

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA

COMP NO./296/2021

BETWEEN:

DOROTHY PHIRI SOKO



COMPLAINANT

AND

NATIONAL PENSION SCHEME AUTHORITY

RESPONDENT

Coram: Chigali Mikalile, J on the 23rd day of February, 2024

For the Complainant: Mr. P. Songolo & Mr. C. Samechi – Messrs Philsong &
Partners Legal Practitioners

For the Respondent: Mr. K. Mwondela & Ms. J. Ngandu – Messrs Kaumbu
Mwondela Legal Practitioners

JUDGMENT

Legislation referred to:

1. The Employment Code Act No. 3 of 2019
2. The National Pension Scheme Authority Act, Chapter 256

Cases referred to:

1. Baillie v. Kell (1838) 4 Bing NC 638

2. Edwards v. Levy (1860) 2F & F
3. Fletcher v Krell (1872) 42 LJ GB 55
4. North Western Energy Company Limited v. Energy Regulation Board (2011) Z.R Vol 3
5. Hotel and Tourism Institute Trust v. Happy Chibesa, Appeal No. 58 of 2001.
6. Shawaza Fawaz & Another v. The People (1995) SJ (S.C)
7. Superbets Sports Betting v. Batuke Kalimukwa, SCZ selected judgment No. 27/2019.
8. Zambia Postal Services Corporation v. Prisca Bowa & Another, Appeal No. 72/2009
9. Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited, Appeal No 129/2017
10. Beatrice Chileshe Sinyangwe v. Barclays Bank (Z) Limited & Others, Appeal No. 102/2015
11. David Banda v. Attorney General, Appeal No. 233/2020
12. Kamfwa v. Zambia Electricity Supply Corporation Limited
13. Zambia Airways Corporation Ltd v. Gershom B.B. Mubanga (1990-1992) Z.R. 149 (S.C)
14. Bank of Zambia v. Joseph Kasonde (1995-1997) Z.R 238 (S.C)
15. Contract Haulage Limited v. Mumbuwa Kamayoyo (1982) Z.R 13
16. Augustine Katongo v. Club Secretary and Ndola Senior Police Club (COMP/30/2014)
17. Pule & Others v. Attorney General & Other, 2017/CCZ/004
18. Matthew Ngambi v. FQM Limited (IRC/ND/102/2016).
19. Powell v. Lee (1908) L.T 284
20. Nsansa School Inter Education Trust v. Gladys Mtonga Musamba (2010) Z.R. 457 Vol. 1
21. R v. North and East Devon Health Authority *Ex-Parte Coughlan*
22. Zambia Privatization Agency v. Matale (1995-1997) Z.R 57
23. Francis v. The Principal Commissioner of Kuala Lumpur (1962) 3 All ER 633
24. Zambia National Provident Fund v. Chirwa (1986) Z.R 70

25. Engen Petroleum Zambia v. Muhanga & Another, Appeal No. 117 of 2017
26. Mutale v. Zambia Consolidated Copper Mines Ltd (1993-1994) Z.R 67
27. Galaunia Farms Ltd v. National Milling Company Ltd, SCZ Judgment No. 1/2004
28. Jacques Chisha Mwewa v. Attorney General, IRC Comp No. 95/08
29. Heather Musariri v. iSchool Zambia Limited, Comp No. 391/2016
30. Raine Engineering Co. Ltd v Baker (1972) ZR 156
31. Barclays Bank Zambia Limited v. Mando Chola & Another, SCZ Judgment No. 8/1997
32. Chansa Ng'onga v. Alfred H. Knight (Z) Ltd, Selected Judgment No. 26/2019
33. Joseph Chintomfwa v. Ndola Lime Limited (1999) ZR 172 SCZ
34. Dennis Chansa v. Barclays Bank Zambia Plc, SCZ No. 111/2011
35. Chilanga Cement Plc v. Kasote Singogo (2009) Z.R 122

Texts referred to:

1. Halsbury's Laws of England Volume 16 (4th edition)
2. Mwenda, W.S. and Chungu, C. A Comprehensive Guide to Employment Law in Zambia, 2021, University of Zambia Press
3. Sprack, J. Employment Law and Practice (1st edition) 2007, London: Sweet & Maxwell
4. Chungu, C. & Beele, E. Labour Law in Zambia, An Introduction (2nd Edition) (2020), Juta & company (Pty) Ltd
5. Elizabeth Slade Q.C MA (Oxon) Tolley's Employment Hand Book (21st Edition), 2007

The delay in the delivery of this judgment is deeply regretted. This was due to pressure of work.

Introduction

1. The respondent employed the complainant on 12th August, 2016 as Director Investments under a fixed term contract for a period of 3 years. The end date was 11th August, 2019.

2. It was a term of the contract that where the complainant sought to renew the contract, she was to give at least 3 months' notice before expiry of the contract. On its part, the respondent was obligated to notify the complainant of its decision to renew or to not renew at least 2 months before the expiry of the contract. The complainant notified the respondent of her intention to have her contract renewed on 7th May, 2019. The respondent notified the complainant of its decision not to renew 3 days before expiry of the contract, on 9th August, 2019.

3. Following the non-renewal of her contract, the complainant took out this action by way of Notice of Complaint accompanied by an affidavit on 3rd June, 2021 for the following reliefs:

(a) An order and or a declaration that the sudden dismissal of the complainant by the respondent was and is wrongful, illegal, irrational, null and void ab initio and of no legal consequence whatsoever and is otherwise totally wrongful;

(b) Reinstatement into the complainant's position for a further three(3) year contract in accordance with the National Pension Scheme Authority's conditions of

service considering that the National Pension Scheme Authority is a public body;

(c) In the alternative, for an order of payment of compensatory damages for loss of employment amounting to 36 months' salary and other allowances as per prevailing Zambian judicial precedents;

(d) General damages for mental trauma, stress, anguish, mental torture, inconvenience, loss and damages occasioned to the complainant as a result of the sudden wrongful and illegal dismissal;

(e) Interest on the total award found due and payable by the respondent to the complainant at current bank lending rate from 9th August, 2019 to date of full payment;

(f) Any other award the court may deem fit in the circumstances and;

(g) Costs of this action

4. In reacting to the claim, the respondent filed an Answer on 23rd September, 2021 stating that under the contract, it reserved the right to either renew or to not renew the contract. Therefore, the decision not to renew was not wrongful, illegal, null and void at law or in fact. It was further stated that in lieu of notice, the respondent

paid the complainant all sums due under the contract and she is therefore not entitled to the reliefs sought.

Affidavit in support of complaint

5. The complainant deposed that she was recruited by the respondent as Director Investments for a period of three years from 21st August, 2016 and her contract of employment was duly signed on behalf of the respondent by Mr. Yollard Kachinda, the Director General (D.G). The contract is exhibited to the affidavit as "DPS1".

6. Sometime in January, 2018 she got enlisted on the respondent's negotiating team mandated with overseeing the purchase by the respondent of land famously known as Baobab land. This was offered to the respondent by Nyimba Investments Limited and Bantu Corporations. Exhibited as "DPS2-DPS3" are the draft board meeting minutes evidencing the complainant's participation.

7. The complainant deposed that the 'Baobab land' comprised two portions namely No. F/4300/B1 and B2 which was in extent of 130 hectares offered at K 925,000.00 per acre and property F/4300/B3-B13 in the extent of 46 hectares offered at the price of K 500,000.00 per acre respectively. Sometime in November, 2018, the respondent's Board resolved to end any pursuits and further negotiations for the purchase of the land due to the various ongoing legal disputes that encumbered the land.

8. In 2019, the last year of her contract, and in compliance with clause 11.1, the complainant wrote a letter ("DPS4") dated 7th May, 2019, giving the respondent more than the required 3 months' notice

of her intention to renew her contract for a further period of 3 years. The respondent's D.G quickly acknowledged receipt of the letter and informed her via letter marked "DPS5" that the respondent would respond within reasonable time which she took to mean within the time agreed in clause 11.3 of the contract of employment.

9. The complainant averred that in July, 2019, upon realizing that the trigger date by which the respondent needed to respond was getting close, she approached the D.G, Mr. Kachinda, about her letter. The D.G assured her and she believed him because he was the supervisor and was fully aware of her performance which was described as exceptional. Exhibited to the affidavit as "DPS6" are copies of the performance assessment results showing the score of 4 of 5 levels. According to the complainant, as a result of the assurances made by the D.G, she stopped looking for another job elsewhere as she legitimately expected and believed that her new contract of employment would be signed and that she would continue as Director Investments for the respondent for another 3 years.

