2), and instead averred that the plaintiff is entitled to his normal retirement package as a retired Deputy Commissioner of Police and his entitlements as Commissioner of Police on contract. The defendant further averred that the plaintiff is not entitled to payment of the sum of K250 000=00 for monthly telephone bills as this payment was an incidence of his appointment and cannot subsist upon termination of the plaintiff's appointment. The defendant also denied paragraph 6 (3) (4) and (5) of the plaintiff's amended Statement of Claim but paragraph 6 (6) and (7) and paragraph 7 are admitted. The defendant denied paragraphs 8 and 9 of the plaintiff's amended Statement of Claim and they averred that the repairs claimed to have been done by the plaintiff using his own funds are within the peculiar knowledge of the plaintiff and the same can only be recognised upon the plaintiff written authority for the repair of the said police vehicles at private garages. The defendant further denied the contents of

paragraph 10 and averred that the plaintiff is not entitled to any of the reliefs set forth therein or at all as the plaintiff was not a Service Chief but Deputy to a Service Chief.

Based on the issues in dispute, the matter proceeded to trial. The plaintiff, Wynter Archim Nyamabwita Kabwiku testified to the effect that he was in gainful employment in Zambia Police Force as Deputy Commissioner of Police since 19th June, 2002 and that he was promoted to the position of Commissioner of Police by the late Republican President, Dr. Levy Patrick Mwanawasa, SC. He added that the promotion was initially made verbally and later conveyed in writing according to a letter dated 19th June, 2002, a copy which is exhibited at page 1 of the plaintiff's supplementary bundle of documents filed into court on 8th April, 2008. He testified that he later received his conditions of service in the form of a letter dated 5th September 2002 from the Secretary to the Cabinet, Mr. Leslie Mbula and a copy of the said letter is exhibited at pages 3 to 6 of the plaintiff's bundle of documents filed into court on 31st January, 2008. He referred to pages of 8 and 9 of his bundle of documents which contains a copy of a letter dated 3rd January, 2002 which was addressed to Mr. S. M. Ngangula Inspector General of Police at that time, from Mr. Peter L. Mwamfuli, Permanent Secretary for the Ministry of Home Affairs then. The plaintiff herein stated that in his letter of 5th September, 2002 containing terms and conditions of service, paragraph (v) at page 6 of the said letter, referred to:

“(v) Other Conditions of Service

Other conditions of service not specified above, will be as those applicable to Super Scale Officers in the Civil Service and current conditions applicable to Service Chiefs.”

He alluded to the fact that super scale officers are very senior officers in the Civil Service such as Judges of the Supreme Court and the High Court, the Speaker of the National Assembly, Secretary to the Cabinet, Permanent Secretaries, Inspector General of Police, Army Commander, Air Force Commander, Director General in the Office of the President and Chairpersons of Service Commissions. He further informed the court that this document was subsequently amended by another document which at that time he did not have and he referred to the defendant’s bundle of documents filed on 14th February, 2008 at pages 5 to 6 which contain a copy of Public Service Management Division Circular No. B 18 of 2002 dated 26th August, 2002 concerning Retirement Package for Defence and Security Chiefs, written by C. G. Kaluba, Permanent Secretary, Public Service Management Division and addressed to the Permanent Secretaries of the Ministry of Defence and Home Affairs respectively and the Director General for the Office of the President, Special Division. Mr. Wynter Archim Kabwiku further informed the court that he had been Commissioner of Police for

one year and two months, from 19th June, 2002 to 21st August, 2003 when his contract was terminated according to a letter dated 14th November 2003 and a copy of which is exhibited at page 12 of the plaintiff's bundle of documents. He testified that that he complied with the dictates of the letter of termination of contract and he was entitled to terminal benefits but he was paid terminal benefits only to the extent that he was paid his terminal leave benefits, repatriation allowance and his security cover but he was not paid or given his other benefits or entitlements. He proceeded to state and outline his claims as contained in the amended Writ of Summons and amended Statement of Claim, the contents of which have already been reproduced and, therefore, need not be restated, save to state that the plaintiff referred to his bundle of documents dated 31st January, 2008 at page 15 which contains a description and particulars of Government vehicles that he claims he is entitled to purchase by virtue of the positions he held in the Civil Service, namely the Zambia Police Service. He further testified how he tried to pursue the benefits by first contacting the Inspector General of Police over a period of two years up to 2006 when he wrote a letter on 14th March, 2006 to the Secretary to the Cabinet seeking his indulgence as the Head of Civil Service to see if he could prevail upon the police command to give authority for him to purchase the vehicles and to settle the land phone bills and sort out the payment of 40% of former Commissioner of Police's salary per month effective 21st August, 2003. He referred the court to a copy of the said letter at

