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

Appeal No. 108/2016
SCZ/8/026/2016

B E T W E E N :

MARTIN NGUVULU AND 34 OTHERS **APPELLANTS**

AND

MARASA HOLDINGS LIMITED **RESPONDENT**
(T/A Hotel Inter-Continental Lusaka)

Coram: **Mambilima CJ, Malila and Kaoma, JJS**
On 2nd April, 2019 and 4th June, 2019

For the Appellants: Mr. W. Mwenya of Messrs Lukona Chambers

For the Respondent: Mr. A. J. Shonga Jr. SC with Mr. N. Ng'andu of Messrs Shamwana & Company

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J U D G M E N T

Malila, JS delivered the judgment of the court.

Case referred to:

1. *Anderson Kambela Mazoka and 2 Others v. Levy Patrick Mwanawasa & 2 Others (2005) ZR 132*
2. *Zulu v. Avondale Housing Project Limited (1982) ZR 172*
3. *Galaunia Farms Limited v. National Milling Company Limited and National Milling Corporation Limited (2004) ZR 1*
4. *Nkata & Four Others v. Attorney General (1966) ZR 124*
5. *Swift Cargo v. Lake Petroleum Limited (Appeal No. 32 of 2016)*
6. *Attorney General v. Kakoma (1975) ZR 216*

7. *Patrick Makumbi & 25 Others v. Greytown Breweries Limited and 3 Others (SCZ Appeal No. 032/2012)*
8. *Bank of Zambia v. Kasonde (1995-1997) ZR 238*
9. *Zambia Airways Limited v. Gershom B. Mubanga (1990-1992) ZR 149*
10. *ANZ Grindlays Bank Limited v. Chrispin Kaona (1995-1997) ZR 85 at p. 89*
11. *Zambia National Broadcasting Corporation Limited v. Penias Tembo, Edward Chileshe Mulenga & Moses Phiri (1995-1997) ZR 68*
12. *Kitwe City Council v. William Nguni (2005) ZR 75*
13. *Zambia National Building Society v. Ernest Mukwamataba Nayunda (1993) ZR 29*
14. *Edward Mweshi Chileshe v. Zambia Consolidated Copper Mines Limited (1995-1997) ZR 148*
15. *Coleman v. Magret Joinery Limited (1975) 1CR 46*
16. *Chama v. Zesco (SCZ Judgment No. 20 of 2008)*
17. *ZCCM v. James Matale (1995-1997) ZR 144*
18. *William David Carlise Wise v. EF Harvey Limited (1985) ZR 179*
19. *Admark Limited v. Zambia Revenue Authority (2006) ZR 43*
20. *Capital Drilling (Z) Limited v. Patrick Wamulume, Appeal No. 160 of 2010*
21. *Tom Chilambuka v. Mercy Mission International, Appeal No. 171 of 2012*
22. *Swarp Spinning Mills Plc v. Sebastian Chileshe & Others (2002) ZR 223*
23. *Chilanga Cement v. Kasote Singogo (2009) ZR 122*
24. *Chintomfwa v. Ndola Lime Limited (1999) ZR 173*
25. *Jacob Nyoni v. The Attorney General (2001) ZR 65*
26. *Konkola Copper Mines Plc v. Aaron Chimfwembe & Kingstone Kimbayi (Selected Judgment No. 22 of 2016)*
27. *Georgina Mutale (T/A GM Manufacturing Limited) v. Zambia National Building Society (2000) ZR 24*
28. *BP Zambia Plc v. Zambia Competition Commission & 2 Others (2011) 3 ZR 222*
29. *Emmanuel Mutale v. Zambia Consolidated Copper Mines Limited (1993-1994) ZR 94*
30. *YB and Transport Limited v. Supersonic Motors Limited (2000) ZR 22*
31. *Collet Van Zyl Brothers Limited (1966) ZR 65*
32. *Sibulo v. Kuta Chambers (2015) (3) ZR 191*
33. *Musonda v. Simpemba (1978) ZR 175,*
34. *General Nursing Council of Zambia v. Mbangweta (2008) ZR (2) 105*

Legislation referred to:

1. *Industrial and Labour Relations Act, chapter 269 of the laws of Zambia*
2. *Industrial and Labour Relations (Amendment) Act No. 8 of 2008*
3. *Representative Bodies (Elections and Conduct of Ballot) Regulations, 2008 Statutory Instrument No. 23 of 2008*
4. *Employment Act, chapter 268 of the laws of Zambia*
5. *Halsbury's Laws of England, 4th ed. Vol. 16 para. 522*

The thirty-five appellants were all unionised employees of the respondent company which trades as Intercontinental Hotel, Lusaka. The dispute that gave rise to these proceedings arose from their dismissals from employment sometime in 2015. They regarded those dismissals as an excessive response by the respondent to their conduct in exercise of their collective bargaining rights.

It so happened that following the expiry of the 2012-2014 Collective Agreement governing the parties, the appellants, through their Union, the Hotel Catering and Allied Workers' Union (the Union), began the process of collective bargaining with a view to agreeing on new conditions of service for the ensuing two years. A painfully contentious issue in the negotiations was the Union's proposal for an upward adjustment in the appellants' salaries.

The respondent declined the suggested upward salary review, citing what it considered as its unfavourable financial performance and the attendant inability to justify, let alone sustain any such increase in salaries. Thus, no agreement was reached on that issue.

A dispute was consequently declared by the Union. A board of conciliation was appointed which, in due course, tendered a report. With both sides maintaining their respective positions, the conciliation, not unexpectedly, failed. The Minister of Labour was notified accordingly and invited to intervene. However, the Minister did not show any immediate inclination to do so.

Desirous of proceeding to the next step in the industrial dispute, the appellants' Union then wrote to the Minister of Labour, requesting him to appoint a Labour Officer to superintend the conduct of a secret ballot to decide whether or not to proceed with strike action. In response, the Labour Commissioner intimated reluctance to encourage the appellants to hold a strike ballot as it 'was not in public interest.' He advised the parties to return to the negotiating table.

After further communication with the respondent through their Union, the appellants were convinced that at the rate events were unfolding their concerns were unlikely to be addressed. Using their Union, they appointed the president of the Gemstones and Allied Workers' Union to preside over the strike ballot which took place on 10th October 2014. The result of that ballot was that the appellants should proceed with strike action. In terms of section 78(4) of the Industrial and Labour Relations Act, chapter 269 of the laws of Zambia, as amended by Act No. 8 of 2008, a strike or lockout could occur or commence ten days following a decision to do so.

Ten days after the ballot, to be specific, on 21st October, 2014, a meeting of the appellants was called in the respondent's cafeteria 'to discuss the commencement of the legal strike.' The respondent viewed this as a 'sit in.' It directed its security officer to note all the workers who were seen at the cafeteria on that day, as the respondent had determined to take disciplinary action against those who had participated in the meeting-cum-'sit in.'

Prior to the intended disciplinary action against the appellants, the Minister of Labour had advised the respondent to suspend any such intended action. The respondent disregarded that directive. It charged the appellants with 'gross misconduct and causing disruption' and subsequently dismissed them from employment.

The appellants grieved the dismissal, alleging them to be without just cause and thus approached the Industrial Relations Court, seeking very specific relief which included reinstatement or alternatively, retirement from employment with full benefits.

On the facts and evidence before it, the Industrial Relations Court held that the appellants' action of 21st October 2014, did not meet the criteria of a strike as stipulated in section 3 of the Industrial and Labour Relations Act, chapter 269 of the laws of Zambia. It ordered that the appellants be re-engaged rather than reinstated, as they sought in their originating process, because the Union was partly to blame for the appellants' predicament. By so holding, the lower court in effect found in favour of the appellants. However, it awarded them relief which was different and probably falling short of what they had sought.

That holding of the lower court prompted the appellants to launch the present appeal. They structured three grounds of appeal as follows:

Ground One

The court below erred in law and fact by failure to grant the reliefs sought by the appellants in the court below despite holding that the action of 21st October 2014, did not amount to a strike action and that the termination of employment of the appellants was wrongful.

Ground Two

The court below erred in law and fact by ordering payment of 2 months' pay in lieu of notice as per clause 3(b) of the Collective Agreement when the said provision relates to redundancy and retrenchment of employees a matter that was not before the court below.

Ground Three

The court below erred in law and fact by refusal to order costs to the appellants when it held that the respondent acted or was unreasonable in summarily dismissing the appellants as there was no enough evidence to sustain the charge of gross negligence and disruption of work against the appellants.

The respondent, unhappy that the appellants were awarded any relief at all, cross-appealed on five grounds couched as follows:

Ground One

The learned judge in the court below erred in law and fact when he held that the event of 21st October 2014, did not meet the litmus test required for an illegal strike.

Ground Two

The learned trial judge erred in law and fact when he held that the respondent acted unreasonably when it summarily dismissed the appellants.

Ground Three

The learned judge in the court below erred in fact and in law when he found that an across the board dismissal should not have been used by the respondent when the memorandum of recognition clearly states that participation in an illegal strike warrants automatic resignation by the appellants.

Ground Four

The learned judge in the court below erred in fact and law when he ordered that the appellants be re-engaged.

Ground Five

The learned judge in the court below erred in law and fact when he awarded the appellants 2 months' pay in lieu of notice.

We pause here to make two general observations. The first has to do with the lower court's judgment. It seems to us that the court below did not clearly formulate what issues fell to be determined in the dispute. The judgment is discursive and raises issues whose bearing on the rights of the parties the court did not venture into. This explains the general uncertainty that characterized the court's reflection on many aspects of the suit and probably accounts for the

difficulties that appears to have animated the structuring of the grounds of appeal and cross-appeal.

Our second observation is that there is a remarkable degree of overlap between the grounds of appeal and the grounds of cross-appeal. In specific terms, ground one of the main appeal and grounds one and two of the cross-appeal speak but to the same issue. Ground two of the appeal and grounds four and five of the cross-appeal are also intrinsically linked. Yet, ground four of the cross-appeal is also intimately connected to ground one of the main appeal. Ground three of the appeal stands independently and so does ground three of the cross-appeal.

To the extent of their interrelationship we propose in this judgement to consider the grounds of appeal and those of cross-appeal compositely.

Written heads of argument were filed by both parties in support of their respective positions. The learned counsel for the parties each indicated, at the hearing, that they were adopting and placing reliance on those heads of argument.

In regard to ground one of the appeal as formulated, the grievance of the appellants, as we understand it, lies not with the finding by the lower court that the appellants' action on the material day (i.e. the 21st October, 2014) did not amount to strike action. Rather it is that since the termination was held to be wrongful, reinstatement should have been ordered as prayed, rather than reengagement.

A perusal of the written submissions by the appellants' learned counsel, however, reveals that counsel invested an enormous amount of time to demonstrate that the finding of the lower court as to the wrongfulness of the dismissal of the appellants, was supported by the facts and cogent evidence. In this regard, the learned counsel went to a great extent in his written submissions, referring us to specific statements of the court as well as extracts of the evidence in the court below, to justify the finding by the court that the events of 21st October 2014, did not amount to strike action.

We think with respect, that ground one as formulated does not justify the arguments that the learned counsel advanced under it. While the ground as structured attacks the relief, presupposing in

the process that the dismissal was correctly adjudged as wrongful, the gist of the appellants' arguments under ground one is that the dismissal was unjustified.

Counsel submitted in effect that the court's finding that the activities of the appellant on the material day fell short of strike action, were findings of fact supported by the evidence before the court.

On the contrary, and in response to the question whether the events of 21st October, 2014 amounted to strike action, the learned counsel for the respondent submitted that they indeed did. He, however, deferred full arguments on the matter to the cross-appeal.

Under the first ground of cross appeal, it was submitted that the lower court fell into error when it held that the events of 21st October, 2014 did not meet the litmus test required for an illegal strike.

In arguing this ground of the cross appeal, State Counsel Shonga submitted that the court below was wrong to conclude that the event held on 21st October, 2014 did not meet the litmus test required for an illegal strike because in making that determination it

used the definition of the word 'strike' as contained in section 3 of the Industrial Relations Act as opposed to that in section 3(1) of the Industrial and Labour Relations (Amendment) Act No. 8 of 2008.

He contended that the events of 21st October, 2014 were preceded by a strike ballot conducted on 10th October, 2014 which was undertaken in contravention of the law. State Counsel Shonga identified the law contravened as the Representative Bodies (Elections and Conduct of Ballot) Regulations, 2008 Statutory Instrument No. 23 of 2008. That Statutory Instrument requires that strike ballots should be presided over by a proper officer, that is to say, a Labour Officer appointed or deemed to have been appointed as such under section 3 of the Employment Act, chapter 268 of the laws of Zambia, and includes the Deputy Labour Commissioner, an Assistant Labour Commissioner and a Labour Inspector.

According to State Counsel Shonga, the president of Gemstones and Allied Workers' Union of Zambia, who presided over the strike ballot was not a proper officer, hence the illegality of the strike ballot, and this was confirmed by the lower court in its judgment. The learned State Counsel also pointed out that the appellants' affidavit

in support of the complaint in the lower court showed clearly that on the basis of the outcome of the illegally conducted ballot, the appellants were to proceed with a strike action.

State Counsel Shonga further submitted that on the 21st October, 2014 the Labour Commissioner only arrived at the Hotel from about 12:00 hours and a second strike ballot was therefore conducted under his supervision. Before the arrival of the Labour Commissioner, the appellants were required to be at their work stations, but were in fact not as per evidence on record. This clearly shows that the appellants had withdrawn their labour.

State Counsel further submitted that the gathering of the appellants in the staff cafeteria waiting to be addressed by union leaders amounted to engaging in a strike action. He pointed out that their intention to do so was recorded in the letter from their union dated 14th November, 2014 which read in part as follows:

> **Firstly, we would like to state that our members never participated in any illegal strike. Bullet number 9 of the Recognition Agreement is very explicit as to when workers can proceed on a strike and we quote "no strike nor lockout shall take place until the negotiating procedures have been exhausted and no settlement has been reached" end of quote.**

> **Your Management is fully aware that the negotiation procedure between our union and Hotel Intercontinental ended with a failed conciliation based on that our Recognition Agreement in bullet number 9 gives us the right to proceed on a strike, because by that time the negotiations were exhausted.**

The learned State Counsel also submitted that it was wrong for the lower court to have held that there was no evidence on record to synchronise or relate the headcount by positions against the actual workers who were available during those shifts. This, the lower court held, was the only way that would have credibly proved that the appellants were indeed absent from their work stations.

It was State Counsel Shonga's additional submission that this approach by the lower court was wrong because the established position of the law as espoused in *Anderson Kambela Mazoka and 2 Others v. Levy Patrick Mwanawasa & 2 Others*[1] and reaffirmed in other cases such as *Zulu v. Avondale Housing Project Limited*[2] and *Galaunia Farms Limited v. National Milling Company Limited and National Milling Corporation Limited*[3], is that he who alleges must prove. In this particular case, the burden of proof rested with the appellants and not the respondent, to not only show that the strike

ballot was legal but that the gathering in the cafeteria on 21st October, 2014 was not a strike action.

Counsel ended his submission on this point by stating that the only logical conclusion to be drawn is that the appellants gathered in the cafeteria prior to the address by the Labour Commissioner in order to stage a strike.

The appellants opposed this ground of the cross-appeal. In the heads of argument filed on their behalf, it was contended that ground one of the cross-appeal, challenges findings of fact on what transpired on the 21st October 2014. The finding of the lower court was that no evidence was led regarding which of the appellants/employees were found in the cafeteria who were at that time required to be on duty. He further submitted that the circumstances under which a trial judge's findings of fact may be upset by an appellate court as they were explained in the case of *Nkata & Four Others v. Attorney General*[4], did not exist in the present case.

Mr. Mwenya further submitted that the question of the strike ballot conducted on the 10th October, 2014 being illegal or not was overtaken by the conduct of the subsequent strike ballot undertaken by the Labour Commissioner. He reiterated that there were no records or registers to show which of the appellants were not at their work stations between 08:00 hours and 12:00 hours.

Turning to the argument that the appellants had shown a clear prior intention to go on strike, the learned counsel submitted that such intention never materialized. There was a Union meeting to take place on that day which was followed later by elections. The fact that whenever there was a union meeting some members of the Union attended the meeting while others worked, was never rebutted. It was also submitted that the obligation to prove that the work schedules were not adhered to lay with the respondent and could not shift to the employee/appellants. In any case what the records shows is that the work schedules/staff registers were of no help to the court below as they lacked material particulars. We were thus urged to dismiss ground one of the cross-appeal.

We are grateful to counsel for both sides for their lucid submissions on these grounds. Part of the question that falls to be determined under ground one of the appeal (as argued) and grounds one and two of the cross-appeal, is broadly whether the respondent's action of dismissing the appellants was justified. This question is covered in the arguments on whether or not the events of 21st October, 2014 amounted to a strike. Yet the argument also address the question whether the dismissals were unreasonable.

The lower court found, on the evidence before it, that there was no strike in the proper sense, that took place. The court gave its reasons for that finding as being a 'failure by the respondent to synchronize or correlate positively the Head Count List/or Established Register at the cafeteria with actual staff who were available at various service and Profit Centers during the various shifts.'

What the court meant in effect is that granted that there was no proper accounting as to which staff were in the cafeteria and who were at their work stations, it was improper to conclude, as did the respondent, that there was a strike or a sit in. This, in our view, is a

serious indictment on both the quality of investigations that were undertaken by the respondent's agent prior to the dismissals of the appellants on the basis that they were on strike, and on the presentation of that evidence in court. So, damning is this impeachment of the quality of investigation and evidence presentation that it effectively undermines all the arguments made on behalf of the respondent regarding the lawfulness of the actions of the appellants on the material day. If the very fact of engaging in strike action was effectively rebutted, it is otiose to argue that the said strike action was illegal.

It is also for these same reasons that we are of the considered view that ground three of the cross-appeal has no merit. An across the board method of dismissal should never have been used where it was not clear who was working and who was not, and the records tendered were unhelpful. Innocent employees could well have been unjustly caught up in the method used by the respondent.

State Counsel Shonga submitted that the burden of proof in this case lay on the appellants to show, not only that the strike ballot was legal but also that the gathering in the cafeteria on 21st October, 2014

was not a strike action. We think, with respect to State Counsel, that this argument is fanciful. Indeed, it is incumbent on he who alleges to prove. In this case, the respondent alleged that the strike ballot and the activities in the cafeteria on the material day were illegal and proceeded to take action based on what it perceived and asserted was the case. It ought to have justified its actions. In other words, quite to the contrary of what the learned State Counsel submitted, it was up to the respondent to prove first, that each of the appellants had engaged in a sit in or strike action; and second, that such sit in or strike action was illegal.

As regards the findings of the lower court that the activities of 21st October, 2014 did not meet the litmus test for strike action, we are satisfied from the record that in coming to that conclusion, the lower court considered and assessed the evidence that was placed before it. The learned counsel for the appellants has taken us through much of that evidence which is uncontroverted. The conclusions of the court were largely factual while part of it was based on the court's assessment of the evidence of the witnesses which was adduced before it.

To the extent that much of the findings of the lower court which informed its conclusion on the substance of the activities of the 21st October, 2014 are based on facts, we are loathe to disturb them. We have in numerous case authorities including *Nkata and Four Others v. Attorney General*[4], and *Swift Cargo v. Lake Petroleum Limited*[5], articulated the position that findings of fact will be disturbed in very limited cases, none of which has been alleged or argued here. Equally, we have no reason to disturb the lower court's assessment of the evidence adduced before it by various witnesses. In *Attorney General v. Kakoma*[6], we stated that:

> **...a court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it having seen and heard witnesses giving evidence.**

We reiterated this position in *Patrick Makumbi & 25 Others v. Greytown Breweries Limited and 3 Others*[7].

Our view is therefore that to the extent that it argued the wrongfulness of the dismissals, this part of ground one must succeed. It also follows that grounds one and two of the cross-appeal must fail.

We have earlier stated that part of ground one of the main appeal is linked to ground four of the cross-appeal as they both question the relief given by the court.

The appellants raised the issue of refusal by the lower court to grant the main relief sought i.e. reinstatement or a deemed retirement, while ground four of the cross-appeal alleges a misdirection on the part of the lower court when it ordered re-engagement of the appellants. The question we have to consider, under this part of ground one of the appeal and ground four of the cross-appeal is what was the appropriate relief which the court should have ordered?

To this pertinent question, counsel for the appellants submitted that the court below should have ordered reinstatement under the exceptional rule granted that the circumstances that led to the dismissal of the appellants peculiarly warranted such a relief. We were referred to the case of *Bank of Zambia v. Kasonde*[8]. In that case, in ordering reinstatement, we stated, as the learned counsel for the appellants correctly quotes us in his submissions, that:

> **...we may add a further factor in this case and that is that the plaintiff has been dismissed for dishonest misconduct. This is a very serious stigma to carry with which the plaintiff cannot easily get employment especially in Zambia now with a lot of unemployment this stigma cannot be attorned by damages, it can only be atoned by the defendants themselves. We are aware of what we said in *Kamayoyo v. Contract Haulage*, but the circumstances of this case take it out of the normal master servant cases where damages would be adequate. Reinstatement is the only equitable and reasonable remedy so that the defendant may atone for this stigma pinned on the plaintiff. We are of the view that the learned trial judge was right in granting the remedy of reinstatement prayed for by the plaintiff that the case contains though special circumstances under which it can cautiously and jealously be granted.**

Having reproduced this quotation in his submissions, the learned counsel for the appellant then made an argument with which we have some difficulties appreciating, namely that the respondent's 'attitude of not offering any proposal on salary increase, coupled with the pre-planned reduction of staff in the respondent company, only go to show that the charges levelled against the appellants were unjustified.' We say we have difficulties with the logic employed by the learned counsel here because neither the refusal to offer a salary increment nor a prior decision to terminate employment, is of itself an exceptional circumstance to warrant reinstatement.

We were also referred to the case of *Zambia Airways Limited v. Gershom B. Mubanga*[9]. There, we observed that the vendetta against the respondent employee evinced by the unjustified charges, together with the departure from the employing organization of the person who effected the dismissal, constituted exceptional circumstances justifying an order for reinstatement.

On the basis of the foregoing submission and authorities, counsel for the appellants prayed that we order reinstatement of the appellants in place of the relief given by the lower court. He did not, however, in the heads of argument, prefer any arguments on the alternative relief of retirement with full benefits.

In response to the submissions made under this limb of ground one of the appeal, the learned State Counsel for the respondent submitted that reinstatement was not the appropriate remedy to grant in the present case given that it is a remedy that is granted only sparingly and in very exceptional cases. He quoted passages from *ANZ Grindlays Bank Limited v. Chrispin Kaona*[10] and *Bank of Zambia v. Kasonde*[8]. He also referred us to the case of *Zambia National*

Broadcasting Corporation Limited v. Penias Tembo, Edward Chileshe Mulenga & Moses Phiri[11] in which we held, *inter alia,* that:

> **... the power to order reinstatement is discretionary, and, apart from the gravity of the circumstances, the effect of making such an order should be taken into account.**

State Counsel contended that in the case before us the appellants did not bring out any exceptional circumstances to warrant the court's exercise of the rare power to order reinstatement. If anything, the appellants, as observed by the court below, were through their Union partly to blame for their dismissals.

Still under ground one, the learned State Counsel submitted on the alternative prayer the appellants had made in the lower court, namely that they be retired from employment with full benefits. We have earlier indicated that the appellants' learned counsel preferred no arguments in respect of this relief.

Mr. Shonga agreed with the lower court's position that this was not an option under the circumstances. According to him, there was no evidence that any of the appellants qualified for retirement. The court was thus right to hold, as it did, on the prayer for this alternative relief.

As regards payment of salaries and allowances from the date of dismissal to the date of reinstatement or retirement, State Counsel Shonga submitted that as this relief was premised on the success of either the prayer for reinstatement or retirement, it follows that the claim under this head collapsed with the failure of each of the main prayers made in the alternative. He quoted a passage from the judgment in *Kitwe City Council v. William Nguni*[12] where it was stated that:

> **...it is unlawful to award a salary or pension benefit for a period not worked for because such an award has not been earned and might properly be termed as unjust enrichment.**

He also agreed with the lower court in refusing to award damages beyond the notice period provided in the contracts of employment. He cited the case of *Zambia National Building Society v. Ernest Mukwamataba Nayunda*[13] as authority for that position. He urged us to dismiss ground one of the appeal.

We had earlier on stated that to the extent that ground one raises the aspect of the rejection by the lower court of the relief sought by the appellants, it dovetails with ground four of the cross-appeal which raises the issue of re-engagement specifically. Under that

ground of cross-appeal the lower court is faulted for making an order for re-engagement. State Counsel Shonga likened re-engagement to reinstatement which is discretionary and premised on the relationship of trust between the parties. He submitted that where that trust is fractured it is unconscionable to order the employer and the employee to continue working together.

State Counsel also submitted that in ordering re-engagement the lower court should have considered not only the interest of the appellants, but those of the respondent as well. For this submission the learned State Counsel relied on the case of *Edward Mweshi Chileshe v. Zambia Consolidated Copper Mines Limited*[14] where it was stated by the court that:

> **...the substantial justice which the statute calls upon the Industrial Relations Court to dispense should endure for the benefit of both sides.**

Counsel further argued that in dispensing substantial justice the lower court was not relieved of its obligation of viewing objectively the feasibility of an order for re-engagement being complied with. He referred us to the case of *Coleman v. Magret Joinery Limited*[15] to support this submission and quoted a passage from there.

The learned State Counsel also pointed out that in any case, re-engagement was not amongst the relief that the appellants sought as their notice of complaint shows.

The appellants' reaction to ground four of the cross-appeal was that the respondent did not disclose the reasons for maintaining that the order for re-engagement made by the lower court was wrong in law. According to counsel for the appellants, the respondent laid no evidence in the court below that it no longer had trust in the appellants to warrant refusal to reinstate or re-engage them.

We are again, grateful to counsel for both parties for their exertions in this respect. The issue for determination under this aspect of ground one of the appeal and ground four of the cross-appeal is whether the remedy of re-engagement given by the court, having regard to the circumstances of the case, was appropriate.

To recap, the court in this case ordered re-engagement as opposed to reinstatement which the appellants had specifically sought as the main relief. The court also held that the alternative relief sought, that is to say retirement from employment with full benefits, was not an option under the circumstances.

It is important to bear in mind the distinction between reinstatement and reengagement if the arguments being advanced by the learned counsel for the parties are to be appreciated. When reinstatement is ordered, the employer is obliged to treat the employee in all respects as if he/she had not been dismissed or otherwise have their employment terminated. We articulated this position in *Chama v. Zesco*[16].

Where reinstatement is ordered the employee will thus be entitled to the remuneration and other benefits which the employee would have received but for the wrongful dismissal or termination, together with any other rights and privileges such as seniority and pension entitlements. Reinstatement being restorative in nature entitles the employee to receive retroactive pay and other benefits from the date of dismissal or termination (See *Halsbury's Laws of England*, 4th ed. Vol. 16 para. 522).

Because of the far-reaching consequences reinstatement has on the relations of the parties, as well as the financial implications it carries, it is a remedy that is rarely and exceptionally granted. We have stated time and again in numerous case authorities, some of

which the learned counsel for the parties have referred to, that reinstatement will only be ordered in special circumstances. Thus in *ZCCM v. James Matale*[17] we stated among other things that:

> **...the Industrial Relations Court has a general jurisdiction – as we will demonstrate – and should be able to award compensation or damages, which are the universal remedy, and any other suitable awards. Of course, they will not be able to routinely award reinstatement if the case is not caught by the "discrimination" provisions under which, in any case, reinstatement is not to be automatic either.**

We also should stress that reinstatement will not be a viable option where there has been such a loss of trust and confidence that it would not be feasible to reestablish the pre-existing harmonious employer/employee relationship.

Where reinstatement is not available, re-engagement, as a second option, may be ordered. Here, unlike in reinstatement where the employee is given back his/her original job, the employee is re-employed or given a different but comparable job. We shall ventilate our views on this remedy a little more expansively later on in this judgment. For now, we wish to exhaust our reflections on reinstatement.

To revert to the question; was this then an appropriate case in which to order reinstatement?

We have already stated, and we accept the submission of counsel for both parties, that case law indicates that the jurisdiction to order reinstatement in lieu of other remedies such as reengagement or damages, should be exercised in 'exceptional' or extra-ordinary' circumstances. Commensurate with the notion of exceptional and rare circumstances, as developed in available jurisprudence on reinstatement, is the need for trial courts to fashion appropriate remedies, taking into consideration all the circumstances. While culpable conduct of the employer is far more likely to lead to a poisoned or inhospitable work environment than conduct which may fairly be characterized as non-culpable, the consequences of the conduct and not its characterization should, in our view, be the primary focus of any remedial inquiry by a court faced with a plea for reinstatement. Thus, in the present dispute, it is not so much the guilt, malice or illegality of the actions of the respondent that counted; rather it was the effect of the action taken

by the employer on the relationship between it and the employees going forward, which mattered.

While it appears highly desirable that if an employee's collective agreement rights have been violated, reinstatement of the employee to his/her previous position should normally be ordered, we have approached this issue rather cautiously. In *ANZ Grindlays Bank (Z) Limited v. Chrispin Kaona*[10], which we have earlier on alluded to, the respondent was dismissed following his attendance of a Union meeting in circumstances suggestive of a strike action by his Union. The trial court ordered his reinstatement. In setting aside that order we stated as follows:

> **We are of course mindful, as we have said so often, of the admonition that orders of reinstatement in such cases are only made in exceptional cases, and even then, are very rarely made.**

In the present case, we note that, in the main, what led to the dismissal of the appellants was their assertion or attempted assertion of their collective bargaining rights. The lower court observed with concern in its judgment [at J15] that:

> **...the respondent has selectively, in some cases considered the disciplinary historic records of the complainants, but in other cases**

has not, to arrive at the verdict. Thus in some case, the charge was upgraded from the final warning to dismissal...

The record also reveals that the reason the respondent was not amenable to accede to the Union's proposed pay increase was partly due to a drop in the gross operating profit by 50% between 2012 and 2014, according to the financial performance statements availed to the lower court – but with which the lower court did not entirely agree. The lower court did, however, accept the appellants' counsel's submission that there was a 'pre-planned staff reduction exercise.'

Taken in the round, our view is that there is a history behind the dispute which casts serious doubts on the continued viability of the employment relationship. Any suggestion that the lower court should have ordered reinstatement in those circumstances creates a substantial prospect that the differences and concerns between the parties would not be finally and conclusively settled by an order for reinstatement. We are satisfied, therefore, that in declining to award reinstatement to the appellants the lower court was in perfect keeping with the exceptional nature of the remedy of reinstatement.

The question that next arises is whether re-engagement should have been ordered. The Industrial and Labour Relations Act does of course, provide for the remedy of reengagement in appropriate circumstances which the court may grant in terms of its general jurisdiction. Section 85A of the Act states that:

> **Where the court finds that the complaint or application presented to it is justified and reasonable, the court shall grant such remedy as it considers just and equitable and may –**
>
> **(a) award the complainant or applicant damages or compensation for loss of employment;**
>
> **(b) make and order for reinstatement, re-employment or re-engagement;**
>
> **(c) deem the complainant or applicant as retired, retrenched or redundant; or**
>
> **(d) make any other order or award as the court may consider fit in the circumstances of the case.**

In making an order for re-engagement, the court must have regard to any wish expressed by the employee, and above all whether it is practicable for the employer.

In the present case, while the lower court would, under the law we have just reproduced, order re-engagement, the approach it took was procedurally unfair. First, as was properly pointed out by State Counsel Shonga in his submissions, the appellants had not indicated

any desire to be re-engaged in lieu of reinstatement or any other remedy. Second, in making a wider order that the respondent re-engages the appellants, the respondent should have been alerted much earlier in the proceeding of the possibility of such an order so that it was enabled to present evidence regarding the viability of such an order at the hearing. This again is a point that State Counsel Shonga articulately spoke to in his submission.

In any event, the order of re-engagement presupposes that the respondent would find suitable roles for the appellants, irrespective of actual vacancies available. Here, the court did not identify with enough detail the nature of the employment in which the appellants were to be re-engaged.

We hold, therefore, that the order for re-engagement was not an appropriate order to make in the circumstances of this case.

As regards the alternative relief of retirement with full benefits, we pointed out earlier that counsel for the appellants made no specific argument on this relief. All we can say in agreeing with State Counsel Shonga's submission on this issue is that the lower court cannot be faulted in its conclusion.

It follows from what we have stated under this part that although the arguments that have been advanced on behalf of the appellants regarding the wrongfulness and thus the unreasonableness of the appellants' dismissals have been accepted as correct, the substantive part of the ground of appeal that impeaches the court's finding on the inappropriateness of the remedy of reinstatement, re-engagement or retirement sought, fails. It also follows that grounds one and two of the cross-appeal must fail while ground four of the cross-appeal succeeds.

Under ground two of the appeal, the appellants were unhappy with the lower court's awarding them two months' pay in lieu of notice as the provision relied upon, that is to say clause 3(b) of the Collective Agreement, relates to redundancy and retrenchment of employees – a matter that was not before the court.

Citing this court's decision in the case of *William David Carlise Wise v. EF Harvey Limited*[18], counsel for the appellant submitted that a court can only adjudicate on a matter that is before it and has no jurisdiction to make awards on matters not brought before it. Counsel also referred us to the case of *Admark Limited v. Zambia*

Revenue Authority[19] on the purpose of pleadings, contending that parties to litigation are bound by their pleadings and the court is confined to adjudicate on the dispute as defined by the pleadings.

In this case, the parties were bound by the case as set out in the complaint and the answer which, in the present circumstances, served as the pleadings. According to counsel, the award of damages under the provisions of a clause on redundancy/retrenchment went against the cardinal principle regarding the purpose of pleadings as explained in the two cases. The documents filed before the court did not urge the lower court to adjudicate on the issue of redundancy/retrenchment. The issue was disciplinary in nature – simple and pure. There was no basis, according to Mr. Mwenya, for the court to have invoked clause 3(a) of the Collective Agreement dealing with redundancy, in awarding relief to the appellants.

Counsel also contended that in the absence of a notice period for termination in the Collective Agreement other than the one relating to redundancy, the court had power to award damages under its discretion based on precedent.

It was further submitted that the Industrial Relations Court is empowered to do substantial justice and in a quest to do so, where it finds that a complaint presented to it is justified and reasonable, it can grant such remedy as it considers just and equitable and may award monetary compensation. The case of *Capital Drilling (Z) Limited v. Patrick Wamulume*[20], was cited as authority for this submission.

Counsel prayed that the award of damages as ordered by the court below be enhanced given that the respondent acted unreasonably in dismissing the appellants through its predetermined action.

In responding to the appellants' arguments on ground two, State Counsel Shonga, like Mr. Mwenya for the appellants, also alleged error on the part of the lower court judge in awarding two months' salary in lieu of notice as per clause 3(b) of the Collective Agreement, grant that the provisions relating to redundancy and retrenchment of employees did not apply. Unlike the learned counsel for the appellants, it was, however, State Counsel's submission that the dismissal of the appellants was in accordance with the law and

therefore the appellants were not entitled to damages on any account. Mr. Shonga SC, submitted that if, however, the court agrees that the dismissal was wrongful, all the appellants would be entitled to are damages measured with reference to the notice period. For this submission, he referred us to the cases of *Tom Chilambuka v. Mercy Mission International*[21] and *Swarp Spinning Mills Plc v. Sebastian Chileshe & Others*[22], in both of which it was stressed that the normal measure of damages is determinable with reference to either the applicable contractual length of notice to terminate, or the notional reasonable notice to terminate.

According to State Counsel, there are no aggravating circumstances attending this case which would make it a fit and proper case for the court to enhance the damages awarded to the appellants. Two months' notice period, according to State Counsel, is reasonable. We were urged to dismiss ground two for these reasons.

As we noted at the outset, the issue under ground two of the appeal is also related to that raised by the respondent in ground four of its cross-appeal. Both parties allege an error on the part of the

court in awarding the appellants two months pay in lieu of notice, but suggest totally different formulae for determination of compensation.

In the cross-appeal, the respondent equally allege that the Collective Agreement was inapplicable. We have already captured the respondent's arguments in this regard.

Following from our holding under ground one that although indeed the appellants were wrongfully dismissed they were neither entitled to reinstatement nor re-engagement, if follows that they are only entitled to an award of damages.

The question for determination under ground two of the appeal and ground five of the cross-appeal seems to us to be two pronged: first, whether it was justified for the lower court to resort to the redundancy provision in determining the length of the notice period for purposes of payment of damages. Second, whether in the absence of a notice period stipulation for determination of the contract, the period of notice used to compute payment was appropriate.

The resort by the court below to a provision of the Collective Agreement which deals with payment in the event of a redundancy occurring was plainly a misdirection. As correctly pointed out by both counsel, that provision has no relevance to the present situation. It cannot be used to compute damages awardable to a dismissed employee where the dismissal is found to be wrongful. To that extent, the criticism against the lower court by both counsel, was well-taken. We hold, therefore, that the court below was indeed wrong in resorting to the provisions for redundancy in the Collective Agreement for purposes of determining the measure of damages awardable to the appellants.

The appellants had claimed payment of salaries and allowances payable to each one of them from the date of dismissal from employment to date of reinstatement or deemed retirement, whichever the court would order.

The normal measure of damages in wrongful dismissal cases should be payment of money equivalent to or in lieu of the notice period. The quantum of such payment is therefore determinable with reference to the notice period to terminate unless there are other

compelling circumstances to warrant an award in excess of that determinable by the notice period.

We are not unmindful that the award of damages by this court in wrongful termination or unlawful dismissal cases has, at face value, appeared rather inconsistent. Such awards have ranged from amounts equivalent to payment in lieu of notice – determinable with reference to the notice period – up to three years or 36 months emoluments. We have, however, throughout maintained the position that the common law remedy for wrongful termination of a contract of employment is payment of damages equivalent to remuneration otherwise payable during the notice period.

We have not left matters there. In *Chilanga Cement v. Kasote Singogo*[23], we explained that in deserving cases, the courts could award more than the common law damages as compensation for loss of employment. In *Chintomfwa v. Ndola Lime Limited*[24] we declined to interfere with the lower court's award of twenty-four months pay as damages for wrongful dismissal on the basis that the appellant's prospects of getting another job were dim.

In *Tom Chilambuka v. Mercy Touch Mission International*[21], which has been quoted by the learned counsel for the respondent, we did indeed hold, that unless the dismissal is in very traumatic fashion, the normal measure of damages is the salary for the period for which notice should have been given. This decision follows a host of other decision such as *Swarp Spinning Mills Plc v. Sebastian Chileshe & Others*[22].

In *Kitwe City Council v. William Nguni*[12], also quoted by counsel for the respondent, we did indeed state that paying an employee for a period not actually worked for would amount to unjust enrichment.

In *Jacob Nyoni v. The Attorney General*[25] we held that depending on the circumstances of each case, in awarding damages in wrongful dismissal cases each case should be considered on its own merits. In adding to this position, we stated in *Konkola Copper Mines Plc v. Aaron Chimfwembe & Kingstone Kimbayi*[26] that:

> **The award of damages in wrongful termination of employment cases is subject at all times to a rather amorphous combination of facts peculiar to each case and perpetually different in every case. As no facts of any two cases can be entirely identical, it should not be expected that in applying the general principle for award of damages in these cases the courts will think in a regimented way. In the**

present case, the trial court took into consideration the ages of the respondents and the number of years they had served the appellant company before determining the awards. We have no basis to fault the court in this regard.

Guided by the authorities that we have cited, the court below should quite legitimately have determined a reasonable period for termination of contract which period should then have been used as a basis for computing the damages awardable to the appellants.

All circumstances considered, we believe that two month salary payment in lieu of notice was reasonable compensation. Ground two of the appeal, as well as ground five of the cross-appeal should accordingly both fail for the reason we have given.

Turning to ground three regarding costs, it was submitted by the learned counsel for the appellants that the court was wrong to have refused to order costs against the respondent having held that the respondent had in fact acted unreasonably in dismissing the appellants summarily in those circumstances. The lower court was thus accused of having improperly exercised its discretion regarding the award of costs. Reference was made to the case of *Georgina Mutale (T/A GM Manufacturing Limited) v. Zambia National Building*

Society[27] and *BP Zambia Plc v. Zambia Competition Commission & 2 Others*[28] in both of which we held that the award of costs was in the discretion of the court and that the discretion to deprive a successful party of his costs must be exercised judiciously.

Mr. Mwenya also submitted that the discretion to award costs in the court below was not exercised properly as the appellants had partially succeeded in their claims while the respondent did not succeed on any issue. Counsel further submitted that a party will throw away its costs for conduct that arises in the course of proceedings. The court below did not give any reason why the appellants were not awarded costs save to say that it did not find any circumstances to justify condemning the respondent in costs. This, according to counsel, flew in the face of the decision of this court in *Emmanuel Mutale v. Zambia Consolidated Copper Mines Limited*[29] where we restated the general rule that a successful party should not be deprived of his costs unless his conduct in the course of proceedings merits the court's displeasure, or his success is more apparent that real.

Counsel also adverted to our holding in *YB and Transport Limited v. Supersonic Motors Limited*[30] restating the general principle in regard to the award of costs. He ended by fervently praying that we uphold the appeal.

The respondent's learned counsel shortly responded to ground three of the appeal, supporting the decision of the lower court. The point counsel stressed was that the case authorities on the issue of costs confirm that as a general rule, costs are awarded in the discretion of the court. These authorities include *Collet Van Zyl Brothers Limited*[31] and *YB and Transport Limited v. Supersonic Motors Limited*[30].

According to State Counsel Shonga, neither the appellants nor the respondent were successful in the conduct of their respective cases before the lower court. Even if the appellants were to be regarded as having succeeded, they were nonetheless not entitled to costs as the court in fact found that the strike ballot conducted on 10th October, 2014 was illegal. Counsel referred us to a passage in the lower court's judgment which read as follows:

We have also found that the Hotel Catering, Tourism and Allied Workers Union of Zambia's Committee was wrong for insisting that 10th October, 2014 strike ballot was legal when in fact not. They even went to accuse the Minister of Labour and Social Security of "interfering in Trade Union activities including conduction of strike ballots..." the Union even argued that, "the law does not state that if a strike ballot is conducted by any other person other than a proper officer that strike ballot is illegal."

We were also referred to a passage in the judgment in which the lower court gave its reason for not ordering reinstatement. Counsel concluded that as the appellants were not blameless in their dismissals they were not entitled to be awarded damages and costs.

We were urged to dismiss ground three of the appeal as well.

We have paid close attention to the submissions of counsel on the issue of costs. It is of course well settled that costs are awarded in the discretion of the court. This position was well articulated in the cases such as *Musonda v. Simpemba*[33], *General Nursing Council of Zambia v. Mbangweta*[34] and *Collect v. Van Zyl Brothers Limited*[31] which the learned counsel for the respondent referred to.

In awarding costs, the court ought to exercise that discretion judiciously. In this regard, certain canons exist to help courts in exercising that discretion. Among the important considerations in awarding costs is the principle which we have so consistently articulated in cases such as *YB and F. Transport v. Supersonic Motors Limited*[30] and *Emmanuel Mutale v. Zambia Consolidated Copper Mines Limited*[29], that costs follow the event, meaning the successful party get the costs unless his conduct in the course of proceedings merits the court's displeasure or unless his success is more apparent than real.

The appellants' position in this case is that the lower court having found that their dismissal was unlawful it follows that they were successful and therefore entitled to costs.

The issue really is whether the court's exercise of its discretion in regard to costs was exercised justly. The lower court directed that each party shall bear its own costs because it did not find any circumstances that justified condemning the respondent to any cost.

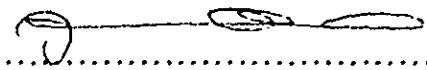
In *Sibulo v. Kuta Chambers*[32], we stated that the principle that costs follow the event means in effect that a party who calls forth the event by instituting suit will bear the costs if the action fails; but if this party shows legitimate cause by successful suit then the losing party will bear the costs. The judicious exercise of discretion by the court, however, is a vital factor in settling the preference.

In the present case, the court did not find it appropriate to exercise its discretion in awarding costs in favour of either party for the reason it gave. Viewed in that perspective, the lower court properly exercised its discretion in directing each party to bear its own costs. Ground three of the appeal therefore fails.

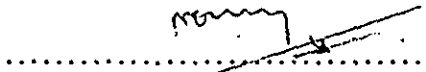
The net result is that ground one as framed fails. We uphold the lower court's refusal to order reinstatement or deem the appellants as retired. We also reverse the court's order of re-engagement.

Ground two of the appeal succeeds only to the extent that the lower court based the two months pay in lieu of notice on the provisions of the Collective Agreement which was inapplicable. We hold, however, that the appellants should be given two months salary

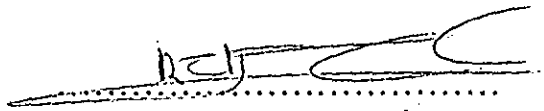
We make no order as to costs.



I. C. Mambilima
CHIEF JUSTICE



M. Malila
SUPREME COURT JUDGE



R. M.C. Kaoma
SUPREME COURT JUDGE