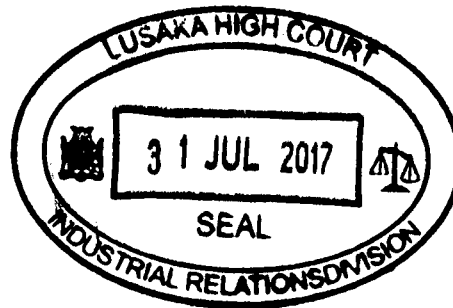


**IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA**

COMP/93/2014

BETWEEN:

**MWAMBA MUTALE
CLARENCE MWAMI
VICTOR LOLOZI**



**1ST COMPLAINANT
2ND COMPLAINANT
3RD COMPLAINANT**

AND

SOS CHILDREN'S VILLAGE ZAMBIA

RESPONDENT

CORAM

**Hon. M. Musaluke - Judge
Hon. E. C. Katai - Member
Hon. N. Z. Mbewe - Member**

Appearances:

For the Complainant:

*Dr. S. Sumaili with Mrs. Mary M. Harawa of Messrs.
MC Mulenga & Company*

For the Respondent:

Mr. L. Mwanabo of Messrs. L. L. Chambers

JUDGMENT

31st July, 2017

Legislation referred to:

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

Cases referred to:

1. *Attorney General -Vs- Richard Jackson Phiri (1988-1989) Z.R. 121 (S.C.).*

2. *National Breweries -Vs- Phillip Mwenya SCZ Judgment No. 28 of 2002*

3. *Zambia National Provident Fund -Vs- Yekweniya Chirwa (1989) Z.R. 70.*

4. *Anandram Vaswani -Vs- Union of India (1983) 2LL.N 510.*

1.0 COMPLAINANTS' CASE

1.1 On 5th May, 2014, **Mwamba Mutale** (1st Complainant), **Clarence Mwami** (2nd Complainant) and **Victor Lolozi** (3rd Complainant) filed a Notice of Complaint against the Respondent.

1.2 The grounds on which the Complaint was presented were that:

- (a) On 21st August, 2013, the Complainants, owing to the deteriorated working conditions, applied to leave the Organisation (Respondent) on Voluntary Separation, as was provided by the Conditions of Service;
- (b) On 4th September, 2013 the Complainants were suspended from duty to pave way for investigations;
- (c) On 21st October, 2013, the Complainants were charged with various offences by the National Director of the Respondent.
- (d) On 11th December, 2013 the Complainants were dismissed from employment by the Disciplinary Committee;
- (e) On 18th December, 2013, the Complainants appealed to the Board of Trustees against the verdict of the Disciplinary Committee;

- (f) On 3rd January, 2014, the Board Chairman wrote to the Complainants refusing to hear their Appeal, and upheld the verdict of the Disciplinary Committee for the reason that they had decided to appeal to the Labour Commissioner also;
- (g) On 7th April, 2014, the Organisation's representatives walked out of the meeting at the Ministry of Labour;
- (h) The Complainants sought the indulgence of the Court to grant the following reliefs:
 - (a) A declaration that their dismissal from employment was illegal, wrongful and unfair;
 - (b) A declaration that the procedure used was legally flawed and a sham;
 - (c) Reinstatement or, in the alternative, payment of full Salaries and all fringe benefits which the Complainants could have received at the normal retirement age, or the benefits which the Complainants would have received had their request for Voluntary Mutual Separation been granted;
- (i) Repatriation to their place of Engagement;
- (j) Punitive damages for shock, trauma, embarrassment and humiliation arising from the dismissal;

(k) Interest, costs and any other relief the Court may deem fit.

1.3 The Notice of Complaint was supported by an Affidavit.

1.4 At trial, the Complainants relied on their individual Notices of Complaint and Affidavits in support, and they also gave oral evidence on Oath individually.

1. **VICTOR LOLOZI:**

The first Complainants' witness (**CW1**) was Victor Lolozi, former Human Resource Manager in the Respondent Organisation.

It was his testimony that when he joined the Respondent in 2013, the 1st Complainant, Mwamba Mutale, was Acting as National Director (ND) and the working environment was cordial until the new National Director, Bwalya Melu, was employed in March 2013.

CW1 testified that the new ND had no regard for the law as well as the Rules and Procedures of the Respondent, a situation which strained the relationship between Senior Managers and the new National Director.

