IN THE HIGH COURT FOR ZAMBIA **COMP/IRC/ND/109/2020**
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

CLIVE MUMBA **COMPLAINANT**

AND

MABIZA RESOURCES LIMITED **RESPONDENT**

Before: *The Honourable Lady Justice Dr. Winnie Sithole Mwenda at Ndola this 23rd day of February, 2024.*

For the Complainant: *Mr. D. S. Libati of Messrs. D. S. Libati Legal Practitioners*

For the Respondent: *Mr. P. Chomba of Messrs. Mulenga Mundashi Legal Practitioners*

JUDGMENT

Cases referred to:

1. *JCN Holdings Limited v. Development Bank of Zambia (2013) 3 Z.R. 299.*
2. *Enock Kavindele and Dorothy Kavindele v. Bologna Properties Limited and Diego Casilli, CAZ Appeal No. 136/2020.*
3. *Engen Petroleum Zambia Limited v. Willis Muhanga and Jeremy Lumba, SCZ Appeal 117/2016.*
4. *Indo-Zambia Bank Limited v. Mushaukwa Muhanga, SCZ Appeal No. 58/2007.*
5. *African Banking Corporation Zambia v. Lazarous Muntente, CAZ Appeal No. 51 of 2021.*
6. *Ian Chipasha Mpundu v. Road Transport and Safety Agency, CAZ Appeal No. 107/2021.*
7. *Henry Chiwaya v. Corporate Air Limited, CAZ Appeal No. 229/2021.*

8. *Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited, CAZ Appeal No. 129/2017.*
9. *Konkola Copper Mines Plc v. Hendrix Mulenga Chileshe, SCZ Appeal No. 94/2015.*
10. *Eston Banda and Edward Dalitso Zulu v. Attorney-General, SCZ Appeal No.42/2016.*
11. *Moses Choonga v. ZESCO Recreation Club, SCZ Appeal No. 168/2013.*
12. *Sun Country Limited & Others v. Roger Redin Savory & Another SCZ Appeal No. 122 of 2006.*
13. *Swarp Spinning Mills Limited v. Sebastian Chileshe and Others (2002) Z.R. 23.*
14. *MP Infrastructure Zambia Limited v. Matt Smith and Kenneth Barnes, CAZ Appeal No. 102/2020.*
15. *Konkola Copper Mines Plc v. Aaron Chimfwembe and Kingstone Simbayi, SCZ Appeal No. 195/2013.*
16. *First Quantum Mining and Operations Limited v. Obby Yendamoh, SCZ Appeal No. 206/2015.*
17. *David Banda v. The Attorney-General, CAZ Appeal No. 233/2020.*
18. *AB Bank Limited v. Benjamin Nyirenda, CAZ Appeal No. 58/2020.*
19. *BHM Enterprises Limited v. Paul Chiwina, CAZ Appeal no. 58/2021.*
20. *National Airports Corporation Limited v. Reggie Ephraim Zimba and Saviour Konie, SCZ Judgment No. 34 of 2000.*
21. *Chansa Ng'onga v. Alfred H. Knight (Z) Ltd, SCZ Selected Judgment No. 26 of 2019.*
22. *Zesco Limited v. Edward Angel Kahale, CAZ Appeal No. 37/2020.*

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.*

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. *Ng'ambi, Sangwani Patrick and Chungu, Chanda 'Law of Contract in Zambia'* 2nd Edition *(2021) Juta & Company (Pty) Limited, South Africa.*
3. *Peel, Edwin et al, 'Trietel's Law of Contract' 14th Edition (2015) Sweet & Maxwell.*
4. *Bryan A. Garner (ed), Black's Law Dictionary, 10th Edition (2014) Thomson Reuters.*
5. *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

1.1 Clive Mumba, the Complainant, filed a Notice of Complaint in this Court on 4th December, 2020, against Mabiza Resources Limited, the Respondent, on the following grounds:

(i) That the Respondent wrongfully terminated the Complainant's employment by deliberately disregarding the period for which the Complainant was employed, that is, six years, based on the life of the mine as stated in his contract;

(ii) Alternatively, that by terminating his employment before the end of the six-year period for which he was employed, the Respondent declared the Complainant redundant.

1.2 The Complainant sought the following reliefs:

(a) A declaration that the Complainant's contract of employment was wrongfully terminated;

(b) In the alternative, a declaration that the Complainant was declared redundant by the Respondent;

(c) Damages for wrongful termination of employment;

(d) In the alternative, damages for redundancy;

(e) Costs;

(f) Interest on amounts found to be owing; and

(g) Any other relief that the Court will deem fit.

2. Affidavit in Support of Complaint

2.1 The Complainant filed an Affidavit in Support of Notice of Complaint on the same day as the Notice of Complaint wherein he deposed that he was employed as a Geologist Graduate Trainee by the Respondent by an offer of employment dated 18th September, 2018 as evidenced by the copy of the offer of employment produced and exhibited as "CM1".

2.2 The Complainant further asserted that the duration of his employment with the Respondent was clearly spelt out in clauses 2 and 2.1 of the offer of employment which stipulated that the contract would be an open one (life of mine), the life of the mine being six years according to a summary of the Respondent's mining project. To support

this claim, a copy of the Respondent's mining project was produced and marked "CM2".

2.3 The Complainant was confirmed in employment by the Respondent on 15th August, 2019 as evidenced by a copy of the Complainant's letter of confirmation produced and marked "CM3".

2.4 The last pay slip for the month of October, 2020, issued by the Respondent shows that the Complainant's last salary was a gross amount of K22,028.73. A copy of the said pay slip was produced and marked "CM4".

2.5 The Respondent wrote to the Complainant on 20th October, 2020, purporting to terminate the Complainant's employment on the basis that the graduate programme he was supposedly employed for was coming to an end. A copy of the letter of termination was produced and marked "CM5".

2.6 The Complainant formed the view and verily believed that, by terminating his employment by deliberately disregarding the period for which he was employed, that is, a six-year period based on the life of the mine, the Respondent wrongfully dismissed the Complainant or in the alternative, declared him redundant.