10. On or about 17th July, 2019, the complainant was informed by her colleague, Mr. Mason Mwiinga, the Director Contributions and Benefits of an ongoing sale of a 50 by 50 meters plot by Marshall Chambers on behalf of Mr. Leonard Nyoni at a price of K 200,000.00. The complainant and her husband agreed to buy the said property and on 19th July, 2019, her husband made a deposit of K100,000.00 to Marshall Chambers. The deposit slip is exhibited as "DPS7 (a) and (b)". On 20th July, 2019, the complainant and her

husband were shown the beacons for plot F/4300/149 by the Surveyor, Mr. Chris Daka.

11. On 23rd July, 2019, the complainant learnt that one of her colleague's workers who was clearing her colleague's plot was arrested for possible trespass. This was followed by the complainant receiving summons from the police in relation to the 50 by 50 meters plot. She could, however, not attend as she was in Livingstone. On 25th July, 2019, whilst in Livingstone, she saw a news clip on Prime TV reporting that 5 of the respondent's directors were being probed for theft as they had paid K 2,000,000.00 each to purchase the Baobab land which proposal to purchase the land was initially rejected by the Ministry of Labour and Social Security.

12. On 30th July, 2019, Prime TV ran a story on its television network in which the Minister of Labour and Social Security informed the nation that the respondent's director's contract was not going to be renewed by the respondent's Board of Trustees due to the Baobab land saga as the same director is the one that generated the proposal.

13. On 2nd August, 2019 around 17:00 hours, the complainant received a charge form (exhibited as "DP8") from the respondent alleging that she had contravened its code of discipline and grievance procedure on two grounds namely: abuse of one's authority and failure to declare interest. She responded to the charges through her statement marked as "DPS9" denying both of them.

14. On 9th August, 2019, she attended a disciplinary hearing conducted by the Staff Affairs Committee of the respondent's Board of Trustees. On the same day, she received a letter ("DPS10") from the respondent informing her that the charge of abuse of authority had been dropped but that the charge of failure to declare interest had been sustained because the respondent believed that there was a likelihood that the land that the complainant purchased was part of the land that was offered to the respondent by Nyimba Investments.

15. According to the complainant, the respondent came to its verdict without having conducted any proper investigation into the matter. This was contrary to what the respondent informed her in the suspension letter which is exhibited as "DPS11".

16. On 9th August, 2019, 3 days before her contract was due to end and contrary to clause 11.3 of her contract of employment, the complainant received a notice ("DPS12") from the respondent under the office of D.G that her contract was not going to be renewed. This shocked the complainant as it was contrary to the assurances she received from the D.G.

17. On 23rd August, 2019, the complainant appealed against both decisions of the respondent, that is, the verdict of the disciplinary committee and the non-renewal of her contract of employment. She exhibited the letter of appeal as "DPS13". In its response of 13th September, 2019 ("DPS 14(a) and (b)"), the respondent maintained its decision without giving valid justification. The complainant

attested that she disagreed with the respondent's decision given the lack of investigation on its part that resulted in it concluding that there was likelihood of an offence being committed and not that an offence had been committed. The respondent, it was averred, came to an adverse decision against the complainant which cost her a job without being sure of whether or not she had committed any offence at all or whether or not the land is the same.

18. According to the complainant, the charge of failure to declare interest under clause 13.74 of the respondent's code of discipline relates to the respondent's procurement issues and not individual and private procurement matters as it was in this case where the complainant was trying to purchase land in her personal capacity. Exhibited as "DPS15" is the respondent's Code of Discipline.

19. The complainant emphasized that the plot that she purchased was not the same piece of land as the one that the respondent was offered to purchase to warrant non-renewal of her contract as the pieces of land were offered by different vendors and were not of the same size and price. In any event, the respondent's Board of Trustees had decided to end all pursuit or negotiations concerning the land that was being offered by Nyimba and Bantu.

20. The complainant deposed that the respondent's refusal to renew her contract was wrongful as it was based on unfounded accusations relating to the Baobab land saga as no investigations had been conclusively determine by the respondent's disciplinary committee at the time the decision was made. Further, the

respondent's decision not to renew her contract was wrongful, illegal null and void because the respondent had created legitimate expectation in the complainant's mind through its own actions and assurances that her contract would be renewed. This was supported by the fact that no adverse decision was communicated to her in line with clause 11.3 of the employment contract thereby confirming her legitimate expectation.

21. She further deposed that the decision not to renew was clearly imposed on the respondent by a third party who was not privy to the contract of employment namely the Minister of Labour and Social Security.

Affidavit in opposition

22. The affidavit was sworn by Betty Meleki, the respondent's former Director Human Resources and Administration. She admitted that the complainant was appointed by the Board of the respondent institution to the negotiation team for the land situated at Farm 4300, Lusaka (the Baobab land) which was being offered for sale by Bantu Corporations Limited and Nyimba Investments Limited. Ms. Meleki confirmed that the negotiations for the land reached a stalemate causing the respondent not to proceed with the transaction.

23. She further confirmed that the complainant did express a desire to have her contract renewed in line with clause 11.1 of the contract dated 12th August, 2019. The assurances purportedly given to the complainant are in the peculiar knowledge of the complainant as the

renewal of the directors' contracts is a decision of the Board of Trustees and not the D.G or any other individual employee of the respondent. She maintained that no assurances were made to the complainant other than the respondent informing the complainant that her expressed desire to have her contract renewed was received and feedback would be given to her in due course in line with clause 11.2 of the contract as indicated in exhibit "DPS 5".

24. Ms. Meleki deposed that on or around 25th July, 2019 it came to the respondent's attention that information circulating in the media was that 5 of the respondent's directors, of which the complainant was among them, were being investigated for abuse of authority for purchasing portions of the Baobab land.

25. On 29th July, 2019, the respondent placed the complainant and the other directors entangled in the land saga on suspension to allow for proper investigations into the matter as indicated in exhibit "DPS11".

26. In line with the respondent's code of discipline and grievance procedure, the respondent did formally charge the complainant as seen in exhibit "DPS8". In the spirit of according the complainant an opportunity to be heard, a notice of case hearing (exhibited to the affidavit as "BM1") was issued and the hearing took place on 9th August, 2019 as depicted in exhibit "BM2". The decision in exhibit "DPS10" was arrived at after considering the evidence before the committee.

27. The fact that the respondent communicated its decision regarding renewal 3 days before the expiry of the contract did not negate the actual expiration of the term of the complainant's employment. Furthermore, the respondent paid the complainant in lieu of notice and all sums due under the contract as per computation exhibited as "BM3" which computation the complainant accepted without complaint.

28. It was deposed that only the Board had power to renew the complainant's contract and as such, any assurance that did not come from the Board cannot be attributed to the Board. The affidavit revealed that the Board of Trustees that is mandated to consider renewal of directors' contracts is distinct from the disciplinary committee that is mandated to ensure adherence to the respondent's code of conduct.

29. The complainant exercised her right to appeal the decision of the disciplinary committee and the same was duly considered and a verdict was accordingly rendered in accordance with the respondent's code of conduct. The minutes of the Appeals Committee hearing are exhibited as "BM4"

30. According to Ms. Meleki, the complainant's appeal of the respondent's decision not to renew the contract was improperly before the Disciplinary Committee as it was outside the committee's mandate as evidenced by the exhibit "DPS14(a)". She added that the decision was not appealable as it was a right exercised by the Authority in line with clause 11 of the complainant's contract.

Contrary to the complainant's assertions, exhibit "DPS14(a)" was a response to the complainant's letter appearing under exhibit "DPS13" and not the decision of the Appeals Committee. The decision of the Appeals Committee was independent from the land saga that the complainant entangled herself in and was clearly communicated to the complainant in the exhibit marked "DPS14(b)". Further, the respondent properly charged the complainant as seen in exhibit "DPS8" and the provisions of the disciplinary code.

31. The deponent attested that the land that was offered to the complainant namely property No. F/4300 is part of the land that was offered to be sold to the respondent by Nyimba and/or Bantu being F/4300 B1 and B2 and F/4300/B3-B13, a fact which the complainant ought to have known having done due diligence and having been part of the team that had previously negotiated on behalf of the respondent to buy the land.

32. The deponent reiterated that the complainant's term of employment with the respondent was terminated by effluxion of time and not as a result of disciplinary matters faced by the complainant during her tenure.

Hearing

33. The complainant testified on her own behalf and called three other witnesses. The respondent called one witness.

Complainant's case

34. The complainant (CW1) testified that she joined the respondent on 3rd July, 2002 as Contributions Officer in the Contributions and

Benefits Department. She rose through the ranks and in 2016 she attended an interview and was given the position of Investment Director under a three-year contract.

