IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. 54/2008**

HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

ZAMBIA NATIONAL COMMERCIAL BANK PLC **APPLICANT**

AND

JOSEPH KANGWA **RESPONDENT**

CORAM: Mambilima C.J, Phiri and Hamaundu, JJS
on 7th May, 20015 and 22nd August, 2016

For the Applicant : Mr F. Mudenda, Messrs Chonta Musaila and Pindani Advocates
For the Respondent: Mr G.D. Chibangula, Messrs G.D.C Chambers

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to

1. **D.P.P v Bwalya Ng'andu & Ors [1975] ZR** 253
2. **Attorney General V Achiume [1983] ZR 1**
3. **ZCCM Limited v Matale [1995 -97] ZR 144**
4. **Atlas Copco (Z) Limited v Andrew Mambwe, Appeal /no. 137/2001**
5. **James Zulu & 3 others v Chilanga Cement, Appeal No. 12 of 2007**
6. **Contract Haulage Limited v Mumbuwa Kamayoyo [1982] ZR 13**
7. **Council of Civil Service v Minister of Civil Service [1985] A.C. 374**
8. **Zambia China Mulungushi Textiles (Joint venture Limited V Gabriel Mwami [2004] ZR 244.**
9. **Attorney-General v Peter Mvaka Ndhlovu [1986] ZR 12**
10. **Kapembwa v Maimbolwa and Attorney-General [1981] ZR 127**
11. **Banda v Chief Immigration officer [1993/1994] ZR 80**
12. **Kenmuir v Hattingh [1974] ZR 162**
13. **Attorney-General v D.G. Mpundu [1984] ZR 6**
14. **Kafue District Council v James Chipulu [1995/1997] ZR 190**
15. **Zambia Airways Corporation v Gershom B.B. Mubanga[1990/1992] ZR 149**
16. **Chilanga Cement Plc v Kasote Gingogo [2009] ZR 122**

17. Jonathan Musialela Ng'uleka v Furniture Holding Limited [2008] ZR 19
18. Swarp Spinning Mills Plc v Chileshe & Ors [2002] ZR 23

Legislation referred to:
Industrial Relations court Rules, Cap 269 of the Laws of Zambia, Rule 44

This is an appeal against the judgment of the Industrial Relations Court which ordered that the respondent be deemed to have been confirmed as Executive Director and retired in that capacity.

The undisputed facts that emerged from the documents produced in the court below were these:

The respondent was at all material times employed by the appellant. On the 24th November, 1997, the appellant appointed the respondent to act as Director, Accounting and Finance for administrative expediency. For that appointment the respondent was paid 10% of his basic salary as acting allowance. On the 5th August, 1999, the appellant promoted the respondent, substantively, to the position of General Manager, Treasury. This substantive position was still below the position of Director to which he had been appointed to act. On the 4th October, 1999 the appellant was placed on a fixed term contract and, therefore, ceased to be on permanent and pensionable conditions of service. The

contract was for a term of three years. On the 28th January, 2000, the appellant added to the respondent the responsibilities of General Manager-Accounting and Finance. This was due to the hospitalization of the office holder. The respondent was paid 10% of his basic salary as responsibility allowance.

On the 5th February, 2001, the appellant appointed the respondent to act as Executive Director – Finance and controls Division, for administrative convenience. This position was a combination of the Accounting and Finance Department, in which the respondent had previously acted as Director, and the Directorate of Compliance and Controls. The respondent was paid 20% of his monthly salary as acting allowance. On 20th April, 2001, the appellant, by way of letter, commended the respondent for accepting the added responsibilities without flinching and awarded him a salary increase.

On the 23rd November, 2001, the respondent wrote to the appellant, pointing out that he had been acting in the position of Director for almost four years, except for a brief period. He observed that his continued acting as Executive Director was saving the appellant a gross total of K15,550,000(old currency) per month. He

complained that his correct emoluments were not equitable or compatible with his workload. Accordingly, he requested that his emoluments be reviewed.

On the 25th May, 2002, the appellant wrote to the respondent, expressing its appreciation for the commendable manner in which the respondent had discharged his duties in his acting capacity. The appellant pointed out that its divestiture programme had entailed the suspension of the recruitment process for a substantive holder of the office in which the respondent was acting. The appellant stated that, for that reason, it was extending the respondent's acting appointment and that in view of the respondent's other responsibilities it had reviewed substantively his basic salary. With this review, the appellant stopped paying to the respondent acting and responsibility allowances.

On 4th August, 2002, the respondent's contract came to an end. It was immediately replaced by another one of six month's duration, and which was scheduled to end on 31st January, 2003. The renewed contract was still in the respondent's substantive capacity. The appellant, again, immediately, appointed the

respondent to act as Executive Director of Finance and Controls. He was again paid an acting allowance of 10%.

On 8th November, 2002, the appellant's Managing Director issued a circular to all members of staff, announcing the retirement of three Executive Directors; this included the respondent. The respondent however was reflected as acting in that position. On the same day, the Chairman of the appellant's Board of Directors informed the respondent that the Board of Directors had terminated his contract of employment.

On the 12th November, 2002, the respondent wrote back to the appellant, complaining that ever since he had been appointed to the substantive position of Head-Treasury in 2001, he had always been acting in the position of Executive Director and had never set foot in the office of his substantive position. He complained that his services were terminated in line with the appellant's termination of contracts of Executive Directors without any consideration that he could be reverted to his substantive position. He charged that the substantive appointment had just been the appellant's excuse to avoid paying the respondent the requisite emoluments. He, therefore, claimed an underpayment of his emoluments; roughly

estimated at K132 million. The appellant, however, paid the respondent a sum of K52,395,625.27 as his terminal benefits. The respondent acknowledged receipt of that amount but wrote that this was subject to the demand in his letter of the 12th November, 2002.

The respondent then filed a complaint in the Industrial Relations Court, based on unlawful dismissal in his substantive position and discrimination based on his social status. The reliefs he sought were; damages, reinstatement into his substantive position, payment of arrears of salary and other benefits, and payment of terminal salaries and benefits in the position of Executive Director.

The respondent's affidavit in support revealed pretty much what we have outlined above, save that he contended that he was discriminated against because some of the confirmed Executive Directors were not better qualified than he was and that, infact, other heads of department had their contracts renewed for a further period of two years.

The appellant's answer and affidavit in support, similarly, did not reveal any fact outside what we have outlined above, save that

the appellant emphasized that the acting appointment was for administrative convenience.

At the hearing, the respondent's testimony was that the position of the appellant bank was that if one acted for administrative convenience, the period of acting was limited to only six months. He said that in his case, however, he had acted for years. He further said that since he was merely acting in the position of Executive Director he should not have been retired together with the other Directors but should have, instead, been reverted to his substantive position.

The appellant's testimony was that the respondent was never appointed to act as Executive Director with a view to confirmation. It was the appellant's testimony that in the conditions of service which governed the respondent's employment, there was no limit as to how long one could act for administrative convenience. The appellant said that if the respondent was appointed to act as Executive Director with a view to confirmation, the letter of appointment would have expressly said so.

The trial court found that the facts were not in dispute. The trial court noted that the respondent had proved that he had been a

diligent employee who was relied on by the appellant. The court observed that the respondent was often asked to act in a higher position for long periods of time and, in some instances, was also given extra duties over and above the ones that he was employed to perform. The court went on to find that the intention of the respondent was to retire Executive Directors. According to the court below, if that was not the respondent's intention then a separate letter would have been written to the respondent terminating his contract or reverting him to his substantive position. In the trial court's view, the appellant mishandled the respondent's termination.

The court found for the respondent but said that, since he was in employment elsewhere, the court could not reinstate him to his substantive position. Instead, the court ordered that he be deemed to have been confirmed as Executive Director and that his terminal benefits be paid accordingly. The court also awarded the respondent compensation amounting to six months' salary in the position of Executive Director. Hence this appeal.

The appellant's appeal is on four grounds.

The first ground is that the court below erred in both law and fact when it held that the appellant wrongfully terminated the respondent's contract of employment as Executive Director and that it treated him unfairly by so doing.

The second ground is that the court below erred both in law and fact when it held that the respondent be deemed to have been confirmed as Executive Director and that he be paid terminal benefits according to that position, in line with other Executive Directors who had been retired on the same day and in the same termination notice.

The third ground is that the court below erred both in law and fact when it held that the respondent be awarded compensation amounting to six months' salary of an Executive Director.

The fourth ground is that the court below erred in law and fact when it held that the respondent should be awarded interest.

The parties filed heads of argument which their respective counsel augmented at the hearing.

Mr Mudenda, learned counsel for the appellant argued the first two grounds together. The arguments under these two grounds

were anchored on the following passage from the trial court's judgment;

> **"The court finds for the complainant. Firstly, the court found that the respondent Bank mishandled the complainant's termination. The court took note that there was a contract in place which contract could be terminated in accordance with the relevant contractual provisions as agreed by both parties. However, it was the intention of the author that the persons being retired were in fact Executive Directors. If this was not the position, a separate letter should have been written to the complainant terminating his contract or reverting him to his substantive position. There was nothing wrong with the termination except that the respondent Bank made such a mess of it. There is an obligation on the part of the respondent to not only be fair but be seen to be fair".**

Learned counsel took issue with the trial court for imputing an intention on the part of the appellant to retire the respondent as an Executive Director merely on the ground that according to the trial court, if that were not so, then a separate letter should have been written to the respondent, terminating his contract or reverting him to his substantive position. Counsel argued that, by that reasoning,

the trial court infact contradicted itself because it had earlier found that the appellant's Board Chairman had written to the respondent, informing him that his contract of employment had been terminated. Counsel argued that since the appellant had written to the respondent to terminate his contract of employment, then the trial court's reasoning had collapsed and that therefore there was no basis or foundation upon which the respondent could be deemed to have been confirmed as Executive Director and paid terminal benefits according to that position in line with the other Directors.

Learned counsel also attacked the trial court's view that the appellant **"made such a mess"** of the termination. Counsel pointed out that the respondent had admitted during trial that the letter of termination of employment written by the appellant Bank's chairman was in accordance with the terms of his contract. Counsel pointed out that the respondent admitted that he was paid three month's salary in lieu of notice. Counsel argued that in view of that evidence it was difficult to see how the appellant had **"made a mess"** of the termination. Therefore, in learned counsel's view, the trial court misapprehended the facts before it and came to a conclusion which was not supported by the evidence on record.

Counsel referred us to the case of **D.P.P v Bwalya Ng'andu & Ors**[1] and **Attorney General V Achiume**[2] as the basis for that submission. In conclusion on these two grounds, Counsel submitted that, in the appellant's view, the respondent's employment was properly terminated by giving three month's salary in lieu of notice. Counsel cited the case of **ZCCM Limited v Matale**[3] to lend support to the appellant's argument.

In the third ground, the appellant attacked the court for awarding the respondent compensation amounting to six month's salary of an Executive Director. The gist of the argument was that the compensation ordered was on the strength of the perverse findings and that with the success of the first two grounds, the compensation falls away and, therefore, the third ground succeeds. Counsel went on to argue that, even assuming that there had been wrongful termination of employment, it was wrong in principle to award six month's salary as compensation for a six months contract which had already been exhausted by four months.

In the fourth ground, the appellant attacked the trial court for awarding interest on the compensation at the bank lending rate from the date of complaint to the date of judgment. Learned counsel

argued, first, that the **Industrial and Labour Relations Act** makes such provision on court judgments. However, counsel relied on pronouncements we made in two cases emanating from the Industrial Relations Court, namely; **Atlas Copco (Z) Limited v Andrew Mambwe**[4], and **James Zulu & 3 others v Chilanga Cement**[5]. In the case of **Atlas Copco (Z) Ltd v Andrew Mambwe**, in particular we said;

> **"We have repeatedly said that interest up to date of judgment should be at the average short term deposit rate and after judgment at the average lending rate as determined by the Bank of Zambia".**

On the strength of that pronouncement, counsel argued that the trial court was wrong to order interest at bank lending rate from the date of complaint to the date of judgment.

With those submissions we were urged to allow this appeal.

In response to the appellant's submissions in the first and second grounds of appeal, counsel for the respondent pointed to clause 19 of the contract of employment which states;

> **"the contract shall be terminated in event of gross misconduct or poor performance"**

and argued that the respondent had never been found guilty of misconduct or under performance. Instead there was commendation from the Managing Director for the respondent's commitment to duty. Counsel argued that the respondent's contract of employment could only be terminated on grounds of gross misconduct and poor performance and that, therefore, the appellant's failure to do so was fatal. To buttress that argument, learned counsel referred us to three cases, namely;

(i) **Contract Haulage Limited v Mumbuwa Kamayoyo**[6]

(ii) **Council of Civil Service v Minister of Civil Service**[7]

(iii) **Zambia China Mulungushi Textiles (Joint venture Limited V Gabriel Mwami**[8]**.**

From the Mumbuwa Kamayoyo case, counsel relied on the second holding which states;

> **"where there is a statute which specifically provides that an employee may only be dismissed if certain proceedings are carried out, then an improper dismissal is ultra vires: and where there is some statutory authority for a certain procedure relating to dismissal a failure to give an employee an opportunity to answer charges against him or any other unfairness is contrary to natural justice and a dismissal in those circumstances is null and void"**

From the case of **Council of Civil Service v Minister of Civil Service**[7], counsel quoted the holding which states;

> **"whenever a decision to be taken takes away the rights or benefits of an individual... then procedural fairness is required"**

From the case of **Zambia China Mulungushi Textiles (Joint Venture) Limited v Gabriel Mwami**[8] counsel placed reliance on our holding that tenets of good decision making import fairness in the way decisions are arrived at. Counsel also relied on the other holding which states:

> **"The old fashioned language of master and servant is out of place in many of the employment situations nowadays; certainly in large conglomerates or public companies. In many cases, the terms governing the employment indicate that there is a right to natural justice and a right not to be thrown out of work except on some rational grounds; some explicable basis which is reasonable in the circumstances".**

Learned counsel argued that the dismissal of the respondent as Acting Executive Director is not in dispute but that what is in contention is the dismissal of the respondent from his substantive

position as Head-Treasury and Investment Management. According to counsel, this is where, in the words of the trial court, the appellant made a mess. Counsel went on to argue that the trial court found as a fact that the appellant mishandled the respondent's termination and that an appellate court should not interfere with findings of fact made by a lower court unless it is apparent that the lower court fell in error. For that principle of law counsel referred us to a number of our decisions in the following cases;

(i) **Attorney-General v Peter Mvaka Ndhlovu**[9]

(ii) **Kapembwa v Maimbolwa and Attorney-General**[10]

(iii) **Banda v Chief Immigration officer**[11] **and**

(iv) **Kenmuir v Hattingh**[12]

Counsel argued that, in this particular case, there was no evidence to show that the trial court fell in error when it arrived at the finding of fact.

The respondent's arguments in response to the third ground were rather jumbled. However, the simple position that can be deduced from the arguments is that the respondent supports the lower court's award of six months' salary and allowances as

compensation. To expand that position, counsel for the respondent argued that, the respondent having been treated unfairly, he was entitled to substantive damages. These, according to counsel, would recompese the respondent for mental torture, stress, anguish and inconvenience. Counsel referred us to the cases of **Attorney-General v D.G. Mpundu**[13] and **Kafue District Council v James Chipulu**[14].

In both cases, we held that in the case of breach of contract of employment, damages for mental distress and inconvenience may be awarded.

Learned counsel also referred us to the case of **Zambia Airways Corporation v Gershom B.B. Mubanga**[15] and the case of **Chilanga Cement Plc v Kasote Gingogo**[16] and argued, that in cases of wrongful or unlawful dismissal, damages may be enhanced depending on the peculiar circumstances of each case. Finally on this ground, counsel referred us to the case of **Jonathan Musialela Ng'uleka v Furniture Holding Limited**[17] to support the lower court's inclusion of allowances in the award of compensation.

Responding to the fourth ground of appeal, learned counsel cited a number of cases in which we have laid down the principle to

be applied regarding the rate of interest to be awarded. These included the two cases already cited by the appellant, namely; **Atlas Copco(Z) Ltd v Andrew Mbewe** [4] and **James Zulu & 3 Ors V Chilanga Cement**[5]. Counsel, however, lay emphasis on the periods in which the interest was to be applied, namely; from the date of complaint up to the date of judgment and, thereafter, up to the date of payment. Counsel argued that that was how the court below divided the award of interest.

With those arguments, learned counsel urged us to dismiss the appeal.

The substantive part of this appeal is contained in the first two grounds thereof. The appellant's grievance with the lower court's judgment stems from the following statement therein;

> **"There was nothing wrong with the termination except that the Respondent Bank made such a mess of it".**

The reason why the lower court held that view was because it had found that the respondent's services had been terminated together with those of substantive Executive Directors when his position as Director was merely an acting one and that the

appellant did not write to the respondent to terminate his services in his substantive capacity.

We have pointed out in our outline of the undisputed facts on record that the appellant issued a circular to all its employees notifying them that certain Executive Directors, including the respondent had been retired. We have pointed out that, infact, simultaneous with the circular, the appellant's chairman wrote to the respondent, particularly addressing him in his substantive capacity and informing him that his contract of employment in that capacity had been terminated. In its findings of fact above, the lower court appears to have been oblivious to that letter. Going by the principles we have laid down in several authorities which were cited by the appellant, the lower court's findings were made on a complete misapprehension of the facts before it. Consequently that finding of fact is set aside.

Otherwise there was clear evidence before the court that the respondent was on a contract of six months in his substantive position and that that contract was terminated in accordance with the termination clause therein. Therefore, there was no **"mess"** which the appellant made of the termination.

We wish to point out that the respondent, in his arguments, had brought out the issue that the appellant terminated his substantive appointment without according him an opportunity to be heard and when he was not guilty of gross misconduct or poor performance.

As we have stated above, the respondent's contract was for six months. The contract had a clause which allowed either party to terminate it even in the absence of gross misconduct or poor performance on the part of the respondent. The appellant merely utilized that clause. Therefore, as the lower court said, there was nothing wrong with the termination.

With the success of these two grounds of appeal, the third and fourth grounds have been rendered effectively futile. However, we shall briefly state this: With respect to the third ground of appeal where the appellant takes up issue with the lower court for awarding six months' salary as damages, the measure of damages will vary in each particular case depending on the circumstances of the unlawful or wrongful dismissal. We have said in some cases that some circumstances may demand a departure from the normal measure, which is payment for the period of notice. For example in

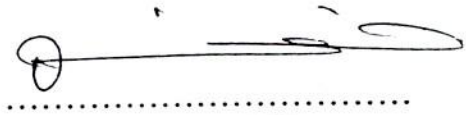
the case of **Swarp Spinning Mills Plc v Chileshe & Ors**[18], we held that the normal measures of damages is deported from where the termination may have been inflicted in a traumatic fashion which causes undue distress or mental suffering.

With regard to the fourth grounds of appeal we agree with counsel for the appellant that the lower court wrongly applied the Bank lending rate for the period starting from the filing of the complaint up to the date of judgment when we have said in a number of authorities that during that period the rate applicable should be the short term fixed deposit rate. Counsel for the respondent missed the essence of the appellant's argument when he thought that the issue was with regard to the periods themselves instead of the rates applicable to those periods.

All in all, the appeal has succeeded and is allowed. Therefore, the judgment of the court below is set aside.

With regard to costs, **Rule 44** of the **Industrial Relations Court Rules** contained in the **Industrial** and **Labour Relations Act, Chapter 269** of the **Laws of Zambia** provides that a party should only be condemned in costs if they have been guilty of misconduct in the prosecution or defence of the proceedings. We

wish to adopt the principle in that rule since this is a matter coming from the Industrial Relations Court. We do not find any misconduct in the respondent's defence of this appeal. Therefore either party will bear their own costs, both here and in the court below.



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I. C. Mambilima

CHIEF JUSTICE

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G. S. Phiri

SUPREME COURT JUDGE

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E. M. Hamaundu

SUPREME COURT JUDGE