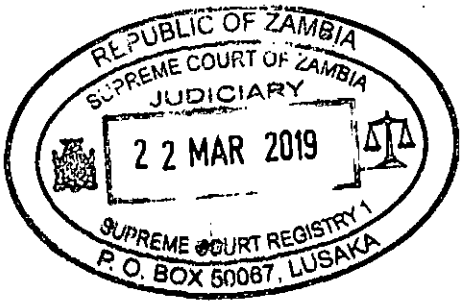
IN THE SUPREME COURT OF ZAMBIA **Appeal No.37/2016**
HOLDEN AT KABWE
(Civil Jurisdiction)



BETWEEN:

ABRAHAM NYIRENDA **APPELLANT**

AND

MULUNGUSHI VILLAGE COMPLEX LIMITED **RESPONDENT**

CORAM: **Hamaundu, Kajimanga and Kabuka, JJS**
On 6th November 2018 and 22nd March 2019

For the Appellant: Mr. J. C. Kalokoni, Messrs Kalokoni & Co.

For the Respondent: Mr. P. Chungu, Messrs Ranchhod, Chungu Advocates

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J U D G M E N T

Kajimanga, JS delivered the judgment of the court

Cases referred to:

1. **Nelly Nyoka v Zambia National Commercial Bank Plc, Appeal No. 28a/2004**
2. **Dobie v Burns International Security Services (UK) Ltd [1984] 3 ALL ER 333**
3. **Wilfred Weluzani Banda v Medical Council of Zambia and Another, Appeal No. 116/2012**
4. **King v University Court of the University of St Andrews [2002] S.L.T 439**
5. **Bank of Zambia v Joseph Kasonde (1995-1997) Z.R. 238**
6. **Hannam v Bradford Corporation [1970] 1WLR 937**
7. **Muleba Sule and Others v ZESCO Limited, Appeal No. 170/2002**

8. **John Paul Mwila Kasengele v Zambia National Commercial Bank Limited (2000) Z.R. 72**
9. **National Milling Company Limited v Grace Simaata (2000) Z.R. 91**
10. **Attorney General v Marcus Kampumba Achiume (1983) Z.R. 1**
11. **Martin Richard v BC Tel [2001] SCC 38**
12. **Johnson Mathney Metals Limited v Harding EAT/8/816/77**
13. **Caroline Daka v Zambia National Commercial Bank Limited Plc (2012) 3 Z.R. 8**
14. **Tobacco Sales Floors Limited v Chimwala (1987) Z.R. 210**
15. **DHL International (Private) Limited v Kevin Tinofireyi SCZ Judgment No. 80/2014**
16. **Johnson Mathney Metals Limited v Harding EAT/816/77**
17. **Wallace v United Grain Growers Limited (1997) 152 DLR (4th) 1**
18. **Pearce v Foster [1885] 15 QBD 114**
19. **Agholor v Cheeseborough Pond's (Zambia) Limited (1976) Z.R. 1**
20. **Contract Haulage Limited v Mumbuwa Kamayoyo (1982) Z.R. 13**
21. **Attorney General v Richard Jackson Phiri (1988 – 1989) Z.R. 121 (S.C.)**
22. **Zambia State Insurance Corporation v Alisand Singogo – Appeal No. 02/2006**
23. **Africa Supermarket Limited (T/A Shoprite Checkers) v Mhone – Appeal No. 162 of 2001**

Introduction

1. This appeal is against a judgment of the Industrial Relations Court which dismissed the appellant's claim for damages for wrongful dismissal and payment of various allowances.

2. In essence, the appeal calls for a discussion on whether the appellant's dismissal was in accordance with the disciplinary procedure.

Background to the dispute in this appeal

3. The appellant was employed by the respondent as an accountant in April 2000 and was later elevated to the position of general manager which he held until his dismissal in September 2009. Prior to his dismissal, the appellant was placed on forced leave. He was subsequently suspended and charged with the offences of dishonest conduct, fraud and gross negligence of duty resulting in the loss of company funds. The appellant exculpated himself and appeared before the disciplinary committee of the respondent's board of directors who later found him liable for the offences of dishonest conduct and negligence resulting in loss.

4. The appellant appealed against his dismissal and later appeared before the respondent's board but he abandoned the appeal after he expressed misgivings on the impartiality of the appeal committee that the same board had handled his disciplinary case hearing. The board then reinstated his dismissal. Aggrieved by this decision, the appellant commenced proceedings against the respondent before the Industrial Relations Court.

The appellant's claim and the respondent's answer in the court below

5. The appellant's claim was for:

   a) **Damages for wrongful dismissal;**
   b) **An order for the payment of all benefits payable under the applicable conditions of service and pension and, or an order that the complainant be put on early retirement with full benefits;**
   c) **Damages for breach of the rules of natural justice**
   d) **An order that the complainant is entitled to the purchase of the motor vehicle he uses on personal-to-holder basis as well as the furniture he uses at home;**
   e) **Damages for mental torture and anguish or any other relief the court may deem fit;**
   f) **Costs.**

6. The basis upon which the appellant made the claim was that his dismissal from employment was wrongful in that he did not commit any act of negligence resulting in financial loss to the respondent as alleged or at all. According to the appellant, the disciplinary committee found him wanting in respect of a refund he authorized to be made to the Ministry of Agriculture and Co-operatives ("the MAC") for a seminar held at the respondent's premises. However, the committee ignored his explanation that there was no loss occasioned to the respondent as the refund

was part of the money which the MAC had prepaid to the respondent and was requested for by the MAC's employee, one Humphrey Mulenga, who was in charge of the seminar, and no complaint had ever been made by the MAC regarding the refund that he authorised.

7. The appellant also contended that when he was sent on forced leave, the respondent substantively appointed a Mr. Kamanga as its general manager entailing that he had been dismissed even before being sent on suspension and before being charged with any offence by the respondent company.

8. He also alleged that the respondent had neglected to settle all accrued benefits payable to him under the applicable conditions of service. Further, that these conditions entitled him to purchase the motor vehicle he used on personal-to-holder basis but the respondent had requested him to handover the said vehicle to it.

9. The respondent denied the claim and contended that the appellant's dismissal was not wrongful as the disciplinary process was followed; none of the members of the disciplinary

committee who heard his case were board members; the disciplinary committee made findings with recommendations to the sub-committee of the board which in turn made recommendations to the chairperson who wrote to the appellant informing him of his dismissal; and both committees of the respondent's board were impartial and objective in the manner they handled the appellant's case.

10. The respondent also contended that it did not appoint a general manager when the appellant was sent on forced leave but merely appointed Mr. Kamanga to act in that position.

Evidence before the Industrial Relations Court

11. The appellant's evidence in the court below was that he was sent on forced leave pending investigations into allegations of abuse of office which had been levelled against him. The letter of forced leave was authored by the permanent secretary at the Ministry of Finance and National Planning ("the MFNP"), yet he never reported to him but to the respondent's board.

12. The investigations were done through an audit but the same was not properly conducted because as the person being

audited, he was not given an opportunity to make comments. Following the audit, he was charged in writing by the chairperson of the board, one Emmanuel Ngulube and was slapped with about 8 offences of which he exculpated himself in writing denying all the charges. He then appeared before a disciplinary committee set up by the administration and legal committee of the board and chaired by Mr. Silas Mumba, a board member.

13. Upon hearing his case, the disciplinary committee recommended summary dismissal and the appellant was accordingly dismissed. The letter of dismissal was authored by the board chairperson, Mr. Emmanuel Ngulube. The appellant appealed to the same board chairperson but later abandoned the appeal because he felt there would be a miscarriage of justice since the same chairperson who dismissed him would handle the appeal. The dismissal was then upheld.

14. The appellant stated that he was dismissed for monies paid by the MAC for workshops hosted by the respondent and that one Humphrey Mulenga, a senior accountant at the ministry, was

in charge of the workshops. According to the appellant, Mr. Mulenga wrote to his office requesting for refunds to enable them to complete their workshops. He then authorized the refunds because the client had paid cash and the refund was the balance. After authorizing the refund, the appellant forwarded the request to accounts for a reconciliation to ascertain if there was a balance. The accounts did accordingly and it was proved that there was a balance which was given to the MAC. Therefore, he could not have caused financial loss to the respondent because the monies belonged to the MAC. Further, that no figure was specified as to the loss he had caused.

15. The appellant's evidence also revealed that the respondent was owing him allowances that were unpaid in respect of furniture, maintenance, security and entertainment. He stated that furniture allowance had not been paid since April 2000, security allowance from December 2001 and entertainment allowance from February 2009. Further, that he was entitled to purchase his personal-to-holder motor vehicle as set out under clause 19 of his conditions of service and that clauses 101 - 103 provided

for the purchase of household furniture.

16. The respondent called seven witnesses. The evidence of RW1, the respondent's human resource manager was that the appellant was entitled to retention allowance which was embedded in the salary. He was also entitled to entertainment allowance if he was in a hotel to entertain guests. He, however, was not entitled to security allowance as it only applied to non-represented employees who were retrenched and that since he was residing in one of the respondent's villas where the respondent provided 24 hours' security he was not entitled to security allowance. Further, that the furniture allowance was not provided for in the conditions of service. As for the personal -to-holder vehicle, the appellant was entitled to purchase it upon meeting three conditions which he did not. The conditions were a minimum service of ten years, an employee should not be on a contract but permanent and pensionable and upon retirement at 55 years. According to RW1 the appellant had served 9 years at the time of his dismissal.

17. RW1 also stated that the appellant was reporting to the

permanent secretary of the MFNP because there was no board in place in 2008 and that he even obtained authority to travel from him during that period. He further stated that the appellant caused financial loss of K106 million (unrebased).

18. RW2 testified that he chaired the disciplinary committee that sat to hear the complainant's case in 2009. In the same year, he was appointed as a member of the respondent's staff and administration sub-committee though he was not a member of the board. The disciplinary committee comprised four members but only three sat and the said committee was appointed by Dr. Chulu who was the chairperson of the staff and administration sub-committee. The committee heard three cases over the same facts. Those charged were the appellant, the auditor and the accountant.

19. Although numerous charges were levelled against the appellant, the committee found him culpable on dishonest conduct because of the manner in which he had handled the refunds to the MAC. According to RW2, the appellant had breached the procedure for processing refunds in that huge sums were being

disbursed to the MAC's employee, Mr. Mulenga, in cash and although all requests for funds were made in writing, they were not on official headed paper which raised suspicion. The cash refunds involved the unrebased sums of K35 million, K38 million and K14 million. The committee, therefore, recommended dismissal since dishonest conduct was a dismissible offence under the ZIMCO conditions.

20. The appellant was also found answerable for negligence resulting in loss which was also a dismissible offence. The committee felt that he should have put systems in place to ensure funds ended at the MAC. A report was then made to the staff and administration legal committee who ratified the disciplinary committee's decision.

21. RW3, a board member of the respondent's board, testified that on 28th September 2009 he was invited to be part of an appeal meeting regarding the case of the appellant. At the appeal hearing, the appellant raised a number of preliminary issues including impropriety of the appeal since the same board had sat as a disciplinary committee. The committee assured him

that none of the board members were part of the disciplinary committee. However, the appellant opted to withdraw his appeal, thereby rendering his dismissal effective. He, however, admitted that the disciplinary committee was set up by the board and that the staff and administration committee received the report of the disciplinary committee recommending dismissal and it too recommended dismissal in its report to the chairperson. He also admitted that Mr. Ngulube, the permanent secretary, wrote both the charge and the dismissal letters though he did so as an interim chairperson of the board.

22. RW3's evidence also revealed that the respondent suffered loss as a result of the appellant's actions in that normally refunds were made after the close of the client's function but in this case refunds were made during the function and not at the client's request. He stated that the respondent wrote to the MAC asking if it had initiated and received refunds but the ministry responded in the negative. He, however, confirmed that the MAC never demanded for the respondent to pay its money which was paid to Mr. Mulenga.

