IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 41/2021**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MARK TINK AND 6 OTHERS **APPELLANTS**

AND

LUMWANA MINING COMPANY LIMITED **RESPONDENT**

CORAM: ***Kondolo, Sichinga, and Sharpe-Phiri JJA***
on 16th November, 2022 and 20th December, 2022

For the Appellants: *Mr. M. Batakathi of Messrs Muyatwa Legal Practitioners*

For the Respondent: *Mr. K. Phiri of Messrs Corpus Legal Practitioners*

JUDGMENT

Sichinga JA delivered the judgment of the Court.

Cases referred to:

1. *Kitwe City Council v. Ng'uni (2005) ZR 57*
2. *Sara Aliza Vehnik v Casa Dei Bambini Montessori Zambia Limited CAZ Appeal No. 126 of 2017*
3. *Spectra Oil Zambia Limited v Oliver Chinyama CAZ Appeal No. 18 of 2018*
4. *Nkhata and Four Others v the Attorney General (1966) ZR 124*

5. *The Attorney General v Marcus Kampumba Achiume (1983) ZR 1*
6. *Majory Mambwe Masiye v Cosmas Phiri (2008) ZR 56 Vol. 2*
7. *Mohamed v The Attorney General (1982) ZR 49*
8. *Sobek Lodges Limited v Zambia Wildlife Authority 2008/HP/668*
9. *Zambezi Portland Cement Limited v Kevin Jivo Kalidas CAZ Appeal No. 29 of 2019*
10. *Nyoni v the Attorney General SCZ Appeal No. 11 of 2001*
11. *Barclays Bank Zambia Plc v Weston Luwi and Another SCZ Appeal No. 7 of 2012*
12. *Swarp Spinning Mills Limited v Sebastian Chileshe and Others (2002) ZR 23*
13. *African Supermarkets T/A Shoprite Checkers v Bethel Mumba and Another CAZ Appeal No. 48 of 2018*
14. *Zambia Industrial and Mining Corporation Limited (in Liquidation) v Chimanja and Another SCZ Appeal No. 90 of 2000*
15. *Zambia Privatisation Agency v James Matale (1996) ZR SJ*
16. *The Attorney-General v Katwishi Kapandula (1988-1989) ZR 69*
17. *Tholani Zulu and Others v Barclays Bank Zambia Limited (2003) ZR 127*
18. *Gerald M. Lumpa v Maamba Collieries Limited (1988-89) ZR 217*
19. *Colgate Palmolive Incorporation v Shemu and Others SCZ Appeal No. 181 of 2005*
20. *Zulu v Avondale Housing Project* (1982) ZR 172
21. *Mazoka and Others v Mwanawasa and Others (2005) ZR 138*
22. *Copperbelt Bottling Company Limited v Phineas Fombe SCZ Appeal No. 37 of 1996*
23. *National Airports Corporation Limited v Zimba and Another SCZ Judgment No. 34 of 2000*
24. *Konkola Copper Mines Plc and Aaron Chinfwembe v Kingstone Simdayii SCZ selected Judgment No. 22 of 2016*
25. *Chilanga Cement Plc v Kasote Singogo SCZ Judgment No. 13 0f 2009*
26. *The Attorney-General v Kakoma (1975) ZR 212*

Legislation referred to:

1. *The Employment Act, Chapter 268 as amended by Act No. 15 of 2015, Laws of Zambia*

Other works referred to:

1. *Phipson on Evidence, 17th edition, Sweet and Maxwell*

1.0 Introduction

1.1 This is an appeal by the appellants, who were the plaintiffs in the court below, against the Judgment of Muma J delivered on 27th November, 2020 in favour of the respondent. The main question for determination in the court below is whether or not the appellants' were availed valid reasons for their termination of employment in conformity with the law.

