77

IN THE HIGH COURT FOR ZAMBIA **2015/HP/0275**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

CATHERINE SIMFUKWE **1ST PLAINTIFF**

SUSAN DAKA **2ND PLAINTIFF**

FRANCIS MULENGA **3RD PLAINTIFF**

AND

RURAL ELECTRIFICATION AUTHORITY **DEFENDANT**

BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE

For the Plaintiffs: *Mr. G. Chisanga and Ms. M.C Kaoma- Messrs KMG Chisanga Advocates.*

For the Defendant: *Mr. B. Mosha - Messrs Mosha & Co and Mrs. M. I. Malawo – Daka -In-house Counsel Rural Electrification Authority (REA).*

J U D G M E N T

***Cases referred to*:-**

1. **Wilson Masautso Zulu v. Avondale Housing Project (1982) Z.R 172.**
2. **M.M Tshishonga v. The Minister of Justice and Constitutional Development and the Director of Department and Constitutional Development- Case No. JS 898/04.**

3. **Christopher Lubasi Mundia v. Sentor Motors Limited (1982) Z.R. 66.**
4. **Bank of Zambia v. Kasonde (1995-1997) ZR 238.**
5. **ZNBC v. Penias Tembo, Edward Chileshe and Moses Phiri (1995) (SCZ No.9 of 1995).**
6. **Martin Nguvulu and 34 others v. Marasa Holdings Limited (T/A Hotel Inter-Continental Lusaka) - SCZ/8/026/2016.**
7. **Chitomfwa v. Ndola Lime Company (1999) Z.R. 172.**
8. **Chilanga Cement Plc. v. Kasote Singogo (2009) Z.R. 122.**
9. **Livingstone v. Rawyard Company (1880) 5 App Case 2539.**
10. **McCall v. Abelesz and another (1976) 1 ALL ER 727.**
11. **Attorney General v. Mpundu (1984) Z.R. 6.**

Legislation and other material referred to:

1. **The Public Interest Disclosure (Protection of Whistle Blowers) Act No. 4 of 2010.**
2. **The Employment Act, Chapter 268 of the Laws of Zambia**
3. **Bryan A. Garner, Black's Law Dictionary 8th Edition. Thomson West, (2004), USA.**

By a writ of summons and statement of claim dated 24th February, 2015, the Plaintiffs seek the following reliefs:

i. *A declaration that the Defendant's termination of the Plaintiffs contracts of employment was in violation of the Public Interest Disclosure (Protection of Whistle blowers) Act No.4 of 2010 and was void* ***ab initio*** *for want of legality;*

ii. *An Order that the Plaintiffs be reinstated to their jobs;*

iii. *In the alternative, damages for unlawful termination of their employment;*

iv. *Damages for mental stress and anguish;*

v. *Such further or other relief as the Court may deem fit to award to the Plaintiff;*

vi. *Costs for and incidental to these proceedings.*

The Plaintiffs averred in the statement of claim that they were at all material times employees of the Defendant which was a corporate body established pursuant to the Rural Electrification Act No. 20 of 2003. That the 1st, 2nd and 3rd Plaintiffs were at all material times employed by the Defendant as Administrative and Protocol Officer, Senior Accountant and Director Technical Services respectively.

The Plaintiffs averred that during the course of their employment, they noticed acts of gross abuse of office and public funds that was being perpetrated by the then Chief Executive Officer one Wilfred Serenje.

In acting in the best interests of the Defendant and the general public and in a bid to avert the further misuse of public funds, they prepared a dossier tabulating the acts of the said Chief Executive Officer, which dossier was sent to the Anti-Corruption Commission, Office of the Auditor General and Office of the President.

The relevant authorities upon receipt of the dossier conducted inquiries and made findings against the Chief Executive Officer which led to his dismissal and subsequent indictment in the courts of law.

That subsequent to the dismissal of the Chief Executive Officer, there was caused to be raised against the Plaintiffs false and unsubstantiated allegations that the Plaintiffs were responsible for leaking information to the media.

In consequence of the allegations, the Defendant's Board of Directors in its Special Meeting of 9th November, 2012 resolved that the contract of employment of the 3rd Plaintiff which was due to expire on 31st March, 2013 should not be renewed.

Further, that the Board of Directors at another Special Board Meeting on 14th November, 2012 resolved that the contracts of employment for the 1st and 2nd Plaintiff be terminated.

Upon receipt of the letters of termination and non-renewal of the contracts, the Plaintiffs appealed the decision of the Defendant and contended that the allegations against them were serious and that they ought and needed to be subjected to a disciplinary hearing. However, the Defendant through the Human Resource Manager dismissed the appeal.

It was averred that in addition to the Plaintiffs' efforts to attend to a pacific and negotiated settlement of the matter, the Plaintiffs sought the assistance of the Anti-Corruption Commission acting in line with the provisions of the Public Interest Disclosure (Protection of Whistle Blowers) Act No.4 of 2010 for a settlement with the Defendant on behalf of the Plaintiffs. All attempts proved futile.

The Plaintiffs averred that at trial they would show that the termination and non-renewal of their contracts were directly related to their having made a public interest disclosure and that this was in fragrant violation of the law.

The Defendant filed a defence and denied the contents of paragraph 1 to 4 of the statement of claim.

In relation to paragraph 6 of the statement of claim, the Defendant neither admitted nor denied the contents. It was averred that the Plaintiffs did in fact communicate certain information and allegations of a confidential nature to the press.

They denied the contents of paragraph 7 of the statement of claim and put the Plaintiffs to strict proof of the alleged falsity of the fact that they were responsible.

The contents of paragraph 8 of the statement of claim were admitted only to the extent that the 3rd Plaintiff's contract of employment was due to expire and naturally terminate. The Defendant averred that at trial it would show that it rightfully exercised its rights not to enter into another contract with the 3rd Plaintiff.

Regarding paragraph 9, the contents were admitted only to the extent that the Board of Directors held a meeting on the 14th November, 2012 at which the contract of employment of the 1st

Plaintiff was discussed but denied that the 3rd Plaintiff's contract was discussed nor any resolution made with regard to the same. Thus the 1st and 2nd Plaintiffs were put to strict proof of the allegations contained in paragraph 9 of the statement of claim.

Paragraph 10 of the statement of claim was also denied. The Defendant averred that all and any decisions made in respect of the Plaintiffs were made within the law and their contracts of employment.

Regarding paragraph 11, it was averred that the Plaintiffs by their actions sought to pressurise or compel the Defendant to make a payment to them where there was no justification for such payment.

Paragraph 12 of the statement of claim was denied and the Defendant averred that the termination and non-renewal of the Plaintiffs contracts was completely unrelated to any public interest disclosure (if any) to the relevant authorities.

In conclusion, the Defendant denied that the Plaintiffs were entitled to any of the relief sought or at all.

1. THE PLAINTIFFS EVIDENCE

The first witness **PW1** was **CATHERINE CHIMBUKA SIMFUKWE**, a Human Resource Practitioner of Libala South, Lusaka aged forty six (46) years old.

She testified that she was employed in 1993 in the Ministry of Energy and Water Development. In October 2004, she was seconded to Rural Electrification Authority (REA) as Personal Secretary to the Chief Executive Officer (CEO), Mr. Wilfred Serenje.

In 2006, she signed her first contract of employment as Executive Assistant to the CEO. She upgraded to Executive Assistant and the contract was for three (3) years and ended in 2008. She signed another contract which ended in 2012.

She testified that in 2012, her contract was renewed on 31st July, 2012. During that period, there was a pronouncement from the late President Mr. Michael Chilufya Sata to help the government fight corruption. As she had noticed corrupt practices and abuse of office which was taking place at REA, she brought it to the attention of the Director Human Resource Mr. Maxwell Zephanati

Phiri but nothing was done. She then decided with her two colleagues, Susan Nalivwe Daka the Senior Accountant and Francis Mulenga the Director, Technical Services to prepare a dossier about the irregularities which were taking place at REA.

She told the Court that she took the dossier to Hon. Miles Sampa to deliver to the President. She and Susan took the other dossier to the Director, Anti-Corruption Commission (ACC) and another dossier was taken to the Director General-Auditor General's Office. This was in August, 2012.

