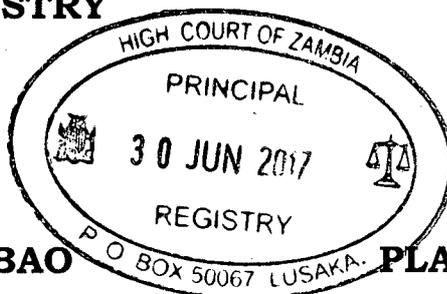


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2013/HP/1459



BETWEEN:

NATHANIEL NAWA INAMBAO

PLAINTIFF

AND

THE ATTORNEY GENERAL
ZAMBIA RAILWAYS LIMITED

1st DEFENDANT
2ND DEFENDANT

Before the Hon. Mrs Justice J.Z. Mulongoti on the
30th day of June, 2017

For the Plaintiff: Mr. M. Chipanzhya of Inambao Chipanzhya & Co.

For the 1st Defendant: N/A

For the 2nd Defendant: Mr. N. Sampa of Norman Sampa & Co.

J U D G M E N T

Cases referred to:

1. *Lovie Limited v. Anderson* (1999) IRLR 164
2. *Zambia National Provident Fund v. Chirwa* (1986) ZR 70 (SC)
3. *Swarp Spinning Mills Plc v. Chileshe and Others* (2002) ZR 23 (SC)
4. *Chilanga Cement Plc v. Kasote Singogo* (2009) ZR 122 (SC)
5. *Attorney General v. Mpundu* (1984) ZR 6 (SC)
6. *Nguleka v. Furniture Holdings Limited* (2006) ZR 19 (SC)
7. *Munsanje v. Family Health Trust Registered Trustees* (SCZ) Selected Judgment No. 27 of 2017
8. *Livingstone v. Rawyards Coal Company* (1880) App. Cas. 25

Works referred to:

1. *N.M. Selwyn, Selwyn's Law of Employment* 14th edition, Oxford University Press 2006

By writ of summons and accompanying statement of claim, the plaintiff seeks the following:

- (i) A declaration that the plaintiff's suspension from duty as Company Secretary of the 2nd defendant of the 4th November, 2012 by the Permanent Secretary, Ministry of Transport, Works, Supply and Communications was ultra vires the 2nd defendant's Terms and Conditions of Employment and Service for Management Employees and General Staff Regulations and Discipline Code and Procedures and therefore illegal and void ab initio.**
- (ii) A declaration that the aforesaid suspension was ultra vires the plaintiff's contract of employment with the 2nd defendant dated the 31st January, 2012 and therefore illegal and void ab initio.**
- (iii) As against the 1st defendant, damages for conduct inducing the breach of contract between the plaintiff and the 2nd defendant.**

The plaintiff alleges that his contract of employment expressly stated that he would functionally report to the Chairperson of the 2nd

defendant and operationally to the Managing Director of the 2nd Defendant. The contract provided for the benefits and allowances he was entitled to.

It also stated that either party could terminate by giving 90 days notice or payment in lieu of notice. However by letter dated 4th November, 2012, the Permanent Secretary (PS) of the Ministry of Transport, Works, Supply and Communications suspended the plaintiff from duty and placed him on half salary, purportedly to facilitate investigations in the operations of the plaintiff's office as Company Secretary.

The plaintiff alleges that this was contrary to the provisions of the 2nd defendant's General Staff Regulations and Disciplinary Code as he was neither charged for any offence within 48 hours of committing any alleged offence nor were the investigations concluded within 4 days or slightly longer and with approval of the plaintiff's supervisor as provided for in the aforesaid Disciplinary Code.

The plaintiff further avers that the suspension letter was maliciously and wrongfully written and therefore the PS procured and induced the 2nd defendant to break its respective contract with him. The

plaintiff outlines the particulars of inducement and procurement in paragraph 9(i) to (iv) of the statement of claim.

Furthermore, that on 8th April, 2013 he wrote to the PS and copied the 2nd defendant's Managing Director, inquiring about his status but there had been no reaction by date of commencement of these proceedings on 4th October, 2013.

