

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

**2017/HP/1505**

**BETWEEN:**

**EUPHEMIA CHAMBULA**



**PLAINTIFF**

**AND**

**WILLIAM CHISOKO** (Sued in his capacity as  
Chairman of the Board of Zambia Chambers of  
Small & Medium Business Associations)

**DEFENDANT**

**BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE**

*For the Plaintiff:* Mr. A. Banda - Messrs. L.M. Chambers

*For the Defendant:* Mrs. K.M. Chileshe - Messrs. Mweemba Chashi & Partners.

---

## **J U D G M E N T**

---

***Cases referred to:***

1. Chilanga Cement Plc. v. Kasito Appeal (No.86/2015-SCZ/8/70/2015).
2. Zambia National Provident Fund v. Yekweniya Mbiniwa (1986) ZR 70.
3. Care International Zambia Limited v. Tembo Appeal No.57/2016.
4. Khalid Mohamed v. Attorney General (1982) ZR 49.

5. **Supabets Sports Betting v. Batuke Kalimukwa (Selected Judgment No.27/2019).**
6. **Bank of Zambia v. Kasonde (1995-1997) Z.R**
7. **Bikson Jishika v. Barrick Lumwana Mining Company Limited (CAZ Appeal no. 117/2017).**
8. **Rabson Sikombe v. Access Bank (Zambia) Limited (SCZ Appeal No. 240/2013)**
9. **Shilling Bob Zinka v. Attorney General (SCZ Judgment No. 9 of 1991)**
10. **Kenny Sililo v. Mend a Bath (SCZ/8/192/2014).**
11. **George Chisenga Mumba v. Telecel (Zambia) Limited (SCZ Appeal No. 156/2015).**
12. **Butler Asimbuyu Sitali v. Central Board of Health (SCZ Appeal No. 178 of 1999).**
13. **Kambatika v. ZESCO Limited (SCZ Appeal No. 186/2000).**
14. **Sarah Mayobela Mukuma and Albert Kaela Mutale v. Finance Bank Zambia Limited (SCZ Appeal No. 3 of 2011).**
15. **Liswaniso Sitali and others v. Mopani Copper Mines Plc. (2004) Z.R. 176.**
16. **Bank of Zambia v. Peter Kombaniya (SCZ Appeal No. 87 OF 1996).**
17. **Zambia Telecommunications Company Limited v. Ambrose Chipowe (SCZ Appeal No. 207/2008).**
18. **Prudence Rashi Chaikatisha v. Stanbic Bank Zambia Limited SCZ/8/110/2015).**
19. **Jack Needham Belmonte v. Lubambe Copper Mine Limited and two others (Appeal No. 111/2018).**
20. **Jackson Mwape and 61 others v. ZCCM Investments Holdings Limited Plc. (SCZ Judgment No.23 of 2014).**
21. **Kitwe City Council v. William Ng'uni (2005) Z.R 57.**
22. **Tasomo v. The Credit Organization of Zambia (1973) Z.R. 347.**
23. **Nsansa School Education Trust v. Musamba (2010) Z.R 458.**

**Legislation and other material to:**

1. **Halsbury's Laws of England Volume 97, Fifth Edition (5th) (Butterworth's) London, 2015.**
2. **Halsbury's Laws of England Volume 68, Fifth Edition (5th) (Butterworth's) London, 2016.**
3. **W.S. Mwenda & C. Chungu A Comprehensive Guide to Employment Law in Zambia (2021) UNZA Press; Lusaka.**

4. **W.S. Mwenda, Employment Law in Zambia; Cases and Materials (2004) UNZA Press; Lusaka.**
5. **Bryan A. Garner Black's Law Dictionary 8<sup>th</sup> Edition. (2004).**

## **1. PLEADINGS**

By way of writ of summons and statement of claim dated 15<sup>th</sup> December, 2015, the Plaintiff seeks the following reliefs:

- i) *The sum of ZMW 418,862.11 being monies for unpaid salaries, leave days' commutation, acting allowance, gratuity and money lent to the Defendant.*
- ii) *Damages for mental anguish, embarrassment and physical harassment;*
- iii) *Interest;*
- iv) *Any other relief the court may deem fit;*
- v) *Costs.*

In the statement of claim, the Plaintiff averred that she was employed by the Defendant as Administration Manager under a contract for the period 1<sup>st</sup> March, 2014 to 28<sup>th</sup> February, 2017.

In the course of her employment the Plaintiff procured a loan on behalf of the Defendant in the amount of ZMW55,000.00 and the said loan was secured by a motor vehicle Nissan Tiida Registration Number ABP 7537. She was made to be the custodian of the motor vehicle used as security for the loan and according to the loan agreement dated 20<sup>th</sup> October, 2015, the Plaintiff was also a guarantor for the said loan.

When the Defendant realized that due to financial challenges it could not liquidate and or settle the loan, it resolved to surrender the motor vehicle to the lender.

On 16<sup>th</sup> January, 2016, the Plaintiff was appointed acting Executive Secretary and served in that position for a period of five months. By a letter dated 29<sup>th</sup> June, 2016, the Plaintiff was informed that the Board of the Defendant had resolved to revert her to her substantive position of Administration Manager and that this had been necessitated by the extreme financial difficulties the Defendant was facing.

It was averred that on 12<sup>th</sup> July, 2016, the Plaintiff was suspended from work on the basis that the above-mentioned Nissan Tiida motor vehicle which was surrendered to the lender parked at the Plaintiff's residence.

The Defendant even reported the Plaintiff to Lusaka Central Police Station for motor vehicle theft but the police found no case.

The Plaintiff was put on suspension for four (4) months without being advised of the status of the investigations against her, thereby leaving her in a state of uncertainty, distress and mental anguish.

At a meeting held on 3<sup>rd</sup> August, the Plaintiff was asked to submit a report on why the vehicle mentioned above was parked at her residence which she did by a letter dated 10<sup>th</sup> August, 2016. She averred that a charge letter was served on her only after a letter from her advocates was written to the Defendant dated 16<sup>th</sup> November, 2016, querying the suspension. The charge letter was back dated to 1<sup>st</sup> November, 2016 and contained allegations which were different from those in the letter of suspension dated 12<sup>th</sup> July, 2016.

The Plaintiff was on 14<sup>th</sup> December, 2016, requested to appear before a disciplinary committee to answer the charges served on her in November, 2016 and the outcome of this disciplinary committee hearing was that on 27<sup>th</sup> January, 2017, the Plaintiff was dismissed from work and given seven (7) working days within which to appeal the decision of the disciplinary committee.



The letter of dismissal was only delivered on the Plaintiff's residence on 30<sup>th</sup> January, 2017, and at the time of delivery, the Plaintiff was out of town until 3<sup>rd</sup> February, 2017. She responded to the letter of dismissal dated 27<sup>th</sup> January, 2017 and appealed to the Supreme Body of the Defendant to resolve the matter, but no response was given.

The Plaintiff averred that her advocates on 10<sup>th</sup> April, 2017 wrote to the Board Chairperson of the Defendant urging the Board to inform the Plaintiff of the outcome of her appeal but the outcome was never communicated. It was also averred that the Plaintiff during the course of her employment lent some personal funds to the Defendant amounting to K11,700.00 which had not been paid back.

The Plaintiff also averred that the investigations and disciplinary proceedings dragged on from 12<sup>th</sup> July, 2016, to 28<sup>th</sup> February, 2017 when the Plaintiff's contract of employment was scheduled to end. From December, 2015 until the contract ended on 28<sup>th</sup> February, 2017, the Plaintiff was not being paid her salary which as at 28<sup>th</sup> February, 2017 stood at K160,733.65, leave days' commutation in the sum of K32,918.23, gratuity in the sum of K190,710.23, acting allowance in the sum of K22,800.00 and money lent to Zambia Chamber of Small and Medium Business Associations in the sum of K11,800.00

It was averred that the actions of the Defendant were in breach of the Plaintiff's contract of employment and conditions of service. She also added that she was reported to the police even when there was no merit in the report thereby humiliating her as a result of which she suffered loss and damage.

The Defendant filed a defence on 28<sup>th</sup> September, 2017, in which he averred as follows:

At the time the Plaintiff started her employment, the Chairman of the Board was Mr. George Banda, the Defendant was appointed Chairman of the Board in June, 2016.

In October, 2015 the Plaintiff, without approval of the Board of Directors or Board Resolution procured a loan of K55, 000.00 from a Mr. Patel secured by a Nissan Tiida Registration Number ABP 7537.

The Plaintiff later claimed that she had obtained the loan to pay off two former employees who had brought an action against the organization. The sum borrowed was not used for this purpose and when this came to the attention of the Board, the Plaintiff claimed that the sum

borrowed was used to pay her salary as well as that of the Chief Executive Officer.

The Defendant averred that the purported Lease Agreement on which the Plaintiff relied did not state that she was the custodian of the motor vehicle that was meant to be security for the loan but only stated that she was the guarantor of the said loan. It was not standard practice or procedure for a guarantor (and additionally in these circumstances, the Administrative Manager of the borrower) to be entrusted by the lender with the asset that was security for the loan before it was repaid. In this regard, the Defendant averred that the whole procedure, having not been approved by the Board, was marred with irregularities.