page 16 of his bundle of documents. He explained that arising out of that letter, the police command paid him his leave benefits and repatriation allowance, and that on 31st July he wrote a follow up letter to Dr. Kanganja, Secretary to Cabinet which he copied to Mr. Ephraim Mateyo, the Inspector General of Police at that time and a copy of this letter is exhibited at page 18 of the plaintiff's bundle of documents filed on 31st January, 2008. He testified further that he received a blind copy of the letter dated 8th August, 2006 that the Secretary to the Cabinet sent to Mr. E. Mateyo and copied to Mr. I. Kashoka, Permanent Secretary for the Public Service Management Division and Mr. Peter Mumba, Permanent Secretary for the Ministry of Home Affairs. The plaintiff stated that he was told to go and see Mr. Kashoka by Dr. Kanganja and he did and Mr. Kashoka asked him to give him time to make consultations and on 1st September 2006, he wrote a letter to the Inspector-General in the plaintiff's presence and a copy of the said letter is exhibited at page 21 of the plaintiff's bundle of documents and it was also copied to the plaintiff and to Mr. Peter Mumba, Permanent Secretary for the Ministry of Home Affairs. He informed the court that even after this letter was sent to the Inspector General of Police, payment was not made and he said that after he contacted the Inspector-General of Police on the phone, he retorted that as long as he was in office as the Inspector General, the plaintiff would not get all the prerequisites that he was asking for. He testified further that after this he approached the Solicitor General, Mr. Sunday Nkonde who asked

him to go and see him after a week but when he went back he told him that it was difficult for the plaintiff to get redress through overtures he was making and he advised him to see the services of a legal practitioner and that on that basis he went to Messrs D. H. Kemp and Company, his current advocates. He said that they took up the matter with the Solicitor-General as indicated at pages 23 to 24 of the plaintiff's bundle of documents in the letter dated 11th October 2006. The plaintiff also alluded to the fact that he had served for thirty-three (33) years in the Zambia Police Service as indicated in his Certificate of Service from 22nd April 1969 to 20th August 2003 signed by Mr. Peter Mumba, Permanent Secretary (Home Affairs) which is exhibited at page 11 of the plaintiff's bundle of documents. He said that since he was retired with a good service record, he is entitled to the prerequisites he is claiming as shown at page 9 of his supplementary bundle of documents filed on 8th April, 2008.

Under cross-examination by the learned Assistant Senior State Advocate Mrs. S. Anderson, the plaintiff maintained that clause (v) at page 6 of the letter on his terms and conditions of service clearly states that he would enjoy the same conditions of service as applicable to Service Chiefs and he added that these terms and conditions of service highlights a number of things of substance to his case. He stated further that clause (f) on telephone bills and clause (n) on domestic servant are pertinent because they are reflected in the retirement package for Defence and Security

Chiefs contained in circular No. B 18 of 2002 dated 26th August, 2002 which is contained at page 5 of the defendant's bundle of documents. Wynter Archim Kabwiku informed the court that police command determines the other conditions of service and that his position falls under the other conditions according to his interpretation and the basis of which he claims is threefold:

- (i) the letter from Mr. Kashoka at page 14 of the defendant's bundle of documents;**
- (ii) terms and conditions of service at page 3 of the plaintiff's bundle of documents, and**
- (iii) circular no. B 18 of 2002 on Retirement Package for Defence and Security Chiefs at page 5 of the defendant's bundle of documents and page 6 item (b) and the last paragraph of said circular letter**

