

**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE KITWE DISTRICT REGISTRY**

**2009/HK/609**

**(Civil Jurisdiction)**

**BETWEEN:**

**THE COPPERBELT UNIVERSITY**

**PLAINTIFF**

**AND**

**MULEMWA AKOMBELWA**

**DEFENDANT**

Before the Honourable Mrs. Justice R.M.C. Kaoma in Open Court on this 15<sup>th</sup> day of February, 2013

For the Plaintiff: Mr. K. Bota - William Nyirenda & Co.

For the Defendant: Mr. D. Mazumba - Douglas & Partners

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**J U D G M E N T**

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**Cases referred to:**

1. Kitwe City Council v William Nguni (2005) Z.R. 57
2. Chikuta v Chipata Rural Council (1983) Z.R. 26

**Other works and legislation referred to:**

1. Employment Law in Zambia-Cases and Materials, Revised Edition, UNZA Press by W.S. Mwenda, page 155
2. Employment Act, Cap 268, section 36(1) (a) to (c)

In the writ of summons and statement of claim issued on 26<sup>th</sup> October, 2009 the plaintiff, Copperbelt University, claims against the defendant, Mulemwa Akombelwa £18,000 in respect of daily maintenance allowance; £600 in respect of book allowance, thesis and examination allowances and K2,160,000.00 in respect of research work in Zambia with interest and costs. On 3<sup>rd</sup> November, 2009 the defendant filed the defence at pages 7 to 8 of the plaintiff's Bundle of Pleadings in which he admits paras 1, 2 and 3 of the statement of claim, but denies the rest of the allegations made therein. The defendant counterclaims for leave days and terminal benefits together with interest on the terminal benefits and costs. In the defence to counterclaim at page 10 of the statement of claim, the plaintiff denies that the defendant is entitled to the claims he makes.

The plaintiff's only witness Jerous Ngulube, the Deputy Registrar of the University testified that the defendant was employed by the Copperbelt University in the School of Technology as lecturer Grade 3. In 2003 the defendant was granted leave to go and study Geographical Information Systems at PhD level at Nottingham University in the United Kingdom under a scholarship given through the Commonwealth. This is clear from the confirmation of award at page 1, the application for leave at page 5, and the paid study leave at page 6 of the Plaintiff's Bundle of Documents. According to PW1, most of the financial obligations were catered for by the Commonwealth, but the University had its own obligations which included paying the defendant's salary, and giving logistics in terms of local transport for purposes of research and daily monthly allowance whilst in the U.K. These obligations are shown in the document at page 8 of the same Bundle. The programme was to run for 3 years. Upon completion in 2006, the defendant was expected to return home and to serve the University.

It is the plaintiff's evidence that the Bonding Agreement at pages 9 to 11 of the same Bundle was signed between the University and the defendant on 15<sup>th</sup> September, 2003. The salient features of the agreement were that the expenses on the part of the University were treated as a grant and the defendant upon successful completion of study would return and serve the bonded period of four and half years. If the defendant failed to comply with the Bond, then he was required to refund the University all the expenses accrued during the study. This is clear from paragraph 2 at page 10 of the plaintiff's Bundle of Documents. The defendant did not return home in 2006. He requested for a further period to enable him finish the study programme. The extension was granted. However, on 1<sup>st</sup> June, 2009 by the letter of resignation at page 12 of the same Bundle, the defendant informed the University that he was resigning as an employee from 31<sup>st</sup> July, 2009. This move surprised the University as the defendant was on a study program and was expected to return and serve the bonded period before he could resign. Further the defendant was writing from South Africa when he was supposed to be in the U.K. In July, 2009 the University informed the defendant that his resignation was not accepted on the basis that there was a bonding agreement which was not fulfilled.

It is the plaintiff's case that the defendant was a member of staff who was on staff development and was serving on CBU Academic Union Conditions of Service. Under clause 9.2.1 of the 2009 Collective Agreement at pages 27 of the Supplementary Bundle of Documents, a member of staff may terminate one's employment by giving 3 calendar months' notice in writing, but the defendant did not comply, as such he was not entitled to terminal benefits as provided in clauses 15 and 16. According to PW1 clause 9.2.1 applied to a member of staff who had returned and served the bonded period. He said the notice period given by the defendant was only two months. In the letter at page 13 of the plaintiff's Bundle the University requested the defendant to refund the monies that he owed them. Since the University had rejected the defendant's resignation as he was on extended study leave and he did not returned he was treated as an absconder.

