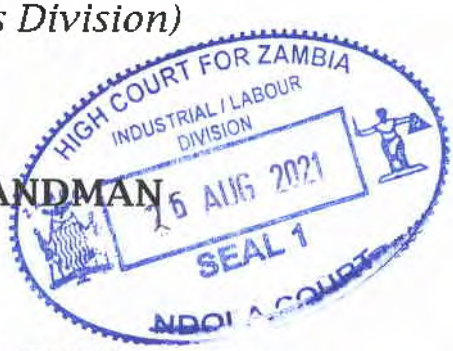
IN THE HIGH COURT FOR ZAMBIA **IRC/SL/19/2020**
HOLDEN AT SOLWEZI
(Industrial Relations Division)



BETWEEN:

MARTIN WILLEN LANDMAN **COMPLAINANT**

AND

NEMCHEM INTERNATIONAL LTD **RESPONDENT**

Before the Hon. Mr. Justice Davies C. Mumba in Open Court on the 26th day of August, 2021.

For the Complainant: Mr. M. Benwa & Mr. M. Mwachilenga, Messrs James and Doris Legal Practitioners.
For the Respondent: Mr. G. Pindani, Messrs Chonta, Musaila & Pindani Advocates

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JUDGMENT

Cases referred to:

1. ZESCO v Ivor Yambayamba & 3 Others, Appeal No. 224 of 2013.
2. Camfed Zambia v Yvonne Matebela Sichingabula, Appeal No 111 of 2016.
3. The Attorney General v Richard Jackson Phiri (1998/99) Z.R. 121
4. Dennis Chansa Vs Barclays Bank Zambia PLC Appeal No.111 of 2011.
5. Barclays Bank Zambia Plc v Weston Lyuni and Suzyo Ngulube, Appeal No.7 of 2012
6. Care International Zambia Limited v Misheck Tembo, Appeal No. 56 of 2018.
7. Caroline Tomaidah Daka v Zambia National Commercial Bank (2012) Z.R. 8 H.C.
8. Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa (1986) Z.R. 70.
9. Wessex Dairies v Smith (1935) 2 KB 80.
10. Bourhill v Young (1943) A.C. 92.
11. Finance Bank Zambia Limited and Another v Simataa Simataa, Appeal No. 21 of 2017.

12. Chilanga Cement Plc vs. Kasote Singogo (2009) Z.R. 122.
13. Fidler vs. Sun Assurance Co. of Canada (2006) 25 C.R. 3
14. Chilanga Cement v Venus Kasito, Appeal No 86 of 2015.
15. Sarah Aliza Vekhnik v Cash Dei Bambini Montessori Zambia Limited, Appeal No. 129 of 2017.
16. Mukobe Musa Bwalya v The Attorney General, Appeal No. 62 of 2012.
17. Zambia China Mulungushi Textile (Joint Venture) Limited v Gabriel Mwami, (2004) Z.R. 244 (S.C.).
18. Rabson Sikombe v Access Bank Zambia Limited, Appeal No. 240 of 2013.
19. Attorney General v Richardson Phiri (1988/89) Z.R. 121

Legislation referred to:

1. The Employment Code Act No. 3 of 2019
2. Rule 44 of the Industrial and Labour Relations Act Cap 269.

Other works referred to:

1. Tolley's Employment Hand Book
2. Winnie Sithole Mwenda and Chanda Chungu: A Comprehensive Guide to Employment Law in Zambia: UNZA Press. 2021.
3. Winnie Sithole Mwenda: 'Employment Law in Zambia: Cases and Materials', revised edition. UNZA Press 2011.
4. Chitty on Contracts, 26th Ed. Vol. II. Specific Contracts.
5. Chitty on Contracts, 28th Ed.

By notice of complaint supported by an affidavit filed into Court on 27th August, 2020, the complainant commenced this action against the respondent seeking the following reliefs:

1. **An order for the payment of the complainant's May, 2020 salary and accrued leave days;**
2. **An order that the respondent makes payment of the complainant's accrued 10% monthly commission (i.e. 10%**

of the monthly gross profits for the region) for the period February, 2018 to May, 2020;

3. **An order that the complainant was unfairly, unlawfully and/or wrongfully terminated by the respondent;**
4. **36 months' salary or such higher amount as the Court may deem fit as damages for unfair and/or unlawful and/or wrongful termination and loss of employment;**
5. **Damages for hardship, mental torture, distress, pain, suffering and anguish inflicted on the complainant by the respondent's conduct;**
6. **Interest on all sums found due;**
7. **Any other relief the Court may deem fit;**
8. **Costs of and incidental to this action.**

In opposing the complaint, the respondent filed its answer and counter-claim supported by an affidavit and denied all the complainant's claims. In its counter-claim, the respondent sought the following reliefs:

a. **An order that the complainant renders an account of all monies earned by the complainant through his enterprise Rustic from the sale of sanitisers or other similar products to FQM, among others, whilst in the employ of the respondent.**
b. **An order that the complainant pays or surrenders the proceeds of transactions in clause (a) above to the respondent.**

c. **An order of set-off of any amount owed to the complainant against the unaccounted for funds in clause (a) above.**
d. **An order that the complainant surrenders the resident permit obtained whilst in the employ of the respondent to the respondent for onward transmission to the Immigration Department for cancellation.**
e. **Interest on any money award(s).**
f. **Any other relief the Court may deem fit.**
g. **Costs of and incidental to this action.**

On 11th November, 2020, the complainant filed into Court a combined affidavit in reply to the respondent's affidavit in support of its answer and in opposition to the respondent's counter-claim.

In his affidavit and *viva voce* evidence, the complainant testified that he was employed by the respondent as a Branch Manager for Solwezi and Kalumbila branches on 26th June, 2017 under a written contract, 'MWL1' exhibited to his affidavit in support of the complaint. He stated that on 25th April, 2019, the General Manager informed him that his salary was to be fixed at $4,000.00 at the rate of K12.00, as shown by the email, 'MWL2', meaning that he was to be paid a salary of K48,000.00 per month.

The complainant testified that he used work as North-Western Regional Manager and was charged with the responsibility of

selling industrial chemicals to the mines. That when the Covid-19 pandemic broke out, the respondent ran out of stock and could not meet the demand by the mines. That he made a plan to make stock available in Zambia and offered it to the respondent to buy and sell it to the mines in order to honour its contracts but the respondent declined. He, therefore, proceeded to use his own company to supply the chemicals. He explained that what he was selling was a non-alcoholic sanitiser and he declared his intention to the respondent sometime in March, 2019, through the General Manager, Khadija and the Operations Manager, Gerald. That since there was no stock for the respondent to deliver all the pending orders from the mines, he delivered what he acquired from within Zambia to First Quantum Mineral Limited (FQM) in order to fulfill the contract. That the mine, through email, sought to clarify from the General Manager whether the respondent was aware that he was supplying sanitiser which was not from the respondent and the respondent's General Manager said that they would investigate the matter. That on or about 2nd April, 2020 he received the letter, 'MWL3' from the respondent's Human Resources Manager, RW1 informing him that he was allegedly quoting services to the mines using the respondent's name to benefit his own business and that he should give a report showing proof of the allegations against him and what had transpired. That upon receiving that information, the complainant spoke with the General Manager and informed her that he did not understand the issues raised against him; and that the said offence of conflict of interest did not exist

in his contract of employment or the respondent's grievance and disciplinary procedure code and as such, he did not know how to defend himself. That whilst talking to the General Manager, he was threatened and advised to humble himself by way of just accepting and asking for leniency. That he was also informed that the Managing Director had his own ways of dealing with such, among others, taking him to the police or taking him out of the country or being dumped somewhere alone and make his life a living hell. She also asked him to stop supplying chemicals. He stated that he informed RW1 and the General Manager that he did not do anything to prevent the respondent from gaining any business nor did he act in conflict of interest. That he also informed them that upon being informed and forced by the respondent's client to provide a disinfectant chemical that was urgently needed which the respondent did not have in stock at the time, he intended to outsource so as to deliver to the respondent's client in order to serve the respondent's reputation, as shown by the emails, 'MWL3a' from Kansanshi mine. That because he was afraid that he might be chased out of Zambia and to avoid bringing trouble to his family, he was forced to write an apology letter, in which he acknowledged that what he had done was wrong; and that he was also asked to sign the restraint of trade, 'MK3b'. That after receiving the document, he asked for some time to seek legal advice and the respondent agreed. That he also agreed that his company would not continue selling the chemicals but he would continue working for the respondent and maintain the

relationship. That on 8th April, 2020 the respondent issued the letter, 'MWL4' stating that he was being investigated and was most likely to be suspended or his employment terminated. That investigations were instituted against him and he was cleared and he worked for three to four months. That on 20th May, 2020, the respondent's General Manager informed its client, through the email, 'MWL5', that the matter had been resolved. That he was cleared and would continue working for the respondent.

