IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 38/2016**
HOLDEN AT KABWE
(Civil Jurisdiction)

BETWEEN:

SOS CHILDREN'S VILLAGES ZAMBIA **APPELLANT**

AND

VICTOR CHILESHE **RESPONDENT**

REPUBLIC OF ZAMBIA
SUPREME COURT OF ZAMBIA
JUDICIARY
19 DEC 2018
SUPREME COURT REGISTRY 1
P. O. BOX 50067, LUSAKA

Coram: Wood, Kaoma and Musonda, JJS
on 6th November, 2018 and 19th December, 2018

For the Appellant: Miss Mwape Bwalya, Mwenye & Mwitwa Advocates

For the Respondent: Dr. F. Sumaili, Mumba Malila & Partner

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

1. **Attorney General vs. Richard Jackson Phiri (1988-89) Z.R. 121**
2. **Zambia Electricity Supply Corporation Limited vs. David Lubasi Muyambango (2006) Z.R. 22**
3. **National Breweries Limited v. Philip Mwenya: SCZ Judgment No. 28 of 2002**
4. **Zambia National Provident Fund v. Y. M. Chirwa (1986) Z.R. 70 (S.C.)**

5. **Redrilza Limited v. Abuid Nkazi and Others: SCZ Judgment No. 7 of 2011**
6. **Chilanga Cement Limited v. Kasote Singogo (2009) Z.R. 122**
7. **Konkola Copper Mines PLC v. Chileshe: Appeal No. 94 of 2015**
8. **Gunton v. London Borough of Richmond Upon Thames (1980) ALL. E.R. (3) P.577**

Other Works referred to:

1. **Tolley's Employment Law (2013) at page 1273**

This is an appeal arising from a judgment of the Industrial Relations Court which adjudged the respondent's dismissal from his employment by the appellant illegal and wrongful and, consequently, awarded him damages in the form of 24 months' salary in lieu of reinstatement. Additionally, the lower court granted the respondent compensation to the tune of 6 months' salary by way of compensation for embarrassment, trauma, shock and humiliation consequent upon the abrupt loss of his employment. The lower court also awarded interest on the said moneys at short-term commercial bank rate effective from 31st October, 2013 to the date of judgment and, thereafter, at the current lending rate as determined by the Bank of Zambia from time to time until full settlement.

The background facts and circumstances to which the present appeal is owed are fairly straightforward and can be recounted with ease.

The respondent was employed by the appellant on 12th January, 2005 as a Science Teacher at Herman Gneiner School in Lusaka. Three years later, he was promoted to the position of Village Educator. On 1st September, 2010, the respondent was appointed to serve as Director for the appellant's Kitwe Village.

In his position as Director of Kitwe Village, the respondent was responsible for 244 children and superintended over 41 members of staff.

On 26th March, 2013, a Mr. Bwalya Melu, who had recently been appointed to the position of National Director of the appellant visited the Kitwe Village for the purpose of familiarising himself with that facility. On 27th March, 2013, Mr. Melu arranged to hold separate meetings with both the Village's children and members of staff. During those meetings, letters which had been written by some members of staff and children setting out various complaints against the respondent were read out.

Among the complaints which the above letters highlighted was his management style which was described as dictatorial. The respondent was also described as a 'Wolf in a sheep's skin' who abused children at the Village and mistreated workers. He was also accused of using abusive language towards workers and the children.

On 5th April, 2013, Mr. Melu, the National Director, wrote a letter to the respondent in which the latter was reprimanded and warned against conducting himself in the manner which had generated complaints against him. The respondent was specifically warned of sterner disciplinary action if found guilty of misconduct in future.

On 29th April, 2013, that is, about three weeks after receiving his letter of reprimand on 5th April, 2013, the respondent received another letter from the National Director. In this second letter, the respondent was informed about the appellant's management's decision to investigate allegations of verbal abuse against the respondent. Following this development, he was immediately suspended from executing his duties and given 24 hours within which to vacate the Village premises.

On 28th June, 2013, the respondent received a letter written by the National Director in which he was informed about the conclusion of the investigations which had been launched against him and which had established that he had abused his office as Village Director by:

(i) disregarding procedures and guidelines which were contained in the SOS Zambia Terms and Conditions of Service as well as the respondent's job description with respect to the manner he had been conducting himself towards his co-workers; and

(ii) disregarding the provisions of the Child Protection Policy guidelines, SOS Zambia Terms and Conditions of Service with respect to his alleged use of abusive language towards the children under his care.

The offences with which the respondent was charged were stated to have arisen under items 11 and 40 of the appellant's Disciplinary and Grievance Procedure Code. For completeness, the respondent was asked to exculpate himself in writing to the National Director within two working days as to why disciplinary action could not be taken against him.

The respondent subsequently wrote his letter of exculpation to the National Director following which a disciplinary hearing took place on 9th August, 2013 before a Disciplinary Committee which the National Director himself constituted.

According to the documents on record, the respondent protested over the composition of the Disciplinary Committee as it had been constituted in a manner which was not consistent with the Disciplinary and Grievance Procedure Code in that its membership was not drawn from SOS staff but from Government employees instead of Heads of Facilities within the appellant organization as provided in the Code.

Ten days after the disciplinary hearing, the respondent received a letter of dismissal from the National Director. The National Director did not sit as part of the Disciplinary Committee.

On 20th August, 2013, the respondent wrote to the Secretary to the Board of Trustees of the appellant for the purpose of appealing against the decision to dismiss him.

On 29th August, 2013, the respondent's appeal was heard by a 3-member panel. According to the Minutes of the proceedings of

the appeal hearing, the panel recommended to have the respondent reinstated and redeployed to a station other than Kitwe Village. Contrary to this recommendation, the Chairperson of the appellant's Board wrote to the respondent on 7th October, 2013 advising him that the Appeals Committee had presented its findings to the Board for a final decision and that the Board had accordingly upheld the earlier decision to summarily dismiss the respondent from his employment.

On 31st October, 2013, the respondent presented his Notice of Complaint to the court below in which he sought the following reliefs:

(a) a declaration that his dismissal from employment was illegal, wrongful and unfair;

(b) a declaration that the disciplinary procedure which the appellant had employed against him was legally flawed and a complete sham;

(c) reinstatement or, payment of full salaries and all fringe benefits which he would have received up to normal retirement age;

(d) punitive damages for shock, trauma, embarrassment and humiliation arising out of the dismissal;

(e) any other relief;

(f) costs; and

(g) interest.

The respondent's Notice of Complaint was supported by an Affidavit in which the respondent recounted the matters which we have canvassed in the preceding narrative.

A number of poignant assertions in the respondent's Affidavit in support of his Notice of Complaint are worthy of note:

Firstly, the respondent alleged that the Disciplinary Committee which heard his case comprised persons who were not employees of the appellant but Government employees. In the respondent's view, this arrangement constituted a violation of the appellant's disciplinary procedure. For this reason, the respondent indicated that he had only submitted himself to the jurisdiction of the Disciplinary Committee under protest.

Secondly, in his exculpation, the respondent complained that he had been charged by the National Director who was not his line

manager contrary to Section 2.5 of the Disciplinary and Grievance Procedure Code.

Thirdly, the respondent complained that the Disciplinary Committee which heard his case was not constituted in accordance with Section 4.2 of the Disciplinary Code which required first hearing for offenders at Head of Facility level to be heard by a Committee at Head of Department level. As earlier noted the Disciplinary Committee which heard the respondent's case was drawn from Government employees.

With regard to the letter of dismissal, Section 6 (e) (iv) of the Code prescribed that the Chairperson of the Disciplinary Committee must sign a dismissal letter. In the respondent's case, the dismissal letter was signed by the National Director.

The respondent further deposed in his affidavit that aside from being reprimanded by the National Director, he was also summarily dismissed over the same offence. The respondent wondered as to how many times he was to suffer punishment for the same offence.

The respondent closed his affidavit in support of his Notice of Complaint by asserting that his dismissal was not founded on a genuine basis but more of a witch hunt.

In its Answer to the respondent's complaint, the appellant asserted that the respondent had committed a repudiatory breach of contract when he:

(a) flouted the laid down guidelines and procedures for the SOS Children's Villages Terms and Conditions of Service;

(b) abrogated and violated the Child Protection Policy; and

(c) failed to execute his functions in accordance with his job description; and

(d) willfully disobeyed superior orders and guidance.

The appellant asserted in its Answer that the termination of the respondent's employment was lawfully executed after following all the laid down disciplinary procedures and that the respondent was found guilty of gross misconduct and violation of the terms and conditions of service and the Child Protection Policy.

The appellant further asserted that nothing in the organisation's Disciplinary Code precluded the National Director from intervening or preferring charges against the respondent in the circumstances which prevailed at the time whereby the respondent's immediate supervisor was facing allegations of gross negligence. The appellant accordingly maintained in its Answer that the respondent had been lawfully and properly dismissed in accordance with the appellant's disciplinary procedure and that his complaint was without merit.

In addition to its Answer, the appellant caused to have an affidavit sworn and filed in support of the Answer. In that affidavit, it was deposed that the allegations which were made against the respondent during the meetings which were held when the National Director visited the Kitwe Village on his first familiarisation tour were raised in the respondent's presence and had to be investigated and subjected to further consultations. The deponent of the affidavit further deposed that it was only after those further consultations and investigations that it was firmly established that the respondent had, indeed, committed the offences in question.

The deponent further asserted that the respondent could not be charged by his immediate supervisor on account of the fact that investigations had revealed that the latter had willfully neglected or refused to deal with the issues which had been raised against the respondent over a period of 3 years immediately preceding the last investigations into his conduct.

With regard to the composition of the members of the Disciplinary Committee, it was asserted on the appellant's behalf that the Disciplinary and Grievance Procedure Code did not restrict membership on the Committee to employees of the appellant.

The deponent of the affidavit also maintained that the Disciplinary Committee was on firm ground when it concluded that the respondent had committed the offences for which he was subsequently dismissed adding that the National Director acted properly when he upheld the Disciplinary Committee's recommendation to have the respondent dismissed. In this regard, the deponent of the affidavit further deposed that the National Director's intervention was warranted or necessitated by the circumstances in which the respondent's immediate supervisor found himself in.

The complaint was subsequently tried in the court below in the usual manner. The respondent testified on his own behalf and led evidence the gist of which we have captured in the preceding narrative. The appellant's witness also testified by way of confirming the narrative which we have set out above.

After reviewing the evidence which was deployed before it by both sides, the trial court established, as undisputed facts, the following:

(i) that, at the time of his dismissal, the respondent had been employed by the respondent in the position of Village Director based at Kitwe Village;

(ii) that the respondent had been accused of having been abusive towards the children at the Village and of having breached or abrogated the appellant's Child Protection Policy;

(iii) that the National Director, Mr. Bwalya Melu, had charged, reprimanded and suspended the respondent on account of the same allegations or the same offence;

(iv) that the Disciplinary Committee which had heard the respondent's case was composed of persons who had not been employees of the appellant but employees of the Government of the Republic of Zambia. Following a hearing of his case, the Committee had recommended that the respondent should be reinstated and redeployed or dismissed;

(v) that the Appeals Committee recommended that the respondent be reinstated and redeployed.

In the view of the court below, the main issue that fell to be determined by it was whether or not the respondent's dismissal was unfair or illegal or wrongful and whether the procedure which was employed to deal with the respondent was legally flawed and entitled the respondent to the remedy of reinstatement or, in the alternative, whether some monetary compensation or damages would have constituted sufficient legal redress for him.

In undertaking the exercise which has been identified above, the trial judge started off by discounting 'unfair dismissal'. Thereafter, the court went on to consider whether or not the respondent's dismissal fell in the category of wrongful dismissal.

In this regard, the lower court explained that for a claim of wrongful dismissal to stand, a complainant must adduce evidence and prove that the laid down dismissal procedure in its Disciplinary Code was not followed in effecting the dismissal. In the context of the matter at hand, following the appellant's Grievance and Disciplinary Code entailed the following:

(a) The respondent having been properly charged by a proper officer;

(b) The respondent having been afforded the opportunity to exculpate himself;

(c) The Disciplinary Committee having necessary powers to conduct a disciplinary hearing; and

(d) The said power having been properly exercised.

The trial court went on to observe that the function of the court was not to interpose itself as an appellate Tribunal from the decision of the Disciplinary Committee for the purpose of inquiring whether or not its decision was fair or reasonable. The court further confirmed that the duty of the court was merely to examine

if the Tribunal had the necessary disciplinary power and if that power was exercised properly.

To support its narrative, the trial court cited this court's decisions in **Attorney General vs. Richard Jackson Phiri**[1] and **Zambia Electricity Supply Corporation (ZESCO) Limited vs. Lubasi Muyambango**[2].

In relation to the matter at hand, the trial court noted that the respondent adduced evidence and proved that the provisions of the SOS Children's Village's own Disciplinary Code and Grievance Procedure were not adhered to by the appellant when it dismissed him from employment.

The court then went on to highlight the procedural issues which had affected the integrity of the disciplinary process in question.

Firstly, charging officer of the respondent was a wrong person namely, the National Director, Mr. Bwalya Melu. The right person to charge the Complainant should have been his immediate Supervisor, the Deputy National Director, Mr. Mwamba Mutale, in accordance with Basic Principles 3.2.5 page 3 of the Disciplinary

Code and Grievance Procedure. This principle, however, was not followed but disregarded.

Secondly, the National Director constituted an irregular Disciplinary Committee comprising officials from Government Ministries outside the appellant's establishment, to hear the case, instead of constituting a Select Committee of the Board of Trustees of the SOS Children's Villages, since the respondent was a Functional Head and should not have been charged by the National Director. The Select Committee of the Board of Trustees should have been the right Disciplinary Committee in accordance with Clause 5.4.4 of the Disciplinary and Grievance Procedure Code. The constitution of the Disciplinary Committee with members from outside the appellant was totally illegal, and in violation of provisions of the appellant's Disciplinary Code.

Thirdly, in terms of Clause 9.2(d) of the appellant's Disciplinary and Grievance Procedure Code, the Appeals Committee's **verdict/decision is final** (trial court's emphasis). In this case, the Appeals Committee was the Select Committee of the Board of Trustees which recommended reinstating and redeploying the respondent elsewhere.

This decision/recommendation by the Board's Select Committee which heard the Appeal was, however, overturned and the respondent was dismissed in **total disregard** of Clause 9.2 (d) of the appellant's Code of Conduct.

The trial court wondered as to why the decision/recommendation by the Appeals Committee to reinstate and redeploy the respondent which was supposed to be the final decision was referred to the Board of Trustees for ratification. The Appeals Committee was a Select Committee comprising members of the Board of Trustees, and **Clause 9.2 (d)** of the Disciplinary Procedure states that:

> ***"... The decision of the Appeals Committee shall be final, and the letter to communicate their decision to the employee shall be signed by the Committee Chairperson".***

The trial court accordingly concluded that the procedure which the appellant employed to dismiss the respondent was contradictory and legally flawed. For this reason, the court adjudged the dismissal as having been illegal and wrongful.

Consequently, the lower court awarded the respondent Twenty-Four (24) months' salary as damages in lieu of

reinstatement on account of the unlawful and wrongful termination of the respondent's employment.

The court further awarded the respondent six (6) months' salary as compensation for mental distress i.e. embarrassment, trauma, shock and humiliation at the abrupt dismissal from employment.

The appellant was not satisfied with the conclusion and reasoning of the court below and has now come to us by way of this appeal which is premised on the following grounds:

"1. The Court below erred in law and in fact when it concluded and held, at page J21 of the judgment, that the Respondent's dismissal was illegal and wrongful as the Appellant followed the proper and/or fair procedure before dismissing the Respondent.

2. The Court below erred in law and in fact when it awarded the Respondent, at page J22 of the judgment, 24 months' salary as damages for wrongful and unlawful termination of employment in lieu of reinstatement.

3. The Court below erred in law and in fact when it awarded the Respondent, at page J22 of the judgment, 6 months' salary as compensation for mental distress, embarrassment, trauma, shock and humiliation at the abrupt dismissal from employment."

At the hearing of the appeal, counsel for either side confirmed having filed their respective Heads of Argument upon which they relied. Counsel also indicted their wish to orally augment their respective written arguments.

Learned counsel for the appellant's arguments around the first ground of appeal essentially sought to demonstrate that the respondent's employment was properly terminated by way of summary dismissal and in accordance with the appellant's established disciplinary procedure.

The appellant's counsel acknowledged that the respondent was initially reprimanded by the appellant's National Director on account of his alleged use of vulgar and abusive language towards both the children and workers who were under his charge and their alleged general mistreatment She also acknowledged that, notwithstanding the reprimand and warning which the National Director had administered against the respondent, the appellant's management had directed that the allegations which had been made against the respondent be investigated and that, pending the outcome of such investigations, the respondent was to be placed on suspension in accordance with the appellant's Disciplinary and

Grievance Procedure Code. According to the appellant's counsel, the respondent was properly suspended by the National Director who had acted in consultation with the appellant's human resource personnel.

Under this same ground (ground one) the appellant's counsel advanced the argument that the respondent's dismissal was justified on account of the fact that he had violated the appellant's Child Protection Policy with regard to the manner in which he was managing the children under his care as the overall boss at the appellant's Kitwe Facility (Kitwe Village).

With regard to the respondent's complaint that he was subjected to a disciplinary hearing before a disciplinary committee which comprised members who were not employees of the appellant, the appellant's counsel argued that there was nothing wrong, or illegal or unfair with that arrangement as it did not result in any infliction of injustice upon the respondent.

The appellant's counsel summed up her arguments around the first (and primary) ground of appeal by adverting to legal principles which, in her estimation, she deemed or considered germane to the issues and circumstances which had arisen in

relation to the matter at hand. In this regard, learned counsel began by drawing our attention to the principle, which we pronounced in the case of **Zambia Electricity Supply Corporation Limited v. David Lubasi Muyambango**[2] that:

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

Buoyed by the principle which we have set out above, counsel for the appellant submitted that, in relation to the matter at hand, the appellant had the necessary power to take the disciplinary steps which it had taken against the respondent and that the power in question was properly exercised.

The appellant's counsel also turned to our earlier decision in **National Breweries Limited v. Mwenya**[3] where we said, following our seminal observations in **Zambia National Provident Fund v. Y. M. Chirwa**[4] that:

> *"Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is also dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract and the employee*

has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity".

In relation to the matter at hand, counsel for the appellant argued that by using vulgar or abusive language and issuing disparaging remarks against the children who had been under his care, the respondent had committed a dismissable offence which could not be negatived or discounted by any failure on the appellant's part to adhere to the organisation's disciplinary procedures.

We were accordingly urged to allow the first ground of appeal.

With regard to the second ground of appeal, counsel for the appellant argued that the trial court fell in error when it awarded the respondent 24 months salary in damages for wrongful and unlawful termination of employment when, according to counsel, the respondent was actually summarily dismissed from employment. Citing our decision in **Redrilza Limited v. Abuid Nkazi and Others**[5], the appellant's counsel posited that there is a difference between dismissal and termination in that while the former involves loss of employment arising from disciplinary action, the latter does not necessarily involve disciplinary action.

In the view of the appellant's counsel, the lower court had no proper basis for awarding the respondent 24 months' salary in the way of damages for wrongful and unlawful termination of employment.

To support the above contention, learned counsel cited our decision in **Chilanga Cement Limited v. Kasote Singogo**[6] where we criticized the lower court for having awarded 24 months' pay for *abrupt loss of employment* without setting out the considerations which that court had taken into account in arriving at that level of compensation. Counsel accordingly invited us to allow the second ground of appeal as well.

As to the third and final ground of appeal, the appellant's counsel criticized the trial court for having awarded the respondent 6 months' salary as compensation for mental distress, embarrassment, trauma, shock and humiliation as a result of his abrupt dismissal from employment.

To fortify the above criticism, the appellant's counsel quoted extensively from our decision in **Singogo**[6] before reaching the conclusion that the type of damages which this ground seeks to impugn could only be awarded in exceptional cases. Counsel poignantly reminded us that the granting of the damages in

question by the lower court in **Singogo**[6] was not only criticized by ourselves but set aside in toto.

In relation to the matter at hand, counsel for the appellant pointed out that the respondent had not even proved or demonstrated that he suffered mental distress, embarrassment, trauma, shock or humiliation. Under these circumstances, we were urged to allow the third ground of appeal as well.

For his part, Dr. Sumaili, learned counsel for the respondent fervently supported the lower court's judgment in its entirety.

Dr. Sumaili's point of departure in attacking the first ground of appeal was that, contrary to the appellant's counsel's contention, the appellant did not strictly adhere to its entire prescribed disciplinary procedure when it dismissed the respondent from his employment. While seemingly acknowledging that the appellant had observed some of the disciplinary procedures in its Disciplinary and Grievance Procedure Code when it dismissed the respondent, counsel argued that some of "the requisite steps" under that code "were... neglected" thereby rendering the respondent's dismissal "wrongful". To support the above

contention, counsel cited our decision in **Konkola Copper Mines PLC v. Chileshe**[7] where we said:

> "*The concept of wrongful dismissal has been widely accepted to mean that in considering whether [a] dismissal is wrongful or not it is the form to be considered rather than the substance (emphasis supplied by counsel).*"

Counsel also cited the authors of *Tolley's Employment Law (2013)* who have asserted at page 1273, that:

> "*If the contract of employment stipulates that a particular procedure must be followed before an employee [can be] dismissed, then a dismissal which is carried out without that procedure having been followed is necessarily wrongful (counsel's emphasis).*

Learned counsel then went on to submit that, in relation to the respondent's dismissal, the Disciplinary and Grievance Procedure Code was not followed in that:

(a) the appellant failed in its duty of ensuring that the disciplinary charge which was preferred against the respondent was not only fully and clearly explained to him but that the same had been fully understood by him;

(b) the respondent was charged by the appellant's National Director as opposed to the organisation's Deputy Director as the disciplinary Code had prescribed in Clause 2.5;

(c) the respondent's case was not heard by functional Heads as dictated by Clause 4.2 of the appellant's Disciplinary and Grievance Procedure Code but by a committee comprising outsourced Government employees;

(d) the subjection of the decision of the Appeals Committee which had determined in the respondent's favour to a process of ratification by the appellant's Board which was neither contemplated nor provided for in the Disciplinary Code; and

(e) the failure to follow the prescription in the Disciplinary Code which required the communication of the Appeals Committee's decision to be by way of a letter signed by the Appeals Committee's chairperson.

The respondent's grievance relative to this last aspect of the appellant's alleged violation of its Disciplinary Code was that the letter conveying the Appeals Committee's decision relating to the respondent's appeal was not signed by the Committee's

chairperson as Clause 9.22 of the Disciplinary Code required but by the chairperson of the appellant's Board.

Citing the English case of **Gunton v. London Borough of Richmond Upon Thames**[8], counsel for the respondent submitted that, compliance with some prescribed disciplinary procedure is a condition precedent to the exercise of the relevant disciplinary power.

Learned counsel for the respondent also submitted that no evidence was placed before the trial court to demonstrate the respondent's use of vulgar language against some of the children who were under his care.

Counsel further submitted that there was nothing improper or offensive over the respondent's use of the expression 'sexy reports' as this expression conveys nothing offensive or improper in itself in its grammatical or literal use.

With respect to the 2nd and 3rd grounds of appeal, the respondent's counsel essentially supported and justified the lower court's approach and conclusion with respect to the awarding of

24 months' salary in the way of damages for wrongful and unlawful termination of employment.

Counsel also supported the lower court's conclusion that the respondent was entitled to a further 6 months' salary by way of compensation for mental distress, embarrassment, trauma, shock and humiliation consequent upon his abrupt dismissal from employment.

As earlier noted, counsel for the two sides were granted the opportunity to orally augment their written arguments.

For her part, Miss Bwalya, learned counsel for the appellant briefly submitted that there was evidence of wrong-doing on the respondent's part and that, this having been the case, the decisions of this court have repeatedly affirmed that the court cannot interfere with the dismissal even in the face of a proven failure to comply with the laid down disciplinary procedure.

Counsel accordingly urged us to stand by our previous decisions such as **ZESCO and Muyambango[2], Zambia National Provident Fund v. Chirwa[4]** and several others and allow the appeal.

For his part, Dr. Sumaili's brief oral augmentation was that, unlike in the cases which counsel for the appellant had cited, the respondent's circumstances were different in the sense that the alleged wrong-doing for which he was dismissed was not proven.

Counsel accordingly invited us to uphold the lower court and dismiss the appeal with costs.

We have examined the record of appeal, the judgment appealed against and the respective arguments of counsel involved and express our gratitude to counsel for their invaluable perspectives.

Having regard to the evidence which was before the trial court and the position of the law as we articulated it in such cases as **Zambia National Provident Fund v. Chirwa**[4]; **National Breweries PLC v. Philip Mwenya**[3]; **ZESCO Limited v. David Lubasi Muyambango**[2] and others, the core issue which we consider as falling for determination and upon which this whole appeal must turn is whether the respondent had committed an offence which entitled the appellant to dismiss him irrespective of whether or not the appellant's laid down procedures for effecting that disciplinary measure were followed.

The position which Miss Bwalya, learned counsel for the appellant articulated and reinforced in her oral augmentation was that, although the appellant followed all the applicable disciplinary procedures when it effected the disciplinary measure of dismissal against the respondent, that measure or action could not, in the light of the decisions of this court which we cited a short while ago, be impugned even on the basis of any failure to comply with the procedures which were prescribed in the appellant's disciplinary code.

For his part, Dr. Sumaili's reaction to his colleague's exertions was that, quite aside from the issue of the appellant's non-adherence to the Disciplinary Code, the appellant did not prove or establish any dismissable disciplinary offence against the respondent to warrant the sanction of dismissal which he incurred. For this reason, Dr. Sumaili posited that the decisions of this court upon which the appellant had founded its core contention had no relevance or application to the respondent's circumstances.

We must pause here to observe that, in the light of the other factors which we shall shortly advert to, we find ourselves more attracted to the respondent's contention. In taking this position

we call to mind the following conclusions by the Appeals Committee which heard the respondent's appeal:

(a) that the disciplinary charge which the appellant had preferred against the respondent was ambiguous; and

(b) that the respondent should not have been reprimanded/warned and subsequently charged, suspended and dismissed over the same offence.

We also remind ourselves that, by reason of what we have just highlighted in (a) and (b) above, the appellant's Appeals Committee recommended the respondent's reinstatement and redeployment.

We pause here again to observe that, following the making of the recommendation to have the respondent reinstated, the Appeals Committee noted that its recommendation needed to be ratified by the appellant's Board in accordance with its terms of reference.

Although the trial court did not pronounce itself upon the manner in which the Appeals Committee had proceeded in its handling of the respondent's appeal, in the sense of treating its role as that of making a recommendation which was subject to

ratification, it emphatically and categorically noted that Clause 9.2 (d) of the appellant's Disciplinary Code made any decision or verdict by that committee final.

In the context of this matter, Clause 9.2 (d) of the Disciplinary Code was not observed in the sense that the Appeals Committee performed a role (that is, of making a recommendation) which the Code did not prescribe for it while the appellant's Board effectively circumvented the appellant's disciplinary machinery to the respondent's detriment and in circumstances which did not contemplate its (the Board's) involvement.

On first brush one may be inclined to see little or nothing in the grievances which the respondent laid before the court below beyond non-compliance with or violations of the Disciplinary Code by the appellant. And the reaction of the law, where such grievances emanate from a proven offender, is now treated as having been settled by this court in **Chirwa**[4], **Mwenya**[3], **Muyambango**[2] and several other decisions. A common thread which runs through each one of these decisions is that:

> **"Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is also dismissed, no injustice arises from a failure to comply with**

the laid down procedure in the contract and the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity."

A key element which was revealed to us when we examined the judgment of the court below was that the thrust of the court's conclusion turned on procedural transgressions. Those transgressions revolved around the manner in which the respondent was charged and how the disciplinary offence against him was prosecuted.

In the view which we have taken, the 'injustice' which the respondent suffered went beyond procedural transgressions and possessed a clearly substantive characterisation as we now demonstrate below.

To start with, the lower court accepted the evidence which pointed to the ambiguity of the offences which had been preferred against the respondent. This ambiguity clearly went to the root and substance of the offences and probably called the validity of such offences into question.

Secondly, the respondent was subjected to double punishment for the same offence. For the removal of any doubt,

there was uncontested evidence in the court below that the respondent was formally reprimanded by the appellant's National Director for 'misconduct'. He was also warned against *'future misconduct'* which was going to attract *"... sterner disciplinary action."*

Undoubtedly, the subsequent subjection of the respondent to a second disciplinary process and the consequential infliction of the ultimate disciplinary sanction of dismissal over what even the Appeals Committee found to have been the same allegations against the respondent constituted an injustice of a substantive nature. In days when Latin expressions counted a lot more than they do now, what the respondent was subjected to was prohibited by the expression *nemo debet bis puniri prouno delicto* which, when translated, means no one should be punished twice for one fault.

Thirdly, the subvertion of the disciplinary machinery by the appellant's Board in the way of substituting the favourable outcome of the appellate process to which the respondent had subjected himself with the sanction of a dismissal constituted injustice of a substantive characterization.

In our considered view, the factors which we have identified above, coupled with the fact that the respondent fervently disputed the commission of the disciplinary charges which led to his dismissal took the respondent's case beyond the ambit of the principle which runs through **Chirwa**[4], **Mwenya**[3] and **Muyambango**[2] and which appears to have given some oxygen to this appeal.

Having regard to the fact that **Chirwa**[4], **Mwenya**[3] and **Muyambango**[2] cannot avail the much-needed oxygen to the appellant's quest, the first ground of appeal must fail. The failure of this core ground means that the second ground must incur the same fate.

With respect to the third ground, it is our considered view that the award of 24 months' salary represents sufficient compensation in the circumstances of this matter. Accordingly, we set aside the additional award of 6 months' salary which the lower court pronounced in favour of the respondent.

As we said in **Chilanga Cement PLC v. Kasote Singogo**[6]:

> **"[Awards] for torture or mental distress should [only] be granted in exceptional cases and, certainly, not in a case where more than the**

normal measure of common law damages have been awarded [given] that the enhanced damages are meant to encompass the inconvenience and any distress suffered by the employee as a result of the loss of the job..."

We do not, indeed, consider that, in the circumstances of this case, the respondent made out a good case to justify an additional 6 months' pay award. The third ground of appeal succeeds.

Two out of the three grounds of appeal having failed, the net result is that the appeal has failed.

The costs will follow the outcome we have just announced and the same should be taxed in default of agreement.

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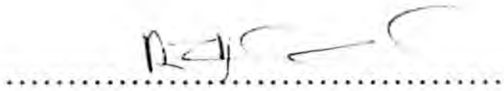
A. M. WOOD
SUPREME COURT JUDGE



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R.M.C. KAOMA
SUPREME COURT JUDGE

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M. MUSONDA, SC
SUPREME COURT JUDGE