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

APPEAL NO. 83/2002

BETWEEN:

BENEDICT CHILESHE APPELLANT

AND

MPONGWE DEVELOPMENT COMPANY LIMITED 1ST RESPONDENT
MPONGWE MILLING COMPANY LIMITED 2ND RESPONDENT

CORAM: LEWANIKA, DCJ, CHIBESAKUNDA AND SILOMBA, JJS

On 3rd September, 2002 and 2nd September, 2003

For the Appellant: Mrs. C. Kunda, George Kunda and Company.
For the Respondents: Mr. C. Mukokweza, Corpus Globe.

JUDGMENT

SILOMBA, JS, delivered the judgment of the court.

A. **Cases referred to:**
1. Harry Nkumbula and Simon Kapwepwe Vs. The Attorney General (1979) ZR. 267
2. Re Bruce (a debtor) exparte The Debtor Vs. Gabriel and Official Receiver (1969) 2, AER 38
3. Miller Vs. Minister of Pensions (1974) 2 AER, 372
4. Nkata and 4 Others Vs. The Attorney General (1966) ZR, 124
5. ZCCM Vs. Matale (1995 – 1997) ZR, 144

B. **Legislation referred to:**
6. Labour and Industrial Relations Act, Ch. 269, Section 85 (5).
7. Industrial Relations Court Rules, Rules 63 and 64.

This is an appeal against the judgment of the Industrial Relations Court (hereinafter to be referred to as "the IRC") of the 5th of April, 2002 in which the appellant, Mr. Benedict Chileshe, had his complaint under Sections 85(1)(4), 85A and

108 of the Industrial and Labour Relations Act (hereinafter to be referred to as "the Act") dismissed for lack of merit. The appellant had challenged his dismissal from his employment with the 1st respondent company as being wrongful, unfair, discriminatory and unlawful.

In his complaint in the court below the appellant had prayed for a number of reliefs, some of which were a declaration that his dismissal was null and void; an order for the payment of US $91, 794, being an under payment of his salary; an order for the payment of his pension contribution, leave pay and so on. From the answer filed in the court below the respondents admitted having dismissed the appellant but denied that the dismissal was wrongful, unfair, discriminatory and unlawful. They contended that the appellant was properly dismissed following a charge of gross negligence of duty, which resulted in the respondents losing K133, 756, 197.30. It was asserted in the answer that it was the specific duty of the appellant, as chief and most senior financial officer at Mpongwe Milling Company Limited, the second respondent in these proceedings, to oversee, supervise and enforce proper accounting procedures at the company.

Apparently, the fraud was discovered by the appellant himself on 28th of April, 1999, a day after the audit of the second respondent's accounts had started and ten months after the effective period of the fraud. With this state of affairs it is averred in the answer that the fraud was occasioned by failure on the part of the appellant to enforce proper checks and controls under the accounting system. It was further averred that the omission by the appellant to perform and supervise the performance of the necessary reconciliation between the bank statements and the general ledger bank balance, being standard accounting practice, allowed the entering of fictitious receipts in the cash sale control account resulting in the loss of K133, 756, 197.30.

At the hearing of the complaint on the 14th of December, 2001 the respondents did not adduce evidence in their defence and in support of their answer because they were not in court; the reasons for their non-attendance were not communicated to the court. From the record of appeal it is apparent that the respondents were aware of the date of hearing because their counsel was in attendance at the previous sitting when the matter was adjourned to the 14th of December, 2001. In the absence of any official communication

from the respondents' counsel to excuse their non-attendance, the court decided to proceed with the trial.

This meant that the only evidence tendered before the court below came from the appellant who, apart from his notice of complaint, did not call any witnesses to support him. The appellant's evidence, as far as we can ascertain from the record of appeal, was that he joined the 1st respondent on the 3rd of April, 1993 as a chief accountant. Between January, 1994 and June, 1996 he was appointed company secretary for the 1st and 2nd respondents and Mukumpu Farms Limited, a sister company of the 1st respondent. He was later appointed financial controller of the 2nd respondent

In 1998 the 1st and 2nd respondents and Mukumpu Farms Limited were merged under the 1st respondent. As a result of the re-organisation, the appellant became financial controller (mill), the post he held until he was dismissed. According to the letter of appointment, his remuneration was to be effective from the 1st of July, 1996 based on CDC Financial Controller conditions of service. The appellant's evidence was that the conditions of service and remuneration did not improve up to the time of his dismissal.

His further evidence was that the salary for a financial controller under the CDC conditions of service was US $4,000 per month and a white man occupying a similar position of financial controller was being paid 4,000 sterling pounds per month. On his part he was being paid K3, 544, 000 per month instead of US $4,000 per month. The appellant complained in writing on the lack of action on his conditions of service but there was no reply to his complaint.

According to the appellant's evidence, he was dismissed on allegations of fraud, which took place when he was away on leave. As alleged in the respondent's answer, the fraud involved the loss of K133, 000,000. As per his evidence, the fraud started when the finance manager, a Mr. Huntingford, was in charge of the finance department. During the absence of the appellant on leave, Mr. Huntingford made a lot of changes on how to handle cash without consulting him. The appellant told the court below that the new changes created confusion leading to the fraudulent loss of money, as the subordinates did not know who to report to.

The appellant was told in writing about the fraud. In fact he was held responsible for failing to carry out a number of duties. Before the case hearing he responded to the

allegations by way of exculpation, accusing Mr. Huntingford as being the one who was responsible for the fraud as it took place when he was in full control of the department. This was in reference to the period 23rd of December, 1998 to 9th of January, 1999 when the appellant was on leave. After a Board meeting of the 15th of July, 1999 the appellant was formally charged with gross negligence and he was told to stop reporting for work. On the 3rd of August, 1999 a disciplinary hearing was convened in which he participated fully. The disciplinary committee was composed of two members, namely, Mr. Huntingford and Mr. Morgan.

The appellant's evidence to the IRC was that he did not like the composition of the committee because he was not in good terms with Mr. Morgan. Besides, Mr. Huntingford was presiding over the meeting after having attended the board meeting earlier. He was, however, dismissed after the meeting and this was done in writing. He appealed against the dismissal because he was of the view that it was racially motivated, especially that he was not in good working relationships with his superior white bosses, but the appeal was unsuccessful. At the end of his testimony the appellant was not cross-examined due to the absence of the respondent's counsel from the court. The IRC considered the entire evidence of the appellant, together with the affidavit evidence of the respondent and dismissed the complaint as lacking in merit, hence the appeal to this court.

There are nine grounds of appeal, which Mrs. Kunda, counsel for the appellant, argued before us. From the outset, Mrs. Kunda informed us that she intended to argue grounds 1 and 2 as one while grounds 4 and 5 were to be consolidated and argued as one. The rest of the grounds of appeal were to be argued individually. In support of the grounds of appeal Mrs. Kunda has filed heads of argument, which were supplemented by oral submissions. The respondent's counsel has also filed heads of argument in answer to the appellant's heads of argument. With regard to grounds 1 and 2, it was contended by counsel for the appellant that: -

> **The learned Deputy chairperson misdirected herself in using the respondent's answer and supporting affidavit as evidence in the proceedings when they were not supported by *viva voce* evidence adduced in terms of Rules 63 and 64 of the Industrial Relations Court Rules, Chapter 269 of the laws. In view of the contentious**

nature of the facts in this matter the court should not have admitted such evidence without the consent of the appellant. That the learned Deputy Chairperson further misdirected herself by rebutting the appellant's evidence on the basis of the respondent's affidavit and documents, which were not formally tendered before the court through *viva voce* evidence and were not subjected to cross examination, thereby attaching undue weight to the respondent's "evidence."

In arguing the two grounds, counsel for the appellant told us that for the lower court to make use of the affidavit evidence there should be an order of the court to do so. Not only should parties adduce *viva voce* evidence but that they should tender such evidence on oath, she submitted. Having submitted thus, she was of the view that the lower court fell into serious error to have relied on affidavit evidence of the respondent in the absence of *viva voce* evidence.

In her written submission counsel has drawn our attention to the requirement of Rules 63 and 64 of the IRC Rules in Chapter 269 of the laws. She submits that the two Rules require that parties give *viva voce* evidence in addition to affidavit evidence in accordance with Section 36 of the High Court Act, Chapter 27 of the laws, which prescribes the manner oaths must be taken. Her argument is that when *viva voce* evidence is given and any exhibits are tendered in evidence under oath such evidence must customarily be tested in cross-examination. If such evidence is not tested in cross-examination it is useless and of no value, she submits.

She cannot appreciate why the respondents should benefit from their own default by having their affidavit evidence and exhibits admitted in evidence when the facts of the case were seriously contested. She has accordingly submitted that the respondents who decided to stay away from the proceedings should have been made to bear the consequences of their own default, by the court refusing to admit their affidavit evidence.

In response to grounds 1 and 2 Mr. Mukokweza, for the respondent, contended that the court below was on firm ground and had actually exercised its discretion correctly in considering affidavit evidence not only as a court of substantial justice but also as per the authority in Rule 64 of the IRC Rules. He was of the view that affidavit evidence could be relied upon even in a contentious matter and he has cited the cases of ***Mwaanga Nkumbula and Simon Mwansa Kapwepwe Vs. Attorney General*** (1) and ***Re***

Brace (a debtor) *ex parte The Debtor Vs. Gabriel and the Official Receiver* (2) in support of his proposition.

He said that under Rule 64 the IRC has power to make the order for the use of affidavit evidence, which it exercised in its judgment as at page 11 of the record of appeal. But when the court reminded him that there was no such an order made to rely on affidavit evidence during the proceedings Mr. Mukokweza told the court that there was no particular procedure for accepting affidavit evidence. From his written heads of arguments Mr. Mukokweza seems to suggest that the court below was fully empowered, at any stage or time of the proceedings under Rule 64, to order proof of facts by affidavit evidence.

Before we consider the submissions of counsel in support of and against grounds 1 and 2 we wish to observe that the reference, in the grounds of appeal, to the learned Deputy Chairperson as an individual instead if the IRC is erroneous. In terms of Section 89 (2) of the Act the sitting of the IRC is duly constituted as a court only when it is composed of three members or such an even number as the Chairman may direct. We thought we should mention this in order to dispel the notion that the decision of the court below, the subject of this appeal, could have been the work of the Deputy Chairperson sitting alone.

We have given our due consideration to the arguments presented to us in respect of grounds 1 and 2. It is not in contention that when the case was adjourned to the 14th of February, 2001 for trial the counsel for the respondent was in attendance. His absence on the adjourned date was, therefore, not appreciated in the absence of a valid excuse. The order of the lower court to proceed with the trial of the complaint, upon an application by counsel for the appellant, sufficiently sums up the mood of the trial court when it ordered thus: *"Mr. Mukokweza was in court when we last adjourned and is fully aware of this date and has not communicated to any of us of his non attendance. Cause to proceed."*

As per the order of the lower court, the trial of the complaint proceeded in the absence of the respondents and their advocates. Arising from the submission of the appellant's counsel, it would appear that there was great expectation that the IRC would come up with a judgment favourable to the appellant because his *viva voce* evidence was not challenged. Unfortunately for the appellant this was not the case and the argument

before us is one where the appellant is saying that the lower court should not have placed reliance on the affidavit evidence of the respondents in the absence of their *viva voce* evidence.

It is submitted that evidence that is not given *viva voce* in support of affidavit evidence and which has not been subjected to cross examination should not have been relied upon because it is not credible evidence. At this stage we would like to point out that even the oral evidence of the appellant was not subjected to cross-examination and if the argument of the appellant is valid then his evidence too, though given *viva voce*, was not credible. The foregoing notwithstanding we think that the argument before us is whether Rules 63 and 64 of the IRC Rules gave discretion to the lower court to rely on the affidavit evidence of the respondent. We reproduce the two Rules as follows:-

> Rule 63. **Unless the Court otherwise directs, a witness shall give his evidence on oath or solemn affirmation administered in accordance with the provisions of Section thirty six of the High Court Act.**
> Rule 64 **A witness at any proceedings shall be examined viva voce but the Court may at any time order that any particular fact may be proved by affidavit.**

It will be noted from the arguments that while counsel for the appellant made reference to both Rules the counsel for the respondents only made reference to Rule 64. In our evaluation of Rule 63 we do not find it relevant to the case at hand because the question whether or not the witnesses testified on oath or solemn affirmation is not the issue here. Coming to Rule 64 the record of appeal reveals that there was no order made in the course of the trial that the respondents could give their evidence through an affidavit. However, at page 10 and spilling over to page 11 of the record of appeal this is what the judgment of the IRC states: -

> **Since we are a Court of substantial justice and in conformity with Section 85 (5) of Act No. 27 of 1993 of the Industrial and Labour Relations Act, we have decided to use, as evidence, the respondents' answer and the supporting affidavit sworn by Michael Huntingford filed in Court on 18th of October, 1997. We wish to observe, at the outset, that the evidence before us, though sworn, was not tested in cross-examination and will place equal weight on it.**

We agree with counsel for the respondents that Rule 64 gives the IRC the power, at any time or stage of the proceedings, that is to say, from the date of trial to the date of

judgment, to make an order that it desires to rely on the affidavit evidence of a party to the proceedings to prove certain facts in contention. In this particular case the IRC had to take a position that was, by any account, non prejudicial to both parties because of the recognition that the evidence of the appellant, though given on oath, was not different from the affidavit evidence of the respondents for the simple reason that it was not subjected to cross-examination. Going by the reasoning contained in the above quotation, we are satisfied that the IRC, being a court of substantial justice, was indeed on firm ground in taking an impartial position that it took for the sole purpose of doing substantial justice to the parties before it.

It would have been absurd for the lower court to wholly rely on the evidence of the appellant when it was not any better than the affidavit evidence of the respondents. It would have been equally absurd for the lower court not to rely on any of the evidence because the requirements of Section 85 (5) of the Act, under which the IRC is mandated to do substantial justice to the parties before it, would not have been met.

We have had occasion to look at the appeal case of **Harry Mwaanga Nkumbula and Simon Mwansa Kapwepwe Vs. The Attorney General (1),** a very controversial case with political undertones, and the case of **Re Brace (a debtor) ex parte The Debtor Vs. Gabriel and the Official Receiver (2),** an English case. The latter case was referred to in the *Nkumbula and Kapwepwe* appeal case **in** deciding the procedure to adopt when a lower court is faced with oral evidence and affidavit evidence that contains disputed material.

We observed in the *Nkumbula and Kapwepwe* appeal case that in an obviously controversial case, which it was, it was inappropriate for the evidence to be taken both orally and on affidavit. We observed in that case that what the parties should have done was to apply to the learned trial judge to make an order for directions as to the mode of trial and since the case was controversial our view was that the learned trial judge should have called for oral evidence. This was not the case and at the end of the trial the learned trial judge was faced with a situation where oral evidence and affidavit evidence on disputed facts was allowed to stand side by side.

Faced with that situation the learned trial judge had no choice but to compare such affidavit evidence with oral evidence to make a decision whether the affidavit evidence

was reliable. On appeal we took the position that the learned trial judge did not misdirect himself in assessing the evidence as to the facts of the case and that in his judgment he had properly relied on those facts. In the *Re Brace, ex parte The Debtor* case, an English case, both oral and affidavit evidence had been heard. Although the makers of the affidavit evidence were not cross-examined the court accepted and preferred oral evidence to affidavit evidence.

Our view of the two cases is that affidavit evidence is not discarded at the outset just because the deponent has not testified *viva voce* and has not been cross-examined. It is actually evaluated and applied if necessary. In the instant case the IRC properly directed itself when it considered the affidavit evidence of the respondents and even allowed it to stand against the oral evidence of the appellant. This was so because of the statutory requirement, in Section 85(5) of the Act, to do substantial justice to the parties. On the basis of our reasoning the appeal on the two grounds, therefore, fails. We now move to deal with ground three in which the appellant is asserting that: -

> **That the IRC erred in law and in fact when it ruled that the appellant had failed to rebut the charge of negligence in spite of the *viva voce* and documentary evidence which he adduced and which the respondents failed to challenge through cross-examination, as they failed to attend court. The court misdirected itself in applying a standard of proof which was higher than the traditional standard of "proof on a balance of probability" applicable to civil cases.**

Supporting the above ground of appeal the appellant's counsel submitted that the evidence, including documentary evidence, that was given by the appellant was never challenged by the respondents; that in his evidence the appellant denied the charge of gross negligence of duty and explained how the fraud happened. It was contended that the finance manager made changes to the appellant's department without consulting the appellant, thereby creating confusion.

Apparently, the changes the finance manager made interfered with the running of the department in that direct and conflicting instructions were issued to members of staff resulting in cash being not properly handled. The confusion naturally led to theft of cash and not even bank reconciliations could act as a deterrent to the thefts. It was further contended that the lack of bank reconciliations was, therefore, not the cause of the loss of

cash. The cause of the loss of cash, according to the appellant, was because of the confusion in the handling of cash brought about by the finance manager.

With regard to the standard of proof it was contended that the IRC did not apply the traditional standard of 'proof of on a' balance of probability.' It was argued that what was applied in this case was a higher standard of proof than the traditional one in that even though the respondents did not give evidence the lower court was still inclined to reject the appellant's unchallenged *viva voce* and documentary evidence.

The appellant thinks that the IRC could have arrived at a different conclusion if the appellant's explanation at pages 42 to 43 of the record of appeal, in relation to how the cash went missing, had been closely scrutinised. The two pages relate to an internal memorandum, which the appellant wrote to Mr. Huntingford, the finance manager, in ch the appellant alluded to the delays in reconciling the ledger and the role the finance manager played in the confusion, mismanagement and loss of cash, as being responsible for the lost cash.

The respondents, through their counsel, are adamant. They assert that the IRC was well grounded in law when it ruled that the appellant had failed to rebut the charge of gross negligence of duty. In so deciding the respondents do not think that the IRC had departed from the normal standard of proof in civil cases. The case of **Miller Vs. Minister of Pensions** (3) has been cited in aid but because of wrong citation we have not been able to find it. By treating the affidavit evidence of the respondents on equal footing with the evidence of the appellant, which was heard *viva voce*, the respondents think that the lower court acted prudently and legally within the framework of the law in Section 5) of the Act.

We have considered the arguments relating to ground 3 with keen interest. We have decided to split this ground into two parts in order to have a proper understanding of the issues at play. From the outset we wish to observe that the first part of this ground of appeal, as outlined in the first sentence, has been partially covered when we exhaustively dealt with grounds 1 and 2 above in relation to the IRC's use or adoption of the respondents' affidavit evidence.

We, however, note that in dealing with the charge of gross negligence the IRC observed at page 12 of the record of appeal thus –

The response of the complainant to the charge of gross negligence of duty is contained in his exculpatory letter dated the 23rd of July 1999 (CB5). In this letter of exculpation, the complainant does not deal specifically and adequately with the charge of gross negligence of duty. Indeed, when he appeared before us the complainant did not deal with the charge adequately and specifically ... As we observed above in this judgment, this is a specific charge supported by detailed particulars of the gross negligence. We expected the complainant to have dealt with it in a similar manner but the complainant took a cursory treatment of the matter ...

By and large the finding of the lower court, that the respondent had failed to rebut the charge of gross negligence of duty, was a finding of fact, for which this court has no legal basis upon which to overrule such a finding. Our decision in **Nkata and 4 others Vs. Attorney General** (4), is still valid law. The IRC heard the testimony of the appellant and had the opportunity to assess his demeanour, which opportunity we did not have since we are not a court of first instance.

Having ruled that the IRC was at liberty to rely on the affidavit evidence of the respondents in its evaluation of the appellant's evidence there is nothing this court can do to upset the finding of the lower court on a question of fact. That not withstanding, we have said in the case of **Zambia Consolidate Copper Mines Ltd Vs. Matale** (5) and in many other cases that "a finding of fact becomes a question of law when it is a finding which is not supported by the evidence or when it is one made on a view of the facts which cannot reasonably be entertained."

From the record of appeal, oral submissions and the heads of argument it has not been shown that the disputed finding of the IRC, that is to say, that the appellant had not rebutted the charge of negligence of duty, was a finding not supported by evidence or that it was made on a view of the facts, which cannot reasonably be entertained. All the appellant has done on appeal is to rely heavily on the fact that the respondents did not testify at trial, an issue we have already disposed of in favour of the respondents.

The second and last part of ground three deals with the standard of proof in civil cases. In this particular case the appellant, through counsel, is of the view that the lower court did not apply the usual or traditional standard of "proof on a balance of probability." Had the IRC applied the traditional standard of proof the appellant thinks

that it could not have come to the conclusion that the appellant had failed to rebut the charge of gross negligence of duty.

We have looked at the reasoning of the IRC at page 12 of the record of appeal from which the above quotation is extracted. From the reasoning, there is nothing to suggest that a higher standard of proof than the usual one was applied. We hasten to say that the standard of proof applied was not above the civil standard or anywhere close to the proof required in criminal cases. All we can say is that the IRC skillfully analysed the documentary evidence of the appellant, as well as, his oral testimony and compared it with the affidavit evidence of the respondents and came to a conclusion that the appellant had failed, on a balance of probability, to rebut the charge of gross negligence of duty. This ground also fails.

On grounds 4 and 5 it is contended that the lower court misdirected itself in holding that the appellant's dismissal was neither wrongful, unlawful unfair nor discriminatory in view of the unchallenged evidence adduced by the appellant on the fairness of the disciplinary proceedings and the facts pertaining to the dismissal. In support of the two grounds Mrs. Kunda submitted that rules of natural justice were breached when the appellant was dismissed by the respondents. She argued that it was trite law that an employee has a right to be heard and not to be thrown out of employment without justification; that an employee should not be discriminated against, especially on racial grounds. Counsel pointed out that it was at the board meeting of the 15th of July, 1999 where it was resolved to dismiss the appellant and not at any other meeting thereafter; that the meeting was attended by board members who included Mr. Huntingford, finance manager, Mr. Morgan and Mr. Marmelsten, the chief executive officer of the respondents, to whom the appellant was to appeal, thereby rendering the appeal process a farce. Counsel further pointed out that after the meeting the appellant was told to resign by Mr. Huntingford.

On discrimination, counsel submitted that although the appellant was a senior employee he was not allowed to attend board meetings of the respondents; that in the course of employment the appellant unearthed a lot of things in the respondents' companies, hence the victimization that followed. On the dismissal of the appellant, counsel argued that it was a misdirection for the lower court to hold that it could not rule

as to whether the dismissal was wrongful or not in the absence of the conditions of service regulating the employment of the appellant. In the view of counsel the appellant's conditions of service could properly be deduced from the letter of appointment, duration of employment, the memoranda exchanged between the parties and the general law of employment, that is, statutory and common law.

In response to the submission, counsel for the respondents argued that grounds 4 and 5 were based on findings of fact, contrary to the stipulation in Section 97 of the Industrial and Labour Relations Act, which provides that an appeal to this court from the decision of the IRC shall be on point of law or mixed point of law and fact. We have duly considered the arguments for and against grounds 4 and 5. From our decision in the case of **ZCCM Limited Vs. Matale** (5), which we have already referred to in this judgment, we have no difficulty in agreeing with the respondents' counsel that the decision of the IRC that the appellant's dismissal was neither wrongful, unlawful, unfair nor discriminatory was indeed a finding of fact

At page 13, lines 19 to 27, of the record of appeal, the lower court had this to say in relation to the allegation that the appellant's dismissal was wrongful and unlawful: -

> **The appellant has asserted that his dismissal was wrongful and unlawful. These are common law concepts, which are used to state that the dismissal was not in accordance with the contract of employment. At common law, an employee who has been wrongfully dismissed may sue for damages. But to succeed, he must show in which way the dismissal can be described as unlawful or wrongful. He will do so by leading evidence showing which provisions of the contract of employment were breached in effecting the dismissal. In the case before us, no contract of service was put before us. Not only this, but there was no evidence of the existence of any contract of service between the complainant and the respondents, adduced before us.**

In his evidence before the lower court the appellant admitted that there were no conditions of service for him as a senior member of staff, except those for the junior staff. At the time the complaint was being tried he had not secured any conditions of service. With such evidence, true as it is, we have no basis for impeaching the finding of the lower court as it is well supported by evidence. The appellant went to court alleging that he had been unlawfully or wrongfully dismissed and as per standard practice it was

incumbent upon him to prove the allegation. It was wrong, as counsel for the appellant seemed to suggest, to leave the matter of conditions of service to the court. It was the duty of the appellant to lay before the court all material evidence in support of his case. It is, however, surprising that the appellant, being a very senior officer, could not produce his conditions of service.

We still stand by the finding of the IRC that there was no unfairness in the manner the appellant was dismissed. As was rightly espoused at page 14, lines 6 to 15, there was no evidence before the trial court to show that the dismissal was in total disregard of the disciplinary procedures or that the dismissal was in contravention of the principles of natural justice. Besides, the appellant did not demonstrate, through evidence, that he was completely innocent of the charges leveled against him. To the contrary, there is evidence on record that the appellant was charged and he actually exculpated himself. In addition, the appellant attended a disciplinary meeting of the 3rd of August, 1999 at which he was dismissed; that after dismissal he appealed to the chief executive officer of the respondents who turned down the appeal. On the submission that the appellant was dismissed at a board meeting of the respondents of the 15th of August 1999 the trial court found that this was not proved in the absence of the minutes of the board showing those who attended and the relevant resolution passed. We have no cause to disturb such a finding of fact.

On a finding that the dismissal was not discriminatory and racially motivated we have again looked at our decision in the case of **ZCCM Ltd Vs Matale** (5) to see whether a finding of fact, as is the case here, could become a question of law but there has been no assistance from the case. In the case before us we feel that the appellant did not fully discharge the onus of proving his case to the satisfaction of the court. To succeed, the appellant should have led evidence, which would have enabled the lower court to compare the treatment given to him and to those others who were similarly charged in order to arrive at a conclusion that he (the appellant) was less favourably treated as compared to the treatment given to those others who were similarly charged. As the judgment of the lower court will clearly show such evidence was seriously lacking. With these comments the two grounds are unsuccessful.

On ground six the appellant has asserted that the IRC erred in law when it held that an invitation made to an employee to resign as an alternative to facing a disciplinary hearing, which may result in a dismissal, is not by itself a dismissal. In support of this ground, it was argued before us that 'if the lower court had properly directed itself it would have found that the demand to resign or face dismissal was itself constructive dismissal, particularly that the demand was put to the appellant even before he was heard on the allegations.

In rebuttal the respondents have argued that it was not the appellant who terminated the contract of employment but rather the respondents. It is argued that there was an actual dismissal before the appellant could resign and that being the position a case for constructive dismissal was not properly founded. We have considered the arguments for and against and we think that there was no constructive dismissal. We say so because the appellant did not resign as a result of some pressure that might have been exerted on him. He was actually dismissed. In our view, and without taking into account any other factors, a case for constructive dismissal would have been properly made if the appellant had resigned immediately he was told "to resign or face dismissal" because in that case he would have shown that he was actually "forced out" of employment.

At this stage we have decided to deal with Grounds 7, 8 and 9 together. The grounds read as follows: -

Ground seven: **That the IRC misdirected itself in refusing to award the underpayment of US $91, 794 or any equitable figure in respect of underpayment of salary claimed by the appellant.**

Ground eight: **That the IRC erred in law by referring the appellant's claim for K14, 742, 792 in respect of pension contributions to the Deputy Registrar for assessment when the appellant as an accountant had proved this claim through the unchallenged evidence.**

Ground nine: **That the IRC misdirected itself in dismissing the appellant's claim for the equivalent of redundancy pay as compensation for wrongful dismissal or wrongful redundancy in line with decided cases and the Minimum Wages and Conditions of Employment (General) Order, Statutory Instrument No. 2 of 2002, which revoked Statutory Instrument No. 119 of 1997.**

In support of ground 7, Mrs. Kunda submitted that the lower court rejected the appellant's claim on the basis that there was no agreement to pay the sum of US $4, 000 per month or any equitable figure. In her view this was a misdirection in view of the evidence on record. She referred us to the letter at page 38 of the record of appeal in which the respondents promised the appellant new remuneration as from the 1st of July 1996. When this was not forthcoming the appellant wrote a reminder to the respondents on the 1st of July, 1996, the day on which the new remuneration package was to commence, but there was no response. As per his evidence on record the appellant was asking for a monthly payment of US $4, 000 per month and other conditions to bring him to the level of expatriate staff of the same standing.

On ground 8 Mrs. Kunda submitted that the IRC should not have referred the claim for K14, 742, 792 to the learned Deputy Registrar for assessment because the appellant, as an accountant, had proved his claim on a balance of probability. The calculation appears at page 126 of the record. Counsel submitted that in addition to the calculation the appellant gave *viva voce* evidence, which was never challenged. On ground 9 the appellant's counsel submitted that the claim for the equivalent of redundancy pay as compensation was based on the averment that he was wrongfully dismissed. In terms of decided cases the appellant was entitled to an award of damages or compensation for wrongful dismissal equivalent to redundancy package.

In response, counsel for the respondents submitted that the finding under ground 7, that there was no agreement between the appellant and the respondents to pay US $4, 000 per month, was a finding of fact. With regard to ground 8 the counsel adopted the respondents' argument against grounds 1 and 2. The same position has been adopted in respect of ground 9.

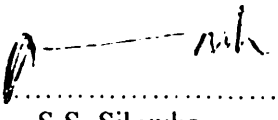
We have dutifully considered the three remaining grounds and our considered view is that they are all based on findings of fact, a matter we have ably dealt with above when evaluating other grounds based on facts. Under ground 7 it cannot be doubted that the respondents did not agree with the appellant's demand to be pegged at US $4,000 per month and it cannot, therefore, be the duty of the court to impose the new salary. On ground 8 it is a well- established fact that when parties cannot agree on the amount payable, the matter or dispute is sent for assessment. On ground 9, after having been

satisfied that the appellant was not wrongfully or unlawfully dismissed what else was there for him to be compensated for?

With the foregoing comments we find that there is no merit in this appeal and we dismiss it accordingly with costs to be taxed in default of agreement.

D.M. Lewanika,
DEPUTY CHIEF JUSTICE.

L.P. Chibesakunda,
SUPREME COURT JUDGE.



S.S. Silomba,
SUPREME COURT JUDGE.