

**IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT NDOLA**
(Industrial Relations Division)

IRC/ND/26/2021

BETWEEN:

**ARTHUR LUKUMBA
ERNEST SOOPU
JOHN KATOWA**



**COMPLAINANT
COMPLAINANT
COMPLAINANT**

AND

G & H TRANSPORT

RESPONDENT

Before the Hon. Mr. Justice Davies C. Mumba in Chambers on the 10th Day of February, 2023.

For the complainants: Mr. K. Tembo, Messrs K. Tembo & Co. Advocates
For the Respondent: Mr. C. Magubbwi and Mrs. Nyangu-Zimba, Messrs
Magubbwi & Associates

JUDGMENT

Cases referred to:

1. Eston Banda and another v The Attorney-General, SCZ Appeal No. 42 of 2016.
2. Chilanga Cement v Venus Kasito, SCZ Appeal No. 86 of 2015.
3. Emporium Fresh Foods Limited (T/A Food Lovers Market) and Another v Kapya Chisanga, CAZ Appeal No. 44 of 2021.
4. Bethel Mumba and Another v Africa Super Market (Trading as Shoprite Checkers), Complaint No. IRC/ND/80/201.
5. Tasomo v The Credit Organisation of Zambia (1973) Z.R. 347 (H.C.).
6. Kitwe City Council v William Ng'uni (2005) Z.R. 57 (SC).
7. Time Trucking Limited v Kelvin Kipimpi, CAZ Appeal No. 25 of 2016.

Legislation referred to:

1. The Employment Code Act No. 3 of 2019.
2. The Industrial Relations Court Rules, Chapter 269 of the Laws of Zambia.

Other works referred to:

1. W.S Mwenda, Employment Law in Zambia: Cases and Materials: UNZA Press, Lusaka, 2004.
2. Winnie Sithole Mwenda and Chanda Chungu: A Comprehensive Guide to Employment Law in Zambia: UNZA Press. Lusaka, 2021

By notice of complaint supported by an affidavit filed into Court on 7th April, 2021, the complainants commenced this action against the respondent. On application by the complainant, the notice of complaint and the supporting affidavit were amended pursuant to the Court order dated 23rd December, 2021. In the amended notice of complaint filed into Court on 31st December, 2021, the complainant are seeking the following reliefs:

1. Damages for wrongful and unlawful dismissal.
2. Damages for constructive dismissal, in the alternative.
3. Payment of salary arrears from April, 2019 to February, 2021.
4. Interest
5. Costs
6. Any other relief which the Court deems fit and just under the circumstances.

In his affidavit in support of the notice of complaint, the 1st complainant deposed that all the complainants were employed

by the respondent on permanent and pensionable contracts in 2018. That around April and May, 2019, the respondent, through its Fleet Manager, instigated a complaint at the Zambia Police against them for theft by servant. That upon the instigation of the said complaint, they were apprehended and put into police custody. That subsequently, they were granted police bond and each one of them reported for work at the respondent's garage. That after they reported for work, the respondent's Fleet Manager informed them that they were suspended until the criminal trial was concluded. That despite reporting for work and the respondent giving them transport money, the respondent had not paid them salaries since April, 2019. That the respondent paid them salaries for the month of October, 2019 only in spite of the fact that they had not been paid since April, 2019. That after being unkindly arraigned in a public criminal Court for a period of one year, they were acquitted. That upon being acquitted they reported for work on 9th February, 2021 and worked throughout that month until when the Fleet Manager informed them verbally that their services were no longer needed and that, therefore, they stood dismissed. That the respondent did not level any charges against them nor was there any disciplinary hearing before their dismissals. That they were never notified of any further proceedings or actions nor were they ever informed of their employment status with the respondent. That they did not know the reason for their dismissal from work as the same was not formally provided. That after being dismissed, the respondent did

not pay them any salary arrears nor their benefits. It was their prayer that this was a proper case for the Court to grant them damages for wrongful and unlawful dismissal and/or damages for constructive dismissal.