When referred to the email, 'MK5c', the complainant stated that the email was written by RW1 and it stated that he and the respondent had resolved that he was not to trade in his personal capacity in chemicals unless through the respondent, but one of the customers was not happy. When referred to the letter, 'MK2d', the complainant stated that it was a letter from the General Manager where she asked him to explain the email she received from one of the respondent's customers. The complainant also testified that he had received an email, from Michelle Thomas, Commercial Manager for FQM Roads Division stating that the mine had lost confidence or trust in the respondent because of the decision it had taken concerning him. That he phoned Michelle to find out if he was indeed the problem and she told him that she was upset with the respondent because it was not delivering stock. When referred to page 5 of the email, 'MK5d', the complainant stated that it was an email that Michelle wrote to the General Manager stating that the complainant had been phoning, harassing

her about losing his job and how it had affected his livelihood; and she wanted to know if the respondent had dismissed him. That the respondent was going to lose its contract with the mine if the complainant remained in its employment.

It was the complainant's testimony that he continued to work but to his surprise, he received the letter of termination of employment, 'MWL6' by way of summary dismissal on 30th May, 2020 in which the Managing Director alleged that he had conducted himself in conflict of interest and that there was customer dissatisfaction due to the alleged conflict of interest. The complainant contended that the respondent failed to give a valid reason for terminating his employment and disregarded its disciplinary and grievance procedure code, 'MWL7' as the respondent did not charge him, subject him to a disciplinary hearing and/or allow him to exercise his right to appeal to the General Manager against the sanction as required by its disciplinary code. The complainant also averred that the respondent's General Manager ran a similar business as the respondent as she owned a lodge and similar travels business to that which the respodendet owned under the name Shamba Lodge and Shamba Tour and Travels.

With regard to his claim for commission, the complainant testified that on or about 2nd February, 2018 the respondent offered him 10% commission on its gross profits for all sales over and above

the average monthly sales target of K900,000.00 with effect from the said date, as shown by the email from the General Manager, 'MWL1' exhibited in his affidavit in reply. That he accepted the offer, thereby making it a term of his contract. That he reached the sales target by signing contracts with companies that needed cleaning contracts with industrial chemicals, such as FQMO, Kansanshi mine, Mary Begg clinic, Kalumbila, Lumwana Mine, schools and colleges. That for instance, the cleaning product for FQMO was K300,000.00 whereas as the contract for Kansanshi mine was K1,400,000.00 without cleaning chemicals while the cleaning contract was K300,000.00 to K400,000.00 per month. That for Mary Begg clinic, the contract was K800,000.00 whereas the sales contract for Kalumbila mine was $20,000.00 to $25,000.00 per month. That for EDUCO, the contract was over K400,000.00 per month for three years. That the above figures were sufficient to meet the monthly target. That the Financial Manager, Mr. Banda used to send him the figures on a monthly basis for him to claim commission. That he was never given any reports and he got all his information he was supposed to use to submit his report to headquarters from the physical invoices he made out with the North Western Region. The complainant produced the said contracts as 'MWL8' collectively. That if he were to add the figures on all the contracts, his 10% commission should have been calculated on the amount of over K300,000.00 on a monthly basis. It was his evidence that the respondent had

refused, failed and/or neglected to pay him his accrued 10% monthly commission.

That the respondent did not also pay him for his accrued leave days and his salary for the month of May, 2020.

In reaction to the respondent's counter-claim, the complainant also testified that the respondent did not help him acquire his resident permit as he had acquired it in 2010 or 2012. He also stated that the respondent knew how much he had earned through his business, Rustic Limited, as it had his bank statements and also that his earnings had nothing to do with the respondent after clearing him through the investigations it conducted. Further, that it was not correct that Rustic Limited had earned more than K200,000.00. That his total profit must have been K10,000.00 to K15,000.00 because he had to buy the chemical and also transport it. When referred to the purchase orders, 'MK5a' and 'MK5b', the complainant stated that the said purchase orders were from FQM to Rustic Company Limited in the amount of K121,000.00 for the supply of non-alcoholic liquid sanitiser. That he had delivered the first order and was paid for it but the second one was cancelled as the mine did not get a response from the respondent over his investigations. The complainant explained that the respondent used to manufacture its own industrial chemicals using alcoholic sanitiser. That it never used to make the products he was dealing in. That he had offered his chemical to the respondent on

numerous occasions as it was already registered with the mines as a chemical supplier but he was told that the respondent was not interested by the General Manager, Khadija. That he had also declared his interest.

During cross-examination, the complainant confirmed that he knew that as an employee of the respondent, among his duties to the respondent, was the duty of honesty and fidelity. That as an employee, he had the duty to avoid engaging in competing business with the respondent. When referred to the email, 'MK2g', the complainant admitted that according to the said email, the chemical he quoted to the mine was not specified as non-alcoholic. He also admitted that in the said email, Khadija told him not to engage in chemical business. He, however, stated that he could not tell from the email whether FQMO had expressed discomfort in dealing with him. He stated that Khadija allowed him to supply and she knew that he had supplied. He admitted that when he became the Regional Manager in 2017, the respondent had running businesses within the region. That he came in to manage and improve on the businesses and also that he used to receive a salary. He stated that from 2017, he could market the respondent's business without receiving any commission. He admitted that he used his personal email address, and not the respondent's email address when he sent the quote to FQM and it was because the respondent was not intended to know. He also admitted that FQM complained to the respondent about him quoting the company

using his private company. That according to the email, after FQM reported him to the respondent, he started harassing the Commercial Manager from the mine and the respondent was not pleased with that. That the respondent informed FQM that it would investigate the matter. He stated that he and the respondent did not resolve the matter right away but the respondent told him that it would resolve the matter and requested for all the documents on which he supplied chemicals to FQM under Rustic Limited. He stated that he emailed the documents to the respondent except the bank statement for Rustic Limited. He admitted that the respondent never knew how much he had been making from his private business. He denied that the respondent dismissed him after investigations but stated that his letter of dismissal made reference to conflict of interest and customer dissatisfaction. He stated that he was paid about K200,000.00 by FQM when he supplied the sanitisers under Rustic Limited. That he did not produce the invoices for the transaction before Court. When referred to the email, 'MWL1', the complainant admitted that in the said email, he was informed to push sales and that the commission was intended for ordinary sales made away from running contracts. He admitted that the respondent's contract with FQM and EDUCO were as a result of tenders submitted by the respondent. That the companies had advertised and the respondent, as well as other bidders responded to the adverts. He stated that Kansanshi was a new business but it had advertised for a tender and the respondent responded. He admitted that the

submission of the bids was a collective effort of all the employees of the respondent. He also admitted that the contract with Mary Begg was also as a result of the respondent responding to a tender and the contract was already running before he joined the respondent. He stated that he had a monthly report with figures which he had sent to the Country Manager to show that he had reached the monthly target, but he did not produce the said report before Court. He also stated that he did not produce his own summary of the tabulations of the sales and commission. The complainant admitted that after the complaint by FQM to the respondent, he continued to work for three to four months. That the respondent wanted concrete evidence before it could deal with him. He stated that he understood what conflict of interest meant. That he had offered the chemical opportunity for the mine to the respondent many times but he did not have any evidence in form of documents or email to that effect. That he had declared his intentions to the General Manager, Khadija. He also stated that Khadija had told him never to deal in chemical business with anyone else but he went ahead and supplied to the mines. He confirmed that he was asked to write an exculpatory statement or report regarding his dealings using his private company and he emailed it to the Human Resources Manager. He stated that he did not know RW1. When referred to the letter, 'MWL3', the complainant stated that the said letter was authored by the Human Resources Manager, RW1 and it was addressed to him. That at that point, he knew RW1. He stated that he did not avail the respondent

the invoice from Rustic Limited when it asked for his report. He admitted that in his email, he submitted a report for his friend using his company but he never mentioned his friend's name in the emails. That his friend's name was Simon and he used to work for FQM. He admitted that an employee of FQM was not supposed to get involved in supplying and tendering. He denied that he and Simon were working together to do illegal things. He stated that he did not indicate who Simon was in his report. He stated that he provided the money to buy the chemicals that he supplied using Rustic Limited. He stated that he had produced his resident permit before Court. He also stated that the profit he had made from his supplies using Rustic Limited was in the range K10,000.00 to K15,000.00 but he did not produce any documentary evidence before Court to prove the actual cost of the supply.