He further stated that there were personal-to-holder vehicles and (other two vehicles claimed) at the time he was Deputy Commissioner of Police that he was entitled to purchase which he did not purchase. He also agreed that he knew the formalities required to be followed to purchase the said vehicles. He added that since he was working for the police his application could have been through the Ministry of Home Affairs who in turn would contact the Permanent Secretary for Works and Supply for authority to purchase the vehicles and the applicant would be

informed after the process and the vehicle would be purchased. He informed the court that he did his part by lodging his application because it was his entitlement but he had not heard from them and he said that he is claiming a refund on the services he undertook for the two vehicles. He agreed that he knew the procedure to be followed when repairing Government vehicles but he said that he did not follow the procedure and that police command refused to pay and he explained that he had difficulties in requesting personnel from the garage section to take the vehicles for servicing, sourcing of proformas and submission of the same to police command such that in the end he had no authority to claim what he had spent on the service and repairs of the vehicles. He also maintained that he followed the procedure for lodging complaints by lodging his complaint to the Office of the Inspector General and then he wrote to the Secretary to the Cabinet and he added that he has never received a response from the Inspector General and that the issue of vehicles was not resolved and has never been resolved. He said that the other issues that form the basis of his claim were, however, resolved by way of the Permanent Secretary (Public Service Management Division), Mr. Ignatius Kashoka writing to the Inspector General of Police asking him to pay the plaintiff in accordance with Public Service Management Division Circular No. B 18 of 2002. With reference to Mr. Kashoka's directive, the plaintiff stated that Mr. Kashoka as Permanent Secretary (Public Service Management Division) was responsible for working out

the terms and conditions of service for all civil servants and that, therefore, he was superior to all of them (as civil servants) and that his instructions were supposed to be carried out. He informed the court that he recalled that the Inspector General's response was, however, one of adamancy and arrogance when he wrote to Dr. Joshua Kanganja, Secretary to the Cabinet on 15th September, 2006 in the letter exhibited at page 15 of the defendant's bundle of documents. Mr. Wynter Archim Kabwiku said that the Civil Service was his employer and that he was answerable to the office of the Secretary to the Cabinet and his contention is that his conditions of service could have been different from those of Mr. Ephraim Mateyo's when he was Commissioner of Police at State House and he was Commissioner of Police, Zambia Police Headquarters and *de facto* Deputy Inspector General of Police as he could send instructions to him at State House as Commissioner of Police Zambia Police Headquarters. He said that he carried more responsibilities than Mr. Mateyo at the time he was Commissioner of Police and he was also senior because he could act as Inspector General of Police.

Upon the defendant filing a supplementary bundle of documents, on 2nd December 2010, the plaintiff was allowed to re-open his case for purposes of making reference to the documents and being cross-examined on the said documents. With reference to the document at pages 7 to 9 of the defendant's supplementary bundle of documents, being a letter of appointment of Mr. S. M.

Samatunga as Commissioner of Police, the plaintiff said that he knew him as his subordinate and instructor at Lilayi Training College in 1997 and also as the plaintiff's Senior Assistant Commissioner of Police when he was Commissioner of Police. He testified that Mr. Samatunga took over from him as Commissioner of Police but there are a lot of variations or disparities between his terms and conditions of service and his own. He referred to the plaintiff's bundle of documents at pages 3 to 7 in comparison and he pointed out that there is a provision that his contract would be for an initial renewable contract of three (3) years whilst the plaintiff's contract was open-ended. He stated that in Mr. Samatunga's letter and terms and conditions of service, clause (k) relating to "Other Conditions of Service" varies from his own in that it states:

"Other conditions of service not specified above, will be as those applicable to officers serving in Division 1 of the Civil Service."

Reference was made to pages 10 to 14 of the defendant's supplementary bundle of documents containing Mr. Francis Kabonde's letter of appointment as Commissioner of Police from which the plaintiff also observed some variations, especially in clause (q) relating to Other Conditions of Service which varied from his own conditions but was similar to Mr. Samatunga's terms and conditions. Mr. Willis Manjimela, Commissioner of Police

appointed on 13th June, 2006 also had varied conditions of service from the plaintiff's and specifically in clause (q) on Other Conditions of Service which stated:

“Other Conditions of Service not specified above, will be as those applicable to officers in Division 1 of the Public Service.”