On 17th January, 2022, the respondent filed into Court an answer and an affidavit in opposition sworn by Prince Murapa, Fleet Coordinator in the respondent's employment. He denied that the complainants were employed by the respondent. He explained that the 1st complainant was employed as a Driver on or about 23rd July, 2018 on contractual basis under I Tre Cugini Logidtics Limited; and that his conditions of services were governed by I Tre Cugini Logistics conditions of service and not the respondent company. The deponent averred that the 2nd complainant was employed by the respondent on three months' probation during which period his conditions of service were governed by the respondent's conditions of service, 'PM1'. That the 3rd complainant was also employed by the respondent and served in its employment for a period of eleven months upto May, 2019; and his conditions of service were governed by the respondent's conditions of service. That whilst on probation, the respondent company reasonably suspected the 2nd and 3rd complainants to have been involved in a crime and lodged a complaint with the Zambia Police Service. That the respondent company did not lodge a complaint against the 1st complainant as it was not his employer and even if it did, it acted just like any other reasonable company

would do having reasonably suspected and believed that a crime had been committed. That after a complaint was lodged, the Zambia Police Service launched an independent investigation and took steps that it deemed appropriate and necessary without the respondent's knowledge or approval. That the detention and prosecution of the complainants was thus independently done by the Zambia Police Service as the respondent was not passively or actively responsible for whatever steps the Police took in acting upon the complaint. It was the deponent's averment that the respondent did not dismiss the complainants but that the complainants were absent from work by reason of desertion. That the 2nd and 3rd complainants had not returned to work and that upon further consultations with the 1st complainant's employer, the respondent was advised that the 1st complainant had also never reported back to work. The deponent denied that after the complainants reported for work, the respondent's Fleet Manager informed them that they were suspended until the criminal trial was concluded. Further, he reiterated that the complainants' services were not terminated as alleged but that the complainants abandoned their work place and thus were absent by reason of desertion. That the complainants deserted their work and only surfaced after one year 6 months. That the complainants never reported for work and could not be paid salaries for work not done. That the complainants were never advised that their services were no longer required. That, however, the complainants were never charged and/or dismissed but were absent by reason

of desertion. The deponent deposed that the complainants were paid all their dues as shown by exhibit, 'PM2' as such the respondent did not owe them any payment. That the complainants were not entitled to any of their claims as the same were frivolous and vexatious.

At the trial, the 2nd complainant, Ernest Soopu also testified on behalf of the other complainants. He testified that he and the other complainants were employed by the respondent in South Africa as Truck Drivers. That they used to transport dangerous goods from South Africa to various parts of Zambia, that is, Kitwe; Kansanshi and Kalumbila Mines. In the present case, they used to export explosives and chemicals which were used for explosives. That sometime in 2019, they started off in a convoy of three trucks from Chirundu border in Zimbabwe. Each of the complainants was driving a truck and was in charge of his own truck. That they were destined to offload the goods in three different towns. That the witness was headed to Kitwe to offload ammonium nitrate at African Ware houses which was a sister company to the respondent company. That the 1st complainant was driving a tanker and he was going to offload some liquid in Kalumbila. That the 3rd complainant was going to off load ammonium nitrate at Kansanshi Mine in Solwezi. That the witness was the first one to arrive and he offloaded in Kitwe where he spent his night. The next day, he started off going back to their yard in Ndola where he was told by his boss, RW1 that he was going to load some goods in

Luanshya. That he went to Luanshya and loaded and on his way back, he had to stop at their yard in Ndola. That he was approached by two Police Officers and RW1 who arrested and took him to the police station. That he was in police detention for 30 days after which he was taken to Court. That whilst in police cells, he learnt from RW1, who took some food for him, that the 1st and 3rd complainants were also arrested and detained at Ndola Central Police station. He testified that after 30 days, they were taken to Court. By that time, the 1st and 3rd complainants were already on police bond. From Court, he was taken to a remand prison where he spent about three weeks until he was granted bail by the Court. That trial took about two years to be concluded. That they were all charged with the offence of theft by servant as they were alleged to have stolen the ammonium nitrate which was on the 3rd complainant's truck. That after two years, the 1st and 2nd complainants were acquitted whilst the 3rd complainant was convicted. That following their acquittal, he and the 1st complainant went to see their boss, RW1 in Ndola where they had a branch. Upon seeing him, RW1 told them that their services were not required and the respondent had employed other drivers on their trucks. The witness stated that they were not called for any disciplinary hearing nor were they charged for any disciplinary offence by the respondent. That according to him, that was the reason they decided to sue the respondent for wrongful and unlawful dismissal as the respondent never also gave them the reasons for the dismissal. He stressed that they had done nothing

