

IN THE HIGH COURT FOR ZAMBIA

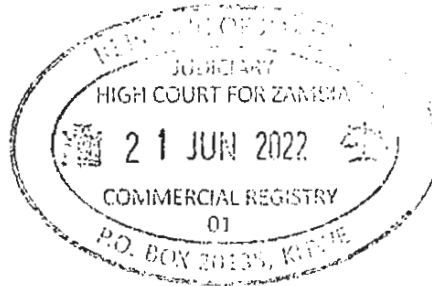
2020/HKC/047

AT THE COMMERCIAL REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)

**BETWEEN:**



**RICHARD ILUNGA**

**PLAINTIFF**

**AND**

**GEODRILL ZAMBIA LIMITED**

**DEFENDANT**

**Before Hon. Lady Justice Abha Patel, S.C.**

**For the Plaintiff:**

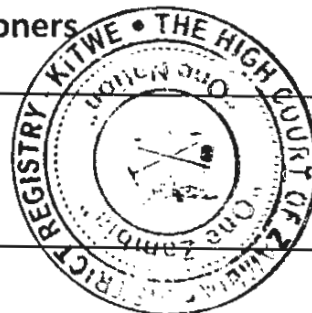
**Mr. N. Chaleka & Mr. G. Kalandanya  
Messrs ECB L.P. & Messrs G.M. L.P.**

**For the Defendant:**

**Mr. K. Phiri**

**Messrs Corpus Legal Practitioners**

**JUDGMENT**



## **List of Authorities**

1. Patrick Matibini, *Zambian Civil Procedure, Commentary and Cases* Lexis Nexis
2. Hughes W et al, *Construction Contracts; Law and Management* 5<sup>th</sup> Edition, New York, Routledge, 2015;
3. Chitty on Contract, *The Law of Contracts, Specific Contracts* 30<sup>th</sup> Edition Volume II London, Sweet & Maxwell, 2008
4. Chitty on Contract, *The Law of Contracts, General Principles*, 29<sup>th</sup> Edition Volume I, London, Sweet & Maxwell, 2004
5. Cheshire, Fifoot and Furmston's *Law of Contract* 11<sup>th</sup> edition.
6. Phipson on Evidence, 17<sup>th</sup> Edition Page 151

## **Cases Referred to:**

1. BJ Poultry Farms Limited vs Nutri Feeds Zambia Limited SCZ Judgment No. 3 of 2016
2. Colgate Palmolive Zambia Limited vs Able Shemu Chuka SCZ 181 of 2005
3. Rollop and Colls Limited vs Northwest Metropolitan Regional Hospital Board D (1973) 2 AIEr 260;
4. Zambia Railways vs Pauline S. Mundia and Another (2008) Z.R 287 Vol. 1
5. Wilson Masauso Zulu v Avondale Housing Project (1982) Z.R 172 (SC)
6. National Drug Company Limited and Zambia Privatisation Agency vs Mary Katongo Appeal No. 79/2001;

7. Rosemary Ngorima and 10 others vs Zambia Consolidated Copper Mines Appeal No. 97 of 2000;

8. Michael Chilufya Sata vs Zambia Bottlers Limited SCZ Judgment No. 1 of 2003

9. Finance Bank Zambia Limited and Rajan Mahtani vs Simataa Simataa SJZ 21 of 2017

10. Sylvester Musonda Shipolo vs Shadreck Maipambe Appeal No. 1/2016 (SCZ)

## **1. Introduction**

1. The Plaintiff commenced this action on 3<sup>rd</sup> July 2020, by Writ of Summons and Statement of Claim, seeking the following reliefs:

1.1 Payment of total sums of USD 497,225.00 being accrued annual retainer fees and additional allowances;

1.2 Payment of the emoluments for the duties executed as Executive General Manager at the rate at which the current Executive General Manager is being paid;

1.3 Damages for the breach of statutory duty and failure to pay the Plaintiff the Management Information circulars and the law;

1.4 Costs for this action;

1.5 Any other relief the Court will deem fit.

2. The Defendant entered appearance on 28 July 2020 and, in its defence, admitted that the Plaintiff was employed by the Defendant on 18 September 2014 as a Senior Logistics and Immigration Officer under successive yearly renewable contracts, which position the plaintiff held until effluxion of his 2019 fixed term contract on 31 December 2019.
- 2.1 The Defendant has stated that the duties of the Plaintiff, were to inter alia, assist with issues related to immigration, human resources, marketing of the defendant and to assist with field, IT and general administration of the defendant.
- 2.2 The Defendant admits that in or around June 2015, the Plaintiff was appointed as the Zambia national Director for the defendant company and referred to as the "Local Director", in which capacity he performed administrative tasks.
- 2.3 Save as pleaded above, the Defendant denied all the Plaintiff's claims and stated that the Plaintiff was not a member of the Defendant's Board of Directors, nor did he perform official statutory duties including preparation of financials or make any investment or strategic decisions of the defendant.
- 2.4 The Defendant denies that the Plaintiff is entitled to the sum of USD 497,250.00 in accrued fees as a local director, as the same were neither agreed by the Defendant nor approved by resolution of the shareholders of the defendant.

The defendant consequently denies that the Plaintiff is entitled to any claims as set out in the Statement of Claim.

### 3. Facts and Background

#### The Plaintiff's case

- 3.1 The Plaintiff led evidence and relied on his Witness Statement of 10<sup>th</sup> October 2020 and his bundle and supplementary bundle of documents filed into Court on 17 November 2020 and 19 April 2021 respectively.
- 3.2 The Plaintiff testified that he was employed under contract as a logistics officer in for the Defendant Company in 2014. It was further his evidence that the defendant company appointed him as a local director and referred to Minutes dated 24 June 2015 and which appointment was subsequently reflected in the documents filed at the Office of the Registrar of Companies (PACRA), both of which he referred to on pages 1 and 206/207 of his bundle of documents.
- 3.3 It is the Plaintiff's further evidence that as the local director, he did not receive any commission for securing a contract with Anglo America, although another Director named as *Dave Harper* received a bonus for the said contract. He has referred to a document on page 2 of his bundle being a email from a *Dr. Gerard Darmanin*.
- 3.4 It was his evidence that he had performed the duties of a local director such as signing Reports, Financial statements and the preparation of Directors Reports, and referred to documents collectively produced in his supplementary bundle of documents. He has further advanced the argument that as he was executing duties of the Executive General Manager, (EGM) a position which he believed is equivalent to the substantive CEO of the Branch and reported directly to the President and

CEO of the Group, he was entitled to remuneration at the same rate as the substantive office holder.

3.5 It is his evidence that the Company subsequently appointed a *Mr Greig Rodger* as EGM, to whom he was to report circumventing his reporting to the group CEO, a fact which he believed undermined his authority as local director. He referred to two further contracts that he had secured and for which he believes he was entitled to commission. His evidence was that he continued in his position as Senior Logistics Officer from 2017 to 2019 under an oral contract.

3.6 It was his evidence that he and the defendant had began contract negotiations and he referred to **pages 3 and 4 and 76 to 80** of his bundle of documents. He remained the local director from September 2015 to 16 March 2020 when he tendered his resignation as per **page 210** of his bundle.

3.7 He has also referred to management meetings and circulars of the Defendant company which set out annual retainer fees as well as additional allowances to which he is also entitled. He referred to **page 20** of his bundle of documents. He also referred to entitlement to participate in stock options and referred to **pages 34 and 35** of his bundles, although he was not offered any. He has maintained that he was side-lined and not offered the retainer fees and directors allowances which were revised upwards in 2019 and in support of this he referred to **page 193** of his bundle.

3.8 It was his evidence that he then engaged Counsel to issue a letter of demand claiming the sum of USD 497,225.00 details of which are in **paragraph 17** of his statement of claim, and at **paragraph 22** of his Witness Statement. He also makes additional claims, details of which are at **paragraph 18 and 26** of his statement of claim and witness statement respectively. This marked the close of the case for the Plaintiff.

#### 4. The Defendant's Evidence

4.1 The Defendant called one witness; a **Dr. Gerard Darmanin** whose details are on his Witness Statement filed into Court on 16 December 2020. He placed reliance on his Witness Statement, the Defendant's bundle and supplementary bundle of documents filed into Court on 18 November 2020 and 15 April 2021.

4.2 The witness explained the nature of the defendant company's business and its corporate structure. He was at the material time, and still is, the Group Director of Corporate Foreign Affairs in the employ of **Geodrill Limited** based in Ghana. **Geodrill Limited** is registered and based in the Isle of Man and referred to as the **Holding Company**. It was his evidence that Geodrill operates in Ghana, Burkina Faso, Cote d'Ivoire, Mali and Zambia.

