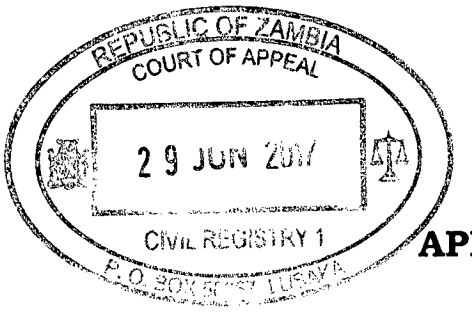
IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO. 14/2016

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

PATRICK CHIBULU **APPELLANT**

AND

ATTORNEY GENERAL **RESPONDENT**

Coram: Chisanga, JP, Mulongoti and Sichinga, JJA

On 7th and 9th March, 2017 and 29th June, 2017

For the Appellant: Mrs. L. Mushota of Mmes Mushota & Associates

For the Respondent: Mr. F. Imasiku, Principal State Advocate, Attorney General's Chambers

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J U D G M E N T

MULONGOTI, JA, *delivered the Judgment of the Court.*

Cases referred to:

1. ***Zambia National Provident Fund v. Yekweniya M. Chirwa (1986) ZR 70 (SC)***
2. ***Chilanga Cement Plc v. Kasote Singogo (2009) ZR 122 (SC)***
3. ***Swarp Spinning Mills Plc v. Sebastian Chileshe and Others (2002) ZR 23 (SC)***
4. ***Chintomfwa v. Ndola Lime (1999) ZR 172 (SC)***

5. *McCall v. Abelesz (1976) 3 ALL ER 161*
6. *Attorney General v. Mpundu (1984) ZR 6 (SC)*
7. *Miyanda v. Attorney General (1985) ZR 185 (SC)*
8. *Jonathan Musialela Nguleka v. Furniture Holdings Limited (2006) ZR 19 (SC)*
9. *Mazoka and Others v. Mwanawasa and Others (2005) ZR 138 (SC)*
10. *Mweshi Chileshe v. Zambia Consolidated Copper Mines Limited (1996) S.J (SC)*
11. *Paul Roland Harrison v. The Attorney General (1993) S.J No. 58*
12. *Zambia Privatisation Agency v. Matale (1995 -1997) ZR 157 (SC)*
13. *Ngwira v. Zambia National Insurance Brokers Limited (SCZ) Appeal No. 9 of 1994*
14. *Sitali v. Central Board of Health (SCZ) Appeal No.178 of 1999*
15. *Mumba v. Telecel (Zambia) Limited SCZ Appeal No. 156 of 2005*

Legislation referred to:

1. *Court of Appeal Rules, Statutory Instrument No. 65 of 2016*
2. *The State Proceedings Act, Chapter 71 of the Laws of Zambia*
3. *The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia*

This is an appeal by Mr. Chibulu (the appellant) from a decision of the High Court sitting at Lusaka. The High Court decided that as a result of the appellant's dismissal he was not only gravely embarrassed, but suffered mental torture as well. The Court

awarded him twelve months salary as damages with interest at average short term deposit rate from the date of writ to Judgment. Thereafter, at current Bank of Zambia lending rate until payment. The appellant was also awarded costs to be taxed in default of agreement.

It is necessary at this stage for us to say a little about the background of the case. The appellant was for many years employed by the respondent as a gemmologist with the Ministry of Mines and Mineral Development, Geology department.

On 17th May, 2010 the appellant received a letter from the respondent captioned "*alleged corrupt and fraudulent conduct*". It was alleged that he was compromised by the respondents (accused) in the case of **The People v. Ross Ernest Moore and Hassle Shamalime,** as observed by the Supreme Court, "***when examining a 'gold' sample that was brought to the Geological survey department for export analysis and valuation.***" Consequently, that the appellant classified it (the sample) as metallurgical residue when no gold was in fact presented to him. The appellant was asked to exculpate himself against charges of bribery, corruption and fraud contrary to clause 11(a) and

(c) of the Public Service Commission Disciplinary Code and Procedures.

In his lengthy exculpatory letter dated 28th May, 2010, the appellant outlined what he termed shortcomings and weaknesses of the respondent's mineral export procedure.

He also denied the allegations and stated that no gold was ever submitted to the Ministry's laboratory by the two respondents in the case before the Supreme Court. He explained that metallurgical residue samples were cleared by the Ministry's laboratory in December, 2006 whilst the 'gold' was intercepted at the airport ready to be exported on 30th January, 2007, more than a month after the papers for metallurgical residue were obtained. According to him, this was a clear indication of the respondent's weaknesses in the mineral export system.

On 24th August, 2010, the Director of Geological Survey wrote to the appellant informing him that his exculpatory letter was unsatisfactory and referred his case to the Permanent Secretary, Ministry of Mines and Mineral Development, who dismissed the appellant vide letter dated 8th July, 2011.

He sued, seeking *inter alia* a declaration that his summary dismissal is null and void for non compliance with the law, in breach of the rules of natural justice, and discriminatory. In the alternative damages for unlawful or wrongful dismissal. He also sought exemplary damages for the defendant's contumelious disregard of his rights by denying him the right to be heard in accordance with the Disciplinary Code of the Public Service Commission.

The Court received oral evidence from both parties and found as common cause that the appellant was dismissed following observations made by the Supreme Court in the *Ross Moore* case supra, to the effect that "***officers from the Geological Survey Department may have been compromised in the manner they issued a valuation certificate to the accused***" (Ross Moore and Shamalime).

The High Court further found that the charges laid against the appellant were unsubstantiated. Following the Supreme Court decision in **Zambia National Provident Fund v. Yekweniya M. Chirwa**[1] that "***Procedural rules were part of the conditions of service..... and that where it is not in dispute that an employee has committed an offence for which the appropriate action is dismissal and he is so dismissed, no injustice arises from failure to comply with the laid down***

procedure in the contract and the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity," the Court concluded that having found that the charges against the appellant were unsubstantiated, and the respondent having failed to strictly follow procedure in that the appellant was not heard at a disciplinary hearing, his dismissal was wrongful.

Most pertinently, the Court held that the measure of damages for wrongful dismissal is the notice period or payment in lieu thereof, where the conditions of service provide. That where the conditions are silent, by the giving of reasonable notice as restated by the Supreme Court in the case of **Chilanga Cement v. Kasote Singogo**[2] as follows:

> ***"Payment in lieu of notice is a proper and lawful way of terminating employment, since every contract of service is terminable by reasonable notice".***

Furthermore, that:

> ***"7. when awarding damages for loss of employment, the common law remedy for wrongful termination of a contract of employment is the period of notice. In deserving cases, the courts have awarded***

more than the common law damages as compensation for loss of employment.

"12. in a proper case, damages for loss of employment may be awarded for embarrassment and mental torture. Damages for mental distress and inconvenience would also be recovered in an action for breach of contract. However, such an award for torture or mental distress should be granted in exceptional cases."

The Court accordingly awarded "twelve months salary in damages for embarrassment and mental torture" as the dismissal was "hastily done without even calling for a disciplinary hearing or the plaintiff's attendance contrary to the Disciplinary Code. Further, the defence witness admitted that *"they were under pressure to act ...."*

It is the award of twelve months salary that the appellant is dissatisfied with, prompting him to lodge an appeal in this Court on four grounds as follows:

1. The Court below erred in law and fact for awarding twelve months pay with interest without giving due regard to the exceptional circumstances of the case.

2. The Court below erred in law and fact in not ordering the payment of perks with the twelve months pay contrary to the law and practice applicable to similarly circumstanced cases.
3. The Court below erred in law and fact when it did not make a finding that the appellant was discriminated against and make an appropriate award for discrimination.
4. The Court below erred in law and fact when it failed to award exemplary damages for the respondent's flagrant and contumelious disregard of the rules of natural justice to be accorded a hearing.

The appellant's counsel also filed a list of authorities and arguments. In arguing grounds one and two counsel contends that the Supreme Court has held that where mental torture or suffering is inflicted in termination of employment, the normal measure of damages, that is, twelve months salary and perks, is departed from.

Yet in *casu*, the twelve months salary awarded by the High Court did not even include perks. According to counsel in **Swarp Spinning Mills Plc v. Sebastian Chileshe and Others**[3], the High Court assessed damages equivalent to two years salary and perks after

taking into account scarcity of jobs and the manner of termination which was inflicted in a traumatic fashion. Also cited is the case of **Chintomfwa v. Ndola Lime**[4] where two years salary plus perks were awarded after the Court considered that job opportunities were then almost nil.

Accordingly, the appellant's position as senior gemmologist being scarce and specific to the mines, the normal measure of damages should have been departed from.