wrong. It was his further testimony that the respondent had stopped paying them their salaries as soon as they were arrested. That they were also claiming for salaries because throughout the time they were going to Court, they used to see their boss and he used to tell them that they were still in employment. That they also never received any letters to the effect that their employment had been terminated.

The witness referred to the 1st complainant's pay statement, 'PM2a' and stated that the said pay statement showed that the 1st complainant was being paid by the respondent. He also referred the Court to exhibits 'PM2c-m' and stated that all the three complainants used to drive trucks for the respondent and they used to report to the same person. That they never drove trucks for another company. The witness referred the Court to page 1 of the respondent's notice of intention to produce documents and stated that the 1st complainant had signed on the document to show that he had agreed with the respondent's conditions as he was working for the respondent. That at Page 5 of the respondent's notice of intention to produce was the 1st complainant's salary. That he and the 3rd complainant used to receive the same amount of the salary which was being paid in Kwacha currency. That at Page 6 of the said notice of intention to produce documents were payments made to the 1st complainant. It was the witness' further testimony that they were also claiming for damages for constructive dismissal because RW1 told them that the respondent

did not need them anymore and it had employed other drivers who were already occupying their trucks.

During cross-examination, the 2nd complainant stated that he could not remember the exact dates when they were employed but it should have been in 2018. That he was employed from South Africa yard. He confirmed that the respondent company was in existence in South Africa and that the respondent company in South Africa was the holding company to the one in Zambia. He stated that he was employed under a written contract on permanent and pensionable basis. That the written contract was between him and G & H South Africa. That none of the complainants had produced their written contracts of employment. That as for himself, he did not produce one because at the time he was in detention, his wife shifted and a lot of papers went missing. That he used to receive his salary through his account at FNB Zambia but he did not know how the 1st and 3rd complainants used to receive their salaries. That his salary was being credited to his account from Zambia offices. He confirmed that they used to get paid in the Zambia currency in Zambia. That they were told that they were under the respondent's company - Zambia branch. He stated that they had signed other contracts with G & H Zambia in 2018. That he did not know whether the respondent had other companies but he only knew about its branch that was in Ndola in Zambia. That his contract was signed with the holding company in South Africa. He admitted knowing a

company known as I Tre Cugini Logistics CC. That the owners of that company were the same as those for the respondent and that they used to park their trucks in the same yard. He stated that he did not know the circumstances of the 1st complainant's employment and that, therefore, he would not disagree that the 1st complainant was employed by I Tre Cugini Logistics CC. When referred to the exhibits 'PM2c-m' of the respondent's affidavit in opposition, the witness stated that he was not aware that the payments for the 1st complainant were from I Tre Cugini Logistics CC at the time he was giving his evidence in chief. He testified that they were asking to be paid salary arrears from April, 2019 to February, 2021. However, he admitted that he and the 1st complainant received their salaries for May, 2019. That he did not remember having received the salary for June, 2019 paid in September, 2019. He stated that the respondent company which they had sued was a Zambian company and not G & H Transport South Africa which employed them. He stated that he had forgotten the month in which he was arrested. That after being arrested, he was in detention in police custody for 30 days before he was taken to Court and trial took two years to be concluded thus making a total of 25 months. He denied having gone back to the respondent only at the end of the trial and stated that as soon as he was released from custody, while the trial was going on, he went there to request for transport because he had not been paid and RW1 told him to wait until the case was concluded. That he also used to go to the respondent's offices whenever they came

for their case in Ndola. He stated that RW1 told them that the respondent had dismissed him although he did not receive any letter of dismissal from the respondent. He admitted that they had never provided any service to the respondent from April, 2019 to February, 2021 which was the same period they were appearing for their criminal case hearing. He denied having deserted his job during that period. He stated that he was not aware that the branch for the respondent company in Ndola never handled administrative issues relating to their contracts. Further, that he was also not aware that its role was simply to manage their transport fleet in Ndola. Furthermore, that it was an operations office whose purpose was to manage their fleet here in Ndola. That they were reporting to the respondent's branch in Ndola because at the time they were employed, they were told that they were under G& H Zambia.

In re-examination, the witness confirmed that they were employed in South Africa where the holding company was located. He stated that he did not desert his job. He explained that RW1 told them that they were not fired and that they could report for work after their Court case was concluded. That after the Court case was concluded, the next day he went back to report for work and they were told that their services were no longer required because the respondent had employed other drivers.

RW1 was Prince Milton Morapa, Fleet Coordinator in the respondent's employment. He testified that he knew the complainants in July, 2015 and that the complainants, according to his knowledge, were not employed by the respondent company. That they were working for I Tre Cugini Logistics CC - South Africa Company which was sub-contracted by G & H South Africa Company. That the complainants had signed all the company rules for I Tre Cugini Logistics CC under G & H South Africa Company. He stated that exhibited at page 1 of the respondent's notice to produce documents was the document which was signed by the 1st complainant on 23rd July, 2018 in South Africa. At page 2 of the aforesaid notice to produce documents were the Driver's Staff rules and regulations which showed that desertion of duties and threatening to abandon a company vehicle was covered under the said staff rules and regulations. That to his knowledge, the complainants had deserted their work. That, therefore, the complainants were not wrongfully and unlawfully dismissed. It was his testimony that it took the complainants over a period of one year for them to report back for work after a complaint was lodged at the Police. That the only time the complainants went back to work was after one year at the time they took to the respondent Court summons. He testified that the complainants were not constructively dismissed but they themselves did not report for work. That the respondent did not receive any resignation letters from the complainants.

It was the witness's contention that the complainants were not entitled to the payment of salaries from April, 2019 to February, 2021 because they did not render any services to the respondent. Further, he stated that instructions for the complainants used to come from South Africa.

In cross-examination, the witness stated that the complainants were working for the respondent company namely G & H Transport, Zambia. He confirmed that he had not produced to the Court any document showing that there were a lot of companies by the name of G & H Transport for different countries. When referred to pages 1-4 of the respondent's notice of intention to produce, RW1 confirmed that those were the documents the complainants had signed with G & H Transport. That the documents did not indicate whether they were for G & H Zambia or G & H South Africa. The witness confirmed that he did not produce any documents to the Court to prove that the complainants were employed by I Tre Cuggin Logistics C C. According to him, this was because he was not working for I Tre Cuggin Logistics C C and that he came to Court to testify on behalf of the respondent company. He admitted that the respondent company did not charge any of the complainants with any offence neither did it invite the complainants to any disciplinary hearing. Furthermore, that the respondent did not even write any dismissal letters to the complainants. The witness admitted that the complainants were still employees of the respondent since they

had not been dismissed. He stressed that the complainants were not entitled to be paid any salaries because they did not provide any services to the respondent since they had deserted their jobs. He confirmed that the respondent did not charge the complainants with the offence of desertion. That they did not dismiss them for the offence of desertion. He stated that the complainants' salaries used to vary and would go up to as much as SAR11,000.00. Further, he confirmed that he was aware that the complainant's case in the Subordinate Court lasted over a year.

In re-examination, RW1 stated that the complainants were not charged with the offence of desertion and that there was no disciplinary hearing accorded to them because they did not avail themselves. It was the witness's evidence that after they were released on police bond, the complainants were supposed to go to South Africa where they used to get instructions and report. The witness stated that the complainants did not resign from their jobs. That the bank transfers showed that the money was coming from I Tre Cuggin Logistics CC. He stated that the contract for the 1st complainant showed that it was signed in Chloorkop, South Africa on 23rd July, 2018.

I have considered the parties' affidavit and *viva voce* evidence and the respondent's final written submissions.

I have critically combed the evidence in this case and I have discovered that almost every aspect of the complainants' averments have been disputed by the respondent. From the evidence on record, therefore, the following are the issues for determination:

1. Whether the complainants were employees of the respondent.
2. Whether the complainants' dismissal from employment was wrongful and unfair thereby entitling them to the payment of damages.
3. Whether, in the alternative, the complainants were constructively dismissed by the respondent and thereby entitling them to the payment of damages.
4. Whether the complainants are entitled to the payment of salaries from April, 2019 to February, 2021.
5. Whether the complainants are entitled to the payment of costs of this action.

I will start with the first issue, which is, whether the complainants were employees of the respondent.

The complainants have contended that they were all employed by the respondent as Truck Drivers in 2018 on permanent and pensionable basis. It was also argued that all of them used to drive trucks for the respondent and used to report to the same person. Further, that they never drove trucks for any another company. In

addition, they have argued that the document at page 1 of the respondent's notice of intention to produce documents showed that the 1st complainant had agreed to the respondent's conditions of service as he was working for the respondent.

On the other hand, the respondent has argued that the complainants were not employed by the respondent but they were employed by a company called I Tre Cugini Logistics C C, a South African company which had been subcontracted by G & H Transport, South Africa. That the complainants signed all the rules for I Tre Cugini Logistics C C under G & H Transport, South Africa. With regard to the document exhibited at page 1 of the respondent's notice of intention to produce documents, RW1 conceded that the said document was signed by the 1st complainant on 23rd July, 2018.

I have considered the evidence from both parties.

Regarding the 1st complainant, I find that there is no dispute that the document at page 1 of the respondent's notice of intention to produce documents was signed by the 1st complainant on 23rd July, 2018. On the said document, authored on the respondent's letterhead, the 1st complainant was acknowledging receiving the respondent's Human Resources Policy Manual and company induction as well all employment conditions as contained in his letter of appointment. In my view, the foregoing is sufficient proof

of the fact that the 1st complainant was an employee of the respondent as at the time of signing the aforementioned document he had already been given the letter of appointment by the respondent in which all his employment conditions were outlined. I also find that the permit to perform essential services, 'AL1' was issued to the 1st complainant on 1st August, 2020 by the respondent. It was written on the respondent's company letterhead and bore the official stamp for the respondent. Yet again, this document evidences the fact that the 1st complainant was an employee of the respondent. I have also perused the documents marked exhibits 'PM2c-m' which showed that the 1st complainant was being paid a monthly salary by a company called I Tre Cugini Logistics C C between July, 2018 and May, 2019. However, the sub-contract for I Tre Cugini Logistics C C which the respondent's witness talked about was not produced to the Court. Had this sub-contract been made available to the Court, it would have assisted the Court to ascertain how the 1st complainant who was an employee of the respondent was being paid salaries by a company that had been sub-contracted by the respondent. Since the said sub-contract was not produced to the Court, there is a strong presumption that the respondent would have been supplying labour to its sub-contractor who then was paying the 1st complainant. Further, there is no evidence showing that the 1st complainant had left the respondent's employment between 23rd July, 2018 and 1st August, 2020; and that he had been given a contract of employment by the said I Tre Cugini Logistics C C.

Consequently, having no any other evidence on record to show that the 1st complainant was not employed by the respondent, the mere payment of the 1st complainant's salaries by I Tre Cugini Logistics C Chas not convinced me that he was an employee of the said sub-contractor. On the whole evidence relating to this aspect, I am satisfied that the 1st complainant was an employee of the respondent as evidenced by the document exhibited at page 1 of the respondent's notice of intention to produce documents; and the permit to provide essential services, 'AL1' which were authored by the respondent. Above all, RW1 confirmed in cross-examination that he was the respondent's employee.

