

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

Appeal No.110/2015

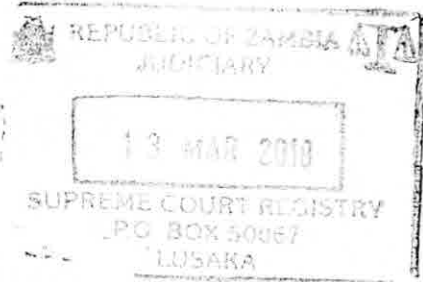
BETWEEN:

WILSON TEMBO

AND

WILLIAM KAPAMBWE

**(Sued as Chairman of the Board of Governors of
Lake Road PTA School)**



APPELLANT

RESPONDENT

CORAM: Mwanamwamba DCJ, Wood and Kajimanga JJS

On 6th March 2018 and 13th March 2018

FOR THE APPELLANT: Mr. N. Nchito SC, Messrs Nchito & Nchito

FOR THE RESPONDENT: No Appearance

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. Zambia Airways Corporation Limited v Gershom Mubanga (1990-1992) Z. R. 149
2. Bank of Zambia v Joseph Kasonde (1995-1997) Z. R. 238
3. Zambia Consolidated Copper Mines v James Matale (1995-1997) Z. R. 144
4. Redrilza Limited v Abuid Nkazi and Others (2011) Z. R. 394
5. Nkhata and 4 Others v Attorney General (1966) Z. R. 124
6. Contract Haulage Limited v Mumbuwa Kamayoyo (1982) Z. R. 13
7. Gerald Musonda Mumba v Maamba Collieries Limited (1988 - 1989) Z. R. 217

This is an appeal against the decision of the Industrial Relations Court, dismissing the appellant's claims against the respondent.

The undisputed facts leading to this appeal are that the appellant was employed as superintendent of Lake Road PTA school in 2004 and served on a fixed term contract of three years which was renewed on three occasions with the last one expiring on 30th April 2013. By conduct of the parties, the contract remained effective until 16th September 2013 when it was terminated. Prior to the expiry of the contract, the school's board of governors ("the board") held a meeting where it was resolved to renew the appellant's contract. He was accordingly informed of this decision and continued to work under the same terms of the expired contract.

The appellant was not availed with any formal contract of employment with the school as according to the respondent, his personal file, which would have assisted the board to finalise the terms relating to his salary and allowances, could not be traced. In the absence of his personal file, the board was unsure as to how the appellant's salary and allowances came about under his previous contract. Consequently, a forensic audit was instituted to try and

establish these issues. The forensic audit by the school's external auditors was, however, inconclusive with regard to the appellant's salary and allowances due to the fact that his personal file could not be traced. The board subsequently made a resolution to terminate the appellant's contract on 16th September 2013, pursuant to clause 11 of the contract.

Aggrieved by this decision, the appellant filed a complaint against the respondent in the Industrial Relations Court seeking the following:

- 1. A declaration that the termination of the appellant's employment by notice was a dismissal in disguise and was therefore wrongful, unjust and unmerited given the circumstances of the case and that he be compensated to the tune of all contractual benefits he would have been entitled to had his contract not been terminated;**
- 2. Damages for the mental anguish, inconvenience and loss suffered and occasioned by the respondent's action;**
- 3. Any other relief the Court may deem fit;**
- 4. Costs.**

The appellant contended that the purported termination of his employment was preceded by allegations made against him by way of board resolutions to the effect that he had awarded himself allowances but he was not formally charged and the said allegations

were in fact baseless. He, therefore, asserted that the termination of his employment was a dismissal disguised as an exercise of the respondent's right to terminate by giving notice.

The respondent disputed the appellant's claim and contended that the board was within its right to terminate the appellant's employment by notice as the same was provided for under clause 11 (a) of his contract. Further, that the entitlements due to the appellant under the said contract were paid to him in full following the termination and, therefore, the respondent had effectively satisfied its obligations towards the appellant under the contract and was not in breach thereof.

