IN THE COURT OF APPEAL FOR ZAMBIA **Appeal No. 154/2020**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ALISTAIR LOGISTICS (Z) LIMITED **APPELLANT**

AND

ALBERT MATANDA MWAPE **RESPONDENT**

Coram: Sichinga, Ngulube and Banda-Bobo, JJA
On the 21st April, 2022 and 3rd August, 2022

For the Appellant: *Mr. M. Nyirenda of Messrs Kafunda and Company*

For the Respondent: *No appearance. Messrs James and Doris Legal Practitioners*

JUDGMENT

Sichinga, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Alistair Logistics (Z) Limited v Dean Mwachilenga CAZ Appeal No. 232 of 2019*
2. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172*
3. *Zambia Consolidated Copper Mines Limited v James Matale SCZ Judgment No. 9 of 1996*
4. *Isaac R.C. Nyirenda v Kapiri Glass Products Limited (1985) ZR167*
5. *Contract Haulage Limited v Kamayoyo SCZ Judgment No. 2 of 1982*

6. *Colgate Palmolive Zambia Limited v Chuuka SCZ Appeal No. 182 of 2005*
7. *Eston Banda and Edwards Dalitso v Attorney General SCZ Appeal No.42 of 2016.*
8. *Care International Zambia Limited v Misheck Tembo SCZ Selected Judgment No.56 of 2018*
9. *Gerald Musonda Lumpa v Maamba Collieries Limited SCZ Judgment No. 29 of 1989*
10. *Zambia Electricity Supply Corporation Limited v Muyambango SCZ Appeal No. 7 of 2006*
11. *Attorney General v Richard Jackson Phiri (1988-89) ZR 121*
12. *Admark Limited v Zambia Revenue Authority (2006) ZR43*
13. *Brelsford Gondwe v Catherine Namugala SCZ Appeal No. 175 of 2012*
14. *Murray and Roberts Construction Limited and Another v Lusaka Premier Health Limited and Another SCZ Appeal No.141 of 2016*
15. *Konkola Copper Mines PLC and Zambia State Insurance Corporation Limited v John Mubanga Kapaya (As Administrator of the estate of the late Geoffrey Chibale) and other Administrators SCZ Judgment No. 26 of 2004*
16. *Kitwe City Council v William Ng'uni SCZ Judgment No. 12 of 2005*
17. *Post and Telecommunications Corporation Limited v Phiri SCZ Judgment No. 7 of 1995*
18. *Zambia National Commercial Bank Plc v Joseph Kangwa SCZ Appeal No. 54 of 2008*
19. *Kanga v Zambia Revenue Authority SCZ Appeal No. 194 of 2015*
20. *Kayula v Family Health International SCZ Appeal No. 145 of 2012*
21. *Redrilza v Nkazi SCZ Appeal No. 7 of 2011*
22. *Sarah Aliza Vekhnik v Casa Dei Bambini Montessori Zambia Limited CAZ Appeal No. 129 of 2017*

23. *Spectra Oil Zambia Limited v Chinyama CAZ Appeal No. 18 of 2018*

24. *Lupemba v First Quantum Mining and Operations Limited CAZ Appeal No. 120 of 2017*

25. *Kawimbe v Attorney General (1974) ZR 244*

26. *Rose v Willey CA 221*

27. *The Attorney General v Fred Chileshe Ngoma (1987) ZR 80*

28. *Alro Engineering Limited v B. Himuyandi (1987) ZR 83*

29. *Jacob Nyoni v Attorney General SCZ Judgment No. 11 of 2001*

30. *Time Trucking Limited v Kipimpi CAZ Appeal No. 25 of 2016*

31. *Dennis Chansa v Barclays Bank Zambia Plc SCZ Appeal No. 111 of 2011*

32. *First Quantum Mining and Operations Limited v Obby Yendamoh SCZ/8/307/2015*

33. *Attorney General v Kakoma (1975) ZR 216*

34. *Chintomfwa v Ndola Lime Limited (1999) ZR 172*

35. *Chilanga Cement Plc v Kasote Singogo SCZ Judgment No. 13 of 2009*

36. *Butler Asimbuyu Sitali v Energy Regulation Board CAZ Appeal No. 12 of 2017*

Legislation referred to:

1. *Employment Act Chapter 268 of the Laws of Zambia as amended by Act No. 15 of 2015*
2. *Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia*

Texts referred to:

1. *Employment Law in Zambia- Cases and Materials, Dr. W.S. Mwenda, UNZA Press 2004*
2. *Gwyneth Pitt, Employment Law, Sweet & Maxwell, 2009*

1.0 Introduction

1.1 This is an appeal against the decision of the High Court (Mumba J) in which it found that the respondent's employment was unfairly and unlawfully terminated by the appellant.

1.2 The respondent who was the complaint in the court below took out a complaint against the appellant (the respondent in the court below), claiming:

i. A declaration that his employment with the respondent was unlawfully, unfairly and/or wrongfully terminated;

ii. Damages for unfair and/or unlawful and/or wrongful dismissal termination and loss of employment;

iii. Interest on sums found due;

iv. Any other reliefs the court would deem fit; and

v. Costs.

2.0 The factual background

2.1 The alleged facts were that the respondent was employed by the appellant on or about 15th August, 2018 for a period of one year, as a Transit Controller. He was placed on a three (3) months' probation from 15th August, 2018 to 15th November, 2018 in accordance with clause 2 of the contract.

2.2 At the end of the probation period, there was no communication from the employer as to whether he had successfully completed his probation or not.

2.3 At a meeting with the respondent, held on 28th December, 2018, the company discussed his performance with him. On the same day, the company wrote a letter to him informing him that his contract had been terminated due to poor performance.

3.0 The decision of the court below

3.1 On the question whether the complainant had failed to successfully complete his probation, the court found that after the first three (3) months, there was no communication with the complainant to inform him if he had successfully completed his probation. The complainant continued working until his contract was terminated on allegations of poor performance. The company's position was that it had extended the probation period automatically for a further period, up to 15th February, 2019.

3.2 The court held that if the company was of the view that the complainant was unsuitable for employment, then it ought to have terminated within or at the end of the first three (3) months of his probation. However, this was not done.

3.3 The lower court took the view that the complainant had successfully completed his three (3) months' probation period because the company did not inform him of his shortcomings in his performance of duties during the probationary period of three (3) months. The lower court held that since nothing was brought to his attention, the complainant legitimately and reasonably concluded that his probation was successful. That there was no automatic extension of the probationary period. The court held that the complainant successfully completed his three (3) months' probation and was confirmed in his appointment.

3.4 On whether the company complied with the contract of employment and the rules of natural justice, the lower court found that there was no formal charge laid against the complainant. He was not charged with the offence of poor performance, the reason given by the company for terminating his employment.

3.5 The lower court found that he was not availed an opportunity to be heard because he ought to have been charged, asked to exculpate himself and where possible subjected to a disciplinary hearing. The court opined that an administrative meeting could not substitute a disciplinary hearing. The lower court declared that the complainant's employment was wrongfully terminated.

3.6 The lower court found that the reason given to terminate the complainant's employment was not substantiated and was therefore unfair, as the rules of natural justice were not followed. The termination was held to be unfair and unlawful.

3.7 On the issue of damages, upon considering the circumstances of the case, the court found that this was a matter deserving of departing from the normal measure of damages. The court considered the abrupt and summary termination of employment and that the employer's conduct caused the complainant to suffer inconvenience and mental distress. The lower court was satisfied that the complainant had proved his case on a balance of probabilities.

3.8 The court took into account that the complainant had since secured employment as a Human Resource Assistant with another company, AVIC International. The court awarded him 24 months of his last basic salary plus allowances with interest at the short term commercial deposit rate as determined by the Bank of Zambia from the date of complaint to the date of judgment and thereafter, at 10% per annum until final settlement.

4.0 The appeal

4.1 Dissatisfied with the trial court's Judgment, the appellant accordingly appealed and advanced the following grounds of appeal:

i. **That the learned trial Judge in the court below erred both in law and fact when he held on page J31 – J32 of the Judgment to the effect that "on the facts of this case, it is my firm view that the complainant had successfully completed his three months' probation... Accordingly, I hold that the complainant successfully completed his 3 months' probation and inevitably got confirmed in his appointment," such a finding being against the weight of the evidence that was led at the trial of the matter.**

ii. **The learned trial Judge in the court below erred in law and fact when he held at page J35, J36 and J37 that "the complainant's employment was wrongfully, unfairly and unlawfully terminated" when the evidence on the record was that the complainant was charged, exculpated himself and or heard for the offence for which he was dismissed. Further, the complainant was given a valid reason for his dismissal.**

iii. **The court below erred in law and fact when it held at page J39 to the effect that "Accordingly, I award the complainant damages equivalent to 24 months of his last basic salary plus allowances with interest..." as the same is way too excessive and shocking.**

5.0 **Appellant's submissions**

5.1 At the hearing of the appeal, Mr. Nyirenda, learned counsel for the appellant relied on the appellant's heads of argument filed on 17th August, 2020. In his brief submission, he stated that this Court's decision in the case of ***Alistair Logistics (Z) Ltd v Dean Mwachilenga***[1] was on all fours with the instant case.

5.2 In arguing ground one, the appellant assails the lower court's finding at pages J33 –J32 of its judgment where the court held that the respondent successfully completed his three months probation and was confirmed in his appointment. In assailing this finding, the appellant relied on the cases of ***Wilson Masauso Zulu v Avondale Housing Project Limited***[2] and ***Zambia Consolidated Copper Mines Limited v James Matale***[3] which refer to conditions applicable when an appellate court can reverse findings of fact and when a finding becomes a question of law respectively.

5.3 It was submitted that the court's finding in question was made on no proper view of the evidence and in the absence of evidence or any evidence that no trial court acting correctly could reasonably make. It was submitted that the letter of termination at page 56 of the record of appeal was written after reviewing the respondent's poor performance, and that he was allowed to appeal the decision within 48 hours after he received the letter on 31st December, 2018, but he did not do so.

5.4 We were also referred to the respondent's testimony on record and clause 2 of the contract of employment. It was submitted that the wording in the said provision was intended to cover a situation where an employer does not confirm the appointment or dismiss the employee within three months, in which event the probationary employment is deemed to be extended. Reliance was placed on the case of ***Isaac R.C. Nyirenda v Kapiri Glass Products Limited***[1]. It was submitted that the probationary period of employment of the respondent was extended for another three (3) months and it therefore follows that his employment could be lawfully terminated under clause 2 of the contract of employment without notice or compensation to the respondent other than the wages owed for the period of time worked.

5.5 It was submitted that the respondent admitted in his testimony that he had read and understood the contract of employment, and that he could be terminated during the probationary period without notice. That he understood that the period of probation could be extended from three (3) months to six (6) months upon poor performance observed by the employer as per clause 2 of the contract.

5.6 It was submitted that since the respondent's probation was not confirmed in writing after three (3) months in line with the culture of the company, it was impliedly extended by a period of three months which was supposed to end on 15th February, 2019. Reliance was placed on the case of ***Contract Haulage Limited v Kamayoyo***[5] in which the Supreme Court held as follows:

> ***"The employer can terminate the contract of employment at any time as long as it is done in accordance with the terms of the contract."***

5.7 The case of ***Colgate Palmolive Zambia Limited v Chuuka***[6] was relied upon for its holding that:

> ***"Men of full age and competent understanding have the liberty of entering into free and voluntary contracts and the court's duty is merely to enforce the contracts."***

5.8 In light of these authorities, it was submitted that the parties should be bound by the contract of employment and the court's role is merely to enforce it. That the lower court erred in not enforcing clause 2 of the contract of employment.

5.9 We were urged to reverse the trial court's finding that the respondent had successfully completed his three (3) months' probation and that he was inevitably confirmed in his appointment.

5.10 On the second ground of appeal, we were referred to the meanings of *wrongful, unlawful* and *unfair* as found in the case of ***Eston Banda and Edwards Dalitso v Attorney General***[7]. The case of ***Care International Zambia Limited v Misheck Tembo***[8] was referred to where the Supreme Court stated the following:

> ***"We did re-iterate the legal position that, the mode of an employee's dismissal or exit from employment will determine what relief, if at all, they would be entitled to, and the need for trial courts to avoid the careless and cavalier use of legal terms or expressions without regard to their proper meaning."***

5.11 The case of ***Gerald Musonda Lumpa v Maamba Collieries Limited***[9] was relied upon where the Supreme Court held that:

> ***"A contract of employment can be terminated by either party at any time in accordance with the terms of the contract."***

5.12 It was submitted that where a dismissal is done in accordance with prescribed procedure, no claim for wrongful dismissal should be entertained. That *in casu* the respondent's contract of employment was terminated in accordance with clause 2 of the contract which required no notice or compensation to be given to the respondent as he was on probation.

5.13 Finally, on the issue of wrongful dismissal, we were referred to the case of ***Zambia Electricity Supply Corporation Limited v Muyambango***[10] where Supreme Court held as follows:

> ***"...it is not the function of the court to interpose itself as an appellate tribunal within the domestic disciplinary procedures to review what others have done. The duty of the court is to***

examine if there is a necessary disciplinary power and if it was exercised properly."

5.14 It was submitted that this Court should reverse the finding of the lower court of wrongful dismissal as it was made on no proper view of the evidence and no trial court acting correctly would reasonably make.

5.15 On the question of unfair dismissal, we were referred to the case of ***Attorney General v Richard Jackson Phiri***[11] where the Supreme Court held as follows:

"Once the correct procedures have been followed, the only question which can arise for the consideration of the court, based on the facts of the case, would be whether there were in fact facts established to support the disciplinary measures since any exercise of powers will be regarded as bad if there is no substratum of fact to support the same."

5.16 It was submitted that the only consideration the lower court was supposed to establish was whether there were facts to support the disciplinary measures undertaken for poor performance of the respondent. That the trial court failed to cautiously evaluate the evidence placed before it for poor performance. It was submitted that we should reverse the finding of the trial court of unfair dismissal as the respondent's contract of employment was terminated for a valid reason of poor performance which was supported by evidence.

5.17 On unlawful dismissal we were referred to the case of ***Admark Limited v Zambia Revenue Authority***[12] where the Supreme Court stated as follows:

"The purpose of pleadings is to ensure that in advance of trial, the issues in dispute between the parties are defined."

5.18 The cases of ***Brelsford Gondwe v Catherine Namugala***[13] and ***Murray and Roberts Construction Limited and Another v Lusaka Premier Health Limited and Another***[14] were cited for the principle that he who alleges must prove. It was submitted that the order of unlawful dismissal made by the trial Judge was erroneous. That the trial Judge volunteered a ruling in the absence of an appropriate pleading under ***section 36 (3) of the Employment Act***[1] as amended by ***Act No. 15 of 2015,*** or evidence to support the same. We were urged to allow this ground of appeal.

5.19 In ground three we were referred to the cases of ***Konkola Copper Mines PLC and Zambia State Insurance Corporation Limited v John Mubanga Kapaya (As Administrator of the estate of the late Geoffrey Chibale) and other Administrators***[15] and ***Kitwe City Council v William Nguni***[16] on when an appellate court can interfere with an erroneous estimate of damages and unjust enrichment respectively. It was submitted that there was no evidence admitted during trial to treat the respondent as a special case to be entitled to an award of 24 months' salary.

5.20 It was submitted, in the alternative, that should we agree with the lower court in faulting the termination of the respondent's employment, the appropriate measure of damages should be damages commensurate to the balance of the contract. The case of ***Post and Telecommunications Corporation Limited v Phiri***[17] was referred to.

5.21 With regard to costs, it was submitted that the award for cost to the respondent was erroneous. The case of ***Zambia National Commercial Bank Plc v Joseph Kangwa***[18] was referred to. It was submitted that the appellant in defending the matter was never sanctioned by the court for any misconduct, and therefore should not have been condemned in costs.

5.22 We were urged to allow all three grounds of appeal.

6.0 **Respondent's submissions**

6.1 The respondent's counsel filed a notice of non-attendance on 20th April, 2022. They relied on the respondent's heads of argument filed on 30th October, 2020.

6.2 In response to ground one, it was argued that the trial court was on firm ground when it held that the respondent had successfully completed his probation. That the appellant attempted to challenge a finding of fact without merit. Reliance was placed on ***Section 97 of the Industrial and Labour Relations Act Chapter***[2] which provides as follows:

> ***"Any person aggrieved by any award, declaration, decision or judgment of the court may appeal to the Supreme Court on any point of law or any point of mixed law and fact."***

6.3 We were referred to a number of authorities including ***Kanga v Zambia Revenue Authority***[19] and ***Kayula v Family Health International***[20] on when an appellate court can upset findings of fact. It was contended that the finding by the learned trial Judge was based on the evidence on record. Counsel submitted that there was no extension given, and the appellant failed to produce any evidence to the effect that the probation period was extended.

6.4 In the second ground of appeal, it was submitted that the learned trial Judge's finding was firm, based on the evidence presented. That ground two equally offends ***section 92 of the Industrial and Labour Relations Act*** *supra.*

6.5 It was further submitted that that the instant case involves termination and not dismissal as argued by the appellant. We were referred to the case of ***Redrilza v Nkazi***[21] where the Supreme Court held as follows:

"There is a difference between dismissal and termination. Dismissal involves loss of employment arising from disciplinary action. While termination allows the employer to terminate the contract of employment without invoking disciplinary action.

The terms "dismissal" and "termination," should not be used interchangeably."

6.6 It was submitted that at termination, the appellant relied on the notice clause and did not furnish the respondent with any valid reasons for the termination. It was argued that according to the evidence on record, no reasons were given in the letter of termination, which violates the provisions of ***section 36 of the Employment Act***. For this submission we were referred to the cases of ***Sarah Aliza Vekhnik v Casa Dei Bambini Montessori Zambia Limited***[22], ***Spectra Oil Zambia Limited v Chinyama***[23] and ***Lupemba v First Quantum Mining and Operations Limited***[24] on the import of giving a valid reason for termination in compliance with provision of the law.

6.7 We were urged to dismiss the second ground of appeal for want of merit.

6.8 In response to the third ground of appeal, we were referred to the cases of ***Kawimbe v Attorney General***[25], ***Rose v Willey***[26], ***The Attorney General v Fred Chileshe Ngoma***[27] and ***Alro Engineering Limited v B. Himuyandi***[28]. That the gist of these authorities is that the Court should not lightly interfere with an award of damages made by a trial court merely because this Court would have awarded a different sum had it been the one that tried the case. It was submitted that in order to warrant interference the appellant must show that the award was hopelessly wrong in principle.

6.9 In urging us not to interfere with the award of 24 months' salary as damages for loss of employment, we were referred to a number of cases including ***Jacob Nyoni v Attorney Genral***[29], ***Time Trucking Limited v Kipimpi***[30], ***Dennis Chansa v Barclays Bank Zambia Plc***[31] ***and First Quantum Mining and Operations Limited v Obby Yendamoh***[32] on the applicable principles in awarding damages.

6.10 It was submitted that in the instant case the lower court awarded damages in line with the principles set out in the above cases and also supported by the evidence on record. We were urged to dismiss the appeal with costs.

7.0 Our decision on appeal

7.1 We have considered the appeal, the heads of argument, the impugned Judgment, and the authorities cited by learned counsel on behalf of both parties. The paramount issue for determination, as we see it, in this appeal, which will to a large extent settle the issues raised, is to determine whether we can reverse findings of fact made by the learned trial Judge since grounds one and two largely challenge findings of fact.

7.2 In the first ground of appeal, the grievance that the learned Judge held that the respondent had successfully completed his three (3) months' probation and inevitably got confirmed in his appointment is a finding based on fact. We are entitled to reverse such finding where we are satisfied that the finding was either perverse or made in the absence of any evidence or upon a misapprehension of facts or where the finding, on a proper review of the evidence, cannot be reasonably made by any trial court acting correctly. The case of ***Wilson Masauso Zulu v Avondale Housing Project Limited*** *supra* refers. We are also alive to the Supreme Court's holding in the case of ***Attorney General v Kakoma***[33] that:

"A court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it, having seen and heard witnesses giving that evidence."

7.3 The learned trial Judge considered the probation clause in the respondent's contract of employment. It states the following:

"The Employee must successfully complete a probationary period of 3 (three) months during which time the Employer will have the right to determine employment without any notice or compensation to the Employee other than the wages owed for the period of time already worked. Three (3) months' probation applicable to this contract which may be extended for another three months."

7.4 The learned Judge noted the evidence that the initial probation period was three months from 15th August, 2018 to 15th November, 2018. At the end of the period he found that the appellant had neither assessed the respondent's performance during the probation period, nor communicated to him as to whether he had successfully completed his probation or not, following which the period was extended. The lower court's finding was against the backdrop of the appellant's own witness, RW2, who told the trial court that if one successfully completed probation, a letter of confirmation would be given. Page 122 of the record of appeal, lines 19 to 20 refers.

7.5 The witness went on to tell the trial court that "*When the initial 3 months' probation elapses and one is not successful, they are not given any letter stating that their probation*

has not been confirmed but they automatically know that their probation has been extended for another 3 months." (Page 123 lines 7-11). It is against the weight of this evidence that the appellant has vigorously argued that the learned trial Judge made erroneous findings.

7.6 In the case of ***Alistair Logistics (Z) Limited v Dean Mwachilenga*** *supra,* we had occasion to interpret the same identical probation clause as *in casu.* We stated the following at page J18 of our Judgment:

> ***"It is crystal clear that the probation was for a three months' period but could be extended. The appellant commenced employment on 1st June, 2018, and all things being equal ought to have completed his probation on 31st August, 2018. He continued working up until 22nd October, 2018 a period of four months and three weeks."***

7.7 We went on to find at page J20, paragraph 10.7 of our Judgment as follows:

> ***"Against this evidence, we see no basis upon which the findings of the Judge could be assailed. He properly evaluated the evidence that was before him and has been stated in a plethora of authorities…"***

7.8 In the instant case, the trial court, having heard the witnesses and analysed the contract which was the subject of the trial, came to the conclusion that the respondent had completed the first three (3) months of probation. The learned Judge found that he was not informed as to whether the probation was successful or not. Further, he was never written to that his probation was extended for a further three months. After examining the

probation clause of the contract, he found that it did not provide for an automatic extension of the probation period.

7.9 Having perused through the evidence on record, we are of the view that the lower court cannot be faulted in coming to the decision it did and holding that the respondent successfully completed his three months' probation and as such was confirmed in his employment. The first ground of appeal is bound to fail.

7.10 Under ground two, the appellant alleges a misdirection on the part of the lower court in holding that the respondent was wrongfully, unfairly and unlawfully terminated. The appellant in its submission has sought to have us accept that the respondent was charged with an offence and as a result suffered dismissal which was done in accordance with prescribed procedure as laid down in clause 2 of the contract of employment.

7.11 We accept the respondent's submission that the appeal is premised on facts as found by the learned trial Judge, which we have addressed in the first ground of appeal. We are equally guided by the Supreme Court in the case of ***Kanga v Zambia Revenue Authority*** *supra* where it enunciated that:

> ***"An appeal based on findings of fact cannot lie to the Court of Appeal from the Industrial Relations Division of the High Court pursuant to section 97 of the Industrial Relations Act."***

7.12 Suffice to state that we have considered the form in which the termination occurred. We refer to the learned author Dr. W.S. Mwenda, ***Employment Law in Zambia - Cases and Materials***, at page 105;

"Wrongful dismissal is one at the instance of the employer that is contrary to the terms of employment. When considering whether a dismissal is wrongful or not, the form rather than the merits of the dismissal must be examined. The question is not why but how the dismissal was effected. Most contracts of employment have provisions for the employer to terminate the services of the employee upon giving the required notice or payment of money in lieu of notice. If the employer wrongfully dismisses the employee without giving him due notice or by giving less than the required notice, the employee may challenge such dismissal on the basis of lack or insufficient notice."

7.13 We agree that this is indeed the position of the law on wrongful dismissal, as supported by a plethora of authorities in this regard. The question is whether the appellant terminated the respondent's employment in accordance the contract. The learned Judge accepted his evidence that he was not accorded a hearing before his employment was terminated. Further, the learned Judge found that: he was not charged; and invited to exculpate himself. The learned Judge declared that the employment was wrongfully terminated. This was largely a finding of fact which is accurate in law.

7.14 The learned Judge considered the provisions of ***section 36 (3) of the Employment Act as amended by Act No. 15 of 2015*** which provides that:

"The contract of service of an employee shall not be terminated unless there is a valid reason for the termination connected with the

capacity, conduct of the employee or based on the operational requirements of the undertaking."

7.15 On the circumstances of this case, the learned Judge found as a fact that the respondent was not charged with the purported reason, given by the appellant, for poor performance. The lower court was of the view that by giving a reason which was not supported by the evidence for terminating the respondent's employment, it gave no valid reason at all. The learned Judge held the termination unfair.

7.16 In the case of ***Sarah Aliza Vekhnik v Casa Dei Bambini Montessori Zambia*** *supra* we pronounced that:

> *"**Section 36 of the Act has placed a requirement on an employer to give reasons for terminating an employee's employment. Employers are no longer at liberty to invoke a termination clause and give notice without assigning reasons for the termination. What is of critical importance to note however is that, the reason or reasons given must be substantiated."***

7.17 In the instant case the finding that the reason given by the appellant for terminating the respondent's employment was unsubstantiated was one based on fact which was not challenged at trial. This rendered the decision unfair.

7.18 As determined in the first ground, on the circumstances of this case, having found that the respondent had successfully completed his three months' probation and that his contract was terminated, purportedly on account of poor performance without complying with the provisions of the law and the rules of natural justice rendered the

termination unlawful. It is our considered view that the learned Judge's finding were not perverse to warrant our reversal of the findings made.

7.19 We agree with the learned counsel for the respondent that ground two is without merit. It is dismissed accordingly.

7.20 Turning to the third ground of appeal, in the case of ***Alistair Logistics (Z) Limited v Dean Mwachilenga*** *supra* we belaboured to outline the principles to be followed when awarding damages for loss of employment. It is trite that the common law remedy for wrongful termination of a contract of employment is the period of notice. That in deserving cases, the courts have awarded more than the common law damages as compensation for loss of employment. We referred to a number of authorities including ***Chintomfwa v Ndola Lime Limited***[34], ***Chilanga Cement Plc v Kasote Singogo***[35], ***Dennis Chansa v Barclays Bank*** *supra,* and ***Butler Asimbuyu Sitali v Energy Regulation Board***[36] on the considerations to take in considering damages. The import of these authorities is that where there are exceptional circumstances, the courts will go beyond the normal measure of damages to award compensation.

7.21 In the instant case, the appellant lamented that the trial court's award of damages was inordinately high and erroneous on the circumstances of the case. Paramount to the complaint was that the lower court did not carefully consider that the contract of employment was only for a duration of one year, however, the award of damages was equivalent to 24 months of the respondent's last basic salary plus allowances with interest which was inordinately high and shocking. The respondent's opposing

argument is that the complaint is unsubstantiated and that we should uphold the award given.

7.22 In the ***Alistair Logistics v Dean Mwachilenga case***, a matter of similar facts as the instant case, we took the view that damages were not informed by the contract but the circumstances of each particular case. We are mindful of the fact that we cannot interfere with findings of the trial court on an award of damages unless they are so manifestly wrong.

7.23 Among the cases cited by Mr. Nyirenda in support of his submission is that of ***Konkola Copper Mines Plc and Zambia State Insurance Corporation Limited v John Mubanga Kapaya*** *supra* wherein the Supreme Court held *inter alia* that:

> "***The guiding principles on which an appellate court can interfere with the quantum, are that the appellate court must be satisfied either that the Judge in assessing damages applied a wrong principle of law, or if he did not err in law, then the amount was either so inordinately low or inordinately high that it must be a wholly erroneous estimate of the damage."***

7.24 The question for our consideration is: *Was the award of damages totally incorrect to warrant our interference?* In the ***Dean Mwachilenga case*** quoting the learned authors of ***Gwyneth Pitt, Employment Law***[2], at paragraph 8004 on page 236 we noted:

> ***"Contracts of employment are usually drawn up to last indefinitely. But people cannot be tied to each other forever, and at common law,***

the rule grew up that either party could lawfully terminate the contract of employment provided that reasonable notice was given."

7.25 We also noted that:

"The general principle in contract law and it must be remembered that employment law is basically concerned with a contract of employment, is that the purpose of damages is to put the innocent party in the position in which he would have been had the contractual obligations been performed in so far as it is possible to do this by monetary award."

7.26 Having examined the contract of employment, we find that in accordance with clause 12, it was terminable by either party giving the other one month's notice in writing or one month's pay in lieu of notice. Upon a reflection of the peculiar circumstances of this case, we are of the view that the award of 24 months' pay was inordinately high and it came to us with an acute sense of shock. We are inclined to interfere with the award following the guidance of the Supreme Court in cases which include ***Konkola Copper Mines Plc and Another v John Mubanga Kapaya*** *supra* and ***Kawimbe v The Attorney-General*** *supra.*

7.27 We therefore, find merit in ground three and allow it. We set aside the award of 24 months' pay, and in its place we award three (3) months' pay as damages plus interest at a short term commercial deposit rate from the date of the judgment in the court below.

7.28 In line with ***Rule 44 of the Industrial Relation Court Rules***, we order that either party will bear their own costs, both here and in the court below.

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D.L.Y Sichinga, SC
COURT OF APPEAL JUDGE

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P.C.M. Ngulube
COURT OF APPEAL JUDGE

.....
A.M. Banda-Bobo
COURT OF APPEAL JUDGE