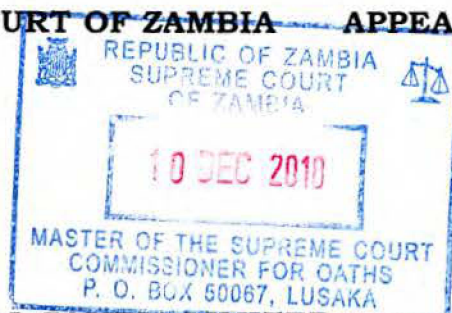


SELECTED JUDGMENT NO. 56 OF 2018

P.2102

IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 57/2016
HOLDEN AT NDOLA
(Civil Jurisdiction)



BETWEEN:

CARE INTERNATIONAL ZAMBIA LIMITED APPELLANT

AND

MISHECK TEMBO

RESPONDENT

Coram: Mambilima, CJ, Musonda and Kabuka, JJS
on 4th and 10th December, 2018

For the Appellant: Miss M. H. Masengu, Mwenye & Mwitwa
Advocates

For the Respondent: N/A

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

1. Chilanga Cement PLC v. Kasote Singogo: (2009) Z.R. 22
2. Redrilza Limited v. Abuid Nkazi: (2011) Vol. 1 Z.R. 394
3. Zambia Electricity Supply Corporation Limited v. David Muyambango: (2006) Z.R. 22
4. Bwalya v. Attorney-General: SCZ Appeal No. 062/2012
5. Albert Mwanaumo & Others v. NFC Africa Mining PLC, Nelson Jilowa (2011) 1 Z.R. 30
6. National Breweries Limited v. Philip Mwenya: (2002) Z.R. 118
7. Zambia National Provident Fund v. Y. N. Chirwa: (1986) Z.R. 70

8. **Zambia Consolidated Copper Mines Limited (ZCCM) v. Zulu:** (1999) SCZ Judgment No. 9
9. **Emmanuel Mponda v. Mwansa C. Mulenga & 2 Others: Selected Judgment No. 42 of 2017**
10. **Credit Suisse Asset Management Ltd. v. Armstrong:** [1996] 1 C.R. 882; [1996] 1 RLR 450
11. **Chimanga Changa Limited v. Stephen Chipango Ngombe:** (2010) Z.R. Vol. 1, at 208
12. **Undi Phiri v. Bank of Zambia:** (2007) Z.R. 186

Other Works referred to:

1. *Black's Law Dictionary*, 8th edition
2. *Sprack, John, Employment Law and Practice*, 1st edition (2007: London: Sweet & Maxwell)
3. *Mwenda W. S., Employment Law in Zambia: Cases and Materials:* (2004) (UNZA Press, Lusaka)

1.0 INTRODUCTION

1.1 The appellant has approached us for the purpose of contesting a judgment of the former Industrial Relations Court (now reconstituted as a division of the High Court) dated 4th November, 2015 by which that court awarded the respondent 30 months' salary in damages or compensation following its determination that the respondent had been wrongfully dismissed and had suffered mental torture, distress and embarrassment consequent upon his said dismissal.

2.0 HISTORY AND BACKGROUND

- 2.1 The history and background facts to which this appeal is owed are neither complex nor complicated and can be recounted with ease.
- 2.2 The respondent had been an employee of the appellant in the position of Project Management Coordinator or Manager responsible for grants management between 13th December, 2010 and 16th April, 2012 when he finally exited from the organization following the dismissal of his appeal against his earlier dismissal.
- 2.3 The brief facts around which the respondent had incurred the sanction of dismissal were that he was accused by the appellant of having been abusing his position to intimidate female employees, making unwelcome amorous advances to such female employees or seeking their sexual favours and inviting them to his hotel rooms. The respondent was also accused of having been using his position in the appellant organization to terrorise his fellow employees on the pretext that he held the key to their job security.

2.4 Prior to his dismissal, the respondent was duly charged and subjected to a Disciplinary Committee hearing. The Disciplinary Committee unanimously determined that the charges of abuse of office and sexual harassment of female employees had been proved against the respondent while his appeal to the appellant's Country Director against the committee's determination was unsuccessful.

2.5 PRESENTATION OF COMPLAINT, ANSWER AND THEIR RESPECTIVE AFFIDAVIT EVIDENCE

The respondent subsequently presented a Notice of Complaint in the court below seeking the following relief:

2.5.1 An injunction restraining the Respondent from communicating with [his] current or future employers with regard to his previous employment.

2.5.2 A declaration that the termination of his employment was done in bad faith and thus constituted his constructive dismissal thereby rendering the dismissal unlawful, illegal and null and void on account of procedural impropriety or, in the alternative, a declaration that the termination of his

employment was done in bad faith and was, therefore, unlawful, illegal and null and void due to the fact that the Respondent did not give the Complainant the opportunity to question his accusers.

2.5.3 An Order of the Court for damages to compensate him for the unlawful termination of employment by way of constructive dismissal.

2.5.4 An Order for damages for the alleged wrong perception that he continued to suffer at his current place of work.

2.5.5 An Order of Court directing the appellant to pay damages for the manner in which his employment was terminated, the embarrassment he endured and the physical and mental distress that he allegedly suffered.

2.5.6 Interest.

2.5.7 Costs.

2.6 The respondent's Notice of Complaint was supported by an affidavit the gist of which was to the effect that:

2.6.1 He denied having sexually harassed any female employee, be it the appellant's or that of any of its associate organisations;

2.6.2 One of his accusers, Mary Chipso Tembo, had sought to be taken out for dinner but that he declined to extend the favour to her;

2.6.3 Mary Chipso Tembo had deliberately schemed to fix him following the revelation by him to an audit team that she (Mary Tembo) had made a false claim relating to the recovery by herself of a sum of K220.00 on account of a taxi fare when no such taxi fare was incurred by her in respect of the travel involved as the respondent had given her a lift and dropped her off at her sister's place;

2.6.4 By reason of the matters in 2.6.3, Mary Chipso Tembo could not legitimately recover the K220.00 purported taxi fare;

2.6.5 The appellant's employment policy did not prohibit its employees of the opposite sex from fraternizing with those of the other gender after working hours;

2.6.6 He was denied justice in that the Disciplinary Committee which heard his case comprised some members who had vested interests; and

2.6.7 That, the Disciplinary Committee hearing did not follow formal procedures in that he was not accorded the benefit or opportunity of cross-examining his accusers, namely Mary Chipu Tembo and Charlene Bangwe Chama.

3.0 For its part, the appellant filed an Answer which was supported by an affidavit. In its Answer, the appellant:

3.1 averred that the respondent was properly and regularly dismissed from employment after subjecting him to a proper disciplinary hearing;

3.2 denied that the termination of the respondent's employment was unfair or done in bad faith, or that he was constructively dismissed or that his dismissal was illegal or null and void; and

3.3 denied that the respondent was entitled to any of the reliefs he was seeking and invited the lower court to dismiss the complaint with costs.

- 4.0** In its supporting affidavit, it was deposed on behalf of the appellant as follows:
- 4.1 that the respondent's employment was subject to the condition that he was to obey the appellant's policies and rules which were contained in its Human Resources Policy Manual;
- 4.2 that on 28th February, 2012, the appellant received two separate complaints of sexual harassment from two female employees who were working for two of the appellant's partners whose names were Ms. Mary Chipso Tembo and Charlene Bangwe Chama of Livingstone and Ndola respectively.
- 4.3 Following the receipt of the said complaints in 4.2, the respondent was suspended from employment with pay in order to allow for the conduct of smooth investigations into the allegations in question.
- 4.4 Following the appellant's receipt of formal complaints against the respondent, the latter was availed with copies of the written complaints against him and invited to respond - in writing - to those allegations or complaints.

- 4.5 The investigations which were conducted established that the respondent had, indeed, committed the acts which had been the subject of the allegations earlier mentioned against him.
- 4.6 The respondent was subsequently charged and invited to respond to the charges against him after which a disciplinary hearing was conducted which established that the allegations against him had been proved.
- 4.7 The respondent subsequently launched an appeal to the appellant's Country Director who dismissed the appeal.
- 4.8 Following the dismissal of his appeal, the respondent was paid his salary up to 26th March, 2012 as well as his gratuity and pay in lieu of leave.
- 4.9 The appellant's affidavit also addressed the respondent's allegations as follows:
- 4.9.1 That, contrary to the respondent's assertion, the respondent did not object to the manner in which the disciplinary panel which heard his case had been constituted.

4.9.2 The appellant's Human Resource Manual obliged the appellant to accord the respondent a hearing while the respondent was at liberty to bring witnesses of his choice during the disciplinary hearing;

4.9.3 While the Manual in question did not prohibit the respondent from fraternizing with employees of the opposite sex, it expressly prohibits sexual harassment.

4.9.4 The appellant accordingly reiterated its position that the respondent had been properly dismissed after according him a full and fair hearing.

5.0 HEARING AND CONSIDERATION OF COMPLAINT BY TRIAL COURT

5.1 The lower court tried the matter in the usual way and reasoned that, from the evidence which it had received and the findings of fact which it made thereon, the central issues which fell for its determination were whether or not the respondent had been constructively or unlawfully dismissed.

5.2 With regard to whether or not the respondent had been constructively dismissed, the lower court took recourse to *Black's Law Dictionary*, 8th edition, which defines the expression '*constructive dismissal*' as -

“a termination of employment brought about by making the employee's working conditions so intolerable that the employee feels compelled to leave.”

5.3 The court below then went on to draw the following passage from our decision in **Chilanga Cement PLC v. Kasote Singogo**¹ where we said:

“An employee can claim to have been constructively dismissed if he resigned or was forced to leave employment as a result of his employer's unlawful conduct which ... amounts to fundamental breach of the contract of employment. It is the employee who makes the decision to leave.”

5.4 On the basis of the foregoing, the lower court concluded that the respondent was not constructively dismissed as he did not resign but was dismissed.

5.5 As regards the respondent's claim that he was unlawfully dismissed, the lower court opined that as the dismissal in question was attended by procedural impropriety in the sense that the two female employees at the centre of the sexual harassment allegations neither testified before the disciplinary committee nor did they avail sworn statements for the committee's use, the dismissal was unfair.

5.6 Having made the determination in 5.5, the lower court accordingly proceeded to award the respondent 24 months' pay by way of compensation for loss of employment and a further 6 months' pay by way of compensation for mental torture, distress and embarrassment.

6.0 THE APPEAL AND THE GROUNDS THEREOF

6.1 The appellant was dissatisfied with the judgment of the court below and mounted the present appeal which was inspired by three (03) grounds which were expressed in the memorandum of appeal as follows:

1. The Court below erred in law and in fact when it concluded and held, at page J10 of the judgment, that the Respondent's dismissal was unfair and wrongful as the Appellant followed the proper and/or fair procedure before dismissing the Respondent.
2. The Court below erred in law and in fact when it awarded the Respondent, at page J11 of the judgment, 24 months' salary as compensatory damages for loss of employment.
3. The Court below erred in law and in fact when it awarded the Respondent, at page J11 of the judgment, 6 months' salary as compensation for mental torture, distress and embarrassment."

7.0 HEARING OF THE APPEAL AND ARGUMENTS CANVASSED

- 7.1 At the hearing of the appeal, Miss Masengu, learned counsel for the appellant confirmed having filed Heads of Argument upon which the appellant entirely relied. Counsel also indicated that, with our leave, she would orally augment the first ground, albeit, very briefly.
- 7.2 Counsel's arguments in regard to the first ground of appeal revolved around the rather indiscriminate manner in which the lower court employed the expressions '*wrongful dismissal*', '*unfair dismissal*' and '*unlawful dismissal*' in its judgment.

7.3 Counsel further complained that, as a result of the trial court's failure to appreciate what the precise legal typology of the situation it was dealing with was, it ended up misapplying legal principles and even invoking legally inappropriate legal redress. To drive her point home, learned counsel quoted the following line from the judgment now being assailed which occurs at page 18 of the record:

"Accordingly, for the unlawful termination of employment, we award the complainant [now respondent] twenty-four (24) months' salary as compensatory damages for loss of employment (emphasis by counsel)."

7.4 Counsel for the appellant then went on to submit that, there is a clear and legally settled distinction between 'dismissal' from employment and 'termination' of employment. This distinction, counsel observed, was acknowledged by this court in **Redrilza Limited v. Abuid Nkazi**² where we said:

"Indeed, there is a difference between 'dismissal' and 'termination' and quite obviously the considerations required to be taken into account vary. Simply put, 'dismissal' involves loss of employment arising from disciplinary action, while 'termination' allows the

employer to terminate the contract of employment without invoking disciplinary action.”

- 7.5 Buoyed by our remarks in **Redrilza²**, counsel for the appellant noted that, as the terms ‘dismissal’ and ‘termination’ entail different things, they should not be used interchangeably as the lower court did.
- 7.6 The appellant’s counsel further argued that, because the trial court misapplied key employment terms in the judgment now being assailed, it was bound to and inevitably ended up arriving at a wrong conclusion. In this regard, counsel noted that the matter at hand involved a dismissal from employment as opposed to a termination of employment.
- 7.7 Turning to the disciplinary procedure which the appellant had employed in relation to the respondent, the appellant’s counsel argued that the appellant had strictly complied with the procedure which is outlined in its *Human Resource Manual*. In this regard, counsel confirmed that, prior to charging the respondent with the disciplinary offence in issue, he was invited to exculpate himself. He

was also invited to respond to the charges which had been preferred against him before subjecting him to a disciplinary hearing.

7.8 Following the disciplinary committee's determination that the respondent had committed the disciplinary offence in question, the respondent was informed of his right to appeal which he duly exercised.

7.9 Quoting an oft-quoted passage from our decision in **Zambia Electricity Supply Corporation Limited v. David Muyambango**³ the appellant's counsel noted that:

"The duty of the court is to examine if there was the necessary disciplinary power and if it was exercised properly."

7.10 The appellant's counsel also quoted our more recent decision in **Bwalya v. Attorney-General**⁴ where we said:

"We refuse to review minute details of the rule of procedure to ascertain whether or not they were followed to the letter. The duty of the court ... is to inquire from the evidence on record whether the disciplinary committee had the requisite disciplinary power to deal with him, and, if so, whether the said power was properly exercised."

7.11 In the context of the matter at hand, learned counsel for the appellant submitted that the evidence on record did demonstrate that the appellant had the necessary disciplinary power to deal with the respondent and that the power was properly exercised.

7.12 Turning to the lower court's criticism of the appellant's alleged failure to bring the respondent's accusers to the disciplinary hearing for the purpose of having them questioned by the respondent, counsel for the appellant submitted that the appellant's disciplinary procedure, as set out in its Human Resource Manual, did not provide for the summoning of accusers to a disciplinary hearing.

7.13 Adverting to the role of the court when confronted with matters involving the exercise of disciplinary power, counsel for the appellant cited another oft-quoted passage from our decisions in **Albert Mwanaumo & Others v. NFC Africa Mining PLC, Nelson Jilowa⁵** and **National Breweries Limited v. Philip Mwenya⁶** that:

"It is not the function of the court to interpose itself as an appellate tribunal within the domestic disciplinary procedures to review what others have done... The duty of the court is to examine if there was the necessary

disciplinary power, and if [that power] was exercised in due form.”

7.14 The appellant’s counsel concluded her arguments on the first ground of appeal by adopting another frequently cited passage from our decision in **Zambia National Provident Fund v. Y. N. Chirwa**⁷ where we said:

“... Where it is not disputed that an employee has committed an offence for which the appropriate punishment is dismissal, no injustice arises for failure to comply with the laid down procedure in the contract...”

7.15 Turning to the second ground of appeal, the appellant’s counsel opened her arguments around this ground by contending that it was a misdirection for the lower court to have awarded the respondent damages for ‘unlawful’ termination of employment when the same court had concluded that the respondent had been wrongfully dismissed.

7.16 Learned counsel also specifically criticized the trial court’s reliance upon our decision in **Zambia Consolidated Copper Mines Limited (ZCCM) v. Zulu**⁸ on the basis that, unlike in that decision, the respondent’s circumstances in

the matter at hand, did not involve a dismissal which had been adjudged null and void and in consequence of which a reinstatement could have been ordered and that, consequently, the issue of awarding compensatory damages beyond the normal measure of damages by reference to the notice period could not arise.

7.17 The appellant's counsel concluded her brief arguments around the second ground of appeal by contending that, in the context of the matter at hand, there was no basis, in principle, which could have justified the 24 months' salary award which the lower court pronounced in the respondent's favour.

7.18 With respect to the third and last ground of appeal, counsel for the appellant argued that there was no evidence in the court below to support the award of 6 months' salary in the way of compensation for mental torture, distress and embarrassment in favour of the respondent. To support the above contention, counsel cited our decision in **Chilanga Cement PLC v. Kasote**

Singogo¹ which the lower court relied upon but in which we said, at page 142:

“On the award of six months’ salary as compensation for embarrassment, physical and mental torture, we are mindful that, in a proper case, damages for loss of employment may be awarded for embarrassment and mental torture... We are of the view, however, that such an award for torture or mental distress should be granted in exceptional cases, and certainly, not in a case where more than the normal measure of common law damages have been awarded; the rationale being that the enhanced damages are meant to encompass the inconvenience and any distress suffered by the employee as a result of the loss of the job. In the circumstances of this case where the respondent admitted that he was already in employment, no exceptional circumstances could arise to justify an award of a further six months’ pay as damages...”

7.19 On the basis of the foregoing arguments, the appellant’s counsel urged us to allow the appeal with costs.

At the hearing, counsel briefly augmented the first ground of appeal by submitting that the appellant’s manual was specific as regards the manner in which disciplinary powers such as those which were exercised in relation to the respondent had to be exercised. She further posited

that no impropriety of any nature was committed by the appellant in relation to the respondent.

7.20 The respondent's counsel, for his part, opened his written arguments around the first ground of appeal by contending that, in spite of using the expressions '*wrongful dismissal*', '*unfair dismissal*' and '*unlawful termination*' of employment interchangeably, the lower court did not arrive at a wrong conclusion with respect to the loss, by the respondent, of his employment. In this regard, learned counsel cited our decision in **Redrilza Limited v. Abuild Nkazi and Others²**, where we criticized the lower court's use of the terms 'dismissal' and 'termination' interchangeably. Counsel went on to observe that the use of the terms in question interchangeably did not have any effect on the award of damages.

7.21 The respondent's counsel went on to contend that the appellant had embarked upon a scheme to solicit for information for the purpose of cooking up a case against the respondent.

7.22 The respondent's counsel also argued that the allegations of sexual harassment which the appellant had caused to be fabricated against him were an afterthought which arose after the respondent had raised the issue of the K220.00 refund which Mary Chipso Tembo had made in circumstances which we alluded to early on in this judgment.

7.23 Counsel for the respondent further argued that the respondent had suffered a denial of natural justice in the sense that his sexual harassment accusers were not availed during the disciplinary hearing for the purpose of having the veracity of their allegations tested through cross-examination.

7.24 With respect to the second and third grounds of appeal, the respondent's counsel supported the awards which the lower court pronounced in the respondent's favour. In sum, we were urged to uphold the judgment of the court below in its entirety.

8.0 CONSIDERATION OF ARGUMENTS ON APPEAL AND DECISION

8.1 We have considered the grounds of appeal and the arguments which counsel on either side placed before us in the context of the judgment now under attack and express our indebtedness to counsel for their helpful exertions.

8.2 At the outset, we do share in counsel for the appellant's legitimate remonstrations, under the first ground of appeal, over the trial court's rather indiscriminate or careless use of the expressions '*unlawful dismissal*', '*unfair dismissal*' and '*unlawful termination of employment*' in the following passages which occur in the judgment being assailed and which the appellant's counsel complained about:

*"However, on the claim that the complainant was unlawfully dismissed, this court holds that the complainant was rather unfairly dismissed in so far as there was procedural impropriety" (at P.J16 of the **Record**).*

...

“The dismissal was, therefore, unfair and hence wrongful in the sense that there was procedural impropriety as the disciplinary procedure had flaws...”

(at page 17 of the Record)

...

We, therefore, find that the procedure was legally flawed and the complainant was wrongfully dismissed.” (pages 17-18 of the Record)

...

“Accordingly, for the unlawful termination of employment, we award the complainant ... 24 months’ salary as compensatory damages for loss of employment...” (page 18 of the Record)

8.3 In the theory and practice of Employment/Labour/Industrial law, terms or expressions such as ‘dismissal’, ‘employment termination’, ‘unlawful dismissal’, ‘wrongful dismissal’, ‘unfair dismissal’ ‘unlawful termination’ of employment mean or connote different things, even though they all relate to the cessation of the employer-employee relationship.

8.4 In **Redrilza Limited**² we briefly commented that the lower court was not entitled to use the terms ‘dismissal’ and ‘termination’ interchangeably because they mean or

connote different things. We have also said in numerous cases that the mode of an employee's exit from employment will invariably determine what, if at all, relief they would be entitled to.

- 8.5 Sprack John, an employment law jurist, has stated in his book, *Employment Law and Practice*, 1st edition, at P.117 that:

"Wrongful dismissal ... essentially is a dismissal which is contrary to the contract and its roots lie in the common law. The remedy is usually limited to payment for the notice period... [In contrast] unfair dismissal is dismissal contrary to statute... Unfair dismissal is, therefore, usually a much more substantial right for the employee and the consequences for the employer of dismissing unfairly are usually much more serious than those which attend a wrongful dismissal."

- 8.6 The same learned author has written that:

"It follows from the distinction between unfair and wrongful dismissal that a dismissal may be:

- (a) Wrongful but not unfair;*
- (b) Unfair but not wrongful;*
- (c) Unfair and wrongful;*

(d) Lawful, in the sense that it is neither unfair nor wrongful” (at P.117).

8.7 Mwenda, W.S, (2004) has also written, in her book *Employment Law in Zambia: Cases and Materials*, that:

“Unlike wrongful dismissal, unfair dismissal is a creation of statute... Unlike wrongful dismissal, which looks at the form [of the dismissal] unfair dismissal looks at merits [or substance] of the dismissal and the form is only supportive of the whole merits [of] the dismissal... Under unfair dismissal, the courts will look at the reasons for the dismissal [for the purpose of determining] whether the dismissal was justified or not.”

8.8 We confirm that we deliberately ventured into the preceding discourse in order to remind trial courts, such as the court below, to avoid the careless or cavalier use of critical legal terms or expressions in judgments without regard to their proper meaning as borne out in the judgment under attack as this serves no positive purpose other than misleading stakeholders in such judgments.

8.9 As we said in **Emmanuel Mponda v. Mwansa C. Mulenga & 2 Others**⁹, at P.J52:

“Everything that appears in the final version of [the judgment] should be there because you intend it to be there. Nothing should have crept in by accident, or thoughtlessness; nothing should be left out by oversight. What you end up with should be exactly what you want. Every word [or expression] you have used should be there because you have chosen to use that [expression] as opposed to any other.”

8.10 Having regard to the foregoing observations, the trial court was, in the context of the matter at hand, duty-bound to resolve and definitively reveal its mind upon the legal nature of the respondent’s exit from the appellant.

8.11 Turning to the real business of the moment, we must immediately acknowledge that the trial court was spot on when it discounted the respondent’s claim that he had been constructively dismissed.

8.12 However, as regards its conclusion that procedural impropriety had characterized the manner in which the disciplinary machinery had been set in motion against the respondent, we are in full agreement with counsel for the appellant that there was no such procedural impropriety as the appellant’s disciplinary machinery was properly

invoked in relation to the respondent following the laying of the disciplinary charges in question against him.

8.13 For the avoidance of doubt, the trial court's conclusion that the appellant's disciplinary machinery had not been properly set in motion as the respondent had submitted, ostensibly because the respondent's accusers were not availed for the purpose of affording the respondent an opportunity to question them, ignored the crucial fact, as aptly contended by the appellant, that the respondent's employment was subject to the condition that he had submitted to the appellant's rules, policies etc. which included its disciplinary procedure. That procedure, needless to say, did not provide for the availing of the so-called accusers for the purpose which the respondent had suggested.

8.14 We must also stress that, having examined the record relating to this appeal in its entirety, we have been left in no doubt that the respondent had made sexual advances to the ladies identified in the record as Chipu Mary Tembo and Charlene Bangwe Chama. The record further revealed

that the respondent also made inappropriate sexual advances to Ludwina Mushanga and Chagota Mwanza Malambo who did not lay formal complaints against the respondent. However, in the case of Chagota Malambo, her husband did make a formal complaint to the appellant against the respondent over the latter's sexual overtures to his wife.

8.15 Selwyn, N.M., the author of the self-titled *Selwyn's Law of Employment*, 6th edition has stated that:

"The [disciplinary] rules which an employee is expected to observe can be found in either the disciplinary procedure itself or in the works or staff rules... The important thing is that they must be brought to the employee's attention, whether on an induction course or in a specially prepared handbook or other suitable method."

8.16 For the avoidance of doubt, the Court of Appeal in England affirmed in **Credit Suisse Asset Management Ltd. v. Armstrong**¹⁰ that a Staff Handbook can have contractual effect.

8.17 Clearly, the position of the appellant with regard to the respondent's contractual obligation to obey and submit to its prescriptions in the Human Resource Manual cannot be assailed.

8.18 According to *Selwyn's Law of Employment*, 6th edition:

"The employer is not obliged to conduct a full scale trial..." (at P.201)

8.19 We must pause here to confirm that we did adopt Selwyn's postulation in **Chimanga Changa Limited v. Stephen Chipango Ngombe**¹¹ when we said, at P.220:

"The appellant ... believed, from its investigations, that the respondent was responsible for the loss... [The] employer does not have to prove that an offence [was committed] or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision. The rationale behind this is clear: an employment relationship is anchored on trust and once such trust is eroded, the very foundation of the relationship weakens. In this case we are satisfied that the appellant carried out its investigations on the basis of which the respondent was dismissed. We do not find the dismissal wrongful."

8.20 Turning to the matter at hand, the evidence which was laid before the trial court clearly revealed that the appellant

undertook the necessary investigations around the allegations which had formally been raised against the respondent. Indeed, the respondent's inappropriate conduct even attracted the concern of Father Mark Kaingo of the Catholic Diocese of Chipata who identified Chipo Mary Tembo and Charlene Chama as having been victims of the respondent's unwelcome sexual overtures.

8.21 We must also pause here to observe that the respondent admitted both in his affidavit and oral testimony that he was fraternizing with female employees outside working hours because the appellant had no policy which prohibited this.

8.22 Quite apart from the point we have adverted to in the next paragraph, we have also no doubt that the appellant's disciplinary machinery was also properly set in motion against the respondent for the misconduct in question.

8.23 In any event, even if there had been shortcomings with the manner in which the disciplinary machinery was set in motion against the respondent, the principle which we first

espoused in **Chirwa**⁷ and which we subsequently restated in **Philip Mwenya**⁶, **David Muyambango**³ and **Undi Phiri v. Bank of Zambia**¹² does sit comfortably with the factual matrix which confronted the court below.

8.24 For the avoidance of doubt, the principle in question was expressed in the following words:

“Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal, but the employer dismisses him without following the procedure prior to the dismissal laid down in a contract of service, no injustice is done to the employee by such failure to follow the procedure and he has no claim on that ground either for wrongful dismissal or for a declaration that the dismissal was a nullity.” (at P.72)

8.25 In the result, the first ground of appeal must succeed.

8.26 As to the second and third grounds of appeal, we confirm that as the two grounds were anchored upon and flowed from the core ground whose success we have just

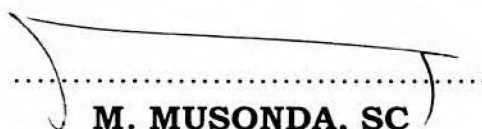
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announced, the two grounds do also succeed. In sum, the appeal succeeds on all the grounds.

8.27 With regard to the issue of costs, we have chosen to remain faithful to the general traditional reluctance of the trial court which was involved in this matter in favour of sparing employees from the usual cost consequences of failed litigation. Consequently, each party will bear its own costs.



I. C. MAMBILIMA
CHIEF JUSTICE



M. MUSONDA, SC
SUPREME COURT JUDGE



J. K. KABUKA
SUPREME COURT JUDGE