The appellant's evidence in the court below was that when his contract was coming to an end, he indicated to the board of the school that he was seeking another contract which would be his last one. Consequently, he was appraised by one Mr. Robert Ng'uni, a board member, on 3rd April 2013 and the board chairman, Mr. William Kapambwe. On 5th April 2013, the board of the school met to discuss his appraisal. The following morning, he received a handwritten letter from the chairman of the board informing him that he had earned

his contract renewal from the board. He then waited for the formal written contract to be drafted and continued working with the assurance that the contract would be prepared and signed within the shortest possible time. Whist awaiting the contract, he was being paid in accordance with the terms and conditions of his previous contract. This went on for four months and the payments were being signed by the board. In June 2013, the respondent pledged that he himself was going to work on the contract but this did not materialize despite the repeated reminders made to him regarding the contract.

It was his further evidence that between 20th and 23rd June 2013, he received an email from the respondent stating that he had ordered a vehicle worth K50,000.00 and that he had a shortfall of K20,000.00 which was needed to clear the vehicle. The respondent requested that the school lends him the sum of K20,000.00 to enable him pay for duty on the car he had ordered. The appellant replied and advised the respondent that it would not be appropriate for him to use money from the school coffers for this purpose. The respondent thanked the appellant for the advice.

Shortly afterwards, however, he came across some communica-

tion in which the respondent alleged that the appellant had been giving himself allowances without authority and that a forensic audit would be conducted to establish the same. The audit was subsequently conducted by HLB Auditors who were the official external auditors for the school. According to the appellant, the findings of the auditor's report not only exonerated him from the allegations of having paid himself allowances but it also established that he was being underpaid in fuel allowances.

He admitted, however, that the findings highlighted that there were general weaknesses identified in the management of the school's affairs and he accepted responsibility for them. He also conceded that the audit exercise was concerned with record keeping, documentation and record availability and that in terms of his personal file, the auditors ruled that it could not be audited because it was missing. Further, that being a superintendent, he was the chief executive officer of the school who had the institutional memory and as such the board relied on him to know what happened in the past. Further, that it was also his responsibility to maintain archives, documentation and other records on behalf of the board.

The appellant testified that it was the board that was the custodian of the said file and that it had earlier been collected by Mrs. Mukaya and Mr. Chongo, both of whom were board members prior to 2010. The appellant stated that he had expected the board to have been in possession of his personal file but, because they did not know where it was, he arranged with his secretary to have it replaced. That at the time he was leaving the school, the said file was in the superintendent's office.

It was his further testimony that following the audit, he received a letter from the board chairman to the effect that the board had failed to agree on the terms of the contract and therefore, they were terminating his contract. Prior to this, he was not charged with any offences and neither was he made to undergo disciplinary proceedings of any sort. He, however, conceded that the letter of termination did not cast any aspersions on him and that the respondent simply wanted to part company with him. The appellant also agreed with the position that the board was grappling with the fact that they should give him a new contract and that never at any one time did they allege impropriety on his part. Further, that the

board had made strenuous efforts to renew his contract but they were confused as to what terms and conditions to insert in the new contract and that this confusion was a fair assessment of the predicament the board was in, in relation to whether or not to offer him a new contract.

He confirmed that under clause 11(b) of his contract of employment, he was not obliged to give reasons for terminating the contract and hence he could leave employment for any reason or for none. Similarly, that his employer could terminate the employment under clause 11(a) by giving three months' notice and was not obliged to give reasons. Further, that under clause 11(a) and (b) the requirement was the service of the requisite notice and that the respondent was in compliance, hence, they were not in breach of clause 11. The appellant also admitted that subsequent to his letter of termination he was paid all his entitlements under the contract save for repatriation which he did not request for.

The respondent's evidence was that in April 2013, his board met to discuss the appellant's renewal of contract, as it was coming to an end. Eventually, a decision was arrived at to renew the appellant's

contract. He was then mandated by the board to communicate to the appellant informally about its decision which was conditional on the clarification of the terms and the actual contract to be availed to him later after the board had worked out the terms. Two board members, namely the chairman of the audit committee and the board secretary, were tasked to draw up the terms. However, three months elapsed without the two board members coming up with the contract. So he took it upon himself to draw up the contract and when it reached near completion, the only part that remained to be included was the appellant's salary.

The respondent stated that he encountered difficulties as regards the information he was given by the appellant as to what constituted his salary because, according to him, the figures had some anomalies. Subsequently, he convened a board meeting to establish whether any of the board members had knowledge as to who had authorized the allowances that the appellant had been enjoying. The board expressed ignorance about the allowances and so he followed up the matter with the appellant but he in turn referred him to the finance manager and a junior accountant. They

too could not establish the appellant's salary from the salary structure. The board then resolved to engage the school's external auditors to look into the issue. They also could not come up with any tangible information because the appellant's personal file was not available. In the end, the board found itself in a situation where it had lost confidence in the appellant. It then sought legal advice and later terminated the appellant's contract by invoking the termination clause contained in his contract.

The respondent, however, conceded that as a result of the audit exercise, the appellant ended up being paid some allowances which previously had not been paid to him and that there was nowhere in the auditor's report stating that the appellant had paid himself unapproved allowances. He said that nonetheless, the board went ahead and terminated the appellant's contract because it did not fully understand the salary structure pertaining to the appellant since some of the allowances were not approved by the board. He stated further, that although the school had a grievance procedure, it could not be invoked in the present case as there was insufficient information to proceed with the same due to the appellant's missing

file and that, that was why the board resorted to using the termination clause.

After considering the evidence and submissions of the parties, the trial court found that there was no clause in the appellant's contract of employment that obliged the respondent to hold a formal disciplinary hearing before invoking clause 11. As such, the respondent was at liberty to invoke the termination clause without following a formal procedure. Concerning the allegation of the termination being made in bad faith, the trial court found that insufficient evidence had been led to substantiate malice on the part of the respondent to warrant the court delving behind the termination clause in the matter. Overall, the trial court found that the termination of the appellant's contract by notice was lawful and in accordance with the terms of the contract. The appellant's claims were accordingly dismissed for lacking merit.

Dissatisfied with the lower court's judgment, the appellant now appeals to this court on three grounds, namely:

- 1. The learned trial court erred in fact and law when it held that sufficient evidence was not led by the appellant to substantiate malice on the part of the respondent to warrant delving behind the**

termination when the appellant had established that he had denied the respondent's board chairman an illegal loan.

2. The learned trial court erred in law and fact when it failed to make a finding that the respondent herein could not rely on alleged misconduct on the part of the appellant to terminate him [his contract] by notice and that in any case, the HLB Reliance Audit cleared the appellant and could not therefore be relied upon as a reason for his contract termination.
3. The learned trial court erred in law and in fact when, having held that [the] appellant's contract was renewed and he continued to work on the same terms and conditions as the last contract, it accepted that his contract could properly be terminated because his emoluments were unknown.

The parties filed heads of argument in support of and against the appeal. In arguing ground one, Mr. Nchito SC, counsel for the appellant referred us to the judgment of the trial court in the record of appeal and submitted that the trial court's appreciation of the facts of the present case was misapprehended and misdirected for the reason that it failed, or otherwise omitted, to take into account matters which it ought to have taken into account. He contended that it failed to take into account the material facts, supporting evidence and law presented by the appellant during trial and in its submissions showing malice and foul play on the part of the respondent. In particular, the learned trial court omitted to include,

and therefore, did not take into account the fact that the respondent had requested the assistance of the appellant in illegally misappropriating school funds for his personal and private use, to which the appellant declined.

Our attention was drawn to the email in the record of appeal in which the respondent's board chairman requested the appellant for a loan of K20,000.00 from school funds and asked that the same be kept private and confidential. According to State Counsel, the respondent was requesting that the appellant facilitates the provision of funds to which in his own testimony he admitted would have been an illegal act. He contended that from the email, the respondent's need and desperation was apparent. We were specifically referred to the following excerpt of the email to support this argument:

"I called on your numbers the 096 and the 095. I am in a very difficult situation and I have found it difficult this time to avoid requesting for help."

It was the submission of Mr. Nchito SC, that given the illegal nature of the respondent's request and his position, he sought to ensure that the appellant would be precluded from divulging this information to other members of the board by terminating the

appellant's contract. He relied on the cases of **Zambia Airways Corporation Limited v Gershom Mubanga¹** and **Bank of Zambia v Joseph Kasonde²** and submitted that the respondent was merely "fishing" for a means by which the dismissal of the appellant from employment could be warranted.

Our attention was also drawn to the appellant's testimony in the record of appeal, where he stated as follows:

"Between 20th and 23rd June, 2013 I received an email from my Board Chair in which he communicated to me that he had ordered a vehicle costing K50,000 and that he had a shortfall of K20,000. The email was addressed to me and copied to the Finance Manager. The email is marked "WT3" in Bundles of Documents.

I was requested to organize K20,000 to assist the Chairman for the purpose of meeting duty on the cost of the vehicle. I replied to the email and advised my Board Chair that it would not be right for me to organize these monies which belonged to the school. I told my Board Chair that if I had my own money amounting to that much, I was going to lend him. He replied thanking me for the advice I gave him in my reply.

After this, suddenly, I saw communication where the Chairman was saying I was giving myself allowances."

It was State Counsel's argument that the trial court did not prudently consider the evidence advanced by the appellant to the

effect that the respondent's failure to reach a conclusion regarding the appellant's salary and allowances was merely a façade. He referred us to the case of **Zambia Consolidated Copper Mines v James Matale**³ where this court held that:

"In the process of doing substantial justice, there is nothing in the Act to stop the Industrial Relations Court from delving behind or into the reasons given for termination in order to redress any real injustices discovered."

We were also referred to the case of **Redrilza Limited v Abuid Nkazi and Others**⁴ where it was held:

"We must hasten to point out, that while the Industrial Relations Court is empowered to pierce the veil, this must be exercised judiciously and in specific cases, where it is apparent that the employer is invoking the termination clause out of malice."

State Counsel, accordingly, contended that the evidence adduced in the court below was sufficient to substantiate malice on the part of the respondent. He drew our attention to the fact that prior to the respondent's denial of the illegal loan by the appellant, the respondent had, in writing, positively indicated and confirmed that the appellant's contract would be renewed. He argued, therefore, that the respondent's request for an illegal loan, and the appellant's

denial of the same, impelled the respondent to maliciously invoke the termination clause of the employment contract. Relying on the **James Matale³** case, Mr. Nchito SC implored this court to delve behind the reason given for the termination of the appellant's employment, that the board was unable to finalise the terms of the appellant's salary and allowances, and instead conclude that the termination of the contract was in fact actuated by malice.

In support of ground two, State Counsel referred us to the judgment of the trial court in the record of appeal which states that:

"Shortly afterwards, however, he came across some communication in which the Chairman alleged that CW1 had been giving himself allowances without authority.

Further, it was indicated in the same communication that a forensic audit would be conducted to establish whether or not he was giving himself allowances. CW1 responded to the communication welcoming the initiative and copied his response to the Board Chairman and the Chairperson of the Audit Committee Ms. Priscilla Mpundu. The audit was subsequently conducted by HLB Auditors who were the official external auditors for the school."

He also referred us to paragraph 3 of the respondent's Answer

in the record of appeal where the respondent averred as follows:

"The respondent and other members of the Board of Governors did engage in discussions with the Complainant but failed to reach an understanding on the terms that the Complainant was currently serving under, especially with respect to the following matters:

- (a) The salary**
- (b) The allowances**
- (c) Fringe benefits."**

Our attention was also drawn to paragraph 9 of the respondent's affidavit in opposition to the Complaint in the record of appeal which reads in part as follows:

"... It is at this time that the problems began because the salary and allowances which Mr. Tembo presented could not be justified in terms of amounts and board authority."

We were further referred to a portion of paragraph 10 of the said affidavit which states that:

"... The main resolution was to engage our Auditors, HLB to establish the gaps in salary and allowance structure system."

Mr. Nchito SC contended that the statements in the above excerpts carried an accusatory tone and that it was clear at the trial that the respondent attempted to allege misconduct on the part of

the appellant in respect of his salary and allowances; more particularly, the respondent's allegation that the appellant had been receiving unjustified allowances. It was State Counsel's argument that the trial court erroneously failed to make a finding that the respondent herein could not rely on alleged misconduct on the part of the appellant to terminate the appellant's employment by notice as termination by notice is 'no fault termination' and further, that the forensic audit conducted by HLB Reliance completely exonerated the appellant of any such misconduct.

He submitted that in light of the allegations made against him regarding his allowances and salary, all of which had been received with the due approval of the board itself for the duration of his employment, the learned trial court neglected or otherwise failed to acknowledge that in the instance of any misconduct by an employee of the respondent, the correct and proper procedure to be followed is as detailed in Clause 6.1 of the Disciplinary Code and Grievance Procedure which states as follows:

"Immediately a material violation of rule(s) has been noticed, the

supervisor/head of department should charge the employee with the appropriate offence, which should be clearly written, on an organisation charge sheet in quadruplicate.”

State Counsel argued that the respondent went on to allege that because the appellant's file was misplaced, the forensic audit yielded inconclusive results and the same was accepted by the trial court in the following terms:

“The forensic audit by the external auditors, HLB Reliance was inconclusive with regard to the appellant's salary and allowances due to the fact that the respondent's personal file could not be traced.”

Relying on the case of **Nkhata and 4 Others v Attorney General**⁵, Mr. Nchito SC argued that the trial court omitted to state, and therefore, did not take into account the fact that the appellant's personal file had, until the material time, been in the due care and possession of the respondent and further, that the file was in fact misplaced by the respondent.

State Counsel submitted that on page 21 at lines 19 - 30 of the record of appeal, the trial court omitted to include, and therefore, did not take into account the fact that the appellant actually availed the

external auditors HLB Reliance with his personal copy of the relevant file, thereby ensuring that the forensic audit was conclusive and that the said audit served to completely exonerate the appellant of any and all misconduct and in fact revealed that the appellant was underpaid. In this regard, he referred us to auditor's report in the record of appeal which states that:

"Except for the Superintendent whose fuel was being underpaid due to payroll error. He was supposed to have been at ZMW 3,049 not the ZMW 2,509."

We were further referred to the record of appeal where the auditor's report states as follows:

"From our review of the Superintendent's personal file (which he created for his personal use, as the official one was not availed to us) all the increments were approved by either the Board Chair, or the Admin committee chairperson and by Board resolution on increments for all employees."

State Counsel, therefore, contended that the learned trial court erred in law and fact when it failed to make a finding that the respondent could not rely on alleged misconduct on the part of the appellant to terminate him by notice and that in any case, the HLB Reliance audit cleared the appellant of any and all misconduct. That

the audit report was in fact conclusive as to its findings, as any gaps were supplemented by the appellant's personal copy of his file which he availed to the auditors. Further, the audit revealed underpayment of the appellant's transport allowance, and stated that any and all increments in the salary and allowances of the appellant were given with the due approval of the board, or the board chairperson, by resolutions of the board. Thus, State Counsel sought this court's indulgence in finding that the appellant was innocent of any and all misconduct.

In support of ground three, counsel submitted that the trial court's finding that the appellant's contract of employment could be properly terminated because his emoluments were unknown suggests that the respondent offered the appellant a contract of employment on terms that were otherwise unknown to itself. He contended that even more baffling was the fact that the said contract was offered on the same terms and conditions as the appellant's previous contract, therefore suggesting that for the duration of the appellant's previous term of employment of 3 years, the respondent did not fully understand the terms of the appellant's employment. In

this regard, we were referred to the record of appeal where the respondent stated as follows:

“We did not renew his contract because we did not fully understand the salary structure pertaining to Mr. Tembo.”

State Counsel submitted that the rationale behind the respondent's termination of the contract in the above statement begs the appellant to pose the question as to how an employer can be so nonchalant as to offer an employee a contract of employment on undefined or unknown terms. Further, that the employee should not suffer the punishment for the employer's oversight. He contended that this was certainly a gross injustice which the appellant seeks this court to remedy by finding that the trial court did err in law and fact when it accepted that the appellant's contract could properly be terminated because his emoluments were unknown. Such a finding, State Counsel argued, flies in the teeth of good logic and serves to prejudice the course of substantive justice. He accordingly prayed that the appeal be upheld with costs.

At the hearing, Mr. Nchito SC indicated that the appellant would rely on the filed heads of argument and briefly augment on each

ground of appeal. The oral submissions were however a regurgitation of the written heads of argument and therefore require no further repetition. Suffice it to state that according to State Counsel, this is a proper case to overturn the court below because its findings were faulty.

In the respondent's heads of argument, counsel submitted in response to ground one that the trial court properly evaluated the evidence and did not find any malice at all on the part of the respondent. He contended that at its meeting held on 4th April 2013, the board, by a vote of 4 in favour and 3 against, resolved that the appellant's contract of employment be renewed by being offered a new contract on terms and conditions to be agreed upon. That over the next 6 months, several members of the board were designated to enquire into the subsisting conditions of service and thereafter come up with the proposed terms for a new contract. They all failed to decipher what terms of employment were then applicable to the appellant and this was primarily due to the absence of documentary data and the fact that the appellant was not forthcoming or helpful in disclosing the relevant information. Consequentially, the board

resolved at its meeting held on 11th September 2013, not to offer a new contract or contract extension at all.

It was counsel's contention that there is no rationale or credible basis for the appellant to allege that the decision was a result of malice on the part of the board and it is too tenuous and fallible to argue that the respondent's request for a loan affected the entire board comprising 7 independent members. Moreover, counsel argued, the respondent is one of the 3 who voted against a new contract at the meeting held on 4th April 2013 but they were out-voted by the other members thereby demonstrating that he had no influence over the other members or on the ultimate decision of the board in the matter. Counsel, therefore, argued that the appellant's arguments lacked any proper basis or foundation and the cases cited were not of any relevance.

In response to ground two, counsel submitted that it was standard business practice and a regulatory requirement for a board of directors to engage auditors on a regular basis. This was to ensure proper stewardship and fiduciary responsibility over the affairs of the institution. He contended that the appellant's imputation that the

HLB audit was predicated on allegations of impropriety against him and should, therefore, have required the institution of disciplinary proceedings against him is totally baseless and misconceived.

According to counsel, the termination of the contract was pursuant to clause 11(a) of the contract of employment by giving 3 months' notice or salary in lieu thereof. Moreover, the contract had already come to an end by effluxion of time effective 30th April 2013. In the premises, even the payment of 3 months' salary in lieu of notice was gratuitous and a generous overture on the part of the respondent. He contended that the contract was effectively automatically terminated by itself and all that was required was a notification to the appellant that the contract would not be renewed or extended. Hence, counsel contended, there is no basis for the appellant to challenge the termination.

In response to ground three, counsel submitted that there is no basis whatsoever to suppose that the contract was renewed at all as the appellant would have been informed in writing of this fact as well as the terms and conditions attaching thereto. This would have included express stipulations of the duration of the new contract,

salary and other conditions of service. In any case, he argued, since the contract had expired naturally, the parties would have had to engage through a whole process of contract negotiation. Further, that the respondent would have had to make an offer for the appellant's consideration and it would have been up to the appellant to either accept or reject the offer, adding that he was at liberty to walk away from the negotiations without any obligation to the respondent or make a counter offer.

Counsel contended, therefore, that there was no contract at all and if as argued by the appellant there was a contract, he wondered what the terms, duration, agreed salary and other perquisites were. According to counsel, a fixed term contract, having run its full term, expired automatically and either party was at liberty to disengage from the other. In the circumstances, he prayed that the appeal be dismissed with costs.

We have considered the arguments of counsel for the respective parties, the record of appeal and the judgment appealed against. The gist of ground one is that the court below did not properly consider the evidence adduced by the appellant regarding the illegal loan

which he declined to advance to the respondent. Counsel for the appellant contends that the respondent sought to terminate the appellant's employment to preclude him from informing the board about this illegal loan and that the failure to reach a conclusion on the appellant's salary was merely a façade. Further, that the appellant's evidence was sufficient to substantiate malice on the part of the respondent to warrant the court to delve behind the termination.

After considering the evidence of the parties on the issue of malice, the trial court found at page J22 of the judgment that:

"On the evidence before us we are inclined to agree with the Respondent that there was no malice involved in the termination of the Complainant's contract.

The Complainant accepted in his testimony, under cross-examination, when referred to exhibit WT2 and WT6 that the intention to renew his contract by the Board was there. He further accepted that the Board after several discussions failed to agree amongst themselves on the terms. The Complainant further accepted that the scope of the forensic audit was wider and was not aimed at him and that the position taken by the Board was not misplaced.

The Complainant also agreed that the Board was not able to make an informed decision on his terms because of the missing file...

We find, on the basis of the evidence before us, that sufficient evidence has not been led to substantiate malice on the part of the Respondent to warrant us delving behind the termination clause in this particular matter.”

We cannot fault the findings of the trial court because they were a correct analysis of the evidence deployed before it. The mere fact that the refusal by the appellant to grant the respondent a loan preceded the enquiry into his allowances and entitlements does not, in our view, suggest that the termination of his contract by notice was in bad faith. Firstly, there is no evidence showing that the respondent exhibited any form of animosity towards the appellant after being denied the loan which he had requested the appellant to organize. On the contrary, the evidence on record shows that when the appellant informed the respondent that it would not be appropriate for him to take money from the school coffers, the respondent thanked the appellant for his advice. His response, therefore, did not reveal that he harboured hard feelings against the appellant or that the appellant had fallen out of his favour such that he would want to get rid of him.

Secondly, the appellant has not shown that the appellant's

refusal to advance a loan to the respondent influenced the entire board to resolve to terminate his employment. This is evident from the minutes of the board meeting held on 4th April 2013 which indicate that when the board sat to deliberate on the renewal of the appellant's contract, the respondent and 2 other board members voted against a new contract but were out voted by the remaining 4 members. On these facts, the respondent cannot be said to have arm twisted the other board members or influenced the ultimate decision of the board in deciding to terminate the appellant's contract. As will be noted later from our consideration of ground two, the decision to terminate the appellant's contract appears to have been a unanimous decision of the board. The view we take, therefore, is that the lower court was on firm ground in finding that no sufficient evidence had been led by the appellant to prove that the termination of his employment contract was actuated by malice on the part of the respondent. Accordingly, we do not find any justification to delve behind the reason for the termination of the appellant's employment as urged by State Counsel. It follows that on the circumstances of this case, the cases of **James Matale**³ and **Redrilza Limited**⁴ cited

by the appellant in support of this ground cannot aid him in any way. We, therefore, find no merit in this ground of appeal.

In ground two, the appellant assails the trial court for failing to find that the respondent could not rely on allegations of impropriety against him to terminate his contract given that he was exonerated of any such misconduct during the forensic audit conducted by HLB Reliance. Essentially, the appellant contends that his termination of employment was predicated on the allegation that he received unjustified allowances and should, therefore, have required the institution of disciplinary proceedings against him.

The minutes of the board meeting held on 11th September 2013 state as follows:

“4.0 CHARGING MR TEMBO

- 4.1 The Board deliberated on the issue of charging Mr. Tembo.**
- 4.2 Since the forensic audit could not be conclusive with its work as Mr. Tembo's file had gone missing, it was decided that there was lack of information for charging him.**
- 4.3 The meeting however strongly felt that Mr. Tembo as the Chief Executive was the chief custodian of all documents in the school and the Board therefore held Mr. Tembo accountable for the missing file.**

5.0 TERMINATION OF CONTRACT

5.1 Different board members shared their private consultations they had held over the issue with different human resource and legal experts ... and there was consensus that most consultations recommended that the board could invoke clause 11 in the contract which provided for either party to terminate the contract.

5.2 The meeting therefore resolved that the Chairperson should consult a lawyer and prepare a letter of termination of contract on 12th September 2013."

When referred to the above excerpts at trial, the appellant stated that:

"I accept that the position taken by the board was not misplaced.

And he also stated that:

"I agree that the board was willing to offer a contract but they did not finalise the terms."

The appellant went on to state that:

"... The board looked at the payslips and I agree they were trying to understand what I was entitled to and who authorized."

And earlier he stated that:

"The board was unable to make a formal decision on my terms because of the missing file. It is a fair assessment."

He also said that:

"I agree the board of governors had no ill feelings and made good faith efforts to renew my contract."

The appellant further stated as follows:

"I would accept that they preferred to part company without alleging anything. The letter terminating did not allege anything."

What emerges from the foregoing excerpts of the appellant's evidence is the admission by the appellant that the board did not at any given time cast aspersions or allege impropriety on the part of the appellant regarding his allowances and salary. It is clear, on his own admission, that the board simply wanted to part company with him and that the position which they took was appropriate in the circumstances. Therefore, the argument that the appellant ought to have been subjected to the disciplinary process provided for under his conditions of service cannot be sustained. Further, the trial court cannot be faulted for not arriving at the conclusion that the respondent relied on the alleged misconduct of the appellant to terminate his contract. For these reasons, this ground of appeal also fails.

And at page J17, the lower court opined as follows:

"In the instant case, it is not in dispute that the relationship between the Complainant and the Respondent was guided by a written contract that was signed by both parties... The contract contained a clause with respect to termination, which clause was invoked by the Respondent."

And at page J18 the lower court went on to state that:

"We have reviewed the contract of employment and have not found a clause that obliges the Respondent to hold a formal disciplinary hearing before invoking clause 11. It was accepted by the Complainant, under cross-examination, that under clause 11 either party to the contract could terminate the relationship by giving three months' notice or pay in lieu of notice."

Given this state of affairs, the Respondent was at liberty to invoke the termination clause without following a formal procedure."

In our view, the starting point in addressing this ground is to look into the terms and conditions of the appellant's last contract, particularly clause 11 thereof which provides for termination of contract. This clause is reproduced below as follows:

"11. TERMINATION OF CONTRACT

Either party may terminate the contract:

- (a) The Board of Governors giving three months' notice in writing or**

(b) You giving, in writing, one clear academic term's notice of your intention to terminate the contract."

The law is settled that an employer is entitled to terminate a contract of employment for any reason or for none at all. We held in the case of **Gerald Musonda Mumba v Maamba Collieries Limited**⁷ that:

"In an ordinary master and servant relationship the master can terminate the contract with his servant at any time and for any reason or for none whatsoever. If a master gives a reason for termination, he is not obliged to substantiate it. It is the giving of notice or pay in lieu that terminates the employment." (emphasis ours)

This position of the law was acknowledged by the appellant in his evidence when he stated as follows:

"If I had decided to terminate the contract I would have invoked 11(b). 11(b) does not compel me to give reasons. I could leave for any or no reason at all. My employer could also terminate under 11(a). 11(a) does not oblige the employer to give reasons. I agree the employer could terminate for any reason or no reason at all. It is correct that the only requirement is notice of 3 months. In the letter dated [12th September 2013] they did comply with that notice. They were not in breach of Clause 11. Subsequent to that letter, I was paid all my entitlements except for repatriation. I did not ask for repatriation. It is not in the contract – it is in my conditions of service."

From the foregoing, it is clear that the appellant's last contract of employment which had been extended expressly provided for termination by the employer, by way of three months' notice which was duly served and he was paid all his entitlements under the said contract. In arguing this ground, counsel for the appellant has laboured to show that the rationale behind the termination was illogical in that the board offered the appellant a contract on undefined terms and later terminated it on the basis that the terms were unknown to itself. As we see it, the appellant is seeking to have the reasons for his termination substantiated by the board. However, as we held in the **Gerald Musonda Mumba**⁷ case cited above, there is no such requirement under the law for an employer to do so. In light of the appellant's own admission that notice was served and, therefore, the board was not in breach of clause 11, it is our considered view that the giving of notice to terminate under the said clause was a proper way of terminating the appellant's employment. We, therefore, find no basis to fault the lower court's finding that the termination of the appellant's employment was proper. Ground three consequently suffers the same fate as other grounds.

In the final analysis, we hold that this appeal has no merit. It is accordingly dismissed with costs to the respondent, to be taxed in default of agreement.



M. S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE



A. M. WOOD
SUPREME COURT JUDGE



C. KAJIMANGA
SUPREME COURT JUDGE