

IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

APPEAL No. 196 OF 2019  
CAZ/08/221/2019

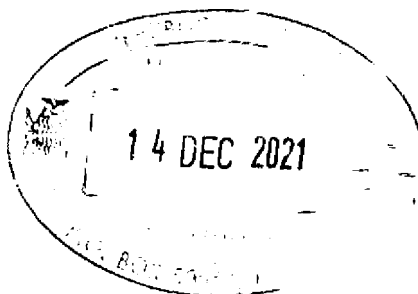
BETWEEN:

DR. RICHARD MWIINGA

AND

PUBLIC PENSION FUND BOARD

ATTORNEY GENERAL



APPELLANT

1<sup>ST</sup> RESPONDENT

2<sup>ND</sup> RESPONDENT

*Coram: Makungu, Sichinga, and Banda-Bobo, JJA  
on 20<sup>th</sup> May, 2021 and 14<sup>th</sup> December, 2021*

*For the Appellant: Mrs. M.K. Soko of Messrs Malambo and Company*

*For the 1<sup>st</sup> Respondent: Mr. M. Chileshe of Messrs Eric Silwamba, Jalasi and Linyama Legal Practitioners*

*For the 2<sup>nd</sup> Respondent: Ms. D.M. Mwelwa, Principal State Advocate*

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## JUDGMENT

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Sichinga, JA delivered the Judgment of the Court.

### Cases referred to:

1. *Trywell v The People* (2015) ZR 69
2. *Zambia China Mulungushi Textiles (Joint Venture) Limited v Gabriel Mwami* (2004) Z.R. 244
3. *Nkhata and 4 Others v The Attorney General* (1966) Z.R. 124

4. *Communications Authority of Zambia v Vodacom Zambia Limited* (2009) Z.R. 21
5. *Attorney General v Achiume* (1983) Z.R. 1
6. *Hutton v Walting* (1947) 2 All E.R. 641
7. *National Airports Corporation Limited v Reggie Ephraim Zimba and Savior Konie* SCZ Judgment No. 34 of 2000
8. *Chilanga Cement Plc v Kasote Singogo* (2009) Z.R. 122
9. *Zambia Revenue Authority v Dorothy Mwanza and Others* (2010) 2 Z.R. 181
10. *Gerardud Adrianus Van Boxel v Rosalyn Mary Kearney (A minor by Charles Kearney her father and next friend)* (1987) Z.R. 63
11. *Pan Electronics Limited and Savvas Panayiotides and Others v Andreas Miltiadous and Others* (1988) S.J. 1
12. *Zambia Consolidated Copper Mines Limited v Richard Kangwa and Others* SCZ Judgment No. 25 of 2000
13. *Friday Mwamba v Sylvester Nthenge and Others* SCZ Judgment No. 5 of 2013
14. *Wilson Masauso Zulu v Avondale Housing Project* (1982) Z.R. 172

#### **Legislation referred to:**

1. *Public Service Pensions Act, Chapter 260 of the Laws of Zambia*
2. *Constitution of Zambia Act, Chapter 1 of the Laws of Zambia*
3. *Employment Act, Chapter 268 of the Laws of Zambia*
4. *Statutory Functions Act, Chapter 4 of the Laws of Zambia*

#### **Other works referred to:**

1. *Oxford Advanced Learner's Dictionary, 8<sup>th</sup> Edition*
2. *McGregor on Damages, 15<sup>th</sup> Edition, Harvey McGregor, Sweet and Maxwell, 1988*
3. *Halsbury's Laws of England, 4<sup>th</sup> Edition, Lexis Nexis, 2006*
4. *Phipson on Evidence, 14<sup>th</sup> Edition, M.N. Hoard, Peter Crane, Daniel A. Hochberg, Sweet and Maxwell 1990*

## **1.0 Introduction**

- 1.0 This appeal is against the Judgment of the High Court Industrial Relations Division (IRD) in which Musona J rendered a decision dismissing all the complainant's claims and held in the main that his contract was terminated by effluxion of time rather than the Board's interference. Therefore, he was not entitled to damages for unlawful interference in the decision making process regarding the renewal of his contract. The complainant seeks a reversal of this decision on appeal.

## **2.0 The Factual Background**

- 2.0 A summary of the facts is that the complainant, Dr. Richard Mwiinga, who is the appellant in this appeal, was employed as Secretary and Chief Executive Officer (CEO) of the Public Service Pension Fund Board (PSPF) on a three (3) year contract of employment which was due to expire on 28<sup>th</sup> February, 2018, and subject to renewal. Prior to his last appointment as CEO, he was initially appointed by the PSPF from 2004 to 2014 in which years he rose through the ranks to the position of Operations Manager, and thereafter he was appointed Board Secretary and CEO on a three (3) year contract, which was subject to renewal.
- 2.1 On 4<sup>th</sup> December, 2017, Dr. Mwiinga received a letter from the Office of the President, Cabinet Office, authored by the Secretary to the Cabinet, Dr. Roland Msiska. In his letter, Dr. Msiska referenced Dr. Mwiinga's letter of 20<sup>th</sup> November, 2017 in which he had written to the Board Chairman, Dr. Moses Banda, seeking the renewal of his contract. In response Dr Msiska referred to the Constitution and advised that the term of office of the

Secretary to the Cabinet, Secretary to the Treasury, Attorney General, and Permanent Secretaries, beginning the year 2018, would be five years subject to renewal.

- 2.2 In November, 2017, Dr. Banda, as Chairman of the Board set up a select committee comprising of Chairpersons of the Board's subcommittees to undertake the task of evaluating Dr. Mwiinga's performance as CEO. Dr. Banda chaired the select committee. Upon evaluating Dr. Mwiinga's performance, the select committee gave him a score of 86.88%. The select committee wrote a report recommending Dr. Mwiinga's contract to be renewed with effect from 1<sup>st</sup> March, 2018.
- 2.3 On 1<sup>st</sup> December, 2017, the Board convened a meeting to consider the select committee's report and recommendation to renew Dr. Mwiinga's contract. The complainant alleged that two members of the Board, Mr. Barnaby Mulenga – Permanent Secretary, Ministry of Labour and Social Services; and Mr. Borniface Chimwali – Permanent Secretary, Public Service Management Division, were not in favour of renewing his contract. The dual requested an adjournment of the meeting to enable them consult their principals.
- 2.4 The adjourned meeting re-convened on 8<sup>th</sup> December, 2017. At that meeting, Mr. Mulenga then handed over a letter to Dr. Banda and another to a Board member, Professor Oliver Saasa. The said letters dated 8<sup>th</sup> December, 2017 were authored by the Republican President. In the letters, the President revoked the appointments of Dr. Banda and Professor Saasa as Board Chairperson and Board member respectively with effect from 4<sup>th</sup> December, 2017. The dual were then excused from the meeting.

- 2.5 Barnaby Mulenga then assumed the role of interim chairperson of the Board by virtue of a letter authored by the Republican President dated 8<sup>th</sup> December, 2017. The re-convened meeting then went ahead. Mr. Mulenga informed the Board that he had a directive from the Republican President not to renew the complainant's contract.
- 2.6 On 27<sup>th</sup> December, 2017, Mr. Mulenga as Board chairperson authored a letter to Dr. Mwiinga informing him that the Board of Directors of the Public Service Pensions Fund had resolved on 8<sup>th</sup> December, 2017 not to renew his contract. He was further advised to proceed on leave from 2<sup>nd</sup> January, 2018 pending the expiry of his contract on 28<sup>th</sup> February, 2018.

### **3.0 Complainant's claims in the High Court**

- 3.1 Dissatisfied with the decision not to renew his contract, Dr. Mwiinga took out a complaint in the High Court, Industrial Relations Division, seeking the following reliefs:
- i. An Order that the decision not to renew his contract of employment as Secretary to the Board and Chief Executive Officer of the Public Pensions Fund was not in fact the decision of the Board that is capable of being enforced, and is therefore null and void;
  - ii. An Order that the complainant's contract of employment be deemed to have been renewed (effective 1<sup>st</sup> March, 2018) by the decision of the majority members of the Board who reviewed the Performance Evaluation Report of the select committee of the Board dated 22<sup>nd</sup> November, 2017; and accepted for adoption at the 6<sup>th</sup> Extraordinary

- Board meeting that had begun on 1<sup>st</sup> December, 2017, but which was adjourned at the request of two members for the stated purpose that they needed to consult on the decision to renew externally;
- iii. An Order to stay execution of the decision not to renew the complainant's contract of employment pending the determination of proceedings; and that the complainant do return to the Public Service Pensions Fund Board and continue carrying out the duties of the office of Chief Executive on 1<sup>st</sup> March, 2018;
  - iv. An Order to set aside the decision not to renew the complainant's contract of employment; and that the renewed contract of employment shall commence on a 5 year term effective 1<sup>st</sup> March, 2018;
  - v. Damages for breach of contract of employment;
  - vi. In the alternative, damages for wrongful and unlawful dismissal from employment calculated on the basis of full salary and benefits for the period of a full contractual term of 5 years from 1<sup>st</sup> March, 2018;
  - vii. Costs; and
  - viii. Any other relief that the court may deem fit.

#### **4 Decision of the court below**

- 4.1 In sum, the court below considered whether the Board's decision not to renew the complainant's contract of employment as Secretary to the Board and Chief Executive Officer was a decision of the majority of the members of the Board. The learned Judge discussed, in some detail, the procedure under which the Board conducted its business. He found that under *section*

**5 of the Public Service Pensions Act<sup>1</sup>** the Board was empowered to regulate its own procedure. He considered the complainant's contract of employment and found that it was for a fixed duration of three (3) years. He found that the renewal of a contract of employment is a discretion of an employer, as there is no law requiring the giving of a reason to renew a contract. The learned trial Judge concluded that the non-renewal of complainant's contract was not a dismissal because the contract had run its full course. The first claim failed on this basis.

- 4.2 On the claim that the complainant's contract of employment be deemed to have been renewed, the learned judge found that there was no evidence produced to prove that the majority of the members of the Board resolved to renew the complainant's contract of employment. This claim failed.
- 4.3 The claim seeking an Order to stay the execution of the decision not to renew the complainant's contract of employment pending the determination of proceedings failed because it had been dealt with as an interlocutory application and a ruling dismissing the claim was rendered on 12<sup>th</sup> April, 2018.
- 4.4 On the claim for an Order to set aside the decision not to renew the complainant's contract of employment, the learned Judge held that the contract of employment was not faulty and that the contract expired by effluxion of time.
- 4.5 As regards the claim for damages for breach of contract of employment, the learned trial Judge found that the contract had not been breached as alleged by the complainant. He relied on his earlier finding that the contract

had run its full course of three years. Thereafter the employer refused to renew the contract. The claim failed.

- 4.6 Turning to the claim for damages against the State for unlawful interference in the decision making process of the Board's duties and in breach of the complainant's contract of employment, the learned Judge found there was no interference amounting to a breach of the law because the contract was allowed to run its full three (3) year term. This claim equally failed.
- 4.7 On the alternate claim for damages for wrongful and unlawful dismissal and non-renewal of the complainant's contract of employment, the learned trial judge reiterated that he found that the complainant had worked the full life of his contractual term. Therefore, there was no wrongful dismissal or breach of contract. This claim equally failed.
- 4.8 Turning to the respondent's counterclaim for a refund of any emoluments the complainant drew after his contract of employment expired on 28<sup>th</sup> February, 2018, the learned Judge found that the complainant was entitled to be remunerated because he had remained in office by virtue of an Order of the court. The said Order was discharged after forty-three (43) days. The counter-claim failed on this basis.

## **5 The Appeal**

- 5.1 Aggrieved by the decision of the lower court, the complainant (hereinafter referred to as the *appellant*) launched this appeal advancing one (1) ground of appeal couched as follows:



1. (a) *The court below erred in law and in fact when it failed to find that there was interference in the conduct of the Board's decision making process when considering the renewal of the appellant's contract of employment;*
- (b) *The court below erred in law and fact when it found that the appellant was not entitled to damages for unlawful interference in the decision making process regarding the renewal of his contract.*

## 6 Appellant's arguments

6.1 The appellant relied on his written heads of argument filed into court on 5<sup>th</sup> November, 2019 and counsel's oral submissions. The appellant's grievance on the first part of the ground of appeal is that the court below did not make any reference to any legal provisions to support and substantiate its finding that the involvement of the President, (i) did not amount to the President making or directing the PSPF not to renew the complainant's contract of employment; and (ii) that it did not amount to interference on the basis that he is the *Minister* of the PSPF. It was submitted that the learned Judge only sought to rely on Barnaby Mulenga's evidence on the President's alleged guidance, at the expense of the appellant's witnesses, who were subjected to cross-examination at trial, and their testimonies were never discredited by the respondents. It was submitted that the lower court's failure to take into account the complainant's evidence was unreasonable in the circumstances of the case.

- 6.2 Counsel recounted the testimonies of CW2 – Dr. Moses Banda, CW3 – Mukela Muyunda, the Board Chairperson and Board member respectively. It was submitted that in light of evidence presented by these witnesses, it was curious that the lower court did not seem to have interrogated it to the extent that it would have been reasonable for him to do so. It was contended that it was equally curious that the court did not make a finding that the involvement of the President did not amount to the latter making or directing the PSPF not to renew the appellant’s contract of employment. Counsel submitted that the outcome of the President’s involvement was the decision not to renew the contract.
- 6.3 It was argued that evidence of the President’s interference begun with the removal of Dr. Banda and Professor Saasa at the commencement of the meeting of the Board of 8<sup>th</sup> December, 2017. It was submitted that their ousting from the meeting had a profound and adverse impact on the rest of the Board members who saw and heard them bid farewell to the Board minutes after receiving their termination letters.
- 6.4 It was submitted that following the ousting of Dr. Banda and Professor Saasa, Mr. Mulenga, as the new Chairman announced to the Board that he had received a “directive” from the President. However, Chimbwali corrected him on the use of the word “directive” in preference of the word “guidance” instead. It was submitted that it was clear from the evidence that the change of the use of the word “directive” to “guidance” was made to give the impression that the Board could have had the liberty to have decided against this strict directive of the President, which was not the case.

- 6.5 It was submitted that the fear or obvious discomfort which seized members of the Board upon receipt of the directive was further heightened by Mr. Mulenga when he reminded the Board that they should not place the President in a position in which he could be cited for abuse of authority of office should they decide to go against the directive not to renew the appellant's contract.
- 6.6 Counsel submitted that with the aforestated background and tampering with the Board's ability to freely decide the question of renewal based on the subsisting facts, criteria reasons, the Board could not have been expected to execute their duty properly or fairly. That the Board could not carry out meaningful debates to interrogate the reasons for or against renewal when they were contending with the presidential directive looming directly above their heads and minds. It was submitted that the inability of the Board to conduct itself properly could also be seen in the fact that the new Chairman did not even conduct a vote of the members on the question of renewal in accordance with *section 5(6) of the Public Service Pension Act supra*. It was submitted that the finding that the involvement of the President did not amount to interference was perverse, not supported by the evidence, and ought to be set aside. The case of *Trywell v The People*<sup>1</sup> was referred to.
- 6.7 On the finding that the President's involvement did not amount to interference on the basis that he is the Minister of the PSPF, it was submitted that the President unlawfully interfered in the decision making process of the 1<sup>st</sup> respondent by imposing on it a directive through the Permanent Secretary in the Ministry of Labour and Social Security, not to

renew the appellant's contract, where such decision is the preserve of the 1<sup>st</sup> respondent. It was argued that the 1<sup>st</sup> respondent acted unlawfully when it allowed this interference into its deliberations by adopting a directive given by an entity outside the Board and implementing the said decision without valid reason or following the requirements of the law, in particular sections 12 and 13 of the *Public Service Pensions Act supra*.

6.8 It was submitted that the Act spells it out in unambiguous terms that the entity which has the authority and mandate of appointing the Chief Executive Officer of the PSPF is the Board. It was submitted that there was breach of the complainant's contract of employment when the President interfered in the deliberations of the Board on the issue of renewal of the appellant's employment.

6.9 Counsel contended that the Board's failure to consider the appellant's qualifications and experience was a serious miscarriage of justice, a breach of the law and the complainant's contractual terms. It was submitted that the court below ought to have exercised its jurisdiction to correct the breach and do substantial justice. That it is perverse that the court below found that the President's involvement was not interference. Reference was made to the case of *Zambia China Mulungushi Textiles (Joint Venture) Limited v Gabriel Mwami*<sup>2</sup> in which case the Supreme Court had this to say:

*"Tenets of good decision making import fairness in the way that decisions are arrived at. It is certainly desirable that an employee who will be affected by an adverse decision is given an opportunity to be heard."*

*...In many cases, the terms governing the employment indicate that there is a right to natural justice and a right not to be thrown out of work except on some rational grounds; some explicable basis which is reasonable in the circumstances."*

- 6.10 It was submitted that there was no rational ground or explicable basis to be gleaned from the evidence brought before court by the respondents to substantiate the directive given by the President to the Board not to renew the appellant's contract.
- 6.11 On the composition of the Board, it was submitted that *section 2 of the Public Service Pension Act supra* provides that *"'Board' means Public Service Pensions Fund Board established by section four."* *Section 4 of the Act* stipulates the composition of the Board. It was submitted that whilst the Act allows the President to appoint two persons as Directors on the Board, it does not state that those persons would override or dictate the decisions of the Board on behalf of the President. It was argued on this point that the law requires that only the Board must make decisions concerning the Fund including the decision to appoint the Chief Executive Officer. Further, that the law provides that decisions of the Board are arrived at upon voting of the majority members of the Board and not one or two members, or in fact by an entity outside the Board. Reference was made to *section 5(6) of the Act* which is couched in mandatory terms on the voting requirements.
- 6.12 With reference to the role of the President in the PSPF as provided by the Act, reference was made to section 4 of the ACT on the President's power to appoint and remove members of the Board; Section 56 on the President's power after consultation with the Board to make regulations for

the better carrying into effect of the provisions of the Act by issuing Statutory Instruments; and Section 25 on the President's entitlement to receive updates and actuarial reports through the Board. It was submitted that there was no provision in the Act allowing the President to either sit on the Board or dictate to the Board what decision it ought to make. Reference was made to *section 11(1) of the Act* on the powers of the Board.

- 6.13 We were also referred to the ***Oxford Advanced Learner's Dictionary***<sup>1</sup> on the definition of "*unlawful*" meaning "*not allowed by the law*" or "*illegal*." "*Interfere*" is defined as "*to get involved in and try to influence a situation that does not concern you*." Counsel contended that it was clear from the provisions of the law that there was unlawful interference because the involvement of the President in the Board meeting was for the purpose of communicating a directive which in fact not only influenced the decision of the Board not to renew the appellant's contract, but actually dictated such a decision to the Board. It was argued that the lower court's finding that there was no interference by the President because he is the Minister of the Fund is perverse and contrary to the provisions of *the Act*. It was submitted that the President's involvement was ultra vires his authority under *the Act* when he, through Mr. Mulenga, as the Board chairperson, imposed his decision on the Board. It was contended that the Board was not availed an opportunity to vote on the question of renewal, but rather was used to implement the directive so as to satisfy the legal requirement that states that decisions concerning the Fund must be made by the Board.
- 6.14 On the finding that the Republican President merely guided the Board not to renew the complainant's contract of employment, it was submitted that

the same was perverse as it goes against the clear letter of the law as contained in the **Public Service Pensions Act**. It was contended that it went against the proper examination of the facts and evidence brought before the court and must be set aside. The submissions presented in the preceding paragraph were relied upon.

- 6.15 Further the appellant relied on the case of **Nkhata and four others v Attorney General**<sup>3</sup> on considerations to be made by a trial judge.
- 6.16 The case of **Communications Authority of Zambia v Vodacom Zambia Limited**<sup>4</sup> on when an appellate court can interfere with findings of fact.
- 6.17 Similarly the case of **Attorney General V Achiume**<sup>5</sup> was relied upon for its holding that an unbalanced evaluation of evidence, where only the flaws of one side but not the other are considered, is a misdirection, entitling an appellate court to interfere.
- 6.18 Turning to the second part of the ground of appeal as it challenges the court's finding that the appellant was not entitled to damages. Reference was made to the definition of "interfere" per the *Oxford Dictionary* as earlier stated. The appellant relied on his earlier submissions that the President's interference was a breach of his contract. Reliance was placed on the case of **Hutton v Walting**<sup>6</sup> where Jenkins J held:

***"The normal common law remedy for breach of a contract, namely damages is not in all cases an adequate remedy."***

- 6.19 It was submitted that the breach of a contractual term entitles the aggrieved party to an award of damages. Reliance was placed on the

learned authors of *McGregor on Damages 15<sup>th</sup> Edition*<sup>2</sup> where they state at paragraph 727 that:

*"In contract, however, the wrong consists not in making but in the breaking of the contract and therefore the plaintiff is entitled to be put into the position he would have been in if the contract had never been broken, or in other words, if the contract had been performed."*

6.20 The case of *National Airports Corporation Limited v Reggie Ephraim Zimba and Savior Konie*<sup>7</sup> was cited as one similar to the facts prevailing *in casu* in which the Supreme Court held *inter alia* that:

*"...we come to the inescapable conclusion that the learned trial Judge was not in error when he found for the Managing Director on the issue of liability. There was quite clearly the plainest breach of contract after the new Minister's intervention which resulted in an attempt to "nullify" the contract already being performed and already just over four months old. The employer did repudiate the contract and it was not wrong for the Managing Director to reject a non-consensual substitution of the contract for the worse."*

6.21 It was submitted that in like manner as *in casu*, the Minister of the PSPF, being the President interfered with the Board's ability to make its own decision on the issue of renewal by giving a directive that the contract be not renewed in breach of the appellant's contractual terms. We were urged to find that there was a breach of the appellant's contractual terms by the



respondents, which breach ought to be remedied by an award of damages to the appellant.

- 6.22 It was submitted that the terms of the appellant's contract were breached by the respondents when they delivered the decision not to renew on unfounded and unlawful basis as the contract was still subsisting.
- 6.23 On the measure of damages to be awarded, it was submitted that damages ought to be awarded to the appellant on the basis of a 5 year contract as enjoyed by the current Chief Executive Officer of PSPF. In the alternative, it was submitted that damages be calculated on the basis of a 3 year term enjoyed by the appellant in his first term contract. Reliance was placed on *Halsbury's Law of England 4<sup>th</sup> Edition*<sup>3</sup> where it states at paragraph 456 that:

*"However, in a more usual case where the employee is suing for breach of contract, the rule is that the wrongfully dismissed employee should, so far as money can do so, be placed in the same position as if the contract had been performed. This is to be done by awarding as damages the amount of remuneration that the employee has been prevented from earning by the wrongful dismissal. ...In the case of a fixed term contract this means that the starting point is the remuneration for the remainder of the fixed term."*

- 6.24 It was submitted that, in the circumstances of this case, damages should not be calculated on the basis of a period of notice to terminate contract because it did not apply in this case, and the second contract had not

commenced when the breach was committed by the respondents. However, that the proper computation of damages ought to be on the basis of the full contractual term.

- 6.25 The Court was called on to take in to account other considerations in awarding damages for breach of contract as enunciated in the case of *Chilanga Cement Plc v Kasote Singogo*<sup>8</sup> where the Supreme Court held that:

*“We are alive to the fact in the Chintomfwa case, the rationale for awarding two years’ salary as damages was due to the appellant’s grim future job prospects. We are of the view that when each case is considered on its own merit, future job prospects may not be the only consideration for enhanced damages in wrongful or unlawful dismissal.*

*As we have stated above, it would appear that in this case, the respondent was compensated for ‘abrupt loss of a job.’ We are not inclined to interfere with this award because we wish to underline the indignation we share with the lower court in the harsh and inhuman manner in which the respondent was treated.”*

- 6.26 It was submitted that in the circumstances of this case, the Court ought to consider an award of enhanced damages owing to the fact of the grim prospects of the appellant being able to find alternative employment at the level of Chief Executive. We were urged to award enhanced damages in light of the unlawful interference and breach of the appellant’s contract of employment which were unfair. Further, it was argued that the decision

not to renew was unreasonable. Reference was made to the case of *Gabriel Mwami supra* where the Supreme Court held:

*“In many cases, the terms governing the employment indicate that there is a right to natural justice and a right not to be thrown out of work except on some rational grounds; some explicable basis which is reasonable in the circumstances.”*

6.27 The appellant’s written submissions ended on this note.

6.28 In her oral submissions, Ms Soko, learned counsel for the appellant begun by posing questions for the Court to determine

- *Was there interference in the Board’s decision making process to the extent whether the decision not to renew was infact that of the Board?*
- *On the affirmative finding of the first question that there was interference, whether, but for that interference, the Board would have decided otherwise on the question of the renewal of the appellant’s contract?*

*Whether the failure of the Board to make a decision by reason of the interference was not infact a breach of the Board’s duty and terms of employment which would entitle the appellant to damages for breach of contract? Alternatively, damages for non-renewal of contract? And*

- *Whether, if the decision not to renew was that of the Board, the Board was infact not in breach of their duty and in breach of the*

*appellant's terms of employment in carrying out a decision not to renew.*

- 6.29 Ms Soko submitted that interference, is in the manner the directive was given and not the guidance not to renew the contract. She argued that the interference was in the manner of the workings of the Board. Counsel submitted that in accordance with *the Act*, the power to appoint the Chief Executive is reposed solely in the Board.
- 6.30 Ms Soko ended her submissions by asking the question whether the Board would have decided otherwise. She concluded that without any interference the Board would have decided differently.

## **7.0 1<sup>st</sup> Respondent's arguments**

- 7.1 Mr Chileshe, learned counsel for the 1<sup>st</sup> respondent relied on the 1<sup>st</sup> respondent's heads of argument filed on 20<sup>th</sup> May, 2021 and its final arguments in the court below which are contained in the record of appeal. The submissions in this Court begin with the background which we have earlier summarised in this Judgment.
- 7.2 In response to the first part of the ground of appeal, it was submitted that the appellant's contract of employment terminated by effluxion of time. It was contended that an employer is not compelled to renew the contract of an employee once the contract of employment has ran its course. Reliance was placed on the case of ***Zambia Revenue Authority v Dorothy Mwanza and Others***<sup>9</sup> where the Supreme Court held:

*“We are of the firm view that since the respondents’ contracts of service were for a specific period of 5 years and since the offer of a new contract of employment was at the discretion of the appellant as stipulated in clause 2 and 3 of their contracts of service, the offer of a new contract was not automatic as the same was at the appellant’s discretion. ...*

*... The separation from employment was by virtue of the respondents’ 5 year term of contracts coming to an end at the expiration of that contract period.”*

- 7.3 It was submitted that the trial court was on firm ground when it held that there was no interference in the process of the appellant’s contract of employment. Counsel took us through the detailed evidence as presented by the appellant including excerpts of his Notice of Complaint filed on 28<sup>th</sup> February, 2018 and exhibit MBMS1 being Minutes of the Board Meeting dated 22<sup>nd</sup> December, 2017. It was submitted that it could be observed that the Board Meeting held on 1<sup>st</sup> December, 2017 was inconclusive and adjourned, whereas the Board Meeting held on 8<sup>th</sup> December, 2018 was conclusive and resolved that the appellant’s contract of employment should not be renewed.
- 7.4 Reference was made to various provisions of the *Public Service Pensions Act supra* including sections 3,4,5,6,7 and 8 to demonstrate that in the PSPF the Government of the Republic of Zambia is a shareholder in the 1<sup>st</sup> respondent which is a statutory body.

- 7.5 We were then referred to **Article 265 of the Constitution of Zambia<sup>2</sup>** which provides as follows:

***“265. (1) A public office shall be adequately funded to enable it perform its functions.***

***(2) The expenses of the state organ, state institution and public office shall be a charge on the consolidated fund.***

***(3) The emoluments payable under this Constitution or as prescribed, shall be a charge on the consolidated fund.”***

- 7.6 It was submitted that the President of the Republic of Zambia is the Minister in charge of the Public Service Pension Fund Board and also the Minister responsible for superintending *the Act* pursuant to the provisions of the ***Statutory Functions, Portfolios and Composition of Government (Amendment) Notice, Gazette Notice No. 36 of 2017<sup>3</sup>***. It was submitted that shareholders have an overriding interest over the 1<sup>st</sup> respondent and therefore can override the Board and that the decision passed by the Extraordinary Board on 8<sup>th</sup> December, 2017 to refuse to renew the contract of employment was valid and legally sound.

- 7.7 It was submitted that the appellant and his witnesses came to the trial court to ventilate their disquiet and dismay at the purported lack of “Good Governance” that characterised the Board Meeting of 8<sup>th</sup> December, 2017. It was argued that in this jurisdiction courts of law are not general complaints commissions. However, that it is incumbent upon a litigant to plead and prosecute a clear cause of action. It was submitted that

lamentations about good governance or lack thereof is not a clear cause of action that could have been maintained in the court below, and the matter should have been dismissed on that ground alone.

- 7.8 It was submitted that the court below was on firm ground when it held that there was no interference in the non-renewal of the contract of the appellant. We were therefore urged to dismiss Ground 1(a) for lack of merit.
- 7.9 On Ground 1(b) the 1<sup>st</sup> respondent submitted that the appellant is not entitled to damages for unlawful interference in the decision making process regarding the renewal of his contract because there was no unlawful interference in the decision making process as the President simply gave guidance.
- 7.10 It was submitted that the appellant's claims for unlawful interference and breach of contract were not tenable at law because the contract had expired due to effluxion of time. That in any event, the law is clear on the capacity of shareholders in a plethora of decided cases. Reference was made to the cases of *Gerardus Adrianus Van Boxel v Rosalyn Mary Kearney (A minor by Charles Kearney her father and Next Friend)*<sup>10</sup>; *Pan Electronics Limited and Savvas Panayiotides and Others v Andereas Miltiadous and Others*<sup>11</sup>; and *Zambia Consolidated Copper Mines Limited v Richard Kangwa and Others*<sup>12</sup>. The import of these authorities being that shareholders are vested with overriding power over a company's affairs.
- 7.11 The 1<sup>st</sup> respondent submitted that it cannot be compelled to enter a renewed contract with the appellant. The case of *Friday Mwamba v*

***Sylvester Nthenge, Monica Kaping'a, Derrick Chekwe<sup>13</sup>*** was cited in which it was stated that:

***"The law of contract is perceived as a set of power conferring rules which enable individuals to enter into agreement of their own choice on their own terms."***

- 7.12 It was submitted that the 1<sup>st</sup> respondent was not under any legislative nor contractual obligation to automatically renew the appellant's employment contract. It was submitted that Ground 1(b) lacks merit and ought to be dismissed with costs.
- 7.13 In conclusion, it was submitted that the Board Meeting of the PSPF Board of 8<sup>th</sup> December, 2017 was *coram judice* (properly constituted) and *quorate* (mustered the requisite quorum of the minimum number of 7 Board Members). It was submitted that the resolution of the Board not to renew the appellant's contract of employment was legally and validly carried. We were urged to dismiss the appeal with costs.

## **8.0 2<sup>nd</sup> Respondent's arguments**

- 8.1 The 2<sup>nd</sup> respondent filed its heads of argument into court on 30<sup>th</sup> January, 2020. In Ground 1(a) the State makes similar arguments as the 1<sup>st</sup> respondent to the effect that the Minister responsible for the PSFP is the President, and it is for this reason that the President has an interest in the day to day activities of the Fund.
- 8.2 The long and short of the State's submissions is that the lower court was on firm ground in holding that there was no interference in the decision



making process of the Board by the President. It was argued that the finding made by the trial court ought not to be reversed as a reasonable interpretation of the evidence before the court is that the Board made the ultimate decision despite the guidance, (which was not binding) the members were given. Relying on the case of ***Attorney-General v Marcus Kampumba Achiume supra***, on when an appellate court should reverse findings of fact, it was submitted that this is not a case fit for the Court to intervene with the findings of the lower court. We were therefore urged to dismiss the first part of Ground 1 of the appeal.

- 8.3 The State's response to Ground 1(b) of the appeal is that it is trite law that the burden of proof lies upon the person who alleges. Reliance was placed on ***Phipson on Evidence, 14<sup>th</sup> Edition*** at page 50 which states that:

***"The burden of proof lies upon the party who substantially asserts the affirmative of the issue."***

- 8.4 And the case of ***Wilson Masauso Zulu v Avondale Housing Project*** was relied upon where the Supreme Court state that:

***"It appears that the appellant is of the view that the burden of proof laid upon the respondents and it is on this that I would like to say a word. I think that it is accepted that where a Plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case when he makes an allegation, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to Judgment, whatever may be said of his opponent's case."***

- 8.5 It was submitted that it is the duty of the appellant to discharge the burden and prove his case on a balance of probabilities. It was argued that the appellant failed to prove that there was interference in the decision making process of the Board and thus should not be entitled to damages for unlawful interference. We were urged to dismiss this part of the Ground of appeal.
- 8.6 In conclusion, It was emphasised that the learned trial Judge was on firm ground in holding that the President did not interfere in the decision making process of the Board and therefore the, appellant was not entitled to damages.
- 8.7 In her oral submissions, Ms Mwewa, learned Principal State Advocate advanced three concise points. The first being that the appellant cannot force the 1<sup>st</sup> respondent to employ someone it does not wish to employ. The second being that the circumstances of this case would have been somewhat different if the appellant's contract of employment had not expired. The State's third submission is that the appellant seeks to upset the lower court's Judgment on hypothetical situations or as counsel termed them "what ifs". Counsel submitted in summary that the appeal has no merit as the appellant cannot play down aspects of the President's role in the Board. We were urged to dismiss the appeal in its entirety with costs to the respondents.

## **9.0 Appellant's submissions in reply**

- 9.1 In response to the respondents' submissions, Ms Soko submitted that the Board is legally obliged by law considering the question of appointing a

Chief Executive to look at the academic qualifications and relevant experience of a candidate. **Section 13** of the Act referred to; She submitted that the Board was obliged to give a reason for not renewing her client's contract.

- 9.2 In response to the respondent's submissions that the contract had expired by effluxion of time on 28<sup>th</sup> February, 2018, counsel submitted that the breach occurred on 27<sup>th</sup> December, 2017. We were urged to look at the circumstances and facts in determining the reliefs sought on specific issues.

#### **10.0 The decision of the Court**

- 10.1 We have intently considered the arguments of the parties and the record of appeal. We are grateful for the detailed submissions made by counsel for the parties. As we see it from the onset, this appeal is premised on mixed points of law and facts.
- 10.2 On the first part of the ground of appeal the appellant assails the lower court for finding that there was no interference with the Board's decision making process when considering the renewal of the appellant's contract of employment. The portion of the Judgment forming the trial court's finding is at J21 (page 26 of the record of appeal) wherein Musona J stated at lines 14 to 20:

*"It is not in dispute that the Republican President is the "Minister" of PSPF. The involvement of the President did not amount to the President making or directing the PSPF not to renew the Complainant's contract of employment. It also did not amount to*

*interference because he is the “Minister” of the PSPF. The claim fails.”*

- 10.3 In considering whether or not the involvement of the President did amount to interference in directing the Board not to renew the appellant’s contract, the learned trial Judge considered *section 6* of the *Public Service Pensions Act* *supra* which provides as follows:

*“6. A decision of the Board on any question shall be by a majority of the Members present and voting at the meeting and, in the event of an equality of votes, the person presiding at the meeting shall have a casting vote in addition to his deliberate vote.”*

- 10.4 The learned trial Judge considered *section 5* of the *Act* which provides *inter alia* that subject to other provisions of the *Act*, the Board may regulate its own procedure.

- 10.5 The learned Judge went on to consider the appellant’s contract of service to ascertain its duration. He cited Clause 1.1 of the Contract which states as follows:

*“Your contract with the Public Service Pension Fund Board (herein after referred to as the Board) is for a period of three (3) years from 1<sup>st</sup> March, 2015 to 28<sup>th</sup> February, 2018.”*

- 10.6 From the events preceding the suit, the learned Judge found that the appellant’s contract had not been terminated. It ran its full life. The learned Judge formed the view that what was in dispute was the non-renewal of the contract. In finding that the contract was terminated by effluxion of time the lower court relied on *section 36(1)(a) of the Employment Act*<sup>3</sup>

which provides that a written contract of employment can be terminated by *inter alia* the expiry of the term for which it is expressed to be made. The learned Judge opined that a contract of employment could only be renewed by mutual agreement. He placed reliance on the case of ***Zambia Revenue Authority v Dorothy Mwanza and others supra***. He formed the view that a party refusing to renew a contract need not give a reason as there is no requirement to do so under the law.

10.7 The learned Judge analysed the evidence before him. In particular, he listened to a recording of the Board discussing the appellant's renewal of contract of employment. He equally read the transcript of the recording. He formed the view that the Chairman gave guidance to the members present in the meeting that regardless of the results coming from external consultations, the Board had the power to make its own independent decision. He thus found that the decision of the Board could not be said not to be a decision of the majority since the Chairman merely gave guidance.

10.8 Our view is that the learned Judge's conclusions were not farfetched after analysing the law and the evidence before him. It is not in dispute that the Public Service Pensions Fund, a body corporate with perpetual succession, is a statutory body to which the Government of the Republic of Zambia is the major shareholder. **Section 3** of the Act refers. The Government's interest in the Fund is reflected in the composition of its Board of Directors:

- (a) The Permanent Secretary in the Ministry responsible for Labour;
- (b) The Permanent Secretary, responsible for personnel management;
- (c) The Director of Budget, Ministry of Finance;

- (d) A representative of the Attorney-General;
- (e) The National Secretary of the Pensioners' Association representing persons who have retired under the Act;
- (f) The General Secretary of the Civil Servants Union of Zambia;
- (g) The General Secretary of the National Union of Teachers;
- (h) A representative of the Defence Forces;
- (i) A representative of the Security Forces;
- (j) A representative of the Chamber of Commerce;
- (k) A representative of the Lusaka Stock Exchange; and
- (l) Two persons appointed by the President;

**10.9** We note that out of the thirteen (13) members of the Board, six (6) are representatives of Government departments and or officers subordinate to the President. A further two (2) directors of the Board are directly appointed by the President. The President has an overarching interest in the affairs of the Public Service Pensions Fund. We say so because under **Section 9** of the **Public Service Pensions Act** the President retains the power in consultation with the Board to constitute the Fund. Further, by virtue of **section 3(3)** of the **Statutory Functions Act**<sup>4</sup> the President is vested with statutory functions where the law does not state the person vested with statutory functions. The said Act provides:

***“(3) The person for the time being vested with statutory functions shall be-***

***(c) If such provision does not confer or impose such functions on an identified person and the President has made no allocation or transfer, the President.”***

10.10 It is clear from the evidence of the Board’s meeting of 22<sup>nd</sup> December, 2017 that some members of the Board expressed some reservations in the manner in which the meeting of 8<sup>th</sup> December, 2017 was conducted, and in particular, whether the Board Chairperson, Mr. Mulenga had directed them to come to a conclusion they did not agree with. Our view after analysing the transcript of that meeting is that Board members were engaged in deliberations predominantly about what their roles were. In the final analysis, the Minutes of the 6<sup>th</sup> Extraordinary Board Meeting held on 8<sup>th</sup> December, 2017 reflect the following:

***“At that point, some members sought clarity through the Chairperson on the guidance and whether it was subject to question or discussion. Further, clarification was also sought in relation to the performance Appraisal. The meeting was however reminded that the Performance Appraisal was not an end in itself and that the Board had a precedent to refer to where Mr. Joseph Zulu, the former Director of Investigations contract was not renewed in 2017 notwithstanding a favourable Performance Appraisal by his supervisor, the Chief Executive.***

***After a brief deliberation, the meeting resolved not to renew the employment contract of the Chief Executive.”***

10.11 We accept the respondents' submissions that the meeting held on 8<sup>th</sup> December, 2017 was conclusive and resolved that the contract of employment of the appellant would not be renewed. We agree with the learned trial Judge that when the two board members (Mulenga and Chimbwali) consulted the President on the renewal of the Chief Executive officer's contract it did not amount to interference because the President retains a sufficient supervisory role by law over the affairs of the Fund. Therefore the first part of the ground of appeal must fail.

10.12 Turning to ground 1(b) of the appeal, the same assails the lower court for finding that the appellant was not entitled to damages for unlawful interference. In the first part of the appeal, we have upheld the lower court's finding that there was no interference on the part of the President. We have intently followed the appellant's submissions on the question of damages for unlawful interference. Interestingly the appellant contends in addition to unlawful interference, that there was a breach of his contract of employment. Curiously, no specific provision of the contract evidencing the breach has been cited by the appellant. The learned trial Judge found as a fact that the appellant's contract of employment was allowed to run its full course. That finding has not been challenged by the appellant.

10.13 The appellant cited a number of authorities in support of his case for damages. We have carefully considered these authorities. In **Hutton v Watling** *supra* a written contract was drawn up and signed by the vendor. In an action to enforce one of the clauses in the contract, the vendor



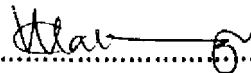
claimed that it did not represent the whole contract. It was held that the vendor was not entitled to introduce evidence in this manner, because the written document represented a true record of the contract. The import of the case is the applicability of the parole evidence rule by reading previous oral declarations into the written contract to preserve its genuinity or integrity. However, the parole evidence rule is irrelevant to the issues under consideration *in casu*.

10.14 In ***National Airports Corporation Limited v Reggie Ephraim Zimba and Savior Konie supra*** the 1<sup>st</sup> respondent was appointed by the Board of Directors on a two year contract. He worked for four months and a few days when his contract was terminated summarily. The trial Judge awarded him damages for breach of contract. On appeal, the Supreme Court upheld the lower court's finding that the employer had breached the contract and the 1<sup>st</sup> respondent was entitled to damages. *In casu* there was no breach of contract as determined by the trial Judge because the contract was allowed to run its full term.

10.15 We distinguish all the other cases cited by the appellant for his claim on damages on the basis that damages were awarded, in those cases, on the basis of a breach of the employee's contract which is not the case *in casu*. We accept the respondents' submissions to the extent that the appellant's contract of employment had ran its full course. The respondent was neither under any legislative nor contractual obligation to automatically renew the appellant's employment contract. We therefore cannot fault

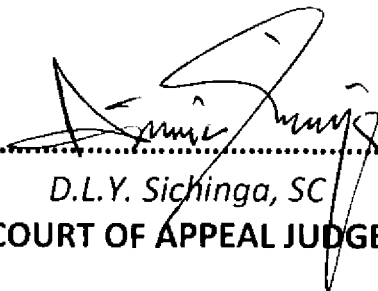
the lower court for finding that the appellant was not entitled to damages for unlawful interference in the decision making process regarding the renewal of his contract. Ground 1(b) of the appeal also lacks merit and we dismiss it.

10.16 In conclusion, we find no merit in this appeal and we dismiss it in its entirety. We order that each party bears its own costs.



C.K. Makungu

**COURT OF APPEAL JUDGE**



D.L.Y. Sichinga, SC

**COURT OF APPEAL JUDGE**



A.M. Banda-Bobo

**COURT OF APPEAL JUDGE**