

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
(CIVIL JURISDICTION)

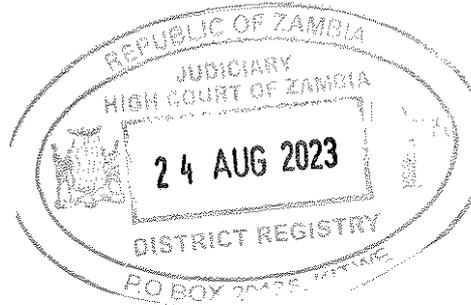
2021/HK/99

BETWEEN:

IGNATIUS MWANAMWALYE

AND

MICRO FINANCE ZAMBIA LIMITED



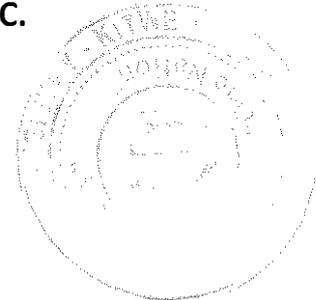
PLAINTIFF

DEFENDANT

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

For the Plaintiff:

Mr. T. Chibeleka & Ms. S. Banda
Messrs ECB Legal Practitioners



For the Defendant:

Mr. W.B. Nyirenda S.C., Ms. W. Nyirenda & Mr K. Mwinga
Messrs William Nyirenda & Company

JUDGMENT

Cases Referred to:

1. *Union Bank Zambia Limited v Southern Province Co-operative Marketing Union Limited (1997) S.J. 30 (S.C).*
2. *Mazoka and others v Mwanawasa and Others (2005) Z.R. 138.*
3. *Mwape and 61 others v ZCCM Investments Holdings Limited PLC SCZ Judgment No.23 of 2014.*

4. *Numerical Registering Company v Simpson (1875) LR 19 EQ 462.*
5. *Colgate Palmolive (2) Inc. v. Abel Shemu Chuka & 110 Other, Appeal No.181 of 2005.*
6. *National Drug Company and Zambia Privatization Agency vs Mary Katongo Appeal No. 79/2001.*
7. *Holmes Limited vs Buildwell Construction (1973) ZR 97 (HC)*
8. *Dangote Industries Zambia Limited v Enfin Limited (Appeal 53 of 2020) [2021] ZMCA 3 (29 January 2021).*
9. *Ford v Beech (1848) QB 114*
10. *Indo Zambia Bank Limited v Mushaukwa Muhanga SCZ Judgment No.26 of 2009.*
11. *Chilanga Cement PLC v Kasote Singogo SCZ Judgment No.13 of 2009.*
12. *Joseph Aleper & Another v Lodwar Water and Sanitation Company Limited [2016] eKLR.*
13. *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR.*
14. *Josephat Lupemba vs First Quantum Mining and Operations Limited CAZ Appeal No 120 of 2017*
15. *Standard Chartered Bank v Celine Nair CAZ Appeal No. 14/2019*

Legislation referred to:

1. *The Employment Code, Chapter 268 of the Laws of Zambia.*
2. *The Banking and Financial Services Act Chapter 387 of the Laws of Zambia (The BFS)*
3. *Banking and Financial (Microfinance) Regulations, Statutory Instrument No.3 of 2006 (The Regulations)*
4. *Bank of Zambia Corporate Governance Directives Gazette Notice No. 237 of 2016.*
5. *The National Health Insurance Act No.2 of 2018.*
6. *Income Tax Act Chapter 323 of the Laws of Zambia.*
7. *The National Pension Scheme Act, Chapter 265 of the Laws of Zambia.*

1. Introduction

1. The Plaintiff commenced this action on 31st March 2021 by Writ of Summons and Statement of Claim seeking the following reliefs:
 - i. *Payment of full salary arrears at K38, 500 per month from 21st September 2020 to 9th March 2021, factoring salary increments effected in January 2021;*
 - ii. *Payment of all contractual and statutory allowances such as housing for the period between 21st September 2020 and 9th March, 2021;*
 - iii. *Retention on payroll beyond 9 March 2021 until all benefits and outstanding payments to the Plaintiff have been settled;*
 - iv. *An Order for the Defendant Company to remit all Statutory payments, as by law provided (such as PAYE, NAPSA Contributions, NHIMA) to the relevant Authorities from 21st September 2020 to 9th March, 2021;*
 - v. *Payment of all leave days accumulated between 21st September 2020 and 9th March, 2021;*
 - vi. *Damages for constructive dismissal and breach of contract;*
 - vii. *Damages for emotional anguish and distress;*
 - viii. *Gratuity at the rate of 25% of annual salary prorated for the period between 21st September 2020 and 9th March, 2021;*
 - ix. *Interests on all the sums found due;*
 - x. *Any other reliefs the Court may deem fit;*
 - xi. *Costs.*

2. The Defendant entered appearance and filed its defence on 20th April 2021 denying the Plaintiff's claims and stating that the Defendant will show that the Plaintiff's employment was subject to the implied precondition of Bank of Approval based on best practice in the industry and that at the material time such approval was not obtained.
 - 2.1 The Defendant also averred that the Plaintiff's salary was to include education, housing, telephone, electricity and water allowance and that the Plaintiff's salary was K38,500.00 gross subject to statutory obligations and taxes.
 - 2.2 The Defendant averred that in the absence of approval, the Plaintiff's Contract of Employment stood frustrated and stated that the appointment of the Plaintiff by the Defendant was void *ab initio* and/ or illegal.
 - 2.3 The Defendant further averred that they took all reasonable steps in requesting for the Bank of Zambia's approval of the appointment of the Plaintiff in good faith/promptly upon receipt of the Plaintiff's acceptance of the Defendant's offer of employment and cannot be held liable for Bank of Zambia's delayed response.
 - 2.4 The Defendant denied that the Human Resources Officer informed the Plaintiff that the Defendant Company's salary obligations would be met. The Defendant averred that the Plaintiff had not worked or rendered any service to the Defendant to entitle him to payment of a salary, and any payment thereof would have been unjust enrichment on the part of the Plaintiff. Therefore, the Defendant could not place the Plaintiff on its payroll as he had not commenced executing his duties as Head of Compliance.

2.5 The Plaintiff subsequently filed a Reply to Defence where the Plaintiff averred that both the offer letter and the Contract of Employment categorically stated that the salary shall be K38, 500.00 and did not state that this will be the gross. The Plaintiff averred that the definition section of the Contract of Employment provides that the salary excludes allowances and other earnings. The Plaintiff averred that any ambiguity as to the salary should react against the Defendant who drafted the documents.

3. **Facts and Background:**

The Plaintiff's Case

3.1 Lead evidence was given through one **Ignatius Mwanamwalye** ("The Plaintiff") who relied on his bundle of documents and his Witness Statement filed into Court on 29th July 2021 and 17th January 2022 respectively, in his capacity as Risk and Compliance Practitioner of Self-Help Africa. His evidence in chief was that he was working for Zambia Electronic Clearing House Limited, a subsidiary entity of the Bank of Zambia, as Risk and Compliance Officer/Analyst, periodically and on several occasions, acting as the institutions Risk, Audit and Compliance Manager (Head of Department). He was offered the job of Compliance Officer/Analyst with the Clearing House on 26th December 2017. The Plaintiff referred to his Letter of Offer appearing on *page 1* of the Plaintiffs Bundle of Documents.

3.2 In his witness statement, it was the Plaintiff's evidence that he resigned from his position with the Electronic Clearing House to take up a new employment position as Head of Compliance with the Defendant Company.

At the time of his resignation, his basic pay at the Electronic Clearing House was **K24, 752.95** cited at *page 7* of his Bundle of Documents.

- 3.3 The Plaintiff testified that on or about the 4th of February 2020, he applied for a job advertised at the Defendant Company for the position of Head of Compliance. He stated that in the month of March 2020, he received a call from the Defendant Company to attend interviews for the job. He successfully attended the interviews and was informed that the company would be in touch if he were successful in gaining the job. On the interviewing panel was, among several other senior personnel, the then Chief Finance and Operations Officer, **Mr. Mpimpa Miyoba**.
- 3.4 He gave evidence that on the morning of 11th August 2020, he received a call from **Madam Lorraine Lungu**, who introduced herself as the **Human Resource Officer** of the Defendant Company, to inform him that Mr. Mpimpa Miyoba, who was by this time the Acting Chief Executive Officer (CEO) of the Defendant Company, wished to see him as his interview for the position had been successful.
- 3.5 At mid-morning of the same day, he went to the Defendant Company premises and met with the then Acting Chief Executive Officer, Mr. Mpimpa Miyoba, who offered him the job of Head of Compliance. He stated that it was his wish that he commence work with the Defendant Company as soon as possible. The Acting Chief Executive Officer then stated that his date of commencement would be the 21st September 2020, as this date would align with salary payments which are credited to staff accounts on the 21st day of each month.

- 3.6 He testified that the Acting Chief Executive Officer then instructed the Human Resource Officer to prepare his letter of offer and referred to the same which appears at *pages 8-9* of the Plaintiffs Bundle of Documents dated 12th August 2020, with an effective commencement date of 21st September, 2020 which was reflected in the Contract of Employment.
- 3.7 The witness statement confirms that his monthly salary was stipulated to be K38, 500.00 and he was required to serve a probation period of three months and that he signed the letter of offer on 14th August, 2020.
- 3.8 He gave evidence that he resigned from Zambia Electronic Clearing House on the 14th day of August, 2020 and reported for work at the Defendant Company's premises on the morning of the 21st September 2020. He stated that upon arrival, the newly appointed CEO, a Mr Ackim Chalwe, informed him that he could not commence work as the Defendant Company had not obtained Bank of Zambia approval to appoint him as Head of Compliance.
- 3.9 He testified that neither the offer letter nor the contract of employment provided for Bank of Zambia approval, and this was not a condition precedent to the contract of employment nor was it mentioned in any of the several discussions held between himself and the Human Resource Officer.
- 3.10 He gave evidence that he was escorted off the premises by the Human Resource Officer, who assured him that the matter would be resolved within 7 days to which she added that his salary would be paid on the 21st of October 2020. He gave evidence that he made several attempts following up on the salary processing to no avail.

- 3.11 By 21st October 2020, his account was not credited with the salary and he had received no communication from the Defendant Company regarding the same.
- 3.12 Between 28th October 2020 and 10th November 2020, the Human Resource Officer, **Madam Lorrain Lungu** called and advised him to report to the Defendant Company office on a day which she advised.
- 3.13 Between the 2nd and 12th November 2020, a meeting was held between himself, the Chief Executive Officer and the Chief Financial and Operations Officer. He was told that he could not be placed on the payroll for fear of detection by the Bank of Zambia in the event that Bank of Zambia were to conduct an audit on the Defendant Company.
- 3.14 The Plaintiff gave evidence that he was informed that all background checks were done and that the company urgently needed him to commence work. However, he reported for work countless times and was turned away each time by the Defendant Company.
- 3.15 The Plaintiff gave evidence that he rejected the proposal of the opening of an account as a customer with a loan account in which the defendant company proposed to pay some money to him which would be subsequently recovered once the approval had been obtained. The Plaintiff was averse to the suggestion as it contravened **Regulation 4 of the Banking and Financial Services (Insider Lending) Regulations (Statutory Instrument No.97 of 1996)**, and **Directives 18.1, 18.3 and 18.4**, and **Directive 23.2** of the **Bank of Zambia Corporate Governance Directives**, and that as Head of

Compliance, it would be folly of him to engage in such an activity as his very first act as Head of Compliance.

- 3.16 Due to the delays on the part of the Bank of Zambia, he was under serious financial stress, including loans that were in default. He referred to a letter dated 7 January 2021 that he had sent to the CEO of the Defendant stating his plight and concerns. The letter appears at *page 20* of the Plaintiff's bundle of documents.
- 3.17 Upon receipt of his letter, the Plaintiff was called for a meeting on 12th January 2021, which he attended at the Defendant Company premises. The meeting was hosted by the newly employed Head of Legal/Company Secretary, **Madam Precious Goma**, in the presence of the Human Resource Officer. At this meeting, the Plaintiff gave evidence that the Company Secretary uttered several snide remarks, including that she had received his "love letter" in reference to his letter dated 7th January 2021. He was then handed a document titled "Acknowledgement of Receipt of Compensation in lieu of Salary" at *page 22* of the Bundle of Documents and asked to read and sign it. This acknowledgment which did not address the concerns the Plaintiff had raised in his letter of the 7th of January 2021. He gave evidence that he asked what would happen to the pension benefits and National Health Insurance Cover that had not been paid since September 2020. The Company Secretary, among several other demeaning representations, slammed her hands on her desk as he was explaining his concerns about the content of the document and shouted back to him that he was not paying attention to her instructions.

3.18 It was his evidence that he did not sign the document as it was erratic for several reasons. He stated that it was an attempt to unilaterally alter the terms of the contract of employment in terms of salary reduction. He was offered K74, 080.00 as complete and final payment for the period between 21st September 2020 and 15th January 2021, which translates into a monthly salary of about K18, 520.00. The acknowledgement further attempted to subject his employment to Bank of Zambia pre-approvals, and shifted the blame of the Defendant's Company negligence onto him. It was his evidence that the Defendant Company attempted to negate his contract of employment by means other than those provided under Zambian employment and labor law.

3.19 Madam Goma of the Defendant Company insisted that he was not an employee of the company as the contract had not commenced, nor was he entitled to any form of salary, let alone NAPSA benefits, annual (January) salary increment, ZRA remittance, personal pension with prudential pension's management, or National Health Insurance subscriptions.

3.20 It was his evidence that Madam Goma stated in very clear terms, that the industry is very small. And that if he does not consent to their offer, he would find it very difficult to work in the Banking industry going forward. She further stated that he was young and should not make enemies in the industry at such a tender age.

3.21 He testified that the Defendant Company asserted that basic pay to be K38, 500 and that this was the gross amount before all deductions.

However, he testified that the contract provided that this amount was the consolidated salary which included all allowances.

3.22 Further, he gave evidence that the tax computations, statutory contributions, the PAYE and the NAPSA contributions computation were all wrong. This meant that the erroneous contributions would affect his pension benefits.

3.23 Ha gave evidence that the actions of the Defendant Company left his family and himself vulnerable to lack of access to medical care of all forms, including NHIMA, and at a time when the COVID-19 Pandemic was raging, causing health complications and overall increases in the cost of medical care, causing job losses and the rampant increase in prices due to constrained economic activity.

The Plaintiff stated that he was a student at the University of Zambia and had a mortgage with Cavmont Bank (now Access Bank) among several other financial obligations.

3.24 It was his evidence that he tendered his resignation, combined with his letter of demand by letter dated 9th March 2021, produced at *page 30* of his bundle of documents. As at this date, the Defendant had made no attempt to settle its outstanding salary obligations to him.

3.25 On 11th March 2021, the Defendant wrote to the Plaintiff re-iterating the contents of its letter dated 15th January 2021, ignoring his demands and his resignation, and requesting him to respond. A copy of this letter was produced at *page 32* of his bundle of documents.

- 3.26 On 15th March 2021 the Plaintiff wrote another letter to the Defendant highlighting his grievances and re-iterating his resignation. He expressed the fact that there was no serious consideration given to the issues he highlighted in his previous letters. A copy of this was produced at page 33 of his bundle of documents.
- 3.27 On 22nd March, 2021 he received a letter from the Defendant Company in response to his demands. The letter confirmed that the Defendant Company was only ready to pay what was stated in their letter dated 15th January, 2021 regardless of two new month's having passed. A copy of the said letter was produced at *page 35* of his bundle of documents.
- 3.28 The Plaintiff gave evidence that the actions of the Defendant Company were calculated so as to destroy the relationship of trust and confidence between employer and employee, which compelled him to resign. Due to the defendant's actions, he has suffered among several other entitlements, a loss of membership to professional bodies, loss of medical cover for his family and a complete loss of income, which eventually impacted on the running of his home and contributed to the breakdown of his marriage as he was unable to meaningfully financially contribute to the marriage and other domestic obligations. He gave evidence that he resigned from his previous job and did not receive a salary from August 2020 to the point of his resignation in March 2021. This caused him to have serious mental and emotional stress, including the rampant threats of being blacklisted with the Credit Reference Bureau.
- 3.29 The Plaintiff testified that at present he and his wife are estranged.

4. Under cross examination, he maintained that he had worked for Bank of Zambia through their Zambia Electronic Cleaning House in which the Bank of Zambia holds 50 percent shares in the company and the other share is held by other commercial banks. He maintained that the job of Head of Compliance and the job described was compliance management including risk and confirmed that risk management is a component in compliance management. The Plaintiff maintained that the Head of Compliance position is characterized as *Head of Department* rather than a managerial position stating that Head of Department and Manager, are two different positions. He gave evidence that had he successfully commenced work, the lines of reporting would have been made clear.
- 4.1 He was referred to *page 1* of the Plaintiff's Bundle of Documents and stated that when he reported for work on 21st September 2020, he was received by the Human Resource Officer, Madam Lorraine Lungu and then proceeded to the office of the Chief Financial Officer, Mr. Mpimpa Miyoba who then informed the Plaintiff that he could not commence work as they (the defendant) had yet to obtain Bank of Zambia approval. He maintained that he was directed to meet the Chief Executive Officer, **Mr Ackim Chalwe**, who reiterated the sentiments of the Chief Financial Officer and then exited the premises.
- 4.2 He was referred to the following letters in the Defendant's Bundle of Documents:
 - i. *page 35* being a letter from Bank of Zambia in relation to the submission that was made to Bank of Zambia;

- ii. *page 36* a letter from the Defendant to Bank of Zambia seeking their authorization of employment;
- iii. *page 47* being a follow-up from the Defendant to Bank of Zambia regarding the position;
- iv. *page 48* being a letter to Mr Ackim Chalwe; and
- v. *page 56* being a letter relating to conditional approval given by Bank of Zambia for Mr Ignatius Mwanamwalye's appointment.

He maintained that none of the above named letters were addressed to him. He acknowledged the 6 month back and forth between the Defendant and Bank of Zambia but disagreed that Bank of Zambia had any interest in his position.

4.3 During continued cross examination by Counsel for the Defendant, Mr Nyirenda S.C, the Plaintiff maintained that he was constructively dismissed. He was referred to *page 35* of the Defendant's Bundle of Documents being Bank of Zambia's response to the Defendant regarding the proposed appointment of the Plaintiff. The Plaintiff denied that the letter was seeking further clarity and stated instead, that the document was expressing errors.

4.4 He confirmed that at *pages 38 and 39* of the Defendant's Bundle of Documents, he wrote to the Chief Executive Officer inquiring on the status of commencement of work and confirmed that having had discussions with management, no solution was agreed as it related to some schemes, compensation, and loans. He confirmed that all of this was in writing evidenced by *pages 41, 42, 43 and 44* of the Defendant's Bundle of Documents, with a view to finding a solution.

- 4.5 He confirmed that on 9th March, 2021, he wrote a letter of resignation to the Defendant. He was referred to *page 45* of the Defendant's Bundle of Documents. When asked whether the letter was informing the Plaintiff that they still wanted him to work, he maintained that the letter provided that they would pay him in accordance to what they had computed.
- 4.6 He confirmed that Bank of Zambia granted the Defendant conditional approval, which came after the Plaintiff had resigned. He confirmed that on 25th March 2021, the Defendant wrote to him informing him that Bank of Zambia had given the approval and they wanted him to commence work but added that the letter came after his resignation. The letter was produced at *page 57* of the defendants bundle of documents.
- 4.7 The Plaintiff confirmed that he had found alternative employment by this time which became effective on 1st April, 2021.
- 4.8 He was referred to *page 10* of the Plaintiff's bundle and *page 3* of Defendant's bundle and maintained that he was an employee of the Defendant despite not actively starting his duties. He stated that he should have been paid regardless on the basis that he was ready to work and reported for work on the given day but was asked to leave on every occasion.
- 4.9 He confirmed that in terms of *Clause 3.3* of the Contract of Employment, he was not entitled to gratuity but stated that he was claiming it based on the provisions of the Employment Act.
- 4.10 He was referred to *page 19* of the Plaintiff's bundle being the requirement for one months' notice for termination of the contract. He stated that he did

not give this notice but maintained that he was not in breach of the contract in light of the circumstances. With regards to the issue of leave days, he stated that, according to his understanding, leave days start to accrue when a person becomes an employee of the organisation.

- 4.11 He confirmed that Madam Lungu, the Company Secretary, was involved in the matter of his employment and that is why he was referred to her office to discuss his proposed settlement package. He was referred to *page 1* of the Defendant Bundle of Documents and agreed that the salary is subject to law, NHIMA and NAPSA deductions. He denied the assertion that housing was included in the salary of K38, 500.
- 4.12 Further in cross examination by Counsel Mwiinga, the Plaintiff confirmed that he was divorced and confirmed that there was no evidence before the Court to prove his divorce.
- 4.13 In re-examination, he stated that his offer of employment indicated the commencement date of 21st September 2020 and that he was required to serve a period of probation of three months which according to him, was from the commencement date to 21st December 2020. He also explained that he was not privy to the correspondence between the Defendant and Bank of Zambia as the documentation was not addressed to him. He formed his decision based on the conversations with the Defendant and the treatment he received from them. He also explained that his opinion of *paragraph 4* of the letter on *page 45* of the defendant's bundle, was that the Defendant would pay him his initial salary and other dues that are stated in the contract.

5. **Evidence of Plaintiff Witness Lorraine Lungu.**

5.1 **PW2, Lorraine Lungu**, was called in her capacity as Human Resource Manager of the Defendant Company and was subpoenaed as a witness to bring evidence regarding the case before the Court.

5.2 She confirmed that she was directly involved in the recruitment of the Plaintiff. She gave evidence that she was involved in the placement of the advert, preparing of interviews and later with the internal process. She maintained that she called the Plaintiff to inform of his successful selection for the position of Head of Compliance. She invited him for a meeting with Mr Miyoba, the acting Chief Financial Officer, since there was no Chief Financial Officer at the time.

5.3 When asked whether she had raised the issue of BOZ approval to the Plaintiff and whether it was needed prior to him taking up the position, she confirmed that the conversation was centred around the Plaintiff coming through and the rest of the discussion was to be led by the CEO. She did, however, confirm that the issue of the Bank of Zambia approval was within her scope of knowledge.

5.4 She confirmed that the Plaintiff reported for work on 21st September, 2020. She also confirmed that the acting CEO asked her to prepare the letter of offer to the Plaintiff and maintained that the issue of BOZ approval was not stated in the offer letter. She confirmed that she prepared the contract of employment from *pages 3 to 12* of the Defendants Bundle of Documents.

5.5 When questioned about the *conditions of service*, she explained that the conditions of service were imbedded in the contract but there was no

additional document or separate document. The conditions of service that were referred to were *clauses 14.08, 14.12, 16, and 37.1*, in various parts of the contract. She explained that these conditions existed administratively but that they were not documented.

- 5.6 She confirmed that in the Human Capital Policy, under ***Selection Criteria***, there was nothing listed that speaks to Bank of Zambia approval regarding the recruitment of the Plaintiff as Head of Compliance. She stated that she was aware that the Plaintiff reported for work but was not aware of him being asked to leave the premises.
- 5.7 When asked whether she had assured the Plaintiff on the payment of salary by 21st October, 2020, she stated that she could not recall exactly if it was an assurance. She confirmed that the Plaintiff after growing weary of waiting for the capturing of his banking details, called her and informed her that he would send them via email to which she responded in agreement.
- 5.8 She confirmed that it was the duty of management to provide work to the Plaintiff but, because he did not commence work, he was not entitled to salary and PAYE, NHIMA and ZRA remittances. She explained that after he had joined the Defendant, he would have been entitled to the above. She confirmed that he was entitled to airtime of K500. She confirmed that Plaintiff would have been entitled to fuel of 150 litres per month for his personal car. She confirmed that the Plaintiff would have been entitled to medical cover of K5, 000.00 annually.
- 5.9 She was asked whether during the wait, pending Bank of Zambia approval, the Plaintiff would be entitled to medical cover, to which she responded in

- the affirmative. She further explained that life insurance is available for all employees. She confirmed that the insurance for the Head of Compliance was adjusted such that the employee's annual basic pay is paid annually as the life assurance cover provided by Prudential Insurance.
- 5.10 As relates to NAPSA, she confirmed that there is a pension scheme that exists where amounts are deducted from the employee. She confirmed that it was 5 to 10 percent of the basic pay from the employer and 5 percent from the employee. She added that none of the above were made available for the benefit of the Plaintiff. With reference to his claims for housing allowance, she confirmed that according to the Employment Code, housing was compulsory.
- 5.11 During cross examination by Counsel Nyirenda S.C., Ms Lungu confirmed that she facilitated the recruitment of the Plaintiff, and the Managing Director was the driving person in relation to the recruitment. State Counsel referred her to the Defendants bundle of documents *page 1 and 2* and confirmed that Mr Miyoba was the author of the document being the offer of employment.
- 5.12 She confirmed that Mr Ackim Chalwe told the Plaintiff that he could not commence work because the Defendant had not obtained Bank of Zambia approval to appoint him as Head of Compliance and confirmed that he was in order to state that. She confirmed that she had reassured the Plaintiff that they were hopeful that BOZ approval would have been obtained within that time frame.

- 5.13 She recalls that between the 28th October 2020 and 8th November 2020, she made a call to the Plaintiff and communicated good news referring to the meeting that they were scheduled to have. However, she confirmed that they had not received Bank of Zambia approval by that time.
- 5.14 She was referred to *paragraph 27* of the witness statement and she confirmed that there was a fear of rejection by Bank of Zambia in the event that Bank of Zambia would conduct an audit on the defendant and also confirmed that the Defendant would have been penalised if they had placed the Plaintiff on the payroll without Bank of Zambia approval. She insisted that the Plaintiff became aware of Bank of Zambia approval in November 2020 upon signing a declaration form and a questionnaire.
- 5.15 She confirmed that the “*acknowledgment of receipt of compensation in lieu of salary*” as it appears on *page 22* of the Plaintiff’s bundle was not signed.
- 5.16. Under re examination, she stated that the Plaintiff was entitled to the listed benefits on commencement of employment if he was engaged with the defendant.
- 5.17 She confirmed that the clauses referring to *conditions of service* were not supposed to be part of the contract. She confirmed that NAPSA, and ZRA were statutory requirements.
- 5.18 Further with regard to the payroll, she clarified that the Plaintiff was not placed on the payroll either and the reason was because although the defendant had offered him the position, he had not yet been engaged to provide services.

5.19 During re-examination by Counsel Chibeleka, she confirmed that the positions of CEO, CFO and Managers required Bank of Zambia approval. When asked to lead the court on documentation that demonstrates the requirements of Bank of Zambia approval, she maintained that both documents do not speak to Bank of Zambia approval. When asked if there was any documentation that states that the position of Head of Compliance required bank of Zambia approval, she maintained that had the Plaintiff started work without BOZ approval, the company would have been sanctioned. When asked about how external screening is done, she stated that it would be applicable for the positions that are mentioned such as CEO, CFO and Managing Director. Counsel sought clarity on the process of external screening referred to as part of the selection criteria insofar as those three positions are concerned, includes the Bank of Zambia screening to which she confirmed in the affirmative.

5.20 It was her opinion that she did not witness any hostility from anyone directed to the Plaintiff. She also confirmed that the Plaintiff signed the contract of employment on 14th August 2020 and that she had witnessed the same. When asked why she, as a Human Resource Manager did not include the provision of Bank Of Zambia approval, as a prerequisite in the contract, she confirmed that it was an oversight on the part of the defendant.

The Plaintiffs closed its case at this stage.

6. The Defendant's Case

- 6.1 The Defendant's evidence was led by **Banji Munyati, DW1**, in his capacity as Chief Financial Officer of the Defendant Company who relied on his witness statement filed into Court on 29th June 2022. It was the gist of his evidence that he was the current Chief Financial Officer of the Defendant and was the Finance Manager at the time of the employment of the Plaintiff.
- 6.2 He gave evidence that on the 12th August 2020, the Defendant offered the Plaintiff the position of Head of Compliance, with effect from 21st September 2020 as per the Offer of Employment at *pages 1 to 2* of the Defendants Bundle of Documents.
- 6.3 He referred to *paragraph 2* of the offer that provided “... ***policy documents that may be varied or issued from time to time.***” He stated that it was therefore communicated to the Plaintiff by the Defendant that his terms and conditions of service could be varied or new conditions of service could be issued from time to time by the Defendant Company.
- 6.4 Her further gave evidence that the Defendants operations are governed by statutory provisions including but not limited to **Statutory Instrument No. 3 of 2006, The Banking and Financial (Microfinance) Regulations 2006.**
- 6.5 He also stated that the Defendant could not appoint the Plaintiff to the position of Head of Compliance without first seeking confirmation from Bank of Zambia to establish that the Plaintiff was a fit and proper person to hold office at the material time and not under any suspension or previously removed from office by the Bank of Zambia.

- 6.6 It was his evidence that that to allow the Plaintiff to commence work would be a direct contravention of the **Banking and Financial (Microfinance) Regulations 2006** and that the effect of this would render the Plaintiff's contract of employment illegal and therefore *void ab initio*.
- 6.7 He was informed by the outgoing Managing Director that the Defendant advised the Plaintiff on 21st September 2020, that once they received Bank of Zambia approval of his appointment, he would be able to commence work as intended by the Contract of Employment.
- 6.8 It was his evidence that the Defendant was unable to remunerate the Plaintiff with a salary for the period 21st September 2020 to 9th March 2021 as the period was not duly worked for by the Plaintiff. Additionally, the Defendant was unable to pay the Plaintiff's statutory contributions such as ZRA, PAYE, or NAPSA contributions as the same are remitted on the basis of an employee's monthly salary. He maintained that the Defendant could not determine the Plaintiff's suitability for the position as the Plaintiff did not serve his probation period as anticipated by the contract.
- 6.9 It was his evidence that on the 7th January 2021, the Plaintiff wrote to the Defendant, evidenced by *pages 38 and 39* of the Defendants Bundle of Documents, enquiring on the status of his employment to which he was told that the Defendant requested that the Plaintiff attend a meeting in order to discuss the way forward. He stated what transpired at the said meeting, as reported directly to him by the outgoing MD as there were no official minutes taken at the said meeting because the said meeting was informal.

He confirmed that this was part of the handover process of the office to him by Mr Chalwe, the then MD of the Defendant company.

6.10 On 22nd March 2021, the Defendant received conditional approval of the Plaintiff's appointment to the position of Head of Compliance, from Bank of Zambia. He maintained that upon receipt thereof, the Defendant proceeded to request that the Plaintiff report for duty as intended by the Parties when they entered into the contract of employment. He maintained that at all material times the Defendant Company engaged the Plaintiff as effectively as possible, in an effort to amicably settle the matter at hand. It was his evidence that the administrative channels for amicable dispute resolution were open and accessible to the Plaintiff and denies that the defendant's conduct was such that the Plaintiff was left with no option but to resign.

6.11 Under cross examination, he maintained that at the time the Plaintiff was given his offer of employment, he held the position of Finance Manager. Some of his duties were mobilizing funds for the company, ensuring books of accounts were kept, managing the Finance Department amongst other duties.

6.12 He was asked to what extent his duties overlap with human resource related duties at the Defendant company. He explained that the duties overlap to the extent that when people are *on-boarded*, the Chief Financial Officer is aware of the salaries. His knowledge kicks in as it relates to payroll stage. He confirmed that the Plaintiff had a meeting with Madam Goma and Madam Lungu, in which she said to him that he was not yet an employee of the company. As such, he was not entitled to his salary, NAPSA benefits, ZRA

remittance, NHIMA and all other insurance policies applicable stating that these become payable once he is on-boarded.

- 6.13 He confirmed that according to **Section 24 of the Employment Code, Chapter 268 of the Laws of Zambia**, the Plaintiff did enter into a permanent contract as provided for in the definition set out in the contract of employment and confirmed that this was signed by Lorraine Lungu, **PW2**.
- 6.14 He confirmed that the requirement to include a provision for Bank of Zambia approval was omitted in the contract of employment. He confirmed that Mr Chalwe, who is the author of the contract of employment, admitted that there was an omission in his offer of employment. He asserted that the Plaintiff ought to have known that BOZ approval was required. He agreed that the Plaintiff's complaints in so far as it relates to no access to an income, no access to medical facilities are valid complaints for any individual.
- 6.15 Further in cross examination, he was asked whether the office of Head of Compliance was referred to amongst the other offices mentioned in **section 23 of S.I. No.3 of 2006**, to which he denied. Further, in light of **section 23**, he was asked whether the Plaintiff has been a director of a finance institution whose license has been revoked or a company which has been judged insolvent. He confirmed that he was familiar with the Plaintiff's CV at *pages 11 and 12* which showed his work history. He also confirmed that an internal screening process was undertaken of the Plaintiff's previous employment. He confirmed that he was not aware of any director position held by the Plaintiff that was revoked, neither has the Plaintiff been a CEO

- or Manger of a bank or of a finance institution whose licence has been revoked or in a company which has been judged to be insolvent, neither has he ever held the position of a Chief Financial Officer.
- 6.16 He confirmed that the directives expressly provide Bank of Zambia approval for the positions of CEO and Chief Risk Officer. He was referred to *page 30, Directive 13.19* and confirmed that as it relates to Head of Compliance, there is no requirement for prior approval from the Bank of Zambia. **Directive 13.21**, in which he confirmed that the positions of CEO, Chief Risk Officer, the Company Secretary, and the Chief Financial Officer, require BOZ Approval.
- 6.17 He gave evidence that because the Plaintiff was a Risk practitioner for more than 5 years from what he could see from his CV, in his perspective he ought to have known of the requirement of approval. He further added that it is **standard practice** as the compliance function has to be approved by Bank of Zambia.
- 6.18 It was his evidence that as far as the contract of employment was concerned, it was a proposed appointment on the basis that prior approval had not been obtained.
- 6.19 It was his evidence that the Plaintiff reported for work on the 21st September 2020, and that the next follow up letter regarding status of employment was 21st December 2020. The next letter of follow up was in February 2021, almost 2 months later. He added that other follow ups were made. However, there was no record to demonstrate that there were phone calls made, or emails which he confirmed were not on record.

6.20 He confirmed that there was no written communication from the Defendant to the Plaintiff informing him of this approval process.

6.21 Further, he confirmed in the *Acknowledgement of Receipt of Compensation in Lieu of Salary*, the sum of **K74, 080.00** was offered to the Plaintiff. He confirmed that the Plaintiff did not agree with how the sum was computed. He stated that despite the letter from the Defendant on 15th January 2021, being the response to the Plaintiff's inquiry on the status of employment, the defendant company wrote as follows:

“For the avoidance of doubt, you will be paid your salary as per your contract together with other dues for the period 21st September 2020, to December, 2020, net of tax and all statutory obligations”

evidenced at *page 27* of the Plaintiffs Bundle of documents. However, the proposed payment amount included on *page 29* of the Plaintiff's Bundle indicated the sum of **K74,080.05** being the same figure under the acknowledgment of lieu of salary.

6.22 He admitted that there were wrong computations in the document as the tax band was wrongly applied in error. When asked to calculate the figures appearing under basic pay, he confirmed that the figure on record was erroneous and the total correct figure ought to have been **K145, 679.01**. He clarified that the company was not aware of any error. If it had been pointed out, it would have been corrected.

6.23 In re-examination, he maintained that the Plaintiff had not commenced employment and could not be paid a salary and no statutory obligations could be deducted. He maintained that BOZ approval could be obtained at

any time and was not necessarily a prerequisite. It could even be obtained at the point where the job had been offered to him.

6.24 He also stated that one person who was in that meeting was the Human Resource Manager who was available. He stated that he could say this with certainty because she confirmed that she had been in the meeting.

7. **Fridah Tamba DW2**

This witness was subpoenaed to testify on behalf of the Defendant in her capacity as Director of Non-Bank Financial Institutions Supervision Department, Bank of Zambia. It was the gist of her evidence that she is responsible for the regulation and supervision of all non-bank financial institutions which are licensed by the Bank of Zambia. These institutions include micro-finance institutions, leasing companies, building societies, bureau de change and other credit providers.

7.1 It was her evidence that at the material time, she was involved in the exchanges between the Defendant and Bank of Zambia. It was her evidence that in 2018, the department of which she was the head, undertook an examination of the Defendant Company. This examination was taken in the normal course of Bank of Zambia duties. As a result of this examination, it was discovered that the Defendant did not have a person holding the position of *Head of Compliance*. Further to their examination, the Bank of Zambia directed the Defendant to fill the role of Head of Compliance, being a critical role for the Defendant. She explained that the Defendant proposed a person, who in the assessment of the Bank of Zambia was not suitably

qualified. The Defendant then proposed the name of the Plaintiff for the said position.

It was her evidence that the position of Head of Compliance is a critical role, and that every regulated institution must have one in its organization structure. She added that the Head of Compliance is responsible to ensure that the institution complies with all the rules and regulations as set by the Bank of Zambia. The Head of Compliance ensures that the institution complies with the laws of the Banking and Financial Services Act subsequent regulations, and subsequent directives that are issued by the Bank of Zambia.

7.2 She was referred to *page 18* of the Defendants bundle of documents being the proposed appointment letter of Mr Ignatius Mwanamwalye as Head of Compliance for Microfinance Zambia Limited dated 17th August 2020. She explained that they were required to review the appointment of the Plaintiff and approve the same. It was her evidence that a questionnaire submitted to BOZ is significant in as it provides the Bank of Zambia with all the relevant information of the proposed individual which would enable them to assess the suitability of the Plaintiff. The questionnaire requests personal relevant information, professional information, and the individual's relevant experience to undertake the role.

7.3 She gave evidence of the vetting process and stated that a preliminary review of the documents is conducted, the personal details as well as the professional details that are submitted via a curriculum vitae. She confirmed that that documentation is then sent to several law enforcement agencies

to undertake security screening. These include Zambia Police, the Office of the President, the Drug Enforcement Commission and the Anti-Corruption Commission. Thereafter, they wait for response from those institutions to clear the individuals. Once a satisfactory response is received, they (BOZ) then approve the appointment of the said individual and the same is communicated to the institution. She confirmed that the **Banking and Financial Services Act 2017** and **Statutory Instrument No.3 of 2006** is the reference and authority relied on to undertake the vetting process.

7.4 At *Page 56* of the Defendant Bundle of Documents, she confirmed that this was a letter dated 22 March 2021, to the Defendant from the Deputy Registrar of Financial Service Providers of the Bank of Zambia, granting conditional approval for the Defendant to appoint the Plaintiff as its Head of Compliance. The letter was written on account that the security screening was not 100% complete but adequate information had been received which could warrant a conditional approval for his appointment.

7.5 She confirmed that the role of Head of Compliance can be categorised as a Senior Management role under the Bank of Zambia Corporate Governance Directives. She also testified with reference to the document produced in the defendant's supplemental bundle of documents, being a letter from the Bank of Zambia, with reference to the appointment of Ms Goma, that the appointment of Ms Goma as Company Secretary, was not a vettable position.

7.6 Under cross examination led by Counsel Chibeleka, Ms Tamba confirmed that before the Defendant enters a contract of employment with an

individual who fits any of those officers the CFO, the CEO or Managers, the Defendant should come to Bank of Zambia first and get approval to go through the clearing and vetting process. She confirmed that in the particular case of Head of Compliance, they did require the Defendant to request and obtain approval before the Plaintiff's appointment. She confirmed that the application submitted by the Defendant was incomplete as the requisite documents were not attached and referred to a letter dated 26 August 2021 from Bank of Zambia and produced at *page 35* of the Defendants bundle.

7.7 She confirmed that she was unaware of the background issues of the employment of the Plaintiff. She later stated that it was not stated in the Directives that approval of Bank of Zambia is required prior to the appointment. She confirmed that she was told about the Plaintiff's resignation on 9th April, 2021, a month later.

7.8 In re-examination led by Counsel Nyirenda, S.C, Ms Tamba clarified that the Defendant ought to have sought Bank of Zambia approval, before engaging the Plaintiff. She further confirmed that she had given directives to the Defendant that before employing a person to hold the position of Head of Compliance, they should have first approached her department.

This marked the close of the Defendant's case.

7.9 Counsels filed written submissions as agreed and as directed at the end of Trial. Subject to the Courts observations offered below, the Court wishes to thank Counsels for their industry in the said written submissions, which have been thoroughly considered and appreciated.

8. The conduct of proceedings

8.1 The Record will reflect a rather bizarre state of proceedings. For what appeared to be a relatively straight forward matter, and one which in the considered opinion of the Court, was amenable to a mediated and or negotiated settlement, seemed to develop a trajectory of its own. The result of each such intervention was to delay the commencement of the trial. The Court rests in the knowledge that the Record is comprehensive and speaks to the many challenges posed in the matter.

8.2 One specific challenge was on 12 July 2022, a date set for commencement of trial, when the Defendant from the Bar, asked the Court to subpoena a witness from the Bank of Zambia, to testify and bring documents, with no formal application or foundation laid before the Court. The Court declined to entertain the verbal request and in dealing with this and other issues raised, directed that the matter proceed to trial as scheduled.

8.3 The Defendant then informed the Court that the Parties wished to engage in settlement talks, which the Court reluctantly allowed with the Order that Counsels do return to Court at 14:00 hours, with an Agreement, failing which the matter would proceed to Trial.

8.4 At 14:00 hours, as agreed, Counsels addressed the Court and pleaded to stand the matter down to 15:00 hours on the ground that a settlement looked imminent. Again, in the discretion of the Court, the application was allowed and at 15:00 hours, Counsels from both sides reported that the terms of a settlement had been agreed, pending only Board Approval of the Defendant.

- 8.5 The Court directed that the same be placed before the Court by 22 July 2022, and commended the Parties, while lamenting that the Court had been kept waiting from 09:00 hours to 15:00 hours on the said day.
- 8.6 In the continued exercise of case management, the proposed Consent Judgment not having been filed by 22 July 2022, caused the Court to issue a notice to show cause by its Notice dated 8th August 2022 returnable by 12 August 2022. Both Parties filed Affidavits on 12 August 2022, averring to the extent of the advanced deliberations and discussions. The Defendant placed reliance on several exhibits, evidencing the actual terms of settlement including the ultimate rejection by its instructing client of the negotiated settlement.
- 8.7 It remained only for the Court to proceed to issue a Notice of trial for the matter to proceed accordingly. Amidst other adjournments, for reasons on record, including a last-minute application by the Defendant on 11 January 2023 for leave to issue Subpoena Duces Tecum and Ad Testificandum to call a witness from the Bank of Zambia to produce documents that they deemed were vital for the determination of the issues before the Court.
- 8.8 In the interest of justice, and in the interest of finality to litigation, the Court did allow the application and issued an Order to compel the witness to come to Court with the requested documents. The Record will reflect that the Witness, a **Ms Frida Tamba**, did attend Court and brought with her the requested documents, which were by consent of the Parties produced to the Court, under a Bundle marked "*Documents produced under Subpoena*" filed on 1st February 2023.

8.9 What is crystal clear and needs no judicial determination, is that the Plaintiff was made an offer of employment which he accepted in its totality. It is clear from the evidence of the Plaintiff, as well as the evidence of the Defendant's own witness, Mr. Banji Munyati including the evidence of Ms Lorraine Lungu, who was subpoenaed by the Plaintiff, that there had been an omission by the Defendant in its letter of offer. What was obvious to everyone, is that the offer of employment to the Plaintiff as Head of Compliance, was not made conditional to the grant of, or prior approval of, the Bank of Zambia. It is also clear that he reported for work on 21 September 2020 until 9th March 2021 when he tendered his letter of resignation and demand. This is actually part of the admitted facts in the submissions of the defendant at *paragraph 3* thereof. This leads the Court to reflect on the only pertinent issue for determination.

Issues for determination

8.10 In the face of the above, and of the record being what it is, I am of the considered view that there is only one real issue that this Court must determine and from which determination, other corollary issues will be determined:

8.11 Was the Plaintiff's offer of employment vitiated and or rendered null and void by the lack of prior approval of the Bank of Zambia?

9. Findings of Fact

9.1 I am of the considered view that before I embark on determining the single issue above, I will proceed to make findings of fact, for clarity of Judgment and to prevent repetition.

- 9.2 The Plaintiff was offered the position of Head of Compliance by the Defendant under the hand of Mpimpa Miyoba, the then Acting Managing Director by letter dated 12th August 2020.
- 9.3 The Plaintiff accepted the offer on 14th August 2020, to commence work on 21st September 2020.
- 9.4 The offer letter provided for a salary in the sum of K38, 500.00.
- 9.5 The Plaintiff and Defendant executed a contract of employment on 14th August 2020.
- 9.6 The Plaintiff reported for work on 21st September 2020 and was asked to leave.
- 9.7 The Plaintiff tendered his composite letter of resignation and demand on 9th March 2021.
- 9.8 The defendant has placed reliance *inter alia*, on the following exchange of letters between it and the Bank of Zambia. These are produced in its bundle of documents and are at *pages 18, 35, 36, 37, 47, 48, 56 and 58*.

10. The Submissions

- 10.1 As noted the Court extends its gratitude to Counsels respectively for their industry, diligence and co-operation rendered to the Court and for the submissions filed on the due dates, all of which have been considered in the Judgment of the Court.
- 10.2 I will not recast the submissions as the same are on record, and I will refer to them where appropriate in the Judgment.

11. Analysis and Application of the Law

11.1 In answering the question whether Bank of Zambia vetting and approval is a statutory requirement for the appointment of the Plaintiff for the position of Head of Compliance, the attention of the Court has been drawn to the provisions of **Section 124 of the BAFSA** which provides as follows:

“The Minister, on the recommendation of the Bank of Zambia, may make regulations for or with respect to any matter that by the Act is required or permitted to be prescribed by regulation or that is necessary or convenient to be so prescribed for carrying out or giving effect to this Act.”

11.2 It is also the Defendant’s submission that the position of Head of Compliance was one which would exercise **managerial** functions, hence constituted a management position within the structures of the Defendant institution for the intents and purposes of the above. It therefore placed reliance on **section 23** of the **Regulations**. It is thus the thrust of the Defendant’s submission that the criteria listed therein is applicable to the Defendant to the extent that that the Defendant was mandated to ensure that the Plaintiff satisfied the criteria as fit and proper for the position.

11.3 **Section 23** of the **Regulations**, provides as follows:

*“23. A person shall not be appointed as a director, chief executive officer, chief financial officer or **manager** of a microfinance institution if that person—*

- a) is not a fit and proper person to hold the office in relation to that person’s integrity and relevant knowledge;*

- b) *is not a natural person;*
- c) *is below the age of twenty-one years;*
- d) *is an undischarged bankrupt;*
- e) *has been convicted of a felony or any offence involving dishonesty;*
- f) *has been declared or otherwise adjudged in any official proceedings to be mentally unsound;*
- g) *is under suspension or has been removed from office by order of the Bank of Zambia;*
- h) *has been a director, chief executive officer, chief financial officer or **manager** of a bank or financial institution **whose licence has been revoked or a company which has been adjudged insolvent or has entered into any other arrangement with creditors or taken any other action with similar effect in Zambia or elsewhere**, unless that person was not responsible for the insolvency, liquidation, composition with creditors or other action with similar effect or unless the Bank of Zambia has given approval for that person to act or continue to act as a director or to be directly concerned in the management of a microfinance institution.”* (the highlighting in bold is by the Court).

11.4 At trial, the Defendant's submitted that the requirement for scrutiny and screening of the Plaintiff by Bank of Zambia, has always been **best practice**

by Microfinance Institutions such as the Defendant Company, when employing individuals in management positions.

11.5 The Plaintiff has countered the arguments above and has submitted that this was an averment unsupported by any evidence whatsoever. Counsel for the Plaintiff referred the Court to the learned authors of a "**Comprehensive Guide to Employment Law in Zambia**" which stated as follows:

"A custom of established practice can be binding or form part of the employment contract if it meets three conditions, namely notoriety, reasonableness and certainty."

11.6 The Plaintiff placed reference on a decision of the Supreme Court in the case of **Union Bank Zambia Limited v Southern Province Co-operative Marketing Union Limited**¹ and borrowed the words of the Supreme Court to submit that there has been no fact or authority pleaded or otherwise that has been drawn to the attention of this Court to demonstrate that Bank of Zambia approval was notorious or widespread. As such, it is their submission that such best practice in does not exist.

11.7 In addressing my mind to this issue, I find as a fact that the Defendant has not produced any evidence that demonstrates to the Court the requirement of prior BOZ approval being *common practice or industry norm*, nor have they illustrated this as being general custom among banking and financial institutions. To the contrary, the defendant's own witness admitted the omission of the requirement of approval, from the letter of offer to the Plaintiff. The Human Resource Manager, Ms Lorraine Lungu, the author of the letter of offer, equally admitted the omission. That being said, I cannot

determine that this should be considered an implied term of the Plaintiff's Contract of Employment, nor can I find that the Plaintiff ought to have known of this as part of custom or industry practice. This is unreasonable given the absolute lack of evidence in the matter.

11.8 I turn to the next issue being whether Bank of Zambia approval for the position of Head of Compliance is a **requirement at law** prior to the appointment of the Plaintiff.

11.9 At trial, it was **Banji Munyati's** evidence that to allow the Plaintiff to commence work would be a direct contravention of the **Regulations** and that the effect of this would render the Plaintiff's contract of employment illegal and therefore void *ab initio*. It was the Defendant's submission that the Microfinance Regulations have the force of law and operate as a binding regulatory mechanism for microfinance institutions. They submitted that in particular, **section 23** of the **Regulation** negates the appointment of a person in management and pointed out the use of mandatory wording, "**shall not be appointed...manager**". It was their submission therefore that because BOZ approval of the Plaintiff's appointment was a statutory requirement, which carried the force of the law, it was also an implied term of the contract of employment and urged the Court not to fall for the abrogation of the law in the circumstances.

11.10 The Court has noted from the evidence of **Banji Munyati**, in cross examination, where he gave evidence that the position of Head of Compliance was not referred to amongst the other offices listed in **Section 23 of the Regulations**. The question then for the Court to determine as

pointed out by the Plaintiff, is whether **section 23** applies to the Plaintiff. He confirmed that he was familiar with the Plaintiffs CV for the purposes of internal screening to establish if he was fit and proper for the position. In light of **section 23**, he confirmed that the Plaintiff had never been a director of a finance institution whose license has been revoked or a company which has been judged insolvent. He confirmed that he was not aware of any director position held by the Plaintiff that was, neither had the Plaintiff been a CEO or Manger of a bank or a finance institution whose licence has been revoked or in a company which has been judged to be insolvent, neither has he ever held the position of a Chief Financial Officer.

11.11 I have noted the Plaintiff's reference to the case of **Mazoka and Others v Mwanawasa and Others**² where it was observed, it is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words, and the intention cannot be ascertained from the words used by the legislature, that recourse can be had to the other principles of interpretation.

I am of the considered view, that this provision is misapplied to the Plaintiff as he does not fit the description of having held such office as listed under **section 23** nor in the circumstances of this case. I am of the considered view that a strict interpretation of the law does confirm that it does not apply to the Plaintiff.

11.12 My attention was also drawn to the Documents produced under Subpoena filed on 1st February 2023 and specifically to the Bank of Zambia Corporate Governance Directives at *pages 23 to 38* thereof.

I have noted at *page 30*, **Directive 13.19**, a fact also confirmed by Banji Munyati, as it relates to the position of **Head of Compliance**, that there is no mention of prior approval from the Bank of Zambia.

The said directive provides as follows:

'13.19 Every bank or financial institution shall appoint a suitably qualified officer as head of the compliance function who shall be responsible for co-ordinating the identification and management of compliance risk.'

11.13 Further and with reference to **directive 13.21**, he confirmed that the positions of CEO, Chief Risk Officer, the Company Secretary, and the Chief Financial Officer, require BOZ Approval. He further confirmed that for the position of Head of Compliance, there was no requirement expressed.

I have also looked at **directive 13.18** with respect to the position of Chief Financial Officer which provides as follows:

*"The chief financial officer shall not discharge his duties as chief financial officer **without the prior written approval of the Bank of Zambia.**"*
(emphasis is by the Court).

11.14 From the above, I am left with no doubt in my mind that the defendant is splitting hairs and cherry picking on what it deems is a mandatory provision as seen in **directive 13.18** above, and in what it is purports to ascribe best practice or industry practice to. I also find that it is unreasonable for the

Defendant to suggest that as far as the contract of employment was concerned, it was a proposed appointment, on the basis that prior approval had not been obtained. From the facts and evidence placed before the Court, the defendant did not submit the necessary documents required by BOZ that they ought to have submitted before appointing any successful candidate for the position. The defendant's initial letter to Bank of Zambia dated 17 August 2020 on *page 18* of its bundle, seeking approval, was defective and returned under cover of the letter from Bank of Zambia dated 26 August 2020 (*page 35* of the bundle). The letter states as follows:

"...In this regard, your submission has been returned and may only be resubmitted when the inadequacies raised are addressed."

11.15 It is also noted that after resubmitting its corrected letter for the appointment of the Plaintiff on 31st August 2020, at *page 36*, of its bundles, the defendant made no follow up to the Bank of Zambia till its letter of 21st December 2020 at *page 37* of its bundle. In his evidence, Mr Munyati attempted to state that the Defendant had made regular follow ups with Bank of Zambia but was not able to produce any evidence of such follow ups save for the two letters referred to above over a three month period.

11.16 I must also disagree with the Defendant's submissions on the burden of proof and of the Plaintiff having failed to discharge it. The Court is familiar with the authorities in the cases of **Wilson Masauso Zulu** and finds that to have no bearing on this case.

11.17 The Court has further noted that **Ms Fridah Tamba**, suggested that the position offered to the Plaintiff being a *Managerial* position, required formal

approval of the Bank of Zambia. However, the Record is clear, in that at best, she was offering an opinion, an opinion which was neither confirmed nor based on a close reading of all the documents produced before the Court. In her evidence and what was clear was that the requirement of prior approval of the position of Head of Compliance, was made known to the defendant only, during what she termed an earlier audit of the defendant. On this aspect of her evidence, I accept the submissions of the Plaintiff that this evidence flies in the face of Pleadings as this did not form part of the Defendant's defence and should be disregarded by the Court. However, and to the extent that this witness came to Court under a subpoena, the Court does find that her evidence highlighted a requirement, made known only to the defendant. Nothing more nothing less.

11.18 I therefore determine that it is unreasonable to place the obligation of prior approval on the Plaintiff. I am of the view that this is an attempt on the part of the defendant to move the goal post to conveniently suit their omission to follow procedure correctly. I am further persuaded by the evidence given to this court by Mr Banji Munyati, who confirmed that the requirement to include a provision for Bank of Zambia approval was omitted in the contract of employment. He also confirmed that Mr Chalwe, the author of the contract of employment, admitted that there was an omission in his offer of employment.

11.19 It is far-fetched to submit that the contract of employment is illegal without prior approval. It also cannot be said that the absence of the approval renders the contract void, as there was no requirement at law for the prior

approval for the position of Head of Compliance. It is thus the finding of the Court that the absence of Bank of Zambia approval has no effect on the validity and enforceability of the contract of employment.

11.20 I equally reject the defendant's submission on frustration. In arriving at this decision, I am guided by the case of **Mwape and 61 others v ZCCM Investments Holdings Limited PLC SCZ Judgment No.23 of 2014³**, where the Supreme Court agreed with the learned authors of *Chitty on Contracts (2008)* where it reads:

"...in deciding whether a contract is frustrated is that the event cannot have been in any way induced by either of the parties; and that any supervening event must be unenforceable and vitiated by entirely external factors."

11.21 I have taken care to examine the authorities cited by the Defendant and I am of the considered view that test for frustration has not been met as the contract is not incapable of being performed. The Defendant cannot have the proverbial cake and eat it too.

11.22 I therefore enter Judgment and find for the Plaintiff. For the avoidance of doubt, I find that the Plaintiff was an employee of the defendant company for the period from 21 September 2020 to 9 March 2021 and that his offer of employment was not vitiated or rendered void for lack of approval of the Bank of Zambia. I also make a finding of breach of contract on the part of the Defendant.

12. Findings of the Court on the Claims of the Plaintiff

Having arrived at the above determination, I will now escalate my enquiry to the claims of the Plaintiff.

12.1 I am guided by **Section 3 of the Employment Code Act No. 3 of 2019**, cited by the Plaintiff, which defines a contract of employment in the following terms:

“‘contract of employment’ means an agreement establishing an employment relationship between an employer and an employee, whether express or implied, and if express, whether oral or in writing.”

12.2 The Act further defines an employee to mean “a person who, in return for wages, or commission, **enters into a contract of employment.**” An employer is defined as “...a person who, in return for service enters into a **contract of employment.**” Additionally, **Clause 1 of the Contract** states “...that the employee shall be described for all purposes as the employee of MFZ...”

12.3 I am further guided by the case of **Numerical Registering Company v Simpson⁴** quoted at *page 8* of **Colgate Palmolive (2) Inc v. Abel Shemu Chuka & 110 Others⁵** as follows:

“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 Courts of Justice.”

12.4 In **National Drug Company and Zambia Privatization Agency vs Mary Katongo Appeal No. 79/2001⁶**, cited by the Defendants, it was held:

"It is trite law that once the parties have voluntarily and freely entered into a legal contract, they become bound to abide 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 respectfully, upholding and enforcing the contract."

12.5 I am guided by **Section 66 (1) of the Employment Code** which provides that *"an employer shall pay the wages of an employee."* I have noted **Clause 3.1** under the Contract of Employment at *page 6* of the Defendant's Bundle of Documents which provides:

"The employee shall be entitled to a consolidated salary of K38, 500 (Thirty-Eight Thousand Kwacha only) per month payable in arrears on the last day of each calendar month." This salary shall include: education, house, telephone, residence, electricity and water allowances. No other allowances shall be paid except as provided in this contract."

3.5 Housing

Will be made applicable once relevant consultations have been made.

I have noted the definition of *"Salary"* which means the salary on which pension is based and as advised from time to time **but excluding allowances, perks and any other earnings.**

12.6. In determining the salary offered to the Plaintiff, it is not the intention of the Court to re-write the contract between the Parties, but to give effect to the same. On this aspect, I am of the considered view that any ambiguity created by the wording of the contract, must lie against the defendant, who clearly is the author of the letter of offer and the contract of employment.

The witness, *Lorrain Lungu*, also admitted to the errors in the contract when she admitted that references to certain clauses were in fact non-existent. The defendant should therefore be responsible for their careless drafting. The defendant is bound by their own agreements and parole evidence is inadmissible to vary the same. On this principle, the Court is suitably guided by the case of **Holmes Limited vs Buildwell Construction**⁷.

12.7 I am of the considered view that there was an obligation on the Defendant to have taken care in the drafting of not only the terms as it pertains to salary, but all clauses and provisions of the contract. I am guided by the case of **Dangote Industries Zambia Limited v Enfin Limited**⁸ which referred to the learned authors of **Anson's Law of Contract**, citing the case of **Ford v Beech**⁹ in respect to construction of terms of a contract:

"An agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent... however if the words of a particular clause are clear and unambiguous, they cannot be modified by reference to other clauses in the agreement."

12.8 On the issue of whether the monthly salary of K38,500 was net or gross as argued by the Parties respectively, I arrive at the inescapable conclusion that the ambiguity if any, must lie in favour of the Plaintiff without extensive deliberation on the matter. The Supreme Court of Zambia, in the case of

Indo Zambia Bank Limited vs Mushaukwa Muhanga¹⁰ cited the contra preferentum doctrine when it described it in the following terms:

"...commendable principle that ambiguity will be construed against the interest of the party responsible for it. We might call it the careless drafting rule".

It cannot also be argued that payment to the Plaintiff of his salary will constitute undue enrichment. On this position, I accept the Plaintiff's submission that he was able and willing to render the services for which he was employed, and the Defendant should not benefit from its own default to refuse to pay the Plaintiff. I am therefore of the view that the Plaintiff is entitled to net salary of K38, 500.00 as construed by the contract of employment. I have noted the Defendant's submission that as the Plaintiff did not commence work, he is not entitled to salary or allowances claimed. I have also noted from the evidence on record, the several attempts made by the Plaintiff to commence work from the 21st September 2020 up to the time of resignation on the 9th of March, 2021. This position is supported by further evidence on record, being the Plaintiffs letters dated 7th January 2021, 14th January 2021, 15th January 2021 respectively, all with the intention of following up on the status of employment as Head of Compliance.

12.9 I therefore find and hold that the Plaintiff is entitled to his salary arrears at the consolidated net amount of **K38,500 per month for the period from 21 September 2020 to 9 March 2021, and salary increments effected in**

January 2021, if any, to include payment of all leave days accrued for the period.

12.10 I turn to the whether the Plaintiff is entitled to payment of gratuity. I make specific reference to **Clause 3.3** of the Contract of Employment, *page 6* of the Defendant's Bundle of Documents which reads:

"Gratuity

The employee shall not be entitled to gratuity."

I am of the view that the Contract of Employment expressly provided that the Plaintiff is not entitled to gratuity. I am guided by the evidence he gave at trial where he confirmed that in terms of Clause 3.3 of the Contract of Employment, he was not entitled to gratuity. He pointed out that he was claiming for it despite the contract not specifying it, as his claim was based on the provisions of the Employment Act. I am guided to maintain and uphold parties' freedom to contract. I have noted the Employment Act as it relates to gratuity. My understanding, however, is that gratuity is contractual.

Therefore, I am of the view that the Plaintiff is not entitled to gratuity under the contract of employment. **I will not allow the claim for gratuity.**

12.11 On the Plaintiff's claim for other benefits and allowances, *clause 3.1* of the contract under the heading 'salary' provides as follows: "*...This salary shall include: education, house, telephone, residence, electricity and water allowances, no other allowance shall be paid except as specifically provided in this contract.*". In contrast, the testimony of Ms Lorraine Lungu confirmed that there were additional allowances that the Plaintiff would have been

entitled to. However, using the same reasoning as in paragraph 13.9 above, I **will not allow the Plaintiff's claims for other benefits and allowances.**

12.12 On the Plaintiff's claims for the Defendant Company to remit all statutory payments as by law provided, namely PAYE, NAPSA and NHIMA, on the finding of the Court in *paragraph 13.8* above and based on the relevant provisions of the applicable statutes, I **allow these claims and order that these be paid to the appropriate authorities for the period between 21 September 2020 to 9 March 2021.**

12.13 On the Plaintiff's claim for damages for emotional anguish and distress, and although the Court is alive to the common law position that a husband is liable to maintain his wife, and also whilst the Court is alive to the obvious hardship and suffering that the Plaintiff may have endured during this period, there was no evidence laid before the Court of the breakdown of his marriage or other evidence of hardship suffered to justify a claim under this head of damage. I **decline to award any damages on the claim for emotional anguish and distress.**

12.14 I turn to the next issue of whether the Plaintiff is entitled to be retained on the payroll. It is the Defendant's submission that the Plaintiff has alternative means of income, and that he is already in gainful employment as a Risk and Compliance practitioner at Self Help Africa Limited. Based on the evidence on record, submissions and authorities cited by the Parties, I am of the considered view that the Plaintiff did successfully mitigate his loss and in his own evidence, he had started work by April 2021. Given his age and my

understanding of the provisions of **Article 189** and **266** of the Constitution, I **decline this claim.**

12.15 On the Plaintiff's claim for damages for constructive dismissal and breach of contract, I have taken into consideration the conduct of the Parties as their relationship deteriorated along the period, the subject of this dispute. The facts of the case have been well documented, the letters exchanged have been scrutinised. What remains, is for the Court to reveal its mind on whether there was constructive dismissal, and if so, the attendant damages that are warranted in the circumstances.

I am guided by the case of **Chilanga Cement PLC v Kasote Singogo**¹¹, cited by both parties, in which the Supreme Court aptly laid out the principles that are applicable to a claim for constructive dismissal:

*"The notion of constructive dismissal is anchored on the concept that an employer must treat his employee fairly and should not act in a manner that will compel the employee to flee his job. As was stated in the case of **Courtland's Northern Textiles Ltd v Andrew** (4) by the Employment Appeal Tribunal:*

"An employer must not, without reasonable cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee."

It can thus be discerned, from the various authorities on constructive dismissal, that an employee can claim to have been constructively dismissed if he resigned or was forced to leave employment as a result of his

employer's unlawful conduct, which conduct amounts to a fundamental breach of contract of employment. It is the employee who makes the decision to leave."

12.16 I am also persuasively guided by the Kenyan decision of **Joseph Aleper & Another v Lodwar Water and Sanitation Company Limited**¹² where the Court stated:

"Constructive Dismissal has its roots in the law of contract under the doctrine of 'discharge by breach'. Under this doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employers conduct was a significant breach going to the root of the contract..."

12.17 Also, in the Kenyan decision of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga**¹³ the Court stated as follows:

"Constructive Dismissal occurs where an employee is forced to leave his job against his will because of his employers conduct. Although there is no actual dismissal, the treatment is significantly bad, that the employee regards himself as having been unfairly dismissed."

The Court went ahead to provide the basic ingredients as being *inter alia* the employer being in breach of the contract of employment and the breach being so fundamental as to be considered a repudiatory breach.

12.18 It is the Defendant's submission that in order for constructive dismissal to be established there must be a **final straw** which causes the employee to resign. It was their submission that a finding of constructive dismissal would

require some form of repudiatory conduct on the part of the Defendant, which the Plaintiff could reasonably construe to mean that the defendant no longer intended to be bound by the terms of the contract. The defendant submitted that they are of the firm submission that this did not exist.

12.19 I have noted the Plaintiff's submissions on the above. I have noted all evidence on record and observe the following:

- i. At trial, I noted the efforts on the part of the Plaintiff in attempting to resolve this matter. From the time the Plaintiff signed the offer of employment on 14th August, 2020 up to 21st September 2020 when he reported, there is no document that speaks to the Defendants promptly following on the approval required by BOZ. The evidence on record demonstrates that the Plaintiff reported for work on 21st September 2020, the next follow up letter regarding status of employment was 21st December 2020, a period of three months after the corrected submission of 26th August 2020 . The next letter of follow up was in February 2021 almost 2 months later. Additionally, there was no record to demonstrate that prompt efforts were made on the part of the Defendant in resolving the matter.
- ii. I have also taken note of the financial hardship the Plaintiff faced as well as evidence given at trial in which the Plaintiff testified that the actions of the Defendant Company left his family and himself vulnerable to lack of access to medical care of all forms, including NHIMA, and at a time when the COVID-19 Pandemic was raging, causing health complications.

- iii. I have also taken into consideration ***the Acknowledgement of Receipt of Compensation in Lieu of Salary***, in the sum of **K74, 080.00** that was offered to the Plaintiff at *page 40* of the Defendant's Bundle of Documents., *Banji Munyati*, confirmed that the Plaintiff did not agree with how the sum was computed. I refer specifically to the letter from the Defendant of 15th January 2021, being the response to the Plaintiff's inquiry on the status of employment, where the defendant assured the Plaintiff that he would be paid his salary as per his contract together with other dues for the period 21st September 2020, to December, 2020, **net** of tax and all statutory obligations evidenced at *page 27* of the Plaintiffs Bundle of documents. However, I have noted that the proposed payment amount included on *page 29* of the Plaintiff's bundle indicated the sum of **K74, 080.05** being the same figure under the acknowledgment in lieu of salary.
- iv. Further although the letter, the subject of the Court's scrutiny refers to the element of "*good faith*" twice in the said letter, the calculations attached were a far-cry from any act of '*good faith*'. When questioned about the error in computation, Mr Munyati casually agreed that it was simply *an error in calculation*, which was not brought to the attention of the Defendant, despite there being the letter from the Plaintiff of 14th January 2021 at *page 23* of his bundle, in which the Plaintiff authored a four-paged letter, itemising the injustices occasioned on him by the Defendant.

- v. The Court was also not impressed with the demeanour of Ms Lorraine Lungu, as she professed to have a very clear recollection of certain events and feigned loss of memory as to the behaviour of Miss Goma, the Company Secretary, when the Plaintiff testified as to her behaviour and aggressive attitude exhibited towards him. Her presence in Court was that of a reluctant witness and she seemed to have an interest to protect at best, her job, and to cover up her part of the series of mistakes made by the Defendant. I am of the considered view that Miss Goma could have been called to rebut actions specifically attributed to her, including her high handed and condescending behaviour. The Plaintiff on the other hand, narrated facts as they happened and from a factual and personal perspective. His evidence was credible and convincing, and he remained steadfast even under aggressive cross examination at the hands of the defendant. I accept in totality evidence of the unfair treatment that he was subjected to.
- vi. From the date of his effective commencement of employment, 21st September 2020 to 7th January 2021, there was no written communication from the Defendant to the Plaintiff on the status of his employment or at all.
- vii. I have also taken note that by the time the Bank of Zambia gave approval on 25 March 2021, the Plaintiff had already tendered his resignation. It will also be noted that again, the Defendant attempted to unilaterally change the terms of the contract by varying the commencement date, and the approval, was still only a conditional

approval. What more evidence is required to prove constructive dismissal? What more was the Plaintiff expected to endure to satisfy the 'last straw' test as submitted by the defendant. To arrive at any other determination from the authorities submitted by the defendant, and as applied to the facts of the case in *casu*, is wrong and totally misapplied. The defendant's behaviour left much to be desired and in my considered opinion, the actions of the Defendant were part of a series of breaches which destroyed the relationship of trust between the parties. **I accordingly find for the Plaintiff on his claim for constructive dismissal.**

12.20 I now turn to consider the measure of damages bearing in mind that each case will turn on its own individual set of facts and circumstances. It is trite that the common law remedy for wrongful termination is the period of notice. The Courts have awarded more than the common law measure of damages for loss of employment in deserving cases and where there has been blatant disregard for the contract and the rights of the employee. My attention has been drawn to several authorities where the Courts have awarded 24 months salary as damages as well as interest. One such case is **Chilanga Cement Plc vs Kasote Singogo**¹¹, an award upheld by the Supreme Court citing the harsh and inhumane manner in which the respondent (in that case) had been treated.

12.21 The Court of Appeal in the case of **Josephat Lupemba V First Quantum Mining and Operations Limited**¹⁴ substituted the award of four months with an award of 24 months. This Court wishes to borrow the words of the

Court of Appeal, which in the opinion of the Court, reflect and speak to the facts in *casu*, the only difference being the mode of termination.

“we think that the learned trial judge did not seriously consider the injustice, trauma and mental anguish that the Appellant was subjected to by his abrupt termination. We believe that if he had done so, he would have awarded a much higher measure of damages than he did... Having recognized that the Appellant was given a contract which he acceptedand having induced him to resign his job by offering him a job he accepted, the Respondent cannot be allowed to pay him only a four month salary. The experience was shocking, traumatic and abrupt such as to fall within the exceptions to the common law measure of damages....”

12.22 The Plaintiff has also referred this Court to the decision of the Court of Appeal in the case of **Standard Chartered Bank v Celine Nair**¹⁵ where the Court did award 36 months gross salary as damages for constructive dismissal. The Plaintiffs in their submission have attempted to equate the behaviour of the Appellant in that case to the facts of the case in *casu* and invited the Court to award 36 months as damages payable to the Plaintiff. While I do not condone the behaviour of the Defendant, which though callous and insensitive, I am not convinced that the measure of damage for an employee who had not worked for the Defendant, can, or should warrant such a high award. That, in my opinion, would be excessive and unconscionable. I also note that the Plaintiff did readily find alternative employment. I therefore award damages calculated at 24 months salary.

12.23 On all the awards granted to the Plaintiff, I also award interest at the short term commercial deposit rate, as approved by the Bank of Zambia, from the date of the Writ to the date of Judgment. Interest thereafter to the date of payment shall be calculated in accordance with the Judgments Act.

12.24 As to costs, I have noted common practice that has emerged, supported by case law, that although costs are awarded in the discretion of the Court, it emerges that the award of costs should normally be guided by the principle that costs follow the event. Essentially this means that the Party who initiates the suit will bear the costs if the suit fails; conversely if the Party is successful in the suit, then the defendant will bear the costs. It is also common cause that awarding costs is a matter of the exercise of judicial discretion, such discretion to be exercised judiciously. Having regard to the complete circumstances of the case in the matter before me, I find that the Plaintiff having been successful in its claim against the defendant shall have the costs awarded to it, same to be taxed in default of agreement.

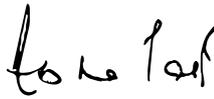
13. **Orders of the Court**

13.1 Having entered Judgment for the Plaintiff and having found on the issues above, I summarise the findings of the Court and make the following orders:

- i. Payment of full salary arrears at K38, 500 per month from 21st September 2020 to 9th March, 2021, factoring salary increments effected in January 2021;
- ii. I order that the Defendant Company remit all statutory payments to the relevant authorities from the 21st of September 2020 to 9th March, 2021;

- iii. I award the Plaintiff 24 months of salary for damages for constructive dismissal and breach of contract;
- iv. On all awards above, I also award the Plaintiff interest at the short-term commercial deposit rate, as approved by the Bank of Zambia, from the date of the Writ to the date of Judgment. Interest thereafter to the date of payment shall be calculated in accordance with the Judgments Act.
- v. Costs shall be for the Plaintiff.

Delivered in Open Court, the ²⁴.....day of August, 2023.



Lady Justice Abha Patel, S.C.



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