Further, that in September, 2012, auditors from the Auditors General's Office went to REA and started auditing and the audit finished in October, 2012. A week later there was a meeting to the effect that there were leakages in the press about the audit that took place at REA and the irregularities they had found. The irregularities found were that REA was renting a house for the CEO Mr. Wilfred Serenje in Marshlands. However, there was no provision for REA to be paying electricity for him although it was part of his contract for a house to be rented.

That the other irregularity was that the CEO Mr Serenje was entitled to 560 litres of fuel per month but he allowed his relatives to be drawing fuel from REA's operations account.

Furthermore, that Mr. Serenje used to get K1, 000,000.00 (old currency) allowance for the domestic servant. However, he allowed his servant by the name of Edward Mulenga to be put on the REA payroll and he used to get a salary of ZMW632.00.

She told the Court that all these irregularities came out in the press after the audit.

She testified that on 14th November, 2012, there was a Special Board Meeting at REA where the members suspected the Plaintiffs to have leaked the information to the press. That it was in that meeting where it was decided that her contract of employment be terminated. Together with the 2nd Plaintiff, they reported the said termination to ACC which commenced investigations.

She further told the Court that ACC wrote to REA and instructed REA to re-instate them. This was because ACC was convinced that the Plaintiffs were being victimised because they were whistle

blowers. REA responded to the effect that they would re-deploy the Plaintiffs but that did not happen. That ACC sued REA and REA was found guilty of terminating the Plaintiffs' contracts of employment because they were whistle blowers.

She identified in Court the contract of employment she signed as Personal Secretary which was at page 1 of the Plaintiffs bundle of documents. The second contract she signed as Executive Assistant was at page 10.

She further identified the dossier they prepared which was at page 46 of the Plaintiffs bundle of documents; the minutes of the Special Board Meeting were at page 77 and the letter of termination of employment was at page 81.

She told the Court that she wanted to be compensated for the five (5) years that she had not been working. She also wanted to be re-instated.

She stated that she sought these reliefs because she had not been able to work elsewhere; that as a whistle blower she was protected

by the law as she did not commit any offence but was merely helping the government fight corruption.

In cross-examination, she stated that when they prepared the dossier, the information contained was of a confidential nature which they obtained by virtue of their positions. She agreed that the contracts signed with REA had a confidentiality clause.

When referred to clause 15 of the contract of employment in the Plaintiffs bundle of documents, she admitted that there was a restriction on the release of information; that they released information to the Head of State, the Anti-Corruption Commission and the Auditor General's office.

When further referred to clause 3.3 of the minutes of the Special Board Meeting at pages 77 to 79 of the bundle of documents, she stated that the reason why her contract was terminated was because she was suspected to have leaked information to the media. That at the time her contract was terminated, she did not know that the reason she was dismissed was because of leaking information to the media. She only found out when ACC got the minutes from REA before she sued the Defendant.

She admitted that there was nowhere in their statement of claim where they attributed the leaking of information to the Auditor General's Report and that she had not brought the Auditor General's Report.

She stated that the minutes she referred to did not make any reference to the Auditor General's Report. She also stated that REA had agreed that the proposal for re-deployment into the Ministry of Energy and Water Development would be considered. That by re-deployment, it meant that they would no longer be employed by REA.

The witness also admitted that she was not allowed to give information that was contained in the dossier to the press.

In re-examination, she stated that she did not divulge information about REA's secrets but brought out corrupt practices; that REA was a non-profit making organisation which depended on grants from taxpayers, therefore as a tax payer, it meant that her money was being misused.

The witness added that no reasons were given for the termination in the letter of termination; that she had not received any information about re-deployment from REA but got the information from ACC.

PW2 was **SUSAN NALIVWE DAKA** aged forty-two (42) years old, an Accountant of Plot 377 Makeni in Lusaka.

She told the Court that on 1st April, 2007, she was employed as an Accountant for REA and her major task was to make payments. During the course of her employment, she noticed that they were being given instructions by the CEO Mr. Wilfred Serenje to make payments which were not supported. This went on for quite some time.

That with the change of government in 2011, the late President Mr. Michael Chilufya Sata came out strongly on corruption and emphasised that it was the responsibility of every citizen to fight corruption. Therefore she saw this as an opportunity to bring out the wrongdoings at REA.

She stated that together with the 1st and the 3rd Plaintiff, they prepared a dossier in 2012 which they released to ACC, the Auditor General's Office and State House. That almost immediately after the dossier was released, they saw auditors from the Auditor General's Office in August, 2012 and there were also inquiries from ACC.

That the auditors found that what was alleged in the dossier was correct. After the Auditor General's Report came out, there were reports in the media about some of the irregularities.

She stated that on 14th November, 2012, a Special Board Meeting was convened. After that meeting, she was given a letter of non-renewal of her contract of employment and her colleague's contract was terminated. They were asked to go home and go through the letters which were handed to them by Mr. Maxwell Zephanati Phiri.

After that, they tried to pursue the matter with ACC. They were told that they would be re-instated. REA however told them that they were not in a position to take them back.

She identified her contract of employment at pages 23 to 33 of the Plaintiffs bundle of documents and the notice of non-renewal at page 82. She also identified the dossier and the minutes of the Special Board Meeting.

She told the Court that she wanted damages for the pain and embarrassment she had suffered for having been a good citizen and having brought out the things that were being done at the institution. She further stated that she wanted the Court to declare that her termination was a violation of the Public Interest Disclosure Act; that the Court should also order re-instatement.

In cross-examination, she told the Court that her contract of employment was not terminated. It was supposed to expire on 31st March, 2013 and she was handed the letter of non-renewal on 14th November, 2012. That from 14th November, 2012 she was on leave, as she was sent home to serve the non-renewal but that her salary was being paid.

She told the Court that she wanted to be re-instated in accordance with the Whistle Blowers Act. She testified that she was entitled to gratuity under her contract and the same was paid to her.

There was no re-examination.

PW3 was **DANIEL CHIMFWEMBE**, aged thirty three (33) years old an Investigations Officer at Anti-Corruption Commission.

He told the Court that his duties included receipt of complaints from members of the public on corruption and abuse of office and any other allegations of wrong doing both in public and private sector. That he also investigated cases of corrupt practices and abuses in public sector and any other criminal activities that arose in the course of the investigations.

It was his testimony that in August 2012, ACC received an anonymous letter of allegations against the CEO of REA Mr. Serenje. That the letter highlighted allegations of abuse of authority and Theft by Public Servant which related to some of the conditions of service he was enjoying at the institution. The said letter was addressed to the Head of State ., the late Mr. Michael C. Sata and copied to the Ministry of Energy and Water Development, the Director General at the Office of the President- Special Division and the Auditor General. That the letter was not addressed to ACC but was sent as a blind copy.

Based on that information, he was tasked to carry out investigations into the allegations. In November, 2012, the Director General at ACC received a letter from the Attorney General Mr. Mumba Malila who informed her of a complaint that was made to him relating to the dismissal of three (3) former employees of REA namely; Catherine Simfukwe, Susan Daka and Francis Mulenga.

He testified that the Attorney General requested ACC to look into the possibility of an offence of unlawful reprisal against the trio which the institution had allegedly instituted. In conducting the preliminary inquiries, he interviewed Catherine Simfukwe, Susan Daka and Francis Mulenga who confirmed to have been the authors of the dossier. He concluded that the dossier was prepared by former employees of REA.

PW3 stated that he proceeded to conduct a full scale investigation by interviewing members of REA management and REA Board. He also collected documents such as minutes of the Board that terminated the contract of employment for PW1 and non-renewal of the contract for PW2 and PW4. He also obtained the contracts of employment of the Plaintiffs and the letters of dismissal.

PW3 told the Court that from his investigations, he concluded that a possible offence had been committed by REA to dismiss the three (3) for whistle blowing the CEO of REA. PW3 forwarded the case to the legal department for prosecution. It was then agreed by ACC management that an out of court settlement be considered.

It was his testimony that sometime in October 2013, a letter was written to the Chairperson of REA Board requesting that the Plaintiffs be re-instated. In that letter, the Director-General informed the Chairperson of the findings of ACC and the conclusion that an offence had been committed by REA management and board. The Chairperson replied and stated that a board meeting would be constituted on 25th October, 2013 to discuss the matter.

The said meeting was constituted between REA and ACC. The CEO for REA informed them that the Board had considered ACC's proposal but the concern was that the Plaintiffs positions had already been filled. That it was impracticable for the Plaintiffs to be re-integrated into the institution considering the manner they had left. That there was however an indication from the Minister of

Energy and Water Development to have them given positions at the Ministry.

He further told the Court that after deliberations, some of which he was not privy to, efforts to have the Plaintiffs re-instated ended with a letter from REA stating that they were unable to re-instate them; that there was no provision in the ACC Act which required them to do so.

That ACC proceeded with the criminal matter in court in which REA was found guilty of the offence of unlawful reprisal contrary to Section 46 of Public Interest Disclosure Act. Consequently, REA was fined 10,000 penalty units. It did not appeal and so it paid the fine.

During cross-examination, he told the Court that according to the minutes of the Board, the 3rd Plaintiff's contract was due to expire on 31st March, 2013 and the decision was not to renew it and his dues were paid to him. That regarding PW2's contract, the decision of the Board was not to renew the contract and her dues were paid from the date of the meeting to the end of the contract. He stated that the minutes did not state that the reason for dismissing PW1

was because she prepared a dossier and submitted it to the President and Law Enforcement agencies.

In further cross examination, he told the Court that the ACC Act did not protect employees who leaked information to the media.

He admitted that he had occasion to read the media reports that the Board was concerned about in the Post Newspaper. That Catherine Simfukwe confirmed she was part of those who prepared the dossier.

There was no re-examination.

PW4 was **FRANCIS MULENGA,** aged fifty-seven (57) years old, an Electrical Engineer of Woodlands, Chalala in Lusaka.

He told the Court that he was employed by REA on 1st April, 2007 and at the time he left REA, he was Director Technical Services. That he was made to act in that position of Director as CEO for the institution somewhere in July 2012. During the time of acting, he was given a payroll to approve for the month of July, 2012. He came across the name Edward Mulenga which was not familiar to him.

When he called the Director Human Resource to furnish him with details, he was told that Edward Mulenga was the domestic servant at the CEO's residence. He asked him why they were paying him. He was told that it was part of the lease agreement for the CEO's house. He approved the payment with the view that they would deal with it later.

He testified that after that meeting, he called the payroll accountant to get more facts about Edward Mulenga. He was told that the said Edward was paid through an allowance for the CEO. He found this as a double payment which was a waste of government resources.

PW4 was later asked to approve the payment of fuel at a filling station at Arcades. He asked the accountant about it as their account was with Impala filling station and not Arcades. He was told that the account at Arcades was managed by the CEO. In short all the REA vehicles used to refuel at Impala and not Arcades but the institution paid for the two fuel accounts. When he asked about the vehicles which refuelled from Arcades, he found that they did not belong to REA. With these anomalies, he thought he would explain a lot in future if he did not deal with them. That was when

he decided with his two colleagues, PW1 and PW2 to prepare a dossier in August, 2012 and sent it to two investigative wings. When the CEO came back, he reverted to his original position.

Around mid- August, 2012 there was an impromptu meeting called by the CEO where the CEO mentioned that he had credible information that there were officers who had compiled information about him and sent to higher authorities.

He testified that a couple of weeks later, the Auditor General's office went to audit the books at REA. What prompted the audit was the dossier they received. ACC also started the investigations at REA.

He further stated that on 9th November, 2012 there was an emergency Board Meeting. On that day, he was travelling to Luapula Province for duty. When he reached Serenje, he received a call from one of managers who told him to return to Lusaka. When he returned to Lusaka he met the manager at the REA offices. He was asked to sign one copy of a letter and then take the original. In the letter, he was informed that the next contract due to end in March 2013 would not be renewed and that he should immediately proceed on leave until expiry of the contract.

During the forced leave, his salary was paid up to the end of the contract. He found this to be unusual and he concluded that it was because of the dossier and other threats that the people who were suspected to have leaked information would be fired.

That on receipt of that letter, they engaged ACC as they saw themselves as whistle blowers but it led to unnecessary exit from the institution. ACC made efforts to have them re-instated or redeployed within the Ministry of Energy and Water Development but it proved futile.

He told the Court that when redeployment could not work he decided to seek redress as his career, profession and dignity had been affected. He stated that he had attended two interviews at international organisations and the interviewers could not understand how and why a person with a good Curriculum Vitae (CV) would be sent away by an institution.

It was his evidence that he appealed against the non- renewal of his contract which went to the Appeals Committee. He got a response that there was no case against him and so the appeal was misplaced. They told him that an employer had the right to

terminate or not renew a contract for an employee as and when they so desired.

He told the Court that he wanted to clear his name as he had gone through much anguish. He also wanted compensation as he had lost out on other emoluments.

He identified the letter of non-renewal of contract at page 76 of the Plaintiffs bundle of documents. That the appeal letter he wrote to the committee was at page 83 of the Plaintiffs bundle of documents and the response he received to his appeal at page 86.

In cross examination, he told the Court that the dossier was prepared by the three Plaintiffs; that he was the only one in management at the time. To his knowledge, no one else knew that they were preparing a dossier.

He testified that there was a grievance procedure at REA pertaining to workers relating to salaries but nothing relating to someone above him. That there were no minutes written in the meeting where the legal counsel threatened to fire them.

In cross- examination, he told the Court that he learnt that they were being targeted when he received his letter of non-renewal. He confirmed that he had an option not to renew his contract when it came to an end; that REA also had the right not to renew it. He added that REA communicated that they would not renew his contract and that he was not charged with anything. That all his dues were paid and his claims before Court were that he suffered because of non- renewal of his contract.

He denied having given any information to the press regarding what was in the dossier; that he did not have meetings with the incumbent CEO.

In re-examination, he told the Court that the problem he had with the letter of non-renewal was that there was no prior communication of what would happen and he was not given an opportunity to hand over the office.

That marked the close of the Plaintiffs case.

2. **DEFENDANT'S EVIDENCE**

DW1 was **MAXWELL PHIRI**, aged forty-six (46) years old the Director of Human Resource at REA.

He testified that PW1, Catherine Simfukwe worked as an Executive Assistant at REA and that her contract was terminated in November 2012. That at the time of the termination, his position was that of Director Human Resources and Administration.

He stated that PW1's contract was a three year contract from 2010 which was renewed in 2011. That PW1's termination arose due to the fact that she was one of the three employees suspected to have leaked information to the press about the CEO having abused funds of the Authority. He told the Court that the Plaintiffs made these allegations to ACC, Drug Enforcement Commission and also a report was sent to the President and the press.

It was his testimony that the contracts were terminated because they signed under oath to not leak information to the press and the decision was made collectively by management and the Board. He told the Court that the decision to terminate was communicated through a formal letter which he signed. He identified the

termination letter at page 37 of the Defendant's bundle of documents.

He testified that the termination was done in accordance with the contract and that she was given one month's notice. That between the time the notice was given and the expiration of her contract, she was advised to proceed on leave but she continued getting her normal benefits from the organisation which included her salary and any other benefits linked to her basic pay. To his knowledge, PW1 received her dues.

When asked about PW2, he told the Court that her contract was not terminated it was just not renewed. That she was given notice on the expiry of the contract. He identified the Notice of Non-Renewal of Contract.

Regarding PW4, he told the Court that he was also advised to proceed on leave and that his contract would not be renewed. That the terms given to him in the interim before non-renewal, were similar to PW2; he got his salary up to the end of the contract. That there was nothing that accrued to both PW2 and PW4 as their gratuity was paid.

In cross examination, he told the Court that he had worked for over fifteen (15) years under Human Resource Department; that he fully understood that the department operated as a pivot between management and staff and that one needed to operate with fairness.

He told the Court that he was not part of the meeting that was convened when the contracts of employment for the three (3) Plaintiffs were terminated. That he was invited to attend the second meeting which took place on 14th November, 2012; that the meeting was a Special Board Meeting called to deal with issues which were disturbing to the institution. He stated that he was just invited for about 15 minutes to report on whether there was stability at the institution after termination of employment of the CEO and Director Technical Services. That he didn't have the official position why the two were dismissed but the unofficial position was that the contract of employment for the CEO was terminated due to alleged abuse; that he was aware that the CEO, Mr Wilfred Serenje was arraigned and acquitted before the Subordinate court.

When asked what the source of the information was when he stated that the staff had leaked information to the press, he stated that he didn't have any evidence that information was leaked.

In relation to PW1, he agreed that there was an allegation that she had leaked information to the press; that she had signed an oath of secrecy but that they could give information to ACC or DEC. However, he stated that the said oath of secrecy was not in the bundle of documents.

Further, that he studied PW1's case when it was brought to his attention; that he did not establish the name of the journalist the information was leaked to as it was an allegation and he did not have proof. That her termination letter had no reason for termination. He stated that it was not really the position that the reason for terminating her contract was concealed; that the decision was collectively made by the Board and that the contract provided that either party could terminate with or without notice.

When asked what he was supposed to do as a Human Resource practitioner where there was no proof, he told the Court that during that period, the Board made all the decisions and that the

Board collectively decided to terminate the contracts of employment for the three.

When further asked if from a strict point of corporate governance the Board didn't overstep its authority, he repeated his earlier answer and stated that the final decision was made by the Board collectively.

He further stated that he understood that the Board was concerned with policy decisions over which they were appointed and that the Board was not involved with staff recruitment at lower level. That the letter was not signed by the Board but management and that the Board also made decisions to recruit and terminate and management implemented the decisions.

When asked if the Board was involved with the recruitment of junior employees, he stated that the Board made decisions to increase the establishment whilst management implemented by recruiting staff.

He further stated that PW1 was hired by REA whose supreme body was the Board which made all the decisions to hire members of

staff not only PW1. That he signed the letter of termination for PW1 at the instruction of the Board; that he was satisfied that he was doing the right thing as he consulted the legal department and the Human Resource fraternity.

In continued cross examination, he told the Court that he was aware that there were steps by ACC to have PW1 reinstated because her contract was erroneously terminated; that his office did not play a role in this as the Board did not inform him to implement. That when the issue of reinstatement was tabled with the Board, it was decided that it would be toxic to the institution to reinstate them considering the way they left. That ACC was not a court to order reinstatement.

The witness confirmed that he was aware that the Defendant was prosecuted over allegations made by whistle blowers and that it was convicted and fined.

In relation to PW2, Susan Daka, he confirmed having sent her on leave; that he also signed the notice of non-renewal for PW2 as instructed by the Board on allegations of leaking information to the press.

He stated that he was familiar with clause 9 of PW2's contract; that the employer indicated to the employee that if he wanted to renew, he had to apply before three (3) months and the employer could respond within three (3) months. When asked why PW2 was notified outside the 90 days period provided in the contract, he stated that the three months was just a minimum provision which was discretionary.

The witness also agreed that the clause gave the CEO discretionary powers to renew or not renew the contract; that at the time he wrote the letter to PW2, he was Human Resource Director. When asked if the CEO had delegated the powers to him, he stated that the CEO was not there and the powers were delegated by the Board.

He also admitted that PW2's contract was supposed to expire on 31st March, 2013 but the letter he wrote was dated 14th November, 2012 which was more than four months in between. However, he stated that according to the labour laws, the letter was sufficient to terminate the contract. He disagreed that the only time that REA could have written to PW2 was within three (3) months; that this

was only the minimum period provided in the contract but that the employer could exercise its discretion even outside this period.

In relation to PW4, he confirmed that the letter was written by the Chairman of the Board as he was not in the country; that he could not speak on behalf of the Board if it exercised the powers of the CEO.

The witness confirmed that the letter was written within a period of four (4) months before it expired; that the Plaintiffs contracts were terminated on allegations of leaking information to the press but that he and the Legal counsel did not investigate the allegation.

In continued cross- examination by Ms. Kaoma, the witness stated that the three officers did not make allegations to the President, ACC or DEC but to the press. That investigations were conducted by the Auditor General's office but he could not recall what was in the report.

That when the three appealed, the response to them was that the termination was not as a result of any wrong doing on their part.

When asked why they didn't afford the three an opportunity to be heard, he stated that the employer had the right to terminate without giving reasons and the decision was made by the Board.

In re-examination, he stated that it was not necessary to accord the Plaintiffs an opportunity to be heard or to constitute a disciplinary hearing because the contracts had come to an end. They were just given notice. That according to clause 9 of the contract of employment, what triggered the CEO to give Notice of non-renewal was when the employee applied to renew the contract or not; that there was no notice from the employees.

On the request by ACC to re-instate the three, he stated that their position was that ACC was not a court to direct REA to reinstate the ex-employees of the institution. He also stated that members of staff signed the Oath of Secrecy for purposes of confidentiality and that any abuse could only be reported to the regulators and not the press.

That marked the close of the Defendant's case.

Both parties filed written submission which have been helpful. I have considered the submissions when arriving at this decision which I will referring to as and when it is necessary.

By this action, the Plaintiffs seek *inter alia* a declaratory order that the termination of their contracts of employment was in violation of the Public Interest Disclosure (Protection of Whistle blowers) Act No. 4 of 2010. That therefore the termination was void *ab initio* for want of legality.

From the outset I wish to state that the burden of proof lies on the Plaintiffs to prove their case on a balance of probabilities. In the case of **Wilson Masautso Zulu v. Avondale Housing Project**[1] referred to by the Defendant, the Supreme Court stated that:

> **"Where a plaintiff alleges that he has been unfairly dismissed, as indeed in any other case where he makes an allegation, it is for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to a judgment whatever maybe said of the opponent's case."**

Having considered the pleadings and evidence adduced by the parties, the following facts are not in dispute:

(i) The three Plaintiffs were employees of the Defendant. The 1st Plaintiff was an Executive Assistant to the CEO Mr. Wilfred Serenje, the 2nd Plaintiff was employed as an Accountant while the 3rd Plaintiff was the Director of Technical Services.

(ii) That sometime in August 2012, they prepared a dossier containing allegations of abuse of office against the CEO. The said dossier was delivered to State House, the office of the Auditor General and the Anti-Corruption Commission.

(iii) The Auditor- General's Office conducted an audit and the findings of the audit report were reported in the press.

(iv) Investigations were conducted by ACC and the CEO was arraigned and prosecuted but was acquitted by the Subordinate Court.

(v) The 1st Plaintiff's contract of employment was terminated whilst the contracts for the 2nd and 3rd Plaintiffs were not renewed.

(vi) That the Defendant terminated and exercised the option not to renew the contracts on allegations that the Plaintiffs had leaked information to the media.

(vii) On termination/non-renewal, the Plaintiffs were paid their dues by the Defendant.

(viii) The Defendant was prosecuted by the ACC for unlawful reprisal against the Plaintiffs contrary to Section 46 of Act No. 4. It was convicted and fined 10,000 penalty units.

However, the issues that are in dispute and fall determination are:

1. *Whether or not the disclosure made by the Plaintiffs is protected under the Public Interest Disclosure (Protection of Whistle Blowers) Act No.4 of 2010.*
2. *Whether the Plaintiffs suffered unlawful reprisal and/or occupational detriment as a result of the disclosure made to the investigative wings.*
3. *Whether they are entitled to the reliefs sought in the writ of summons and statement of claim?*

I shall now proceed to consider the issues for determination.

(i) ***Whether or not the disclosure made by the Plaintiffs is protected under the Public Interest Disclosure (Protection of Whistle Blowers) Act No.4 of 2010.***

By way of background, the Public Interest Disclosure (Protection of Whistle Blowers) Act No.4 of 2010 (hereinafter referred to as Act No. 4 of 2010) is a fairly recent Act. According to the preamble, it was enacted because Zambia is a signatory to the United Nations Convention against Corruption. This convention requires state parties to enact laws to protect whistle blowers from any form of distress that may arise as a result of having made a public disclosure of conduct adverse to the public interest in the public and private sectors.

Thus it *inter alia* provides for the framework within which the public interest disclosures should be independently and rigorously dealt with. It also provides for procedures in terms of which employees in both the private and the public sectors may disclose information regarding unlawful or irregular conduct by their employers or other employees.

In addition, it safeguards the rights including employment rights of persons who make public disclosures and also provides a framework within which persons who make a public interest disclosure shall be protected.

In essence, it is a piece of legislation which provides protection to those who make disclosures in the public interest. It is thus an important weapon in the anti-corruption struggle to encourage honest employees to report wrong doing.

As I have already alluded to, it is not in dispute that the Plaintiffs prepared the dossier using information obtained by virtue of their employment and sent it to the Auditor General's Office, ACC and State House.

I have read the contents of the dossier which is at page 46 of the Plaintiffs bundle of documents. In that report, the Plaintiffs made allegations *inter alia* of Abuse of Authority, Theft by Public Servant, Nepotism, and Victimisation of Employees by the CEO Mr. Wilfred Serenje.

PW3 told the Court that in August 2012, ACC received an anonymous letter of allegations against the CEO of REA Mr. Serenje. That the letter which was addressed to the Head of State Mr. Michael Chilufya Sata and copied to the Auditor General's office and ACC highlighted allegations of abuse of authority and Theft by Public Servant.

This evidence is confirmed by the letter at page 88 of the Plaintiffs bundle of documents which was written by the Director-General of ACC confirming that it received a report on 15th August, 2012 against the then CEO of REA Mr. Wilfred Serenje. In that letter, the Director General stated that the report they received contained allegations of abuse of authority of office against the said Mr. Serenje.

Given the foregoing, can it be said that the disclosure is protected under the Act?

Section 2 of the Act defines public interest disclosure as:

> **"Disclosure of information made by any person or an employee regarding any conduct of any persons or by an employer, or an employee of that employer, that the person making the disclosure believes on reasonable grounds shows or tends to show one of the following:**
>
> **(a) that a person has engaged, is engaging, or proposes to engage, in disclosable conduct;**
> **(b) public wastage;**
> **(c) conduct involving substantial risk or danger to the environment;**
> **(d) that a person has engaged, is engaging, or proposes to engage, in an unlawful reprisal;**

(e) that a public officer has engaged, is engaging, or proposes to engage, in conduct that amounts to a substantial and specific danger to the health or safety of the public;
(f) that a criminal offence has been committed, is being committed or is likely to be committed;
(g) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
(h) that a miscarriage of justice has occurred; is occurring or is likely to occur; or
(i) That any matter referred to in (a) to (h) has been, is being or likely to be deliberately concealed.

In terms of a protected disclosure, Section 22 provides that:

Disclosure is a protected disclosure if—

(a) It is made in good faith by an employee—
(i) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and
(ii)who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law;
(b) one or more of the conditions specified in subsection (2) apply; and
(c) in all the circumstances of the case, it is reasonable to make the disclosure.

The disclosure may be made to an investigating authority. According to Section 2, investigating authority means the Auditor General, ACC, the Drug Enforcement Commission, Investigator

General, the Police Public Complaints Authority, the Judicial Complaints Authority and any other person or body prescribed under the Act or any other law.

Although the term whistle blower has been used in the title of the Act, it is not defined in the Act. However, according to the Garner's Black's Law Dictionary, a whistle blower is:

> **"An employee who reports employer wrong doing to a governmental or law enforcement agency."**

What the foregoing means is that the person who makes a public interest disclosure to an investigating authority is called a whistle blower.

Pillay D.J in the South African case of **M.M. Tshishonga v. The Minister of Justice and Constitutional Development and the Director of Department and Constitutional Development**[2] quoting from different authors succinctly highlighted the rationale of their Public Disclosure Act when he stated in relation to whistle blowers that:

> **"Internationally, there is growing recognition that whistle-blowers need protection. Whistleblowing is**

healthy for organizations. Managers no longer have a monopolistic control over information. They have to be alert to their actions being monitored and reported on to shareholders and the public. Everyone is alive to their loyalty to the organization. As a safe alternative to silence, whistleblowing deters abuse."

What is evident from the foregoing definitions is that disclosure is protected if it is made in good faith to an investigative authority about the wrong doing of any person or an employer or an employee of that employer.

In the present case, what then was the basis of the disclosure?

In the statement of claim, the Plaintiffs in paragraph 4 averred that during the course of their employment, they noticed acts of gross abuse of office and public funds that were being perpetrated by the then CEO Mr. Wilfred Serenje.

That in acting in the best interests of the Defendant and the general public and in a bid to avert the further misuse of public funds, they prepared a dossier tabulating the acts of the said CEO

and sent the dossier to ACC, Office of the President and Office of the Auditor General.

In her evidence, PW1 stated that after her contract was renewed on 31st July, 2012, a pronouncement was made by the late President Michael Chilufya Sata for citizens to help the government fight corruption; that because she noticed corrupt practices and abuse of office which was taking place at REA, she brought it to the attention of the Human Resource Director but nothing was done. She then decided with PW2 and PW4, to prepare a dossier about the irregularities that were taking place at REA.

In their evidence PW2 and PW4 also gave these reasons as the basis for having prepared the dossier. To further support this, the Plaintiffs in the bundle of documents at page 73 produced an article published by Zambia Daily Mail in which the late President Mr. Michael Chilufya Sata encouraged citizens to provide evidence of abuse of office by those appointed in public offices.

Therefore, to answer the question posed, what the above evidence has revealed is that the Plaintiffs made the disclosure to investigating authorities as they reasonably believed that their

disclosure showed public wastage of resources on the part of the CEO, Mr. Serenje. I say this because the Plaintiffs not only prepared the dossier, but they also attached vouchers of the payments they suspected to have been irregularly issued to support their allegations.

Furthermore, I carefully examined their demeanour in order to assess their credibility. From my own observations, they did not strike me as witnesses who had fabricated a story that they prepared a dossier in response to the call by the late President Michael Sata to assist the government in fighting corruption and not for personal gain.

Furthermore, there is no evidence to suggest that the disclosure was made for ulterior motives, in a quest for revenge or in their quest for self-advancements.

I therefore accept their evidence that the Plaintiffs acted in the interest of the Defendant and general public in a bid to avert further misuse of funds. I also accept that they were motivated to make the disclosure of the conduct of the CEO by the pronouncement made by the late President Michael Chilufya Sata

as shown in the Daily Mail Publication to the effect that citizens should assist the government with evidence of abuse of office by public officers.

Given the foregoing and in the absence of any evidence to the contrary, I find that the following facts as proved:

(a) The disclosure made by the Plaintiffs to ACC and Auditor General's office which are investigative authorities under Act No. 4 of 2010 was made in good faith and not for personal gain as they believed that the information contained in the dossier was substantially true.

(b) The public disclosure was meant to show public waste of resources at REA through the conduct of the CEO.

(c) The Plaintiffs are whistle blowers as they reported the wrong doings of the CEO to ACC and the Auditor-General.

(d) That the disclosure made by the Plaintiffs was protected in accordance with the Act No.4 of 2010.

(ii) Did the Plaintiffs suffer unlawful reprisal and occupational detriment as a result of this protected disclosure?

It is not in dispute that the contract of employment for the 1st Plaintiff was terminated and whilst for the 2nd and 3rd Plaintiffs, their contracts were not renewed. The Plaintiffs in the pleadings and evidence therefore contend that the termination and non-renewal was a consequence of the dossier that they prepared and sent to the ACC, Office of the President and Office of the Auditor General.

However, the Defendant in the pleadings and evidence contend that the contract was terminated in respect of the 1st Plaintiff and not renewed for the 2nd and 3rd Plaintiffs as the Plaintiffs communicated certain information and allegations of a confidential nature to the press. Thus it exercised the right to terminate and not to renew in accordance with the contracts of employment and the law.

The Defendant therefore contends that the termination and non-renewal of the contracts was completely unrelated to any public interest disclosure to the relevant authorities.

The Plaintiffs in their submissions argued that while it was accepted employment procedure that an employer could terminate

the contract of an employee without giving reason provided the notice period was proper, the defence could not stand in the face of evidence that the main reason they were terminated and opted not to renew were on suspicions that they had leaked information to the media. That an allegation of this magnitude required thorough investigation by the employer including having the affected employee arraigned before a duly constituted Disciplinary Committee.

I have given careful consideration to these arguments advanced by the respective parties. To appreciate why the Plaintiffs contend that they suffered unlawful reprisal and occupational detriment as a result of the dossier they prepared and disclosed to relevant authorities, it is important again to consider the objectives of the Act and what is meant by unlawful reprisal and occupational detriment.

As I have mentioned, one of the main objectives of the Act is to safeguard the rights of persons including employment rights of those who make public interest disclosure.

These safeguards include Section 10 of the Act. This section provides that:

> **"An employer shall not subject an employee to any occupational detriment on account or partly on account of the employee having made a protected disclosure or a public interest disclosure."**

According to Section 2, occupational detriment in relation to the working environment of an employee means:

> "**(a) being subjected to disciplinary action;**
>
> **(b) being dismissed, suspended, demoted, harassed or intimated;**
>
> **(c) being transferred against the employees will;**
>
> **(d) being refused transfer or promotion**
>
> **(e) being subjected to a term or condition of employment or retirement which is altered or kept altered to the employee's disadvantage;**
>
> **(f) being refused a reference or being provided with an adverse reference from the employer;**
>
> **(g) being denied appointment to any employment, profession or office;**
>
> **(h) being threatened with any actions referred to in paragraphs (a) to (g); or**

(i) being otherwise adversely affected in respect of employment, profession or office including employment opportunities and work security."

Unlawful reprisal is defined in Section 2 of the Act as:

> **"Conduct that causes or threatens to cause detriment to a person directly because a person has made or makes a public interest disclosure."**

In relation to the meaning of detrimental action, subsection 3 reads as follows:

> **"In this section, detrimental action means action causing, comprising or involving any of the following:**
>
> **(a) Injury, damage or loss;**
>
> **(b) Intimidation or harassment;**
>
> **(c) Discrimination, disadvantage or adverse treatment in relation to employment;**
>
> **(d) Dismissal from, or prejudice in employment; or**
>
> **(e) Disciplinary proceedings.**

Subsection (2) of section 42 provides that:

> **"A civil proceeding in respect of a detrimental action under this section may be instituted at any time**

within three years after the detrimental action is alleged to have been committed."

Given the foregoing definitions, it is important to consider the sequence of events that occurred before the Plaintiffs separation in order to determine whether or not the Plaintiffs suffered unlawful reprisal and occupational detriment.

(i) In August, 2012, the Plaintiffs prepared a dossier on the conduct of the CEO Mr. Wilfred Serenje and sent it to ACC, Office of the President and the Office of the Auditor General.

(ii) ACC received the dossier on 15th August, 2012 as seen from the letter at page 88 of the Plaintiffs bundle of documents. Investigations into the allegations were instituted.

(iii) A Special Board Meeting was held on 9th November, 2012 to assess the situation at REA and to provide the way forward.

(iv) In order to arrest the situation at REA, the meeting resolved among other things not to ratify the CEO's

contract which had been provisionally renewed; that the CEO would therefore leave immediately.

(v) It was also resolved that the Technical Director's (3rd Plaintiff) contract due to expire on 31st March, 2013 would not be renewed and that he would be sent on leave until the expiry of his contract.

(vi) On the same day 9th November, 2012, the Board Chairman wrote to the 3rd Plaintiff and informed him that his contract would not be renewed. He was also advised to proceed on leave immediately and not until the end of the contract on 31st March, 2013.

(vii) Another Special Board Meeting was held on 14th November, 2012 as a follow up on the decisions made at the meeting held on 9th November, 2012 to regularise the situation at REA.

(viii) In this meeting, the Board was concerned with the leakages that had been made to the press and felt that the issue had to be addressed. The meeting was also informed that at the meeting held on 9th November, 2012, the officers who were being suspected to have been leaking the information to the press were named.

(ix) The meeting resolved to terminate the contract for Catherine Simfukwe (the 1st Plaintiff) and not to renew the contract for Susan Daka (the 2nd Plaintiff) which was due to expire on 31st March, 2013. That she would proceed on leave.

(x) On 14th November, 2012, a letter was written to Susan Daka by the Director Human Resources in which she was advised that her contract which was due to expire on 31st March, 2013 would not be renewed pursuant to clause 9 of the said contract. She was also informed to proceed on leave immediately.

(xi) On the same day, a letter terminating the contract of employment for Catherine Simfukwe, the 1st Plaintiff with immediate effect was written by the Director Human Resources and Administration. The 1st Plaintiff was informed that the termination was in accordance with clause 16 of the contract and that she would be paid one month's salary in lieu of notice.

(xii) On 15th November, 2012, the three Plaintiffs appealed against the decision to terminate and not to renew their contracts.

(xiii) On 26th November, 2012, the Plaintiffs were informed that their appeals were not successful.

What is clear from the foregoing is that the Defendant suspected the Plaintiffs to have leaked the information to the press about the happenings at REA following the audit report.

Thus in paragraphs 5 and 6 of the Defence, the Defendants averred that the Plaintiffs did in fact communicate certain information and allegations of a confidential nature to the press and it put the Plaintiffs to strict proof of the alleged falsity of the fact that they were responsible.

Is there evidence to support this allegation that the Plaintiffs leaked information to the press and thus breached the confidentiality clause?

To begin with Clause 15 which is the confidentiality clause in the contracts of employment signed by the Plaintiffs provides that:

> **"Confidentiality- as a professional member of staff, the employee will be privy to confidential information and expressly agrees to maintain the confidentiality of such information during and after the period of employment. Under no circumstances**

is the employee authorised to release confidential information to the public directly or indirectly without necessary clearance with the Chief Executive. Any breach of confidentiality during employment will be regarded as gross misconduct.

a) Secrecy- the employee shall, during employment under this contract, sign a Declaration of Secrecy not to divulge or make known any information, which may come to the employee's knowledge except with the permission of the Chief Executive."

The Plaintiffs contention is that they did not disclose any information to the press about the audit findings; that they only made the disclosure to the relevant authorities.

In this regard, the 1st Plaintiff in her evidence denied any knowledge that her contract was terminated because she was suspected to have leaked information to the press. This was because the letter of termination did not provide the reasons for the termination; that she only found out when ACC got the minutes from REA before she took out this action.

On the part of the Defendant, DW1 in his evidence told the Court that the three Plaintiffs were let go because they were suspected to have leaked information to the press. He also stated that disclosure

about any abuse of authority could only be made to regulators and not the press. However, in cross examination he stated that he didn't have evidence as to the source that the Plaintiffs had leaked information to the press; that he also did not establish the name of the journalist the information was leaked to. Thus he did not have proof.

Furthermore, I have read the letter of termination in respect of the 1st Plaintiff and the letters of non-renewal in relation to the 2nd and 3rd Defendant. The reasons for the action the Defendant took have not been disclosed.

In addition, in the response by the Director Human Resource to the letters of appeal written by the Plaintiffs which are at pages 84, 85 and 86 of the Plaintiffs bundle of documents, the Plaintiffs were informed that their separation was not as a result of any unacceptable conduct or breach of conduct. This means that the Defendant did not find any wrong doing on the part of the Plaintiffs.

In view of the foregoing, the following facts are proved:

(a) There was no evidence that the 1st Plaintiff's contract was terminated and the contracts for the 2nd and 3rd Plaintiffs were not renewed because they leaked information to the press after the audit was done by the Auditor General's office.

(b) The Plaintiffs did not breach the clause 15 which is the confidentiality clause as the disclosure was made to investigative authorities and not the press.

Having made the above findings, can it be said that the Plaintiffs separation was connected to the disclosure they made to the investigative authorities about the conduct of the CEO?

From my own analysis and understanding of the sequence of events which I have outlined above, the Special Board Meetings were convened as a result of the investigations that were being undertaken by ACC and also the audit by the Auditor-General following the dossier that was submitted to these offices about the conduct of the CEO by the Plaintiffs.

I say this because it could not have been a coincidence that three months after the dossier was prepared and sent out to the investigative authorities by the Plaintiffs and whilst investigations

were being conducted by ACC, the Board made the following resolutions:

(a) Not to ratify the contract for the CEO Mr. Wilfred Serenje whose conduct the Plaintiffs disclosed in the dossier they prepared.

(b) To terminate the contract of employment for Catherine Simfukwe and not renew the contracts of employment for Susan Daka and Francis Mulenga the ones who prepared the dossier.

In short, the circumstances under which these actions were taken confirms the Plaintiffs contention that their separation was as a result of the dossier that was prepared about the conduct of the CEO which was sent to the relevant authorities. This disclosure cannot simply be brushed aside as it is clear that the Board acted on the disclosure made when it took the above actions.

By way of further illustration to support this, the letter terminating the 1st Plaintiff's contract of employment, Catherine Simfukwe which is at page 81 of the Plaintiffs bundle of documents shows that the contract was terminated in accordance with clause (16) of

the contract. A perusal of the said contract has revealed that the employer or the employee could terminate the contract of employment by resignation, discharge in the event of breach of conditions of service or the disciplinary code, summary dismissal if the employee committed an offence, medical grounds, death or redundancy.

As I have already mentioned, the response to the letter of appeal which is at page 84 of the Plaintiffs bundle of documents shows that the 1st Plaintiff's contract was terminated not because she had been accused of any act that would warrant a disciplinary hearing but because the Defendant exercised its right to terminate the contract.

However, none of the provisions under which the contract could have been terminated applied to the 1st Plaintiff. In this regard, I find that the termination was not in accordance with the contract of employment.

In relation to the non-renewal of the contracts of employment for the 2nd and 3rd Plaintiffs, Clause 9 of the contracts reads as follows:

(a) *The Chief Executive at his discretion may renew or extend the Employee's contract for a further three (3) year period provided that the employee shall three months before the expiry of this contract give written notice of the intention to renew.*

(b) *The Chief Executive shall within that period inform the Employee whether or not he is to be offered a further appointment.*

What I discern from the above clause is that the discretion is upon the CEO to renew or not renew the contract for a further term. However, the employee is the one who initiates the process to renew or not to renew the contract by giving three (3) months' notice before the expiry of the contract. This is why DW1 in re-examination stated that what triggers the exercise of the CEO's discretion to renew or not renew the contract is the application made by an employee.

Yet, there is no evidence that the 2nd and 3rd Plaintiffs triggered this process to renew or not renew their contracts. In fact DW1 admitted that there was no evidence that there was any notice from the Plaintiffs.

In addition, the power not to renew is vested with the CEO. However, in respect of the 2nd Plaintiff, that power was exercised by the Director Human Resources and Development and in relation to the 3rd Plaintiff, the Chairman of the Board which is also in contravention of the terms of the contract.

Based on the foregoing, I find that the non-renewal of the contract by the Defendant was contrary to the terms of the contract of employment.

In view of the above findings, I cannot fathom why the Defendant proceeded in this manner by not complying with the terms of the contract of employment if indeed all it wanted was to exercise its power not to renew the contracts. I say so because it is very clear that in the Special Board Meeting of 14th November, 2012, the Board resolved that a person be appointed to act in the position of CEO. However, the Defendant chose not to wait for the appointment of the person to act so that it could comply with the terms of the contract of the employment.

Therefore, given the circumstances of the case and the manner in which the Plaintiffs were separated from employment, I am inclined

to agree with counsel for the Plaintiffs and I find that there was an orchestrated scheme by the Defendant to get rid of the Plaintiffs following their disclosure of the information about the conduct of the CEO. In so doing, the Defendant chose to ignore the terms of the contract of employment and the relevant provisions of the law like the Public Interest Disclosure (Protection of Whistle Blowers) Act. This in my view bordered on desperation to push the Plaintiffs out of the institution.

I should pause here and mention that under Section 45 of the Act No. 4 of 2010, an employer is supposed to establish procedures to protect its employees from reprisals that may be taken against them. This is because disclosures that are made by employees in good faith serve the public interest and should not lead to career damage and job loss.

It is therefore abundantly clear and I find as a fact that there was a causal relationship between the disclosure made by the Plaintiffs and the Defendants action to terminate and not renew the contracts of employment. This means that the Defendant did not comply with the provisions of the Act No. 4 of 2010 in as far as

safeguarding the rights of the Plaintiffs as whistle blowers was concerned.

It is immaterial whether one is a servant under the Employment Act or not, an employee who makes a public interest disclosure which is protected of an employer's wrong doing to law enforcement agencies is protected under Act No. 4 of 2010 unless there is proof of acts of misconduct on the part of the employee.

I cannot therefore accept so bold an argument by the Defendant that since the Plaintiffs were servants under the Employment Act, then Act No.4 of 2010 was inapplicable. This argument is misconceived.

The Defendant as employer of the Plaintiffs who were whistle blowers cannot therefore hide under the provisions of the Employment Act that it had the right to terminate and not renew the contract of its employees when it was under an obligation to safeguard their rights against any unlawful reprisal and occupational detriment under Act No. 4 of 2010.

For the reasons that I have taken time to explain above and in answer to the second question, I find that the Plaintiffs suffered unlawful reprisal and occupational detriment as the Defendant terminated the contract of the 1st Plaintiff and did not renew the contracts of the 2nd and 3rd Plaintiffs. This is because the action taken by the Defendant was detrimental to their employment as they lost their jobs because of the public interest disclosure they made.

(iii) Are the Plaintiffs entitled to the reliefs sought?

The first relief sought by the Plaintiffs is a declaration that the Defendant's termination of the Plaintiffs contracts of employment was in violation of the Public Interest Disclosure (Protection of Whistle blowers) Act No. 4 of 2010 and was void *ab initio* for want of legality.

It is trite that the court's power to make a declaratory order is a discretionary one. In the High Court decision of **Christopher Lubasi Mundia v. Sentor Motors Limited**[3], a case I cite for its persuasive value on the subject of declaratory judgments, Chirwa J.(as he then was) held that:

> **"A declaration is a discretionary judgment which must be granted with care, caution and justice having regard to all the circumstances of the case, and not where the relief claimed would be unlawful or unequitable or where an adequate alternative remedy which disposes of all the issues is available."**

I have carefully considered the circumstances of this case. Although the Defendant has argued that the declaratory order sought herein should fail as the Plaintiffs have not proved the circumstances in which they claim they were whistle blowers, I have made a finding that the Plaintiffs were whistle blowers and they suffered detriment as a result of the disclosure they made about the CEO. This was in violation of Act No. 4 of 2010 as they were not supposed to suffer job loss.

I am therefore satisfied that this is a case in which I can exercise my discretion and grant the declaratory order sought. For the avoidance of doubt, **I hereby make a declaration that the Defendant's termination of the Plaintiffs contracts of employment was in violation of the Public Interest Disclosure (Protection of Whistle blowers) Act No. 4 of 2010 and was void *ab initio* for want of legality.**

The second relief sought is an order that the Plaintiffs be reinstated to their jobs.

The Plaintiffs contend that this is a special case in which reinstatement could be ordered as it is the only equitable and reasonable remedy the Defendant could atone the stigma pinned on the Plaintiffs. PW4 stated that he had not been able to find a job as the exit from the Defendant was a subject of most of the job interviews and that these were special circumstances justifying a grant of the order.

It is contended further that the actions of the Board/management indicated a vendetta against the Plaintiffs.

I must mention that the law is very clear when it comes to ordering the remedy of reinstatement. In the case of **Bank of Zambia v. Kasonde** [4] the Supreme Court held that:

> **"It is trite law that the remedy of reinstatement is granted sparingly, with great care and jealously and with extreme caution."**

Furthermore, in the case of **ZNBC v. Penias Tembo, Edward Chileshe and Moses Phiri** [5] the Supreme Court held:

"The power to order reinstatement is discretionary, and, apart from the gravity of the circumstances, the effect of making such an order should be taken into account."

The Supreme Court again went further in the case of **Martin Nguvulu and 34 others v. Marasa Holdings Limited (T/A Hotel Inter-Continental Lusaka)** [6] and stated that:

"We also should stress that reinstatement will not be a viable option where there has been such a loss of trust and confidence that it would not be feasible to re-establish the pre-existing harmonious employer/employee relationship."

The Supreme Court went on and stated that:

"While culpable conduct of the employer is far more likely to lead to a poisoned or inhospitable work environment than conduct which may fairly be characterised as non-culpable, the consequences of the conduct and not its characterisation should in our view be the primary focus of any remedial inquiry by a court faced with a plea for reinstatement. Thus in the present dispute, it is not so much the guilt or illegality of the actions of the respondent that counted; rather it was the effect of

the action taken by the employer on the relationship between it and the employees going forward which mattered."

While in the matter in casu I have found that the Defendant breached Act No. 4 of 2010, in view of the above case authorities, I have approached this issue of reinstatement cautiously.

In the present case, I have made a finding that in the main what led to the separation was the disclosure that the Plaintiffs made to the investigating authorities about the conduct of the CEO. The Defendant being the employer opted not to safeguard the rights of the Plaintiffs who were whistle blowers. The view I hold is that reinstatement would not be an appropriate remedy as there is a serious doubt in my mind on the continued viability of the employment relationship.

Moreover, the 1st Plaintiff left in 2012 and the 2nd and 3rd Plaintiffs in 2013. This is more than eight years. I have no doubt that the positions they held have been taken up by other people.

For the foregoing reasons, I find that an order for re-instatement would not be appropriate remedy on the facts of this case. I therefore decline to order reinstatement.

In the alternative to re-instatement, the Plaintiffs pleaded damages for unlawful termination of the contracts of employment and damages for mental anguish and distress.

I have made a finding that the Plaintiffs suffered unlawful reprisal as a result of the disclosure that they made. Section 50 (1) and (2) of Act No. 4 of 2010 provides that:

> 1. **"A person who engages in an unlawful reprisal is liable in damages as any person who suffers detriment as a result of the unlawful reprisal.**
> 2. **The damages referred to under subsection (1) may be recovered in an action in any court of competent jurisdiction."**

In the present case, the 1st Plaintiff's contract of employment was terminated whilst for the 2nd and 3rd Plaintiffs, their contracts were not renewed. I have made findings that this was contrary to the contracts of employment. Furthermore, I have made a finding that the Plaintiffs were protected under Act No. 4 of 2010.

The detriment therefore that the Plaintiffs suffered in this case is that they lost their jobs because of being brave, patriotic and courageous by exposing malfeasant at the institution.

I find that the action taken by the Defendant was therefore unlawful and that the Plaintiffs are therefore entitled to damages for unlawful termination and non-renewal of their contracts.

When awarding damages for loss of employment, I am mindful that the common law remedy for wrongful termination of a contract of employment is the period of notice. In deserving cases, depending on the circumstances of each particular case, awards more than the common law damages as compensation for loss of employment are made.

A case in point is the case of **Chitomfwa v. Ndola Lime Company** [7] in which the Court awarded 24 months' salary as compensation for employment loss. The rationale for awarding two years' salary as damages was due to the appellant's grim future job prospects.

However, the Supreme Court in the case of **Chilanga Cement Plc. v. Kasote Singogo**[8] stated that each case should be considered

on its own merit, future job prospects may not be the only consideration for enhanced damages in wrongful or unlawful dismissal.

The basis of awarding damages is to bring the wronged party, as far as money can do, to a position he would otherwise have been in had the wrongful act not been occasioned by the other party. In **Livingstone v. Rawyard Company** [9], Lord Blackburn defined the measure of damages as:

> **"That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."**

In the present case, it is clear from the evidence that the Plaintiffs were treated harshly and suffered abrupt job loss for being patriotic. This was not anticipated considering that there was no wrong doing on their part.

Furthermore, the disclosure was intended for the greater good of the institution and not for personal gain as the CEO's contract was

not ratified by the Board. Thus the Plaintiffs were socially responsible but they were not protected by the Defendant.

Therefore on the facts of case, the view I hold is that justice will be done if the award of damages is enhanced as the Plaintiffs suffered serious detriment of abrupt loss of employment.

Taking into account the foregoing criteria, I make the following awards as damages for unlawful termination and non- renewal of the contracts of employment.

1. I award the 1st Plaintiff thirty-six (36) months' gross salary based on her last pay as indicated on the pay slip.
2. I award the 2nd Plaintiff thirty-six (36) months' gross salary based on her last pay as indicated on the pay slip.
3. I award the 3rd Plaintiff thirty-six (36) months' salary based on his last pay as indicated on the pay slip.

The award of 36 months' gross salary as damages for the 1st 2nd and 3rd Plaintiffs shall attract interest at short term deposit rate from the date of the writ of summons until date of judgment.

Thereafter at current bank lending rate as determined by the Bank of Zambia until full payment.

The Plaintiffs have also claimed damages for mental stress and anguish.

Mental anguish as defined by Black's Law Dictionary is:

> **"A highly unpleasant mental reaction such as anguish, grief, fright, humiliation, of fury that results from another person's conduct; emotional pain and suffering."**

It further goes on to state that:

> **"Emotional damages passes under various names, such as mental suffering, mental anguish, mental or nervous shock or the like and includes all highly unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea".**

In the case of **McCall v. Abelesz and Another** [10], it was held (per Lord Denning, M.R.) at page 731 that:

> **"It is now settled that the court can give damages for the mental upset and distress caused by the defendant's conduct in breach of contract."**

The Supreme Court in the case of **Attorney General v. E.S Mpundu** [11] also stated that that damages for mental distress and inconvenience may be recovered in an action for breach of contract. In that case, the respondent claimed damages for mental distress and inconvenience suffered as a result of unlawful suspension from employment. The court awarded him damages after accepting that the respondent had suffered some mental distress and inconvenience as a result of the wrongful termination

However, in the case of ***Chilanga Cement Plc. v. Kasote Singogo***, the Supreme Court further stated that:

> **"We are of the view, however, that such an award for torture or mental distress should be granted in exceptional cases, and certainly, not in a case where more than the normal measure of common law damages have been awarded; the rationale being that the enhanced damages are meant to encompass the inconvenience and any distress suffered by the employee as a result of the loss of the job. In the circumstances of this case, where the respondent**

admitted that he was already in employment, no exceptional circumstances could arise to justify an award of a further six months' pay as damages."

The Plaintiffs in the present case stated that they suffered mental stress as a result of the action taken by the Defendant when they were just trying to be good citizens by disclosing the malfeasant at the institution through the conduct of the CEO. To be specific, the 2nd Plaintiff stated that she wanted to be compensated for the pain and embarrassment she suffered. The 3rd Plaintiff also stated that he wanted to clear his name as he had gone through a lot of anguish.

While I do acknowledge that abrupt job loss has emotional impact, the Plaintiffs did not adduce sufficient evidence of the mental stress and anguish they suffered. In any event I have awarded enhanced damages meant to encompass the inconvenience and any distress they may have suffered as a result of the abrupt loss of job.

In this regard, I decline to award damages for mental stress and anguish as this has not been sufficiently proved. This claim therefore fails.

The upshot of my findings is that the Plaintiffs have proved their case against the Defendant on a balance of probabilities as indicated herein. Costs are awarded to the Plaintiffs to be taxed in default of agreement.

Leave to appeal granted.

Delivered in Lusaka this 30th day of June, 2020

.....

M.C. KOMBE

JUDGE

The upshot of my findings is that the Plaintiffs have proved their case against the Defendant on a balance of probabilities as indicated herein. Costs are awarded to the Plaintiffs to be taxed in default of agreement.

Leave to appeal granted.

Delivered at Lusaka this 30th day of June, 2020

.....

M.C. KOMBE
JUDGE