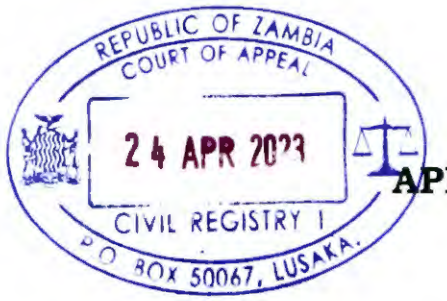
IN THE COURT OF APPEAL FOR ZAMBIA **APP NO. 284/2021**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

FIRST QUANTUM MINING **APPELLANT**

AND

SYDNEY MWAPE **RESPONDENT**

CORAM: Kondolo, Chishimba and Sichinga, JJA

On 22nd February, 2023 and 24th April, 2023

For the Appellant: *Mr. H. Pasi of Messrs Mando and Pasi Advocates*

For the Respondent: *Mr. M. Mwachilenga of Messrs James and Doris Legal Practitioners*

JUDGMENT

Sichinga JA, delivered the judgment of the Court.

Cases referred to:

1. *Chimanga Changa v Stephen Chipango Ngombe SCZ Judgment No. 5 of 2010*
2. *The Council of the University of Zambia v University of Zambia and Allied Workers Union (Through its General-Secretary Michael Kaluba) SCZ Appeal No. 4 of 2003*
3. *First Quantum Mining Limited v Yendamoh SCZ Appeal No. 206 0f 2015*

4. *Tembo v Zambia Information and Communications Technology Authority SCZ Appeal No. 226 of 2013*
5. *The Attorney-General v Richard Jackson Phiri [1988-1989] ZR 121*
6. *Care International Zambia Limited v Misheck Tembo SCZ Appeal No. 57 of 2016*
7. *ZCCM Investments Holdings PLC v Mufalali and others SCZ Appeal No. 238 of 2013*
8. *First Quantum Mining Limited v Moses Banda CAZ Appeal No. 194 of 2018*
9. *Association of Copper Mine Employees and Attorney-General v Mine Workers Union of Zambia SCZ Appeal No. 129 of 1998*
10. *Chongo Stanley Mukuma v David Kangwa Nkonde SCZ Selected Judgment No. 11 of 2015*
11. *Zesco Limited v David Lubasi Muyambango (2006) ZR 22*
12. *Richard Musenyesa v Indo Zambia Bank Limited SCZ Appeal No. 214 of 2016*

Legislation referred to:

1. *The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia*
2. *The Employment Code Act, No. 3 of 2019*
3. *Pension Scheme Regulation Act Chapter 255 of the Laws of Zambia*
4. *The Constitution of Zambia Act Chapter 1 of the Laws of Zambia as amended by Act No. 2 of 2016*

1.0 Introduction

1.1 The appellant appeals against the decision of Mulenga J of the High Court Industrial Relations Division (IRD) at Solwezi promulgated on 30th July, 2021. Judge Mulenga upheld the complainant's claim that his dismissal from employment was wrongful and unfair. He further upheld the claim for pension benefits.

1.2 On the claim by the complainant that he be placed on the respondent's payroll until pension benefits are paid in full, the learned Judge found the same not tenable as his service commenced in 2009 and the law he relied upon was passed in 2016. That it could not be applied retrospectively. The claim was dismissed for lack of merit.

1.3 The appellant's case is that the respondent was lawfully terminated and that the learned judge made an error of law in his decision to award the respondent double compensation.

2.0 Background and claim

2.1 In the introductory part of this judgment we shall refer to the parties by their designations in the court below.

2.2 The appellant is First Quantum Mining and Operations Limited (The respondent in the court below). The complainant, Sydney Mwape, was employed by the respondent on 1st September, 2009 on a permanent and pensionable basis as an excavator operator.

2.3 On or about 25th and 26th February, 2021, he fell ill whilst attending a funeral in Lusaka. He was attended to by medical officers at Arakan Baracks who gave him 2 days bed rest. Upon his return to work he presented the sick note to his supervisor and resumed his duties without incident.

