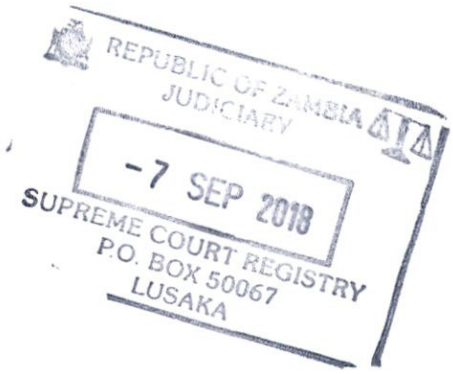
IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 223/2015
HOLDEN AT NDOLA
(CIVIL JURISDICTION)



B E T W E E N:

AEL ZAMBIA PLC **APPELLANT**

AND

SWIFT SIMWINWA **RESPONDENT**

CORAM: MAMBILIMA, CJ, MALILA AND MUSONDA, JJS
On4th and 7th September, 2018

For the Appellant: **No Appearance**
For the Respondent: **Mr. Chanda Chilufya, of Derrick Mulenga & Company**

JUDGMENT

MAMBILIMA, CJ delivered the Judgment of the Court.

CASES REFERRED TO:

1. **RAINWARD MUBANGA V. ZAMBIA TANZANIA ROAD SERVICES LIMITED (1987) ZR 72;**
2. **BRIDGET MUTWALE V. PROFESSIONAL SERVICES LIMITED (1984) ZR 72;**
3. **THE ATTORNEY-GENERAL V. MARCUS KAMPUMBA ACHIUME (1983) ZR 1;**
4. **SHILLING BOB ZINKA V. ATTORNEY GENERAL (1991/1992) ZR 73;**
5. **THE ATTORNEY GENERAL V. RICHARD JACKSON PHIRI (1988/1989) ZR 121;**
6. **BOSTON DEEP FISHING CO. V. ANSELL (1888) 39 CH. D 339;**
7. **NATIONAL BREWERIES LIMITED V. PHILIP MWENYA, SCZ JUDGMENT NO. 28 OF 2002;**
8. **AGHOLOR V. CHEESEBROUGH PONDS (ZAMBIA) LIMITED (1976) ZR 1;**

9. **ZAMBIA AIRWAYS CORPORATION LIMITED V. GERSHOM B. B. MUBANGA (1990/1992) ZR 149;**
10. **AISTHORPE V. MARX CHILDCARE DIRECT LTD (2011) UD 341/ 2010**
11. **ZAMBIA NATIONAL PROVIDENT FUND V. YEKWENIKA MBINIYA CHIRWA (1986) ZR 70,**
12. **BANK OF ZAMBIA V. JOSEPH KASONDE (1995-1997) ZR 238; AND**
13. **SWARP SPINING MILLS V. SEBASTIAN CHILESHE AND 30 OTHERS (2002) ZR 23.**

1.0 INTRODUCTION

1.1 This appeal, emanates from a judgment of the High Court, in an employment dispute commenced by the Respondent against the Appellant by way of a Writ of Summons and a Statement of Claim. In that Judgment, which was delivered on 8th May, 2015, the lower Court held, among others, that the termination of the Respondent's employment by the Appellant was wrongful and unlawful and consequently accordingly, ordered the Appellant to reinstate the Respondent.

2.0 BACKGROUND

2.1 The facts leading to this dispute are common cause. The Respondent was employed by the Appellant on 19th March, 1999 as a Bulk Assistant Operator. He was based

at the Appellant's Mufulira Site. He was later promoted to the position of UBS Supervisor and the said promotion was confirmed on 18th May, 2006 with effect from 1st June, 2006.

2.2 In a letter dated 26th March, 2007, the Appellant transferred the Respondent to its UBS site in Kitwe. In the said letter of transfer, the Respondent was instructed to be reporting to the Maintenance Foreman and to be getting instructions regarding his work from the said Foreman. The letter also stated that the Respondent would continue to enjoy the salary and benefits which were applicable to his position and grade.

2.3 On 21st April, 2007, the Respondent wrote to the Appellant's Human Resources Manager, raising some concerns in relation to the manner in which his transfer to Kitwe had been handled. One of the concerns was that although some of his conditions of service had been maintained, he had been abased in his status without indicating why that had been done. This complaint related to the instruction in the letter of transfer that the

Respondent should be reporting to the Maintenance Foreman. According to the Respondent, the Maintenance Foreman was his junior in the Company's hierarchy.

2.4 On 22nd July, 2009, the Appellant, through its UBS Superintendent, Mr. Thomas MWITA (who testified as DW1 in the lower Court), verbally told the Respondent that he had been transferred to Lonshi Mine in the Democratic Republic of Congo. DW1 was the Respondent's immediate supervisor. The Respondent's reaction to this 'verbal' transfer sparked the events which eventually led to his dismissal from employment.

2.5 Barely seven days later, on 29th July, 2009, DW1 charged the Respondent with three disciplinary offences, namely, absenteeism for three working days; failure to follow the established grievance procedure, and, insubordination. The details of the charges were stated as follows:

> **"On 22nd July, 2009 you were instructed by your supervisor to get yourself prepared to go and work at Lonshi Mine DRC in order to relieve Collins Sangambo who has worked for more than 3 months now. The supervisor explained to you the conditions and incentives you will get whilst working at Lonshi Mine DRC. You totally refused to accept the instructions given to you."**

2.6 On 11th August, 2009, the Appellant conducted a disciplinary hearing for the above charges. The disciplinary hearing was chaired by a Mr. Joseph MWANZA, the Appellant's Production Controller. Also present during the hearing were DW1, Thomas MWITWA, and a Mr. Mike MWANAUTE, the Human Resources Manager (he testified as DW2 in the Court below).

2.7 The Respondent was found guilty on all the three charges and in a letter dated 10th August, 2009, authored by Mr. Joseph MWANZA, the Respondent was informed that he had been summarily dismissed from the Appellant's employment with immediate effect. A copy of the letter of dismissal is produced on page 99 of the record of appeal. Curiously, although it is dated 10th August, 2009, it refers to a case hearing held on 11th August 2009. It reads, in part:

> **"Reference is made to the charge of absenteeism, failure to follow established grievance procedure and insubordination raised against you on 29th July 2009 and the subsequent case hearing on 11th August, 2009.**
>
> **The three above mentioned charges are very serious offences, which cannot be condoned by AEL Zambia PLC**

Management. It was proved during the case hearing that you are guilty of the charges raised against you and that you are setting a very bad example as a supervisor by failure to carry out lawful instruction from your immediate supervisor (Ubs Superintendant) and from your Departmental Manager. You also did the same to the Company Human Resources Manager where you even walked out of the office and only returned the following day with an application letter of retirement."

2.8 The Respondent was told that he was free to appeal against the dismissal through the Human Resources Manager within three working days from the date of receiving the letter of dismissal. In his letter of reply, the Respondent indicated that he would not go through the internal appeal procedure but would instead seek what he referred to as a 'legal option.'

3.0 THE CASE FOR THE RESPONDENT

3.1 It would appear that the 'legal option' that the Respondent resorted to was to sue the Appellant in the High Court claiming among others:

"(i) damages for wrongful and/or unlawful dismissal from employment;
(ii) Damages for breach of contract;
(iii) An order that he be deemed to have been reinstated and retired from employment;
(iv) Payment of alludes which the Defendant has not paid and these which the Court may fin to be payable."

3.1 From the pleadings and the evidence on record, it is evident that the Respondent was not happy with the reporting structure when he was transferred to Kitwe. In the Court below, he claimed that it was an express condition of his employment that, on promotion to the position of UBS Site Supervisor, he would be reporting to the UBS Superintendent and that the Maintenance Foreman would be his subordinate. That, therefore, the Appellant violated his conditions of service when it transferred him to Kitwe and placed him under the Maintenance Foreman.

3.2 The Respondent further claimed that the Appellant attempted to transfer him to Lonshi Mine in the Democratic Republic of Congo where he was required to work as an Operator and report to even more junior officers. In his testimony, the Respondent told the learned trial Judge that he requested for a formal letter of transfer from DW1. That he insisted on the letter of transfer because that was what would have guided him on the nature of the job that he was going to be doing at

Lonshi Mine and the conditions of service under which he was going to be working. That in particular, he wanted to know whether he was going to be entitled to responsibility allowance and other incentives, like out of station allowance.

3.3 The Respondent further alleged that after he raised the complaint on why he was being transferred to Lonshi Mine without a letter of transfer, DW1 sent him to see Mr. ENSLIN, the Regional Manager who upon entering his (Mr. ENSLIN's) Office, chased him before he could even say anything. That DW1 then escorted him to see DW2, the Human Resource Manager who told him that if he did not want to go on transfer he should resign. That having observed that he was being frustrated; he wrote a letter dated 27th July, 2009, where he expressed his intention take early retirement from employment but the Appellant rejected his request.

3.4 The Respondent averred that, subsequently, he held a meeting with Mr. ENSLIN on 29th July, 2009 and

immediately after that meeting, DW1 slapped him with three disciplinary offences which led to his dismissal.

3.5 According to the Respondent, after he was dismissed from employment, he did not appeal against the dismissal because he believed that justice was not going to be done considering the conduct of the Appellant. He added that he did not think justice would be done by DW2 on appeal when DW2 was part of the disciplinary hearing panel that dismissed him, stating that he felt frustrated and mistreated by the Appellant.

3.6 In response to the charges against him, the Respondent explained that he was never absent from work without permission on the stated dates. That on 24th July, 2009, he got permission from his immediate supervisor, DW1 to go to Ndola to renew his passport. That on the same day he brought the travel document to DW2 for his signature and returned it to Ndola after DW2 had signed it. With regard to the charge of insubordination, he stated that he did not refuse to go to Lonshi but that he simply requested his supervisor to put the transfer in writing.

On the allegation that he did not follow the grievance procedures, he told the Court that he started by raising his grievance with his immediate supervisor, followed by the Regional Manager and later, the Human Resources Manager. That it was only after he had seen these superiors that he proceeded to see the Managing Director.

3.7 The Respondent further contested the decision to summarily dismiss him on the ground that DW1 and DW2 were interested parties and should not have been part of the disciplinary panel. Further, that the disciplinary hearing was held on 11th August, 2009 but that his letter of dismissal was dated 10th August, 2009. According to him, this showed that the dismissal letter was prepared before he was even heard.

4 THE CASE FOR THE APPELLANT

4.1 The Appellant challenged the Respondent's action by filing a memorandum of appearance and defence and calling two witnesses, that is, DW1 and DW2.

4.2 The gist of the defence by the Appellant was that the Respondent was at all times under the supervision of the UBS Superintendent (DW1). DW1 told the lower Court that when the Appellant had new business in Lonshi, it sent a Mr. Collins SANGAMBO to work at their Lonshi Site. That after working at Lonshi Site for three months, Mr. SANGAMBO asked for a break to come back to Zambia and see his family. That DW1 called the Respondent so that they could make arrangements for him to go and relieve Mr. SANGAMBO. That DW1 explained to the Respondent what he would be doing at Lonshi and his out of station allowance entitlement. According to DW1, the Respondent refused to go to Lonshi. That the following day the Respondent did not report for work and did not communicate the reason for his absence.

4.3 DW1 took the matter to DW2 and Mr. ENSLIN, who also tried to persuade the Respondent to accept the transfer to Lonshi Mine but the Respondent maintained that he could not move. That the Respondent brought up the fact

that he could not travel to Lonshi because he had no passport. That Mr. ENSLIN, however, told him that the Appellant would pay for the processing of his passport. That Mr. ENSLIN also asked him to go to Appellant's accounts department and get the money to pay for the passport. DW1 alleged that, during the Meeting in DW2's office, the Respondent walked out of the meeting before discussions were concluded.

4.4 It was DW1's further testimony that later, he made arrangements for the Respondent to again meet DW2, Mr. ENSLIN and DW1 himself and that that meeting was held in DW2's office. That at that meeting, they resolved to give the Respondent one free shift so that he could have time to consult his family on the transfer to Lonshi. That, accordingly, the following day the Respondent did not report for work and DW1 did not mark him absent. However, after that day, the Respondent was absent from work for three days and when asked why he had not reported for work for the three days, he failed to give DW1 a proper explanation. That for this reason DW1

made up his mind to charge the Respondent with the subject offences.

4.5 DW2 explained that he refused to allow the Respondent to go on early retirement because he did not qualify for early retirement. That at the time the Respondent was less than forty-five years old.

4.6 DW2 explained the procedure which was followed by the Appellant when an employee was charged with a disciplinary offence. He stated that the Human Resource Department is not involved in charging an employee but only receives a copy of the original charge from the charging section. That the Human Resources Department then calls the charged employee to submit a written statement in response to the charge, after which the Department arranges a disciplinary inquiry to be chaired by an independent person. He explained that in the instant case, the Production Controller, Mr. Joseph MWANZA, was assigned to chair the disciplinary case. That Mr. MWANZA was in a different section from the one the Respondent was working in.

4.7 DW2 told the Court below that DW1 was present during the disciplinary hearing in his capacity as the Management Representative who charged the Respondent. He also explained that the function of the Human Resources representative during the disciplinary hearing was to take minutes and to advise on the procedure. That after the hearing, the decision is made by the Chairperson after giving the two sides an opportunity to explain their respective sides of the story.

4.8 DW2 explained that the Respondent was charged with insubordination for having walked out of DW2's office before they could conclude the discussions. With regard to the charge of failure to follow established procedure, DW2 told the trial Court that when an employee is aggrieved, he or she is supposed to start with the immediate supervisor and that if not satisfied, the employee can ask for permission to go and see someone higher than the immediate supervisor or the grievance can be taken to the Human Resources Manager. That, however, in this case, the Respondent went straight to

the Customer Service Manager, Mr. Rob MAKOYI. DW2 told the lower Court that when the Respondent was dissatisfied with the decision of his immediate supervisor, he should have raised the issue with the Regional Manager. That it was only if he was not happy with the decision of the Regional Manager that he was entitled to go to the Customer Service Manager.

4.9 It was DW2's evidence that while at the Mufulira Site, the Respondent used to report to the UBS Superintendent. That when he was transferred to Kitwe it was agreed that he would be reporting to the Foreman. DW2 clarified that the UBS Superintendent was in Salary Grade 33; the Foreman was in Salary Grade 32 and the Respondent was in Salary Grade 30. That, therefore, the Respondent was not reduced in status when he was asked to be reporting to the Foreman because the Foreman had a higher salary grade.

4.10 DW2 admitted that the Appellant did not write a letter of transfer for the Respondent to move to Lonshi Mine. He, however, explained that this was because the procedure

required the Respondent to first agree with his supervisor, DW1, on whether the Respondent would accept the transfer. That, thereafter, Human Resources Department would put down the transfer in writing. DW2, however, conceded in cross-examination that the Respondent was entitled to a written transfer to enable him know the conditions of service under which he would work.

4.11 DW2 maintained that the Appellant picked the Production Controller to chair the panel because he was an independent person. It was DW2's testimony that the Chairperson of the disciplinary inquiry had discretion, after checking the accused officer's file, to decide the appropriate sanction. That in this case, the Chairperson found that the Respondent had been previously been punished for other disciplinary offences.

4.12 The Appellant, accordingly, averred that the Respondent did not suffer any damage and that he was not entitled to any of the reliefs he claimed.

5 JUDGMENT OF THE LOWER COURT

5.1 On the basis of the evidence and submissions before her, the learned trial Judge made a number of findings and holdings. The Court found that the termination of the Respondent's employment was connected with his refusal to be transferred to Lonshi Mine in the Democratic Republic of Congo. According to the Judge, a letter of transfer was important because it would have spelt out clearly the conditions of service under which the transfer was to be effected. That the refusal by DW1 to give the Respondent the letter of transfer was unfair and unreasonable.

5.2 Accordingly, the learned trial Judge held that the Respondent was justified in demanding for the letter. The learned trial Judge held that the termination of the Respondent's employment based on the alleged refusal of the transfer to Lonshi Mine was wrongful and/unlawful, as it was done in breach of Article 5.2 of the Staff Conditions of Employment for Non-Contractual Employees. This Article stipulates the conditions applicable when an employee is assigned to work away

from his home base. Relying on the cases of **RAINWARD MUBANGA V. ZAMBIA TANZANIA ROAD SERVICES LIMITED**[1] and **BRIDGET MUTWALE V. PROFESSIONAL SERVICES LIMITED**[2], the learned trial Judge held that the termination of the Respondent's employment was ineffectual, wrongful and unlawful.

5.3 The Court also found that the panel, which heard the disciplinary charges against the Respondent, was unfairly constituted, because DW1, who was the charging officer, and DW2, who made the allegation of insubordination against the Respondent, were both on the case hearing panel. The Court expressed the strong view that the presence of DW1 and DW2 on the panel was intimidating to the Respondent and had the possibility of influencing the decision of the Chairperson even if the Chairperson had exclusive powers to make the decision of summary dismissal. That therefore, the presence of DW1 and DW2 on the panel was a violation of the rules of natural justice.

5.4 Consequently, the Court concluded that the disciplinary panel, not having been properly constituted, did not have valid disciplinary powers to hear the charges leveled against the Respondent. That, for this reason, the Respondent was not accorded a fair hearing and the decision of the panel was wrongful, unlawful and void *ab initio*. Further that the person who should have dismissed the Respondent was the Head of Department and not the Production Controller.

5.5 With regard to the Respondent's claim for damages for breach of contract, the Court held that there was no breach of contract to entitle the Respondent to damages. That, in fact the Respondent could not be entitled to damages for breach of contract because he was not saving under a contract but on pensionable terms. The Court also held that the Respondent was not entitled to the payment of any arrears because the Appellant had paid him all outstanding payments.

5.6 On the Respondent's claim of entitlement to retirement, the lower Court held that the Respondent was not

entitled to early retirement because he had not reached the age of 50, which was provided for in his conditions of service.

5.7 The learned trial Judge went on to hold that the Respondent was entitled to reinstatement because, according to her, the case hearing panel did not have valid powers to hear the Respondent's case. That, therefore, its findings against the Respondent were void *ab initio* rendering the dismissal of the Respondent from employment a nullity. The Court, consequently, ordered that the Respondent should be reinstated to the position he held with the Appellant on the date of his dismissal. Further, that the Respondent should be paid his salary arrears and arrears of any allowances that he was entitled to, from the date of his dismissal up to the date of reinstatement, with interest at the prevailing Bank of Zambia lending rate.

6.0 GROUNDS OF APPEAL

Respondent's employment was wrongful and unlawful. In support of this prayer, Counsel referred us to the case of **THE ATTORNEY-GENERAL V. MARCUS KAMPUMBA ACHIUME**[3], where we said that-

> **"The appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make."**

7.2 Counsel contended that the lower Court erred when it dealt with the reason for Respondent's dismissal instead of looking at how the Respondent was dismissed. According to Counsel, the question should not have been WHY but HOW the dismissal was effected.

7.3 Counsel submitted that the evidence on record shows that the Respondent did not go to Lonshi Mine because he was not happy with the conditions and incentives offered to him and not because there was no letter of transfer In his view, the issue of there being no letter of transfer was an afterthought. In support of this submission, Counsel referred us to the Respondent's

exculpatory statement on page 172 of the record of appeal where, the Respondent wrote that **"Insubordination, again I refuse the case because I didn't refuse to go to Lonshi but I wasn't happy with the conditions and incentives."** According to Counsel, the only point at which the Respondent raised the issue of the letter of transfer was in his pleadings.

7.4 Counsel also contended that the Appellant explained to the Respondent the terms and conditions under which the Respondent was going to work at Lonshi Mine. That, in this respect, the Appellant complied with the requirements of Section 51 of the **EMPLOYMENT ACT CHAPTER 268 OF LAWS OF ZAMBIA** (hereinafter referred to us "the Act"), which stipulates that-

> **"Every employer shall, before an employee commences employment or when changes in the nature of such employment take place, cause to be explained to such employee the rate of wages and conditions relating to such payment."**

7.5 With regard to the composition of the disciplinary hearing panel, Counsel submitted that DW1 was present at the hearing to give management's side of the story because

he was the one who had charged the Respondent. That DW2 attended the disciplinary hearing to record the minutes. Counsel distinguished the case of **SHILLING BOB ZINKA V. ATTORNEY GENERAL**[4] from the instant case. According to Counsel, in this case DW1 and DW2 were not Judges in their own cause unlike the position in the **SHILLING BOB ZINKA**[4] case.

7.6 Counsel went on to submit that the Respondent's Head of Department, Mr. Michael ENSLIN, could not have chaired the disciplinary hearing because he had already been consulted on the Respondent's grievances. That it was important to get an independent person to ensure fairness.

7.7 Counsel submitted that the power of the Court, in a case where an employee is dismissed after a disciplinary hearing, is explained in the case of **THE ATTORNEY GENERAL V. RICHARD JACKSON PHIRI**[5]. We have referred to this case in detail later in this judgment.

7.8 With regard to the actual offences alleged to have been committed by the Respondent, Counsel faulted the lower

Court for having declined to consider whether the Respondent was guilty of any of the said offences. On the offence of absenteeism, Counsel submitted that no one was allowed to get permission on phone. According to Counsel, the Respondent breached this requirement and admitted that he did not obtain written permission to be absent from work on the material dates. Counsel pointed out that during re-examination, the Respondent testified that he asked for permission from his supervisor on the phone because most of the time he used to communicate with his Supervisor by phone.

7.9 With regard to the charge of insubordination, Counsel submitted that there was evidence before the lower Court to show that the Respondent walked out of the Human Resources Manager's office during a meeting aimed at addressing the concerns the Respondent had raised.

7.10 Coming to the alleged failure to comply with established procedures/failure to carry out lawful instructions, Counsel submitted that the lower Court should have considered the finding of guilt made by the disciplinary

hearing panel because courts are not supposed to act as appellate bodies from a decision of a disciplinary tribunal.

7.11 Counsel went on to submit that the Chairperson found that the Respondent had previously been punished for a number of disciplinary offences. That, therefore, the Chairperson was justified when he imposed the penalty of dismissal on the Respondent. In support of his submissions, Counsel referred us to the case of **BOSTON DEEP FISHING CO. V. ANSELL**[6], where it was held that-

> **"Where the employee is guilty of sufficient misconduct in his capacity as an employee he may be dismissed summarily without notice and before the expiration of a fixed period of employment."**

7.12 Counsel explained that the Respondent had the right to appeal to Management 'through' the Human Resources Manager and not to appeal 'to' the Human Resources Manager as claimed by the Respondent. That the Respondent declined to exercise this right. To augment the foregoing submissions, Counsel cited the case of **NATIONAL BREWERIES LIMITED V. PHILIP MWENYA**[7], where we said-

> **"Where an employee has committed an offence for which he can be dismissed, no injustice arises for failure to comply with the procedure stipulated in the contract and such an employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity."**

7.13 Counsel went on to refer us to, among other cases, the case of **AGHOLOR V. CHEESEBROUGH PONDS (ZAMBIA) LIMITED**[8], where it was held that-

> **".... It is trite law that a master can terminate a contract of employment at any time, even with immediate effect and for any reason. If he terminates outside the provisions of the contract then he is in breach thereof and is liable in damages for breach of contract.**
>
> **Where a master "dismisses" a servant he terminates the contract summarily without any notice, on the grounds of misconduct, negligence or incompetence. If such grounds are justified the servant forfeits the right to any notice whatsoever and a number of other benefits...."**

7.14 Counsel relied on the **AGHOLOR**[8] case to advance the view that having been found guilty of the offences leveled against him, the Respondent forfeited the right to any notice. Further, that the Respondent forfeited a number of other benefits including the right to be considered to have been reinstated and retired.

7.15 Coming to the second ground of appeal, Counsel submitted that the lower Court misdirected itself when it ordered that the Respondent be reinstated and paid

arrears of salaries and allowances when the Respondent's dismissal was neither wrongful nor unlawful. Counsel went on to argue that the remedy of reinstatement is only awarded in special circumstances. To reinforce his argument, he referred us to, *inter alia*, the **RAINWARD MUBANGA**[1] case, where this Court said the following:

> **"In the case of Francis v Municipal Councillors of Kuala Lumpur (2), a Privy Council case, it was held as follows:**
>
> **'.... When there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court....'**
>
> **In that case the president of the country concerned had power to dismiss an employee of the local council; however, the employee was dismissed wrongfully by the use of the wrong procedure. It was held that despite the fact that the dismissal was quite improper there was no reason to grant the applicant a declaration that he was entitled to reinstatement."**

7.16 In the alternative, Counsel contended that should this Court find that the termination of the Respondent's employment was unlawful, this Court should still overturn the order of reinstatement because there were

no special circumstances proved to entitle the Respondent to reinstatement.

7.17 Counsel maintained that the Respondent was not entitled to salary and allowance arrears because the Respondent did not adduce any evidence to show that he had suffered damage to the extent of his former full salary. To buttress these arguments, Counsel referred us to the case of **ZAMBIA AIRWAYS CORPORATION LIMITED V. GERSHOM B. B. MUBANGA**[9], where we held:

> **"As to the order that the respondent should be paid his full salary and arrears from the date of his purported dismissal, we note that no evidence was called to the effect that the respondent had actually suffered damages to the extent of his former full salary. It was the duty of the respondent to mitigate his loss and we have heard from his counsel, though not as evidence, that the respondent has in fact been engaged otherwise since the dismissal. In the absence of any evidence to enable any court to calculate the losses, if any, which have accrued to the respondent the award in this respect was not justified."**

7.18 Counsel further submitted that should this Court find that the Respondent's dismissal was wrongful and unlawful, we should hold that it was unrealistic for the lower Court to order that the Respondent be paid salary arrears and arrears of allowances from the date of his

dismissal to the date of his reinstatement. That the Court should instead order a fair recompense if it finds that the Respondent was wrongfully dismissed. For these submissions, Counsel again relied on the case of **GERSHOM B. B. MUBANGA**[9].

7.19 In conclusion, Counsel urged us to allow the appeal with costs.

8.0 ARGUMENTS ON BEHALF OF THE RESPONDENT

8.1 In response, Counsel for the Respondent, Mr. CHILUFYA filed written heads of argument. On the first ground of appeal, Counsel contended that the learned trial Judge was on firm ground when she held that the termination of the Respondent's employment was wrongful and unlawful. Counsel argued that the Court rightly found as a fact, that the Respondent's employment was terminated because he complained about being transferred to Lonshi Mine without a written letter of transfer. According to Counsel, it is common practice in Zambia that whenever an employee is transferred from one working place to another, Management must communicate the transfer

through a letter of transfer. That, in fact, this was the practice in the Appellant Company. To supplement his arguments, Counsel cited, among others, the case of **RAINWARD MUBANGA**[1], which we have already referred to above.

8.2 Counsel argued that the Appellant did not adhere to its Staff Conditions of Employment for Non-Contractual Employees which, according to Counsel, contained provisions relating both to temporal and permanent relocation of an employee to another workplace either within or outside Zambia. Counsel particularly highlighted Article 5.2 of the said Conditions which provided for the conditions of service that should apply to an employee who is required to work permanently away from home and cannot reasonably attend work from his normal place of residence.

8.3 Counsel stressed that based on the above, the lower Court properly directed itself when it held that the termination of the Respondent's employment was wrongful and unlawful.

8.4 Counsel further contended that the Appellant did not comply with Section 51 of the **ACT** as it did not explain to the Respondent the conditions of service under which he was going to work at Lonshi Mine.

8.5 Counsel submitted further that the case hearing panel was unfairly constituted because DW1 and DW2 should not have been part of the panel as they had their own interest to serve. That the Appellant, therefore, breached the rules of natural justice when it allowed DW1 and DW2 to sit in the disciplinary hearing. To emphasize these submissions, Counsel cited the case of **SHILLING BOB ZINKA**[4] for the proposition that a person should not be a judge in that person's own cause.

8.6 It was Counsel's further submission that the Respondent was not absent from duty as alleged by the Appellant because on the dates in question he obtained permission from his immediate supervisor, DW1.

8.7 Counsel concluded by praying that this Court should uphold the judgment of the lower Court.

9.0 DECISION OF THIS COURT

9.1 We have carefully considered the evidence on record, the Judgment of the lower Court and the submissions of Counsel. The contention by the Appellant under this ground is that it terminated the Respondent's employment in accordance with his conditions of employment. We note, however, that while the staff conditions of employment for non contractual employees and the schedule of offences were availed, the grievance code which outlines the grievance procedure was not. Be that as it may, the broad issue for our determination in the first ground of appeal is **'whether the lower Court on the evidence that was before it, properly directed itself when it held that the termination of the Respondent's employment was wrongful and unlawful'**.

9.2 Counsel for the Appellant has submitted that, contrary to the findings of the lower court, there is evidence on record to show that the disciplinary charges leveled against the Respondent were proved before the disciplinary panel. According to Counsel, the lower Court

should not have focused on the fact that the Respondent was not given a letter of transfer to Lonshi Mine but should have concentrated on how the termination of the Respondent's employment was effected.

9.3 Counsel for the Respondent on the other hand contended that the lower Court was on firm ground when it held that the termination of the Respondent's employment was wrongful and unlawful.

9.4 In the often quoted case of **ATTORNEY GENERAL V. RICHARD JACKSON PHIRI**[5], we said-

> **"In a case such as this, the court ought to have regard only to the question whether there was power to intervene, that is to say, the question whether the Public Commission had valid disciplinary powers and, if so, whether such powers were validly exercised. ... As Mr. Phiri pointed out, there was no dispute that the Public Service Commission had jurisdiction and power over the disciplinary proceedings and they can impose the penalty of discharge. The only issue which remains to be considered is whether, in exercising the power which they undoubtedly have, such powers were validly exercised.**
>
> **.... 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 leveled 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."**

9.5 It is clear from the case of **RICHARD JACKSON PHIRI**[5] that there are two elements that must be proved before a decision of a disciplinary committee can be considered to have been validly made. These are:- (1) whether the disciplinary panel had valid disciplinary powers; and (2) whether the said powers were validly exercised.

9.6 In the instant case, the Respondent impugned the composition of the hearing panel. As alluded to above, the applicable grievance code was not availed to assist the Court ascertain the quorum of the case hearing panel. But it would appear that in this case, it was composed of three persons. The Chairperson, Mr. Joseph MWANZA, who was the Production Controller. DW1, who charged the Respondent and DW2, the Human Resource Manager. In order to resolve the first ground of appeal, we must first consider whether there was anything irregular with the composition of the

6.1 The Appellant has now appealed to this Court against the determination of the lower Court advancing two grounds of appeal, namely, that-

1. **the Court below erred both in law and in fact when it held that the termination of the Respondent's employment was wrongful and unlawful when the termination was in accordance with his conditions of employment; and**

2. **the Court below erred both in law and in fact when it ordered that the Respondent be reinstated and paid salary arrears and arrears of any allowances from date of dismissal to date of reinstatement when the Respondent's dismissal was not wrongful or unlawful.**

6.2 At the hearing of the appeal on 4th September, 2018, the Appellant did not appear. There are, however, heads of argument which were filed on its behalf on 30th December, 2015. The learned Counsel for the Respondent appeared and relied entirely on the heads of argument filed on behalf of the Respondent on 21st February, 2017.

7.0 ARGUMENTS ON BEHALF OF THE APPELLANT

7.1 The main thrust of Counsel's submissions in support of the first ground of appeal is that this Court should reverse the findings of fact upon which the lower Court based its holding that the termination of the

disciplinary panel which heard the Respondent's case before we can determine whether the said panel validly exercised its disciplinary powers.

9.7 The learned trial Judge found that the case hearing panel was unfairly constituted because DW1, who was the charging officer and DW2, who made the allegation of insubordination against the Respondent, were on the panel. The learned trial Judge held the strong view that the presence of DW1 and DW2 on the panel was intimidating to the Respondent and had the possibility of influencing the decision of the Chairperson, even if the Chairperson had exclusive powers to render the final decision. She held that the panel was not properly constituted and that it had no valid disciplinary powers.

9.8 We have judiciously examined the evidence on the record of appeal in relation to the composition of the disciplinary hearing panel. Counsel for the Appellant has maintained that the disciplinary hearing panel was fairly constituted. That, in fact, during cross-examination, the Respondent admitted that he did not challenge the composition of the

panel. Counsel for the Respondent, on the other hand, has submitted that the Respondent was not accorded a fair hearing. According to him, DW1 and DW2 should not have been part of the case hearing panel because they had interests of their own to serve.

9.9. It is not in dispute that DW1 was the one who charged the Respondent with the subject disciplinary offences. It is also not in dispute that it was DW2 who made the allegation of insubordination against the Respondent on the basis that the Respondent walked out of his office in the middle of a meeting. The question, therefore, is whether it was proper and fair for DW1 and DW2 to be part of the disciplinary hearing panel in view of the respective roles that they played in the preferring of disciplinary charges against the Respondent.

9.10. It has been spiritedly argued, on behalf of the Appellant, that DW1 and DW2 were each performing a specific role to assist the Chairperson come up with a decision. It is apparent however, that this was a panel consisting of three persons and it would not be farfetched to conclude

that they had occasion to discuss the matter on their own in the absence of the Respondent. DW1 and DW2 had adverse interests to the Respondent and they could not be neutral members of the panel. At best, they should have just been witnesses before the hearing panel to prosecute the case for the Appellant. Their presence tainted the neutrality of the panel.

9.11. The importance of natural justice in employee disciplinary hearings cannot be over-emphasised. An employee must be subjected to fair processes. We find that there was, in this case, a flagrant violation of the rules of natural justice by the Appellant. DW1 and DW2 clearly had their own interests to serve because they are the ones that raised the allegations against the Respondent. There was an obligation, on the part of the Appellant, as employer to ensure that the persons conducting the disciplinary hearing were objective and impartial.

9.12 In the Irish case of **AISTHORPE V. MARX CHILDCARE DIRECT LTD**[10], an employee was dismissed from her

position as a child care worker, following allegations that she had hit a child. The employee appealed against the decision and the appeal was heard by the owner of the Child Care Institution, who upheld the dismissal. On appeal to the Employment Appeals Tribunal, the Tribunal held that the dismissal was unfair because the same parties were involved at the investigation stage, disciplinary stage and appeal stage. According to the Tribunal, the employer had breached the principle of *nemo judex in causa sua*, that is, no man may be a judge in his own cause.

9.13 Taking a leaf from the **AISTHORPE**[10] case, we hold that the Appellant, in the instant case, breached the principle of *nemo judex in causa sua*, since DW1 and DW2 were both involved in the leveling of disciplinary charges, against the Respondent. The claim by the Appellant that DW1 and DW2 did not participate in making the decision to dismiss the Respondent is untenable because it is clear from the evidence on record that the two played a major role in the decision to dismiss the Respondent. We,

accordingly, agree with the lower Court's finding of fact that the case hearing panel was unfairly constituted.

9.14 In addition to the above, we have looked at the letter of dismissal. Evidently, the offences for which the Appellant purported to dismiss the Respondent were not dismissible offences for a first offender. This is clear from the Appellant's Schedule of Offences/Sanctions. For the offence of absenteeism of more than two days but not exceeding ten days, an employee could only be discharged on a third breach. Similarly, for the offence of insubordination, an employee could only be dismissed on a third breach, while for the offence of failure to follow disciplinary procedures/failure to follow established grievance procedure, an employee could only be dismissed on second breach. In the instant case, the letter of dismissal does not state that the Respondent was not a first offender. The relevant portion of the letter of summary dismissal read as follows:

> **"The (3) three above mentioned charges are very serious offences, which cannot be condoned by AEL Zambia PLC management. It was proved during the case hearing that you are guilty of the charges**

raised against you and that you are setting a very bad example as a supervisor by failure to carry out lawful instruction from your immediate supervisor (Ubs Superintendent) and from your department Manager. You also did the same to the company Human Resources Manager where you even walked out of the office and only returned the following day with an application letter of retirement.

Therefore, you have been summarily dismissed from AEL Zambia PLC employment with immediate effect."

9.15 It is evident from the above portion of the letter of dismissal that the dismissal was based purely on the purported seriousness of the offences. It was not based on the fact that the Respondent was a subsequent offender as claimed by Counsel for the Appellant.

9.16 Furthermore, an impression has been created that the decision to dismiss the Respondent from employment was predetermined and the disciplinary hearing was a mere formality. This can be deduced from the fact that the letter of dismissal was written a day before the disciplinary hearing was conducted. It was written on 10th August, 2009 and refers to a disciplinary hearing which was held on 11th August, 2009. There is therefore credence, in the Respondent's statement that he was

dismissed before he was heard. The letter of dismissal clearly shows that the Appellant made the decision to dismiss the Respondent before it even afforded him an opportunity to be heard.

9.17 In view of the above, we hold that the Respondent was not afforded a fair hearing. We are alive to our decision in the case of **ZAMBIA NATIONAL PROVIDENT FUND V. YEKWENIKA MBINIYA CHIRWA**[11], where we said that-

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

9.18 That decision in the **YEKWENIKA MBINIYA CHIRWA**[11] case is still good law. However, the facts of that case are distinguishable from the facts of the present case. In the case in casu, there was a violation of the rules of natural justice which vitiated the decision of the panel. Further, the Appellant drafted the letter of dismissal in advance

therefore rendering the disciplinary hearing to be a formality.

9.19 Even assuming that the disciplinary hearing panel was properly constituted, we still hold that the Respondent was wrongfully dismissed. Our assessment of the evidence on record and the findings of fact by the lower Court establishes that the Respondent was willing to go on transfer to Lonshi Mine. This is particularly evident from the fact that he took positive steps to prepare himself to move to Lonshi. In particular, the Respondent took steps to renew his travel document and made attempts to renew his driver's license which he was required to use in his new position at Lonshi Mine. If he had indeed refused to go on transfer, as submitted by Counsel for the Appellant, he would not have made these preparatory arrangements. In his testimony before the lower Court, the Respondent insisted that he was prepared to go to Lonshi but that he first wanted to get a letter of transfer so that he could know the nature of the

work he was going to be doing at Lonshi and the conditions of service he was going to be serving under.

9.20 Accordingly, we agree with the finding of fact by the lower Court that the impediment to the Respondent's transfer was the refusal by the Appellant to formally write to him a letter of transfer. We have found it difficult to appreciate why the Appellant resolutely resisted to write a letter of transfer for the Respondent despite his persistent demands in that respect. In our view, the Respondent was entitled to have his new conditions of service spelt out in a formal letter especially that he was being asked to move to a foreign country.

9.21 We agree with Counsel for the Respondent that all the misunderstandings that culminated into the charging and dismissal of the Respondent emanated from the unyielding refusal by the Appellant to give the Respondent the letter of transfer. The record of appeal shows that the Respondent unsuccessfully made every effort to raise his grievances with DW1, Mr. ENSLIN, DW2 and the Acting Managing Director. In fact, the

evidence on record establishes that when the Respondent insisted on the letter of transfer in the meeting he had with DW1, Mr. ENSLIN and DW2, DW2 told him to resign if he did not want to take up the transfer. Section 51 of the **ACT**, which we have reproduced above, obliges an employer, before an employee commences employment or when there are changes in the nature of the employment, to cause to be explained to the employee the rate of wages and other conditions of service.

9.22 With regard to the charges themselves, apart from the fact that they clearly arose from the Respondent's insistence on being given a written letter of transfer, we are of the view that there was no substratum of facts to justify the charges. Firstly, with regard to the three days that the Respondent was alleged to have been absent from work, an analysis of the evidence on record establishes that he was granted permission to be away on those days. He was allowed to go and renew his passport and driver's license and later to pick up the travel document from Ndola after it had been issued. One of the

three days which DW1 alleged the Respondent was absent from work was the 27th July, 2009. However, in cross-examination, DW1 conceded that 27th July, 2009 was the day the Respondent was given permission to go and process his travel document. Further, DW1 did not dispute the fact that the Respondent was later given another day to go and collected the travel document when it was ready.

9.23 The charge of insubordination was based on the fact that the Respondent walked out of the meeting with the DW2 in the presence of Mr. ENSLIN. As we have already stated elsewhere in this judgment, the Respondent walked out of the meeting after DW2 refused to address his grievance relating to the letter of transfer but instead challenged him to resign. Clearly, the Respondent was not treated properly and, to this extent, we agree with the lower Court's finding of fact that the Respondent felt frustrated by the manner in which he was being treated by members of the Appellant's management.

9.24 We do not, therefore, think that it was fair for the Appellant to have grounded the Respondent's dismissal on the fact that he walked out of the aforesaid meeting.

9.25 With regard to the charge of failure to follow established procedure, there is evidence on record, that the Respondent first raised his grievance over the absence of the letter of transfer with his immediate supervisor, DW1. When DW1 failed to resolve the matter, the Respondent moved to the next person in the hierarchy, Mr. ENSLIN and later to the Human Resources Manager. It was only after he had seen these superiors and did not get a solution to his grievances that he proceeded to see the Acting Managing Director.

9.26 From the foregoing and applying our pronouncements in the case of **RICHARD JACKSON PHIRI**[5], we hold that the disciplinary panel in this case did not validly exercise its disciplinary powers. There was a breach of the rules of natural justice. Also, we find that there was no substratum of facts to support the disciplinary measure of dismissal of the Respondent from employment. We,

therefore, agree with the Court below that the Respondent was wrongfully dismissed. We find no merit in the first ground of appeal.

9.27 Coming to the second ground of appeal, we must state from the outset that we do not agree with the lower Court's order that the Respondent should be reinstated and paid salary arrears and arrears of allowances that he was entitled to, from the date of his dismissal up to the date of reinstatement. It is trite law that the remedy of reinstatement is only granted in exceptional cases. The Court must exercise extra care and caution before granting this remedy. The Court must take into account all relevant circumstances of the case including the nature of the allegations that led to the purported dismissal and the nature of the concerned institution and, in particular the kind of working environment the employee would be subjected to if reinstated. For example, in a very small organization it may not be very appropriate to order reinstatement if the employee's estranged working relationship with his or her superiors

cannot be mended. In the case of **BANK OF ZAMBIA V. JOSEPH KASONDE**[12], we said-

> **"It is trite law that the remedy of reinstatement is granted sparingly, with great care and jealously and with extreme caution."**

9.28 In any case, we have noticed, in the instant case, that the Respondent did not even claim for reinstatement both in his pleadings as well as in his testimony before the lower Court. A review of the Respondent's writ of summons and statement of claim establishes that what he prayed for, among other reliefs, was **"an order that he be deemed to have been reinstated and retired from employment."** It appears from the Respondent's heads of argument that Counsel for the Respondent was mindful of the fact that the Respondent did not ask the lower Court for reinstatement. In the said heads of argument, Counsel for the Respondent has not advanced any argument in support of the lower Court's order of reinstatement.

9.29 We, therefore, reverse the lower Court's order of reinstatement. It follows that the Respondent is not

entitled to any arrears of salaries and allowances which the lower Court ordered to be paid from the date of his dismissal up to the date of reinstatement.

9.30 Having, however, found that the Respondent was wrongfully dismissed, we are of the considered view that he is entitled to some damages for wrongful dismissal. There is no evidence on record on which we can properly base the calculation of the said damages. However, we take a leaf from our decision in the case of **SWARP SPINING MILLS V. SEBASTIAN CHILESHE AND 30 OTHERS**[13], where we held that-

> **"In assessing the damages to be paid and which are appropriate in each case, the Court does not forget the general rule which applies. This is that the normal measure of damages applies and will usually relate to the applicable contractual length of notice or the notional reasonable notice, where the contract is silent. However, the normal measure is departed from where the circumstances and the justice of the case so demand. For instance, the termination may have been inflicted in a traumatic fashion which causes undue stress or mental suffering ...."**

9.31 In the present case, clause 3.6.2 of the **Staff Conditions of Employment – Non Contractual Employees** provided that the applicable contractual length of notice would be

one calendar month's notice on either side. The question which inevitably follows is **whether there were circumstances in this case which would justify a departure from the award of one month's salary and allowances as damages**.

9.32 In our view, the circumstances in which the Respondent was dismissed from employment would justify a departure from the award of one month's salary and allowances as damages. We have already outlined the said circumstances elsewhere in this judgment and we do not see it necessary to repeat them here. In light of the said circumstances, we award the Respondent damages for wrongful dismissal equivalent to his three months' salary and allowances. The damages shall attract interest at the average short term deposit rate prevailing from the date of the Writ of Summons to the date of this judgment and, thereafter, at the current lending rate, as determined by the Bank of Zambia up to the date of payment.

9.33 We find no merit in the second ground of appeal.

10 CONCLUSION

10.01 The Appellant, having failed on the first ground of appeal and succeeded on the second ground, we order that each party will bear their own costs.

I.C. Mambilima
CHIEF JUSTICE

M. Malila
SUPREME COURT JUDGE

M. Musonda
SUPREME COURT JUDGE