

**IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

COMP/IRCLK/72/2022

BETWEEN:

WELLINGTON MWANZA

AND

**THE REGISTERED TRUSTEES OF BAKER
HEIGHTS CHURCH OF CHRIST**

COMPLAINANT

RESPONDENT



**Before: Hon. Lady Justice Dr. Winnie Sithole Mwenda at Lusaka this 3rd
day of February, 2023.**

For the Complainant: Mr. A. Musonda of Legal Aid Board

*For the Respondent: Messrs. S.M. Lungwebungu and M.K. Mpemba
of Messrs. SCPM Legal Practitioners*

JUDGMENT

Cases referred to:

1. *Supabets Sports Betting v. Batuke Kalimukwa, SCZ Selected Judgment No. 27 of 2019.*
2. *Konkola Copper Mines Plc. V. Hendrix Mulenga Chileshe, SCZ Appeal No. 94/2015.*
3. *ZCCM Investments Holdings v. Sichimwi, SCZ Appeal No. 172 of 2014.*
4. *Hastings Obrien Gondwe v. B.P. Zambia Limited, (1997) S.J.1 (S.C.).*
5. *Isaac Tantameni C. Chali (Executor of the Will of the late Mwalla Mwalla) v. Liseli Mwala (Single woman) (1997) S.J. 22 (S.C.).*
6. *Holmes Limited v. Buildwell Construction Company Limited (1973) Z.R. 77.*
7. *Premesh Bhai Megan Patel v. Rephidim Institute Limited, SCZ Judgment No. 3 of 2011.*
8. *Care International Zambia Limited v. Misheck Tembo, SCZ Selected Judgment No.56/2018.*
9. *Attorney General v. Paul Chilosha, SCZ Appeal No. 220/2016.*

10. *Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia* CAZ, Appeal No. 129 of 2017.
11. *Spectra Oil Zambia Limited v. Oliver Chinyama* CAZ Appeal No. 18/2018.
12. *Zambezi Portland Cement Limited v. Kevin Jivo Kalidas*, CAZ Appeal No. 29 of 2019.
13. *Mark Tink and Others v. Lumwana Mining Company Limited*, CAZ Appeal No. 41 of 2021.
14. *Albert Mupila v. Yu-Wei* COMP/IRCLK/222/2021.
15. *Frida Kabaso Phiri (sued as Country Director of Voluntary Services Overseas Zambia) v. Davies Tembo* SCZ Appeal No. 04/2012
16. *MP Infrastructure Zambia Limited v. Matt Smith and Kenneth Barnes*, CAZ Appeal No. 102/2020.
17. *Emporium Fresh Foods t/a Food Lovers Market and Another v. Kapyia Chisanga*, CAZ Appeal No. 44/2021.
18. *Photo Bank (Z) Limited v. Shengo Holdings Limited* (2008) Z.R. Vol. 1 108.
19. *Swarp Spinning Mills Plc. v. Sebastian Chileshe and Others* (2002) Z.R. 23 (S.C.).
20. *Charles Ng'onga v. Alfred H. Knight (Z) Limited*, SCZ Selected Judgment No. 26 of 2019.
21. *Attorney General v. John Tembo*, SCZ Judgment No. 1 of 2012.
22. *African Banking Corporation v. Bernard Fungamwango* CAZ Appeal No. 148/2020.
23. *Dennis Chansa v. Barclays Bank Zambia Plc.*, SCZ Appeal No. 111 of 2011.
24. *First Quantum Mining and Operations Limited v. Obby Yendamoh*, SCZ Appeal No. 206/2015.
25. *David Banda v. The Attorney-General*, CAZ Appeal No. 233/2020.

Legislation cited:

1. *The Employment Act, Chapter 268 of the Laws of Zambia, as amended by Acts Nos. 15 of 1997 and 15 of 2015.*
2. *The Employment Code, Act No. 3 of 2019.*
3. *Employment Code (Exemption) Regulations, Statutory Instrument No. 48 of 2020*
4. *Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, as amended by Act No. 8 of 2008.*

Texts referred to:

1. *Mwenda, W. S. and Chungu, C., A Comprehensive Guide to Employment Law in Zambia (University of Zambia Press, 2021).*
2. *Davidson Morris, Summary Dismissal (Fair Procedure Guide) Revised on 16th September 2022, Available at: <https://www.davidsonmorris.com>.*
3. *Chungu, Chanda (2022) "MP Infrastructure Zambia Limited v. Matt Smith and Kenneth Barnes, CAZ Appeal No. 102/2020," SAIPAR Case Review: Vol. 5: Iss. 2, Article 6. Available at: <https://scholarship.law.cornell.edu/scr/vol5/iss2/6>.*

1. Introduction/Background and Complaint

- 1.1 On 4th February, 2022, the Complainant herein filed a Notice of Complaint against the Respondent on the grounds that he was employed by the Respondent on 1st September, 2004 as a Missionary and Director of Operations of Chipata Bible and Leadership Training College (hereinafter referred to as "Chipata Bible College") situated in the Chipata District of the Eastern Province of the Republic of Zambia.
- 1.2 That, on or about 20th June, 2018, he was dismissed from employment by the Respondent termed as a result of "a cumulative effect of different actions". It was further alleged that contrary to his conditions of service and the rules of natural justice, he was neither charged with any offence nor accorded any hearing or notice of any kind.
- 1.3 That, in view of the aforesaid, the Complainant seeks the following reliefs: -
 - (i) Damages for wrongful and unfair dismissal;
 - (ii) Payment of all outstanding allowances and terminal dues inclusive of leave pay;
 - (iii) Payment in lieu of notice;
 - (iv) Any other relief the Court may deem fit;

(v) Costs.

- 1.4 In the Affidavit in Support of Notice of Complaint filed together with the Notice of Complaint, Wellington Mwanza, the Complainant herein, and deponent of the Affidavit, testified that he was employed on 1st September, 2004 as a Missionary and Director of Operations of Chipata Bible College situate in the Chipata District of the Eastern Province of the Republic of Zambia.
- 1.5 It was the Complainant's testimony that his Contract of Employment was partly signed in Texas in the United States of America and partly in Zambia. That, the contract was first signed by the elders of Bakers Heights Church of Christ in the United States of America ("the Respondent") and was then sent to him here in Zambia where he appended his signature on the document. A copy of the agreement and its Addendum was produced as exhibit "WM1".
- 1.6 The Complainant testified that he was entitled to a monthly salary of \$1, 350.00 and \$800.00 monthly working fund.
- 1.7 Further, that in addition to the agreement, the conditions of service of Chipata Bible College were applicable to his employment. A copy of the conditions of service was produced as exhibit "WM2".
- 1.8 It was the Complainant's further evidence that, on or about 20th June, 2018, the Respondent's two elders, namely, Elder Robert Dennis and Deacon Johnson travelled to the Eastern Province of Zambia where they had a meeting with the Board of Directors for Chipata Bible College. The Complainant was not allowed to be part of the meeting even though he was present at the College.
- 1.9 That, after the meeting, the Complainant was notified that the Respondent had decided to terminate his employment not as a kneejerk reaction but more of a cumulative effect of different

actions he had taken which had deeply affected individuals and brought reproach on the school, the evangelistic effort and the church. A copy of the letter of dismissal was produced as exhibit "WM3".

- 1.10 According to the Complainant, he was neither charged with any offence or wrongdoing nor notified that the said elders would be travelling to Zambia and let alone have a meeting with the Board of Directors to discuss his employment. Further, that he was not given any hearing by the Respondent.
- 1.11 The Complainant deposed that the reasons for his dismissal are malicious and completely baseless. That, he was not at any time prior to his dismissal, ever been charged with any offence or faced any form of disciplinary action and that he diligently and faithfully executed his duties for fifteen years prior to his dismissal.
- 1.12 The Complainant finally deposed that he had diligently and faithfully executed his duties for fifteen years prior to his dismissal and had accumulated a total of five hundred and forty leave days in the fifteen years he served and only proceeded on leave once covering a duration of two months.

2. Respondent's Answer and Affidavit Evidence

- 2.1 In an Answer to the Complaint filed on 16th August, 2022, the Respondent averred that the Complainant was indeed employed and or engaged by the Respondent as a Missionary to the Eastern Province of the Republic of Zambia and was also tasked with the responsibility of overseeing the operation of Chipata Bible College, a college funded by the Respondent.
- 2.2 The Respondent admitted that the Complainant was dismissed from employment on or about 20th June, 2018 and averred that the Complainant's contract of employment was executed in Texas, United States of America and not in Zambia, and was therefore subject to the jurisdiction of Texas labour laws.

- 2.3 The Respondent further contended that contrary to the averment by the Complainant, the Complainant was given an opportunity to be heard and to exculpate himself prior to his dismissal. That, despite being given the opportunity to exculpate himself, the Complainant, for reasons best known to himself, declined to exculpate himself.
- 2.4 That, the Respondent denies that the Complainant is entitled to the reliefs claimed for and that the Complainant's action herein is an abuse of court process, vexatious and devoid of merit, by reason of which, the Complaint must be dismissed.
- 2.5 In the Affidavit in Support of Respondent's Answer also filed on 16th August, 2022 and jointly deposed to by Nathan Tonga and Apson Phiri, both Directors of Chipata Bible College, the deponents deposed that the College is the brainchild of the Respondent which also funds it. That, the Complainant was appointed as Overseer of the operations of the College.
- 2.6 Further, that the deponents were appointed attorneys for the Respondent through a Power of Attorney dated 1st June, 2022 which authorised them to depose to the affidavit from facts within their personal knowledge. A copy of the Power of Attorney was produced as exhibit "NTAP 1".
- 2.7 The deponents admitted that the Complainant and the Respondent entered into a contract of employment for the Complainant to be employed as a Missionary and Overseer of Chipata Bible College on 1st September, 2004. However, as per the Addendum to the Contract dated 21st November, 2005, the Contract was to take effect on 1st January, 2006.
- 2.8 That, contrary to the averment by the Complainant that the Contract was first signed by the elders of Bakers Heights Church of Christ in the United States of America and then sent to the Complainant in Zambia where he appended his signature, both the Contract as well as the Addendum were fully executed by the parties in Texas, United States of America, following a

visit to Texas by the Complainant, at the invitation of the Respondent. As evidence of this averment, a copy of a letter dated 7th March, 2005, addressed to the Complainant was exhibited as "NTAP 2".