2.4 On 9th March, 2021 he again fell ill whilst visiting a farm he was interested in acquiring in Kalumbila District. He managed to access help from the nearest hospital which was Kamiba Rural Health Centre. He was prescribed 2 days bed rest or sick leave. The complainant informed his supervisor about his

illness and upon return to work on 11th March, 2021 he handed over the sick note.

2.5 On 17th March, 2021 he was charged by the respondent with the offence of AWOL between 1 and 5 consecutive days/shifts contrary to clause no. 1.4 of the respondent's disciplinary code of conduct on the allegation that he had absented himself from work on 25th and 26th of February, 2021 the period he fell ill whilst attending a funeral in Lusaka.

2.6 On the same day he was again charged with the offence of AWOL between 1 and 5 consecutive days/shifts contrary to clause no. 1.4 of the respondent's disciplinary code of conduct on the allegation that he had absented himself from work on 9th and 10th March, 2021 when he fell ill whilst in Kalumbila District.

2.7 The first charge was heard on 24th March, 2021 and he gave the committee the sick note from a registered medical officer. He was found guilty and sanctioned with a final warning notifying him not to commit another offence between 24th March, 2021 and 23rd March, 2022.

2.8 The 2nd charge was heard on 26th March, 2021 and he was found guilty of AWOL (Absent Without Official Leave). The sanction given was a summary dismissal. This prompted the complaint before the lower court.

3.0 The claim

3.1 The complainant's claim was for:

a) An Order that the complainant was unfairly, unlawfully and/or wrongfully dismissed by the Respondent;
b) 36 months' salary or such higher amount as the Court may deem fit as damages for unfair and/or unlawful and/or wrongful termination and loss of employment;
c) An Order for payment of pension benefits for the years served and an order that the complainant be retained on the respondent's payroll until full and final payment;
d) Interest;
e) Any other relief the Court may deem fit; and
f) Costs of and incidental to the action.

4.0 The Answer

4.1 In its answer to the complaint, the respondent averred that the complainant did not report for work on 9th March, 2021 and 10th March, 2021 without official leave or justifiable excuse in breach of his conditions of employment. That he was charged

on 17th March, 2021 with the offence of AWOL pursuant to clause 1.4 of the schedule of offences to the Disciplinary Code.

4.2 That he exculpated himself by submitting a written statement and a written statement was submitted by his witness. A hearing was held on 26th March, 2021.

4.3 That he was found guilty of the offence as charged and summarily dismissed and informed of the outcome of the hearing and of his right of appeal against dismissal. His appeal was unsuccessful. The respondent denied that he was entitled to any of the claims sought.

5.0 The appeal

5.1 Dissatisfied with the decision of the High Court, the respondent appealed to this Court raising three grounds of appeal as follows:

1. ***The court below erred in law by erring in the interpretation of the respondent's disciplinary rules and policies to hold that the respondent was unfairly and wrongfully dismissed.***

2. ***The court below erred in law when it erred in its interpretation of the Collective Agreement between the***

appellant and the unions and the respondent's conditions of employment to hold that the complainant was entitled to accrued pension benefit when he was summarily dismissed.

3. ***The Court below erred in law by awarding the Respondent accrued pension benefits in addition to damages for unfair and wrongful dismissal which amounted to double compensation for loss of employment.***

6.0 Appellant's submissions

6.1 On 24th November, 2021, the appellant filed its heads of argument. Mr. Pasi, learned counsel for the appellant entirely relied on the same.

6.2 Under ground one, the summary of the appellant's arguments was that the holding that the respondent was unfairly and wrongfully dismissed was a misdirection because the appellant had the power to charge the respondent with the offence and the procedure was prescribed in the Disciplinary Code and Schedule of offences.

6.3 It was submitted that the policy of retaining Mary Begg Clinic as the sole health provider was introduced and deliberately

communicated to the employees by way of a joint memorandum from management and the unions. That the said policy could only be revoked in like manner.

6.4 It was argued that clause 14 of the Collective Agreement, which was the provision pursuant to which the medical scheme was introduced maintained that Mary Begg Clinic continued to be the sole medical services provider as stipulated in clause 19.4 of the Collective Agreement.

6.5 Firstly, it was argued that as long as Mary Begg Clinic remained the sole provider of medical services to the appellant's employees, the policy on sick notes would remain in force unless expressly revoked.

6.6 Secondly, it was submitted that it was a misdirection for the lower court to substitute the tribunal's findings of fact with its own as this was tantamount to the lower court sitting as an appellate court to review what the tribunal had done because it was on record that the intention of management and the union was to continue with the policy of sick notes. In support of this submission, reliance was placed on the case of

Chimanga Changa v Stephen Chipango Ngombe[1] in which case the Supreme Court held that:

> ***"What is crucial is that an employer carried out investigations as a result of which he reasonably believed that the employee is guilty of misconduct... The employer does not have to prove that an offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision. The rationale behind this is clear: an employment relationship is anchored on trust and once such trust is eroded, the very foundation of the relationship weakens."***

6.7 We were also referred to the learned authors of ***Selwyn's Law of Employment***[1] 4th edition at page 169 which states that:

> ***"There are certain limits to the extent an employer may properly make inquiries into an incident, particularly if a charge is a serious one, such as theft for there may well be an improper interference with the process of justice... The important thing is that the employer does not have to prove that an offence took place, or even satisfy himself beyond all reasonable doubt that the employee committed that act in question. The function of an employer is to act reasonably in coming to a decision... At the end of the day the employer must satisfy the threshold test laid down in British Home Stores v Burcell. First, the employer must show that he genuinely believes the employee to be guilty of the misconduct in question; and second, he must have reasonable***

grounds upon which to establish that belief; third, he must have carried out such investigation into the matter as was reasonable in the circumstances."

6.8 It was submitted that the court below departed from the guidance given in the above authorities.

6.9 Thirdly, it was submitted that the formation of policy governing the manner in which sick leave was to be administered was a function preserved for management which is entitled to formulate policies on sick leave without the consent or input of the employees or the union. That it was not in dispute that the appellant only accepted sick notes from Mary Begg Clinic or from elsewhere but verified by Mary Begg Clinic. That it was also not in dispute that the respondent knew of this requirement from his many previous similar infractions which later culminated in a final warning which he was serving at the time of his dismissal. That the policy on sick leave was applicable to the respondent even without the concurrence of the unions via a collective agreement.

6.10 Lastly, it was submitted that the Collective Agreement of 2021 to 2022 only became effective on 21st April, 2021. Therefore it

was inapplicable at the time when the respondent was dismissed on 26th March, 2021 because it had not come into force. Reliance on this submission was placed on ***Section 71(3) of the Industrial and Labour Relations Act***[1] which provides that:

> ***"Every collective agreement which has been approved by the Minister shall –***
>
> ***(a) come into force on the date on which it is approved or on a later date specified in the collective agreement;***
>
> ***(b) remain in force for such period as shall be specified in the agreement;***
>
> ***(c) be binding on the parties to it."***

6.11 We were further referred to the case of ***The Council of the University of Zambia v University of Zambia and Allied Workers Union (Through its General-Secretary Michael Kaluba)***[2] in which the Supreme Court stated that:

> ***"The Collective Agreement as agreed upon by the parties was not registered and the Industrial Relations Court never ordered that it be registered. Therefore, it has no legal force.***

6.12 Under ground two, it was explained that the court's award of accrued pension payment emanated from the Collective Agreement in which the unions and the appellant agreed to migrate from the current severance pay for employees leaving employment by way of retirement to a private pension fund which the parties agreed to set up in clause 18 of the Collective Agreement. The said provision reads as follows:

> ***"18. Private Pension Scheme***
>
> ***The parties hereby agree that the retirement benefits currently being accrued by eligible unionized employees who are on permanent and pensionable contracts of employment (the "eligible employees"), under previous collective agreements and under the appropriate law, shall cease to accrue and be replaced with a pension fund to be managed by a private pension provider. However, employees who were in employment before 31st December, 2020 will have an option to either join the private pension scheme or continue on the retirements benefits as agreed in the previous collective agreements."***

6.13 The gist of the appellant's argument was that the respondent was not entitled to be paid retirement benefits as contemplated under the collective agreement because the collective agreement came into force on 21st April, 2021.

Further, that there was no evidence that the private pension scheme had been set up. It was submitted that for as long as the pension scheme was not yet set up, the status quo was to be maintained. That in this case the respondent was not entitled to a pension benefit because he had not retired but was summarily dismissed.

6.14 It was submitted that the said collective agreement borrows the definition of the term *'severance pay'* from the definition under ***section 3 of the Employment Code Act***[2] which defines the term to mean:

> ***"The wages and benefits paid to an employee whose contract of employment is terminated in accordance with section 54."***

6.15 Furthermore, that a collective agreement is only effective from the date of registration and the provisions relating to the setting up of a pension fund could not have been implemented overnight.

6.16 It was submitted that the appellant and the unions' agreement on the establishment of a private pension scheme was subject to the registration of the proposed pension scheme pursuant

to the ***Pension Scheme Regulation Act***[3] which provides for the establishment and management pension scheme.

6.17 The appellant submitted that there was need for the registration of the collective agreement and the registration of a private pension scheme as contemplated by the parties to be operational.

6.18 Under ground three, it was submitted that the lower court's award of accrued pension benefits and damages for wrongful and unfair dismissal amounted to double compensation for loss of employment.

6.19 That the lower court did not deem the respondent to have retired to entitle him to pension benefits. It was submitted that the damages awarded were sufficient compensation for loss of employment.

6.20 We were urged to uphold the grounds of appeal and allow the appeal with costs.

7.0 The respondent's submissions

7.1 The respondent filed his heads of argument of 16th February, 2023. Mr Mwachilenga relied on the filed submissions. In his brief oral submissions, he contended that the appellant had raised in grounds one and two, new issues which were not raised in the court below. On ground three, he sought to add the case of ***First Quantum Mining Limited v Yendamoh***[3] to the list of cases relied upon.

7.2 In response to ground one, the respondent first submitted that the appellant's argument regarding the policy was self-defeating because the provision in the collective agreement partly read, *"These conditions remain valid until they are amended by the parties. Any other conditions not included in this agreement are excluded."* That this it was clear that the intention of the parties was to have one comprehensive document and not piecemeal type of agreements full of memoranda and addendums.

7.3 It was argued that the appellant adduced evidence by counsel from the bar. That the issues being alleged on appeal did not

arise in the lower court. In support of these submissions, we were referred to the case of ***Tembo v Zambia Information and Communications Technology Authority***[4] where the Supreme Court held as follows:

> ***"Where the parties have embodied the terms of contract into a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written document except on certain exceptions."***

7.4 Counsel urged us not to accept the continuance of the addendum beyond the period stated in the addendum and the memo.

7.5 On the appellant's argument regarding the role of the court, we were referred to the case of ***The Attorney-General v Richard Jackson Phiri***[5] where the Supreme Court held that if there is no evidence to sustain charges leveled in disciplinary proceedings, injustice would be visited upon the party concerned if the court could not then review the validity of the exercise of such powers simply because the disciplinary authority went through the proper motions and followed the correct procedure.

7.6 It was argued that if the assumption was made that the said policy on sick leave was properly inserted in the appellant's conditions of service, then the policy would still be un-implementable for being unreasonable and contrary to statute. Reliance was placed on ***section 38(1) of the Employment Code Act*** which provides that:

> ***"(1) An employee who is unable to perform that employee's normal duties due to illness or injury not occasioned by the employee's default shall notify the employer of the illness or injury and proceed on sick leave on production of a medical certificate from a health practitioner."***

7.7 It was submitted that the ***Employment Code Act*** is applicable to the facts of this case. That the law protects the right to sick leave and sets out a prohibition on employers not to dismiss employees for absence from work during temporary sick leave. We were referred to the case of ***Care International Zambia Limited v Misheck Tembo***[6] to the effect that unfair dismissal is a creation of statute as the courts look at whether the dismissal was justified or not.

7.8 It was further advanced that the argument of the applicability of the collective agreement was a new issue which was not

raised in the lower court. That the position taken by the appellant contradicts the evidence of its own witness to the effect that the collective agreement of 2021 to 2022 was applicable at the material time. In support of this submission, we were referred to the case of ***ZCCM Investments Holdings PLC v Mufalali and others***[7] on the principle that an issue which was not raised in the lower court cannot be raised for the first time on appeal.

7.9 It was ultimately submitted on ground one that even if we upheld the ground one, the dismissal would still be unfair on the aspect of unreasonableness which has not been assailed, thereby making the appeal academic. Reliance was placed on the case of ***First Quantum Mining Limited v Moses Banda***[8] where we held as follows:

> ***"In our view, had the learned Judge in the court below applied his mind and addressed the issue at hand, he would have found that the sanction which was imposed was too severe and contrary to the Appellant's Code. Be that as it may, he would have reached the same conclusion that the Respondent was unfairly dismissed which as aforestated is a finding supported by the evidence and we cannot overturn it."***

7.10 We were urged to dismiss ground one.

7.11 In response to ground two, it was submitted that there was no error in the interpretation of the Collective Agreement by the lower court. We were referred clause 18.2 of the Collective Agreement at page 200 of the record of appeal which states as follows:

> ***"That the extant accrued benefits as at 31st December, 2020 shall only be remitted to and exclusively managed by the company selected pension scheme. Each employee will be communicated to in writing on their accrued benefits up to 31st December, 2020. The company and the unions shall ensure that the employees are informed that this notification will not result in payment of accrued benefits to them."***

7.12 We were also referred to ***Article 187 of the Constitution of Zambia***[4] to the effect that a pension benefit shall not be withheld or altered to that employee's disadvantage.

7.13 ***Section 51(1) of the Employment Code Act*** was equally relied upon for providing that an employer who summarily dismisses an employee under *section 50* shall pay the employee, on dismissal, the wages and other accrued benefits due to the employee up to the date of the dismissal.

7.14 Ultimately on this ground, we were invited to consider the case of ***Association of Copper Mine Employees and Attorney-General v Mine Workers Union of Zambia***[9] where the Supreme Court held as follows:

> ***"There can be no doubt therefore that those benefits became an accrued right and it is trite law that an accrued right cannot be taken away."***

7.15 In light of these submissions we were urged to dismiss the second ground of appeal for want of merit.

7.16 Turning to the final ground of appeal, it was submitted that damages for loss of employment and the award of payment of accrued benefits are separate and distinct. That accrued benefits are earned as a result of the service rendered to the appellant, whereas the damages for loss of employment were as a result of the wrongfulness of the termination of employment by the appellant when the respondent had a legitimate expectation to continue in employment.

7.17 We were urged to dismiss the appeal in its entirety.

8.0 The Court's considerations and decision

8.1 We have carefully considered the record of appeal and the submissions by counsel for both parties.

8.2 The challenge to the decision of Judge Mulenga is that he made an error of law when he misinterpreted the respondent's disciplinary rules and policies and found that the respondent was unfairly and wrongfully dismissed. Further, that the learned judge misinterpreted the collective agreement in question and held that the respondent was entitled to accrued pension benefits when he was summarily dismissed.

8.3 Under ground one, we shall begin with the respondent's complaint that the appellant ought not to have raised the issue of the applicability of the collective agreement on appeal as the same had not been raised in the court below. We are guided by the Supreme Court in the case of ***Chongo Stanley Mukuma v David Kangwa Nkonde***[10] in which Malila JS, as he then was, stated the following at page J7:

> ***"In affirming the position so clearly stated in Buchman v Attorney General and other cases, that a matter not raised in***

the lower court cannot be raised in the higher court as a ground of appeal, we stated in the case of Nevers Mumba v Muhabi Lungu that:

> ***"The reason for this position, in our view, is that in an adversarial system of justice, such as obtains in this country, it is generally considered fair to afford the opposing party an opportunity to respond to every issue raised. Furthermore, we are loath to reverse a lower court based on an issue that the trial court has not ruled upon. This court will, however, affirm or overrule a trial court on any valid legal point presented by the record, regardless of whether that point was considered or even rejected."***

8.4 Before us is a legal point whether the Collective Agreement 2021 to 2022 was applicable at the time of the respondent's dismissal. We are of the view that the point raised by the appellant is an important one that could have a bearing on the outcome of the appeal. We shall revert to the question of the applicability of the collective agreement 2021 to 2022.

8.5 Turning to the appellant's charge that the learned judge usurped the disciplinary tribunal's powers by substituting its decision with his, we note pages J13 and J14 of the judgment that he considered the cases of ***Zesco Limited v David***

Lubasi Muyambango[11] and ***The Attorney General v Richard Jackson Phiri*** *supra.* The import of these authorities, which the learned judge accepted, is that they define the function of the court to examine if the necessary disciplinary power exists and if it was exercised in due form or validly exercised.

8.6 The learned judge went on to consider the manner in which the power was exercised and the source of the power. He accepted that the source of the power was the conditions of service. He considered that the Addendum to the Collective Agreement 2016 and the Joint Communication. Pages 146 to 151 of the record of appeal refer. He found that the Addendum was to the effect that "only sick notes issued by Mary Begg shall be admissible for sick leave." He found that the Collective Agreement 2014 to 2016 was inapplicable to the respondent because it had expired in 2016.

8.7 Having so found the learned held that the Collective Agreement of 2021 to 2022 was applicable to the respondent. He found that of the said agreement provided for "*unchanged*

conditions of employment". That the only condition that remained unchanged was in respect of *"medical allowance"* as provided in Clause 19.4 at page 105 of the record of appeal. It states as follows:

> ***"Medical Allowance***
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> ***A medical allowance will be paid at a rate of 15% of monthly basic pay Company employees will be full members of the Mary Begg clinic which has been established in Solwezi. Monthly deductions for membership of the clinic shall be made from this allowance as follows:***
>
> . ***K150 – Main employee membership – this is compulsory.***
>
> . ***K70 – For up to five dependants. Dependants shall mean the spouse and biological/legally adopted children of the employee.***
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> ***Additional dependants may be enrolled at a cost of K15 per dependant. Management agrees to ensure sufficient levels of service delivery and provision of suitable hospital infrastructure.***
>
> ***The company agrees to, implementing twenty-four hour operations at Kabitaka Primary Health Care Facility, on guarantee from the Unions that all "registered dependants" are to use the facility as first port of call for illness/injuries. Serious illness/injuries will be referred to the Kansanshi Mine Hospital. Parties agree that the Kabitaka Primary Healthcare***

facility must be run cost efficiently, and if sufficient utilization is not achieved and maintained, that the service could be withdrawn."

8.8 We take the view, as submitted by the appellant that the above provision was not in derogation to the policy on sick leave because to a larger sense the condition that Mary Begg was the sole provider of medical services to employees remained unchanged. The learned judge fell into error when he assumed that the policy of only accepting sick notes issued by Mary Begg was not part of the collective agreement because it was rejected or the parties did not agree. The assumption he made was not supported by the evidence on record because Mary Begg was still retained as the sole medical provider in the Collective Agreement of 2021 to 2022.

8.9 Reverting to the issue of the applicability of the Collective Agreement of 2021 to 2022, we accept the appellant's submissions that ***section 71(3) of the Industrial and Labour Relations Act*** provides that a collective agreement approved by the Minister shall come into force on the date it is approved or on a later date specified in the collective

agreement. We have noted from the Collective Agreement of 2021 to 2022 at pages 95 to 112 of the record of appeal that the date on which it came into was neither specified nor endorsed on the Collective Agreement. However, at page 113 of the record of appeal is a letter dated 21st April, 2021 from the Ministry of Labour and Social Security addressed to the appellant and the unions that the collective agreement had been approved and duly registered. The letter is equally silent on the date on which the Minister approved the Collective Agreement or had it registered.

8.10 What is clear in our finding is that both the Collective Agreement and the letter of 21st April, 2021 are insufficient to dispose of the appeal at this stage.

8.11 In the circumstances of this case, the evidence reveals that the respondent was absent from work on 25th and 26th February, 2021. According to RW1 he was charged with absenteeism on 28th February, 2021. The charge raised against him was "AWOL-Between 1and 5 consecutive days/shift" under clause 1.4 of the appellant's Disciplinary Code. His case was heard on

24th March, 2021 and he was found liable and sanctioned with a Final Written Warning valid for 12 months from 24th March, 2021 to 23rd March, 2022 provided he did not commit any other offence during this period. The written warning at page 192 of the record of appeal refers.

8.12 On 26th March, 2021, the respondent faced another charge of "AWOL-Between 1 and 5 consecutive days/shift" under clause 1.4 of the appellant's Disciplinary Code. The particulars of the offence were that he was absent from work without official leave for 2 days on 9th and 10th March, 2021. He was found liable. The appellant considered that he was serving a Final Written Warning and summarily dismissed him.

8.13 We note that his Final Written Warning had a condition that he should not commit any other offence for the period 24th March, 2021 to 23rd March, 2022. A perusal of the record shows no evidence that the respondent was charged with any other offence while he was serving the final warning which would have attracted the sanction of summary dismissal for the second charge of AWOL he faced on 26th March, 2021.

8.14 Had the learned judge properly construed the Disciplinary Code and the evidence before him, he would have found that the sanction of dismissal meted out against the respondent was harsh and contrary to the Disciplinary Code. In any event, he would have arrived at the same conclusion that the respondent was wrongfully and unfairly dismissed, which as submitted by Mr. Mwachilenga, renders ground one academic.

8.15 We find merit in ground one to the extent that appellant's insistence of sick notes from Mary Begg was neither wrongful nor unreasonable. However, in view of the forestated, we cannot overturn ground one. Our decision in ***First Quantum Mining and Operations Limited v Moses Banda*** *supra* refers.

8.16 Under ground two, the gist of the appellant's argument is that the respondent and other employees on permanent and pensionable terms as at 31st December, 2020 had the option to either remain with the status quo or sign on with a private pension fund that was yet to be established. That those employees who left employment by way of retirement prior to

the establishment of the pension fund, would be eligible to be paid 1 month's gross salary per each year served plus an additional one month's gross salary. That since the appellant was not retired but dismissed, he was not entitled to any pension benefits. It was further contended that the Collective Agreement of 2021 to 2022 was inapplicable to the respondent as it came into force on 21st April, 2022 after the respondent's dismissal.

8.17 On the other hand, the respondent's rebuttal is that the court's interpretation was on firm ground.

8.18 The learned judge considered the kernel of the matter was in the meaning of clause 18 of the Collective Agreement for 2016 to 2016. It provides as follows:

> ***"18. Private Pension Scheme***
>
> ***The parties hereby agree that the retirement benefits currently being accrued by eligible unionized employees who are on permanent and pensionable contracts of employment (the "eligible employees"), under previous collective agreements and under the appropriate law, shall cease to accrue and be replaced with a pension fund to be managed by a private pension provider. However, employees who were in***

employment before 31st December, 2020 will have an option to either join the private pension scheme or continue on the retirements benefits as agreed in the previous collective agreements."

8.17 In concert he went on to consider the following provisions of the Collective Agreement 2021 to 2022:

> ***"18.2 That the extant accrued benefits as at 31st December 2020 shall only be remitted to and exclusively managed by the Company selected pension scheme. Each employee will be communicated to in writing on their accrued benefits up to 31st December, 2020. The Company and the Unions shall ensure that the employees are informed that this notification will not result in payment of accrued benefits to them.***
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> ...
>
> ***18.4 That the Company will make an employer contribution equivalent to 5% of an eligible employee's basic salary into the Company's selected pension scheme.***
>
> ***18.5 Employer private scheme contributions will commence effective 1st January, 2021 and will be posted to the fund manager once appointment of fund managers is finalized."***

8.18 From these provisions the learned judge found that the respondent was a permanent and pensionable employee and that he had accruing benefits up to 31st December, 2020. He

accepted, as the appellant has submitted, that the private pension fund had not been established.

8.19 On the question whether the respondent was entitled to private pension benefits, the learned judge found that he was entitled to accrued pension benefits prior to 1st January, 2021. He placed reliance on the guidance of the Supreme Court in the case of ***Richard Musenyesa v Indo Zambia Bank Limited***[12] where the Supreme Court held *inter alia* that:

> ***"Having determined that the evidence on record confirms the 1997 conditions of service were still applicable, we, on that premise uphold the appellant's contention in ground two, that he had an accrued right to being paid gratuity under the 1997 terms and conditions of service. In the case of the Attorney-General v Thixton[14], we did state that:***
>
> > ***"In deciding whether a right accrues or is acquired one must have regard not only to the process of accrual and acquisition but also to the nature of the right in question. Some rights, in order to become accrued and acquired, undoubtedly require some incident, that is, some action to be taken – not necessarily by the Claimant or some event to occur.***
>
> ***In the case of Godfrey Miyanda v Attorney-General[15], our holding was that an accrued right has inchoate or incomplete right that is contingent on, and would vest on the happening of a future event."***

8.20 The learned judge held that the respondent was entitled to the pension benefits as the same were his accrued rights which could not be forfeited as at 31st December, 2020. He did not end there. On the basis of clauses 18.4 and 18.5 of the Collective Agreement 2021 to 2022, the learned judge found that the respondent, as a matter of accrued right was entitled to five percent (5%) of his basic salary, which the appellant ought to have contributed towards the respondent's private pension, effective 1st January, 2021 to March, 2021 when he was dismissed.

8.21 The learned judge relied on the evidence of Isabel Gatsi, RW1, who told the court in examination in chief that the appellant did not have a pension scheme but a severance package which was granted to a retiring employee, an employee discharged on medical grounds, or an employee separating on mutually agreed terms. She stated that dismissed employees were not entitled to any severance package. Pages 229 to 230 of the record of appeal refers.

8.22 Under cross-examination, she stated that the Collective Agreement of 2021 to 2022 applied to the respondent. She informed the court that the respondent was accruing money at the rate of 1 month gross salary for each year served as part of his pension benefit. However, she stated that he was not eligible to receive it because he had been dismissed. That he had forfeited it. Pages 242 to 245 of the record of appeal refers.

8.23 We cannot fault the trial judge for holding that the respondent had accrued benefits up to 31st December, 2020 because the finding is supported by the appellant's own witness and the Supreme Court's holding in the case of ***Richard Musenyesa***. We find no merit in ground two and accordingly dismiss it.

8.24 The challenge to the learned judge's decision in ground three is that he ought not to have awarded the respondent accrued pension benefits in addition to damages for unfair and wrongful dismissal as the same amounted to double compensation for loss of employment. Ordinarily, we would consider the position we have taken in grounds one and two sufficient to dispose of ground three. We take the view that the

appellant's submission regarding the setting up of a private pension fund pursuant to the ***Pension Scheme Regulation Act*** *supra* are somewhat misplaced. We say so because the learned judge accepted the appellant's submission and found that the appellant's private pension scheme had not been set up as at the time that the respondent left employment. He found on the basis of the appellant's own evidence that the respondent had accrued the right to the money he earned. As of right he was entitled to funds earned regardless of his exit. We accept that the damages awarded were infact a compensation for the manner of his wrongful and unfair exit. That the two are separate and distinct.

8.25 We take the view that the position taken by the learned judge was correct on account of the wording found in ***Section 18 of the Pension Scheme Regulation Act.*** It provides:

> ***"18. (1) A pension scheme shall-*** *Conditions of compliance of Pension Schemes*
>
> ***(a) make adequate arrangements for the preservation of pension rights so as to protect the interest of its members;***

(b) lay down the rights and obligations of the members in writing in the pension plan rules, a copy of which shall be given to each member;

(c) each year give to every member a benefit statement showing the member's actual benefits and the member's accrued portable benefits;

(d) during the first five years after registration, carry out an actuarial valuation every two years, thereafter at least every five years so as to review and determine the sound funding of the pension scheme;

(e) in managing its assets, aim to maintain at any time the real value of its members' accrued portable benefits; and

(f) grant to members leaving the scheme before a benefit has become payable full portability of the accrued retirement benefits at the time the member leaves the scheme.

(2) For the purposes of this section and the defined contribution schemes "portable benefits" means the total of the retirement contributions paid by the employee and the employer on the leaving member's account, plus interest during his participation under the plan. *Emphasis is ours.*

8.26 It is clear from the wording of the *Act* that the contributions made by the respondent prior to 31st December, 2020, as referred to by RW1 in her testimony, could not be forfeited

because there were *portable benefits* emanating from contributions pursuant to previous collective agreements as clause 18 of the Collective Agreement for 2014 to 2016 states. Ground three is bound to fail.

9.0 Conclusion

9.1 For all the reasons we have given, we would dismiss the appeal.

9.2 Each party will bear their own costs of the appeal.

M.M. Kondolo, SC
COURT OF APPEAL JUDGE

F.M. Chishimba
COURT OF APPEAL JUDGE

D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE