

.-

**IN THE SUPREME COURT FOR ZAMBIA
72/2009**

APPEAL NO.

HOLDEN AT NDOLA AND LUSAKA

(Civil Jurisdiction)

BETWEEN:

**ZAMBIA POSTAL SERVICES CORPORATION
APPELLANT**

AND

**PRISCA BOWA
RESPONDENT**

1ST

CARISTO MUKONKA

2ND RESPONDENT

**Coram: Sakala, CJ., Chibesakunda and Mwamamwambwa
JJS.**

1st March, 2010 and 30th January 2012

**For the Appellant: Mrs. L. M. Ngoma, Assistant Legal
Counsel, Zambia Postal Services
Corporation.**

**For the 1st Respondent: Mrs D.P.S. Chabu of Messrs
Lumangwe**

Chambers.

JUDGMENT

Chibesakunda, JS., delivered the Judgment of the Court.

Cases referred to:

1. BARCLAYS BANK PLC VS UNION FINANCIAL AND ALLIED WORKERS, SCZ JUDGMENT NO. 12 OF 2007.
2. ZAMBIA CONSOLIDATED COPPER MINE VS JAMES MATALE [1995-1997] ZR 144.
3. KABWE VS BP (ZAMBIA LTD (1995-97)ZR 218
4. TOLANI ZULU AND MUSA HAMWALA VS BARCLAYS BANK ZAMBIA LIMITED (SCZ NO. 17 OF 2003.
5. HOLMES LIMITED VS BUILDWELL CONSTRUCTION COMPANY LIMITED (1973) ZRL 97
6. ZESCO VS MUYAMBANGO 2006 ZLR P.22
7. NATIONAL BREWERIES Ltd VS MWENYA 2002 ZLR P118,

Legislation referred to:

8. SECTION 26A, 26B, 36(C) 4(1) AND 8(1) OF THE EMPLOYMENT ACT, CAP 268.
9. CONSTITUTION OF ZAMBIA CAP 1 OF THE LAWS OF ZAMBIA
10. POSTAL SERVICES ACT CAP 470 OF THE LAWS OF ZAMBIA SECTIONS 4,5,6 AND 8(1)
11. PUBLIC AUDIT ACT CAP 378 OF THE LAWS OF ZAMBIA SECTION 13
12. PUBLIC FINANCE ACT NO. 15 OF 2004 SECTIONS 6,34 AND 38
13. ARTICLE 7 OF THE INTERNATIONAL LABOUR ORGANIZATION.
14. PUBLIC SERVICE MANAGEMENT DIVISION CIRCULAR B8 OF 2001
15. HALSBURY'S - THE LAW OF ENGLAND V.7 P354
16. SECTION 85 OF THE INDUSTRIAL AND LABOUR RELATIONS ACT NO. 27 OF 1993

This is an appeal by the Appellant against a Judgment by the Industrial Relations Court in favour of the Respondents.

The history of this matter is that the Respondents were employed by the Appellant. The 1st Respondent was employed as Chief Internal Auditor and the 2nd Respondent was employed as Legal Counsel and both of them were employed on a three year contract with fixed terms of employment. Their contracts were terminated pursuant to the termination clauses in their respective contracts. Consequently, upon their terminations, the Respondents by their amended Notice of Complaint, dated 28th of

October, 2008, sought the following reliefs at Industrial Relations Court:-

“(a) The balance on the gratuity for the contract served between August 2003 and August 2006 in respect of the 1st Complainant

(a) Unpaid salaries and perks for the remainder of the contract

(b) Damages for wrongful/unlawful termination of contracts

(c) Payment of gratuity in line with the contracts or reinstatement in the alternative

(d) Any Other relief the Court may deem fit

(e) Interest and

(f) Cost”

The 1st Respondent gave evidence before the Industrial Relations Court. The summary of her evidence is that, she was employed as a Chief Internal Auditor for the Appellant until 16th of May 2008 when she was served with a letter of termination of her contract without any reasons. From the time she was employed, she had no work related problems. She testified that after the

appointment of RW4, as Post Master General, she started having problems. She was asked by RW4 to report on her juniors to him on the thefts, alleged to have been committed by her juniors. According to her, these were unsubstantiated claims of thefts alleged to have been committed by her juniors. She refused to do what RW4 asked her to do as she thought that this was witch hunt. According to her, RW4 then started to ask her to meet him socially outside working hours over drinks. She turned down such requests. This upset him. So he started to refuse to sign or approve any work done by her such as audit plans and annual audit charters. In the same vein, he even refused to read her auditor's reports on Barclays Bank Western Union Account 0535228. She tried to put in a report explaining her approach to work, he in turn started by passing her and dealt with her subordinates. He directed her not to continue with any audits until he directed so. In February, 2008, she was served with a letter, which was produced in Court, in which the Post Master General (RW4) alleged that she had been writing to Ministry of Communication and Transport about him. In the letter from the Post Master General, the 1st Respondent was asked to "*show*

cause why” she should not be disciplined. She responded exculpating herself. The next event was that she was summoned to the meeting chaired by RW2. That was the end of this disciplinary process. The next thing was that on the 16th of May, 2008, she received a letter of termination. She was convinced that although in this letter the Appellant invoked clause 5.1 of her contract, by giving her a notice period, the real reason, for terminating her contract, was the hostility which existed between her and RW4. The notice clause, in this letter, was a mere cover up.

Regarding the issue of gratuity, she testified that she was on contract and that during her 2000 to 2003 contract, gratuity was paid at 35%. This was raised to 45%. However, during the next segment of her contract, gratuity was raised to 100% by the Board of Directors. She referred to paragraph 3.2.2. of that Board’s minutes marked “5” dated 29th of October, 2004. According to her, at the expiry of that segment of her contract in 2006, her gratuity was calculated at 100%. She was paid that gratuity except for K30million outstanding.

Under cross-examination, she accepted that under clause 5 of her contract, it was possible to terminate her contract by notice or payment in lieu but she testified that she was shocked when the Appellant used that clause as there was no good reason for terminating her contract. According to her, this was so because of the reports emanating from RW4. That was the basis of the termination of her contract.

