IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL 297/2022**

HOLDEN AT NDOLA

(*Civil Jurisdiction*)

BETWEEN:

MIDLANDS MILLING (2011) LIMITED **APPELLANT**

AND

LLOYD TEMBO **RESPONDENT**

CORAM: Kondolo, SC., Majula and Banda-Bobo, JJA on 15th August, 2024 and 22nd August, 2024

For the Appellant: Mr. F. Besa of Messrs. Friday Besa and Company

For the Respondent: Mr C. Chungu of Messrs. Nsapato & Co Under LAZ Pro Bono Program

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JUDGMENT

Banda-Bobo JA, delivered the Judgment of the Court.

Cases referred to:

1. *Lubunda Ngala, Jason Chulu v Anti-Corruption Commission, Selected Judgement No. 4 of 2018*
2. *Agholor v Cheesebrough Ponds (z) Limited (1976) ZR. 1*
3. *Alistair Logistics v Dean Mwachilenga CAZ Appeal No. 232/2019*
4. *Albert Mupila v Yu-Wei COMP/IRCLK/222/2021,*
5. *David Chongo v Group 4 Secure Solutions Comp/IRC/275/2021*
6. *Saviours Mundia v Consolidated Farming Unit COMP / IRCLK / 442 / 2019*

7. *Dansiano Phiri v Afronet Trading Limited (T/A Fresh Bakery) COMP/IRCLK/283/ 2021*
8. *Damales Mwansa v Ndola Lima Company Ltd SCZ Appeal No. 201/2012*
9. *Wellington Mwansa v The Registered Trustees of the Baker Heights Church of Christ COMP/IRCLK/72/2022*
10. *Anderson Mazoka & Others v Levy Patrick Mwanawasa (2005) ZR 138*
11. *Samuel Miyanda v Raymond Handahu (1993-1994 ZR 187*
12. *Attorney General and Another v Lewanika and Others (1993-1994) Z.R. 164*
13. *Citibank Zambia Ltd v Suhayl Dudhia SCZ Appeal No. 6 of 2022.*
14. *David Chongo v Group 4 Secure Solutions Limited COMP/IRC/275/2021*
15. *GDC Logistics Zambia Limited v Kanyanta and Others SCZ Appeal No. 144 of 2014*
16. *Zambia National Commercial Bank Plc v Jason Mweemba SCZ Appeal No. 92 of 2015*
17. *Barclays Bank Zambia Limited v Mando Chola and Ignatius Mubanga (1997) S.J. 35 (S.C)*
18. *Agro Fuel Investment Ltd v Zambia Revenue Authority Appeal 187 of 2008*
19. *Joe's Earthworks and Mining Limited v Dennyson Mulenga, Appeal No. 107 of 2022*
20. *General Nursing Council of Zambia v Inutu Milambo Mbangweta (2008) ZR 108*
21. *Matilda Mutale v Emmanuel Munaile SCZ Judgement No. 14 of 2007*
22. *R v Immigration Appeals Adjudicator, exparte Crew, [1982] Imm AR 94, the Times, 26 November, 1982*
23. *Redrilza Limited v Abuid Nkazi and Others S.C.Z Judgement No. 7 of 2011.*
24. *South Dakota v North Carolina (1904) 192 US 268 LED 448 at 465.*
25. *Ifezu v Mbadugha (1984) 1 SC NLR 427; 5 SC 79.*
26. *Zambia National Commercial Bank v Martin Musonda and Others Selected Judgement No. 24 of 2018.*

Statues referred to:

1. *Employment Code Act No. 3 of 2019*
2. *The Immigration Act 1971*

Other Works referred to:

1. *W.S. Mwenda and C. Chungu, A Comprehensive Guide to Employment Law in Zambia (Lusaka, UNZA Press: 2021)*

1. INTRODUCTION

1.1. This is an appeal against the Judgement of the Honourable Lady Justice Dr. Mweenda W. S. delivered at Lusaka on 30th May, 2022. The Notice and Memorandum of Appeal were filed into Court on 22nd September, 2022.