In re-examination, the complainant stated that in the email he sent using his Rustic email address, he spoke confidently about the respondent and defended it as the client knew that he was with the respondent. He stated that he did not harass FQMO's Commercial Manager but he made a humble phone call to find out why she was saying the things she had been saying; and to tell her that he was not the one giving the bad service but that the respondent had failed to deliver. He stated that when the respondent started its investigations, he submitted all the required documents they had asked for and he would have submitted more documents had the respondent not dismissed

him. The complainant also stated that the respondent used to manufacture alcohol based sanitiser whilst he used to supply UK based sanitiser which was water based and different from the respondent's. He also explained that his commission was calculated on gross profit on any invoice whether it was an ordinary sale or tender. He stated that after his discussion with Khadija, he submitted one quotation to the Procurement Manager. That he was forced and threatened to do so because he was pushed to survive. That he had to write the email because he was scared as he had never received any commission or any other money and he just supplied chemicals that the respondent could not supply to a customer.

The respondent's evidence came from Muwina Kalumiana (RW1), the Human Resources Manager through his affidavit in support of the answer and counter-claim filed into Court on 7th September, 2020 and at the trial. The witness confirmed that the complainant was employed by the respondent as Branch Manager for its Solwezi and Kalumbila branches but that the employment was with effect from 1st January, 2018 and not 26th June, 2017 as shown by the letter of confirmation, 'MK1'. It was his evidence that the respondent used to supply a wide range of hand sanitisers, including both alcoholic and non-alcoholic. The witness testified that the respondent had received a complaint from one of its clients, FQMO, to the effect that the complainant was supplying materials which the respondent used to supply to the mines; and

that it was not happy with such a relationship from the respondent. He stated that after receiving the complaint from FQMO, he was asked by management to engage the complainant and he wrote the letter, 'MK2d' to the complainant asking him to explain the allegations that were levelled against him. The witness stated that in its communication to the complainant, the respondent was looking at the possibility of the complainant providing proof of the business transaction he was involved in by way of submitting receipts, invoices, bank statements and so on, but he did not do so. That the complainant first spoke to the General Manager, Khadija who advised him to respond to the letter. He denied that the General Manager made threats to the complainant and advised him to just admit the allegations levelled against him. It was his evidence that based on the respondent's disciplinary code, 'MWL7', fraud, gross misconduct and dishonesty were disciplinary offences which entitled the respondent to dismiss an erring employee summarily on first breach. Further, that an employee, such as the complainant, had an implied duty of fidelity to serve the employer honestly and faithfully and a duty not to compete with his employer's business which he breached with impunity. That the complainant had engaged in competitive business with the respondent's customer in clear breach of the implied duties of an employee; and contrary to the terms and conditions of employment and the disciplinary code. He stated that at no point did the respondent state or write that the complainant had been cleared of any wrong doing and the

complainant refused to sign a non-competition agreement, as shown by the email and the unsigned non-competition agreement, 'MK3b'. That the complainant had been issuing threats to officers of the respondent's clients who complained about his behavior and secret business and the respondent was doing damage control to avert possible cancellation of the contract with the affected client. That the respondent's management continued to engage the complainant over the matter and eventually summarily dismissed him. The witness stated that the complainant was dismissed following his exculpation letter and investigations which revealed overwhelming evidence of misconduct, dishonesty and fraud as well as conflict of interest when he supplied cleaning sanitisers to its customers in his role as Branch Manager for the respondent to the respondent's detriment. That it was proved that the complainant was engaged in the business that the respondent was engaged in without authorisation. He denied that the complainant declared his business transaction to his supervisor, Khadija. He also denied that Khadija used to engage in competitive business with the respondent's clients. Further, the witness denied that the respondent terminated the complainant's employment without a valid reason and disregarded its disciplinary code. That the offence of conflict of interest and its sanction did not exist in the disciplinary code and the contract of employment.

With regard to the complainant's claim for sales commission, the witness denied that on 2nd February, 2018, the respondent offered

the complainant 10% commission on its gross profits for all sales over and above the average monthly sales target. That the alleged 10% sales commission was never agreed to in the accepted offer of employment, 'MWL1'. That the 10% sales commission was an incentive based on the net sales beyond a specific monthly sales target which the complainant never at any one time or month achieve during his employment period and as such, was not eligible and/or entitled to the stated 10% sales commission. That the sales from already earned businesses through tendering did not attract commission. That the process of tendering could not be attributed to a single employee hence no single employee earned commission on such business. That there was no commission earned from the businesses from FQM, Kansanshi Mines, Mary Begg clinic, EDUCO and other businesses because they were tendered, and that according to the respondent's records, the target of K900,000.00 was not met by the complainant. Further, that the complainant never complained about commission during the course of his employment. That the complainant had never brought out the issue of commission until he brought the matter to Court. When referred to the email, 'MK5d', the witness stated that the email was sent to Khadija, the respondent's Country Manager.

The witness further testified that after dismissing the complainant, a payment of his dues was prepared in line with his termination letter, but the separation package, 'MK4c' was not

accepted by the complainant. That the separation package comprised the complainant's May, 2020 salary and accrued leave days.

It was also RW1's evidence that the complainant had made secret profits in excess of K216,858.00 as shown by the copies of some purchase orders and emails, 'MK5a-b' from his dishonest conduct, breach of trust and misconduct under his company, Rustic Limited which he refused to surrender to the respondent. That the respondent was justified in summarily dismissing the complainant as there was overwhelming evidence of dishonesty, misconduct and breach of implied duties of fidelity of an employee to the employer and that the complainant confessed and admitted to the same. That the complainant had also written an exculpation letter.

During cross-examination, the witness stated that his duties were restricted to human resource management but he still knew what the respondent used to supply. That he used to get records of the stock on request. The witness admitted that he knew the procedures to follow when exercising disciplinary powers against employees which were provided for in the contracts and disciplinary code. That the complainant had signed a contract and was also subject to the disciplinary code. When referred to the complainant's contract of employment, 'MWL1', the witness confirmed that it did not provide for conflict of interest. When

referred to the disciplinary code, 'MWL7', the witness stated that the punishment for conflict of interest was summary dismissal but it was not indicated in the code. That the document contained nothing about customer satisfaction and conflict of interest. He admitted that the contract and the disciplinary code provided for the procedure to follow in the disciplinary process. He stated that it was not odd for the General Manager to be involved in the disciplinary hearing. That the General Manager was senior to the complainant and he was the one the complainant was supposed to appeal to. He also stated that the also became involved in the process. He stated that the respondent did not need external forces to discipline its employees but whether or not it was wrong to use external forces as the basis for disciplining employees depended on the nature of the case. That it would be wrong for a manager from another company to ask the respondent to fire an employee. When referred to the email, 'MWL5' the witness admitted that Khadija was his boss as well as the complainant's boss. That on 20th May, 2020, Khadija informed someone that the issue involving the complainant had been resolved and the witness did not complain about her decision. When referred to page 3 of the email, 'MK5d', the witness stated that according to the said email, the respondent resolved that the complainant should sign a restraint of trade with the respondent. That the decision was made in the middle of investigations and not after investigations. That after that, the mine sent an email stating that it was not comfortable with that arrangement because of the

complainant's unethical behavior in the past and that it would negatively affect its dealings with the respondent. He admitted that there was a threat from the mine that the respondent was going to lose the mine as its client, according to page 4 of the email, 'MK5d', but he denied that it was the reason the complainant was dismissed. When referred to page 5 of the e-mail, 'MK5d' dated 29th May, 2020, the witness admitted that the said email was written before the complainant was dismissed. That the complainant was dismissed the next day. He denied that the procedure was not followed. He admitted that the Director signed the letter of dismissal but that that did not take away the complainant's right of appeal.

Further, the witness stated that he did not produce any document before Court to show that the respondent used to supply non-alcoholic sanitisers. He admitted that the mine used to get sanitisers from different companies. He stated that he was not privy to the discussions the complainant had with the General Manager so he did not know if the complainant had offered a certain product to the General Manager. When referred to the email, 'MWL1' exhibited to the combined affidavit in reply, the witness confirmed that that was the document which was the basis upon which the complainant was entitled to be paid commission by the respondent. That the document provided that the complainant's entitlement to commission was 10% incentive bonus on all gross profits above K900,000.00; and that it did not

talk about new or old business. He admitted that he was aware of the complainant's request for commission. He stated that the complainant was entitled to commission but he could not tell whether he had been paid. The witness stated that he did not produce any document before Court to show that the complainant had not met his monthly target. When referred to the contracts, 'MWL8' between Kansanshi mine and the respondent, the witness stated that during that period the complainant was Regional Manager for the respondent. That the amount indicated on the last page of the contract was K327,860.00 but he disagreed that the complainant had met the target of K900,000.00 mentioned in the email, 'MWL1'. The witness stated that the complainant had never been charged with the offence of fraud or dishonest conduct, but that there was a charge letter that was produced before Court. He confirmed that the respondent had requested the complainant to produce bank statements, receipts and invoices although not expressly. He also confirmed that the complainant had submitted a report and the respondent did not request for any further information from the complainant after receiving the report because the complainant's response was conclusive as the complainant had admitted. He stated that when he wrote to the complainant the letter, 'MK5', it was copied to Kansanshi mine and they also informed Kansanshi mine that they had written the said letter to the complainant and would communicate the outcome. That the respondent informed the mine that it had separated with the complainant and a new Regional Manager had since reported.

