IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No.29/2016

BETWEEN:

THE SECRETARY GENERAL AND/OR THE ACTING SECRETARY GENERAL OF THE ZAMBIA RED CROSS SOCIETY **APPELLANT**

AND

CHARLES MUSHITU **RESPONDENT**

CORAM: Mambilima CJ, Kaoma and Kajimanga, JJS
On 2nd October 2018 and 28th May 2019

For the Appellant: Ms I. Suba of Messrs Suba, Tafeni & Associates

For the Respondent: Mr. J. A. Wright of Messrs Wright Chambers

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J U D G E M E N T

Kajimanga, JS delivered the judgment of the court

Cases referred to:

1. **Barclays Bank Zambia Limited v Mando Chola and Ignatius Mubanga (1997) Z.R. 212**
2. **Shilling Bob Zinka v Attorney General (1991) Z.R. 73**
3. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172**
4. **Nkhata and 4 Others v Attorney General (1966) Z.R. 124**
5. **Zambezi Ranching and Cropping Limited v Lloyd Chewe - Appeal No. 128/99**

6. Vas Sales Agencies Limited v Finsbury Investment Limited and 2 Others (1999) Z.R. 11
7. Undi Phiri v Bank of Zambia (2007) Z.R. 187
8. Priscilla Ngenda Simvula Kalisilira v Zambia National Commercial Bank Plc (2015) Z.R. 147
9. The People v Registrar of the Industrial Relations Court and Another (2007) Z.R. 44
10. Jones v Dunkel and Another [1959] 101 CLR 298
11. Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (Suing as a Firm) - SCZ/8/52/2014
12. Ram Auerbach v Alex Kafwata - Appeal No. 65/2000
13. Duncan Sichula and Another v Catherine Chewe (2000) Z.R. 56
14. Zambia Airways Corporation v Gershom Mubanga (1990-1992) Z.R. 149
15. Attorney General v Richard Jackson Phiri (1988-1989) Z.R. 121
16. Ridge v Baldwin (1963) ALL ER 71
17. Contract Haulage Limited v Mumbuwa Kamayoyo (1982) Z.R. 13
18. Zambia China Mulungushi Textiles (Joint Venture) v Gabriel Mwami (2004) Z.R. 244
19. Bank of Zambia v Joseph Kasonde (1997) Z.R. 238
20. Zambia Consolidated Copper Mines v James Matale (1995-1997) Z.R. 144
21. Josephat Lupemba v First Quantum Mining and Operations Limited - Appeal No. 120/2017
22. First Quantum Mining and Operations Limited v Obby Yendamoh - Appeal No. 206/2015
23. Dennis Chansa v Barclays Bank of Zambia Plc - SCZ/8/128/2011

Legislation and other works referred to:

1. Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia; section 85(5)
2. Halsbury's Laws of England, 4th Edition; paragraph 64
3. S.A. de Smith's Judicial Review of Administrative Action, 3rd Edition
4. W. S. Mwenda (2004). Employment Law in Zambia: Cases and Materials, Lusaka: UNZA Press

Introduction

1. This is an appeal against a judgment of the Industrial Relations

Court ("the IRC") dated 7th October 2015 which upheld the respondent's claims against the appellant.

2. The central issue in this appeal is whether two remedies should be awarded where a single compensatory event of loss of employment has been proved by two facts namely, wrongful dismissal and unfair dismissal.

Background to the dispute in this appeal

3. The facts giving rise to this appeal are that the respondent was employed by the appellant in 2001 as a public relations officer and later rose to the position of secretary general on 1st November 2004. As secretary general, he was initially engaged on a two-year contract which was then renewed for three years up to 2009 and thereafter, for a further three-year contract which was to end on 31st October 2012. On 28th January 2012, the respondent was placed on suspension pending the outcome of criminal proceedings against him following his arrest by the Drug Enforcement Commission (DEC). However, by a letter dated 21st March 2012, the respondent was summarily dismissed by the appellant for gross misconduct. The respondent subsequently commenced proceedings against the

appellant in the IRC to challenge his dismissal.

Pleadings before the IRC

4. In his notice of complaint dated 20th May 2012, the respondent claimed:

a) **Six months' salary for unfair dismissal;**
b) **Six months' salary for unlawful dismissal;**
c) **Salary and leave days accrued as at 31st March 2012 totalling K87,638.00;**
d) **[Payment] in lieu of notice being salary for six months;**
e) **Damages equivalent to 12 months' salary for [the] stigma attached to him due to false accusations in the letter of dismissal which was circulated to all Red Cross Society branches and donor community as well as the Zambia Daily Mail Newspaper;**
f) **Medical bill refunds in the sum of K1,755.00;**
g) **Education allowance for the year 2011 being K5,000.00;**
h) **Housing allowance for a period of six months being K60,000.00;**
i) **Gratuity being K85,061.00;**
j) **An order that the respondent should sell to him the personal-to-holder vehicle Nissan Patrol Registration No. ABG 4854;**
k) **Costs and interest.**

5. The respondent contended that his employment was unlawfully and unfairly terminated on false and unwarranted allegations of gross misconduct through a letter circulated to all society branches and donors for which he was given no opportunity to be heard. He also claimed that he was not paid salary arrears

and leave pay for the year 2011 and half pay from the time he was suspended in February 2012 until his dismissal. Further, that the appellant had continued to harass him over the return of the personal-to-holder vehicle he was using during his employment of which he had an exercisable option to purchase as per his contract and conditions of service.

6. For its part, the appellant contended that there existed sufficient grounds for gross misconduct warranting the respondent's dismissal. It denied that the respondent was entitled to any leave days as he had none outstanding at the time of his dismissal and further, that the respondent was not entitled to payment in lieu of notice as his separation with the appellant was disciplinary in nature.

7. The appellant denied that the respondent was entitled to damages for stigma as the circulation of his dismissal was intended to inform the appellant's stakeholders about the developments in the respondent's establishment. It also denied that the respondent was entitled to a refund of medical bills, education allowance, housing allowance and gratuity as the same were not payable on dismissal. According to the appellant,

the respondent was entitled to 30% of his basic pay as housing allowance, and the K10,000.00 he was claiming was far beyond what he was entitled to, and that the housing allowance paid to the respondent for the period of August 2011 to December 2011 was an overpayment.

8. As regards the claim to purchase the personal-to-holder motor vehicle Nissan Patrol Registration No. ABG 4854, the appellant's position was that it did not intend to sell the said motor vehicle, as the decision to sell was discretionary and it did not wish to exercise that discretion in respect of the respondent.

9. The appellant counterclaimed damages for negligence and/or breach of trust on the basis that the respondent had facilitated the sale of subdivision "A" of Stand No. 2837 Lusaka at a consideration of K4,700,000.00 against a valuation of K12,100,000.00.

Evidence before the IRC

10. The respondent's evidence was that when he signed his second contract as secretary general of the appellant in 2006, he was provided with conditions of service that governed his

employment with the appellant. When he signed his third contract on 5th September 2009, he carried over the same conditions as those in his previous contract. Some of the features of the conditions of service were that he was entitled to a basic salary of K12,000.00, housing allowance of 30% of his basic pay if not accommodated by the respondent, medical entitlement of 20% of the annual basic pay, gratuity payable on successful completion of contract at 25% of total basic pay, 42 days leave per annum and K2,500.00 education allowance per term.

11. It was his testimony that on 21st May 2012, he received a letter from the appellant dismissing him for gross misconduct, signed by the appellant's acting national president, Mr. Elias K. Mutale. The letter gave four reasons for his dismissal, namely:

    i. That towards the end of October 2011 and early November 2011, he instructed Mr. Sydney Chituta, the Finance and Administration Manager, to cause to be delivered to him motor vehicle Toyota Land Cruiser, registration no. ABJ 7612 together with the white book purporting that he wished to travel to Namibia but the motor vehicle ended

up in the hands of a lady, Ms. Lucy Bwalya formerly of Tasinta;

ii. That his emails of 31st January 2012 entitled 'Counsel to the National Governing Board' were inappropriate and constituted misconduct;

iii. That he moved from House No. 7 in Lagos Road, a rented house, to his personal house in Chalala on 19th February 2011 and that from the time he moved to his own house, he should have been drawing 30% of his monthly salary as housing allowance, and not the K10,000.00 he was drawing; and

iv. That he was entitled to one personal-to-holder vehicle but, without authority of the board, he kept and used at his residence a second motor vehicle, Registration No. ABG 1396.

12. The respondent testified that his reaction to the first allegation on which he was dismissed was that the delivery of the vehicle to Ms. Lucy Bwalya was never authorised by him and he never gave any authority to Mr. Chituta as alleged.

13. This was confirmed in a report dated 2nd April 2012 written by

the appellant's Finance and Administration Manager, Mr. Sydney Chituta, explaining the issue of the motor vehicle Registration No. ABJ 7612. That in that report, Mr. Chituta exonerated him by stating that from the inception the respondent was never involved in the dealings with that particular vehicle.

14. As regards the emails entitled 'Ingratitude', his evidence was that the same never contained any abusive language but mere statements of fact and if they were found to be abusive, the proper penalty as per clause 7.6 of the appellant's code of conduct would have been a written warning for the first breach and not dismissal.

15. On the issue of him moving from a rented house to his own house, the respondent testified that when he was appointed as secretary general of the respondent, one of his conditions was to be housed in a rented house by the respondent. Thus, he moved into a rented house at 17 Lagos Road, Rhodes Park, Lusaka in 2007 and when time came to shift to his own house, he wrote a memo to the national president on 8th August 2011 that he was vacating the respondent's house and requested

that he be paid housing allowance effective February 2011. He also requested that the arrears be calculated at the rate of his monthly rentals of K10,000. The national president authorised his requests by inscribing on the said memo and requesting the finance manager to process the payment. Consequently, this could not have been a reason to dismiss him as the payment was authorised by his superior.

16. As regards the use of motor vehicle Registration No. ABG 1396, the respondent stated that on 18th March 2005, he had sought the permission of the board to station a second vehicle at his residence to help attend to domestic chores and his request was granted by the national president on 20th March 2005 when he inscribed on the memo which he wrote to him.

17. It was the respondent's testimony that the appellant's code of conduct, specifically clause 8.0, gives clear guidelines on procedures to follow when disciplining an employee. The procedure was that one must first be charged with an offence under Form D1. He, however, was never charged and Form D1 was not given to him. Neither was he given Form D2 which he should have used to exculpate himself.

18. The respondent testified that prior to his dismissal, he was accused of having stolen some funds belonging to the appellant. He was subsequently arrested on 24th January 2012, and the respondent placed him on suspension. When Mr. Chiposwa stepped down as national president, he (Mr. Chiposwa) wrote a report to the appellant's incoming national governing board of the respondent where he confirmed that the appellant's board did not comply with the disciplinary procedure regarding his case.

19. The respondent stated that following receipt of his letter of dismissal, he wrote to the acting national president stating why he felt it was not justified. When he received no response, he appealed to the national council and his appeal was only heard on 25th May 2013, after the intervention of the court below. However, whilst the appeal process was going on, the respondent advertised his position in the national press on 22nd May 2013 indicating that the appeal hearing was a mere academic exercise. He nevertheless attended the appeal hearing.

20. The respondent's evidence also disclosed that prior to the

hearing, the board chairman, a Mr. Simasiku, gave him a letter containing additional charges to the ones he was dismissed for and he was told to exculpate himself during the hearing. He then responded to this letter in writing, protesting to the fresh charges as he had already been dismissed and the appeal he had lodged was in respect of the issues in his letter of dismissal. Following the hearing, the national president of the respondent wrote to him informing him of the appeals committee's decision to uphold his dismissal.

21. As regards the personal-to-holder vehicle, the respondent stated that his claim for the purchase was based on the fact that there was a precedent to sell personal-to-holder vehicles by the respondent, as he had been sold vehicles before in his previous contracts, namely:

a) Isuzu KB300 Registration No. ABA 132 sold to him at US$7,000 and payment deducted from his gratuity.

b) Toyota Land Cruiser Registration No. ABA 3426 sold to him at US$2,000 and payment deducted from his gratuity.

22. He testified that he was entitled to be sold his personal-to-

holder vehicle even though the board had discretion to sell the vehicle to him and that the court should order the respondent to exercise that discretion in his favour and rely on the precedent already set.

23. Kelvin Chiposwa (CW2), the former national president of the appellant, testified on behalf of the respondent. His evidence was that prior to his dismissal, the respondent was arrested by the DEC, and the appellant consequently put him on suspension. Being the immediate supervisor to the respondent, the board assigned him to negotiate a mutual separation with the respondent from the appellant. Before that could be implemented, a team from the International Federation of the Red Cross came and rejected the board's proposal for a mutual separation and insisted on having the respondent dismissed. The team also attached a condition that the appellant would not receive any financial assistance from the International Federation of the Red Cross if the respondent was not dismissed.

24. CW2 stated that he chaired the board meeting of 17th March 2012 where the grounds of dismissal for the respondent were

framed and even though he advised the board against it, he was out voted. He was later told to step down as board chairman as the team from the International Federation of the Red Cross claimed he was too close to the respondent, and he was replaced by a Mr. Elias Mutale. Although he stepped down as board chairman, he still remained as an ordinary member of the board. He testified that Mr. Mutale, the new acting chair, authored the letter of dismissal to the respondent which he objected to, as the procedure of charging the respondent and giving him chance to exculpate himself was not followed but he was ignored.

25. According to CW2, the allegation in the letter of dismissal that the respondent had given a vehicle to Ms. Lucy Bwalya without authority was baseless, as the said vehicle was in fact at that time being held by a financial institution where the respondent had borrowed money, and that he had told the board of directors' meeting that the allegation was malicious as the finance manager who could have given the board a clear picture on that particular vehicle was not interviewed.

26. On the payment of housing allowance of K10,000.00 to the

respondent, his evidence was that he had approved that request in his capacity as his immediate supervisor. Regarding the emails that the respondent had sent, the witness stated that he did not take them to be disrespectful to the board as they were merely stating the facts, and that using abusive language was not a dismissible offence in terms of the respondent's code of conduct.

27. It was his testimony that when the new board was appointed, he submitted a hand over report at an extra ordinary meeting held on 2nd April 2012 as outgoing national president, where he highlighted that the outgoing board did not follow procedures in dismissing the respondent as outlined in the code of conduct.

28. At the end of CW2's testimony, the matter was adjourned to 19th March 2015 for cross-examination. On 19th March 2015, trial did not take off as the respondent applied for an adjournment. The matter was adjourned to 4th May 2015. On 4th May 2015, the case was again adjourned without being heard, to 26th May 2015. On 26th May 2015, the appellant was not before court. The trial court then made an order to adjourn

the case to 7th August 2015, and a further order condemning the appellant in costs for that day's adjournment, to be paid on or before 7th August 2015, and that if the appellant failed to attend court on 7th August 2015, the court would proceed to render its judgment based on the respondent's witnesses' testimonies and affidavit evidence of both parties.

29. On 7th August 2015, the appellant was again not in attendance and based on the affidavit of service filed into court on 16th July 2015 by the respondent, the trial court was satisfied that the respondent was aware of that day's court hearing and decided that it would proceed as ordered earlier on 26th May 2015, to render its judgment.

Consideration of the matter by the trial court and decision

30. After considering the oral evidence of the respondent and his witness and the affidavit evidence of both parties, the trial court found that two issues fell for determination namely, whether the dismissal was unfair and wrongful and if so, what damages needed to be awarded and secondly, whether the appellant was entitled to purchase the personal-to-holder vehicle.

31. The court reasoned that for the claim of wrongful dismissal to

stand, a complainant must adduce evidence and prove that the provisions of the contract of employment or code of conduct were not adhered to by the respondent when it terminated the contract. In the trial court's view, when the appellant noticed some violations of its code of conduct, it was obliged to charge the respondent on Form D1 and he would have exculpated himself on Form D2. The respondent was not charged nor given a chance to exculpate himself prior to his dismissal in blatant violation of the appellant's disciplinary code of conduct. Thus, the respondent had been wrongfully dismissed as there was an abrupt end of his employment through dismissal and no disciplinary process was ever embarked on prior to his dismissal.

32. The trial court went on to state that the aspect of unfair dismissal referred to a situation when employment is terminated by means of unfair labour practices and relates to unfair procedures followed by employers in terminating the employment of an employee. The court opined that in order to determine whether there was a valid and fair reason for imposing a sanction on an employee, a fair procedure must be

followed by the employer prior to imposing a sanction on an employee, especially the sanction of dismissal. Further, that a fair procedure means that a fair and proper disciplinary enquiry must be held.

33. On the ground of dismissal relating to the respondent having given the appellant's vehicle to his acquaintance without authority, the trial court found that the dismissal was unfair as the appellant did not conduct proper investigations to establish the truth as regards the motor vehicle in question.

34. Regarding the respondent's use of abusive language in his emails to the appellant, the trial court found that under clause 7.6 of the appellant's code of conduct, the proper penalty for the offence was a written warning and not dismissal. That the dismissal was, therefore, unfair.

35. As to the issue of the respondent drawing a housing allowance of K10,000.00 per month instead of 30% of his basic pay, the findings of the lower court were that the appellant's board chairman had varied the respondent's conditions of service by payment of K10,000.00 as housing allowance instead of 30% and that if the appellant was not happy with the decision of its

distress owing to the fact that it had already awarded him more than the normal measure of common law damages for wrongful dismissal. The respondent was, however, awarded his claims for medical refund, education allowance, salary arrears, accrued leave days and housing allowance set out in his notice of complaint with interest.

39. On the personal-holder-vehicle, the trial court found that even though it was within the discretion of the appellant to offer the vehicle to the respondent, the appellant had set a precedent as regards the sale of such vehicles to the respondent. It was accordingly ordered that the said vehicle be offered for sale to the respondent after a valuation being conducted on its current condition by a recognized dealer in Nissan vehicles or by any other valuer agreed by the parties.

The grounds of appeal to this court

40. Dissatisfied with this decision, the appellant has now appealed to this court advancing seven grounds as follows:

    1. **The trial court misdirected itself in law and fact when [it] proceeded to render [a] judgment without permitting the appellant to cross-examine the respondent's witness and giving the appellant [an] opportunity to be heard without taking into**

consideration that it's a court of substantive justice;

2. **The trial court erred in law by refusing to hear the appellant's applications to arrest judgment and to set aside the order of 7th August 2015;**
3. **The trial court misdirected itself in law and fact by awarding the respondent claims which were not prayed for in his complaint;**
4. **The trial court misdirected itself both in law and fact when [it] found that the respondent's dismissal from the appellant's employ was both wrongful and unfair;**
5. **The trial court erred both in law [and fact] when it awarded the respondent damages for both wrongful [dismissal] and unfair dismissal;**
6. **The trial court erred both in law and fact when it ordered the appellant to sell the motor vehicle, namely, Nissan Patrol, Registration Number ABG 4854 when the appellant had discretionary powers;**
7. **The trial court erred in law in considering extraneous matters in awarding the respondent housing allowance of K10,000.00 instead of 30% of his salary.**

The arguments presented by the parties

41. Both parties filed written heads of argument. In support of ground one the learned counsel for the appellant, Ms Suba, submitted that the trial court gravely misdirected itself in law and fact when it made the order dated 7th August 2015 directing that it would proceed to pass judgment based on the affidavit evidence of the appellant. She referred us to section 85 (5) of the

Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia ("the Act") for the principle that the IRC was not bound by the rules of evidence in its proceedings and that its main object was to do substantial justice between the parties before it. She argued that in the present case, the appellant had been subjected to injustice in that he was not given an opportunity to cross-examine the respondent and that the appellant was not heard on its counterclaim, contrary to the rules of the court and natural justice. This was so inspite of the fact that on two of the previous three occasions when the respondent did not appear, there was no evidence that they were aware that their advocates on record did not attend court.

42. For the meaning of the IRC being one of substantial justice, she cited the case of **Barclays Bank Zambia Limited v Mando Chola and Ignatius Mubanga**[1] where it was held that:

> **"The general jurisdiction of the IRC and the expansive extent of it is manifest in section 85 under various subsections which cumulatively, confer a sufficient jurisdiction unrestrained by technicalities under which real justice can be dispensed."**

43. That the court in that case further guided that the mandate in subsection 5 which requires that substantial justice be done

does not in any way suggest that the IRC should fetter itself with any technicalities or rules.

44. Counsel contended that the trial court first became aware that the advocate on record had withdrawn from representation through a report given to the court by the appellant. At the following sitting held on 7th August 2015, there was no appearance on behalf of the appellant and at that point the record does not show any proof of service on either the appellant or its advocate. According to counsel, it was clear that the court proceeded while disregarding proof of service as there was no evidence on record to show that either the appellant or its advocates were aware of that day's proceedings.

45. It was her submission that the proceedings of that day were irregular in that regard and that the order dated 7th August 2015 was fundamentally flawed as it was contrary to the rules of the court, particularly section 85 (5) of the Act. Relying on the **Barclays Bank**[1] case cited above, she argued that the IRC ought not to be fettered with any technicalities or rules but must ensure that substantial justice is achieved between the parties and that in failing to determine the appellant's application to

set aside its order, the court not only misdirected itself in terms of section 85(5) but also acted against the rules of natural justice which require that both parties must be heard. She referred us to the learned authors of **Halsbury's Laws of England, 4th Edition** at paragraph 64 and **S.A. de Smith's Judicial Review of Administrative Action, 3rd Edition** who, in her contention, state that the principles of natural justice must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, except where their application is excluded.

46. She submitted that failure to observe the rules of natural justice in granting the appellant an opportunity to be heard on the substantive issues raised in its counterclaim effectively renders the entire decision of the trial court void. The case of **Shilling Bob Zinka v Attorney General**[2] was cited in support of this argument.

47. Counsel, therefore, contended that the proceedings in the trial court were fundamentally flawed as the lower court failed to adhere to the provisions of section 85(5) of the Act and that despite the court ordering that it would pass judgment based

on the affidavit evidence of the appellant, at no point in its judgment does the court refer to the appellant's evidence on record, thereby gravely prejudicing the appellant's defence and counterclaim.

48. Our attention was also drawn to the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[3] where we held that the trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined with finality; and that the appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts.

49. We were further referred to the case of **Nkhata and 4 Others v Attorney General**[4] on the same principles. Counsel submitted that the entire findings of the court below were arrived at without consideration of the appellant's evidence. Although there was a reference made in passing to the fact that an answer and counterclaim supported by an affidavit had been filed into court, counsel contended, the respondent's evidence was not

considered in the judgment as per the order dated 7th August 2015. She further argued that the court below glossed over very important legal issues that should have been considered, namely, the respondent's misconduct and other issues raised in the appellant's answer and counterclaim and placed reliance on the case of **Zambezi Ranching and Cropping Limited v Lloyd Chewe**[5].

