THE COURT OF APPEAL OF ZAMBIA **APPEAL 102/2020**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

MP INFRASTRUCTURE ZAMBIA LIMITED **APPELLANT**

AND

MATT SMITH **1ST RESPONDENT**

KENNETH BARNES **2ND RESPONDENT**

Coram: Makungu, Sichinga and Siavwapa JJJA

On 17th November, 2021 and 21st April, 2022

For the Appellant: *Mr. M. Chisunka of Nkusuwila, Nachalwe Advocates*

For both Respondents: *No appearance*

JUDGMENT

Makungu JA, delivered the Judgment of the Court.

Cases Referred to;

1. *Redrilza Limited v Abuld Nkazi & others SCZ Judgment No.7 of 2011*
2. *Care International Zambia Limited v Misheck Tembo SCZ Appeal No. 57 of 2016 (2018) ZMSC 369*
3. *Giles Yambayamba v The Attorney General and National Assembly SCZ/26/2015*
4. *Chilanga Cement Plc v Kasote Singogo SCZ Judgment No.13 of 2009*
5. *Dzekedzeke v Zambia Telecommunications Company Limited Comp No.349/2016 (2017)*
6. *Maamba Collieries Limited v Douglas Siakalanga and others SCZ Appeal No. 12 of 2004*
7. *Zambia Revenue Authority v Chintu Kanga SCZ Appeal No. 219 of 2015*
8. *Swarp Spinning Mills v Sebastian Chileshe and 30 others (2002) Z.R 23*

Legislation Referred to;

1. *Industrial Relations Court Rules, Chapter 44 of the Laws of Zambia.*
2. *The Employment Act, Chapter 268 of the Laws of Zambia*
3. *The Judgments Act, Chapter 81 of the Laws of Zambia*

1.0 INTRODUCTION

1.1 This is an appeal against the judgment of E. Mwansa J of the Industrial Relations Division of the High Court delivered on 20th February, 2020 in favour of the 2nd respondent. Both respondents have cross - appealed.

2.0 BACKGROUND

2.1 The background of this appeal is that the 1st and 2nd respondents, who were 1st and 2nd complainants respectively in the court below, commenced an action against the appellant (respondent in the court below) by way of complaint supported by an affidavit; pursuant to **section 85 (4) of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia** on the following grounds.

a) The 1st complainant was employed by the respondent as Country Manager on a fixed-term contract on 15th January, 2015. The 2nd complainant was also employed by the respondent but as Project manager for HIS RMS Installation with effect from 9th April, 2015 on a fixed-term contract.

b) On 5th May, 2016 the respondent terminated the complainants' contracts of employment for alleged unsatisfactory performance without affording them an opportunity to be heard and without complying with the provisions of the Grievance and Disciplinary Procedures contained in the Company Handbook. In short, the complainants were not heard.

c) That the company did not raise any issue of unsatisfactory performance during the term of their respective employment contracts and if they felt it was an issue, then they condoned it and could not later use the same as a ground for termination.

d) That the termination was wrongful and unlawful as it was done contrary to **section 36 of the Employment Act Chapter 268 of the Laws of Zambia as amended by the Employment Amendment Act No. 15 of 2015**.

2.3 The complainants sought the following reliefs:

a) An order that the termination of their fixed-term contracts of employment by the respondent was wrongful and unlawful.

b) An order for payment to each of the complainants as compensation 24 months' salary as damages for wrongful/unlawful termination.

c) Damages for mental distress, anguish and inconvenience arising from the unlawful termination of employment.

d) Interest and costs

e) Any other relief the Court may deem fit.

2.4 The complainant was supported by a joint affidavit dated 5th August 2016 sworn by both complainants. They stated that they were employed by the respondent on different dates on fixed-term contracts. That by letters dated 5th May, 2016, their contracts of employment were terminated on the allegation of unsatisfactory work performance. However, before that, the company/respondent had never warned, cautioned or charged them on grounds of incompetence or unsatisfactory performance. The letters terminating their employment were exhibited as MS1 and MS2.

2.5 Complainant number one (CW1) deposed that he was employed as Country Manager on 1st February, 2015 on permanent basis as per exhibit MS3, his contract of employment.

2.6 That up to the time his contract of employment was terminated, he never had any negative assessment regarding his work performance.

2.7 That complainant No. 2 (CW2) was employed as Project Manager for HIS RMS Installation on 9th April, 2015 on

permanent basis as shown by exhibit "MS4", a copy of his employment contract. During his tenure, there was no disciplinary charge brought against him relating to work performance and neither was he ever warned regarding his work performance.

2.8 The complainants' grievance was that the sudden and wrongful termination of their contracts of employment without prior notice had caused them distress and anguish.

2.9 The complainants further averred that following the termination of their employment, the respondent refused to pay them for their accrued leave days, which they were entitled to according to their contracts.

2.10 That efforts to resolve the matter with the respondent proved futile and this prompted them to report the matter to the labour office. On 13th July, 2016, the parties met at the labour office and the respondent promised to give the complainants an offer for full settlement of all their claims but no such offer ever came. Consequently, they decided to commence legal action against the respondent.

2.11 The respondent did not dispute having employed the 1st complainant on permanent basis. The respondent claimed that it employed the 2nd complainant on a 2 months fixed-term written contract. After the expiration of his contract, the company continued to engage him without an express offer for renewal. On 5th May, 2016, both complainants' contracts were terminated for unsatisfactory performance and failure to follow laid down company procedures. They were both paid one month's salary in lieu of notice as per contract.

2.12 The respondent averred that both complainants were made aware of their unauthorised actions and repeated failure to follow company procedure prior to termination. Therefore, their claims that the respondent condoned their unsatisfactory performance was false.

2.13 That the 1st complainant was requested to pay from his own resources an employee whom he employed without following company procedure.

2.14 The respondent denied having proposed an ex-curia settlement. It went on to state that both complainants'

conduct warranted dismissal without notice as there was no dispute as to the offences they committed. They were both paid in lieu of notice and the termination was in accordance with the law.

2.15 The affidavit in reply was mainly a repetition of the contents of the affidavit in support of the complaint save to add that the recruitment of Sarah Cassim was ratified by Mrs Chinyere Azike in her email dated 6th April, 2016 (exhibit "MAT1") addressed to the 1st complainant, where it was agreed that the respondent would pay Sarah Cassim for the period spent at the company. It was averred further that the company could not later use this to allege unsatisfactory performance on the part of the 1st complainant.

2.16 That on 21st November, 2015, the 1st complainant received an email from the Chief Executive Officer Mr. Clement Nwogbo, commending him for his good work.

2.17 As for the 2nd complainant, the respondent paid for his work permit for two years and he worked for over 12 months

without the respondent raising any issues about his contractual status.

3.0 DECISION OF THE LOWER COURT

3.1 The learned trial judge considered the evidence before him and identified the issue for determination, that is, whether the complainants' employment was wrongfully or unlawfully terminated.

3.2 The learned trial judge took note of the fact that the employment relationship was regulated by written contracts and the **Employment Act, Chapter 268 of the Laws of Zambia as Amended by Act No.15 of 2015.**

3.3 The trial judge found that the 1st complainant's contract of employment contained a termination clause to the effect that either party could terminate the employment relationship upon giving one month's notice or payment of a month's basic pay in lieu of notice, and that clause was complied with. That the respondent also gave him reasons for the termination, which were unsatisfactory performance, conduct below

expected standard and failure to follow company recruitment and procurement procedures.

3.4 The trial judge took note that, the respondent had made it clear that the recruitment of the accounts clerk by the 1st complainant was contrary to company procedure. On this basis, it was held that the termination of his employment was rightful.

3.5 As regards the 2nd complainant, the respondent claimed that his contract expired after two months as there was no renewal. The lower court applied **section 3 of the Employment Act,** which provides, in the definition of "employee", that a contract of service can be express or implied and held that the 2nd complainant was an employee until the date of termination of the contract as the respondent had continued to pay him after the alleged end of the fixed term contract.

3.6 The lower court found that the 2nd complainant's contract contained a termination clause to the effect that either party could give the other not less than one week's prior notice in writing or payment in lieu thereof. However, the respondent

terminated his contract by paying him a month's salary in lieu of notice.

3.7 The lower court found the reasons advanced for the termination of the 2nd complainant's employment to have been insufficient as the respondent did not point to any conduct which was below their expected standard, hence the termination was held to be unlawful, and he was awarded 24 months' salary as damages.

3.8 As regards the claim pertaining to accrued leave days, the trial judge found that both complainants had not adduced evidence of the leave days that they accumulated, and he dismissed the claim.

3.9 Coming to the claim for damages for mental distress, anguish and inconvenience arising from the termination of employment, the judge found that the circumstances warranted departure from the normal measure of damages because the termination was sudden and did not prepare the 2nd complainant, a foreign national, for the rigorous job

market. He was therefore awarded the equivalent of six months' earnings.

3.10 In total, CW2 was awarded 30 months' salary, plus interest at the bank of Zambia short-term deposit rate from the date of the complaint, as well as costs of the action.

4.0 GROUNDS OF APPEAL FOR THE MAIN APPEAL

4.1 Discontented with the decision of the court below, the appellant company has advanced 3 grounds of appeal framed as follows:

1. ***The lower court erred in law and fact when it held that the employment of the 2nd respondent was unlawfully terminated.***
2. ***The lower court misdirected itself in law and fact when it awarded the 2nd respondent the total of thirty (30) months' salary for unlawful termination and mental distress.***
3. ***The lower court misdirected itself in law and fact when it awarded costs to the 2nd respondent for the action.***

5.0 APPELLANT'S HEADS OF ARGUMENT IN SUPPORT OF THE MAIN APPEAL

5.1 During the hearing of the appeal, the appellant relied on the heads of argument filed on 22nd June, 2020.

5.2 The 1st and 2nd grounds of appeal were argued together as follows: That the court below misdirected itself because the appellant did not dismiss the 2nd respondent but merely exercised its right as employer to "*terminate*" the 2nd respondent's contract of employment as per terms of the contract of service and provisions of the law. That there is a clear distinction between "*dismissal*" and "*termination*". Reference was made to the cases of **Redrilza Limited v Abuld Nkazi & others[1] and Care International Zambia Limited v Misheck Tembo[2],** where the Supreme Court defined the distinction between the two terms.

5.3 That under the circumstances, the crucial question should have been what amounts to unlawful '*termination?*' In answer to this question, counsel relied on the case of **Redrilza Limited v Abuld Nkazi[1]**, where the Supreme Court held that

in order for a termination to be deemed wrongful or unlawful, the court must among other things delve into the reasons for the termination and establish that the said reasons were advanced in bad faith, out of malice and contrary to the terms of the contract of employment. Further that, it is not in every case that the court must exercise its power to pierce "*the veil*" but only in cases where it is apparent that the termination clause was invoked maliciously.

5.4 In light of the preceding authority, it was submitted that in order for the 2nd respondent's claim to have succeeded, he should have proved that his employment was terminated either in breach of his contract of employment, the provisions of the law or that the termination was invoked maliciously.

5.5 Counsel submitted that it was a misdirection for the lower court to hold that the 2nd respondent's claim succeeded on the premise that the appellant failed to provide valid reasons for the said termination contrary to **section 36 of the Employment Act.** That the holding was inspite of the fact that the appellant had advanced reasons for invoking the termination clause which was in the 2nd respondent's contract.

Counsel submitted that **section 36 (1) of Employment Act** only requires an employer to give valid reasons for the termination and not to prove the said reasons.

5.6 Counsel contended that by stating that: **"in *the case of the 2nd complainant, I find in his favour on his claim for unlawful dismissal because the respondents have failed to show any valid reasons for his termination as required by law*"**, the lower court erroneously delved *suo motu* into the reasons for the 2nd respondent's termination without evidence being led, contrary to the guidelines laid down by the Supreme Court in the case of **Giles Yambayamba v The Attorney General and National Assembly.**[3]

5.7 Counsel further submitted that the evidence on record shows that, the 2nd respondent's employment was terminated because of his unsatisfactory performance, which reason does not fall within the ambit of reasons considered invalid by the law. Therefore, the termination cannot be considered wrongful or unlawful.

5.8 The substance of the submissions on ground two is that; the award of 30 months' salary for unlawful termination was excessive, considering the fact that the 2nd respondent's contract was only for a period of two months at a time with a requirement of a week's notice of termination or payment in lieu of the same by either party.

5.9 We were referred to the case of **Chilanga Cement Plc v Kasote Singogo**[4] where the Supreme Court stated that when awarding damages for loss of employment, the common law remedy for wrongful termination of a contract of employment is the period of notice. Further, that only in deserving cases, and depending on the circumstances of each case, does the court award more than the common law damages as compensation for loss of employment.

5.10 In that case, the court considered the award of 24 months' pay as damages to the respondent to be excessive as there was no indication in the judgment as to what the trial court took into account when arriving at the 24 months' pay save for a reference to abrupt loss of employment.

5.11 The court went further to state that the issue of preparation for loss of employment should only be considered in termination involving redundancy as there is a prescribed procedure and cannot be relegated to matters involving instant loss of employment as *in casu.*

5.12 On the strength of the Singogo case, counsel for the appellant submitted that the lower court erred when it made the collective award of 30 months' salary in damages as the 2nd respondent's employment was lawfully terminated and there were no exceptional circumstances warranting the departure from the common law remedy for wrongful termination of a contract of employment. That in this case, the 2nd respondent was entitled to one week's pay. That the appellant, in the circumstances, went above and beyond the requirements of the common law by paying the 2nd respondent one month's salary in lieu of notice.

5.13 Counsel urged us to overturn the decision of the lower court regarding the awards for unlawful termination and mental distress as they had no legal basis.

5.14 On ground three, counsel submitted that **Rule 44 of the Industrial Relations Court Rules** provides for instances when the court may exercise its discretion to condemn a party in legal costs. The said rule provides as follows:

"Where it appears to the court that any person has been guilty of unreasonable delay, or taking improper, vexatious or unnecessary steps in any proceedings, or of other unreasonable conduct, the court may make an order for costs or expense against him."

5.15 Counsel submitted that the record shows that the appellant did not act improperly during the proceedings in the lower court. It was contended that the lower court's order of costs against the appellant was contrary to **Rule 44 of the Industrial Relations Court Rules.**

5.16 **The 2nd respondent did not file heads of arguments in response to the appeal**.

6.0 CROSS-APPEAL

6.1 The respondents' have advanced 3 grounds of cross-appeal, couched as follows:

1. ***The court below erred in law and fact when it held that the termination of the 1st respondent's contract of employment was lawful and in compliance with the contract of employment and the law.***

   The lower court further misdirected itself when it did not take into account the copy of the email exhibited as "MAT2" in the affidavit in reply dated September, 2016 in which the 1st respondent was applauded for his satisfactory performance. The court below further misdirected itself when it held that the reasons advanced for the purported unsatisfactory performance by the appellant herein were sufficient and in compliance with the contract and the law when at no point did the appellant hold a disciplinary hearing to prove the aforesaid allegations against the 1st respondent.

2. ***The court below erred in law and in fact when it held that the respondents are not entitled to leave days on the premise that the respondents did not adduce evidence of the leave days they had accrued during their employment and how many these are. The court below misdirected***

itself when it did not consider the respondents' contract of employment which clearly stipulates the number of leave days they had acquired. The court below further misdirected itself when it overlooked the fact that it is the obligation of the appellant herein to keep records of all their employees' payslips and accordingly they should have adduced the same during trial.

The court below erred in law and fact when it held that the 1st respondent was not entitled to an award for damages for mental distress, anguish and inconvenience on the premise that his contract of employment was terminated in accordance with the provisions of the contract itself and the law.

3. *The court below misdirected itself when it did not take into account the fact that the 1st respondent was a foreign national and the effect that the aforesaid sudden loss of employment had on him.*

7.0 RESPONDENTS' ARGUMENTS IN SUPPORT OF THE CROSS-APPEAL

7.1 In arguing ground one, the respondents' counsel submitted that the lower court's finding that the 1st respondent's contract of employment was terminated according to the law and the terms of the contract was misconceived as it did not address its mind to the provisions of the law and the contract of employment exhibited as **"MS3"**. Clause 1 of the said contract read as follows:

"Your duties shall include but not be limited to the following: Recruit and manage staff, including performance monitoring and possible mentoring and training."

7.2 Counsel stated that the 1st respondent's job description included recruitment of staff members and therefore, the allegation by the appellant that this was a ground for the purported unsatisfactory performance which warranted the termination was unjustifiable as he was never warned of the

alleged unsatisfactory performance, neither did the appellant adduce any purported appraisal in this respect.

7.3 That, the appellant did not give the 1st respondent a valid reason for its decision to terminate the contract of employment as required under **section 36 (3) of the Employment Act.**

7.4 In support of ground two, reliance was placed on the case of **Dzekedzeke v Zambia Telecommunications Company Limited**[5] to the effect that leave days are an accrued right and are paid regardless of the mode of exit from employment.

7.5 Reference was also made to clause 1 of the 1st respondent's contract of employment and clause 5.3 of the 2nd respondent's contract of employment in support of the argument that the lower court's holding that the respondents did not adduce evidence of their leave days was erroneous and inconceivable as the record shows that the number of leave days each respondent was entitled to were clearly stipulated in their contracts of employment, which were before the lower court. Counsel further placed reliance on the cases of **Maamba Collieries Limited v Douglas Siakalanga and others**[6] **and**

Zambia Revenue Authority v Chintu Kanga[7] to the effect that when computing terminal benefits of any employee, the existing conditions of service at the time of separation have to be used.

7.6 Counsel submitted that the 1st respondent was employed as Country Manager from 1st February, 2015 to 5th May, 2016. The 2nd respondent was employed as HIS RMS Installations Team Leader from 9th April, 2015 to 5th May, 2016. In line with their contracts of employment and the law, they were entitled to two days' leave per month. The 1st respondent from the date of employment to the date of termination of employment was entitled to 30 leave days (15 months of employment x 2 days per month). That the 2nd respondent, from the date of employment to the date of termination of the contract of employment was entitled to 26 leave days (13 months of employment x 2 days per month).

7.7 It was further submitted that the court below misdirected itself when it held that the respondents did not adduce any evidence of records reflecting their leave days and how many these are, when, as a matter of law and practice, it is the responsibility of

the employer to keep records of employees' wages. Reference was made to Section 50 of the Employment Act.

7.8 In support of ground three, the submissions were that the lower court's refusal to grant the 1st respondent damages for mental distress, anguish and inconvenience arising from the unlawful termination of employment was misconceived as the court did not take into account the impact and the effects that the termination had on him. Counsel called to his aid the case of **Swarp Spinning Mills v Sebastian Chileshe and 30 others**[8] to buttress the point that the 1st respondent suffered agonizing mental distress and inconvenience as a result of the extremely sudden termination which took him by surprise and shocked him. What made it worse was that he was an expatriate working in a foreign country, which meant that his work permit would be revoked and he would be required to leave the country immediately.

7.9 Counsel summed up by stating that in light of the foregoing, this is a proper case for an award of damages for mental torture, stress and anguish to the 1st respondent.

7.10 The prayer was that all three grounds of appeal be allowed.

7.11 **The appellant did not respond to the cross-appeal.**

8.0 OUR DECISION

8.1 We have considered the evidence on record, the grounds of the main appeal, the cross-appeal, the respective arguments by the parties and the judgment appealed against.

8.2 The "appeal" is mainly concerned with the 2nd respondent. We shall determine the 1st and 2nd grounds together and the 3rd ground separately.

8.3 The appellant's argument on ground one of the appeal is that the 2nd respondent's termination of employment was valid as it was done in accordance with the contract itself and the law. **Section 36 of the Employment Act, Chapter 268 of the Laws of Zambia, as amended by Act No. 15 of 2015,** provides as follows:

"1. A written contract of service shall be terminated;-

(c) In any other manner in which a contract of service may be lawfully terminated or deemed to be terminated

whether under the provisions of this Act or otherwise except that where the termination is at the initiative of the employer, the employer shall give reasons to the employee for the termination of that employee's employment.

...

(3) The contract of service of an employee shall not be terminated unless there is a valid reason for the termination connected with the capacity, conduct of the employee or based on the operational requirements of the undertaking."

8.4 The law is clear insofar as it requires the reasons to be given for a termination at the employer's instance to be **"valid".**

8.5 In the 2nd respondent's contract of employment, clause 1.1 provided for a fixed period of 2 months, which could be renewed. Although the appellant did not formally renew the contract, the appellant kept him employed until the contract was terminated on 5th May, 2016. **Section 3 of the Employment Act** defines to an employee as *"any person who has entered into works under a contract of service whether the*

contract is express or it is implied". We therefore cannot fault the trial court for finding that the 2nd respondent was an employee up to the time that his contract was terminated.

8.6 As regards the reason for the termination of the 2nd respondent's contract of employment, that is to say unsatisfactory performance, the appellant did not point out any wrong-doing on his part.

8.7 It has been argued on behalf of the appellant that the reason given was valid as the appellant was not obliged to prove the reason. We however, agree with the learned trial judge that the termination was unlawful as the appellant failed to provide a "*valid reason*" for the same. This is because there was no notice of any wrongdoing on the part of the 2nd respondent.

8.8 The appellant alleged that they had reviewed the 2nd respondent's work performance but did not produce the work appraisals in evidence. We therefore find no merit in ground one.

8.9 As regards the award of 30 months' salary for unlawful termination of employment and mental distress, we are guided

by the case of **Chilanga Cement Plc V Kasote Singogo**[4] that in awarding damages for loss of employment, the common law remedy for wrongful termination or normal measure of damage is the period of notice. Only in deserving cases can the court award more than the common law damages for compensation.

8.10 We have considered the circumstances of this case and are of the view that the award of 30 months' salary for unlawful termination and mental distress was indeed excessive. The court misdirected itself by separating the award for unlawful termination from the award for mental distress. When a court finds it lawful, in the circumstances of a case to exceed the normal measure of damages, it ought to consider the appropriate award as a lump sum. See the case of **Swarp Spinning Mills v Sebastian Chileshe** and the **Singogo** [8] **case Supra.**

8.11 It was erroneous to award the 2nd respondent 24 months' salary as general damages plus 6 months' salary for the distress caused by the sudden termination.

8.12 The award is excessive as the lower court even glossed over the fact that the 2nd respondent's contract of employment was for a fixed duration of two months, renewable, and the termination clause provided for only a week's notice or pay in lieu thereof, and yet he was paid a month's pay in lieu of notice.

8.13 If the court below had considered these facts, it would have awarded the 2nd respondent reasonable damages. For the preceding reasons, we hereby set aside the said award and instead award the 2nd respondent two months' salary as damages for unlawful termination of employment, mental distress and the inconvenience caused to him by the sudden termination.

8.14 On ground three, the appellant's counsel argued that the court below misdirected itself when it awarded costs to the 2nd respondent for the action as this was contrary to **Rule 44 of the Industrial Relations Court Rules.** We accept the appellant's counsel's submission that the appellant company was not guilty of any improper conduct during the proceedings to warrant an order of costs against it. Therefore, the award of

costs was unjustified and we hereby set it aside. Instead, we order that each party shall bear its own costs.

9.0 CROSS-APPEAL

9.1 Turning to ground one of the cross-appeal, the 1st respondent contends that the court below erred in law and fact when it held that the termination of the 1st respondent's contract of employment was lawful and in compliance with the contract of employment and the law.

9.2 We have considered clause 1 of the 1st respondent's employment contract, which provided that his duties included recruitment and management of staff, performance monitoring and possible mentoring and training.

9.3 The 1st respondent has argued that as recruitment of staff members was one of his duties, the appellant should not be heard to allege that his recruitment of Sarah Cassim amounted to unsatisfactory performance, which warranted termination of his contract of employment, because he even agreed to pay her for the time at the company. Moreover, on 21st November, 2015 the Chief Executive Officer Mr. Clement

Nwongo commended him for his work in an email exhibited as **"MAT2".**

9.10 We have considered the email exhibited as **"MAT2"**, the contract of employment and the letter of termination of employment dated 5th May, 2016. Although the 1st respondent's duties included recruitment of manpower, the evidence on record shows that the recruitment of the Accounts Clerk Sarah Cassim, was without the company's blessings as the laid down procedures on recruitment had been contravened. If that were not the case, the said employee would have been paid by the company.

9.11 The letter of termination further alleged failure to follow procedures on procurement of materials and deserting work, among other things. All these were advanced as factors constituting the 1st respondent's alleged unsatisfactory work performance.

9.11 The e-mail marked "MAT2" did not, in our view, validate the recruitment of Sarah Cassim. It was simply commending the 1st respondent for his work in general. It did not estop the

appellant from invoking the termination clause. We are of the view that the said reasons were advanced in good faith.

9.12 We hold that, as the appellant had given valid reasons for terminating the 1st respondent's employment contract in compliance with **section 36 of the Employment Act** and the contract itself, the lower court was on firm ground when it held that the termination was lawful. We therefore find no merit in ground one of cross-appeal.

9.13 Ground two relates to the claim for leave days. We are alive to the fact that leave days are an accrued right and are paid regardless of the mode of exit from employment by an employee. See the case **DzekeDzeke v Zambia Telecommunications Company Limited.**[5] We have considered clause 3 of the 1st respondent's contract of employment as well as clause 5.3 of the 2nd respondent's contract of employment, which stipulate the number of leave days each was entitled to.

9.14 The respondents relied on **section 50 of the Employment Act** to argue that the lower court erred when it held that they

did not adduce any evidence of records reflecting their accrued leave days and that, as a matter of law and practice, the onus was on the appellant to keep records of the employees' wages.

9.15 The law is settled that the burden of proof lies on the person who alleges. Since the contracts of employment were on record, and they showed the leave days that each respondent was entitled to, the lower court was duty-bound to consider that evidence and whether there was any evidence that the respondents had taken leave or that the leave days were even commuted. In the absence of such evidence, the court should have ordered that their leave days amounts due be assessed. We are of the view that both respondents were entitled to leave days and payment for the same, and we order that their leave days and the amounts due to each of them be assessed by the District Registrar, to be paid by the appellant with interest as provided under the **Judgments Act**[3].

9.16 For the preceding reasons, ground two succeeds. The third ground of appeal falls away since we have already held that the termination of the 1st respondent's employment was lawful.

10.0 CONCLUSION

All things considered, ground one of the main appeal fails for lack of merit. Grounds two and three, on the other hand, succeed. We find no merit in ground one of the cross-appeal, ground two partly succeeds and ground three is otiose.

Each party to bear its own costs.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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D.L.Y. SICHINGA, SC
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE

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