4.3 It was his explanation that the Defendant, Geodrill Zambia Limited, is registered in Zambia as a Foreign Company, and continues to operate in that manner since its registration on 17 April 2014, and is a branch of the Holding Company, Geodrill Limited. He named the 5 directors of the

Holding Company, three of whom are members of the Board of Directors of the Defendant company, while other Members of the Board are invited external persons and who are not employed by either the Holding company or the Defendant Company. He furthered the explanation that being a company director, does not of itself render that person to becoming a board member in the Holding Company.

4.4 He testified that in September 2014, the Plaintiff was employed as a Senior Logistics and Immigration Officer, under successive yearly renewable fixed term contracts until the effluxion of his 2019 fixed term contract on 31 December 2019. He explained the duties of the Plaintiff as appearing on **page 2** of the defendant's bundle and confirmed his appointment in June 2015, as the local director of the Defendant. He explained that the Plaintiff was neither a Board Member of the Holding Company, nor the Defendant company for the period that he held office of local director and in that capacity, he was not entitled to any retainer fees, director fees or Board fees during the course of his directorship.

4.5 It was also his defence that the Plaintiff was not involved in any statutory duties nor did he sign any Financial reports or statements or participate in any strategic decisions as per **pages 10 to 169** of the Defendant's Bundle.

4.6 The witness has further maintained that none of the local directors in any of the branches, qualified for annual retainer or additional allowances as claimed by the Plaintiff and he has denied that the Plaintiff is entitled to any of the claims he has made and has reiterated that the Plaintiff was a



local director of the Zambia Branch and played no role in the Holding Company or in any of the Geodrill Group of Companies or its subsidiaries.

4.7 The witness has tendered an explanation for the appointment of *a Mr Greig Rodger* on 15 August 2016 as General manager of the Holding Company mandated to oversee and manage all business of the Geodrill Group of Companies which included Zambia. This marked the close of the case for the defendant.

4.8 Both witnesses were duly cross examined and details of their cross examination are on record and will not be re-cast here save for emphasis where appropriate.

## 5. The Issues for determination

5.1 Although the Parties having failed to file a list of agreed issues in dispute for the determination of the Court, the Plaintiff, did on **10 December 2020** file its list of issues for determination by the Court. Essentially, these are the same as the issues identified by the Defendant in its List of Authorities and Skeleton Arguments filed on **16 December 2020**.

5.2 Whichever way one looks at this matter, the cardinal issues which require determination by the Court are the following:

i. Whether the Plaintiff is entitled to a payment of USD 497,225.00 being

accrued annual retainer fees and additional allowances and emoluments for the duties executed as Executive General Manager at the rate which the current Executive General Manager is paid.?

ii. Whether the Plaintiff is entitled to damages for alleged breach of any statutory duty.

iii. Whether the Plaintiff is entitled to costs or any other relief.

5.3 The Court extends its gratitude to Counsels respectively for their industry, diligence and co-operation rendered to the Court and for its submissions, all of which have been painstakingly considered in the Judgment of the Court.

## 6. Findings of Facts

6.1 I am of the considered view that before I embark on analysing the facts, the evidence, the law as well as the supporting skeleton arguments and submissions filed by Counsels, I will proceed to make findings of facts, for clarity of Judgment and to prevent repetition.

6.2 **Geodrill Limited** (incorporated in the Isle of Man on 17<sup>th</sup> April 2014), was registered as a Foreign Company in Zambia, under Certificate Number 220140001603 issued by PACRA.

- 6.3 The Plaintiff was appointed as Logistics Officer in the Zambia Branch of the Defendant Company in 2014 on agreed terms and conditions in accordance with the executed contract of employment. (Hereinafter referred to as the Contract).
- 6.4 In 2015, the Plaintiff was appointed as a local director for the subsidiary company in Zambia, as per Minutes of a Meeting of Directors of Geodrill Limited held in Ghana on 24 June 2015. These are produced on **page 1** of the Plaintiff's bundle of documents. The appointment is reflected by the records obtaining at PACRA and produced on **page 207** of the said bundle of documents.
- 6.5 The Plaintiff tendered his resignation as local director on 16<sup>th</sup> March 2020 which resignation was accepted by the Defendant.
- 6.6 For the period that he was employed, the Plaintiff has received his emoluments as per his contract of employment.

