

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

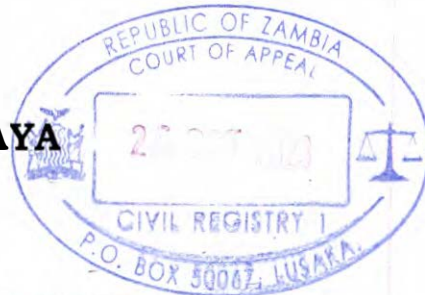
APPEAL NO./229/2021

BETWEEN:

COL HENRY CHIWAYA

AND

CORPORATE AIR LIMITED



APPELLANT

RESPONDENT

CORAM: KONDOLO SC, MAJULA, CHEMBE JJA

On 21st September, 2023 and 26th October, 2023

For the Appellant: Mr. K. Hang'andu of Messrs Kelvin
Hang'andu & Company

For the Respondent: Mr. M. Lisimba of Messrs Mambwe, Siwila
& Lisimba Advocates

J U D G M E N T

KONDOLO SC JA delivered the Judgment of the Court.

CASES REFERRED TO:

- 1. Care International v Misheck Tembo SCZ/56/2018**
- 2. Wilson Masauso Zulu v Avondale Housing Project (1982)
ZR 172**

2. **Wilson Masauso Zulu v Avondale Housing Project (1982)**
ZR 172
3. **Zambia National Provident Fund v Yekweniwa Mbiniwa Chirwa (1986)** ZR 70
4. **Attorney General v John Tembo SCZ/1/2012**
(App/4/2010)
5. **Glynn v Keele University & Another [1971]** 1 W.L.R, 487
6. **National Breweries v Philip Mwenya SCZ/28/2002**
7. **Ward v Bradford Corporation Limited (1971)** 70 LGR 27
8. **Dennis Chansa v Barclays Bank, Zambia Plc [2012]** ZMSC
81 (27th February 2012)
9. **Swarp, Spinning mills Plc v Chileshe and Others**
SCZ/6/2002
10. **Zambia Consolidated Copper Mines v Matale (1995-1997)**
ZR 144
11. **Donoghue v Stevenson [1932]** AC, 562 (H.L)
12. **African Banking Corporation (Z) Limited v Lazarous Mutente CAZ/Appeal/51/2021**
13. **Alistair Logistics Limited v Albert Matanda Mwape**
CAZ/Appeal/154/2020[
14. **Attorney General v Mpundu (1984)** ZR 6 (SC)
15. **Mark Tink & Others v Lumwana Mining Company Limited**
CAZ/41/2021

LEGISLATION & PUBLICATIONS REFERRED TO:

1. **The Employment Code Act 2019**

PUBLICATIONS REFERRED TO:

1. Labour Law in Zambia - An Introduction Labour Law in Zambia - An Introduction, by Chanda Chungu and Ernest Beele, 2nd Edition, Juta and Company (Pty) Ltd

1. INTRODUCTION

1.1. This is an appeal against the ruling of the High Court delivered by Mwansa J on 17th November, 2020 in which the Appellants claim for unfair and wrongful dismissal was dismissed.

2. BACKGROUND

2.1. In the lower Court the parties were referred to as the Complainant and Respondent respectively. I will address them as the Appellant and Respondent onwards. The Appellant commenced an action by complaint against the Respondent seeking, inter alia, the following reliefs;

- 1. Damages for wrongful dismissal**
- 2. Damages for unfair dismissal**
- 3. Arrears for unpaid leave days**
- 4. Damages for emotional injury**
- 5. Interest**
- 6. Costs and further or other reliefs that might be just**

- 2.2. The Appellant was employed by the Respondent as a commercial pilot on contract. According to the contract of employment, it was a requirement for commercial pilots to, at all times, hold a valid Commercial Pilot's licence which included a valid Medical Examination Certificate. On 6th December 2019 the Appellant's medical certificate expired and as a result, he was dismissed by summary dismissal on 9th December 2019.
- 2.3. The Appellant was issued a new certificate on 10th December 2019 with its period of validity indicating 7th December 2019. The Respondent summarily dismissed the Appellant on grounds of gross negligence arising from the Appellant's failure to renew his certificate by the date of expiry.
- 2.4. The Appellant complained that he was neither charged nor heard on the ground upon which he was dismissed. He further insisted, that he had actually renewed his license before it expired and he therefore held a valid licence at the time of the dismissal. He reacted by commencing an action for unfair and wrongful dismissal.