He stated that the new National Director was issuing threats that he would fire all of them and recruit new staff in a new deal.

CW1 further testified that in a bid to cultivate cordial Human Relations in the Institution, he called a meeting with the ND and all Senior staff but the meeting bore no good results.

The ND was shouting at all the Senior Managers and the meeting ended without tangible solution.

It was CW1's testimony that with the approval of the ND himself, he sought the indulgence of the Board Chairman at another meeting with the ND and Senior Managers in an attempt to reach a workable solution, but the meeting ended up again with no solution. He said the ND still continued threatening them with dismissal and bring in a New Team.

CW1 testified that it was after failure of the meetings to cultivate and instil the culture of cordial and harmonious relationship between the ND and the Senior Staff that CW1 and the other Complainants requested for Mutual Separation, in line with Clause 11.5(a) of the Respondent Disciplinary Code and Grievance Procedure.

He further testified that with the consent of the Chairman of the Board of Trustees, he wrote to the legal firm, Musa

Mwenye Advocates, to seek a Legal Opinion on how best to execute the Mutual Separation, since there were no detailed guidelines on the same in the Respondent's Disciplinary Code and Grievance Procedure (DCGP). Musa Mwenye Legal Practitioners responded by sending a quotation to CW1.

CW1 testified also that the ND had told him to go ahead getting a Legal Opinion, since he (ND) was in the process of getting rid of the Deputy National Director (DND), Mwamba Mutale.

CW1 went on to state that the Board Chairman initially thought the Legal Opinion was free, but the Respondent ended up paying K2,500 for it. He contended that when this expenditure was queried by Mr. Leufloa Moteetee, Regional Director – AFSA Region based in South Africa, the Board Chairman expressed ignorance about the authorisation of CW1 to seek a Legal Opinion.

CW1 informed Court that he was suspended from duty on 3rd September, 2013, pending investigations which were concluded on 15th September, 2013, and he was charged on 21st October, 46 days after he was suspended. He was charged with two Offences, namely **(i) Gross Misconduct and Misrepresentation**, and, **(ii) Gross Negligence of Duty**.

CW1 testified that he did not understand the Offences in the Charge Letter since there was no reference to any Clause in the DCGP under the Table of Offences.

He wrote an exculpatory letter on 23rd October, 2013 addressed to the ND, in which he contended that he was authorised in everything he did.

He informed Court that his Disciplinary Hearing was on 1st November, 2013 and he received the Verdict of Dismissal on 16th December, 46 days after the Disciplinary Hearing took place.

CW1 further informed Court that he wrote an Appeal against his dismissal to the Board Chairman on 21st December, 2013 in which he contended that the Respondent did not follow the DCGP in dealing with his case.

He informed Court also that his request for Mutual Separation was lodged earlier before charges were leveled against him, and the Complainants then wrote to the Labour Office appealing against their Unfair Dismissal and Unjust Practices in the Institution. This followed their loss of hope after seeing how the ND and the Chairman of the Disciplinary hearing were conniving, through e-mail communication, on dismissing the three Complainants.

CW1 further testified that he received an invitation to attend Appeal Hearing 4 days after he lodged the Appeal and that since it was short Notice, he requested for an extension by one day but never received a response from the Appeals Committee. He said even without being heard by the Appeals Committee, what he received next was a final decision made by the Committee upholding the Dismissal Verdict.

CW1 contended that Clause 10(b) in the DCGP provides for the Appeals Committee to invite him for the second time to appear for the Appeal hearing, if he did not attend at the first invitation, but the Committee ignored this provision and just kept silent after he asked for a one day extension. He said he was ready to attend the Appeal Hearing if they gave him that extension.

He further contended that his dismissal was illegal and unfair as he was not availed a copy of the Investigation Report following his suspension, so that he could have the opportunity to interrogate whoever testified against him.

CW1 asked Court to grant him reliefs as sought in the Notice of Complaint.

Under cross-examination, CW1 testified that the Respondent wrote to him informing him that his Appeal had lapsed and could not continue with it because the Complainants had

simultaneously sought the intervention of the Labour Office on the same matter, before the Respondent dealt with the Appeal. The Appeal lapsed in accordance with Clause 11.5 (b) of the DCGP.

CW1 conceded also that there was no written request but verbal communication to engage Musa Mwenye Advocates to give a Legal Opinion on Mutual Separation, and that he signed an Agreement to the effect that all information about the Respondent was confidential.

In further cross-examination, CW1 told the Court that he sent the Employment Contract of National Director, Mr. Melu, to Musa Mwenye Advocates without written authority from anyone, following the Advocates verbally requesting for a Contract of Employment, for them to work on a Legal Opinion on Mutual Separation. This move led to the Legal Opinion being focused on Separation from employment of National Director, instead of the Complainants who were seeking Mutual Separation from employment.

He further testified that his complaint to the Board of Trustees Chairman, against the threats by the National Director to dismiss him and the other Complainants, was not put in writing but was verbal.

2. **CLARENCE MWAMI:**

The second Complainant to testify (**CW2**) was Clarence Mwami, who was Financial Controller in the Respondent.

CW2 reiterated CW1's testimony about the bitter and deteriorated relationship between the National Director and Senior Managers, a situation which culminated in him and the other Complainants to seek Early Separation from employment.

It was his testimony that he was suspended on 4th September, 2013, allegedly for his role in the processing of payment for the Legal Opinion.

He testified that following a request he received from CW1, he wrote to Accounts Section for payment. He continued that while on suspension he appeared before the Investigation Team on 25th September, 2013.

CW2 testified that he was later charged on 21st October, 2013 with three (3) Offences as follows: -

- (i) ***Failure to follow established rules, guidelines and procedures;***
- (ii) ***Fraud; and***
- (iii) ***Gross Misconduct.***

The charges were that under the first Offence (i) above, he sanctioned and signed a cheque of K2,500 to Musa Mwenye Advocates, without seeking approval from National Director; (ii) He sanctioned a Salary Advance of K10,000 to the 1st Complainant (Mutale Mwamba) without approval or knowledge of the National Director.

Under third (iii) offence, Gross Misconduct, the charge was that he allowed CW1, to seek Legal Opinion from Musa Mwenye Advocates regarding Mutual Separation of CW2 himself from the Respondent and National Director, in which he had personal interest.

CW2 testified that the 1st charge relating to sanctioning payment and signing a cheque of K2,500 without the National Director's approval was unfair on him, as the cheque in question and other cheques had passed through the same process and had been sanctioned by the Office of the National Director.

He testified also that the second charge was also unfair on him as his role was **just to recommend** the Salary Advance for Deputy National Director, Mwamba Mutale, and the Office of the National Director sanctioned the payment. It was not him (CW2) that sanctioned the payment but just recommended it since funds were available.

CW2 testified that he exculpated himself and the Disciplinary Hearing was held on 21st November, 2013, and he was dismissed, against which he appealed.

He contended that the offence of Gross Misconduct was unfairly leveled against him since he was not part of the sourcing of the Legal Opinion, and did not supervise CW1. He further contended that he was not availed an opportunity to defend himself through the Appeal, as it had been closed following their indulgency with the Labour Office.

CW2 further contended that his dismissal was unfair in that it was based on the Investigation Report and he was not availed the Report after being interviewed by the Investigations Team.

CW2 asked the Court to grant him reliefs as sought in the Notice of Complaint.

Under cross examination, CW2 testified that the National Director had queried the request to CW2 by CW1 for K2,500 in favour of Musa Mwenye Advocates, and the Deputy National Director, Mwamba Mutale, went ahead to approve the payment Voucher without the authority of National Director.

He admitted also that appealing simultaneously to the Appeal's Committee and Ministry of Labour about the

dismissal was outside the provisions of the Respondent's DCGP.

In further cross-examination, CW2 stated that he recommended the Deputy National Director's Salary Advance to the National Director's Office, and that later in the process, he saw that it was the Deputy National Director who had approved and signed his own cheque for Advance of Salary, since the National Director was not a signatory. He testified that in the situation that the National Director was not a signatory, alternative signatory would have been the Human Resource to approve the Application.

CW2 testified that it was not correct for one to approve their own Application.

In re-examination, CW2 contended that the Disciplinary Process was flawed in that the composition of the Disciplinary Committee fell short of what is stipulated at Clause 5.4.4 in the DCGP.

He maintained that as a Functional Head (Finance) charged by the National Director, his case should have been heard by a Select Committee of the Board of Trustees but, instead, his Disciplinary Hearing was chaired by an employee who happened to be Human Resource Personnel. This was a big flaw, as it contravened Clause 5.4.4 in the DCGP.