35. The complainant told court that her performance whilst working for the respondent was impeccable. To exemplify this, she informed Court that when she was Investment Accountant, she found the respondent's portfolio at K 900 million. She grew the portfolio to K 25.5 billion by the time she was leaving the Authority. She added that her disciplinary record was equally impeccable.

36. The complainant, thereafter testified in line with her affidavit and her testimony in that regard will not be repeated. She emphasized that her performance was rated by the D.G from superior to exceptional. Her performance appraisal for 2017 which was rated as superior performance came with a bonus of K63,446.71 while for her performance appraisal for 2018, she received a bonus of K31,624. She said she was confident that with such performance, her contract would be extended by another 3 years.

37. The complainant confirmed that she knew about the Baobab land way back from the media which reported the wrangles surrounding the land. In relation to the respondent, she testified that Nyimba and Bantu had brought a proposal in late 2017 for consideration for purchase by the respondent and she was appointed to the negotiating team. To her recollection, the plots offered to the respondent for close to K 400 Million were in extent of 130 hectares belonging to Nyimba Investments and about 46

hectares belonging to Bantu Corporation. However, the negotiations were closed around November, 2018 as the Board resolved not to proceed with the purchase of the land.

38. According to the complainant, the directors were asked to provide evidence of how they came to purchase the land from Mr. Nyoni. When the complainant asked why, she was informed that there was a complaint but it was not disclosed as to who had lodged it. It was the complainant's evidence that the news report aired on 25th July, 2019, discussing the land and alleging that the directors of the respondent had defrauded the respondent was false and malicious.

39. Upon her return from Livingstone, the complainant proceeded to give a statement to the police. This was on 29th July. On the same day, when she got back to the office, she received a letter of suspension and was told to stay away from the office. On 2nd August, 2019, the directors involved in the land purchase were given charge letters and asked to exculpate themselves. She was charged with abuse of office and conflict of interest in line with the Code of Discipline and Grievance Procedure. The complainant stated that she duly submitted her exculpatory letter.

40. In response to charge of abuse of authority, the complainant explained that she did not use information from the authority to purchase the land in the Baobab area. She became aware of the land through her colleague, Mr. Mwiinga. She neither used her position nor the respondent's resources to purchase the land which, according to Mr. Mwiinga, belonged to Mr. Nyoni. She purchased as

a private citizen. According to the complainant, Mr. Nyoni never presented a proposal to the respondent to sale a 50 x 50 metres plot at K 200,000.00. The complainant emphasized that from her personal knowledge as a member of the Investment Committee who attended its proceedings, the respondent had discharged its interest in the land in November, 2018 and she was the one that drafted the letter to Bantu and Nyimba Investments to that effect. She stated that she only purchased the land 9 months later and as a result of the forgoing, the charge was unsubstantiated.

41. As regards the second offence, the complainant testified that the rationale for the offence is that in procurements, the respondent's staff must declare interest in the event that they have a relationship with the supplier. It was her evidence that she was not related to or associated in any way either with Bantu or Nyimba. She also did not know Marshall Chambers or Mr. Leonard Nyoni and did not aid them in any way to take advantage of the respondent.

42. As regards the hearing that took place on 9th August, 2019, she was surprised to hear from the D.G, the charging officer, that there was a complainant that had submitted a letter. As far as she was concerned and in light of her charges, the respondent was the complainant. The chairman asked the D.G to read out the letter but she objected on grounds that she had not seen the letter and the procedure was not in line with the disciplinary code. The objection fell on deaf ears and the D.G proceeded to read out the letter.

43. Following the hearing, the complainant received two letters, one informing her of the outcome of the disciplinary hearing and the

other concerning non-renewal of her contract. The decision from the hearing was final written warning and uplifting of the suspension. The complainant testified that it was shocking that the respondent could not say with certainty that the land which she purchased was the one which the respondent had earlier expressed interest in. According to the complainant, this was a discrepancy because according to clause 5 of the disciplinary code, the authority must only proceed on the basis of clear evidence.

44. According to the complainant, she appealed against the disciplinary hearing and the non-renewal of her contract. She highlighted that the respondent did not follow the contractual terms as she was given her notice of non-renewal on 9th August, 2019 when the respondent should have given her feedback by 11th June, 2019 which is two months before the expiry of her contract as agreed. The complainant asserted that as of 12th June, 2019, she had a new contract with the respondent because the respondent sat on its rights. She contended that the respondent had created a legitimate expectation and so she was shocked by the non-renewal letter given to her on 9th August, 2019 around 19:00 hours.

45. The complainant highlighted that in the news clip which aired 10 days before the disciplinary hearing, it was reported that one of the directors who had bought land did not have their contract renewed. She asked why the news about the non-renewal of her contract was in the public domain when it was supposed to be private. The Board was unable to respond. According to the complainant, the Board and management breached the code of

ethics with regard to the leaked information. Reference was made to clauses 2.5.5, 2.5.6, 3.5,3.6 and 3.9 contained in the Code of Ethics. She argued that the respondent was trying to create an environment to justify the non-renewal of her contract. In addition, her reputation was injured. She was defamed as everyone knew that the contract which was not renewed was hers.

46. The outcome of the appeal was that the charge of conflict of interest was upheld. This came as a surprise to the complainant because in her view, the Disciplinary Committee never investigated the matter.

47. As it pertains to the response to her appeal on non-renewal (DPS14(a)), the complainant pressed that she never received any notice and she was never asked to submit any grounds of appeal. She asserted that the respondent conducted a hearing on its own without any witness and passed a verdict. The complainant contended that although the Board argued that a decision which was not made by it was not valid, the D.G had delegated authority to act on behalf of the Board. He is the one that signed her contract of employment.

48. It was the complainant's evidence that the charge of conflict of interest had no legal basis and should be dismissed. Also, the respondent had no legal basis not to renew her contract. If the respondent's intention from the get go was not to renew her contract, it ought to have followed clause 11.3 of the contract. In light of the forgoing the complainant prayed for an order of reinstatement or an order for payment of all her salaries and

allowances for 36 months. She also asked that she be paid for the torture and anguish she suffered at the hands of the authority as well as costs.

49. In *cross examination*, the complainant insisted that her dismissal was wrongful. She disputed the assertion that the land she purchased was part of the Baobab land that the respondent wanted to purchase. Regarding her contract, the complainant echoed that she should have received the letter of renewal by 12th June, 2019 and the fact that she did not meant that the respondent was okay with her continuing her employment.

50. The complainant acknowledged that she was appointed to the position of Director Investments by the Board but the appointment was communicated to her by the D.G.

51. When questioned about the Staff Affairs Committee, the complainant confirmed that this committee was responsible for making recommendations to the Board regarding recruitments. She confirmed that her application for renewal did go through the committee. The complainant believed that the decision to not renew her contract was made before her disciplinary hearing. She however disputed the assertion that the decision to not renew her contract was independent of the disciplinary hearing.

52. On the alleged assurances of a renewal, the complainant confirmed that she was given assurances by the D.G, the first of which occurred on 7th May, 2019. The complainant conceded that

she did not have evidence of the said assurances and she would not call Mr. Kachinda as a witness.

53. When questioned on the aspect of her performance, the complainant reiterated that it was rated superior to exceptional. She was then referred to exhibit "DPS6" and she accepted that it was fair to say that her performance was from superior to met; superior being that she had exceeded expectations and met being that she had done what she was asked to do.

54. Further on renewal, the complainant maintained that she was expecting a response from the respondent 2 months prior to expiry of her contract. She confirmed that she interpreted the respondent's silence to mean that her contract was to be renewed. She asserted that it would be unfair to interpret the respondent's silence to mean that the contract was not going to be renewed. This is owing to the fact that clause 11.3 in her contract was clear and put there for orderliness and good industrial practice.

55. Cross examination then focused on the public media reports regarding the purchase of land. The complainant maintained that the said reports were meant to tarnish her image. She, however, acknowledged that she did not sue Prime TV and the respondent for defamation of character.

56. In *re-examination*, the complainant maintained that the respondent did not follow the procedure laid down in the code. According to her, investigations ought to have been carried out before her suspension. On renewal of contract, the complainant

clarified that the guiding factor was clause 11. However, the issue was handled causally by the D.G, despite the fact that he was aware of the consequences of not communicating in time if the intension was to not renew.

57. CW2, Mason Mwiinga, told court that he had been with the respondent for 8 years and was on his third contract as Director.

58. He testified that in July, 2019, he learnt that Marshall Chambers was selling land in the Baobab area on behalf of a client called Mr. Nyoni. He confirmed this through activities he observed in the area including the grading of roads and clearing of plots. Subsequently, he drove to Marshall Chambers and a Mr. Stanley Tembo confirmed availability of plots. The following day after a staff meeting, he mentioned to his fellow directors that there was land for sell in the Baobab area. Four directors including the complainant expressed interest and he took them to Marshall Chambers where they transacted. It was his evidence that the land that they were dealing in was not the same land that the respondent had earlier expressed interest in purchasing. As such, if someone contended that they were competing with the respondent he would disagree and further, at that time, the respondent had no interest.