It was the further submission of counsel, that in the Swarp Spinning Mills[3] case, the Supreme Court, after referring to the English case of **Mccall v. Abelesz**[5] stated that:

> ***"in this country, we too have recognized this kind of additional damages, in cases like the Attorney General v. Mpundu[6] and Miyanda v. Attorney General[7]."***

Counsel also argues, following the Supreme Court decision in **Jonathan Musialela Nguleka v. Furniture Holdings limited**[8] that:

> ***"awards have always included allowances and any other perks that the aggrieved party was entitled to at the time of termination of employment....."***

Accordingly, that the appellant be paid compensation or damages inclusive of allowances and other entitlements such as leave pay and pension contributions as he was similarly circumstanced with the employees in the cases cited.

Regarding ground three, it is counsel's argument that both the appellant and respondent argued the issue of discrimination in the High Court as shown at page 216 lines 22 to 25 and page 217 lines 1 to 2 of the record of appeal. Therefore, having argued the unpleaded claim of discrimination, the Court was bound to consider it as held in cases like **Mazoka and Others v. Mwanawasa and Others**[9]. That the Court ignored the fact of discrimination when the evidence clearly showed that only the appellant was dismissed. This fact coupled with the fact, that the rules of the disciplinary code were disregarded constituted exceptional circumstances justifying departure from the normal measure of damages.

As to ground four, it is submitted that as a result of the contumelious disregard of the rules of natural justice, exemplary damages should have been awarded. Odgers on Civil Court in Action 2nd edition, was quoted thus:

"Exemplary damages are awarded where the courts desires to mark their disapproval of the defendant's conduct towards the plaintiff, by awarding the plaintiff damages beyond the amount which would be adequate compensation for his actual loss or injury. They are allowed only where the damage has been oppressive, arbitrary or unconstitutional conduct by a government official."

Counsel contends, this was the case with the appellant and that the damage suffered is partly permanent in nature and merits exemplary damages.

The respondent's counsel filed the respondent's skeleton arguments in response to the appellant's heads of argument. In arguing ground one it is submitted that the circumstances that led to the appellant's termination were not exceptional in any way and that the award of twelve months salary as damages fell within the discretion of the Court. Furthermore, that the appellant failed to establish the exceptional circumstances. It is also argued that the appellant's case did not even warrant an award of damages for mental distress and inconvenience. That the Mpundu[6] case is distinguishable, in that Mpundu suffered mental distress and inconvenience as a result of the wrongful suspension for a prolonged period of time.

The respondent concedes to ground two that the Court below erred in fact and law in not ordering the payment of perks with the twelve months pay awarded as damages.

According to the respondent, ground three is misconceived and ought to be dismissed. Relying on the case of **Mweshi Chileshe v. Zambia Consolidated Copper Mines Limited**[10] that:

> ***"A point needs to be made – and stressed – regarding the discrimination cases: in effect, the rule against discrimination on at least one of the grounds listed in the statute was clearly intended to guard against unwarranted victimization or inexcusable unfairness. The liability of the employer and the entitlement of the employee to a judgment in his or her favour must necessarily depend on the absence of reasonable or just cause, where despite any colourable excuse cited or contractual clause cited; the real, substantial, dominant, or operative reason is the discrimination on one of the grounds. The rule could not have been designed to benefit or to protect workers who are guilty of wrong doing in fact which is sufficient to warrant the termination, penalty or disadvantage inflicted. The substantial justice which the statute calls upon the Industrial Relations Court to dispense should endure for the benefit of both sides".***

Counsel argues that a finding of the appellant having been discriminated against does not warrant an award of damages. By contrast, that the court can make an award based on discrimination which renders the dismissal either wrongful or unlawful.

Regarding ground four, it is argued that in order for an award of exemplary damages to be made, there must be aggravating conduct on the part of the respondent as held by the Supreme Court in several cases like **Paul Roland Harrison v. The Attorney General**[11]. That the appellant failed to demonstrate the conduct of the respondent which deserved further punishment beyond compensatory damages. Thus ground four lacks merits and ought to be dismissed.

The respondent then made a submission on interest which is not responding to any ground of appeal. Quoting the provisions of Order 36 Rule 8 (statute not cited) that:

> *"Where a judgment or order is for a sum of money, interest shall be paid thereon at the average of the short term deposit rate per annum prevailing from the date of the cause of action or writ as the Court or Judge may direct to the date of Judgment"*

Further, that the rate of interest payable post Judgment against the Attorney General (respondent herein) is provided under section 20 of the State Proceedings Act, Cap 71 as follows:

> *"The Minister responsible for Finance may allow and cause to be paid out of the general revenues of the Republic to any person entitled by a Judgment under this Act to any money or costs, interest thereon at a rate not exceeding six per centum from the date of the Judgment until the money or costs are paid".*

At the hearing of the appeal Mrs. Mushota, who appeared for the appellant, placed reliance on the written arguments and submitted that since there is no cross appeal, the Court should disregard the submission on interest.

Mr. Imasiku, the learned Principal State Advocate, relied on the respondent's skeleton arguments.

We have considered the arguments and submissions by counsel including the Judgment of the High Court. The cardinal issues this appeal raises are whether the twelve months salary as damages awarded by the High Court is equal to the normal measure of damages and thus inadequate due to exceptional circumstances

which also warrant an award of exemplary damages. And whether the trial Judge erred in law and fact when she did not pronounce herself on the question of discrimination of the appellant.

The appellant's counsel contends that the award of damages is inadequate in light of the exceptional circumstances and discrimination of the appellant. The respondent contends that awards of damages are in the discretion of the Court and the appellant did not demonstrate any exceptional circumstances.

We wish to state from the outset that both counsel have cited some useful authorities on the subject of damages in employment cases. In cases like **Swarp Spinning Mills Plc**[3] and **Chilanga Cement Plc**[2], the Supreme Court held that the normal measure of damages is the notice period. However, this is departed from where the termination is done in a traumatic fashion which causes undue distress and the justice of the case so demands.

In this case we note the appellant was an established civil servant whose employment was governed by the Terms and Conditions of Service for the Public Service, which it would appear, were not produced in the court below and are not part of the record of appeal.

Be that as it may, the learned trial Judge correctly observed following the decision in Chilanga Cement Plc[2] that where the conditions are silent, a contract of service may be terminated by giving reasonable notice. The Court awarded a global award of twelve months salary for embarrassment and torture as a result of the wrongful dismissal.

This award encompasses the aspect of damages for wrongful dismissal, as well as damages for embarrassment and torture. We are of the considered view that the trial Court was perfectly entitled to do so. This award is clearly above the normal measure i.e the notice period or reasonable notice.

The Court considered the circumstances of the case. She found, rightly so, that the allegations against the appellant were unsubstantiated that contrary to the Supreme Court's directive that the allegations of compromise, bribery and corruption be investigated, no investigations were carried out. The Court also noted that the disciplinary action was hastily taken, without even calling for a disciplinary hearing or the plaintiff's attendance contrary to procedure in the Disciplinary Code.

The Court took into account the exceptional circumstances hence her finding that "***the whole disciplinary process was totally mishandled, resulting no doubt, in grave embarrassment to the plaintiff....***" Furthermore that ***"the plaintiff was not only gravely embarrassed but suffered mental torture as well.....***"

We therefore, find no merit in counsel's argument in ground one. Counsel actually wrongly argued that twelve months pay is the normal measure of damages. As alluded to, the notice period is the normal measure of damages. In Swarp Spinning[3] the High Court awarded 24 months salary as damages less what had already been paid but this was reduced to six months by the Supreme Court. In reducing the award the Court stated:

> "***the reduced award we are making cannot be subject to any deduction for the simple reason that it is intended to be compensation by way of the Mpundu type of damages.....***"

As afore mentioned the twelve months salary encompassed the damages for wrongful dismissal which is the notice period and damages for torture and embarrassment which are the Mpundu type of damages.

We note from the writ of summons and statement of claim at pages 60 to 64 of the record of appeal that the appellant was seeking *inter alia "(i) a declaration that his summary dismissal is null and void for non compliance with the law in breach of the rules of natural justice, and discriminatory (ii) in the alternative damages for unlawful or wrongful dismissal"*

The court did not consider the first claim thus the judge did not declare that the dismissal was null and void and discriminatory for non compliance with the law. The court instead considered the second claim for damages for wrongful dismissal which was in the alternative.

We have no hesitation in agreeing with the approach that she took. It is settled law that claims or cases for discrimination per se are statutory based as is provided in section 108(1) of the Industrial and Labour Relations Act. The appellant did not even state the Act or Law which the respondent purportedly breached. The High Court was therefore on firm ground to consider the alternative claim.

This is in accordance with a plethora of cases like **Zambia Privatisation Agency v. Matale**[12] and **Ngwira v. Zambia National**

Insurance Brokers Limited[13] that where the employee fails to prove discrimination as set out in section 108(1) of the Industrial and Labour Relations Act, but has pleaded other grounds, the court is entitled to consider those.

Thus, though the issue of discrimination was pleaded, contrary to Mrs. Mushota's assertion, the Court did not consider it because she considered the alternative claim for damages for unlawful and wrongful dismissal for which she gave a global award. Such that it awarded for torture and embarrassment though not pleaded but because of the circumstances of the case, she felt duty bound and, correctly so, to award damages over and above the normal measure. In maintaining the twelve months pay award, we also note that the appellant is already in gainful employment with Lumwana Mine.

The trial judge was therefore, on firm ground in her award of twelve months salary as damages. She did not misdirect herself in law and fact as contended. We therefore, find that grounds one and three lack merit and are dismissed.

We note that the respondent has conceded to ground two. It is indeed settled law that terminal benefits or awards should be paid

together with allowances and perks an employee was entitled to during the course of his employment. We agree with Mrs. Mushota and the cases cited in this regard. Ground two is allowed. We order that the twelve months salary as damages awarded to the appellant be paid with allowances and perks he was entitled to. We wish to clarify that leave days and pension contributions are not allowances as argued by Mrs. Mushota. It is trite that an employee is entitled to payment of leave days, if they have any, even if they were dismissed. As for pension contributions, the appellant should claim a refund of these from the respondent's pension fund.

Turning to ground four, what we are seized with here is whether the appellant was afforded an opportunity to be heard and not whether an oral or physical hearing was conducted before his dismissal. We are mindful that the appellant wrote a lengthy exculpatory letter denying the allegations/charges and blamed it all on the shortcomings and weaknesses in the respondent's export system.

In **Sitali v. Central Board of Health**[14] the Supreme Court elucidated that:

> ***"'Hearing' for purposes of disciplinary proceedings is not confined to physical presence of an accused (employee) and giving oral evidence. In our view a submission of an exculpatory letter in disciplinary proceedings is a form of hearing. What is important is that a party must be afforded an opportunity to present his or her case or a defence either orally or in writing...."***

And also in **Mumba v. Telecel (Zambia) Limited**[15] that:

> ***"We have pronounced ourselves before on this matter and we shall say it again that the employee is given an opportunity to be heard on the charges levelled against him when he is charged and asked to exculpate himself. There is no format on what an exculpatory statement should take but it is anticipated that the employee concerned will explain fully what transpired in relation to the allegations levelled against him with a view to vitiating those allegations."***

Thus, even though the appellant was not afforded a physical hearing at which he could call witnesses, we are of the considered view that he was afforded an opportunity to be heard when he exculpated himself in writing. Therefore, we do not agree with Mrs. Mushota's arguments on this ground and the finding of the trial Judge that the appellant was not given a hearing. We therefore, find no basis for

awarding exemplary damages for contumelious disregard of the rules of natural justice and the Disciplinary Code. If anything breach of the Disciplinary Code or conditions of service where the employee is not guilty of any disciplinary offence attracts an award of damages for wrongful dismissal, which the appellant was awarded. We are fortified by the Chirwa[1] case in this regard.

Therefore, only ground two succeeds to the extent that the twelve months salary be paid with perks and allowances the appellant was entitled to during his employment.

Before we leave this appeal, we wish to address the issue of interest which has been raised by the respondent though there is no cross appeal. We opine that the High Court erred in its award of post Judgment interest against the respondent. As submitted by the Principal State Advocate section 20 of the State Proceedings Act provides for post Judgment interest against the State (Attorney General) at six per centum until the money or costs are paid.

We are therefore, duty bound to interfere with this award of interest post Judgment, even though there is no cross appeal, as the rate of

interest against the State post Judgment is provided in an Act of Parliament.

We equally find solace in the second part of Order 10 Rule 9 (3) of the Court of Appeal Rules that ***"....but the court in deciding the appeal shall not be confined to the grounds put forward by the appellant."***

Accordingly, we set aside that part of the Judgment that erroneously ordered post judgment interest at current Bank of Zambia lending rate until payment. We instead order that from date of judgment interest shall be paid on the award at six per centum until payment in accordance with the State Proceedings Act. The appeal having partially succeeded, we award costs to the appellant, to be taxed failing agreement.

F.M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

D.L.Y. SICHINGA
COURT OF APPEAL JUDGE