IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 51 OF 2021

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

AFRICAN BANKING CORPORATION (ZAMBIA) LIMITED **APPELLANT**

AND

LAZAROUS MUNTETE **RESPONDENT**

CORAM: **Chashi**, **Siavwapa and Banda-Bobo**, **JJA**

ON: **18th January and 10th February 2023**

For the Appellant: *(1) M.A. Mukupa- Messrs Isaac and Partners*

(2) T. Banda (Ms) - In House Counsel

For the Respondent: M. Nyirenda, Messrs SLM Legal Practitioners

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J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172**
2. **Raphael Katenekwa v Finance Bank Zambia Limited – SCZ Appeal No. 140 of 2011**

3. **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa (1986) ZR, 70**

4. **Chansa Ng'onga v Alfred H Knight (Z) Ltd - SCZ Selected Judgment No. 26 of 2019**

5. **Care International Zambia Limited v Misheck Tembo - SCZ Appeal No. 57 of 2016**

6. **National Breweries Limited Plc v Patrick Simfukwe - SCZ Appeal No. 5 of 2020**

7. **African Banking Corporation v Bernard Fungamwango - CAZ Appeal No 148 of 2020**

8. **Charles Pearson Daka v Zambia Consolidated Copper Mines Ltd – SCZ Appeal No 12 of 2004**

9. **Engen Petroleum Zambia Limited v Willis Muhanga and Another – SCZ Appeal No. 117 of 2016**

10. **Bupe & Another v Zambia national Commercial Bank- SCZ Appeal No. 27 of 2000**

11. **Swarp Spinning Mills Plc v Sebastian Chileshe (2002) ZR, 23**

12. **Barclays Bank Zambia Plc v Weston Luwi and Suzyo Ngulube- SCZ Appeal No 07 of 2012**

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

<u>Legislation referred to</u>:

1. **The Employment Act, Chapter 268 of the Laws of Zambia as amended by the Employment (Amendment) Act, No. 15 of 2015**

2. The Employment Code Act, No. 3 of 2019

Rules referred to:

1. The Industrial and Labour Relations Rules, The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia

Other authorities referred to:

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

2. A Comprehensive Guide to Employment Law in Zambia by Winnie Sithole Mwenda and Chanda Chungu, The University of Zambia Press

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of Hon. Mr. Justice D. Mulenga, Industrial and Labour Division, delivered on 22nd January 2021 in favour of the Respondent.

1.2 In the said Judgment, the learned Judge held that the Respondent, who was the complainant in the court below, was wrongfully dismissed and awarded him 12 months' salary with interest as damages for wrongful dismissal.

2.0 BACKGROUND

2.1 The Respondent commenced an action against the Appellant by way of complaint seeking the following reliefs:

(i) Damages resulting from loss of employment due to unlawful, unfair or wrongful dismissal

(ii) In the alternative an Order for reinstatement

(iii) Any other relief the court may deem just and equitable

2.2 According to the attendant affidavit deposed to by the Respondent, he was employed by the Appellant as Branch Manager on permanent and pensionable basis. That he had a bad working relationship with Elizabeth Mukupa and Naomi Sichilongo who were bent on frustrating his work.

2.3 That on 26th April 2018, a bank's client had a bank transfer for K750,000 made to it, but the amount was not reflecting on the client's account. That the customer queried him on the transaction as he urgently needed to draw K100,000. That after verifying the receipt of funds on the banking system which was confirmed by the

Appellant's Central Treasury Department, he issued instructions to have the customer paid.

2.4 Ten days later, he received a call from the Head of Frauds and Investigations at head office inquiring about the payment and was asked to render a report, which he did. On 8th May 2018, he called for a meeting with other members of staff to brief them over the matter and encourage a spirit of team work. However, on 9th May 2018, he received a letter of suspension and he was consequently charged with the following offences:

(i) Failure or refusal to carry out reasonable and lawful instructions

(ii) Dishonest during the course of employment

(iii) Intimidation or incitement to violence

2.5 According to the Respondent, he was given 24 hours in which to exculpate himself, which he did. The disciplinary committee cleared him on the second charge, but found him guilty on the other two and dismissed him. The appeal to the appeals committee was also dismissed.

2.6 The Respondent averred that his suspicions regarding the circumstances, was aroused when he received information from a former workmate that she had sight of emails on an unattended unlocked work station operated by Naomi Sichilongo which were sent to the Head of Frauds and Investigations in which she alleged that he had convened a meeting at which he had threatened her and other workers with violence, despite her not being present at the meeting.

2.7 The Respondent also averred that, it was a contravention of the grievance code not to be availed an opportunity to face his accusers during the disciplinary hearing. That, this was actuated by malice and was purely calculated to hound him out of employment without due regard to procedural propriety.

2.8 In its answer filed on 16th September 2019, the Appellant stated that, the Respondent was dismissed in compliance with the rules of natural justice and in line with the Appellant's Code of Disciplinary and Grievance Policy and Procedure (the Code) and the law. That he was duly

charged and asked to exculpate himself and following a disciplinary hearing, he was found guilty and dismissed.

2.9 According to the attendant affidavit, the Respondent paid out K100,000 on an insufficiently funded account in breach of the Cash Handling Procedure of the bank and that was confirmed by the Appellant's internal investigations, which led to one of the charges being dropped. That the report was brought before the disciplinary committee.

3.0 DECISION OF THE COURT BELOW

3.1 After considering the evidence, pleadings and submissions by the parties, the learned Judge formulated the issue for determination as **"whether the complainant's dismissal from employment by the Respondent was unlawful, unfair and or wrongful."**

3.2 The learned Judge then went on to state that it has been traditional as guided in a plethora of cases that the burden of proof is on the complainant to establish and prove his

case on a balance of probabilities. He then went on to state as follows:

> **"However, from the above traditional position in respect to the onus of proving the case, there now appears to be evidential burden of proof placed by statutory law on the employers, to establish and prove on the balance of probabilities that there was a valid reason for terminating or dismissing an employee from employment."**

3.3 According to the learned Judge, Section 36 (3) of **The Employment (Amendment) Act, No. 15 of 2015[1] (the Act)** places a duty on the employer by way of defence to show that there was a valid reason for terminating or dismissing an employee.

3.4 The learned Judge was of the view that the Appellant followed the Code, in finding the Respondent not guilty on the offence of *"dishonest conduct"* and guilty of the offences of *"failure to obey lawful instructions and intimidation or incitement of violence."* According to the

learned Judge, however, the issue in contention was whether the Appellant was justified in dismissing the Respondent on the two offences.

3.5 The learned Judge opined that, the two offences were not dismissible, as the sanction on first breach is final written warning and dismissible for a subsequent breach. Reference was then made to the letter of dismissal which in the last paragraph stated as follows:

> **"Having been given two final warnings, the second written warning culminates into a dismissal. Therefore, your final verdict is a dismissal, we hereby inform you that you have been dismissed for the above offences in line with the Disciplinary and Grievance Policy and Procedure..."**

3.6 The learned Judge then opined that, what was in contention and a matter for determination of the court was *"whether the Appellant was justified to dismiss the Respondent for offences which are not dismissible under*

the Code." Reference was then made to a **Note** in the Code, which is couched as follows:

> **"The code makes provision for progressive disciplinary actions in each category of offence. Discipline will therefore be taken progressively in each category of offence and not necessary only in regard to a specific offence. The disciplinary action prescribed by the code may be deviated from where justified by the particular circumstances of the case.**
>
> **Accordingly, such an action may be more severe than the prescribed guideline where aggravating circumstances exist or less severe where mitigating circumstances exist. In certain circumstances and in the case of certain offences, dismissal even for a first offence would be appropriate."**

3.7 According to the learned Judge, the reason for deviating from the prescribed sanction of "final written warning" to

a more severe sanction of "Dismissal", was that, the two final written warnings culminated into a dismissal. The learned Judge, was in disagreeing with the Appellant, of the view that the two final warnings arose from the same set of facts and were raised on the same charge sheet and as such he opined that the discretion which the disciplinary committee had and could have duly exercised was to order that the penalty of final written warning for the two offences run concurrently or consecutively.

3.8 The learned Judge acknowledged the **Note** aforestated, that it gives discretionary power to the disciplinary committee to deviate from the prescribed action under the Code. That however, the said discretion may only be exercised where there are particular justified circumstances of the case. That in *casu* there were no aggravating circumstances to justify the deviation. The learned Judge found that the Appellant's conclusion was arrived at in error and as such the reason given for the dismissal was not valid and consequently that he was wrongfully dismissed.

3.9 As regards the damages, the learned Judge observed that the Respondent did not call any evidence to prove that, because of the dismissal, his endeavours to find alternative employment failed, although it was not in dispute that he was still unemployed. The Judge however was of the view that "it is a notorious fact in this world economical environment, employment is scarce, worse in the banking industry and finding employment in the position he was, is not easy". It was on the aforestated considerations that the learned Judge found it in the interest of justice to award 12 months salary as damages for wrongful dismissal.

4.0 THE APPEAL

4.1 Dissatisfied with the Judgment, the Appellant has appealed to this court advancing five grounds of appeal couched as follows:

1) *The court below erred both in law and fact when at page J12 of the Judgment it interpreted Section 36 (3) of the Employment (Amendment)*

Act No. 15 of 2015 to mean that there is an ***"...evidential burden of proof placed by the statutory law on the employer (the Appellant) to establish and prove on the balance of probabilities that there was a valid reason for terminating or dismissing an employee from employment"***

2) *The court below erred both in law and fact when it found and held that the Respondent was wrongfully dismissed from employment by the Appellant based on the fact that the Disciplinary Grievance and Policy Procedure did not provide for dismissal in respect of the offences for which the Respondent was charged and found guilty*

3) *The court below erred both in law and fact by awarding the Respondent 12 months salary as damages for wrongful dismissal*

4) *The court below erred both in law and fact by finding as it did at page J22 that* ***"...it is a notorious fact that in this world economical***

environment, employment is scarce, worse in the banking industry" *in the absence of any evidence before the honourable court to support such a finding.*

5) *The court below erred both in law and fact by finding as it did at page J22 that* ***"...the complainant as Branch Manager was in management and finding employment in the said position is not easy..."*** *in the absence of any evidence before honourable court to support such a finding.*

5.0 THE CROSS APPEAL

5.1 The Respondent on 9th March 2021 filed a notice of cross appeal advancing the following one ground as follows:

"That the award of 12 months' salary as damages for wrongful dismissal to the Respondent be varied for a higher award of between 24 and 36 months, which award would be consistent with awards in cases of

a similar nature, and reflective of the current economic environment"

6.0 ARGUMENTS IN SUPPORT OF THE APPEAL

6.1 In arguing the first ground of appeal, it was submitted that the court below erred in its interpretation of Section 36 (3) of the Act which provided as follows:

> **"The contract of service of an employee shall not be terminated unless there is a valid reason for the termination connected with the capacity, conduct of the employee or based on the operational requirements of the undertaking."**

6.2 It was the Appellant's contention that, the provision compels an employer to give a valid reason for the termination of employment, but does not place a statutory burden of proof on the employer to establish or prove that the reason was valid. That the employer must merely give a valid reason.

6.3 It was submitted that, the law on burden of proof in civil matters is well settled. Our attention in that respect was

drawn to the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[1]. It was the Appellant's contention that, in holding that it was the employer's obligation to establish and prove that there was a valid reason for the termination of the contract, the learned Judge fell into error as he departed from the well settled judicial precedent as settled by the Supreme Court and against the doctrine of *stare decisis.*

6.4 As regards the second ground, it was submitted that, the Appellant was well within its rights to dismiss the Respondent upon his being found guilty on two offences. According to the Appellant, it followed its administrative disciplinary process as provided for in the Code. Our attention was drawn to the **Note** earlier alluded to and contended that, in the circumstances of the case, the Respondent, having been charged with three offences and found guilty on two, and taking into account the seriousness of the offence, his senior status in the Appellant bank and his actions; the Appellant had the right to effect the dismissal, in the manner that it did.

6.5 It was submitted that the disciplinary committee, having issued two final written warnings in accordance with the Code, which culminated into a progressive situation warranting a dismissal, especially taking into account that he acted in total disregard to the cash handling procedure of the bank, the Appellant, was entitled to dismiss the Respondent.

6.6 That the decision to dismiss the Respondent was due to the gravity of the offences as the same offences provided for the dismissal in the Code and the Appellant had the right to culminate the two final written warnings into a dismissal. The case of **Raphael Katenekwa and Finance Bank Zambia Limited**[2] was cited, where the Supreme Court observed as follows:

> **"...The lower court did acknowledge that accumulation of wrong doing may merit dismissal in appropriate cases even when dismissal is not specifically provided for in each disciplinary charge. In our considered view, this position is further supported by our decision in the case of**

Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa[3] which was cited in the submissions...."

6.7 The third, fourth and fifth grounds were argued together. It was the Appellant's contention that, the standard measure of damages is the notice period of the contract of employment. That, in the event that, this court does not uphold the appeal and finds in favour of the Respondent, the principles in relation to quantum of damages and mitigation of loss must be applied. The case of **Chansa Ng'onga v Alfred H Knight (Z) Ltd[4]** was cited and submitted that the case reconciles the divers law on damages and has established, with finality, that the employee is only entitled to a maximum amount of notice pay and nothing more and further that the employee is under a duty to mitigate his own losses.

6.8 The Appellant submitted that the aforestated case has made it very clear on the normal measure of damages, unless there are other compelling circumstances to warrant an award in excess of the notice period. According

to the Appellant, no evidence of such compelling circumstance have been found to exist by the court below.

6.9 We were further referred to the earlier cited case of Chansa **Ngonga** where the Supreme Court stated as follows:

> **"As matters stand, we are satisfied that the Appellant, as the party upon whom the duty to mitigate rested, did not demonstrate in his evidence before the lower court that he had discharged that duty."**

6.10 It was submitted that in this case, the Respondent did not show in the court below that he had made an effort to mitigate his loss by looking for alternative employment or that his dismissal from employment has prevented him in any way from seeking alternative employment.

6.11 The Appellant further submitted that, the court below erred by finding that "… it is a notorious fact that in this world economic environment, employment is scarce, worse in the banking industry and also in finding that…" the complainant as Branch Manager was in management and

finding employment in the said position is not easy in the absence of any evidence before the court to support such a finding.

6.12 The case of **Wilson Masauso Zulu**[1] was referred to and submitted that this is a proper case for reversing the findings of fact by the court below as they were made in error and in the absence of any evidence.

7.0 ARGUMENTS IN RESPONSE TO THE APPEAL

7.1 In response to the first ground, it was submitted that, the court below was on firm ground in its analysis of Section 36 (3) of the Act, as the words are clear and unambiguous. According to the Respondent, the Judgment in the court below gave efficacy to the statutory provision *vis 'a vis* the traditional position with regard to who bears the onus of proof.

7.2 It was submitted that whilst a valid reason is required to be given by the employer at the time of termination or dismissal, an employer should have to prove compliance with the provision in the event that such validity of reason

or otherwise is called into question. That once the termination or the dismissal has been challenged in court, such employer wishing to rely on the allegation that Section 36 (3) had been adhered to, must to that effect furnish proof. According to the Respondent, the position of the court below was not to shift the burden of proof from an alleging party, but to simply highlight that, the Act now places an obligation on an employer to provide a valid reason for termination, and that the onus to prove the performance of this obligation undoubtedly rests with the employer.

7.3 The Respondent relied on the case of **Care International Zambia Limited v Misheck Tembo**[5], where the Supreme Court had this to say:

> **"Where an employer dismisses an employee and in doing so, acts in breach of his contractual obligations... to succeed in defending this claim, it must be shown by the employer that they had valid reason to justify the dismissal and also that they acted reasonably."**

7.4 In respect to the second ground, it was submitted that, the Respondent was charged with three offences. The Appellant found that he was not guilty of the offence of dishonesty during the course of employment, whose sanction is dismissal for the first offence. That the other two offences for which he was found guilty carry the punishment of a final written warning for a first offender. According to the Respondent he was a first offender and should therefore have only received a final written warning.

7.5 The Respondent submitted that, he was in agreement with the court below, on its ultimate conclusion that the Appellant's decision to dismiss the Respondent on the misapprehension that the two final written warnings culminated into a dismissal, when the two offences for which the Respondent was found guilty arose from the same set of facts and were raised on the same charge sheet was wrong. The Respondent drew our attention to the case of **National Breweries Limited Plc v Patrick Simfukwe**[6] where the Supreme Court at page J34 stated as follows:

"The Appellant sought to rely on the case of Philip Mwenya and Yekweniya Mbiniwa Chirwa which propounded the principle that where an employee commits an offence for which he or she can be dismissed, no injustice arise for failure to comply with the procedure in the contract of employment. Clearly this is an attempt to fit a round peg in a square hole. The offence with which the Respondent was charged did not attract dismissal....Secondly, as the court below observed, much as the Appellant had the discretion under the guideline in its disciplinary rules to impose a stiffer punishment, there was a prescribed sanction under note 1 and 2 of the offence of careless/reckless driving of company vehicle which was suspension and not dismissal."

7.6 The Respondent submitted that, the aforestated case falls on all fours with this case and that therefore, the court below was on firm ground in finding that the dismissal was not appropriate punishment under the Code. In addition,

it was the Respondent's argument that the Appellant did not, in the court below, allege or adduce evidence to suggest that aggravating circumstances existed to warrant the decision to ignore the standard punishment of a final written warning as provided for in the Code and replace it with the more serious punishment of dismissal.

7.7 In response to the third, fourth and fifth grounds, it was submitted that the court below was on firm ground in arriving at the award of 12 months salary as damages. The Respondent adopted the cases of **African Banking Corporation v Bernard Fungamwango**[7] and **Charles Pearson Daka v Zambia Consolidated Copper Mines Ltd**[8] which the learned Judge in the court below relied on.

7.8 The Respondent submitted that, in arriving at the award, the learned Judge took cognizance of the world economical environment, the scarcity of employment in the banking industry, as well as the position the Respondent held in the bank at the time of dismissal.

8.0 ARGUMENTS IN SUPPORT OF THE CROSS APPEAL

8.1 In arguing the sole ground of cross appeal, our attention was drawn to the cases of **Bernard Fungamwango**[7] and **Charles Pearson Daka**[8]**,** in which 36 and 24 months salaries were respectively awarded in damages. It was submitted that this is a proper case in which the court can interfere with the award of damages to a higher award that would reflect the current economy, the scarcity of employment in the banking sector and the position the Respondent held in the Appellant bank. That this Court should award damages which are consistent with awards in cases of a similar nature by granting 36 months salary as damages in this case.

9.0 ARGUMENTS IN RESPONSE TO THE CROSS APPEAL

9.1 In response to the cross appeal, the Appellant reiterated its position in the appeal, that the court below erred by awarding 12 months salary as damages for wrongful dismissal. It was also reiterated that the Appellant ought to have been awarded damages equivalent to the notice

period, which in this case is one month. To a great extent, the Appellant rehashed its arguments on grounds three, four and five of the appeal and prayed that the award be overturned.

10.0 OUR ANALYSIS AND DECISION ON THE APPEAL

10.1 We have considered the arguments and the Judgment being impugned. The first ground of appeal attacks the learned Judge's interpretation of Section 36 (3) of the Act. From the onset, it must be noted that, the legal burden of proof, is different from evidential burden (which is the burden of adducing evidence). It is not in dispute that the legal burden of proof in a civil action is borne by the plaintiff. The burden of adducing evidence is generally borne by the party bearing the burden of proof.

10.2 However, when it comes to adducing evidence, the burden (evidential burden) shifts. The learned authors of **Black's Law Dictionary** as regards shifting the burden of proof at page 1410 states as follows:

> **"In litigation, the transference of the duty to prove a fact from one party to the other: the passing of the duty to produce evidence in a case from one side to another as the case progresses, when one side has made a *prima facie* showing on a point of evidence."**

10.3 It is evident from the Judgment being impugned, that, when the learned Judge made reference to Section 36 (3) of the Act, he was speaking to the evidential burden and not the legal burden. The learned authors of **Labour Law in Zambia - An Introduction**[1], at page 103, in interpreting Section 52 (2) of **The Employment Code Act**[2] which is worded exactly as section 36 (3) of the Act, states that, for a dismissal to be fair, an employer must give a valid reason prior to the dismissal. They then go further to state as follows:

> **"The authors submit that this provision that a valid reason must be given before dismissal, means that The Employment Act is giving effect to Article 9 (2) of ILO convention No 158, which**

requires the employer to prove the existence of a valid reason for termination. It also provides that the body determining the dispute may reach a conclusion on the reason for termination based on the evidence provided by the parties and according to procedures governed by national law and practice."

10.4 The learned authors went on to state that, the requirement to give valid reason prior to termination, in essence also entails the employer substantiating the reason, in order to comply with the need for such a reason to be valid. They concluded that, as the law stands in terms of Section 52 (2) of **The Employment Code Act[2]**, 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.

10.5 In view of the aforestated, we are in agreement with the learned Judges interpretation as regards Section 36 (3) of the Act, that there was an evidential burden placed by the statute, on the employer to establish and prove on the

balance of probabilities that there was a valid reason for terminating or dismissing an employee. In that respect, we find no basis on which to fault the learned Judge.

10.6 As regards the second ground, we note that the reason given for the dismissal was that, the Respondent was found guilty on two charges of (i) failure to carry out reasonable and lawful instructions and (ii) intimidation or incitement to violence. Whilst it is evident that, the offence of failure to obey lawful instructions was substantiated, based on the evidence which was before the disciplinary committee, the same cannot be said of the offence of intimidation or incitement to violence. Since an appeal to this Court is a rehearing on the record, our view after perusal of the record, is that the offence of intimidation or incitement of violence, apart from being alleged was never substantiated. Apart from the allegation not being addressed in the Appellant's answer in the court below, no evidence was adduced before the disciplinary committee nor the court below to prove that intimidation or incitement was a valid reason for the termination. The

effect of not having substantiated the reason of intimidation or incitement for it to be said to be a valid reason is that, the dismissal based on that ground was unfair.

10.7 In the view that we have taken, the only offence left standing is that of failure to obey lawful instructions, which attracted a penalty of a final written warning. In that event the issue of two final written warning culminating into a dismissal falls away. Our view is that the appropriate sanction should have been only one final written warning on the offence of failure to obey lawful instructions. In that respect, the second ground also fails.

10.8 The third, fourth and fifth grounds have been argued together and we will address them as such. The learned Judge is being impugned for granting twelve months salary in damages. According to the Appellant, the learned Judge in doing so, took into consideration the scarcity of employment and the difficulty the Respondent would have in finding a job in the banking industry, especially at the level he was at the time of the dismissal. The Appellants

contention was that, should the appeal be dismissed, the Respondent should only be awarded the notice period in damages, which in this case was one month's salary. It was also submitted by the Appellant that, there was no evidence that the Respondent mitigated his loss by looking for alternative employment.

10.9 It is not in dispute as is evidenced in a plethora of decisions, most of them which have been cited by the parties, in this case, that the normal measure of damages is an employee's notice period in the contract of employment or as provided for by law.

10.10 Section 85 A (a) and (d) of **The Industrial and Labour Relations Act**[3] provides amongst other award as follows:

> **"Where the court finds that the complaint or application presented to it is justified and reasonable, the court shall grant such remedy as it considers just and equitable and may:**
>
> **(a) award the complainant or applicant damages or compensation for loss of employment**

(d) make any other order or award as the court may consider fit in the circumstances of the case

10.11 The learned authors of **Labour Law in Zambia – An Introduction**[1] at page 242 cited the case of **Bupe & Another v Zambia National Commercial Bank**[10] where it was emphasized that the granting of remedies is done with due regard to the need for substantial justice. It is evident from the aforestated that in awarding damages, the court should award damages or compensation as it considers fit in the circumstances of each case and it must do so with regard to the need for substantial justice.

10.12 Despite the normal measure of damages being the notice period, in special and deserving cases, the courts have departed from that principle. In the case of **Swarp Spinning Mills Plc v Sebastian Chileshe**[11], the Supreme Court held that:

"The normal measure of damages applies and will usually relate to the applicable contractual length

of notice or the national reasonable notice where the contract is silent. The normal measure is departed from where the termination may have been inflicted in a traumatic fashion which causes undue distress or mental suffering…"

10.13 It is evident from a plethora of cases, that our courts have awarded enhanced compensatory damages or exemplary damages far and above the notice period. This has been done in cases where there has been mental distress, mental torture and inconvenience or severe distress and hardship and any other distress. These damages will be granted only where it is shown that the distress or inconvenience was a direct consequence of the dismissal. Therefore an employee has to show that the distress or inconvenience results from some act or omission on the part of the employer, which does occasion suffering which goes beyond the normal consequences of the wrongful breach.