59. With reference to the contract of employment and in particular clause 11, he stated that it was meant to allow the Board time to consider the matter. If the employee does not give notice within 3 months then its automatic that the employee is leaving. The respondent will consider the request within 2 months in line with

clause 11.2 in order to allow for a smooth handover. It was his evidence that if the respondent had not communicated it meant that it had not made a decision and not necessarily that it had automatically agreed to carry on with the employee. This would however make the handover difficult.

60. CW2 testified that he was also charged with the offence of failure to declare interest as defined under clause 14.21. He explained that as an owner of a company, if he was to supply anything to the respondent, he would have to declare interest. In relation to this case, he stated that the respondent was not buying anything from the Nyonis in order for the directors to declare interest.

61. When referred to "DPS10", CW2 confirmed that it was a final written warning in which was indicated that there was a high likelihood which denotes uncertainty. He affirmed that the procedure is that the employer must be clear before they charge and discipline an employee.

62. In *cross examination*, CW2 confirmed that Nyimba did offer land to the respondent in the Baobab area. He was not part of the team constituted to deal with the transaction. The transaction was not successful. He stated that after their cases had been disposed of, the respondent bought the land from Nyimba. He also stated that the land he had paid for is outside the respondent's fenced property.

63. Further in cross, CW2 confirmed that the incident which gave rise to the matter before Court began whilst he was serving under his second contract which commenced on 2nd May, 2019. He also

confirmed that all the 5 directors went through the disciplinary process and for 3 of them including himself, the charge of failure to declare interest was upheld. He, however, highlighted that none of the directors was dismissed on account of the charge that was upheld.

64. In *re-examination*, CW2 reiterated that out of the 5, 4 stayed in the employ of the respondent. His contract was renewed after he served his punishment.

65. CW3 was Lawrence Soko, the complainant's husband whose testimony on the land purchase was similar to the complainant's account and therefore will not be repeated.

66. On the renewal issue, he testified that the complainant informed him that her supervisor, the D.G, had assured her that she would be given the contract. By 11th June, however, there was no response from the respondent and as a family they concluded that the contract had been renewed automatically. They were so confident such that they spent K100,000.00 towards the purchase of the land. According to CW3, the complainant was mistreated by the employer.

67. When *cross examined*, CW3 stated that after the police got involved, they decided not to proceed with the purchase of the land and asked for a refund. He stated that the complainant has been trying to get back to formal employment but has so far been unsuccessful. It was his evidence that had the respondent responded to her application 2 months before expiration of her contract, she would not have sat back but would have began looking

for another job. CW3 confirmed that the complainant had been searching without success for 3 years. He acknowledged that the complainant was paid 2 months' salary for the two months she lost opportunity to find a job.

68. The witness was not re-examined.

69. CW4 was Gerald Shawa, a Journalist from Prime T.V whose testimony was that the station received a tip off that directors of the respondent had been suspended because of the land issue in the Baobab area in Lusaka. Prime T.V went on the ground to verify the information which involved calling the Minister of Labour and Social Security. Following the Minister's verification which was recorded, the story was aired in July 2019. He produced the flash disk containing 2 video clips as part of his evidence and it was admitted in evidence as "GS1".

70. In *cross examination*, CW4 confirmed that the minister was asked if the 5 directors were suspended for conflict of interest. He acknowledged that there was nothing on non-renewal of contract in the clip that was played before Court.

71. There was no re-examination of this witness.

Respondent's case

72. The respondent's witness was Betty Chipika Meleki, former Director Human Resource and Administration who told Court that she worked for the respondent from December, 2012 to December of 2021.

73. It was her testimony that the complainant was charged with the other directors over the purchase of the Baobab land. This is due to the fact that they decided to go ahead with the purchase despite being aware that the respondent had an interest in the land. The complainant's suspension from duty was meant to facilitate investigations regarding the purchase of land in line with the respondent's disciplinary code.

74. Ms. Meleki confirmed that the complainant did submit her request to renew her contract to the D.G who advised her that it would be considered. On 19th July, 2019 a meeting of the Staff Affairs Committee was held to consider the request. Later, on 29th July 2019, the Board sat and upheld the recommendation of the Staff Affairs Committee to not renew the complainant's contract. The witness produced an extract of the Board resolution and it was admitted in evidence as exhibit "BM5".

75. Ms. Meleki acknowledged that the Board was supposed to communicate its decision with 2 months of the date of notice. She emphasized that there were some processes to be followed within the 3 months which are the Staff Affairs Committee meeting and the Board meeting to consider the request for renewal. According to Ms. Meleki, the convening of these meetings depended on the availability of members some of whom did not work within the respondent's organization. This is the reason the meetings were held well into the two months provided for in clause 11.3 of the contract.

76. In addition, the land scandal occurred after the Staff Affairs Committee meeting but before the Board meeting. As a result, in consideration of the fact that the two months had elapsed, the respondent decided to compensate the complainant by paying her 2 months' salary in lieu of notice in the sum of K 178,782.00. According to Ms. Meleki, there was no unfairness to the complainant as it pertains to the end of her contract as the respondent went out of its way to pay the complainant the aforesaid amount which was not normally done. She cited herself as not having received such compensation.

77. As regards the complainant's employment prospects, Ms. Meleki told court that she was aware that the complainant was heading a certain housing institute established by Government.

78. In *cross examination*, Ms. Meleki confirmed that the respondent was interested in purchasing land known as the Baobab land but resolved not to proceed with the transaction in November, 2018. At the time, Mr. Kachinda was still the D.G for the respondent.

79. Cross examination then focused on the renewal of the complainant's contract and she confirmed that it was important for the respondent to respond to the complainant at least 2 months before the expiration of the contract to allow for smooth handover as that was the best practice. She conceded that this did not happen. She further conceded that clause 11.3 has nothing to do with payment in lieu of notice.

80. When referred to clause 5.4.4 of the disciplinary code, Ms. Meleki confirmed that the respondent's disciplinary process should not only be fair but be seen to be fair. She confirmed that the respondent dropped the first charge against the complainant but found the complainant guilty of the offence of failure to declare interest. According to her, the respondent was 100% sure that the land that the complainant wanted to purchase was the same land that the respondent was interested in.

81. Ms. Meleki acknowledged that in the 9 years that she worked for the respondent, the complainant had not been charged with any other offence. She stated that it was against the respondent's policy to disclose information to unauthorized persons. She acknowledged that the respondent owed the complainant a duty of confidentiality. She clarified that to some extent the respondent was no longer interested in the land but there were some continued discussions. She was, however, unable to produce evidence of the continued discussions. She also clarified that as secretary of the committee, she had access to the documents. She stated that the land which the complainant bought was in area B1, which belonged to Nyimba Investments, which land the respondent eventually bought in 2020.

82. When referred to exhibits "DPS5" "DPS8" and "DPS10", Ms. Meleki accepted that the documents were authored by the D.G. She could not confirm that the D.G. wields authority on behalf of the respondent. She admitted that to a large extent, it was a breach of contract if the terms of the contract are not followed and that the respondent was aware that two meetings were required. She

admitted that clause 11 of the contract does not provide for cash payment in the event of failure to give notice within time. She disputed the averment that the payment was acknowledgment of breach by the respondent, but rather a payment made out of goodwill.

83. In *re-examination* Ms. Meleki clarified that there were instances where the response from the respondent was delayed such as when there was no Board of Trustees in place. Regarding the land, she told court that Nyimba Investments questioned as to why the 5 directors bought the land that was still under discussion with the respondent. According to her, the land which included the plot that the complainant bought was fully purchased in 2020. This in itself shows that the respondent was still interested in the land. She emphasized that there was failure on the part of the complainant to declare interest and the respondent as a public body had to address the issues which were of interest to the general public. Furthermore, the complainant was part of the initial negotiating team.

84. Ms. Meleki further clarified that clause 5.4.4 should not be read in isolation but together with other clauses in the code. She clarified that clause 5.9.8 gives the committee leeway to obtain further evidence and carry out further investigations if they are not satisfied with the initial investigation.

85. On the issue of renewal of contract, the witness told court that there were factors to be considered other than performance.

Submissions

86. Mr. Songolo for the complainant submitted that if the respondents intention was to demonstrate the disconnect between the non-renewal of the contract and the Baobab land saga and the subsequent disciplinary proceedings that took place, it should have produced the minutes of the Staff Affairs Committee of the Board of Trustees that sat and made its recommendations on the application for renewal to the Board long before the Baobab saga issue and the attendant disciplinary decisions that followed. The minutes were withheld as they were in favour of a renewal of the complainant's contract. The respondent only produced the Board minutes of a meeting that was held after the Baobab land saga had arisen and after the items were carried by the media houses and statements issued by the police. Counsel asked Court to draw the appropriate inference from the respondent's conduct.