In the letter at page 15 of the plaintiff's Bundle of Documents the defendant simply instructed the University to get in touch with his lawyers. In return the University's lawyers, William Nyirenda & Co. wrote to the defendant's lawyers, Douglas & Partners (page 16 of same Bundle) claiming the expenses incurred by the University. In the letter dated 19<sup>th</sup> October, 2009 at page 17 of the plaintiff's Bundle, Douglas & Partners informed William Nyirenda & Co. that at the time the defendant left the University he was entitled to terminal benefits which should be calculated and be offset against the amount claimed. The University says there is no amount owed to the defendant because he was not entitled to any terminal benefits.

PW1 has drawn my attention to page 3 of the plaintiff's Bundle of Documents, under the caption 'I acknowledge receipt of a satisfactory medical report' where it is indicated that "confirmation of this Academic Staff Scholarship is subject to your signing an undertaking to return to the post in your home country in connection with which you were nominated." He said this is the condition on which the scholarship was awarded to the defendant and that it was meant to strengthen the University's human resource. On clause 13.0 of the conditions of service for academic staff at pages 22 to 25 of the defendant's Bundle of Documents, it is the plaintiff's evidence that this is only applicable where the employee gives the required notice which the defendant did not do.

On the defendant's resignation letter at pages 12 and 30 of the parties' respective Bundles, it is the plaintiff's evidence that they did not understand the defendant's forfeiture of salary in lieu of notice in paragraph one of the said letter, whether it was for June and July or for the whole period he was granted study leave.

In cross-examination PW1 said the defendant was employed as Staff Development Fellow on 26<sup>th</sup> December, 1991 and that under paragraph 2 of the Bonding Agreement at page 18 of the defendant's Bundle of Documents one may desert or resign and that the defendant resigned. He admitted that clause 9.2 of the 2009 Collective Agreement which applied to the defendant provided for resignation and that the defendant was on full and pensionable conditions of service. However, he said only the defendant can explain what he meant by forfeiture of his salary in lieu of notice in his resignation letter. He agreed that clause 9.2.3 required the officer to pay cash in lieu of the unsaved portion of one's notice, meaning that one could pay cash instead of giving the required notice. He said it is normal procedure that for the resignation to be effective it must be accepted, although there is no such provision in the Collective Agreement.

He also admitted that clause 16.1 of the 2009 Collective Agreement provided for benefits for a member of staff on permanent and pensionable conditions of service who has served not less than seven years who wished to resign after giving the required notice. He confirmed that by 2009 the defendant had served the University for about seventeen years. He agreed that the award for 15-19 years of service was 75% of normal retirement benefits as provided in clause 15 which is 4 months' basic salary for each year of service. He insisted that the defendant absconded since he never returned after his resignation was rejected although the word 'absconded' does not appear in the letter rejecting the resignation; and that the benefits on resignation would have been applicable had the defendant returned to serve the bonding period as required by paragraph 7 of the Bonding Agreement. He further told the Court that there are two issues here, first the defendant as an employee and, second as a Staff Development Fellow who needed to clear the bondage period before he could resign.

In re-examination he said the defendant has never paid any cash in lieu of the unsaved portion of his notice as provided under clause 9.2.3; and that in paragraph two of the letter to Douglas and Partners by William Nyirenda and Co. at page 16 of the plaintiff's Bundle of Documents, the issue of absconding was communicated.

