IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 108/2021**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MAXWELL ZEFFINATI PHIRI **APPELLANT**

AND

RURAL ELECTRIFICATION AUTHORITY **RESPONDENT**

CORAM: Siavwapa, JP, Chashi and Sichinga, JJA
On 21st March, 2023 and 6th April, 2023

For the Appellant: *Mr. M. Mwachilenga of Messrs James and Doris Legal Practitioners*

For the Respondent: *Mr. J. Ilunga of Messrs Ilunga and Company*

JUDGMENT

Sichinga JA, delivered the judgment of the Court.

Cases referred to:

1. *Zambia Electricity Supply Corporation v Muyambango (2006) ZR 22*
2. *Aliza Vekhnik v Casa Dei Bambini Montessori Zambia Limited- CAZ Appeal No. 129/2017*
3. *Rabson Sikombe v Access Bank Zambia limited- SCZ/8/309/2013*
4. *Samatemba v Zambezi Waterfront Limited-SCZ Appeal No. 110 of 2011*

5. *Attorney-General v Marcus Kampumba Achiume (1983) ZR 1*
6. *Attorney-General v Kakoma (1975) ZR 21*
7. *Holmes Limited v Buildwell Construction Company Limited (1973) ZR 97*
8. *Undi Phiri v Bank of Zambia (2007) ZR 186*
9. *Contract Haulage Limited v Kamayoyo-SCZ Judgment No. 2 of 1992*
10. *Marandola and Others v Milanese and Others-SCZ Appeal No. 130 of 2008.*
11. *BP Zambia v Zambia Competition Commission-SCZ Appeal No. 21 of 2011*
12. *First Quantum Mining Limited v Yendamoh-SCZ Appeal No. 206 0f 2015*
13. *Printing and Numerical Registered Company v Simpson (1875) LR 19*
14. *National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo-SCZ Appeal No. 79/2001*
15. *National Breweries Limited v Phillip Mwenya (2002) ZR 118*
16. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172*
17. *ZESCO Limited v Justin Chishimba-SCZ Appeal No. 131 of 2013*
18. *Redlilza Limited v Abuid Nkazi and Others-SCZ Judgment No. 7 of 2011*
19. *Chimanga Changa v Stephen Chipango Ngombe-SCZ Judgment No. 5 of 2010*
20. *Mohamed v Attorney-General (1982) ZR 49*
21. *Zamtel v Eva Banda-CAZ Appeal No. 2 of 2017*

Legislation referred to:

1. *The Employment Code Act, No. 3 of 2019 Laws of Zambia*

Other works referred to:

1. *Evan McKedrick's Contract Law, 3rd Edition*
2. *The English Law Dictionary, 2nd Edition, Peter Collin Publishing, 1987*

1.0 Introduction

1.1 The appellant, appeals against the decision of Mumba J of the High Court Industrial Relations Division (IRD) at Solwezi delivered on 26th February, 2021. Judge Mumba held that despite the respondent's failure to comply with the rules of natural justice and the ***Employment Code Act***[1] the complainant was properly dismissed having committed the offences of abuse of office and dishonest conduct for which the appropriate punishment was summary dismissal.

2.0 Background and claim

2.1 In the introductory part of this judgment we shall refer to the parties by their designations in the court below.

2.2 The appellant, Maxwell Zeffinati Phiri, was the complainant in the court below. The respondent, Rural Electrification Authority, was the complainant's employer from about August

2010 to 17th January, 2020 when his contract was terminated. He was initially employed in the capacity of Director of Human Resource and Administration for a period of three (3) years from 2010 to 2013. His contract was subsequently renewed under the same terms for two periods of three years each. On 15th May, 2019 the complainant's contract was again renewed for a further period of five (5) years.

2.3 On 17th January, 2020 the respondent terminated the complainant's employment citing three reasons: Firstly, Abuse of Office for applying and going on leave from 30th September, 2019 to 29th October, 2019 despite not having sufficient leave days to do so following the renewal of his contract of employment which commenced on 1st August, 2019; Secondly, Dishonest Conduct for stating that he had over five (5) leave days when in fact he only had 5 days. That he also received a salary from the respondent when he was not entitled to while on unpaid leave; and Thirdly, Gross Misconduct for conducting training under ESAMI contrary to section 17(c) of his contract of employment which specified that he was in the *"sole employment"* of the respondent during office hours and

would not engage in any other business or occupation without the permission of the Chief Executive Officer. All the three offences attracted the sanction of summary dismissal in accordance with the respondent's Human Resource and Administration policy.

2.4 On 22nd January, 2020, the complainant wrote a letter to the Permanent Secretary, Ministry of Energy, appealing against the termination of his employment. He denied all the charges levelled against him. The Permanent Secretary, in his response of 7th February, 2020, upheld the respondent's decision to terminate the complainant's employment.

3.0 The claim

3.1 The complainant filed a complaint on 3rd March, 2020 seeking the following reliefs:

a) A declaration that his employment with the respondent was unlawfully and/or wrongfully dismissed terminated;

b) 36 months' salary as damages for unlawful and/or wrongful termination and loss of employment;

c) Specific performance of clause 11 of the contract of employment;

d) *Payment of gratuities and all allowances and accrued entitlements under the contract of employment for the whole period of the contract;*

e) *Interest on all sums found due;*

f) *Any other relief the Court may deem fit; and*

g) *Costs of and incidental to the action.*

4.0 The Answer

4.1 In its answer to the complaint, the respondent averred that the complainant committed an offence namely, abuse of authority, whose sanction is summary dismissal. Further, that he applied and proceeded on annual leave from 30th September, 2019 to 28th October, 2019 with the full knowledge that he had not accrued sufficient leave days to take the annual leave. The respondent also stated that the complainant had breached the condition of his contract of employment on 'sole employment' with the respondent when he went on to conduct training for ESAMI without the permission of the respondent's Chief Executive Officer, an action which amounted to gross misconduct.

4.2 It was averred that the respondent followed the right procedure when dismissing the complainant as there was no

specific process outlined in the Disciplinary Code relating to erring supervisors or senior management as in the case of the complainant. That even if procedure had not been follow (which was denied), the appropriate punishment for the offences committed was dismissal. Therefore no injustice or prejudice arose from the failure to comply with laid down procedure in the contract of employment or indeed the Disciplinary Code. The respondent also denied that the complainant was entitled to payment of allowances and gratuity for the whole contract period as per clause 11 of the contract of employment since he was summarily dismissed. The respondent denied that he was entitled to any of the claims sought.

5.0 The appeal

5.1 Dissatisfied with the decision of the High Court, the complainant appealed to this Court raising four grounds of appeal as follows:

1. ***The learned trial judge erred both in law and fact when he constituted himself as a disciplinary tribunal to determine***

whether or not the Appellant had committed a wrong contrary to the law on the role of the Court in employment matters;

2. ***The learned trial judge in the court below misdirected himself in law and fact when he held that the Appellant abused his office and conducted himself in a dishonest manner when there is uncontested evidence on record that the Respondent's CEO approved his leave on the basis of unutilized leave days from his previous contract;***

3. ***The learned trial judge erred in law and fact when he failed to award the Appellant damages for unlawful termination despite finding that the Respondent herein had failed to comply with the rules of natural justice and the Employment Code Act on the basis of case authority whose effect has been overtaken by the Employment Code Act 2019; and***

4. ***The learned trial judge erred in law and fact when he refused to enforce the contract between the parties by ordering specific performance of clause 11 of the contract between the parties.***

6.0 Appellant's submissions

6.1 On 21st May, 2021, the appellant filed its heads of argument.

6.2 Under ground one, the summary of the appellant's arguments was that the learned judge exceeded his authority by constituting himself as the respondent's Disciplinary Committee and he reviewed detailed evidence which led him to fall into serious error that led to injustice in this case. In support of this submission, reliance was placed on the case of ***Zambia Electricity Supply Corporation v Muyambango***[1] where the 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 necessary disciplinary power and if it was exercised properly."***

6.3 We were also referred to our decision in the case of ***Aliza Vekhnik v Casa Dei Bambini Montessori Zambia Limited***[2] where we held that:

> ***"The Appellant was never called for a hearing neither was she called upon to tender an explanation. It is in this vein that we come to the inescapable conclusion that the appellant breached the rules of natural justice. It follows***

that in as much as the appellant had the power to terminate the appellant's employment, the power was not exercised fairly. In light of the foregoing, we find that the termination of the appellant's employment was wrongful in the circumstances."

6.4 It was argued that the respondent's failure to follow disciplinary rules rendered the appellant's termination as unlawful and wrongful. In support of this submission reliance was placed on the case of ***Rabson Sikombe v Access Bank Zambia Limited***[3] where the Supreme Court held as follows:

"We must however stress that the position that we have taken with regard to an employer's failure to follow procedural imperatives is predicated on the commission by an employee of a dismissible offence or a transgression which the employee admits, or is otherwise established by unimpeachable evidence. Where an employee has not committed any identifiable dismissible wrong or such wrong cannot be established, the employer shall not be allowed to find comfort in the principle we expounded in the Zambia National Provident and Chirwa case. The position we have taken should not be viewed as a panacea for allowing all

forms of disregard of procedural imperatives. Those rules which go to the very core of the right to be heard and other due process requirements will not easily be discountenanced on the basis of what we stated in the Chirwa case."

6.5 It was contended that there was no unimpeachable evidence or admission in this case, the basis upon which the court could have found the termination to be valid. That there was no evidence showing that no offence was committed. That in fact, the court itself ruled out one of the offences.

6.6 Under ground two, it was argued that the finding by the court below that the appellant abused his office and conducted himself in a dishonest manner is not support by the evidence and made on a view of facts that cannot reasonably be entertained. Reliance was placed on the case of ***Samatemba v Zambezi Waterfront Limited***[4] in which the Supreme Court held that:

"A finding of fact becomes a question of law when it is a finding which is not supported by the evidence or when it is one made on a view of facts which cannot reasonably be entertained."

6.7 Our attention was further drawn to the cases of ***Attorney-General v Marcus Kampumba Achiume***[5]***, Attorney-General v Kakoma***[6]**.** The cases set out the principles when an appellate court may interfere with a finding of fact and state that a court is entitled to make findings of fact where parties advance directly conflicting stories respectively.

6.8 We were urged to adopt the approach taken in the case of ***Holmes Limited v Buildwell Construction Company Limited***[7] when the then Court of Appeal held:

> ***"Where parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally allowed to add, to vary, subtract from or contradict the terms of the written contract."***

6.9 We were urged to set aside the finding at pages J34 to J35 where the learned judge stated the following:

> ***"Although the complainant strongly argued that the 15 days leave he had taken was approved by the former Chief Executive Officer, he could not produce any documentary evidence to prove that fact. It was his duty to present evidence to show that he had leave days which were***

unutilized and that he had obtained written approval from the Chief Executive Officer authorizing him to use the said leave days during the subsistence of the new contract which was distinct and separate from the contract that had expired. This he failed to do."

6.10 It was argued that these findings are not supported by any substantive evidence. That the respondent's evidence was to the effect that even though the appellant had applied for leave in March or April under the old contract, he never took the said leave until the contract expired and was left with no option but to take the leave under the new contract with the agreement of the CEO who was his supervisor.

6.11 We were urged to set aside the finding of fact regarding the issue of abuse of office and dishonest conduct, found by the lower court, and enter judgment for the appellant for wrongful and unlawful dismissal or termination.

6.12 In support of ground three, reliance was placed on ***section 52(3) of the Employment Code Act No. 3 of 2019*** which provides as follows:

"An employer shall not terminate the contract of employment of an employee for reasons related to an employee's conduct or performance, before the employee is accorded an opportunity to be heard."

6.13 It was submitted that with the codification of the requirement for natural justice, the requirement to accord an employee a hearing before dismissal is mandatory and there is now no exception as any breach of the statutory right results into a dismissal being unlawful. That it is now not important for the court to determine whether or not there is injustice as there is no such exception in the law as written by Parliament. To drive the point, reference was made to the case of ***Undi Phiri v Bank of Zambia***[8] where the Supreme Court stated that:

"Procedural rules are part of conditions of service and not statutory and that where it is not disputed that an employee has committed an offence for which the appropriate sentence is dismissal, and he is also dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract of service and the employee has no claim on that ground for wrongful dismissal or a declaration that a dismissal is a nullity."

6.14 The cases of ***Contract Haulage Limited v Kamayoyo***[9] and ***Marandola and Others v Milanese and Others***[10] were referred to for their import that the right to natural justice is considered differently if it is a provision of a statute than a mere condition of service. It was submitted that these cases were determined on the basis of a mere procedural rule contained under the conditions of service, and the same have since been overruled by the statutory provision. That any dismissal or termination that breaches the right to be heard is null and void.

6.15 It was submitted that in the case of ***BP Zambia v Zambia Competition Commission***[11] the Supreme Court stated that:

> ***"Courts have to apply a statute in a manner in which the statute can be held to have been contemplated, and that if the words in the statute are clear, then those words must be followed even though they lead to manifest absurdity as was held in Queen v The Judge of the city of London Court."***

6.16 The case of ***First Quantum Mining and Operations Limited v Obby Yendamoh***[12] was referred to for its emphasis on the importance of the rules of natural justice in an instance where

it is a provision of statute and nullified a dismissal even though the employee had committed a dismissible offence. On this basis we were urged to allow ground three.

6.17 In support of ground four, we were referred to the case of ***Printing and Numerical Registered Company v Simpson***[13] which established the following principle in contract law:

> ***"...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 their contract when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."***

6.18 Other authorities cited reiterating the same principle were ***National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo***[14] and the learned authors of ***Evan Mckedrick's Contract Law 3rd edition***. We were urged to grant the appellant's claim of specific performance of the contract between the parties as it was entered into voluntarily.

7.0 The respondent's submissions

7.1 In response to ground one, it was submitted that the learned judge did not interpose himself as an appellate tribunal of the respondent's disciplinary process but rather made findings premised on a proper evaluation of the evidence before him. That it was clear that the appellant committed dismissible offences. Therefore, the learned judge was on firm ground to hold that he was validly dismissed from employment. In support of this submission reliance was placed on ***section 50(1) (a)*** and ***(f) of the Employment Code Act***[1] which provides as follows:

> ***"An employer shall not dismiss an employee summarily except in the following circumstances: (a)where an employee is guilty of gross misconduct inconsistent with the express or implied conditions of contract of employment; (f) or for a misconduct under the employer's disciplinary rules where the punishment is summary dismissal."***

7.2 We were also referred to the cases of ***National Breweries Limited v Phillip Mwenya***[15] and ***Zambia Electricity Supply***

Corporation Limited v David Lubasi Muyambango *supra.* In the latter case it was held:

> ***"Where it is not disputed that the employee has committed an offence for which the appropriate punishment is dismissal and he is also dismissed, no injustice arises from failure to comply with the laid down procedure in the contract and the employee has claim on that ground for wrongful dismissal or a declaration that the dismissal was a nullity."***

7.3 It was argued that the respondent's Disciplinary Code had no express procedure for disciplining supervisors and members of management. It was submitted that the learned judge was on firm ground to hold that the appellant was validly dismissed.

7.4 In response to ground two, it was submitted that the learned judge was on firm ground when he found that the appellant abused his office and conducted himself in a dishonest manner. On the basis of the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited***[16] we were urged not to lightly interfere with findings of fact as it was neither perverse nor premised on misapprehension of facts. That the learned judge arrived at the decision upon a balanced evaluation of the

evidence before him. The case of the ***Attorney-General v Marcus Kampumba Achiume*** *supra* was equally referred to by the respondent where the Supreme Court held:

> ***"An unbalanced evaluation of the evidence, where only the flaws of one side but not the other are considered, is a misdirection which no trial court should make, and entitles the appeal court to interfere."***

7.5 We were urged not to interfere with the findings of the lower court.

7.6 In response to ground three, it was submitted that on the totality of the evidence, the learned trial Judge arrived at the correct decision in not awarding damages for unlawful termination despite an attribution in the judgment of non-compliance with the rules of natural justice and a section of the ***Employment Code.*** That a wrong application of a principle of law cannot invalidate a decision that is supported by evidence. In support off this submission we were referred to the case of ***ZESCO Limited v Justin Chishimba***[17] in which the Supreme Court held:

"Although the learned trial judge wrongly applied the strict liability principle in Rylands v Fletcher case finding the Appellant liable for negligence, he arrived at the correct decision. Therefore, we have not seen any basis for upsetting his judgment."

7.7 It was submitted that the learned judge's finding is consistent with ***section 50(1) (a)*** and ***(f) of the Employment Code.*** We were urged to dismiss ground three.

7.8 In response to ground four, it was submitted the learned trial judge was on firm ground when he held that the appellant was properly instantly dismissed by respondent for offences of abuse of office and dishonest conduct. That he could not be entitled to payment of gratuity in conformity with clause 11 of the contract of employment. The arguments on ground three were repeated and reliance placed on the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited*** *supra.*

7.9 It was submitted that the appellant was instantly dismissed, and therefore, the provision of the law did not apply to this case as found by the learned judge.

7.10 We were urged to dismiss the entire appeal.

8.0 Our consideration and decision on appeal

8.1 We have carefully considered the record of appeal together with the submissions by counsel for the parties. The main issue in this appeal is whether the appellant was properly summarily dismissed by the respondent for offences of abuse of office and dishonest conduct as held by the lower court.

8.2 The gist of the appellant's argument in ground one is that the learned trial judge interposed himself as the respondent's disciplinary tribunal. From the outset, our view on ground one is that the learned judge made findings of fact after reviewing the detailed evidence. At page J35 of the Judgment (page 42 of the record of appeal), the learned judge made the following finding of fact:

> ***"From the above established facts, I am satisfied that the complainant had abused his office and conducted himself in a dishonest manner. According to the schedule of offences and corresponding disciplinary action, under clauses 3.7.1(h) and 3.7.3(f), the offences of abuse of office and dishonest***

conduct both attract the penalty of summary dismissal. I am satisfied that despite the respondent's failure to comply with the rules of natural justice and the Employment Code Act, the complainant was properly dismissed as he had suffered no injustice. (See the case of David Lubasi Muyambango[2])."

8.3 In the absence of a disciplinary committee, the learned judge constituted himself as one when it was not his role to do so. The findings that the appellant abused his office and was dishonest were findings that ought to have been made by a disciplinary tribunal and not the court. We accept the appellant's submissions and reliance on the case of ***Zambia Electricity Supply Corporation v Muyambango*** *supra* in which case the Supreme Court guided *inter alia* that the duty of the court is to examine if there is necessary disciplinary power and if it was exercised properly. We heeded the said guidance in the case of ***Aliza Vekhnik v Casa dei Bambini Montessouri Zambia Limited*** *supra.*

8.4 The learned judge ought to have restricted himself to the consideration whether there was valid disciplinary power and whether it was properly exercised. In the present case, the

learned judge considered the ***Employment Code Act*** and superior court authorities on the principle of the rules of natural justice. His analysis was that in the circumstances of this case the appellant's loss of employment arose from disciplinary charges which led to his dismissal. He relied on the case of ***Redlilza Limited v Abuid Nkazi and Others***[18] where the Supreme Court held that:

> ***"There's 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."***

8.5 That as such his sanction was summary dismissal and not a mere termination of his employment.

8.6 The learned judge went further to consider whether the appellant had admitted to any of the offences levelled against him for which he was dismissed even though the respondent had not followed the correct procedure by availing him an opportunity to be heard. He considered the evidence on record

and found that there was abuse of office and dishonest conduct on the part of the appellant.

8.7 The approach taken by the learned judge was erroneous because if he had reviewed the question whether the respondent had the necessary power and had properly exercised it, he would have come to the conclusion that the letter of the law and the disciplinary code were not adhered to. We refer to the case of ***Chimanga Changa v Stephen Chipango Ngombe***[19] in which case the Supreme Court held that:

> ***"What is crucial is that an employer carried out investigations as a result of which he reasonably believed that the employee is guilty of misconduct... The employer does not have to prove that an offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision. The rationale behind this is clear: an employment relationship is anchored on trust and once such trust is eroded, the very foundation of the relationship weakens."***

8.8 In the circumstances of this case, it is clear that the appellant was neither availed a hearing nor called upon to render an explanation of the charges leveled against him by the Chief Executive Officer in the letter of dismissal dated 17th January, 2020. He only appealed to the Permanent Secretary, Ministry of Energy in his letter of 22nd January, 2020, which office did not constitute part of the respondent's disciplinary procedure. Part 2 of the respondent's Disciplinary Code and Grievance Procedure refers.

8.9 Whilst it has been argued by the respondent that there was no disciplinary procedure applicable to the appellant because he was the Human Resources Manager, we find this argument bereft of merit because Clause 1.1 of the said Disciplinary Code and Grievance Procedure states that the code shall apply to each and every employee of the respondent. The Chief Executive Officer was therefore obliged to adopt the procedure provided in the code.

8.10 We find merit in ground one and allow it.

8.11 In ground two the appellant challenges the finding of fact that he abused his office and conducted himself in a dishonest manner when there is uncontested evidence on record that the respondent's Chief Executive Officer (CEO) approved his leave.

8.12 We have, in preceding paragraphs held that the appellant was not availed a hearing. The learned judge found at pages J34 to J35 (pages 41 to 42 of the record of appeal) that the appellant failed to produce evidence that his leave had been approved. Whilst he was not availed a hearing, he produced a leave form at page 112 of the record of appeal to show that his leave had been approved by the Chief Executive Officer. When shown the leave form, this is what the respondent's witness, RW1 said in cross-examination at page 180 of the record of appeal:

> ***"Q. The leave that he took in the month of October, 2019, was it approved by the CEO of the authority?***
>
> ***A. It was administratively approved.***
>
> ***Q. Sir, who approved the leave, who was in charge of approving his leave?***
>
> ***A. It was the CEO.***

Q. Did you see the approval of his leave or when you see it can you identify it?

A. Yes, if I see it I can identify it.

Q. May I refer the witness to the unmarked document, what is that document witness?

A. This is the employee leave form for Maxwell Phiri."

8.13 From the evidence on record, it is clear that the appellant produced his leave form which was confirmed by the respondent's witness, RW1. The learned judge's finding that the appellant failed to present evidence cannot be sustained. In a plethora of authorities the Supreme Court has guided when an appellate court can reverse findings of fact by a lower court. In the case of ***Mohamed v Attorney-General***[20] *Ngulube, DCJ,* as he then was, held *inter alia* that:

> ***"The appellate court may draw its own inferences in opposition to those drawn by the trial court although it may not lightly reverse the findings of primary facts."***

8.14 The inference we draw on the basis of the evidence on record is that there was a misdirection on the part of the learned judge when he found that the appellant had failed to produce

evidence that he had approval to proceed on leave. We accept the appellant's submissions and accordingly reverse the finding of fact.

8.15 Ground two of the appeal is allowed.

8.16 The complaint in ground three is that the learned trial judge failed to award damages for unlawful termination despite finding that the respondent neither complied with the rules of natural justice nor the ***Employment Code Act***.

8.17 The learned judge considered whether there was sufficient evidence on the record warranting dismissal. Mr. Mwachilenga, learned counsel for the appellant, was emphatic in pointing out that there was no admission of wrong doing by the appellant. The respondent, on the other hand submitted that a wrong principle of law cannot invalidate a correct decision that is supported by the evidence. We have shown in considering the first ground of appeal that the approach taken by the learned judge was erroneous. The case of ***Zesco Limited v David Lubasi Muyambango*** *supra* refers on the function of the court, that is, to examine if the necessary

disciplinary power exists and if it was exercised in due form or validly exercised.

8.18 The appellant referred us to ***section 52(3) of the Employment Code Act*** which provides that an employer shall not terminate an employee's contract of employment for reasons related to an employee's conduct of performance, before the employee is accorded an opportunity to be heard. This is a mandatory provision of the law. It ensures that an employee is accorded a hearing before termination of employment. At page J32 (page 39 of the record of appeal) the learned judge stated the following:

> ***"On the facts of the present case, I am quite satisfied that the summary dismissal of the complainant was wrongful as it was done in breach of the rules of natural justice.***
>
> ***Further, I am satisfied that the said termination was unlawful as the same was done in violation of the provisions of section 52(3) of the Employment Code Act No.3 of 2019...***
>
> ***On the above authorities, I am quite satisfied that the complainant has, on a balance of probabilities, proved that his dismissal was wrongful and unlawful."***

8.19 Having found that the dismissal was wrongful and unlawful, the learned judge need not have proceeded to constitute himself as the disciplinary committee as we have stated under ground one.

8.20 On the basis of the lower court's finding, we allow ground three and hold that the appellant is entitled to damages for wrongful and unlawful termination. We have considered what would be a just award in light of the consideration that reinstatement would create a hostile atmosphere for the respondent. In its place, we award the appellant the following: twenty-four months' salary as damages for wrongful dismissal; and twelve months' salary as compensation for unlawful dismissal. The basis of our award is the case of ***First Quantum Mining Limited v Yendamoh*** *supra* whose awards are based on similar circumstances as the present case. We also award the appellant interest on these monetary awards at the average short term deposit rate from the date of writ to date judgment in this Court, thereafter, at the rate of six percent per annum (6%) till date of final settlement.

8.21 Ground four complains that the learned judge ought to have ordered specific performance of clause 11 of the contract between the parties. Clause 11 provides:

> ***"Where the contract of employment is terminated by the employer before the completion of the contract period, gratuity shall be paid to the employer for the entire period, that is to say, for the period of 60 months unless such termination is on instant dismissal."***

8.22 In the case of ***Zamtel v Eva Banda***[21] we discussed at length *clause 9.1(b),* a provision similar to the one in the present case. From page J19 to J21 of our judgment we stated the following:

> ***"We are of the view that the impugned Clause 9.1(b) is penal in nature and the amount payable under the clause was imposed in terrorem. In addition, it does not constitute a genuine pre-estimate of the loss. The Clause is a deterrent to breaching the contract and is in our view unenforceable. The Appellant's argument that because the clause was applicable to both parties, it is not unjust enrichment is untenable. It is immaterial that the clause was applicable to both parties as it was deterrent on both the employer and employee. We have perused a number of Supreme Court decisions which has***

settled the position of the law where an employee seeks payment of salaries or benefits for the remainder of the period not worked. In the cited case of National Airports Corporation Limited and Reggie Ephraim Zimba and Another[11] *the contract of employment provided for three months' notice and further had a clause that stipulated that;*

> *"If the employer terminated the contract prematurely for reasons other than incompetence or unlawful neglect of duty, all the benefits under the contract shall be paid as if the contract had run the full term."*

The Supreme Court held that damages;

> *"should relate to the period of three months of salary and perquisites and any other benefits such as gratuity over that period."*

As the notice clause in the above case was not invoked, the Supreme Court went on to state as follows;

> *"We find and hold that the phrase invoked so as to damages as if the contract had run its full course offends the rules which were first propounded as proposition by Lord Dunedin in Dunlop Pneumatic Tyre Company Limited Vs New Garage and Motor Company*

Limited (8), especially that the resulting sum stipulated for is in effect bound to be extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. This part of the appeal has to succeed and the damages directed to be assessed as we have indicated and not as ordered below."

In the case of Kitwe City Council Vs Williams Ng'uni[3] the Supreme Court held that

"We are, therefore, dismayed by the order to award terminal benefits equivalent to retirement benefits the Plaintiff would have earned if he had reached retirement age had he not been constructively dismissed. Apart from the issue of constructive dismissal, which we have already dealt with, we have said in several of our decisions that period not worked for because such an award has not been earned and might be properly termed as unjust enrichment."

Further in the case of Zesco Limited Vs Alexis Mabuku Matale[15], the Supreme Court reiterated by stating the following that;

"We have held, in a number of cases that an employee cannot be paid salaries or allowances for a period he or she has not worked".

The cases in point that the Supreme Court referred to were namely the Kitwe City Council Vs William Ng'uni and National Airports Corporation Limited Vs Reggie Ephraim Zimba and Savior Konie. The Supreme Court stated further that;

"The principles emanating from these authorities are still good law and we agree with them entirely."

As an Appellate Court we are bound by the decisions of the Supreme Court on the issue of payment of salaries/benefits for a period not worked for. We are further fortified by the recent Supreme Court case of Callister Kasongo and Mansa Milling Limited and APG Milling Limited, Naomi Tetamashimba, Racheal Tetamashimba, Christopher Mulusa and Nathan Kabamba Mulonga where it was held in reference to dismissal of the claim for salaries and allowances for the period during which the Appellant's benefits remained unpaid,that;

"However, this claim was doomed to fail on the basis of our decision in the case of Kitwe City Council Vs Ng'uni."

8.22 We are equally of the same view in the present case that the impugned Clause 11 is penal in nature and the amount payable under the clause was imposed in terrorem. It does not constitute a genuine pre-estimate of the loss. The Clause is a deterrent to breaching the contract and is in our view unenforceable.

8.23 Ground four lacks merit and is bound to fail.

9.0 Conclusion

9.1 For all the reasons given, we largely find merit in this appeal and allow grounds one, two, and three.

9.2 We order that each party bears their own costs of the appeal.

M.J. Siavwapa
JUDGE PRESIDENT

J. Chashi
COURT OF APPEAL JUDGE

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