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IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 73/2014**
HOLDEN AT KABWE
(Civil Jurisdiction)

BETWEEN:

ROY MWABA (Sued in his capacity as Secretary General of the Zambia Congress of Trade Unions) **APPELLANT**

AND

MTUMBI GOMA **RESPONDENT**

CORAM: MAMBILIMA, CJ, HAMAUNDU AND WOOD, JJS
On 1st November, 2016 and , 2016.

For the Appellant: **Mr. N. YALENGA, of Messrs. Nganga Yalenga & Associates;**

For the Respondent: **Mr. P. KATUPISHA, of Messrs. Milner Paul & Associates.**

JUDGMENT

MAMBILIMA, CJ, delivered the Judgment of the Court.

CASES REFERRED TO-

1. **SHILLING BOB ZINKA V. ATTORNEY GENERAL (1990-1992) ZR 73;**
2. **THE ATTORNEY GENERAL, THE MOVEMENT FOR MULTIPARTY DEMOCRACY V. AKASHAMBATWA MBIKUSITA LEWANIKA, FABIAN KASONDE, JOHN MUBANGA MULWILA, CHILUFYA CHILESHE KAPWEPWE AND KATONGO MULENGA MAINE (1993-1994) Z.R. 131;**
3. **TAYLOR V. NATIONAL UNION OF SEAMEN (1967) 1 ALL ER 767; AND**
4. **REES AND OTHERS V. CRANE (1994) 1 ALL ER 833.**

STATUTES REFERRED TO-

1. **INDUSTRIAL AND LABOUR RELATIONS ACT, CHAPTER 269 OF THE LAWS OF ZAMBIA; AND**
2. **INDUSTRIAL RELATIONS COURT RULES, CHAPTER 269 OF THE LAWS OF ZAMBIA.**

OTHER AUTHORITIES REFERRED TO-

1. **BLACK'S LAW DICTIONARY, 9TH EDITION; AND**

2. **NORMAN SELWYN, SELWYN'S LAW OF EMPLOYMENT, 15TH EDITION, OXFORD UNIVERSITY PRESS: NEWYORK.**

This appeal is from a Judgment of the Industrial Relations Court, delivered on 22nd October, 2013. The Judgment followed an action by the Respondent commenced by way of a notice of complaint under Section 85(4) of the **INDUSTRIAL AND LABOUR RELATIONS ACT[1],** (hereinafter referred to as "the Act").

At the hearing of the matter before the lower Court, the Respondent gave oral evidence in support of his case. The gist of his case, as can be gathered from the originating process and his testimony, was that he was an elected member of the Zambia Congress of Trade Unions (ZCTU) serving as Deputy Secretary General in charge of Finance and Business Administration. He told the Court that his primary function was to ensure financial integrity through the establishment and maintenance of financial systems. That he was also mandated to report on all financial matters to the various organs of ZCTU and to monitor, control and implement accounting systems. He testified that it came to his notice that there were a number of irregular decisions made by the Appellant

that were not backed by the Constitution of ZCTU (hereinafter referred to as "the Constitution") or the Conditions of Service. That he advised the Appellant verbally on the said irregular decisions but the Appellant did not respond.

It was the Respondent's further evidence that he was left with no option but to send an internal memorandum to the Appellant, on 20th July, 2011, highlighting the allegations of irregularities. That some of the irregularities related to appointments of members of staff at Director level and Deputy Director level. According to him, the appointment of the Assistant Accountant, and, the Director and Deputy for Research and Economic Affairs were supposed to have been effected by a Staff Affairs Committee. That the said Staff Affairs Committee was unconstitutionally constituted by the Appellant, as he appointed the Committee instead of the Executive Board. That he advised the Appellant that the appointees could not be included on the payroll until the irregularities had been resolved.

The Respondent went on to state that on same day of 20th July, 2011 the Appellant wrote a letter to him where he stated that the Respondent's conduct was inimical to the smooth running of ZCTU. That the Appellant subsequently charged the Respondent for

gross insubordination in line with Article 18(5) of the Constitution. That the Appellant told the Respondent to stay away from the office. That the Respondent nevertheless reported for work but he was refused entry into the ZCTU premises by a security guard. That the security guard showed him a circular dated 21st July, 2011, titled "Relief of office Deputy Secretary General (F & BA)" in which the Appellant had instructed all members of staff not to take instructions from the Respondent.

The Respondent's case was referred to the Conciliation and Demarcation Committee.

The Respondent told the Court below that he did not appear before the Conciliation and Demarcation Committee, on 30th September, 2011, because he had not received the charge sheet to enable him prepare to exculpate himself. Further, that his advocates advised him not to attend the meeting. That the meeting nevertheless went ahead and it was decided that he should be suspended for a period not exceeding 90 days. That on 31st October, 2011, an Extra-ordinary Executive Committee Meeting was convened to hear his case. That the Committee endorsed the decision of the Conciliation and Demarcation Committee without

affording him an opportunity to be heard. That this was despite the fact that he was present in the meeting but the Committee voted that he should not be given any chance to speak because he did not attend the Conciliation and Demarcation Committee meeting.

He told the lower Court that the General Council sat on 13th January, 2012 and resolved to suspend him indefinitely. He stated that this was wrong because, in his report, the Appellant had directed the General Council to make a decision on his suspension. Further, that the General Council had no jurisdiction to deal with his disciplinary matter because he had not appealed to that body but had instead opted to go to Court.

Accordingly, the Respondent claimed that the disciplinary procedures were not followed in disciplining him. He claimed that he was wrongfully suspended on three occasions as procedure was not followed.

On the basis of the above, the Respondent claimed for the following reliefs:

i. **that the suspension is null and void *ab initio*;**
ii. **that the Complainant be paid all his salaries and allowances that have been withheld from 1st November, to the end of 90 days period;**
iii. **compensation for wrongful suspension;**
iv. **damages for inconvenience and emotional stress caused to the Complainant during the period of wrongful suspension;**

v. **an order of injunction restraining the Respondent by himself or the Chairman of the General Council or whomsoever from transacting any business relating to the Complainant's suspension during the General Council to be held on 13th January, 2012 at 09:00 hours;**
vi. **interest on the amounts to be found due;**
vii. **costs; and**
viii. **any other relief the Court may deem fit.**

The Appellant reacted to the Respondent's action by filing an answer and an affidavit in support. In addition, the Appellant called two witnesses to augment his own testimony. The gist of the Appellant's defence, as can be discerned from the answer and the affidavit in support, was that the Respondent's justification for his refusal to obey instructions from the Appellant's office was an act of gross insubordination. That the Appellant, therefore, duly charged the Respondent in accordance with the Constitution and the Conditions of Service.

The Appellant stated that the Respondent was placed on administrative leave and locked out of the office for among other reasons, his own personal safety, as there had previously been demonstrations against him by employees of ZCTU. That the Respondent was charged and served with a notice of the charge on 20th July, 2011.

That the Respondent was served with a notice of the meeting of the Conciliation and Demarcation Committee which was set up to hear the charge proffered against him. That the Respondent refused to attend the said meeting. That the Committee proceeded with the meeting and recommended that he be suspended.

The Appellant conceded that there was no offence of gross insubordination in the ZCTU Conditions of Service. He, however, expressed the opinion that it is an established principle of common law that an employer can sanction an employee for refusing to obey instructions. Further, that Article 18 of the Constitution provided for the punishment of erring officers.

The Appellant went on to state that under the Constitution, either party to a dispute can refer the matter to the General Council. That it was not true that the Respondent was not allowed to defend himself before the General Council. But that the Respondent opted not to attend the meeting and instead sought to restrain the holding of the meeting by way of an injunction.

The Appellant, therefore, stated that the Respondent's suspensions were lawfully done in accordance with the Constitution. He further stated that he did not suspend the

Respondent but only advised him to stay away from work. He added that at one point, members of staff had demonstrated against the Respondent. That the Appellant had just arrived from South Africa but he had to rush to the office to diffuse the demonstrations. He claimed that the allegations raised in the Respondent's internal Memorandum were what had led to the demonstrations. That there was tension at the office and that was why he advised the Respondent to stay away from the office.

Mr. Cosmas MUKUKA, the Deputy Secretary General (Administration and Organisation), testified as RW2. His evidence, in so far as it is relevant to this appeal, was that the disciplinary procedure in ZCTU was that the accused officer is charged and asked to respond through an exculpatory letter. When the Secretary General receives the exculpatory letter, he or she refers it to the Executive Committee which in turn refers it to the Conciliation and Demarcation Committee, which is the only body empowered to hear and determine disciplinary cases. The report of the Conciliation and Demarcation Committee is taken to the Executive Committee which can either agree or disagree with the recommendations.

RW2 stated that the Respondent's disciplinary matter was supposed to be referred to the Conciliation Committee but the Committee was not in place. That at the General Council meeting of 12th August, 2011, which the Respondent also attended, the General Council ordered that the Conciliation and Demarcation Committee be formed because there were a lot of pending cases. That the order was issued to the Executive Committee to appoint members of the Conciliation and Demarcation Committee for ratification. That the names of the members of the Conciliation and Demarcation Committee were subsequently ratified by the General Council. That the Respondent's case was referred to the Conciliation and Demarcation Committee which sat and recommended that he be suspended for 90 days. That on 31st October, 2011, the Executive Committee sat to consider the report of the Conciliation and Demarcation Committee. The Executive Committee decided to suspend the Respondent for 90 days. That later, the General Council put the Respondent on an indefinite suspension.

Mr. Leonard HIKAUMBA, the then President of ZCTU testified as RW3. The crux of his testimony was that he recalled holding a

General Council Meeting in August, 2011 which the Respondent also attended. That at that meeting, a member proposed the appointment of the Conciliation and Demarcation Committee. That the disciplinary matter involving the Respondent was referred to the Conciliation and Demarcation Committee soon after that Committee was appointed.

After considering the evidence that was before it, the lower Court was satisfied that as regards the 90 days suspension which was effected by a letter dated 1st November, 2011, the procedure was followed and on that basis, the Court refused to nullify this suspension. The Court refused to award the Respondent damages for the 90 days suspension on the ground that he had not satisfied the Court that the suspension was irregular. The Court also found that the 90 days suspension had lapsed by effluxion of time.

With regard to the indefinite suspension, the lower Court found that the said suspension was irregular because Article 18(5) of the Constitution did not empower the Executive Committee to make recommendations to the General Council. In the lower Court's opinion, it is the aggrieved official who may appeal to the General Council or take the matter to Court. The Court held that since the

Respondent opted to bring the matter to Court, the disciplinary case was not properly before the General Council. The Court, accordingly, held that the indefinite suspension imposed on the Respondent by the General Council was void *ab initio.*

Coming to the relief of the Respondent from official duties, the Industrial Relations Court found that the Appellant's letter of 20th July, 2011, was a charge letter. The Court also found that although the Appellant did not expressly state in that letter that he was suspending the Respondent, the Appellant actually suspended the Respondent because that was the effect of advising the Respondent to stay away from official duties. The Court stated that when an employee is asked or advised to stay away from official duties and if the employee has no choice but to oblige, then that is a suspension regardless of the terminology used. That the fact that this was a suspension was evidenced by the issuance of a memorandum to the members of staff, the blocking of the Respondent by security guards from entering the ZCTU premises and the locking of the Respondent's office by the Appellant. The Court found that neither the Constitution nor the Conditions of Service gave the Appellant

power to suspend the Respondent or to ask him to stay away from work. That, therefore, the actions of the Appellant were *ultra vires*.

The Industrial Relations Court went on to hold that notwithstanding that the 90 days suspension was not wrongful, the Appellant should pay the Respondent the half salary that was withheld during that period. That this was because there was no disciplinary Committee that sat and found the Respondent liable of the charges.

The Court further held that all the half salary which was withheld during the indefinite suspension should be paid back to the Respondent.

On the removal of the Respondent from the payroll, the lower Court found that action to have been wrong because the Respondent was not given an opportunity to be heard before he was struck off the payroll. The Court ordered the Appellant to pay the Respondent all his basic salary which had been withheld during the period he had been struck off the payroll.

With regard to the funeral policy, the Court ordered that the Respondent be paid all entitlements including cash equivalent of

other entitlements which were due to the Respondent on the death of his mother.

On the indefinite suspension, the Industrial Relations Court ordered the Appellant to pay the Respondent three months' basic pay as damages.

For compelling the Respondent to stay away from official duties, the Court ordered the Appellant to pay the Respondent two months' basic pay as damages.

The Court refused to award damages for emotional trauma and inconvenience on the ground that this claim arose from the wrongful suspension.

The Court also ordered the Appellant to pay the Respondent amounts in lieu of provision of actual security.

The Court found that the Appellant's action to put the Respondent on an indefinite suspension and strike him from the payroll amounted to constructive dismissal. It, however, refused to reinstate him in the job on the ground that there would be no harmony between the Appellant and the Respondent at the workplace. The Court ordered instead, that the Respondent should be deemed to have served his complete period of secondment to

ZCTU and must be separated with full benefits as if he had served the remaining period of secondment.

The Appellant has now appealed to this Court, against the Judgment of the lower Court, advancing the following grounds of appeal:

1. **that the Court below misdirected itself in law and fact when it held that the indefinite suspension slapped on the Respondent by the General Council of the Zambia Congress of Trade Unions was irregular and therefore void *ab initio*;**
2. **that the Court below misdirected itself in law and fact when it held that the Appellant's charge letter to the Respondent of 20th July, 2011 was a suspension letter and therefore ultra vires the Constitution of the Zambia Congress of Trade Unions;**
3. **the Court below misdirected itself in law and in fact when it held that the half salaries withheld from the Respondent during his ninety days suspension be paid to him notwithstanding that it had upheld the same suspension as lawful;**
4. **the Court below misdirected itself in law when it held that the removal of the Respondent from the Appellant's payroll without giving him an opportunity to be heard was unlawful based on the unsworn testimony of Counsel at the Bar;**
5. **the Court below misdirected itself in law and fact when it held that the Respondent be paid funeral grant when the evidence showed that the Respondent never applied for the payment of the grant from the Appellant as per his conditions of service;**
6. **the Court below misdirected itself in law when it ordered that the Respondent be paid-**
   i. **three months basic pay as damages for the wrongful suspension;**
   ii. **two months basic pay as damages for compelling the Respondent to stay away from work which had the effect of a suspension;**

   having already ordered that the Respondent be paid all his salaries from the time he was suspended; and
7. **the Court below misdirected itself in law and fact when it ordered that the Respondent be deemed to have completed his period of secondment to the Zambia Congress of Trade Unions and be separated with his full benefits as would have been the case if he were to remain.**

In support of the above grounds of appeal, the learned Counsel for the Appellant, Mr. YALENGA, filed written heads of argument. On the first ground of appeal, Counsel submitted that the Industrial Relations Court misdirected itself when it held that the matter had been improperly before the General Council. Counsel faulted the lower Court for having held that the indefinite suspension, meted on the Respondent by the General Council, was unlawful because the Respondent had not appealed to the said Council. He contended that contrary to that holding, Article 34(5) to (8) empowered the General Council to punish an elected official including by indefinite suspension. The said Article provides as follows:

> **"34(5) The General Council may suspend from office an Elected Officer who:-**
> **(a) in the opinion of the General Council, has committed an offence which renders such officer unsuitable for elective office.**
> **(b) fails to carry out his duties in accordance with this Constitution or any standing orders made hereunder.**
>
> **(6) The period of suspension of any Elected Officer under this Constitution shall not exceed ninety (90) days and that during the period of suspension; an Elected Officer shall receive half salary;**
>
> **(7) The General Council may suspend an Elected Officer for such longer period as it may deem fit notwithstanding the provisions of Article 34(6) above.**
>
> **(8) The General Council shall give due consideration on the matter occasioning the suspension of an Elected Officer and shall have the discretion:**

(a) To lift the suspension or to give notice to the Quadrennial or Extra-Ordinary congress, as the case may be, that the officer should be removed from office. If the General Council decides to lift the suspension it may do so without imposing a penalty on the suspended Elected Officer or it may impose such penalty as is consistent with the offence committed;
(b) Any Elected Officer on whom a penalty is imposed shall have the right to appeal against such penalty to the Quadrennial Congress or the Extra-Ordinary Congress."

According to Mr. YALENGA, since the Constitution clothed the General Council with the above powers, the Council had jurisdiction to deal with the disciplinary matter against the Respondent. Counsel further argued that Article 28(3)(d) of the Constitution obliged the Secretary General to keep the Constitutional organs of ZCTU, such as the General Council, informed of all important matters relating to or affecting the affairs of the Congress. That since the Respondent was a very senior member of ZCTU, his suspension was an important matter which the General Council had to be informed about. The said Article 28(3)(d) of the Constitution provided that-

"28(3) The Secretary General
(d) Shall keep the General Council, Extra-ordinary General Council, Executive Board, Extra-Ordinary Executive Board, Executive Committee, extra-Ordinary Executive Committee informed of all important matters relating to, affecting or incidental to the affairs of the Congress."

Mr. YALENGA contended, in the alternative, that this Court should hold that notwithstanding the absence of an appeal, the General Council had legitimate power to suspend the Respondent indefinitely. For this contention, Counsel cited the case of **SHILLING BOB ZINKA V. ATTORNEY GENERAL**[1] where, according to Counsel, this Court held that if the exercise of a power is traceable to a legitimate source, the fact that it is exercised under a wrong source does not invalidate actions undertaken pursuant to that power.

Mr. YALENGA went on to submit that the strict literal interpretation of Article 18(5) in isolation leads to the absurd result that the General Council could only exercise its powers under Article 34(7) at the instance of aggrieved officials. Counsel argued that the lower Court should have adopted the purposive approach to statutory interpretation. To reinforce this argument, he relied on the case of **THE ATTORNEY GENERAL, THE MOVEMENT FOR MULTIPARTY DEMOCRACY V. AKASHAMBATWA MBIKUSITA LEWANIKA, FABIAN KASONDE, JOHN MUBANGA MULWILA, CHILUFYA CHILESHE KAPWEPWE, KATONGO MULENGA MAINE**[2] where this Court said the following:

"In the instant case, we have studied the judgment of the court below and we find it sound and correct by applying the literal interpretation. However, it is clear from the Shartz and Northman cases that the present trend is to move away from the rule of literal interpretation to 'purposive approach' in order to promote the general legislative purpose underlying the provision. Had the learned trial judge adopted the purposive approach she would undoubtedly have come to a different conclusion. It follows, therefore, that whenever the strict interpretation of a statute gives rise to unreasonable and an unjust situation, it is our view that judges can and should use their good common sense to remedy it - that is by reading words in if necessary - so as to do what parliament would have done had they had the situation in mind."

Coming to the second ground of appeal, Mr. YALENGA submitted that the lower Court erred when it held that the Appellant's charge letter to the Respondent was a suspension letter and, therefore, ultra vires the Constitution. Counsel argued that the Respondent himself did not understand the letter to be a suspension letter as evidenced by his reply to the said letter in which the Respondent informed the Appellant as follows:

"I have taken note of your advice to me to stay away from official duties from your letter of 20th July, 2011. I wish to inform you that I have declined your advice as the tenets of advice are that advice can either be taken or declined."

Counsel went on to point out that even in cross-examination the Respondent maintained that he did not believe that he had been suspended.

On the third ground of appeal, Mr. YALENGA contended that the lower Court misdirected itself when it held that the half salary

that had been withheld from the Respondent during the 90 days suspension should be paid to him. According to Counsel, the Court had already found as a fact that the decision to place the Respondent on suspension for 90 days was lawful. According to him, it followed that the punishment imposed on the Respondent was also lawful.

On the fourth ground of appeal, Mr. YALENGA argued that the lower Court misdirected itself when it held that the removal of the Respondent from the payroll, without giving him an opportunity to be heard, was unlawful based on what Counsel referred to as 'the unsworn testimony of Counsel at the Bar'. In Counsel's view, the Court should not have allowed Counsel to address it on the issue of removal of the Respondent from the payroll because the application was not made in writing and did not specify the direction or order sought from the Court as required by Rule 33 of the **INDUSTRIAL RELATIONS COURT RULES, CHAPTER 269 OF THE LAWS OF ZAMBIA**. Counsel further submitted that Rule 63 of the **INDUSTRIAL RELATIONS COURT RULES** requires that evidence must be on oath or solemn affirmation.

Mr. YALENGA did not amplify on the fifth and sixth grounds of appeal.

In response, the learned Counsel for the Respondent, Mr. KATUPISHA, filed written heads of argument. On the first ground of appeal, Counsel submitted that the trial Court was on firm ground when it held that the indefinite suspension imposed on the Respondent by the General Council was irregular. Counsel argued that the General Council is an appellate body which can only sit when there is an appeal by an aggrieved Congress Official before it. He submitted that although there may not have been anything wrong with the Appellant informing the General Council about the suspension of the Respondent, it was wrong for the General Council to proceed to sit as an appellate Court when there was no appeal by the Respondent. Counsel was of the view that the procedure for taking a matter before the General Counsel is not stated in Article 34 (5) to (8). That, therefore, Article 18(5) must be relied upon for that procedure. Counsel further contended that the sitting of the General Council was irregular because it did not give the Respondent an opportunity to be heard. For this contention,

Counsel referred us to our holding in the case of **SHILLING BOB ZINKA V. ATTORNEY-GENERAL**[1] where we said that-

> **"Where a power is being exercised to deprive a person of the rights and freedoms of an individual the exclusion of the 'audi alteram partem' rule cannot be implied, it must be express to oust the presumption."**

Mr. KATUPISHA referred us to Article 17(6)(d) of the Constitution and submitted that a matter is only referred to the General Council pursuant to Article 18(5) of the Constitution. He contended that the Respondent preferred to go to the Industrial Relations Court. That while the General Council was aware of the fact that the Respondent had gone to Court, it proceeded to deliberate on his disciplinary case and suspended him indefinitely in his absence. In support of the above submissions, Counsel cited portions from **SELWYN'S LAW OF EMPLOYMENT** among them, an extract from page 559, paragraph 22.30, where the learned authors have said the following:

> **"Although the statutory requirement that a trade union must act in accordance with the rules of natural justice have been repealed, it is submitted that the common law position is not changed. This means that a trade union in the exercise of what is generally a quasi-judicial function, cannot expel a member without giving him a hearing, notifying him of the charges against him and giving him an opportunity to rebut them. It also means that the officials of the union should avoid being placed in the position of being Prosecutor, Judge and Jury."**

Mr. KATUPISHA accused the Appellant of having acted as the accuser, prosecutor and Judge in his own cause. According to Counsel, the Appellant was the one that put the disciplinary machinery in motion and originated all letters including the report of the General Council where he sat as Secretary of the Council Meeting of 13th January, 2012. To augment these arguments, Counsel referred us to the case of **TAYLOR V. NATIONAL UNION OF SEAMEN**[3] where the Court stated the following:

> **"The hearing of an appeal offended against the rules of natural justice in that (a) the chairman of the Council hearing it acted as accuser and (b) prejudicial and irrelevant matters were introduced which the Plaintiff was not given an opportunity to answer."**

Accordingly, Mr. KATUPISHA submitted that the lower Court properly directed itself when it held that the indefinite suspension was irregular and void *ab initio*.

Coming to the second ground of appeal, Mr. KATUPISHA submitted that the Court below did not misdirect itself when it held that the Appellant's charge letter to the Respondent was a suspension letter and that it was *ultra vires* the Constitution. Counsel referred us to a definition of the word 'suspension' from the **BLACK'S LAW DICTIONARY, 9TH EDITION,** where that word is defined at page 1584 as follows:

"3. The temporary deprivation of a person's powers or privileges especially of office or profession.
4. The temporary withdrawal from employment ...."

Mr. KATUPISHA contended that even if the Respondent had reported for work, no one would have received instructions from him. That this was because the Appellant had locked the Respondent's office and told all members of staff not to receive instructions from the Respondent. Counsel argued that the Constitution did not allow the Appellant to withdraw any elected official from performing their functions or to suspend any such elected official. In support of these arguments, he referred us to the case of **REES AND OTHERS V. CRANE**[4] where the Court said the following:

"However, s 137 of the Constitution provided an exclusive procedure for the suspension of a Judge or the termination of his appointment and suspension or termination could not be carried out under the guise of administrative arrangements. The Chief Justice's decision that the Respondent should not sit until further notice effectively banned him from exercising his functions as a Judge sitting in Court and went beyond a mere administrative arrangement. The decision was therefore ultra vires the Chief Justice."

With regard to the third ground of appeal, Mr. KATUPISHA submitted that the lower Court properly directed itself when it held that the half salary that was withheld from the Respondent during his ninety days suspension be paid. Counsel contended that since

both the Appellant and the Respondent did not appear before the Conciliation and Demarcation Committee to give evidence, it was wrong for that Committee to suspend the Respondent for 90 days. In Mr. KATUPISHA's view, it was on that basis that the lower Court ordered the refund of all of the withheld salary.

Coming to the fourth ground of appeal, Mr. KATUPISHA contended that the lower Court rightly directed itself when it held that the removal of the Respondent from the payroll was unlawful. He submitted that the holding was made following a *viva voce* application by Counsel for the Respondent. That Counsel for the Appellant responded to the said application before the Court made its ruling. To augment his arguments, Mr. KATUPISHA referred us to Section 85(5) of the **INDUSTRIAL AND LABOUR RELATIONS ACT** which provides that-

> **"85(5) The Court shall not be bound by the rules of evidence in civil or criminal proceedings, but the main object of the Court shall be to do substantial justice between the parties before it."**

Mr. KATUPISHA went on to argue that in fact the action to remove the Respondent from the payroll was against his conditions of service. For this argument, he referred us to clauses 9.10 and 10 of the conditions of service which provide as follows:

"9.10 Under no circumstances whatsoever shall an officer have his/her contract terminated prematurely other than on any of the circumstances prescribed in this paragraph, and in the event that such a situation arises, the affected officer shall be entitled to full gratuity and other corresponding benefits applicable to the officer upon completion of the normal and stipulated contract period.

10. Upon loss of office in respect of a full time elected officer, and in the event that all the accrued gratuity have not been paid in full, the Congress shall continue payment of monthly basic salary."

On the strength of the above, Mr. KATUPISHA argued that the Appellant should not have removed the Respondent from the payroll before it paid him his full gratuity.

With regard to the fifth ground of appeal, Mr. KATUPISHA submitted that the conditions of service did not require that a person should first apply for a funeral grant before they could be given that grant by the Appellant.

Coming to the sixth ground of appeal, Mr. KATUPISHA contended that, since the Respondent proved that the indefinite suspension and the order for him to stay away from work were wrong, the lower Court properly directed itself when it awarded the Respondent damages in relation to the two suspensions.

We have carefully considered the evidence on record, the judgment appealed against and the heads of argument filed by

Counsel. We will deal with the Appellant's grounds of appeal seriatim.

On the first ground of appeal, Mr. YALENGA has faulted the Industrial Relations Court for having held that the indefinite suspension imposed by the General Council was irregular and void. Mr. KATUPISHA, on the other hand, has supported the holding of the lower Court. According to Mr. KATUPISHA the General Council had no jurisdiction to hear the disciplinary matter against the Respondent because the Respondent had not appealed to the Council against the decision of the Executive Committee. In his view, under Article 18(5) of the Constitution it is only the aggrieved elected officer who can appeal against a decision of the Executive Council.

We have carefully studied the Constitution and, in our view, the General Council had jurisdiction to deal with the disciplinary matter involving the Respondent notwithstanding the fact that the Respondent did not appeal to the Council. Indeed, as Mr. KATUPISHA has rightly pointed out, Article 18(5) of the Constitution specifically provides that an aggrieved officer may

appeal to the General Council. That Article does not state what happens if the Appellant is the aggrieved party.

Notwithstanding the above, an examination of other provisions of the Constitution makes it clear that the Appellant and the Executive Committee are not barred from referring a matter to the General Council. This is particularly clear from Article 17(6)(d) of the Constitution which provides that-

> **"17(6)(d) Subject to the provisions of this Article, the General Council shall consider any matter referred to it falling within its jurisdiction pursuant to the requirement of the Constitution and the enabling laws."**

From Article 17(6)(d) above, it is clear that the General Council can consider any matter referred to it as long as that matter falls within its jurisdiction under the Constitution or enabling laws. A study of Article 34(7) of the Constitution establishes that the General Council has jurisdiction to suspend an elected officer for a period of more than 90 days. Article 34(7) specifically provides that-

> **"34(7) The General Council may suspend an Elected Officer for such a longer period as it may deem fit notwithstanding the provisions of Article 34(6)."**

From the above, it is clear that the General Council had jurisdiction to deal with the disciplinary matter involving the Respondent which was referred to it from the Executive Committee.

Evidently, the drafters of the Constitution gave the General Council power to impose a penalty stiffer than what the Executive Committee could impose because they contemplated a situation where the gravity of a disciplinary offence would require an elected officer to undergo that stiffer punishment. In fact, Article 34(8)(a) even makes provision for the General Council to, among other things, give notice to the Quadrennial or Extra-Ordinary Congress that an elected officer should be removed from office. It would defeat the provisions of the Constitution if we were to hold that the said stiffer penalties could only be suffered by an erring elected officer if that officer decides to appeal to the General Council.

Accordingly, we find merit in the first ground of appeal.

Coming to the second ground of appeal, Mr. YALENGA has argued that the Court below misdirected itself when it found that the Appellant's charge letter of 20th July, 2011, was a suspension letter. Mr. KATUPISHA, on the other hand, has contended that although the said letter did not use the word 'suspension', the effect of the Appellant telling the Respondent to stay away from office, locking the Respondent out of his office and ordering members of

staff not to take instructions from him, was that the Appellant had suspended the Respondent.

We have carefully looked at the Appellant's letter of 20th July, 2011. Clearly, in that letter, the Appellant did not use the word 'suspension'. However, it is evident from the letter that the effect of the directive by the Appellant was to suspend the Respondent from performing his normal functions as Deputy Secretary General (F & BA). This becomes clearer when one looks at the Appellant's Memorandum to all members of staff, dated 21st July, 2011, where the Appellant strongly advised members of staff not to take any instructions from the Respondent. The actions of the Appellant constituted 'suspension' of the Respondent from work as defined in **BLACK'S LAW DICTIONARY 9TH EDITION**, at page 1584 where the authors have defined that word to mean:

> **"3. The temporary deprivation of a person's powers or privileges especially of office or profession.**
> **4. The temporary withdrawal from employment ...."**

In our view, notwithstanding the fact that the Respondent could have been insubordinate to the Appellant, the Appellant did not have power to bar the Respondent from performing his official functions as Deputy Secretary General. The furthest the

Constitution allowed the Appellant to go was to take the matter before the Executive Committee.

We, therefore, hold that there is no merit in the second ground of appeal.

With regard to the third ground of appeal, Mr. YALENGA has contended that the lower Court should not have awarded the Respondent the withheld half salary for the period of the 90 days suspension because the Court had found that suspension to have been lawful. Conversely, Mr. KATUPISHA has argued that the lower Court rightly directed itself because the Respondent was suspended for 90 days without having first been given an opportunity to be heard.

We have carefully considered the facts and evidence leading to the 90 days suspension of the Respondent from work. We are of the opinion that the lower Court misdirected itself when it proceeded to order the Appellant to pay the Respondent the half salary withheld during the 90 days suspension because the lower Court had earlier found that the said suspension was lawful. Article 34(6) of the Constitution provides that when an elected officer is put on

suspension, that officer should be paid half salary during the period of the suspension. That provision specifically states that-

> **"34(6) The period of suspension of any Elected Officer under this Constitution shall not exceed ninety (90) days and that during the period of suspension; an Elected Officer shall receive half salary."** (emphasis ours)

It is clear from Article 34(6) that during a lawful suspension, an elected officer should receive half salary.

Accordingly, we find merit in the third ground of appeal.

Coming to the fourth ground of appeal, Mr. YALENGA has argued that the Industrial Relations Court should not have held the removal of the Respondent from the payroll unlawful on the basis of unsworn testimony of Counsel for the Respondent from the Bar. Counsel for the Respondent has, however, submitted that the lower Court rightly directed itself because its decision was based on a *viva voce* application to which Counsel for the Appellant responded before the Court delivered its ruling.

After studying the proceedings before the lower Court, we agree with Mr. KATUPISHA that the issue of the removal of the Respondent from the payroll was raised as a *viva voce* application by Counsel for the Respondent and not as unsworn testimony by Counsel. It is clear from the record that Counsel for the Appellant

did not contest the truthfulness of the fact that the Respondent had indeed been removed from the payroll. In fact, the lower Court delivered its ruling on that application after hearing Counsel for both parties.

Accordingly, we find no merit in the fourth ground of appeal.

With regard to the fifth ground of appeal, Mr. YALENGA has not made any submissions. Mr. KATUPISHA on the other hand has submitted that the Respondent was entitled to the funeral grant as a condition of service and that the conditions of service did not outline any procedural requirements that the Respondent was supposed to go through before accessing the said grant.

We have carefully looked at the Conditions of Service for Elected Officers and indeed clause 8 of the said Conditions simply provides that-

> **"The Congress shall meet funeral expenses upon the death of the officer, spouse, child, biological parent(s) and registered dependent(s) living with the officer and or any such benefits as shall be determined from time to time."**

We, therefore, cannot fault the lower Court for having awarded the Respondent the funeral grant. The fifth ground, therefore, fails.

Mr. YALENGA has equally not advanced any submissions in support of the sixth ground of appeal. Mr. KATUPISHA on the other

hand has argued that since the Respondent proved that the two suspensions were unlawful, the lower Court rightly directed itself when it awarded damages for the two suspensions.

As we have already held elsewhere in this Judgment, the suspension of the Appellant for 90 days and the indefinite suspension were lawfully done. The Respondent is, therefore, not entitled to any damages in relation to the said suspensions.

However, the Respondent is entitled to damages for the wrongful suspension during the period he was told by the Appellant to stay away from work. In this regard, we uphold the award of two months' basic pay which was made by the lower Court.

The Appellant has abandoned the seventh ground of appeal.

The appeal has succeeded only on the first and third grounds of appeal. It has failed on the second, fourth and sixth grounds of appeal. We therefore order that each party should bear its own costs.

I.C. Mambilima
CHIEF JUSTICE

E.M. Hamaundu
SUPREME COURT JUDGE

A.M. Wood
SUPREME COURT JUDGE