With regard to the 2nd and 3rd complainants, RW1 did state, in his affidavit in opposition, that the 2nd and 3rd complainants were employed by the respondent and their conditions of service were that of the respondent. That the 2nd complainant was employed by the respondent on three months' probation during which period his conditions of service were government by the respondent's conditions of service, 'PM1'. That the 3rd complainant was also employed and served in its employment for a period of 11 months upto May, 2019; and his conditions of service were governed by the respondent's conditions of service. Surprisingly, in his *viva voce* evidence, RW1 contradicted himself when he stated that the 2nd and 3rd complainants were not employed by the respondent but by I Tre Cugini Logistics C C. However, in cross-examination, RW1 backpedalled and confirmed his earlier affidavit evidence that all

the complainants worked for the respondent. In this regard, I accept the complainants' evidence that they were employed by the respondent. Therefore, I am satisfied that the 2nd and 3rd complainants were also employees of the respondent and not I Tre Cugini Logistics C C.

I now turn to the second issue, which is, whether the complainants' dismissal from employment was wrongful and unfair thereby entitling them to the payment of damages.

Before determining whether or not the complainants were wrongfully and/or unfairly dismissed, I will first determine whether or not the complainants had deserted work as alleged by the respondent.

The respondent argued that it did not dismiss the complainants but they just deserted work and only resurfaced after one year. On the other hand, the complainants denied deserting work. They stated that upon being released on police bond after their arrest, they reported back for work but RW1 informed them that they had been suspended from work until the conclusion of their criminal trial. That when their trial concluded after over a year, they again reported back for work but RW1 informed that their services were no longer required and that they stood dismissed.

I have considered the evidence on record regarding this issue. I have found that there is nothing on record indicating that the respondent had at any point tried to contact the complainants or write to them about their absence from work. There is also no evidence on record showing that the respondent had written to the complainants to exculpate themselves as to why they had been absent from work or charged them with the offence of desertion either during their absence from work or when they returned to work after the conclusion of their criminal trial. For the foregoing reasons, I have believed the complainants' evidence that they were told by RW1 that they were on suspension from work until the conclusion of their criminal trial; and that upon their return to work, RW1 told them that they had been dismissed. Therefore, I find that the complainants had not deserted work but the respondent, in effect, dismissed them from their employment.

I now come to the question for determination, which is, whether the complainants' dismissal from employment was wrongful and unfair thereby entitling them to damages.

The complainants claimed that their dismissal from employment was wrongful and unlawful. However, in the case of **Eston Banda and Another v the Attorney General**,¹ the Supreme Court has guided that:

"There are only two broad categories for dismissal by an employer of an employee, it is either wrongful or unfair. 'Wrongful' refers to a dismissal in breach of a relevant term

embodied in a contract of employment, which relates to the expiration of a term for which the employee is engaged; whilst 'unfair' refers to a dismissal in breach of a statutory provision where an employee has a statutory right not to be dismissed. A loose reference to the term 'unlawful' to mean 'unfair' is strictly speaking, in employment parlance, incorrect and is bound to cause confusion. The learned author, Judge W.S. Mwenda, clarifies on the two broad categories, in her book *Employment Law in Zambia: Cases and Materials*, (2011), revised edition UNZA Press, Zambia at page 136. She opines that, in our jurisdiction, a dismissal is either wrongful or unfair, and that wrongful dismissal looks at the form of the dismissal whilst unfair dismissal is a creature of statute."

On the above authority, I am of the view that the relief that the complainants are seeking is for an order that their dismissal from employment was wrongful and unfair, and I will proceed to determine the issue as such.

Firstly, I will begin with the issue of wrongful dismissal.

It is settled that for an employee to successfully bring and maintain an action for wrongful dismissal, it must be shown that the employer had breached the disciplinary procedure outlined in the contract of employment or the rules of natural justice and/or the disciplinary procedure stipulated in the Employment Code Act No. 3 of 2019. In this regard, the complainant bears the legal and evidential burden to prove that the dismissal from employment was wrongful.

Hon. Judge W.S. Mwenda, learned author of the book entitled **'Employment Law in Zambia: Cases and Materials'** states at page 18 that:

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

Further, in the case of **Chilanga Cement v Venus Kasito²**, the Supreme Court held that:

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

On the above authorities, for the complainants to succeed in their claim for wrongful dismissal, they have to prove, on a balance of probabilities, that the respondent breached the disciplinary procedure outlined in the contract of employment or the rules of natural justice and/or the disciplinary procedure stipulated in the Employment Code Act No. 3 of 2019.

I note that none of the parties had produced to the Court the respondent's disciplinary procedure code thereby making it impossible for the Court to know the disciplinary procedure that ought to have been invoked by the respondent when dismissing the complainants from employment. Therefore, in determining whether the dismissal of the complainants was wrongful, I will

take into account the principles of natural justice coupled with the provisions of the Employment Code Act No. 3 of 2019.

As I have already found above, it is not in dispute that the complainants were neither charged with any offence nor given an opportunity to defend or exculpate themselves before their dismissal. From the evidence, it is clear that the complainants were dismissed from employment for reasons connected with their conduct on allegations of desertion. Therefore, the respondent was required to charge the complainants and accord them an opportunity to be heard as provided by section 52(3) of the Employment Code Act No. 3 of 2019. Section 52(3) of the aforesaid Act provides that:

“An employer shall not terminate the contract of employment of an employee for reasons related to an employee’s conduct or performance, before the employee is accorded an opportunity to be heard.”

In the case of **Emporium Fresh Foods Limited (T/A Food Lovers Market) and Another v Kapya Chisanga**,³ the Court observed that:

“The fact that section 52(3) prohibits termination of a contract of employment by an employer for reasons relating to conduct or performance of an employee without giving the employee an opportunity to be heard reinforces the importance of adhering to the rules of natural justice.”

It should be stressed that there is always the need for an employer to formally charge an employee prior to his/her dismissal on disciplinary grounds. In the case of **Bethel Mumba and Another v**

Africa Market (Trading as Shoprite Checkers),⁴ which decision I approve of, it was held that:

“In industrial and labour matters, the need for an employer to charge an employee with a disciplinary offence and to give such an employee an opportunity to be heard before any sanction can be imposed cannot be over-emphasised as the same is the hallmark procedural and legal requirement in dealing with disciplinary process in employment matters.”

In the present case, I am satisfied that the respondent, by not charging the complainants with the alleged offence of desertion, denied them an opportunity to defend or exculpate themselves contrary to the rules of natural justice and the provisions of the Employment Code Act No. 3 of 2019. Therefore, the complainants have, on a balance of probabilities, proved that their dismissal from employment was wrongful and they are entitled to the payment of damages accordingly.

I have also to determine whether the complainants' dismissal from employment was unfair.

The learned authors, Judge Dr. W.S. Mwenda and Chanda Chungu in their book entitled: **A Comprehensive Guide to Employment Law in Zambia**, state at page 241 as follows:

“Unfair dismissal is dismissal that is contrary to the statute or based on unsubstantiated ground. For unfair dismissal, the Courts will look at the reasons for the dismissal for the purpose of determining whether the dismissal was justified or not. In reaching the conclusion that the dismissal is unfair, the Court will look at the substance or merits to determine if the dismissal was reasonable and justified.”

On the above authority, unfair dismissal is one where a specific statutory provision has been breached by an employer when dismissing an employee or one where a dismissal has been based on unsubstantiated reasons.

According to section 52(5) of the Employment Code Act No. 3 of 2019, the employer bears the burden of proving that the termination of a contract of employment was fair and for a valid reason.

In *casu*, I have already found that when the complainants returned to work after over a year, the respondent did not charge them or accord them an opportunity to exculpate themselves as to why they had been absent from work for such a long time. They were simply dismissed. Had the respondent accorded the complainants an opportunity to exculpate themselves, it could have satisfactorily established whether they had been absent from work for any good reason or none. On the evidence in this case, I find that the respondent has failed to show that the dismissal of the complainants was based on substantiated grounds and for a valid reason. Therefore, I am satisfied that the dismissal of the complainants was unfair and they are entitled to the payment of damages.

In summary, I am satisfied that the dismissal of the complainants was both wrongful and unfair.