The defendant resides in Durban, South Africa and is a lecturer at the University of KwaZulu-Natal. He testified that he was appointed as Staff Development Fellow by the plaintiff effective 1<sup>st</sup> January, 1992 under the appointment letter at page 1 of his Bundle of Documents. He confirmed that he was awarded the Commonwealth Scholarship in 2003 to study at Nottingham University; that he applied for study leave (page 5 of plaintiff's Bundle); that his paid study leave was approved and the University stated the conditions (page 6 of same Bundle). He signed the Bonding Agreement and departed for studies in September, 2003. He said in 2004 he returned home for field work. Upon return to Nottingham there was a problem with his data, so he came back in 2005 for more field work. As a result he took longer to submit his Thesis for examination. In September, 2006 he requested for an extension of his study leave. Because the Commonwealth scholarship had expired, he also requested the University to assist him with upkeep up to the time he submitted his Thesis. He submitted his Thesis in 2008 and his examiners required him to carry out corrections for 12 months into May 2009, but the University only agreed to extend their assistance up to December, 2008. He said from January 2009 he had to support himself and his family. Because his personal circumstances had become very difficult he tendered his resignation in May 2009 before he completed his PhD program. He completed in 2010 and graduated in July, 2011.

The defendant's evidence is further that he was aware of his conditions of service which were normally negotiated by the Academic Union and that the document at pages 22 to 25 of his Bundle of Documents contains the amendments. He said clause 15.0 at page 25 entitled him to resign; that clause 9.2.1 of the 2009 Collective Agreement provided for 3 months' notice; and that in his resignation letter he was giving two months notice and forfeiting his salary for the entire notice period, meaning that he did not wish to be paid during the notice period.

He said his understanding of clause 9.2.3 was that if one failed to give notice, then they would have to refund the salary that is paid during the notice period. He said he did not deny owing the amounts claimed by the plaintiff in the statement of claim which amounts were spent from October, 2006 to December, 2008. He said in accordance with the Bonding Agreement, the plaintiff is in order to claim these amounts because he did not fulfill that agreement and he did not complete his studies at the time he resigned. He said he has not paid these amounts because he believes that they can be offset against the benefits that he had accrued during his service with the University to which he was entitled when he resigned as provided in clauses 15 and 16 of the 2009 Collective Agreement. He said he is entitled to 75% of normal retirement benefits based on the number of years served and three quarters of 4 months pay for each year served. He said his gross salary was about K9,000,000.00 and net salary about K6,000,000.00 as Lecturer Grade 1. He said at the time he went on study leave, he had accrued leave days which he is also claiming.

In cross-examination he admitted that from 1<sup>st</sup> June, 2009 he changed his domicile from Nottingham in the U.K to KwaZulu-Natal in South Africa upon taking up appointment at the said University; and that up to 31<sup>st</sup> July, 2009 he was already an employee of KwaZulu-Natal University. He said between 1<sup>st</sup> June and 31<sup>st</sup> July, 2009 he was employed by KwaZulu-Natal University and Copperbelt University. He denied knowledge that that was a fundamental breach of his employment with the plaintiff or that he was in breach. He admitted that his terms of employment with the plaintiff did not allow him to take up a job elsewhere. He admitted that he has no proof of the actual figures of his basic pay or the exact record of the leave days accrued up to September, 2003. He accepted that the two months' notice he gave fell short of the three months required notice and that he has not paid any cash to the University in accordance with clause 9.2.3. He disagreed that his conditions of service do not provide for forfeiture of his salary. He agreed that the university had rights over him under the Bonding Agreement and as an employee and that if counsel said so, then his employer was entitled to treat him as having absconded. He accepted that the benefits on resignation are not available to an absconder.

In re-examination he said he did not report for work with the plaintiff on 31<sup>st</sup> July, 2009 because he had resigned and that he cannot be termed as an absconder. He said he did not pay cash to the University because in his resignation letter he asked not to be paid the salary that is paid during the notice period. He also believed that he had accrued benefits which would offset any dues to the university. He said he has his pay slip from April on which he has based his estimation of the last salary, but he has not produced it. This in brief is the evidence I received at the trial of this cause.

