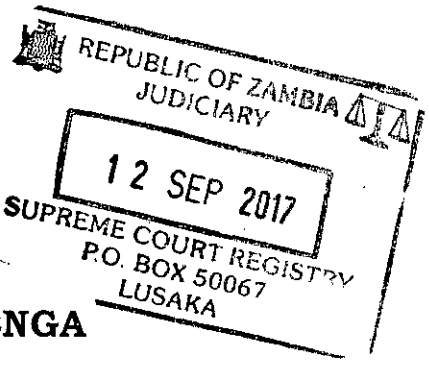
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 219/2016**

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

VICTOR KAMPAMBA MULENGA **APPELLANT**

AND

ZAMBIA CHINA MULUNGUSHI TEXTILES JOINT VENTURE LIMITED **1ST RESPONDENT**

MUTEX DEVELOPENT COMPANY LIMITED **2ND RESPONDENT**

CORAM: Mwanamwambwa DCJ, Kajimanga and Kabuka, JJS, on 6th June, 2017, 5th September, 2017 and 12th September, 2017.

FOR THE APPELLANT: In Person.

FOR THE RESPONDENTS: Ms. N.M. Mulenga, Isaac & Partners for Ms. L. Ngoma, Legal Counsel, Industrial Development Corporation.

JUDGMENT

Kabuka, JS, delivered the Judgment of the Court.

Cases referred to:

1. Jonathan Musialela Ng'uleka v Furniture Holdings Limited (2006) ZR 19 (SC).

2. Nyambe Lyuwa v The Council of The University of Zambia (1995) ZR 58 (SC).
3. Bank of Zambia v Kasonde (1995-1997) ZR 238 (SC).
4. Raine Engineering Co. Ltd v Baker (1972) ZR 156 (CA).
5. Zambia Consolidated Copper Mines Limited v Eddie Zulu (1999) ZR 80 (SC).
6. Chintomfwa v Ndola Lime Company Limited (1999) ZR 172 (SC).
7. Chilanga Cement v Kasote Singogo (2009) ZR 122 (SC).
8. Attorney General v Nachizi Phiri and 10 Others (2014) Volume 1 ZR 302 (SC).
9. Phillip Mhango v Dorothy Ngulube and Others (1983) ZR 61 (SC).
10. Antonio Ventriglia, Manuela Ventriglia v Eastern and Southern African Trade and Development Bank (2010) ZR 486 (SC).
11. Anthony Khetani Phiri v Workers Compensation Fund Control Board (2003) ZR 9 (SC).

Legislation referred to:

Supreme Court Rules, O.70 r. 1 Cap. 25 of the Laws of Zambia.

On the 12th of September, 2013, we delivered a judgment on appeal in which we found that the appellant had been wrongfully dismissed by the respondent and directed that there be an assessment by a District Registrar of the High Court, to ascertain the amounts due to him.

The judgment rendered in favour of the appellant was substantially, grounded on facts that were not in dispute. Briefly, these were that, the appellant was employed by the 1st respondent from January, 1997 until November, 1999, when he was

transferred to the 2nd respondent on the same terms and conditions of service.

The 2nd respondent was a duly owned subsidiary of the 1st respondent and was intended for the latter's sole benefit. As such, it was operated as a club patronised by employees of the 1st respondent. The appellant as the person who was placed in charge of managing the affairs of the 2nd respondent was selling goods belonging to the 2nd respondent to employees of the 1st respondent, on credit. Recovery of the monies due was by way of deductions from the said employees' salaries. The money so recovered, was in turn, used to pay salaries of the same employees.

After sometime, challenges arose in the operations of the 2nd respondent and on 28th January, 2002, the appellant received a letter of suspension. The grounds of his suspension were that, Auditors had discovered financial irregularities and mismanagement of the 2nd respondent by the appellant. These findings were set out in an Audit Report dated 1st November, 2001.

Although the letter of suspension stated that he was to be placed on half salary while on suspension, the appellant did not receive any payment in respect of his monthly salary for the whole

period of eleven months that he remained suspended, up to November, 2002. The appellant was requested to exculpate himself, which he did in writing, but claimed that the allegations on which he was requested to do so, were different from those that were in his letter of suspension.

Subsequently, the appellant received a letter from the General Manager of the 1st respondent inviting him for a meeting which, amongst others, was attended by the Auditor and Deputy Human Resources Manager. Following upon this meeting, the appellant received a letter dated 29th January, 2003 dismissing him from employment. Aggrieved by the respondents' said action, the appellant issued a writ from the High Court, claiming damages for wrongful dismissal on grounds that, in dealing with his disciplinary case, the 1st respondent adopted a procedure that infringed the rules of natural justice. As a result, the appellant contended that, he was entitled to damages for wrongful dismissal; damages for pain and suffering; terminal benefits; interest; any other relief as the Court would deem fit; and costs of the action.

In defence of the matter, the respondents denied the appellant's claims and averred that, his dismissal was based

purely on the Auditor's report. The findings contained in the report were that, there was poor financial management of the 2nd respondent by the appellant, as its Chief Executive Officer. In his evidence given at the trial of the matter before the High Court, the Auditor of the respondent companies could not confirm that the signature on the Audit Report in issue was his and he further denied any knowledge of its contents.

Relying on the evidence of the same Auditor's Report however, the trial judge still found, as Chief Executive Officer of the 2nd respondent, the appellant's conduct was wanting. Consequently, that he was properly dismissed.

On appeal to this Court, the appellant argued that, the trial court wrongly found that he was properly dismissed, purely on the basis of the financial irregularities and mismanagement as reflected in the Auditor's Report. That as he was not heard on the allegations, there was also a breach of the rules of natural justice on the part of the 1st respondent.

Upon our consideration of the evidence on record which disclosed that the appellant was charged and given an opportunity to answer to the charges; we further considered that thereafter, a

meeting was held where he was called to present his defence. On this evidence, we were satisfied that there was no breach of the rules of natural justice on the part of the respondents. That position notwithstanding, we considered that the Auditor, as author of the report on which all the allegations of irregularities and financial mismanagement attributed to the appellant were premised, denied the report in question. We, accordingly, found no evidence to support the trial court's conclusion that the appellant was responsible for the financial mismanagement of the 2nd respondent. In the event, we reversed the trial court, held that the appellant was wrongfully dismissed and proceeded to order as follows:

(i) that the appellant be paid half of his monthly salary for the period he was on suspension;

(ii) that the appellant be paid damages for wrongful dismissal, equivalent to six months' pay.

(iii) that the appellant be paid his terminal benefits for the period he worked for the 1st respondent company in accordance with his conditions of service, up to the date of his dismissal.

(iv) Interest on amounts due was awarded at 10 % from the date of the writ up to the date of judgment. Thereafter, it was to be calculated at 16% up to the date of full payment.

When the matter went before the District Registrar for assessment, the appellant's argument was that, the orders for payment made by this Court in effect, translated into a re-instatement. The District Registrar rejected that argument on the ground that, there was no such order made by this Court. He accordingly proceeded to assess damages as directed.

On the order for payment of half salary to the appellant for the period he was placed on suspension, the District Registrar rejected the appellant's claim that his salary was subject to a 16% annual increment on grounds that, he did not lead any evidence to establish that assertion. The District Registrar considered that the appellant's monthly salary at the time of suspension was K390.00. He also took into account that the period of suspension lasted for twelve months from 28th January, 2002 to 29th January, 2003. Multiplying K390.00 x 12 (K4,680.00) x ½, the District Registrar found the amount due to the appellant under this head, was **K2,340.00.**

Under the order for payment of six (6) months' salary x K390.00 p.m. as damages for wrongful dismissal, the District Registrar awarded the sum of **K2,340.00.** He further referred to

our decision in the case of **Jonathan Musialela Ng'uleka v Furniture Holdings Limited**[1] where we held that:

> **" An award of damages should include allowances and any perks the aggrieved party was entitled to at the time of termination."**

The District Registrar in this regard, considered that in his conditions of service the appellant was entitled to a number of allowances which he then, went on to individually consider. He found the fuel allowance was payable at K400.00 p.m. x 6 months which came to a total of **K2,400.00.** He also considered educational allowance at the rate of K120.00 per child for a maximum number of four (4) children but rejected this claim. He gave as the reason, that the appellant did not lead any evidence on the number of his children, if any, who were going to school, college or university, as to be entitled to payment of such allowances.

The District Registrar awarded the medical allowance placed at K75.00 per month x six months, in the sum of **K450.00**, but rejected the claims for telephone incentive at 40%, newspapers, office upkeep and chitenge material for having been unsubstantiated with evidence. The appellant's claim for

repatriation allowance provided for in the appellant's conditions of service in the sum of **K1,500.00** was allowed. The District Registrar in this regard reasoned that, the appellant had to vacate house No. H8 Mulungushi Textiles Compound which belonged to the 1st respondent and relocate elsewhere.

The claim for long service bonus was rejected on grounds that it was only payable to an employee who had worked for a minimum of ten (10) years, while the appellant had worked a total of six (6) years, only.

On the order for payment of terminal benefits to the appellant for the period he worked for the 1st respondent company on terms provided by his conditions of service, the District Registrar considered the evidence adduced, that the appellant worked from January, 1997 to November, 1999 which came to 35 months or 2 years 11 months. He rejected the appellant's argument that the period be extended to 2014, when judgment was entered in his favour, on grounds that he should be deemed to have been reinstated. Multiplying the period of 2 years x 3 months' salary per year served – K390.00 x 3 x $2^{11/12}$ the court came to a figure of **K3,412.50.** Finally, the District Registrar

awarded **K3,510.00** in respect of the claim for leave days for the whole period of six (6) years which were a total of

$\frac{216 \text{ days x K390.00}}{24}$ = K3,510.00.

The appellant's claim to purchase house No. H8 Mulungushi Textiles Compound was rejected, on grounds that it was never offered to him, as he was dismissed before the decision to sell the 1st respondent's houses was made.

The Court found the principal amount awarded came to a total of **K15,952.00.** It also found **10% interest** on this amount for the period of 10 years from the date of the writ to judgment being February, 2004 to September, 2013 in the sum of **K15,925.00** being the product of $\frac{10 \text{ x } 10 \text{ x K15,9250.00}}{100}$.

This brought the grand total of the **principal + interest** to **K31,904.00.** The District Registrar further ordered that, interest on that amount would continue to accrue at 16% from the date of the judgment, being 12th September, 2013 to the date of payment of the judgment debt.

Dissatisfied with the assessed amounts, the appellant has come back to this Court and has now advanced seven grounds of appeal, stated as follows: -

1. **that the Honourable District Registrar erred in law and fact by refusing to accept that the appellant was reinstated to his position when the Supreme Court ordered that his dismissal was wrongful;**

2. **that the Honourable District Registrar erred in law and fact by holding that the order by the Supreme Court that the appellant be paid his terminal benefits for the period he worked for the 1st respondent meant from 1997 to 1999;**

3. **that the Honourable District Registrar erred in law and fact by holding that the order by the Supreme Court that the appellant be paid his terminal benefits for the period he worked for the 1st respondent company as per his conditions of service up to his date of dismissal meant that the appellant should be paid terminal benefits based on old conditions of service that existed at the time he was wrongfully dismissed;**

4. **that the Honourable District Registrar erred in law and fact by using old conditions of service resulting in under assessing the following allowances: media, fuel and rejecting to pay educational allowance, telephone, incentive at 40%, newspapers, office upkeep and chitenge material;**

5. **that the Honourable District Registrar erred in law and fact by rejecting to restore house no. H8 which the appellant should have bought had his services not have been terminated wrongfully by the respondent;**

6. **that the Honourable District Registrar erred in law and fact by refusing to pay long service bonus to the appellant yet the Supreme Court cleared him and ordered his dismissal wrongful, meaning that his employment with the respondent has never ceased.**

7. **that the Honourable District Registrar erred in law and fact by refusing to pay the appellant terminal and other benefits from the date of wrongful dismissal to date.**

In support of the grounds of appeal the appellant on 22nd November, 2016, filed heads of argument into Court. There were no heads of arguments in response filed on the part of the respondents. This was so notwithstanding that, when the appeal first came up for hearing in June, 2017 we granted counsel for the respondents his application for an adjournment to enable him file his clients' heads of arguments.

When the matter next came up as scheduled on 5th September, 2017, no heads of arguments had been filed. We accordingly declined another application for an adjournment made by Ms Mulenga on behalf of the respondents and substantially, for the same reason, that we give them time to file their heads of arguments.

When we invited the appellant to proceed, he made brief oral submissions and indicated he would rely on his written heads of arguments that were filed on record.

In the said arguments the appellant in essence, was re-arguing his case, rather than focusing on the grounds of appeal he had raised against the assessment. This made it difficult to ascertain what the real arguments are on appeal. We nevertheless will endeavour to address the issues underlying each ground of appeal.

Grounds 1, 3, 4, 6 and 7, are interrelated and we will start by dealing with these grounds at once. For convenience, we will thereafter, deal with ground 5 and conclude with ground 2 of the appeal.

Grounds 1, 3, 4, 6 and 7, are all premised on the appellant's misconception that our finding of wrongful dismissal automatically meant he had been reinstated to his former position and that his employment was never terminated. The appellant in these grounds argues that, due to the failure by the District Registrar to recognise his re-instatement, he had erred in calculating various allowances. That, despite his re-instatement the District Registrar

used his old conditions of service resulting in under assessment of the amounts found due to him. He further refused to order payment of the appellant's terminal benefits and other allowances, from the date of wrongful dismissal to the date of assessment.

In his oral submission made at the hearing of the appeal on 5th September, 2017, the appellant remained adamant on his contention that, as the holding of this Court in its judgment of 12th September, 2013 that he was wrongfully dismissed resulted in his re-instatement, he was still in employment.

In dealing with grounds, 1,3,4,6 and 7 the starting point in our view, is whether, in our judgment dated 12th September, 2013, we indeed ordered that the appellant was to be re-instated. This is bearing in mind that, re-instatement is not a relief that is easily granted by the courts of law.

The appellant contends that, he was re-instated to his former position when this Court held that his dismissal was wrongful. A perusal of the judgment in question however, shows that this Court made no such finding or order. All we stated was that, the record in the court below showed no evidence to support the conclusion that the appellant was lawfully dismissed. This does

not by any stretch of imagination mean that, the appellant was thereby re-instated. We indeed made no such pronouncement as confirmed by the actual orders reproduced at pages J6 – J7 of this judgment.

Further and in any event, the law is that parties are bound by the matters they raise in their pleadings. The appellant in his statement of claim did not plead re-instatement. He certainly could not also raise it at assessment stage, as it was an issue that was not amongst those we directed the District Registrar to determine by way of assessment.

As we have said, in amongst many other decisions, the case of **Bank of Zambia v Kasonde[3],** where unlike the appellant in this appeal, the plaintiff there, had actually pleaded reinstatement as a relief and in rejecting to grant him that relief, we re-iterated that:

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

The reason courts are reluctant to order re-instatement were well articulated by the House of lords in the case of **Raine Engineering Co. Ltd v Baker[4],** where they observed as follows:

> *"When there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that* ***the courts will not grant specific performance of contracts of service.*** *Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court."* (boldfacing for emphasis supplied).

It is for the reasons espoused in the cited cases, that we did not, in our judgment dated 12th September, 2013, make any pronouncement, whether directly or otherwise, that the appellant had been re-instated in his position.

Grounds 1, 3, 4, 6 and 7, of appeal which were anchored on the erroneous assumption that our finding of wrongful dismissal resulted in the appellant being re-instated, accordingly fail.

There were also three corollary issues raised under grounds 1,3,4,6 and 7.

The first, was the appellant's argument equating a finding that there is a wrongful dismissal to an order of re-instatement. We have noted that the appellant did not refer us to any law or decided case to support that proposition. This Court however, has variously in numerous past decisions stated that, every contract of employment is terminable by either party thereto giving the other,

notice or payment in lieu thereof. That where the employer terminates an employee contrary to the terms of the contract, or some relevant rules of procedure, they may be liable in damages for wrongful dismissal.

The second corollary issue was alleged inadequacy of the damages awarded and a suggestion that, the applicable salary for purposes of calculating terminal benefits, is the one obtaining at the time judgment is delivered. We have previously said that, damages due to an employee for wrongful dismissal is payment of the salary, equivalent to the notice period as provided in the contract or where the contract is silent, reasonable notice. In **Zambia Consolidated Copper Mines Limited v Eddie Zulu[5],** we did say that, where there are aggravating factors in the termination, the court could exceed the notice period. We there awarded twelve months salary as sufficient damages, in view of the aggravating circumstances. This was the same position we took in the case of **Chintomfwa v Ndola Lime Company[6],** where we held that, the rationale for awarding two years salary as damages for wrongful dismissal, was due to the appellant's grim prospects of finding a job in the future. In **Chilanga Cement v Kasote Singogo[7],** the award of six months' damages was made

due to the harsh and inhumane treatment to which the employee had been subjected.

Having considered the circumstances in which the appellant was dismissed in the present case, we awarded him six months' salary as damages for the wrongful dismissal. The applicable salary in such a situation, is the salary he was receiving at the time of the wrongful dismissal.

We have, in this regard, looked at the conditions of service that the appellant sought and apparently, still seeks to rely on, which are at page 51 of the record of appeal. We note that these conditions only came into effect on 1st August, 2003 and remained in force up to 31st July, 2005. As the appellant's employment was terminated by letter of dismissal dated 29th February, 2003, the conditions of service that came into effect six months thereafter, on 1st August, 2003 did not apply to him. In **Attorney General v Nachizi Phiri and 10 Others**[8] we did observe that:

> "It is trite that employment relationships and the payment of salaries, dues, benefits and allowances are anchored in contract; with clear terms governing such contracts.....**We have stated in many employment cases that employees should not be subjected to conditions of service which did not exist during their service;....**"
> (emphasis in bold supplied)

The learned District Registrar was, therefore, on firm ground when in calculating what was due to the appellant, he applied the appellant's salary as it was on 29th February, 2003.

The third corollary issue was that, the appellant was denied payment of allowances such as educational allowance, telephone, incentive at 40%, newspapers, office upkeep and chitenge material. The record shows that, the District Registrar did consider the claims relating to payment of these allowances but he rejected them on grounds that there was no evidence led by the appellant to establish that he was entitled to such payment. In relation to the education allowance in particular, the District Registrar bemoaned the fact that, there was no evidence before him that the appellant had school going children who could be entitled to payment of this allowance. Suffice to state in this respect, that the onus of proving his claims, as always, lay on the appellant as the claimant. This principle was clearly espoused in the case of **Dorothy Ngulube v Philip Mhango[9].**

In rejecting the claim for payment of long service bonus, the District Registrar gave the reason that, the appellant had worked a total of six (6) years, while long service bonus was only payable to

an employee who had worked for a minimum of ten (10) years. This was a finding of fact. Our perusal of the record shows that it is supported by the evidence on record. The appellant remained in employment from 1997 to 29th February, 2003, which is 6 years. Accordingly, we find no basis for reversing it.

All the corollary arguments having collapsed, we will now proceed to consider ground five. This ground faults the learned District Registrar for having, allegedly, failed to restore house No. H8 to the appellant. Our sharp response to this grievance is first, that the District Registrar was given a specific directive to deal with assessment of clearly identified orders granted by this Court in its judgment dated 12th September, 2013. The issue of the house was not one of the grounds of appeal raised by the appellant, which at pages J7 – J8 of that judgment, were quoted and stated that, the lower court erred in law and fact by:

1. **holding that the appellant was responsible for the financial mismanagement against evidence in totality like the withholding of funds which belonged to the 2nd respondent by the 1st respondent and the Managing Director;**

2. **relying on an Audit Report to conclude irregularities and financial mismanagement by the appellant when this was not so;**
3. **holding that Rules of Natural Justice were not breached;**
4. **dismissing the action without awarding damages admitted as payable by the respondents;**
5. **addressing himself to irrelevant matters like the conditions of service of the 2nd respondent;**
6. **by not addressing himself to the allegations in the letter of dismissal.**

In the case of **Antonio Ventriglia, Manuela Ventriglia v Eastern and Southern Trade and Development Bank**[10] we did hold that, a party cannot raise on appeal for the first time, matters that were not placed before the trial court. This rationale holds true to the situation now at hand, in the present appeal, where the appellant sought to raise before the District Registrar, the issue of a house that was neither part of the grounds of appeal from the trial court, the subject of our judgments on the merits dated 12th September, 2013. Nor, pursuant to the same judgment, was it part of the orders on which the District Registrar was directed to assess amounts due to the appellant, by this Court.

For those reasons, ground five of the appeal cannot be sustained and hereby fails.

Finally, on ground two of the appeal, it is not disputed that the appellant initially worked for the 1st respondent company from 1997 to November, 1999. Thereafter, he was transferred from the 1st respondent to head the 2nd respondent, a subsidiary of the 1st respondent, where he remained up to 29th February, 2003 when he was dismissed. We must here, point out that, our order referred to 'the period the appellant worked for the 1st respondent up to his dismissal'. The fact is that, the appellant continued working, for all intents and purposes, for the same employer, under the same management and conditions of service, as correctly noted by the District Registrar at page 12 of the record of appeal. The appellant must accordingly be paid his terminal benefits from January, 1997 to the date of his dismissal on 29th February, 2003. In the case of **Anthony Khetani Phiri v Workers Compensation Fund Control Board**[11], where the employee continued working for the employer's successor under the same conditions of service, we did hold that, an employee's period of service for any given period, must be presumed to be continuous, and that a transfer does not mean a break in the employment.

Ground two must, for the reasons given, succeed.

In sum, the appeal fails, save for ground two, which has succeeded in relation to terminal benefits that are to be paid to the appellant on the basis of his conditions of service under which he served from January, 1997 to 29th February, 2003.

As the appellant's success is only nominal, we find an appropriate order on costs, is for each party to bear their own costs of the appeal and we so order.

M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

C. KAJIMANGA
SUPREME COURT JUDGE

J. K. KABUKA
SUPREME COURT JUDGE