It is alleged that the 2nd defendant has by its conduct repudiated the plaintiff's contract of employment as it has subsequently appointed someone to act in his position. The plaintiff accepted the repudiatory conduct of the 2nd defendant at a meeting held on 2nd September, 2013 and by letter dated 24th September, 2013 where he stated that he considered his contract to have come to an end.

That as a result of the 2nd defendant's conduct the plaintiff has lost the benefit of the said contract and has been injured in his profession and put to considerable trouble, inconvenience and expense. He has thereby suffered loss and damage.

The particulars of special loss and damage are stated as follows:

- I. *Loss of use of withheld half salary at the rate of K21,000.00 per month from the 4th of November, 2012 to date and continuing K252,000.00*
- II. *Fuel allowance @ 125 litres per month X12 X K920.00 K 14,023.00*

III.	Talk time allowances @ K200.00 per month X 12	K	2,400.00
IV.	<i>Emergenced Railways Properties (ERP) allowances:-</i>		
	Sub-committee seating allowance @ US\$330 X 3X 4	US\$	3,960.00
	Sitting allowance @ US\$ 330 X 3 X 4	US\$	3,960.00
	Quarterly allowances @ US\$ 700 X 4	US\$	2,800.00
	Travelling allowance @ US\$ 300 X 4	US\$	1,200.00
	Territorial allowances @ US\$ 342 X 4	US\$	5,472.00
V.	<i>Zimbabwe Zambia (ZIZA) Quarterly sitting allowances</i>		
	@ 15% of ERP X 4	US\$	420.00
	<i>Zimbabwe Zambia (ZIZA) Quarterly sitting allowances</i>		
	@15% of ERP X 4	US\$	589.50
VI.	<i>Gratuity @ 25% of annual basic salary of</i>		
	K504,000.00 X 3 years	K	378,000.00

In its defence, the 1st defendant denied the plaintiff's claims. It partly admitted paragraph 7 only to the extent that the plaintiff was suspended by the PS to facilitate investigations which were ongoing by the date of the defence, on 30th October, 2013. The PS did not contravene the 2nd defendant's General Staff Regulations and Discipline Code in that there was no board in place at the time of the plaintiff's suspension.

The 2nd defendant also filed its defence. It admitted that it employed the plaintiff as its Company Secretary by contract of employment

dated 31st January, 2012 and averred that it had never terminated the said contract.

It admitted that clause 2 of the contract expressly provided that the plaintiff was to functionally report to the Board Chairperson of the 2nd defendant and to operationally report to the Managing Director of the 2nd defendant. However, the 2nd defendant avers that this was not the only clause as the contract provided that for avoidance of doubt the plaintiff shall not be covered by any other conditions of service other than those provided in the aforesaid contract of 31st January, 2012.

The 2nd defendant further avers that the PS followed procedure in suspending the plaintiff as he allegedly committed serious offences whose investigations could not be concluded within 4 days referred to. And he could not be charged before investigations were concluded. That the plaintiff has prematurely rushed to court even before investigations are over or his contract terminated.

The 2nd defendant denied that the plaintiff's contract had been repudiated since Patrick C. Musonda was appointed to act as Company Secretary for administrative convenience only and that no one had been appointed Company Secretary to replace the plaintiff.

The 2nd defendant also denied the plaintiff's claims that he has suffered loss and damage.

That Emerged Railways Properties (ERP) and ZIZA are separate legal entities who are not party to these proceedings and thus a claim for such allowances from the 2nd defendant is frivolous and vexatious. Furthermore, that the plaintiff is not entitled to Non Private Practice Allowance since it was not embodied in his contract of employment.

At trial both parties adduced oral evidence. The plaintiff testified as PW1 and called one witness. He testified that he was employed by the 2nd defendant as Company Secretary in 2008 on a four year contract expiring in 2012. Upon successful completion of that contract, he was awarded a three year contract expiring in February, 2015. This contract provided that he was to report functionally to the board and operationally to the Managing Director. On 15th November, 2012, he received a letter from the PS who purported to invoke clauses 1, 2 and 3 of Part II of the 2nd defendant's Disciplinary Code of Conduct, by suspending him.

According to the plaintiff the authority to suspend him was with the Managing Director especially that during that period there was no board in place. The suspension also contravened the Disciplinary

Code which specified that an employee be charged within 48 hours. He was never charged and his contract has since expired; (on 5th February, 2015).

Around 24th September, 2013 he was called by a joint team of investigators from Anti-Corruption Commission (ACC), Drug Enforcement Commission (DEC), Zambia Police (ZP) and Office of The President Special Division (OPSD) to inquire on six allegations. He responded and the issue was quiet.

He later wrote to the PS inquiring on his suspension and he was referred to the Managing Director. According to the plaintiff the PS, Dr. Atanga, who had suspended him was now the Managing Director of the 2nd defendant. He later came to know through an advert in the press that his position was vacant and later a Mr. Patrick Chileshe Musonda started holding himself out as Company Secretary for the 2nd defendant.

He was later called by the investigating team over a fresh allegation of abuse of authority. He was arrested and appeared in court on 9th October, 2013. According to the plaintiff this was malicious because it came after he had commenced these civil proceedings against the defendants.

He reiterated his claims that the PS acted ultra vires thus the suspension was illegal and void ab initio. His claim is for damages for breach of contract. And special damages from date of suspension to date as he suffered loss and he lost half of his salary from 13th November, 2012 to 1st February, 2015 the date of expiry of the contract of employment. He also lost out on full entitlement of 125 litres of fuel per month and K200 airtime per month. The plaintiff further claims that as Company Secretary he was joint Company Secretary of the inter state company between Zambia and Zimbabwe called Emerged Railways Properties (ERP) Plc., where he was entitled to sitting allowance of USD 330 per sitting of four quarters in a year, quarterly allowance of USD 700 four quarters every year, travelling allowance of USD 300 per quarter of four quarters a year, and territorial allowance of USD 342 per quarter.

The court heard that the plaintiff was also joint Company Secretary of ZIZA another inter state company where he got a quarterly sitting allowance of USD 420, USD 590 of quarterly allowance as a retainer. It was his testimony that he also lost out on gratuity at 25% of his annual basic of K504,000 per year X 3 years.

He was also entitled to repatriation allowance of K3,500 at the end of the contract, and to purchase the personal to holder motor vehicle

at 15% of the purchase price. His K6,000.00 non practice allowance was never paid to him also his K950,000 sitting allowance per quarter as a trustee of the 2nd defendant's pension trust fund was not paid due to the suspension.

In cross examination he testified that when there was no board in place, the Managing Director in consultation with the parent Ministry did policy direction. He insisted that the parent Ministry of Transport, Works and Communications was not a shareholder of the 2nd defendant but the Ministry of Finance was.

He admitted that it was not strange that the Managing Director assumes policy direction when there is no board. And that the Managing Director is a board member ex-officio. He further admitted that in the absence of the board, the parent Ministry could take over policy decisions.

When referred to the letter of suspension at page 30 of the plaintiff's bundle of documents, the plaintiff admitted that it informed him of irregularities and that he would be called by security wings. He was called by the security wings after he wrote three letters of reminders. He was interviewed over six allegations bordering on board resolutions.

When cross examined by the 2nd defendant's counsel, the plaintiff admitted that the 2nd defendant was wholly owned by the government and that the PS is an employee of the government. He admitted that he did not protest the suspension letter the first time he got it but he later did. He conceded that clause 1.1 of the Disciplinary Code stipulates that once suspended an employee is on half salary. He admitted that the Code also provides for investigation of an employee while on suspension and to be charged once an offence is established. He said he did not appeal because he was never charged. He admitted that his entitlements are as stated in the contract. He conceded that ZIZA, ERP and the 2nd defendant's Pension Trust Fund, were not party to the proceedings.

He admitted that the contract did not provide for non practice allowance, nor ZIZA and other allowances from the pension fund and ERP. He admitted that his contract was not terminated. Additionally, that he was paid his leave days, repatriation and payments relating to half salary. He conceded that he wrote to the 2nd defendant through his lawyer, to inform them that his contract be deemed to have been terminated. The said letter was dated 30th September, 2013 and that by that date he had not yet sued.

In re-examination, he clarified that the Code of Conduct and conditions of service provide that an employee who is charged with criminal proceedings is to be suspended which was not the case with him because he was never charged before the suspension. That this was provided in clause 1.1. His letter of suspension was silent on offences but referred to irregularities which were never brought to his attention.

PW2, Knox Karima, 62, former Managing Director of the 2nd defendant testified that he served as Managing Director from February, 2004 to 13th December, 2012. It was his testimony that the plaintiff was suspended by the PS. As Managing Director he was the first in line but he could not administer any action on the plaintiff without agreement of the Board Chairman. When asked to suspend the plaintiff he objected because he was not told the reason and he also required the approval of the Board Chairman. It was PW2's testimony that the plaintiff was then suspended by the PS for abuse of office. The board approval was not sought because the board had been dissolved.

According to PW2, the plaintiff's entitlement were monthly salary of K42,000.00, a car, fuel allowance and that he served on the ZIZA and ERP boards where he also received payments.

During cross examination by the 1st defendant's counsel he testified that he was verbally instructed to suspend the plaintiff by the PS but he objected; verbally. He further stated that the PS had no powers to discipline the plaintiff.

He testified when cross examined by the 2nd defendant's counsel that the PS was a board member by appointment not by virtue of his office. In re-examination he testified that the PS was a member of the dissolved board.

That was the evidence on behalf of the plaintiff.

The 1st defendant did not adduce oral evidence.

The second defendant called one witness Reuben Fanwell Lungu, 48, its Human Resource Manager. The witness (DW1) testified that the plaintiff separated from the 2nd defendant after his contract was deemed terminated on 30th September, 2013 as requested by himself. The plaintiff was entitled to K12,000 per month and fringe benefits as a full remuneration. He also enjoyed annual leave days, sick leave days, loans and advances, subsistence allowance, membership to professional bodies, transport, repatriation and medical scheme.

After termination of his contract, the plaintiff was paid gratuity, accrued leave days, repatriation, salaries and allowances withheld

during the period of his suspension. That the allowances from ERP were not part of the plaintiff's contract and could not be paid.

Regarding the damages for special loss, DW1 testified that withheld salaries were paid to the plaintiff but fuel, talktime and non private practice allowances were not paid. Fuel was given in the course of daily reporting on duty and physically operating. Talktime was provided for purposes of communication when on duty hence it was not paid since the plaintiff was on suspension.

DW1 disclosed that the plaintiff was paid ERP and ZIZA allowances as and when sittings were held. The entities were separate from the 2nd defendant. It was his testimony that the personal to holder vehicle was still with the plaintiff and that the 2nd defendant had no problem selling it to him. That non private practice allowance was not part of the plaintiff's conditions of service. The Zambia Railways Pension Fund is also separate from the 2nd defendant and it paid him allowances when it held sittings. These allowances were not part of his conditions of service.

He also testified that the plaintiff was not paid three months pay in lieu of notice because he requested to have the contract terminated

and the 2nd defendant accepted. Thus, payment in lieu of notice did not arise.

During cross examination, DW1 testified that the plaintiff's contract provided for fuel allowance but not talktime. When referred to the government circular no. B4 of 2006 on revision of payment of non private practice allowance – he testified that it did not apply to the 2nd defendant because it was for government employees and the 2nd defendant had its own conditions of service. The non private practice allowance was not part of the plaintiff's conditions.

That was the evidence on behalf of the 2nd defendant.

It was not disputed that the plaintiff was suspended by the PS on 4th November, 2012. The defendants also do not dispute that the plaintiff was never charged with any disciplinary charges. Though the suspension was pending investigations, the plaintiff was only charged with criminal charges in September, 2013. His contract was later terminated on 30th September, 2013 after the plaintiff suggested that it be deemed to have been terminated since the 2nd defendant had appointed someone to act in his position.

The issues that arise for determination are whether the plaintiff's suspension by the PS was void ab initio for being ultra vires his

contract of employment with the 2nd defendant. Is the plaintiff entitled to damages as against the 1st defendant for conduct of inducing the breach of contract between the plaintiff and the 2nd defendant?

It was not disputed that the investigations over which the plaintiff was suspended were being done by the Police, ACC, DEC and OPSD which are investigative wings outside of the plaintiff's contract of employment. The plaintiff was initially questioned by the investigative wings over six allegations concerning his position or duties as the 2nd defendant's Company Secretary. This was in September, 2013 almost a year after his suspension. However, he was only arrested in October, 2013 over a fresh allegation of abuse of authority and not the initial six allegations.

According to the author of '*Selwyn's Law of Employment*', "no disciplinary action should be taken in advance of proper investigations by the employer. Whether an employer should carry out his investigations after being informed that criminal charges are to be brought against an employee, in respect of matters arising out of his employment is a question of circumstances". Further, that "on the one hand, it is incumbent on an employer to embark on some form of investigation involving at least an interview with the

employee, to give him an opportunity to state his side/defence. If the circumstances are so blatant and sufficient to warrant a belief as to the employee's guilt, no further investigation is necessary".

According to the English case of **Lovie Limited v. Anderson**¹ within this spectrum there are many situations where a further consideration of the position, including an interview with the employee, should be considered before disciplinary action is taken.

The plaintiff in *casu* was not given a hearing before the suspension pending investigations. He was, in fact, charged about a year later by the investigative wings not the employer.

According to Selwyn the employer is obliged to conduct its own investigations where criminal charges are pending. That such an investigation should not be conducted with such haste that important evidence is overlooked, neither should it be delayed so long that issues become stale and hazy in the minds of witnesses. There is no particular form of procedure to be adopted as long as the employee is given a fair hearing and without prejudicing a fair trial (in criminal proceedings). This actually conforms to clause 1.1 of the Staff Guidelines of the 2nd defendant.

Clause 1.1 is couched thus:

(i) *“Immediately after becoming aware of the alleged offence, the immediate supervisor will make preliminary investigations in the matter and take either of the following steps:-*

- a. Dismiss the case for lack of merit.*
- b. Award unrecorded warning depending on the offence or;*
- c. Institute formal investigation in the matter.*

(ii) *In certain instances where the continued presence of the employee is likely to hamper investigations, pose a security risk or danger to other employees or company property, the employee will be placed on suspension at half pay including allowances.*

For instances the following offences will attract immediate suspension:- Theft, fraud, assault or fighting on duty, immorality, bribery, being under the influence of alcohol or unlawful drugs, disobeying lawful instructions, unconstitutional industrial action, sabotage and insubordinate etc”.

According to clause 2.1

- b. “Normal investigations in a case must take a maximum of four (4) working days. However, investigations in serious and complex cases, for example, of criminal nature involving the police or audit*

department may take slightly longer periods subject to approval by the supervisor”.

It is clear that the guidelines were abrogated by the defendants in this case. The plaintiff was wrongly suspended by the PS instead of his supervisor. No investigations were conducted by the 2nd defendant before he was suspended. Even the criminal investigations took over a year, contrary to the guidelines which provide that such investigations should take slightly longer than the prescribed four days.

It is settled law that where it is not in dispute that an employee is guilty of a dismissible offence and the employer terminates without following procedure, such an employee has no case on grounds of unfair or wrongful dismissal or a declaration that the dismissal is a nullity. This was elucidated by the Supreme Court in the case of **Zambia National Provident Fund v. Chirwa²**.

It is pertinent to state here that the Supreme Court further observed that ***“where the procedural requirements before disciplinary action, are not statutory but merely form part of the conditions of service in the contract between the parties, a failure to follow such a procedure would be a breach of contract and could***

possibly give rise to a claim for damages for wrongful dismissal but would not make such dismissal null and void".

The plaintiff here was not charged with any disciplinary charges, he was not given an opportunity to be heard or to exculpate himself in order for the employer to establish whether he was guilty or not. The allegations were clearly unsubstantiated. Thus, not only was procedure not followed but the allegations were equally unsubstantiated.

However, following the case of Zambia National Provident Fund v. Chirwa², I refuse to declare that the suspension was illegal and void ab initio as the Terms and Conditions of Service and the General Staff Regulations that the PS breached are not statutory but procedural. The plaintiff has equally not specified which law or statute the defendants breached to render his dismissal illegal. Be that as it may, I am inclined to find that the suspension which eventually led to termination was wrongful as held in Zambia National Provident Fund v. Chirwa².

I note that the plaintiff wrote to the 2nd defendant informing them that his contract be deemed to have been terminated due to their conduct of appointing someone in his position. Though the 2nd

defendant refused filling up the plaintiff's position and insisted that it only appointed someone to act, it accepted the plaintiff's suggestion that the contract be deemed to have come to an end.

As earlier noted, the plaintiff was never charged nor given a hearing by the 2nd defendant. He was on suspension for a long time until he wrote to suggest that his contract be deemed to have been terminated. The investigation of the six allegations by the investigative wings yielded nothing. The later charge of abuse of office also came much later and after the plaintiff started writing asking for his status and after he had sued. Furthermore, as alluded to, the PS acted contrary to the Staff Regulations as the plaintiff's supervisor should have suspended him. However, it is clear that he acted on behalf of the 2nd defendant and the 1st defendant. Thus, damages for breach i.e. wrongful suspension should lie against the 2nd defendant.

It is settled law that the normal measure of damages in employment cases is the notice period. It is further settled law that the normal measure is departed from depending on the circumstances of the case such as where the termination may have been inflicted in a traumatic fashion which causes undue distress. See **Swarp Spinning Mills Plc v. Chileshe and Others**³. I am equally fortified

by the Supreme Court decision in **Chilanga Cement Plc v. Kasote Singogo**⁴ per Mambilima, DCJ, as she then was, that:

“enhanced damages are meant to encompass the inconvenience and any distress suffered by the employee as a result of the loss of a job.”

The plaintiff's contract of employment provided for three months as notice period. However, the circumstances of this case clearly distressed the plaintiff and warrants an award above the notice period. I therefore, award six months salary as damages.

I am cognisant that the plaintiff has been paid gratuity in accordance with the contract, repatriation, withheld half salaries and accrued leave days. The six months award is for the undue distress famously referred to as the Mpundu type of damages. See **Attorney General v. Mpundu**⁵ and **Swarp Spinning Mills v. Chileshe and others**³ where the Supreme Court in reducing the twenty four months award given by the High Court to six months stated that...*“the reduced award we are making cannot be subject to any deductions for the simple reason that it is intended to be compensation by way of the Mpundu type of damages.”*

The six months salary to be paid with allowances he was entitled to during the course of his employment. See **Nguleka v. Furniture Holdings Limited**⁶.

Turning to the claim for special loss and damage, as alluded to the plaintiff was paid the withheld half salary, repatriation, accrued leave days and gratuity. Regarding fuel and talktime allowances, in the recent case of **Munsanje v. Family Health Trust Registered Trustees**⁷ the Supreme Court per Mwanamwambwa DCJ, held that:

“the principle of compensation is the sum of money which will put the party who has been injured or suffered, in the same position as he would have been in, if he had not sustained the wrong for which he is now getting his compensation or reparation”

This was in line with the case of **Livingstone v. Rawyards Coal Company**⁸. The Supreme Court observed that had the appellant not been suspended, he would have been paid up to the end of the contract his monthly salary, monthly talktime and monthly fuel allowance. The Court held that the appellant be paid those benefits in accordance with the principle of compensation. Guided by this

decision I order that the plaintiff be paid fuel and talktime allowances with his terminal benefits.

The claim for non private practice allowance is bound to fail. The plaintiff's contract did not provide for it and he did not adduce evidence to show that he was being paid even through his payslip or otherwise. And as testified by DW1, the circular B4 was for government employees of which he was not. The circular was clearly addressed to the PS Ministry of Justice informing him/her that non private practice allowance for lawyers working in that Ministry had been revised as indicated.

Turning to ERP and ZIZA allowances, I am again inclined to accept the testimony of DW1. I accept that these allowances were not part of his contract nor conditions of service. The plaintiff was entitled to these allowances when sittings were held, thus without having attended the sittings he cannot be paid. Most likely, someone else attended and got paid accordingly. No proof was provided for retention allowance of ZIZA board.

Sitting allowances from the 2nd defendant's pension fund were equally payable as and when sittings were held. The vehicle be sold to him as testified by DW1.

The money due to him to be paid with interest at short term deposit rate from date of writ to Judgment and thereafter at Bank of Zambia current lending rate until payment in full.

I award the plaintiff costs of, and incidental to the action, to be taxed in default of agreement.

Delivered at Lusaka this 30th day of June, 2017.


J.Z. MULONGOTI
HIGH COURT JUDGE