Counsel for the plaintiff has submitted in brief that the facts of this case are on all fours with those in the case of *Kitwe City Council v William Nguni (1)* where it was held, inter alia, that the respondent decided to resign in the face of dismissible disciplinary charges against him in order to be paid terminal benefits, which he would not have been entitled to had he been dismissed. Counsel has urged me not to uphold the defendant's defence that he had resigned; but to accept the plaintiff's contention that he is an absconder on the grounds, first, that he had no intention to return to Zambia and to the plaintiff's station to serve the period of bonding which is clear from his movement to South Africa and engagement with University of KwaZulu-Natal before he purported to resign; and second, that his purported resignation does not satisfy his terms of employment as he did not give the requisite three months' notice, nor had he, up to the time of trial, paid any cash due for the notice period.

Counsel argues that it is plain from the defendant's testimony that his purported resignation was an afterthought and that he admitted under cross-examination that the notice period he gave of two months instead of three months was insufficient. Counsel further argues that the defendant told the Court that he was conscious that he had breached the bonding terms; that the plaintiff was entitled to treat him as an absconder; and that benefits were not available to an absconder. In conclusion it is counsel's prayer that the defendant's defence and his counterclaim having failed, this is a proper case for me to uphold the plaintiff's case and condemn the defendant in costs and dismiss the counterclaim with costs.

It is the submission of counsel for the defendant, that the latter does not dispute the plaintiff's claim. He is claiming that the plaintiff is holding on to his terminal benefits. Counsel says the question to decide is whether the defendant was entitled to terminal benefits on resignation. He has referred me to clauses 9.2.1 and 9.2.3 of the 2009 Collective Agreement and the book titled *Employment Law in Zambia-Cases and Materials, Revised Edition, UNZA Press by W.S. Mwenda* at page 155 which he says defines resignation as the voluntary termination of the contract of employment by an employee by either giving the required notice or payment of money to the employer in lieu of notice and that resignation effectively terminates the contract of employment. Counsel has also urged on the basis of the Supreme Court decision in *Chikuta v Chipata Rural Council (2)* that the defendant's resignation was effective and is supported by law and the University's conditions of service. He has also referred to clauses 15 and 16 of the 2009 Collective Agreement and urged that the defendant's counterclaim should succeed and the difference that will remain should attract interest at the current bank lending rate as this action should not have been commenced.

On the evidence I heard there is no dispute that the defendant was employed by the plaintiff on 26<sup>th</sup> December, 1991 as Staff Development Fellow in the Mining Department in the School of Technology. The appointment was effective from 1<sup>st</sup> January, 1992 (page 1 of the defendant's Bundle of Documents). On 13<sup>th</sup> February, 1995 the defendant was appointed as Lecturer Grade III on Permanent and Pensionable terms (page 6 of defendant's Bundle). On 8<sup>th</sup> December, 1997 he was promoted to Lecturer Grade II (page 9 of same Bundle), and on 11<sup>th</sup> December, 2001 he was promoted to Lecturer Grade I effective 1<sup>st</sup> January 2002, the entry point being K23,616,204 per annum (page 13 of same Bundle). It is a fact that in June, 2003 the defendant was awarded an academic staff scholarship by the Commonwealth Scholarship Commission in the United Kingdom to pursue studies leading to the qualification of PhD in Geographical Information Systems tenable at the University of Nottingham in the U.K. From the notification of award at page 3 of the plaintiff's Bundle of Documents, confirmation of the Scholarship was made subject to the defendant signing an undertaking to return to the post in Zambia in connection with which he was nominated.



It is common ground that on 23<sup>rd</sup> August, 2003 the defendant was granted paid study leave by the plaintiff on the terms contained in the letter at pages 6 to 7 and 15 to 16 of their respective Bundles. The study leave was effective 1<sup>st</sup> September 2003 and was to end at the end of September, 2006. It is also common ground that on 1<sup>st</sup> September, 2003 the parties signed the Bonding Agreement at pages 9 to 11 and 17 to 19 of the respective Bundles of Documents. Under para 2 of the said Agreement, the defendant bound himself to refund the University all the financial assistance to be given in the form of scholarship/sponsorship while on training (salary/allowance, fees, fares inclusive) should he fail to complete the bondage period specified under para 7 as 1.5 times outside Africa. Under para 3 of the Agreement, the University was entitled to sue to recover monies spent on the defendant, which action the plaintiff has taken.

Further there is no dispute that the defendant pursued his studies at Nottingham University. I accept that he completed his PhD programme in 2010 and graduated in July, 2011, but he did not return to Zambia to take up his post at the University. There is no dispute that the defendant failed to complete his study programme in three years. He was given an extension of study leave and according to the defendant the University agreed to extend financial assistance to him up to December, 2008. It is common ground that on 1<sup>st</sup> June, 2009 the defendant wrote to the University the letter at page 12 of the plaintiff's Bundle giving formal notification that he was resigning from his position as lecturer effective 31<sup>st</sup> July, 2009. He also wrote that he wished to forfeit his salary in lieu of notice. He cited difficult personal circumstances and indicated that he would return to the University to discuss the issue of his bond at the end of July. He never returned to the University to discuss the bond.

It is a fact that in the letter dated 16<sup>th</sup> July, 2009 (pages 13 to 14 of plaintiff's Bundle) the defendant was advised that his resignation had not been accepted as it had contravened the provisions of his Bonding Agreement for him to return upon completion of his studies. He was also advised to refund the University all monies that were spent on his studies from 1<sup>st</sup> October, 2003 to 31<sup>st</sup> July, 2009. These are the same monies now claimed by the plaintiff.

The defendant accepts that the monies are due to the University. Therefore, I accept that the defendant was given financial assistance by the University up to the time he tendered his resignation. Under para 2 of the Bonding Agreement the plaintiff is entitled to recover the monies claimed in the writ and statement of claim.

The main issue in the case with which I am concerned is whether or not the defendant was entitled to resign his position as lecturer; and if so, whether he was entitled to terminal benefits upon resignation. The subsidiary issue is whether or not the defendant absconded. Counsel for the defendant has given the definition of "resignation" in his submissions. This is the voluntary termination of the contract of employment by an employee by either giving the required notice or payment of money to the employer in lieu of notice. In *Chikuta v Chipata Rural Council (2)* referred to me by counsel for the defendant, the Supreme Court agreed with the learned trial Judge who referred to resignation as the unilateral free choice of an employee in a contract of personal service to terminate the contract at any stage either contractually or even in breach of contract. I can add that resignation is the voluntary act of an employee who finds himself in a situation where he believes that personal reasons cannot be sacrificed in favour of the service and he has no other choice but to dissociate himself from his employment. This does not cover cases where the employee is forced to resign by use of threats, intimidation or manipulation or where resignation is imposed as a penalty for an offence.

The Employment Act, Cap 268 does not provide for resignation or require the employee to give an advance notice to the employer of his intention to resign. Under section 36(1) a written contract of service shall be terminated (a) by the expiry of the term for which it is made; or (b) by the death of the employee before such expiry; or (c) in any other manner in which a contract of service may be lawfully terminated or deemed to be terminated whether under the provisions of the Act or otherwise. The requisite notice is normally provided for in the contract of employment or in a Collective Agreement. The period of notice varies from contract to contract. Resignation notice usually takes the form of a letter commonly called 'resignation' letter addressed to the employer, expressing the employee's intention to terminate his employment.

It must state the date when resignation is to take effect. It may also contain the reason or justification of the employee for filing his resignation, although legally, this is not important. I think that the employee may resign for whatever reason or even for no reason at all. Thus in legal parlance, voluntary resignation is also called "termination by employee without just cause." If the employee fails to give the employer the requisite notice of his intention to resign he may be held liable for damages. Generally an employee who voluntarily resigns from his work is not entitled to separation pay or terminal benefits. The law does not oblige the employer to give separation pay if the initiative to terminate comes from the employee himself and there is no provision in the Employment Act which grants separation pay to voluntary resigning employees.

Separation pay as a rule is paid only in those circumstances where the severance of employment is due to factors beyond the control of the employee such as retrenchment or redundancy to prevent losses where the employee is forced to depart from his company due to no fault on his part. However, I believe that by way of exception, there are at least two instances where an employee who voluntarily resigns is entitled to receive separation pay; first when payment of separation pay is stipulated in the employment contract or Collective Agreement; and second when it is sanctioned by established employer practice or policy. There may also be special cases where the court may award separation pay to a voluntary resigning employee such as where the employer agreed to give separation pay to the employee as an incident of his resignation, but later on renege in the performance of such commitment.

In the present case, the 2009 Collective Agreement between the University and the Academic Union which applied to the defendant provided under clause 9.2.1 that a member of staff may terminate his/her employment by giving three (3) calendar months' notice in writing of the intention to do so. As properly urged by counsel for the defendant under clause 9.2.3, a member of staff on Permanent and Pensionable terms of service who fails to give notice of resignation as required in 9.2.1 shall be required to pay cash in lieu of the unsaved portion of his/her notice.

Further under clause 9.2.4 the Vice-Chancellor, acting on behalf of the Council, had discretion in cases of genuine hardship to release a member of staff from appointment without any or part of the penalties aforesaid. Of course it is not disputed that under clause 16.1 a member of staff on Permanent and Pensionable Conditions of Service who had served not less than seven years who wished to resign after giving the required notice would be awarded benefits as set out in that paragraph. Where an employee had done 15-19 years of service they are entitled to seventy five percent of normal retirement benefits which are set out at para 15. For 15 years service and above, this is 4 months basic salary for each year of service. It is accepted that the defendant had served the University for seventeen years. Therefore, if his resignation complied with the provisions of the Collective Agreement, he would be entitled to a separation pay equal to 75% of 4 months basic salary for each year of service.

I come back to the question of whether the defendant was entitled to resign his position as lecturer. Evidence adduced before me tends to give an affirmative answer. As I have said under clause 9.2.1 of the 2009 Collective Agreement, a member of staff may terminate his employment by giving 3 calendar months notice in writing of his intention to do so. In my view the resignation notice was to ensure appropriate staffing and continuity for the University's educational and research programs. I agree with the extract from *Chikuta v Chipata Rural Council* (2) cited by counsel for the defendant in his submissions wherein the Supreme Court stated as follows “...**we do not believe that there is any law which confers the right in effect to force an employee to remain in the employer's service. In our opinion, the appellant had every right to resign and having done so, such resignation effectively terminated the contract.**”

But counsel for the plaintiff has referred me to *Kitwe City Council v Nguni* (1) a later decision of the Supreme Court. Although the facts are not exactly on all fours, I find the decision of the Supreme Court very helpful. That was a case where the respondent claimed terminal benefits of K77,534,824.36 for loss of employment with the appellant and damages for breach of contract, conditions of service and for loss of earnings, arising from the appellant's delay in processing his resignation.

The Supreme Court considered whether an employee is entitled to terminal benefits, on resignation prompted by desire to avoid dismissal. As properly submitted by counsel for the plaintiff the Court found that the respondent decided to resign in the face of dismissible disciplinary charges against him in order to be paid terminal benefits, which he would not have been entitled to had he been dismissed. The Court reversed the learned trial Judge on his findings that the plaintiff resigned due to harassment, victimization and frustration. The Court agreed with the argument of the defendant that the evidence of harassment, victimization and frustration was an afterthought.

In this case the defendant tendered his resignation notice on 1<sup>st</sup> June, 2009. The resignation was effective 31<sup>st</sup> July, 2009. He accepts that he did not give the 3 months' calendar notice as required by clause 9.2.1 of the 2009 Collective Agreement and that he has not paid cash in lieu of the unsaved portion of his notice as set out in clause 9.2.3. His argument is that in the resignation letter he said he wished to forfeit his salary in lieu of notice; therefore he complied with clause 9.2.3 and is entitled to separation pay. While it is correct that a resignation would effectively terminate the contract of service, what happened in this case cannot be glossed over. The defendant was on study leave from 1<sup>st</sup> September, 2003 to end of September, 2006. His study leave and financial assistance were extended to enable him finish his PhD programme. It was a condition for confirmation of the academic staff scholarship that the defendant signed an undertaking to return to the post at the university in connection with which he was nominated. According to the plaintiff this condition was meant to strengthen their human resource at the University. The defendant did not return to take up his position. Instead he took up the job of lecturer at University of KwaZulu-Natal in Durban, South Africa.