23. The evidence of RW4, the respondent's food and beverage manager was that on a date she could not recall, she received a written query from the chief accountant on a request for the refund of K14 million (unrebased) to the MAC by its contact person, Mr. Mulenga. After checking the amount of money remaining and what the client had consumed, she discovered the balance was K8 million (unrebased) and the workshop was still running with 5 days to completion. She then informed the chief accountant that it was not possible to effect the refund after she ascertained how much was being consumed per day. She later learnt, however, that the client had been refunded K10 million (unrebased).

24. RW5, the respondent's accounts assistant testified that she sometimes acted as a cashier and she so acted on 5th December 2007. On that day, the chief accountant requested her to pay a refund in favour of the MAC but she noticed that the said refund was not on MAC headed paper though it was from Mr. Mulenga who worked there. The amount in question was K23 million (unrebased). She then raised the necessary document plus a cheque in the name of the MAC and followed the procedure of

the cheque being signed from the chief accountant, the auditor and finally the general manager. When she got to the general manager's office, she was instructed to issue cash and she cancelled the cheque in the MAC's name, issued one in her name and withdrew the cash. She was later instructed to take the cash to the general manager's office which she did.

25. On 11th January 2008, she acted again as cashier and had to cash a cheque of K35 million (unrebased) which was written in her name. Mr. Mulenga from the MAC subsequently collected the cash and signed to acknowledge receipt. She confirmed that the monies she refunded belonged to the respondent.

26. RW6, the respondent's former chief accountant testified that the MAC had a function which was hosted by the respondent for which it paid K600 million (unrebased) as an advance payment and he received instructions from the appellant that the money be banked at ZANACO bank and that it should not be withdrawn without his specific instructions. Sometime in December 2007, the MAC had a function which lasted for a few days. RW6 later received instructions from the appellant by

letter for a refund of K23 million (unrebased) and also to pay from the ZANACO account. He found this strange because he was the one to decide which account to pay from. He then instructed the cashier to pay and verbally told her to raise a cheque. When the cheque reached the appellant for signing, he phoned RW6 saying the payment was supposed to be in cash. Further, that he had opened the cheque and countersigned. RW6, however, told the appellant that it was unusual to pay amounts in cash to a third person. The cashier then took the cheque to RW6 and he countersigned for the alterations to open it.

27. About a year later, he received similar instructions purporting that the MAC was demanding for a refund of K35 million (unrebased). That the appellant even endorsed on the letter to say "CA pay cash as they need cash." RW6 then instructed the cashier accordingly and he opened the cheque in the name of the cashier. The cashier later approached RW6 and told him that she was getting afraid of what was happening.

28. A month later, he was again instructed by the appellant to pay

a cash refund to the MAC involving K14 million (unrebased) but before he issued instructions to the cashier, he discussed the issue with RW4 who informed him that the client had little, if anything, remaining in its account. RW6 informed the appellant about this but one or two days later, the appellant phoned and told him that it had been agreed with front office that the MAC should pay for each villa at K800,000.00 (unrebased) and not K1,200,000.00 (unrebased). Further, that front office had issued credit notes to reverse the K1,200,000.00 per day and new invoices had been issued at K800,000.00 per day and that consequently there was money now due to the client. He was then instructed to pay K10 million (unrebased) after he told the appellant that the client was still around. The K10 million cash refund was paid after going through the usual routine. He, however, admitted that throughout the time of refunds, the MAC's account was in credit. He also stated that the respondent lost funds as a result of the appellant's actions and the liability was there for it to refund but that no demand had been made yet.

29. RW7, a former employee of the MAC testified that he

remembered receiving a letter from the respondent requesting the MAC to confirm if it had asked for refunds and also if it had received the same. After checking the records, he wrote back stating that refunds had not been received. He, however, confirmed that Mr. Mulenga was an employee of the MAC who was dismissed as a result of the refunds in question.

Consideration of the matter by the lower court and decision

30. After considering the evidence and submissions of the parties, the learned trial court found that three issues fell for determination namely, whether the appellant's dismissal was wrongful on account of being placed on forced leave by the permanent secretary of the MFNP; whether the respondent breached the rules of natural justice in the manner it handled the appellant's case; and whether the appellant was entitled to purchase his personal-to-holder vehicle and other allowances such as those relating to entertainment and security.

31. The trial court found that the respondent followed procedure in disciplining the appellant. It based its finding on the fact that the appellant was charged, he exculpated himself and appeared

before a disciplinary hearing which found him culpable and he was dismissed for dishonest conduct and negligence resulting in loss.

32. The court observed that the appellant admitted to authorizing refunds to Mr. Mulenga in cash regardless of the amounts involved and that the same were done on unofficial letter heads, a thing which should have raised suspicion, but the appellant went ahead to authorize several refunds in that manner. On the facts and evidence before it, the trial court opined that the respondent was justified in its use of disciplinary power against the appellant as his actions were reckless and the court could not condone them.

33. It also found that the complainant's dismissal could not be said to be wrongful on account of involvement of the interim board chairperson and the board as he was charged with dismissible offences of which he was found guilty and was accordingly dismissed. Further, that the appellant was given an opportunity to be heard on the charges levelled against him and the disciplinary committee was impartial such that most of the

charges were dropped except for the two, for which he was dismissed. The trial court, therefore, concluded that the appellant, having admitted to authorizing payment to Mr. Mulenga in a suspicious manner and being the CEO, was properly dismissed even though RW6 was placed on early retirement.

34. Regarding the claim for purchase of the motor vehicle, the trial court found that under clause 19.1 of the appellant's conditions of service, the sale of personal-to-holder vehicles only applied to employees continuing in service thereby disqualifying the appellant who had been dismissed. Further, that the appellant was also disqualified by the fact that those eligible to purchase the vehicle should have completed a minimum of 10 years of continuous service in the ZIMCO group but the appellant had only served the respondent for 9 years.

35. As for the entertainment allowance, the trial court noted that it was provided for in the conditions of service under the heading of "Summary of Allowances Used to Compute Retrenchment Benefits to Non Represented Employees" at K10,000.00 per

month for the appellant's grade. The trial court reasoned that since the appellant lodged a claim for entertainment allowance but the respondent refused to pay and he then continued to work, he thereby consented to forfeiture of the allowance and that the same applied to all the allowances he was claiming.

36. The trial court, therefore, found that the appellant had failed to prove his case and the complaint was accordingly dismissed.

The grounds of appeal to this Court

37. Dissatisfied with the lower court's decision, the appellant now appeals to this Court on five grounds as follows:

1. **The learned trial judge misdirected herself in both law and fact in holding that the appellant was not wrongfully dismissed contrary to the overwhelming evidence on record which clearly point to wrongful dismissal.**
2. **The learned trial [judge] misdirected [herself] in holding that the respondent company did not breach the rules of natural justice because it was not in dispute that the appellant committed industrial offences for which the appropriate punishment is dismissal which is contrary to the evidence on record and the settled law.**
3. **The learned trial judge misdirected herself in law in failing to follow the principle of law that in the absence of special circumstances, similarly circumstanced employees must be**

treated the same thus coming up with a judgment which is a travesty of justice in totality.

4. **The trial court misdirected itself in law by failing to evaluate the evidence on record in a balanced way by just looking at the evidence adduced by the respondent company and their submission but failing or omitting to do the same with the evidence and submissions from the appellant that [was] placed before the lower court.**
5. **The learned trial judge erred in law in denying the appellant accrued benefits, namely, the unpaid allowances, holding that he consented to the forfeiture of them when he continued to work which is contrary to the evidence on record and the current position of the law.**

The arguments presented by the parties

38. Both parties filed written heads of argument. In support of grounds one and two, Mr. Kalokoni, the learned counsel for the appellant submitted that where an employee is dismissed after a disciplinary hearing, the role of the court is to determine whether the proper procedure was followed and whether the disciplinary body acted fairly and justly in arriving at its decision. He relied on the case of **Nelly Nyoka v Zambia National Commercial Bank Plc**.[1] In determining whether the disciplinary body acted fairly and justly in arriving at its decision, the court must consider the significance of the

injustice suffered by the employee in the manner that the employer conducted itself at the time of dismissal and the extent of that injustice. In support of this argument, he cited the case of **Dobie v Burns International Security Services UK Ltd.**[2]

39. It was his contention that the lower court misdirected itself at law by not taking into account the significance of the injustices suffered by the appellant in the manner that the respondent conducted itself. The first injustice he pointed out was that the appellant was sent on forced leave and investigated by the permanent secretary from the MFNP, a non-party to the contract of employment, who callously ignored the respondent's board of directors which was re-constituted in 2008. This, counsel argued, was contrary to his conditions of service because the appellant was reporting to the board and not the permanent secretary who suspended him. Further, that under the applicable conditions of service, the final authority in any ZIMCO subsidiary was the director general's office which position was not vested in the board of directors after dissolution of ZIMCO.

40. According to counsel, there was no provision in the appellant's conditions of service for the permanent secretary to suspend or send an employee of the respondent on forced leave. He referred us to the case of **Wilfred Weluzani Banda v Medical Council of Zambia and Attorney General**[3], where the appellant's contract of employment was held to have been unlawfully terminated by the minister of health, a non-party to the contract of employment.

41. He also submitted that the appellant was entitled to rely upon the implied duty of trust and confidence that the respondent would respect clauses 6.1 – 7.2 of the applicable ZIMCO disciplinary code, which provided that the investigations would be carried by the supervising authority which was the board of directors, but the same was breached with impunity. Additionally, the appellant was denied the opportunity to confront the audit team and clarify himself on their audit report. He relied on the case of **King v University Court of the University of St Andrews.**[4]

42. Counsel contended that the second injustice suffered by the

appellant was that the offences of dishonest conduct and causing financial loss to the company were not proved. Our attention was drawn to the case of **Bank of Zambia v Kasonde**[5] for the principle that dismissals based on misconduct must be on proven grounds as they carry a serious stigma for which one cannot easily get employment.

43. He therefore argued that the court below misdirected itself when it made the finding that the appellant, having admitted authorizing payment to Mr. Mulenga in a suspicious manner and being CEO, was properly dismissed. According to counsel, the lower court failed to consider the paramount question of whether the refunds to the MAC through Mr. Mulenga, its representative, were made with transparency. It was his submission that the evidence on record of all the respondent's directors was that all the refunds were made transparently. Further, that all the witnesses who testified on behalf of respondent in the court below stated that as at the date of dismissal, let alone the trial date, there was absolutely no financial loss that the appellant caused the respondent.

44. The other injustice highlighted by counsel as having been occasioned to the appellant was that he was denied the rules of natural justice during the investigatory proceedings set up by the permanent secretary and during the disciplinary hearing. It was argued, firstly, that the appellant was denied the chance to confront his accusers namely, the auditors from the MFNP who prepared the audit report which triggered the appellant's dismissal. That the extent of this injustice was that when the appellant clarified issues before the disciplinary committee, six out of the eight charges were dropped because the clarification was excellent. Thus, if he had made the clarification before the auditors from the ministry, all the charges could have been dropped.

45. As far as the disciplinary hearing was concerned, counsel submitted that the board of directors, which was the final appellate body under the ZIMCO conditions of service, charged the appellant, disciplined him and was the judge in its own cause in that it was involved in the entire process up to the appeal stage. He also contended that when the full board ratified the recommendation of the staff administration and

legal committee of the board, it became the decision of the full board thus making it impossible for the appellant to appeal to the same full board which dismissed him. Relying on the case of **Hannam v Bradford Corporation**,[6] he argued that upon the respondent's board instructing its sub-committee on staff administration and legal affairs to set up a disciplinary committee and this sub-committee made the decision to dismiss the appellant, the board did not cease to be an integral part of the body whose action was being impugned on appeal by the appellant. Further, that it made no difference that none of the members of the administration staff and legal committee personally attended the appeal hearing. According to counsel, the decision that was being impugned on appeal was the decision to dismiss the appellant which was made by the same board through its sub-committee chaired by a board member Dr. Chulu and attended by other three board members.

46. In arguing ground three, counsel submitted that the evidence on record showed that all the refunds to Mr. Humphrey Mulenga were in writing; that the chief accountant was the appellant's chief financial advisor; and that the chief

accountant was merely put on early retirement whereas the appellant was dismissed from employment. This, he contended, offends the law that similarly circumstanced individuals must be treated the same. The case of **Muleba Sule and Others v Zesco Limited**[7] was cited in support of this argument.

47. Counsel therefore prayed that this Court may also consider putting the appellant on early retirement as was done by the respondent to the chief accountant, taking into account the fact that the refunds to the MAC were done transparently, and therefore, there are no aggravating circumstances.

48. In support of grounds four and five, it was submitted that the appellant served under ZIMCO conditions of service and was entitled to several allowances including education, medical, social tour, water and electricity, accommodation, air time, purchase of motor vehicle and security allowance. According to counsel, some of these allowances were not paid to him since the year 2000 due to financial difficulties and that the lower court denied him these accrued benefits holding that he did not protest against the non-payment of them. He relied on the case

of **John Paul Mwila Kasengele v Zambia National Commercial Bank Limited**,[8] where it was held that inability to pay benefits has never been a defence to any legal claim and he argued that the alleged non-protesting is not supported by evidence on record.

49. Counsel also contended that the allowances constituted accrued benefits and that accrued rights cannot be taken away from an employee. That in the event that this court allows this appeal, he prayed that there may be an order for payment of all these allowances and the same to be merged into basic pay as per the **Kasengele**[8] case. He cited as authority the case of **National Milling Company Limited v Grace Simaata**,[9] where this Court held as follows:

> **"In this regard we accept that to a person leaving employment the arrangements for terminal benefits - such as pension, gratuity, redundancy pay and the like - are most important and any unfavourable unilateral alteration to the disadvantage of the affected worker and which was not previously agreed is justiciable and in this connection it is unnecessary to place a label of basic or non-basic on it, it is no wonder that in public service for example the constitution of the land itself saw fit in Article 124 to protect pension benefits of public workers which may not be altered to the disadvantage of an employee."**

50. Further, it was submitted that there was an unbalanced evaluation of the evidence on record in that the lower court made too much of an issue of the alleged suspicion in the manner the money was refunded to Humphrey Mulenga without considering that Mr. Mulenga was an officer of appropriate authority as chief accountant who was vested with actual authority to manage funds and to be in charge of the workshop; the money that was refunded to Mr. Mulenga was the property of the MAC not the respondent; all the requests were in writing; all refunds were transparently made in that they are all evidenced in writing; all these refunds were audited before being paid out; there is no evidence on record that Mr. Mulenga implicated the appellant in these refunds; there is no evidence on record that if the workshop overran the costs, they were not supposed to be refunded part of the money that was on the MAC account to cover these costs; and there is no evidence of money that the respondent organization lost in this case.

51. To buttress this argument, he cited the case of **Attorney General v Marcus Kampumba Achiume**[10] where it was held

that:

> **"An unbalanced evaluation of the evidence, where only the faults of one side but not of the other are considered, is a misdirection, which no trial court should reasonably make, and entitles the appeal court to interfere."**

52. In the appellant's further heads of argument, it was submitted that there are two approaches that courts adopt when dealing with dismissals that are based on alleged dishonest conduct of an employee, namely; a strict approach and a contextual approach. Reliance was made on the case of **Martin Richard Mckinley v BC Tel**[11].

53. According to counsel, under the strict approach, the court takes a stringent view without analyzing the nature and context of the alleged misconduct. Further, that dishonesty, in and of itself, provides just cause, irrespective of the factors and circumstances surrounding the conduct, the nature or the degree of such dishonesty, or whether it breached the essential conditions of the employment relationship. He, however, submitted that this approach is not supported by credible authorities and should not be adopted by this court.

54. The contextual approach on the other hand, counsel argued, was described as one where the court looks at all the circumstances involving the commission of the alleged offence. Counsel contended that this is an approach to adopt as it is supported by a plethora of authorities including **Jognson Mathney Metals Limited v Harding**,[12] **Caroline Daka v Zambia National Commercial Bank Limited Plc**,[13] **Tobacco Sales Floors Ltd v Chimwala**[14] and **DHL International (Private) Limited v Kevin Tinofireyi**[15].

55. It was his submission that the circumstances and surrounding facts which are matters of considerable importance in the present case were: firstly, there is overwhelming evidence on record proving that the alleged stolen money did not belong to the respondent but a third party, the MAC; secondly, the person who stole the money is known i.e. the chief accountant of the MAC by the name of Mr. Mulenga and he did not implicate the appellant; thirdly, all the refunds were in writing and went through the clearing system as admitted by the respondent's witnesses when cross-examined; fourthly, at the time the

respondent dismissed the appellant, there was no loss caused to the respondent; lastly, at that time, the chief accountant of the respondent was the chief financial advisor to the appellant and he was later put on early retirement but the appellant was dismissed. He relied on the case of **Johnson Mathney Metals Limited v Harding**.[16]

56. He accordingly prayed that this court allows the appeal with costs.

57. In the respondent's heads of arguments, Mr. Chungu, the learned counsel for the respondent submitted in response to grounds one and two that in arriving at the decision that the dismissal was wrongful, the court should take into account the two conditions that must be fulfilled for a successful action for wrongful dismissal at common law. First, the employer must have terminated the contract without notice or inadequate notice and secondly, the employer is not justified in doing so.

58. Counsel argued that adequate notice was given to the appellant and that the respondent was justified in terminating the appellant's contract of employment, the same way that an

innocent party would be entitled to terminate any other contract when the other has committed a fundamental breach which when translated in employment law means that an employer is entitled to dismiss the employee when he or she has committed an act of dishonest conduct and gross negligence.

59. He referred us to the learned author of **Employment Law in Zambia: Cases and Materials** for the principle that when considering whether a dismissal is wrongful or not, the form rather than the merits of the dismissal must be examined and that the question is not why but how the dismissal was effected.

60. It was his contention that the respondent had conformed to the proper procedure when dismissing the respondent. The cases of **Wallace v United Grain Growers Ltd**,[17] **Pearce v Foster**,[18]and **Agholor v Cheeseborough Pond's (Zambia) Limited**[19] were cited in support.

61. Counsel also submitted that there was no breach of the contract in the dismissal of the appellant; that the respondent is a parastatal organization and there was no particular procedure specified regarding how a person would be dismissed from

employment. The respondent, therefore, followed the statute in the steps to dismiss the appellant. Reliance was placed on the cases of **Contract Haulage Limited v Mumbuwa Kamayoyo**[20] and **Attorney General v Richard Jackson Phiri.**[21] He argued that the disciplinary committee was duly appointed by the staff legal and administration committee and that the power it possessed was properly exercised. Further, that this court is not being called to decide whether what the disciplinary committee decided was correct but whether the said disciplinary committee had the requisite power to carry out the function of the hearing and to make recommendations.

62. On the question of the appellant being sent on forced leave and investigated by a non-party to the contract, counsel contended that this issue was never raised in the trial court and it is, therefore, an afterthought on the part of the appellant. That notwithstanding, the record shows that the respondent stated that the reason the MFNP sent the appellant on forced leave was justified by the circumstances surrounding the respondent at the material time.

63. He drew our attention to the testimony of RW3 who stated that even though the board of directors was reconstituted in December 2008, it did not start operations until January 2009 and that the board only convened for the first time on 20th January 2009. Further, that the board had not met prior to the appellant being placed on forced leave and that the appellant did admit that during the course of his duty up to the time he was put on forced leave he did, for all intents and purposes, report to the permanent secretary in the MFNP. That the record showed several correspondences between the appellant and the permanent secretary in the said ministry in which the appellant was seeking permission to take trips on official duty and the permanent secretary responded to the same.

64. Counsel submitted, therefore, that the appellant was reporting to the permanent secretary in the MFNP as at the time; there was no board of directors at the respondent to whom he could have or ought to have been reporting; and that if indeed the board had been operational at the time, he would have been seeking for permission to take trips from the board and not the permanent secretary. Further, that the fact that the permanent

secretary in the MFNP put the appellant on forced leave does not make the dismissal of the appellant wrongful as the correct procedure of the company was followed.

65. He contrasted the present case from the case of **Zambia State Insurance Corporation v Alisand Singogo**[22] where the employee's employment was terminated by the MFNP and the employer did not take any further steps of conforming it with the contract of employment unlike the present case, where it was the respondent and not the said ministry which dismissed the appellant. It was argued that neither the charge sheet, the exculpation letter, the disciplinary hearing nor the appeal hearing were the subject of the approval of the MFNP and that at no point while the due process leading to the dismissal of the appellant was being carried out was there any intervention of the said ministry. That additionally, neither did the respondent seek the intervention or counsel of the MFNP during this process.

66. Counsel also contended that the argument by the appellant that his being put on forced leave was the beginning of the

proceedings leading to his dismissal is incorrect as the purpose of the leave was to facilitate investigations to ascertain whether or not there was substance in the allegation that the appellant had been abusing the authority of his office as general manager. That the act that essentially triggered the beginning of the dismissal process was the suspension of the appellant on 2nd June 2009 and therefore, there was no connection between the appellant's leave and the dismissal. To substantiate this point, counsel submitted that the appellant was never charged with the offence of abuse of authority of office and he was never dismissed for this offence.

67. As to the offences of dishonest conduct and causing financial loss to the respondent not being proved, it was argued that the appellant was the custodian of the respondent's funds in that the funds moved at his signature and he signed off the release of these funds without following the correct procedure and without double checking or checking the authenticity of the documents used to procure the funds.

68. We were referred to the evidence of the appellant who admitted

in cross-examination that he was aware that all correspondence from government institutions are written on headed paper but he still went ahead to pay monies purportedly to the MAC under letters written on plain paper without following the procedure. That regarding all the refunds made to the said ministry, the appellant stated that he did not verify before authorizing the movement of the money; he did not check with the MAC if Mr. Mulenga who signed these letters which were not on letterhead was authorized by the controlling officer of the ministry to collect these funds; and he made the refunds against the correct procedure to pay by cheque.

69. Counsel also referred us to the testimony of RW6 who stated that he had on several occasions informed the appellant that a refund cannot be made in cash as all refunds had to be made in cheque. However, the appellant continued to pay out refunds to Mr. Mulenga in cash.

70. According to Counsel, as chief executive officer and having worked for a period of 9 years, the appellant should have known the correct procedure to be followed in the procurement of goods

and services, in the making of payments to third parties as the sum of ZMK106 million was paid to Mr. Mulenga who was not the payee but the MAC. It was his contention that the appellant was both negligent and dishonest in the way he carried out his duties with respect to the payment of purported refunds to the MAC; in obtaining of a refund on forged Shoprite receipts and procuring of services for renovation of villas without following proper tender procedure.

71. He argued that the only reason advanced by the appellant at trial was that he did not know that he needed to follow certain procedure but he did not seek guidance and the evidence that the respondent lost money from the refunds to the MAC was not rebutted. That at the time the appellant was dismissed this money was not sitting in the account of the MAC and the appellant could not prove that the money had actually been received by the said ministry.

72. On the argument that the rules of natural justice were not followed, counsel submitted that the rules of natural justice were adhered to all the way in the process of dismissing the

appellant. He contended that the appellant was actively involved in the disciplinary process and at no time did the appellant mention or assert that the disciplinary process was biased until the appeal was determined.

73. He pointed out that RW2 who was the chairperson of the disciplinary hearing had testified that during the proceedings, the appellant mentioned that he was uncomfortable with the presence of Mr. Kambondo, the human resource manager. As such, Mr. Kambondo was asked to leave the meeting before it proceeded and the meeting went ahead. It was argued that there is no evidence on record that the appellant felt prejudiced during the disciplinary hearing and, therefore, he impliedly waived his right to impugn the proceedings and taint them. Thus, he has come belatedly to complain.

74. Counsel also referred us to the case of **Africa Supermarket Limited (Trading as Shoprite Checkers) v Mhone**[23] where it was held that the rules of natural justice do not have to be observed in an employer/employee relationship where it is not in dispute that an employee has committed an offence for which

the appropriate punishment is dismissal. That in such a case, even if the employer dismisses such an employee without following the procedure in the contract of service prior to dismissal, no injustice is done to that employee by such failure to follow the stipulated procedure.

75. In response to ground three, it was submitted that there is no justification that one in an office such as chief executive officer would be treated the same as the office of chief accountant in awarding punishment for wrong behaviour. As such, the decision in the **Muleba Sule v Zesco**[7] case ought to be distinguished. According to counsel, the question to be asked here is, in terms of responsibility, skill and liability, what is the level that is required from a chief executive officer and from a chief accountant? He argued that much more was required from the former as he is the custodian of the business of his master; his hands hold the pen that append the signature that moves the money; makes the impression as he is the face of the corporation and the duty placed upon him was greater than that of the chief accountant.

76. Further, that the liability that was suffered by the corporation as a result of the decision made by the chief executive officer was greater than the liability that the corporation suffers if any subordinate employee made a decision as no one checks the decision of the chief executive officer and yet the decision of the chief accountant is checked by the chief executive officer who in this case was the appellant, inevitably means that the appellant bears the chief accountant's liability in the first place, and most importantly his own liability. That it was, therefore, not practical that the respondent should have given the appellant and the chief accountant similar punishment as the appellant should have been more diligent to see that the monies of the respondent were safeguarded.

77. In response to grounds four and five, counsel submitted that the appellant is not entitled to purchase the motor vehicle he drove on personal-to-holder basis as clause 19. 1 of the conditions of service under which he served disqualified him from doing so. He contended that to be eligible to purchase the vehicle, an employee should have completed a continuous term of 10 years in employment. However, the appellant was not

continuing in employment and had only served the respondent for a period of 9 years thereby disqualifying him.

78. It was also argued that the appellant did not claim for educational, medical, social tour, water and electricity, accommodation and air time allowances in the court below and that it was incumbent upon him to prove that he was entitled to these allowances.

Decision of the Court

79. We have given careful consideration to the record of appeal, the judgment appealed against, the parties' heads of argument and the oral submissions of counsel. At the hearing of the appeal, both learned counsel augmented their written arguments which we need not repeat here as they did not materially depart from the written heads of arguments.

80. Grounds one and two were argued together. We will equally consider them together as they are interrelated. The first ground of appeal alleges a misdirection on the part of the trial court in holding that the appellant was not wrongfully dismissed and

further, that the respondent did not breach the rules of natural justice as it was not in dispute that the appellant committed offences for which the appropriate punishment was dismissal, contrary to the evidence on record. The gist of ground two is that the holding by the trial court that the respondent did not breach the rules of natural justice was contrary to the evidence on record and the law.

81. The appellant's counsel contended that the appellant suffered three injustices in the manner the respondent conducted itself in the disciplinary process, namely: that the appellant was sent on forced leave and investigated by the permanent secretary from the MFNP instead of the respondent's board; that the offences of dishonest conduct and negligence causing financial loss to the company were not proved; and that the appellant was denied natural justice during the investigatory proceedings and during the disciplinary hearing.

82. In sum, counsel for the respondent contended that the appellant was not wrongfully dismissed and that the rules of natural justice were properly followed by the respondent in the

process of dismissing the appellant.

83. The evidence before us is that at the time when the appellant was placed on forced leave, the respondent's board was already in place but it had not started conducting any meetings. We, therefore, agree with the appellant's position that he should have been put on forced leave by the respondent's board and not the permanent secretary of the MFNP.

84. Nevertheless, we do not see what prejudice was occasioned to the appellant as a result of this anomaly in that his forced leave was merely meant to pave way for investigations into the allegations that had been levelled against him and upon the conclusion of these investigations, he had the opportunity to exculpate himself after being charged and was later granted a right to be heard at the disciplinary hearing. This case can, therefore, be distinguished from the **Wilfred Weluzani Banda**[3] case cited by the appellant, where the non-party terminated the employee's contract of employment.

85. Having found that the appellant was afforded a right to be

heard, the argument that there was a breach of natural justice during the investigatory proceedings and during the disciplinary process, is flawed. The evidence on record is that following the disciplinary hearing, the appellant was dismissed and he appealed against the dismissal but later abandoned the appeal on grounds that the board chairperson who was to hear the appeal was involved in the disciplinary case. The evidence on record, however, indicates that although the board chairperson authored the appellant's charge and dismissal letters, he had no direct hand in the disciplinary hearing which was conducted by the disciplinary committee set up by the staff and administration legal committee of the board. Therefore, no injustice would have been occasioned to the appellant by having the appeal heard by the board chairperson.

86. The appellant also contended that the offences of dishonest conduct and negligence causing financial loss were not proved. It is trite law as stated by the learned author of **Employment Law in Zambia: Cases and Materials**, that it is the form rather than the merits of the dismissal which the court must consider when determining whether or not an employee was wrongfully

dismissed.

87. In this case, the appellant was dismissed for two offences – gross misconduct and gross negligence of duty resulting into loss of company funds. The two offences were in relation to monies the appellant authorized to be paid in cash to Mr. Humphrey Mulenga. According to the respondent's disciplinary and grievance procedure code, punishment for both offences was summary dismissal on first breach.

88. At pages J24 – J25 of the judgment, the trial court found as follows:

> **"In the case in casu, we have noted that the Complainant did admit to authorizing refunds in cash and on unofficial letter heads. It is our considered view that his actions were reckless and this Court cannot condone them. We are thus not persuaded by his counsel's submission that the Respondent did not suffer any loss and or that [since MAC] has not demanded the money from the Respondent then what he did was fine. RW6 testified that the Respondent still carries the liability and RW7 confirmed that [MAC] did not receive the funds that the Complainant recklessly refunded to Mr. Mulenga."**

89. The above excerpt clearly indicates that the trial court was satisfied that the two offences for which the appellant was

dismissed were proved. Although it may seem that the respondent did not suffer financial loss because the money refunded to Mr. Mulenga belonged to the MAC, there is sufficient evidence on record, and we cannot agree more with the trial Court, that the appellant was extremely reckless in the manner he facilitated the cash payments to Mr. Mulenga, which on many occasions was done against the advice of the chief accountant. We are appalled that the appellant, a chartered accountant by profession, could conduct himself in such a reckless manner.

90. In view of the observations we have made in the preceding paragraphs, we find that the trial court was on firm ground in holding that the appellant was not wrongfully dismissed and that the rules of natural justice were not breached in the process of dismissing the appellant.

91. Ground three attacks the trial court for failing to follow the principle of law that in the absence of special circumstances, similarly circumstanced employees must be treated the same. The appellant contended that he and RW6, the respondent's

former chief accountant, were similarly circumstanced employees and as such the appellant should not have been dismissed but put on early retirement as was done to RW6.

92. The respondent's position is that there can be no justification for a chief executive officer to be treated in the same way as a chief accountant in terms of punishment for wrong behaviour as much more is required from the former in terms of responsibility. Further, that the duty placed upon the former is greater than the latter's.

93. We agree with the respondent that the appellant's grievance in ground three was not raised in the court below. Coming to the merits of this ground, however, our view is that although the termination of RW6's employment by way of early retirement may have arisen from the refunds paid to Mr. Mulenga, as was the case with the appellant, a different standard applied to the appellant as he was the general manager of the respondent and had the final say on the authorization of the said refunds. Further, the evidence on record was that RW6 was simply acting on the instructions of the appellant to process the refunds and

that the appellant even disregarded RW6's advice against the payment of funds to Mr. Mulenga in cash. We also agree with counsel for the respondent that the **Muleba Sule**[7] case relied upon by the appellant is distinguishable from the facts of this case.

94. In the view that we take, there was no impropriety on the part of the trial court for not ordering that the appellant should be placed on early retirement as was the case with RW6. There is no merit in this ground and it is also dismissed.

95. Although grounds four and five were argued together by the parties, we will consider them separately because they are not interrelated. The argument in ground four is that the trial court failed to evaluate the evidence on record in a balanced way by only looking at the respondent's evidence and submissions but ignoring that of the appellant. According to the appellant, the lower court gave much weight to the alleged suspicion in the manner the money was refunded to Mr. Mulenga without considering that as chief accountant for the MAC, he had actual authority to manage funds, among others. Further, that all the

requests for refund were made in writing and there is no evidence of money which the respondent lost in this case. No arguments specific to this ground were advanced by the respondent.

96. We note that the appellant has not made allusion to the evidence adduced by the appellant which was not considered or evaluated by the trial court. On the contrary, we are of the considered view that the trial court properly evaluated the evidence deployed by both parties, leading to its conclusion that the appellant's dismissal was not wrongful. The evidence on record as found by the trial court, is as clear as crystal, that although the requests for refund from Mr. Mulenga were in writing, they were not on the MAC's headed paper; instead of refunds being paid by cheque, huge sums of money were paid to Mr. Mulenga in cash even against advice from the respondent's chief accountant. The appellant contends that Mr. Mulenga did not implicate the appellant in his theft of the money but there can be no doubt that the theft was clearly aided or facilitated by the appellant, and we dare say wittingly.

97. Placing reliance on the Canadian case of **Martin Richard Mckinley**[11], counsel for the appellant has urged us to adopt the contextual approach rather than the strict approach so that we can find in favour of the appellant. We have no hesitation in saying that that case may be good authority in Canada but it is not useful in our jurisdiction where we do not have a dearth of jurisprudence on how to deal with dismissal cases. We, therefore, refuse to be tempted into irresponsibly adopting an approach which rewards misconduct of employees. Consequently, we also find no merit in this ground.

98. Ground five asserts that the trial court erred in denying the appellant his accrued benefits in form of unpaid allowances by holding that he consented to their forfeiture when he continued to work, contrary to the evidence on record.

99. The appellant contended that he was entitled to several allowances under the Zimco conditions of service, including security allowance, which had not been paid to him since 2000 and that these allowances were accrued rights which could not be taken away from an employee. Further, that he was entitled

to purchase his personal-to-holder vehicle.

100. The position of the respondent is that the appellant failed to prove that he was entitled to the various allowances he was claiming. Further, that he was not eligible to purchase the personal-to-holder motor vehicle because he had not completed a continuous period of 10 years in employment.

101. We agree with the appellant's argument that accrued benefits cannot be taken away from an employee and that where an employee continues to work without payment of such accrued benefits, the same cannot constitute consent to their forfeiture.

102. Our perusal of the record, however, reveals that the allowances being claimed by the appellant were provided for in the Zimco conditions of service under the heading of "summary of allowances used to compute retrenchment benefits to non-represented employees". In this case, the appellant was not retrenched but was dismissed from employment. The allowances he is claiming are, therefore, not applicable to him.

103. As regards the personal-to-holder vehicle, we note from the

record that according to the respondent's conditions of service which applied to the appellant, an employee had to be in continuous employment for 10 years to be eligible to buy such vehicle. The undisputed evidence deployed before the lower court was that the appellant had only worked for 9 years prior to his dismissal. We can, therefore, not fault the lower court for holding that the appellant did not qualify to purchase the personal-to-holder vehicle as he was dismissed after serving the respondent for 9 years. On that score, this ground has no merit.

104. In the final analysis, we conclude that this appeal is doomed to fail and we accordingly dismiss it. Notwithstanding this conclusion and bearing in mind the court from which this appeal arose, we make no order for costs.

E. M. Hamaundu
SUPREME COURT JUDGE

C. Kajimanga
SUPREME COURT JUDGE

J. K. Kabuka
SUPREME COURT JUDGE