2. BACKGROUND

2.1. The brief background to this matter is that on 7th June, 2021, the Respondent filed an action in the Industrial Relations Division of the High Court under Comp No. IRCLK/ 2021. The Respondent claimed the following reliefs:

i. **Notice pay;**

ii. **Gratuity;**

iii. **Toll fees and fuel refund;**

iv. **Benefits for the years worked; and**

v. **Costs and any other benefits the Court may deem fit.**

2.2. The uncontested facts were that the Respondent was employed by the Appellant on 6th August, 2013 as a Driver/Salesman on a permanent and pensionable contract of employment. On 13th March, 2021 the Appellant

summarily dismissed the Respondent from employment on the ground of misconduct after undertaking a disciplinary hearing. At the time of the dismissal, the Appellant only paid the Respondent accrued leave days.

3. DECISION OF THE LOWER COURT

3.1. The Judge in the Court below after considering the evidence and the law, found that the Respondent was not entitled to notice pay, gratuity, toll fees and fuel refund.

3.2. However, the Learned Judge found that the Appellant, having been on a permanent contract of employment, was entitled to a severance package. This was notwithstanding the fact that the Respondent was summarily dismissed.

4. THE APPEAL

4.1. Dissatisfied with a part of the Judgement of the Lower Court, the Appellant launched the present appeal fronting the following sole ground of appeal:

i. **The Learned Judge in the Court below erred in Law and in Fact in granting severance package to the Respondent who was dismissed from a permanent and pensionable job, more so that he did not seek**

the relief granted after all the reliefs he sought were dismissed.

5. ARGUMENTS IN SUPPORT

5.1. Counsel for the Appellant filed into Court its Heads of Argument on 15th December, 2022. The gist of the Appellant's arguments is that the Respondent was not entitled to severance pay, on two grounds.

5.2. Firstly, that severance pay as provided for under **Section 54 of the Employment Code Act No. 3 of 2019**, does not apply to an employee whose contract has been terminated by the employer on account of wrong doing on the employee's part. That the instances covered under **Section 54 (1) (a), 54 (1) (d) and 54 (1) (e) of the Employment Code Act**, all show that the spirit of Section 54 is that severance pay is only payable to an employee whose contract of employment has been terminated by the employer through no fault of the employee and the employee does not qualify to get a pension or gratuity.

5.3. By way of analogy, the Appellant cited the Constitutional Court case of **Lubunda Ngala, Jason Chulu v Anti-**

Corruption Commission[1], in which according to Counsel, the Court expressed the view that an employee who resigns or leaves employment on their own doing cannot be entitled to terminal benefits, akin to pension or gratuity. That going by the above reasoning, an employee who causes their own dismissal through misconduct or breach of contract cannot be rewarded with severance pay which is akin to a terminal benefit.

5.4. Secondly, that a reading of Section 50 and 51 of the Employment Code shows that an employee who is summarily dismissed is only entitled to wages and other accrued benefits as at the date of the dismissal. That this reflects the long-standing common-law principle on summary dismissal, reaffirmed by the Supreme Court in the case of **Agholor v Cheesebrough Ponds (z) Limited**[2]**.**

5.5. In the alternative, it was submitted that even assuming that the Respondent was entitled to severance pay, he would still not be entitled to 25% basic pay earned during the contract period. That this is because according to Section 54 (1) (b) of the Employment Code Act, an employee on permanent and

pensionable contract of employment whose contract has been terminated by the employer, is entitled to benefits provided under the relevant social security scheme.

5.6. That to hold that an employee on a permanent and pensionable contract is entitled to 25% basic pay earned during the contract would produce a hardship to employers, which the Legislature would not have intended.

5.7. We were accordingly urged to quash the decision of the Lower Court and uphold the appeal.

6. ARGUMENTS IN OPPOSITION

6.1. Counsel for the Respondent filed into Court amended Heads of Argument on 20th January, 2023. The gist of the respondent's submissions is that the Appellant is entitled to severance pay, for two reasons.