87. It was contended that in complete disregard of the legitimate expectations that had been created by the respondent's assurances and conduct that the complainant's contract of employment would be renewed for a further three-year term, after the Baobab land saga, suddenly and with immediate effect, the complainant was suspended from employment with a view to conduct investigations into the alleged offences. It was submitted that contrary to the respondent's code of discipline under clause 4.0 and 5.4 which require disciplinary action to be taken only after thorough investigations into each alleged offence, the respondent went ahead and charged the complainant without carrying out full investigations for the offence of abuse of one's authority and failure to declare

interest. Further, the complainant was not informed who had made the complaint and this showed how procedurally unfair the whole process was. In addition, the complainant was not availed the documents forming the basis of the said complaint.

88. Counsel asserted that the verdict rendered against the complainant following the hearing of 9th August was tainted with unfairness and was arrived at without any clear evidence showing that the complainant was guilty of failure to declare interest. It was submitted that the complainant's contract of employment was wrongfully, unfairly and unlawfully terminated by the respondent who had ignored its own disciplinary procedures and basic principles of fairness in the work place. This was especially so, since the ownership of the land was not established. Counsel pressed that it was extremely difficult for one not to conclude that the non-renewal of the complainant's contract was occasioned by the Baobab land saga.

89. It was submitted that the fact that the contents of "BM5" and that of the Prime TV clip are the same confirms that the respondent was engaged in unethical behaviour as it was clear that the minutes of the Board dated 29th July, 2019 were leaked to the media. It was argued that a breach of the disciplinary code and code of ethics rendered the decision of the respondent totally wrongful at law.

90. It was submitted that the burden to show that a dismissal was carried out fairly and on good and substantiated reasons falls on the employer's shoulders as prescribed by section 52(5) of the

Employment Code Act. Reliance was also placed on Halsbury's Laws of England Vol. 16, 4th Edition at paragraph 628 which states that:

In all cases, the burden lies upon the employer to show that the dismissal was fair. He must show what was the reason for the dismissal; and he must also show that it was a reason which the law regards as acceptable and in the circumstances, having regard to equity and the substantial merits of the case, he acted reasonably in treating it as sufficient reason for dismissing the employee.

91. Counsel highlighted that this was the common law position under sections 55(2)(b) and 83(2)(b) of the British Employment Protection (Consolidation) Act of 1978. Expiry of a fixed term contract without renewal is deemed to be a dismissal for unfair dismissal and redundancy purposes. According to counsel, the common law position was applicable to Zambia. Further recourse was had to the cases of **Baillie v. Kell**⁽¹⁾, **Edwards v. Levy**⁽²⁾ and **Fletcher v Krell**⁽³⁾ all of which discuss fixed term contracts.

92. It was submitted that legitimate expectation is a well-established cause of action in Zambia set to protect employees from being unfairly treated by their employers who in often cases tend to change their position when it suits them most and abandon their assurances to the employees. Reference was made to the case of **North Western Energy Company Limited v. Energy Regulation Board**⁽⁴⁾ where Justice Dr. Matibini quoted observations made by the learned author of De Smith's Judicial Review on legitimate expectation as follows:-

Such an expectation arises where a decision maker has led someone affected by the decision to believe that he will receive, or retain a benefit, or advantage -including that a hearing will be held before a decision is taken.

It is a basic principle of fairness that legitimate expectations ought not to be thwarted...that the doctrine of legitimate expectation derives its justification from the principle of allowing the individual to rely on assurances given, and to promote certainty and consistent administration.

93. Premised on the aforesaid authority, it was submitted that where a person in authority with actual or ostensible authority makes a representation, and this person has power to bind the authority, he creates a legitimate expectation at law. It was argued that in this instance the D.G of the respondent had actual and ostensible authority and could bind the respondent. The complainant knew that the D.G had power to bind the respondent. Counsel pressed that the Supreme Court has guided that employers who create legitimate expectation must be estopped from refusing to be bound by the expectation they have created. The case of **Hotel and Tourism Institute Trust v. Happy Chibesa**⁽⁵⁾ was cited in aid.

94. According to counsel, there is no requirement that the assurances must be evidenced in writing only. On the contrary the two authorities discuss the various forms that assurances or representation take namely, by record, express or implied, by conduct or by deed or verbally.

95. Further recourse was had to the learned authors Mwenda and Chungu, in their book, A Comprehensive Guide to Employment Law in Zambia at page 136 where they state that:

“In some cases, it is possible for an employee to claim that he/she has a legitimate expectation to an employment benefit or allowance. This usually occurs where an employee is similarly circumstanced to another employee who received the said

benefit or allowance. In such situations, an employee may claim an entitlement to the benefit based on their legitimate expectation."

96. It was then submitted that there is evidence from CW1 and CW2 that at least 3 out of the 5 directors involved in the Baobab land saga had their contracts renewed when their contracts came up for renewal but the complainant was treated differently. Counsel argued that although the discrimination and the breach of the respondent's code of ethics was not expressly pleaded, the record will show that evidence of these grievances was led without any objection from the respondent. As a result such evidence was allowed onto the Court's record as part of the complainant's case against the respondent. According to counsel, failure to accord the complainant the same treatment that was given to the other directors offends the respondent's code of discipline and grievance procedure. It was also against the time honoured principle of fairness in the workplaces and legitimate expectation. In the circumstances, the complainant was unjustly treated and was entitled to compensatory damages so that she can enjoy similar benefits as those who had their contracts renewed.

97. The submissions then addressed the issue of procedural unfairness and dismissal. For the definition of unfair dismissal, reliance was placed on the learned authors Mwenda and Chungu in their book at page 243 who state that:

"Unlike wrongful dismissal, where form is pivotal, unfair dismissal, a creation of statute, is concerned with the merits or substance of the dismissal and form is only supportive of the whole merits of the dismissal."

98. Reliance was also placed on the learned author Sprack John who in his book Employment Law and Practice, at page 117 states that wrongful dismissal essentially is a dismissal which is contrary to the contract and its roots lie in common law. The remedy is usually limited to payment for the notice period...unfair is dismissal contrary to statute.

99. Counsel then proceeded to cite section 52(1)(2)(3) and (5) of the Employment Code Act. Emphasis was placed on the fact that an employer who dismisses an employee ought to give a valid reason for their dismissal.

100. It was further submitted that the respondent's witness was not a reliable witness as she testified to the effect that the respondent was 100% certain that the land the complainant paid for was part of the land the respondent was offered when the verdict of the Disciplinary Committee was that there was a likelihood that the land was the same. According to counsel, as held in the case of **Shawaza Fawaz & Another v. The People**⁽⁶⁾ it is sufficient to demonstrate the unreliability of a witness if they are shown to have told an untruthful statement about an important part of their evidence.

101. It was thus submitted that the complainant's dismissal was null and void at law for failure to provide valid reasons. The case of **Superbets Sports Betting v. Batuke Kalimukwa**⁽⁷⁾ was cited in which it was emphasized inter alia that employers are prohibited from terminating employees' contracts of employment except for valid reasons and on specified grounds.

102. Further, the case of **Zambia Postal Service Corporation v. Prisca Bowa & Another**⁽⁸⁾ was cited which held that the main concern of the Industrial Relations Court was to bring out the need for employers to treat their employees fairly by observing rules of natural justice when disciplining their employees. It was then submitted that the respondent failed to give the complainant an opportunity to respond to the complaint letter from Bantu Corporations and Nyimba Investments Limited which was only introduced during the hearing itself, contrary to the respondent's Code. The respondent ignored protests from the complainant and continued with the hearing.

103. Counsel submitted that the complainant was alive to the fact that Courts are not meant to sit as appellate adjudicators with regard to disciplinary committee decisions but to establish if the committee had the requisite power to discipline and if so if that power was validly exercised. His contention was that in casu, the powers of the respondent's disciplinary committee was not reasonably exercised as the complainant was not informed as to who the complainant was before or during the hearing. To buttress this argument, counsel relied on the case of **Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited**⁽⁹⁾

104. The submissions then touched on damages for mental trauma, stress, anguish, mental torture, inconvenience, loss and damages occasioned to the complainant. Several authorities were cited in support of this claim one of which is the case of **Beatrice Chileshe Sinyangwe v. Barclays Bank (Z) Limited & Others**⁽¹⁰⁾ which held

that mental distress or inconvenience are not recognized heads of tort but are heads of damages that are recoverable after a party has proved liability for a tort or breach of contract.