On the issue of drawing up an audit plan, her testimony was that she followed her plan and eventually produced the plan. She testified that her reports were rejected by RW4. Basing on this testimony, she asked the court to grant her the remedies she prayed for.

The 2nd Respondent also testified before the Industrial Relations Court. His evidence was that he was the in house Legal Counsel and that originally, he was operating in Ndola until he was transferred to Lusaka. He worked for the Appellant for eight years. He testified that on 11th March, 2008, he had received a letter from RW4 entitled **“Termination of Contract of**

Employment.” According to him, in that letter, RW4 was annoyed that the Permanent Secretary, in the Ministry of Communication and Transport, had called him (RW4) on 6th March, 2006 to answer to a number of written allegations allegedly made by him against the 1st Respondent and 2nd Respondent. On 11th March, 2008, the 2nd Respondent was called upon to exculpate himself and “*show cause why*” the disciplinary action should not be taken against him, on the allegation of insubordination, gross negligence, indiscipline, failure to follow disciplinary procedure, releasing Corporation information without authority and misrepresenting facts. He forwarded his exculpatory statement on 17th March 2008 in which he denied all the allegations. He was called to a meeting chaired by RW2 to answer any of the allegations. What followed was a letter of termination on 16th May, 2008. In his view, his termination was premised on the disciplinary charges leveled against him which were never concluded as they were discontinued. He explained that, the procedures of disciplining him, were not followed. He testified that, according to his contract, the disciplinary action ought to have been commenced by a charge being raised against

him. This should have been followed by a disciplinary hearing. But there was no such disciplinary hearing. He also testified that non of all disciplinary offences, catalogued in this letter, with the exception of insubordination, were listed in the disciplinary code. He testified that he never heard anything from RW4 until he received his letter of termination while he was attending a course at the Zambia Institute of Advanced Legal Education (ZIALE).

His contention on his gratuity, is that, it ought to have been computed at 100% as provided in clause 8.1 of his contract. He was surprised that his gratuity was computed at 45%. He therefore, rejected that gratuity. He explained that in 2004, after concluding salary increments for unionized staff, proposals were made for the review of the conditions of service for non unionized staff and proposals were submitted to an interim Board which existed from 2000 to 2007. That interim Board met on the 29th of October, 2004 and discussed proposals tabled before it. One such proposal, which was tabled before the interim Board, was to review salaries and gratuity for non unionized members of staff. He testified that these proposals tabled before this interim Board,

were based on comparisons made with the other parastatal organizations. So the interim Board approved the reviewed salaries for the Management staff and approved the increment of gratuity from 45% to 100%, to mitigate the disparity between the salaries of the Appellant's members of staff and other parastatal organizations. On the audit query by the Auditor General's office, he testified that although there was an audit query as to why gratuity was raised from 45% to 100%, and although the Public Accounts Committee directed that increment should be reversed, that was never tabled before the interim Board for the interim Board to implement that directive. The 2nd Respondent also testified that he maintained that he was entitled to 100% gratuity because he was employed by the Appellant which is a legal body, capable of suing and being sued, and not any other institution. He also testified that he had a chance of going through his conditions of service before accepting them and signing the contract. He further testified that he advised RW4, as Post Master General, to take the recommendations of 100% rate of gratuity to the Public Accounts Committee and wait for the response and to table the response before the interim Board before

communicating this increment of 100% to the affected employees. This was not done. Subsequently, after the directives came from the Secretary to the Cabinet to reduce the increment from 100% to 45%, he advised RW4 to either allow the live contracts (with 100% increment of gratuity) to run their life until expiry and to deal with the reduction of gratuity in new contracts involving new employees or to present the suggested amendments to the interim Board for the Board to make those variations to the conditions of service and to present them to the employees affected for them to accept that reduction in the gratuity rate from 100% to 45%. RW4 rejected that also.

On his going to ZIALE, he explained that he had responded to an advertisement in the local media and made a budgetary provision for the same through the Director of Human Resources. Upon his acceptance, he brought this to the attention of RW4 and sought his permission to attend the course but his request was turned down after which he continued to work. He appealed to RW2, the Board Chairman who indicated that he had talked to RW4 and that he had no objection and advised him to see RW4. After a stretch of time, RW4 allowed him to join the class as he

did not want to be seen as the one who hindered people's academic progress. He explained that he joined the class in the second week of May 2008 but that he continued reporting for work at the Lusaka office whenever he was not in class. He further pointed out that his contract was terminated within two weeks of going to ZIALE.

The Appellant's evidence at the Industrial Relations Court was given by four witnesses. The first witness (RW1) was the Director of Human Resources, who testified that the two Respondents' contracts of employment were terminated on the 5th of May, 2008. On disciplinary procedures, he explained that, where an employee is formally charged and called upon to exculpate himself within 24 hours, that employee is entitled to appear before a disciplinary committee after which that committee decides what disciplinary measures to take and that decision is communicated to the employee concerned in writing. He said that the document marked 40 in the Respondents' Supplementary bundle of documents was known as "*show cause why*". It was addressed to 1st Respondent. It was not a charge

letter. He identified another document 24 in the Appellant's bundle of documents as the **Public Service Management Division circular B8 of 2001**¹⁴ which he told the Court was not applicable to the Appellant as it was not addressed to it. He also identified document 37-42 as the Minutes of the Executive Committee Meeting which approved the adjustment of gratuity to 100%. He told the Court that, the Auditor General observed that the circular cited, was not applicable to the Appellant's employees. The Auditor General's report went to the Public Accounts Committee which recommended that the increased gratuity of the Appellant's employees had to be reversed to 45%. The Secretary to the Cabinet wrote a letter to the Appellant, directing that the monies paid to employees of the Appellant as part of the increased gratuity of 100%, had to be recovered from those employees who had benefitted.

Under cross-examination, he told the Court that at the time the Respondents left employment with the Appellant, their contract had not been amended reflecting the reduced rate of gratuity to 45%. He furthermore testified that the reviewed

conditions of service, including the proposed increase of gratuity to 100%, were fully endorsed by the Board of Directors and fully implemented. So the normal procedure of revising conditions of service had been fully followed. He concluded that, at the time the contracts of the Respondents were terminated, he calculated their gratuity at 100% although he only paid them 45%.

