Civ. App. 51/2007

IN THE COUERT OF APPEAL OF SIERRA LEONE

BETWEEN:

CHARLES D.K. NICOL - PLAINTIFF/RESPONDENT

AND

1. COUNTRY DIRECTOR - DEFENDANTS/APPELLANTS
   CARE INTERNATIONAL IN SIERRA LEONE
2. CARE INTERNATIONAL IN SIERRA LEONE

CORAM:

Hon. Justice S. Koroma - JSC
Hon. Justice E.E. Roberts - JSC
Hon. Justice A. Showers - JA

ADVOCATES:

M.S. Turay Esq, for Plaintiff/Respondent
V.V. Thomas, Esq, for Defendants/Appellants

JUDGMENT DELIVERED THIS 12th DAY OF FEBRUARY, 2015

ROBERTS, JSC

By a letter dated 14th June 2007 the Respondent, Charles D. K. Nicol, was offered an employment by the 2nd Appellant Company, CARE INTERNATIONAL IN SIERRA LEONE, as Internal Auditor on a fixed term contract effective 2nd July 2007 to 30th June 2008. According to the Appellants this employment was subject to the Respondent serving a probationary period of 6 months before confirmation as contained in the letter of employment dated 14th June 2007 as well as the company's Human Resources Manual. The Respondent accepted the appointment and started work. The 2nd Appellant Company opened an account at Rokel Commercial Bank in the name of the Respondent into which his monthly salary and allowances were paid. By letter dated 21st August 2007 however the 2nd Appellant terminated the employment of the Respondent effective 24th August 2007. This letter was signed by the 1st Appellant who was the Country Director of the 2nd Appellant. Aggrieved by the said termination, the Respondent issued a Writ of Summons

(against the 1st and 2nd Appellants) dated 21st September 2007 claiming several reliefs as follows:

a. *A declaration that the purported termination of the Plaintiff from the employment of the Defendants was wrongful.*

b. *Damages for breach of contract.*

c. *Loss of Salary/earnings from 1st day of September, 2007 – 30th June, 2008 at Le 25,739,799.70 (Twenty-five Million Seven Hundred and Thirty-Nine Thousand Seven Hundred and Ninety-Nine Leones Seventy cents).*

d. *Loss of Social Security contributions for the period – 1st September, 2007 – 30th June, 2008 at Le3,607,500.00 (Three Million Six Hundred and Seven Thousand Five Hundred Leones).*

e. *Leave pay as assessed by this Honourable Court.*

f. *Interest pursuant to section 4 of the Law Reform Miscellaneous Provisions Act Cap. 19 of the Laws of Sierra Leone 1960.*

g. *Any further reliefs that this Honourable Court may deem fit and just.*

h. *Costs of this action.*

The Appellants entered an appearance on the 28th September 2007 followed by a Defence dated 5th October 2007. The Respondent then filed a Judges Summons dated 5th October 2007 praying for judgment against the Appellants in respect of the reliefs/claims contained in the said Writ of Summons. The Appellants filed an affidavit in opposition. After arguments and submissions the learned trial judge delivered his Ruling on the 14th November 2007 granting Summary Judgment in respect of the reliefs/claims contained in the said Writ of Summons. The Appellants being dissatisfied with the said Ruling filed a Notice of Appeal dated 23rd November 2007 which contained the following grounds.

(1) That the Learned Judge having agreed that there was no contractual relationship between the Plaintiff and the 1st Defendant, who was sued jointly and severally with the 2nd Defendant, failed to dismiss the Plaintiff's application against the 1st Defendant under Order 16 of the High Court Rules, 2007 as far as the 1st Defendant was concerned and appropriate consequential orders on such dismissal.