When referred to page 3 of the email, 'KM5d', the witness stated that the initial outcome from the respondent was that the complainant would sign a restraint of trade agreement and it was communicated to the mine. That there was no appeal either from the respondent's management or the complainant against the restraint of trade agreement but the complainant kept on asking for time to look at it. That the respondent terminated the complainant's contract because the resolution was not concluded as the complainant had not signed the restraint of trade agreement. When referred to page 5 of the emails, 'KM5d', the witness confirmed that the document was written before the complainant was dismissed and after the resolution to sign a restraint of trade agreement. That the respondent did not indicate the instruction from FQM in the complainant's letter of dismissal. When referred to the financial report, the witness admitted that there were signs of improvement in the respondent's business not only as a result of the complainant's efforts but also as a result of efforts from all other employees.

In re-examination, the witness stated that as an employee of the respondent, he was not only interested in the core business of the company but he was also involved in the business activities hence his knowledge about the sanitisers. When asked to show provision for conflict of interest from the letter of employment, 'MWL1' and disciplinary code, 'MWL7', the witness stated that the respondent's disciplinary code was structured in such a way that

one offence would encompass actions that would lead to violation of an offence. He stated that the complainant's dismissal was not based on external forces but the complainant did not honour the agreement for the restraint of trade. When referred to page 3 of the email, 'MK5d', the witness stated that the respondent's management had set a roadmap on how the complainant's issue was to be resolved and signing the restraint of trade agreement was one of the conditions which the complainant was supposed to abide by. The witness also stated that if the complainant had made sales beyond K900,000.00, then 10% of the extra sales would have been his commission but he never met that target hence no payment of commission. He explained that there was a charge letter which explained what led to the taking of disciplinary action against the complainant, that is conflict of interest, and that the conflict of interest was dishonest conduct. With regard to the complainant's argument that he had no one to appeal to, the witness stated that there was overwhelming evidence against the complainant and he had actually accepted that he was guilty of the offence.

Learned Counsel for both parties filed written submissions.

Learned Counsel for the complainant submitted that the evidence on record was very clear to the effect that the respondent presented to the complainant the letter, 'MK2' asking him to give a report showing proof of the allegations of conflict of interest

that were levelled against him. That after discussions and deliberations, the respondent cleared the complainant and confirmed to a third party, FQM that it had resolved the differences with the complainant as per the email, 'MWL5' dated 20th May, 2020. It was learned Counsel's submission that on the basis of the said email, the complainant's initial alleged charge for which the aforementioned letter, 'MK2d' was issued was dealt with and closed on or before 20th May, 2020 as per the above email, 'MWL5' and the sequential result was the complainant's clearance and return to employment. He submitted that the respondent's witness, RW1 and the emails dated 20th May, 2020 and 29th May, 2020 exhibited as 'MK5' at pages 4 and 5 showed that despite the complainant having been cleared by the Country General Manager and allowed to resume work, the respondent's Managing Director, after receiving threats and ultimatums, terminated the complainant's employment contract for reasons of an alleged conflict of interest. It has been contended the real reason for the termination of the complainant's employment contract was that the respondent was forced and/or given an ultimatum to either lose their contract with the mine or dismiss the complainant. That subsequent to the above emails, the respondent, through its Managing Director, a person who was not supposed to commence any disciplinary action as he was the highest holder of the position to whom an appeal was and/or was always to be brought to, prematurely, unfairly, wrongfully and unlawfully terminated the complainant's employment contract abruptly. That the

termination was devoid of raising another or any other further charge against the complainant despite him having been cleared and allowed to return back to work; and having worked for some time. It was contended that the respondent's Managing Directors alleged reasons for the termination raised after the clearance, did not in fact exist in any of the contractual documents exhibited as 'MWL1' and 'MWL7' that were governing the employment relation between the complainant and the respondent. That the respondent was in pure breach of the law as was held in the cases of **ZESCO** v **Ivor Yambayamba & 3 Others**[1] and **Camfed Zambia v Yvonne Matebela Sichingabula**[2]. It was submitted that the respondent, in exercising the second disciplinary process of terminating the complainant's employment contract by way of summary dismissal after having cleared the complainant, was under a duty to raise a new appropriate charge, request an exculpation to be done by the complainant, and subject him to a hearing. That, however, the respondent breached the requirement of the law and its own laid down procedures by terminating the complainant's employment devoid of a valid reason and/or affording him an opportunity to be heard, that is, charging him, allowing him to be heard and/or subjecting him to a disciplinary hearing as established by section 52(3) of the Employment Code Act. Learned Counsel also submitted that under section 52(1) of the Employment Code Act, the respondent was mandated to pay the complainant's wages and other benefits due to the him up to the date of the dismissal but the respondent has refused, failed and/or neglected not only to

pay him his entitled 10% commission on all the gross profit of the respondent's transactions but also his accrued leave days and salary for the month of May, 2020.

Learned Counsel referred this court to the respondent's Country General Manager's email, 'MWL1' where the complainant's remuneration was changed to include a 10 % incentive bonus on gross profits for sales above K 900,000.00 and the various contracts and documents marked 'MWL8' which confirmed that the respondent made in excess of K3,500,000.00 every month in gross profits since the beginning of the year 2018. That for a period in excess of 24 months, the respondent had failed, refused and/or neglected to provide sales figures so as to allow the complainant to compute his actual wages owed to him in commission.

It was learned Counsel's further submission that the respondent had endeavoured to show to the Court that the complainant breached an implied duty and that was why he was dismissed. That, however, as per the Supreme Court's directive, this Court should be very slow to read in an implied term into an employment contract, or indeed any other contract, that parties make for themselves especially where the terms are unambiguous. That the record was clear that the parties were governed by a written contract and a written disciplinary code of conduct which ought to be interpreted by this Court. That in any event, the respondent's

Managing Director merely terminated the complainant's contract without affording him a chance to be heard. It was submitted that the respondent had not in any way established any special reason and/or circumstances warranting the Court to impose any implied term when all the terms of the contract had been specifically reduced into writing by the respondent itself.

Learned Counsel further submitted that in reference to the case of **The Attorney General v Richard Jackson Phiri**[3] where it was guided that any disciplinary measure taken is regarded as bad if there is no substratum of facts to support the same, there was no such substratum of fact/s that warranted the respondent to take any disciplinary measure against the complainant and that was why he was cleared; and the parties resolved their differences. That the decision and/or termination effected by the Managing Director was void of any substratum of facts to support it and in addition no proper procedure was followed.

With regard to the respondent's counter-claims, learned Counsel submitted that the said counter-claim was only placed there so as to intimidate the complainant, such as the claim for an order that this Court orders that the complainant surrenders his resident permit to the respondent. That no law requires an employee that has his contract of employment terminated to surrender a resident permit to the employer for any reason. That the reading of the law showed that the law required a foreign employee to surrender to

the employer a work permit. That the evidence given by RW1 indicated that what the respondent wished to be surrendered to them is the complainant's resident permit so that it could be cancelled. It was also submitted that the respondent had failed to lead any evidence to show that the complainant was a foreign employee and that he held any work permit which should be surrendered to it. Further, that the law was clear that it was only a work permit held by a foreign employee that could be surrendered to an employer which was totally not the case in this matter. It was submitted that the reason why the respondent wished the complainant's resident permit to be cancelled was totally unknown and the claim left much to be desired. That it was not the duty of the respondent to surrender and/or process any cancellation of any individual's resident permit as this was the preserve of the Director of Immigration and/or Immigration Officers as established by the provisions of the Immigration and Deportation Act.

With regard to the respondent's claim that the complainant gives details of the dealings by Rustic Limited, learned Counsel submitted that the record showed that Rustic Limited was an incorporated private company limited by shares and it was not a party to these proceedings. That the company was distinct from the complainant and as such, all its dealings were distinct from that of its members, Directors and/or employees. It was submitted that the ends of justice would not be met if this Court granted

orders that are affecting individuals at law that are not a party to the proceedings, from which orders affecting them are granted devoid of having granted them their constitutional right to be heard. He prayed that this Court enters judgment in favour of the complainant for all claims as are in the notice of complainant and dismiss the respondent's counter-claims for lack of merit and substance at law.