- 2.9 That, the Provincial Labour Officer for Eastern Province confirmed that the Complainant was employed under Texas labour laws as evidenced by a copy of the letter from the Provincial Labour Officer exhibited as "NTAP 3".
- 2.10 That, contrary to the Complainant's assertion, the Complainant was entitled to US \$1,250 monthly salary and US \$ 800.00 for incidental personal work fund expenses arising out of his full time missionary work.
- 2.11 The deponents further averred that the Respondent did, in consultation with the College, and for purposes of convenience, offer the Complainant accommodation on the College premises as part of its employment package to easily fulfill the missionary work for which the Complainant was engaged.
- 2.12 That, in addition to the remuneration stated above, the Complainant allocated himself an illegal monthly salary of K8,000.00 which was drawn out of the College funds without prior approval of the College and/or the Respondent as the funder of the College. Copies of documents evidencing the payments were collectively produced as exhibit "NTAP 4".
- 2.13 The deponents further averred that contrary to the Complainant's assertion, there existed no agreement between the parties that the College conditions of service would extend to the Complainant herein as Overseer of the College operations.
- 2.14 The Respondent denied the rest of the Complainant's averments in paragraphs 9 to 17 of the Affidavit in Support of Notice of Complaint.

3. Complainant's Reply

- 3.1 In reply to the Respondent's Answer, the Complainant filed an Affidavit on 13th December, 2022, wherein he disputed the Respondent's allegation that the Contract of Employment was to take effect on 1st January, 2006 and stated that the Contract of 1st September, 2004, was for the appointment as a preacher in Chipata while the contract of 21st November, 2005, was for appointment as Director with the necessary conditions.
- 3.2 The Complainant disputed the Respondent's assertion that he travelled to the United States of America in March, 2005. He further disputed that any contract was signed under Texas labour laws as he was employed and worked under the Zambian labour laws.
- 3.3 The Complainant further disputed having been offered accommodation by the Respondent and averred that the College buildings were not there when he moved to Chipata and that the house which he had been occupying since inception was constructed by the Complainant and belongs to the Church of Christ Mission Zambia and not the Respondent.
- 3.4 The Complainant also disputed the Respondent's assertion that he illegally allocated to himself a monthly salary of K8,000.00 which was drawn out of the College funds without prior approval of the College or the Respondent as the funder of the College. He insisted that his salary was US \$1,350.00. To that end, he exhibited a document dated 13 August which shows some disbursements, as "WM1".
- 3.5 In further reply, the Complainant stated that contrary to the Respondent's contention that there existed no agreement between the parties that the College conditions of service would extend to the Complainant; he was entitled to some conditions of service of Chipata Bible College. The Complainant exhibited a copy of the Chipata Bible College's Terms and Conditions of Service (2007) as evidence of his averment, as "WM2".

- 3.6 The Complainant averred that contrary to the Respondent's assertion, he was not given an opportunity to exculpate himself and his dismissal was wrongful and unfair. He produced a copy of his dismissal letter as exhibit "WM3".
- 3.7 The Complainant denied the Respondent's claims that his tenure in office was marred by illegal and clandestine activities and asserted that the College had written some internal correspondences so that they could create some malicious allegations in order to have the Complainant's contract terminated at all costs. The Complainant then allegedly produced a copy of a "malicious letter" marked "WM4". However, the document is not among the documents attached to the Certificate of Exhibits.

4. Respondent's Further Affidavit in Support of Respondent's Answer

- 4.1 The Respondent filed a Further Affidavit in Support of Answer by leave of Court on 23rd December, 2022, also sworn by Nathan Tonga and Apson Phiri, both Directors of Chipata Bible College.
- 4.2 The deponents avowed that a letter from the Respondent to the then Board Chairperson of Chipata Bible College, Mr. George J. Banda dated 10th September, 2018 confirmed that the Complainant was an employee of the Respondent and not Chipata Bible College. Hence, they verily believed that the Conditions of Service for the Chipata Bible College did not apply to the Complainant. That, the fact that the Complainant was an employee of the Respondent was also confirmed by letter dated 25th September, 2018 authored by the then Board Chairperson, Mr. George J. Banda. Copies of the two letters mentioned above were collectively produced as exhibits "NTAP 1".
- 4.3 That, the contents of the above paragraph are confirmed by minutes of the Board of the Chipata Bible College dated 9th

March, 2019 and 22nd September, 2018, which also confirm the resignation of Mr. George J. Banda as Board Chairperson of Chipata Bible College and further confirmed by letter to him dated April, 2019. The minutes and letter referred to above were collectively exhibited as "NTAP2".

- 4.4 The deponents deposed further, that whilst acting as directors, they discovered that the Complainant was drawing an illegal salary aside from his entitled salary with the Respondent. That, this salary was created without the approval of the Board of Chipata Bible College. As evidence of this averment, copies of payslips belonging to the Complainant were produced and collectively marked as exhibit "NTAP 3".

5. Evidence at Trial

- 5.1 Trial in the matter took place on 14th, 19th and 28th December, 2022. Two witnesses testified for the Complainant, namely, the Complainant himself (CW1) and George Banda (CW2).
- 5.2 Wellington Mwanza, CW1, testified that he was offered employment by Baker Heights Church of Christ, the Respondent, on 1st September, 2004 as a Missionary at Chipata Bible College. That, there was an agreement that was partly signed in Texas, United States of America and partly in Zambia. The elders at Bakers Heights Trust firstly signed the document in Texas and then sent it to him in Zambia for his signature.
- 5.3 It was CW1's evidence that under the Contract he was entitled to US \$1,350.00 per month as salary and US \$800 as allowance. Further, that the conditions of service of Chipata Bible College where he was a director, applied to his employment. CW1 identified exhibit "WM1" in the Affidavit in Support of Notice of Complaint, as the document which showed that he was supposed to be paid US \$1,350.00 per month as salary and US\$800.00 as an allowance.

- 5.4 CW1 testified that on 20th June, 2018, the Respondent sent two elders in the name of Robert Dennis and John Hanson to Chipata to have a meeting with the Board of Trustees of the College. That, he was not told that the two elders would come to Zambia to hold a meeting with the Board of Trustees. After the meeting, he was informed that the Respondent had decided to terminate his employment. That, he was denied entrance into the meeting and thereafter, he was given a letter which stated that he should resign for offending some people. CW1 alleged that prior to the arrival of the two elders from America, no letter was written to him telling him that he had done something wrong. It was CW1's further testimony that in the fifteen years that he served diligently, there was never a time that he was charged for any wrong doing.
- 5.5 According to CW1, there were two contracts that were drawn up, the first one was for him to go to Chipata to become a Missionary; a year later they changed the contract so that he could become a Director at Chipata Bible College. When CW1 wrote to the Board of Trustees of the College to intervene as he felt that he had been unfairly treated, the Board said there was nothing that they could do.
- 5.6 CW1 testified that according to the terms and conditions of service for Chipata Bible College, he was entitled to a 25% gratuity for every year that he served and to leave pay at the rate of three days per month.
- 5.7 With regard to the procedure to be followed when a contract of employment was to be terminated, CW1 stated that according to the conditions of service, when an employee did something wrong, they would ask him to exculpate himself. If the employee did not improve, they would write a final warning letter and if the employee did not change, they would terminate his employment but the conditions of service also had a provision for other forms of punishment rather than termination of

- employment. It was CW1's evidence that he was not asked to exculpate himself.
- 5.8 According to CW1, there was no clause in the conditions of service that provided for the Respondent to terminate his employment without giving him a chance to be heard.
- 5.9 CW1 testified that the owner of the house he was living in is not the Respondent or Chipata Bible College, but Church of Christ Mission of Zambia.
- 5.10 In cross-examination CW1 confirmed that he executed a contract of employment with the Respondent. He also confirmed that there was an interaction between himself, the Labour Office and Respondent in Chipata and that there was a response that came from the Labour Office following their interaction which stated that his contract of employment was subject to Texas law and not Zambian law. However, he disagreed that his contract was subject to Texas law.
- 5.11 CW1 also confirmed that his contract was terminated and he was dismissed by the elders of Baker Heights Church. That, he appealed against the dismissal.
- 5.12 Under further cross-examination CW1 admitted that there was no contract of employment between himself and Chipata Bible College before Court. When referred to the terms and conditions of service of Chipata Bible College, exhibited as "WM2" in the Affidavit in Reply, which in examination-in-chief he had indicated applied to him and asked to indicate where the signatures of members of the Board were, CW1 stated that there were no signatures on the document.
- 5.13 When asked if he had produced his last pay slip as proof that he was entitled to 540 leave days, CW1 told the Court that he had not produced the pay slip before Court. He further stated that his contract with Baker Heights Church did not provide for leave days.

- 5.14 When referred to exhibit "NTAP 4", CW1 admitted that the funds he was being paid came from America but he still drew K8,000.00 monthly. He confirmed that his contract with the Respondent did not provide for payment in lieu of notice.
- 5.15 In further cross-examination, CW1 stated that he raised the money to build the house he was still living in from friends in the United States of America, some of whom were at Baker Heights Church and that he was still keeping the Ford Ranger he was given to carry out his duties.
- 5.16 When referred to exhibit "WM2" in the Affidavit in Reply, CW confirmed that the document contained conditions of service for Chipata Bible College and that it was dated 2007. He agreed that his Contract was signed on 1st September, 2004 and that the Addendum was signed on 21st November, 2005. He admitted that his conditions of service and the Addendum to the Contract of Employment came later, but denied the suggestion that the conditions didn't apply to him.
- 5.17 CW2 was George Banda. It was his testimony that he was once the Chairman of the Board of Trustees for Chipata Bible College. That, on 20th June, 2018, they had a scheduled Board meeting. The sponsors from Baker Heights Church arrived in the morning and he asked Mr. Mwanza, the Complainant, if as secretary of the Board he was aware of the sponsors' coming. That, Mr. Mwanza's reply was that he was not aware. In the meeting the sponsors asked CW2 if Mr. Mwanza could declare interest. CW2 argued with the sponsors as he did not understand why they wanted to send Mr. Mwanza away. Later on, after Mr. Mwanza had left the meeting, the sponsors disclosed that they did not want to work with Mr. Mwanza anymore.
- 5.18 CW2 testified that the sponsors produced a letter which was signed by the elders in America saying that Mr. Mwanza should hand over his office. Mr. Mwanza was sent home and the

sponsors appointed some co-directors. That, the contents of the letter were to ask Mr. Mwanza to write a resignation letter. According to CW2, there was a heated debate because the Board was split – some of the Board members were for the idea of asking Mr. Mwanza to resign while others were against it. The co-directors appointed by the sponsors took charge of the position of Director, the meeting concluded and the attendees dispersed.