50. She accordingly submitted that the procedural flaws in the present case should not be used to defeat the substantive reasons contained in the appellant's defence and counterclaim.

51. In arguing ground two, counsel submitted that the trial court grossly misdirected itself by refusing to hear the appellant's application to arrest the judgment and set aside the order dated 7th August 2015. Upon receipt of this order, counsel contended, the appellant made an application in terms of order 85(5) of the Act seeking to arrest the judgment and to set aside the order dated 7th August 2015. She argued that in spite of an affidavit having been filed showing sufficient cause, the court ordered that it would proceed to render its judgment. It was her contention that the trial court's decision to wholesomely reject

the appellant's application to set aside the order was against settled law and procedure. For the procedure to be adopted in the event that the court is inclined to refuse an ex-parte application, she cited the case of **Vas Sales Agencies Limited v Finsbury Investment Limited and 2 Others**[6] where it was held that:

> **"We have said before and wish to reiterate here that in any ex-parte application, if the court is inclined to refuse the application then the proper procedure to adopt is to order that the application do stand as inter partes summons and hear both sides instead of hearing the applicant only and then embark on a lengthy ruling which is not on the merits to justify the refusal."**

52. It was counsel's submission that the trial court did not hear the application either inter partes or ex-partes and did not pass a ruling on the application but merely discarded it in its entirety. Relying on the above cited case, she contended that the actions of the court below were flawed and highly prejudicial to the appellant as it proceeded to pass judgment in the matter based on the evidence of the respondent only who was not cross-examined by the appellant.

53. In support of ground three, it was submitted that in order for a

party to be entitled to relief, such relief must be specifically pleaded. She relied on the case of **Undi Phiri v Bank of Zambia**[7] where it was stated as follows:

> **"It is trite that a matter that a party wished to rely upon in proving or resisting a claim must be pleaded."**

54. She, therefore, contended that the trial court misdirected itself in law when it granted the appellant reliefs that were neither pleaded nor canvassed during trial.

55. Grounds four and five were argued together. It was counsel's submission under these grounds that the trial court grossly misdirected itself in finding that the respondent was both wrongfully and unfairly dismissed by the appellant. She argued that the trial court failed to appreciate the law in relation to wrongful and unfair dismissal by awarding the respondent damages for both as this was a duplicity. She pointed out that in addition to the two awards, the respondent had also been awarded damages of six months salary in lieu of notice entailing that the respondent had been paid three times the amount of compensation that he should have received.

56. It was her contention that the trial court fell into grave error

the date of judgment and the appellant was condemned in costs for non-appearance on 26th May 2015 and 7th August 2015 sittings. Further, that the court in its order dated 7th August 2015 directed as follows:

> **"Should the respondent make any application before Court before judgment day, the application will not be considered unless the costs as ordered under paragraph 3 herein are paid."**

61. This, counsel argued, was an order of the court which the appellant was obliged to obey and if the appellant wanted to exercise its right to have the order set aside, it should have first done what the court ordered, that is, to pay costs first before filing the application to set aside the order. The order, however, was disregarded wantonly by the appellant despite counsel for the respondent having written letters reminding the appellant to pay costs. Thus, the court below was on firm ground in refusing to accept and hear the appellant's application to set aside the order and to arrest the judgment of 7th October 2015.

62. Counsel drew our attention to the provisions of Rule 55 of the Industrial Relations Court Rules which provides as follows:

> **"Nothing in these Rules shall be deemed to limit or otherwise**

affect the power of the Court to make such Order as may be necessary for the ends of justice or to prevent the abuse of the process of the Court."

63. Counsel submitted that in terms of the above rule, the court below is empowered to prevent any abuse of the court process by parties before it. That the conduct of the appellant in the court below in disregarding a valid court order to pay costs and sneaking in an application to set aside the same order was a clear abuse of the court process which Rule 55 seeks to address and counsel relied on the case of **The People v Registrar of the Industrial Relations Court**[9].

64. He contended that the court below did not shut its doors to prevent the appellant from being heard and cross-examine witnesses. The appellant was fully aware of the date of hearing set for 26th May 2015 but chose not to attend court. Exercising its maximum leniency, the court set another date of hearing, being 7th August 2015 and a notice of hearing dated 26th May 2015 was issued to this effect. This notice of hearing, counsel contended, was served on the appellant on 15th June 2015 and service was acknowledged. In fulfillment of the rules relating to service of court process, an affidavit of service was sworn by

counsel for the respondent and filed in the court below on 16th July 2015 to confirm that the appellant had been served with the said notice and was aware of the date.

65. Counsel submitted that further proof of service on the appellant is captured in the record of proceedings in the court below where on 7th August 2015, the trial court stated that:

> **"The respondent is not before Court today and we have noticed that there is an affidavit of service filed by the Complainant dated 16th July [2015] indicating that the respondent was aware of today's hearing."**

66. He, therefore, argued that the appellant cannot claim that it was not aware of the hearing date on 7th August 2015 when proof of service is on record. According to counsel, at page J19 of the judgment of the court below, the trial court laboured to give events that led to the passing of the judgment on 7th October 2015 and the same confirmed that there was proof of service by way of an affidavit of service dated 16th July 2015.

67. Counsel submitted that parties before courts of law have no luxury to dictate when matters should be heard as this is the preserve of the court. When the appellant was served with the

notice of hearing it had no choice but to attend court. If it sought to have the matter adjourned, it should have filed a notice to adjourn for the court's consideration. However, the appellant simply chose to stay away.

68. It is not true, counsel contended, that the trial court became aware of the withdrawal of the appellant's advocates through a report by the respondent on 26th May 2015 during the hearing as there is on record a notice of withdrawal of advocates filed in the court below on 20th May 2015 by Messrs Besa Legal Practitioners. That when the matter came up on 26th May 2015, the court took note of this notice and asked the respondent if he was aware of this development. He further submitted that the appellant is deliberately misleading this court to justify its arguments when it submits that the appellant's advocates withdrew their services on 8th June 2015 when the record clearly shows that the withdrawal was on 20th May 2015.

69. It was submitted that contrary to the assertion by the appellant that the court below did not give it an opportunity to be heard, cross-examine witnesses and prosecute its counterclaim, the appellant sat on its rights to be heard by deliberately failing to

attend court and disregarding court orders. There is nothing on record, counsel argued, to show that the trial court just ignored to hear the appellant.

70. Relying on the case of **Jones v Dunkel and Another,**[10] Mr. Wright submitted that when a litigant fails to adduce evidence about a fact in issue, for example by not attending court or calling witnesses, he runs the risk of his opponent's version being believed. That contrary to the appellant's submissions that it was not given an opportunity to cross-examine the respondent's witnesses, the appellant's then advocates Messrs Besa Legal Practitioners, without any hindrance, extensively cross-examined the respondent. According to counsel, it was therefore, highly misleading for the appellant to submit that they were not given an opportunity to cross-examine witnesses when the record shows the contrary.

71. Counsel pointed out that CW2 gave his evidence on 25th February 2015 and remained on the stand ready to be cross-examined by the appellant's advocates on 25th February 2015, 26th May 2015 and 7th August 2015 but the appellant never attended court. Thus, he wondered how the appellant could cry

foul and claim that they were denied an opportunity to cross-examine witnesses.

72. Regarding the **Barclays Bank of Zambia**[1] case (supra) relied upon by the appellant, counsel contended that contrary to the interpretation and understanding by the appellant, what this court meant in that case was that in so far as the IRC was a court of substantial justice, it should not be prevented, hampered, hindered, or constrained to exercise its powers because of technicalities or rules. This court, counsel argued, did not in any way suggest that because the IRC is a court of substantial justice, it should allow parties before it to conduct themselves in any manner whatsoever while hiding under the guise of substantial justice.

73. It was submitted further, that section 85 (5) of the Act does not in any way suggest that the court shall not be bound by its own rules. This section, counsel contended, was not enacted to promote arrogance and disobedience by the parties before the IRC nor was it meant to encourage the parties to dare the court and disregard its orders.

74. Counsel, therefore, submitted that it was inappropriate for the

appellant to justify its disobedience of court orders by hiding under this section. That in any case, rule 55 of the IRC Rules does not ***"... limit or otherwise affect the power of the Court to make such order as may be necessary for the ends of justice or to prevent the abuse of the process of the Court."***

75. Citing the cases of **Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (Suing as a Firm)**[11] and **Ram Auerbach v Alex Kafwata,**[12] counsel argued that it was highly misleading for the appellant to suggest that the IRC, in its course of dispensing substantial justice, should not invoke its own rules when necessary, but allow parties before it to abuse it and disregard its authority.

76. It was counsel's final submission on this ground, that contrary to the arguments by the appellant that the trial court did not consider its affidavit evidence when passing judgment, the court in fact considered all pieces of evidence both from the appellant and the respondent, only that the appellant's defence mostly contained irrelevant points and documents which did not address the four allegations that were contained in the respondent's dismissal letter.

77. In response to ground two, counsel submitted that the trial court did not err in law and fact by refusing to hear the appellant's application to arrest judgment and set aside the order dated 7th August 2015. He referred us to the proceedings in the court below where the learned trial judge stated as follows:

> **"We further order that the respondent bear today's costs as well. Should the respondent make any application before delivery of judgment in this cause, they should only do so after payment of the costs ordered on 26th May 2015 and today's costs."**

78. It was his contention that the court below did not state that it would never hear the appellant's application. On the contrary, the court below was open to accepting and hearing any application by the appellant on condition that costs had to be paid first as ordered. However, the costs were not paid in total disregard of the court order despite reminders by the respondent's counsel.

79. He submitted that this was not the first time the appellant was disregarding a court order in this matter. According to counsel, the appellant had on a number of occasions disregarded the orders of the court below and, therefore, it was not strange to

the court when its order of 7th August 2015 was also disregarded. He argued that on 7th April 2014, the court below ordered the parties to file a statement of agreed facts by 2nd May 2014 but the appellant disregarded the order. Further, that on 8th May 2014, the appellant was not before the lower court and the court ordered the parties to once again file a statement of agreed facts within seven days from that date and that the appellant pays costs for non-appearance on that day before the next hearing on 17th September 2014 which orders were ignored by the appellant.

80. Counsel contended that the foregoing showed that the appellant had no regard for court orders and the court below was pushed too far and could not entertain any further disobedience of its orders by the appellant, hence it invoked rule 55 of the IRC Rules to prevent further abuse of court process by the appellant. Consequently, counsel argued, the appellant cannot claim to have been prejudiced by the conduct of the court below.

81. The respondent's arguments in response to ground three were that the appellant has failed to show the awards that the court below granted the respondent which he did not pray for. He

argued that all the reliefs which were awarded were duly pleaded and/or prayed for in the respondent's complaint in the court below. If anything, counsel argued, it was the respondent who was not granted or awarded some of the reliefs which he pleaded namely, the claim for payment in lieu of notice; further damages for the stigma attached to the respondent due to false accusations in the letter of dismissal circulated to all Red Cross Society branches and the donor community; and the claim for gratuity.

82. It was contended that this ground of appeal lacks merit and should not be entertained by this court. Reliance was placed on the case of **Duncan Sichula and Another v Catherine Chewe**[13] where it was held that:

> **"An appellate court should not interfere with an award unless it was clearly wrong in some way, such as because a wrong principle has been used or the facts were misapprehended or because it is so inordinately high or so low that it is plainly a wrong estimate of the damages to which a claimant was entitled."**

83. Counsel, therefore, argued that the appellant has not demonstrated to this court that there was an award which was clearly wrong in some way for this court to interfere as required

in the **Duncan Sichula**[13] case cited above and as such, this ground should be dismissed.

84. In response to grounds four and five, it was submitted that the trial court did not err or misdirect itself either in law or in fact when it found that the respondent's dismissal was both wrongful and unfair and awarded the respondent damages for the same. According to counsel, a dismissal is said to be wrongful if the disciplinary procedure has not been complied with as was the case in **Zambia Airways Corporation v Gershom Mubanga**[14] where a purported dismissal was found by this court to have been wrongful due to non-compliance with the correct disciplinary procedure.

85. He contended that the respondent in the court below prayed for damages for both wrongful dismissal and unfair dismissal. That it was wrongful in the sense that the appellant did not follow its own procedure in the code of conduct when dismissing the respondent. He cited the case of **Attorney General v Richard Jackson Phiri**[15] where this court held that:

> **"The major ground of appeal was that the trial commissioner had erred when he found that the discharge was wrongful. It was pointed out that, in accordance with the procedures laid down,**

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

86. Counsel argued that in addition to citing false allegations to justify the dismissal, the appellant flouted its own code of conduct by failing to strictly follow the laid down procedure on investigation and disciplining of its staff. He pointed out that the respondent was never charged with any offence; was never availed an opportunity to be heard; and despite him appealing, the appellant ignored the appeal and only heard the appeal when the court below ordered it to hear the appeal which was also full of flaws. He, therefore, submitted that the failure by the appellant to adhere to the laid down disciplinary procedure when dismissing the respondent amounted to wrongful dismissal. To

support this argument, he referred us to the cases of **Ridge v Baldwin**[16] and **Contract Haulage Limited v Mumbuwa Kamayoyo;**[17] and to section 26A of the Employment Act, Chapter 268 of the Laws of Zambia.

87. On the aspect of unfair dismissal, counsel drew our attention to the case of **Zambia China Mulungushi Textiles (Joint Venture) Limited v Gabriel Mwami**[18] where this court held that:

> **"Demotion, just like a termination of employment is an adverse action against an employee. If reasons for a demotion turn out to be false or cannot be sustained, it follows that such termination or demotion is unfair and/or wrongful. Tenets of good decision-making import fairness in the way decisions are arrived at."**

88. He submitted that the trial court found the dismissal to be unfair because all the four allegations in the letter of dismissal were not proved and that the real reason for the respondent's dismissal was not what was in the dismissal letter but that the appellant's financial donor, the International Federation of the Red Cross, demanded the dismissal of the respondent as a condition for the appellant to continue receiving donor funding. He further referred us to the **Barclays Bank Zambia**[1] case (supra) for the principle that the IRC is not precluded from delving behind or

into reasons given for termination in order to redress any real injustice discovered.

89. Counsel contended that in the appellant's answer and supporting affidavit in the court below, none of the four allegations contained in the dismissal letter were proved and the trial court correctly found that the allegation of gross misconduct for which the respondent was dismissed, was false. He relied on the case of **Bank of Zambia v Joseph Kasonde**[19] where we held that:

> **"Dismissals based on misconduct must be on proven grounds...and we may add a further factor and that is that the plaintiff has been dismissed for dishonest conduct. This is a very serious stigma with which the plaintiff cannot easily get employment especially in Zambia with a lot of unemployment. This stigma can only be atoned by the defendants themselves."**

90. According to counsel, the trial court considered the gravity of the falsehood that led to the dismissal of the respondent and this justified why it arrived at the conclusion that the respondent was unfairly dismissed and awarded damages under this head. He called in aid the case of **Zambia Consolidated Copper Mines v James Matale**[20] where it was held as follows:

> **"In the instant case, the Industrial Relations Court found, in effect,**

that for a variety of reasons there was a wrongful and unwarranted termination since the wrong authority terminated the employment and because there was no offence committed by the complainant and that the rules of natural justice and the disciplinary code had not been followed."

91. Counsel argued that the court in that case went on to award damages in favour of the respondent. That similarly, in the present case, the respondent lodged a complaint in the IRC for both wrongful and unwarranted (unfair) dismissal and just like in the **James Matale**[20] case, the court below found as a fact that no offence was committed and further, that the rules of natural justice and the disciplinary code had not been followed and awarded damages for both wrongful and unfair dismissal.

92. He also contended that the appellant's argument that the court cannot find a dismissal to be both wrongful and unfair is not supported by any law and that there is nothing to prevent the court from finding a dismissal to be both wrongful and unfair if facts to prove both are present and proven as in the present case. In any case, counsel submitted, this court has found dismissals to have been both wrongful and unfair in a number of cases including the **James Matale**[20] case and the **Zambia China**

Mulungushi Textiles[18] case. Further, that in the recent case of **Josephat Lupemba v First Quantum Mining and Operations Limited**[21] which was an appeal against part of the lower court's judgment that awarded the appellant four months' salary as damages for wrongful, unlawful and unfair dismissal for being inadequate, this court held that:

> **"We have carefully considered the arguments by both sides and the judgment delivered by the court below which is sound in so far as the decision to uphold the appellant's claims is concerned."**

93. Counsel, therefore, urged us to dismiss the entire appeal and submitted that allowing the appeal would be tantamount to endorsing the habitual abuse of court process exhibited by the appellant in the court below.

94. In reply to the respondent's heads of argument, Ms Suba submitted in respect of grounds one and two that it was trite law that justice ought to be administered without undue regard to procedural technicalities. Article 118(2)(e) of the Constitution (Amendment) Act No. 2 of 2016 was cited in support of this argument. It was her contention that our laws have always provided for the setting aside of any judgment, order or decision made in the absence of a party and that the criteria for the same

was that there should be good cause shown for having been absent during proceedings; and that a party should be able to show that they have an arguable case or defence that they want to articulate. She relied on the cases of **John W. K Clayton v Hybrid Poultry Farm Limited,**[22] **Waterwells v Wilson Jackson,**[23] **Fanny Muliango and Another v Namdou Magasa and Another,**[24] **Elias Tembo v Henry Sichembe and 2 Others,**[25] **Jean Mwamba Mpashi v Avondale Housing Projects Limited**[26]; and section 85 (5) of the Act.

95. In light of these authorities, counsel argued, the court below fell into grave error when it proceeded to enter judgment on a technicality occasioned not by the appellant but by its advocates of record and by not giving the appellant an opportunity to be heard on the merits. That such denial of justice was not only manifested by the court's order for the appellant to pay costs when the default did not lie with it but also the court's insistence that it would not entertain any application by the appellant before paying such costs.

96. She reiterated that the appellant was not given an opportunity to

cross-examine the respondent and was also not heard on its defence and counterclaim. It was her submission that after receipt of service, the appellant engaged another firm of advocates who unfortunately could not attend court on 7th August 2015 as they had a matter before the High Court and that in itself is sufficient cause shown for the purpose of setting aside an order made in the absence of the party. This, she contended, should have also vindicated the appellant when it came to condemning the wrongdoer with costs.

97. According to counsel, the rules regarding setting aside of orders made in the absence of a party do not require stringent rules of evidence prohibiting setting aside such orders. She referred us to the case of **Walford (Zambia) v Unifreight**[27] where it was held that:

> **"As a general rule, breach of a regulatory rule is curable and not fatal, depending upon the nature of the breach and the stage reached in the proceedings."**

98. She argued that the appellant, not attending court on 7th August 2015, was under the impression that the matter was being attended to by their advocates and that their non-attendance was not due the appellant's fault. The appellant, therefore did not

disregard the court's order dated 7th August 2015 but instead worked on it promptly and that is why 3 days before the hearing date, there was an advocate representing it and had already filed the notice to that effect. As such, the court below should have condemned the defaulting counsel in costs. Further, that the proceedings in the court below had not reached a stage that would prejudice the respondent if the matter was adjourned so that the respondent would be given an opportunity to be heard.

99. In reply to the respondent's arguments relating to ground three, counsel submitted that the claims numbered (c), (d), (e), (i) and (j) in the notice of complaint also fell under the category of reliefs that should not have been granted to the respondent due to the fact that the respondent was summarily dismissed. She clarified that the reliefs referred to in the appellant's heads of argument as being reliefs that were not prayed for only relate to one item appearing at page 43 of the record as follows:

> **"We, therefore, order that the said motor vehicle, namely, Nissan Patrol, Registration No. ABG be offered for sale to the Complainant after the valuation is done on its current condition by a recognised dealer in Nissan Vehicles or by any other valuer agreed by the parties."**

100. It was, therefore, argued that the order cited above awarded the respondent over and above what was prayed for in that the prayer was for an order to be sold the motor vehicle by the appellants.

101. She went on to submit that since the appellant summarily dismissed the respondent from its employment, he was not entitled to any benefits that accrued to him in the contract of employment in that once an employee is dismissed, he loses all his benefits under his contract. It then followed that the earlier mentioned reliefs that the court awarded the respondent did not accrue to him as he had lost his right to earn them. In addition, the appellant's counterclaim although not taken into account in the judgment was of a much higher amount than the amounts that the respondent was claiming from it.

102. Counsel also contended that according to the respondent's conditions of service, a personal-to-holder motor vehicle is sold subject to the discretion of the appellant's board. She referred us to the condition of service which was couched as follows:

> **"You will be entitled to a personal-to-holder vehicle. The Board shall exercise its discretion to sell the same vehicle to you at the end of the contract provided that it has been running for a period of not less than 5 years from the date of purchase. The disposal value shall be determined by the Finance and Planning Sub-committee."**

103. According to counsel, in ordering that the personal-to-holder motor vehicle be sold to the respondent, the court below usurped the appellant's right to exercise its discretion to sell the motor vehicle in issue to the respondent. Further, the order that a valuation be undertaken by CFAO was contrary to law as the appellant's conditions of service provided in relation to valuation that:

> **"The Disposal Value shall be determined by the Finance and Planning Sub-committee."**

104. She submitted that in making that order, the court below was in effect re-writing the conditions of service for the respondent. Viewed from another angle, counsel argued, it usurped the jurisdiction of the board by ordering the sale and varying the conditions of valuation of the motor vehicle. This, she contended, was not only contrary to law but also to the conditions of service which the court below decided to totally disregard. She relied on the case of **Kenya Revenue Authority v Mungani**[28] where it was

held that:

> **"It was not the business or function of a Court of Law to re-write**

a Contract for the parties by prescribing how the organs entrusted with disciplinary matters in a contract were to operate or to introduce terms and conditions extraneous to the contract."

105. Counsel argued that the dispute in the present matter was as a result of the respondent's summary dismissal and that it was trite law that when an employee is summarily dismissed from employment, he loses all the benefits incurred under the contract. She referred us to the learned author of **Employment Law in Zambia: Cases and Materials** who states at page 86 that:

> **"Summary dismissal is the termination of a contract of employment by an employer summarily without notice, before the expiration of the period for which the employee is hired. Summary dismissal invariably incurs loss of benefits other than those earned under the contract."**

106. She, therefore, submitted that the court below fell in grave error when it exceeded the reliefs prayed for in its award in favour of the respondent.

107. In reply to the respondent's arguments in response to grounds 4 and 5, counsel submitted that the lower court erred in awarding the respondent damages for both wrongful dismissal and unfair dismissal because the respondent was neither unfairly nor

wrongfully dismissed. She referred us to section 108(1) of the Act which provides that:

> **"No employer shall terminate the service of an employee or impose any other penalty or disadvantage on the employee on grounds of race, sex, marital status, religion, political opinion or affiliation, tribal extraction or social status of an employee."**

108. She further referred us to the learned author of **Employment Law in Zambia: Cases and Materials** who states at page 136 that:

> **"Any dismissal that falls within the ambit of section 108 of the Industrial and Labour Relations Act is deemed to be an unfair labour practice amounting to an unfair dismissal. Section 108 bars an employer form dismissing an employee on the grounds of race, sex, marital status, religion, political opinion or affiliation, tribal extraction or status. Breaches of section 5 of the Act are also regarded as unfair labour practices and the Court has the discretion to decide whether any proved anti-union discrimination should attract damages, reinstatement or any other remedy."**

109. In view of these authorities, counsel argued, it was clear that the court below erred in ordering that the respondent was unfairly dismissed as there was no evidence on record to indicate that this claim meets the provisions of section 108 of the Act.

110. On the question of wrongful dismissal, it was submitted that this deals with a situation whereby the employer terminates the employment relationship in violation of the terms of the contract of employment. Counsel called in aid the case of **Zambia Airways Corporations Limited v Gershom Mubanga**[29] where it was held that:

> **"For an employee to successfully succeed with a claim for wrongful dismissal, the employer should have breached an important or fundamental term of employment. Breaches of trivial nature will not usually lead to a successful claim for wrongful dismissal. Further...it should be noted that the dishonest employee or someone refusing to perform the basic and important functions of a contract of employment cannot claim wrongful dismissal. Employees who have committed acts such as gross misconduct or negligence or any other breach of contract can be summarily dismissed and their claim for wrongful dismissal will fail."**

111. She, therefore, submitted that the lower court gravely misdirected itself when it held that the respondent was wrongfully dismissed without taking into account the fact that there was no fundamental breach of the contract of employment when the appellant summarily dismissed the respondent.

112. As regards summary dismissal, counsel further referred us to the

learned author of **Employment Law in Zambia: Cases and Materials** who defines summary dismissal as follows:

> **"Summary dismissal is the termination of a contract of employment by an employer summarily without notice, before the expiration of the period for which the employee is hired. Summary dismissal invariably incurs loss of benefits other than those earned under the contract."**

113. Counsel submitted that since the respondent was summarily dismissed, he was not entitled to be paid any damages for both wrongful and unfair dismissal because to award both would amount to unjust enrichment. Secondly, the two amounts to one and the same as employment having been terminated only once, this could not necessitate a double recompense. She, therefore, urged us to allow the appeal.

114. At the hearing of this appeal, counsel for the respective parties briefly augmented their written arguments. We need not repeat them here as they did not materially depart from their written arguments. We have considered the written and oral arguments of the parties, the record of appeal and the judgment appealed against. Although both counsel exerted a lot of energies by making lengthy arguments in support of the parties' respective

positions, the issues in this appeal are in our view, quite simple. For this reason, we do not see the need to make similar exertions in our determination of this appeal.

115. Grounds one and two will be considered together as they are interrelated. In sum, the appellant alleges error on the part of the trial court by refusing to hear the application to arrest judgment and to set aside the order of 7th August 2015 and further, by proceeding to render judgment without giving the appellant an opportunity to cross-examine the respondent's witness and to be heard on its counterclaim. On his part, the respondent asserts that the court below was on firm ground when it refused to accept the appellant's application to set aside the said order and to arrest the judgment of 7th October 2015 because the appellant sat on its rights to be heard by deliberately disregarding court orders.

116. Relevant to the determination of these grounds is the order of the trial court dated 7th August 2015 which is reproduced below as follows:

> **"UPON the Respondent failing to appear in Court on 26th May, 2015 and 7th August 2015 AND UPON the Court's Order of 26th**

May, 2015 that the Court would proceed to render judgment if the Respondent fails to appear in Court on 7th August 2015 IT IS HEREBY ORDERED that:

1. **The Court will proceed to render judgment in this matter based on viva voce evidence of the Complainant['s] witnesses and Affidavit evidence of the parties.**
2. **Judgment will be delivered on 7th October, 2015.**
3. **The Respondent is condemned in costs for the 26th May 2015 and 7th August 2015 sittings to be paid immediately.**
4. **Should the Respondent make any application before Court before judgment day, the application will not be considered unless the costs as ordered under paragraph 3 herein are paid.**
5. **The Order for Preservation of Property granted on 3rd June, 2013 is HEREBY SET ASIDE and it's FURTHER ORDERED that the motor vehicle namely Nissan Patrol registration No. ABG 4854 parked at the Industrial Relations Court premises be removed from there and is placed in the Complainant's custody. The Complainant is directed to have the Respondent's Agent present when removing the said motor vehicle so as to account for its present state of repair.**
6. **Costs to the Complainant."**

117. It is plain from the foregoing excerpt that in order for the trial court to entertain any application from the respondent before the delivery of judgment, the respondent was required to settle the costs ordered against it on account of its non-attendance at the sittings held on 26th May 2015 and 7th August 2015.

118. We have examined the record of appeal and there is nothing in it to suggest that these costs were ever paid by the appellant before it launched its application to arrest judgment and set aside the order of 7th August 2015 in the court below. Neither has the issue of costs being paid been canvassed by the appellant in their heads of argument. It is, therefore, quite clear that the appellant did not comply with the directive in the order of the court below.

119. Given the failure to comply with the order, the argument that the appellant was denied an opportunity to cross-examine the respondent and to be heard on its counterclaim, cannot hold.

120. Counsel for the appellant, relying on the **Barclays Bank**[1] case and section 85(5) of the Act argued that the lower court misdirected itself by failing to determine the appellant's application to set aside its order and acted against the rules of natural justice. We take the view that the quotation from the **Barclays Bank**[1] case and the import of section 85(5) of the Act relied upon by the appellant do not in any way suggest that because the IRC is a court of substantial justice, its orders should be flouted willy nilly. Allowing such anarchy to prevail

would negatively impact on that court's proper administration of justice. As aptly argued by the respondent, the appellant sat on its rights to be heard when it disregarded the order of the court below on payment of costs.

121. Counsel also placed reliance on Article 118(2)(e) of the Constitution (Amendment) Act No. 2 of 2016 in arguing that justice ought to be administered without undue regard to technicalities. We have pronounced ourselves before on the import of Article 118(2)(e) of the Constitution in a number of cases. For example, in the **Access Bank (Zambia) Limited**[11] case, we guided in relation to the said article as follows:

> **"All we can say is that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts."**

122. We need not say more than the guidance we gave in that case in concluding that the appellant's reliance on Article 118(2)(e) of the Constitution is legally flawed.

123. Consequently, the trial court cannot, therefore, be faulted for refusing to hear the appellant's application and proceeding to render its judgment in the matter. We accordingly find no merit

in these grounds.

124. In ground three, the appellant attacks the trial court for allegedly awarding the respondent claims which were not prayed for in his complaint. In the appellant's submissions in reply to the respondent's arguments, counsel submitted that claims numbered (c), (d), (e), (i) and (j) in the notice of complaint reproduced in paragraph 4 of this judgment should not have been granted because the respondent was summarily dismissed. According to counsel, the respondent could not, therefore, be entitled to any benefits that accrued to him in the contract of employment. On his part, the respondent's position was that all the claims awarded by the lower court were duly pleaded and prayed for by the respondent.

125. As will be noted later in paragraph 133 of this judgment, we have determined that the trial court correctly found that the respondent's dismissal from employment was wrongful and unfair. Since the respondent was wrongfully and unfairly dismissed, he is only entitled to an award of damages and nothing more, as will be noted in paragraph 136 of this judgment. We therefore agree with the appellant that the

respondent could not be entitled to any benefits that accrued to him in the contract of employment. Accordingly, we find that the trial court fell into error by awarding the claims numbered (c), (d), (e), (i) and (j) in the notice of complaint in addition to an award of damages.