This letter is exhibited at pages 15 to 18 of the defendant's supplementary bundle of documents.

The late Mr. Wazakaza Nguni's letter of appointment as Deputy Commissioner of Police dated 13th June, 2006 is exhibited at pages 20 to 23 of the same bundle of documents and has the same wording in clause (r) on Other Conditions of Service as that in Mr. Manjimela's terms and conditions of service.

From all these documents referred to all the letters of appointment and terms and conditions of service, the plaintiff observed slight variations from his own terms and conditions of service which he pointed out especially in travel benefits, rates on Government housing, motor vehicle and household loans applicable to the plaintiff in accordance with terms and conditions of service applicable in Super Scale Officers in Civil Service, water and electricity bills and domestic servant which were conspicuously absent in the latter appointments.

With respect to the appointment of the late Mr. Wazakaza Nguni, the plaintiff stated that he found it difficult that Mr. Nguni could be re-appointed by the President when in fact that position rests with the Police and Prison Service Commission but he added that his having been out of the Police Service system it is possible that such a situation could arise. He said that he got his letter of appointment in good faith as it duly originated from the appointing authority and it was duly signed.

The defendant called only one witness, Dr. Joshua Lawson Kanganja, Secretary to the Cabinet and Head of the Public Service in Zambia, who testified that with reference to the Public Service he was responsible Constitutionally under the President for securing the efficient operation of the Public Service. He acknowledged that he needed to clarify certain issues concerning conditions of service raised by the plaintiff. He also said that he knew the plaintiff as they came from the same home (chief's) area, went to the same school and had seen each other rise in the Public Service. He testified that the plaintiff, Wynter Archim Kabwiku was Commissioner of Police after having risen through the ranks as a police officer and he referred to the defendant's bundle of documents filed into court on 14th February, 2008 at page 7 containing a copy of the letter dated 5th September 2002 which specified the terms and conditions of service for Mr. Wynter Kabwiku as Commissioner of Police from the Secretary to the

Cabinet at that time, Mr. S. L. Mbula. With respect to item (a) relating to the date of appointment and which states:

“The effective date of your appointment is 19th June, 2002.”

Dr. Joshua Kanganja stated that according to the information that he had on official records was that at the time of Mr. Kabwiku's appointment, he was an officer serving on permanent and pensionable terms and conditions of service and that as such, he could not have been issued with a letter which could have given the duration of the contract. He, however, informed the court that a letter informing the officer that he was on contract and gratuity terms was issued to him by the then Permanent Secretary in the Ministry of Home Affairs, Mr. Peter Mumba and that at that time, the issue of his retirement had been dealt with. The Secretary to the Cabinet explained that the procedure for putting officers on contract normally should start with their retirement and thereafter they can be placed on contract. He gave an example of the Director of Public Prosecutions who does not have a contract that specifies any term or duration because Constitutionally there is a retirement age. He added that when officers serving as Directors or Permanent Secretaries on permanent and pensionable terms are appointed as Permanent Secretaries, they have to be retired in the national interest so that they can receive their pension dues and thereafter be placed on

contract for an initial period of three years renewable and that such contract may be terminated by giving three months notice or three months salary in lieu of notice.

With respect to item (v) at page 10 of the defendant's bundle of documents, which relates to "Other Conditions of Service," Dr. Kanganja explained that this clause means that if something is not specifically mentioned then cross-reference can be made with the conditions of service of those officers who are mentioned in that clause which for ease of reference states:

"(v) Other Conditions of Service

Other conditions of service not specified above, will be as those applicable to Super Scale Officers in the Civil Service and current conditions applicable to Service Chiefs."

He further stated that the conditions of service are determined by Government from time to time. When referred to the document at pages 5 to 6 of the defendant's bundle of documents, he identified it as a circular minute titled: "Public Service Management Division Circular No. B 18 of 2002," and dated 26th August 2002 and signed by Mr. C. G. Kaluba (now deceased) the Permanent Secretary, Public Service Management Division, at that time. He said that the circular minute was addressed to the

Permanent Secretary, Ministry of Defence, Permanent Secretary, Ministry of Home Affairs and the Director General, Office of the President. He added that the said circular refers to Defence Chiefs who include the Zambia Army Commander, the Zambia Air Force Commander, the Inspector General of Police, the Commandant of the Zambia National Service and the Director-General (Special Division) for the Office of the President. The Secretary to the Cabinet proceeded to clarify that the plaintiff was Commissioner of Police and not the Inspector General of Police and that he was retired and paid his pension dues in the first instance and then placed on contract and gratuity terms and that consequently, he should have been paid his gratuity accordingly. He stated further that he had not had access to how the gratuity was paid but he assumed that the relevant documentation would indicate how it was computed.

When Dr. Kanganja was referred to page 14 of the defendant's bundle of documents, he identified the document as a letter dated 1st September 2006 that was written by Mr. Ignatius Kashoka, Permanent Secretary, Public Service Management Division and addressed to Mr. Ephraim Mateyo, the Inspector-General of Police (at that time). He explained that the Inspector General was being invited to pay Mr. Wynter Kabwiku according to the contents of a copy of the circular minute dated 3rd January, 2002 referenced Public Service Management Division Circular No. B 18 of 2002. With reference to the letter dated 15th September

2006 at page 15 of the defendant's bundle of documents, he identified it as a letter addressed to him as Secretary to the Cabinet, by Mr. Ephraim Mateyo, Inspector General of Police, on the subject of staff payment in relation to Mr. Wynter Kabwiku. After reading the said letter, he candidly informed the court that he told both the Inspector General of Police then and the Permanent Secretary, Public Service Management Division to give instructions to the Attorney-General because at that time he was thoroughly fed up and he was of the view that if what the plaintiff, Mr. Wynter Kabwiku was claiming was not properly due to him, someone within the service should have raised a red flag at the time that the letter specifying the terms and conditions of service was issued to Mr. Wynter Kabwiku, as this letter was copied to the Secretary to the Treasury, the Permanent Secretary, Public Service Management Division, the Permanent Secretary, Ministry of Home Affairs, the Auditor-General and Secretary, Police and Prison Service Commission. He restated that those were the circumstances under which he got fed up because instead of the command in the Zambia Police Service having raised the red flag at the right time, they were now asking the Secretary to the Cabinet to indicate why Mr. Wynter Kabwiku should be paid this or that. On the same issue he reiterated his candidness as a public officer that when Mr. Wynter Kabwiku started pursuing this matter, that should have been the time when the command should have started asking for clarification from the office that issued the letter.

When referred to the defendant's supplementary bundle of documents filed on 2nd December, 2010 and the documents therein, namely Public Service Management Division Circular No. B 8 of 2001 dated 22nd May, 2001, and appointment letters from the Secretary to the Cabinet specifying the terms and conditions of service for former Commissioners of Police, Mr. S. M. Samatunga, Mr. Francis Kabonde, Mr. Willis Manjimela and former Deputy Commissioner of Police Mr. Wazakaza Ng'uni (deceased), the Secretary to the Cabinet testified that there are no variations in the terms and conditions of those officers but only differences for clarification, he gave example that in his old conditions of service, at the end of his contract, he would have gone away with a brand new four by four (4 x 4) vehicle but when a letter of the draft conditions of service was sent to the late President Dr. Levy Patrick Mwanawasa, SC, he did not think it was appropriate and he accepted the late President's decision. He testified further that he served as a Permanent Secretary under the first Republican President, Dr. Kenneth David Kaunda and that as Permanent Secretaries, they used to fly first class when travelling abroad but when the late second Republican President, Dr. Frederick Titus Jacob Chiluba took over, the conditions of service changed and they fly business class and so does the Secretary to the Cabinet but the Defence Chiefs fly first class and he had accepted that. He informed the court that when he retired, his package would be different from his predecessors even though he

would continue to be on the pay roll at a reduced salary. He added that conditions of service change from time and he made specific reference to the differences in the conditions of service as specified in the letters of the police service officers already referred to in the defendant's supplementary bundle of documents filed on 2nd December 2010, and he pointed out that the last item on "Other Conditions of Service" in each letter apart from that of Mr. Wynter Kabwiku, alludes to "other conditions of service not specified above, will be as those applicable to officers serving in Division 1 of the Public Service." Dr. Kanganja further stated that although he was not the signatory of Mr. Wynter Kabwiku's letter, but as a Public Officer he considered it his duty to avail the court with copies of letters of appointment which had been issued after Mr. Wynter Kabwiku had left office as Commissioner of Police.

The Secretary to the Cabinet also informed the court that he felt that the court is placed in the best position to make a decision and he further stated that as a public officer who came from the same chiefdom as the plaintiff he did not to be perceived as taking sides. He proceeded to make reference to the late Mr. Wazakaza Ng'uni's appointment letter as Deputy Commissioner of Police at pages 20 to 23 of the defendant's supplementary bundle of documents and testified that he was appointed by the President as Deputy Commissioner of Police but he served as Commissioner as indicated by the conditions of service and that

he felt that he should bring all the documents and not suppress any evidence.

Under cross-examination by Mr. Mubonda, Counsel for the plaintiff, the Secretary to the Cabinet was referred to page 8 and item (k) of the defendant's supplementary bundle of documents and to page 6 and item (v) of the plaintiff's bundle of documents, for purposes of comparison and he clarified that it is not a difference in the condition of service but it is a difference in the phraseology of the clauses and that the two are not the same. He stated that as he had indicated earlier in his testimony, he wanted the court to take note that individuals serving at the same level were issued letters which indicated different levels and that subsequent letters show a different pattern. Dr. Kanganja confirmed that according to the letter issued to the plaintiff, Mr. Wynter Kabwiku, the conditions indicated were extended to him hence his earlier testimony that the red flag should have been raised earlier instead of raising it after he had left service, years later. He also confirmed that although the plaintiff was informed that he was on contract and gratuity terms, there was no letter stating the duration or what his entitlement would be and he added that he had earlier indicated who the service chiefs are and that the Commissioner of Police is not one of those. He also admitted that the plaintiff did bring to his attention his plight through the letter dated 14th March, 2006 which he was referred to at pages 16 to 17 of the plaintiff's bundle of documents. Whilst

he could not recall whether he responded to the letter, he recalled that the plaintiff visited him in his office. He also informed the court that on numerous occasions he briefed the plaintiff on what he had done and he said that this could be confirmed by the letter that Mr. Ignatius Kashoka, the Permanent Secretary, Public Service Management Division at that time, wrote to the Inspector General of Police and resulting in the letter that Mr. Ephraim Mateyo the Inspector general of Police (at that time) wrote to him. With respect to the issue of purchase of Government motor vehicles, he stated that if the defendant had acknowledged that Mr. Kabwiku is entitled to the vehicle, he had not received a letter from the Attorney General's Chambers asking him to facilitate the matter. He explained the procedure followed with respect to purchase of Government motor vehicles which is that the institution under which an officer serves is supposed to write to the Secretary to the Cabinet to seek authority for a particular vehicle to be sold on the basis of the terms and conditions of service of a particular officer. He, however, observed that the plaintiff worked in an institution where until recently issues were dealt with on the basis of personalities and that the plaintiff is aware of that but he informed the court that they were trying to change that system. With reference to Mr. Kashoka's letter at page 21 of the plaintiff's bundle of documents, he reiterated that it is an instruction. However, when referred to letter dated 27th October, 2006 written by the Solicitor General to the plaintiff's advocates, Dr. Kanganja

answered that he was not privy to what the Attorney-General does and that he could not speak for the Attorney General. He also explained that since he was not the author of the letter at page 3 of the plaintiff's bundle of documents, that is why he had provided the other letters in the supplementary bundle for the court's interpretation. The Secretary to the Cabinet acknowledged that this litigation came about because the plaintiff felt that there was something wrong and he agreed that it is the way things were handled.

In re-examination by Mrs. M. N. Siansima, Assistant Senior State Advocate, Dr. Joshua Kanganja's view on the Inspector General of Police, Mr. E. Mateyo's reaction to Mr. Kashoka's letter by writing to him challenging him that Mr. Kabwiku was not entitled to what he was claiming and that he should come out clearly and advise him on what he wanted him to pay the former Commissioner of Police, was that at that stage he did not want to be involved.

I have carefully considered the plaintiff's claim, the reliefs he seeks all the evidence adduced before this court. From the evidence before this court, it is clear that the only issue is whether the plaintiff is entitled to the reliefs that he seeks and claims to be entitled to. Since the said reliefs have already been outlined I need not restate them for fear of being repetitive.

It is not disputed that the plaintiff, Wynter Archim Kabwiku was appointed as Commissioner of Police on 19th June, 2002 and that on 21st August, 2003, the said appointment was terminated by the President of the Republic of Zambia (at that time being the late Dr. Levy Patrick Mwanawasa, SC). What is disputed are the conditions under which his terminal benefits were to be paid. The plaintiff's contention is that he is entitled to be paid in accordance to the conditions applicable to Super scale officers in the Civil Service and Service Chiefs and he based his claim on the terms and conditions of service that were set out in the Cabinet Appointment Memorandum dated 5th September, 2002 as read with Review of Retirement Package letter dated 3rd January, 2002 and clause (v) of the Cabinet Appointment Memorandum which provides for other conditions of service which states that:

“Other conditions of service not specified above, will be as those applicable to Super Scale Officers in the Civil Service and current conditions applicable to Service Chiefs”

The bone of contention as is evidenced by the contents of the defendant's Defence, is that the plaintiff is not entitled to what he is claiming in his amended Statement of Claim as he was not a Service Chief but a Deputy to a Service Chief, who in this case was the Inspector General of Police while he was Commissioner of Police after having been retired as Deputy Commissioner. The

defendant's contention as contained in their Defence is that the plaintiff is entitled to his normal retirement package as a retired Deputy Commissioner of Police and his entitlement as Commissioner of Police on contract.

I will first deal with the issue of the plaintiff's normal retirement package as a retired Deputy Commissioner. As Dr. Joshua Kanganja, testified, the plaintiff as a permanent and pensionable civil servant could only be appointed on contract after being retired, which he was, before he was appointed on contract. Since he has not claimed a retirement package as Deputy Commissioner of Police, except for the claims to be offered to purchase the vehicles named, I can safely assume that he was paid the said package and, therefore, I will not dwell on that issue.

I turn to issue of the plaintiff's 'terms and conditions' of service as contained in the letter dated 5th September, 2002 and particularly clause (v) on 'Other Conditions of Services' which has caused the controversy. Evidently, the plaintiff as Commissioner of Police could neither be described as a Super Scale Officer in the Civil Service nor Service Chief as he, himself informed the court that super scale officers are very senior officers in the Civil Service such as Judges of the Supreme Court and High Court, the Speaker of the National Assembly, Secretary to the Cabinet, Permanent Secretaries, Inspector-General of Police, Army Commander,

Zambia Air Force Commander, Director-General in the Office of the President and Chairpersons of Commissioners. The question that arises from that observation is whether what was contained in the plaintiff's letter of 5th September, 2002 as his terms and conditions of service was what was intended or there was an oversight on the part of the author of that letter, Mr. S. L. Mbula, Secretary to the Cabinet at that time. The learned Assistant Senior State Advocate, Mrs. M. N. Siansima on 2nd December, 2010 filed into a court defendant's supplementary bundle of documents which was of great assistance to this court as I was able to look at appointment letters of other Commissioners of Police and to compare the terms and conditions of service. These appointment letters related to former Commissioners of Police, Mr. S. M. Samatunga, Mr. Francis Kabonde, Mr. Willis Manjimela and late Mr. Wazakaza Ng'uni and all whose terms and conditions differed with those contained in the plaintiff's appointment letter of 5th September, 2002. For instance, in the appointment letter of Mr. S. M. Samatunga as Commissioner of Police and the plaintiff's successor and which letter was dated 27th October, 2003, the difference was in clause (c) on subsistence allowance in terms of the rate which was increased from K90 000=00 (single rate) to K160 000=00 per night and from K95 000=00 (married rate) to K165 000=00 per night. The other difference was in clause (h) on travel benefits which were changed from business class travel by air and first class travel by road or rail on official duty outside and within Zambia to air travel within and outside Zambia by

economy class. Clauses (j) to (t) were excluded in the said letter. However, the controversial clause on “Other conditions of service” was included in a revised form from “those applicable to Super Scale officers in the Civil Service and current conditions applicable to Service Chiefs” to “those applicable to officers serving in Division 1 of the Civil Service”.