- 5.19 When asked what the connection was between the Respondent who is the registered trustees of Baker Heights Church of Christ and Chipata Bible College, CW2 stated that the connection was that the College is sponsored by Baker Heights Church of Christ through Chipata Church of Christ.
- 5.20 With regard to how the employees of the Bible College are paid, CW2 testified that the College is paid by the sponsors who send funds into the church account and administratively the Director and his team facilitate the payments to the employees. He clarified that by sponsors he was referring to Baker Heights Church of Christ.
- 5.21 Testifying on the procedure for termination of employment of an employee of the College, CW2 stated that the Board sits to determine any disciplinary charges against employees. If the employee is found guilty, the Board dismisses that employee. It was CW2's evidence that the Complainant's contract of employment was terminated wrongly because the correct procedure was not followed. That, the sponsors should have built up a case against Mr. Mwanza and then written to the Board which would have determined the case, but that was not what happened. That, up to the time of the hearing of the case in Court, CW2 could not specify which case was brought up to dismiss the Complainant. That, according to the letter from the sponsors, it appeared that the Complainant was dismissed for personal reasons.

- 5.22 When asked what his position as Chairperson of the Board was in view of the divisions among Board members with regard to the issue of Mr. Mwanza, CW2 said that from the beginning he argued that the procedure followed was wrong and since he was convinced that three quarters of the members wanted Mr. Mwanza to go, they wrote a letter under duress.
- 5.23 When referred to the exhibit collectively marked "NTAP 1" in the Further Affidavit in Support of Respondent's Answer to the Complainant's Complaint, CW2 said that the document showed that there was a document which the sponsors wrote which the Board used as instructions. He also testified that had the sponsors not used a short cut to terminate Mr. Mwanza's employment, the Board could have dealt with the matter administratively.
- 5.24 Under cross-examination, CW2 confirmed that he was the Board Chairperson for the Bible College Board for three years and that the sponsors paid several visits to Chipata during that time and that Mr. Mwanza was Secretary of the Board. He further, confirmed that each time there was a Board meeting the minutes would reflect when the next Board meeting would take place.
- 5.25 CW2 further confirmed that Mr. Mwanza, as Board Secretary, would communicate with the sponsors and send minutes of the meetings. He also admitted that the meeting which took place on 20th June, 2018 was scheduled at the last Board Meeting.
- 5.26 CW2 confirmed that Baker Heights Church of Christ is a separate entity from Chipata Bible College; that the Bible College was incorporated in Zambia while Baker Heights Church of Christ was registered in the United States of America. He also confirmed that the Director of Chipata Bible College was appointed by the registered trustees of Baker Heights Church of Christ. He admitted that the Director was not appointed by the Board of Chipata Bible College. He also conceded that since the

Board did not employ the Complainant, it was not privy to the terms and conditions of the contract between the Director and the Respondent. However, CW2 refused to confirm that the power to dismiss the Complainant lay with the Respondent.

- 5.27 Under further cross-examination, CW2 agreed that there was no evidence before the Court that the Board approved Mr. Mwanza's salary. He further confirmed that the Chipata Bible College was established after Mr. Mwanza was engaged by the Respondent. When referred to exhibit "NTAP 1" in the Further Affidavit in Support of Respondent's Answer, CW2 agreed that the power to fire or maintain Mr. Mwanza was the preserve of the Respondent. He further agreed that during his tenure as Chairperson of the Board he never signed off or approved any salary for Mr. Mwanza.
- 5.28 CW2 reiterated that there was a split in the Board over the termination of Mr. Mwanza's contract and that three quarters of the Board wanted Mr. Mwanza gone. He agreed that Mr. Mwanza was appointed as Overseer of Chipata Bible College through the Addendum exhibited as "NTAP 2" in the Affidavit in Support of Respondent's Answer. He admitted that there was no provision in the Addendum stating that Mr. Mwanza was to draw a salary from Chipata Bible College and yet he was drawing a salary.
- 5.29 CW2 stated under further cross-examination that he was aware of the terms and conditions of service that were prepared by Mr. Mwanza in relation to Chipata Bible College but did not participate in their preparation and did not approve of them as Board Chairperson. He, however, said that the terms and conditions were applicable to Mr. Mwanza as a worker of Chipata Bible College. He admitted that Chipata Bible College was a different registered entity from Baker Heights Church of Christ and that Mr. Mwanza had a contract with the Respondent. He agreed that there was no evidence before the

Court of the contract between Chipata Bible College and Mr. Mwanza.

- 5.30 When reminded that during examination-in-chief he had stated that the letter he had written was written under duress, CW2 admitted that he had said so and that the duress came from members of the Board of Chipata Bible College. It was his evidence that he tried to protest against this pressure but had no evidence before the Court to prove his assertion.
- 5.31 That was the end of cross-examination. There was nothing in re-examination and that marked the close of the Complainant's case.
- 5.32 The first witness for the Respondent was Leonard Simutombo, a former Board Chairperson of Chipata Bible College. He will be referred to as "RW1". It was RW1's testimony that on 30th June, 2018, they had a Board meeting but before the meeting started, two visitors from Baker Heights Church of Christ in Texas, the United States of America came; namely, elder Robert Dennis and Deacon John Hanson who intimated that they had something to share relating to Mr. Mwanza's work and they were allowed to address the Board members before the meeting started.
- 5.33 The two elders complained that they had encountered some problems while working with Mr. Mwanza who was not writing his reports on time and would only be compelled to do so after they withheld his salary. Further, that when Mr. Mwanza fired employees, he would not send a report to the Respondent but would continue to receive their salaries, for example, there was an accountant by the name of John Simfukwe, who stopped working in February, 2018 but Mr. Mwanza did not tell the Respondent that the man had stopped working and so the Respondent kept on sending his salaries for March up to July, 2018. Their other complaint was that Mr. Mwanza did not give them the correct number of students at the College.

- 5.34 RW1 testified further, that in the meeting, Mr. Banda, the former Chairperson of the Board, informed Mr. Mwanza that he had been relieved of his duties by his bosses. The two visitors told Mr. Mwanza to write a letter of resignation but he refused to do so. The visitors also told Mr. Mwanza to hand over the keys to his office, documents for the school and the vehicle for the school. Mr. Banda then told Mr. Nathan Tonga, Mr. Abson Phiri and Mr. Clement Mwenya that from then onwards they would perform Mr. Mwanza's duties as he had been relieved of his duties.
- 5.35 In further examination-in-chief, RW1 said that after one week, Mr. Mwanza appealed to Chipata Bible College Board and the Board of Baker Heights Church of Christ. The two visitors were still around at that time. Mr. Mwanza complained about how he was relieved of his duties but the visitors said the decision to relive him of his duties was final. Mr. Mwanza was again requested to hand over the school property but he never handed in anything, prompting the former Board Chairperson to write a letter to Mr. Mwanza asking him to hand over the school property since he was no longer an employee. That, up to the time of trial Mr. Mwanza had not handed over any school property. RW1 testified that they had to break into Mr. Mwanza's office by court order so that the directors appointed to do Mr. Mwanza's work could access the office.
- 5.36 In cross-examination, RW1 admitted that Mr. Mwanza was employed by the Respondent to work at the Bible College. He admitted that the letter exhibited as "NTAP 2" (the Addendum) in the Affidavit in Support of Respondent's Answer, referred to Mr. Mwanza as Director of Operations. It was also his evidence that Baker Heights Church of Christ pays salaries of members of staff of Chipata Bible College. Further, that he did not have proof to show that some people were fired at the Bible College.

- 5.37 Under further cross-examination, RW1 said that there is an accounts department at Chipata Bible College and admitted that some people could be fired but still appear on the payroll. He was not aware that the institution was once subjected to an audit.
- 5.38 RW1 admitted that he was not privy to the way the Director used to conduct himself or the way he used to handle the operations of the institution. He denied that it was his evidence that the sponsors, Becker Heights Church of Christ, forced Mr. Mwanza to write a resignation letter but agreed that they told him to write the resignation letter and he did not write it.
- 5.39 RW1 also denied it when it was put to him that the Respondent just wanted to dismiss Mr. Mwanza because he had not committed any offence. RW1 admitted that he did not know if Mr. Mwanza misappropriated funds belonging to Chipata Bible College or not.
- 5.40 In re-examination, RW1 stated that the sponsors continued for five months to send the salary of Mr. Simfukwe who was no longer in employment. Finally, RW1 clarified that the Board members and himself as Board Chairperson, were not employed by Baker Heights Church of Christ but were just chosen by the Churches of Christ to oversee the College.
- 5.41 The second witness for the Respondent was Nathan Tonga, a co-Director at Chipata Bible College. He shall be referred to as "RW2". RW2 explained his role at the Chipata Bible College as to oversee the operations of the College.
- 5.42 RW2 testified that Chipata Bible College is a Non-Governmental Organisation that is donor funded. That, Baker Heights Church of Christ is the main sponsor of the College. Further, that Baker Heights sponsors many entities, including the Church of Christ Mission of Zambia Registered Trustees in Eastern Province.