10.14 Our courts have also enhanced compensatory damages or exemplary damages based on the manner of separation

and the conduct of the employer, especially where the termination or dismissal was inflicted in a traumatic fashion. In the case of **Barclays Bank Zambia Plc v Weston Luwi and Suzyo Ngulube**[12] ***where the court below awarded 24 months salaries and fringe benefits, the Supreme Court on appeal referred to the Swarp Spinning Mills case and stated as follows: "at this stage we take the liberty to correct Mr. Lukangaba's assertion that mental anguish is the only exception. What we said in that case is that the normal measure of damages is departed from where the circumstances and the justice of the case so demands. Therefore termination inflicted in a traumatic fashion causing undue distress or mental suffering is, but one example. Loss of employment opportunity is another...enhanced damages are meant to encompass the inconvenience and any distress suffered by the employee as a result of the loss of employment... We hold that the trial court was entitled based on the evidence before it, to award***

damages to cover distress and inconveniences. An award of 24 months' salary as damages, therefore does not come to us with a sense of shock as being excessive to warrant being set aside..."(Page 424). Furthermore the courts have also taken into consideration the loss of future employment opportunities. In the case of **Dennis Chansa v Barclays Bank Zambia Plc**[13] the Supreme Court in a 2012 Judgment opined as follows:

> **"We now come to the second issue. The court in Zambia Airways Corporation Limited v Gershom Mubanga awarded 12 months salaries as damages in lieu of reinstatement in 1992. Seven years later in Chitofwa v Ndola Lime Supra, we awarded 24 months. The lower court seven years later in the appeal before us awarded 36 months salaries as damages. The rationale is as the global economics deteriorate, the chances of finding employment even by graduates are dimmer. There should be a progressive upward increase in damages as it is bound to take longer to find a job**

in the current domestic and global economic environment."

10.15 In upholding 36 months salaries, the Supreme Court opined that where difficulty in finding a job in the future is shown, the court will award even more damages. We emphasize that in enhancing damages or awarding exemplary damages each case must be considered on its own facts and circumstances in a bid to do substantial justice, as that is the main objective of the court below. In our view, the list of circumstances as to when enhanced damages can be awarded is not exhaustive.

10.16 We note that in enhancing damages or awarding exemplary damages, the courts have taken judicial notice in most circumstances as was the case in the **Dennis Chansa**[13] case. It must be emphasized to the Industrial and labour relations practitioners that if a party is seeking enhanced or exemplary damages, such party must adduce evidence and explain any special circumstances to take his case out of the realm of the ordinary award of the notice period, rather than leaving it to the contemplation of the

court. It would even be prudent to plead the same and thereafter lead evidence to prove that the party claiming is entitled thereto. Therefore, the court will only grant enhanced damages if an employee can prove that the manner of the dismissal caused distress that was contemplated.

10.17 In the arguments, the Appellant has emphasized that the Respondent did not mitigate his loss, by seeking alternative employment. The learned authors of **A Comprehensive Guide to Employment Law in Zambia**[2] at page 419 stated that: ***"mitigation of loss entails seeking alternative employment within a reasonable period after the dismissal or finding another source of income in the intervening period which will then be deducted from the loss suffered and damages to be paid."*** This indeed is the position as stated by the Supreme Court in the **Chansa Ng'onga**[4] case, although however it is now difficult to find alternative employment in the face of the notorious fact that as of now, there is scarcity of jobs as observed in the **Dennis Chansa**[13] case.

10.18 It is evident from the Judgment in the court below, that in enhancing the damages and awarding 12 months salaries in damages for wrongful dismissal, the learned Judge took judicial notice of the scarcity of employment and the difficulty the Respondent would have in finding a job in the banking industry especially, in the position he held as Branch Manager. Having taken judicial notice, there was no need for the learned Judge to consider what evidence had been laid before him by the Respondent. We are also satisfied that the learned Judge took into consideration that there was no evidence that the Respondent had mitigated his losses by finding alternative employment. The third, fourth and fifth grounds in our view have no merit and are accordingly dismissed.

11.0 OUR DECISION ON THE CROSS APPEAL

11.1 We reiterate our analysis, consideration and decision on the third, fourth and fifth grounds on the main appeal and for the reasons given therein, the cross appeal equally fails as the award given was adequate in the circumstances of the case. In any case in responding to the third, fourth and

fifth grounds, the Respondent in his submission, in arguing why the award of 12 months should not be interfered with, the learned Judge took judicial notice of the world economical environment, the scarcity of employment in the bank industry as well as the Respondent being a Branch Manager at the time of his dismissal. We see no basis on which to interfere with the award.

12.0 CONCLUSION

12.1 The main appeal and the cross appeal having failed, they are both dismissed. This being an Industrial and Labour relations case, each party shall bear its own costs.

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J. CHASHI
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE

A.M. BANDA-BOBO
COURT OF APPEAL JUDGE