With regard to the quantum of damages, learned Counsel referred this Court to the cases of **Dennis Chansa v Barclays Bank Zambia PLC**[4] and **Barclays Bank Zambia Plc v Weston Lyuni and Suzyo Ngulube**[5]. He submitted that the complainant was unemployed at the date of hearing this case; and that his employment was terminated in an abrupt and unwarranted manner whereof the respondent even intimidated and threatened the complainant with removal of the complainant and his family out of the country. Learned Counsel also urged the Court to take into consideration the prevailing economic situation in Zambia which made it more difficult to find alternative employment. He further submitted that the complainant was employed on a permanent and pensionable basis but not only been caused to lose his expected terminal benefits but was also being subjected to great hardship as prospective employers would avoid employing him. That he had been subjected to great mental anguish. He prayed that this was a good and proper case for this Court to award 36 months' salary or

such a higher sum as the Court may deem fit; and that costs be for the complainant.

In response, learned Counsel for the respondent submitted that the complainant's claims for his May, 2020 salary and accrued leave pay were admitted and computed as shown by the computation, 'MK4c' amounting to a total of K59,250.00 which was still available. That the respondent has, however, a counter-claim for an order of set-off of any amounts owed to the complainant against the unaccounted for funds. That the respondent was seeking the application of the sum of K59,250.00 being the May, 2020 salary and leave days as computed towards the unaccounted for funds or proceeds of the competitive contract which the complainant benefited from FQM when he supplied hand sanitizers in clear conflict of interest and breach of implied duties of an employee.

With regard to the complainant's claim for accrued 10% monthly commission, that is, 10% of the monthly gross profits for the region for the period February, 2018 to May, 2020, learned Counsel submitted that from the evidence adduced in Court and on record, it was not in dispute that the complainant and the respondent entered into a contract of employment, 'MWL1' on 26th June. Citing a plethora of authorities, it was learned Counsel's submission that an employee can only enjoy employment benefits if he was eligible in terms of a written document or other

parameters set by the employer during the subsistence of the employment relationship. That in *casu*, the alleged 10% sales commission was never agreed to in the accepted offer letter, 'MWL1'. In the alternative, learned Counsel submitted that the alleged 10% sales commission as per the email, 'MWL1' was an incentive based on net sales beyond a specific monthly sales target above K900,000.00 which the complainant never, in any one single month, achieved during his employment period from February, 2019 to May, 2020 and as such, was not entitled to the stated 10% sales commission. He also submitted that the complainant did not adduce any evidence to show his monthly total sales during the period in issue outside the ordinary daily business sales or routine business of the respondent. He urged the Court not to entertain the complainant's testimony that he met the monthly sales target by virtue of monthly invoices or proceeds of the contracts for all signed contracts between the respondent on the one part and FQM and/or other organisations on the other hand because the said signed contracts were not as a result of the complainant's individual or personal effort outside the respondent's routine business or daily sales for which the complainant was receiving a monthly salary. That the signed contracts were entered into following vigorous tendering processes of the respondent and/or were already earned without the complainant's effort. That in a tender, several of the respondent's employees, including the complainant, were involved as part of the work for which they were employed to do

and paid for and the complainant could not solely claim accolades for the same to the extent of demanding commission for the proceeds of the contract(s). Learned Counsel contended that the business sales which came to the respondent's regional office in Solwezi were already earned businesses even before the complainant was employed and some contracts were merely being renewed and other contracts were entered into through tendering and could not attract the claimed 10% sales commission. Further, that the complainant, throughout his employment period from February, 2019 to May, 2020 did not raise issue or complain about non-payment of 10% sales commission because he knew that he had not met any target(s). That the email relied upon by the complainant was emphatically clear that the complainant needed to push the monthly sales to above K900,000.00. That this entailed that the complainant knew that he did not accrue or earn any 10% sales commission to be entitled to in any particular month.

Regarding the complainant's claim that his contract of employment was unfairly, unlawfully and/or wrongfully terminated by the respondent, learned Counsel submitted that for a claim of wrongful dismissal to succeed, the complainant must adduce evidence and prove that the provisions of the contract of employment and/or disciplinary code of conduct to which he was a party was breached by the respondent when he was dismissed. That, therefore, when a claim for wrongful dismissal is presented before Court, the duty of the Court was to examine if there was

breach of contract of employment by the employer in the manner the dismissal was done. Learned Counsel referred this Court to the case of **Care International Zambia Limited v Misheck Tembo**[6] and the learned author of **Tolley's Employment Hand Book** in support of this position. Learned Counsel also submitted that unfair dismissal, on the other hand, is dismissal that is contrary to a statute or based on an unsubstantiated ground. He placed reliance on the case of **Caroline Tomaidah Daka v Zambia National Commercial Bank**[7] where it was held that 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 the rare remedy of reinstatement. Unfair dismissal, therefore, occurs when an employee's contract is terminated in breach of a statutory provision."**

It was learned Counsel's submission that from the evidence on record, the complainant did not deny the allegations of conflict of interest or selling sanitisers to FQM using his company Rustic Limited. That the complainant, therefore, benefitted himself and his own business/company to the detriment of the respondent, and that amounted to conflict of interest. Learned Counsel referred the Court to the case of **Zambia National Provident Fund v M Chirwa**[8], where it was held that:

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

It was learned Counsel's submission that based on the disciplinary code, the offences of fraud, gross misconduct and dishonesty were disciplinary offences which entitled the respondent to dismiss an erring employee summarily on first breach. Further, that an employee had an implied duty of fidelity to serve the employer honestly and faithfully and a duty not to compete with his employer's business. That engaging in conflict of interest was not only dishonest behavior but was also fraudulent and gross misconduct of breaching implied fiduciary duties of an employee. He placed reliance on the learned authors **Winnie Sithole Mwenda and Chanda Chungu: A Comprehensive Guide to Employment Law in Zambia, 2020 at page 52** where they stated that:

> **"Every employee is under an implied duty to serve his employer faithfully. This is a fundamental duty of an employee which affects every other implied duty of the employee. The duty of fidelity entails being on time to work, exercising reasonable care and skill, being ready and willing to serve the employer and not act in a manner contrary to the employer's interests. The duty of good faith, loyalty and fidelity is a broad concept that can be broken down into other sub-duties and of interest to this case are the duties to avoid conflict of interest, avoid solicitation of customers and the duty not to work against the employer's interest."**

Learned Counsel also referred the Court to the emails, 'MK2f' and 'MK2g' from the complainant and submitted that the complainant admitted wrong doing, that is, dishonesty and gross misconduct and apologised. That the complainant clearly conceded engaging in competitive business with the respondent by supplying

sanitisers to FQMO using his company, Rustic Limited. That the complainant refused to disclose, by way of invoices, how much money he was paid for this business by FQMO or how much secret profit/commission he made from the supply of the sanitisers. That he also refused to avail the bank statement for Rustic Limited to show how much money came into his company account from this business. Learned Counsel urged the Court not to accept the complainant's testimony that the sanitisers he supplied were non-alcoholic and were different from the alcohol based sanitisers supplied by the respondent to FQMO. That the evidence of RW1 was clear that the respondent made both alcohol based and non-alcohol based sanitisers and/or could easily source for the same from its sister companies within the Southern and East African Region countries. It was his submission that according to **Winnie Sithole Mwenda and Chanda Chungu: A comprehensive Guide to Employment Law in Zambia, 2020 at page 61**, an employee cannot use the employer's property for his own personal use, without consent or for another job. Learned Counsel referred this Court to the case of **Wessex Dairies v Smith**[9] where it was held that:

> **"An employee cannot undertake work for himself or for other persons during his working hours. Courts often permit the right of an employee to benefit from entrepreneurship if his business activity is not in conflict with the interests of the employers business, does not interfere with the work he is to carry out during his normal working hours and no damage will be caused to the employer."**

Learned Counsel submitted that there was overwhelming evidence on record of the complainant's gross misconduct, which merited or warranted the decision of summary dismissal. That the complainant conceded in his testimony at trial that he outsourced disinfectant chemicals to supply to the respondent's client as the respondent could not supply the chemicals to its customers in order to fulfill the continued service.

He also submitted that the complainant was given a chance to exculpate himself on the allegations of supplying sanitisers to FQM and he wrote a report. That, therefore, the rules of natural justice were followed. That the complainant was heard and that his dismissal was not wrongful or unlawful or unfair.

That it was trite law that an employee was under a duty not to solicit his employer's customers for his own benefit. That such conduct would be regarded by the Courts as breach of duty to give faithful service and good faith. That the complainant, in addition to engaging in competitive business with the respondent's client, FQMO, he went to the extent of threatening FQMO's officers when they complained about his behaviour, which was in clear breach of his implied duties as an employee and contrary to the terms and conditions of employment and disciplinary code. That in addition, when asked to sign a non-competition contract or restraint of trade agreement, the complainant declined. That this was an indication that the issue was not resolved. That the

complainant had made a secret profit in excess of K216,858.00 from his secret competitive business, dishonesty, breach of trust and misconduct which ought to be surrendered to the respondent. That no injustice was done to the complainant by summarily dismissing him. That he had committed the offence(s) which justified the dismissal. Learned Counsel urged the Court not to accept the complainant's submission that he was already punished or that the parties had already agreed that the complainant's misconduct had been resolved. He denied that the respondent was forced by FQMO to dismiss the complainant.

With regard to the complainant's claim for 36 months' salary or such higher amount as the court may deem fit as damages for unfair and/or unlawful and/or wrongful termination and loss of employment, learned Counsel submitted that it is trite law that before damages can be recovered in an action, there must be a wrong committed, whether the wrong be a tort or a breach of contract. He placed reliance on the case of **Bourhill v Young**[10]. Learned Counsel also cited the case of **Finance Bank Zambia Limited and Another v Simataa Simataa**[11] where the Supreme Court held that:

> **"Damages in the law of contract are awarded for the purpose of putting the innocent party in the position in which he would have been had the contractual obligations been performed. Damages are payable in the case of breach of contract of employment in much the same way as they are payable in other cases of breach of contract."**

It was learned Counsel's submission that it had been established that there was a contract between the complainant and respondent and that there was no breach of contract. That, therefore, the payment of damages did not arise. Learned Counsel also urged the Court to take into account that the complainant had a company called Rustic Limited which he used whilst in the respondent's employment and in direct competition with the respondent to supply sanitisers to FQM and made in excess of K216,858.00. That the respondent was justified in summarily dismissing the complainant following overwhelming evidence of dishonesty, misconduct and breach of implied duties of fidelity. That it was logically inconceivable for the complainant to claim for damages in the face of overwhelming evidence of misconduct as to what he did, what he confessed to and admitted and apologised. That the complainant failed to prove his case and was, therefore, not entitled to damages; and his claim for 36 months' salary or such higher amount as the Court may deem fit as damages for unfair and/or unlawful and/or wrongful term and loss of employment should not be entertained by this Court. He further submitted that the dismissal of the complainant was justified and that the complainant was a South African national on a work permit in Zambia. That employment prospects in South Africa which is more industrialised than Zambia were very high as compared to Zambia. That the complainant was also a proprietor of a company, Rustic Limited and could continue running his business as his livelihood is not completely dependent on a salary.

Regarding the complainant's claim for damages for hardship, mental torture, distress, pain, suffering and anguish inflicted by the respondent, learned Counsel submitted that damages for mental distress and inconvenience are recoverable in an action for breach of contract where the object of the contract includes the implied provision for peace of mind or freedom from distress. He referred the Court to the case of **Chilanga Cement Plc v Kasote Singogo**[12] where the Supreme Court held that:

> **"We are of the view that such an award for damages 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."**

He also referred the Court to the case of **Fidler vs. Sun Assurance Co. of Canada**[13] where it was held that:

> **"Damages for mental distress could be awarded if such arises naturally from such breach of contract itself."**

That the damages for mental distress granted beyond notice period must be shown to have been within the contemplation of the parties at the time of the contract and that the psychological distress arose from the manner of termination. That an employee should, therefore, prove that the manner of dismissal caused mental distress. It was contended that the complainant's dismissal was lawfully done; and that the complainant did not produce any medical evidence to substantiate mental distress. Further, that the evidence on record revealed that the contract of employment did not show that the parties contemplated a psychological distress

resulting in a dismissal at the time of framing the employment contract. That the complainant may have experienced normal distress and hurt feelings when he was dismissed but these feelings were not compensable as a dismissal such as the one that affected him was a clear legal possibility as a result of breach of contract by the complainant himself when he engaged in conflict of interest and breaches of fiduciary duties. That the complainant could not benefit from his own money.

In conclusion, learned Counsel submitted that the complainant had failed to prove, on a balance of probabilities, that he was entitled to the reliefs he was seeking and that he was not entitled to any of the reliefs contained in his notice of complaint. That the complainant's involvement in the breach of implied fiduciary duties and conflict of interest was gross misconduct or was a grave or serious breach of acceptable or known employer -employee relationship. He urged the Court to dismiss the notice of complaint and that each party bears his/its own costs in accordance with **Rule 44 of the Industrial and Labour Relations Act, Cap 269.**

Regarding the respondent's counter-claim, learned Counsel submitted that since the complainant did not dispute that he supplied sanitisers to FQMO using his company, Rustic Limited in direct competition with the respondent, he must render an account of all monies he earned through his competitive business and surrender to the respondent. Further, that the Court should

order or set off the complainant's May, 2020 salary and leave pay against the unaccounted for funds and losses suffered by the respondent.

I have considered the affidavit and *viva voce* evidence as well as the final submissions by both parties and the authorities referred to.

The facts which were common cause are that the complainant was employed by the respondent as a Branch Manager for Solwezi and Kalumbila under a written contract, 'MWL1' with effect from 1st July, 2017. The respondent company was in the business of supplying sanitisers and industrial chemicals to several institutions, among them, FQMO. At the material time, the complainant was employed as North-western Regional Manager charged with the responsibility of supplying sanitisers and industrial chemicals to several institutions, among them, FQMO.

By the email dated 18th February, 2019 the respondent revised the complainant's conditions of service which included the introduction of 10% commission per month on its gross profits for all sales above K900,000.00. The revision of the said conditions of service is as shown by the email from the General Manager, 'MWL1' exhibited in the complainant's affidavit in reply. On 25th April, 2019, the respondent, through the email, 'MWL2' informed the complainant that it was fixing all dollar based salaries in kwacha

due to the constant fluctuation in exchange rates. Therefore, the complainant's monthly salary of $4000.00 was fixed at the rate of K12.00 equivalent to K48,000.00 per month.

Whilst in the employment of the respondent, the complainant began his own business of supplying sanitisers and chemicals to one of the respondent's client, 'FQMO' through his company, Rustic Limited. His action did not sit well with FQMO so it lodged a complaint against the complainant with the respondent. By the letter, 'MWL3' dated 2nd April, 2020, the respondent wrote to the complainant alleging that the complainant's conduct amounted to conflict of interest and asked the complainant to write a report concerning the said allegations. In his exculpatory emails dated 2nd April and 9th April, 2020 exhibited as 'MK2f' and 'MK2g' respectively, the complainant admitted being in the wrong and offered an apology. The respondent resolved that the complainant was going to continue working for it on condition that he signed a restraint of trade agreement. However, the complainant did not sign the said restraint of trade agreement. Subsequently, on 30th May, 2020, the respondent dismissed the complainant for the offence of conflict of interest and customer dissatisfaction due to the alleged conflict of interest. At the time of termination of the complainant's contract of employment, the respondent owed him one month salary for the month of May, 2020 and payment for accrued leave days as at 30th May, 2020 as shown by the letter of termination, 'MWL6'.

From the evidence on record, the issues for determination are, therefore, as follows:

1. Whether the complainant is entitled to the payment of the salary for the month of May, 2020; and for accrued leave days.
2. Whether the termination of the complainant's employment was wrongful and unfair thereby entitling him to damages.
3. Whether there was sufficient evidence warranting the dismissal of the complainant for the offence of conflict of interest.
4. Whether the complainant is entitled to the payment of 10% monthly commission on gross profits in excess of K900,000.00 for the period February, 2019 to May, 2020.
5. Whether the complainant should surrender his resident permit to the respondent for onward transmission to the Immigration Department for cancellation.

Regarding the first issue, since there is no dispute that the respondent owes the complainant a total sum of K59,250.00 for his accrued leave days and May, 2020 salary. I enter judgment in favour of the complainant in the said sum.

I now turn to the second issue which is *whether the termination of the complainant's employment was wrongful and unfair.*

Before discussing the above issue, it is my considered view that it is important to resolve the question whether or not the complainant was cleared of the allegations leading to his dismissal grounded on the offence of conflict of interest.

The complainant has contended that he should never have been dismissed based on the offence of conflict of interest from which he was cleared by the respondent as shown by the email, 'MWL5'. On the other hand, the respondent has argued that the complainant was never cleared of the allegations of conflict of interest because he declined to sign the restraint of trade agreement which was a condition precedent to his clearance of the allegations levelled against him.

