IN THE COURT OF APPEAL OF ZAMBIA APPEAL 112/2019

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

DANIEL MIYOBA SICHOMBO **APPELLANT**

AND

THE CITIZENS ECONOMIC EMPOWERMENT COMMISSION **RESPONDENT**

CORAM: **Chashi, Mulongoti and Lengalenga, JJA**

On 21st May, 2020 and 26th June, 2020

For the appellant: *M. Chitambala of Messrs Lukona Chambers*

For the respondent: *J.C. Kalokoni of Messrs Kalokoni Chambers*

JUDGMENT

Mulongoti, JA, *delivered the Judgment of the Court,*

cases referred to:

1. ***Zambia Revenue Authority v Kangwa Mbao & others- SCZ Appeal No. 89/2000***

2. *Atlas Copco (Zambia) Limited v Andrew Mambwe- SCZ Appeal No. 139/2001*
3. *Chilanga Cement Plc v Kasote Singogo (2009) ZR 122*
4. *Contract Haulage v Mumbuwa Kamayoyo (1985) ZR 13*
5. *Lumpa v Maamba Collieries Limited (1988-89) ZR 217*
6. *Zambia Consolidated Copper Mines v Matate (1995- 1997) ZR 144*
7. *Southern Water and Sewerage Company Limited v Sanford Mweene- SCZ Appeal No. 14/2007*
8. *Kapembwa Siwale and Kapembwa Sikazwe v The Road Development Agency -Comp. No. 99/2012*
9. *Zambia National Provident Fund v Chirwa (1986) ZR 70*
10. *National Breweries Limited v Mwenya (2002) ZR 118*
ii. *Undi Phiri v Bank of Zambia (SCZ Judgment No. 12 of 2007)*
12. *Zambia Electricity Supply Corporation Limited v David Lubasi Muyambango (2006) ZR 22*
13. *Kambatika v Zambia Electricity Supply Corporation- SCZ Appeal No. 14 of 2000 (Unreported)*
14. *Nkhata and 4 others v the Attorney General (1966) ZR 124*
15. *James Mankwa Zulu and Others v Chilanga Cement Plc-SCZ Appeal No. 12 of 2004*
16. *National Airports Corporation Limited v Reggie Zimba and Saviour Konie (2000) ZR 154*
17. *Siamutwa v Southern Province Cooperative Marketing Union Limited and Finance Bank Zambia Limited -SCZ Appeal No. 114 of 2000 (Unreported)*

1$. *Philip Mutantika & Sheal Mulyata v Kenneth Chipungu- SCZ Judgment No. 13 of 2014*

19. *Redrilza Limited v Nkazi and others (2011) ZR 394 (SC)*
20. *Zulu v Avondale Housing Project Limited (1982) ZR 172*
21. *Tolani Zulu and Musa Hamwala v Barclays Bank (2003) ZR 127*

22, *Standard Chartered Bank v Celine Nair- CAZ Appeal No. 14/2019*

Legislation referred to:

1. ***The Industrial and Labour Relations Act, cap 269 of the Laws of Zambia.***
2. ***The Employment Act, Cap 268 of the Laws of Zambia***

1.0 Introduction

1.1 The appeal assails the Judgment of the Industrial Relations Court (IRC) delivered by the Deputy Chairman, E. Mwansa (as he then was) sitting with two members, namely, Hon. H.E Phiri and Hon. F. Mwangilwa.

1.2 The IRC dismissed the appellant's case for wrongful dismissal, damages for mental stress, and torture or anguish.

2.0. Background

2.1. For perspective. The appellant, Daniel Miyoba Sichombo, was initially employed by the respondent, Citizens Economic Empowerment Commission, (CEEC), as Director- Corporate Services on a three-year fixed term contract from 1st October 2009 to 2012.

2.2. The contract was renewed for a further three-years, effective 1st October 2012. However, on 16th October, 2012 the appellant was charged with disciplinary charges and suspended from duty.

2.3. On 15th July, 2013, the respondent dropped all the charges and terminated the appellant's contract of employment by invoking the notice clause (9.0) in his contract. The appellant was accordingly paid one month's salary in lieu of notice.

2.4. Aggrieved, the appellant filed a Complaint in the IRC seeking the following reliefs:

(i) **"An order for damages for wrongful termination of the contract of employment dated 1st October 2012 and entered into between the complainant and respondent;**

(ii) **An Order for payment to the complainant by the respondent of gratuity on a pro rata basis, accrued leave pay, accrued allowances and in appropriate circumstance refunds in accordance with the Respondent's Terms and Conditions of Service;**

(iii) **An Order for damages for mental distress, torture and or anguish arising out of the suspension from employment of the complainant and eventual termination of his contract of employment by the respondent.**

(iv) An Order to the respondent to issue the complainant with a certificate of satisfactory service;

(v) An Order to the respondent to sale to the complainant the personal to holder motor vehicle namely Mistubish Pajero Registration No. ABV 4056 on terms provided in the Respondent's Conditions of Service;

(vi) Interest

(vii) Any other relief the Court may deem fit; and

(viii) Costs."

2.5. For its part, the respondent filed an Answer and averred that it exercised its contractual rights by invoking the notice clause in the contract. And, that it did not owe the appellant any allowances in relation to the personal to holder car.

3.0. Evidence Adduced in the Court Below

3.1. The appellant testified that, on 17th October 2012, he received a suspension letter signed by the respondent's then Board Chairperson Dr Overs Banda, with a charge form attached. He was charged with three offences but the charge form itself was unsigned and undated.

3.2. On 31st August 2012, he requested for further particulars seeking clarity on the capacity in which the Board Chairperson charged him. The Board Chairperson responded to his letter. He then proceeded to write a detailed exculpatory letter dated 21st November 2012.

3.3. He was, however, not accorded an oral hearing.

3.4. On 15t11 July 2013, about 8 months after suspension, he received a letter lifting his suspension and terminating his contract of employment with immediate effect. He was paid a month's salary in lieu of notice as provided by his contract of employment. He lamented that no reasons were given for his termination.

3.5. In cross examination, the appellant accepted that the audit reports conducted during the period he acted as Chief Executive Officer revealed some irregularities but he denied that the irregularities were attributed to him.

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3.6. Regarding the fuel allowances, he stated that clause 16.4.1 of the Conditions of Service did not provide for fuel allowance for managers. He testified though that managers were entitled to fuel based on other documents.

3.7. When further cross examined, he testified that the managers were not entitled to fuel and if there were no documents to support payment for the managers drawing fuel, then it was done in error.

3.8. In re-examination he insisted that all the employees whose fuel allowance he approved were entitled.

3.9. The appellant also denied having seen any report from the Auditor General questioning the payment of fuel.

3. 1O.The respondent's Human Resource Manager, Merenia Makombe, (RW1) testified that the appellant's contract was terminated by notice and no reason was required to be given for the termination.

3. 11. Furthermore that, there were irregularities that were unearthed by the audit team regarding the management of the respondent's funds. These concerned issues relating to daily subsistence allowance, fuel allowance, acting allowance, leave commutation and loans. The irregularities were discovered by the Auditor General's office. That was the basis for charging and suspending the appellant.

3.12. Regarding the fuel allowance, she testified that the managers were not entitled to fuel allowance, but the appellant authorized that they be paid, resulting in a loss to the respondent.

3. 13.According to RW1, the respondent had options to deal with the appellant administratively or report him to law enforcement agencies. However, it opted to drop the charges and terminate his contract by notice, because it did not want to sabotage his employability.

3.14. The witness denied that there was any malice by the respondent for doing so.

3.15. She also testified that the appellant was not underpaid his salary.

3.16. Furthermore, that the car was sold to the appellant and nothing was outstanding.

3.17. She also confirmed that the complainant was never issued with a certificate of service.

4.0. Consideration of the Evidence and Decision of the Trial Court

4.1. After evaluating the evidence, the trial court made several findings of fact.

4.2. Mainly, the trial court found that there was no unfair termination because there was no breach of any statutory provision in the manner the dismissal was conducted,

4.3. In addition, that the contract was properly terminated by payment in lieu of notice. Thus, the respondent was not obliged to furnish reasons for termination by notice. There was therefore, no wrongful dismissal.

4.4. Despite the appellant's plea that the Court should go behind the notice clause to find the real reason for the termination, the trial court found that there was no reason for doing so.

4.5. The lower court took the view that, there was no evidence adduced to show that the respondent breached the disciplinary code and that they did so in bad faith to justify 'piercing the veil'. It opined that it could not interpose itself for an appellate tribunal.

4.6. Regarding the fuel allowance allegations, the IRC *observed that "during cross -examination, the complainant admitted having committed the offence."* On that basis, it found that notwithstanding that the respondent's

witness confirmed that this evidence emanated from the Forensic Audit Report which was not produced before court, the termination was not wrongful because the appellant admitted having committed serious financial irregularities and those offences attracted the penalty of summary dismissal.

4.7. As regards the claim for allowances during suspension, the court held that the appellant was not entitled to the allowances because no service was rendered during that period and there would be no consideration.

4.8. The trial court then proceeded to dismiss the appellant's entire case and made no order as to costs.

5.0. <u>The Appeal</u>

5.1. Dissatisfied with the decision of the IRC, the appellant now appeals to this Court advancing eight grounds.

5.2. The eight grounds of appeal are couched as follows:

The honourable trial court erred in law and fact when it held that the termination of the appellant's contract of employment was not wrongful contrary to the evidence on record.

2. The honourable trial court grossly erred in law and fact when it held that the Appellant conducted himself in a manner inconsistent with his duty to his employer by being grossly negligent in a number of cases outlined in the letter of suspension dated 2nd November 2012.

3. The honourable trial court grossly erred in law and fact when it held that at page J16 of the Judgment that there was no breach of the Disciplinary Code by the respondent in dealing with disciplinary charges against the appellant in the face of overwhelming evidence to the contrary on record.

4. The honourable trial court misapprehended the import of section 85(5) of the Industrial and Labour Relations Act Cap 269 of the Laws of Zambia when it made a finding that the appellant admitted to payment of fuel allowance to employees of the respondent not entitled thereto without evaluating relevant evidence on record.

S. The honourable trial court grossly erred in law and fact when it made a finding of fact that the appellant admitted having committed serious

financial irregularities in the absence of any credible evidence on record to that effect.

6. The honourable trial court misdirected itself in law and fact when it held that the appellant was not entitled to be paid allowances during the period he was serving a suspension from duty on the ground that he did not provide a service to the respondent.

7. The honourable trial court fell in grave error when it completely failed to adjudicate on the issue of the sale of the personal to holder motor vehicle to the appellant by the respondent.

8. The honourable trial court fell in grave error when it completely failed to adjudicate on the mandatory provisions of section 79(1) of the Employment Act Cap 268 of the Laws of Zambia with regards to the issue of certificate of service on termination of the contract of employment.

6.0. <u>The Arguments</u>

6.1. The appellant filed into court heads of argument dated 28th June, 2019.

6.2. On grounds one and three, argued together, learned counsel for the appellant submitted that the respondent did not comply with the disciplinary procedure when dealing with the charges leveled

against the appellant. It was submitted that clause 7.2 of the respondent's disciplinary handbook provided that the charging officer was the supervisor of the alleged erring employee.

6.3. The appellant's charge letter dated 16th October 2012 was signed by the Board Chairperson and not the Director General who was his immediate supervisor. The appellant argues that this was wrong and a breach of the disciplinary procedure.

6.4. Not to mention that, clause 9.1 of the disciplinary handbook provided that:

> ***"where it is considered that the continued presence at work of an employee under investigation pose a further risk to the Commission, the employee(s) under investigation may be suspended."***

6.5. Clause 9.1 was therefore breached because the appellant was suspended after investigations and not to facilitate investigations.

6,6. The appellant's counsel also highlighted the following as irregularities in the manner the respondent handled the appellant's case:

6.6.1. First, the appellant was not given an opportunity to state his case at a hearing in disregard of clauses 8.1 and 7.8 of the disciplinary handbook.

6.6.2. Second, the appellant was suspended for 9 months contrary to clause 10.4 of the disciplinary handbook.

6.6.3. Third, the respondent did not furnish any evidence to support the allegations as the basis for suspending the appellant was contrary to clause 10.5 of the disciplinary handbook.

6.6.4. Fourth, the charge form containing the allegations against the appellant was unsigned contrary to clause 7.2 of the disciplinary handbook.

6.6.5. Fifth, no administrative charges were raised against the appellant for allegedly paying

fuel allowance to employees who were not entitled.

6.6.6. Sixth, no disciplinary committee was constituted to hear the appellant's disciplinary case in breach of clause 11 of the disciplinary handbook.

6.7. Counsel argued that the real reason for the termination were the unproven allegations levelled against the appellant and as testified by RW 1. As such, the respondent was obliged to follow the disciplinary procedure. Instead, the respondent dropped all the charges and terminated the appellant's contract by invoking the notice clause.

6.8. The Supreme Court decision in the case of **Zambia Revenue Authority v Kangwa Mbao** & **others**' was relied upon where it was held that:

> ***"In the instant case, there appeared to be causeless termination of public employment simply because of the notice clause. The court was perfectly entitled to delve behind the notice clause. By so doing the court found that during the respondents' employment they were***

investigated on allegations of corruption without their knowledge but cleared. The respondents' did not face any other disciplinary action... The court further said it was true there were other reasons behind the termination of services than mere reliance on the clause..."

6.9. Further that:

"..In the instant case, we found that for a variety of reasons, these are unlawful terminations because there was no offence committed by the respondents and natural justice had not been followed."

6. 1O.We were also referred to the case of Atlas Copco (Zambia) Limited v Andrew Mambwe[2], where the Supreme Court stated that:

"On the evidence before the Court below it was not in dispute that the respondent's real reason for terminating the complainant's services was incompetence. As Mr Matibini rightly submitted, and as the court below held, having decided to terminate the complainant's services on grounds of incompetence, the respondent was by law obliged to afford the complainant an opportunity to be heard on the charges of incompetence. Failure by the respondent to afford the complainant an opportunity to be heard breached not only section 26A of the Employment Act but also the rules of natural justice. The result is that the termination by notice in this case was wrongful..."

6.1 1.Based on the above, it was submitted that, the appellant was entitled to be tried in accordance with the disciplinary handbook. Counsel condemned the course of action by the respondent of invoking the notice clause in the midst of disciplinary charges. The Supreme Court decision in the case of **Chilanga Cement Plc** v **Kasote Singogo**[3] was relied upon as authority that:

> *"Instant loss of job should be relegated to the realm of* ***instant dismissal for erring employees, or those who have misconducted themselves. Even then the grievance code is invoked and usually the employee is put on notice through the grievance procedure. ...The events leading to the termination*** *of the respondent's employment laid bare, the true intention of the appellant, through the General Manager, to get rid of the respondent. These events clearly show that this was not an ordinary termination of employment and the appellant cannot hide its bad faith under normal* ***termination of*** *employment by notice or payment in lieu of notice. We therefore hold that the respondent's employment was wrongfully terminated."*

6.12. It was submitted that the respondent's true reason for termination of the appellant's contract of employment was a consequence of the charges

leveled against him. There was no record of guilt recorded to warrant the respondent's actions. The respondent attempted to justify its position by raising other allegations that the appellant approved fuel allocations to employees who were not entitled, but that too failed.

6. 13.The appellants counsel maintained that the sole basis for the latter allegations was the Forensic Audit Report which was not produced by the respondent's Empowerment Fund. The evidence based on that Report was expunged from the record by Order of the trial court dated 30th November 2017 because the respondent failed to adhere to a subpoena to produce it.

6. 14.As regards ground four, it was submitted that the trial court misapprehended the provisions of **section 85(5) of the Industrial and Labour Relations Act** when it made a finding that the appellant admitted to paying fuel allowances to employees who were not entitled.

6. 15.Counsel argued that, the enactment of **section 85(5) of the Industrial and Labour Relations Act** altered the earlier position in a master servant relationship where the employer could terminate the employee's contract by notice without a reason. This was the law applied in the cases of **Contract Haulage Mumbuwa Kamayoyo**[4] and **Lumpa v Maamba Collieries Limited**[5], which has been altered by **section 85(5) of the Industrial and Labour Relations Act.** Therefore, the trial court was obliged to interrogate the real reasons for termination in keeping with doing substantial justice as provided under **section 85(5) of the Act.**

6. 16.Thus, the court erred when it failed to interrogate the fact that the termination was instigated by the disciplinary charges against the respondent which were subsequently dropped.

6.17.1n addition, it was argued that the court failed to appreciate the full effect of its Order expunging the

Forensic Audit Report of 2012 from the record at trial, because all the allegations concerning the fuel allowances sprouted from that Report.

6.18. In view of the foregoing, Counsel submitted that there was overwhelming evidence for the trial court to invoke its mandatory power under **section 85(5) of the Industrial and Labour Relations Act** to investigate the real reasons for the termination of the appellant's contract of employment, as held in the cases of **Zambia Consolidated Copper Mines v Matale**[6], **Southern Water and Sewerage Company Limited v Sanford Mweene**[7], **Atlas Copco (Zambia) Ltd v Andrew Mambwe'** and a decision of the IRC in **Kapembwa Siwale and Kapembwa Sikazwe v The Road Development Agency**[8].

6. 19. Concerning grounds two and five, it was submitted that the trial court was wrong to find that the appellant's conduct was inconsistent with his duty to his employer because he was grossly negligent, and that he perpetrated serious financial

irregularities; in the absence of evidence. Hence, the trial court misapplied the cases of **Zambia National Provident Fund v Chirwa**[9], **National Breweries Limited v Mwe nya**[10] and **Undi Phiri v Bank of Zambia".**

6.20. The trial court's approach of finding that the appellant admitted the disciplinary offences was wrong because the court misapprehended its role in the disciplinary process of an employee by an employer. The trial court could not interpose itself for an appellate court to the disciplinary procedure. The Supreme Court decisions in the cases of **Zambia Electricity Supply Corporation Limited v David Lubasi Muyambango**[12] and **Kambatika v Zambia Electricity Supply Corporation'3** were cited as authorities for that argument.

6.21. Counsel also submitted that in any event, there was no evidence on record suggesting that the appellant admitted the alleged misconduct. The exculpatory letter on pages 205 to 206 of the record of appeal does not contain any admission of financial

irregularities or gross negligence to perform his duties. And, all evidence linked to these allegations was connected to the Forensic Audit Report which was expunged from the record.

6.22. Thus the finding that the appellant admitted conducting financial irregularities or was grossly negligent in the performance of his duties was perverse and not supported by the evidence. The trial court relied solely on the suspension letter of 2nd November 2012 in making these findings.

6.23. We were referred to a plethora of cases such as **Nkhata and 4 others v the Attorney General**[14], on when an appellate court can reverse or interfere with findings of fact made by a trial court. We were, therefore, urged to reverse the findings of fact made by the trial court for being perverse.

6.24. With respect to ground six, it was submitted that the trial court erred when it held that the appellant was not entitled to allowances during the suspension because he did not provide a service to

the respondent. These were medical refund, subscription to professional bodies, telephone and service of personal to holder motor vehicle.

6.25. It was argued that the appellant was entitled to those allowances because clause 9.5 of the disciplinary handbook provided that ***"the time away from the workplace on suspension will be on a full pay and be for as short a period as possible."***

6.26. Counsel argued that even though the disciplinary code defines the term "full pay", it means full salary plus all entitled allowances. If any other meaning for the expression was intended, it would have been expressly stated. Hence, the appellant was entitled to the allowances as an incident of his employment as elucidated by the Supreme Court in **James Mankwa Zulu and Others v Chilanga Cement Plc**[15] that:

> ***"there is no longer any debate as to the meaning of 'salary' as the word salary includes allowances that are paid together with salary on periodical basis by an employer to his employee."***

6.27. Still on ground six, it was submitted that the trial court misapprehended the import of the ratio in

National Airports Corporation Limited v Reggie Zimba and Saviour Konie[16] and **Siamutwa v Southern Province Cooperative Marketing Union Limited and Finance Bank Zambia Limited17.** Counsel distinguished those cases from the present case in that the affected employees sought to be paid salaries and pension benefits up to retirement or up to the end of the contract following termination of their contracts. Whilst, the appellants claim is for payment of accrued allowances during the period he was placed on suspension especially that the charges against him were subsequently dropped.

6.28. Regarding grounds seven and eight, it was submitted that the trial court erred when it failed to adjudicate on the sale of the personal to holder motor vehicle as well as the claim for a certificate of service on termination of the contract of employment as provided by **section 79(1) of the Employment Act Cap 268 of the Laws of Zambia.**

6.29. It was argued, that **section 79(1)** is couched in mandatory terms as it requires the employer to

issue an employee with the certificate on termination of the contract of service. This proposition was supported by the decision of the Supreme Court in **Philip Mutantika** & **Shea! Mulyata v Kenneth Chipungu**[18].

6.30. Regarding the personal to holder motor vehicle registration number ABV 4056, the appellant's counsel argued that although the appellant was given the vehicle, the respondent did not disclose how they arrived at the value of the vehicle which they translated into the amount they deducted from the appellants benefits. And, that the registration book for the motor vehicle stipulates that the property in the vehicle is non-transferrable. The appellant made an effort to have the respondent rectify the situation but to no avail. As a consequence, the appellant has failed to transfer the vehicle into his name and thus cannot enjoy the full ownership benefits.

6.3 1. In response, the respondent's filed their heads of argument.

6.32. In relation to grounds one, two and three, the respondent's counsel submitted that the trial court was on firm ground when it held that the termination of the appellant's employment by notice did not amount to wrongful dismissal nor was it a breach of the disciplinary code.

6.33. In its Judgment, the lower court relied on the Supreme Court decision in **Redrilza Limited v Nkazi and others**[19] that:

> ***"...Indeed, there is a difference between 'dismissal' and 'termination' and quite obviously the considerations required to be taken into account, 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...***

6.34. Counsel amplified that the court below found as a fact that the appellant was terminated by payment of one month's salary in lieu of notice. Such that as

an appellate court we cannot reverse this finding of fact unless it was perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts as elucidated by the Supreme Court in **Zulu v Avondale Housing Project Limited**[20] and a host of other cases.

6.35. Thus, the only question that falls for determination in the current appeal, is whether an employer who drops charges levelled against an employee is barred from invoking the notice clause.

6.36. It is submitted that the Supreme Court answered this question in the case of **Tolani Zulu and Musa Hamwala v Barclays Bank**" when it held that the employer was within its rights to drop the charges and invoking the notice clause. Furthermore, that court observed that the exercising of the notice clause in the agreement was within the powers of the respondent and therefore, the employment was properly terminated.

6.37. Counsel maintained that in *casu,* the trial court observed thus:

> *"The contract is what governs the employment relationship and contains various terms and conditions. Where parties have entered into a contract which has a termination clause, either party can terminate the employment relationship in accordance with that provision. There is no provision which places an obligation on an employer/employee to give reasons for termination by notice because it Is the giving of notice or payment in lieu of notice which terminates the employment. We are alive to the provisions of the Amended section 36 of the Employment Act, CAP 268 of the Laws of Zambia, by the Employment (Amendment) Act, No. 15 of 2015. These provisions which require an employer to give reasons do not apply in this case ... the cases* ***of Contract Haulage*** *v Kamayoyo, Gerald Musonda Mumba v Maamba Collieries Limited, Tolani Zulu & Musa Hamwala v Barclays Bank Plc, and Josephine Mwaka Mwambazi v Food Reserve Agency, are instructive on the law that an employer can exercise the option to terminate employment without reasons and by payment in lieu of notice."*

6.38. Therefore, the trial court was on firm ground when it held that the respondent merely opted to exercise what the parties had agreed in their contract of employment instead of reporting the appellant to law enforcement authorities or summarily dismiss

him. By invoking the notice clause, the element of bad faith or malice was removed.

6,39. It was the further submission of counsel that in **Redrilza Limited v Nkazi and others**[19], the Supreme Court in its determination of the issue when the IRC could delve into the reasons for termination by notice stated thus:

> ***"In our view, the starting point in this case, for the lower court should have been the terms of the contract between the parties instead of rushing into questioning the reasons for the termination. In arguing his grounds of appeal, learned counsel for the appellant quite rightly submitted that the Industrial Relations Court is empowered to delve into the reasons for the termination of employment but that, it should not be so in every case. We agree with him."***

6.40. The respondent herein, followed the appellant's contract of employment by invoking the notice clause and did not violate its disciplinary code in dealing with the charges levelled against the appellant. Not to mention that the appellant was terminated and not dismissed. We were urged to dismiss grounds one, two and three.

6.41. With respect to grounds four and five, it is argued that the appellant admitted to having committed serious financial irregularities as shown at pages 351-352 of the record of appeal. The respondent had the choice of either reporting the matter to the police or to deal with it administratively as it did.

6.42. The trial court's finding of fact that he admitted to committing serious financial irregularities was therefore supported by the evidence and is not perverse. We, as an appellate court cannot reverse this finding. See **Zulu v Avondale Housing Project Limited**[20].

6.43. Additionally, having admitted to committing serious financial irregularities, which offence attracted a penalty of summary dismissal, the appellant has no case on grounds of wrongful dismissal. As illuminated by the Supreme Court in cases like **Zambia National Provident Fund v Chirwa**[9], that where it is not in dispute that an employee has committed a dismissible offence and if such an employee is

dismissed without following the laid down procedure in the contract, the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity. Grounds four and five be dismissed on that basis.

6.44. In response to ground six, the respondent's counsel maintained that the appellant was not entitled to be paid allowances during the period of suspension as he did not provide a service to the respondent during that period. The cases of **National Airports Corporation Limited v Reggie Zimba and Saviour Konie**[16] and **Siamutwa v Southern Province Cooperative Marketing Union Limited and Finance Bank Zambia Limited17** were cited as authorities that it would amount to unjust enrichment to pay the employee for a period he/she rendered no service to the employer.

6.45. On grounds seven and eight, the respondents counsel submitted that the trial court did adjudicate

on the issue of the sale of motor vehicle as clearly shown on page 39 lines 3-6 of the record of appeal.

6.46. The trial court found that the appellant was sold his personal to holder vehicle and paid his gratuity. There was no outstanding salary payment. The appellant had reached his salary ceiling and no further increase to the salary accrued.

6.47. It was the further submission of counsel that an employer cannot be mandated to issue a certificate of satisfactory service where it is not in dispute that an employee committed a summary dismissible offence, which he himself did not dispute.

6.48. Furthermore, that **section 79 (2) of the Employment Act** provides that:

> ***"An employer shall not be bound to give a testimonial, reference or certificate of character to any employee at the termination of his service, but any employer who knowingly gives a false testimonial, reference or certificate of character to any employee shall be liable for any loss or damage caused thereby to any third person who, by reason-thereof, has been induced to take such employee into his service."***

The hearing.

6.49 At the hearing of the appeal, Mr. Chitambala, who appeared for the appellant relied on the appellant's heads of argument. He augmented that, the respondent invoked the notice clause to disguise the real reason of terminating the appellant's employment. The respondent abrogated the disciplinary code by dropping the charges midway. The respondent had a duty to go ahead with the disciplinary proceedings.

6.50 The charges the appellant was slapped with all emanated from the Auditor General's Report and yet the forensic report was not produced before the trial court.

6.51 In distinguishing the case of **Tolani Zulu and Musa Hamwala v Barclays Bank**[2'] from the appellant's case, Mr. Chitambala submitted that in that case there was ample evidence to charge the employees but the employer opted to invoke the notice clause. In *casu,*

there is no credible evidence to justify the charges which were later dropped. The IRC failed to do substantial justice to the appellant as mandated under **section 85(5) of the Industrial and Labour Relations Act.**

6.52. Mr. Kalokoni, who appeared for the respondent, also relied on the heads of argument. He augmented that the IRC could not look behind the notice clause because there was no evidence of malice.

6.53. He referred us to page 347 line 11 of the record of appeal regarding allowances and submitted that the appellant was paid.

6.54. Mr. Kalokoni, further argued that the whole appeal be dismissed as it is attacking findings of fact only contrary to **section 97 of the Industrial and Labour Relations Act** which provides that the appeal be based on findings of mixed law and fact.

6.55. In reply, Mr. Chitambala argued that a finding of fact which is not supported by evidence becomes a

point of law. The findings in *casu,* were not supported by evidence and are therefore points of law.

7.0. Issues on Appeal

7.1. As we see it, the cardinal issue the appeal raises is, whether the respondent could invoke the termination/ notice clause after charging the appellant with disciplinary charges.

7.2. What was the effect of the notice clause on the disciplinary charges that were dropped?

8.0. Consideration and determination of Issues on Appeal

8.1. We have considered the arguments by counsel and authorities cited.

8.2. In the case of **Tolani Zulu and Musa Hamwala v Barclays Bank**[21], the Supreme Court, in dealing with the issue whether the employer could opt to invoke the notice

clause and forego disciplining the employees, observed that:

> ***"the respondent (employer) had a number of options open to them: they could have had the appellants (employee) prosecuted, put on disciplinary charges or opt to give them notice required under the conditions of service or pay the amount in cash in lieu of notice. The respondent opted for the last option of paying a month's salary in lieu of notice"***

8.3. In its later decision in Redrilza Limited v Nkazi and others19 the Supreme Court in following the Tolani Zulu and Musa Hamwala v Barclays Bank[2]' case illuminated thus:

> ***"the appellant (employer) was within its right, to terminate by notice as provided in the contract. If the appellant had terminated outside the contract our views would have been different. After considering the facts, the Judgment of the lower court and learned counsel's submissions, our finding is that the lower court misdirected itself in holding that the appellant acted in bad faith and unfairly when it terminated the respondent's employment by notice".***

8.4. The Supreme Court observed in Redrilza Limited v Nkazi and others19 that the fact that the termination/ notice clause in the contract was

invoked after the work stoppage in which the respondents were involved, could not bar the appellant from exercising the right to terminate under the contract. This could not justify the IRC's decision to pierce the veil and find in favour of the respondents.

8.5. In *casu,* therefore the question is, did the respondent act in accordance with the contract by invoking the notice clause? Clause 9.0 of the appellant's contract of employment provided that the contract could be terminated by either party giving one month's notice or payment of one month's salary in lieu of notice.

8.6. We are of the firm conclusion that the respondent acted within the contract by invoking the notice clause to terminate the appellant's contract of employment.

8.7. The appellant asserts that the notice clause was used in bad faith because at the time he was on suspension facing disciplinary charges. His counsel

has urged us to reverse the finding by the lower court that there was no evidence of malice and no need to pierce the veil'.

8.8. It is crystal clear from the **Tolani Zulu and Musa Hamwala v Barclays Bank**" decision that, an employer is within his right to opt to invoke the notice clause in the contract even in the midst of a suspension and disciplinary charges so long it is done in accordance with the contract.

8.9. In **Redrilza Limited v Nkazi and others**[19] the Supreme Court elucidated that the need for piercing the veil to do substantial justice, is not, in every case but where there is malice or bad faith. In the **Zambia Revenue Authority v Kangwa Mbao** & **others**' case, it was justified to pierce the veil as the employees were investigated and cleared without their knowledge and then terminated by notice. It is clear that the notice was used in bad faith as the real reason for termination was the failed secret investigations which the employees were not aware of at the time.

8. 1O.Equally, in **Chilanga Cement Plc v Kasote Singog0**[3] there was behind the scene the altercation between the employer's client and the employee which bordered on racism, and which was discovered by the employer's general manager. The general manager was upset with the employee and sided with its client leading to termination by redundancy at a time when redundancy exercise was in motion and employees to be redundant already identified. The Supreme Court found the termination by redundancy to be in bad faith and motivated by the altercation hence to do substantial justice the IRC was entitled to 'pierce the veil'. And, the Supreme Court upheld the decision to do so.

8.11.1n **Zambia Consolidated Copper Mines** v **Matale**[6] the Supreme Court illuminated that:

> *"the mandate of subsection 5 (of section 85 of* ***the Industrial Relations Act), which requires that substantial justice be done, does not in any way suggest that the IRC should suffer itself with technicalities or rules. In the process*** *of doing, substantial justice, there is nothing in the Act to*

stop the IRC from delving behind or into the reasons given for termination in order to redress any real injustices discovered: such as the termination on notice or payment in lieu of pensionable employment In a parastatal on a supervisor's whim without any rational reason at all as in this case".

8.12. Clearly, the veil was pierced because the supervisor acted in bad faith by invoking the notice clause, on a whim and without any rational reason at all. In the background the facts revealed that the supervisor had told the employee that the Chief Executive Officer was uncomfortable working with him.

8. 13.In *casu,* there was nothing that was hidden to justify piercing the veil. No evidence of malice was adduced by the appellant. The fact that he was charged and the charges later dropped in his letter of termination is a known fact, which the respondent admit is what happened.

8. 14.We note from the record of appeal, that the disciplinary charges were actually instigated by an

audit conducted by the Auditor General's office and its report was submitted to Parliament. This was following reports of mismanagement of public funds by the respondent. The fact that the Auditor General conducted the audit was not disputed by the parties. It is therefore absurd for the appellant to argue in one breath that all evidence to do with the said report was expunged and then in another insist that the charges emanated from the same report. It is immaterial that the report was not exhibited and all evidence relating to it expunged as the respondent opted to invoke the notice clause. We surmise that there was actually no malice on the part of the respondent as it did not undertake the audit itself but an outside entity did.

8.15. Be that as it may, the appellant was properly terminated by notice. All charges were dropped, so there was no need to continue with disciplinary charges option.

8.16. In the net, we uphold the finding by the IRC that the appellant was not wrongfully terminated. This finding was supported by evidence. We find no merit in grounds one to five. We opine that issues raised in ground five that the appellant admitted to wrong doing are otiose as the appellants termination was by notice for which he was correctly paid one month in lieu of notice.

8.17. Regarding ground six, we opine that the appellant was entitled to full pay while on suspension in accordance with clause 9.5 of the disciplinary code (see page 213 of the record of appeal). We opine that full pay includes allowances. We uphold Mr. Chitambalas arguments in this regard. However, as to the medical allowance and subscription to professional bodies, the appellant should have proved that he incurred these at trial. We should point out that once the charges were dropped, he was correctly paid one months salary in lieu of notice. Ground six therefore partially succeeds.

8.18. Much as we agree that the Court ought to adjudicate all issues in controversy, we are inclined to dismiss ground seven because the issue of assessment of the price of the personal to holder vehicle was not raised in the court below. If anything, the vehicle was sold to the appellant and the conditions of service in clause 16.2. 1 provides that the price is the net book value or 15% of the initial total cost whichever is higher. As for the challenges on transfer of ownership, we order the respondent to facilitate the same since the car has been sold to him.

8. 19.We thoroughly scanned the provisions of **section 79 of the Employment Act** (Cap 268 which was in force then) we noted the following; **section 79(1)** provides for issuance of certificate of service. It is couched thus:

> ***"79 (1) Notwithstanding the provisions of subsection (2), every employer shall, on the termination of a contract of service between such employer and his employee, give to such employee a certificate of service which shall contain-***
> ***(a) The name of the employer;***

(b) The name of the employee;

(c) The date of engagement;

(d) The date of discharge;

***(e) The nature** of employment;*

U) The employer's account number with Zambia National Provident Fund under which statutory contributions have been or will be remitted to the said Fund on behalf of the employee;

(g) The employee's national registration number and membership number in the Zambia National Provident Fund; and

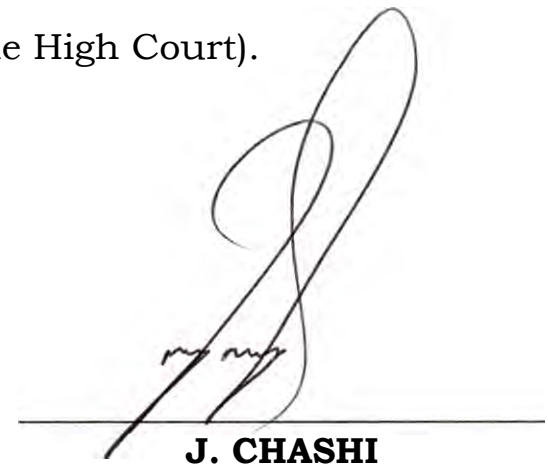
(h) With effect from the 1st April, 1976, a statement showing the amount of statutory contributions and any supplementary contributions paid by the employer to the Zambia National Provident Fund during the course of such contract"

Clearly, the certificate related to issues of payment of pension. We would order the respondent to issue it, if issues of pension etc for the appellant are still outstanding.

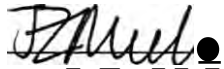
8.20. The respondent objected to issuing the certificate of service based on the provisions of **section 79(2).** In agreeing with the respondent, we wish to distinguish the certificate of service and testimonial, which requires the employer to give a certificate of character etc. The respondent here is only required

to give the certificate of service relating to pension. It is not bound to give a testimonial in line with **section 79(2).** Ground eight therefore, succeeds to the extent stated.

8.21. Thus the appeal partially succeeds. Each party to bear own costs in this Court and below. See our decision in **Standard Chartered Bank v Celine Nair**[22] on costs in the IRC (Now Industrial Relations Division of the High Court).



J. CHASHI
COURT OF APPEAL JUDGE



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COURT OF APPEAL JUDGE

F.M. LENGALENGA
COURT OF APPEAL JUDGE