6.2. Firstly, that the Appellant is entitled to severance pay because a permanent contract of employment, under which the Appellant was employed, is a contract of fixed duration, as envisaged in Section 54 (1) (c) of the Employment Code Act, and as such is amenable to severance pay. According to Counsel, a permanent contract of employment is a contract

of fixed duration because it is certain to expire on the retirement date, if not terminated by other ways stipulated in the Employment Code Act. That as such both the employer and the employee know that the contract will terminate at the retirement date, unless terminated in any other way.

6.3. In order to demonstrate the above point, counsel cited this Court's decision in **Alistair Logistics v Dean Mwachilenga**[3], where it was held that there is no contract which is indefinite and has an until death do us part clause. Counsel also relied on the definition of a permanent contract in Section 3 of the Employment Code Act, the High Court decisions of **Albert Mupila v Yu-Wei**[4], **David Chongo v Group 4 Secure Solutions**[5], **Saviours Mundia v Consolidated Farming Unit**[6] and the **Learned Author Winnie Sithole Mwenda, the Learned Authors Chanda Chungu, A Comprehensive Guide to Employment Law in Zambia at page 288** and an Article by **Chanda Chungu published in the SAIPAR Case Review: Vol. 4: Iss. 2 analysing the case of Albert Mupula v Yu-Wei**[4], to further cement this position.

6.4. Secondly, that the Appellant is entitled to severance pay because a permanent contract of employment is not excluded from severance pay under Section 54 (3) of the Employment Code Act.

6.5. That out of the 5 kinds of contracts of employment recognised in Zambia, namely, permanent, long-term, fixed-term, short-term and temporary contracts, only casual employees, those on probation, long-term and temporary employees are excluded from severance pay by Section 54 (3) of the Employment Code Act. That as such, severance pay is applicable to the Respondent on a permanent contract of employment. In support of this argument, Counsel had recourse to the learned authors, **Winnie Sithole Mwenda and Chanda Chungu, A Comprehensive Guide to Employment Law in Zambia at page 290,** the High Court decision of **Dansiano Phiri v Afronet Trading Limited (T/A Fresh Bakery)[7].**

6.6. Counsel for the Respondent went on to submit that severance pay is payable to an employee on a permanent contract of employment regardless of being summarily dismissed. That

this is so because the only instances when an employee on a permanent contract cannot get severance pay is where termination is by redundancy, medical discharge or death.

6.7. To further augment this point, Counsel submitted that by virtue of Section 51 of the Employment Code Act, an employee who has been summarily dismissed is entitled to all accrued benefits. Counsel found solace in the cases of **Damales Mwansa v Ndola Lima Company Ltd**[8] and **Wellington Mwansa v The Registered Trustees of the Baker Heights Church of Christ**[9], which emphasise that an employee is entitled to accrued benefits. In view of this, Counsel submitted that entitlement to severance pay is an accrued right. Counsel added that, where an employer has incurred a financial loss as a result of the employee's conduct, the employer is at liberty to deduct from the employee's dues, as per Section 68 of the Employment Code Act.

6.8. Coming to the applicable severance package, Counsel for the Respondent submitted that by virtue of a permanent contract of employment being a contract for a fixed duration, an

employee is entitled to a severance package in form of a gratuity, in accordance with Section 54 (1) (c) of the Employment Code Act. That this is because the Appellant's contract of employment is not excluded from payment of severance pay in form of gratuity. Counsel found refuge in the learned authors **Winnie Sithole Mwenda and Chanda Chungu, A Comprehensive Guide to Employment Law in Zambia at page 288**, where it is opined that Section 54 (1) (b) and (c) of the Employment Code Act was intended for employees *inter alia,* on permanent contracts to receive a gratuity when their employment terminates for reasons other than redundancy, medical discharge or death. Counsel also cited the High Court case of **Albert Mupila v Yu-Wei**[4] where the above opinion was endorsed.

6.9. Counsel further cited the cases of **Anderson Mazoka & Others v Levy Patrick Mwanawasa**[10] and **Samuel Miyanda v Raymond Handahu**[11], to posit that the natural and ordinary meaning of fixed duration is that permanent employees are entitled to severance pay under Section 54 (1) (c) of the Employment Code Act, as they are not excluded

from it. In view of the foregoing, it was submitted that the Court below was on firm ground to award a gratuity to the Respondent.

6.10. Still on severance package, and in responding to the Appellant's view that for a permanent contract of employment, recourse should be had to NAPSA as a severance package, Counsel for the Respondent submitted that the relevant social scheme envisaged in Section 54 (1) (b) of the Employment Code Act, is a private or occupational pension scheme. That this is in accordance with the purposive rule of interpretation as espoused in the cases of **Attorney General and Another v Lewanika and Others**[12] and **Citibank Zambia Ltd v Suhayl Dudhia**[13]. That accordingly, the intention of the legislator was to ensure that all employees under Zambian law receive a payment, in addition to a pension from NAPSA, when they leave employment to cushion them against unemployment, and as a reward for services rendered to the employer. That there is no justification for employees on long-term contracts to get gratuity on top of NAPSA while permanent employees should

only get NAPSA. Counsel cited the following excerpt from the Hansard of the National Assembly during the Second reading of the Employment Code Bill in the National Assembly:

> **"...issue of gratuity, gone are the days when we used to have Zambia State Insurance and all these kinds of companies because these were taking people on permanent and pensionable. But with the falling off of these companies, I observed that there is a growing trend where employees went without terminal benefits. I think the time has come for us to do what we are doing and there is no going back where we are going to have these organizations employing people on permanent and pensionable. So, then the thing now, especially by foreign or multi nationals is that they will employ our people starting from the range of 6 months to 3 years and then they will move on. So, if we do not protect the employees with the gradual payments then people will get old and there will be no benefits. So, I think this is a good thing honourable minister that you**

have done, that you have captured this element which used to be a headache.

6.11. In view of the above, it was submitted that had the Appellant had a private pension scheme, the Respondent would not be entitled to a gratuity under Section 54 (1) (b) of the Employment Code Act. That this is so because where an employee is a member of a social security scheme, they benefit from the said scheme in lieu of receiving a severance package. Reliance was placed on the case of **David Chongo v Group 4 Secure Solutions Limited**[14], to show that an employee can either receive a gratuity or a retirement benefit under a relevant security scheme.

6.12. In winding up, Counsel for the Respondent submitted that the Lower Court was on firm ground to award severance pay to the Respondent as the same was pleaded in form of gratuity and any other benefits the court may deem fit. That in any case **Section 85A of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia,** and Rule 55 **of the Industrial and Labour Relations Rules** gives

the Industrial Relations Division discretion to award any benefit which are justified and reasonable. Counsel referred to the cases of **GDC Logistics Zambia Limited v Kanyanta and Others**[15], to posit that the Court is mandated to make any other order or award it may consider fit in the circumstances of the case. Counsel also cited the cases of **Zambia National Commercial Bank Plc v Jason Mweemba**[16] and **Barclays Bank Zambia Limited v Mando Chola and Ignatius Mubanga**[17], to demonstrate that the Industrial Relations Division is not bound by strict rules of pleadings and that the Court's main object is to do substantial justice between the parties before it.

6.13. The Respondent urged this Court to dismiss the appeal and uphold the decision of the Lower Court.

7. ARGUMENTS IN REPLY

7.1. The Appellant filed Heads of Argument in reply to the Respondents Amended Heads of Argument on 1st August, 2024. In reply, the Appellant reiterated that an employee who is summarily dismissed is only entitled to accrued benefits. Counsel disputed the Respondent's view that

severance pay is an accrued benefit. That accrued benefits are benefits which are owed to the employee prior to termination while severance pay only becomes payable after the contract has been terminated in the manner prescribed by the Employment Code Act. The High Court decision of **Agholor v Cheesebrough Ponds (Z) Limited**[2], was cited to posit that a dismissal incurs loss of benefits other than those already earned under the contract.