RW2, the Board Chairman, testified that he had received a call from State House informing him that State House had received a lot of complaints about some unfair terminations of employment. State House advised him to take a certain course. He declined to take that course because he maintained that the matters were purely administrative.

On the 2nd Respondent, RW2 told the Court that the 2nd Respondent talked to him about RW4 refusing to allow him to go to Ziale. On 1st Respondent, RW2, knew about RW4's complaint that the Appellant had lost a sum of K600,000,000.00 due to the lack of good quality audit reports by the 1st Respondent and that more than that sum had been stolen and that the culprits had not

been brought to book. According to him, the Appellant had also lost a plot in Ndola and another one in Nakonde as well as a house in Samfya due to lack of supervision by the 1st Respondent. As regards the Public Accounts Committee, he testified that the Board knew of the report in which it was directed to revert to 45%, the rate of gratuity for the employees of the Appellant from 100%.

Under cross examination, RW2 told the Court that the Board of Directors was virtually non-existent at the time the interim Board of Directors approved of 100% increment because it had only two members out of the five prescribed by statute and just before the contracts of the Respondents were terminated, he was the only member of the Board. So the Board never sat. In cross examination, he testified that the appointing authority had given him powers to perform the functions of the Board. According to him, the Board of Directors on 29th October 2004 had approved of the increment of gratuity to 100%. He also told the Court that the 1st and 2nd Respondents lost their jobs. The reasons given for their losing their jobs were for the 1st

Respondent that she was responsible for the loss of property in Ndola, Nakonde and Samfya and for the 2nd Respondent, that he was insubordinate.

RW3 was a junior person to the 1st Respondent. In his testimony, he confirmed that RW4 instructed him to investigate Western Union Account and the overdrawn account held at Barclays Bank. He said that upon receiving instructions, he set up a team of five people including himself. The team went into the field and prepared a draft report which he submitted to the 1st Respondent. He told the Court that their findings were that there was no evidence of thefts but that the funds were being mismanaged and the team recommended some corrective measures and disciplinary action against the Managers of money transfer, the Accountant, bank reconciliation, the Finance Manager and the Finance Director. RW4 (Post Master General) got concerned over the delay in submitting the final report by the 1st Respondent. So he, RW3, submitted a report to RW1. He, RW3 later discovered that the final report submitted by the 1st Respondent did not capture all the recommendations which the

team made in the draft report. So it was not true that the team made no recommendation.

RW4, the Post Master General, testified that he assumed office on the 13th of March, 2007. He was a Banker and he worked for various banks including Bank of Zambia. He testified that his appointment was in order to put a stop to financial mismanagement and to turn the Appellant into a viable entity. He denied the allegation that he came to the Appellant with a misconception that the Directors were stealing from the Appellant. He however accepted that there was a perception that he had come to dismiss members of staff particularly Directors. He also told the Court that he terminated the contracts of the 1st and 2nd Respondents, as their supervisor, in accordance with clauses 5.1 of their respective contracts. He told the Court that, contrary to the testimony of the two Respondents, the two Respondents attended a meeting at which they were entitled to exculpate themselves. RW2 chaired the meeting. On the allegation that he solicited for an intimate relationship with the 1st Respondent, he denied any suggestion of sexual harassment. He

told the Court that she never complained of sexual harassment. He also denied sidelining the 1st Respondent. He further told the Court that after the Barclays Bank's duplication of the Western Union account and the overdrawing of the same account, the Finance Director approached him recommending to invest some money in Western Union account and to use the interest to buy some assets for the Appellant. Due to inadequacy of the explanation rendered to him by the Finance Director on the transactions in the Western Union account, he directed the internal audit to investigate the account. He was not happy that instead of taking the scheduled one month, the audit went into the fifth month and the 1st Respondent who was in charge kept giving excuses. This is why he resorted to calling on the audit team and the audit team gave him a draft report. He compared the draft report with the final report surrendered to him by the 1st Respondent. They were different as the final report made no recommendations. Therefore, he concluded that the 1st Respondent was incompetent.

As regards to 2nd Respondent, RW4 told the Court that he received a note from the 2nd Respondent, asking for permission to proceed on leave to pursue a course. He did not grant him permission. He traveled out of the country on duty. On his return, he had a discussion with the 2nd Respondent during which discussion he advised the 2nd Respondent to take leave before proceeding to pursue his studies. RW4 testified that the 2nd Respondent did not take leave as advised. He took off for Lusaka without permission and purported to operate from there. He further said to the Court that at one time RW4 refused to take legal advice from the 2nd Respondent as he was not obliged to do so and consequently, the 2nd Respondent cut a deal with the other side without his authority, a move he considered unreasonable.

As regards to termination of contracts, he testified that he made recommendations to the Board to terminate the two Respondents' contracts on the basis of incompetence, failure to obey lawful instructions, concealing information, negative and counter productive behaviour. He told the Court that he opted to

invoke the termination clauses in their respective contracts. He denied the assertion that the Respondents were dismissed as a disciplinary measure and that due process was not followed.

With regard to the issue of gratuity, he told the Court that he was not with the Appellant at the time it was raised from 45% to 100%. He was later told that the raise was passed on the basis of a Government circular. He testified that the Auditor General made a report and that he was summoned to appear before the Public Accounts Committee together with the Permanent Secretary for the Ministry of Communication and Transport. He testified that he was accompanied to the meeting by the 2nd Respondent and the Finance Director. He told the Court that these people, who accompanied him, told the Public Accounts Committee that there was nothing irregular about the increment of gratuity from 45% to 100%. But the Public Accounts Committee informed them that, that **Circular B8 of 2001**¹⁴, was not applicable to Parastatal bodies. According to RW4, the Committee further recommended that, all excess gratuity paid to the Directors, had to be recovered and that the rate had to revert

to 45%. He told the Court that after this hearing, he held a meeting with the Directors to explain the outcome. He told the Court that he received a directive from the Permanent Secretary of the Ministry of Communication and Transport, to implement the Public Accounts Committee's ruling.

In cross examination, he told the Court that the issues over which he had written the complainants, asking them to "*show cause why*" disciplinary action should not be taken against them, had been closed at a meeting chaired by the Board Chairman. He told the Court that the Board had never sat since his appointment as a quorum could not be constituted. He also told the Court that there was no correspondence directing the reversal of 100%.

That was the evidence before the Industrial Relations Court. On this evidence, the Industrial Relations Court held that:

"We therefore, do not accept the submission on behalf of the Respondent that the Complainants are guilty of unauthorized expenditure. The correct position is that the Complainants did

not authorize the expenditure on the 100% rate of gratuity. They however, benefited from the rate by virtue of clause 8.1 of their contracts of employment which were duly signed after the interim Board, the employer, had approved the increment. We take the view that if there is anyone guilty of unauthorized expenditure, it is the interim Board and not the Complainants. It is therefore, our considered view that in this case, the Complainants' contracts of employment remained intact and valid including clause 8.1 regardless of the Public Accounts Committee's recommendation in that regard."

On the issue of the lawfulness of termination of the Respondents' contracts, the Court held at page 30 that:

"It is our considered view that given the background to this case which we highlighted earlier, this is a proper case in which the Court ought to delve behind the Notice Clauses. We have done so and we are satisfied that the Complainants' terminations were predicated upon RW4's preconceived perception that the Directors, including the Complainants were perpetrating fraud in the Respondent. We are further satisfied that the Complainants are sufficiently qualified for the positions they held justifying their long periods of service in those positions (18 years for the 2nd Complainant and 8 years for the 1st Complainants) and as such we do not accept

suggestions of incompetence as the reason for the terminations. We do not subscribe to the suggestion of incompetence as the reason for the terminations. We do not subscribe to the suggestion that an employer can make open allegations relating to the conduct and performance of an employee and avoid Section 26A by using the Notice Clause and we do not think that that was the tenor of the Supreme Court's decision in Tolani Zulu and Musa Hamwala. We believe that the Notice Clause provides an avenue through which either party to a contract of employment may quietly walk out of it."

The Appellant, being aggrieved by this decision, has come to this Court raising four grounds of appeal:-

- 1. That the learned trial Court below erred in law and fact when it held that Section 26A of the Employment Act, Cap 268 of the Laws of Zambia applies to written contracts of employment.**
- 2. That the learned trial Court below erred in law and fact when, in delving behind the termination of contract of employment for the Respondents, it disregarded the evidence adduced by the Appellant to the effect that the Respondents were incompetent and insubordinate.**

3. That the learned trial Court below erred in law when it held that the Appellant's termination of the Respondents' contract of employment was unlawful.
4. That the learned trial Court below erred in law when it failed to consider the legal effect of implementation of the recommendations of the Parliamentary Committee on Public Accounts as laid down by the Public Finance Act No. 15 of 2004 on both the Appellant and the Respondents.

At the hearing of the appeal, both sides relied on their written heads of argument. In the written heads of argument, the Appellant sought to expunge from the record all documents in the supplementary record which documents were never produced in the Court below. The Court granted this application.

Coming to ground 1, the Appellant's position was that the Industrial Relations Court erred in law and in fact when it held that **Section 26A of the Employment Act**⁸ applied to written contracts of employment. Citing the case of **Barclays Bank PLC vs Union Financial and Allied Workers**¹, Counsel argued that **Section 26A of the Employment Act**⁸ only applied to oral

contracts. Counsel pointed out that **Section 26A of the Employment Act**⁸ is contained in part 4 of the Employment Act and Section 16 is also part of part 4 of the same Act. Section 16 provides that the provisions of part 4 only apply to oral contracts. This was confirmed in the case of **Barclays Bank Plc vs Zambia Union of Financial and Allied Workers**¹. Counsel argued that in this case, the Industrial Relations Court was supposed to settle a collective dispute arising from a compulsory redundancy scheme, which had been reduced into writing, and which had set out in detail the rights and obligations of the parties to the agreement. So the Industrial Relations Court erred in concluding that Section 26A, like Section 26B, applied to the Respondents. Counsel drew a distinction between **Section 26A and Section 26B of the Employment Act**⁸. Counsel argued that whereas Section 26A related to termination of contracts of employment on the ground related to conduct or performance by an employee, Section 26B related to termination by redundancy. He contended that the Industrial Relations Court erred in its conclusion because neither Section 26A nor Section 26B applied to the issues in this case.

On grounds 2 and 3, the Appellant's arguments are that the Industrial Relations Court erred in law and in fact in delving behind the termination of the contracts of employment of the two Respondents in total disregard of the evidence adduced by the Appellant, to the effect that the two Respondents were incompetent and insubordinate. Citing the well celebrated case of **Zesco vs Muyambango**⁶, the Appellant argued that it is not the function of the Industrial Relations Court, to interpose itself as an Appellant tribunal, within the domestic disciplinary procedures of the Appellant and to review what the Appellant had done. The duty of the court, Counsel maintained, was to examine if there was any necessary disciplinary power and whether it was exercised properly. According to the Appellant in the case in casu, there was evidence of incompetence and insubordination on the part of both the 1st and 2nd Respondents. This evidence is distinguished from the "*show cause why*" letters written by the Appellant to the Respondents. The Respondents did not refute this evidence of incompetence or insubordination apart from simply denying that, the evidence adduced, amounted to

incompetency or insubordination. According to Counsel, both offences carry the sanction of dismissal under the Appellant's Disciplinary Code. The fact that the Appellant chose to invoke the termination clauses for the two contracts of employment as opposed to disciplinary action, is legally tenable (see case of **Tolani Zulu and Musa Hamwala vs Barclays Bank**⁴).

In the alternative, the Appellant argued that even if the Court found that the Appellant was in breach of the disciplinary (code) procedure, there is no injustice which was occasioned by the Appellant having dismissed the two Respondents as they had committed the two offences for which they could have been dismissed. There was overwhelming evidence that two Respondents committed these two offences. Citing the case of **National Breweries vs Mwenya**⁷, where it was held:

“where an employee has committed an offence for which he can be dismissed, no injustice arises for failure to comply with the procedure stipulated in the contract and such an employee has no claim on that

ground for wrongful dismissal or a declaration that the dismissal is a nullity

Counsel argued that the Appellant was perfectly entitled to dismiss these two Respondents which it did. Therefore the Appellant argued that the Industrial Relations Court erred in law when it held that the Appellant's termination of the Respondents' contracts of employment was unlawful.

On ground 4, the Appellant's arguments were that the Court below, erred in law when it failed to consider the legal effect of the implementation of the recommendations or directives from the Parliamentary Committee on Public Accounts as laid down by the **Public Finance Act**¹² on both the Appellant and the Respondents. The Appellant argued that it had labored to expound the law that gives power to the Parliamentary Committee on Public Accounts. It was argued that the Court below did not address its mind on the legal implications of the said Committee giving directives to the Appellant and instead found that the Appellant was liable when the Appellant was just

carrying out instructions. It was further argued that the Public Accounts Committee draws its authority from both the Constitution of Zambia Cap 1 and the **Public Finance Act**¹². According to Counsel for the Appellant, the Secretary to the Treasury, under Section 6 sub-section (3)(h) of the **Public Finance Act**¹² is mandated to implement the recommendations of the Parliamentary Committee on Public Accounts without questions. He has no discretion in carrying out this statutory function. The record shows that the Secretary to the Treasury did write to the Appellant to effect this statutory duty by implementing the recommendations of the Parliamentary Committee on Public Accounts, in order that an appropriate treasury minute could be tabled before Parliament. Further, it was argued that the record shows that the Appellant's Controlling Ministry, the Ministry of Communication and Transport echoed this directive of implementing the reduction of 100% to 45% relating to the rate of the gratuity of their employees. So Counsel posed a question as to whether it was correct for a mere recipient of this obligatory statutory directive - (the Appellant) to bear the consequences of implementing the directives from the

Parliamentary Committee on Public Accounts. According to Counsel, the answer is negative. Counsel went on to submit that, although the Appellant accepted that the rate of gratuity was increased to 100%, by the interim Board, this was a mistake because this increment was meant to be based on **Government Circular B8 of 2001**¹⁴ which circular did not apply to parastatal employees (including the Appellant's employees). Therefore this was a mistake of fact. This mistake of fact therefore nullified the increase of the rate of gratuity to 100%. Counsel, therefore argued that the Court below erred when it held that the Respondents' gratuities were validly increased to 100%.

The Respondents' counter arguments on ground 1 are that the Industrial Relations Court did not err in law or in fact when it held that **Section 26A of the Employment Act**⁸ applied also to written contracts. Citing both **Sections 26A and 26B of the Employment Act**⁸, the Respondents argued that the main distinction between Sections 26A and 26B is that whereas Section 26A deals with termination of contracts of employment on grounds related to conduct or performance of an employee,

Section 26B deals with termination of contracts due to redundancy. The gravamen of the Respondents' argument in ground 1 is that the Appellant breached the rules of natural justice in that it did not give a chance to the Respondents to be heard on the allegations of inefficiency and insubordination before terminating their respective contracts of employment, by invoking the termination clauses. Counsel's contention is that the intention of legislature, **in Section 26A of the Employment Act⁸** was to underscore the importance of observing the principle of **audi alteram partem** in cases where employees are being disciplined and their contracts being terminated on the basis of misconduct or any other disciplinary measures. Counsel argued that **Section 26A of the Employment Act⁸** domesticated **Article 7 of the International Labour Organisation¹³** Convention. So when the Industrial Relations Court made references to **Section 26A of the Employment Act⁸**, this was purely to underscore the notion that it is cardinal for employers, when they are disciplining their employees, to observe rules of natural justice. The reference to Section 26A applying to written contracts, although obviously wrong, was really **orbiter dictum**.

So it is on this basis that the Industrial Relations Court made these remarks.

In response to ground 2, the two Respondents argued that the Industrial Relations Court did not err in law and in fact in delving behind the termination of the two Respondents' contracts, (see the well celebrated case of **Zambia Consolidated Copper Mines Limited vs James Matale²**.) Counsel argued that the Industrial Relations Court has a mandate to do substantial justice. There is nothing in this case to suggest that the Industrial Relations Court itself was at fault or technically wrong as there is nothing in the Act to stop the Industrial Relations Court from delving behind to find the real reasons for the terminating of the Respondents' contracts in order to redress any wrong or injustice discovered. Counsel argued that in this particular case, the Court by delving behind termination of the Respondents' contract, found that although the Appellant used the termination clauses, the real reasons for terminating the Respondents' contracts were related to disciplinary measures which had been abandoned mid stream. As a result, the court having considered evidence before

it, made certain findings of facts: (1) That the Respondents did not have a good working relationship with RW4 from the time he assumed office as Post Master General (2) That the termination of the Respondents' contract were predicated upon the Post Master General's preconceived perceptions that the Directors, including the Respondents, were perpetrating fraud in the Appellant's organization. (3) That this perception was not founded on any evidence (4) On the contrary, the Respondents were sufficiently qualified for the positions they held (5) That the allegations of incompetence were unfounded as the court rejected the evidence of incompetency and insubordination.

In the alternative, Counsel argued that the offences, allegedly committed by the Respondents, did not carry the penalty of dismissal under the Appellant's disciplinary code. The penalty for the offence of incompetence is written warning for the first breach, delayment of increment for the second breach and final warning or demotion for the third breach. Whereas for insubordination, the penalty is ten days suspension without pay

and final written warning and not dismissal (see pages 453 and 454 of the Record of Appeal).

On ground 3, the Respondents' response was that as they were not given an opportunity to respond to the allegations of incompetency and insubordination, it was wrong for the Appellant to try and bring up these allegations in court. Besides the evidence, adduced in court on these charges by the Appellant, was rejected. The court accepted the evidence of the Respondents that there was an acrimonious relationship between the Post Master General (RW4) and especially with the 1st Respondent. Therefore, according to Counsel, the court was right to have delved behind the reasons given for the termination of the contract by the Appellant and to have looked at the actual motivation and to hold that the terminations were unlawful. Counsel argued that although an employer may terminate a contract of employment of an employee by giving notice to terminate or payment in lieu of notice, it is equally trite law that the court has a prima facie duty to ensure that the right to terminate employment, through notice clause, is not abused. A

notice clause is a powerful weapon in the hands of an employer which is susceptible to abuse unless the courts are alert and vigilant.

The two Respondents, in response to ground 4, argued that the court below did not err in law and in fact. On the implementation of the directives from the Parliamentary Committee on Public Accounts Committee, it was argued that although the Respondents did not question the authority of the Parliamentary Committee on Public Accounts nor did they question the existence of this statutory duty or obligation under the **Public Finance Act**¹². Their arguments however are that (1) These legal implications had not been canvassed before the court below. (2) The main issue before the court below was in the manner in which the Appellant attempted to implement the directives from the Parliamentary Committee on Public Accounts, (3) The Appellant had attempted to implement these directives from the Parliamentary Committee on Public Accounts at the time when the contracts between the Respondents and Appellant had already been validly entered into three years or so before. (4)

The gratuity rate had all along been 35%, far much less than the other employees in other parastatal bodies. (5) These increments from 35% to 45% and finally to 100% were in exchange with the employees giving up their long service bonus of three months pay per each year of service, in the spirit of give and take and the principle of accord and satisfaction. (6) Under Section 3 of the **Postal Services Act**¹⁰, the Appellant has the due recognition of being a legal entity, capable of suing and being sued. As a legal entity, under Section 8 sub Section 1 of the First Schedule of the **Postal Services Act**¹⁰, the Appellant's Board of Directors has the power to determine terms and conditions of employment for its employees. Under Section 4 sub Section 1 as read together with Section 5 of the same Schedule, the Board of Directors regularizes its own procedures for the purposes of carrying out these functions. The Board of Directors is empowered to establish sub committees (7) As there was no full establishment in the membership of the Board of Directors from 2004 up to 2008, there was an interim Board. This interim Board of Directors on the 29th of October, 2004, convened to review conditions of service for non unionized and contract employees of the

Appellant. Eleven items were considered and approved of by this interim Board. Amongst the approved items were the new conditions of service. Among these new conditions of service, the increment of gratuity from 45% to 100% was one of the approved new conditions. (8) The interim Board of Directors which convened on the 29th of October 2004, had the Deputy Permanent Secretary of the Ministry of Communication and Transport and the Assistant Secretary in the same Ministry in attendance (9) The Parliamentary Committee on Public Accounts resolved that **Circular B8 of 2001**¹⁴ did not apply to the employees of the Appellant three years after the interim Board had approved of the increment (10) The Appellant's Chief Executive wrote to the 2nd Respondent informing him that the Parliament Committee on Public Accounts had reversed the increment from 100% to 45% (11) By then, the only member of the Board was RW2 as against the full compliment of five members. The interim Board of Directors could not meet as a quorum could not be formed to reverse the increment of the rate of gratuity which had been increased from 45% to 100% as provided under Section 8 1 read together with Sections 4 and 5 of the **Postal Services Act**¹⁰ (12)

The affected employees were not consulted contrary to the decision of **Kabwe vs BP (Zambia) Limited**³ (13) The shareholders in the Appellant's company had already expressed their wish to raise the rate of gratuity from 45% to 100 %. In conclusion, the recommendations/directives from the Parliamentary Committee on Public Accounts, to vary the rate of gratuity in the contracts of employees of the Appellant, from the rate of 100% to 45%, was not implemented as per procedure laid down in Section 8 as read with Section 4 and 5 of the **Postal Services Act**¹⁰.

On the argument that the interim Board of the Appellant was misled into believing that the Government **Circular B8 of 2001**¹⁴ applied to the employees of the Appellant at the time when the increment of 100% was approved, Counsel argued that that point is not tenable because in attendance at the interim Board of Directors' meeting, which approved of the increment on the 29th of October, 2004, there were the Deputy Permanent Secretary and the Assistant Secretary in the parent Ministry of Communication and Transport. These two senior civil servants

must have known the contents of this **Circular No. B8 of 2001**¹⁴ and must have known who were affected by that circular. It follows that the approval to revise the rate of gratuity to 100% could not have been made based on any wrong information or mistake. This decision to increase the rate of gratuity to 100% must have been based on the government's new policy that had been adopted on gratuity.

So the Respondents' argument was that the directives of the Parliamentary Committee on Public Accounts remained unimplemented as the correct procedure of amending the Respondents' contracts of employment was not followed in spite of the advice from the 2nd Respondent to RW4.

In conclusion, on ground 4, Counsel citing the case of **Holmes Limited Vs Buildwell Construction Company Limited**⁵ urged this Court to adopt the following approach:

“where parties have embodied the terms of their contract in a written document, extrinsic evidence is

not generally allowed to add, to vary, subtract from or contradict the terms of the written contract.”

Counsel argued that in this case, the agreement between parties was embodied in a written contract. It was therefore, not correct for extrinsic evidence to be allowed to add, vary or subtract from or contradict the terms of that written contract.

These were the arguments before the court

We have looked at the record. We have also considered the issues raised by both sides. What clearly comes out, in this case, are three issues. These are: (1) Whether the court below was correct to emphasize the need to observe the principle of **audi alteram partem** (the applicability of **Section 26A of the Employment Act**⁸) (2) Whether the court was correct in delving behind the termination clauses and thus reaching the conclusion that the termination of the two Respondents' contracts of employment was unlawful (3) Whether the increment of gratuity

from 45% to 100%, which variation now became part of the two Respondents' contract of employment, was valid.

On the first issue, which is canvassed in grounds 1, 2 and 3 of the appeal, according to the evidence before the Court, there is common ground on the following issues: (1) That the two Respondents were employed as Chief Internal Auditor (the 1st Respondent) and as in-house Legal Counsel (the 2nd Respondent) (2) RW4 was appointed as Postmaster General much later than the two Respondents. The 1st Respondent had worked for the Appellant for eight years. After the appointment of RW4 as Postmaster General, an acrimonious relationship started between the two Respondents on one hand and RW4 on the other hand. (3) RW4 accused 1st and 2nd Respondents of being incompetent and insubordinate. (4) This led to the 1st Respondent being side-lined by RW4, she was not allowed to perform her duties, to make audit reports, in particular on the Barclays Bank duplication of Western Union. (5) This acrimonious relationship culminated in the 1st Respondent being subjected to disciplinary procedure. These disciplinary procedures were mid stream dropped. (6) As regards

the 2nd Respondent, RW4 refused to allow him to go to Ziale to pursue his law studies (7) He reluctantly allowed the 2nd Respondent but later wrote the 2nd Respondent a letter asking him to “*show cause why*” he was not going to be disciplined. (8) The 2nd Respondent exculpated himself, again these disciplinary measures were in mid stream dropped. He received a letter of termination invoking the termination clause. (9) The interim Board of Directors had before the termination of the two Respondents’ contracts, convened and approved of the increment of gratuity on the 29th of October 2004 (10) From around 2004 to the time the Respondents’ contracts were terminated, the Board did not have a full compliment and as such, the powers vested in the Board were vested in RW2 to carry out. (11) At the time the two Respondents left employment, their respective contracts of employment had not been amended to reflect the reduction in gratuity from 100% to 45% as directed by the Parliamentary Committee on Public Accounts (12) The Auditor General’s Report had observed that **Circular B8 of 2001**¹⁴ did not apply to the Appellant’s employees.

Bearing these facts, on which there is common ground in mind, on the first issue, that is whether or not **Section 26A**⁸ applies to the issues before this Court, it is obviously clear that **Section 26A of the Employment Act**⁸, coming under part 4 of the Act and with Section 16 providing that this part of the Act shall apply only to oral contracts, was not applicable to the issues before the Court. Nonetheless, looking at the reasoning of the lower court, we hold that the Industrial Relations Court did not have to rely on the provisions of Section 26A to reach the conclusion it reached. The Industrial Relations Court's decision was anchored on the fact that the Appellant had not observed the rules of natural justice which are embodied in **Section 26A of the Employment Act**⁸ domesticating **Article 7 of the International Labour organization**¹³ convention. This is so as according to the facts not in dispute, the Appellant was accusing the two Respondents of disciplinary offences and as such the two Respondents had a fundamental right of being given a chance to respond to the accusations. The court below made its comments on the applicability of Section 26 because the Appellant had commenced disciplinary action against them, they were sent

letters of (*show cause why*). These disciplinary measures were abandoned mid stream. Then the Appellant dubiously and surreptitiously invoked the termination clauses. This is what prompted the Industrial Relations Court to make references to Section 26A wrongly. The remarks were **orbiter dictum**. The main concern of the Industrial Relations Court was to bring out the need for employers to treat their employees fairly by observing rules of natural justice when disciplining their employees. The court, fulfilling its prima facie duty to ensure that the right to terminate the employment of the two Respondents, through notice clause, was not abused, made those orbiter dictum remarks.

On the second issue, that is whether the court was correct in delving behind the termination clauses and thus reaching the conclusion that the terminations of the two Respondents' contracts of employment, were unlawful, in the celebrated case of **Matale**², this Court clearly defined the general mandate of the Industrial Relations Court and the expansive extent of it. Section 85 of the Industrial Relations Court as a whole, describes the

jurisdiction of the Industrial Relations Court. It provides in Sub Section 4 that in carrying out this substantial justice, the court should not be restrained by any technicalities. This Court put it this way:

“The mandate in subsection 5 which requires that substantial justice be done does not in any way suggest that the Industrial Relations Court should filter itself with any technicalities or rules in the process of doing substantial justice, there is nothing in the Act to stop the Industrial Relations Court from delving behind or into reason 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 reasons at all”

In this case, where there was a general complaint of wrongful and unjust or unfair dismissal by the Respondents, in accordance with **sub 4 of Section 85**¹⁶, the court below, in order to carry out its mandate of doing substantial justice, rightly decided to delve behind the termination clauses. We agree with the Industrial Relations Court that in doing substantial justice, there is nothing in the Act to stop it from delving behind or into reasons of terminating any employee's contract of employment. In our view, the court below was on firm ground to have done that. And in so doing, the court below made the following findings of fact, (1) That the two Respondents were well qualified for the positions they held in the Appellant's organisation (2) That the evidence of insubordination and incompetence was not credible, (3) The accusations of insubordination and incompetency were based on the fact that RW4 had an acrimonious relationship with both the 1st and 2nd Respondents. The court accepted that RW4 sought to have an intimate relationship with the 1st Respondent which the 1st Respondent rejected and thus resulting in resentment by RW4 of the 1st Respondent. As regards to the 2nd Respondent, the accusations of insubordination were based on RW4's refusal to

allow the 2nd Respondent to go to Ziale to complete his law studies. In addition, in both cases, the court found that these accusations had not been brought to the attention of the two Respondents before the Appellant invoked the termination clauses.

Therefore, the Industrial Relations Court was correct when it ruled that:

“It is our considered view that given the background to this case which we highlighted earlier, this is a proper case in which the Court ought to delve behind the Notice Clause. We have done so and we are satisfied that the Complainants’ termination were predicated upon RW4’s preconceived perception that the Directors, including the Complainants were perpetrating fraud in the Respondent.”

On the 3rd issue of gratuity, we have held in the case of **Kabwe Vs BP Zambia Limited**³ that it is not legally tenable for an employer to vary a basic condition or basic conditions of employment to the detriment of an employee without the consent of such an employee. In such cases, we have held that it is trite

law that the contract of employment terminates and the employee is deemed to have been declared redundant or to have gone on early retirement. So in line with the **Kabwe vs BP Zambia Limited** case, it was not legally correct to change the conditions of the Respondents without their consent. This is strengthened by the fact that the Respondents had accrued rights which could not be disturbed. Coming to the question which was mooted namely that the law as provided in the constitution read together with the **Public Audit Act**¹¹ and **Public Finance Act**¹², dictated this change, that the Appellant was just a receiver of instructions from the Parliamentary Committee on Public Accounts, so it cannot be held to be liable for implementing instructions from the Parliamentary Committee on Public Accounts, firstly, these arguments were not canvassed before the Industrial Relations Court, so as per plethora of our authorities, these arguments cannot be advanced before this court. Secondly, there is no legal provision in either the Constitution of the Republic of Zambia or the Public Audit Act which state the penalty for any breach. Article 121 of the Constitution only prescribes the duties of the Auditor General. It does not prescribe

the penalties for non observance of the Auditor General's reports. Section 13 of the Public Audit Act also prescribes generally the penalties for non compliance with that Act.

Now in this case, it is common ground that the Appellant being a legal corporate - capable of being sued and suing, has a procedure of amending or varying its own conditions of service under Section 8 sub Section 1 of the First Schedule as read together with Section 4 and 5 of the First Schedule of the **Postal Services Act**¹⁰. So when the interim Board met on the 29th of October, 2004, this interim Board of Directors carried out its mandate and the amendment of increasing gratuity from 45% to 100% was properly done. According to the 2nd Respondent and the court below accepted this, this was so because the Board compared and contrasted the conditions of service of the Appellant's employees with other parastatal bodies. In addition, this interim Board of Directors had decided to have this increment of gratuity from 45% to 100% in the spirit of give and take and on condition that the employees gave up their long term bonus of three months pay for each year served. So the shareholders

decided to increase the rate of gratuity to 100%. So when these directives to reduce came, it was expected that the Appellant would implement those directives by following the procedure laid down in Section 8 sub Section 1 and Section 4 as read with Section 5 of the first schedule of the **Postal Services Act**¹⁰. These suggested amendments ought to have been tabled before the interim Board of Directors for approval and to have been passed on to the employees for them to either accept or reject them as new conditions of service. This was not done. The Appellant's case is that at the time there was no Board of Directors in existence as the Board had only two members against the full establishment of five members. The interim Board could not form a quorum. That may have been so but the end result is that the Appellant did not follow this procedure of varying the conditions of employment of its employees. Therefore, clause 8 in the two Respondents' respective contracts of employment remained unamended up to the time they lost their employment.

The other limb of the Appellant's argument is that the decision of the Board on the 29th of October, 2004 was passed on a mistake of fact or law and that therefore the increment to 100%

of the rate of gratuity was null and void. At law, it is essential for a contract to be valid that the parties must assent to the same thing in the same sense. The parties must have the same intentions and these intentions must be declared. If there is no evidence as to the intentions of the parties, there cannot be a valid contract. Similarly, if it appears that the parties were negotiating or contracting with regard to two different things or contemplating on diversity items, there is the absence of mutuality and consequently no contract (see the case of **Falck vs William**), **Halsbury's - the Laws of England** ¹⁵ It is also trite law that where parties contract with reference to a subject matter, which unknown to them has ceased to exist, there is no contract.

In this case, it has been argued that the interim Board resolved to increase the rate of gratuity on the mistake and understanding that **Circular B8 of 2001**¹⁴ applied to the employees of the Appellant. We, however, note that in the meeting of the interim Board on the 29th of October 2004, there was in attendance two top civil servants from the Ministry of

Communication and Transport. There was in attendance the Deputy Permanent Secretary and the Assistant Secretary in the Ministry of Communication and Transport. These two senior civil servants, who it would be in the line of logic and reason to hold that they had actual knowledge of the contents of **Circular B8 of 2001**¹⁴ and who must have known the category of employees covered in this circular, were in attendance. In our view, therefore, there is no way these two senior officials of the Ministry of Communication and Transport would have allowed the interim Board to work and resolve on a mistake of the contents of this circular.

In addition, the amended conditions of service were approved on the 29th of October, 2004. It is beyond logic that it would have taken three years for the Parliamentary Committee on Public Accounts to get to know the decision of the interim Board of Directors of increasing the rate of gratuity from 45% to 100%. We base this conclusion on the fact that the Public Finance Act as well as the Public Audit Act has provisions meant to protect and

monitor the usage of public funds. We have in mind **Sections 34 of the Public Finance Act**¹² which says

“(1) Notwithstanding the provisions of any other written

law, the Secretary to the Treasury shall ensure that Government is represented on all boards of directors of statutory corporations.

(2) The Board of directors of any statutory corporation

referred to in subsection (1) shall furnish the Secretary to the Treasury at the end of every financial year with reports covering the operations of such statutory corporations and the corporation’s financial affairs.”

In addition, Section 38 (1) of the **Public Audit Act**¹¹ says:

“(1) The Secretary to the Treasury shall cause to be maintained a record of all moneys invested in statutory corporations and ensure that such statutory corporations are managed efficiently so that they yield reasonable dividends to Government

(2) For the purposes of subsection (1), the chief executive officer of the statutory corporation shall ensure that financial statements including management reports and returns are submitted to the Secretary to the Treasury on a regular basis.”

All these provisions were enacted to protect public funds. We, therefore, are satisfied that in the three years from 29th October, 2004 up to the time the Respondents’ contracts were terminated, the Government of the Republic of Zambia must have known of these increments. We, therefore, hold that it is beyond reason to plead now that there was a mistake of fact or law when the

interim Board of Directors resolved to increase the rate of gratuity from 45% to 100%. We are inclined to accept the Appellant's contention that the increment from 45% to 100% must have been grounded not on **Circular B8 of 2001**¹⁴ but on the fact that the interim Board of Directors compared and contrasted the Appellant's employees' emoluments and found there was a disparity between the Appellant's employees' emoluments and the other parastatal bodies' employees' emoluments. We, therefore, hold that the Industrial Relations Court was on firm ground in holding that the Respondents were entitled to their 100% gratuity.

In the alternative, we accept the Respondents' submissions that offences alleged to have been committed by the two Respondents did not carry a penalty of dismissal. We accept as argued by the learned Counsel for the Respondents that as per page 453 and 454 that the penalty for the offence of incompetency for the first breach is written warning, for the second breach demotion, and for the third breach final warning or termination. There is no evidence that the Appellant invoked

its own disciplinary code to deal with the 1st Respondent. We also accept that for insubordination, the penalty for the first breach is ten days suspension without pay and final written warning for the second breach and not dismissal.

In sum total, we find no merit in the appeal. We dismiss the appeal with costs.

.....
E. L. Sakala
CHIEF JUSTICE

.....
L. P. Chibesakunda
SUPREME COURT JUDGE

.....
M. S. Mwanamwambwa
SUPREME COURT JUDGE