1.2 In the main, the plaintiffs' claims were for:

i. A declaration that the termination of their employment by the defendant was unlawful dismissal/unfair and a nullity at law;

ii. An order for an award of US$4,584,490.88 being total salaries and other benefits for the unexpired period of the plaintiffs' contracts unlawfully or unfairly terminated;

iii. Damages for unlawful termination of employment;

iv. Damages for harassment, inconvenience and unfair treatment;

v. A full refund of termination benefits paid to domestic workers as a result of being forced off site and out of the country to be calculated in accordance with Zambian labour law;

vi. Punitive damages;

vii. Interest;

viii. Costs; and

ix. Further and other relief the court may deem fit.

2.0 Background

2.1 The plaintiffs were expatriates employed on various dates by the defendant company. They all received letters of termination on varying dates between 17th July, 2018 and 13th July, 2019. Their termination was said to have been done in

accordance with Clause 19.1.1 of the Expatriate Terms and Conditions of Employment. This prompted them to commence the collective action.

2.2 The defendant's position was that it 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.

3.0 The lower court's decision

3.1 On the claim for a declaration that the termination of the plaintiffs' employment was unlawful/unfair and a nullity at law, the learned Judge found that the plaintiffs' contracts were terminated prematurely as their two year terms had not elapsed. He, however held that the Expatriate General Terms and Condition allowed for termination of the contracts by either party giving notice in writing. He went on to state that the defendant's verbal notification (reason given) did not suffice. The learned Judge held that even though the termination letters did not give a reason for terminating their contracts, the said letters were in line with ***Section 36 of the***

Employment Act[1] which requires an employer to afford an employee a reason for terminating. The learned Judge found the termination lawful and not unfair. The first claim failed.

3.2 On the claim for an award of USD$4,584,490.88 being salaries and other benefits for the unexpired period of the plaintiffs' contracts, the learned Judge held this would amount to unjust enrichment in line with the case of ***Kitwe City Council v. Ng'uni***[1]. This claim failed.

3.3 On the claim for damages for unlawful termination of contract, the learned Judge held since the claim for unlawful termination failed, this claim could not be sustained.

3.4 On the claim for damages for harassment, inconvenience and unfair treatment, the learned Judge held that the claim failed for lack of merit.

3.5 On the claim for a full refund of termination benefits paid to domestic workers as a result of being forced off site and out of the country, the learned Judge held there was no clause in their contracts of employment that placed liability of domestic workers on the defendant. The claim failed.

3.6 On the claim for punitive damages, the learned Judge found no wrong doing on the part of the defendant, therefore this claim failed.

3.7 On interest, the learned Judge held since there was no award given in favour of the plaintiffs, the claim failed.

3.8 No order for costs was made and no other relief was granted to the plaintiffs.

3.9 The learned Judge held the plaintiffs failed to prove their claims on a balance of probabilities.

4.0 The appeal

4.1 Aggrieved by the decision of the lower court, the plaintiffs (hereinafter referred to as *the appellants*) launched this appeal advancing five (5) grounds of appeal couched as follows:

1. ***The learned trial Judge misdirected himself in law and in fact when he held that the appellants' contracts of employment were not unlawful despite having found as a fact that no reason for such termination was provided;***

2. ***The learned trial judge fell into grave error when he found that the reason for terminating the appellants' employment was given verbally prior to such termination, when there was no such evidence before the court to support such a finding;***
3. ***The learned trial Judge erred in law and in fact when he held that the appellants' Talent and Advisory Panel had informed the appellants that their contracts would be terminated after training of locals when there was no evidence to support the finding;***
4. ***The learned trial Judge erred in law and in fact when he held that the 1st appellant had not proved that he had school going children when there was undisputed evidence before the court to that effect; and***
5. ***The learned trial judge erred in law and in fact not to award damages for the unexpired period of the appellants' contracts as it ignored binding authority under Zambian law for the award of damages even for a period not worked for where an employer unlawfully or unfairly terminates an employee.***

5.0 Appellants submissions

5.1 The appellants filed detailed written heads of argument on 10th March, 2021 which we shall summarise.

5.2 In support of the first ground of appeal it was argued that the main issue was that the appellants' termination, as it was conveyed by the respondent, was unlawful as a result of there being no reason given for the said termination. That the learned Judge held that the termination was not unlawful despite having found as a fact, that no reason for such termination was provided as evidenced on page J27 of his judgment (page 39 of the Record of Appeal, lines 2-3).

5.3 It was submitted that the learned Judge seriously misdirected himself when he held that the termination of the appellants' contracts of employment was not unlawful despite having stated in his judgment on page 37 and 38 of the *Record of appeal that: "it was not in dispute that the Plaintiff were terminated without cause".*

5.4 Counsel argued that the respondent's action of terminating the appellants' employment contracts "***without cause***" constitutes

an unlawful termination of employment. In support of this submission, reliance was placed on ***Section 36*** *of the* ***Employment Act***[1] which provides as follows:

> ***"36. (1) A written contract of service shall be terminated-***
>
> ***(a) by the expiry of the term for which it is expressed to be made; or***
>
> ***(b) by the death of the employee before such expiry; or***
>
> ***(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 employment."***

5.5 It was submitted that the invocation of the notice clause which is not accompanied by a valid reason has consistently been frowned upon by the courts since the advent of the ***Employment Act*** in *2015* and its successor, the ***Employment***

Code Act[2] in 2019. Reliance was placed on the cases of ***Sara Aliza Vehnik v Casa Dei Bambini Montessori Zambia Limited***[2] and ***Spectra Oil Zambia Limited v Oliver Chinyama***[3] on the requirement of the law for the employer to give an employee a valid reason for terminating a contract of employment.

5.6 We were urged to note the fact that despite the learned trial Judge finding that no reason was given for the termination, he held that the termination of the appellants' contracts of employment was not unlawful, and to allow the first ground of appeal.

5.7 On the second ground of appeal it was submitted that there is no record of evidence produced before us in support of verbal communication that allegedly transpired between the parties, showcasing that a reason was given verbally for the termination of the appellants' contracts of employment.

5.8 Reference was made to page J26 (page 38 of the record of

appeal) where the learned Judge stated that:

> ***"The Panel then advised the Plaintiffs verbally that their contracts would be terminated"***

5.9 It was submitted that the above statement merely shows that there was a verbal notice made, but it made no indication of any reasons for the termination of the appellants' employment contracts. That in fact, such verbal termination was in itself flawed as the Expatriate General Terms and Conditions only allow for the termination of the contract by either party giving notice in writing as provided by clause 19.1.1 which states that:

> ***"Either party has the right to terminate the contract by giving signed notice in writing to the other party. The period of notice of termination is one month or pay in lieu of"***

5.10 That the learned trial Judge acknowledged this fact at page J26 of his judgment (page 38 of the record of appeal), wherein he stated that:

"The Defendant's verbal notification does not suffice in this instance."

5.11 That having admitted that a verbal notification was insufficient to terminate the appellants' employment, it is inconceivable and a gross misapprehension of the facts on the part of the learned trial Judge to conclude that there was a verbal reason given for the termination of the appellants' employment. Reliance was placed on the cases of ***Nkhata and Four Others v the Attorney General***[4], ***the Attorney General v Marcus Kampumba Achiume***[5] and ***Majory Mambwe Masiye v Cosmas Phiri***[6] on when an appellate court can reverse a finding of fact made by the trial court.

5.12 On the third ground of appeal, it was submitted that there was no evidence produced by the respondent to show that the Talent Advisory Panel had informed the appellants that their contracts would be terminated after training of locals. That the respondent did not produce any minutes of the said meeting to show that the appellants were informed about their contracts being terminated after training of the locals. It was submitted that it was an error

of fact and a misapplication of the law for the learned trial Judge to hold that such communication took place. Reliance was placed on the cases of ***Mohamed v The Attorney General***[7] and ***Sobek Lodges Limited v Zambia Wildlife Authority***[8] on the burden of proof lying upon a party who asserts the affirmative of the issues.

5.13 It was submitted the respondent's allegation that the appellants were given a reason at the Talent Advisory Panel meeting that their contracts would be terminated after training of the locals, without actually having effected an actual termination at that point, was flawed. This is so because the termination was not accompanied by a reason. Counsel contended that the learned trial Judge's reliance upon the said communication was an error in law and in fact, which we ought to reverse.

5.14 On ground four, we were referred to the respondent's witness' testimony at page 414 of the record of appeal where he admits that tickets were bought for the 1st appellant and his family. That this was corroborated by the evidence at page 144 of the record of appeal showing the ticket and the names of the 1st appellant and

his family. That notwithstanding this evidence, the learned Judge held that the 1st appellant had not proved that he had children of school going age. We were urged to reverse this finding of fact as being perverse or misconceived.

5.15 Turning to the last ground of appeal, it was submitted that the learned trial Judge relied on the case of ***Kitwe City Council V. William Ng'uni*** *supra* in not awarding salaries or pensions stating it amounted to unjust enrichment. It was submitted that the question before the court, in that case, was whether an employee was entitled to full terminal benefits on resignation prompted by desire to avoid dismissal. That it was held that the plaintiff was not entitled to full payment of terminal benefits as he resigned to avoid disciplinary charges.

5.16 That in the present case, all the appellants' fixed terms of employment contracts were terminated by the respondent purportedly pursuant to Clause 19.1.1 of the Expatriate General Terms and Conditions of Service governing the employment relationship between the appellants and the respondent. The said clause being a termination without

cause clause.

5.17 That the decision in the **Kitwe City Council** case was arrived at before the new amendments to the ***Employment Act*** *supra* were made, which amendments included *inter alia* that an employer cannot terminate an employee's employment without a reason being furnished. Reliance was placed on the case of ***Zambezi Portland Cement Limited v Kevin Jivo Kalidas***[9] wherein we departed from the normal measure of damages for unlawful termination.

5.18 We were invited to consider a number of cases on damages for unlawful or wrongful termination of employment including but not limited to the cases of ***Nyoni v the Attorney General***[10], ***Barclays Bank Zambia Plc v Weston Luwi and Another***[11], ***Swarp Spinning Mills Limited v Sebastian Chileshe and Others***[12] ***African Supermarkets T/A Shoprite Checkers v Bethel Mumba and Another***[13], ***Zambia Industrial and Mining Corporation Limited (in Liquidation) v Chimanja and Another***[14].

5.19 It was submitted that the learned trial Judge erred in law and in fact not to award damages for the unexpired period of the appellants' contracts as he ignored binding authorities on the award of damages. We were urged to award the appellants the sum of **USD $4,584,490.88** being amounts due as salaries and other benefits for the unexpired period of the appellants' contracts, unlawfully terminated.

5.20 All in all, we were urged to allow the appeal in its entirety and to set aside the lower court's judgment with costs.

6.0 Respondent's submissions

6.1 The respondent filed its detailed heads of argument on 12th April, 2021, which we will equally summarise for brevity.

6.2 In response to ground one, reference was made to ***section 36 of the Employment Act*** *supra* and the cases of ***Spectra Oil Zambia*** *supra* and ***Zambezi Portland Cement Limited*** *supra.* It was submitted that it is not in dispute that the respondent herein was within its power to terminate the contracts of employment that it signed with the appellants. That either the appellants or the respondent could give one

month's notice or pay in lieu of notice. That in accordance with the executed contracts of employment, the respondent opted to pay the appellants in lieu of the said notice. In support of this submission reliance was placed on the case of ***Zambia Privatisation Agency v James Matale***[15].

6.3 It was submitted that the respondent gave a reason for termination in accordance with clause 19.1.1 of the Expatriate Terms and Conditions of Employment which was *localisation.*

6.4 As for the reason for termination as required by ***Section 36 of the Employment Act,*** it was submitted that the appellants were well informed of the reason for termination before it was effected. That clause 19.1.1 of the appellants' contracts of employment refers to *"Termination Without Cause"* as a reason for termination.

6.5 It was submitted that both PW1 and PW2 confirmed in their evidence that they were expatriates employed to train Zambian nationals, and that they were aware of the localization clause in their contracts of employment.

6.6 It was submitted that the evidence of DW1 to the extent that the appellants were aware of the localization clause being a

reason for their termination went unchallenged and was relied upon by the learned trial Judge. In support of this submission, reliance was placed on the case of ***the Attorney-General v Katwishi Kapandula***[16] in which case the Supreme Court held that a trial Judge is entitled to rely on unchallenged evidence.

6.7 It was also submitted that the localization fell under the principle of operational requirements as provided in ***Section 36 (3) of the Employment Act*** which provides as follows:

> ***"The contract of service of an employee shall not be terminated unless there is a valid reason for that termination connected with the capacity, conduct of the employee or based on the operational requirements of the undertaking."***

6.8 It was presented that the statute allows an employer to use a termination clause in the contract of employment to terminate employment of an employee. The cases of ***Tholani Zulu and Others v Barclays Bank Zambia Limited***[17] ***and Gerald M. Lumpa v Maamba Collieries Limited***[18] among others were cited as authorities.

6.9 In response to ground two, it was tendered that whilst ***Section 36 of the Employment Act*** makes it mandatory for reasons to be furnished to an employee for the termination of employment, the *Act* does not provide a prescribed mode of transmission of the said reasons. That an employer discharges his duty once an employee is made aware of the reason either verbally and/or in writing.

6.10 Counsel proposed that ground two is misconceived as the trial court made a finding of fact based on unchallenged evidence that was brought before it. That the evidence proof of verbal communication of the reason for termination of the employment contracts in question.

6.11 Relying on the ***Nkhata*** case, it was submitted that the lower court's findings of fact were neither perverse nor lacking in merit, but were based on unchallenged evidence as presented by DW1. As such we were urged not to reverse the findings of fact, and dismiss ground two for lack of merit.

6.12 In response to ground three, it was put forward that the parties herein were free to set out terms and conditions as they felt were necessary to govern their relationship. That the

parties agreed that either party was at liberty to terminate the contract by simply giving notice to the other. The case of ***Colgate Palmolive Incorporation v Shemu and Others***[19] was referred to.

6.13 It was submitted that the respondent went a step further in pursuance of a legal termination of its contracts of employment. That in compliance with ***section 36 (1) (c) of the Act,*** it informed the appellants that their contracts would be terminated as the purpose of the contracts had been served. It was argued that DW1's evidence was unchallenged, and the learned Judge was entitled to rely on it.

6.14 On ground four, the respondent relied on the cases of ***Zulu v Avondale Housing Project***[20] **and** ***Mazoka and Others v Mwanawasa and Others***[21], and the learned authors of ***Phipson on Evidence***[1] to assert that the burden of proof lay on the appellants to prove all their claims on a balance of probabilities. It was advanced that the 1st appellant failed to discharge his burden of proof.

6.15 Turning to the final ground of appeal, the respondent submitted that the lower court was on firm ground when it

refused to award the appellants damages for the unexpired period of the contract.

6.16 It was argued that it is trite law that a plaintiff claiming damages over and above the common law principle of notice at termination, should strictly prove factors that remove the said plaintiff out of the general rule and place him in exceptional circumstances. Reliance was placed on the case of ***Copperbelt Bottling Company Limited v Phineas Fombe***[22].

6.17 It was contended that where there is a claim for liquidated damages, as demanded in the present case, the plaintiff has a duty to prove how the quantified amount was arrived at. Reliance was placed on the case of ***National Airports Corporation Limited v Zimba and Another***[23].

6.18 It was submitted that it is trite law that the general rule with regards damages for wrongful or unlawful termination is the equivalent to the notice period. In support of this submission counsel cited the case of ***Konkola Copper Mines Plc and Aaron Chinfwembe v Kingstone Simdayii***[24]. It was submitted that the appellants had failed to prove that there was wrongful or unlawful termination of their contracts.

6.19 The case of ***Chilanga Cement Plc v Kasote Singogo***[25] was cited for the Supreme Court's holding that in deserving cases where it is proved that there are exceptional circumstances, the court will depart from the ordinary measure of damages equivalent to the notice period. That for a court to depart from the general rule a plaintiff/appellant must prove aggravating circumstances. It was submitted that there were no aggravating circumstances in the instant case.

6.20 It was submitted that the appellants' contracts on record were terminated by effluxion of time or were terminable by either party at the provision of notice. That the appellants were given notice of termination of their respective contracts in good time before the letters of termination were served. As such there was no sense of shock whatsoever experienced by the appellants?

6.21 It was submitted that the appellants failed to prove that the termination was carried out in a traumatic manner or that they suffered any mental stress. Reliance was placed on the cases of ***Barclays Bank (Z) Plc v Weston Lyuwi and Sugzo Ngulube*** *supra* and ***Swarp Spinning Mills Limited v***

Sebastian Chileshe and Others *supra.*

6.22 In conclusion it was submitted that the appellants had failed to prove their claims on a balance of probabilities. We were urged to dismiss the appeal for lack of merit.

7.0 The decision of this Court

7.1 We have considered the appeal, the record of appeal, the heads of argument, and the authorities cited by learned counsel on behalf of both parties. The cardinal issue for determination, as we see it, in this appeal, which will to a large extent settle the issues raised, is to determine whether a valid reason was availed to the appellants by the respondent, to terminate their contracts of employment. Grounds one, two and three largely raise this issue. As such, since they are interrelated, they shall be dealt with as one. Grounds four and five will be dealt with separately.

7.2 Firstly, the finding that the learned Judge held that the termination of the appellants' employment was unlawful after having found that they were terminated without cause is at

page J26 to J27 (pages 38 to 39 of the record of appeal) where the learned Judge stated as follows:

> ***"However the Expatriate General Terms and Conditions allows for the termination of the contract by either party giving notice in writing. The Defendant's verbal notification does not suffice in this instance. Nonetheless the Defendant provided the plaintiffs with their salary one month in lieu of notice therefore meeting their obligations. ...***
>
> ***... 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."***

7.3 We are mindful that as an appellate court, we are entitled to reverse findings of fact where we are satisfied that the finding in question was either perverse or made in the absence of any evidence or upon a misapprehension of facts or where the finding, on a proper review of the evidence, cannot be reasonably made by any trial court acting correctly. The case of ***Wilson Masauso Zulu v Avondale Housing Project Limited*** *supra* refers. We are also alive to the Supreme Court's holding in the case of ***Attorney General v Kakoma***[26] that a court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it, having seen and heard witnesses giving that evidence.

7.4 In the present case, the learned trial Judge considered the Expatriate General Terms and Conditions of Employment where it states that:

> ***"The contract is valid for the term set out in the Letter of Offer, but may be renewed as mutually agreed by the Employee and the Company."***

7.5 Having reviewed the terms of engagement, he went on to make a series of non-contentious findings of fact *inter alia* that the appellants were terminated without cause. *"Without cause,"* according to Kelvin Ngandwe Chibesa, the respondent's Human Resource Manager and sole witness *"means without a reason."* That said, he also went on to state that the reason for termination was that the appellants had successfully trained Zambians.

7.6 In one breath, the learned Judge found that no reason had been given and that the reason given verbally did not suffice. In the next breath, he found that the Talent Advisory Panel advised the appellants that Zambian employees had been localized and ready to take up their positions. That the appellants did not dispute this assertion, therefore the respondent had availed the appellants a reason in line with the requirements of ***Section 36 of the Employment Act.***

7.7 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 after 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.

7.8 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. We therefore reverse the finding that the respondent accorded the appellants a reason in accordance with ***Section 36 of the Employment Act.*** We wish to restate what we stated in the case of ***Sarah Aliza Vekhnik v Casa Dei Bambini Montessori Zambia*** *supra* where we pronounced that:

> ***"Section 36 of the 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. What is of critical importance to note however is that the reason or reasons given must be substantiated."***

7.9 In the present case, 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.

7.10 We accordingly find merit in the first, second and third grounds of appeal and allow them.

7.10 Under the fourth ground of appeal, the appellants allege a misdirection on the part of the lower court in holding that the 1st appellant had not proved that he had school going children. In response to this ground of appeal, we firstly considered whether the 1st appellant had a specific claim in relation to his school going children. The writ of summons and statement of claim at pages 42 to 48 of the record of appeal reveal no such pleading on behalf of the 1st appellant. The appellants' claims were as we have highlighted at paragraph 1.2 above.

7.11 Secondly, we combed through the considerations of the learned Judge from pages J24 to J29 of the Judgment (pages 36 to 41 of the record of appeal) and found no support to the

allegation that the lower court held that the 1st appellant failed to prove that he had school going children. He made no such finding.

7.12 It is trite that pleadings serve to give notice of the nature of the claim or defence, state the facts that each party believes exist, narrow the issues that ultimately must be adjudicated upon, provide a means to determine whether a party has a claim or defence and create a record of what has been decided after trial. The case of ***Mazoka and Others v Mwanawasa and Others*** *supra* refers. In the present case, there was in fact no misdirection on the part of the learned trial Judge because he was not invited to make such a finding that the 1st appellant had school going children since it was not pleaded. We find no merit in this ground as it is misconceived. It is accordingly dismissed.

7.13 Turning to the final ground of appeal, as determined in the first, second and third grounds of appeal, on the circumstances of this case, having found that the appellants' contracts of employment were terminated without valid

reason, as is required by ***section 36 of the Employment Act,*** rendered the termination unlawful and unfair.

7.14 In the ***Kevin Jivo Kalidas*** case *supra*, it was not in dispute that the respondent's contract was governed by a contract of employment executed by the parties. The lower court found that the termination was in contravention of ***section 36(1)(c) and (3) of the Employment Act*** *supra*. The issue for determination on appeal was whether it was justified to depart from the normal measure of damages. We held that a departure from the normal measure of damages was justified and upheld an award of six months basic pay as damages for unlawful termination of employment.

7.15 In the ***Swarp Spinning Mills Limited*** case *supra*, the Supreme Court held as follows:

> ***"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."

7.16 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 appellant's contractual periods and their respective dates of their terminated contracts of employment were as follows:

i. The first appellant, Mark Tink's contract of employment was with effect from 17th July, 2018 to 17th July, 2020. His employment was terminated on 12th July, 2019. His last working day was 25th July, 2019;

ii. The second appellant, Theresa Mentz was serving on a 24 months fixed term contract effective 1st January, 2019 to

the 31st December, 2020. The said contract was terminated on 12th June, 2019, then 12th July, 2019, both letters reflecting that her final working day would be 28th August, 2019;

iii. The third appellant, Frank Dudley's contract was with effect from the 10th April, 2018 for a duration of 24 months. It was terminated on 12th July, 2019. His last working day was 23rd July, 2019;

iv. The fourth appellant, Jon Morgan's contract was with effect from 25th January, 2019. He received two letters of termination. One dated 24th June, 2019 and the other dated 12th July, 2019. His last working day was 25th July, 2019;

v. The fifth appellant, Werner Le Roux's contract was with effect from the 29th March, 2018 for a duration of 24 months. It was terminated on 12th July, 2019 and his last working day was 23rd July, 2019;

vi. The sixth appellant, Herman Princsloo's contract was with effect from 16th May, 2019 to 15th May, 2021. It was terminated on 12th July, 2019. His last working day was

25th September, 2019; and

vi. The seventh appellant, Kevin Hanley's contract was with effect from 13th June, 2019 for a duration of 24 months. It was terminated on the 13th day of July, 2019.

7.17 The aforestated facts were not in dispute between the parties. Having noted from the record that the appellants' contracts were renewed for 24 months each, we were left to wonder why they were abruptly terminated with at least a year outstanding to their durations. 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.

7.18 In the case of ***Spectra Oil Zambia Limited v Oliver Chinyama*** *supra,* a case in which the employer terminated the contract of employment without furnishing the employee with

a valid reason as is required by statute, we upheld the lower court's decision to award 12 months' salary as damages and took the view that it was not inordinately high.

7.19 In the present case, we are of the view that the trial court misapplied the law to the facts. 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.

7.20 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.

8.0 Conclusion

8.1 In view of the forestated, we find merit in this appeal and allow all grounds save for ground four. We award costs to the appellants to be taxed in default of agreement.

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M. M. Kondolo, SC
COURT OF APPEAL JUDGE

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

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N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE