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

APPEAL NO. 50/2010
SCZ/8/27/2010

BETWEEN:

BANK OF ZAMBIA — APPELLANT

AND

MARTIN SIMUMBA — RESPONDENT

CORAM: **Mambilima, D.C.J, Chibesakunda, Mwanamwambwa, J.J.S.**
On the 1st of June, 2010 and 24th June, 2014

For the Appellant: *Mr. B. Mutale, SC and Mr L. Kalaluka, of Messrs Ellis and Company.*

For the Respondent: *No appearance*

JUDGMENT

Mwanamwambwa, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Mandona V. Zambia National Commercial Bank Plc (2008) ZR 23.**
2. **Zambia National Building Society V. Nayunda (1993-94) Z.R. 29.**
3. **Waterwells Limited V. Wilson Jackson (1984) ZR 98.**
4. **Attorney-General V. D.G Mpundu (1984) ZR 6.**
5. **Tasomo V. Credit Organisation of Zambia (1973) ZR 347.**
6. **Wallwork V. Fielding (1922) ALL ER 298.**
7. **Millitis V. Chiwala (2009) Z.R. 34.**
8. **Zambia National Wholesale and Marketing Co. LTD V. Zambia Sugar Company LTD, Appeal No. 9 of 1994(unreported).**
9. **Attorney-General V. Mooka Mubiana, Appeal No. 38 of 1993 (Unreported).**
10. **Central Refrigeration Co. Ltd V. Attorney-General (1977) ZR 69.**
11. **Georgina Mutale (T/A G.M Manufacturers Ltd) V. Zambia National Building Society (2002) ZR 19.**
12. **Attorney-General V. Valentine Musakanya (1981) ZR 1.**

Legislation referred to:

The Supreme Court Act, Cap 25 of the laws of Zambia, Section 24(1)(d).

The High Court Rules, Cap 27 of the laws of Zambia, Order 40, rule 6.
The Constitution of Zambia Act, Cap 1 of the Laws of Zambia, Article 18.

Other works referred to:

McGregor on Damages, 18th Edition, Sweet and Maxwell, September, 2009

This is an appeal against a Judgment of the High Court dated the 21st of January, 2010.

The brief facts of the matter are that the Respondent was employed by the Appellant under a contract from the 1st of July, 2006 which was due to expire on the 30th of June, 2009. He was employed as APEX Manager in charge of the Enterprise Development Project, under the auspices of the World Bank.

Sometime in 2007, the Appellant's Internal Audit Department undertook an inspection of the Enterprise Development Project headed by the Respondent. The inspection revealed some irregularities and as a result, the Appellant decided to undertake full scale investigations of the irregularities. Since the Respondent was the head of the Project, the Appellant decided to suspend him, to allow for the smooth run of the investigations. The suspension was done pursuant to Clause 3.2.1 of the Appellant's Disciplinary Code. The Respondent was suspended on the 26th of November, 2007. He was put on half pay for the period of the suspension. During the course of the investigations, the Appellant discovered that the activities

regarding the Project were too complicated. Therefore, the Appellant decided to engage the services of Price Waterhouse Coopers, to conduct a forensic audit of the activities of the Project.

The Appellant's Disciplinary Code provides that-

> **"seven (7) working days will usually be allowed for the case investigation. In the case of very serious, complex or possibly criminal cases, this may be extended to a period of not exceeding sixty (60) working days."**

On the basis of the above clause, the Respondent commenced an action challenging the basis of his suspension. This action was commenced on the 12th of December, 2008 under cause number 2008/HP/1301. He claimed the following reliefs:

1. **For a declaration that the continued suspension is null and void;**
2. **For a declaration that the Plaintiff is entitled to resume work;**
3. **Damages for the continued suspension;**
4. **Interest; and**
5. **Costs.**

The investigations of the activities of the Project took long and were only completed in May 2009. On the 10th of June, 2009, the Appellant charged the Respondent with a number of offences under its Disciplinary Code. He responded to the charges in a letter dated the 16th of June, 2009.

On the 26th of June, 2009, the Appellant wrote to the Respondent inviting him to appear before a Disciplinary

Committee on the 30th of June, 2009, to answer to the charges against him. The Respondent did not appear. On the 30th June, 2009 itself, the Appellant decided to extend the Respondent's contract of employment by another three months, to allow the disciplinary process to be concluded. However, on the 8th of July, 2009, the Respondent's lawyers, Lisimba and Company, wrote to the Appellant stating that the Respondent was not interested in extending his contract. The lawyers stated that they had been instructed to demand the Respondent's accrued benefits, for the successful completion of the three years contract.

On the 11th of August, 2009, the Respondent brought another action in the High Court, under cause number 2009/HP/982 against the Appellant for the following reliefs:

1. **Payment of all outstanding salaries and allowances as per contract of employment;**
2. **Gratuity;**
3. **Damages occasioned by unfair treatment by the Defendant**
4. **Punitive damages for character assassination**
5. **Mental stress, embarrassment**
6. **Inconvenience and frustration**
7. **Interest**
8. **Costs; and**
9. **Any other relief the Court shall so determine.**

In September, 2009, cause number 2008/HP/1301 and cause number 2009/HP/982 were consolidated into one. The

matter went to trial and on the 21st day of January, 2010, the learned trial Judge said the following:

> **"established facts show that the Plaintiff was employed Apex Manager on 01/07/2006 on contract for a period of three years which expired on 30th June, 2009...**
>
> **As the Plaintiff was suspended under this clause, he impugns the said suspension when it exceeded 60 working days, since his learned Counsel contends it breaches clause 3.2.6 which is at page 32 of the said Defendant's bundle. The latter clause reads as follows:... "seven (7) working days will usually be allowed for the case investigation. In the case of very serious, complex or possibly criminal cases, this may be extended to a period not exceeding 60 working days..." incidentally, this clause relates to investigations and not suspension. I thus reject the contention that the suspension was null and void as there is no evidence to support. I agree as argued by the Plaintiffs learned Counsel by relying on the case of ZNPF V. Chirwa (1986) ZR 70 that it is injustice when an employee is not dismissed after it was alleged he/she committed the offence. This contention would hold water if the disciplinary proceedings were concluded, but were not, hence, it has no basis for the converse to apply, as argued. That being so, there is no reason why I should damn the Defendant by ordering it to pay the Plaintiff damages...**
>
> **Since the disciplinary proceedings remained inconclusive which would show the way forward, it is difficult for the Defendant to decide either way. That is why the Defendant wrote the Plaintiff the letter at page 20 of the Defendant's bundle asking him to renew the contract for a period of three months, mainly to enable disciplinary proceedings conclude. Unfortunately, that request fell against the granite wall. Therefore, I hold that withheld half salary is not payable, as it is in conflict with clause 6.6 at page 40 of the Defendant's bundle.**
>
> **I agree with the contention that the Plaintiff was not obliged to work during the suspension period. However, the Plaintiff's learned Counsel should not claim for Plaintiff's payment of gratuity, because the Selwyn's Law of Employment which he leans on says that if any employee is**

absent from work because he is suspended, there is no obligation for him to return to work until the suspension is lifted. In the case matter, the suspension was not lifted, hence the Plaintiff was not obliged to return to work. That having being the position, he continued receiving half salary till the contract petered out on 30/06/2009. This scuppers the Defendant from paying the Plaintiff full gratuity, but prorated gratuity. In my view, the Defendant is holding the right end of the stick and I agree with it that the Plaintiff be paid gratuity on pro rata basis, since the Plaintiff never rendered services to the Plaintiff for the whole contractual period of three years, but for part of that period.

As for damages for mental stress, frustration and annoyance, I have no quarrel finding for the Plaintiff who stressed how frustrated he felt under the supervision of Mr Mulomba till the World Bank Representative intervened for him. I thus subject the assessment of these damages to the learned Registrar.

Consequently, I enter Judgment for Plaintiff to be paid gratuity on pro rata basis, damages for mental stress, frustration and annoyance the assessment of which will be done by the learned Registrar. All these will attract interest from the date the action was commenced till payment is effected.

Costs follow the event which in default of agreement, may be taxed."

After delivering the above Judgment, Counsel for the Appellant made an application to Court for clarification of the order as to costs. He stated that the Respondent's Counsel had written demanding for costs. He contended that neither party succeeded entirely in the matter.

In his Ruling, the learned trial Judge stated the following:

"on the basis of these observations, I regarded the Plaintiff a successful party, then."

The Appellant now appeals against the Judgment. There are two grounds of appeal and these are-

Ground one:

That the learned trial Judge misdirected himself in law and fact when he awarded damages for mental stress, frustration and annoyance on the basis that; "the Plaintiff who stressed how frustrated he felt under the supervision of Mr Mulomba, till the World Bank Representative intervened for him."

Ground two:

The learned trial Judge misdirected himself in law and fact when he awarded the costs in the Court below to the Respondent, considering that the Respondent in the Court below only succeeded on one ground.

The Responded cross appealed on the following grounds:

Ground one:

The trial Judge misdirected himself in law and in fact when he held that the Appellant was not entitled to full gratuity for the whole contractual period of three years.

Ground two:

The learned trial Judge misdirected himself in law and in fact when he held that the withheld half salary was not payable upon expiry of contract.

Ground three:

The learned Judge misdirected himself in law and in fact when he held that the half salary was not payable upon expiry of contract.

Before the appeal was heard, counsel for the Respondent raised a preliminary point of law. The preliminary point of law was whether the Appellant had properly brought ground two of

its appeal before this court without leave of the court. He argued that **section 24(1) (d) of the Supreme Court Act, Cap 25 of the laws of Zambia** requires that leave is obtained from court before appealing on costs. He relied on the case of **Mandona V. Zambia National Commercial Bank Plc** [(1)] to support his argument.

On behalf of the Appellant, counsel argued that this appeal is properly before this court in that the learned trial Judge in his Judgment on page 31 off the Record of appeal granted leave to appeal.

We have looked at the evidence on record and considered the submissions by both parties on this preliminary point. Section 24(1)(d) of the Supreme Court Act provides that-

> **"(1) No appeal shall lie-**
>
> **(d) from an order of the High Court or any Judge thereof made with the consent of the parties or from an order as to costs only which by law is left to the discretion of the court without the leave of the court or of the Judge who made the order or, if that has been refused, without the leave of a Judge of the Court..."**

From the above, it is clear that the restriction in the above provision applies when an appellant's only ground of appeal relates to costs. In the case before us, the appeal relates to costs and damages. Therefore, we are of the view that this appeal is properly before us. Further, the record of appeal shows, at page 31 that leave to appeal was granted by this court. We note that

there was a Ruling made by the trial Judge to 'clarify' on the aspect of costs. However, this Ruling was not a departure from the Judgment. It was to clarify the issue of costs which was already dealt with in the Judgment. Therefore, we hold that section 24 above, does not apply in this case and that despite that fact, the learned trial Judge granted leave to appeal.

We therefore dismiss the preliminary point of law.

We shall deal with the appeal first before we go to the cross appeal.

When the matter came up for hearing, Counsel for the Appellant relied on their heads of argument filed into Court. There was no appearance on behalf of the Respondent.

In ground one of the Appeal, counsel for the Appellant submitted that this is not a proper case for awarding damages to the Respondent as the Court below never faulted the Appellant either in tort or contract. He argued that damages are intended to be a recompense for a breach or wrongful act. In support of his submission, he referred to **paragraph 1-001** of the **18th Edition** of **McGregor on Damages**, which reads as follows:-

> **"Damages in the vast majority of cases are pecuniary compensation, obtained by success in action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a sum awarded at one time unconditionally..."**

Counsel added that the award of damages in this case, cannot be sustained in law as it purports to unjustly enrich the Respondent, by putting him in a financially better position notwithstanding that no injury was occasioned to him. Counsel cited the case of **Zambia National Building Society V. Nayunda** [2], to support his argument.

He stated that after holding that the suspension of the Respondent was not null and void, the Court below declined to order damages against the Appellant. Counsel submitted that the Court below also declined to award the Respondent the withheld half salary while on suspension. He argued that this was in line with the principle in the case of **Waterwells Limited V. Wilson Jackson** [3] which held that a party should not benefit from that party's own default. Counsel submitted that the Court below held that the Respondent should not be paid his full gratuity but on a pro rata basis. However, when awarding damages, the Court stated that it had no quarrel finding for the Respondent, who stressed how frustrated he felt under the supervision of Mr Mulomba, till the World Bank Representative intervened for him.

Counsel contended that the basis for the award of damages was not elucidated. He added that in this case, there was no reason to award damages for mental distress because there was no finding that the Appellant had breached the contract of employment with the Respondent.

On behalf of the Respondent, it was submitted that there was no contravention or opposition of the evidence that was adduced before the trial Court, as to the amount of mental stress, frustration and annoyance that the Respondent was subjected to by the Appellant. Counsel stated that the evidence on page 369, lines 12-19 of the record of appeal is clear testimony that the Respondent had gone through some mental torture in this whole episode. He added that what is even more compelling is the fact that the Appellant breached its own terms of employment.

Counsel contended that the Appellant breached the contract of employment when it took 2 years to investigate the matter concerning the Respondent instead of the maximum 60 days provided in the Appellant's Disciplinary Code. He added that the Appellant also breached the contract of employment when it refused to pay the Respondent his pro rata dues, until after the Court pronounced that this should be done.

Counsel added that the insistence by the Appellant that they will pay gratuity only up to the date of suspension and not based on the received salary, is another breach of the contract. Counsel conceded that though the avenue taken by the trial Judge to arrive at a conclusion that damages were payable is different, the net effect is that the Respondent was put to great embarrassment, ridicule, stress and annoyance and that on the authority of **Attorney-General V. D.G Mpundu**[4], the Respondent was entitled to the claim for damages.

We have looked at the evidence on record and considered the submissions filed by both parties on this ground. The lower court, in its Judgment on this issue stated the following:

> **"as for damages for mental stress, frustration and annoyance, I have no quarrel finding for the Plaintiff who stressed how frustrated he felt under the supervision of Mr Mulomba till the World Bank representative intervened for him. I thus subject the assessment of these damages to the learned Registrar."**

Further, the learned trial Judge stated the following, at page 28 of the Record:

> **"as the Plaintiff was suspended under this clause, he impugns the said suspension when it exceeded 60 working days, since his learned Counsel contends it breaches clause 3.2.6 which is at page 32 of the said Defendants bundle. The latter clause reads....incidentally, this clause relates to investigations and not suspension. I thus reject the contention that the suspension was null and void as there is no evidence to support..."**

From the above, it is clear that the learned trial Judge found as a fact that the suspension of the Respondent by the Appellant was lawful. Further, it is clear that that the reason given by the trial Judge for awarding damages for mental stress and frustration was due to the fact that the Respondent was frustrated under the supervision of Mr. Mulomba.

We wish to state that damages for mental stress are awarded in tort and in breach of contract: **See: <u>Attorney-General V. D.G Mphundu</u>**, cited above. In the case before us, the lower court stated that the suspension of the Respondent was

lawful. This means that the Appellant did not breach the contract by suspending the Respondent. The Respondent argued that the failure by the Appellant to complete the investigations within 60 days was a breach of the contract. We do not accept this contention. This is because the 60 days does not relate to lifting the suspension; but to completion of the investigations. In any case, it is clear from the record that there were good reasons for going beyond the 60 days. The Appellant had to bring in foreign expertise in forensic auditing, to conduct the investigations, as they were too complex. We are of the view that the type of investigation envisaged by the Appellant's Disciplinary Code was not as complex as the one involving the Appellant.

In any case, even assuming that there was a breach of contract by the Appellant, there is no evidence that the Respondent suffered mental stress, frustration and annoyance as a result of the breach. The frustration and annoyance referred to in this case relates to his supervisor, a Mr. Mulomba. It is clear that the frustration suffered at the hands of Mr. Mulomba was before the Appellant was suspended. This is not the type of frustration envisaged by the Mpundu case referred to above. The Mpundu case envisages mental stress, frustration and annoyance suffered as a result of the breach of contract or a tort. Counsel for the Respondent also argued that the Appellant breached the contract, when it refused to pay the Respondent his pro rata dues until after the Court pronounced that this should be done. He added that the insistence by the Appellant that they

will pay gratuity only up to the date of suspension and not based on the received salary is another breach of the contract.

It is clear from the evidence on record that the first action under cause number 2008/HP/1301, was commenced on the 12th of December, 2008. This was way before the contract came to an end. Further, the testimony of DW1, Director, Human Resource of the Appellant, shows that the Appellant were of the view that the Respondent should be paid gratuity on a pro rata basis. However, the Appellant could not pay the gratuity due to the fact that the Respondent had challenged his suspension. The Respondent had already brought an action in court and hence, the only prudent thing to do was to wait for the Court's decision. We, therefore, do not see how the Appellant breached the contract by not paying the Respondent the pro-rated gratuity when there was pending litigation.

Counsel for the Respondent argued that the gratuity should be paid up to the date the contract came to an end and not up to the date of the suspension. We reject this argument. This is because a person cannot be paid for work they did not do. The Respondent's contract of service under clause 2.5 stated as follows:

> **"at the end of the contract, the employee shall be paid a gratuity equal to 25% of his total basic salary received during the contract period. Should the contract end before the agreed period, gratuity shall be paid on pro rata basis."**

In the case of **Tasomo V. Credit Organisation of Zambia** [5], Doyle CJ, quoting in the case of **Wallwork V. Fielding** [6] stated the following:

> **"Those learned judges, as it seems to me, treat it as indisputable that if there is a power of suspension, the whole contract is suspended; the obligations on both sides are suspended. It seems to me that that is the inevitable meaning of suspension, and there was here express statutory power to suspend the man from duty; that, in my opinion, means to suspend him from duty, and from payment for his duty. It suspends the contract with regard to the performance of it by both sides, and not by one only. I think, therefore, that that point also fails, and that the appeal should be dismissed with costs...**
>
> **It is said that the power to suspend does not involve the power to abstain from paying. That argument is, in my opinion, unfounded, and for this reason. The relations are those of employer and employed. If the employed is suspended from his functions as an employed person, it seems to me that the effect is to suspend the relation of employer and employed for the time being, to excuse the employed person from performing his part of the contract, and at the same time to relieve the employer from performing his part of the contract. It would be a most extraordinary thing if suspension (assuming that there is power to effect suspension) were to be so one-sided that the servant was to be excused from performing his part of the contract while the employer remained liable to perform his part. It seems to me that suspension suspends for the time being the contractual relation between the two parties on both sides. Therefore, suspension by the Watch Committee does involve suspension of payment by them, as well as suspension of the performance of the duty by the police constable. I think that the appeal must fail."**

Doyle, C.J., went on to hold that-

> **"I would adopt the reasoning in this case and hold to the same effect. The fact that the employer here did continue to pay the plaintiff at half rate did not alter the legal position.**

The employer may have been following the Government practice in accordance with regulations binding the Government, but these regulations were not part of the conditions of service of the plaintiff. In law the payment was not due and was merely ex gratia. This ex gratia payment of half pay could not impose an obligation upon the employer to pay the full salary. I hold, therefore, that no sum was due to the plaintiff in respect of arrears for this period of suspension."

From the above authority, it is clear that the Respondent's contract of employment with the Appellant was suspended at the time the Respondent was suspended. The Respondent was not entitled to the half salary that he was given. It was given to him *ex gratia.* The suspension of the Appellant meant that all the obligations of the Appellant to the Respondent were also suspended. Therefore, the Respondent was not entitled to be paid gratuity for the period the contract was suspended. The Respondent did not successfully complete his contract with the Appellant. The contract was suspended half way. In any event, Clause 2.5 in the Respondent's contract of employment with the Appellant provides for payment of gratuity on a *pro rata* basis.

This ground of appeal is, therefore, allowed.

In ground two, Counsel for the Appellant submitted that while it is settled that costs are in the discretion of the court, the discretion to award costs should be exercised judiciously. He argued that the court below failed to take into account the fact that the Respondent was successful in only one ground.

He added that this Court has always taken into account the net result, when exercising its discretion with regard to costs. He cited the cases of **Millitis V. Chiwala**[7], **Zambia National Wholesale and Marketing Co. LTD V. Zambia Sugar Company LTD**[8] and the **Attorney-General V. Mooka Mubiana,** [9] to support his argument. He concluded by saying that the lower court erred in the exercise of its discretion in awarding costs to the Respondent, taking into account the circumstances of this case.

On behalf of the Respondent, counsel submitted that costs are in the discretion of the court. He argued that the courts have held in certain circumstances that even were the Plaintiff is partially to blame, he is usually awarded the whole of his costs. He cited the case of **Central Refrigeration Co. Ltd V. Attorney-General** [10] to support his argument.

He argued that the discretion to deprive a successful party of his costs must be exercised judicially, on grounds which are explicable or evident and which disclose something blameworthy in the conduct of the case. He cited the case of **Georgina Mutale (T/A G.M Manufacturers Ltd) V. Zambia National Building Society**[11] to support his argument.

He submitted that the trial Judge, in his Ruling on the clarification of his Judgment in relation to costs gave the grounds for awarding costs to Respondent. He added that in the case of

Attorney-General V. Valentine Musakanya[12], the Court granted costs to the Respondent, despite him succeeding on only one ground out of the five that he took to court.

We have looked at the evidence on record and considered the submissions filed by both parties on this ground. **Order 40 rule 6 of the Rules of the High Court, Cap 27 of the laws of Zambia** provides as follows:

> **"The cost of every suit or matter and of each particular proceeding therein shall be in the discretion of the Court or a Judge; and the Court or a Judge shall have full power to award and apportion costs, in any manner it or he may deem just, and, in the absence of any express direction by the Court or a Judge, costs shall abide the event of the suit or proceeding.**
>
> **Provided that the Court shall not order the successful party in a suit to pay to the unsuccessful party the costs of the whole suit; although the Court may order the successful party, notwithstanding his success in the suit, to pay the costs of any particular proceeding therein."**

From the above, it is clear that costs are in the discretion of the Court. It is also clear that the Court considers the net result of a matter before making an order as to costs. Discretion is supposed to be exercised judiciously. It must be exercised fairly and justly, with reasons for departing from the rule that costs shall abide by the outcome of the suit. Therefore, there should be circumstances that should exist before a court can depart from this. In the case before us, the Respondent was granted costs. The Respondent sued for the payment of his full gratuity. He did not succeed in this suit because the Court granted him

gratuity on a pro rata basis. We have already stated in ground one of the appeal that the payment of gratuity on a pro rata basis was not in dispute. The Respondent also wanted the court to declare his suspension null and void. He did not succeed. The court found that the Appellant was justified in suspending the Respondent. In short, there was no wrong doing on the part of the Appellant. The Respondent only succeeded in his claim for damages. Otherwise, the net result was that neither party was entirely successful. We do not find any circumstances that justify condemning the Appellant to costs, when there was no wrong doing on its part. The Respondent was not the successful party in the court below. This would not be just. The Respondent's counsel relied on a number of authorities to argue that the court was justified to award costs to the Respondent. One of the authorities was the **Valentine Musakanya** case. The Respondent in that case applied for habeas corpus on five grounds but succeeded on one. He was awarded costs. The **Musakanya** case is different from the case before us in that the Respondent in the **Musakanya** case, the net result was that the Respondent was successful in his application for habeas corpus.

In the case **Georgina Mutale** cited by the Respondent, it was held that-

> **"the discretion to deprive a successful party of his costs must be exercised judicially, on grounds which are explicable or evident and which disclose something blameworthy in the conduct of the case."**

We have already stated that the net result of this case in the lower Court was that neither party was entirely successful. Therefore, **the Georgina Mutale case** does not apply in our case.

For the reasons we have given above, we allow this ground.

We now come to the Respondent's cross appeal. For convenience, we shall deal with all the grounds of cross appeal at the same time.

In ground one and two of the cross appeal, the Respondent argued that the Respondent's contract of employment came to an end on the 30th of June, 2009, by effluxion of time. He submitted that the Respondent was entitled to his full gratuity because he was not found guilty of any offence by the Disciplinary Committee. He submitted that since there was no verdict arrived at, the presumption of innocence should invoked.

Counsel submitted that gratuity is based on receivables and not on performance. He added that in the worst case scenario, the pro-rata gratuity should have been up to the date of termination of the contract, as he had continued to receive his salary. He added that the Respondent should be paid gratuity up to the 30th of June, 2009. He stated that this is because the Appellant's internal administration could not come up with a decision within the allowed period of 60 days.

In ground three of the cross appeal, the Respondent argued that the trial court erred when it held that the half salary was not payable upon expiry of contract. He stated that this is because the Respondent was never found guilty of any charge. He submitted that this is because the status quo of the innocence of the Respondent is still intact. He added that the court fell into error in not upholding the presumption of innocence of the Respondent, as the Respondent's position was not altered on the 30th June, 2009.

On behalf of the Appellant, it was argued that clause 2.5 of the contract of employment implies that the Respondent would only be entitled to full gratuity upon successful completion of the contract and that should he fail to successfully complete the contract, then he would be entitled to gratuity on a pro rata basis.

Counsel contended that when the Respondent was suspended, his employment was equally suspended, and as such, he did not successfully complete the contract; and hence not entitled to full gratuity. He relied on **Tasomo V. The Credit Organisation of Zambia**, cited above, to support his argument. He argued that clause 6.6 of the Appellant's Disciplinary Code is clear as to when a person, who has been on suspension, is entitled to the withheld half salary. He stated that the withheld half pay is only payable once a person is found with no case to answer. Counsel contended that gratuity is based on the successful completion of the contract and not for the period when

the contract was suspended. He added that the question for the basis for gratuity cannot be separated from performance of the whole contract or any part thereof. Counsel submitted that the Respondent wilfully refused to facilitate the completion of the disciplinary proceedings, which would have determined, whether or not, the Respondent had a case to answer. That the Respondent's wilful refusal to facilitate the conclusion of the disciplinary proceedings, should not be used to the Respondent's benefit.

We have looked at the evidence on record on the cross appeal and considered the submissions by both parties. The Respondent's counsel argued that the Respondent remains innocent as he was not found with a case to answer and hence, entitled to full gratuity. We have partly addressed the issues raised in this cross appeal under Ground one. We add that the evidence on record shows that the Respondent was invited for a disciplinary hearing but he did not go. He was further offered an extension of his contract of employment to facilitate the conclusion of the disciplinary process but he refused it. Therefore, the Respondent wilfully frustrated the disciplinary proceedings. The forensic audit of the APEX Department, which was under the control of the Respondent, took long to finish. This was not without reason. The reason was that the investigations were complex such that the Appellant had to bring in a foreign firm to conduct the forensic audit. The Appellant cannot therefore be blamed for this.

The Respondent's counsel also argued that since no verdict was arrived at by the disciplinary committee, the presumption of innocence should be invoked. **Article 18 of the Constitution of Zambia Act, Cap 1** of the Laws of Zambia provides that-

> **"(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.**
>
> **(2) Every person who is charged with a criminal offence-**
>
> **(a) shall be presumed to be innocent until he is proved or has pleaded guilty.."**

It is clear that the invitation for this court to invoke the presumption of innocence in this case is misplaced. The presumption of innocence applies where a person is charged with a criminal offence. This is not to state that the Respondent was guilty of the offence. The Appellant had the right to suspend the Respondent. It is to say that this court cannot grant him judgment simply because he was not heard and therefore not found guilty. The invitation to appear before a disciplinary committee was extended but the Respondent refused to appear. He cannot, therefore, use the fact that no hearing was held to obtain a favourable Judgment, a process he frustrated.

On the aspect of payment of the full gratuity, we have already stated in ground one of the appeal that the Respondent is not entitled to the payment of the full gratuity because he did not complete the contract successfully.

Therefore, we find no merit in the cross appeal and we dismiss it.

All in all, we find merit in the appeal and allow it. the Respondent is only entitled to gratuity on a pro rata basis.

We order that each party bears its own costs, both here and in the court below.

....
L. P. CHIBESAKUNDA
ACTING CHIEF JUSTICE

....
I.C. MAMBILIMA
DEPUTY CHIEF JUSTICE

....
M.S. MWANAMWAMBWA
SUPREME COURT JUDGE