The defendant accepts that at the time he wrote the resignation letter and throughout the notice period from 1<sup>st</sup> June to 31<sup>st</sup> July, 2009 he was in employment with the University of KwaZulu-Natal. In fact the address given in the resignation letter is that of the university in South Africa. Before he wrote the resignation letter the defendant did not inform the plaintiff that he was moving from Nottingham University to take up appointment as lecturer at the University of KwaZulu-Natal in South Africa.

In fact the plaintiff was surprised that the defendant who was supposed to be in the UK was writing to them from South Africa. Applying the Supreme Court decision in *Kitwe City Council v Nguni (1)* I am inclined to agree with the argument by counsel for the plaintiff that the defendant's resignation from his post at the University was an afterthought. In my judgment the employee serving the notice of termination is still considered an employee of his current employer and hence prohibited to join another company during the notice period. Unless his contract of employment allows him to work with another employer before the end of the notice period, he has to seek written permission from his current employer to do so. In this case the defendant admitted that his terms of employment with the University did not allow him to take up a job elsewhere without approval. I observe that clause 13.6 of the 2009 Collective Agreement provided for leave of absence to enable a member of staff take up alternative paid employment while still remaining a university employee. But the defendant did not seek permission to take up paid employment with the University of KwaZulu-Natal or to move from Nottingham University where he was studying. Neither did he ask the Vice-Chancellor to release him from appointment under clause 9.2.4.

In my judgment the defendant could have terminated the contract of service without waiting for the required notice period to expire, by paying to the University a sum equal to the salary that he would have earned during the required period of notice as stated in clause 9.2.3. He wished to forfeit his salary in lieu of notice, but at the time of his resignation he had already left his employment to work for another university in South Africa. In my view having left the plaintiff there was no salary payable to him which he could lawfully forfeit in lieu of notice as he indicated in his resignation letter. I again agree with the Supreme Court's decision in *Kitwe City Council v Nguni (1)* that it would be unlawful to award a salary for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment. I find myself unable to accept that the defendant was entitled to a salary during the purported notice period. I say this because he had already left to work for another employer. It follows, therefore, that the defendant did not comply with clause 9.2.3 of the 2009 Collective Agreement and was not entitled to the resignation benefits set out in clause 16.

Furthermore, I am persuaded by the argument of counsel for the plaintiff that the defendant had absconded from his employment whilst on study leave to join another employer in South Africa. The defendant admits that his employer was entitled to treat him as having absconded and that the benefits spelt out at clause 16 of the Collective Agreement are not available to an absconder. I add that the defendant as a lecturer and Staff Development Fellow was employed in a professional capacity. His contractual obligation was defined largely by the nature of his profession and the obligations incumbent on him. In my view he had a professional obligation to the plaintiff to return home to take up his post. He had a duty to discharge that obligation. He breached that duty by taking up alternative paid employment before he completed his study program.

Of course it is clear from para 2 of the Bonding Agreement that one may fail to complete the bondage period. Even so, the nature of the academic scholarship itself required the defendant to return to his university post. I conclude that the defendant absconded from duty and that having failed to comply with clauses 9.2.1 and 9.2.3 of the 2009 Collective Agreement he is not entitled to payment of terminal benefits by the plaintiff or to equitable setoff. Further still, the defendant did not provide any proof to persuade me that he is entitled to leave days accrued before he left for studies. I do hereby dismiss his counterclaim with costs. Consequently I hold that the plaintiff has proved its claim for the sums of £24 000 in respect of daily maintenance allowance, book allowance and thesis and examination allowances. I enter judgment for the plaintiff in that amount. I also award the plaintiff interest on the sum of £24,000 at 2% above LIBOR from the date of writ, being 26<sup>th</sup> October, 2009 to the date of payment. I also find for the plaintiff in the sum of K2,160,000.00 (old currency) in respect of research work in Zambia plus interest also computed from 26<sup>th</sup> October, 2009 at 12% up to date of judgment and thereafter at 20% until fully paid. Costs are for the plaintiff to be taxed if not agreed.

Delivered in Open Court at Kitwe this 15<sup>th</sup> day of February, 2013

**R.M.C. Kaoma**  
**JUDGE**