In Mr. Francis Kabonde’s letter of appointment as Commissioner of Police dated 18th August, 2005, clause (i) on travel benefits was as contained in the plaintiff’s letter of appointment and clause (k) on transport on appointment and termination of appointment, clause (l) on funeral grant, clause (m) on loss and damage caused to personal property, clause (n) on transfer, clause (o) on oath and secrecy and clause (p) on termination of service were reinstated as contained in the plaintiff’s letter of appointment. Notable in Mr. Francis Kabonde’s letter was clause (q) on “Other conditions of service” which remained the same as in Mr. Samatunga’s letter, that is:

“Other conditions of service not specified above, will be as those applicable to officers serving in Division 1 of the Civil Service”

From this revision in the clause on “other conditions of service” which is contained in the appointment letters of the plaintiff’s successor and other Commissioners as indicated in the

appointment letters exhibited from pages 7 to 23 of the defendant's supplementary bundle of documents filed into court on 2nd December, 2010, it is clear that the head of the Civil Service, namely the Secretary to Cabinet had accepted or acknowledged the error contained in the plaintiff's letter of appointment as Commissioner of Police. Clearly from the various correspondence between the senior civil servants, it became apparent to them that an error had been made and that the plaintiff was clearly not entitled to some of the conditions that were contained in his letter of appointment whether the said errors were made inadvertently or by design with a mischief behind it, but as Dr. Joshua Kanganja pointed out, the red flag should have been raised when the plaintiff started claiming what he clearly was not entitled to because of the mischief in his letter of appointment.

From the evidence before this court, I am satisfied that the plaintiff's claims are based on conditions of service of Super Scale officers and Service Chiefs none of which he was. I am further satisfied from the evidence before this court and from the documents exhibited and also the evidence by Dr. Joshua Kanganja (former Secretary to the Cabinet) that the plaintiff was not entitled to some of the conditions that were contained in his appointment letter because he served as Commissioner of Police and not Inspector General of Police who was entitled to the conditions claimed. Having found that the plaintiff was actually

not entitled to 'other conditions' based on the Civil Service Super Scale officers and Service Chief, even though that clause was contained in his letter of appointment, I am of the considered view that to allow the plaintiff to benefit from conditions that were clearly not his entitlement just because they were erroneously put in his letter of appointment would not only be wrong and set a bad precedent but it would create a financial dent on the national economy as it would entail paying him terminal benefits of forty percent (40%) of former Commissioner of Police's salary per month effective from 21st August, 2003 and the other payments and entitlements he has outlined in his amended Statement of Claim. Allowing that claim would trigger future actions of this nature which may be based on mischief and it is quite unacceptable to this court, as I consider it to be morally wrong. Therefore, having found that the plaintiff is not entitled to payment of terminal benefits in accordance with super scale or Senior Chiefs conditions, it accordingly follows that the plaintiff is not entitled to the reliefs he seeks in (1) to (4) of his claim.

However, in relation to the reliefs claimed in (5) (6) and (7) for declaration that he is entitled to change of ownership into his name of motor vehicle, Toyota Land Cruiser VX registration number ZP 153 B and purchase of motor vehicles, Toyota Land Cruiser Pick-up registration number ZP 1431 B and Toyota Corona saloon registration number ZP 414 B, I am of the considered view that since there appeared to be no serious opposition by the

defendant except in respect of the monies spent on repairs and servicing the same as he did not follow the proper laid down procedure, the plaintiff is entitled to be sold the said vehicle provided that he follows the proper procedures to apply to purchase the same.

On the claim for damages for mental distress and inconvenience I find that he is not entitled to any such damages considering that he was never entitled to the reliefs that he was claiming. It also follows that the plaintiff's claims in (9) and (10) fall away. Further, the plaintiff having been unsuccessful in this action except with respect to three out of ten claims, I, accordingly order that he bears the costs of this suit as costs follow the event. In default of agreement costs to be taxed.

DELIVERED this 30th day of April, 2012 at Lusaka.

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F. M. Lengalenga

JUDGE