105. As regards quantum, reliance was placed on the case of **David Banda v. The Attorney General**⁽¹¹⁾ where the award of 36 months salaries was enhanced to 42 months salaries and perquisites as damages for wrongful dismissal taking into account the oppressive treatment the appellant was subjected to, the harsh social-economic situation in the country and the high rate of unemployment.

106. On behalf of the respondent, Mr. Mwendela in tackling the allegation on wrongful dismissal referred to the learned authors of Tolley's Employment Handbook who define wrongful dismissal as follows:

A wrongful dismissal occurs when the employer dismisses an employee in a way which is in breach of the employee's contract of employment. Most commonly this arises when the employer dismisses the employee summarily (i.e. without any notice at all) or with short notice, and has no sufficient justification for doing so. However, there may also be a wrongful dismissal in another situation: for example, if the employer terminates the employment without following some procedure prescribed by the contract.

107. Reference was then made to Halsbury's Laws of England Volume 6 at page 439 paragraph 649 which states that "an employer commits a breach of contract if he wrongfully dismisses an employee before the expiration of the term for which he is employed."

108. Reliance was placed on the cases of **Kamfwa v. Zambia Electricity Supply Corporation Limited**⁽¹²⁾, **Zambia Airways**

Corporation Limited v. Gershom B.B Mubanga⁽¹³⁾, **Bank of Zambia v. Joseph Kasonde**⁽¹⁴⁾ and **Contract Haulage Limited v. Mumbuwa Kamayoyo**⁽¹⁵⁾. Premised on the forgoing authorities it was submitted that wrongful dismissal involves two main things:

- i. Failure by the employer to comply with the terms of an employee's contract as regards termination.
- ii. Failure by an employer to follow the laid down procedure as contained in the employer's code of disciplinary and grievance procedure.

109. As regards illegal dismissal, reference was made to the case of **Augustine Katongo v. Club Secretary and Ndola Senior Police Club**⁽¹⁶⁾ where the High Court stated that illegal dismissal is synonymous with unlawful dismissal. What is unlawful is illegal and so to mount a claim for wrongful dismissal and again to claim for illegal dismissal on the basis of the same facts is duplication.

110. The submissions then dealt with irrational dismissal and discussed that irrationality is in the realm of judicial review. The Court's decision as to whether actions of the public authority are *Wednesbury* unreasonable or irrational, illegal and/or procedurally improper is through the judicial review process. The respondent being a statutory body exercising government powers pursuant to CAP 256 is subject to judicial review. Counsel argued that the procedures for judicial review have been clearly outlined and are distinct and separate from employment law.

111. On the issue of disciplinary proceedings, it was submitted that the complainant's suspension was in line with clause 8.2 of the NAPSA Code. In addition, the complainant was accorded an opportunity to be heard in accordance with clause 5.9 of the Code. Attention was drawn to case of **Contract Haulage Limited**⁽¹⁵⁾ which emphasized that an employee must be given an opportunity to answer the charges against him. Premised on this authority, it was argued that the complainant was given an opportunity to be heard and the decision was rendered thereafter. She was also heard on appeal.

112. Court was then referred to clause 2 of the complainant's contract which reads: *"The employee shall serve the Authority for a period of three years (3) from 12th August, 2016 and subject to the renewal for a further term upon agreement by the Authority and Employee"*. It was submitted that this clause is clear in that the respondent reserves the right to either renew the complainant's contract or not at the end of the 3 years, as renewal was not automatic. The decision not to renew the complainant's contract, therefore, was the respondent's right exercised by them under the employment contract.

113. As such, the complainant's termination was not wrongful on the basis of failure to follow procedure as contained in the code of conduct as the same was duly followed.

114. On the alleged irrationality of the respondent's decision to terminate her contract, counsel referred to clause 10.3 of the employment contract and reminded Court that the Employment Act

referred to was Cap 268 as it was the law in force at the time of the contract. However, in light of the case of **Pule and Others v. Attorney General**⁽¹⁷⁾ which discusses transitional provisions, that is, when one legislative system ends and another begins, it was submitted that the Employment Code Act, 2019 is the law of the contract of employment between the respondent and the complainant.

115. Recourse was then had to section 52 of the Employment Code which provides for termination of employment. Based on the aforesaid provision, it was submitted that the respondent had the right to either renew the complainant's contract or not at the end of the three-year contract as renewal was not automatic. Therefore the decision by the respondent to not renew the contract of employment was neither 'irrational nor illegal' as it was rightly exercised under the employment contract and statute.

116. On whether the respondent created legitimate expectation in the complainant, it was submitted that the question to be answered is whether the letter dated 23rd May, 2019 and the supposed oral promise made by the D.G is sufficient to create a legitimate expectation.

117. The case of **Matthew Ngambi v. FQM Limited**⁽¹⁸⁾ was cited and it was submitted that the import of the clause on renewal of contract is that the discretion to renew is on the employer but in exercising its discretion to renew the contract, the employee is at liberty either to accept or refuse to have the contract renewed. A contract which has come to an end is null and void which means it

is not operational or cannot be deemed to have force or be said to be automatically renewed.

118. As for the alleged assurance by the D.G, counsel relied on the case of **Powell v. Lee**⁽¹⁹⁾ and **Nsansa School Inter Education Trust v. Gladys Mtonga Musamba**⁽²⁰⁾ in which the Supreme Court held that “*Verbal assurances that a contract of employment would come into existence could be described as a declaration of intent which never crystallized into a valid contract.*” It was submitted that the authorities are clear that unless the parties conclude the terms of the contract and/or have a contract in place, it cannot be assumed that there is or going to be a contract upon the expiration of the current contract.

119. The case of **R v. North and East Devon Health Authority, ex parte Coughlan**⁽²¹⁾ was cited which case emphasized that in some situations, the Court is entitled to determine whether it is fair to compel the authority to fulfil its representation, or whether there is sufficient overriding public interest which justifies allowing the authority to depart from the promise made. It was submitted that in casu, there was sufficient overriding public interest which justifies allowing the respondent to depart from the promise made by the D.G.

120. Reference was again made to the learned authors of Tolley's Employment Handbook on payment in lieu of notice who acknowledge that to dismiss an employee with pay in lieu rather than give due notice is in fact to dismiss wrongfully. The true legal analysis of the situation is that there is a summary dismissal carried

out in breach of the contract and the wages paid in lieu represent a payment of damages for the breach of contract.

121. Also cited was the case of **Zambia Privatization Agency v. Matale**⁽²²⁾ where it was stated that:

The payment in lieu of notice was a proper and lawful way of terminating the respondent's employment on the basis that in the absence of express stipulation every contract of employment is determined by reasonable notice.

122. Based on the above authorities it was submitted that in the absence of wrongful dismissal, the respondent is not liable to damages as claimed by the complainant as all procedures were followed and payment was made to the complainant in lieu of notice which the law recognizes as reasonable and fair.

123. As it pertains to whether or not the complainant was entitled to reinstatement, Court was referred to **Halsbury's Laws of England** Volume 16 at page 424 which states that "*an order for reinstatement is an order to the employer to treat the complainant in all respects as if he had not been dismissed.*" Further reference was made to the case of **Bank of Zambia v. Joseph Kasonde**⁽²³⁾ wherein the Supreme Court guided that reinstatement is rarely granted unless there are special circumstances which make it the only equitable decision. Mr. Mwendela then submitted that it is trite law that the remedy of reinstatement is granted sparingly, with great care and extreme caution. Counsel's position was that in this case the right procedure was properly followed.

124. Turning to the claim of damages for sudden wrongful dismissal, counsel relied on the Malaysian case of **Francis v. The Principal Commissioner of Kuala Lumpur**⁽²⁴⁾ where it was stated that the appellant's remedy lay in damages for wrongful dismissal as a declaration that a contract still subsisted would rarely be made in the absence of special circumstances.

125. Reliance was also placed on the case of **Zambia National Provident Fund v. Yekweniya Mbiniwa Chirwa**⁽²⁵⁾ where the Supreme Court stated that:

Where the procedural requirements before disciplinary action are not statutory but merely form part of the conditions of service in the contract between the parties, a failure to follow such procedure would be a breach of contract and could possibly give rise to a claim for damages for wrongful dismissal but would not make such dismissal null and void.

126. From the forgoing, it was submitted that damages can only be awarded in the event that the Court finds that there was wrongful dismissal. In this case, however, there was no wrongful dismissal as the contract terminated by effluxion of time and not as a result of the disciplinary proceedings.

127. On the issue of costs, counsel submitted that it was the Court's discretion to award costs and further that the general rule was that costs are normally awarded to a successful litigant as highlighted in the cases of **Engen Petroleum Zambia Limited v. Willis Muhanga & Jeremy Lumba**⁽²⁶⁾, and **Mutale v. Zambia Consolidated Copper Mines Limited**⁽²⁷⁾ and as provided for by Order 62(3)(3) of the White Book (1999) Edition.

128. On the strength of the forgoing authorities, it was submitted that costs follow the event and that should the respondent be successful in defending this case, the Court is imbued with the discretionary power to order that the costs of and incidental to this matter be for the respondent. Counsel prayed that this Court exercise its discretion in favour of the respondent.

Analysis and decision

129. I have considered the evidence on record, the submissions by both parties and the authorities cited therein. It is not in dispute that the complainant was employed the respondent as Director Investments under a fixed term contract for a period of 3 years from 12th August, 2016 to 11th August, 2019.

130. In compliance with clause 11.1 of her contract of employment, the complainant gave the respondent notice to renew on 7th May, 2019. The contract provided for at least 3 months' notice before expiry. The respondent failed and/or neglected to respond to the complainant at least two months before the expiry of the contract as provided for by clause 11.3. The respondent only notified the complainant of its decision to not renew the contract 3 days before its expiry, on 9th August, 2019. The respondent went on to pay the complainant two months' salary in lieu of notice.

131. It is a fact that in late July, 2019, a few days before the expiry of the complainant's contract, the Baobab land saga broke out whereby the media reported that directors of the respondent,

including the complainant, were being investigated for abuse of authority for purchasing portions of the Baobab land. It is also a fact that the complainant was charged; given an opportunity to exculpate herself; heard; appealed the Disciplinary Committee's verdict which found her not guilty of abuse of authority but guilty of failure to declare interest and; the verdict was upheld by the Appeals Committee.

132. The complainant alleges that the respondent dismissed her suddenly after creating a legitimate expectation that her contract would be renewed. This is wrongful, illegal, irrational, null and void and of no legal consequence. She asserts that the decision to not renew her contract is connected to the disciplinary issue. The respondent denies the allegations asserting that it exercised its right as per contract as renewal was not automatic. The respondent maintains that there was no wrongful dismissal as the complainant's contract was terminated by effluxion of time and not because of the disciplinary matter.

133. Arising from the foregoing, the issues for determination as I see them are as follows:

(i) Whether the complainant was dismissed and if so, whether or not the dismissal was wrongful, illegal or irrational as alleged;

(ii) Whether or not the respondent created a legitimate expectation that the complainant's contract would be renewed;

(iii) Whether the non-renewal was occasioned by the Baobab land saga;

(iv) Whether the complainant ought to be reinstated or paid compensatory damages for loss of employment as well as damages for mental trauma, anguish, torture, inconvenience, loss.

Whether the complainant was dismissed and if so, whether or not the dismissal was wrongful, illegal or irrational

134. As established, the complainant's contract was not renewed. But, did the non-renewal amount to a dismissal?

135. In answering this question, I have called to aid the case of **Redrilza Limited v. Abuid Nkazi & Others**⁽²⁸⁾ where the Supreme Court had occasion to explain the difference between dismissal and termination. The Court held that dismissal involves loss of employment arising from disciplinary action while termination allows the employer to terminate the contract of employment without invoking disciplinary action.

136. The above authority is clear that only when an employee loses employment as a result of disciplinary proceedings can they be said to have been dismissed. It follows that when a contract is not renewed as was the case with the complainant, there is no dismissal. The contract terminates by effluxion of time.

137. I am of the view that the **Redrilza** case does not support the complainant's contention that expiry of a fixed term contract without renewal is a dismissal for unfair dismissal.

138. Notwithstanding, I still ought to determine whether the complainant's termination was proper. I am of the view that the propriety of the termination or lack thereof can only be determined after resolving the aspect of legitimate expectation as well as whether there is a nexus between the non-renewal and the land saga.

Whether or not the respondent created a legitimate expectation that the complainant's contract would be renewed

139. The respondent argued and I agree that it had the prerogative to renew or to not renew. The contract provided for those options.

140. In determining whether or not there was a legitimate expectation, I have had recourse to the learned authors of A Comprehensive Guide to Employment Law in Zambia who opine at page 233 that:

...while a contract for a fixed duration expires automatically on the date agreed to by the employer and employee, and the employer retains the discretion to extend or not, there may be instances where an employee has legitimate expectation of renewal. The onus is on the employee to provide the objective evidence that gives rise to the alleged subjective legitimate and reasonable expectation of renewal. The justification for the legitimate expectation of renewal principle is based on the principle of estoppel. Under this principle, if the promisor makes an undertaking which is acted on by another person, the promisor is prevented (or estopped) from going back on that promise. This is so even where the other person has not provided consideration.

141. The authors go on to cite the Supreme Court decision of **Galaunia Farms Limited v. National Milling Company Limited**⁽²⁷⁾ where it was asserted that in order to succeed under the doctrine of estoppel, there must be a representation of fact intended to be acted upon by the person to whom it is made; the person to whom it is made must actually act on the representation; and by so acting it must be to his detriment.

142. I have also had occasion to peruse decisions of the Industrial Relations Division in the cases of **Jacques Chisha Mwewa v. Attorney General**⁽²⁸⁾ and **Heather Musariri v. ISchool Zambia Limited**⁽²⁹⁾ both of which discuss legitimate expectation. In the former case, an employee's contract of employment was renewed twice. The employee applied for renewal at the end of the third contract but his request was denied. The Court applied the contractual principle of promissory estoppel. It held that the employer was barred from disputing the extension of the contract by his previous conduct. It was opined that for the employer to have successfully defeated the application of estoppel, it had a duty to inform the employee that the contract would not be renewed when he applied for renewal.

143. In the **Heather Musariri** case, the Court endorsed the factors to consider in determining a reasonable expectation of renewal as espoused in the South African case of Diereks v. University of South Africa (1999). These are: significance or otherwise of the contractual stipulations, agreements or undertakings by the employer; practice or custom in regard to renewal; the reason for concluding the fixed-term contract; any assurances that the contract would be renewed; inconsistent conduct and failure to give reasonable notice of non-renewal.

144. While the two cited cases are only of persuasive value, I am of the view that they set out sound legal principles. They assert that the employee must prove the existence of facts that would lead a reasonable person to anticipate renewal. These may include: the presence of a promise or undertaking by the employer upon which the employee acts to his/her detriment; the provision on renewal in the contract; the conduct of the employer in the past and; failure to give reasonable notice of non-renewal.

145. The decisions also assert that the application of estoppel can be impugned by the employer showing that the employee was informed that the contract would not be renewed.

146. With the foregoing in mind, the questions that arise are: (1) has the complainant provided the objective evidence? (2) has the principle of estoppel been established?

147. On the one hand, the complainant insists that the Director General made verbal assurances that her contract would be renewed. The respondent on the other hand argues that the decision to renew or not was made by the Board and not the Director General and in any case, there is no proof of the alleged assurances.

148. I agree that there is no proof that the Director General made assurances of a renewal. However, this is not to say that verbal assurances cannot be relied on. A resolve whether or not verbal assurances were made can be arrived at by reviewing all the evidence available. In this case, I have no qualms accepting that indeed the Director General made assurances that the contract would be renewed from the fact that the complainant did not actively begin looking for alternative employment whilst waiting for the respondent's response.

149. Further, the evidence has established that the respondent ought to have responded to the complainant's application for renewal by 11th June, 2019 in accordance with the contract. The respondent only responded two days before expiry of the contract on 9th August, 2019. Had the respondent written in time, the complainant's expectation of a renewal would have been extinguished.

150. The evidence has also shown that the complainant was in the previous years favorably graded by the Director General. She was said to have exceeded expectations in 2017 and that she met

expectations in 2018. It was, therefore, reasonable of her to have the confidence that her contract would be renewed.

151. The respondent in arguing its case against legitimate expectation referred to the case of **Nsansa School Inter Education Trust v. Gladys Mtonga Musamba**⁽²⁰⁾ where an employee was employed on a two-year contract which was renewed for a further period when it expired. Towards the end of the second contract, 2 directors of the employer told the employee that the board of directors had decided to renew her contract and even gave her information on the terms. The employer, however proceeded to terminate the contract. The Supreme Court in considering the verbal assurances concluded that there was one renewal which was communicated through a letter. Against this background, it was expected that the renewal of the contract would have to be in writing. The Supreme Court refused to hold that the assurances given by the 2 directors gave the employee a right to a new contract.

152. I opine that the facts of the foregoing case can be distinguished from the facts at hand in that the complainant's contract which expired on 11th August, 2019 was the first of its kind requiring Board approval. Thus, there is no reference point in terms of the respondent's past conduct in relation to the complainant.