The Defendant denied that the Plaintiff was found with no case to answer. It was averred that in June, 2016, after a Board Meeting, the Defendant was mandated to deliver a letter to the Plaintiff's premises reverting her to her substantive position as Administrative Manager. The letter was delivered to her home because the Plaintiff was on leave. The Defendant was in the presence of the Accountant Mr. Banda and the driver Mr. Muzumara. The Defendant was surprised to find the Zambia Chamber of Small & Medium Business Associations (ZCSMBA) Nissan Tiida Registration Number ABP 7537 as the Board had been



informed by the Plaintiff that the vehicle was in possession of the lender, a Mr. Patel. The Defendant then went back and informed the Board who decided to seek help from the police to retrieve the motor vehicle so that it could be returned to the person that had lent the Organization money.

The Defendant went to the police station together with two Board Members, however, the Police stated that it was theft of motor vehicle and sought to open a docket. The Defendant contended that the intention was not to press charges but to get help to retrieve the vehicle and take it back to the lender. The Plaintiff had previously informed the Board that the motor vehicle had been surrendered to the lender thus the vehicle was not meant to be in possession of an employee. A call out was then issued to the Plaintiff who showed up the next day with her family.

After the Defendant explained what had happened the Plaintiff's husband shouted at her asking why she had told her employers that the money had been borrowed from Mr. Patel when it was Chambula money.

The Plaintiff's husband then told the three Board Members to give back the K55, 000.00 and then get the vehicle from their premises. At that

point, the Defendant asked the Police Officers to remove the Plaintiff's family from the room. The officers then gave the Plaintiff one week to organize the people that had witnessed the signing of the Loan Agreement. At no point was the Plaintiff charged with any offence. Therefore, it was incorrect that she was found with no case to answer. A decision was made by the Board to place the Plaintiff on suspension.

The Defendant denied the contents of paragraph 7 of the Statement of Claim and averred that the Plaintiff was communicated to but she refused to appear before the Executive Committee Board. The Plaintiff insisted on being heard only by the full Board but there were not enough funds to hold a full Board meeting. Thus, the uncertainty, distress and mental anguish claimed by the Plaintiff were of her own making as her matter could have been dealt with quickly if she had agreed to appear before the Executive Committee when she was called.

It was averred that no charges were backdated and that further charges were added after investigation in addition to the one she had been suspended for and the charges were served on her on time.

It was further averred that the Plaintiff refused to appeal to the ZCSMBA Board of Directors and stated that she could only appear to the supreme

body being the Annual General Meeting (AGM) which took place at the end of each year. It was because of the Plaintiff's insistence on not appealing to the Board of Directors that she had no response as the AGM had not yet been held that year.

It was averred that the Plaintiff was dismissed from employment in January, 2017 and not February 2017. Her contract did not come to an end on 28<sup>th</sup> February, 2017, as alleged but her employment was terminated after a Disciplinary hearing. Therefore, the Plaintiff was not entitled to any dues she would have been entitled to if she had completed her contract.

It was also averred that having been dismissed from employment after investigation and a Disciplinary Hearing, the Plaintiff was not entitled to be paid salaries from the time of her suspension in terms of the Defendant's Code of Conduct.

In addition, the Defendant denied breaching the Plaintiff's Contract and Conditions of Service because the Defendant went through the proper procedures resulting in her dismissal.

The Defendant further averred that there was merit in reporting the matter involving the Defendant's Nissan Tiida to the police because the Plaintiff had misled the Defendant by stating that the vehicle had been surrendered to the lender, a Mr. Patel, when in fact the vehicle was parked at her premises. Despite the decision not to press charges against the Plaintiff, there were irregularities in the manner she obtained the loan without the authority of the Board and thus merit in the report.

The Defendant denied that the Plaintiff was entitled to any relief sought.

The Plaintiff filed a reply on 21<sup>st</sup> November, 2017 in which she averred as follows:

That the Defendant was aware of the Plaintiff's employment and there was a contract of employment which contained all her conditions of employment. At the time of procuring the loan, the Plaintiff was not the CEO or Executive Secretary to unilaterally procure a loan as the CEO was the only one with such powers. The loan was procured on instructions of the CEO then and the money for the loan was taken to the Defendant's office and disbursed accordingly by the accounts office.

The Board approved the loan and the use of the Nissan Tiida as security for the loan and that this was done in the 4<sup>th</sup> Special Board Meeting where it was confirmed that the decision to procure the loan and to use the Nissan Tiida as security was made by the Executive Committee.

Although the Plaintiff was only a guarantor she stood in a special position as she was the Administrative Manager and the custodian of the motor vehicles which were parked at her home as per memo dated 19<sup>th</sup> October, 2010, which included the Nissan Tiida.

When the vehicle was used to secure a loan, the said vehicle was kept at the Plaintiff's residence awaiting payment of the loan as the lender had agreed to this arrangement: no complaint was made by the lender to the Defendant concerning the parking of the vehicle at the Plaintiff's home.

She averred that her husband did not state that the money was not borrowed from Mr. Patel but their family.

In reply to paragraph 7 of the Defence, she averred that her refusal to appear before the Executive Committee was justified as the procedure only permitted that a matter of that nature be dealt with by a full Board.



She averred that it was within her right to appeal to the Supreme Body of the Defendant. Since she appealed to the Supreme Body of the Defendant, the appeal was never determined until it was overtaken by the expiry of her contract of employment which ran its full course and came to an end in February, 2017. She was therefore entitled to all her dues under the contract.

In reply to paragraph 13 of the defence, she averred that there was documentary evidence in form of receipts from the Defendant showing the money the Plaintiff lent to the Defendant.

## **2. PLAINTIFF'S EVIDENCE**

At trial, the first witness was **PW1, EUPHEMIA MUBANGA CHAMBULA** the Plaintiff herein aged sixty-six (66) years old.

She testified that she was employed as Administration Manager from February, 2014 for a term of three (3) years to have ended on 28<sup>th</sup> February, 2017. She identified the contract of employment at page 1 of the Plaintiff's bundle of documents.

In 2016, she was offered to act in the position of Executive Secretary which was the equivalent of Chief Executive Officer of the Institution.

She identified the letter of appointment at page 3 of the bundles of documents. Her gross salary as Administrative Officer was K18,304.00 and came to K 13,000.00 after taxes. She was supposed to be getting a difference between the Executive Secretary and Administrative Officer as a top up in her acting position but she never got paid. She stated that even in her previous position as an Administration Manager, she never got her salary from the previous year from October 2015 up to the time she was given the elevation. It was just on promissory note and that her money had not been paid to date.

PW1's evidence was that she acted as Executive Secretary for five (5) months from February to June, 2015. Before the letter of reversion came, there was a change of the Board. The Chairperson who signed her letter of appointment to act resigned and a new Chairperson was appointed in May, 2016. She then received a letter reverting her to her previous position as Administration Manager. She was surprised that after acting in the position, she was reverted to her substantive position due to financial constraints that the institution was facing towards end of June.

Around 16<sup>th</sup> July, 2016, she received a letter of suspension which she identified at page 5 of the Plaintiff's bundle of documents. She stated

that she was told that she had parked the Nissan Tiida at her place when she was not supposed to do that. A day before the letter was written to her, she was taken to the police for the same reason. At the police station, it was found that she was not guilty because the intention of the people who took her was to file a charge of a stealing a motor vehicle. The police therefore dismissed the case. In the letter of suspension, she was informed that investigations would be undertaken of how she had the Nissan Tiida parked at her place and that they would revert to her with their findings. She however, was never informed of any findings.

PW1 responded to the letter of suspension and she explained how the Nissan Tiida was parked at her residence since 2008 when it was bought. She identified the report at pages 6 to 7 of the Plaintiff's bundle of documents. She explained that she parked the vehicle at her place because it was given as security of the loan that the institution got to enable carry out functionalities of the office and she was the guarantor of the same loan. At that time, there was a substantive CEO, Ms. Patience Sakuringwa who authorized the loan. Being the guarantor, it was imperative that she looked after the property until the money was paid back to the lender.

It was her testimony that after giving her report, she was called to go and meet the Board of Directors at 14:00 hours. She went there from 13:45 hours until 16:00 hours and they failed to get back to her because they were holding an interview. She had an appointment with her doctor to collect medication at 16:30 hours on the material day. Since they were conducting interviews, Mr. Chisoko, the Chairperson excused her. When she came back around 16:50 hours, she only found Mr. Chisoko as the other directors, the Vice Chairperson, Treasurer and Provincial Representative for Copperbelt had left. Mr. Chisoko told her that it was fine since they were already in receipt of her letter explaining herself and that they would get back to her but they never did.

She later received a letter in which they had charged her on three different issues unrelated to the suspension. The three charges were:

- (i) Telling lies about the monies in the Bank account.
- (ii) Selling a motor vehicle Nissan Patrol and failing to declare the balance of K30,000.00.
- (iii) Not surrendering a motor vehicle Nissan Hardbody which she was using as Administrative Manager.

She testified that the charge sheet did not refer to the Nissan Tiida. They told her that she kept the Nissan Tiida at her place without authority. She was surprised because she was the custodian. In relation to that, they also stated that she had sanctioned the loan in which the Nissan Tiida was a surety but there was in fact a Board Resolution which had sanctioned the borrowing.

When referred to the charge sheet in the bundles of documents, she told the Court that on the 1<sup>st</sup> charge, even if the money of K14,519.42 was in the account, it had been expended to the service charges, telephones and payments to security guards. That was why she told the Chairperson that there was no money for the meeting they wanted to conduct.

For the charge of K30,000.00 which they said she had not disclosed on the balance of the Nissan they sold, she stated that the money was still with the buyer and she had already left the institution when it was paid.

On the charge of not obeying lawful charges regarding the Nissan Hardbody, she stated that the vehicle was still parked at her place as the Defendant had not paid her since October, 2015 so it was a way of telling them that they should pay her salary.



She further told the Court that she was the one given the authority to park vehicles at her place even if they were not being used to avoid abnormal charges using car parks. She identified a memo at pages 13 and 14 of the Plaintiff's bundle of documents on Vehicle Utilization and signed by the Executive Secretary Ms. Sakuringwa. She was given the authority to keep all motor vehicles that were not given to individuals. She kept the Nissan Tiida, Toyota Hilux APP 9248 and Nissan Hardbody at her place.

After the charge, nothing happened until early January, 2017 when she received another letter which referred to the dismissal if she did not exculpate herself. She identified the letter at page 12 of the Plaintiff's bundle of documents. She exculpated herself by writing to them in the first week of February and she never got any response from them.

She told the Court that she was claiming K22,800.00 because there was a time they did not have funds in the organization so she lent them money on three occasions to assist in paying guards, telephone and also the Auditors, Zambia Governance Foundation and office utilities.

She told the Court that upon request from the Executive Secretary, she was given receipts. For the first amount of K21,000.00 she was given

back about K10,000.00 and the balance of K11,000.00 had not been paid back yet. Another amount of K2,000.00 for office utilities and another was given to offset the balance for auditors. She identified the receipts at pages 82 and 83 of the bundles of documents for the money the institution got from her for part payment for the audit and internet. She stated that her money had not been paid.

PW1 told the Court that what she wanted was for all her monies to be paid which included salaries to the end of the contract and gratuity according to her letter of appointment. She also wanted redress for the anguish and distress that she went through in this case because she was embarrassed when taken to the police. She stated she was also given different reasons for her suspension and in the charge sheet.

She further told the Court that the investigation results were not availed to her. According to the Code of Conduct, she was supposed to be given three months' notice but she was unfairly treated and only given twenty-four (24) hours' notice and the procedure in the Code of Conduct was not followed. She was also questioning what she misappropriated and mismanaged and that she was not aware of the disciplinary hearing as they never sat down to talk.

On the contention that she refused to appeal to the Board of Directors, she stated that the Board of Directors was not a supreme body and she could not appeal to her accuser as she was charged by the Board of Directors. She stated that she had to appeal to a higher body and that was the AGM of the General Membership of the institution but she was never called to the General Assembly to state her case.

**Cross examined**, she told the Court that she had claimed for her salary arrears in her statement of claim and that paragraph 14 had a total calculation of the amount she was claiming.

She stated that guarantors held on to the security and that in this case, the lender refused to hold on to the motor vehicle but that the agreement was verbal.

It was also her evidence that the Board of Directors sanctioned the loan and that she exhibited the resolution. When referred to pages 34 and 38 of the bundles of documents, she agreed that the loan was obtained by the Executive Committee and sanctioned by the Board afterwards.

When referred to page 12 of the Plaintiff's bundle of documents, she denied not attending the meeting and stated that on 17<sup>th</sup> November,

2016, she did not get any notification to attend a disciplinary hearing on 22<sup>nd</sup> November, 2016.

She further stated that she did not exhibit the exculpatory letter and the appeal that she wrote to the AGM in the bundles of documents even though she had them.

**In re-examination**, she told the Court that she had appealed to the AGM and she gave the same letter to her lawyer.

The Plaintiff's second witness, **PW2** was **GEORGE BANDA**, an Accountant aged thirty-nine (39) years old.

He told the Court that he came to know the Plaintiff in September, 2014 when she joined ZCSMBA. At that time, he happened to be the only Accountant and he left in June, 2016, when his contract came to an end.

He testified that in October, 2015, the Secretariat was given a go-ahead by the Board, through the Executive Secretary to contract the loan of K55,000.000 to meet pressing administrative issues. He happened to be a witness of the said contract and signed on the loan agreement. He

identified the loan agreement at pages 32 to 35 of the Plaintiff's bundle of documents.

After the loan was obtained, the institution could not meet its obligation regarding the loan so the Secretariat eventually resolved to surrender the motor vehicle to the lender at the time the loan had attracted interest and the total was K77,000.00.

When PW2 joined the institution, the motor vehicle was under the department of the Administration Manager. This meant that all the documentation for all the motor vehicles were under her custody. He also found that the storage for all the motor vehicles for the Chamber were being parked at the Plaintiff's yard.

They surrendered the motor vehicle which meant that they sold the vehicle and all documents were handed over to the lender of the money. After that, the Executive Secretary who was there in 2016 was relieved of her position due to a lot of financial irregularities and was replaced with the Plaintiff as Acting Executive Secretary.

He told the Court that the Plaintiff was suspended from office by the new Board which came and the new Board Chairperson started acting



as Executive Secretary. He brought out allegations that in her own capacity, she contracted the loan when in fact not. There was an Executive Secretary in the office who actually contracted the loan and she even signed on the loan documents.

PW2 told the Court that the Board Chairperson further pursued the matter by saying that the Plaintiff had stolen a motor vehicle and he convinced other Board members to make a report at the police station. After further investigations by the police, it was concluded that there was no case of theft of motor vehicle. The situation circulated to other members of the organization in the institution which painted a picture that the Plaintiff was a thief and her name was eventually dented.

He testified that whatever was happening at that time depicted that the new Board wanted to eliminate all the staff they found. He said this because even he was laid off through the Chairman that the Board had not approved his qualifications because he was a graduate under ZICA and not CIMA or ACCA.

In conclusion, he stated that whatever the Chairman did was not right and that they did not want to pay whatever dues the Chamber owed their staff.

**In cross examination,** PW2 told the Court he did not have sight of the resolution of the Board sanctioning the loan. The people who were present at the signing of the loan were the Executive Secretary and the Plaintiff and it was signed at the office in the Show Grounds. The loan was signed by Mr. Greenwell Mumba who acted as an agent for Mr. Patel the actual lender.

He did not witness the surrender of the vehicle because he was in the field and the surrender was not under Accounts but Administration Manager.

PW2 further told the Court that at the time the matter was reported to the police in July, 2016 he was still an employee of the Company. He did not go to the police station but whatever the Board was doing was reaching them. He stated that at the time the Plaintiff was dismissed, he was still an employee of the institution because when the new Executive Secretary came in, he worked with him for six (6) months and left.

There was no re-examination.

That marked the close of the Plaintiff's case.

### **3. DEFENDANT'S EVIDENCE**

**DW1** was **WILLIAM CHISOKO** a Businessman of 9 Chipembere Road, Luanshya aged fifty-four (54) years.

His testimony was that in June, 2016, he took over as Board Chairperson of the institution from George Banda and found the Plaintiff's matter running. He explained that the Plaintiff borrowed an amount of K55,000.00 which accumulated interest of K18,000.00 in 2015 without the approval of the Board. The surety levelled against the borrowing was a motor vehicle which belonged to the Defendant.

When it was time to pay back the loan, things started unfolding. That was when the issue came to the attention of the Board. The Plaintiff was the guarantor on behalf of the Defendant and at that point the Board had no option but to authorize the payment of that loan because it was management that had borrowed. Since the organization had no money, they released the Nissan Tiida. He explained that in the agreement, the lender was said to be Mr. Patel and the collateral was supposed to go to the lender.

DW1 told the Court that the Plaintiff only acted for six (6) months. When the letter reverting her to her substantive position was written, the Board was in a sitting and she was on leave. The Board resolved that the letter be served in person. He was appointed to serve the letter, accompanied by George Banda and the driver Mr. Sam Muzumara. When they got to the Plaintiff's home, they found the Nissan Tiida which was collateral parked at her residence. They did not find her home but found Mr. Chambula.

When he went back to the office, he reported to the Board that he found the Nissan Tiida at the Plaintiff's home. The information raised concerns amongst the members that the vehicle which was released to the lender was found at an employee's home and she was a guarantor.

The Board resolved that the matter be reported to the police so that they could help retrieve the vehicle and take it to the lender. DW1 went to the police with the treasurer and one board member. At the police station, they issued a call out to the Plaintiff and they were told to go back at 09:00 hours. When they went back, a statement was taken from him. As he was explaining to the police, Mr. Chambula who was at the police station came out on top of his voice and said that: *'the money*

*K55,000.00 did not come from Mr. Patel but from the Chambula family.  
Give us the K55,000.00 and go and pack up the car’.*

At that point, there was commotion and the Board requested the police officer to send away the Chambula family and remain with staff members. The police dismissed the family and told them that the issue concerned theft of motor vehicle and they were going to open a docket. He told the police they did not want to press charges they just wanted to retrieve the vehicle and take it to the rightful owner. The police sent them back and told them to report the following day and that the Plaintiff should go with witnesses who were present when the agreement was signed. The Plaintiff never provided any witnesses and they never went back to the police station. In short, there were no charges levelled against anyone.

When the Board sat, they decided that the Plaintiff be charged. When she was charged, she was notified in writing to attend the Board and hear the charges against her but she did not show up. DW1 called the Plaintiff and put the phone on loud speaker in the presence of other members but her phone went unanswered. The Board resolved to write to their lawyers and one of the Board members advised that they follow the procedure in the Code of Conduct and their Constitution.



DW1 explained that the Disciplinary Committee was handed over the issue as per constitution. Before the Disciplinary Committee could sit, they insisted that the Plaintiff attends the Board Executive Committee. The Plaintiff refused stating that she wanted a full Board. The organization was insolvent so they could not call the full Board. So they reverted to the Constitution and the Code of Conduct and asked the Disciplinary Committee to sit.

The Plaintiff was notified in writing to attend before the Disciplinary Committee at 14:30 hours in June, 2016. He identified the letter written to the Plaintiff at page 17 of the Defendant's bundle of documents. She complied but the time she came the Committee was resolving other issues. The Plaintiff waited for some time and left the note that 14:30 had passed. She had another appointment with her doctor and she would be back later. When the time came for her to be attended to, she was not yet back.

The Disciplinary Committee within their powers resolved to go ahead with the item on the agenda as there were insufficient funds to convene another meeting and two of the members of the committee could not be summoned again. The Committee proceeded in accordance with the

Constitution. The Plaintiff returned around 16:00 hours and found that they had closed and left.

The Plaintiff was informed that the Disciplinary Committee went ahead with the hearing and that she would be informed in writing. DW1 was given the resolution by the Disciplinary Committee and he wrote to the Plaintiff. He identified the resolution at page 18 of the Defendant's bundle of documents.

DW1 further told the Court that the Plaintiff refused to appeal to the Board and stated that she could only appeal to the National Council. However, the Council only sat once a year depending on the availability of funds. The Plaintiff put her refusal to appeal to the Board in writing.

Later, the Plaintiff started chasing for her dues and said that she was going to keep the car, which was still in her possession. DW1 told the Court that the Defendant denied the claims by the Plaintiff. That for most of the claims, they did not have any documents because the Plaintiff went away with all the files and all the documents were deleted from the system.

**In cross examination**, DW1 told the Court that he still insisted that despite there being a loan agreement contracted by the Defendant with the Executive Secretary on behalf of the Board, the Plaintiff obtained the loan without the Board's authorization.

He told the Court that the time the issue came up; the Plaintiff was the acting Executive Secretary as the Executive Secretary had been fired. He stated that they went for the Plaintiff because she was the Executive Secretary and the guarantor of the loan. DW1 agreed that the Plaintiff was the custodian of all the motor vehicles and that at the time the vehicle was released, it was in the custody of the institution under the Manager in Charge, the Plaintiff. He stated that the Plaintiff explained to him in the letter she wrote that the motor vehicle was with the lender but it was found at her house. She told him that the lender had not collected it so it was with her. After surrendering the motor vehicle, the lender did not bother the institution in any way.

It was his evidence that he did not have the charge sheet but they were copying their lawyer in all the processes. He stated that they demanded that the Plaintiff was supposed to appear before the Board before appearing before the Disciplinary Committee according to their Code of Conduct. One could appear before the Board or the Disciplinary

Committee and if dissatisfied, they could appeal to the General Membership which was the Council. DW1 told the Court that the Board was a superior body to the Disciplinary Committee and if one was dissatisfied with the decision of the Committee, they could appeal to the Board.

He told the Court that it was the secretary of Committee who summoned an employee for disciplinary action. When referred to page 17 of the Defendant's bundle of documents, he told the Court that the letter was written by him. When further asked whether it was right for the Board Chairperson to write the letter, he stated that it was because by then the Chairperson was appointed to act as Secretary. He explained that the Secretary to the Disciplinary Committee was the Executive Secretary and he was the one acting at that time. He admitted that he wrote the letter in his capacity as Board Chairperson even though he was both Chairperson and Secretary.

DW1 told the Court that the disciplinary hearing was scheduled for 14:30 hours but they delayed to convene the meeting despite the Plaintiff coming on time. He admitted that the delay was their fault and not the Plaintiff's.

Counsel for the Defendant filed written submissions under the following heads:

1. Wrongful dismissal

Counsel referred to the learned author W.S Mweenda of Employment Law in Zambia; Cases and Materials at page 48 where she stated that wrongful dismissal is one at the instance of the employer that is contrary to the terms of employment. When considering whether a dismissal is wrongful or not, the form rather than the merits of the dismissal must be examined. According to the author, the remedy for wrongful dismissal is an award of damages calculated on the basis of what the employee would have received had the necessary notice been given.

It was stated that the said author in her book further stated that another form of wrongful dismissal was the one that involved a legal challenge on the basis of procedural error. Where the right procedure in effecting a dismissal had not been followed, the employee may challenge the said procedure with the intention of asking the court to declare the whole dismissal null and void in which case the employee may be entitled to damages as well as re-instatement.



by letter dated 27<sup>th</sup> January, 2017, the Plaintiff was dismissed from employment.

She was given seven (7) working days within which to appeal in line with the Code of Conduct but she refused to appeal because she could only appeal to the General Membership. It was submitted that such a claim had no basis as the Code of Conduct only provided for appeals to the Appeals Committee and not the General Membership sitting at an AGM.

It was submitted that the procedure followed was in line with the ZCSMBA Code of Conduct and did not point to wrongful dismissal of the Plaintiff.

## 2. Unfair dismissal

It was submitted that according to the author W.S. Mwenda at pages 68-69, unlike wrongful dismissal which looked at the form, unfair dismissal; looked at the merits of the dismissal. The form was only supportive of the whole merits of the dismissal. In other words, under unfair dismissal, the court would look at the reasons for the dismissal to determine whether the dismissal was justified or not.

commutation, acting allowance, gratuity and money lent to the Defendant. She also seeks damages for mental anguish, embarrassment and physical harassment *inter alia*.

From the evidence on record, I find the following facts not in dispute:

1. The Plaintiff was employed by the Defendant as Administration Manager.
2. In the course of her employment, a loan was procured in the amount of K55,000.00 and the said loan was secured by one of the institution motor vehicle Nissan Tiida Registration Number ABP 7537.
3. The Plaintiff was the guarantor of the loan.
4. Due to financial constraints, the institution failed to pay back the loan and the Board resolved that the Nissan Tiida be surrendered to the lender.
5. On 1<sup>st</sup> February, 2016, the Plaintiff was appointed to act as Executive Secretary until further notice and served in the position until 29<sup>th</sup> June, 2016 because the institution was facing financial difficulties.

6. On 12<sup>th</sup> July, 2016, the Plaintiff was suspended from work on the basis that the Nissan Tiida which was pledged as security was not surrendered to the lender but was parked at her house.
7. The Plaintiff wrote a exculpatory letter regarding the Nissan Tiida on 10<sup>th</sup> August, 2016.
8. The Plaintiff was charged with three (3) offences on 1<sup>st</sup> November, 2016 and was scheduled to appear before the Disciplinary Committee on 20<sup>th</sup> December, 2016.
9. The disciplinary hearing was conducted in her absence.
10. By a letter dated 27<sup>th</sup> January, 2017, the Plaintiff was dismissed from employment and given seven (7) days within which to appeal.

The Plaintiff has challenged this dismissal and contends that she was unfairly and wrongfully dismissed by the Defendant and that is the basis upon which she seeks the reliefs.

The Defendant on the other hand has denied that the dismissal was unfair and wrongful and contends that the procedural requirements as set out in the Zambia Chamber of Small and Medium Business Associations (ZCSMBA) Code of Conduct were followed. It is also contended that there was a basis for her dismissal as the Nissan Tiida

was found parked at her residence when she had initially indicated that she had handed it over to the lender but later changed that the lender had not collected it. That the change in statements pointed to dishonesty which warranted summary dismissal.

Given the foregoing, the issues that fall for determination are:

- (i) Whether there was adherence to the disciplinary procedure before the Plaintiff was dismissed.
- (ii) Whether the summary dismissal was justified.
- (iii) Whether the Plaintiff is entitled to the reliefs sought.

I will at this stage consider these issues.

**(i) Whether there was adherence to the disciplinary procedure before the Plaintiff was dismissed.**

In making a determination on this issue, it is important first to discuss the two broad categories for dismissal of an employee by an employer. The dismissal can either be wrongful or unfair.

The learned author of Employment Law in Zambia; Cases and Materials, in contrasting the two categories states as follows:

**“...Unfair dismissal is a creation of statute...Unlike wrongful dismissal, which looks at the form (of the dismissal) unfair dismissal looks at the merits (or substance) of the dismissal and the form is only supportive of the whole merits (of) the dismissal... under unfair dismissal, the courts will look at the reasons for the dismissal (for the purpose of determining) whether the dismissal was justified or not.”**

It is clear that unlike wrongful dismissal which looks at form of the dismissal, unfair dismissal is a creation of statute which looks at the merits of the dismissal. The court thus looks at the reasons for the dismissal for the purposes of determining whether the dismissal was justified or not.

The Supreme Court stated in the case of **Supabets Sports Beting v Batuke Kalimukwa** <sup>(5)</sup> regarding wrongful dismissal that:

**“... wrongful dismissal looks at the form of the dismissal and refers to dismissing an employee in breach of contractual terms, such as non-compliance with the disciplinary procedure.”**



The Supreme Court also in the case of **Bank of Zambia v. Kasonde** <sup>(6)</sup> held that if the dismissal is not on proved grounds then it amounts to wrongful dismissal.

It can be stated in simpler terms that unfair dismissal dwells on the merits or substance of the dismissal and the Court's duty is to look at whether the reason given for the dismissal is supported by the relevant facts. Wrongful dismissal however dwells on the form of the dismissal and whether there was compliance with the laid down procedures in effecting that dismissal.

In the present case, what I discern from the evidence is that sometime in June, 2016, the Board decided to revert the Plaintiff to her substantive position of Administrative Secretary as she had been acting as Executive Secretary. When the decision was made, the Plaintiff was on leave. DW1 who was the Board Chairperson then decided to effect personal service of the letter on the Plaintiff at her home. When he got there, he found that the Nissan Tiida which was given as security for a loan was parked at her residence.

This discovery later culminated into the suspension of the Plaintiff and she was required to exculpate herself. The Plaintiff exculpated herself

through the report dated 10<sup>th</sup> August, 2016 at pages 6 and 7 of the Plaintiff's bundle of documents.

After this, on 1<sup>st</sup> November, 2016, the Plaintiff was charged with two offences. These are dishonest conduct and misrepresentation which had two counts. The other one was Refusal to obey instructions or comply with lawful directions.

The Plaintiff was later notified to appear before the Disciplinary Committee on 20<sup>th</sup> December, 2016. When she went there, she found that the Committee was resolving other issues. However, the Plaintiff informed the Committee that she had an appointment with the Doctor and therefore, she would come back another time. When she returned at 16:00 hours, she only found DW1 who informed her that the other members had dispersed and that they were going to communicate with her on the outcome.

The Plaintiff's evidence was that she was served with a letter dated 27<sup>th</sup> January, 2017 on 30<sup>th</sup> January, 2017 wherein she was informed that she would be dismissed if she did not exculpate herself within twenty-four hours.

DW1's evidence on the other hand is that when the Plaintiff returned, she was told that the Committee had proceeded with the hearing and that she would be informed of the outcome in writing. That the outcome was communicated to her in a letter dated 27<sup>th</sup> January, 2017 which he identified at page 18 of the Defendant's bundle of documents. In that letter, the Plaintiff was informed of her dismissal and her right to appeal but she refused to appeal to the Board demanding that she could only appeal to the National Council.

Based on the following, the Plaintiff's contention is that the Defendant did not follow procedure due to the following:

- (i) After being suspended because the Nissan Tiida was found parked at her house, the Defendant did not charge her with this offence but charged her with offences unrelated to this issue.
- (ii) She was not given an opportunity to be heard because she found the Board attending to another matter at the time she was supposed to be heard.
- (iii) She was served with a letter dated 27<sup>th</sup> January, 2017 on 30<sup>th</sup> January, 2017 wherein she was informed that she would be dismissed if she did not exculpate herself within twenty-four hours.

- (iv) The appeal procedure was not complied with and she was not informed of the outcome of the appeal.

I have carefully considered the evidence adduced by the parties regarding the procedure and I have also read the Disciplinary Procedure to be followed in case of an erring employee as set out in the Code of Conduct.

According to Clause 6.0 of the Code of Conduct, the employee is supposed to be charged with an appropriate offence no matter how obvious the offence may be immediately the supervisor notices any violation of the rules. The employee is then supposed to be given twenty-four hours in which to respond to the charge.

The employee is protected against unfair treatment and thus the rules of natural justice are supposed to be complied with by being accorded an opportunity to be heard. An employee has the right to appeal within a period of seven days against any disciplinary action taken by the Disciplinary Committee. If the right is not exercised, the appeal is rendered null and void.

The appeal procedure which falls under clause 8.0 provides that an appeal is made to the Appeals Committee and the membership is appointed by the Board. This body has the right to review the decision by the Disciplinary Committee by either confirming or overruling the decision and reducing the penalty.

I shall first consider the issues raised in relation to the charges proffered against the Plaintiff as shown at pages 8 to 11 of the Plaintiff's bundle of documents.

It is very clear that the charge forms relate to different offences from the issue the Plaintiff was suspended for. Can it be said therefore that procedure was not complied with in relation to the charges?

The learned authors of Comprehensive Guide to Employment Law in Zambia stated at page 201 that an employer should be allowed to add or vary the factual allegations in a charge sheet as the investigations unfolds. This is important because it might emerge from the investigations that an employee was charged with the wrong offence or should have been charged for more or less offences.



The issue does not end there. I also have to determine whether procedure was followed in relation to the charges proffered.

From the evidence on record, the Plaintiff as I have stated was charged with the offence of Dishonest conduct on 1<sup>st</sup> November, 2016. In the first account, it was alleged that the Plaintiff did not disclose that the organization had K14,519.42 in its account but told the Executive Committee that the organization had no money.

In the second count, it was alleged that the Plaintiff sold a motor vehicle Nissan Patrol without following procedure and concealed that there was a balance of K30,000.00 to be paid by the buyer. The Board only came to know about the balance when the buyer went to pay the balance.

The other offence was refusal to obey instructions. It was alleged that following her suspension the Plaintiff was asked to handover the Nissan Hard body but she did not comply with the instructions.

The charges were on the ZCSMBA charge form and they also specified that the Plaintiff was required to submit a written statement exculpating herself within a period of twenty-four hours.

After this, a letter notifying the Plaintiff to appear before the Disciplinary Committee was sent to her as shown by the letter dated 14<sup>th</sup> December, 2016 at page 17 of the Defendant's bundle of documents.

Based on the evidence adduced by the Plaintiff, her position is that she was not given an opportunity to be heard because when she went for the hearing, she found that the Board was attending to another matter. She left because she had an appointment with the Doctor to collect her medicine. When she came back, she found that the members of the Board had left. She was told by the DW1 that she would be informed of the outcome.

The Defendant does not dispute that on 20<sup>th</sup> December, 2016 the Plaintiff went to attend the hearing but left since she had another appointment with the Doctor because they were still attending to another matter. However, although DW1 stated in cross examination that it was their fault that the hearing was delayed, he insisted that the Plaintiff should not have left but waited until she was attended to.

The Supreme Court in the case of **Rabson Sikombe v. Access Bank (Zambia) Limited** <sup>(8)</sup> in explaining section 26A of the now repealed Employment Act stated as follows regarding the right to be heard:

**“Section 26A does embody a cardinal principle of natural justice namely that a party should not be condemned unheard. Before an employee is dismissed on conduct related grounds, he should be afforded an opportunity to say something in his own defence.”**

It is clear from the foregoing that the right to be heard is a cardinal principle which employers should adhere to. While section 26A applied to oral contracts, the learned authors of A Comprehensive Guide to Employment Law in Zambia stated at page 174 that the case of **Shilling Bob Zinka v. Attorney General** <sup>(9)</sup> laid down the general rule that nobody should be condemned without being afforded an opportunity to be heard and this applies to employment matters.

As a result, this principle has been applied in all contracts of employment because of the general importance of giving employees the right to be heard prior to dismissing them. The case in point is the case of **Kenny Sililo v. Mend a Bath** <sup>(10)</sup> which involved a written contract. The Court in that case confirmed the position that regardless of the type of contract, when termination is based on disciplinary grounds, the employee should be given the right to be heard.

Give the foregoing, it is also crucial to determine the formula to be used when it comes to ensuring that the proceedings are fair.

In the case of **George Chisenga Mumba v. Telecel (Zambia) Limited** <sup>(11)</sup> the Supreme Court guided that there is no prescribed formula on how an employer should ensure fair procedure prior to dismissing an employee. The Supreme Court in the case of **Butler Asimbuyu Sitali v. Central Board of Health** <sup>(12)</sup> held that:

**“Hearing for the purposes of disciplinary proceedings is not confined to the physical presence of an accused employee and giving oral evidence. In our view, a submission of an exculpatory letter in disciplinary proceedings is a form of hearing. What is important is that a party must be afforded an opportunity to present his or her case or a defence either orally or in writing...”**

What is patently clear from the above cases is that there is no format on what the disciplinary proceedings should take. What is important is that the employer should give the employee an opportunity to be heard and this may take the form of physical hearing or consideration of the exculpatory letter. Thus the mere fact that the employee is not present is immaterial for as long as the employee has been given a chance to defend himself.

In the present case, the Plaintiff was charged as shown by the charge forms that she has produced in her bundle of documents. It is indicated on the form as follows:

**“Having heard the charge you are requested to submit a written statement to Administration department on the form attached hereto to exculpate yourself within 24 hours...”**

In cross examination, the Plaintiff stated that she exculpated herself sometime in February, 2017. In fact, her contention is that she was not given ample time to do so because the letter dated 27<sup>th</sup> January, 2017 was served on her on 30<sup>th</sup> January, 2017 after 24 hours had lapsed.

Given this contention taken by the Plaintiff, it is important to first refer to the letter because in my view, the Plaintiff misconstrued the gist of that letter. It reads as follows:

*27<sup>th</sup> January, 2017*

*Mrs. Chambula Euphemia*

*C/O ZCSMBA*

*Lusaka*

*Dear Mrs. E. Chambula*



On 17<sup>th</sup> November 2016 the Board of Directors for Zambia Chamber of Small and Medium Business Association notified you that you appear before its disciplinary committee for case hearing to be held on 22/11/16. The Board sat on the material day and in the midst of the meeting you were phoned five (5) times in order to remind you that you were supposed to come and appear to a disciplinary committee panel at 14:00 hours but you deliberately you decided not to answer the calls.

In order to uphold rules of natural justice and fair play the hearing was re-scheduled for 20/12/16 and you were placed on notice by way of a letter which was physically handed over to you. You came to ZCSMBA Secretariat on the said date presumably for disciplinary case hearing but therefore you were asked to present yourself before the disciplinary committee, you decided to leave the premises after sending a small note that you had other issues to attend to.

From foregoing (sic) and failure to exculpate yourself within twenty-four (24) hours, you (sic) DISMISSED from work in accordance with ZCSMBA CODE OF CONDUCT and may you surrender ZCSMBA Nissan Hard Body ABX 8067 with immediate effect.

Please be reminded that you have the right to appeal within seven (7) working days from today Friday 27<sup>th</sup> January 2017.

Also kindly be informed that the Board of Directors are looking into circumstances that could have led you into granting Auditing Contract to UHYAMO Auditing firm without the Board's approval.

Yours faithfully

*William Chisoko*

*BOARD CHAIRPERSON (ZCSMBA) acting Executive Chair.*

It is patently clear from the underlined portion of this letter that the Plaintiff was being informed of her dismissal from employment because she failed to appear before the disciplinary committee and also to exculpate herself within twenty- four hours. It cannot by any stretch of imagination be taken to mean that the Plaintiff was being called to exculpate herself within twenty-four hours.

I cannot therefore accept so bold an argument by the Plaintiff that she was given twenty-four hours in which to exculpate herself and that by the time she was served with the letter on 30<sup>th</sup> January, 2017, that time had since lapsed. The notice to exculpate herself was given in the charge form which was in accordance with the Code of Conduct.

In this regard, I dismiss that argument as being misconceived and I find that the letter written in February, 2017 was not an exculpatory letter as it was written after a decision to dismiss her had been made.

Then again, there is another aspect to the argument by the Plaintiff that she was not heard because they did not sit down to discuss the issue. In short, she contends that she was not given an oral hearing.

While the Plaintiff has taken that position, the letter at page 17 of the Defendant's bundle of documents shows that she was notified of the disciplinary hearing which was an oral hearing so that she could answer to the charges. However, she left because she was not heard at the appointed time of 14:30 hours.

In the view that I hold, the Plaintiff was given an opportunity to be heard through an oral hearing as she was called upon to physically attend the hearing and answer to the charges. I do not therefore understand why she had to leave before being heard when the Doctor's appointment to collect medication could have been rescheduled to another time. I say this recognizing the importance health matters. However, in the present case, the Plaintiff should have known that her job was at stake as employer had subjected her to a disciplinary hearing concerning her conduct at the workplace.

It is for this reason that I agree and accept the evidence of DW1 that the Plaintiff should have waited so that she appeared before the disciplinary hearing which had been set in process in accordance with the Code of Conduct.

On the right to appeal, the evidence by the Plaintiff is that she refused to appeal to the Appeals Committee because as far as she was concerned, she could not appeal to the same body which made the decision to dismiss her. She therefore requested that she appeals to the General Membership being the AGM.

The Defendant in their submission contend that the procedure that the Plaintiff alluded to had no basis as the Code of Conduct only referred to the Appeals Committee.

I have stated that the Code of Conduct provides that appeals are to be made to the Appeals Committee. In this vein, I agree with counsel for the Defendant that the procedure of appealing to the General Membership that the Plaintiff requested the Defendant to follow is not provided for under the Code of Conduct.

The view I have is that if the Plaintiff was not satisfied with the membership of the Appeals Committee, she should have at least appeared before that Committee and raised her concerns on the membership before that Committee rather than condemn the membership before she knew who the members were.

I therefore agree with the Defendant that the Plaintiff chose to sit on her right to appeal and she did that at her own peril.

In the light of the forgoing and guided by the case authorities, I find that:

- (i) The Plaintiff was informed of the nature of the charges against her as shown by the charge forms at pages 8 to 12 of the Plaintiff's bundle of documents.
- (ii) The Plaintiff was given an opportunity to be heard by submitting an exculpatory letter when she was charged with the offences.
- (iii) The Plaintiff failed to do so within the stipulated period of twenty-four hours as provided for in the charge form and the Code of Conduct.
- (iv) The Plaintiff was also given an opportunity to be heard through a physical hearing as shown by the letter dated 14<sup>th</sup> December, 2017 at page 17 of the Defendant's bundle of documents.
- (v) The Plaintiff chose to leave when she could not be attended to at the time set for her.
- (vi) A decision to dismiss her was made regarding the charges after considering all the circumstances as shown in the letter dated



27<sup>th</sup> January, 2017 at page 12 of the Plaintiff's bundle of documents.

- (vii) The Plaintiff was informed of her right to appeal with seven (7) days.
- (viii) The Plaintiff chose not to exercise her right to appeal when she asked to appeal to the General Membership of the AGM which procedure is not provided for under the Code of Conduct.

In the result, I find that the that procedure was adhered to by the Defendant before she was dismissed. The Plaintiff's argument that the procedure was not adhered to is dismissed as being misconceived.

**(ii) Whether the summary dismissal was justified.**

According to the learned authors of a Comprehensive Guide to Employment Law in Zambia, summary dismissal is:

**“Termination without notice. It is appropriate where the employee has committed a fundamental breach of the contract or the employee by his conduct commits a serious offence that undermines his mutual duty of trust and respect to the employer.”**

What the foregoing means is that summary dismissal is dismissal before the expiration of the period for which the employee was employed and must be for serious misconduct or breach of the express or implied terms of the contract of employment. It may be effected immediately when it is established that the employee committed the conduct or can be carried out after a disciplinary process has been concluded.

In this regard, when it comes to making a determination whether the dismissal was justified or not, the Court will look at the reasons for the dismissal. In essence the Court will be determining whether the dismissal was unfair. And the role of the Court is not to review the decision of the disciplinary committee that determined the employee's fate but rather analyses whether the power was fairly and reasonably exercised.

The Supreme Court therefore guided in the case of **Kambatika v. ZESCO Limited** <sup>(13)</sup> as follows:

**“It is not the function of the Court to interpose itself as an appellate tribunal within the domestic disciplinary procedures to review what others have done. The duty of the court is to examine if there were necessary disciplinary powers and if this had been exercised in due**

**form... of course the court will also be concerned to see that the disciplinary procedures were properly invoked that is to say, that there was in fact a sufficient substratum of fact to support their invocation since otherwise, the exercise of disciplinary powers will be regarded as bad."**

The Plaintiff contends that she was not availed the results of the investigations so she did not know what she misappropriated and mismanaged. She also contends that she was unfairly dismissed from employment as the Defendant breached her contract of employment and conditions of service in that there was no merit in the claim that she had parked the Nissan Tiida at her place without authority. In short, she contends that there was no justification for her dismissal.

The Defendant on the other hand contends that while the Plaintiff contends that the police did not find her with a case to answer, they did not have to carry out a full trial against the Plaintiff and find her guilty beyond reasonable doubt. However, what they had to show was that they acted reasonably in their investigations, conducted a disciplinary hearing and then made a decision either to dismiss her or retain her services.

a balance of K30,000.00 to be paid by the buyer. The Board only came to know about the balance when the buyer went to pay the balance. Copies of the facts and financial reports as well as the Board meetings minutes were attached.

The other offence was refusal to obey instructions. It was alleged that following her suspension the Plaintiff was asked to handover the Nissan Hard body but she did not comply with the instructions.

According to the Schedule of offences and Penalties which forms part of the Code of Conduct, the offence of Dishonest Conduct and misrepresentation attracts summary dismissal at first breach while the offence of refusing to obey instructions attracts a verbal reprimand.

As I have stated, the Plaintiff did not exculpate herself or dispute or rebut the allegations against her by submitting a written statement as indicated in the charge form. In addition, even when she was called for a physical hearing, the Plaintiff left and when she came back, she found that the Disciplinary Committee had dispersed.

Given these state of facts, the letter dated 27<sup>th</sup> January, 2017 gave a sequence of how the events unfolded and a decision was made to dismiss the Plaintiff as she had failed to exculpate herself.

The Supreme Court in the case of **Sarah Mayobela Mukuma and Albert Kaela Mutale v. Finance Bank Zambia Limited** <sup>(14)</sup> held that:

**“An employee must at least present evidence or information demonstrating that she did not commit the offence that the employer has charged her with. If the employee does not give any explanation or an adequate justification but merely denies an allegation, the employer would be justified in dismissing such an employee.”**

This case therefore demonstrates the significance of giving an explanation regarding the charges. From what I have discerned from the evidence by the Plaintiff, she did not regard the disciplinary process with the seriousness that it deserved. I say this because even in the letter written after her dismissal dated 7<sup>th</sup> February, 2017 at page 19 of the Defendant's bundle of documents, the Plaintiff did not endeavor to respond to the charges against her but rather accused the Defendant of victimizing her and concocting issues.



The Plaintiff gave an explanation was when she appeared in Court. Regarding the first count of dishonest conduct and misrepresentation, she stated the reason why she had informed the Board that there was no money in the account even though there was K14,519.42 was because that money had been expended to the service charges, telephones and payments to security guards.

In the view that I hold, this response in itself was an admission that she did not communicate the correct position that there was K14,519.42 in the account. And if the money had been expended, I find it puzzling that it was still in the account. Furthermore, if the money had been expended as she claimed, that information should have been disclosed to the Board rather than just state that there was no money in the account.

In relation to the allegation that she did not disclose that there was a balance of K30,000.00 on the sale of the Nissan Patrol, under item 7.5.1 of the ZCSMBA 42<sup>nd</sup> Board Meeting minutes at page 52 of the Plaintiff's bundle of documents, an issue was raised by the Treasurer that during the last meeting, he wanted to know about the balances which were due on the motor vehicles and this was not reflected in the minutes. The members agreed with the Treasurer and stated that the Acting

Executive Secretary (the Plaintiff herein) and the Accountant did not report this matter when the Management Accounts were presented.

The Plaintiff's evidence in Court was that the money was still with the buyer and she had already left when it was paid. This was an admission that there was actually a balance and she did not refute the allegation that she had not told the Board that there was no balance.

The second offence was that of refusing to obey lawful instruction by not surrendering the vehicle. The Plaintiff also admitted in her evidence that she had not surrendered the vehicle. Her argument was that she did that because the institution still owed her money.

Although the second charge was not a dismissible offence, the authors of The Comprehensive Guide to Employment Law in Zambia state at page 203 that for dismissal to be fair and justified, the employee need only be found guilty of one of the offences not all of them. This is because an employer must reach a fair and reasonable conclusion that an employee is guilty of an offence and being guilty of one offence even in the midst of multiple charges would suffice.

What the foregoing means is that what was required in the present was for the Defendant to show that the Plaintiff was guilty of one offence which warranted summary dismissal.

I should also hasten to add at this point that the same authors at page 212 stated that Dishonesty is one of the most serious offences that warrants dismissal including summary dismissal. They state that the offence of dishonesty would include

- (a) Deceiving the employer*
- (b) Giving False information*
- (c) Fraud*
- (d) Theft*
- (e) Non-disclosure of information.*

In this regard, the Supreme Court in the case of **Liswaniso Sitali and others v. Mopani Copper Mines Plc.** <sup>(15)</sup> held that no employer can be expected to keep a dishonest employee in his employment.

It is clear from the foregoing that considering the seriousness of the charges levelled against the Plaintiff, it was incumbent upon her to give an explanation when she was asked to exculpate herself. Her failure to do so as I have stated left the employer with no option but to dismiss her as there was no explanation provided by the Plaintiff to dispute the allegations.

I am fortified by what the Supreme Court stated on the case of **Bank of Zambia v. Peter Kombaniya** <sup>(16)</sup> that:

**“Where an employee is dishonest and dismissed, the employer would not be deemed to have acted unfairly and the employer’s conduct in that regard is justified.”**

In the case of **Zambia Telecommunications Company Limited v. Ambrose Chipowe** <sup>(17)</sup>, the employee dishonestly gave his employer a false receipt for reimbursement. The Court held that such dishonesty warranted dismissal.

Dismissal is therefore justified given that dishonesty goes to the root of the relationship of trust and confidence between the employer and employee.

In the present case the Plaintiff was alleged to have given false information and also not to have disclosed certain information. And copies of the facts and bank statements were availed to her as shown in the charge forms. However, the Plaintiff did not exculpate herself even after she was given an opportunity to do so. While the Plaintiff contends that the outcome of the investigations was not availed to her, the

Supreme Court's guidance in the case of **Chimanga Changa** already cited by counsel for the Defendant is apt. It was stated that:

**“The employer does not have to prove that an offence (was committed) or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision. The rationale behind that is clear: the employment relationship is anchored on trust and once such trust is eroded, the very foundation of the relationship weakens.”**

In the view of the foregoing, given the nature of the offence, the particulars of the allegations and also fact that there was no explanation proffered by the Plaintiff to counter the allegations made against her in the charge form, I find as follows:

- (i) The Disciplinary Committee had valid powers in accordance with the Code of Conduct to conduct disciplinary hearing.
- (ii) The powers were properly exercised as the dismissal was justified considering the circumstances of the case.
- (iii) In view of the findings above, the Defendant was not under any obligation to give the Plaintiff the three months' notice provided



for in the contract of employment because she was summarily dismissed. Summary dismissal is dismissal without notice.

- (iv) Thus the issue of non-compliance with the procedure does not arise in this case.

It is also important to add that while the Plaintiff raised a number of issues of non-compliance with rules procedure, I have already found that the procedure was complied with. Even assuming that there was non-compliance with rules of procedure the Supreme Court in the case of ***Zambia National Provident Fund v. Yekweniya Mbiniwa Chirwa*** which has been cited by counsel for the Defendant stated that:

**“The position of the law is quite clear. Where an employee has committed a dismissible offence and he has been dismissed, the fact that there is failure to comply with procedure prescribed for dismissing him does not make the dismissal ipso facto invalid. The critical issue here as we see it is not whether or not there was a set of procedure for dismissal which may or may not have been followed. It is whether there was a dismissible offence committed by the employee.”**

The non-compliance with the procedure relates to being afforded an opportunity to be heard or to mitigate, if the punishment for the serious

breach of contract by the employee would still be summary dismissal, then the failure to comply with procedure would be excusable. See the case of **Prudence Rashi Chaikatisha v. Stanbic Bank Zambia Limited** <sup>(18)</sup>.

The principle in the ***Yekwenya Mbiniwa Chirwa*** case was also applied by the Court of Appeal in the case of **Jack Needham Belmonte v. Lubambe Copper Mine Limited and two others** <sup>(19)</sup> where it was held that:

**“Even if there is valid argument regarding non-compliance with procedural rules, where an employee has committed an offence for which the appropriate punishment is dismissal and he is also dismissed, no injustice arises from failure to comply with the laid down procedure in the contract.”**

The significance of this principle as it applies to the present case is that even if I found that there was non-compliance with procedural rules, the dismissal would be justified because the Plaintiff was alleged to have committed a dismissible offence and the allegations were not disputed.

In this regard, even on this score I would have found that the dismissal was justified in the circumstances.

The upshot of my findings on the first two issues for determination is that:

- (i) The termination of the Plaintiff's contract of employment by way of summary dismissal was not wrongful and unfair.
- (ii) The Plaintiff's contract of employment did not end on 28<sup>th</sup> February, 2017 but the Plaintiff was summarily dismissed following disciplinary action against her.

Before proceeding to consider the last question, it is important to consider the issue regarding the Nissan Tiida which led to the Plaintiff's suspension.

It is evident from the letter at page 11 of the Defendant's bundle of documents that the Plaintiff was suspended on 12<sup>th</sup> July, 2016 following the discovery of the Nissan Tiida at her residential place.

Much of the Plaintiff's and Defendant's case hinged on this issue. Suspension refers to situation where an employee is temporarily stopped from performing functions usually for disciplinary purposes. According to the authors of The Comprehensive Guide to Employment Law in Zambia, the employee should only be suspended pending

investigations and disciplinary procedures if the employer has reasonable cause to believe that the employer committed an offence. The employee should also be given chance to respond.

As I have already alluded to, the Defendant decided to suspend the Plaintiff following the discovery of the Nissan Tiida at her residential place when she had told them that the vehicle was pledged as security and surrendered to the lender, a Mr. Patel.

That later, the Plaintiff changed the story and told them that the lender had not yet collected the vehicle. This change of statement pointed to dishonesty which eroded the relationship of trust between the Plaintiff and the Defendant.

In her response to the suspension letter which is at page 6 of the Plaintiff's bundle of documents, the Plaintiff indicated that she kept the vehicle to avoid misuse of the asset by the lender in the event that the borrower paid back the money. That if anything happened to the vehicle, she was the one who was going to be answerable. Hence, she had to ensure that it was kept safely.

From the evidence adduced, it is not in dispute that the Plaintiff as Administration Manager was the custodian of the institution vehicles. However, that was not the issue in contention. What was in contention was her keeping the Nissan Tiida at her residence which had been pledged as security. There is no evidence to support her contention that as custodian of the vehicles, she was also supposed to keep the Nissan Tiida at her residence.

Furthermore, there is no evidence that the lender asked her to keep the vehicle. In my view, if the lender had taken that position, that should have been included in the Loan Agreement or at least it should have been put in writing because it was an important term which had a bearing on the agreement reached by the parties.

In addition, seeing that the issue was very serious and that the Defendant even reported the matter to the police, efforts should have been made by the Plaintiff to avail the lender so that he could clear the air over the issue. However, that was not done.

Her explanation therefore which she rendered to the institution was not compelling and I have no hesitation in finding that there was reasonable cause to suspect that the Plaintiff had committed an offence of



dishonest conduct which warranted the suspension to pave way for investigations.

In this regard, I find that the Plaintiff's argument that there was no merit in suspending her is misconceived.

**(iii) Whether the Plaintiff is entitled to the reliefs sought.**

According to the writ of summons and statement of claim, the Plaintiff seeks:

- (i) The sum of ZMW 418,862.11 being monies for unpaid salaries, leave days' commutation, acting allowance, gratuity and money lent to the Defendant.

**(a) Gratuity**

Clause 12.8 of the Terms and Conditions of the Zambia Chamber of Small and Medium Business Associations provided for gratuity upon completion of the contract period at the rate of 25% of the basic salary calculated on monthly basic salary.

However, the Plaintiff's letter of offer which she accepted provided that she would be entitled to two (2) months of basic salary payable annually

at the end of each completed year. There is no provision for gratuity to be paid on a pro rata basis.

In this regard, in the statement of claim, she claims an amount of K190,710.23 as gratuity. The Plaintiff did not provide any evidence of how she arrived at this figure. The Defendant also merely denied the claim that she could not be paid because she was dismissed.

Section 26 of the Employment Act (repealed) which was applicable then provided that:

**“Where an employee is summarily dismissed, he shall be paid on dismissal the wages and other working or other allowances due to him up to the date of such dismissal.”**

Section 51(1) of the Employment Code Act is couched in similar words as the above provision.

It has been confirmed in a plethora of cases including the case of **Jackson Mwape and 61 Others v. ZCCM Investments Holdings Limited Plc** <sup>(20)</sup> that notwithstanding the mode of separation, an employee is always entitled to his accrued benefits.

I have found that the summary dismissal by the Defendant of the Plaintiff was justifiable in the circumstances and it was neither wrongful nor unfair. Having been dismissed means that the Plaintiff did not complete the entire contract. However, she is entitled to payment of gratuity at the end of each completed year according to the contract of employment as it had accrued. As I have stated there was no provision for gratuity to be paid on pro rata basis.

Given the foregoing, I find that the gratuity for the two years completed had accrued before she was dismissed. The Plaintiff is therefore entitled to be paid gratuity for the two years completed and not the entire three years she has claimed for.

*(b) Leave days, unpaid salaries and acting allowance.*

The Plaintiff told the Court that she wanted all her monies to be paid which included salaries to the end of the contract. She was further not paid the acting allowance for the five months she worked as acting Executive Secretary.

The Defendant argued that the Plaintiff had not proved that she was entitled to the K418.862.11 and further that she was not entitled because she was dismissed.

In terms of leave days, the Plaintiff's offer of employment stated that she would be entitled to 2.6 days accrued leave for each completed calendar month. Leave days are accrued benefits which an employee is entitled regardless of the mode of separation. However, the Supreme Court in the case of **Kitwe City Council v. William Ng'uni** <sup>(21)</sup> held that:

**“It is unlawful to award a salary or pension benefit for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment.”**

In addition, where the employee has been suspended, the law is that the employee is not required to work and the employer is not under an obligation to pay the employee. Thus in the case of **Tasomo v. The Credit Organization of Zambia** <sup>(22)</sup> it was stated that:

**“Whilst an employee is suspended, the employee is not entitled to receive a salary as that employee would not be providing any service or work for the employer.”**

However, the general rule is that where an employee is suspended without pay or on half pay as the case may be, they are not entitled to the balance of the pay if they are cleared of the charges being investigated whilst they were suspended unless the employee's contract provides otherwise.

The Code of Conduct provides under Clause 6.0 paragraph (iii) that:

**“The Administrative Officer or whoever is responsible for human resource matters in the organization shall investigate all circumstances surrounding the case. In order to allow investigations to be carried out without interference, a rule violator may be suspended. On completion of the investigations and if the rule violator is found innocent then he/she should be entitled to pay for the period of suspension but should he/she be found guilty of the offence, then the appropriate disciplinary action should be taken.”**

What the foregoing means is that a suspended employee would only be entitled to be paid for the period of suspension if he/she has been found innocent.



In the present case, the Plaintiff pleaded that she was not being paid salaries from December, 2015 until the contract ended on 28<sup>th</sup> February, 2017. That the amount stood at K160,733. 65.

It is not clear to the Court how the Plaintiff arrived at this figure. Further, in her evidence, she stated that she was not paid her salary from October, 2015 to the time that she was elevated. In her letter at page 71 of the Plaintiff's bundle of documents, the Plaintiff indicated that she had not been paid her salary since November, 2015. This evidence was not consistent with her pleadings wherein she pleaded that she was not paid from December, 2015.

However, the minutes of the 4<sup>th</sup> ZCSMBA Special Board Meeting held on February, 1 2016 under item 6.5 shows that members of staff had not been paid salaries since December, 2015.

The Plaintiff was a member of staff as at that date when the meeting was held. That notwithstanding, the Plaintiff was suspended in July, 2016 and dismissed in January, 2017. This means that the Plaintiff cannot claim for unpaid salaries up to the end of contract as she was not working during the period of suspension until she was finally

dismissed and there is no evidence that she was not being paid her half pay.

In this regard, I find that the Plaintiff is entitled to be paid her salary from the period of December, 2015 which she pleaded and is in the minutes referred to up to the time she was elevated to the position of Acting Executive Secretary which is January, 2016. The amount will be less any advance made to her.

Regarding the leave days, there is no evidence that the Plaintiff was paid leave days. Guided by the above authorities, I find that she is entitled to be paid leave days accrued up to the time of dismissal.

There is also undisputed evidence that the Plaintiff acted in the position of Executive Secretary for the period of five months from February, 2016 to June, 2016. According to the letter at page 3 of the Plaintiff's bundle of documents in which the Plaintiff was appointed as Acting Executive Secretary, she was informed that she would earn half salary of that position on which she was acting on. There is no evidence that the Plaintiff was paid the acting allowance.

In view of the fact that the acting allowance had accrued, I find the Plaintiff is entitled to be paid the acting allowance for the period of five months.

*(c) Payment of money lent to the institution.*

The Plaintiff told the Court that she was claiming K22,800.00 because there was a time there were no funds in the organization so she lent them money on three occasions to assist in paying guards, telephone and also the also the Auditors, Zambia Governance Foundation and office utilities.

She told the Court that upon request from the Executive Secretary, she was given receipts. For the first amount of K21,000.00 she was given back about K10,000.00 and the balance of K11,000.00 had not been paid back yet. Another amount of K2,000 for office utilities and another was given to offset the balance for auditors.

The evidence in form of receipts at pages 42, 82 and 83 show that the amounts of K4,900.00, K4, 900.00 and K2, 000.00 respectively were paid to the Defendant. However, the receipt at page 42 is in the name of Mambwe Chambula and not the Plaintiff. It is not clear to the Court

whether this amount was refunded to Mambwe Chambula and the Plaintiff did not explain who Mambwe Chambula was and why the receipt was issued in that name.

Given the forgoing, I find that the Plaintiff is entitled to be paid K6,900.00 which has also been admitted by the Defendant.

(ii) Damages for mental anguish, embarrassment and physical harassment.

The claim is made on the basis that the Plaintiff was wrongfully and unfairly dismissed and also that a report was made to the police that she had stolen a motor vehicle.

In the case of **Nsansa School Education Trust v. Musamba** <sup>(23)</sup> the Supreme Court observed at page 466 that:

**“Damages for breach of contract committed by the defendant are a compensation to the plaintiff for the damages, loss or injuring he has suffered through the breach.”**

I have made a finding in this case that the Plaintiff's summary dismissal was not wrongful and unfair and that there was reasonable cause to

- (b) *Unpaid salaries from December, 2015 to the time she was elevated to the position of Acting Executive Secretary which was January, 2016 less any advance received.*
- (c) *Leave days accrued up to date of dismissal.*
- (d) *Acting allowance for the period of five (5) months from February, 2016 to June 2016.*
- (e) *K6,900.00 for money lent to the institution.*

The amounts found due shall attract interest at short term deposit rate from the date of writ to the date of judgment and thereafter at a rate not exceeding the current bank lending rate as determined by Bank of Zambia from the date of this judgment until final payment. Considering the circumstances of this case, I make no order as to costs.

Leave to appeal is granted.

**DELIVERED AT LUSAKA THIS 15<sup>TH</sup> DAY OF DECEMBER, 2023**



.....  
**M.C. KOMBE**  
**JUDGE**