3. Respondent's Answer

3.1 The Respondent filed an Answer on 28th January, 2021, wherein it stated that the Complainant was employed by

the Respondent as a Graduate Trainee on or around 15th September, 2018 with the employment commencing on or around 10th October, 2018.

3.2 The Respondent asserted that the nature of the Complainant's contract of employment upon which the Complainant was engaged was an open contract which was to last for the period of the mine subject to a probationary period of three (3) months and confirmation.

3.3 The Complainant duly completed his probationary period and was on or around 15th August, 2019, presented with a letter of confirmation which accordingly confirmed the Complainant as a Geologist Graduate Trainee.

3.4 It was an agreed express term of the letter of confirmation that the graduate trainee programme was for a period of 24 months and that the Complainant would undergo regular quarterly and annual performance evaluations.

3.5 The Complainant continued on the terms of the letter of confirmation without opposition and proceeded with employment on the basis of the letter of confirmation.

3.6 Sometime in October, 2020, the Complainant was notified by the Respondent that the Graduate Trainee Programme would come to an end on 10th October, 2020 and his contract was terminated following the expiration of the Graduate Trainee Programme at the end of the 24 months in line with the contract of employment as read together with the letter of termination.

3.7 That, in the circumstances, the Complainant's employment contract was terminated lawfully, therefore, the Complainant is not entitled to any of the claims set out in the Notice of Complaint and it is the Respondent's prayer that the complaint be dismissed.

4. Respondent's Affidavit in Support of Answer

4.1 The Respondent's Human Resources Business Partner, Pauline Sakala, swore an Affidavit in Support of Answer, wherein she confirmed the Complainant's offer of employment and confirmation.

4.2 She further stated that it was an express agreed term of the letter of confirmation that the Graduate Trainee Programme would run for a cumulative period of 24 months as shown in the following quote from the said letter: "This is a 24 months programme with regular quarterly and annual performance evaluations by your supervisors and management."

4.3 The Complainant continued on the terms of the letter of confirmation without opposition and proceeded with employment on the basis of the letter of confirmation.

4.4 It was the deponent's further averment that contrary to the Complainant's assertion that the contract was for a period of six years, the duration of the employment contract was envisaged under the contract of employment as read together with the letter of confirmation. That, it was a term of the contract of employment as varied by

the letter of confirmation, that the graduate trainee programme was only for a period of 24 months.

4.5 Further, that contrary to the Complainant's assertion, the contract of employment was terminated on the basis of effluxion of time as the 24 months that was stipulated in the letter of confirmation had expired as evidenced by the copy of the letter of termination produced and marked "PS3".

4.6 That, the deponent was advised by the Respondent's advocates and verily believed the same to be true, that the Complainant's contract of employment was lawfully terminated and thus, the Complainant cannot claim wrongful dismissal or redundancy.

5. Affidavit in Reply

5.1 The Complainant filed an Affidavit in Reply on 9th February, 2021 where he reiterated that his contract of employment clearly stated in paragraph 2 that as his role was critical in the organisation, his terms of employment would be an open contract, that is, the duration would be the life of the mine.

5.2 Further, that the confirmation of employment, exhibit "PS2' clearly referred to and indicated that the graduate trainee programme was for a period of 24 months but with regard to the contract of employment, all other conditions of employment would remain the same, including the duration, being, life of the mine. That, in

that regard, paragraph 2 of the Respondent's Answer acknowledged that the duration of his employment with the Respondent was one that was to last for the life of the mine subject only to probation.

5.3 The Complainant further avowed that on the basis of the contract of employment produced by the Respondent as "PS1", his employment with the Respondent continued to be in existence not on the terms of the letter of confirmation marked "PS2", but on the terms of the contract which clearly stated that the duration was dependent on the life of the mine as stated in paragraph 2 of the Respondent's Answer.

5.4 The Complainant denied signing for any graduate training programme agreement but a contract of employment exhibited as "PS1" and that the graduate trainee programme was supposed to run within the period of employment stated in the contract, that is, the life of the mine.

5.5 That, it is clear that the Respondent ignored the contract of employment that he agreed to in favour of the letter of confirmation thereby failing to acknowledge that the basis of any employment is the offer of contract which produces the confirmation letter. Further, that the letter of confirmation merely acknowledged his capabilities to perform allocated tasks as stipulated under his contract of employment.

5.6 The Complainant contended that the Respondent in its Affidavit contradicted the duration of his contract of employment by attempting to confuse the duration of the graduate trainee programme with that of his employment as, whereas the graduate trainee programme was to run for 24 months within the duration of employment, the duration of employment was that of life of the mine, based on the contract of employment that he signed and upon which terms he agreed to be bound.

5.7 That, the purported termination of employment was erroneous as it sought to include the letter of confirmation as part and parcel of the contract of employment wherein the duration of his employment was the life of the mine and on the basis of which he was on firm ground in seeking the intervention of this Court and the remedies sought.

6. Summary of Evidence at Trial

6.1 The matter came up for trial on 26th April, 2023 and 4th December, 2023. The Complainant testified on his own behalf while Paul Milandu Sakala, the Head of Human Resources in the Respondent Company, testified on behalf of the Respondent. The Complainant and Mr. Sakala shall be referred to as "CW" and "RW", respectively.

6.2 CW testified that he was employed by the Respondent in October, 2018 as Graduate Trainee Geologist and

commenced work on 10th October, 2018. He was confirmed in his position in August, 2019. Before, that, in November to December, 2018, the Respondent introduced a Graduate Development Programme.

6.3 On 9th October, 2020, the Complainant made a presentation under the Graduate Development Programme and later in the afternoon he was called by the Human Resource Advisor who informed him that his Graduate Development Programme would not be renewed and that his last working day would be Saturday 10th October, 2020.

6.4 Upon enquiring from the Human Resource Advisor on the duration of his employment, CW was informed that it was two years, contrary to the contract of employment which he had signed in October, 2018. Ten days later CW was given the actual letter of termination.

6.5 It was CW's evidence that his contract of employment gave the duration of the contract as 6.1 years, depending on the life of the mine. CW referred the Court to exhibit "CM2" on page 1-2, table 1.1, row number 6, which states the life of the mine as 6.1 years. That, the termination letter contradicted what was in the contract of employment as it quoted CW's confirmation letter instead of his contract which was legally binding on the parties and which did not say anything about renewal.

6.6 According to CW, what came to an end in October, 2020 from the confirmation he received in August, 2019, was the Graduate Development Programme and not the contract of employment.

6.7 CW testified that he wanted the Court to declare that the termination of his contract of employment with the Respondent was wrongful. In the alternative, the Court should declare that by terminating his contract of employment, he was rendered redundant. He also wanted the Court to order the Respondent to pay him damages for the wrongful termination of his contract of employment or for rendering him redundant. Further, he wanted the Court to award him costs and any other relief that the Court would deem fit.

6.8 In cross-examination CW admitted that he was employed on 10th October, 2018 as opposed to 18th September, 2018 which he had alluded to in his Affidavit in Support of the Notice of Complaint. He further admitted that contrary to his assertion that he was paid leave pay for 1 day, he was actually paid for 20 days. He also admitted that he was paid one month's salary in lieu of notice for October, 2020.

6.9 Under further cross-examination, CW admitted that his basic pay was K8,625.00 per month and that the reason why the amount grossed up to K22,028.73 in the month of October, 2020 was because he was pain in lieu of notice and also leave days and overtime. CW further

confirmed that his letter of confirmation as a Geologist Graduate Trainee amended certain portions of his contract of employment and his salary was increased. He agreed that he did not dispute his salary increment and accepted the changes that were introduced with the confirmation letter.

6.10 When questioned about the Graduate Development Programme, CW denied having any knowledge about it before 9th July, 2019 but that he only came to know about it on 16th July, 2019 when the first meeting took place. It was his testimony that even though his position was Graduate Geologist Trainee, he was not being trained by the Respondent. He, however, confirmed that during the duration of his contract he was evaluated twice. He also confirmed that he did not approach management to tell them that he was not supposed to be under the programme.

6.11 CW confirmed that he made two presentations relating to the Graduate Development Programme, one in 2019 and the other in 2020. That, he also submitted a final report in October, 2020. He admitted that at page 105 of the Respondent's Notice to Produce filed on 21st November, 2021, were recommendations which he had prepared and were in the Graduate Development Programme Report. CW still maintained that he was never trained by the Respondent.

6.12 CW was then referred to Page 106 of the Report where he stated that the Graduate Development Programme had been a success and for one year and two months he had developed good interpersonal skills, being willing to learn new things from the geology team, being available to help when a need arises and demonstrated competence in the tasks allocated; that, in a nutshell, the programme was suitable for building leaders and shaping talent.

6.13 Under further cross-examination, CW admitted that from 10th October, 2018 when he started working to 10th October, 2020 when the contract expired, the period amounted to two years and after that, he did not report for work again. When referred to the letter from the Ministry of Labour and Social Security dated 23rd November, 2020 exhibited at page 2 of the Respondent's Notice to Produce, relating to a labour dispute resolution meeting, CW admitted having knowledge of the said letter and said he had no reason for not exhibiting the letter in his Affidavit in Support of Notice of Complaint.

6.14 It was CW's evidence that his contract had no provision for gratuity but he was paid K39,459.38 as gratuity. Further, that he decided not to tell the Court about the Ministry of Labour and Social Security mediation settlement.

6.15 In re-examination, CW reiterated that when he was given the offer by the Respondent, it was to work and not to be

trained. Further, that the offer of employment is five pages long and is silent on the Graduate Trainee Programme. He further clarified that he was doing the actual work of a Geologist. That marked the close of the Complainant's case.

6.16 The Respondent's witness was Paul Milandu Sakala, the Respondent's Head of Human Resources. He shall be referred to as ""RW". RW confirmed that the Complainant was employed by the Respondent as Geologist Graduate Trainee in October, 2018. His annual basic salary was K60,000.00 and his salary grade was BU, which was the highest grade in the junior employees' category.

6.17 According to RW, the Complainant was employed under a development programme which sought to expose fresh graduates with experience and exposure to real work environments. Further, that this programme required that the Complainant present progress reports on quarterly basis to assess how the training was being implemented. The Complainant was confirmed in the same position in August, 2019. At confirmation , his salary was increased from K60,000.00 to K90,000.00 per annum. His grade was also changed from BU to MRG. It was also expressly written in the confirmation letter that this was a 24-month programme. According to RW, the Complainant worked with full knowledge of all the changes without any objection. RW identified exhibit "PS2" as being the confirmation letter.

6.18 It was RW's evidence that somewhere in October, 2020, the Complainant was informed that his contract would expire after reaching 24 months. He was also informed to come and conduct exit formalities and thereafter, he separated from the company.

6.19 Around 28th October, 2020, the Respondent received a letter from the Ministry of Labour and Social Security, Mazabuka Office inviting the Respondent to a conflict resolution meeting in a case between the Complainant and the Respondent. The meeting took place on 11th November, 2020 and after deliberations, the Labour Inspector gave the final resolutions. Among the resolutions, the Respondent was advised to pay the Complainant the following:

(a) Accrued leave days;

(b) One month's salary in lieu of notice;

(c) 15% private pension arrears;

(d) Gratuity at 25% of accrued basic salary.

6.20 The Respondent paid the Complainant as directed by the Ministry of Labour and Social Security and as far as the Respondent was concerned, the matter had been resolved and closed by the Ministry. However, the Respondent later received summons from this Court.

6.21 In cross-examination, RW identified exhibit "CM1" in the Complainant's Affidavit in Support as being the letter of

employment for the Complainant. It was his evidence that the letter spelled out the terms and conditions of employment for the Complainant. He read the duration of employment in the letter as being 'Life of Mine' and said 'Life of Mine' was not defined in the contract of employment.

6.22 RW confirmed that exhibit "CM2" was the Respondent's project document and it defined 'Life of Mine' on page 1-2, Table 1.1 to mean 6.1 years. RW identified exhibit "CM3" as the Complainant's letter of confirmation. That, the 24 months referred to in the confirmation letter referred to the duration of the programme and not employment.

6.23 Under further cross-examination, RW admitted that the letter of confirmation amended a few items and provided that all other conditions in exhibit "CM1" would remain the same.

6.24 RW was resolute that the Complainant was informed that his contract would expire after 24 months. He further stated that the date on the letter of termination, exhibit "PS3", was 20th October, 2020 but the last working day in the letter was indicated as 10th October, 2020. He admitted that 20th October, 2020 is 10 days after 10th October, 2020.

6.25 There was nothing in re-examination and that marked the close of the Respondent's case.

7. Legal Arguments

7.1 Both the Complainant and Respondent's advocates filed written submissions. I am indebted to them and have considered their arguments in this Judgment.

8. Findings of Fact

Undisputed Findings of Fact

8.1 The Complainant was employed by the Respondent as a Geologist Graduate Trainee by an offer of employment dated 18th September, 2018, which came into effect on 20th October 2018.

8.2 According to Clause 2.1. of the contract, the duration of employment was subject to the life of the mine, being 6.1 years.

8.3 On 15th August 2019, the Respondent wrote to the Complainant confirming his employment and stating that his employment would be subject to a 24-month training program where the Complainant would undergo regular quarterly and annual performance evaluations.

8.4 The confirmation letter expressly stated that all other conditions of employment would remain the same.

8.5 On 20th October 2020, the Complainant was informed that the Graduate Trainee Programme would come to an end on 10th October, 2020 and his contract was terminated.

Disputed Findings of Fact

8.6 Whether the Complainant's contract was for a period of 24 months or 6.1 years.

8.7 Whether or not the conformation letter 15th August 2019 which stated that the training program was for 24 months varied Clause 2.1. of the contract linking the Complainant's employment to the duration of the mine.

8.8 Whether or not the Complainant could bring his claims before the Court having had some of his claims against the Respondent settled by the Ministry of Labour and Social Security.

9. Issues for Determination

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

9.1.1 Whether this Court has the jurisdiction to hear and determine this dispute;

9.1.2 What the nature of the Complainant's contract of employment was;

9.1.3 Whether the Complainant's employment was wrongfully terminated;

9.1.4 In the alternative, whether the Complainant was declared redundant; and

9.1.5 Whether the Complainant is entitled to any relief.

10. Determination of Issues

Whether this Court has the jurisdiction to hear this dispute

10.1 The Respondent in its submissions raised a point in limine asserting that this Court does not have the jurisdiction to hear and determine this dispute given that the Ministry of Labour dealt with a portion of the Complainant's grievances.

10.2 The issue of jurisdiction is fundamental. Jurisdiction is what enables the Court to hear and determine any issue before it. The Supreme Court in **JCN Holdings Limited v. Development Bank of Zambia**[1] stated in unequivocal terms that:-

> *"...it is settled law that if a matter is not properly before a court, that court has no jurisdiction to make any orders or grant any remedies.*
>
> *It is clear from the Chikuta and New Plast Industries cases that if a court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to that matter"*

10.3 Put differently, jurisdiction is everything and a court has no power to move ahead with a matter without jurisdiction. In **Enock Kavindele and Dorothy**

Kavindele v. Bologna Properties Limited and Diego Casilli,[2] the Court of Appeal held that:

> *"It is trite that when a court passing a decree lacks inherent competence over the subject matter/parties, there is a total lack of jurisdiction. The lack of jurisdiction goes to the root and any decisions made by such a court are a complete nullity."*

10.4 Therefore, without jurisdiction, whatever a court decides, is null and void. Hence, a court must always ensure that it has jurisdiction before proceeding to hear a case. Since the issue of jurisdiction goes to the core of a matter, it can be raised at any stage of the proceedings, either by formal application or viva voce.

10.5 The starting point as it relates to jurisdiction in the Industrial and Labour Relations Division is Section 85 (1) and (4) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, which establishes the jurisdiction of this Division of the High Court. Section 85(1) provides as follows:

> *"(1) The Court shall have original and exclusive jurisdiction to hear and determine any industrial relations matters and any proceedings under this Act."*

10.6 Subsection (4) of section 85 reads as follows:-

> *(4) The Court shall have the jurisdiction to hear and determine any dispute between an employer and an employee notwithstanding that such dispute is not connected with a collective agreement or other trade union matter.* (Emphasis, the Court's)

10.7 From the above it clear that this Court has original and exclusive jurisdiction to hear and determine any industrial relations matter and any dispute between employers and employees. Neither provision makes the jurisdiction of this Court subject to any settlement discussions or agreement at the Ministry of Labour and Social Security. Hence, any settlement or agreement reached by the parties at the said Ministry does not oust the jurisdiction of this Court to hear and determine a matter.

10.8 This brings me to the role of the Ministry of Labour and Social Security as a form of alternative dispute resolution. Section 121 (2) of the Employment Code Act states that:-

> *"(2) An authorised officer shall—*
>
> *(a) take steps that the authorised officer may consider to be expedient to effect a settlement between the parties and, in particular, shall encourage the use of collective bargaining facilities, where applicable; and*
>
> *(b) where an authorised officer fails to effect a settlement between the parties, the authorised officer may recommend that the aggrieved party refers the matter to court."* (Emphasis, the Court's)

10.9 From the above, it is clear that, the role of an authorised officer in the Ministry of Labour is, *inter alia*, to effect a settlement between the parties where possible and if that fails, to recommend to the aggrieved party to refer the

matter to this Court. The provision does not state that the Ministry shall settle all issues in dispute between the employer and employee. If the Ministry of Labour manages to settle an entire dispute, the Court may be precluded from further interference. However, if a settlement is effected only with respect to a certain aspect, nothing in Section 121 precludes a party from bringing other issues to Court for determination.

10.10 Therefore, had the Complainant brought issues before this Court that were settled by the Labour Office, the Respondent's point on jurisdiction would have had a leg to stand on. However, it is clear from the Notice of Complaint that the issues relating to the Complainant that were settled before the Labour Office, namely, gratuity, accrued leave days, salary in lieu of notice and payments from the Pension Scheme, differ substantially from those raised before this Court which relate to a declaration that the Complainant's employment was wrongfully terminated or alternatively, that he was declared redundant and a claim for damages for wrongful termination or redundancy.

10.11 It is thus, clear that the Complainant excercised his option to have part of his dispute resolved with the help of the Labour Office and the other part by this Court. This is justified given that the powers of the Ministry and the Labour Office are limited and, in

some cases, certain disputes such as those relating to award of damages and equitable remedies cannot be determined by the Ministry, and can only be granted by a Court in line with Section 85A and 108 of the Industrial and Labour Relations Act.

10.12 As mentioned above, Section 121 does not proscribe an employee from pursuing his rights in court, even where part of his dispute has been partially settled by the Labour Office. In fact, such practice is encouraged where parties can settle certain matters beforehand and narrow the issues for determination in court to ensure speedy determination of disputes.

10.13 As such, I do not agree with the Respondent that the Complainant is precluded from bringing issues before this Court. This view is not supported by any law. Indeed, where some issues have been determined by settlement at the Labour Office, the Court takes into consideration what has been agreed but that does not mean that a Complainant cannot exercise his right to come to court after engaging the Ministry of Labour.

10.14 The Respondent also sought to argue that where the Labour Commissioner makes a decision, the recourse is an appeal to the Minister and thereafter to the High Court. Section 126 of the Employment Code Act reads as follows:-

> *"(1) A person who is aggrieved with a decision of the Labour Commissioner may appeal to the Minister within thirty*

days of the date of receipt of the decision of the Labour Commissioner.

(2) A person who is aggrieved with the decision of the Minister may, appeal to the High court."

10.15 The above provision does not apply to settlements because by definition, a settlement refers to an agreement between two parties on a specific issue. Decisions by the Labour Commissioner relate to matters that have been adjudicated by that office, such as a decision to suspend the operations of an employer in terms of Section 10(5) or approve or reject a redundancy payment plan in terms of Section 56, or a decision to grant or deny an employment agency permit in terms of Section 109 of the Industrial and Labour Relations Act, to mention but a few. In my view, the direction by Labour Office to the Respondent to pay the Complainant was not a decision but advice in a bid to settle the matter.

10.16 For the above reasons, I dismiss the Respondent's point in limine relating to jurisdiction.

<u>The nature of the Complainant's contract of employment</u>

10.17 In terms of the Employment Code, specifically Sections 3 and 19, there are five (5) types of contracts of employment. These are:

10.17.1 A permanent contract which runs from the date of engagement until the employee reaches the retirement age prescribed in the National Pension Scheme Act, unless validly terminated in accordance with the law. Although such a contract does not have a date fixed in advance, it is considered to be for a fixed duration as its end date is known in advance, i.e. retirement.

10.17.2 A long-term contract is one where the pre-determined and specified duration is more than twelve (12) months, or where the performance of a specific task or project is to be undertaken over a specific period of time, and whose termination is fixed in advance.

10.17.3 A short-term contract for a duration of less than twelve (12) months;

10.17.4 A seasonal contract of employment where the timing and duration of the contract is influenced by seasonal factors, including climate, agricultural or business peak cycle;

10.17.5 Temporary contract where the employee is engaged to do relief work in the absence of a substantive employee.

10.18 The learned Authors Mwenda and Chungu in their book, A Comprehensive Guide to Employment Law in Zambia, put it thus at page 23:-

> *"a person's employment during any period should be presumed to have been continuous unless the contrary is proved. Hence, it is always assumed that an employee is in permanent employment unless there is evidence to the contrary, such as the inclusion of a fixed-term."*

10.19 Therefore, the default type of contract is a permanent one. However, where the contract contains a clause fixing the duration and stating a pre-determined end date, this would change the characterisation of the contract. Put differently, a contract is presumed to be permanent in nature, unless the contrary is proven.

10.20 Clause 2.1 of the Complainant's contract reads as follows:

> *"As your role is critical to the organisation, your term of employment will be Open Contract (Life of Mine)."* (Emphasis, the Court's)

10.21 From the above, it is clear that the intention of the parties was for the contract to run for the duration of the mine. According to exhibit "CM2", the life of the mine was 6.1 years.

10.22 Section 3 of the Employment Code Act defines a long-term contract as follows:-

> *"long-term contract" means a contract for service for-*

(a) A period not exceeding twelve months, renewable for a further period; or

(b) the performance of a specific task or project to be undertaken over a specified period of time, and whose termination is fixed in advance by both parties."

(Emphasis, the Court's)

10.23 The above definition clearly shows that a long-term contract can be tied to a specific project or task, with the date for termination fixed. In my estimation, there is only one type of contract that would fit into such a description, and that is a long-term contract, tied to the life of the mine.

10.24 However, the Respondent has argued that on 20th October 2019, the Complainant was given a confirmation of employment where it was stated that he would be placed on a 24 months program. Therefore, on the one hand, Clause 2.1 states that the contract shall be for the duration of the mine while on the other hand, the confirmation letter states that the Complainant shall be on a 24 months program.

10.25 The letter of confirmation appearing as "CM3" in the Complainant's Affidavit in Support of Answer provided, *inter alia*, that:

"All other conditions of employment will remain the same.

On behalf of management, I would like to thank you for the valuable contribution you have made to Munali Nickel Mine so far. We hope and trust that you will continue working hard

and contributing significantly for the Mine to achieve its goals." (Emphasis, the Court's)

10.26 The fact that the confirmation letter expressly stated that all other conditions of employment would remain the same is instructive. Further, the fact that the Respondent alluded to the Complainant contributing to the achievements of the mine's objectives demonstrates that his work was linked to the existence of the mine. It is clear that the duration of the contract would remain unchanged, with the subsequent 24 months of the contract simply falling under the overall duration of the contract, being, the life of the mine or 6.1 years.

10.27 At trial, the Complainant testified that his confirmation letter amended portions of his contract, but not the entire contract. That indeed, is correct. The fact that the letter stated that the rest of the contract would remain the same and did not allude to any changes to the overall duration in Clause 2.1 demonstrates that the contract was to endure for the life of the mine with the inclusion of a 24-month training period to enhance the Complainant's capability to serve the Respondent long term.

10.28 As such, I have no hesitation in holding that the contract of the Complainant was a long-term one for the life of the mine or a period of 6.1 years. This to me is clear from the contract itself and the wording of the confirmation letter in no way varies Clause 2.1. Had

the Respondent intended to alter Clause 2.1 relating to the duration of the mine, the confirmation letter would have expressly said so and the consent of the Complainant would have been solicited. In my view, the wording of the confirmation was clear and merely brought in a training program within the overall scheme of a 6.1- year contract.

10.29 However, even if I were to conclude that the duration of the contract was ambiguous, which I am not, I would have no difficulty in applying the contra preferentem rule of interpretation. The learned Authors Ng'ambi and Chungu in their book, Contract Law in Zambia, Second Edition, put it as follows at page 174:

> *"The effect of the contra preferentem rule is that, where there is any ambiguity in the contract, ambiguity will work against the party seeking to rely on the clause. Having inserted the clause in the contract that party cannot rely upon it unless it is clear."* (Emphasis, the Court's)

10.30 Therefore, even if an ambiguity was alleged, the said ambiguity would be interpreted against the party that drafted the contract, namely, the Respondent. The Supreme Court in **Engen Petroleum Zambia Limited v. Willis Muhanga and Jeremy Lumba**[3] held that:

> *"Contra preferentem may refer to the rule that, in the event of any ambiguity, wording in a contract is to be construed against a party who seeks to rely on it in order to diminish or exclude his basic obligation, or any common law duty, which arises apart from contract. It may also refer to the rule that*

wording is to be construed against the party who proposed it for inclusion in the contract. The latter is a rule of 'last resort' and can only apply if a document, properly interpreted, admits of doubts..."(Emphasis, the Court's)

10.31 Based on the contra preferentem rule, the Court should interpret the wording of the clauses against the Respondent as the drafter of the documents where there is an ambiguity in interpretation. Reference can also be made to the case of **Indo-Zambia Bank Limited v. Mushaukwa Muhanga**,[4] where the Supreme Court held that:

"Moreover, this document on 'terms and conditions of employment' was prepared by the Appellant itself. If the insertion of the words 'permanent and pensionable' was as a result of careless drafting, then the Appellant surely shot themselves in the foot. Under the 'contra proferentem' doctrine, the document has to be construed against them and in favour of the Respondent." (Emphasis, the Court's)

10.32 Based on the above, even if this Court were to find that there was some ambiguity in the two clauses referred to above, I would interpret them against the Respondent and hold that the Complainant was employed for a duration linked to the life of the mine, and thus served on a long-term contract of employment for at least 6.1 years.

10.33 Further to the above, the Employment Code Act, at Section 127 reads as follows:-

"Where a contract of employment, collective agreement or other written law provides conditions more favourable to the employee, the contract, agreement or other written law shall prevail to the extent of the favourable conditions."

10.34 The above seeks to ensure that employees enjoy the best possible terms and conditions of employment applicable to them in either their contract, collective agreement or written law. Therefore, where two clauses in a contract or documents applicable to an employee are in conflict, the more favourable provision applies to the employee.

10.35 This fortifies my view that the Complainant's contract, which was tied to the life of the mine, was long-term and due to expire when the mine's life came to an end.

Whether the Complainant's employment was wrongfully terminated

10.36 Before dealing with the claim for wrongful termination, I will begin by dispelling the Respondent's submission that the burden of proof lies on the Complainant in relation to wrongful and/or unfair termination. Indeed, the traditional position that he who alleges must prove continues to apply to this day except in relation to an allegation relating to dismissal or termination. This follows the amendment to the Employment Act in 2015 and the enactment of the Employment Code Act in 2019 which now require an employer to furnish a valid and substantiated reason when bringing an employee's

contract of employment to an end. This was confirmed in the case of **African Banking Corporation Zambia v. Lazarous Muntente**[5] 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."*

10.37 Further, in **Ian Chipasha Mpundu v. Road Transport and Safety Agency**,[6] 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."* (Emphasis, the Court's)

10.38 Therefore, the Respondent, as employer now has the onus to prove that a termination or dismissal was for a valid, fair and reasonable reason that is justified.

10.39 An excerpt of the Complainant's letter of termination appearing as "CW3" in the Complainant's Affidavit in Support of Complaint reads as follows:-

> *"20th October 2020*
>
> *Dear Clive,*
>
> *RE: TERMINATION OF GRADUATE TRAINEE PROGRAM*
>
> *We refer to your contract of employment dated 15th September 2018 and subsequently your confirmation letter as Geologist*

Graduate Trainee dated 15th August 2019, which is coming to an end on 10th October 2020. We regret to inform you that your Graduate Trainee Programme will not be renewed.
(Emphasis, the Court's)

10.40 The first anomaly I have observed in the letter above, is that the letter is titled 'Termination of Graduate Trainee Program' and yet the contents of the letter refer to non-renewal of the contract of employment. Employers such as the Respondent, are cautioned to craft contracts and termination letters carefully to avoid adverse interpretations.

10.41 The second anomaly is that the Respondent purported to inform the Complainant about the non-renewal of his contract ten (10) days after his contract had allegedly come to an end by effluxion of time. I shall revert to this point later in this Judgment.

10.42 Having established that the Complainant was serving on a 6.1-year long-term contract of employment, I have no hesitation in holding that the Respondent could not have terminated the Complainant's contract in the manner that it purported to do as the Complainant's contract was not linked to the graduate program but to the lifetime of the mine.

10.43 I should also point out that the Complainant's contract was subject to a condition subsequent. There are two kinds of conditions, conditions precedent and conditions subsequent. The learned Authors Edwin

Peel and Others of Trietel's Law of Contract, 14th Edition, state at page 70 that:

> *"Contingent conditions may be precedent or subsequent. A condition is precedent if it provides that the contract is not to be binding until the specified event occurs. It is subsequent if it provides that a previously binding contract is to determine on the occurrence of the event"* (Emphasis, the Court's)

10.44 A condition precedent suspends the operation of the contract until the occurrence of a specified incident, whilst with a condition subsequent, the contract comes into effect, but terminates when a particular event occur. In the circumstances, it is clear Clause 2.1 subjected the contract of employment to a condition subsequent, that is, the life of the mine.

10.45 Therefore, when the Respondent terminated the Complainant's employment before the life of the mine came to an end, there was a breach of the condition subsequent, that renders the Complainant's termination wrongful.

10.46 Lastly, on this issue, the Complainant was on a long-term contract of employment that was still running, and only due to expire when the mine's life came to an end. There was a subsisting contract of employment between the parties and thus, the Respondent's reference to non-renewal of the contract midway during the tenure of the contract was irregular.

10.47 To that end, the Complainant was entitled to a valid reason for the termination and an opportunity to be heard if the Respondent were to validly terminate before the date fixed for expiration of the contract. The prevailing dispensation is that an employer who initiates dismissal or termination of employment 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.

10.48 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 the giving of the employee an opportunity to be heard. This is what validates the reason given.

10.49 I am fortified in this regard by the Court of Appeal holding in **Henry Chiwaya v. Corporate Air Limited**,[7] where, it was stated thus:

> *"In the case of African Banking Corporation (Z) Limited v. Lazarous Mutente, we agreed with the learned authors of the book Labour Law in Zambia – An Introduction, by Chanda Chungu and Ernest Beele, 2nd Edition, Juta and Company (Pty) Ltd at page 103 when in interpreting Section 52 (2) of the Employment Code Act, they stated that as the law stands, the employer is required to give a valid reason for dismissal after giving the party the right to be heard and to substantiate the reason for the dismissal."* (Emphasis, the Court's)

10.50 Further, in the seminal decision of **Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited**[8] the Court of Appeal 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.."* (Emphasis, the Court's)

10.51 The Court of Appeal underscored the need for employers to not only give a valid reason, but to 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 termination. The opportunity to be heard must be meaningful and the employer must demonstrate that it took into consideration the employee's submissions before making its decision.

10.52 The justification for the new approach to dismissal and termination is to ensure that the employer acts in accordance with the law and good faith when deciding to bring employment to an end. As the Court of Appeal in Sarah Aliza Vekhnik (supra) noted:

"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."

10.53 The giving of valid, substantiated reasons combined with the rules of natural justice, protects employees, who have lower bargaining power in the employment relationship, from being dismissed or terminated in an unjustified manner.

10.54 Against the above backdrop, and before I make a determination on whether or not the Complainant was wrongfully terminated, it is important to get a clear understanding of what amounts to wrongful termination.

10.55 Wrongful termination is termination 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. In the case of **Konkola Copper Mines Plc. v. Hendrix Mulenga Chileshe**,[9] 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..."

10.56 Based on the definition above, wrongful termination occurs where an employee does not adhere to the terms of the contract of employment. I am fortified by the decision of **Eston Banda and Edward Dalitso Zulu v. Attorney-General**[10] where the Supreme Court held that:

> *"Wrongful' refers to a dismissal in breach of a relevant term embodied in a contract of employment, which relates to the expiration of the term for which the employee is engaged..."*

10.57 In my view, the fact that the Respondent terminated the contract without reference to Clause 2.1, rendered the termination a breach of contract which justifies a claim for wrongful termination.

10.58 Further, it is noteworthy that the terms of a contract are not limited to the express ones, but includes terms implied from facts, custom, trade usage, the common law and statutes, unless the contract provides more favourable terms, based on Section 127 alluded to above. As the Respondent not only failed to comply with an express term of the Complainant's contract but also failed to provide a valid, substantiated reason for the termination of the contract, I find that the termination of the Complainant's employment was wrongful.

10.59 I also wish to point out that the evidence on record shows that the Complainant was formally informed of

his non-renewal on 20th October 2020, ten (10) days after his contract purportedly came to an end. As such, even if the Complainant was on a 24-month fixed-term contract as the Respondent suggests, his contract would have automatically renewed on the strength of the case of **Moses Choonga v ZESCO Recreation Club**,[11] where the Supreme Court held that:

> *"Since the respondent allowed the appellant to continue his duties for one month after the contract expired due to effluxion of time on 31st July, 2012, it can be implied and properly so, that the contract of employment was extended for the same period and on the same conditions as those contained in the expired fixed term contract of employment."* (Emphasis, the Court's)

10.60 The position above is that where an employee on a long-term contract continues working after the date of expiry, his contract is deemed to have been renewed on the same terms and duration as his expired contract.

10.61 Therefore, even if I had accepted the Respondent's argument in this regard, which I do not, the fact that the Complainant was formally informed of his purported non-renewal several days after the alleged expiration date, meant that his contract would have, in any case, automatically renewed. Hence, from whatever angle one looks at it, the Respondent's defence is untenable as it relates to termination of the Complainant's employment, which I have found to be wrongful.

Whether the Complainant was declared redundant

10.62 The Complainant has pleaded that in the alternative, he be deemed to have been declared redundant. Redundancy under Zambian law is regulated by section 55 of the Employment Code Act which reads as follows:-

> *"55. (1) An employer is considered to have terminated a contract of employment of an employee by reason of redundancy if the termination is wholly or in part due to—*
>
> *(a) the employer ceasing or intending to cease to carry on the business by virtue of which the employees were engaged;*
>
> *(b) the business ceasing or diminishing or expected ceasing or diminishing the requirement for the employees to carry out work of a particular kind in the place where the employees were engaged; or*
>
> *(c) an adverse alteration of the employee's conditions of service which the employee has not consented to.* (Emphasis, the Court's)

10.63 From the above, it is evident that a redundancy situation arises where an employee's position or services cease or are abolished or where an employer unilaterally and adversely alters the contract of employment, without the employee's consent.

10.64 In the circumstances, the Respondent did not assert that it was closing its entity or that the Complainant's

position would cease. However, the Respondent varied the Complainant's terms of employment, without his consent.

10.65 The Respondent in the termination letter alluded to a 24-month duration as opposed to a contract linked to the life of the mine and thereafter, issued the letter. This amounted to a simultaneous non-consensual variation of the contract and termination on the basis of the said unilaterally imposed shortened contract. This could potentially justify a declaration of redundancy based on section 55(1)(c) of the Employment Code Act.

10.66 The above notwithstanding, I will not make the alternative order that the Complainant was declared redundant because he has succeeded on his claim for wrongful termination. In **Sun Country Limited & Others v. Roger Redin Savory & Another**,[12] the Supreme Court held as follows:

> *"...where parties are seeking a main relief and some alternative reliefs, the Court is not bound to consider alternative reliefs. This is especially in cases where the Court has granted the main relief. In such cases, it ought to look no further."* (Emphasis, the Court's)

10.67 The above decision underscores the position that an alternative claim will only be considered upon the failure of the main claim.

10.68 Since the Complainant has succeeded on the claim of wrongful termination, which was the main claim, I shall not deem the termination a redundancy as this was an alternative claim which fell away when the primary claim before this Court succeeded.

Whether the Complainant is entitled to any relief

10.69 Having found earlier that the Complainant was wrongfully terminated, the next step is to decide the quantum of damages due.

10.70 Damages for 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 and length of service of the employee, and an objective assessment of the nature of his job, the position and rank he/she reached and held, and the trade/industry that he/she is engaged in, as well as the state of the Zambian economy and job market.

10.71 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 cases, the courts held that the normal measure of damages was the employee's notice period or the notional reasonable notice where the contract was silent.

10.72 In the case **Swarp Spinning Mills Plc. v. Sebastian Chileshe and Others,**[13] the Supreme Court confirmed that the normal measure of damages is an employee's notice period or as it is provided for in the law and can only be departed from when the employee proves that he is deserving of more and the conduct of the employer was so serious that it warrants a higher award of damages.

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

10.74 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,**[14] 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." (Emphasis, the Court's)

10.75 I am in agreement with the views expressed by the learned author Chungu in the article referred to 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.

10.76 I am of the view that damages should be awarded depending on an analysis of the particular circumstances of each case. In **Konkola Copper Mines**

Plc. v. Aaron Chimfwembe and Kingstone Simbayi[15] the Supreme Court observed that:

> *"The award of damages in wrongful termination of employment cases is subject at all times to a rather amorphous combination of facts peculiar to each case and perpetually different in every case. As no facts of any two cases can be entirely identical, it should not be expected that in applying the general principle for award of damages in these cases, the courts will think in a regimented way."* (Emphasis, the Court's)

10.77 The development of the law on damages considers an application of the following factors as relevant, namely:- how the termination or dismissal was effected, that is, the conduct of the employer – whether it was oppressive, infringed the employee's rights, inflicted in a traumatic manner, caused mental anguish, stress, or inconvenience, and whether the prospects of future employment by the employee are bleak. These principles can be gleaned from a number of decisions including, but not limited to, **First Quantum Mining and Operations Limited v. Obby Yendamoh**[16] and **David Banda v. The Attorney-General.**[17]

10.78 Having examined the circumstances leading to the dismissal of the Complainant, I form the view that even though the termination of the Complainant's employment was not done in a traumatic manner, the termination must have caused mental anguish, stress

and inconvenience. I am fortified in this regard by the case of **AB Bank Limited v. Benjamin Nyirenda**,[18] Where 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 many more."*

10.79 Therefore, I take judicial notice of the fact that where an employee, such as the Complainant, is terminated suddenly and on unsubstantiated grounds, such conduct is likely to cause anxiety, anguish and stress, particularly as an employee will suffer inconvenience due to loss of income.

10.80 In relation to dimunition of future job prospects, I have taken note that the Complainant was employed as a Geologist which requires a special skill and I am ably guided by the Court of Appeal in **BHM Enterprises Limited v. Paul Chiwina**,[19] where the Court held that where an employee's job requires a special skill, that would also be a determinant. I take cognisance of the sector that the Complainant was engaged in, the mining sector. Jobs in the mining sector are scarce and opportunities to find alternative employment as a Geologist in another mine may not be that many.

10.81 A further consideration for damages payable in this case is that the Complainant was serving on a long-term contract which had at least four (4) more years to run. The wrongful deprivation of such an expectation and impact on the Complainant's livelihood, should be

considered in determining the quantum of damages due.

10.82 I take note of the Supreme Court's guidance in cases such as **National Airports Corporation Limited v. Reggie Ephraim Zimba and Savior Konie**,[20] that damages should not be awarded on the basis of the remaining period of service, but rather, the circumstances should inform the quantum of damages to be awarded. This notwithstanding, an employee's reasonable expectation of remaining in employment for a substantial period of time, cut short by wrongful action is a legitimate expectation to be considered in the award of damages, as was the case here.

10.83 Where an employee suffers loss, the law places a duty on him to take reasonable steps to limit his loss. This is referred to as mitigation of loss. In **Charles Ngong'a v. Alfred H Knight**,[21] the Supreme Court held that:

> *"It is a fundamental principle that any claimant will be expected to mitigate the losses they suffer as a result of an unlawful or wrongful act. A court will not make an award to cover losses that could reasonably have been avoided. Likewise, an employee is expected to search for other work."*

10.84 I have, unfortunately, no evidence of any reasonable steps taken by the Complainant to find alternative employment or alternative sources of income. I do however, take judicial notice of the poor state of the Zambian economy and the challenges many

unemployed persons face in finding other streams of income, and the impact that the unwarranted loss of employment would have had on the Complainant.

10.85 When awarding damages, the Court of Appeal in **Zesco Limited v. Edward Angel Kahale**[22], was clear that the discretion on the quantum of damages awarded must be excercised judiciously with evidence of exceptional circumstances informing the amount to be awarded.

10.86 The Complainant's contract of employment in this case was wrongfully terminated and there were various breaches of the contract. This warrants a substantial sum in damages to compensate the Complainant. However, this will be assuaged by the Complainant's failure to provide any evidence of mitigation of his loss.

10.87 Considering all the factors and circumstances pointed out above, I award the Complainant Twenty-Four (24) months' salary as damages for wrongful termination.

11. Conclusion and Orders

11.1 In conclusion, I find that the Complainant has succeeded on the claim for wrongful termination.

11.2 The claim for redundancy falls away as it was pleaded by the Complainant in the alternative.

11.3 I therefore, make the following orders:

11.3.1 I award the Complainant Twenty-Four (24) months' salary, that is, basic salary plus allowances, as damages for wrongful termination.

11.3.2 The amount due shall attract interest at the short-term deposit rate from the date of filing of the Notice of Complaint until judgment and thereafter, at the lending rate as determined by the Bank of Zambia, until full payment.

11.4 Each party shall bear its own costs.

11.5 Leave to appeal is granted.

Dated at Ndola this 23rd day of February, 2024.

Winnie Sithole Mwenda (Dr.)
JUDGE