## **7. The Submissions of the Parties**

- 7.1 The Parties tendered written submissions, whose dates were enlarged by a Consent Order and filed on 26<sup>th</sup> January 2022 and 11 February 2022 respectively. For unknown reasons, the Defendant's submissions were only seen by the Court on 11<sup>th</sup> March 2022 and have been duly noted. The same are on record and will not be restated, save to thank Counsels for their

diligence and industry, as they have assisted the Court in arriving at its Judgment.

## 8. The Law

8.1 In my considered opinion, the legal principles that are being canvassed by the Parties respectively, largely focus on the law of contract. I will begin by analysing the Plaintiff's first claim as identified above and consider whether the Plaintiff is entitled to payment of fees, allowances and emoluments in the sum of USD 497,225.00.

8.2 It is trite and the law is clear with regards the burden of proof in civil matters. The law guides that where such burden is not discharged to the satisfaction of the Court, the Party claiming is not entitled to its claims, even in the face of a failed defence.

8.3 My attention has been drawn to the statement of the Supreme Court in the cases of **B.J. Poultry Farms Limited vs Nutri Feeds Zambia Limited** and **Zambia Railways vs Pauline S Mundia**, which cases have affirmed and re-affirmed, time and time again, the above principle on the burden to be discharged by the Plaintiff. I will accept this line of submission in its totality, as there really is no need for the Court to reinvent the wheel on this principle.

8.4 I have noted as a fact, and the record will reflect from the evidence of both the Plaintiff and the defendant's witness, that the Plaintiff was employed as

Senior Logistics and Immigration Officer. A copy of his contract which mirrored his exact contract, was exhibited at **pages 76 to 80** and **pages 3 to 7**, in the bundles of documents respectively. There is no dispute to this fact and the Plaintiff in his evidence and under cross examination, did confirm that he received full payment in accordance with the said contract.

- 8.5 What separates the Parties, and which forms the first issue, is the Plaintiff's claims for allowances, fees and commissions in the sum of USD 497,225. The law governing contracts is that Parties are bound by the terms and conditions upon which they have agreed. The defendant has quoted from within and outside the jurisdiction and has submitted that a Party is not allowed to imply into a contract any terms that were not expressly agreed upon by the Parties or added by way of an addendum. They have relied on the case of **Colgate Palmolive Zambia vs Abel Shemu Chuka** in which the Supreme Court stated as follow:

*"If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by the Courts of Justice".*

The defendant has also relied on the pronouncement of the Supreme Court in the case of **Ngorima vs Zambia Consolidated Copper Mines** in which the Court stated:

*"It is trite law that in an employer/employee relationship parties are bound by whatever terms and conditions they set out for themselves."*

- 8.6 They have further submitted from the English Court of Appeal in the case of **Rollop and Colls Ltd vs Northwest Metropolitan Regional Hospital Board D** where the Court has stated that:

*"if the express terms are perfectly clear from ambiguity, there is no choice to be made between different possible meanings; the clear terms must be applied even if the court thinks some other terms would have been more suitable".*

- 8.7 The Plaintiff, on the other hand has invited the Court to consider the legal status of a director and has referred to the provisions of the **Isle Of Man Companies Act 2006** and the provisions of the **Zambian Companies Act No. 10 of 2017** in support of its submission that the law provides for remuneration of directors and that the Plaintiff's first claim is anchored on this provision. The Plaintiff has further submitted that it is a guiding principle of company law that where no express contract has been entered into between the company and its directors, the provisions contained in the Act and the Company's Memorandum of incorporation are generally viewed as guiding the terms of the relationship that the director has with the company. They have also submitted that a director occupies a position of trust within the company. The Plaintiff has relied on **section 102** of the Isle of Man Companies Act which provides as follows:

1. *"Subject to the memorandum or articles of a company, the directors may fix their emoluments in respect of services to be rendered in any capacity to the company."*

2. *"subject to contrary provision in the memorandum and articles of a company, the directors may be paid all expenses properly incurred in the discharge of their duties"*.

8.8 The Plaintiff has submitted forcefully that there is no agreement on record that shows that the Plaintiff forfeited or indeed agreed not to be compensated as other directors of the defendant were. Counsel for the Plaintiff has submitted extensively on the issue of executive and non-executive directors, Board Members against Directors and has also referred to **section 118** of the **Zambian Companies Act** to support its submission that the Plaintiff was entitled to remuneration, allowances and fees as claimed in the first issue.

