

**IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA**

COMP NO./44/2002

BETWEEN:

WISE SILUMBU

AND

BARCLAYS BANK ZAMBIA PLC



COMPLAINANT

RESPONDENT

Before the **Hon. Mr. Justice M. Musaluke** in Open Court on the 1st day of November, 2016

Appearances:

For the Complainant: Mrs. M. M. Harawa of Messrs. M. C. Mulenga and Nzonzo Advocates

For the Respondent: Mr. R. Mwanza of Messrs. Robert & Partners

JUDGMENT

1st November, 2016

Legislation Referred to:

- 1. *The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia***
- 2. *The Employment Act, Chapter 268 of the Laws of Zambia***

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. ***ALCOA Minerals of Jamaica vs. The Union of Technical Administrative and Supervisory Personnel (2014) JMSC Civ. 59.***
4. ***R. vs. Secretary of State for the Home Department Exparte Doody (1994)1 AC 531***
5. ***J. P. S. Co. Limited vs. Bankcroft Smikle (1985) 22 JLR 244.***
6. ***West Midland Cooperative Society Limited vs. Tipton (1986) ICR 192***

1.0 INTRODUCTION

- 1.1 This case was filed way back in 2002 and went through a number of Judges before it was finally allocated to this Court in February, 2015. As a result, the matter had to be heard de novo.
- 1.2 On 21st July, 2016 trial in this matter was conducted and concluded. Below is the opinion of this Court.

2.0 COMPLAINANT'S CASE

- 2.1 On 18th May, 2015, the Complainant filed an Amended Notice of Complaint supported by an Affidavit pursuant to **Section 85 (1) of the Industrial and labour Relations Act Chapter 269 of the Laws of Zambia.**
- 2.2 The grounds on which the Complaint was presented were that:

“(a) In April, 2001, disciplinary charges were laid against the Complainant for which he was punished by reduced performance bonus and denied the annual pay rise;

- (b) *On 25th July, 2001, the Complainant was served with a final Warning Letter which was withdrawn a day later with a promise from the Acting Country Treasurer that the Complainant only needed a verbal warning;*
- (c) *On 27th July, 2001, the Complainant was suspended from employment pending investigations;*
- (d) *On 31st July, 2001, the Complainant was charged by the Acting Country Treasurer. The Complainant exculpated himself, and a disciplinary hearing was held which the Acting Country Treasure chaired;*
- (e) *On 13th November, 2001, the same Acting Treasurer wrote a letter terminating the Complainant, based on the same charges for which he had already been punished;*
- (f) *On 8th February, 2002, the Complainant appealed to the Managing Director as per procedure against the decision of the Disciplinary Committee, and*
- (g) *On 27th March, 2002, the Human Resources Manager, who was the Complainant's rank mate, wrote to the Complainant upholding the decision of the Disciplinary Committee."*

2.3 At trial, the Complainant was the only witness **(CW1)** for his case.

- 2.4 He testified that he was employed by the Respondent on 20th December, 1982 as a Bank Clerk, and rose to the position of Chief Dealer in the Respondent's Treasury Department.
- 2.5 It was his testimony that the Treasury Department was headed by the Country Treasurer where he used to report.
- 2.6 The Complainant's job as Chief Dealer meant that he was in charge of Foreign Exchange (FOREX) dealings and Money Markets.
- 2.7 He testified that during the course of his job, sometime on 5th March, 2001, the Respondent's Bank Account at the Bank of Zambia was overdrawn. To mitigate this state of affairs, Commercial Banks who find themselves in this situation, borrow from the inter-banking Market or borrow directly from the Bank of Zambia if they are in the market.
- 2.8 The Complainant stated that on that particular day, there was no money to borrow from the inter-banking market and Bank of Zambia was not in the market. The Treasury Department at the Respondent had no option but to sell FOREX to the Bank of Zambia so that the overdrawn Account at Bank of Zambia could be normalized.
- 2.9 The selling of FOREX to Bank of Zambia was made at the Bank of Zambia's rate which was lower than the market rate and this resulted in a loss on FOREX.

- 2.10 Based on that, the Regional Director was not happy with the loss and the Country Treasurer requested the Complainant to reverse off the loss so that it could be transferred to the Kwacha position.
- 2.11 It was the Complainant's testimony that the Country Treasurer was soon thereafter suspended as a result of the reversal.
- 2.12 It was his further testimony that the Regional Treasurer requested him to write a statement to the effect that he did the reversal under the instruction from the Country Treasurer and he was assured of a reduced punishment in form of reduced Performance Bonus and that he would be denied annual increment. He was further told that he would also receive a letter of reprimand. (Complainant's statement is at exhibit "WS2" in the Complainant's Affidavit in support of Notice of Complainant).
- 2.13 The Complainant told Court that between 29th June, 2001 and 6th July, 2001 the Respondent exceeded an open position (limit given by Bank of Zambia for reserves for Banks). Following this state of affairs, the Acting Country Treasurer gave the Complainant a written final warning letter.
- 2.14 On 26th July, 2001, the Acting Country Treasurer withdrew the warning letter as he claimed the HR Department advised him that a verbal reprimand should have been given to the Complainant.

- 2.15 On 27th July, 2001, after the written final warning letter was withdrawn, the Complainant was suspended from work by the Acting Country Treasurer pending investigations into the way he had carried out his duties as a Chief Dealer (document at page 6 in the Complainant's Notice to Produce is the Suspension letter).
- 2.16 On 31st July, 2001 the Complainant was charged by his Supervisor, the Acting Country Treasurer. The Complainant testified that of the eight charges that he was given, two had nothing to do with him and other charges were recommended from the Audit report, of which he had already been punished. (Charge Letter is on page 7 of Complainant's Notice to Produce).
- 2.17 The Complainant testified that on 1st August, 2001, he exculpated himself against the charges (page 8 in the Complainant's Notice to Produce is the Exculpatory Letter).
- 2.18 It was his further testimony that a Disciplinary hearing for his case was held and the same Acting Country Treasurer who suspended and charged him Chaired the Disciplinary meeting.
- 2.19 On 13th November, 2001, he received a letter terminating his employment which was again signed by the same Acting Country Treasurer (Termination Letter is at page 10 of the Complainant's Notice Produce).

- 2.20 He testified that on 26th November, 2001, he appealed his dismissal to the Appeals Committee. It was his further testimony that at the Appeal hearing, the meeting was chaired by the HR Manager who was his rank mate. He claimed this was an error as at Appeal Committee level, he should have been heard by somebody Senior at the Director Level.
- 2.21 He told Court that on 8th February, 2002, the Appeals Committee communicated to him upholding the decision of the Disciplinary Committee.
- 2.22 On 8th February, 2002, he further appealed to the Managing Director of the Respondent who on 27th March, 2002 rejected his Appeal.
- 2.23 The Complainant claimed his dismissal was both unfair and wrongful because: he was punished for charges that did not relate to him; the person who suspended him was the same one who charged him; he also sat as Chairman of the Disciplinary Committee and wrote a letter of dismissal; that the Appeal was heard by a rank mate; and that the Charges did not make any reference to the Disciplinary Code.
- 2.24 The Complainant prayed that he be reinstated and, in the alternative, be given Separation Package for the time he spent at the Respondent.
- 2.25 The Complainant reiterated his Claims as outlined under paragraph 5 of the Amended Notice of Complaint.

- 2.26 Under cross-examination, the Complainant testified that he did not complain about the Acting Country Treasurer sitting as Chairman of the Disciplinary Committee in his Appeal Letter.
- 2.27 He also testified that HR Personnel could sit in disciplinary case hearings as Secretaries and not to chair the meetings.

3.0 RESPONDENT'S CASE

- 3.1 On 15th October, 2015, the Respondent filed its Answer to the Notice of Complaint and stated that the Complainant's employment was terminated on 13th November, 2001. It stated that the termination was legally justified and done in accordance with the Disciplinary Procedure Code with the Complainant having been accorded due process.
- 3.2 The Answer further stated that the Complainant's claims were therefore, baseless and ought to be dismissed with costs.
- 3.3 The Answer was supported by an Affidavit sworn by Cynthia Katongo Chanda, the Employee Relations Manager of the Respondent.
- 3.4 At trial only the said Cynthia Katongo Chanda testified on behalf of the Respondent.
- 3.5 She testified that the Complainant was suspended by his Line Manager, the Acting Country Director pending investigations.

- 3.6 Once investigations were completed, the same Line Manager charged the Complainant. The Complainant exculpated himself and a Disciplinary hearing was held which was chaired by the same Charging Officer.
- 3.7 She told Court that, after the Disciplinary Hearing, the Complainant was dismissed and letter of dismissal was authorised by the same Acting Country Treasurer.
- 3.8 The Complainant appealed against the decision of the Disciplinary Committee to the Appeals Committee.
- 3.9 She testified that the Appeals Committee was chaired by the head of Human Resource and the Appeals Committee upheld the decision of the Disciplinary Committee of dismissing the Complainant.
- 3.10 She stated that the decision of the Appeals Committee was final process in the Disciplinary procedures of the Respondent, and that the decision by the Complainant to write to the Managing Director seeking compensation was done outside the Disciplinary process.
- 3.11 She justified the Charging Officer to sit as a Chairperson of the Disciplinary Committee and called it normal.
- 3.12 She testified that when the Complainant appealed to the Appeals Committee, he was no longer an employee of the Respondent and, therefore, enjoyed no status of a rank. The

Head of Human Resource chaired the Appeals Committee hearing and did so by virtue of her Office.

- 3.13 It was her testimony that at Disciplinary Committee stage, Human Resource staff performs an advisory role and does not form part of the panel hearing the case. At Appeal Committee stage, however the Human Resource staff becomes part of the panel.
- 3.14 The witness told Court that the reduced bonus and denied increments that were imposed by the Respondent on the Complainant were as a result of Performance Appraisals that were different from the Disciplinary Process. She testified that the Complainant had a reduced bonus and denied increment because he could have operated below the expected standards, and that affected his appraisal for that particular year.
- 3.15 It was, therefore, her conclusion that the Complainant did not suffer punishment by being denied bonus and salaries increments as he did not perform in accordance with set standards.
- 3.16 On the claim for reinstatement by the Complainant, she testified that this Claim was belated, as the dismissal was on solid grounds and the period of time that had passed between the time the Complainant was dismissed and the time Judgment would be rendered, dynamics of the market had changed and the Complainant's skills may not be needed as a Chief Dealer.

- 3.17 Under cross-examination, the witness told Court that there were no specific mention of the Clauses the Complainant breached in the Market Operational Manual.
- 3.18 She also stated that in the Termination Letter there was no reference made to the Disciplinary Code as regards offences that were committed by the Complainant.
- 3.19 She testified that the minutes of both the Disciplinary Committee and Appeals Committee were not before Court and she did not know who constituted the panels apart from the Chairpersons.

4.0 SUBMISSIONS BY PARTIES

- 4.1 I am indebted to both Counsel for well researched and articulated submissions. I will not recite them here but will take note of them in my opinion.

5.0 FINDING OF FACTS

- 5.1 The Complainant was employed by the Respondent on 20th December, 1982 as a Clerk, and rose through the ranks to the position of Chief Dealer.
- 5.2 On 27th July, 2001, the Complainant was suspended from work by his immediate Supervisor, the Acting Country Treasurer.

5.3 On 31st July, 2001, he was charged by the Acting Country Treasurer, with the following:

- (a) Breach of Clause 2 of the Articles of Agreement between the Complainant and the Respondent;
- (b) Gross incompetency by failure to achieve a satisfactory standard of performance;
- (c) Misconduct by falsifying the Bank of Zambia Return for October, 2000 and thus exposing the Bank to financial and reputational loss.

5.4 On 1st August, 2001, the Complainant exculpated himself denying the charges.

5.5 A Disciplinary Hearing was held where the Charging Officer, the Acting Country Treasurer, was the Chairperson.

5.6 After deliberations, the Complainant was dismissed from employment and the Chairman of the Disciplinary Committee wrote a Letter of Dismissal.

5.7 On 26th November, 2001, the Complainant appealed the decision of the Disciplinary Committee to Respondent's Appeals Committee which was chaired by the Head of Human Resource, who was of the same rank as the Complainant.

5.8 The Appeals Committee upheld the decision of the Disciplinary Committee to dismiss the Complainant.

- 5.9 The Respondent did not refer to any Clauses in the Disciplinary Code of Conduct as regards the charges preferred on Complainant neither did it refer to them in the Letter of Dismissal.
- 5.10 The minutes of both the Disciplinary Committee and Appeals Committee were not produced into Court.
- 5.11 The Disciplinary Code of Conduct in relation to the Complainant was not produced in Court.
- 5.12 The Complainant claimed that he could not have been charged by the same person who heard his case at Disciplinary Committee and, therefore, his dismissal was both unfair and wrongful.
- 5.13 The Complainant further claimed that a rank mate could not sit as a Chair on his Appeal hearing and, therefore, the dismissal was unfair and wrongful.
- 5.14 The Respondent claimed that it was normal for the same Charging Officer to sit as a Chairman of the Disciplinary Committee, and further that a rank mate could sit on the Appeals Committee panel as a Chairperson since at the time of appeal the Complainant was a dismissed employee and had no rank to refer to.
- 5.15 The Respondent claimed the Complainant's Claims had no merit.

6.0 ISSUES FOR DETERMINATION

6.1 Following the finding of facts, the main issues for determination are as follows:

- (a) Has the Complainant made a case for wrongful and unfair dismissal?
- (b) If so, is the remedy of reinstatement appropriate?

7.0 OPINION

7.1 WHETHER THE COMPLAINANT HAS MADE A CASE FOR WRONGFUL AND UNFAIR DISMISSAL

7.2 WRONGFUL DISMISSAL

7.3 The term wrongful dismissal has been used for a long time in our jurisdiction and it has since been settled by the Supreme Court as to what it constitutes. For a claim of wrongful dismissal to stand, the Complainant must adduce evidence and prove that the provisions of the Contract of Employment and/or Disciplinary Code of Conduct were not adhered to by the Respondent when it dismissed the Complainant.

7.4 Wrongful dismissal is a Common law term which essence is a Breach of Contract by the Employer.

7.5 When a claim for Wrongful Dismissal is presented before Court, the duty then of the Court is to examine if there was a Breach by the Employer of the Contract of Employment in the manner the dismissal was done.

- 7.6 The cases of ***Attorney General vs. Richard Jackson Phiri and Zambia Electricity Supply Corporation Limited vs. Lubasi Muyambango*** are leading authorities on this issue and give a clear direction as to what constitutes Wrongful Dismissal. The elements to be fulfilled are that there was an abrupt end of employment through dismissal and that no Disciplinary Process was followed or, if followed, it was flawed.
- 7.7 In casu evidence was laid and unchallenged that the Acting Country Treasurer charged the Complainant and sat as a Chairperson of the Disciplinary Committee that dismissed the Complainant.
- 7.8 No Disciplinary Code of Conduct was produced in Court and the Respondent's witness justified this action as normal without giving any backing for it.
- 7.9 My duty is not to retry the case between the parties herein but, as directed by the Supreme Court cases earlier cited, is to examine the Disciplinary Committee's findings with a view to satisfy myself as to whether there had been a breach of Natural Justice or whether the Disciplinary Committee acted in excess of its powers.
- 7.10 My role, therefore, is limited to reviewing whether there was an error or breach on the face of the record, or in the Conduct of the Disciplinary Committee in exercising its powers. (see the Jamaican case of ***J. P. S. Co. Limited vs. Bankcroft Smikle***.

7.11 The presence of the Acting Country Treasurer at the Disciplinary Committee as Chairman of the same Committee is a clear breach of the Rules of Natural Justice. The Acting Country Treasurer had earlier suspended the Complainant and charged him. I agree with Complainant's Counsel's submissions that the Acting Country Treasurer had an interest in this case and should not have sat at the Disciplinary Hearing. I also agree with Complainant's Counsel's submissions that *'where a person had been heard by a person with an interest in the matter, it is just as well as he had never heard'*.

7.12 That said, I find that the Respondent failed to observe its Contractual Disciplinary Procedures and this amounted to a breach of Contract by the Respondent.

7.13 I, therefore, find that the case for Wrongful Dismissal has been made by the Complainant.

7.14 **UNFAIR DISMISSAL**

7.15 Unfair dismissal also means unjustified dismissal and is different from the terms 'Wrongful', 'Illegal' or 'Unlawful' Dismissal. This was the holding in the Jamaican case of ***ALCOA Minerals of Jamaica vs. the Union of Technical Administrative and Supervisory Personnel***.

7.16 If follows, therefore, that even though a dismissal might be lawful at Common Law, it may still not be justified. It also means that an employee may be dismissed according to the Contractual Terms but the manner of dismissal was such as to be objectively viewed as unjustified or unfair in all the circumstances.

7.17 The Court will then look at what Constitutes fairness. In the case of ***R. vs. Secretary of State for the Home Department Exparte Doody*** the Court stated that:

“Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representation on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken with a view of procuring its modification; or both.”

7.18 The Disciplinary Process should, therefore, indicate the matter giving rise to discipline being taken against the worker, and must clearly specify and communicate in writing and he should be given an opportunity to be heard by an independent tribunal. An avenue for appeal must also be given. It is, therefore, anticipated that the Respondent (employer) should have a two-step process i.e. an adverse decision taken fairly and justly and not arbitrarily and an avenue for appeal of the decision.

- 7.19 If the Disciplinary Process taken gives an adverse decision without any grain of fairness and justification, that decision will be held to be unfair.
- 7.20 In casu, the Complainant was heard by the same person that charged him with an offence. Clearly, the adverse decision to dismiss him was not justified as the Rules of Natural Justice were abrogated. This procedural defect was sufficiently serious to render the decision to dismiss the Complainant unfair. The Respondent was contractually bound to act fairly and implement good corporate practices even in the absence of the Disciplinary Code of Conduct. The Respondent did not even bring evidence to justify that it may have been impracticable for a different constituted Panel to have heard the Complainant's case.
- 7.21 As regards the Appeals Committee where Head Human Resource sat as a Chairperson who shared the same rank as the Complainant, evidence of the Respondent's witness was that the Human Resource was involved in the Disciplinary Process of all employees, though they do not sit on the panel at Disciplinary Committee level. She further went on to state that Human Resource gives guidance on the Disciplinary Process.
- 7.22 This evidence by the Respondent's witness went to confirm that the Human Resource Department was intimately involved in the Consultation process and discussions surrounding the investigation and decision to dismiss the Complainant. The

same Head of Human Resource then conducted the '**Appeal**'. The evidence on record does not even show who else was on the Appeal's Committee.

- 7.23 This decision by Head of Human Resource to hear the Appeal was unjustified and unfair.
- 7.24 The justification by the Respondent's witness that by the time the Complainant's Appeal was being heard, he was out of employment and had no rank to refer to, is logically flawed.
- 7.25 It must be put straight here that where an employee is dismissed, but the Contract allows him a period to Appeal, the dismissal does not take effect until the Appeal is completed or the time to Appeal has passed. In the case of **West Midland Cooperative Society Limited vs. Tipton** the question which arose in the absence of any Statutory Provision was; at what point did the termination take effect where a domestic Right of Appeal existed? It was held that, in such a case the dismissal was suspended pending the outcome of the Appeal. If the Appeal succeeded, the employee was reinstated. If it failed, the Original termination took effect as at that date.
- 7.26 It follows, therefore, that when the Complainant appealed the decision to dismiss him, and since that was provided for in his Contract, then he remained an employee until the outcome of the Appeal. The Respondent, therefore, failed to follow the basic rules of Natural Justice to have assigned Head of Human

Resource who as at the same rank with the Complainant to have heard his Appeal. This action was unfair.

- 7.27 Based on the facts before me, I find that the dismissal of the Complainant was unfair.

8.0 REMEDIES

8.1 REMEDIES FOR WRONGFUL DISMISSAL

- 8.2 Damages for Wrongful Dismissal compensate the employee for losses suffered as a result of the termination of Contract of Employment by the employer.

- 8.3 Damages for Wrongful Dismissal are very rarely substantial, essentially for two reasons. The first is that either as a result of express agreement or by way of an implied term, the employer will almost invariably possess the right at Common Law to terminate the Contract simply by giving notice¹. Secondly the victim of a Breach of Contract may only claim by way of compensation, damages for those losses which he or she can show derive from a clear Contractual entitlement².

- 8.4 It follows, therefore, that since the employee is not entitled to remain in employment for longer than the minimum period of Notice contained in the Contract, damages are then limited to a sum representing net Salary for the Notice period.

¹ Simon Deakin and Gillian S. Morris 'Labour Law' Butterworths Reed Elsevier (UK) 1995, page 351

² Ibid

8.5 The parties to this suit did not provide the Contract of Employment that was executed between them. Understandably, the Complainant was employed in the year 1982 and loss of such documents by both parties over time is a good excuse. It then remains for me to imply the Notice period for the parties herein.

8.6 The learned authors of 'Labour Law' already cited, at page 351 had written that:

*"where a Contract of Employment is silent on the question of termination by notice, a term will normally be implied at Common law to make provision for it."*³

8.7 I will imply that the Complainant being a Chief Dealer of the Respondent which was relatively a Senior position, the Contract could have had a Termination Clause of three months.

8.8 I, therefore, order that the Complainant be paid three months' Salary (equivalent to the Notice pay) of his last drawn Salary, as compensatory damages for Wrongful Dismissal.

8.9 **UNFAIR DISMISSAL**

8.10 Since I have already found that the dismissal was unjustified, a remedy has to be imposed.

³ Ibid

- 8.11 The Complainant prayed that he be reinstated. The Respondent countered this argument stating that time had passed and dynamics had changed and, therefore, it would be impracticable to have the Complainant reinstated into employment.
- 8.12 It must be stated that the order to reinstate is discretionary. The ***Industrial and Labour Relations Act*** at ***Section 85A(b)*** does not indicate how this Court can exercise that discretion.
- 8.13 The Common Law recognises the right of employer to lawfully dismiss a worker for cause and if that is done legally, the employer cannot be forced to re-employ a person in whom it has lost confidence.
- 8.14 It must be noted though that our ***Industrial and Labour Relations Act*** does not impose Common Law remedies under ***Section 85A***, however, implicit in any power to order reinstatement, whether at Common Law or by Statute, is the consideration that there is an office or position in which the employee may be reinstated.
- 8.15 In exercising this discretion whether to reinstate or not, I must act fairly, balancing the interest of the Respondent and the Complainant and weighing in whose favour the Scales of justice are tipped. I must also take cognizance of the objection to reinstatement by the Respondent.

- 8.16 Taking into account the time when the Complainant was dismissed (in November, 2001) at the age of 38 years and by the time of this Judgment he will be 55 years, I feel reinstatement will not be the reasonable thing to do. Balancing the interest of both parties, I find the Scale of Justice are tipped to the order of non-reinstatement.
- 8.17 The Complainant in fact prayed for payment of damages as an alternative to reinstatement. I am more inclined to order damages in lieu of reinstatement.
- 8.18 I, therefore, order that the Complainant be paid 36 months' Salary (as at the time of dismissal) as compensatory damages for Unfair Dismissal.

9.0 DAMAGES FOR SHOCK, TRAUMA AND EMBARRASSEMENT

- 9.1 The Complainant did not adduce evidence for this claim. This Claim was, therefore, not proved and it is dismissed.

10.0 CONCLUSION

- 10.1 Arising from the Judgment, I make the following Orders;
- (a) The Claim for Wrongful Dismissal succeeds and the Respondent is ordered to pay the Complainant Three (3) months' Salary (as at the date of dismissal) as damages;
 - (b) The Claim for Unfair Dismissal succeeds and the Respondent is ordered to pay the Complainant Thirty-six

(36) months' Salary (as at the time of dismissal) as damages;

(c) The Claim for damages for shock, trauma and embarrassment have failed and, therefore, dismissed;

(d) The awards in paragraph 10.1 (a) and (b) herein will attract interest at short term Commercial Bank lending rates from 26th April, 2002 (Date of filing of Notice of Complaint) until the date of Judgment, thereafter at the current lending rates as determined by the Bank of Zambia from time to time until full payment.

10.2 Costs are awarded to the Complainant.

10.3 Leave to appeal to the Court of Appeal within 30 days granted.

Dated the 7th day of November, 2016

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M. MUSALUKE
JUDGE

