IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 48/2021**

HOLDEN AT LUSAKA **CAZ/08/46/2021**

(Civil Jurisdiction)

BETWEEN:

MOPANI COPPER MINES PLC **APPELLANT**

AND

ESNART TEMBO KATONGO **1st RESPONDENT**

MIRRIAM BANDA **2nd RESPONDENT**

CORAM: Makungu, Ngulube and Sharpe-Phiri JJA
On 17th January, 2023 and 24th July, 2023

For the Appellant: Mr. A. Imonda of Imonda & Co

For both Respondents: Mr. M. Libakeni with Mr. J. Hara both of Z Muya & Co

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JUDGMENT

MAKUNGU, JA delivered the Judgment of the Court

Cases referred to:

1. *Rosemary Ngorima and 10 Others v Zambia Consolidated Copper Mines Limited, SCZ Appeal No. 97 of 2000*
2. *Kitwe City Council v William Nguni (2005) Z.R 57*
3. *Swarp Spinning Mills Pic v Sebastian Chileshe and others (2002) Z.R.23.*
4. *Interfoto Pictures Library v Stileto Visual Programmes Limited (1988) 1 ALL ER 348*

5. *Caroline Tomaidah Daka v Zambia National Commercial Bank Limited PLC 2008/HP/0846*
6. *Zambia Railways Limited v v Oswell Joseph SCZ Judgment No.2 of 1995*
7. *Zambia Airways Corporation Limited v Geshom B.B. Mubanga (1990-1992) Z.R 149*
8. *Eston Banda, Edward Dalitso Zulu v The Attorney General SCZ Appeal no. 42/ 2016*
9. *Zambia Consolidated Copper Mines v Matale (1995-1997) Z.R 144*
10. *Amiran Limited v Robert Bones, SCZ Appeal No. 42* of 2010
11. *Zambia National Commercial Bank v Joseph Kangwa SCZ Appeal No. 54 of 2008*
12. *Kansanshi Mining Plc v Mathews Mwelwa CAZ Appeal No. 103 of 2019*
13. *Nevers Sekwila Mumba v Mukabi Lungu SCZ Apeal No. 200 of 2014*

Legislation Referred to:

1. *The Employment Act, Chapter 268 of Laws of Zambia as amended by the Employment Amendment Act No 15 of 1997*

Other Authorities Referred to:

1. *Halsburys Laws of England Vol.16 4th Edition*

1.0 INTRODUCTION

1.1 This appeal is against the decision of E. Mwansa J, of the High Court dated 22nd January, 2021 which declared the respondents' dismissals as being both wrongful and unfair.

2.0 BACKGROUND

2.1 The respondents (complainants in the Court below) commenced an action in the Industrial Relations Division of the High Court against the appellant (respondent in the court below) by way of complaint on grounds that:

1. They were wrongfully and unfairly summarily dismissed from employment by the appellant for violation of a company policy of which they had no prior notice.
2. They were dismissed from their employment without following the proper procedure during the disciplinary hearing.
3. That the dismissals were wrongful because according to the disciplinary code the offences they were alleged to have committed warranted a different penalty.
4. They were dismissed for offences that they did not commit.

2.2 The complainants sought the following reliefs:

i. A declaration that the complainants be deemed retired;

ii. A declaration that the complainant's termination was wrongful and unfair;

iii. Damages for wrongful and unfair termination of employment;

iv. Payment of accrued terminal benefits;

v. Interest on the sums found payable;

vi. Any other award the court may consider fit and

vii. Costs

2.3 We shall henceforth refer to the parties as they are cited in the appeal.

3.0 RESPONDENTS' EVIDENCE

3.1 The brief facts were that the 1st and 2nd respondents were employed by the appellant in their capacity as senior buyer and buyer respectively.

3.2 By letters dated 29th June 2018, they were individually charged \with the offence of substandard and poor performance because they were involved in processing order no. D31509 for a Bench Vice at a high cost when a Bench Vice ordered earlier under order no. D22949 was obtained at a lower cost of $600.

3.3 They were each given chance to exculpate themselves. On 1st August 2018, the procurement superintendent individually charged them for contravening policy 039, by splitting orders.

That it amounted to unethical business conduct, substandard and poor work performance, breach or repudiation of contractual obligations, aiding and abetting a breach of procedure and standing instructions, contrary to the respondent's Disciplinary code.

3.4 The respondents claimed that they were not aware of policy no. 039 as the offence was not in the Disciplinary Code and they only became aware of it when the letters dated 1st August, 2018 were presented to them.

3.5 At the disciplinary hearing held on 14th August, 2018, the 1st respondent was dismissed from employment. In dismissing her, the administering official told her that they had dropped the charges for deliberate breach due to lack of evidence but they upheld the charges for noncompliance with established procedure and standing instructions, as well as substandard and poor work performance.

3.6 The 1st respondent alleged that none of her grounds of appeal were addressed in the respondent's communication to her which was contrary to clause 8.4 of the Disciplinary Code and Grievance Procedure for senior staff employees which states

that an administering official should give reasons in writing whenever they dismiss an employee.

3.7 The 1st respondent averred that she was unfairly dismissed because she had no authority to approve orders. She could only review and elevate a requisition to the Purchasing Superintendent who was her supervisor.

3.8 She stated that split requisitions were never raised by her but by the end user. She had no authority to make any alterations to requisitions in the system. That her superior the purchasing superintendent who had approved the transaction was never disciplined. At the time of being dismissed, split requisitions were still being processed and yet the company had put in place some control measures.

3.9 She further stated that the charges levelled against her were under categories 1 and 2 of the Disciplinary Code and not category 3. The penalty under category 1 was a severe warning while under category 2, it was a final warning for first offenders. The 1st respondent stated that she expected the appellant to exercise leniency as she was a long serving member of staff with a good record, due for retirement and a first offender. She

claimed that she was entitled to gratuity at the rate of 2 months' pay for every year served.

3.10 The 2nd respondent also claimed that her dismissal was unfair and wrongful because she did not have authority to approve any orders which were processed. That she could not make any alterations to requisitions. That upon receipt of a requisition, her job was to initiate the tender process, analyse the quotations and send the requisition to the next approver. She refuted the claim that her actions led to the appellant having to suffer a loss because at that point nothing had been supplied by the appellant. She further averred that every level of approval carries a responsibility, thus the next approvers should have also been held liable.

3.11 The 2nd respondent further stated that she was dismissed under category 1 for an offence which was not dismissible. That category 2 offences warrant summary dismissal.

4.0 APPELLANT'S EVIDENCE

4.1 The appellant called Craig P.G Botha (RW1), the respondent's Investigator and Justin Chiwama the Employee Relations Manager (RW2). Their collective evidence was that they received information from the security department that there was a

cartel of employees operating at Mindolo SV and causing overspending. In their investigations they identified transactions for procurement of mine equipment from Mindolo SV that were split to avoid approval levels, contrary to policy 039. Several employees including the respondents who were based in the supply department were mentioned as being part of the cartel and they were requested to exculpate themselves which they did. Their supervisors were not satisfied with the exculpatory letters and proceeded to organize a disciplinary hearing. After the disciplinary hearing, the respondents were dismissed. They were informed of their right of appeal. They appealed but the sanctions were upheld.

4.2 The 1st respondent was involved in the procurement of two trolleys, flow meters and flow meter monitors. Two of the transactions were approved by a Mr. Patrick Mwenge in a manner that avoided authority levels. Four requisitions were raised for the purchase of two cabinets and the total amount was about $19,500 but they were split. That the 1st respondent also played a role in the procurement of electric magnetic flow meters and Mr. Mwenge approved each transaction which was

below $10,000. She was also involved in the purchase of a flow meter monitor and an electric cabinet.

4.3 The 2nd respondent was involved in the procurement process of the trolley jacks, a transaction worth $19,000 which was above Mr. Mwenges level of approval. She was also involved in the procurement of electromagnetic flow meters and flow meter monitors that had a total value above $25,000 and two trolley cabinets transaction worth over $54,000, electrical tools in cabinet worth about $45,500. All this was done in violation of policy No. 039, the delegated approval policy which prohibits splitting of transactions to avoid approval levels.

4.4 As regards the respondent's claims that requisitions were from the end user and they merely passed them on to their superiors, RW1 stated that even if requisitions came in a default form, they had a duty to scrutinized the transactions and flag any suspicious transactions and bring the issue of splitting orders to the attention of their supervisor.

4.5 As regards the respondents claim that they were not aware of policy No. 039 as it did not exist at that time, the appellant stated that the policy existed before the respondents' dismissal and it had been circulated to all employees through email and

departmental heads. That the sanction for breaching policy no.039 was dismissal.

4.6 With regards to the notice to produce dated 12th October, 2020, relating to transfer of employment in the year 2000, the appellant averred that accrued benefits under ZCCM were computed and those with a positive balance had their money put in trust. That the 1st respondent's terminal benefits were in the negative. That both respondents were paid for their accrued leave days.

4.7 Further evidence was that since the mode of exit for the respondents was summary dismissal, the respondents were only entitled to accrued leave days and not 2 months' pay for every completed year of service which the 1st respondent was claiming.

4.8 In cross examination, RW2 admitted that the respondent's administering officials did not state the reasons why the appeals were dismissed contrary to clause 8.4 of the Disciplinary Code and that he had no evidence that policy 039 was circulated to all employees.

5.0 DECISION OF THE LOWER COURT

5.1 The learned trial Judge made the following findings of fact:

a) The 1st respondent was an employee of the appellant holding a position of senior buyer and had worked for the company for 18 years.

b) That she had worked for ZCCM for 12 years before being transferred to the appellant in the year 2000.

c) That the 2nd respondent was also an employee of the appellant in her capacity as buyer for seven years.

d) Both respondents had never been a subject of any disciplinary process before.

e) Both respondents were dismissed summarily after a disciplinary hearing for the offences of non-compliance with established procedure/standing instructions and substantial/poor performance.

f) The process of purchasing or buying anything was initiated by the end user and it ended up with an approval by the relevant authority.

g) That the two respondents were not end-users and so they could not initiate any transaction.

h) That the respondents did not have authority to approve any transactions.

i) The Judge further found that the respondents' role in the purchasing system of their automated workflow chart was merely to review and escalate the requisitions to their superiors, the Purchasing Superintendent for further review and approval. They were not initiators of split transactions. That initiating of any purchase transaction was done by the requisition End-User Department.

j) The court accepted the evidence that the respondents did not have authority to either approve a requisition to become an order or send it back to the initiator if it had a problem as the system was designed in such a way that it would detect flaws in the processing of requisitions.

k) The court observed that the end users who initiated the requisitions had a manager who verified the requisitions. This meant that if the respondents noticed something wrong they could not alter the requisition or send it back since the person who escalated it from the end-user was

their superior (Manager at the End-User level) and this would amount to insubordination. The only way was to escalate it to their Manager who would then raise issue with his line manager.

l) The Judge therefore found that the respondents could not be charged with initiating split transactions (which was done by the end user department) or even approving them as this was the function of their Manager and other Superiors.

m) The Judge also found that Policy no. 039-Delegated Approval Authorization Policy, on which the respondents were charged was not made available to the respondents as there was no evidence to show that it was communicated to all employees.

n) The Court further found that there was evidence of split transactions which were verified and processed in part by a Jacqueline after the respondents had been charged for a similar offence.

o) On this basis, the Judge found the dismissals to be unfair.

p) With regard to the claim for wrongful dismissal, the Judge found that the appellant followed the disciplinary procedure and gave the respondents an opportunity to be heard. They also exercised their right to appeal to the highest level available although the dismissals were upheld.

q) As regards the respondents' position that the punishments meted were too severe, the Judge observed that the administering officials at the appellate levels did not give reasons when handing down their decision contrary to clause 8.4 of the Disciplinary Code which requires the administering official to give reasons in writing for dismissing an employee.

r) The Judge further found that the charges leveled against the respondents fall under categories 1 and 2 of the Disciplinary Code which carry the penalties of severe and final warning respectively. He opined that the offences under these categories should not have attracted dismissals.

s) The Judge went on to consider certain provisions of the Disciplinary Code and found that the appellant did not

take into account the following factors in dismissing the respondents: (a) the categories of the offences leveled against the respondents did not warrant summary dismissal but only severe and or final warnings (b) the respondents good record of service (c) the respondents were first offenders (d) they never had any warnings (e) the 18 and 8 or 7 years of respective long diligent service (f) the untrue allegation of loss suffered by the respondent merely by processing requisitions (g) what the respondent processed, was in line with their duties whether they were split transactions or not. They did not initiate or approve the requisitions or orders.

5.2 Having found that the guidelines in the code were completely ignored to the detriment of the respondents, the Judge held that the dismissals were wrongful. He went on to make the following Orders:

i. That the 1st respondent who had worked in the industry for 30 years be deemed to have retired at the appropriate age and that she be paid her retirement package.

ii. This remedy was unavailable for the 2nd respondent whom the Judge considered to be still young.

iii. Since the dismissals were found to be both wrongful and unfair, the Judge granted the 2nd respondent an aggregated award of damages for wrongful and unfair termination of twenty-four months basic salary. The same to be paid as at last pay slip.

iv. The Judge further granted accrued terminal benefits to the 2nd complainant.

v. Interest was awarded on the judgment sums at the Bank of Zambia short term deposit rate from date of Notice of Complainant being the 5th October, 2018 to date of judgment and thereafter at 6% to date of complete settlement as well as costs.

vi. The Judge declined to order re-instatement.

6.0 GROUNDS OF APPEAL

6.1 As earlier stated, this is an appeal against the lower court's judgment. It is based on 5 grounds of appeal.

1. *That the court below erred in law and fact when it declared that the respondents were unfairly/wrongfully dismissed from their employment (page J 31 line 17-18 and page J36 line 3-4 of the judgment) because in assessing and evaluating the evidence, the court below failed to take into account some matters which it ought to have taken into account.*
2. *The court below erred in law and fact when it declared that the 1st respondent be deemed to have retired at the appropriate age of the retirement and that the calculations of the retirement package do include the break in service as a result of these proceedings (page J36 line 15-20 of the judgment) because the dismissals have not been nullified and further the declaration contradicts the courts position on page J38 line 1-3 of the judgment refusing to grant an order of reinstatement.*
3. *The court below erred in law and fact when it declared that the 1st respondent be deemed to have retired at the appropriate age of retirement and that*

the calculations of the retirement package do include the break in service as a result of these proceedings (page line 15-20 of the judgment) because such a declaration or order amounts to awarding a pension benefit for a period that the 1st respondent has not worked thereby infringing the law against unjust enrichment.

4. *That the court below erred in law and fact in awarding aggregated damages of twenty four (24) months basic salary in respect of the 2nd complainant (page J36 line 21-24 and J37 line 1-4 of the judgment) without specifying the compelling circumstances to warrant an award in excess of the normal measure of damages of one month in lieu of notice in line with the conditions of employment and service.*
5. *That the court below misdirected itself in law and fact in ordering that the 2nd complainant be paid all that had accrued as at the point of termination of her employment (page J37 line 5-10 of the judgment) without taking into account the evidence on record indicating that the 2nd complainant was paid accrued*

terminal benefits on dismissal in line with the provisions of section 26 of the Employment Act Chapter 268 of the Laws of Zambia as amended by the Employment (Amendment) Act No. 15 of 1997.

7.0 APPELLANT'S HEADS OF ARGUMENT

7.1 During the hearing of the appeal, the appellant relied on the heads of argument filed on 18th March, 2021. In arguing ground 1, counsel submitted that the respondents did not dispute processing the split transactions at the disciplinary hearing or at trial. In fact, during cross examination, the respondents admitted to processing the split transactions referred to. During the disciplinary proceedings and at trial, the argument by the respondents was that they were not aware of Policy No. 039. That, the position of the administering official was that, "it was incumbent on the employee to familiarize herself with the policies that exist with the job she was executing.

7.2 Counsel submitted that the trial Judge in accruing the decision that the dismissals were unfair did not take into account the

evidence on record in the Senior Staff Conditions of Employment and Service which provided as follows:

> ***"Policies and Procedures***
>
> ***Unless otherwise specified in this letter while in the service of MCM, the employee will be subject to the company's policies and procedure in accordance with Senior Staff Conditions of Employment and Service as amended from time to time. It is the employee's responsibility to ensure he is aware of all such policies and procedures."***

7.3 That the court below did not take into account the offer of employment to the 2nd respondent which had a similar provision under clause 8 appearing at 142 of the Record of Appeal which states as follows:

> ***"..... it is the employee's responsibility to ensure that one is aware of all such policies and procedures."***

7.4 Counsel submitted that the respondents were bound by the terms and conditions of their contracts of employment and therefore had the responsibility to ensure that they were aware

of policy No. 039. He relied on the case of **Rosemary Ngorima and 10 Others v Zambia Consolidated Copper Mines Ltd**[1] where it was held that;

> ***"In an employer-employee relationship the parties are bound by whatever terms and conditions they set out for themselves."***

7.5 Counsel further contended that the court below misapprehended the facts when it held that: "*the complainants could not by any stretch of practice and procedure in the processing of transactions, be guilty of initiating and approving the flawed transactions or any such transactions*". That this was a misdirection because the respondents were not accused of initiating or approving the transactions. The evidence on record indicates that the respondents were accused and found guilty of processing split transactions contrary to the spirit of policy No. 039.

7.6 As regards the issue of wrongful dismissal, counsel submitted that the court below in concluding that the dismissals were wrongful, did not take into account the fact that the disciplinary appeal proceedings were recorded in writing and the reason for dismissing the appeal were given at the hearing of the appeal as

per the minutes of the appeal case for the 1st respondent which appear at pages 258-259 of the record of appeal. The reasons for dismissing the appeal for the 2nd respondent were given at the hearing of the appeal in the minutes at pages 260-261 of the record of appeal.

7.7 That the veracity of the minutes of the disciplinary proceedings has not been challenged by the respondents. Thus, the respondents were aware of the reasons for dismissing the appeals.

7.8 Counsel contended that the court below failed to take into account the fact that the administering official at the disciplinary hearing gave reasons for handing down the penalty of summary dismissal to each of the respondents as per the minutes of the case hearing at pages 252-254 of the record and the summary dismissal letters. That if the court below had taken into account the minutes of the disciplinary proceedings and the provisions of section 4.1 of the Disciplinary Code, it would have arrived at a different conclusion consistent with the evidence on record.

7.9 Counsel urged us to allow the first ground of appeal considering that the court below found that the procedures in discipling the

respondents were properly followed and that they were heard by properly constituted disciplinary bodies.

7.10 On ground two, it was submitted that the court below did not declare the dismissals null and void. That although the respondents did not seek the relief of reinstatement, the court of its own volition declined to grant an order of reinstatement.

7.11 It was submitted that on this basis, the declaration that the 1st respondent be deemed to have been retired at the appropriate age of retirement and that the calculations of the retirement package do include the break in service as a result of these proceedings was a misdirection.

7.12 On ground 3, it was submitted that the award of pension benefits to the 1st respondent for a period she did not work for amounts to unjust enrichment as per the case of **Kitwe City Council v William Nguni**[2]. We were urged to set aside the award.

7.13 On the 4th ground, counsel submitted that the normal measure of damages in unfair/wrongful dismissal cases should be the usual salary for the notice period unless there are compelling circumstances to warrant an increased award. In support of this submission, we were referred to the cases of **Konkola**

Copper Mines Plc v Greenwell Mulambia[3] **and Swarp Spinning Mills v Chileshe**[4].

7.14 It was submitted that in this case, clause 1.2.1 (b) & (c) of the Senior Staff Condition of Service which applied to the respondents provided for one month's pay in lieu of notice for termination by either party.

Counsel submitted that since the 2nd respondent did not explain to the court below any special or peculiar circumstances to take her case out of the realm of ordinary award of compensation, there was no basis for awarding her 24 months' salary as compensation especially when one considers the finding of the court below that she was "still very young and far from the age of retirement."

7.15 In support of ground five, counsel referred to **section 26 of the Employment Act, Chapter 268 of the Laws of Zambia** which provides that upon summary dismissal, an employee is entitled to payment of wages and other allowances due at the date of such dismissal.

7.16 Counsel further submitted that for the dismissal under clause 12.8.3 of the Senior Staff Conditions of Employment and

Service, there is no compensation for dismissal other than commutation of accumulated leave days.

7.17 That according to the termination pay statement for the 2nd respondent, the 2nd respondent was paid accrued wages, leave pay and housing allowance upon dismissal, which she confirmed in her evidence. Therefore, the order by the court below that the 2nd respondent be paid all that had accrued as at the point of termination of her employment would result in duplicity of payments and offend the legal principle against unjust enrichment.

8.0 RESPONDENT'S HEADS OF ARGUMENT

8.1 During the hearing of the appeal, the respondents relied on the heads of argument filed on 10th June, 2021. In response to ground one, counsel for the respondent contended that the court below was on firm ground when it declared that the respondents were unfairly/wrongfully dismissed from their employment. He referred to **Halsburys laws of England Vol. 16, 4th Edition at paragraph 335** which states that:

"The key consideration in cases of unfair dismissal is the reasonableness of the employer's decision to dismiss and not the injustice caused to the employee."

8.2 Counsel argued that it was unfair for the appellant to have charged and dismissed the respondents for abrogating or violating clause 4.1 of Policy No. 039 when the respondents were not the ones that divided the transactions in issue. That the respondents were not even initiating any transaction within the appellant company. Therefore, other than the fact that the respondents were not aware of the said policy, the respondents had established before the lower court that they were not responsible for initiating the split requisitions in issue as the department responsible for raising or initiating the said transactions is and was the user department (in this case the Engineering Department). That the respondents merely processed the already initiated split transactions authorised by the end user manager in accordance with the Purchasing Procedure Policy (for items that are not stock coded). That the respondents' role in the purchasing system or automated work flow chart was merely to review and escalate the requisitions to

their superior, the Purchasing Superintendent, who would further review and approve the transactions. The respondents did not have any authority to either approve a requisition to become an order or send back the requisition to the initiator in case it had an error. If transactions were initiated in abrogation of any company procedure or policy, only their superior had the authority to reject the processing of such transactions.

8.3 Counsel for the respondent stated that, it was also proved before the lower court that the practice of splitting transactions was common amongst the appellant's employees.

8.4 That even assuming that the respondents were aware of clause 4.1 of the said policy, they could not under the circumstances be held to be guilty of abrogating the policy. Counsel further submitted that the respondents were not aware of the existence of the policy and dismissing them for that was unfair. The case of **Interfoto Pictures library v Stileto Visual Programmes Limited**[5], was cited in furtherance of the argument that the appellant's policy in issue was not communicated in the established manner.

8.5 To counter the argument by the appellant that the disciplinary appeal proceedings were recorded in writing and the reason for dismissing the appeals were given, the respondents' counsel submitted that the lower court was on firm ground when it held that the dismissals were wrongful as administering officials did not give reasons when handing down their decision. To fortify this submission, he referred to clause 8.4 of the Disciplinary Code which states that:

> "***Whenever an appeal is determined, the administering official shall state in writing reasons for dismissing or upholding the appeal.***"

8.6 Counsel pointed out that, the letters in which the respondents' appeals were dismissed appear on pages 126,129,221 and 225 of the record of appeal. In those letters the administering officials did not state the reasons for dismissing the appeals as required by the Disciplinary Code. That the reasons were supposed to be indicated in the letters sent out to the respondents and not the company minutes. Counsel contended that the minutes referred to by the appellant, are the appellant's own documents and cannot be used as a point of reference with

respect to the requirement of informing the respondents of the decision to dismiss their appeals in writing. Counsel further pointed out that the minutes referred to by the appellant were not even recorded by the administering officer as required by the said Code and were only seen by the respondents at the time when they had instituted the action.

8.7 Counsel further submitted that the failure by the appellant to follow the procedure in the Disciplinary Code rendered the dismissals wrongful. To support this submission, he referred to the High Court case of **Caroline Tomaidah Daka v Zambia National Commercial Bank Limited PLC[6],** to persuade us that as the appellant failed to take into account the laid down factors that should have weighed in favour of the respondents, they were not guilty as charged.

8.8 Counsel further made reference to clauses 4.1, 2.6.5, 4.10, 4.10.2 and 4.10.3 of the Disciplinary Code to submit that other than alleged seriousness of the offences in this matter and the fact that the respondents herein were senior staff employees who were supposed to lead by example; the administering officials handling the first hearing for the respondents were

required to take into account the following factors; (a) the respondents were first time offenders (b) the respondents never had sanctions pertaining to warnings before they were charged and dismissed for the offences leading to this case. (c) the good service record that the respondents had (d) the 18 and 7 years respective long service that the 1st and 2nd respondents diligently served the appellant.

8.9 In addition, the following facts could have been taken into account by the administering official;

(a) the categories of offences levelled against the respondents did not warrant summary dismissal but merely severe and final warning.

(b) the respondents good record of service;

(c) the false allegation by administering officials that the respondents case was aggravated by the extent of the loss suffered by the appellant company when there was no loss suffered by the respondents processing of split transactions.

(d) the respondents processing of the split transactions was in accordance with their duties and prescribed

automated work flow system. We were therefore urged to uphold the lower court's decision.

8.10 To counter ground 2, counsel submitted that a declaratory order that the dismissals were unfair and wrongful has the same effect as nullifying the dismissals. Counsel further submitted the lower court's declaratory order that dismissals were wrongful and unfair does not contradict the refusal to grant an order of reinstatement. This is because reinstatement is granted under exceptional circumstances, as guided by the Supreme Court in the case of **Zambia Railways Limited v Oswell Joseph**[7].

8.11 As regards the appellant's argument that the effective date of separation remains 14th August, 2018, it was submitted that the 1st respondent was 50 plus years old, due for early retirement and entitled to the same benefits as an employee on normal retirement. Had it not been for the unfair and wrongful dismissal, the 1st respondent could have clocked 55 years whilst in the employ of the appellant. That with or without reinstatement, the 1st respondent qualified to be deemed retired

and to be entitled to a retirement package and the lower court correctly exercised its authority to deem her retired.

8.12 Grounds 3 and 4 were argued together as follows: with regard to the lower court's order that the 1st respondent be deemed retired, counsel submitted that the 1st respondent worked for the appellant for 18 years after the transfer from ZCCM to the appellant in 2000. She was more than 50 years old at the time of her dismissal and had qualified for early retirement as per the clause on early retirement in the Senior Staff Conditions of Employment and Service. Further that at 50 plus years the 1st respondent has no prospects of finding another job as she had grown old. That there were justifiable reasons and compelling grounds for the lower court to have deemed the 1st respondent as retired and entitled to pension benefits. Therefore, the issue of unjust enrichment does not arise.

8.13 With respect to the award of damages, reliance was placed on the case of **Zambia Airways Corporation Limited v Gershom B.B Mubanga**[8]. It was submitted that although the 2nd respondent was wrongfully and unfairly dismissed, an order for reinstatement would not have been appropriate as the work

relationship with the appellant would not have been the same. That the said award granted to the 2nd respondent is not excessive considering the circumstances under which the 2nd respondent was dismissed, the nature of her job and her future prospects of finding another job which have reduced due to her dented reputation resulting from her wrongful and unfair dismissal. Therefore, the lower court was on firm ground to award her 24 months basic salary as damages for wrongful and unfair dismissal.

8.14 In arguing ground 5, counsel submitted that far and above the wages and leave days accrued and paid to the 2nd respondent, she is entitled to 1 month's pay for each year served as compensation for loss of her employment following the lower court's order that her dismissal was wrongful and unfair. That this position if supported by clause 12.2.3 of the Senior Staff Conditions of Employment and Service.

8.15 Counsel further argued that the issue of unjust enrichment or duplicity of payment does not arise under the circumstances. That whatever amount has already been paid for the 2nd respondent ought to be deducted from her dues.

8.16 We were urged to dismiss the appeal and uphold the decision of the lower court with costs to the respondents.

9.0 ORAL ARGUMENTS

9.1 Counsel for the appellant Mr. Imonda raised an issue on a point of law concerning the lower court's order condemning the appellant to costs. He argued that the order for costs was not in accordance with **Rule 44 of the Industrial Relations Court Rules.**

9.2 Counsel for the respondent, Mr. Libakeni, contended that the appellant was attempting to sneak in a ground of appeal disguised as a point of law. He went on to cite cases to the effect that you cannot raise a ground of appeal in the heads of argument. He submitted that the proper procedure to bring in a ground of appeal is to amend the memorandum of appeal.

10.0 ANALYSIS AND DECISION

10.1 We have duly considered the record of appeal and the arguments made by counsel on behalf of the parties concerned.

10.2 The issue raised in ground one is that the court would not have found that the respondents' dismissals were wrongful/unfair if

it had taken into account certain facts. The factors which counsel for the appellant contends were not taken into consideration by the lower court include (a) the respondents never denied processing split transactions contrary to Policy No. 039. (b)That it was the responsibility of the employee to be aware of all such policies and procedures as envisaged in the Senior Staff Conditions of Employment and Service and the offer of employment to the 2nd respondent; (c) the administering officials gave reasons for dismissing the appeals as can be seen in the minutes of the disciplinary proceedings.

10.3 In the case of **Eston Banda, Edward Dalitso Zulu v. The Attorney General[9],** the Supreme Court rehashed its holding in **Care International Limited Supra** that the mode of an employee's dismissal or exit from employment will determine what relief, if at all, they would be entitled to. They stated further that: ***"..there are only two broad categories for dismissal by an employer of an employee, it is either wrongful or unfair. 'Wrongful' refers to a dismissal in breach of a relevant term embodied in a contract of employment, which relates to the expiration of the term for which the employee is engaged; whilst 'unfair', as***

stated at paragraph 757 of Halsbury's Laws of England, refers to a dismissal in breach of a statutory provision, where an employee has a statutory right not to be dismissed."

10.4 With the above authority in mind, we note that the evidence on record shows that the respondents herein were dismissed for abrogating Policy No.039 (the Delegated Approval Authorization) which under clause 4.1 prohibits combining transactions or splitting transactions. The said clause provides as follows;

> ***"Dividing a commitment or transaction into two or more parts to evade a limit of authority is prohibited and is a violation of this policy. This policy shall be interpreted broadly so that a series of reasonably related transactions shall be considered as a single transaction for purposes of determining approval and authority levels required by this policy."***

10.5 The respondents did not dispute processing the split transactions but claimed that they were unaware of the said policy. They claimed that they only became aware of it through the charge letters dated 1st August, 2018.

10.6 We take the view that there was no proof that they were aware of that policy prior to being charged with the offences. The respondent's evidence was that the policy was communicated to the employees by e-mail but no such e-mails were produced. This created doubt in the mind of the trial Judge and we cannot fault him for that.

10.7 Further, even if they were aware of the Policy, it was not in dispute that the respondents were not initiators of the split transactions as the requisitions were initiated by the End-User Department. Their role in the purchasing system was merely to review and escalate the requisitions to their superiors. They also had no authority to alter a requisition or send it back to the initiator. The respondent's evidence that even after their dismissal, split transactions were still being processed, did not justify the abrogation of the said policy. However, the trial Judge was under the circumstances on firm ground to hold that they were unaware of the policy.

10.8 Based on the above evaluation of the evidence, we uphold the trial Judge's finding that the dismissals were unfair.

10.9 As for the question of wrongful dismissal, the trial Judge found that the disciplinary procedures were followed in that the

respondents were charged and accorded the rights to be heard. They also had opportunity to appeal to the highest level available but their appeals were dismissed. That, the administering officials at the appellate levels did not give reasons when handing down their decisions contrary to clause 8.4 of the Disciplinary Code which requires the officials to give reasons in writing whenever they dismiss an employee.

10.10 The minutes of the disciplinary hearing appearing on pages 252 to 253 and 255 to 257 of the record of appeal show the reasons given for dismissing the 1st and 2nd respondent respectively and for dismissing their appeal. The reasons given for dismissing the appeal were in both cases lack of new evidence. We are of the considered view that contrary to the trial Judge's findings, reasons were given for the respondents' dismissals at both hearing and appeal stage.

10.11 Further, the Judge found that the respondents were charged under categories 1 and 2 of the Disciplinary Code where the penalty is a severe warning or final warning but in this case, the respondents were dismissed without considering the guidelines in the Disciplinary Code. For example, the Judge rightly found that the respondents were charged under

categories 1 and 2 of the Disciplinary Code which carry the punishment of severe and final warnings respectively. However, they were dismissed. Therefore, the appellant did not exercise its power in due form as the respondents records of service were excellent.

10.12 For the foregoing reasons, we find that ground 1 has no merit and it fails.

10.13 Grounds 2 and 3 of the appeal will be tackled together as they are related. Both grounds address the issue of the lower court deeming the 1st respondent to have retired at the appropriate age and entitled to pension benefits.

10.14 We agree with counsel for the appellant that the respondents did not seek a declaration that the dismissals be declared null and void. However, by holding that the dismissals were wrongful and unfair, the Judge was essentially saying that they both should not have been dismissed. The import of this is that the effective date of separation remains 14th August, 2018.

10.15 Although the practice of the courts in Zambia is to award damages as a remedy in cases of wrongful and unfair dismissal, the court have, in some instances deemed complainants to have been retired with full benefits and rightly so. In the case

of **Zambia Consolidated Copper Mines v Matale**[10], the Supreme Court upheld the decision of the Industrial Relations Court to deem the respondent as having retired with full benefits from the date of separation. The Supreme Court found such an order justifiable upon considering that the Industrial Relations Court has powers under **Section 85 of the Industrial and Labour Relations Act**, in matters of wrongful and most unwarranted termination of employment, to exceed the normal measure of damages at common law in order to do substantial justice.

10.16 In this case, 1st respondent's age was over 50, she had served the appellant for 18 years. She qualified for early retirement as per the conditions of early retirement in the Senior Staff Conditions of Employment and Service. If she had retired early she would have been entitled to benefits as though she had retired normally. Considering the above circumstances, the lower court was on firm ground in exercising its statutory authority of doing substantial justice to deem the 1st respondent as retired.

10.17 In light of what we have stated above, the appellant's argument that the 1st respondent is only entitled to what she had worked

for because awarding her what she had not worked for would amount to unjust enrichment cannot stand.

10.18 For the foregoing reasons, we find merit in grounds 2 and 3 and allow the same.

10.19 Grounds 4 and 5 will also be dealt with together as they are interrelated. The issues raised under these two grounds of appeal are that there was no basis of awarding 24 months basic salary to the 2nd respondent and ordering that she be paid her accrued benefits without considering her evidence that she was paid accrued terminal benefits.

10.20 As regards the award of 24 months basic salary to 2nd respondent, the position of the law is clear that the normal measure of damages for wrongful dismissal is the notice period unless there are compelling circumstances to warrant an award in excess of the normal measure. **Section 26 of the Employment Act, Chapter 268 of the Laws of Zambia as amended by Employment (Amendment) Act No.15 of 1997** reads:

> ***"Where an employee is summarily dismissed, he shall be paid on dismissal the wages and other working or***

other allowances due to him up to the date of such dismissal."

10.21 In the cases of **Konkola Copper Mines Plc v. Greenwell Mulambia**[3] **and Swarp Spininning Mills v Sebastian Chileshe**[4], the Supreme Court clarified that the normal measure of damages applies and will normally relate to the contractual length of notice or the notional reasonable notice where the contract is silent. However, the normal measure of damages may be departed from under special circumstances.

10.22 The grounds on which the 2nd respondent was dismissed from employment, the nature of the job, the low prospects of finding employment elsewhere, the evidence that at the time of trial she was still unemployed, are all special circumstances to warrant the award of 24 months' salary as damages for unfair dismissal.

10.23 As regards to the other lower court's order that the 2nd respondent be paid all that had accrued to her as at the point of dismissal, the appellant's contention is that under **Section 26 of the Employment Act**[1], there is no compensation for summary dismissal and since the 2nd respondent was paid all

her accrued benefits, she would be unjustly enriched if paid damages.

10.24 The respondent's counsel has argued that the 2nd respondent is entitled to 1 month's pay for each year served on pro rata basis as compensation for loss of her employment in accordance to clause 12.2.3 of the Senior Staff Conditions of Employment and Service. The evidence on record is that the 2nd respondent was paid accrued wages, leave pay and housing allowance as shown by the statement appearing on page 345-346 of the record of appeal. However, we find no justification to tamper with the lower court's decision as what has already been paid can be taken into account before the compensation is paid. In that way, the issue of unjust enrichment would be averted.

10.25 The appellant's counsel informally raised the question whether the lower court was on firm ground to grant costs to both respondents in view of **Rule 44 of the Industrial Relations Rules.**

10.26 The respondent's counsel's spirited argument was that the appellant attempted to sneak in a new ground of appeal without obtaining leave to amend the Memorandum of Appeal

and therefore this issue should not be determined by the Court. Be that as it may, the appellant's spirited argument that the question of costs is a question of law which can be raised at any stage of the proceedings is also acceptable. See the case of **Nevers Sekwila Mumba v Mukabi lungu**[14].

10.27 We hold that this is indeed a question of law. **Rule 44 of the Industrial Relations Court Rules** has been interpreted in a plethora of authorities including **Amiran Limited v Robert Bones**[11]and **Zambia National Commercial Bank v Joseph Kangwa**[12].

10.28 In the case of **Kansanshi Mining Plc v Mathews Mwelwa**[13] we referred to the Supreme Court Judgment in **Amiran Limited case supra** and set aside an order for costs which was improperly made. We hasten to point out that in the **Kanshanshi Mining Plc case**, the issue of costs was raised as a ground of appeal. In the case before us, for reasons we have already stated, we shall proceed to determine the issue even if it is not a ground of appeal.

10.29 **Rule 44 (1) of the Industrial Relations rules** provides as follows:

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

10.30 The case authorities mentioned in paragraph 10.28 hereof are to the effect that in cases before the Industrial Relations Court, costs can only be awarded against a party if such a party is guilty of unreasonable delay, or of taking improper, vexations, or unnecessary steps in the proceedings or of other unreasonable conduct.

10.31 In casu, the lower court granted costs to the respondents without considering **Rule 44(1) of the Industrial Relations Court Rules** and no reason was given for condemning the appellant in costs.

10.32 We are of the firm view that the lower court erred in awarding costs to the respondents as there is no indication on record that the appellant was guilty of any unreasonable conduct in the proceedings. Consequently, the said order for costs cannot stand and it is hereby set aside.

11.0 CONCLUSION

11.1 In sum, the appeal is dismissed for lack of merit. However, we order that each party shall bear its own costs in the court below and here.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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P.C.M. NGULUBE
COURT OF APPEAL JUDGE

.....

N.A.SHARPE-PHIRI
COURT OF APPEAL JUDGE