8.9 The arguments advanced by the Plaintiff, appear attractive in theory, but lack the force and will of the Parties to the contract. I am guided by the cases of **National Drug Company limited and Zambia Privatization Agency vs Mary Katongo** in which the Court stated:

*"it is trite law that once the parties have voluntarily and freely entered into a legal contract, they become bound by the terms of the contract and that the role of the Court is to give efficacy to the contract when one party has breached it by respecting, upholding and enforcing the contract."*

8.10 In the case in *casu*, I find that the Parties voluntarily and freely entered into an employer/employee relationship, the terms of which were set out in the contract of employment exhibited in their respective bundles and referred to in **paragraph 8.4** above. **Clause 5** of the said contract refers to the duties of the employee and **clause 5.1** and **5.2** mandated the employee to perform duties and responsibilities assigned by the employer in a professional manner. The Plaintiff has admitted that he was serving under the said contract of employment and that he was paid in accordance with the contract. He equally conceded that his job description was as stated on **page 2** of the Defendants bundle of documents. He further admitted that he had no power to bind the company.

8.11 I have also looked at the documents produced by the Plaintiff on **pages 208, 209 and 212** of his Bundle of documents. Looked at chronologically, I note the following:

on 21 February 202 at 11:10 hours, the Plaintiff appears to have sent an e-mail to the Defendant, addressed to *Greig* and which refer to contract negotiations between himself and the defendant. I note the following:

*"...It is not my intention to hold the company at ransom, but I just feel it's the right time for me to push in a few new terms in the contract which I let go in the past as I was aiming to ensure that the company was fully operational and with stable contracts, which I believe at the moment is the case. As such I believe the terms contained in my suggested contract are a*



*close reflection of the efforts I have put in over the past years from Geodrill's inception....*

*I therefore hope that you will have a relook at my suggested contract before we can proceed with the new contract."*

The email on page 209 was the response from the Defendant's Witness, Dr. Gerard Darmanin to the Plaintiff, the contents of which are self-explanatory. The document on page 212 of 22 February 2020 appears to be an e-mail from the Plaintiff, in response to Dr. Gerard, the salient points that I note are as follows:

*"Thank you for your email. It is comforting to know that Head Office remains committed to supporting the Zambian Office. I have a few changes that I would like to make to the contract suggested by Greig. These are:*

*1. Net pay. The suggested contract has a net pay of around K35,000. However, I would like the net pay to be adjusted to K48,000...*

*2. use of personal car.....*

*These two changes will help conclude the contract in good time thank you.*

*Regards*

*Richard"*

8.12 I have reflected on the submissions of the Parties and the documents on record. I accept the defendant's submission on the principle of extrinsic evidence not being admissible to add to or vary or contradict the terms of a written contract. The Plaintiff appears to have harboured the belief that he

was entitled to make this claim on the basis of what he perceived and witnessed as remuneration payable to other named members of the Board of Directors of the Holding Company.

On this, I find the evidence of the Defendant's witness to have been credible and consistent and in keeping with privity of contract and am satisfied that other Directors had their own agreements and contracts with the Company, based on which they received compensation, by way of allowances, directors' fees and or salaries and commissions.

All that the Plaintiff managed to do by referring to all the documents in his voluminous bundle of documents, supports the above finding. It does not lend itself in any way, to proving that the Plaintiff himself was equally entitled to similar compensation in the absence of a written agreement between the Parties.

The function of the Court on this issue, is to establish if the Plaintiff has proved his claim or not. Counsel for the Plaintiff has argued based on the Articles of the Defendant that there is no agreement on record that shows that the Plaintiff forfeited or indeed agreed not to be compensated as other Directors of the Defendant were.

I am not inclined to accept this submission as conversely stated, there is nothing to show that the Plaintiff made or raised any claim for compensation over and above what he was receiving under his contract of employment for the additional duties that were assigned to him as per **clause 5** of the contract.

8.13 I also note from the exchange of correspondence referred to above, that the Plaintiff was alive to the fact that whatever duties he performed for the Defendant, as local director, were compensated within the contract of employment. From the documents on **pages 3 and 4** of the Plaintiffs bundle of documents, I note an exchange of correspondence to re-negotiate terms of the contract in **May 2016**, and these do not refer to any additional duties in respect of the appointment of the Plaintiff as local director. Again documents at **pages 76 to 80** of the Plaintiff's bundle point to terms of the contract being re-negotiated in the year **2020**.

In his evidence and from the documents on record, he confirmed his appointment as local director with effect from **24 June 2015**.

I am therefore satisfied, and find, that the Plaintiff accepted that the Defendant by replacing *Namukonda Suwilanji* with the Plaintiff as local director, was simply assigning duties to him, which were compensated within the terms of his contract and employment with the Defendant. It is also noteworthy that the Plaintiff has not placed before the Court any evidence to show that his predecessor was receiving any emoluments by way of Director's fees and allowances.

He has also not proved that he was in fact carrying out the duties of the Executive General Manager to support his claim for compensation on the same rate as that payable to the Executive General Manager. This came out clearly by his own admission, under cross examination. To the contrary, the evidence of the defendant was more credible on this aspect and any documents signed by the Plaintiff such as those in his supplementary

bundle of documents, were under instruction and on behalf of the Defendant, and when lodging the documents with the relevant authorities. To read any more into this relationship, would be akin to the Plaintiff, with the blessings of the Court, to re-writing the contract of employment between the Plaintiff and the Defendant, post-facto. This the Court will not sanction.

8.14 The Plaintiff not having discharged the burden of proof, I have no hesitation therefore in dismissing the Plaintiff's claims for payment in the sum of USD 497,225.00 in respect of accrued annual retainer fees, additional allowances and payments of emoluments for duties executed as Executive General Manager.

8.15 I now turn to consider the second issue to analyse if there has been breach of any statutory duty and any consequential damages payable to the Plaintiff. The Plaintiff has placed reliance on **Section 118** of the **Zambian Companies Act** which provides as follows:

*"the remuneration of directors shall be proposed by the board of directors and approved by members by ordinary resolution".*

According to the Plaintiff, the defendant not having provided such remuneration has breached its statutory duty and is liable in damages to the Plaintiff.

8.16 Counsel has submitted that the Defendant having failed to propose remuneration as per law provided, is in breach of its statutory duty, the natural consequence of which, is that the Plaintiff is within his rights to claim the same amount payable to the other directors. The defendant has countered in response to this submission and has invited the Court to note that both provisions relied on by the Plaintiff, require either a resolution of the board of directors or for the Articles to provide for such payment. It has already been noted that apart from the Minutes of a Meeting of Directors, of Geodrill Limited, of 24 June 2015, produced at page 1 of the Plaintiff's bundle of documents, which appointed the Plaintiff as a replacement local director in the place of Namukonda Suwilanji, the Plaintiff has produced no other document, resolution or agreement altering his remuneration as per the requirement of the law.

8.17 I now move to consider whether the Plaintiff is entitled to damages for breach of statutory duty. The defendant has invited the Court to consider the holding of the Supreme Court on the principle that the onus to prove damage is on the party claiming the breach. My attention has been drawn to the cases of **Zulu vs Avondale Housing Project** and **Mhango vs Ngulube & Others**. Further the Supreme Court in affirming this principle in the case of **JZ Car Hire Limited vs Malvin Chala and Scirocco Enterprises Limited** stated as follows:

*"it is the party claiming any damages to prove the damages."*

It is noted that in *casu*, and I accept the proposition that the Plaintiff claiming breach of a statutory duty, must prove the damage he has suffered.

8.18 The law relating to statutory duty as outlined in the old case of **London Passenger Transport Board vs Upson** was cited with favour by the Supreme Court of Zambia in the case of **Michael Chilufya Sata vs Zambia Bottlers Limited** in which the Court refused to find the respondent (in that case), liable for any breach of statutory duty, as the appellant failed to prove any injury caused on him as a consequence thereof. My attention has also been drawn to the case of **Ross vs Associated Portland Cement Manufacturers Limited** which case was cited by the Supreme Court in the case of **Lafarge Cement Plc vs Patrick Mandona**, to support the submission that the Plaintiff must not only prove that damage was suffered but that there was a direct connection between the breach and his injury. The principle was stated as follows:

*"It is now well established that a breach of a statutory duty does not give rise to civil liability unless there is a proved causal connection between the breach and the Plaintiff's injury."*

8.19 In *casu*, I have found that the Plaintiff has admitted to the contract between him and the defendant, has admitted that he was paid in accordance with the said contract, and that the contract provided for the imposition of additional duties. I have also further noted that the Plaintiff

and Defendant exchanged correspondence for a renewed contract in 2016 and subsequently in 2020, with no claims made for allegedly extra services or for his appointment as local director, which appointment was made in 2015. The lack of agreement between the Parties culminated in the Plaintiff resigning from local directorship, by e-mail of 16 March 2020, which resignation was accepted by the Defendant's undated letter, as can be seen from the documents on **pages 210 and 211** respectively of the Plaintiff's bundle of documents. It is also clear that in his resignation e-mail, he made no claims for any payments due to him, or at all. The Plaintiff has therefore not shown any action occasioned by the defendant and which caused injury for which he now claims damages.

I am satisfied and find that the Plaintiff has not discharged this burden and I accordingly dismiss the claim for damages for breach of statutory duty.

- 8.20 A company's internal remuneration policy, even if it appears unfair on the face of it, is not a cause of action. The Plaintiff may have been privy to these figures from documents available to him, but that in itself does not constitute a cause of action or proof that he was appointed on the same terms.

A contract is a very specific document between the 2 Parties and the Court cannot and will not read into it terms that were not negotiated and agreed. The Plaintiff has not placed reliance on any document before the Court to show that he attempted to negotiate a package for himself for his appointment as local director, nor has he shown any refusal by the defendant company to pay him for his services rendered as local director.

I am alive to the decision of the Supreme Court in the case of **Sylvester Musonda Shipolo vs Shadreck Maipambe** where the court stated:

*"A Judgment must be anchored on (or supported) by evidence adduced before the Court"*

8.21 Suffice it to say, that this is the Plaintiff's action. I am not convinced that the Plaintiff has discharged the burden placed on him. Authorities abound on the issue of burden of proof. In **Zambia Railways vs Pauline S Mundia and Another** it was held that:

*"..the old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable...."*

8.22 The Court's attention has also been drawn to similar principles espoused by the case of **Wilson Masauso Zulu v Avondale Housing Project** which echoes the general rule of thumb that a Plaintiff who has failed to prove his case cannot be entitled to Judgment, whatever may be said of the opponent's case. I have also been referred to a quote from **Phipson on Evidence**, as follows:

*"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has not discharged it, the decision must be against him. It is an ancient rule founded on*



*considerations of good sense and should not be departed from without strong reasons."*

8.23 I move now to pronounce on the issue of costs in the matter, noting that the Plaintiff has failed in all his claims. I have noted the contents of the initial letter of demand and the response marked at **pages 213 and 215** of the Plaintiff's bundle of documents.

It is noteworthy that the Plaintiff in his deluded belief that he was entitled to huge sums of money, was inclined to issue process in the matter, culminating in this Judgment. The conduct of the Plaintiff including his attempt at an interlocutory attachment Order, speaks volumes to his efforts to extract monies from the defendant who remained steadfast in its defence.

The demeanour of the Plaintiff did not impress the Court as he claimed an *'entitled attitude'* through-out his evidence, whilst not being able to point to any document that spoke to compensation figures as claimed subsequent to his appointment. His access to detailed company information, compensation structures and management information of the Holding Company, including access to 'loading orders' dated 4 August 2020 and 21 August 2020, marked as **'RI1'** to his Affidavit in Support of the Ex Parte Order of Attachment, proves his access to documents even after his resignation had been accepted. However, all these did little to prove, or support his claims.

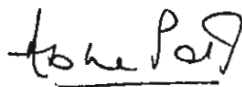
His claims to additional commissions, for allegedly single-handedly bringing in business contracts, by referring to a generic congratulatory e-mail directed at the entire team, on page 2 of the Plaintiff's bundle of documents, speaks to his inflated sense of self-importance.

The defendant's witness, Dr. Darmanin, on the other hand, remained consistent and credible on all issues that related to this action, though the Court has noted the attempts by Plaintiff's counsel, in its submissions, to highlight discrepancies or inconsistencies in his evidence, which in any event did little to prove or support the Plaintiff's claims.

I am minded of the reasoning applied by the Supreme Court of Zambia in the recent case of **Finance Bank Zambia Limited and Rajan Mahtani vs Simataa Simataa** on the issue of costs where Parties to a litigation may have proved an infraction of their legal rights yet failed to prove loss or damage.

Ultimately, the discretion to award costs rests with the Court. In my considered opinion, and for the reasons above, I award costs to the defendant, to be taxed if not agreed.

Delivered at Kitwe, the 21<sup>st</sup> day of June, 2022.



**Lady Justice Abha Patel, S.C.**