I quite agree with the respondent that the complainant was not cleared of the allegations of conflict of interest because he had not fulfilled the condition precedent as can be deduced from the email, 'MWL5'. It is not in dispute that the complainant did not sign the said restraint of trade agreement. Had he signed the restraint of trade agreement, the differences that the two parties had would have been put aside. The perusal of the email, 'MWL5' shows that the email simply conveyed the message that differences were to be resolved upon signing of the restraint of trade agreement and not otherwise. In this regard, the allegations of conflict of interest continued to exist up to the time the complainant was dismissed from his employment. Therefore, I

find that the allegations against the complainant were not cleared, and this entitled the respondent to take the necessary disciplinary action against the complainant.

I now turn to determine the main issue of whether or not the complainant's dismissal was wrongful and unfair.

It is settled that for an employee to successfully bring and maintain an action for wrongful dismissal, it must be shown that the employer breached the disciplinary procedures under the contract of employment and/or the rules of natural justice. Therefore, the legal and evidential burden rests on the complainant to prove that his dismissal from employment was wrongful. Hon. Judge W.S. Mwenda, learned author of the book entitled '**Employment Law in Zambia: Cases and Materials'** states at page 18 that:

> **"The concept of wrongful dismissal is the product of common law. When considering whether a dismissal is wrongful or not, the form, rather than the merits of the dismissal must be examined. The question is not why, but how the dismissal was effected."**

Further, in the case of **Chilanga Cement v Venus Kasito**[14], the Supreme Court held that:

> **"The concept of wrongful dismissal is essentially procedural and is largely dependent upon the actual terms of the contract in question."**

in its disciplinary code and/or that the rules of natural justice were breached. In proving that the rules of natural justice were breached, the complainant must show that the respondent was biased against him and/or did not accord him an opportunity to be heard.

In the present case, the complainant has contended that the respondent dismissed him without laying a formal charge against him; without subjecting him to a disciplinary hearing; and without allowing him to exercise his right to appeal to the General Manager against his summary dismissal as provided by its disciplinary code. On the other hand, the respondent denied having disregarded its disciplinary procedures stipulated in its disciplinary code. It argued that the complainant was dismissed following his exculpatory letter and investigations which revealed overwhelming evidence of misconduct, dishonest and fraud as well as conflict of interest when he supplied sanitisers to its customers while employed as Regional Manager for the respondent to the respondent's detriment.

The perusal of the respondent's disciplinary and grievance procedure code, 'MWL7' at page 1 has shown the disciplinary procedure that ought to be followed in the disciplinary process of an erring employee. There is a provision that a detailed complaint form should be completed by the immediate supervisor of the offending employee and forwarded to management. Management

As regards the concept of natural justice, the Court of Appeal in the case of **Sarah Aliza Vekhnik v Cash Dei Bambini Montessori Zambia Limited**[15], observed that:

> **"In English law, natural justice is a technical terminology for the rule against bias *(nemo judex in casua)* and the right to a fair hearing *(audi alteram partem)*, put simply it is the *'duty to act fairly.'* The right to a fair hearing requires that individuals should not be penalized by decisions affecting their rights of legitimate expectation unless they have been given prior notice of the case, a fair opportunity to answer it, and the opportunity to present their own case."**

In the case of **Mukobe Musa Bwalya v The Attorney General**[16], the Supreme Court observed that:

> **"It is trite that natural justice and procedural fairness demands not only that those whose interests may be affected by an act or a decision should be given an opportunity to be heard, but it also requires that a decision maker should not be biased or prejudiced in a way that precludes fair and genuine consideration being given to the arguments advanced by the parties."**

The requirement for the rules of natural justice to be complied with in order for a dismissal to be deemed fair was re-affirmed in the case of **Zambia China Mulungushi Textile (Joint Venture) Limited v Gabriel Mwami**[17] where it was held that:

> **"Tenets of good decision making import fairness in the way decisions are arrived at. It is certainly desirable that an employee who will be affected by an adverse decision is given an opportunity to be heard."**

On the above authorities, it is clear that for the complainant to succeed in his claim for wrongful dismissal, he must prove that the respondent breached its disciplinary procedures as stipulated

is then supposed to carry out investigations, take statements from witnesses and ask the offending employee to exculpate himself. Thereafter, the respondent conducts a disciplinary hearing before making a decision.

From the evidence on record, I find that the respondent did not follow the above procedure outlined in its disciplinary code in dealing with the complaint's disciplinary case. There was no detailed complaint form that was completed by the complainant's immediate supervisor and forwarded to management for investigations, and no statements were taken from witnesses prior to the decision of dismissing him. Further, there was no formal disciplinary hearing that was conducted before the respondent summarily dismissed the complainant. It is also evident that the complainant was not given the right to appeal to the General Manager. Therefore, I am satisfied that the respondent failed to comply with its disciplinary code in disciplining the complainant.

With the above scenario can it also be said that the respondent breached the rules of natural justice and section 52(3) of the Employment Code Act which provide that no man shall be condemned without being heard? It is trite that before an employee is dismissed he should be afforded an opportunity to say something in his defence. In the present case, whether the complainant was accorded an opportunity to be heard or not is strictly a factual question.

In *casu,* the complainant has contended that the respondent breached the requirement of the law by terminating his employment without affording him an opportunity to be heard, that is, without charging him, and/or subjecting him to a disciplinary hearing as established by section 53(2) of the Employment Code Act. In countering the foregoing, it was the respondent's argument that when the respondent received a complaint from one of its clients namely FQMO, RW1 wrote the letter, 'MK2d' to the complainant asking him to write a report on the allegations that were levelled against him. That the complainant first spoke to the General Manager Khadija who advised him to respond to the letter and did in fact write exculpatory statements exhibits, 'MK2f' and 'MK2g'. That the complainant was dismissed following the said exculpatory letters and investigations which revealed overwhelming evidence of misconduct, dishonesty and fraud as well as conflict of interest when he supplied sanitisers to its customers while employed as Regional Manager for the respondent to the respondent's detriment.

It is not in issue that the respondent asked the complainant to render a report with respect to the allegations of conflict of interest, and the complainant exonerated himself through the emails, 'MK2f' and 'MK2g'. There was also evidence that the complainant was personally engaged by the General Manager over

his dealings with the respondent's clients for his own benefit and that of his company, Rustic Limited; and not on behalf of the respondent, his employer. It is my firm view that the foregoing point to the fact that the complainant was accorded sufficient opportunity to be heard and to defend himself on the allegations levelled against him. I am fortified by the decision of the Supreme Court in the case of **Rabson Sikombe v Access Bank (Zambia) Limited**[18], where it was guided as follows:

> **"We note in passing that section 26A, as formulated does not prescribe the procedure in which the employee is to be afforded an opportunity to be heard on a charge against him. In these circumstances, the provisions of the section are sufficiently complied with if an employee has had an opportunity in whatever way, to ventilate his views on an issue touching on his conduct or performance prior to the termination of his services."**

In the same case of *Sikombe*[18], the Supreme Court held that:

> **"The position of the law on failure to follow procedural rules is well settled. It is that the employer is not hamstring by procedural requirements in disciplining by way of dismissal, an erring employee."**

On the above authority, it is my considered view that the fact that the complainant was asked to write a report concerning the allegations of conflict of interest and he gave an explanation through the emails, 'MK2f' and 'MK2g', and also the fact that he was given audience by the General Manager over the same meant that he was given an opportunity to be heard. Therefore, I am satisfied that the respondent did not contravene the provisions of section 52(3) of the Employment Code Act and the rules of natural

justice, as the complainant was given an opportunity to be heard prior to his dismissal.

The next question is whether there was sufficient evidence warranting the dismissal of the complainant for the offence of conflict of interest.

In the case of the **Attorney General v Richardson Phiri**[19], it was held that:

> **"Once the correct procedure has been followed, the only question which can arise for consideration of the Court based on the facts of the case, would be whether there were infact, facts established to support the disciplinary measures, since any exercise of power would be regarded as bad if there is no substratum of facts to support the same."**

In *casu*, the complainant does not dispute that he had supplied sanitisers to one of the respondent's clients, FQMO for his own benefit and that of his company, Rustic Limited. He even apologised for his wrong doing. However, he has contended that what he had supplied were non-alcoholic sanitisers whereas the respondent used to supply alcoholic sanitisers. Suppose I were to accept this position, which I do not, in my view, the business that the complainant had engaged in was substantially similar to the respondent's business, more so that he was supplying to the same clients that the respondent, his employer, used to supply to. Further, the complainant did not lead any evidence to prove that the sanitisers he had supplied to FQMO were of a different type and quality to that of the respondent's. In this regard, I am

satisfied that the complainant had engaged in a business that was in direct conflict with that of the respondent's. I also find that the complainant acted dishonestly. I am satisfied that the conduct of the complainant was deliberate and inconsistent with the continuation of his employment contract with the respondent.

According to the learned authors of the book, **Chitty on Contracts, 26th Ed. Vol.II. Specific contracts** at page 3802, it is an implied term of the contract of employment that an employee will serve the employer with fidelity and good faith. Further, the learned authors of the book, **A Comprehensive Guide to Employment Law in Zambia** state at pages 52 and 53, that an employee has the implied duty of good faith, loyalty and fidelity. That every employee is under an implied duty to serve his employer faithfully. That the duty of good faith, loyalty and fidelity entails, among others, being ready and willing to serve the employer and not to act in a manner contrary to the employer's interests; and avoiding conflict of interest.

From the foregoing, it is my considered view that even if the complainant used his own company and resources to supply chemicals to FQMO, he had acted contrary to his employer's interests. I am of the firm view that the complainant was obligated to advance the business interests of the respondent and not his own. He ought not to have solicited for orders from the respondent's clients without its approval. I, therefore, agree with

the respondent that the complainant's conduct was a breach of the duty of good faith, loyalty and fidelity. This clearly amounted to conflict of interest.

The learned authors of the book, **A Comprehensive Guide to Employment Law in Zambia** also write at page 60 that the breach of the duty of good faith may amount to misconduct as an employee must act reasonably in relation to the business of his employer. In *casu,* I am satisfied that the complainant's conduct of supplying the same or similar products to the respondent's clients for his own benefit and that of his company while in the employment of the respondent amounted to gross misconduct and dishonesty. Under the respondent's disciplinary code, the offences of gross misconduct and dishonesty attract the penalty of summary dismissal, as shown by clauses 24 and 26, respectively. Based on the evidence in this case, the respondent was on firm ground to have summarily dismissed the complainant for the subject offence. Therefore, the claim for wrongful and unfair dismissal cannot stand and is accordingly dismissed.

I now turn to the fourth issue, which is *whether the complainant is entitled to the payment of 10% monthly commission on gross profits for the period February, 2018 to May, 2020.*

The complainant argued that on 2nd February, 2019, the respondent, through the email, 'MWL1' in his affidavit in reply,

offered him 10% commission on the gross profit on all sales over K900,000.00 per month. That the respondent had since made profits over the stipulated target. However, the Financial Manager, Mr. Banda never used to send the sales figures to him in order for him to do reports for claiming the commission. The complainant relied on the contracts marked 'MWL8' as the contracts he signed during his employment with the respondent to claim the said commission.

On the other hand, the respondent argued that the alleged 10% sales commission was never agreed to in the accepted offer letter, 'MWL1' exhibited in the complainant's affidavit in support of the notice of complaint. That it was not part of the complainant's conditions of service. That in any event, the alleged 10% sales commission as per the email, 'MWL1' in the affidavit in reply was an incentive based on net sales beyond a specific monthly sales target above K900,000.00. That the complainant never, in any one single month, achieved the said target during his employment period and as such, he was not entitled to the stated 10% sales commission. It was also argued that the complainant did not adduce any evidence to show his monthly total sales during the period in issue outside the ordinary daily business sales or routine business of the respondent. That the contracts, 'MWL8' on which the complainant relied to claim that he had met the monthly sales target were monthly invoices or proceeds of the contracts for all signed contracts between the respondent on the one part and FQM

and/or other organisations on the other hand. That the said signed contracts were not as a result of the complainant's individual effort outside the respondent's routine business or daily sales for which the complainant was receiving a monthly salary but were entered into following vigorous tendering processes of the respondent and/or were already earned businesses without the complainant's personal effort. Further, that the complainant, throughout his employment period from February, 2019 to May, 2020 did not raise issue or complain about non-payment of 10% sales commission because he knew that he had not met any target(s). That the email relied upon by the complainant was emphatically clear that the complainant needed to push the monthly sales to above K900,000.00. That this entailed that the complainant knew that he did not accrue or earn any 10% sales commission to be entitled to in any particular month.

I have considered the opposing arguments from the parties.

I have noted that it was not uncommon for the respondent to communicate through email, any variations to the complainant's contract. This can be seen from the email, 'MWL2' wherein the respondent informed the complainant that it had fixed his salary at $4000.00 at the rate of K12.00, equivalent to K48,000.00 per month. Even in the said email, 'MWL1', the respondent had informed the complainant of the changes to his remuneration namely the basic salary, housing allowance and other allowances.

Therefore, I am satisfied that the variations to the complainant's conditions of service, including his entitlement to the 10% commission, contained in the email, 'MWL1' formed part of the complainant's conditions of service.

During cross-examination, the complainant conceded that the 10% commission was dependent on him pushing for sales and also that it was intended for ordinary sales made away from running contracts. He admitted that the respondent's contracts with FQM and EDUCO were as a result of tenders submitted by the respondent. That the companies had advertised and the respondent, as well as other bidders responded to the adverts. He stated that Kansanshi mine was a new business but it had been advertised for a tender and the respondent responded. He also admitted that the contract with Mary Begg was also as a result of the respondent responding to a tender and the contract was already running before he joined the respondent company. He also admitted that the submission of the bids was a collective effort of all the employees of the respondent.

It is clear from the complainant's own admissions, in cross-examination, that he had not earned the 10% commission he was claiming. Besides his own admissions of not having earned the 10% commission, the complainant did not adduce evidence to justify the fact that he had made gross profits in excess K900,000.00 per month. For these reasons, his claim for 10% accrued monthly

commission on the gross profits for the period February, 2019 to May, 2020 cannot stand and is accordingly dismissed.

I now turn to deal with the respondent's counter-claims.

The respondent claimed that the complainant should render an account of all the monies he earned through his enterprise, Rustic Limited from the sale of sanitisers and similar products to its clients, among them, FQMO. That since the complainant did not dispute that he supplied sanitisers to FQMO using his company Rustic Limited in direct competition with the respondent, he must surrender all the monies to the respondent. It was argued that the complainant had made over K200,000.00 profit. Further, that the Court should order a set off against the complainant's May, 2020 salary and leave pay for the unaccounted for funds and losses suffered by the respondent.

The complainant, on the other hand, argued that the respondent knew how much he had earned through his business, Rustic Limited, as it had his bank statements. That his earnings had nothing to do with the respondent. Further, that it was not correct that Rustic Limited had earned more than K200,000.00. That his total profit must have been between K10,000.00 to K15,000.00. He also argued that he had offered his chemicals to the respondent on numerous occasions as it was already registered with the mines as a chemical supplier but he was told that the respondent was not

interested by the General Manager, Khadija. That he had also declared his interest to the respondent.

I have considered the arguments from both parties.

As already found above, the complainant had engaged in business which was competitive to that of the respondent, his employers. I find that he obviously made some earnings from the said business. However, the evidence on record has shown that even though the complainant had engaged in business with some of the respondent's clients, he had used his own resources and money to conduct the business. Further, the respondent has not shown that it had suffered loss as a result of the complainant's conduct. It has also failed to prove that the complainant earned more than K200,000.00 from his unauthorised business. For these reason, the respondent's claims for an order that the complainant renders an account of his proceeds and surrender the said proceeds; and also for an order of set-off of any amounts owed to the complainant against the unaccounted for funds cannot stand and are accordingly dismissed.

Lastly, the respondent claimed for an order that the complainant surrenders his resident permit to the respondent for onward transmission to the Immigration Department for cancellation.

The complainant, on the other hand, contended that the respondent did not help him acquire his resident permit, as he had already acquired it in 2010 or 2012. That the claim for an order that the complainant surrenders his resident permit to the respondent was only included so as to intimidate the complainant as there is no law that requires an employee that has had his contract of employment terminated to surrender a resident permit to the employer for any reason. That a reading of the law showed that the law requires a foreign employee to surrender to the employer a work permit. It was also submitted that the respondent had failed to lead any evidence to show that the complainant was a foreign employee and that he held any work permit which should be surrendered to it. That it was not the duty of the respondent to surrender and/or process any cancellation of any individual's resident permit as this was the preserve of the Director of Immigration and/or Immigration Officers as established by the provisions of the Immigration and Deportation Act.

I have considered the arguments from both sides.

I find the respondent's claim in this matter to be frivolous and vexatious. The Court cannot be dragged in this administrative issue which falls squarely within the ambit of the Immigration Department. I think and rightly so that if the complainant has contravened any immigration laws, the aggrieved party can make a report to the relevant law enforcement agencies for an

appropriate action. In this regard, therefore, the respondent's claim has failed and is accordingly dismissed.

I make no order for costs.

Leave to appeal is granted.

Delivered at Ndola this 26th day of August, 2021.

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Davies C. Mumba
HIGH COURT JUDGE