I now turn to the issue of the appropriate damages to be awarded to the complainants.

In determining the appropriate quantum of damages, I am guided by the Supreme Court decision in the case of *Eston Banda*¹, where it was held that the normal measure of damages where there is nothing extra ordinary is an amount equivalent to the notice period provided in the contract or in the absence of such provision, a reasonable period. However, the normal measure of damages is departed from where the circumstances and the justice of the case so demand.

I have considered all the circumstances surrounding the manner in which the complainants were dismissed from employment. I find that this is a case deserving of an award of damages beyond the common law measure of damages. Therefore, I award each of the complainants damages equivalent to 24 months of their last basic salaries plus allowances with interest at the short-term commercial deposit rate, as determined by the Bank of Zambia, from the date of the notice of complaint to the date of the judgment and thereafter, at 10% per annum until full settlement. The amount is to be agreed or assessed by the learned Deputy Registrar in default of such agreement.

The third issue for determination is whether, in the alternative, the complainants were constructively dismissed by the respondent and thereby entitling them to the payment of damages. This issue has been overtaken by the fact that the complainants have succeeded in their claim for damages for wrongful and unfair dismissal. Therefore, it has become unnecessary to discuss and to determine the alternative remedy sought by the complainants.

I now turn to the fourth issue, which is, whether the complainants are entitled to the payment of salaries from April, 2019 to February, 2021.

It is not in dispute that from the time the complainants were charged and arrested for the offence of theft by servant, they did not perform any services for the respondent during the period they were undergoing a criminal trial. According to the complainants, they were informed that they were placed on suspension until the conclusion of their criminal trial. The complainants did not, however, state whether the suspension was with or without pay. They did not also produce their conditions of service for me to determine whether or not the conditions provided for payment of their salaries during their suspension. In the case of **Tasomo v The Credit Organisation of Zambia**⁵, it was stated that suspension effectively suspends the mutual rights and

obligations of the employee and the employer meaning that there was no work to be done for which remuneration ought to be paid.

In the case of **Kitwe City Council v William Ng'uni**⁶, the Supreme Court held that:

“You cannot award a salary or pension benefits, for that matter, for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment.”

Further, in the case of **Time Trucking Limited v Kelvin Kipimpi**⁷, the Court of Appeal held that there cannot be any payment by an employer for a period that an employee has not performed his obligations and held that the respondent, in that case, could not be awarded salaries whilst on suspension as it would undeniably amount to unjust enrichment.

On the above authorities, there being no evidence that the complainants' conditions of service provided for the payment of a salary during their suspension from work, I find that the complainants are not entitled to receive any payment of salary arrears for the period April, 2019 to February, 2019 and their claim in this regard is accordingly dismissed.

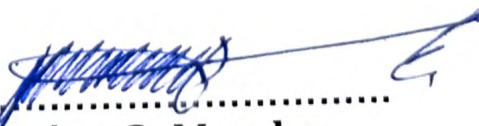
The complainants have prayed for the award of costs of these proceedings. Costs in this Division can only be awarded in accordance with Rule 44 of the Industrial Relations Court Rules, Chapter 269 of the Laws of Zambia. The said Rule 44 provides:

“Where it appears to the Court that any person has been guilty of unreasonable delay, or of taking improper, vexatious or unnecessary steps in any proceedings, or of other unreasonable conduct, the Court may make an order for costs or expenses against him.”

In the present case, I have found that the respondent's conduct of only taking disciplinary action against the complainants upon the conclusion of their criminal trial which took well over one year amounted to unreasonable delay. If the respondent was of the view that its case against the complainants was meritorious, it was entitled to take administrative disciplinary action without having had to wait for the conclusion of the criminal trial. Further, it is my view that the respondent blatantly breached the rules of natural justice and section 52(3) of the Employment Code Act and still took vexatious and unnecessary steps in defending its case in these proceedings. Therefore, I award costs to the complainants to be agreed or taxed in default of such agreement.

Leave to appeal is granted.

Delivered at Ndola this 10th day of February, 2023.


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Davies C. Mumba
HIGH COURT JUDGE