

MWANZA (FK) v NATIONAL TRANSPORT CORPORATION OF ZAMBIA LTD  
AND ANOTHER (1979) Z.R. 129 (H.C.)

HIGH COURT  
JEAREY,  
6TH  
1975/HP/1218

APRIL

COMM.  
1979

Flynote

Contract - Employment - Wrongful dismissal - Offer of alternate position later refused - Lack of proper notice - Breach of contracted terms - Plaintiff entitled to damages.

Contract - Employment - Presidential nominations - Powers of dismissal - Whether vested in President.

Headnote

The plaintiff was nominated by the President as General Manager of UBZ, a subsidiary of the 1st defendant. Upon dismissal by the Managing Director of NTC Ltd, he refused to leave on the basis that he could only be dismissed by the President. A month after his dismissal he was invited to discuss an alternative position, but declined and brought an action claiming damages for wrongful dismissal.

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**Held:**

- (i) Upon wrongful dismissal due to a breach of contract by the employer, the employee is entitled to salary and other employments for a period equivalent to the relevant period of notice.
- (ii) Powers of dismissal do not rest in the hands of the President when he makes nominations unless specifically stated in the regulations.

**Cases referred to:**

- (1) *Marriott v Oxford Co-operative Society*, [1969] 3 All E.R. 1126.
- (2) *British Guiana Credit Corporation v Da Silva*, [1965] 1 W.L.R. 248.
- (3) *Thomas Marshall (Exports) Ltd v Guinle*, [1978] 3 All E.R. 193.

For the plaintiff: S.S. Zulu, SC Zulu & Co.

For the defendants: H.H. Ndhlovu, Jaques & Partners.

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Judgment

**JEARY, COMMISSIONER:** This is a claim for damages for wrongful dismissal brought by the plaintiff against the first defendant, National Transport Corporation of Zambia Limited (which I shall call NTC) and its wholly owned subsidiary, United Bus Company of Zambia Limited (which I shall call UBZ) as second defendant.

On 30th April, 1974, His Excellency the President wrote a letter to the plaintiff, the operative part

of which reads as follows:

"I have great pleasure in appointing you General Manager of the United Bus Company of Zambia (UBZ) with immediate effect. In your new role, you will be required to work with the Minister of Power, Transport and Works. The aim, of course, is to improve the effectiveness of the company in its operations and to provide the necessary political guidance which only a Cabinet Minister can do."

Upon receipt of this letter the plaintiff took up the appointment as General Manager of UBZ and was so employed until 25th June 1975, when he received a letter written by Mr S.B. Kafumukache, the Managing Director of NTC and Chairman of the Board of Directors of UBZ, which stated as follows:

"I wish to advise you that, with immediate effect, you have been relieved of your appointment as General Manager of the United Bus Company of Zambia Limited. Meanwhile, arrangements are being made to find you another suitable appointment."

The plaintiff refused to accept this letter as a valid termination of his employment on the basis that, having been appointed by His Excellency the President, he could only be dismissed by His Excellency. He accordingly retained possession of his office in the UBZ premises until evicted therefrom by the Police on 23rd July 1975, and sent a circular to employees asserting that he was still the company's General Manager. This followed a previous circular from Mr Kafumukache to the effect that the plaintiff had been relieved of his post.

The plaintiff persisted in this attitude right up to and during the trial, and it is of course possible that the Articles of Association of UBZ provide

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that its General Manager shall be appointed by the President. Such Articles were not put in evidence before me, but since both counsel for the plaintiff and counsel for the defendants agreed that His Excellency's letter referred to above must be taken as a nomination rather than as an appointment, and in this they were supported by the evidence of Dr N.S. Mulenga, MP, who was Minister of Power, Transport and Works during 1975, I think I am justified in finding that the Articles of UBZ are in common form and vest the management of the company, including the appointment and dismissal of staff, in its Board of Directors.

The case as put by plaintiff's counsel at the trial (though not in earlier correspondence) was that the plaintiff could only be dismissed by the Board of Directors of UBZ which did not in fact do so. Some support for this argument is to be found in the fact that the letter of 25th June 1975, was written on NTC's letterhead and was signed by Mr Kafumukache as Managing Director of NTC and not as Chairman of UBZ.

The evidence of Mr Kafumukache and the Company Secretary of UBZ, Mr LJ Shimaponda, on this point was to the effect that in communicating with officials of subsidiary companies Mr Kafumukache always signed as Managing Director of NTC, that he had delegated authority (subject

to subsequent ratification) from the Board of UBZ to dismiss the plaintiff, and that his action had been ratified by the Board of UBZ on 9th July, 1975, and that of NTC on 11th July, 1975.

The plaintiff might have disproved this evidence by obtaining an order for the specific discovery of the minutes of the UBZ Board of Directors meetings, but he did not do so. I must therefore find that in writing the letter of 25th June 1975, Mr Kafumukache was duly authorised to do so or, at least, that his actions were subsequently ratified. This finding does not, however, assist the defendants a great deal, because the said letter constituted a summary dismissal of the plaintiff, and no facts were pleaded or proved by the defendants to justify such dismissal. I say that this letter constituted a summary dismissal, or, to put it more accurately, a unilateral repudiation by the employer of the contract of employment, because the employer was purporting to make a fundamental change in the terms of the plaintiff's employment by depriving him of his post of General Manager, and where such a change is not accepted by the employee it constitutes a termination of his contract - *see Marriott v Oxford Co-operative Society* (1).

What is said above is, of course, subject to any specific provision in the employee's contract of employment. Such contracts commonly provide that the employee will serve in a particular post or in such other post as may be specified by the employer. In this case it was common cause that the plaintiff was employed on what were called the ZIMCO Conditions of Employment for permanent and pensionable staff. Clause 2.1 of those conditions reads as follows:

"Subject to these conditions the Employee shall serve the Company . . . in the Initial Position and in the Initial Grade or in such other

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capacity or grade as the Company may from time to time notify to the Employee in writing."

This is such a clause as was described above, but it was admitted by the defendants before me that they never specified an alternative capacity or grade for the plaintiff.

The reason as given by Mr Kafumukache was that the plaintiff refused to meet him to discuss an alternative job. The plaintiff admitted that he received a telephone call from Mr Kafumukache on or about 22nd July, 1975, asking him to come to a meeting and that he had declined. He confirmed that telephone conversation by writing Mr Kafumukache a letter on the same day reading as follows:

"Dear Mr Kafumukache,  
You telephoned me this afternoon and wanted me to come over to NTC to discuss my problem over my vacating the office. I replied that I was not discussing anything."

The plaintiff's evidence as to why he wrote that letter and what it meant was confused and not very convincing. The probability is that he still regarded himself as General Manager of UBZ (indeed, he signed the letter as such) and therefore felt there was nothing to discuss. The defendants justify their failure to offer him another job by pointing to this letter coupled with his refusal to vacate his office. In this I have considerable sympathy for them. But I cannot find that an offer of discussions

about a new job made almost a month after the plaintiff had been relieved of his previous office complied with Clause 2.1 of the ZIMCO Conditions.

Clause 18.1 of the same conditions might also be relevant in that it empowers the employer to transfer the employee to another company within the ZIMCO group. That clause, however, requires the execution of a transfer notice by the transferor and transferee companies and no such notice was ever executed.

NTC's substantive defence was that the statement of claim disclosed no cause of action against it, a contention I will return to later, while UBZ's substantive defence was that the plaintiff's appointment was terminated by the payment of salary in lieu of notice. This refers to a payment of K3,126.29 which was made to the plaintiff under cover of a letter entitled "Terminal Benefits" dated 27th August, 1975. The provisions of the ZIMCO Conditions of Employment relevant to this are as follows:

- "2. 5 Either party may terminate the employment at any time by serving not less than 90 days' written notice on the other such notice to expire on any day in the month.
2. 7 The Company is entitled to pay the Employee salary in lieu of the period or part of the period of notice."

Neither the letter dated 25th June, 1976, nor the letter dated 27th August, 1975, purported to give the plaintiff the notice required by Condition 2.5, and although the cheque sent to the plaintiff under cover

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of the second letter represented three months' salary (with certain additions and deductions) I am satisfied that that letter did not comply with the provisions of Condition 2.5.

This is not to say, however, that the payment made under cover of that letter is without effect, as will be seen in a moment. Having found that the plaintiff was wrongfully dismissed on 25th June 1975, what is the measure of damages? Firstly, he is entitled to his salary and other emoluments for the period 1st June 1975, to 25th June 1975. While I have a suspicion that such salary and other emoluments were not paid to the plaintiff for that period (because his Statement of Claim claims salary, etc. from 1st September 1975), he did not claim them as special damages in his Statement of Claim nor did he lead any evidence one way or the other. Accordingly, I cannot award these to him.

Secondly, he is entitled as damages for breach of contract to the payment of such amount (less tax) as he would have earned during the period until UBZ could lawfully have terminated his employment-see *British Guiana Credit Corporation v Da Silva* (2) at pp. 259-260. From this amount must be deducted any sums actually earned by the plaintiff in other employment during the corresponding period or sums which he ought to have earned during the same period in accordance with the doctrine of mitigation of damages. There is no evidence in this case that the plaintiff earned any other sums during the period of ninety days following his dismissal nor was any evidence adduced by the defendants (on whom the onus lay) to suggest that the plaintiff could have mitigated his damages.

I can therefore ignore these two factors. The plaintiff is accordingly entitled to his salary and other emoluments for a period of ninety days from 25th June, 1975. The payment made to him referred to above comprised three months' salary, housing allowance at the rate of 20 per cent thereon, and pay in lieu of accrued leave, less tax, certain personal advances and a sum of K464.03 described as hire charges for a motor vehicle registration number AAB 1179 for two months. With the exception of the last item the plaintiff does not dispute the calculation of the amount paid to him although he maintains that he was entitled to other perquisites and emoluments to which I will refer in a moment.

It seems to me to be clear that if an employee who is wrongfully dismissed is entitled to his salary for the period until his employer could lawfully have dismissed him then he is also entitled to compensation for the loss of other benefits (for example, the provision of housing or a motor car) during the same period. Whether he is entitled to the actual enjoyment of such benefits during that period or only monetary compensation for loss thereof depends on the difficult question as to whether the wrongful repudiation by one party of a contract of employment which is not accepted by the other party is effective to terminate the contract or not. The general principle of the law of contract is, of course, that the wrongful repudiation of a contract by one party which is not accepted by the other party does not terminate the contract. The opposing argument is that

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since contracts of employment cannot be specifically enforced they form an exception to the general rule. The authorities for each of these arguments are set out by Megarry, VC, with, if I may respectfully say so, his customary clarity and learning in the recent case of *Thomas Marshal (Exports) Limited v Guinle* (3). Megarry, V. C., comes to the conclusion that contracts of employment do not form an exception to the general rule although he admits (at p. 205) that "there are difficulties in almost any view that one takes". With the greatest of respect, and admitting the logic of Megarry, V.C.'s reasoning, I myself am inclined to the older view that contracts of employment constitute an exception to the general rule. Fortunately, it is not necessary for me to decide this point in this case since the defendants have made no claim against the plaintiff in relation to his occupation of his office after his dismissal and the motor vehicle in question was in fact recovered from the plaintiff by the police and returned to the defendant prior to the institution of these proceedings.

Accordingly, I conclude that UBZ was not entitled to deduct the sum of K464. 03 from the payment referred to above and the plaintiff must succeed against UBZ at least to this extent.

The plaintiff is entitled to the use of the said motor vehicle or compensation for a period of ninety days from the date of his dismissal. The sum of K464.03 was calculated at the rate of 3.5 per cent of the capital cost of the motor vehicle per month and represented two months. It was pleaded by UBZ in its defence that the motor vehicle was recovered by the police on 11th October, 1975, but no evidence as to the date of recovery was led either by the plaintiff or by the defendants. I must therefore resolve the question of the date of its return by applying the burden of proof. In relation to his claim it is for the plaintiff to prove his damages. He has not proved that he was deprived of the use of the vehicle before the expiration of the ninety day period and accordingly I can award him no

more than the sum of K464.03 referred to above.

In relation to the UBZ's counterclaim for the unlawful detention of the vehicle between 26th June, 1975, and 11th October, 1975, UBZ has not proved that the vehicle was retained by the plaintiff for a period in excess of ninety days and I must therefore hold that the counterclaim fails.

In addition to salary, housing allowance and leave pay the plaintiff also claimed the following benefits in his statement of claim:

- (a) A tax free entertainment allowance of K1, 200 per annum.
- (b) A tax free gratuity at 25 per cent of his salary.
- (c) Two tax free domestic servants at K65.00 per month.
- (d) Household electricity and water up to a maximum of K40.00 per month.
- (e) A free security night guard.

The plaintiff's evidence in relation to these benefits was that while they were not provided for in the ZIMCO Conditions of Employment referred to above they had been enjoyed by his predecessor as General

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Manager of UBZ and had been agreed by Mr Kafumukache when he first took up his appointment. In passing I note that while the plaintiff disputes Mr Kafumukache's authority to dismiss him, he apparently does not dispute Mr Kafumukache's authority to negotiate his terms of service.

The defendant's evidence was to the effect that requests for these benefits had been put forward by the plaintiff but that since the plaintiff was a Presidential nominee the requests had been referred to the Ministry of Power, Transport and Works and the Cabinet Office and that in spite of reminders no ruling had been received by the time the plaintiff's services were terminated. While I do not doubt for a moment that as a matter of practice such matters are referred to the Ministry and/or the Cabinet Office, as a matter of law it is for the Board of Directors of UBZ or some person acting with their authority to determine the conditions of service of its employees.

Mr Kafumukache stated in his evidence that the plaintiff was entitled under ZIMCO Conditions for General Managers to two domestic servants at the expense of the company (but not tax free), and free electricity and water, but not to the other benefits claimed (i.e. entertainment allowance, gratuity and a security guard). While I am not by any means completely satisfied that these emoluments were properly authorised (and I note that Mr Kafumukache's evidence about domestic servants and electricity and water was contradicted by another defence witness, Mr L. J. Shimaponda) I am bound to give the plaintiff the benefit of this admission, and adopting a period of three months rather than ninety days for ease of calculation I award him K195.00 in respect of domestic servants and K120.00 in respect of electricity and water. Tax should be deducted from these sums but I do not have the information necessary to calculate this.

I must now deal briefly with the position of the first defendant, NTC. This action was originally commenced against NTC alone and the writ was endorsed with a claim for damages for wrongful dismissal. Such claim was repeated in the statement of claim delivered to NTC in May 1976.

In June 1976, the plaintiff obtained leave to amend the writ by adding UBZ as a second defendant and thereafter the plaintiff delivered a statement of claim to UBZ in virtually identical terms to the statement of claim previously delivered to NTC. The plaintiff, of course, was never employed by NTC, and while it is possible that the plaintiff might have been able to make out some form of claim against NTC arising from his dismissal (for example, knowingly procuring a breach of contract) no such claim has been put forward.

At the trial the plaintiff's counsel attempted to overcome this problem by obtaining leave to amend the statement of claim against NTC by adding the words "the servants or agents of the second defendant" in para. 5 of the said statement of claim, so that it read:

"On 25th June, 1975, the Managing Director of National Transport Corporation of Zambia Limited the servants or agents of the Second Defendants purported to relieve the plaintiff of his appointment as General Manager . . . ."

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No other amendment was made to the said statement of claim and since it is not contended that NTC was acting as agent for an undisclosed principal I cannot see that the statement of claim, even as amended, discloses any cause of action against NTC.

Accordingly, I dismiss the plaintiff's claim against the NTC. I award the plaintiff K779.03 against UBZ, and I dismiss UBZ's counterclaim.

As to costs, the normal order would be for the costs of the claims against each defendant and of the counterclaim to abide the event. Since, however, both defendants were represented by the same firm of advocates I think the taxing master would have considerable difficulty in respect of many items in apportioning costs as between the claim against NTC (which would be payable by the plaintiff) and the claim against UBZ (which would be payable by UBZ). I also bear in mind that UBZ is a wholly owned subsidiary of NTC and that the plaintiff has succeeded only in respect of a small part of his claim. Subject therefore to anything which counsel may have to say to me on the subject I propose to order that each party shall pay its own costs.

Claim successful in part

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