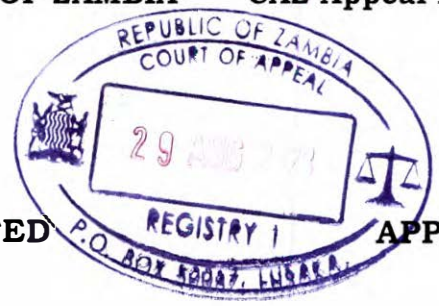
IN THE COURT OF APPEAL OF ZAMBIA **CAZ Appeal No. 182/2021**
HOLDEN AT NDOLA
(Civil Jurisdiction)



BETWEEN:

LIEBHERR ZAMBIA LIMITED **APPELLANT**

AND

CLEOPATRA NGANDU MANDANDI **RESPONDENT**

CORAM : Siavwapa, JP, Chishimba and Banda-Bobo JJA

On 22nd August, 2023 and 29th August, 2023

For the Appellant: *Mr. C. Salati and Mr. P. Chomba of Messrs. Mulenga Mundashi Legal Practitioners*
For the Respondent: *Mr. M. Mwachilenga of Messrs. James & Doris Legal Practitioners*

J U D G M E N T

Chishimba JA, delivered the Judgement of the Court.

CASES REFERRED TO:

1) Zambia Consolidated Coper Mines v Jackson Munyika Siame & 33 Others (2004) ZR 193
2) Konkola Copper Mines v Martin Nyambe CAZ Appeal No. 12 of 2018
3) National Drug Company Limited & Zambia Privatisation Agency v Mary Katongo SCZ Appeal No. 79 of 2001
4) Derek Mukokanwa v Development Bank of Zambia SCZ Appeal No. 120 of 2014
5) Johnson v Nottinghamshire Combined Police Authority (1974) 1 All ER 1082
6) Zambia Privatisation Agency v James Matale (1996) ZR
7) Chilanga Cement Plc v Kasote Singogo (2009) ZR 122
8) Kitwe City Council v William Ng'uni (2005) Z.R. 57
9) Guardall Security Group v Reinford Kabwe CAZ Appeal No. 44 of 2019
10) Kanga v Zambia Revenue Authority SCZ Appeal No. 194 of 2015

11) Kayula v Family Health International SCZ Appeal No. 145 of 2012
12) Citibank Zambia Limited v Suhayl Dudhia SCZ Appeal No. 6 of 2022
13) Sun Country Limited Others v Roger Redin Savory & Another SCZ Appeal No. 122 of 2006
14) Swarp Spinning Mills Plc v Chileshe & Others (2002) ZR 23
15) Konkola Copper Mines PLC and Aaron Chinfwembe v Kingstone Simbayi Appeal No. 195 of 2013.

LEGISLATION CITED:

1) The Employment Code Act No. 3 of 2019
2) The Employment Act Chapter 268 of the Laws of Zambia (repealed)
3) The Employment (Commencement Order) S.I. No. 29 of 2019
4) The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia
5) The Acts of Parliament Act Chapter 3 of the Laws of Zambia

OTHER WORKS CITED:

1. W. S. Mwenda and C. Chungu, (2021) A Comprehensive Guide to Employment Law in Zambia. University of Zambia. UNZA Press

1.0 INTRODUCTION

1.1 This appeal is against the judgment of the Industrial Relations Division dated 26th February, 2021. In that judgment, the learned Justice Davies Mumba found that the appellant did not comply with the statutory procedure on redundancy thereby making the termination of the respondent's employment unfair and unlawful.

1.2 In addition, the court below granted the respondent a redundancy package and damages for unfair and unlawful termination.

2.0 CLAIMS IN THE COURT BELOW

2.1 The respondent lodged a complaint against the appellant, her employers, in the court below seeking the following reliefs:

1) ***A declaration that her employment with the appellant was unlawfully terminated.***
2) ***36 months' salary as damages for unlawful termination or in the alternative, payment of a redundancy package in accordance with the provisions of the law;***
3) ***Interest on all sums found due and payable from the date of termination of employment;***
4) ***Any other relief the court may deem fit; and***
5) ***Costs of and incidental to the action.***

3.0 EVIDENCE IN THE COURT BELOW

3.1 The respondent was initially employed by the respondent on one-year fixed term contracts from 24th October, 2016. On 1st July, 2018, she was offered a permanent and pensionable contract for the position of Service Administrator. Clause 1.3 of the contract of employment provided that *"... the duration of her employment is directly related to the services provided to Kalumbila Minerals Limited (KML) at Kalumbila Sentinel Mine in Kalumbila ("the Contract") and the Employee agrees*

that her employment is subject to the duration of the said Contract which at the date of this Agreement is to be read with clause 1.2 above."

3.2 Around 1st February, 2019, the appellant's initial service contract with KML as envisaged under clause 1.3 of the contract of employment was amended at the behest of KML. In the amended Kalumbila Service Level Agreement, KML requested for reduced service administrator support. This meant that the respondent was no longer required and could not be economically sustained by the appellant as KML was no longer going to pay for her role.

3.3 The appellant maintained the respondent up and until 4th November, 2019 when it terminated her employment by letter of even date. She was not given any notice as she was told to handover and leave her office on the same day.

3.4 In her evidence at trial, the respondent, Cleopatra Mandandi (PW1) complained that the reason for the termination of her employment was not valid as the appellant soon advertised for the recruitment of another employee who was to carry out the duties that she previously performed. That the only

difference was the job title. She also lamented that the appellant did not offer to re-employ her in her position.

3.5 The appellant denied the claims through its witness, Henri Wassink (RW1) the Managing Director – Administration. At trial, he stated that the amended service contract with KML required the removal of the respondent's position by 1st August, 2019. The appellant tried to maintain the respondent's position for three months but had to terminate it on 4th November, 2019 by notifying her in writing of the termination effective 5th November, 2019.

3.6 The appellant paid the respondent for the five days she worked in November 2019 together with all outstanding accrued leave days and one month's salary in lieu of notice.

3.7 With respect to the internal job advertisement for the position of Receptionist – Administration Support, the witness stated that this was a different position in the sense that the position of Service Administrator was more technical and involved health and safety. On the other hand, the position of Receptionist – Administration Support involved running the office, day to day and routine tasks, and sending and filing documents. Further that the professional qualifications

required for the advertised role were lesser in comparison to the role previously occupied by the respondent with a reduced salary.

3.8 Henri Wassink denied that the respondent was declared redundant stating that the termination of her employment was an operation termination as her contract was directly linked to KML that no longer required the services she rendered. He was not aware if there was any notice to the respondent that her employment would come to an end prior to 4th November, 2019.

4.0 ARGUMENTS IN THE COURT BELOW

4.1 In their submissions to the court below, counsel for the respondent argued that the evidence on record showed that the respondent's employment was terminated by way of redundancy. In so doing, neither actual notice of the impending redundancy was ever given nor was any redundancy package paid to her. The respondent was taken off the payroll before payment of the redundancy package and that she was not given any opportunity to make consultations on the measures to be taken to minimize the adverse effects of the termination.

4.2 Therefore, counsel submitted that the termination was unlawful and contrary to **section 55(2) of the Employment Code Act No. 3 of 2019 (the Code)**. This entitled the respondent to both compensation for loss of employment in form of damages for unlawful termination, and payment of redundancy benefits which ought to include retention on the payroll or salary arrears, until payment of redundancy benefits under section 55 (3)(a) and (b) of the Code.

4.3 It was argued that the termination was unlawful as the reason given for the termination was not valid and thus contravened **section 52(2) and (5) of the Code**.

4.4 Counsel for the appellant submitted that the provisions of the Code did not apply to the case as the Code only came into effect on 8th May, 2019 through the **Employment (Commencement Order) Statutory Instrument No. 29 of 2019**. This was because the respondent's contract of employment was only entered into on 1st July, 2018, almost a year before the Code came into effect. Reliance was placed on the provisions of **Regulation 5(2) and (3) of the Fourth Schedule of the Code**. Therefore, the respondent's claims

were not applicable to the Code but rather, the repealed **Employment Act Chapter 268 of the Laws of Zambia**.

4.5 Counsel for the appellant further argued that the termination of the employment was not unlawful as her contract of employment under clauses 1.2 and 1.3, was to the effect that she agreed that the duration of her employment contract would be directly related to the Kalumbila Service Level Agreement.

5.0 DECISION OF THE COURT BELOW

5.1 In his decision, the learned Judge considered the affidavit and oral evidence on record and was of the view that the main issue for determination is whether in terminating the contract of employment, the appellant complied with the relevant law on termination of employment by reason of redundancy.

5.2 The court below found that the respondent's employment having been terminated on 4th November, 2019, the applicable law at the time is the Code pursuant to Regulation 5(1) which deems contracts entered into under the repealed Act, to have been entered into under the Code. The court further found that the provisions of **Regulation 5(2) and (3)**

of the Fourth Schedule of the Code, relied upon by the appellant, were inapplicable as they relate to contracts executed in a foreign country but to be performed in Zambia.

5.3 In this regard, the lower court found that the appellant did not observe the mode of termination provided in the contract of employment when terminating the respondent's employment. As KML no longer required the services of the respondent, it meant that her position had been declared redundant due to restructuring as the Service Level Agreement between the appellant and KML had not come to an end. The respondent was entitled to payment of a redundancy package.

5.4 The court below also found that the provisions of **section 55(1) of the Code** were not complied with by the appellant in terminating the respondent's employment as she was only given a day's notice and paid in lieu of notice. The failure to comply with the law made the termination unlawful and unfair.

5.5 The court awarded the respondent two months' pay as redundancy package and full wages from the 5th November, 2019 being the date of termination, until the redundancy

package is paid in full. With respect to damages for unlawful and unfair termination, the court found no extraordinary circumstances to warrant a departure from the normal measure of damages, being the equivalent of the notice period. In that regard, the respondent was awarded one months' full wages as damages for unfair and unlawful termination.

6.0 GROUNDS OF APPEAL

6.1 In seeking to assail the decision of the lower court, the appellant has advanced seven grounds of appeal as follows:

1) ***The court below erred in law and in fact when it held that the Employment Code Act, 2019 applies to the respondent's dispute which arose on 5th November, 2019 notwithstanding the fact that the Employment Code Act came into full force on 8th May, 2020, following a one-year transition period pursuant to Regulation 5(3) of the Fourth Schedule to the Employment Code;***

2) ***The court below erred in law and in fact when it held that the termination of the respondent's employment was due to redundancy in terms of section 55 of the Employment Code Act when the respondent's contract of employment was terminated due to operational requirements which is a separate and different mode of termination of the contract of employment;***

3) ***The court below erred in law and in fact when it held that the appellant failed to follow the prescribed redundancy procedure as the termination was not due to redundancy***

and thus the appellant was not obliged to follow redundancy procedure;

4) ***The court below erred in law and in fact when it held that the payment in lieu of notice paid to the complainant was not sufficient for her termination despite the law permitting an employer to terminate employment in this manner;***

5) ***The court below erred in law and in fact when it granted the complainant two months' pay as redundancy pay and salary from the date of complaint to the date of judgment, in addition to damages for unfair, unlawful, and wrongful termination of the contract. Such an award is not permitted in terms of Zambian law;***

6) ***The court below erred in law when it proceeded it proceeded to render a judgment on the matter despite its jurisdiction having lapsed on account of the matter not having been concluded within one year from the date the Notice of Complaint was filed on 21st January, 2020; and***

7) ***The court below erred in law when it, in the absence of jurisdiction, proceeded to pass judgment in the matter after a period of more than sixty (60) days from the time trial was concluded on 31st July, 2020.***

7.0 APPELLANT'S HEADS OF ARGUMENTS

7.1 The appellant filed heads of argument in support of the appeal on 10th August, 2021. In ground one, the appellant submitted that the Code came into effect on 8th May, 2019 following the promulgation of the **Employment (Commencement Order) S.I. No. 29 of 2019** (**the Commencement Order**). The contract of employment

between the appellant and respondent was entered into on 1st July, 2018, almost a year before the Code came into effect.

7.2 It was argued that the Code cannot apply retrospectively to a contract of employment that was entered into before it came into force. In support thereof, the appellant cited the case of **Zambia Consolidated Coper Mines v Jackson Munyika Siame & 33 Others** [1] for the proposition that any legislation is not intended to operate retrospectively but prospectively, more so where the enactment would have prejudicial effect on vested rights.

7.3 The case of **Konkola Copper Mines v Martin Nyambe** [2] was also cited where this court held that:

> ***"A law that comes into effect after parties have contracted, cannot apply to relations that were consummated previously."***

7.4 It was argued that the parties having consummated their employment contract in 2018, the Code which came into effect on 8th May, 2019 cannot apply to relations of the parties consummated in 2018. Further, that **Regulation 5(2) and (3) of the Fourth Schedule** to the Code, provides for a transition period of one year, meaning that the Code only came into effect on 10th May, 2020.

7.5 The appellant further argued that the lower court applied **paragraph 5(1) of the Fourth Schedule** as a stand-alone provision instead of reading it with **paragraph 5(3)** which gives the statutory grace period of one year for all employers to comply with the provisions of the Code.

7.6 In ground two, the appellant contends that the termination of the respondent's employment was due to operational requirements pursuant to clause 1.3 of the employment contract and not redundancy under **section 55(3) of the Code**. That in terms of **section 36(3) of the repealed Act**, a contract of service can only be terminated where there is a valid reason for the termination connected with the capacity, conduct of the employee, or based on operational requirements of the undertaking.

7.7 Counsel submitted that though the repealed Act did not define what amounts to ***"operational requirements"***, in terms of the **Note on Convention No. 158 and Recommendation No. 166 Concerning Termination of Employment**[1], the reasons ***"... generally include reasons of an economic, technological, structural, or similar***

[1]https://www.ilo.org/wcmsp5/groups/public/---ed_norm/-normes/documents/wcms_100768.pdf

nature. Dismissals resulting from these reasons may be individual or collective and may involve reduction of the workforce or closure of the undertaking. ..."

7.8 In this regard, the appellant submitted that the termination of the respondent's employment was based on operational requirements which falls within the purview of **section 36(3) of the repealed Act** and cannot amount to redundancy. This concept of termination of employment based on 'operational requirements' has since been reflected under **section 52 of the Code**.

7.9 The appellant further argued that the termination of the respondent's employment was undertaken pursuant to clause 1.3 of the employment contract. That the respondent also conceded in cross-examination that she was aware that her contract was wholly dependent on the needs of KML as per the Service Level Agreement between KML and the appellant. Therefore, she is bound by the terms of the contract that supports termination by operational requirements that she voluntarily and freely entered into as per the case **National Drug Company Limited & Zambia Privatisation Agency v Mary Katongo** [3].

7.10 In seeking to distinguish redundancy from termination by operational requirements, the appellants referred to the learned authors **W. S. Mwenda and C. Chungu, (2021) A Comprehensive Guide to Employment Law in Zambia. University of Zambia. UNZA Press**, who state that redundancy is defined by **section 3 of the Employment Act (repealed)** as the termination of a contract of employment in accordance with section 55.

7.11 In ground three, the appellant further argued that the termination of the respondent having been due to operational requirements and not redundancy, the appellant was not obliged to follow the redundancy procedure when terminating her employment. For this, the appellant relied on the learned authors **Mwenda and Chungu** supra at page 302, who state that:

> ***"Whereas all redundancy situations fall under operational requirements envisaged under section 52(2), not all operational requirements result in a redundancy situation. If the termination based on operational requirements does not create a redundancy situation, then the employer can terminate and not incur liability for breaching the redundancy procedures. This is most common in situations of re-organisation, which in Zambia are referred to as retrenchment."***

7.12 The Supreme Court decision of **Derek Mukokanwa v Development Bank of Zambia** [4] was also called in aid where the termination of the appellant's employment was held not to be a redundancy as the position he held continued to exist and was filled by someone else. For that reason, the court held that **section 26B (2) (a) and (b) of the now repealed Employment Act** was inapplicable to the facts of that case.

7.13 The appellant further cited the case of **Johnson v Nottinghamshire Combined Police Authority** [5] which holds that an employer is entitled to reorganise his business to improve its efficiency and in so doing, to propose a change to the staff of terms and conditions, and failing agreement, to dispense with their services. That such a change, does not automatically give the staff a right to redundancy payments.

7.14 In ground four, the appellant submits that the payment in lieu of notice to the respondent was sufficient because payment in lieu of notice is a permitted route to terminate a contract of employment. For authority, reliance was placed on the cases of **Zambia Privatisation Agency v James Matale** [6] and **Chilanga Cement Plc v Kasote Singogo** [7].

7.15 That clause 9.1 of the contract of employment provides for termination of the contract by giving one month's notice or one month's salary in lieu of notice which must be in writing and to be submitted by the last working day of the month. Further that in terms of **section 36(1) and (3) of the repealed Employment Act** and **sections 52(1) and (2) of the Code,** the payment must be accompanied by a valid reason. That the reason tendered by the appellant was valid in accordance with clause 1.3 of the employment contract and was accompanied by payment in lieu of notice.

7.16 In ground five, the gist of the appellant's contention is that it was unlawful for the lower court to award the respondent two month's pay as redundancy pay, salary from the date of complaint to the date of judgment, and damages for unfair, unlawful, and wrongful termination of the contract. This is because the minimum redundancy payment under **section 55(3) of the Code**, is not less than two month's pay for every year served and other benefits the employee was entitled to as compensation for loss of employment which must be paid not later than the last day of duty.

7.17 It was further argued that section 55(3) only applies where there is a redundancy situation and the employer is due to make a redundancy payment, which is not the case in these circumstances. In the alternative, the appellant argued that if the court were to find that there was a redundancy, then the offer made to the respondent amounting to three months' pay as appears at pages 93 to 94 of the record of appeal, exceeds the statutory two months' pay under the Code.

7.18 In these circumstances, it was submitted that the damages awarded by the lower court are only tenable when the employer fails to make payment on the last day of duty following a redundancy. The case of **Kitwe City Council v William Ng'uni** [8] was called in aid to show that the award made by the lower court was unlawful because it was not earned and might be properly termed unjust enrichment.

7.19 The court was urged to set aside the award made by the court below given that the termination was in line with the law and that the respondent was already paid a salary equivalent to her notice period. In any case, **section 133 of the Code** provides a penalty for failure to follow the redundancy procedure.

7.20 In ground six, the appellant contends that the court below erred in law when it proceeded to render judgment in this matter as its jurisdiction had lapsed on account of the matter not having been concluded within one year from the date of notice of complaint. The complaint was filed on 21st January, 2020 while judgment was only rendered on 26th February, 2021.

7.21 The appellant cited **section 85(3)(b)(ii) of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia** which requires the court to dispose of the matter within a period of one year from the day on which the complaint is presented to it and our decision in **Guardall Security Group v Reinford Kabwe** [9] as authority.

7.22 Lastly, in ground seven, the appellant contends that the lower court lacked the requisite jurisdiction to deliver judgment in this matter as the judgment was rendered more than 60 days after trial concluded on 31st July, 2020. That this was contrary to **section 94(1) of the Industrial and Labour Relations Act** which requires the court to deliver its judgment within 60 days after the hearing of the case.

7.23 In this regard, it was argued that the judgment of the lower court is null and void and ought to be set aside for that reason.

8.0 ARGUMENTS BY THE RESPONDENT

8.1 The respondent filed heads of argument on 19th July, 2023. In ground one, the respondent submits that her employment was terminated on 4th November, 2019 at which time, the **Employment Act Cap 265** had already been repealed. The law applicable to the termination and the employment relationship at the time was the Employment Code, 2019 by virtue of **section 10(2) of the Acts of Parliament Act Chapter 3 of the Laws of Zambia** which provides as follows:

> ***(2) Every Act shall be deemed to come into force immediately on the expiration of the day next preceding its commencement.***

8.2 In this case, the Employment Code came into force on 8th May, 2019 following the promulgation of the **Employment Code (Commencement Order) Statutory Instrument No. 29 of 2019**. That the basis upon which the appellant argues that the Code does not apply to the respondent is strange and has no legal legs to stand on. That before invoking **Regulation 5(3) of the Fourth Schedule of the**

Employment Code, 2019, it must first be shown that a contract made prior to the enactment of the Code is materially inconsistent with the provisions of the Code. In this case, the appellant has not shown any clause in the contract or provided any evidence to prove this aspect of the law.

8.3 Further, the court was referred to **section 138(2) of the Employment Code** which states that the Fourth Schedule applies to the savings and transitional arrangements. Therefore, in light of clauses 9.3, 10 and 26 of the employment contract, the provisions to look to are the provisions of the Employment Code.

8.4 In response to grounds two, three and four, the respondent submits that the issues therein did not arise in the pleadings but only arose in the appellant's submissions in the court below without any evidential backing. In particular, the court was referred to paragraph 17 of the appellant's affidavit in support of answer at page 88 of the record of appeal *"That the termination based on redundancy was for a bona fide purpose and made in good faith ..."*

8.5 Counsel argued that what the appellant is seeking to assail is a finding of fact made by the trial court after evaluating the evidence on record. This is contrary to **section 97 of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia** which only provides for appeals on any point of law or any point of mixed law and fact.

8.6 The respondent cited the cases of **Kanga v Zambia Revenue Authority** [10] and **Kayula v Family Health International** [11] where the Supreme Court found that the grounds of appeal were against findings of fact which is against the spirit of section 97 of Chapter 269.

8.7 In ground five, the respondent submits that the two awards for damages for loss of employment on account of the unlawful termination and the award for being retained on the payroll until payment of the redundancy benefits are separate and distinct remedies that the law provides. That there is nothing unlawful or prohibited under our laws in as far as the awards granted by the lower court are concerned.

8.8 Lastly, in ground six and seven, the respondent submitted that these grounds of appeal on the jurisdiction of the

Industrial Relations Division, must fail and placed reliance on the **Citibank Zambia Limited v Suhayl Dudhia** [12] case.

9.0 APPELLANT'S ARGUMENTS IN REPLY

9.1 On 26th July, 2023, the appellant filed heads of argument in reply to the respondent's heads of arguments in opposition to the appeal.

9.2 In ground one, the appellant maintained that in spite of the Employment Code having come into force on or around 9th May, 2019, there was a one-year transitional statutory grace period during which employers who had entered into contracts of employment that were not consistent with the Code were required to comply. That the contract between the parties is materially inconsistent with the financial obligations as well as the modes of termination of a contract of employment as introduced by the Code.

9.3 This is because termination by reason of redundancy under section 26B of the Employment Act is materially different from the new regime under section 55 of the Code which requires an employee to be retained on the payroll until the redundancy package is paid. Therefore, it was argued that since the respondent's employment contract was made

pursuant to the repealed Act, the applicable law is the same repealed Employment Act.

9.4 In arguing grounds two, three and four, the appellant maintained that the termination of the respondent's employment was in accordance with the relevant law and by following the relevant procedures. That there is no requirement that a business must be unsound in its current form before an employer can undertake to restructure its operations or terminate a contract of employment for operational reasons. Therefore, the termination of the appellant's employment was not in breach of any statutory provision nor was it in violation of the employment contract.

9.5 In ground five, the appellant maintained that the award made by the lower court is not only against the principles of awarding damages in contract law but would amount to unjust enrichment of the respondent. Counsel maintained that the measure of damages in cases of wrongful dismissal, is a salary equivalent to the period of notice unless exceptional circumstances exist, which in this case, there was none.

9.6 With respect to damages for redundancy, the appellant maintained that the Employment Code does not apply to the case in *casu*. That even if it did, the respondent would only be entitled to nominal damages as opposed to the redundancy package envisioned under section 55 of the Employment Code.

10.0 ORAL ARGUMENTS

10.1 At the hearing of the appeal, learned Counsel for the appellant, Mr. Chomba, briefly augmented grounds one and two. With respect to ground one, Mr. Chomba submitted that following its enactment, the Employment Code Act No. 3 of 2019 provided that contracts of employment entered into between employers and employees that were either inconsistent with the new legislation or not aligned with it, would be required to comply with the new regime within one year of its enactment.

10.2 As the written contract of employment between the appellant and the respondent had no provision for redundancy being aligned with the repealed Employment Act Chapter 268 of the Laws of Zambia, the contract had to be aligned with the new legislation which applied redundancy provisions to written

contracts for the first time in Zambia. Therefore, as the 2019 contract between the appellant and respondent was inconsistent with the new employment regime, the appellant was required to amend the employment contract so as to ensure compliance within one year. On this basis, the appellant was not required to comply with the provisions of redundancy within that one year.

10.3 With respect to ground two, learned Counsel submitted that the main relief sought by the respondent was a declaration that her employment had been unlawfully terminated and that she be awarded 36 months' salary in damages. That the claim for damages for redundancy was only in the alternative. Mr. Chomba argued that it is settled that where there is a main relief, the court must address that claim first. If that relief fails, then the court addresses the alternative.

10.4 In support of this, we were referred to the case of **Sun Country Limited & Others v Roger Redin Savory & Another** [13] where the court guided that:

> ***We wish to indicate that in cases such as this one where parties are seeking a main relief and some alternative reliefs, the Court is not bound to consider alternative reliefs. This is especially in cases where the Court has granted the main relief. In such cases, it ought to look no further. The***

> ***rationale behind alternative reliefs is that if the main relief fails, the Court can consider granting the alternative reliefs. This does not however mean that if the main relief fails, then the alternative reliefs should automatically succeed. There is still need for a party seeking an alternative relief to prove that he is entitled to it.***

10.5 On this basis, counsel contended that the manner in which the lower court formulated the issue for determination as being redundancy was extremely prejudicial to the appellant who argued that there was no redundancy. He prayed that the appeal be granted, and the judgment of the court below set aside with costs to the appellant.

10.6 Learned counsel for the respondent, Mr. Mwachilenga placed reliance on respondent's heads of argument.

11.0 ANALYSIS AND DECISION OF THE COURT

11.1 We have considered the record of appeal and the heads of arguments filed by learned Counsel. It is not in dispute that the respondent was employed by the appellant as a Service Administrator on a fixed term contract effective 1st July, 2018. The contract stated that the duration of her employment was directly related to the services provided to KML. On 1st February, 2019, KML initiated a revision of the service level contract by requesting for reduced service

administrator support with the result that the services of the respondent were no longer required. On 4th November, 2019, the appellant terminated the respondent's contract by letter giving her a day's notice.

11.2 We shall address grounds six and seven first and together as they challenge the jurisdiction of the court below. The appellant contends that the court below had no jurisdiction to deliver the judgment appealed against as the matter was concluded beyond one year from the date the notice of complaint was filed. It was further argued that the judgment was also delivered more than 60 days from the date hearing was concluded.

11.3 These arguments are anchored on **section 85(3)(b)(ii) of the Industrial and Labour Relations Act** which provides as follows:

> ***(3) The Court shall not consider a complaint or an application unless the complainant or applicant presents the complaint or application to the Court-***
>
> ***(a) within ninety days of exhausting the administrative channels available to the complainant or applicant; or***
>
> ***(b) where there are no administrative channels available to the complainant or applicant, within ninety days of the occurrence of the event which gave rise to the complaint or application:***
>
> ***Provided that-***

(i) upon application by the complainant or applicant, the Court may extend the period in which the complaint or application may be presented before it; and

(ii) the Court shall dispose of the matter within a period of one year from the day on which the complaint or application is presented to it.

Further, section 94(1) of the Act provides that:

94(1) The Court shall deliver judgment within sixty days after the hearing of the case.

11.4 The issue of whether or not the Industrial Relations Division lacks the jurisdiction to dispose of a matter when more than one year has passed from the date of complaint was settled in the recent Supreme Court decision of **Citibank Zambia Limited v Suhayl Dudhia** [12]. In that case, the court applied the purposive rule of interpretation of statutes and held as follows:

"***5.36 We think that a purposive interpretation of section 85(3)(b)(ii) of the Industrial and Labour Relations Act means that the court does not lose jurisdiction after one year. To hold otherwise would, in our view, create a result which is absurd in light of the intention of Parliament to curb delays in concluding matters of an industrial relations nature.***

5.37 A purposive interpretation would also, in our view, be in keeping with the general tone of the Industrial and Labour Relations Act which in section 85(5) enacts that

the main object of the court is to do substantial justice between the parties before it."

11.5 With respect to the delivery of a judgment outside the 60-day period from the conclusion of hearing, the Supreme Court stated as follows:

"5.45 .... In the Industrial and Labour Relations Act itself, for example, section 94 directs that at the conclusion of a trial of a dispute, a judgment must be delivered within 60 days. Judgments delivered outside the 60-day period, and they are in majority, are not necessarily void on account of loss of jurisdiction. The sanction for failure to deliver within the prescribed period is, under subsection 2, placed on the adjudicator."

11.6 In this regard, the court below did not lose jurisdiction when it rendered its judgment on the matter more than one year after hearing concluded and more than 60 days after trial concluded. Grounds six and seven lack merit.

11.7 In ground one, it was argued that the Employment Code, 2019 does not apply to the dispute herein which arose on 5th November, 2019 because the Code only came into force on 8th May, 2020. In arguing this ground, the appellant relied on **regulation 5(3) of the Fourth Schedule to the Code** which provides that:

> ***(3) Despite sub-paragraph (1), where a contract of employment made prior to the commencement of this Act is materially inconsistent with the provisions of this Act, an employer shall comply with the provisions of this Act within one year of the commencement of this Act."***

11.8 However, **regulation 5(1) of the Fourth Schedule** provides that:

> ***5(1) A contract of employment entered into before the commencement of this Act in accordance with the repealed Acts shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to be a contract of employment entered into under this Act.***

From the above, it can be seen that the application of the Employment Code to a contract of employment entered into before the commencement of the Code is based on whether its provisions are materially inconsistent with the provisions of the Code.

11.9 In this case, it was not argued that the provisions of the contract of employment are materially inconsistent with the Code for the employer to be given one year in which to comply with the Code. The appellant simply argued that it had one year in which to comply with the provisions of the new legislation with respect to redundancy. Therefore, there is no inconsistency in the contract of employment with the Code to

argue that the Employment Code does not apply to the dispute. Ground one is bereft of merit.

11.10 Grounds two and three shall be dealt with simultaneously as they relate to whether the termination of the respondent's contract of employment was due to redundancy, and not operational requirements. In our view the issue for determination is whether the respondent's employment was terminated wrongfully or unlawfully or by way of redundancy.

11.11 In addressing these grounds, we agree with counsel for the appellant that in her pleadings or complaint, the respondent's main claim was for a declaration that her employment was unlawfully terminated and damages arising thereof. Redundancy was pleaded as an alternative claim. It is trite that an alternative claim is considered only upon failure of the main claim as per the case of **Sun Country Limited & Others v Roger Redin Savory & Another** [13] cited by the appellant.

11.12 Therefore, the issue for determination is whether the respondent was unlawfully terminated, and if so, the damages she is entitled to. The Supreme Court guided in **Swarp Spinning Mills Plc v Chileshe & Others** [13] that:

(1) The normal measure of damages usually relates to the applicable contractual length of notice or the reasonable notice where the contract is silent.

(2) The normal measure is departed from where the termination may have been inflicted in a traumatic fashion which causes undue distress or mental suffering normally, in unlawful termination, the measure of damages is the notice period unless there are grounds or circumstances warranting damages beyond the normal measure of damages.

11.13 The evidence on record shows that following the revision of the service level agreement between the appellant and Kalumbila Minerals Limited around August 2019, the respondent's employment was terminated on 4th November, 2019. She was not given any notice as she was told to hand over and leave immediately. The contract of employment provided for one month's notice of termination or, alternatively, one months' salary in lieu of notice.

11.14 The learned author, **W.S Mwenda Employment Law in Zambia. Lusaka, University of Zambia Press, 2004** at page 40, defines the concepts of wrongful dismissal and unlawful dismissal as follows:

"The concept of wrongful dismissal is a product of common law; 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.....”

11.15 Therefore, the concern of this court is not why or the reasons for the termination of the respondent's employment, but rather how the termination was done. In our view, the termination of employment was unlawful/wrongful based on other grounds by the employer when it ought to have been redundancy in view of the reduced service for the respondent's role of administrator support. The duration of her employment, having been directly related to the services provided to Kalumbila Minerals Limited (KML) and her services being no longer required.

11.16 We therefore hold that the termination of employment was unlawful in the circumstances of this case. Therefore, the court below erred in law and fact by holding that the termination was by way of redundancy. The court below further erred by considering the alternative relief of redundancy when the main claim was for a declaration that her employment was unlawfully terminated.

11.17 Having determined that the termination was unlawful, the last issue to be determined is the measure of damages applicable.

11.18 We had earlier under paragraph 11.2 alluded to the normal measure of damages, that is the applicable contractual length of notice or reasonable notice where the contract is silent. There are a plethora of authorities speaking to the general rule with regards damages for wrongful and unlawful termination being equivalent to the notice period. We refer to the case of **Konkola Copper Mines PLC and Aaron Chinfwembe v Kingstone Simdayii** [15]. It is only in deserving cases where it is proved that there are exceptional circumstances that the court will depart from the ordinary measure of damages, such as were aggravating circumstances are proved. See the case of **Chilanga Cement PLC v Kasote Singogo (supra)**.

11.19 Reverting to the issue at hand, of the measure of damages that the respondent was entitled to, it is not in issue that on 4th November, 2019, the appellant terminated the respondent's contract by giving her only a day's notice. She was paid for the five days she worked in November 2019

together with all outstanding accrued leave days and one month's salary in lieu of notice.

11.20 Though the respondent was not given the contractual one month's notice, she was nonetheless paid one month's salary in lieu of notice. We do not find any evidence of trauma that the respondent may have suffered as a result of the termination to warrant a departure from the normal measure of damages.

11.21 We reiterate our earlier holding that the court below misdirected itself in determining the complaint on the basis of redundancy which claim was in the alternative, when the main claim was a declaration that her employment with the appellant was unlawfully terminated. We accordingly uphold the award of one month's salary in lieu of notice for unlawful termination of employment. The award of two months' pay as redundancy package is accordingly set aside.

11.22 In ground four, the appellant contends that the one month's pay in lieu of notice given to the respondent was sufficient. We have found that the main claim of unlawful or wrongful termination succeeds, and not redundancy. Therefore, we

uphold the award of one month's salary for wrongful termination.

11.23 In view of our findings above, ground five succeeds, the respondent was not entitled to two months' pay as redundancy pay, the termination having been held to be wrongful and unlawful.

12.0 CONCLUSION

12.1 We uphold grounds two to five of the appeal as well as the award of one month's full wages as damages for unlawful termination. We hereby accordingly set aside the award of two months' pay as redundancy package. The parties shall bear their own costs.

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M. J. Siavwapa

JUDGE PRESIDENT

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F. M. Chishimba

COURT OF APPEAL JUDGE

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A. M. Banda-Bobo

COURT OF APPEAL JUDGE