3. MWAMBA MUTALE:

The third Complainant to testify (**CW3**) was Mwamba Mutale, the former Deputy National Director (DND) at the Respondent.

It was his testimony that he was appointed Deputy National Director on 1st October, 2010, and acted as National Director from January, 2012 to March, 2013 as the incumbent, Florence Phiri, was not there. A new National Director, Mr. Bwalya Melu, got employed in March, 2013 to replace Florence Phiri.

CW3 testified that between 24th to 26th March, 2013, the new National Director and himself went to visit Kitwe SOS Village and held separate meetings with members of staff, mothers looking after the Children, and also with Children. He went on to say that upon their return to Lusaka, they held a discussion of the meetings they had in Kitwe.

He told the Court that later he received a letter dated 26th August, 2013 from the National Director with allegations of (i) Gross Negligence of duties, and (ii) Insubordination – toward his Supervisor, after which he was suspended to pave way for Investigations.

While on suspension CW3 was called to appear before an Investigations Team and, later, he received a letter dated 21st October, 2013 charging him with the following offences:

- (i) Failure to follow established Rules, Guidelines and Procedures;**
- (ii) Fraud;**
- (iii) Gross Negligence of duty; and**
- (iv) Insubordination toward his Supervisor.**

CW3 testified that he exculpated himself in a letter dated 24th October, 2013, and later appeared before a Disciplinary Hearing on 1st November, 2013, which verdict was communicated to him on 11th December, 2013.

He further testified that the Disciplinary Committee found him guilty, his Contract was terminated and was given an opportunity to appeal to the Chairman of the Board of Trustees. He, however, told the Court that in January, 2014, the Chairman communicated to him that his Appeal could not be heard as it had been closed. CW3 eventually contended that the termination of this Contract was Unfair and flawed for the following reasons:

- (i) His Appeal was not heard;**
- (ii) His suspension was too long (3 months);**
- (iii) Due to the suspension, he lost three months' Salary i.e. October, November and December, 2013;**

- (iv) He was not given chance to question the evidence that was given against him, by not availing him a copy of the Investigations Report;**
- (v) His Disciplinary Hearing took place on 1st November, 2013, which was more than 4 days after his appearance before the Investigations Team on 1st September, contrary to Clause 7.3 of the DCGP;**
- (vi) His Disciplinary Hearing was chaired by the Human Resource Manager, instead of a member of the Board of Trustees, which was in contravention of Clause 7.2 in the DCGP;**
- (vii) The Minutes of his Disciplinary Hearing did not contain the verdict/decision of the Committee.**

Under cross-examination, CW3 contended that Mr. Kunda, Acting Human Resource Manager was supposed to appear as recorder, but appeared as Company representative at the Disciplinary Hearing.

He stated also that there is no time frame on how long an employee should be on suspension.

2.0 RESPONDENT'S CASE

On 13th June, 2013, the Respondent filed its Answer to the Notice of Complaint supported by an Affidavit, in which it stated that the Complainants' Contracts of Employment were terminated as they were engaged in acts of insubordination that were part of a calculated ploy to adversely affect the Respondent's operations.

It further stated that they were terminated in accordance with the Respondent's DCGP 2012 Revision.

The Answer further stated that the Complainants and other Senior Managers were requested to write their own individual letters, and not a Group letter, requesting for Mutual Separation but they did not do so and, consequently, the Organisation's Board had received nothing to consider.

It was also stated in the Answer that the Respondent's DCGP does not provide for a time limit in which verdicts should be delivered.

It was further stated in the Answer that the Internal Appeal process lapsed following the Complainants' seeking the Labour Office's intervention in their dismissal.

The Answer stated that the Employment Contracts of the Complainants were legally and fairly terminated, following full Disciplinary Hearing and their failure to offer justification for their

acts of indiscipline and, consequently, they did not deserve any of the Reliefs sought.

The only Respondent's Witness (**RW1**) was **Simate Simate**, Human Resource Manager, employed on 13th April, 2016 after the Complainants had long been terminated.

RW1 chose to rely on the Affidavit evidence filed by the Respondent and sworn by one Freddy Kaunda, former Human Resource Manager.

In his viva voce evidence, RW1 mainly focused on and highlighted the Disciplinary Process on the Offences of the three Complainants before they were dismissed.

He also testified that the Respondent provided for Mutual Separation from Employment but that needed to be approved upon request/application, and that approval was not automatic.

RW1 further told the Court that if a Complainant was not happy with the composition of the Disciplinary Committee, they were free to raise an objection before the Hearing commenced.

RW1 went on to testify that the Complainants were dismissed because they violated the Conditions of Service, part of which is the DCGP under which they were serving. Records show that there were other employees at the Respondent, who worked under the same

environment with the Complainants, and some even applied for Mutual Separation and they were not granted, yet they did not leave the Respondent and they continued working. It was his testimony that this contradicts the Complainants' claim that the environment under National Director Melu was hostile.

In cross-examination, RW1 conceded that the Disciplinary Committee did not make the decision to dismiss the three Complainants, since there is nowhere in the Minutes where such a decision is recorded.

He testified that he was not aware of other Minutes where a Disciplinary Hearing Committee made the decision to dismiss the trio.

3.0 SUBMISSION BY PARTIES

We have had sight of submissions by parties. We will not recite them but will only refer to them when necessary.

4.0 COMMON CAUSE FACTS

From the evidence laid before this Court, we find the following as undisputed facts:

- (a) The Complainants were in the employ of the Respondent as Human Resource Manager (CW1), Senior Accountant (CW2) and Deputy National Director (CW3) effective 15th December, 2011, 27th May, 2010 and 1st October, 2010, respectively;

(b) Complainant CW1 was charged with Offences of:

- (i) Gross Misconduct and Misrepresentation, and**
- (ii) Gross Negligence of duty.**

(**exhibit V10** in his Affidavit in support of Complaint). He exculpated himself (**exhibit VL11**) and a Disciplinary Case Hearing was held on 1st November, 2013. In a letter addressed to him dated 11th December, 2013 (**exhibit VL12**), the Disciplinary Hearing Committee Chairman informed him that the Panel found him guilty of the two offences and, consequently, his Contract of Employment was terminated effective 16th December, 2013, (**exhibit VL12**). He appealed on 21st December, 2013 to the Chairman of the Board of Trustees against his dismissal. (**exhibit VL14**).

(c) Complainant CW2 was charged with three Offences of:

- (i) Failure to follow established Rules;**
- (ii) Fraud, and**
- (iii) Gross Misconduct (exhibit CM 13 in his Affidavit in support of Complaint).**

He exculpated himself (**exhibit CM9**) and Disciplinary Case Hearing was held on 1st November, 2013. In a letter (**exhibit CM 10**) dated 11th December, 2013, he was informed that he was found guilty of only the first and second Offences, but was cleared of the Offence of

Gross Misconduct. Consequently, his Contract of Employment was terminated effective 16th December, 2013, (exhibit CM10). He appealed to the Board Chairman on 22nd December, 2013 against his dismissal (**exhibit CM12**).

(d) Complainant CW3 was charged with three Offences of:

(i) Failure to follow established Rules, Guidelines and Procedures;

(ii) Gross Negligence of duty; and,

(iii) Insubordination (exhibit MM7 in his Affidavit in support of Complaint).

He was given chance to exculpate himself (**exhibit MM8**) and a Disciplinary Case Hearing took place on 1st November, 2013. On 11th December, 2013 (**exhibit MM10**) he was informed of the verdict of his Disciplinary Case Hearing that he was found guilty of the three Offences, except the charge of involvement in seeking Legal Opinion from Musa Mwenye Advocates.

(e) On 18th December, 2013, the Complainants wrote to the Minister of Labour “appealing against their Unfair dismissal and Unjust practices going on at SOS Children’s Villages in Zambia,” while still awaiting the Respondent’s response to their Appeal against dismissal.

5.0 ISSUES FOR DETERMINATION

5.1 Following our findings of facts, and taking into account the evidence and submission of the parties, we find that the core of this case rests on:

- (a) Whether or not termination of the Complainants were wrongfully dismissed;*
- (b) Whether or not the Complainants were unfairly dismissed;*
- (c) Whether or not the claim for repatriation has merit; and;*
- (d) Whether or not the claim for shock, trauma and embarrassment has merit.*

6.0 OPINION

6.1 WHETHER OR NOT THE TERMINATION OF EMPLOYMENT CONTRACTS WERE ILLEGAL, WRONGFUL AND UNFAIR

(a) WRONGFUL DISMISSAL

It has been settled that wrongful dismissal is essentially a common law claim for breach of relevant provisions in the Contract of Employment.

Wrongful dismissal, therefore, occurs when an employer dismisses the employee in breach of the Employment Contract, either by failing to give Notice which the employee is entitled to, or by failing to follow the Disciplinary Process as stated in the Disciplinary Code, which is part of the

Conditions of Service, and ends up terminating the fixed Term Contract before it expires. Since it is a Breach of Contract, an employee is entitled to sue for damages.

A typical Disciplinary Procedure involves the following steps:

- 1. The employee being charged of an offence;**
- 2. The employee being given chance to exculpate himself;**
- 3. A Disciplinary Case Hearing taking place before a properly constituted Disciplinary committee;**
- 4. Verdict of the Disciplinary Hearing communicated to the employee;**
- 5. If verdict is dismissal, the employee given a chance to appeal to the Appeals Committee which should be properly constituted;**
- 6. Verdict of the Appeals Committee communicated to the employee.**

Any dismissal which is not in accordance with steps 1 through 6 above is said to be Wrongful.

We will now examine whether or not the Respondent followed these steps when dealing with the Complainants.

(a) **MWAMBA MUTALE**

This Complainant was on 21st October, 2013 charged with the offences of

- (i) ***Failure to follow established rules, guidelines and procedures;***
- (ii) ***Gross negligence of duty; and***
- (iii) ***Insubordination.***

On 24th October, 2013 Mr. Mutale exculpated himself of the charges. On 1st November, 2013, Mr. Mutale attended the Disciplinary Hearing and the Verdict of that Hearing was communicated to him on 11th December 2013.

(b) **MR. CLARENCE MWAMI**

This Complainant was on 21st October, 2013 charged with the offences of;

- (i) ***Failure to follow established rules, guidelines and Procedures;***
- (ii) ***Fraud; and***
- (iii) ***Gross misconduct***

On 25th October, 2013, Mr. Mwami exculpated himself of the charges. On 1st November, 2013, he attended a Disciplinary Hearing and the Verdict of that Hearing was communicated to him on 11th December, 2013.

(c) **MR. VICTOR LOLOZI**

On 21st October, 2013, Mr. Lolozi was charged with the offences of;

- (i) Gross misconduct and misrepresentation, and**
- (ii) Gross negligence of duties**

On 23rd October, 2013, Mr. Lolozi exculpated himself of the charges. On 1st November, 2013, he attended a Disciplinary Hearing and the Verdict of that Hearing was communicated to him on 11th December, 2013.

On 20th, 21st and 23rd December, 2013, the Complainants appealed the decision to dismiss them to the Board Chairman respectively.

On 18th December, 2013, they appealed to the Minister of Labour also against their dismissals.

It is clear from the facts there is a problem with the procedure at appeals stage of the Disciplinary Process. It is also clear from the record that the Appeal was never heard by the Respondent. The main contention by the Respondent is that since the Complainants simultaneously appealed to another body outside the established channels of the Respondent, that Appeal lapsed. The Respondent relied on Clause 11.5 of its Disciplinary Code and Grievance Procedure which deals with

GRIEVANCE PROCEDURE. Clause 11.5 of the said GRIEVANCE PROCEDURE states:

“(a) The employee at Head of Department level who is aggrieved and wishes to appeal against the National Director’s decision shall appeal to the Board of Trustees through the Board Secretary.

“(b) Where an employee has appealed but simultaneously commences legal action against the organisation in a Court of law, or any other law institution, such an appeal shall automatically lapse”.

We will deal with the issue of grievance procedure later in our Judgment.

We agree with the Respondent’s Counsel submissions that the law is settled in this jurisdiction as regards the function of the Court in hearing labour matters and how to look at Disciplinary Procedures. Counsel submitted that the law is aptly settled in the case of **Attorney General -Vs- Richard Jackson Phiri**. The duty of the Court is not to review disciplinary procedure but to examine if there is necessary disciplinary powers within the domestic tribunal and if that power was exercised properly.

We will therefore, examine whether or not the Disciplinary Committee had necessary powers to conduct hearings in regard to the Complainants. In examining this aspect we will refer to Clause

4.4 of the Respondent's Disciplinary Code and Grievance Procedure which provides that:

"In an event where the Function Head is charged by the National Director the case shall (emphasis ours) be heard by the Select Committee of the Board. The Appeals shall be heard by the Select Committee composed of members other than the ones who sat on the first hearing. For purposes of clarity, disciplinary cases involving Function Heads will be handled by the Deputy National Director".

Evidence is on record that Mrs. Ottilia Dube, Mr. John Zulu and Mrs. Musakanya sat to hear the disciplinary cases of the Complainants. Evidence was adduced by CW2 that this Disciplinary Committee was infact constituted in contravention of Clause 4.4 aforesaid, as it included a Ms. Dube who was an employee of the Respondent in the Human Resources Department at its Regional Office in South Africa, and not a Board Member. This evidence was never challenged by the Respondent.

That being the case, we find that the Disciplinary case Hearing for the Complainants was not held before a properly constituted Disciplinary Committee. The purported Disciplinary Committee was in contravention of Clause 4.4 of the Respondent's Disciplinary Code and Grievance Procedure as it included a non-Board Member.

We now come to the issue of Appeal which the Respondent contended had lapsed because the Complainants appealed to the Ministry of Labour.

This contention by the Respondent is misplaced and a misdirection. The Appeal provided for under Clause 11.5 which they mistakenly relied upon to refuse the Complainant's appeal deals with the Grievance Procedure and not Disciplinary Procedure. The aim of Grievance Procedure as provided for under Clause 11.3 is to allow employees chance to challenge unfair and inconsistent action of Management and to provide machinery through grievances by employees could be addressed. This procedure allows for employees who are aggrieved by certain Management decisions to invoke the process whilst they are in employment.

This is different from Disciplinary Procedure which is provided for under Section 7 of the Respondent's Disciplinary Code and Grievance Procedure whose object is for Management to initiate corrective action where work performance is unsatisfactory or the behaviour of an employee is unacceptable. Once the Disciplinary Procedure is invoked, the process of charging, exculpation, disciplinary hearing and appeals follow. In fact Clause 9.2 of the Respondent's Disciplinary Code provides for the process of appeal.

The use of Clause 11.5(a) under the Grievance Procedure to deny the Complainants the right of Appeal was, therefore, a gross misapplication of the Respondent's own code, and we find that the

Complainants were not given a chance to have their Appeal heard by the Appeals Committee.

We are cognisant of the Supreme Court cases of **Zambia National Provident Fund -Vs- Yekweniya M. Chirwa** and **National Breweries -Vs- Philip Mwenya** where it was held that "*where an employee has committed an offence for which he can be dismissed, no injustice arises for failure to comply with procedure in the Contract and such an employee has no claim on that ground for wrongful dismissal or declaration that the dismissal is a nullity*".

We will distinguish these cases to the case at hand and mention that these two cases were cited by Counsel out of context.

In the Chirwa case, the Supreme Court came to its conclusion after evaluating evidence and noted: "*The deceased by his own admission was guilty of the offence of theft for which the punishment of dismissal was a proper one*".

The Supreme Court went further to state that:

"Where the procedural requirements before disciplinary action are not statutory but merely form part of the conditions of service in the contract between the parties, a failure to follow such procedure would be a breach of contract and could possibly give rise to a claim for damages for wrongful dismissal but would not make such dismissal null and void".

In essence the Supreme Court was not giving a Carte Blanche guidance that if an employee is deemed to have committed an offence to which the penalty is dismissal then no injustice would occur if disciplinary procedures are not followed.

The Supreme Court in both Chirwa and Mwenya cases only gave guidance that **once an employee admits to wrong doing** whose punishment is dismissal then no injustice would be occasioned on that employee if disciplinary procedures are not followed. This cannot be interpreted to mean that even in cases where there is no admission of guilty by an employee the procedure of discipline should not be followed by the Respondent.

It must be noted that the right to be heard in employment cases is key in the promotion of the rules of Natural Justice which is key in promoting aspiration of institutional harmony. **The basic tenets of Natural Justice are to afford an accused person with the right to be heard** so as to prevent miscarriage of justice.

In casu, the inclusion of a Ms. Dube who was an employee of the Respondent in the Disciplinary Committee to hear the Complainants was in contravention of Clause 4.4 of the Disciplinary Code. It must be noted that in employment disputes, the question of bonafides or malafide of the employer carries importance. This is the reason all disciplinary committees in employment cases should be held with scrupulous regard to Rules of Natural Justice.

In the Indian Supreme Court case of **Anandram Vaswani -Vs- Union of Indian (1983) 2 LL.N 510** it was observed by the Court that in domestic enquiries, the enquiry office as well as witnesses were from the same establishment, which was sufficient to raise serious apprehension in the mind of a charged employee. The Court further observed that "*justice should not only be done, but should appear to be done, and this is not an euphemism for Court, alone, it applied with equal vigour to all who were responsible for fair play*".

It is, therefore, our holding that by having Ms. Dube on the Disciplinary Panel for Case Hearing of the Complainants when she was not supposed to be there, and by failing to hear the Appeal of the Complainants, the Respondent was in breach of its Disciplinary Code, and a failure by the Respondent to follow the tenets of natural justice. As instructed by the Chirwa case, failure to follow disciplinary procedure gives rise to a claim for damages for wrongful dismissal. We find that the Complainants have succeeded in their claim for Wrongful Dismissal.

It must be understood that the remedy for wrongful dismissal are damages.

The measure of damages is limited to the amount of Notice the employee would have received had the Contract been adhered to. This reflects the contractual position that damages for Breach of Contract should be actual loss sustained.

We have had sight of the Contract of Employment for only Mr. C. Mwami (page 5 of Complainant Notice to Produce). The Notice period provided in that Contract is three (3) months. We would assume that since both Mr. M. Mutale and Mr. V. Lolozi were at the same level as Function Head, their Contracts had a provision similar to Mr. Mwami (i.e. three months' Notice).

It is, therefore, ordered that each Complainant be paid three (3) months' Salary (last drawn salary) as Compensatory Damages for Wrongful Dismissal.

CLAIM FOR UNFAIR DISMISSAL

The High Court in December, 2012 made an observation, in the case of ***Caroline Tomaidah Daka -Vs- Zambia National Commercial Bank***, that Unfairness is Statutory – related and is linked to protection of the Right of Employment and promotion of fair labour practices of requiring employers to terminate Contracts of Employment only on specified and reasonable grounds, and also providing for rare remedy of reinstatement.

Unfair Dismissal, therefore, looks at the merits of the dismissal. In other words, under Unfair Dismissal the Courts will look at the reasons for dismissal to determine whether the dismissal was just or not. Contracts of Employment should be terminated only if there were a valid reason related to the conduct, or capacity of the worker, or the operational requirements of the Business. These,

broadly speaking, are the circumstances that form the law on Unfair Dismissal.

In casu, the Complainants did not adduce evidence to show that there was a Statutory breach by the Respondent. We, therefore, find difficulty to entertain this claim of Unfair Dismissal and, consequently, dismiss it for lack of merit.

CLAIM FOR REPATRIATION

No evidence was presented to support this Claim by the Complainants. In fact, the only Contract exhibited in Court between the Respondent and Mr. C. Mwami does not have a provision for repatriation. This Claim, therefore, fails and it is dismissed.

CLAIM FOR PUNITIVE DAMAGES FOR SHOCK, TRAUMA, EMBARRASSMENT AND HUMILIATION

No evidence was equally presented to support this Claim by the Complainants. The Claim fails and it is dismissed.

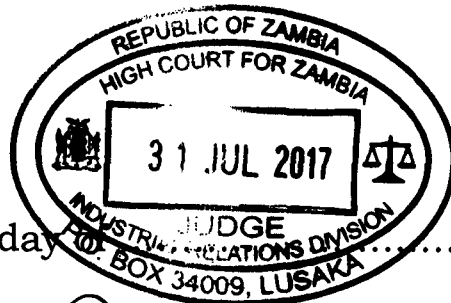
CONCLUSION

From the Judgment, we make the following Orders:

1. Claim for Wrongful Dismissal by the Complainants succeeds and we order that each Complainant be paid three (3) months' Salary as Compensatory Damages. This award will attract interest at short term Commercial Bank lending rates from 5th May 2014 (Date of filling of Notice of Complaint) until the date

of Judgment, thereafter, at the current lending rates as determined by the Bank of Zambia from time to time until full settlement.

- 2. The claim for repatriation is dismissed.
- 3. The claim for punitive damages for shock, trauma, embarrassment and humiliation is dismissed.
- 4. We award costs to the Complainants.
- 5. Parties informed of the Right to Appeal to the Court of Appeal within 30 days.



Delivered this day, 2017

[Handwritten signature of M. Musaluke]

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M. MUSALUKE
HIGH COURT JUDGE

[Handwritten signature of Hon. E. C. Katai]

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HON. E. C. KATAI
MEMBER

[Handwritten signature of Hon. N. Z. Mbeve]

.....
HON. N. Z. MBEWE
MEMBER