126. Regarding the personal-to-holder vehicle, it was argued on behalf of the appellant that by ordering that the said vehicle be sold to the respondent, the lower court usurped the appellant's discretion to sell the motor vehicle to him. Counsel also contended that a valuation of the vehicle to be undertaken by CFAO as ordered by the court was contrary to law as the appellant's conditions of service provided that this was to be done by the Finance and Planning Sub-committee.

127. The respondent's conditions of service contained in the appellant's letter to the respondent dated 23rd May 2005 stated in paragraph (e) as follows:

> **"You will be entitled to a personal-to-holder vehicle. The Board shall exercise its discretion to sell the same vehicle to you at the end of your contract provided that it has been running for a period of not less than five (5) years from the date of purchase. The disposal value shall be determined by the Finance and Planning Sub-committee."** [Emphasis added]

128. While acknowledging that the sale of the personal-to-holder vehicle to the respondent was at the appellant's discretion, the lower court stated at pages J35 – J36 of its judgment as follows:

> **"Even though it was within the discretion of the respondent to offer the personal-to-holder vehicles to the Complainant, we find that the respondent had set a precedent as regards the sale of motor vehicles to the Complainant.**
> **We, therefore, order that the said motor vehicle namely, Nissan Patrol, Registration No. ABG 4854 be offered for sale to the Complainant after the valuation is done on its current condition by a recognized dealer in Nissan vehicles or by any other valuer agreed by the parties."**

129. The view that we take is that the appellant's discretion to sell the personal-to-holder vehicle to the respondent only applied under normal circumstances when the respondent's contract of employment came to an end by effluxion of time. In the present case, however, there was a fundamental change in the circumstances of the respondent's contract of employment as it did not come to an end by effluxion of time but through a dismissal. Since the respondent's employment came to an end through a dismissal, albeit wrongful and unfair, he could not be entitled, as ordered by the trial court, to be sold his personal-to-order vehicle. The so called 'precedent' set by the appellant

in selling the respondent his personal-to-holder vehicles in the past only applied at the expiry of the respondent's employment contract. Without doubt, it would be inappropriate to extend such a 'precedent' to circumstances where the respondent's employment came to an end through a dismissal and not by effluxion of time.

130. According to paragraph (e) of the respondent's conditions of service we have quoted in paragraph 127 above, the respondent was entitled to be sold his personal-to-order vehicle at the end of the contract not as of right but at the appellant's discretion. In the circumstances, we cannot agree more with the appellant that by ordering that the respondent's personal-to-holder vehicle be sold to him at a price to be valued by an entity other than the appellant's Finance and Planning Sub-committee, the lower court usurped the appellant's discretion. The lower court's order is accordingly quashed. We consequently find that there is merit in ground three.

131. We now deal with grounds four and five. These grounds, although couched differently, are actually one ground of appeal

and it is no wonder that both counsel also argued them together. The thread running through the two grounds is the appellant's assertion that the court below misdirected itself when it found that the respondent was wrongfully and unfairly dismissed and awarded separate damages for both.

132. The kernel of the argument by the appellant is that both types of dismissal cannot occur at the same time as wrongful dismissal relates to the procedure relating to an employee's dismissal while unfair dismissal relates to the reasons for the dismissal.

133. It was submitted by the respondent, on the other hand, that there is nothing to prevent the court from finding a dismissal to be both wrongful and unfair if facts to prove both are present and proven as in the present case. We cannot agree more with this submission. In the court below, the respondent alleged that the termination of his contract of employment was wrongful and unfair. Thus, the burden was on him to prove that allegation in order to be entitled to damages which on the facts of the case, the court below correctly found that he did. The view we take, therefore, is that the argument that the court cannot

find a dismissal to be both wrongful and unfair is not only misguided, but it is also not supported by law. For the reasons stated above, we conclude that grounds four and five have no merit.

134. We, however, agree with Ms. Suba on one narrow aspect - that the award of separate damages for wrongful dismissal and unfair dismissal by the trial court was a misdirection. In our recent decision in the case of **First Quantum Mining and Operations Limited v Obby Yendamoh**[22], we stated as follows:

> **"55. Consequently, this appeal lacks merit in respect of the findings under wrongful and unfair dismissal. The matters however, do not end there because, the Court below went on to award two remedies, that is twenty four months' damages for wrongful dismissal and twelve months' salary as compensation for unfair dismissal.**
>
> **56. The position we have taken is that the two awards were wrong in principle because they arise out of one compensatory event, which is the loss of employment. In granting the two awards the Court below justified them with the fact that reinstatement was inappropriate and that there is scarcity of jobs on the labour market. The Court relied on a number of our decisions to justify the awards.**
>
> **57. The first of such decision was *Dennis Chansa v Barclays Bank of Zambia Plc*[13] in which we upheld an award of thirty six months salary as damages on the ground that with**

passage of time our awards must increase because the global economies deteriorate the chances of finding employment.

58. There is a clear distinction between the principle applied in the award by the Court below, which we upheld, in the *Dennis Chansa* case and the one in this case by the Court below in that in the former, the thirty six months salary award was a single award for a single or one compensatory event. In essence, the fact that a single compensatory event had been proved by two facts i.e. wrongful dismissal and unfair dismissal does not mean two remedies should be awarded.

59. What we have said in the preceding paragraph must be distinguished from what we said in the *Kafue District Council v Chipulu* case which is the second decision the Court below relied upon. In that case we upheld the decision of the lower Court awarding various monetary amounts as damages. These were, inter alia, for inconvenience and mental torture arising out of the appellant's failure to recruit the Respondent. These were proper awards because they were given in respect of the various damages proved to have been suffered by the Respondent. To this extent, the case is distinguishable from this appeal. Likewise, the decision in the *Singogo* case is also distinguishable because we only upheld one award of twenty four months salary as damages and struck down the award of six months pay for mental torture.

60. In the ordinary course of things we would have been compelled to strike down the two awards by the Court

> **below. We have not done so because, the quantum of damages i.e. thirty six months is in conformity with our decision in the case of *Dennis Chansa v Barclays Bank of Zambia Plc* where we expressed the need for awards to increase because the scarcity of employment is higher by the day on account of deterioration of the global economy."**

135. In this case the court below awarded damages of twenty-four months salary and twelve months salary for wrongful dismissal and unfair dismissal respectively. As we stated in the case referred to in the preceding paragraph, the two awards were wrong in principle as they arose from one compensatory event being the loss of employment and it matters not, that such loss was both wrongful and unfair.

136. We accordingly set aside the two awards. We substitute them with a single award of thirty-six months salary as damages for wrongful and unfair dismissal, in keeping with our reasoning in **First Quantum Mining and Operations Limited v Obby Yendamoh**[22] and **Dennis Chansa v Barclays Bank of Zambia Plc**[23]. We should, however, point out that the quantum of damages we have awarded is in fact equivalent to the two separate awards given by the lower court. To this extent, therefore, there is no real benefit or success achieved by the

appellant from our foregoing decision in respect of grounds four and five.

137. We note from the record that there were seven grounds of appeal initially filed by the appellant; of these only grounds one to five have been canvassed in the appellant's written arguments and oral submissions. We can only conclude that grounds six and seven of appeal must have been abandoned and we so hold.

Conclusion

138. In the final analysis, we conclude that this appeal is partially successful to the extent indicated in this judgment. We shall make no order for costs.

I. C. MAMBILIMA
CHIEF JUSTICE

R. M. C. KAOMA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE