

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

**2023/HN/IR/21**

**BETWEEN:**

**GILBERT BESA**

**AND**

**CHIMWENDA INVESTMENTS LIMITED**



**COMPLAINANT**

**RESPONDENT**

*Before: The Honourable Lady Justice Dr. Winnie Sithole Mwenda at  
Ndola this 16<sup>th</sup> day of February, 2024.*

*For the Complainant: Mr. P. Banda of Messrs. GM Legal Practitioners*

*For the Respondent: Mr. M. G. Numbwa of Messrs. Kitwe Chambers*

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## **JUDGMENT**

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**Cases referred to:**

- 1. Attorney General v. Richard Jackson Phiri (1988 – 1989) Z.R. 121 (S.C.).*
- 2. Konkola Copper Mines Plc v. Hendrix Mulenga Chileshe, S.C.Z. Appeal No. 94/2015.*
- 3. African Banking Corporation Zambia v. Lazarous Muntente, CAZ Appeal No. 51 of 2021.*
- 4. Ian Chipasha Mpundu v. Road Transport and Safety Agency, CAZ Appeal No. 107/2021.*
- 5. Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited, CAZ Appeal No. 129/2017.*
- 6. Care International Zambia Limited v. Misheck Tembo, SCZ Selected Judgment No. 56 of 2018.*
- 7. Supabets Sports Betting v. Batuke Kalimukwa, SCZ Selected Judgment No. 27/2019.*

8. *Emporium Fresh Foods t/a Food Lovers Market and Another v. Kapya Chisanga*, CAZ Appeal No. 44/2021.
9. *Swarp Spinning Mills Limited v. Sebastian Chileshe and Others* (2002) Z.R. 23.
10. *MP Infrastructure Zambia Limited v. Matt Smith and Kenneth Barnes*, CAZ Appeal No. 102/2020.
11. *AB Bank Limited v. Benjamin Nyirenda*, CAZ Appeal No. 58/2020.
12. *First Quantum Mining and Operations Limited v. Obby Yendamoh*, SCZ Appeal No. 206/2015.
13. *Konkola Copper Mines Plc v. Aaron Chimfwembe and Kingstone Simbayi*, SCZ Appeal No. 195/2013.
14. *Charles Mushitu (sued in his capacity as Secretary General of Zambia Red Cross Society) v. Christabel M. Kaumba*, SCZ Appeal No. 122/2015.
15. *John Paul Mwila Kasengele and Others v. Zambia National Commercial Bank*, SCZ Judgment No. 11 of 2000.
16. *Lubunda Ngala and Jason Chulu v. Anti-Corruption Commission*, SCZ Selected Judgment No 4 of 2018.
17. *Kitwe City Council v. William Ng'uni* (2005) Z.R. 57 (S.C.).
18. *National Airports Corporation Limited v. Reggie Ephraim Zimba and Saviour Konie*, SCZ Judgment No. 34 of 2000.

**Legislation referred to:**

1. *The Employment Code Act, No. 3 of 2019.*
2. *The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, as amended by Act No. 8 of 2008.*
3. *The Industrial and Labour Relations Rules, Chapter 269 of the Laws of Zambia.*
4. *The Employment Act, Chapter 268 of the Laws of Zambia.*
5. *Article 189 of the Constitution of Zambia.*

**Authoritative texts referred to:**

1. *Mwenda, Winnie Sithole and Chungu, Chanda 'A Comprehensive Guide to Employment Law in Zambia' (2021) University of Zambia Press.*
2. *Chungu, Chanda (2022) "MP Infrastructure Zambia Limited v. Matt Smith and Kenneth Barnes, CAZ Appeal No. 102/2020," SAIPAR Case Review: Vol. 5: Iss. 2, Article 6. Available at: <https://scholarship.law.cornell.edu/scr/vol5/iss2/6>.*

**1. Introduction/ The Complainant's Claims**

- 1.1 Gilbert Besa, the Complainant, filed a Notice of Complaint on 4<sup>th</sup> April, 2023 against Chimwenda Investments Limited, the Respondent, on the following grounds:
  - (i) That, the Complainant and the Respondent executed a written contract of employment wherein the Complainant was employed by the Respondent as Site Manager. The Contract was to run from 2007 to August, 2019.
  - (ii) In the course of employment, the Complainant had the duty to verify and issue contractors' reports and deliver the same to Mopani Copper Mines for approval, which if approved, were to be used to generate invoices and payments to the Respondent.
  - (iii) In April, 2019, Mopani Copper Mines declined to approve a Contractor's Report that had been verified by the

Complainant, causing non-payment by Mopani Copper Mines to the Respondent.

- (iv) The Respondent alleged that the Complainant caused the said non-payment and dismissed him from employment.
- (v) The Complainant was not charged or given any opportunity to exculpate himself or heard and no hearing was conducted. He was not informed of the Company's decision to dismiss him and he was not given any opportunity to appeal against the dismissal.
- (vi) That, the entire process leading to his dismissal was unfair and in total breach of the rules of natural justice. Further, that there was no proper reason to dismiss him from employment and there were no grounds for dismissal or if at all there were, they were vexatious in all material respects. Further, that there was no charge and if at all there was, the same was baseless and was never established and did not warrant a dismissal.

1.2 That, in view of the foregoing, the Complainant seeks the following remedies:

- (i) Pursuant to the employment contract, housing allowance at 30% basic salary totaling K53,000.00 from December, 2013 until November, 2015;
- (ii) Pursuant to the employment contract, leave days, to the total tune of K16,000.00;

- (iii) Medical allowance from January, 2017 to the tune of K2,600.00;
- (iv) Unpaid salaries from April, 2019 to 5<sup>th</sup> August, 2019 to the tune of K83,333.30;
- (v) Pursuant to the employment contract, gratuity for 10 years from August, 2009 to 5<sup>th</sup> August, 2019, to the tune of K60,000.00;
- (vi) A declaration that the dismissal was unfair and wrongful and that there was procedural impropriety and disregard of the rules of natural justice on the part of the Respondent;
- (vii) Damages for wrongful and unlawful dismissal as the same was done in total disregard of the rules of natural justice and in breach of the Respondent's Disciplinary Code;
- (viii) Damages for inconvenience caused;
- (ix) Payment of all salary arrears from the date of termination; and
- (x) Legal costs.

## **2. The Affidavit in Support of Complaint**

2.1 The Complainant deposed to an Affidavit in Support of the Notice of Complaint wherein he stated that at all material times, he was an employee of the Respondent and was unlawfully dismissed from employment without being charged with any offence in or around August, 2019.

- 2.2 The Complainant alleged that he did not commit any offence or breach any condition of employment to warrant dismissal from employment and was at all material times never afforded an opportunity to be heard or to exculpate himself prior to the dismissal. Further, that he was equally not given an opportunity to appeal against the dismissal. That, the Respondent is in fact, indebted to him in salary arrears, gratuity, leave days and unpaid housing allowance.
- 2.3 According to the Complainant, the Respondent and himself executed a contract of employment in 2007 wherein he was employed as a Site Manager and worked for the Respondent from 2007 until around May, 2019. That, the said contracts were executed annually and sometimes, were not executed at all, the last contract he executed being in April, 2018. As evidence of this averment, a copy of the Contract of Employment dated 16<sup>th</sup> April, 2018 was produced and marked "GB1".
- 2.4 It was the Complainant's evidence that the Respondent had numerous contracts with Mopani Copper Mines which it executed and consequently some of the Respondent's employees, including himself, worked at one of the sites within the Mopani Copper Mines premises.
- 2.5 That, by reason of working within the mine premises, an employee was required to have an Identity Card for him to gain entry into the mine area and proceed to the

Respondent's work area. The Complainant had such an Identity Card due to the fact that he worked at the Respondent's site within the mine area. A copy of the Identity Card was produced and marked "GB2".

- 2.6 The Complainant averred further, that part of his duties was to verify a contractor's report issued by the Project Controller, which itemised the works done and the amounts to be paid to the Respondent. The Complainant also had the responsibility, and so did the Project Controller, to deliver the said contractor's report to the Cost Accountant at Mopani Head Office for verification of whether the Respondent's account had enough funds and if so, approve the same so that the Respondent could then issue invoices for payment by Mopani Copper Mines. If there were no funds in the Respondent's account, the Cost Accountant would decline to approve the contractor's report and hence prevent the Respondent from issuing an invoice for payment.
- 2.7 According to the Complainant, sometime in March, 2019, there was an incident at the Mopani South Ore Body( SOB) Shaft, which caused the Respondent's operations to cease from around 20<sup>th</sup> March, 2019 to about 8<sup>th</sup> April, 2019.
- 2.8 As part of the Complainant's job, in or about the end of April, 2019, he verified a contractor's report for the months of March and April, 2019 and delivered the same to the Cost Accountant of Mopani Copper Mines.

However, he was told that it would not be approved as payment for the period from around 19<sup>th</sup> March, 2019 to 8<sup>th</sup> April, 2019 would not be made due to the fact that the employees were not working during that period. The Complainant was, however, told that payment would be made for the period 9<sup>th</sup> April, 2019 to 19<sup>th</sup> April, 2019 and advised him to prepare a new contractor's report for that period, which was duly done. A copy of the contractor's report was produced and marked "GB3".

2.9 The Complainant delivered the contractor's report for the period 9<sup>th</sup> April, 2019 to 19<sup>th</sup> April, 2019 to the Cost Accountant for Mopani Copper Mines but was informed that it could not be approved due to the fact that the Respondent's accounts with Mopani Copper Mines had insufficient funds and consequently, the Cost Accountant declined to approve the said contractor's report and was told that it could only be approved once Mopani Copper Mines credited the said account. That, he was advised that this would take some time and therefore, the Respondent should source for funds to pay the employees while waiting for its account to be credited by Mopani Copper Mines.

2.10 Consequent to the aforesaid, the Respondent's employees went on strike for non-payment of salaries.

2.11 On or about 5<sup>th</sup> May, 2019, the Respondent's Director, a Mr. Charles Chikwelete, came to the mine site and ordered that the Complainant follow him to speak to the



Mine Manager concerning the contractor's report, non-payment of salaries and the strike. At a meeting in the Mine Manager's office, it was alleged that the Complainant and the Project Controller were the reason the contractor's report was not approved for want of having it signed/approved. After that, the Director ordered that they proceed out of the mine gate. After leaving the mine premises, the Director accused the Complainant of having caused the delay in having the report approved and consequent non-payment and the strike and had the Complainant's Identity Card blocked to prevent him from entering the mine premises. The Director then informed the Complainant that he had been suspended from work until further notice. The letter of suspension was produced and marked "GB4".

2.12 Following the suspension, the Complainant was handed a letter of dismissal on 5<sup>th</sup> August, 2019. A copy of the letter of dismissal was produced and marked "GB5".

2.13 The Complainant contended that he was never charged with any offence and he did not breach any term of his employment contract or Respondent's Disciplinary Code of Conduct to warrant a dismissal. Further, that he was never afforded an opportunity to exculpate himself, no hearing was held and he was never given an opportunity to appeal against his dismissal. That, it was his belief that his dismissal was unlawful and to that end,

produced a copy of the Respondent's Disciplinary Code as evidence of his averment.

2.14 Furthermore, that from 2007 until his unlawful dismissal in August, 2019, the Respondent had not paid him his housing allowances, leave days, medical allowances from January, 2017; unpaid salary from April, 2019 to 5<sup>th</sup> August, 2019; gratuity for 10 years. As evidence of the non-payments, copies of pay slips and bank statements were produced and collectively marked "GB7".

### **3. Respondent's Answer**

3.1 The Respondent filed its Answer to the Complaint on 13<sup>th</sup> April, 2023, wherein it asserted that the Complainant was employed on a contract dated 16<sup>th</sup> April, 2018 and all previous contracts had expired and the Complainant was paid his dues thereunder.

3.2 It was further stated that the Complainant was employed as a Site Manager with duties which included, amongst other, verification of contractors' reports and delivery of the same to Mopani Copper Mines Plc.

3.3 That, on or about the 6<sup>th</sup> day of June, 2019, the Complainant was suspended and charged with an administrative offence because of his failure to perform his duties. The Complainant attempted to exculpate himself. However, at a disciplinary hearing he was found guilty and his services were terminated by way of summary dismissal on 5<sup>th</sup> August, 2019. The

Complainant was informed of his right to appeal but he did not exercise it. That, the Complainant was properly charged and given a hearing at the disciplinary meeting.

- 3.4 The Respondent further averred that the Complainant was properly dismissed in accordance with the company procedures and the law. Hence, the reliefs sought by the Complainant have no basis and should be dismissed.

#### **4. Respondent's Affidavit in Support of Answer**

- 4.1 The Respondent filed an Affidavit in Support of Answer to Complaint on 13<sup>th</sup> April, 2023 which was sworn by one Tina Chibwe, the Respondent's Human Resources Officer.
- 4.2 The deponent asserted that contrary to the Complainant's assertions in his Affidavit, he was lawfully dismissed after he was properly charged and heard at a disciplinary hearing. Further, that the Complainant was afforded an opportunity to be heard and given an opportunity to exculpate himself on the charges. As evidence of this assertion, a copy of the Complainant's exculpatory letter was produced and marked "TC1".
- 4.3 The deponent further avowed that after the hearing, the Complainant was dismissed and advised of his right of appeal if not satisfied with the verdict of the disciplinary board, but he refused to appeal.

- 4.4 The Respondent denied that it is indebted to the Complainant in salary arrears, gratuity, leave days or any unpaid dues.
- 4.5 The deponent further averred that the Complainant failed to undertake his cardinal duties to ensure that he checked and verified the contractor's report for purposes of receiving payment from Mopani Copper Mines and that the conduct of the Complainant clearly showed gross negligence and as a result, the Respondent company suffered extra damages and loss.
- 4.6 The deponent stated that the Respondent's workers went on strike for non-payment of salaries because of the gross negligent conduct of the Complainant in not undertaking his duties as Site Manager.
- 4.7 It was averred by the deponent, that investigations were conducted which revealed that apart from the Complainant's failure to undertake his duty, he had negligently missed important meetings with Mopani Copper Mines Plc as he never reported for work. As evidence of this averment, a copy of the Time Sheet or Report at the Mopani Copper Mines gate was produced and marked "TC2".
- 4.8 It was the deponent's further evidence that the Complainant was suspended, charged and given a hearing and thereafter, dismissed after the offences against him were proved. Further, with regard to the

Complainant's claims of what is due and owing to him, it was asserted that the employment terms and conditions of the Complainant were all complied with by the Respondent. Further, that the contracts of employment for 2007 up to 2009 were duly complied with and their inclusion in this matter was an attempt to bring in matters which fall outside the jurisdiction of this Court and are in fact, statute barred.

## **5. Summary of Evidence**

- 5.1 Trial took place on 24<sup>th</sup> April and 15<sup>th</sup> November, 2023. The Complainant testified on his own behalf and did not call any witness. Tina Chibwe, the Respondent's Human Resources Officer, testified on behalf of the Respondent. The Complainant shall be referred to as "CW" while the Respondent's witness shall be referred to as "RW".
- 5.2 It was CW's evidence that he brought the Respondent to court because it had not paid him his benefits for the years he worked for it. He testified that he was summarily dismissed on 5<sup>th</sup> August, 2021 but he did not know the offence he was charged with. He claimed that he was not paid his salary from March, 2021 to up to 5<sup>th</sup> August, 2021. He was also not paid his medical allowance even though they signed for it in the contract.
- 5.3 CW testified that the Respondent had three sites at the Mine, namely South Ore Body (SOB), Central Shaft and Mindolo Shaft. He used to operate from SOB as a Site

Manager. CW identified exhibit "GB3" as a contractor's report. It was his evidence that if the document was not submitted in time, the workers would not get their salaries.

- 5.4 Testifying on what caused the delay in signing and submitting the contractor's report, CW said that it was because of an accident that took place on 19<sup>th</sup> March, 2021 which led to Mopani Copper Mines closing its operations. However, on 9<sup>th</sup> April, 2021, Mopani Copper Mines resumed operations and they worked until 19<sup>th</sup> April, 2021. On 22<sup>nd</sup> April, 2021, workers at all three sites went on strike, demanding for their salaries for March.
- 5.5 On 20<sup>th</sup> May, 2021, he and his colleagues went to see the Quantity Surveyor who informed them that the Chief Executive Officer had said that the payments for 29<sup>th</sup> March to 8<sup>th</sup> April, 2021 would not be paid as no labour had been provided and the employees were only attending safety lessons. It was CW's evidence that the US\$15,000.00 they had been paid was taken to the company and it was used to pay employees at Head Office and the other workers were not paid, leading to the strikes.
- 5.6 At a meeting with the Mine Manager, CW and another employee, a Mr. Chungu, were accused of having caused a strike because of their failure to submit a report on time thereby causing the company to fail to pay the

workers on time. What followed was that CW was dismissed from employment without being an opportunity to be heard. He was given a letter of suspension on 5<sup>th</sup> June, 2021 and was not paid his June salary.

5.7 CW further testified that after being given the suspension letter, he was not charged with any offence and no disciplinary hearing took place. What followed was a letter of summary dismissal on 5<sup>th</sup> August, 2021. It was CW's evidence that in Clause 10 of his Contract of Employment (exhibit "GB1" in the Affidavit in Support of Notice of Complaint), it states that when a person is dismissed, he should be paid for the days worked, less what he owes the company. That, he did not owe the company anything. CW implored the Court to order the Respondent to pay him for the period he worked for the Respondent. He also prayed that the Court orders the Respondent to pay him his medical allowance, leave days and housing allowance for two years as per contractual agreement of 30%, and all other reliefs as per the Notice of Complaint.

5.8 Under cross-examination, CW informed the Court that he had worked for the Respondent for 8 years. That, he signed the first contract in 2013, the second one in 2016 and the third one in 2018. He confirmed that the previous two contracts had expired and that is why he signed another contract for 2018 to 2019. He admitted

that the last contract he was referring to was exhibit "GB1".

5.9 It was CW's testimony that in claim number 1 he was claiming for housing allowance at 30% to the tune of K53,000.00 for the period 2013 to 2015. However, he had not exhibited the contract for that period before Court. He admitted that the only contract that was before Court was for 2018.

5.10 When referred to his March, 2019 payslip, CW admitted that it had leave days on it and that the February, 2015 pay slip did not show any leave days. CW said that he was paid his leave days for some months and not paid for some other months. He could not remember the number of days that he was not paid leave days. He admitted that the days that appeared on the payslips were the ones for which he was not paid leave days.

5.11 With regard to medical allowances from January, 2017 amounting to K2,600.00, CW confirmed that he had not tendered the contract relating to the year 2017 in evidence and therefore, it was not before Court.

5.12 CW reiterated that he was not paid his salary from 5<sup>th</sup> April, 2019 to 5<sup>th</sup> August, 2019. He confirmed that he was suspended on 6<sup>th</sup> June, 2019 and that April to May, 2019 was the period when he did not submit the contractor's report. He admitted that the contractor's report was the basis upon which Mopani Copper Mines



would pay the Respondent. CW further admitted that the strike of May, 2019 was due to non-payment of salaries to the Respondent's workers.

- 5.13 On his claim for gratuity, CW stated that his previous contracts provided for gratuity but he could not produce the previous contracts to show that he was entitled to gratuity for the period 2009 to 2019 as the only contract that was before the Court was that for 2018.
- 5.14 CW was referred to exhibit "GB6", namely, an excerpt from the Respondent's Disciplinary Code of Conduct, in particular, offences number 7 and 12. He read offence number 7 as misuse, loss or damage to company property with summary dismissal as the penalty for the first breach. Offence number 12 was failure to obey or carry out lawful instructions carrying a penalty of final warning and 5 days' suspension for the 1<sup>st</sup> breach and summary dismissal for the 2<sup>nd</sup> breach.
- 5.15 CW testified that he had not been referred to the two offences before the matter came up in court. He stated that he was given an opportunity to exculpate himself and he wrote the exculpatory letter and submitted it to the Respondent.
- 5.16 When asked what he was responding to in exhibit "TC1" of the Affidavit in Support of Answer if he was never charged as he claimed, CW said that he was responding to the statement on the suspension letter which referred

to the allegation of not submitting the contractor's report and absenteeism from work.

5.17 CW was referred to exhibit "TC2" in the Respondent's Affidavit in Support of Answer to Complaint and identified it as a logging sheet for the gate for going into and out of the plant. He agreed that the document showed that he went for work on 13<sup>th</sup> March, 2019 and 7<sup>th</sup> May, 2019. CW denied that the logging sheet confirmed the days he reported for work in March and May, 2019.

5.18 In re-examination CW clarified that he was not signing new contracts after the expiry of previous ones but was renewing them. Further, that the contractor's report was not submitted on time because it was during the period when they were told to wait for the Chief Executive Officer to authorise the payment and they waited from April to May, 2019.

5.19 Under further re-examination, CW reiterated his evidence that he was not charged for any offence. He agreed that he had admitted under cross-examination that he had been given an opportunity to exculpate himself but said that that the letters he wrote were not part of the hearing as there was no case hearing.

5.20 That marked the end of re-examination and the close of the Complainant's case

- 5.21 The Respondent's witness (RW) was Tina Chibwe, a Human Resources Officer in the Respondent company. RW testified that some of her duties are recruitment of employees, training and running the payroll. It was her evidence that procedure in dismissing the Complainant was followed; therefore, he was not wrongfully dismissed.
- 5.22 According to RW, the Complainant was charged and there was a case hearing where the Complainant defended himself. She identified exhibit "TC1" as a statement made by the Complainant in which he exculpated himself from the charges against him by explaining what allegedly happened during the period in contention.
- 5.23 RW testified that one of the reasons that led to the Complainant's dismissal was absenteeism from work. The other reason was negligence on his part as he was supposed to carry out certain duties, which he didn't, thereby causing the company to lose some money.
- 5.24 When referred to exhibit "TC2", RW identified it as the clocking in system report which showed the number of times an employee has clocked in and out at different sites of the Mine. That, according to the document, the last time the Complainant exited the SOB entrance was on 13<sup>th</sup> March, 2019. Thereafter, he was booked for refresher training and was supposed to start the training in March but did not attend it and only showed up on 7<sup>th</sup> May, 2019 at the academy.

5.25 RW was referred to document 1 in the Respondent's Notice to Produce dated 28<sup>th</sup> September, 2020 and identified it as an Employee Transaction Report. According to RW, there were some discrepancies in the way the Complainant was login in and login out of the Mine. For example, on 21<sup>st</sup> January, 2019 the Complainant exited at 10:39 hours when he should have exited at 13:00 hours. The next time the Complainant appeared at the Mine was on 30<sup>th</sup> January, 2019, meaning the other days he was not showing up.

5.26 Testifying on the issue of the contractor's report, RW stated that contractors' reports are documents on which contractors are paid. The reports are generated by the Cost Accountant for Mopani Copper Mines and it was one of the Complainant's duties to follow up the reports so that money is paid to the company. That, because the Complainant did not follow up the contractor's report for April, 2019, the company was not paid for that period. The Complainant did not follow up the report even in May, 2019 leading to the Respondent failing to pay its employees and the employees striking. It was RW's further evidence that at the Mines once employees go on strike, there is loss of time and production.

5.27 It was RW's further evidence that the Complainant was paid all his dues on termination as per his net pay in the contract. With regard to the Contract of Employment exhibited as "GB1", it was RW's evidence that the

contract was for 2018 and it came after the period 2013 – 2015 and was a re-engagement.

5.28 With respect to the claim for leave day of K16,000.00, RW testified that the claim was without basis as it is the Respondent's policy to pay leave days together with the monthly salary so that it does not accumulate.

5.29 When shown the Complainant's payslip for April, 2019 exhibited as "GB7", RW said that there was the basic salary, leave commutation for two days and housing allowance. That, the leave commutation translates into money and it was paid monthly. She testified that on the May, 2019 payslip there was leave commutation pay amounting to K1,269.00 while there was no leave commutation on the June, 2019 payslip. It was RW's testimony that the Complainant was not entitled entirely to leave commutation because his leave pay was being paid per month.

5.30 On the issue of medical allowance, RW testified that it was paid to every employee and in the Complainant's case, the period was not supposed to start in 2017 because the contract started in 2018. Further, that the Complainant is not entitled to payment of medical allowance because it was being paid together with his salary.

5.31 RW testified that the Complainant was suspended on 6<sup>th</sup> June, 2019, which means he ceased doing any work

for the Respondent and had not been doing any work from the time he was suspended. The Complainant was dismissed on 5<sup>th</sup> August, 2019; hence he was not entitled to payment of the amount of K83,333.31 he was claiming as he did not work for it.

5.32 It was RW's further evidence that the Complainant was not entitled to gratuity of K60,000.00 because he was terminated in 2011 and re-engaged in 2013. Further, that he was signing yearly contracts in which gratuity was not included because by then gratuity was not law and the contracts he was signing did not provide for gratuity.

5.33 When referred to the Contract of Employment exhibited as "GB1", RW testified that it was from April, 2018 to December, 2018 and it did not provide for gratuity. That, gratuity was made law in April, 2019. She explained that her point was that the Complainant's period of employment was way before the law which made payment of gratuity part of the law was enacted.

5.34 On whether the Complainant was heard on the charges, RW testified that he was given the chance to be heard twice and asked to put a report on what happened. Further, that procedure was followed when effecting his dismissal.

5.35 In conclusion, RW testified that the Complainant is not entitled to his claims as he was paid accordingly.

Further, that he was given the chance to appeal but he opted not to do so.

5.36 In cross-examination, RW stated that the Complainant was dismissed for absenteeism and negligence. She admitted that he was not charged before he was suspended but that the reason for his suspension was indicated in the letter of suspension. When asked whether it was legally correct to suspend an employee without being charged, RW answered that it all depended on the nature of the offence. That, the Complainant was made aware of the offence he committed in the letter of suspension and was charged verbally.

5.37 When referred to the extract from the Respondent's Disciplinary Code marked "GB6", RW said that for absenteeism the penalty for first breach is a severe warning and a final warning for the second breach, with summary dismissal for the third breach. According to RW, the Complainant was given a warning for the first breach, although it was verbal, hence procedure was followed.

5.38 Under further cross-examination, RW said that there is evidence that the Complainant was given a fair hearing because there was an exculpatory letter which he wrote after he was suspended. It was RW's further evidence that there was a hearing even though the Minutes of the said hearing are not before Court. That, the Minutes were not produced in Court through an oversight.

5.39 On further questioning RW stated that the contents of exhibit "TC2" in the Affidavit in Support of Answer, being an Employee Transactions Report, which showed that the Complainant was absenting himself from work was brought to the attention of the Complainant.

5.40 It was RW's further evidence that the accident at Mopani took place in April, 2019 and Mopani Copper Mines was shut down for about 2 weeks following the accident and the safety training started about 3 days after the accident. That, the people who were mainly affected by the shutdown were the production employees. It was also her evidence that the shutdown affected the Respondent's productivity but not administration.

5.41 RW testified, further, that the Complainant did not inform the Respondent why he failed to follow up the contractor's report. That, he did not notify the Respondent that there was no money in the Respondent's account. It was RW's contention that since the Complainant was absent from work, he did not know what was happening.

5.42 When referred to exhibit "GB1", RW said the Respondent renewed employment contracts yearly and when she said in her examination in chief that the Complainant was re-engaged, she meant that the Complainant's contracts were renewed.



- 5.43 RW admitted that by virtue of clause 2.2 of the Contract of Employment exhibited as "GB1", the Complainant was entitled to the allowances provided under the Minimum Wages Act as outlined in clause 2.2 of the Contract.
- 5.44 RW was referred to the pay slip for September, 2014 and said that the Complainant's basic pay was K8,000.00 and that there was no housing allowance, medical allowance or leave commutation on the pay statement. It was her evidence that the practice of adding leave pay to pay slips began in 2011.
- 5.45 RW testified that the payroll system omits certain payments. She, however, admitted that the pay slips should have reflected the payments. She also conceded that the amount of money that goes into an employee's account tells if some allowances have been left out.
- 5.46 Under further cross-examination, RW admitted that for January, February, March and May, 2015, there was no computation of leave days and medical allowance for the Complainant even though the Complainant was paid the allowances. She conceded that proof of payment of the allowances was not provided in the Respondent's Answer.
- 5.47 RW reiterated that there was no disregard of the rules of natural justice when effecting the Complainant's dismissal as he was heard in two meetings and given a chance to appeal, which chance he did not utilise. Further, that he was given the date of appeal verbally.

She admitted that the Complainant was not given the outcome of the hearing in writing.

5.48 In re-examination, RW stated that the Complainant was verbally charged and the offence which he had committed was indicated in the letter of suspension. He replied to the charge by writing an exculpatory letter.

5.49 With regard to the absence of Minutes of the disciplinary proceedings, RW clarified that there were no Minutes because the proceedings were verbal.

5.50 She reiterated that the Contract of Employment exhibited as "GB1" was applicable to the period April, 2018 to December, 2018 and the said contract had different terms from the previous contracts.

5.51 That marked the end of the testimony by RW and the close of the Respondent's case.

## **6. Legal Arguments**

6.1 Both the Complainant and Respondent submitted written submissions and I am indebted to them. Both have been considered in the delivery of this Judgment.

## **7. Findings of Fact**

### Undisputed facts

7.1 The undisputed facts in this case are:

- (i) The Complainant was employed by the Respondent as Site Manager between 2007 and 2019;
- (ii) One of his duties as Site Manager was to verify and issue contractors' reports to Mopani Copper Mines for approval;
- (iii) In April, 2019, Mopani Copper Mines declined to approve a contractor's report issued by the Complainant on the ground that the Respondent did not have sufficient funds in its account;
- (iv) The refusal by Mopani Copper Mines to approve the contractor's report led to the non-payment of money by Mopani Copper Mines which, in turn, led to non-payment of salaries to workers of the Respondent and strikes by the workers.
- (v) The Complainant was suspended by the Respondent on 5<sup>th</sup> June, 2021;
- (vi) The Complainant was dismissed from employment by the Respondent on 5<sup>th</sup> August, 2021.

Disputed facts

7.2 The disputed facts in this matter are the following

- (i) That the Complainant caused the non-approval of the contractor's report and non-payment by Mopani Copper Mines, which led to failure by the

Respondent to pay its workers and consequent strikes by the workers;

- (ii) The Complainant's allegation that he was not charged with any offence or given an opportunity to exculpate himself. Further, that he was not heard or given an opportunity to appeal against his dismissal;
- (iii) The Complainant's allegation that the entire disciplinary process of the Respondent leading to dismissal was unfair and in contravention of the rules of natural justice.

## **8. Issues for Determination**

8.1 Having carefully examined the Affidavits and documents filed by the Complainant and the Respondent in support and defence of their respective cases, respectively, and identified the undisputed and disputed facts herein, the issues for determination, as I see them, are the following:

8.1.1 Did the Respondent follow the correct disciplinary procedure?

8.1.2 Was the Complainant unfairly and wrongly dismissed, and if so, is he entitled to any relief?

8.1.3 Is the Complainant entitled to the underpayment of his housing allowances, leave days, medical allowance, unpaid salaries and gratuity?

8.1.4 Is the Complainant entitled to salary arrears from the date of termination?

## 9. Determination of Issues

### Did the Respondent follow the correct disciplinary procedure?

9.1 The Supreme Court guided as follows on the issue of following the correct disciplinary procedure and the court's role in **Attorney General v. Richard Jackson Phiri**,<sup>1</sup> where it was held that:

*We agree that once the correct procedures have been followed, the only question which can arise for the consideration of the court, based on the facts of the case, would be whether there were in fact facts established to support the disciplinary measures since it is obvious that any exercise of powers will be regarded as bad if there is no substratum of fact to support the same. Quite clearly, if there is no evidence to sustain charges leveled in disciplinary proceedings, injustice would be visited upon the party concerned if the court could not then review the validity of the exercise of such powers simply because the disciplinary authority went through the proper motions and followed the correct procedures.*

9.2 Based on the above, this Court's role is not to sit in an appellate capacity, but is limited to analysing whether or not there were any facts and evidence to sustain the

dismissal of the Complainant and if the Respondent arrived at the decision fairly and reasonably.

- 9.3 The starting point as it relates to this dispute was the suspension of the Complainant following an allegation that he failed to verify and issue a contractor's report and deliver the same to Mopani Copper Mines for approval.
- 9.4 Suspension relates to a situation where an employer temporarily suspends the operation of the contract on valid and grounds, for a reasonable period of time. Suspension is usually effected as a penalty for an offence or as a mechanism to investigate an issue before a decision is made to charge an employee for an offence or not. The Complainant's suspension letter reads as follows:-

*Dear Sir,*

*RE: SUSPENSION*

*The above matter refers.*

*It has come to management's attention that you do not do your duties of following up contractors reports with Mopani cost accountants which has led to late payment of salaries to our employees at S.O.B Shaft. Furthermore, management has also discovered that your work attendance has been below par for the last two months.*

*Therefore, you are hereby suspended from work until further investigations are completed.*

*Further action may be taken against you including dismissal should you be found wanting.*

*For and on behalf of  
Chimwenda Investments*

- 9.5 In the circumstances, the suspension was effected to carry out further investigations. However, the wording and tone of the letter suggests that the Respondent had already pre-determined the outcome of the Respondent's complaint against the Complainant. This is because statements of guilt have been made relating to his work with Mopani and absenteeism. Further, the letter itself makes reference to a potential dismissal.
- 9.6 The conduct of the Respondent in this regard, as can be discerned from the latter of suspension above, is not correct as an employee's fate cannot be summarily determined before the matter is investigated, and the employee is charged and given a chance to respond. To that end, the manner in which the Complainant was suspended was not in accordance with the principles of suspension applicable in this jurisdiction.

- 9.7 The Complainant proceeded to submit an exculpatory statement in response to the letter of suspension, which is his right. As already alluded to above, a suspension must be for a justifiable reason given that it has the effect of suspending the contract, including suspending the right to a salary, depending on the employee's conditions of service and disciplinary code. As such, the Complainant has the right to challenge the suspension given the impact it would have on him personally.
- 9.8 The exculpatory statement in response to the suspension is different and distinct from one responding to a valid charge. After an employer concludes its investigations, it can choose to raise a charge against the employer, to which the employee must be given the opportunity to be heard on that charge, even if he responds to his suspension.
- 9.9 The Supreme Court in **Konkola Copper Mines Plc v Hendrix Mulenga Chileshe**<sup>2</sup> guided thus:

*"The particulars of the offence did not set out the effect of the Respondent's alleged failure to inspect and supervise the contractor nor did they refer to his having authorized payments to the contractor by signing invoices for works that were not done properly. He, therefore, did not refer to these issues in his exculpatory letter. It is clear, though, from the notes of the proceedings of the appeal hearings on the record of appeal and the letter of rejection of the appeals that this*



*is what formed the basis of his dismissal. The position we take is that it rendered the dismissal unlawful because the Respondent was not given an opportunity to exculpate himself and prepare a defence on the said issues which the Appellant's witness conceded did not form part of the particulars of the charge."*

9.10 According to the Supreme Court, laying a charge against an employee is mandatory and the charge must give relevant details and particulars of the facts and circumstances giving rise to the disciplinary action. A disciplinary committee cannot consider and determine an issue relating to an employee's conduct, if that offence or charge was not contained in the employee's charge letter. The particulars of the charge must be sufficient to give the employee the opportunity to respond adequately.

9.11 In this case, not only did the Respondent fail to charge the Complainant, there were no particulars to enable him to respond to the allegations against him prior to his dismissal. RW testified that the Complainant was charged verbally. To say that this testimony came to me with a sense of shock is an understatement. If indeed the Complainant was charged verbally, that was a novel way of doing things. However, apart from the claim by PW, there is no evidence before court that the Complainant was indeed charged verbally. For that reason, I am of the considered view that the Complainant was not charged for any offence. This failure by the Respondent rendered

the Complainant's dismissal unfair and a nullity as it is mandatory, in the absence of an express and clear admission of an offence, to charge an employee and give him an opportunity to be heard on those charges prior to bringing his employment to an end.

9.12 The Respondent has argued that a disciplinary hearing was held and the Complainant was found guilty. The Respondent has not, however, produced the Minutes of the disciplinary hearing to enable the Court to ascertain if a hearing took place and/or if the Complainant was heard in his defence.

9.13 The law places the burden on an employer such as the Respondent, to prove that it brought the contract of employment to an end in a valid manner. This was confirmed in the case of **African Banking Corporation Zambia v. Lazarous Muntente**<sup>3</sup> where the Court of Appeal held that:

*...there was an evidential burden placed by the statute, on the employer to establish and prove on the balance of probabilities that there was a valid reason for terminating or dismissing an employee.*

9.14 Further, in **Ian Chipasha Mpundu v. Road Transport and Safety Agency**,<sup>4</sup> it was held that:

*Therefore, in accordance with section 52(5) of the Employment Code, the respondent had a duty to prove*

*that the appellant's termination of employment was fair and for a valid reason.*

9.15 Therefore, the Respondent, as employer had the onus to prove that the termination or dismissal of the Complainant was for a valid, fair and reasonable reason and that it was justified.

9.16 As the burden of proof lies on an employer, it was imperative for the Respondent to adduce evidence of the purported disciplinary hearing by way of minutes or record of proceedings. This would have also enabled this Court to determine if the Respondent's disciplinary power was validly exercised and whether there was a sufficient substratum of facts justifying the Complainant's dismissal.

9.17 In the circumstances, the Respondent failed to provide any such evidence and I therefore, find that the Respondent failed to carry out the disciplinary process properly.

Was the Complainant wrongfully and unfairly dismissed, and if so, is he entitled to any relief?

9.18 Before I make a determination on whether or not the Complainant was wrongfully and/or unfairly dismissed, it is important to get a clear understanding of the applicable law on dismissal and termination. Section 52 of the Employment Code Act provides in part as follows:-

- (1) *A contract of employment terminates in the manner stated in the contract of employment or in any other manner in which a contract of employment is deemed to terminate under this Act or any other law, except that where an employer terminates the contract, the employer shall give reasons to the employee for the termination of the employee's contract of employment; and*
- (2) *An employer shall not terminate a contract of employment of an employee without a valid reason for the termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.*
- (3) *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.*

9.19 According to Sections 52(1), (2) and (3) of the Employment Code Act, an employer who initiates dismissal must give a valid reason related to either the employee's misconduct or capacity (ill-health or poor performance), or the employer's operational requirements or redundancy. This is in addition to the requirement to give an employee a meaningful opportunity to be heard prior to dismissal for misconduct or poor performance.

9.20 Therefore, an employer can only bring the contract of employment to an end by giving one of the reasons prescribed. However, the giving of a valid reason does not suffice. The said reason must be substantiated, that is, supported by the facts, evidence and circumstances and be preceded by giving the employee an opportunity to be heard. Justifying the reason as well as complying with the rules of natural justice is what validates any reason given to an employee.

9.21 The Court of Appeal in **Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited**<sup>5</sup> explained the above when they held that:-

*Section 36 of the Act has placed a requirement on an employer to give reasons for terminating an employee's employment. Employers are no longer at liberty to invoke a termination clause and give notice without assigning reasons for the termination. What is of critical importance to note, however, is that the reason or reasons given must be substantiated. We recall that our duty as a court is to ensure that the rules of natural justice were complied with and to examine whether there was a sufficient substratum of facts to support the invocation of disciplinary procedures. In other words, we must be satisfied that there was no mala fides on the part of the employer. The basis of this is that the employee who is a weaker party is protected from being*

*dismissed at the whims of the employer without any justifiable reason.*

9.22 The Court of Appeal underscored the need for employers to not only give a valid reason, but substantiate the same and ensure that the rules of natural justice are observed that is, employees are given an opportunity to be heard prior to their dismissal or termination. As alluded to earlier, the opportunity to be heard must be given after a charge sheet has been issued and it must be meaningful and the employer must demonstrate that it took into consideration the employee's submissions before making its decision.

9.23 I now turn to consider wrongful and unfair dismissal. Wrongful dismissal is dismissal that is contrary to the contract of employment. It is a product of the common law and one at the instance of the employer that is contrary to the terms of employment.

9.24 Unfair dismissal, on the other hand, is dismissal that is contrary to the statute, or based on an invalid reason and/or unsubstantiated ground. It is a creation of statute. In **Care International Zambia Limited v. Misheck Tembo**,<sup>6</sup> the Supreme Court was of the view that unfair dismissal is dismissal which is contrary to statute and that the right not to be unfairly dismissed is usually a much more substantial right for the employee. Further, that the consequences for the employer of dismissing unfairly are usually much more serious than

those which attend to a wrongful dismissal. The Supreme Court further clarified unfair dismissal as follows, in the case of **Supabets Sports Betting v. Batuke Kalimukwa**:<sup>7</sup>

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

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

*We do acknowledge the legal position that unfair dismissal is a creature of statute with its origins in the need to promote fair labour practices by prohibiting employers from terminating employees' contracts of employment, except for valid reasons and on specified grounds. The position is substantially in line with Article 4 of the International Labour Organisation (ILO) standards, Convention 158, Termination of Employment, 1982.*

9.25 The Supreme Court, in the Supabets Sports Betting case (supra), held that in unfair dismissal the Court is obliged to consider the merits or substance of the dismissal to determine whether the reason given for the dismissal is supported by the relevant facts, while wrongful dismissal looks at the form of the dismissal and refers to dismissing an employee in breach of contractual terms, such as non-compliance with the disciplinary procedure.

9.26 In the case of Konkola Copper Mines Plc. v. Hendrix Mulenga Chileshe (supra), the Supreme Court had the following to say with regard to the difference between 'unfair dismissal' and 'wrongful dismissal':

*Unfair dismissal focuses on "why" the dismissal was effected whereas wrongful dismissal focuses on "how" the dismissal was effected. In considering whether the dismissal is wrongful or not, it is the form to be considered rather than the substance...*

9.27 Prior to the enactment of the Employment Code Act in 2019, an employer was permitted to summarily dismiss an employee, without following any laid down contractual procedures, provided there was clear evidence that the employee committed a dismissible offence. In such an instance, a claim for wrongful dismissal would not arise.

9.28 However, with the enactment of the Employment Code Act, particularly section 52(3), an employer will be liable



for wrongful and unfair dismissal if the employer summarily dismisses any employee who does not admit to an offence, without charging the employee, giving him/her an opportunity to be heard and carrying out due disciplinary process. This was the holding of the Court of Appeal in **Emporium Fresh Foods t/a as Food Lovers Market and Another v. Kapya Chisanga**<sup>8</sup> where it was held that:-

*Although the Appellants have argued that section 50(i) (f) is independent of section 52(3), we find no substance in the argument because both sections occur under division 3.3 of the Code which deals with suspension and termination of contract of employment of which summary dismissal is a way of terminating a contract of employment. The fact that section 52(3) prohibits termination of 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 re-enforces the importance of adhering to the rules of natural justice. In turn, rules of natural justice are incorporated in the employers' disciplinary rules as envisaged by section 50 (i) of the Code. Summary dismissal should therefore, be understood to refer to the power bestowed upon the employer to instantly dismiss an employee following adherence to the disciplinary process as set out in the employer's disciplinary code or rules. Once this procedure has been followed there is no*

requirement for the employer to give notice or payment in lieu of notice. (Emphasis the Court's)

9.29 Based on the above, the requirement to give an opportunity to be heard is mandatory prior to dismissal, including summary dismissal, even in situations where there is clear evidence of wrongdoing, except where an employee admits to the offence.

9.30 Taking into consideration the definitions of wrongful dismissal by the Supreme Court of Zambia in the cases referred to above, I have no doubt that the Complainant's dismissal was wrongful. This is because all contracts of employment have an implied term from the common law and statute that the correct disciplinary processes shall be followed and thereafter, valid, substantiated reasons must be given for dismissal.

9.31 In the circumstances, the Respondent breached the Contract of Employment by failing to follow any sound processes. I am of the view that following the correct process would have validated any decision that would have been made by the Respondent. The failure to do so, amounted to breach of contract and rendered the dismissal wrongful.

9.32 As it relates to unfair dismissal, the Respondent's neglect to offer the Complainant a chance to be heard on any charge and failure to justify the reasons given, amounted to unfair dismissal.

9.33 The Complainant asserted in his response to his suspension and before this Court, that he duly verified and issued a contractor's report that was delivered to Mopani Copper Mines for approval. That, the payment was not approved due to the fact that the Respondent's account with Mopani Copper Mines had insufficient funds. This is a material averment by the Complainant that ought to have been interrogated by the Respondent through an adequate investigation and disciplinary process.

9.34 In the absence of carrying out a proper disciplinary process, I am unable find a sufficient substratum of facts to justify the Complainant's dismissal. Further, the unfairness of the Complainant's dismissal is compounded by the fact that there is no evidence on the record that the Respondent took into consideration the content of the Complainant's exculpatory statement and the peculiar circumstances relating to the incident at hand. In my view, the Respondent did not properly give effect to the rules of natural justice.

9.35 In light of the finding that the dismissal was wrongful and unfair, the Complainant is entitled to damages.

9.36 Damages for unfair and/or wrongful dismissal or termination are informed by factors such as how the dismissal was effected, that is, the conduct of the employer – whether it was oppressive and caused mental anguish, stress, or inconvenience, or infringed the

employee's rights and where the prospects of future employment by the employee are grim or bleak. Ascertaining the scarcity of employment and job prospects will naturally depend on the age of the employee, the nature of his job, the position and rank he/she held, and the trade he/she is engaged in.

9.37 Until the law was amended to bring in the requirement of giving a valid reason for termination of a contract of employment, the common law award of damages being notice, was the normal measure of damages. Hence, in a number of earlier cases, the courts held that the normal measure of damages is the employee's notice period or the notional reasonable notice where the contract is silent.

9.38 In the case **Swarp Spinning Mills Plc. v. Sebastian Chileshe and Others**<sup>9</sup>, the Supreme Court confirmed that the normal measure of damages was an employee's notice period or as it was provided for in the law and could only be departed from when the employee proved that he was deserving of more and the conduct of the employer was so serious that it warranted a higher award of damages.

9.39 With the introduction of the statutory provision making it mandatory for a valid reason to be given to the employee before terminating his contract of employment, the common law right to dismiss without a reason but by

giving notice, has been done away with by statutory law. As such, without the variation of the common law right, it can be concluded that the normal measure of damages being notice pay at common law should no longer apply in this jurisdiction.

9.40 The above conclusion is supported by the learned author Chanda Chungu in his article **MP Infrastructure Zambia Limited v. Matt Smith and Kenneth Barnes, CAZ Appeal No. 102/2020**,<sup>10</sup> published in Volume 5, Issue 2 of the SAIPAR Case Review where he states that:

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

*position at common law that should no longer apply due to the current legislative position on the need for valid reasons.*

9.41 I am in agreement with the views expressed by the learned author above. It therefore, follows that given the abrogation of the common law right to terminate with notice or payment in lieu of notice, which must now be accompanied with a valid reason, the payment of salary equivalent to the notice period should no longer apply as the normal measure of damages for unfair and/or wrongful dismissal or termination in Zambia.

9.42 I am of the view that damages should be awarded depending on how the termination or dismissal was effected, that is, the conduct of the employer – whether it was oppressive, infringed the employee's rights, was inflicted in a traumatic manner, caused mental anguish, stress, or inconvenience, and whether the prospects of future employment by the employee are bleak.

9.43 Having examined the circumstances leading to the dismissal of the Complainant, I form the view that the Respondent did infringe the Complainant's rights in the way it effected the termination of the Complainant's employment.

9.44 Further, In **AB Bank Limited v. Benjamin Nyirenda**,<sup>11</sup> the Court of Appeal noted that:

*In our view, it is obvious that a sudden loss of employment will lead to one suffering some form of physical discomfort, inconvenience, and may more.*

- 9.45 There is therefore no doubt that where an employee is dismissed in an unfair and wrongful manner, based on unsubstantiated and unreasonable grounds, such conduct is very likely to cause anxiety, anguish and stress particularly as an employee will suffer inconvenience due to loss of income.
- 9.46 As it relates to the diminution of future job prospects, the Complainant has neither pleaded nor led any evidence on this aspect which is at the core of determining the quantum of damages. I do however, take notice of the poor state of the Zambian economy and the challenge many unemployed persons face in finding other streams of income, and the impact that the unwarranted unemployment would have had on the Complainant.
- 9.47 I should also point out that in *Care International v. Misheck Tembo* (supra), the Supreme Court stated that unfair dismissal justifies a higher award of damages than wrongful dismissal because of the infringement of statutory rights. Where the dismissal is both unfair and wrongful as is the case herein, the Supreme Court in **First Quantum Mining and Operations Limited v Obby Yendamoh**<sup>12</sup> guided that a global award should be awarded.

9.48 A further consideration is the Complainant's length of service. The record shows that the Complainant served the Respondent for twelve (12) years. This loyalty of service according to the Supreme Court in **Konkola Copper Mines Plc v. Aaron Chimfwembe and Kingstone Simbayi**<sup>13</sup>, should be considered when determining the quantum of damages.

9.49 Considering the above factors and circumstances relating to the Complainant, I award him eighteen (18) months' salary as damages for unfair dismissal.

Is the Complainant entitled to the underpayment of his housing allowance, leave days, medical allowance, unpaid salaries and gratuity?

9.50 The Complainant has alleged that he is entitled to housing allowance at 30% of basic salary totaling K53,000.00; leave days in the sum of K16,000.00; Medical Allowance from January, 2017 of K2,600.00 and unpaid salaries from April, 2019 to 5<sup>th</sup> August, 2019 totaling K83,333.30.

9.51 He has also asserted that pursuant to the employment contract, he is entitled to gratuity for 10 years from August, 2009 to 5<sup>th</sup> August, 2019, in the sum of K60,000.00.

9.52 There is no doubt that a court has the power to order underpayment of salary, allowances or benefits where the employer fails, refuses or neglects to pay an employee in



accordance with the express terms of the contract of employment or where the employee pays the employee in contravention of, or below the minimum emoluments provided for in the applicable statute.

9.53 The prevailing law that applied to the Complainant's employment from 2007 to February 2019 was the now repealed Employment Act. Section 24(5) of the Act provided that:

*(5) Where any dispute arises as to the terms and conditions of an oral contract other than a contract for the employment of a casual employee, and the employer fails to produce a record of such contract made in accordance with the provisions of this section, the statement of the employee as to the nature of the terms and conditions shall be receivable as evidence of such terms and conditions unless the employer satisfies the court to the contrary.*

9.54 Section 24 (5) stated that where a dispute arose and the employer failed to produce a record, the Court had to take the statement of the employee as the truth. The rationale for this was to protect employees who in some cases are not presented with their contracts of employment. This is why it is imperative for an employer to keep records of oral engagements or written contracts of employment as mandated by the law to defend itself from an employee's assertions to the contrary in Court.

9.55 I have been at pains to determine whether Section 24 (5) of the now repealed Employment Act, Chapter 268 of the Laws of Zambia applied to the Complainant herein. This is because the Complainant has alleged that during the period 2007 to 2019, when he worked for the Respondent, sometimes contracts were executed and sometimes they were not. This would mean that in certain instances, the Complainant served under written contracts of employment and during the times when the written contracts had expired, they were either renewed under some provision for renewal in the contracts or deemed to be renewed or, he served under oral contracts of employment.

9.56 In such circumstances, it was incumbent on the Respondent to disprove the Complainant's claims of absence of written contracts of employment by providing copies of the written contracts and proof of the payments made to the Complainant. This is because the law places the burden on employers to keep copies of written contracts or records of oral contracts, as well as prove that the employer made good on all payments due to an employee.

9.57 However, in the absence of any pre-2018 contracts or evidence of payments of the allowances being claimed by the Complainant before court, from which I would have been in a position to determine whether the same had provisions for renewal after expiry or not, I have no choice

but to hold that the Complainant served on a number of oral contracts and on a balance of probabilities, his claims for underpayment of housing allowance, leave days and medical allowance succeed on the basis of Section 24 (5).

9.58 However, I cap the Complainant's claim to 2018 going forward due to the evidence of a written contract. The Complainant's claim is also curtailed because in February 2019, the Employment Code Act was enacted and it repealed Section 24 (5).

9.59 I should mention that notwithstanding the repeal of Section 24 (5), employers are still mandated to maintain a record of employment for those on oral contracts and contracts in the prescribed manner for employees serving on written contracts. This ensures that disputes on underpayments and benefits can be easily ascertained by the Labour Office or the Court.

9.60 In relation to the claim for gratuity for ten (10) years of service from August, 2009 to 5<sup>th</sup> August, 2019, the Complainant has to satisfy certain requirements in order to succeed because his claim relates to the regime before the enactment of the Employment Code Act. The learned Authors Mwenda and Chungu in their book A Comprehensive Guide to Employment Law in Zambia state at page 287 that:-

*Prior to the enactment of the Employment Code Act, gratuity was only a statutory entitlement for employees covered by the General and Shop Workers Orders provided they reached the retirement age and had worked for at least ten (10) years. For all other employees, gratuity was only an entitlement if provided for in their contract of employment or given at the discretion of the employer as an ex-gratia payment. This has now changed with the enactment of the Employment Code Act.*

9.61 Therefore, for gratuity to be awarded prior to the enactment of sections 54 and 73 of the Employment Code Act, an employee had to either prove it was an express term of the contract or that he was entitled to such benefit in terms the General Order. This is because prior to the enactment of the Employment Code Act, gratuity only accrued if it was stated in a contract or an employee was retiring and had served 10 years as an employee covered by the General Order based on Regulation 8 (1) which read as follows:-

*8 (1) An employee who has served with an employer for more than ten years and has attained the age of fifty-five years shall be entitled to a retirement benefit of three months' basic pay for each completed year of service.*

9.62 Based on the above, an employee could only succeed with a claim for gratuity in terms of the General Order, if he

was an employee expressly mentioned and covered by the Order; had served for 10 years and reached retirement. Although the Complainant was covered under the Order and did indeed serve for 10 years, there is no evidence that he had reached retirement age at the time of the dismissal. He, thus, only satisfied two of the three conditions required for the gratuity to accrue. As such, the claim for gratuity fails.

Payment of unpaid salaries from April 2019 to August 2019

9.63 The evidence on record as submitted by both the Complainant and the Respondent, is that due to the issues with the payments from Mopani Copper Mines, none of the Respondent's affected employees received their salaries for April 2019. This would include the Complainant as he has averred in his claim.

9.64 In **Charles Mushitu (sued in his capacity as Secretary General of Zambia Red Cross Society) v. Christabel M. Kaumba**,<sup>14</sup> the Supreme Court held that:

*Any contract of employment is underpinned by two mutual and complementing obligations of the parties: that of the employee to provide his or her labour in the manner prescribed by the contract, and that of the employer to pay reasonable and/or fair remunerations for the employee's services.*

9.65 Therefore, notwithstanding the financial issues faced by the Respondent, it was obligated to keep paying its

employees, including the Complainant, as the duty to pay is a continuing duty. As the Supreme Court stated in **John Paul Mwila Kasengele and Others v. Zambia National Commercial Bank**<sup>15</sup> :-

*Moreover, inability to pay has never been and is not a defence to a claim.*

9.66 It was, thus, an oversight on the part of the Respondent to neglect to make payments to the Complainant in April 2019 and the subsequent months. Further, the letter of suspension dated 6th June, 2019 did not specify that the Complainant would be placed on suspension without pay. This omission meant that the Respondent retained its obligation to pay the Complainant.

9.67 Without prejudice to the above, having found that the Complainant was unfairly and wrongfully dismissed, he is entitled to backpay, being the salary and allowances he would have been entitled to. Backpay is a remedy to ensure an employee who has been subjected to unjustified action and deprived of pay recovers the sum he was entitled to receive. This is a just and equitable remedy that I am empowered to make pursuant to section 85A of the Industrial and Labour Relations Act.

9.68 For the above reasons, I find that the Complainant was entitled to his salary from April 2019 to the date of termination.

Payment of all salary arrears from the date of termination

9.69 The Complainant has also claimed for the payment of salary arrears from the date of termination. Such a claim is only tenable where an employee has not been paid his pension benefits or redundancy benefits by the last day of service in accordance with Article 189 of the Constitution and section 55 (3) (b) of the Employment Code Act, respectively. The Constitutional Court, in **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission**<sup>16</sup>, held that:

*The mischief behind the enactment of Article 189 is plain and the intention is clear, namely, to cushion pensioners and retrenchedes from the hardships they were experiencing as a result of delayed payment of their pension money or gratuity. (Emphasis, the Court's)*

9.70 Thus, where an employee's mode of termination is not retirement or redundancy, he or she is not entitled to remain on the payroll or claim salary arrears from the date of termination where his/her employer neglects to pay his gratuity, severance pay or other terminal benefits. Such an employee's only recourse would be to claim for the benefits and interest.

9.71 This rule equally applies where an employee has been unfairly and/or wrongfully dismissed and there is an

unexpired portion of the contract. In **Kitwe City Council v. William Ng'uni**<sup>17</sup> the Supreme Court held that:

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

9.72 Based on the above, because an employee cannot claim salary arrears for a period he has not worked, it follows that he cannot claim his salary for the unexpired duration of his contract. In **National Airports Corporation Limited v Reggie Ephraim Zimba and Saviour Konie**<sup>18</sup>, the Supreme Court had the following to say on the issue:

*We find and hold that the phrase invoked so as to pay damages as if the contract had run its full course offends the rules which were first propounded as propositioned by Lord Dunedin in Dunlop Pneumatic Tyre Company Limited vs New Garage and Motor Company Limited (8), especially that the resulting sum stipulated for is in effect bound to be extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. This part of the appeal has to succeed and the damages directed to be assessed as we have indicated and not as ordered below.*



9.73 Therefore, the only claim that an employee would have where his dismissal or termination is wrongful or unfair, is either reinstatement, re-employment or damages, with damages being the common remedy.

9.74 Damages in this matter have duly been awarded to the Complainant and thus, the claim for salary arrears fails.

## **10. Conclusion and Orders**

10.1 In conclusion, the Complainant has succeeded in his claim for wrongful and unfair dismissal.

10.2 The Complainant's claims for underpayments of salary and allowances for his period of service from the date of his employment, being 2007 to 2018, have succeed as well as the claim for salary arrears from April 2019 to date of dismissal.

10.3 However, the Complainant's claim for gratuity and salary arrears from the date of termination to date of judgment has failed.

10.4 I therefore, make the following orders:

- (i) I award the Complainant eighteen (18) months' salary, that is, basic salary plus allowances, as damages for wrongful and unfair dismissal.
- (ii) The Respondent shall pay the Complainant the arrears of his salary and allowances from April

2019 to the date of his dismissal, 5<sup>th</sup> August 2019, amounting to K83,333.30;

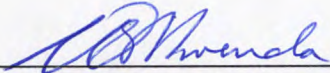
(iii) The Respondent shall also pay the Complainant's claims for underpayments of his housing allowance amounting to K53,000, leave days amounting to K16,000 and medical allowance of K2,600.00, giving a total of K71,600.

(iv) The amounts due shall attract interest at commercial Bank deposit rate from the date of filing of the Notice of Complaint until judgment and thereafter, at ruling commercial Bank lending rate, as determined by the Bank of Zambia, until full payment.

10.5 Costs shall follow the event.

10.6 Leave to appeal is granted.

**Dated at Ndola this 16<sup>th</sup> day of February, 2024.**

  
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**Winnie Sithole Mwenda (Dr.)**  
**JUDGE**