153. All in all, I am satisfied that the complainant has established the relevant facts that would lead a reasonable person to anticipate a renewal. The Director General wielded power in the organization. He had delegated authority to act on behalf of the Board as

evidenced by the fact that he signed the complainant's first contract of employment as Director. Thus, his assurances carried a lot of weight. Further and perhaps most importantly, the respondent did not respond when it should have thereby giving the complainant the indication that the contract had been renewed and all that was left was to sign a fresh contract. There was a failure by the respondent to give reasonable notice.

154. I am satisfied, therefore, that the principle of estoppel been successfully established.

Whether the non-renewal was occasioned by the land saga

155. The complainant argues that the non-renewal is directly linked to the Baobab land saga for which she was charged and found guilty. The complainant further argues that the verdict of the disciplinary committee finding her guilty of failure to declare interest which verdict was upheld by the Appeals Committee was arrived at without justifiable cause. The gist of the respondent's argument is that the complainant, as an employee of the respondent appointed to the negotiating team for the Baobab land must have known that the land she was paying for was the same land the respondent had an interest in and therefore she should have declared interest.

156. I have considered the foregoing arguments. I note that the complainant's evidence that she heard about the land from Mr. Mwiinga, a fellow director in the respondent institution, was not meaningfully challenged. Further the evidence that the vendor in the transaction was a Mr. Nyoni was not challenged either. Thus, I

have no reservations accepting that the complainant believed, and reasonably so, that she was not buying land from Nyimba Investment or Bantu Corporation but from an individual called Mr. Nyoni through his advocates, Marshall Chambers. In any case, Mr. Mwiinga is on record as having said (and his evidence was not challenged) that the land he paid for was outside the land that the respondent subsequently purchased. It would thus not be farfetched to conclude that even the land the complainant had paid for was not part of the land that the respondent eventually purchased.

157. In addition, Clause 13.74 which provides for the charge of failure to declare interest is under procurement related offences in the respondent's disciplinary code and the offence is defined as follows:

Failure to declare interest on matters that involve your company(s) and/or other company(s) and person(s) associated with you prior to their engagement.

158. The complainant herein bought the land in her personal capacity and was not involved in any procurement for the respondent. She did not use the respondent's resources to pay for the land. In short her paying for the land had nothing to do with the respondent.

159. Furthermore, the evidence has established that the respondent had relinquished interest in the land belonging to Nyimba and Bantu

in 2018. The complainant made payment towards the land she believed belonged to Mr. Nyoni in 2019.

160. From the foregoing, I hold the view that to have expected the complainant to declare interest under such circumstances was unfair and unreasonable. I am mindful of the fact that I am not sitting as an appellate court from the respondent's internal disciplinary proceedings. However, I have jurisdiction to look into the reasons relied on for arriving at the guilty verdict and I hold the firm view that the reason for finding the complainant guilty was not justificatory.

161. The decision was based on speculation whether or not the land the complainant paid for was the same as the land that the respondent had an interest in. The use of the words likelihood and may be in the verdict letter of 9th August, 2019 clearly shows the uncertainty on the part of the respondent. The matter was not thoroughly investigated and this goes against clause 5.4.4 of the respondent's Code of Discipline which demands that disciplinary action be taken after thorough and critical investigations into the alleged offence.

162. I agree with the submission that the respondent came to an adverse decision against the complainant without being sure whether or not she had committed any offence or whether or not the land is the same.

163. It is quite clear to me that the respondent's decision not to renew the complainant's contract was informed by the land saga wherein the complainant was unreasonably and unfairly treated. The Minister of Labour made the announcement of the non-renewal of the contract about 10 days prior to the respondent's communication to the complainant. Quite clearly, the respondent had no objectivity when handling the disciplinary hearing. The decision had already been made and the processes carried out by the respondent were merely a formality.

164. I am satisfied that without the Baobab land saga, the complainant's contract would have been renewed.

165. In light of the foregoing, I find that the complainant's termination was wrongful as it was based on a charge that was procedurally incorrect. There was no proper investigation carried out and the charge preferred was unrelated to the situation at hand. I also find the termination to be unfair as it was based on a verdict arrived at on unsubstantiated allegations or for unjustified reasons contrary to sections 52(1) and 52(2) of the Employment Code Act.

166. Furthermore, the complainant acted on the verbal assurances made by the Director General and stopped looking for alternative employment.

167. I now turn to the reliefs sought.

Reinstatement

168. It is established at law that orders for reinstatement are only made in exceptional cases and rarely so. The Supreme Court, in the case of **Bank of Zambia v. Joseph Kasonde**⁽²³⁾ relied on by the respondent, held that the remedy of reinstatement is granted sparingly, with great care and jealousy and with extreme caution.

169. The reasons why courts are reluctant to order re-instatement were well articulated by the House of Lords as quoted by the Court of Appeals in the case of **Raine Engineering Co. Ltd v Baker**⁽³⁰⁾ as follows:

When there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the Courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the Court. (Underlined for emphasis).

170. I do not see any special circumstances in the matter at hand to warrant an order of reinstatement.

Compensatory damages for loss of employment

171. Having found that the complainant was wrongfully and unfairly terminated, it follows that she is entitled to damages. The complainant prayed for 36 months' salary plus allowances. This is equivalent to the pay she would have earned had her contract been renewed for a further 3 years.

172. A plethora of cases have decided that the award of damages should be equivalent to the contractual period of notice. In the case of **Barclays Bank Zambia Limited v. Mando Chola & Another**⁽³¹⁾ it was held that the reason why the normal measure of damages is based on the period of notice is that it is the period within which the employee could reasonably be expected to have secured another job.

173. In the case of **Charles Ng'onga v. Alfred H. Knight (Z) Limited**⁽³²⁾ 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.

174. However, in the case of **Joseph Chitomfwa v. Ndola Lime Company Limited**⁽³³⁾, it was held that when considering what award of damages would suffice, the court should consider the employee's prospects of finding alternative employment in a similar capacity. Taking cognizance of the fact that job opportunities for the claimant at the time were almost nil, the court awarded damages equivalent to 2 years' salary with all other perquisites.

175. In the case of **Dennis Chansa v. Barclays Bank Zambia Limited Plc**⁽³⁴⁾, the Supreme Court awarded 36 months' salary as compensation taking into consideration that Zambia's and the global economies made it difficult for an employee to find alternative employment after dismissal. In the **David Banda** case cited by the

complainant, the award of 36 months was enhanced to 42 months salaries as the Court of Appeal took into account the oppressive treatment the appellant suffered, the harsh social economic situation and the high rate of unemployment.

176. Reverting to the case at hand, I make two observations. Firstly, the respondent had the prerogative to renew or to not renew the contract. All it had to do was follow the terms and conditions of employment. Secondly, it is not clear whether or not the complainant is in employment. Each side gave verbal representations in support of its position, so it is the complainant's word against the respondent's. What is clear, however, is that there is no basis upon which I can conclude that the complainant has nil prospects of finding employment.

177. In light of the foregoing, I am of the view that the normal measure of damages, being notice period, would not suffice given the unfair and unreasonable treatment that the complainant suffered. However, I hold the firm view that damages must not exceed 12 months' salary plus perquisites for the reasons stated above. Awarding 36 months' salary as prayed would be unjust enrichment.

General damages for mental trauma, stress, anguish, mental torture, inconvenience, loss and damage

178. The Court of apex jurisdiction has guided on many occasions that such damages should be awarded in exceptional cases. One such occasion was the case of **Chilanga Cement Plc v. Kasote Singogo** ⁽³⁵⁾ where the Court held as follows:

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

179. The complainant herein has been awarded more than the normal measure of damages which is the notice period. According to her contract of employment, notice period was 3 months. This court has awarded 12 months' salary with all other perquisites. That being the case, a further award of damages for mental trauma, stress, anguish, mental torture, inconvenience, loss and damage would not be justified more so that the respondent already paid the complainant two months' salary for the inconvenience caused by the failure to give reasonable notice.

Conclusion and Orders

180. The complainant has discharged her burden of proof to the extent shown above. For the avoidance of doubt, I make the following declaration and orders:

- (i) The complainant was wrongfully and unfairly terminated;
- (ii) I award the complainant damages for wrongful and unfair termination equivalent to 12 months' salary with all other perquisites.

(ii) The sum due shall carry interest at short-term bank deposit rate from the date of notice of complaint to the date of judgment and thereafter, at current bank lending rate as determined by the Bank of Zambia until full settlement.

(iv) Costs shall follow the event; to be taxed in default of agreement.

176. Parties are informed of their right to appeal.

Dated at Lusaka this 23rd day of February, 2024



M.Chigali Mikalile

HIGH COURT JUDGE