2.5. APPELLANTS CASE

2.6. According to Appellants Notice of Complaint and Affidavit in support thereof, the Appellant was on 9th December, summarily dismissed from employment by the Respondent.

2.7. He averred that he was dismissed for gross negligence contrary to clause 10 of the Respondent's Disciplinary Code of Conduct on account of purportedly failing to renew his commercial licence. He contended that he never charged nor heard with regard to the purported offence.

2.8. He attested that due to the sensitive nature of his employment, he was required to hold a valid commercial pilot license, which included a valid medical certificate issued by a qualified medical practitioner to confirm his suitability to fly an aircraft which was renewed every six months.

2.9. He stated that his medical examination certificate expired on 6th December 2019 and was renewed on 7th December 2019. However, on 10th December 2019 at 21:25 hours, the Respondent's Accountable Manager, Mr. Nixon. Chimuka sent a message on the Respondent's WhatsApp group, requesting the members of that group to read their emails and it was

upon opening his email that he received a notice of summary dismissal, which he was unable to read at the time.

2.10. He averred that on 11th December 2019 he went to the Respondent's place of business to collect a hard copy of the notice of summary dismissal, which disclosed that he had been summarily dismissed on grounds of gross negligence, contrary to clause 10 of the Respondent's Disciplinary Code of Conduct as a result of failure to renew his license on time.

2.11. The Appellant stated that at no point was he charged or given an opportunity to exculpate himself in writing against this summary dismissal

2.12. He complained that although the reason for the purported summary dismissal is that he failed to make a timely renewal of his commercial pilot license, he had actually done so by the date, and the Respondent therefore had no legal justification to summarily dismiss him from employment

2.13. **RESPONDENTS CASE**

2.14. The Respondent filed an Affidavit in Opposition to the Complaint, in which it attested that the complainant did not renew his medical certificate within time, and that the date on which he claimed to have renewed his license, was a

Saturday. According to the Respondent, the Zambia Aviation Authority does not conduct medical examinations on Saturday meaning that if he indeed obtained it on a Saturday then it must have been obtained by fraud.

- 2.15. The Respondent stated that when it wrote the dismissal letter on 9th December 2019 it checked for an update of the licence and its system which showed that the Appellant had no valid licence, it was on that basis, that he was accordingly dismissed from employment on 9th December 2019 for falling afoul of clause 10 of the Respondents disciplinary code of conduct.

3. DECISION OF THE HIGH COURT

- 3.1. The learned trial judge found that main the issues for determination were whether the Appellant had a valid licence at the material time, and whether his dismissal from employment was wrongful and unfair.
- 3.2. The lower Court approached the issues by first defining wrongful dismissal and unfair dismissal. He cited a number of authorities in that regard, including the case of **Care International v Misheck Tembo** ⁽¹⁾, in which wrongful dismissal was defined as dismissal, which is contrary to the

contract and its roots lie in common law and whose remedy is usually limited to payment for a period. Unfair dismissal, on the other hand is dismissal, contrary to statute and is therefore usually a much more substantial right for the employee and the consequences for the employer dismissing unfairly are usually much more serious than those attached to wrongful dismissal.

- 3.3. The trial Judge established that unlike wrongful dismissal, unfair dismissal is a creature of statute and the primary goal of statute law is the promotion of fair labour practices. He cited the case of **Wilson Masauso Zulu v Avondale Housing Project** ⁽²⁾, in which the Supreme Court, while examining a claim for dismissal took occasion to look at the reasons that led to the Appellants dismissal, and determine whether or not that the action which led to dismissal was, legislated upon so as to be termed unfair.
- 3.4. The learned trial judge considered the evidence and found that the Appellant had not shown that the Respondent breached any statutory law in the manner his employment was terminated meaning that he was not unfairly dismissed.

3.5. The learned trial judge held that the Appellant admitted to not having a valid commercial pilot license as at 6th December 2019 and that the same was only issued to him on 10th December 2019 but its effect backdated to 7th December 2019. The lower Court cited the case of **Zambia National Provident Fund v Yekweniwa Mbiniwa Chirwa** ⁽³⁾ in which the Supreme Court held as follows;

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

3.6. He held the view that it went without saying that a pilot can only be employed if he has a valid commercial pilot license and failure to procure the license renders that particular pilot not capable of being employed.

3.7. It was the judge’s position that the dismissal of the appellant was not wrongful and he also decided that the damages for emotional injury should fail as the injury could safely be said

to have been self-inflicted at the point when the complainant failed or neglected to renew his license

3.8. The learned trial judge, however, granted the appellant areas for unpaid leave days.

4. APPEAL

4.1. The Appellant filed this appeal fronting six grounds as follows;

- 1. The lower Court erred both in law and in fact when it held that the Appellant was not wrongfully dismissed in disregard of the agreed evidence that the Appellant was neither charged nor heard prior to his dismissal.**
- 2. The lower Court misdirected itself in fact and in law when it held that the Appellant admitted to not having a valid commercial pilot licence as at 6th December 2019 as the said finding of fact was inconsistent with the weight of the documentary evidence adduced during the trial.**
- 3. The lower Court misdirected itself in fact and in law when it held that the Appellant was not unfairly dismissed.**

4. **The lower Court misdirected itself in fact and in law when it held that the Appellant failed or neglected to renew his licence or certificate.**
5. **The lower court misdirected itself in law and in fact when it left entirely undecided the legal issue regarding whether the charge of gross negligence was legally tenable against the Appellant**
6. **The lower Court misdirected itself in both law and fact when it held that the Appellant's emotional injury could safely be said to have been self-inflicted.**

4.2. The Appellant filed heads of argument on 23 September 2019. **Grounds 1 and 2** were argued together. It was the Appellant's position that the court below misapplied the case of **Zambia National Provident Fund v Yekweniwa Mbiniwa Chirwa (supra)**. It was argued that at no point during trial did the Appellant admit to not having had a valid commercial pilot license as at 6th December 2019, the Appellant's position is that he submitted his medical documents between 2nd and 3rd

December 2019 and his certificate was issued on 10th December 2019 but backdated to 7th December 2019.

4.3. The Appellant strongly and repeatedly disputed having committed the offence of negligence and he cited the case of **Attorney General v John Tembo** ⁽⁴⁾ in which the respondent was dismissed amid allegations that he had been absent from work without official leave for a period of more than 10 days following the allegation that he had leaked a letter copied to the Minister of Home Affairs. The respondent therein was told to report himself to the police where he was interrogated over the leakage and then told to go home, pending completion of the investigation. He was however, never called back to the police. The appellant later claimed that the respondent was charged and given an opportunity to exculpate himself by way of it personally delivering a letter. The respondent denied the assertion and testified that he did not receive any such letter or charge. The Supreme Court in finding for the respondent held as follows;

“We therefore agree that there has been maladministration as the respondent was neither charged nor given an opportunity to exculpate himself over the allegations that he

*had absented himself from work without official leave for a period of 10 days or more. Therefore, the cases of **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa (supra); Glynn v Keele University & Another; National Breweries v Philip Mwenya & Ward v Bradford Corporation Limited** cited by the learned counsel should be distinguished from the facts of the current case, **as this case shows a blatant disregard for the respondent's conditions of service and the rules of natural justice.**"*

- 4.4. It was submitted that the court below misapplied the **Zambia National Provident Fund Case (supra)** as the facts presented were much more similar to those in **Attorney General v John Tembo (supra)**. That the Respondent's failure, or neglect to charge, and afford the Appellant a hearing prior to his dismissal, was a blatant disregard of the rules of natural justice and justifies a drift from the normal measure of damages.
- 4.5. The Appellant has urged this Court to consider awarding the Appellant damages beyond the normal measure, which is the notice period. The case of **Dennis Chansa v Barclays Bank, Zambia Plc** ⁽⁸⁾, was cited in which the Supreme Court stated

that the rationale for departing from the normal measure of damages is that as the global economy deteriorates the chances of finding employment even by graduates are dimmer. There should therefore be an upward increase in damages as it is bound to take longer to find a job in the current domestic and global economic environment.

- 4.6. He further cited the case of **Swarp, Spinning mills Plc v Chileshe and Others** ⁽⁹⁾ in which it was held that the normal measure is departed from where the termination may have been inflicted in a traumatic fashion which causes and due distress or mental suffering.
- 4.7. The Appellant argued that the manner in which the Accountable Manager, Mr. Nixon Chimuka communicated the notice of the email containing the summary dismissal, and the action of having him removed from the Whatsapp group was in line with the cited case. He testified that none of his job applications since his dismissal, have been successful.
- 4.8. **On grounds 3 and 4**, the Appellant's position was that the Respondent in the court below, failed to adduce any evidence to support the unfounded assertion that the Appellant's last license prior to his dismissal on 9th December 2019 was

procured fraudulently. It was argued that the court below completely ignored the principles in the case of **Zambia Consolidated Copper Mines v Matale** ⁽¹⁰⁾ in which the Supreme Court stated that in the process of doing substantial justice, there is nothing that stops the court from delving behind the real reasons given for the termination in order to redress the injustice discovered.

4.9. **In ground 5**, the Appellant argued that the court below left undecided the issue of negligence. He stated that the case of **Donoghue v Stevenson** ⁽¹¹⁾ has long established that to prove negligence one must prove that the alleged negligent act or omission caused injury to the Claimant.

4.10. It was the Appellant's position that the Respondent in the lower court, failed or neglected to show that it suffered any injury as a result of the Appellant's supposed neglect to renew his license on time. That in any case, the Appellant was not scheduled to fly during the period that he was dismissed, therefore, no negligence could have occurred against the Respondent.

5. Respondents Arguments

5.1. The Respondent filed its heads of argument at the hearing.

There was no objection from the Appellant.

5.2. The main gist of the Respondents argument under grounds 1

and 2 was that it was a fact that the Appellant was not in possession of a valid license between the 6th to 9th December,

2019 and the licence was purportedly issued on the 10th. The

Appellant submitted that appellate courts should not easily

interfere with findings of fact made by lower Courts. The

Respondent cited the case of **Wilson Masauso Zulu v**

Avondale Housing Project (supra).

6. THE HEARING

6.1. Appellants Submissions

6.2. At the hearing Mr. Hangandu on behalf of the Appellants

relied on the Appellants heads of argument and challenged

the learned trial judge's finding at page 19 of the ROA that the

Appellant had admitted that he was not in possession of a

valid licence when he was dismissed from employment.

Counsel submitted that nowhere in the record does it show

that the Appellant admitted to not being in possession of a

valid licence.

6.3. We were directed to the licence at page 44 of the ROA which shows that the Appellant was examined on the 7th December, 2019 and the licence certified (stamped and signed) 3 days later on the 10th. According to Mr. Haangandu, the stamp had retrospective effect, therefore the licence was issued on the 7th, meaning that the Appellant was in possession of a valid licence when he was summarily dismissed.

6.4. He reiterated the point that the Appellant was neither charged nor given an opportunity to be heard contrary the provisions of the employment code.

6.5. Respondents Submissions

6.6. Mr. Lisimba on behalf of the Respondent conceded that there was nowhere on the record where the Appellant directly admitted to not having a licence. He however submitted that the trial judge was on firm ground when he considered the licence at page 44 of the ROA and made a finding that when he was dismissed, the Appellant was not in possession of a valid licence, as the licence clearly shows that it was only issued on the 10th December, 2017. The cases of **Wilson Masaúso Zulu (supra)** and others were cited on this point.

- 6.7. It was further submitted that in terms of the **Yekeniwa Chirwa Case (supra)** where it is not in dispute that an employee has committed a dismissible offence, no injustice arises where the correct procedure is not followed in dismissing such an employee.
- 6.8. In grounds 3 and 4 it was argued that the trial judge was on firm ground when he held at page J6 (p. 19 ROA) that the Appellant had not shown that the Respondent had breached any statutory law in the manner his employment was terminated.
- 6.9. In ground 5 on the issue of negligence it was submitted that a pilot owes a duty of care to his employer and to the general public and not being in possession of a valid licence was an omission or act of negligence.
- 6.10. In ground 6 the Respondent submitted that the trial Judge was correct when he found that the circumstances that led to the Appellants dismissal were self-inflicted. The Respondents failure to be in possession of a valid license during the material dates spoke for itself.

7. DECISION OF THIS COURT

7.1. Having considered the record of appeal and the arguments advanced by the parties we have identified the following issues for determination;

1. Whether or not the Appellant was entitled to a hearing prior to the dismissal.

2. Whether or not the dismissal of the Appellant was justifiable.

7.2. We shall begin by addressing grounds 1 and 3. In relation to these grounds, the Appellant argued that the lower court misapplied the case of **Zambia National Provident Fund v Yekweniwa Chirwa (supra)** because at no time did he admit to not having a valid commercial pilot licence as at 6th December 2019 but instead testified during trial that he was not charged or heard on the charge of gross negligence and as such the summary dismissal was unfair and unlawful.

7.3. A perusal of the record shows that the Appellant was required under clause 2 (j) of his employment contract to hold a valid licence at all times. The clause states that;

“The pilot is to hold a valid pilot licence at all times and is responsible for giving timeous notice of pending

licence/instrument rating / validation renewal. The pilot is further responsible for renewing his pilot licence timeously....”

7.4. Further, clause 7 (d) of the contract provides for the manner in which the contract of employment between the parties can be terminated and it states as follows:

“The employer shall have the right to give 30-day’s notice to terminate this contract or immediate dismissal when there is just cause to do so in terms of this contract, Corporate Air Disciplinary Code of Conduct and the Zambian labour law.”

7.5. The Appellant was dismissed on grounds of gross negligence and under the Corporate Air Disciplinary Code of Conduct the penalty for the offence is dismissal. We note that the employment contract and the disciplinary rules do not provide for a procedure for hearing before dismissal.

7.6. Paragraph 6 of the Respondents Affidavit in Opposition to Notice of Complaint states that when the dismissal letter was written on 9th December, the Respondent checked with the complainant for an update on his licence and the Respondent’s system still showed that the Complainant had

no valid licence. Paragraph 7 states that the Complainant was dismissed from employment on 9th December as a result of failure to renew his licence within time, contrary to point no. 10 of the Respondents Disciplinary Code of Conduct.

7.7. The Appellant's contract of employment was terminated in accordance with clause 7 of the Disciplinary Code for breach of the disciplinary rules. The Respondent does not dispute that the Appellant was neither charged nor given an opportunity to exculpate himself.

7.8. Even though clause 7 of the Respondents Disciplinary Code does not provide any disciplinary procedure, **sections 52 (1) and 52 (3) of the Employment Code** provides for termination of contracts of employment as follows;

52. (1) A contract of employment terminates in the manner stated in the contract of employment or in any other manner in which a contract of employment is deemed to terminate under this Act or any other law, except that where an employer terminates the contract, the employer shall give reasons to the employee for the termination of the employee's contract of employment; and

(3) 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.

7.9. In our view, the failure to charge the Appellant and afford him an opportunity to exculpate himself offends the rules of natural justice but most important of all, it is contrary to **section 52 (3) of the Employment Code** and perfectly aligns with the case of **Attorney General v John Tembo (supra)** cited by the Appellant in which the Supreme Court ruled in favour of an appellant who was not given an opportunity to exculpate himself over allegations that he had absented himself from work without official leave.

7.10. In the case of **African banking Corporation (Z) Limited v Lazarous Mutente** ⁽¹²⁾ we agreed with the learned authors of the book **Labour Law in Zambia - An Introduction Labour Law in Zambia - An Introduction, by Chanda Chungu and Ernest Beele, 2nd Edition, Juta and Company (Pty) Ltd , at page 103**, when in **interpreting Section 52 (2) of The Employment Code Act**, they stated that as the law stands,

the employer is required to give a valid reason for dismissal after giving the party the right to be heard and to substantiate the reason for the dismissal.

- 7.11. We repeated our reasoning in the case of **Alistair Logistics Limited v Albert Matanda Mwape** ⁽¹³⁾ when we held that the termination of the employee's contract of employment for purported poor performance without giving the employee an opportunity to be heard, went against the provisions of the law and the rules of natural justice thus rendering the termination unlawful.
- 7.12. We agree with the Appellant the lower Court misapplied the **Yekweniwa Chirwa Case (supra)** because the provisions which the employer ignored or omitted to apply were sitting in the conditions of service whereas in casu, the requirement to hear the Appellant was a mandatory provision of law.
- 7.13. Having established that the Appellant should have been given the opportunity to be heard, it is adjudged that the Appellant was unfairly dismissed and therefore grounds 1 and 3 succeed.
- 7.14. Further, having found that the Appellant was unfairly dismissed, he is entitled to damages and we must determine

whether, on the facts before us, the Appellant is entitled to damages beyond the normal measure. We shall return to this question after determining the remaining grounds of appeal.

7.15. We now turn to grounds 2, 4 in which the Appellant argues against having admitted to the allegation that he did not have a valid commercial licence as at 6th December and denies having failed or neglected to renew his licence or certificate.

7.16. As earlier alluded, under clause 2(j) of the contract of employment, the Appellant was required to have a valid licence at all times and to notify the Respondent in the event of any delay in renewing his license.

7.17. We note that at page 35 of the record of appeal, the Appellant himself stated that due to the sensitive nature of his employment, he was required to have a valid commercial pilot licence at all times which included the medical certificate which confirms suitability to fly an aircraft. He however maintained, throughout his testimony, that he was not in violation of this requirement, that he had a valid licence and as such the reason for his dismissal was not justified.

- 7.18. We have scrutinised the Medical Examination Certificate at page 75 of the Record of Appeal and observed that the relevant Medical Examination Certificate was issued on the 10th December 2019 with the validity period commencing on 7th December 2019.
- 7.19. During cross examination, the Appellant admitted at page 113 of the record that when he was dismissed on 9th December, and the medical certificate had not yet been issued. He further testified at page 116 of the record of appeal that the finding of the Respondent on the checklist document was correct which document, according to the Respondent is the document that revealed that the Appellant did not have a valid certificate prior to his dismissal.
- 7.20. The record of appeal, at page 116, further shows that the Appellant stated that he had asked Mr. Shiku the quality assurance manager to confirm that he had applied for a certificate but he conceded that he had no written proof to support his assertion. He further stated that he did not intend to call Mr. Shiku to testify on this point.
- 7.21. There is no merit in the vehement arguments by learned counsel for the Appellant that his client was in possession of

a valid license merely because he underwent a medical examination on the 7th of December, 2017 and all that was pending was the certificate to be signed and it was indeed signed a few days later on the 10th. No evidence was provided to support counsel's assertion that the stamping and signing of the licence had retrospective effect.

7.22. We have perused the medical certificate at page 44 of the ROA and the fact of the matter remains that it expired on 6th December 2017 and was only renewed when it was signed on the 10th. It is clear to us that the Appellant was not in a possession of a valid licence when he was dismissed on the 9th December, 2017.

7.23. Clause 2 (j) of the Employment Contract reads as follows;

“2 (j) License Validity - Minimum CPL/Instrument Rating

*The pilot is to hold a valid pilots license **at all times** and is responsible for giving **timeous notice** of pending license/Instrument Rating/Validation renewal, **The Pilot is further responsible for renewing his pilot's license timeously.** The Company shall pay for all licence renewals and endorsements after employment.” (emphasis ours).*

- 7.24. According to Clause 2 (j) the Appellant was responsible for renewing his licence and had a duty to inform the Respondent of any pending license renewal timeously. The Appellant did not prove that he informed the Respondent that he had a pending application to renew his licence.
- 7.25. We further note that even though the validity of his renewed licence commenced on 7th December it was issued on 10th December, after his existing licence had already expired.
- 7.26. Further, Clause 2 (j) required that the licence be renewed timeously yet the renewed license was only issued on 10th December which was hardly timeous.
- 7.27. The Appellant has also not proved that he informed the Respondent of any delay, which he was obliged to do timeously.
- 7.28. The Appellant was clearly in breach of clause 2 (j) and was not in possession of a valid license when he was dismissed and therefore probably liable to be charged with gross negligence for which the penalty was summary dismissal. Grounds 2 and 4 are consequently dismissed.
- 7.29. With regard to ground 5, the Appellants arguments with relation to the charge of negligence are totally misplaced

because *in casu*, negligence was not being referred to in Tort but in Contract. All that needed to be proved was a breach of contract (a breach of the conditions of service amounting to gross negligence). Ground 5 is therefore dismissed.

7.30. Lastly in ground 6 the Appellant submitted that he is entitled to damages for emotional injury because the manner in which he was informed of the dismissal caused him emotional injury as he is a retired Colonel and a person of high status.

7.31. In the case of **Attorney General v Mpundu** ⁽¹⁴⁾ it was held that awards for damages can be awarded for mental distress and inconvenience suffered as a result of unlawful suspension. The courts reasoned that the enhanced damages are to encompass any distress or inconvenience that may be caused by the abrupt loss of employment.

7.32. In our view of the manner in which the Appellant was dismissed, without being charged nor given an opportunity to be heard must have been quite shocking and the notification of his dismissal by e-mail was quite demeaning. We agree that under the said circumstances the Appellant was subjected to emotional distress and this ground of appeal

therefore succeeds and he is entitled to damages on this score.

7.33. We earlier stated that we would revert to the question of whether the Appellant is entitled to compensation for unlawful dismissal beyond the normal measure of damages.

7.34. Our finding that the Appellant was in breach of clause 2 (j) of his employment contract must be perceived through the lens that he was not actually charged with the offence and not given an opportunity to exculpate himself contrary to the Employment Code. He was simply notified by e-mail that he had been dismissed for gross negligence. Hence our finding of unlawful dismissal.

7.35. Regardless of the Respondent's view on the Appellants delay in renewing his licence, the Appellant was entitled to be formally charged and also entitled to a hearing where he might have been able to provide a satisfactory explanation for the delay or provide an explanation that could have resulted in a lesser penalty.

7.36. The failure to charge the Appellant and the blatant disregard of the employment code by failing to charge the Appellant and failing to give him an opportunity to be heard combined

with the manner in which he was notified of his dismissal was abrupt, high-handed, demeaning and hurtful. We find that is sufficient reason to go beyond the normal measure of damages. In the **Swarp Spinning Mills Case (supra)** the Supreme Court held that “*the normal measure is departed from where the circumstances and the justice of the case so demand*”.

7.37. In the case of **Mark Tink & Others v Lumwana Mining Company Limited** ⁽¹⁵⁾ delivered on 20th December, 2022, we decided to go beyond the normal measure of damages after finding that the appellants termination of employment was unlawful and abrupt and awarded damages of 12 months’ salary for unlawful termination of employment.


7.38. In casu, we note that the Appellant was employed on renewable one-year contracts and the contract that was terminated had run almost half its course. We also note that according to Clause 7 (d) of the contract of employment (see page 41 ROA) the notice period to terminate by either party was 30 days.

7.39. In the circumstances, we award a global sum of 3 months’ salary for unlawful dismissal and emotional distress with

interest at the average short-term deposit rate per annum from the date of Complaint to date of Judgement on appeal and thereafter at six percent per annum until final settlement.

7.40. Costs are for the Appellant to be taxed in default of agreement.


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M.M. KONDOLO SC
COURT OF APPEAL JUDGE


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B.M. MAJULA
COURT OF APPEAL JUDGE


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YVONNE CHEMBE
COURT OF APPEAL JUDGE