(2) That the Learned Judge erred in law when he held in the penultimate paragraph of his Ruling as follows:

"In the present case even if it is true that the Plaintiff was required to serve probation the terms and conditions prescribed how this probation was to be served (i.e. 5 months and thereafter assessment), prescribes when assessment during probation was to take place (one month to the end of probation) and the period of notice to be given before termination (at least 2 weeks it could even be four weeks but not three days). The Defendant clearly breached those provisions. He failed to comply with the contract of employment and so is unprotected. The employee plaintiff has a remedy in Law. There is nothing to try here as the facts speak for themselves in that there is no likelihood of success meaning that the 2nd Defendant has no defence to the claims. In that:

(a) That the 2nd Defendant was at liberty to terminate the Plaintiff's employment on 2 weeks' notice pursuant to his contract with the 2nd Defendant without any assessment after serving 5 months of his probationary period.

(b) On the affidavit evidence before the Court on Plaintiff's application, there were issues or questions in dispute which ought to be tried, namely:

(i) Whether the tender of 2 weeks' salary in lieu of notice by the 2nd Defendant and the acceptance thereof by the plaintiff did not absolve the 2nd Defendant of any further liability to the Plaintiff and if not, what was the effect of such tender and acceptance in Law.

(ii) That the affidavit in opposition sworn to on the 17th October 2007 on behalf of the 2nd Defendant raised issues which ought to have been tried as defences to the Plaintiff's claims.

(3) That the Learned Judge erred in Law and came to the wrong conclusion in granting to the Plaintiff liberty to sign final judgment against the 2nd Defendant for the sums of Le25,739,799 less Le414,491.35 and Le3.607,500 in that:

(a) The measure of damages to which a successful plaintiff who was on

probation and entitled to 2 weeks' notice of termination is entitled is the salary he would have earned under his contract during his employment period of 2 weeks' notice.

(b) Having received the sum of Le414,491.35 being 2 weeks' salary, the Plaintiff was not entitled to any other amount by way of general damages.

(c) The special damages to which a successful plaintiff for wrongful termination may be entitled is loss of income in respect of the time which might reasonably elapse before he finds alternative employment and not his full salary and employer's NASSIT Social Security contributions for the unexpired period of his contract of employment.

(4) That the said Ruling and Judgment consequent thereon is against the weight of the evidence."

This Court gave directions upon which counsel filed written Arguments and Submissions on behalf of the Appellants and Respondent respectively which were followed by brief oral submissions by counsel.

I shall now proceed to deal with the various grounds as contained in the said Notice of Appeal.

GROUND 1

In arguing this ground counsel for the Appellants submitted that the Learned Trial Judge agreed that there was no contractual relationship between the Respondent and the 1st Appellant who was sued jointly and severally with the 2nd Appellant but yet failed to dismiss the claim against him. Counsel for the Respondent on the other hand submitted that the Summary Judgment was not against the 1st Appellant but only against the 2nd Appellant, adding that the Learned Trial Judge in a way conceded that the 1st Appellant had no case to answer. I have read all the documents filed relating to the Respondent's employment.. The first paragraph of The letter of employment dated 14th June 2007 (see page 23 of the Records) states:

"CARE – Sierra Leone is pleased to offer you contract of employment as Internal Auditor……"

Furthermore the Defence filed on behalf of the 1st and 2nd Appellants clearly insisted that the 1st Appellant did not employ the Respondent. (See paragraphs 1 and 8 of the said

Defence at pages 9-10 of the Records). Indeed the Learned Trial Judge himself agreed that there was no contractual relationship between the 1st Appellant and the Respondent.

I agree therefore that having come to the conclusion that he did in his judgment (lines 2-6 at page 125 of the Records), the Learned Trial Judge ought to have dismissed the action against the 1st Appellant as he was delivering a final, albeit a summary, Judgment. He could either have granted the 1st Appellant conditional or unconditional leave to defend or order that he be struck off the action or dismiss the action against him with or without costs.

Also the 1st Appellant or the Respondent could have applied to the Court below for the judge to rectify or amend his judgment as it appears to be a slip, and such amendment would have had the effect of stating what the judge must have intended having come to the conclusion he did in his judgment in lines 2-6 at page 125 of the Records. However even though such an application for amendment was not made in the Court below, this Court is empowered by virtue of Rules 31 and 32 of the Court of Appeal Rules 1985 to make such similar or appropriate order which could or ought to have been made by the court below, including the award of costs.

I must state here that I do not find much fault on the part of the Respondent as the name of the 1st Appellant must have been added ex abundante cautela, as accepted by the Learned Trial Judge. Indeed after naming him in the Writ of Summons the first and earliest time an objection was raised was in the Defence dated 5th October 2007 which was the same date the Judges Summons for Summary Judgment was filed. There was not much else (and no time) that the Respondent could do as the application was then already before the Judge. As I said earlier however, this Court can and shall make appropriate order(s) in respect of the claim against t the 1st Appellant which the Learned Trial Judge could and ought to have made. Ground 1 therefore succeeds.

GROUND 2

In arguing ground 2 Counsel for the Appellants submitted that the Respondent's employment was subject to his satisfactory completion of a probationary period of 6 (six) months. Counsel added that the 2nd Appellant was at liberty to terminate the Respondent's employment on 2 weeks' notice pursuant to his contract without any assessment after serving 5 months of his probationary period. .Counsel further submitted that the Respondent's employment may be lawfully terminated by the 2nd Appellant at any time

during the probation period upon giving 2 weeks previous notice. Counsel went on to submit that on the affidavit evidence before the court on the application for Summary Judgment, there were issues or questions in dispute which ought to have been tried. Counsel submitted that one of such issues was whether the tender of 2 weeks' salary in lieu of notice by the 2nd Appellant and acceptance thereof by the Respondent did not absolve the 2nd Appellant from any further liability to the Respondent. Counsel referred to several case authorities submitting that the effect of the tender of the 2 weeks' salary in lieu of notice was that the Respondent had received the general damages to which he was entitled if at all there was a breach of contract.

Counsel for the Respondent however submitted that according to the terms and conditions of employment the period of probation was 6 months and that 1 month to the end of that period there should have been a performance review. Counsel submitted therefore that the Respondent's employment could not have been terminated before 5 months into his probation. Counsel submitted that the Respondent served for only 7 weeks. Counsel submitted that even though the required notice to terminate during probation was two weeks the 2nd Appellant gave only 3 days' notice as the letter of termination was dated 21st August 2007 to take effect on the 24th August 2007. Counsel further submitted that the 2 weeks' salary in lieu of notice was not provided for in the clause relating to probation in the contract of employment and further that even if it were applicable the payment of 2 weeks' salary in lieu of notice must be made contemporaneous with the termination. Counsel added that the 2 weeks' salary was paid three weeks after the termination of the employment of the Respondent. Counsel submitted that there was no tender of the 2 weeks' salary by the 2nd Respondent and that if at all the tender should have been by cheque and not paid into the Respondent's account three weeks later. Counsel also submitted that there was no acceptance as the money was paid into Respondents account adding that the sum was in fact deducted by the Judge in the final orders. Counsel submitted that the contract was for a fixed period of 1 year and so if the contract was wrongfully and prematurely terminated the Respondent is entitled to his salary for the unexpired term as damages.

It is my view that this ground and indeed the issues in the Court below could be summarised as follows:

a) Whether or not the 2nd Appellant could terminate the Respondent's employment during the probation period.

b) Whether by giving two weeks wages in lieu of notice the Respondent's employment was duly and properly terminated.

c) Whether this was a proper case to be disposed of by Summary Judgment.

d) Whether the damages awarded were lawful, justifiable or excessive.

I shall deal with issues a) and b) together as I believe they are sufficiently related for me to do so. To determine whether or not the Respondent's employment was properly terminated, I shall refer to the letter of appointment/contract of employment dated 14 June 2007 (page 23 of the Records) and the Human Resource Manual (pages 27 – 104 of the Records). The two documents contain the applicable terms and conditions of the Respondent's employment. Indeed clause 11 of the said letter/contract dated 14th June 2007 stated that the terms and conditions of the Respondent's employment "will be subject to the CARE –Sierra Leone Human Resource Manual", adding that if there were any inconsistencies between the terms in the contract and the Manual, it was the Manual that would apply.

At this juncture, it would be useful to state that there is no doubt that the Respondent's employment was a fixed term contract of employment as the contract fixes or stipulates the maximum duration of the employment. See Clause 2 of the contract at page 2 of the Records). This contract however contains provision for its early termination which in my view does not necessarily alter or affect the fixed term nature of the contract. You may well have a fixed term contract of employment which provides for its early termination by notice as the case may be. In **Unfair Dismissal by Malcolm Mead 4th Edition** at page 29, the author defined fixed term contract as follows:

"A contract is for a fixed term if it fixes the maximum duration of the period of employment, whether or not the contract contains a power for either party to bring the contract to an end by giving notice to the other party before the expiration of the period certain."

Also in the case of DIXON V BBC (1979) 2 All ER 112 Lord Denning at page 116 stated as follows :

"The words 'a fixed term' must include a specified stated term even though the contract is determinable by notice within its term."

Although Lord Deming was defining the term as used in a particular legislation, it is clear that his Lordship recognised that a contract for a fixed term may contain a clause providing for its early termination by notice (See the Ruling of Roberts JA in ADETUNJI ADEDOKUN V. ZAIN unreported).Having accepted that the Respondent's contract was for a fixed term I shall now proceed to examine the clauses relating to termination in both the contract and the Manual.

Clauses 2,3 and 4 in the contract dated 14th June 2007 (page 23 of the Records) provides as follows:

2 ***You will serve a probationary period of six months from the effective date of your employment, which, if successfully completed will result in your being confirmed. If your performance during this period fails to meet expectations, your employment may be terminated or your probationary period extended as decided by the organization.***

3. ***This contract of employment states the end of this contract hire date.***

4. ***This contract may be terminated earlier than the period specified by either party giving one month's notice or one month's salary in lieu of notice. The months' notice is applicable only after the successful completion of your probationary period."***

Clauses 2.15 and 3.3 of the Manual provide as follows:

2.15 PROBATION

Once hired, new staff must successfully complete a certain period of employment before they can be confirmed in their employment.
All staff are subject to a probationary period, which is six months.
During this period, employees will not be entitled to any accrued severance benefits to minimally include annual leave UPA leave (which is usually deducted from annual leave) annual bonus, end of year gift.
One month prior to the end of the probationary period a performance review should be done.
In the event of an employee's performance being less than the expected standards, CARE- Sierra Leone may, on the recommendation of the

employee's supervisor, extend the probation period for a maximum of nine months or terminate the employee's service.

<u>Procedure</u>

A minimum notice of two weeks must be given by either party for staff in grades 6-8 to terminate the contract during the probationary period at which time proper handing over should be done with the immediate supervisor on different procedures.

3.3 TERMINATION WHILE ON PROBATION

During the initial probationary period, either party may terminate the services of an employee with a minimum of two weeks' notice and in such event no benefits are due the employee."

With regard to the above provisions it is the Respondent's contention that the contract could not be terminated until after 5 months into the probation period and not until after a performance review has been done. I do not entirely agree with this contention. Granted that the Respondent's contention is one, but not the only, situation where his contract may be terminated during probation. It is my view that according to the above provisions the Respondent's contract could also be terminated upon giving "a minimum of two weeks' notice". I am fortified in this view by the contents of clause 3.3 of the Manual. This clause is dealing specifically with "**Termination While on Probation**", and while it does not necessarily derogate from the provisions of clause 2.15, it certainly provides a separate occasion or circumstance for termination during probation. Interestingly, clause 3.3 enables "either party" to terminate during probation on giving 2 weeks' notice. This means that even the Respondent could terminate during the probation period upon giving two weeks' notice and I am sure the Respondent would not argue that he would have to wait until after 5 months and after performance review, for him (the Respondent) to terminate under this clause. And so if the Respondent would not be expected to wait until after 5 months or after performance review to terminate under clause 3.3 then the same cannot be required of the 2nd Appellant.

Having concluded that by virtue of particularly clause 3.3 of the Manual the contract could be terminated during the probation and before 5th months and without a performance review, I am to now determine whether indeed the contract was properly and lawfully terminated in accordance with the terms of the contract. It is my view that when

an employer seeks to terminate a contract of employment in accordance with stipulated terms he must ensure that he strictly and carefully follows those terms. The Respondent alleges here that in purporting to terminate his employment the 2nd Appellant did not strictly follow the terms of the contract and the Manual in that

a) The 2nd Appellant allegedly paid two weeks wages in lieu of Notice which was not expressly provided for in the contract or the Manual, and
b) That the payment of two weeks wage in lieu of notice was not made contemporaneous with the termination but was made three weeks after the effective date of termination.

Indeed I have perused clause 3.3 of the Manual and it is true that there is express provision for the alternative of 2 weeks wages in lieu of notice with respect to termination during probation. Interestingly however when it comes to the provisions for termination (after probation) for example, clause 3.2 (page 55 of the Records) provide for two months' notice in writing or "two months gross salary in lieu of notice" for employees in grades 7 – 8 and one months' notice in writing or "one month's gross salary in lieu of notice for employees in grades 1 – 6.

The second point (which is perhaps more instructive) was that the payment of the 2 weeks wages in lieu of notice was not made contemporaneous with the termination. On perusal of the letter of termination (page 105 of the Records) I observe that although it was dated 21st August 2007 it was "signed and received" by the Respondent on the 24th.08/07. Indeed the contents of that letter confirmed that the termination was "effective 24th August 2007". However it was only on 14th of September 2007 (3 weeks later) that the two weeks wages was credited into the Respondent's account (See page 106 of the Records). It is clear therefore that the payment of the two weeks wages in lieu of notice was not made contemporaneous with the termination. Interestingly this fact was not contested by the Appellants but was in fact admitted in lines 22-23 in page 8 of Appellants' synopsis. Indeed the offer of two weeks' wages by the 2nd Appellant was made in the letter of termination (page 106 of Records), but it was not paid until 3 weeks later. It is evident therefore that in purporting to terminate the Respondent's employment, the 2nd Appellant did not strictly follow the terms of the contract and the Manual. In this regard I shall refer to and rely on the case of GITTENS -STRONGE –v- S.L. BREWERY LTD Civ. App

7/79 S. C. Unreported, delivered on the 17th December 1980. In that case the appellant was employed by the Respondent S.L. Brewery Ltd who gave him a letter of employment to which was attached a summary of the terms and conditions of his employment which the appellant was required to sign thereby constituting a written contract of service. After several years in employment the Acting General Manager who claimed he had received complaints against the appellant called him to his office and verbally told him his services were no longer required. Later that day the appellant received a letter confirming the verbal termination of his employment adding that he, the appellant, would be "advised separately" of his financial status with the company and his entitlement. A few weeks later the appellant received a letter giving details of his entitlement on termination of his employment. His account was later credited with two weeks' salary in lieu of notice several weeks after the termination. Livesey Luke CJ had this to say @ page 11 of his Judgment:

" If according to the terms of the employment, termination must be by written notice or salary in lieu of notice such notice or such payment of salary must, in my opinion, be contemporaneous with the act of termination. It seems to me that if an employer dismisses his employee on the 1st of January and pays him his entitled salary in lieu of notice on the 1st of March, he is in breach of the Contract of Employment."

Livesey Luke CJ continued in pages 14-15 of his judgment citing with approval the case of MACCLELLAND V NORTHERN IRELAND GENERAL HEALTH SERVICES BOARD (1957) 1 WLR 594 and concluded by stating as follows:

"In my opinion the relevant lesson that that case teaches us in that an employer must comply with the terms stipulated in the Contract of Service for the termination or dismissal of the employee: otherwise he terminates the employment at his peril. He will then be held to be in breach and the dismissal will be wrongful. This is in support of the view that I have expressed above that the Company did not comply with the stipulated terms for termination of the employment of the appellant and therefore they were in breach and the dismissal wrongful. "

From the above authority, it is clear that an employer such as the 2nd Appellant here must comply strictly with the terms stipulated in the contract and the Manual and

should follow the termination procedure duly provided otherwise they will be held to be in breach and the termination declared wrongful. Furthermore the above authority confirms that when an employer seeks to terminate a contract of employment by payment of salary in lieu of notice it must be made contemporaneous with termination. Livesey Luke CJ however added that even though payment need not be "immediate" but it certainly cannot be weeks after termination.

In the light of the above and upon the authority of the said case (STRONGE V S.L. BREWERY LTD), it is clear that the 2nd Appellant's termination of the Respondent's employment was wrongful.

I shall now proceed to determine whether this was a suitable case to be dealt with under order 16 (Summary Judgment) of the High Court Rules. I have perused the specially indorsed writ of summons as well as the appearance and defence filed (see pages 1-10 of the Records). The issues for determination between the parties are easily identifiable and they include

a) whether there was a contract of employment between the 1st Appellant and the Respondent.
b) whether the 2nd Appellant could terminate the Respondent's employment during the probation period
c) whether by making a payment of 2 weeks' salary in lieu of notice few weeks into the probation period (and before a performance review) the 2nd Appellant lawfully and properly terminated the employment of the Respondent.
d) Whether the Respondent was entitled to damages and whether the quantum was correctly awarded
e) Whether the Respondent was entitled to the Employers NASSIT Social Security Contributions for the unexpired period of his contract.

It is my view that the above issues could be appropriately dealt with under Order 16. The contract dated 14th June 2007, the Manual and all the other documents as well as the affidavit evidence provide sufficient and appropriate material before the Judge suitable to be considered under Order 16. Issues a) to c) could easily be determined as they require a construction of the terms of employment as contained in the contract between the 2nd Appellant and the Respondent.

Similarly the law and the affidavit evidence would enable the judge to resolve issues d) and e) in relation to damages as the case may be (.I shall deal with the issue of damages more fully under ground 3). The judge was able to determine that the 2nd Appellant had no defence to the claim that the Respondent's contract of employment was terminated wrongfully. (see STRONGE V. SL. BREWERY LTD). And the judge was able to do so by examining the few documents which I had earlier referred to. See HOME & OVERSEAS INSURANCE CO. V MENTOR 1990 1 WLR 153 @ 158

In any event this Court is entitled to treat this appeal as if the application for Summary Judgment was being made afresh, and deal with it accordingly. See Rules 31 and 32 of the Court of Appeal Rules 1985. See also The Supreme Court Practice 1999 page 187 paragraph 14/4/45 where it states as follows:

> *"The evidence on an appeal to the Judge in Chambers should ordinarily be the same as it was before the Master or district Judge; but since such an appeal is dealt with by way of an actual rehearing of the application which led to the order under appeal, and the Judge treats the matter afresh as though it came before him for the first time, save that the party appealing has the right as well as the obligation to open the appeal....."*

It is in these circumstances that I have reviewed the entire case and have come to the conclusion that the termination of the employment of the Respondent was unlawful and further that order 16 was an appropriate procedure. In the light of the foregoing I therefore hold that ground 2 fails.

GROUND 3

In arguing Ground 3 counsel for the Appellants submitted that the Judge was wrong in awarding the damages that he did. Counsel submitted that the measure of damages to which the Respondent was entitled, if at all, was the salary he would have earned during his employment for the period of two weeks for which notice would have been given. Counsel added that having received the 2 weeks' salary in lieu of notice the Respondent was not entitled to any other amount by way of general damages. Counsel submitted that in respect of special damages the Respondent neither pleaded nor proved the kind of special damages that the law prescribes he may be entitled to, adding that it was wrong for the Respondent to plead and for the Judge to award the salary and

allowance for the unexpired term of the contract and that this was a period that the Respondent did not work. Counsel referred to the NASSIT Act No. 5 of 2001 submitting that the award of employer's and employee's contribution over a 10 months period was clearly wrong.

Counsel for the Respondent however contended that this was a contract for a fixed term and that in this circumstance the Respondent was entitled to payment of his salary and other benefits for the unexpired term of his employment. Counsel added that the Judge was justified in awarding the NASSIT contributions for the unexpired period of 10 months to the Respondent.

In dealing with this ground I shall have to determine whether the Learned Trial Judge applied the principles regarding assessment of damages and see whether his award was appropriate in the circumstances of this case. It is important to note that there are usually two heads of damages namely general and special damages. As regards general damages I agree absolutely with counsel for the Appellants that the general rule is that such damage are calculated and based on what the employee is entitled to if his contract were properly terminated. (See STRONGE V. S.L. BREWERY LTD supra). In this regard it is not in dispute that the Respondent has already been paid the two weeks' salary "in lieu of notice" as the same was credited into his account. The same constitute his general damages and is not entitled to anything more under this head of damages.

It is clear that the salary in lieu of notice could only be considered as general damages, and that special damages could be claimed and awarded separately. Again Livesey Luke CJ in GITTENS STRONGE had this to say at page 18 of his judgment:

> *"In this case, as was rightly held by Williams J. and the Court of Appeal the measure of general damages to which the appellant is entitled having regard to the terms of the Contract of Service is two months' salary and allowances to which he was entitled for that period. That he has already received. And as the Court of Appeal rightly held he is therefore not entitled to any more compensation by way of General Damages. But in my opinion that is not the end of the matter as regards damages. The appellant claimed special damages for loss of income. The question then arises: is he entitled to special damages, and if so for what. The Court of Appeal did not dispute the appellant's entitlement to special damages, but they seemed to have been of the view that there was not sufficient material*

before them for the assessment of special damages. In my considered opinion, a plaintiff in an action for wrongful dismissal can claim as special damages loss of salary or wages for the reasonable period that he would take to obtain another employment. "

Livesey Luke CJ added that he derived support for this view from the speech of Lord Atkinson in ADDIS V. GRAMOPHONE LTD 1908 AC 480 at page 493.

As regards special damages therefore, I have perused the Writ of Summons to see what claims were made in that respect. In paragraphs 11 to 16 of the Plaintiffs Particulars of Claim contained in the Writ of Summons, the Respondent made claims that fall under special damages. Indeed particulars were given under paragraphs 11 and 14. What one could glean from the above paragraphs is firstly that the Respondent claims to be entitled (as special damages) to his salary and allowances for the unexpired period of his contract. I am afraid this contention by the Respondent is not supported by any authority. As I stated earlier, the contract (though fixed term in nature) contains provision for its early determination upon notice given by either party. It is therefore not automatic that the Respondent would be entitled to his salary for the unexpired term of the contract even though the same was wrongfully terminated. The salary for the unexpired term may if at all serve merely as a guide in determining the quantum of damages that the Respondent may be entitled to. Indeed so many other factors would be taken into account including the qualification, skill or training of the employee, the likelihood of finding alternative employment, the right to terminate (by notice) the employment, the length of time the employee had worked in this employment and so on. It is my view therefore that the particulars of special damages that the Respondent was claiming in the writ was referable to loss of future earning and in this regard he is not necessarily entitled to the salary he would have earned if he had performed the entire contract. It was therefore wrong for the judge to have awarded the salary for the unexpired term to the Respondent.

Admittedly, calculating loss of future earnings is often speculative. In **Unfair Dismissal 4th Edition by Malcolm Mead** at page 368 the author stated as follows:

"Where the employee has not secured new employment at the date of the hearing the calculation of future loss becomes even more speculative. There is no specified period as to the length of future loss that should be allowed, nor is there any normal period despite a suggestion to this effect in Tidman V. Aveling

Marshall Ltd (1977) ICR 506. ***Parties may or may not lead evidence as to when the employee is likely to obtain other employment. If the employee wishes to adduce evidence as to the period of future loss he should do so, otherwise he will have no cause for complaint about the period of future loss fixed by the tribunal, provided that it acts properly.***"

I have noted that the Respondent was employed as an Auditor which, in my estimation, is a profession that is in relative short supply and it is therefore likely that he would secure another employment within a relatively short time. I also note that the Respondent was still under probation when his employment was terminated and that his contract could well be terminated at the end of the probation. In the light of the above considerations, I believe that an award of the equivalent of 4 months' salary would be appropriate in this regard.

As regards the award of the NASSIT contributions to the Respondent, I am afraid I cannot find any justification for the Learned Trial Judge making same. I have read the National Social Security and Insurance Trust Act no 5 of 2001, particularly section 25 thereof. I agree with counsel for the Appellants that the deductions or contributions are to be paid to the Trust and are not payable to the employee. Section 25 subsections (1) and (2) provide as follows:

25(*1) Every employer of an establishment shall deduct from the earnings of every worker in the establishment immediately at the end of each month, a worker's contribution of an amount equal to 5% of the worker's earnings for that month irrespective of whether or not such earnings are actually paid to the worker.*

(2) Every employer of an establishment shall pay for each month in respect of each worker, an employer's contribution of an amount equal to 10% of such worker's earnings for that month.

Earning is defined in section 2 of the Act as follows:

"Earning" means all emoluments which are earned by a worker while on duty in accordance with the express or implied terms of the contract of employment or apprenticeship and which are paid or payable in cash to him at fixed or determined intervals of time –

(a) In respect of normal periods of work to be performed by the worker;

(b) Where payment is calculated in relation to set tasks, in respect of the number of tasks completed by the worker, or

(c) Where payment is calculated in relation to the volume of work done, in respect of the volume completed by the worker,

and includes emoluments earned by him on leave, any cost of leaving or prescribed allowance but does not include any presents made by the employer, value of any food concession, house rent allowance, ove time allowance, travelling allowance, bonus, commission, or any other similar allowance payable to the worker.

It is clear therefore that the contributions were only payable in respect of "earnings" i.e. wages earned during employment. Again as I stated earlier the payment, if at all, is to be made to the Trust and not to the employee. I therefore hold that the said award of the NASSIT payments by the Learned Trial Judge was wrong and ought not to have been made. I shall indeed make consequential orders in this regard later in this judgment.

GROUND 4:

In arguing ground 4, counsel for the Appellants submitted that the case for the Respondent was not proved and so he was not entitled to the cost of the action. Counsel also submitted that assuming without conceding that there was a breach of contract, the costs awarded against the 2nd Defendant was excessive as this was a matter dealt with under Summary Judgment and not a full scale trial.

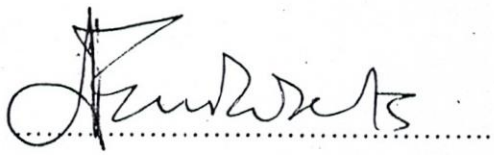
Counsel for the Respondent however submitted that the cost was reasonable having regard to the nature and substance of the action albeit one concluded on Summary Judgment.

In dealing with this ground I shall here repeat all my considerations and conclusions in grounds 1 - 3 above. Having come to the conclusion that the Judge was right in holding that the termination was wrongful it is clear that the Respondent must be entitled to some costs for the action. It may well be however that the award of Le 6 million as cost may perhaps be excessive but this was an estimation by the Judge. This court is always reluctant to interfere with the estimation of cost by the Judge in the Court below even though this was clearly a matter concluded under order 16 (Summary Judgment) of the High Court Rules. The award of costs was at the discretion of the Judge and I do not see

any reason why I should interfere with the award given in exercise of that discretion, However since this appeal succeeds in part it is my considered view that the Appellants should be entitled to cost of the appeal accordingly.

I therefore make the following orders:

1. That decision of the court below holding that the termination of the employment of the Respondent was wrongful is hereby upheld.
2. In respect of loss of salary/earnings the award of 10 months' salary totalling(Le25,739,799.70 less Le414,491.35) is hereby set aside and the Respondent is instead hereby awarded the equivalent of 4 months' salary (at 2,573,979.97 per month) totalling Le10,295,919.88 as special damages.
3. The award of Le 3,607,500.00 in respect of NASSIT Contribution is hereby set aside.
4. The cost of the proceedings in the Court below assessed at Le 6 million is hereby upheld.
5. The action against the 1st Appellant in the Court below is hereby dismissed with no order as to costs.
6. The Appellants shall have the cost of this appeal assessed at Le5 million.



Hon. Justice E.E. Roberts, JSC

I agree.....A. Showers.....

Hon. Justice A. Showers, JA