- 5.43 It was RW2's further testimony that the College was set up by Mr. Wellington Mwanza in 2006 after he was already engaged by Baker Heights Church of Christ in the United States of America. That, when Chipata Bible College was set up in 2006, Mr. Mwanza was put to oversee its operations. Around June, 2018, towards the end of the month, information came to his office as Dean of Students, that as an institution they were visited by two elders from the United States of America, namely, Elder Robert Dennis and John Hanson. After a series of meetings that the two elders had with the Board of the College and Mr. Mwanza, Mr. Mwanza's employment was terminated by his employer, Baker Heights Church of Christ and he was informed that he would no longer oversee the operations of the College. RW2 was informed by the Board of the College that he was appointed, together with Mr. Clement Mwenya and Mr. Apson Phiri, to act as co-directors to oversee the operations of the college.
- 5.44 It was RW2's testimony that it was after he assumed the position of co-director that he came to know that Mr. Wellington Mwanza was employed by Baker Heights Church of Christ. He further came to discover that Mr. Mwanza was paid in United States Dollars directly into his Dollar Account which he had opened in the United States of America at First National Bank. His salary was US \$1,350 per month. That, surprisingly, he also came to learn that Mr. Mwanza created another salary of K8,000 per month for himself from the funds donated to Chipata Bible College. It was from the same K8,000 which he created for himself that he paid his statutory obligations such as pension at NAPSA and PAYE at ZRA.
- 5.45 RW2 testified that the extra salary which Mr. Mwanza paid himself was neither approved by Baker Heights nor the Board of Chipata Bible College. According to RW2, that made the extra salary illegal and the Respondent wants the monies paid to Mr. Mwanza to be paid back in full. That, after Mr. Mwanza's

employment was terminated, several meetings took place and one of them took place at the Provincial Labour Office in Eastern Province and the two elders from the United States of America and Mr. Mwanza were in attendance. RW2 as co-director was also in attendance. The Provincial Labour Officers mentioned in the meeting that Mr. Mwanza was indeed employed under Texas labour laws. The Labour Office eventually wrote a letter to the Respondent where they emphasised that Mr. Mwanza was an employee of Baker Heights Church of Christ under Texas labour laws and that if the Respondent was willing, they could pay Mr. Mwanza any amount in appreciation for the years that he served them.

- 5.46 According to RW2, the Respondent said that they would consider paying Mr. Mwanza some amount in appreciation. Further, that at the time when the Respondent dismissed Mr. Mwanza, in June, 2018, they had already paid him for the month of July which he never worked for. That, he found that out from the document exhibited as "NTAP3" in the Respondent's Further Affidavit in Support of Respondent's Answer.
- 5.47 RW2 further testified that he came to discover that the contract between Mr. Mwanza and the Respondent stated that they would send funds for the purchase of four acres of land for the construction of the preacher's school, the preacher's school referred to being Chipata Bible College. The contract further provided that they would send funds for the purchase of the vehicle which Mr. Mwanza would be using as he did his missionary work. That, the Addendum to the contract stated that Mr. Mwanza together with his family would stay in the Director's house at Chipata Bible College. From 2018 when he was dismissed, Mr. Mwanza had continued staying in the house that was given to him by virtue of his employment. That, Mr. Mwanza had, up to the trial date, not done any hand over of all

the College property, namely, the vehicle, everything in the office where Mr. Mwanza was operating from and the house.

- 5.48 It was RW2's further testimony that Mr. Mwanza paid statutory payments from the illegal salary of K8,000. As evidence of this assertion, RW2 identified exhibit "NTAP 4" in the Affidavit in Support of Answer. That, the total amount Mr. Mwanza paid himself as salary was K378,000.00; the source of the information in exhibit "NTAP 4" being the salary schedules of Chipata Bible College. That, the Bible College contributed a total of K19,060.00 being the 5% that the College contributed towards Mr. Mwanza's NAPSA payments.
- 5.49 In cross-examination, RW2 confirmed that Mr. Mwanza was employed by the Respondent as Director for Chipata Bible College. He also confirmed that he (RW2), is co-Director of the Bible College, but that his employers are not the Respondent. He agreed that the Respondent is the sponsor of the Bible College but that they are not his employers. That, his employer is Chipata Bible College.
- 5.50 RW2 admitted that Mr. Mwanza was employed under United States of America laws and as evidence of his assertion, he referred the Court to exhibit "NTAP 3" of the Affidavit in Support of Respondent's Answer, being a letter written by the Provincial Labour Office to the Respondent. Under further cross-examination, RW2 conceded that other than the letter from the Provincial Labour Office, there was no document before Court to show that Mr. Mwanza was employed under American law.
- 5.51 RW2 reiterated that Mr. Mwanza misappropriated K8,000.00 for a number of months. He denied the assertion that Mr. Mwanza was entitled to funds for special occasions as per paragraph 2 of the Addendum exhibited as exhibit "NTSP 2" in the Affidavit in Support of Respondent's Answer.
- 5.52 Under further cross-examination, RW2 said he was aware that the vehicle that was given to Mr. Mwanza for use in his

missionary work belonged to Namuyanga Mission. He admitted that the Bible College has an accounts department which has qualified accountants whose duty is to ensure that resources are well checked, but stated that it was still possible for someone to misappropriate K8,000.00 every month.

- 5.53 In re-examination, RW2 stated that exhibit "NTAP 4" in the Affidavit in Support of Respondent's Answer is a true reflection of the salaries that the Complainant received. Further, that the money was sent to Chipata by the Respondent and that is why there is a Bible School in Chipata.
- 5.54 That marked the close of the Respondent's case.

6. Legal Arguments

Complainant's Arguments

- 6.1 The Complainant's Counsel filed submissions on behalf of the Complainant on 4th January, 2023. According to Counsel, what is in dispute and hence, falls for determination by this Court, is whether the Registered Trustees of Baker Heights Church of Christ followed the proper procedure in dismissing the Complainant and whether the basis for the dismissal was fair.
- 6.2 Counsel submitted that the law on termination of employment as laid out in the Employment Code, Act No. 3 of 2019, is unambiguous and to the effect that an employee must be given an opportunity to be heard on any allegations raised against him and an employer shall only terminate a contract of employment for a good reason, which must be communicated to the employee. For this submission, Counsel for the Complainant relied on Section 52 (2) and (3) of the Employment Code.
- 6.3 It was submitted, further, that the Complainant's contention that he was not given an opportunity to be heard before being dismissed flew in the face of the Respondent's evidence which did not show any charge sheet raised prior to the dismissal; did not show that any disciplinary panel sat or minutes of the

disciplinary panel/committee. That, what was shown by the Respondent's evidence was that an order was received from the Respondent through their two representatives to dismiss the Complainant and the Board for Chipata Bible College effected that order.

- 6.4 Counsel submitted further, that the reason for the dismissal was not disclosed to the Complainants as required by the law. That, the dismissal letter just stated that the contract was terminated without disclosing any offence. Further, that if the testimony of RW1 and RW2 is considered, the Complainant was in a sense being referred to acts across fifteen years and more of his work and this is the reason why the Respondent wanted the Complainant to write a resignation letter because there was no cause for the termination of his contract of employment. That, even before the enactment of the Employment Code, it was settled law and a requirement of the rules of natural justice, that a person must be afforded an opportunity to be heard before a penal sanction can be meted out.
- 6.5 It was submitted that the general rule in civil matters is that he who alleges must prove and prior to the Employment Code, a plaintiff bore the burden of proving unfair dismissal, but that the position has now changed in that the burden has now shifted to the employer of proving that the termination of a contract of employment was fair and for a valid reason. That, the Respondent's attempt to show that the dismissal of the Complainant was based on actions across a period of fifteen years and more, prior to the dismissal, was a clear showing of the unfairness of the dismissal, particularly in the absence of any offence committed by the Complainant. That, to retain and use conduct records for a period of more than fifteen years in and of itself is a clear demonstration of unfairness on the part of the Registered Trustees of Baker Heights Church of Christ.

- 6.6 Submitting further, Counsel for the Complainant stated that the evidence of both the Complainant and the Respondent was to the effect that there was no apparent reason as to why the Respondent terminated the Contract of Employment for the Complainant.
- 6.7 In conclusion, Counsel submitted that before the Complainant was dismissed, the Registered Trustees of Baker Heights Church of Christ had not charged him of any offence and he was not given an opportunity to be heard by way of a charge sheet and disciplinary hearing but was only given a dismissal letter. The dismissal letter should have at the very least, expressed the actions said to have offended the rules of procedures or the offence committed. That, therefore, the termination of the Complainants employment was wrongful and unfair.

Respondent's Arguments

- 6.8 In the submissions filed on 13th January, 2023, Counsel for the Respondent submitted that the issues to be determined in this matter are the following:
- i. Whether this Honourable Court can proceed to grant the Complainant's claims as prayed on the Notice of Complaint;
 - ii. Whether an employee whose employment has come to an end can continue to hold on to property/items that accrued to him or her by virtue of such employment; and
 - iii. Whether a non-party in a particular action is bound by a Court order.
- 6.9 Submitting on whether or not this Court can grant the Complainant's claims as prayed in the Notice of Claim, Counsel for the Respondent argued that the answer is in the negative. Counsel proceeded to cite a number of authorities on what

constitutes wrongful dismissal, one of which was the case of **Supabets Sports Betting v. Batuke Kalimukwa**¹, where the Supreme Court stated that wrongful dismissal looks at the form of dismissal and refers to dismissing an employee in breach of contractual terms, such as non-compliance with the disciplinary procedure. Another case cited was **Konkola Copper Mines Plc. v. Hendrix Mulenga Chileshe**², where the Supreme Court asserted that the concept of wrongful dismissal has been widely accepted to mean that in considering whether the dismissal is wrongful or not, it is the form to be considered, rather than the substance. It was argued that from the authorities cited, it is clear that the dismissal under discussion here is only concerned with whether or not the procedure was followed.

- 6.10 It was further submitted that the Contract of Employment between the Complainant and the Respondent did not provide for any particular procedure to be followed when terminating the contract. Hence, it is untenable for the Complainant to argue that he was wrongfully dismissed. That, in the absence of any particular procedure in the Contract of Employment outlining the procedure to be followed prior to termination of the contract, both the Respondent and the Court are left to speculate as to the applicable laws relating to wrongful dismissal in Texas, the State in which the contract between the Complainant and the Respondent was executed.
- 6.11 Counsel for the Respondent submitted, further, that having established through cross-examination that the Complainant was an employee of the Respondent and not the College, the Complainant cannot claim to be entitled to or benefit from the conditions of service he singlehandedly prepared without the blessing and/or approval of the College Board, or even the Respondent as the main sponsor of the College. That, the lack of approval of the conditions of service by the College Board was

confirmed under cross-examination by the Complainant himself and his witness.

- 6.12 Proceeding to the Complainant's claim of unfair dismissal, Counsel quoted a passage from page 241 of **A Comprehensive Guide to Employment Law in Zambia**, by Mwenda and Chungu, where the learned authors defined unfair dismissal as dismissal which is contrary to the statute or based on an unsubstantiated ground. That, the courts will look at the reasons for the dismissal to determine if the dismissal was justified or not, and fair and reasonable in the circumstances. Further, that in reaching the conclusion that the dismissal was unfair, the courts will look at the substance or merits to determine if the dismissal was reasonable or justified.
- 6.13 That, the only way this Court can say with certainty that the Complainant was unfairly dismissed is to resort to, and review the relevant statutes and/or legislation; that in this case, it is difficult to determine if the Complainant was unfairly dismissed under Texas law as the Court is unaware of what would amount to unfair dismissal in the United States of America.
- 6.14 It was submitted, further, that in the event that this Court found that Zambian labour laws were applicable to the Complainant's contract of employment, the Complainant was validly dismissed under the prevailing law at the time when he was summarily dismissed by the Respondent for the reasons given in the letter of dismissal.
- 6.15 Submitting on the Complainant's claim for payment of all outstanding allowances and terminal dues, inclusive of leave pay, Counsel stated that it will be noted from the Contract of Employment that nowhere does it state that the Complainant would be entitled to allowances, terminal dues and leave days' pay. Further, that should this Court find that the conditions of service for the Bible College applied to the Complainant, Appendix 1 of the same provides for the disbursements of

terminal benefits and states that where one has been dismissed, as was the case with the Complainant, the dismissed employee would only be entitled to salary in lieu of notice and leave pay. That, on this basis, the Complainant is not entitled to the claims for terminal dues as well as allowances as prayed for.

- 6.16 With regard to the claim for leave pay, it was submitted that, in the event that this Court determined that the conditions of service for Chipata Bible College applied to the Complainant, there is no basis for this Court to deduce that leave days are due to the Complainant as he did not produce any evidence to show how many leave days were in arrears and not even the pay slip which was produced which had the allocated salary under the College showed any accrued leave days.
- 6.17 In relation to the claim for payment in lieu of notice, it was argued that summary dismissal, which was the mode under which the Complainant was dismissed, does not allow for the giving of notice, but if this Court should find that the Complainant was entitled to notice, the salary paid to the Complainant for July, 2018, for which he did not work, should be taken to be payment in lieu of notice. The case of **ZCCM Investments Holdings v. Sichimwi**³ was cited as fortifying that it is unlawful to award a salary or pension benefits for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment.
- 6.18 Counsel submitted, further, that should the Court be of the view that the Complainant is entitled to any of the reliefs sought, such award should be offset from the salary the Complainant allocated himself under the College as the record will show that the Respondent counterclaimed the sum of K378,000.00 plus, being the salary amassed by the Complainant.
- 6.19 Lastly, submitting on the question whether an employee whose employment has come to an end can continue to hold on to

property/items that accrued to him or her by virtue of such employment, it was submitted that the mission house, albeit having been registered in the name of Church of Christ Missions, came to the Complainant as an incident of his employment under the Respondent. That, as per the decision of the Supreme Court in **Hastings Obrien Gondwe v. B.P. Zambia Limited**⁴, such perks are enjoyed as incidence of employment. That, the Supreme Court in the above case stated that the learned trial judge felt that it was going to be unfair to the respondent for the appellant to continue occupying the company house and using the company vehicle when he ceased working for the respondent at the time he purported to retire. That, the Supreme Court agreed with the trial judge's sentiments.

- 6.20 It was further submitted that going by the authority cited above, the Complainant in this case ought to immediately vacate the college house and hand over the vehicles in his possession. That, the argument that the house the Complainant is residing in and situated on the College premises does not belong to the Respondent and in fact belongs to the Church of Christ Missions, is neither here nor there.
- 6.21 It was Counsel's further submission that it is clear from the Contract of Employment that the purchase of the land on which both the College and the house sit, and in fact, the funds for constructing both, came from the Respondent, including the money for the purchase of the motor vehicles in the possession of the Complainant and that these only came into the possession of the Complainant by virtue of his employment with the Respondent, which employment was terminated in June, 2018.
- 6.22 Moving on to the issue of whether a non-party in a particular action is bound by a court order, Counsel for the Respondent submitted that the Court will note that the Complainant hercin

is trying to assert a number of claims against the College that is not a party to this action. That, the Court in **Isaac Tantameni C. Chali (Executor of the Will of the late Mwalla Mwalla) v. Liseli Mwala (Single woman)**⁵, held that:

According to the rules of practice governing joinder of parties and due to non-joinder of parties before trial of the action, other than the respondent, the learned trial judge was legally and effectively precluded from considering the interests of non-parties.

6.23 That, on the strength of the above case, it is the Respondent's submission that in the same way a court is precluded from considering the interests of a non-party, the latter is also not bound by an order of the court in an action to which it is not party.

6.24 That, in the premises, it is the Respondent's prayer that the Complainant's action and the attendant claims be dismissed with costs to the Respondent for want of merit.

7. Findings of fact

Undisputed Facts

7.1 The undisputed facts of this case are that the Complainant was employed by the Respondent on 1st September, 2004 as a Missionary to the Eastern Province of Zambia and was also tasked with the responsibility of overseeing the operations of Chipata Bible College. By an Addendum to the Contract of Employment executed on 21st November, 2005, the effective date of the Contract was 1st January, 2006. In the Addendum, the Complainant was appointed as Director of Operations of the College.

7.2 The Complainant was summarily dismissed by the Respondent by letter dated 20th June, 2018.

Disputed Facts

7.3 The disputed facts of this case are that the Complainant claims that the Contract was first signed by the elders of Baker Heights Church of Christ in the United States of America and then sent

to the Complainant in Zambia where he appended his signature, while the Respondent contends that the Contract as well as the Addendum were fully executed by the parties in Texas, United States of America, following a visit to Texas by the Complainant, at the invitation of the Respondent.

- 7.4 The other disputed facts are that the Complainant claims that the conditions of service of Chipata Bible College applied to him since he was employed and worked under Zambian labour laws. The Respondent, on the other hand, avers that the conditions alluded to by the Complainant did not apply to him as he was not employed by the College. In addition, the Complainant asserts that his employment was governed by Zambian labour laws, while the Respondent argues that there existed no agreement between the parties that the College conditions of service would extend to the Complainant herein as overseer of the College operations. The Complainant also claims that he was neither charged with an offence nor given an opportunity to be heard before he was dismissed. On the other hand, the Respondent states that the Complainant was afforded an opportunity to be heard.

8. Issues for determination

- 8.1 Having carefully examined the documents filed by the Complainant and the Respondent in support of their respective cases and identified the undisputed and disputed facts herein, the issues for determination, as I see them, are the following:
- (i) Which law governed the Contract of Employment between the Complainant and the Respondent?
 - (ii) Did the Conditions of Service of Chipata Bible College apply to the Complainant?
 - (iii) Was the Complainant wrongfully and unfairly dismissed?
 - (iv) Is the Complainant entitled to the claim for outstanding allowances, terminal dues and payment in lieu of notice?

- (v) Is the Respondent entitled to a refund of the sum of K378,000.00 from the Complainant for the unauthorised payments he made to himself from Chipata Bible College funds?

9. Determination of issues

The law that governed the Contract of Employment between the Complainant and the Respondent

- 9.1 The Complainant alleges that he was employed and worked under Zambian labour laws, while the Respondent claims that the Complainant's contract of employment was executed in Texas, United States of America and not in Zambia, and was therefore, subject to the jurisdiction of Texas labour laws.
- 9.2 I will begin my determination of this matter by stating that while the Respondent claims that the Complainant travelled to Texas in the United States of America at the invitation of the Respondent where both the Contract as well as the Addendum were fully executed by the parties; and has, further, pointed to the letter from the Respondent to the Complainant dated 7th March, 2005, exhibited as "NTAP 2", as evidence that the Complainant travelled to Abilene, Texas, in the United States of America where both parties executed the Contract and Addendum, I am of the view that the Complainant's statement that the Contract was first executed by the Respondent in Texas and sent to him in Zambia to execute it, appears to be the correct version of events. I say so because exhibit "WM1" in the Affidavit in Support of Notice of Complaint, shows that the Respondent wrote a letter to the Complainant who was in Kalomo, Zambia, dated 15th July, 2004, enclosing an agreement which, to paraphrase, the Respondent hoped outlined the parties' mutual desires and purposes for saving souls and achieving the ultimate tasks they discussed, planned and prayed about while the Complainant and Irene (the

Complainant's wife) were in Texas with them. The Respondent continued: "If all is agreeable with you, please date and sign the original and keep the copy for your record". (Underlining by the Respondent).

9.3 I believe that if the agreement between the parties had been executed by both parties in Texas, there would have been no need for the Respondent to send the agreement to the Complainant in Kalomo, Zambia with instructions to date and sign the original and keep the copy for his records. The above notwithstanding, it is immaterial whether the contract was executed by both parties in the United States of America or was partly executed in that country and partly in Zambia due to the provisions of the Zambian employment law which made the contract subject to Zambian laws as explained below.

9.4 It is important to note that in the absence of any provision relating to the law governing the contract between the Complainant and the Respondent in the Contract or Addendum, this Court has recourse to Zambian employment law due to the fact that the Contract related to employment of the Complainant in Zambia.

9.5 It has already been established above that the Contract of Employment herein was executed on 1st September, 2004 and the Addendum on 21st November, 2005, which indicated the date of commencement of the contract as 1st January, 2006. At the time the contract was executed and terminated by the Respondent, the Employment Act, Chapter 268 of the Laws of Zambia was the applicable law in Zambia. Section 38 (2) of the Act provided as follows:

When a contract made within another country relates to employment in Zambia the provisions of this Act shall apply to such contract.

9.6 In view of the above provisions, the Contract of Employment between the Complainant and the Respondent was governed by

the laws of Zambia since it related to employment in Zambia. The lesson to be learnt here is that a contract executed outside Zambia but performed in Zambia is subject to Zambian employment law and strict adherence to the law is required.

- 9.7 I should also point out that Chapter 268 which regulated the Complainant's employment at the termination of his employment was repealed in 2019 by the Employment Code Act, No. 3 of 2019. This notwithstanding, section 31 (2) of the Employment Code has a provision similar to Section 38 (2) of Chapter 268. It stipulates as follows:

Where a contract of employment made in a foreign country relates to employment in the Republic, the provisions of this Act apply to that contract.

- 9.8 Therefore, even contracts regulated by the Employment Code Act that are executed outside Zambia but will be performed in Zambia are subject to Zambia's employment legislation.

Whether the Conditions of Service of Chipata Bible College applied to the Complainant

- 9.9 The Complainant has alleged both in his Affidavit evidence and oral testimony, that the Conditions of Service of Chipata Bible College applied to his employment as overseer of the operations of the College, while the Respondent has asserted that there existed no agreement between the parties that the College Conditions of Service would extend to the Complainant herein as overseer of college operations.
- 9.10 The learned authors of **A Comprehensive Guide to Employment Law in Zambia**, at page 25 guide that a contract of employment is not only made up of the express terms, but includes terms implied by law; terms incorporated from custom, practice and trade usage; terms and conditions incorporated from other documents such as registered collective agreements, employer handbooks, management resolutions, circulars and notices issued by the employer, and disciplinary codes.

9.11 It should be noted that as it relates to documentation, the Court in **Holmes Limited v. Buildwell Construction Company Limited**⁶ held that as a general rule, extrinsic evidence cannot be used to vary or interpret a contract. In that case the Court was referring to what is known as the parol evidence rule. The parol evidence rule bars extrinsic evidence that contradicts or creates a variation of a term in writing that the parties intended to be completely integrated. There are, however, a number of exceptions to this rule. Thus, in **Premesh Bhai Megan Patel v. Rephidim Institute Limited**⁷, the Supreme Court held that:

Extrinsic evidence can be admitted to prove any terms which were expressly or impliedly agreed by the parties before or after execution of the contract, where it is shown that the agreement was not intended to incorporate all the terms and conditions of the contract.

9.12 Therefore, amongst the various exceptions to the parol evidence rule, where the contract itself is not intended to embody all the terms of the contract or the contract makes reference to another document or another document is incorporated by reference or otherwise, extrinsic evidence or documentation can be used to interpret, vary or add to the terms of a contract.

9.13 Based on the above, it is clear that under certain circumstances, an extrinsic document such as the conditions of service could form part of the contract. However, it is noteworthy that in the present case, there is no evidence that the Contract itself was not intended to embody all the terms of the Contract. Further, the Contract did not make any reference to the Conditions of Service of Chipata Bible College. What is more, the Complainant did not point to any document other than the Conditions of Service of Chipata Bible College to prove that the same applied to his employment.

9.14 I am of the view that the production of the Conditions of Service of the College is not proof that they applied to the Complainant considering that the Complainant was not an employee of

Chipata Bible College. The Conditions could only have been incorporated into the Complainant's contract of employment if he was an employee of the College.

9.15 The evidence before this Court shows that the Complainant's employer was the Respondent and not the Bible College. This also explains the removal from cause number Comp/IRCLK/453/2018 of the Registered Trustees of Chipata Bible College for misjoinder. That complaint, which had claims similar to the ones herein, was commenced by the Complainant against Chipata Bible College and the Respondent herein. The matter was later dismissed by the presiding Judge for loss of jurisdiction.

9.16 For the afore-mentioned reasons, I find and hold that the Conditions of Service of Chipata Bible College did not apply to the Complainant.

Whether the Complainant was wrongfully and unfairly dismissed

9.17 The Complainant is seeking damages from the Respondent for wrongful and unfair dismissal. He claims that he was dismissed without being charged with any offence or accorded any hearing or notice of any kind, but was dismissed as a result of "a cumulative effect of different actions".

9.18 On the other hand, the Respondent claims that the Complainant was given an opportunity to be heard and exculpate himself prior to his dismissal. Further, that despite being presented with an opportunity to exculpate himself, the Complainant, for reasons best known to himself, declined to do so.

9.19 Before I make a determination on whether or not the Complainant was wrongfully and/or unfairly dismissed, it is important to get a clear understanding of what amounts to wrongful dismissal and unfair dismissal.

- 9.20 The learned authors Mwenda and Chungu, at page 244 of their book, define wrongful dismissal as dismissal that is contrary to the contract of employment. That, it is a product of the common law and one at the instance of the employer that is contrary to the terms of employment.
- 9.21 Unfair dismissal, on the other hand, is dismissal that is contrary to the statute or based on an unsubstantiated ground. It is a creation of statute. In **Care International Zambia Limited v. Misheck Tembo**⁸, the Supreme Court was of the view that unfair dismissal is dismissal which is contrary to statute and that the right not to be unfairly dismissed is usually a much more substantial right for the employee. Further, that the consequences for the employer of dismissing unfairly are usually much more serious than those which attend to a wrongful dismissal. The Supreme Court further clarified unfair dismissal as follows, in the case of *Supabets Sports Betting v. Batuke Kalimukwa* (supra):

In a recent decision of this Court, Moses Choonga v. Zesco Recreation Club, Itezhi-tezhi, our holding was that, the dismissal was unfair and unlawful as the reason given was not related to the qualifications or capability of the appellant in the performance of his duties... in order to determine whether a dismissal was fair or unfair, an employer must show the principal reason for the dismissal.

That such reason must also relate to the conduct; capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do; or to operational requirements of the employer's business.

We do acknowledge the legal position that unfair dismissal is a creature of statute with its origins in the need to promote fair labour practices by prohibiting employers from terminating employees' contracts of employment, except for valid reasons and on specified grounds. The position is substantially in line with Article 4 of the International Labour Organisation (ILO)

standards, Convention 158, Termination of Employment, 1982.

- 9.22 The Supreme Court, in the Supabets Sports Betting case, held that in unfair dismissal the Court is obliged to consider the merits or substance of the dismissal to determine whether the reason given for the dismissal is supported by the relevant facts, while 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.
- 9.23 In the case of Konkola Copper Mines Plc. v. Hendrix Mulenga Chileshe (supra), the Supreme Court had the following to say with regard to the difference between 'unfair dismissal' and 'wrongful dismissal' :
- Unfair dismissal focuses on "why" the dismissal was effected whereas wrongful dismissal focuses on "how" the dismissal was effected. In considering whether the dismissal is wrongful or not, it is the form to be considered rather than the substance...*
- 9.24 Taking into consideration the definition of wrongful dismissal by the Supreme Court of Zambia in the cases referred to above and the learned authors Mwenda and Chungu, as dismissal that is contrary to the contract of employment, in order for this Court to find that the Complainant's employment was wrongful, it should have been contrary to the provisions of the contract of employment between the Complainant and the Respondent. However, the evidence before this Court is to the effect that the Contract did not provide for any particular procedure to be followed when terminating the contract. In fact, there was no provision at all on termination of the Contract. That being the case, there is no basis for this Court to find that the Complainant's dismissal was wrongful.
- 9.25 Having found that the Complainant was not wrongfully dismissed, I will consider whether or not he was unfairly

dismissed. As indicated above, unfair dismissal is dismissal that is contrary to the statute or based on an unsubstantiated ground. As correctly submitted by Counsel for the Respondent in their written submissions, in order for this Court to say with certainty that the Complainant was unfairly dismissed, the Court will have to resort to and review the relevant statutes. As earlier found, the law which applied to the Contract between the Complainant and the Respondent was Zambian law for the reasons already given above. Therefore, I will now turn to the law that applied at the time of the Contract.

9.26 At the time of the Contract between the Complainant and the Respondent, and his subsequent dismissal, the Employment Act, Chapter 268 of the Laws of Zambia, applied to employment in Zambia. Sections 36 (1)(c) and (3) of Chapter 268 (which is now embodied in section 52 (1) and (2) of the Employment Code Act) prohibited an employer from terminating a contract of employment without giving a valid reason for termination connected with the capacity or conduct of the employee or based on operational requirements of the undertaking. The Supreme Court of Zambia, in **Attorney General v. Paul Chilosha**⁹, and the Court of Appeal in a quartet of cases, namely, **Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia**¹⁰, **Spectra Oil Zambia Limited v. Oliver Chinyama**¹¹, **Zambezi Portland Cement Limited v. Kevin Jivo Kalidas**¹² and **Mark Tink and Others v. Lumwana Mining Company Limited**¹³, have held that where an employer has not given the employee a valid reason for his dismissal or termination of the contract of employment, the dismissal or termination is unfair and unlawful.

9.27 For the guidance of both employers and employees, this Court will provide a brief overview of the nature and scope of the valid reasons provided for.

- 9.28 An employee's conduct relates to unacceptable behaviour that an employer is not expected to tolerate as it has impacted on his/her employment relationship in such a way that his/her actions have resulted in the breakdown or erosion of the trust and respect relationship between him/her and the employer.
- 9.29 The employee's capacity relates to the employee's inability to perform his duties. Capacity can either be poor performance, which is performance below the expected standard established by the employer for a role, or ill-health, which is where an employee is unable to carry out his functions due to being unwell and failing to recover from sick leave.
- 9.30 In relation to operational requirements, this Court in **Albert Mupila v. Yu-Wei**¹⁴, guided that there is a distinction between termination for operational requirements and redundancy in that termination for operational requirements is based on a bonafide commercial reason, such as inability to financially sustain an employee or due to a restructuring exercise falling short of the employee's position or services being abolished. Redundancy, on the other hand, is only triggered when one of the redundancy situations in the statute arises, and the position of the employee is abolished or the need for his services ceases (See **Frida Kabaso Phiri (sued as Country Director of Voluntary Services Overseas Zambia) v. Davies Tembo**¹⁵), or where his fundamental terms of employment are adversely varied, without his consent.
- 9.31 In addition to giving a valid reason, the Court of Appeal in *Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia* (supra), guided that the said reason must be substantiated, supported by the facts, circumstances and evidence of the case.
- Apart from giving a valid reason that is substantiated, an employer is required to follow the correct procedure. The Employment Act prohibits the termination of a contract of employment of an employee for reasons related to the

employee's conduct or performance before the employee is accorded an opportunity to be heard.

- 9.32 The issue to be addressed is whether on the evidence before this Court the Respondent provided the Complainant with a valid and substantiated reason for terminating his employment and whether the Complainant was afforded an opportunity to be heard before his dismissal.
- 9.33 The letter of dismissal dated 20th June, 2018 exhibited by the Complainant as "WM3" in the Affidavit in Support of Notice of Complaint, reveals that, according to the Respondent, the reason why the Complainant was dismissed from his employment was that his decisions and actions and their consequences, brought the Respondent to the conclusion that they could no longer support the Complainant as Director of the Bible College. The letter further reveals that the decision to dismiss was "not a knee-jerk reaction but more of a cumulative effect of different actions which the Complainant had taken which had deeply affected individuals and brought reproach on the school, the evangelistic effort and the church". The letter went on to say that by association the reproach fell on each one of them as an eldership, mission committee and the College Board of Directors.
- 9.34 Although not specific, it is clear from exhibit "WM3" that the Complainant's dismissal was based on his performance. In **MP Infrastructure Zambia Limited v. Matt Smith and Kenneth Barnes**¹⁶, the Court of Appeal guided that prior to dismissal for poor performance, the performance must be brought to the attention of the employee and he must be given an opportunity to rectify it. In addition, the learned authors Mwenda and Chanda have guided that when considering dismissal for performance, there must be procedural and substantive fairness which is based on following a four-stage enquiry:-

- (i) Whether the employee was aware, or ought to have been aware of the standard expected by the employer when performing his/her duties;
- (ii) Whether the employee was given a fair opportunity to meet the standard;
- (iii) Whether the employee was given an opportunity to be heard prior to dismissal; and
- (iv) Whether dismissal was the correct remedy for the poor performance.

9.35 For dismissal for poor performance to be justified, each step under the above enquiry must be met. From the facts and evidence on record, it does not appear that the Respondent met the above criteria and that set out in *MP Infrastructure Zambia Limited v. Matt Smith and Kenneth Barnes (supra)*. This is because the particulars of the decisions and actions that the Complainant had taken that deeply affected the Respondent were not indicated in the letter. Admittedly, RW 1 testified that the elders from the United States of America had complained that the Complainant was not writing his reports on time and would only be compelled to do so when they withheld his salary. Further, that the Complainant would not inform them when he fired an employee; that an example in that regard was an employee by the name of John Simfukwe, an accountant, who stopped working in February, 2018, but Mr. Mwanza did not tell the Respondent that the man had stopped working and so the Respondent kept on sending his salaries for March up to July, 2018.

9.36 RW1 also testified that the elders complained that the Complainant did not give them the correct number of students at the college. However, these allegations only came out in RW1's testimony in Court. They were not brought to the attention of the Complainant in the nature of charges against him. Further, even though the Respondent claims that the

Complainant was afforded an opportunity to be heard before his dismissal, the evidence on the record shows otherwise. To the contrary, the evidence shows that the Complainant was not charged for any offence and was not allowed to be in the meeting where the two elders from Baker Heights Church of Christ communicated the decision of the Respondent to dismiss the Complainant. It was after the meeting that the Complainant was given a letter (exhibit "WM3"), in which he was asked to resign.

- 9.37 The Court of Appeal for Zambia, in the case of **Emporium Fresh Foods t/a as Food Lovers Market and Another v. Kapya Chisanga**¹⁷, quoted, with approval, **Davidson Morris**, the learned author of **Summary Dismissal (Fair Procedure Guide)** revised on 16th September 2022, as follows:

Summary dismissal does not equate to instant dismissal or dismissal 'on the spot' as you will need to ensure you have followed a fair process and established lawful grounds for dismissal before taking the decision to dismiss without notice...

Regardless of the seriousness of the misconduct you will still be required to follow a fair procedure, as you would with any other disciplinary matter before a decision can be made on which disciplinary action is to be taken.

- 9.38 I concur with the sentiments expressed by the learned author Davidson Morris above. My understanding of the decision of the Court of Appeal in *Emporium Fresh Foods t/a as Food Lovers Market and Another v. Kapya Chisanga* (supra), is that an employee must always be given an opportunity to be heard before being summarily dismissed. Hence, the Respondent's failure to give the Complainant an opportunity to be heard was fatal, especially in the circumstances where the Complainant did not confess to committing any offence and the Respondent did not produce any evidence that substantiated a valid ground for dismissal.

- 9.39 In the case of *Mark Tink and Others v. Lumwana Mining Company Limited* (supra), the Court of Appeal reiterated its earlier judgment in *Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia* (supra), that the law has placed a requirement on an employer to give reasons for terminating an employee's employment and that what is of critical importance is that the reason or reasons given must be substantiated. Crucially, the valid reason and its justification must be clearly communicated to the employee when the employer is dismissing or terminating employment. This, supplemented with an opportunity to be heard, is what provides a basis for dismissal.
- 9.40 In *casu* the Respondent has not clearly provided a valid reason or adduced any evidence to support or substantiate the alleged decisions and actions that the Complainant had taken that purportedly deeply affected the Respondent.
- 9.41 It is not in dispute that the Complainant was dismissed summarily. Summary dismissal is justified where there is an irretrievable breakdown of trust and respect between the employer and employee resulting from the conduct of the employee amounts to gross misconduct that falls short of the faithful discharge of the employee's duties and amounts to a serious breach of the express or implied terms contract of employment. In this case, there is no evidence before this Court to show that any of the circumstances permitted for summary dismissal were met.
- 9.42 In this case, the employer has failed to demonstrate that a valid and substantiated reason was been given for the Complainant's dismissal.
- 9.43 For the above reasons, I find and hold that the summary dismissal of the Complainant was unjustified, and thus, unfair and unlawful.

Whether the Complainant is entitled to the claim for outstanding allowances, terminal dues and payment in lieu of notice

- 9.44 Termination or terminal benefits relate to all the benefits due to an employee, in terms of statute and the contract of employment when his/her contract of employment comes to an end. Where an employer summarily dismisses an employee, the employer has a duty, on dismissal, to pay the employee the wages and other accrued benefits due to the employee up to the date of dismissal.
- 9.45 An employer has a duty to pay an employee on dismissal his wages and other accrued benefits due to the employee up to the date of dismissal. The catch-word above is “accrued”. If the employee has no accrued benefits, then there is nothing to be paid to him by the employer.
- 9.46 The question to be addressed by this Court in this regard is, did any benefits accrue to the Complainant during his employment? A perusal of the Contract of Employment and Addendum reveals that nowhere in the documents is it mentioned that the Complainant was entitled to any allowances, terminal dues or leave days’ pay.
- 9.47 In view of the above, there is no basis for sustaining the Complainant’s claim for outstanding allowances, terminal dues and leave days’ pay. With regard to the claim for payment in lieu of notice, in *Emporium Fresh Foods Limited t/a Food Lovers Market and Another v. Kapya Chisanga (supra)*, the Court of Appeal was of the view that in summary dismissal, once it is established that an employee has committed a dismissible offence, they are liable to be dismissed without regard to the contractual or reasonable notice period (which is the notice given where the contract has no notice period provision) or payment of salary in lieu of notice. However, the

Court went on to state that the above is only applicable where the employee has been subjected to the due process; namely, being formally made aware of the wrong he is alleged to have committed, given an opportunity to give his side of the story and informed of his guilt.

9.48 In *casu*, it has been established that the Complainant was not subjected to the due process. Since the Contract of Employment in this case had no notice period provisions, reasonable notice of termination should have been given to the Complainant. I am of the view that a one month notice period would have been reasonable. Since no reasonable notice was given, the Complainant is entitled to payment of one month's salary in lieu of notice. However, since there is uncontroverted evidence that the Complainant was paid a salary for July, 2018, which he did not work for, that payment shall be offset against the one month's salary in lieu of notice due to the Complainant.

9.49 The Complainant has prayed for any other relief the Court may deem fit. This Court is empowered by section 85A of the Industrial and Labour Relations Act to grant any remedy that is just and equitable in the circumstances.

9.50 It is worth mentioning that section 54 (1) (b) of the Employment Code Act reads as follows:

Where a contract of employment is for a fixed duration, severance pay shall either be a gratuity at the rate of not less than twenty-five percent of the employee's basic pay earned during the contract period or the retirement benefits provided by the relevant social security scheme that the employee is a member of, as the case may be.

9.51 The Contract of Employment between the Complainant and the Respondent had the following provision:

This agreement and compensation shall continue for a period not to exceed five years and is subject to a minimum of at least one "full annual review of progress" between the parties, (it is noted that this agreement may be extended at

will by written notice and mutual signatory agreement between the parties).

- 9.52 The above provision is proof that the Contract of Employment between the Complainant and the Respondent was for a fixed duration of five years, subject to extension at will by written notice and mutual signatory agreement between the parties. No evidence of extension of the Contract was produced in Court. However, the fact that the Complainant worked for the Respondent until 20th June, 2018, is proof that the agreement was extended a number of times.
- 9.53 Given the absence of any evidence of a private or occupational pension scheme, the Complainant herein as an employee serving on a contract for a 'fixed duration' would have been entitled to benefit from the severance pay from the date the Employment Code Act came into force to his date of dismissal, had the Employment Code Act been in effect at the time he was dismissed.
- 9.54 Further, the Minister of Labour and Social Security issued the Employment Code (Exemption) Regulations which exempts expatriate employees and management employees from the payment of severance pay in terms of Section 54 (1) (b) of the Employment Code Act. Section 3 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, as amended by the Industrial and Labour Relations (Amendment) Act No. 8 of 2008, defines a person in management as a person:-
- a) who is the head of an institution or undertaking and has authority to hire suspend, promote or demote an employee of the institution or undertaking;
 - b) who is the head of a department in an institution or undertaking and has authority in the financial, operational, human resource, security or policy matters of the institution or undertaking;

- c) with decision-making authority in the financial, operational, personnel or policy matters of an institution or undertaking and who represents and negotiates on behalf of the institution or undertaking in collective bargaining or negotiations with any trade union; or
- d) with written institutional authority to perform the functions referred to in paragraphs (a), (b) or (c).

9.55 Based on the above, apart from the fact that the Employment Code Act did not apply to the Complainant since he was dismissed before it came into effect, he served as overseer of the Respondent's entity in Zambia in a position of management, and would, thus, not be eligible for the severance pay in any event.

Whether the Respondent is entitled to a refund of the sum of K378,000.00 from the Complainant for unauthorised payments made by the Complainant to himself from Chipata Bible College

- 9.56 In their written submissions, Counsel for the Respondent stated that the record would show that the Respondent had counterclaimed the sum of K378,000.00 plus from the Complainant, being salaries amassed by the Complainant from Chipata Bible College. However, the record shows no such counterclaim.
- 9.57 What is on record is the testimony of the Respondent's second witness, RW2, to the effect that the Complainant paid himself a salary of K378,000.00 from Chipata Bible College from which he was paying statutory payments such as pension to the National Pension Scheme Authority (NAPSA) and PAYE to Zambia Revenue Authority (ZRA).
- 9.58 The record, further, shows that under cross-examination by Counsel for the Respondent, and when showed exhibit "NTAP4", entitled "A record of funds embezzled by Mr. Wellington

Mwanza", the Complainant, as CW1, admitted that he was paid his salary from America but still drew K8,000.00 from the Bible College monthly.

- 9.59 Whereas there is an admission by the Complainant on the record that he was paying himself K8,000.00 per month as additional salary from Chipata Bible College, the Respondent has not expressly pleaded the counterclaim. Mere allusion to the counterclaim in the Affidavit in Support of Respondent's Answer and submissions and an admission by the Complainant in cross-examination, are not sufficient.
- 9.60 Authorities abound to the effect that a counterclaim is a separate cause of action which must be pleaded and proven with facts and evidence. One such authority is the case of **Photo Bank (Z) Limited v. Shengo Holdings Limited**¹⁸, where the Supreme Court held that a counterclaim is a claim, in its own right, which has to be proved. A perusal of the Respondent's Answer, clearly shows that there is no mention of any counter claim. It is only in the Affidavit in Support of Respondent's Answer that there is mention of the Complainant creating and allocating to himself an illegal monthly salary of K8,000.00 drawn out of the College without approval of the College.
- 9.61 This Court is, therefore, constrained from awarding an unpleaded claim. The Respondent is at liberty to pursue its claim of K378,000.00 from the Complainant by other means, including court action.

Position regarding perquisites enjoyed by an employee as an incidence of employment

- 9.62 An issue which has caught my attention in this case is the refusal by the Complainant to surrender the house, motor vehicle and office equipment which he enjoyed as an incident of his employment with the Respondent, after being dismissed.

- 9.63 In the case of *Hastings Obrien Gondwe v. BP (Zambia) Limited* (supra), the Supreme Court held that an employee must relinquish all perquisites enjoyed as an incidence of employment when his employment comes to an end, unless the contract provides otherwise; in other words, unless the contract expressly permits an employee to maintain a benefit following termination of the employment relationship.
- 9.64 The Contract of Employment between the Complainant and the Respondent had no such provision. Thus, it was wrong for the Complainant to refuse to hand over the property belonging to the Bible College.

10. **Quantum of Damages for Unfair Dismissal**

- 10.1 Having found earlier that the Complainant was unfairly dismissed, the next step is to decide the quantum of damages to award him. From the authorities on the subject, it is apparent that the law awards damages for unfair dismissal based on factors such as how the dismissal was effected, that is, the conduct of the employer – whether it was oppressive and caused mental anguish, stress, or inconvenience, or infringed the employee's rights and where the prospects of future employment by the employee are grim or bleak. Ascertaining the scarcity of employment and job prospects will naturally depend on the age of the employee, the nature of his job, the position and rank he/she held, and the trade he/she is engaged in.
- 10.2 Until the law was amended to bring in the requirement of giving a valid reason for termination of a contract of employment, the common law award of damages being notice was the normal measure of damages. Hence, in ***Swarp Spinning Mills Plc. v. Sebastian Chileshe and Others***¹⁹, the Court held that the normal measure of damages is the employee's notice period or the notional reasonable notice where the contract is silent. In the case ***Charles Ng'onga v. Alfred H. Knight (Z) Limited***²⁰,

the Supreme Court confirmed that the normal measure of damages is an employee's notice period or as it is provided for in the law and can only be departed from when the employee proves that he is deserving of more and the conduct of the employer was so serious that it warrants a higher award of damages.

10.3 With the introduction of the statutory provision making it mandatory for a valid reason to be given to the employee before terminating his contract of employment, the common law right to dismiss without a reason but by giving notice has been done away with by statutory law. As such, without the variation of the common law right, it can be concluded that the normal measure of damages being notice pay at common law should no longer apply in this jurisdiction.

10.4 The above conclusion is supported by the learned author **Chanda Chungu** in his article **MP Infrastructure Zambia Limited v. Matt Smith and Kenneth Barnes CAZ Appeal No. 102/2020**, published in Volume 5, Issue 2 of the SAIPAR Case Review where he states that: -

Previously, an employer could terminate employment for no reason or any reason. In such circumstances, a normal measure of damages equivalent to the notice period was appropriate because notwithstanding any unfair or wrongful dismissal, an employer was entitled to bring the contract to an end without having to give a reason. As such the court could award damages equivalent to the notice period because the employer enjoyed the option to terminate at will and the notice period encompassed the loss to be suffered by an employee. Under the common law, an employer could terminate or dismiss for no reason, and this reflected in the common law remedy of damages equivalent to the notice period. This common law approach was adopted in Zambia and worked well up until an amendment was made to the legislation. For these reasons, the normal measure of damages being the notice period was the position at common law that should no longer

apply due to the current legislative position on the need for valid reasons.

10.5 I am in agreement with the views expressed by the learned author Chanda Chungu above. It therefore, follows that given the abrogation of the common law right to terminate with notice or payment in lieu of notice, which must now be accompanied with a valid reason, the payment of salary equivalent to the notice period should no longer apply as the normal measure of damages for unfair and/or unlawful dismissal or termination in Zambia. I am of the view that damages should be awarded depending on how the termination or dismissal was effected, that is, the conduct of the employer – whether it was oppressive, infringed the employee’s rights, inflicted in a traumatic manner, caused mental anguish, stress, or inconvenience, and whether the prospects of future employment by the employee are bleak. These factors stem from seminal decisions such as *Swarp Spinning Mills v. Sebastian Chileshe and Others* (supra), **Attorney General v. John Tembo²¹**, **Emporium Fresh Foods Limited t/a Food Lovers Market and Another v. Kapya Chisanga** (supra), **African Banking Corporation v. Bernard Fungamwango²²**, **Dennis Chansa v. Barclays Bank Zambia Plc²³** and **First Quantum Mining and Operations Limited v. Obby Yendamoh²⁴**, to mention but a few. In *Chansa Ng’onga v. Alfred H. Knight* (supra), the Supreme Court guided that these factors or ‘peculiar circumstances’ are what an employee needs to demonstrate to be granted damages. The circumstance are weighed and examined together in the facts and circumstances of each case to determine the appropriate quantum of damages. In *Chansa Ng’onga v. Alfred H. Knight*, the Supreme Court also held that the award of damages is subject to the rule that all employees are mandated to take reasonable steps to mitigate their loss.

- 10.6 Having said the above, in the case before this Court, it has already been established that the Respondent flouted the rules of natural justice by failing to give an opportunity to be heard and the provisions of sections 36(1)(c) and (3) Employment Act by failing to provide a valid and substantiated reason in effecting the dismissal, thus infringing upon the Complainant's statutory rights. The Complainant was not charged with any offence and was not given an opportunity to exculpate himself. Further, he was not given a hearing. I am, further, cognisant of the fact that the Complainant worked for the Respondent for about fifteen years and to be dismissed summarily must have been traumatic and caused mental torture, anguish, stress and inconvenience. I am, thus, satisfied that this is a proper case which warrants a higher quantum of damages as an award for the unfair conduct of the Respondent.
- 10.7 In a recent Court of Appeal judgment of **David Banda v. Attorney General**²⁵, the Court enhanced the maximum award that may be awarded by a court from 36 months salaries and perquisites which was given in *Dennis Chansa v. Barclays Bank Zambia Plc.* (supra) and *First Quantum Mining and Operations Limited v. Obby Yendamoh* (supra), to 42 months salaries and perquisites as damages for wrongful dismissal taking into account the oppressive treatment the appellant in that case was subjected to, the harsh social-economic situation in the country and high rate of unemployment.
- 10.8 It should be noted that the award in the David Banda case above was for wrongful dismissal and not unfair dismissal which, in *Care International v. Misheck Tembo* (supra), the Supreme Court said justifies a higher award of damages than wrongful dismissal because of the infringement of statutory rights. On the authority of *Care International v. Misheck Tembo*, I would be justified in awarding a higher award than the award in the *David Banda v. Attorney General* (supra) case. However, I

am mindful of the fact that the Complainant admitted to paying himself a salary, that was neither approved by the Board of Chipata Bible College nor the Respondent, totalling K378,000.00 from funds provided by the Respondent that was meant to support the operations of the College and for which, had it not been for the fact that the Respondent did not specifically counterclaim for the same in its Answer filed before this Court, I would have entered judgment for the Respondent on admission. Lastly, the Complainant did not adequately demonstrate to this court, the measures he had taken to mitigate his loss.

10.9 I am also mindful of the fact that the Complainant has not pleaded the extent of his diminished job prospects, if any, and has benefited from living in the house which he found himself in as an incidence of his employment for over four years, using the motor vehicle and other properties which he has kept to date and which came into his possession by virtue of his employment. Being in possession of the properties mentioned above diminished the Complainant's stress and inconvenience and affects the award of damages to the Complainant.

10.10 For the above reasons, and having weighed all the relevant factors against the facts, circumstances and evidence, and guided by the fact that section 85A of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia guides that a remedy must be just and equitable, I will award the Complainant 12 months' salaries as damages for unfair dismissal.

11. Conclusion and Orders


11.1 In conclusion, the Complainant has succeeded on his claim for unfair dismissal and failed on his claims for wrongful dismissal, payment of all outstanding allowances and terminal dues inclusive of leave pay.

11.2 I therefore, make the following orders:

- (i) I award the Complainant twelve (12) months' salaries as damages for unfair dismissal. The amount due shall attract interest at bank deposit rate from the date of filing of the Notice of Complaint until judgment and thereafter, at ruling Bank lending rate as determined by the Bank of Zambia until full payment.
- (ii) The Complainant shall give up possession of the house he is currently occupying to the Respondent within three (3) months of the date hereof.
- (iii) The Complainant shall return the motor vehicle and all other properties belonging to the Respondent forthwith.

12.3 Each party to bear own costs.

Delivered at Lusaka this 3rd day of February 2023.



Winnie Sithole Mwenda (Dr.)
