TOLANI ZULU AND MUSA HAMWALA *v* BARCLAYS BANK OF ZAMBIA LIMITED

Supreme Court
Sakala, C J, Chaila and Chirwa, JJS
1st July, 2001 and 17th December, 2003
(SCZ Judgment No. 17 of 2003)

Flynote

Employment Law – Termination of Employment – Whether reasons require to be furnished.

Headnote

The appeal arises from the dismissal by the Industrial Relations Court of an action brought under Section 85 (2) of the Industrial Relations Act, in which the appellants sought reinstatement or damages for the wrongful dismissal.

In dismissing the appellants claims the Industrial Relations Court after referring to Section 26 A of the Employment Act and also to the International Labour Organization Convention, particularly to Articles 4 and 7 thereof, found that the respondent had good reasons for terminating the employment, albeit the employer failed to indicate in the letters of termination reasons for terminating employment. The Industrial Relations Court held that this was a mere technicality, but found the terminations wrongful and illegal. The same were declared null and void. The Industrial Relations Court found that the appellants were authors of their own predicament, even though the fraudulent transaction was subsequently thwarted.

The Industrial Relations Court then concluded that the appellants had not gone to court with clean hands and felt it inappropriate to order reinstatement or award any damages or any other relief. It is against the court's failure to award any remedy after having found that the dismissals were wrongful and null and void, that the appellants appealed.

Held:

1. The lower court misdirected itself in holding that an employer must give reasons for terminating the services of an employee and that the failure to do so was technical.

2. The exercise of the notice clause in the agreement was within the powers of the respondent. The employment was therefore properly terminated.

Case referred to:

Zambia Consolidated Copper Mines Limited v Jame Matale (1995-1997) Z.R 144

Legislation referred to:

1. The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia Section 85 (2)
2. Employment Act Chapter 268 of the Laws of Zambia.

Works referred

International Labour Organization Convention Number 158 Articles 4 and 7.

P. Chisi, Chifumu Banda Associates for the appellant
J. Chanshi, Muponda Chanshi and Company for the respondent

Judgment

CHIRWA, JS, delivered judgment of the court:-

The inordinate delay in delivering this judgment is deeply regretted and the court regrets any inconvenience caused to the parties.

The appeal was heard before the demise of our brother Mr. Justice Chaila and this judgment should therefore be regarded as judgment by the majority. The appeal arises from the dismissal, by the Industrial Relations Court of an action brought under Section 85 (2) of the Industrial and Labour Relations Act in which the appellants sought reinstatement or damages for the wrongful dismissal. The undisputed facts of the case are that the appellants were working for the Respondent. The 1st Appellant was a Supervisor in the Communications Department and the 2nd Appellant was his subordinate working as a Telex Operator and Clerk. They were both based at Head Office of the respondent Bank. In the office where they were working then, were other workers and they had three Telex Machines. On 30th June, 1997, the 2nd appellant reported that Telex Machine No. 41570 was not working. He reported to his Supervisor, the 1st Appellant. On the same day, a telex message was sent by Mazabuka Branch of the respondent with instructions to transfer US $371,000.00, to Glencore Corporation in Bermuda. These instructions were received at Head Office. It transpired that the money was not sent to Glencore Corporation as the Client, Nyati Milling Company, complained to Mazabuka Branch that the money had not been received in Bermuda. Investigations were carried out by the Security and Prevention of Frauds Department of the Bank with the assistance of ZAMTEL, which results showed that on the same day, the 30th June, 1997, a message was sent from a machine No. 41570 earlier reported not working to another machine in the office, No. 48840, purporting to give instructions from Mazabuka altering the destination and beneficiaries on the first cable involving US $371,000 and the new destination was India and the beneficiaries were Ambika Corporation. The querry from Mazabuka was not acted upon immediately, but the officers in Communication Centre re-routed it to Ndola Business Centre of the Bank. Further investigations revealed that the re-routing of the querry was done by the appellants. The appellants were interviewed over the US $371,000. They both played ignorance and they said that as far as they were concerned, Telex Machine No. 41570, was not working on that day; and only the 2nd appellant was operating the telex machines.

As a result of those anomalies, the appellants were suspended from work and they were made to appeal before a Disciplinary Committee and the matter was dealt with under Clause 6 of Articles of Disciplinary Procedure Code of the Bank that dealt with THEFT, DISHONESTY, DEFALCATION AND OTHER SERIOUS FINANCIAL IRREGULARITIES and they were found guilty of dishonesty and dismissal was recommended and they were duly dismissed by paying them one month salary in lieu of notice. The appellants being dissatisfied with the action taken against them by the respondent, took the matter to the Industrial Relations Court as we have already stated.

In dismissing the appellants' claims, the Industrial Relations Court after referring to Section 26A of the Employment Act, and also to the International Labour Organisation Convention No. 158, particularly to Articles 4 and 7 thereof, that the respondent had good reasons for terminating employment, but they failed to indicate in the letters of termination reasons for terminating employment and they were of the view that this was mere technicality but found the terminations wrongful and illegal and the same were declared null and void. The Court went on to lament that its concern was the remedies the complaints were seeking.

The Court found that the appellants were the authors of their own predicament even if the fraudulent transaction was subsequently thwarted. The Court then concluded that the appellants had not gone to Court with clean hands and felt it inappropriate to order reinstatement or award any damages or any other relief.

It is against the Court's failure to award any remedy after having found that the dismissals were wrongful and null and void that the appellants have appealed. Although the memorandum of appeal contains three grounds of appeal, at the hearing of the appeal, Mr. Chisi for the appellants, filed written heads of arguments on one ground of appeal, namely that the lower court misdirected itself in law by failing to grant any of the remedies sought by the appellants in their application after holding that the termination of the services of the appellants by the respondent was wrongful, null and void.

In his written heads of arguments and oral submissions, Mr. Chisi argued that the Court having found that the dismissal was wrongful and therefore null and void, the Court was then bound to award damages and that the Court cannot refuse to award damages on the grounds that the plaintiff or complainant had not gone to Court with clean hands. The coming to Court with dirty hands only goes to affect the quantum. In support of his argument, the case of Zambia Consolidated Copper Mines Limited v Matale (1), where this Court stated that: "The normal measure of damages at common law is ousted by the requirement to do substantial justice" was relied upon. In response to this ground of appeal, Mr Chanshi for the respondent, submitted that the Court found that there were good reasons or good evidence on which the services could have been terminated but the respondent did not state the reasons, and therefore this failure was a mere technically which did not go to the root of the matter and as such the Court was on firm ground not to award any damages.

We have carefully considered the findings of the Court below and the conclusions made there from and the arguments by both Counsel in arguing this appeal. The conclusion of the Court below stems from its finding after considering Section 26A of the Employment Act and Article No. 7 of the International Labour Organisation Convention No. 158; Section 2A of the Employment Act reads as follows:-

*"26A An employer shall not terminate the services of an employee on grounds related to the conduct or performance of an employee without affording the employee an opportu*nity *to be heard on the charges laid against him."* (Emphasis our own).

Article 7 of the International Labour Organisation Convention No. 158 reads as: *"The employment of a worker shall not be terminated for reasons related to the workers conduct or performance before he is provided with an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity".* (Emphasis our own).

After considering the above provisions the Court below found that:-

"*The above provisions clearly put an end to the notion that an employer can terminate the services of an employee without giving reasons, by merely relying on a Notice Clause in the*

Contract. Such a clause can obviously be abused particularly by an employer. We emphasise therefore that justice and fair play demands that in all circumstances the employer must give reasons for the termination".

We consider this as misinterpretation of the provisions of both the Employment Act and ILO Convention 158 and therefore a misdirection on the part of the Court. The gist of these two provisions is that the conduct or performance of the employee which is questioned must arise or relate to his work and he must be given an opportunity to be heard and this has nothing to do with the Notice Clause that may be in the Contract. Neither do these provisions call for reasons to be given for terminating employment. In other words, the employee is notified of his questionable conduct related to his work and he is given an opportunity to explain and it is then up to the employer to decide. The provisions do not set any standard or proof, they merely emphasis on the employee being given an opportunity to defend himself. It follows, therefore, that in the present case, the Court below founded its findings that the failure by the respondent to give reasons was a mere technicality, hence the terminations were wrongful and illegal and therefore null and void. The lower Courts findings were further strengthened on its misdirection that the above provisions require reasons for termination of employment to be given. That is not the law.

Coming to the facts of the present case, there is no doubt that the appellants were aware as to why they were suspended from work. It was in relation to a very serious ground which was centred to have originated from the Communication Centre where the 1st appellant was one of the Supervisors and the 2nd appellant was a Telex Operator. Letters of suspension were written and served on 28th August, 1997. Both appellants were suspended to facilitate full investigations into the fraudulent transfer of US $372,734.83 to India to unknown beneficiary. In the letters of suspensions to appellants, they were required to be reporting daily to the Internal Audit, Zambia Security and Fraud Prevention Section and they were required to co-operate with the investigators. We will assume that the appellants followed the instruction in the suspension letter. The next are letters of termination of employment dated 10th November, 1997. Employment was terminated as provided for in clause 6 of the Articles of Agreement. The appellants were paid one month's pay in lieu of notice plus cash in lieu of accrued leave days if any.

From the evidence, it is clear no disciplinary action was taken against the appellants, they were merely suspended. They were suspended on suspicion of a very serious fraud. The suspension was never lifted. The respondent opted to use the Notice Clause in the Agreement, which was an option open to them. The lower Court was of the view that the respondent had sufficient material from which they could have given in terminating employment instead of the Notice Clause. This was a misdirection as we have already stated. The respondent had a number of options open to them; they could have had the appellants prosecuted; put on disciplinary charges or opt to give them notice required under the Conditions of Service or pay the amount in cash in lieu of notice. The respondent opted for the last option of paying a month's salary in lieu of notice.

We are aware that there was no cross-appeal in this matter but the appeal having come this far, we cannot deal with it without interfering with the basic finding of the Court. Our finding is that the lower Court misdirected itself in holding that an employer must give reasons for terminating the services of an employee and that, in the circumstances of the failure in the present case, was technical. The exercise of Notice Clause in the Agreement was within the powers of the respondent. The findings that the termination of employment was wrongful and therefore null and void is set aside. The appellants were properly terminated. The result is that this appeal is dismissed with costs.

Appeal dismissed