7.2. According to Counsel, interpreting Section 54 (1) (c) in its plain meaning means that a dismissed employee is entitled to severance pay would lead to an absurdity. That it would encourage wrongdoing on the part of employees as they will get a more attractive package than diligent employees. That this is because an employee who serves up to retirement only walks away with a pension from NAPSA while a dismissed employee would walk away with a severance package on top of NAPSA. The cases of **Attorney General and Another v Lewanika & Others**[12] and **Agro Fuel Investment Ltd v Zambia Revenue Authority**[18], were cited to urge us to apply

the purposive rule to Section 54 (1) (c) and to consider all provisions having a bearing on this subject matter.

7.3. In replying to the Respondent's submissions that the Industrial Relations Division is not bound by strict rules of pleadings, it was submitted that despite the Industrial Relations Division being a Court of substantial justice, it is still bound to issues presented before it by the parties and only give remedies the parties have asked for. Counsel placed reliance on this Court's case of **Joe's Earthworks and Mining Limited v Dennyson Mulenga**[19], emanating from the Industrial Relations Division. In that case this Court held that it was a misdirection on the part of the Lower Court to introduce an issue and give a remedy not pleaded.

8. HEARING

8.1. At the hearing of this Appeal on 15th August, 2024 both parties relied on the Heads of Argument on record and briefly augmented orally.

8.2. Mr Besa, Counsel for the Appellant, in his oral submissions, submitted that in the event that this Court found that severance pay was payable to the Appellant, for purposes of

determining the applicable severance package, recourse should be had to the relevant Social Security Scheme to which the Appellant was contributing. That in the present case, the Respondent was contributing to NAPSA, and as such, recourse should be had to NAPSA. This is because the relevant applicable Social Scheme, under Section 54 of the Employment Code Act, does not specify that it has to be a Private Pension Scheme.

8.3. Mr Chungu, Counsel for the Respondent reiterated his position that the Industrial Labour Division of the High Court is not bound by the Pleadings. As such, the Court below was on firm ground to award severance pay, though not pleaded.

8.4. In relation to the argument raised by Counsel for the Appellant regarding a relevant social scheme, it was argued that because most employees are covered by NAPSA, interpreting that a relevant social scheme includes NAPSA would mean that this provision will not apply to anyone. That the idea as per the Hansard was that all employees must have a package at the end of the contract, something to supplement NAPSA.

8.5. In relation to the applicability of severance pay to a dismissed employee, it was argued that an employee who is dismissed is not excluded from severance pay under Section 54 of the Employment Code act. That in any case, an employer who has incurred a loss at the hands of an erring employee can still recover the loss by withholding the same from the severance package of such an employee.

8.6. Counsel for the Respondent went on to submit that there is no indefinite contract in Zambia, as per this Court's case of **Alistair Logistics v Dean Mwachilenga**[3]. That therefore, every contract in Zambia is of fixed duration, including a Permanent Contract of Employment.

8.7. In reply, Mr Besa submitted that the issue of whether there is no indefinite contract of employment in Zambia is not relevant to this appeal. That recourse can only be had to the Hansard where a provision is ambiguous. That in the present case, there is no ambiguity regarding severance pay, to warrant recourse to the Hansard.

9. ANALYSIS AND DECISION

9.1. We have taken due consideration of the Record of Appeal and the arguments advanced by each party. The core issue for our determination, as we perceive it, is whether an employee who has been dismissed from employment is entitled to severance pay.

9.2. We are cognizant of the fact that severance pay is a new phenomenon in Zambia, that was introduced by the enactment of the Employment Code Act No. 3 of 2019.

9.3. Severance pay is provided for in Section 54 of the Employment Code Act. The Respondent appears to hold a view that severance pay is payable to an employee on a permanent contract who has been dismissed for conduct because a permanent contract is not expressly excluded from severance pay by Section 54 (3) of the Employment Code Act.

9.4. We find this position flawed for reasons that shall become apparent soon. The central issue here is not about the types of contracts of employment which are amenable to severance pay. Rather, the issue is about the modes of separation from employment or ways through which a contract of

employment comes to an end, which are amenable to severance pay. For avoidance of doubt, we shall reproduce section 54 (1) and (3) below:

"(1) An employer shall pay an employee a severance pay, where the employee's contract of employment is terminated or has expired, in the following manner:

(a) where an employee has been medically discharged from employment, in accordance with section 38(5);
(b) where a contract of employment is for a fixed duration, severance pay shall either be a gratuity at the rate of not less than twenty-five percent of the employee's basic pay earned during the contract period or the retirement benefits provided by the relevant social security scheme that the employee is a member of, as the case may be;
(c) where a contract of employment of a fixed duration has been terminated, severance pay shall be a gratuity at the rate of not less than twenty-five percent of the employee's basic pay earned during the contract period as at the effective date of termination;
(d) where a contract of employment has been terminated by redundancy in accordance with section 55, the severance pay shall be a lumpsum of two

months' basic pay for each year served under the contract of employment; or

(e) where an employee dies in service, the severance pay shall be two months' basic pay for each year served under the contract of employment

" (underling for the Court's emphasis)

"(3) The severance pay under this section shall not be paid to a casual employee, a temporary employee, an employee engaged on a long-term contract or an employee serving a period of probation."

9.5. In order to decipher the meaning of the above provisions of the law and any other provisions that will have a bearing on the determination of this appeal, this Court must engage itself in an interpretative exercise. The Supreme Court in the case of **General Nursing Council of Zambia v Inutu Milambo Mbangweta**[20], guided as follows regarding interpretation of a statute:

"the primary rule of construction or interpretation of statutes is that enactments must be construed according to the plain and ordinary meaning of the words used, unless such construction would lead to some unreasonable result, or be inconsistent with, or

contrary to the declared or implied intention of the framers of the law, in which case the grammatical sense of the words may be extended or modified."

9.6. Similarly, in **Matilda Mutale v Emmanuel Munaile**[21], it was held as follows:

"if the words of the statute are precise and unambiguous, then no more can be necessary than to expand on those words in their ordinary and natural sense..."

9.7. With the above guidance in mind, the natural and ordinary meaning of Section 54 (1) of the Employment Code Act is that it provides for severance pay to be paid to an employee where an employee's contract is either terminated or has expired. The same section in subsection 1 (a) to (e) goes further to prescribe the manner of termination or expiry of the contract and the respective applicable severance packages.

9.8. It is thus very apparent that Section 54 (1) above prescribes the two modes of separation from employment, or ways through which a contract of employment comes to an end, for which severance pay is payable. These are termination

(other than at the instance of the employee) and expiration of the contract of employment.

9.9. It is also trite that there are several modes of separation from employment or ways through which a contract of employment comes to an end, which include termination, expiration of contract, dismissal and retirement, among others. However, here the drafters of the law only picked on two modes of separation from employment, set out above, which are amenable to severance pay. What then was the intention of the drafters of the law when they selected only two modes of separation from employment?

9.10. The answer lies in the *expressio unius est exclusio alterius* rule of interpretation propounded in the case of **R v Immigration Appeals Adjudicator, ex-parte Crew**[22], which states that the mention of one thing excludes another. In that case the word 'parent' within the meaning of Section 2(3)(a) of the Immigration Act 1971, was interpreted not to include the father of an illegitimate child, because the definition of a parent only included a mother of an illegitimate child and not a father

9.11. Based on the above rule of interpretation, it follows that the express mention of termination and expiry of contract in section 54 above, excludes the other modes of separation from employment not mentioned.

9.12. Thus, in our view, the exclusion of dismissal as a mode of separation amenable to severance pay was deliberate and intentional. Therefore, severance pay is not applicable to a dismissal. It only applies to termination and expiration of contract. As can be seen from Section 54 of the Employment Code Act, the termination or expiry envisaged in this provision can take the form of medical discharge, by notice, redundancy or death. The question that remains is whether the word "termination" includes "dismissal".

9.13. The law provides sufficient distinction between termination and dismissal. In the case of **Redrilza Limited v Abuid Nkazi and Others**[23], the Supreme Court guided as follows:

> **...there is a difference between dismissal and termination and quite obviously the considerations required to be considered vary. Simply put, dismissal involves loss of employment arising from disciplinary**

action, while termination allows the employer to terminate the contract of employment without invoking disciplinary action. In fact, we note that in its judgement, the Lower Court concluded that it found the respondents' dismissals to have been unfair. It is apparent, that the Court, in its judgement used the term dismissal and termination interchangeably, this should not have been so, especially that the Respondents were not dismissed from employment, but their services were terminated by way of notice."

9.14. It is clear from the above guidance of the Supreme Court that the words "termination" and "dismissal" are different and the two cannot be used interchangeably. Dismissal envisages a disciplinary action following an employee's wrongful conduct or performance. This is not the case with termination. Thus, by using the word "terminated" in section 54 (1) above, as opposed to "dismissed", the legislature did not envisage payment of severance pay to employees whose contracts of employment ended as a result of a disciplinary action. This

implies that an employee who is guilty of wrong doing is not entitled to severance pay.

9.15. Turning attention to Section 54 (3) above, the plain reading of this provision shows that it proscribes payment of gratuity to employees on probation, Long-term contract, casual employees, and temporary employees. It therefore follows that the other categories of contracts or employees not mentioned here are not precluded from severance pay.

9.16. That notwithstanding, this provision must be construed within the meaning of Section 54 (1) above. This is because as shown earlier, the mode of separation from employment determines whether severance pay will be payable to an employee regardless of being in a category of employees or contracts not excluded from severance pay.

9.17. Put differently, an employee can fall within the categories of employees not excluded from severance pay but still not get severance pay if their contract of employment did not come to an end by way of termination or expiration of contract. We are fortified by the principle that legislation must be read as a whole and all provisions having a bearing on a subject

matter must be brought to the fore, as pronounced by the Supreme Court of the United States of America in the case of **South Dakota v North Carolina**[24], the Supreme Court of Nigeria in **Ifezu v Mbadugha**[25] and the Constitutional Court of Zambia in the case of **Zambia National Commercial Bank v Martin Musonda and Others**[25].

9.18. Furthermore, we agree with the Appellant that the instances covered under Section 54 (1) (a) to (e) of the Employment Code, which give rise to severance pay are instances where there is no fault on the part of the employee. These are medical discharge, redundancy and death. This makes it clear that the legislature intended to provide for severance pay where the contract is terminated or it expired in circumstances where there is no fault by the employee. This clearly excludes the dismissal of an employee for conduct.

9.19. In a nutshell, when it comes to payment of severance pay, the key is Section 54 (1) of the Employment Code Act, which prescribes when an employer can pay severance pay to an employee, that is, where there is a termination or expiration of the contract. When it has been established that an

employee falls within the prescribed mode of separation from employment, then recourse can be had to Section 54 (3) to determine whether the employee does not fall within the category of excluded employees. Once the above steps have been satisfied, that is when recourse can be had to the applicable severance package.

9.20. In the present case, the Respondent was summarily dismissed from employment after having undergone a disciplinary hearing. The dismissal was not contested. In view of our findings above, it follows that severance pay under Section 54 (1) is not applicable to the Respondent's mode of separation from employment. We take the view that had the trial Judge applied her mind to this provision, she would have reached a different conclusion.

10. CONCLUSION

10.1. Based on the foregoing we find merit in the appeal and we accordingly set aside the order by the lower Court for payment of severance pay to the Respondent. In view of this finding, the other arguments raised by the parties have been rendered otiose.

10.2. All in all, the sole ground of appeal has succeeded. Since this appeal emanated from the IRD, the circumstances under Rule 44 of the Industrial Relations Court Rules have not been satisfied to warrant awarding costs. In any case this appeal has raised new issues that this Court needed to clarify. We therefore find it appropriate that each party will bear its own costs.

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M. M. KONDOLO, SC
COURT OF APPEAL JUDGE

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B. M. MAJULA
COURT OF APPEAL JUDGE

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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE