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Mark Tink and Others v. Lumwana Mining Company Limited CAZ Appeal No. 41/2021

Chanda Chungu[1]

Facts

A group of expatriate employees were employed on fixed term contracts with the idea that they would help train Zambian employees during their term of employment. Before the expiring of their fixed term contracts, they were terminated at various stages, without the employer ascribing any valid reasons for the termination of their contracts of employment.

According to the employer, the employees were advised verbally of the impending terminations of their contracts so local Zambian employees could take over. This was done in various meetings, both collectively and individually. Some of the employees begun to pack in preparation for the upcoming termination.

The employer was of the view that they gave a reason for the termination of the plaintiffs' fixed term contracts of employment in accordance with Clause 19.1.1 of the Expatriate Terms and Conditions of Employment. The said clause provided for the localisation of positions that were held by the employees.

The High Court held that the various terminations were neither unlawful nor unfair, and declined to award damages to the employees. The employees subsequently appealed the matter to the Court of Appeal for determination.

Holding

The Court held that the failure to give a valid reason prior to the termination of the employees was unlawful as it was contrary to the amendment to the Employment Act. The Court of Appeal per Sichinga JA held that: -

> …we hold that the termination was not in conformity with the law as enshrined in Section 36 of the Employment Act. For the reasons we have articulated above we hold that the terminations of the appellants' contracts to have been unlawful and the manner it was done unfair.

The Respondent sought to argue that the employees were on fixed term contracts and knew their contracts would not run indefinitely, and that they were for the purpose of training local employees. The Court of Appeal rejected this as a valid reason because the employees were not informed of the same at the point of termination. The Court confirmed that the only valid reasons are those stated which are the employee's conduct or capacity or the employer's operational requirements.

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The Court went on to hold that: -

> None had a valid reason for termination offered to the appellants as is required by section 36(1)(c) and (3) of the Employment Act supra as amended, which places a duty on an employer to furnish an employee with valid reasons for termination of employment.

Therefore, the Court of Appeal confirmed its earlier decisions from *Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited,*[2] *Zambezi Portland Cement Limited v. Kevin Jivo Kalidas*,[3] and *Spectra Oil Zambia Limited v. Oliver Chinyama*[4] where it was held that an employer who intends to bring the employment relationship to an end must furnish a valid reason. This principle was also acknowledged and endorsed by the Supreme Court in *Attorney General v Paul Chilosha*.[5]

As the court found the dismissal to be unfair and unlawful, it turned to the consideration of damages. As it related to damages to be awarded, the Court of Appeal held that: -

> In the instant case, we have considered the circumstances of the appellants' termination. We have also considered whether it would be justified to depart from the normal measure of damages as per the Expatriate General Terms and Conditions of Employment which formed part of the contract of employment and gave the notice period of one month.

The Court went further and stated that: -

> We have taken into account the abrupt termination of the appellant's contracts of employment coupled with the fact that they were all foreigners who had to exit the country and wind up their personal affairs at short notice. This was aggravating. These circumstances in our view merit a departure from the normal measure of damage. We accordingly award each appellant twelve months' basic salary for unlawful termination of employment with interest at the average short term deposit rate per annum from the date of writ to date of judgment on appeal and thereafter at six per cent per annum till final settlement.

The Court of Appeal confirmed the award of 12 months' salary as damages based on the circumstances of the cases which were examined. In that case, the Court of Appeal considered the infringement of the employees right to be given a valid reason (which was not given) and the traumatic and abrupt manner their employment was ended.

Significance

[2] CAZ/Appeal No. 129/2017.
[3] CAZ Appeal No. 29 of 2019.
[4] CAZ Appeal No. 18/2018.
[5] SCZ Appeal No. 220/2016

The law as it stood in Zambia prior to 2015 was that a contract of employment could be terminated at any time, for any reason or no reason at all.[6] In *Gerald Musonda Lumpa v. Maamba Collieries*[7], the Supreme Court held:

> The employer, in this case, the respondent, was perfectly entitled to give notice for no reason whatsoever. In this respect, we disagree with the learned trial Commissioner that, if a reason is given for termination of employment, that reason must be substantiated; that is not the law. It is the giving of notice or pay in lieu that terminates the employment. A reason is only necessary to justify dismissal without notice or pay in lieu. (Emphasis author's)

The *Lumpa* case underscored the fact that an employer could terminate an employee's contract of employment for any reason or no reason at all, provided the employer complied with the notice period or paid the employee in lieu of giving notice. Giving a reason was only necessary for summary dismissal. Where a reason was given, then the requirement for substantiation arose.

In the subsequent case of *Tolani Zulu and Another v. Barclays Bank of Zambia Limited*,[8] the court considered whether the duty to give the employee the right to be heard prior to dismissal for conduct or capacity, entitled an employee to reasons for dismissal. Chirwa JS., delivering the Judgment, held that:

> the gist of these two provisions is that the conduct or performance of the employee which is questioned must arise or relate to his work and he must be given an opportunity to be heard and this has nothing to do with the notice clause that may be in the contract. Neither do these provisions call for reasons to be given for terminating employment... the lower court misdirected itself in holding that an employer must give reasons for terminating the services of an employee.

Therefore, an employer did not have to give a valid reason for dismissal and could dismiss without giving any reason at all. The only time reasons were necessary before dismissal was to justify summary dismissal or payment in lieu of notice.[9]

Under the common law, an employer had the right to terminate a contract of employment for any reason or for none and without applying the rules of natural justice.[10] However, as regards this particular common law principle's applicability to Zambia, the Supreme Court of Zambia, in the case of *Morris Mbalakao and Zambia National Provident Fund Board,*[11] to some extent modified the common law in as far as observance of the rules of natural justice was concerned. The Court held that the common law applicable in Zambia in a master/servant relationship was that the relationship, even if brought about by an oral or written agreement, could be terminated for good, bad cause or none.

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[6] See also *Agholor v. Cheeseborough Ponds (Zambia) Limited* (1976) Z.R. 1 and *Morris Mbalakao v. Zambia National Provident Fund,* SCZ Appeal No. 120/2000.).

[7](1988 – 1989) Z.R. 217 (S.C).

[8] (2003) Z.R. 127 (S.C.)

[9] *Gerald Musonda Lumpa v Maamba Collieries* (1988 – 1989) Z.R. 217 (S.C.).

[10] See the cases of *University Council of Vidyodaya University of Ceylon v. Silva* (1965) 1 WLR 77; *Barber v. Manchester Regional Hospital Board of Management* (1958) 1 WLR 181; *Glynn v. Keele University* (1971) 1 WLR 487; *Contract Haulage Limited v. Mumbuwa Kamayoyo* (1982) ZR 13.

[11] SCZ Appeal No. 120 of 2000.

The court went further to state that in most cases, the terms governing all these relationships indicated that there was a right to observe rules of natural justice and a right not to be thrown out of the job except on some rational ground. The Court found that in the case at hand there was no miscarriage of justice as on the facts the appellant's dismissal was warranted. It then held that the rules of natural justice had been observed and the regulations stated in the Collective Agreement had also been observed as the letter of termination stated so. The Court found that there was no breach of any laid down rules. Further, in the case of *Zambia China Mulungushi Textile (Joint Venture Limited v Gabriel Mwami*,[12] the Supreme court was the opinion that:

> there is a right to natural justice and a right not to be thrown out of work except on some rational grounds; some explicable basis which is reasonable in the circumstances.

Without expressly overruling the *Gerald Musonda Lumpa* case, both courts stated that dismissal for any or no reason was incompatible with public policy and employment law practice of the time. In fact, in the *Gabriel Mwami* case, the Supreme Court held that:

> the old-fashioned language of master and servant is out of place in many of the employment situations nowadays.

The court emphasised that the old terms of master and servant were not only derogatory but implied that all employees were at the mercy of the employer because they were servants to a master.

Notwithstanding these persuasive judgments, neither position in the *Morris Mbalakao* and *Mwami* decisions was followed or referred to by the Supreme Court when deciding the case of *Tolani Zulu and Musa Hamwala v Barclays Bank of Zambia Limited.*[13] Despite making reference to the ILO Convention No. 158 which requires reasons to be given for dismissal, the Supreme Court in the *Tolani Zulu* case was emphatic that whereas an employee was entitled to be given an opportunity to be heard prior to dismissal based on his conduct or capacity, an employer was not obliged to give any reasons for terminating the services of an employee. In other words, the Supreme Court per Chirwa JS., was saying that if an employee was notified of his questionable conduct related to his work and was given an opportunity to explain, it was then up to the employer to decide. The Employment Act was not very helpful in this regard as it did not set any standard of proof, but merely emphasised on the need for the employee to be given an opportunity to defend himself.

Although at common law an employer could terminate a contract at any time and for any reason, according to *Albert Mwanaumo and Others v NFC Mining PLC, Que Nelson Jilowa*[14] if an employer terminated the contract outside the provisions of the contract, there was a breach of the contract, and the employer was liable in damages for breach of contract. It is the authors' view that even though the *Albert Mwanaumo* case is a High Court decision, it is sound and persuasive because termination of a contract outside its provisions is undoubtedly, in breach of the contract thereby entitling the employee to damages for the same.

[12] (2004) Z.R. 244 (SC).
[13] SCZ Judgment No. 17 of 2003.
[14] (2006/HK/385).

Prior to the amendment of the Employment Act, the right to be heard prior to dismissal could not be invoked when the employment was terminated by the notice period provided for in the contract of employment or statute.[15] However, in 2015, the Employment Act was amended, with the introduction of section 36(1)(c) and (3) of the Employment (Amendment) Act (and these amendments are reflected in the recently enacted Section 52 (1) and (2) of the Employment Code Act). Accordingly to section 36(1)(c) and (3) of the Employment (Amendment) Act read as follows:-

> (1) A written contract of service shall be terminated-
>
> (a) …
> (b) …
> (c) in any other manner in which a contract of service may be lawfully terminated or deemed to be terminated whether under the provisions of this Act or otherwise, except that where the termination is at the initiative of the employer, the employer shall give reasons to the employee for the termination of that employee's employment
>
> (2) …
>
> (3) An employer shall not terminate a contract of employment of an employee without a valid reason for the termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking. (Emphasis Mine)

Therefore, for the dismissal to be fair, an employer must give a valid reason prior to the dismissal and for the reason to be valid, it must be related to the conduct or capacity of the employee or operational requirement of the employer.[16]

The authors opine that the introduction of sections 36(1)(c) and (3) of the Employment (Amendment) Act which applied to the facts of the case (which is now reflected in section 52 (1) and (2) of the Employment Code) which requires a valid reason to be given before dismissal means that the Employment Act is giving effect to Article 9 (2) of Convention No. 158, which requires that the employer proves the existence of a valid reason for termination. It also requires that the body determining the dispute reaches a conclusion on the reason for the termination based on the evidence provided by the parties and according to procedures governed by national law and practice.

In *Victoria Chileshe Sakala v Spectra Oil Corporation Limited,*[17] the Supreme Court confirmed that an employer who terminates employment must give valid reasons. In a judgment delivered by Kabuka JS., the Supreme Court, interpreted Section 36 of the now repealed Employment Act, which is replicated in Section 52 (2) of the Employment Code Act. The Court held:

> We are alive to the fact that since the coming into effect of the Employment (Amendment) Act No. 15 of 2015, which amends Section 36 of the Employment

[15] *Clive Kapila v. Kasembo Transport* (2015) Z.R (1) 158.
[16]See *Post Office v Foley* (2001)1 All ER 550.
[17] SCZ Appeal No. 02/2016

> Act, Cap 268, an employer is now required to give a valid reason for termination of an employment contract. (Emphasis author's)

The High Court decision of *James Banda v Neria's Investments Limited*,[18] and Supreme Court case of *Elizabeth Sokoni Mwenya v CFB Medical Centre Limited*[19] confirmed that the amendment that requires an employer to give valid reasons prior to dismissal applies to written contracts. Again, the court here was analysing sections 36(1)(c) and (3) of the Employment (Amendment) Act which applied to the facts of the case (which is now reflected in section 52 (1) and (2) of the Employment Code) and emphasising the need for the valid reason to precede any termination (or dismissal) by the employer. An excerpt from the Supreme Court's judgment in the *Elizabeth Sokoni Mwenya* case states the following:

> we are mindful of the fact that, on 9th February, 1990 when Zambia ratified the International Labour Organisation - Termination of Employment Convention 158 of 1982, in article 4 the same prohibits termination of employment contracts without valid reasons when it states that: "the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service" That article was domesticated by the Employment (Amendment) Act No. 15 of 2015 through the addition of the following words to Section 36 (1)(c)…

Hence, the employer must now give valid reasons to the employee for the termination of a written contract of employment. Valid reasons for dismissal recognised in Zambian law are those that relate to the conduct or capacity of the employee or operational requirements of the employer.[20] Should an employer fail to comply with the requirements in Section 52 (2) of the Employment Code Act, he risks court action for damages. The Court of Appeal in *Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited,*[21] explained the rationale for this amendment as follows:

> The basis of this is that the employee who is a weaker party is protected from being dismissed at the whims of the employer without any justifiable reason.

Section 36 (3) of the Employment (Amendment) Act which applied at the time and is now embodied in section 52 (2) of Employment Code Act which requires a valid reason to be given is a marked departure from the holding in *Gerald Musonda Lumpa v. Maamba Collieries*[22] that an employer need not give a reason prior to the dismissal.

Previously, there could be no cause of action that could be brought against an employer who had lawfully terminated a contract in line with the notice period clause in the contract of employment.[23] In *Zambia Consolidated Copper Mines v James Matale*,[24] the Supreme Court of Zambia held that a dismissal with proper notice is a lawful way of terminating a contract of employment.

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[18] Comp/IRCLK/171/2016.
[19] SCZ Appeal No. 009/2015.
[20] Section 52 (2) of the Employment Code Act.
[21] CAZ/Appeal No. 129/2017.
[22] (1988 – 1989) Z.R. 217.
[23] *Barclays Bank Zambia Limited v. Benjamin Ndeketeya Mvula* SCZ Judgment No. 51 of 2002.
[24] (1995-1997) ZR 157.

The position in the *James Matale* case has been altered by Section 52 (2) of the Employment Code Act which now provides that a contract of employment shall not be terminated by the employer unless there is a valid reason for the termination connected with the capacity, conduct of the employee, or based on the operational requirements of the undertaking. In *Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited,*[25]the Court of Appeal per Majula JA., held that Section 36 of the now repealed Employment Act (now Section 52 (1) and (2) of the Employment Code Act):

> …has placed a requirement on an employer to give reasons for terminating an employee's employment. Employers are no longer at liberty to invoke a termination clause and give notice without assigning reasons for the termination.

The *Sarah Aliza Vekhnik* case established that employers must give reasons when they terminate by way of notice. This, therefore, means that while an employer can terminate the contract of employment by giving notice, the employer must specify a valid reason related to the employee's conduct or capacity or employer's operational requirements for the termination to be valid. This is so because the Employment Code Act makes it very clear that where the employer initiates termination of the employee's employment, even if they do so by invoking the notice clause in the contract of employment, they must give a valid reason.

In *Spectra Oil Zambia Limited v. Oliver Chinyama*,[26] the employee was terminated by notice and not furnish with any reasons. The Court of Appeal was clear that

> an employer cannot hide behind the notice clause and invoke it without giving any valid reason. The net effect of the foregoing is that to the extent that employment contracts have provisions for termination by notice without giving reasons, they are in contravention or in conflict with the provisions of section 36(1) and (3) of the Employment Act, and the termination shall be unlawful.

The court found the termination by notice without reasons to be a violation of the law which requires valid reasons to be given. Similarly, in *Zambezi Portland Cement Limited v. Kevin Jivo Kalidas*,[27] the Court of Appeal dealt with a case where the employer terminated the contract of employment of an employee by invoking the termination clause in the contract. According to the clause either party could terminate the contract by giving one months' notice. In this case, the Court of Appeal in a judgment delivered by Chashi JA stated that: -

> In our view, section 36(1)(c) and (3) of the Employment Act is very clear and unequivocal that it is a legal requirement that every employer who terminates the employment of an employee must furnish the employee with valid reasons. The aforecited provisions are clear as day and it is therefore, not enough for the Appellant to merely give notice.

The Court of Appeal stated that because of the enactment of section 36(1)(c) and 36(3) of the Employment Code Act (which are now embodied in section 52(1) and (2) of the Employment

[25] CAZ/Appeal No. 129/2017.
[26] CAZ Appeal No. 18/2018.
[27] CAZ Appeal No. 29 of 2019.

Code Act), an employer who terminates the contract, even by way of notice or payment in lieu of notice must give a valid reason.

It is based on the above decisions that the Court of Appeal in the *Mark Tink* matter relied on the earlier Court of Appeal decisions and found the termination of the employees unlawful. As interesting question now arises. Clause 19.1.1. of the Expatriate Terms and Conditions of employment provides for localisation. The High Court delivered a judgment where held that: -

> Further the Plaintiffs were aware of their obligations as provided by the Expatriate terms and conditions and were further aware that their contracts would not subsist indefinitely. The Defendants having afforded the Plaintiffs with reasons for terminating their contracts, even though not specifically stated in the termination letters, were in line with Section 36 of the Employment Act. The Defendant therefore acted within the provision of the Contract and the Employment Act and therefore it cannot be resolved that there was unlawful dismissal.

It was the position of the High Court that the fact that employees were aware that their contracts would not be indefinite and would be subject to localisation means that they knew of the valid reason for the termination, despite the same not being stated in their termination letters.

One could argue that because the employees knew of the localisation of their positions from the onset and the fact that their contracts would last for the duration of the training, the employees were aware of their employer's operational requirements. Because they were aware of the operational requirements, it might be plausible to argue that once they were issued with letters of termination, it was implied from the Terms and Conditions that the termination was for operational requirements.

The Supreme Court in *Rabson Sikombe v. Access Bank (Zambia) Limited,*[28] rejected an argument by the employee that he was only bound to the contract of employment and not the other documents affecting the employment relationship. In the *Rabson Sikombe* case, the employee attempted to argue that he was only bound to the letter of offer of employment and his contract and not the staff handbook which laid out disciplinary measures. In a judgment delivered by Malila JS (as he was then) the Supreme Court held that:

> We quite frankly do not think that this ground of appeal is worth much of the appellant's time, let alone that of this court. The law is trite that a party is bound by the terms of any agreement that he voluntarily enters into. We do not wish to undertake the difficult task of explaining very elementary principles of the law of contract in this regard. Suffice it to state that we agree with the submissions of the learned counsel for the respondent on this point… Clearly the provisions of the staff handbook were incorporated into the appellant's employment contract and applied with full force and effect as if the appellant had signed them specifically.

The above statement from the Supreme Court clearly demonstrates that whether the contract of employment refers to another document, the document shall apply to the contract of

[28] SCZ Appeal No. 240/2013.

employment. Further, in *Care International Zambia Limited v. Misheck Tembo*,[29] Musonda JS (as he was then) on behalf of the Supreme Court said the following: -

> For the avoidance of doubt, the Court of Appeal in England affirmed in Credit Suisse Asset Management Ltd. v. Armstrong that a Staff Handbook can have contractual effect. (Emphasis author's)

It would thus appear that because the Expatriate Terms and Conditions applied to the contract of employment, one could argue that the employees knew or ought to have known that their contract would endure for as long as they were needed to train employees and localise the employees. Based on this, it could be argued that the employer, the Respondent in this matter complied with the requirement to give a valid reason, namely termination for operational requirements which was expressly laid out in the Respondent's Expatriate Terms and Conditions which applied to the employees' contracts of employment.

The above notwithstanding, the reaction of the Court of Appeal to the position of the High Court was as follows: -

> Our reaction to the learned trial Judge's reasoning is that he fell in grave error and misdirected himself on the finding that the appellants did not dispute the assertion that Zambian employees would take up the appellants' positions. We say so because earlier in his judgment at page J25 (page 37 of the record of appeal), he found that it was not in dispute that the appellants' obligation was to impart technical knowledge and personal development onto Zambian employees and localize them to take up the positions held by the expatriates. The reason for the appellants' engagement was for them to train local staff. The appellants were aware from the outset of their engagement that their positions would be localized alter successfully completing their contracts. The fact that the Panel Advisory Committee verbally informed the appellants that their contracts would be terminated after successfully training Zambians was not new. That was the essence of their contracts. In other words, it was envisaged by the parties that localization would take place after the appellants successfully completed their contracts. The reason ascribed to by the learned Judge that they were aware of their obligations as provided by the Expatriate terms and conditions cannot therefore be a valid reason to abruptly terminate their services after only serving a few months of their renewed contracts which all had unexpired periods in excess of one year. Whilst we agree that they were aware that their contracts would not subsist indefinitely, it was equally not in contemplation of the appellants that their contracts would be terminated abruptly without running their full term upon which localization would take place. (Emphasis author's)

The reasoning of the Court of Appeal is compelling. The law is clear that no contract of employment in Zambia is indefinite In *Alistair Logistics (Z) Limited v. Dean Mwachilenga*,[30] the Court of Appeal aptly stated that: -

[29] SCZ judgment No. 56 of 2018.
[30] CAZ Appeal No. 232/2019.

> There is no contract that is indefinite and has an 'until death do us part' clause. Either party can terminate the contract in line with the provisions of their contract.

Whilst the above is true and employees, particularly those on fixed term contracts know that their contract is to come to an end at some point, this in no way negates their statutory right to receive a valid reason when effecting a termination of employment.

Another peculiar circumstance that should be highlighted is that the employees were informed verbally, prior to the issuing of the termination letters that their contracts would be ended due to the localisation of their positions. This is incredibly interesting because a valid reason may have been given verbally, notwithstanding the fact they were omitted in the subsequent letters. The question that arises is whether the communication of the reason prior to the letter, that was not embodied in the letter itself suffices.

The Court of Appeal was of the view that because the letter did not embody the reason even though the employees were made aware of the reason. Siavwapa JA on behalf of the Court of Appeal guided that: -

> We carefully reviewed the letters of termination to each of the appellants at pages 142, 183, 184, 213, 238, 258, 293, 295, 300, 301, and 302 of the record of appeal. None had a valid reason for termination offered to the appellants as is required by section 36(1)(c) and (3) of the Employment Act supra as amended, which places a duty on an employer to furnish an employee with valid reasons for termination of employment.

Therefore, notwithstanding the facts that the employees were aware of the fixed duration of their contracts of employment, and the fact that their role was to train Zambian employees who would take over from them, the employer still needed to accord them a reason for their termination at the point that the letters off termination were to come to an end.

In other words, it is not possible for a letter of termination to infer or imply a valid reason, the said reason must be expressly stated and brought to the employee's attention when the termination of employment is communicated. This is an important principle that the Court of Appeal clarified in this matter. It would thus appear that what is contained in the letter of termination or communication is crucial in determining if the employer has complied. In the circumstances, even though there was verbal communication prior and the existence of Clause 19.1.1 on localisation, the failure to state the same in the letter and link it to a valid reason was lethal and thus deemed unfair and unlawful.

It is thus important to emphasise that whatever reason is given by an employer, the reason must relate to one of the valid reasons recognised under Zambian law. Based on the facts, the Respondent sought to terminate for operational requirements given that the role occupied by the employees (the Appellants) were to be held by local Zambian employees after their training concluded. However, because the employer, the Respondent did not expressly state this in the termination notices, this was fatal, notwithstanding the verbal information and the employees' awareness of the situation.

For these reasons, the decision of the Court of Appeal was sound notwithstanding the arguments above that the Terms and Conditions were part of their contract, and the employees knew or ought to have known of the employer's operational requirements.

Substantiating the valid reason

I wish to also point out that giving a valid reason is not enough, it need be substantiated. Substantiation based on several decided decisions such as *Chimanga Changa v. Stephen Chipango Ngombe*[31] and *Chilanga Cement v. Venus Kasito*[32]means the reason given is supported by the facts, evidence and circumstances. Therefore, even if one accepts that the employer gave a valid reason because the localisation was expressly stated in the Expatriate Terms and Conditions, the purported reason needed to be substantiated, for example, clear evidence shown that Zambian employees who were trained were ready to take over.

The *Gerald Musonda Lumpa* judgment also provided that where an employer gave a reason for the termination of the employment contract, there was no obligation to substantiate the reason given. In *Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited,*[33] the Court of Appeal dealt with the need to substantiate the valid reason given. The Court stated as follows:

> What is of critical importance to note however, is that the reason or reasons given must be substantiated. We recall that our duty as a court is to ensure that the rules of natural justice were complied with and to examine whether there was a sufficient substratum of facts to support the invocation of disciplinary procedures. In other words, we must be satisfied that there were no *mala fides* on the part of the employer.

The requirement to give valid reasons prior to termination, in essence also entails the employer substantiating the reason to ensure that it is valid. To be substantiated, the reason must not only be valid but be supported by the substratum of the facts, circumstances and evidence that justifies and support the reason given by the employer when terminating the contract of employment. Therefore, the holding in *Gerald Musonda Lumpa* case that there is no duty to substantiate the reasons does not apply today and has been overtaken by the Employment (Amendment) Act (and now the Employment Code Act) which requires valid reasons to be substantiated. This approach can be seen from the Court of Appeal's decision in *MP Infrastructure Zambia Limited v. Matt Smith Kenneth Barnes*.[34]

Employers are now required to substantiate the valid reason that they give employees when dismissing or terminating the contract of employment. This is important because the substratum of the facts, circumstances and evidence must support the holding that an employee committed misconduct or performed poorly, or the employer has a bona fide operational requirement that justifies termination of employment. As such the decision taken by the employer must not only be valid but substantiated to ensure that decision to dismiss or termination is reasonable and fair.

Therefore, the *Gerald Musonda Lumpa* holding that where reasons are given the employer does need not to substantiate them, no longer applies today. Employers are required to substantiate the valid reason that they give. In addition to giving a valid reason, it is important to note that the valid reason given to the employee, must also be substantiated. In other words, the valid reason must have a fair and reasonable basis. Therefore, the burden on employers is

[31] Selected Judgment No. 5 of 2010.
[32] Selected Judgment No. 61 of 2019
[33] CAZ/Appeal No. 129/2017.
[34] CAZ Appeal No. 102/2020

to illustrate that they gave a valid reason, and that reason was based on sound grounds. Based on the *Supabets Sports Betting v. Batuke Kalimukwa*[35] Supreme Court decision, if a valid reason is given but it is unsubstantiated, such dismissal or termination would be unfair.

Thus, as the law stands, as provided in the statute and on the strength of the *Sarah Aliza Vekhnik, Kevin Jivo Kalidas* and *Oliver Chinyama* judgments, the employer must give a valid, reason that is substantiated, after according the employee a right to be heard (except in cases of summary dismissal for gross misconduct). This is important because the substratum of the facts and evidence must support the holding that an employee committed misconduct or performed poorly, and such the decision taken by the employer must be reasonable and fair in the circumstances. Therefore, the guidance of the Court of Appeal in the *Mark Tink* matter is an important restatement of the law as it requires a valid reason to be given and that the said reason must be substantiated.

Based on what has been discussed above, there is a slight critique of the judgment of the Court of Appeal would be the failure of the Court of Appeal to appropriately define the meaning of the valid reasons for termination. In other decisions of the Court of Appeal, including this *Mark Tink* judgment, the Court of Appeal merely repeated the valid grounds, without giving meaning to what they mean. It is submitted the Court should provide guidance to employers and thus it would be prudent to highlight the meaning of the grounds of termination. For the avoidance of doubt: -

- Conduct – behaviour which is unacceptable to the employer;
- Capacity – either poor performance which is where an employer carries out his duties below the acceptable performance standard or ill-health, when an employee is too sick to perform even after serving the full sick leave term;
- Operational Requirements - bona fide, commercial reason that falls short of being a redundancy;
- Redundancy – where the employee's position or services are no longer required (i.e. closing the business or branch or employee's position being abolished) where one of the situation in the statute is triggered.

It is with noting that under Zambian law, termination for operational requirements and termination by redundancy are separate. Under the Employment Act, Chapter 268 of the Laws of Zambia, as amended by the Employment (Amendment) Act No. 15 of 2015, redundancy was in Part IV of the Employment Act which only applied to employees on oral contracts of employment, whilst termination for operational requirements applied only to written contracts. The Supreme Court in the case of *Barclays Bank v. Zambia Union of Financial Institutions and Allied Workers* [36] where the court held:

> In enacting Section 26(B) Parliament intended to safeguard the interest of employees who were employed on oral contracts of service by which nature would not have any provision for termination of employment by way of redundancy.

The above confirms that redundancy was only for oral contracts, and by virtue of the section 36 being under Part V, it only applied to written contracts. This means that the two modes of termination were intended to be separate and different.

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[35] Selected Judgment No. 27/2019.
[36] (2007) Z.R. 106.

The problem however was that section 36(3) Employment Act, Chapter 268 of the Laws of Zambia, as amended by the Employment (Amendment) Act No. 15 of 2015 did not provide meaning on what termination for operational requirements was. The only guidance was the Supreme Court decision in *Frida Kabaso Phiri (sued as Country Director of Voluntary Services Overseas Zambia) v. Davies Tembo*[37] which held that a redundancy could only occur where the position was abolished. If not abolished or triggered by the statute, as redundancy is a creature of statute, such termination cannot be held to be a redundancy.

The only guidance on this matter was given by the High Court in *Albert Mupila v. Yu-Wei*[38] where Mwenda J stated that: -

> a reason for termination of a contract of employment must precede the termination and the only valid reasons for termination are those connected to the capacity, conduct of the employee or operational requirements of the employer's undertaking as well as redundancy in terms of Section 55 of the Employment Code Act. The distinction between termination for operational requirements and redundancy is that termination for operational requirements is based on a bona fide commercial reason such as inability to financially sustain an employee or due to a restructuring exercise while redundancy is only triggered when one of the redundancy situations in Section 55 (1) of the Employment Code arises. Section 55 (1) provides as follows:
>
> "55. (1) An employer is considered to have terminated a contract of employment of an employee by reason of redundancy if the termination is wholly or in part due to –
>
> (a) the employer ceasing or intending to cease to carry on the business by virtue of which the employees were engaged;
> (b) the business ceasing or diminishing or expected ceasing or diminishing the requirement for the employees to carry out work of a particular kind in the place where the employees were engaged; or
> (c) an adverse alteration of the employee's conditions of service which the employee has not consented to.
>
> I am fortified in making the above distinction based on the definition of redundancy in Section 3 of the Employment Code Act which limits redundancy to the situations in Section 55 and makes no reference to termination for operational requirements which is found in Section 52 (2).

The High Court thus attempted to distinguish between termination for operational requirements and redundancy as guidance for employers in Zambia. Whilst a court is indeed mandated to only deal with issues before the court, it is submitted that in cases where no valid reason is given, it is imperative that the court outline the meaning, nature, scope and content of the said valid reason(s) prescribed by law, so an employer is aware of the extent of their breach. This is also important in guiding other employers, particularly as the law has ben amended recently.

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[37] SCZ Appeal No. 04/2012.

[38] COMP/IRCLK/222/2021.

The Court of Appeal confirmed that the employee was entitled to twelve (12) months' salary as damages because they were terminated without a valid reason as required by the law and in an abrupt and traumatic manner.

The author has been critical of the Court of Appeal's haphazard approach to awarding damages. In. *Dean Mwachilenga*, the Court of Appeal refused to confirm an award of 36 months' salary as damages, thus denying granting an employee exemplary damage. The Court of Appeal in a judgment delivered by Majula JA stated that: -

> We have meticulously examined the contract of employment in particular the termination clause 12 which is that the contract is terminable by either party giving the other one months' notice in writing or one months' pay in lieu of notice. Having exercised our minds as to the facts of this case, we have arrived at the inescapable conclusion that the award of 36 months' pay is inordinately high given the particular circumstances of the case and does greet us with a sense of shock. We are thus compelled to interfere with the said award bearing in mind the cases of Kawimbe vs The Attorney-General and The Attorney-General vs Fred Chileshe Ngoma. On this score we find merit in grounds 3 and 4 and uphold them. We accordingly set aside the award of 36 months' pay and in its place we award three months' pay as damages, to include housing allowance and interest at a commercial rate from the date of the judgment in the court below.

The Court eventually granted the employee three (3) months' salary as damages, but without giving a comprehensive and sufficient justification for the same. This is unsatisfactory, primarily because the Court did not properly explain the basis for its award. In another case of *Spectra Oil Zambia Limited v. Oliver Chinyama*,[39] an employee's contract of employment without being given a valid reason. The Court of Appeal confirmed an award of twelve (12) months' salary of damages granted by the High Court but did not give guidance on why this award was justifies based on the facts.

The Court of Appeal awarded six (6) months' salary as damages where an employee was terminated without a valid reason in *Zambezi Portland Cement Limited v. Kevin Jivo Kalidas*.[40] Again, the Court did not give sufficient detail as to why this measure of damages sufficed. In another case involving the failure to give a valid reason, *Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited,*[41] the Court of Appeal awarded three (3) months' salary as damages, with the only justification being that the employee mitigated her loss by finding alternative employment.

In yet another case of *MP Infrastructure Zambia Limited* the Court of Appeal substituted the Industrial Court's award of thirty (30) months' salary as damages with an award of two (2) months' salary as damages for unlawful termination of employment, mental distress and inconvenience caused to him by the sudden termination. in the circumstances of this case, the court held that the damages to be awarded in the circumstances were excessive as the employee was on a two-month contract and was already paid one month in lieu of service when his contract provided for one week's notice.

[39] CAZ Appeal No. 18/2019
[40] CAZ Appeal No. 29 of 2019.
[41] CAZ/Appeal No. 129/2017.

The recent approach of the Court of Appeal differs from their approach is cases such as *Standard Chartered Bank v. Celine Meena Nair*[42] and *African Banking Corporation v. Bernard Fungamwango*.[43] In these cases, the Court of Appeal confirmed thirty-six (36) months' salary as damages. In *Bernard Fungamwango*, the Court of Appeal considered the traumatic way his employment was terminated and diminished prospects of finding alternative employment in the banking sector. It is submitted that the approach in *Bernard Fungamwango* is favourable because the Court of Appeal clearly outlined the basis for the enhanced damages awarded.

From the above, the approach of the Court of Appeal on the issue of damages for employees who have suffered unfair, unlawful and/or wrongful dismissal or termination has not been very consistent, and in some cases lacked clarity. Firstly, damages for unfair and/or wrongful dismissal or termination should be based on the nature of the dismissal or termination and not the notice clause for termination provided for in the contract. This is because damages are to compensate an employee for the unfair and/or wrongful conduct on the part of the dismissal.

Secondly, section 52(2) of the Employment Code Act now provides that an employer must give a valid reason before termination of the contract of employment. This was not the case before. Previously, an employer could terminate employment for no reason or any reason. In such circumstances, a normal measure of damages equivalent to the notice period was appropriate because notwithstanding any unfair or wrongful dismissal, an employer was entitled to bring the contract to an end without having to give a reason.

Based on the above, the such the court could award damages equivalent to the notice period because the employer enjoyed the option to terminate at will and the notice period encompassed the loss to be suffered by an employee. Under the common law, an employer could terminate or dismiss for no reason, and this reflected in the common law remedy of damages equivalent to the notice period. This common law approach was adopted in Zambia and worked well up until an amendment was made to the legislation.

It is submitted that the introduction of the requirement to give valid reasons prior to the termination or dismissal of an employee means that the common law position no longer applies. The position now is that an employer must accompany any termination with a valid reason, even when terminating with notice or payment in lieu of notice means that the orthodox normal measure of damages does not apply. This should have been brought out by the Court of Appeal.

For the above reasons, where an employer is guilty of wrongful or unfair dismissal or termination, compensation with notice pay would not be justifiable as an employer is no longer at liberty to terminate the contract without a reason, as was the case before. Therefore, the removal of the right to dismiss or terminate without a reason has equally taken away the common law normal measure of damages being salary equivalent to the notice period.

Further to the above, having established that the normal measure of damages should no longer apply in Zambia, the courts should now adopt a more systematic approach to how damages are to be awarded. This is based on the circumstances of each case. This was clearly the guidance given by the Supreme Court in *Swarp Spinning Mills Limited v. Chileshe*[44] where it was held that: -

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[42] CAZ Appeal No. 14/2019.
[43] CAZ Appeal No. 148/2020.
[44] (2002) Z.R. 23 (SC).

> In assessing damages, to be paid and which are appropriate in each case, the court does not forget the general rule which applies. This is that the normal measure of damages applies and will usually relate to the applicable contractual length of notice or the notional reasonable notice, where the contract is silent. However, the normal measure is departed from where the circumstances and the justice of the case so demand. For instance, the termination may have been inflicted in a traumatic fashion which causes distress or mental suffering.

Further, the Court of Appeal in *Zesco Limited v. Edward Angel Kahale*,[45] guided that:-

> …the courts are inclined to depart from the normal measure of damages if they are of the view that exceptional circumstances exist, such as the manner in which the termination was effected and in addition consideration may be had to the scarcity of jobs**.**

The above makes it clear that the normal measure of damages in employment law is the salary equivalent to the notice period in the contract of employment. However, in deserving cases, where the circumstances demand, a court is permitted to deviate from the normal measure and award enhanced damages.

A court is obliged to consider an award of enhanced damage s beyond the notice period because a contract of employment differs from any regular contracts. In *Kafue District Council v James Chipulu*,[46] the Supreme Court held that:

> [D]amages for anguish and vexation arising out of a breach of contract were not recoverable unless the object of the contract was to provide peace of mind or freedom from distress and accordingly were not recoverable for anguish and vexation arising out of the breach of a purely commercial contract … it is quite clear that the respondent did suffer mental distress and inconvenience as a result of the wrongful rejection by the appellant Council

Based on the above, is a contract of peace of mind, and where an employer unlawfully and wrongfully disrupts such peace, the employer should be condemned to punitive or exemplary damages.

As outlined above, the common law measure of damages should no longer apply in Zambia and the courts must now merely ascertain the quantum of damages based on the circumstances of each case. Where an employee seeks to claim enhanced damages Malila JS (as he was then) on behalf of the Supreme Court in the case of *Chansa Ng'onga v. Alfred H. Knight (Z) Limited*[47] stated that: -

> In the present case the appellant seeks to be paid compensation for twenty-four or thirty-six-months which he has not worked for. It is of course fair for him to entertain such hope as long as he can show, as did claimants in cases where such awards were made, that the peculiarity of the circumstance and the loss he suffered merited such an award.

[45] CAZ Appeal No. 37/2020.
[46] (1997) SJ 13 (SC).
[47] Selected Judgment No. 26 of 2019

Malila JS, on behalf of the Supreme Court held that the court is permitted to deviate from the salary equivalent to the notice period or reasonable notice period and award these enhanced damages where there are compelling circumstances to warrant such an award.

The deviation from the normal measure of damages depends on the various factors that have been developed by the Supreme Court in cases such as *Attorney General v. John Tembo*[48] and *First Quantum Mining and Operations Limited v Obby Yendamoh,*[49] In these case, the Supreme Court confirmed that an employee must prove the following for the court to awarding damages beyond the notice period: -

- that his/her employment was terminated in traumatic fashion;
- was the employment brought to an end in an abrupt manner;
- was the result of the blatant infringement and/or disregard of their rights, the rules of natural justice and/or their contract of employment;
- whether the termination or dismissal was carried out in an abrupt manner
- caused mental anguish, anxiety, inconvenience and stress; and
- the employee's future job prospects and the economy when awarding these damages.

A point needs to be made about the last factor above, the employee's future job prospects when awarding these damages, the Supreme Court has guided that this will be guided by the economy, which shall progressively increase with time. In *Joseph Chintomfwa v Ndola Lime Company Limited,*[50] the Supreme Court in awarding twenty-four (24) months' salary as damages. held that a court, when considering what award of damages would suffice, should consider the employee's prospects of finding alternative employment in a similar capacity.

Taking into consideration the deterioration of the Zambian domestic and global economies that had an effect on Zambia since the *Chintomfwa* case that made it more difficult to find alternative employment after an employee had been unfairly dismissed, the Supreme Court awarded thirty-six months' salary as compensation in the later case of *Dennis Chansa v. Barclays Bank Zambia Plc*.[51] This shows that when awarding exemplary damages, the court will take into consideration the state of the economy, the chances of finding employment at the date of dismissal and the changes in global economy when awarding damages. Therefore, the grant of enhanced damages depends on several factors but does not remain static over a long period of time. The court in *Dennis Chansa* awarded more damages than in *Chintomfwa* because of the passage of time that warranted a higher amount.

It will be difficult to prescribe how many months' salary should attach to each factors cited above. This shall be determined by the facts and evidence. It is therefore imperative to emphasise that the court should look at each of the fact factors alluded to above and ascertain an appropriate quantum of damages into a global sum that will be appropriate in the circumstances.
in *Obby Yendamoh*, Mutuna JS on behalf on behalf of the Supreme Court held that: -

[48] SCZ Judgment No. 1 of 2012
[49] SCZ Appeal No. 206/2015.
[50] (1999) Z.R. 172 (S.C.).
[51] SCZ Appeal No. 111/2011.

> In essence, the fact that a single compensatory event had been proved by two -facts i.e. wrongful dismissal and unfair dismissal does not mean two remed.es should be awarded.

Based on the above and for the avoidance of doubt, where a dismissal is both unfair and wrongful, one remedy should be awarded considering all the factors above. It is hoped that if this matter proceeds to the Supreme Court, the court will adopt this approach and provide clarity on the award of damages.

The author would like to bring to the attention of the reader the case of *Konkola Copper Mines Plc v. Aaron Chimfwembe and Kingstone Simbayi*,[52] the Supreme Court in a judgment delivered by Malila JS (as he was then) stated that: -

> In Jacob Nyoni v. The Attorney General(, we held that depending on the circumstances of each case, an award of damages in wrongful termination of employment cases could range from payment equivalent to the notice period for termination to two years emoluments. We must stress that each case should be considered on its own merits. The award of damages in wrongful termination of employment cases is subject at all times to a rather amorphous combination of facts peculiar to each case and perpetually different in every case. As no facts of any two cases can be entirely identical, it should not be expected that in applying the general principle for award of damages in these case, the courts will think in a regimented way.

The need to apportion the appropriate quantum of damages is guided by the facts and circumstances – this point cannot be over emphasised. Indeed, this has been the entire justification for this specific article. It is the author's view that the Court of Appeal have neglected to follow a regimented approach when awarding damages. In other words, with all due respect, the factors to be used when awarding damages have not been properly applied to the circumstances to determine the appropriate award due to employees who suffer wrongful, unfair or unlawful conduct at the hands of their employer. This is despite decided cases from the Supreme Court providing the necessary guidance. It is submitted that if the Court of Appeal follow the guidance above, we shall see more consistency in the way damages are awarded as opposed to the current prevailing situation.

It is also important to note that in addition to the above, the quantum of damages will vary if the dismissal is unfair and/or wrongful. In cases, *Care International Zambia Limited*, the Supreme Court guided that where the dismissal is unfair, it should attract a higher rate of damages because it involves the infringement of one's statutory rights. In other words, cases of unfair dismissal often attract severe consequences, much more than those for claims brought under wrongful dismissal because it is premised on breach of statute.

Furthermore, a court also must consider whether an employee has mitigated his loss or not. The Supreme Court in *Alfred H. Knight (Z) Limited* confirmed the principle of mitigating one's loss which entails taking reasonable action to minimise or reduce the amount of loss when you have suffered loss from breach of contract or unfair conduct. Malila JS on behalf of the Supreme Court held that: -

[52] SCZ Appeal No. 195/2013

> It is a fundamental principle that any claimant will be expected to mitigate the losses they suffer as a result of an unlawful or wrongful act. A court will not make an award to cover losses that could reasonably have been avoided. Likewise, an employee is expected to search for other work.

The Court of Appeal equally in *Sarah Aliza Vekhnik* endorsed the following from the seminal decision of *Caroline Tomaidah Daka vs Zambia National Commercial Bank Limited Plc*[53] where Matibini J held that: -

> Thus if an employee is dismissed without notice, and obtains other employment, he must give credit for any earning from his new employment in respect of any payment for the period of notice he should have received. The burden is on the employer to show that the employee has failed to take reasonable steps to mitigate loss. This he may be able to do either by reference to a matter known to him, or by obtaining some form of discovery from the employee concerning attempts to seek alternative employment. Damages for breach of contract at common law are always subject to the rule that the innocent party must take reasonable steps to mitigate against the loss, which in this context involves looking for other suitable employment. Any earning from such employment or from self-employment can be deducted from the loss suffered.

Put simply, mitigating loss, means lessening or diminishing the effects and gravity of a serious or severe situation. Therefore, when courts award damages, the Supreme Court affirmed that they will only award the greatest possible loss an employee would face.

A court ought to weigh the above factors to determine the appropriate damages to be awarded. It would however be impossible to ascribe how many months' salary or the quantum to be awarded under each factor as this should be determined from the facts of each case.

In this case particular case, the award of twelve (12) months' salary of damages may be justified because it was clearly terminated in an abrupt manner as he was terminated without notice and the termination infringed his rights to be heard as enshrined in section 52(3) of the Employment Code Act. However, the Court of Appeal should have also interrogated the impact of the dismissal on the employee and whether it caused him mental anxiety, stress and inconvenience and how it affected his future job prospects. This would have comprehensively dealt with the full entitlement of damages for the employee in line with the guidance of the Supreme Court. Further, there doesn't seem to be sufficient justification for the award of twelve (12) months' salary as damages when the Court of Appeal has awarded up to thirty-six (36) months' salary in other cases such as *Standard Chartered Bank v. Celine Meena Nair*[54] and *African Banking Corporation v. Bernard Fungamwango*.[55] Even in the recent Court of Appeal case of *Emporium Fresh Foods Limited t/a Food Lovers Market and Gourment Market Limited v. Kapya Chisanga,*[56] the Court of Appeal granted twenty-four (24) months' salary as damages for the employer's failure to give the employee an opportunity to be heard prior to his summary dismissal.

It is difficult to understand why the Court of Appeal would not award a higher quantum of damages for a breach of statute in relation to the valid reason in the Mark Tink matter but award

[53] 2008/HP/0846.
[54] CAZ Appeal No. 14/2019.
[55] CAZ Appeal No. 148/2020.
[56] CAZ Appeal No. 44/2021

higher damages in other cases. This level of inconsistency could be easily remedied and mitigated if the guidance espoused above is followed in subsequent cases.

Whilst the author is pleased that the Court of Appeal's approach to the award of damages, particularly as it relates to considering the circumstances of the case, it would have been helpful if the Court of Appeal gave more detail as to how damages should be awarded by the courts and explained why this award differs from other cases. It is hoped that the above analysis will assist the Court of Appeal going forward, and/or is adopted the Supreme Court can consider the issue of damages in employment matters soon.

Conclusion

The decision in *Mark Tink and Others v. Lumwana Mining Company Limited* is an important decision because it clarifies and restates that law that a valid reason, that is substantiated is required when an employer initiates termination of the contract of employment.

This article has however critiqued the approach of the Court of Appeal as it relates to the award of damages. This article has sought to provide clarity as it relates to the award of damages, particularly the way is granted and justified. It has been suggested that when the opportunity arises either the Court of Appeal or the Supreme Court should revise its guidance with respect to the award of damages in employment matters.

The position of this piece has been that the common law position on damages is no longer tenable and needs to be revised. In other words, the common law rate of damages only applies where the common law right to terminate without a reason was permitted. The statutory intervention on the other hand does away with the common law and thus the rate of damages must also alter.

Lastly, it is submitted that a court should always apply the factors namely whether the employer has infringed his/her right(s), inflicted termination in a traumatic fashion, caused mental anguish, anxiety, stress, and inconvenience and there has been a diminution in the employee's job prospects. As outlined above, courts are to determined damages in a regimented manner having regard to each of these factors as they relate to the circumstances of each case. If this is done, we shall see more consistency in the way the Court of Appeal, or indeed any courts, award damages to employees in the face of unfair or wrongful behaviour by their employers.